

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC NO. 32 OF 2020

ESTATE OF NGIGI KARANJA
(Represented by
NJOROGE NGIGI KARANJA)-----
PLAINTIFF

VERSUS

GEOFFREY NGOTHO NJOROGE-----1ST
DEFENDANT
ESTATE OF NDUNG’U NJOROGE
(Represented by
JAMES KARIUKI NDUNG’U)-----2ND
DEFENDANT

JUDGMENT

1. Through an Amended Plaintiff dated **21/03/2023** the Plaintiff sued the Defendants, who were his cousins. He sought the following reliefs:

- (1) General and aggravated damages for trespass to land;**
- (2) A mandatory injunction/eviction order;**
- (3) A permanent injunction;**
- (4) Costs;**
- (5) Interests and**
- (6) Any other relief the honourable court may deem fit.**

2. The Plaintiff’s case is that his father, the late Ngigi Karanja, was the owner of land parcel **Trans-Nzoia/Cherangani/84** measuring **8.8 Hectares.**

He averred that although the Defendants were awarded 8 acres of the suit land by the Kaplamai Land Disputes Tribunal at the instigation of the 1st Defendant, which award was subsequently adopted as an order of the court in **Kitale SPMCC No. 28 of 2002**, the award was later quashed on appeal (*sic*) by **Kitale HC Misc. Application No. 67 of 2003** on **20/9/2005**.

3. The Plaintiff's further case was that notwithstanding his protests to the County Surveyor, the Defendants proceeded to enforce the decree in **Kitale SPMCC No. 28 of 2002** and excised 8 acres from the suit land which they occupied.
4. According to the Plaintiff, the excision was unlawful and amounted to trespass, as the decree in **Kitale SPMCC No. 28 of 2002** had already been quashed. He further maintained that the judgment was barred by **Section 4(4)** of the Limitation of Actions Act, and the execution was undertaken without compliance with **Order 22 Rule 18** of the Civil Procedure Rules. Further, the Court executing the decree was not involved.

5. In response, the 1st Defendant filed a Defence and Counterclaim dated **30/7/2020**. He maintained that the Defendants were the rightful owners of 8 acres of the suit property, asserting that it was their grandfather, the late Njoroge Kariuki, and not the Plaintiff's father, who was the lawful owner of the suit land. It was his contention that the Plaintiff's father had taken advantage of his position as administrator of Njoroge Kariuki's Estate to illegally transfer the land to himself.
6. The 1st Defendant further averred that it was the Plaintiff who had trespassed onto the land. In his Counterclaim, he sought **a declaration that the family of the late Ndung'u Njoroge was entitled to 8 acres of Trans-Nzoia/Cherangani/84, eviction orders against the Plaintiff, and costs of the Counterclaim.**
7. The 2nd Defendant, through a Defence and Counterclaim dated **1/12/2022**, aligned himself with the 1st Defendant's case. He asserted that the Plaintiff was not the legal administrator of the Estate of Ngigi Karanja, and that the transfer of the suit land to Ngigi Karanja was unlawful. According to him, the rightful owner of the land was their

grandfather, Njoroge Kariuki, who also owned **Lari/Magina/244**. He further averred that the family of Ndung'u Njoroge had resided on the land for over **55** years.

- 8.** The 2nd Defendant also contended that the Plaintiff's claim for trespass could not be sustained in the absence of a survey. In his Counterclaim, he maintained that it was the Plaintiff who had trespassed onto the land. He urged the Court to declare that he and the family of Ndung'u Njoroge were entitled to half of the suit property. He sought **eviction of the Plaintiff from the 11 acres of the land, together with costs of the Counterclaim and any other relief the Court may deem fit.**
- 9.** In rejoinder, the Plaintiff filed an Amended Reply to Defence and Defence to Counterclaim dated **21/3/2023**. He maintained that he was the valid holder of a Grant *Ad Litem* in respect of the Estate of his father, Ngigi Karanja. He contended that it was his father who purchased the land and registered it in his grandfather's name, thus upon the latter's death, the land rightfully devolved to his father as the administrator without objection from the family.

