



**Tormoi (Suing as personal representative of the Estate of David Kiptormoi Langat) v
Saina (Suing as personal representative of the Estate of Joel Kipsaina Korir) (Environment
& Land Case 90 of 2015) [2024] KEELC 4114 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4114 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 90 OF 2015**

MC OUNDO, J

MAY 9, 2024

BETWEEN

**SIMON KIBET TORMOI (SUING AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF DAVID KIPTORMOI LANGAT) PLAINTIFF**

AND

**MOSES KIBORE SAINA (SUING AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF JOEL KIPSAINA KORIR) DEFENDANT**

JUDGMENT

1. Vide a Complaint dated 7th June, 2011, amended on 25th September, 2015 and further amended on 11th November, 2019, the Plaintiff herein sought for the following orders; -
 - i. (AA). A declaration that the Defendant is holding the title numbers Kamara/Mau Summit Block 4/153 (Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”), Kericho/Koita-Burot/289 and Kericho/Manaret/14 in trust for himself and the Plaintiff.
 - ii. (BB). An order that the said trust be dissolved and the Defendant’s registration as the proprietor of title numbers Kamara/Mau Summit Block 4/153 (Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”), Kericho/Koita-Burot/289 and Kericho/Manaret/14 be cancelled and Kamara/Mau Summit Block 4/153 (Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”) be registered in the name of the Plaintiff and L.R. No. Kericho/Koita-Burot/289 be subdivided into equal portions and each portion be registered in the names of the Plaintiff and the Defendant respectively.
 - iii. (CC). A mandatory injunction be issued compelling the Defendant by himself, his workers, servants, employees and/or agents to vacate his crops from all that portion of land in Kamara/



Mau Summit Block 4/153 (Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”) measuring 5.348 hectares until the hearing and determination of the instant suit.

- iv. (DD). A perpetual injunction restraining the Defendant himself, his workers, servants, employees and/or agents from entering, working on, transferring, leasing and/or in any way or manner whatsoever interfering with the Plaintiff’s possession and/or use of land parcel numbers Kamara/Mau Summit Block 4/153 (Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”) and the Plaintiff’s portion in L.R. No. Kericho/Koita-Burot/289.
 - v. Costs of the suit.
 - vi. Any other relief that the court deems fit to grant.
2. Vide the Defendant’s Statement of Defence dated 7th October 2011 was amended on 26th October 2026, further amended on 5th February 2018 and further, further amended on 17th December, 2019 wherein he denied each and every allegation contained in the Plaint putting the Plaintiff to strict proof. In his Counterclaim, the Defendant prayed that the Plaintiff’s suit be dismissed with costs to him and judgment be entered in his in terms of the Counterclaim for orders that; -
- i. A declaration that the Defendant (now Plaintiff) is the absolute sole and legal proprietor of the parcel of land known as Kamara/Mau Summit Block 4/153 (Boror “B”), Kericho/Koita-Burot/289 and Kericho/Manaret/14.
 - ii. An eviction order against the Plaintiff (now Defendant) from the parcel of land known as Kamara/Mau Summit Block 4/153 (Boror “B”), Kericho/Koita-Burot/289 and Kericho/Manaret/14.
 - iii. A permanent order of injunction restraining the Plaintiff (now Defendant), his servants, agents, representatives, assigns and heirs from putting up any structures, both temporary and permanent, transferring, planting, grazing or doing any activities on land parcel numbers Kamara/Mau Summit Block 4/153 (Boror “B”), Kericho/Koita-Burot/289 and Kericho/Manaret/14 to the detriment of the Defendant (now Plaintiff).
 - iv. Mesne Profit.
 - v. Costs of the suit.
3. In response to the counterclaim, the Plaintiff reiterated the contents of the Plaint and denied the allegation contained in the Defence and Counterclaim putting the Defendant to strict proof therein. He further stated that the Defendant’s Counterclaim was defective, frivolous and vexatious, incurable and bad in law as it offended the rules of civil procedure and prayed that the be dismissed with costs for lack of merit.
4. Before the matter could proceed for hearing on 4th May, 2017, the court was informed that the Defendant had passed on wherein on 25th January, 2018 he had been substituted by Moses Kibore Saina.
5. The parties’ having complied with Order 11 of the Civil Procedure Rules, the matter had proceeded for hearing on 22nd May, 2018 wherein David Kiptomoi Langat, the Plaintiff herein had testified as PW1, to the effect that he lived in Nakuru County and was a farmer. That he knew the deceased Joel Kipsang Korir who was his brother and who had passed away and had been substituted by his son.
6. That he was in court because of a dispute involving land parcel No. Kericho/Koita-Burot/289 (the suit land) registered in the original Defendant’s name. That he was the last born in his family having been



born in the year 1951 in Gwasi. That when they moved to Kericho in the year 1962, they did not have any land and therefore lived with his aunty. That after his two sisters, Elizabeth Boiyo and Esther Too got married, the proceeds of the sale of the cows they had been given as their dowry had been used to purchase the suit land in 1962. That since his father had died in the year 1957, the suit land was then registered in the original Defendant's name as he was the eldest son.

7. His evidence was that the land could not have been registered in his mother's name as it was contrary to the Kipsigis Customs. That they bought another parcel of land, Kamara/Mau Summit Block 4/115 (Boror "B") in the same year, from a land buying company which land was also registered in the name of the original Defendant. That a third parcel of land No. Kericho/Manaret/14 was also bought in the year 1965 and again registered in the name of the original Defendant. His evidence was that all the three 3 parcels of land were family land which were held in trust for himself and his siblings by the original Defendant.
8. He produced a copy of the green card for parcel Numbers Kamara/Mau Summit Block 4/115 (Boror "B"), Kericho/Koita-Burot/289 and Kericho/Manaret/14 as Pf exh 1-3 respectively wherein he proceeded to testify that after buying the first parcel of land Kericho/Koita-Burot/289, they had moved therein together with their mother and the original Defendant. That thereafter sometime in the year 1965, while he was still in school in Muhoroni, the original Defendant had been employed as an Administration Police.
9. That in the year 1967, the original Defendant, his wife and himself had moved to Manaret leaving his mother on parcel No. Kericho/Koita-Burot/289 wherein in the year 1970 their mother had joined them in Manaret but in the year 1973 she moved to Mau Summit and left him and the original Defendant at Manaret where they had lived up to the year 1996 when he moved to Mau Summit to stay with his mother while the original Defendant had remained at Manaret.
10. That in the year 1976 they had a family meeting wherein they had agreed that the family lands be divided as follows:
 - i. Land Parcel No. Kericho/Koita Burot/289 measuring 12 acres was to be divided equally between him and the original Defendant, hence he had been given 6 acre of the said land which he used for sugar cane farming.
 - ii. That land parcel No. Kamara/Mau Summit Block 4/115 (Boror "B") measuring 15 acres be given to him exclusively which land he was currently residing on.
 - iii. That Land Parcel No. Kericho/Manaret /14 measuring 39.6 acres was to be given to the original Defendant which land the said original Defendant had resided until his death
11. That sometime in the year 2011, the original Defendant started claiming land parcel number Kamara/Mau Summit Block 4/115 (Boror "B") where the Plaintiff had been residing and it had been after the demise of their mother in the year 2011, that the original Defendant had started demanding that he vacates from Land Parcel No. Kamara/Mau Summit Block 4/115 (Boror "B") claiming proprietorship of the same. That in fact the original Defendant had forcefully taken possession of land using the police wherein he had even started ploughing it.
12. That was when he had sought for legal advice from his Advocate who had issued a demand letter dated 19th April, 2011 to the original Defendant who had ignored the same and had continued ploughing about 5 acres which he later increased to 10 acres. That he (PW1) was currently occupying 5 out of the 15 acres of the land on parcel No. Kamara/Mau Summit Block 4/115 (Boror "B").



