



Kahiro (Suing as the Legal Representative of the Estate of Kahiro Maara (Deceased)) v Njoroge & 2 others (Environment & Land Case 1502 of 2014) [2023] KEELC 18223 (KLR) (19 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18223 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1502 OF 2014**

JO MBOYA, J

JUNE 19, 2023

BETWEEN

**GATHONI KAHIRO PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KAHIRO
MAARA (DECEASED)**

AND

**THINI NJOROGE 1ST DEFENDANT
JAMES KIBICHO NJUGUNA 2ND DEFENDANT
MONICAH NYAGICAI KIGURU 3RD DEFENDANT**

JUDGMENT

Background and Introduction

1. The Subject matter was commenced vide Plaintiff dated the 26th November 2014; but which Plaintiff was thereafter amended in terms of the amended Plaintiff dated the 21st January 2015.
2. Furthermore, the amended Plaintiff was further amended and thus the operative Plaintiff is the Further amended Plaintiff dated the 23rd June 2022; and in respect of which, the Plaintiff herein has sought for the following reliefs;
 - i. A restraining order against the Defendants, their agents and/or servants from encroaching, trespassing or in any manner interfering with the Plaintiff's peaceful use and occupation or quiet enjoyment of the suit property known as L.R No 10090/63 (Deed Plan No. 113471) originally L.R No. 10090/13.



- ii. A declaration that the Plaintiff is the legal and rightful owner of the said L.R No. 17894/27 (I.R No. 23749) previously L.R No. 10090/13 and now sub-divided into six (6) portions and in particular L.R No. 10090/63 Deed Plan No. 113471 and the Defendants have no claim whatsoever.
 - iii. Eviction of the Defendants from the suit property altogether.
 - iv. General damages for trespass as the court may deem fit to assess.
 - v. Any other or further relief the Honourable court may deem fit and just to grant.
3. Upon being served with the original Plaint, the Defendants herein duly entered appearance and filed a Joint Statement of Defense dated the 15th December 2014. For good measure, the Defendants herein adopted and relied on the same Statement of Defense in answer to the amended and Further amended Plaints respectively.
 4. Following the conclusion of the Case Conference, the instant matter which was filed in court on the 28th November 2014; ultimately took off and the hearing was commenced on the 6th October 2021, whereupon the Plaintiff called Four witnesses while the Defense case revolves around the testimony of three (3) Witnesses.

Evidence by the Parties::

a. Plaintiff's Case

5. The Plaintiff's case revolves around the evidence of Four witnesses, namely; Michael Mbugua Kahiro, Samuel Kangei Kahiro, Gathoni Kahiro and Peter Ng'ang'a Kahiro, who testified as PW1, PW2, PW3 and PW4, respectively.
6. It was the testimony of PW1 that same is a Son of one Kahiro Maara, now deceased. Further, the witness also stated that the late Kahiro Maara, Deceased, was registered as the owner of L.R No. 10090/13; I.R No. 17894/27, together with other persons as owners in common.
7. In addition, the witness testified that pursuant to and on the basis of the registration of the subject property in the name of Kahiro Maara, now deceased, he (witness) together with his siblings and the Plaintiff herein entered upon and commenced occupation of a portion of the subject property measuring 10 acres.
8. Furthermore, the witness testified that upon the death of Kahiro Maara, now deceased, the Plaintiff herein commenced succession proceedings and was ultimately granted Letters of administration over and in respect of the Estate of the said Kahiro Maara.
9. On the other hand, the witness also testified that the subject property is currently registered in the name of the Plaintiff, who holds same on Trust for the entire Kahiro Maara's Family.
10. On the other hand, it was the testimony of the witness that on or about the year 2009, the Defendants herein encroached upon and trespassed onto the subject property and commenced to interfere with their occupation, possession and use of the subject property.
11. Additionally, the witness testified that the Plaintiff, himself and his siblings took suitable steps and measures to prevent the offensive activities of the Defendants, but the Defendants remained adamant and continued to occupy a portion of the subject property measuring approximately five (5) acres.



