



**Laton & 2 others v Konchellah & 3 others (Environment & Land Case 26 of 2021) [2023] KEELC 16562 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16562 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KILGORIS**  
**ENVIRONMENT & LAND CASE 26 OF 2021**  
**EM WASHE, J**  
**MARCH 23, 2023**  
**(FORMERLY NAROK ELC CASE NO. 368 OF 2017 & KISII ELC CASE NO. 1276 OF 2016)**

**BETWEEN**

**ERICK SAITOTI LATON ..... 1<sup>ST</sup> PLAINTIFF**  
**VALENTINE NAMOO LATON ..... 2<sup>ND</sup> PLAINTIFF**  
**SAMPAYIAN LATON ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JAMES LATON KONCHELLAH ..... 1<sup>ST</sup> DEFENDANT**  
**ABDIHAKIM MOHAMUD JUBAT ..... 2<sup>ND</sup> DEFENDANT**  
**BENJAMIN MBATE NDETO T/A JUMBA & COMPANY,**  
**ADVOCATES ..... 3<sup>RD</sup> DEFENDANT**  
**LAND REGISTRAR, TRANSMARA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. This Judgement Herein Relates To The Amended Complaint Dated 11<sup>th</sup> October 2018 (hereinafter Referred To As “the Amended Complaint”) And Filed In Court On The 12<sup>th</sup> October 2018.
2. The Amended Complaint Seeks For The Following Orders Against The Defendants Herein Jointly And Severally; -
  - A. A Declaration That The Sub-division, Sale, Transfer And Subsequent Registration Of The Original Title Deed No. Transmara/enaenyieny/200 Into L.r.no. Transmara/enaenyieny/645,646,647,648,654,661,662,665 And 666 Without The Consent Of The Plaintiffs And Family Members Was Irregular, Illegal, Null And Void.



- B. An Order Of Cancellation And Rectification Of The Register Of L.r.no. Transmara/ enaenyeny/645,646,647,648,654,661,662,665 And 666 To The Names Of The 1<sup>st</sup> Defendant To Hold In Trust For The Family.
  - C. An Order Of Permanent Injunction Restraining The Defendants, By Their Agents, Servants And Or Any Other Person Claiming Through Them From Evicting, Charging, Selling, Sub-dividing, Developing The Suit Properties Known As L.r.no. Transmara/ enaenyeny/647,648,654,662,665 And 666.
  - D. An Order Of Mesne Profits Out Of The Suit Properties Known As Transmara/ enaenyeny/647,648,654,662,665 & 666 Since Transfer And Registration.
  - E. Costs Of The Suit And Interest.
  - F. Any Other Relief This Honourable Court May Deem Just And Expedient To Grant.
3. The 1<sup>st</sup> Defendant Filed A Statement Of Defence On The 16<sup>th</sup> Of January 2017 When He Sought The Entire Suit To Be Dismissed With Costs.
  4. The Plaintiffs Filed A Reply To The Statement Of Defence Filed By The 1<sup>st</sup> Defendant On The 7<sup>th</sup> Of February 2017.
  5. The 2<sup>nd</sup> Defendant Also Filed A Statement Of Defence And Counter-claim On The 18<sup>th</sup> Of January 2017 Seeking For The Plaintiffs Suit To Be Dismissed And Instead Judgement Be Entered Against The Plaintiffs In The Following Manner; -
    - A. A Declaration That The 2<sup>nd</sup> Defendant Is The Lawful Proprietor Of All Those Parcels Of Land Known As L.r.no. Transmara/ enaenyeny/645,646,647,648,661,662,665 And 666.
    - B. An Order Of Permanent Injunction Restraining The Plaintiffs Acting By Their Agents, Servants And/or Any Other Person Claiming Through Them From Entering, Remaining Upon, Evicting, Selling, Developing The Suit Properties L.r.no. Transmara/ enaenyeny/645,646,647,648,661,662,665 And 666.
    - C. That Costs Of This Suit Be Provided For.
  6. On The 7<sup>th</sup> Of February 2017, The Plaintiffs Also Filed A Reply To The Statement Of Defence Filed By The 2<sup>nd</sup> Defendant As Well As A Defence To The Counter-claim Therein.
  7. On The 29<sup>th</sup> Of November 2018, The 3<sup>rd</sup> Defendant Filed A Statement Of Defence Dated 26<sup>th</sup> November 2018 Seeking For Dismissal Of This Suit Together With Costs.
  8. The Plaintiffs Responded To The 3<sup>rd</sup> Defendant's Defence By Filing A Reply To The Defence Dated 7<sup>th</sup> February 2019.
  9. Lastly, The 4<sup>th</sup> Defendant Also Filed Their Statement Of Defence Dated 3<sup>rd</sup> April 2019 On The 9<sup>th</sup> Of April 2019.
  10. The Pleadings In This Case Were Closed On The 24/10/2019 And The Hearing Of The Matter Commenced On 01/02/2021.
  11. The 1<sup>st</sup> Plaintiff's Witness Was Valentine Namoo Latio Who Is The 2<sup>nd</sup> Plaintiff Herein.
  12. Pw 1 Informed The Court That The 1<sup>st</sup> Plaintiff Was Her Brother While The 3<sup>rd</sup> Plaintiff Was The Mother.



13. Pw 1 Stated That She Had Prepared And Filed A Witness Statement Together With A List Of Documents Which She Would Rely Upon In Her Testimony In Chief.
14. Pw 1 Produced The Following Documents As Exhibits In Support Of Their Case.  
Plaintiff's Exhibit No. 1- Copies Of The Green Cards.  
Plaintiff's Exhibit No.2- Agreements For Sale.  
Plaintiff's Exhibit No. 3- Copies Of Official Searches  
Plaintiff's Exhibit No. 4- Proceedings Of Kilgoris Pm Criminal Case No. 9 Of 2017 Together With Photographs Thereof.
15. According To Pw 1 Testimony, Her Deceased Father Owned A Property Known As L.r. Transmara/enaenyeny/200 Which Was First Leased Out.
16. Pw 1 Further Testified That Her Late Father Hived Off A Portion Of 4 Acres From The Property Known As L.r.no. Transmara/enaenyeny/200 And Sold It To One Elijah Kinyaone Sikora Without The Knowledge Of The Other Family Members.
17. This Purported Sale Of 4 Acres To Elijah Kinyaone Sikora Was Subsequently Reversed And The Purchase Price Paid By Elijah Kinyaone Sikora Refunded To Him.
18. Pw 1 Further Informed The Court That Later On, Her Deceased Father Again Entered Into Another Agreement For Sale Relating To The Property Known As L.r.no. Transmara/enaenyeny/200 With The 2<sup>Nd</sup> Defendant Without Involving The Entire Family.
19. Not Being Aware Of The 2<sup>Nd</sup> Defendant's Ownership Of The Property Known As L.r.no. Transmara/enaenyeny/200, The Plaintiffs Entered The Said Property And Were Arrested And Charged At The Kilgoris Law Court.
20. Pw 1 States That The 2<sup>Nd</sup> Defendant At That Time Was The District Commissioner Of Transmara.
21. Pw 1 Testified That The Plaintiffs Who Are The Immediate Family Members Of The Vendor Who Owned The Property Known As L.r.no. Transmara/enaenyeny/200 Were Not Called To The Land Control Board To Express Their Consent.
22. Pw 1 Informed The Court That The 2<sup>Nd</sup> Defendant Was By Virtue Of His Office The Chairperson Of Transmara Land Control Board And The Land Control Board Consent Was Signed By Him.
23. Pw 1 Testified That There Are No Minutes Of The Land Control Board Meeting That Approved The Said Transaction Relating To L.r.no. Transmara/enaenyeny/200 And The Entire Process Was Manipulated By The 2<sup>Nd</sup> Defendant For His Personal Benefit.
24. Pw 1 Further Testified That The Agreement For Sale Between Her Late Father And The 2<sup>Nd</sup> Defendant Included Particulars Of The 3<sup>Rd</sup> Plaintiff.
25. According To Pw 1, The 3<sup>Rd</sup> Plaintiff's Kenyan Identification Card Number Was Indicated As 161155178 Yet The Correct Identification Card Number For The 3<sup>Rd</sup> Plaintiff Is 161151738.
26. Pw 1 Stated That The Owner Of The Kenyan Identification Card No. 161155178 Was Unknown To The Plaintiffs.
27. Pw 1 Informed The Court That Due To This Fraudulent Sale, The Plaintiffs Who Are Farmers Have Been Deprived Of Their Land And By Extension Their Livelihood.



28. Pw 1 Stated That The Agreement For Sale Was Prepared By The 3<sup>Rd</sup> Defendant Herein Who Is Not A Licensed Advocate But A Clerk.
29. Pw 1 Relied On The Proceedings Of The Kilgoris Criminal Case No. 9 Of 2017 Wherein One Witness Known As Ambrose Kiptai Mashara Testified That The 3<sup>Rd</sup> Defendant Was Not A Licensed Advocate And Was The Mastermind Of The Entire Fraudulent Transaction.
30. Pw 1 Further Pointed Out That The Land Control Board Consent Used To Transfer The Property Known As L.r.no. Transmara/enaenyeny/200 Was Issued To A Different Property Known As L.r.no. Transmara/olempontiti/200.
31. Pw 1 Clarified That The Consent Dated 22/10/2021 Referring To L.r.no. Transmara/olempontiti/200 Was Cancelled The Particulars Of The Property Known As L.r.no. Transmara/enaenyeny/200 Inserted Thereof.
32. Pw 1 Pointed Out To The Court That The Consent Form Used In The Transfer Of The Property Known As L.r.no. Transmara/enaenyeny/200 Was Not Signed, Does Not Have Any Stamp Duty Affixed To It, A Copy Of A Receipt Of The Charges Paid When Applying For The Land Control Board Consent And/or The Signature Of The Land Owner.
33. Pw 1 Stated That The Purported Approval By The Land Control Board Was Not Supported By Any Minutes And Therefore The Entire Process Undertaken By The 2<sup>Nd</sup> Defendant To Acquire The Property Known As L.r.no. Transmara/enaenyeny/200 Was Unlawful.
34. Pw 1 Prayer To The Court Was That The Purported Sale And Transfer Of The Property Known As L.r.no. Transmara/enaenyeny/200 To The 2<sup>Nd</sup> Defendant Be Nullified And The Same Reverted Back To The Plaintiffs Who Are The Immediate Beneficiaries Of The Deceased Owner.
35. Further To The Above, Pw 1 Sought An Order Directed To The 2<sup>Nd</sup> Defendant Prohibiting Him From Using The Property Known As L.r.no. Transmara/enaenyeny/200 And Lastly Costs Of This Suit.
36. The 1<sup>st</sup> Defendant Was The First One To Cross-examine Pw 1.
37. Pw 1 Informed The Court That He Was In High School At The Time The Property Known As L.r.no. Transmara/enaenyeny/200 Was Sold And Transferred To The 2<sup>Nd</sup> Defendant.
38. The 2<sup>Nd</sup> Defendant Also Cross-examined Pw 1.
39. Pw 1 Confirmed That According To The Current Land Records, The 2<sup>Nd</sup> Defendant Was The Registered Owner.
40. Pw 1 Informed The Court That Her Demised Father Was The Previous Registered Owner And Was The One Who Had Applied For A Sub-division.
41. Pw 1 Testified That The Agreement For Sale Dated 4/01/2013 Included The 3<sup>Rd</sup> Plaintiff Who Is The Mother And Is Still Alive.
42. Pw 1 Informed The Court That Although The 3<sup>Rd</sup> Plaintiff Is Alleged To Have Witnessed The Agreement For Sale Dated 04/01/2013, There Was Doubt As To Who Actually Affixed The Said Finger Print.
43. Pw 1 Stated That Although The Transaction Was Fraudulent, There Was A Transfer Form Which Was Done, A Receipt Of Payment Done On 23/04/2013 Presented, A Copy Of Mutations On The Sub-divisions Created And Lastly Receipt Of Payments Done Of The Property Known As L.r.no. Transmara/enaenyeny/200.



