



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CASE NO. 05 OF 2019**

**FORMERLY CHUKA C.M'S CIVIL CASE NO. 114 OF 2018**

**MUGERE KAMOTHO.....PLAINTIFF**

**VERSUS**

**JAMES MUCHIRI NDEGWA.....1<sup>ST</sup> DEFENDANT**

**DAVID MUTHENGI.....2<sup>ND</sup> DEFENDANT**

**JOHN NYAGA .....3<sup>RD</sup> DEFENDANT**

**M'IMWITHA M'RINTHIRA.....4<sup>TH</sup> DEFENDANT**

**JACKSON MAKUNYI KURURU.....5<sup>TH</sup> DEFENDANT**

**M'GWETA MURUA.....6<sup>TH</sup> DEFENDANT**

**NJERU NGOROI.....7<sup>TH</sup> DEFENDANT**

**ALEXANDER MUNENE MATI.....8<sup>TH</sup> DEFENDANT**

**PATRICK MUTUGI MATI.....9<sup>TH</sup> DEFENDANT**

**JOHN GITONGA MATI.....10<sup>TH</sup> DEFENDANT**

**CATHERINE KAGENDO MUTURIA.....11<sup>TH</sup> DEFENDANT**

**M'NANDI MAIKITHE.....12<sup>TH</sup> DEFENDANT**

**THE DISTRICT LAND ADJUDICATION AND SETTLEMENT**

**OFFICER, MERU SOUTH/MAARA SUB-COUNTIES...13<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL OF**

**THE REPUBLIC OF KENYA.....14<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. In his plaint dated **3<sup>rd</sup> March, 2015**, the plaintiff prays for judgment against the defendants jointly and severally for:

- a) A declaration that the 13<sup>th</sup> Defendant's actions of excising, awarding and subsequently registering the 1<sup>st</sup> to the 12<sup>th</sup> Defendants as the owners of the twelve (12) parcels of land set out in paragraph 3 above out of the suit property is illegal, null and void;

- b) A declaration that the Plaintiff is the legal and rightful owner of the twelve (12) parcels of land of the suit property set out in paragraph 3;
- c) An Order of cancellation and removal of the names of the Defendants as against the twelve (12) parcels of land of the suit property set out in paragraph 3 from the Adjudication register for KAMWIMBI 'A' adjudication section within MERU SOUTH sub-county;
- d) An Order to substitute the names of the Defendants in the Adjudication register for KAMWIMBI 'A' adjudication section within MERU SOUTH sub-county for the twelve (12) parcels of land of the suit property set out in paragraph 3 with the name of the Plaintiff MUGERE KAMOTHO;
- e) An order of permanent injunction restraining the 1<sup>st</sup> to 12<sup>th</sup> Defendants whether by themselves, their agents, servants and/or employees from in any way or howsoever from trespassing or any in way interfering with the twelve (12) parcels of land of the suit property set out in paragraph 3;
- f) An eviction order against the 1<sup>st</sup> to 12<sup>th</sup> Defendants, their employees, servants and/or agents who have wrongfully and forcefully possessed, occupied and settled on the twelve (12) parcels of land of the suit property set out in paragraph 3.
- g) Mesne profit;
- h) General damages for non-user;
- i) Special damages as set out at paragraph 9.9
- j) Cost of the suit;
- k) Interest on (a) (vi) (vii) & (viii) above; and
- l) Such further or better Orders and/or other Orders as the Honorable Court may deems fit and expedient to grant for the cause of justice.

2. This suit was filed in Meru as Environment and Land Case No.14 of 2015. It was transferred to Chuka and the Chuka ELC Court transferred it to Chuka CM's Court where it became Chuka CM's Court Case No. 114 of 2018. Eventually it came back to this court where it became Chuka ELC Case No. **5 of 2019**.

3. PW1, Ephantus Njuki Kamumo, told the court that he had written a witness statement dated **3<sup>rd</sup> March, 2015**. He asked the court to adopt this statement as his evidence in this suit. The statement reads as follows:

**STATEMENT OF EPHANTUS NJUKI KAMUMO**

I am a male adult citizen and a resident of Kamwimbi Location of Chuka – Igamba Ng'ombe Sub County of Tharaka Nithi County.

During the year 1988 I was a Senior Assistant Chief of the Kamwimbi Sub-Location of Magumoni Location of the then larger Meru District.

During the month of April, 1988 'KIGOCI' elders met at Kabururu Market within my sub-location to deliberate over the land issue between Muruga Nyaga and Ngatuni Mugere. Kigoci elders used to determine disputes using an oath system. The dispute was scheduled for hearing for three (3) separate days but Ngatuni Mugere never turned up. The forth (4) day the elders went to the disputed land and Muruga Nyaga provided a goat to finalize the matter. The dispute was determined to the effect that the land belonged to Muruga Nyaga.

To be clear Muruga brought the chief as the family leader. He was doing the case on behalf of the family.

I was present all the way through and I recorded the verdict for the elders.

Both parties died and Mugere Kamotho took over the matter and in 1991 he complained that the children of Ngatuni were encroaching upon the land. I wrote to Njoka Ngatuni the son of Ngatuni on behalf of their family warning him to leave the land. They refused and I had no power to evict them.

During the year 1993 the defendants entered upon the land claiming that they were given the land by the family of Ngatuni.

I can confirm that the rightful owner of the land is Mugere Kamotho on behalf of his family and the family of Muruga Nyaga.

That is all to state.

**Dated at Meru this .....3<sup>rd</sup> .....day of .....March,..... 2015.**

**Signed by Ephantus Njuki Kamumo.**

4. PW1's oral evidence was by and large congruent to what he had averred in his witness statement. During cross examination PW1 was rather hostile to the defendants' advocate.

5. Despite having averred in his statement that he was present during deliberations concerning disputes involving Muruga Nyaga and Ngatuni Mugere and that he himself recorded the verdict of the elders, PW1 was laconic that he never arbitrated disputes involving the parties in this suit.

6. PW1 told the court that all deliberations concerning the suit lands he was aware of took place before the Land Adjudication process commenced. When asked about how the land became registered in the names of the defendants PW1 was veritably rude and told the defendants' advocate not to ask him irrelevant questions. He was unequivocal that he was not an adjudication officer and therefore could not know if there was an appeal before the minister.

7. PW2, M'Ngereni M'Mathaia, asked the court to adopt his witness statement dated 3<sup>rd</sup> March, 2015 as his evidence in this suit.

8. During cross-examination, PW2 told the court although during adjudication, allocation of land was based on occupation, he did not know how the defendants came to own their land. At one point he was unequivocal that the defendants did not live on the suit lands. A moment later, he changed his narration and said that some lived on the suit lands. After telling the court that he knew the different steps necessary for the adjudication process to be completed, he told the court that he did not know if or if not the defendants had titles to their parcels of land.

9. PW2's witness statement states as follows:

**STATEMENT OF M'NGERENI M'MATHAIA**

I am a male adult citizen a resident of Ngaituni sub location Gitaruni Location of Chuka – Igambang'ombe Sub-County.

I have a land bordering the land of Mugere Kamotho at Kabururu. I know that the family of Mugere Kamotho and Muruga Nyaga had always owned a block of land at the area.

At one time the Kigoci elders determined a dispute between Muruga Nyaga and Ngaituni Mugere. I was present when the dispute was on going at the market place until the same was determined. We were a big crowd. It was decided that the land belonged to Muruga Nyaga on behalf of the family.

I know that Ngaituni and Muruga Nyaga died and Mugere Kamotho took over on behalf of Muruga Nyaga.

That is all.

**Dated at Meru this .....3<sup>rd</sup> .....day of..... March,..... 2015**

**Signed by M'Ngereni M'Mathaia**

10. PW3, Alphan Muthami Gilbert, told the court that he was giving evidence as next friend of the plaintiff, his elderly father. He asked the court to adopt his witness statement dated **10<sup>th</sup> July, 2019** as his evidence in this suit. The statement reads as follows:-

**WITNESS STATEMENT**

Name: Alphan Muthami Gilbert

Residence: Nairobi

Postal Address: 56 – 60400, Chuka

I, Alphan Muthami Gilbert of the above captioned particulars do state as follows:

1. That I am well versed with the facts of this suit hence competent to make this statement.
2. That the suit herein concerns portions/parts of all that parcel of unsurveyed land located at Gachakuthe village, Kamwimbi Location, Meru South Sub-County, Meru County in the Kamwimbi 'A' Land Adjudication Section (hereinafter referred to as 'the suit property').
3. That the suit property borders the Itugururu market to Kabururu market road to its west and the Ruguti River to its east. It is bordered to the north by a land parcel owned by M'Ngereni M'Mathaia and to the west by a land parcel owned by Celestino Riungu. The Gaciere stream flows through the land on its southern side flowing in the west to east direction.
4. That the said portion of land was been subdivided into around thirty-eight (38) portions of land which are parcel numbers 685, 702, 703, 704, 705, 724, 732, 769, 770, 771, 773, 775, 776, 777, 788, 797, 798, 799, 800, 802, 803, 804, 805, 806, 817, 818, 876, 985, 1079, 1081, 1080, 1106, 1130, 1249, 1280, 1286, 1309, 1968, 1969 and 1970.

5. That the suit herein concerns the Land Adjudication Officer's decision to allocate twelve (12) parcels of the thirty eight (38) parcels out of the suit property as follows:-

**Parcel Number      Owner in adjudication register**

a)702	James Muchiri Ndegwa
b)703	David Muthengi
c)770	John Nyaga
d)771	M'Imwitha M'Rintira
e)788	Jackson Makunyi Kaburu
f)776	M'Gweta Murua
g)775	Njeru Ngoroi
h)773	Alexander Munene Mati
i)1249	M'Nandi Maikithe
j)1280	Patrick Mutugi Mati
k)1286	John Gionga Mati
l)1309	Catherine Kagendo Muturia

6. That the genesis of the dispute over the suit property can be traced back about thirty (30) years ago.

7. That the plaintiff herein is the first cousin of the late Muruga Nyaga.

8. That in the 1900's the late Nyaga father of the late Muruga Nyaga and the plaintiff's father the late Kamotho gathered and took possession of the suit property herein. The land has since been in the family having been handed from one generation to another and Nyaga and Kamotho were buried on the suit property.

9. That the said Muruga Nyaga died in the year 1992 and the rights over the suit property passed to the plaintiff herein as the last surviving eldest family member.

10. That in the year 1987, the late Muruga Nyaga had a dispute with the late Ngatuni Mugere before the 'KIGOCI' elders over the suit property whose ownership was contested between the two deceased persons. Ngatuni Mugere had entered the suit property and started committing wanton acts of destruction in 1987.

11. That the 'KIGOCI' elders are a group of elders who hear and determine disputes among the Meru Community, including but not limited to land disputes, according to Meru customs and traditions.

12. That the 'KIGOCI' elders determined the dispute in favour of the late Muruga Nyaga on 23<sup>rd</sup> April, 1988.

13. That Mr. Ephantus Njuki, the then assistant chief of Kamwimbi sub location, was present when the said dispute was heard and determined by the said elders as a witness. He wrote the letter dated 7<sup>th</sup> May, 1991 in which he pointed out that the elders had decided the dispute in favour of the late Muruga Nyaga.

