



REPUBLIC OF KENYA



**Kaluu & another v Kituku & 13 others (Environment and Land Case
315 of 2017) [2025] KEELC 6470 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6470 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND CASE 315 OF 2017**

TW MURIGI, J

SEPTEMBER 25, 2025

BETWEEN

KITUKU KALUU 1ST PLAINTIFF

SAMUEL WAMBUA KAMUYA 2ND PLAINTIFF

AND

JOSIAH KITUKU 1ST DEFENDANT

JOSEPH M MWOLOLO 2ND DEFENDANT

JONATHAN M NZOMO 3RD DEFENDANT

BONIFACE M MUTUNGI 4TH DEFENDANT

DAVID NGILA 5TH DEFENDANT

JACKSON MUNUGU 6TH DEFENDANT

DAVID NGILA 7TH DEFENDANT

WILFRED M KING'OO 8TH DEFENDANT

SAMUEL M ITIJIO 9TH DEFENDANT

DORCUS SAMMY 10TH DEFENDANT

KINUKA SUKALI 11TH DEFENDANT

KIMONDOLO NGILA 12TH DEFENDANT

DAVID KUIRA GICHUKI T/A GICHUKI & ASSOCIATES 13TH DEFENDANT

**CHIEF REGISTRAR OF TITLES, ARDHI HOUSE –
NAIROBI 14TH DEFENDANT**



JUDGMENT

1. The Plaintiffs instituted this suit vide the further amended Plaint dated 16th May, 2018, seeking the following orders: -
 - a. A permanent injunction restraining the Defendants by themselves, their agents, employees, servants, and/or any person acting under their authority from dealing, sub-dividing, issuing/processing new titles, alienating and/or in any way interfering with the ownership, occupation and/or possession of all that parcel of land known as Land Reference Number 7612/2 Machakos District.
 - b. A permanent injunction restraining the 14th Defendant from altering Title Number 7612/2 Machakos District/County and/or issuing new titles thereof and/or in any manner interfering with the said certificate of Title Number 7612/2 Machakos.
 - c. An order declaring all the subdivisions and the beacons laid by the Defendants, their agents, servants, employees, between the periods August 2013 and September 2013, and any further subdivisions illegal, null, and void.
 - d. A declaration that the 20 persons registered as proprietors of L.R. Number 7612/2 hold the said title in trust for themselves as well as the persons mentioned in HCCC 220 of 1992 mentioned in paragraph 6 above.
 - e. An order that the property known as L.R. Number 7612/2 be subdivided and titles issued by the land occupied by the beneficiaries of the judgment in HCCC Number 2249 of 1992 and mentioned in paragraph 6 at the time the said suit was filed in 1981, in compliance with Hon. Justice Mwera's judgment dated 14th January, 1992, accordingly.
 - f. That the costs of this suit be paid by the Defendants.
 - g. Any other and/or further relief that this Honourable Court deems fit to grant.
2. The 1st – 12th Defendants filed an amended Statement of Defence on 9th May, 2018, in which they denied the Plaintiff's claim. They urged the court to dismiss the Plaintiffs' suit with costs.
3. The 13th Defendant elected to rely on his replying affidavit, sworn on 15th October, 2021.
4. The 14th Defendant filed its statement of defence dated 28th September, 2021, denying the Plaintiffs' claim. It urged the court to dismiss the Plaintiffs' suit with costs.

The Plaintiff's Case

5. The 1st Plaintiff Kituku Kaluu testified as PW1. He adopted his witness statements, dated 18th May, 2018, and 8th October, 2023, as his evidence in chief. He also produced the documents in his list dated 8th October, 2023, as PEX 1–4.
6. PW1 testified that in 1981, Kiu Ranching & Farming Cooperative Society Ltd sued him along with 20 others in NBI HCCC No. 2749 of 1981, seeking their eviction from L.R. No. 7612/2 (the suit property herein).
7. He further testified that the Society filed a similar suit, namely, HCCC No. 2207 of 1982, seeking similar orders, which was later consolidated with HCCC No. 2749 of 1981.



8. That by a judgment issued on 14th January 1992 in HCCC No. 2749 of 1981, the court determined that the Defendants had acquired the suit property measuring 1081.4 hectares through adverse possession, and each was to be allocated the land they occupied. Subsequently, the Defendants, including him, were registered as the proprietors of the suit property.
9. He testified that the Surveyor, Machakos District was to facilitate the demarcation and issuance of the titles for the suit property, but this was not achieved.
10. That sometime in September 2013, the Defendants purported to subdivide the suit property by placing beacons, thereby displacing the lawful owners.
11. He further stated that the Defendants have unlawfully sold portions of the suit property to third parties who are not entitled to the land, thereby infringing their right to property.
12. He maintained that the suit property is registered in the names of 20 people who hold it in trust for 143 others, in accordance with the judgment delivered in NBI HCCC No. 2749 of 1981.
13. Concluding his evidence, he urged the court to grant the orders sought in the Plaint.
14. On cross-examination by Mr. Mulei, he testified that the suit land was owned by a white man, who designated an area for their residence with the understanding that they would inherit the portions where they were settled.
15. He further testified that Kaseve Farmers were not present when the white man sold the land and that they intended to sell their land. He confirmed that he was a party in NBI HCCC Nos. 2749 of 1981 and NBI HCCC No. 2207 of 1982, in which the court ordered the subdivision of the suit land. He maintained that he instituted this suit because the property had not been subdivided in accordance with the court orders. He also confirmed that he resides on the portion of the land shown to him by the white man.
16. He confirmed that the subdivision of the suit property should have included everyone who had worked for the white man.
17. On cross-examination by Mr. Makundi, he testified that he was aware that the High Court had ordered the subdivision of the suit land amongst the 143 farmers and had directed them to hire a local surveyor to divide the land amongst those entitled.
18. He told the court that he had sued the Surveyor because he had attempted to assign his land to another person. He confirmed that the 1st - 12th Defendants were elected by people to oversee the subdivision of the suit property.
19. He further testified that he was not aware of how the 13th Defendant was appointed. He confirmed that the Surveyor had not sold the suit land to third parties, and noted that some of their own members had. He conceded that he had not provided the names of the outsiders who had purchased the suit land.
20. According to him, the head of each of the 143 families should be allocated land. He explained to the court that he had sued the Defendants because they had excluded him in the subdivision of the suit land and were selling it.
21. He confirmed having signed the Kaseve 143 families agreement to facilitate the subdivision of the suit land, but denied attending the meeting held on 8th November 2010.



