



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT MAKUENI**  
**ELC SUIT NO.88 OF 2017**  
**(CONSOLIDATED WITH ELC 30 OF 2018)**

**GEOFREY KITHOME NGEWA**

*(Suing on his behalf and on behalf of the Estate of*

**JOSEPH NGEWA KILOTE – DECEASED).....PLAINTIFF**

**VERSUS**

**GEOFREY MWANGANGI MUTETI.....1<sup>ST</sup> DEFENDANT**

**JONATHAN PETER KILONZO.....2<sup>ND</sup> DEFENDANT**

**KATUKU NGITE.....3<sup>RD</sup> DEFENDANT**

**FRANCIS MUTISYA SILA.....4<sup>TH</sup> DEFENDANT**

**PAUL WAMBUA KYENGO.....5<sup>TH</sup> DEFENDANT**

**HARRISON MUTUA NZIOKA.....6<sup>TH</sup> DEFENDANT**

**JOEL MALELU KIOKO.....7<sup>TH</sup> DEFENDANT**

**MULILU KIMOTHO .....8<sup>TH</sup> DEFENDANT**

**KYENZE MUIA.....9<sup>TH</sup> DEFENDANT**

**DAVIS KIVIEKO MUTETI.....10<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR – MAKUENI COUNTY.....11<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. By a consent dated 29<sup>th</sup> October, 2018, ELC cases number 88 of 2017 and 30 of 2018 were consolidated and heard together since the parties and the subject matter of the two suits are the same with the former suit being treated as the lead file.

2. In ELC number 88 of 2017, the Plaintiff prays for judgement against the Defendants for:-

**1) An order declaring the registration of the suit properties herein in favour the Defendants illegal, null and void and further directing that the register be rectified to remove the Defendants as proprietors thereof and instead revert ownership to the Plaintiffs herein.**

**2) An order upholding the boundaries as per the judgment of 26/05/1960.**

**3) An order of permanent injunction restraining the Defendants whether by themselves, their servants or agents or otherwise from trespassing, occupying the suit land herein.**

**4) Costs of this suit plus interest thereon.**

**5) Any other or further relief as this Honourable court may deem fit and just to grant.**

3. The claim is denied by the Defendants vide their statement of defence dated 13<sup>th</sup> October, 2017 and filed in court on 24<sup>th</sup> October, 2017. And in ELC 30 of 2018, the Plaintiffs (the Defendants in ELC number 88 of 2017) pray for judgement against Geoffrey Kithome Ngewa (1<sup>st</sup> Defendant and the Plaintiff in ELC No.88 of 2017) together with three (3) others jointly and severally for: -

**a) A mandatory injunction compelling the Defendants to stop trespassing into and to remove the illegal structure they have put up on the Plaintiffs' parcels of land known as Makueni/Ikalyoni/1911, Makueni/Ikalyoni/2215, Makueni/Ikalyoni/2216, Makueni/Ikalyoni/2217, Makueni/Ikalyoni/1912, Makueni/Ikalyoni/2210, Makueni/Ikalyoni/2211, Makueni/Ikalyoni/2212, Makueni/Ikalyoni/2213, Makueni/Ikalyoni/2214, Makueni/Ikalyoni/1908, Makueni/Ikalyoni/1909, Makueni/Ikalyoni/1910, Makueni/Ikalyoni/2224, Makueni/Ikalyoni/2222, Makueni/Ikalyoni/2218, Makueni/Ikalyoni/2219, Makueni/Ikalyoni/2220, Makueni/Ikalyoni/2221.**

**b) In the alternative an order for demolition of the said structures and eviction therefrom.**

**c) Mense profits till the date the Defendants shall remove the illegal structures and vacated from the properties or till they shall be evicted.**

**d) Costs of the suit and interests.**

4. The above mentioned claim is denied by the Defendants (Plaintiffs in ELC No.88 of 2017) in their statement of defence and counterclaim dated 30<sup>th</sup> May, 2018 and filed in court on 12<sup>th</sup> June, 2018. In their counterclaim, the Defendants pray for judgement against the Plaintiffs (now Defendants in ELC No. 88 of 2017) jointly and severally for:-

