



REPUBLIC OF KENYA

High Court at Kitale

Civil Case 89 of 1997

ELIJAH CHEMOYWO ARAP KOROS ::::::::::::::::::::::::::::::::::: PLAINTIFF.

VERSUS

HEZEKIAH KIPTOO KOMEN & 4 OTHERS ::::::::::::::::::::::::::::::::::: DEFENDANT.

J U D G M E N T.

This is a judgment on the defendants' counterclaim against the plaintiff who already has a judgment in his favour in the main suit against the defendants.

The main suit was filed at the High Court in Kakamega in the month of May, 1978 and was based on the facts that the original plaintiff **Elijah C.A. Koross**, was the registered owner of all that parcel of land known as **L.R. No. 11440** and a co-owner of land parcel **No. L.R. 9154** along with one Solomon Muke and four others. On or about the year 1975, the first defendant, **Hezekiah Kiptoo Komen**, purchased fifteen (15) acres of the plaintiff's share in L.R. No. 9154 comprising a total of 478 acres. The purchase price was Ksh. 10,000/= which was duly paid to the plaintiff. Consequently, the first defendant took possession of the 15 acres and utilized it. However, the plaintiff's co-owners in the said L.R. No. 9154 did not accept the first defendant and gave him a notice to vacate and he complied. The plaintiff refunded the first defendant part of the purchase price i.e. Ksh. 4,000/= and undertook to refund the balance of Ksh. 6,000/= at a later stage.

In 1977, the plaintiff offered to refund the said outstanding balance but the first defendant declined to accept it. The plaintiff offered to deposit the amount in court.

Upon refusal to accept the outstanding balance of the purchase price, the first defendant, without the consent of the plaintiff trespassed into and settled on L.R. No. 11440 belonging to the plaintiff on grounds that he had the right to occupy L.R. No. 11440 since he had been forced to vacate L.R. No. 9154.

The plaintiff therefore filed this present suit praying for orders that the first defendant and/or his servants and/or agents be restrained from trespassing into L.R. No. 11440 and L.R. No. 9154 and that the first defendant and/or servants/agents be ordered to vacate L.R. No. 11440.

In his defence filed on 3rd August, 1978, the first defendant admitted that the plaintiff was the registered owner of L.R. No. 11440 but contended that the registration of the parcel of land in the name of the plaintiff was fraudulently secured by the plaintiff.

The first defendant denied having purchased at Ksh. 10,000/= fifteen (15) acres of L.R. No. 9154 and having taken possession thereof as alleged by the plaintiff.

The first defendant also denied the existence of the alleged co-ownership of L.R. No. 9154 by the plaintiff

and others and the alleged refund of Ksh. 4,000/= to him by the plaintiff and the alleged promise to refund Ksh. 6,000/=.

The first defendant contended that if the plaintiff deposited a sum of Ksh. 6,000/= then it was not in respect of the present dispute.

The first defendant denied the allegation of trespass made against him and counterclaimed against the plaintiff for declaratory orders to the effect that the plaintiff was not entitled to the registrable interest in L.R. No. 11440 and that the registration of the plaintiff as owner of L.R. No. 11440 was secured by fraud and that the true owners of L.R. No. 11440 are the first defendant and his co-defendants viz **Jonathan Kipkoros Chesaguru, Kibet Cherotich, Cheserem Rotich and Chebilong Chebiator.** The defendants also seek an order to have the register rectified to include their names as registered owners of L.R. No. 11440.

The facts leading to the counterclaim are that in the year 1974 or thereabout, the first defendant and his co-defendants contributed a total sum of Ksh. 68,000/= towards the purchase of L.R. No. 11440 and appointed the plaintiff to be in charge of the contribution for the purpose of the intended purchase although he (plaintiff) made no contribution of his own.