12. Other than the foregoing, the witness intimated to the Honourable court that same recorded a witness statement dated the 30th January 2019; and in this respect, the witness sought to adopt and rely on the witness statement. For good measure, the witness statement dated the 30th January 2019 was thereafter adopted and admitted as the Evidence in chief of the witness.
13. On cross examination by Learned counsel for the Defendants, the witness herein stated that even though he has attended court and testified, same is not knowledgeable and/or familiar with the registration number of the subject property. Further, the witness added that he does not know in whose name the land has been registered.
14. Whilst under further cross examination, the witness also admitted that the Defendants herein have been staying on a portion of the land, whose registration details he does not know. In any event, the witness pointed out that the portion of land which is occupied by the Defendants measures approximately 5 acres.
15. In addition, the witness stated that the title in respect of the subject property has not been issued. However, the witness quickly recanted the said position and thereafter averred that same is aware of a title which was issued in the name of the Plaintiff herein.
16. Nevertheless and when pressed further, the witness stated that he doesn't have the said Certificate of Title before the Honourable court.
17. On the other hand, when same was referred to the Certificate of title which was filed by the Plaintiff, the witness admitted and confirmed that the said Certificate of title does not contained the name of the Plaintiff herein, as on of the registered owners of the said property.
18. Moreover, the witness added that the certificate of title, which has been filed before the Honourable Court shows that the land in question belongs to and is registered in the names of 6 persons, 5 of whom the witness stated have since passed on. In any event, the witness clarified that the only registered owner, who remains alive to date is known as Njuguna Wakahi.
19. The 2nd witness who testified on behalf of the Plaintiff was Samuel Kangei Kahiro, who was PW2.
20. According to the witness herein, same indicated that the subject property, namely, L.R No. 10090/13 was lawfully registered in the names of six persons, including Mr. Kahiro Maara, who is now deceased.
21. It was the further testimony of the witness that upon the death of the deceased, the Estate thereof was succeeded by the Plaintiff herein who was duly issued with the requisite Grant of Letters of administration. In this regard, the witness pointed out that the suit property was thereafter registered in the name of the Plaintiff, albeit to hold on Trust for the Kahiro Maara Family.
22. On the other hand, the witness averred that the despite the fact that the Land in question belongs to the Plaintiff herein, who holds the property on trust for the Kahiro family, the Defendants herein have illegally encroached upon and trespassed onto the said property, albeit without the consent and permissions of the Plaintiff.
23. Furthermore, the witness also stated that the Defendants herein have since remained on the occupation of the subject property and; as a result of the unlawful occupation, the Defendants herein have denied and deprived the Plaintiff of the right to use and benefit from the subject property. In this regard, the witness has impressed upon the Honourable court to find and hold that the Plaintiff herein has established and proved her case according to the requisite standard of proof.



