



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
CIVIL CASE 167 OF 1989

**NELSON NAMASWA AND SEVEN
OTHERSPLAINTIFFS**

VERSUS

**JAMES WANYAMA AND 3
OTHERSDEFENDANTS**

J U D G E M E N T

The original complaint was dated 19th December 1989 and filed in court on 20TH December 1989. A defence and counter claim to it were dated 13th February 1990 and filed on 14th February 1990. A reply to the defence and counter claim is dated 25th April 1990 and filed on 26th April 1990. The complaint was amended on 11th October 1995 then 23rd May 1997 and finally 2nd November 1998 and filed on the same date. The proceedings proceeded on the basis of the complaint filed on 2nd November 1998 and the original defence which had a fair amendment made to it orally in court on 5.8.1999 with the permission of the court. The reply to defence and counter claim was amended orally for paragraphs added to it. The plaintiffs are named as Joash Kisianganyi Wanyonyi, Daina Nasambu Wanyonyi, Dina Wasike, Samson Wanyonyi, Justus Mwesia, Patrick Wamai, Stephen Watwati, Beatrice Wanyama Watwati, Paul Naminyu, Nedi Wanyama, Pius Kimungui and Lenah Nasipwondi Mamai.

The defendants are named as James Wanyama, Alexander Ndamaki, Nahashon Watulo Maswa, Susan Namuki Mabanga and Stanley Mayika Mabanga.

The 2nd and 3rd plaintiffs were original plaintiffs while the rest (a) (b) (c) and (d) plaintiffs are the joint legal representatives of the estate of the late Nelson Namaswa who was the first original plaintiff who is deceased and have been substituted herein accordingly in that capacity. The 4th, 5th and 10th plaintiffs are legal representatives of Dixm(Dickson) Watwati Kiberenge and Jackson Mamai Masakalia (or Masakari) respectively who are deceased but co-owners members/partners of the suit land Mbai farm. The 7th, 8th plaintiffs are also legal representatives of one deceased Enos Wanyama who was co-owners/member, partner of the suit land Mbai farm. Defendants 1, 2 and 3 were the original defendants while the 4th and 5th defendants are the joint legal representatives of the estate of the late Johnstone Mabanga who is

deceased and have been substituted herein accordingly in that capacity.

The averments put forward by the plaintiffs are that they are co-owners and or partners of Mbai farm LR Nos. 6651/2 and 6697 which they acquired and have resided thereon since 1965, that the plaintiffs together with the defendants agreed to give a share contribution of Ksh. 5,000.00 each towards the deposit of the purchase of the said land, that the 4th and 5th defendants did withdraw Ksh. 500/- from his share and thus leaving a balance of Ksh. 4,500/-, that there are twelve rightful partners, co-owners of the said farm as per the Trans Nzoia Land Control Board consent given on 11th April 1980, that the said Land Control Board consent of April 1980 stand enforceable to date as the same was never challenged by way of appeal to the Provincial Land Control Board or any court of law as to the number of partners or members of the said farm by the defendants jointly or severally, that the balance of the purchase price of Ksh. 120,000.00 of the farm was financed by Agricultural Finance Corporation and this loan was fully repaid from the proceeds obtained from the sale of milk, cows, maize and other items that were on the said farm, that there was no any other later arrangements or agreements between the partners, co-owners or members of the farm to raise the share contribution above the original one of Ksh. 5,000.00, that on divers occasions during the year 1981, 1982, 1983 upto date the defendants jointly and severally have disputed, claimed that the co-owners, partners members of the said farm are only nine and not twelve, that on diverse occasions during the years stated in paragraph 13 above the defendants jointly and severally have alleged, claimed that they did pay more than the share contribution of Ksh. 5,000/-, that the said farm land is comprised 1,206 acres, they contend that the said farm land should be subdivided on equal basis among the co-owners, partners/members who have fully paid up the share contributions of Ksh. 5,000.00, that the 7th, 8th, 9th and 10th plaintiffs and the 4th and 5th defendants (joint legal representatives of the 4th deceased Johnstone Mabonga) be given shares of land equivalent to their share contributions stated above which is 7th and 8th plaintiffs share of Ksh. 1808.00, 9th plaintiff share of Ksh. 3592/60, 10th plaintiff's share of Ksh 2870/20 and the 4th and 5th defendant jointly share of Ksh. 4,500.00.

In consequence thereof the plaintiffs prayed for orders that the partners, members or co-owners of Mbai farm LR Nos. 6651/2 and 6697 are twelve as per the Trans Nzoia District Land Control Board consent issued on 11th April 1980, that the share contributions for each member, partner or co-owner was Ksh. 5,000.00, that the said Mbai farm be sub divided/surveyed equally among the first, 2nd, 3rd, 4th and 6th plaintiffs and the 1st, 2nd, 3rd defendants who have fully paid up share contributor of Ksh. 5,000.00 each, that the 7th, 8th, 9th and 10th plaintiffs and the 4th and 5th defendant jointly be given share of land (acres) equivalent to their respective contributions tabulated in paragraph 17 above of the amended plaint, that each partner/member stay on the portion of land he/she has occupied since 1965 to date, that the court do give any other such or reliefs as this court may deem fit and just to grant in the circumstances.

As stated earlier on the defence and counter claim were dated on 13th February 1990 and filed on 14th February 1990. There were oral amendments to it made on 5.8.1999. The key averments in it are that they defendants deny that the 7th, 8th, 9th and 10th plaintiffs reside on Mbai farm, that the claim of the 7th, 8th, 9th and 10th plaintiffs is in any event barred by the Limitation of Actions Act as they have not resided on the said Mbai farm since 1969. They contend that the 4th, 6th and 8th plaintiffs have no locus standi in this matter as they are not administrators of the deceased persons, they strictly deny the contents of paragraph 5 and 6 and put the plaintiffs to strict proof thereof, they deny that the 6th and 8th plaintiffs paid Ksh. 1,808,2870.20 respectively but contend that the late Enos Wanyama, Pius Kimungui and the late Mamai Masakalia paid Ksh. 1,808/-, 3,592/- and 2,870/- respectively but which sums of money was refunded to each of the three and the three left the farm, they strictly deny the contents of paragraph 8. In reply to paragraph 9 and 10 the defendants state that the said consent was obtained fraudulently in that the proprietors of the land parcel Nos. 6651/2 and 6697 were not parties to that consent, denied contents of paragraph 11 and 12, admitted the contents of paragraph 13, 14 and 15. In reply to paragraph 16 the defendants state that not all the members paid Ksh. 5,000.00 as alleged.

In reply to paragraph 17 the defendants state tht the 6th, 7th and 8th plaintiffs have no claim against the defendants in view of paragraph 4 herein, that the 4th plaintiff has also no claim against the defendants in

view of paragraph 2 above.

In their counter claim the defendants reiterate the contents of paragraphs 1 – 12 above and contended that the members who are now residing on the farm contributed on equal amount of money and are entitled to different sizes of land, further stated that in 1976 a subdivision was carried out and each member was allocated his rightful share.

In the premises the defendants pray that the plaintiffs suit against them be dismissed with costs and the Trans Nzoia Land Control Board consent dat3d 11.4.1980 be declared null and void, that an order be made that the subdivision approved by the Ministry of Lands and Housing in 1992 be followed.

The plaintiffs reply to defence and counter claim filed on 26th April 1990 was also amended orally on 3.8.1999. The key averments in the same are that the plaintiffs repeated paragraph 1 – 20 of the plaint and joins issues with the defendants on the defence, denied that there was any lawful subdivision in 1992 or any other year sanctioned by the consent of Land Control Board, contended that the lawful partners/members of the farm are twelve in number, they deny fraud in respect of the Land Control Board consent issued in 1980 and defendants are put to strict proof, that the 7th, 8th, 9th and 10th plaintiffs deny paragraph 2 of the defence filed herein and more specifically that their claims are time barred, that they have never resided on the suit land since 1969 and shall put the defendants to strict proof thereof, that the plaintiffs shall contend that the defendants claim against the letter of consent of 1980 are bad in law and time barred by Limitation of Actions Act hence not entitled to the reliefs or remedy sought in the counterclaim. Further the plaintiff will contend that proprietors or rightful owners of the suit land have not at any one time approved or consented to the issuance of the subdivision map of 1992 purportedly approved by the Ministry of Lands or any other map.

In consequence thereof prayed that the defendants counter claim be dismissed with costs and judgement be entered as prayed in the plaint.

A total of twelve witnesses gave evidence for the plaintiffs. These were Justus Barasa Muresia P.W.1, Paulo Maminyu P.W.2, Lena Mamai P.W.3, Beatrice Wanyama Watwati P.W.4, Stephen Wekesa Watwati P.W.5 Diana Nasambu wife of late Nelson Wanyonyi Namaswa P.W.6, Joash Wanyonyi Kisiangani son of late Nelson Wanyonyi Namaswa P.W.7, Patrick Wamai P.W.8, Methodeus Pius Wasike Kimungui P.W.9, Shem Mutai Muthami P.W.10, Joseph Barasa Wanyama son of late Enos Wanyama P.W.11 and Francis Mungo Waswa whose evidence was not completed and so the same will not be considered when assessing the evidence on record for purposes of this judgement.

The defence called 4 witnesses namely James Wanyama Masolo D.W.1, Nahashon Watulo Masiwa D.W.2, Susana Namuki Mabonga D.W.3 and Maurice Lusweti Ndemaki D.W.4.

The star witnesses in these proceedings are P.W.1 Justus Muresia for the plaintiffs and James Wanyama Masolo for the defence. They gave crucial evidence which will form the bulk of the assessment of the evidence herein. The evidence tallied on the history of the origin of the group but came to disagree sharply on the number of members who are eligible to get a share of the said Mbai farm which is the subject of these proceedings, the share contribution of each eligible member, the share contribution and number of those considered to be non members by the defence, issue of the refund of the share contributions of those alleged to be non members by the defence, non refund of the share contribution of those alleged to be non members by the defence and the share entitlement of those alleged not to be none member by the defence. They also disagreed sharply on the issue of the two consents for subdivision one issued in 1980 and that one issued in 1990. The one issued in 1980 was the brainchild of the plaintiffs while that one issued in 1990 was the brain child of the defence. The foregoing being the case the court has decided to assess the evidence of witnesses who touched on less contentious issues.

P.W.2 Paul Namuny the 6th plaintiff although from the history of the matter he seems to have been involved in the transaction leading to this case right from 1965 due to senility or politely old age could not say much. He confirmed he paid money equivalent to a folded first, he lost receipts, he settled at Mbai and was still resident there as at the time of trial, he maintained that he is a fully paid up member,

he maintained they all paid equally an equal amount for the share contribution and he was only waiting for survey to come and demarcate land for him so that he gets registered and gets the title.

P.W.3 is Lenah Mamai the tenth plaintiff. She is wife of late Jackson Mamai. The sum total of her evidence is that from her knowledge her late husband paid shares in Mbai farm to the tune of Ksh. 2,870.20 but she has no receipt. The husband used to reside at Mbai farm but when he died he was buried at Chwele. She confirmed the husband was involved in the purchase of the farm right from the beginning but she had no receipt to show to the court as that was with the farm officials. The late husband died in 1986 and she was issued with a grant to his estate which she produced as exhibit 8 issued at Kitale on 18th February 1992. She denied any knowledge of refund of her late husband shares in 1973.

P.W.4 Beatrice Wanyama Watwati and P.W.5 Stephen Wekesa Watuati are a wife and son of the late Dickson Watwati. They are plaintiff No. 4 and 5. They confirmed they have knowledge that the deceased was a founder member of Mbai farm. They were unable to trace any receipts to that effect but the farm records confirm so. P.W.4 was married when the husband was already at Mbai farm and she was settled at Mbai farm while P.W.5 was a small child when the farm was purchased and they have no knowledge of what the deceased did in 1964 – 67. They produced a grant exhibit 9 showing that the deceased died on 26.5.1989. The grant was issued on 6th February 1991.

P.W.6 Daina Nasambu and P.W.7 Joash Kisiang'ani Wanyonyi are the wife and son of the late Nelson Wanyonyi Mamaswa. They are plaintiffs 1(a) (b). The sum total of their evidence is that they are representatives of the deceased's estate on behalf of two others. He died in 1997 and they took out a grant issued to four people on 16th day of March 1998 produced as exhibit 10. They have no records to show that the deceased was a member of Mbai farm save the farm records and the records with their advocate but they have knowledge that he was a member. He resided at Mbai farm but when he died he was buried at Namwela.

P.W.11 Joseph Barasa Wanyama son of late Enos Wanyama Mukwoma the 7th plaintiff. The sum total of his evidence is that the father paid shares in Mbai farm and went to settle at Mbai in 1968 but he has no document to show that the father had shares in Mbai farm save the farm records. He produced the grant to the late fathers estate as exhibit 22.

On the side of the defence the witnesses who gave evidence on less contentious issues save for the share holding receipts are D.W.3 Susana Namuki Mabonga widow of late Johnstone Mabanga. She produced the grant as exhibit D 32 issued to her on 31st August 1995. The late having died on 22nd September 1994. She confirmed the deceased was a founder member of Mbai farm. He settled at Mbai farm in 1965 and when he died he was buried at Mbai farm. She also has knowledge that the later Masakari was buried at Namwela at a place called Namukholo. The late husband gave her receipts for his share holding in Mbai farm which she produced as exhibit D 33a – b namely receipt No. 225 dated 13th June – 21st December 1964 to the tune of Ksh. 10,955/30, No. 252 dated 21.12.1964 to the tune of Ksh. 40,990.00 and number 231 dated 8th January 1965 to the tune of Ksh. 1852/40 total amount coming to Ksh. 53,797.70. She confirmed those are the only receipts given to her by the late husband. She was married in 1961 as the 4th wife and shortly thereafter came to settle at Mbai farm with him. Her testimony is that she is not aware that her late husband filed a case Eldoret HCCC No. 52/74 against James Wanyama Masolo and the others. She agreed that the dates on the receipts for her late husband tally the dates on the receipts of Watulo and James Wanyama Masolo but she cannot explain why that is so but may be they were paying on the same day and she cant know if there was a move to cheat.

D.W.4 is Maurice Lusweti Ndemaki a son of the second defendant who gave evidence on behalf of his father because his father was under medical instructions not to involve himself in contentious issues. He was a child when the farmer was purchased. The father gave him 4 receipts to produce as showing his share contributions which he produced as exhibit D 34 a – d namely No. 227 dated 13th June - 21st December 1964 for Ksh. 8,465.150. 348 dated 21.12.1964 for Ksh. 32,011.00, 233 dated 8th January 1965 for Ksh. 1572/80 and No. 238 dated 4th May 1965 for Ksh. 3250/- all totaling Ksh. 45,299.30. it is his

evidence that he is not aware that his father avoided coming to give evidence because he wanted to withhold material evidence having been a secretary of the farm for a long time. He agreed the receipts produced by his father bear similar dates as those of Watulo, Mabonga and James Wanyama but he cannot explain how that came to be the case. He confirmed the father was genuinely sick and he had been medically advised to keep off contentious issues so that he is not agitated, that the letter by his father to the advocate is sufficient authority to enable him testify on his behalf.