Accordingly, the plaintiff submitted the necessary application to the land control board for consent but fraudulently represented himself as the purchaser and was granted consent in his name instead of the names of the defendants. He later wrongfully and fraudulently transferred L.R. No. 11440 in his own name. Consequently, the defendants were deprived of their land and suffered damage. They therefore pray for judgment against the plaintiff in terms of the counterclaim. The plaintiff denied the counterclaim and prayed for its dismissal.

The plaintiff contended that even if the defendants were parties to the agreement for the purchase of the suit land, the agreement was null and void and unenforceable for want of the land control board consent and for having not been in the form of writing.

The plaintiff also contended that even if there was fraud as alleged by the defendants, their counter claim is time barred by the Limitations of Actions Act.

All along this matter proceeded on the basis of the original statement of defence and counterclaim which ought to have been amended to reflect the additional defendants who were joined as parties to the suit on the 23rd October, 1978. the failure to accordingly amend the statement of defence and counterclaim was however not fatal neither did it prejudice the plaintiff.

Be that as it may, the basic issue arising for determination herein is whether **the defendants are entitled to the declaratory orders sought against the plaintiff in the counterclaim** which is anchored on the allegation that the defendants made a joint contribution of Ksh. 68,000/= for the purchase of the suit land. (i.e L.R. 1140).

It is contended by the defendants that there was no contribution from the plaintiff towards the purchase of the suit land and that his role was limited to receiving the money from the defendants and facilitating the purchase transaction. The defendants alleged that contrary to their expectations, the plaintiff went ahead to cause the transfer and registration of the land in his name and in doing so, he fraudulently represented himself to the Land Control Board as the sole owner of the land instead of the defendants. However, on the 2nd April, 1980, the plaintiff testified before the High Court (**Scriven, J.**) at Kakamega in the absence of the defendants to the effect that he went into occupation of the suit land in 1975 under a lease from a European called George Billman Mott by way of assignment. The head lease was at the time in the name of a company known as **Lands Limited** which was responsible for selling the land to the plaintiff on 16th June, 1977 after necessary land board consent was obtained by the plaintiff.

It was also the testimony of the plaintiff that the land covered an area measuring 514 acres and was at the time valued at Ksh. 2.5 million. Apart of the land was occupied by the first defendant while

awaiting to purchase 15 acres of L.R. No. 9154. However, the intended purchases aborted with the result that the first defendant was to be refunded the purchase price of Ksh. 10,000/= of which Ksh. 4,000/= was directly paid to the first defendant while Ksh. 6,000/= was deposited at the Kakamega Court.

It was the plaintiff's contention that the first defendant remained in the suit land despite being notified to vacate. It was also the plaintiff's contention that the defendants' counterclaim is made of falsehood. The plaintiff testified that in 1974 he borrowed a sum of Ksh. 25,000/= from the second defendant (Jonathan) and refunded the same with interest totaling a sum of Ksh. 2,500/=. He (plaintiff) contended that he purchased the suit land in 1977 and that it was only himself and the first defendant (Hezekiah) who were in occupation of the land. Several documents were exhibited on behalf of the plaintiff indicating that the proprietorships of the suit land lies with the plaintiff. The letter dated 13th November, 1975 (P.Exh. 1) and that dated 4th November, 1976 (P.Ex. 8) both from lands ltd show that the plaintiff's application to purchase the land was approved. The purchase price was Ksh. 215,000/= subject to the consent of the Land Control Board. Several receipts (P.Exh. 2) show that payments were made by the plaintiff to Lands Ltd on account of the suit land. Most of the said receipts were issued in the 1980's while two of them were issued in 1976 and 1978 respectively. The receipts coupled with several demand letters from lands ltd confirmed that the plaintiff operated a loan account with lands ltd. A discharge instrument (P.Ex. 4) showed that the loan had been secured by a charge over the suit land and that the loan had been repaid in full as at 8th March, 1993. the lease (P.Exh. 6) confirmed that the suit land was transferred to the plaintiff on 16th June, 1977 for the sum of Ksh. 215,000/= and was on the same date charged to lands ltd for a loan of Ksh. 172,000/=. the lease also points out to a caveat over the suit land registered in favour of the first defendant on the 24th May, 1978. The first defendant claimed an absolute purchaser's interest in the land.

