



Osano & 10 others v Osano alias Peter Ouma Osano & 2 others (Environment and Land Case E049 of 2021) [2025] KEELC 4851 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4851 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE E049 OF 2021
SO OKONG'O, J
JUNE 26, 2025**

BETWEEN

**ARGWINGS MUGA OSANO 1ST PLAINTIFF
MARY ATIENO OSANO 2ND PLAINTIFF
CONSOLATA ATIENO OSANO 3RD PLAINTIFF
JANE ADHIAMBO 4TH PLAINTIFF
CHARLES OMONDI OSANO 5TH PLAINTIFF
MICHAEL OKOTH 6TH PLAINTIFF
DAVID JUMA OSANO 7TH PLAINTIFF
FRANCIS OWINO OSANO 8TH PLAINTIFF
SOPHIA AJWANG 9TH PLAINTIFF
JOHANNES OPIYO OSANO 10TH PLAINTIFF
BEATRICE ACHIENG' 11TH PLAINTIFF**

AND

**VITALIS OUMA OSANO ALIAS PETER OUMA OSANO 1ST DEFENDANT
JOSEPH OTIENO ALIAS JOSELEWIS OTIENO 2ND DEFENDANT
LAND REGISTRAR KISUMU 3RD DEFENDANT**

JUDGMENT

1. The Plaintiffs brought this suit against the Defendants on 8th December 2021. The 1st, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th Plaintiffs are siblings. The 2nd Plaintiff is the mother of the 1st, 4th, 5th, 6th, 7th,



- 8th, 9th, 10th and 11th Plaintiffs and a stepmother to the 3rd Plaintiff who shares a mother with the 1st and 2nd Defendants. The Plaintiffs averred that they were a widow and children of Johannes Osano Wariero, deceased [hereinafter referred to as “the deceased”], who died intestate and was survived by the Plaintiffs and the 1st and 2nd Defendants.
2. The Plaintiffs averred that the deceased was the initial owner of the parcels of land known as Title No. Kisumu/Kanyakwar “B”/134 [approximately 4.5 acres] and Title No. Kisumu /Kanyakwar “B”/135 [approximately 10 acres] [hereinafter together referred to as “the suit properties” and separately as “Plot No. 134” and “Plot No. 135” respectively]. The Plaintiffs averred that at the time of the deceased’s death, Plot No. 134 was registered in the name of the 1st and 2nd Defendants, while Plot No. 135 was registered in the name of the 1st Defendant. The Plaintiffs averred that Plot No. 135 was registered in the name of the 1st Defendant to hold in trust for himself and his siblings as it was acquired through money paid as compensation by the Government, which had acquired the former family land compulsorily on or around 1982. The Plaintiffs averred that it had come to their knowledge that the 1st Defendant had used illegal means to dispossess them of the property.
 3. The Plaintiffs averred that Plot No. 134 jointly registered in the names of the 1st and 2nd Defendants whose title deed was issued in 2016 was registered in the names of the 1st and 2nd Defendants irregularly to defeat the ends of justice the registration having been done without undertaking the process of succession in respect of the deceased’s estate.
 4. The Plaintiffs averred that on or around 2016, the 1st and 2nd Defendants changed their names to hide their identities and defeat justice. The Plaintiffs averred that the 2nd Defendant distanced himself from the events leading to his registration as a co-owner of Plot No. 134. The Plaintiffs averred that the 1st and 2nd Defendants were tasked with the responsibility of holding the suit properties under customary trust for themselves and other beneficiaries of the estate of the deceased who lived on, died and was buried on the suit properties which had separate titles, but were considered as one property as their boundaries were not marked for the convenience of the family.
 5. The Plaintiffs averred that the 1st and 2nd Defendants willfully and maliciously dispossessed all the other beneficiaries of the deceased’s estate, including the deceased’s 2nd wife, the 2nd Plaintiff of the suit property, after they were assisted by the 3rd Defendant to obtain titles for the suit properties. The Plaintiffs averred that the 3rd Defendant’s records were altered and/or interfered with for the benefit of the 1st and 2nd Defendants. The Plaintiffs averred that the titles for the suit properties were issued to the 1st and 2nd Defendant illegally, thereby occasioning unfairness and outright disinheritance of the Plaintiffs of the deceased’s property. The Plaintiffs prayed for judgment against the Defendants jointly and severally for;
 - a. An order for the division of the suit properties into equal shares for all children of Johannes Osano Wariero, deceased.
 - b. A permanent injunction restraining the 1st and 2nd Defendants by themselves, their servants/agents, or otherwise whosoever from physically denying the Plaintiffs access to the suit properties.
 - c. Costs of the suit together with interest thereon.
 - d. Any such other or further relief that this honourable court may deem appropriate to grant.
 6. The 1st Defendant filed a statement of defence and a counterclaim dated 1st February 2022. The 1st Defendant denied all the allegations made against him in the plaint. The 1st Defendant denied that the



suit properties were registered in his name to be held in trust for himself and all the beneficiaries of the estate of the deceased. The 1st Defendant also denied that the suit properties were registered in his name irregularly and illegally.