**a) An Order declaring the registration of the suit properties herein in favour of the Plaintiffs illegal, null and void and further hereof and instead revert ownership to the Defendants herein.**

**b) An Order upholding the boundaries as per the judgment of 26/05/1990.**

**c) An Order od(sic) permanent injunction restraining the Plaintiffs whether by themselves, their servants or agents or otherwise from trespassing, occupying the suit land herein.**

**d) That the suit filed by the Plaintiffs herein be dismissed with costs.**

5. The Plaintiffs in the latter file did not file their reply to the defence and counterclaim.

6. In their plaint in ELC No.88 of 2017, the Plaintiffs have averred in paragraph 4 of their plaint that at all material times of this suit, they are the lawful owners of land parcels and which sub divisions of what was formerly plot No.1906 which have been registered as follows: -

i. Makueni/Ikalyoni/1908 - Katuku Ngite

ii. Makueni/Ikalyoni/1909 - Francis Mutisya Sila

1. Paul Wambua Kyengo

2. Harrison Mutua Nzioka

3. Joel Malelu Kioko

4. Mulilu Kimotho

iii. Makueni/Ikalyoni/1910 - Mbuli Muia (deceased), Kyenze Muia

iv. Makueni/Ikalyoni/1911 - Geoffrey Mwangangi Muteti

v. Makueni/Ikalyoni/1912 - Jonathan Peter Kilonzo

vi. Makueni/Ikalyoni/2210 - Jonathan Peter Kilonzo

vii. Makueni/Ikalyoni/2211 - Jonathan Peter Kilonzo

- viii. Makueni/Ikalyoni/2212 - Jonathan Peter Kilonzo
- ix. Makueni/Ikalyoni/2213 - Jonathan Peter Kilonzo
- x. Makueni/Ikalyoni/2214 - Jonathan Peter Kilonzo
- xi. Makueni/Ikalyoni/2215 - Geoffrey Mwangangi Muteti
- xii. Makueni/Ikalyoni/2216 - Geoffrey Mwangangi Muteti
- xiii. Makueni/Ikalyoni/2217 - Geoffrey Mwangangi Muteti
- xiv. Makueni/Ikalyoni/2218 - Davies Kivieko Muteti
- xv. Makueni/Ikalyoni/2219 - Davies Kivieko Muteti
- xvi. Makueni/Ikalyoni/2220 - Davies Kivieko Muteti
- xvii. Makueni/Ikalyoni/2221 - Davies Kivieko Muteti
- xviii. Makueni/Ikalyoni/2222 - Muia Kithongo Ngulya (deceased). Father to Kyenze Muia
- xix. Makueni/Ikalyoni/2224 - Kyenze Muia

7. In ELC No. 30 of 2018 the Plaintiffs (Defendants in ELC No. 88 of 2017) have averred in paragraph 3 of their plaint that they are the registered legal and bonafide owners of the following parcels of land situated at Ikalyoni, Kivani within Makueni County: -

- a) Makueni/Ikalyoni/1911 - Geoffrey Mwangangi Muteti
- b) Makueni/Ikalyoni/2215 - Geoffrey Mwangangi Muteti
- c) Makueni/Ikalyoni/2216 - Geoffrey Mwangangi Muteti
- d) Makueni/Ikalyoni/2217 - Geoffrey Mwangangi Muteti
- e) Makueni/Ikalyoni/1912 - Jonathan Peter Kilonzo
- f) Makueni/Ikalyoni/2210 - Jonathan Peter Kilonzo
- g) Makueni/Ikalyoni/2211 - Jonathan Peter Kilonzo
- h) Makueni/Ikalyoni/2212 - Jonathan Peter Kilonzo
- i) Makueni/Ikalyoni/2213 - Jonathan Peter Kilonzo
- j) Makueni/Ikalyoni/2214 - Jonathan Peter Kilonzo
- k) Makueni/Ikalyoni/1908 - Katuku Ngite
- l) Makueni/Ikalyoni/1909 - Francis Muia Sila
  - Paul Wambua Kyengo
  - Harrison Mutua Nzioka
  - Joel Malelu Kioko
  - Malilu Kimotho
- m) Makueni/Ikalyoni/1910 - Kyenze Muia
- n) Makueni/Ikalyoni/2224 - Kyenze Muia
- o) Makueni/Ikalyoni/2222 - Kyenze Muia

