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Citation:	Rael Jebet Tanui (Suing as the Administrator of the Estate of the Late Kaptigei Chemwor & 40 others) v Susan Cherubet Chelugui & 5 others [2022] eKLR
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Advocates Against:	-
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

LAND SUIT E & L NO. 404 OF 2013

(FORMELY CIVIL CASE NO. 80 OF 1988)

RAEL JEBET TANUI

(Suing as the Administrator of the Estate of the

Late KAPTIGEI CHEMWOR AND 40 OTHERS.....PLAINTIFFS

-VERSUS-

SUSAN CHERUBET CHELUGUI &

DAVID K. CHELUGUI

(Sued as Administrators of the Estate of the late

NOAH KIMNGENY CHELUGUI).....1ST DEFENDANT

STANLEY ARAP METTO.....2ND DEFENDANT

RAMJI D. VEKARIA.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

NATHANIEL K. LAGAT.....5TH DEFENDANT

JUDGEMENT

(a) Introduction

By amended plaint filed on 5/3/2019, the plaintiffs claim that in 1965 the first plaintiff and the first defendant jointly with 58 other people bought a farm comprised of 3236 acres which farm was known as L.R. No. 10492 situated at Eldoret. That it was agreed by all the parties that the land would be registered as a partnership under the name N.K. Lagat & Partners and that the partners who would formally have their names reflected in the partnership deed would be Daniel Kiptalam Lagat, Thomas K. Yator, William Letting, Maritim Cherwon Maru and Noah Kimgeny Kimngeny Chelugui.

That in 1969 all the members of the partnership resolved to subdivide the farm into 3 portions and it was agreed that Daniel Lagat would share his portion known as Ngechek estate with 28 members, William Letting would share his portion known as Kapchumba Estate with 12 members and that Maritim Cherwon Maru and Naoh Kimngeny Arap Chelugui would share their respective portions known as Lolosio Estate with 23 members. That the first plaintiff was assigned to Lolosio estate.

That in 1975 or 1976 or thereabout it was resolved by the members of the partnership that they would sell 137 acres to Huruma Farmers Company Limited to enable them to pay off a bank loan. It was then that it was further agreed that the land would be

subdivided into 6 portions with the members who were assigned to them. One of the said portions was known as Emtin Estate which was headed by Martin Cherwon Maru. The other portion was known as Kapkoros estate and was headed by the first defendant. That the first plaintiff was assigned to his Estate with 12 other members.

That one of the partners known and described as Noah Kimngeny Arap Chelugui, the first defendant with his 13 members took possession of a portion of the farm which is popularly known as Kapkoros farm.

That thereafter without the knowledge and consent of the 13 members, Noah Kimngeny Arap Chelugui unlawfully sold 59 acres or thereabout of the portion known as Kapkoros Farm to Rai Plywood (K) Limited.

That in 1997 all members of the company met under supervision of Daniel Lagat to assess the property of each member of the partnership, counted all the money which had been paid by the members, engaged a private surveyor to carry out the survey and fix beacons to indicate the boundaries.

That as a result of the exercise the first plaintiff got 51 acres in the said Kapkoros estate whereas the first defendant got 59 acres. That in 1982 the first defendant sold his 54 or 53 acres or thereabout. That in or about late 1982 the first defendant unlawfully and fraudulently encroached on the first plaintiff's said 51 acres and subdivided the same into the following 3 portions namely: -

a) Eldoret Municipality Block 15/237

b) Eldoret Municipality Block 15/238

c) Eldoret Municipality Block 15/239

That the first defendant then fraudulently purported to sell Land parcel no. Eldoret Municipality Block 15/238 measuring 12 acres or thereabout to the second defendant. That the first defendant then purported to sell Land Parcel No. Eldoret Municipality Block 15/239 to another party and got himself fraudulently registered as the proprietor of Land Parcel No. Eldoret Municipality Block 15/237. Fraud is particularized as causing himself to be falsely registered as the lessee of Eldoret Municipality Block 15/237, presenting himself as the rightful lessee of Eldoret Municipality Block 15/237, transferring 7 acres in Eldoret Municipality Block 15/238 to Stanley Metto which he knew they were property of the first plaintiff, holding himself out as the owner of the first plaintiff's portion of land and purported to have the capacity to sell the same. The first plaintiff contends that the first defendant held and holds Land Parcel Nos. Eldoret Municipality Block 15/237 and 15/238 in trust for all the plaintiffs.

The plaintiffs contend that the first defendant as a trustee had no right to sell Eldoret Municipality Block 15/238 to the second defendant and he could not pass good title to the said land to the second defendant. The second defendant was not an innocent purchaser. The sell was null and void. The second defendant subdivided Land Parcel No. Eldoret Municipality Block 15/238 into following portions:

a) Eldoret Municipality Block 15/1816

b) Eldoret Municipality Block 15/1814

c) Eldoret Municipality Block 15/1815

That the second defendant then purported to sell Land Parcel No. Eldoret Municipality Block 15/1816 to the third defendant. Land Parcel No. Eldoret Municipality Block 15/1814 was acquired compulsorily by the Government for use by the Kenya Ports Authority (for which the second defendant was unlawfully and handsomely compensated which compensation should have gone to the first plaintiff) and Land Parcel No. Eldoret Municipality Block 15/1815 became a public land. That the second defendant held Land Parcel Nos. 15/1814 and 15/1816 in trust for all the plaintiffs.