7. In his counterclaim, the 1st Defendant averred that together with the 2nd Defendant they were the absolute owners of the suit properties, the same having been registered in their names as the first registered owners thereof after adjudication. The 1st Defendant averred that he was entitled to enjoy exclusive and unhindered access, use and control over the suit properties to the exclusion of all other parties. The 1st Defendant averred that their father, Johannes Osano Wariero, deceased [the deceased] did not buy and/or own the suit properties at any time during his lifetime. The 1st Defendant averred that the deceased never stayed on the suit properties and was not buried thereon. The 1st Defendant averred that at no point was he appointed a trustee of the Plaintiffs, and no trust was ever registered in the Plaintiffs' favour concerning the suit properties.
8. The 1st Defendant averred that the Plaintiffs were determined to interfere with his peaceful possession and use of the suit properties while their deceased father, Johannes Osano Wariero had a property registered in his name, which ought to be distributed amongst his beneficiaries in Kisumu High Court Succession Cause No. 14 of 2020. The 1st Defendant averred that the 1st Plaintiff placed a caution on the suit properties, thereby unlawfully hindering his peaceful use of the same.
9. The 1st Defendant averred that he acquired the suit properties in 1974. The 1st Defendant prayed that the Plaintiffs' suit be dismissed with costs and judgment be entered as prayed in his counterclaim against the Plaintiffs jointly and severally for;
 - a. An order directing the Lands Registrar to remove the caution placed on the suit properties by the 1st Plaintiff.
 - b. A permanent injunction restraining the Plaintiffs, their servants, employees, agents and/or anybody who is claiming through them from interfering in any manner with the 1st Defendant's peaceful use and occupation of the suit properties and/or trespassing thereon in any manner.
 - c. Costs of this suit.
 - d. Any other order which this honourable court may issue in the interest of justice.
10. The 2nd Defendant filed a statement of defence on 1st March 2022. The 2nd Defendant's defence consisted of a general denial of the Plaintiffs' claim. The 2nd Defendant prayed that the suit be dismissed with costs. The Attorney General entered an appearance on 10th January 2022 on behalf of the 3rd Defendant and filed a statement of defence on 21st November 2022. The 3rd Defendant denied the allegations in the plaint and prayed that the suit against him be dismissed with costs.

The evidence

11. The 1st Plaintiff, Argwins Muga Osano[PW1], adopted his witness statement dated 7th December 2021 as part of his evidence in chief. He produced the documents attached to the Plaintiffs' list of documents dated 6th December 2021 as P.EXH. 1 to 15 respectively. He stated further as follows: He was not staying on the suit properties. It was the 1st Defendant who was occupying the suit properties. The 2nd Defendant was also not staying on the suit properties. The suit properties were registered in the names of the 1st and 2nd Defendants. Their father had two [2] wives. The 1st and the 2nd Defendants were from the first house [first wife]. He did not know why the 1st and 2nd Defendants changed their names. He was from the second house [second wife]. His mother was still alive. His mother was living on the parcel



- of land known as Kisumu/Kanyakwar “B”/163 [hereinafter referred to as “Plot No. 163”]. Plot No. 163 was registered in the name of his father, Johannes Osano Wariero [the deceased].
12. He stated further that the deceased was buried on Plot No. 134. The deceased did not distribute his parcels of land amongst his heirs. The 3rd Plaintiff was his step sister. She was a sister to the 1st and 2nd Defendants. The dispute over the suit properties was taken before the local chief for resolution but the 1st Defendant refused to co-operate. It was only the 2nd Defendant who agreed to discuss the issue. Plot No. 135 was bought by his deceased father. They used to live near Mamboleo Junction next to where Uzima University now stands. The land on which they had family home was compulsorily acquired by the Government and they were forcibly moved out. His deceased father went out looking for land. His father was not compensated. The suit properties were purchased in 1978. He did not know why Plot No. 135 was registered in the sole name of the 1st Defendant. His deceased father lived on Plot No. 134 and was buried on the same parcel of land. PW1 stated that he was born on 24th September 1968. They moved out of their initial family home in 1978. His deceased father had a butchery business. He did a search that revealed that Plot No. 135 was registered in the name of the 1st Defendant. He was interested in Plot No. 134 because that was where they buried their deceased father and step mother.
 13. On cross-examination by the advocate for the 1st Defendant, PW1 stated that the suit properties were purchased by his deceased father, and the same belonged to him. He stated that the deceased was buried on the suit properties. He stated that the suit properties were not ancestral land. He stated that he had no documentary evidence of the purchase of the suit property by the deceased. He stated that the registers for the suit properties did not show that the deceased had owned the two parcels of land at any time. He stated that the adjudication record showed that Plot No. 134 was registered in the names of the 1st and 2nd Defendants, while Plot No. 135 was registered in the name of the 1st Defendant alone. He stated that when doing succession in respect of the estate of his deceased father, they included the suit properties as part of the estate of the deceased, but the same were excluded by the court following an application by the 1st and 2nd Defendants. He stated that he did not appeal the decision. He stated that their ancestral land was acquired compulsorily, but they were not compensated. He stated that his deceased father moved to the suit properties where he settled his two wives. He stated that when they moved, they settled on Plot No. 134 and not on Plot No. 135.
 14. PW1 stated that they did not live together on Plot No. 134 peacefully. He stated that his step mother, his deceased father’s first wife and the 1st Defendant wanted his mother and them [second family] to move out of Plot No.134. He stated that his father was forced to move his second family to the parcel of land, Kisumu Kanyakwar “B”/163 [Plot No. 163] in 1988. He stated that they had remained on Plot No. 163 since then. He stated that his deceased father’s first wife remained on Plot No. 134. He stated that Plot No. 163 was in the name of his deceased father and his [PW1] brother, Martin Hassan Osano, also deceased. Martin Hassan Osano was his elder brother in the second house. His stepmother [the first wife of his father] had sons. He stated that he was not claiming the homestead of his stepmother. He stated that his father was buried on Plot No. 134 because it was his land and not because that was the homestead of his first wife. He stated that his father died at the age of 82 on 15th December 1989. He stated that his father protested that he had been dispossessed of his land by the Defendants. He denied that it was the 1st Defendant who purchased the suit properties.
 15. On cross-examination by the advocate for the 2nd Defendant, PW1 reiterated most of what he stated on cross-examination by the advocate for the 1st Defendant. He stated that his father purchased the suit properties in 1978 but did not tell him from whom he purchased the suit properties. He stated that the second family was forcibly moved from Plot No. 134 to Plot No. 163 in 1988. He stated that his father and step mother were buried on Plot No. 134.



