



**Njogu & 3 others (Suing as Official of Kakuzi Kinyangi Mixed Organic Farmers (CBO)) v Kakuzi Limited (Environment & Land Case E007 of 2023) [2025] KEELC 281 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 281 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE E007 OF 2023  
LN GACHERU, J  
JANUARY 29, 2025**

**BETWEEN**

**MURIGI NJOGU ..... 1<sup>ST</sup> PLAINTIFF  
CATHERINE NJAMBI ..... 2<sup>ND</sup> PLAINTIFF  
ANN KABERA ..... 3<sup>RD</sup> PLAINTIFF  
LUCAS NDUNGU ..... 4<sup>TH</sup> PLAINTIFF  
SUING AS OFFICIAL OF KAKUZI KINYANGI MIXED ORGANIC FARMERS  
(CBO)**

**AND**

**KAKUZI LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiffs herein vide their Plaint dated 5<sup>th</sup> October 2023, brought this suit against the Defendant herein, and sought for Judgement against the said Defendant for :
  - a. A permanent injunction restraining the Defendant by itself, its agents and servants, employees or any person acting on their behalf from entering into, blocking, trespassing, digging holes, erecting, constructing or in any other manner interfering with the Plaintiff's property measuring 1,142 Acres which is part of LR. No. 10731/R-Ithanga Settlement Scheme K.7 situate in Kinyangi.
  - b. A declaration that the Plaintiffs are the legal owners of the property measuring 1,142 Acres which is part of LR. No. 10731/R-Ithanga Settlement Scheme K.7 situate in Kamuyu.



- c. An order compelling the Defendant to surrender the original Title Deed for LR. No. 10731/R for excision of 1,142 Acres to be registered in the name of the Plaintiffs for the benefit of its members.
  - d. General damages.
  - e. Costs of the suit plus interest.
  - f. Any other relief that this honourable Court may deem fit and just to grant.”
2. The Plaintiffs claimed that they are the bona fide proprietors and are entitled to 1,142 Acres out of land parcel LR. No. 10731/R-Ithanga Settlement Scheme K.7, situate in Kinyangi area. That the said parcel of land is the subject of a surrender by the Defendant to the Plaintiff organization in year 1979.
  3. The Plaintiffs contended that the Defendant surrendered a total of 1902 Acres, out of its entire land holding of 22,000 Acres, to several organizations including the Plaintiffs, and the necessary consents for transfer of the concerned parcels of land were executed.
  4. However, that the Defendant failed to surrender the original title deed for the purpose of excision of the affected parcels of land in favour of the beneficiaries of the surrender, despite several reminders and demands by the affected parties.
  5. That the then District Commissioner of Murang’a District vide a letter dated 24<sup>th</sup> November 1979, forwarded the Application Forms for excision of land prepared by the Defendant Company to the Commissioner of Lands through which the Defendant offered parcels of land to several organizations including the Plaintiffs.
  6. Citing item No.7 appearing on the said letter by the District Commissioner, Murang’a District, it was the Plaintiff’s averment that it is listed as a beneficiary of 1,142 Acres from land parcel No. LR. NO. 130731/R owned by the Defendant.
  7. Further, that the Murang’a Land Control Board wrote a letter dated 26<sup>th</sup> February 1986, to the Secretary, Central Authority Nairobi, confirming that a parcel of land measuring approximately 800 Acres and forming part of land parcel LR. No. 10731/R-Ithanga Settlement Scheme K.7 situate in Kinyangi area was surrendered to the Plaintiffs Organization by the Defendant’s Company.
  8. They further contended that the Defendant interfered with the exercise of sub-dividing the said 1,142 Acres of land amongst the Plaintiffs’ members by deploying its employees and agents to stop a sub-division exercise taking place on the said parcel of land on 28<sup>th</sup> September 2023. The Plaintiffs accused the Defendant of trespassing on the 800 Acres of land located within land parcel LR. No. 10731/R-Ithanga Settlement Scheme K.7 situate in Kinyangi, which parcel of land belongs to the Plaintiff.
  9. The Plaintiff prayed for a Permanent injunction to restrain the Defendant from trespassing unto the Plaintiff’s property measuring 1,142 Acres, which forms part of land parcel LR. No. 10731/R-Ithanga Settlement Scheme K.7 which is situated in Kinyangi area, as well as a declaration that the Plaintiffs are the lawful owners of the said parcel of land.

### **The Defendant’s Response**

10. The Defendant herein opposed the suit through its Statement of Defence and Counter-claim dated 7<sup>th</sup> November,2023, wherein it averred that it is the bonafide registered owner of land parcel number LR. No. 10731 (the suit property), and is in occupation of the said land, and utilizes the same for cultivation, particularly, farming of blue berries and macadamia nuts for export and cattle grazing.



11. The Defendant controverted the Plaintiffs' claim regarding the surrender of any of its land holdings in favour of the Plaintiffs. Further, that the two letters relied upon by the Plaintiffs dated 24<sup>th</sup> November 1979, and 26<sup>th</sup> February 1986, do not amount to indefeasible proof of ownership over the suit property.
12. The Defendant also averred that any purported transfer of a portion of the suit land to the Plaintiffs by way of a gift by the Defendant is time-barred, and the Court lacks jurisdiction to determine questions related to gifts of land as they are legally unenforceable.
13. Further, the Defendant asserted its rights of ownership over the entirety of land parcel number LR. No. 10731, and accused the Plaintiffs of violating its Constitutional and Statutory proprietary rights as set out under Article 40 of *the Constitution* of Kenya, as read together with Sections 24, 25 and 26 of the *Land Registration Act*.
14. It was the Defendant's contention that it did not occasion violence upon the Plaintiff's members on 28<sup>th</sup> September 2023, as claimed in the Plaintiff's Plaint. The Defendant averred that on 3<sup>rd</sup> October 2023, it received reports that some individuals were surveying, apportioning and erecting beacons on a section of the suit property with the help of Surveyor, on grounds that the Defendant had surrendered the affected parcel of land to them, which claim the Defendant refuted.
15. The Defendant further averred that it sought the intervention of the Police who required the Plaintiffs' members to supply evidence of the said surrender of the Defendant's land to the Plaintiffs, and which evidence was not forthcoming. Subsequently, the Defendant registered a complaint with the Police, which was registered as OB No. 19/3/10/2023, and proceeded to remove the beacons illegally erected on the suit property by the Plaintiffs' members.
16. It was the Defendant's further averment that the Plaintiffs are trespassers onto the suit land, and, thus, are not entitled to the reliefs sought in the Plaint. Furthermore, there is a live dispute between the parties herein before the National Land Commission (NLC) over the suit property.
17. In its Counter-claim dated 7<sup>th</sup> October 2023, the Defendant sought a permanent injunction to restrain the Plaintiffs from trespassing onto the suit property or otherwise interfering with the Defendant's peaceful possession and occupation of the same.
18. The Plaintiffs filed a Reply to the Defendant's Defence together with a Defence to Counterclaim dated 8<sup>th</sup> December 2023, and denied the Defendant's assertion that the section of the suit property in contention was transmitted by the Defendant to the Plaintiffs as a gift. The Plaintiffs reiterated that the Defendant surrendered the said parcel of land to the Plaintiffs, as alleged in their claim.
19. With regard to the Defendant's Counterclaim, the Plaintiff refuted the claims of trespass onto the suit property on or about 13<sup>th</sup> October 2023, and reiterated that in year 1979 the Defendant surrendered a total of 1902 Acres, out of total land holdings amounting to 22,000 Acres to various organizations including the Plaintiffs.
20. The suit proceeded by way of viva voce evidence, wherein the Plaintiffs called two witnesses, and the Defendant called one witness to support their respective claims.

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

21. PW1 Murigi Njogu, from Kakuzi area and a businessman, adopted his witness statement dated 5<sup>th</sup> October 2023, as his evidence in chief. He also produced the List of Documents as his exhibits, which were marked P exhibits 1-7.



