



**Ndamwe v Amukonambi & 9 others (Environment & Land Case  
54 of 1999) [2023] KEELC 17454 (KLR) (15 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17454 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 54 OF 1999**

**FO NYAGAKA, J**

**MAY 15, 2023**

**BETWEEN**

**AZIZ NDAMWE ..... PLAINTIFF**

**AND**

**EDITH NAFULA AMUKONAMBI ..... 1<sup>ST</sup> DEFENDANT**

**HABIB SALIM NDAMWE (SUED AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF SALIM NDAMWE) ..... 2<sup>ND</sup> DEFENDANT**

**MARY PTIKENY ..... 3<sup>RD</sup> DEFENDANT**

**SAMSON N. LOKURUSA ..... 4<sup>TH</sup> DEFENDANT**

**REUBEN K. CHEPKONY ..... 5<sup>TH</sup> DEFENDANT**

**JACKSON PLIMO NGOLEKONG ..... 6<sup>TH</sup> DEFENDANT**

**THOMAS LOKEER ..... 7<sup>TH</sup> DEFENDANT**

**JACKSON PARNGETINY MUNOKI ..... 8<sup>TH</sup> DEFENDANT**

**PETERO MNANGAT ..... 9<sup>TH</sup> DEFENDANT**

**JULIUS C. KORINGURA ..... 10<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff is the son of the late Ndamwe Wakoli. He had sued one of his parents, the mother, and his brother, among other parties. His mother was the 1<sup>st</sup> Defendant and his step brother the 2<sup>nd</sup> Defendant. They both are now deceased.



2. Pursuant to the Court order of 30/04/2019, leave was granted to substitute the 2<sup>nd</sup> Defendant with one Edith Nafula Mukonambi and Habib Salim Ndamwe, his surviving 2<sup>nd</sup> wife and son respectively. The said persons are the Administrators of the estate of the 2<sup>nd</sup> Defendant limited to the hearing and determination of the present suit. On the part of the 1<sup>st</sup> Defendant, no Application for revival and substitution was made. Therefore, as a consequence, the suit against the 1<sup>st</sup> Defendant abated.
3. By a consent dated 29/10/2020 and adopted on that day, the 3<sup>rd</sup> - 10<sup>th</sup> Defendants were enjoined in these proceedings in the manner they appear in the pleadings.
4. The Plaintiff initially filed this suit on 07/07/1999. He, however, relies on his Further Amended Amended Plaint dated 14/06/2021 and filed on 14/06/2021 vide a consent dated the same date and filed on even date. In it he sought the following reliefs against the 1<sup>st</sup> - 10<sup>th</sup> Defendants:
  - a. A declaratory order that the Plaintiff was a rightful and legal owner of the land known as West Pokot/Siyoi 'A'/2713 and all the resulting subdivisions thereof being West Pokot/Siyoi 'A'/4434 measuring 0.80 ha and West Pokot/Siyoi 'A'/4435 measuring 0.54 Ha and all other resulting subdivisions thereof being West Pokot/Siyoi 'A'/4597, 4601, 4602, 4603, 4819, 4820, 4821, 3822, 5000 and 5001 hence the first and second original Defendants and/or legal representative and/or dependents and/or any other persons under their authority are trespassers for being in unlawful and illegal occupation and enjoyment of the said land known as West Pokot/Siyoi 'A'/2713 and all the resulting subdivisions thereof West Pokot/Siyoi 'A'/4434 measuring 0.80 Ha and West Pokot/Siyoi 'A'/4435 measuring 0.54 Ha and all other resulting subdivisions thereof being West Pokot/Siyoi 'A'/4597, 4601, 4602, 4603, 4819, 4820, 4821, 3822, 5000 and 5001 and must therefore be evicted and a permanent injunction be issued against them jointly and severally restraining them from interfering with the suit land;
  - b. An order cancelling title No. West Pokot/Siyoi 'A'/4434 measuring 0.80 Ha and all other resulting subdivisions of the above parcels of land being the names of the defendants and be replaced by the name of the Plaintiff in West Pokot/Siyoi 'A'/4597, 4601, 4602, 4603, 4819, 4820, 4821, 3822, 5000 and 5001 and the land to revert back and the register thereof be rectified forthwith in favor of the Plaintiff;
  - c. An order declaring that the proceedings and subsequent award of the Kapenguria Land Dispute Tribunal which was adopted as a judgment of the court and the decree therein in Kitale SPMCC Land Case No. 105 of 1998 were null and void ad (sic) abinition (sic) for all intent and purposes thereto and the same be quashed and set aside;
  - d. Costs;
  - e. Any other remedy this Honourable Court will deem fit to grant.
5. Following the joinder of the 3<sup>rd</sup> - 10<sup>th</sup> Defendants in these proceedings, the Defendants filed a Joint Amended Amended Statement of Defence and Counterclaim amended on 18/12/2020 on 21/12/2020. They denied the allegations set out in the Plaint save those expressly admitted. Praying that the Plaintiff's suit be dismissed with costs, the Defendants prayed further for the following reliefs:
  - a. A declaration that the Plaintiff held land parcel No. West Pokot/Siyoi 'A'/2713 in trust for Salim Abdallah Ndamwe hence there will be no good reason or justifiable ground to nullify the sub-division of parcel No. West Pokot/Siyoi/2713 to parcels No. West Pokot/Siyoi/4434 and 4435 and subsequent transfer of parcel No. 4443 to the name of Salim Abdallah Ndamwe and all other resulting subdivisions Nos. West Pokot/Siyoi 'A'/4597, 4601, 4602, 4819, 5001, 4821 and 4822.



- b. Costs of the Counterclaim.

### **The Plaintiff's Case**

6. Before meeting his death on 18/12/1991, whose evidence the Death Certificate was produced and marked as P. Exhibit 21, one Ndamwe Wakoli, the father of the Plaintiff, acquired trust land under the aegis of the Pokot Area Council vested with the same. The District Commissioner West Pokot so advised in his letter dated 24/03/1969 and produced in evidence as P. Exhibit 2. He lived on the said property with his three (3) wives and children who included the Plaintiff and his siblings. The Plaintiff produced his Birth Certificate as P. Exhibit 1. Later on, between 1965 and 1975, an adjudication and demarcation exercise of the area took place. Ultimately it saw the registration of all that parcel of land known as West Pokot/Siyoi 'A'/585. To evidence this, the Plaintiff produced the letter dated 18/11/1971 as P. Exhibit 3 and the adjudication record dated 17/09/1975 as P. Exhibit 4. The process was successfully objected to by St. Andrews Church who claimed ownership. The Church was given four (4) acres therefrom.
7. The Plaintiff testified that his deceased father subdivided that parcel of land amongst his sons. He testified further that his father apportioned the portion of the property measuring four (4) acres to St. Andrews Church but he later stated that it was the Council that gave land to the church from that parcel. He produced a copy of the sketch map showing the subdivisions marked P. Exhibit 6. He testified further that the distribution of the land by the late father amongst the sons, insofar as acreage was concerned, was hinged on the contribution towards its development from each son.
8. In that regard, the Plaintiff obtained all that parcel of land namely West Pokot/Siyoi 'A'/603 measuring 1.6 Hectares. His evidence was that grandmother and father were buried here. He produced a copy of the title and the receipt in respect to its registration dated 16/08/1980 both as P. Exhibit 10. Its adjudication successfully took place on 18/09/1975 bereft of any objection. He evidenced this with the adjudication record he produced as P. Exhibit 5.
9. It was the Plaintiff's case that all sons except Salim Ndamwe, Rajab Ndamwe, Reuben Ndamwe and Abdulrahman Ndamwe (all now deceased) acquired property. The aforementioned elected to venture into new pastures in Uganda and Mombasa as they had no interest in acquisition of the suit properties.
10. The Plaintiff's deceased father retained a portion of that parcel of land which became known as West Pokot/Siyoi 'A'/585. He subsequently had the same registered in the joint names of the Plaintiff, Wanjala Ndamwe and Wafula Ndamwe. His further testimony was that the following other sons acquired various parcels of land from the subdivision aforementioned as follows:
  - i. Adam Ndamwe (deceased) - West Pokot/Siyoi 'A'/599;
  - ii. Evans Ndamwe - West Pokot/Siyoi 'A'/600;
  - iii. Hassan Ndamwe - West Pokot/Siyoi 'A'/601;
  - iv. Omar Ndamwe - West Pokot/Siyoi 'A'/602;
  - v. The Plaintiff - West Pokot/Siyoi 'A'/603;
  - vi. John Situma Ndamwe - West Pokot/Siyoi 'A'/604 (who was advised to consult the County Council of West Pokot to have his boundary identified and avoid encroaching on the Council's land. See P. Exhibit 11 letter from that County Council dated 04/08/1989).
11. Upon issuance of the titles to the said plots, all persons elected to build, make developments and reside thereon. The Plaintiff maintained that the above transactions were undocumented.



12. Later on, the Plaintiff's deceased father transferred his share on all that parcel of land namely West Pokot/Siyoi 'A'/585 to Rajab Ndamwe upon his return to Kenya from Uganda. In support of the evidence he produced as P. Exhibit 7 a copy of the agreement dated 26/12/1986, as well as the Plaintiff's father's two (2) letters dated 26/05/1989 to the Land Control Board requesting for transfer of ownership to Rajab Ndamwe which he gave as P. Exhibit 8 and P. Exhibit 9. The Plaintiff continued that the parcel was subdivided by the 2<sup>nd</sup> Defendant into three (3) portions.
13. Following acquisition of West Pokot/Siyoi 'A'/603 measuring 0.045 Hectares, the Plaintiff subdivided the same into two (2) plots namely West Pokot/Siyoi 'A'/2485 measuring 1.55 Hectares. Its title deed issued on 16/04/1991 he produced as P. Exhibit 19 and West Pokot/Siyoi 'A'/2486 measuring 0.046 Hectares. He subsequently subdivided West Pokot/Siyoi 'A'/2485 into two (2) further plots namely West Pokot/Siyoi 'A'/2713 measuring 1.34 Hectares and West Pokot/Siyoi 'A'/2714 measuring 0.092 Hectares. His evidence was that there was no order barring him at this juncture from doing so.
14. Upon subdivision, the Plaintiff sold parcel no. West Pokot/Siyoi 'A'/2486 to Peter Njiriri. His brother Adam Kimungoi Ndamwe and David Njoroge Mugo attested to the sale agreement dated 20/02/1991 which he produced as P. Exhibit 12. It showed that he sold 50 by 100 feet for Kshs. 50,000.00. He alleged that his late mother wanted a share of the proceeds which he declined to give. According to the Plaintiff, his mother was dejected by the Plaintiff's decision thereby escalating a dispute.
15. In 1991, the Plaintiff's deceased mother accused him of disinheriting the family of its property namely West Pokot/Siyoi 'A'/603. The Plaintiff's brother one Evans Wanyama Ndamwe lodged a complaint before the D.O. Makutano. He received a letter dated 21/02/1991 from the D.O. informing him of the same. He produced it as P. Exhibit 13. He was also cautioned against further dealings on the land.
16. In pursuance of the complaint, the D.O. invited the parties to a hearing vide his letter dated 22/02/1991 which he produced as P. Exhibit 14. It was in respect to parcel No West Pokot/Siyoi 'A'/603. It acknowledged that the Plaintiff was the sole owner of the disputed land and cautioned other parties against interference with the transaction. It further invited the parties to a hearing slated to take place on 14/03/1991. Notwithstanding the non-appearance of parties, the Plaintiff submitted the title. He further submitted the 2<sup>nd</sup> Defendant's Affidavit sworn on 13/03/1991 which the Plaintiff produced as P. Exhibit 16. It stated at paragraph five (5) that the parcel belonged to the Plaintiff. The 2<sup>nd</sup> Defendant essentially corroborated the Plaintiff's case stating that Evans Wanyama Ndamwe's claim was frivolous as the Plaintiff lawfully obtained title over the suit property.
17. Meanwhile, the Plaintiff filed suit against Evans Wanyama Ndamwe in Kapenguria Civil Case No. 970 of 1991. Vide a letter dated 08/03/1991 and produced in this Court as P. Exhibit 15, the summons in the said suit were returned unserved since the Defendant could not be traced.
18. Vide letters dated 19/04/1991 and 22/04/1991 to the family members and the Complainant respectively and produced herein as P. Exhibit 17 and P. Exhibit 18, the D.O asked the parties to initially resolve the dispute amicably and report back to him on 01/05/1991. The matter was referred back to the elders for hearing on 18/04/1991 where only the Plaintiff appeared. The elders' decision advised parties to seek redress from the High Court as per the terms set out in the Registered [Land Act](#) (now repealed), the governing statute.
19. The Plaintiff was subsequently approached by the 1<sup>st</sup> Defendant who requested him to share proceeds arising out of another sale. In it he had sold land parcel number West Pokot/Siyoi 'A'/2485 measuring 100 by 100 Hectares in aggregate to Solomon Bukhala Marobolo. He testified that the sold portion was ultimately the subdivided to another plot namely West Pokot/Siyoi 'A'/2713.



