



**Koros (Sued as the administrator of the Estate of Elijah CA Koros) v Kiptoo & 6 others
(Environment & Land Case 34 of 2017) [2023] KEELC 20488 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20488 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 34 OF 2017**

**FO NYAGAKA, J
OCTOBER 5, 2023**

BETWEEN

**WILLIAM K KOROS (SUED AS THE ADMINISTRATOR OF THE ESTATE OF
ELIJAH CA KOROS) PLAINTIFF**

AND

**NELSON KIPTOO 1ST DEFENDANT
JONATHAN KIPKOGEI 2ND DEFENDANT
SOLOMON KIBETT KOSGEI 3RD DEFENDANT
BENARD KIBETT KOSGEI (SUED AS LEGAL PERSONAL REPRESENTATIVE
OF KIBET CHEROTICH KIMURON) 4TH DEFENDANT
WILLIAM KIPRUTO (SUED AS LEGAL PERSONAL REPRESENTATIVE OF
CHEBIATOR CHEMIOR CHEBITONG) 5TH DEFENDANT
KIPRONO KIPSEREN (SUED AS LEGAL PERSONAL REPRESENTATIVE OF
CHEREM KIPTOTICH) 6TH DEFENDANT
CHARLES BARCHIGEI (SUED AS LEGAL PERSONAL REPRESENTATIVE OF
JONATHAN KOPKORORS BARCHAGEI) 7TH DEFENDANT**

JUDGMENT

Introduction

1. When this matter was certified ready for hearing on 12/02/2020, the parties agreed to hear it concurrently with Kitale ELC Petition No. 8 of 2016. For this reason, there will be a cross reference on the evidence herein from the cited Petition where the evidence was recorded. Furthermore, the annexures therein which were finally produced in evidence will be relied on, as recorded in the proceedings at the hearing. It is important to make that clarification at the outset so as to avoid any



confusion that may ensue for want of it. Worth noting is that the two matters were heard together for purposes of evidence taking only: they were not consolidated.

2. Vide a Further Amended Plaintiff dated 30/09/2017, the Plaintiff sued the 1st, 2nd, and 3rd Defendants, who were kin members of the estates set out in the 4th, 5th, 6th and 7th Defendants, sued in their capacities as Administrators of the estates (of persons who were referred to in evidence as the “sleeping partners”) represented respectively: the sleeping partners and the father of the Plaintiff as now deceased. In support of this he produced Grants of Letters of Administration Ad Litem which were marked as D.Exhibit 12, D.Exhibit 13 and D.Exhibit 14 respectively. He prayed for:
 - a. A permanent order of injunction restraining the Defendants, their families, servants and/or agents and/or any other person(s) acting through the Defendants or claiming interest through them from trespassing on any portion of L.R. No. 11440.
 - aa. A mandatory injunction requiring the Defendants, their families, servants and/or agents and/or any other person(s) acting through the Defendants or claiming interest through them to remove themselves together with their properties from Land Parcel no. L.R. No. 11440 in default thereof they be removed with reasonable force and at their own expense.
 - b. Costs and interest thereon.
 - c. Any other appropriate relief this Honorable Court may deem fit to grant.
3. The 1st - 6th Defendants entered appearance and filed an amended joint Statement of Defence and Counterclaim dated 27/10/2017 on 30/10/2017. It was titled ‘Reply to Amended (Amended) Plaintiff by the 1st to 3rd Defendants and Written Statement of Defence by the 4th to 6th Defendants. Notably, the 1st paragraph clarifies that the document appertains to all the 1st - 6th Defendants.
4. They denied every averment contained in the Plaintiff. At paragraph 10, they reiterated that the Plaintiff holds 187 acres of the suit land in trust for them and prayed that the court determines the trust by ordering excision of their portion from the suit land. Thus, they prayed that based on a resultant trust and effluxion of time their counterclaim be allowed with costs.
5. The 7th Defendant entered appearance and filed his Statement of Defence and Counterclaim on 03/11/2017. It was dated 02/11/2017. He denied all the averments contained in the Plaintiff relied on by the Plaintiff accusing him of fraud. He prayed for the following reliefs in his Counterclaim:
 - a. A declaration be and is hereby issued that the 7th Defendant is entitled to ownership and registration of 203.82 acres comprised of the property known as L.R. No. 11440.
 - b. An order be and is hereby issued compelling the Plaintiff to transfer 203.82 acres comprised of the property known as L.R. No. 11440 to the 7th Defendant within 14 days of this decision, in default of which the Deputy Registrar of the Environment and Land Court should execute the transfer documents in place of the Plaintiff.
 - c. A permanent injunction be and is hereby issued restraining the Plaintiff by himself, his agents or servants from interfering with the 7th Defendant’s ownership and possession of 203.82 acres comprised of the property known as Land Reference No. 11440.
 - d. Costs of the suit.
 - e. Any other relief that the court may deem fit and just to grant in the circumstances.



The Plaintiff's Case

6. The Plaintiff relied on his Replying Affidavit sworn on 23/01/2017 and filed on 26/01/2017, with the annexures thereto, which were marked as WKK1 to WKK55 in Kitale ELC Petition No. 8 of 2016 together with his Supplementary Affidavit sworn on 03/04/2017 and filed in this matter on 05/04/2017. He also relied on his witness statement dated 23/02/2017 and filed on 24/02/2017 as well as his supplementary witness statement dated 12/10/2017 and filed on 16/10/2017. Additionally, he relied on two (2) statements both dated 22/01/2018 and filed on 23/01/2018 in this suit and in Kitale ELC Petition No. 8 of 2016.
7. Insofar as documentary evidence is concerned, the Plaintiff marked the following for identification, but finally produced as:
 - i. D.Exhibit 1 - 50 - List of documents dated 22/01/2018 and filed on 23/01/2018;
 - ii. D.Exhibit 51 - 100 - List of documents dated 22/01/2018 and filed on 23/01/2018. [It is notable that the said documents are a mirror reflection of the documents marked D.Exhibit .1 - 50 in that order. Therefore, and to avoid confusion and repetition, I will refer to the documents marked D.Exhibit 1 -50 solely in respect of the evidence in that regard];
 - iii. D.Exhibit 101 - 122 - Supplementary Affidavit sworn on 12/10/2017 and filed on 16/10/2017;
 - iv. D.Exhibit 123 - 148 - Replying Affidavit sworn on 23/01/2017 and filed on 26/01/2017;
 - v. D.Exhibit 149 - 151 - List of documents dated 23/02/2017.
8. The Plaintiff, William K. Koross, testified as PW1. He described himself as the Legal Representative of the Estate of Elijah C. A. Koross; the registered as the sole owner of all that parcel of land known as L.R. No. 11440 also I.R 20230 measuring five hundred and fourteen (514) acres situate at Endebess area, Kwanza, Endebess Sub-County of Trans Nzoia County. He was the sole witness for his case.
9. Perusal of the Plaintiff's unconfirmed Grant issued in Kitale HC P&A No. 117 of 2003; In the matter of the Estate of Elijah Chemoiywo Arap Koross, produced as D.Exhibit 30 which was annexure WKK1 reveals that he is amongst one of the four (4) Administrators of the estate of Elijah Koross who died on 12/10/2001 as evidenced vide a Death Certificate produced and marked as D.Exhibit 27.
10. In terms of ownership of the suit land, PW1 maintained that the property was acquired from Land Limited vide a transfer instrument registered on 16/06/1977, free from any encumbrance. He produced the title deed as D.Exhibit 25 which was annexure WKK51. He produced the Registry Index Map (RIM) showing the suit land and marked it as D.Exhibit 41. His claim as to ownership of the suit land was further premised on the pronouncements of the court sitting at Kitale in Kitale HCCC No. 89 of 1997 which declared his father as the sole owner.
11. Briefly, the Plaintiff synopsised the parties herein, their Administrators and the pleadings filed in Kitale HCCC No. 89 of 1997 (formerly Kakamega HCCC No. 43 of 1978); Elijah C. A. Koross vs. Hezekiah Kiptoo Komen. He produced the Complaint dated 22/05/1978, the Statement of Defence and Counterclaim dated 29/07/1978 and Reply to Defence and Counterclaim dated 21/08/1978 and marked them as D.Exhibit 1 (annexture WKK2), D.Exhibit 2 (annexture WKK3) and D.Exhibit 3 (annexture WKK4) respectively.
12. The Plaintiff maintained that at all material times the people whom he indicated as having teamed with his late father initially, and whom he referred in his evidence as sleeping partners, were well aware of the proceedings in Kitale HCCC No. 89 of 1997 where they were enjoined in the proceedings. He



produced the Chamber Summons Application and Affidavits in support thereof dated 06/10/1978 produced as D.Exhibit 5 (Annexure WKK5) filed by the Applicants (the so-called sleeping partners). He continued that their Application to be enjoined in the proceedings was granted as prayed on 23/10/1978 as evidenced in the proceedings in Kitale HCCC No. 89 of 1997 which he produced and marked as D.Exhibit 7 (Annexure WKK6).

13. The Plaintiff opined that the 1st Defendant (grandson to Chebiator Chemjor), the 2nd, 3rd and 4th Defendant (brothers and sons to Kibet Cherutich), the 5th Defendant (son to Chebiator Chemjor Chebitony), the 6th Defendant (son of Cheserem Kiprotich) and the 7th Defendant (son of Jonathan Kipkoross Chesagur) directly or indirectly participated in the proceedings in ventilating their claims in the said suit. He labeled them as Hezekiah Kiptoo Komen's agents and as such were affected by the eviction order which was issued in Kitale HCCC No. 89 of 1997, by which the said H. K. Komen was evicted from the suit land.
14. Further justifying participation of the "sleeping partners" in the proceedings, the Plaintiff produced a Chamber Summons Application dated 05/11/1993 and marked it as D.Exhibit 15. In it, one Cherutich Kimuron filed an Application in Kakamega HCCC No. 43 of 1978 seeking to set aside orders issuing a warrant of arrest against him.
15. The Plaintiff also annexed an Authority to Plead dated 11/08/2015, produced as D.Exhibit 45, filed in Kitale HCCC No. 89 of 1997. In it, the 4th and 7th Defendants authorized Julius Kibet Cherotich to sign, execute, plead and set his hand on any document requiring their execution.
16. In the same vein, Julius Kibet Cherutich Kimuron filed citation proceedings in Kitale HC Miscellaneous Application No. 81 of 2003; In the matter of the Estate of Elijah Chemoiywo Arap Koross. According to his Affidavit in verification of proposed citation to accept or refuse letters of administration intestate, which were produced herein as D.Exhibit 50, the deponent desired to have the Counterclaim in Kitale HCCC No. 89 of 1997 heard. He disclosed that he was the 4th Defendant in the matter. That the absence of a representative of the estate of the Plaintiff therein impeded the exercise hence the Application.
17. The Plaintiff recalled that when Kakamega HCCC No. 43 of 1978 was heard by Scriven J. on 02/04/1980, an ex parte judgment was entered in his favor against Hezekiah Kiptoo Komen. The Defendant therein was evicted from a portion of the suit land measuring sixty (60) acres and restrained from trespassing the suit land. To support this, PW1 referred to the Order dated 21/11/1980 produced and marked D.Exhibit 48 (Annexure WKK54) and warrant of eviction dated 16/03/1982 produced as D.Exhibit 49 (Annexure WKK55), and eviction order dated 20/05/2016 produced as D.Exhibit 43.
18. Thereafter, all sleeping partners, with the exception of the 7th Defendant, on 04/08/1998 gave evidence in support of the Counterclaim. That Counterclaim dated 29/07/1978 in Kitale HCCC No. 89 of 1997 was ultimately determined by Karanja J. whose judgment was produced as D.Exhibit 8 (Annexure WKK8) and the decree of 12/02/2013 produced as D.Exhibit 4 (Annexure WKK7).
19. In his evidence, he stated that on the strength of the Order issued on 02/04/1980, the sleeping partners were evicted by the court bailiff, the OCPD Wilfred Mwongera and Kamaliza Security Guards whom the Plaintiff accused of burning their houses and camping there.
20. The Plaintiff testified that all the parties involved have never co-existed on the suit land in peace. The peak of their embattlement took place in 2013 after the judgment of the court in Kitale HCCC No. 89 of 1997. He accused the five (5) sleeping partners and their assigns/personal representatives of destroying three hundred (300) acres of his land, arson and theft of his tractor registered as KXU Fiat New Holland Tractor KTCB379P, which was since recovered and cattle. He reported the matter at



Endebess Police Station as a result of which the PPO Rift Valley, one William Lipusa, managed to restore the situation to calmness.

21. PW1's further testimony was that on 01/02/2017, he was ploughing on the suit land when the 1st, 2nd and 3rd Defendants descended on him, trespassed on the portion and barred him from carrying out works. During the process, PW1 was assaulted by the said persons, occasioning him actual bodily harm. They also assaulted his driver and caused damage on his two (2) tractors. He reported the matter at Endebess Police Station whereat they were charged in Kitale Chief Magistrate's Court Criminal Case No. 551 of 2017 with the offence of assault causing actual bodily harm. The parties therein amicably resolved the dispute out of court. However, it instigated the filing of the present suit.
22. The Plaintiff maintained that upon eviction in 1980, the evictees never returned to the suit land until they were unlawfully brought back by Provincial Commissioner (PC) Hezekiah Oyugi, District Commissioner (DC) Anthony Oyeir, District Officer (DO) Oreta and Chief Kapondi. He did not specify when that happened. But to him, they were settled on a different section of the suit land. He wrote a letter dated 25/01/1985, produced as D.Exhibit 34, urging the Attorney General (AG) and Agricultural Development Corporation (ADC) to help him safeguard his interest and evict unauthorized persons from the suit land.
23. He stated further that the 1st, 2nd and 3rd Defendants had vowed never to allow the Plaintiff go about his business over the suit land. For this reason, PW1 accused the Defendants of illegally occupying and using the suit land courtesy of partisan administration in yester years. In his view, the Defendants' actions of occupying and using the suit land without his permission amounted to trespass. He particularized the acts of trespass as follows:
 - i. Entering into a portion of the Plaintiff's said parcel of land unlawfully and without any color of right and/or without the consent of the Plaintiff;
 - ii. Illegally taking possession of a portion of the Plaintiff's said parcel of land;
 - iii. Remaining on the Plaintiff's land without any color of right and/or consent of the Plaintiff.
24. By reasons set out above, the Plaintiff averred that he had been deprived of the use and enjoyment of the parcel of land. That he had suffered loss and damage including loss of mesne profits over a portion of the land.
25. In his evidence reverting back to the suit in Kitale HCCC No. 89 of 1997, PW1 stated that he applied successfully to dismiss the Counterclaim on 30/11/1994. Dissatisfied with that finding, Hezekiah Kiptoo Komen filed in the same cause a Chamber Summons Application dated 06/12/1994 seeking to reinstate the Counterclaim. That Application was prosecuted successfully.
26. Following the re-opening of the suit in Kitale HCCC No. 89 of 1997, Karanja J. delivered his judgment on 12/02/2013 which was produced as D.Exhibit 8. The judgment was entered in favor of the five (5) purchasers. They used it to obtain title in their names jointly. Through the 7th Defendant as Chairman, the sleeping partners sought to subdivide the suit land as follows: share out four hundred and eight (408) acres amongst themselves and reserve the remaining fifty (50) acres to the Plaintiff's family.
27. Dissatisfied with that decision, the Plaintiff preferred an appeal in Eldoret Civil Appeal No. 223 of 2013; Elijah C. A. Koross vs. Hezekiah Kiptoo Komen & 4 Others. In its judgment dated 06/03/2015 produced as D.Exhibit 9 (Annexure WKK9), the Court of Appeal set aside the judgment of the trial court in Kitale HCCC No. 89 of 1997. The Court of Appeal found that the 7th Defendant and the interested parties were never made parties to the proceedings. Additionally, the ex parte judgment of Scriven J. rendered the issues raised in Hezekiah Komen's Counterclaim res judicata. The effect of the



- judgment was to and did reverse the registered interests of the 4th, 5th, 6th and 7th Defendants to their detriment. For that reason, the suit land remains registered in the name of PW1's deceased father.
28. The court further went on to clarify that the suit only lay against Hezekiah Komen since the other Respondents (sleeping partners) were never formally enjoined in the proceedings and as such were not affected by the outcome.
 29. The embattlement in the form of litigious disputes befalling the parties informed PW1's conclusion that the said sleeping partners have, contrary to their statements, not occupied the suit land peacefully for twelve (12) uninterrupted years.
 30. In 1979, Land Agent one H. A. Odwor prepared a report P.Exhibit 3 forwarded to the District Commissioner Trans Nzoia vide a letter dated 18/04/1979. He was acting on the instructions of ADC. The Plaintiff lamented that during the compilation of the report, he was never interrogated yet the land had been transferred to him on 16/06/1977 as evidenced by D.Exhibit 25.
 31. According to the report marked as P.Exhibit 3, the 7th Defendant paid Kshs. 23,000.00, Hezekiah Komen paid Kshs. 10,000.00 and the 4th, 5th, and 6th Defendants each paid Kshs. 40,000.00 to the Plaintiff's father yet he held himself out as the only purchaser thus taking the other partners for a ride.
 32. The report accused the Plaintiff's father of proceeding to obtain a consent from the Land Control Board fraudulently because he failed to include all the purchasers. Instead, he declared that he was the sole purchaser of the property. The sentiments in the said report were also delineated in Hezekiah Komen's Counterclaim in Kitale HCCC No. 89 of 1997.
 33. According to the report, the five (5) purchasers were not interested in a refund of their contribution to the Plaintiff. They were intent on owning the land as arranged and agreed on earlier in April, 1979. The report acknowledged that the said purchasers did indeed contribute money in good faith and had since lived on the suit land for three (3) years as at the date of the report, with knowledge that they were the registered proprietors.
 34. For the above reason, the report recommended that a consent be obtained from the Land Control Board to include all the sleeping partners in compliance with the presidential directive. In compliance with that report, an application for consent was made before the Land Control Board by the Plaintiff and Land Limited jointly dated 25/07/1980. In its meeting held on 15/08/1980, the board issued a consent in favor of the sleeping partners together with the Plaintiff. It was dated 19/08/1980.
 35. Dissatisfied with report marked P.Exhibit 3, the Plaintiff filed Nakuru HC Misc. No. 10 of 1980; Elijah Chemoiywo Arap Koross vs. Antony Oyier & 10 Others seeking to quash the consent given on 13/03/1980. He sued the Trans Nzoia Land Control Board. The five (5) purchasers were enjoined in the suit as interested parties. It is to be noted that the report by ADC was never challenged.
 36. In his Ruling delivered on 12/01/1981 produced as D.Exhibit 6 (Annexure WKK52), Mead J. declared that the proceedings before the Respondents concerning the Application for consent dated 11/05/1979 and its subsequent issuance were a nullity because the Applicant in the dispute had not executed the Application consenting to transfer the suit land as sought. Furthermore, the Application was caught by limitation of time.
 37. The five (5) purchasers then moved the High Court sitting at Nairobi in HC Misc. App. No. 167 of 1981; Hezekiah Komen & 4 Others vs. Elijah Chemoiywo Arap Koross seeking to have the Plaintiff declared a trustee of the suit land. They further sought subdivision pro rata.



