



Muna (Suing as the Legal Representative of the Late - Ann Wambui Muna) & 5 others v Boscardin & 5 others (Environment and Land Case 27 of 2020) [2026] KEELC 160 (KLR) (21 January 2026) (Judgment)

Neutral citation: [2026] KEELC 160 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CASE 27 OF 2020
CK NZILI, J
JANUARY 21, 2026**

BETWEEN

**REUBEN NG'ANG'A MUNA (SUING AS THE LEGAL REPRESENTATIVE OF THE LATE - ANN WAMBUI MUNA) 1ST PLAINTIFF
ALLAN MUNGA MUNA 2ND PLAINTIFF
SARAH MWIHAKI MUNA 3RD PLAINTIFF
LUISA NYAKIBISHOI MUNA 4TH PLAINTIFF
REUBEN NG'ANG'A MUNA 5TH PLAINTIFF
KITAMU FARM LIMITED 6TH PLAINTIFF**

AND

**ANNE NJOKI MUNGA BOSCARDIN 1ST DEFENDANT
JANE WANGECI (BEING THE ADMINISTRATOR OF THE ESTATE OF THE LATE ELIZABETH WACHEKE) 2ND DEFENDANT
BERNARD MUIRURI KAMAU (BEING THE ADMINISTRATOR OF THE ESTATE OF THE LATE PRISCILLA WANGECI MUIRURI) 3RD DEFENDANT
MUKAMI GATHU 4TH DEFENDANT
NJERI GATHU 5TH DEFENDANT
NG'ANG'A GATHU 6TH DEFENDANT**



JUDGMENT

1. On the tombstones of the late Clement Munga Muna and Milka Mwihaki Muna, their children, before this court quoted Proverbs 8:17 and Revelation 3:5, respectively:

“I love those who love me, and those who seek me diligently find me”.

He who conquers shall be clad thus in white garments, and I will not blot his name out of the book of life.”

I wish the protagonists in this suit had heeded those words; otherwise, the litigation for the last 36 years would have been avoided.

A). The Plaintiffs’ Pleadings

2. The plaintiffs approached the court through a further, further, further, further, further amended plaint dated 31/7/2025. The prayers are:
 - a. An order of permanent injunction restraining the defendants, their agents, servants, family members or any other person claiming for them from entering into, remaining, wasting, carrying out any construction, ploughing, farming, carrying out activities of any nature, and or in whatever way trespassing or unlawfully or illegally interfering with the plaintiffs’ possession and or use of the suit properties known as Waitaluk/Kapkoi 11/Gutongorio/71, Waitaluk/Kapkoi 11/Gutongorio “B”/70, Waitaluk/Kapkoi 11/Gutongorio” B”/58 and Waitaluk/Kapkoi 11/Gutongorio “B”/54, (hereinafter the suit properties), and for trespass.
 - b. Damages for illegal destruction of the suit properties and for trespass.
 - c. Mesne profits of Kshs. 8,850,746/= per year, from the time the defendants trespassed onto the suit properties and illegally occupied the same until the date that the defendants shall vacate the suit properties.
 - d. Interest rates on prayers (b) and (c) above, from the time the defendants trespassed onto the suit properties registered in the name of the 1st plaintiff, to the date of full payment.
3. The 1st plaintiff, who passed on is now represented by her legal representative who is also the 5th plaintiff, contends that she was the sole proprietor of the suit properties situated at Waitaluk within Trans Nzoia County, which were duly transferred to her by her late husband, the late Clement Solomon Muna, and the co- defendant in the counterclaim, said to have become the registered owner by transmission from the estate of Clement Munga Munga - deceased. The 1st plaintiff averred that she held the suit properties for herself and in trust for the 2nd, 3rd, 4th, and 5th plaintiffs.
4. The plaintiffs’ case is that on or about 15/4/2020, the defendants, without any colour of right and or justification whatsoever, forcefully invaded the suit parcels of land, drove them out of occupation, took over the use and occupation, and caused significant wanton destruction, loss, and damage to them.
5. The plaintiffs aver that on 10/12/2018, the probate court in Nairobi High Court Succession Cause No. 857 of 1992 dismissed the defendants’ application to revoke the confirmed grant in favour of the three administrators and or to challenge the manner of distribution of the estate of the late Clement Munga Munga to the beneficiaries.