20. The parties to the transaction executed an agreement dated 14/03/1992 which he produced as P. Exhibit 22. He was paid in form of a quid pro quo of a parcel of land situated in Kipsaina measuring two (2) acres. The agreement was witnessed by the 1<sup>st</sup> Defendant, John Situma Ndamwe, Sofia Aliuba Aziz, Monica Kuramtoni, Benjamin M. Kisiangani and Reverend Jackson Wambua of Deliverance Church. Following successful sale, the said Solomon Bokhara was issued with the title deed on 16/12/1992 in the name of the Plaintiff in respect to West Pokot/Siyoi 'A'/2713. He produced it as P. Exhibit 53.
21. Vide a note dated 17/02/1993 produced as P. Exhibit 23, the Plaintiff was summoned to appear on 18/02/1993 before the C.I.D. office at Kapenguria. On 07/03/1993, the 2<sup>nd</sup> Defendant wrote to the Plaintiff a letter produced as P. Exhibit 24. In it he expressed dissatisfaction in his mannerisms towards himself, his wife and mother. He declared war. On that day, the 2<sup>nd</sup> Defendant wrote another letter produced as P. Exhibit 25 informing the Plaintiff that he had collected his scooter and would bill the Plaintiff for the necessary repairs. He alerted him that he would collect his pick-up the following week. The Plaintiff was subsequently arrested.
22. The Plaintiff testified that the 2<sup>nd</sup> Defendant registered a caution on West Pokot/Siyoi 'A'/2713. He produced a newspaper printout as P. Exhibit 20 showing that the said 2<sup>nd</sup> Defendant, who was a politician at that time, sought to challenge in court the AG's decision refusing to register a party, NDP, under the Societies Act.
23. In the meantime, the 2<sup>nd</sup> Defendant and his wife Edith Nafula Mukonambi alias Zaina Salim found themselves brawled in a domestic dispute that caused his wife to leave Mombasa. She moved to and settled in Makutano where she resided in West Pokot/Siyoi 'A'/2485.
24. The Plaintiff was physically assaulted by his brothers and the 2<sup>nd</sup> Defendant's wife. His property was also destroyed and vandalized on 07/03/1993. He reported both matters to the police on 10/03/1993 as evidenced by P. Exhibit 26. This caused the Kapenguria Police station to write a letter referenced O.B. 38 of 15/03/1993, produced as P. Exhibit 27, inviting the chief to intervene on allegations of destruction of his property. Ultimately, the 2<sup>nd</sup> Defendant's wife was arrested, charged and convicted of assault. At the same time, the 2<sup>nd</sup> Defendant was summoned by the police officers.
25. In that same year, on 10/06/1993, A.N. Nakoli lodged a complaint against Saidi Wafula Ndamwe claiming interference with his water connection obtained in 1979. Parties were thus summoned by the District Water Office West Pokot District to appear before it on 15/06/1993 for the purpose of dispute resolution. He produced the summons as P. Exhibit 28.
26. The 2<sup>nd</sup> Defendant's wife opted to settle and reside on West Pokot/Siyoi 'A'/2485 where the Plaintiff received her with open arms. The Plaintiff lamented that she later turned against him by lodging a complaint before the D.O.s office. She accused him of interfering with family property. On 27/02/1996 the parties were summoned to appear before the D.O. on 28/02/1996 as per the letter he produced as P. Exhibit 29.
27. A meeting of members of the Muslim community passed a decision to divide land in line with a dispute between the 2<sup>nd</sup> Defendant and the Plaintiff herein. He produced the minutes of the meeting and resolution as P. Exhibit 34. Through a letter dated 12/03/1996, which he produced as P. Exhibit 30 the D.O. wrote to the High Court Registrar indicating that the 2<sup>nd</sup> Defendant's case against the Plaintiff herein was heard in 1991 by the land disputes elders. In their decision, it was advised that the dispute be resolved in court. The purpose of the said letter was to refer the matter back to court.
28. On that same day, the Plaintiff was charged with the offence of creating disturbance contrary to Section 95 of the Penal Code in Criminal Case No. 84 of 1996. He produced as P. Exhibit 31 and P. Exhibit



- 32 a receipt for bond and one for deposit dated 18/03/1996 respectively in support of this assertion. In the criminal case the 1<sup>st</sup> Defendant who was the Complainant was summoned to give evidence on 30/04/1996 through a bond on 25/04/1996 which the Plaintiff produced as P. Exhibit 33. Before the hearing, and citing that the matter would be best resolved out of court since parties were family members, the Complainant wrote to the court on 18/04/1996, which the Plaintiff produced as P. Exhibit 35, seeking to withdraw the case.
29. It appears that a series of letters addressed to different bodies attempted to resolve the disputes arising. These include the letter dated 11/04/1996 addressed to the Kapenguria Land Control Board, produced as P. Exhibit 36, the letters dated 22/05/1996, produced as P. Exhibit 37 and 17/06/1996 as P. Exhibit 38 addressed to the chief, and the letter dated 06/08/1996 produced as P. Exhibit 39.
30. In 1998, the 2<sup>nd</sup> Defendant lodged a complaint before the Kapenguria Land Dispute Tribunal challenging ownership of all that parcel of land namely West Pokot/Siyoi 'A'/2713. The Plaintiff together with the Complainant (the 2<sup>nd</sup> Defendant) were summoned on 04/08/1998 appear before the Tribunal for hearing of the dispute on 07/08/1998. He produced the letter by the District Officer as P. Exhibit 40. They were again summoned on vide a letter dated 07/08/1998 which he produced as P. Exhibit 41, to appear for hearing on 11/08/1998. On both occasions, they were asked to carry the necessary documentation in support of their respective positions.
31. The hearing took place. Ultimately, in its decision dated 11/12/1998 marked P. Exhibit 42, the Tribunal found that the 2<sup>nd</sup> Defendant was entitled to a share of the land. It observed that the land was allocated to him by his father prior to his death and further that the Plaintiff herein was required to look after the property while the 2<sup>nd</sup> Defendant was away. As such, the Plaintiff was directed to execute all necessary consent and transfer forms to subdivide the parcel as decided.
32. In pursuance of that decision, the 2<sup>nd</sup> Defendant instituted Kitale CMCC No. 105 of 1998 - Salim Ndamwe vs. Aziz Ndamwe, seeking to adopt the findings of the Tribunal. The parties were summoned to appear before the court on 03/02/1999 for its adoption as evidenced by P. Exhibit 44. The same was adopted on that day by Hon. L. N. Kinyanjui as was evidenced by the proceedings produced as P. Exhibit 45. The Plaintiff accused his deceased brother of clandestinely obtaining the decree, arguing that parties mutually agreed to put in abeyance any further dealings on the land until the hearing and determination of this present suit.
33. On 24/02/1999 the Plaintiff filed Kitale High Court Judicial Review No. 20 of 1999 as he referred to the application in his testimony. In it he sought to quash the decision of the Kapenguria Land Dispute Tribunal. He produced the motion, his statement, supporting Affidavit and annexures thereto as P. Exhibit 46. He informed the Court that it was ultimately concluded and the court entered judgment. He, however, also stated that he abandoned the said proceedings.
34. On 16/03/1999, the Plaintiff employed the firm of Sichale & Kidiavai Advocates and filed a Chamber Summons Application in the adoption cause for stay of execution of the decree. He produced the application as P. Exhibit 48. Temporary orders of stay were on 17/03/1999 granted pending inter partes hearing scheduled for 21/04/1999 as shown by a copy of the order he produced as P. Exhibit 49.
35. That Application was opposed by the 2<sup>nd</sup> Defendant. He filed a Preliminary Objection dated 24/03/1999 that sought to strike out the Application with costs. He also filed a Replying Affidavit sworn on 24/03/1999. He produced them as P. Exhibit 51 and P. Exhibit 52 respectively.
36. Thereafter, on 09/04/1999, P. Exhibit 50, the Plaintiff's Advocates wrote to the D.O. informing the office about the stay orders. They urged the office to assist in implementation of the orders of 17/03/1999.



37. On 22/08/2001, a vesting order, which he produced as P. Exhibit 55 was issued in Kitale CMCC No. 105 of 1999. It directed the Executive Officer of Kitale Law Courts to execute the Land Control and Transfer forms in favor of the 2<sup>nd</sup> Defendant in the stead of the Plaintiff herein. This prompted the Plaintiff to seek certified copies of the proceedings in the suit. He produced the letter, that was fairly obliterated, as P. Exhibit 54. He complained that he was yet to receive a response as at the time of the testimony in this matter.
38. The proceedings arising out of the land dispute held at the D.O.'s office between Naomi Chelangat Ngaliman and Veronica Chemanang Ngalam were, on 20/02/2003, forwarded to the SRM Kitale Law Courts, as evidenced by document P. Exhibit 47. As a result, a decree was obtained in Kitale SPM Land Case No. 48 of 2003.
39. It was premised from that vesting order in Kitale CMCC No. 105 of 1999 that 2<sup>nd</sup> Defendant proceeded to subdivide all that parcel of land namely West Pokot/Siyoi 'A'/2713. It was subdivided into West Pokot/Siyoi 'A'/4434 and West Pokot/Siyoi 'A'/4435. He produced as P. Exhibit 56 the Application dated 22/08/2004, for subdivision of parcel No. West Pokot/Siyoi 'A'/2713, the letter of consent dated 15/06/2004 as P. Exhibit 57, the mutation form and attached sketch plan as P. Exhibit 58, the transfer form as P. Exhibit 72 and the green card in respect of West Pokot/Siyoi 'A'/4434 as P. Exhibit 59 and P. Exhibit 73. By it the 2<sup>nd</sup> Defendant was registered as the proprietor on 27.08.2004 and a title deed issued on that day.
40. The other parcel of land West Pokot/Siyoi 'A'/4435 was issued to the Plaintiff on 27/08/2004. The title deed, issued on 04/01/2007, was produced and marked as P. Exhibit 69. He subsequently subdivided the same into plot no 5045 measuring 0.925 Hectares and plot no. 5540 measuring 0.092 Hectares currently registered under his name.
41. On 31/01/2006, The District Commissioner West Pokot District wrote a letter, produced as P. Exhibit 60, asking the Land Registrar to maintain the status quo due to the subsistence of a land dispute. The Registrar responded on 10/04/2006, through a letter produced as P. Exhibit 61, stating that the case was finalized before court and a title deed issued. He stated in it that as such, no status quo subsisted on West Pokot/Siyoi 'A'/4434.
42. The 2<sup>nd</sup> Defendant further subdivided West Pokot/Siyoi 'A'/4434 measuring 0.80 Hectares into several plots, as seen on the mutation form dated 17/05/2006 and produced as P. Exhibit 62, as follows:
- i. West Pokot/Siyoi 'A'/4596 measuring 0.37 Hectares;
  - ii. West Pokot/Siyoi 'A'/4597 measuring 0.10 Hectares sold to the 3<sup>rd</sup> Defendant. Its Green card was produced as P. Exhibit 74;
  - iii. West Pokot/Siyoi 'A'/4601 measuring 0.045 Hectares sold to the 4<sup>th</sup> Defendant. Its Green card was produced as P. Exhibit 75;
  - iv. West Pokot/Siyoi 'A'/4602 measuring 0.045 Hectares retained by Salim Ndamwe. Its Green card was produced as P. Exhibit 83;
  - v. West Pokot/Siyoi 'A'/4603 measuring 0.045 Hectares sold to the 5<sup>th</sup> Defendant. Its Green card was produced as P. Exhibit 76;
  - vi. West Pokot/Siyoi 'A'/4826 measuring 0.07 Hectares;
  - vii. West Pokot/Siyoi 'A'/4821 measuring 0.05 Hectares sold to the 7<sup>th</sup> Defendant. Its Green card was produced as P. Exhibit 78;