The salient features of the evidence touching on the entire case as derived from the testimony of P.W.1, P.W.8, P.W.9, P.W.10, D.W.1 and D.W.2 is that in the year 1964 a group of 6 people full grown up men hailing from Chwele Namwela in Bungoma District were desirous of buying land in the settlement schemes. They grouped themselves being six of them namely

1. Johnson Mabonga now deceased represented by his widow D.W.3
2. Alexander Ndemaki the second defendant
3. Nahashon Watulo D.W.2
4. Dickson Watwati deceased and represented by the 4th and 5th plaintiffs.
5. Justus Barasa Muresia P.W.1 and
6. James Wanyama Masolo the first defendant and D.W.1.

They scouted around and then went to the advocate handling sales of farms in Trans Nzoia District and were given a list of farms on sale. A photocopy of the list was produced by D.W.1 in a bundle as exhibit D 30. The farm subject of these proceedings was listed as No.2 comprising 1206 acres being registered as LR No. 6651/2. The conditions of sale/purchase were attached in exhibit D 30. The six studied them, went around the farms and settled for the purchase of the farms subject of these proceedings. Since one of the conditions was to show written evidence of cash assets the group set about organizing for contributions from each other. According to P.W.1 the group raised 5,000/- each which was not enough to cover the deposit required. They made efforts to seek financial assistance from the late Masinde Muliro did not fruitify and so they turned to the bank for a loan. No records for the loan application and acquisition were available to the court but it is agreed in principle that the money was realized, the deposit met, the loan requirements met and the loans granted. That gave birth to the sale agreement between the owners of the farm and the six who are referred to as founder members. The agreement was produced in evidence as exhibit D 2 (a) and b.

The salient features of the agreement are that

1. It was dated 21st day of December 1964
2. It was between L. Pratt leach and G. N. Hebert on the one hand as sellers and Johnstone Mabonga, James Wanyama, Alexander Ndemaki, Nahashon Watulo, Dixion Watwati and Justus Muresia on the other part as purchasers.
3. The sellers or the vendors agreed to sell and the purchasers agreed to buy the said land LR Number 6651/2 and 6697 situated within Trans Nzoia District.
4. The purchase price for the land was Ksh. 168,000.00 of which Ksh. 12,000/- was to be paid as a deposit to H. S. Bhogal advocates as stakeholder immediately upon the signing of the agreement.
5. The purchase also included loose assets enumerated in the schedule at a purchase price of 94,000.00.
6. The agreement was subject to the consent of the Trans Nzoia Land Control Board.

7. The completion date was set to be on 1st day of March 1965.
8. The completion of payment of the purchase price was to coincide with the registration of the titles in the name of the purchasers.
9. The vendors were to seek an irrevocable authority from the purchasers to have any loans advanced to the purchasers by the Land and Agricultural Bank of Kenya and the Agricultural Finance Corporation for the purchase of the land and the loose assets to be paid to them vendors direct less any difference already paid to Ms Bhogal advocate as deposit or otherwise
10. The property was believed and taken to be correctly described
11. Vacant possession was to be given to the purchasers by the vendors at the end of February 1965 subject to full payment of the purchase price.
12. The crops growing on the farm were to remain the property of the vendors till delivery of vacant possession of the vendors to the purchasers.
13. The vendors were to ensure the property against fire and civil commotion.
14. In the event of the purchasers failing to comply with the conditions stipulated as regards the completion date they were to forfeit their deposit to the vendors as liquidated damages to the vendors
15. Interest accrued from the date of possession was to be paid by the vendors. Each party was to pay its own legal fees and the purchasers shall stamp duty and the registration fees on transfer.
16. The schedule of loose assets is also given
17. The agreement was signed by the two vendors and the 6 original

founder members namely Johnston Mabonga, James Wanyama, Alexander Ndemaki, Nashon Watuto, Dixon Watwati and Justus Muresia.

On 14.5.1965 the title exhibit D.3 for LR number 6651/1 was transferred from the vendors to the six named above purchasers as tenants in common in equal shares only subject to entry No. 10 above which entry related to a right of way over the title to title No. 6651/2. The transfer was noted as entry No. 37. The other entries following are notification of charge to the Land Agricultural Bank of Kenya as entry No. 34. Notification of charge to Agricultural Finance Corporation was noted as entry No. 35 and 36. Entry No. 34 was discharged on 5.8.1975 also the entry in No. 36 was also discharged on the same date of 5.8.1975. It is to be noted that there have been no other entries to this title since the date of 5.8.1975.

The next title is title number LR 6697 produced as exhibit D. 4. A perusal of the same shows that on 14.5.1965 entry No. 26 was made to discharge the charge at entry No. 18 above, entry No. 27 discharging the charge at No. 19 above, No. 28 discharging the charge at No. 20, entry No. 29 discharging the charge at No. 21, entry No. 30 discharging the charge at entry No. 22 above, No. 31 discharging or cancelling Land Development order No. 23, entry 32 which is for notification of discharge of charge in No. 25 above. Entry No. 33 is also for the transfer of the land to the named 6 as tenants in common in equal shares. In entry No. 34 there is entry for notification of charge to the land and Agricultural Bank of Kenya dated same date of 14.5.1965. In entry No. 35 there is notification of memo of charge with the Agricultural Finance Corporation subject to entry No. 34 above. Entry No. 36 is another notification of charge to the Agricultural Finance Corporation dated 9.2.1972 subject to entry No. 34 and 35 above. Entry No.37 is for discharge of No.34 above dated 5.8.1975 entry No. 38 is for discharge of No. 35 above and it is also dated 5,8,.1975. While entry No. 39 is for the discharge of entry No. 36 above also made on 5.8.1975.

The foregoing information shows that both titles were cleared and became disencumbered on the same

date of 5.8.1975. It is also clear that from that date no entries have been made in the title concerning the share holding to date.

What transpired on the farm between 1965 to 1975 after the members took possession is contained in the minute book exhibit 1 as per the evidence of P.W.1. D.W.1 on the other hand dismissed the entries in exhibit 1 as being doctored and or fabricated. That they the defence had the farm records which they produced before the District Officer during the hearing of arbitration proceedings relating to this matter which were never returned to them.

The summary of evidence on that period by P.W.1 is that they the six failed to raise the required deposit and they decided that each of the six founder members should go back to their home land at Namwela and look for more people to come and team up with them. This was because they had failed to raise the deposit required of 48,000.00 and they had also failed to raise funds from the late Hon. Masinde Muliro. It is the same late Hon. Masinde Muliro who advised them to increase their share holding numbers.

Following that advise the following persons were brought in to join the membership.

1. Josek Kasembeli
2. Peter Malaka
3. Joash Sitati
4. Patrick Sitati
5. Jephnea Yasele
6. Enos Wanyama
7. Pius Kimungui
8. Jackson Masakari
9. Patrick Mamai
10. Nelson Wanyonyi Namaswa and
11. Paul Namunyu

It is the evidence of P.W.1 that contribution from the 11 enabled the original 6 founders to raise the required deposit for the land of Ksh. 48,000.00. It is his evidence that it was unanimously agreed that the share contribution of each member was 5,000.00. There are those members who managed to fully pay for their shares namely

1. Justus Muresia
2. Alexander Ndemaki
3. James Wanyama
4. Dickson Watwati
5. Nahashon Watulo
6. Nelson Namaswa Wanyonyi

7. Paul Namunyu

8. Patrick Mamai

That there are those who were unable to fully pay up the required share holding enumerated as

1. Pius Kimungui Ksh. 3,592.00

2. Jackson Masakari Ksh. 3,870.00

3. Enos Wanyama Ksh. 1,808.00

4. Johnstone Mabonga Ksh. 4,500.00

There was a 3rd group of those who failed to meet the requirements and chose to withdraw and leave and these are

1. Jephnea Yasele

2. Joseck Kasembeli

3. Joash Sitati

4. Patrick Sitati

5. Peter Malaki

6. and Johnson Kasembeli

This far the defence is in agreement that indeed they brought in more members, that it is true some of those who failed to meet the share holding target resigned and left. The disagreement is over those who failed to pay up the required share holding target but failed to leave or abandon their claims to a share of the land. According to the plaintiffs these members were not refunded their share contributions and they are therefore entitled to land equivalent to their share contribution. While the stand of the defence is that these members have no claim on the disputed land, they were refunded their shares through the farm advocate and they should leave because they are not in the two titles exhibit D.3 and D.4 neither are they in the certificate for registration of the name Mbai farm. Indeed as noted earlier on in this judgement it is only the six original or founder members whose names appear in the title documents. The registration of business names certificate Exhibit D.1 was registered on the 13th day of March 1965. It only notes the 6 founder members namely.

1. Johnstone Mabonga s/o Maika

2. James Wanyama s/o Masolo

3. Alexander Ndemaki s/o Masika

4. Nashon Watulo s/o Maswa

5. Dixon Watwati s/o kiberenge

6. and Justus s/o Muresia

The business name chosen was Mbai farm carried on at LR No. 6651/2 and 6697 near Kiminini Trans Nzoia District.

It is further the evidence of P.W.1 that the balance of the purchase price for the land, loose assets and cattle came from loans advanced by the land and Agricultural Bank of Kenya and the Agricultural Finance Corporation of Kenya. It is his evidence that neither member was required to pay more than 5,000/- share holding and he disputes allegations by the defence that anyone paid beyond 5,000/-. It is his evidence that the loan were paid off in the following manner.

1. Loan paid off by proceeds realized from the sale of milk and butter.
2. From the proceeds of the sale of maize and sunflower grown on the land ploughed using their own tractor while the milk was transported for sale using their own pick up. At one time they sold 1,400.00 bags of maize from the farm.
3. They sold the tractor and used the proceeds to pay off the loan
4. They also sold 38 heads of cattle to clear the loan. His evidence is that, the loan was cleared in the year 1975 which fact is true as shown by the entries in exhibit D.3 and D.4 the title documents which show clearly that loans were cleared and titles discharged on 5.8.1975.

After the members took vacant possession of the land the farm management passed through various managers overseen by the entire committee of the farm and the membership. There were two recognized officials namely the chairman who were Nashon Watulo Masiwa and Dickson Watwato while the secretary was Alexander Ndemaki and Nelson Namaswa.

They recorded down their transactions which were conducted through meetings in a minute book. It is the evidence of P.W.1 that the first minute book for the years 1964 – 68 was in the custody of Alexander Ndemaki and this was not availed to court while the second minute book is the one which was handed to him by Nelson Namaswa before he died and which P.W.1 produced as exhibit 1. A perusal of the book shows that various transactions took place but those that concern these proceedings are those relating to the stand to be taken for and against the members who had not fully paid up their shareholding. As noted earlier on the defence dismissed exhibit 1 as a fabrication and said that the correct minute books were left in a dilapidated house, where they were raised on and then destroyed while others were taken to the District officer during arbitration proceedings but were not returned back to them. It is however to be noted that one should wonder as to why the District Officer selectively returned the receipts to the defendants and then retained the minute book and other records. It should also be noted that no letter from the defence to the District officer concerned demanding the return of those books or records was exhibited in court and no effort was made by the defence to summon the said District Officer to come to court and explain where these records are. Be that as it may the worth or value of the contents in exhibit 1 will be determined at a later stage in this judgement. For now it is enough to say that it is necessary to take a journey into the entries in this book to determine what was said by the members about the fate of those who had not completed payment of their share contribution leading to these proceedings observation of the book shows that the spine of the book got started falling off and had to be held in place by a string. P.W.1 denied that the book was mutilated or tampered with. This court has no way of determining whether the tearing is as a result of mutilation or careless record keeping. It was disarranged when put together but it is readable.

1. Vide minute No. 4/67 (a) it is noted that after a long deliberation on the matter it was resolved that the share holding of the members should remain fixed as earlier agreed upon of 5,000/- each. That resolution was passed in a meeting held at Mbai farm on 22.9.1967 by a committee which had been selected on 9.9.1967 and those present were Pius Kimungui as the chairman, Nahashon Watulo as a member, Dickson Watwati, Johnstone Mabonga, Justo Barasa and James Wanyama section B of the same minute resolved that those members who had paid over and above the agreed share holding should be paid back the excess. It is noted that James Wanyama was present and he contributed by saying that the excess be given together with interest. It was resolved that 6½% over 100% was to be paid together with refund of the excess payment but this was subject to proof of excess payment by those claiming to have paid in excess.

2. Vide minute No. 5/67 of the same meeting it was resolved that the seven sleeping partners be registered. They were to pay money to the farm advocate to cover the cost of registration. J. Mabonga and J. Wanyama as farm managers were mandated to go and see the farm advocate over that issue and know the cost of registration of these members who were to foot the cost of that registration.
3. Minute No. 9/67 (b) Nelson Namaswa asked for an advance of Ksh. 400/- to go and pay school fees which was to be refunded on a monthly basis but that issue was deferred to another date.
4. Vide minute No. 24/67 it was noted that one member Alexander Ndemaki had declined to sign the advocate letter setting in motion the process of registering the unregistered members. This was observed in a meeting held on 14.4.1967 and it was resolved that the venue of the meeting be shifted from Mbai farm to Namwela in order to get Alexander Ndemaki to attend. Those present in that meeting were P. Kimungui in the chair, N. Watulo, member, Dickson Watwati, Justus B. Muresia, Johnstone Mabanga and Nelson Namaswa.
5. The said meeting was held on 15.10.67 at Namwela and those present were noted as Pius Kimungui in the chair, Johnson Mabonga, Nashon Watulo. Dickson Watwati and N. W. Namaswa the secretary as members. Those invited were Patrick Wamaye, Peter Malaka, James Wanyama manager, Alex Ndemaki, Jackson Namunyu and Jackson Masakari as members. The issue of minute No. 6/67 dealing with registration of sleeping partners was raised vide minute No. 25/67. The issue raised was for member Alexander Ndemaki to explain why he declined to sign the aforementioned letter and he replied he was not properly explained and he was absolved of blame.
6. Vide minute no. 38/68 of the meeting held on 16th January 1968 at Mbai farm attended by Nashon Watulo as the Ag. Chairman, Johnstone Mabanda, Dickson Watwati, Justus Barasa as secretary and James Wanyama it was noted that the members Alexander Ndamaki and James Wanyama were boycotting meetings saying that they would only attend meetings of the 6 original registered members but not meetings where the other unregistered members were in the meeting members expressed surprise at that attitude but resolved to carry on with the meeting.
7. Vide minute No. 53/68 of the meeting held on 25.2.1968 at Mbai farm and attended by Pius Kimungui in the chair, Dickson Watwati Wamai, Enos Wanyama, Justus Muresia, Nelson Wanyonyi secretary. Those who willfully absconded were Nahashon watulo, Alex Ndemaki and James Wanyama and those absent with apology were Peter Malaka and Paulo Namunyu. In this meeting it was emphasized that those members who had not fully paid up their share contribution should be impressed upon to clear the outstanding amount as the same was required for the running of the farm. They were also to be informed that if they don't then action was being contemplated against them.
8. Vide minute No. 69/68 of the meeting held on 14.4.1968 and attended by Pius Kimungui in the chair, J. Mabonga, J. Masakari, D. Watwati, J. Muresia, N. Watulo, P. Wamayi and N. Namaswa. Those absent with apology were P. Malaka, p. Nauinyu, J. Wanyama and A. Ndemaki. In that meeting it was resolved that the farm owed land bank Ksh. 15,168/- and those members who had not completed payment should pay the same so that the same is used to clear the said debt pledges were made by P. Kimungui to pay 500.00 before leaving for Germany, P. Wamayi pledged to pay 1,000/-, D. Watwati 308, and P. Masakari 200/- which were to be paid by 19.4.1968.
9. Vide minute no. 73/68 of the meeting held at Mbai farm on 25.5.1968 attended by P. Kimungui in the chair, A. Ndemaki, J. Mabonga, J. Masakari N. Watulo, P. Malaka, E. Wanyama, P. Wamayi, D. Watwati, J. Meresia, P. Namunyu and N. Mamaswa and not attended by James Wanyama. It was stated that the purpose of the meeting was to deliberate upon the issue of the registration of the seven members. It was noted that there were many shambas purchased by Africans in groups of about 100 or 200 and yet only four of them are registered in the title. It was resolved that it is better for the rest to be registered. They also resolved to remain as partners.
10. Vide minute No. 74/68 of the same meeting it was resolved that those members who had not fully paid up their share holding should do so. It was noted that the payment was to top up to Ksh. 5000/-.