According to the letter of consent dated 24th January, 1975 (P. Exh. 7), the suit land was initially leased to Kaubeyon Estates Ltd. Before the lease was assigned to the plaintiff with an option to purchase.

All the foregoing facts narrated by the plaintiff before the High Court at Kakamega in the absence of the defendants resulted in an ex-parte judgment being entered against the defendant.

The same facts were more or less repeated herein by **William Kipkemoi Koros (PW1)**, who succeeded the now deceased plaintiff in this matter.

William produced the title document. (P.Ex. 6 respecting the suit land. It confirms that the land was registered in the name of his late father on 16th June, 1977. he contended that the land had in 1975 been sub-leased by his late father from Kaubeyon Estates ltd and that consent of the land Board was to that effect given (see, P.Ex. 7). We further contended that the land was exclusively purchased by his late father from lands Ltd for Ksh 215,000/=. He produced several receipts and other documents relating to the transaction and said that his late father had charged the land for the sum of Ksh. 172,000/= which was paid in instalments until completion in 1992. A discharge of charge was executed on 8th March, 1993.

William (PW1) contended that the defendants are merely squatters on the suit land and were never involved in the purchase of the land. He also contended that a sum of Ksh. 10,000/= paid by the first defendant to his late father was for the purchase of part of L.R. No. 9154 but the amount was refunded to the first defendant by a direct payment of Ksh. 4000/= and a deposit of Ksh. 6,000/= at the Kakamega court. He said that any dealings between his late father and the defendants did not involve the suit land and were in any event undertaken prior to the purchase of the suit land in 1977.

It was also stated by William (PW1) that save the first and fourth defendants, the rest of the defendants are now deceased. He affirmed that the Land Board Consent obtained by the defendants in 1980 was invalidated by the Nakuru High Court and another obtained in 1988 was also invalidated by the Eldoret High Court. He said that in 1980 and 1982, eviction orders were obtained against the defendants but they were reinstated in the suit land by the Provincial Administration. He contended that the said eviction orders (P.Exh. 12 a-b) have never been set aside by the court and that the judgment entered against the defendants has never been challenged to date. He also contended that the land is agricultural land so that even if there was an agreement between his late father and the defendants, there was no

consent of the Land Board for the transaction. He further contended that the land was not fraudulently obtained by his late father and that the defendants are not the owners of the land but squatters not deserving of the orders sought in their counterclaim which ought to be dismissed with costs.

The evidence by the plaintiff adduced at the Kakamega court as confirmed and fortified by the evidence adduced herein by his son William (PW1) does establish without dispute from the defendants that the suit land is registered in the name of the late plaintiff. The effect of that registration was to confer to the plaintiff absolute ownership of the suit land together with all rights and privileges belonging or appertaining thereto. The plaintiff therefore acquired an indefeasible right over the suit land exclusive of the defendant.

However, it is the defendants' contention that the registration of the land in the name of the plaintiff was fraudulent in that the plaintiff falsely represented himself as the sole purchaser of the land yet the actual purchase was done by the defendants through him.

The registration of a caveat over the land by the first defendant on the 24th May, 1978 was a clear indication that the purchase of the land and its ultimate registration in the name of the plaintiff was shrouded in controversy which was compounded by the continued occupation of the land by the first defendant and indeed, the rest of the defendants. The controversy raged on notwithstanding that the caveat was at a later stage removed.

The present counterclaim against the plaintiff is a direct or indirect result of the controversy aforementioned and may only succeed if the defendants were able to establish fraud and/or misrepresentation on the part of the plaintiff in having the land registered in his name. The plaintiff's registration as the absolute proprietor of the suit land would thus be defeated and be rendered null and void ab initio.

