Singoei & 3 others (Suing on their own behalf and on behalf of 57 others) v Marete & 2 others (Environment and Land Case 48 of 2021) [2025] KEELC 6723 (KLR) (1 October 2025) (Judgment)

Neutral citation: [2025] KEELC 6723 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND CASE 48 OF 2021

CK NZILI, J

OCTOBER 1, 2025

BETWEEN

NATHANIEL KAPTINGEI SINGOEI .... 1ST PLAINTIFF

ESTATE OF SAMUEL CLEMENT NYAMACHE ONDIEKI REPRESENTED BY TAMINA JUMA .... 2ND PLAINTIFF

DAVID GITHUNGURI BORO .... 3RD PLAINTIFF

RONALD BARASA .... 4TH PLAINTIFF

SUING ON THEIR OWN BEHALF AND ON BEHALF OF 57 OTHERS

AND

ALFRED KIRERA MARETE .... 1ST DEFENDANT

AUSTIN RICHARD GITHOGO .... 2ND DEFENDANT

REUBEN WAIRICHU .... 3RD DEFENDANT

JUDGMENT

1. This court was approached by the plaintiffs through amended amended plaint dated 3/11/2023, following two amendments of the initial plaint dated 10/8/2021, by 56 plaintiffs. They seek:

   a. An order that the defendants do surrender the original title for L.R. No. 13420 (Original No. 5779/3 and 2198/1) to the Chief Land Registrar, to facilitate the issuance of ready titles to the plaintiffs and those others on whose behalf the suit has been filed, as well as to the 1st and 3rd defendants.

   Alternatively

(b) A declaration that the three defendants are registered as proprietors of the L.R. No. 13420 in trust for themselves, the plaintiffs, and the persons on whose behalf the suit is filed, being persons in occupation of the land holding various acreages, which trust should now terminate and the land subdivided.

(c) Costs.

(d) Interest.

(e) Any other relief or order that the court may deem fit to grant.

2. The plaintiffs averred that the late Erastus Kirera Marete, the 2nd and 3rd defendants, were the registered joint owners of the land comprised in L.R. No. 13420 (originally No. 5779/3 and 2198/1) measuring 120.5 Hectares as tenants in common in equal shares, situated in the South of Kitale Municipality, commonly known as Waigama Farm, a leasehold of 999 years with effect from 1/7/1919.

3. The plaintiffs averred that the three partners jointly sold and transferred some 10.11 Ha out of the suit land on 20/12/1990 to Mr. and Mrs. Mudida and retained the balance, which, over time, they have sold parts of their entitlement to various persons, and put them into both possession and occupation.

4. The plaintiffs averred in particular that the 2nd defendant, by sale agreements dated 14/12/1987 and 12/10/1985, sold 40 acres each to the 1st and 2nd plaintiffs at Kshs. 600,000/= and Kshs. 480,000/=, which they paid to him, and were handed vacant possession and have remained in occupation to date.

5. The 3rd plaintiff averred that on 15/3/1984, the 3rd defendant sold to him 10 acres at Kshs. 105,000/=, later bought 4 other acres from a third party, who had bought the same from the 3rd defendant at Kshs. 850,000/= and Kshs. 90,000/=, respectively, and has retained both possession and occupation to date.

6. The 4th plaintiff averred that by an agreement dated 2/9/1988, he bought 2 ½ acres of land out of the suit land from the 1st defendant at Kshs. 50,000/=, which he duly paid for and was put into possession thereof to date.

7. The plaintiffs averred that the three joint owners jointly sold some of the land pleaded in paragraph 6, and the remainder was shared amongst themselves.

8. The 4th plaintiff purportedly representing 57 persons on whose behalf he also sued on account of the authority attached to the plaint dated 2/11/2023 and pursuant to a court order dated 30/10/2023, plead that the undersigned purchased various portions from the original 1st and 3rd defendants, or persons who had bought from the two and were given vacant possession and retained the same portions todate, as per a schedule filed thereto. The particulars of those persons, sizes, localities, dates of the sale agreements, terms, and conditions were not specifically pleaded. Further, the date when leave to sue in a representative capacity was sought and obtained was not pleaded.

9. Equally, the plaintiffs averred that in view of the foregoing, a constructive trust in their favor was created by the original owners, who sold to them the portions of land, received consideration for the same, handed over vacant possession, and or allowed them to take possession and have since retained both possession and occupation to date.

10. The plaintiffs averred that the constructive trust created should now terminate, and the defendants be ordered to formally subdivide the suit land and process title deeds in their favour. The plaintiffs aver that whereas the 1st and 3rd defendants are in occupation of part of the suit land, the 2nd defendant is not.

11. The plaintiffs averred that the suit land had been subdivided into several portions in their favor during the national presidential titling programme, capturing the acreages of all those in occupation and

possession, and even titles prepared, but when the defendants were called upon to surrender the original title and thereby facilitate the issuance of title deeds to them, the 1st and 2nd defendants declined.

12. The plaintiffs averred that the original 1st defendant, vide Kitale ELC Misc. Civil Appl. No. 7 of 2016 had sought orders to restrain the processing and issuance of titles out of L.R. No. 2198/1, but the application was struck out on 24/8/2017 with no appeal preferred against it.

13. Further, the plaintiffs averred that vide Kitale ELC Case No. 107 of 2015, the 2nd defendant had sought inter alia, an injunction to restrain the Chief Land Registrar, Chief Land Surveyor, and the 1st defendant from trespassing or otherwise dealing in any way with L.R. No. 13420, but the application was dismissed on 12/10/2015, with no appeal preferred against the order.

14. The court record shows that on 18/7/2022, there was a consent that the suit papers be served through advertisement in the local dailies for anyone in occupation of the L.R. No. 13420, and who had an interest in the suit land to join the suit. The order was extracted on 8/9/2022. Further, the consent order was to the effect that any of the partners of Waigama Farm were at liberty to commence the dissolution of the partnership at the High Court. The advertisement was carried out in the Standard Newspaper on 27/9/2022.

15. By an application dated 6/10/2022, the estate of Jacob Kiplagat Sigowo, represented by Rosa Chepkoech Sigowo and Philip Kibungoi as administrators, sought to be joined as interested parties. Similarly, by an application dated 23/6/2023, the plaintiffs sought to amend the plaint to substitute the initial 1st defendant after he passed on. The application was eventually allowed, and an amended plaint was filed, dated 31/7/2023, reflecting the changes, while retaining 56 plaintiffs as represented by the 4th plaintiff.

16. As regards the application dated 6/10/2022, the court record of 6/12/2022 shows that it was directed to be canvassed after the issue of substitution of the deceased 1st defendant was dwelt with. From the records of 6/2/2023 and 22/3/2023, it shows that Mr. Bikundo advocate was appearing for an intended interested party. When the matter came up on 19/7/2023, Mr. Bikundo, advocate for the interested party, was not there. The only application that was allowed was with respect to the substitution of the deceased 1st defendant. The record shows that when the court resumed on 29/9/2023, Mr. Bikundo sought time to discuss with Mr. Kiarie for the plaintiffs for his client to be joined as a plaintiff.

17. Come 18/10/2023, the application dated 6/10/2022 was withdrawn. An application dated 26/10/2023 was therefore filed by the initial plaintiffs. The record shows that what they filed is an amended amended plaint dated 2/11/2023, indicating 57 plaintiffs instead of 56 plaintiffs as represented by the 4th plaintiff. The verifying affidavit, sworn on 3/11/2023, referred only to 56 other persons and not 57 persons. However, the letter of authority to sue was amended, purportedly out of an order dated 30/10/2023, to include the 57th person, the estate of Wilson Sigowo Birech, represented by Rosa Sigowo and Philip Soyowo. The said authority was a mere photocopy of the initial names and signatures of the original 56 plaintiffs.

18. The original, in which the court has the names of the two legal representatives, which are superimposed on a photocopy of the initial authority to sue. The amended amended list of documents includes the agreement of Wilson Sigowo Birech. The court record shows that the firm of Bikunda & Co. Advocates formally came on record on 27/11/2023 for the 57th plaintiff, while the firm of Majanga Deverell & Associates came on record for the 1st defendant on 22/1/2024 and filed an unsigned amended defence and counterclaim dated 6/2/2024. The record shows a notice of change of advocates by Bikundo & Co. Advocates was filed on 10/2/2024 for the 61st plaintiff, who later on purportedly filed a reply for the

1st defendant's amended defence and counterclaim, yet the latter had only referred to the 57th plaintiff and not the 61st plaintiff.

19. Therefore, the confusion was started by the 57th plaintiff and the 1st defendant who now opposed the amended amended plaint by an amended amended defence and counterclaim dated 29/4/2024. The 1st defendant averred that he only sold 20 acres and not 36 acres and 18.38 acres of L.R. No. 13420 to the 57th plaintiff and other parties, leaving an entitlement of 1.62.

20. The 1st defendant averred that the 57th plaintiff had encroached on his land and was occupying 11.62 acres instead of 20 acres. Further, the 1st defendant averred that the 57th plaintiff was illegally occupying 10 acres, which the court should order that they surrender in default, and issue an eviction order.

21. The 1st defendant, by way of a counterclaim, averred that the 57th plaintiff was unlawfully occupying his 10 acres of land, was a trespasser, had interfered with the rights of the estate of the deceased, that the sale agreement dated 17/7/1978 was with respect to 20 acres, that the agreement or minutes showing or reflecting 36 acres instead of 20 acres dated 4/3/2021 and 3/3/2022 of 20 acres was a forgery and a misrepresentation of facts. The 1st defendant prayed for:

    (a) Judgment in favour of the 57th plaintiff for 1.62 acres only.

    (b) Vacant possession of 10 acres illegally occupied by the 57th plaintiff and forceful eviction.

    (c) Declaration that the 57th plaintiff was illegally interfering with the estate's right to 10 acres of land without just cause or compensation.

    (d) Permanent injunction.

22. The 2nd defendant opposed the suit through an amended defence and counterclaim dated 27/11/2023, only admitting that the defendants were tenants in common of all that parcel of land known as L.R. No. 13420. The 2nd defendant denied that he jointly and or individually sold any portion of the suit property to the plaintiffs or at all.

23. The 2nd defendant averred that since the suit land was jointly owned, there was no capacity issued to any of the joint owners to enter into agreements to sell portions of the suit property to any of the plaintiffs. The 2nd defendant averred that the 1st plaintiff and Clement Nyamache Ondieki (deceased) declined to pay the balance of the purchase price until completion documents were given to them.

24. The 2nd defendant denied that any constructive trust was created or that any of it exists in favour of the plaintiffs as alleged or at all. The 2nd defendant averred that due to the trespass to the land, he went to court; otherwise, the purported subdivisions of the suit land were not only illegal but were also done without his consent or approval with the intention of arbitrarily depriving him of his land, hence he was justified in declining the surrender of the original title. The 2nd defendant averred that the purported sale agreements offend the Law of the Contract Act, the *Land Registration Act*, and the suit was statute-barred.

25. By way of a counterclaim, the 2nd defendant averred that he was one of the partners of Waigama Farm, which owns L.R. No. 13420, which is a consolidation of L.R. No. 57779/3 and 198/1, measuring 129.1 acres, 80 acres of which are occupied by the 1st and 2nd plaintiff, while the balance of 49.1 acres is supposed to be vacant.

26. The 2nd defendant averred that he agreed with the 1st plaintiff for the sale of 40 acres out of his portion, who paid only Kshs. 100,000/=, but declined to pay the balance of Kshs. 500,000/= until completion documents are availed, though the 1st plaintiff has been in occupation thereof since 1987.