24. Other than the foregoing, the witness alluded to his witness statement dated the 30th January 2019; and which same sought to adopt and rely on. In this regard, the witness statement was duly adopted and admitted as further Evidence in chief of the witness.
25. On cross examination by Learned counsel for the Defendants the witness herein pointed out that same has previously seen a Certificate of title over and in respect of the subject land. In any event, the witness added that the certificate of title, which he has hitherto seen, contains and bears the names of the Plaintiff.
26. Nevertheless, the witness herein stated that same could not remember or recall the title number of the property in question.
27. Additionally, the witness pointed out that the Defendants are in occupation of a portion measuring 5 acres. Consequently, the witness added that the entire land should be registered in the name of the Plaintiff.
28. The third witness who testified on behalf of the Plaintiff was Gathoni Kahiro. Same testified as PW3.
29. The witness herein averred that same is the Plaintiff in respect of this matter. Furthermore, the witness added that she is a widow of one Kahiro Maara, now deceased.
30. On the other hand, it was the testimony of the witness that upon the death of Mr. Kahiro Maara, Deceased, same applied for and was issued with Grant of Letters of administration. In this regard, the witness thus pointed out that she is the Administratrix of the Estate of the deceased.
31. In addition, the witness testified that she is the one who has sued the Defendants herein. In any event, the witness added that she has sued the Defendants because same has encroached onto and/or trespassed onto her late husband's land.
32. Other than the foregoing, the witness testified that she has sued the Defendants because she wants the Defendants to be evicted and removed from the land.
33. On the other hand, the witness herein referred to her witness statement dated the 30th January 2019; and which witness statement same sought to adopt and rely on. In this regard, the witness statement was duly admitted and constituted as the evidence in chief of the witness.
34. Nevertheless, it is important to point out that the witness herein was not cross examined because same appeared not to be abreast of the facts and the issues pertaining to and concerning the subject matter. Furthermore, the advocates for the Parties kept disputing the interpretation by the Court interpreter.
35. Ultimately, the advocate for the Plaintiff chose to let lie and instead indicated that same would bring forth another witness to take up the position of the Plaintiff and to testify before the Honourable court.
36. The 4th witness who testified on behalf of the Plaintiff was one Peter Ng'ang'a Kahiro. For coherence, the said witness was PW4.
37. It was the testimony of the witness that as a result of the age of Gathoni Kahiro, the Plaintiff herein, same was constrained to and applied to be a co-administrator of the Estate of Kahiro Maara, now deceased.
38. It was the further testimony of the witness that thereafter same was constituted as a Co-administrator and in this regard, the witness pointed out that same is now competent and authorized to tender evidence for and on behalf of the Plaintiff.



39. Additionally, the witness testified that as concerns the subject matter, same has since recorded a witness statement dated the 23rd June 2022. In this respect, the witness sought to adopt and rely on the witness statement dated 23rd June 2022.
40. At the instance and request of the witness, the witness statement dated the 23rd June 2022; was adopted and constituted as the evidence in chief of the witness.
41. Furthermore, the witness also alluded to the List and Bundle of documents which had hitherto been filed by the Plaintiff and sought to have same produced and admitted as exhibits before the court.
42. In this respect, the documents at the foot of the List of Documents dated 21st January 2015 were thereafter admitted as exhibit P1 to P4, respectively.
43. On the other hand, the witness also referred to the Further List of Documents dated the 15th January 2018 and same sought to adopt and rely on same as further evidence. In the absence of any objection, the documents at the foot of the List dated 15th January 2018 were admitted as exhibits P5 to P8, respectively.
44. On cross examination by Learned counsel for the Defendants, the witness testified that the land in question belongs to his late Father, namely, Kahiro Maara, now deceased.
45. Furthermore, the witness stated that a certificate of title was indeed issued over and in respect of the subject property. However, the witness added that the certificate of title shows and confirms that the land in question is registered in the name of the many persons.
46. Additionally, the witness pointed out that the many persons, include his late father, who was also a shareholder in respect of the land. In any event, the witness added that most of the persons, who had been registered as the owners of the land, have since passed on. In addition, the witness stated that only one of the registered owners remains alive to date.
47. It was the further testimony of the witness that same has sued the Defendants because the Defendants have entered upon and trespassed onto the Land belonging to Kahiro Maara, now deceased.
48. In addition, the witness averred that the Certificate of title in question relates to L.R No. 10090/63, which lawfully belongs to Gathoni Kahiro, the Plaintiff herein.
49. With the foregoing testimony, the Plaintiff's case was duly closed.

b. Defendants' Case:

50. The Defendants' case is anchored and premised on the evidence of three witnesses namely; Thini Njoroge, James KNjuguna and Monicah Kiguru, who testified as DW1, DW2 and DW3, respectively.
51. It was the testimony of DW1, that same bought and/or purchased a portion of the subject property, namely L.R No. 10090/13, from one James Muhiru Kagotho, who sold unto him a portion measuring three acres.
52. Furthermore, the witness pointed out that the Land in question belonged to and was registered in the names of various owners, most of whom have since passed on, with the exception of one Njuguna Wakahi.
53. It was the further testimony of the witness that same entered into the Land in the year 1983. For good measure, the witness added that he has since remained in occupation and possession of the disputed portion of Land to date.