Some members pledged payment as follows p. Kimungui Ksh. 200 by 27.5.68, J. Masakari 200/- D. Watwati 308/-. P. Malaka 200.00, E. Wanyama never gave a pledge while P. Wamai paid all the outstanding balance of Ksh. 1,365/50 thus competing his share contribution. Those still with balances were impressed upon to ensure that they complete them soonest. It was also noted that no interest would be paid to those who had not completed payment of their shares.

11. Vide minute No. 86/68 of the meeting held on 31.8.68 attended by P. Kimungui in the chair and A. Ndemaki, D. Watwati, N. Watulo, J. Mabonga, P. Wamai, P. Namunyu, E. Wanyama, J. Muresia, N. W. Namaswa and not attended by J. Wanyama, J. Masakari and P. Malaka it was resolved and supported by N. Watulo and A. Ndemaki that they should make an appointment and see the advocate to finalize the issue and Mr. Mwesia and P. Kimungui were mandated to attend to that issue.

12. Vide minute No. 98/68 of the meeting held on 14.9.68 attended by N. Watulo, J. Masakari, P. Malaka, J. Wanyama, A. Ndemaki, P. Wamai, J. Muresia, P. Kimungui, D. Watwati A. J. Mabonga, E. Wanyama and M. Namaswa it was represented by N. Watulo that after seeing the advocate Ksh. 10,000.00 was needed to be paid to the land bank in Nairobi before new names could be added to those who had been registered earlier. In the alternative it was recommended that if the 10,000/- is raised efforts could be made to top up that amount to make 20,000/- to buy another farm and have the unregistered seven members registered in respect of the new farm. After a lengthy discussion it was resolved that the seven be registered without paying of the 10,000/-.

13. Vide Minute No. 146/68 of the meeting held on 19.12.68 and attended by J. Wanyama, J. Masakari, P. Namunyu, J. Muresia, A. Ndemaki, P. Kimungui, N. Watulo, D. Watwati and N. Namaswa and not attended by J. Mabonga, P. Wamai, P. Malaka and E. Wanyama. It was recommended by A. Ndemaki that it is better for those members who have not completed payment of their share contribution to do so and they were given upto 31.12.68 to complete the payment.

14. It should be noted that the numbers for entries for the minutes for 1969 were changed and P.W.1 gave no explanation as he said he was given the minute book by E. Namaswa in the condition he produced it to court. Vide minute No. 166/69 changed to read 11/69 in reference to minute No. 146/68 of the meeting held on 6.1.1969 attended by 13 members namely A. Ndemaki, P. Wamai, J. Masakari, P. Malaka, J. Mabonga, J. Muresia, J. Wanyama, N. Watulo, D. Watwati, P. Kimungui, E. Wanyama, P. Namunyu and N. Namaswa. The discussion was on share holding and showed that Dixion Watwati had paid 305/05 leaving 3/-, while P. Kimungui had not paid anything, same to J. Masakari, P. Kimungui said he will sell his cattle at the auction to pay while Enos Wanyama said he had nothing and P. Malaka said that he would respond soon. The members concerned asked to be given an extension of time to pay upto 30.1.69.

15. Minute No. 168/69 changed to 13/69 of the same meeting shows that E. Namaswa had asked for 2,000/- from Mbai farm to enable him go and buy a plot in the scheme and although he had not been successful in the interview it was resolved that he be given that money end of January 1969 to enable him go to Nairobi to see if he could get a scheme plot.

16. Vide Minute No. 48/69 of the meeting held on 16.5.69 and attended by Justus Muresia in the chair N. Watulo, P. Namayi, E. Wanyama, J. Mabonga, A. Ndemaki D. Watwati, P. Kimungui, J. Masakari, P. Malaka, P. Wamai, J. Wanyama and N. Namasu. The names of the members and their share holding were given as hereunder:-

1. Nahashon Watulo - 5,000.00
2. J. Muresia - 5,000.00
3. J. Mabonga - 5,000.00
4. J. Wanyama - 5,000.00
5. D. Watwati - 5,000.00

6. A. Ndemaki - 5,000.00
7. P. Wamayi - 5,000.00
8. N. Namaswa - 5,000.00
9. P. Namunyu - 5,000.00
10. P. Kimungui - 3,592.60
11. J. Masakari - 2,870.20
12. P. Malaka - 1,864.50
13. E. Wanyama - 1,808.00

It is further noted that during that meeting members of DAC Trans Nzoia were invited and they attended. After discussion the members of the farm were informed that the original six founder members cannot now try to shut out the other seven members because had they had enough money of their own they would have purchased the land without the other seven but since the seven contributed money to enable them pay for the said land they cannot be shut out and that both the 6 and 7 are members of the farm without distinction they were all equal. There is no mention that Namaswa had been given the money he had asked for vide minute 168/69 changed to 13/69. That minute confirmed the membership to be 13 as at that time.

17. Vide minute No. 60/69 of the meeting held on 15.10.69 attended by J. Masakari in the chair, N. Watulo, A. Ndemaki, D. Watwati, E. Wanyama, P. Namunyu, N. Namaswa the meeting was attended by the extension officer Kitale. It was noted that the underlisted had not fully paid up their share holdings namely

1. J. Masakari - 2,870.40
2. E. Wanyama - 1,808.00
3. P. Kimungui - 3,592.60
4. P. Malaka - 1,864.50

The said members were impressed upon to pay up by 1.11.69 otherwise they would be forced to sell their shares

18. Vide minute No. 5/70 of the meeting held on 7.3.70 attended by all the named except Kimungui. It was noted that J. Mabonga had gotten fed up with quarrels in the farm management and offered to sell his shares. He was told to bring a buyer but not a Kikuyu.

19. Vide minute No. 6/70 one p. Malaka resigned from the share holding and his shares were worked out to be 1,860.00 together with interest of Ksh. 242/45 and it came to Ksh. 2107.45. it is noted that the rest of the other members agreed to buy these shares and they signed in the record book.

20. Vide minute No. 15/70 in respect to Min. 5/70 in respect to shares of J. Mabonga and he reported that he was not interested in withdrawing the shares because what he had wanted to buy was no longer there.

21. Vide minute 16/70 it was confirmed that P. Malaka was still desirous of withdrawing his shares and it was resolved that efforts should be made to raise the required sums so that he is paid and he goes his way.

22. Vide Minute No. 23/71 of the meeting held on 14.2.71 attended by all except J. Wanyama, A. Ndemaki and P. Kimungui the issue of unfinished share payment was raised and the same was deferred till all the members were present

23. Vide Minute No. 30/71 of the meeting held on 20 – 21.3.71 attended by all members except P. Wamayi, J. Masakari, P. Kimungui and J. Wanyama. It was resolved that there was only one solution to the problem of shares. The affected members were given 11 days to pay up from 20 – 31.3.71 or face the inevitable. They were given up 31.3.71 to pay up.

24. Vide minute No. 14/72 of the meeting held on 6.5.72 attended by N. Watulo in the chair P. Wamayi, P. Namunyu, J. Mabonga, A. Ndemaki, J. Muresia, J. Wanyama, D. Watwati and N. Namaswa it was resolved that J. Mabonga be loaned 500/- to pay fees and refund the same by the end of 1972 failing which the same was to be deducted from his shares.

25. Vide Minute No. 15/72 it was resolved that because J. Mabonga is the one who appears to be the boss and his name was all over and appears to be the boss because of that name it was resolved that name be changed to read Mbai only and not Johnstone Mabonga and partners.

26. Minute No. 22/72 of the meeting held on 17.6.72 and attended by N. Watulo in the chair, A. Ndemaki, J. Muresia, P. Namunyu, J. Mabonga, D. Watwati and N. Namaswa in the absence of P. Wamayi, J. Wanyama it was reported by the chairman that he had taken the money equivalent to the share contributors of those who had not completed payment to the advocate to have the same refunded to those members but on arrival with the money of Ksh. 3,592.00 for Pius Kimungui, Ksh. 2,870.40 for Jackson Masakari, Ksh. 1,808 for Enos Wanyama and Ksh. 1,364/50 for Peter Malaka. It was reported that on arrival Enos Wanyama and his son declined to accept the shares supported by J. Mabonga who had invited them to buy shares in the farm. That Enos and his son had said that they could pay 400/- there and then and then pay the balance by the end of the year and declined to accept the said shares. It is also noted that the advocate had asked the chairman to sign for that money and he declined.

It was further noted that the late J. Mabonga agreed that he had intervened not to chase away Enos Wanyama because he was not in favour of one person being send away from the farm membership while others are left. He would have no objection if all those who had not completed their shares are taken to the advocate all at once and be refunded their money. There is no mention that any other member was taken to the advocate to be refunded their money.

27. Vide Minute No. 23/72 held on 16.9.72 at Mbai farm attended by the District Officer on behalf of the District Commissioner Trans Nzoia all the members attended and it was noted that only 3 had not completed payment of their full shares namely P. Kimungui, E. Wanyama and J. Masakari. The District officer was informed that the only disagreement in the shamba was over the issue of those who had not fully paid up their shares. On inquiry by chief Kipkut on who had fully paid up the shares and who had not the following were said to have fully paid up their shares N. Watulo, J. Wanyama, J. Muresia, J. Mabonga, D. Watwati, A. Ndemaki, N. Mamaswa and P. Wamayi each having paid up to 5,000.00. It is noted that when the District Officer and the chief Saboti asked the fully paid up members to give the three a short time to complete they declined because the members had had 8 years from 1965 to pay up but they had not done so and the fully paid up members declined to extend the time for completion. It is further noted that the District Officer informed the meeting that the government could not force the fully paid up members to accept their colleagues who were not fully paid up but those not fully paid up could take action they deem necessary to redress their grievances. It is further noted that a vote was taken to know if there was any other member who supported J. Mabonga that those who had not fully paid up should not be chased away from the shamba but no fully paid up member raised up his hand in support of that.

28. Vide minute No. 25/72 the District Officer inquired about the registration of the members who were fully paid up but were not in the title and N. Namaswa replied that an application or request had been placed with their advocate to deal with that.

It was noted that when P. Kimungui raised the issue of payment of his salary and 70 bags of maize he left

behind. He was advised that even if he is more highly educated than the rest of the members he has to show respect and bring himself down to their level in order to get on along well but if he exalts himself he will find problems. Further that he had no claim from the rest because he was not a member and he was to follow up his claims carefully.

After the meeting of 16.9.72 the meetings were being attended by 7 members out of the 9 eligible members namely the meeting of 8.10.72 attended by N. Watulo, J. Wanyama, J. Mabonga, J. Muresia, P. Namunyu, D. Watwati, N. Namaswa in the absence of A. Ndemaki and P. Wamayi and also the meeting of 4.11.72 attended by J. Wanyama, P. Namunyu, J. Muresia, D. Watwati, N. Namaswa, J. Mabonga and P. Wamayi and the meeting of 18.11.72 attended by N. Watulo in the chair, J. Wanyama, P. Namunyu, D. Watwati, N. Namaswa, J. Mabonga, A. Ndemaki and those noted to have been absent were P. Wamayi and J. Muresia. The meeting of 10.12.72 was attended by all the nine.

29. Vide minute No. 9/73 of the meeting held on 11.12.73 attended by N. Watulo in the chair. A. Ndemaki, J. Wanyama, P. Namunyu, D. Watwati, N. Namaswa in the absence of P. Wamayi and J. Muresia it was noted that Ksh. 6,462/20 belonging to those members who were unable to fully pay up for the shares as per minute No. 30/71 named as Pius Kimungui, J. Masakari it was resolved that the said money be taken to the advocate for the same to be refunded quickly. That the share of Jackson Masakari should be taken to his home by N. Namaswa and P. Namunyu while that of P. Kimungui to be taken to the advocate by D. Watwati.

The subsequent events tend to show that after the meeting with the District Officer and the chief during which time the fully paid up members refused to extend the time to allow those not fully paid up to pay up the unpaid up members were locked out of the farm transactions and this explain the action taken by them to move to court and file Eldoret H.C.C.C. No. 52 of 1974. The plaint in the said case was produced as exhibit D6. The plaintiffs in the said case were Johnstone Mabonga, Enos Wanyama, Pius Kimungui and Jackson Masakhala (Masakari). The 2nd to 4th plaintiffs are those who had been barred from the meetings and those who had not fully paid up their shares. The first plaintiff was always opposed to these members being chased away from the shamba as shown by the minutes and so it is no surprise that he teamed up with them.

The first to the 5th defendant are the founder members and those registered in the title as shown by exhibit D3, 4 and 1 together with the first plaintiff.

The salient features of the claim are stated in the following paragraphs.

1. Paragraph 4 that the first plaintiff and the defendants being the registered owners were later joined by a further 6 persons who included the 2nd to the 4th plaintiff and the six with the agreement and accordingly the nine of them agreed jointly and severally to contribute a sum of Ksh. 5,000.00 each towards the capital of the partnership.
2. Vide paragraphs 5 that there was a verbal agreement to contribute 5,000/- each towards the capital which was contributed by the 1st plaintiff and the defendants but which target was not met by the 2nd to the 4th plaintiffs.
3. Vide paragraph six that the partnership received a loan from the Land Agricultural Bank to the tune of Ksh. 120,000.00 with a promise to make an additional fund of 80,000.00 which was not done.
4. Vide paragraph 7 that there were other partners who were refunded their share holding and ceased to be partners.
5. Vide paragraph 8 thereof that despite agreeing to partitioning and apportionment of the land to the individual partners that had not been done.
6. Vide paragraph 12 thereof that during the years 1972, 73 the plaintiffs have unsuccessfully called upon

the defendants to allow the 2nd to 4th plaintiffs complete their share contributions and then have their names included in the registration to no avail and thus the plaintiffs have been in the dark as regards the running of the farm affairs and had no access to the books of accounts.

7. vide paragraph 13 thereof that the defendants have wrongfully and unlawfully in the contravention of the verbal partnership agreements express or implied on various dates during 1973 jointly and severally and in front of the first to 4th plaintiff

(a) refused to produce for inspection books of accounts

(b) On 21.1.73 when the 1st plaintiff tried to make reconciliatory moves between the plaintiffs and the defendants all the defendants threatened violence to the body of the first plaintiff

(c) Despite the plaintiffs jointly and severally efforts to solve the impasse all the defendants have jointly and severally resisted and made impossible the formulation of a basis for reconciliation

(d) the defendants have all along been resisting the plaintiffs from taking active participation in the running of the affairs of the partnership.

8. Vide paragraph 15 thereof they sought the dissolution of the partnership between the plaintiffs and the defendants.

9. Vide paragraph 17 thereof they sought a declaration that the plaintiff and the defendants were at all material times and still are partners in the business of farming for gain and profit known as the said Mbai farm.