13. He thus sought for orders that he be allowed to occupy the 15 acres of the land parcel No. Kamara/Mau Summit Block 4/115 (Boror “B”) as was agreed by the family and that he be registered as proprietor of a portion of the 6 acres of land to be excised from land parcel No. Kericho/Koita Burot/289. He also sought for costs of the suit and adopted his witness statement as his evidence in chief.
14. On cross-examination, the Plaintiff confirmed that he was born in the year 1951 while the original Defendant was born in the year 1934. That when they came to Kericho from Gwasi, they did not own any land and therefore had lived with their aunty. He confirmed that their father had died in the year 1957 wherein they had moved to Kericho in February of 1962 and started buying land in the said year. That in the year 1962 despite the original Defendant being 28 years old, he had married and had 3 children. That the Plaintiff at the time was only 11 years. He also confirmed that the original Defendant was employed as an Administration Police in the year 1963.
15. That since the original Defendant was a married man, his aunty had built him a house where he had lived with his family while the Plaintiff had lived with their mother in a different house. He confirmed that the original Defendant had married in 1957. He emphasized that original Defendant did not buy the suit land using his salary but that the same had been bought using proceeds from his sisters’ dowry. He also testified that his eldest sister got married in the year 1962.
16. That whereas he did not participate in the dowry negotiations, he had been the one who had taken care of the cows. That according to Kipsigis customs, children did not participate in dowry negotiations known as Koito. He also confirmed that he had not been involved in the sale of the cows. His evidence was that his elder sister’s dowry was 16 cows and a bicycle while his second sister’s dowry had been 12 cows and Kshs. 700/-.
17. He confirmed that he was still a dependent in the year 1962. That his mother had received the cows from his sisters’ dowry and it had been his mother who had educated him. That according to the Kipsigis Customs, women were not allowed to be registered as land owners and that customary law was recognized by Kenyan Court. He maintained that the original Defendant had never paid his school fees but had sold some of his mother’s cows to pay the same. He confirmed that according to Kipsigis customs, his mother was allowed to own the cows that had been paid as his sisters’ dowry.
18. He also confirmed that his wife’s dowry had been paid by his mother using part of the cows that had been paid as his sisters’ dowry. That after he was employed, he had bought land in Manaret and in Kapsabet. That he had sold another parcel of land in Keringet wherein he had used the proceeds of the sale to educate his children. He also confirmed that he had bought a piece of land next to the family land in Mau Summit.
19. When he was referred to the receipts from Boror Farmers Company Limited, he confirmed that the same had been issued in the 1980’s. That whereas he had been adult by then, he did not protest to the registration of the suit land in the original Defendant’s name because he had trusted him. That he had also accompanied the original Defendant to buy land in the year 1975 in exchange for 4 cows. He confirmed that the Boror land had been bought in portions and that the suit lands comprised 3 parcels of land. He also confirmed that he had not constructed a house on the parcel of land he had bought in Mau Summit.
20. He proceeded to testify that in the year 1986 he had been living in Sotik where his home had been, but that he had another house in Mau Summit. That his sister also had a house in Mau Summit on a separate parcel of land where she had been living with her husband. He confirmed that the Land Adjudication & Settlement Department had written to the original Defendant on 24th May, 2006 regarding land parcel No. Kericho/Manaret /14 which he had bought through loans and further



confirmed that Land Parcel No. Kamara/Mau Summit Block 4/115 (Boror “B”) had been bought between the years 1970 and 1989.

21. In re-examination, he reiterated that they had some cows and goats when they left Gwasi. That his sisters’ dowry had been paid in form of cows, some of which had been sold to purchase land. He confirmed that Boror Farm was a land buying Company to which the original Defendant used to repay the loan on behalf of the family. He also confirmed that he had houses on the Boror land where his mother had lived. He confirmed that the land that he had sold had been bought with his own money and was adamant that the 3 suit parcels of land were all family land for which he could not be registered as proprietor because he had been young at the time. He confirmed that he was still cultivating the land in Kipsitet.
22. When he was examined by the court, he confirmed that the original Defendant had died in the year 2017 while his mother had died in the year 2011. That before his mother’s demise, there had been no dispute.
23. Esther Too testified as PW2, on 26th July, 2018 to the effect that she lived in Koita –Burot in Kericho County and that she knew both the Plaintiff and the original Defendant who were her brothers. That their father was called Arap Ronger and that she was the third born in the family. Her evidence was that they had been born in Gwasi, Homa Bay, but had migrated to Koita –Burot when she was already a young adult. That before she got married, they had first lived with their aunt. Her evidence was that while the original Defendant was an adult, the Plaintiff was still been young when they had migrated. That when she got married, her dowry had been paid to her mother since her father was already deceased.
24. That her dowry had been 12 heads of cattle, Ksh 500/= and 2 acres of land, which had been used to acquire more land. That the original Defendant had not contributed any money towards the purchase of the suit land since he was not employed at the time. That they had later acquired other parcels of land from European settlers using her sister’s dowry which had comprised 16 heads of cattle and Kshs. 500/=.
25. She adopted her Witness Statement dated 5th April, 2017 as her evidence in chief before proceeding to testify that her mother had also bought another parcel of land in Bureti wherein all the title deeds had been fraudulently registered in the original Defendant’s name. That the Plaintiff had still been young and her mother had been old hence the original Defendant had taken advantage of the situation.
26. She confirmed that the Plaintiff lived in Molo on one of the family’s parcels of land. That both the original Defendant and the Plaintiff had sugarcane plantations in Koita-Burot. That the original Defendant’s family lived both in Buroti and in Manaret Sotik. She maintained that the land at Manaret was family land where her mother had been buried.
27. On being cross-examined, she stated that she was 70 years old and that her father had died when she was about 10 years old. That she got married one year after circumcision at the age of about 21 years old. That the land in Koita – Burot was purchased in the year 1961 when she was about 13 years old.
28. She denied having been forced to come to testify or having ever sworn an affidavit in the office of Nyige & Co. Advocates in the year 2011. She maintained that the suit land had been fraudulently registered in the original Defendant’s name. That whereas her mother had participated in the purchase of the suit land, the same could not be registered in her name since a woman could not own land according to the Kipsigis Customary law. That instead, she had allowed the original Defendant to be registered as the proprietor because he was her eldest son. That there were people who had witnessed the same, although they were all dead.