That the third defendant is now the registered proprietor of Land Parcel No. Eldoret Municipality Block 15/1816 and the plaintiffs contend that he holds the same in trust for them. The third defendant has purported to subdivide this land into parcels numbers 2042,

2043, 2044, 2045, 2046, 2047, 2048 and 2049 whose subdivisions have been approved by the Commissioner of Lands. The 1st plaintiff claims that he has been in occupation of Eldoret Municipality Block 15/238 and or Eldoret Municipality Block 15/237 since and has extensively made developments thereon worth more than Kenya Shillings Eight Million.

The plaintiffs' number 2 to 41 have each purchased various portions of land from the first plaintiff from the aforesaid Kapkoros Estate which has subsequently been subdivided and are registered as Eldoret Municipality Block 15/237 and Eldoret Municipality Block 15/1816. All the said plaintiffs have taken possession of their various entitlements and have carried out extensive developments thereon.

That the first plaintiff has called upon the first, second and third defendants to agree to the rectification of the register by cancelling the first defendant's registration and registering the first plaintiff as the lessee but they have refused. The Plaintiffs pray for an order to rectify the register under Section 143 of the Registered Land Act cancelling registration of the defendant and registering the plaintiff as the proprietor of Eldoret Municipality Block 15/238.

Moreover, plaintiffs pray for a declaration that the defendants separately and individually held Land Parcels Nos. Eldoret Municipality Block 15/237, 15/238, 15/1814, 15/1815 and 15/1816 and that the first defendant had no land which he could lawfully sell to the second defendant and that the purported sell to him of Eldoret Municipality Block 15/238 was null and void.

Furthermore, the plaintiffs pray for a declaration that the second defendant had no land which he could lawfully sell to the third defendant and that the purported sell of Land Parcel Eldoret Municipality Block 15/238 was null and void and an order directing the Land Registrar to cancel the name of the first defendant as the registered proprietor of Land Parcel Eldoret Municipality Block 15/237 and to substitute thereof the name of the first plaintiff and or names of the plaintiffs. An order directing the Land Registrar to cancel the name of the third defendant as the registered proprietor of Land Parcel Eldoret Municipality Block 15/1816 or the subdivision thereof and to substitute therefore the name of the first plaintiff and or names of the plaintiffs. An order that the first and second defendants do refund to the first plaintiff or plaintiffs the money paid to them by the Kenya Ports Authority as compensation for land allegedly acquired from them. Lastly the plaintiffs pray for Exemplary damages and costs of the suit.

The 1st Defendant on his part contends that the Plaintiffs' have no genuine legal interest in the suit property. All genuine shareholders and members of the suit property to which the plaintiff's purport to claim, ought to have original membership receipts and documents and are well known to the original partners and the present plaintiffs are all strangers to the 1st defendant.

The 1st Plaintiff improperly, irregularly and illegally purported to "sell" to Plaintiffs' numbers 2 to 41 varying portions of land supposedly comprised in the suit property without the 1st plaintiff having any lawful interest or right or good title thereto hence no property rights as known in law passed to plaintiffs' number 2 to 41. The 1st plaintiff was a trespasser in the suit property ab initio and has presently vacated the same voluntarily.

According to the 1st defendant, his right to any of the suit plots is unquestionable and inalienable and any transfers to the other defendants were legal and proper and any existing interest in favor of the 1st defendant is valid and that all genuine shareholders and members of the suit property to which the plaintiff's purport to claim, ought to have original membership receipts and documents and are well known to the original partners and the present Plaintiffs are all strangers to the 1st Defendant. The 1st Defendant avers that the 1st plaintiff improperly, irregularly and illegally purported to "sell" to plaintiffs' numbers 2 to 41 varying portions of land supposedly comprised in the suit property without the 1st plaintiff having any lawful interest or right or good title thereto hence no property rights as known in Law passed to Plaintiffs numbers 2 to 41.

The 1st Defendant denies that 54 acres of land or thereabout was sold as well as allegation of fraud and states that he was lawfully registered as the lessee of Eldoret Municipality Block 15/237. He was the rightful lessee of Eldoret Municipality Block 15/237. He had the right of transferring 7 acres of Block 15/238 to the 2nd Defendant as it was his property. He was the legal owner of the parcel he sold and he was not holding it in trust to anyone.

The 1st Defendant avers that he legally obtained his parcel of land and that he had the legal capacity to pass good title of the suit land to the 2nd and 3rd Defendants. He further avers that the 1st plaintiff could not pass any good title to the 2nd to 41 plaintiffs as he had no legal capacity to transact on the parcels hence the sales are null and void.

The 3rd defendant filed a statement of defence and counterclaim whose gist is that he was a bonafide purchaser for good value of L.R NO Eldoret Municipality Block15/1816 and denies that he was a trustee of the said land for the plaintiff. The 3rd defendant denies that he has subdivided the said property and denies that the 1st plaintiff is in occupation of the property and that he has developed the same but states that the 2nd to 41st plaintiffs are in illegal occupation of the property as the 1st plaintiff had no power to sell them L.R NO Eldoret Municipality Block15/1816.