14. That the late Ngatuni Mugere continued entering the suit property as a trespasser and continued committing acts of wanton destruction despite the decision by the 'KIGOCI' elders. This is confirmed by the letter dated 23<sup>rd</sup> April, 1989 by the late Muruga Nyaga to the District Officer of Nithi division as well as by the letter dated 7<sup>th</sup> June, 1991 by Mr. Ephantus Njuki addressed to Njoka Ngatuni (son of the late Ngatuni Mugere) asking him to vacate the suit property by July, 1991 pursuant to the decision of the 'KIGOCI' elders delivered on 23<sup>rd</sup> April, 1988.

15. That when the dispute between Muruga Nyaga and Ngatuni Mugere started on or about the year 1987, there were confrontations between members of families of Muruga Nyaga and Ngatuni Mugere which threatened to get violent.

16. That the area Assistant Chief, Mr. Ephantus Njoka directed both parties not to use the suit property to prevent a breach of peace which Muruga Nyaga and his family members adhered to.

17. That the defendants herein entered the suit property sometime in year 1993 when the adjudication process started. The land before then was not habited. It had only been previously used for grazing and cultivation by Muruga Nyaga and his family.
18. That the defendants entered the suit property during the subsistence of the said directive of the Assistant Chief.
19. That when land adjudication commenced in Kamwimbi 'A' in 1993, the defendants and other persons not parties herein fraudulently and by means of deception caused the parcels of land in dispute herein and others pending before other avenues to be recorded as belonging to them respectively.
20. That the decision of the Land Adjudication Officer in relation to the parcels of land in dispute herein were rendered sometime in 2015.
21. That the plaintiff obtained consent from the Land Adjudication Officer to file the suit herein on 6<sup>th</sup> January, 2015.
22. That I urge this honourable court to grant the plaintiff the prayers in the plaint.
23. That is all I have to state.

NAME: Alphan Muthami Gilbert

DATE: 10.7.2019

Dated at Nairobi this .....10<sup>th</sup> July, 2019

.....

**KAMINZA & AMBANI**

**ADVOCATES FOR THE CLAIMANT**

11. During cross-examination PW3 told the court that a litigant had the choice to appeal to the minister or to the court regarding decisions concerning Land Adjudication matters. He also told the court that the plaintiff had the discretion to seek or not to seek extension of time when the period for the appeal expired.
12. PW4, Celestino Riungu, asked the court to adopt his witness statement dated **3<sup>rd</sup> March, 2015** as his evidence in this suit.

The statement reads as follows:

**STATEMENT OF CELESTINO RIUNGU**

I am an adult male citizen resident of Weru Sub Location of Kithangani Location. I own a land that borders that of Mugere Kamotho. I was present as a member of umotho clan when the boundary between our land and that of Mugere Kamotho and Muruga Nyaga was fixed. They belonged to the clan of Ithimbugi.

Their land is big more than 100 acres approximately.

**Dated at Meru this .....3<sup>rd</sup> day of .....March, .....2015.**

**Signed by: Celestino Riungu**

13. In his oral evidence and in cross-examination, PW4 told the court that he was a neighbour of the plaintiff and knew that the apposite suit lands belonged to the plaintiff.
14. DW1, M'Igweta Murua, told the court that he did not know the plaintiff although he had heard that he came from Cheera village, Gitareni Location. He said that the plaintiff did not belong to his location. He told the court Cheera, Gitareni Adjudication did not take place at the same time as the adjudication in the plaintiff's location.
15. He said that his land parcel No. 776 did not have a title as the land is still under adjudication as there was an appeal to the minister. He said that other parcels also had appeals to the minister. DW1 told the court that his evidence represented that of all the defendants. He testified that he represented all the defendants because he knew all the facts concerning the apposite adjudication process.
16. DW1, told the court that he was not aware of prior disputes between the plaintiff and the defendants which were heard by elders. He testified that although he knew, PW1, Ephantus Njuki, he did not know that he had been a chief and had presided over disputes concerning the suit land. He was laconic that he had buried his mother on his land in 1974.
17. DW1's witness statement reads as follows:

## **6<sup>TH</sup> DEFENDANT'S STATEMENT**

My name is M'Igweta Murua. I come from Rianthiga village, Rianthiga sub location, Kithangani location, Meru South Sub County and I am a peasant farmer. I know the plaintiff. I am not related to him in any way. We are not of the same clan. He comes from Gitarene Location.

I know the other defendants. Some of them borders my land. We are not all of the same clan. The 3<sup>rd</sup> defendant and 7<sup>th</sup> defendant are of my clan but the other defendant borders my land or are found within my village.

I know land parcel Kamwimbi A adjudication section 776. This is my land. I was born on this land. There is a mature mango tree that I planted back in 1968. I particular recognize my land by a grinding stone that was communally used. This stone is on my land. I buried my mother on this land in 1947. I also buried my father on this land in 1974. My brother known as Mati is also buried on this land.

Those who borders me are as follows; David Muthengi and John Gitonga Mati. They have been my borders from time immemorial. Land adjudication section commenced in 1993. I walked the boundaries of land parcel Kamwimbi A adjudication section 776 no person including the plaintiff filed a dispute with the land committee. I was therefore registered as the owner of the land. During arbitration board objection no person including the plaintiff objected to my being the owner of Kamwimbi A adjudication section 776. Then came 60 days' objection and the plaintiff did not file any objection as being my registered with 776 Kamwimbi A adjudication section. Ownership of land was determined during the arbitration board objections.

It's an afterthought on the part of the plaintiff now to come and claim ownership of land parcel 776 Kamwimbi A adjudication section. The land in Kamwimbi A adjudication section was adjudicated under Cap 284. Under this act the adjudication officer told us one is entitled to the part one has occupied or the part one has been using. One could not walk boundaries of a land fragment if one has not settled on that particular land. We are advised by DLASO that cap 284 and cap 283 operated differently. Under cap 283 one could gather various land fragments and be consolidated and be placed at a place that he has never occupied or used.

The plaintiff could not have possibly owned land in Kamwimbi A adjudication section. The plaintiff has never lived in any part of Kamwimbi A adjudication section. He lives and he has been living in Gitarene. From Kamwimbi A adjudication section and Gitarene is a distance of 15 kilometers separating the two. He is on a fishing expedition. He cannot call a single person who can back him as a boarder on such land he would call his let alone 776 Kamwimbi A adjudication section.

The suit deserves to be dismissed. It has no merit. I will also be praying for cost of this suit and interest thereon.

That is all I wish to state.

**Signed by: M'IGETA MURUA**

**Dated at Chuka this..... 15<sup>th</sup> day..... of January, .....2018**

18. The parties filed written submissions.

19. The plaintiff's written submissions dated **17<sup>th</sup> November, 2020** are pasted herebelow in full without any alterations whatsoever:

### **PLAINTIFF'S WRITTEN SUBMISSIONS**

**May it please your Lordship,**

The Plaintiff submit as follows in support to the claim herein:

#### **A. INTRODUCTION**

1. The Plaintiff instituted the suit herein vide a Plaint dated 3<sup>rd</sup> March, 2015 and Amended on 4<sup>th</sup> December, 2019. The Plaintiff seeks the following reliefs from this Honourable Court:

m) A declaration that the 13<sup>th</sup> Defendant's actions of excising, awarding and subsequently registering the 1<sup>st</sup> to the 12<sup>th</sup> Defendants as the owners of the twelve (12) parcels of land set out in paragraph 3 above out of the suit property is illegal, null and void;

n) A declaration that the Plaintiff is the legal and rightful owner of the twelve (12) parcels of land of the suit property set out in paragraph 3;

o) An Order of cancellation and removal of the names of the Defendants as against the twelve (12) parcels of land of the suit property set out in paragraph 3 from the Adjudication register for KAMWIMBI 'A' adjudication section within MERU SOUTH sub-county;

p) An Order to substitute the names of the Defendants in the Adjudication register for KAMWIMBI 'A' adjudication section within MERU SOUTH sub-county for the twelve (12) parcels of land of the suit property set out in paragraph 3 with the name of the Plaintiff MUGERE KAMOTHO;

- q) An order of permanent injunction restraining the 1<sup>st</sup> to 12<sup>th</sup> Defendants whether by themselves, their agents, servants and/or employees from in any way or howsoever from trespassing or any in way interfering with the twelve (12) parcels of land of the suit property set out in paragraph 3;
- r) An eviction order against the 1<sup>st</sup> to 12<sup>th</sup> Defendants, their employees, servants and/or agents who have wrongfully and forcefully possessed, occupied and settled on the twelve (12) parcels of land of the suit property set out in paragraph 3.
- s) Mesne profit;
- t) General damages for non-user;
- u) Special damages as set out at paragraph 9.9
- v) Cost of the suit;
- w) Interest on (a) (vi) (vii) & (viii) above; and
- x) Such further or better Orders and/or other Orders as the Honorable Court may deems fit and expedient to grant for the cause of justice.

2. The 1<sup>st</sup> Defendant neither entered Appearance nor filed a Statement of Defence. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendant filed a Joint Statement of Defence dated 2<sup>nd</sup> June 2015. The 13<sup>th</sup> and 14<sup>th</sup> Defendants filed a Joint statement of Defence dated 17<sup>th</sup> February, 2020.

3. The matter proceeded for hearing on 7<sup>th</sup> May, 2019, 27<sup>th</sup> January, 2020, 4<sup>th</sup> March, 2020 and 12<sup>th</sup> October, 2020. The Plaintiff called four (4) witnesses to testify in support of his testimony, the 6<sup>th</sup> Defendant testified in his Defence and the other Defendants opted not to call witnesses in their Defence.

## **B. PLAINTIFF'S CASE**

4. From the Pleadings and the evidence on record, the Plaintiff's case is that before land adjudication commenced in KAMWIMBI "A" in 1993, the Plaintiff was the proprietor/owner of all that parcel of unsurveyed land located at Gachakuthe village, Kamwimbi location, Meru south sub-count, Meru County in the Kamwimbi "A" Land Adjudication section (hereinafter referred to as "**the suit property**"). The suit property borders the Itugururu market to Kabururu market road to its west and the Ruguti River to its east. It is bordered to the north by a land parcel owned by M'NGERENI M'MATHAIA and to the west by a land parcel owned by CELESTINO RIUNGU. The Gaciere stream flows through the land on its southern side flowing in the west to east direction. The suit property measures approximately 100 acres and the current estimated value is well over 20 million Kenya shillings.

5. The suit property was gathered in the 1900's by the late NYAGA who was the father of the late MURUGA NYAGA and the Plaintiff's father the late KAMOTHO. The said NYAGA took possession of the suit property and the same was passed from generation to generation hence the same is the Plaintiff's ancestral land. Indeed, the late NYAGA and the late KAMOTHO were buried on the suit property.

6. The suit property was used by the late MURUNGA NYAGA for grazing and cultivation. The Plaintiff herein is a first cousin to the late MURUGA NYAGA since their fathers were brothers. The said MURUGA NYAGA died in the year 1992 and the rights over the suit property passed to the Plaintiff herein as the last surviving eldest family member.