6. The plaintiffs aver that the succession cause application was also followed by other unsuccessful suits over the subject matter, such as Kitale Case No. 25 of 1994, Saboti Land Disputes Tribunal No. 23/94/B, later Kitale PMCC No. 25 of 1995, and later Eldoret Misc. Appl. No. 76 of 1995, Eldoret Misc. Appl. No. 193 of 1994, Petition No. 5 of 2012, Succession Cause No. 857 of 1992, and Court of Appeal Nairobi Civil Appeal No. 283 of 2019, which were resolved by the time the transfers and registration of the suit properties occurred in favour of the 1st plaintiff.
7. The 1st plaintiff avers that together with the 2nd and 3rd plaintiffs, they incorporated the 6th plaintiff to operate a dairy farm on the suit properties, to which they have been undertaking crops and cattle farming on the suit lands. It is averred that, according to the audited accounts of the 6th plaintiff, the plaintiffs have, since 1994, invested in the suit properties in excess of Kshs. 5,000,000/= as of 2020, to run and operate the dairy farm from which they distribute or supply to customers dairy products, silage, and vegetables.
8. The plaintiffs aver that by a ruling delivered on 30/6/2020, this court vacated the existing exparte orders and granted orders of status quo in favour of the defendants, to which, upon taking physical possession of the suit properties, they have been wantonly cutting down and felling trees, disposing of the livestock, and preventing the plaintiffs' veterinary doctor from accessing the farm to attend to ailing livestock, some of which have died.
9. The 1st plaintiff avers that the estates of her late parents had invested all their earnings, pension, and savings on the dairy farm, and that his late father was sickly and of advanced age, requiring medical bills for his chronic kidney failure, after the invasion, he had no other sources of income, save for the suit properties, leading to his passing on on 2/2/2023.
10. The initial 1st plaintiff had averred that she entered a contract with Kinetic Africa for the supply of silage and therefore, stood in breach of the said contract and risked losing such a high-profile client with a likelihood of a court case for damages.
11. Further, the plaintiffs aver that their late parents had also entered into a binding contract with Kitale Club for the supply of vegetables, which they had been supplying for 20 years, risking also losing a prominent client, and the attendant risk of breach and court cases. In view of the foregoing, the plaintiffs aver that at no point before the date of the trespass had the defendants ever resided or otherwise lived on the suit properties.
12. The plaintiffs aver that the late Elizabeth Wacheke Waruiru was given 20 acres from the estate of the late Clement Muna Munga, which parcel was registered under her husband's name, where the 2nd defendant and her late mother used to and still reside todate with her father, which is adjacent to the suit properties.
12. Again, the plaintiffs aver that the late Priscillah Wangechi Muiruri was given 12 acres, being title Nos. Waitaluk/Kapkoii Block 12/Chamgei/1 and Waitaluk/Kapkoii Block 12/Chamgei/160, adjacent to the suit properties.
13. As regards the 1st defendant, it is averred that Anne Njoki Mungai Boscardin, who has dual citizenship, was residing in Switzerland for over 30 years and has a second home on title No. Waitaluk/Kapkoii Block 12/Chamgei/527, which is adjacent to the suit properties.
14. The plaintiffs aver that the 4th, 5th, and 6th defendants are adult children of the late Loise Wangui, who used to reside on title No. Waitaluk/Kapkoii Block 12/Chamgei/503, which is also adjacent to the suit properties.



15. The plaintiffs deny ever authorising or allowing the defendants to enter into or otherwise remain on the said suit properties, before or after the date of the alleged trespass, hence their actions are illegal, amount to trespass and encroachment, have interfered with the quiet enjoyment of the suit properties and their productive agricultural purposes, leading to deprivation from making or enhancing, or generating annual income and profits from the suit properties, approximated at Kshs. 8,850,746/=, per annum, from the date of the trespass and subsequent occupation.
16. The plaintiffs aver that the defendants hold no proprietary rights whatsoever in the suit properties, ought to be enjoined forthwith and should be ordered to remove their offending presence from the suit properties, which, despite notices, they continue to persist in their grossly illegal and prejudicial acts of trespass and illegal occupation, despite several applications and suits alluded to above, affirming the plaintiffs' constitutional and proprietary rights to the suit properties.

B). The 1st, 3rd, 4th, 5th, & 6th Defendants' Pleadings

17. The 1st, 3rd, 4th, 5th, and 6th defendants opposed the suit through a further, further amended defence and counterclaim dated 10/1/2025. It is averred that the initial 1st plaintiff had acquired titles to the suit properties fraudulently and in collusion with her late husband, who was the 1st and 3rd defendants' brother and uncle to the 4th and 6th defendants.
18. According to the defendants, the initial 1st plaintiff's particulars of fraud include the failure, neglect, and or refusal to acknowledge the fact that the suit properties are subject to a customary trust as an overriding interest, transferring the suit properties when there was a pending appeal over the suit lands, namely Civil Appeal No. 283 of 2019, colluding with the late husband to disinherit all the defendants on the basis that they were all women, colluding with the late husband to style his name as a camouflage, not to raise eyebrows while, transferring the land to frustrate and defeat the Court of Appeal hearing, transferring the suit parcels without any valuable consideration, presenting false documents for registration and proceeding to transfer the suit properties without prior notice of an existing dispute.
19. The 1st, 3rd, 4th, 5th, and 6th defendants deny the contents of paragraph 10 of the amended plaint. On the contrary, it is averred that the 1st - 3rd defendants were born in a family of 12 children, belonging to the late Clement Munga Muna, who left an estate comprised of the suit properties, which, as per the certificate of confirmation of grant, was grabbed entirely by their late elder brother and uncle to the 3rd - 5th defendants, who disinherited all of them, through fraud, and misrepresentation, and out of discrimination on account of their gender, in total disregard of customary trust that automatically attaches to such properties, have been living therein since birth, hence rendering them destitute.
20. The 1st, 3rd, 4th, 5th, and 6th defendants aver that they are unemployed women with nowhere else to live apart from the suit properties; otherwise, they will be rendered destitute.
21. The 1st, 3rd, 4th, 5th, and 6th defendants, while admitting previous cases or litigation in other courts over the estate, save for the pending Civil Appeal No. 283 of 2012, aver that the initial 1st plaintiff was only registered as the owner of the suit properties in 2019, on account of being the wife of the late brother and or uncle, who had purportedly styled himself as Clement Solomon Muna to conceal his true identity.
22. The 1st, 3rd, 4th, 5th, and 6th defendants aver that they were born, lived, and continue to live on the suit properties, for which no evidence has been tendered on the alleged developments or investments by the plaintiffs. Notwithstanding the alleged contracts or agreements with third parties, the 1st, 3rd, 4th, 5th, and 6th defendants aver that both the initial plaintiffs and the current plaintiffs had no right,



- legal or equitable, to transact over the suit properties, otherwise, the initial 1st plaintiff was not even a dependant for purposes of inheritance from the estate of the late Clement Munga Muna, hence her acts of registration as owner of the suit premises amounted to intermeddling with the deceased's estate.
23. The 1st, 3rd, 4th, 5th, and 6th defendants aver that, as per the certificate of confirmation of grant dated 28/1/2019, they were disinherited of the estate, as none of the female dependants of the late Clement Munga Muna received a share of the estate.
 24. Therefore the defendants aver that in the circumstances obtaining, they have not and could not have trespassed onto the suit properties, they are entitled to it as of right, otherwise, the alleged fraudulent transfer and registration in favor of their late sister in law and aunt, did not and or could not in law, override their overriding interest over the same, founded on an implied trust and or constructive trust and or resulting trust and or customary trust, created in favour of all the children of the late Clement Munga Muna, irrespective of gender.
 25. The 1st, 3rd, 4th, 5th, and 6th defendants aver that if at all the plaintiffs and in particular the 6th plaintiff was making profit out of use or occupation of the suit properties, then the said profits were only exclusively utilized by the plaintiffs, subject to their beneficial interest over the suit properties, which are held and continue to be held in trust for all the dependants of the estate of the late Clement Munga Muna.