29. Her evidence was that after getting married, she went to live with her husband which was within Koita-Burot and a walking distance from their home wherein they fetched water from the same stream. That whereas she could not remember when the original Defendant got employed, yet it was after she had given birth to two children.
30. That during the period that the original Defendant was working in the government, he had bought the Manaret property. That the said original Defendant owned 3 parcels of land in Manaret including the one that belonged to the family. That he used to live on the family land at Manaret where their mother had been buried, but his children were residing on the other 3 parcels of land.
31. She stated that it had not been true that their mother had been buried in Manaret because the Plaintiff had sold all the other parcels of land. She continued to testify that she was not aware that the Plaintiff had been given land and cows in Keringet and neither was she aware that he had bought a parcel of land in Mau Summit. That she did not also know whether the Plaintiff had sold his land in Tinderet or anything about the land that the Plaintiff had bought. She confirmed that Prisca was her daughter whose husband was called Paul.
32. She also confirmed that the original Defendant had leased his portion of land in Koita-Burot to the said Paul, that the two acres that had been part of her dowry was being used by the Plaintiff, that the family land in Koita-Burot was about 12 acres and it bore one title deed registered in the original Defendant's name and that the Plaintiff did not claim his share of the land when he became of age because the original Defendant had become hostile to him.
33. Her evidence was that she was not aware that the original Defendant had bought the land in Manaret on loan, but maintained that the family land had been bought using the cows that were paid for her dowry. That she had come to court as a witness and had no interest in the suit land. That she did not know that she had a right to the suit land and that in any case, she was not interested in the same since she had her own land.
34. In re-examination, she confirmed that the land in Manaret had been bought from the proceeds of her and her sister's dowry. That the first parcel of land to be bought in early 1960's was the one in Koita-Burot. That the second parcel was the one in Mau Summit which had been bought after 3 years. That the land in Manaret had been bought 5 years after the Mau Summit one had been bought and that the same had been paid for by instalments. That since she was illiterate, she did not know the exact year that the land in Koita-Burot was bought, although it was in the early 1960s.
35. In the cause of the trial the Plaintiff passed away wherein he was substituted with his son Simon Kibet Tormoi.
36. PW3, one Elizabeth Sigei Boiywo then proceeded to testify that she lived in Kamara area within Nakuru County and was a farmer. That the original Plaintiff and the original Defendants were her younger and elder brothers respectively. That Simon Kibet Turmoi was the original Plaintiff's son while Moses Kibore Saina was the original Defendant's son.
37. Her evidence was that initially, they used to live in Gwasi in Nyanza province and when they left Gwasi in the year 1963, she went to live with her aunty known as Taprandich at Koitapuroti in Kipsilet which was situated on the way to Kisumu before the Muhoroni junction. That at the time their mother Jeniffer was alive. That it had after she and her sister got married, that their dowry had been used to buy family land. She explained that her dowry had been 16 cows while her sister's had been 12 cows and a piece of land.



38. That the said cows had been disposed of by her mother who had then bought the first land in Koita-Burot whose title number she could not remember although she had indicated the same in her statement. She adopted her witness statements dated 5th April, 2017 and 24th February, 2020 as her evidence in chief before proceeding to testify that the land at Koita Burot was around 12 acres and had been registered in the name of the original Defendant because at the said time of registration, her mother did not have an Identity Card and women were not allowed to own a parcel of land.
39. Her evidence was that the second piece of land was situated in Sotik and measured around 34 acres, and was also registered in the name of the original Defendant. That whereas she could not remember the year in which the land in Koita Burot had been bought, the parcel of land in Sotik had been bought around the year 1983 although she could not remember very well. That there had also been a third piece of land situated at total measuring around 14 acres where her mother used to live, but the original Plaintiff had later moved therein. She asserted that the said land was her mother's land.
40. That nobody was living in the Koita Burot land as they had re-located to Sotik but the original Plaintiff and their mother had later moved to the parcel of land in Total. That whereas she did not know who was utilizing the Koita Burot land, the said land had belonged to their family and that the original Defendant had leased it out.
41. She reiterated that the three parcels of land were family land and had been bought from the proceeds of the sale of the cows that had been given for their dowry. She confirmed that the original Plaintiff resided in a parcel of land in total which now measured 14 acres after the original Defendant sold one-acre during subsistence of the trial. She produced the following exhibits;
 - i. A Certificate of Search for land parcel No. Kamara/Mau Summit Block 4/153 (Boror "B") dated 22nd October, 2019 and registered in the name of Joel Kipsania Korir (the original Defendant herein) as Pf exh 5,
 - ii. A Certificate of Search with respect to land Parcel No. Kamara/Mau Summit Block 4/154 (Boror "B") dated 22nd October, 2019 registered in the names of Kelvin Algata Mburu as Pf exh 6,
 - iii. A Certificate of Search with regards to the parcel of land No. Kamara/Mau Summit Block 4/155 (Boror "B") dated 22nd October, 2014 and registered to Kelvin Ngata Mburu as Pf exh 7
 - iv. A Certificate of Search dated 22nd October, 2014 in relation to land parcel No. Kamara/Mau Summit 4/156 (Boro "B") registered to Kelvin Ngata Mburu was produced as Plaintiff Exhibit 8.
 - v. A Certificate of Search dated 22nd October, 2019 in respect of land parcel No. Kamara/Mau Summit 4/158 (BoroR "B") registered to Stephen Kipkemoi Ngeno as Plaintiff Exhibit 9.
42. She proceeded to testify that her mother had caused the three parcels of land to be registered in the name of the original Defendant because he was the elder son and further because the original Plaintiff had still been young.
43. She reiterated that the original Plaintiff used to live on the parcel of land at Total that is, land parcel No. Kamara/Mau Summit block 4/115 (Boror "B"). That the land that was referred to as Sotik was land parcel No. Kericho/Manaret/14 while the land referred to as Kotapot was Kericho/Koita-Burot/289.
44. When she was examined by the court, her response was that she did not know her age, but that the late first president Mzee Jomo Kenyatta had come to power when she was already existing and that she had been born before independence.



45. Upon being cross-examined, she confirmed that she was married at 18 years old before Kenya attained independence. That the original Defendant was her elder brother who had been above 18 years when she had got married but had not been employed yet. That whereas the said original Defendant had latter become an officer, she could not remember the exact time that he had been employed.
46. She maintained that when they had re-located from Gwasi, her family had no family land and they had been living on her auntie's land. She reiterated that the parcels of land registered in the name of the original Defendant had been bought from the proceeds of their dowry. That whilst there had not been anything written when the dowry was paid, she had a witness known as Dr. Soi who could confirm that indeed the dowry had been paid. That the said Dr. Soi had participated when the dowry was being paid although he was still young at the time. That the cows had been sold and the proceeds used to acquire land although she had nothing to show the same, but there had been witnesses to the said transaction
47. She admitted that there had been no agreement to show that the original Defendant had bought the property on behalf of the family from the proceeds of the dowry. That whereas she had already been married and had not been present during the negotiation, her mother had negotiated with the original Defendant on how to purchase the land. That when she visited their home, she found out that the cows had already been sold wherein her mother told her that she had already purchased land. That her mother had confidence that the original Plaintiff and the Original Defendant would not have an issue dividing the parcels of land between themselves.
48. That whereas she could not remember when the parcels of land at Koita-Burot and Mau Summit had been bought, the land at Sotik was bought when the original Defendant was already a police officer. She maintained that the original Defendant had not been employed at the time that she got married and that her cows had also been sold before the said original Defendant was employed. That the land at Koitabot was bought immediately the cows were sold and that it had not been true that the rest of the land had not been bought with the proceeds of their dowry.
49. That her mother used to live in Koitabot, but when the land in Sotik was bought, she had moved therein and later moved to Mau Summit. That whereas she had not seen the receipts that the original Defendant had bought the land with, she was aware that he had the receipts. That it was not true that more than 20 years had passed since the said receipts were issued.
50. She testified that she was not aware of any loan that had been taken by the original Defendant. She confirmed that she was living at Kaplelarteb on her husband's property although she had another property in Mau Summit which she had purchased. That neither the original Defendant not the original Plaintiff had assisted her in purchasing the said parcel of land. That the original Plaintiff had purchased his parcel of land as well, although she did not know if he still owned it. That her mother was the first to go to Mau Summit wherein the original Plaintiff had later joined her therein.
51. That whilst she could not remember signing any affidavit, she had recorded a statement with her advocate where they had not stated that the suit lands belonged to the original Defendant and not to the original Plaintiff.
52. She confirmed that the plot at Mau Summit had been sub-divided by the original Defendant who had sold the resultant plots to other people whom she did not know whether they were parties in the instant suit.
53. That when she got married, she had just remained a farmer while staying at home but she had purchased a parcel of land at Mau Summit. That she was aware that her brother had purchased other different parcels of land. She maintained that the original Defendant was holding the suit lands on behalf of the family since her mother was the one who had paid for their purchase..



