



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 899 OF 2015**

**(FORMERLY HCCC NO. 127 OF 2010)**

JOASH ONYANGO OKELO ..... 1<sup>ST</sup> PLAINTIFF  
PETER MWOSO O. OWANO.....2<sup>ND</sup> PLAINTIFF  
MICHAEL OPES NYALUO.....3<sup>RD</sup> PLAINTIFF  
JEREMIAH OSODO OSEWE.....4<sup>TH</sup> PLAINTIFF  
MAURICE ODOGO ODERA.....5<sup>TH</sup> PLAINTIFF  
SILVANUS OTIENO DAJO.....6<sup>TH</sup> PLAINTIFF  
DAVID OUMA ALOKA.....7<sup>TH</sup> PLAINTIFF  
RICHARD AWITI OGIRA.....8<sup>TH</sup> PLAINTIFF  
LUDIA ANYANGO ONYANGO.....9<sup>TH</sup> PLAINTIFF  
ROSELIDA OKAKA ADOGO.....10<sup>TH</sup> PLAINTIFF  
JOSHUA OCHIENG ADEE.....11<sup>TH</sup> PLAINTIFF  
ROSEBELA AMOLO AUDI.....12<sup>TH</sup> PLAINTIFF  
MOSES ONYANGO ODERA.....13<sup>TH</sup> PLAINTIFF  
PETER OURU ANAM.....14<sup>TH</sup> PLAINTIFF  
GEORGE OCHIENG OKELLO.....15<sup>TH</sup> PLAINTIFF  
PAUL OMBOK.....16<sup>TH</sup> PLAINTIFF  
MAURICE OKOTH OTIENO.....17<sup>TH</sup> PLAINTIFF  
CHARLES ADEM ADEM.....18<sup>TH</sup> PLAINTIFF  
NOAH JUMA OKELLO.....19<sup>TH</sup> PLAINTIFF  
NICHOLAS OTIENO ONGOMBE.....20<sup>TH</sup> PLAINTIFF  
ROSELIDA ALUOCH OPUNDO.....21<sup>ST</sup> PLAINTIFF

THOMAS OLUOCH MUOSO.....	22 <sup>ND</sup> PLAINTIFF
HARUN ANAM OFINYO.....	23 <sup>RD</sup> PLAINTIFF
NELSON ONYANGO OMBOGO.....	24 <sup>TH</sup> PLAINTIFF
MARTIN ODI AWANDU.....	25 <sup>TH</sup> PLAINTIFF
HESBON OMONDI APIYO.....	26 <sup>TH</sup> PLAINTIFF
JOHANA ATIENO AUMA.....	27 <sup>TH</sup> PLAINTIFF
FRANCIS OYUCHO OYUCHO.....	28 <sup>TH</sup> PLAINTIFF
GILBERT ONYANGO OLUOCH.....	29 <sup>TH</sup> PLAINTIFF
PETER AJWALA OJOO.....	30 <sup>TH</sup> PLAINTIFF
VITALIS ABWAO WAYUMBA.....	31 <sup>ST</sup> PLAINTIFF
HELIDA MARENYA ATIENO.....	32 <sup>ND</sup> PLAINTIFF
NATHANIEL ONDEGO AJWANG.....	33 <sup>RD</sup> PLAINTIFF
ISABELA OGUNDE OYUCHO.....	34 <sup>TH</sup> PLAINTIFF
GABRIEL OYUCHO.....	35 <sup>TH</sup> PLAINTIFF
JOHN ORWA OMOLO.....	36 <sup>TH</sup> PLAINTIFF
JACKOB OKOLA OGWEYO.....	37 <sup>TH</sup> PLAINTIFF
THADEUS ORWA LWEYA.....	38 <sup>TH</sup> PLAINTIFF
SAMUEL OTIENO AYIEGA.....	39 <sup>TH</sup> PLAINTIFF
MARIKUS ODHIAMBO MUOSO.....	40 <sup>TH</sup> PLAINTIFF
ELLY AGUMBA OWANO.....	41 <sup>ST</sup> PLAINTIFF
PETER OTIENO.....	42 <sup>ND</sup> PLAINTIFF
CHARLES OMONDI OMWARE.....	43 <sup>RD</sup> PLAINTIFF
PAUL KIPINDA NDUNGA.....	44 <sup>TH</sup> PLAINTIFF
MOSES OLAL ONYANGO.....	45 <sup>TH</sup> PLAINTIFF
NICANOR OTIENO AUMA.....	46 <sup>TH</sup> PLAINTIFF
ERICK OCHIENG NYABUAN.....	47 <sup>TH</sup> PLAINTIFF
TERESIA ONYANGO ALOO.....	48 <sup>TH</sup> PLAINTIFF
AMOS OTIENO NYALUO.....	49 <sup>TH</sup> PLAINTIFF
MANASES OKUKU AWUOR.....	50 <sup>TH</sup> PLAINTIFF
JONATHAN ONGONGA AUMA.....	51 <sup>ST</sup> PLAINTIFF