- 10.** Furthermore, the Plaintiff asserted that the 1st Defendant's claim for **8 acres** was time barred. He maintained that the 1st Defendant lacked locus as he wasn't the administrator of the Estate of Ndung'u Kariuki. The Plaintiff averred that after the death of Njoroge Kariuki, his father naturally became the sole heir of plot **No. 84** in Cherengani being the sole purchaser.
- 11.** To buttress his position, the Plaintiff averred that his father had successfully sought eviction orders against the Defendants before the Makutano Land Disputes Tribunal, whose decision was adopted in **Kitale SPMC Land Case No. 123 of 1995**, and no appeal had been filed against that decision. As such he averred that the 2nd Defendant's claim for **11 acres** was *res judicata*. He prayed for the claim in the Plaint to be upheld and the Counterclaims to be dismissed with costs.
- 12.** In support of his case the Plaintiff called two witnesses. Testifying as **PW1**, one **Lecticia Asolo Ekisa**, a Court Administrator II based in Kitale Law Courts then, testified that she had in her custody several files relating to the present dispute. She explained that the first file was

Kitale SPMCC Land Case No. 122 of 1995 between Philip Njoroge and Samuel Karanja. According to her, the matter had initially been before the Land Disputes Tribunal and was subsequently adopted by the SPM Court in Kitale on **1/9/1995**. The award held that Plot **No. 84** Cherangani Settlement legally belonged to Samuel Ngigi Karanja, that Philip Njoroge could not inherit land in Cherangani as his inheritance lay in Kiambu where his father's land was situated, and that Philip Njoroge already had land in Lari, Kiambu. She produced the file as **PEXH 1**.

- 13. PW1** further testified regarding a second file, being, **Kitale SPMCC Land Case No. 123 of 1995**, in which was a claim pitting Samuel Ngigi Karanja against Jesse Njoroge and James Kariuki. The court adopted the Tribunal's award confirming that Plot **No. 84** Cherangani belonged to Samuel Ngigi Karanja (the Plaintiff's father), who had documents proving it was his inheritance. The Tribunal also found that the plot had been transferred to him by the High Court in Nairobi, and that Jesse Njoroge and James Kariuki should vacate the land since they already had their own plots. Pursuant to this decision, an

eviction order was issued on **18/1/2002**, and the decree was forwarded to the Land Registrar, Kiambu, and the District Commissioner, Kitale, vide letters dated **8/5/1996** and **30/11/1995** respectively. She produced this file as **PEXH 2**.

- 14.** As for the third file **PW1** testified that it was **Kitale CMC Land Case No. 28 of 2002**, in which Ngigi Karanja had sued Geoffrey Karanja. She testified that the court adopted the Tribunal's award in the following terms: Ngigi Karanja was to receive **14 acres** of Plot **No. 84** Cherangani Settlement Scheme, while the family of the late Ndung'u Njoroge, including Geoffrey Njoroge, was to receive **8 acres**. It was also ordered that survey fees be shared among the parties to facilitate issuance of title deeds. She produced this file as **PEXH 3**. Following this decree issued on **21/5/2003**, **PW1** testified, the decision was challenged via **Kitale HC Misc Application No. 12 of 2003** in which Ngigi Karanja was granted leave to apply for orders of certiorari. Later, in **Kitale HC Misc Application No. 67 of 2005**, the High Court issued an order of certiorari quashing the Kaplamai Land Disputes

Tribunal's decision adopted in **Kitale SPMCC No. 28 of 2002**.

15. PW1 however, stated that she was unable to trace the complete record for **Kitale HC Misc. Application No. 67 of 2005**.

16. The second witness, **PW2, Ngigi Njoroge Karanja**, the Plaintiff, adopted his two witness statements dated **17/6/2020** and **9/6/2023**. He testified that the suit property was originally purchased by his father but registered in the name of his grandfather, Njoroge Kariuki. He explained that his grandfather had two wives, Wambui Njoroge and Wamaitha Njoroge. With Wambui, he had five children, including two sons, Ngigi Njoroge (PW2's father) and Ndung'u Njoroge. With Wamaitha, he had a son, Kariuki Njoroge, and a daughter, Nduta.

17. PW2 recounted that his uncle, Ndung'u Njoroge, died in **1957** leaving two children, Jesse Njoroge and Geoffrey Ngotho. According to him, his father took in these children together with James Kariuki Ndung'u and settled them on the suit property, as they had nowhere else to reside. Later, upon his father's death, succession proceedings

were conducted through **Kitale District Magistrate's Court Succession Cause No. 4 of 1971**, which decreed that PW2's father was the rightful heir to the plot. **PW2** further explained that his grandfather also owned another parcel of land in Kiambu, **Lari/Magina/22**, which was shared between the families of Ndung'u Njoroge and Kariuki Njoroge, while his father received no share.