44. Pw 1 Confirmed That The Transfer Forms Relating To L.r.no. Transmara/enaenyieny/200 Contained The Signature And Pictures Of Her Deceased Father And Witnessed By Advocate P.o. Makori On The 9/01/2013.
45. The 2<sup>Nd</sup> Defendant Also Seems To Have Appeared Before The Same Advocate For Purposes Of Witnessing The Said Transfer Documents.
46. However, The Agreement For Sale Was Prepared By The 3<sup>Rd</sup> Defendant And Not Advocate P.o.makori.
47. As Regards The Kilgoris Criminal Case No. 9 Of 2017, The 3<sup>Rd</sup> Defendant Was Not Charged In These Criminal Proceedings.
48. Pw 1 Indicated That She Did Not Refer To The Judgement That Was Pronounced In Those Criminal Proceedings Known As Kilgoris Criminal Case No. 9 Of 2017.
49. Pw 1 Reiterated Her Testimony That The Deceased Father Had Sold The Property Known As L.r.no. Transmara/enaenyieny/200 Without Consulting The Family Including Her As The Daughter.
50. Pw 1 Confirmed That As The Registered Owner Of The Property Known As L.r.no. Transmara/enaenyieny/200, The Deceased Father Had A Right To Transact Of The Said Land.
51. The 4<sup>Th</sup> Defendant Also Cross-examined Pw 1.
52. According To The Green Cards Presented In Court, Pw 1 Father Had Been Allocated The Property Known As L.r.no. Transmara/enaenyieny/200 By Olomporatiti Group Ranch.
53. The Name Of Pw 1 Father Was Entered As Entry No. 1 In The Said Green Card.
54. Entry No. 2 In The Green Card Was In The Name Of The 1<sup>St</sup> Defendant Herein.
55. According To Pw 1, The Property Known As L.r.no. Transmara/enaenyieny/200 Was Not An Ancestral Inheritance But A Family Property.
56. Pw 1 Confirmed That The Agreement For Sale Was Signed By Her Late Father And The Mutations For Sub-divisions Were Duly Registered.
57. According To Pw 1, The 2<sup>Nd</sup> Defendant Had Purchased Some Portions Of Land From The Sub-divisions Which Had Been Done By Her Deceased Father And Other Portions Sold To Different Purchasers.
58. Pw 1 Indicated That The Plaintiffs Did Not Have Any Issue With The Other Portions Sold To Different Purchasers Hence Had Not Included Them In This Suit.
59. Pw 1 Testified That Currently, The Plaintiffs Did Not Have Any Land To Use.
60. Pw 1 Reiterated That She Was Not Involved In The Sale Transaction Of The Property Known As L.r.no. Transmara/enaenyieny/200 Or Its Sub-divisions Thereof.
61. Pw 1 Informed The Court That The Searches Presented In Court Were Obtained From The Land Registrar, Transmara.
62. In Re-examination, Pw 1 Clarified That The Sub-divisions Known As L.r.no. Transmara/enaenyieny/645,646,647,648,654,661,662,665 And 666 Were All Registered In The Name Of The 2<sup>Nd</sup> Defendant.



63. However, Pw 1 Did Not Have Receipts Confirming Payments Of Each Of The Mutations Which Created These Sub-divisions.
64. In Addition To The Above, Pw 1 Stated That There Was No Agreement For Sale Confirming That The Property Known As L.r.no. Transmara/enaenyieny/200 Has Been Sold Off For Kenya Shillings 100,000/-.
65. According To Pw1, The Sum Of Kenya Shillings 100,000/- Was For The Purchase Of The Sub-division L.r.no. Transmara/enaenyieny/661 Of Which No Agreement For Sale Has Been Produced.
66. Referring To The Kilgoris Criminal Case No.9 Of 2017, It Was Testified That The Person Who Presented And Executed The Agreement For Sale Was The 3<sup>rd</sup> Defendant.
67. Pw 1 Stated That The Agreement For Sale Did Not Describe The Deceased Father And The 3<sup>rd</sup> Plaintiff As Joint Owners Of The Property Known As L.r.no. Transmara/enaenyieny/200.
68. Pw 1 Indicated That The 3<sup>rd</sup> Plaintiff Was Not Educated And Particulars Of Her Kenyan Identification Cards Has Been Altered In Three Separate Documents.
69. Pw 1 Testified That She Had Been Shown How The Purchase Price Was Sub-divided Within The Family Members.
70. Lastly, Pw 1 Testified That The Land Registrar, Transmara Did Not Exercise Due Diligent In Finding Out If There Was Any Objection On The Transfer Of The Suit Property.
71. The Second Plaintiff's Witness Was One Sampayian Laton.
72. Pw2 Introduced Herself As The 3<sup>rd</sup> Plaintiff And One Of The Two Wives Married To The 1<sup>st</sup> Defendant.
73. Pw 2 Informed The Court That She Had Instituted This Suit To Claim Back The Property Known As L.r.no. Transmara/enaenyieny/200.
74. Pw 2 Testified That She Had Visited Their Advocates Offices And Prepared A Witness Statement Which She Affixed Her Thumb Print.
75. Pw 2 Sought To Adopt The Said Witness Statement As Her Evidence In Chief In This Suit.
76. According To Pw 2, The 1<sup>st</sup> Defendant Was The Registered Owner Of The Property Known As L.r.no. Transmara/enaenyieny/200 Which He Wanted To Dispose Of.
77. However, Pw 2 Informed The Court That Upon Being Told About The 1<sup>st</sup> Defendant's Intention To Sell Of The Property Known As L.r.no. Transmara/enaenyieny/200, She Vehemently Opposed And Refused To Even Execute The Agreement For Sale.
78. Pw 2 Stated That At The Time Of The Purported Sale, The Intended Purchasers Were Kinayamal Sikone And Another Person.
79. Pw2 Reiterated That The Intended Sale Of The Property Known As L.r.no. Transmara/enaenyieny/200 Was Also Opposed By The Children.
80. Pw 2 Was However Surprised To Later On Learn That Despite Their Opposition, The Property Known As L.r.no. Transmara/enaenyieny/200 Was Sold Of Thereby Leaving Them With No Land To Reside And/or Work On.



81. Pw 2 Denied Visiting The Offices Of The 3<sup>Rd</sup> Defendant Who Allegedly Was The Advocate Undertaking The Said Sale Transaction And Did Not Execute Any Agreement For Sale.
82. Pw 2 Indicated That Her Kenyan Identity Card Number Was 16115178 Which Was Different From The One Indicated In The Agreement For Sale Dated 04/01/2013 Given As Kenyan Identity Card Number Was 161155178.
83. Pw 2 Informed The Court That He Did Not Know Ambrose Kimatui Parta, Joseph Kisira Ole Naiko Or Stephen Lesoo Parta.
84. Pw 2 Stated That She Has Never Been To The Chief With Regard To The Property Known As L.r.no. Transmara/enaenyieny/200 And It Was Not Therefore True That She Was Present During The Sale Of The Property.
85. Pw 2 Confirmed That She Was Arrested And Charged In Kilgoris Criminal Case No. 9 Of 2017 But The Said Proceedings Were Concluded With A Not Guilty Verdict.
86. In Concluding Her Evidence In Chief, Pw 2 Requested The Court To Cancel Any Purported Sale Of The Property Known As L.r.no. Transmara/enaenyieny/200 And Reinstate The Same To The Plaintiffs On Behalf Of All The Other Family Members As They Did Not Have Any Land To Occupy And Or Work On For A Livelihood.
87. The 1<sup>St</sup> Defendant Did Not Have Any Question To Pw 2.
88. The 2<sup>Nd</sup> Defendant Cross Examined Pw 2 Thereafter.
89. Pw 2 Confirmed That The 1<sup>St</sup> Defendant Was His Husband Who Was The Registered Owner Of The Property Known As L.r.no. Transmara/enaenyieny/200.
90. Pw 2 Further Confirmed That The Agreement For Sale Was Between The 1<sup>St</sup> And 2<sup>Nd</sup> Defendants Herein.
91. Pw 2 Informed The Court That She Was Not Aware That It's The 2<sup>Nd</sup> Defendant Who Had Purchased The Property Known As L.r.no. Transmara/enaenyieny/200.
92. Pw 2 Indicated That She Objected To The Sale Of The Property Known As L.r.no. Transmara/enaenyieny/200.
93. Pw 2 Testified That She Was The One That Had Instructed Their Advocate On Record To Institute This Suit.
94. Pw 2 Denied Being Present When The Agreement For Sale Was Executed By The Parties.
95. Pw 2 Also Indicated That Her Identity Card Number Was Not The Correct One.
96. Pw 2 Informed The Court That Her Identity Card Was With The 1<sup>St</sup> Defendant During The Time When The Property Known As L.r.no. Transmara/enaenyieny/200 Was Being Leased.
97. Pw 2 Confirmed That The Identity Number And The Photo Attached To The Transfer Belonged To The 1<sup>St</sup> Defendant.
98. Pw 2 Again Denied Signing And/or Witnessing The Agreement For Sale As Well As Attending The Offices Of The 3<sup>Rd</sup> Defendant.
99. Nevertheless, Pw 2 Conceded That She Had Not Called Any Expert Witness To Verify The Thumb Print That Was On The Agreement For Sale.



100. Pw 2 Testified That The Only Document She Affixed Her Thumb Print Was A Lease Agreement And Not An Agreement For Sale.
101. Pw 2 Stated That She Had A Right To Stop The Sub-division And/or Transfer Of The Property Known As L.r.no. Transmara/enaenyieny/200 Because As A Spouse, Her Consent Was Required.
102. Pw 2 Indicated That She Did Not Know Advocate Makori From Kilgoris And Therefore Was Not Intending To Call Him As A Witness.
103. The 3<sup>rd</sup> Defendant Also Cross-examined Pw 2.
104. Pw 2 Informed The Court That The 3<sup>rd</sup> Defendant Operated A Law Firm.
105. However, Pw 2 Did Not Have Any Registration Documents To Confirm The Same.
106. Similarly, Pw 2 Did Not Have Any Documents To Show That It Was The 3<sup>rd</sup> Defendants That Had Prepared The Agreement For Sale Or Affixed His Signature On It As A Witness Thereof.
107. The 4<sup>th</sup> Defendant Cross-examined Pw 2 Further.
108. Pw 2 Reiterated The Property Known As L.r.no. Transmara/enaenyieny/200 Was Acquired For The Family.
109. Pw 2 Stated That Previously, The Property Known As L.r.no. Transmara/enaenyieny/200 Was Registered In The Name Of The 1<sup>st</sup> Defendant.
110. Pw 2 Denied That The Property Known As L.r.no. Transmara/enaenyieny/200 Was Ever Sub-divided Into Various Portions.
111. Pw 2 Prayer Was That The Entire Property Known As L.r.no. Transmara/enaenyieny/200 Should Be Returned As A Whole To The Family.
112. In Re-examination, Pw 2 Stated That The Purported Agreement For Sale Was Prepared In The Year 2013.
113. However, Pw 2 Denied Having Agreed To Sell The Property Known As L.r.no. Transmara/enaenyieny/200 Or Visited Any Advocates Office To Sign The Agreement For Sale.
114. The Third Plaintiff's Witness Was Eric Saitoti Laton.
115. Pw 3 Introduced Himself As The 1<sup>st</sup> Plaintiff And A Grandson To The 1<sup>st</sup> Defendant Herein.
116. Pw 3 Informed The Court That He Was Literate And Confirmed To Have Prepared And Signed The Witness Statement Dated 27/12/2015.
117. Pw 3 Confirmed That He Would Like To Adopt The Witness Statement Filed In Court As His Evidence In Chief.
118. According To Pw 3, The Property Known As L.r.no. Transmara/enaenyieny/200 Belonged And Was Registered In The Name Of The 1<sup>st</sup> Defendant.
119. Pw 3 Testified That Although He Resides Somewhere Else, He Was Aware That The Mother And Other Aunties Had No Land To Reside Upon.
120. Pw 3 Indicated That He Has Never Signed Any Agreement For Sale Or Given A Consent For The Property Known As L.r.no. Transmara/enaenyieny/200 Should Be Sold Off.