54. In addition, the witness testified that same has since recorded a witness statement pertaining to and in respect of the matter. In this regard, the witness sought to adopt and rely on the Witness statement dated 23rd may 2023. In this respect, the witness Statement dated 23rd may 2023, was thereafter adopted and constituted as the Evidence in chief of the witness.
55. The 2nd witness was James KNjuguna, who testified as DW2. It was the testimony of the witness herein that same bought a portion of the subject property from James Muhiru Kagotho in the year 1993 and thereafter, same entered upon and took possession of the sold portion of land.
56. Other than the foregoing, the witness testified that upon purchase of a portion of the subject parcel of land, same entered upon and constructed his Residential premises thereon. In any event, the witness added that he has been in possession and occupation of the purchased portion of land ever since the year 1993.
57. Additionally, the witness intimated to the Honourable court that same has recorded a witness statement dated the 23rd May 2022. In this regard, the witness sought to adopt and rely on the witness statement as his Evidence in chief.
58. For completeness the witness statement dated the 23rd May 2022 was thereafter adopted and constituted as the Evidence in chief.
59. The third witness who testified on behalf of the Defendants was Monicah Kiguru. For good measure, same testified as DW3.
60. It was the Evidence of the witness that her late husband bought a portion of the subject property from Mr. James Muhiru Kagotho on or about 1983. Further, the witness added that her late husband and herself thereafter entered upon and took possession of the sold portion of the subject property.
61. Furthermore, the witness also testified that when her late husband died, same was buried on the portion of land which had been purchased/bought.
62. Additionally, the witness testified that she has remained in occupation and possession of the suit property since the year 1993 to date.
63. Other than the foregoing, the witness intimated that same had recorded a witness statement dated the 23rd May 2023 and therefore same sought to adopt and rely on the said witness statement. Instructively, the witness statement was thereafter adopted and constituted as the Evidence in chief of the witness.
64. On cross examination by Peter Ng'ang'a Kahiro, who is a co-Plaintiff; the witness reiterated that her late husband bought the disputed portion of land from Mr. James Muhiru Kagotho.
65. In addition, the witness also testified that the said James Muhiru Kagotho, who sold a portion of the subject land to her (witness) husband, was one of the shareholders of the subject land.
66. Finally, the witness pointed out that same entered upon and has remained in occupation of the land since 1983.
67. With the foregoing testimony, the Defendants' case was duly closed.

Submissions by the Parties:

a. Plaintiff's Submissions:

68. The Plaintiff filed written submissions dated the 5th April 2023 and in respect of which the Plaintiff has raised, highlighted and canvassed four issues for due consideration by the Honourable court.



69. First and foremost, Learned counsel for the Plaintiff has submitted that L.R No. 10090/13 was registered and owned by six (6) persons, inter-alia, Kahiro Maara, now deceased. Further, Learned counsel also added that the subject property was owned by the named persons as tenants in common.
70. Secondly, Learned counsel for the Plaintiffs has submitted that what was hitherto L.R No. 10090/13 was thereafter subdivided into five portions culminating into the creation of L.R No's 10090/59 to 10090/63, respectively.
71. In addition, Learned counsel has submitted that upon the subdivision of the original parcel of land, namely, L.R No. 10090/13, the resultant subdivision and in particular L.R No. 10090/63 was transferred and registered in the name of the Plaintiff herein.
72. Premised on the foregoing, Learned counsel for the Plaintiff has therefore contended that the Plaintiff herein is the lawful and legitimate owner of the suit property. In this regard, counsel invited the Honourable court to find and hold that indeed that Plaintiff is the lawful and legitimate owner of (sic) L.R No. 10090/63.
73. Lastly, Learned counsel for the Plaintiff has submitted that the Defendants herein do not have any lawful or legitimate rights or interests over and in respect of the suit property. In this regard, Learned counsel for the Plaintiff has therefore implored the Honourable Court to find and hold that the Defendants are actually trespassers and thus same ought to be evicted from the suit property.

