



**Ngetich v Barngetuny & 2 others (Environment & Land Case 23 of 2021)
[2023] KEELC 20228 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20228 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 23 OF 2021
MN MWANYALE, J
SEPTEMBER 25, 2023
FORMERLY ELDORET E & L CASE NO 122 OF 2014**

BETWEEN

STANLEY KIPRUTO NGETICH PLAINTIFF

AND

MARY BARNGETUNY 1ST DEFENDANT

PETER TALAM 2ND DEFENDANT

JOSEPH TALAM 3RD DEFENDANT

JUDGMENT

1. Before proceeding on the determination of the main suit, the Court has to dispose off the Notice of Preliminary Objection dated 22nd May 2023, filed by the Plaintiffs Advocates in the matter against the counterclaim filed by the Defendants.
2. Ordinary the Preliminary objection would have been dealt with before hearing of the matter but the Preliminary Objection dated 22nd May 2023 was filed on 23/5/2023 when the matter was scheduled for hearing of the main suit.
Since the preliminary objection related to the counterclaim, the Court directed the Plaintiff's case to proceed and preliminary objection to be dealt with at the Defence and counterclaim stage.
3. The Notice of Preliminary Objection is founded on the provisions of Section 7 of the *Civil Procedure Act*, and the Plaintiff submit that the counterclaim as pleaded offends the said provisions and it is *resjudicata* Kapsabet Senior Resident Magistrates Court Case No. LDT 34/97 between Henry Kiplatum Barngetuny and the Plaintiff herein, and that Henry K. Barngetuny (now deceased) was the husband to 1st Defendant and father to 2nd and 3rd Defendants in this suit.



4. In relation to the preliminary objection the Court directed separate submissions to be filed thereon and proceeded to hear the main suit.
5. The Court has to deal, with the preliminary objection first before turning to the main suit, for if indeed the preliminary objection succeeds it shall dispose off the counterclaim by the Defendants.
6. In respect of the Preliminary Objection the Court frames two issues for determination;
 - i) whether there is a proper Notice of Preliminary Objection and
 - ii) whether the Preliminary Objection is merited
7. In the case of *Mukisa Biscuit Manufacturer Limited v Westend Butchery Limited* the Court in respect of a preliminary objection held “so far as I am aware, a preliminary Objection consists of a pure point of law which has been pleaded or which arises by clearer implications out of pleadings, and which if argued as a preliminary objection is in the nature of what used to be a domineer. It arises a pure point of law which is argued on the assumption that all acts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.”
8. Similarly in the case of *Omondi v National Bank of Kenya Limited and 2 others* as quoted in the decision of *J. N. & 5 others v Board of Management of ST. G. School Nairobi & Another*, the Court held as follows;

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit..... Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary Objection must not deal with disputed facts; and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
9. The above principles shall guide this Court ascertain whether or not the Notice of Preliminary Objection meets the criteria of Preliminary Objection.
10. The preliminary objection herein is based on Section 7 of the *Civil Procedure Rules* and it is a pure point of law. The objection however is premised on the existence or otherwise of a decision in Kapsabet Senior Resident Magistrates Court LDT No. 34/97 between *Henry Kiptalam Bargenny v Stanley Ngetich*. This means the Court has to ascertain facts of the existence or otherwise of the said decision in the said suit, which has to be subjected to the normal rules of evidence.
11. That ascertainment of facts thus removes the preliminary objection dated 22nd March 2023 outside of the ambit of Mukisa Biscuit as read together with *Omondi v National Bank* cited above.
12. For the above reasons the Court finds that the Preliminary Objection dated 22nd March 2023 in so far as it requires ascertainment of facts is not a pure preliminary point.
13. The issue of *resjudicata* raised in the preliminary objection shall be dealt with as a defence to the counterclaim in the main suit; as the preliminary objection herein fails.
14. Having disposed of the Notice of Preliminary Objection dated 22nd May 2023, the Court shall now proceed to determine the case on its merits taking note of the issue of *resjudicata* raised in the Notice of Preliminary Objection shall be dealt with in the main suit as the preliminary objection did not meet the criteria established in Mukisa Biscuit and *Omondi v National Bank* cases cited earlier in the judgment.