22. Further, PW1 testified that he was born on the suit property, and on 3<sup>rd</sup> October 2023, he was on said suit property and he wanted to be shown the boundaries of his parcel of land. However, the Defendant had and has refused to hand over the title deed of the suit land for subdivision in favor of the Plaintiffs. That the Plaintiffs claim is for 1,114.2 Acres, out of the land parcel LR. No. 10731/R- Ithanga.
23. He further testified that Exhibit No.3 demonstrates the Defendant's intention to allocate part of the suit property to the Plaintiffs. That there exist other organizations and Government institutions including Kinyangi Primary School and Administrative Offices located in the contested portion of the suit land.
24. PW1 denied having trespassed on the suit property on 3<sup>rd</sup> October 2023, and he reiterated that he was born and raised thereon. That the Plaintiffs resolved as a group to subdivide the suit property, and the said act of subdivision of the parcel of land where they have lived for over 30 Years, did not amount to trespass. He urged the Court to allow the Plaintiffs' claim.
25. Upon cross-examination by Mrs. Opiyo for the Defendant, PW1 testified that there is certificate appearing on page 9 of the Plaintiffs' trial bundle which indicates that the Plaintiffs' CBO was registered on 6<sup>th</sup> September 2018. He admitted that there is no agreement executed between the Plaintiffs and the Defendant, over surrender of the alleged parcel of land.
26. He further admitted that the name of the Plaintiffs' CBO does not appear on page 7 of the Defendant's bundle of documents. That the author of the letter appearing on page 7 of the Defendant's bundle of documents is the District Commissioner, as distinguished from the Defendant, and bears the signature of Hudson W. Misiko. Further, that he was born in 1977, and was thus two years old as at 24<sup>th</sup> November 1979, when the letter in question was written.
27. He admitted that on page 22 of the Defendant's bundle of documents, there is a letter authored by Mbuo Waganagwa( the then District Commissioner- Muranga),and that the Plaintiffs were not mentioned. He confirmed that he entered unto the suit property on 3<sup>rd</sup> October 2023, which action, he stated, does not amount to trespass, as the said parcel of land is not part of the Defendant's property. That the Plaintiff's members wished to demarcate the section of the suit land claimed by themselves, and were awaiting the arrival of the Government Surveyor on 3<sup>rd</sup> October 2023, at Kinyangi site to execute the sub-division exercise.
28. It was his further testimony that the Defendant holds the title deed to the entire suit property, and the Plaintiffs have filed a claim before the National Land Commission in respect of land parcel No LR 11674, as opposed to the suit land. He admitted that from the year 1979 to year 2000, the Plaintiffs did not pursue any claim as against the Defendant over the suit property. Further, that any engagements with the Defendant concerning the contested section of the suit land have proved fruitless.
29. On re-examination, PW1 admitted that the Plaintiffs' group is not listed on paragraph 7 of the letter dated 24<sup>th</sup> November 1979, and that the Plaintiffs' Certificate of registration was issued in year 2018. However, the Plaintiffs' members existed prior to the formation of the Plaintiffs as a CBO.
30. It was his further testimony that the Plaintiffs did not enter into any agreement with the Defendant because the Defendant had already surrendered the section of the suit property in contention. He referred to page 27 of the Plaintiffs' bundle containing a consent signed by the District Commissioner Mbuo Waganagwa for the Murang'a Land Control Board.
31. Further, that the said consent relates to subdivisions as between the vendors and the purchasers, and he admitted to the existence of a different suit with the Defendant concerning a different parcel of land. He stated that the membership of the Plaintiffs CBO are 4824 persons.



32. PW2 Francis Mutie Nguti, who was the retired Chief of the area wherein the suit land is located, and who served in that capacity for 26 years prior to retirement. He adopted his Witness Statement as his evidence in chief, and he also confirmed that he is a member of the Plaintiff's group. It was his testimony that on the material day, the Plaintiffs members were affixing boundaries on the suit land, when they were confronted with accusations of trespass by the Defendant.
33. He admitted to having seen Exhibit No. 3, appearing on pages 22 and 23 of the Plaintiffs' bundle of documents. That the Plaintiffs' CBO was constituted by former employees of the Defendant, and their claim is for 1,114 Acres, from the Defendant's parcel of land.
34. On cross-examination by Mrs. Opiyo for the Defendant, PW2 reiterated that he is retired Civil Servant, and he also admitted that the Plaintiffs' CBO, is not mentioned in the letter appearing on page 21 of the Defendant's Bundle of documents. That the acreage which the Plaintiffs are claiming are 1,114 Acres, and that the said information was relayed to him by the District Officer (D.O.).
35. Further, that he was born in Kinyangi area, and is familiar with Ithanga hills, and the Defendant's land holdings fall entirely within Kinyangi area. The witness could not recall his membership number at the Plaintiffs' organization.
36. PW2 also testified that the Plaintiffs CBO does not possess the title deed to the portion of the suit land claimed as the Defendant continues to retain the mother-title.
37. On re-examination, he reiterated the demand for 1,114 Acres out of the suit land, which land was to go to the Plaintiffs Members. Further, that the said land is actual acreage occupied by the Plaintiffs said members, whom he served in the capacity of Chief. That the Plaintiffs as a CBO operates to bring its members together to pursue common interests.
38. It was his further testimony that they were engaged in aligning their boundaries on 3<sup>rd</sup> October 2023, and were in the company of a surveyor and police officers. That even although his name is not listed among the beneficiaries of the suit land, his name is listed with the Plaintiffs CBO, which has 4824 members.
39. Pw2 urged the Court to allow the Plaintiffs' claim, and he also denied being involved in trespass or any criminal activities in relation to the suit property.

### **The Defendant's Case**

40. DW1 Simon Odhiambo Achieng', adopted his Witness Statements dated 14<sup>th</sup> November 2023, and 22<sup>nd</sup> January 2024, as his evidence in chief. He also produced his List of Documents as exhibits, which were marked D Exhibits I-II.
41. DW1 also testified that Kinyangi is a different location from Ithanga, and the two are separated by about a 15 to 20 minutes' drive. Further, that the Plaintiffs' members invaded the Defendant's parcel of land situated in Kinyangi area, in response to which the Defendant filed a report with the Police. Further, that the Defendant uprooted 30 beacons erected on the suit land on 3<sup>rd</sup> October 2023, by the Plaintiffs members, and by 5<sup>th</sup> October 2023, the Defendant had removed 45 beacons from the suit land.
42. On cross-examination by Mr. Ondabu for the Plaintiffs, DW1 testified that he holds a Bachelor of Science Degree in Environmental Science, and he is the Executive Head of Corporate Affairs of the Defendant. He also testified that the letter dated 24<sup>th</sup> November 1979, is an application for excision



- addressed to the Commissioner for Lands. That a number of excisions are set out in the said letter, and he admitted that the Ithanga Settlement Scheme K.7, is listed as against 800 Acres, in the said letter.
43. He further testified that item No. 5 provides that 400 Acres, were for ex-employees of Kakuzi, while item number 17 refers to 100 Acres ,while item number 8 reserves 100 acres for Kakuzi Hills. He admitted that the said letter is signed by MBUO Waganagwa D.C./Murang'a LCB. It was DW1's further testimony that the document in question is a consent issued by the LCB Murang'a, and the names listed therein are the same names in the application for excision.
  44. DW1 also testified that the Plaintiffs are not in occupation of the suit land, and admitted having seen the Plaintiffs members on 3<sup>rd</sup> October 2023, on the suit property. That he also saw a Surveyor and rowdy youths on the material day, and he alerted the area OCPD, to place them under arrest.
  45. It was his further testimony that 50 Acres from the suit property was set aside for Administration Offices, and there exists a chief's Office at Kinyangi, area and other amenities. DW1 disclaimed knowledge of ACK Church being located on the contested section of the suit land.
  46. He admitted to the existence of Kinyangi Primary School and Kinyangi Trading Centre, and also stated that the Defendant has set aside 50 Acres out of which Kinyangi Primary School occupies 12 Acres. That the area invaded by the Plaintiffs falls outside the 50 Acres designated by the Defendant for social amenities.
  47. He also testified that it was not within his knowledge whether the acreage occupied by the said school arose from excision of the suit land. It was his further testimony that there are over 5 cases involving the suit property currently before the NLC and the Courts of law.
  48. It was DW'1 further testimony that the Defendant has not surrendered the mother title to the suit property for purposes of excision. Further, that the Plaintiffs members have not been on the property for a long time, and that the surrender was undertaken in year 1979.
  49. Referring to Entry No. 5, DW1 testified that was a transfer of 313 Hectares to David Mungai, a former Manager of the Defendant's Company. That the entire acreage of land parcel No. LR. No. 10731 is 26,618 Acres, out of which the said David Mungai received 313 Hectares. He reiterated the Claim that the Plaintiff invaded the suit property which belongs to the Defendant. Further, that he joined the Defendant in year 2006, and that he has total faith in the ownership documents held by his employer in respect of the suit property.
  50. He admitted that people attend the LCB to obtain consents to transfer or subdivide land, and that the Plaintiffs members do not live on the suit land except for PW2.
  51. On re-examination, DW1 made reference to letters which were not authored by the Defendant, and testified that there exists no agreement between parties to this suit. It was his further testimony that the Defendant set aside 50 Acres for Administrative Office and 12 Acres for Kinyangi Primary School. That the claims filed against the Defendant before the NLC were originated by Kinyangi squatters.
  52. After the close of viva voce evidence, parties filed and exchanged their rival written submissions, which this court has considered as follows;

### **The Plaintiff's Submissions**

53. The Plaintiffs filed their written submissions on 28<sup>th</sup> October 2024, through the Law Firm of Ondabu & Co. Advocates. The following issues were identified for determination:-
  - i. Whether there was surrender of part of the property owned by the Defendant to the Plaintiffs.