121. Pw 3 Stated That The Reason This Suit Was Filed Was To Reclaim Back The Property Known As L.r.no. Transmara/enaenyieny/200 As No Consent Was Obtained From The Family Members Of The 1<sup>st</sup> Defendant Before The Same Was Sold Off.
122. The 1<sup>st</sup> Defendant Opted Not To Cross Examine Pw 3 Herein
123. The 2<sup>nd</sup> Defendant Proceeded To Cross-examine Pw 3.
124. Pw 3 Indicated That He Was 24 Years Old And Confirmed That Indeed, There Exists An Agreement For Sale Dated 04/01/2013.
125. Pw 3 Testified That The 3<sup>rd</sup> Plaintiff's Name And A Thumb Print Is Purported To Have Been Affixed.
126. Pw 3 Confirmed That He Had Never Been To The Office Of The 3<sup>rd</sup> Defendant On The Dates Which The Agreement Of Sale Was Prepared.
127. Pw 3 Stated That The Property Known As L.r.no. Transmara/enaenyieny/200 And Registered In The Name Of The 1<sup>st</sup> Defendant In Trust Of The Rest Of The Family.
128. The 3<sup>rd</sup> Defendant Further Cross-examined Pw 3.
129. Pw 3 Indicated That He Did Not Have Any Evidence To Show That The 3<sup>rd</sup> Defendant Was Not Employed In The Law Firm Which Appears On The Agreement For Sale.
130. Then The 4<sup>th</sup> Defendant Concluded The Cross Examination Of Pw 3.
131. According To The Testimony Of The Pw 3, The 1<sup>st</sup> Defendant Was The Person Registered As The Owner Of The Property Known As L.r.no. Transmara/enaenyieny/200.
132. Pw 3 Stated That The Property Known As L.r.no. Transmara/enaenyieny/200 Was Sub-divided And Some Of It Sold To The 2<sup>nd</sup> Defendant.
133. Pw 3 Indicated That The Property Known As L.r.no. Transmara/enaenyieny/672 Was Owned By The 1<sup>st</sup> Defendant But Later Sold To One James Kiriga Misira.
134. Pw 3 Confirmed That The Property Known As L.r.no. Transmara/enaenyieny/200 Was Indeed Sub-divided And Other Portions Sold To Over Persons Who Were Not Parties In This Suit.
135. There Was No Re-examination Of Pw 3 By The Advocate And The Plaintiffs Closed Their Case Thereof.
136. The Defence Hearing Commenced On The 26/09/2022.
137. The 1<sup>st</sup> Defence Witness Was One Kakiu Nawangas.
138. Dw 1 Introduced Himself As A Cousin To The Deceased 1<sup>st</sup> Defendant And The Administrator Of The Estate Of The 1<sup>st</sup> Defendant.
139. Dw 1 Thereafter Produced A Copy Of The Limited Grant Of Ad Litem Issued On The 23<sup>rd</sup> Of February 2022 As Well As A Copy Of The Death Certificate Of The 1<sup>st</sup> Defendant Issued On The 16<sup>th</sup> Of June 2021 As Defence Exhibits No. 1 And 2 Respectively.
140. Dw 1 Further Informed The Court That He Was Well Aware Of The Facts Of This Case And Would Be Ready To Testify On Behalf Of The Deceased 1<sup>st</sup> Defendant.
141. According To Dw 1, The Property Known As L.r.no. Transmara/enaenyieny/200 Originally Belonged To One Nawangas Konchellah Who Was The Father Of The 1<sup>st</sup> Defendant.



142. Thereafter, The Property Known As L.r.no. Transmara/enaenyieny/200 Was Divided Among Two Brothers With One Being The 1<sup>st</sup> Defendant.
143. Dw 1 Stated That He Was Not Aware Whether The 1<sup>st</sup> Defendant Sold His Portion Of Land Or Not.
144. Similarly, Dw 1 Had Not Heard From The 1<sup>st</sup> Defendant's Children Whether Or Not They Had Consented To A Sale Of Their Father's Land.
145. Consequently Therefore, Dw 1 Testified That If Indeed The 1<sup>st</sup> Defendant Sold The Portion He Was Given, Then It Was Without The Consent Of The Other Family Members.
146. The Counsel For The Plaintiffs Then Cross-examined Dw 1.
147. Dw 1 Stated That The Suit Property Known As L.r.no. Transmara/enaenyieny/200 Was Located Within Enaenyieny Location.
148. Dw 1 Further Informed The Court That The Portion Given To The 1<sup>st</sup> Defendant Was Registered In His Personal Name.
149. Dw 1 Confirmed That The 1<sup>st</sup> Defendant Had A Family Although He Never Discussed The Issue Of Selling The Land With Any Of His Family Members.
150. The Counsel For The 2<sup>nd</sup> Defendant Further Cross-examined Dw 1.
151. Dw 1 Indicated That The 1<sup>st</sup> Defendant Was His Nephew Meaning He Was A Son To His Brother.
152. Dw 1 Reiterated That The Original Parcel Of Land Belonged To Their Father.
153. Dw 1 Further Informed The Court That The Sale By The 1<sup>st</sup> Defendant Was Not Communicated To His Family Members And They Were Totally Unaware.
154. Dw 1 Confirmed To Court That The Portion In Which He Stays Has A Title As Well As That Given To The 1<sup>st</sup> Defendant.
155. Dw 1 Further Indicated That If He Wanted To Sale His Portion, His Relatives Can Object To The Same And Even Place A Caution On The Title.
156. However, In This Property Before The Court, He Was Not Aware If A Caution Had Been Placed On The Register Thereof.
157. Dw 1 Informed The Court That It Was The 1<sup>st</sup> Defendant's Wife Who Had Informed Him That The Property Known As L.r.no. Transmara/enaenyieny/200 Had Been Sold Off.
158. Dw 1 Confessed That He Was Not Aware Of The Circumstances And/or Terms Of The Alleged Sale Of The Property Known As L.r.no. Transmara/enaenyient/200.
159. The Counsel For The 4<sup>th</sup> Defendant Also Cross-examined Dw 1.
160. Dw 1 Testified That The Original Property Owned By Nawangas Konchellah Has A Title Deed.
161. However, Dw 1 Did Not Have Any Documentary Proof To Confirm That A Title Deed Had Been Issued To Nawangas Konchellah.
162. In Re-examination, Dw 1 Informed The Court That There Was No Family Member Who Was A Witness To The Agreement For Sale Entered By The 1<sup>st</sup> Defendant.
163. The Counsel For The 1<sup>st</sup> Defendant Then Closed His Case At That Point.



164. The 2<sup>Nd</sup> Defendant's Case Began With The Testimony Of The 2<sup>Nd</sup> Defendant.
165. Dw 2 Informed The Court That He Had Prepared And Filed In Court A Witness Statement Dated 15/01/2017 Which He Adopted As His Evidence In Chief.
166. Thereafter, Dw 2 Produced The Following Documents In Support Of His Evidence In Chief; -  
2<sup>Nd</sup> Defendant's Exhibit 1- Copies Of The Title Deeds To The Properties Known As L.r.no.transmara/ enaenyeny/645,646,647,648,661,662,665 & 666.  
2<sup>Nd</sup> Defendant's Exhibit 2- Copy Of Agreements For Sale Dated 04/01/2013, 07/02/2013 & 19/06/2013.  
2<sup>Nd</sup> Defendant's Exhibit 3- Copies Of The Kenyan Identity Card Of The 2<sup>Nd</sup> Defendant Together With That Of The 1<sup>St</sup> Defendant And The Witnesses Known As Stephen Leshoo Barta, Joseph Kisira Ole Nankoras, Ambrose Kiptai Mashara & Sampayian Laton.
167. According To The Testimony Of Dw 2, The Properties Mentioned Hereinabove Were Not Acquired Through Fraudulent Means.
168. Dw 2 Stated That The 3<sup>Rd</sup> Plaintiff Who Was The Wife Of The 1<sup>St</sup> Defendant Was Present At All Times And Was Aware Of The Sale Transaction To The Extent That She Affixed Her Finger Thumb Of The Said Agreement For Sale.
169. Dw 2 Further Testified That The Title Held By The 1<sup>St</sup> Defendant Was A First Registration Thereof.
170. Dw 2 Informed The Court That The Agreement For Sale Was Prepared And Executed In The Offices Of The 3<sup>Rd</sup> Defendant By One Advocate Makora.
171. Thereafter, The 1<sup>St</sup> Defendant Applied For The Land Control Board Consent Which Was Then Issued To Him.
172. Dw 2 Further Testified That A Transfer Form Was Executed By The 1<sup>St</sup> Defendant In Kilgoris Town At The Offices Of Advocate Makori.
173. Dw 2 Stated That At The Time Of Purchasing The Properties In His Name From The 1<sup>St</sup> Defendant, There Was No Caution Placed On The Green Cards.
174. Thereafter, Dw 2 Informed The Court That He Took Possession And Occupied The Properties For A Period Of 4 Years Before This Suit Was Filed.
175. Dw 2 Told The Court That He Had Planted Trees, Tea, Sugar Cane And Also Built A Home Stead Therein.
176. Dw 2 Further Testified That The Family Of The 1<sup>St</sup> Defendant Were Not In Occupation Of The Properties Because They Own Other Parcels Of Land.
177. Consequently Therefore, Dw 2 Sought This Court To Dismiss The Plaintiffs Case With Costs.
178. Dw 2 Informed The Court That He Had Purchased All His Titles For Value And This Suit Had Been Filed Against Him Because He Was Perceived To Be A None Local.
179. Dw 2 Stated That He Did Not Use His Influence As A District Commissioner To Acquire The Properties In His Name But Had Bought Them Legitimately And For Value.
180. Dw 2 Further Prayed That The Court Grants Him The Prayers Contained In The Counter-claim Filed Together With His Defence.



181. The Plaintiffs Counsel Was The First To Cross-examine Dw 2.
182. Dw 2 Informed The Court That He Did Not Produce Any Documents To Confirm That The 1<sup>st</sup> Defendant's Family Had Been Aware Of The Sale Of Their Land.
183. Dw 2 Further Stated That He Did Not Have A Documentary Evidence To Prove That The Plaintiff's Herein Had Other Parcels Of Land.
184. According To Dw 2, He Purchased Land From A Maasai Person And Was Not Sure If The Family Of The 1<sup>st</sup> Defendant Was Pastoralist.
185. Dw 2 Testified That He Undertook A Search Of The Property Known As L.r.no. Transmara/enaenyieny/200 Before The Agreement For Sale Was Prepared And Executed.
186. However, Dw 2 Confessed That He Did Not Have A Copy Of This Search Undertaken Before The Agreement For Sale.
187. Dw 2 Further Confirmed That The 1<sup>st</sup> Defendant Was The Registered Owner Of The Property Known As L.r.no. Transmara/enaenyieny/200.
188. Dw 2 Indicated That The Persons He Dealt With During The Sale Transaction Was The 1<sup>st</sup> Defendant And The 3<sup>rd</sup> Plaintiff.
189. According To Dw 2, The Property Known As L.r.no.transmara/enaenyieny/200 Was A Private Property Owned By The 1<sup>st</sup> Defendant.
190. In Dw 2 Recollection, The Reason The 1<sup>st</sup> Defendant Was Selling The Property Known As L.r.no. Transmara/enaenyieny/200 Was Because Of School Fees.
191. Dw 2 Insisted That The 3<sup>rd</sup> Plaintiff Was Present During The Sale Transaction And Even Affixed Her Thumb Print Thereof.
192. Referring To The 2<sup>nd</sup> Defendant's Exhibit No. 1 (c), The Agreement Dated 07/02/2013, The 3<sup>rd</sup> Defendant Used A Signature And Not A Thumb Print.
193. Dw 2 Indicated That There Were 6 Separate Agreements For Sale That Were Signed By The 1<sup>st</sup> Defendant And Himself.
194. However, All These Agreements For Sale Were Done In The Year 2013.
195. According To Dw 2 Recollection, The Original Property Owned By The 1<sup>st</sup> Defendant Was Known As L.r.no. Transmara/enaenyieny/200 Which Was Then Sub-divided Into Various Portions Of Land.
196. Dw 2 Stated That According To Him, All The Required Steps Of Sub-division Were Followed And This Is The Reason That He Was Able To Register His Transfers On The Portions Purchased And Obtained Legitimate Titles Thereafter.
197. Dw 2 Indicated That All The Transfers Were Assessed Stamp Duty By The Land Office In Kilgoris And That Is What Was Paid To The Government.
198. Dw 2 Confirmed That All The Agreements For Sale Were Done In The Offices Of The 3<sup>rd</sup> Defendant And He Personally Visited Those Offices For Purposes Of Executing Them.
199. Dw 2 Identified One Ambrose Kiptan Mashara As His Witness On The Day Of Executing The Agreements For Sale.