27. Further, the 2nd defendant averred that he also agreed with the 2nd plaintiff for the sale of 40 acres at Kshs. 480,000/=, who paid a deposit of Kshs. 250,000/=, but has not paid the balance unless completion documents are availed, though he has been in possession of the 40 acres of the land since 1985.

28. The 2nd defendant averred that the remainder of 46.1 acres has been encroached upon by the plaintiffs, who have partitioned, fenced it, erected illegal structures, and have been farming on the land to the detriment of his rights. The 2nd defendant prays for:

    (a) The plaintiffs' suit be dismissed.

    (b) The 1st plaintiff does pay the amount of Kshs. 500,000/= together with interest at court rates from 1987 until payment in full.

    (c) The 2nd plaintiff does pay Kshs. 230,000/=, together with interest at court rates from 1985 until payment in full.

    (d) An order of eviction against all the plaintiffs who have encroached and or trespassed onto his portion of 49.1 acres.

    (e) Injunction against the plaintiffs who have encroached onto his 49.1 acres of land to stop any trespass, farming activities, sale, and or any dealings over his land.

    (f) General damages for trespass.

29. The 3rd defendant opposed the suit by a statement of defence dated 30/6/2022. The 3rd defendant admitted the contents of paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17,18, 19, 20, and 21 of the original plaint dated 16/8/2021. The 3rd defendant averred that he has never objected to the titling of the land, since he was a vendor to 82 people and therefore, he was never involved in stopping any process of the issuance of the title deeds in their favour, nor has he been party to the issues between the 1st and 2nd defendants.

30. The 3rd defendant averred that in 2020 and 2021, he made efforts by writing, visiting, and depositing cash to the 1st and 2nd defendants' advocates on record to have the original title for his portion to issue title deeds to the purchasers of his portion, but all in vain. There is no record to show that the 1st, 2nd, 3rd, and 4th plaintiffs filed any replies to the defence and defences to the counterclaims brought by the 1st and 2nd defendants.

31. The 57th plaintiff filed a reply to the 1st defendant's amended defence and defence to the counterclaim dated 10/2/2024. He insisted that the sale agreement dated 17/7/1978 was for 36 acres of land, which was paid in full, and vacant possession was handed over by the initial seller, which has remained uninterrupted to date. This position was never repudiated, but was instead acknowledged in writing by the late Erastus Kirera Marete on 4/3/2021.

32. The 57th plaintiff averred that any sale agreement dated 24/8/1978 showing an acreage of 20 acres instead of 36 acres was a forgery and aimed at defeating the clear intention of the parties, otherwise, the parties did not sign such an agreement, the signatures thereto are forgeries, the sale agreement was not properly executed, it was a false document, the document is not legible or valid, the 1st defendant was misrepresenting himself as the owner, the 1st defendant unjustly wants to enrich himself, the consideration alleged could not be similar for dissimilar acreages.

33. The 57th plaintiff denied that he was entitled to only 2 acres of land, or that he was a trespasser to 10 acres of land belonging to the estate. The 57th plaintiff averred that the estate of the late Wilson Sigowo Birech was legally occupying 17 acres, which the 1st defendant has acquiesced to since 17/7/1978. By

a copy of a defence to the counterclaim, the 57th plaintiff maintains that the estate of the deceased was legally occupying the land, the counterclaim raises no reasonable cause of action of trespass, the same is time-barred, a constructive trust for the 17 acres of land has accrued and should terminate, and a prayer for eviction is an afterthought and lacking merits and that the estate is entitled to the reliefs sought in the amended amended plaint.

34. The 57th plaintiff equally, filed a notice of preliminary objection dated 30/3/2024, terming the 1st defendant's amended amended defence and counterclaim as offending Orders 2(3) (1) and 8 of Rules 7(1), (2) and (3) of the Civil Procedure Rules, disclosing no material facts on trespass or a reasonable cause of action against him, and for being statute barred to raise a claim for 10 acres out of L.R No.13420. The said preliminary objection was, however, withdrawn on 13.6.2024. An oral application to file the supplementary list of documents by the 57th plaintiff was also declined on 4/12/2024, without a formal application. Therefore, the supplementary list of documents and statement dated 10/6/2025 remains filed without leave of court.

35. At the trial, Nathaniel Singoei testified as PW1. He relied on a witness statement dated 30/12/2021 as his evidence-in-chief. He told the court that vide an agreement dated 14/12/1987, he bought 40 acres of land out of the 2nd defendant's share in L.R. No. 13420 for Kshs. 600,000/=, paid the entire consideration as per evidence before the court, and was handed over vacant possession.

36. PW1 relied on documents in lists dated 3/5/2024 and 26/3/2025, namely a sale agreement dated 14/12/1987, P. Exhibit. No. (1), letter dated 15/12/1987, P. Exhibit. No. (2), acknowledgement receipt of a cheque dated 15/12/1987, P. Exhibit No. (3), cheque dated 29/1/1988, P. Exhibit. No. (4), acknowledgement receipt for Kshs. 200,000/=, cheque dated 17/5/1988, P. Exhibit No. (5), acknowledgement receipt of Kshs. 50,000/=, on 15/8/1985, P. Exhibit No. (6), acknowledgement of Kshs. 50,000/= on 4/5/1989, P. Exhibit. No. (7), payment of Kshs. 20,000/= on 5/8/1990, P. Exhibit. No. (8), cheque for Kshs. 15,000/= dated 30/11/1990, P. Exhibit. No. (9), payment of Kshs. 7,400 and Kshs. 12,600/= to Agricultural Finance Corporation on 23/4/2003 and 11/10/2007 as P. Exhibit. No. (10) and (11), payment of Kshs. 5,000/= on 12/11/2007 as P. Exhibit. No. (12), following a demand from AFC dated 25/3/2003, P. Exhibit. No. (13), and lastly, a payment of Kshs. 50,000/= on 1/10/2013 as per P. Exhibit. No. (14).

37. PW1 told the court that the suit land had been surveyed at the instigation of the seller and following the presidential tilting programme. However, the said title deeds for the subdivision were not released, since the partners did not surrender the original title deed, yet it was released to them as per the acknowledgement letter dated 10/10/2017, produced as P. Exhibit No. (15). PW1 denied the allegation in the 2nd defendant's counterclaim as he had cleared all the purchase price of Kshs. 600,000/ =.

38. PW1 in cross-examination admitted that the 1st and 3rd defendants were not party to the sale agreement with the 2nd defendant. PW1 said that L.R. No. 13420 came out of L.R. No. 5779/3, following changes to the parcel number. PW1 said that he had not conducted due diligence before the sale agreement was executed to establish that the land belonged to three partners; otherwise, initially, he used to lease out the land from the seller. PW1 admitted that though the instalments were due as per paragraphs 3 and 4 of the sale agreement, he defaulted in meeting the deadlines by 1/7/1988; otherwise, some of them were made 26 years after the deadlines, given that the seller had not processed the completion documents.

39. PW1 said that the first subdivision of the entire land took place in 1987. PW1 said that he moved to court after the 2nd defendant failed to complete the transaction. PW1 said that during the national titling programme, he was found on the land. PW1 said that the 2nd defendant had never demanded any rent from him since 1987.

40. Further, PW1 said that the 2nd defendant became uncooperative; otherwise, by 1987, he had ceded all his interest in the suit land, after disposing of it to him and acknowledging receipt of the consideration. PW1 said that the sale agreement had captured the particulars of the parcel at the time. PW1 said that the 2nd defendant had never objected to his use or occupation of the portion.

41. Tamina Juma, the widow of Samuel Nyamacha Ondieki, the 2nd plaintiff, testified as PW2. She relied on a witness statement dated 20/12/2021 as her evidence-in-chief. She relied on a grant for letters of administration issued on 29/7/2021 as PP. Exhibit. No. (1), sale agreement dated 12/10/1985 as PP. Exhibit. No. (2), payment of Kshs. 130,000/= on 19/12/1985 as PP. Exhibit. No. (3), payment of Kshs. 60,000/= on 2/6/1987 as PP. Exhibit. No. (4), payment of Kshs. 10,000/= on 20/6/1987 as PP. Exhibit. No. (5), payment for Kshs. 10,000/= and Kshs. 12,000/=, on 18/12/1987 and 20/5/1989 as PP. Exhibits. No. (6) and (7), receipt for Kshs. 2,000/= dated 12/12/1991 as PP. Exhibit. No. (8).

42. PW2 denied that there was any outstanding balance of Kshs. 230,000/=, as alleged in the counterclaim; otherwise, all the purchase price had been paid to the 2nd defendant, who also handed over vacant possession to them. PW2 confirmed that there was a survey of the land before her late husband passed on, which the 2nd defendant did not participate in. Further, PW2 said that Clause No. 9(a) of the sale agreement related to 30 acres of land, but the other 10 acres were subject to confirmation on the grant.

43. PW2 insisted that the pleadings by the 2nd defendant had also acknowledged that her late husband bought 40 acres and not 30 acres, which the 2nd defendant also handed over vacant possession to them. PW2 said that the 2nd defendant had not demanded the alleged balance since 1987; if at all, there was any outstanding balance of Kshs. 230,000/=.

44. David Githunguri testified as PW3. He relied on a witness statement dated 26/2/2025 as his evidence-in-chief. He told the court that by a sale agreement dated 15/3/1984, he bought 10 acres of land belonging to the 3rd defendant for Kshs. 105,000/=, as per a sale agreement, which he produced as P. Exhibit No. (16). Further, he said that on 10/1/2005, he added another 2 acres, which Timothy Nabwera had bought from the 3rd defendant for Kshs. 850,000/= and took vacant possession. He produced the records as P. Exhibits. No. (17) and (18).

45. PW3 said that he has been occupying the said acres of land, though despite follow-up, the defendants have not surrendered the original title deed to facilitate the issuance of individual title deeds to the purchasers and occupants of the land. Equally, PW3 said that he only dwelt with the 3rd defendant; otherwise, during the survey process, an area list was generated showing the respective names and acreages of the beneficiaries of the suit land, which list the defendants did not object to.

46. PW3 said that according to the 3rd defendant, his share of the entire 240 acres of Waigama Farm was 70.3 acres. PW3 confirmed to the court that three other neighbours had bought land from the three defendants and were issued with title deeds.

47. Ronald Barasa testified as PW4. He relied on a witness statement dated 10/10/2024 as his evidence-in-chief. He told the court that he bought 2.5 acres of land from the 3rd defendant at Kshs. 50,000/= as per P. Exhibit. No. (20). PW4 said that he was also aware that some of the plaintiffs also bought parcels of land from the defendants as per sale agreements and a schedule appearing on page numbers 28, 46, and 115 of the supplementary affidavit and trial bundle produced as P. Exhibit. No. (21) and (22), respectively.

48. PW4 said that the said names and acreages are also included in the area list, which was prepared after the land was surveyed, which took place between 2014/2015, as per P. Exhibit. No. (23), appearing in pages 115 – 119 of the trial bundle dated 3/5/2024. PW4 confirmed that there was a case, Kitale HC

Misc. Appl. No. 7 of 2015, where he was the 1st respondent, brought against him, the National Land Commission, and the Chief Land Registrar and the Surveyor by the 1st defendant, seeking to stop the processing of the title deed, but was dismissed by the court on 24/8/2017, as per an order produced as P. Exhibit No. (24).

49. PW4 said that there was also a case, Kitale ELC No. 107 of 2015, which had been filed by the 3rd defendant, which was dismissed on 12/11/2015. He produced the ruling as P. Exhibit. No. (25). PW4 told the court that a demand letter was also written to the defendants dated 12/8/2020. It was produced as P. Exhibit. No. (26). PW4 confirmed that all the 56 plaintiffs have been on the land, including the 1st defendant.