- ii. Whether the orders sought in the Plaintiffs' Plaint are merited.
  - iii. Who shall bear the costs of the suit.
54. It was submitted that the Defendant voluntarily surrendered 1902 Acres, out of its land parcel no. L.R. No. 10731/R, to various institutions including the Plaintiffs. Reliance was placed on a letter dated 24<sup>th</sup> November 1979, appearing as the Plaintiffs' Exhibit No. 4 to show that the Plaintiffs were allocated 1,114.2 Acres, out of the suit land by the Defendant. Further reliance was placed on the Plaintiffs' Exhibit No.5, being a consent dated 26<sup>th</sup> February 1986, to anchor the submission that the Murang'a LCB, gave its approval for the allocation of a section of the suit property measuring 1,114.2 Acres to the Plaintiffs herein.
55. It was further submitted that the Defendant has never attempted to evict the Plaintiffs' members from the suit property, and has been content to retain the mother title thereof thereby, impeding the excision of the Plaintiffs' rightful share from the suit property. Further, that the Defendant's witness admitted during the trial that the Plaintiff's members have occupied the suit land in excess of 30 years. The Plaintiffs further submitted that its prolonged occupation of the suit property is sufficient evidence of the Defendant's surrender of the same to the Plaintiff.
56. Further, that the Defendant being the lawful owners of the suit land voluntarily surrendered part thereof to the Plaintiffs members, and other organizations and institutions voluntarily, therefore, the Defendant cannot be allowed to walk away from such surrender, merely on account of its refusal to present the mother title to the Commissioner of Lands to effect the necessary sub-divisions.
57. Relying on the holding of the Court in the case of Chief Land Registrar & 4 others Vs Nathan Tirop Koech & 4 Others [2018] eKLR, it was submitted that by surrendering the contested portion of the suit land to the Plaintiffs, the Defendant waived all rights and interests held in the said land. That the Defendant failed to prosecute its Counter-claim and the said counter-claim is an afterthought.
58. The Plaintiffs argued that the failure by the Defendant to register the surrender of the suit land to the Plaintiffs does not operate to invalidate the said surrender. Reliance was sought in the decision of the Court in the cases of Mwinyi Hamisi Ali vs The Attorney-General & Another [1997] eKLR; Ngimu Farm Limited Vs Attorney-General [2019] eKLR; and, Kinuthia & 2 Others vs Anyanga & 4 Others (ELC Civil Suit No. 160 of 2011) [2022] KEELC 3997 (KLR), in support of the said proposition.
59. Reference was made to a letter dated 8<sup>th</sup> March 2023, issued by the County Commissioner – Muranga, addressed to the Sub-County Commissioner in charge of Ithanga/Kakuzi Community Settlement speaking about the surrender of the subject land for public purposes.
60. That the Plaintiffs are entitled to 1,114.2 Acres from the suit property on account of surrender of the same by the Defendant. Further, that it is the Defendant who has trespassed on the suit land, having surrendered the acreage in contention to the Plaintiffs. It was argued that the Plaintiffs are deserving of a permanent injunction as against the Defendant as prayed. Reliance was sought in the Judgment of the Court in the case of Kenya Power & lighting Co. ltd vs Sheriff Molana Habib [2018] eKLR, on the meaning and import of a permanent injunction.
61. On the question of costs, reliance was sought in the provisions of Section 27(1) of the *Civil Procedure Act*, and the decision of the Court in the case of Party of Independent Candidates of Kenya & Another V Mutula Kilonzo & 2 Others [2013] eKLR, in support of the submission that the Plaintiffs are entitled to the costs of the suit, and costs in respect of the Defendant's Counterclaim.



## The Defendant's Submissions

62. The Defendant filed its written submissions dated 9<sup>th</sup> July 2024 through the Law Firm of Kaplan & Stratton Advocates. The following issues were isolated:
- a. Whether the Plaintiffs' claim in respect of an alleged gift and/or allocation of the suit property is time-barred.
  - b. Whether the Plaintiffs' claim in respect of the alleged gift is legally enforceable.
  - c. Whether the Plaintiffs' witness testimony is credible.
  - d. Whether the Defendant is the registered proprietor of L.R. No. 10731.
  - e. Whether the Plaintiffs have established any proprietary rights under the Land Registration Act, and is thus entitled to the orders sought in the Plaint.
  - f. Whether the Plaintiffs are in breach of the Defendant's constitutional rights under Article 40 (1) of the Constitution, the Land Registration Act and the Trespass Act.
  - g. Whether the Defendant is entitled to the prayers sought in the Counterclaim dated 7<sup>th</sup> November, 2023.
  - h. Whether the Plaintiffs' claim is justified.
  - i. Who should bear the costs of the suit and the Counterclaim.
63. It was submitted that the Plaintiffs' claim is statute-barred pursuant to the provisions of Section 7 of the Limitation of Actions Act, having been brought more than 12 years, since the cause of action complained of arose. Reliance was placed in the decision of the Court in the case of M'Ikiara M'Rinkanya & Another vs Gilbert Kabeere M'Mbijiwe [2007] eKLR.
64. It was further submitted that limitation touches on the jurisdiction of the Court to determine disputes as held by the Court in the case of Bosire Ongero vs Royal Media Services [2015] eKLR. Further reliance was sought in the decision of the Court in the case of Gathoni vs Kenya Cooperative Creameries Ltd [1982] eKLR to underpin the claim that the statute of limitations is meant to protect a Defendant from defending stale claims.
65. It was further submitted that the alleged gift of the portion of the suit land in question in favour of the Plaintiffs by the Defendant is not enforceable because the gift was not perfected. Reliance was sought in the reasoning of the court in the cases of: Ogwara vs Mangera & 4 Others (Civil Appeal no. 18 Of 2017) [2021] KECA 117 (KLR); and, Micheni Aphaxard Nyaga & 2 others vs Robert Njue & 2 Others [2021] eKLR to buttress the foregoing argument.
66. The Defendant refuted the claims that it surrendered any part of its land holding to the Plaintiffs, and that a surrender instrument constitutes sufficient evidence of a surrender as held by the Court in the cases of Push Enterprises Ltd vs Kenya Airports Authority (ELC Case 721 of 2013 [2024] KEELC 449 (KLR) (25 January 2024) (Judgment); Fanikiwa Limited & 3 Others vs Sirikwa Squatters Group & 17 others (Petition 32 (E036), 35, (E038), & (E039) of 2022 (consolidated) [2023] KESC 105 (KLR) (15 December 2023) (Judgment); Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 others [2018] eKLR; and, Kinuthia & 2 Others vs Anyanga & 4 Others (ELC Case 160 of 2011) [KEELC] 3997 (KLR0 (Ruling).



67. Further, that there does not exist any agreement to donate any section of the suit property to the Plaintiffs, and in any event the alleged gift in favour of the Plaintiffs was never completed. The Defendant argued that it was true that the Plaintiffs' members were in occupation of the suit property, they would not have invaded the same on 3<sup>rd</sup> October 2023, as they did.
68. It was further submitted that the Plaintiffs' witnesses' testimony was contradictory on account of the disparities between the averments set out in the Plaint, and the oral evidence adduced before the Court. Reliance was sought in the holding of the Court in the cases of *Abudi Ali Mahadhi vs Ramadhani Saidi & Another* [1999] eKLR; and, *Elisa Chizi Lugogo vs pack Kenya* [2013], to anchor the proposition that inconsistent and contradictory evidence must be disregarded. It was argued that PW1 stated in his oral testimony that the Plaintiffs' members were in occupation of the suit land, yet in the Plaint it is averred that the Plaintiff received the suit property as a donation having not lived therein.
69. Furthermore, the Plaintiffs claim to be a beneficiary of the suit land, vide a donation dated to 1979, yet the Plaintiffs' CBO was registered only in year 2018. Yet another contradiction noted in the Plaintiffs' case is in respect of PW2's claim that the Plaintiffs were entitled to 1,114.2 Acres, out of the suit property, yet in his Witness Statement PW2 laid claim to only 800 Acres.
70. The Defendant asserted its proprietary over the suit land, pursuant to the provisions of Section 26 (1) of the *Land Registration Act*. It was submitted that a surrender of land is a consensual matter and the Court lacks power to compel such surrender.
71. On the question of damages, it was argued that the Plaintiff is not entitled to an award of damages pursuant to the reasoning of the Court of Appeal in the case of *Jogoo Kimakia Bus Services Ltd vs Electrocom International Ltd* (1992) KLR 177.
72. It was reiterated that the Plaintiffs have violated the Defendant's rights to property as set out under Article 40(1) of *the Constitution* of Kenya, and enunciated by the Courts in the cases of *Kibet Ruto vs Samuel Kiplenting Bett* [2017] eKLR; *Municipal Council of Eldoret vs Titus Gatitu Njau* [2020]; and, *Mohamed & Another vs Bader & 340 Others (ELC Petition 006 of 2021)* [2024] KEELC 1 (KLR0 (15 January 2024)).
73. The Defendant prayed for its Counterclaim to be allowed together with costs of the suit and Counterclaim.