38. The court was informed that in the proceedings the Respondent had identified the suit land for purchase from a European. Since he did not have enough funds, he approached the Applicants who subsequently contributed, as testified by the 7th Defendant. That in February, 1975, upon paying the said sums, the Applicants entered on the suit land and cultivated on the land. The Respondent was employed as their manager. The others discovered the Respondent's fraudulent activities when they sought to register the suit land in their joint names.
39. In the proceedings, the court took into account the historical background of the parties including the Judgment entered by Scriven J. on 02/04/1980 in Kakamega HCCC No. 43 of 1978 and the Ruling of Mead J. in Nakuru HC Misc. No. 10 of 1980 dated 12/01/1981. The court found that since ownership had been determined to belong to the Respondent and that decision had not been appealed, then he remained the purchaser of the suit land. He thus said: "All the Applicants are saying is that they contributed to the purchase price. Maybe they did, I do not know, but it does not make them purchasers."
40. In its decision delivered on 05/10/1988, produced as D.Exhibit 26, the court dismissed the suit on account of two (2) technicalities; firstly, the Applicants had approached the court with unclean hands for failing to disclose that the parties had been in a litigious battle at the High Court in Kakamega. Secondly, the Counterclaim in Kakamega HCCC No. 43 of 1978 was yet to be determined.
41. Still intent on protecting his interests, one Hezekiah Komen filed Eldoret HCCC No. 115 of 1998; Hezekiah Kiptoo Komen vs. Elijah C. A. Koross seeking to obtain a consent. In dismissing his Application, Justice Aganyanya on 05/10/1988 produced as D.Exhibit 10 and D.Exhibit 42 (Annexure WKK53) found that the Applicant was guilty of material disclosure. He acknowledged that previous litigation had found that the Plaintiff was the lawful proprietor of the suit land. He thus urged the matter to end there.
42. In another dispute at Eldoret HCCC No. 73 of 1995; Elijah C. A. Koross vs. Hezekiah Kiptoo & 4 Others, the Plaintiff sued the five (5) sleeping partners. By order dated 12/02/1996 produced as D.Exhibit 24, interim orders were granted staying the sale of the Defendant's goods and heads of cattle attached by M/s Fema Traders or any other Auctioneers. The substantive Application was set to be heard on 26/02/1996.
43. PW1 dismissed as false the minutes indicating that his father and Land Limited were intent on selling the suit land. In addition, since the property had been charged for a period of twenty (20) years in favor of Land Limited on 16/07/1977, the land could not have been available for sale as it was encumbered. He relied on D.Exhibit 28, the transfer dated 16/06/1977.
44. On 08/02/1974, the 4th Defendant appointed the Plaintiff as his Attorney over the all that property namely Cherangany/Chebororwa/182. Under the Power of Attorney marked D.Exhibit 19, the donee was appointed the donor's attorney generally in relation to his interests over the named parcel of land and do anything as may be necessary to carry out the powers.
45. The Plaintiff produced green cards in respect to properties, namely, Cherangany/Koitugun/78, Cherangany/Koitugun/99 and Cherangany/Chebororwa/182. He produced them as D.Exhibit 20, D.Exhibit 21 and D.Exhibit 22 respectively. They belonged to 5th, 6th and 4th Defendants respectively.
46. The Plaintiff produced as D.Exhibit 38 a charge in respect to all that parcel of land namely Cherangany/Koitugun/78. The charge document dated 05/07/1974, indicated that the property was at the time charged in favor of Kenya Commercial Bank (KCB) for a principal sum of Kshs. 35,000.00. Similarly,



- there was another charge document dated 05/07/1974 in respect to parcel number, Cherangany/Koitungun/99 to KCB for a principal sum of Kshs. 35,000.00. He produced the copy as D.Exhibit 39.
47. Although the Plaintiff admitted in cross-examination that he was very young at the time of the transactions that led to the acquisition of the suit land he contended, while explaining the history on the acquisition of the suit land, that on 24/01/1975 he was issued an assignment of lease with an option to purchase. He became lessee for an annual revisable rent of Kshs.13,485.10 for a period of two (2) years in the year it was made available. Thus, by a letter of consent dated 24/01/1975 produced as D.Exhibit 18, he was assigned the lease with an option to purchase from Kaubeyon Estates Limited. For that reason, the suit land was not available for sale as at 27/08/1974.
 48. Vide a letter dated 13/11/1975 produced as D.Exhibit 133 marked as annexure WKK10, Land Limited made to the Plaintiff a proposal for purchase of the suit land. Under the terms and conditions of the offer, the property was to be purchased at a consideration in the sum of Kshs. 215,000.00.
 49. In its letter dated 18/11/1975 referred to as Annexure WKK25, Agricultural Settlement Trust, the predecessor of Land Limited forwarded the lease agreement from Kaubeyon Estates Limited to the Plaintiff. This was preceded by his application for transfer of the suit land to his name. In his letter dated 20/08/1975 marked as annexure WKK26, the Plaintiff requested Land Limited for indulgence as he sought to obtain a loan from ADC.
 50. Speaking to financing, the Plaintiff authorized the Kenya Farmers Association (KFA) to remit[] the sum of Kshs. 9,500.00 from the proceeds of his planted crops. The authority was made vide a letter dated 19/12/1975 which he produced as D.Exhibit 36 and marked as annexure WKK27.
 51. Come 28/02/1976 the Kenya Seed company enclosed a cheque in the sum of Kshs. 12,000.00 from proceeds of seed maize from their Plaintiff customer to Agricultural Settlement Trust. The Plaintiff marked the copy of the cheque as Annexure WKK28 and annexed it to the Supplementary Affidavit at page eleven (11).
 52. Thereafter on 04/11/1976, Land Limited issued an offer letter following the Plaintiff's application seeking to purchase the suit land. The proposal, marked as WKK11 and produced as D.Exhibit 134, disclosed that a deposit of Kshs. 43,000.00 be paid. Thereafter, the balance of Kshs. 172,000.00 was to be paid in forty (40) monthly installments for a period of twenty (20) years at Kshs. 8,436.00 each.
 53. Confirming transfer of the suit land in favor of the Plaintiff, Land Limited wrote a letter dated 19/05/1977 marked as WKK29-30 and produced as D.Exhibit 138, which was addressed to Archer & Wilcock Advocates. It disclosed that the property had been sold to Elijah Chemoiywo Koross . It requested the Advocates to prepare the necessary transfer documents, having enclosed the necessary documents in the letter.
 54. PW1 was emphatic that his father single handedly paid duly paid the loan between 1977 and 1993. For this presupposition, he relied on a bundle of receipts from Land Limited produced as D.Exhibit 33 and annexed to his Replying Affidavit sworn on 24/01/2017WKK12 - WKK24 and D.Exhibit 139 which was annexed as WKK31. It was a letter dated 04/04/1979 from Elijah Chemoiywo Koross requesting Kenya Seed Company Limited to remit a loan amount in the sum of Kshs. 47,049.75 to Land Limited, realized from proceeds of the cultivated seeds on the suit land.
 55. The Plaintiff similarly authorized Kenya Cooperative Creameries vide its letter dated 12/02/1987 annexed as WKK43, to pay Land Limited Kshs. 2,000.00 on every 20th day of the month. The Plaintiff further relied on a bundle of demand letters, produced as D.Exhibit 35 which were marked as WKK34-42, 44-47, directed to him from Land Limited on diverse dates between 1982 and 1990. They sought that he pays outstanding the monies owed. He further marked as DMFI-139(b) his statements



of account, dated 18/06/1981, annexed as WKK32-33 and a bundle of statements of account between 1978 and 1984 as D.Exhibit 37.

56. It was the Plaintiff's evidence that resultant to or following the full payment of the purchase price loan amount, a discharge of charge instrument which he produced as D.Exhibit 29 was issued in his favor on 08/03/1993. It had been marked as WKK50. The document was made when the consent dated 19/08/1980 was in force. Thus, he questioned the validity of the consent since at the time it was issued the suit land had been encumbered thus not available for any transaction.
57. The Plaintiff acknowledged the existence of the agreement dated 27/08/1974. He noted that on the terms of the document, the 7th Defendant was to be given eighty (80) acres of the suit land for contributing Kshs. 23,000.00. That the said sum was paid on his behalf to Kaubeyon Estates Limited to purchase the suit land. PW1 however explained further that the sum was not an agreement for sale but a loan facility.
58. The Plaintiff generally denied that the sleeping partners had an agreement with him to share the suit land. He maintained that they had no such agreement and denied that they remitted contributions towards its purchase.
59. He further acknowledged that the agreement stated that in case of any eventuality in the farm failing to be obtained, he was to return the said purchase sum. This, in his evidence, was done in 1976 vide a cheque in the sum of Kshs. 25,500.00 drawn on 03/04/1976 which he produced as D.Exhibit 40.
60. Speaking to the refund, he denied that Retired Justice Phillip Tunoi was his Counsel. This was regardless of the fact that the cheque was paid in his name. Controvertibly, he confirmed that the Retired Judge did testify as recorded in P.Exhibit 8 that he acted for him in a big parcel of land of over three thousand (3000) acres in Moiben.
61. PW1 read out the contents of Nyairo Tunoi & Company Advocates letter dated 11/05/1981 produced as D.Exhibit 32, which was addressed to his father, as follows:

“RE: Jonathan Chesagur Shs. 25,500/-

As requested by you we hereby submit to you how the above sum received by us from you for and on behalf of Mr. Chesagur was paid to him or on his behalf. We retained the sum of Kshs. 500/- being our fees.

You should also note that we have acted and have been acting for Mr. Chesagur on some other matters which should not be confused with the above refund transaction.”

62. He relied on this to demonstrate that the 7th Defendant was indeed refunded the money he paid to him. And that from the refund, Kshs. 500.00 was retained by the firm of while the sum of Kshs. 25,000.00 was forwarded to the 7th Defendant.
63. He stated that since the payment was rejected, the 7th Defendant was paid via payment vouchers, produced as DExh.31. He maintained that that the 7th Defendant was refunded, although upon a careful calculation of the total of the petty cash vouchers he relied on the sum paid from the payment vouchers totaled Kshs. 18,940.00.
64. Regarding the payment of the sum of Kshs. 6,100.00 in a voucher dated 26/01/1977 which had been annexed as WKK57(d), PW1 testified that it was in respect to a repayment for a loan amount taken by the 7th Defendant. That the monies were disbursed to the 7th Defendant's loan account, namely, AFC No. 5127135010230 (AFC refers herein to the Agricultural Finance Corporation). He referred to the



- notice of advertisement of sale by AFC which the company stated in the document that it be ignored because the sum had since been settled. The letter, addressed to the 7th Defendant's lawyers reminded the 7th Defendant that he had promised to pay the balance to AFC by 20/01/1977 who confirmed that they were yet to receive.
65. The Plaintiff observed that from the evidence of the Retired Judge testified on 30/10/2006, the 7th Defendant refused to take the refund and thus it remained in the firm's account. Further that there was no breach of the agreement and also that there was not any entered between the 7th Defendant and the Plaintiff and no consent of the Land Control Board subsisted. To him, the 7th Defendant was to be refunded Kshs. 23,000.00 plus interest of Kshs. 2,500.00 to initiate his departure from the suit land.
 66. PW1 denied that the sleeping partners owned a pickup. In that stead, it was his evidence that his father owned two (2) pickups and a lorry. He denied that his father was a manager and instead reiterated that he was the owner of the suit land. He cast doubt on the authenticity of the minutes dated 15/08/1980 since they were neither dated nor signed.
 67. Following the judgment in Eldoret Civil Appeal No. 223 of 2013, the Plaintiff obtained an eviction order dated 06/08/2015 which was produced as DExh.44. The same had the effect of evicting all the sleeping partners from the suit land. Dissatisfied with the order, the sleeping partners filed an Application in Kitale HCCC No. 89 of 1997 seeking to have them removed from the eviction order.
 68. In his ruling of 11/05/2016 produced as D.Exhibit 23, Obaga J. adopted the findings of the Court of Appeal to hold that the Applicants were not parties to the suit. Consequently, no eviction orders could lie against them. The court corrected the order by removal of the Applicants' names from order. This was evidenced by the order produced as D.Exhibit 46. As such, the order only lay against Hezekiah Kiptoo Komen who had already been evicted. This was further evidenced by the proceedings and order issued on 21/06/2016 produced as D.Exhibit 11 and D.Exhibit 16 respectively.
 69. The Plaintiff informed the Court that to the date of trial, he was in occupation of four hundred (400) acres of the suit land. His claim sought to evict the seven (7) Defendants who had remained in occupation as trespassers to that date. Ultimately, the Plaintiff prayed that his Plaint as pleaded be allowed with costs and that the Statements of Defence and Counterclaim be all dismissed with costs.
 70. On cross examination, contrary to his earlier averments, PW1 stated that as per D. Exhibit 6, the investigation report's authenticity produced as P.Exhibit 3 had never been challenged. Further cross-examination led the him to admit that the High Court sitting at Nairobi in HC Misc. App. No. 167 of 1981 determined the suit in limine on grounds of res sub judice. Furthermore, that the suit was only between Hezekiah Komen and ELIJAH KOROSS and not any other of the sleeping partners.
 71. Speaking to the letter dated 10/07/1980 by Land Limited addressed to Nyairo Tunoi & Company Advocates produced as P.Exhibit 5, PW1 admitted that at paragraph 1 (b), the transaction was done clandestinely as the sleeping partners were neither disclosed to the vendor Land Limited nor the Land Control Board. That for failing to disclose important information, the Plaintiff had misled ADC and Land Limited.
 72. On the consent dated 19/08/1980, PW1 confirmed that it was issued by the Trans Nzoia Land Control Board and addressed to Land Limited and both the Plaintiff jointly as transferors/Applicants on the one part and the five (5) purchasers as the transferees to include the Plaintiff on the other part.
 73. On further cross-examination as to the agreement marked P.Exhibit 2, PW1 took note of the fact that his father acknowledged receipt of the sum of Kshs. 23,000.00 being a consideration sum for the purchase of the suit land. That by the document the 7th Defendant was entitled to eighty (80) acres.



- It was executed by him, Plaintiff's late father, and attested by RETIRED JUSTICE PHILIP TUNOI. He further noted that the refund clause connoted that the Kshs. 23,000.00 and not Kshs. 25,500.00 was to be refunded if he failed to acquire the land.
74. In that regard, when referred to D.Exhibit 40, the cheque for the sum of Kshs. 25,500.00, PW1 stated that while it was made and executed by his father in favor of P.K. TUNOI, I did not disclose its purpose. He maintained that this was the same Advocate who drew the acknowledgment dated 27/08/1974. And further that the cheque was cleared since the money went into the Advocate's account.
 75. When referred to the letter dated 11/05/1981, he stated that the letter neither indicated the purpose of the refund nor cross referenced any payment vouchers. Again, that the letter further stated that the refund ought not to have been confused with other matters Counsel was acting for the 7th Defendant.
 76. He was cross-examined further to state that Nyairo Tunoi & Company Advocates the issuer of the payment vouchers, whose purposes were never disclosed, was not the issuer of the cheque drawn to P.K. Tunoi. That they were not issued with forwarding letters. Further cross-examination of him about the vouchers demonstrated that the serial numbers did not appear sequentially. In addition, the signatures, where the recipient signed those that he was purported to sign, were strikingly different.
 77. In his re-exam, PW1 purported to state that the signatures in the vouchers were the same as those captured in the agreement dated 27/08/1974. A cursory perusal on face value by this court, however, revealed that they were different.
 78. Explaining the deficit of Kshs. 18,940.00 not totaling Kshs. 23,000.00 as the sum refunded to the 7th Defendant, PW1 justified that a sum of Kshs. 6,100.00 was paid in the form of a voucher dated 26/01/1977 by Nyairo Tunoi & Company Advocates to the loan account of the 7th Defendant namely AFC No. 5127xxxxxxx230. This information was relayed on a letter dated 26/01/1977. However, it was clear that the letter neither indicated the suit land nor the Plaintiff.
 79. Combining the total figure, a calculation of the sum thus informed that the amount was still different from the Kshs. 25,500.00 since it totaled Kshs. 25,040.00. He then went on to state that the 7th Defendant lent Kshs. 23,000.00 that was paid back with interest totaling Kshs. 25,500.00. In other words, the amount was not the purchase price but a loan facility.
 80. When referred to D.Exhibit 7 particularly the evidence of Retired Justice Philip Tunoi, it was stated that the Plaintiff presented the Retired Judge with Kshs. 35,000.00 from the 4th, 5th, and 6th Defendants jointly, he prepared the agreement dated 27/08/1974, the 7th Defendant refused to accept the sum of Kshs. 25,000.00 which was retained in the firm account, the Counterclaim that he drew and filed in Kakamega HCCC No. 43 of 1978, produced as D.Exhibit 2, set out the facts of the dispute unambiguously.
 81. PW1 was led, in cross-examination, to the averments contained in the Counterclaim where it was stated that the five (5) sleeping partners in 1974 contributed a total of Kshs. 68,000.00 to purchase the suit land as follows: The 7th Defendant paid Kshs. 23,000.00, Hezekiah Komen paid Kshs. 10,000.00 while the remaining three (3) purchasers paid a combined total of Kshs. 35,000.00; the purchase price of the suit land was capped at Kshs. 215,000.00 to be paid to Land Limited, the vendor; the sleeping partners appointed the Plaintiff (who did not contribute any monies) manager to facilitate payment of the purchase price. But he dismissed those averments as false.
 82. PW1 testified that the payments were disbursed as follows: a deposit of Kshs. 43,000.00 with an additional sum of Kshs. 1,000.00. Thereafter, the balance of Kshs. 172,000.00 was financed by Land Limited and charged to the Plaintiff to be paid within a twenty (20) year period.



83. In his testimony, PW1 acknowledged receipt of the sum of Kshs. 23,000.00 from the 7th Defendant in 1974. He testified that he refunded Kshs. 25,500.00. For this reason, no claim lay against the Plaintiff and that the 7th Defendant's claim lay in seeking recovery of the said sum from the firm of Nyairo Tunoi & Company Advocates. He denied any agreement with the 6th Defendant.
84. PW1 admitted that none of the antecedent suits declared that the 4th, 5th, 6th and 7th Defendants were not purchasers or had no right of claim of ownership. Additionally, his Application seeking to have the Court of Appeal in Civil Appeal No. 223 of 2013 review its decision was dismissed. As such he had no decree against the 4th, 5th, 6th and 7th Defendants, adding that they had continued to remain on the suit land since 1970.
85. PW1 was referred to his Verifying Affidavit attached to his Plaint in Kitale ELC No. 34 of 2017. He stood by the averments contained in the said Affidavit to state that there had never been any previous litigious matters between the parties herein over the subject matter save for Kitale CMCR. No. 551 of 2017, the only criminal case litigated between the parties herein. He further stated that his latest Amended (Amended) Plaint dated 30/07/2017 did not include a defence to the Counterclaim.
86. When referred to paragraph eight (8) of his father's Plaint in Kakamega HCCC No. 43 of 1978, PW1 stated that only Hezekiah Komen was evicted and restrained from trespassing L.R. No. 11440 and L.R. No. 9154.
87. Finally, PW1 stated that he had never sought to evict the Defendants since 1982. He further could not affirm or deny if his father explored to negotiate the dispute out of court.