22. He further testified that some members, such as Sammy, the son of Nzomo Ngole, were excluded from the subdivision of the suit property. He asserted that he is entitled to sixteen acres, comparable to that of other members, and lamented that his current allocation was less than one acre.
23. In re-examination, he denied attending any meeting convened to discuss the subdivision of the suit land or meeting Gichuki, the Surveyor. He further testified that there was no agreement requiring each family to surrender one acre to facilitate the subdivision of the suit land. He maintained that the suit property was forcibly subdivided.
24. He told the court that he was not asked to pay any money for the subdivision process. He also stated that the first list of allocation shows that he was allocated 2.2 acres, whereas the second list indicates an allocation of 4.92 acres.
25. The 2nd Plaintiff, Samuel Wambua Kamuya, testified as PW2. He adopted his witness statement dated 18th May, 2018, as his evidence in chief. He also produced the documents in his list filed in court on 9th October, 2013, as PEX 5 – 7, 11, 12, and 13. He echoed the evidence of PW1.
26. PW2 informed the court that his father Kamuya Nganda, one of the parties registered on the title for the suit property died before the land was subdivided. It was his testimony that Josiah Kituku and Jonathan Musyoka who were both chiefs started selling the land and brought in a surveyor in 2005 to subdivide the land.
27. Consequently, they filed a suit and the surveyor was restrained from subdividing the land. That the surveyor attempted to subdivide the land in 2012 on the instructions of the chiefs but they obtained orders to restrain them from carrying out the subdivision.
28. On cross-examination, he testified that his father was the 4th Defendant in NBI HCCC No. 2749 of 1981. He reiterated that, after the judgment was delivered, the two Chiefs, Josiah Kituku and Jonathan Nzomo, began selling the suit land, as evidenced by the photographs depicting houses constructed on the suit land by the purchasers.
29. He acknowledged initiating HCCC No. 51 of 2005 to stop the private Surveyor from subdividing the land and added that the case was eventually dismissed. He told the court that he had sued the Defendants because they had engaged a surveyor without adhering to proper procedures.
30. He further testified that the Ministry of Lands issued him a letter dated 22nd January 2013 in his capacity as the representative of Kaseve Farmers. He also stated that he had previously communicated with the Ministry on behalf of the members.
31. According to him, the subdivision plan prepared by the 13th Defendant shows that Kamuya Nganda was assigned parcels Nos. 163 and 450, measuring 4.5527 hectares, while Kituku Kaluu received parcels Nos. 86, 151, and 361, measuring 5.8592 hectares, and that he was allocated parcels Nos—23 and 324, measuring 6.477 hectares.
32. He confirmed that none of the 144 farmers had been relocated from their residences in the subdivision plan. He also confirmed that he did not see any notice from the Defendants requiring people to vacate the parcels they occupy. He admitted that some members had sold their respective portions and confirmed that he had sold six acres of his land to four people.
33. PW2 claimed that he is entitled to 100 acres of the suit land, while his father is entitled to 50 acres. He also stated that the Defendants gave him a smaller portion than what he is entitled to. Although he denied the existence of an agreement for each family to be allocated a commercial plot, he confirmed



- that he had been allocated commercial Plot No. 13. He further stated that he was unaware of the meetings convened by the Defendants regarding the subdivision of the suit property.
34. He denied attending the meeting held on 8th November 2010. He also stated that he was unaware of any committee elected to oversee the subdivision of the suit land or of any agreement between the 1st-12th and 13th Defendants. He further stated that he was unaware that the Defendants had agreed to pay the 13th Defendant Kshs—2,876,220/ as the subdivision fee.
 35. He stated that he was not aware whether the Physical Planning Department had issued any consent and denied having seen the public notice inviting objections to the subdivision of the suit land. He confirmed that he did not object.
 36. He maintained that a Government Surveyor should have subdivided the suit property. He confirmed that he had not hired a local Surveyor as directed by the court, nor had he submitted an alternative survey plan opposing that of the Defendants.
 37. In re-examination, he reiterated that the court in its judgment of 14/01/1992, ordered a Government Surveyor to demarcate the suit land. He also confirmed that he did not participate in signing the contract between the 1st – 12th and 13th Defendants.
 38. PW3, Sammy Nzomo, adopted his witness statement dated 18th May 2018, as his evidence in chief. He echoed the evidence of PW1.
 39. On cross-examination by Mr Makundi, he told the court that he was 15 years old in 1981 and added that he had contributed towards the legal fees. He testified that his brother, Daudi Nzomo, who had represented the Nzomo family in NBI HCCC No. 2749 of 1981, was not a party to this suit and was not claiming his share. He confirmed that on 8th November 2010 an agreement was reached regarding the subdivision of the suit land. He acknowledged that his mother, Loise Nzomo, was listed at entry No. 14 in the agreement to subdivide the suit land. He also acknowledged that he had not received a notice to vacate the land though some people, such as Mutuku Kito, had been issued a notice to vacate.
 40. He went on to state that the court in its judgment delivered in Nairobi HCCC No. 2749/81, directed the parties to hire a local surveyor to subdivide the land.
 41. He also testified that Samuel Wambua Kamuya, one of their leaders involved in their subdivision efforts, gave them a letter indicating that the subdivision fee was Kshs. 300,000/= and confirmed that he did not pay this amount.
 42. He stated that he was unaware that the villagers contributed money toward the Surveyor's fees. He further testified that no meeting was held nor was any resolution passed requiring members to sell a portion of the suit land to cater for the Surveyor's fees.
 43. He further testified that he was not aware of the agreement dated 13th January 2012, between the 1st - 12th and the 13th Defendants to subdivide the suit land.
 44. He acknowledged that he only had the report prepared by the 13th Defendant and confirmed that no other surveyor was hired to demarcate the land. He also expressed his intention to acquire ten acres of the suit land and denied the allegations that he had been allocated an agricultural or commercial plot.
 45. He asserted that the Surveyor did not conduct any survey on the suit property, as the beacons were placed on the road rather than on the suit land.