### **The Plaintiff's Further Submissions**

74. The Plaintiff filed further submissions on 28<sup>th</sup> October 2024, and submitted that surrender of land is not subject to limitation. The Plaintiff reiterated the submission that all it is seeking through the instant suit is a formal recognition and registration of the surrender undertaken by the Defendant in its favour. It was argued that surrender does not amount to a gift, and is incapable of being retaken. Reliance was sought in the decision of the Court in the case of *Mwinyi Hamisi Ali vs The Attorney-General & Another* [1997] eKLR. It was argued that the authorities cited by the Defendant are inapplicable to the current suit.
75. The court has considered the available evidence as adduced by the parties in court, the exhibits produced thereon, the rival written submissions, the numerous cited authorities and the relevant provisions of land, and finds that there are facts that are not disputed herein.
76. There is no doubt that land parcel LR NO. 10731, which was described to be in North East of Thika township, was granted to Kakuzi Fibrelands Ltd on 2<sup>nd</sup> May 1963, as is evident from Certificate of title (Grant), produced by the Defendant herein.



77. Further, it is evident that the said certificate of title was changed to Kakuzi Ltd on 29<sup>th</sup> July 1971. There are also two other entries for 8<sup>th</sup> April 1980, which shows that a caveat was lodged on the suit land by the East Africa Power & Lighting Co. Ltd, claiming grant of easement by virtue of agreement dated 30<sup>th</sup> September 1979.
78. The second entry is for transfer of land to John Munyae, for an area of 313.4 Ha, subject to the caveat, and the said entry is dated 2<sup>nd</sup> June 1989. There is no other entry/ries indicating either subdivisions or surrender of any part of this suit land to anyone.
79. It is also evident that the suit land was initially registered under The Registration of Transfer Act, Cap 281. Under the said Cap 281, Section 23, it gives an absolute and indefeasible proprietorship to the owner of the property, and title of such an owner can only be challenged on the grounds of fraud or misrepresentation, to which the owner is proved to be a party. This provision of law, has been replicated in section 26 of the [Land Registration Act](#), No 3 of 2012.
80. A mere looking at the Certificate of title held by the Defendant, which shows that it is the registered owner of the suit land, and taking into account the provisions of sections 23 of “The Registration of Title Act( RTA) Cap 281” (repealed), and section 26 of [Land Registration Act](#), the court finds that prima facie, the Defendant is the absolute and indefeasible owner of this parcel of land LR NO. 10731, and the said ownership can only be challenged under the conditions provided by the Act.
81. However, there is no doubt that the Plaintiffs have a lodged a claim over Land parcel No. LR NO. 10731/ R, comprising of 1,114.2 acres which land is registered in the name of the Defendant on the basis that the said suit land was surrendered by the Defendant in 1979, and given to the Plaintiffs, as a gift. The Plaintiffs have alleged that they have been on the suit land for more than 30 years, and some of them were born on the suit land.
82. It is also evident that on 28<sup>th</sup> September 2023, a group of people, which the Plaintiffs admitted were allegedly members of Kinyangi Mixed Organic Farmers( CBO), entered unto the suit land, with the aim of subdividing the said land, and placed beacons thereon.
83. There is no doubt that the Plaintiffs members entered the suit land on allegations that they are the bone fide proprietors of the said land, on the basis that the Defendant surrendered the said land along time ago, and thus the Defendant has no proprietary rights over the suit land.
84. Further, there is no doubt that the Defendant has denied having surrendered and/or allocated the said suit land to the Plaintiffs, and or having allowed the Plaintiffs to occupy the said land. The Defendant alleged that the Plaintiffs members are trespassers, and that on the material day, upon realizing that the Plaintiffs’ members had invaded and or trespassed on the suit land, they reported the matter to the Police, or repulsed the said invaders/ trespassers, and thereafter the Defendant’s agents removed the illegally placed beacons which were totally 45 in number.
85. It is not in doubt that the Defendant has urged the court to find and hold that the Plaintiffs herein are trespassers, and that the court should restrain them from further trespass. The Plaintiffs have of course denied all the above allegations.
86. Further, the Plaintiffs have alleged that they were granted 800acres out of land parcel No LR 10731/R, and they based their allegation on the letter dated 24<sup>th</sup> November 1979, titled Application For Excision, which Letter was signed by Hudson W. Misiko; District Commissioner Muranga. In the said letter, item No7 indicated that 800 acres, were to be registered in favour of Ithanga Settlement Scheme -K.7



87. Further, from the exhibits produced in court by the Plaintiffs, one of them is the Certificate of Registration of Community Based organization(CBO) FOR Kakuzi/ Kinyangi Mixed Organic Farmers CBO. This is the Plaintiffs herein, and it is evident that the said registration was done on 6<sup>th</sup> September 2018. In essence, the Plaintiffs came into being upon being registered.
88. Therefore, the Plaintiffs having alleged that they are the bona- fide proprietors of the suit land measuring, 1114.2 acres by dint of a surrender, allocating and/or gifting of the said land to them by the Defendant, and the denial of those allegations by the Defendant, and upon the Defendant alleging that the Plaintiffs' entry and occupation of the suit land was on 28<sup>th</sup> September 2023, and that action amounted to trespass, this court is called upon to determine the disputed facts.
89. Having considered the above undisputed facts and allegations, the available evidence and the relevant provisions of law, the court finds the issues for determination are;
- i. Whether the Plaintiffs' claim in respect of an alleged surrender, gift and allocation of the suit property is time barred.
  - ii. Whether there was a surrender and gifting of the section of the suit land in contention by the Defendant to the Plaintiffs.
  - iii. Whether the Plaintiffs suit is merited.
  - iv. Whether the Defendant's Counterclaim is merited.
  - v. Who shall bear the costs of the suit and the Counterclaim?

**i). Whether the Plaintiffs claim in respect of an alleged surrender, gift and allocation of part the suit property is time barred?**

90. Before delving into the merit or demerit of the above issue, this court take note that the suit herein is brought by Murigi Njogu, Cathherine Njambi, Ann Kabera & Lucas Ndundu} suing as the officials of Kakuzi/ Kinyangi Mixed Organic Farmers ( CBO). However, in paragraph 1 of the Plaint, the Plaintiffs described themselves as adults of sound mind, living and working for gain within Kiambu County. From the above description, the Plaintiffs live and work for gain in Kiambu County, while the suit land is in Muranga County, in Kakuzi/ Kinyangi area. If that is the case, do they live, and have they lived on the suit land as alleged by themselves for more than 30 years?
91. Further, in their Verifying Affidavits, the deponents, who are the Plaintiffs herein deposed that they are the officials of Kakuzi- Kinyangi Mixed Organic Farmers CBO of Ithanga Community, and had authority for and on behalf of the members to swear the Affidavit. In the Plaint, the Plaintiffs did not aver that they had brought the suit for and on behalf of the members. They just described themselves as adults of sound mind, and also did not aver that they had authority of the members to file this suit on their behalf.
92. How are officials of a Community Based organization verified? The Plaintiffs ought to have produced documents or minutes of the said CBO, confirming that they were elected as officials and their capacity, together with the list of members duly signed, with their Identification Cards(IDs) and mobile numbers and signatures of the members. The Plaintiffs herein have not produced any documents to show and confirm that they are officials of the named CBO.