b. Defendants' Submissions:

74. The Defendants filed written submissions dated 18th May 2023; and same have raised and canvassed two issues for due consideration by the Honourable court.
75. Firstly, Learned counsel for the Defendants has submitted that the subject property namely, L.R No. 10090/13 was registered in the name of 6 persons, inclusive of one Kahiro Maara, now deceased. Further, Learned Counsel added that the property was owned by the owners thereof as Tenants in Common.
76. Insofar as the property was owned by the various persons as Tenants in common, the Plaintiff herein cannot now purport and/or pretend to be the lawful and legitimate owner to the exclusion of the rest of the tenants in common.
77. Additionally, Learned counsel for the Defendants has also submitted that the suit property which is the subject of the current proceedings, L.R No. 10090/63, does not belong to the Plaintiff herein or otherwise. In this regard, Learned counsel for the Defendants invited the court to take cognizance of a copy of Certificate of title which was produced before the court by the Plaintiffs.
78. Finally, Learned counsel for the Defendants has submitted that the Defendants herein entered upon and took possession of various portions of the suit property, as a result of purchase or acquisition thereon from the co-owners of the subject property. In any event, Learned Counsel added that the Defendants herein entered upon the named portion of the suit property in the years 1983 and 1993, respectively.
79. Premised on the foregoing, Learned counsel for the Defendants has thus contended that the Defendants have been of occupation of the disputed portions of the suit property for a substantial amount of time. Consequently and in this respect, counsel has implored the court to find and hold that the Plaintiff's case is not legally tenable.



Issues for Determination

80. Having reviewed the Pleadings filed by the Parties and having taken into account the oral Evidence tendered by and on behalf of the Parties herein and finally upon considering the written submissions filed, I come to the conclusion that the following issues are pertinent and thus worthy of determination;
- i. Whether the suit Property namely L.R No. 10090/63 (Original Number 10090/13) belongs to the Plaintiffs or better still whether same comprised of the Estate of Kahiro Maara, now deceased.
 - ii. Whether the Plaintiff's suit as against the Defendants is Statute barred by dint of the provisions of Section 7 and 12 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
 - iii. What Reliefs ought to be granted.

Analysis and Determination

Issue Number 1 Whether the Suit Property namely L.R No. 10090/63 (Original Number 10090/13) belongs to the Plaintiffs or better still; whether same Comprised of the Estate of Kahiro Maara, now Deceased.

81. The Plaintiff herein has filed the instant suit and same contends that the suit property namely, L.R No. 10090/63, (original number 10090/13), lawfully belongs to and is registered in the name of the Plaintiff and hence same is entitled to a declaration to that effect.
82. In respect of the claim that the suit property lawfully belongs to and is registered in her name, the Plaintiff tendered to and produced before the court a copy of certificate of lease registered on the 19th October 2018. In this regard, it is imperative to state and underscore that the certificate of lease which was tendered and produced by the Plaintiffs reflects that L.R No. 10090/63 belongs to and is registered in the names of Kahiro Mara, Kgonye Warindi, Wakahiu Njuguna, Gitau Githaiga, Kimani Kabogoro and Joseph Njoroge Kamau; as tenants in common in equal share.
83. My reading of the Lease instrument and the resultant certificate of lease which was issued on even date, namely, the 19th October 2018 shows and confirms that the property alluded to and which the Plaintiff herein claims to be her property is still registered in the names of various persons as owners in common.
84. Consequently and in this regard, it is difficult to appreciate and comprehend the basis under which the Plaintiff herein contends that the suit property belongs unto her.
85. Furthermore, during the hearing of the case and in particular on cross examination, PW1 stated as hereunder;

“I don't know in whose name the land is registered. The Defendants are staying on the land and the portion on which the stay measures about 5 acres. The title has not been issued. Further, I don't have the title deed in court”