The Defendants' Case

88. The Defendants called three (3) witnesses to the stand. The 7th Defendant who is the Petitioner in Kitale ELC Petition No. 8 of 2016 and the 4th Defendant who testified as follows:

The 4th Defendant - DW3

89. Sixty-two (62) year old Bernard Kibett Kosgei the 4th Defendant, testified as DW3 that he is the 2nd and 3rd Defendant's brother and the 1st, 5th, 6th and 7th Defendants' neighbor over the suit land. He became the Legal Representative as son of his deceased father one Kibet Cherutich Kimuron upon his death in 2016.
90. The 4th Defendant adopted his undated witness statement filed on 05/10/2021. His statement was a rehash of the statements filed by the 1st Defendant and one Benjamin Seroney Nyebet. He further relied on the 2nd Defendant's Replying Affidavit sworn on 20/03/2017 and filed on that day. He then adopted the proceedings in Kitale ELC No. 89 of 1997 as his evidence.
91. His evidence was that the Defendants were not trespassers as they acquired and entered on the suit land lawfully in 1974 as testified by the 7th Defendant. He restated that his father together with the Plaintiff, the 5th, 6th, and 7th Defendants as well as Hezekiah Komen teamed up as the five (5) sleeping partners/ sleeping partners to purchase the suit land from a European namely Moti.
92. That the 7th Defendant contributed Kshs. 23,000.00, Hezekiah Komen contributed Kshs. 10,000.00 while the 4th, 5th and 6th Defendants jointly contributed Kshs. 35,000.00 which was obtained from a loan with KCB. That the said funds, totaling Kshs. 68,000.00, were given to the firm of Nyairo Tunoi & Company Advocates for onward transmission to the Plaintiff to handover to the European vendor.



93. The 4th Defendant testified that the Plaintiff was the only literate person amongst them. For that reason, they entrusted him to make the necessary arrangements to secure the suit land in their names. The total purchase price was agreed at Kshs. 215,000.00. Since a deposit of Kshs. 43,000.00 had been paid, the balance of Kshs. 172,000.00 was paid for twenty (20) years.
94. In a bid to raise the funds, the partners agreed to lease out a portion of the land to Kenya Seed Company Limited and further settle the debt from their farm produce. The lease agreement was executed by the Plaintiff who was appointed as manager to transact on their behalf. Further that the Plaintiff never contributed towards purchase of the suit land. The relationship between the sleeping partners and the Plaintiff as manager was based on mutual trust. No partnership deed had been executed by the parties. He relied on the evidence of Sammy Tanui in Kitale HCCC No. 89 of 1997 to state that no other sources of income paid out the balance of the loan due.
95. When the lease with Kenya Seed Company Limited terminated, the same was reverted back to Land Limited later Agricultural Development Corporation.
96. It was after expiry of the lease with Kenya Seed Company Limited in 1977 that the purchasers discovered that the Plaintiff had fraudulently registered the suit in his name solely. On this discovery in 1981, the purchasers sought the intervention of the Provincial Administration and the Chief who settled them on one hundred and eighty-seven (187) acres of the suit land.
97. The sleeping partners had been evicted on the strength of an eviction order issued in Kakamega HCCC No. 43 of 1978, a suit filed in Kakamega High Court by Elijah Koross against Hezekiah Komen. Although leave was granted to have the purchasers enjoined, that did not take place.
98. He testified that having established that the Plaintiff only sued Hezekiah Komen, it was the said Hezekiah Komen who was lawfully evicted in 1982 and subsequently in 2016 hence they themselves as the members of the estates of their fathers had never been evicted. The 4th Defendant continued that the Land Control Board gave consent on 05/08/1993 in favor of the Plaintiff.
99. Commenting on the proceedings in Kitale CMCR No. 551 of 2017, he stated that the proceedings were withdrawn to pave way for negotiations out of court. Ultimately, parties (including the 2nd and 3rd Defendants) were urged to live in harmony as neighbors. He recalled that the proceedings were filed on the strength Plaintiff's allegations by framing them. He reported an invasion to Endebess Police Station that led to the arrest of his brothers.
100. The 4th Defendant disputed the evidence captured in the Plaintiff's bundle where Retired Justice Philip Tunoi stated that he did not know how much loan he took. That no evidence supported the fact that they had paid Kshs. 35,000.00. Furthermore, he was never refunded the funds that he contributed.
101. When they returned back to the suit land after the unlawful eviction, the sleeping partners were relocated to a different side of the suit land measuring one hundred and eighty-seven (187) acres. That is where their descendants occupy to date. On that part they have put up permanent and semi-permanent structures erected therein. He clarified however that he currently resided in Merwet since 2010. His two (2) mothers live on the suit land. That the 7th Defendant lived in Nandi but had a homestead on the suit land.
102. When referred to the title deed, the 4th Defendant observed that the property was transferred from Land Limited to the Plaintiff on 27/05/1977 for a consideration sum of Kshs. 215,000.00. While entry eleven (11) demonstrated that a charge was in existence, the amount outstanding had not been revealed. Entry fourteen (14) was the discharge of charge entered on 12/03/1993. At that time, the Defendants



- were in occupation of the suit land. He was of the view that the suit land was registered in the name of the Plaintiff in trust for the sleeping partners.
103. The 4th Defendant maintained that the Plaintiff was obligated to give the land to the Defendants owing to their contributions. As a representative of the estate of Kibet Cherutich Kimuron, the 4th Defendant urged this court to award the estate a share worked out from his contribution of Kshs. 35,000.00 out of the purchase price of Kshs. 215,000.00 to be awarded one hundred and five (105) acres. Withal, the 4th Defendant claimed adverse possession as they had lived on the suit land for thirty-nine (39) years as farmers.
 104. Urging this Honorable Court to dismiss the Plaintiff's claim with costs and allow the Counterclaim with costs, the 4th Defendant prayed that it grants the Plaintiff one hundred (100) acres as a reward for management of the farm by him as his only contribution towards acquisition of the property since he never contributed any money between 1974 and 1993 and the balance of four hundred and fourteen acres (414) be shared out amongst the Defendants pro rata.
 105. On cross-examination DW3 recalled that his father was a witness for Hezekiah Komen in Kitale KCCC No. 89 of 1997. He denied that the Plaintiff's two (2) tractors were burnt.
 106. When cross-examined further on annexure JKK2 (a) to the 2nd Defendant's Replying Affidavit, the 4th Defendant testified that it neither ascertained the author of the map nor did establish if it was registered at the land's office. He stated that it was a temporary settlement scheme designed for the Defendants herein and that it was prepared when the sleeping partners were returned back to the farm. The survey of the suit land took place in the presence of the Plaintiff.
 107. Further examination of the 4th Defendant on JKK2 (a) he testified that according to the map, the plan was adopted from FR No. 101/44. It was a proposed subdivision of 514 acres into two (2) plots: Plot A approximately one hundred and fifty (150) acres be given for the other group while Plot B measuring three hundred and sixty-four (364) acres be given to the Plaintiff.
 108. When referred to JKK4 (a), the 4th Defendant stated that the photographs did not bear the name of the person who took them. However, he identified the 2nd Defendant and his wife who photographed standing at their house. He stated that JKK4 (b) was a photograph of the 1st Defendant and his wife while JKK4 (c) was a house under construction. Again, that the last photograph was that of the 3rd Defendant and his wife. He testified that the photographs were not accompanied by certificates.
 109. DW3 denied knowledge of any previous litigation. He was led on annexure D.Exhibit 50 in respect to HC Succession Cause No. 81 of 2003. He observed, from the Affidavit in support of the citation, that his father compelled the family of the late ELIJAH CHEMWOIYWO KOROSS to take out letters of administration of the estate.
 110. Further, adopting the 7th Defendant's evidence, the 4th Defendant highlighted that a consent dated 19/08/1980 was issued pursuant to a meeting that took place on 15/08/1980. It transferred the suit land from the Plaintiff and Land Limited on the one part to the sleeping partners and the Plaintiff on the other part. The consent had never been altered or disturbed.
 111. When he was referred to D.Exhibit 5, the 4th Defendant testified that the application dated 06/10/1978 in the form of a Chamber Summons Application sought to enjoin the sleeping partners as parties to Kakamega HCCC No. 43 of 1978. They however were never formally made parties to the proceedings. He buttressed that position by setting out the finding of the court in Eldoret Civil Appeal No. 223 of 2013. According to the judgment dated 06/03/2015 produced as P.Exhibit 11, the Court of Appeal found that the sleeping partners were never formally enjoined in the proceeding hence not parties.



112. He was further led to establish that by an application dated 27/08/2015 for review of the judgment of the Court of Appeal, the Plaintiff moved the said Court to make a finding that the sleeping partners were parties to the proceedings. That Application was dismissed vide the Court's ruling dated 05/02/2016 which he produced as P.Exhibit 12.
113. When referred to paragraph thirteen (13) of Hezekiah Komen's Statement of Defence dated 29/07/1978, he admitted that as shown, the Retired Justice Phillip Tunoi acted for the parties to the transaction. Further, that the averments therein were that the sleeping partners paid a total of Kshs. 68,000.00 towards purchase of the suit property as follows: Hezekiah Komen paid Kshs. 10,000.00, the 7th Defendant Kshs. 23,000.00 while a sum of Kshs. 35,000.00 was jointly paid by the 4th, 5th and 6th Defendants.
114. And further that having collected a total of Kshs. 68,000.00, the sum of Kshs. 43,000.00 was paid as deposit for the farm while the balance of Kshs. 15,000.00 was used to buy a farm vehicle. Upon being referred to P.Exhibit 8, he observed that the Retired Justice Phillip Tunoi acted for the Plaintiff in a transaction in Moiben of over three thousand (3000) acres.
115. Finally, when led to annexure JKK 1(b), it was highlighted that as at 18/04/1979, the sleeping partners had contributed as follows: the 4th, 5th and 6th Defendants had each contributed Kshs. 40,000.00, the 7th Defendant had contributed Kshs. 23,000.00 while Hezekiah Komen had contributed Kshs. 10,000.00. Thus, the amount collected in total was Kshs. 153,000.00.
116. In support of his evidence, the 4th Defendant annexed the investigation report dated 18/04/1979 marked as annexure JKK1, a sketch map of the suit land marked as JKK2(a), letter dated 25/11/1983 marked as JKK2(b), letter of consent dated 19/08/1980 and unsigned Minutes of the Trans Nzoia Land Control Board meeting held on 15/08/1980 marked as JKK2(c), an eviction order dated 06/08/2015 marked as JKK3(a), a ruling dated 11/05/2016 marked as JKK3(b) and photographs of the 1st Defendant and his wife and the third Defendant and his wife marked as JKK4(a)-(c).
117. In the letter dated 25/11/1983, a staff surveyor one Z.M. Mirutu wrote to the Provincial Surveyor. He referred to the boundary dispute in respect to the suit land. He also made reference to verbal instructions from the addressee asking him to determine a possible solution to the boundary subdividing the suit land into two parts: 187 acres and 327 acres.
118. After making rough measurements, the author found that 187 acres would go beyond a line of gum tress near a beacon referred to as G-40 into the main house of Mr. Koross. For this reason, a boundary was marked on the ground 20m away from the beacon G-40 along line G-41 - G-40 and the lower part defined by measuring 100m from River Kaibayan junction, that is to say, along the river. This gave 160 acres for portion A whose map was attached and 354 acres for portion B.
119. The author stated that ascertained that the compound (former white man's house), that is to say, was Mr. Koross farm as this was just a possible solution and pending appointment of the Provincial Commissioner (of the former Rift Valley Province).
120. Finally, from the Minutes of the meeting held on 15/08/1980, minute DLB/33/80 (b) stated as follows:

“North of Kitale Municipality L.R. No. 11440 - 208.1 Ha. Leasehold proposed sale and transfer by Land Limited and Elijah Koross To K.c. Kimuton, H.k. Komen, J. Chesagur, C. Cherotich, C.c. Cheptong And E.c.a. Koross. Purchase price Kshs. 215,000.00 (L.C.R 11183) - approved and consent granted.”



The 7th Defendant

121. On behalf of the 7th Defendant, DW1, Jared Omondi, Court Administrator II produced the proceedings and judgment (delivered on 12/02/2013) in Kitale HCCC No. 89 of 1997 (formerly Kakamega HCCC No. 43 of 1978); William K. Koross & Elijah C. K. Koross vs. Hezekiah Kiptoo Komen, Jonathan Kipkoross Kipsangur, Chebiatori Chemchor, Julius Kibet Cherotish & Kipserem Rotich. The proceedings were contained in two (2) volumes of original court files that were marked for identification and then produced and as P.Exhibit 1 (a) and P.Exhibit 1 (b).
122. DW2 Charles Tarioot Barchigei the 7th Defendant testified that he obtained a Grant of Letters Ad Litem on 21/10/2016. He produced it as P.Exhibit 1. It authorised him to represent the estate of the deceased. He relied on his Petition filed in Kitale ELC Petition No. 8 of 2016, the Supporting Affidavit annexed thereto sworn on 06/12/2016 together with the annexures thereto which were marked and produced as P.Exhibit 2 - P.Exhibit 13 respectively. He also relied on his Statement of Defence and Counterclaim dated 02/11/2017 and filed on 03/11/2017, witness statement dated 24/02/2002 produced as P.Exhibit 14, Affidavit of Philip Kiptoo Tunoi sworn on 23/05/2018 and filed on that day, as well as a list and bundle of documents dated 24/02/2020 and filed on 26/02/2020 which were marked for identification and then produced as P.Exhibit 15 - P.Exhibit 27 in this matter.
123. On examination of the Exhibits relied on by the 7th Defendant, this court observes that the documents marked P.Exhibit 1 through to P.Exhibit 14 are a mirror reflection of the documents marked P.Exhibit 15 through to P.Exhibit 27 in that order. Thus, to avoid confusion and repetition, I will make references to the documents marked P.Exhibit 1 through to P.Exhibit 14.
124. He testified further that desirous of purchasing the suit land but unable to raise the funds, the Plaintiff approached the 4th, 5th, 6th and 7th Defendants (the five (5) purchasers also interchangeably referred to as the five (5) sleeping partners) to raise funds to purchase the entire suit land.
125. According to DW2, his father Jonathan Kipkoross Chesagur on 27/08/1974 entered into a sale agreement with one Elijah Chemoiywo Koross (now deceased) for the purchase all that parcel of land namely Kaubeyon Estates, L.R. No. 11440, measuring five hundred and fourteen (514) acres. The agreement was produced as P.Exhibit 2. The other partners entered into a verbal agreement with him. As such, they lay no claim in all that parcel of land namely L.R No. 9154. It is not in dispute that the said Elijah C. Koross was the father to the Plaintiff.
126. The agreement was drawn by Retired Justice Philip Tunoi in the nature and style of the firm of Nyairo, Tunoi & Company Advocates. The 7th Defendant was of the view that since the sums were paid, this refund clause was superfluous and overtaken by events. The agreement marked P.Exhibit 2 read as follows:

“I, Elijah C Koross, do hereby acknowledge receipt of the sum of Kshs. 23,000.00 given by Jonathan Kipkoros Arap Chesagur which sum has been paid on my behalf to Kabyeton Estate Limited for the purchase of the said farm L.R. No. 11440.

In exchange thereof, I give to the said Jonathan Kipkoros Arap Chesagur 80 (eighty acres) acres on the said farm after the purchase of it and he will free use and occupation of the said 80 acres.

In case of any eventuality in the farm failing to be obtained by me I bind myself to return the said amount of Kshs. 23,000.00.”



127. He stated further that the said property, a government lease, was owned by George Pitman Mott. Explaining the historical acquisition of the land, he testified that Land Limited, a subsidiary of the Agricultural Development Corporation (ADC), was preceded in ownership of the suit land by the Agricultural Settlement Trust which held the land on a government lease.
128. His further testimony was agreed that the consideration sum stood at Kshs.215,000.00 paid as follows: a deposit sum to the tune of Kshs. 43,000.00 was paid to the owner while the balance of Kshs. 172,000.00 was paid for over twenty (20) years in forty (40) equal half yearly installments of Kshs. 8,436.00 each.
129. Upon payment of the purchase price, the 7th Defendant and the sleeping partners occupied forty (40) acres of the suit land where they began farming activities and milk production supplied to KIC from animals left by the settler. The 7th Defendant went on and stated that out of these activities, including instructing the Plaintiff to lease out a portion of the suit land to Kenya Seed Company Limited, the parties managed to offset the entire purchase price. Withal, some of the purchasers repaid the loan paid using personal means.
130. In terms of their contributions, the 7th Defendant remitted a sum of Kshs. 23,000.00 (accounting for 39.7% of the suit property), Hezekiah Komen paid Kshs. 10,000.00 while the 4th, 5th and 6th Defendants jointly paid Kshs. 35,000.00 obtained from a charge instrument registered in favor of KCB of the 6th Defendant's parcel of land. He noted that this was the 6th Defendant's evidence in Kitale HCCC No. 89 of 1997.
131. In total thus, a sum of Kshs. 68,000.00 was given to Elijah Chemoiywo Koross for onward transmission to Land Limited. It was agreed that based on the above contributions, the entire suit land would ultimately be distributed on a pro rata basis upon completion of the purchase price.
132. Since the sleeping partners had contributed a total of Kshs. 68,000.00, once Kshs. 43,000.00 had been submitted as deposit towards the principle sum, the balance of Kshs. 15,000.00 was used to purchase a green Toyota pickup, registration number KSP 144. That this vehicle was later converted for personal use by the Plaintiff.
133. The 7th Defendant's evidence was that throughout, the Plaintiff never financially contributed towards the purchase of the suit property. He was however retained as their manager to facilitate purchase of the suit property.
134. Intent on registering the suit land in their favor, the 4th, 5th, 6th and 7th Defendants would later discover that the Plaintiff clandestinely and fraudulently transferred the suit land in his own name to the exclusion of the sleeping partners. In turn, the sleeping partners lodged a complaint with ADC.
135. Vide a forwarding letter dated 18/04/1979, one H.A. Oduor, land agent gave to Land Limited a report about the complaint. The letter referred to a meeting of the Land Control Board held on 11/04/1979. In pursuance of that meeting, the said land agent investigated claims for consideration of the Land Control Board. This in turn would enable the Claimants register the land in accordance with Presidential Directive. The letter and report produced as P.Exhibit 3 had the following salient features, relied on as factual by DW2:
 - I. The Complainants outlined that they had purchased the suit land and had since farmed on it under the chairmanship of the Plaintiff. He later filed a suit for trespass against one of them. This prompted the Complainants to conduct a search at the Land's Registry where they discovered that the Plaintiff was the sole chargee to the title charged to the favor of Land Limited.