93. In the case of Andu Akuru A Twiga CBO v Chief Land Registrar; National Land Commission (Interested Party) (Environment & Land Case E013 of 2023) [2023] KEELC 20419 (KLR) (4 October 2023) (Ruling, the court held as follows;

“The officials of the Applicant should have at least been listed as Applicants suing on behalf of the Applicant but that was not the case. The alleged officials only went as far as to swear the Affidavit in support of the Originating Summons Application and depone to have the authority to bring this suit on behalf of the Applicant. The three individuals who have sworn the said affidavit aver that they are the Chairman, Secretary and member of the Applicant respectively and therefore they argue that they are lawfully authorized by the said Applicant to bring this suit against the Respondent in order to preserve its interest in parcel numbers LR Nos 252 and 253. There is no evidence before this Court demonstrating such authority as alleged.”

94. Though the Plaintiffs have alleged that they are officials of Kakuzi- Kinyangi Mixed Farmers; Community Based Organization, they did not avail evidence of their official capacity in the said CBO. In the above quoted case of Andu Akuru A Twiga( supra), the court further held;-

“In regard to authority to institute the suit, other members of the CBO are to be seen to have given it in writing to the officials to institute the suit on behalf of the Applicant. The alleged officials of the Applicant stated in paragraph 1 on the face of the Application that this suit was brought by the Applicant in its own capacity as a registered CBO and further the alleged officials at paragraph 2 of the Affidavit in support contend that they are the Chairman, Secretary and member of the Applicant respectively and therefore they are lawfully authorized by the said Applicant to bring this suit against the Respondent in order to preserve its interest in parcel numbers LR Nos 252 and 253. Then again, no evidence has been adduced to demonstrate this alleged authority.

95. It is evident that the Plaintiffs herein did not avail documents to prove their capacity, and their claim that they are officials of the said CBO, remains as mere allegation, without backing of any evidence. Be that as it may, that omission was not contested by the Defendant, and thus this court will consider the substance of the case and not the procedural technicality.

96. It was the Defendant’s submissions that the Plaintiffs’ claim or suit is time barred as provided by Section 7 of the *Limitation of Actions Act*, which provides;

“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.”

97. For this allegation that the suit is time barred, the Defendant relied on various decided cases such as Bosire Ongero vs Royal Media Services ( 2015) eklr, where the court held that limitation goes to the jurisdiction of the court to entertain the case. They submitted that the Plaintiffs filed this suit after expiry of limitation of actions period, and thus this court has no authority and/or jurisdiction to hear and determination this matter.

98. The Defendant also relied on the case of Gathoni vs Kenya Co-operative Creameries (1982) eklr, where the court held that the statute of limitation is meant to protect a Defendant from defending stale claims, and he urged the court to dismiss the Plaintiffs’ suit.



99. The Plaintiffs on their part denied that the issue of surrender is subject to limitation of actions, as provided by Cap 22 laws of Kenya. The Plaintiffs alleged that they are not seeking recovery of land, but are seeking formal recognition and registration through a permanent injunction.
100. For the submissions that the issue of surrender is not caught by limitation of action, the Plaintiffs relied on the case of Ngimu Farm Ltd vs Attorney General ( 2019) eKLR, where the court held that since land surrender is one of the tools to achieve the constitutional tenets of equitable access to land, then surrender being a constitutional process cannot be time barred/ limited at the whims of the Defendant.
101. In the above referred case, the surrender that the court referred to is the one required by the Physical Planning Act, when a developer applies to subdivide the land for development, then there is a requirement to surrender part of the land as a condition for being granted permission to subdivide. The surrendered land is for public utilities, such as roads, schools and commercial centers. The court did not envisage a situation where the surrender was by a private individual for benefits of other private individuals, which is the case herein.
102. The Plaintiffs herein have claimed that they are bona fide owners, of the suit land, and that as they were subdividing the suit land on 28<sup>th</sup> September 2023, wherein the Defendant by itself, servants prevented them from carrying on further subdivisions without any explanation.
103. The Plaintiffs alleged that they have been on the suit land since it was surrendered and offered to them in 1979, and the Defendant declined to surrender the original title so that it can be registered in their names.
104. The bone of contention is whether the Defendant surrendered the suit land and donated it to the Plaintiffs, and whether the Defendant prevented the Plaintiffs from carrying out subdivision of the said land on 28<sup>th</sup> September 2023 or 3<sup>rd</sup> October 2023, and /or whether the Plaintiffs trespassed on the Defendant's land as alleged in the Counter- claim.
105. The cause of action that brought about this suit was allegedly committed on 28<sup>th</sup> September 2023/ and/or 3<sup>rd</sup> October 2023, according to the Defendant. Though the basis of the claim is the alleged surrender, the Plaintiffs have prayed for permanent injunction to restrain the Defendant from blocking them to deal or enter unto the suit land.
106. The court finds that the cause of action that allegedly occurred on 28<sup>th</sup> September 2023, and or 3<sup>rd</sup> October 2023, is not time barred. The court finds that it has jurisdiction to hear the dispute herein between the Plaintiffs and the Defendant, which dispute arose either on 28<sup>th</sup> September 2023 or 3<sup>rd</sup> October 2023, and decide the case on merit.
107. Consequently, on issue No1, this court finds that since the suit contains claims of surrender and donation of land, and trespass which allegedly occurred in September/ October 2023, then the suit is not caught up by *limitation of Actions Act*, and will not be struck out, but will be decided on merit.

**ii). Whether there was a surrender and gifting of a section of the suit land in contestation by the Defendant to the Plaintiffs**

108. Coming to issue No 2, on whether, there was evidence of surrender and gifting of the suit land to the Plaintiffs by the Defendant, the court has taken note of indefeasibility of titles and the fact that a certificate of title to land can only be defeated as provided by the land. The Defendant herein is the owner of the suit land, but it can lose ownership of land through the given means provided by the law such as Compulsory Acquisition, adverse possession, transfer, surrender and cancellation of title if the same is found to have been acquired through fraud, misrepresentation or illegally/ irregularly.



109. The Plaintiffs is seeking to have the suit land declared as theirs as opposed to the Defendant, through a process of surrender and later offering the same to them by the Defendant, which allegations have been vehemently opposed by the Defendant. The Plaintiffs are the ones who have alleged, and the burden of proof is upon them. See the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others* (2014) eKLR where the court held;

“The person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue.”

110. In the case of *Chief Land Registrar, Registrar of Titles, Ministry of Lands, Director of Survey & Attorney General v Nathan Tirop Koech, Zacharia Kimutai Kosgei, Ezekiel Kiptoo, Ernest Kibet & National Land Commission* [2018] KECA 27 (KLR), the Court of Appeal observed as follows;

“Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of *the Constitution* or Statute. The condition precedent to taking away anyone's property is that the authority must ensure compliance with *the Constitution* and Statutory provisions.”

111. The Defendant's herein being the registered owner of the suit land, the claim herein by the Plaintiffs is to deprive it of the said land, and thus sufficient evidence must be called to satisfy that the constitutional and statutory provisions have been fulfilled, and the said land can thus be taken away, and granted to the Plaintiffs.

112. As observed above, the Plaintiffs have the legal and evidential burden of proof, there allegations and were required to discharge it adequately on the required standard of balance of probabilities. See the case of *Miller Vs Minister of Pensions* [1942] 2 ALL ER 372, where the court held;

“It must carry a reasonable degree of probability... If the evidence is such that the tribunal can say ‘we think it is more probable than not’ the burden is discharged., but if the probabilities are equal, it is not”.

113. Right to own land is a right guaranteed by *the Constitution* of Kenya 2010. Article 40 of the said Constitution provides;

“Protection of right to property

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property— (a) of any description; and (b) in any part of Kenya
- (2) Parliament shall not enact a law that permits the State or any person— (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).



- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
  - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that— (i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

114. In light of the above constitutional guarantee, the Supreme Court of Kenya in the case of *Rutonga Farm Ltd Vs Kenya Forest Services & 3 others* (2018) eKLR, held as follows;

“once property interest has been lawfully acquired, the guarantee to protection of rights to property under Article 40 of *the Constitution* is then expressed in terms that no person shall be deprived of the said property.”

115. Bearing in mind the provisions of above Article of *the Constitution*, and the above holding of the Supreme Court, this court will proceed to determine who between the Plaintiffs herein and the Defendant are the lawful holder/ and or owner of the suit land, and whose holding and right requires the protection by *the Constitution* and Statutes, so that they are not unlawfully deprived of the said property.

116. The suit land having been registered in favour of Kakuzi Fibrelands Ltd in 1963, and Later Kakuzi Ltd, the Defendant herein in 1971, it is evident that the Defendant acquired the suit land under one of the methods provided by the law, being allocation. There is no claim that the Defendant acquired the suit land through fraud or misrepresentation, and its certificate of titles is not challenged for having been acquired through any of the illegal means mentioned in the “Registration of Title Act, Cap 281(repealed). The said conditions for challenge of a title are now mirrored in section 26 of the *Land Registration Act*, 2012.