KEN OCHIENG ONGONGA.....	52 <sup>ND</sup> PLAINTIFF
BEN OMONDI OKELO.....	53 <sup>RD</sup> PLAINTIFF
RISPER OCHIENG OSEWE.....	54 <sup>TH</sup> PLAINTIFF
ALOICE OPIYO ACHIENG.....	55 <sup>TH</sup> PLAINTIFF
GEORGE OTIENO OWANO.....	56 <sup>TH</sup> PLAINTIFF
NAFTAL OWAK ONDIGO.....	57 <sup>TH</sup> PLAINTIFF
GEORGE ODOK ALANDE.....	58 <sup>TH</sup> PLAINTIFF
HEZEKIA ODHIAMBO AUMA.....	59 <sup>TH</sup> PLAINTIFF
CHRISTOPHER ONDULA OCHUNG.....	60 <sup>TH</sup> PLAINTIFF
PAMELA ATIENO ODERA.....	61 <sup>ST</sup> PLAINTIFF
AFLIN ADHIAMBO JUMA.....	62 <sup>ND</sup> PLAINTIFF
ROSELYNE AUA OUMA.....	63 <sup>RD</sup> PLAINTIFF
MARIA ONDIGO.....	64 <sup>TH</sup> PLAINTIFF
JARED OUKO ONYANGO.....	65 <sup>TH</sup> PLAINTIFF
PETER ONYANGO ONYANGO.....	66 <sup>TH</sup> PLAINTIFF
SUSANA ADHIAMBO ODERA.....	67 <sup>TH</sup> PLAINTIFF
FREDRICK JUMA AWANDO.....	68 <sup>TH</sup> PLAINTIFF
EDWARD ODHIAMBO OKELO.....	69 <sup>TH</sup> PLAINTIFF
ZEDEKIA ONYANGO OPUNDO.....	70 <sup>TH</sup> PLAINTIFF

**VERSUS**

KENYA WILDLIFE SERVICE.....	1 <sup>ST</sup> DEFENDANT
THE MINISTER OF FORESTRY & WILDLIFE.....	2 <sup>ND</sup> DEFENDANT
THE MINISTER OF LANDS AND SETTLEMENT.....	3 <sup>RD</sup> DEFENDANT
THE ATTORNEY GENERAL.....	4 <sup>TH</sup> DEFENDANT
THE COUNTY COUNCIL OF KISUMU.....	5 <sup>TH</sup> DEFENDANT
THE NATIONAL LAND COMMISSION.....	6 <sup>TH</sup> DEFENDANT

**JUDGEMENT**

1. Joash Onyango Okelo and 69 Others, the Plaintiffs, filed this suit on their own behalf and on behalf of members of Ndere Island Farmers & Conservation Group, against Kenya Wildlife Service, The Minister of Forestry & Wildlife, The Minister of Lands & Settlement, The Attorney General, The County Council of Kisumu and The National Land Commission, the 1<sup>st</sup> to 6<sup>th</sup> Defendants respectively, through their plaint dated the 2<sup>nd</sup> August 2010, and amended on the 23<sup>rd</sup> October 2014, seeking for the following;

- (a) “A declaration that actions of the actions (sic) or omissions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant in taking possession of the

Lands comprised in the Island and their occupation thereof are illegal, un-procedural, unconstitutional and fraudulent and in breach of international law.