16. He stated that the 1st and 2nd Defendants had rights over Plot No. 163 as sons of his deceased father. He stated that apart from Plot No. 163, there were two other plots in the name of his father namely, Kisumu/Kanyakwar “B”/116 and Plot No. 21 Anyanga Market, Nyawita. He stated that the 2nd Defendant wrote a letter through his advocate stating that he was not interested in the family land.
17. On cross-examination by the advocate for the 3rd Defendant, PW1 stated that the records held by the 3rd Defendant concerning the suit properties were altered. He stated that he was about 13 years old when the adjudication was done. He stated that his father was among the elders who were assisting the adjudication officer during the adjudication. He stated that his deceased brother was an adult during the adjudication process. He stated that he witnessed the adjudication process. He stated that he did not know how the parcels of land in dispute were registered in the names of the 1st and 2nd Defendants. He admitted that Plot No. 163 was in the name of his father and his elder brother. He denied that his brother was representing their house. He also denied that Plot No. 134 and Plot No. 135 were original numbers given during the land adjudication. He stated that during the adjudication, his father was staying on the suit properties.
18. On re-examination by the Plaintiffs’ advocate, PW1 stated that when they moved from Mamboleo Junction, they moved to Plot No. 134 and Plot No. 135. He stated that at that time, the adjudication had not been done and plot numbers had not been given. He stated that the adjudication was done in 1981. He stated that it is this court which has jurisdiction to determine the dispute over the ownership of the suit properties.
19. On examination by the Court, the PW1 stated that it took him time to follow up on the two parcels of land in dispute because he was the sole breadwinner. He stated that the other reason for the delay in bringing the suit was the death of his elder brother. He told the court that he had 7 siblings. He stated that in the first house, there were 4 children in total.
20. The Plaintiffs’ second witness was Shem Ochieng Kango [PW2]. PW2 adopted his witness statement dated 7th December 2021 as his evidence in chief. He stated further as follows: Johannes Osano, deceased, was his cousin. He had known the family for a very long time. The family used to stay at Mamboleo Junction. From there, they moved to the area near St. Paul. Their land was compulsorily acquired. The land they moved to belonged to Johannes Osano [deceased]. He did not know the land reference number. The deceased had two wives. He had not shared his land between his two wives. The land they were occupying was not divided. The two wives were using the land. They were cultivating the land. The land was on top of a hill. The dispute before the court was known to him. It concerned the distribution or sharing of the deceased’s land. The dispute was taken before the chief. The parties did not agree. In his view, the eldest son of Johannes Osano, deceased, should share the land with his siblings.
21. On cross examination by the advocate for the 1st Defendant, PW2 stated that the suit properties were purchased by the deceased although he did not know from whom the deceased purchased the same as he was not around when the deceased was purchasing the land. He stated that the 1st Defendant was running a secretarial college while the deceased was running a butchery. He denied that the suit properties were purchased by the 1st Defendant.
22. On cross-examination by the advocate for the 2nd Defendant, PW2 stated that his father moved from Kanyakwar to Nyahera around 1950, and he settled at Kadongo near Ojola after he retired. He stated that the land belonging to the Kanyakwar people was taken by the government in the 1960s. He told the court that a portion of the deceased’s land was acquired compulsorily by the Government, and he was compensated. He stated that the compensation was paid after the death of the deceased. He stated that



- the compensation was received by the deceased's son. He stated that the deceased was around during the land adjudication and was one of the elders who were assisting the adjudication officer. He stated that if there was land that belonged to the deceased, he could tell the adjudication officer to register the same in his name. He reiterated that the suit properties belonged to the deceased.
23. On examination by the court, PW2 stated that the deceased was illiterate. He stated that in his opinion, it was possible that during the adjudication process, the 1st Defendant committed some acts of fraud. He stated that the deceased's first wife had a son who died while young. He stated that people could register land in the names of their adult sons during the land adjudication. He stated that it was however not possible for the deceased to have registered the land in dispute in the names of his sons, because the deceased could not live on the land owned by his children.
 24. The Plaintiffs' next witness was the 3rd Plaintiff, Consolata Atieno Osano [PW3]. PW3 adopted her witness statement dated 12th July 2022 as her evidence in chief. She stated further as follows: The 1st Defendant was her elder brother, while the 2nd Defendant was her younger brother. She was the youngest in their house. They shared the same mother and father. The 1st Plaintiff was her stepbrother, while the 2nd Plaintiff was her stepmother. The remaining Plaintiffs were her step sisters and brothers. Her father and mother were known as Johannes Osano Wariero and Birgitta Awino Osano, respectively. She knew Kisumu/Kanyakwar "B"/134 [Plot No. 134]. She came to learn through a search that the same was registered in the names of the 1st and 2nd Defendants. She also knew Kisumu/Kanyakwar "B"/135 [Plot No. 135]. She learnt that the same was registered in the name of the 1st Defendant. Plot No. 135 did not belong to the 1st Defendant. The same belonged to their deceased father.
 25. PW3 stated further that she was born on Plot No. 135, raised on the same plot and got married while living on the plot. Her brothers and sisters, and step brothers and step sisters were also raised on Plot No. 135. The 1st Defendant was still living on their father's homestead. He had not built his own home. The family homestead was on Plot No. 135. The family houses were still standing on Plot No. 135. That was where their parents were buried. Her relationship with the 1st Defendant was not good. The 1st Defendant chased them away from the family home. He demolished the 2nd Defendant's house. They were unable to visit the family home. They were not allowed to visit the home. She went to the family home one time, and she was locked inside. She urged the court to fairly share the land between the first and second families.
 26. On cross-examination by the 1st Defendant's advocate, PW3 stated that the suit properties belonged to her parents. PW3 stated that the suit properties belonged to their father. She stated that she was married while staying on the suit properties and that she could not get married on the 1st Defendant's land. She stated that her father's two homes were built on Plot No. 135. She stated that her stepmother's home was on Plot No. 163, which was not far from Plot No. 135.
 27. PW3 stated that their father did not purchase the suit properties. She stated that the suit properties belonged to their father as they were ancestral land. She stated that their father used to take her to these parcels of land even before they moved to the land. She reiterated that the suit properties did not belong to the 1st Defendant. On cross examination by the advocate for the 2nd Defendant, PW3 stated that the suit properties were fraudulently registered in the names of the 1st and 2nd Defendants as they were ancestral land. She stated that the money that was given to their father could not buy land. She stated that she was born in 1962 and the family moved to the suit properties when she was still young.
 28. The Plaintiffs' next witness was Richard Rombo Kango [PW4]. PW4 adopted his witness statement dated 7th December 2021 as his evidence in chief. He stated further as follows: The family of Johannes