- 18. PW2** further testified that the Defendants' father resided in Moi's Bridge. In support of his case **PW2** produced various documents including: Ngigi Mbugua's death certificate as **PEXH 4**, the Limited Grant issued to him on **12/5/2020** for the Estate of Ngigi Mbugua, produced as **PEXH 5**, a letter dated **16/10/1971** from the District Magistrate to the Director of Settlement allotting the suit property to Ngigi Karanja produced as **PEXH 6**, the title to the suit property **PEXH 7**, the decree in **Kitale CMC Land case No. 28 of 2002** produced as **PEXH 8**, a letter forwarding the decree to the District Commissioner by the Senior Principle Magistrate as **PEXH 9**, the proceedings in **Kitale CMC Land case No. 28 of 2002** as **PEXH 10**, the

decree in **Kitale HC No. 67 of 2003** as **PEXH 11** and the surveyor's letter dated **20/1/2020** as **PEXH 12**.

19. The Plaintiff also produced the decree in **Kitale SPMC Land Case No. 123 of 1995** as **PEXH 14**, the eviction orders from the above case issued on **9/1/1996** and **18/1/2002** as **PEXH 15** and **PEXH 16** respectively, a letter dated **10/7/1995** forwarding the proceedings of the Makutano Land Tribunal to the District Officer Cherengani as **PEXH 17**, proceedings in **Kitale SPMC Land case No. 122 of 1995** and **123 of 1995** as **PEXH 18** and **19**, letter forwarding the decree in **Kitale SPMCC No. 122 of 1995** to the Land Registrar as **PEXH 20**, the decree itself as **PEXH 21**, an Amended decree for the same file as **PEXH 22** and a certified copy of the Green card for **Lari/Magina/ 224** as **PEXH 23**.

20. On cross-examination, **PW2** admitted that he was not present when his father purchased the suit property. He insisted, however, that the land was acquired eight years after the Defendants' father had passed away. He also acknowledged that the 1st Defendant had been occupying one acre of the suit property since **1965** with his father's

consent. Nevertheless, he maintained that the Defendant should be evicted, noting that his father had already obtained an eviction order against him. At this stage, the Plaintiff closed his case.

- 21.** On their part, the Defendants called two witnesses. **DW1, Geoffrey Ngotho Njoroge**, testified that the suit property originally belonged to his grandfather, Njoroge Kariuki. He stated that it was his grandfather who purchased the land from the Cherangani Settlement Scheme and repaid the loan in instalments. In support, he produced two account statements from the Settlement Fund Trustees as **DEXH 12** and **13**. **DW1** testified further that the Plaintiff's father had recognized them as beneficiaries in his affidavit for letters of administration, which he produced as **DEXH 1**. He explained that in the Tribunal's award, Ngigi Karanja was allocated **14 acres** while they were awarded **8 acres**. He produced a survey receipt to that effect as **DEXH 10**. He reiterated that they had lived on the suit property since **1966**. He produced photographs of houses standing thereon as **DEXH 17(a)**

and **(b)**. He maintained that this was the only land they knew as theirs.

22. However, on cross-examination **DW1** admitted being aware of his grandfather owning land in Lari, portions of which had been allocated to some family members. He also conceded that only he and the 2nd Defendant currently occupy the suit land. He acknowledged that he engaged surveyors after the Tribunal's decision had been quashed.

23. DW2, James Kariuki, testified that he had lived on the suit land from **1965** until **1996**, when he was evicted, on the basis that he was entitled to land elsewhere.

24. At this juncture the defence case was closed and parties filed written submissions.

PLAINTIFF'S SUBMISSIONS

25. The Plaintiff submitted at the outset that the Defendants were his cousins, all being grandchildren of the late Njoroge Kariuki. He maintained that save for his father, Ngigi Karanja, none of Njoroge's other children settled on the suit property. He asserted that it was only on humanitarian grounds that his father allowed the widow of

his late younger brother, together with her children (including the Defendants), to reside on the land.

26. To reinforce this position, the Plaintiff referred to **Kitale Succession Cause No. 4 of 1971**, wherein his father was appointed as the legal heir to the suit property. He emphasized that this appointment was never challenged by way of appeal or review. He further drew attention to **Kitale SPMC Land Case No. 123 of 1995**, in which his father obtained eviction orders against the 2nd Defendant and his brother, Jesse Njoroge.