46. In re-examination, he insisted that he wants the judgment in Nairobi HCCC No. 2749 of 1981 implemented. He further testified that his mother was illiterate and denied the claim that she signed or consented to the subdivision of the suit property.
47. According to him, the Government Surveyor did not survey the suit property because the 13th Defendant had already been hired. He also testified that neither he nor his brother agreed to the sale of one acre.
48. PW4, Joseph Makundi Kingoo, adopted his witness statement dated 8th October 2013, as his evidence in chief. He echoed the evidence of PW1.
49. On cross-examination by Mr Makundi, he testified that they had filed Machakos HCCC No. 51 of 2005 to stop the survey of the suit land. He also stated that the suit property should be divided amongst twelve families.
50. He went on to state that his late father was a party in HCCC No. 2749 of 1981. He testified that they protested after the private Surveyor subdivided their land. He further stated that the Surveyor had allocated land to six outsiders and distributed more shares to others. He claimed that Josiah Kituku had 71 acres, Joseph Mwololo held 49 acres, and Muoki Kingoo owned 64 acres.
51. He confirmed that he had not specified the names of the outsiders who invaded his land in his statement. He also confirmed that all the parties are on the suit land and that no one had been issued a notice to vacate. He acknowledged that people had contributed towards the legal fees and that a Committee had been established.
52. According to him, the Defendants from Kaseve, are not entitled to the suit land. He also claimed that the Surveyor forcibly installed beacons on the land while accompanied by police officers. He asserted that Josiah Kituku, the area Chief, fraudulently appointed the 1st - 12th Defendants as the Committee, an appointment that he does not recognize.
53. He stated that he had not seen the list detailing the subdivision conducted by the Committee and the Surveyor, nor the Surveyor's report on the land subdivision. He further stated that he did not attend any meetings regarding the subdivision of the suit property.
54. He denied the allegations that they had agreed to sell a portion of the suit land to raise funds for the survey.
55. He explained to the court that some people listed in the document attached to the 13th Defendant's Replying Affidavit are shown to have signed but were actually deceased. He testified that since 1992, he and the 2nd Plaintiff had been requesting a survey of the suit land from the Government Surveyor, but the Chief had refused.
56. On cross-examination by Mr. Mamboleo, he testified that the judgment of 1992 ordered the subdivision of the suit land amongst twenty families. He further testified that his father was a party to the suit but did not receive his share of the land because the Government Surveyor had not subdivided it. He insisted that the suit land was yet to be subdivided.
57. He stated that he was not involved in the survey and confirmed that he did not pay for it. He maintained that he does not recognize the Committee in place or its resolutions.
58. On cross-examination by Ms. Mwangi, he reiterated that the suit land had not been subdivided. He also testified that the Chief hired a private Surveyor instead of a Government Surveyor.



59. In re-examination, he reiterated his evidence as above. He insisted that they were not involved in the appointment of the private Surveyor.
60. He confirmed that the Chief brought police officers onto the suit land because he intended to subdivide it by force. Additionally, he mentioned that the Chief's Committee sold land to outsiders, which led to numerous disputes since they were not part of those transactions.