50. Further, PW4 told the court that he was also the chairman of the residents of Waigama Farm and that before a name was entered into the area list, a claimant had to produce a sale agreement and an authority from the seller, but was also subject to authentication by the area Assistant County Commissioner.

51. PW4 also confirmed that the 57th plaintiff had bought 20 acres of land, though his name had not been included in the area list, which ideally was to capture all the genuine beneficiaries to the suit land. PW4 said that there was also a court decree that had captured the alleged shares of the defendants to the Waigama Farm, which the land buyers were not privy to. PW4 said that the meeting at the Assistant County Commissioner's office was in 2024, during the pendency of this suit. PW4 said that he was among the custodians of the sale agreements.

52. According to PW4, he was the one who prepared the area list, which had the 57th plaintiff's name missing, though he had been living on the land. PW4 confirmed that he caused the subdivision and survey of the land to be undertaken.

53. PW4 confirmed that most of the sale agreements were silent on the land reference numbers. He admitted that most of the sale agreements had errors and were equally misleading in terms of where the portion was emanating from, the registered owners, and their respective shares. PW4 said that the names included in the area list were based on information that he received. PW4 said that the reason why the defendants did not surrender the original title deed was that they were not in agreement over their respective shares of the Farm. PW4 said that he was not privy to the partnership agreement between the defendants; otherwise, it was the 3rd defendant who told him that part of the defendants had a share of 80 acres.

54. PW4 said that the same information had also been confirmed by the 1st defendant in his witness statement dated 30/6/2022, that the partnership had defined shares, contrary to the decree dated 15/9/1995, marked as MF ID(1). PW4 denied that he was representing 56 persons who were illegal occupants on a portion belonging to the 2nd defendant. PW4 denied that only 5 persons out of the number given in the Schedule were genuine beneficiaries of land from the 1st defendant. PW4 denied doctoring the area list. PW4 denied receiving any eviction notice from the 2nd defendant on account of trespass to his land.

55. PW4 said that he was not aware whether MFI D(I) was ever executed or implemented on the ground by fixing the respective shares among the defendants. PW4 said that the 2nd defendant was privy to the survey process, hence the reason that he filed the two suits, save that none of the defendants objected to the survey. PW4 confirmed that some of the buyers had primary as well as secondary agreements with the defendants.

56. Further, PW4 said that the area list was the one used to process the subdivision. PW4 said that it was the 2nd defendant who declined to sign the surrender, claiming that his share had been encroached upon

or invaded by third parties. PW4 said that the 57th plaintiff was left out of the area list, since he had no sale agreement to present to the committee.

57. Philip Singor, testified as PW5, on behalf of Rosa Chepkogh. He relied on a witness statement dated 10/2/2024 as his evidence-in-chief. He relied on a grant of letters of administration dated 13/10/2022 as P. Exhibit No. (19), authority to plead as P. Exhibit. No. (20), sale agreement dated 17/7/1978 as P. Exhibit No. (21), document examiner's report dated 22/3/2024 as P. Exhibit No. (22), photographs as P. Exhibit. No. 23(a) and (b), sale agreement dated 24/8/1987 as P. Exhibit No. (24), acknowledgment dated 27/3/2021 as P. Exhibit No. (25), schedule of acreage in the list of documents dated 26/2/2025 as P. Exhibit No. (26), agreement from the Assistant County Commissioner – P. Exhibit No. (27).

58. PW5 said that he was born and has lived on the suit land for over 30 years and that PW4 had admitted the authenticity of the sale agreement before the Assistant County Commissioner. PW5 said that late Marete, in his presence, acknowledged the authenticity of the sale agreement. PW5 said that the difference in the acreage only arose after their names were left out in the area list. PW5 admitted that P. Exhibit No. (21) had some alterations on its face.

59. PW5 admitted authoring P. Exhibit No. (25). PW5 admitted that the visit to the Assistant County Commissioner's offices was an agreement that was realised, took place during the pendency of this suit, in the presence of the area chief and the OCPD, following a complaint that the 57th plaintiff's name, among other 8 genuine purchasers, was missing in the area list that PW4 had prepared.

60. PW5 said that all 8 claimants availed their sale agreements. PW5 said that the other complaint was that some names had also been erroneously included in the area list. PW5 said that a resolution was made between the local administration and the officials of Waigama Farm on the way forward.

61. PW5 confirmed that he was not privy to the sale agreement in 1978. PW5 confirmed that the plaintiffs who are represented are entitled to the share that the late 1st defendant sold to his grandfather. PW5 confirmed that as of 1991, when he was born, the land was already occupied by third parties. PW5 confirmed that out of the land his grandfather had bought, he had resold the same to 12 people. PW5 admitted that the sale agreement dated 5/4/1994 had several errors or anomalies.

62. Isaya Birech testified as PW6. He relied on a witness statement dated 10/2/2024 as his evidence-in-chief. He confirmed that he accompanied his cousin PW5 to visit the late Marete in Meru, when he acknowledged selling 36 acres of land to the 57th plaintiff. PW6 confirmed that his late uncle, Mr. Siyor, had sold portions of the 36 acres of land that he had bought from the late Marete to some third parties who are still occupying the land.

63. Silvia Gacheri testified as PW7. She adopted a witness statement dated 22/3/2025 as her evidence-in-chief. She confirmed witnessing the acknowledgment note by the late Marete on 4/3/2021, regarding the 36 acres of land, which was drafted by PW5. PW7 disputed the capacity of the 1st defendant to represent the estate of the late Mzee Marete, since as a sister in law, the two houses had not met to appoint him to take up letters of administration; otherwise, she was occupying 3 ½ acres of the suit land.

64. Pius K. Kidor testified as PW8. He relied on a witness statement dated 10/2/2024 as his evidence-in-chief. He confirmed witnessing the signing of the agreement dated 4/3/2021, when he accompanied PW5, 6, and 7 to Meru.

65. Martin Baraza testified as PW9. As a neighbour and village elder covering the Waigama Farm, he told the court that the chairman of the Farm had engaged him to settle the land dispute. PW9 said that from his interaction with the disputants, they were able to compile the area list, though he did not

involve the 2nd and 3rd defendants, the former of whom is based in Nairobi, regarding the share of each defendant in the farm. PW9 said that he was not a party to any of the sale agreements relied upon by the claimants, who allegedly bought land from the 1st defendant.

66. Cross-examined by the 57th plaintiff, PW9 admitted that his name was appearing in the amended authority to sue dated 2/11/2023, as No. 16, seeking some parcel of land from the 1st defendant. Equally, PW9 admitted that he had also been listed as a witness for the 1st defendant. PW9 admitted that his name appears in the area list as standing in for one Oscar Chore, though he had no authority to use on his behalf. PW9 confirmed that the said Oscar Chore had also complained to the police about the failure to surrender the share to him.

67. PW9 said that even though he was not a member of the Waigama Farm, by virtue of being a village elder, he sat in the committee that came up with the area list. PW9 said that the name of the 57th plaintiff was omitted in the area list since the exact acreage that he had bought was disputed.

68. The last witness called by the 57th plaintiff was Martin Sakina Papa as PW10. As a document examiner, PW10 told the court that he was approached by the 57th plaintiff to examine signatures appearing in a typed sale agreement dated 24/8/1978 and a handwritten one dated 17/7/1978.

69. He told the court that after examining the two, he prepared an opinion dated 22/4/2024, stating that the two documents share a common origin. He produced the report as P. Exhibit No. 24(a) and (b). PW10 said that the signature of Mr. Birech had issues and could therefore not ascertain which of the two documents was signed by Mr. Birech.

70. Alfred Marete Kirera testified as DW1. He relied on a witness statement dated 6/2/2024 as his evidence-in-chief and produced a Limited Grant of Letters of Administration Ad Litem dated 12/6/2023 as D. Exhibit. No. (1), sale agreement dated 17/7/1978 as D. Exhibit. No. (2), sale agreement dated 24/8/1978 as D. Exhibit. No. (3), Schedule of land parcel sold by Wilson B. and Jacob Sigor as D. Exhibit. No. (4), minutes for a meeting held on 3/3/2022 as MFI-D(5).

71. DW1 confirmed that D. Exhibit. No. (2) had an alteration relating to the acreage. He said that there was no evidence that the balance of Kshs. 31,000/= was ever paid to his late father. DW1 disputed the authenticity of P. Exhibit. No. (25), since his late father could not have been in Kitale, given that he had relocated to Meru at the time.

72. DW1 said that each of the partners of Waigama Farm was entitled to an equal share of the 240 acres of land. DW1 said that there was no court finding on the shares between the partners since P. Exhibit. No. (25) was dismissed or struck out.

73. DW1 confirmed that the 57th plaintiff has been occupying 36 acres of land, though they were only entitled to 20 acres. DW1 said that he never appeared before the Assistant County Commissioner to deal with the acreage due to the 57th plaintiff; otherwise, they had been unable to produce any authentic sale agreement for 36 acres.

74. Equally, DW1 told the court that he was aware that the three partners acquired Waigama Farm in 1978, but could not tell how much each contributed towards its acquisition. DW1 said that he was unable to tell how many people bought land from his late father and their respective portions. PW4 was not the owner capable of authenticating the purchasers. DW1 admitted that the consent of the 2nd and 3rd defendants was not sought and obtained while his late father was selling the land to third parties. DW1, however, clarified that the three partners jointly sold and transferred part of the Waigama Farm to Francis Mudoba, Mary Kanywa, and Bill Cheruiyot.

75. DW1 said that the assumption is that each of the partners was entitled to 80 acres each. Asked about pleadings in Kitale SPMCC 78 of 1995 appearing on page 22 of the 3rd defendant's trial bundle, DW1 said that his late father is indicated as entitled to only 39 acres. DW1 said that the partners had not met and resolved the respective shares of the land for each partner. DW1 denied that the dispute before the court arose after his late father disposed of more land to third parties, among them the plaintiffs, than he was entitled to as per his share based on his contribution towards acquiring the Farm in 1979.

76. DW1 denied that such purchasers and occupants on the land were trespassers. DW1 insisted that the title deed was clear that all the partners were tenants in common in equal shares. Regarding minutes and the signatures on the particulars and the application for land control board consent in 1984, regarding their individual shares, alongside those to go to Francis Mubaba, Bill Cheruiyot, and Erastus, and the consent dated 10/5/1984, the subdivision and the deed plan, DW1 denied the same. Regarding P. Exhibit No. (23), DW1 said that he was not party to the entourage to Nairobi, otherwise the 2nd defendant had no reason to object to the surrender since he had already disposed of his entire share of 80 acres by 1987, to be entitled to any balance.

77. Further, DW1 said that his late father was unable to give the title deeds to the plaintiffs after the 2nd defendant refused to surrender the original title deed, despite requests to do so from his late father. DW1 had no documents that the 2nd defendant had declined to sign. DW1 confirmed that his family was in possession of only 15 acres out of the share of 80 acres; otherwise, the claimants of land from his father's share demand more than 39 acres.

78. DW1 said that he had no document to show that the 3rd defendant had declined to sign papers for the portions of land sold by his late father to third parties. DW1 admitted that he had no report showing that the 57th plaintiff had trespassed into his land by approximately 16 acres, contrary to the agreement dated 1978.

79. DW1 confirmed that he had not reported any of the alleged forgery of his late father's signature in the agreement of 24/8/1978, or that regarding trespass to land, beyond the 20 acres. Equally, DW1 admitted that there was no demand letter written over the alleged forgery or related to any encroachment on land, or for its recovery from the trespassers on 10 acres of his land.