15. Turning on the main suit vide Notice of Motion application dated 16/3/2022 the Plaintiff sought to amend the plaint dated 16th April 2014, and whereas the application was allowed and leave granted to amend the plaint, the Plaintiff did not file the amended plaint as directed on 24/3/2022 or anytime thereafter, hence the Primary pleading in respect of the Plaintiff is the plaint dated 16/4/2014.
16. In the said plaint the Plaintiff Stanley Ngetich sought judgment against the 3 Defendants Mary Barngetuny, Peter Tallam and Joseph Tallam for;
 - a) permanent injunction against the Defendants, their servants and/or agents from continued interference with the Plaintiff's land which is still registered under names of the Plaintiff and therefore legally belongs to the Plaintiff.

Plaintiff's Case and Evidence: -

17. The Plaintiff testified as PW1 and adopted his witness statement as part of his evidence in chief and produced the documents listed in the list of documents dated 2/3/2015 as his exhibits in the matter.
18. In cross – examination he confirmed having known the late Henry Kiptalam Barngetuny. He stated that he had sold 10 acres of plot No. Nandi/Kipkaren Salient 335 herein after referred to as the original suit property to Henry Kiptalam. He had not transferred the said 10 acres to the Defendants. The Plaintiff indicated that he had subdivided plot number Nandi/Kipkaren Salient 335 into several plots and he lived in Nandi/Kipkaren Salient/ 572.
19. It was his answer in cross - examination that he wanted to evict the Defendant from the subdivision Nandi/kipkaren Salient/565. He had not signed any transfer because the Plaintiff had wanted half share as opposed to 10 acres. The Defendants had occupied the property for more than 50 years.
20. PW2, Kipsomo Kuto equally testified and adopted his witness statement. In cross – examination the witness stated that the late Henry Barngetuny had purchased 10 acres but added himself 12 more acres. The family of the late Henry Barngetuny lived in Nandi/Kipkaren Salient/ 572 while Joseph Tallam the 2nd Defendant lives in Nandi/Kipkaren Salient/ 565. Thus, the Defendants lived in Nandi/ Kipkaren Salient/ 572 and Nandi/Kipkaren Salient/565.

Defence Case and Evidence: -

21. The Defendants filed an Amended Statement of Defence and counterclaim dated 21st June 2021, it is their defence that they have been in lawful possession, occupation and use of the subject parcel of land for a period of exceeding 50 years.
22. The enjoyment of the suit land stemmed out of the beneficial interests over the subject suit land by the late Henry Kiptalam Bargentuny, and they prayed for the dismissal of the suit.
23. Vide their counterclaim, they brought the claim against the Plaintiff on behalf of the Estate of the late Kiptalam Barngetuny herein after called “the deceased” and it is their claim that the deceased had bought 10 acres vide an agreement dated 4/6/1969 which was part of Nandi/Kipkaren/salient 335 which measured 71.25 acres and the deceased took possession and occupation immediately.
24. The Defendants aver that the Plaintiff unable to pay the whole purchase price of Nandi/Kipkaren Salient/ 335 to the Settlement Fund Trustee for purchase approached the deceased for assistance and that the deceased assisted in the payment thus entitling the deceased a share of the property Nandi/ Kipkaren Salient/ 335 on a pro-rata basis.