The 3rd defendant filed a counterclaim as the registered owner of L.R NO Eldoret Municipality Block15/1816 and averred that the 2nd to 41st defendants are in illegal occupation of the said property and prays for their eviction. The 3rd defendant prays for a declaration that the 2nd to 41st plaintiffs are trespassers on his parcel of land L.R NO Eldoret Municipality Block15/1816 and prays for an eviction. The 3rd defendant further prays for an order directing the 2nd to 41st plaintiffs to pay the 3rd defendant the Current Market value for the portions of land occupied and to be agreed failure of which a valuation to be done. The 3rd defendant prayed for the costs of the suit.

The 4th Defendant filed defence whose gist is that the 4th Defendant had no knowledge of a trust registered on the suit property. Moreover, that the issues raised in the instant suit against 4th defendant over the suit parcels of land in question were judicially pronounced by the Court of Appeal in Eldoret CACA No. 51 of 2016: Chief Land Registrar & 4 others versus Nathan Tirop Koech & 4 others (2018) eKLR and Eldoret E&L Petition No. 9 of 2014: Susan Cheburet Chelugui & another versus Daniel Toroitich Arap Moi & 5 others (2019) eKLR and this court is functus officio, in terms of any claim against the 4th defendant.

The 4th Defendant avers that vide a surrender instrument together with sub-divisional plan, an area list and members' register the proprietors of LR No. 10492 (N.K. Lagat & partners) through their advocate, M/s r L. Aggarwal Advocate and a private surveyor, M/s J.s. Vaughan surrendered LR. No. 10492 in consideration of leasehold titles for the parcel of land falling within Eldoret Municipality and freehold titles for parcels of land falling outside Eldoret Municipality and vide Eldoret CACA No. 51 of 2016 it was found that the surrender was voluntary, lawful, legal and proper in the circumstances.

The 4th defendant further avers that as per surrender one of the titles issued to N.K. Lagat & partners was Eldoret Municipality Block 15/1 which was also surrendered to Government of Kenya in 1983 by the said proprietors in consideration of scheme plan, and register that resulted to land parcels Eldoret Municipality Block 15/237, 238 and 239.

The 4th Defendant further contends that in pursuance of the surrender of parcel number Eldoret Municipality Block 15/1 which was done by the registered proprietors (N. K. Lagat & partners) in good faith and without coercion:

a) LR No. Eldoret Municipality Block 15/239 was allocated to H. E. Daniel Toroitich Arap Moi vide a lease dated and registered on 21-9-1983 and a certificate of lease issued in that regard but was subsequently transferred to Rai Plywood (K) limited. This was the Subject of Eldoret E &L Petition No. 9 of 2014 and Eldoret CACA No. 51 of 2016.

ii) LR No. Eldoret Municipality Block 15/238 was allocated to Stanley Arap Mettor, the 2nd plaintiff herein vide lease dated 13-9-1983 and registered on 28-9-1983 and a certificate of lease issued in that regard. This is the subject of Eldoret E &L 287 of 2012.

iii) LR. No. Eldoret Municipality Block 15/237 was allocated to and registered in the name of Noah Kipngeny Arap Chelugui and a certificate of lease issued in that regard.

The 4th defendant further avers that vide Kenya Gazette Notice No. 5947 dated 17-12-1987 the Government of Kenya acquired 5.4 Ha, 2.1 Ha and 10.15 Ha out of land parcel Eldoret Municipality Block 15/237, 238 and 12 respectively for various public purposes.

The 4th defendant avers that following the acquisition Government of Kenya registered notices of acquisition and taking possession in which Eldoret Municipality Block 15/238 was sub-divided into Eldoret Municipality Block 15/1814, 1815 and 1816 registered as follows:

(i) Eldoret Municipality Block 15/1814 and 1815 were registered in the name of Kenya Pipeline Corporation Limited.

(ii) Eldoret Municipality Block 15/1816 was registered in Ramji Devji Vekaria.

The 4th defendant further contend that the plaintiffs' claim, if any, lies against partners of the farm (N.K. Lagat & partners) who voluntarily surrendered not only LR. No. 10492 in the exchange of leasehold and freehold titles as per their sub-divisional scheme, area list and members' register but also unilaterally surrendered LR. No. Eldoret Municipality Block 15/1 in exchange of Eldoret Municipality Block 15/237, 238 and 239 as per proposed scheme.

The 4th defendant acted in good faith and based on instructions given by or at instance of the proprietors N.K. Lagat & Partners) personally or through their appointed and most trusted representative, M/s r. L. Aggarwal Advocate and M/s J.S. Vaughan, private surveyor,

That from the available records the 4th defendant was diligent by writing to proprietors seeking approval of every process and responses were prompt and positive thus allowing the 4th defendant to exercise her statutory and constitutional authority and therefore was not party to or aware of the alleged fraud.

The 4th Defendant also contends that the issues surrounding Eldoret Municipality Block 15/238 and Eldoret Municipality Block 15/1816 are pending in Eldoret E &L 287 of 2012: Ramji D. Vekaria – versus Nathaniel Kiptalam Lagat & others and it would only be fair and just that these disputes be consolidated or heard simultaneously.

The 5th Defendant states that a partnership was formed and he was a partner in common with purchasers of land originally known as L.R. No. 10492 measuring 3236 acres bought in 1965. The land was later subdivided among partners and each allocated 220 Hectares. He avers that L.R. No. 10492 was later subdivided to form Eldoret/Municipality block 15/12, 15/237, 15/238, 15/239. The 5th Defendant contends that he has been erroneously sued. He prays that the suit be dismissed with cost.