(C). The 1st, 3rd, 4th, 5th, & 6th Defendants' Counterclaim

26. By way of a counterclaim, the 1st, 3rd to 6th defendants in the primary suit sued the initial 1st plaintiff and her late husband, the Chief Land Registrar, and the Attorney General as the 1st, 2nd, 3rd, and 4th defendants in the counterclaim as amended.
27. The plaintiffs in the counterclaim aver that title deeds to parcel Nos. Waitaluk/Kapkoi 11/Gutongorio/71, Waitaluk/Kapkoi 11/Gutongorio B/70, Waitaluk/Kapkoi 11/Gutongorio B/58, Waitaluk/Kapkoi 11/Gutongorio B/54, and L.R. No. 1800/4 and its subdivisions thereof, were fraudulently transferred by the initial 2nd defendant to the initial 1st defendant, now deceased, through fraud or collusion of the late husband and wife, when there was a pending succession case application at the court of appeal over the suit properties, to frustrate or defeat their overriding interests.
28. The plaintiffs to the counterclaim aver that they have lived and reside on the suit properties since birth, and have developed the said suit properties through farming and construction of their homes, and live thereon as the land belongs to their late father and or grandfather, which acts constitute customary or constructive or resultant trust, against the 1st and 2nd defendants, which unfortunately the late 2nd defendant being the sole administrator of the estate, was reasonably expected to hold the said properties in trust and for all the plaintiffs' benefit.
29. Further, the plaintiffs in the counterclaim aver that by virtue of the fact that the suit properties were not sold to the deceased 2nd defendant for any value, by the late Solomon Muna, there exists a privity of estate between the defendants and the plaintiffs herein.
30. The plaintiffs in the counterclaim aver that the defendants, without their consent and to their exclusion, caused the 6th plaintiff to be incorporated and utilised to operate a farming business on the suit properties, thereby generating annual profits which were not accounted to them, notwithstanding their overriding interest.
31. The plaintiffs in the counterclaim aver that the 3rd defendant, in purporting to authorise the subdivision of title No. Waitaluk/Kapkoi Block 11/Gutongorio, in the name of the deceased late brother and uncle, issuance of title deeds in favour of the current registered owner, despite a pending



appeal filed on 26/7/2019, based on a fictitious consideration, and without interrogating the letter of administration, acted recklessly and negligently, without the skill and diligence expected of a Land Registrar.

32. The plaintiffs in the counterclaim pray for:

- (a) The 1st defendant's suit be dismissed.
- (b) Cancellation of all the title deeds and the alleged proprietary entitlements of the late Anne Wambui Muna and Solomon Muna alias Clement Solomon Muna over titles Nos. Waitaluk/Kapkoi 11/Gutongorio/71, Waitaluk/Kapkoi 11/Gutongorio B/70, Waitaluk/Kapkoi 11/Gutongorio B/58, and Waitaluk/Kapkoi 11/Gutongorio B/54 and L.R. No. 1800/4 or any subdivisions thereof.
- (c) Transfer of Title Nos. Waitaluk/Kapkoi 11/Gutongorio/71, Waitaluk/Kapkoi 11/Gutongorio B/70, Waitaluk/Kapkoi 11/Gutongorio B/58, and Waitaluk/Kapkoi 11/Gutongorio B/54 and L.R. No. 1800/4 or any subdivisions thereof in favour of the estate of the late Clement Munga Muna to Solomon Muna, alias Clement Solomon Muna, alias Clement Muna, without recognition of a trust as an overriding interest, be declared fraudulent and annulled.
- (d) Transfer of Title Nos. Waitaluk/Kapkoi 11/Gutongorio/71, Waitaluk/Kapkoi 11/Gutongorio B/70, Waitaluk/Kapkoi 11/Gutongorio B/58, and Waitaluk/Kapkoi 11/Gutongorio B/54 and L.R. 1800/4 or any subdivisions thereof from the late initial 2nd defendant to the initial 1st defendant, without recognition of a trust as an overriding interest, be declared fraudulent and be annulled.
- (e) Orders that the Chief Land Registrar cancel title deeds issued to Anne Wambui Muna and Solomon Muna, alias Clement Solomon Muna, alias Clement Muna, over the suit land being Waitaluk/Kapkoi 11/Gutongorio/71, Waitaluk/Kapkoi 11/Gutongorio B/70, Waitaluk/Kapkoi 11/Gutongorio B/58, and Waitaluk/Kapkoi 11/Gutongorio B/54 and L.R. No. 1800/4 or any subdivisions thereof.

OR in the alternative:

- (f) A declaration does issue that the 1st and 2nd defendants' conduct created a constructive trust as an overriding interest in favour of the plaintiffs over the suit properties being: Waitaluk/Kapkoi 11/Gutongorio/71, Waitaluk/Kapkoi 11/Gutongorio B/70, Waitaluk/Kapkoi 11/Gutongorio B/58, and Waitaluk/Kapkoi 11/Gutongorio B/54 and L.R. No. 1800/4 or any subdivisions thereof.
- (g) An order directing that the plaintiffs herein are the legal and beneficial owners of part of the suit properties being: Waitaluk/Kapkoi 11/Gutongorio/71, Waitaluk/Kapkoi 11/Gutongorio B/70, Waitaluk/Kapkoi 11/Gutongorio B/58, and Waitaluk/Kapkoi 11/Gutongorio B/54 and L.R. No. 1800/4 or any subdivisions thereof.