- viii. West Pokot/Siyoi 'A'/4822 measuring 0.05 Hectares sold to the 7<sup>th</sup> Defendant. Its Green card was produced as P. Exhibit 79;
  - ix. West Pokot/Soyoi 'A'/4819 measuring 0.05 Hectares later sold to the 6<sup>th</sup> Defendant. Its Green card was produced as P. Exhibit 77.
  - x. West Pokot/Siyoi 'A'/4820 measuring 0.07 Hectares retained by Salim Ndamwe. Its Green card was produced as P. Exhibit 82.
43. The Plaintiff registered two (2) cautions on West Pokot/Siyoi 'A'/4434. The copies of the cautions, produced as P. Exhibit 63 and P. Exhibit 64, were lodged on 14/12/2005 and 13/11/2008. The Land Registrar notified the 2<sup>nd</sup> Defendant that a caution had been registered vide a notice dated 28/11/2008 and marked as P. Exhibit 71 in the instant case.
  44. On 04/10/2006, the court herein gave interim orders maintaining the status quo over parcel no. West Pokot/Siyoi 'A'/4434 pending the hearing and determination of the Application dated 06/07/2006. The Order was produced and as P. Exhibit 65.
  45. According to the Plaintiff, the cautions have never been disposed of. He added that on 27/11/2008, the Land Registrar wrote to the Plaintiff in respect to his caution(s). He returned the same marked unregistered because the interest claimed was not registrable and the declaration was not signed by the Plaintiff. He produced the letter as P. Exhibit 70.
  46. The Plaintiff conducted a search on the property namely West Pokot/Siyoi 'A'/4434. As at 10/12/2008, it disclosed that a caution, which he produced as P. Exhibit 66(a) had been registered on the parcel of land by one Thomas Lokeer, a purchaser. The search receipt in support of payment of the services was marked as P. Exhibit 66b. Similar search results were revealed in the certificate of official search dated 12/07/2007 which he produced as P. Exhibit 67.
  47. According to the search results, the following was indicated as hereunder:
    - i. 01/02/2006 - restriction; no dealings until land case in HCCC No. 54 in High Court Kitale is finalized;
    - ii. 14/06/2006 - caution in favor of Thomas Lokeer of BOX 208 Kapenguria claiming an interest as purchaser;
    - iii. 28/11/2008 - caution in favor of Aziz Ndamwe Wakoli claiming an interest as a beneficiary.
  48. The Plaintiff lodged a complaint before the Attorney General (the AG) through his letter dated 21/05/2007, which he produced as P. Exhibit 43. He accused the 2<sup>nd</sup> Defendant of obtaining the decision in the Tribunal by means of inter alia fraud, corruption, bias and misrepresentation. He further challenged that the sitting of the collegial elders lacked quorum and proceeded without the D.O. He invited the AG to institute investigations into the matter.
  49. The Plaintiff conducted an official search on West Pokot/Siyoi 'A'/4435. It was discovered through it that the same arose out of the subdivision of West Pokot/Siyoi 'A'/2713. It had no inhibition, cautions and restrictions. The search was dated 26/02/2008 and was produced as P. Exhibit 68.
  50. Thereafter, West Pokot/Siyoi 'A'/4596 was subdivided into two (2) plots namely West Pokot/Siyoi 'A'/5000 which was retained by Salim Ndamwe. It measured approximately 0.32 Hectares. The other was West Pokot/Siyoi 'A'/5001, measuring 0.005 Hectares. It was sold to the 7<sup>th</sup> and later the 8<sup>th</sup> Defendant. Their Green cards of both were produced and marked as P. Exhibit 81 and P. Exhibit 82 respectively.



51. The Plaintiff denied knowledge of the contents of the letter dated 13/02/2014 which the Defendants produced as D. Exhibit 8/D. Exhibit 13. He urged the Court that in light of the above, the suit ought to be granted as prayed. He however intimated in the oral testimony that he was willing to sell the suit land to the Defendants if they approached him. He further prayed that the Counterclaim be dismissed with costs.

### **The Defendants' Case**

52. Edith Nafula Mukonambi, the 2<sup>nd</sup> wife of the 2<sup>nd</sup> Defendant testified as DW1. She testified that the 2<sup>nd</sup> Defendant died on 27/05/2010. She adopted the witness statement of her eldest son DW2 stating that he was well versed with the facts of the present dispute.
53. In brief, his statement dated 31/01/2020 was to the effect that he stayed with the father, one Salim Abdalla Ndamwe in Mombasa up to 1993 before moving to Nairobi between 1993 and 1996. He knew of a dispute between his father and the Plaintiff. He stated that his father obtained title to West Pokot/Siyoi 'A'/4434 and divided it into eight portions. He stated that they as family were residing on parcel No. 5000 which was in the name of his late father. He stated that the title was issued to him after his death. He stated that it was his uncle, Hassan Wekesa Ndamwe who knew the dispute well up to when parcel No. 4434 was generated.
54. DW1 testified further that, by virtue of their faith, she was not involved in any transactions or decisions regarding the suit land namely West Pokot/Siyoi 'A'/4434. She, however, admitted that on certain occasions, she executed sale agreements. She further admitted that although she left the suit land in 2006, her children live there. In particular, she mentioned that DW2 currently resides on the suit land.
55. Habib Salim Ndamwe DW2's evidence was that he lived with his late father in Mombasa until 1993 when he was twenty-one (21) years old. They moved to Nairobi and then to West Pokot in 1996 where they settled down and lived as a family.
56. In that year of 1996, a dispute arose between his 2<sup>nd</sup> Defendant father and the Plaintiff. Once the 2<sup>nd</sup> Defendant obtained title in respect to parcel no. West Pokot/Siyoi 'A'/4434, he subdivided some eight (8) portions and titles were issued.
57. He testified that he currently lived with his family on parcel no. West Pokot/Siyoi 'A'/5000 whose title deed he produced as D. Exhibit 6. It was registered in the name of the 2<sup>nd</sup> Defendant on 18/08/2010. It was as a result of a subdivision of parcel no. West Pokot/Siyoi 'A'/4434. He referred to photos he produced as D. Exhibit 7 to demonstrate where exactly he resided. He added that the parcel of land also contained a clinic and a rental house. His evidence was that the said parcel was registered in the name of his father to date. He adopted the witness statement of his uncle Hassan Wekesa Ndamwe DW4 who gave a history of the dispute up to the creation of West Pokot/Siyoi 'A'/4434.
58. DW2 continued his testimony that before his death, his late father entered into several sale agreements where his mother DW1 was a witness. He believed that the transactions and sale agreements were lawfully obtained and not by means of fraud.
59. DW3, Hamisi Busakhala Sumba, testified as a neighbour to the family. He recalled that after their prayers on 13/03/1996 in the Mosque, the Plaintiff arose and stated that he had a boundary dispute with his brother the 2<sup>nd</sup> Defendant. He requested the Muslim community to accompany him and ascertain the boundary. All twenty-one (21) attendees, including DW3, had their names indicated somewhere in a list. It was resolved by them. The Plaintiff then placed the beacons. He confirmed that the list was that produced by the Plaintiff and marked as P. Exhibit 34. After the exercise, members had tea and departed hereafter.



60. When cross-examined as to the appearance of his signature of the Plaintiff on P. Exhibit 34 as compared to that on his Verifying Affidavit, he noted that they appeared different as they did not resemble. He remembered that he executed the document but could not recall if the Plaintiff appended his signature. He added that the Plaintiff never complained that his signature was forged.
61. DW4 Hassan Wekesa Ndamwe, the Plaintiff's step-brother testified that their deceased father one Ndamwe Wakoli married three (3) wives namely Halima Nabukwangwa, Susan Naliaka and the deceased 1<sup>st</sup> Defendant. He had initially married four (4) wives but divorced once who had borne him one (1) or a daughter. That his deceased father moved into the suit land in 1945 where he resided with his three (3) wives and their children. The land did not initially have title.
62. In 1975, an adjudication exercise was conducted. The deceased Ndamwe Wakoli divided his twelve 12.32 acres as seen on the sketch map with intended subdivisions. He produced it as D. Exhibit 1. It contained the following subdivisions to the church and his sons:
- i. St. Andrews Church ACK - six (6) acres. In his cross examination however, he revealed that the Adjudication committee found that a portion of land belonged to the Church. The Church had raised an objection on allocation and took four (4) acres. He relied on the adjudication records produced as D. Exhibit 4;
  - ii. Omari Wakoli Ndamwe - 1.2 Hectares in no. 599;
  - iii. John Stuma Ndamwe - 0.7 Hectares in no. 604;
  - iv. Evans Wanyama Ndamwe - 0.4 Hectares in no. 601;
  - v. The Plaintiff & 2<sup>nd</sup> Defendant - 1.6 Hectares in no. 603;
  - vi. Hassan Wekesa Ndamwe - 0.37 Hectares in no. 600;
  - vii. Adam Kimungi Ndamwe - 0.4 Hectares in no. 602;
  - viii. The late Ndamwe Wakoli retained 1.2 Hectares in trust for Rajab Maika Ndamwe, driver working in Uganda, Swaib Wanjala Ndamwe, aged fourteen (14) years and ten (10) year old Saidi Wakoli Ndamwe in no. 585. It was subsequently divided into three portions namely 4992 measuring 0.34 Ha, 4993 measuring 0.34 Ha and 4994 measuring 0.53 Ha. He referred to the mutation form produced as D. Exhibit 3 issued to N. Wakoli, W. Ndamwe alias Saidi Wakoli Ndamwe and Wanjala Ndamwe alias Swaib Wanjala Ndamwe. He relied on D. Exhibit 5 to show that Wanjala Ndamwe and Swaib Wanjala Ndamwe were one and the same person. Following the same, a title deed which was produced as D. Exhibit 2 was issued to Said Wakoli Ndamwe over West Pokot/Siyoi 'A'/4992 on 27/03/2014.
  - ix. Abdulrahman Wangila Ndamwe - one (1) acre in Namanjalala.
63. He continued that since Reuben Opicho Ndamwe and the 2<sup>nd</sup> Defendant lived in Mombasa during the adjudication process, their shares were held in trust for them by the Plaintiff herein. It is for that reason that he held the lion's share. He stated further that they were not given any additional land. Because of the immense love they had for him, Reuben Opicho Ndamwe and 2<sup>nd</sup> Defendant agreed to register the disputed parcel in the Plaintiff's name.
64. In 1991, the Plaintiff disposed of a 50 by 100 portion of West Pokot/Siyoi 'A'/603. But it is noteworthy here that during his testimony, DW4 was referred to P. Exhibit 5 and P. Exhibit 11 and confirmed that only the Plaintiff was solely allocated that land yet in P. Exhibit 4, the names of the trustees were disclosed. His further evidence was that for reason of the sole registration of the Plaintiff as owner yet



- he was supposed to be a trustee, this prompted their late father to lodge a complaint at the D.O.'s office on 22/04/1991. The complaint was filed on his behalf by his son Evans Wanyama Ndamwe.
65. Following the transpirations, the Plaintiff called the 2<sup>nd</sup> Defendant, his blood brother and stated that Evans Wanyama Ndamwe, their half-brother, was trying to disinherit them. That this was what prompted the 2<sup>nd</sup> Defendant to swear the Affidavit that the Plaintiff relied on as P. Exhibit 16.
  66. Subsequently, West Pokot/Siyoi 'A'/603 was subdivided into two (2) portions, namely, West Pokot/Siyoi 'A'/2485 which was retained by the Plaintiff and West Pokot/Siyoi 'A'/2486. Following the death of their father in 1991, the Plaintiff sold a portion of West Pokot/Siyoi 'A'/2485 and subdivided the rest into two portions namely West Pokot/Siyoi 'A'/2713 and West Pokot/Siyoi 'A'/2714.
  67. Before 1996, the 2<sup>nd</sup> Defendant discovered that his brother had sold his portion of land. He informed his reticent brother Reuben Opicho Ndamwe who decided to move with his family to Namanjalala where he died in 2007.
  68. In 1996, the Plaintiff requested the Muslim community to accompany him for the purpose of determining the dispute between himself and the 2<sup>nd</sup> Defendant. He continued to sell West Pokot/Siyoi 'A'/2713 and refused to share the estate with his brother. It was for this reason that the 2<sup>nd</sup> Defendant lodged a complaint before the Land Dispute Tribunal. It was resolved in 1996 that the Plaintiff does transfer the 2<sup>nd</sup> Defendant's portion to his name. The Plaintiff was however defiant. The 2<sup>nd</sup> Defendant built a family home on his portion where the family resides to date.
  69. DW4 continued that both their grandmother and father who died on 18/12/1991 were buried in West Pokot/Siyoi 'A'/2713 without any opposition from the Plaintiff. Further that following the death of their father, West Pokot/Siyoi 'A'/585 was transferred to Rajab Maika Ndamwe, Swaib Wanjala Ndamwe and Saidi Wakoli Ndamwe which had been held in trust.
  70. DW4 continued that Omari Wakoli Ndamwe received 1.2 Hectares because he was a carpenter. He was also the eldest son and lived at home. He also supported his younger siblings and the parents. It is for these reasons that he had the largest estate of the property subdivided.
  71. Following subdivision of West Pokot/Siyoi 'A'/2713 into West Pokot/Siyoi 'A'/4434 measuring 0.80 Hectares and West Pokot/Siyoi 'A'/4435 measuring 0.54 Hectares to the 2<sup>nd</sup> Defendant and the Plaintiff respectively, the properties were sold to third parties. He recognized the handwriting on P. Exhibit 8 as that of Evans Ndamwe who wrote on behalf of their father. He recognized the Plaintiff's handwriting in P. Exhibit 7 written on behalf of their father. He concluded that since the Plaintiff held the land in trust for the 2<sup>nd</sup> Defendant, the transfer in his name was lawful.
  72. DW5 Abdulrahman Wangila Ndamwe, another of the Plaintiff's step brothers testified that his mother Halima Ndamwe was the 1<sup>st</sup> of three (3) wives (initially four (4)). The divorced wife birthed his father one (1) daughter. He adopted the witness statements of Hassan Wekesa Ndamwe, Evans Wanyama Ndamwe and Saidi Wakoli Ndamwe. The evidence of Hassan Ndamwe which constitutes the written and oral testimony is laid out at length when analyzing his testimony as DW4 below.
  73. The statement of Evans Wanyama Ndamwe dated 31/01/2020, adopted, was to the effect that the Plaintiff and Salim were brothers. Giving his mother's name as Susan Ndamwe and late mother of the two brothers named as Miriam Anjao he adopted the statement of Hassan Wekesa Ndamwe. He then wrote that his father mzee Wakoli Ndamwe sent him to report a land dispute between him and the Plaintiff and he did so at the District Officer's office in Kapenguria. He was given a letter from there which stated that the land was not family land. Later he learnt that Salim Abdallah had made an Affidavit confirming that the land belonged to Asiz (the Plaintiff). He then said that four years



later, while in Nairobi, Salim informed him that the Plaintiff had lied to him that he (Evans Wanyama Ndamwe) wanted to take away parcel No. 603 only to discover later that the Plaintiff was selling the land meant for Salim Ndamwe and Reuben Opicho and himself (the Plaintiff). After that Salim informed him that he wanted a title deed for his portion and had sued the Plaintiff in court and the elders.