(b) A declaration that the gazettment of the land comprised in the Island as Ndere Island National Park was irregular, illegal and unconstitutional.

(c) A declaration that the acts and omissions of the 5<sup>th</sup> Defendant constitute or constituted a breach of trust.

(d) A declaration that the 1<sup>st</sup> Defendant has acted in contravention of its undertaking to the Plaintiffs since taking possession of the lands comprised in the Island and an order directing the 5<sup>th</sup> Defendant to act to safeguard the Plaintiffs' interests as required by the law.

(e) An order directing the 1<sup>st</sup> Defendant to furnish an account of the income it has earned from Ndere Island National Park since the time of its gazettment as a National Park.

(f) An order directing the physical and legal return to the Plaintiffs of all the lands comprised in the Island either directly or through the 5<sup>th</sup> Defendant.

(g) An order directing the 6<sup>th</sup> Defendant to facilitate and oversee the registration of the plaintiffs as proprietors of the suit property.

(h) In the alternative –

i) Payment of Compensation for the land seized at current market rates or otherwise in accordance with the applicable laws.

ii) Damages for trespass and mesne profits.

(i) Costs of the suit.”

2. The Plaintiffs among others, avers as follows;

· That they are members by descent and birth of the Seme clan who historically were at all material times either by themselves or those whom they customarily descend, resided in Ndere Island in Lake Victoria within the Jurisdiction of the 5<sup>th</sup> Defendant.

· That the Plaintiffs and those through whom they claim owned defined parcels of land under and in keeping with Luo Customary laws, demarcated by the community. That they had homes, practiced their customs, buried their dead, grew various crops, kept their livestock, engaged in fishing, used the Island as a docking area for their boats and shelter or refuge during bad weather in the lake.

· That sometimes in the 1978, the Plaintiffs permitted the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to bring in animals, especially the Impala, which were roaming around Kisumu Town, to the upper part of the Island on the understanding that the Plaintiffs would continue occupying the lower part and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants would build hotels through which they would benefit in employment. That the Government would also pay royalties, improve infrastructure, set up schools, hospitals and undertake rural electrification among others.

· That though the 3<sup>rd</sup> Defendant had in 1982 advised the Plaintiffs and residents of neighbouring Islands to prepare for land adjudication, the exercise was not completed in the Island. That instead, the 3<sup>rd</sup> Defendant in cahoots with 1<sup>st</sup> and 2<sup>nd</sup> Defendants asked the Plaintiffs to remove their animals from the Island ostensibly to allow the adjudication process be completed with ease. That the Plaintiffs complied but continued to live on the Island co-existing with the animals that had been introduced.

· That in 1986, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants violently, and at gun points, removed the Plaintiffs from the Island claiming that it had become a National Park. That the land was not compulsorily acquired as provided for by the Land Acquisition Act Chapter 295 of the Laws of Kenya as read with Section 75 of the Constitution.

· That there was no setting apart of the land under Sections 117 and 118 of the Constitution before the land was taken from them as no notice was given to the 5<sup>th</sup> Defendant who held it in trust for them. That the 5<sup>th</sup> Defendant did not give notice in the gazette as required by Section 7 of the Trust Land Act Chapter 298 of Laws of Kenya and that no compensation was assessed and deposited as required under Section 9 of the said Act. That any purported setting aside by the 5<sup>th</sup> Defendant under Section 117 (1) of the Constitution was illegal for failure of complying with Section 13 (2) of the Trust Lands Act Chapter 288 of Laws of Kenya.