(b) Evidence

When the matter came up for hearing, PW1, Kiptingei Chemuron the Pioneer plaintiff stated that they purchased Land No. LR No. 10492 as a group of 5 people and agreed that the land was to be registered in names of N.K. Lagat and Partners. He was allocated 51 acres and built on the same and sold to the other people. He sued the 1st Defendant because the first defendant sold his land to the 2nd President of the Republic of Kenya Mzee Daniel Toroitich Arap Moi. On cross examination by Mr. Kibichy, he did not know how parcel number 238 was created. PW1 died before re-examination.

PW2 the administrator of the Estate of the late Kiptingei Arap Chemjor testified that Kiptingei Arap Chemjor was a shareholder of Kingongo farm. The Kingongo farm was owned by 60 people and was divided into five portions namely Kapkoros, Emdim, Kapchorwa, Lolosio and Ngechek. Kiptingei was on Kapkoros portion that measured 630 acres and their leader was Noah Chelugui. Kiptingei Arap Chemjor sold his share of land to 40 people.

On cross examination by M/s Sitienei counsel for the 1st defendant, she states that the land was sold in 1982 and that the last face was in 1987. On cross examination by Mr. Aseo counsel for the 3rd defendant, she states that the land was acquired in 1965 but she had not been born. The land is subdivided into Eldoret/Municipality block 15/12, 15/237, 15/238, 15/239.

PW3 Andrea Kibii Kotut states that they bought the land in 1965 and moved into the land. He was the record keeper. He prepared the list of beneficiaries. He divided the land measuring 630 acres with the members' shares. The Plaintiff had 51 acres whilst the 1st defendant had 59 acres.

PW4, was Kibor Arap Sang of Id number 1226293 that the land in dispute belongs to the plaintiff. He was a member of the land buying company. The Plaintiffs land was 52 acres with the road but after excising the road it is 51 acres.

The 2nd -41 plaintiffs called **Hesha Otieno Ochola** who relied on his statement whose gist is that he has land bought in 1990 from Kiptingei Chemjor. He has lived in the land since 1990. He has a permanent house. The land is ¼ of an acre. He has constructed 15 houses rented out to people. The 2nd-41 plaintiffs live in their houses built on the land. He is the chairman of the group of people living on the land.

He produced the certificate of registration of the group and photographs of their houses. They have developed the land but have no title deeds. Lucy Wanjiru testified as 2nd – 41st PW2 and confirmed that she also bought part of the land from Kiptingei Chemjor. The 2nd – 41st plaintiffs prayed for title to issue.

DWL, David K. Chelugui testified that the 1st defendant was his father. After his father's death he was substituted as the defendant. He relied on his statement. He gave further evidence that his father had 89 acres. His father was given 15/237 and 15/239 and the latter was sold to Daniel Toroitich Arap Moi and part of the land was compulsorily acquired

Ramji Derji Verkaria, the 3rd defendant testified that he is a businessman in Eldoret. The statement dated 29th January 2019 and filed on 24th January 2019 was adopted as evidence in chief. He states that he has title for Eldoret Municipality Block 15/238. Block 15/238 was subdivided to create 15/1816. He acquired it on 3/1/1996. He produced a certificate of lease. He produced an agreement between himself and Stanley Metto made on 3/1/1989. He has another agreement with another made on 4/12/1989.

He had another agreement between Stanley Metto and Vishva builders dated 9/4/1990. He produced payment receipts for Kshs 780,000. He produced the surrender of lease and a certificate of registration of Vishva builders. He produced evidence for rates and rent payment.

The 4th DWL, Sarah Cheron, the County Land Registrar testified that the Dispute herein related to L. R. 10492. She states that in the 1970s when Registered Land Act (repealed) was passed, the title converted from the Registration of Titles Act (repealed) to Registered Land Act and a Register opened. She showed Block 15/1 which was a leasehold Tenure for 948 years from 1/5/1960. The proprietors were

1. Nathanel Kiptech Arap Lagat.
2. Noah Kiptoigei ARap Chellugui
3. Chemor Aungo
4. William Kiyagengo Arap Letting.

They were tenants in common in equal shares. After surrender of Block 15/1 Block 237, 238, 239 were created. In respect of Block 15/237 a lease was signed on 13/9/1983 granting the same to Noah Arap Chelugui. The land Registrar produced the white card and Kenya Gazette notices as evidence of compulsory acquisition. The land Registrar produced copies of restrictions and cautions. Noah K. Chelugui was compensated for the portion of land acquired by the Government. In regard of parcel number 238, the same was registered in the names of Stanley Arap Metto. The Commissioner of Lands signed the lease on 13/9/1983 granting the land to Metto. The lease was registered on 28/9/1983. Metto transferred the property to Ramji Devji Verkaria on 14/8/1990. Ramji Devji Verkaria surrendered the title and it was closed on subdivision and acquisition by the Government and Verkaria was given parcel number 1816. He is not aware of 1816 being given to Nathaniel Lagat. After the testimony of the County Land Registrar, the court made a site visit to the disputed property in the presence of the Government Surveyor with R.I.M and it was ascertained that there were people settled on portion of the disputed land, there was wheat being grown in the disputed area.