(b) An order that the partnership be dissolved and affairs of the partnership be wound up, accounts and inquiries be made and defendants be made liable to the plaintiffs for such sums as they may be found due to the plaintiffs, that an independent receiver and manager be appointed, the defendant do pay costs and the court do give such further or other relief as the court may deem fit to grant.

The defence to that claim was not availed to the court to know the version of the defendants defence Exhibit D.8 shows that the case was not prosecuted and on the motion of the defence advocate then on record the same was dismissed for want of prosecution.

Other documentary evidence showing the dispute persisted over the share holding are exhibit No. 2 which is an extract of minutes dealing with share holding whose details have already been set out in this judgement and which show that after several extensions to enable the affected share holders pay up but did not till they were locked out.

Exhibit D 11 a letter to Pius Kimungui from R. F. J. Lind sell to the effect that Mbai were willing to deposit 3,500/- with the said advocate to be refunded to Pius Kimungui if he agreed he had no further claim against them. It is not proof of refund.

Exhibit D 9 a photocopy of a letter dated 26.3.71 signed by N. Watulo, J. Mabonga , A. Ndamaki, D. Watwati, J. Wanyama, J. M. Muresia and N. Namaswa addressed to Pius K. Kimunguyi, Enos Wanyama and Jackson Masakari informing them that a resolution had been passed in the meeting of 20 – 21.3.71 that who ever does not top up his shares by 31.3.71 he would no longer be a share holder of the farm. The implication of this letter is that it is only the three addressed who had not fully paid up their share holding.

Exhibit D 16 is dated 13.4.67 and purports to have been written by N. W. Namaswa as an ex (Mwanachama) member on behalf of other ex (wanachama) members. This document is of no documentary value as it was superceded by exhibit D9. of 26.3.71, Exhibit D. 10 is a photocopy of 2 receipts issued by the advocate R.F.J. Lindsell namely No. 14194 of 20.2.73 for Ksh. 2870/20 an account of the share of Jackson Mamai and No. 16180 dated 13.2.73 for Ksh. 3,592.60 on account of Pius

Kimungui exhibit D 10 has a relation with exhibit D11 and confirms the evidence of D.W.1 that the money for refund of the shares of the affected members was handed to the advocate but do not prove that the same was refunded to the said members. It is also to be noted that nothing has been produced by the defence to show that the shares of Enos Wanyama were forwarded to the advocate for a refund.

It is evident that from 1974 – 1979 Eldoret H.C.C. 52/74 was subsisting in court, that it was filed after the affected shareholders were kicked out of the share holding. The same was dismissed for want of prosecution on 15.11.79 as shown by exhibit D8. The costs of the same were agreed upon by consent on 8.3.85 as shown by exhibit D 27.

After the dismissal of Eldoret HCCC 52/74 it is the evidence of p.w.1 that the members agreed to go to the Land Control Board to apply for registration of the sleeping members in a response to the government directive that all sleeping partners be brought on board. It is P.W.1's evidence that following that consensus they applied to the area Land Control Board for consent vide exhibit D5. A perusal of the same shows that only 4 partners signed instead of six. Those whose signatures are legible are J. Muresia P.W.1 and D. Watwati. The other 2 their signatures are not legible. It is agreed in principle that a consent following presentation of exhibit D5 was issued as it was marked for identification as MFI 4 but then it was not produced. The minutes during which the consent was issued were produced as exhibit 12. The matter was deliberated upon vide minute No. 4© Ex. Min. DCB 13/80 (b) of the meeting held on 11th April 1980 in K.F.A. board room Kitale. The contents of the minute are in respect of Kiminini LR 6651/2 and 6697 – 488 ha leasehold proposed transfer to include sleeping partners J. M. Mabonga and 5 others to J. M. Mabonga and 11 others. The application together with their advocate appeared before the members of the board. They were informed that the farm owed AFC GMR loan to the tune of Ksh. 250,000/- and should make definite arrangement of how to repay it. The application was approved and consent granted. Exhibit 12 was accompanied by exhibit 11(b) showing the full list of 12 members. Nine (9) fully paid up members and three (3) not fully paid up members. Also annexed to it is 1 letter from the Commissioner of Lands Office Nairobi dated 20th February 1980 to Kaptan and Company Advocates informing him that the application form for consent had been forwarded to the board for consideration under LCR 10862.

Although P.W.1 said that all the members were in agreement to go to the board in 1980 that seems not to have been the case because had that been the case then the partners would have proceeded to change the registration and proceed to subdivision the net result of that consent is that it gave birth to a series of arbitration proceedings as conceded by P.W.1 and D.W.1. one of which was that one culminating in the proceedings before a panel of elders under the chairmanship of S. K. K. Limo District Commissioner Trans Nzoia who sat in those proceedings as the chairman. The proceedings are titled civil case No. 52/73 Mbai farm and are dated 5.9.88 produced as exhibit 5. Several witnesses gave evidence in those proceedings and it is important to Highlight the salient features of the same though briefly

1. Justus Muresia gave the history of the formation of the partnership already set out earlier in this judgement.
- (ii). That purchase of the land was financed partly from the members shares contribution to a maximum of Ksh. 5,000/- and partly by loans from the Agricultural land bank and the Agricultural Finance Corporation.
- (iii). Initially there were 6 members who had fully paid 5,000/- each. Followed by 6 other additional members who were also told to pay up to 5,000/- each but of these additional people only 3 fully paid up leaving 3 who did not namely Pius Kimungui, Enos Wanyama and Jackson Masakari.
- (iv). That In 1975 they fully paid off the loan using proceeds of sell of maize, cattle and sell of a tractor and celebrated by holding a party for themselves and neighbours.
- (v) That in 1976 by local arrangement they subdivided the land and gave to each member so that each can develop his portion.
- (vi) In 1981 members began receiving receipts showing they had increased their share holding which

receipts looked fictitious and which were not believed by the members as they members had completed paying for the farm in 1976 so the question of more shares did not arise.

(vii) That no receipts were issued when they were buying the land as their share contribution were being recorded in a book. Further that they as members never authorized anyone to issue such receipts. That they became suspicious wondering where the receipts came from and the purpose for which the receipts were being issued. That at that time they had fully paid for the farm through milk sales sell of farm maize and sell of farm animals.

2. The late Nelson Namaswa also gave evidence and the salient features of his evidence are as set out hereunder.

(i) He reiterated the history of the organization set out above by Justus Muresia.

(ii) He confirmed that nine members completed payment of their shares upto 5,000.00 namely Justus Muresia, Dickson Watwati, Nashon Watulo, Johnstone Mabonga save he Johnstone withdrew 500/- leaving 4,500.00, Alexander Ndemaki, James Wanyama, Nelson Namaswa, Paul Namunyu and Patrick Wamai.

(ii) That the nine people named were the only ones who subdivided the farm among themselves in 1975 and also shared the 200 heads of cattle amongst themselves each getting 11 heads of cattle and the remaining 101 heads of cattle were sold to pay off the loan.

(iii) That 3 people did not complete payment for their shares namely Pius Kimungui Ksh. 3,592.60, Jackson Masakari Ksh. 2,870.20 and Enos Wanyama Ksh. 1808.00. That these same people were not allowed to enter and build on the land and so they remained outside the farm.

(v) That when a directive came that farms be subdivided is when the three called elders namely Hilary Nyongesa, Ainea Masinde, Wilson Nate and Timothy Wanjala to come and reconcile them. That meeting ruled that the share contribution for each member to remain at 5,000.00 and the three to be given land equivalent to their share holding of the money paid. But founder members Alexander Ndamaki asked for bonus shares for the founder members because they had used their money and vehicles while looking for the shamba and on that account Ndemaki and 3 founder members refused to sign the elders ruling thus worsening the dispute.

(vi) After that Ndemaki went and brought false receipt and began forging and writing false shares contributions Mwesia was send a receipt showing he had paid Ksh. 20,000.00 and Watuati 18,000.00 which false receipt were back dated to 1964 and yet when they entered the farm they were using a minute book for entering the payments.

(vii) That the case was also heard by District Officer Oreta who ruled that the share for each member to remain at 5,000.00 and that those who paid less be given land according to what they had paid. No more money was to be demanded from the members because all the purchase price had been fully been paid for.

The late Johnstone Mabonga also gave evidence and the salient features of his evidence are

(i) He confirmed the history of how the farm was looked for for purchase but differed with the other two first witnesses on the share contribution of the founder members. According to him in 1964 they paid as hereunder

James Wanyama - 11,000.00

Johnstone Mabonga - 9,800.00

Alexander Ndemaki - 7,000.00

Nashon Watulo - 8,000.00

Muresia - 4,000.00

Then the six people contributed 18,000.00 to buy cattle from the settler which was not enough forcing the six to go and pledge their wealth in Bungoma for a loan. It is only the 6 people who added more money and remained in the farm.

(ii) It is the additional six who started bringing problems when they said that the share holding should be sealed at 5,000.00 each.

(iii) Those who failed to reach the target like Pius Kimungui, Enos Wanyama and Jackson Masakari were removed from the farm. That their money was refunded and it is still with the advocate upto that moment and they have no claim to the land. The land to be shared as hereunder. James Wanyama – 320 acres, Johnstone Mabonga – 245 acres, Alexander Ndemaki 206 acres, Nahashon Watulo – 195 acres, Justus Muresia – 94 acres and Dickson Watwati – 84 acres.

(iv) That it is the receipts which show how much each person paid.

The salient feature of the evidence of Dickson Watwati was that

(i) Those who paid in excess of 5,000.00 were refunded the excess.

(ii) Records of payments were in two books two held at the farm and a 3rd one at the advocates office.

(iii) He recalled being given a receipt showing he had paid 18,000.00 as his share contribution which he rejected as what he knew was that each member paid 5,000.00 and they have never used receipts.

5. Pius Kimungui's evidence was that

(i) There were six founder members who were joined by 11 others later on inclusive of him. Five members withdrew leaving 12 members. The maximum share contribution was 5,000.00 only and a 9 people fully paid up leaving three with a short. One reduced his share by 500/- leaving 8 fully paid up members. Those who paid less are four namely Johnstone Mabonga 4,500.00, Jackson Masakhala 3,800.00, Enos Wanyama 1808.00, Pius Kimungui 3,592.00.

(ii) Their agreement as partners was that the four would pay for itself.

(iii) When they decided to subdivide the farm is when the dispute started and the other parties started telling lies and brought in fake receipts.

(iv) The case went before the elders where it was ruled that the share contribution per member should be sealed at 5,000.00 only and even the sleeping partners who joined the six founder members later on be given land.

(v) He was shown where to build and he even started building his house. The other members came and destroyed it.

6. The salient features of the evidence of Alexander Ndemaki are

(i) The six founder members came together wanting to buy land and resolved to raise 10,000/- each but were unable as only Johnstone Mabonga managed to raise 7,000/-. Each of them went back home and brought a friend or a relative in an effort to try and raise money making a total of 12 people but still they could not raise the required amount.

(ii) The 12 met and set the deadline of 15.5.1965 to be the deadline extended to 26.7.65. Thereafter some

withdrew. Others did not complete and took their case to chief Chebus who then took them to the then District Commissioner who ruled that those who had not completed payment for the land should not step on the land.

(iii) The disgruntled members then filed Eldoret H.C.C.C. No. 52/74 which ruled that those who had not completed payment were not members and were to pay damages of Ksh,10,000.00.

(iv) At the time they were buying land in 1964 they were using Miscellaneous receipts for the payments and later bought proper receipts to replace the previous ones and so the new receipts are not fake.

(v) In 1976 they decided to subdivide the land and asked members to move to their respective plots but some refused to move and took the case to the panel of elders and that is when those who had been refunded money through the advocate came up claiming to be members namely Pius Kimungui, Mamai, Masakari and Enos Mwanyama.

7. James Wanyama gave brief evidence to the effect that they had agreed to contribute each 10,000/- but members were unable to raise the target and he is the only one who raised 7,731.00. In all he contributed 19,971.00 and when the farm committee subdivided the land in 1976 he was given 320 acres which is equivalent to what he had paid.

8. Patrick Wamai said he entered the land and paid 3,120/- followed by 1,880.00 to complete the required 5,000/- and he became a fully paid up member and was given 11 heads of cattle. He has settled on the land and he is using the same.

9. Nelson Namaswa produced a letter signed by Ndemaki addressed to the District Commissioner confirming that each share was 5,000/- and that he Ndemaki had brought in forgeries to claim that each share was 10,000.

The elders findings were that

1. The deposit of 48,000.00 was raised by the 12 people after those who were defeated had withdrawn.
2. They agreed that the farm records were being recorded in a book and the receipts now being presented by Ndemaki were introduced as a conspiracy by a small group so that they get more acres than the others. All members except a few paid the 5,000.00 deposit and should get equal shares.
3. In all the farm should be divided equally between the members who paid 5,000.00 and those who paid less to be given land equivalent to their share contribution.

The foregoing elders award was filed in Kitale SRM C.C. land case No. 34 of 1988 for adoption. Four persons were aggrieved by that ruling who are James Wanyama Masolo, Johnstone Mbonga, Alexander Ndemaki and Nashon Watulo Masiwa. They filed a notice of motion on 23.11.1988 dated the same day exhibit 6 seeking orders that the elders award formally filed in court on 10.11.1988 be set aside and in the alternative the same be declared a nullity.

The application was supported by an affidavit sworn by James Wanyama Masolo. The salient features of the affidavit are

1. Gave the history of the founder members, purchase price and the title members.
2. Vide paragraph 9 of the affidavit he deponed that the 6 founder members agreed to contribute 10,000/- each to meet the required 20% sum which was 49,200/05 and whatever was over and above went to pay the advocates fees and stamp duty.
3. Vide paragraph 10 thereof that the 10,000/- was not enough and so more money was required to keep the farm running and so it was resolved that out of the six members any who could raise more money

could go ahead and do so and they raised the amount required as stated hereunder.

1. Johnstone Mabonga - Ksh. 53,797.00
2. James Wanyama Masolo _ Ksh. 70,256/30
3. Alexander Ndemaki Masika _ Ksh. 45,299/30
4. Nashon Watulo Masiwa - Ksh. 43,287/90
5. Justus Muresia - Ksh. 20,572.80
6. Dickson Watwati - Ksh. 18,534/90

4. Vide paragraph 11 thereof that the cost of living went up and more money was required to run the farm and so it was resolved that 11 new members be invited at half the contribution of the initial founder members now read in paragraph 12 of the affidavit. Out of the 11 eleven 5(five) of them could not raise the required amount and they withdrew from the membership whose names are set out in paragraph 13 of the affidavit. The remaining 6 did not raise the required 5,000/- but did not withdraw their membership as set out in paragraph 14 of the affidavit.

5. Vide paragraph 15 thereof that as a result of failure of the 6 to raise the required 5,000/- the founder members informed them that they were no longer members.

6. Vide paragraph 16 and 17 thereof that it was resolved at the time of sharing of the farm that each founder member was to get his acreage at the rate of 219/10 for every acre while the other 3 members who had failed to raise 5,000.00 at 250/- per acre while 3 others named in paragraph 18 thereof were chased from the shamba and refunded their money but instead went and filed Eldoret H.C.C.C. No. 52 of 1974 which was dismissed for want of prosecution.