· That the conduct of the 5<sup>th</sup> Defendant to allow the 1<sup>st</sup> to 3<sup>rd</sup> Defendants to forcibly enter into the land was a serious breach of trust and duty owed to the Plaintiffs by failing to have the adjudication completed, and Plaintiffs issued with titles for their portions of land.

· That the 1<sup>st</sup> Defendant has since taking over the Island completely shut the Plaintiffs from the land and failed to pay any form of compensation.

· That the Plaintiffs have since established that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant caused the Island to be gazetted as a National Park in 1986 under L. N. No. 368 without consulting them which is gross contravention of the Wildlife (Conservation and Management) Act Chapter 376 of the Laws of Kenya and hence illegal, null and void.

· That the Defendants conduct constitute a deprivation of the Plaintiffs rights as enshrined in the Universal Declaration of Human Rights and the African Charter on Human and Peoples Rights to which Kenya is a signatory.

3. The 1<sup>st</sup> Defendant opposed the Plaintiffs' claim through their statement of defence filed on the 20<sup>th</sup> September 2010 among others, averring as follows;

· That the Plaintiffs are not members by descent and birth of the Seme clan and were not residents of Ndere Island at any time.

· That it was not involved in disinherit the Plaintiffs.

· That there was no illegal, unconstitutional or fraudulent scheme against the Plaintiffs, and that it was not a party to remove the Plaintiffs domestic animals from the Island to give way for adjudication process.

· That the gazette of the suit land as a National Park was legal, proper and legitimate for the National good and public interest.

· That the Plaintiffs voluntarily agreed to the surrender of the land.

· That the suit is statute barred.

4. The 5<sup>th</sup> Defendant also opposed the Plaintiffs' case through their statement of defence filed on the 6<sup>th</sup> October 2010 averring as follows among others:-

· That it did not hold the suit land in trust for the Plaintiffs or that the suit lands were vested in them for the use and benefits of the Plaintiffs.

· That it did not owe the Plaintiffs any duty and trust when the 1<sup>st</sup> to 3<sup>rd</sup> Defendants forcibly entered onto the suit land.

· The 5<sup>th</sup> Defendant denies that the Plaintiffs had customary law rights that subsists to date over the suit land.

· They also denied that the Plaintiffs had suffered any damage or loss.

5. The 2<sup>nd</sup> to 4<sup>th</sup> and 6<sup>th</sup> Defendants did not file statements of defence. The 2<sup>nd</sup> to 4<sup>th</sup> Defendants participated in part of the hearing through their Counsel on record.

6. The hearing commenced on the 9<sup>th</sup> December 2013 when Moses Olal Onyango, the 45<sup>th</sup> Plaintiff, testified as PW1. Then followed Helinda Malenyo Atieno the 32<sup>nd</sup> Plaintiff, as PW2, Hesborn Omondi Opiyo, the 26<sup>th</sup> Plaintiff, as PW3 and Nicholas Otieno Ongombe, the 20<sup>th</sup> Plaintiff, as PW4. Peter Mwasu Ochieng the 2<sup>nd</sup> Plaintiff, testified as PW5. The testimony of PW1 was that he used to live on the lower part of the Island before it became infested with tsetse flies. That in the year 1982, adjudication was done and people were shown their portions of land. That wildlife was later introduced on the Island without consulting the people or compensating them. That the people were removed from the Island without benefiting from the wildlife. PW2 testified that she was married in Seme and moved out of the Island in 1986. She told the court that she knows the boundaries of their land. PW3 told the court that the Island was their ancestral land and that they used to cultivate on it before they were moved out. That adjudication of the land on the Island has not been done, and that they are not allowed back onto the Island except as paying visitors. PW4 told the court that the people living on the Island agreed to leave after the then Minister of Wildlife requested them to do so, and promised them employment, hospital, electricity and other facilities. That later on, the people were evicted from the Island without being consulted. PW5 is the secretary of Ndere Island Farmers and Conservation Group. He produced the certificate for the group's registration. He testified that from the 1982, the residents of the Island co-existed with the wild animals until 1986, when the 1<sup>st</sup> Defendant demanded that the people leave as the Island had been gazetted as a National park. That the residents were forcefully removed without compensation. He produced copies of letters they had done to various authorities seeking for assistance without getting any. He told of a delegation that was led by the late Ndolo Ayah to the then President. That the President advised them to take the matter up with the 5<sup>th</sup> Defendant so that the land could be adjudicated and registered with the residents, but nothing happened after that, as the 1<sup>st</sup> Defendant had already taken over the Island.