86. Further and in addition, PW1 continued and stated as hereunder;

“The title deed at page four of the Plaintiff's bundle does not have the name of Gathoni Kahiro. The name of the Plaintiff is not in the title. The title is in the names of 6 people. 5 of the people whose names are in the title are now Deceased”



87. On his part PW2 stated as follows during cross examination as hereunder;
- “I have a title deed showing the names of the Plaintiff. The title deed is for parcel number 100XXX. I now say that I have forgotten the number of the title. The title deed whose number I have forgotten is for 10 acres”
88. Whilst under further cross examination, PW2 added as hereunder;
- “I now wish to state that we have not produced before the court a copy of title that bears the name of the Plaintiff”
89. On his part PW4 stated during cross examination stated that the certificate of title which same has produced before the Honourable court shows that the suit property belongs to many persons who own the land in common, albeit in equal shares. In addition, the witness added that the late Kahiro Maara only owned a portion of the suit property.
90. Premised on the evidence on record, there is no gainsaying that the Plaintiff and her witnesses did not tender and/or avail to court any certificate of lease either bearing the name of Kahiro Maara, now Deceased or the name of the Plaintiff herself.
91. To the contrary, the Lease instrument and the certificate of lease which have been produced and tendered before the Honourable court show that the Suit property L.R No. 10090/63 (I.R 10090/13) is still registered in the names of 6 persons as owners in common in equal share.
92. In this regard, it is instructive to state and underscore that for as long as the suit property is registered in the names of 6 persons as owners in common, the Plaintiff herein cannot be heard to lay a claim to the whole of the suit property and to pretend that same lawfully belongs to her.
93. Additionally, it is my considered view that for as long as the suit property is registered in the name of the 6th persons as owners in common, then each of the owners in common owns an equal portion of the suit property and the portion owned by each by the owners thereof would ordinarily pass over to the heirs/beneficiaries of the named owners upon death.
94. For good measure, it is imperative to point out that unlike Joint ownership wherein the Doctrine of survivorship or Jus accrescendi applies; ownership in common does not invite the application of the Doctrine of survivorship.
95. In view of the foregoing, it is not legally tenable for the Plaintiff herein to purport and claim that same owns the entirety of the suit property and by extension that same can approach the Honorable court and seek to procure an order of eviction, with a view to evicting the rest of the persons who are in occupation of the suit property.
96. To be able to understand and appreciate the scope and tenor of ownership in common/tenancy in common, it is imperative to take cognizance of and to reiterate the holding of the Court of Appeal in the case of *Mukazitoni Josephine versus Attorney General Republic Of Kenya* [2015] eKLR, where the court of appeal stated thus;
34. We have considered the appellant’s contention and the learned judge’s finding. The title document to the property has two names and this is concurrent ownership. There is no indication as to whether the property is held on a tenancy-in-common or joint tenancy or tenancy in entirety. When a property is registered in more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in joint tenancy and not



tenancy-in-common or tenancy in entirety. A tenancy in common or tenancy in entirety means that the interest of each registered owner is determinable and severable; in a joint tenancy, the interest of each owner is indeterminable, each owns all and nothing.