Hezekiah Kiptoo Komen (DW1), testified that he is in occupation of the suit land which was purchased from a European in 1974. The European had been introduced to him by the plaintiff. The land comprised a total of 514 acres and a sum of Ksh. 10,000/= was raised and contributed by him (DW1) towards the purchase of the land. However, the amount was insufficient for purposes of raising 20% of the purchase i.e. Ksh. 43,000/=. The first defendant said that the plaintiff brought on board three other people in order to raise the sum of Ksh. 43,000/=. the three people were Kibei Cherotich (4th defendant), Chebiator Chemjor (3rd defendant) and Kipserem Rotich (5th defendant) who jointly contributed a sum of Ksh. 35,000/= which was still deemed insufficient. Therefore, an additional person, Jonathan Kipkoros Chesagor (2nd defendant) was brought on board and he contributed Ksh. 23,000/=. a total sum of Ksh. 68,000/= was raised although the deposit required was the sum of Ksh. 43,000/=.

The first defendant testified that the plaintiff did not contribute any money towards the purchase of the land. He was given the role of being the leader of the group for purposes of facilitating the purchase of the land which was going at Ksh. 215,000/= of which Ksh. 43,000/= was paid leaving an outstanding balance of Ksh. 172,000/= which was secured through a loan. The plaintiff and the first defendant therefore moved into the land in March, 1975 to manage the farm and sell farm produce to repay the loan. The first defendant said that after Ksh. 43,000/= was deducted from the sum of Ksh. 68,000/=. the balance was used to purchase a vehicle for use on the farm but which vehicle was converted by the plaintiff for his own use besides treating all proceeds from the farm as his and using such towards the repayment of the loan. The plaintiff went further by later having the land registered in his own name and on making enquiries from their advocates, **Nyario & Tunoi**, the first defendant was informed that the plaintiff had thrown them out of the transaction leading to the purchase and registration of the land. The first defendant testified that a large portion of the land was leased to Kenya Seed Co. Ltd. And the money realized was used to pay off the loan and have the land shared by all the purchasers. But, on being confronted by the first defendant for registering the land in his sole name, the plaintiff reacted by instituting the present case against the first defendant.

The first defendant went on to testify that he teamed up with the other defendants and obtained the consent of the Land Control Board to have their names included as proprietors of the land. The consent

was later invalidated by the High Court in Nakuru. A second consent was however given within the same year i.e. 1980 (see D. Exh. 3). a further consent was given in 1988 to have the land sub-divided (see, DNN4). The plaintiff declined to approve the registration of the land in the names of the defendants and instead filed this suit at the Kakamega High Court.

The first defendant contended that no money was refunded to him as alleged by the plaintiff and that the plaintiff used his “brains” to cheat him and the other defendant.

The first defendant contends that they all have rights over the suit land and should therefore be allowed peaceful occupation and enjoyment of the same.

Kibet Cherotich (PW2), is the fourth defendant. He more or less concurred with what was stated by the first defendant but added that the plaintiff filed this case in 1978 claiming that they had invaded the suit land, yet they were looking for ways to have the land registered in their names since they had purchased it together with the plaintiff and its proceeds from leasing it to Kenya Seed Co. Ltd. Were used to pay off the loan obtained from lands ltd to purchase the land which was however registered in the sale name of the plaintiff contrary to their expectation.

Kibet (DW2) indicated that they sought the assistance of the district administration and were in the process granted consent by the land Board to have their names included in the register. The consent was however invalidated by the court in Nakuru. The matter was forwarded to the Provincial Administration which allocated them 187 acres of the suit lands pending the outcome of this case. A further consent of the Land Board allowed them to be registered as joint owners of the suit land.

Kibet (DW2) produced minutes of the land control board (see D.MF1. 7) approving their application for the loan. He contended that the plaintiff obtained his Land Board consent in secret. He (DW2) indicated that the plaintiff being a cleverer person and a councillor abused the trust bestowed upon him by the defendants and registered the land in his own name., he (DW2) contended that no money was refunded to them by the plaintiff and that they were granted consent by the land control board to have the land sub-divided.