7. On or about the year 1987, the late MURUGA NYAGA had a dispute with the late NGATUNI MUGERE over the suit property which concerned the ownership of the suit property. The said NGATUNI MUGERE had entered the suit property and started committing wanton acts of destruction in 1987.

8. When the dispute between MURUGA NYAGA and NGATUNI MUGERE over the suit property started on or about the year 1987, there were confrontations between members of families of MURUGA NYAGA and NGATUNI MUGERE which threatened to get violent. The area Assistant Chief, Mr. Ephantus Njoka, intervened and issued a directive that both parties should not use the suit property to prevent a breach of peace which MURUGA NYAGA and his family members adhered to.

9. The dispute was heard and determined by the "KIGOCI" elders. The "KIGOCI" elders are a group of elders who hear and determine disputes among the Meru community, including but not limited to land disputes, according to Meru customs and traditions. The "KIGOCI" elders determined the dispute in favour of the late MURUGA NYAGA on **23<sup>rd</sup> April, 1988**.

10. The 1<sup>st</sup> to 12<sup>th</sup> Defendants herein started trespassing on the suit property sometime in year 1993 when the adjudication process started. Subsequently, fraudulently and by means of deception the 1<sup>st</sup> to 12<sup>th</sup> Defendants' caused the 13<sup>th</sup> Defendant to excised out of the suit property twelve (12) parcels of land and the same were recorded as belonging to them respectively as follows:

Parcel Number	Owner in adjudication register
i. 702	JAMES MUCHIRI NDEGWA

- ii. 703 DAVID MUTHENGI
- iii. 770 JOHN NYAGA
- iv. 771 M'IMWITHA M'RINTIRA
- v. 788 JACKSON MAKUNYI KARURU
- vi. 776 M'GWETA MURUA
- vii. 775 NJERU NGOROI
- viii. 773 ALEXANDER MUNENE MATI
- ix. 1249 M'NANDI MAIKITHE
- x. 1280 PATRICK MUTUGI MATI
- xi. 1286 JOHN GIONGA MATI
- xii. 1309 CATHERINE KAGENDO  
MUTURIA

11. The 1<sup>st</sup> to the 12<sup>th</sup> Defendants have no colour of right whatsoever over the twelve (12) parcels of land of the suit property set out hereinabove.

12. The Plaintiff called witnesses in support of his case as stated herein above as follows:

**i. PW1 – EPHANTUS NJUKI**

13. During EXAMINATION IN CHIEF, PW 1 adopted his witness statement dated 3<sup>rd</sup> March, 2015 and stated that he is a retired Chief of Kamwimbi Location having retired in 1994. He confirmed being fully aware of the dispute over the suit property, the hearing and determination of the dispute over the suit property by *Kigoci* elders and the suit property which he stated was about 3 kilometers from his home.

14. PW 1 stated that the rightful owner of the suit property is the Plaintiff. He confirmed that there was a Hearing of dispute over the suit property between MURUGA NYAGA and NGATUNI MUGERE before the '*Kigoci*' elders and the elders decided the dispute in favour of the MURUGA NYAGA. He stated that the *Kigoci* elders were the ones who dealt with land disputes at the time as they knew the village well and their decision were always right.

15. He confirmed that after the decision was made in favour of MURUGA NYAGA, he wrote a letter to the area Chief of Gatereni Location where NGATUNI MUGERE hailed from to inform him of the decision of the elders in favour of MURUGA NYAGA. He also stated that he wrote to NJUKA NGATUNI son of NGATUNI MUGERE asking him to vacate the suit property so as to avoid any further conflicts.

16. Pw 1 testified the land which was the subject of the dispute before the *Kigoci* leaders is the same land in dispute in this matter. He confirmed that the 1<sup>st</sup> to the 12<sup>th</sup> defendant's were not on the suit property before demarcation started and they never made any claim over the same before land adjudication started.

17. During CROSS EXAMINATION, PW 1 stated that he was appointed Assistant chief in 1983 and retired in 1994 as Chief. He confirmed he was not a relative of the Plaintiff and the Plaintiff hailed from Gitareni Location. He confirmed that the Plaintiff and his family lived at Kabururu sub-unit.

18. PW 1 further stated that when cases were referred to him concerning un-adjudicated land before 1993, he referred them for determination by the '*Kigoci*' elders and he had never heard and determined any dispute over land between the Plaintiff and the 1<sup>st</sup> to the 12<sup>th</sup> Defendants.

19. He stated that when land adjudication commenced in 1993, the land cases were handled by the adjudication officers as after an area was declared an adjudication section, all land cases were referred to adjudication. He stated that he is not aware of what transpired during the adjudication process as he was not part of the officers conducting the same or a party to any of the disputes between the Plaintiff and the 1<sup>st</sup> to the 12<sup>th</sup> Defendants.

20. PW1 further stated that the allocation of the twelve parcels to the Defendants was improper. He confirmed the Defendants were not on the suit property when he was the area chief.

**ii. PW2 – M'NGERENI M'MATHAI**

21. During EXAMINATION IN CHIEF, PW 2 adopted his witness statement dated 3<sup>rd</sup> March, 2015 and stated that he from Gitareni Location and the Plaintiff is his neighbour.

22. He confirmed that land in this area was not allocated through clan affiliations as he is from the Njugoni clan while the Plaintiff is not from that clan. He further stated that he knows of Ndei Kiigii from the Mugere clan and Celestio Kiungu from Mugweni clan who have land near the Plaintiff's land.

23. He confirmed that he lives on his property and the Defendants do not live on the suit property.

24. On CROSS EXAMINATION, PW2 he confirmed that both he and the plaintiff hail from Gitareni location and that both he and the Plaintiff own land within Kamwimbi A adjudication section in Magumoni location.

25. He confirmed that during the adjudication process, land was allocated based on where one lived or where his ancestors were occupying.

26. He reiterated that the land in dispute belonged to the plaintiff's family from time immemorial and the defendants never lived on the suit property.

27. PW 2 confirmed that when land adjudication commenced, there was a procedure for determining disputes over claims of land ownership. He stated he was neither aware if the Plaintiff had filed objections to the Defendant's being allotted the 12 parcels in dispute nor if the Plaintiff had been awarded 2 parcels within the block claimed in this suit herein.

28. He reiterated that the plaintiff has a block of land next to his at Kamwimbi A land adjudication area which is the 100 acres he is claiming in this suit. He confirmed his parcel of land was subjected to adjudication from the committee stage to the Appeal to the Minister. He stated he was unaware of the role of the Court in the adjudication process.

29. ON RE-EXAMINATION, PW2 reiterated that the plaintiff has a block of land next to his at Kamwimbi A land adjudication area which is the 100 acres he is claiming in this suit. He further stated that while he is aware of some aspects of land adjudication, he does not know everything on the subject and he is not an expert on land adjudication and the law on the same.

30. He stated that the adjudication officers informed them that people would get where they occupied but some people got land they did not occupy. He reiterated that the Defendants even to date do not live on the suit property and that the suit property is Plaintiff plaintiff's ancestral land which had a dispute between MURUGA NYAGA and NGATUNI MUGERE.

### **iii. PW3 – ALPHAM MUTHAMI GILBERT**

31. During EXAMINATION IN CHIEF, PW 3 adopted his witness statement dated 10<sup>th</sup> July, 2019 and stated that he a grandson and next of friend to the Plaintiff. He also produced the documents as appearing in the list and bundle of documents dated 10<sup>th</sup> July, 2019 and 3<sup>rd</sup> March, 2015.

32. He stated that land in the area was not allocated through clan lines as there are several individuals from different clans allocated land in the area. He stated that Celestine who is a neighbour to the right is from the umotho clan; Ndemi Mathui to the left is from Njoguni clan and Ndei Kiigii from the Mugere clan.

33. He stated that the suit property is not occupied by the Defendants or any other person.

34. On CROSS-EXAMINATION, PW 3 stated that he is the Plaintiff's son and that his father and his father's brothers are still alive but they are not witnesses in this matter. He stated he is 41 years old and in 1993 he was 15 years old. He conceded that his father and his father's brothers know more about the disputed land and further stated that he is equally aware of land adjudication within Kamwimbi A land adjudication section.

35. He testified that they claim all the land and the trees on it which is not recorded in his grandfather's name and parcel numbers 1970 and 1968 are among the lands not registered in his grandfather's name. He confirmed that the said parcels have no titles and if they are there, he is not aware of the same.

36. He reiterated that the 1<sup>st</sup> to the 12<sup>th</sup> Defendant's do not live on the suit property and invited the Court to make a site visit if necessary. He confirmed that he knows M'gweta Murua (the 6<sup>th</sup> Defendant) and stated is not aware if the 6<sup>th</sup> Defendant buried his father on the suit property in 1958.

37. He confirmed that he is familiar with the adjudication dispute resolution process from the committee stage to the Appeal to the minister. He confirmed that he is a ware of a party's right to Appeal to the minister or the Court.

38. Finally, he stated that he is not a lawyer and that the 1<sup>st</sup> to 12<sup>th</sup> Defendant's parcels were adjudicated pursuant to the process under cap 203 and 204.

39. On RE-EXAMINATION, he stated that he was appointed as next of kin by the Court as his grandfather due to his advanced age and that his father and surviving brothers are all at an advanced age. He stated that the matter needed to be followed up by someone who can attend Court regularly and can understand English and Kiswahili. He further stated that his father's brother, Mbabu, was following up the matter

during the adjudication process but he is since deceased.

40. He stated that the Court is not barred from hearing an adjudication dispute. He confirmed he is not a lawyer by profession but he is aware of certain aspects of the adjudication process.

**iv. PW4 – CELESTINO RIUNGU**

41. During EXAMINATION IN CHIEF, PW 4 adopted his witness statement dated 3<sup>rd</sup> March, 2015 and stated that he from Weru sub-location, Kithangani Location and that the Plaintiff is his neighbour.

42. He confirmed that he is aware that there was a dispute over the suit property between MURUGA NYAGA and NGATUNI MUGERE and the dispute was decided by the elders in favor of MURUGA NYAGA.

43. On CROSS EXAMINATION, he reiterated that he is from Kithangani location and he is a neighbour of the Plaintiff at Kamwimbi which is the land in dispute. He stated his parcel number is 1061 and the same has a pending Court case.

44. He stated that he is aware that there are 12 disputed parcels and of the 12, the one neighbouring his property was allocated to Mugendi Nkurure whose father is Makunyi Kururu (the 5<sup>th</sup> Defendant). He stated that he is not aware if the said Mugendi has been allocated any other parcels within the said block.

45. He stated that under CAP 284, adjudication officers indicated that land would be allocated where one lived or cultivated at the Kamwimbi A adjudication section. He stated that he was aware that there was a dispute resolution mechanism which started at the committee stage followed by an Appeal to the Arbitration board, then Adjudication Officer and finally an Appeal to the Minister. He stated that he is not aware if the Plaintiff followed the procedure.