- p) Makueni/Ikalyoni/2218 - Davis Kivieko Muteti
- q) Makueni/Ikalyoni/2219 - Davis Kivieko Muteti
- r) Makueni/Ikalyoni/2220 - Davis Kivieko Muteti
- s) Makueni/Ikalyoni/2221 - Davis Kivieko Muteti

8. In the same file, the Defendants (Plaintiffs in ELC No.88 of 2017) have averred in paragraph 11 of the counterclaim that at all material times, they were the lawful owners of land parcels and which are subdivisions of what was formerly plot No.1906 which have been registered as follows: -

- i. Makueni/Ikalyoni/1908 Katuku Ngite
- ii. Makueni/Ikalyoni/1909 Francis Mutisya Sila
  - 1. Paul Wambua Kyengo
  - 2. Harrison Mutua Nzioka
  - 3. Joel Malelu Kioko
  - 4. Mulilu Kimotho
- iii. Makueni/Ikalyoni/1910 Mbuli Muia (deceased) Kyenze Muia
- iv. Makueni/Ikalyoni/1911 Geoffrey Mwangangi Muteti
- v. Makueni/Ikalyoni/1912 Jonathan Peter Kilonzo
- vi. Makueni/Ikalyoni/2210 Jonathan Peter Kilonzo
- vii. Makueni/Ikalyoni/2211 Jonathan Peter Kilonzo
- viii. Makueni/Ikalyoni/2212 Jonathan Peter Kilonzo
- ix. Makueni/Ikalyoni/2213 Jonathan Peter Kilonzo
- x. Makueni/Ikalyoni/2214 Jonathan Peter Kilonzo
- xi. Makueni/Ikalyoni/2215 Geoffrey Mwangangi Muteti
- xii. Makueni/Ikalyoni/2216 Geoffrey Mwangangi Muteti
- xiii. Makueni/Ikalyoni/2217 Geoffrey Mwangangi Muteti
- xiv. Makueni/Ikalyoni/2218 Davis Kivieko Muteti
- xv. Makueni/Ikalyoni/2219 Davis Kivieko Muteti
- xvi. Makueni/Ikalyoni/2220 Davis Kivieko Muteti
- xvii. Makueni/Ikalyoni/2221 Davis Kivieko Muteti
- xviii. Makueni/Ikalyoni/2222 Muia Kithongo Ngulya (deceased) father to Kyenze Muia
- xix. Makueni/Ikalyoni/2224 Kyenze Muia

9. The 1<sup>st</sup> Plaintiff, Geoffrey Kithome Ngewa, in his evidence in chief told the court the Defendants in ELC No. 30 of 2018 are his brothers and that they all reside in a parcel of land known as plot number 1906. He went on to say that the 1<sup>st</sup> to 10<sup>th</sup> Defendants in ELC No.88 of 2017 and who are the Plaintiffs (1<sup>st</sup>, 2<sup>nd</sup> and 10<sup>th</sup> Defendants) in ELC No. 30 of 2018 are his relatives. He added that the Defendants belong to the larger family of Mbutu who was their great grandfather.

10. According to the 1<sup>st</sup> Plaintiff, the Defendants reside in plot numbers 605 and 606 where the Mbutu family also reside. He said that the

Defendants have entered into plot No.1906 and acquired title deeds in a manner that he does not understand.

11. It was also the 1<sup>st</sup> Plaintiff's evidence that the father of the 1<sup>st</sup>, 2<sup>nd</sup> and 10<sup>th</sup> Defendants had suit against his (1<sup>st</sup> Plaintiff's) father in the 1970s. He added that he has recorded the history of the suits in his document filed in court on 09<sup>th</sup> November, 2016 together with his plaint. He said that he has explained in his statement how the Defendants got their respective portions of land. He said that the Defendants who are not his relatives were brought in by the 1<sup>st</sup> Defendant.