117. In the case of *Joseph N.K. Arap Ng'ok v Moiyo Ole Keiwua & 4 others* [1997] eKLR, the Court of Appeal held as follows:

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”



118. The Plaintiffs have alleged that they acquired the suit land through surrender of a section of the suit land, and gifting of the same to them by the Defendant in 1979, and that they have lived thereon since then. This allegation is not admitted by the Defendant, and the Plaintiffs are expected to avail sufficient evidence to prove the said allegation.

119. A gift is defined as a voluntary transfer or conveyance of property or property interest from one individual to another, made gratuitously to the recipient and not upon any consideration. If there is any consideration, then the law of gifts does not apply. The individual who makes the gift is known as the donor, and the individual to whom the gift is made is called the donee. See the case of *In re Estate of Chesimbili Sindani (Deceased)* [2021] Eklr where the court held;

“From the case law above, the principle that emerges is that any gift inter vivos should be backed by some memorandum in writing, and the gift would be complete once title to the subject property is transferred to the name of the beneficiary of the gift. Difficulties arise where transfer is not effected to the beneficiaries before the death of the deceased, in which case such property would remain the free property of the deceased, available for distribution at confirmation, the argument being that such gift was founded on a mere promise which the deceased did not carry through prior to his death. Where some preliminary steps were taken towards effectuating his promise, so that all what remained after the death of the deceased was mere registration of the property in the name of the beneficiary, it would be presumed that that the deceased intended to make a gift inter vivos. That would be the case where the deceased has complied with the *Land Control Act*, Cap 302, Laws of Kenya, where the land is subject to that law, by applying for consent to transfer the property from the name of the deceased to that of the beneficiary, the consent had been granted, and he had signed a transfer form to facilitate registration of the property in the name of the beneficiary. That would mean practically everything had been done to perfect or complete the gift were it not for the demise of the deceased. The mere fact of being shown a piece of land and given permission to occupy and use it, without more, is not adequate proof for a gift inter vivos. The deceased, as registered proprietor of the land in question, would have the right to licence a person to occupy the land and use it. A child who has been shown a piece of land to build on and to till, is not in the shoes of an owner, but a mere licensee. The death of the deceased would not upgrade the licence to ownership, if anything the death of the proprietor could mean that the license comes to an end, and the licensee continues to occupy and work the land at the mercy of the administrator.”

120. The Transfer of Property Act defines a gift as;- “Gift” is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

121. It is not in doubt that one can acquire land as a gift in Kenya. Indeed Gift is one of the methods through which title to land can be acquired, and it involves the voluntary transfer of ownership of land from one person (the donor) to another person (the donee) without any consideration or payment. The transfer of land by way of gift is governed by the laws of the country and /or jurisdiction where the land is located. See the case of *in Re Estate of The Late Gedion Manthi Nzioka (Deceased)* [2015]eKLR where the court held;

“In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa). Section 31 of the *Law*



of Succession Act provides as follows with respect to gifts made in contemplation of death:... For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”

122. Gifting of land is the transfer of property from one person to another without consideration, and the owner of the property expresses his intention to the other party, and physically transfers the property. Further, the person being gifted must accept the property for the transaction to be complete.
123. However, there are conditions to be met for the gift to be perfected. These are;- Acceptance: The donee must accept the gift. Acceptance can be either express or implied, but it must be communicated to the donor during their lifetime. Delivery: There must be a physical or symbolic delivery of the land from the donor to the donee. The form of delivery may vary depending on the circumstances, but it should demonstrate the donor's intention to transfer ownership. No consideration: A gift is a transfer without any consideration or payment. If any form of consideration is involved, it may be considered a sale or another type of transaction, rather than a gift.
124. The Plaintiffs herein needed to prove existence of the above condition for this court to arrive at a finding that indeed the Defendant surrendered and gifted the Plaintiffs the suit property herein, and they are now entitled to it, and thus they are entitled to protection by Law and court.
125. Courts in Kenya have had occasions to decide on the issue of land as a gift. As already noted above, land can be gifted through a gift inter vivos, which is a transfer of property from a living donor to a recipient during the donor's lifetime. In the instant case, the donor is the Defendant herein, which is a juristic person. But who is the recipient, given the alleged gift was made in 1979, and the alleged recipient herein Kakuzi- Kanyangi Mixed Organic Farmers( CBO), was registered on 6<sup>th</sup> September 2018? Can it be said that the recipient was the Plaintiffs herein?
126. It is also trite that to make a gift inter vivos, the donor must: use a deed or written instrument, Make a delivery, and Declare a trust, and the donor and recipient must both be living people. Was there evidence of any written instrument availed by the Plaintiffs herein? This court has not seen any, so far. It has been severally held by courts that when a person transfers land as a gift in Kenya, it must be in writing, and such evidence of gifting the suit land in writing was not availed. See the case of Muthaura (Suing as the Personal Representative of the Estate of Munene Mugo Ncacu - Deceased) v Mugo & another (Environment & Land Case 10 of 2020) [2024] KEELC 3384 (KLR) where the court held that;

“In the instant case it is clear that the gift to the plaintiff's late husband was not complete, therefore it was not valid. The gift was not perfected since it was not registered. The court has to be alive to the instances where the donor changes his mind as in the present case. In this case, the plaintiff's father-in-law changed his mind while he was still alive and transferred the properties to the defendants.”
127. In a bid to prove their case, the Plaintiffs herein produced a letter dated 24<sup>th</sup> November 1979, written by the District Commissioner Muranga, wherein he enclosed “Application Forms for excision” which had allegedly been prepared by Kakuzi Ltd. However, the said Application forms, were not produced as exhibits, and there was no letter or document from the said Kakuzi Ltd confirming that they had offered portions of its land the various organizations named in the said letter.



128. Without evidence of any offer or confirmation in writing from the alleged donor( Kakuzi Ltd), this court would find it difficult to hold and find that there was a written instrument gifting the suit land to any one, and especially the Plaintiffs herein. It is trite that to effect a gift inter vivos, the donor must settle it using either a deed or instrument in writing, delivery, or by way of a declaration of trust.
129. In the case of *Re Estate of The Late Gedion Manthi Nzioka (Deceased)* [2015] eKLR the Court held that:
- “.. for gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered, it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid.”
130. The other condition is that the donee (who are allegedly named in the said letter and Plaintiffs are not one of them) must accept the said gift. The gift herein being land, the said acceptance must be in writing. None was availed as evidence herein by the Plaintiffs. Further, there must be delivery of the land. The Plaintiffs alleged that they took possession of the suit land about 30 years ago. PW 1 testified that he was born in 1977, which was two years before the said gift was made. He could certainly not adduce evidence about delivery of the suit land to the donees.
131. None of the alleged donees named in the letter of 24<sup>th</sup> November 1979, gave evidence to the effect that the Plaintiffs were given possession or the alleged suit land was given to them by the donor( Kakuzi Ltd). On the condition of no consideration, the Defendant denied having offered the suit land to the Plaintiffs, and there was no evidence called especially from the Provincial Administration or Lands Office to confirm that indeed the Defendant, gifted the suit land to the Plaintiffs, for no consideration at all.
132. The other issue in dispute is whether the Defendant herein did surrender the suit land herein, so that the same can be gifted to the Plaintiffs. The Defendant denied having surrendered the suit land herein, especially for the same to be offered or gifted to the Plaintiffs herein. With the said denial, the Plaintiffs had an onerous task of calling sufficient evidence to prove their case on the required standard.
133. The Plaintiffs adduced evidence through Pw1 and Pw2 to the effect that the Defendant herein had surrendered the said suit land for purposes of gifting the same to the Plaintiffs herein. As the court observed earlier, the Plaintiffs’ CBO, came into being on 6<sup>th</sup> September 2018. The alleged surrender was done on or around 1979. The Plaintiffs alleged that the letter dated 24<sup>th</sup> November 1979, showed on item No.7, that 800 acres of land, were supposed to be excised and registered in favour of Ithanga Settlement Scheme k.7. The Plaintiffs alleged that the Kakuzi- Kinyangi Mixed Organic Farmer( CBO) are the same as Ithanga Settlement Scheme,-k.7 and that they were the ones who were offered 800 acres as per the above referred letter.
134. However, as stated by this court, according to the Certificate of Registration produced in court, the Plaintiffs were registered in 2018. There was no evidence produced to link the Plaintiffs herein with Ithanga Settlement Scheme. Further, according to the said letter of 24<sup>th</sup> November 1979, the acreage to be allocated to Ithanga Settlement Scheme was 800 acres. The Plaintiffs herein are claiming 1,114.2 acres. It was not clear how the Plaintiffs arrived at the acreage of 1,114.2 as claimed by them in the instant suit.