- II. That the 4th, 5th and 6th Defendants charged the 6th Defendant's parcel of land to KCB where they managed to raise Kshs. 35,000.00. Thereafter, they occupied the farm, harvested wheat and sold the produce to KFA between 1975 and 1976. So that cumulatively by 1976, they worked out that they had each contributed Kshs. 40,000.00 raising a total sum of Kshs. 120,000.00.
 - III. Mr. Tunoi Advocate witnessed the Plaintiff receive a combined total of Kshs. 10,000.00 from Hezekiah Komen paid on 05/07/1974, 20/07/1974 and 22/07/1974 in the sum of Kshs. 2,700.00, Kshs. 5,000.00 and Kshs. 2,300.00 respectively. Similarly, Mr. Tunoi Advocate witnessed the Plaintiff receive a sum of Kshs. 23,000.00 from the 7th Defendant on 27/08/1974. An acknowledgement was drawn to this effect. It was agreed that the money was in respect of eighty (80) acres of the suit land.
 - IV. The Complainants had contributed a total of Kshs. 153,000.00. That they had no interest in obtaining a refund but instead sought to acquire ownership of the suit land by registration of proprietary interest in their favor.
 - V. Historically, the suit land was the property of Agricultural Settlement Trust with Land Limited later taking over. It was leased to Mr. G. W. Mott. The Plaintiff approached Mr. Mott on assignment of lease to obtain the property. On 19/02/1975, negotiations succeeded to wit the T.Z Land Control Board consented to transfer of the suit land in his name.
 - VI. The Plaintiff subsequently obtained a letter of offer on 04/11/1976 with an option to purchase. The consideration sum was set at Kshs. 215,000.00 where a deposit of Kshs. 43,000.00 (20%) would be paid and the balance of the loan be paid for over twenty (20) years.
 - VII. The Plaintiff accepted the terms of agreement in his own name and to the exclusion of the sleeping partners.
 - VIII. The author of the report became suspicious that fishy activities circumnavigated when he received a letter dated 09/05/1977 requesting for execution and registration of documents in respect to the suit land.
 - IX. The conclusion of the report was that the sleeping partners had been taken for a ride by the Plaintiff. That the sleeping partners had contributed money and lived on the farm in good faith in the knowledge that they were registered proprietors of the suit land. The report accused the Plaintiff, as the most enlightened person, of using the former Estates Officer of Land Limited to accomplish his mission.
 - X. He thus recommended that a consent from the Land Control Board be obtained to include the name of the sleeping partners in compliance with the Presidential Directive. Secondly, that Land Limited does approve their names on the strength of the findings of the report. Finally, handover the consent and approval by Land Limited to the sleeping partners (Complainants) to register their names in the title deed.
136. In light of the above, the 7th Defendant accused the Land Control Board of granting consent to transfer the suit property to the Plaintiff contrary to his right to fair administrative action as envisioned by Article 47 of *the Constitution*.
 137. By letter dated 10/07/1980, produced as P.Exhibit 5, written to the firm of Nyairo Tunoi & Company Advocates, the Land Limited through their estate manager H. A. ODUOR informed the firm of



- advocates that the Plaintiff deliberately withheld material information when it was approached and were thus misled.
138. The Land Control Board acceded to correcting the anomaly when it sat on 13/06/1979, 11/07/1979, 14/02/1980 and 13/03/1980 to consider an Application for consent dated 11/05/1979 presented before them. In its meetings, considerations were taken that the sleeping partners had demonstrated that they had placed monetary contributions towards purchase of the suit land.
 139. In that regard, the letter advised that the draft transfer drawn by Gautama & Kibuchi Advocates was at a variance with the letter of consent. They acknowledged that the Plaintiff did not want to admit the five (5) sleeping partners. Furthermore, he would have frustrated efforts to have their interests secured by not signing the application forms. It was their recommendation that a rectification of title be submitted to the relevant authority so that the sleeping partners be included as proprietors of the title together with the Plaintiff.
 140. Following the findings of the report captured above herein, by meeting held on 15/08/1980 by the Land Control Board, a consent dated 19/08/1980 was obtained for transfer of the suit land in favor of the sleeping partners and the Plaintiff jointly.
 141. All the while, the Plaintiff filed a Plaint dated 22/05/1978 being for Kakamega HCCC No. 43 of 1978 (later Kitale HCCC No. 89 of 1997, who proceedings were produced as P. Exhibit 6. In it the Plaintiff sued Hezekiah Komen accusing him of trespassing onto the suit land. He sought eviction orders against him.
 142. In response, the said Hezekiah Komen filed a Statement of Defence and Counterclaim dated 22/05/1978 [P.Exhibit 7] seeking to inter alia rectify the register so that the five (5) sleeping partners be registered as the proprietors of the suit land. He accused the Plaintiff of obtaining title by means of fraud. The sleeping partners, although not sued as Defendants, were listed as witnesses on behalf of Hezekiah Komen.
 143. The Plaintiff filed a Reply to Defence and Defence to Counterclaim dated 21/08/1978. It was produced and marked P.Exhibit 8. The proceedings in the suit was also produced and marked for identification as P.Exhibit 9.
 144. In the midst of all this, DW2 recalled that the consent given on 13/03/1980 was quashed by the Court in Nakuru HC Misc. No. 10 of 1980, being, Elijah Chemoiywo Arap Koross vs. Antony Oyier & 10 Others. The decision was produced as D.Exhibit 6. In his Ruling dated 12/01/1981, Mead J. declared that the proceedings before the Respondents concerning an Application for consent dated 11/05/1979 and its subsequent issuance were a nullity because the Applicant in the dispute had not executed the Application consenting to transfer the suit land as sought. Furthermore, the Application was caught by limitation of time.
 145. The matter in Kakamega HCCC No. 43 of 1978 proceeded for hearing ex parte on 02/04/1980 before Scriven J. The Plaintiff was the sole witness. In its judgment dated 02/04/1980, the court ordered that the Defendant Hezekiah Komen be evicted and was furthermore restrained from gaining access to the suit land.
 146. The Plaintiff on 08/03/1993 obtained a discharge of charge, produced herein as P.Exhibit 4, from Land Limited. For these reasons, the 7th Defendant accused the Plaintiff of fraudulently obtaining title to the exclusion of his father and the other sleeping partners. That the same was contrary to the initial agreement entered by the parties herein.



147. Thereafter, by Application dated 31/10/1994, the Plaintiff applied to have the Counterclaim dismissed. The same was dismissed on 30/11/1994. Dissatisfied with the decision, Hezekiah Komen filed an Application dated 06/12/1994 seeking to reverse those orders. The Application was allowed, paving way for hearing of the Counterclaim that took place on 25/02/1998.
148. In the judgment delivered on 12/02/2013, produced as P.Exhibit 10, Karanja J. found that the suit land ought to have been registered in the joint names of the five (5) sleeping partners, as follows:
- “All in all, judgment is entered for the Defendants against the Plaintiff as prayed in the Counterclaim to the extent that the Plaintiff is not entitled to the sole registrable interest in the suit land (prayer (a)) and that he (sic) appropriate register be rectified to have the suit land registered in the names of the Plaintiff and the five Defendants and/or their Personal Legal Representatives (prayer (a)). Thereafter, the parties shall at their own work out modalities aimed at sharing and or distributing among themselves the entire portion of the land.”
149. The Court further found that the consents given on 13/03/1980 and 09/03/1988 were invalidated by the Nakuru High Court and Eldoret High Court respectively. The court noted that the 2nd consent, given on 19/08/1980, was never invalidated and was most crucial in establishing on a balance of probabilities that the five (5) purchasers had a right to claim the suit land.
150. Following successful judgment, on 09/07/2014 the five (5) purchasers caused the suit land to be registered in their names as captured in entry No. (15) on the title produced as D.Exhibit 25.
151. Dissatisfied with the findings of the trial court, the Plaintiff filed Eldoret Civil Appeal No. 223 of 2014 by lodging a Memorandum of Appeal, produced herein as P.Exhibit 11. In its judgment delivered on 06/03/2016 in the appeal, a copy of which was produced as P.Exhibit 12, the Court of Appeal found that the 4th, 5th, 6th and 7th Defendants were never made parties to the proceedings. Additionally, the ex parte judgment of Scriven J. rendered the issues raised in Hezekiah Komen’s Counterclaim res judicata. For these reasons, the decision of the trial court was reversed.
152. The 7th Defendant contended that when examining the Judgment of the Court of Appeal in Eldoret Civil Appeal No. 223 of 2014, the same did not determine his rights.
153. Aggrieved by that finding, the Plaintiff challenged the decision of the Court to the extent that the interested parties were never enjoined in the proceedings at the trial court. His Application dated 27/08/2015 was dismissed on 05/02/2016 with costs. In its Ruling marked P.Exhibit 13, the Court held:
- “Whether or not the third-party respondents were parties to the suit is a matter of fact, and not a matter for conjecture. For the court to have considered the status of the third-party respondents in its judgment and to have arrived at the conclusion that they were not parties to the suit is a substantive determination, and not one that could by any stretch of imagination fall within the definition of an error or accidental slip as envisioned by rule 35 of this court’s Rules ... This court having rendered a substantive decision on the status of the third-party respondents is for all intents and purposed functus officio...”
154. It is in light of the above that the 7th Defendant justified his Statement of Defence and Counterclaim as never having been heard and determined before any trial court. And that for these reasons, it was proper before this court for hearing and determination on merits. Following the pronouncement of the Court of Appeal, entry No. (6) in the title was entered on 04/07/2017.



155. Speaking to the eviction, the 7th Defendant recalled that in 1982, all the five (5) sleeping partners were evicted and their houses torched. It took the intervention of Provincial Administrator namely PC Hezekiah Oyugi and DC MR. Oyier to restore them back to the land. This evidence was captured in proceedings marked P.Exhibit 9.
156. When referred to D. Exhibit 43 and D. Exhibit 44, DW2 testified that the two (2) eviction orders were different. The former sought to evict Hezekiah Komen alone while the latter sought to evict all the five (5) sleeping partners.
157. DW2 was referred by learned counsel to D.Exhibit 32 which was a letter dated 11/05/1981. The same was authored by Nyairo Tunoi and Company Advocates and addressed to Elijah Chemoiywo Koross . It read as follows:
- “RE: Jonathan Chesagur Shs. 25,500/-
- As requested by you we hereby submit to you how the above sum received by us from you for and on behalf of Mr. Chesagur was paid to him and/or on his behalf. We retained the sum of Kshs.500/= being our fees.
- You should also note that we have acted and have been acting for Mr. Chesagur on some other matters which should not be confused with the above refund transaction.”
158. On it, he denied that his father received the said funds and stated that if at all that was the case, then he ought to have been refunded a sum of Kshs. 23,000.00 and not Kshs. 25,500.00. Withal, he disputed the letter as having been received by his father since it bore the address P.O. Box 100 Eldoret that did not belong to his father as P.O. Box 684 Eldoret.
159. DW2 stated that in 2016, by the time of filing his Petition in Kitale ELC Petition No. 8 of 2016, he had lived on the farm for forty-two (42) years. He testified that all sleeping partners were illiterate. While he spent considerable time with his father particularly during the transactions herein, he met the Plaintiff only once. That he filed his present Petition in 2016 because of the ongoing battle at the Court of Appeal in Eldoret Civil Appeal No. 223 of 2013 and that in its decision, the court remarked that the other Defendants were not enjoined in the suit. It is for this reason, coupled with the fact that an eviction process was imminent he filed his Statement of Defence and Counterclaim.
160. The 7th Defendant’s claim was premised on the agreement dated 27/08/1974, coupled with allegations of fraudulent activities that occurred after the agreement. In light of the above evidence, the 7th Defendant urged this court to award the estate two hundred and three (203) acres.
161. He continued that presently, all five (5) purchasers and Elijah Chemoiywo Koross ’s kin remained in occupation of the suit property measuring five hundred and thirty-five (535) acres. That presently, he stayed on fifty (50) acres, the 4th Defendant’s estate occupied thirty-five (35) acres, the 5th Defendant’s estate occupied an unknown acreage while the 6th Defendant’s estate occupied forty to fifty (40-50) acres of the suit land. The 7th Defendant prayed that the Plaintiff’s suit be dismissed with costs and that his Counterclaim be allowed with costs.
162. When cross examined, DW2 accused the Plaintiff’s late father of failing to remit the sum of Kshs. 68,000.00 collected by the five (5) purchasers to the vendor company.
163. He further could not confirm with certainty that the Plaintiff was a manager of the company. He added that he was contracted to represent the interest of the five (5) sleeping partners but did not adduce any



partnership deed to this effect. He however stated that he paid himself as manager out of the proceeds of the farm.

164. While reading P.Exhibit 2, the 7th Defendant was alive to the proviso, similarly confirmed by Counsel for the parties Retired Justice Philip Tunoi. In his evidence captured in the proceedings marked D.Exhibit 11 and P.Exhibit 8, the Retired Judge testified that if the Plaintiff did not give the eighty (80) acres, there was a refund option to the tune of Kshs. 23,000.00. Further, that Jonathan Chesagur rejected the refund. Thus, the money remained was never refunded. It was intended to be paid via cheque dated 03/04/1976 that bore no name of the drawer but to be paid to P. K. Tunoi.
165. DW2 was further referred to D.Exhibit 26, a Ruling in respect to Nairobi High Court Misc. Civil Case No. 167 of 1981, being, Hezekiah Komen & 4 Others vs. Elijah Chemoiywo Arap Koross. In the matter, the sleeping partners sued the Plaintiff seeking inter alia that the Plaintiff be declared a trustee of the suit land to the extent of each Applicants' contribution to the purchase of land and that the suit land be subdivided and each Applicant be allocated his portion.
166. Again, the witness went on further to inform the court in the matter that the Respondent had identified the suit land for purchase from a European. Since he did not have enough funds, he approached the Applicants who subsequently contributed as set out in paragraph eleven (11) of this Judgment. That in February, 1975, upon paying the said sums, the Applicants entered the suit land and cultivated on the land. The Respondent was employed as the manager. That the partners discovered the Respondent's fraudulent activities when they sought to register the suit land in their joint names.
167. The court took into account the historical background of the parties including the judgment entered by Scriven J. on 02/04/1980 in Kakamega HCCC No. 43 of 1978 and the Ruling of Mead J. in Nakuru HC Misc. No. 10 of 1980 dated 12/01/1981. The court found that since ownership had been determined to belong to the Respondent and that decision had not been appealed, then he remained the purchaser of the suit land. The judge thus said therein:
- “All the Applicants are saying is that they contributed to the purchase price. Maybe they did, I do not know, but it does not make them purchasers.”
168. The suit was dismissed for two (2) reasons; firstly, the Applicant had approached the court with unclean hands for failing to disclose that the parties had been in a litigious battle at the High Court in Kakamega. Secondly, the Counterclaim in Kakamega HCCC No. 43 of 1978 was yet to be determined. For these reasons, the court dismissed the Originating Summons on technical grounds.
169. Contrary to his earlier evidence, DW2 stated on cross-examination that each of the 4th, 5th and 6th Defendants contributed Kshs. 40,000.00 and not Kshs. 35,000.00 jointly. DW2 was emphatic that the sum of Kshs. 153,000.00 was paid by the five (5) sleeping partners from the farm produce.
170. DW2 lamented that the parties herein had been in a long unending protracted legal battle of a criminal nature. He remembered that in 2014, the Plaintiff had caused him to be incarcerated for using the wrong road. Similarly, the sons of the remaining purchasers had slept behind bars at the instance of the Plaintiff.
171. DW2 acknowledged the efforts made by Hezekiah Komen in safeguarding their interests. He was appointed associate manager of the farm. He was also authorized by the sleeping partners to file a counterclaim in Kitale HCCC No. 89 of 1997.
172. DW2 confirmed that the following vouchers D.Exhibit 31 were drawn by the firm of Nyairo Tunoi & Company Advocates and received by and in favor of his father on diverse dates as follows:



- i. Voucher No. 402 dated 22/1/1976 for Kshs. 1,000.00;
 - ii. Voucher No. 29 dated 07/05/1976 for Kshs. 2,000.00;
 - iii. Voucher No. 431 dated 26/8/1976 for Kshs. 1,100.00;
 - iv. Voucher No. 381 dated 25/10/1976 for Kshs. 300.00;
 - v. Voucher No. 274 dated 21/02/1977 for Kshs. 200.00;
 - vi. Voucher No. 223 dated 03/05/1977 for Kshs.14,300.00 by cheque no. A3XXX87.
173. DW2 maintained that the above vouchers totaling Kshs. 18,900.00 were not in respect to the refund money as stated in the agreement.
174. Disputing that the cheque dated 03/04/1976 settled the payment vouchers, the 7th Defendant justified that the first voucher was dated 22/01/1976 yet the cheque was drawn on 03/04/1976. He further stated that the payment vouchers were not proof of actual payment. Further cross-examination of the 7th Defendant sought to establish that the five (5) purchasers/sleeping partners were not proprietors of the suit land as follows:
- i. D.Exhibit 68, a Letter of consent dated 24/11/1973. By it the Land Control Board approved a transfer of lease from Land Limited to Elijah Chemoiywo Koross ;
 - ii. D.Exhibit 107 - statements of account of Elijah Chemoiywo Koross for the period 1978, 1983 and 1984 as debtor from Land Limited, a wholly owned subsidiary of ADC);
 - iii. D.Exhibit 131 - offer letter dated 13/11/1975 from Land Limited to Elijah Chemoiywo Koross on purchase of the property at Kshs. 215,000.00;
 - iv. D.Exhibit 132, a further offer letter dated 04/11/1976 disclosing the terms and conditions of the parties as follows: a deposit of Kshs. 43,000.00 with the balance of Kshs. 172,000.00 being paid in forty (40) monthly installments for a period of twenty (20) years at Kshs. 8,436.00 each.
 - v. D.Exhibit 138, a letter dated 19/05/1977 from Land Limited to Archer & Wilcock Advocates. It disclosed that the property had been sold to Elijah Chemoiywo Koross in the terms set out in D.Exhibit 132. It was seeking the Advocates to prepare the necessary transfer documents having enclosed the necessary documents in the letter;
 - vi. D.Exhibit 139, a letter dated 04/04/1979 from Elijah Chemoiywo Koross requesting Kenya Seed Company Limited to remit a loan amount in the sum of Kshs. 47,049.75 to Land Limited, the vendor;
 - vii. DMFI.139(b), a statement of account of Elijah Chemoiywo Koross from Land Limited dated 18/06/1981. The amount outstanding then was Kshs. 88,949.05;
 - viii. D.Exhibit 140, a bundle of demand letters from Land Limited to Elijah Chemoiywo Koross between 1982 and 1990;
 - ix. D.Exhibit 141, a discharge instrument dated 08/03/1993 in the name of Elijah Chemoiywo Koross ;
 - x. D.Exhibit 144, a Ruling dated 05/10/1988 in respect to Eldoret HCC 115/1988 (OS); Hezekiah Kiptoo Komen vs. Elijah Chemoiywo Arap Koross. In dismissing the Application, Aganyanya J. discovered that the Applicant had lost in Kakamega HCCC No. 43 of 1978 and Nakuru HC Misc. No. 10 of 1980; facts that had not been disclosed to the court. He was thus



guilty of material non-disclosure. The Judge thus found that it was unlawful to obtain the consent dated 09/03/1988. He acknowledged that previous litigation found that the suit land belonged to the Respondent and that the same should end there.

