



**Kenya Railways v Namusu Enterprises Ltd & 3 others; Usii (Interested Party) (Environment & Land Case 632 of 2012) [2023] KEELC 18951 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18951 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 632 OF 2012  
SM KIBUNJA, J  
JULY 25, 2023**

**BETWEEN**

**KENYA RAILWAYS ..... PLAINTIFF**

**AND**

**NAMUSU ENTERPRISES LTD ..... 1<sup>ST</sup> DEFENDANT**

**ELDORET HOTEL LTD ..... 2<sup>ND</sup> DEFENDANT**

**THE COMMISSIONER FOR LANDS ..... 3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**JOHN BOSCO MUSYIMI USII ..... INTERESTED PARTY**

**JUDGMENT**

1. The plaintiff commenced this suit vide the plaint dated the August 9, 2010 against the defendants, filed through Ms Tom Mutei Advocates, seeking for;
  - a. A declaration that the allocation, registration of the lease in favour of the 1<sup>st</sup> defendant, subsequent transfer and registration of the lease in favour of the 2<sup>nd</sup> defendant in respect of Eldoret Municipality Block 3/58, suit property, is illegal, null and void.
  - b. A declaration that the plaintiff is the rightful owner of the suit property, and an order cancelling the certificate of lease in respect of suit property be issued.
  - c. An order for the 3<sup>rd</sup> defendant to rectify the register of the suit property in accordance with prayer (b) above be issued.



d. A permanent injunction to restrain the defendants, their servants and or agents from interfering with the plaintiff's use and occupation of the suit property.

e. Costs of this suit plus any other relief the court may deem fit to grant.

The plaintiff averred that it is the absolute proprietor of the land forming part of the Eldoret Railway Station, which includes the Railway Staff Quarters, Railways Recreational areas which comprises of among others, the Railway Junior Club, football pitch, badminton and Tennis Courts, by virtual of the Kenya Railways Corporation (Vesting Order) 1986. That it got surprised to learn from the Eldoret Land Registry that part of the said land had been allocated by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant, registered as Eldoret Municipality Block 3/58 and subsequently transferred to the 2<sup>nd</sup> defendant on the September 3, 1997. That the said transactions over its land was done without its consent and or consultations, and was therefore illegal, fraudulent, null and void. The plaintiff has set out the particulars of fraud, illegality and or nullity at paragraph 7 of the plaint as follows;

i. The allocation by the 3<sup>rd</sup> defendant of the plaintiff's land to the 1<sup>st</sup> defendant without consultation and consent from the plaintiff was fraudulent.

ii. The 3<sup>rd</sup> defendant exercise of his powers to allocate land was misplaced as the land in issue was not government land.

iii. The 1<sup>st</sup> defendant's transfer of the land in question to the 2<sup>nd</sup> defendant was both mischievous and fraudulent and only meant to defeat the due process of the law.

iv. Substantial part of the land in issue is still in use by the officers of the plaintiff as on it stands the Railway Staff Quarters, Railway Club, Railway Football pitch, badminton courts, and land reserved for operation and expansion.

v. The said allocation was done without the consent of the plaintiff.

vi. The plaintiff was not paid monetary compensation for the acquisition of the said land.

The plaintiff further averred that the 2<sup>nd</sup> defendant has entered onto the suit property and erected structures that pose a danger to the safety of Railway transport. That on the 20<sup>th</sup> July 2020, the court granted the plaintiff leave to file this suit out of the statutory time, demand and intention to sue has been issued and served.

2. The court has noted that the plaintiff had filed a notice of motion dated the March 1, 2012 on the March 16, 2012 seeking for leave to amend its plaint. Annexed to the application is an undated document headed "Amended Plaint" which the court will take to be the draft amended plaint. The document has two additional defendants being Kuyang Agencies Ltd and Mabaki Limited as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively. It retains Mamusu Enterprises Ltd as the 1<sup>st</sup> defendant but pushes the initial 2<sup>nd</sup> to 4<sup>th</sup> defendants as the 4<sup>th</sup> to 6<sup>th</sup> defendants respectively. When the court was delivering its ruling on the application to inter alia dismiss the suit for being res judicata on the November 27, 2013, Munyao J, made the following observation about the application to amend the plaint at paragraph 17;

"... At some point, the plaintiff filed an application for leave to amend the plaint to include some parties, but again, that application was never pursued....."