80. DW1 said that he became aware of the forged sale agreement in 2006. DW1 vehemently denied any involvement in the compilation of the names and acreages in the area list produced as P. Exhibit No. (23), allegedly approved by the officials of Waigama Farm in 2016. DW1 confirmed that he has not availed before the court of any survey, report showing encroachment of his land by the 57th plaintiff.

81. Richard Gathogo testified as DW2. He relied on a witness statement dated 15/10/2021 as his evidence-in-chief. DW2 told the court that the late Erastus Kirera Marete, himself, and the 3rd defendant are the registered proprietors of the suit land, which was consolidated with L.R. No. 57779/3, measuring 297.3 acres, of which he held 129.1 acres, the 3rd defendant 74.3 acres, and the late Erastus Kirera Marete 30 acres. DW2 said that whereas all the partners were supposed to contribute towards the acquisition of the land, the late Erastus Marete did not contribute anything.

82. DW2 said that they agreed to allocate a portion to the 1st defendant, father, and hence obtained a consent from the land control board, Saboti, approving the proposed subdivision into 11 portions in favour of the partners, Francis Mudada, 25 acres, Mary Kinyua, 2 acres, Willy Cheruiyot, 5 acres, and Francis K. Limo, 5 acres. DW2 said that before they could obtain the consent, the late Erastus Kirera Marete declined to sign any documents relating to the subdivision.

83. DW2 said that around 1985 and 1987, in the hope that the subdivision of the land would go through, he sold to the 1st and 2nd plaintiffs a portion of his entitlement. He said that the purchasers only paid some deposits but declined to clear the balance until completion documents were available. DW2 said that, out of frustration with the late Erastus Marete, he has been unable to transfer the portions to the 1st and 2nd plaintiffs.

84. DW2 denied knowledge of the alleged sale agreements between the 56 plaintiffs and the late Erastus Marete. DW2 said that in the past agreements, the late Erastus Marete had been unsuccessful. For instance, DW2 said that on 15/7/2015, the County Land Surveyor, together with his servants or employees, without any consent or justification, illegally and unlawfully descended on the suit land, purporting to subdivide the land and give it to unknown persons. DW2 said that the attempts to deprive him of his land forced him to file a court case to stop the process.

85. DW2 said that the suit land is already surveyed and titled; otherwise, there was no reason for the County Land Surveyor or the national tilting programme team to enter into his land to cause another survey or subdivision without his consent or authority. DW2 said that the Land Registrar ought to issue title deeds to the partners and the six known persons alluded to above; otherwise, the rest of the plaintiffs are encroachers onto the suit land.

86. DW2 said that he was entitled to a balance of 49 acres, which the rest of the plaintiffs have trespassed onto, erected illegal structures, fenced off, alienated, and otherwise dwelt on without his authority. In the alternative, DW2 said that the Deputy Registrar should sign transfer documents instead, and or on behalf of Erastus Kirera Marete, for the person listed above, so long as they can prove a legal right to any portion within the suit land.

87. DW2 relied on a copy of the certificate of title for L.R. No. 13420 as D. Exhibit. No. (7), minutes of the meeting by the partners held on 11/4/1984, D. Exhibit. No. (8), an application to the land control board consent and the consent dated 10/5/1984 as D. Exhibit. No. (9), bundle of maps and deed plan for the subdivision as D. Exhibit. No. (11), bundle of correspondences between counsel for the defendants as D. Exhibit. No. (12), pleadings in ELC Case No. 107 of 2015 as D. Exhibit No. (13) and lastly, an application and consent to transfer land to the various subdivisions as D. Exhibit No. (14).

88. DW2 said that he procured those consents to transfer the subdivisions, but unfortunately, the late Erastus Marete objected to signing them. DW2 insisted that he had no objection to the persons who bought land from the 3rd defendant, as well as the 1st and 2nd plaintiffs, having their transfers effected. As regards the 4th plaintiff and the 57 persons, DW2 said that he did not know them and that they were at best trespassers on his land. He said that he has never authorised them to stay on his land and prays for their eviction.

89. DW2 said that the three partners were not strangers to each other when they jointly acquired the Farm from a settler in 1978. DW2 said that DW3 was then working with the Agricultural Finance Corporation. To raise the loan, DW2 said that they opted to dispose of a portion of the land to third parties, after which the 3rd defendant became entitled to 74 acres, his 129 acres, while the late Erastus Marete acquired 39 acres. DW2 said that they identified the boundaries of each of their respective portions on the ground.

90. Similarly, DW2 said that the certificate of title was under the custody of his lawyers on record. DW2 said that it is the late Erastus Marete who disappeared following their meeting to subdivide the land amongst themselves, and as per the 11 subdivisions captured in D. Exhibit No. (9). DW2 said that the title deed for the land was issued on 20/12/1990 after they fully cleared the loan with the Agricultural

Finance Corporation. DW2 said that at first their partnership was registered, but they were not certain if they formally dissolved it.

91. DW2 said that he eventually sold his portion to the 3rd defendant at Kshs. 600,000/=. Asked if the 1st and 2nd plaintiffs cleared their consideration, DW2 said they may have cleared the sums. Similarly, DW2 said that he did not require the consent of the late Mr. Marete and the 3rd defendant to dispose of part of his share to the 1st and 2nd plaintiffs. DW2 admitted that he took the matter to the Lands Disputes Tribunal, leading to a court decree dated 15/9/1995, which, unfortunately, he did not execute, save that the subdivisions alluded to above were based on that decree. DW2 said that it was the late Erastus Marete who settled persons on his land without consent or authority.

92. DW2 said that they obtained consent from the land control board to subdivide the land on 10/5/1984 as per D. Exhibit No. (9) and (14); otherwise, the manner of sharing their respective shares out of the farm was never in dispute, until the late Erastus Marete disappeared and or declined to sign the papers to effect the transfer.

93. Reuben Wairichu testified as DW3. He relied on a witness statement dated 26/6/2022 as his evidence-in-chief. Further, he produced a letter dated 18/4/1984 as D. Exhibit. No. (15), letter dated 9/4/1993 as D. Exhibit. No. (16), letter dated 19/4/1983 as D. Exhibit. No. 16(a) and (b), tribunal proceedings as D. Exhibit. No. (17), decree as D. Exhibit. No. (18), deed plan as D. Exhibit No. (19), a bundle of correspondences as D. Exhibit No. (20) and fee notes as D. Exhibit No. 20(a) - (e).

94. DW3 said that he was the one who sourced the land on 19/6/1977, made a deposit for the same, and eventually paid the balance through a bank loan procured from Agricultural Finance Corporation. DW3 said that they disposed of 50 acres of the land to clear the Agricultural Finance Corporation loan. DW3 said that the partners' last meeting was at a hotel in Kitale, following which the late Marete declined to attend a follow-up meeting to sign the D. Exhibit. No. (16). DW3 said that their lawyers were M/S Mwangi Wahome Advocates from whom they obtained the title deed as per an acknowledgement note dated 10/1/2017.

95. DW3 said that each of the partners was to contribute Kshs. 25,000/= to acquire the Farm, but the late Erastus Marete was unable to contribute the whole of it. DW3 confirmed that the 1st defendant was only entitled to 39 acres as opposed to 129 acres in favour of the 2nd defendant and 74.3 acres in his favour, after they disposed of 50 acres of the land to offset the loan. DW3 said that after obtaining the land control board consent, a land surveyor came to the land and effected the subdivisions as per the deed plans. DW3 said that, given the land control board consents obtained, the original intention of the three partners should be implemented by the court, with each party being at liberty to deal with all those people whom he sold off to his respective portion.

96. DW3 confirmed that there were trespassers on the land belonging to the 2nd defendant, measuring about 39-40 acres. DW3 confirmed that the shares for the partners are in line with the initial agreement and the mode of contribution toward acquiring the farm. DW3 confirmed that Waigama Farm had no other officials led by an alleged chairman. DW3 said that during the national titling programme, one Barasa was allegedly selected by some of the purchasers of the land belonging to Mr. Marete to represent them, including the trespassers to the land belonging to the 2nd defendant.

97. DW3 denied or disputed the list of 82 persons appearing in the area list captured during the presidential titling programme. DW3 confirmed that the partnership had a certificate and was yet to be formally dissolved. DW3 confirmed that the certificate of title showed that they were registered as tenants in common.

98. The plaintiffs rely on written submissions dated 29/8/2025, isolating seven issues for the court's determination. On whether the defendants sold part of the land comprised of L.R. No. 13420 to the plaintiffs, it is submitted that the 1st and 2nd plaintiffs pleaded and produced evidence that they paid all the consideration as per P. Exhibits. No. (3), (4), (5), (6), and (7). Regarding the 3rd plaintiff, it is submitted that the 3rd defendant did not oppose the claim for land parcels genuinely and legally bought by the 82 people. As regards the 1st – 57th plaintiff, it is submitted that the late Erastus Marete had not filed any statement of defence before he passed on. Further, it is submitted that the 1st defendant, who substituted the initial 1st defendant, confirmed in cross-examination that he had no issues with all the 60 plaintiffs as per the produced sale agreements in the schedule.

99. On whether there is in existence a constructive trust as a result of the land sold to the plaintiffs by the defendants, who also gave possession and which has been retained todate, the plaintiffs submit that they have satisfied the ingredients of the doctrine as set out in Willy Kimutai Kitlit -vs- Michael Kibet [2016] eKLR and Macharia Mwangi Maina & Others -vs- Davison Mwangi Kagiri [2014] eKLR, since they paid full purchase price, entry occurred in 1985, 1987, 1988 with respect to the 1st, 2nd, 3rd and 4th plaintiffs and between 1991 a 2015 with respect to the 5th – 60th plaintiffs.

100. On whether the counterclaim by the 2nd defendant is merited, the plaintiffs submitted that evidence tendered by PW1 and PW2 through P. Exhibits. No. (1) – (14), confirms full payment of the consideration to the 2nd defendant. The plaintiffs submitted that the 2nd defendant was unable to pinpoint who the trespassers were on his 49 acres of land. Given P. Exhibit. No. (23) containing 146 persons, the plaintiff submitted that some persons who are not parties to this suit may be the persons occupying the 49 acres.

101. The plaintiffs submitted that no surveyor was called by the 2nd defendant to confirm the existence of the alleged 49.1 acres on the ground, as surveyed and demarcated or having defined boundaries. The plaintiffs submitted that the 2nd defendant was unable to produce evidence to locate his 49.1 acres on the ground and how he deserves the portion, especially after his earlier suits were dismissed.

102. On the legal position on the disposal of land jointly owned by tenants in common in equal shares, as well as the partnership, the plaintiffs submitted that it is not in dispute that on 20/12/1990, the late Erastus Marete and the 2nd and 3rd defendants were registered as proprietors and or lessees of the suit land measuring 120.5 Ha. The plaintiffs submitted that tenancy in common is defined in Section 2 of the *Land Act* as a form of concurrent ownership of land in which two or more persons possess the land simultaneously, where each holds an undivided interest in the property and each party has the right to alienate or transfer their interests.

103. The plaintiffs submitted that upon the death of a co-owner in common, the deceased co-owner's share is treated as part of his estate under Section 91(1) of the *Land Act*. Therefore, the plaintiffs submit that the suit land is held by each partner as 1/3 of the 120.5 Ha. Reliance is placed on Gabriel Njoroge Kirori -vs- Esther Njambi Kirori [2023] KEELC 16058 [KLR].

104. The plaintiffs submitted that the suit has not been filed by any of the registered proprietors under Section 91(7) and (8) of the *Land Registration Act*, with any co-proprietor complaining that the co-tenant had sold land to third parties. Therefore, the plaintiffs submitted that the assertion by the defendants that the land was not owned in common tenancy in equal shares has no basis in view of the express indication in the title certificate.