74. Said Wakoli, whose statement dated the same date as the one of Evans and which was adopted, was that he was born in 1964 and was 11 years old in 1975 while his brother Swaib Wanjala Ndamwe was born in 1962 hence was 13 years old then. He stated that his elder brother Rajab Maika was working as a driver in Uganda. He then stated that when adjudication took place in 1975 his as well as his other minor brother's share and that of Rajab Maika were registered in the name of their father Wakoli Ndamwe. That was parcel No. West Pokot/Siyoi 'A'/ 585. Later their father signed all the necessary transfers in their favour and they obtained title thereto. He stated that none of his siblings claimed their said respective shares which were divided into three portions, namely, 4992, 4993 and 4994.
75. His further written evidence was that the Plaintiff and his mother had a quarrel in 1996 and brought Muslim elders and his brother Salim home. The Plaintiff apologized and then the Plaintiff showed the elders the boundary of the portion of land out of parcel No. 2713 which belonged to Salim.
76. Then DW5 stated that he was aware that his father had a twelve (12) acre plot that was subsequently distributed to the church and his sons, to his exclusion. He recalled that his father informed them that the Plaintiff was to hold land in trust for the 2<sup>nd</sup> Defendant and Reuben Opicho Ndamwe, but he turned against them. He testified that he currently resides in Namanjalala on a one (1) acre plot given to him by his late father in 1975.
77. He testified that during the adjudication process, DW5, Reuben Ndamwe and the 2<sup>nd</sup> Defendant were not living in the suit land. DW5 contended that he was not given any property in West Pokot as he was given land where he currently resides. He confirmed that the plot numbers were given in accordance with P. Exhibit 6. He added that West Pokot/Siyoi 'A'/585 was registered in the names of his father and two (2) brothers and was objected to by the church according to P. Exhibit 4 while P. Exhibit 5 disclosed that West Pokot/Siyoi/603 was undisputedly registered in favor of the Plaintiff solely. He referred to D. Exhibit 4.
78. DW6 Evans Wanyama Ndamwe, a step brother to the Plaintiff and 2<sup>nd</sup> Defendant adopted the evidence of Hassan Wekesa Ndamwe. He affirmed that their late father asked him to lodge a complaint between the Plaintiff and himself at the D.O.'s office because the Plaintiff was acting against his request to divide the property amongst his brothers. He was later informed that the land was not family land. He also discovered that the 2<sup>nd</sup> Defendant, by an Affidavit, confirmed that the land belonged to the Plaintiff. He was then informed by the 2<sup>nd</sup> Defendant that the Plaintiff was disinheriting him. He complained before the Tribunal. His evidence was that a portion of the property was supposed to be shared between the Plaintiff, the 2<sup>nd</sup> Defendant and Reuben Opicho Ndamwe. Finally, DW6 testified that his father, his late grandmother and the Plaintiff's deceased child have been buried on the suit land.
79. He confirmed affirmatively during cross examination the contents of P. Exhibit 18, P. Exhibit 19, P. Exhibit 11, P. Exhibit 15, P. Exhibit 17, P. Exhibit 4 and P. Exhibit 5.
80. DW7 Saidi Wakoli Ndamwe, brother to the Plaintiff and 2<sup>nd</sup> Defendant from the 3<sup>rd</sup> house testified that he was eleven (11) years old in 1975. He produced a copy of his national identity (ID) card as D. Exhibit 4. Title No. West Pokot/Siyoi 'A'/585 was shared between his brother Rajab Maika Ndamwe who obtained West Pokot/Siyoi 'A'/4994, his late brother Swaib Wanjala Ndamwe, whose name he confirmed vide his ID produced as D. Exhibit 5, who obtained West Pokot/Siyoi 'A'/4993 and himself



who acquired West Pokot/Siyoi 'A'/4992, a copy of the title produced as D. Exhibit 2. He relied on the mutation form D. Exhibit 3 for this exposition.

81. DW7 continued that sometime in March 1996, the Plaintiff and the 1<sup>st</sup> Defendant differed, prompting Muslim elders to come home. The 2<sup>nd</sup> Defendant was also present. During that meeting, the Plaintiff apologized to his 1<sup>st</sup> Defendant mother by touching her feet. Thereafter, the Plaintiff showed the Muslim elders the boundary between himself and the 2<sup>nd</sup> Defendant over parcel No. West Pokot/Siyoi 'A'/2713. The Minutes of that meeting were recorded. DW7 later learned that the Plaintiff refused to apportion land to the 2<sup>nd</sup> Defendant.
82. When cross examined he confirmed that P. Exhibit 4, P. Exhibit 5, P. Exhibit 11 and P. Exhibit 35 bore the contents as inscribed thereon.
83. DW8 the 4<sup>th</sup> Defendant, was authorized to testify on behalf of the 3<sup>rd</sup>, himself, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants as purchasers over parcels within the suit land. To them, at the time of purchase, none was stopped by an order of injunction or any other encumbrance. He testified that the title deeds were lawfully obtained. He maintained that the 3<sup>rd</sup> - 10<sup>th</sup> Defendants are innocent purchasers for value without any notice to any suit, injunction or encumbrance. The claim against them was thus bad in law and prayed that the same be dismissed.
84. DW8 produced copies of sale agreements dated 05/12/2005 and 03/01/2006 in favor of the 3<sup>rd</sup> Defendant, 19/12/2005 and 13/07/2006 in his favor, 05/01/2006, 27/05/2006, 13/07/2006 and 31/07/2006 in favor of the 5<sup>th</sup> Defendant, 02/12/2005 and 16/04/2007 in favor of the 7<sup>th</sup> Defendant and 14/12/2010 in favor of the 9<sup>th</sup> Defendant all produced and marked as D. Exhibit 8 (a), D. Exhibit 8 (b), D. Exhibit 9 (a), D. Exhibit 9 (b), D. Exhibit 10 (a), D. Exhibit 10 (b), D. Exhibit 10 (c), D. Exhibit 10 (d), D. Exhibit 11 (a), D. Exhibit 11 (b) and D. Exhibit 12 respectively.
85. In his cross examination, DW8 observed that as per P. Exhibit 79 and P. Exhibit 81, cautions and/or restrictions were placed on 01/02/2006, 14/06/2006 and 28/11/2008 over parcel No. West Pokot/Siyoi 'A'/4434. He stated that the purchasers were not aware of these facts.
86. DW8 added that following the death of the 2<sup>nd</sup> Defendant on 27/05/2010, only the Administrators of his estate were lawfully authorized to transact on behalf of the deceased. Additionally, the sale agreements were all attested to by their Advocate in the present suit, Barongo Advocate. He denied that any construction was ongoing stating that not only were they complying with the orders of the court but also hard economic times impeded their plans. Finally, each of the buyers built on their plots of land upon acquisition of the same and some reside therein. With that the defence case was closed.

## Submissions

87. At the close of viva voce evidence, parties were directed to advance their arguments to the Court with their respective rival written submissions. The Plaintiff's submissions dated 13/01/2023 and filed on 03/01/2023 framed six (6) issues for determination as follows and which shall be reproduced verbatim:
  - i. Whether or not the land known as West Pokot/Siyoi 'A'/2713 measuring 1.6 Ha was held by the Plaintiff in trust for Salim Ndamwe;
  - ii. Whether or not the Land Dispute Tribunal had jurisdiction to entertain, hear and determine the dispute over the ownership of the registered land (West Pokot/Siyoi 'A'/2713) being a resultant subdivision of West Pokot/Siyoi 'A'/603;
  - iii. Whether or not the court should declare that the proceedings and subsequent award of the Kapenguria Land Dispute Tribunal which was adopted as a judgment of the court and the



decree therein in Kitale SPMCC Land case no. 105 of 1998 were null and void ab initio for all intent and purposes thereto and the same be quashed at set aside;

- iv. Whether or not the Plaintiff is/was a rightful and legal owner of the land known as West Pokot/Siyoi 'A'/2713 being a resultant subdivision of West Pokot/Siyoi 'A'/603 and all the resulting subdivisions thereof being West Pokot/Siyoi 'A'/4434 measuring 0.80 Ha and West Pokot/Siyoi 'A'/4435 measuring 0.54 Ha and all other resulting subdivisions from West Pokot/Siyoi 'A'/4434 thereof being West Pokot/Siyoi 'A'/4597, 4601, 4602, 4603, 4819, 4820, 4821, 4822, 5000 and 5001;
  - v. Whether or not the court should cancel title no. West Pokot/Siyoi 'A'/4434 measuring 0.80 Ha and all other resulting subdivisions of the above parcels of land being the names of the Defendants and be replaced by the name of the Plaintiff in West Pokot/Siyoi 'A'/4597, 4601, 4602, 4603, 4819, 4820, 4821, 4822, 5000 and 5001;
  - vi. Who to bear the costs of the suit.
88. On the 1<sup>st</sup> issue, the Plaintiff cited Section 115 and 116 of the repealed Constitution, Section 6, 7, 13, 26, 27 and 29 of the *Land Adjudication Act* to hold that West Pokot/Siyoi 'A'/603 was properly adjudicated under his name after following the proper procedure. Furthermore, that the adjudication exercise was not objected to. He denied that the property was registered in his name in trust for his brother since there was no indication as such on the title. He argued that customary trust could not further be inferred since their late father intended that the suit property be solely subdivided in his name.
89. On the 2<sup>nd</sup> issue, the Plaintiff accused the 2<sup>nd</sup> Defendant of unlawfully applying for consent to subdivide West Pokot/Siyoi 'A'/2713. He submitted that by dint of Section 3 of the repealed Land Disputes Tribunal Act, the Kapenguria Land District Tribunal lacked jurisdiction to hear and determine the subject matter.
90. On the 3<sup>rd</sup> issue, the Plaintiff urged this court to find that the said Tribunal acted ultra vires. As a consequence of that declaration, he prayed that the decision made therein be found null and void and that the subsequent adoption of that award in Kitale SPMCC Land case No. 105 of 1998 be quashed and set aside.
91. Regarding the 4<sup>th</sup> issue for determination, he prayed that this court does declare that he is the rightful legal owner of all that parcel of land namely West Pokot/Siyoi 'A'/2713. He maintained that the defendants did not produce any records to indicate that he was registered as a trustee. Be that as it may, he argued that he was not a trustee and if that was the case, entries to that effect would have been made. He relied on Section 27 and Section 28 of the repealed Registered *Land Act* and Section 24 and Section 25 (1) of the *Land Registration Act* to submit that having obtained title to West Pokot/Siyoi 'A'/603, it was conclusively established that he is the registered proprietor of the suit land and the subsequent subdivisions.
92. The 5<sup>th</sup> issue relied on his antecedent arguments to urge this court to cancel titles morphed from several subdivisions arising out of West Pokot/Siyoi 'A'/2713. He fortified that submission by citing Section 26 (1) of the *Land Registration Act*.
93. Finally, on who ought to bear costs of the suit, the Plaintiff reproduced Section 27 (1) of the *Civil Procedure Act* to submit that costs, as a discretionary award, are awarded to the successful party. In this instance, the Plaintiff relied on several authorities to arrive at the conclusion that he was deserving of the costs. He said that the Defendants were the authors of their own misfortune. He further pitted them as fraudulent persons who were thus undeserving on an order for costs. For the above reasons,



the Plaintiff prayed that his Plaint be found merited and be allowed with costs while the Defendants' Counterclaim be dismissed with costs.