(c) 1st Plaintiffs Submissions

The gravamen of the 1st plaintiff's submissions is that the 1st plaintiff has proved that he was a member of the group that purchased LR no 10492 in 1965 from a departing white settler and was bona fide owner of 51 acres whereas the 1st defendant was a bonafide owner of 59 acres. The plaintiff submits that her father's property was encroached upon by the 1st defendant and that at no time did the 1st plaintiff surrender the said land to the 1st defendant. The 1st defendant was a trustee as one of the 5 partners and had a duty to ensure that his 13 members under Kapkaros farm each got their right share from the 620 acres allocated to the group. The 1st plaintiff submits that LR NO 10492 over time became Eldoret Municipality Block 15/1 and was subdivided into 15/237, 15/238, 15/239 without the Knowledge of the plaintiff and sold to various persons and the 1st defendant got himself registered as the proprietor of 15/237 that belonged to the 1st plaintiff. The 1st defendant was not the legal owner of 15/237 and 15/238 and was holding the same in trust for the 1st plaintiff and that he abused the trust by acting against the interest of the 1st plaintiff. According to the 1st plaintiff the 2nd and 3rd defendants have no legal claim over 15/238 and the resultant block 15/1816.

(d) The 2nd To 41st Plaintiffs' Submissions

The 2nd to 41st Plaintiffs submit that they have proved that they are innocent purchasers for valuable consideration. It is beyond peradventure that the purchasers have massively developed their properties with the approval of all the relevant authorities. The purchasers' right and interests on their respective properties is well protected under Article 40 of the Constitution of Kenya, 2010 which states as follows;

“40. Protection of right to property

1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person— (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

They further submit that the Sale Agreements which were produced as exhibits by PW2 (administrator) for and on behalf of the purchasers meet the statutory requirements under the provisions of section 3(3) of the Laws of Contract Act Cap 23 laws of Kenya as follows:

a) The sale agreements are in writing;

b) The sale agreements are signed by all the parties thereto.

c) They were attested by an advocate of the High Court of Kenya.

They ARGUE THAT Article 21 of the Constitution of Kenya 2010 stipulates that it is a fundamental duty of the state and every

state organ to observe, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. Article 19(2) of the Constitution of Kenya 2010 provides that the purpose of recognizing and protecting the dignity of individuals and communities is to promote social justice and the realization of the potential of all human beings. In conclusion, they submit that the 2nd to 41st plaintiffs have proved their claims on a balance of probabilities as required by the law. It would be grossly inhumane, draconian and punitive to disrupt or evict the 2nd to 41st plaintiffs and their families who include children and women from their homes, business, schools, churches, health facilities and all developments/investments they have undertaken on their respective parcels. Their right to shelter, economic well-being, religion, education and health would be violated in the event they are evicted therefrom. Such adverse orders would violate the Bill of Rights which protects the purchasers' rights and fundamental freedoms.

The 2nd to 41st plaintiffs submit that they have legitimate expectations that the court will protect and preserve their properties and developments thereon. The court ought to take judicial notice of the prevailing Covid 19 pandemic which is ravaging the Country and the fact that the 1st to 41st plaintiffs are ordinary law-abiding citizens who have no other place to call home or to do business. The ends of justice demand that the purchasers be allowed to continue occupying their respective parcels of land in the circumstance. They pray for costs of the suit.

SUBMISSIONS BY THE 3RD DEFENDANT

The 3rd Defendant submits that section 107 of the Evidence Act places the burden on the person alleging existence of certain facts to prove those facts. Provides thus:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

That Section 108 on the other hand states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. This position has been restated by this Court in Jacob Nyakwa Ojwang v Nathwalal Narishidas Ghelani & 5 others [2021] eKLR.

That the 3rd defendant is a bona fide purchaser for value without notice of any defect to title having purchased the same from the initial registered proprietor Stanley Metto for valuable consideration.

The 3rd defendant relies on the case of Katende v Haridar & Company limited (2008) 2 E.A. 173 the court held as follows in determining who a bona fide purchaser for value is, and stated inter alia:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that: he holds a certificate of title; he purchased the property in good faith; he had no knowledge of the fraud; he purchased for valuable consideration; the vendors had apparent valid title; he purchased without notice of any fraud; he was not party to any fraud.”

The 3rd defendant further submits that the title to Eldoret Municipality Block 15/238 was held by Stanley Metto, the 2nd defendant, who later had it registered in his name prior to subdivision and compulsory acquisition by the Government of Kenya, he purchased the property in good faith and for valuable as evidenced by the Sale Agreements dated 03/01/1989, 04/12/1989, 09/04/1990 and 21/11/1995 (all produced as exhibits) and neither Stanley Metto nor his estate have disputed the sale.

The purchase in good faith and subsequent possession is also demonstrable by the actions by the 3rd Defendant to pay and continue paying land rent and rates even as the present case is ongoing (a period of 25 years) in contrast with either the plaintiffs or the 5th defendant. We submit that this can be compared to the Biblical case where King Solomon was called to judge on who between two mothers was the 'real mother', the real owner of the land in this case, we submit that one who is diligent enough to make sure relevant government levies are still being paid on the land.

The sanctity and validity of Stanley Metto's title as the original owner and vendor, and Ramji Vekaria as the current proprietor has further been verified by the evidence of the Land Registrar as the keeper of the master record of all land in Kenya on behalf of the Attorney General.