The court has perused the record before and after that ruling and noted that there is no evidence of the application to amend dated March 1, 2012 having been heard and or granted. The proposed amended plaint was therefore never formally filed and will not be considered in this judgement.



3. The record confirms that the interested party had applied to be joined in the suit through the notice of motion dated the September 8, 2021 that was allowed on the November 24, 2021.
4. The plaintiff's claim is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants through their statement of defence dated the October 8, 2010, filed through Ms Ngigi Mbugua & Co Advocates. They averred inter alia that the suit land came to being upon being registered in 1997. The land was then allocated to the 1<sup>st</sup> defendant without notice that it ever belonged to the plaintiff, for valuable consideration on the September 3, 1997. That the 2<sup>nd</sup> defendant purchased the suit property for valuable consideration but the plaintiff filed a caution against the title on the April 4, 2002. That plaintiff did not take any further action until 2006 when they filed Eldoret HCCC No 76 of 2006 which was heard and dismissed with costs. They denied the allegations of fraud stating that the due process was adhered to in the alienation and transmission of the suit property. That the utilization of the suit land by the 2<sup>nd</sup> defendant was consistent with the proprietorship under the law and was not in any way a danger to railway transport. That the plaintiff never owned the suit property and has no basis of claiming it. That the suit is *res judicata*, offends the provisions of [Limitation of Actions Act](#), Government Lands Act, [Public Authorities Limitations Act](#), and the leave obtained *ex parte* cannot cure the foregoing challenge. They denied demand being issued before filing of the suit and challenged the court's jurisdiction for reasons of the foregoing objections, and sought for the plaintiff's suit to be dismissed with costs.
5. The Commissioner of Lands and the Attorney General, being the 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively, filed the statement of defence headed "5<sup>th</sup> and 6<sup>th</sup> defendants' defence", through Mr Joseph Ngumbi, Litigation Counsel, dated July 4, 2014 in which they inter alia averred that the allocation and registration of the suit property in the names of Mamusu Enterprises Ltd, Kuyang Agencies Limited, Mabaki Limited, and Eldoret Hotel Ltd was not illegal, fraudulent, null or void but was done in accordance with the law and in good faith. That the plaintiff is not entitled to the reliefs sought and the claim is *res judicata* in view of the decree in HCCC No 76 of 2006 that was over the same subject matter and parties. They disputed that leave to file the suit out of time had been granted on July 20, 2010, and that notice of intention to sue had been received. They admitted the jurisdiction of the court and sought for the plaintiff's suit to be dismissed with costs.
6. The interested party did not file any documents or processes despite being granted leave in the directions of the court of the November 24, 2021.
7. By consent of counsel for the parties represented in court on the November 24, 2021, an order was issued for the County Land Surveyor, in the presence of the County Land Registrar, parties and or their counsel, to visit the suit property, prepare and file a report along the lines of their report filed in Eldoret ELC No 663A of 2012. The report dated the January 26, 2022 was later filed with the court on the March 7, 2022.
8. The hearing of the plaintiff's case commenced on the 6<sup>th</sup> June 2022 with Emmanuel Kipkurui Keitany, the Uasin Gishu County Land Surveyor testifying as PW1. He produced the report dated the 26<sup>th</sup> January 2022 in respect of Eldoret Municipality/Block 3/58 measuring 1.05 hectares [about 2.6 acres], suit property, that he prepared pursuant to the court order. It was his testimony that the suit property exists on both the ground and survey documents including index map and survey plan FR No. 314/76. That the said land was within the Station Land under survey plan FR No. 24/74 dated the 30<sup>th</sup> November 1925, totaling 167.54 acres. During cross examination, PW1 stated that the survey plan No. 314/76 that created the suit land resulted in altering the boundaries of the Eldoret Station Yard land under survey plan 24/74. The witness testified that he was not able to trace any parcel reference for the Station yard land or the owner of the land comprised thereon. He confirmed that on the said land are several structures including Eldoret Police Station, and other houses. He could not confirm whether



the Central Bank building was within the Station Yard land or whether that land belonged to Kenya Railways, the plaintiff. He confirmed finding some temporary structures on the suit property during his visit to the land. He added that he did not find any overlapping of boundaries in the demarcation of the suit property, but only variation of boundaries in accordance with the allotment letter and approved PDP by the previous owner. In re-examination, PW1 agreed that the Station Yard land belonged to Kenya Railways.