Kipserem Rotich (DW3), is the fifth defendant. He confirmed his participation in contributing money to purchase the suit land and said that he went into occupation of the land together with his sons. He was however mixed up during cross-examination such that he could not record most of the details regarding the purchase transaction. He readily attributed his mix-up to his old age.

William Kipruto Tator (DW5), is son to the third defendant, Chebiator Chemjor. He said that he occupied the suit land after his father informed him that the land had been purchased by him (3rd defendant) and others. He (DW5) was a young lad at the time. He had no knowledge of the current dispute between the plaintiff and the defendant.

Joseph Kipserem (DW6), son to the fifth defendant, indicated that he has been in occupation of the land since 1976.

Julius Kipkel Rotich (DW7), a bank manager with kenya Commercial Bank, confirmed that the plaintiff obtained a loan of about Ksh. 30,000/= from the bank in 1974 and that the loan was secured by land titles belonging to the third, fourth and fifth defendants.

The land Registrar, **Aloice Opanga (DW8)**, said that the loan obtained from the bank was for the sum of Ksh. 35,000/= and that it was secured by land titles belonging to the third, fourth and fifth defendants.

The Assistant Land Registrar, **Kwendo Wycliff (DW9)**, produced minutes of a meeting held on 17th July, 1974, by the land control board in which consent was given to change titles belonging to the third, fourth and fifth defendants as security for the repayment of the loan of Ksh. 35,000/= obtained from the bank.

Sila Kipnigel Kitur (DW10), said that he purchased L.R. No. 9154 from the plaintiff who teamed up with other people including the second defendant to purchase the material parcel No. 11440 from a European.

Chebiator Chemjor (DW11), confirmed that he purchased the suit land with the rest of the defendants and briefly took possession thereof before handing it over to his children.

Benjamin Maritim (DW12), a legal assistant with Agricultural Development Corporation (ADC) informed the court that Lands Ltd. Was a subsidiary of the ADC and that it was preceeded in ownership of the suit land by Agricultural Settlement Trust which held the land on a government lease. Lands Ltd offered the land for sale to the plaintiff on 4th November, 1976 at a purchase price of Ksh. 215,000/= of which Ksh. 43,000/= was paid as a deposit and the balance of Ksh. 172,000/= was to be paid over a period of 20 years by forty (40) equal half yearly instalments of Ksh. 8,436/=.

The legal assistant (DW12) said that the offer was accepted by the plaintiff and an agreement was reached. Payments were made by the plaintiff as agreed and the land was eventually transferred to him. However, after the transfer, the five defendants appeared and claimed an interest in the land on the basis that they were the plaintiff's sleeping partners.

The legal assistant testified that after the appearance of the defendants and their claim of interest in the suit land, ADC commenced investigations and established that indeed the five defendants had contributed money towards the purchase of the suit land from Lands Ltd through the plaintiff. Consequently, on the 15th August, 1980, ADC applied and was granted consent by the Land Control Board to have the land transferred and registered in the names of the plaintiff and the five defendants (see, D.Ex. 14, 15, 16 and 17).

The legal assistant further testified that the current dispute arose after the plaintiff refused to sign the transfer of the suit land to himself and the defendants. He (DW12) contended that the land belongs to the plaintiff and the five defendants and that in the transaction involving the purchase of the land, the plaintiff acted as the leader of the land buying group consisting of himself and the defendants but failed to disclose the fact to the vendor.

Phillip Kiptoo Tunoi (DW 13), a Judge of the Court of Appeal of Kenya (as he then was), testified that in the year 1974, he was practicing as an advocate with Nyairo, Tunoi & Co. Advocates, based in Eldoret. He acted for the plaintiff and the defendants in relation to matters connected with the purchase of the suit land from lands ltd. He confirmed that he received Ksh. 35,000/= from the defendants to forward to the plaintiff for the purchase of the land. He indicated that an agreement made on 27th August, 1974 (D.Exh. 19) showed that the plaintiff was entitled to 80 acres of the land. The judge (DW13) said that the parties settled on the land and continued farming but after about two to three years, a serious dispute erupted between themselves. The dispute led to this case and others.