25. The Defendants aver, that the deceased contribution together with the 10 acres earlier bought thus to entitle the deceased to 46.5 acres.
26. The Defendants further aver that the Plaintiff in total disregard of this went ahead and registered the whole property.
27. The Defendant plead that the dispute was heard by the Nandi Dispute Land Tribunal and award thereof endorsed in Kapsabet SPMCC LDT Case No. 34/1997, although thereafter the Plaintiff subdivided the original suit property into Nandi/Kipkaren Salient/565 – 574 and the Defendants thus attributed fraud and illegality on the part of the Plaintiff.
28. The Defendants thus sought Judgement against the Plaintiff for
 - a) Dismissal of the Plaintiffs' suit
 - b) declaration that the registration of Plaintiff as the sole owner of Nandi/Kipkaren/335 and issuance of a title under his sole name was irregular and illegal hence a nullity.
 - c) a declaration that the subdivision of the original suit property resulting in land title numbers Nandi/Kipkaren Salient 565 – 574 was illegal and irregular hence a nullity.
 - d) A declaration that the Estate of the late Henry Kipatalam Bargentuny is the bonafide owner of a portion measuring 46.5 acres of the original suit property and the County Land Registrar and Surveyor Nandi should carry out a subdivision of the subject parcel of land and transfer the respective portions to the Plaintiff and Defendants.
29. In support of the defence case the Defendants called three witnesses.
30. DW1 was the 1st Defendant Mary Barngetuny. The witness adopted her witness statement dated 7/7/2014 as part of her evidence in chief; and produced 19 exhibits listed in the list of documents filed on 7/7/2014 together with documents in the supplementary list of documents dated 15/3/2023.
31. In cross – examination the witness in reference to D Exhibit 8, stated that they were given 11.5 acres but her husband had refused the same. She stated that the receipts were for shares and not survey fees. She stated that her husband had gone to Court because he was dissatisfied with the Tribunal's findings. The witness indicated that she was occupying 25 acres. She had a claim over the property because her husband paid for the shares. She stated that Stanley did not pay for the property at once but her husband assisted her to make payments to SFT as evidenced by the receipts.
32. In re-examination, she stated that the receipts were for shares. DW2 Samuel Kibet Sawe testified and adopted his witness statement as part of his evidence in chief.
33. in cross – examination, the witness stated that he knew the are owned by the Plaintiff. The property is about 70 acres and Stanley were using 35 acres. He indicated that he knew that Henry had been given 11.5 acres. He indicated that the agreement was that they would share the property equally.
34. In re-examination, the witness stated that he lived about 1 ½ kilometers from the suit property. He stated that an advisory committee resolution was that the property was to be shared equally.
35. The last defence witness DW3 was Joseph Kimeli Talam who was the 3rd Defendant and he adopted his witness statement as part of his evidence in chief.
36. In cross – examination, he stated that the receipts produced in Court were part of the evidence but were not produced at the LDT. At the LDT his father was given 11 ½ acres in d exhibit 11, we had



sought in the plaint seeking for 29.125 acres. There was no prayer of adverse possession in the High Court Civil Suit 52/2003.

37. He indicated that his late father had equal shares with Stanley Ngetich the Plaintiff.
38. In re-examination, the witness stated that Mr. Ngetich got his title in 2020 after the decision of the Tribunal. That his father's acre was 46.5 acres. That the High Court case No. 53/20033 abated and there was no decision. The property in dispute was Nandi/Kipkaren/335 and the letter of consent talks about the said property. He indicated that his late father had equal shares with Stanley Ngetich.
39. Upon the close of Defence case, parties were directed to file submissions. The first set of submission related to the same and the Court has rendered itself on the Preliminary Objection while the 2nd set of the submissions, related to the main suit which Court shall now consider.

Plaintiff's Submissions: -

40. The Plaintiff has framed and submitted on 4 issues for determination, to wit,
 - i) what is the mode of acquisition of the original suit property Nandi/Kipkaren/salient/335.
 - ii) whether there was ever been joint ownership regarding to the original suit property Nandi/Kipkaren Salient/335 and is so was the subdivision thereof irregular and illegal by reason of fraud?
 - iii) whether the Defendants are in wrongful occupation of the parcel Nandi/Kipkaren Salient 565 and if so should they be evicted and a permanent injunction issued to protect the Plaintiff's interests?
 - iv) who shall be the costs of the suit?
41. On the first issue, the Plaintiff submits placing reliance of the proceedings before Nandi LDT34/1997 that the Plaintiff purchased the property in 1964, from Mosop Settlement Scheme. To buttress the point the Plaintiff places reliance in the case of *Samuel Kawere v Land Registrar* (2015) eKLR, on a bonafide purchaser for value.

The Plaintiff submits that the property was acquired in a one-off payment from the SFT and not by installments.
42. On the second issue of joint ownership, the Plaintiff submits that the issue was determined by the LDT and it amounts to *resjudicata*, hence the counterclaim should not be allowed.
43. The Plaintiff further submits that additional evidence in form of receipts should not be adduced in evidence and places reliance in the decision in the case of *Mohamed Abdi Mabamud v Ahmed Abdulllali Mohamed and 3 others*
44. The Plaintiff submits that there was no prove of written agreement contrary to Section 3 (3) of the *Law of Contract Act*.
45. On the second issue as to whether the Defendants are in wrongful occupation of Nandi/kipkaren Salient 565 and whether they should be evicted and permanent injunction issued to protect t the Plaintiff's interest.
46. It is the Plaintiff submission that the Defendant ought to be enjoined from continued interference with his land which property is still registered under the names of his name and therefore legally belongs to him. That the Plaintiff is thus entitled to an eviction order.