135. Be that as it may, the allegation of surrender has been denied by the Defendant. The law on surrender is provided for in section 44 of the Registration of Title Act, Cap 281(repealed) which provides;

“ 44. Whenever any lease which is required to be registered by the provisions of (1) this Act is intended to be surrendered, and the surrender thereof is effected otherwise than by operation of law, there shall be endorsed upon the lease the word “surrendered”, with the date of surrender, and the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof, and shall be attested by a witness; and the registrar thereupon shall enter in the register a memorial recording the date of surrender and shall likewise endorse upon the lease a memorandum recording the fact of the entry having been so made in the register, and thereupon the interest of the lessee in the land shall vest in the lessor or in the person in whom having regard to intervening circumstances, if any, the land would have been then vested if no such lease had ever been executed; and production of the lease or counterpart bearing the endorsed memorandum shall be sufficient evidence that the lease has been so surrendered:

Provided that no lease subject to a charge shall be surrendered without the consent of the chargee.”

136. Both the Plaintiffs and the Defendant relied on various decided cases to support their respective positions. The Plaintiffs claimed there was surrender made by the Defendant, the Defendant denied having surrendered the suit land.

137. What is surrender of land in Kenya? It is trite that surrender of land is the voluntary giving up of land by the holder, which extinguishes their rights. The process for surrender involves applying for the said surrender in writing and giving possession. If only part of a holding is surrendered, then the surrendered land will be apportioned, and surrendered back to the head lessor. See the case of Dorcas Atieno Rajoru & 145 others v Mjahid Sub-chairman Harambee Maweni Committee SHG & 2 others (2016) eKLR, the court stated that,

“indeed it is trite law that plots for public utilities and open spaces are usually surrendered to either the council, the county government or the national government that is required to hold plots meant for public utilities on behalf of the residents of the place where such plots are situated.”

138. Further The Black’s Law Dictionary (7th edition) at page 1458 defines “surrender” as follows:

“...The return of an estate to the person who has a reversion or remainder, so as to merge the estate into a larger estate.... A tenant’s relinquishment of possession before the lease has expired, allowing the landlord to take possession and treat the lease as terminated.”

139. In the case of Push Enterprises Limited v Kenya Airports Authority [2024] KEELC 449 (KLR), referred to by the Defendant, the court cited with approval Lord Millett at the House of Lords in Barrett v. Morgan, [2000] 2 AC 264, who aptly noted thus on the nature of ‘surrender of leases’: “A surrender is simply an assurance by which a lesser estate is yielded up to the greater, and the term is usually applied to the giving up of a lease or tenancy before its expiration. If a tenant surrenders his tenancy to an immediate landlord, who accepts the surrender, the tenancy is absorbed by the



landlord's conversion and is extinguished by operation of law. A surrender is ineffective unless the landlord consents to accept it, and is therefore consensual in the fullest sense of the term.”

140. Though surrender is recognized in *the Constitution* as one of the tools used to achieve equitable access to land ,sustainable and productive management of land resources, transparent and costs effective administration of land; it is underpinned by free will to surrender; must be consensual and in writing; and whenever there is a surrender, there must be an instrument of surrender duly executed by the owner of the land, and which must thereafter be lodged for registration and be duly registered. Therefore, surrender only takes effects upon registration of the surrender instrument and the owner of the land must consent to such surrender.
141. In the case of *Fanikiwa Limited vs Sirikwa Squatters Group & 20 others* (Petition 32 (E036) & 35 (E038) of 2022 (Consolidated)) [2023] KESC 58 (KLR) (16 June 2023) (Ruling), as cited by the Defendant, the Supreme Court of Kenya held as follows;
- “More recently, in *Chief Land Registrar & 4 Others v. Nathan Tirop Koech & 4 Others*, Civil Appeal 51 & 58 of 2016 (Consolidated); [2018] eKLR, the Court of Appeal , held at paragraph 96 that: “A surrender of Grant or instrument of title is not compulsory acquisition. The legal framework and procedure for surrender of title to land is different from the legal regime for compulsory acquisition. Section 44 of the RTA is the legal framework for surrender and the Land Acquisition Act is the regime for compulsory acquisition. Surrender cannot be construed and equated to compulsory acquisition.”
142. Further, the said Superior court held;- ...the “consensual” nature of a surrender is emphasized in Robert Megarry & William Wade, *The Law of Real Property* (Sweet & Maxwell; 2012, 8th ed.) page 851 as follows: “surrender is a consensual transaction between the landlord and the tenant, and therefore dependent for its effectiveness on the consent of both parties . Similarly, Martin Dixon, *Principles of Land Law*, (Cavendish Publishing; 2002, 4th ed.) at page 237 notes that: “a surrender, being a consensual act between landlord and tenant. We are persuaded by the foregoing propositions that the “consensual” nature of a surrender is the cardinal ingredient of a surrender of lease. Indeed, this is the essence of the proviso in Section 44 of RTA that: “and the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof”. This raises the question as to what was the “consensual arrangement” or “agreement” between Lonrho Agribusiness and the Government of Kenya, being the lessee and lessor respectively, that underpinned the contested surrender. Petition Nos. 32 (E036), 35 (E038) & 36 (E039) of 2022 47 [113] Put differently, to resolve the present dispute, the Court needs to determine what was agreed between the Government of Kenya and Lonrho Agribusiness at the time of alleged surrender of the subject leases in 2000. It is here that we meet the evidential contestation between the two parties which is at the heart of the question as framed.”
143. The Plaintiffs hinged there claim on the fact that the Defendant had surrendered the suit land, and that surrendered meant it was surrendered to the Government. The Defendant denied ever having surrendered the suit land, at all for purposes of allocating and/or gifting the same to the Plaintiffs. The Plaintiffs are not County or National Governments, as it is clear that surrender is done for purposes of development of public utilities.
144. With the denial of such surrender, the Plaintiffs needed to call evidence from government officials to confirm whether there was such formal communication of surrender of the suit land by the Defendant; whether it was consensual, and whether there was an instrument of such surrender.



145. Without that evidence, this court finds that the Plaintiffs have not proved their case on the required standard that indeed, the Defendant herein surrendered the suit land, for purpose of having it offered to the Plaintiffs

146. The Plaintiffs relied on the cases of Ngimu Farm Limited V Attorney General ( 2019) eklr, where the court held;

“Surrender of land either as a whole or a temporary title by owners to the Government for a particular purpose is borne of a legal process in Kenya. Once surrendered the land is reinstated back to the grantee, the Government of Kenya. The land owner retains the larger lot of land either in its current tenure or another. Surrender may be made in exchange of change of user, subdivision, conversion, amalgamation and or partition to name a few. Since the land is changing character, it becomes important to re plan it to meet the new use or state.

Land surrender is therefore one of the tools for land planning and development control by the county or national Government to achieve the Constitutional tenets of equitable access to land, sustainable and productive management of land resources transparent and cost effective administration of land stated in para 28 above. It is underpinned by the free will to surrender with the intentions to develop the particular land and not just a mere surrendering.” and Kinuthia & 2 others vs Anyanga & 4 Others (Environment and Land Case Civil Suit 160 of 2011) [2022] KEELC 3997 (KLR),where the court held that;

“It is clear that the suit lands were surrendered to the Government of Kenya free of costs and in consideration of approval of subdivision plan. The plots surrendered are to serve public purposes in accordance with the planning requirements of the subdivided land and the eventual uses that the lands will be put in. Unlike compulsory acquisition, there is no reversionary interest that the surrenderee retains in the case of surrender pursuant to subdivision. As stated above the surrender was a condition precedent to the approvals of the subdivision scheme.”

147. From the holdings above, it is evident that surrender of land is done to the government for purposes of serving the public, and is a condition precedent for subdivision. The Plaintiffs herein are private individuals, and they are not retaining the suit land for public purposes. At least government officials should have given evidence on behalf of the Plaintiffs to confirm if indeed there was surrender by the Defendant; and whether the said surrender was to benefit the Plaintiffs herein, whom as the court stated earlier, were only registered in 2018, and there was no clear connection between the Plaintiffs and Ithanga Settlement Scheme.

148. The certificate of title produced herein does not contain any entry to indicate that the Defendant herein did surrender part of the suit land to the Plaintiffs herein, and the Consent produced by the Plaintiffs is not enough to prove that indeed there was any surrender of the suit land by the Defendant to the Plaintiffs. The Plaintiffs alleged that they have been living on the suit land since 1986, but there was no evidence adduced to support that allegation.