175. Explaining why the 7th Defendant's estate was entitled to two hundred and three (203) acres and not eighty (80) acres as captured in the agreement dated 27/08/1974, the 7th Defendant stated that after remitting the sum of Kshs. 43,000.00, Land Limited gave them a loan facility in the sum of Kshs.172,000.00 payable in forty (40) instalments of Kshs. 8,436.00 each. While the loan facility was not verifiable by way of production of a document to that effect, DW2 was adamant that the same was paid on a pro rata basis thus entitling the five (5) sleeping partners to portions of the suit property depending on their contribution.
176. DW2 was referred to the impugned title deed, produced as D.Exhibit 25, in respect to the suit land. At entry No. (7), it was revealed that the land was transferred to Elijah Chemoiywo Koross on 19/02/1975 for Kshs. 41,120.00. Entry No. (8) recorded the transfer to Land Limited on 15/06/1976 for Kshs. 207,463.25. Entry No. (9) was a surrender of lease as captured in entries No. (5) and No. (7) dated 16/6/1997. Entry No. (10) showed a transfer to Elijah Chemoiywo Koross for Kshs. 215,000.00 on 16/6/1977. Finally, entry No. (12) was a caveat by Hezekiah Komen registered on 24/05/1978 on ground that he had purchaser's interests.

Submissions

177. At the close of evidence, the parties summed up and argued their respective cases written submissions. They filed elaborate written submissions urging this court to enter judgment in their favor. The Plaintiff's submissions dated 18/10/2022 were filed on 19/10/2022. The 1st - 6th Defendant's submissions dated 14/12/2022 were filed on 15/01/2023 while 7th Defendant's submissions dated 05/12/2022 were filed on 06/12/2022.

Analysis and Determination

178. I have considered the pleadings and examined the evidence, both oral and documentary. I have also analyzed the extensive and elaborate submissions presented by Counsel herein.
179. It is not in dispute that the suit parcel of land namely L.R. No. 11440 also I.R 20230 measuring five hundred and fourteen (514) acres situate at Endebess area, Kwanza Endebess Sub-County Trans Nzoia County remains registered in the name of ELIJAH C. A. KOROSS, the deceased PW1's father. The parties herein had however laid claim as to its ownership out of which sought that they be declared owners from a portion of the estate. Contrary to the claims, the Plaintiff prayed that the suit land does remain intact in his name.
180. Having analyzed the pleadings and the evidence in line with the law, this court postulates that the following issues fall for determination and shall be analyzed sequentially:

i. Whether the suit is Res Judicata

181. The Plaintiff claimed that the Defendants could not claim against him since the issues raised herein had been heard and determined before the several fora at the High Court. This included Kitale HCCC No. 89 of 1997, formerly Kakamega HCCC No. 43 of 1978. According to the Plaintiff, the sleeping partners, represented by their estates, were well aware of the proceedings in Kitale HCCC No. 89 of 1997 having been enjoined on 23/10/1978. The Plaintiff further opined that the 4th, 5th, 6th and 7th Defendants were agents of Hezekiah Kiptoo Komen who was by order of the court, evicted from the suit premises.



182. Further justifying participation of the sleeping partners in the proceedings, the Plaintiff produced in evidence one Cherutich Kimuron's Chamber Summons Application dated 05/11/1993 in Kakamega HCCC No. 43 of 1978 seeking to set aside orders issuing a warrant of arrest against him. The Plaintiff also annexed an Authority to Plead dated 11/08/2015 filed in Kitale HCCC No. 89 of 1997. In it, the 4th and 7th Defendants authorized Julius Kibet Cherotich to sign, execute, plead and set his hand on any document requiring their execution.
183. In the same vein, Julius Kibet Cherutich Kimuron filed citation proceedings in Kitale HC Miscellaneous Application No. 81 of 2003, being, In the matter of the Estate of Elijah Chemoiywo Arap Koross. According to his Affidavit in verification of proposed citation to accept or refuse letters of administration intestate, the deponent desired to have the Counterclaim in Kitale HCCC No. 89 of 1997 heard. He disclosed that he was the 4th Defendant in the matter. That the absence of a representative of the estate of the Plaintiff therein impeded the exercise hence the Application.
184. The Plaintiff similarly relied on the disputes in Nakuru HC Misc. No. 10 of 1980; Elijah Chemoiywo Arap Koross vs. Antony Oyier & 10 Others, Nairobi HC Misc. App. No. 167 of 1981; Hezekiah Komen & 4 Others vs. Elijah Chemoiywo Arap Koross and Eldoret HCCC No. 73 of 1995; Elijah C. A. Koross vs. Hezekiah Kiptoo & 4 others to contend that since the sleeping partners were parties to the suit then, they couldn't claim ownership in the present dispute.
185. The substantive law on res judicata is to be found in Section 7 of the Civil Procedure Act. It provides that the following conjunctive elements that must all be proved for the doctrine to apply:
- a. The suit or issue was directly and substantially the same in a former suit;
 - b. The issue was between the same parties;
 - c. The same parties are litigating under the same title;
 - d. The suit or issue was heard in a court competent to try such subsequent suit or the suit and;
 - e. Such issue has been subsequently raised, and has been heard and finally decided by such court".
186. The Plaintiff raised several facts to support his argument that the issues in the present suit are res judicata. I shall dissect each and every decision cited and analyze them individually in arriving at a conclusion as to whether the Defendants claims of ownership are res judicata.
187. Commencing with Kitale HCCC No. 89 of 1997 (formerly Kakamega HCCC No. 43 of 1978), the Plaintiff argued that since the 4th, 5th, 6th and 7th Defendants were successfully enjoined in the suit on 23/10/1978, they substantially participated in the proceedings giving rise to the Judgment of the Court delivered on 12/02/2013.
188. That argument is in my view a red herring since when the suit was appealed in Eldoret Civil Appeal No. 223 of 2013; Elijah C. A. Koross vs. Hezekiah Kiptoo Komen & 4 Others, the Court of Appeal found that the 4th, 5th, 6th and 7th Defendants were never parties to the suit and consequently, no orders could lie against them.
189. As a matter of fact, when the Plaintiff elected to review that holding by Application dated 27/08/2015, the Court of Appeal in its Ruling delivered on 05/02/2016, categorically stated that the status of the third-party Respondents as not parties to the suit was a substantive determination and not a matter for conjecture. For that reason, the court upheld that they were not parties to the suit. The court took into account that no amendment to pleadings took place. Furthermore, the said Defendants never filed any



pleadings. For these reasons, I find no proof of the element of the doctrine in regard to Kitale HCCC No. 89 of 1997.

190. This Court cannot depart from the reasoned finding of the Court of Appeal regarding the fact that the respective parties herein were never joined as parties to the suit. Thus, it is this Court's finding that 4th, 5th, 6th and 7th Defendants were not parties in Kitale HCCC No. 89 of 1997. And further to that, this means that even if they gave Authority to Plead to one H. Komen, the Defendant in that case, the authority was neither here nor there. Such authority could only be given by parties in the suit: the named people were not. This is because the tenet and import of the provisions of the Civil Procedure Rules regarding such authority are clear. In regard to filing of Plaintiffs which is the aspect specifically provided for about such authority, Order 4 Rule 1(3) of the Civil Procedure Rules stipulates that "Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others." Order 4 Rule 1(5) then provides that the same applies mutatis mutandis to Counterclaims.
191. In Nakuru HC Misc. No. 10 of 1980; Elijah Chemoiywo Arap Koross vs. Antony Oyier & 10 Others, the Plaintiff sought to quash the consent given on 13/03/1980. He sued the Trans Nzoia Land Control Board and enjoined the 4th, 5th, 6th and 7th Defendants as interested parties. It is my finding that the court therein was concerned with whether the decision to grant the consent was proper, and that is not the issue before this Court in the present suit. The Court did not determine proprietary interests. Furthermore, the said Defendants were interested parties while the Plaintiff was an Applicant in a miscellaneous cause. For those reasons, I find that the dispute does not meet the parameters of the doctrine.
192. The five (5) purchasers moved the High Court sitting at Nairobi in HC Misc. App. No. 167 of 1981; Hezekiah Komen & 4 Others vs. Elijah Chemoiywo Arap Koross seeking to have the Plaintiff declared a trustee of the suit land. They further sought subdivision pro rata. The court took into account the historical background of the parties including the judgment in Kakamega HCCC No. 43 of 1978 and the Ruling in Nakuru HC Misc. No. 10 of 1980.
193. The court found that since ownership had been determined to belong to the Respondent and that decision had not been appealed, then he remained the purchaser of the suit land. In its decision delivered on 05/10/1988, the court dismissed the suit for two (2) reasons; firstly, the Applicant had approached the court with unclean hands for failing to disclose that the parties had been in a litigious battle at the High Court in Kakamega. Secondly, the Counterclaim in Kakamega HCCC No. 43 of 1978 was yet to be determined. For these reasons, the court dismissed the Originating Summons on technical grounds.
194. Looking at the order of the court, I find that the suit was not determined substantively but in limine. The court downed its tools to pave way for hearing of the Counterclaim in Kakamega HCCC No. 43 of 1978. Furthermore, the 4th, 5th, 6th and 7th Defendants were Applicants while the Plaintiff was the Respondent in that matter. For those reasons, I find that the doctrine of res judicata is not applicable to the facts and circumstances of that dispute.
195. In Eldoret HCCC No. 115 of 1998; Hezekiah Kiptoo Komen vs. Elijah C. A. Koross, the suit was not only between the Plaintiff and a party, one Hezekiah Kiptoo Komen, who was not party to the present suit, but also sought to obtain a consent. For those reasons, res judicata is inapplicable.
196. In Eldoret HCCC No. 73 of 1995; Elijah C. A. Koross vs. Hezekiah Kiptoo & 4 Others, the Plaintiff sued the five (5) sleeping partners. By order dated 12/02/1996, interim orders were granted staying the sale of the defendant's goods and heads of cattle attached by M/s Fema Traders or any other



Auctioneers (emphasis added). The substantive Application was set to be heard on 26/02/1996. Looking at orders sought before the Court then and the orders granted, it is glaringly evident that the dispute concerned issues, being those relating to sale of goods and heads of cattle, which were not present in the circumstances herein: The Court cannot stretch its imagination so much as to bring in an issue of such a sale into being the same as the one ownership of land herein. I thus find no elements of *res judicata* appurtenant to this matter.

197. Finally, the 4th Defendant filed citation proceedings in Kitale HC Miscellaneous Application No. 81 of 2003; In the matter of the Estate of Elijah Chemoiywo Arap Koross. According to his Affidavit in verification of proposed citation to accept or refuse letters of administration intestate, the deponent desired to have the Counterclaim in Kitale HCCC No. 89 of 1997 heard. He disclosed that he was the 4th Defendant in the matter. That the absence of a representative of the estate of the Plaintiff therein impeded the exercise hence the Application. The nature and character of those proceedings were separate and distinct from those in the present dispute. Be that as it may, the 4th Defendant had cited persons in the deceased estate; certainly, no *res judicata* arises.
198. For the above reasons, I find that the Plaintiff's bid seeking to find that the claims raised by the Defendants are estopped from re-litigation is a non-starter. The doctrine of *res judicata* is inapplicable and is accordingly hereby dismissed.

ii. Whether the pleadings are or suit is competent

199. The Plaintiff observed that the 1st - 6th Defendants' Counterclaim was not accompanied by a Verifying Affidavit, a factual observation which this court has similarly observed. In the same vein, the Plaintiff instituted the suit with an unconfirmed Grant, and also alone to the exclusion of the other proposed administrators of the estate of his late father, bringing into question the competency of the present suit altogether in terms of whether the Plaintiff had the *locus standi* to institute the present suit.
200. Order 7, Rule 5 (a) of the Civil Procedure Rules provides that a Defence and Counterclaim shall be accompanied by an Affidavit sworn by the Plaintiff in the Counterclaim, verifying the correctness of the averments. The use of the word 'shall' connote that the same is couched in mandatory terms.
201. In terms of the competency of the Plaintiff's suit the question is, does the Plaintiff have *locus standi* to institute the present suit given the fact that the grant issued in Kitale HC P&A No. 117 of 2003; In the matter of the Estate of Elijah Chemoiywo Arap Koross on 17/06/2004 in favor of the Plaintiff and three (3) other Administrators has never been confirmed?
202. The authority to sue on behalf of the estate of a deceased person is set out in provisions of the Civil Procedure Rules under Order 3, Rule 7 which provides as follows:
- “No claim by or against an executor or administrator, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in of which the plaintiff or Defendant sues or is sued as executor or administrator, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.”
203. As stated herein, the Plaintiff relied on an unconfirmed Grant to file the present suit. Empirically, an estate cannot be devolved or dealt with in any manner as long as the Grant is not confirmed. Indeed, the purpose of the initial Grant is to preserve the assets of the estate pending distribution. During that intervening period, no one is allowed to deal with the estate in any manner.



204. To avoid such a scenario, our jurisdiction devised special Grants to enable Administrators act for and on behalf of the deceased's estate during the intervening period. In this regard, a Grant of Letters of Administration Ad Litem as provided in law, ensures that an Administrator defends or sues the deceased's estate; which remedy would otherwise not be available until the issuance of a confirmed Grant.
205. The unconfirmed Grant, which lists three (3) other individuals together with the Plaintiff as joint Administrators simply notified members of the public inviting them to challenge or be aware that they were intent on obtaining a confirmed Grant. The final reliefs were not for the filing of the instant suit. Noteworthy is that only when a Grant is confirmed is the Legal Administrator of the estate permitted to conduct himself/herself in the manner provided in Section 82 of the *Law of Succession Act*.
206. So, cardinal is this issue that the High Court in Julian Adoyo Ongunga vs. Francis Kiberenge Abano Migori Civil Appeal No.119 of 2015, held that without a proper Grant, a suit ought to be dismissed since it is tantamount to the court lacking jurisdiction. The court held as follows:
- “Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”
207. It appears on face value that two (2) parties to the dispute herein violated mandatory provisions of the law that would otherwise lead to an automatic dismissal of the suit on technical grounds. This is because rules of procedure are not made in vain. To pardon such parties would be to succor litigants to circumvent the law as and when they so choose yet the seat of justice calls upon parties to turn the turbines by firstly complying with rules of procedure even as they bring an action before a court of law.
208. The present dispute presents an isolated circumstance where the oxygen principle and the provisions of Article 159 of *the Constitution* inoculate the technicalities in favour of substantive justice. Adherence to rules of procedure and the law is a principle this Court will always guard jealously. This is an issue that the Court brings into the notice of the parties that in relation to the issues herein to the effect that if such infractions arise in the future the Court shall not pardon them. The Court has painstakingly applied the provisions of Article 159(2)(d) of *the Constitution* 2010 in order to move to determine the suit on substantive justice rather than technicalities for reasons that the dispute herein seems to have spanned two generations (since 1978). The dispute herein seeks to determine the ownership of the suit land of which the persons claiming to be original owners are all since deceased. Before me is the second generation of contestants whom I would refer to as derivative owners. When they appeared before me they all, together with their brothers and sisters, their children and possibly grand-children who flocked my Court every time the hearing took place, desired that this dispute be brought to an end in one way or other.
209. With the background and hindsight as stated in the preceding paragraph in mind, this Court considers that if it were to dismiss the Plaintiff's suit and the 1st - 6th Defendants' Counterclaim on the two infractions singled out, it would in essence drive away from the seat of justice and leave hundreds of the derivative contestants languishing in greater pain than has been before. Since none of the proposed administrators of the estate of the late Elijah Chemoiywo Koross raised any issue with their own sibling



prosecuting the claim in that behalf without the full grant to him only or the grant Ad Litem having been obtained, and since the 1st to 6th Defendants all acknowledged through the oath of the witnesses who testified in that behalf that the Counterclaim was filed by and on their behalf, in doing substantive justice and further, since Article 10 (2)(b) recognizes equity as one of the nation's values and principles, this Court hereby applies the maxim of equity that "equity treats as done that which ought to be done" to consider the failure by both sets of parties as pardonable.

210. Thus, in *Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi (Milimani)* HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460, Ringera J (as he then was) stated that:

"...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...."

211. Though the above decision speaks to verification of Plaintiffs and counterclaims, I find that, and for only this isolated unique case, the principle would be extended locus standi as well. Given the higher calling of this court which is to do justice, I am inclined to pardon the two (2) parties but caution all and sundry about demeaning the rules of procedure deliberately as to cause procedural lapses. In light of these circumstances I save the suit and the pleadings on counterclaim by doing justice to hear and determine the issues at hand in the interest of resolving the dispute.

iii. Whether the Defendants' claims are statute barred

212. According to the Plaintiff, the Defendants' claims were barred by limitation of time since they were founded on contract, recovery of land, fraud and misrepresentation.

213. He relied on Section 4 (1) (a) of the *Limitation of Actions Act* which states that actions founded on contract may not be brought after the end of six (6) years from the date on which the cause of action accrued. According to his interpretation of the 7th Defendant's case, founded on the agreement dated 27/08/1974, the claim lay in seeking a refund and that should have been carried out in September, 1980.

214. Looking at the claim in totality, I find that the Defendants claim ownership of the suit land on the strength of a trust created by the conduct of the parties. They, particularly the 7th Defendant, do not seek a refund of the sums indicated therein. For this reason, I find that the provision referred to does not apply to the facts and circumstances of this case.

215. The Plaintiff cited Section 4(2) of the Act to contend that an action founded on tort may not be brought after the end of three (3) years from the date on which the cause of action accrued. That since the Defendants claimed that the Plaintiff committed acts of fraud, they ought to have instituted the suit within three (3) years from the date of discovery. As a matter of fact, when cross examined, DW2 testified that before his father met his death in 1992, he did not sue the Plaintiff for the fraudulent activities that were apparent during his lifetime.