47. The Plaintiff submits after sub division his parcel fell on land parcel number 565 while the Defendants parcel fell on number 572. The Plaintiff has cited the decision in the case of *Giella v Cassman Brwon* [1973] (EA) 358 as well as *Mrao Limited v First American Bank Ltd & 2 others* in support of the prayer for injunction.

48. The Plaintiff submits that he had made out a case for grant of injunction and prays for issuance of the same.

Om costs the Plaintiff prays for the suit.

Defendants Case Submission: -

49. The Defendants had framed and submitted on 6 issues for determination as here follows;
- a) whether the Defendants should be evicted from a parcel of land they have occupied for more than 50 years.
 - b) whether the title deed issued to the Plaintiff with respect to land title Nandi/Kipkarensalinet/335 was obtained regularly.
 - c) Whether the Plaintiff continued to hold a valid title with respect to the subject parcel of land upon cancellations of the Land Registrar.
 - d) whether the subdivision of the suit parcel of land was regular.
 - e) whether the Honourable Court should determine the division of the acreage omitted by the Tribunal
50. On their issue number 1, the Defendant submit that the Plaintiffs case for eviction against them is time barred by virtue of Section 7 of the [Limitation of Action Act](#) and cites the decision of [Dickson Ngigi Ngugi v Consolidated Bank Ltd \(formerly Simba Corporation Limited and another\)](#) (2020) eKLR.
51. The Defendant thus submits; that the prayer of eviction is not available to the Plaintiff and should be dismissed.
52. The Defendants submit that with regard to the portion beyond the 10 acres, they would be entitled to the same by virtue of adverse possession and have cited the decision in Kisumu Civil Appeal No. 27/2023 [Samuel Kihamba v Mary Mbaisi](#) (2015) eKLR.
53. On the second issue, the Defendant submits that the District Land Dispute Tribunal determined in the year 1997 had determined that the property was owned by the late Henry Barngetuny and the Plaintiff as tenants in common each with an identifiable share hence the Plaintiff could not register himself as the sole proprietor of the suit land.
54. The Defendant submit that the registration of the Plaintiff was thus obtained irregularly and in support of the said submissions the Defendants cited the decision in [Joseph Kibet Tuwei v LJT and another](#) on the proposition that a title procured irregularly cannot enjoy protection of the law; as well as decision in [Munyu Maina v Hiram Gathitia Maina](#) [2013] eKLR.
55. On the 3rd issue, the Defendant submits that the title in respect of Nandi/Kipkaren Salient/335 was actually cancelled in 2001 by the Land Registrar vide a Gazette Notice No. 1240 of 2nd March 2001; the cancellation was noted in the parcel register as can be seen from the Green Card. The Gazette Notice was never revoked and the Defendant submits that there is no valid title over the suit parcel of land as the Plaintiff ceased to be the registered owner from 2nd March 2001.



56. On the 4th issue the Defendant submits that although a valid consent to subdivide had been issued on the strength of an irregularly obtained title, the said consent was acted upon 8 years later when the title had been canceled hence the subdivision was illegally done in view of the cancellation of the title.
57. The Defendant further submits that the Honourable Court should determine the division of the acreage omitted by the Tribunal.
58. Under this head the Defendant submits that the Court has jurisdiction to offer any solution on any matters within its jurisdiction. The Defendant submits that whereas the LDT Tribunal dealt with a dispute on 46.5 acres the said Tribunal did not deal with 24 acres and the Honourable Court should deal with the said despite that was not resolved by the Tribunal.
59. In this regard the Defendant submits that the Plaintiff having been given 35 acres by the Tribunal and 11.5 acres were granted to the Defendant the 24 acres ought to be wholly given to the Defendant.
The Defendant further submits that since the Defendants occupy 25 acres and have been occupied the same for more than 50 years, they should not get less than 25 acres to protect their current settlement.
60. In conclusion the Defendant submits that Plaintiff's claim is statute barred and that the eviction cannot issue; and prays for judgment as prayed for in the counterclaim with costs.