54. In re-examination, she confirmed that she had never attended school and her mother had not gone to school as well. She confirmed that her mother had paid all the money for the land. That the land at Koita Burot measured 12 acres and both the original Plaintiff and the original Defendant were utilizing it. That the original Plaintiff's children were still using the land at Mau Summit while the original Defendant's children were living in Sotik.
55. That the original Defendant had purchased the parcels of land and plots with his money and that there had been one parcel of land for Elizabeth, the original Defendant's younger wife at Chebitet in a place known as Moniret which was different and far away from the family land.
56. She confirmed that her mother had lived at Mau Summit with the original Plaintiff whereupon she had left him there and gone to Sotik
The Plaintiff thus closed his case.
57. DW1, Esther Korir, testified on 10th February, 2022 to the effect that she was the original Defendant's wife and the mother to Moses Kibor Saina who had substituted the original Defendant. That Simon Kibet Tormoi, the Plaintiff herein, was the son to the original Plaintiff who was her brother-in law. She adopted her witness statement dated 24th July, 2018 as her evidence in chief then testified that whilst she could not remember the year that she got married to the original Defendant, they had lived in Gwasi until when they had migrated to Kipsitet wherein the original Defendant had bought a piece of land therein measuring 7 acres. That they had lived there for some time before migrating to the Scheme in Sotik which is land parcel No. Kericho/Manaret/14 measuring 40 acres which land had been purchased and paid for by the original Defendant.
58. Her evidence was that whereas the original Defendant had purchased the two parcels of land aforementioned, he had also purchased a parcel of land No. Kamara/Mau Summit/115 (Boror "B") in Molo but she had neither been to the said land nor knew how he had purchased it. That the original Defendant's mother and her daughter used to live therein with the permission of the original Defendant.
59. That it was not true that the Plaintiff had purchased the land since it was the original Defendant who had purchased the parcels of land while he was working as an Administration Police Officer in Kericho. That although she could not remember the period that he had worked as an Administration Police officer, he had become a chief upon his retirement. That the original Defendant had been working and earning an income during the period that she was married to him. She explained that the money used to purchase the parcel of land in the scheme had been from farm produce, since they used to sell milk and maize, while the other parcels of land had been bought from the money that they had collected.
60. That the original Defendant had purchased a parcel of land for the original Plaintiff in Keringet wherein the said original Plaintiff used to live, before they moved to Molo. That the original Plaintiff used to stay in her house while attending school at Nashiombo School and that they were the ones who had educated him wherein he had later been employed at Sotik Tea Factory although she could not remember the duration that he had worked therein. Further, that whereas the original Plaintiff worked in Sotik, his children lived in Keringet. That apart from the land that the original Defendant had purchased for the original Plaintiff, the said original Plaintiff had purchased another parcel of land at Tinderet. She testified that all the parcels of land had been purchased by the original Defendant when they were together hence they were not family land.
61. On cross-examination, she confirmed when they left Gwasi for Kipsitet, the original Plaintiff had been young. That they had lived with their aunty in Kipsitet because they had no land. That when they



- left Gwasi before independence, PW2 and PW3 had not been married and that when they later got married, she did not see the cows that were paid as dowry.
62. She also confirmed that the original Defendant had been employed while they were at Kipsitet, although she could not remember the year. That whilst it was true that they had left Kipsitet for Manaret, they had later taken the original Plaintiff and lived with them. That it was not true that the land parcel No. Kericho/Koita-burot/289 was not shared by the original Plaintiff and the original Defendant when they planted sugar cane. She maintained that the original Defendant had bought the said parcel of land. That since they relocated to Sotik, she had never gone back to land parcel No. Kericho/Koita-burot/289 although she was aware that some farming was ongoing therein.
 63. That whereas she had not produced any letter to show that the original Defendant was an Administration Police, the file was with the Chief. She maintained that the original Defendant had bought a parcel of land in Molo for himself and a parcel of land in Keringet for the original Plaintiff.
 64. Her testimony was that although the original Plaintiff did not live in Molo, he had been buried at his mother's land in Molo. However, on further probe, she testified that the said original Plaintiff had relocated from Keringet and had lived with his mother on land parcel No. Kamara/Mau Summit/115 (Boror "B") for a short while.
 65. She confirmed that the original Defendant was the first born in that family but denied that the suit lands had been registered to him to hold in trust stating that he had bought the said parcels of land. That there had been a sale agreement for the Koita-burot land although she had not produced the same as an exhibit. Her evidence was that it had been the original Defendant who had educated the original Plaintiff and paid for him his dowry.
 66. That she had only seen PW3's dowry. That although she visited the original Defendant's mother in the Molo firm, she had never lived there. She confirmed that land in Koita-Burot measured 7 acres and had been leased out to one Prisca Langat. That the original Defendant had lived in Kericho/Manaret/14 before his demise on which land she now lived. That the original Plaintiff had lived on the Molo land until his death wherein his wife had also been buried thereon by force. That the original Plaintiff's children lived on the Molo land and that it was not true that the original Plaintiff's mother had subdivided the land between him and the original Defendant.
 67. In re-examination, she testified that they were not informed that the original Plaintiff would be buried on the Molo land, since he had been buried in the morning. She maintained that the three parcels of land had been bought by the original Defendant on his own behalf and not for the family. That her mother-in-law had not given the original Plaintiff the land in Molo but she had instead, given him the land in Keringet. She reiterated that the original Plaintiff had joined them when they moved from Koita-Burot to Sotik,
 68. When she was examined by the Court, she stated that she did not know her age. However, the Court noted that she was an elderly woman of about 70 years old.
 69. Joel Kiptanui Kilele, testified as DW2 to the effect that he was a farmer and lived at Sitiang. That before moving to Sitiang, he used to live in Mau Summit at a place called Total. That he knew both the original Plaintiff and the original Defendant. He adopted his witness statement dated 26th October, 2016 as his evidence in chief before proceeding to testify that they bought a parcel of land measuring 621 acres at a place known as Rongai, together with the original Defendant, in a group of about 200 people the year 1967. That the group which was known as Boror had consisted of 3 women since in the year 1967 women were allowed to be registered as land owners.



70. That each member had shares of Kshs. 100/= and the registration fee was Kshs. 40/=. That they use to be issued with receipts, and that the said land had not been sub-divided but they used to keep cattle therein. That they had been given the loan by Kenya Farmers' Cooperative and after they had cleared the said loan, they had purchased another land measuring 430 acres wherein the original Defendant had decided to take his mother and sister there since he already had another land.
71. That they never knew the original Plaintiff. That they had then purchased a third land measuring 280 acres at which time they had an additional 50 members. That the lands were then known as Boror A, B and C.
72. That they used the services of an Advocate called Patel who was situated in Nakuru and they were issued with receipts. That the land in Koita-Burot had been bought by the original Defendant while he was working as an Administration Police in Londiani. That he neither saw nor heard about the original Defendant's family at the time the said original Defendant was purchasing the parcels of land.
73. On being examined by Court, he testified that they used to keep cattle and farm wheat on those parcels of land.
74. His evidence on cross-examination was that they had been Directors of Boror A, B and C alongside other elders although he had not produced any document to that effect since it had been a long time ago. That they had purchased the first parcel of land Boror "A" measuring 621 acres in the year 1967 when they were 200 members, while Boror "B" measuring 430 acres had been bought in the year 1978. That whereas he could not remember when Boror "C" measuring 280 acres had been bought, he had started living there in the year 1980. That the proceeds from the first land were used to pay for the subsequent parcels of land.
75. He confirmed that they had lived with the original Defendant in Boro 'A' in the year 1967 wherein the said original Defendant had told them that he would bring his mother and sister to live in Boror 'B'. That he only came to know about the original Plaintiff recently.
76. His evidence was that he had come to Sitiyang in the year 2016 but after he had purchased Boror 'C' in the year 1980, he had moved therein. He reiterated that he only knew the original Defendant but did not know about his family. That he had never gone to visit the original Defendant in Sotik.
77. He confirmed that the original Defendant had bought the parcels of land in his name and even the receipts had been issued in his name.
78. When he was examined by court, he testified that he was 88 years old having been born in the year 1934.
79. DW3, Moses Kibore Saina, the Defendant herein, had testified to the effect that he was a retired civil servant and lived at Mau Summit in Molo. That the original Plaintiff was his uncle while the original Defendant was his father and that he was in court as a personal representative of his father.
80. He explained that after his father had died, he had been chosen by his family to represent him in the instant case wherein he had been given a Limited grant of Letter of Administration dated 30th October, 2017 by the court to represent his father. He produced the said Limited Grant as Df exh 1. He then proceeded to adopt his witness statement dated 15th March, 2018 as his evidence in chief before proceeding to testify that the instant case was in relation to land parcel No. Kamara/Mau Summit 4/153 (BoroR "B"), Kamara/Mau Summit 4/157 (BoroR "B"), Kericho/Manaret/Block/14 and Kericho/Koita/Burot 289. That the proprietor of the aforementioned parcels of land was his late father the original Defendant.