7. Vide paragraph 19, 20, 21, 23, 24 deponed that 11 acres had been set aside for public utilities namely a school, Dip roads, that the case had been heard severally by the same panel and at one time they had produced records as exhibits which were not given back to them for fresh production which if produced would have shown a clear picture of the whole case.

8. Vide paragraph 25, 26 and 27 that they put forward oral evidence which was overlooked and secondly the panel did not consider all the material evidence placed before it and lastly that the panel lacked jurisdiction to hear the matter in the absence of a specific order of reference from the court.

That application was upheld by the court vide exhibit 7 for want of jurisdiction on 12.1.1989.

The upsetting of the elders award led to the filing of these proceedings vide the first plaint which was filed on 20th December 19989 as Eldoret H.C.C.C. no. 167/89 when a High Court was opened at Kitale the court file was transferred from the Eldoret High Court registry to the Kitale High Court Registry and given a new number hence Kitale H.C.C.C. NO. 8 OF 1997. The defence to the plaint was filed in 1990. It transpired during the trial that even before the case was filed in court an application had been made to the area Land Control Board for consent. This is evidenced by the Land Control Board minutes exhibit 15 in respect to the meeting held on 9th March 1989. The matter was deliberately upon vide Mini. DLB/6/80 for new large scale transaction. The contents of the minutes show that the transaction was for a proposed subdivision into agricultural portions, Schools, dip and roads from James Wanyama Masolo and five others as per the attached list. It is noted that some of the members attended before the board but were advised to come with the rest of the members. The matter appeared before the board again. In the meeting of 18.5.89 as shown by the minutes exhibit 16. The matter was considered under the same minute number. The matter was deferred because the parties did not attend. The matter came before the board again on 13th July and considered under the same minute number as shown by exhibit 17. The remarks are that members appeared before the board and some objected to the subdivision that it was

improper and their matter was referred to the District Officer Saboti Division. It came up again on 16th November 1989 as shown by exhibit 18. The remarks were that not all members appeared before the District Officer Saboti and they were advised to do so and the District officer Sabot was to file his report before the next board. The members were also to explain how Agricultural Finance Corporation loan was going to be dealt with. The matter appeared again before the board on 22nd February 1990 and considered under the same minute number. The remarks were that the members appeared before the board and were referred to the District Officer Saboti and chief Kiminini to enlighten the board whether they should be 9 members or 12 members. These minutes were produced as exhibit 19 on 22nd March as shown by exhibit 20 the matter appeared before the board and considered under Exh, Min. No. DLB/5/89. The remarks are that proposed subdivision of 1206 acres into 9 agricultural plots, school, dip and roads inclusive. Applied by Mbai farm. The members appeared before the board and the application was approved. That approval gave birth to the consent produced as exhibit 21 issued on 22nd March 19 something as the last two numbers are not very clear. This consent exhibit 21 refers to an application of January 1987 but the date of the month and the date of the month and the year aren't very clear. However the original was produced as exhibit D. 30 which shows clearly that it referred to the application of 30th January 1987 which application was not availed to court as the application availed to court is exhibit 14 whose original is D.29. It shows clearly that the applicant was Mbai farm., the consent was given in respect of LCR 134/90 which refers to the application of 29.3.90 and not 30th January 1987.

A copy of the register for consents issued was produced as exhibit 23. It appears at entry number 9 and a perusal of the same shows that the date 29.3.90 was changed to read 20.3.90 by overwriting on the 9. It refers to LCR 134/90 which is shown on exhibit 14 and 26 which number is also shown on the consent exhibit 21 and D.30. The date in the register contradicts the minutes exhibit 20 which show that the consent was given on 22.3.90 and not 20.3.90. The book copy of the consent has similar information although they are faint.

Following that consent exhibit 21 and D.30 a subdivision map was made produced as exhibit D.31 drawn by a person whose name is not disclosed and signed by D.W.1 Wanyama as the owner of the farm. Exhibit D.32 shows that it was submitted to the Department of Lands Nairobi for approval and the approval came vide the letter dated 3rd November 1992. Certain conditions were set out in that letter which are set out herein for purposes of the record which are that :-

- (a) Development conditions on each plot being apportioned on prorata basis
- (b) New annual rent for each agricultural portion being assessed by the Commissioner of Lands on completion of survey.
- (c) The area set aside for a primary school and cattle dip being surrendered to the government free of cost.
- (d) No new access roads being constructed to the classified road network without prior approval from the chief engineer roads.

The court was informed that exhibit 31 and 32 were not carried into effect because P.W.1 moved to Eldoret High Court and filed High Court Miscellaneous application Number 24 of 1990 seeking to quash the consent issued to D.W.1 exhibit D.30 and 21. The court was informed that that application was refused. D.W.1 became aggrieved and moved to the Court of Appeal and filed Nakuru C.A. No. 143/1992 seeking the same reliefs. That appeal was not heard by the Court of Appeal. It was deferred to await the outcome of these proceedings. The court of Appeal order was produced as exhibit D.28.

Coming back to oral evidence in court the salient features of the evidence of P.W.1 are

1. He maintained that there were nine fully paid up share holders who paid upto 5,000.00 namely Justus Muresia, Alexander Ndemaki, James Wanyama, Dickson Watwati, Nahashon Watulo, Nelson Namaswa Wanyonyi, Paul Namunyu and Patrick Mamai. Those who did not fully pay up to 5,000.00 are Pius

Kimungui 3,592.00, Jackson Wasakari Ksh. 2,870.00, Enos Wanyama Ksh. 1808.00 and Johnstone Mabonga ksh. 4,500.00.

2. He stands by the contents of the minute book exhibit 1 as outlined elsewhere in detail in these proceedings as they represent the transactions that took place in the farm leading to these proceedings. He adds that most records were kept by the secretary Alexander Ndemaki especially for the period covering 1964 – 68 before exhibit 1 was put in use. He received exhibit 1 from late Namaswa and he has not added or subtracted anything from the same.
3. He agrees the registered proprietors as per the two titles exhibit D.3 and 4 are only 6 but to him the land is the property of both the fully paid up members and those not fully paid up each getting a share proportionate to his share contribution with those fully paid up getting an equal share.
4. Differences arose between them because the defendants wanted to chase away the members who were not fully paid up and yet these people had not been refunded their share contribution as these members refused to be chased away. He agrees that there are those who surrendered and were refunded their shares and they left and they are not claiming any share.
5. He agrees that some eligible members have since died and their wives have been joined to the proceedings at first without first getting letters of administration but that was later rectified and they all had letters of administration to the deceased's estates as at the time of trial and are eligible to get their late husbands shares.
6. He agreed the title documents read that the registered proprietors were tenants in common in equal shares and that holding has not changed. But that notwithstanding those whose names do not appear in the titles but are fully paid up members or not fully paid up members are also entitled to a share of the same. Those fully paid up in equal shares with those fully paid up shares who are registered in the title and those not fully paid up will get land proportional to their share contribution.
7. The application for consent made in 1980 was signed by him P.W.1, Kimungui and Namaswa the disputed signature on exhibit D.5 was signed by Alexander Ndemaki. He concedes that the signatories Pius Kimungui and Nelson Namaswa who signed the applications are not registered proprietors as per exhibit D.3 and 4. The application was for consent to register the sleeping members but there was no members resolution to go to the board to register the sleeping partners.
8. He agreed Eldoret H.C.C.C. 52/74 was filed by some members among them those who had not fully paid up their shares against 5 of the original founder members but to him that case did not decide anything as it was dismissed for want of prosecution and so it did not determine the rights of the plaintiffs in that case.
9. He agreed that the dispute all along in Eldoret HCCC No. 52/74 and the current proceedings has been because the members who had not fully paid up their shares were told that if they don't complete they would no longer be members. But he still maintains that there was no counterclaim in that suit and no decision taken that they are not members and cannot get a share of the land.
10. He agrees that as at the time the new members came in the issue of purchase of land had been dealt with but still the six founder members decided to increase the share holding although there is no minute showing a resolution to that effect but it could be in the missing book. He P.W.1 further agrees that deadlines were set for completion of paying up of the shares which were met by the nine leaving the three who are some of the plaintiffs. He P.W.1 also agrees that there is no time they reversed the minutes that those who had not fully paid up were no longer members but as per minute No. 74/68 the restriction was on the benefits and not the land and it is his evidence that money for profits from farm produce went to pay up shares but he has no resolution or record to prove that.
11. He agreed that there is no record in exhibit 1 showing how each member was making his payment as that was in the other missing books in the custody of Ndemaki.

12. He had no knowledge of the application, proceedings before the board and the consent exhibits 14, 15, 16, 17, 18, 19, 20, 21, and 30 as he saw them in court and that is why he moved to court to block the same.

13. It is his evidence that he did not contribute beyond 5,000.00 as per the new receipts. His evidence is that the new receipts attributed to him like those of others are all forgeries as they are not backed up by minutes.

14. When re-examined by his counsel he reiterated that meetings were attended by only members and not strangers, that all members attended the board meeting which gave consent in 1980 to register sleeping partners and there was no objection from anybody, raised to the same till 9 years later when this case was filed and it is only in 1999 that the defence sought leave to upset it, that though the titles have only 6 registered members the unregistered members are recognized and that is why they allowed them to participate in the meetings, that they agreed that the shareholding was as tenants in common and that position has never been changed, neither was it indicated in the sale agreement that the shares of the members were at variance, he maintains those not registered were being called as sleeping partners. No defence to case No. 52/94 was exhibited to show what the response of the defendants to those claims were, it is his evidence and he confirms to court that those suing and those being sued are all members of Mbai farm, there is no minute showing the value of an acre for land given to each member, he does not know who and when the money was taken to Lindsell advocate as there is no minute to that effect on the record, he also agrees that there is no document shown to him where the two members signed saying that they had received their refund and withdrawn from the partnership. He was not aware of the application for consent dated 20th January 1987 neither did he consent to it. It is his evidence that they have not sat down as share holders and agreed on the subdivision, that he has seen minutes showing that there were objections to the consent being given to the application of 1987 but it was later given and he does not know why that was granted, that the map is fake as it bears one name and yet there is nothing to show that the members authorized him to sign it on their behalf.

The salient features of the evidence of P.W.8 Patrick Wamai is that he confirms the evidence of P.W.1 on the history of the matter and the dispute involving the paid up and the unpaid up shareholders. He initially paid 3,200.00 but fully paid up in 1969 and details recorded in a ledger book as there were no receipts. He is a stranger to the allegation that he is not a fully paid up member.

The salient features of the evidence of D.W.9 Methodeus Pius Wasike Kimungui are that he confirmed the evidence of P.W.1 on the history of the matter, he confirmed he paid 3,192.00 but was not issued any receipt as the particulars were recorded in a book, he failed to pay up the balance because the secretary was not available, agrees he is not a fully paid up member, that trouble started when the pioneer members wanted to chase away new members and that is the dispute which is still going on to date, that the arbitration proceedings have always ruled that all the pioneer and in coming members should share the land, he confirms that he was never refunded any money, he does not want any refund and all that he is asking for is land as a sleeping partner as he is not named in the titles, he never authorized advocate Lindsell to receive money on his behalf and neither did he go to the office of Lindsell to collect any money.

The evidence of P.W.10 relates to the transactions before the Land Control Board already set out elsewhere in this judgement. His evidence is based on the documents produced as he was not involved in the transactions but what he knew is that a person who is not an owner is not authorized to sign the application for consent and secondly that the decision of the board for consent should be entered in the register which was not the case herein for the decision of 22.3.1990 but he has no explanation for that although the documents tends to suggest that two consents were given for subdivision but there seems to be some evidence of a human error involved.

Turning to the defence case as noted earlier on in this judgement the key witness is D.W.1 and the salient points of his evidence are

1. According to him 6 pioneer members were from the same area Namwela and agreed to buy land.

Their contributions were John Mabonga Ksh. 53,797.10, James Wanyama 70,256.31, Alexander Ndemaki 45,399.30, Nahashon Watulo – 43,287.99, Justus Muresia 20,522.80, Dickson Watwati 18,534.90. The total came to Ksh. 250,748.40 and armed with that money they went to look for land to buy.

2. Although he D.W.1 denied that they wrote an agreement of sale in an effort to hide the purchase price one was produced as exhibit D2 (a) (b) dated 21st December 1964. He confirmed that the purchase price for the purchase of the land was Ksh. 168,000.00 while the value of the loose assets came to Ksh. 94,000.00 making a total of 262,000.00 meaning that they only had a short fall of Ksh. 11,251.60. They registered the group under the business name of Mbai farm on 13.3.65 but the transfer was given out in their names on 14.5.65. He further said that although they had contributed 250,000/- for the purchase price of the land and assets they had to follow the laid down conditions by applying for a loan from the land bank and the Agricultural Finance Corporation (AFC).

3. He agrees that in 1965 they brought in new members namely Paul Namunyu, Nelson Wanyonyi, Patrick Wamai, Enos Wanyama, Pius Kimungui and Jackson Masakhari to raise funds for working capital which money was used to buy animal feeds, pay wages for employees, and diesel for the tractor and vehicles and farm inputs like seeds and fertilizer.

4. That the incoming members were required to raise 10,000/- each but non was able to raise that amount forcing the pioneers to reduce the amount to Ksh. 5,000.00 but still they did not meet this target. It is his evidence that those who did not meet the target are not members because they passed a resolution to that effect.

5. It is his stand that exhibit D.10 shows that the three affected members were refunded their money hence they have no claim although there is no document to show that the said money was refunded.

6. Concerning the application for consent made in 1980 to include sleeping partners in the title exhibit D3, 4 his version is that 4 of the registered persons did not sign it, two of those who signed were not registered, he was not aware of the same till the 1983 arbitration proceedings and the proceedings in Miscellaneous application number 24/1990. he does not agree with the action taken as the founder members did not authorize anyone to take such an action on their behalf and there was no need to take such action as the rightful people had the title.

7. It is his evidence that every payment of money to the farm was acknowledged by issuance of a receipt and he produced his as exhibit D 28 (a) (b) (c) (d). He does not agree that the share contribution was sealed at 5,000/- and he does not agree with the various minutes in exhibit 1 where it is stated that the share contribution of each member was 5,000/- Kenya Shilling but agrees with the minutes in exhibit 1 which show those who did not fully pay up the share contribution. On that account he recognizes the claim of Dickson Watwati and Muresia P.W.1 but he does not recognize the other claim of the plaintiffs and he does not understand why P.W.1 took sides with them. It is his evidence that the member who did not fully pay up their shares left the farm in 1969 but some used to come from their homes in the reserve to come and attend farm meetings.

8. When cross examined D.W.1 stressed the following points that at one time he was a manager of the farm but denied stealing any farm property, agrees he was at one time arrested and locked up by police over money he had borrowed from the farm which he was to refund at a later date which report had been made to the police by Pius Kimungui, although he says land had been sold and permanent structures put up contrary to the Court of Appeal order of status quo he has no photographs to show the structures or the documents to show evidence of sell.

(ii) He agrees he is the one who filled in exhibit D.29, 31 and the only signatory and agrees that the 6 title holders should have signed. He is also the only signatory in the subdivision map. He agrees he signed exhibit 29 on 29.3.90 which is supposed to have given rise to the consent exhibit D30 but which instead refers to an application of 30.1.87 not exhibited in court also contrary to the entry in the register exhibit 23, to have been issued on 20.3.90 whereas the minutes approving the same talk of meeting held on

22.3.90. He cannot explain the discrepancies but does not agree that this was a move to assist some members to steal land from other members. It is his evidence that the subdivision presented to the board in 1990 followed the subdivision agreement made in 1976 but he has no minute to prove that.