OR in the alternative:

- (h) A declaration does issue that the 1st and 2nd defendants' conduct created a resulting trust as an overriding interest in favour of the plaintiffs over the suit properties being: Waitaluk/Kapkoi 11/Gutongorio/71, Waitaluk/Kapkoi 11/Gutongorio B/70, Waitaluk/Kapkoi 11/Gutongorio B/58, and Waitaluk/Kapkoi 11/Gutongorio B/54 and L.R. No. 1800/4 or any subdivisions thereof.



(i) An order directing that the plaintiffs herein are legal and beneficial owners of part of the suit properties being: Waitaluk/Kapkoi 11/Gutongorio/71, Waitaluk/Kapkoi 11/Gutongorio B/70, Waitaluk/Kapkoi 11/Gutongorio B/58, and Waitaluk/Kapkoi 11/Gutongorio B/54 and L.R. No. 1800/4 or any subdivisions thereof.

OR in the alternative:

(j) A declaration does issue to the 1st and 2nd defendants' conduct created a customary trust as an overriding interest in favour of the plaintiffs over the suit properties being: Waitaluk/Kapkoi 11/Gutongorio/71, Waitaluk/Kapkoi 11/Gutongorio B/70, Waitaluk/Kapkoi 11/Gutongorio B/58, and Waitaluk/Kapkoi 11/Gutongorio B/54 and L.R. No. 1800/4 or any subdivisions thereof.

(k) An order directing that the plaintiffs herein are legal and beneficial owners of part of the suit properties being Waitaluk/Kapkoi 11/Gutongorio/71, Waitaluk/Kapkoi 11/Gutongorio B/70, Waitaluk/Kapkoi 11/Gutongorio B/58, and Waitaluk/Kapkoi 11/Gutongorio B/54 and L.R. No. 1800/4 or any subdivisions thereof.

(m) An order directing that the annual profits of Kshs. 8,850,746/=, since 1994, and/or all other profits derived by the defendants (if any) through the 6th defendant, during the period of its operations on the suit properties, be shared with the 1st, 3rd, 4th, 5th, and 6th plaintiffs in proportion to their shares until payment in full.

(n) A permanent injunction to issue restraining the 1st and 2nd defendants in the counterclaim, their servants, employees, and/or agents from trespassing on and/or interfering with the plaintiffs' quiet possession of the suit land until the succession procedure and all appeals arising therefrom are finally determined.

(o) Costs.

(p) Any other relief that this court may be pleased to grant.

33. The court notes that the amended counterclaim was not accompanied by any authority to plead, sue, and appear on behalf of the co-plaintiffs in line with Order 4 Rule 2, 3, and 5 of the Civil Procedure Rules.

(D). The 2nd Defendant's Amended Statement of Defence

34. The 2nd defendant opposes the suit through an amended statement of defence dated 29/9/2023, confirming that she is the 1st born and an administratrix of the estate of the late Elizabeth Wacheke, a firstborn child of the late Clement Munga Muna.

35. The 2nd defendant avers that her late mother was married to Esau Waruiru at Kijabe before later moving to West Pokot, where she was born and raised.

36. The 2nd defendant avers that her father later on bought 20 acres of land from his father-in-law, the late Clement Munga Muna, to relocate to Kitale, where they currently reside, and therefore, it was not true that her parents were gifted any land by her grandfather, as alleged or at all.

37. Further, the 2nd defendant avers that her late mother was never listed as a beneficiary to the estate of her late grandfather, following which she filed a case against her uncle, the late Solomon Muna alias Clement Solomon Muna, before she passed on in 2021.



38. The 2nd defendant avers that since the land in dispute was eventually unlawfully and illegally transferred to her late aunt, the initial 1st plaintiff, this court should direct that it be properly distributed as per the Law of Succession Act for the benefit of all the children of the deceased's grandfather.

(E). The 1st & 2nd Defendants' Reply to Amended Defence & Counterclaim and Defence to the Counterclaim

39. The initial 1st and 2nd defendants to the counterclaim, now deceased, oppose the defence and counterclaim dated 28/9/2023 through a reply dated 21/11/2025. They reiterated the contents of the further, further amended plaint dated 25/9/2023, insisting that Order 4 Rule 1 of the Civil Procedure Rules had been complied with as regards the 6th plaintiff.

40. The 1st and 2nd defendants aver that there were no interim orders barring the transfer of the suit properties to the initial 1st plaintiff and that there was no pending appeal after the Court of Appeal dismissed the Nairobi Court of Appeal No. 283 of 2019 on 18/12/2020.

41. The 1st and 2nd defendants aver that, in light of several court decisions affirming the late Solomon Muna as the lawful title holder to the suit properties, they had a legal and constitutional right to dispose of the suit properties in a manner they deemed fit, with no reference whatsoever to the plaintiffs in the counterclaim, hence the transfers thereof were conducted lawfully, with no alleged fraud committed.

42. The 1st and 2nd defendants aver that the amended counterclaim was yet another desperate attempt by the plaintiffs to abuse the court processes, noting that the counterclaim is res judicata in view of past suits and decisions rendered in the High Court, Nairobi Succession Cause No. 857 of 1992, Eldoret J.R Misc. Appl. No. 76 of 1995, Kitale Case No. 25 of 1994, Eldoret Misc. Appl. No. 193 of 1994, Kitale Petition No. 5 of 2012, and eventually Nairobi Court of Appeal Civil Appeal No. 283 of 2019.

43. The 1st and 2nd defendants insisted that the initial 1st defendant was the duly registered owner of the suit properties, which they have always exclusively, physically possessed, controlled, and occupied since 1994, until 13/4/2020, and were undertaking commercial farming, when the plaintiffs in the counterclaim with the help of hired goons acting in cohorts with the area chief and some rogue police officers, broke into the suit premises and forcibly took over.