The judge further said that he did not know how the parties settled on the land and how they shared the acreages. He said that the provincial administration attempted to settle the matter in 1979 and in the 1990's but all in vain. He also attempted to arbitrate the parties in 1984 but all in vain.

An accountant with Kenya Seed Co. Ltd. **Sammy K. Tunoi (DW14)**, confirmed that the suit land was leased to the company for purposes of growing seeds. He produced documents (D.Ex. 21) confirming the payments made by the company to the plaintiff.

Samwel Birgen (DW15), of the ADC availed minutes of the land Control Board showing grants of consent but there were not formerly tendered as exhibits to be accorded any reliance.

There is clear indication from all the foregoing evidence by the plaintiff and the defendants that although the suit land was registered in the name of the plaintiff thereby becoming the absolute proprietor of the same, there was some monetary contributions made by the defendants towards the purchase of the land from lands ltd on the basic understanding that upon successful completion of the purchase, the land

would be registered in the joint names of the plaintiff and the defendants. What was not certain was how the land would be divided amongst those who contributed to its purchase.

It was the defendants' allegation that there was no monetary contribution made by the plaintiff towards the purchase of the land. They said that his role was merely to facilitate the transaction on account of his knowledge and enlightenment in such matters. However, the defendants seemed to acknowledge that the plaintiff played a key role in negotiating for the land and eventually purchasing it. The defendants also acknowledged that the plaintiff was responsible for securing the loan to pay the outstanding balance of the purchase price after the initial deposit was obtained and made by them through the plaintiff. The defendants however contended that the loan was primarily re-paid through proceeds realized from the usage of the land by the Kenya Seed Co. Ltd. It was not in dispute that the loan was secured by a charge created over the suit land by the vendor cum financier.

The evidence by the Kenya Seed Co. Ltd. Through its accountant (DW14) confirmed that the land was pledged as security and that proceeds from the usage of the land served as repayments for the loan.

It is apparent from the evidence that the defendants were rather reserved in acknowledging that they owe the plaintiff for the land not because of his monetary contribution (if any) but because of the hard work and efforts he put in towards managing the land, protecting it and eventually purchasing it, all on his own behalf and that of the defendants. The plaintiff ensured that maximum profit was reaped from the usage of the land to facilitate the repayment of the loan. It was through the plaintiff's single effort that the loan was fully repaid thereby conferring interest in the land to himself and of course, the defendants. It was certainly because of the plaintiff that the defendants can confidently lay claim to the suit land not as legally registered owners but as beneficial owners. Despite his immense contribution to the purchase of the land, he made a single and costly mistake i.e. failing to register the land in his name and that of the defendants as co-owners. This appears to have been a deliberate mistake made possible by the ignorance of the defendants and misrepresentations made by the plaintiff to the vendor and indeed, the Land Control Board.

As a result of the plaintiff's misrepresentation, the vendor carried out an investigation and established that the defendants made contributions towards the purchase of the land and ought to have been registered as owners together with the plaintiff. This was clearly captured in the report of the investigations produced by Benjamin Maritim (DW12) and fortified by the evidence of the judge (DW13)

It may therefore be safely stated that had it not been for the misrepresentations made by the plaintiff to the vendor and the Land Board, the suit land would not have been transferred and registered in the sole name of the plaintiff but in his name and that of the defendants.

Indeed, the Land Board appreciated and acknowledged that the land was wrongly transferred and registered in the sole name of the plaintiff and sought to rectify the error by granting consents to have the land transferred and registered in the names of both the plaintiff and the defendants. The Land Board also granted consent for sub-division of the land for the benefit of all the parties.