27. The Plaintiff framed the issues for determination as follows:

(1) Whether the 1st Defendant had trespassed on the suit property, and if so whether the trespass attracted general and aggravated damages;

(2) Whether the 1st Defendant should be ordered to move out of the one acre he is occupying default of which he should be evicted;

(3) Whether a declaration could be issued that the 1st Defendant is the owner of 8 acres of the suit property;

(4) Whether a declaration could issue that the 2nd Defendant and the family of the late

Ndung'u Njoroge are entitled to 11 acres of the suit land;

(5) Whether the Plaintiff should be evicted from either 8 or 11 acres of the suit property in order for the defendants to occupy it; and

(6) What should be the appropriate orders?

28. On the question of trespass, the Plaintiff submitted that the 1st Defendant illegally excised **8 acres** of the suit property on **25/5/2005** pursuant to a decree that had already been quashed by the High Court in **Kitale HC Misc. Application No. 67 of 2003**. He asserted that the 1st Defendant failed to involve the court that issued the decree and unlawfully implemented a statute-barred judgment. The Plaintiff relied on this Court's ruling delivered on **4/9/2020**, which granted a mandatory injunction against the 1st Defendant. He also drew attention to the fact that the ruling noted that the 1st Defendant had unlawfully harvested crops on the land to his prejudice.

29. On the basis of the foregoing, the Plaintiff prayed for damages in the sum of **Kshs. 600,000/=**, citing **Francis Kimani Njoroge v Municipal Council of Limuru**

(2020) eKLR, where the court awarded **Kshs. 400,000/=** as general damages for trespass.

- 30.** Regarding whether the 1st Defendant should be evicted from **1 acre** of the suit property, the Plaintiff submitted that his late father only hosted the Defendants on humanitarian grounds. Given that eviction orders had already been obtained in **Kitale SPMC Land Case No. 123 of 1995**, he urged the Court to issue an eviction order against the 1st Defendant.
- 31.** As to the 1st Defendant's counterclaim for **8 acres**, the Plaintiff submitted that it was untenable. He maintained that the Defendants' claim of illegal transfer to his father was unsustainable because: no objection was raised to the transmission in **Kitale Succession Cause No. 4 of 1971**; no appeal was lodged against the transmission; and the Defendants failed to call their surviving aunt, Nduta, to shed light on the matter.
- 32.** To buttress his position, the Plaintiff relied on **Nakuru HC Succession Cause No. 598 of 2002 (In the matter of the Estate of Mbugua Ngane)**, in which the Petitioner's appointment as the sole heir of the deceased's property

was revoked on account of forged signatures and non-enlistment of beneficiaries.

- 33.** The Plaintiff therefore urged the Court to find that the Defendants had failed to discharge the burden of proving that Ngigi Karanja held the land in trust for other beneficiaries. He prayed for an award of **Kshs. 600,000/=** as damages for trespass, and that the Defendants' Counterclaims be dismissed with costs.

DEFENDANTS' SUBMISSIONS

- 34.** On their part, the Defendants submitted that the Plaintiff's father held the land in trust for the entire family, including themselves, and that it was unconscionable to exclude them. They emphasized that their mother had lived and was buried on the suit property, and that the Plaintiff himself admitted that they resided on the land.
- 35.** The Defendants asserted that, given these circumstances, the suit land was ancestral property, and that Ngigi Karanja could not have been the sole heir. They relied on **Wamboi v Wamboi & Another (1984) KLR**, for the proposition that where land is ancestral, beneficiaries cannot be disinherited.

36. The Defendants further submitted that having occupied the land for over **55 years**, they had acquired rights to it by way of adverse possession. On this basis, they urged the Court to dismiss the Plaintiff's suit and to allow their counterclaims.

ANALYSIS & DETERMINATION

37. The Court has carefully considered the pleadings, the evidence on record, and the submissions of the parties. From the issues raised, the following emerge for determination:

- (a) *Whether the Defendants trespassed on the Plaintiff's land.***
- (b) *Whether the Plaintiff can recover the land from the Defendants.***
- (c) *Whether the Plaintiff is entitled to the reliefs sought namely, damages for trespass and eviction of the Defendants.***
- (d) *Whether the Defendants' counterclaims succeed on their merits.***

(a) Whether the Defendants trespassed on the Plaintiff's land

38. The Plaintiff's case is premised on the contention that the Defendants should be evicted from eight **(8) acres** of the suit property. He asserts that it was his father, Ngigi Karanja, who purchased the land and caused it to be

registered in his grandfather's name; therefore, the land was not ancestral as claimed by the Defendants. Conversely, the Defendants maintain that the Plaintiff's father held the land in trust for the wider family, including themselves.