81. That the first parcel of land No. Kericho/Koita Burot/289 was bought in the year 1963 at which time the original Defendant had been working as an Administration Police. He produced the original Defendant's Identity Card of Civil Service, Certificate of Appointment of Administration Police and the Staff Identity card as a counselor as Df exh 2 (a), (b) and (c) respectively stating that the original Defendant had the ability to purchase the parcels of land.
82. That Land parcel No. Kericho/Manaret/Block/14 had been bought in the year 1965 while land parcel No. Kamara/Mau Summit Block 4/153 (Boror "B") had been bought with Co-operative Society in the year 1967 in a group of about 200 people and that he had the receipts of payment of the loan in the name of his father, the original Defendant herein. He produced the bundle of receipts of Boror farm Co. Ltd as Df exh 3 (a – k) and testified that after the original Defendant had paid for the land, he was given title deed. That he also had letters written to the original Defendant by the Ministry of Lands and Settlements.
83. That the said letters included, a letter dated 22nd September, 2011 in regard to land parcel No. Kericho/Manaret/14 in Manaret Settlement Scheme to show that the original Defendant had cleared the loan and to enable him acquire a title deed. That he also had a document dated 18th November, 2009 in reference to payment in full of the outstanding amount. That further, he had a letter dated 20th May, 2010 on the particulars of settlers desiring to repay in full the outstanding amount against the land loan. He explained that all the aforementioned letters were with reference to land parcel No. Kericho/Manaret/14. He produced the said letters as Df exh 4 (a – c).
84. That after the original Defendant had paid the loan, he was given the title deed on 29th July, 1986. He produced the title deed to land parcel No. Kericho/Manaret/14 as Df exh 5. That his mother and his brothers lived on land parcel No. Kericho/Manaret/14 since the year 1965.
85. That the original Defendant had also owned land parcel No. Kamara/ Mau Summit block 4/153 (Boror "B") which had been a sub-division of land parcel No. Kamara/ Mau Summit block 4/115 (Boror "B"). He produced the green cards with regard to land parcel No. Kamara/ Mau Summit block 4/153 (Boror "B") as Defence Exhibit 6 (a) and then testified that the said parcel of land had been registered in the name of the original Defendant.
86. His evidence was that parcels numbers Kamara/ Mau Summit block 4/154-157 (Boror "B") had also been a sub division of land parcel No. Kamara/ Mau Summit block 4/115 (Boror "B") which sub divisions had been transferred to other purchasers who were not Defendants in the instant suit. He produced the Green Card in respect to land parcel Nos. Kamara/ Mau Summit block 4/153-158 (Boror "B") as Defence Exhibits 6 (b –f).
87. He proceeded to testify that they were cultivating land parcel numbers Kamara/ Mau Summit block 4/153 and 157 (Boror "B") while parcel numbers Kamara/ Mau Summit block 4/154-156 (Boror "B") belonged to Stephen Kipkemoi Ngeno who was utilizing it.
88. That he and the original Plaintiff's children were living on land parcel No. Kamara/Mau Summit block 4/153 (Boror "B") land wherein his grandmother used to live and the original Plaintiff used to visit her as she had been sick. That in the year 1996, pursuant to the original Plaintiff losing his job, he had also started living on the said land. That the said original Plaintiff had sold his land in Keringet before joining the Defendant on parcel of land No. Kamara/Mau Summit block 4/153 (Boror "B") which he had not bought.
89. That the original Plaintiff had two other parcels of land in Sachangwan Settlement Scheme Numbers 183 and 188 which he had also sold. That the original Plaintiff did not have land near land parcel No.



- Kamara/ Mau Summit block 4/115 (Boror “B”). He explained that Land parcel numbers 183 and 188 bordered land parcel No. Kamara/ Mau Summit block 4/153 (Boror “B”) and that parcels numbers Kamara/ Mau Summit block 4/153 and 157(Boror “B”) were not his parcels of land.
90. That it had been after the original Plaintiff lost his job that he had started claiming the land. He reiterated that the original Defendant had purchased land parcel No. Kamara/ Mau Summit block 4/115 (Boror “B”) in the year 1976 and had also bought land parcel No. Kericho/Koita-Burot/289 from Charles Kibanga in the year 1963. That after they had relocated in the year 1969, the original Defendant had rented out land Parcel No. Kericho/Koita-Burot/289 to Prisca Langat to farm Sugar Cane on it. He produced the cane purchase agreement and the land lease agreement as Defence Exhibit 7 (a) and (b).
 91. He asked the court to assist them solve the issue as the suit lands belonged to the original Defendant hence the people living therein should be evicted and injuncted from interfering. When he was referred to Document 3 which is an Affidavit by his Aunties, he confirmed that indeed although the same had been made on 27th October, 2016, yet his Aunties had confirmed that they had lied in the previous affidavit. That they being illiterate had signed documents that they did not know. He produced the affidavits as Df exh 8 (a) and (b).
 92. On cross-examination, he confirmed that the original Plaintiff was his uncle who was the last-born sibling of his father, the original Defendant herein and that PW2 and PW3 were their sisters. That he was born in the year 1960 hence he had been 2 years old in the year 1962. That he was brought up in Koita Burot. That his aunties got married and dowry was paid in the year 1965. He confirmed that land parcel No. Kericho/Manaret/14 had been bought in the year 1965 when he was a child of 5 years old. He further confirmed that land parcel No. Kamara/Mau Summit Block 4/115 (Boror “B”) was bought in the year 1967.
 93. That between the year 1965 and 1967 the original Plaintiff was still young. That the original Defendant was the first born and he would not know if he used to be sent at the time to buy parcels of land on behalf of the family.
 94. When he was referred to Df exh 2 (a – c), he confirmed that the original Defendant was employed on 4th November, 1976 according to the said document. However, he testified that between the years 1963 – 1977, the original Defendant had been serving as an officer in Londiani although he had nothing to show that he was employed at that time.
 95. That he had been born in Gwasi in Nyanza, after his grandparents had been displaced by colonialists they had moved to Koita Burot in the year 1962. That whilst his aunties got married and dowry was paid, it was not true that the said dowry had been used to buy the land.
 96. Upon being referred to Df exh 7 (a – b), he confirmed that land parcel No. Kericho/Koita-Burot/289 had been bought in the year 1963 barely one year after his family had migrated from Gwasi. That before then, they had been living at the original Defendant’s aunty’s place. He maintained that it was not true that PW1 and PW2’s dowry had been used to buy suit lands.
 97. When he was referred to land parcel No. Kamara/Mau Summit block 4/115 (Boror “B”) he testified that the same had been subdivided between the years 2015 – 2016. On being referred to Df exh 6 (a) he stated that he was not sure that the land had been sub-divided to defraud the original Plaintiff while the instant matter was ongoing in court and that maybe the said land had been sold earlier.
 98. Upon being referred to Df exh 7 (a) and (b) he confirmed that land parcel No. Kericho/Koita-Burot/289 measured 12 acres and that he was not aware that the original Plaintiff had used part of the



said land to plant sugar cane since he had just been aware that he had been leasing the land. However, when he was referred to Df exh 7 (a), he confirmed that the original Defendant had leased 4 acres portion of the said land although the agreement had not indicated the title and parcel numbers of the land.