9. Though the suit was scheduled to the 14<sup>th</sup> November 2022 for further hearing after the testimony of PW1 was taken, the record shows that, the counsel for the parties present entered a consent to rely on their filed pleadings, documents, witness statements and evidence already taken; proceed to file and exchange submissions and thereafter have the file transmitted to Justice Kibunja to write the judgement. The record shows that the order to forward this file to Justice Kibunja was eventually made on the 24<sup>th</sup> April 2023. It is important for record purposes to state that Justice Kibunja had left the station on transfer to Mombasa ELC in September 2022.
10. The record confirms that for the plaintiff, the witnesses named Victor Wahome, Stanley Gitari and Dancan Mwangi had recorded their statements dated the 9<sup>th</sup> September 2013, 27<sup>th</sup> July 2018 and 17<sup>th</sup> June 2020 respectively. That for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, one Japheth Kipkemboi Magut had recorded a statement dated the 19<sup>th</sup> January 2015. The court will consider the contents of their statements and the various documents filed by the plaintiff and 1<sup>st</sup> to 4<sup>th</sup> defendants that were admitted through the case stated consent of the 14<sup>th</sup> November 2022.
11. The learned counsel for the plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> defendants, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed their submissions dated the 14<sup>th</sup> December 2022, 6<sup>th</sup> March 2023 and 20<sup>th</sup> April 2023 respectively which the court has considered.
12. The following are the issues for the determinations by the court;
  - a. Whether the court has jurisdiction to hear and determine this suit.
  - b. Whether the suit property was hived/excised from land reserved for the plaintiff, and if so, whether it was available for allocation by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant.
  - c. Whether the 1<sup>st</sup> defendant got a good title to the suit land capable of being transferred to the 2<sup>nd</sup> defendant.
  - d. Whether the 2<sup>nd</sup> defendant was a bona fide purchaser of the suit property for value and without notice.
  - e. Whether the plaintiff is entitled to the prayers, or any of the prayers sought.
  - f. Who pays the costs.
13. The court has carefully considered the parties' pleadings, evidence tendered, submissions filed by the learned counsel, superior courts decisions cited thereon and come to the following conclusions;
  - a. The court's jurisdiction over the suit was objected to on two fronts. Firstly, that the suit was res judicata in view of the previous case between the same parties and the same subject matter and secondly, the it is statute time barred. The record shows that the issue of the suit being res judicata has already been heard through the application dated the 23<sup>rd</sup> July 2013 by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Prayer 1 of that application sought for the "... plaintiff's suit be dismissed for being res judicata." The application was heard interpartes and in the ruling delivered on



the 27<sup>th</sup> November 2013 the Munyao J, inter alia observed as follows about the impact of the previous suit, Eldoret HCCC No. 76 of 2006;

“ 18. The former suit was actually never heard. The issues were never decided. The court never got an opportunity to determine whether or not the title issued to the 1<sup>st</sup> and later to the 2<sup>nd</sup> defendant, were properly issued. It never got to determine whether Kenya Railways is entitled to claim the land. What it decided in the ruling of 21<sup>st</sup> May 2008, was that the suit could not stand because the required statutory notice under section 136 (2) of the *Government Lands Act* was never issued. It cannot therefore be said that the issues in the former suit were actually determined. They never were.”