The 1st – 12th Defendants' case

61. The 1st – 12th Defendants called two witnesses in support of their defence. DW1, Malonza Mwololo, adopted his witness statement dated 6/6/2018 as his evidence in chief. He testified that he was one of the Defendants in HCCC No. 2479 of 1981 and HCCC No.2207 of 1982.
62. He further confirmed that after the Court of Appeal ruled in their favour, members of the 143 families agreed to surrender one acre to cater for the Survey fees. He went on to state that 20 people were registered as trustees on behalf of the 143 members in accordance with the judgment in NBI HCCC No. 2479 of 1981, and a title deed for the suit property was issued.
63. He told the court that initially, approximately 143 families occupied the suit land. An additional five to ten people, who were their children, were added due to the financial challenges they encountered in raising the surveyor's fees. He explained that those who were added were expected to pay Kshs 20,000/= per acre. It was his testimony that no houses had been demolished and no one had been evicted from their land.
64. He also stated that the 13th Defendant was identified as the Surveyor for the suit land.
65. He informed the court that the subdivision of the suit land had been finalized. He told the court that in 2005 the 2nd Plaintiffs and others sued them in Machakos HCCC No. 51 of 2005 which was eventually dismissed.
66. He testified that the DC advised them to appoint some members because they needed to pay fees to the advocate. He explained to the court that Kisee Mweu, aside from being the 1st Defendant in HCCC No. 2749/1981, served as their chairman. Additionally, he stated that the DC assigned two police officers to safeguard the survey equipment. He urged the court to order everyone to remain within their respective parcels of land as demarcated.
67. On cross-examination by Mr. Munyao, he confirmed that the 143 Kaseve families elected Committee members following the advice of the DO and the DC, although he lacked supporting documentation to prove this claim.
68. He further testified that the Committee allocated 143 acres to be sold to the members' children to cater for the Surveyor's fees. He confirmed that there was no explicit agreement that the land was to be sold for this purpose. He also confirmed that he contributed one acre towards the Surveyor's fees and noted that no receipts were issued.
69. He further testified that the suit land was divided into more than 143 parcels and that there was no disruption during the survey. He asserted that the role of the police officers was to safeguard the Surveyor's equipment.
70. On cross-examination by the 2nd Plaintiff, he reiterated that the title deed for the suit land was registered in the names of twenty people who held it in trust for their families. He acknowledged that a decision was made to sell some portions of the suit land to cater for the Surveyor's fees. He testified that the



colonial authorities had allocated 18 acres to eighteen families from the suit property, and these families are entitled to their respective share of the land.

71. In re-examination, he reiterated that the 143 families agreed to sell one acre each to cater for the Surveyor's fees. He confirmed that the Committee's officials and members approved the appointment of the Surveyor. According to him, the Plaintiffs neither opposed the registration of the 20 members nor sought the cancellation of the title. He clarified that the Chief, Josiah Kituku, was not a member of the Committee.
72. DW2, Wilfred Muoki King'oo, adopted his witness statement dated 9th May, 2018, as his evidence in chief. He produced the documents in the list filed on 9th May 2018 as DEX 1 – 12, the documents in the further list dated 5th June 2018 as DEX 13 – 19, the documents in the list dated 29/11/2018 as DEX 20 - 22, and the documents in the list dated 29/4/2019 as DEX 23 – 24.
73. DW2 testified that he has been the Secretary of the Kaseve 143 Families Group since 2010. He further testified that the group was established in 1981 and was registered with the Registrar of Societies to raise funds for defending the two cases filed by the Society. That after they obtained the title for the suit property, members agreed to surrender one acre each to cater for the Surveyor's fees.
74. He went on to state that the 2nd Plaintiff declined and demanded to be allocated 200 acres while his father be allocated 60 acres but the members refused. As a result, this led to the formation of a group opposed to the subdivision and one that wanted the subdivision to proceed. In the year 2010, the DCC advised each group to elect three members to join the old committee and they later hired a surveyor to subdivide the land.
75. That when the process of laying beacons was in progress, the 2nd Plaintiff organized a group of non-members who started destroying the beacons and the matter was reported to the police. Thereafter, the Plaintiffs filed Machakos HCCC No. 51 of 2015, which was dismissed for want of prosecution. He went on to state that after the process of subdivision was completed, they discovered that a caveat had been registered against the suit property.
76. On cross-examination by Mr. Munyao, he confirmed that he did not produce the group's certificate of registration or the minutes validating his election as the Secretary. He further testified that the minutes dated 26/08/2010 indicate that members consented to contribute one acre each to cater for the Surveyor's fees.
77. He also testified that receipts were issued to individuals who purchased the one-acre contributions, who are sons of members of the Kaseve 143 families. He explained that, although they were unable to secure a Government Surveyor, they succeeded in instructing the 13th Defendant to carry out the subdivision of the suit property.
78. He went on to state that at a general meeting with the Surveyor, 134 people were listed as attendees, although some did not sign because they had sent representatives who could not sign on their behalf.
79. On cross-examination by the 2nd Plaintiff, he reiterated that they instructed the 13th Defendant to conduct a survey of the suit property because the Government Surveyor informed them that they were too busy for the task. He further stated that PW2 was allocated 16 acres. He explained that their actions were based on a resolution passed by the members and that no one was given any land as a gift. He also testified that the land was subdivided according to the amount of money each of them contributed towards the case. He denied the allegations that he led the group to incur losses or that they were involved in any fraudulent activities.



80. On cross-examination by Mr. Mamboleo, he testified that the suit land was to be subdivided amongst 143 families. He also stated that the titles had not been issued because the 2nd Plaintiff had filed suits between 2010 and 2017, which halted the survey. He further stated that they selected the 13th Defendant out of three surveyors because he gave them a favorable quotation.
81. He went on to state that the 13th Defendant was invited to attend a general meeting held on 8th November 2010 and was provided with a list of members along with the respective acreage each was to receive.
82. In re-examination, he confirmed that none of the 143 family members claimed that they did not authorize the surrender of one acre. He also stated that the 2nd Plaintiff was being greedy by claiming 200 acres, even though he is only entitled to 12-15 acres.