216. The allegation of fraud is a tort in law. It therefore falls under the provisions set out above herein. Indeed, the Defendants stated that the Plaintiff committed acts of fraud when he registered the suit land in his name to their exclusion.
217. Finally, the Plaintiff cited Section 7 of the Act to contend that an action may not be brought by any person to recover land after the end of twelve (12) years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. Indeed, the parties seek that a portion of the estate of the Plaintiff be excised and shared to the Defendants herein.
218. The enactment of the *Limitation of Actions Act* was to prevent indolent litigants from filing suits as and when they so choose, to the detriment of their adversaries. It is intended to encourage a party seeking redress to file a dispute within reasonable time. In that vein, not only does it enhance the probative value of the evidence since witness accounts are fresh but it also departs from the unfair advantage that would be taken if a party were to file a suit at the time it so chose.
219. To determine whether a dispute falls under statutory limitation, one must ascertain when time starts running. According to Bryan A. Garner, (2019) Black's Law Dictionary (11th Edition), Thompson Reuters, St. Paul MN, p. 26 the word "accrue" means "to come into existence as an enforceable claim or right." From the definition, time starts running when the actual breach takes place.
220. It has already been established that the present dispute is not res judicata, meaning it had never been heard and determined, on merits, before a court competent to try the suit. The Plaintiff filed a suit for trespass against Hezekiah Komen in 1978 and it was the one that was finally determined in his favour by the Court in Kitale whose entire file was produced as P.Exhibit 1(a) and (b) in the proceedings.
221. Throughout the proceedings, the estates of the 4th, 5th and 6th Defendants and the Plaintiff, participated by giving evidence in spite of not being formally enjoined in the proceedings. When judgment was entered by Karanja J. on 12/02/2013, the court directed that the suit land be registered in the favor of the Defendants. Ultimately, that decision was overturned by the Court of Appeal on 06/03/2015. Two (2) years later, the Plaintiff filed the present suit.
222. Presently, to establish when the cause of action arises, this court must appreciate the history of the parties, particularly the institution, pendency and determination of the suit in Kitale HCCC No. 89 of 1997. The court entered judgment in favor of the Defendants on 12/02/2013. This was then overturned on 06/03/2015.
223. That notwithstanding, the father to the Plaintiff got registered as the owner of land parcel LR. 11440 on 16/06/1977. That was the same date a charge was registered by him in favour of Land Limited which was the previous owner of the land. The Defendants claim that the registration of the said parcel in that manner by the Plaintiff's father was done in trust for the 4th, 5th, 6th and 7th Defendants. My understanding of the Defendants' counterclaims is that they are not founded on contract but on trust.
224. That being the case and finding (as above), it is noteworthy that Section 20 (1) of the *Limitation of Actions Act* provides that none of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy.
225. A trust under the *Limitation of Actions Act* has the same meaning as that set out in Section 2 of the Trustees Act which states that the expression trust "...extends to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative..."



226. I therefore find and hold that contrary to the Plaintiff's allegations, the Defendants' claims are not caught by the statute of limitation of time and are thus proper before this court.

iv. Whether an agreement existed between the Plaintiff and the 4th, 5th, 6th and 7th Defendants

227. The crux of the dispute herein centers around an agreement or acknowledgement note dated 27/08/1974, produced as P.Exhibit 2. The same was authored by Retired Justice P. K. Tunoi who at that time was a practicing Advocate in the nature and style of Nyairo Tunoi & Company Advocates. It read as follows:

“I, Elijah C Koross, do hereby acknowledge receipt of the sum of Kshs. 23,000.00 given by Jonathan Kipkoros Arap Chesagur which sum has been paid on my behalf to Kabyeton Estate Limited for the purchase of the said farm L.R. No. 11440.

In exchange thereof, I give to the said Jonathan Kipkoros Arap Chesagur 80 (eighty acres) acres on the said farm after the purchase of it and he will free use and occupation of the said 80 acres.

In case of any eventuality in the farm failing to be obtained by me I bind myself to return the said amount of Kshs. 23,000.00.”

228. To the extent of its contents, all parties acknowledge the same and, in some instances, concur on its modalities or nature. The said agreement was seen to be a culmination of a series of conversations. On their part, the Defendants testified that with the intent of purchasing the suit land, the Plaintiff approached the 4th, 5th, 6th and 7th Defendants together with one Hezekiah Komen. These were the persons referred to as the sleeping partners. The Plaintiff was unable to raise the full sum hence asked them to join in on the purchase.

229. The said property was owned by a European man named George Pitman Mott who was keen to disposing of his leasehold in the property. The leasehold was acquired by Land Limited, a subsidiary of the Agricultural Development Corporation (ADC). The ownership of the suit property by Land Limited was preceded by the Agricultural Settlement Trust which held the land on a government lease.

230. Thus, the 7th Defendant paid Kshs. 23,000.00, Hezekiah Komen paid Kshs. 10,000.00 while the 4th, 5th and 6th Defendants jointly paid Kshs. 35,000.00 after obtaining a loan from KCB to whom they charged their farms. In total thus, a sum of Kshs. 68,000.00 was given to Elijah Chemoiywo Koross for onward transmission to Land Limited.

231. Upon payment of the purchase price, the 7th Defendant and the sleeping partners occupied forty (40) acres of the suit land where they began farming activities and milk production.

232. This evidence was similarly reiterated by one H.A. Oduor Land Agent in his report forwarded vide a letter dated 18/04/1979 compiled under the behest of Land Limited. In the report, the sleeping partners outlined that the suit land had been purchased under the chairmanship of the Plaintiff. It outlined that the 4th, 5th and 6th Defendants charged their (separate) parcel of land to KCB where they managed to raise Kshs. 35,000.00. Thereafter, they occupied the farm, harvested wheat and sold the produce to KFA between 1975 and 1976. So that cumulatively by 1976, they worked out that they had each contributed Kshs. 40,000.00 raising a total sum of Kshs. 120,000.00.

233. Insofar as the payment of the funds were concerned, Mr. Tunoi Advocate witnessed the Plaintiff receive a combined total of Kshs. 10,000.00 from Hezekiah Komen paid on 05/07/1974, 20/07/1974 and 22/07/1974 in the sum of Kshs. 2,700.00, Kshs. 5,000.00 and Kshs. 2,300.00 respectively. He also



witnessed the Plaintiff receive a sum of Kshs. 23,000.00 from the 7th Defendant on 27/08/1974. He further witnessed the sum of Kshs. 35,000.00 paid to the Plaintiff from the 4th, 5th and 6th Defendants jointly.

234. According to the report, produced as P.Exhibit 3, the purpose of the fund remittance to the Plaintiff was to acquire ownership of the suit land which remained the interest of the sleeping partners.
235. In his evidence recorded in Kitale HCCC No. 89 of 1997, Retired Justice P.K. Tunoi stated that the sleeping partners approached him with a view to retaining him as their Counsel as the Plaintiff had obtained property from Land Limited. That the Plaintiff lacked the financial muscle thus invited the sleeping partners as contributors. Further, confirming the contents set out in paragraph 112 of this judgment, the Retired Judge stated that the sleeping partners moved onto the suit land upon payment of the respective sums. His further evidence was that the agreement, except as with that of the 7th Defendant, concerning their contribution and ownership of the suit land was verbal.
236. This court takes note of and appreciates the fact that the documentary evidence relied on by the parties formulated a higher probative value in comparison to their oral evidence not supported by such documentary evidence. This is because the court is alive to the fact that all the original parties are all deceased and the 'derivative' witnesses who gave evidence relied more on the documents and what they would understand of them than first-hand account of the events leading to the acquisition of the suit land. It is thus placed extensively reliance on and analyzed the documentary evidence on record.
237. On the issue of whether the ownership of the suit land arose from a partnership relationship, this court takes guidance from the definition of a partnership as set out in Section 2 of the *Partnerships Act* 2012 to mean "the relationship which exists between persons who carry on business in common with a view to making a profit."
238. Given the evidence of the Retired judge, as summarized above, this Court appreciates the evidence of the Retired Judge as given in Kitale HCC 89 of 1997 to the effect that the Plaintiff and the five (5) people (Plaintiff and the 4th - 7th Defendants) were partners in the enterprise, although five (5) were sleeping ones. The Retired Judge having participated as the lawyer for all the parties herein in the initial stages of the transactions leading to the acquisition of the suit land from Pittman, he understood the relationship of the six people, and testified on oath about it, as being a partnership. It thus agrees with the Defendants that there was a partnership consisting of the six (6) people as members.
239. From the facts sheet, this court arrives at the unwavering conclusion that the Plaintiff and the 4th, 5th, 6th and 7th Defendants had an agreement (through the partnership) that would ultimately lead all parties to ownership of the suit land. That they were joined together with the common goal of acquiring the suit property with a view to making a profit, with the profit being acquisition and ownership of the suit land.
240. In regard to adduction of oral and documentary, the Halsbury's Laws of England 4th edition Vol. 12 is relevant as follows:

"Where the intention of the parties has been reduced to writing it is, in general not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary, or add to the terms of the document."



241. Also, Chitty on Contract 29th Edition Vol. 12 is also relevant:

“It is often said to be a rule of law that if there is a contract which has been reduced to writing, verbal evidence is not to be given..... so as to add or subtract from, or in any manner to vary or qualify the written agreement..... The rule is usually known as “parol evidence” rule. Its operation is not confined to oral evidence. It has been taken to exclude extrinsic matter in writing such as drafts, preliminary agreements and letters of negotiation.”

242. Additionally, the Court of Appeal in *Twiga Chemicals Industries Ltd vs. Allan Stephen Reynolds* (2014) eKLR, had stated as follows:

“It is familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence”. This position is also reiterated in *Halsbury’s Laws of England* (4th edn) vol. 9 (1) where para 622 partly states that:

“Where the intention of parties has in fact been reduced to writing, under the so-called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms”.

243. When the Plaintiff received money from the 7th Defendant and subsequently the 4th - 6th Defendants, he was furthering the honest common intent of the people. Consequently, I find that indeed the Plaintiff approached the said Defendants as partners to collectively raise funds and set forth to purchase the suit land. I find that the ultimate goal was that upon acquisition of the suit land, the Plaintiff, 4th, 5th, 6th and 7th Defendants (all the parties indicated) would acquire ownership of the suit land pro rata. As such, from the evidence in the previous paragraphs, this court finds that indeed a sum of Kshs. 68,000.00 was collected by the Plaintiff for onward transmission to Land Limited, the vendor, a sum collected from the contributions of the sleeping partners to the exclusion of the Plaintiff.

244. The Plaintiff maintained that since no partnership agreement/deed was embedded in writing, no partnership existed between the Plaintiff and the 4th, 5th, 6th and 7th Defendants. I have found to the contrary, particularly based on the evidence of the Retired Judge Tunoi as recorded in P.Exhibit 1(a) and (b). Furthermore, concerning disputes lacking written partnership agreements/deeds, the Court of Appeal in *Julius Mworira & Another vs. Kiambati* [1988] eKLR, held as follows:

“In some cases, partners establish their business by entering into a deed. In many cases, agreement is oral. In a verbal contract of partnership, a person has to prove the existence of it by proving material terms. These can be proved by their conduct, the mode they have dealt with each other, and with other people. Their books of accounts, testimony of clerks and agents, letters, admissions, or any other established mode. The burden of proving oral partnership is heavier than where the contract is in writing.”

245. This Court therefore relies on the above binding authority to state that the partnership entered between the Plaintiff, the 4th, 5th, 6th and 7th Defendants was created by implication from the conduct of the parties herein as set out above herein.

246. The Plaintiff disputed the contents of the report by H.A. Oduor Land Agent instructed by Land Limited. He stated that since he was never interrogated by the author, its veracity was subject to



challenge. This court notes that the report was issued on 18/04/1979 and was never subjected to any challenge about its authenticity in any forum, including the present suit. PW1 testified that his late father was not interrogated before the report was authored. Well, that may have been the case. But this Court disregards the content of the report on the alleged finding that the sum of Kshs. 40,000/= was paid by each of the four Defendants while most of the other findings in it find corroboration by other independent evidence.

247. I am not satisfied with the Plaintiff's allegation of inauthenticity thereof, which hasn't been backed by any proof. It is a mere statement of allegation which in my view stems from the fact that the report did not favor the Plaintiff's position in this matter. Be that as it may, the allegations as to its scrupulousness only comes more than five (5) decades later, and in this suit. It is not lost that equity aids the vigilant and not the indolent. Moreover, the witness herein cannot be heard to contradict documentary evidence in the form of the Report, which his own late father did not dislodge when he testified in Kitale HCC No. 89 of 1997.
248. On the above finding, I rely on the decision of *Twiga Chemicals Industries Ltd vs. Allan Stephen Reynolds* (2014) eKLR (supra). For these reasons, and in the absence of any abrogation, this court finds that the findings in the report regarding the existence of a partnership and the contributions the partners and the Plaintiff made in regard to the acquisition of the suit land corroborate numerous pieces of evidence about those two facts. PW1 herein cannot, according to the parole evidence rule, be permitted to contradict the evidence therein. Moreover, as noted above and discussed hereafter there was more corroborative evidence on the issue of the creation and existence of a partnership.
249. According to the report prepared by H.A. Oduor, Land Agent, the 4th, 5th, 6th and 7th Defendants disbursed their monetary contributions, occupied the suit land and had since farmed on it under the chairmanship of the Plaintiff. That the 4th, 5th and 6th Defendants charged their parcel of land to KCB where they managed to raise Kshs. 35,000.00.
250. In Kitale HCC No. 89 of 1997, whose entire files was produced as P.Exhibit 1 (a) and (b), the evidence of the 4th, 5th and 6th Defendants' (partners) contributions of the said sum was further corroborated by Benjamin Maritim, Legal Assistant working at Agricultural Development Corporation. He highlighted and produced the above report. The Emeritus Justice Philip Tunoi similarly testified in Kitale HCCC No. 89 of 1997 that the Plaintiff received the said sums of money.
251. Further, in the same cause, Julius Kipkel Rotich testified as a Bank Manager working at Kenya Commercial Bank. He confirmed that the Plaintiff had obtained a loan of about Kshs. 30,000.00 in 1974. That loan was secured by land titles belonging to the 4th, 5th, and 6th Defendants herein. It is this court's observation that the power of attorney donated by the 4th Defendant that granted the Plaintiff such power as donee to take out the loan as testified.
252. Also, in the cause, the Land Registrar Aloice Opanga testified in the same cause that the loan obtained from the bank was for the sum of Kshs. 35,000.00 secured by titles belonging to the 4th, 5th and 6th Defendants.
253. Still on the report by H. A. Oduor the Land Agent, it was observed the 4th, 5th and 6th Defendants occupied the farm, harvested wheat and sold the produce to KFA between 1975 and 1976. So that cumulatively by 1976, they worked out that they had each contributed Kshs. 40,000.00 raising a total sum of Kshs. 120,000.00. The Court finds no proof of this evidence and rejects it.
254. The report indicated further that the aforementioned Defendants had no interest in obtaining a refund but instead sought to acquire ownership of the suit land by registration of proprietary interest in their favor. The conclusion of the report was that the sleeping partners had been taken for a ride by the



- Plaintiff. That the sleeping partners had contributed money and lived on the farm in good faith in the knowledge that they were registered proprietors of the suit land. The report accused the Plaintiff, seen as the most enlightened person, of using the former Estates Officer of Land Limited to accomplish his mission.
255. The author of the report thus recommended that a consent from the Land Control Board be obtained to include the name of the sleeping partners in compliance with the Presidential Directive. Secondly, that Land Limited does approve their names on the strength of the findings of the report. Finally, to hand over the consent and approval by Land Limited to the sleeping partners (Complainants) to register their names in the title deed.
256. This court finds that in terms of his contribution the 7th Defendant remitted a sum of Kshs. 23,000.00. This sum was admitted by the Plaintiff who disputed its purpose. This evidence of the 7th Defendant's contribution was additionally captured in the agreement dated 27/08/1974, produced as P.Exhibit 2, the report by H.A. Oduor annexed to the forwarding letter dated 18/04/1979, the evidence in Nairobi HC Misc. App. no. 167 of 1981; as well as the testimony by Retired Justice Philip Tunoi in Kitale HCC. No. 89 of 1997. As stated in the agreement dated 27/08/1974, he was entitled to eighty (80) acres of the suit land. As to the Plaintiff's contention that the money was not part of that used for the acquisition of the land, this Court will address hereinafter.
257. Regarding the contribution of the 4th, 5th and 6th Defendants, it was testified by the DW1 and DW2 herein that they (their late fathers or the estates of their fathers) contributed Kshs. 35,000.00 towards this cause. These were the sentiments captured similarly in the testimony of the Retired Judge who witnessed the sum given to the Plaintiff, the evidence of Aloice Opanga Land Registrar and the summary of the Court's Ruling in Nairobi HC Misc. App. no. 167 of 1981. The parties herein cannot now, without any written documents at variance, adduce oral evidence to the contrary.
258. The evidence of the 4th, 5th, and 6th Defendants was that the sum of Kshs. 35,000.00 was secured by charge over their parcel of land. This court observed that the Plaintiff produced a charge in respect to all that parcel of land namely Cherangany/Koitugun/78. According to the charge document dated 05/07/1974, the property was charged in favor of KCB for a principle sum of Kshs. 35,000.00. Similarly, a charge document dated 05/07/1974 charged Cherangany/Koitugun/99 to KCB for a principle sum of Kshs. 35,000.00. Evidently, one charge was taken out by the Plaintiff while the other was taken out by the 4th, 5th and 6th Defendants as their monetary contribution. Therefore, based on a preponderance of the furnished evidence, I find that the 4th, 5th, and 6th Defendants jointly contributed only Kshs. 35,000.00 towards their partnership share as the three, given the loan they obtained from the bank for their share.
259. According to P.Exhibit 2, the 7th Defendant was granted eighty (80) acres. Thus, applying that formula in relation to the acquisition of the whole farm, if the 7th Defendant paid Kshs. 23,000.00 and was entitled to eighty (80) acres, then the outstanding question is what the sum of Kshs. 35,000.00 (contributed jointly by the other Defendants would be equivalent to. That would translate to 121.7 acres which is worked out as follows: $(\text{Kshs. } 35,000.00 \div \text{Kshs. } 23,000.00) \times 80 \text{ acres} = 121.7 \text{ acres}$. That would account for entitlement of approximately 40.6 acres to the 4th, 5th, and 6th, Defendants each.

v. Whether the refund clause in the agreement dated 27/08/1974 was discharged

260. The agreement dated 27/08/1974, produced as P.Exhibit 2 drawn by the Retired Judge contained a refund clause that the Plaintiff vehemently maintained was discharged. In corroboration, PW1 herein



relied on a letter dated 11/05/1981 drawn by Nyairo Tunoi and Company Advocates addressed to him thus:

“RE: Jonathan Chesagur Shs. 25,500/-

As requested by you we hereby submit to you how the above sum received by us from you for and on behalf of Mr. Chesagur was paid to him and/or on his behalf. We retained the sum of Kshs.500/= being our fees.

You should also note that we have acted and have been acting for Mr. Chesagur on some other matters which should not be confused with the above refund transaction.”