44. The 1st and 2nd defendants aver that, apart from dairy farming, they were rearing 65 cows, 65 dorper sheep, 30 goats, and growing maize in over 70 acres, which the plaintiffs, upon unlawfully taking over, have wastefully, maliciously, and illegally interfered with.

45. The 1st and 2nd defendants deny that the 1st plaintiff in the counterclaim has lived on the suit properties, given that she is married to a Swiss national and has lived in Switzerland for over 30 years.

46. The 1st and 2nd defendants aver that the late Clement Munga Muna had allocated and subdivided his land with beacons before his death, the title to the expansive land before subdivision was at his death, still held in trust by his elder brother Apollo Mwangi.

47. The 1st and 2nd defendants aver that the three brothers to the late Clement Munga, attested to the subdivision and resloution of the land matters relating to the deceased estate at a meeting held on 18/6/1991, which adjudication of the land was also witnessed by third parties in attendance including the inlaws represented by husband to the 3rd plaintiff, father to the 4th, 5th, and 6th plaintiffs, and the 3rd plaintiff in the counterclaim.

48. The 1st and 2nd defendants aver that the late Clement Munga Muna had also distributed his estate inter vivos particularly shares that he owned in Moi Farm, to both his daughters and sons alike, which



fact the plaintiffs in the counterclaim have deliberately withheld from the court with an intention of misleading the court to conclude that the defendants in the main suit were allegedly disinherited of the estate of their late father.

49. The 1st and 2nd defendants gave the particulars of the distribution of Changei Farm to the plaintiffs in the counterclaim as follows:
 - a. L.R. No. 5558/11 - 30 acres to the 3rd plaintiff
 - b. L.R. No. 5558/160 - 3 acres to the 3rd plaintiff
 - c. L.R. No. 5558/503 - 30 acres to Loise Muhuha and
 - d. 20 acres to the 2nd plaintiff and Esau Wairuru
50. The 1st and 2nd defendants aver that, following the confirmation of the grant by a court of competent jurisdiction, the plaintiffs in the counterclaim have no right to lay claim to the suit properties as their alleged “home”; they ought to have sought such reliefs, if any from the succession court, which court heard the matter and found them undeserving of the prayers requested.
51. Again, the 1st and 2nd defendants aver that in a ruling dated 10/12/2018, the succession court had made a finding that the matter had been litigated for over 20 years, yet litigation must have an end, and that parties cannot keep on attempting to redistribute the estate, which had been properly distributed to all the beneficiaries in the first instance, and who had also subdivided and sold or dwelt otherwise with their respective portions.
52. The 1st and 2nd defendants aver that the plaintiffs in the counterclaim were at all material times in the previous court cases in company of many other family members and other concerned representatives of each household, whilst the probate court conducted a full hearing by way of viva voce evidence, entailing a full narrative of the entire history of those matters, consisting of more than 5-8 separate contentious cases in different courts spanning over a period of 30 years.
53. The 1st and 2nd defendants aver that in this litigation, the plaintiffs now want the court to make and indirectly redistribute the estate, already lawfully and properly distributed by a court of competent jurisdiction.
54. Further, the 1st and 2nd defendants aver that the plaintiffs were nothing but galloping litigants, who will go to great length to pursue illegal pathway to obtain land which does not belong to them, moreso, despite having exhausted all the available legal avenues in various courts, on the very same issues and reasons being raised in the amended defence and counterclaim, but which were dismissed in the said suits.
55. The 1st and 2nd defendants aver that the plaintiffs in the counterclaim were not parties in both the succession cause and the appeal, and therefore, at the point that the subject properties were gifted to the initial 1st defendant, the succession matter had already been determined, otherwise they ought to have applied for an order for stay pending appeal, extracted and served it upon all the parties after the alleged unfavourable decision against them by the probate court.
56. Similarly, the 1st and 2nd defendants aver that the plaintiffs in the original suit had invested heavily in the suit properties, dairy farm, and had been subjected to irreparable loss and damage, namely:
 - i. 15 cows valued at Kshs. 1,500,000/=.
 - ii. 30 sheets valued at Kshs. 360,000/=.



- iii. Tractor valued at Kshs. 1,800,000/=.
 - iv. Loss of earnings on milk Kshs. 720,000/=.
 - v. Cutting and disposal of bananas valued at Kshs. 540,000/=.
 - vi. Indiscriminate felling of trees Kshs. 200,000/=.
- All totalling Kshs. 12,120,000/=.
57. The 1st and 2nd defendants deny the allegations of paragraphs 6-11 of the counterclaim, as the title deeds to the suit properties were lawfully and procedurally transferred by transmission to the late husband, that the application to revoke or challenge the distribution of the grant was dismissed on 10/12/2018, and that the same was later affirmed on appeal on 18/12/2020.
58. The 1st and 2nd defendants reiterate that they have been in actual, exclusive and lawful occupation and possession of the suit properties since 1994, where they have been operating a commercial horticulture and dairy farming, from which farm produce they have been distributing, until the unfortunate unlawful a forceable takeover by the plaintiffs leading to the pleaded loss and damage, including inability to take care of the ailing 1st defendant's late husband.
59. Further, the 1st and 2nd defendants deny that the plaintiffs to the counterclaim had ever resided or otherwise lived on the suit properties, as alleged or at all.
60. The 1st and 2nd defendants in the counterclaim specifically deny any alleged use, occupation and possession of the suit properties, exists to found or amount or constitute to any alleged customary or constructive or resulting trust; otherwise the plaintiffs have deliberately failed to disclose to the court how they also benefited from gifts given to them inter vivos, from the estate of and by the late Clement Munga Muna, during his lifetime as pleaded above, to purport to alleged discrimination on account of their gender.
61. The 1st and 2nd defendants reiterate that the manner in which the plaintiffs had benefited from Changei Farm and other parcels of land alluded above, where each of them todate lives, occupies, resides, or owns, adjacent to the suit properties.
62. The 1st and 2nd defendants deny ever authorising the plaintiffs to enter into or otherwise remain on the suit properties, making their said actions illegal, for they have no proprietary or equitable interest therein as a justification for their illegal acts of trespass.
63. Further, the 1st and 2nd defendants deny the alleged negligence, fraud, or collusion with the 3rd and 4th defendants, noting that the transfer of the suit properties from the initial 2nd defendant to his late wife, the 1st defendant, was lawfully effected. The 1st and 2nd defendants specifically deny the jurisdiction of this court to entertain and determine the counterclaim.