94. The Defendants' filed their joint submissions dated 18/02/2023 on 22/02/2023. The Defendants hypothesized that the following issues fall for determination:
- i. Whether the Plaintiff held the land in trust for the family; and if so, whether the trust should be determined and the land distributed to the family; and
  - ii. Who should bear costs of the suit?
95. On the first issue, the Defendants defined the meaning of a resulting trust as provided in the Halsbury's Law of England 4<sup>th</sup> Edition Vol. 48 at paragraph 597 to argue that the Defendants did establish that the Plaintiff held land in trust for his brothers. They buttressed this argument by stating that the tyranny of numbers swayed in their way since several witnesses were called in support of their position. They argued that their late father's intention was for the plaintiff to hold the land in trust for his absent brothers; the 2<sup>nd</sup> Defendant and REUBEN NDAMWE.
96. It is the Plaintiff's actions, they continued, of selling a portion of the property before sharing with his brothers that prompted his father to file a complaint against him. They relied on the proceedings at Kapenguria Land Dispute Tribunal to lay a basis that indeed they were entitled to the suit land.
97. The Defendants urged this court not to be misled by the Affidavit of the 2<sup>nd</sup> Defendant which they maintained was done per incuriam. They accused the Plaintiff of bias because all the quasi-judicial bodies made decisions against his desires. He also submitted that the court should be wary of the fact that the Plaintiff filed Kitale High Court Miscellaneous Civil Application No. 20 of 1999 seeking prerogative writs, which he was granted, but instead insisted on claiming fraud hence this suit.
98. On the second limb, the Defendants urged the costs to follow the outcome of the matter. In conclusion, the Defendants prayed that this court does find that a constructive trust was created between the Plaintiff and the 2<sup>nd</sup> Defendant. For that reason, they urged this court to dismiss the Plaintiffs claim and allow their Counterclaim.

### **Analysis & Disposition**

99. I have extensively considered the pleadings, carefully analyzed the litany of both documentary evidence as well as the oral testimonies and considered the submissions relied on by parties herein. I have also given due consideration to the law applicable. Before identifying the issues for determination, I find it necessary to give an outline this Court finds as uncontested facts.
100. It cannot be gainsaid the parties herein have been embattled for decades on by virtue of this thing called 'land'. What is even more infelicitous is that the war is pitted amongst members of a family. It is my presumption that when the late Ndamwe Wakoli moved to West Pokot in the 70's, he ideally hoped that his estate wouldn't be tied to a long chequered history of litigation and complaints. The intention of this Court is not to dissect conceptualized emotions that it shall never come to discern their dept and true origin or purposed end since the departed is no longer with us.
101. It was not uncommon that prior to the year 1975, several Kenyans claimed ownership of land but sadly many lacked any proof of thereof: much was heard from calls of owning land by communal dwelling and consanguinity. Inter alia, this informed the government of the day to establish a mechanism that would grant title to person who obtained or intended to obtain immovable property by lawful means.



102. One Ndamwe Wakoli was one (1) such people. He had lived a polygamous lifestyle, professing the Muslim faith. Having married four women, in the course of his marital journey the said Ndamwe Wakoli divorced one of them who had borne him a daughter. Granted that that was the reason for divorce, as one witness herein tended to allude to, it was a pity. But it is water under the bridge.
103. His other three (3) wives were, namely, the 1<sup>st</sup> Defendant (now deceased), Halima Nabukwangwa and Susan Naliaka.
104. From these three (3) wives or houses (loosely used), the said Ndamwe Wakoli was blessed with twelve (12) sons: Aziz Ndamwe the Plaintiff herein, Salim Abdalla Ndamwe the deceased 2<sup>nd</sup> Defendant, DW4 Hassan Wekesa Ndamwe, Dw5 Abdulrahman Wangila Ndamwe, Dw6 Evans Wanyama Ndamwe, Dw7 Saidi Wakoli Ndamwe, Rajab Ndamwe, Adam Ndamwe, Omar Ndamwe Johnstuma Ndamwe and Reuben Opicho Ndamwe.
105. Together, the family of the late Ndamwe Wakoli moved to Pokot Area. It is to be remembered that at that time the said land was trust land. In the said area of residence, the same was vested in the Pokot Area Council.
106. Between 1965 and 1975 during the time the deceased lived in Pokot Area, an adjudication and demarcation exercise took place. From this adjudication process, the parcel of land that the parties lived on was named West Pokot/Siyoi 'A'/585. It appears that the adjudication process had been objected to by St. Andrews Church. For this reason, it was declared that a portion of the plot (4 acres) be awarded to the church and it gave rise to a parcel of land known as West Pokot/Siyoi 'A'/656. The adjudication record evincing this in respect to that land dated 17/09/1975 was produced by both the Plaintiff and Defendants as P. Exhibit 4 and D. Exhibit 4 respectively.
107. Undisputed also was that the intention of the late Ndamwe Wakoli was to subdivide the said plot measuring 12.32 acres (1.2 Ha). Although parties concur that the parcel was subsequently subdivided, they were not in consonance as to how it was distributed, which the Court tabulated from the evidence as follows, with the plot numbers shown in the last two columns bearing the signification or prefix West Pokot/Siyoi 'A':

Child inheriting/ heir	Plaintiff (Plot No.)	Defendant (Plot No.)
Adam Ndamwe	599	602
Evans Ndamwe	600	601
Hassan Ndamwe	601	600
Omar Ndamwe	602	599
The Plaintiff	603	603
The 2 <sup>nd</sup> Defendant	Nil	603
Johnstuma Ndamwe	604	604



108. Following an undisputed adjudication process that took place on 18/09/1975, the Plaintiff obtained title namely West Pokot/Siyoi 'A'/603 measuring 1.6 Hectares. Both parties produced the adjudication report marked D. Exhibit 4 and P. Exhibit 5. Resultantly, the Plaintiff was issued with a title deed on 16/08/1980. Some of his kin, including the siblings' grandmother and father who died on 18/12/1991, have been buried on the land.
109. DW5 did not benefit from the subdivision as at that time as he was not living in the area. DW5 was, however, given a one (1) acre plot in Namanjalala where he resides with his family to date. The 2<sup>nd</sup> Defendant and REUBEN NDAMWE (both living in Mombasa at that time) as well as RAJAB NDAMWE (working in Uganda at the time as a driver) were also not living on the suit land.
110. The deceased NDAMWE WAKOLI retained a portion of his land namely West Pokot/Siyoi 'A'/585. He had the same registered in the joint names of RAJAB MAIKA NDAMWE, SWAIB WANJALA NDAMWE and SAIDI WAKOLI NDAMWE after subdivision into three (3) plots namely West Pokot/Siyoi 'A'/4992 measuring 0.34 Ha and title deed issued on 27/03/2014, West Pokot/Siyoi 'A'/4993 measuring 0.34 Ha and West Pokot/Siyoi 'A'/4994 measuring 0.53 Ha.
111. The Plaintiff subdivided West Pokot/Siyoi 'A'/603 measuring 0.045 Hectares into two (2) plots, namely, West Pokot/Siyoi 'A'/2485 measuring 1.55 Hectares and West Pokot/Siyoi 'A'/2486 measuring 0.046 Hectares. Subsequently, he subdivided West Pokot/Siyoi 'A'/2485 into two (2) further plots, namely, West Pokot/Siyoi 'A'/2713 measuring 1.34 Hectares and West Pokot/Siyoi 'A'/2714 measuring 0.092 Hectares.
112. Upon the subdivision, the Plaintiff sold a 50 by 100 portion of parcel no. West Pokot/Siyoi 'A'/2486 to Peter Njiriri for a sum of Kshs. 50,000.00. The sale of that portion was the genesis of a dispute marred with complaints, allegations of criminal activity and the filing of several disputes in various fora.
113. According to the Plaintiff, in that year his deceased mother (the 1<sup>st</sup> Defendant, now deceased) accused him of disinheriting the family of its property namely West Pokot/Siyoi 'A'/603. However, DW6 testified that he lodged a complaint before the D.O. Makutano on behalf of their father. The Plaintiff was, on 21/02/1991, informed of it and cautioned against further dealings on the land.
114. The D.O. invited the parties to a hearing slated for 14/03/1991 to resolve the complaint. He acknowledged that the Plaintiff was the sole owner of the disputed land and cautioned other parties against interference with the transaction.
115. In that hearing, no parties appeared. The Plaintiff, however, submitted the title deed in respect to the suit land and the 2<sup>nd</sup> Defendant's Affidavit sworn on 13/03/1991. The Plaintiff highlighted at its paragraph five (5) of the Affidavit the 2<sup>nd</sup> Defendant admitted that the parcel belonged to the Plaintiff. The 2<sup>nd</sup> Defendant further accused DW6 of filing a frivolous complaint as the Plaintiff properly obtained title over the suit land lawfully.
116. Meanwhile, the Plaintiff filed suit against DW6 in Kapenguria Civil Suit No. 970 of 1991. However, the summons were returned unserved, since the Defendant could not be traced. In view of that, and with no further evidence of continuation of the suit, it abated as stipulated by the Civil Procedure Rules. That aside, on 19/04/1991 and 22/04/1991, the family members herein were asked by the D.O. to resolve the dispute amicably. It was then referred to the elders for hearing on 18/04/1991. In the presence of the Plaintiff and in the absence of the other parties, the elders advised parties to seek redress from the High Court since the dispute fell under the Registered *Land Act* (now repealed) regime.
117. The Plaintiff sold West Pokot/Siyoi 'A'/2485 measuring 100 by 100 Hectares to Solomon Bukhala Marobolo by agreement dated 14/03/1992. He testified that the sold portion arose out of the



- subdivision of West Pokot/Siyoi 'A'/2713. The agreement was attested to by inter alia, the 1<sup>st</sup> Defendant.
118. The Plaintiff was on 17/02/1993 summoned to appear on 18/02/1993 before the C.I.D. office at Kapenguria. On two (2) occasions, the 2<sup>nd</sup> Defendant expressed displeasure with the Plaintiff. It is instructive to note that as earlier stated, the 2<sup>nd</sup> Defendant was living in Mombasa at the time. He was living with his 2<sup>nd</sup> wife and son, the Administrators of his estate and DW1 and DW2 respectively. Owing to some domestic disputes, the said wife left Mombasa and moved on the suit land.
  119. On the strength of allegation of assault by his brother and the 2<sup>nd</sup> Defendant's 2<sup>nd</sup> wife, coupled with claims of vandalism, the Plaintiff reported on 10/03/1993 at Kapenguria Police station. In turn, the Police sought intervention from the chief. Ultimately the 2<sup>nd</sup> Defendant's wife was arrested and charged with assault while her husband was summoned.
  120. On 10/06/1993, A.N. Wakoli lodged a complaint against the 2<sup>nd</sup> Defendant claiming interference with his water connection. Parties were thus summoned by the District Water Office West Pokot District to appear before it on for the purpose of dispute resolution. Owing to another complaint by the 2<sup>nd</sup> wife of the 2<sup>nd</sup> Defendant, parties were on 27/02/1996 summoned to appear before the D.O. on 28/02/1996.
  121. DW3 recalled that after their prayers on 13/03/1996 in the Mosque, the Plaintiff arose and stated that he had a boundary dispute with his brother the 2<sup>nd</sup> Defendant. DW3, the Plaintiff and the 2<sup>nd</sup> Defendant were among others listed as members who passed the ruling to divide the shamba. In addition, DW7 stated that the Plaintiff apologized to his 1<sup>st</sup> Defendant mother by touching her feet.
  122. The D.O. vide his letter dated 12/03/1996 wrote to the High Court Registrar indicating that the 2<sup>nd</sup> Defendant's case against the Plaintiff herein was heard in 1991 by land elders. In their decision, it was advised that the dispute be resolved in court.
  123. On that same day, the Plaintiff was charged with the offence of creating disturbance contrary to Section 95 of the Penal Code in Criminal Case No. 84 of 1996. His mother the 1<sup>st</sup> Defendant was the Complainant. Before its hearing, citing that the matter was best resolved out of court since parties were family members, the 1<sup>st</sup> Defendant wrote to the court on 18/04/1996 seeking to withdraw the suit.
  124. In my view the crux and central kernel of the dispute is to be found in the initiation by the 2<sup>nd</sup> Defendant to lodge a complaint before the Kapenguria Land Dispute Tribunal over West Pokot/Siyoi 'A'/2713, and the award of that Tribunal. The Plaintiff and the 2<sup>nd</sup> Defendant were summoned to appear before it for hearing. They were required to carry the necessary documentation in support of each other's case.
  125. In their decision dated 11/12/1998, the Tribunal found that the 2<sup>nd</sup> Defendant was entitled to a share of the land. It observed that the land was allocated to him by his father prior to his death. Further that the Plaintiff herein was obligated to look after the property while the 2<sup>nd</sup> Defendant was away. As such, the Plaintiff was directed to execute consent and transfer forms to subdivide the parcel equally.
  126. The above decision was adopted as a judgement of the court in Kitale CMCC No. 105 of 1998; Salim Ndamwe vs. Aziz Ndamwe on 03/02/1999. Thereafter on 24/02/1999, the Plaintiff filed Kitale High Court Misc Civil Application No. 20 of 1999 seeking to quash the decision of the Kapenguria Land Dispute Tribunal. He informed that the same was ultimately concluded where the court entered judgment. He however also stated that he abandoned the said proceedings.
  127. The Plaintiff on 16/03/1999 filed a Chamber Summons Application in the Kitale CMCC No. 105 of 1998 seeking stay of execution of the decree. Temporary orders of stay were on 17/03/1999 granted



pending inter partes hearing. It was opposed. Thereafter on 09/04/1999, the Plaintiff's Advocates wrote to the D.O. seeking assistance in implementation of the orders of 17/03/1999.