(iii) He agreed that although in his evidence in chief he stated that

Nelson Namaswa was an ex member but all the same in the subdivision map exhibit D 31 he has benefited with 18 acres which acreage D.W.1 urges the court not to give him because he is not a member.

(iv) He agreed that as at the time the 1990 consent was given

proceedings were still pending in court.

(v) He is from that Nelson Namaswa and Patrick Wamai are not full

members same to Paul Namunyu. It is his evidence that Nelson Namaswa invaded the land after he had been chased away in 1969. He died in 1997 and his wife is still on Mbai farm. Patrick Wamai also settled on the land in 1968 and he is still on the land. Paul Namunyu also moved to the land in 1968 and still resides on the said land.

(vi) He does not recognize the consent of 1980 because he does not

know how it came about but he cannot commit himself as to why his advocate belatedly moved on 2.8.1999 to have that consent faulted 10 years after their defence had been filed.

(vii) He agrees he has no minute, consent or subdivision map to

show that they subdivided the land in 1976.

(viii) That ordinary receipts were being used from 1964 – 67 and

when they printed farm receipts they transferred entries to the

new receipts and old ones were destroyed.

(ix) The shamba had no bank account despite the fact that the farm

had cattle producing milk for sale and there were farm produce sales such as maize and sunflower. He agreed new receipts do not show that the entries were transferred from old receipt books. He adds that contribution of 250,000 were being made in a book but he does not know where the same is.

(x) He agrees that he swore an affidavit in 1988 that the six did not

complete payment of their shares but did not withdraw their shares. He agreed he has sworn contradicting affidavits showing his share contribution to have been 5,000.00, 19,971.00 and then 70,000.00. He says that was an error and the figure he has given in evidence is the correct figure. His last testimony on the shares is that there was no fixed amount for the share contribution and whoever wanted to pay more could do so.

(xi) He agreed he signed exhibit 2 to show the minutes showing

those who had not completed the payment of 5,000.00 but denies that the receipts he has produced were a ploy to deny others land. He agreed that they have no letter showing that their advocate wrote to Mbai farm telling them that he had refunded the money.

(xii) His responses in re-examination were that it was not

necessary to show on the new receipts that entries had been transferred from old receipts, that there is no minute to show that no member could contribute more than the others, that when they took money they had made up their mind to refund those shares, there has been no claim that the original receipts were never made, that there has been no case filed to deny that the moneys were never refunded. He maintains that the minutes in exhibit 1 are not genuine.

The salient features of the evidence of Nashon Watulo are that he confirms the evidence of D.W.1, he was the first chairman of the group and his payments are shown by the receipts exhibit D31 (a) (b)(c)(d), he confirms that they dropped 3 people from Mbai farm namely Pius Kimungui, Enos Wanyama and Jackson Masakari but the rest are there, he also confirmed that the wife of Masakhari resides at Mbai farm, he confirms that the business of the farm were transacted through meetings, he agreed his receipts and those of D.W.1 bear the same dates but denies they are evidence of a conspiracy to defraud others of their rightful share of the land, neither does he know why they bear the same dates as those on the receipts of D.W.1, he confirms the entries on the new receipts were transferred from old receipts, they sat as a committee and worked out the share of each person and his entitlement came to 197 acres but he uses only 40 acres which acreage was based on the amount paid by each member and there was authority to combine several old receipts into one of the new receipts, there is no time they had a conspiracy meeting to deny others land.

At the close of the whole case only counsel for the plaintiffs filed written submissions. Counsel for the defence never filed any submissions neither did he intimate to the court that none was to be filed by him. The salient features of the submissions of the plaintiffs counsel are as follows

1. That Mbai farm was bought in 1964. It has a membership of 12

supported by a letter of consent plaintiffs exhibit 4 (juit marked as an MFI) issued on 11.4.80 which was never challenged in any court of law and it is conclusive evidence that there are 12 members of Mbai farm and the defendants move to seek declaratory orders that the consent is null and void is futile in law as it had been issued 9 years prior to the filing of the suit in 1989. The defendants filed a defence and counterclaim in 1990 while well aware of its existence but made no moves to upset it till 2.8.99 when they applied to amend the defence to seek declaratory orders to have the same consent declared null and void.

2. That a declaratory order is an equitable remedy and no relief can

be granted in respect of the same in respect to an action complained of after the expiry of 3 years hence the defendants prayer for such a relief must fall thus leaving the consent granted in April 1980 intact.

3. The plaintiffs stand is that the members of the said farm

contributed equal shares of Ksh. 5,000.00 per member towards the purchase of the suit land confirmed by the fact that the names of the six founder members are in the title documents which show that they are tenants in common in equal shares supported by plaintiffs exhibit 2 signed by the members shown dated 17.6.1972.

4. There is no evidence to show that members agreed to pay what

one was able to pay as alleged by D.W.1 in his evidence which fact was disproved by the contents of exhibit 1 the minuet book. The book contained the transactions of the members in relation to the affairs of the farm through meetings and going through it does not reveal any evidence of forgery or fabrication. Loans were paid from the proceeds of sell of farm produce and cattle and so there was no need for huge contributions to be made by members as claimed by D.W.1. This is confirmed by the fact that although he D.W.1 claimed the initial contribution was 250,00 he failed to show who contributed what and how that money was utilized. It is their stand that that allegation was intended to explain the fabricated inflated huge contribution put forward by D.W.1 and his co-defendants in an effort to try and deprive other beneficiaries of their rightful share of the land.

5. There is no evidence that members approved the printing of

company receipts to replace the old or miscellaneous receipts if any were used. The allegations of D.W.1 and his witnesses do not hold as the receipts do not show that they were replacing other earlier receipts and it is their stand that his is fabricated evidence by the defence which should be ignored more so when the secretary Alexander Ndemaki was not called to produce the receipt books with counterfoils used if any. Also he kept away from court without any medical proof of incapability to testify.

6. The application for consent to subdivide the land into 9 portions is

an admission by D.W.1 that there are 9 fully paid up members and there was no justification for D.W.1 to try and deny the full membership of Nelson Namswa, Patrick Wamai and Paul Namunyu whom he alleges to be trespasser. Also he D.W.1 cannot claim that the late Nelson Namasa was an ex member of Mbai farm when the application of 1990 includes him. Further since the said members have been on the land since 1965 the defendants wish to evict them from the land is thus barred under the Limitation of Action Act Cap 22 Laws of Kenya.

7. Concerning the three who allegedly did not complete payment of

the membership share of 5,000.00 the affidavit of D.W.1 exhibit 6 shows that they did not withdraw their membership. This confirmation was made as late as 1988. It follows that the allegations by the defence that a refund was done through Lindsell advocate holds no water as no payment voucher or acknowledgement was produced to prove that the three ever received a refund more so when that allegation of a refund is contradicted by the affidavit of D.W.1 exhibit 6.

8. The court is invited to rule that D.W.1's evidence is full of untruths

evasiveness and contradictory in nature shown by the fact that he alleged in his evidence that the only eligible share, holding members were six and yet in the subdivision plan he produced shows that 9 members were to benefit, he claimed to have paid 70,000/- as his share contribution which was contradicted by the affidavit exhibit 6 where he said he paid 19,000.00 he signed exhibit 2 showing that there were members who were unable to meet the Ksh. 5,000.00 target as the share contribution of each and so he cannot be believed when he says that what he deposed in his affidavit 11 years earlier was an error and yet no efforts were made by him to try and correct the error till he D.W.1 was cross examined on the matter and their stand is that the same is an afterthought. That allegation is ousted by the plaintiffs exhibit 2 where all members signed showing that the share contribution of each member was 5,000.00.

9. That no agreement or minutes were produced to show that

members agreed and passed any resolution to the effect that members agreed that a share for an acre would be equivalent to 219/- and so that evidence by D.W.1 should be dismissed.

10. That it is evident that the six registered partners who are holding

the land in equal shares had not passed a resolution on how to share out land to the sleeping partners. It is their view that fully paid up members get equal shares while those who paid less it is recommended that the court should use the value of the land in 1964 as a basis worked out as 168,000.00 into 1206 acres gives a ratio of 139/30 per acre which the court should use to work out the acreages of those members who paid less than 5,000.00

The court has taken an overview picture of the evidence adduced orally in court by both sides, considered exhibits produced by both sides, also considered the submissions of the plaintiffs counsel and the findings of the court on the evidence are as follows:-

1. There is no agreement or memorandum bringing the original six

pioneer members or the additional 11 later trimmed to 6 members together into partnership to buy the suit land. As per the evidence from both sides they talked to one another and mutually agreed to team up together and buy land. Their conduct of operation and the way they related with each other confirmed the mutual and verbal understanding that they were cooperating with one another to buy land for their benefit. None said that they were buying land for the benefit of others other than their family members. That mutual understanding is what gave rise to the registration of the business name Mbai farm as shown by exhibit D1.

2. There is no dispute that the founder members six in number are

the ones who were registered as title holders as shown by exhibit D 3 and 4.

3. There is no dispute that the title documents show that the six were

registered as share holders being tenants in common in equal shares. As submitted by the plaintiffs counsel no resolution was passed by the members to change that share holding and this court has not been moved by a proper pleading to change that share holding and it was rightly submitted that the evidence of the defence that the holding is not equal should be ignored. The courts finding is that the defence evidence that the share holding is not equal being oral evidence cannot oust the documentary evidence of exhibit D 3, 4. The court finding is that the six pioneer members were and still are tenants in common in equal shares.

4. There is no dispute that the six pioneer members invited in 11

other members whose names do not appear in the title documents out of the 11 five of them withdrew and they were refunded their shares and left and are not part to these proceedings six were left who are part of the proceedings. The dispute is on the reason for the invitation to join. According to the plaintiffs the incoming six were invited to join and assist in raising the deposit required to pay for the land in order to qualify for a loan for the balance and they did so. But according to the defence through the evidence of D.W.1 the reason was that as at the time the newcomers came in the six pioneers had already contributed ksh. 250,748.40 which went to buy the land. That the other members contribution went to pay wages, farm inputs and costs of fuel for the farm machinery. The court has considered the two versions and finds that the version of the plaintiff holds water because it is on record that the purchase price for the land was 168,000.00 and that of loose assets of 94,000.00 bringing the total figure to Ksh. 262,000.00 if what was contributed is subtracted from this figure it leaves a short fall of 11,251.60 which amount could have easily been contributed by the same members who appeared to have been financially stable. There would have been no need for the bank loan and the loan from the A.F.C. (Agricultural Finance Corporation). It is to be noted that when put to him in cross examination D.W.1 further stated that despite the fact that they had raised Ksh. 250,748.40 which would have enabled them to pay off the purchase price of the land easily without resorting to a loan they took a loan in order to comply with the conditions laid down for the purchase of the land. By that D.W.1 meant that there was a condition in the land buying conditions that a loan was mandatory whether one had cash or not. This court had a chance of looking at the conditions produced as exhibit D 30 and find that the only condition relevant to these proceedings is as set out in the 9th line from the bottom which states “written evidence of cash assets will be required by the bank. Applicants are not advised to sell their realizable assets assuming that the loan applied for will be granted. The completion of an application form does not mean a loan will be automatically approved”. The foregoing condition faults the evidence of D.W.1 and it is the finding of this court that the issue of 250,748.40 did not exist as at 1964 – 65 but it is a later development as it will be shown later on this judgement. Both the pioneers and the incoming members assisted in the raising of the initial deposit for the land purchase.

It is further the finding of this court that even if the incoming members raised money to pay inputs and diesel for the farm machinery no agreement was exhibited by the pioneers to show that the incomers were informed that their contributions were not going to buy them an interest in land. Secondly those activities were for the benefit of the farm and members and that went to earn the incomers an interest in land.

Thirdly nowhere in the evidence of D.W.1 did he say that the six original founder members informed the new incomers that their money was not going to be used to earn an interest in land. The court is therefore right in making a finding that the contribution of the incomers went to buy an interest in land.

5. There is no dispute that there is no note memorandum or

agreement spelling out the terms of admission of new members. All that the court has is just the mutual understanding, verbal arrangements and the conduct of the parties.

6. There is no dispute that the dispute between the disputants

culminating in these proceedings started way back in 1968 barely 3 years after the purchase of the land. The court has derived the history from the minute book exhibit 1. The plaintiffs have placed great reliance on the same as a true record of the transactions of the members through committee meetings. It is their evidence that an earlier record was in the custody of Alexander Ndemaki who did not give evidence allegedly on medical grounds. The defence through D.W.1 dismissed it as a fabrication but did not tender in evidence a similar record allegedly because the records were left in an old farm house, rained on and destroyed. This court has considered the two versions and it makes its findings that although exhibit 1 is torn and held in place by a string the contents are a true representation of what transpired because D.W.1 agreed that the entries for the extracts of minutes on share holding listed on exhibit 2 are correct and were signed by the members. Those minutes are all contained in exhibit 1 as summarized on exhibit 2. It is further the finding of this court that exhibit 1 is key evidence and sheds light on the root cause of the dispute before the court.

7. It is the finding of this court that the high lights in exhibit 1 reveal

the following factors

(i) The minutes show that those sought to be shut out of the

shareholding of the land were not in the pioneers group but the new incomers group and they were the most active in the running of the farm affairs.

(ii) They show that James Wanyama, D.W.1, Alexander Ndemaki

and Nahashon Watulo the defendants were the forefront in trying to block the registration of the unregistered members by refusing to sign a letter to their advocate to set the process in motion to register the unregistered members. James Wanyama and Alexander Ndemaki refused to attend meetings where the new comers were present and participating. They placed a condition that the new comers pay 10,000/- each before they could be registered as partners over their share contribution

(iii) Minute No. 74/68 of 25.5.68 confirmed that Patrick Wamai

completed payment of his share contribution on that date which fact was also confirmed by Minute 48/69 of 16.5.69.

(iv) Minute 146/68 gave those members who had not fully paid up their shares time to top them up till 31.12.68. That time was extended by minute No. 11/69 (166/69) which extended the period to 31.1.69 while Minute 60/69 extended the time to 1.11.69 minute No. 30/71 extended the time to 31.3.71 while minute No. 24/72 of 16.7.72 the fully paid up members refused to extend the time of completion to those who had not completed their shares.

(v) Min. 168/69 (13/69) shows that E. Namaswa asked for 2,000/- to go and buy land in the schemes and he was told he would be given the money end of January 1969 to go to Nairobi to see if he could get land although he had failed an interview. There is no other minute showing that he was ever given this money. The farm having failed to give him money to look for land elsewhere cannot now turn round and

shut out his beneficiaries from getting a share of the land which benefited from his money.

(vi) It is the finding of this court that Min. No. 48/69 attended by D.A.C. Trans Nzoia to try and resolve the wrangling in the farm between the original share holders and those invited rightly resolved that the money of those who were invited to join the organization by the pioneer members also went to purchase the farm and so those invited later were also members of the farm without distinction and that goes to cement the common tenantship in the new comers as well. It is to be noted further from the proceedings of minute 48/69 held on 16.5.69 that the shares contributed by each member pioneer and invited were read out in the presence of N. Watulo D.W.2, James Wanyama D.W.1 and Alexander Ndemaki represented by D.W.4 who did not dispute the figures read out and attributed to them as being their share contribution as no protest were raised to the effect that the figures read out, was not what they had contributed. This court has already ruled that the entries in exhibit 1 are correct. There was also no mention of miscellaneous receipts having been used in the first instance and later changed to receipts printed with a farm name on them. This conduct on their part goes to show and confirm that the assertion of the plaintiffs in the arbitration proceedings and in court that the receipts tendered in court as exhibits D 28, (a) (b) (c),(d), 31 (a) (b) (c) (d) and 34 (a) (b) (c) (d) were a later development. This is further confirmed by the fact that all the receipts bear the same dates and secondly if indeed they were a transfer from old receipts then there was no need to write several receipts. One would have sufficed to show the total figure. It is the courts findings that these receipts without evidence that there were earlier miscellaneous receipts, book or ledger to support the figures and without counterfoils and any minutes to print and issue receipts they cannot be taken as being genuine and the same were rightly protested. The court rejects the same as not being genuine.