99. On being referred to Df exh 7 (b), he confirmed that the lease agreement had been with regard to 3 acres but it did not indicate the parcel number of the land as well. That it was not true that the original Plaintiff had been using the remaining parcel of land. He explained that part of the land was rocky, while a small portion was marshy hence it could not be true that the original Plaintiff was using half of the land since the said half portion was not arable.
100. His evidence was that in the year 1996 his Grandmother and the original Plaintiff started living on land parcel No. Kamara Mau /Summit block 4/115 (Boror “B”) wherein the original Plaintiff had informed them that he would sell his land in Keringet so he could come and live near his mother.
101. He confirmed that when the original Plaintiff’s wife died, she was buried on land parcel No. Kamara/ Mau Summit Block 4/153 (Boror “B”). That whereas he had documents to prove that the original Plaintiff had bought land in Sachangwan Scheme, he had not produced the said documents. That it was not true that the original Plaintiff only had land parcel No. Kamara/ Mau Summit block 4/153 (Boror “B”) or that the original Defendant was a trustee of the family.
102. His response when he was referred to Defence Exhibit 8 (a) and (b) was that he was not surprised to hear that the deponents therein had denied having signed the said Affidavits. That he did not make the commissioner of the Affidavits as a witness in the instant case because they did not deem it necessary. He confirmed that currently, the original Plaintiff’s children were residing on land parcel No. Kamara/ Mau Summit block 4/153 (Boror “B”) where the remains of their parents had been interred.
103. In re-examination, he confirmed that the original Plaintiff and his wife were buried on land parcel No. Kamara/ Mau Summit block 4/153 (Boror “B”). That whereas they had objected to the said burial, the original Plaintiff had been buried early in the morning. He also confirmed that the original Plaintiff’s children were living on the said land although not with consent of the entire family. He maintained that the said land had not been bought using the proceeds from his auntie’s dowry.
104. He maintained that land parcel No. Kericho/Koita-Burot/289 was purchased when the original Defendant had been employed before which he had engaged in business to sustain the family. He admitted that at the time when the said land was bought, his grandmother could have been in a position of trustee. That the said grandmother must have received the dowry as she had been alive when the same was paid and that she could have used the same.
105. The Defendant closed his case and parties were directed to file their written submissions to which I shall herein summarize as follows;

Plaintiff’s submissions.

106. The Plaintiff, vide its submissions dated 28th November, 2023, summarized in detail, the factual background of the matter and the evidence adduced in court before framing his issues for determination as follows:
 - i. Whether the suit lands namely Kericho/Manaret/14, Kericho/Kota-Burot/289 and Kamara/ Mau Summit/Block 4 (Boror “B”)/115 and now subdivided into Kamara/Mau Summit Block 4 (Boror “B”)/153 and Mau Summit Block 4 (Boror “B”)/157 are family lands and registered in trust in the names of the Defendant herein.
 - ii. If the answer is in affirmative, is the suit lands created by customary trusts?



107. On the first issue for determination, it was the Plaintiff's submission that it had not been in dispute that the suit lands had been registered in the name of the original Defendant, what was in dispute however was whether or not the said suit lands had been registered in the name of the said Defendant during his lifetime, as a trustee of the original Plaintiff and the entire family.
108. He submitted that the evidence adduced in court, was to the effect that the proceeds from the payment of the dowry of PW2 and PW3's had been used to purchase the first land namely Kericho/Koita-Burot/289 which had been utilized and the proceeds therein used to purchase land parcel numbers Kericho/Manaret/14 and Kamara/Mau Summit Block 4 (Boror "B")/153 and Kamara/Mau Summit Block 4 (Boror "B")/157 respectively. That, these parcels of land were registered to the original Defendant to hold as a trustee for the family since his brother, the original Plaintiff had been of tender years, and their mother could not be registered as proprietor due to the Kipsigis customary practice. That the both the original Plaintiff and Defendant had been in occupation and possession of the suit lands until the same was distributed between them by their deceased mother whereby land parcel number Kericho/Koita-Burot/289 had been shared equally between them, No. Kericho/Manaret/14 had been given to the original Defendant while No. Kamara/Mau Summit Block 4 (Boror "B")/115 had been given to the original Plaintiff.
109. Reliance was placed on the provisions of Section 25(b) and 28 of the *Land Registration Act* and the Supreme Court decision in the case of Isack M'inanga Kiebia v Isaaya Theuri N'lintari & another [2018] eKLR to submit that it was clear that the three suit lands had been created by customary trust therefore they were an overriding interest. That the original Plaintiff was during his lifetime in possession and occupation of the suit land formally known as Kamara/Mau Summit/Block 4 (Boror "B")/115, now subdivided into Kamara/Mau Summit Block 4 (Boror "B")/153 and Mau Summit Block 4 (Boror "B")/157 while No. Kericho/Koita-Burot/289 had been occupied and utilized by both the original Plaintiff and the original Defendant in equal shares.
110. That indeed the evidence by DW1 and DW3 had been an admission that the original party's mother had been residing with them in the three suit lands during their childhood until they got married. That thereafter, the original Plaintiff had settled in Mau Summit farm while the original Defendant had settled in the Manaret farm until their demise. That their families still lived in their respective farms.
111. That subsequently, the three suit lands were family land hence both the original Plaintiff and the original Defendant had overriding interests therein. He thus submitted that the Plaintiff had proved his case on a balance of probabilities hence the reliefs sought in the Further Amended Plaint should be allowed with costs. But

Defendant's Submissions.

112. The Defendant, vide his submissions dated 5th February, 2024 also summarized the brief background of the matter herein before framing his issues for determination as follows:
- i. Whether the Plaintiff has a cause of action against the Defendant.
 - ii. Whether the Plaintiff is entitled to the prayers sought therein.
 - iii. Whether the title deed issued to the Defendant were validly issued.
 - iv. Whether the Defendant is entitled to the prayers sought in the counterclaim.
 - v. Whether the parcels of land contested are ancestral land.
113. The Defendant placed his reliance on a combination of decisions in the decided case of Daniel Otieno Migore v Soth Nyanza Sugar Co. Ltd [2018] eKLR, Raila Amolo Odinga & Another v IEBC &