128. On 22/08/2001, a vesting order was issued in Kitale CMCC No. 105 of 1999 directing the Executive Officer of Kitale Law Courts to execute the Land Control and Transfer forms in favor of the 2<sup>nd</sup> Defendant. This prompted the Plaintiff to seek certified copies of the proceedings in the suit. The obliterated letter appears not to have been stamp received.
129. On the strength of that vesting order, the 2<sup>nd</sup> Defendant subdivided all that parcel of land namely West Pokot/Siyoi 'A'/2713 into West Pokot/Siyoi 'A'/4434 registered in favor of the 2<sup>nd</sup> Defendant and West Pokot/Siyoi 'A'/4435 registered in favor of the Plaintiff on 27/08/2004. The Plaintiff subsequently subdivided his plot into plot no. 5045 measuring 0.925 Hectares and plot No. 5540 measuring 0.092 Hectares currently registered under his name.
130. On 31/01/2006, The District Commissioner West Pokot District wrote to the Land Registrar asking to maintain the status quo due to the subsistence of a land dispute. The Registrar responded on 10/04/2006 stating that the case was finalized before court and a title deed issued. As such, no status quo subsisted on West Pokot/Siyoi 'A'/4434.
131. On 04/10/2006, the court herein gave interim orders maintaining the status quo over parcel No. West Pokot/Siyoi 'A'/4434 pending the hearing and determination of the Application dated 06/07/2006.
132. The Plaintiff registered two (2) cautions on West Pokot/Siyoi 'A'/4434 lodged on 14/12/2005 and 13/11/2008. The Land Registrar notified the 2<sup>nd</sup> Defendant on 28/11/2008 that a caution had been registered.
133. The Plaintiff conducted a search on 12/07/2007 and 10/12/2008 over West Pokot/Siyoi 'A'/4434 that revealed the following results:
  - i. The property arose out of a subdivision over West Pokot/Siyoi 'A'/2713;
  - ii. 01/02/2006 - restriction; no dealings until land case in HCCC No. 54 in High Court Kitale is finalized;
  - iii. 14/06/2006 - caution in favor of Thomas Lokeer of BOX 208 Kapenguria claiming an interest as purchaser;
  - iv. 28/11/2008 - caution in favor of Aziz Ndamwe Wakoli claiming an interest as a beneficiary.
134. According to the Plaintiff, the cautions have never been disposed of. He however added that on 27/11/2008, the Land Registrar wrote to the Plaintiff in respect to his caution(s). He returned the same marked unregistered because the interest claimed was not registrable and the declaration was not signed by the Plaintiff.
135. The Plaintiff conducted a search on West Pokot/Siyoi 'A'/4434 on 26/02/2008. It was discovered that it had no inhibition, cautions and restrictions; it was unencumbered.
136. The 2<sup>nd</sup> Defendant died on 27/05/2010. Subdivisions on West Pokot/Siyoi 'A'/4434 took place as follows:
  - i. West Pokot/Siyoi 'A'/4596 measuring 0.37 Hectares;
  - ii. West Pokot/Siyoi 'A'/4597 measuring 0.10 Hectares sold then transferred to the 3<sup>rd</sup> Defendant on 30/03/2011;



- iii. West Pokot/Siyoi 'A'/4601 measuring 0.045 Hectares sold then transferred to the 4<sup>th</sup> Defendant on 03/06/2014;
  - iv. West Pokot/Siyoi 'A'/4602 measuring 0.045 Hectares with title issued to 2<sup>nd</sup> Defendant on 28/09/2009;
  - v. West Pokot/Siyoi 'A'/4603 measuring 0.045 Hectares sold and later transferred to the 5<sup>th</sup> Defendant on 03/06/2014;
  - vi. West Pokot/Siyoi 'A'/4826 measuring 0.07 Hectares;
  - vii. West Pokot/Siyoi 'A'/4821 measuring 0.05 Hectares sold and then transferred to the 7<sup>th</sup> Defendant on 30/09/2009;
  - viii. West Pokot/Siyoi 'A'/4822 measuring 0.05 Hectares sold and then transferred to the 7<sup>th</sup> Defendant on 30/09/2009;
  - ix. West Pokot/Soyoi 'A'/4819 measuring 0.05 Hectares later sold and transferred to the 6<sup>th</sup> Defendant on 16/06/2014;
  - x. West Pokot/Siyoi 'A'/4820 measuring 0.07 Hectares retained by Salim Ndamwe. Title issued on 28/09/2009;
137. Thereafter, West Pokot/Siyoi 'A'/4596 was subdivided into two (2) plots namely West Pokot/Siyoi 'A'/5000 measuring 0.32 Hectares and West Pokot/Siyoi 'A'/5001 measuring 0.005 Hectares. The subdivision took place on 18/08/2010. Plot No. 5001 was transferred to the 7<sup>th</sup> Defendant on 24/08/2010 and later the 8<sup>th</sup> Defendant on 24/01/2017 where titles were issued on those dates.
138. Plot No. 5000 was retained by the 2<sup>nd</sup> Defendant where DW2 resides with his family presently to the exclusion of DW1. The said parcel contains structures including a medical facility and residential homes.
139. DW8 confirmed that the sale agreements in respect to the sale of the sub divided plots initially owned by the 2<sup>nd</sup> Defendant were executed by various purchases (3<sup>rd</sup> - 10<sup>th</sup> Defendants) with the 2<sup>nd</sup> Defendant as the vendor in all except one (1) transaction. The sale agreements produced in evidence were respectively entered on 05/12/2005, 03/01/2006, 19/12/2005, 13/07/2006, 05/01/2006, 27/05/2006, 13/07/2006, 31/07/2006, 02/12/2006, 16/04/2007 and 14/12/2010.
140. Finally, according to the sale agreement dated 14/12/2010, the vendors were Sadique Salim Ndamwe and Edith Mukonambi Ndamwe. DW1 attested to all the agreements save for that of 14/12/2010. It was also admitted that the Barongo Advocate for the Defendants in this suit attested to some of the agreements particularly those dated 13/07/2006, 27/05/2006, 13/07/2006, 31/07/2006 and 14/12/2010.
141. The above abridgment marks the end of the facts not disputed. I shall now proceed on the disputed facts which, having gone through the evidence, formulate the following issues for determination:
- a. Whether the proceedings herein are proper as filed by the Plaintiff
142. At prayer (c) of his Plaint, the Plaintiff sought an order declaring that the proceedings and subsequent award of the Kapenguria Land Dispute Tribunal adopted in Kitale SPMCC Land Case No. 105 of 1998 are null and void. To be precise, in my view, it is the impugned judgment that was the stir or driving force of the present dispute which caused a ripple effect to the extent that the 2<sup>nd</sup> Defendant



proceeded to subdivide the suit land on its account. In other words, had it not been for that decision, parties would not be before me.

143. Section 3 of the repealed Land Disputes Tribunal Act, Chapter 303A of the Laws of Kenya, limited the jurisdiction of Tribunals therein to make a determination on matters of a civil nature concerning the division of, or the determination of boundaries to land including land held in common, a claim to occupy or work land or trespass to land. Thus, any decision made against this provision per incuriam or otherwise was contingently the subject of appeal proceedings.
144. Any party aggrieved by the decision of a Tribunal was under Section 8 of the Act empowered to appeal within 30 days after the decision to the Appeals Committee. Section 8 (9) provided as follows where one was dissatisfied with the findings of the Appeals Committee and the same shall be reproduced verbatim:
- Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of: Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.
145. From the above provisions, it emerges that dispute resolutions mechanisms had been placed where a party was aggrieved by the decision of the Tribunal. A party was required to explore the Appeals committee and only if dissatisfied on an issue of law would such a party move the High Court. Of importance is firstly, the exercise of this avenue being done within sixty (60) days of the decision and secondly, the issue being certified by a Judge that it is a point of law.
146. In the present case, it is my considered view that the Plaintiff essentially invites this court to quash the decision of the Kapenguria Land Dispute Tribunal of 11/12/1998 but has guised this suit as to seek declaratory orders that he is lawful proprietor. However, as I have stated, the straw that broke the camel's back was the decision of the Tribunal that was adopted as a judgment of the court on 03/02/1999.
147. Thereafter a vesting order was issued on 22/08/2001 that ultimately legitimized the execution of the necessary transfer and consent forms that subdivided all that parcel of land namely West Pokot/Siyoi 'A'/2713 into West Pokot/Siyoi 'A'/4434 registered in favor of the 2<sup>nd</sup> Defendant and West Pokot/Siyoi 'A'/4435 registered in favor of the Plaintiff on 27/08/2004.
148. The Plaintiff seeks an order canceling that subdivision and other succeeding subdivisions. The historical background of this matter informs that indeed the subdivisions sought to be cancelled morphed from the vesting on the 2<sup>nd</sup> Defendant the land in issue following the decision of the Tribunal. I need not belabor further the point that the Plaintiff's suit herein essentially invites this court to determine the dispute in line with Section 8 of the repealed Act.
149. I find that the Plaintiff's action of claiming in the present suit that he was entitled to a relief of a declaration that "the proceedings and subsequent award of the Kapenguria Land Dispute Tribunal which was adopted as a judgment of the court and the decree therein in Kitale SPMCC Land Case No. 105 of 1998 were null and void ad (sic) abinition (sic) for all intent and purposes thereto [and seeking] the same be quashed and set aside" was not only improper but incompetent for the reasons following hereafter. But as a parting shot and advice to litigants in general, one of the important virtues of practice is that good drafting of pleadings and documents is a value that should never depart from any. In this era of globalization where practically everything we do locally is open and available to the whole world via the internet, for instance this judgment will be read world over at a click of a button, it is of so much worth to polish each and every sentence and point or fact in drafting that not an iota of error should



remain for the world to see how careless or lackadaisical one was. For example, I have set out verbatim, immediately above, the prayer so as to remind learned counsel that three errors within one sentence is too much to excuse a good practitioner. That aside, I now give the reasons for the finding of the relief sought to be incompetent.

150. Firstly, the jurisdiction sought to be invoked by this court cannot because the Plaintiff failed to comply with the mandatory provisions set out in Section 8 of the repealed Act. Secondly, the Plaintiff pompously ignored the spirit and tenor of the doctrine of exhaustion. Be that as it may, he failed to establish that his dispute fell within the exceptions to that doctrine. The Court of Appeal in *Geoffrey Muthiga Kabiru & 2 Others vs. Samuel Munga Henry & 1756 Others* [2015] eKLR had his to say on the doctrine and the exceptions thereto:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R. Vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA)* (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved - including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 others vs Aelous (K) Ltd and 9 others.*)

151. I find that the Plaintiff failed to bring himself within the exceptions the doctrine of exhaustion of resolution mechanisms. Rules of procedure are not drafted in vain. It is incumbent upon parties to uphold that doctrine because no remedy lies against their lack of compliance.
152. Finally, the Plaintiff admitted that on 24/02/1999, he filed Kitale High Court Misc. Civil Application No. 20 of 1999 seeking to quash the decision of the Kapenguria Land Dispute Tribunal. He informed that the same was ultimately concluded where the court entered judgment. He however also stated that he abandoned the said proceedings.
153. In order to ascertain the correct facts over this issue, this Court had occasion to peruse the original file of Kitale High Court Misc. Civil Application No. 20 of 1999. Indeed, the record showed that the Plaintiff filed a Chamber summons dated 26/02/1999 seeking leave to file judicial review proceedings



against the adoption of the award. On 05/05/1999, the leave was granted by Lady Justice Nambuye J (as she then was). After that nothing took place. That accorded with the Plaintiff's testimony that he abandoned the Judicial Review process. If he wanted to quash the decision of the Tribunal and the adoption of the award, the Plaintiff's recourse lay in pursuing the judicial review proceedings.

154. I am afraid, this Court cannot grant the Plaintiff the relief sought in (c) of the Amended Plaint as that would amount to the Court arrogating itself with jurisdiction it does not have, and that would amount to proceeding on an illegality. Before me is not an application for Judicial Review but a Further Amended Amended Plaint which would pass as a Judicial Review Application if the relief sought were to be granted. It would be a sad day in jurisprudence to mix the interpretation and import of the two forms of pleading by granting a relief of the nature sought in that manner.