- Osano, deceased, was known to him. His father and the father of the deceased were brothers. He was his cousin. He knew the deceased from a young age. He was staying at Kajulu, about 2 miles from the home of the deceased. He was normally invited in case the family had a dispute. They tried to resolve the dispute before the court, but the parties were unable to reach an agreement. The deceased was buried on his land. He could not be buried on his son's land, according to Luo customs. He was buried on Plot No. 135. The 1st Defendant was the eldest son of the deceased, and the deceased left everything in his [1st Defendant] name. The suit properties belonged to the deceased.
29. On cross-examination by the advocate for the 1st Defendant, PW4 stated that he was born in 1949. He stated that he was not involved in the purchase of Plot No. 135 but Johannes Osano told them that he was going to purchase the land. He stated that Johannes Osano was illiterate and everything was being handled by the 1st Defendant. He stated that the 1st Defendant was known to him being a nephew who was nearly his age mate. He told the court that the 1st Defendant was a businessman in 1970s. He stated that he was running colleges while Johannes Osano was running a butchery and had two wives and several children. He stated that Johannes Osano used the compensation money to purchase Plot No. 135.
30. On cross-examination by the advocate for the 2nd Defendant, PW4 stated that a man cannot be buried on his son's land. He stated that it was against the customs for a man to be buried on the land registered in the name of his son. He stated that he had no document showing that Plot No. 135 was registered in the name of Johannes Osano. He stated that Plot No. 135 was purchased and that it was not Johannes Osano's ancestral land. He stated that he had forgotten the name of the person who sold the land to Johannes Osano.
31. After the close of the Plaintiffs' case, the 1st Defendant, Vitalis Ouma Osano [DW1], was the first to give evidence for the Defendants. DW1 adopted his witness statement filed on 22nd August 2022 as his evidence in chief. He produced the documents attached to his list of documents dated 12th October 2022 as D.EXH.1 to 12, respectively and the documents attached to his supplementary list of documents filed on 7th February 2024 as D.EXH. 13 to 18, respectively. He stated further as follows: The Plaintiffs were his stepsisters, stepbrothers and stepmother. The suit properties were not ancestral land. He bought the suit properties from a member of his clan. The suit properties were not purchased using money that was given as compensation for the family land that was compulsorily acquired. He purchased the suit properties in 1974 before the compulsory acquisition of their family land.
32. DW1 stated further that his father's homestead was built on Plot No. 134. They were evicted from family land following the compulsory acquisition of the same in 1978 by the Government. They had nowhere to go. He decided to accommodate his father on the land that he had purchased in 1974. The land was initially one parcel. It was during the land adjudication that he subdivided the land into two so that one part could be used for the homestead and the other part for his business. He bought the land before the adjudication that took place in 1981. During the adjudication, they were all staying on the suit properties as a family. His father was part of the adjudication team. Plot No. 134 was adjudicated in his name and the name of his younger brother, while Plot No. 135 was adjudicated in his name and the adjudication record that he had produced confirmed that fact. Some of the Plaintiffs were present when the land was registered in his name. His father oversaw the exercise. Neither his father nor the Plaintiffs who were present at the time objected.
33. His father died in 1989. His father never complained that he had registered his [father] land in his name. He registered a college known as Victoria Commercial College in 1969. He had branches of the college at Kakamega and Kisumu. He used the money from the college business to purchase the suit properties. He ran the college up to 2002. The Tachometry map that he produced as D.EXH.18 was



- prepared in 1975 before adjudication. It was prepared to support his application for a bank loan. This was the first case filed against him by the Plaintiffs. During the succession of his father's estate, the suit properties were included by the Plaintiffs as part of his father's estate. He challenged that action. The court made a ruling on the matter, removing the suit properties from the succession proceedings. He had produced the ruling of the succession court as an exhibit. The Plaintiffs did not appeal the decision.
34. DW1 stated that he was the one who caused the 2nd Defendant to be co-registered as the owner of Plot No. 134. The 2nd Defendant was his real brother with the same mother and father. The 2nd Defendant was to remain at the family homestead. The names appearing in the titles were different from the names on their identity cards. They officially changed their names in the titles, and he had produced documents in proof of that fact. DW1 stated that his stepmother and stepbrothers were living on Plot No. 163 registered in the name of their deceased father and Martin Obonyo Wariero, who was the eldest son of his stepmother. He stated that the land belonged to his father. He stated that he bought the suit properties from Lango Oyuo.
 35. On cross-examination by the advocate for the 2nd Defendant, DW1 stated that he was the one who caused Plot No. 134 to be registered in his name and that of the 2nd Defendant. He stated that the 2nd Defendant was married and had a family at the time. He told the court that he did not seek his permission to have his name on the title.
 36. On cross-examination by the advocate for the Plaintiffs, DW1 stated as follows: His name was Vitalis Ouma Osano. He had an identity card but did not carry it with him. Initially, his name was Peterlis Ouma Osano. He was shown the title deed for Plot No. 135. He stated that the same was issued on 21st August 1984 in the name of Vitalis Ouma Osano. He told the court that he undertook the process of changing of name when he was being issued with the title. He stated that he abandoned the name Peterlis when he was issued with a new identity card. He stated that the 2nd Defendant and he corrected their names at the same time in 2015. DW1 stated that at the time of correction of names, he had changed his name on the identity card, and his name was Vitalis Ouma Osano. His name on the original identity card was Peterlis Ouma Osano. That was the name that he was using when he was registered as the owner of Plot No. 134.
 37. DW1 stated further that the name he used during the land registration was Peterlis Ouma Osano. That was why he did the correction of name to Vitalis Ouma Osano. It was after the correction of his name in the register that he was issued with a title deed for Plot No. 135 in his new name. He stated that his father registered Plot No. 163 in the name of the elder son of his stepmother and his [father] name in 1981. The land was a gift from another family. It was on this land that his stepmother was staying when they were evicted from their family land. The land was given to them by their extended family. His father was buried on Plot No. 134 which was the home where his elder wife was staying. There was a boundary between Plot 134 and Plot No. 135. He was staying on Plot No. 134. The land was registered in his name and the name of the 2nd Defendant. He took the title deed in 2016. He did not get the title earlier because his brother was not at home, and they had to correct their names. The 2nd Defendant did not participate in the registration of Plot No. 134 in his name. He was the one who registered the property in the name of his younger brother. He stated that his younger brother lived in Nairobi and they were not talking to each other. He stated that he did not even have his telephone number.
 38. DW1 stated that a father can be buried on land belonging to his son. He stated that his father could read and write. He stated that he was not the preferred son as claimed. He stated that his father died on Plot No. 134 and was buried there. He told the court that it was not true that his father died on Plot No. 163 and was taken to Plot No. 134 after his death. He denied that the suit properties were