Issues for Determination: -

61. The parties herein did not frame joint issues for determination but in their respective submissions frame their individual submissions. It behoves the Court thus to frame for issues for determination arising from the pleadings, the evidence as well as submissions of the parties herein.
62. Before framing the issues for determination, a few non – contentious issues have since been settled in the course of the proceedings. It is commons ground that Nandi/Kipkaren Salient/335 was 71 acres, out of which the late Henry Barngetuny purchased from Stanley Ngetich 10 acres. Hence by virtue of that purchase 10 acres rightfully belong to the Estate of Henry Barngetuny.
63. It is also common ground that there was a dispute before the Land Disputes Tribunal at Kapsabet in 1997 before the issuance of the title deed in favour of Stanley Ngetich.
64. The parties differ on the import of the decision of the Land Disputes Tribunal and whether the decision thereof has a bearing in these proceedings and as such the Court frames that as the first – issue for determination and the issues for determination are thus;
 - i) what is the import of the decision of the LDT and whether the said decision renders the counterclaim and prayer (d) thereof as resjudicata.
 - ii) whether or not the title deed in respect of Nandi/Kipkaren Salient/335 was issued validly and regularly to the Plaintiff
 - iii) whether the Plaintiff has proven his case and is entitled to the reliefs sought.
 - iv) whether the Defendants have proven their claim and are entitled to the reliefs sought
 - v) What reliefs sought to issue in the matter?
 - vi) Who bears the costs of the suit?



Analysis and Determination: -

65. Once the first issue is determined, the real issue in controversy will come to light and most of the other issues in dispute.
66. It is common ground between the parties that there was a dispute between the Plaintiff and the late Henry Barngetuny which was Kapsabet Land Dispute Tribunal Case No. 34/1997. The proceedings were produced as D Exhibit No. 8 by the Defendant. The Plaintiff was equally aware of the proceedings and listed the proceedings in the supplementary list of documents as well as raised a Notice of preliminary objection based on the decision of the tribunal.
67. At the outset of this judgment paragraph 1 -13 the fate of the said preliminary objection was made known but the issue of *resjudicata* was reserved to be dealt with and forms part of issue number one herein.
68. Before the Tribunal, the issue was joint ownership of Nandi/Kipkaren Salient/ 335; between the late Henry Bargentuny and Stanley Ngetich; in respect of 46.5 acres. This is gained from the late Henry Barngetuny statement before the tribunal when he stated “the land in dispute is 46.6 acres and it belongs to us both parties”.
69. In its determination the tribunal awarded the late Henry Barngetuny 11.5 acres and the Plaintiffs 35 acres. The determination by the Tribunal was thus in respect of 46.5 acres. At the time of the determination the whole of Nandi/Kipkaren Scheme/355 had not been registered and hence the tribunal in dealing with the matter had jurisdiction.
70. The decision of the tribunal was adopted by the Magistrates court and no appeal was filed against it.
71. I find merit in the Plaintiff’s argument that the issue of joint ownership in respect of the 46.5 acres was dealt with in the tribunal and it cannot be raised again in the counterclaim and the parts of the counterclaim raising the same are clearly *resjudicata* and prayer (d) of the counterclaim is clearly *resjudicata*. The counterclaim has pleaded issues of fraud in relation to the issue of the title and subdivision of Nandi/kipkaren/335. Those issues could not have been dealt with by the Tribunal as they arose post the decision and it falls squarely on this Court to determine the same, and shall be determined as they form part of the issues for determination.
72. The whole of Nandi/Kipkaren Salient 335 measured 71 acres, out of which 10 acres were not in dispute having been sold and purchased by the late Henry Barngetuny. The dispute at the tribunal dealt with only 46.5 acres thus leaving 14 acres which were not dealt with and the Defendant though submits that it is 24 acres that were not dealt with forgot that 10 acres already belonged to them hence it is only 14 acres which were not dealt with under the joint ownership claim before the Tribunal.
73. The Defendant submits that the Court should determine joint ownership with respect of this. This seems to the Court as the real matter in dispute, noting that already 10 acres were not in dispute and that an additional 11 ½ acres were awarded to the Defendant by the Tribunal.
74. It follows therefrom that the tribunal found joint ownership of Nandi/Kipkaren 335 between the Plaintiff and Henry Barngetuny, but in finding joint ownership, the Tribunal did not find equal ownership as claimed by the Defendants.
75. In awarding 11 ½ acres out of 46.1/2 acres, it must be deemed that the tribunal assessed the joint ownership by the late Barngetuny and Stanley Ngetich to be in the ratio of 24.7:75.3 in favour of the Plaintiff.