**b. What (if any) was the consequential effect of the decision of the Tribunal of 11/12/1998?**

155. Although I have come to the conclusion that the relief sought for the quashing and setting aside of the award and judgment of the Kapenguria Land Disputes Tribunal and Court in Kitale SPMCC No. 105 of 1998 respectively failed, I cannot ignore the boomerang effect of the adoption of that decision for that is the basis for the Plaintiff's prayer in reliefs (a) and (b) of the Amended Plaint. The two prayers in the Amended Plaint were that he be declared the legal owner of all that parcel of land known as West Pokot/Siyoi 'A'/2713. The other reliefs sought attendant thereto, which I paraphrase here for narration purposes, are that the subdivision of the parcel to numbers West Pokot/Siyoi 'A'/4434 and 4435 and other subsequent subdivisions be cancelled and the title reverts to the original West Pokot/Siyoi 'A'/2713 in the Plaintiff's name while the defendants who occupy the parcels resulting from the process are declared trespassers thereon, be evicted therefrom and an injunction issued restraining them from interfering with the Plaintiff's use of the said parcel.
156. For one to understand the issue I have set out and how it relates to the reliefs sought in (a) and (b) of the Amended Plaint as summarized above, it is worth restating the historical trail of the titles in issue as follows. Land parcel No. West Pokot/Siyoi 'A'/2713 was initially registered on 16/12/1992 in the name of the Plaintiff. It arose from the subdivision of West Pokot/Siyoi 'A'/2485. By the order of the Court in Kitale CMCC No. 105 of 1998 land parcel No. West Pokot/Siyoi 'A'/2713 was to be vested in the name of the 2<sup>nd</sup> Defendant. By the Vesting Order the Executive Officer of the Court was mandated to sign the transfer forms in favour of the said Defendant, as evidenced in P. Exhibit 55. But the Plaintiff testified that the Vesting Order never referred to his land. Instead the Executive Officer signed an Application, P. Exhibit 56, to the West Pokot Land Control Board for consent to subdivide the land into two parcels. A consent, P. Exhibit 57, was granted by the said Land Control Board. The land was subdivided into two parcels, namely, West Pokot/Siyoi 'A'/4434 registered in the name of the 2<sup>nd</sup> Defendant and West Pokot/Siyoi 'A'/4435 in the name of the Plaintiff. Land parcel No. West Pokot/Siyoi 'A'/4434 was divided subsequently to West Pokot/Siyoi 'A'/4596, 4597, 4601, 4602, 4603, 4826, 4821, 4822, 4819 and 4820. With that the question is, whether or not decision of the Land Disputes Tribunal should have led to the award declaring the 2<sup>nd</sup> Defendant to be legally entitled to part of land parcel No. West Pokot/Siyoi 'A'/2713.
157. The legal position is that Section 3 of the repealed Act indubitably limited the jurisdiction of a Tribunal. Thus, if the Tribunal acted ultra vires where it was not clothed with jurisdiction, this court will not hesitate to find its decision to be of no legal effect. What it means is that this Court needs to determine is whether, having been asked to consider whether the decision of the Tribunal was or was not within the law, and it finds that the Tribunal did not, yet its decision led to actions that affected the rights of a party herein, it should fold its hands and say, "I have nothing to say about the decision and its ripple effects because you have come to me using a different procedure." I do not think so. This is



where in the interest of justice Article 159(2)(d) of *the Constitution* about courts delivering substantive justice and not denying parties justice base on technicalities should come it very strongly. In so doing, I am guided by the wisdom of Lord Denning MR in celebrated case of *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169 who pronounced himself as follows:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

158. In the present suit, it is not denied that by the time the 2<sup>nd</sup> Defendant filed a complaint against the Plaintiff, the Plaintiff was in possession of a title deed over parcel number West Pokot/Siyoi ‘A’/603. Additionally, the title was issued under the repealed Registered *Land Act* regime.

159. Glaringly clear is that at the onset, evidently it was manifest that the Tribunal lacked jurisdiction to trudge in the path it trod and arrived at the destination or decision it did. Section 3 of the repealed Act did not confer jurisdiction upon the Tribunal to give ownership of land where a title exists. The Tribunal, should have downed its tools and sent parties to the proper forum since it could not determine ownership where the property was vested with a title issued under the Registered *Land Act*. In arriving at this holding, I am guided by the court’s pronouncements in *Joseph Malakwen Lelei & another vs. Rift Valley Land Disputes Appeals Committee & 2 others* [2014] eKLR, where the Court of Appeal held as follows:

“Evidently the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land, or the determination of a Trust in favour of a party, which in essence was the basis of the 3<sup>rd</sup> respondent’s claim. Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate on the matter before them, then all other grounds become moot. We say so because it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity... Moreover, Section 159 of the Registered *Land Act* (now repealed) which was in operation when the 3<sup>rd</sup> respondent filed her claim before the Tribunal was explicit that such a dispute could only be tried by the High Court.”

160. Similarly, in *Jonathan Amunavi vs. Chairman Sabatia Division Land Disputes Tribunal & Another* C.A Civil Appeal No 256 Of 2002 (Kisumu) the Court went on to say:

“... if the implementation of the decision of the Tribunal entails the sub-division of the suit land into two parcels, opening a register in respect of each sub-division and thereafter the transfer of the sub-division of half acre it’s clear that the proceedings before the Tribunal related to both title to land and to beneficial interest in the suit land and such a dispute is not within the provisions of Section 3(1) of the Land Disputes Act as such disputes can only be tried by the High Court, or by the Resident Magistrate’s Court where such latter Court has jurisdiction.”

161. It is beyond peradventure that the directions of the Tribunal that the 2<sup>nd</sup> Defendant was an owner of part of the land which was registered in the name of the Plaintiff was plainly contrary to law, null and void and it can only remain to be so. No sanitization of it by way of adoption of the award by a court



of law, as was done in Kitale SPMCC No. 105 of 1998 can ever legalize it. Thus, the decision of the Court in adopting the award and subsequently issuing a vesting order of whatever nature amounted to legitimization of an illegality. An unlawful act or step is and forever remains unlawful at the point in time where the law declares it to be so. It will not change its legality even if the law changed subsequent to that point in time to declare such an act lawful. For instance, if the law of Kenya declares presently that marriage between persons of the same sex is illegal but it changed in future to declare otherwise, it will not act retrospectively to legitimize ‘unions’ made before then.

162. I do not need to belabor further to find that indeed, the Tribunal acted outside the limits of its statutory granted jurisdiction. Consequently, all the subsequent orders and actions emanating from the strength of that decision are nothing but a nullity. In the circumstances, I find and hold that all the subdivisions emanating from the resultant property over West Pokot/Siyoi ‘A’/2713 were improper, illegal and unlawful. Further, it is clear that the said parcel of land was registered in the name of the Plaintiff and I do find as an obvious position that he was the lawful owner thereof irrespective of any other claims. Apart from the oral evidence, which this Court found unsatisfactory or short of the required standard of a balance of probabilities to hold otherwise, there was no evidence that he was registered as owner in trust for and on behalf of other persons.

**c. Whether the titles emanating from the subsequent subdivisions were obtained by fraudulent means**

163. I have already stated that all subdivisions arising out of West Pokot/Siyoi ‘A’/2713 were illegal and of consequence null and void. Extrapolating from that thus, it emerges that all titles in respect to those subdivisions cannot be held to be valid or voidable.

164. However, that is not the only reason I find to hold that the titles emanating therefrom were illegally, fraudulently and improperly obtained. Firstly, the vesting order which was issued in Kitale CMCC No. 105 of 1998, P. Exhibit 55, was clear that the Executive Officer was to sign transfer forms to vest the land in the name of the Plaintiff therein (the 2<sup>nd</sup> Defendant). What I see and find is that the Officer signed an application for subdivision of the parcel of land into two and purported to give the Plaintiff herein one and the other the 2<sup>nd</sup> Defendant. I see no orders of the Court mandating him to do so or a variation of the orders of adoption, although I have found them to have been a nullity. *lis pendens*. They knew the instant suit was pending yet they proceeded to enter into the sale of property which was the subject of the suit as to change its character. If they claim that they did not have express knowledge, they had constructive knowledge of the pendency of the instant suit and that cannot be overlooked by this Court. Thirdly, my analysis and finding of fraud stems from the fact that as at the time the other defendants entered into sale agreements between 2006 and 2010, while a restriction dated 01/02/2006, that predated the agreements, was already in force. It barred further dealings on the suit property until the present dispute had been finalized. Thirdly,

Secondly, the said parties entered into the agreements during the pendency of the instant suit and therefore acted against the doctrine of

165. Furthermore, Section 136 (1) of the repealed Registered *Land Act*, where the instrument the subject of this dispute was governed by, spelled out that the purpose of restriction was to prevent fraud, improper dealing or for any other sufficient cause. Section 137 (2) provided as follows:

“So long as any restriction remains registered, no instrument which is inconsistent with it shall be registered except by order of the court or of the Registrar.”



166. The order for removal of a restriction could be done on application of either party or on the Registrar's own motion. However, the removal of the order could only be made after giving the affected parties an opportunity to be heard. The court also had powers to remove a restriction upon application by a party and upon notifying the Registrar of the same. Thus, the removal of a restriction was the only way paved for making entries on a property under this regime.
167. In the present case, it is apparent that the said restriction, on the strength of its wordings alone, remained alive so long as the issues at hand had not been decided to its logical conclusion. Besides, I was not provided with any evidence to demonstrate that the restriction entered on 01/02/2006 was lawfully removed in the manner set out in the repealed Act. For these reasons, the transactions conducted therein were a nullity and void ab initio.
168. The other reason justifying my finding of fraud lies in my interpretation of Part VIII titled Restraints on Disposition in the repealed Act, at Division 2 thereof which is titled Cautions. Under it, Section 132 (1) allowed a party affected by futuristic entries on the subject suit land to register a caution to prevent further dealings on the land. Upon doing that the Registrar would give notice to the affected party concerning the same. I note that in the instant matter, this occurred when the Plaintiff registered the caution. In its notice dated 28/11/2008, that was complied with.
169. Although it appears that the Registrar returned the Plaintiff's initial caution(s) on 27/11/2008, it is my view that these must have not been in respect to the one dated 28/11/2008 since orders cannot apply prospectively unless the Registrar was engaged in a corrupt scheme to defeat the Plaintiff's interests.
170. Section 132 (2) of the repealed Registered Land Act provided that as long as a caution remains registered, no disposition which is inconsistent with it shall be registered except with the consent of the cautioner or by order of the court.
171. The Act set out mechanisms for removal of a caution. It outlined that it could be withdrawn at the instance of the Applicant, the court or the Registrar. The procedure for removal by the Registrar obligated him to issue notice to the cautioner and anyone objecting to it and hear both parties before cancelling the caution.
172. In the present dispute, it was not demonstrated to the Court that the cautions were removed in the manner set out in the Act. For instance, the caution placed on West Pokot/Siyoi 'A'/2713 by the Plaintiff seems to have disappeared mysteriously. Thus, as long as the cautions remained registered, no dealings were permitted on the title.
173. Fourthly, I note that the 2<sup>nd</sup> Defendant died on 27/05/2010. This evidence was confirmed by his second wife DW1. Thereafter, title deeds were issued with respect to the subdivision of land parcel number West Pokot/Siyoi 'A'/4434 as follows: West Pokot/Siyoi 'A'/4596; West Pokot/Siyoi 'A'/4597 transferred to the 3<sup>rd</sup> Defendant on 30/03/11; West Pokot/Siyoi 'A'/4601 transferred to the 4<sup>th</sup> Defendant on 03/06/2014; West Pokot/Siyoi 'A'/4602 title to 2<sup>nd</sup> Defendant on 28/09/2009; West Pokot/Siyoi 'A'/4603 transferred to the 5<sup>th</sup> Defendant on 03/06/2014; West Pokot/Siyoi 'A'/4826; West Pokot/Siyoi 'A'/4821 transferred to the 7<sup>th</sup> Defendant on 30/09/2009; West Pokot/Siyoi 'A'/4822 transferred to the 7<sup>th</sup> Defendant on 30/09/2009; West Pokot/Soyoi 'A'/4819 transferred to the 6<sup>th</sup> Defendant on 16/06/2014; West Pokot/Siyoi 'A'/4820 title to 2<sup>nd</sup> Defendant issued on 28/09/2009; West Pokot/Siyoi 'A'/4596 subdivided into two (2) plots namely West Pokot/Siyoi 'A'/5000 and West Pokot/Siyoi 'A'/5001 on 18/08/2010. Plot no. 5001 was transferred to the 7<sup>th</sup> Defendant on 24/08/2010 and later the 8<sup>th</sup> Defendant on 24/01/2017.