200. Dw 2 Stated In Court That He Only Knew Advocate Jumba And Not Benjamin.
201. Dw 2 Indicated That He Had Not Filed Any Document To Challenge The Allegations Relating To The Property Known As L.r.no. Transmara/enaenyieny/654.
202. Nevertheless, Dw 2 Confirmed That All The Transfers Were Registered With The Land Offices And Titles Issued.
203. Dw 2 Reiterated That The 3<sup>Rd</sup> Plaintiff Was Present During All These Transactions And Consented To The Sale.
204. Dw 2 Stated That He Is Registered As The Owner Of Six Parcels Of Land Known As L.r.no.transmara/enaenyieny/645,646,647,648,661,662,665 And 666 And Therefore Sought The Court To Grant The Prayers Contained In The Counter-claim.
205. There Was Further Cross-examination Of Dw 2 By Counsel For The 1<sup>St</sup> Defendant.
206. According To Dw 2, The Only Family Member He Knew Was The 3<sup>Rd</sup> Plaintiff Who Was The Spouse.
207. Unfortunately, The 3<sup>Rd</sup> Plaintiff Has Also Sued Him In This Suit.
208. The 4<sup>Th</sup> Defendant's Counsel Also Cross-examined Dw 2.
209. Dw 2 Stated That At The Time Of Purchasing His Property, He Had Done A Ground Visit.
210. Dw 2 Confirmed That The Property Known As L.r.no. Transmara/enaenyieny/200 Was Completely Vacant.
211. Dw 2 Further Stated That All The Transfer Documents Were Duly Signed By The 1<sup>St</sup> Defendant And Lawfully Registered At The Land's Registry.
212. In Re-examination, Dw 2 Confirmed That All The Agreements Were Witnessed By Advocate Jumba And Not A Person Called Benjamin.
213. Thereafter, Dw 2 Presented All The Relevant Documents To The Land Registrar Who Duly Registered Them And Issued Him With Title Deeds.
214. Upon Completion Of This Re-examination, The 2<sup>Nd</sup> Defendant Closed His Case.
215. The 4<sup>Th</sup> Defendant Also Called One Witness To Testify In Court.
216. The 4<sup>Th</sup> Defendant's Witness Was One Stephen Kithinji.
217. Dw 3 Introduced Himself As The Land Registrar In Charge Of Transmara East,west And South.
218. Dw 3 Informed The Court That He Has Been In Transmara For The Last 10 Years And Was Well Conversant With The Facts Of This Case.
219. Dw 3 Stated That He Would Like To Produce A Number Of Documents That Would Assist The Court In Determining This Case.
220. The Documents To Be Produced By Dw 3 Were Contained In The 4<sup>Th</sup> Defendant's List Of Documents Dated 23/09/2019.
221. The Documents Produced Dw 3 On Behalf Of The 4<sup>Th</sup> Defendant Are As Follows; -
  - I. Dw 3- Exhibit 1- Copy Of The Green Card Of The Property Known As L.r.no.transmara/enaenyieny/200 In The Name Of The 1<sup>St</sup> Defendant.



- ii. Dw 3- Exhibit 2- Copy Of The Mutation Form Of The Property Known As L.r.no. Transmara/enaenyieny/200 In Regards To Sub-division Which Created L.r.no.transmara/enaenyieny/644,645 & 646.
- iii. Dw 3- Exhibit 3- Copy Of The Application Form For Consent From Land Control Board For Sub-division Of L.r.no.transmara/enaenyieny/200 Into L.r.no.transmara/enaenyieny/644,645 And 646.
- iv. Dw 3- Exhibit 4- Copy Of The Letter Of Consent From The Land Control Board Sub-dividing L.r.no. Transmara/enaenyieny/200.
- v. Dw 3-exhibit 5- Copy Of The Mutation Form For The Sub-division Of L.r.no. Transmara/enaenyieny/644 To L.r.no.transmara/enaenyieny/653 & 654.
- vi. Dw 3- Exhibit 6- Copy Of The Green Card For The Property Known As L.r.no. Transmara/644.
- vii. Dw 3-exhibit 7- Copy Of The Letter Of Consent For The Sub-division Of L.r.no. Transmara/enaenyieny/644.
- viii. Dw 3- Exhibit 8- Copy Of The Application Form For Consent To Sub-divide L.r.no.transmara/enaenyieny/644.
- ix. Dw 3- Exhibit 9- Copy Of The Mutation Form Of The Sub-division Of L.r.no. Transmara/enaenyieny/653 Into L.r.no. Transmara/enaenyieny/671 & 672.
- x. Dw 3- Exhibit 10- Copy Of The Green Card Of L.r.no. Transmara/enaenyieny/653.
- xi. Dw 3- Exhibit 11- Copy Of The Application For Consent To Sub-divide L.r.no. Transmara/enaenyieny/653.
- xii. Dw 3- Exhibit 12- Copy Of The Letter Of Consent For Sub-division Of L.r.no. Transmara/enaenyieny/653.
- xiii. Dw 3- Exhibit 13- Copy Of A Receipt Dated 07/10/2003.
- xiv. Dw 3- Exhibit 14- Copy Of The Title Deed Of The Property Known As L.r.no. Transmara/enaenyieny/653.
- xv. Dw 3- Exhibit 15- Copy Of The Green Card Of The Property L.r.no. Transmara/enaenyieny/671.
- xvi. Dw 3- Exhibit 16- Copy Of The Transfer Of The Property Known As L.r.no. Transmara/enaenyieny/671.
- xvii. Dw 3- Exhibit 17- Receipt Dated 04/03/2015.
- xviii. Dw 3- Exhibit 18- Copy Of The Application For Consent To Transfer L.r.no. Transmara/enaenyieny/671.
- xix. Dw 3- Exhibit 19- Copy Of The Identity Card Of One Lorna Reteti Sosio.
- xx. Dw 3-exhibit 20- Copy Of A Letter Of Consent For The Transfer Of L.r.no. Transmara/enaenyieny/671.
- xxi. Dw 3- Exhibit 21- Copy Of The Green Card Of The Property Known As L.r.no. Transmara/enaenyieny/672.



- Xxii. Dw 3- Exhibit 22- Copy Of A Letter Of Consent To Transfer The Property L.r.no. Transmara/enaenyieny/672.
- Xxiii. Dw 3- Exhibit 23- Copy Of The Application For Consent To Transfer The Property Known As L.r.no. Transmara/enaenyieny/672.
- Xxiv. Dw 3-exhibit 24- Copy Of The Stamp Duty Payment For The Property L.r.no. Transmara/enaenyieny/672.
- Xxv. Dw 3- Exhibit 25- Copy Of Receipt Of Stamp Duty Payment Dated 15/08/2014.
- Xxvi. Dw 3- Exhibit 26- Copy Of The Transfer Form Of L.r.no. Transmara/enaenyieny/672.
- Xxvii. Dw 3- Exhibit 27- Copy Of The Green Card Of The Property L.r.no. Transmara/enaenyieny/654.
- Xxviii. Dw 3- Exhibit 28- Copy Of The Transfer Form Of L.r.no.transmara/enaenyieny/654.
- Xxix. Dw 3- Exhibit 29- Copy Of The Application For Consent For Transfer Of L.r.no. Transmara/enaenyieny/654.
- Xxx. Dw 3- Exhibit 30- Copy Of The Receipt Dated 19/02/2013.
- Xxxi. Dw 3- Exhibit 31- Copy Of The Title Deed Of L.r.no. Transmara/enaenyieny/654.
- Xxxii. Dw 3- Exhibit 32- Copy Of Receipt Dated 26/02/2013.
- Xxxiii. Dw 3-exhibit 33- Copy Of Assessment Of Stamp Duty Dated 26/02/2013.
- Xxxiv. Dw 3- Exhibit 34- Copy Of The Letter Of Consent To Trnasfer The Property Known As L.r.no. Transmara/enaenyieny/654.
- Xxxv. Dw 3- Exhibit 35- Copy Of The Mutation Of The Property L.r.no. Transmara/enaenyieny/645.
- Xxxvi. Dw 3- Exhibit 36- Copy Of The Receipt Dated 23/04/2013.
- Xxxvii. Dw 3- Exhibit 37- Copy Of The Application To Sub-divide L.r.no. Transmara/enaenyieny/645.
- Xxxviii. Dw 3- Exhibit 38- Copy Of A Letter Of Consent For Sub-division Of L.r.no. Transmara/enaenyieny/645.
- Xxxix. Dw 3- Exhibit 39- Copy Of The Title Issued On The 21/11/2012.
- Xl. Dw 3- Exhibit 40- Copy Of The Mutation For Sub-division Of L.r.no. Transmara/enaenyieny/661 Into L.r.no Transmara/enaenyieny/665 & 666.
- Xli. Dw 3- Exhibit 41- Copy Of The Application For Registration Of The Mutation Form For L.r.no. Transmara/enaenyieny/661.
- Xlii. Dw 3-exhibit 42- Copy Of The Receipt Dated 25/07/2013.
- Xliiii. Dw 3- Exhibit 43- Copy Of An Application For Consent To Sub-divide L.r.no.transmara/enaenyieny/661.
- Xliv. Dw 3- Exhibit 44- Copy Of The Letter For Consent For The Sub-division Of L.r.no. Transmara/enaenyieny/661.



- Xlv. Dw 3- Exhibit 45- Copy Of The Green Card Of L.r.no. Transmara/enaenyieny/665.
- Xlvi. Dw 3- Exhibit 46- Copy Of An Application For The Registration Of Transfer Of L.r.no. Transmara/enaenyieny/665.
- Xlvii. Dw 3- Exhibit 47- Copy Of Receipt Dated 28/07/2013.
- Xlviii. Dw 3- Exhibit 48- Copy Of The Stamp Duty Payment Dated 28/08/2013.
- Xlix. Dw 3- Exhibit 49- Assessment Of Stamp Duty For L.r.no. Transmara/enaenyieny/665.
- L. Dw 3- Exhibit 50- Copy Of An Application For Consent To Transfer L.r.no.transmara/enaenyieny/665.
- Li. Dw 3- Exhibit 51- Copy Of A Letter Of Consent For The Transfer Of L.r.no. Transmara/enaenyieny/665.
- Lii. Dw 3- Exhibit 52- Copy Of The Green Card Of L.r.no. Transmara/enaenyieny/666.
- Liii. Dw 3- Exhibit 53- Copy Of A Transfer From Of L.r.no. Transmara/enaenyieny/666.
- Liv. Dw 3- Exhibit 54- Application For Consent To Transfer L.r.no.transmara/enaenyieny/666.
- Lv. Dw 3- Exhibit 55- Copy Of A Letter Of Consent For The Transfer Of L.r.no. Transmara/enaenyieny/666.
- Lvi. Dw 3- Exhibit 56- Copy Of The Receipt Dated 26/07/2013.
- Lvii. Dw 3- Exhibit 57- Copy Of The Green Card Of L.r.no Transmara/enaenyieny/662.
- Lviii. Dw 3- Exhibit 58- Copy Of The Transfer Of L.r.no. Transmara/enaenyieny/662.
- Lix. Dw 3- Exhibit 59- Copy Of Receipt Dated 10/05/2012.
- Lx. Dw 3- Exhibit 60- Copy Of The Application For Consent To Transfer L.r.no. Transmara/enaenyieny/662.
- Lxi. Dw 3- Exhibit 61- Copy Of The Letter Of Consent To Transfer L.r.no. Transmara/enaenyieny/662.
- Lxii. Dw 3- Exhibit 62- Copy Of K.r.a Pin Certificate Of The 1<sup>st</sup> Defendant.
- Lxiii. Dw- 3- Exhibit 63- Copy Of The 1<sup>st</sup> Defendant's I.d.
- Lxiv. Dw 3- Exhibit 64- Copy Of The Mutation Of L.r.no. Transmara/enaenyieny/646 Into L.r.no. Transmara/enaenyieny/647 & 648.
- Lxv. Dw 3- Exhibit 65- Copy Of Application For Consent For The Sub-division Of L.r.no. Transmara/enaenyieny/646.
- Lxvi. Dw 3- Exhibit 66- Copy Of Receipt Dated 04/01/2015.
- Lxvii. Dw 3- Exhibit 67- Copy Of The Letter Of Consent To Sub-divide L.r.no. Transmara/enaenyieny/646.
- Lxviii. Dw 3- Exhibit 68- Copy Of The Transfer Form Of L.r.no. Transmara/enaenyieny/647.
- Lxix. Dw 3- Exhibit 69- Copy Of Assessment Of Stamp Duty Slip Dated 26/02/2013.