105. As regards the partnership alleged to have been registered, the plaintiffs submit that no certificate of registration, partnership deed, or agreement was produced outlining each partner's rights,

responsibilities, capital contribution, profits and losses sharing, rates, and operation rules. In the absence of the above, the plaintiffs submit that the evidence of the 2nd and 3rd defendant that they paid more money to acquire the land, and hence, the shares were at the ratio of 129.1, 74.1, and 39.1 acres, was not proved.

106. The plaintiffs submitted that under Section 2 of the Partnership Act, the 2nd and 3rd defendants should have moved to the High Court to have a determination of share ownership, on the basis of an alleged higher capital investment than the co-proprietors. The plaintiffs submitted that despite the order made on 18/7/2022, for any partner to be at liberty to commence dissolution of the partnership within 14 days of the order, none of the defendants complied; hence, in the absence of such a determination, the court should accept that the defendants are tenants in common in equal shares.

107. The plaintiffs submitted that the Land Disputes Tribunal had no jurisdiction to hear and determine matters relating to partnership over registered land, and the decree issued in SPMCC Land Case No. 78 of 1995 was ultra vires; otherwise, the court seized of jurisdiction is the High Court.

108. Further, the plaintiffs submitted that parties are bound by their pleadings, and therefore, the 3rd defendant's defence had not pleaded the issue of D. Exhibit No. (18). Reliance is placed on Emuria -vs- Sambu & Others [2025] KECA [KLR] and Mwinyihaji -vs- Mwebeyu & Another [2025] KECA 868 [KLR].

109. The plaintiffs submitted that D. Exhibit No. (15) issued on 15/9/1995 had no reference to L.R. No. 13420, the decree was never implemented and became time-barred under Section 4(4) of the *Limitation of Actions Act*, hence is incapable of any enforcement by this court. The plaintiffs submitted that since the suit land was registered on 20/12/1990, D. Exhibits. No. 1, 2(a) and (b) and (3), 8, 9, and 10 produced by DW3 were made or issued in 1983, before L.R. No. 13420 came into existence and therefore, could not have been a subdivision of a non-existent piece of land.

110. On whether the 2nd defendant is entitled to 49.1 acres, the plaintiffs submitted that, since the suit land is held in tenancy in common in equal shares, the 2nd defendant having sold 80 acres to the 1st and 2nd plaintiffs, and having moved out of it since 1987 todate, for over 12 years, his claim is time barred under Section 7 of the *Limitation of Actions Act*. The plaintiffs submitted that since L.R. No. 13420 has been fully subdivided and titles prepared in terms of occupation on the ground, then the 2nd defendant should surrender the original title to the government to facilitate the issuance of title, or in the alternative, the Chief Land Registrar should be ordered to do so, notwithstanding the non-surrender of the original title.

111. The 1st defendant relied on written submissions dated 30/8/2025, isolating six issues for the court's determination. On the competence of his defence dated 29/4/2024 as alleged by the 57th plaintiff, for not being signed, the 1st defendant invoked Section 3 of the *Environment and Land Court Act*, and Article 159 of *the Constitution*, Sections 1A, and 1B of the *Civil Procedure Act* and Concise Exford Dictionary 10th Edition that the mistake of counsel is curable and not fatal, otherwise there was no prejudice occasioned by the error. Reliance is placed on Nicholas Salat -vs- Independent Electoral and Boundaries Commission& Others CA Appl. No. 228 of 2013 and Morton -vs- Copeland [1855] ER 861.

112. On constructive trust, the 1st defendant submitted that constructive trust is defined in Black's Law Dictionary, 11th Edition, page 1819, and in Twalib Hatayan & Another -vs- Said Saggar Al-Heidy & Others [2015] eKLR, as an equitable remedy imposed by the court against one who has acquired the land by wrongdoing. The 1st defendant submitted that the plaintiffs have not met the ingredients since some sale agreements are ineligible, lacking details on the title, details of the sellers are lacking, acreage

is missing, and some of the claimants are trespassers without proper documentation. Reliance is placed on Shah & 7 Others -vs- Mombasa Bricks & Tiles Ltd & Others, Petition 18 (E020) of 2022 [2023] KESC 106 KLR.

113. The 1st defendant submitted that the burden under Section 107 of the *Evidence Act* was on the plaintiffs to prove the existence of facts of sale based on proper and clear sale agreements capable of enforcement by a court of law. The 1st defendant submitted that some plaintiffs claimed to have purchased land from the defendants, in their personal capacities, and some from third parties, which creates a scenario of purchasing a land portion from non-legitimate owners, licences, or those parties, in which case constructive trust may not arise against the true owners.

114. The 1st defendant submitted that some plaintiffs based their claim on sale agreements made in 1980 and 1990, which, in law, are statute-barred. Reliance is placed on Haron Onyancha -vs- National Police Service Commission & Another [2017] eKLR.

115. On whether the 57th plaintiff bought 36 acres from the 1st defendant or 20 acres, the 1st defendant submitted that D. Exhibit. No. 21 dated 17/7/1978, was not supported by any evidence of clearance of the balance of Kshs. 31,000/=, the following day or any other time or at all. Further, the 1st defendant submitted that the document has alterations on the acreage which are not countersigned or authenticated.

116. Further, the 1st defendant submitted that D. Exhibit. No. (7) dated 17/7/1978, shows the acreage as 20 acres as opposed to 36 acres. The 1st defendant submitted that D. Exhibit. No. (3) is in line with Section 3(3) of the Law of Contract, ruling out the validity of D. Exhibit. No. (21).

117. Regarding D. Exhibit. No. (6), the 1st defendant submitted that the 57th plaintiff is only entitled to 20 acres, going by D. Exhibit. No. (7). The 1st defendant submits that the 57th plaintiff took advantage and encroached onto the 16 acres of land; otherwise, the claim for the 36 acres is based on a forged document, which they also tried to sanitise on 4/3/2021, when they visited the deceased in Meru. The 1st defendant submitted that the document examiner's evidence was not reliable, in view of the fact that he was not supplied with original handwritten documents and or known signatures of the makers of the document

118. The 1st defendant submitted that it makes no sense why the 57th plaintiff only came to court 43 years later, to claim an extension from 20 to 36 acres, which claim is time-barred under Section 7 of the *Limitation of Actions Act*. Reliance is placed on Haron Onyancha -vs- National Police Service Commission (supra) and Iga -vs- Makerere University [1972] EA 5.

119. On whether the defendants are joint owners of the suit land, it is submitted that the certificate of title issued on 20/12/1995 by the Registrar of Titles is clear and therefore, any alleged contrary arrangements relating to share acreage or minutes for meeting held on 11/4/1984, singed documents, existence of a stale decree, dated 15/9/1995, signing of such documents when the parties were intoxicated cannot be used to vary the title.

120. Reliance is placed on Blomley -vs- Ryan [1956] HCA 81, Section 4(4) of the *Limitation of Actions Act*, Halsbury's Law of England Vol. 68 [2008] 5th Edition, Moses Kipkurui Bor -vs- John Chirchir [2019] ekrl, M'Ikiara M'Rinkanya & Another -vs- Gilbert Kabeere M'Mbijiwe [2007] eKLR, Kahindi Ngala Mwagandi -vs- Mtana Lewa [2014] eKLR, J.A. Pye (Oxford) Holding -vs- Graham [2000] CH 676 and Assia Pharmaceuticals Ltd Kenya Alliance Insurance Co. Ltd [2021 KEHC 19 [KLR].

121. The 1st defendant submitted that the alleged transfer and subdivision documents produced by the 2nd and 3rd defendants, dated 18/4/1984, were brought as an attempt to disinherit him; otherwise, they were made before the title was issued in 1990.

122. On whether the 57th plaintiff has proved forgery against the 1st defendant, it was submitted that fraud was not pleaded and proved to the required standard. Reliance is placed on Benson Wandera Okuku -vs- Israiel Were Wakago [2020] eKLR, Bullen and Leak & Jacob's; Precedent on Pleadings; 13th Edition page 427.

123. The 3rd defendant relied on written submissions dated 1/7/2025, isolating four issues for determination. The 3rd defendant submitted that D. Exhibit. No. 20(a)-(e), and in particular the letter dated 12/11/2020, is clear on who has custody of the original title deed by the 2nd defendant.

124. On whether the 3rd defendant made efforts to have the original title deed surrendered for titling and the transfer process, it is submitted that D. Exhibit. No. 20 (a)-(e) are clear on how he made efforts to realise his duty as a vendor under both the *Land Act* and *the Constitution*, the only stumbling block being that the 1st and 2nd defendants had a case in court.

125. The 3rd defendant submitted that he had shown how the suit land was jointly acquired as per the certificate of title, how he sold part of his share to 87 people out of his 74.3 acres. The 3rd defendant submits that the suit should therefore be allowed with no order as to costs against him as per Section 27 of the *Civil Procedure Act*, since he has always been willing to have the transfers effected in favour of the purchasers. The 3rd defendant submitted that most of the parcels of land were disposed of by DW1 and DW2 and that he only sold land to the 4th plaintiff, who took possession. Therefore, the 3rd defendant submitted that he should be exempted from paying any costs to the plaintiff.

126. The court has carefully gone through the pleadings in the suit, the evidence tendered, the written submissions, and the cited laws. The issues calling for my determination are :

1. Whether the plaintiffs, generally and in particular the 4th plaintiff, can legally plead for, appear, and represent 57 persons as plaintiffs before the court.
2. If the 4th plaintiff has the capacity to represent the 5th to 56th persons whose facts and particulars are missing in the paint.
3. What was the ownership status of the suit land, as of 1990, regarding the register of titles?
4. Whether any of the registered tenants in common in equal shares individually had the capacity to deal with the portions of the suit land without the consent of the co-tenants.
5. If all the plaintiffs have pleaded and proved the purchase of their respective portions of the suit parcels of land from any of the respective defendants (owners of the land).
6. If the plaintiffs have proved the existence of any valid sale agreements to invoke the creation of a constructive trust against the defendants.
7. If the 1st and 2nd defendants have proved trespass against any of the plaintiffs, to be entitled to any eviction orders.
8. Whether the plaintiffs and the defendants are entitled to the reliefs sought.

(9) What is the order as to costs?

127. It is a trite law that parties are bound by their pleadings. Order 1 of the Civil Procedure Rules provides that all persons may be joined in one suit as plaintiffs in whom any right or relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or in the alternative, and where a common question of law or fact would arise.

128. Order 1 Rule (6) of the Civil Procedure Rules provides that a plaintiff may join as parties to the same suit all or any of the persons, severally, or jointly on any one contract. Order 1 Rule 8(1) of the Civil Procedure Rules provides that where numerous persons have the same interest in any proceedings, the proceedings may be commenced and, unless the court otherwise orders, continued by or against any one or more of them as representing all or as representing or all except one or more of them.

129. Order 4 of the Civil Procedure Rules provides that a plaint shall contain the names, description, and place of residence of the plaintiff, the place where the cause of action arose, and, where there are several plaintiffs. Order 4 Rule (3) provides that one of them with the authority filed with the verifying affidavit may swear the verifying affidavit on behalf of the others. Order 4 Rule (4) of the Civil Procedure Rules provides that where a plaintiff sues in a representative capacity, the plaint shall state the capacity in which he sues.

130. In Sila -vs- Attorney General, Civil Appeal No. 224 of 2019 [2025] KECA 498 [KLR], (21ST March 2025) (Judgment), the court said that cases must be decided on the issues pleaded, parties are bound by their pleadings, cannot be allowed to raise unpleaded issues or call evidence on such an issue during the hearing. The court cited Mohamed Fugicha -vs- Methodist Church in Kenya & Others [2016] eKLR, that the purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as a sufficient notice to the party impleaded to enable him to know what case to answer.