7. The defence case commenced on the 15<sup>th</sup> May 2017 with Amos Otieno Nyaoro, a Senior Sergeant with the 1<sup>st</sup> Defendant, testifying as DW1. He produced the copy of the L.N. No. 3552 of 7<sup>th</sup> July 1987 under which Ndere Island was, after consultation with the 5<sup>th</sup> Defendant was set apart, for Ndere Island Game Park, as exhibit. He also produced copies of letters dated 4<sup>th</sup> March 1985, 7<sup>th</sup> January 1985, 11<sup>th</sup> February 1993 and 18<sup>th</sup> February 1986 on the engagement with the various authorities over the Island. DW1 also produced L. N. No. 368 of 3<sup>rd</sup> November 1986 declaring Ndere Island a National Park. That he also produced letters dated 22<sup>nd</sup> May 1992, G.N. No. 1936 dated 21<sup>st</sup>

May 1992, letters dated 26<sup>th</sup> May 1992 and the 20<sup>th</sup> November 1992 on the intention to degazette the Island as a National Park and the decision to retain it as such. The witness also produced a map of the Island and copy of a letter of allotment under reference No. 83697/60 dated 2<sup>nd</sup> June 2011 allotting “**L.R. No. 28036 – Ndere National Park – Kisumu**” to the Kenya Wildlife Service. The allotment letter shows the land is 408.17 hectares and the term of the lease is 99 years from 1<sup>st</sup> March 2001. DW1 testified that the setting apart of the Island was legally done and the 1<sup>st</sup> Defendant does not owe the Plaintiffs any compensation. He added that the people have benefited from employment opportunities and other social amenities.

8. The learned Counsel for the Plaintiffs, 1<sup>st</sup> and 5<sup>th</sup> Defendants filed written submissions dated 3<sup>rd</sup> October 2017, 2<sup>nd</sup> November 2018 and 30<sup>th</sup> May 2018 respectively. The Counsel for the Plaintiffs then filed a reply to the 1<sup>st</sup> and 5<sup>th</sup> Defendants’ submission dated the 4<sup>th</sup> December 2018. The following is a summary of the said submissions;

**PLAINTIFFS SUBMISSIONS:**

- That there was no notice given to the 5<sup>th</sup> Defendant that Ndere Island was to be set aside and that the 5<sup>th</sup> Defendant did not give notice or cause such notice to be published in the Kenya Gazette. That no compensation was assessed and deposited prior to setting aside and therefore the process did not comply with the law and hence was illegal.
- That the gazattement of Ndere Island as a National Park was done without consulting the plaintiffs and was hence illegal and should be reversed.
- That their chronology of events and facts are not challenged as the 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants chose not to participate in these proceedings.
- That the Island was set apart without considering that it was trust land vested on the 5<sup>th</sup> Defendant for the benefit of the Plaintiffs who were subsequently violently evicted from their ancestral land.
- The learned Counsel cited the case of Funzi Island Development Limited & Others vs County Council of Kwale & Others [2014] IEA 183 where the Court of Appeal pronounced itself on the issue of setting aside of trust land. The court in that case observed that the land subject matter of that case was “...not trust land. It was, and still is, partly forest land and partly beach land not available for alienation” to the Assistant Minister and later to the third respondent which allocation was found to be fraudulent. The Court further observed that a registered proprietor’s title to an allocated land is only absolute and indefeasible if the allocation was legal and regular.
- The Counsel also referred to the case of John Muruge Mbogo vs Chief of Kenya Defence Forces & Another [2018] eKLR on the issue of limitation where the court held that there was no provision in the Constitution or any other law prescribing the period within which to file a claim challenging violation of one’s constitutional and human rights.
- The learned Counsel also referred to several other decided cases, The Universal Declaration of Human Rights, The Banjul Charter, The Native Lands Trust Ordinance and The African Commission Complaint No. 276 of 2003.