The 3rd defendant relies on the case of Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads authority & 4 others [2019] eKLR is even more forceful in protecting this right. The court stated:

“The law has never intended to punish the innocent as to punish the innocent would break down all the trust and respect for the law and legal system ... it has long been accepted beyond debate that the land registration process in Kenya is a product of the Torrens system... Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. Finally, the statutory presumption of indefeasibility and conclusiveness of title based on the register can be rebutted only by proof of fraud or misrepresentation which the buyer is himself shown to have been involved...”

That it is now trite law that in civil proceedings, issues are raised by way of pleadings and, as a rule, the court can only lawfully determine issues that are specifically pleaded and proved before it. The court cannot base its decision on an un-pleaded issue.

That as parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleading, for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made.

In Vijay Morjaria v Nanshsinh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:

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

In Kinyanjui Kamau v George Kamau Njoroge (2015) eKLR, the court stated:

“In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.

The 3rd defendant submits that the plaintiffs have failed and have not particularized any fraudulent action by either the 2nd defendant (who sold the land to the 3rd defendant) or the 3rd defendant himself.

The 3rd defendant submits that the plaintiffs' claim, if any exists, ought to lie against the original proprietors of the farm – N.K. Lagat and Partners. Who not only voluntarily surrendered L.R. No. 10492 in exchange of leasehold and freehold titles as per their sub-divisional scheme, area list and members' register but also unilaterally surrendered LR No. Eldoret municipality Block 15/1 in exchange of Eldoret Municipality Block 15/237, 15/238 and 15/239 as per the proposed scheme.

On the issue of costs; the 3rd defendant submits that, though costs are discretionary under section 27 of the Civil Procedure Act, the discretion ought to be applied judiciously and that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. From the foregoing the 3rd defendant submits that the plaintiffs have failed to discharge their burden of proving title to the suit land to the exclusion of the defendants and urge this Honorable Court to dismiss the plaintiffs' suit with costs to the defendants and that the 3rd defendant has on the other hand been able to prove that he is the proper and exclusive proprietor of Eldoret municipality Block 15/1816 having purchased he same from the 2nd defendant as a bona fide purchaser for value.

SUBMISSIONS BY 4TH DEFENDANT

The 4th defendant submits that It is not enough for party to merely allege or infer to acts of fraud. The party must tender evidence to prove the fraud. In Vijay Morjaria –versus-Nansingh Madhusingh Darbar & another (2000) Eklr (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:

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

On the standard of proof of allegations of fraud the court in Ndolo-Versus- Ndolo (2008) 1 KLR (G&F) 742 stated that:

“..... We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud. The standard of proof required of him was obviously higher than that required in ordinary civil cases. Namely proof upon a balance of probabilities. But the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal case...”

The 4th defendant relies on the case of Kinyanjui Kamau-versus George Kamau Njoroge (2015) eKLR where the court of appeal unanimously stated that:

In this case, fraud cannot be imputed on the part of the respondent by the mere fact that the record in relation to the subject properly was missing at the Lands Registry. To succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence and the court below rightly came to the conclusion that appellant had not made out a case for the grant of the orders he sought.

The 4th defendant submits that he has demonstrated that the transfer of Eldoret Municipality Block 15/237, 238 and 239 were created lawfully and procedurally. Indeed, the court of Appeal in Eldoret CACA 55 of 2019 already held that the surrender of L.R 10492 and its conversion from the registration of titles Act into the registered Land Act and the creation of Eldoret Municipality Block 15/1 was lawful. Procedural and legal nad that the entire process resulted to good titles.

Moreover, the 4th defendant demonstrated that the transfer of Eldoret Municipality Block 15/239 to the late Daniel Moi was sanctioned by this court in Eldoret ELC petition No. 9 of 2014 where the aggrieved parties were redressed by an order of compensation. The 1st plaintiff did not challenge the decision which the court had found that the estate of Chelugui was the right party to be compensated by the late Daniel Moi. This court cannot find for the 1st plaintiff in view of its findings in Eldoret ELC petition No. 9 of 2014.

Finally, this court has already held in Eldoret ELC 287 of 2012 that land parcel Eldoret Municipality Block 15/1816 belongs to the 3rd defendant.

The land parcel Eldoret Municipality Block 15/239 was no longer in existence as it had been subdivided. However, the subdivisions were being used by the Rai Plywood (K) Ltd. It was established that there were very few encroachments on this land. Nonetheless, the court could not delve much into it as Rai Plywood (K) Ltd was not a party in the suit.

Thirdly, the court established that Eldoret Municipality Block 15/1814 and 1815 were under use by the Kenya Pipeline Corporation and the Kenya Ports Authority respectively. The parcels were fenced with perimeter walls and that there were no encroachments whatsoever. Again, the court did not inquire much into the parcels as the proprietors were not parties in the case.

Finally, as regards land parcel Eldoret Municipality Block 15/1816, the court noted that it belonged to the 3rd defendant who held a valid title. The court also noted that save for few encroachments including a church and an academy. This parcel of lands was substantially vacant.

The plaintiffs did not point out to the court, during site their actual places of abode. The agreements they produced in court did not indicate the parcels of land from which they purchased their respective shares. We submit that this court cannot act on speculations.

The 4th defendant submits that even if the plaintiff had purchased their various portions from Eldoret Municipality Block 15/237 and Eldoret Municipality Block 15/1816. Which is not the case, the question that follows is whether the vendor (s) had capacity to sell the said portions without knowledge of the registered owners. In the circumstances. The plaintiffs do not qualify as bonafide purchaser for value without notice.