12. The 1<sup>st</sup> Plaintiff adopted his recorded statement as part of his evidence in chief.

13. The 1<sup>st</sup> Plaintiff stated that originally plot number 1906 was large in size and that what now remains of it is 10 acres. He produced documents in his list of documents dated 08<sup>th</sup> November, 2016 as P. Exhibit Nos.1 to 13 respectively.

14. The 1<sup>st</sup> Plaintiff went on to say in his evidence in chief that all the judgements concerning plot No.1906 show that the land belongs to Kilote who is his grandfather. He said that it is not true that they lost the suits. He added that it is not true that he and his co-plaintiffs are trespassers as alleged in ELC No.30 of 2018. He urged the Court to enter judgement in his favour and dismiss ELC case No.30 of 2018.

15. It was also his evidence that he has sued the Land Registrar Makueni because the Adjudication officers ignored the court orders thus the latter should be compelled to cancel the titles and issue titles according to the judgements on record.

16. On the other hand, the 10<sup>th</sup> Defendant in his evidence in chief told the court that the Plaintiffs together with the 1<sup>st</sup>, 2<sup>nd</sup> and 10<sup>th</sup> Defendants are all great grandsons of Mbutu Kanyuu who had two wives. He pointed out that Mbutu Kanyuu's first wife was Mutee while the second one was Nthanze. He went on to say that the 3<sup>rd</sup> to 9<sup>th</sup> Defendants had their own parcels of land inside parcel number 1906 that were acquired by their great grandfather. He pointed out that parcel number 1906 was first registered in the name of the Plaintiff's father whereupon other Interested Parties among them the 3<sup>rd</sup> and 9<sup>th</sup> Defendants, were asked to file case before the adjudication committee. He clarified that the parties were the 1<sup>st</sup> to 10<sup>th</sup> Defendants. According to him, the Plaintiffs and the Defendants owned land parcel number 1906 by way of inheritance from Mbutu Kanyuu, their late grandfather, (before it was registered).

17. The 10<sup>th</sup> Defendant went on to say that the dispute now in court has been in various fora. That in 1957 there was L124 of 1957 whose ruling of the court he has retained. That there was also L.No.140 of 1970 at Kilungu Court where it was held that parcel number 1906 was held by Mbutu Kanyuu and ought to be shared between the Plaintiffs father and the father of 1<sup>st</sup> and 10<sup>th</sup> Defendants. The 10<sup>th</sup> Defendant went on to say that the third case was Machakos case number 137 of 1972 whose ruling was that the land be shared equally by the two parties. He went on to add that the father of the Plaintiff filed appeal number 107 of 1977. The 10<sup>th</sup> Defendant thereafter proceeded to produce the 13 documents in his list of documents dated 13<sup>th</sup> October, 2017 as D.Exhibit Nos.1 to 13 respectively.

18. It was also the 10<sup>th</sup> Defendant's evidence that the Plaintiffs and all the Defendants have their title deeds which were issued after all the proceedings and cases were finalized. He added that the land was shared equally in line with the Court's judgement. According to him, this case should not have been filed since the dispute was determined by a court of competent jurisdiction. He urged the Court to dismiss the suit against the Defendants and allow the prayer in ELC No. 30 of 2018.

19. The 10<sup>th</sup> Defendant denied the allegation by the 1<sup>st</sup> Plaintiff that the suit land initially belonged to Ulisu family.

20. In his evidence in cross-examination by Mr. Nzavi for the Defendants, the 1<sup>st</sup> Plaintiff told the Court that sub division of the suit land was done by the Court in case number L124 of 1957 at the District Magistrate's Court Kilungu. He said that their dispute was resolved at the committee stage and also an appeal to the Minister. He agreed that they lost in that it was resolved that the land belonging to Mbutu Kanyuu be shared equally. He went on to say that they appealed in the High Court vide Appeal No.107 of 1977 where the determination was that the land of Mbutu is in the 1<sup>st</sup> ridge and that it ought to be subdivided between the 1<sup>st</sup> Plaintiff's father who was the Appellant and one Mutali Mutisya who was the Respondent. He said that after judgement by Kilungu District Magistrate's Court, his father appealed in case No.107 of 1977 and he did not succeed as the appeal was dismissed.