**1<sup>ST</sup> DEFENDANT’S SUBMISSIONS:**

- That the suit was time barred. The learned counsel cited the decision in Kenya Orient Insurance Ltd vs Senenarro Ole Kurraro & 7 Others Kajiado [2016] eKLR.
- That the Island was lawfully made a National Park and the Plaintiffs do not have the *locus standi* to file this suit.

**5<sup>TH</sup> DEFENDANT’S SUBMISSIONS:**

- That the suit was time barred under Section 7 of the Limitation of Actions Act.
- That the Plaintiffs have failed to proof ownership of the suit land as no documentary evidence was availed.
- That the Plaintiffs have not fulfilled the requirements of Article 63 of the Constitution for a claim on Community Land which requires identification of communities in terms of ethnicity, culture or similar community interests for a finding in their favour to be made.
- That the Ndere Island had not been declared Community land through statute and referred to the case of Statrose Ayama & 11 Others vs Barclays Staff Retirement Scheme Petition No. 63 of 2010 Nairobi.
- The Learned Counsel cited the case of William Gatuhi Murathe vs Gakuru Gathimbi [1998] eKLR among others and submitted that the suit was filed after 32 years, and hence time barred, as causes of action based on contract should be filed within six (6) years under Section 4 (1) of the Limitation of Actions Act.

9. The following are the issues for the Court’s determinations;

- a) Whether the Plaintiffs have adduced sufficient evidence to be entitled to the declaratory orders/prayers sought.
- b) Whether the Plaintiffs have adduced sufficient evidence to fault the setting apart and gazetting of the Island as a National Park.
- c) Whether Plaintiffs are entitled to any compensation.
- d) Whether the Plaintiffs' suit is statute time barred.
- e) Whether the Plaintiffs are entitled to general damages, mesne profits and if so, how much

10. The court has carefully considered the pleadings filed by the Plaintiffs, 1<sup>st</sup> and 5<sup>th</sup> Defendants, oral and documentary evidence by PW1 to PW5 and DW1, written submissions by Counsel for the Plaintiffs, 1<sup>st</sup> and 5<sup>th</sup> Defendants, plus the decided cases and provisions of the law cited therein, and come to the following findings;

- a) That from the totality of the evidence of PW1 to PW5, the residents of the Ndere Island were engaged and aware of the discussions taking place from 1978 leading to the introduction of wild animals onto the upper part of the Island. That it was because of the said awareness and engagement that they readily agreed to the introduction of the animals on the upper parts and to co-exist them for a number of years up to 1986 when they left the Island.
- b) That the evidence adduced by the Plaintiffs through PW1 to PW5, leads the court to the finding that the residents of the Ndere Island were only asked to leave the Island after it was set apart and gazetted as a National Park. That by that time, some of the people had already left for the main land and only those who had not heeded the directive were forcefully moved out.
- c) That the evidence adduced by the PW1 to PW5, and DW1, confirms that Ndere Island was trust land vested in the 5<sup>th</sup> Defendant until it was set apart through Gazette Notice No. 3552 of 31<sup>st</sup> July 1987 by the then Commissioner of Land. That the schedule for setting apart the Island that is attached gives the purpose as "Ndere Island Game Park." That there is no evidence availed before this court that the setting apart was ever legally challenged through judicial review proceedings by the Plaintiffs, the 5<sup>th</sup> Defendant or any other person.
- d) That before the setting apart of the Ndere Island as in (c) above, the land had not been adjudicated or registered but had been gazetted as a National Park vide L.N. No. 368 of 3<sup>rd</sup> November 1986, after consultation with the 5<sup>th</sup> Defendant. That after the setting apart in 1987, there was concerted effort to have the gazette ment reversed as confirmed by PW5, who told of a delegation led by the late Ndolo Ayah to the then President in 1992, and the letters dated 22<sup>nd</sup> May 1992, 26<sup>th</sup> May 1992, 25<sup>th</sup> June 1992, 18<sup>th</sup> June 1992 and 20<sup>th</sup> November 1992 to and from the various offices. That the last letter contains the position or decision of the Ministry of Tourism and Wildlife that-