The judge proceeded to pronounce himself as follows;

“ 22. My own assessment is that the present suit is not *res judicata*, as the matters in issue were never heard and decided. I am buttressed in coming to this conclusion, by the decision in the case of *Kebarchand v Jan Mohamed* (1919) 2 EACA 64. In that case, a suit had been filed under summary procedure on two promissory notes. The limitation period under that procedure was six months. The suit was dismissed as being out of time. A latter suit filed through ordinary procedure was then brought. An objection was raised that the suit was *res judicata*. The High Court held that the suit was *res judicata* and the plaintiff appealed. On appeal, it was held that the latter suit was not *res judicata*. Although the causes of action were one and the same, i.e, the liability of the defendant under the promissory notes, the issue was never heard and finally decided in the first suit. Lyall Grant J put the matter thus at page 68:-

“the broad rule appears to be that the plaintiff can bring a second action unless he has in the first action had an opportunity of being heard on the merits. Here the plaintiff has not had the opportunity of being heard on the merits, the case having been dismissed on a preliminary point.”

23. it is the same situation in this matter. Although the cause of action in the previous suit is the same as this one, the issues in the former suit were never heard and determined.

24. I therefore dismiss prayer 1 of the application as I am convinced that this suit is *res judicata*.”

I am in agreement with the above decision by Munyao J, that to date has not been challenged on appeal or review. I need not say any more except that this suit is indeed not *res judicata*.



- b. On the second limb of the objection that the suit is statute time barred, the plaintiff has pleaded at paragraph 15 of the plaint that;

“ 15. Leave was granted by the honourable [sic] to the plaintiff on the 20<sup>th</sup> ay [sic] of July 2010 to file this suit out of the statutory time.”

On their part, the 1<sup>st</sup> and 2<sup>nd</sup> defendants averred at paragraph 11 of the statement of defence that;

“ 11. This suit offends the provisions of the *Limitation of Actions Act*, *Government Proceedings Act*, *Government Lands Act* and the *Public Authorities Limitations Act* and accordingly the defendants shall raise preliminary objections that the suit is a non suit for want of compliance with the afore referred acts [sic]. Leave obtained exparte cannot cure the defects of law alluded to.”

In the statement filed by Victor Wahome dated the 9<sup>th</sup> September 2013, he indicated that the plaintiff had filed a caution against the suit property's title on the 4<sup>th</sup> April 2002. He however did not disclose the specific date the plaintiff got to know that the suit property had been excised from its land, allocated and registered in the name of the defendants. A similar position was taken by Stanley Gitari and Duncan Mwangi in their statements dated the 27<sup>th</sup> July 2018 and 17<sup>th</sup> June 2020 respectively. Japheth Kipkemboi Magut recorded his evidence in the sixteen {16} paragraph statement dated the 19<sup>th</sup> January 2015, as a witness for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, among others detailing how the suit property was allocated through the letter of allotment dated the 18<sup>th</sup> November 1996 to 1<sup>st</sup> defendant and two others, before being transferred to the 2<sup>nd</sup> defendant on the 3<sup>rd</sup> September 1997. He added that the plaintiff lost their initial claim over the suit property in Eldoret HCCC No. 76 of 2006. That the plaintiff had then petitioned the Commissioner of Lands to cancel the 2<sup>nd</sup> defendant's title to the suit property but the request was declined following the advice of the Attorney General, which the plaintiff has ignored in filing this suit. That while the plaintiff witnesses appear to suggest that the plaintiff got to know about the 2<sup>nd</sup> defendant's interest over the suit land in May 2006, the fact that it had filed a caution against the title on 4<sup>th</sup> April 2002 is sufficient evidence that the plaintiff knew by then about the excision of the suit land from the Railway Station Land, its allocation and registration jointly to the 1<sup>st</sup> defendant and two others. The court finds that the plaintiff has been evasive in disclosing the exact date or year that it got to know of the transaction involving the suit property for the first time. The fact that the plaintiff reportedly sought and obtained leave to file this suit out of the statutorily prescribed time is itself further evidence that it knew of the transactions over the suit property long before it filed the caution in 2002. It follows that the plaintiff appreciated that had leave to file the suit out of time not have been sought and obtained, it could have had faced objections from the defendants that this suit was statute time barred.