76. The said ratio shall then be applicable to the remaining 14 acres which were not adjudicated before the Tribunal and applying the same, the Court finds the Defendant is entitled to 3.5 acres and the Plaintiff to 10.5 acres.
77. Thus in answer to issue number 1. The Court finds that
- i) the issues of joint ownership of 46.5 acres having been settled by the Tribunal, cannot be relitigated by way of the counterclaim as they are resjudicata.
 - ii) The court finds that the Tribunal in finding that there was a joint ownership did not find that the joint ownership was an equal ownership.
 - iii) With regard to the 24 acres that did not form part of the Tribunal decisions, the Court finds that 10 acres already belonged to the Defendant by virtue of purchase and that it is only 14 acres that had not formed part of the proceedings before the Tribunal and applying the same ratio; of the joint ownership deemed to have been used by the tribunal, the Court finds the Defendant is entitled to 3.5 acres and Plaintiff to 10.5 acres of the same.
78. The Defendants in their testimony and further in their submissions indicated that they occupy a total 25 acres and are entitled to the same, and they having purchased 10 acres, and were awarded 11.5 out of the 46.5 acres and now an additional 3.5 acres out of the 14 acres, their acreage comes to the same exact 25 acres which they have submitted to be occupying.
79. With regard to issue number 2, as to whether or not the title to Nandi/Kipkaren/salient/335 was issued validly to the Plaintiff.
80. The Court finds that the registration of the Plaintiff as the sole owner of Nandi/Kipkaren/335, was irregular in view of the fact that a decree existed awarding the Defendant 11 ½ acres, and that the Plaintiff had not proprietary interested in 10 acres already sold to the Henry Barngetuny and the entries with respect to the Decree had been registered as entry No. 2 on the green card, the title deed of whole of Nandi/Kipkaren/335 could not have validity been issued to the Plaintiff.
81. The Defendant placing reliance on the decision *Joseph Kibet Tuwei v LJT* urges the Court to cancel the title issued to the Plaintiff. On the hand the Defendant submits that the title deed in any event had been cancelled by the Gazette Notice 1240 of 2nd March 2001 thus the title held by the Plaintiff would be rendered a cancelled and non-existent.
82. The legal effect of Gazette Notice No. 1240 however is that having been issued ultra-vires then the same could not have the effect of cancellation of the title but it was more of an entry on the register.
83. Various dicta of this Courts have held time and again that a Land Registrar could not under the Repealed *Registered Land Act* and even now the *Registration of Land Act* revoked titles and doing so would be ultra vires (see Judicial Review 36/2012) *Republic v Land Registrar Taita Taveta* as *Republic v the Registrar of Title Mombasa & 2 others Exparte Emfill Limited*.
84. It follows therefore the title deed issued to the Plaintiff was irregularly issued in view of the decree in Kapsabet Land Dispute 34/1997, but the same has not been revoked.
85. Since the title was irregularly issued by omission of the other joint owner the subsequent subdivisions on the said title were equally a nullity. As an action based on an irregularity is an irregularity in any event.
86. The irregularity in the issuance of the title was the omission of registering Henry Barngetuny as a joint owner but in respect of the Plaintiff he was registered as an owner but with more acreages than he



deserved would have been curable with the proprietors consent under Section 79 2 (a) and (b) the Registration of Land Act, but since the proprietor (Plaintiff has filed suit such rectification can be done under Section 80 of the Land Registration Act as opposed to a cancellation of the title which has not been sought in the suit in any event.