(vii) It is the finding of this court that vide minute No. 14/72 of the

meeting held on 6.5.72 J. Mabonga borrowed 500/- from the farm which he was to use to pay fees and then refund the same by end of 1972 failing which the same would be deducted from his shares. The money having been given out through a resolution it was necessary that the deduction be authorized by a resolution. No resolution exists in exhibit 1 to show that that amount was ever deducted from the shares of J. Mabonga which means that the share of J. Mabonga remained intact at 5,000.00 and that qualifies him as a fully paid up member.

(viii) It is the finding of this court that minute No. 22/72 of the meeting

held on 17.6.72 shows that Nashon Watulo D.W.2 was given money to take to an advocate in Kitale to have the same refunded to Enos Wanyama. It is noted that J. Mabonga who had brought Enos Wanyama to the partnership followed and dissuaded Enos Wanyama not to accept the refund. At that juncture Enos Wanyama promised to pay 400/- there and then and the balance at the end of the year. It is recorded that J. Mabonga explained that he took that action because not all those who had not fully paid up their shares were taken to the advocate to be refunded their money. He J. Mabonga had no objection if all those who had not completed payment had been taken to the advocate together to be refunded their money. The foregoing minute was followed by minute No. 23/72 of the meeting of 16.9.72 attended by the District Officer and Chief Saboti whereby a list of fully paid up members was read out. Once again the issue of excess payment beyond 5,000.00 was not raised by D.W.1, D.W.2 and Alexander Ndemaki represented by D.W.4. The meeting accepted the majority evidence that the share contributions of each member was 5,000.00. This evidence further goes to fortify the assertion of the plaintiffs, the submissions of the plaintiffs counsel and the finding of this court that receipts exhibit D 28, and D31 a – d and D 34 a – c were a later development and not genuine as they would have definitely featured in this meeting. There is no other minute or resolution exhibited by the defence to show where the figures represented in those receipts were passed to be a true representation of the shareholding of the members concerned. In the same meeting it came out evidently that the only members who had not fully paid up were three namely P. Kimangui, J. Masakhari and Wanyama. This is further shown by the subsequent meetings held on 8.10.72, 4.11.72, 18.11.72 and 10.12.72 where the three were excluded from attending those meetings. This evidence goes to oust the evidence of the defence that only 6 pioneer members were the fully paid members thus confirming the evidence of the plaintiffs and the submission of the plaintiffs counsel that only 3 out of 12 members are not fully paid up members.

8. On the issue of refund of the share contribution of the members

who had not fully paid up it is the finding of this court that indeed measures were put in place by the fully paid up members to refund the shares of those members who had not fully paid exhibit D 9 dated 26.3.71 was signed by N. Watulo, J. Mabonga, A. Ndemaki, D. Watwati, J. Wanyama, J. M. Muresia addressed to Pius K. Kimungui in respect to Ksh. 3,200.00, Enos Wanyama in respect to Ksh 1600.00 and Jackson Masakari in respect of Ksh. 2540.00. The central message in that letter is that a resolution had been passed in the meeting of 20-21.3.71 that those members who had not completed payment for their shares would no longer be members of Mbai farm but were at liberty to reapply to be reconsidered subject to tendering the balance due to complete their shares. This letter exhibit D 9 goes to fortify the finding of this court that only the 3 addressees did not fully pay up their shares. It also goes to fortify the finding of this court that P. Namunyu, P. Mamai, and N. Namaswa were fully paid up members as at that time. This was followed by minute No. 9/73 where a resolution was made to the effect that the share of Masakari be taken to him by Namaswa and P. Namunyu while that of P. Kimungui was to be taken the advocate by D. Watwati. Exhibit D.11 is a letter from Lindsell advocates to P. Kimungui informing him that Mbai farm were willing to deposit Ksh. 3,500/- with the said advocate as a refund to him if he P. Kimungui had no further claim from the said Mbai farm. This was followed by exhibit D10 which are photocopies of receipts issued to Mbai farm by the said advocate for monies deposited with them by the said Mbai farm receipt No.1 16194 is dated 20.2.73 for Ksh. 2870.20 on account of Jackson Mamai but I think it should be Jackson Masakari. Receipt No. 16180 dated 13.2.73 for Ksh. 3592.20 for Pius Kimungui. No receipt was exhibited for the deposit of a refund for Jackson Masakari and Enos Wanyama. As submitted by the plaintiffs counsel and contended by the plaintiffs the foregoing exhibits do not show that the three were refunded their shares by the said advocate on account of Mbai farm as no acknowledgement for receipt of the same has been exhibited. The plaintiffs denial of receipts of a refund was given weight by the proceedings before the elders produced as exhibits. The testimony of J. Mabonga shows that the money was still lying with the advocate as at 1988. The finding of this court on the foregoing is that the assertion of the plaintiffs and their counsel that the three affected members who had not fully paid up their shares were not refunded what they had contributed and are rightly claiming a share of the land since it was conceded that as at 1988 they had not been refunded no exhibit has been produced to show that any refund to them was made after that date of 1988.

9. It is the finding of this court that indeed the three Enos Wanyama ,

Pius Kimungui and Jackson Masakari together with J. Mabonga filed Eldoret HCCC No. 52/74 against the other 5 original members seeking the reliefs already set out in this judgement but that proceeding is in consequential as it did not fully adjudicate the rights of the parties as the same was dismissed for want of prosecution as shown by exhibit D6 and D 8. That dismissal does not bar this court from revisiting the issues raised by that plaint and adjudicating on them finally on the defendants in their pleading have not pleaded that the matter is Res judicata and so the filing of that case only goes to show that the three affected members refused to be chased away from the membership of the farm and have all along been pursuing their rights through whatever avenue is available to them. It is on record from the evidence of P.W.1 that after filing of that case the parties resorted to arbitration to try and resolve the matter and when arbitration failed is when they filed the proceedings under consideration it was admitted by D.W.1 and proved by exhibit 5 that indeed there had been several arbitration proceedings before the current proceedings were filed.

10. It is further the finding of this court that Eldoret HCCC 52/74 was

dismissed on 15.11.79 for want of prosecution and then in 1980 the plaintiffs chose another avenue through which to seek redress and this was by going to the Land Control Board to seek consent of the area Land Control Board to register the sleeping partners as shown by exhibit 5. that application was signed by 4 people two of whom were not title holders. A perusal of the same shows that the title holders were set out in paragraph 1 of the said application. The evidence of P.w.10 on the subject is that it should always be filled by the title holder or an authorized agent. There is no minute or resolution exhibited by the plaintiffs to show that the fully paid up members resolved to go to the board at that time and secondly that they authorized the 4 to sign on their behalf. That application came up for deliberations in the

meeting of 11th April 1980 whose minutes were produced as exhibit 12 the deliberations followed the writing of a letter to the board inquiring into the matter replied to vide the letter from the department of lands dated 20.2.1980. the transaction before the board was considered under ex Min. DLB/13/80 B). The contents show that the transaction before the board was proposed transfer to include sleeping partners J. Mabonga and 5 others to J. Mabonga and 11 others. It is noted that the applicants together with their advocate appeared before the members of the board and they were informed that the farm owed Agricultural Finance Corporation GMR loan to the tune of Ksh. 250,000.00 and should make definite arrangement of how to repay it. Their application was approved and consent granted. As noted earlier on a copy of the consent was marked for identification but not produced. That notwithstanding exhibit 12 is proof that a consent to that effect was granted. The defence have asked this court to declare that consent null and void because the same was obtained fraudulently as the proprietors of the farm were not party to it. Counsel for the plaintiff has submitted that that relief cannot be granted because being an equitable relief the same cannot be granted after expiry of three years. He relies on section 4 (x) (e) of the Limitation of Action Act Cap 22 Laws of Kenya. The court has perused the same and finds that the gist of the section is that the actions including action claiming equitable relief for which no other period of limitation is provided by the Act or by any other limitations may not be brought after the expiry of 6 years. The use of the word may denotes that there is room for extension of time and that also denotes that time starts running from the date of knowledge of the action complained of. D.W.1 said they had no knowledge of the same till an application was filed by P.W.1 to quash the consent granted to them in 1990. There is nothing exhibited by the plaintiffs to show that the defendants were present and participated in the proceedings or transactions which gave rise to the consent of 1980. The finding of this court is that had that exercise been undertaken by agreement of all of them all the six founder members could have signed the application form exhibit D 5, secondly measures would have been taken to process the transfer of the title from Johnson Mabonga and 11 others. There would have been no need for the parties again to engage themselves into arbitration proceedings. The fact that both sides agree that arbitration proceedings were going on negatives the assertion of P.W.1 that all members were in agreement. It also goes to negative the contents of the minutes exhibit 12 that all members attended and consented to the transactions. It therefore follows that the foregoing factors have faulted the consent of 1980 because not all the registered proprietors signed the application for consent.

(ii) Some of those who signed the application for consent were not

the registered proprietors and their signing of the same violated paragraph 1 of the said application for consent.

(iii) It is not cemented on any minute or resolution by all the members

that the sleeping partners be registered.

(iv) It is cemented on an invalid application and so it cannot stand

and it matters not that the aggrieved parties did not apply to the Provincial Land Control Board to have the same quashed or that they did not move to the court within 6 months of its being granted to have it quashed. It also matters not that the application to have it declared a nullity was made belatedly in an oral application almost 11 years after the case had been filed in court.

10. The court has also assessed the contents of the arbitration

proceedings vide exhibits 5, 6 and 7 and they show that the receipts produced as exhibit D 28 (a) (b) (c) (d) D 31 (a) (b) (c) (d) and 34 (a) (b) (c) (d) were disputed as being fake. This court has already ruled that they are not genuine for reasons given. The proceedings further show that some of the members who had fully paid up their 5,000/- share contribution were not included in the 1976 land allocation. It is further admitted that those who were to be refunded money were to be refunded the same through an advocate but there were no documents produced before the elders to prove refund and this court has already ruled that there was no refund made. It is also to be noted that Alexander Ndemaki never mentioned how much he had paid as share contribution while the figure James Wanyama gave as his share contribution of

19,971.00 contradicted what he told to the court that he contributed over 70,000/- which entitles him to a share of 320 acres of land.

Turning to the affidavit in support of the application for setting aside award by James Wanyama D.W.1 construction of paragraph 9,10 and 11 thereof shows that the 6 founder members contributed over 250,000.00 before the other 11 incoming members were invited to join them. This court has already ruled that that was not the position and that the allegations was meant to show that the contributions of those members did not go to purchase the land. The court believed the assertion of the plaintiffs that part of their contribution were part of the deposit made to enable them get a loan and if the amount claimed by D.W.1 to have been contributed by his pioneer members had been actually so contributed then there would have been no need for them applying and availing themselves of the loan facilities. Paragraphs 13,14 and 15 contradict paragraph 9 and 10 as they talk of the required share contributions having been 5,000.00 while the earlier paragraphs have given higher figures. There is no deponement that the new group were to raise only 5,000/- while the pioneers were to raise more than that. Paragraph 17 contradicts paragraph 15 as paragraph 15 said they were told they were no longer members which meant that they were not eligible to get any share of the land and yet in paragraph 17 the same rejects have been given land at 250/- per acre. It is to be noted that the date of the meeting and the number of the minute when the resolution on the same was given has not been stated. There is also no deponement explaining why three members of those who had paid less than 5,000/- were given preferential treatment as against their other 3 colleagues who had paid less than 5,000.00. This court has already ruled that those allegedly favoured had in fact fully paid up their share contribution of 5,000.00

11. Turning to the application for consent made in 1990 exhibit 14

copy and D 26 original it shows in paragraphs thereof that the present registered owner was Mbai farm. That information is false because the present registered proprietor of the suit land as shown by exhibit D 3, 4 is not Mbai farm but the 6 original founder members. D.W.1 did not exhibit any minute or registration of title document to show that the six founder members had divested themselves of proprietorship to Mbai farm. The matter was deliberated upon vide minutes shown in exhibit 15,16, 17,18 which show that the application was deferred the first time to enable all the members to attend, deferred a second time as members did not attend, deferred a 3rd time because some members objected and they were referred to the District Officer Kiminini to clarify whether the membership was 9 or 12 and file his report to the next board meeting. Exhibit 20 shows that the members appeared and consent was given but there is no mention that the District Officer Kiminini had filed his report clarifying whether the membership was 9 or 12.

The finding of the court as regards this application for consent are that

(i) It was falsely stated that Mbai farm was the registered proprietor

when in fact the registered proprietors are Johnson Mabonga, James Wanyama, Alexander Ndemaki, Dickson Watwati, Justus Muresia as tenants in common.

(ii) the application dated 29.3.1990 is signed by James Wanyama

only. D.W.1 admitted this fact. As stated by P.W.10 an official from the lands office in order for it to be valid it has to be signed by all the proprietors or their agent with their authority. D.W.1 who signed the same produced no authority by way of a minute or resolution by the others authorizing him to sign for the others. In fact the form does not show that he had authority to sign on behalf of the others.

It therefore follows that the application exhibit 14 and D26 has been faulted on these two aspects.

(iii) The consent granted in pursuance to that application was

produced as exhibit 21 copy and D 27 original. Its L.C.R No. is 134/90 and yet it refers to an application made on 30th January 1987. This application was not availed and so it is not known who made that

application and whether that applicant was an authorized person or not. The only application which was presented to court was the one made by D.W.1 exhibit 14 D 26 which has been faulted above because it was made by Mbai farm which was not the registered proprietor and secondly it was not signed by all the registered proprietors shown on exhibit D 3, 4.

(iv) Further discrepancies noted by the court on the consent are that

it states that it was granted in the meeting held on 22.3.90 while a copy of the register produced as exhibit 23 shows that the consent was granted in the meeting held on 20.3.90 which had been changed from 29.3.90. There are no minutes for the meeting held on 20.3.90 or 29.3.90 and in any case the application dated 29.3.90 was long after the meeting of 22.3.90 and as admitted by D.W.1 and so no consent has been exhibited for the application dated 29.3.90.

The findings of the court are that the consent exhibit 21 copy and D 30 original has been faulted because

(i) It refers to an application dated 30th January 1987 which does not exist to show who made that application.

(ii) It refers to a meeting held on 22nd March 1990 as the one which

approved the same and if that is the case then there is no application to back up what went before the meeting as the application alleged to have given birth to it is dated 7 days later.

(ii) It was not entered in the register as the consent entered in he

register exhibit 23 is the one approved by the meeting held on 20.3.90 which consent of 20.3.90 has not been exhibited and also no minutes for the meeting of 20.3.90 have been exhibited.

(iii) It is not backed by any resolution or minute of the members to go to the board.