261. According to PW1, the above letter was proof that the 7th Defendant had been paid the sum, which according to him was a loan facility, in full with interest. That to him means the contribution could not be interpreted in any way to mean that the 7th Defendant was to acquire a share of the property.

262. The Plaintiff further relied on his evidence marked D.Exhibit 31; payment vouchers drawn by the firm of Nyairo Tunoi & Company Advocates in favor of the 7th Defendant on diverse dates as follows:

- a. Voucher No. 402 dated 22/1/1976 for Kshs. 1,000.00;
- b. Voucher No. 29 dated 07/05/1976 for Kshs. 2,000.00;
- c. Voucher No. 431 dated 26/8/1976 for Kshs. 1,100.00;
- d. Voucher No. 381 dated 25/10/1976 for Kshs. 300.00;
- e. Voucher No. 274 dated 21/02/1977 for Kshs. 200.00;
- f. Voucher No. 223 dated 03/05/1977 for Kshs.14,300.00 by cheque No. A3XXX87.

Total: Kshs. 18,940.00.

263. While acknowledging that the sum of Kshs. 25,500.00, as captured in the letter dated 11/05/1981, was not refunded as testified by the Retired Judge, which sums were retained by the firm of Nyairo Tunoi and Company Advocates, the Plaintiff (PW1) explained that the 7th Defendant was paid via payment vouchers as set out above herein.

264. In addition to the Kshs. 18,940.00, the Plaintiff observed that vide a voucher dated 26/01/1977, the 7th Defendant received Kshs. 6,100.00 into his loan account namely AFC No. 5127135010230. In total thus, the 7th Defendant had received Kshs. 25,040.00.

265. According to the narration captured in the letter dated 26/01/1977 in respect to the sum of Kshs. 6,100.00, it was stated that the “notice of advertisement of sale by AFC be ignored because the sum had since been settled.” The letter, addressed to the 7th Defendant’s lawyers, reminded the 7th Defendant that he had promised to pay the balance to AFC by 20/01/1977 who confirmed that they were yet to receive the same.

266. To answer this question, I must first reproduce the relevant part of agreement dated 27/08/1974 which read as follows:

“... In case of any eventuality in the farm failing to be obtained by me I bind myself to return the said amount of Kshs. 23,000.00.”

267. It stated that in case the Plaintiff was unable to obtain the suit land, he would return the amount of Kshs. 23,000.00. In my view, that conditional terms so unambiguous that it was not open to any other



- form of interpretation. In this case, if the Plaintiff was by any reason impeded from obtaining the suit land, only then would he be duty bound to return the sum of Kshs. 23,000.00 to the 7th Defendant.
268. According to the evidence of the Retired Judge testified on 30/10/2006, the 7th Defendant refused to take the refund and thus remained in the firm's account. He recalled that the Plaintiff gave him Kshs. 25,500.00 intended to be refunded to the 7th Defendant, a sum inclusive of a Kshs. 2,500.00 an interest sum purposed to instigate the refund clause.
269. While the Plaintiff asserted that the 7th Defendant was refunded the sum of Kshs. 23,000.00, I find that the evidence of the Retired Judge contradicted the evidence of PW1. It was the Retired Judge's evidence that the said sum was never collected by the 7th Defendant and was retained in the law firm. The judge added that 7th Defendant rejected the refund. Having said that, the Retired Judge testified that he was not aware of breach of the agreement. In my humble view, when the retired judge added in his testimony in P. Exhibit 1(a) and (b) that a sum of Kshs. 25,500.00 had been retained by him for the 7th Defendant who had refused to accept the refund, it meant that all that the Plaintiff said about payment vouchers amounting to Kshs. 18,940.00 was nothing but a contradiction of the retired the judge's testimony, yet it was the judge who knew the whole transactions. Furthermore, the oral testimony of the Retired Judge was given 29-30 years after the purported issuance of the payment vouchers. If indeed alleged payment were in regard to the refund, nothing could have been easier for the judge to say than that the payment vouchers constituted monies received by Jonathan Chesagur after he initially refused the refund. To me, the payment vouchers, if indeed genuine, were for another purpose than the refund.
270. In addition, I find that the PW1 was not candid with the facts of the matter. Initially, he acknowledged that the agreement awarded the 7th Defendant eighty (80) acres of the suit land in exchange for the 23,000.00 paid to the Plaintiff's father. He would then renege and rely on other unsubstantiated evidence captured in Kitale HCCC No. 89 of 1997 to state that the said amount was simply a loan facility.
271. In my humble view PW1 tried to have his cake and eat it. The question is, was the sum of Kshs. 23,000.00 a loan facility or an agreement in the form of a partnership? If it was a loan agreement, what were the exact terms thereof? Where were the said terms recorded? Further, in what document or agreement was it indicated that an interest sum would be disbursed to the 7th Defendant? These questions are pertinent because as stated earlier the agreement/acknowledgement dated 27/08/1974 (P.Exhibit 2) had the effect of creating a partnership or at the very least was a contribution towards the purchase of the suit land and not a credit facility. Furthermore, the Plaintiff did not explain whether and how he failed to acquire land as a condition precedent to initiate the refund clause yet he acquired the suit land before initiating the failed refund.
272. Additionally, the refund clause dated 27/08/1974 conjunctively needed to fulfil two (2) conditions to give its effect and meaning. Firstly, that the Plaintiff was unable to obtain the suit land. Secondly, that the sum of Kshs. 23,000.00 would as a result be refunded. On the first sine qua non, the Plaintiff was required to demonstrate that he was unable to obtain the suit land before purporting to refund the sum. In other words, the refund would fall due if he was unable to secure the said property. In other words, the second limb of the clause could only be effected upon fulfillment of the first limb of it. In my humble view, it has been established that on the contrary, the Plaintiff secured the suit land on 24/01/1975 but it was transferred to him on 16/6/1977, which parcel remains registered in his name as at this date.
273. The Plaintiff failed to fulfil the first prerequisite which would have formed the basis for a refund. Such that since the two (2) conditions precedent intertwined could not stand autonomously with one



- taking precedence over the other, the refund clause remained unenforceable the moment the Plaintiff obtained an assignment of lease with an option to purchase the suit land on 24/01/1975.
274. Furthermore, the Plaintiff stated that the sum of Kshs. 23,000.00 was refunded as follows; Kshs. 23,000.00 plus Kshs. 2,500.00 interest. Restating, the refund clause was bereft of ambiguity. So that it was not indicated, in the original agreement, that the 7th Defendant would receive an additional interest sum over and above the principal sum.
275. The action of attempting to pay interest in my view amount to a unilateral variation of the initial terms of engagement. The Plaintiff failed to demonstrate that in varying the initial terms, the same was done consensus ad idem. There was no evidence presented before this court to state or demonstrate that the 7th Defendant conceded that he would receive interest over and above the principle sum. Moreover, the Plaintiff, by withholding the information that he had been offered and purchased the land as explained above, acted dishonestly.
276. The foregoing facts, too, introduce the principle of parole evidence as explained above. The rule of parole evidence is that oral evidence cannot be admitted to add, vary or contradict a written statement. The rule forbids parties from introducing new contractual terms not embedded in a contract. This Court relies on the case of *Twiga Chemicals Industries Ltd vs. Allan Stephen Reynolds (supra)* for this holding.
277. In my view, the Plaintiff attempted to substitute the original agreement terms with terms fulfilling his intended objective. If the court were inclined to find in favor of the Plaintiff, it would amount to rewriting a contract yet the parties were bound by the initial terms. In so doing the Court would be cementing an unjust acquisition of property by the Plaintiff to the disadvantage of the person(s) whose money went into the process. I am afraid I cannot uphold the oral evidence that the refund fell due, and with interest.
278. Finally, on the payment vouchers paid on diverse dates between 1976 and 1977, I make the following observations: firstly, on a balance of probabilities, the said sums had an element of transactions done not in relation to the agreement of 27/08/1974. I say so because of the letter dated 11/05/1981 addressed to the Plaintiff. The firm of Nyairo Tunoi and Company Advocates stated that they had been acting for the 7th Defendant on some other matters. It is also instructive to note that the said letter did not make reference to the refund clause contemplated in the agreement dated 27/08/1974.
279. Secondly, the payment vouchers bore no narratives on the transaction. It cannot thus be presumed that the several payments were in settlement of the refund clause. In fact, the Retired Judge stated that vouchers totaling Kshs. 18,900.00 were not in respect to the refund money as stated in the agreement. I have found that if indeed they were for the refund nothing stopped the judge from testifying so.
280. Thirdly, arithmetically, the sum did not total Kshs. 23,000.00. Although the Plaintiff attempted to explain that a further Kshs. 6,100.00 was paid to the 7th Defendant, not only did the sums not total Kshs. 23,000.00 but also, the said Kshs. 6,100.00 explicitly stated that it was in respect to a loan amount in favor of AFC in the 7th Defendant's account with AFC. Furthermore, the acknowledgement by the AFC did not in any way indicate that the sum was paid by the Plaintiff, leave alone the 7th Defendant's lawyers: it was only an acknowledgement.
281. Fourthly, I agree with the 7th Defendant's argument where he disputed the cheque dated 03/04/1976 as having settled the payment vouchers. Notably, the first voucher dated 22/01/1976 preceded the issuance of the cheque. Furthermore, the cheques were neither accompanied by forwarding letters nor did the serial numbers on them run sequentially, making them suspicious, particularly since they were not in the original form.



282. Fifthly, the payment vouchers were disbursed after the Plaintiff acquired the property by way of assignment of lease. In my view, they could not be towards effecting the refund clause since the first pre-condition could not be met. Moreover, the Retired Judge who acted in the transaction gave evidence that the 7th Defendant rejected the refund and he did not give any further evidence that he later changed his mind to take the money.
283. The 7th Defendant disputed payment from another perspective: that the said payment vouchers were not proof of payment of the said sums. In analyzing that argument, I find wisdom in the decision of the Court of Appeal in *Abdi Ali Dere vs. Firoz Hussein Tundal & 2 Others* [2013] eKLR which held as follows regarding vouchers as proof of payment:
- “The term “voucher”, in regard to payment, has at least two distinct meanings. It can mean a written authorization to pay or disburse money. It can also mean confirmation of payment. In the latter sense, a payment voucher is not any different from a receipt. In many daily and official transactions, payees do not walk around with receipts to issue in acknowledgement of payment. They merely counter sign the payment voucher to signify payment. This is particularly the case where the payees are casual workers engaged to undertake short term assignments.”
284. This court could not ascertain whether all the payment vouchers in respect to the 7th Defendant were written authorization or confirmation of payment. This is because not all vouchers had the signature of the payee in spite of the payee’s name captured in some instances. It appears that some were written authorization where the payee’s signatures were missing while the rest were confirmation of payment. Be that as it may, I have already established that the said payment vouchers did not effectuate the refund clause.
285. Finally, the Plaintiff remained uncandid with his evidence. He stated that the signatures (where applicable) were strikingly different. In his re-exam, the Plaintiff purported to state that the signatures in the vouchers were the same as those captured in the agreement dated 27/08/1974. A cursory perusal on face value by this court however revealed that they were different.
286. Ultimately, it is my resolute conclusion that the refund clause in the agreement dated 27/08/1974 was not discharged and remained unenforceable on account of the Plaintiff’s acquisition of the suit land by way of assignment of lease with an option for purchase on 24/01/1975.

vi. Whether the Plaintiff held the ownership of the suit land in trust for the 4th, 5th, 6th and 7th Defendants

287. The evidence presented before this court so far did not present any sale agreements between the Plaintiff and the 4th, 5th, 6th and 7th Defendants.
288. In land disputes, a party is required to demonstrate that his disposition of land was safeguarded in a contract for the disposition of an interest in land. In establishing the same, the agreement must be in writing, signed by all parties thereto and the signature of each party must be attested by a witness who was present when the contract was signed. This is the law as set out in Section 3 of the [Law of Contract Act](#) and Section 38 (1) of the [Land Act](#).
289. Certainly so, the agreement dated 27/08/1974, was not a contract for disposition of land but a partnership agreement as deciphered above herein. Looking at the document on face value, it was not signed by all parties. The solitary signature was attested by a witness present. To that extent, the parties failed to meet the parameters set out in the cited provisions of statute.



290. Withal, Emeritus Justice Philip Tunoi in his evidence stated that the parties herein never entered into a contractual agreement.

291. It is not gainsaid that the Plaintiff is the registered owner of the suit parcel of land. It was the agreement of parties that upon acquisition of the suit land, the same would be shared to the extent of each parties' contribution. In that regard, the wordings of the proviso to Section 3 of the Law of Contract Act become relevant thus:

“This Section shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526); nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

292. Similarly, Section 38 (2) (b) of the Land Act provides that Section 38 (1) of the Act is inapplicable to inter alia “the creation or operation of a resulting, implied or a constructive trust.” The Court of Appeal in *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others* [2015] eKLR defined the concept of trust as follows:

“Dealing with the first issue, according to the Black’s Law Dictionary, 9th Edition; a trust is defined as:

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the Trustee Act, “...the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...” Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury’s Laws of England Vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. 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. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand.

A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black’s Law Dictionary) (Supra). 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...

This leaves us with resulting trusts; upon which the appellants had laid their claim. A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black’s Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally



expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions may be left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra)....”

293. According to the report filed by the land agent one H.A. ODUOR, the Plaintiff was seen the most educated of the partners. He then used this to his advantage so as to deprive the sleeping partners of the suit property. Those assertions were neither controverted nor countermanded. This court has also established from its independent analysis that the Plaintiff stole a march from the sleeping partners. He was able to obtain the deposit sum but would later renege on his promise to distribute the property in accordance to each partner's contribution. In *Yaxley vs. Gotts* [2000] Ch. 162, the court held:
- “an oral agreement whereby the purchaser of a house promised to grant another, in exchange for materials and services supplied an interest in the property, though void and unenforceable under Section 2 of the Act of 1989, was still enforceable on the basis of constructive trust and Section 2 (5) in circumstances where, previously, the doctrine of part performance or proprietary estoppel might have been relied upon ...”
294. The concept of trust is an equitable remedy that has existed for a long time. Courts are urged to only presume a trust where it is out of absolute necessity. The guiding principle that determines the same is the intention of the parties.
295. Looking at the entry on title document entered on 24/05/1978, a caveat was registered by EZEKIA KIPTOO KOMEN, one of the sleeping partners claiming purchaser's interests absolutely. This did not augur well with the Plaintiff. Thus, he struck when the iron was hot by immediately filing Kakamega HCCC No. 43 of 1978 seeking to evict the said KIPTOO KOMEN from the suit land. In the end, he succeeded. This was clear evidence that the Plaintiff had the intended need to explore all possible options to remove any person that stood in his way towards a solitary acquisition of the suit property. He was well aware that the sleeping partners were illiterate and used all means possible to his advantage.
296. It is my analysis that the interactions between the Plaintiff on the one part and the 4th, 5th, 6th and 7th Defendants on the other part, created a partnership in the sense that each party would acquire a share of the suit land based on his monetary contribution. However, the Plaintiff swindled the Defendants and turned against them once he started pursuing the registration and use of property to his sole benefit.
297. Evidence was led in this court to establish that ultimately, the 4th, 5th, 6th and 7th Defendants would receive registrable proprietary interests over the suit land based on their monetary contributions. Put differently, had the Plaintiff not approached them for funding to obtain property as partners, they would not have remitted the sums contributed. Indeed, the Plaintiff having used the Defendants' money to secure the property and purport to deny them the benefit of pro rata ownership thereof would amount to unjust enrichment and disadvantaging others. Their interactional life events amounted to the creation of a resulting trust.
298. It is not lost that the Plaintiff also took several steps towards the completion of the acquisition of the suit land. On account of the correspondence, receipts and statements of account, it is apparent that the Plaintiff made considerable efforts to raise the balance of the purchase price. While the 4th, 5th, 6th and 7th Defendants contended that the Plaintiff acted on their instructions when taking out loans and remitting the loan balance, there was no independent evidence to that effect such as was the one in



relation to the loan taken by the 4th, 5th and 6th. Therefore, I am not persuaded by the unproved oral assertions.

299. In the end, while I appreciate the concerted efforts of the Plaintiff to raise balance of the purchase price entitled him to ownership of the suit land, I find that he registered himself as owner of the suit land in trust for the 4th, 5th, 6th and 7th Defendants to the extent of their share of contribution. I make a further finding that the shares are as has been found at paragraph 259 above, and for the Plaintiff, the balance of the whole parcel area size less that of other parties' shares.

vii. Whether the Plaintiff obtained the suit land by means of fraud

300. According to the title deed in respect to the suit land, the suit property was first registered to Kaubeyon Estates Limited on 01/06/1964 for a term of 990 years. The term would later be reduced to 99 years. It was then charged to Agricultural Settlement Trust on 14/01/1965 and discharged on 13/07/1965. On that same day, the suit land was transferred to Land Limited for Kshs. 200,820.00.
301. The suit land would later be leased to Kaubeyon Estates Limited for a term of 15 years from 03/08/1965 at an annual rent of Kshs. 13,177.00. The property was once more transferred to Agricultural Settlement Trust subject to the lease to Kaubeyon Estates Limited on 22/03/1967.
302. Evidence was led before this court to establish that indeed the Plaintiff took the necessary steps to have the suit registered in his favor. It all began on 24/01/1975 when he was given an assignment of lease with an option to purchase.
303. The Plaintiff became lessee for a period of two (2) years in that year when it was made available for an annual revisable rent of Kshs.13,485.10. By letter of consent dated 24/01/1975, the Application was approved thereby assigning the lease with an option for purchase from Kaubeyon Estates Limited to him.
304. Thus on 19/02/1975, the lease in favor of Kaubeyon Estates Limited was transferred to Elijah Chemoiwoy for Kshs. 41,120.00. It was then transferred on 15/06/1976 to Land Limited for Kshs. 207,463.25 subject to the lease in favor of Kaubeyon Estates Limited.
305. Vide a letter dated 13/11/1975, Land Limited made a proposal for purchase of the suit land by the Plaintiff. Under its terms and conditions, the property was offered for purchase at the consideration sum of Kshs. 215,000.00.
306. Agricultural Settlement Trust, the predecessor of Land Limited, in its letter dated 18/11/1975 forwarded the lease agreement from Kaubeyon Estates Limited to the Plaintiff. This is because he had forwarded an application for transfer of the suit land in his name. In his letter dated 20/08/1975, the Plaintiff forwarded a letter to Land Limited requesting for indulgence as he sought a loan with ADC.
307. In seeking to obtain financing, the Plaintiff authorized KFA to remit the sum of Kshs. 9,500.00 from the proceeds of his planted crops. The authority was made vide a letter dated 19/12/1975.
308. Come 28/02/1976, Kenya Seed enclosed a cheque in the sum of Kshs. 12,000.00 from proceeds of seed maize from their customer the Plaintiff. The sum was paid to the favor of Agricultural Settlement Trust. Thereafter, on 04/11/1976, Land Limited issued an offer letter upon the Plaintiff's application to purchase the suit land. The proposal sought an initial 20% deposit of Kshs. 43,000.00 with the balance of Kshs. 172,000.00 paid in forty (40) monthly installments for a period of twenty (20) years at Kshs. 8,436.00 each.
309. Confirming transfer of the suit land in favor of the Plaintiff, Land Limited wrote a letter dated 19/05/1977 addressed to Archer & Wilcock Advocates. It disclosed that the property had been sold to