46. He confirmed that he is aware of a dispute between MURUGA NYAGA and NGATUNI MUGERE before the Kigoci elders. He stated that he is not aware if the Plaintiff presented the said decision to the committee or the Distract Land Adjudication and Settlement Officer.

47. On RE-EXAMINATION, PW4 stated that he is aware that there some 12 subdivision on the suit property and among the 12 subdivisions, the parcel neighbouring his property is the one allocated to Mugendi Nkurure. He reiterated that but for the subdivisions; the whole parcel claimed by the Plaintiff would be his neighbour.

48. He further reiterated that he lives in Kithangani and he has land at Kamwimbi which was confirmed to him during the adjudication process at Kamwimbi A adjudication section.

**C. DEFENDANTS' CASE**

49. Only the 6<sup>th</sup> Defendant tendered evidence as follows:

50. During EXAMINATION IN CHIEF, DW 1 adopted his witness statement dated 15<sup>th</sup> January, 2018 and stated that he from Kabururu, Kamwimbi.

51. He stated that he does not know the Plaintiff but he has heard that he comes from Cheera, Gitareni location and they do not belong to the same location. He stated that adjudication at Cheera, Gitareni and Kamwimbi were not done at the same time.

52. He stated that he knows all 12 Defendant's sued by the Plaintiff who are his neighbours from nearby. He stated that some do not come from the same family as his.

53. He confirmed that he was allotted parcel number 776 but he does not have a title as the land is still under adjudication and there is an Appeal to the minister and there are other appeals to the minister.

54. He stated that the Plaintiff never had land at Kamwimbi and that it is during adjudication that he tried to get land there but he did not succeed. He stated that all the parcels went through adjudication process.

55. On CROSS-EXAMINATION, DW 1 reiterated that he represented all the Defendants. He stated that he is only related to the 7<sup>th</sup> Defendant, the 4<sup>th</sup> Defendant and the 3<sup>rd</sup> Defendant.

56. He reiterated that the parcels of land in issue are still under adjudication and they do not have title deeds as there is a pending Appeal to the Minister. He also stated that his parcel is 776 and there is no title for the same.

57. He stated that he represents the other Defendant's in the matter as he knows facts about the adjudication process. He stated that some of the parcels have title deeds but when put to task as to why the said titles are not in court he claimed that they were not requested to present them in Court. He conceded that under section 13 of the Land Adjudication Act, interest in land is not said to be only ascertained by occupation.

58. DW1 upon further cross-examination stated that the adjudication officer gave consent for some matters to proceed to Court and when such a consent is given, such parcels do not get a title deed.

59. He conceded that although he indicated that his mother died in 1947, there was no evidence of the same. He also conceded that he is not aware of the number of children the 2<sup>nd</sup> Defendant has and how many are dead or alive. He admitted that he knows Ephantus Njuki, PW1, but he denied knowing he was a chief and insisted the Plaintiff was not from there area.

60. He further stated that he was not aware of any dispute between MURUGA NYAGA and NGUTANI MUGERE before the Kigoci elders and that his father was not party to the said proceedings.

61. On RE-EXAMINATION, DW 1 stated that adjudication ended when he was sued in 2018 and the titling started around 2018/2019.

#### **D. ISSUES FOR DETERMINATION**

62. From the pleadings and the evidence of the parties herein, we submit that the issues for determination by this Honourable Court are as follows:

- a) Whether the Court has Jurisdiction to hear and determine the dispute herein;
- b) What is the applicable law and how are interests in the disputed land parcels to be ascertained; and
- c) Whether the Plaintiff is rightful owner of the land parcels in dispute.

#### **a) The Court has Jurisdiction to hear and determine the dispute herein**

63. It is not in dispute that the parcels of land in dispute herein were within the Kamwimbi A land adjudication section. This fact was pleaded at paragraph 4 of the Amended Plaint and admitted at paragraph 4 of the 2<sup>nd</sup> to 12<sup>th</sup> Defendant's joint statement of Defence. At paragraph 3 (iv), the 2<sup>nd</sup> to 12<sup>th</sup> Defendants pleaded that land in Kamwimbi A Land Adjudication section was adjudicated under the Land Adjudication Act, CAP 284. **Section 30** of the **Land Adjudication Act** provides as follows:

30. *Staying of land suits*  
(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.

(Emphasis supplied)

64. The other statute that deals with land adjudication in Kenya is the **Land Consolidation Act. Section 8** of the said statute provides as follows:

8. *Staying of land suits*  
(1) Subject to the provisions of this section, no person shall institute and no court whatever shall take cognisance of, or proceed with or continue to hear and determine, any proceedings in which the ownership or the existence under native law and custom of any right or interest whatsoever in, to or over any land in an adjudication area is called in question or is alleged to be in dispute unless the prior consent in writing of the Adjudication Officer to the institution or continuance of such proceedings has been given.

(Emphasis supplied)

65. From the foregoing, it is clear that a Court can delve into determining a question into the existence or non existence of an interest in land which fall within a declared adjudication section under either the **Land Consolidation Act** or the **Land Adjudication Act** provided that there is a written consent of the Adjudication Officer allowing for the institution or continuance of such a suit. This much was noted by the Court of Appeal in **John Kariri Mucheke vs. M'itabari M'arunga [2008] eKLR** where it was stated as follows:

*“Section 30 (1) of the Land Adjudication Act requires that the consent be in writing. The consent in this case is in writing and bears the name of the Land Adjudication Officer, Nyambene District. It has not been contended that the Land Adjudication Officer did not infact grant the consent filed in court. The consent which was filed in court is ex facie valid. We find no merit in this ground of appeal.”*

*(See page 3 of the Plaintiff's bundles of authorities)*

66. In this case, the Plaintiff produced and had marked as Exhibit 8 a written consent by the Land Adjudication Officer dated 16<sup>th</sup> January, 2015 authorizing the Plaintiff herein to file the proceedings herein. As such, the matter is properly before this Honourable Court.

67. At the hearing hereof, the 2<sup>nd</sup> to 12<sup>th</sup> Defendants led evidence to the effect that the Court lacks jurisdiction as the Plaintiff has not exhausted the procedures and avenues provided under the Land adjudication process, be it under the Land Adjudication Act or the Land Consolidation Act.

68. Three issues emerge from this. The first is that the evidence and the issue were not pleaded by the Defendant. It is now well settled law that a Court will not permit a party to lead evidence on unpleaded issues and if such evidence is presented, the Court ought to disregard the same. This much was pointed out by the Court of appeal in **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR** , where it noted as follows:

*“The appellants’ contention is that the learned Judge overstepped her mandate in crafting a new issue not brought by the parties and basing it to nullify the 1<sup>st</sup> respondent’s election thereby essentially assisting the petitioner in an impermissible manner. The 1<sup>st</sup> respondent in submissions filed in this Court supported this argument by the appellant and cited to us two decisions of the Nigerian Supreme Court. In the first, **ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC** S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;*

**“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”**

Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;

**“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”**

To the above submissions by the appellant and the 1<sup>st</sup> respondent through its learned counsel Mr. Kiugu, which are by no means insubstantial, we have been unable to find any answer by the 2<sup>nd</sup> to 4<sup>th</sup> respondents both in their written submissions and in the address before us by Mr. Laichena, their learned counsel.

*As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score. (Emphasis supplied) (See pages 7 - 9 of the Plaintiff’s bundles of authorities)*

69. This point was restated by the same Court in the case of **Stephen Onyango Achola & another v Edward Hongo Sule & another [2004] eKLR**, where the Appellant had filed a case against the Respondents alleging, *inter alia*, the tort of fraudulent misrepresentation. The second Respondent, the Municipal Council of Kisumu, which was second Defendant in the High Court, raised a preliminary objection that the suit against it was time barred since the alleged tort was said to have been committed in 1994 and the original plaint was only filed in 1997. A Defence that had been previously filed by the 2<sup>nd</sup> respondent had neither pleaded the Defence of Limitation nor specifically pleaded that the claim was time-barred under the Public Authorities Limitation Act. The High Court nevertheless allowed the issue of Limitation, upheld the preliminary objection and thus terminated the Appellants’ claim. The Appellants appealed and it was held, *inter alia*, that the second Respondent having failed to plead Limitation in its Defence was not entitled to rely on that issue and base a preliminary objection on it. The High Court was faulted for allowing the issue of Limitation to be raised and upholding the preliminary objection of the second respondent based on the issue of Limitation. The Court stated as follows:

*“The difficulty we find with the 2<sup>nd</sup> respondent’s preliminary objection based on limitation and which was upheld by Tanui, J is that in its defence filed in the High Court on 22<sup>nd</sup> September, 1997, the second respondent did not plead the defence of limitation. [...] In the circumstances of the present case, we think Tanui, J was not right in first, allowing the issue of limitation to be raised when it had not been pleaded, and secondly, in upholding the preliminary objection of the second respondent based on that issue and thus terminating the appellants’ claim against the second respondent.” (Emphasis supplied) (See pages 14 and 15 of the Plaintiff’s bundles of authorities)*

70. The point is simple, a Defence should first plead an issue before a party can lead evidence on the same and ultimately the court base its decision on the same. If a point is not pleaded, the same cannot be entertained. This position was resolutely followed in **Emily N. Mulanya vs. Kenya Power and Lighting Company [2018] eKLR**. (See page 18 of the Plaintiff’s bundles of authorities)

71. In this case, the 2<sup>nd</sup> to 12<sup>th</sup> Defendants did not plead the issue of the Plaintiff having failed to exhaust the avenues provided under the Land Adjudication process before coming to court. As such, the evidence on the same cannot be entertained and the Court cannot base its decision on the same.

72. Secondly, though a forum be vested with jurisdiction to handle an issue, a litigant would still be entitled to have recourse to Court if some of the remedies sought cannot be granted by the forum. This much was pointed out in **Emily N. Mulanya v Kenya Power and Lighting Company [2018] eKLR**, where Justice A. K. KANIARU stated that;

*“The Plaintiff also raised another relevant point namely: That though a forum be vested with jurisdiction to handle an issue, a litigant would still be entitled to have recourse to court if some of the remedies sought cannot be granted by the forum. The Defendant has not responded to this point. In particular, the Court would have been interested to know whether the Energy and Regulatory Commission has the power to award general or aggravated damages. The position taken by the Plaintiff is both logical and commonsensical. It helps to obviate a situation where multiple or separate suits can be filed in different places, yet they can be handled at one forum. In this particular matter, if the Defendant’s reasoning is upheld, the Defendant would have to file a dispute at the Energy & Regulatory Commission for issues that that entity can handle and then another dispute here to seek general and aggravated damages. In a scenario like that, the courts considered view is that a litigant is entitled to go to the one forum that can competently handle the dispute.” (Emphasis supplied) (See pages 18 and 19 of the Plaintiff’s bundles of authorities)*

73. In this case, the Plaintiff has sought among other remedies an eviction order against the 1<sup>st</sup> to the 12<sup>th</sup> Defendants, a permanent injunction restraining the 1<sup>st</sup> to the 12<sup>th</sup> Defendants from trespassing on the properties in dispute, mesne profits, general damages for non-user and

special damages. These are not remedies which any of the forums constituted under the **Land Adjudication Act** and the **Land Consolidation Act** can award. As such, the Plaintiff is entitled to approach the Court herein for a wholesome determination of the dispute at hand and an award of the remedies he seeks rather than move to various forums.