39. At the outset, the manner in which the Plaintiff's father acquired the property remains unclear. While the Plaintiff claims that his father purchased the land and caused it to be registered in their grandfather's name, no documentary proof was produced in support of this assertion. Further, the Plaintiff's claim that his father purchased the suit land was untenable, given not only the lack of evidence to that effect but also his clear admission in cross-examination that he was not present when his father allegedly bought the suit land. His evidence was therefore inadmissible hearsay. In the absence of independent corroborative evidence, this Court cannot rely on such testimony.

40. On the other hand, the evidence shows that the Defendants have been on the suit land since about **1965**, allegedly at the invitation of the Plaintiff's grandfather, who was the registered owner. As to how he became

registered, only he and those who were present at the time of acquisition could tell, but not the Plaintiff who was absent at the time. Further, the Defendants' evidence was that their mother was even interred on the land. The Plaintiff, however, argues that the Defendants unlawfully excised eight acres pursuant to a decree which was later quashed in **Kitale HC Misc. Application No. 67 of 2003**. The question therefore is whether, in these circumstances, the Plaintiff can sustain a claim for trespass.

- 41.** The Black's Law Dictionary, 10th Edition defines trespass as:

“An unlawful act committed against the person or property of another: wrongful entry on another's real property”

- 42.** Similarly, in **Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition at page 428**, it is stated as follows, regarding trespass:

“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have

some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.”

43. In addition, the Court of Appeal in **Godfrey Julius Ndumba Mbogori & another vs. Nairobi City County (2018) KECA 702 (KLR)** quoting with approval the decision of **Jones vs. Chapman [1847] 2 Exch 821**, stated:

“...as soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner, so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, I answer, the person who has the title is in actual possession...”

44. From the foregoing, it is clear that possession is central to a claim for trespass. Only a party who is the owner of a land parcel with exclusive possession can maintain such a

claim. Since the Defendants were invited to the land in or about **1965**, their initial occupation cannot be deemed trespass. It is noteworthy, however, that the Plaintiff's father subsequently obtained eviction orders against them, as evidenced by **PEXH 15** and **16**. Further, the decree which had earlier allocated the Defendants a portion of the land was quashed in **Kitale HC Misc. Application No. 67 of 2003**. Subsequent thereto, as the evidence of both PW2 and DW1 indicates the 1st Defendant continued to occupy **8 acres** of the suit land from **25/5/2005**. This occupation spans more than twelve continuous years.

- 45.** Be that as it may, the Plaintiff's father did not enforce the eviction orders. Likewise, the Plaintiff himself did not enforce the decree arising from **Kitale HC Misc. Application No. 67 of 2003**. Under **Section 7** of the Limitation of Actions Act, an action for recovery of land may not be brought after twelve **(12)** years from the date the cause of action accrues.
- 46.** Put differently, under **Sections 7** and **31(1)** of the Limitation of Actions Act the Plaintiff cannot recover such

a portion of land from the defendants. It further follows that any registration of the same in the name of the Plaintiff or his father was in trust for the Defendants and their successors or assigns.

- 47.** The rationale for law of limitation was aptly discussed by the Court of Appeal in **Gathoni vs. Kenya Co-operative Creameries Ltd [1982] KLR 104** as follows:

“The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

- 48.** The eviction orders relied upon by the Plaintiff were issued on **9/1/1996** and **18/1/2002**. This suit having been filed in the year **2020** it is evident that they cannot be used to sustain a claim for trespass. By operation of **Section 4 (4)** of the Limitation of Actions Act, the claim of trespass became statute-barred on **9/1/2008**, and **18/1/2014** respectively. The effect of a judgment being time barred is that a court cannot grant any remedy or relief on the basis of such judgment. Where a party with a legal right fails to

act on it within the prescribed timeframe, that right is extinguished.

49. The upshot of the foregoing is that the prayer for trespass is unsustainable and must fail.

(b) Whether the Plaintiff can recover the land from the Defendants

50. The Plaintiff also claims recovery of land from the Defendants. There is evidence that the defendants have been in occupation of the land for a prolonged period as will become evident below, yet the Plaintiff wants them evicted from it. In essence the Plaintiff seeks recovery of the land.

51. Section 7 of the Limitation of Actions Act provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

52. Further, **Section 13(1)** of the **Act** provides that:

“A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this

Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.”