- Lxx. Dw 3- Exhibit 70- Copy Of Receipt Dated 26/02/2013.
- Lxxi. Dw 3- Exhibit 71- Copy Of Receipt Dated 22/02/2013.
- Lxxii. Dw 3- Exhibit 72- Application For Consent To Transfer L.r.no. Transmara/enaenyieny/647.
- Lxxiii. Dw 3- Exhibit 73- Copy Of A Letter Of Consent To Transfer L.r.no. Transmara/enaenyieny/647.
- Lxxiv. Dw 3- Exhibit 74- Copy Of The Green Card Of L.r.no. Transmara/enaenyieny/648.
- Lxxv. Dw 3- Exhibit 75- Copy Of The Transfer Form Of L.r.no. Transmara/enaenyieny/648.
- Lxxvi. Dw 3- Exhibit 76- Copy Of An Application For Consent To Transfer L.r.no. Transmara/enaenyieny/648.
- Lxxvii. Dw 3- Exhibit 77- Copy Of The Letter Of Consent For Transfer Of L.r.no. Transmara/enaenyieny/648.
- Lxxviii. Dw 3- Exhibit 78 – Copy Of A Receipt Dated 09/01/2013.
- Lxxix. Dw 3- Exhibit 79- Copy Of Receipt Dated 14/01/2013.
222. After Production Of The Above Exhibits, Dw 3 Indicated That The Original L.r.no.transmara/enaenyieny/200 Was Originally Registered In The Name Of Olembongit Group Ranch On The 29/06/1994.
223. Thereafter, L.r.no. Transmara/enaenyieny/200 Was Transferred To The 1<sup>st</sup> Defendant On The 23/04/1998 And Issued With A Title Deed.
224. In Essence Therefore, L.r.no. Transmara/enaenyieny/200 Was Not Communal Land But A Private Property.
225. Dw 3 Testified That If The Land Was To Be Held In Trust, Then A Trust Must Be Indicated On The Green Card And On The Title Deed Indicating That The Name Which Appears On The Title Is Simply Holding It In Trust.
226. Dw 3 Denied Any Participation Of Any Fraudulent Transfers As Alleged By The Plaintiffs.
227. Dw 3 Informed The Court That The 1<sup>st</sup> And 2<sup>nd</sup> Defendant Presented All The Required Documents To Facilitate A Transfer And Therefore The 4<sup>th</sup> Defendant Had No Reason To Decline The Same.
228. Dw 3 Reiterated That The Property Known As L.r.no. Transmara/enaenyieny/200 Had Been Divided Into Three Portions Namely L.r.no. Transmara/enaenyieny/644,645 And 646.
229. Dw 3 Indicated That After The Sub-division Of L.r.no. Transmara/enaenyieny/200 Into Three Portions, There Has Been Further Sub-divisions Done Either By The 1<sup>st</sup> Defendant Or Other Persons.
230. Dw 3 Stated That The Letter Of Consent By The Land Control Board Is Prepared By The Secretary Who Is The District Officer.
231. Dw 3 Further Stated That The Application For Consent Is Usually Prepared By The Land Owner.
232. Dw 3 Confirmed That It Was Possible For One To Be Granted A Consent To Transfer By The Land Control Board And Present The Same For Registration At The Lands Office On The Same Day.
233. Dw 3 Was The Cross-examined By The Plaintiffs Counsel.



234. Referring To The Mutation Of L.r.no. Transmara/enaenyieny/200, Dw 3 Confirmed That There Was A Cancellation Of The Face Of It.
235. Dw 3 Stated That Initially, The Original Mutation Had Referred The Land As L.r.no. Transmara/olembongit/200 Instead Of L.r.no. Transmara/enaenyieny/200.
236. Dw 3 Indicated That The Amended Mutation Was Not Counter-signed By The Maker On The Alteration That Had Been Done.
237. Dw 3 Informed The Court That Even Before The Mutation Form Is Registered, There Should Be A Land Control Board Consent For The Said Sub-division.
238. Referring To Dw 3 Exhibit 3- Dw 3 Confirmed That It Was The Transfer Form Of L.r.no. Transmara/enaenyieny/200.
239. Dw 3 Stated That There Was No Application For Sub-division For The Property Known As L.r.no. Transmara/enaenyieny/200.
240. Dw 3 Informed The Court That The Application For Consent To Transfer L.r.no. Transmara/enaenyieny/200 Was Properly Done Save That The Description Of The Property Indicated Olembongit/200 Referring To The Name Of The Group Ranch Rather Than Enaenyieny/200 Which Was The Name Of The Adjudication Section.
241. Dw 3 Reiterated That The Application To Sub-divide Is Usually Done By The Land Owner And The Mutation Prepared By A Licensed Surveyor.
242. Dw 3 Indicated That The Consent To Sub-divide Dated 22/10/2012 Has A Deletion Of Olembongit/200 And An Insertion Of Enaenyieny/200.
243. Dw 3 Stated That The Consent Was Prepared By The Chair And Secretary Of Land Control Board.
244. According To Dw 3, The Chair Of The Land Control Board Is The District Officer While The Secretary Is A Clerk Usually For The Land Departments Office.
245. Dw 3 Denied That The Land Registrar Is The Secretary Of The Land Control Board.
246. Dw 3 Indicated That The Consent To Sub-divide L.r.no. Transmara/enaenyieny/200 Was Not Executed Or Dated.
247. According To Dw 3, The Land Control Board Meeting Happened On The 23/10/2022.
248. Dw 3 Reiterated That The Cancellation Of The Name Olembongit And Replacement With Enaenyieny Did Not Make The Consent Irregular.
249. Similarly, The Date Which Appeared On The Consent Was The Correct Date Of Issuance.
250. Dw 3 Stated That He Did Not Have The Physical Receipt For The Payment But On The Face Of The Mutation, There Is A Serial Number Which Signifies The Payment Receipt.
251. Dw 3 Also Confirmed That He Did Not Have The Minutes Of The Land Control Board Meeting To Confirm Which Approval Was Granted.
252. Dw 3 Indicated That The Mutation Of L.r.no. Transmara/enaenyieny/200 Gave Rise To L.r.no. Transmara/enaenyieny/644,645 And 646.
253. The Mutation Of L.r.no. Transmara/enaenyieny/200 Was Signed By The 1<sup>st</sup> Defendant.



254. Dw 3 Confirmed That It Was Possible For A Person To Be Granted Consent By The Land Control Board And Do Registration On The Same Day.
255. Dw 3 Indicated That In Any Registration, The Identity Cards, K.r.a. Pin Certificates And Pictures Of The Parties Are Usually Very Important.
256. Dw 3 Stated That All The Transfers In This Suit Have The Relevant Documents In Support.
257. Dw 3 Clarified That The Copies Produced In Court Relating To The Transfer Of L.r.no. Transmara/enaenyeny/654 Did Not Have A Picture.
258. Similarly, There Was No Consideration Indicated In The Transfer Form Of L.r.no Transmara/enaenyeny/654 Which Is Also Not Dated.
259. According To Dw 3, The Office Of The Land Registrar Does Not Have Any Form Of Consent To Be Executed By The Family Of The Vendor Before Registration Is Done.
260. Dw 3 Stated That In His Opinion, A Registrar Does Not Need To Have Any Consent From The Children Of The Vendor To Effect A Transfer By A Land Owner.
261. Dw 3 Indicated That In A Situation Where A Trust Exists, It Is Mandatory To Have An Entry In The Green Card That The Person Indicated On The Title Or Green Card Holds The Same In Trust.
262. Dw 3 Informed The Court That There Is No Land That Can Be Registered Without Any Indication Of A Trust Unless It Is An Overriding Interest.
263. In The Green Card Of L.r.no. Transmara/enaenyeny/200, There Was No Indication That The 1<sup>st</sup> Plaintiff Was Holding It In Trust Of Other Beneficial Members.
264. Dw 3 Testified That His Office Is In Possession Of The Group Ranch Register Which Indicates That The 1<sup>st</sup> Defendant Had Been Allocated Parcel No. 200.
265. Dw 3 Nevertheless, Did Not Have The Group Ranch Register In Court.
266. On The Aspect Of Valuation, Dw 3 Stated That The Property Known As L.r.no. Transmara/enaenyeny/200 Was Properly Valued And There Was No Undervaluation.
267. According To The Consent Of L.r.no. Transmara/enaenyeny/654, The Value Of Kshs 50,000/- Indicated Therein Was Reasonable And Correct As Of That Time.
268. However, Dw 3 Did Not Have Any Document To Support This Assessment.
269. There Was Further Cross-examination Of Dw 3 By The 1<sup>st</sup> Defendant.
270. Dw 3 Confirmed That All The Documents Presented To The Lands Office Achieved The Intention Of The Parties.
271. Dw 3 Stated That As A Registrar, He Had The Powers To Accept And/or Reject Registering Any Document Which Did Not Have The Correct Documents.
272. Dw 3 Clarified That At Times, The Registrar Can Register Documents Which Might Have Minor Errors Of Missing Information Like Dates.
273. Similarly, If The Registrar Discovers A Registration Which Was Not Intended By Parties, The Said Registration Can Be Cancelled.
274. The 2<sup>nd</sup> Defendant Also Cross-examined Dw 3.



275. Referring To The Transfer Form Of L.r.no. Transmara/enaenyieny/647, Dw 3 Confirmed Receipt Of The Said Document On The 22/02/2013.
276. The Transfer Form Of L.r.no. Transmara/enaenyieny/647 Had Been Witnessed By Advocate Makori The Execution By The Parties Herein.
277. The Transfer Form Of L.r.no. Transmara/enaenyieny/647 Was Accompanied With The Relevant Identity Cards, Kra Pin Certificates And Properly Signed.
278. Dw 3 Indicated That The Omission To Fill The Details In The Certificate Of Attestation Cannot Be Deemed As Irregularity Or Illegality.
279. Dw 3 Position Is That This Omission Would Not Affect The Intention Of The Parties Therein.
280. In Re-examination, Dw 3 Informed The Court That Usually, The Mutations Are Prepared By Private Licensed Surveyors Procured By The Land Owner.
281. According To Dw 3, The Presence Of The Land Owner Is Usually Required During The Sub-division On The Ground.
282. Similarly, The Application For Consent To Sub-divide Is Usually Prepared By The Land Owner.
283. Dw 3 Stated That The Anomalies On The Application Form And The Consent To Transfer Issued Thereafter Did Not Amount To An Illegality.
284. Dw 3 Informed The Court That The Minutes Of The Land Control Board Are Retained By The Chair Of The Land Control Board.
285. According To Dw 3, All The Documents Prepared And Presented For Registration Were Properly Obtained.
286. Dw 3 Stated That The Consent Of Family Members Was Not A Mandatory Requirement In This Particular Transaction.
287. Dw 3 Reiterated That Any Land Which Is Held In Trust Must Have An Entry To That Effect In The Green Card And The Title.
288. In The Green Card And Title Of L.r.no. Transmara/enaenyieny/200, There Was No Such Entry Showing That The 1<sup>st</sup> Defendant Was Holding The Same In Trust Of The Family Members.
289. Dw 3 Informed The Court That The Register Of The Group Ranch Was With The Land Adjudication Officer.
290. Dw 3 Further Clarified That The Office Of The Registrar Had No Powers To Determine The Consideration Of A Property Or What Should Be Indicated As The Value Of The Land In The Transfer Form.
291. At The End Of This Re-examination, The 4<sup>th</sup> Defendants Also Closed Their Case.
292. Parties Then Filed Their Submissions In Support Of Their Positions As Well As Their Authorities.
293. The Court Having Gone Through The Pleadings Herein, The Testimonies Of The Parties And Their Witness, The Documents Produced As Exhibits And The Submissions Of The Parties, The Following Issues For Determination Can Be Identified As Follows; -  
  
Issue No. 1- Who Was The Registered Owner Of The Property Known As L.r.no. Transmara/enaenyieny/200?