ancestral family land. He stated that the Government acquired their family land, and it was his father who was compensated.

39. On re-examination DW1 stated that they changed their names in respect of Plot No. 134 because they were being compensated for a portion of the land that was acquired by the National Land Commission for the expansion of a road.
40. The Defendants' second witness was Lucas Orawo Dawa [DW2]. DW2 adopted his witness statement filed on 22nd August 2022 as his evidence in chief. He told the court that the suit properties were known to him and the same were owned by the 1st Defendant. He stated that the 1st Defendant bought the two parcels of land from Lango Oyuo, who was his paternal uncle. He stated that his father was a witness to the sale agreement. He stated that he fenced the boundary between the Plaintiffs' land and his father's land.
41. On cross-examination by the Plaintiffs' advocate, DW2 stated that he was born in 1963. He stated that the 1st Defendant acquired the suit properties around 1976. He stated that he was about 13 years old then and was able to know what was going on. He told the court that Lango Oyuo, Silvester Dawa, Vitalis Ouma, and Gone Odedo were present when the 1st Defendant purchased the suit properties. He stated that he did not know if the 1st Defendant entered into a written agreement with Lango Oyuo. He stated that the 1st Defendant's father was Johannes Osano Wariero, and he was buried on the 1st Defendant's land. He stated that he was the immediate neighbour of the 1st Defendant.
42. After the close of evidence, the court directed the parties to make closing submissions in writing.

The Plaintiffs' submissions

43. The Plaintiffs filed submissions dated 19th March 2024 in which they framed the following issues for determination;
 1. Whether the parcel of land known as Kisumu/Kanyakwar "B"/134 [Plot No. 134] was the late Johannes Osano Wariero's ancestral land;
 2. Whether the parcel of land known as Kisumu/Kanyakwar "B"/135 [Plot No. 135] was the late Johannes Osano Wariero's ancestral land; and
 3. Whether the prayers/orders sought against the Defendants should be granted.
44. The Plaintiffs submitted that Plot No. 134 was registered in the joint names of the 1st and 2nd Defendants. The Plaintiffs submitted that the 1st and 2nd Defendants adduced no evidence of how they acquired the property. The Plaintiffs submitted that the property was not procedurally transferred to the 1st and 2nd Defendants and urged the court to find that the property formed part of the estate of the deceased, Johannes Osano. The Plaintiffs submitted that there was a possibility that the 1st Defendant interfered with the adjudication records since he was unable to explain how the 2nd Defendant got registered as a co-owner of Plot No. 134. The Plaintiffs submitted that the title to Plot No. 134 held by the 1st and 2nd Defendants should be nullified to allow their other siblings to benefit from the estate of their deceased father, Johannes Osano.
45. With regard to Plot No. 135, the Plaintiffs submitted that the property was registered in the sole name of the 1st Defendant. The Plaintiffs submitted that the deceased, Johannes Osano lived on Plot No. 135 with his two wives and children. The Plaintiffs submitted that all the witnesses who testified in the matter were unanimous that Plot No. 135 was ancestral land and that the 1st Defendant held the same in trust for himself and his siblings. In support of this submission, the Plaintiffs cited, Peter



Gitonga v Francis Maingi M'Ikiara, Meru HCCC No. 146 of 2000, Jason Gitimu Wangara v Martin Munene Wangara & Others [2013]eKLR, Peter Thuo Murugah v Githinji Waweru [2019]eKLR, James M'Ngaruthi M'Rintari & Another v Muguna M'Rintari [2017]eKLR, Ileri Nyanga v Nicholas Ndwiga Peter Ileri & 3 Others; Daniel Njagi Mwangi [Interested Party] [2020]eKLR, Francis Kaagu Karichu v Lucy Nyambura Mburu [2019]eKLR and Petition No. 10 of 2015 Isaack M'Inanga v Isaaya Theuri M'Lintari & Another [2018]eKLR.

46. The Plaintiffs submitted that they were entitled to the reliefs sought in the plaint since the suit properties belonged to their deceased father, Johannes Osano and should form part of his estate for succession purposes.

The 1st Defendant's submissions

47. The 1st Defendant filed submissions dated 2nd July 2024 in which he framed the following issues for determination;
1. Whether the court had jurisdiction to entertain the Plaintiffs' suit;
 2. Whether the Plaintiffs had the locus standi to bring the suit;
 3. Whether the Plaintiffs had proved their case on a balance of probabilities to warrant the grant of the orders sought;
 4. Whether the 1st Defendant had proved his counterclaim; and
 5. Who should pay the costs of the suit?
48. The 1st Defendant submitted that in a ruling delivered by the High Court at Kisumu in Succession Cause No. 14 of 2020 on the 22nd November 2021 [D.EXH. 12], the court held that the suit properties did not form part of the estate of the deceased, Johannes Osano Wariero. The 1st Defendant submitted that as beneficiaries of the estate of the deceased, the Plaintiffs were parties to the said succession proceedings. The 1st Defendant submitted that the issue of whether or not the suit properties formed part of the estate of the deceased had already been determined by the High Court in the said succession cause and the same cannot be raised again for determination in this suit. The 1st Defendant submitted that this suit offends the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya. In support of this submission, the 1st Defendant cited *Siri Ram Kaura v M.J.E. Morgan*, [CA 71/1960](#) [1961] EA 462.
49. The 1st Defendant submitted further that the determination of the question whether the suit properties which admittedly were not registered in the name of the deceased belonged to the estate of the deceased was for the probate and administration court. The 1st Defendant submitted that the Plaintiffs were not only asking the court to declare that the suit properties were part of the deceased's estate but also to proceed and distribute the properties among the Plaintiffs as the beneficiaries of the said estate. The 1st Defendant submitted that the court lacked jurisdiction to determine the issues raised in the suit for determination.
50. On the issue of whether the Plaintiffs had the locus standi to bring the suit, the 1st Defendant cited Sections 45 and 82 of the *Law of Succession Act* and submitted that the Plaintiffs brought the suit as alleged beneficiaries of the estate of the deceased, Johannes Osano. The 1st Defendant submitted that since the Plaintiffs brought this suit in this court rather than in the Probate Court, they needed to obtain a grant in respect of the estate of the deceased to give them the capacity to bring the suit. The 1st Defendant submitted that there was no evidence showing that the Plaintiffs or any of them