74. Finally, the Plaintiff has made use of the forums provided under the Act to the point possible. The Plaintiff pleaded at paragraph 10 of the Amended Plaintiff that it had matters before the Land Adjudication officer. He reiterated the same in his testimony where he stated that the reason for filing the dispute before the Court was that the period for filing the Appeal lapsed and there was no other remedy available. This was confirmed by DW 1 who stated that the Plaintiff had raised objections during the adjudication process and did not succeed. As such, the Plaintiff used the forums available up to their logical conclusion.

75. The Court of Appeal in **John Kariri Mucheke vs. M'itabari M'arunga [2008] eKLR** noted as follows on this issue:

*“It is further submitted that the respondent should have exhausted the machinery for resolving disputes prescribed in the Land Adjudication Act. Under the Land Adjudication Act a person who has an interest in land, makes a claim to the recording officer and points out boundaries to the demarcation officer (s. 13). If he is aggrieved by their decision, he refers the dispute to the Adjudication Committee, (s.21) then to the Arbitration Board (s.22). From the decision of the Arbitration Board he can file an objection to the Land Adjudication Officer (s.26) and if he is aggrieved by the decision of the Land Adjudication Officer, he can file an appeal to the Minister for Lands (s.29).*

*It is clear in this case, that the respondent did not make any claim to the land in dispute during the land adjudication. It is also apparent that the adjudication process in respect of the land in dispute is complete. It appears from the evidence of the appellant at the trial that the adjudication process in the area started in about 1967. By the time the respondent filed the suit on 13<sup>th</sup> February, 1997 the adjudication process had long been completed and the respondent could not therefore utilize the machinery for resolving claims to land under the Land Adjudication Act. The clock could not simply be wound back. The time scales for raising complaints prescribed in the Act had long expired.” (Emphasis supplied) (See pages 3 and 4 of the Plaintiff's bundles of authorities)*

76. The simple point is the Appeal to the Minister was no longer available and therefore the avenues under the adjudication process stood exhausted.

77. It should also be noted that at paragraphs 10 of the 2<sup>nd</sup> to 12<sup>th</sup> Defendant's Defence, they admitted that the Court herein has jurisdiction to hear and determine the matter herein. As such, the 2<sup>nd</sup> to 12<sup>th</sup> Defendant's are estopped from raising the issue as they had the opportunity to do so earlier but they turned down the same. They are a Johnny come late and cannot now resile from that position in the instant case.

#### **b) What is the applicable law and how are interests in the disputed land parcels to be ascertained**

78. **Section 30** of the **Land Adjudication Act** bars a court from hearing and determining suits concerning interests in land. **Section 8** of the **Land Consolidation Act** as reproduced herein above bars a court from hearing and determining suits concerning ownership or the existence under native law and custom of any right or interest whatsoever in, to or over any land. In essence, they bar a court from entertaining suits concerning issues of interests and/or rights in land in an adjudication section.

79. Once a case fall within the exception of having the Land Adjudication Officer granting consent to the filing of a suit over the same subject matter, as is the case herein, the court can determining the parties rights openly. It is not restricted to the conditions set in the **Land Adjudication Act** and the **Land Consolidation Act**. The issue falls for determination on a balance of probabilities.

80. In the case of **John Kariri Mucheke vs. M'itabari M'arunga [2008] eKLR** the Respondent obtained consent from the Land adjudication Officer Nyambere District dated 23<sup>rd</sup> January, 1997 to file a suit for interest over a parcel of land within Kangeta Adjudication Section. Subsequently, the Respondent filed S.R.M.C.C. No. 22 of 1997 at Mua claiming half a share in land parcel No. 280 situated within the Kangeta Adjudication Section whose owner was indicated in the adjudication record to be the Appellant. The matter was heard by the trial Court and Judgment was entered in favour of the Respondent. The Appellant appealed to the High Court vide Meru H.C.C.C. NO. 108 OF 1999. The High court Judge after hearing the Appeal dismissed the same finding that the trial court did not misdirect itself on the findings of both matters of law and fact. Dissatisfied with that finding, Appellant moved the court of Appeal challenging the findings of the Superior Court on among other grounds, that the respondent did not prove trust as required by the law and that the superior court erred in law in upholding the decision of the subordinate court that possession is ownership. The Court of Appeal delved into the issue of establishment of trust and found for the Appellant holding as follows:

*“On our analysis of the evidence, we are satisfied that the appellant proved by credible evidence that the suit land is not clan land and that he is not a trustee of the respondent for half share of the suit land.*

*However, there is clear evidence that the respondent occupies a smaller portion of the land with his son and that he has built a house on the land. There was uncontroverted evidence that it was the appellant who gave the land to the respondent voluntarily. The appellant did not explain the full circumstances under which the respondent came to occupy the land. There is evidence that the respondent has occupied an identifiable portion for a long time. In the circumstances, the respondent is entitled to a portion of the suit land. There is evidence that the respondent occupies less than one acre. It is just that the respondent should be awarded one acre.*

*In the result, we allow the appeal and set aside the judgment of the subordinate court and the superior court awarding the respondent half share of the suit land. We substitute therefor judgment for the respondent for one acre to be excised from parcel No. 280 Kangeta Adjudication Section. The portion of one acre awarded to the respondent shall be demarcated from the portion that the respondent is occupying. The appeal has partially succeeded and we award the appellant half of the costs of the appeal in this Court*

and in the superior court. Those are our orders.” (Emphasis supplied) (See pages 1 - 5 of the Plaintiff’s bundles of authorities)

81. The upshot of the above finding is that once consent to file a suit claiming an interest in land falling within an adjudication section has been obtained from the land adjudication officer; the Court is vested with jurisdiction to determine the claim on a balance of probabilities.

**c) The Plaintiff is rightful owner of the land parcels in dispute**

82. The 1<sup>st</sup> Defendant did not enter appearance and file a statement of Defence. As such, he has not defended the suit herein. We humbly submit that the Plaintiff’s claim against him has wholly succeeded as the same is undefended.

83. Be that as it may, only the 6<sup>th</sup> Defendant tendered evidence in his Defence. It is trite law that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged. In the end, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants’ failure to adduce evidence means that the standard of proof in civil cases (on the balance of probabilities) has been attained by the Plaintiff. We rely on the case of **Linus Nganga Kiongo & 3 Others vs. Town Council of Kikuyu [2012] eKLR** for this proposition. (See page 21 and 22 of the Plaintiff’s bundle of Authorities).

84. In the circumstance, we humbly submit that the Plaintiff has proved his claim on a balance of probabilities and he is entitled to the prayers sought.

85. The Plaintiff tendered credible and uncontroverted evidence on his claim over the suit property. PW 1, PW2 and PW 4 confirmed that they were aware that the Kigoci elders had on **23<sup>rd</sup> April, 1988** rendered a decision that the suit property belonged to the MURUNGA NYAGA and his family. PW 3 confirmed this finding and testified that the Plaintiff was the eldest surviving member of the MURUGA NYAGA family and as such, the rights over the suit property passed on to the Plaintiff. PW 3 also gave a chronology of events on how the suit property was acquired by the Plaintiff’s family way back in 1900’s when it was gathered by the late NYAGA who was the father of the late MURUGA NYAGA and the Plaintiff’s father the late KAMOTHO and how after the demise of MURUGA NYAGA the plaintiff took over the same as the eldest surviving member of the family. This evidence was unchallenged and uncontroverted.

86. The 1<sup>st</sup> to the 12<sup>th</sup> Defendants did not lead any evidence as to how they acquired interest over the suit property. The 1, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants did not testify and/or produce any evidence on how they acquired any interest over the disputed parcels.

87. The 2<sup>nd</sup> Defendant stated that he represented them but did not lead any evidence on how they acquired interest over the 12 disputed parcels of land. Despite this statement, the 2<sup>nd</sup> Defendant conceded that he was only related to the 7<sup>th</sup>, 4<sup>th</sup> and 3<sup>rd</sup> Defendant and the rest of the Defendants were not related to him. He also stated that he represented them because he was aware of the land adjudication process not because he was aware of how they acquired interest over the contested parcels of land.

88. The 2<sup>nd</sup> Defendant’s testimony was also contradictory. In his witness statement adopted in Court as well in the joint statement of Defence, he stated that the 2<sup>nd</sup> Defendant has buried his mother, father and several children on parcel number 703 but during cross-examination he stated that he is not aware of how many children the 2<sup>nd</sup> Defendant has and whether any of them are dead or alive. We humbly submit that his evidence is not credible and is at best hearsay as concerns the 1, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Defendants’ interests in the disputed parcels of land.

89. The 2<sup>nd</sup> Defendant also led evidence that the land in this section was allocated along clan lines. This assertion was disproved by PW1, PW 2 and PW 3 who confirmed owning parcels of land adjacent to the suit property herein and who stated that they are from different clans and that land was not allocated using clan lines in the area.

90. Finally, the 2<sup>nd</sup> Defendant pleaded that the Plaintiff is from Kabururu and could not gather land from Kabururu unit. (See Para 3 (ii) of the Defence). In his testimony, he contradicted this assertion by stating the Plaintiff is from Cheera, Gitareni location. At any rate, his evidence as to where the Plaintiff hailed from is at variance with his pleadings and therefore ought to be disregarded.

**E. CONCLUSION**

91. The Plaintiff humbly submits and prays that this Honourable Court allow his claim and grants the prayers sought in their Plaintiff dated 3<sup>rd</sup> March, 2015 and Amended on 4<sup>th</sup> December, 2019.

92. We so humbly pray.

**DATED at NAIROBI this ...17<sup>th</sup> .... day of .....November,..... 2020**

\_\_\_\_\_  
**KAMINZA & AMBANI**

**ADVOCATES FOR THE PLAINTIFF**

20. The plaintiff also filed supplementary submissions dated **18<sup>th</sup> December, 2020**. They are pasted herebelow in full without any alterations whatsoever.

### **PLAINTIFF'S SUPPLEMENTARY WRITTEN SUBMISSIONS**

**May it please your Lordship,**

1. The Plaintiff submits as follows in response to the following issues addressed in the 2<sup>nd</sup> to 12<sup>th</sup> defendant's written submission dated 22<sup>nd</sup> October, 2020:

#### **a) The Plaintiff has not exhausted the procedures and avenues provided under the Land adjudication process**

2. The Plaintiff reiterates paragraphs 67 to 79 of the Plaintiff's written submissions dated 17<sup>th</sup> November, 2020 and further submits that contrary to the allegation at page 3 paragraph 3 of the 2<sup>nd</sup> to 12<sup>th</sup> Defendant's Submissions, the Plaintiff's witnesses did not admit that the Plaintiff declined to participate in the land adjudication process. PW 1, PW 2 and PW 4 only stated that they did not know if the Plaintiff filed objections to the 12 parcels herein. PW 3 confirmed that the Plaintiff participated in proceedings in the land adjudication process and even produced proceedings for some of the cases.