Issue No. 2- Was The Property Known As L.r.no.transmara/enaenyieny/200 A Private Property Owned By The 1<sup>st</sup> Defendant Or Held In Trust For The Other Family Members?

Issue No.3- Did The 1<sup>st</sup> Defendant Require The Consent And/or Authority Of The Other Family Members To Sub-divide And/or Sale The Property Known As L.r.no.transmara/enaenyieny/200?

Issue No.4- Were The Agreements For Sale Between The 1<sup>st</sup> Defendant & 2<sup>nd</sup> Defendant Lawful And Binding?

Issue No.5- Did The Defendants Fraudulently Sub-divide, Sale, Transfer And/or Register Unlawful Sub-divisions Against The Property Known As L.r.no. Transmara/enaenyieny/200?

Issue No. 6- Are The Plaintiffs Entitled To The Reliefs Sought In The Plaint?

Issue No.7- Is The 2<sup>nd</sup> Defendant Entitled To The Reliefs Sought In The Counter-claim?

Issue No.8- Who Bears The Costs Of The Plaint And Counter-claim?

294. The Court Having Identified The Above Issues As Those Core To This Suit, It Will Now Proceed To Analyse The Same And Make Its Determination Based On The Facts And Laws Applicable.

**Issue No. 1- Who Was The Registered Owner Of The Property Known As L.r.no. Transmara/enaenyieny/200?**

295. The First Issue Which This Court Needs To Reaffirm Is The Original Owner Of The Property Known As L.r.no. Transmara/enaenyieny/200.

296. According To The 4<sup>th</sup> Defendant's Exhibit No. 1 Which Is Copy Of The Green Card Of The Property Known As L.r.no. Transmara/enaenyieny/200 The Original Owner Of This Property Was Olembongit Group Ranch As At 29.06.1994.

297. Thereafter, Olembongit Group Ranch Authorised Group Representatives Transferred The Said Property Known As L.r.no. Transmara/enaenyieny/200 To The 1<sup>st</sup> Defendant On The 23.04.1998 And A Title Issued On The Same Date.

298. It Is Therefore Clear That The Property Known As L.r.no. Transmara/enaenyieny/200 Belonged To One James Laton Konchellah Who Is The 1<sup>st</sup> Defendant Prior To Its Sub-division And Sale Thereof.

**Issue No. 2- Was The Property Known As L.r.no.transmara/enaenyieny/200 A Private Property Owned By The 1<sup>st</sup> Defendant Or Held In Trust For The Other Family Members?**

299. The Second Issue In This Suit Is Whether Or Not The Property Known As L.r.no. Transmara/enaenyieny/200 Was A Private Property Or One Held On Behalf Of Other Family Members.

300. The Plaintiffs Herein Testified That The Property Known As L.r.no. Transmara/enaenyieny/200 Had Been In Occupation And Use Of All The Family Members Who Have Now Been Turned Into Destitutes By The 1<sup>st</sup> Defendant's Actions Of Sub-dividing And Selling It Without Their Knowledge And/or Consent.

301. Unfortunately, The 1<sup>st</sup> Defendant Herein Passed Away Before He Would Testify In This Suit.

302. However, The Holder Of The Letters Of Administration Ad Litem Who Took Over These Proceedings Attended Court On The 26/09/2022 And Testified On Behalf Of The 1<sup>st</sup> Defendant.



303. According To The 1<sup>st</sup> Defendant's Witness, The Property Which Came To Be Known As L.r.no. Transmara/enaenyeny/200 Was A Sub-division Of A Larger Parcel Of Land Occupied By The 1<sup>st</sup> Defendant's Father Known As Nawangas Konchellah.
304. The 1<sup>st</sup> Defendant's Witness Further Testified That Mzee Nawangas Konchellah Had Two Sons Who Were The 1<sup>st</sup> Defendant And The Witness's Father.
305. Both Sons Were Then Processed As Legal Owners Of Their Individual Parcels And Issued With The Relevant Title Deeds.
306. The 1<sup>st</sup> Defendant Witness Confirmed That The Plaintiffs Herein Were Direct Relatives Of The 1<sup>st</sup> Defendant In This Suit.
307. According To The Evidence Of The 2<sup>nd</sup> And 4<sup>th</sup> Defendants Herein, The Property Known As L.r.no. Transmara/enaenyeny/200 Was A Private Property Allocated And Transferred To The 1<sup>st</sup> Defendant By The Group Representatives Of Olembongit Group Ranch.
308. The 4<sup>th</sup> Defendant In Particular Informed The Court That There Were No Overriding Interests Entered In The Green Card Of The Property Known As L.r.no. Transmara/enaenyeny/200 Which Would Demonstrate Any Form Of Trust By The Plaintiffs Herein.
309. The Court Takes Note That The 2<sup>nd</sup> And 4<sup>th</sup> Defendants Herein Did Not Dispute That The Plaintiffs Herein Were Immediate And/or Direct Relatives Of The 1<sup>st</sup> Defendant.
310. In Fact, The 2<sup>nd</sup> Defendant Confirmed That The 3<sup>rd</sup> Plaintiff Was A Wife To The 1<sup>st</sup> Defendant Herein.
311. In The Case Cited By The 4<sup>th</sup> Defendant In Their Submissions Known As Isack Kieba Minanga-versus- Isaaya Theuri Mlintari & Another (2018) Eklr, The Court Made The Following Observation; -

“Each Case Has To Be Determined On Its Own Merits And Quality Of Evidence. It Is Not Every Claim Of A Right To Land That Will Qualify As A Customary Trust. In This Regard, We Agree With The High Court In Kiarie-vs- Kinuthia, That What Is Essential Is The Nature Of The Holding Of The Land And Intention Of The Parties. If The Said Holding Is For The Benefit Of Other Members Of The Family, Then A Customary Trust Would Be Presumed To Have Been Created In Favour Of Such Other Members, Whether Or Not They Are In Possession Or Actual Occupation Of The Land.

Some Of The Elements That Would Qualify A Claimant As A Trustee Are; -

1. The Land In Question Was Before Registration, Family, Clan Or Group Land.
2. The Claimant Belongs To Such A Family, Clan Or Group
3. The Relationship Of The Claimant To Such Family, Clan Or Group Is Not So Remote Or Tenuous As To Make His/her Claim Idle Or Adventurous.
4. The Claimant Could Have Been Entitled To Be Registered As An Owner Or Other Beneficiary Of The Land But For Some Intervening Circumstances.
5. The Claim Is Directed Against The Registered Proprietor Who Is A Member Of The Family, Clan Or Group.

312. Indeed, This Court Fully Associates Itself With The Above Outlined Guidelines On The Establishment Of Whether One Had A Claim In Customary Trust Of Not.



313. In The First Principle, It Is Not In Dispute That The Property Known As L.r.no. Transmara/ enaenyeny/200 Was A Sub-division Of A Property Known As L.r.no.transmata/enaenyeny/1 Which Was Registered In The Name Of A Group Ranch Known As Olembongit Group Ranch Under The Land ( Group Representatives) Act, Cap 287 Laws Of Kenya.
314. The Registration Of The 1<sup>st</sup> Defendant Was Therefore A Transfer Done By The Group Representatives Of Olembongit Group Ranch.
315. The Question Is Whether The Registration Of The 1<sup>st</sup> Defendant Was Exclusively For His Own Benefit Or Included The Plaintiffs As Well Being Members Of His Family.
316. According To The Evidence Adduced By The Plaintiffs, The Property Known As L.r.no. Transmara/ enaenyeny/200 Was For The Use And Benefit Of All The Family Members.
317. The 1<sup>st</sup> Defendant Confirmed In His Testimony That The Plaintiffs Herein Were Close Relatives Of The 1<sup>st</sup> Defendant Who Owned L.r.no. Transmara/enaenyeny/200.
318. Ideally, The Creation Of A Group Ranch Under The Land (group Representatives) Act, Cap 287 Points To The Fact That The Property Known As L.r.no. Transmara/enaenyeny/1 Was Community Land Occurred By Members Of The Group Ranch Together With Other Family Members.
319. The Court Therefore Is Drawn To Make A Finding That Looking At The Circumstances Of This Property Before Registration To The 1<sup>st</sup> Defendant, The Same Can Only Be Deemed To Have Been Either Family, Clan Or Group Property And Not Private Property As Claimed By The 2<sup>nd</sup> And 4<sup>th</sup> Defendant.
320. On The Second Principle, The Plaintiffs Herein Are Actually Close Relatives With The 1<sup>st</sup> Defendant Who Is The Registered Owner.
321. The 3<sup>rd</sup> Plaintiff Is A Wife To The 1<sup>st</sup> Defendant, The 2<sup>nd</sup> Plaintiff Is A Daughter While The 1<sup>st</sup> Plaintiff Is A Grandson To The 1<sup>st</sup> Defendant.
322. During The Testimony Of The Plaintiffs Herein, The 1<sup>st</sup> Defendant Who Was Still Alive Did Not Dispute This Fact Either In His Pleading And/or Cross-examination.
323. Consequently Therefore, The Court Hereby Finds As A Fact That The Plaintiffs Belong To The Same Family With The 1<sup>st</sup> Defendant Herein.
324. On The Third Principle, The Court Is Of The Considered View That The Relationship Between The Plaintiffs And The 1<sup>st</sup> Defendant Was Actually An Immediate And Direct Relationship And Cannot Be Said To Be So Tenuous As To Make Their Claim To Be Idle Or Adventurous.
325. On The Fourth Principle, The Court Is Of The Considered View That The 3<sup>rd</sup> Plaintiff Being The Wife Of The 1<sup>st</sup> Defendant Could Have Been Entitled To Be Registered As An Owner Or Be Recognised As A Beneficiary Of The Land But Due To Some Intervening Circumstances, This Did Not Happen.
326. It Is Common Practice And Indeed, This Court Has Come To Discover That Most Of The Group Ranches Within Transmara Sub-counties Only Registered The Male Head Of The Family As The Shareholder And A Female Head Of The Family Would Only Be Registered As A Shareholder If The Male Head Of The Family Was Deceased And/or Absent.
327. The Last Principle Is Whether The Claim Is Directed Against The Registered Proprietor Who Is A Member Of The Family, Clan Or Group.