87. Thus in answer to issue number 2 the Court finds the registration of Stanley Ngetich as the sole proprietor of Nandi/Kipkaren/335 to the exclusion of the late Henry Barngetuny as an irregularity which can be cured under Section 80 of the Land Registration Act.
88. On issue number 3, whether the Plaintiff has proven his case and is entitled to the reliefs sought; The Plaintiff seeks a permanent injunction against the Defendants and an eviction order against the Defendant.
89. The Plaintiff was registered as proprietor of Nandi/Kipkaren Salient 335 on 26/01/2000, and his course of action to recover the said parcels thus accrued to him upon registration.
90. The suit was filed in 2014, 14 years after the cause of action first accrued to the Plaintiff thus in accordance with Section 7 of Limitation of Actions Act, the Plaintiff claim is statute barred and the Plaintiff has not proven his case and is thus not entitled to the reliefs sought as his claim fails entirely.
91. Issue number 4 on whether the Defendants has proven their case; part of the Defendants claim with regard to the joint ownership of 46.5 acres has been found to be resjudicata, hence the remaining Defendants' claim that remains is the claim of fraudulent registration of the Plaintiff.
92. As has been held earlier in the decision the Plaintiff was irregularly registered as the sole proprietor of Nandi/Kipkaren/335; and the Court thus the Defendant has proven his case more so on their irregularity of the issuance of title to the Plaintiff as well irregularity of subdivision of the Nandi/Kipkaren 335 into Nandi/Kipkaren Salient 565 – 574, and the Defendant is entitled some of the reliefs sought in the counterclaim.
93. On the reliefs that ought to issue, this Court has found that the Defendant is entitled to 25 acres in Nandi/kipkaren Salient/335, made up as follows 10 acres purchased by the late Henry Barngetuny, 11.5 acres awarded by the Tribunal out of the 46.5 acres, and 3.5 acres awarded by this Court out of the 14 acres that did not form part of the dispute before the Tribunal thus awards the Defendants the 25 acres.
94. The Defendants testified as to their occupation of 25 acres from 1970's and the surveyor ought to consider the 25 acres already occupied by the Defendants.
95. The Court has found the registration of the Plaintiff as the sole proprietor of Nandi/Kiparen Salient 335 as irregular, and the entries canceling the title as ultra-vires thus illegal and the subdivision illegal shall thus order a rectification of the register of Nandi/Kiparen/335 by ordering the Land Registrar to rectify the same in terms as here follows of the disposition herein;

Disposition: -

96. The upshot is that the Plaintiffs case is dismissed with costs to the Defendant and judgment is entered in the Defendants favour in terms that;
 - i) The Defendants are entitled to 25 acres out of Nandi/Kipkaren Salient/335.
 - ii) The Defendants are already in occupation of the said 25 acres above.



- iii) The County Land Registrar is directed to rectify the register of Nandi/Kipkaren Salient/335 to show a first joint registration of the Plaintiff and the late Henry Barngetuny so as to reveal 25 acres in favour of the late Henry Barngetuny and 46 acres in favour of the Plaintiff.
- iv) The entry in respect of cancellation of the title deed to be deleted from the register
- v) The subdivisions in Nandi/kipkaren Salient/335 to wit Nandi/Kipkaren 565 – 574 are hereby canceled and their entries are to be deleted from the register.
- vi) The County Surveyor to undertake a survey of Nandi/kipkaren Salient/335 at the cost of both parties as was originally and hive out 25 acres and the County Registrar to register the said 25 acres to the Defendants and the resulting 46 acres to be registered in name of the Plaintiff.
- vii) In the said subdivision in (vi) above regard is to be given to the area already occupied by the Defendants, so that the 25 acres so awarded can reflect the 25 acres already occupied by them.
- viii) The Deputy Registrar of this Court to execute any forms for the Land Control Board consent for subdivision and transfer as may be required in the event the Plaintiff fails to do so, within 90 days.

96. The above reliefs are issued under relief of the counterclaim which prayed “any further relief as the Court may deem fit to grant.”

97. Costs of the suit and the costs of the counterclaim are awarded to the Defendants.

JUDGEMENT DATED AND DELIVERED AT KAPSABET THIS 25TH DAY OF SEPTEMBER 2023.

HON. M. N. MWANYALE,

JUDGE.

In the presence of;

Mr. Korir holding brief for Mr. Kiprono for the Plaintiff

Ms. Chelogoi holding brief for Mr. Kenei for the Defendants.