- the Plaintiff. It requested the Advocates to prepare the necessary transfer documents having enclosed the necessary documents in the letter. In this regard, on 16/06/1977, a surrender of the lease in favor of Kaubeyon Estates Limited and Elijah Chemoiywo, a transfer to Elijah Chemoiywo Arap Koross for Kshs. 215,000.00 and charge to Land Limited for Kshs. 172,000.00 were registered on that day.
310. Arguing that he single-handedly paid the purchase price between 1977 and 1993, the Plaintiff produced a bundle receipts from Land Limited addressed to him solely together with a letter dated 04/04/1979 from Elijah Chemoiywo Koross requesting Kenya Seed Company Limited to remit a loan amount in the sum of Kshs. 47,049.75 to Land Limited realized from proceeds of the cultivated seeds on the suit land.
311. He also produced an authorization letter dated 12/02/1987 to Kenya Cooperative Creameries to pay Land Limited Kshs. 2,000.00 on every 20th day of the month, a bundle of demand letters directed to him from Land Limited on diverse dates between 1982 and 1990 and his statements of accounts dated 18/06/1981 marked and a bundle of statement of accounts between 1978 and 1984.
312. Following full payment of the purchase price loan amount, it was the Plaintiff's evidence that a discharge of charge instrument was issued in his favor on 08/03/1993.
313. While the above steps were not in dispute, the Plaintiff was accused of obtaining the suit land clandestinely with intent to keep the other partners away from its acquisition. As I have already established, as long as the 4th, 5th, 6th and 7th Defendants contributed towards the purchase of the suit land and were never given a share of the suit land as agreed upon, the Plaintiff continued to hold the suit land in trust for them.
314. Section 28 (b) of the [Land Registration Act](#) provides that:
- “unless the contrary is expressed in the register, all registered land shall be subject to trusts including customary trust, as an overriding interest as may for the time being subsist and affect the same, without their being noted on the register.”
315. I find that as long as the Plaintiff held a resulting trust in favor of the 4th, 5th, 6th and 7th Defendants, the said overriding interest remained superior to and could not be overshadowed by the Plaintiff's action of the registration of the suit land in his own name. To this extent thus, the Plaintiff's actions were deliberate and intended to disinherit the Defendants. They amounted to fraud.
316. It is critical to note that while all the above transactions took place, Kakamega HCCC No. 43 of 1978 remained an ongoing suit wherein the question of ownership of the suit land had been challenged thus the doctrine of *lis pendens* remained alive. This is because while judgment was entered in his favor on 02/04/1980, the Counterclaim though initially dismissed on 30/11/1994, was reinstated by Application dated 06/12/1994. Following the re-opening of the suit, the judge delivered judgement on 12/02/2013 in favor of the five (5) purchasers.



317. Black's Law Dictionary 9th edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending. The Court of Appeal in Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & another [2015] eKLR had this to say on the doctrine of lis pendens:

Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in Bellamy vs. Sabine [1857] 1 DeJ 566 held as follows:

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

In the case of Mawji vs. US International University & another [1976] KLR 185, Madan, J.A. stated thus:

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...

In the same case at page it was observed inter alia that:

“Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore, purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

See also the considered views of Nambuye J, (as she then was) in Bernadette Wangare Muriu vs. National Social Security Fund Board of Trustees & 2 Others [2012] eKLR. The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of section 52 of the ITPA by the *Land Registration Act* (LRA) Number 3 of 2013, the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of Section 107 (1) of the LRA which provides the saving and transitional provisions of this Act, and which stipulates:

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

The effect of this provision is to allow for the continued applicability of the rights and interests ensuing from legislation that governed titles of properties established prior to the repeal of such legislation.



Given that the concerned property involved land eligible for registration under the Registration of Titles Act (now repealed), having regard to section 107 (1) of the LRA, it is evident the rights flowing from section 52 of the ITPA including those under doctrine of lis pendens would remain applicable to the circumstances of this case.

Furthermore, lis pendens is a common law principle, and in addressing the relevance of common law principles within the Kenyan context, section 3 (1) of the *Judicature Act* Cap 8 stipulates that:

“The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with-

- a. *the Constitution*;
- b. subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
- c. subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date: Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”

318. Similarly, in *Cieni Plains Company Limited & 2 others vs. Ecobank Kenya Limited* [2017] eKLR, the court held:

“The doctrine of lis pendens often expressed in the maxim *pendente lite nihil in novature* (during litigation nothing should be changed): see *Blacks’ Law Dictionary* 9th Ed, was until May, 2012 part of our statute law. With regard to real property, section 52 of the now repealed Indian Transfer of Property Act 1882 provided that during the pendency in any court having authority in Kenya of any suit in which the right to immovable property was directly and specifically in question, the immovable property was not to be transferred or dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order that would be ultimately made, except with the authority of the court and on terms.”

319. It is no doubt that the Plaintiff, in spite of the pending litigious matter, proceeded to register the requisite instruments without disclosing the same. In my view, the doctrine of lis pendens remained applicable as long as Kitale HCCC No. 89 of 1997 remained alive since ownership of the suit land was hotly contested. The Plaintiff’s failure to adhere to and abide by the dictates set thereto amounted to fraudulent activities on his part.

320. The Plaintiff’s uncandid and ill motive activities were further captured in a letter 10/07/1980 addressed to the firm of Nyairo Tunoi & Company Advocates. The author of the letter Land Limited informed the firm that the Plaintiff deliberately withheld material information when it was approached and were thus misled.

321. The letter continued that the Land Control Board acceded to correcting the anomaly when it sat on 13/06/1979, 11/07/1979, 14/02/1980 and 13/03/1980 to consider an Application for consent



- dated 11/05/1979 presented before them. In its meetings, considerations were taken that the sleeping partners had demonstrated that they had placed monetary contributions towards purchase of the suit land.
322. In that regard, the letter advised that the draft transfer drawn by Gautama & Kibuchi Advocates was at a variance with the letter of consent. They acknowledged that the Plaintiff did not want to admit the five (5) sleeping partners. Furthermore, that he would have frustrated efforts to have their interests secured by not signing the application forms. It was their recommendation that a rectification of title be submitted to the relevant authority so that the sleeping partners were included as proprietors of the title together with the Plaintiff. The fact that DW2's father failed to sue PW1's father during his lifetime did not absolve him from any fraudulent activities. He committed acts of fraud with intent to disinherit the sleeping partners.
323. Going by my above analysis, it is my considered view that the Plaintiff did not only commit fraud by registering the suit land pending adjudication proceedings as to ownership but also committed the same when there were subsisting overriding interests over the suit land that remained supreme to his registered ownership over the suit parcel of land.

viii. What the effect of the consent dated 19/08/1980

324. A pertinent issue arose during the conduct of the proceedings: the consent dated 19/08/1980 had never been overturned, varied or set aside. In its meeting held on 15/08/1980, the Trans Nzoia Land Control Board issued a consent in favor of the sleeping partners together with the Plaintiff dated 19/08/1980. The consent was addressed to Land Limited and the Plaintiff jointly as transferors/Applicants on the one part and Hezekiah Komen, the 4th, 5th, 6th and 7th Defendants as the transferees to include the Plaintiff on the other part.
325. Section 8 (2) of the *Land Control Act* provides that the land control board shall either give or refuse its consent to the controlled transaction and, subject to any right of appeal conferred by this Act, "its decision shall be final and conclusive and shall not be questioned in any court." Thus, any person aggrieved shall at the first instance appeal at the provincial land control appeals board as provided in Section 11 of the Act which appeal lies to the central land control appeals board as set out in Section 13 of the Act.
326. Section 28 (j) of the *Land Registration Act* provides that unless the contrary is expressed in the register, all registered land shall be subject to any other rights provided under any written law as overriding interests as may for the time being subsist and affect the same without their being noted on the register.
327. Indeed, the said consent dated 19/08/1980 conferred rights upon the Plaintiff together with the 4th, 5th, 6th and 7th Defendants jointly. The consent was not challenged in any way or form. It continues to remain in existence. In my view, with the subsistence of the consent, nothing ought to have been done contrary to it as it remained an overriding interest.
328. As stated by law, the decision to grant or refuse a consent is final and subject to any challenge thereto as provided by law. The decision having been made, this Court cannot overturn it but rather finds that that going by the provision of the Act, the consent remains valid to date and supersedes all other transactions created thereafter contrary to its meaning and tenor. In any event, it remained an overriding interest that affected the registration of ownership of the suit land as set out in Section 28 (j) of the *Land Registration Act*.
329. Further, this Court is of the humble view that once a Land Control Board has granted a consent to either subdivide or sell land, the board or any subsequent one cannot purport or proceed to grant



another contrary to the subsisting one. No other transaction or decision of the board can be made except if the consent is varied or altered following the internal dispute resolution mechanisms provided by law. Again, the law has not provided the period which the consent once given remains valid. It therefore means it remains valid until it is either acted upon and therefore effected or varied according to the law.

330. The Plaintiff disputed the consent on grounds that the minutes of the meeting culminating to its issuance were not signed. This court was not called upon to question the probative value of the minutes not signed but challenge the process giving rise to the consent dated 19/08/1980. It is to be noted that the consent has never been appealed or subject to challenge.
331. The Plaintiff did not challenge the consent in accordance with the provisions of the Act and/or by way for Judicial Review had the internal mechanisms been exhausted. This court makes a finding that the Plaintiff cannot go against it now.
332. This court reproduced the internal dispute resolution mechanisms made available to a party aggrieved by a decision. In seeking such audience, the onus was on the aggrieved party, being the one asserting, to demonstrate the reasons for impugning the decision. In my view, challenging the minutes for being unexecuted would best fall in that forum where the audience is invited to question its authenticity.
333. As already established, the consent has never been challenged. In light of this, the consent could not be overturned by a court directing the issuance of the title in contrast to the intention of the consent where that consent had not been challenged nor the issuance of a fresh consent when the subsisting consent was in existence. For that reason, the proceedings in Kitale HCCC No. 89 of 1997 and any consent subsequently issued were a nullity to the extent of their contrast to that consent of 19/08/1980 which is still valid.
334. It thus behooved the party to refrain from any other challenge since on one part, he does not dispute the outcome but disputed the minutes of the meeting. Be that as it may, this is not the proper forum for ventilating the dispute as governed by statute in view of the doctrine of exhaustion of internal dispute resolution mechanisms.
335. Article 159 (2) (c) of *the Constitution* calls upon this court to exercise judicial authority by promoting alternative forms of dispute resolution. This includes the internal dispute resolution mechanisms provided in Acts of Parliament.

ix. Whether the doctrine of adverse possession is applicable herein

336. The 1st - 6th Defendants claimed ownership of the suit land by way of adverse possession. It was their evidence that they had met the prerequisites as adverse possessors for living on the suit land for thirty-nine (39) years as farmers.
337. The doctrine of adverse possession has its concept in our jurisdiction. It is provided in a cocktail of statutes set out in Section 7, 13, 16, 17 and 38 of the *Limitation of Actions Act*, Section 28 (h) of the *Land Registration Act* and Section 7 (d) of the *Land Act*. Its effect is to extinguish rights held by a registered proprietor as owner of the suit land.
338. The Court of Appeal in *Kasuve vs. Mwaani Investments Limited & 4 Others* 1 KLR 184 explained what a claim for Adverse Possession has to prove:

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a



period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

339. In the case of *Kimani Ruchine & Another vs. Swift, Rutherford Co. Ltd. & another* (1977) KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, nec vi, nec clam, nec precario (no force, no secrecy, no evasion) ...The possession must be continuous. It must not be broken for any temporary purposes or by any endeavors to interrupt it or by any recurrent consideration.”

340. It is also critical to note that adverse possession lies against the registered proprietor of the suit land. For that reason, time on a claim for adverse possession starts running the moment the suit land is registered in favor of the Defendant. In *Francis Gitonga Macharia Vs. Muiruri Waithaka* [1998] eKLR, the Court of Appeal stated as follows:

“We have considered this appeal with anxiety. It is quite clear from the affidavit in support of the Originating Summons that as at the date of the suit the prescribed twelve years limitation period for bringing an action based on adverse possession of land had not run in favour of the Appellant. He deponed that he went into possession of the suit land sometime in March 1974. As at that date, the Respondent had not become a registered owner of the suit land. As we stated earlier, he became registered as owner on 16th December, 1974 and by 15th April 1986, a period of twelve years had not run. Consequently, the Appellant’s claim based on adverse possession was premature and therefore incompetent.”

341. In the present case, the 1st - 6th Defendants having raised the claim of that nature, they were invited to establish that for an uninterrupted period of twelve (12) years they have been in exclusive possession.

342. It is not denied that the 4th, 5th, and 6th Defendants gained access to the suit land soon after contributing a combined sum of Kshs. 35,000.00, and this was evidenced by the testimony of the retired judge Tunoi. They proceeded to farm on the suit land and lived thereon with their families. The 1st, 2nd and 3rd Defendants were kinsmen of the said 4th, 5th and 6th Defendants.

343. It is also not denied that Kakamega HCCC No. 43 of 1978 was heard and finally determined in 2013 and whose appeal in Eldoret Civil Appeal No. 223 of 2013 was decided in 2015.

344. While it is not disputed that the Defendants gained access to the suit land peaceably and had lived on the suit land for thirty-nine (39) years, had the same remained uninterrupted? The wisdom of Justice Kwach JA (as he then was) in *Joseph Gahumi Kiritu vs. Lawrence Munyambu Kabura* CA No 20 OF 1993 informs this court when answering that question when he pronounced himself as follows:

“The passage from Chesire’s *Modern Law of Real Property* to which Porter JA made reference in *Githu vs. Ndeete* is important and deserves to be read in full. ...Time which has begun running under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him... He must either make a peaceable and effective entry, or sue for recovery of the land.”



345. Between 1978 and 2015, an ongoing battle continued as to ownership of the suit land wherein the Plaintiff sought to claim ownership of the suit land against one Hezekiah Kiptoo Komen. It is clear and beyond any form of peradventure that while the Plaintiff filed an action for recovery of land, the same did not lie against the 1st - 6th Defendants. However, the ongoing dispute still affected the time run effect since ownership of the suit land was disputed.
346. However, it is important to note that come 09/07/2014, a decree issued on 15/07/2013 in Kitale HCCC No. 89 of 1997 was registered to rectify title to include the names of Hezekiah Kiptoo Komen, Jonathan Kipkoross Chesagur, Chebiator Chemchur, Julius Kibet Cherotich And Kipserem Rotich as proprietors in common.
347. In view of the above, time could not run against the Plaintiff since the property was registered in the names of the 4th, 5th, 6th and 7th Defendants as well as Hezekiah Komen. As such, as at 09/07/2014, adverse possession could not lie against the Plaintiff alone since he was not the only registered proprietor. In any event, it would be absurd for the 4th, 5th and 6th Defendants to claim adverse possession against themselves since they were owners of the suit property as the Court has already found.
348. Following the judgment of the Court of Appeal in Eldoret Civil Appeal No. 223 of 2013, the decree issued was registered on 13/06/2017. It was at this juncture that the Plaintiff became the registered proprietor of the suit land, when time started running. Since time started running in 2017, I find that the claim for adverse possession has failed to meet the test given by law and case law.

Orders and Disposition

349. Having said the above, this court is cognizant of the significant role played by the Plaintiff in acquisition of the property. In fact, the court in Kitale HCCC No. 89 of 1997 observed that the Defendants reservedly acknowledged that they owed the Plaintiff not because of his monetary contributions but due to his hard work and effort towards management of the suit land, obtaining a loan amount to clear the balance of the consideration sum and settling the loan on his own efforts.
350. Having said that I note with concern that the present suit was only galvanized by the Petition filed in Kitale Constitutional Petition No. 8 of 2016. This was because the suit was filed only the year following the filing of the Petition. I am not persuaded to hold that it was filed in good faith.
351. Before issuing my orders and disposition, I would like to thank Counsel for their ardent sedulousness in laying out the issues in contention in the manner of their pleadings and the evidence. I thank them further for their call in availing the necessary evidence as and when called by this Honorable Court. This Court did its level best to determine all issues in contention so as to put to rest once and for all. After all, this court feels the compelling need to bring an end to litigation as a principle of finality. In *Lim vs. Jabalde* 172 SCRA 211, 224 (1989), citing *Banogon vs. Serna*, 154 SCRA 593, 597 (1987), the Philippines Supreme Court held as follows:
- “Litigation must end and terminate sometime and somewhere and it is essential to an effective and efficient administration of justice that, once a judgment has become final, the winning party be, not through a mere subterfuge, deprived of the fruits of the verdict. Courts must therefore guard against any scheme calculated to bring about that result. Constituted as they are to put an end to controversies, courts should frown upon any attempt to prolong them.”
352. In light of the above foregoing circumstances and for the reasons given above, my orders and disposition in the above matter.



- a. A declaration be and is hereby made that the Plaintiff held all that parcel of land namely L.R. No. 11440 in trust for the himself, 4th, 5th, 6th and 7th Defendants pro rata.
- b. A declaration be and is hereby made that the Defendants are entitled to ownership of all that parcel of land namely L.R. No. 11440 pro rata to the extent of their contributions as follows:
 - aa. The 7th Defendant shall have (80) acres of the suit land.
 - ab. The 4th, 5th and 6th Defendants shall jointly have one hundred and twenty-one naught seven (121.7) acres of the suit land accounting for forty naught six (40.6) acres each.
 - ac. The Plaintiff shall have the remainder of the portion of land being, approximately 312.3 acres.
- c. The Plaintiff shall surrender the title documents in respect to all that parcel of land namely L.R. No. 11440 for rectification proposes to effect registration as stated in (b) above.
- d. The Plaintiff shall execute the necessary transfer forms to effect registration as (b) above in respect to all that parcel of land namely L.R. No. 11440 within thirty (30) days from the date of this judgment.
- e. Should the Plaintiff fail to comply with (d) above, the Deputy Registrar shall execute the necessary transfer forms to effect this judgment.
- f. A permanent injunction be and is hereby issued restraining the Plaintiff whether by himself and/or his agents or servants, assigns or any other person acting under his behest from interfering with the 4th, 5th, 6th 7th Defendants' ownership and possession of the acres delineated in (b) above comprised of the property known as Land Reference No. 11440.
- g. The Plaintiff's suit lacks merit and is hereby dismissed with no order as to costs.
- h. The 1st - 6th Defendants' Counterclaim is merited to the extent that it has been allowed by this court with each party bearing own costs.
- i. The 7th Defendant's Counterclaim is merited to the extent that it has been allowed above.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 5TH DAY OF OCTOBER, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