(iv) It is evidently clear that the same was calculated to go round the

case which had been filed in 1989 and to which the defence had been filed notwithstanding that there was no injunction in place. Matters in dispute having been referred to court good prudence requires that the court should adjudicate on the matter first and when appropriate orders are made is when the matter can go to another forum for consideration.

12. The subdivision map and its approval letter was produced as

exhibit D 31 and D32. It is cemented on the consents which have been faulted for the reasons given and it cannot stand.

(ii) It is not backed up by any minute showing a resolution for subdivision.

(iii) It is signed by one James Wanyama as the owner when he

D.W.1 was not the sole owner as shown by in exhibit D 3, 4

(iv) The acreages shown on the map are based on the receipts

exhibit D 28 and D 31 A – c and D 34 and which receipts have been found by this court not to be genuine

and not to have any basis.

(v) It is evidence of unfair contribution of the land as no justification was given for giving 3 fully paid up members menial acreage.

(vi) It is an affront to justice and fair play,

(vii) It shows that those who had an upper land in the share holding took advantage of the weak and gave them less acreages.

(viii) It goes against the spirit of the registered mode of share holding

in exhibit D3, 4 that the land was to be held by the proprietors as tenants in common in equal shares which holding had not been changed as there is no minute or resolution showing that members resolved to change that.

(ix). No justification was given for excluding Patrick Wamai P.W.8 a

fully paid up member from getting his share of the land. His fact of having been a fully paid up member was confirmed by the fact that he was not among those shown the door during the meeting with the District Officer in 1972 when the fully paid up members failed to extend time for the non paid up members to complete their full share contribution.

(x) It is also an unfair distribution of the land because the other three

members who had not been refunded their money were not given land equivalent to their share contributions. The defendants could not keep the land and the money at the same time.

13. The last aspect of the evidence is the demeanour of the star

witnesses namely P.W.1 and D.W.1. the court observed their demeanour during the trial and reached the conclusion that P.W.1 was fairly honest save for the evidence on events leading to the issuance of the consent of 1980 which has been faulted. As for D.W.1 the court agrees with the submission of the plaintiffs counsel that his evidence is unreliable because of the following reasons

(i) He has glorified the new receipts which are false as they bear the

same date for all those who produced them which the court has ruled that they are not genuine.

(ii) Evidence shows he has contradicted himself in various forums

and documents on facts concerning his share contribution.

(iii) He told open lies when he said he agreed with the contents of

exhibit 2 which he himself had signed only in relation to those who had not completed payment of their shares but not in relation to those who had fully paid up their shares simply because they show that the share contribution of each person was 5,000.00.

(iv) He failed to explain why if the new receipts were transferred from

old receipts it never stated so on the new receipts and why one receipt was not used for the entire amount. The fact of several receipts being use was just to try and cheat.

(v) Denied exhibit 1 as a fabrication and yet partly agreed with exhibit

2 which had been extracted from exhibit 1.

(vi) He alleged those who did not pay up left the land and when he

was confronted with evidence from exhibit 1 showing that these people were attending meetings of the farm members he D.W.1 said that they used to come from their homes to attend those meetings and yet there is no record to show that they were attending those meetings as ex- members and the correspondences alleged to have emanated from ex-Wanachama whose writers have not been proved could have been D.W.1's own innovation to try and fortify his stand on the number arrived at attempting to exclude certain persons from sharing part of the land.

The upshot of the foregoing assessment of the evidence is that:-

1. There are six founder members who are all fully paid up members.

They are also the registered proprietors as tenants in common in equal shares. The mode of sharing has not been changed to date.

2. It is evidently clear that the other six members who are subject of

these proceedings were drafted into the organization before the farm was purchased. As stated earlier in the judgement no formal agreement was drawn up between the pioneers and the invitees to spell out the terms of entry of these newcomers. All we have is conduct and verbal arrangement. That kind of conduct and arrangement is what led to the dispute herein. It is also evidently clear that when the six pioneers were registered as proprietors the other 6 disputed proprietors had already participated in the purchase of the farm by contributing to the initial deposit. This court has already ruled that the six disputed ones are the ones in fact who took the most active role in running the farm one of them being an able secretary while another being an able manager. The court has already dismissed D.W.1's allegation that they were coming in as ex-members to participate in the running of the affairs of the farm. In the absence of a written memorandum of incorporation the court has to turn to the law for assistance. The six pioneers registered a business name and not a company and so their organization comfortably fell under the Partnership Act Cap 29 Laws of Kenya. Section 3(1) of Cap 29 Laws of Kenya states "Partnership is the relation which subsists between persons carrying on a business in common with a view of profit " The courts finding is that that definition fits the kind of activities described herein as evidenced by exhibit 1. It was a farming activity with a view to profit. Although books of accounts were not exhibited to court exhibit 1 shows that there were profits and losses issues discussed by members and at times profits were shared.

It is further clear from the assessment that as at the time the six pioneers got registered as proprietors vide exhibit D3 and 4 and also in the registered business name vide exhibit D1 the other six were also present. In the absence of a written agreement on terms the court has no alternative but to seek assistance from section 8 of the said Partnership Act which states "An act of instrument relating to the business of the firm and done or in any other manner showing an intention to bind the firm by any person thereto authorized whether of partner or not is binding on the firm and all the partner.

Provided that the section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments"

Applying that section to the facts of this case it is clear that the six newcomers have not complained that the six should not have registered themselves as tenants in common. Their argument is that they are also tenants in common with the pioneers in equal shares. In the absence of any memorandum executed by the partners to the contrary the court has no alternative but to hold that that section binds the pioneers in their action in the mode of those holding and also binds the newcomers as well. The court therefore makes a finding that all the 12 disputants are tenants in common of Mbai farm in equal shares for those who fully

paid up their shareholding 5,000.00 each. Those who paid less will get shares equivalent to their share contribution.

Further evidence can be derived from section 19 of the same Act Cap 29 Laws of Kenya which states “An admission or representation made by any partner concerning the partnership affairs and in the ordinary cause of its business is evidence against the firm”. This provision binds the defendants in that they have admitted the contents of exhibit 2 which was extracted from exhibit 1 on the share holding. D.W.1’s attempt to admit part of the contents and reject the others was rejected by the court. They confirm the share contribution to have been 5,000.00 for each member and those who paid less were shut out of the partnership but since they were not refunded their shares they are entitled to a share of the land equivalent to their money.

It has been noted that some of the original members are dead and legal representations have been substituted in their place section 47 of the Act is called into play to cover and protect their interests. It states “subject to any agreement between the parties, the amount due from surviving or continuous partners to an outgoing partner or the representation of deceased partner in respect of the outgoing or deceased partners share is a debt accruing at the date of the dissolution or death” This section protects the interests of the deceased partners whose representatives are rightly claiming those shares as a debt on the Mbai farm from the registered proprietors.

The mode of sharing will be equal land or acreage for those fully paid up and the shortfall resulting from the acreage for the three who did not fully pay up will be shared equally amongst those who fully paid up. The ration for those who did not fully pay will be worked out by taking the amount paid over the 5,000/- required full share contribution times the acreage due to a fully paid up number. The share contribution of each member who fully paid up his share contribution is worked out as the total acreage of the two farm less the acreage for public utilities divide by twelve. The acreage for public utilities was not agreed upon by any resolution but this court will be guided by the map annexure D 31 and D 32 that 11 acres had been set aside for roads and public utilities. The court has considered this fact and considering its own good prudence and good common sense has increased the acreage for public utilities to 15 acres to allow room for expansion of the school and so the school will have 10 acres, road 4 acres because of the subdivisions and dip one acre.

Exhibits D 2 (a) (b) shows that the acreage comprised in LR 6651/2 and 6697 are 1,206 acres less 15 acres set aside for public utilities leaves an acreage of 1,191 acres to be shared out. 12 divided into 1,191 acres gives a figure of 99.25 acres for each fully paid members

The share of Pius Kimungui will be worked out as $\frac{3,592}{5,000} \times 99.25$

5,000

which gives a figure of 71.30 acres. This means that Pius Kimungui will relinquish a total of 27.95 acres to be shared out to those who fully paid.

The share of Jackson Masakari will be worked out as follows

Ksh. 2870 x 99.25

5000

which comes to 56.96 acres. This means that Jackson Masakari will cede or relinquish a total of 42.29 acres.

The share of Enos Wanyama will be worked out as follows

Ksh. 1808 x 99.25

5000

which comes to 35.88 acres. This means that Enos Wanyama will relinquish or cede to the fully paid up members a total of 63.35 acres.

The excess acreage recovered from the members who did not fully pay up their shares totals as follows

1. From Pius Kimunguyi - 27.95 acres
2. From Jackson Masakari - 42.29 acres
3. From Enos Wanyama – 63.35 acres

Total 133.59 acres. These will have to be shared equally amongst the 9 fully paid up members and each will get additional 14.84 acres when added to the earlier worked out figure it comes to 114.09 acres.

As stated earlier in the judgement such sharing out of the land is fair because the court believed the evidence of the plaintiffs and ruled that the loan was paid up fully from farm proceeds and rejected the receipts produced by the defence as showing bigger contribution by them as being fabricated receipts.

Further the court ruled that Johnstone Mabonga and in his absence his legal representative will have the full benefit of his share contribution because there was no minute which showed that a resolution had been passed authorizing the deduction of the money he had borrowed from his shares. Further the court has treated Nelson Namaswa and Patrick Wamayi as fully paid up shareholders because they were not among those who were kicked out in the District Officer's meeting for non completion of their shares. This court has further given out land to those who did not fully pay up their share contribution because they were not refunded their money.

For the reasons given judgement is entered and or given for the plaintiffs against the defendants jointly and severally on the following terms.

1. An order be and is hereby made and issued to the effect that the

partners, members or co-owners of Mbai farm comprising LR NOs 6651/2 and 6697 are 12 as per the findings of this court on the evidence and exhibits tendered and those are late Nelson Namaswa represented by his legal representative Joash Kisiangani Wanyonyi, Daina Nasambu Wanyonyi, Dina Wasike and Samson Wanyonyi, Justus Muresia, Patrick Wamai, Dickson Watwati represented by his legal representatives Stephen Watwati and Beatrice Wanyama Watwati, Paul Namunyu. Late Enos Wanyama is represented by Joseph Wanyama and Nedi Wanyama, Pius Kimungui, late Jackson Masakaria (Masakari) is represented by Lenah Nasipwondi Mamai, James Wanyama, Alexander Ndemaki, Nashon Watulo and late Johnston Mabonga as represented by Susan Namuki Mabonga and Stanley Mayika Mabonga

2. An order be and is hereby made ordered and issued that the

share contribution for each member, partner or co-owner is/was Ksh. 5,000.00 (five thousand only)

3. An order be and is hereby issued and ordered that the said

parcels of land LR NO. 6651/2 and 6697 be subdivided and shared out to the partners, members and co-owners as follows

(i) (a) Joash Kisiang'ani Wanyonyi

(b) Daina Nasambau Wanyonyi

(c) Dinah Wasike

(d) Samson Wanyonyi

as representatives of the estate of late Nelson Namaswa to get

114.09 acres

(ii) Justus Muresia to get 114.09 acres

(iii) Patrick Wamae to get 114.09 acres

(iv) Stephen Watwati and Beatrice Wanyama Watwati on behalf of

the estate of Dickson Watuati to get 114.09 acres

(v) Paul Namunyu to get 114.09 acres

(vi) (a) Joseph Wanyama

(b) Nedi Wanyama for the benefit of the estate of Enos

Wanyama to get 35.88 acres

(vii) Lenah Nasipwondi Mamai for the benefit of the estate of

Jackson (Masakari) Masakalia Mamai to get 56.96 acres.

(viii) James Wanyama to get 114.09 acres

(ix) Alexander Ndamaki to get 114.09 acres

(x) Nashon Watulo to get 114.09 acres

(xi) (a) Susan Mamuki Mabonga

(b) Stanley Mayika Mabonga on account of the estate of

Johnston Mabanga to get 114.09 acres.

(xii) Pius Kimungui to get 71.30 acres.

4. That an order be and is hereby made and ordered that the

subdivision map do as much as possible consider relocating the shareholders where they are currently settled but this does not limit or rule out the surveyors liberty to adjust boundaries in order to give each member only the acreage awarded by this court and any movements occasioned by the adjustment of boundaries between the members is accepted.

5. Each party will pay his or own survey fees or costs

6. The survey costs for the public utilities will be shared by all the members equally.

7. Under any other such or other relief as the court may deem fit to

grant an order be and is hereby made that the consent obtained by James Wanyama the first defendant together with the approval letter from the Commissioner of Lands and well as the attendant map are declared null and void abinitio and are of no consequence for the reasons given in the body of the judgement.

8. Turning to the counter claim on the defence an order be and is

hereby made and ordered that

(a) The claims of the 7th, 8th, 9th and 10th plaintiffs are not time barred

for reasons given in the judgement that from 1972 when they were kicked out of the membership during the District Officers meetings they have been disputing over their shareholding because they filed Eldoret HCCC 52/74 and when it was dismissed for want of prosecution they commenced arbitration proceedings and when the arbitration award was thrown out the current proceedings were filed

(b) An order be and is hereby made in pursuant to paragraph 6 of the

defence that the consent obtained in April 1980 be and is hereby declared null and void for the reasons given in the judgement.

(c) An order be and is hereby made that the defendants claim that

the members contributed an equal amount be and is hereby dismissed for reasons given in the judgement that the court was satisfied and it was proved by both oral evidence and documentary evidence that each share contribution for a fully paid up member was Ksh. 5,000.00.

(d) An order be and is hereby made and ordered that the defendants

claim that a subdivision was made in 1976 and each member allocated his plot is dismissed as the same was not supported by any members resolution.

9. The plaintiffs will have the costs of the suit.

10. Since the defendants have not substantially succeeded on their

counterclaim save for the quashing of the consent granted in 1980 and since they are the ones who occasioned the proceedings they will pay to the plaintiffs the costs of the counter claim.

11. An order be and is hereby made and ordered that the defendants

do surrender the land titles exhibit D 3, 4 to the Commissioner of Lands to pave way for the subdivision and issuance of titles under the registered Land Act in order to give effect to the judgement herein.

12. There will be liberty to apply if need be.

The reason for the delay in the writing of the judgement are as follows:-

(a) The trial of the case was concluded after the trial judge then

seized of the matter had been transferred to a new station

(b) After the conclusion of the trial the file was taken to the registry

to have the proceedings typed out and copies given to counsels to prepare submissions and this took along time.

(c) After proceedings were typed partially only counsel for the plaintiffs filed written submissions .

(d) Counsel for the defendants never filed written submissions and never intimated to the court that he would not file any.

(e) By the time the file reached the trial judge then seized of the

matter at the station transferred to she was already seized of work at the new station where the flow of work was already overwhelming thus leaving no spare time to write judgments and rulings from the former stations.

(f) Litigants and counsels at the station the trial judge then seized of

the matter was transferred to insisted on having their matters being given priority when it comes to writing of Judgements and rulings.

Dated, read and delivered at Eldoret this 2nd day of November, 2004.

R. NAMBUYE

JUDGE.

2.11.04

Coram: J. Gacheche- Judge

Mr. Ondabu hold briefly for Mr. Onyancha for plaintiff

And also holding brief for Mr. Machio for the defendant

Court Clerk- David (Interpreter English – Kiswahili)

Court: Judgment delivered. File to be sent back to Kitale High Court where it belongs.

JEANNE GACHECHE

JUDGE