- 2Others [2017] eKLR and Kericho HCELC No. 19 of 2018: Jackline Chepngetich Rono & Another v Crispine Kiplangat Rono & 2 Others (sic) to submit that parties were bound by their pleadings. He then urged the court to pay keen attention to the pleadings by the parties and not be swayed into granting prayers that had not been pleaded nor sought for in the pleadings. That the Plaintiff had not tried to impugn the Defendant's title or make any allegation of fraud against the process which he had obtained title deed and neither did he explain how if indeed the suit lands had been purchased by the proceeds of dowry, why the original Defendant had taken out loans to purchase the said suit lands.
114. On the issue of trust, he placed reliance on the definition of trust from the Oxford Advanced Learners Dictionary, Black's Law Dictionary as well as the provisions of Section 28 of the [Land Registration Act](#) on overriding interests and the provisions of Section 66 of the [Land Registration Act](#) to submit that the law provided for Customary trust and Registered trust.
 115. The Defendant's reliance was hinged on a combination of the decisions in the case of Juletabi African Adventures Limited & Another v Christopher Michael Lockley [2017] eKLR, and Isack Minanga Kiebia's case (supra) to submit that a party could not just lay a claim for trust against a registered proprietor who was protected under Sections 24, 25 and 26 of the [Land Registration Act](#) and Article 40 of [the Constitution](#) and be awarded land without cogent evidence and strict proof of the existence of trust. That there ought to be a nexus between the parties in principle, that is, the parties agree that the land was ancestral land or there was irrefutable evidence that the land was ancestral and that the family had agreed that the land should be registered in the name of the registered owner to hold the same in trust for other family members. However, if a party had provided evidence that the parcels of land alleged to be ancestral were personally acquired, then the claimant for customary trust must rebut the same, failure to which the conclusion would be that the properties did not fall within the ambit of customary land and indeed under the principle of customary trust.
 116. He submitted that although the Plaintiff's evidence was that the suit lands had been purchased by the proceeds from his sisters' dowry which dowry had been received by his elder brother, the original Defendant herein, yet no satisfactory evidence had been tendered as to why the parcels of land had not been registered in the name of their mother who was still alive then.
 117. He also questioned the contradictory evidence by the Plaintiff that although the original Defendant having been employed never purchased any land in his name visa vie the Defendant's evidence that the suit lands had been obtained through the original Defendant's hard earned work thorough his employment as an Administration Police Officer and later as a Chief and Councilor, wherein he had allowed his family members to occupy the same including his aged ailing mother and the original Plaintiff, who later lay claim to the land through customary trust.
 118. He submitted that DW3 in his testimony had produced exhibits demonstrating in a chronological way how the original Defendant was registered as the lawful proprietor of the parcels of land. That some of the suit lands had been acquired by a loan facility while the other suit lands had been acquired from the original Defendant's income during his employment. That subsequently, the Defendant had proved his case on a balance of probability hence he was entitled to judgment as per his counterclaim.
 119. That there had been no evidence adduced by the Plaintiff to corroborate his assertion either that the suit lands had been ancestral and or that the original Defendant had been registered as a trustee on behalf of the other family members.
 120. Reliance was placed on the provisions of Article 40 of [the Constitution](#), Sections 24 (a-b), 25(1) and 26(1) of the [Land Registration Act](#) as well as a combination of the decisions in the case of Katana Kalume 7 Another v Municipal Council of Mombasa & Another [2019] eKLR and Republic v The Registrar of Title Mombasa & 2 Others ex parte: Emfil Limited [2012] eKLR to submit that the



original Defendant was the indefeasible proprietor of the suit lands aforementioned, hence he should be declared as the owner of the suit lands and an order of injunction and eviction be issued against the substituted Plaintiff to vacate land parcel number Kamara/Mau Summit block 4/115 (Boror B).

121. That the Plaintiff had not pleaded irregularity, misrepresentation or fraud in the acquisition of the suit lands by the original Defendant that could impugn the original Defendant's title which was protected under the law. That he had proved his case on a balance of probability hence he should be awarded judgment as prayed for in his Counterclaim.
122. The Defendant then placed reliance on the provisions of section 27 of the *Civil Procedure Act* and the decided case of Joseph Oduor Anode v Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR to seek for costs.

Analyses and determination

123. I have carefully and anxiously considered the original Plaintiff's claim against the original Defendant's, the defence, the evidence, submissions as well as the applicable law and the authorities herein cited. For ease of reference herein shall refer to the original parties as deceased Plaintiff and deceased Defendant respectively.
124. The gist of the matter in question which is not disputed is that both the deceased Plaintiff and the deceased Defendant were siblings, wherein the deceased Defendant was the elder one of the two. That they had migrated together with their family including the deceased Defendant's wife (DW1), their mother, Jennifer and sisters, from their original land in Gwasi, to Kericho in the year 1962. That upon arrival in Kericho, they had no place to settle wherein they all lived with their aunty known as Taprandich in Kipsitet. That subsequently their two sisters, Elizabeth Boiyo (PW3) and Esther Too (PW2) got married in the year 1962 and dowry was paid to their mother, their father having died in the year 1957.
125. It is also not in contention that soon after their sisters got married and dowry was paid, parcel No. Kericho/Koita-Burot/289 (the suit land) which is referred to as Kotapot was acquired in 1962, followed by parcel No. Kamara/Mau Summit block 4/115 (Boror "B") and land No. Kericho/Manaret/14 which was referred to as Sotik.
126. Also not in contention was the fact that these three parcels of land were all registered to the deceased Defendant who was the first born male child as the same could not be registered to their mother because according to the Kipsigis Customs, women were not allowed to be registered as land owners.
127. Further evidence which is not in contestation was that pursuant to acquiring the first parcel of land No. Kericho/Koita-Burot/289 they had all moved there together with their mother and the deceased Defendant wherein in 1976 the deceased Defendant had been employed as an Administration Police.
128. That in the year 1967, the deceased Defendant, his wife and the deceased Plaintiff had moved to Manaret leaving his mother on parcel No. Kericho/Koita-Burot/289 wherein in the year 1970 their mother had joined them in Manaret but in the year 1973 she moved to Mau Summit and left the deceased Plaintiff and the deceased Defendant at Manaret where they had lived up to the year 1996 when the deceased Plaintiff moved to Mau Summit to stay with his mother while the deceased Defendant had remained at Manaret.
129. The bone of contention therein arises wherein the deceased Plaintiff's claim was to the effect that the three parcels of land had been purchased from the proceeds of the sale of the cows that had been given as dowry for PW2 and PW3 and therefore they were registered to the deceased Defendant to hold in trust for the family. Whereas there was evidence by PW1, PW2 and PW3 in support of this assertion, the



deceased Defendant's case on the other hand where evidence was adduced by the deceased Defendant's wife and son was to the effect that the suit lands had been acquired through the deceased Defendant's effort since he had been employed.

130. What is disputed herein and which forms the issue for determination is whether or not the deceased Defendant held land parcels No. Kericho/Koita-Burot/289, No. Kamara/Mau Summit block 4/115 (Boror "B") and Kericho/Manaret/14 in trust for himself and the deceased Plaintiff.
131. The provisions of Section 25 of the [Land Registration Act](#) do not relieve a proprietor off any duty or obligation to which she/he is subject to as a trustee. The overriding interests alluded to in Section 25 are set out in Section 28 of the [Land Registration Act](#) which provides as follows :-

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- a. spousal rights over matrimonial property;
 - b. trusts including customary trusts ;
 - c. rights of way, rights of water and profits subsisting at the time of first registration under this Act;
 - d. natural rights of light, air, water and support;
 - e. rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
 - f. leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
 - g. charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
 - h. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
 - i. electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
 - j. any other rights provided under any written law.
1. It will be noted that trusts are among the overriding interests provided for in Section 28 above, and for which a proprietor holds land subject to, as provided in Section 25 above. A trust is essentially a situation in which one person holds property on behalf of, or for the benefit of another. Trusts are of different types and can be created in a variety of ways (See for example Hansbury & Maudsley, Modern Equity, 10 Edition, Chapter 4)
2. Indeed as above found, it is undisputed that deceased Defendant herein had no title of land to his name when they moved from Gwasi to Kericho in the year 1962 and that the three parcels of land in contestation herein were procured between the year 1962 and 1965 after the marriage of PW2 and PW3 wherein dowry was paid in the form of cows, land and some cash. Although



the deceased Defendants case was that he had bought the suit parcels of land from the proceeds of his employment as an Administration Police yet the documents herein produced as Df exh 2 (a – c), and the evidence by his son DW3 were to the effect that the deceased Defendant had been employed on 4th November, 1976. Further, the evidence adduced by DW2 was to the effect that he and the deceased Defendant had bought a parcel of land measuring 621 acres at a place known as Rongai, while in a group of about 200 people, in the year 1967 with a loan given to them by Kenya Farmers' Cooperative. That after they had cleared the said loan, they had purchased another land measuring 430 acres wherein the deceased Defendant had decided to take his mother and sister there since he already had another land. That they had then purchased a third parcel of land measuring 280 acres at which time they had an additional 50 members. That the lands were then known as Boror A, B and C.