328. The Plaintiffs Herein Are Actually The Immediate Members Of The Registered Proprietor Being The Grandson, Daughter And Wife Of The 1<sup>st</sup> Defendant.
329. Based On The Above Outcome, This Court Is Of The Considered View That The Property Known As L.r.no. Transmara/enaenyeny/200 Was To Be Used For The Common Good And Occupation Of The 1<sup>st</sup> Defendant Family Members Including The Plaintiffs Herein And Not For The Exclusive Ownership And Occupation Of The 1<sup>st</sup> Defendant.
330. The 4<sup>th</sup> Defendant Has Further Stated That The Plaintiffs Trust Was Not Registered And/or Entered On The Green Card Of The Property Known As L.r.no. Transmara/enaenyeny/200 And Therefore, No Such Interest And/or Trust Existed In Favour Of The Plaintiffs Herein.
331. In The Supreme Court Decision Referred Hereinabove Known As Isack Minanga Kiebia-versus-Isaaya Theuri Mlintari & Another (2018) Eklr, The Court Held The View That Once A Party Established A Customary Trust, Then Such A Claim Would Still Be Valid Whether Registered On The Green Card Of The Property Or Not.
332. In Essence Therefore, Although There Was No Express Indication On The Green Card Of The Property Known As L.r.no. Transmara/enaenyeny/200 Of The Plaintiffs Customary Trust, The Same Is Still Lawful And Binding Of The Title Issued To The 1<sup>st</sup> Defendant.

**Issue No.3- Did The 1<sup>st</sup> Defendant Require The Consent And/or Authority Of The Other Family Members To Sub-divide Sale The Property Known As L.r.no.transmara/enaenyeny/200?**

333. Referring To Section 28 of The [Land Registration Act](#), Cap 3 Of 2012, The Law Provides As Follows; -
- “Unless The Contrary Is Expressed In The Register, All Registered Land Shall Be Subject To The Following Overriding Interests As May For The Time Being Subsist And Affect The Same, Without Their Being Noted On The Register-
- A. Deleted By Act No. 28 Of 2016, Section 11 (a)
- B. Trusts Including Customary Trusts;.....”
334. The Court Having Decided That The Property Known As L.r.no. Transmara/enaenyeny/200 Is Subject To A Customary Interest By The Plaintiffs Herein, Then A Consent To Sub-divide And/or Sale The Property Known As L.r.no. Transmara/enaenyeny/200 Was Subject To Approval From The Other Persons With An Interest On It And The 1<sup>st</sup> Defendant Could Not Pass Proper And/or Lawful Title Without The Express Authority Of The Plaintiffs.
335. In Addition To The Above, The Property Known As L.r.no. Transmara/enaenyeny/200 Was Sub-divided And/or Sold Of During The Existence Of A Marriage Between The 3<sup>rd</sup> Plaintiff And The 1<sup>st</sup> Defendant.
336. The 3<sup>rd</sup> Plaintiff In Particular Has Testified That She Is A Farmer And Had Been Using The Property Known As L.r.no. Transmara/enaenyeny/200 For Cultivate And Produce Various Farm Products For Her Domestic Use.
337. The 2<sup>nd</sup> Defendant Also Through The Prayers Contained In The Counter-claim And The Evidence Adduced In Court Confirmed That The 3<sup>rd</sup> Plaintiff Had Trespassed Into The Resultant Parcels Produced From The Property Known As L.r.no. Transmara/enaenyeny/200 And Had Been Undertaking Farming Activities Contrary To His Ownership.



338. According To The Two-separate Testimonies, It Is Clear In The Mind Of The Court That The 3<sup>Rd</sup> Plaintiff Has Been Making Use Of The Property Known As L.r.no. Transmara/enaenyeny/200 To Warrant The Same To Be Deemed As A Matrimonial Property Which Is Subject To Spousal Consent In The Event The Registered Proprietor Was Desirous Of Selling And/or Sub-dividing The Same For Whatsoever Reason.
339. In The Case Of Kadzo Mkutano-versus- Mkutano Mwamboje Kadosho & 2 Others [2016] Eklr The Court Made The Following Finding;
- “Section 28 Of The *Land Registration Act* Recognizes Spousal Rights Over Matrimonial Property As An Overriding Interest. Spousal Consent, Is Therefore Required Before A Spouse Can Sell Matrimonial Property. In The Absence Of Such A Consent, The Sale Becomes Null And Void”.
340. Section 12 (1) *Matrimonial Property Act* States That;
- “An Estate Or Interest In Any Matrimonial Property Shall Not, During The Subsistence Of A Monogamous Marriage And Without The Consent Of Both Spouses, Be Alienated In Any Form, Whether By Way Of Sale, Gift, Lease, Mortgage Or Otherwise.”
341. Section 93 (2) Of The *Land Registration Act* No. 3 Of 2012 Provides:
- “If Land Is Held In The Name Of One Spouse Only But The Other Spouse(s) Contributes By Their Labour Or Other Means To The Productivity, Upkeep And Improvement Of The Land, That Spouse (s) Shall Be Deemed By Virtue Of That Labour To Have Acquired An Interest In That Land In The Nature Of An Ownership In Common With The Spouse In Whose Name The Certificate Of Ownership Or Customary Certificate Of Ownership Has Been Registered And The Rights Gained By Spouse(s) Shall Be Recognized In All Cases As If They Were Registered”.
342. In Conclusion Therefore, This Court Hereby Finds That The Sub-division And/or Sale Of The Property Known As L.r.no. Transmara/enaenyeny/200 Was Subject To A Consent From The Family Members And/or Spousal Consent Of The 3<sup>Rd</sup> Plaintiff Herein.
343. Turning To The Documents Produced In Court By The 4<sup>Th</sup> Defendant, The 4<sup>Th</sup> Defendant’s Exhibits No. 2, 3 And 4 Contain The Mutation Form Sub-dividing The Property Known As L.r.no. Transmara/enaenyeny/200 Into Three Portions Namely L.r.no. Transmara/enaenyeny/644,645 And 646, The Application For Consent To Sub-divide By The 1<sup>St</sup> Defendant And Lastly The Consent To Sub-divide Issued On The 23/10/2012.
344. The Three Exhibits Mentioned Hereinabove Do Not In Any Way Expressly Indicate Whether Or Not The 3<sup>Rd</sup> Plaintiff Who Was The Wife Of The 1<sup>St</sup> Defendant Gave Her Consent To The Sub-division Of The Property Known As L.r.no. Transmara/enaenyeny/200.
345. The 1<sup>St</sup> Defendant Who Was The Registered Owner Of The Property Known As L.r.no. Transmara/enaenyeny/200 Before It Was Sub-divided Had A Duty To Produce Either A Consent Letter Or A Spousal Consent Form As Prescribed Under The Rules In The *Land Registration Act*, Cap 300 (now Repealed) Or The *Land Registration Act*, No. 3 Of 2012 And/or Present The Minutes Of The Land Control Board Authorising The Said Sub-division To Confirm At Least The 3<sup>Rd</sup> Plaintiff’s Participation.



346. The Lack Of Presenting Such Crucial Documents Point To One Conclusion That The 3<sup>Rd</sup> Plaintiff And/or Any Other Family Member Did Not Give The Required Consent To Sub-divide The Property Known As L.r.no. Transmara/enaenyieny/200 And Therefore Such An Act By The 1<sup>St</sup> Defendant Was Unlawful And Annulity From The Very Beginning.

**Issue No.4- Were The Agreements For Sale Between The 1<sup>St</sup> Defendant & 2<sup>Nd</sup> Defendant Lawful And Binding?**

347. The 2<sup>Nd</sup> Defendant During The Hearing Of This Suit Presented Three Agreements For Sale Purportedly Executed With The 1<sup>St</sup> Defendant.

348. The Agreements For Sale Were Dated 4<sup>Th</sup> January 2013, 7<sup>Th</sup> February 2013 And The Third One Is Dated 19<sup>Th</sup> June 2013.

349. The 2<sup>Nd</sup> Defendant's Position Is That All The Three Agreements For Sale Were Duly Executed In The Presence And Consent Of The 3<sup>Rd</sup> Plaintiff Herein As A Spouse.

350. The 3<sup>Rd</sup> Plaintiff On The Other Hand Disputes Knowledge Of The Purported Sale Transactions To The 2<sup>Nd</sup> Defendant.

351. The 3<sup>Rd</sup> Plaintiff Further Denied Ever Visiting The Offices Of The 3<sup>Rd</sup> Defendant Who Is The Purported Transaction Advocate In Nakuru Either To Be Explained The Contents Of The Agreements For Sale Or The Reason Of Executing The Said Agreements For Sale.

352. Unfortunately, The 3<sup>Rd</sup> Defendant Did Not Attend Court To Testify Whether Or Not The 3<sup>Rd</sup> Plaintiff Attended His Office And Executed The Agreements For Sale Upon Being Explained To The Contents Thereof.

353. The 3<sup>Rd</sup> Plaintiff Attended Court And Testified At Length On The Dealing Of The Property Known As L.r.no. Transmara/enaenyieny/200.

354. First And Foremost, The 3<sup>Rd</sup> Plaintiff Stated That She Became Aware Of The 1<sup>St</sup> Defendant's Intention To Sub-divide And Sell Of The Property To Some People Known As Kinayamal Sikone And Another Person.

355. However, The 3<sup>Rd</sup> Plaintiff Declined To Consent To The Said Agreement For Sale And Only Came To Learn That The Property Known As L.r.no. Transmara/enaenyieny/200 Had Been Sold Much Later.

356. Section 107 Of The *Evidence Act*, Cap 80 Laws Of Kenya Is That Whoever Desires Any Court To Give Judgement As To Any Legal Right Or Liability Dependent On The Existence Of Facts Which He Asserts Must Prove That Those Facts Exist.

357. In This Aspect, The 1<sup>St</sup> And 2<sup>Nd</sup> Defendants Had A Duty To Provide Evidence That The Family And The 3<sup>Rd</sup> Plaintiff Actually Consented To The Sub-division And Sale Of The Property Known As L.r.no. Transmara/enaenyieny/200.

358. One Key Issue Raised By The 3<sup>Rd</sup> Plaintiff Was That She Was Illiterate And Therefore Could Not Have Signed The Purported Agreements For Sale Produced By The 2<sup>Nd</sup> Defendant.

359. The 3<sup>Rd</sup> Witness Referred To The Court Her Witness Statement Which Is Executed By The Affixing Of A Thumb Print.

360. Referring To The Agreements For Sale, The 3<sup>Rd</sup> Plaintiff Is Purported To Have Affixed Her Thumb Print On The First Agreement Dated 4<sup>Th</sup> January 2013.



361. The Other Two Agreements For Sale Dated 7<sup>th</sup> February 2013 And 19<sup>th</sup> June 2013, The Same 3<sup>rd</sup> Plaintiff Is Now Seen To Hold A Pen And Affix A Signature On The Said Documents.
362. In Addition To The Above, Although These Agreements For Sale Are Purported To Have Been Executed Before An Advocate Of The High Court Of Kenya, None Of Them Has A Certificate Of Attestation To Confirm That The Contents Of The Agreements Were Explained To The Parties And The Parties Executed The Said Documents Voluntarily.
363. In Other Words, Even If This Court Would Grant A Benefit Of Doubt That The 3<sup>rd</sup> Plaintiff Indeed Executed The Said Agreements For Sale, The Question That Begg To Be Answered Is Whether Or Not She Was Explained And Understood The Contents Of The Documents She Had Executed.
364. This Is A Very Crucial Point In Validating The Legality And Intent Of The Agreements For Sale As Well As Any Other Documents That Affects The Legal Rights Of Parties In A Land Transaction.
365. Indeed, Section 110 Of The Registered Land Act (repealed In 2012 By The [Land Registration Act](#)), Which Was Then Applicable, Did Require Attestation.
366. Section 3 (3) Of The [Law Of Contract Act](#), Is Also Applicable In My View. It Provides As Follows: -

(3) No Suit Shall Be Brought Upon A Contract For The Disposition Of An Interest In Land Unless-

(a) The Contract Upon Which The Suit Is Founded-

(i) Is In Writing;

(ii) Is Signed By All The Parties Thereto; And

(b) The Signature Of Each Party Signing Has Been Attested By A Witness Who Is Present When The Contract Was Signed By Such Party: (emphasis Mine)

Provided That This Subsection Shall Not Apply To A Contract Made In The Course Of A Public Auction By An Auctioneer Within The Meaning Of The [Auctioneers Act](#), Nor Shall Anything In It Affect The Creation Of A Resulting, Implied Or Constructive Trust.