#### **b) Effect of the consent of the land adjudication officer dated 16<sup>th</sup> January, 2015.**

3. The Plaintiff reiterates paragraphs 63 to 66 of the Plaintiff's written submissions dated 17<sup>th</sup> November, 2020 and further submits that the issuance of a consent to the filing of the proceedings herein by the Land Adjudication Officer is provided under **section 30** of the **Land Adjudication Act** and **section 8** of the **Land Consolidation Act**. The said remedy was provided by parliament in its wisdom. The Plaintiff has chosen to pursue the remedy as is his right. To find that the Plaintiff's choice to exercise an available legal remedy mischievous is to disenfranchise the Plaintiff as the remedy is provided by law and this Court is tasked with applying the law.

4. The Plaintiff has admitted the existence of a valid consent by the land adjudication officer. The same bestows upon this court the jurisdiction to hear and determine the dispute herein as pointed out by the Court of Appeal in **John Kariri Mucheke vs. M'itabari M'arunga [2008] eKLR**. (See page 3 of the Plaintiff's bundles of authorities dated 17<sup>th</sup> November, 2020 and filed in Court on the same day)

5. In **Republic vs. District Land Adjudication Officer, Trans-Mara District) Samson Kiserian Kilerai [2012]eKLR** the Court of Appeal had the occasion of determining when adjudication is completed. The Court noted as follows:

*“With regard to the learned Judges reasoning as regards whether the adjudication process had been completed or not, we have once again on our own revisited and construed the provisions of section 23, 24, 26, 27, 28, 29 and 30 of the same Act and applied them to the reasoning of the said learned Judge on this issue and we are also satisfied that the same reasoning cannot be faulted. Section 23(1) stipulates clearly what forms an adjudication record namely the forms prepared by the recording officer under section 19 of the Act together with the demarcation map. Whereas the demarcation map and the adjudication record are what collectively become known as the adjudication register. Proof of completion of the adjudication register is catered for under section 25 of the Act. The section stipulates clearly that this arises when the land Adjudication officer certifies the adjudication record and demarcation map and delivers the duplicate of these to the Director of land Adjudication and further displays the original for inspection at a convenient place within the adjudication section. He thereafter gives notice that the adjudication register had been completed and could be inspected at the place where it has been displayed within a period of sixty days from the date of the notice. A revisit to the content of the entire record that was placed before the learned trial Judge does not reveal presence of forms prepared by the recording officer or the demarcation map in order for these to form proof of existence of an adjudication register.*

*The activities anticipated to take place during the 60 days' notice period as contemplated by sections 26, 26 (A), 27, 28 and 29 are those relating to objections to the completed register and hearing of those objections by the adjudication officer resulting in the rectification of the register under sections 27 or appeals to the minister under section 29 of the Act where applicable. When activities under sections 27 and appeals permitted under section 29 are finalized, that is when the land Adjudication officer prepares a **No objection Register** under section 26A of the Act and hands it over to the chief land Registrar under section 28, in pursuance of which the Chief land Registrar causes the registration of the adjudicated plots which registration are to be effected in accordance with the Adjudication Register. It is only then that it can be stated that the adjudication process is complete. In the absence of satisfaction of the afore set out procedures, there is no way the appellant could have accessed the court by way of judicial review without complying with the requirements of section 30(1) of the Act. It provides:-*

*“Except with the consent in writing of the adjudication officer, no person shall institute and no court shall entertain civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has been final in all respects under section 29(3) of the Act.” (Emphasis supplied) (See pages 5 and 6 of the Plaintiff's Supplementary bundles of authorities)*

6. From the foregoing, it is quite clear that the adjudication process is not yet completed as alleged by the 2<sup>nd</sup> to the 12<sup>th</sup> Defendant. They admit that there are appeals to the minister which are pending. As such, from this admission, the process cannot be said to be completed.

7. Further, as pointed out by the Court of Appeal in the above cited case, there are no forms prepared by the recording officer or the demarcation map in order for these to form proof of existence of an adjudication register presented in this case. All the Court has is a consent from the land adjudication officer. As such, it is clear that there is no evidence that the adjudication process is completed.

8. It therefore follows that the assertions that the process was completed are unfounded and not backed up by any evidence. It also follows that the assertion that the consent was issued when the land adjudication officer was *functus officio* is baseless as it has not been shown that the process has been completed.

**c. Evidence attached to the submissions.**

9. The 2<sup>nd</sup> to 12<sup>th</sup> Defendants have attached to their submissions what they refer to a green card and official search. The same is a letter from Land Adjudication Officer dated 12<sup>th</sup> August, 2020 and a certificate of official search dated 12<sup>th</sup> August, 2020.

10. The same is irregular as it amounts to sneaking in evidence vide submissions. We urge the Court to strike the same out.

11. Further, we urge the Court to not pay attention to the documents. As pointed out by the Court of appeal in **Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others [2015] eKLR** at paragraphs 18 to 26, when a document is filed, the document though on the Court file does not become part of the judicial record. It only becomes part of the Court record when it is produced and marked as an exhibit. It is only then that the Court can rely on the document in making its finding. A document only filed in Court but not produced has no evidential weight. ***(See pages 12 to 13 of the Plaintiff's Supplementary bundles of authorities)***

12. In this case, the two documents have no evidential weight as they are not part of the Court record. The Court should disregard them all together.

13. At any rate, and without prejudice to the foregoing, the two documents concern land parcels Kamwimbi 'A'/1147 and M/South/Kamwimbi 'A'/2594 which parcels are not the subject of this suit. Further, the documents were available as from 12<sup>th</sup> August, 2020. The suit herein proceeded for defence hearing on 12<sup>th</sup> October, 2020. The Defendants intentionally chose to not avail the documents as they were aware that under intense cross-examination from the Plaintiff's counsel, the same would not stand a chance as they have no relevance. The Defendants only seek to introduce them through the backdoor at this stage as they are aware that they will not be tested on the same. We humbly urge the Court to strike out the said documents as they are irregularly filed and are very prejudicial to the Plaintiff as he cannot now cross-examine on the same and put them to the required test.

**d) Limitation of time as concerns fraud.**

14. The 2<sup>nd</sup> to the 12<sup>th</sup> Defendants submissions at paragraph 10 assert that the suit herein is time barred as a cause of action based on fraud cannot be instituted after three (3) years from the time the cause of action arose. On this issue, we reiterate the submissions at paragraphs 68 to 71 of the Plaintiff's written submissions dated 17<sup>th</sup> November, 2020.

15. A Defence should first plead an issue before a party can lead evidence on the same and ultimately the court base its decision on the same. If a point is not pleaded, the same cannot be entertained. This position was pointed out by the Court of Appeal in **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR** and **Stephen Onyango Achola & another v Edward Hongo Sule & another [2004] eKLR**. The same was reiterated by the High Court in **Emily N. Mulanya vs. Kenya Power and Lighting Company [2018] eKLR**. ***(See pages 7, 8, 9, 14, 15 and 18 of the Plaintiff's bundles of authorities dated 17<sup>th</sup> November, 2020 and filed in Court on the same day)***

16. In this case, the 2<sup>nd</sup> to 12<sup>th</sup> Defendants did not plead the issue of the suit being time barred. Indeed no evidence was led on the issue. Their statement of Defence at paragraph 10 conceded the jurisdiction of this court. As such, the evidence on the same cannot be entertained and the Court cannot base its decision on the same.

**e) Defendants authorizing 6<sup>th</sup> Defendant to represent them.**

17. The 2<sup>nd</sup> to 12<sup>th</sup> Defendants submissions also allege that the Defendants authorized the 6<sup>th</sup> Defendant to represent them. Nothing could be further from the truth. They did not file an authority to act or an authority to plead. As such, the assertion cannot hold in law as the requisite documentation for the same was never filed. Ignorance of the law cannot be pleaded in this case as the Defendants are represented by an advocate who is an expert on the law.

**f) Conclusion**

18. The Plaintiff humbly submits and prays that this Honourable Court allow his claim and grants the prayers sought in their Plaint dated 3<sup>rd</sup> March, 2015 and Amended on 4<sup>th</sup> December, 2019.

19. We so humbly pray.

**DATED at NAIROBI this ...18<sup>th</sup> .... day of .....December,..... 2020**

\_\_\_\_\_  
**KAMINZA & AMBANI**

**ADVOCATES FOR THE PLAINTIFF**

21. The 2<sup>nd</sup> to 12<sup>th</sup> defendants submissions, dated 22<sup>nd</sup> October, 2020 are pasted herebelow in full without any alterations whatsoever:

**2<sup>ND</sup> TO 12<sup>TH</sup> DEFENDANTS FINAL SUBMISSIONS.**

1. Your lordship by an amended plaint amended on 4<sup>th</sup> December 2019 the plaintiff moved this honorable court for the following orders,

(a) A declaration that 13<sup>th</sup> defendants actions of excising ,awarding and subsequently registering the 1<sup>st</sup> to the 12<sup>th</sup> defendants as the owners of the twelve(12) parcels of land set out in paragraph 3 above out of the suit property is illegal, null and void,

(i) A declaration that the plaintiff is the legal and rightful owner of the twelve (12)parcels of land of the suit property set out in paragraph 3;

(ii) An order of cancellation and removal of the names of the defendants as against the twelve (12) parcels of land of the suit property set out in paragraph 3 from the adjudication register for KAMWIMBI 'A' adjudication section with MERU SOUTH sub county;

(iii) An order of substitute the names of the defendants in the adjudication register for KAMWIMBI 'A' adjudication section within MERU SOUTH sub county for the twelve (12) parcels of land of the suit property set out in paragraph 3 with the name of the plaintiff MUGERE KAMOTHO.

(iv) An order of permanent injunction restraining the 1<sup>st</sup> to 12<sup>th</sup> defendants whether by themselves, their agents, servants and /or employees from in any way or howsoever from trespassing or any in way interfering with the twelve(12) parcels of land of the suit property set out in paragraph 3;

(v) An eviction order against the 1<sup>st</sup> to 12 defendants , their employees, servants and or agents who have wrongfully and forcefully possessed, occupied and settled on the twelve(12) parcels of land of the suit property set out in paragraph 3.

(vi) Mesne profit;

(vii) General damages for non-user

(viii) Special damages as set out at paragraph 9.9

(b) Cost of the suit

(i) Interest on (a) (vi)(vii) and (viii) above ; and

© such further and or other orders as the honorable court may deem fit and expedite to grant for the cause of justice.

2. The plaintiff case is summarized by what is contained in paragraphs 3 to 10 of the amended plaint. The plaintiff case is that even before adjudication of KAMWIMBI A ADJUDICATION SECTION there was a dispute that touched on the suit lands. But did not involve or engage the defendants. On or around 1992 when adjudication process started in KAMWIMBI A ADJUDICATION SECTION the defendant invaded into 100 acres of land belonging to the plaintiff and each of the defendant took a portion which each defendants caused to be recorded in their names. The defendant misrepresented themselves to the 13<sup>th</sup> defendant who in effect recorded each defendant with his respective parcel as pleaded in paragraph 3 of the plaint. The plaintiff in his pleadings admit that all the suit lands were subjected to the adjudication process and to date land parcels number KAMWIMBI ADJUDICATION SECTION 'A' 797 , 798 AND 776 have appeals to the minister. The plaintiff however does not state who has appealed to the minister in 776, 797 and 798 KAMWIMBI A ADJUDICATION SECTION . it is the plaintiff contention in his pleading that the decision by KIGOSI ELDERS determined ownership of 100 acres comprising the suit lands, although the suit was not between the plaintiff and the defendants.