5TH DEFENDANTS SUBMISSIONS

The 5th Defendant submits that he was improperly enjoined in the suit. The 5th Defendant submits that there is no evidence that the 5th Defendant sold the suit land. He was not party to the transactions but is also a victim. The 1st Defendant submits that issues for determination are whether the 1st Defendant is the registered and lawfully owner of Eldoret Municipality Block 15/238. Whether the plaintiffs have any claim against the 1st defendant.

On whether the 1st Defendant is the registered and lawfully owner or Eldoret Municipality Block 15/237 and 15/238, the 5th defendant submits that at the hearing of the suit, DW4 the Lands Registrar confirmed to the court that Municipality Block 15/1 was registered in the name of the 1st Defendant among others after it was converted from LR. No. 10942. Resultantly from subdivision of Eldoret Municipality Block 15/1, Eldoret Municipality Block 15/237, 15/238 and 15/239 were created whereby Block 15/237 was retained by the 1st Defendant while Block 15/238 was sold off to Stanley Metto, the 2nd Defendant herein. As per the testimony of DW4 the parcel of land known as Eldoret Municipality Block 15/237, 15/238 measured 9.644 Ha (24 Acres) or thereabouts. PW2, one Rachel Chebet Tanui claimed at the hearing that the said parcel was partly owned by the 1st plaintiff but failed to demonstrate to court how that was so.

The said Eldoret Municipality Block 15/237 was partially amalgamated by the Government of Kenya vide compulsory acquisition whereby 5.4 Ha were acquired by the government and the remaining parcel measuring 4.244 Ha were retained by the 1st Defendant.

Throughout the above subdivision and acquisition, the 1st Plaintiff was not involved at all as he had absolutely no claim to any of the mentioned parcels. The Certificate of lease in regard to Eldoret Municipality Block 15/237 was registered to the 1st Defendant on 1st August 1983. The 1st Plaintiff in his pleadings and witness testimonies confirms that the parcel which the 1st Defendant was entitled to after sale of Block 15/238 and Block 15/239 was 24 acres, which is the acreage of Eldoret Municipality Block 15/237.

The 1st Plaintiff on the other hand has not demonstrated how he came to be in possession of any interest in any of the parcels herein. He therefore could not possibly pass any good title to 2nd to 41st Plaintiffs as one cannot sell that which they do not own. The claim by the 2nd to 41st Plaintiffs is therefore null ab initio having allegedly purchased the parcels they claim from a stranger.

The 5th defendant submits that the Plaintiff has not discharged the burden of proof as required by Section 107 and 108 of the Evidence Act. The Section provides thus:- Section 107

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Section 108. “Incidence of burden The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

The 5th defendant referred this honorable court to *Kuria Kiarie & 2 others v Sammy Magera (2018) eKLR* where the court stated thus:-

The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria vs Nansingh Madhudingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) stated as follows:

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

The 5th defendant submits that the 1st plaintiff ought to have supplied this court with documentation which he alleges were acquired fraudulently. Only then would the court be better informed and be able to form an opinion on the same. Without proof, the alleged fraud remains mere allegations. In this regard we refer this court to *Kinanjui Kamau vs George Kamau [2015] eKLR* where the court expressed itself as follows:-

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...we start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal case...”: ...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

The 5th defendant submits that the 1st Defendant’s witness at the time of hearing clearly stated that the 1st Defendant’s share was a total of 89 acres which upon conversion created Blocks 15/237 measuring 24 acres, Block 15/238 measuring 12 acres and Block 15/239 measuring 53 acres. It was within the 1st Defendant’s rights to sell any or all of the parcels as he so wished being the lawful and registered proprietor. We refer this court to *Samson Okoa Oigo v Moses Atsulu Mayoka & another [2021] eKLR* where the court stated:-

“The law is clear that, the certificate of title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge...”

In the absence of proof as to how the 1st Plaintiff claims he came to own any portion of the parcels discussed, the 5th defendant submits that the only conclusion that the court can reach is that the 1st Defendant, having been the registered proprietor of the parcels of land was the actual rightful owner of the said parcels.

The 1st Plaintiff’s prayer for cancellation of the title to Block 15/237 therefore fails as they have simply not provided any reasons that are tangible and actionable to enable the court to issue such orders. Whether the Plaintiffs have any claim against the 1st defendant. The 5th defendant submits that if the 1st Plaintiff lost any land as alleged, it appears that he should direct his claim to the original proprietors of the entire parcel, i.e. N.K. Lagat & Partners. The scheme for subdivision by way of shares was agreed upon by the original members, including the 1st plaintiff.