**1. "That the National Park will not be degazetted as had earlier been intended.**

**2. That as had been the historical tradition, the people near the National Park should be allowed to continue collecting grass for thatching their houses. This should be done on a controlled basis.**

**3. That the fishermen should be allowed to continue with their trade as before.**

**4. That as a temporary arrangement, you withdraw your men from the National Park and then allow the Provincial Administration to look after the National Park on your behalf ensuring that no people will settle on it. The men you withdraw from this National Park may be posted to areas where their services are more urgently required."**

That from the foregoing, and considering that there is no documentary evidence availed by the Plaintiffs to confirm their claim that they had been promised employment, infrastructural developments or that their land would be given back, the court finds the setting apart gazette ment of the Island as a National Park had been a final decision which to date has also not been legally challenged through Judicial review by the Plaintiffs, 5<sup>th</sup> Defendant or any other person.

- e) That the letter dated 11<sup>th</sup> February 1993 by the District Warden, Kisumu District to the District Land Adjudication Officer, Kisumu under the reference "**Adjudication of Ndere Island "at paragraph 2 referred to "Council (Min. 13/83 of 2<sup>nd</sup> November 1983)"** under which Ndere Island was set aside (apart). That even though the said minute was not availed to the court, it is obvious that the 5<sup>th</sup> Defendant as the entity vested with the land in dispute before the setting apart has never challenged the gazette notices No. 3552 of 31<sup>st</sup> July 1987 and 368 of 3<sup>rd</sup> November 1986. The foregoing plus the contents of the letters dated 4<sup>th</sup> March 1985 by the Parks superintendent to the Game Warden about monthly visits and the one dated 18<sup>th</sup> February 1986 by the District Warden, Kisumu to Councilor Jeckonia Awundu Ongong'a referring to the councillor's letter dated the 29<sup>th</sup> October 1985, leads the court to further conclude that there was sufficient consultation before the setting apart and gazette ment of Ndere Island as a National Park contrary to the Plaintiffs' claim. That the letter dated the 18<sup>th</sup> February 1986 confirms what the people, who the court takes to have included the Plaintiffs or those that they trace their ancestry to, were seeking at that time, and that was compensation. That from the testimony of PW1 to PW5 and DW1, it appears no compensation was ever agreed or paid. The fact that only compensation was being pursued in 1985/1986 leads the court to conclude that the setting apart of the Island, and gazette ment of a National Park was not being challenged then. That the challenge mounted by the Plaintiffs through this suit against the setting apart and gazette ment is obviously coming outside the period prescribed by **Sections 4 and 7 of the Limitations of Actions Act Chapter 22 of Laws of**

**Kenya.** That as the suit was filed in 2010 challenging the setting apart and gazettelement done in 1986 and 1987, the suit is therefore statute time barred.

f) That whereas the Plaintiffs, as members of the Same clan, had communal rights over the Ndere Island for the period it was vested in the 5<sup>th</sup> Defendant in trust, that right was extinguished or ended when the land was set apart through the gazette notice of 1987. The court of Appeal in **Citson Energy Limited vs Francis Chachu Ganya & 6 Others [2017] eKLR** held as follows on the effect of setting apart of trust land;