131. In the amended amended plaint before the court dated 3/11/2023, the 4th plaintiff pleads that he sues on behalf of 56 unnamed persons in the plaint. The court has not come across evidence that any of the plaintiffs sought leave to file the suit in a representative capacity. The names of the parties that the 4th plaintiff purports to sue on their behalf are not listed in the body of the amended amended plaint. The particulars of their causes of action, when they arose, the dates, and the details of their land transactions with any of the defendants are not pleaded in the body of the amended amended plaint.

132. In Rose Florence Wanjiru -vs- Standard Chartered Bank of (K) Ltd & Others, the court said that the purpose of Order 1 Rule 8 of the Civil Procedure Rules is to enable access to justice and to give the intended persons an opportunity to know the person who has been selected to represent them. The court held that the rule binds parties with a community of interest in one suit with proper notice.

133. Order 1 Rule 13 of the Civil Procedure Rules relates to an authority to appear, plead, and act. It should be in writing, duly signed by the party giving it, and shall be properly filed in the case. In George Ole Sangui & Others -vs- Kedong Ranch Ltd HC Nakuru Civil Suit No. 21 of 2009, the court cited John Kabere Mungai -vs- Charles Karuga Koinange [2005] eKLR, that for the plaintiff to acquire the capacity to institute a suit in a representative capacity, he had to seek consent and or authority of the court; otherwise, without such authority and or notice issued to other joint owners, the plaintiff had no capacity to institute the suit.

134. In John Rees & Others; Martin & Another –vs- Davies & Others (1969) 2 All ER 283, the court said that representative proceedings should be treated as a rigid matter of principle, but a flexible tool of convenience in the administration of justice. Capacity to sue runs through the heart of a case. A party

without locus standi lacks the right to institute and or maintain a suit, even where a valid cause of action subsists. In Julian Adoyo Ongunga & Aothers -vs- Francis Kiberenge Bendera (suing as Administrator of the Estate of Fanuel Evans Amudavi, Deceased) (2016) eKLR, the court observed that the impact of a party in a suit without locus standi can be equated to a court without jurisdiction, which renders the proceedings null and void.

135. In the present suit, the authority to sue as initially filed did not, per se and by itself, confer the 4th plaintiff with the capacity to sue in a representative suit. The capacity to sue in a representative manner is not granted by the consent of parties. Leave of court must be sought and obtained. It is through leave that the court determines and gives directions on whether there is a commonality of an issue of law or fact between the parties. The amended amended plaint dated 3/11/2023 was accompanied by an amended authority to act, plead, and appear, purportedly now signed as if all four plaintiffs herein have been given authority to sue on behalf of the 57 persons. That amounts to misrepresentation of facts.

136. In Hussein -vs- Gedi; Adan (IP) ELC E009 of 2004] [2005] KEELC 931 KLR, (26th February 2025) (Ruling), the first issue was whether the defendant could be sued in a representative suit, and secondly, whether the plaintiff had locus standi. The court held that whether or not a party is a proper party in a suit is a pure point of law, since if a party lacks capacity, any suit commenced by such a party is a nullity and incompetent. The court said that Order 1 Rule (8) of the Civil Procedure Rules makes provisions as to how a representative suit may be commenced or defended.

137. In Jack Anzaya & Others -vs- Zacharia Amambi & Others MSA HC Civil Suit No. 91 of 2009, the court cited Sonko & Others -vs- Haluma & Another [1971] EA 443 and Bahadir Engineer & Other -vs- Aspi Konkrahalla & Others MSA HCC No. 443 of 1993, that Order 1 Rule 8 of the Civil Procedure Rules, provides that a plaintiff bringing a suit in a representative capacity must obtain a representative order on behalf of the unnamed plaintiffs. The court held that non-compliance with the rule is fatal since the requirement is mandatory; hence, the incidental order that must flow from such an omission is that the suit must be struck out.

138. In EL Busaidy -vs- Commissioner of Land & Others KLR E&L 1[479], the court was emphatic that it is mandatory to seek leave of the court before a representative suit is filed; otherwise, the court has to mandatorily make a direction that the notice of the institution of the representative suit be given to all parties concerned.

139. From the case law cited. The inevitable fact is that the 5th - 57th alleged parties, whom the 4th plaintiff purports to represent, were not properly joined as parties in this suit. The names of the 57 persons and the description of their causes of action are alleged to be in a schedule attached to the initial plaint produced as P. Exhibit No. 21. Such a schedule is not a court order granting leave to sue. Parties by consent cannot confer jurisdiction on a court or themselves leave to sue in a representative capacity.

140. A pleading is a statement filed in court that defines the nature of the dispute between the parties. The *Civil Procedure Act* illustrates what a pleading is. A schedule is a document that is foreign to the *Civil Procedure Act*. It is not one of the allowed avenues provided in the law of presenting material allegations of facts to be relied upon by a plaintiff to prove his or her claim. The finding is that, other than the four defined and disclosed plaintiffs in the body of the amended amended plaint, the rest, who are purportedly represented by the 4th plaintiff, are not proper parties in this suit. Consequently, the 4th plaintiff's purported capacity to sue on behalf of the unpleaded 57 persons claims an alleged schedule attached thereto, is struck out with no orders as to costs.

141. The capacity to contract is key to any valid land sale agreement. The ownership status of the land and the capacity of the vendors have to be addressed in this. The title deed in favour of the defendants was issued in 1990. The certificate of title shows that the owners were described as tenants in common

in equal shares. The applicable law at the time was the Registered *Land Act* (repealed). Sections 101-102(1) thereof, provided that where the land lease or charge is owned jointly, no proprietor is entitled to any separate share in the land.

142. Section 103(1) thereof provided that where any land, lease, or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and upon the death of a proprietor, his share shall be administered as part of his estate. In Isabel Chelangat -vs- Samuel Tiro Rotich & Others [2012] eKLR, the court observed that in tenancy in common, the property is held in equal undivided shares.

143. In John Mbogua Getao -vs- Simon Parkoyiet Mokare & Others SCOK Petition No. 9 of 2020, the court held that as long as tenants in common live, no one can say which of them owns any particular parcel of land, and no one has a better right to the property than the other.

144. The certificate of title issued in 1990 was not preceded by an instrument showing the defined shares of each tenant. Section 2 of the *Land Act* and Section 91(5) of the *Land Registration Act* are the current legal framework governing tenancy in common. The key features were discussed in Mukazitoni Josephine -vs- Attorney General [2015] eKLR. The court held that in tenancy in common, the interest of each registered owner is determinable and severable, unlike in a joint tenancy, where the interest of each owner is undeterminable; each owner has all and nothing.

145. In Kasara & Another -vs- Richard, Civil Appeal 52 of 2018 [2023] KECA 1025 [KLR], the court said that one of the main changes brought by the *Land Registration Act* 2012 was Section 91(2), especially where parties do not specify in the instrument of transfer of an interest in land to two or more persons, or the nature of their rights leaving a rebuttable presumption that they hold the interest in tenants in common in equal shares.

146. In this suit, the 1st defendant insists that his late father held the suit premises as tenants in common in equal shares with the 2nd and 3rd defendants. On the other hand, the 2nd and 3rd defendants take a contrary view that the shares held by each of the three co-owners were known and had been agreed at 129.1, 74.2, and 39.1 acres, in favour of the late Erastus Marete, the 2nd and 3rd defendants respectively, based on their contribution in acquiring the land.

147. It is on that basis, therefore, that the 2nd defendant seeks the eviction of the plaintiffs, whom he terms as trespassers on his land. The 2nd and 3rd defendants rely on documents in existence before the issuance of the certificate of title, showing that the three co-owners were aware and were in agreement on their defined shares on the suit land. Section 91(2) of the *Land Registration Act* now makes it clear that the only way to determine the interest of each of the co-owners is through the instruments of conveyance and the endorsement of the details in the parcel register. See Kirori -vs- Kirori Thika ELC Appeal No. 85 of 2021.

148. In Kwanza Estates Ltd -vs- Jomo Kenyatta University of Agriculture & Technology, SCOK Petition No. E001 of 2024, the court said that a contract, using the doctrine of pari materia, should be interpreted in harmony with related laws, in context, and as a whole. It is trite law that a certificate of title is prima facie proof of the registered proprietor. Sections 4 and 9 of the *Registration of Documents Act*, Cap 295, provide that all documents conferring or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property shall be registered, provided that, if such document relates to land registered under any such Act, and where the land is not so registrable, such document shall also be registered under the Act, within two months of their execution.

149. Section 43 of the *Land Registration Act* 2012 provides that no instrument affecting a disposition of land shall, unless registered, operate to sell or otherwise affect any land, lease, or charge until it has been registered in accordance with the law relating to registration of instruments affecting the land.

150. In this suit, the tenants-in-common agree that they sold portions of the suit land to third parties without involving the co-owners. Equally, the plaintiffs herein admit that they dwelt with the co-owners individually and separately, while purchasing portions of the suit land.

151. Section 103(2) of the Registered *Land Act* (repealed) provided:

> " No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor(s) of the land, but such consent shall not be unreasonably withheld".

152. Section 104 thereof provided that an application in the prescribed form to the Registrar for the partition of the land owned in common could be made by any one or more of the proprietors or any person in whose favour an order had been made for the sale of an undivided share in the land in execution of a decree.

153. The Registrar could effect the partition of the land in accordance with any agreement of the proprietors in common or in the absence of agreement in such manner as the Registrar may determine. Partition could be completed by closing the register of the partitioned parcel and opening registers in respect of the new parcel created by the partition, and filing the agreement or determination.

154. In this suit, none of the defendants has tendered evidence that they involved the co-tenants in dealing with a portion of their alleged shares in the suit property. Indeed, none of the defendants has tendered evidence that they tried to register any instrument as envisaged by the law, to define their shares of the suit land, as the 1st defendant wants the court to believe or otherwise. The 2nd and 3rd defendants want the court to take their explanation as the correct version, on the defined shares, which was even disclosed in previous pleadings and decree in 1995, and also in an application for the land control board consents, as well as in the minutes for the meeting held in 1984. The 1st defendant has termed the said decree as stale, unenforceable, and not binding.

155. Equally, the 1st defendant has attacked the minutes, applications for land control board consent, the land control board consents, and all other documents alleging the defined shares as 129.1 acres, 74.1 acres, and 39.1 acres as not genuine, forgeries, and unauthentic.

156. The burden of proof is on he who wants the court to believe the existence of certain facts. Parole evidence may not be used to vitiate clear terms and conditions of a contract that has been reduced into writing.

157. Courts do not rewrite contracts or agreements unless vitiated by illegality, coercion, procured through undue influence, or are against public policy. In this suit, it is notable that a consent court order was issued for the co-tenants to move the appropriate court to dissolve their partnership. No evidence has been tendered that any action was taken in that direction by the defendants. There is no evidence, however, that the suit property was registered under a partnership name. Evidence of the contribution thereof, of each partner in acquiring the suit property, has not been tendered before this court. A partnership agreement or deed, minutes, and or resolution on the share of each partner, before the registration of the suit land in their favour, if any, ought to have been taken to the Registrar of Titles for registration and endorsement as was the requirement under the law.

158. From the pleadings herein, none of the defendants has pleaded against each other, the issue of contribution towards acquiring the land, and the defined shares. Further, none of the defendants has questioned the status of the registration of the certificate of title and the register of titles as erroneous, misleading, and or unlawful. Section 28(b) of the Partnership Act provides that the interests of partners in partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement, express or implied, between the partners.