(F). The 3rd and 4th Defendants' Reply to the Counterclaim

64. The 3rd and 4th defendants to the counterclaim, rely on a reply to the counterclaim dated 19/12/2022, reiterating that the orders issued on case Petition No. 5 of 2012, lifted and discharged unconditionally the restraining, injunctive, and or prohibition orders registered against parcel Nos. Waitaluk/Kapkoi/Block 11/Gutongorio B/54, 58, 70, and 71, making the transfer by the 2nd defendant to the 1st defendant as done in good faith by the 3rd defendant and in accordance with the land transfer laws of Kenya.



65. The 3rd and 4th defendants vehemently deny alleged negligence or collusion; otherwise, they were not aware of any pending dispute, nor did they receive any communications sent to them. The 3rd and 4th defendants aver that they were not presented with any letters of administration in favour of the plaintiffs to the counterclaim.
66. Further, the 3rd and 4th defendants deny any collusion since the green card for parcel Nos. Waitaluk Kapkoi/Block 11/Gutongorio B/54, 58, 70, and 71 indicates the transfer was done in favour of the 1st defendant of ID No. 1910438, while the transfer of the same properties by the initial 2nd defendant to the 1st defendant was in the form of a gift, within the provisions of the Land Laws of Kenya.
67. The court has not come across any reply to defence and defence to counterclaim by the plaintiffs to the counterclaim refuting the contents of the defences to the counterclaim by the 1st - 4th defendants thereof, addressing in particular, the preliminary objections on lack of jurisdiction, res judicata, abuse of the court process and that the plaintiffs in the counterclaim were not parties to the previous suits, though privy to them and for being beneficiaries as daughters of the deceased from other properties outside the estate of the deceased the lae Clement Munga Muna, given to them inter vivos apart from the suit properties.
68. The court also notes the glaring inconsistencies in the pleadings by various parties, perhaps due to a change of representation severally making subsequent pleadings upon amendments to be contrary to the rules on amendment of pleadings.

(G). The Site Visit Order and Report

69. Lastly, the court record shows that just before the hearing commenced, a site visit was ordered and a report prepared and filed by the Deputy Registrar of this court as part of the record in this suit.
70. The findings are on pages 2 - 6 of the report, which are quoted as follows:
 - (1) The persons resident on the suit property, and for how long they have been resident:
 - a. Anne Munga (1st defendant) since 1965.
 - b. Miriam Mwanja (wife of Clement Munga) since 2021. She doubles up as the farm manager.
 - c. Monica Njeri Gathu (child of Loise Gathu) since 2021.
 - d. Naomi Mukami Gatu (child of Loise Gathu) since 2021.
 - e. Ruben Ng'ang'a Muna (child of Clement Solomon Muna and Anne Wambui Muna) since 15/4/2020.
 - f. Several farmhands.
 - (2) Farming activities on the land, both cultivation and dairy, and the extent to which they are done.
 - a. There is no dairy farming currently being undertaken on the farm.
 - b. A fifteen (15) acre banana plantation [AM002 (a)]
 - c. Three (3) acres of maize [AM 002 (b)].
 - d. 0.1 acres of sweet potatoes [AM 002 (c)].



- e. Beans farming on 0.4 acres of land [AM 002 (d)].
 - f. Vegetables/Sukuma wiki on a fairly small portion of the suit property not exceeding 0.4 acres [AM 002(e)].
 - g. Seedbed on a fairly small portion of the suit property [AM 002(f)].
- (3) The specific crops currently growing on the land, and on whose account.
- a. Bananas planted by Solomon Muna.
 - b. Maize planted by Anne Njoki Munga for the farm animals' silage.
 - c. Beans and vegetables/Sukuma wiki planted by Anne Njoki Munga's farmhand for their subsistence.
 - d. Sweet potatoes planted by Anne Njoki Muga are meant for farm animals' feed.
 - e. Seedbed planted by Anne Njoki Munga and maintained by her farmhands.
- (4) The Security Firms providing security on the suit property, and for how long they have been providing the security.
- a. Red Hot Security, contracted by Anne Njoki Munga since August 2024.
 - b. Momo Security, contracted by Reuben Muna since 19/9/2024.
- (5) Any previous Security Farms that may have provided security on the farm since January 2020, and which of the parties had contracted them.
- a. John Speech Security, contracted by Anne Munga since January 2020.
 - b. Mulabet Security, contracted by Anne Munga.
 - c. A security farm run by Mr Wanyama, contracted by Reuben Muna between May and June 2024.
 - d. Capricon Security, contracted by Reuben Muna since 21/5/2024.
 - e. Momo Security, contracted by Reuben Muna since 12/9/2024.
- (6) Any other person or individuals or goons who are or purport to provide security on the land, and on whose account.
- a. The alleged goons are security guards from Momo Security contracted by Reuben Muna. They are possibly referred to as goons since they do not have official uniforms for ease of identification, and they threatened the lives of Anne Njoki Munga's farmhands, who sought to access the suit properties.
- (7) The properties lost on the suit land in the last two years, more so from early this year, and as late as 23/9/2024.
- a. 95 pigs and 55 piglets, according to one Cornelius Barasa, a farmhand employed by Anne Munga. John Mureithi of Momo Security, on the other hand, stated that around 50 pigs had been lost, while the other pigs had died due to hunger.
 - b. Maize sheller machine parts.