had obtained letters of administration in respect of the estate of the deceased. The 1st Defendant cited *Alexander Mutunga Wathome v Peter Lavu Tumbo & Another*, Machakos Succession Cause No. 80 of 2011 [2015] eKLR and submitted that the Plaintiffs had no locus standi to bring the suit.

51. On whether the Plaintiffs had proved their claim against the Defendants, the 1st Defendant submitted that the suit properties were registered in the names of the 1st and 2nd Defendants. The 1st Defendant submitted that at no time had the suit properties been registered in the name of the deceased, Johannes Osano. The 1st Defendant submitted that the Plaintiffs' case did not meet the criteria for establishing a customary trust set out in the Supreme Court case of *Isack M'inanga Kiebia v Isaya Theuri M'lintari & another* [2018]eKLR. The 1st Defendant submitted that he gave evidence that he purchased the suit properties from a third party who had no connection with the family of the deceased. The 1st Defendant submitted that he had placed before the court evidence showing that he could purchase the suit properties. The 1st Defendant submitted that he rebutted the Plaintiffs' claim that the suit properties were bought with the proceeds of the compensation paid by the government for the deceased's ancestral land that was compulsorily acquired by the government for the expansion of Kisumu City.
52. The 1st Defendant submitted that the Plaintiffs did not adduce any evidence showing that a customary trust had been created in their favour over the suit properties. The 1st Defendant submitted that it was noteworthy that the deceased moved his 2nd wife and her children from the suit properties to another parcel of land. The 1st Defendant submitted that this was evidence that the deceased did not consider the suit properties as ancestral land. The 1st Defendant submitted that the 1st and 2nd Defendants were the legitimate owners of the suit properties and that their titles were protected under the law. In support of this submission, the 1st Defendant cited Section 24 of the [Land Registration Act](#) 2012 and *Hassan Mohammed Haji v Mohamed Keynan & another* [2019] eKLR.
53. As concerns the 1st Defendant's counter-claim, the 1st Defendant reiterated the foregoing submissions and submitted that the 1st Defendant had proved his counterclaim against the Plaintiffs. The 1st Defendant submitted that there was no justification for the continued maintenance of cautions or other forms of encumbrances against the titles of the suit properties by the Plaintiffs, who had failed to prove that they were entitled to the suit properties.
54. On the issue of costs, the 1st Defendant submitted that costs follow the event. The 1st Defendant submitted that if the court found for the 1st Defendant, then the costs should be awarded to the 1st Defendant.

The 2nd Defendant's submissions

55. The 2nd Defendant filed submissions dated 4th July 2024 in which he framed the following issues for determination;
 1. Whether the Plaintiffs had proved the existence of a trust relationship between the Plaintiffs and the 2nd Defendant;
 2. Whether the Plaintiffs had proved fraud to the required standard; and
 3. Who was to bear the costs of the suit?
56. The 2nd Defendant submitted that trust is an overriding interest registerable against the title of land and was one of the ways of acquiring land. In support of this submissions, the 2nd Defendant cited Section 7 of the [Land Act](#) 2012, Section 28 of the [Land Registration Act](#) 2012, *Njenga Chogera v Maria Wanjira Kimanui & 2 Others* [2005] eKLR, *Peter Ndungu Njenga v Sophia Watiri Ndungu* [2000]



eKLR, *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* [2017]eKLR, and *Isack M'Inanga Kieba v Isaaya Theuri M'lintari & Another* [2018] eKLR.

57. The 2nd Defendant submitted that while the Plaintiffs claimed that the suit properties belonged to the late Johannes Osano, deceased, they failed to explain why the properties were not registered in the name of the deceased. The 2nd Defendant submitted that the evidence on record showed that the suit properties were bought by the 1st Defendant before registration, and during the adjudication process, the properties were registered in his name with the knowledge of the 2nd Plaintiff and the deceased Johannes Osano who was said to have been one of the members of the adjudication committee in the area. The 2nd Defendant submitted that if there was an intention to create a customary trust, nothing could have been easier than for the deceased Johannes Osano to cause such interest to be noted in the register or even to become a co-owner of the properties. The 2nd Defendant submitted that registration of the 1st and 2nd Defendants as the owners of the suit properties during the adjudication process and failure by the Plaintiffs and the deceased Johannes Osano to raise any objection clearly showed that the suit properties belonged to the 1st and 2nd Defendants. The 2nd Defendant submitted that there was already a finding by the High Court that the suit properties did not form part of the estate of the deceased, Johannes Osano.
58. The 2nd Defendant submitted further that the Plaintiffs failed to prove the fraud alleged against the Defendants in the acquisition of the suit properties. In support of this submission, the 2nd Defendant cited Sections 109 and 112 of the *Evidence Act*, Chapter 80 Laws of Kenya, Sections 24, 25 and 26 of the *Land Registration Act*, 2012, *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2002] eKLR, *Christopher Nsaru Kagina v Esther Mbandi Kagina & Another* [2016] eKLR and *Mombasa Civil Appeal No. 312 of 2012, Emfil Limited v Registrar of Titles Mombasa & 2 Others* [2014] eKLR.
59. On the issue of costs, the 2nd Defendant submitted that costs were at the discretion of the court as provided in Section 27 [1] of the *Civil Procedure Act*. In support of this submission, the 2nd Defendant cited *Githiaka v Nduriri* [2004] e KLR.