- c. It is the case of the plaintiff that the issue of the suit being statute time barred should not even arise as leave to file the suit out of time was granted prior to filing the suit. The plaintiff has in its list of documents dated the 27<sup>th</sup> July 2018 attached a copy of a court order dated the 20<sup>th</sup>



July 2010 and issued on the 23<sup>rd</sup> July 2010 in Eldoret HC. Misc. Appl. No. 171 of 2010 with orders that;

- “ 1. Leave be and is hereby granted to the plaintiff/applicant to file suit against the defendants/respondents out of the statutory time.
2. The plaintiff/applicant be and is hereby allowed to file suit against the defendants/respondents within 21 days from 20<sup>th</sup> July 2010 failure to which leave granted shall lapse.”

The heading of the order in the Eldoret High Court Miscellaneous Application No. 171 of 2010 has the following as the parties;

“Kenya Railways Corporation .....Plaintiff/Applicant.

v

Mamusu Enterprises Limited .....1<sup>st</sup> Defendant/1<sup>st</sup> Respondent

Eldoret Hotel Limited .....2<sup>nd</sup> Defendant/2<sup>nd</sup> Respondent

The Commissioner of Lands .....3<sup>rd</sup> Defendant/3<sup>rd</sup> Respondent

The Attorney General ..... 4<sup>th</sup> Defendant/4<sup>th</sup> Respondent”

This suit commenced through the plaint dated the 9<sup>th</sup> August 2010 that was filed on the 11<sup>th</sup> August 2010 under receipt number 3430626 of the same date is between the same parties as those listed in the Eldoret High Court Misc. Appl. No. 171 of 2010 in which the leave to file suit out of time was granted. It was filed on the 21<sup>st</sup> day from 20<sup>th</sup> July 2010, which was within the time prescribed in order (2).

- d. The court is aware that an order for leave granted *ex parte* may be challenged during the inter partes hearing of the matter filed therefrom. The 1<sup>st</sup> and 2<sup>nd</sup> defendants in this suit have pleaded in their statement of defence that the leave granted “can not cure the defects of law alluded to.” The learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants has submitted at paragraph 6 of their submissions that “... They also put up a defence of limitations of Actions Act, pleading that the suit was time barred for being filed out of time.” The learned counsel for the plaintiff has extensively submitted their claim is based on fraud attributed to the defendants, and therefore the time prescribed by section 7 of the [Limitation of Actions Act](#) started running in 2002 when it discovered the fraud and filed the caution. That the twelve (12) years within which the plaintiff had to take action was to lapse in 2014 and as this suit was filed in 2010, then the issue of limitation does not arise. The counsel submitted that the plaintiff had complied with section 13A of the [Government Proceedings Act](#) to issue a 30 days’ notice by serving the Attorney General with the notice on the 1<sup>st</sup> April 2010. A copy of that notice is attached as document 3 in the plaintiff’s list of documents dated the 27<sup>th</sup> July 2018 and filed on the 30<sup>th</sup> July 2018. The counsel further referred the court to the Court of Appeal decision in the case of [David Njenga Ngugi versus Attorney General](#) [2016] eKLR, where the provisions of section 13A of the said Act was considered alongside Article 159 (2) of the [Constitution](#) and the court made a finding that failure to issue the statutory notice should not impede a party’s access to justice, and therefore a suit should not be said to be incompetent for lack of the said notice. On the provisions of section 136 of the Government Lands Act that provides that;

“ 136.



- (1) All actions, unless brought on behalf of the Government, for anything done under this Act shall be commenced within one year after the cause of action arose and not afterwards.
- (2) Notice in writing of the action and the cause thereof, shall be given to the defendant one month at least before the commencement of the action.”