174. It is clear that except for land parcels number, West Pokot/Siyoi 'A'/4821 and West Pokot/Siyoi 'A'/4822 both transferred to the 7<sup>th</sup> Defendant on 30/09/2009, other subdivisions of the property were transferred to various parties after the 2<sup>nd</sup> Defendant passed on. Section 45 of the [Law of Succession Act](#) prohibits unauthorized persons from disposing off, dealing with, possess or in any other way intermeddle with the assets of a deceased person. In other words, the assets of the deceased person must vest in his estate on the lawful appointment of an Executor or Administrator. It was thus legally obligatory on the said persons to take out Letters of Administration to administer the affairs of the deceased estate. It follows that anything that was contrary to the law was fraudulent and illegal.
175. I have looked at the pleadings and evidence herein. The Administrators of the estate of the 2<sup>nd</sup> Defendant were appointed as such only for the purpose of dealing with the present suit. The was evidenced by the order issued in CMC Citation Case No. 5 of 2018 dated 12/03/2019. It thus follows that as at 28/05/2010, the assets of the 2<sup>nd</sup> Defendant could not be disposed of without the same vesting in his estate. In my view thus, all transactions that took place after 27/05/2010 were an exercise of illegality as not title could pass under the circumstances. Furthermore, the Administrators could not pass any title since they had not title to the estate ab initio, and were not authorized to do so.
176. In *Diamond Trust Bank Kenya Ltd vs. Said Hamad Shamisi & 2 Others* [2015] eKLR the court held as follows when faced with a similar issue:
- “Firstly, Section 26 (1) and (2) are exceptions to the general rule in the sale of goods that a person who does not have title to goods cannot, without the owner’s authority or consent, sell and confer a better title in the goods than he has. (Nemo dat quod non habet). These exceptions are examples of initiatives towards the protection of commercial transactions that Lord Denning famously referred to in *Bishopsgate Motor Finance Corporation Ltd V Transpoert Brakes Ltd* (1949) 1 KB 322, AT PP. 336 when he stated:
- “In the development of our law, two principles have striven for masterly, the first is for the protecting of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions; the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statue so as to meet the needs of our own times.”
- The 3<sup>rd</sup> and 4<sup>th</sup> defendants argue that the import and tenor of the Doctrine of Nemo dat quod non habet, was further amplified and/or otherwise deliberated upon in the decision in the case of *Katana Kalume & Another V Municipal Council Fo Mombasa & Another* [2019] eKLR as follows:
- “Nemo Dat quod Non Habet” (No one can give that which one does not have) equally applies to the purported allocation of the suit property herein to the 2<sup>nd</sup> defendant. A person cannot give a better title than what he has, except in rare cases such as, a sale under an order of court, transfer of negotiable instrument to a holder in due course. None of these exceptions apply in this case, No person can ever pass a better title than the one he has. They relied on the decision of the court of Appeal in *diamond Trust Bank Kenya Ltd vs. Said Hamad Shamisi & 2 others* [2015] eKLR.”
177. It is my considered view that the nemo dat quod non habet rule applied without exception because as long as the 2<sup>nd</sup> Defendant was deceased no title could pass without an order vesting his estate on the sellers or transferors. It is for these reasons that I find that the tittles issued flowing from the subdivision were obtained illegally, by means of fraud or on account of a corrupt scheme.



**d. Whether the 3<sup>rd</sup> - 10<sup>th</sup> Defendants were bona fide innocent purchasers for value without notice**

178. DW8, vested with authority to testify for the purchasers, the 3<sup>rd</sup> - 10<sup>th</sup> Defendants, informed that they were innocent purchasers for value without notice. During his evidence in chief, DW8 explained that during the execution of the sale agreements, the purchasers conducted searches that revealed that the properties were free from injunctive relief, restrictions, cautions or any other encumbrances.
179. Before establishing whether the properties were encumbered in anyway, I think it is prudent to lay an understanding of the meaning ascribed to the term ‘innocent purchaser for value without notice’. Under the 11<sup>th</sup> edn of the Black’s Law Dictionary, an innocent purchaser for value is defined as:
- “Someone who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims. Generally, a bona fide purchaser for value is not affected by the transferor’s creditor to the extent of the consideration that the purchaser has paid.”
180. The element of good faith must be established insofar as the purchaser bought a thing without any notice. It must be established that in ascertaining good faith, the purchaser could not have known or established that indeed, given the circumstances it was placed with, the property was encumbered or in any way in dispute.
181. Looking at the purchasers’ evidence in totality, two (2) weighty or momentous issues emerge. Firstly, although the purchasers indicated that they conducted their due diligence, none of them produced any evidence in that regard. For instance, it was testified that they conducted searches and established that the properties were free from encumbrances. However, no evidence was furnished to establish the credibility of those allegations. Not a single purchaser produced a certificate of official search showing the results they claimed to have obtained.
182. At the same time, the Plaintiff submitted that he registered two (2) cautions on 14/12/2005 and 13/11/2008. Although the letter dated 27/11/2008 from the Registrar indicated that the caution was returned unregistered since the interest claimed was not registrable and that the declaration was not executed by the Plaintiff, and may have discharged the cautions, what was the fate of those registered on 14/06/2006 and 28/11/2008?
183. Of critical importance, even assuming that the cautions presented for registration to the land registrar were not duly registered, the restriction placed on 01/02/2006 categorically prohibited any dealings until the present suit was finalized.
184. Were the purchasers candid with their evidence observing that one of the purchasers registered a restriction and the fate of it remains unknown? I think not. I also find that if indeed they conducted the searches, they were very much aware of the litigious dispute spanning between the Plaintiff and the 2<sup>nd</sup> Defendant herein but consciously chose to keep those facts within themselves surreptitiously. Even without the above facts, the 3<sup>rd</sup> - 10<sup>th</sup> Defendants cannot run away from the binding nature of the doctrine of lis pendens as I have found above.
185. It is my considered view that the purchasers herein opted to disdain the legal procedures with the ultimate expectation that things would go their way. But, alas! They did so to their own peril. Alternatively, the purchasers were engaged in a fraudulent scheme with a view to getting, at all costs, what they desired and in the end it could be costly to them.



186. Secondly, in his evidence and as pointed out above, DW8 testified that a number of the sale agreements were attested to by Barongo Advocate in 2006 and 2010; after the restriction was filed on 01/02/2006. The said Advocate acts for the Defendants in this matter. I have already stated that since the purchasers testified that a search was conducted, then unless for some unexplained and unimaginable reason they were unable to see the entry 01/02/2006, especially going by the fact that they engaged learned Counsel in execution of the subsequent agreements, they were very much aware of that restriction (and its effect of) barring further actions on the title until the hearing and determination of the present dispute.
187. Madan, J.A. in *Mawji vs. US International University & Another* [1976] KLR 185 explained the doctrine of lis pendens as follows:
- “The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”
188. Lis pendens is loosely translated to mean a pending lawsuit. The general principle is that no sale or transfer of land shall pass the hands of third parties that is the subject of dispute resolution before a competent court of law. It essentially bars parties from transacting until the dispute is heard and determined to its logical conclusion. It is in my view immaterial if there are no injunctive reliefs. An order of injunction indeed serves a greater purpose since the orders spell penal consequences upon a contemnor, if one emerges. Thus, for good order and mandatory compliance, they are laudable. However, their absence does not take away the fact that the instant suit was still alive. The restriction dated 01/02/2006 bolsters this train of thought. Its effect and tenor remained alive as long as the suit was pending in court.
189. In the end, I find that the purchasers herein were far from being innocent in any manner for any value whatsoever without notice and I do not hesitate to hold as so. They were not innocent purchasers for value.

**(e) Whether property could vest on third parties on the strength of the provision set out in the Land Control Act**

190. In the preamble the *Land Control Act* is introduced as a statute enacted to provide for controlling transactions in agricultural land. On the strength of the Land Control Board Application and Consent dated 22/08/2001 and 15/06/2004 respectively, I find that the said suit land falls within the scope of that Act: it was agricultural land.
191. Section 6 of the Act provides that all transactions in agricultural land, that would include the division of the property as to issue new titles is void unless consent has been obtained. In the present case, other than the subdivision of West Pokot/Siyoi ‘A’/2713, it was not demonstrated by both the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> - 10<sup>th</sup> Defendants that the subdivision of land parcel number West Pokot/Siyoi ‘A’/4434 was made following an application for and consent for subdivision by the Land Control Board as required by the *Land Control Act*. They did not prove further that the subsequent sales and subdivisions were approved by the land control board as required by the Act.
192. Section 8 of the Act provides that the Application for consent from the Board, mandated to grant such consent, must be made within six (6) months of the making of the agreement of the land controlled



- transaction. It was therefore paramount for the parties to effect the transactions within the stipulated six month period. It was only on Application by party to the High Court, to seek leave to extend such period.
193. Ultimately, I note that the Application for consent to subdivide West Pokot/Siyoi 'A'/2713 was made on 22/08/2001. This followed the vesting order issued on 22/08/2001. However, there was no evidence presented before me to demonstrate that the Applicant applied for consent to transfer the suit land. I thus find that the effected transfers of the plots from the Plaintiff to the deceased 2<sup>nd</sup> Defendant and subsequently to the 3<sup>rd</sup> - 10<sup>th</sup> Defendants were void for violating mandatory provisions of the [Land Control Act](#) as set out herein.
194. In regard to the Counterclaim, the defendants pleaded that the Plaintiff held land parcel No. West Pokot/Siyoi 'A'/2713 in trust for Salim Ndamwe. They then prayed that a declaration does issue to that effect and that as a result the could does not cancel the titles as prayed by the Plaintiff. The Plaintiff denied the averment and testified that he was rightly given the land and got himself duly registered as proprietor.
195. Section 107 of the [Evidence Act](#) is clear that he who alleges a fact must proof it unless the law has prior thereto removed the burden, such as by way of irrebuttable presumption, and placed it on someone else. Thus, it was incumbent upon the Defendants to proof that allegation.
196. I have carefully considered the evidence adduced by the Defendants. I have also carefully analyzed the evidence, both oral and documentary, on how the Plaintiff got himself registered as proprietor of land parcel No. West Pokot/Siyoi 'A'/2713. First, I note as I did before that the said parcel of land was not the one that was initially registered in the name of the Plaintiff but was a resultant subdivision of West Pokot/Siyoi 'A'/603. The evidence of the defendants, especially DW4 whose testimony and evidence most of the other defence witnesses adopted as giving the comprehensive history of the suit lands pointed to, although inadequately as to measure to the standard of proof on a balance of probabilities, to the fact that the Plaintiff was initially registered as a trustee of the land parcel number West Pokot/Siyoi 'A'/603 which was subdivided to give rise to one of two parcel numbers, namely, 2485 which upon subdivision gave rise to one of two parcel numbers, namely, 2713. Why then the Defendants pleaded and testified that it was the parcel number 2713 that was supposed to have been registered in trust for the said Salim it a mystery and a mere conjecture. Why they left out the other supposed beneficiary than Salim only to claim for it for the latter is a guess as good as mine.
197. Be that as it may, the Adjudication documents do not indicate that parcel number 603 was registered in trust of other persons. Only oral testimony tends to suggest that fact. But oral cannot override documentary evidence. Besides, DW2 and DW5 who adopted the statement of DW6, Evans Wanyama, stated that Evans knew the issues well. The said Evans stated that he was sent by his father, Wakoli Ndamwe, to Kapenguria DO's office about Asiz Ndamwe, the Plaintiff over the land. Notably, the father neither wrote a complaint or note nor appeared at the said administrative offices to prosecute the complaint, before he died. I find that evidence wholly unconvincing, especially not coming from the person who gave the land to the Plaintiff, that is, the later father of the Plaintiff. The evidence by the Habib Salim Ndamwe that the land was held in trust for the father is nothing but inadmissible hearsay especially given that he admits that by 1975 when the adjudication took place he was 11 years old, and even then, he was not present when the transactions took place. Thus, the claim of trust fails.

**(f) Who to bear the costs of the suit**

198. It is trite law that costs follow the event unless directed otherwise by the Judge for good reason. Section 27 (1) of the [Civil Procedure Act](#) gives the court discretion to determine by whom and out of what



property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid.

199. In the present suit, I find that although the Plaintiff succeeds. But in determining the award on costs, this Court shall take into account the fact that the Plaintiff and the original Defendants were family members.

### **Orders and Disposition**

200. I note that in his evidence, the Plaintiff intimated that he was willing to sell the suit land to the Defendants. The problem of drafting followed the parties herein to the prayers as I note here: if the Court cancels a title resulting from a subdivision of land, how can the same title be again found to be worth of it being declared to be rightly owned by one or registered in the name of the party who has succeeded to have it cancelled? To me it does not make sense.

201. Following my above exposition in the matter, my final orders are as follows:

- a. The Plaintiff is the legal and rightful owner of all that parcel of land namely West Pokot/Siyoi 'A'/2713.
- b. The decision and proceedings of the Kapenguria Land District Tribunal were a nullity, including the judgment emanating from Kitale SPMCC Land case No. 105 of 1998, were of no legal purpose.
- c. I hereby order a cancellation of the all the resultant subdivisions arising out of West Pokot/Siyoi 'A'/2713 and that the register be rectified accordingly to the effect that the land reverts back to West Pokot/Siyoi 'A'/2713 in the name of the Plaintiff.
- d. On the strength of the Plaintiff's admission, I direct the parties herein negotiate on any potential agreements in respect to the suit parcel of land within sixty (60) days from the date of this order, while following the provisions of the [Land Control Act](#).
- e. If the parties fail to agree in (e) above within sixty (60) days from the date of this order or any longer period but ONLY at the option of the Plaintiff, an order of eviction do issue evicting all the Defendants, their assigns, personal representatives, agents, servants or anyone claiming under them.
- f. Upon the option of eviction of any of the Defendants being exercised by the Plaintiff as ordered in (e) above, a permanent injunction shall take effect accordingly, restraining the Defendants, their agents, servants, assigns, personal representatives or whosoever claiming under them from interfering with all that parcel of land namely West Pokot/Siyoi 'A'/2713.
- g. The Counterclaim amended on 18/12/2020 and filed on 21/12/2020 lacks merit and is hereby dismissed with no orders as to costs.
- h. The 3<sup>rd</sup> - 10<sup>th</sup> Defendants will bear half of the costs of the Plaintiff's suit.

202. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 15<sup>TH</sup> DAY OF MAY, 2023.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**