The 3rd Defendant's submissions

60. The 3rd Defendant filed submissions dated 19th March 2024 in which it framed the following issues for determination;
1. Whether the suit properties were held by the 1st Defendant in trust for his siblings; and
 2. Whether the 3rd Defendant irregularly issued titles for the suit properties to the 1st and 2nd Defendants.
61. The 3rd Defendant submitted that the suit properties did not form part of the estate of the deceased, Johannes Osano. The 3rd Defendant submitted further that the suit properties were not held in trust by the 1st Defendant as the evidence adduced showed that the same were bought by the 1st Defendant before the adjudication process and ultimate registration of the same. The 3rd Defendant submitted that if the suit properties were family land and /or there was an intention to create a customary trust, nothing could have stopped the deceased, Johannes Osano, from registering the properties in his name as the owner thereof. In support of this submission, the 3rd Defendant cited the Supreme Court case of *Isack M'Inanga Kieba v Isaaya Theuri M'lintari & Another*[supra]. The 3rd Defendant submitted that the registration of the 1st and 2nd Defendants as the owners of the suit properties during the adjudication process and failure by the Plaintiffs and the deceased, Johannes Osano to raise any objection clearly showed that the suit properties belonged to the 1st and 2nd Defendants.



62. The 3rd Defendant submitted that its mandate was statutorily underpinned and required it to register and keep records of all instruments affecting interests in land. The 3rd Defendant submitted that that in the instant case, it effected registration of instruments of ownership in relation to the suit properties as received from the Adjudication Department. The 3rd Defendant submitted that there was no evidence of any objection having been raised against the adjudication record. The 3rd Defendant submitted that there was no evidence of any illegality or irregularity on the part of the 3rd Defendant in the transactions in question.

Analysis and determination

63. I have considered the pleadings, the evidence tendered, and the written submissions by the advocates for the parties. I am of the view that the issues arising for determination in this suit are as follows;

1. Whether the 1st and 2nd Defendants held the suit properties in trust for the Plaintiffs;
2. Whether the suit properties were registered in the names of the 1st and 2nd Defendants irregularly and illegally;
3. Whether the Plaintiffs are entitled to the reliefs sought in the plaint;
4. Whether the 1st Defendant is entitled to the reliefs sought in the counterclaim; and
5. Who is liable for the costs of this suit?

64. In *Kurshed Begum Mirza v Jackson Kaibunga* [2017] eKLR, the court stated as follows:

“[16] Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.”

65. In *Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14, the authors have stated as follows on the burden of proof:

“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

66. The Plaintiffs had the burden of proving their case against the Defendants. Similarly, the 1st Defendant had the burden of proving his counterclaim against the Plaintiffs. It is common ground that Plot No. 134 is registered in the names of the 1st and 2nd Defendants, while Plot No. 135 is registered in the sole name of the 1st Defendant. The suit properties were registered in the names of the 1st and 2nd



Defendants as the first registered owners under the Registered Land Act, Chapter 300 Laws of Kenya [now repealed]. Sections 27 and 28 of the Registered Land Act provide as follows:

“27. Subject to this Act –

- a] the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- b] the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

- [a] to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- [b] unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

67. In *John Gitiba Buruna & Another v Jackson Rioba Buruna*, Court of Appeal at Kisumu, Civil Appeal No. 89 of 2003, the court stated as follows:

“Although the rights of a registered proprietor of land are indefeasible under section 28 of the Registered Land Act, such registration does not as the proviso to section 28 states relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

68. In *Kanyi v Muthiora* [1984] KLR 712, Chesoni, Ag. JA stated as follows at page 723:

“Section 143 of the Registered Land Act did not apply as there was no question of rectification of the register but a transfer by a trustee to a beneficial owner. The registration of the suit land in the name of Kanyi under the Registered Land Act did not extinguish Nyokabi’s rights under Kikuyu customary law. Kanyi was not relieved from her duty or obligation to which she was a trustee to Mathiora’s land: see proviso to section 28 of the Act and *Gatimu Kinguru –vs- Muya Gathangi* [1976] KLR 253. There was overwhelming evidence of a trust in favour of Nyokabi.”



69. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another*[supra], the Supreme Court stated as follows on customary trusts:

“[37] Both exponents of colonial land policy and jurisprudence, either completely disregarded, or did not fully appreciate, the nature, scope, and complexity of African land relations. Land in a traditional African setting, is always the subject of many interests and derivative rights. The content of such interests and rights is often a complex area of inquiry. Such rights could be vested in individuals or group units. The rights and interests frequently co-exist with each other. For example, the rights of members of a family do not necessarily derive from the corporate rights of the family as such, but by operation of the applicable law and customs. Besides, the enjoyment of the rights is dependent on the fulfilment of certain conditions unique to the group unit. Several rights of the members could be inferior to, or co-terminus with, or indeed superior to the sum total of the rights of a group. Hence, customary law does not vest “ownership”, in land in the English sense, in the family, but ascribes to the family the aggregate of the rights that could be described as “ownership.” [Bennett 1995:3 and Cocker 1966: 30-33].”

70. The court stated further as follows:

“[52] Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, [now repealed], the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group.



3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

71. In *Mwangi Mbothu & 9 others v Gachira Waitimu & 9 others* [1986] eKLR, the court stated that:

“The law never implies, the court never presumes a trust but in case of absolute necessity. The court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create trust must be clearly determined before a trust will be implied.”

72. In *Njenga Chogera v Maria Wanjira Kimani & 2 others* [2005] eKLR, the Court of Appeal stated as follows on proof of trust:

“It was argued on behalf of the appellant that there was no sufficient evidence to prove customary law trust. On our own re-evaluation of the evidence we are satisfied that there was ample evidence of the history of the suit land and of the relevant customary law on which the learned judge could find as he did.”