21. It was also the 1<sup>st</sup> Plaintiff's evidence in cross examination that after the dismissal of the appeal, his father applied for review to set aside the order of dismissal. He however admitted that according to the ruling that he was shown by Mr. Nzavi for the Defendants, the application for review was dismissed. He said that he was aware of Nairobi HCCA No.3052 of 1988 was between Joseph Ngewa Kilote who is his father and Geoffrey Muteti. He conceded that his father did not succeed in the suit. He pointed out that they were later referred to the Tribunal leading up to the Minister's appeal in the year 2008. He agreed that all the objections were dismissed and the adjudication register was marked as closed. He further agreed that subdivision and title deeds were issued in the year 2008. He agreed that after the matter was arbitrated by the High Court, they came to court again over the same matter. He agreed that the titles held by the Defendants were issued after the due process.

22. His evidence in re-examination was that parties should be guided by Appeal No.107 of 1977.

23. The 10<sup>th</sup> Defendant in his evidence in cross-examination by Mr. Mulei for the Plaintiffs told the court that the subject land was declared family land and pointed out that the 1<sup>st</sup>, 2<sup>nd</sup> and 10<sup>th</sup> Defendants are what he referred to as the family. He said that the 3<sup>rd</sup> to 9<sup>th</sup> Defendants are not a part of the family of Mbutu and neither were they parties to the suits that he had earlier on mentioned. He said that the 3<sup>rd</sup> to 9<sup>th</sup> Defendants are own their own parcels of land inside land parcel number 1906 and that they were awarded the parcels of land in question during the adjudication process (D.Exhibit No.1). He said that he was not aware of the decision of the case committee having been overturned. He added that the ruling in Civil Appeal No.107 of 1977 upheld the judgement in L137 of 1972 where the Plaintiff's father and father of the 1<sup>st</sup> to 10<sup>th</sup> Defendants were ordered to share the 1<sup>st</sup> ridge.

24. In their written submissions, the Counsel on record for the Plaintiffs framed three issues for determination. The issues were:-

- 1) ***Whether land parcel No.Makueni/Ikalyoni/1906 and all subsequent creations thereof is customary land.***
- 2) ***Whether the registration of the Defendants as the absolute owners of the suit properties extinguishes the customary rights of the Plaintiffs.***
- 3) ***Whether the Plaintiffs are entitled to the orders sought in the plaint.***

25. On the other hand, the Counsel for the 1<sup>st</sup> to the 10<sup>th</sup> Defendants framed three issues as well. These were: -

- a) ***Whether this suit (ELC No.88 of 2017) contravenes the principle of Res Judicata and thus ought to fail.***
- b) ***Considering (a) above and the facts of the matter (ELC No.88 of 2017) whether the Plaintiff has established a case against the Defendants on a balance of probabilities.***
- c) ***Whether ELC No.30 of 2019 has merit and ought to be allowed as prayed.***

26. In my view, the issues for determination are: -

- (a) ***Whether the registration of the Defendants as the absolute owners of the suit properties extinguishes the customary rights of the Plaintiffs.***
- (b) ***Whether ELC No.88 of 2017 is res judicata and whether ELC 30 of 2019 has merits and ought to be allowed.***

**Whether the registration of the Defendants as absolute owners of the properties extinguishes the customary rights of the Plaintiffs**

27. It was submitted on behalf of the Plaintiffs that the land adjoining Mbutu's land was owned by the Ulisu family. That the Ulisu family bequeathed the land to Kilote and that when one Kithi Ngwili claimed ownership of it, Kilote sued and the Court ruled in his favour vide Kilungu Division L144/1960 on 26/05/1960. The Plaintiffs submitted that the land became the personal property of Kilote. The Plaintiffs further submitted that in case No.140 of 1971 filed by Mutisya who was the father of the 1<sup>st</sup> to 10<sup>th</sup> Defendants, it was decided that Kilote's land and the ancestral land be subdivided equally between Mutisya and Kilote yet a Court of competent jurisdiction had determined Kilote's land was his personal property.