- c. 120 construction bricks ferried by lorry registration number KAH XXXN, Isuzu white/blue in colour, 10/10/2024, after being allowed access onto the suit property by Momo Security Guards.
 - d. Two (2) wooden pigsty doors.
 - e. One (1) wooden bed.
 - f. One (1) Avary farm weighing machine.
 - g. Twenty (20) bags of maize seeds.
 - h. Two (2) collar plant mortars.
 - i. Two (2) knapsack sprayers.
 - j. One (1) water pump.
 - k. Twenty (20) ninety-kilogram sacks of maize.
 - l. Twenty (24) bags of pig feeds.
 - m. One (1) tractor piston.
 - n. One (1) generator.
 - o. One (1) hydraulic harrow pump.
 - p. One (1) dog.
 - q. Two (2) animal feed milling machines.
 - r. One (1) water pump/generator used to pump water from the dam to the rest of the farm.
- (8) The houses or structures on the suit land, and if possible, the persons who put them up on the land.
- a. Njoki's shop and hotel building – the parties present could not agree on who constructed the structures and when the said structures were constructed.
 - b. Sentry room - constructed by Njoki. Whereas Njoki stated that it was constructed in 2020, Reuben insisted that it was constructed in 2021.
 - c. Farmhands' mud-walled houses - Reuben argued that the said houses were constructed by Jane Wangeci after the order to maintain the status quo had been issued. Jane Wangeci maintained that those houses have always been on the farm and that they were only facelifted for the said houses to be habitable.
 - d. An incomplete house foundation constructed by Jane Wangeci.
 - e. An incomplete mud-walled latrine constructed by Anne Njoki Munga.
 - f. Plastered water tank.
 - g. A modern dairy cow's structure, constructed by Solomon Muna, Reuben Muna's father.
 - h. A cooling structure.



- i. A milling machine house.
 - j. Main farmhouse, workers' permanent houses, cooling structure, sheet and goat shed, pigs' sty, dogs' kennel, farm store, water pump structure, and a man-made dam constructed by Reuben's grandfather.
- (9) The in-charge or managers and contacts of the managers and office contacts, and the C.E.O's contacts of the Security Firm currently providing security on the farm:

S/No.	Security Firm	Contacts	Contractor	Commencement Date
1.	Red Hot Security	In-charge: Stanley Makona Juma 0728329550 Manager: Josphine Wafu Nafu – 0719617639	Anne Njoki Munga	June 2024
2.	Momo Security	In-Charge: John Mureithi – 0724530498 Manager: Milton Omoso Opiyo – 0720878699	Reuben Muna	12/9/2024

Other Observations and Recommendations:

- (a) All the lockable structures except the main farmhouse on the suit property have been locked using padlocks provided by Reuben Muna. The keys to those padlocks are in the custody of Momo Security guards who were contacted by Reuben Muna to secure the farm; hence, only those guards, Reuben Muna, or a person authorised by Reuben Muna can access those lockable structures.
- (b) There is a need for one person appointed by the plaintiffs and another person appointed by the defendants to be allowed to also lock the lockable structures on the suit property with their own padlocks to guarantee the security of the remaining farm equipment and property. This will also ensure that the suit property's status quo is maintained as earlier ordered by the court, and the lockable structures are only accessed with the consent and knowledge of all the parties to the suit.
- (c) Security guards from Momo Security threatened the lives of Anne Njoki Munga's farmhands during the site visit. There is a need for those farmhands to be allowed access to the suit property to take care of the dogs reared on the suit property, tend to the crops growing on the farm, and ensure the security of the property on the suit property.



- (d) The OCS Waitaluk should investigate the loss of property in the suit property in finding (7) above, the threats to the lives of Anne Njoki Munga's farmhands in (c) above, and thereafter file in this court a status update report on the contemplated investigations.

71. The report was accompanied by photos showing the main house, banana plantation, sukuma wiki plants, incomplete latrine, water tank, dairy cattle shed, coding house, dog's kennel, pig sty, overhead water tank, construction bricks, animal feed stores, mud walled farm hand's latrine, mud walled latrine, family graveyard that showing that the late Clement Munya Muna, died on 28/7/1990, Milka Mwhaki Munya, died on 1/5/1993 and Ephrahim Kamau Muna on 9/5/2003.
72. The report also captured a eucalyptus plantation, farm store, farm hand's house, banana plantation, sweet potatoes plantation, a seed bed, a maize shelling machine shed, Njoki shop and hotel structure, a security room, and a foundation for an upcoming house. These were the developments on the suit properties as of the date of the site visit on 11/10/2024.

(H). The Primary Plaintiffs' Evidence

73. At the trial, the plaintiffs relied on the trial bundle dated 31/10/2025. Reuben Nganga Muna, the 5th plaintiff, testified as PW1. He relied on authority to testify on behalf of the plaintiffs dated 31/10/2025, which he produced as P. Exhibit No. 10. PW1 relied on a witness statement dated 7/10/2020 and 31/7/2025 as his evidence-in-chief.
74. PW1 told the court that the initial 1st plaintiff and the 2nd defendant, as well as the 1st defendant in the counterclaim, were his late mother and father, respectively; the 2nd, 3rd, and 4th plaintiffs were his siblings, while the defendants were his paternal aunts and cousins, respectively. Further, PW1 said that he was one of the directors of the 6th plaintiff, whose sole purpose was to operate and manage the commercial farms situated in the suit properties.
75. PW1 told the court that his late mother was the sole registered owner of the suit properties situated in Waitaluk, within Trans Nzoia County, which parcels were transferred to her by his late father, Clement Solomon Muna, the then registered owner by transmission from the estate of his late grandfather, Clement Munga Muna, to hold in trust for herself and the children of the marriage.
76. PW1 said that together with his late mother, the plaintiffs incorporated the 6th plaintiff to operate the commercial farm in the suit properties since 1994, where they had been carrying out horticultural crop and dairy farming, which investment is captured in the audited accounts of 2019, exclusively. PW1 said that they had heavily invested their time, money, and other resources to improve, upgrade, and develop the agricultural output.
77. PW1 told the court that the activities on the farm continued until 13/4/2020, when the defendants, with the help of goons, the area chief, and some police officers, forcefully broke into the farm, destroyed fences, broke the doors, and caused wanton and malicious destruction therein.
78. PW1 said that they were informed of the same by the farm manager, a Mr. John Njoroge Wambugu, whom they instructed to make a report at Sirende Police Station, vide OB No. 12/12/04/2020. He termed the acts of the defendants as unjustified and amounting to trespass with the intention of permanently remaining therein.
79. Further, PW1 told the court that the plaintiffs later moved to court under a certificate of urgency dated 29/4/2020, wherein the court issued a temporary injunction restraining the defendants from entering,