73. From the evidence adduced by the Plaintiffs, I am not persuaded that the suit properties were family or ancestral land owned by Johannes Osano Wariero, deceased, before the same were adjudicated and registered in the names of the 1st and 2nd Defendants as the first registered owners. The Plaintiffs did not give any explanation why the deceased, who had two wives/houses, would have chosen to register the suit properties which measured over 14 acres, in the names of the 1st and 2nd Defendants, who were from the same house [first house] to hold in trust for the deceased and other members of the two houses, instead of having the same registered in his own name. There is evidence showing that the deceased, Johannes Osano and his eldest son from the second house, Martin Obonyo Osano were registered as joint proprietors of the parcel of land known Kisumu/Kanyakwar “B”/163 measuring 1 acre and it was on this parcel of land that the deceased subsequently moved his second family from Plot No. 134. This means that there was no reason why the deceased who was alive during the land adjudication exercise and who is said to have taken an active part in the same could not have registered the suit properties in his own name if the properties belonged to him. I am persuaded that the suit properties were purchased by the 1st Defendant before the land adjudication exercise and the same were adjudicated and ultimately registered in his name and the name of his brother. The 1st Defendant tendered evidence showing that he was engaged in business at the material time and was financially capable of purchasing the suit properties. In my view, nothing turns on the fact that it was the 1st Defendant who caused the 2nd Defendant to be registered as a co-owner of Plot No. 134. The 1st Defendant led evidence that he purchased the suit properties as one parcel of land and that during the land adjudication, he caused the parcel of land to be subdivided into Plot No. 134 and Plot No. 135. The 1st Defendant stated that he caused Plot No. 134 to be registered in his name and the name of the 2nd Defendant, and Plot No. 135 in his sole name. The 1st Defendant produced in evidence the adjudication records for the suit properties, which showed that the two parcels of land were adjudicated and recorded in the names of



the 1st and 2nd Defendants as the owners thereof. I have found no evidence of any irregularity or fraud in this transaction. Although the Plaintiffs claimed that the 1st Defendant, in collusion with the 3rd Defendant, caused alterations to be made to the adjudication record, no evidence was placed before the court to back up that claim.

74. Due to the foregoing, it is my finding that the Plaintiffs have failed to prove that the 1st and 2nd Defendants held the suit properties in trust for them and that the properties were irregularly and illegally registered in the names of the 1st and 2nd Defendants. It follows, therefore, that the Plaintiffs have not proved their case against the Defendants and as such they are not entitled to the reliefs sought in their plaint. With regard to the 1st Defendant's counterclaim, it is my finding that there is no justification for the cautions which have been registered against the titles of the suit properties at the instance of the Plaintiffs. As concerns the injunction sought against the Plaintiffs, I find no basis for the same. There is no evidence that the Plaintiffs have trespassed on the suit properties or attempted to do so. In any event, for the 3rd Plaintiff, she knows no other home apart from Plot No. 134 where her parents lived and were buried. By allowing the deceased, Johannes Osano who was the father of the 3rd Plaintiff, and the 3rd Plaintiff's mother to set up a home and live on Plot No. 134 in which home they also brought up the 3rd Plaintiff among other siblings, the 1st Defendant granted the 3rd Plaintiff a license to enter Plot No. 134 which license in my view cannot be revoked while the 3rd Plaintiff's parents' home is still on the suit property and the 3rd Plaintiff has not moved out of the property. I say so because the court cannot restrain the 3rd Plaintiff from going to her parents' home. As for the other Plaintiffs who are from the second house, they have their homes elsewhere. As I mentioned earlier, the deceased, Johannes Osano moved his second house from Plot No. 134 and settled them on the parcel of land known Kisumu/Kanyakwar "B"/163 before his death. These Plaintiffs would therefore have no reason to enter or interfere with the 1st Defendant's occupation and use of both Plot No. 134 and Plot No. 135. However, in the absence of any evidence of such interference, the court cannot grant the injunction sought against them. It is therefore my finding that the 1st Defendant's counterclaim succeeds in part.

75. On the issue of costs, the authors of Halbury's Laws of England, 4th Edition [Re-issue], [2010] Vol. 10, para 16 have stated as follows:

"The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the Court, a party has no right to costs unless and until the Court awards them to him and the Court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice".

76. Under Section 27 of the *Civil Procedure Act*, the costs of and incidental to a suit are at the discretion of the court and as a general rule, costs follow the event. In *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2014] eKLR, the Supreme Court stated as follows:

"It emerges clearly that, whether in this Court or any other superior Court, costs are awarded at the discretion of the Court or Judge...It is plain to us that, at the time the petition was lodged in the Supreme Court, it was, in every respect, a valid cause of action; and thus, no blame attaches to the act of filing. By Article 50[1] of *the Constitution* of Kenya, 2010 – 'Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court...'"



77. As mentioned at the start of this judgment, the parties to this suit are members of the same family. It is clear from the analysis of their respective cases that they had a genuine dispute that required resolution by the court. The Plaintiffs have not succeeded in their claim, while the 1st Defendant's claim has succeeded in part. In the circumstances, I am of the view that no party should be burdened with the costs of the suit. Each party shall therefore bear its costs of the suit and the counterclaim.

Conclusion

78. In conclusion, I hereby make the following orders in the matter;

1. The Plaintiffs' suit is dismissed.
2. The 1st Defendant's counterclaim is allowed in terms of prayer [a] of the defence and counterclaim dated 1st February 2021. For the avoidance of doubt, the 3rd Defendant shall remove forthwith the cautions registered against land parcels Kisumu/Kanyakwar "B"/134 and Kisumu/Kanyakwar "B"/135 at the instance of the Plaintiffs.
3. Each party shall bear its costs of the suit and the counterclaim.

DELIVERED AND SIGNED AT KISUMU ON THIS 26TH DAY OF JUNE 2025

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Maruja for the Plaintiffs

Ms. Wanyangu for the 1st Defendant

Mr. Munuango for the 2nd Defendant

N/A for the 3rd Defendant

Ms. J. Omondi-Court Assistant