35. A joint tenancy cannot be severed unless one of the four unities of title, time, possession or interest is broken. A joint tenant has the right to the entire property or none – since the other joint tenant also has a right to the entire property. This is expressed in Latin as *totem tenet et nihil tenet*, a Joint tenant holds everything and nothing
97. Premised on the succinct and elaborate exposition of the law (*supra*), it is not possible for this Honourable court to proceed and hold that the Plaintiff herein is the lawful owner and/or proprietor of the suit property, either as claimed or at all. However, it suffices to underscore that the Plaintiff is entitled to claim the portion of the suit property, which represents the share of her late husband.
98. The second aspect of the claim herein turns on whether or not the suit property constitutes the Estate of the deceased, so that same falls under the administration of the Plaintiff herein.
99. I beg to point out that the Plaintiff herein took out and filed succession proceedings before the Chief Magistrate court at Thika and included therein the entire of the property known as Thika Municipality/10090/13; and purported that the entire of the said property belonged to Kahiro Maara, now deceased.
100. Suffice it to state that arising from the representations that were made by the Plaintiff herein, the succession court proceeded to and distributed the named property to the Plaintiff, who was (*sic*) to hold same on trust for herself and the family of Kahiro Maara.
101. In my humble view, the position reflected in the Certificate of Confirmation of Grant which was produced as exhibit P5 before this Honourable court does not correspond with and/or replicate the ownership status contained in the certificate of lease issued on the 19th October 2018.
102. In the premises, I am at pains to understand how the Plaintiff herein can seek to lay a claim to the entirety of the suit property, yet the documents produced before the Honourable Court confirm that the suit property is still registered in the names of 6 persons, *inter-alia*, Kahiro Maara as owners in common.
103. Be that as it may, I come to the conclusion that it would be a travesty of justice for this court to proclaim the Plaintiff as the lawful and legitimate owner of the entirety of the suit property, whilst knowing that the suit property is owned in common with others, who have not been enjoined in the current suit.

Issue Number 2

Whether the Plaintiff's suit as against the Defendants is Statute barred by dint of the Provisions of Sections 7 and 12 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.

104. During the hearing of the Defense case, the Defendants separately testified before the court and each one of them informed the court of the circumstances leading to their entry onto and occupation of a portion of the suit property.
105. Firstly, Thini Njoroge testified that same bought a portion of the suit property measuring three acres from James Muhiru Kagotho, now deceased; who was entitled to a portion of the suit property. Furthermore, the 1st Defendant added that same entered upon and took possession of the sold portion of the suit property in the year 1993.



106. On his behalf, the 2nd Defendant also testified that same also bought a portion of the suit property from the same James Muhiru Kagotho in the year 1993 and thereafter he entered and took possession thereon.
107. On her part, the 3rd Defendant testified that her late husband bought a portion of the suit property measuring one acre in the year 1993. In addition, the 3rd Defendant averred that upon the purchase and acquisition of the portion of the suit property by her husband, same moved thereon and established and built their home.
108. Furthermore, the 3rd Defendant also testified that subsequently her husband passed on and was buried on the designated portion of land in the year 1984.
109. Other than the foregoing, the 3rd Defendant also testified that same has remained on occupation of the designated portion of the suit property since 1983 to date.
110. Arising from the testimony which was tendered by and on behalf of the Defendants, what becomes evident is the fact that all the Defendants have been in occupation and possession of the disputed portions of the suit property for more than 12 years as at the time when the current suit was being filed.
111. Instructively, if the Plaintiff herein was convinced that the Defendants had unlawfully encroached upon and/or trespassed onto portions of the suit property, albeit without her permission and consent, then it behooved the Plaintiff to take appropriate measures and steps to evict the Defendants from the suit property.
112. Moreover, it is imperative to underscore that whatever steps and/or measures that the Plaintiff would have deemed appropriate to take as against the Defendant, same ought to have been taken within 12 years from the date from the offensive entry and occupation. For good measure, the Plaintiff was enjoined to comply with and/or abide by the provisions of Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
113. For ease of reference, the provisions of Section 7 of the *Limitation of Actions Act*, (supra), provides thus;
7. Actions to recover land
- An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
114. In my humble view, the suit herein, which effectively seeks to recover the portions of lands occupied by the Defendants, was mounted long after the lapse of the 12-year period. Consequently, the Plaintiff's claim, if any, to and in respect of the disputed portion of the suit property stood extinguished by effluxion of time.
115. As pertains to the legal effect, implication and consequence of limitation, there is no gainsaying that a cause of action that is statute barred is rendered moot, sterile and redundant. In this regard, such a cause of action cannot be activated and/or prosecuted before a court of law.
116. To highlight the exposition contained in the preceding paragraph, it is appropriate to take cognizance in the case of *Gathoni versus Kenya Co-operative Creameries Ltd*[1982] eKLR, where the court observed as hereunder;

The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is



made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.