149. Having considered the available evidence, the court finds that there was no evidence that the Defendant donated the suit land to the Plaintiffs, as there was no written agreement to that effect. If the Defendant had intended to offer the land to the Plaintiffs as a gift,(which is doubtful as the Plaintiffs were registered on 6<sup>th</sup> September 2018), then the said donation was not completed, and thus the gift was not perfected. There was no written agreement of such donation, no evidence of acceptance of the gift or delivery of the suit land to the Plaintiffs herein.



150. Further, the allegation of surrender of the suit land by the Defendant was not proved, as there was no instrument of such surrender, that was executed by the Defendant, and there was no evidence that the Defendant consented to such surrender. The court cannot compel the Defendant to surrender its lawful owned property, as the Defendant has a right to own property, which right is protected by *the Constitution* and the statutes law.
151. Therefore in answer to issue No1, this court finds and holds that there is no evidence that the suit land was ever surrendered by the Defendant, and then offered as a gift to the Plaintiffs herein( whose CBO, only came into existence on 6<sup>th</sup> September 2018).

**iii). Whether the Plaintiffs suit is merited.**

152. The Plaintiffs have sought for various prayers in their Plaint dated 5<sup>th</sup> October 2023. Among the prayers sought is an order for Permanent injunction; a declaration that the Plaintiffs owns the suit land LR NO. 10731/R Ithanga settlement scheme; an order to compel the Defendant to surrender the title to the suit for excision of 1114. 2 acres and the same to be registered in the name of the Plaintiffs.
153. These prayers are based on the allegations that the Plaintiffs are the owners of the suit land, by dint of having been allocated and/or gifted the same by the Defendant, after it surrendered the said parcel of land for that purpose. That the Defendant has refused to surrender the mother title for purpose of excision of the suit land and having the same in favour of the Plaintiffs
154. The court found and held that the Plaintiffs herein failed to attach documents to prove that they are officials of the Kakuzi- Kinyangi Mixed Organic Farmers( CBO), and authority from the members to sue on their behalf. Further, the court has found and held that there was no evidence of surrender of the suit land and land offering it as a gift to the Plaintiffs herein. Further, it is evident that the Plaintiffs was registered in the year 2018 and was not in existence at the time of the alleged surrender and offering the suit land as a gift to the Plaintiff herein.
155. Without any evidence of surrender and offering the suit land to the Plaintiffs, then the court finds that the suit land belongs to the Defendant as an absolute and indefeasible owner, and is thus entitled to constitutional protection. Having found that the Defendant is the owner of the suit land, then the Plaintiffs herein cannot be offered any statutory protection by this court, as they are not the owners of the suit land.
156. A “permanent injunction” is issued to perpetually restrains the commission of an act by the Defendant in order for the rights of the plaintiff to be protected. The right of a Plaintiff can be protected if he/she has an interest in the property/ land in dispute. It is issued after the suit has been heard. In this case, the court has heard the suit, and has found that the Plaintiffs are not entitled to the suit land, as they are not bona fide proprietors as alleged by themselves in their claim. Therefore, the Plaintiffs are not entitled to a claim of Permanent injunction.
157. On the prayer that the court do issue a declaration that the Plaintiffs are the legal owner of 1114.2 acres out of land parcel no LR NO 10731/R, this court has found and held that there is no evidence that the Defendant herein did surrender and offered the said acreage of land to the Plaintiffs herein as a gift. The Defendant is still the registered owner of the suit land, and cannot be deprived of the said land without tangible evidence. Therefore, the court cannot declare the Plaintiffs herein as the legal owners of the suit land.
158. Having found that the Plaintiffs are not the legal owners of 1114,2 acres , which are to be excised from the suit land, then the court cannot order and/or compel the Defendant to surrender the original title of the suit land so that the said acreage can be excised and registered in the names of the Plaintiffs. The



court also cannot grant the Plaintiffs any General damages as it has not found them to be the owners of the suit land.

159. In a nutshell, the court finds and holds that the Plaintiffs' claim is not merited, and they are not entitled to the orders sought.

**iv). Whether the Defendant is entitled to the orders sought in the Counter- claim.**

160. In its Counter- claim dated 7<sup>th</sup> November 2023, the Defendant averred that the Plaintiffs unlawfully trespassed onto its land parcel no LR NO. 10731, and proceeded to subdivide and occupy it, though they have no legal title to the said land. Therefore, the defendant sought for permanent injunction to restrain the Plaintiffs from trespassing, erecting beacons, subdividing and /or interfering with the defendant's possession and occupation of the suit land.

161. The Plaintiffs admitted that they carried out survey and subdivision work on the suit land on or about 28<sup>th</sup> September 2023, on allegations that the suit land belongs to them, and they were only setting boundaries for their parcel of land, and the public entities. They did not deny having erected beacons on the suit land, and they alleged that they were doing so to obtain their respective title deeds, which the Defendant has failed to facilitate by failing to surrender the original title.

162. This court has found and held that the Defendant is the registered owner of the suit land, which certificate of title was issued in 1963, under The Registration of Title Act. Under the said Act, it is evident that section 23 provides that such certificate of title gives the registered proprietor absolute and indefeasible right over the said land, with all rights and privileges appurtenant thereto.

163. The right of such proprietor can only be defeated as provided by the written law, and such right is guaranteed by *the Constitution* in Article 40. The Defendant being the absolute and indefeasible owner, then its ownership cannot be defeated by entry thereon by other persons without express authority of the owner.

164. The Plaintiffs admitted that they carried out subdivision of the suit land, and also erected beacons. It was their allegations that they have been in occupation and possession of the suit land since 1986. However, this court found and held there was no evidence of such possession, since they never called sufficient evidence to prove that allegation.

165. Section 3(1) of the *Trespass Act* provides;

“(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

166. In the case of Charles Ogejo Ochieng vs Geoffrey Okumu (1995) eKLR the Court defined trespass as an injury to a possessory right.

See also the case of Municipal Council of Eldoret vs. Titus Gatitu Njau [2020] eKLR, expressed itself, inter alia, that:

“Trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership.”

167. It is evident that the Defendant holds a valid title to the suit land, and the Plaintiffs hold none. The Plaintiffs have admitted that they subdivided the suit land on 28<sup>th</sup> September 2023, and the Defendant prevented them from doing so, and thus a dispute arose.



168. The Defendant is the title holder and owner of the suit land, and the Plaintiffs proceeded to subdivide the said land; erect beacons-thereon without the permission of the owner; thus the Plaintiffs are trespassers, and they breached the Defendant's right to property as enshrined in Article 40 of *the Constitution*, and are entitled to protection by this court.
169. Though the Plaintiffs alleged that the Defendant did not prosecute the Counter-claim, it is evident that the court adopted his witness statements as his evidence in chief, and in the said statements, the DW1, averred and explained how the Plaintiffs trespassed on the Defendant's suit land. In fact, the Plaintiffs are the ones who did not offer any evidence to counter the Defendant's counterclaim.
170. A "permanent injunction" was described in the case of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR where the Court held that;
- "...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties..."
171. The Plaintiffs are adamant that they are the owners of the suit land, and if not restrained, they would definitely proceed to erect the further beacons, subdivide and /or interfere with the Defendant's possession and peaceful enjoyment of the suit land.
172. For the above reasons, the court finds and holds that the Defendant is entitled to the orders sought in the Counter-claim.

**v). Who should bear costs of the suit and the counter-claim?**

173. For this issue, the court will be guided by the provisions of sections 27 of the *Civil Procedure Act*, which provides that costs are awarded at the discretion of the court, but ordinarily costs follow the event and are awarded to the successful litigant. The Defendant is the successful litigant, and is thus entitled to costs of the suit and the counter- claim. See the case of Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR quoted the case of Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227 held:
- "It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (FrippvsGibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."
174. Having carefully considered the available evidence, this court finds and holds that the Plaintiffs have failed to prove their case against the Defendant on the required standard of balance of probabilities. For the above reasons, the Plaintiffs' claim as contained in the Plaint dated 5<sup>th</sup> October 2023, be and is hereby dismissed entirely for lack of evidence, with costs to the Defendant.



175. Further, the court finds and holds that the Defendant's Counter-claim dated 7<sup>th</sup> November 2023, is merited and the same is allowed entirely in terms of prayers No. a, with costs to be borne by the Plaintiffs herein.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF JANUARY, 2025.**

**L. GACHERU**

**JUDGE.**

**29/1/2025**

Delivered online in the presence of; -

Joel Njonjo - Court Assistant

M/s Nyambura H/B for Mr Ondabu for the Plaintiffs

Mr Bett H/B for M/s Opiyo for the Defendant

L. Gacheru

Judge

29/1/2025

TABLE

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