53. Furthermore, **Section 17** provides that:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

54. The import of the above provisions is that where a party other than the owner is in adverse possession of land without the permission of the owner for a continuous period of twelve years, the owner loses both the right to recover the land and the title thereto.

55. In the instant case, the evidence, as per **PExh 15** and **16**, is that the Plaintiff relies on eviction orders issued on **9/1/1996** and **18/1/2002**. Even assuming that prior to those orders the Defendants’ occupation was permissive, it was upon issuance of the eviction orders that the Defendants would be deemed to have been on the land without permission. The limitation period thus began to

run. By the time this suit was instituted, the twelve-year period had long elapsed. The eviction orders were never enforced. Consequently, the Plaintiff's claim for recovery of land fails, and the title is extinguished. Similarly, the 2nd Defendant's counterclaim seeking eviction of the Plaintiff from eleven **(11) acres** fails for the same reason. A new title should therefore issue to the Defendants in respect of the eight **(8) acres** they have occupied continuously for more than twelve years. Upon extinguishment of the Plaintiff's title, the registration of the Plaintiff or his father is deemed to have been in trust for the Defendants.

(c) Whether the Plaintiff is entitled to the reliefs sought namely, damages for trespass and eviction of the Defendants

56. Having found the claim for trespass unsustainable, it naturally follows that no damages can issue. Damages can only issue to an owner of a piece of land who proves that the adverse person in occupation is not thereon on his permission or legally. Herein this Court has found that that the Defendants are entitled to be on the land, and actually, are the owners by virtue of the operation of the law. I thus decline the claim for damages.

(d) Whether the Defendants' Counterclaims are merited

- 57.** The 1st Defendant in his counterclaim sought a declaration that the family of the late Ndung'u Njoroge is entitled to eight **(8) acres** of the suit property, eviction of the Plaintiff, and costs. The 2nd Defendant similarly sought eviction of the Plaintiff from eleven **(11) acres**, costs, and any other relief.
- 58. Section 107 (1)** of the Evidence Act behooves a party who desires judgment on any legal right on the basis of a given set of facts must prove that those facts exist. Neither of the Defendants provided any evidence to support the Plaintiff's eviction. In fact, if their testimony and submissions are anything to go by, they seem to have abandoned that prayer all together and proceeded on a trajectory that was antithetical to their case. For instance, both the Defendants were in agreement that the suit land was being held by the Plaintiff's father in trust for the whole family. How that position mutated into seeking eviction of the Plaintiff has not been explained. It is trite law that where the evidence is at variance with the

pleadings fatal consequences ensue for the suit based on the Court of Appeal case of **Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 others [2015] KECA 713 (KLR)**.

59. The analysis on how the counterclaims by the defendants do not succeed has been given in a more detailed way in paragraph **55** above. In the circumstances, the Defendants' counterclaims are devoid of merit and are hereby dismissed. The entitlement of the **8 acres** for the defendants is not by virtue of the counterclaims but by way of extinguishment of title, and this court must, as enjoined by law in that regard, give an effective remedy thereto rather than leave it to the parties to file another claim over the same. It is however important to note that in testimony the 2nd Defendant indicated that he was evicted in **1996**. It is not immediately decipherable whether he ever went back to the suit property. Be that as it may, he is entitled to that portion of land his parents' family gave him to settle on, being part of the **8 acres** forming the acreage that his father and mother's estate is entitled to, and which has now been determined to be the

portion of the title extinguished as to the Plaintiff's claim by virtue of the 1st Defendant's success of his Counterclaim on behalf of the said parents' estate, as part of his inheritance.


DISPOSITION

60. The upshot of the foregoing is that judgment is entered as follows:

- (1) The Plaintiff's suit is dismissed in its entirety.**
- (2) The Defendants' counterclaims are equally dismissed.**
- (3) The Plaintiff's title to the eight (8) acres occupied by the defendants is extinguished, and an order hereby issues cancelling the registration of the plaintiff as owner thereof and registering the defendants as owners in trust for the parents' family. But for the second Defendant the registration as part owner of the eight acres should be limited to the extent that he had been given by his family to occupy, reside on, use and own.**
- (4) Each party shall bear their own costs.**

61. Orders accordingly.

Judgment dated, signed and delivered virtually via the
Teams Platform the 15th day of **December, 2025.**



**HON. DR. IUR F. NYAGAKA,
JUDGE**

In the presence of:

Kiarie Advocate for the Plaintiff

Oburu Advocate for the Defendants