*“[23] By Section 117 (2) of the repealed Constitution the setting apart of land by Council extinguished the rights, interest, or other benefits previously vested in the community as Section 117 (3) provided that the Council could thereafter make grants or dispositions of any estate interest or right to any person or authority for whose use and occupation it was set apart. The Gazette Notice issued under Section 13 (3) of TLA of the repealed Constitution after the approval by Council of the proposal to set apart land was the final step in the mandatory statutory process of setting apart trust land. The implementation of the setting apart would follow by execution of lease and the grant of lease. The issuance of gazette notice had legal consequences. By Section 69 of the Interpretation and General Provisions Act and by Section 85 of the Evidence Act, the copy of the notice published in the Gazette is prima facie evidence in all courts and for all purposes whatsoever of the making and tenor of such notice. It is prima facie evidence that the Council had legally set apart the specified Trust Land for use and occupation of Gitson with the result that the previous rights of Bubisa Community were extinguished from the date of the notice.”*

That on the same issue of setting apart of Trust Land, the **Report of the Commission of Inquiry [The Ndungu Report]** into the illegal/irregular (Allocation) of public land at page 52 under the heading of “**Trust Land**” observed as follows;

*“The only way in which Trust land can be legally removed from the communal ownership of the people is through adjudication and registration or setting apart. Adjudication and registration removes the particular lands from the purview of community ownership and places them under individual ownership. Setting apart removes the Trust Lands from the dominion of community ownership and places them under the dominion of public ownership.”*

That the lands comprised of Ndere Island, the suit land, having been set apart in 1987 was hence removed from the Plaintiffs community’s purview, and any resident of the said land who claimed to have been entitled to compensation under **Section 8 of the Trust Lands Act** was required to apply for the same to the District Commissioner, who after consultation with the Divisional Board, was to make an award if satisfied or reject it. That there is no evidence tendered whether the Plaintiffs herein or those they represent lodged any claims as required at that time and it is too late now to lodge any such claim in view of the **Limitation of Actions Act** provisions. That had the Plaintiffs pursued their claim through a constitutional petition, the provisions of **Limitation of Actions Act** would not possibly have caught up with them in view of the finding in **John Muruge Mbogo vs Chief of the Defence Forces & Another [2018] eKLR at page 68.**

g) That the Plaintiffs applied for, and obtained leave of the court to bring this suit on their own behalf and on behalf of others through the application dated 2<sup>nd</sup> August 2010 that was on the 19<sup>th</sup> June 2013 allowed and an order issued on the 2<sup>nd</sup> August 2013. The submission by the Defence that the Plaintiffs are without **locus standi** in this suit therefore fails.

h) That on the prayers of damages for trespass and mesne profits, the court having found that the community rights and interests over Ndere Island was extinguished after the land was set apart for the 1<sup>st</sup> Defendant, with the consent of the 5<sup>th</sup> Defendant who held it in trust for them cannot be sustained. The 1<sup>st</sup> Defendant has since received an allotment letter dated the 2<sup>nd</sup> June 2011 after adjudication, and cannot be a trespasser on the suit land or be liable for any damages. That even though the Plaintiffs did not quantify and plead the mesne profits in their plaint and amended plaint as required of special damages, that claim is not available to them as their rights and interests over the suit land was extinguished upon the land being set apart and gazetted for 1<sup>st</sup> Defendant in 1986 and 1987.

i) That though the court finds that the Plaintiffs claim fails for among others, statute time barred, and though under **Section 27 of Civil Procedure Act Chapter 21 of Laws of Kenya**, the 1<sup>st</sup> and 5<sup>th</sup> Defendants would be entitled to costs, the court is of the view that this is a proper case where each party should meet their own costs so as to hopefully bring closure to this matter.

11. That from the foregoing, the court finds that the Plaintiffs have failed to prove their case against the Defendants to the standard required by the law. The Plaintiffs’ claim is therefore dismissed with an order that each party do meet their own costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF MARCH 2019

**In the presence of:**

Plaintiffs 5<sup>TH</sup> & 40<sup>TH</sup> present

Defendants Absent

Counsel Mr. Otieno D and Mr. Yogo for the

Plaintiffs and 5<sup>th</sup> Defendant respectively.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**