159. In this suit, none of the defendants has availed a valid partnership deed, board records, or resolutions, and perhaps evidence against the rule of equality, which in the absence of any contrary agreement, always applies when determining the partners' shares in their assets.

160. The court has carefully looked at the evidence tendered by the 2nd and 3rd defendants, compared to that of the 1st defendant. There is no evidence that any of the co-tenants took action to have the suit property partitioned under Sections 103 and 104 of the Registered *Land Act*, when it became apparent as early as 1987 and 1990, that the late Erastus Marete was bringing third parties to the suit land beyond his alleged entitlement of 39.1 acres.

161. Sections 103 and 104 of the Registered *Land Act*, as read together with Part IX of the *Land Registration Act*, relate to partitioning or sale if the land held in common is incapable of being partitioned. In Mwangi & Others -vs- Trunz & Another Civil Appeal No. 210 of 2018 [2025] KECA 1483 [KLR] (19th September 2025) (Judgment), the court said that the absence of a registered partnership deed militated against the appellant's case. The court said that the existence of a partnership could not be inferred in the circumstances without proof.

162. The burden was on the 2nd and 3rd defendants to lead tangible and cogent evidence, in support of their claim that the certificate of title issued in 1990 showing that the suit property is held in tenancy in common in equal shares defined at a ratio of 129.1 acres, 74.1 acres, and 39.1 acres in favour of the 2nd, 3rd defendants and the late Erastus Marete. Section 23 of the repealed Registration of Titles Act provides a certificate of title as conclusive evidence of the nature of ownership in the absence of any fraud or misrepresentation.

163. It would be self-defeating for the 2nd and 3rd defendants, who have been the custodians of the certificate of title, to turn around and challenge their title status as being at variance with what they intended to be described as when they acquired ownership of the suit land in 1979. Nothing would have prevented the 2nd and 3rd defendants from visiting the offices of the Registrar of Titles, as soon as they learned of the registration to correct the entries in the titles register by availing the instruments of transfer showing the ratios to be endorsed and or registered on the register. Parties are bound by their pleadings. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action or defence.

164. In Barmasi -vs- Rono & Others, Civil Appeal E068 of 2023 [2025] KECA 1489 [KLR] (19th September 2025) (Judgment), the court observed that the terms, material facts are only relied upon to establish the essential elements of the cause of action. The court said that pleading must be lucid, logical, and in an intelligible form.

165. The court said that a court should determine, as a general rule, a case on the issue that flows from the pleadings unless, as held in Odd Jobs -vs- Mubea [1970] EA 476, evidence has been led on an unpleaded issue, which is left to the court to decide. Looking at the pleadings of the 1st, 2nd, and 3rd defendants, it is obvious that they are describing the suit property as jointly owned by the late Erastus Marete, the 2nd and 3rd defendants. This is to be found in paragraph 7 of the 2nd defendant's statement of defence dated

15/10/2021. At the same time, however, the 2nd defendant again, at paragraph 17 of the counterclaim, refers to a share of the suit property of 129.1 acres, of which 49.1 acres is supposed to be vacant.

166. The 2nd defendant has not listed the defendants in his counterclaim, alleged to be encroachers or trespassers on his alleged 49.1 acres. Similarly, the 2nd defendant has not pleaded anything regarding the manner of purchase, contribution during the purchase, agreed individual shares to the suit land depending on the respective contributions, whether the said shares were captured in the certificate of title and lastly, fault on the part of the late Erastus Marete in encroaching onto and or purporting to dispose of and introduce third parties in the name of the plaintiffs to occupy the 49.1 acres of land as if it was a share belonging to the initial 1st defendant.

167. Further, the 2nd defendant has not specifically pleaded who is on his parcel of land, the nature and particulars of encroachment, loss, and damage occasioned to him, and whether or not he has notified the said encroachers to vacate his land. As regards the 3rd defendant, in the statement of defence dated 30/6/2022, there is no pleading on the manner, particulars of contribution, agreed contribution, shares entitlement, and the nature and status of the suit land as regards subdivisions, boundaries and whether there was consent issued to any of the co-tenants and vice versa to dispose of one's share to third parties.

168. It is trite law that a party must plead facts and not evidence. A witness statement is not a pleading. Be that as it may, DW3 in his evidence relied on a witness statement dated 30/6/2022 as his evidence in which he sets out the history of acquiring the suit land, disposing part of it to clear the Agricultural Finance Corporation loan, transferring portions of it to third parties, filing a suit to have determined their respective acreages in Kitale SPMCC Land Case No. 78 of 1995, processing deed plans, application for land control board and consents, and writing letters to facilitate the issuance of individual titles in vain.

169. The 3rd defendant relied on an award as D. Exhibit No. (5) and No. (15), land control board application dated 184 1984. Exhibit No. 16(a) and (b), land control board consent dated 19/4/1983, and mutation map as D. Exhibit No. (17) (18), decree proceedings SPMCC Land Case No. 78 of 1995.

170. As regards DW2, he relied on a witness statement dated 15/10/2021 as his evidence in chief. He told the court that he holds 129.1 acres, and that the late Erastus Marete did not contribute anything towards acquiring the land, though they agreed to allocate him 39.1 acres out of the suit land, which was followed by subdivisions, applying and obtaining a land control board consent into 11 portions but when it came to the stage of signing the transfer from to the respective owners, the deceased declined to sign a document thereof. Though the 3rd defendant seeks to have the said subdivisions effected in the witness statement, unfortunately, the same is not pleaded in the statement of defence and the defence to the counterclaim.

171. The 2nd defendant, on the other hand, relied on the certificate of title dated 20/12/1990, as Exhibit No. (7), minutes for the meeting of 11/4/1983- D. Exhibit No. (8), application for land control board consent dated 18/4/1984 as D. Exhibit No. (9) and land control board consent dated 10/5/1984 as D. Exhibit No. (10), deed plans D. Exhibit No. (11), correspondences D. Exhibit No. (12), and pleadings D. Exhibit No. (12). D. Exhibit No. (7) is a certificate of title issued to Erastus Karera Marete, Augustin Richard Gathugo, and Reuben Thairu Wairiru, trading as Waigama Farm, registered as lessees as tenants in common in equal shares.

172. The 2nd and 3rd defendants have not specifically pleaded that the court should declare that the three initial owners held and had agreed on defined shares at the ratio of 39.1 acres, 129.1 acres, and 74.3 acres, respectively. It is trite law that parole evidence cannot be used to add to, vary, or contradict a

deed or a written instrument. See Jacobs -vs- Batavia & General Plantation Ltd [1924] ICHD 287, and Serem & Others -vs- Ndiwa [2025] KLR.

173. Section 97(1) of the *Evidence Act* provides that when the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property, or of such matter, except the document itself.

174. In Fanikiwa Limited & 3 others -vs- Sirikwa Squatters Group & 17 others [2023] KESC 105 (KLR), the court said that the import of Section 91(1) of the *Evidence Act* is that extrinsic evidence as set out in Halsbury's Laws of England 4th Edition Vol. 12 para 1478, cannot be received to prove the object with which a document was executed, or that the intention of the parties was other than that appearing on the face of the document. My finding, therefore, is that the suit parcel of land was held in tenancy in common in equal shares, and therefore, the plaintiffs needed to seek consent or approval of all the tenants in common with dealing in any sale agreements for them to become valid, binding, and enforceable in law.

175. The 1st and 2nd plaintiffs claim that they bought land measuring 40 acres each from the 2nd defendant by sale agreements dated 14/12/1987 and 12/10/1985, respectively, paid fully for the same, took vacant possession, and are yet to be issued with any transfer forms or registration. The 1st and 2nd plaintiffs plead that a constructive trust has been created in their favour.

176. On the other hand, the 3rd and 4th plaintiffs plead that they bought portions of the suit land from the 1st and 3rd defendants, measuring 10 acres and 2 1/2 acres for Kshs. 105,000/= and Kshs. 50,000/=, respectively, and took vacant possession, and were yet to be issued with the respective title deeds by the sellers. The 3rd and 4th plaintiffs equally invoke the doctrine of constructive trust. All the plaintiffs have produced their respective exhibits in support of their claims. The question is whether the sale agreements relied upon by PW1 - 4 met the conditions of the law on the sale of land at the time they were allegedly signed.

177. In Peter Mbiri Michuki -vs- Samuel Mugo Michuki, Nyeri civil Appeal No. 22 of 2013, the court held that in view of Section 3(7) of the *Law of Contract Act* on land, contracts entered into before 1/6/2003, under Section 3(3) thereof, provided that no suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, was in writing and had been signed by the party to be charged or by some person authorised by him to sign it, provided that such a suit shall not be prevented by reason only of the absence of writing where an intending purchaser or lessee who had performed or was willing to perform his part of a contrary; had in past performance of the contract taken possession in part performance and had done some other act in furtherance of the contract.

178. In view of the said law, the court said that the plaintiff had satisfied the trial court that either he took possession of the suit property in part performance of the said oral contract or that, being already in possession of the suit property, he had continued in possession in part performance of the oral contract.

179. In Mombasa Cement Ltd -vs- Harishi Ramji & Others, Supreme Court of Kenya Appl. No. E026 of 2024, the court affirmed Peter Mburi Michuki -vs- Samuel Mugo Michuki (supra), that an oral contract for the sale of land could be enforced if it was coupled with a substantial part performance.

180. In this suit, the burden is on the plaintiffs to demonstrate that they have valid sale agreements capable of enforcement by the court. DW1, DW2, and DW3 confirmed that the only portions of the suit parcels of land that they sold jointly were the ones they disposed of to repay the Agricultural Finance

Corporation loan. The plaintiffs have confirmed in their evidence that they were aware that the suit parcel of land was held in tenancy in common in equal shares by the 1st – 3rd defendants. The legal position is that if land is co-owned, one co-owner cannot deal with the suit property without the consent or authority of the other co-owners, for no one co-owner has a better title than the other. See NNK -vs- JNR [2020] eKLR. In Machage -vs- Samuel Ngigi Karuri [2022] eKLR 3391 KLR, the court held that an agreement entered into by the 1st defendant, without the consent or approval of the 2nd defendant, who was a co-owner of the suit property, was invalid in law.

181. As a general rule, a contract affects only the parties to it. It cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or make him liable upon it. See Agricultural Finance Corporation -vs- Lengetia Ltd [1985] KLR 765. The plaintiffs, in the circumstances, cannot benefit from a constructive trust against the tenant in common, since they did not involve the three in all their sale agreements.

182. The plaintiffs only rely on the exception to the general rule that recognizes a contract for the benefit of a third party if they tendered evidence alongside that lane. See Aineah Liluyani Njirah -vs- Agha Khan Health Services [2013] KECA 481 (KLR). In this suit, no evidence was tendered that each of the defendants jointly benefited one way or the other from the consideration paid to any of the tenants in common by the plaintiffs. In Eighty Four Investments Ltd -vs- Irungu & 4 Others, Civil Appeal No. 122 of 2019 [2015] KECA 1365KLR (25th July 2025) (Judgment), the court observed that the doctrine of constructive trust had merely been thrown in for good measure in an attempt to defeat Singh's interest in the property; a co-owner who was not even privy to the sale of the property to the appellant. The court held that the appellant was not an innocent purchaser as it contended; otherwise, it was inconceivable that a son of one of the shareholders did not know there was a co-owner of the property.

183. In this suit, all the sale agreements relied upon by the plaintiffs did not refer to the three respective tenants in common as holding equal shares of the suit land. The law is that none of the tenants in common could independently dispose of any share thereof, to the exclusion of the others. Due diligence required that one tenant in common, selling his share to seek the consent of the other two tenants. Equally, the purchasers had a corresponding obligation to inquire if the consent of the two other tenants in common in equal shares had been sought and obtained before the sellers could legally enter into a valid sale agreement.