The plaintiff’s counsel submitted that the requirement of filing suit within one year has been settled through the leave granted in Eldoret HC Misc. Appl. No. 171 of 2010 on the 20<sup>th</sup> July 2010. That this court being of equal status to the court that granted the leave, it lacks jurisdiction to overturn that order. The plaintiff’s counsel also submitted that there is no provision for time limits in instituting suits against the government involving land in the *Public Authorities Limitation Act*. The learned counsel for the 3<sup>rd</sup> and 4<sup>th</sup> defendant adopted their submissions in Eldoret ELC Case No. 663A of 2012 in this case. The counsel inter alia submitted that the evidence by the County Surveyor confirmed that the suit land was demarcated from the Eldoret Station Yard, that from the survey plans shows it was part of the land set aside for the plaintiff. That the 1<sup>st</sup> and 2<sup>nd</sup> defendants may have obtained title to the suit land from the 3<sup>rd</sup> and 4<sup>th</sup> defendants, but the title is not protected under Article 40 of the *Constitution* as it was not available for allocation, and therefore, counsel supported the plaintiff’s suit in its entirety. It is important to note that the learned counsel’s submissions supporting the plaintiff’s suit is clearly at variance with their pleadings in their statement of defence dated the 4<sup>th</sup> July 2014 in which they defended the allocation of the suit property to the defendants.

- e. That while the plaintiff’s suit may survive the onslaught of being statute time barred by reason of the leave granted on 20<sup>th</sup> July 2010 in Eldoret High Court Misc. Appl. No. 171 of 2010, the court has noted from the defendants’ pleadings, specifically paragraph 4 of their statements of defence, that the suit land was after excision/creation allocated to and registered in the names of Namusu Enterprises Limited, the 1<sup>st</sup> defendant, and two others. The copy of the green card in the list of documents filed by the Litigation Counsel for the Commissioner of Land and the Attorney General dated the 4<sup>th</sup> July 2014 confirms that the register of the suit property was opened on the 27<sup>th</sup> January 1997. It also shows that the suit property was on the same date registered in the names of Namusu Enterprises Limited, Kuyang Agencies Limited and Mabaki Limited as proprietors in common. As already pointed out in (2) above, the plaintiff’s application dated 1<sup>st</sup> March 2012 to amend its plaint to join Kuyang Agencies Limited and Mabaki Limited was never prosecuted, and the two are not therefore parties in this suit. The court is therefore not in a position to make any determination that is likely to adversely affected their proprietary rights, that they obviously held over the suit property, without according them an opportunity to file their pleadings and be heard. To do otherwise, as the plaintiff has moved the court to do through this suit, would amount to a contravention of their rights to property and fair hearing under Articles 40 and 50 of the *Constitution* 2010. The court is aware that the protection of right to property that has been unlawfully acquired is not protected under Article 40(6) of the *Constitution*. While, that may be what the plaintiff position is in their endeavor to reclaim the suit property, there is as of today no determination made that the suit land was unlawfully obtained. That such a determination has to be done through a litigation process involving all the parties concerned before a court of competent jurisdiction.



The plaintiff's claim therefore fails for failure to join Kuyang Agencies Limited and Mabaki Limited, who were two of the initial proprietors in common as defendants.

- f. That in view of the finding in (e) above, the court is of the view that it does not need to pronounce itself on the other issues including whether the suit land was excised/demarcated from land reserved for the plaintiff or whether the 2<sup>nd</sup> defendant was a bona fide purchaser for value without notice. The learned counsel for the parties have cited several superior court decisions that would definitely have assisted the court in resolving those issues. Another decision that would have assisted the court in this matter is the recent decision of the Supreme Court of Kenya in the case *Dina Management Ltd versus County Government of Mombasa & 5 Others* Petition No. 8 (E010) of 2021, where it was *inter alia* held at paragraph (111) that;

“ Article 40 of the *Constitution* entitles every person to right to property, subject to the limitations set therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1<sup>st</sup> registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of the *Constitution*. The root of title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.”

- g. That flowing from the provisions of section 27 of the *Civil Procedure Act* chapter 21 of the Laws of Kenya that the costs should follow the events unless where for good cause the court orders otherwise, the plaintiff will pay the costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 3<sup>rd</sup> and 4<sup>th</sup> defendants had initially opposed the plaintiff's claim through their filed statement of defence, but turned around and supported it in their submissions. As such they will bear their own costs.

14. The upshot of the above findings is that the plaintiff's claim against the defendants fails and is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 25<sup>th</sup> DAY OF JULY 2023.**

**S. M. KIBUNJA, J.**

In the presence of:

Plaintiff: M/s Moraa Advocate.

Defendants : Mr Simiyu for Ngigi for 1st and 2nd Defendants.

Interested Party : None.

Wilson – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