The first consent appears to have been given on 13th March, 1980 but it was invalidated by the Nakuru High Court. The second consent was given on 19th August, 1980 and the third consent on 9th March, 1988. This last consent was invalidated on 5th October, 1988 by the Eldoret High Court. The second consent was never invalidated and was most crucial in establishing on a balance of probabilities the defendants' claim of right to the suit land. The said consent (D. Ex.15) remained valid and went along way in disproving the plaintiff's contention that the defendants were mere squatters on the land and affirmed the defendants' beneficial interest in the land thereby entitling them to orders sought in the counterclaim and move particularly prayer (a) that the plaintiff is not entitled to a sole registrable interest in the suit land and prayer (a) that there be rectification of the register to include the names of the plaintiff and the five defendants and/or their personal legal representatives.

With regard to the first defendant, Hezekiah Kiptoo Komen, it was established by the evidence of Sila K. Kitur (PW10), the legal assistant (DW12) and the judge (DW13) that he paid a sum of Ksh. 10,000/=

towards the purchase of the suit land No. 11440 and not the parcel described as L.R. No. 9154. the amount was never fully or at all refunded to him despite attempts made by the plaintiff to do so. The contribution together with that of the second, third, fourth and fifth defendants laid the foundation of the purchase transaction by way of providing the required 20% deposit of the purchase price. It has now been established, the balance of the purchase price was obtained through a loan secured by the suit land which was at the same time leased to Kenya Seed Co. Ltd for purposes of generating income to service the loan which mostly through the efforts of the plaintiff was repaid in full and a discharge of charge instrument executed. All the foregoing factors provided good reason for the registration of the suit land in the name of not only the plaintiff but also the five defendants by dint of their monetary contributions towards the purchase of the land.

In his submissions, the plaintiff raised several technical issues to show that this counterclaim is defective on account of limitation of time and the failure to plead the particulars of fraud. It has also been stated that the agreement (if any) and/or the land Board consent regarding the material transaction are invalid. The doctrine of “res-judicata” was also involved on the basis that there is already a judgment entered for the plaintiff against the defendants on the 2nd April, 1980.

In the opinion of this court, these issues do not go to the root and substance of the dispute between the plaintiff and the defendants. Restrictions on time placed by the law ought not be given strict consideration in deciding delicate and emotive matters such as the present dispute. The same would apply to restrictions on formal placed by the law.

As to “res-judicata”, it does not apply in the present circumstances. The counterclaim by the defendants has been treated as a separate suit. It's subject matter and that of the main suit may be similar but certainly not the cause of action. Herein, declaratory orders are sought against the plaintiff whereas in the main suit, the claim was based on trespass. The prayers sought in the main suit and counterclaim are distinct. The success of the counterclaim would invariably render the ex-parte judgment obtained against the defendants way back in 1980 obsolete.

All in all, judgment is entered for the defendants against the plaintiff as prayed in the counterclaim to the extent that the plaintiff is not entitled to sole registrable interest in the suit land (prayer (a)) and that the appropriate register be rectified to have the suit land registered in the names of the plaintiff and the five defendants and/or their personal legal representatives (prayer (a)). Thereafter, the parties shall on their own work out modalities aimed at sharing and/or distributing among themselves the entire portion of land.

It is accordingly ordered.

[Delivered and signed this 12th day of February, 2013.]

[In the presence of Mr. Ngeiywa for plaintiff and Mr. Kwambai for defendants.]

J.R. KARANJA.

JUDGE.

Mr. Ngeiywa:- I apply for copies of proceedings and judgment and for leave to appeal.

J.R. KARANJA.

JUDGE.
12/2/2013.

Mr. Kwambai:- No objection.

J.R. KARANJA.

JUDGE.
12/2/2013.

Court:- Certified copies of proceedings and judgment be supplied to the plaintiff as well as the defendants. The plaintiff granted leave to appeal.

J.R. KARANJA.

JUDGE.
12/2/2013.