117. Furthermore, the effect of Limitations on cases and causes of actions, was underscored and elaborated upon by the Court of Appeal in the case of *Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) vs Rosaline Njeri Macharia & Another* [2016] eKLR. This Court stated:

“As to whether the suit was statute barred under the *Limitation of Actions Act*, the suit was filed on 19th July 2007. By dint of paragraphs 24, 25, 26, 28, 29 and 30 of the plaint, the cause of action was pleaded to have accrued on 27th July 1999 when the alleged breach of contract occurred. As the breach was of a contract relating to lending of money whose security instrument is contested, section 4(1)(a) of the Limitations of Actions Act, Cap 22 requires that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. In this appeal, the “suit” having been instituted in 2007 when the accrual of the cause of action was in July 1999, it was clearly filed outside the six-year period and consequently was time barred, if indeed it was a suit.”

118. Whereas the Court of Appeal was considering the limitation of time as relates to contracts, it is instructive to observe that same underscored that a suit that is filed outside the statutory timelines, cannot be deemed as a suit strictu sensu.
119. Consequently and without belaboring the point, it is my humble view and conclusion that the instant suit which was filed on the 28th November 2014 was clearly statute barred by dint of section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

Issue Number 3

What Reliefs ought to be Granted

120. The Plaintiff herein has impleaded and sought for various reliefs including an order of Permanent Injunction, Declaration and Eviction of the Defendants from the suit property.
121. However, whilst discussing issue number one herein before, the court found and held that the suit property belongs to and is owned by six persons as owners in common alongside Kahiro Maara, now deceased.
122. Furthermore, the court also found that even though the suit is owned in common in others, the other owners in common (most of whom are reported to be dead) have not been joined in the subject matter. In this regard, it is not possible to establish and authenticate whether the Defendant herein were put in place by the other co-owners.
123. Nevertheless, it is not lost on the Honourable court that the Defendants herein have indeed contended that their entry onto and occupation of portions of the suit property is informed by lawful purchase from some of the owners in common/their heirs.
124. In any event, the court also found that the Plaintiff herein cannot claim absolute and exclusive ownership of the suit property. Consequently and in view of the foregoing observations, it is apparent that the reliefs that are sought by the Plaintiff herein are not legally tenable and hence cannot be granted.



125. Other than the foregoing, the Plaintiff has also sought for General damages for trespass. In this respect, I beg to point out that General damages are lawfully awardable to the owner of the property whose rights have been interfered with and/or violated by a Third Party, albeit without lawful basis.
126. In this respect, had the Plaintiff established that the Defendants herein were truly trespassers, (which has not been proved), then I would have been obliged to decree that the Plaintiff is entitled to recompense on account of General damages.
127. Furthermore, I would have been obliged to award to and in favor of the Plaintiff General Damages in the sum of Kes.10, 000, 000/= only taking into account the extent of acreage occupied by the Defendants and the duration of occupation.
128. Nevertheless, I have come to the conclusion that the Plaintiff herein has neither established nor demonstrated that the Defendants have trespassed onto the suit property. In this regard, the Plaintiff is not entitled to any award of General damages.

Conclusion and Disposition

129. Whilst discussing the various issues which were identified and isolated in the body of the Judgment, this court has already made various findings which are pertinent and imperative to the determination of the instant suit.
130. Instructively, the court has found, *inter-alia*, that the Plaintiff herein is not the absolute and exclusive proprietor of the suit property. To the contrary, the court found and held that the suit property is registered in the names of six persons as owners/tenants in common.
131. Furthermore, the Honourable court has also found that the instant suit is barred by dint of the provisions of Section 7 of the *Limitation of Actions act*, Chapter 22 Laws of Kenya. In this regard, the entire suit is thus rendered redundant.
132. Premised on the foregoing, I therefore come to the conclusion that the Plaintiff's suit is devoid and bereft of merits. Consequently, the Plaintiff's suit be and is hereby Dismissed with costs to the Defendants.
133. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JUNE, 2023.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – court assistant

Mr. Kahuthu for the Plaintiff

Mr. Kamiro for the Defendants