28. The Counsel went on to submit that while section 24 of the Land Registration Act No.3 of 2012 provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land together with all rights and privilege's belonging or appurtenant thereto, section 28 provides for overriding interests which affect and are subject to the registration without them being noted in the register. The Counsel pointed out that section 28(b) provides that trusts including customary trusts to be an overriding interest.

29. The Counsel for the Plaintiffs relied on the case **Douglas Macharia Waithaka Vs. Samuel Mugo Njoki [2018] eKLR** where J.G. Kemei, J stated thus:-

***“The fact that the word trust was not denoted on the title does not relieve the registered owner from any obligation as a trustee under Kikuyu custom to which the parties subscribe to.”***

The Counsel further cited the case of **Isaac M'Inanga Kieba Vs. Isaaya Theuri M'Lintari & Another [2018] eKLR**.

30. The submissions by the counsel for the 1<sup>st</sup> to 10<sup>th</sup> Defendants was that the titles issued to the said Defendants are regular and indefeasible and that no good reason has been advanced to interfere with them and their ownership of the respective parcels of land. The counsel was however silent on whether or not the registration of the said defendants extinguishes the customary rights of the Plaintiffs herein.

**Whether ELC No.88 of 2017 is res judicata and whether ELC 30 of 2019 has merits and ought to be allowed**

31. The submissions by the counsel for the Plaintiffs was that the dispute arose when Mutisya (father to the 1<sup>st</sup> to 10<sup>th</sup> Defendants) filed case No. 140 of 1971 where judgment was issued to the effect that the personal land owned by Kilote together with the ancestral land be subdivided equally between him and Muteti Mutisya. The counsel pointed out that this was despite the fact that on 23<sup>rd</sup> July, 1960, the District Officer ordered for traditional oath to be administered to Kilote and Ngwili and the outcome was that the suit land belonged to Kilote. The counsel went on to submit that the outcome of the case No. 140 of 1971 forms the crux of the suit herein and hence the question would be whether the land obtained by Kilote himself formed part of the estate of Mbuto Kanyuu so as to be divided equally between Kilote and Mutisya. The counsel was however silent on whether the suit is *res judicata*.

32. The Counsel for the 1<sup>st</sup> to 10<sup>th</sup> Defendants cited **Black's Law Dictionary 9<sup>th</sup> Edition** which defines *res judicata* as;

***“An issue that has been definitely settled by judicial decision.”***

33. The Counsel further cited **Section 7 of the Civil Procedure Act** which provides as follows: -

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

34. It was further submitted on behalf of the 1<sup>st</sup> to 10<sup>th</sup> Defendants that there was civil case No.140 of 1971 where the Defendant’s father sued Joseph Ngewa Kilote. The Counsel pointed out that the suit was determined in favour of the Defendant’s father where the suit property was declared family land. That the appeal against the judgement filed in Machakos Civil Appeal No.107 of 1977 was dismissed. As such, the Counsel submitted, there were previous litigations identical to the instant claim.

35. As to whether the parties in the instant suit are the same as those who litigated the previous suits, the 1<sup>st</sup> to 10<sup>th</sup> Defendants submit that the Plaintiff has brought this suit on behalf of his late father, Joseph Kilote, who was the party in the previous suits while the Defendants are heirs of Muteti Mutisya, who was also a party in the same suits.

36. The 1<sup>st</sup> to 10<sup>th</sup> Defendants further contend that the previous suits were determined by a court of competent jurisdiction. The 1<sup>st</sup> to 10<sup>th</sup> Defendants further contend that the outcome of the judgement in civil case No.140 of 1971 having been upheld in Machakos Civil Appeal No.107 of 1977, the matter was finally determined and thus this suit is *res judicata*.

37. The Counsel for the 1<sup>st</sup> to 10<sup>th</sup> Defendants rely on the case of **Joshua Ngatu Vs. Jane Mpinda & 3 others in Meru ELC No.15 of 2018 [2019] eKLR**.