The 13th Defendant's Case

83. The 13th Defendant, David Kuira Gichuki, testified as DW3 and was the sole witness in support of his defence. He adopted his replying affidavit, sworn on 15th October 2021, as his evidence in chief. He also produced the annexures in his affidavit, as exhibits DEX 26 – 36 and the allocation list dated 01/15/2020 as DEX 37. He told the court that he is a professional land surveyor and regional planner with thirty-six years of experience.
84. DW3 testified that the Committee of the Kaseve 143 families approached him to conduct a survey of the suit property in accordance with the judgment issued by Justice Mwera in 1992.
85. He further testified that he advised the Committee to convene a general meeting with the members of Kaseve 143 families to discuss the issue of survey.
86. He went on to state that on 8th November 2010, he was invited to attend a general meeting with the members, where it was agreed that a notice would be placed in a newspaper of wide circulation expressing the intention to subdivide and change the use of the suit property and call for objections. It was further agreed that the Kaseve 143 families would pay Kshs.10,000 per plot surveyed, and that the household to be selected for the preparation of a base map in readiness for planning would remain in their original positions without any alteration.
87. He told the court that on 13th January 2012, he signed a contract with the Committee of the Kaseve 143 families to conduct a survey and submit the survey documents to the Director of Surveys.
88. He further testified that he completed his work up to the point where a Registry Index Map and Area List were forwarded to the Land Registrar for the preparation and registration of individual titles. He explained to the court that the individual titles were not processed because a caveat had been registered against the suit land.
89. He informed the court that he completed the planning process and submitted the plan to both the County Government of Makueni and the National Land Commission, which both approved.
90. On cross-examination by Mr. Munyao, he testified that the Committee of Kaseve 143 families provided him with a list of beneficiaries detailing what each person was to receive. He stated that he did not know how the Committee distributed the land amongst its members. He also testified that after he prepared a map of the area, the entire community approved and signed it.
91. He testified that he prepared and submitted a subdivision plan to the Director of Surveys, along with a Registry Index Map.



92. On cross-examination by the 2nd Plaintiff, he testified that the Committee instructed him to demarcate the suit land and confirmed that the 2nd Plaintiff held part of the suit property in his name. He stated that he met the community on two occasions and they gave him authority to subdivide sections of the land they occupied within the suit property.
93. On cross-examination by Mr. Makundi, he stated that he had provided a detailed analysis of the allocations and had also recorded the names of the original Defendants in HCCc No. 2749 of 1981 and HCCC No. 2207 of 1982. He further stated that the list shows the beneficiaries of the deceased members. He explained to the court that he completed his work on 12th June, 2017, when the Director of Surveys transmitted the Registry Index Map to the Land Registrar for issuance of title deeds.
94. On cross-examination by Mr. Njagi, he reiterated that the Registry Index Map was transmitted to the Land Registrar by the Director of Surveys. He confirmed that no titles had been issued because a caveat was registered against the suit land.
95. The 14th Defendant did not call any witnesses in their defense.
96. After the close of the hearing, parties agreed to file and exchange their written submissions.

The 1st Plaintiff's Submissions

97. The 1st Plaintiff filed his submissions dated May 15, 2024. On behalf of the 1st Plaintiff, Counsel submitted that the Plaintiffs are the registered owners of the suit property.
98. Counsel further submitted that the Defendants' actions of subdividing the suit property were illegal, as they were carried out without the Plaintiffs' authorization. To buttress his submission, Counsel relied on the following authorities: -
 - a. *Giella v Cassman Brown & Co. Ltd* [1973] EA 358.
 - b. *Mrao v First American Bank of Kenya Ltd & 2 others* [2002] eKLR,
99. Concluding his submissions, Counsel urged the court to grant the orders sought in the Plaint.

The 2nd Plaintiff Submissions

100. The 2nd Plaintiff filed his submissions dated 4th November 2023.
101. The 2nd Plaintiff submitted that the 1st and 3rd Defendants are brothers and were also Chiefs who were involved in criminal activities regarding the suit land. He submitted that land Committees should not be led by chiefs. He complained that they were asked to surrender one acre to cater for the Surveyor fees yet the court had assisted them with a free surveyor.
102. He further submitted that the Committee relied on fraudulent documents to take advantage of illiterate villagers. He further submitted that in 1992 the families were asked to pay Kshs 2500/= for a non-existent surveyor.
103. That in 1996 each family was again ordered to pay Kshs 7000/= for yet another surveyor. In 1997 the chief Josiah Kituku and the committee ordered all families that did not contribute to the case pay Kshs 20,000/=.
104. He asserted that the court did not authorize a private surveyor to subdivide the suit land.



105. He further submitted that the survey that was done was shoddy and illegal as it was meant to benefit the committee. He urged the court to order that the suit property be demarcated by a government surveyor.

The 1st – 12th Defendants' submissions

106. The 1st – 12th Defendants filed their submissions dated 30th May, 2024. On their behalf, Counsel outlined the following issues for the court's determination: -

- i. Whether or not the subdivision and survey work carried out by the 13th Defendant on the instructions of the 1st – 12th Defendants was proper and lawful?
- ii. Whether the subdivision and survey work carried out by the 13th Defendant was contrary to the decree issued in Nairobi HCCC NO. 2249/1981 as consolidated with NO. 2207/1982?
- iii. Whether the Defendants have illegally sold or allocated land to persons who are not entitled, contrary to the judgment of Justice Mwera?

107. On the first issue, Counsel submitted that it was not in dispute that the 13th Defendant carried out the survey in accordance with the instructions issued by the 1st – 12th Defendants.

108. Regarding the second issue, Counsel argued that the Plaintiffs in their testimony acknowledged that the Kaseve 143 families validly elected the 1st – 12th Defendants. Counsel further submitted that the 1st Plaintiff signed the minutes in DEX 2 and 3, consenting to the subdivision of the land and agreed that each family would relinquish one acre, which would be sold to cater for the Surveyor's fees. Additionally, it was contended that the Committee comprising the 1st – 12th Defendants had the authority to hire the 13th Defendant to implement the judgment.