367. Further To That, Section 70 Of The [Evidence Act](#), Cap 80 Laws Of Kenya States As Follows; -

“If A Document Is Alleged To Be Signed Or To Have Been Written Wholly Or In Part By Any Person, The Signature Or The Handwriting Of So Much Of The Document As Is Alleged To Be In That Person’s Handwriting Must Be Proved To Be His Handwriting.

368. Section 71 Of The [Evidence Act](#), Cap 80 States As Follows; -

“If A Document Is Required By Law To Be Attested It Shall Not Be Used As Evidence Until The One Attesting Witness At Least Has Been Called For The Purposes Of Proving Its Execution, If There Is An Attesting Witness Alive And Subject To The Process Of The Court And Capable Of Giving Evidence;

Provided That It Shall Not Be Necessary To Call An Attesting Witness In Proof Of The Execution Of Any Document Which Has Been Registered In Accordance With The



Provisions Of Any Written Law, Unless Its Execution By The Person By Whom It Purports To Have Executed Is Specifically Denied.”

369. Unfortunately, Although The Agreements For Sale Under Contention Were Witnessed By More Than One Witness, The 1<sup>st</sup> And 2<sup>nd</sup> Defendants Did Not Make Available Any Of Those Witnesses To Collaborate Their Testimony And Or Prove The Validity Of These Agreements For Sale.
370. In The Absence Of This Witnesses Including The 3<sup>rd</sup> Defendant Who Prepared The Said Agreements And Witnessed The Same Being Still Alive, Then This Court Has No Option But To Declare The Agreements For Sale Dated 4<sup>th</sup> January 2013, 7<sup>th</sup> February 2013 And 19<sup>th</sup> June 2013 To Be Inadmissible As Evidence In Law Under Section 70 And 71 Of The Evidence Act, Cap 80 Laws Of Kenya.
371. In Conclusion Therefore, The Agreements For Sale Dated 4<sup>th</sup> January 2013, 7<sup>th</sup> February 2013 And 19<sup>th</sup> June 2013 Are Not Binding And/or Lawful To Give Effect Of Alienating Legal Rights From The 1<sup>st</sup> Defendant To The 2<sup>nd</sup> Defendant.

**Issue No.5- Did The Defendants Fraudulently Sub-divide, Sale, Transfer And/or Register Unlawful Sub-divisions Against The Property Known As L.r.no. Transmara/enaenyieny/200?**

372. The Plaintiffs Herein Have Alleged That The Defendants Herein Fraudulently Sub-divided The Property Known As L.r.no. Transmara/enaenyieny/200 And Thereafter Transferred And/or Registered The Said Sub-divisions In The Names Of The 2<sup>nd</sup> Defendant Without Following Any Lawful Process.
373. The 2<sup>nd</sup> Defendant In Particular Is Alleged To Be The Main Beneficiary Of The Said Sub-division Of The Property Known As L.r.no. Transmara/enaenyieny/200 Into Various Small Properties And Had The Same Transferred To His Name.
374. The Exhibits Produced By The 4<sup>th</sup> Respondent Are Very Important In Determining Whether Or Not There Was Fraudulent Dealing With The Property Known As L.r.no. Transmara/enaenyieny/200.
375. The Chronology Of Events From The Time Of Sub-dividing The Property Known As L.r.no. Transmara/enaenyieny/200 Are As Follows; -
376. The Property Known As L.r.no. Transmara/enaenyieny/200 Was Initially Sub-divided Into Three Portions L.r.no. Transmara/enaenyieny/644,645 And 646 Each Measuring Approximately 5.868 Ha, 5.665 Ha And 4.047 Ha.
377. The First Sub-division Known As L.r.no. Transmara/enaenyieny/644 Was Sub-divided Into Two Portions Namely L.r.no. Transmara/enaenyieny/653 Measuring Approximately 4.248 Hectares And L.r.no. Transmara/enaenyieny/654 Measuring Approximately 1.62 Hectares.
378. The Property Known As L.r.no. Transmara/enaenyieny/653 Was Again Sub-divided Into Two Portions Namely L.r.no. Transmara/enaenyieny/671 Measuring Approximately 1.820 Hectares And L.r.no. Transmara/enaenyieny/672 Measuring Approximately 2.428 Hectares.
379. The Property Known As L.r.no. Transmara/enaenyieny/671 Was Transferred To James Laton Konchellah And Lornah Reteto Sosio On 05.03.2015.
380. The Other Property Known As L.r.no. Transmara/enaenyieny/762 Was Transferred To James Laton Konchellah And James Tiringa Nesiria On The 15.08.2014.



381. The Other Sub-division Known As L.r.no. Transmara/enaenyieny/654 Was Transferred To The 2<sup>Nd</sup> Defendant On The 22.02.2013.
382. The Second Sub-division Known As L.r.no. Transmara/enaenyieny/645 Was Sub-divided Into Two Portions Namely L.r.no. Transmara/enaenyieny/661 Measuring Approximately 3.642 Hectares And L.r.no. Transmara/enaenyieny/662 Measuring Approximately 2.023 Hectares.
383. The Property Known As L.r.no. Transmara/enaenyieny/661 Was Sub-divided Into Two Portions Namely L.r.no. Transmara/enaenyieny/665 Measuring Approximately 2.02 Hectares And Registered In The Name Of The 2<sup>Nd</sup> Defendant On The 28.08.2013 And L.r.no. Transmara/enaenyieny/666 Measuring Approximately 2.02 Hectares Also Registered In The Name Of The 2<sup>Nd</sup> Defendant On The 26.07.2013
384. On The Other Hand, The Entire Property Known As L.r.no. Transmara/enaenyieny/662 Was Wholly Transferred To The 2<sup>Nd</sup> Defendant On The 10.05.2013.
385. The Third Sub-division Known As L.r.no. Transmara/enaenyieny/646 Was Sub-divided Into Two Portions Namely L.r.no. Transmara/enaenyieny/647 Measuring 1.62 Hectares And L.r.no. Transmara/enaenyieny/648 Measuring Approximately 2.43 Hectares.
386. The Property Known As L.r.no. Transmara/enaenyieny/647 Measuring Approximately 1.62 Hectares Was Transferred To The 2<sup>Nd</sup> Defendant On The 9.01.2013.
387. The Second Sub-division Known As L.r.no. Transmara/enaenyieny/648 Measuring Approximately Measuring 2.43 Hectares Was Also Transferred To The 2<sup>Nd</sup> Defendant On The 13.01.2013.
388. Analysing The Documentary Evidence Produced Hereinabove And The Agreements For Sale Dated 4<sup>th</sup> January 2013, 7<sup>th</sup> February 2013 And 19<sup>th</sup> June 2013, It Is Clear That Although The 2<sup>Nd</sup> Defendant Purportedly Purchased A Total 14 Acres From The 1<sup>st</sup> Defendant, The Acreage In The Title Deeds Registered In The Name Of The 2<sup>Nd</sup> Defendant Is Not The Same.
389. The Property Known As L.r.no. Transmara/enaenyieny/200 Measured Approximately 14.10 Hectares Which Is Approximately 34.8 Acres.
390. The Only Sub-divisions From The Property Known As L.r.no. Transmara/enaenyieny/200 Which Were Transferred To Other Persons Other Than The 2<sup>Nd</sup> Defendant Were L.r.no. Transmara/enaenyieny/671 Measuring Approximately 1.820 Hectares And L.r.no. Transmara/enaenyieny/762 Measuring Approximately 2.428 Hectares.
391. In Other Words, The Total Acreage Transferred To The 2<sup>Nd</sup> Defendant Through The Numerous Sub-divisions And Transfers From The 1<sup>st</sup> Defendant Are Amounting To Approximately 9.852 Hectares Which Translates To Approximately 24.33 Acres.
392. It Is Clear From The Above Discussion That The 2<sup>Nd</sup> Defendant Is Not Entitled To Acreage Contained In The Various Sub-divisions Of L.r.no. Transmara/enaenyieny/200 Which Are Registered In His Name.
393. Similarly, The Court Has Also Held That The 1<sup>st</sup> Defendant Was Not Lawfully Authorised By The Family And The 3<sup>Rd</sup> Plaintiff Who Was The Spouse To Sub-divide And/or Sale Any Of The Said Sub-divisions To Anyone Or Entity.
394. The 1<sup>st</sup> Defendants Actions Of Illegally Sub-dividing The Property Known As L.r.no. Transmara/enaenyieny/200 Were Fraudulent And The Subsequent Transferring Of The Ownership And/or



Benefit Of The Said Sub-divisions To The 2<sup>Nd</sup> Defendant Was Contrary To The Law And Fraudulent In Its Entirety.

**Issue No. 6- Are The Plaintiffs Entitled To The Reliefs Sought In The Plaint?**

395. The Court Having Held That Sub-division Of The Property Known As L.r.no. Transmara/enaenyeny/200 And The Subsequent Agreements Entered Into By The 1<sup>st</sup> And 2<sup>Nd</sup> Defendant To Be Inadmissible, The Plaintiffs Herein Have Proved Their Case To The Required Standard Under The Law.

**Issue No.7- Is The 2<sup>Nd</sup> Defendant Entitled To The Reliefs Sought In The Counter-claim?**

396. On The Other Hand, The 2<sup>Nd</sup> Defendant Has Failed To Prove Acquiring Lawful Ownership And/ or Registration Of The Sub-divisions Created From The Property Known As L.r.no. Transmara/enaenyeny/200 And Is Not Entitled To The Remedies Sought In The Counter-claim.

**Issue No.8- Who Bears The Costs Of The Plaint And Counter-claim?**

397. The Cost of the suit usually abide the outcome of the suit.

398. In this instance, the Plaintiffs have proved their case and the costs of the suit should be borne by the Defendants.

399. In conclusion therefore, the Court hereby makes the following Orders as appertains the Amended Plaint dated 11<sup>th</sup> October 2018; -

- A. The Property Known As L.r.no. Transmara/enaenyeny/200 Was Registered In The Name Of The James Laton Konchellah In Trust Of His Immediate Family Members.
- B. The Purported Sub-division Of The Property Known As L.r.no. Transmara/enaenyeny/200 Into L.r.no. Transmara/enaenyeny/644,645 And 646 And Further Into The Properties Known As L.r.no.transmara/enaenyeny/653,654,671,672,654,661,662,665,666,647 & 648 Be And Are Hereby Declared Unlawful.
- C. The Purported Sub-division Of The Property Known As As L.r.no. Transmara/enaenyeny/200 Into L.r.no. Transmara/enaenyeny/644,645 And 646 And Further Into The Properties Known As L.r.no. Transmara/enaenyeny/653,654,671,672,654,661,662,665,666,647 & 648 Be Cancelled By The 4<sup>Th</sup> Defendant Forthwith.
- D. The 4<sup>Th</sup> Defendant Be And Is Hereby Directed To Reconstruct And Reopen The Register Of The Property Known As L.r.no. Transmara/enaenyeny/200 With The Original Acreage In The Name Of The James Laton Konchellah.
- E. The 2<sup>Nd</sup> Defendant Be And Is Hereby Directed To Give Vacant Possession And Yield Vacant Possession Of The Entire Property Known Known As L.r.no. Transmara/enaenyeny/200 Within The Next 30 Days From The Date Of This Judgements Failure To Which An Eviction Order Shall Automaticall Issue Upon Lapse Of 30 Days.
- F. The 2<sup>Nd</sup> Defendant Be And Is Hereby Prohibited By Way Of A Permanent Injunction Either Through His Agents, Servants, Assignees And/ or Any Other Person Claiming Through Them From Evicting, Charging, Selling, Sub-dividing, Developing Of The Property Originally Known As L.r. No. Transmara/enaenyeny/200.



G. The Counter-claim Dated 6<sup>Th</sup> February 2017 Be And Is Hereby Dismissed.

H. The Costs Of The Suit As Well As The Counter-claim Shall Be Borne By The 1<sup>St</sup> And 2<sup>Nd</sup> Defendant Herein.

**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON THE 23<sup>RD</sup> OF MARCH 2023.**

**EMMANUEL.M.WASHE**

**JUDGE**

In the presence of:

Court Assistant: Ngeno

Advocates for the plaintiffs: Nyambati

Advocates for the defendants: N/A