38. Having carefully evaluated the evidence on record and the submissions filed by the counsel on record for the parties herein, it is clear from the proceedings and judgments in Kilungu DMCC No. 140 of 1971 and Machakos Civil Appeal No. 137 of 1972 which both parties rely on, in the Kilungu case, the court held that the land which Kilote claimed to have bought was part of the land of his grandfather, one Mbutu, and hence it was to be shared with Mutisya.

39. In the Civil Appeal No. L 137 of 1972, The learned Resident after referring the matter to the District Magistrate Court so that the latter court could visit the land in dispute, agreed with the District Magistrate’s Court that the Muteti Mutisya and Joseph Ngewa Kilote were to share the 1<sup>st</sup> range which was the origin of the dispute between them and also were to share the rest of the suit land.

40. The Plaintiffs herein and particularly the 1<sup>st</sup> Plaintiff, cannot be heard to say that all the judgements concerning plot No. 1906 show that the land belongs to Kilote who is his grandfather as the evidence on record points to the contrary. The 1<sup>st</sup> Plaintiff admitted in his evidence in cross-examination that during adjudication process, they lost the dispute that they filed in committee all the way up to the Minister’s appeal. The 1<sup>st</sup> Plaintiff further admitted that they lost the appeal at the High Court Civil Appeal No. 107 of 1977 and attempts by his father to have the judgement reviewed were unsuccessful.

He further admitted his father appealed in Nairobi HCCA No. 3052 of 1988 was unsuccessful and hence the Defendants were issued with title deeds after the due process was followed. The Plaintiffs never filed judicial review application to quash the Minister’s judgment in the Appeal that was before the Minister. The titles herein were procedurally issued and no evidence has been given as to why they should be cancelled.

41. It is my considered view that the title documents issued to the parties herein upon conclusion of litigation and the Plaintiffs herein are out to reopen that which has been concluded in other fora. As it were, there is absolutely no evidence before this court to warrant it to conclude that the Defendants hold their title deeds in trust for the Plaintiffs. Suffice to say, the Plaintiffs’ customary trusts were extinguished once litigation came to a conclusion and the Defendants were issued with title deeds to their respective parcels of land.

42. Further, I would agree with the Defendants that the suit is *res judicata* in that the issue in this matter is directly and substantially in issue in the former suits between parties under whom the parties herein and particularly the Plaintiffs claim which issue was raised, heard and finally determined by courts of competent jurisdiction. The Plaintiffs’ claim must therefore fail and I proceed to strike out their claim against the 1<sup>st</sup> to 10<sup>th</sup> Defendants with costs.

43. As regards the prayers sought in ELC No. 30 of 2018, from the statement of Geoffrey Mwangangi Muteti (1<sup>st</sup> Plaintiff in the suit and 1<sup>st</sup> Defendant in ELC No. 88 of 2017), even though the statement which forms part of his evidence in support of his claim shows at paragraph 7 thereof that the Plaintiffs who are the Defendants in the said suit have trespassed and created illegal structures in parcels of land of the 1<sup>st</sup> to 10<sup>th</sup> Defendants, both the Plaintiffs and the 1<sup>st</sup> to 10<sup>th</sup> Defendants appear to have abandoned this evidence when they testified before me. The two parties concentrated their efforts in trying to convince the court that the judgements in Kilungu DMCC No. L14 of 1970, Machakos RMCC L137 of 1972 and Nairobi HCCA No. 107 of 1977 were determined in their favour and hence that court should find for their respective positions.

44. As such, it is my finding that the 1<sup>st</sup> to 10<sup>th</sup> Defendants have not discharged the burden of proof on a balance of probabilities in their counter claim and their claim must also fail. Having noted that both parties constructively abandoned the said suit, I direct that each party will bear their own costs. In the circumstances the 1<sup>st</sup> to 10<sup>th</sup> Defendants case is dismissed.

Signed, dated and delivered via email at Makueni this 19<sup>th</sup> day of January, 2021.

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**MBOGO C.G.**

**JUDGE**

**Court Assistant:** Mr. G. Kwemboi.