109. Regarding the third issue, Counsel argued that the Plaintiffs did not present any evidence to show that the subdivision of the suit land was contrary to Justice Mwera's judgment. Counsel further submitted that there was no evidence to support the allegations of eviction or allocation of land to undeserving individuals, as alleged by the Plaintiffs. Additionally, Counsel maintained that the subdivision was approved by the County Government of Makueni, and therefore, there was no valid reason to nullify the exercise.

110. Based on the foregoing, Counsel argued that prayer No. (a) of the further amended Plaint—should not be granted, as the Defendants are lawfully occupying their land and have not intruded upon the Plaintiffs' respective parcels. Moreover, Counsel contended that prayer No. (b) cannot be granted, as the Plaintiffs are seeking a permanent injunction against the issuance of individual titles, which is inconsistent with the judgment of Hon. Justice Mwera.

111. With regard to prayers No. (c), (d), and (e) of the further amended plaint, Counsel contended that the plaintiffs failed to substantiate these claims with evidence. Ultimately, Counsel urged the court to dismiss the suit with costs.

The 13th Defendant's Submissions

112. The 13th Defendant filed his submissions dated 28th May, 2024. On behalf of the 13th Defendant, Counsel outlined the following issues for the court's determination: -

- i. Whether the subdivision carried out was contrary to the judgment of Hon Justice Mwera?



- ii. Whether the 1st – 12th Defendants had the authority to contract the 13th Defendant to survey and subdivide the suit property?
 - iii. Whether the 13th Defendant was duly authorized to plan, survey, and subdivide the suit property?
 - iv. Whether the doctrine of laches applies in this matter?
113. Regarding the first issue, Counsel submitted that the Plaintiffs did not adduce any evidence to show that the planning, surveying, and subdivision of the suit property was inconsistent with the judgment issued by Hon. Justice Mwera on January 14, 1992.
 114. Counsel further submitted that no evidence was adduced to show that the 13th Defendant discriminated against any beneficiary or was involved in the allocation of land to any beneficiaries. Counsel argued that the Plaintiffs did not adduce any evidence to show that the 13th Defendant allocated more land to certain Defendants or denied land to the Plaintiffs.
 115. According to Counsel, the 2nd Plaintiff received 5.8592 hectares, contrary to the 1st Plaintiff's claim of being allocated less than one acre. Counsel also argued that neither Plaintiff provided proof that the 13th Defendant was involved in land allocation or Committee matters beyond his contractual duties.
 116. Regarding the second issue, Counsel argued that there was no explicit order from Hon. Justice Mwera specifying that the survey was to be conducted solely by a Government Surveyor. Counsel referenced Section 2 of the Survey Act to assert that the term 'local Surveyor' is not part of the definition of 'Government Surveyor.' Additionally, Counsel argued that the 13th Defendant performed his duties in accordance with Section 21 of the Survey Act.
 117. Counsel submitted that the 13th Defendant published a notice in a newspaper indicating his intention to subdivide and change the use of the property. It was submitted that the notice invited objections from interested members of the public, and that the Plaintiffs did not oppose the proposed subdivision of the property.
 118. Regarding the second issue, Counsel submitted that the Plaintiffs did not dispute that the 1st - 12th Defendants are duly elected leaders of the Kaseve 143 families within the subdivision. Counsel supported this argument by noting that the 1st Plaintiff consented to the subdivision and that his signature was included in the minutes dated 8th November 2010, annexed to the 13th Defendant's replying affidavit dated October 15, 2021.
 119. Counsel further submitted that the Committee was established in 1981, and that it involved its members in the decision to appoint the 13th Defendant to conduct the subdivision exercise. Accordingly, the 1st - 12th Defendants had the authority to sign the contract dated 13th January 2012 with the 13th Defendant.
 120. Counsel submitted that the County Government of Makueni approved the subdivision plans in a letter dated 23/4/2015. Similarly, the National Land Commission approved the subdivision plan through a letter dated 16/7/2015. Additionally, Counsel noted that the Director of Surveys verified the survey conducted on 14/12/2017 and that by a letter dated 6/12/2017, which included a Registry Index Map and an Area List, was sent to the Chief Land Registrar for the purpose of preparing and registering individual titles.
 121. Regarding the fourth issue, Counsel argued that the Plaintiffs did not raise any objection when the notice inviting objections to the subdivision was published. Counsel further argued that the doctrine



of laches is applicable because the Plaintiffs delayed in asserting their rights by not registering any objection to the subdivision.

122. Concluding his submissions, Counsel argued that the Plaintiffs did not adduce sufficient evidence to support their claim and thus urged the court to dismiss the suit with costs.

Analysis And Determination

123. Having considered the pleadings, the evidence on record, and the submissions by the parties, the following issues fall for determination:-

- a. Whether the suit land was lawfully subdivided.
- b. Whether the Plaintiffs are entitled to the orders sought.

124. The following facts are not in dispute:

- i. The suit property is registered in the names of the 20 Defendants
- ii. The 20 individuals hold the title to the suit property in trust for the 143 families.
- iii. The suit property was awarded to the defendants families pursuant to the Judgment and decree of Justice J.W. Mwera dated 14th January, 1992.
- iv. The Plaintiffs are beneficiaries of the judgment.
- v. As part of the judgment, the suit property was to be demarcated and registered in the names of all the entitled beneficiaries.
- vi. The judgment also directed that a local survey and land registry officers to act accordingly.