In conclusion the plaintiff conclude his pleading by urging this court to award the prayers contained at paragraph 12 of the amended plaint , which prayers are replicated in paragraph 1 of these submissions.

3. The defendants denies each and every singular allegation of law or fact as contained in the plaintiff plaint, the defendants case is contained in their joint statement of defence dated 2<sup>nd</sup> June 2015, the defendants contend that they have lived on their respective suit land many years before adjudication process in KAMWIMBI A ADJUDICATION SECTION commenced on or around 1993. The 6<sup>th</sup> defendant for example as pleaded in his defence that he buried his mother on 776 KAMWIMBI A ADJUDICATION SECTION in 1957 and later his father 1974 he has also buried his other relatives on his portion of land. All the defendants claim that they were occupying and using their respective parcels of land even before adjudication process commenced in KAMWIMBI A ADJUDICATION SECTION, they also claim that they have buried there loved ones in their respective parcels of land ,see paragraph 7 and 8 of joints statements of defence .

It is the defendants case that when KAMWIMBI A ADJUDICATION SECTION was declared an adjudication section , each defendant gathered his respective parcel of land , the land was gathered under cap 284 and the said act give an elaborate procedure of how land under adjudication was to be adjudicated . the defendants contend that the plaintiff did not file any objection against the defendants irrespective parcels at committee level arbitration board level, AR(60 DAYS OBJECTION ) neither did he appeal to the minister. the adjudication process proceeded normally up to 2014 when the adjudication registered was published complete. The plaintiff for all this time took a back seat and raise no objection for claim of ownership of what he calls a 100 acres of family land.

As pointed supra it is the defendant case that KAMWIMBI A ADJUDICATION SECTION was adjudicated under cap 284 laws of Kenya. persons could only gather land that one was in occupation or as been making use of before adjudication commenced. That the plaintiff come from Gitareni loction while the suit lands are in KAMWIMBI LOCATION and the distance separating the two is about 15 kilometers. The plaintiff therefore could not claim any ownership of land in KAMWIMBI A ADJUDICATION SECTION when he was not a resident and he was not making use of any land fragment in KAMWIMBI A ADJUDICATION SECTION.

The defendants gave blessing to the 6<sup>th</sup> defendant to testify on their behalf. The plaintiff paraded 4 witnesses in support of their case. When cross examined by counsel for the defendants they all admitted that the suit lands went through the adjudication process but the plaintiff chose not to take part in the adjudication process save for two land parcels namely 770 and 776 where the plaintiff lost at land committee proceeding. The court may note that the adjudication process commenced in 1993 and the plaintiff sought for the adjudication consent to institute the suit in 2015 when the adjudication process had been published complete back in 2014. For now titles of KAMWIMBI A ADJUDICATION SECTION have been issued starting from 2017. The defendant save for those whose land have an appeal to the minister have their title deed .

4. The issues for determination in this suit are many. The defendants view on the issues for determination is contained in his summarized issues for determination dated 15<sup>th</sup> January 2018. We will attempt to submit on all the grounds set out therein but where the grounds are verbose we will consolidate the issues.

5. The facts that the plaintiff applied and obtained a consent from DLASO to institute the instant suit was mischievous to say the list. We have stated supra that Adjudication register of KAMWIMBI A ADJUDICATION was published complete in 2014. The DLASO therefore had become fantus official the adjudication register. What remained was now the issuance of title deed of all land parcel in KAMWIMBI/A ADJUDICATION SECTION. Infact the consent was given to the plaintiff on 6<sup>th</sup> January 2015.

6. The plaintiffs basis of his claim against all the defendants is the alleged proceeding and judgment of KIGOCI elders. The KIGOCI elders are a busy body with no statutory powers to determine issues relating to land . More over the alleged proceeding and decision related to MURUGA NYAGA VERSUS NGATUNI NYAGA. The defendants were not privy to this proceeding therefore the proceeding did not affect the defendant right . the land in question was not define in the proceeding and particularly how big it was and the area it covers. The alleged proceeding and decision by KIGOCI elders have no place in this proceeding.

Your lordship as we have stated above , the alleged proceeding and decision by KIGOCI elders have no place or consequence upon the defendants parcels of land. The proceeding and decision were not and cannot be binding to this court or to DLASO. The proceeding and decision could have been useful if they were tabled during adjudication proceeding . had the plaintiffs tabled this proceeding and decision before DLASO , they would have amounted to objection against the defendants. The plaintiff opted not to participate in the adjudication process at his own peril , if at all he had any claim over the defendants parcels of land. The KIGOCI elders proceeding and decision should be dismissed with the contempt they deserve.

7. With or without DLASO consent that was given to the plaintiff ,should this court entertain the instant suit? The answer to this question is in the negative. Issues on land matters in adjudication area or section are exclusively left to the jurisdiction of DLASO. Chapter 284 and 283 laws of Kenya have set out an elaborate procedure under which rights of land in an adjudication section can be ascertained . first there is the compiling of the register of existing right (RAR) every person with an interest on land in an area that have been declared an adjudication section is expected to gather their parcels of land and any person dissatisfied as right to lodge an objection at what is referred to as adjudication land committee. A person who is dissatisfied with the decision in the adjudication land committee as of rights to appeal to the arbitration board. The decision in an arbitration board which is always under the adjudication officer, determines ownership of any land fragment in issue. The AR proceeding (60) days objection do not determine the ownership of land fragment rather the objection are meant to correct small mistakes relating to names size of land and rectification of boundaries in an adjudication section. A person who does not participate in a committee or arbitration board hearing cannot claim ownership of land in AR (60) days objection(or appeals to the minister). the final stop in an adjudication process is the appeal to the minister. Once an appeal to the minister has been determined respective persons are issued with titles. This is the process which the plaintiff ought to have followed. He decided however to jump the gun . according to the plaintiff the plaintiff had several dispute with the defendant( which were not pleaded or named) before DLASO between 1993 and 2014, when the plaintiff decided to go for consent to institute the instant suit. The plaintiff ought to have completed the whole process if there was any up to the appeal to the minister. We submit that this court should not have entertained this suit for the plaintiff was obviously abusing the court process. He must have found that he is loosing in the adjudication process and he thought this court could be his refuge by ignoring and dismissing a legal process of adjudication which all the suit land were subject to.

8. Were all the suit land subjected to the adjudication process as provided for under cap 284 . all the suit lands were legally and lawfully subjected to the due process of adjudication under cap 284 laws of Kenya. that under cap 284 only persons occupying or in use of land fragment could participate in the adjudication process. In principle therefore only the residents of KAMWIMBI LOCATION which comprises KAMWIMBI A ADJUDICATION SECTION could gather land fragment in KAMWIMBI A ADJUDICATION SECTION. IT HAS BEEN POINTED OUT earlier that the plaintiff come from GITARENI LOCATION AND THE LAND parcels are situated in KAMWIMBI LOCATION. The two locations are separated by river RUGUTI and a distance of about 15 kilometers. There is no way that the plaintiff could claim land in KAMWIMBI A ADJUDICATION SECTION where he never lived nor occupied or made use of any land fragment thereto. The plaintiff case is speculative to say the list.

The adjudication process in kamwimbi a adjudication section commenced in 1993. As of 2014 the adjudication registered had been published complete, all the land parcels without appeals to the minister had there title deed issued as of 2017. Only parcels that have been subjected to the appeal to the minister do not have title and they include 776 for the 6<sup>th</sup> defendant and 6 others which include 797 and 798 KAMWIMBI A ADJUDICATION SECTION. Kamwimbi a adjudication section is no longer an adjudication section rather it is a registered area now registered as MERU SOUTH KAMWIMBI A .....matters of ownership and issuance of title deed in what was formally KAMWIMBI A ADJUDICATION SECTION have been fully determine to their logical conclusion. This suit is an attempt to revive and rubbish a legal and lawful process of adjudication of what was KAMWIMBI A ADJUDICATION SECTION , we attach the green card and an official search to demonstrate that KAMWIMBI A ADJUDICATION SECTION is no longer an adjudication section but a registered area with titles.

Did the plaintiff lodge any dispute against the defendants parcels of land at land adjudication committee, arbitration board AR (60 days proceeding) or appeals to the minister as required by CAP 284 LAWS OF KENYA. WE have submitted and repeat here that the plaintiff ignored the whole process of adjudication in kamwimbi adjudication section as it was then save for parcels number 770 and 776 belonging to the 3<sup>rd</sup> and 6<sup>h</sup> defendant whereby the plaintiff lost at land committee level. He can only have himself to blame for abandoning the process when it was almost complete . the plaintiff upon realizing that he is on the losing head , he abandoned the whole process and went for consent from DLASO to enable him institute this suit. had he lodged appeals to minister over all the 12 parcels of land to date those defendants would not been having titles. The plaintiff did not pray for an order injuncting the director of lands , the chief land registrar from issuing titles to the defendant whose lands were not subject to appeals to the minister. The plaintiff is only gambling by claiming the defendant land parcels that they had acquired legally lawfully and through the correct procedure as provided for under cap 284 laws of Kenya. this suit should fail with cost to the defendants.

9. The next question for determination is whether the defendant are trespassers into their land parcels and whether they should pay the plaintiff general damages for such trespass , the defendants are not trespassers in their respective land parcels. They have lived on their respective land parcels from time immemorial. They were in occupation and use of the respective parcels of land even before commencement of adjudication process of KAMWIMBI A ADJUDICATION SECTION IN 1993.the plaintiff alleges that the defendants invaded and occupied the plaintiffs land in 1992. The plaintiff have not proofed this allegation and a fact that has not been proofed is not a fact. The plaintiff has not been able to answer how the defendants invaded their 100 acres parcel of land and fail to report at any police station or any administration office or even to clan elders. The plaintiff is sought of proofing that the defendant invaded the suit land in 1992. We have earlier pointed out that (the 6<sup>th</sup> defendants buried her mother on his portion 776 in 1957 and his father in 1974). These are many years even before 1992 when the plaintiff alleges that the defendants invaded the suit land. Failure of the plaintiff to produce any report or proceeding before elders, the court or administration is a clear proof that the defendants did not invade the suit lands in 1992 or at all. The defendants are in occupation and in use of their land , the majority of them now have their title deeds save for those with appeals to the minister, consequently they cannot be trespassers. They have never been trespassers. The plaintiff has not proofed and has never proofed that the suit land belonged to him. Therefore he cannot have any legal pedestal upon which to claim damages for trespass from the defendants. this particular claim your lordship should fall with a bang.