ANALYSIS AND DETERMINATION

I have considered the evidence on record and rival submissions and do find that the genesis of this matter is the exit from Kenya of a white settler who owned 3236 acres known as LR 10492 situated in Eldoret. The plaintiff and the 1st defendant together with 58 other people bought the farm and that it was agreed that the land would be registered as a partnership under the name of L.K Lagat and partners and that the partners to be reflected in the partnership deed were Daniel kiptalam Lagat, Thomas K. Yator, William Letting, Martim Cherwon Maru and Noah Kimgeny Chelugui. The partners later shared the land in 3 portions and the 1st plaintiff was assigned to the portion of land that was managed by Martim Cherwon Maru and Noah Kimgeny Arap Chelugui known as Lolosio farm. The land was further subdivided into six portions and the 1st plaintiff assigned to the Kapkoros farm with 12 other members. The person who was made in charge of this portion was Noah Kimgeny Arap Chelugui and it is alleged that he sold the land to Rai Plywood LTD and Daniel Toroitich Arap Moi. I do find the land registrar’s evidence credible that in the 1970s when Registered Land Act (repealed) was passed, the title of the land converted from the Registration of Titles Act (repealed) to Registered Land Act (also repealed) and a Register opened. Eldoret Municipality Block 15/1 which was a leasehold Tenure for 948 years from 1/5/1960 was created. The proprietors were; Nathanel Kiptech Arap Lagat, Noah Kiptoigei ARap Chellugui, Chemwor Aungo. William Kiyagengo Arap Letting.

They were tenants in common in equal shares. After surrender of Block 15/1 Block 237, 238, 239 were created. In respect of Eldoret

Municipality Block 15/237 a lease was signed on 13/9/1983 granting the same to Noah Arap Chelugui. The land Registrar produced the white card and Kenya Gazette notices as evidence of compulsory acquisition. The land Registrar produced copies of restrictions and cautions. Noah K. Chelugui was compensated for the portion of land acquired by the Government. In regard of parcel number Eldoret Municipality Block 15/238, the same was registered in the names of Stanley Arap Metto. The Commissioner of Lands signed the lease on 13/9/1983 granting the land to Stanley Arap Metto. The lease was registered on 28/9/1983. Stanley Arap Metto transferred the property to Ramji Devji Verkaria on 14/8/1990. Ramji Devji Verkaria surrendered the title and it was closed on subdivision and acquisition by the Government and Stanley Arap Verkaria was given parcel number 1816. The land registrar was not aware of Eldoret Municipality Block 151816 being allocated to, or registered in the names of, Nathaniel Lagat.

The court made a ground visit to ascertain the actual position on the ground. From the site visit and the testimony of the county surveyor, it was established that land parcel Eldoret Municipality Block 15/237 had various people residing thereon. The 1st defendant however stated that he had not authorized them to enter or reside on his land neither had he sold any portion of his land.

The land parcel Eldoret Municipality Block 15/239 was no longer in existence as it had been subdivided. However, the subdivisions were being used by the Rai Plywood (K) Ltd. It was established that there were very few encroachments on this land. Nonetheless, the court could not delve much into it as Rai Plywood (K) Ltd was not a party in the suit.

The court established that Eldoret Municipality Block 15/1814 and 1815 were under use by the Kenya Pipeline Corporation and the Kenya Ports Authority respectively. The parcels were fenced with perimeter walls and that there were no encroachments whatsoever. The court did not inquire much into the parcels as the proprietors were not parties in the case.

In respect of land parcel Eldoret Municipality Block 15/1816, the court noted that it belonged to the 3rd defendant who held a valid title. The court also noted that save for few encroachments including a church and an academy. This parcel of lands was substantially vacant.

The plaintiffs claim that they purchased their various portions from Eldoret Municipality Block 15/237 and Eldoret Municipality Block 15/1816. However, this court finds that the vendor did not have title to the property and the circumstances had no right to sell the same. The plaintiffs no 2 to No 41 do not qualify as bonafide purchaser for value without notice.

In *Suleiman Rehemtulla Omar & another – versus Musa Hersi Fahiyeh & 5 others (2014) eKLR*. The court of appeal found that a person claiming a purchaser's interest will fail on the claim if he had failed to carry out sufficient due diligence before entering transaction.

This court finds that the plaintiffs have not proved that the defendants obtained title to the property fraudulently as the surrender of L.R 10492 and its conversion from the registration of titles Act into the registered Land Act and the creation of Eldoret Municipality Block 15/1 was held by the court of Appeal in *Eldoret CACA 55 of 2019* to be lawful, Procedural and legal and that the entire process resulted to good titles.

I have considered all rival submissions and do find that the plaintiffs' claims against the defendants must fail and is hereby dismissed with costs, and that the 3rd defendant's counter claim succeeds as the 3rd defendant was an innocent purchaser for value without notice of any wrong doing.

The title to Eldoret Municipality Block 15/238 was held by Stanley Metto, the 2nd defendant, who later had it registered in his name prior to subdivision and compulsory acquisition by the Government of Kenya, he purchased the property in good faith and for valuable as evidenced by the Sale Agreements dated 03/01/1989, 04/12/1989, 09/04/1990 and 21/11/1995 and neither Stanley Metto nor his estate have disputed the sale.

The purchase in good faith and subsequent possession is also demonstrable by the actions by the 3rd Defendant to pay and continue paying land rent and rates even as the present case is ongoing a period of 25 years in contrast with either the plaintiffs or the 5th defendant.

The sanctity and validity of Stanley Metto's title as the original owner and vendor, and Ramji Vekaria as the current proprietor has further been verified by the evidence of the Land Registrar as the keeper of the master record of all land in Kenya on behalf of the

Attorney General.

I do grant the plaintiff judgment on the counter claim and do hereby issue a declaration that the 2nd to 41st plaintiffs are trespassers on his parcel of land L.R NO Eldoret Municipality Block15/1816 and are hereby ordered to vacate within 60 days' failure of which eviction order is hereby issued.

SIGNED, DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF MARCH 2022.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE



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