125. The dispute between the parties herein revolves around the subdivision of the suit property. At this juncture, it is prudent to give a background of the suit property.

126. The suit property originated from the judgment in NBI HCC No. 2749 of 1981, in which Kiu Ranching & Farming Co-operative Society had sued Kisee Mweu and 19 others for their eviction from L.R. No. 7612/2. The Plaintiffs pleaded that this suit was consolidated with HCCC No. 2207 of 1982, in which Kiu Ranching and Farming Society had sued Ngila Thiaka and 123 others seeking similar orders. The record shows that the matter was determined on appeal in favour of the Defendants therein.

127. In its judgment in HCCC No. 2749 of 1981 delivered on 14th January 1992, the court stated as follows in its findings: -

“Finally, the court was satisfied that the defendants had been in adverse possession of the land shown and marked on exh 2 for long and continuous possession, i.e, of over 12 years. They are entitled to that part for themselves, their families, and successors. That noted portion should be formally demarcated and registered in the names of all the entitled defendants. The counterclaim succeeds with costs. A local survey and registry offices should act accordingly.”

128. Consequently, a decree was issued, and the title to the suit property was registered in the names of the twenty Defendants.

129. From the judgment, it is clear that the court ordered the demarcation of the suit property. The Plaintiffs are challenging the subdivision of the suit property on the grounds that it was carried out by a private Surveyor instead of a Government Surveyor as directed by the court. This court is called upon to



determine who was responsible for demarcating the suit property. In its judgment, the court stated that:-

“the noted portion should be demarcated and registered in the names of all the entitled defendants.....A local survey and registry offices should act accordingly.”

130. The Plaintiffs insisted that the suit property should have been subdivided by a Government Surveyor. At paragraph 9 of the further amended Plaint, the Plaintiffs pleaded as follows:-

“The clear terms of Hon Justice Mwera’s the aforementioned judgment was that all Decree holders would be allocated the actual land they occupied as at the time the suit was filed in court and that the then Machakos District Surveyor would facilitate the necessary demarcation between 143 persons to facilitate issuance of individual titles.”

131. At paragraph 10 the Plaintiffs pleaded as follows:-

The aforementioned judgment did not authorize the are government administration and especially the chief or any other person other than the Government Surveyor to conduct any form of subdivision of the land.

132. The 1st – 12th Defendants denied the Plaintiffs' claim and argued that the court did not instruct the Government Surveyor to conduct the survey of the suit property.

133. As regards the subdivision of the suit land, the court in its judgment stated as follows:-

“a local survey and registry office should act accordingly.”

134. At this juncture, this court is called upon to determine who is a local surveyor.

135. Section 2 of the [Survey Act](#) defines a Surveyor as:-

“a Government or a licensed Surveyor.”

The same Section defines a Government Surveyor as:-

“Any officer of the Survey Department of Kenya who is authorised by the Director to perform duty under this Act.”

136. From the foregoing, it is crystal clear that the Surveyor, Machakos District, falls under the category of a Government Surveyor. I have carefully perused the judgment of Hon Justice Mwera, and I find the judgment does not explicitly state that the survey of the suit property was to be carried out by the Surveyor, Machakos District, as alleged by the Plaintiffs. The judgment only refers to a local survey. In my humble view, a local surveyor includes any surveyor who is licensed under the act, who can either be a Government or a Licensed Surveyor.

137. It is not in dispute that the 13th Defendant is a licensed Surveyor. Based on the foregoing, I find that the 13th Defendant qualifies as a local surveyor.

138. Having found that the 13th Defendant qualifies as a local Surveyor, this court is called upon to determine whether he was lawfully appointed to subdivide the suit land.



139. The Plaintiffs contended that they were not involved in the appointment of the 13th Defendant. They also claim that the Surveyor was not appointed in accordance with the appropriate procedural requirements.
140. DW2 testified that the 1st – 12th Defendants were elected to represent the 143 Kaseve families. PW2 confirmed in his evidence that the 1st – 12th Defendants were elected as the committee to oversee the subdivision of the suit property. The 1st – 12th Defendants maintained that the decision to appoint the 13th Defendant was made in the annual general meeting held on 8th November 2010. In this regard, the 1st-12th Defendants produced the minutes of the meeting held on 17th January, 2011 which show that the members gave the surveyor the go-ahead to demarcate the land. They also produced the minutes of the annual general meeting held on 8th November 2010.
141. Minutes 1, refers to “the Surveyor” while Minute 3 indicates that members had agreed in a general meeting to surrender an acre each to cater for the surveyor’s fees.
142. It is undisputed that the 1st Plaintiff attended the meeting and did not raise any objections. The Defendants produced a list of attendees, which confirms that the 1st Plaintiff was present. He did not voice any objections.
143. DW3 testified that he was instructed by the Committee of the 143 Kaseve families to survey the suit property. He stated that he had earlier met the members during the annual general meeting held on 8th November 2010. He further testified that on 13th January 2012 he executed a contract with the 1st – 12th Defendants to carry out the survey of the suit property which specifies the land parcel, the scope of the work, the contract price and the duration of the contract. In this regard, he produced the contract agreement dated 13th January 2012.
144. The Defendants produced the ruling in Machakos HCCC No. 51 of 2005 in respect of the application dated 28/07/2005 in which Samuel Kamuyua and 9 others had sought to restrain the Chief Josiah Kituku and 7 others from contracting the 13th Defendant herein from surveying the suit property. The application was dismissed with costs. No appeal was filed against the order. Having been instructed by the Committee, I find that he had the authority to carry out the survey of the suit property.
145. Having found that the 13th Defendant was lawfully appointed by the Committee to subdivide the suit property, this court is called upon to determine whether the suit land was lawfully subdivided.
146. The Plaintiffs complained that the subdivision of the suit property had displaced them and other beneficiaries from their respective parcels. They contended that the subdivision should have been done amongst 143 beneficiaries. They further contended that the Defendants had unlawfully sold portions of the suit land to third parties.
147. The judgment shows that the suit land was to be demarcated and registered in the names of all the entitled Defendants. According to the Plaintiffs, the suit land was not subdivided in accordance with the judgment delivered in HCCC No. 2749 of 1982. They argued that they received less than their rightful share and that the land was being allocated to people outside the authorized group. PW1 testified that he had sued the 13th Defendant because he had attempted to allocate his land to someone else.
148. The 2nd Plaintiff testified that he wrote to the District Surveyor requesting the demarcation of the suit land. He produced a letter dated 22nd January 2013 in which the Director of Physical Planning forwarded the proposed work plan and budget for the exercise in response to his request for a subdivision Plan. According to the letter, the 2nd Plaintiff was supposed to contact the office once he