184. Just like in this suit, in Eighty Four Investments Ltd -vs- Irungu (supra), the deceased and Singh were proprietors of the property as tenants in common in equal shares. Equity follows the law. The plaintiffs rely on doctrines of equity to have their rights of occupation of portions of the defendant's suit property declared to have accrued to them. An illegal contract cannot be enforced by a court of law. See Patel -vs- Mirza [2016] UK SC 43 and M'Mukidia -vs- Bundi ELC Appeal E027 of 2023 [2024] KEELC 6896 [KLR]. A court of law cannot sanction an illegality or give its seal of approval to an illegal contract.

185. In Agson Mafuta Chioza -vs- Simoking William Siziba, Supreme Court of Zimbabwe Judgment No. SC4/2015, the court said that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced by the court. The court cited the pari delicto rule, which states that where both parties are equally in the wrong, he who is in possession will prevail.

186. The court said that the effect of the rule is that where something has been delivered pursuant to an illegal agreement, the loss lies where it falls, the objective of the rule being to discourage illegality by denying judicial assistance to a person who parts with money, goods, or incorporeal property, in the

furtherance of an illegal transaction. My finding, therefore, is that all the plaintiffs' sale agreements suffer from illegality.

187. The plaintiffs also rely on the doctrine of constructive trust. The legal framework governing constructive trusts in Kenya comprises the Trustees Act, Section 3(1) of the *Judicature Act*, the *Land Registration Act*, and Articles 24 and 40 of *the Constitution*. It is defined as an equitable instrument that serves the purpose of preventing an unjust enrichment. It arises where a party conducts himself in a manner to deny the other party beneficial interest in the property acquired, or where such a party takes advantage of his position for his own benefit. See Dias Property Ltd & Another -vs- Jack Kaguu Githae & 9 Others, Supreme Court Petition No. E019 of 2024, Shah & 7 Others -vs- Mombasa Bricks & Tiles Ltd & Others Petition 18 of 2022[2023] KESC 106 [KLR] (28th December 2023) (Judgment), and Frenkel -vs- LA Micro Group (UK) Ltd & Others [2024] UK SC 42.

188. In Kabui -vs- Kabui Civil Appeal 415 of 2018 [2014] KECA 1296 KLR (11th October 2024) (Judgment), the court was dealing with an oral agreement mutually entered into by the parties. The operative law was the law of the Contract Act No. 21 of 1990. The court cited Twalib Hatayan Twalib & Another -vs- Said Saggar Ahmed Al-Heidy (supra), that the intent and purpose for which the property was bought was key. The court held that constructive trust arises where also the intention of the parties cannot be ascertained; some time the proof of the intention of the parties may be immaterial; it may be imposed either upon the unexpressed but presumed intention of the seller, or upon his informally expressed intention, and that the general rule is that a resulting trust will automatically arise in favour of the person who advances the purchase price whether or not the property is registered under his name or that of another, being immaterial.

189. The court held that, notwithstanding that the application for consent to subdivide the suit land was neither dated nor signed, the existence of the land control board's consent, a mutation form, all the other documents, all to an intention to transfer the land in favour of the appellant. The court held that overriding interests under Sections 25, 26, and 28 of the *Land Registration Act* included trusts, as limitations to a right to property as envisaged by Article 24 of *the Constitution* and Section 28 of the *Land Registration Act*.

190. In Aliaza -vs- Saul [2002] KECA 583 [KLR], the court said that there will be a situation in which an application for consent under Section 6 thereof, that has been made, may be refused for good reason, and in a situation where a seller takes full consideration and hands over vacant possession but declines to apply for the land control board consent. Further, in Macharia Mwangi Maina & Others -vs- Davidson Mwangi Kagiri [2014] eKLR, the court held that the legal status between the respondent and the appellants as the purchasers had created an implied or constructive trust in favour of those persons who had paid the proposed price, pending the sale of all the 240 plots, hence the respondent could not renege from his duty or purport to rescind the sale agreements.

191. On whether the plaintiffs are entitled to the reliefs sought, the court has already made a finding that, other than the four plaintiffs properly before the court, the rest of the plaintiffs did not join as plaintiffs through a representative suit. In Sheikh -vs- Sheikh & Others [1991] LLR 2219 CAK, the court held that a judge has no power or jurisdiction to decide an issue which has not been pleaded unless the pleadings are suitably amended. The court, citing Bullen & Leake & Jacob's Precedents of Pleadings, 12th Edition, held that the system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases, which then a court can be called to adjudicate upon.

192. Further, in David Sironga Ole Tukai -vs- Francis Arap Muge & Others [2014] eKLR, the court held that under our jurisdiction, a court will not grant a remedy that has not been applied for, and it will not

determine issues that the parties have not pleaded. The court said that in an adversarial system, parties are the ones who formulate their cases, set the agenda, and, subject to the rules of pleadings, each party is left to formulate its case in its own way. The court said that since a party is bound by its pleadings, it cannot be allowed to raise a different case from which it has pleaded, without making due amendments.

193. In Mithamo & Another -vs- Mithamo, Civil Appeal No. 76 of 2022 [2024] KECA 1864 KLR (22nd December 2024) (Judgment), the court said that parties should specifically state their claims, by properly pleading the facts relied upon and the reliefs sought as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting position of the parties.

194. In this suit, the only plaintiffs who properly pleaded their facts and sought relief against the defendants are the 1st, 2nd, 3rd, and 4th plaintiffs. In Antony Francis Wareham t/a AF Wareham & 2 others -vs- Kenya Post Office Savings Bank [2004] KECA 166 (KLR), the court said that in discharging the burden of proof, the evidence to be adduced is evidence of existence or how the existence of the facts in issue or facts relevant to the issues. The court said it follows from those principles that only evidence of facts pleaded is to be admitted, and if the evidence does not support the facts pleaded, the party who has the burden of proof should fail. The court held that a court may not make any findings on unpleaded matters or grant any relief that is not sought by a party in the pleadings.

195. In Sanyu International Ltd -vs- Oriental Commercial Bank Ltd [2017] KECA 216 [KLR], the court said that to attempt to make orders against persons or entities who are not party to the suit will be tantamount to condemning that person or parties unheard.

196. In Mbuki & Others -vs- Macharia & Another [2005] 2 EA 206, the court held that the right to be heard is a valued right, and it would offend all notions of justice if the right of a party were prejudiced or affected without the party being allowed to be heard. In this suit, the 2nd defendant has also raised a counterclaim against the trespassers to his portion of the suit land. He wants the court to issue eviction orders against undefined defendants. The counterclaim does not define whether it is filed against all the named four plaintiffs or the 57th others, alleged to be represented by the 4th defendant.

197. In Sanyu International Ltd -vs- Oriental Commercial Bank Ltd (supra), the court observed that amendments contextualizes a claim as it relates to the various players, to clarify and bring into clearer focus the issues in contention between the parties, where the matters are not placed before the trial court, it is not within the court's mandate to direct any of the parties as to the manner of conducting or presenting their case.

198. In Caltex Oil (K) Ltd -vs- Rono Ltd [2016] KECA 457 [KLR], the court held that a court should not engage in an exercise in futility by awarding a prayer that has not been pleaded or prayed for in a plaint, regardless of whether it is canvassed before the court. The court observed that it could amount to a court exercising a power it does not have and rendering a decision without any parameters or borders, which could lead to total disorder and an abuse of the judicial process. See Mary Nyambura Kangara alias Mary Nyambura Paul -vs- Paul Ogari Mayaka & ISLA (Amicus) Petition No. 9 of 221.

199. The 1st, 2nd, 3rd, and 4th plaintiffs are seeking the reliefs based on the doctrine of constructive trust. Whereas the law is that the doctrine of constructive trust can be introduced into land sale agreements, such agreements must not suffer from any defect in law. The sale agreements must be valid and enforceable in law. The sale agreements relied upon by the 1st, 2nd, 3rd, and 4th plaintiffs related to land held in tenancy in common in equal shares. None of the sale agreements is signed by the three tenants in common. The court has already made a finding that the sale agreements suffer from illegality.

200. An issue has been raised on the validity of the 1st defendant's amended defence and counterclaim for lack of a signature. An unsigned pleading cannot be valid in law. The signature of the appropriate person on a pleading is what authenticates the document. Order 2 Rule 16 of the Civil Procedure Rules comes into play.

201. In this suit, the defendants, save for the 3rd defendant, appear to be seeking to be released from the operation of the illegal sale agreements. In Jajbhay -vs- Cassim (1939 AD 537), the Supreme Court of South Africa held that courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract. The court, however, said that in cases where public policy is not foreseeably affected by a grant or refusal of the relief claimed, a court of law might well decide in favour of doing justice between the individual concerned and so prevent unjust enrichment.

202. In Dube -vs- Khumalo SC. 103-87, the South African Court said that in suitable cases, the court will relax the par delictum rule and order restitution to be made in order to prevent injustice on the basis that public policy should properly take into account the doing of simple justice between man and man.

203. In the instant case, if the court were to be strict and or rigid in the application of the ex turpis causa rule, it would result in unjust enrichment on the part of all the defendants herein, who admit receiving consideration from innocent purchasers, putting them into both possession and occupation of the suit land, and failing to transfer any portion thereof, to the purchasers, almost 40 years down the line.

204. In Kenya Airways Ltd -vs-Satwant Singh Flora [2013] eKLR, the court said that if the evidence adduced by the plaintiff proves the illegality, no matter whether the defendant has pleaded the illegality, the court ought not to assist him. In Royal Media Services -vs- IEBC & Others [2019] eKLR, the court held that judicial tradition in this country is to frown upon illegal contracts. In Arvind Shah & 7 Others -vs- Mombasa Bricks (supra), the Supreme Court held that where a party was wronged, another benefited as a result of the wrongdoing, that notwithstanding, courts, as an integral part of the Kenyan judicial system, which are viewed as vehicles for redressing wrongs by adjudicating disputes and administering justice in accordance with *the Constitution*, should dispense substantive justice.

205. Having the guidance of the foregoing caselaw, the court finds that the plaintiffs are not entitled to prayer (a) of the amended amended plaint dated 3/11/2023. Therefore, in the interest of substantive justice, the court issues the following reliefs:

    1. A declaration is hereby issued that the late Erastus Marete, Austin Richard Gathogo and Reuben Wairichu are registered as the proprietors of L.R. No. 13420 (Original No. 5779/3 and 2198/1, as tenants in common in equal shares, hence any sale agreements of the portions of land by anyone of them to third parties required a consent or authority of the other two tenants in common.

    2. The plaintiffs' sale agreements are invalid and unenforceable in law in the absence of signatures, consent, and or approval of the same by the three tenants in common at their execution.

    3. The plaintiffs who genuinely bought and were granted vacant possession by any of the three tenants in common are entitled to a full refund of the consideration from the individual tenant in common with whom they dwelt, in the absence of any agreement of regularisation of the sale and occupation within 3 months from the date hereof, by the three tenants in common.

    4. Upon refund of the full consideration in the absence of an agreement to regularize the occupation, the plaintiffs, bona fide before the court, shall vacate the suit parcel of land, in default of which the three tenants in common shall issue an eviction notice in accordance with the law.

5. Each party to bear its own costs for the suit.

206. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 1ST DAY OF OCTOBER 2025.

In the presence of:

Court Assistant - Dennis

Mr. Kiarie for the plaintiffs present

Bikundo for the plaintiffs

Mr. Kaosa for Nasike for the 3rd defendant present

Majanga for the 1st defendant present

Wambani for the 2nd defendant present

HON. C.K. NZILI

JUDGE, ELC KITALE.