10. Has the plaintiff proved fraud by the defendants in the manner in which the defendants acquired and were subsequently registered with their respective parcels of land? Far from it. The defendants started by compiling RAR whereby each defendants gathered his or her land fragment. The duty of DLASO in those miniature stages of adjudication was to record an individual with his land fragment. At the same time calling upon any person to lodge an objection against such person who gathered a land parcel and object if one had any claim over the land fragment gathered by the other. An objection would then read to land adjudication committee hearing. A person who was not satisfied with the committee decision had the right to appeal to the arbitration board. Not only that whoever was not satisfied with the arbitration board decision could still complain in the AR objection (60 days objection) still a person with a query regarding AR objection could appeal to the minister. The defendant went a full throtor procedure in acquiring and being registered with their respective parcels of land. Save for those parcels of land with appeals to the minister. We submit that we don't see any fraud having been perpetrated by the defendants themselves or in connivance or collusion with the 13 defendants to wit the district land adjudication officer.

When was the alleged fraud by the defendants committed , the plaintiff alleges that the fraud was committed back in 1993 when adjudication process commenced in what was then KAMWIMBI A ADJUDICATION SECTION. Fraud can be a long under the criminal justice or the civil justice of this country. In criminal justice the offence of fraud has no limitation of time. In civil justice a fraud is a tort which should be brought to court within 3 years of its commission. "Section 4 (2) of the limitation of action act states as follows, an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued; provided that an action for libel or slander may not be brought after the end of twelve months from such date"

This suit is time barred. The plaintiff did not seek for leave to file the suit out of time. The suit should be dismissed with cost to the defendants.

11. The plaintiffs prays for eviction orders against the defendants. We have demonstrated that the defendants are not trespassers rather there are on their own land parcels . if the plaintiff did not give the defendant authority to enter the suit land now 28 years from the commencement of the adjudication process in KAMWIMBI A ADJUDICATION SECTION in 1993 , and many years before the commencement of the adjudication process , can the plaintiff now pray that the defendants should be evicted from their suit lands ? the defendants have already been issued with title deed to their respective land after KAMWIMBI A ADJUCATION SECTION WAS Registered as MERU SOUTH KAMWIMBI A .....the defendants acquired they parcels of land after going through a thorough adjudication process as provided by cap 284 . The plaintiff prayer for eviction orders against the defendant have no basis. The court should not issue eviction orders against the defendants. The defendants legitimately legally and lawfully own their respective parcels of land ,having gone through the adjudication process which gave the plaintiff to challenge and fault their claim during the adjudication process.

12. The plaintiff has in his prayer , prayed that the defendants should be ordered to pay special damages to the plaintiff. The figures of special damages that the plaintiff is seeking are conspicuously missing from the pleading. The law relating to special damages is now settled. Special damages must be specifically pleaded and straightly proved. We must submit that the plaintiff did not attempt to proof to any standard any special damages that he is entitled if at all. The most he had done is that he has started that he should be paid special damages by the defendants. In the circumstances the plaintiff should not be paid special damages.

13. We have questioned and we still questioned whether this court has jurisdiction to hear and determine the instant suit? Despite the plaintiff having been issued with a consent to institute the same. This suit by the plaintiff is meant to stop and prevent a legal and lawful adjudication process(although the suit as been overtaken by event). We of course understand and appreciated the supervisory law of the high court over the sub ordinate court and tribunals . The supervisory law of the high court is meant to see that ,injustice is not served through wrong decision of the subordinate court and tribunals and not to tie such court or tribunals from excising their mandate as donated by the law. while we agree that this court can interfere with a decision of DLASO or sub ordinate court through a judicial review this court cannot and should not stop or prevent the magistrates from the lower court or the tribunal from excising their mandate as provided for by the law. This suit is out to seek orders from this court to stop DLASO from conducting an adjudication process as per cap 284 . The plaintiff should have come to this court to challenge a decision by DLASO but not to interfere with adjudication process without any justifiable cause.

The foregoing notwithstanding DLASO proceeded to execute his mandate by conclusively ,adjudicating over all lands over KAMWIMBI A ADJUDICATION SECTION including those of the defendants and at the end of the day the defendant and others in KAMWIMBI A adjudication section were issued with their title deed save for those land parcels with appeals to the minister . the then KAMWIMBI A ADJUDICATION SECTION is no more for it has been registered as MERU SOUTH KAMWIMBI A.....

14. Your lordship in light of the foregoing submissions we urge this court to dismiss this suit with cost to the defendants. The plaintiff suit is wanting in merit and it cannot pass the acid test of meritocracy, the plaintiff prayers are based on the notion that the suit land belong to the plaintiff , we have submitted that the suit lands belong to the defendants ,consequently all the plaintiff prayers should fail, we shall be praying for cost and interest therein at court rate from the date of judgment. We rest our submission and pray.

DATED AT CHUKA THIS ...22<sup>nd</sup> .....DAY OF...October,....2020

**DRAWNA AND FILED BY**

M/S I.C MUGO & CO .....

ADVOCATES I.C MUGO & CO ADVOCATES FOR THE DEFENDANTS

22. I have carefully considered the pleadings, the oral evidence and the submissions proffered by the parties in support of their veritably incongruent assertions. At the outset, I will opine that all the authorities proffered by the plaintiff in support of his various assertions are good authorities in their facts and circumstances. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. The principles enunciated by the proffered cases have been taken into account in my determination of this case. As the principles enunciated by those cases are contained in the written submissions of the plaintiff which have been reproduced in full in an earlier part of this judgment, I do not find it necessary to regurgitate them here.

23. I have reproduced in full the submissions filed by the parties. At the outset, I find it necessary to point out that parties cannot introduce new evidence in their submissions. Where and if they have done so, that new evidence has not been taken into account. This court only relies on the oral evidence and the pleadings filed by the parties. Parties may, however, raise points of law in their submissions.

24. In terms of the requirements of Rule 21(4) of the Civil Procedure Rules, I point out that a conspectus of the case is contained in the submissions filed by the parties in support of their assertions. The decision in this matter and the reasons thereof are contained in this judgment. I frame the points for determination in this suit as follows:-

- a) Does this court have jurisdiction to handle this matter?
- b) Can this court usurp the responsibility of the institutions established by the Land Adjudication Act and the Land Consolidation Act to ascertain ownership of land?
- c) Has the plaintiff proved his case on a balance of probability?

25. Among other complaints, the plaintiff has taken issue with the fact that DW1, M'Igweta Murua, the 7<sup>th</sup> defendant had testified that he was representing the other defendants without having filed an authority to that effect. I do agree that such an authority should have been filed. I, however, note that this statement was not challenged through cross examination. I also opine that it is always the responsibility of the applicant/plaintiff to prove his case on a balance of probability. It is the duty of the court to find out if or if not such proof has been achieved on a balance of probability.

26. The evidence of PW1 and PW2 was unequivocal that Kigoci (traditional) elders had made a finding that the suit lands belonged to Muruga Nyaga, the forefather of Mugere Kamotho. That was well before the Land Adjudication process had commenced.

27. PW3, the plaintiff's son told the court that the late Muruga had in 1987 a dispute with one Ngatuni Mugere and the matter was decided in favour of his grandfather Muruga Nyaga.

28. PW3 during cross-examination told the court that a litigant had a choice to appeal to the minister or to come to court regarding decisions concerning land adjudication matters. He also told the court that a litigant had discretion to seek or not to seek extension of time when the period for the apposite appeal had expired. I do not agree with him. If his position is embraced this would spawn veritable confusion in the adjudication and consolidation processes. This, however, does not mean that the integrity of judicial processes cannot be challenged by way of Judicial Review so that improper procedures and actions can be corrected.

29. PW4 merely testified that the suit land belonged to the plaintiff.

30. None of the 4 witnesses who gave evidence on behalf of the plaintiff evinced any nexus between the twelve defendants and Ngatuni Mugere, who had a dispute with the father of the plaintiff at the Kigoci traditional dispute settlement forum. None of them has also satisfactorily shown that the adjudication process concerning the 12 defendants was done in contravention of the law or was fraudulent. Indeed, the plaintiff did not adduce even an iota of evidence to prove that there was fraudulence in the Adjudication process!

31. DW1 who said that he was also representing all the defendants as he knew all the facts concerning the adjudication averred that he had lived on the suit land for a long time and that he had even buried his mother and his father on parcel No. 776, his land. He said that whereas he had buried them on the land in 1974, the adjudication process commenced in 1993. He said that the ascertainment of the land to himself

and to the other defendants followed the law and the plaintiff had full opportunity to challenge the process but he never did so. He testified that the plaintiff never lived on the suit land and, therefore, ownership of the land could not be ascertained to him.

32. I find that during the very short cross-examination by the plaintiff's advocate, the integrity of DW1's evidence was not impeached in any way. I find him to be a truthful witness.

33. It is true that the plaintiff obtained the consent of the Adjudication Officer before filing this case. I however opine that such consent does not clothe the court with the responsibility of ascertaining and recording of rights in Trust Land and in special areas. That authority is the preserve of the institutions created by the Land Adjudication Act (Cap. 284) and the Land Consolidation Act (Cap 283). The opportunity for litigants to seek the intervention of the courts is to allow courts to ensure the integrity of the procedures gone through when the government officers involved conduct their legally decreed mandates. It is to put on a judicial leash rogue government bureaucrats.

34. Having carefully gone through the submissions filed by the parties, I am inclined to generally agree with the submissions proffered by the defendants. Land Adjudication and Consolidation processes require application of customary law. Courts of law cannot arrogate unto themselves the expertise possessed by elders who are customary law and practice experts.

35. The evidence proffered by the plaintiff is the sort of evidence that should have been adduced before the institutions established by the Land Adjudication Act and the Land Consolidation Act. If the plaintiff tendered that evidence before the concerned institutions, it may be true that such evidence was rejected. The Kigoci decision that was made before the adjudication process commenced cannot debunk the adjudication and consolidation processes.

36. The 1<sup>st</sup>, 13<sup>th</sup> and 14<sup>th</sup> defendants did not have any meaningful participation in these proceedings.

37. I answer the issues I framed for determination as follows:

- a) This suit raises issues which concern the use and occupation of, and title to, land. This being the case, this court has the jurisdiction to handle the suit.
- b) This court cannot usurp the responsibility of the institutions established by the Land Adjudication Act and the Land Consolidation Act to ascertain ownership of land. If I make a different finding every Juma, Otieno, Kamau and Esseli (JOKE) would rush to courts for them to be ascertained as owners of land. The role played by these institutions would veritably be rendered moribund and the role of elders as custodians of customary law would be rendered unnecessary.
- c) The plaintiff has not proved his case on a balance of probability.

38. In the circumstances, I enter judgment for the defendants against the plaintiff in the following terms:

- a) This suit is hereby dismissed.
- b) Costs follow the event and are awarded to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> defendants.

**DELIVERED IN OPEN COURT AT CHUKA THIS 12TH DAY OF MAY, 2021 IN THE PRESENCE OF:**

CA: Ndegwa

Miss Ambani for the Plaintiff

I.C. Mugo for 2<sup>nd</sup> to 12<sup>th</sup> Defendants

Miss Ambani h/b Kiongo for AG for 13<sup>th</sup> & 14<sup>th</sup> defendants

**P. M. NJOROGI,**

**JUDGE.**