was ready. There is no evidence that he ever made contact with the office of the Director of Physical Planning.

149. On the other hand, the 1st -12 Defendants argued that the suit land was subdivided based on each person's contribution to the case. It is the 1st – 12th Defendants case that members agreed to subdivide the suit property. In this regard they produced the Kaseve 143 families agreement on subdivision of the suit property. They asserted that some members did not sign because they had sent their representatives who could not sign on their behalf. The 1st Plaintiff appears on entry No. 47 of the list and has appended his signature. DW1 informed the court that they decided to hire a private surveyor because when they approached the Government Surveyor, he told them that he was very busy for the task.
150. The 1st – 12th Defendants asserted that members had agreed to cede one acre each to cater for the survey. In this regard, the Defendants produced minutes of the meeting held on 26th August 2010. Minute 3 shows members agreed to consider their children first in purchasing the suit land.
151. They also produced the minutes for the meeting held on 8th November 2011. Minute 1 indicates that the surveyor was unable to conduct the survey due to a lack of funds, while Minute 3 states that the members had agreed to surrender one acre to cover the surveyor's fees.
152. In a letter dated 13th March 2012, the Committee issued a communication regarding the size of allocation to its members. They produced a list of Kaseve 143 Families and the agricultural plot each was entitled to. The Defendants also provided a list of allocations for the commercial plots of Kaseve 143 farmers.
153. Section 107 (1) and (2) of the *Evidence Act* provides as follows: -
 - 107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.
 - (2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

It is clear from the above provisions that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe.
154. The 13th Defendant testified that he subdivided the land according to the list provided by the Committee. PW1 has testified that according to the list, he was entitled to Parcel Nos. 86, 151 and 361 measuring 5.8592 while the 2nd Plaintiff was entitled to Parcel No. 23 and 324 measuring 6.477 hectares. The Plaintiffs did not in their evidence dispute the acreage or that they had been deprived of their land. No evidence was adduced to show that the 13th Defendant did not subdivide the land according to the list provided to him by the Committee.
155. The 13th Defendant published a notice in the Standard Newspaper indicating his intention to subdivide the suit property and called for objections. The Plaintiffs confirmed that they did not object to the subdivision of the suit property
156. The 13th Defendant prepared a subdivision plan, which the members approved. The subdivision plan was approved by the National Land Commission vide the letter dated 07/16/2015 and by the County Government of Makueni in its letter dated 23rd April 2015.
157. It is not in dispute that some members had sold their portions to outsiders. PW2 confirmed that he had sold 6 acres of his land to 4 people.



158. The Plaintiffs did not adduce any evidence to show that the Defendants had displaced them from their land or that they had sold portions of the suit property to outsider's alleged.
159. Similarly, the Plaintiffs acknowledged that no one had been moved from their respective land.
160. No evidence was presented to show that the 13th Defendant allocated land to any member outside the list provided by the Committee.
161. Based on the foregoing, I find that the subdivision of the suit property was lawfully conducted in accordance with the judgment of 1992.

Whether The Plaintiffs Are Entitled To The Orders Sought

162. The Plaintiffs are seeking a permanent injunction restraining the Defendants from subdividing, issuing titles, or interfering with the suit property.
163. In *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR, the court aptly held as follows: -

“A permanent injunction, which is also known as a perpetual injunction, is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

164. Similarly in *Bandari Investments & Co. Ltd v Martin Chiponda & 139 others* [2022] eKLR, the Court held as follows: -

“Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3A of the Civil Procedure Code, 2010 if it feels the right of a Party has been infringed, violated and/or threatened as the Court cannot just sit, wait and watch under these given circumstances...”

165. In the matter at hand, the Plaintiffs did not establish a prima facie case that their property rights or interests in the suit property had been infringed to warrant the grant of the orders sought.
166. Regarding prayers (b), (c), (d) and € of the further amended Plaint, the Plaintiffs failed to prove that the subdivision of the suit property was carried out unlawfully or contrary to the judgment issued on 14th January 1992.
167. In the end, I find that the Plaintiffs have not proved their case on a balance of probabilities as required. The upshot of the foregoing is that the suit is hereby dismissed. Each party to bear its own costs.

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 25TH DAY OF SEPTEMBER, 2025.

.....

HON. T. MURIGI
JUDGE



In The Presence Of: -

Makundi for the 1st – 12th Defendants

Ms Mutua for the 1st Plaintiff

Kaloki Mumo for the 2nd Plaintiff

Ahmed – Court Assistant