3. From the evidence of DW3, the deceased Defendant had purchased land parcel No. Kericho/Koita Burot/289 in the year 1963, and land parcel No. Kericho/Manaret/Block/14 in the year 1965, no evidence however had been laid as to where the source of income to purchase the said parcels of land had emanated from keeping in mind that the deceased Defendant was unemployed until the 4th November, 1976 after the said parcels of land had been purchased.
4. Indeed what came out clearly more so from the evidence of PW3 was that when she had visited their home after she got married she had found out that the cows given out as their bride price had already been sold wherein her mother told her that she had already purchased land. That her mother had confidence that the deceased Plaintiff and the deceased Defendant would not have an issue dividing the parcels of land between themselves.
5. Indeed, further evidence was to the effect that via a family sitting in 1976, it had been decided that Land Parcel No. Kericho/Koita Burot/289 measuring 12 acres be divided equally between the deceased Plaintiff and the deceased Defendant wherein subsequently the deceased Plaintiff had been given 6 acres of the said land while the deceased Defendant remained with 6 acres. Undisputed evidence was that both parties had utilized their share of the land for sugar cane farming. Indeed DW1 the deceased Defendant's wife had confirmed that ever since they relocated to Manaret (Sotik), she had never gone back to land parcel No. Kericho/Koita Burot/289 although she was aware that some farming was ongoing therein.
6. The evidence on record was that in 1973, the parties' mother had moved to live on land parcel No. Kamara/Mau Summit Block 4/115 (Boror "B") wherein after the meeting of 1976, the said parcel of land measuring 15 acres had been given to the deceased Plaintiff who then joined his mother thereon in 1996, and took possession of land wherein he continued to be in occupation until after the death of their mother in 2011, when the deceased Defendant lay claim to the same prompting him to file the current suit. Evidence from the deceased Defendant's wife DW1 was to the effect that she had never been to the said land and did not know how it had been purchased but all that she knew was that the deceased Defendant's mother and her daughter lived there but with the permission of the deceased Defendant.
7. Lastly in the same meeting, land Parcel No. Kericho/Manaret /14 measuring 39.6 acres had been given to the deceased Defendant who had already taken possession and occupation of the same in the year 1970 where he lived until his demise in 2017. This turn of events adds credence to the deceased Plaintiff's case that indeed these parcels of land were family land. A cognate explanation was given by the witnesses herein as to why the land was registered to the deceased Defendant and not to the parties' mother in that it was against the Kipsigis custom for women to be registered as proprietors of land.



8. I therefore do not agree with the deceased Defendant's contention that he had purchased suit parcels of land herein out of his own effort and that the same did not constitute family land. I am also not impressed with the arithmetic formula set out by the deceased Defendant in a bid to convince me otherwise. In fact the title deed to land parcel No. Kericho/Manaret/14 herein produced as Df exh 5 and the evidence by DW3 to the effect that his mother and his brothers lived on that parcel of land since the year 1965 only confirmed what the family had decided in its sitting of 1976.
9. The evidence on record is to the effect that in the year 2011, after the demise of their mother, the deceased Defendant started claiming land parcel number Kamara/Mau Summit Block 4/115 (Boror "B") where the deceased Plaintiff had been residing, demanding that he vacates therefrom, wherein he had in fact forcefully taken possession of land using the police and had even started ploughing it.
10. The question that arises herein was why he would wait for his mother to die before seeking to dispossess the deceased Plaintiff of the said parcel of land? Secondly from the year 1962 up to the first registration by the deceased Defendants to the suit lands, how did he hold the land if not as a trustee?
11. The Court of Appeal in the case of *Twalib Hatayan & Anor v Said Saggah Ahmed Al-Heidy & Others* [2015] eKLR expressed itself as follows:-

“In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts...

A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.”

143. The Supreme Court in the case of *Kiebia v M'lintari & another (Civil Case 10 of 2015)* [2018] KESC 22 (KLR) (5 October 2018) held as follows

“What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered *Land Act* (now repealed), in Section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered *Land Act*, have now been subsumed in the “customary trusts” under Section 25 (b) of the *Land Registration Act*. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land”



144. I find in the instance case that there was indeed a relationship of trust between Jennifer and her children the deceased Plaintiff and deceased Defendant herein wherein she had placed her trust in her firstborn son, the deceased Defendant to hold the land she had acquired from the dowry paid to her daughters for the benefit of the deceased Plaintiff who was young by then. The intension of Jenifer was very clear in that she had intended to create a customary trust by entrusting her eldest son the deceased Defendant herein to hold the parcels of land in trust for his brother the deceased Plaintiff. Now instead of using his position strictly as a big brother and a trustee to his younger brother, the deceased Defendant set out in a scheme to grab the property and thus unjustly enrich himself. Indeed it is in lived reality that sometimes parties such as the ones in the instant case enter into good arrangement for the benefit of the whole family wherein later, crafty relatives would want to derive unfair advantage over their own. In most cases where there had existed cordial relation in the family, older siblings who have been asked to hold property in trust of their younger ones for one reason or another will tend to deprive their siblings the property so as to unjustly enrich themselves and this is more often than not upon the demise of their parents and/or persons who conferred such trust upon them.
145. Subsequently, I find that the three suit lands being No. Kericho/Koita-Burot/289, No. Kamara/Mau Summit block 4/115 (Boror “B”) and Kericho/Manaret/14 were family land hence both the deceased Plaintiff and the deceased Defendant had overriding interests therein.
146. The family having agreed on the division of the said suit land wherein both the deceased Plaintiff and the deceased Defendant took possession and occupation of their respective portion of land where their families are living to date, it is herein declared that the customary trust initially created is now dissolved with following orders:
- i. The deceased Defendant’s registration to land parcel L.R. No. Kericho/Koita-Burot/289 shall be cancelled within 30 days wherein the suit property shall be shared equally among the deceased Defendant and the deceased Plaintiff.
 - ii. Secondly, the deceased Defendant’s registration to land parcels Kamara/Mau Summit Block 4/153 (Boror “B”) and Kamara/Mau Summit Block 4/157 (Boror “B”) which are the resultant subdivisions of No. Kamara/Mau Summit block 4/115 (Boror “B”) shall be cancelled within 30 days and registered in the name of the deceased Plaintiff.
 - iii. Therein after, there is herein issued an injunction restraining the original deceased Defendant’s estate, his workers, servants, employees and/or agents from entering, working on, transferring, leasing and/or in any way or manner whatsoever interfering with the original deceased Plaintiff’s estate’s possession and/or use of land parcel numbers Kamara/Mau Summit Block 4/153 (Boror “B”), Kamara/Mau Summit Block 4/157 (Boror “B”) as well as his portion in L.R. No. Kericho/Koita-Burot/289.
 - iv. Since this is the suit between family members there shall be no orders to cost.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 9TH DAY OF MAY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