- destroying, remaining, trespassing, or interfering with the suit properties, which orders were suspended at an interpartes hearing.
80. PW1 told the court that, pending a ruling on 30/6/2020, the defendants, again using the same goons, forcefully took over and caused more destruction, whereafter, on 30/6/2020, a status quo was issued in favour of the defendants. PW1 termed the acts of the defendants unlawful, unjustified, and having caused loss and damage to them, since they cannot derive income from the immense investment on the farm or meet contractual obligations, that they had signed with third parties, to supply dairy products and vegetables to them, including Kinetic Africa for supply of silage and the Kitale Club for supply of vegetables.
 81. PW1 said that as a result of the trespass, medical bills for the ailing late father were not met for lack of income from the farm, which had invested his entire savings and pension, and eventually he passed on.
 82. PW1 said that before the trespass, the defendants had not been residing or occupying the suit properties; they had already acquired some gifts of land from his late grandfather, which they had been occupying adjacent to the suit properties, as pleaded in the further, further, further amended plaint and defence to the counterclaim.
 83. Again, PW1 said that the plaintiffs have never authorised or permitted the defendants to enter, remain, or occupy the suit properties; otherwise, the acts amount to trespass and deprivation of their use, occupation, and quiet enjoyment of the suit properties.
 84. PW1 clarified that the late mother and father were in exclusive peaceful use and occupation of the suit properties together with her family from the time the succession proceedings were completed in respect of the estate of Clement Munga Muna. He contended that although the defendants had allegedly tried in several courts to have the suit properties redistributed to their names, they had been unsuccessful, hence his late father and later his late mother, until their deaths remained the former and the immediate current absolute registered owners to date.
 85. PW1 said that the defendants have no justification to allege, demand, use, challenge, remain, and stake any counterclaim on the suit properties, over alleged overriding interests. PW1 urged that the reliefs sought in the further, further, further amended plaint dated 31/7/2025 be allowed and the counterclaim be dismissed.
 86. PW1 relied on exhibits in a list of documents comprised in volumes (1), (2), (3), and (4), dated 7/8/2020, 9/1/2024, 5/5/2024, and 31/7/2025, respectively; namely, copies of the title deeds for L.R. No. Waitaluk/Kapkoi/Block 11/Gutongorio B/70, 71, 58, and 54 as P. Exhibit No.1(a), (b), (c), and (d), copies of O.B No. 11/6/2020 as P. Exhibit No. (2), a copy of a letter dated 15/4/2020 as P. Exhibit No. (3), a copy of the letter dated 22/4/2020 as PMFI. No. (4), receipts as PMFI-No. (5), photographs as PMFI-No. (6), copies of the green card for L.R. No. Waitaluk/Kapkoi/Block 12/160 as P. Exhibit No. (7), copies of passports of Anne Njoki Muna as P. Exhibit No. (8), copies of the letter from an investigative farm in Switzerland as PMFI-No. (9), copies of title deeds for Waitaluk/Kapkoi/Block 12/Chamgei/537 and 503, as P. Exhibit Nos. (10) and (11), copies of invoices for Gutongorio Farm as PMFI-No. (12), copies of medical bills and receipts for the late Clement Solomon Muna as P. Exhibit No. (13),
 87. Further, the plaintiffs relied on copies of the ruling in Nairobi High Court Succession Cause No. 857 of 1992, delivered on 10/12/2018, as PMFI-No. (14), a copy of the typed decision from the Court of Appeal as PMFI-No. (15) a copy of the ruling in Eldoret J.R No. 76 of 1995 as PMFI-No. (16), judgment in Kitale High Court Succession Cause No. 35 of 2017 as PMFI-No. (17), limited grant of



letters of administration ad litem in respect of the estate of the late Anne Wambui Muna, the initial 1st plaintiff, issued on 24/4/2025 as P. Exhibit No. (18).

88. In cross-examination, PW1 confirmed that the defendants were his relatives, for their common father was the late Clement Munga Muna, who had migrated to Kitale from the ancestral land in Kijabe, Kiambu County. PW1 could not tell if the late grandfather had disposed of the ancestral land to buy the suit properties in Kitale. Equally, PW1 could not tell whether the 7 aunties were all born and brought up either in Kitale or in Kijabe.
89. PW1 denied that his late father had allegedly blocked or denied the 7 aunties from sharing the estate of the late Clement Munga Muna, on account of their gender, to exclusively acquire the 258 acres of the suit land out of the 430 acres, covered in the confirmed grant.
90. PW1 said that there were other properties in the succession cause apart from the suit properties whose beneficiaries are indicated in the grant. PW1 confirmed that, as per P. Exhibit No. 1(b), the subject title was registered on 22/8/2019, 24/7/2019, 23/7/2019, and 22/7/2019, during the lifetime of his late father. PW1 said that the four properties gifted to his late mother were initially part of the estate of his late grandfather, which his late father acquired out of transmission, with no payment of any consideration.
91. PW1 said that his family has been in exclusive, use, possession, and occupation of the suit properties; otherwise, at no time did his aunties refer to the same as their family home, since they were gifted Chamgei parcels by the late grandfather. PW1 denied that there was any pending matter at the Court of Appeal as alleged by the defendants, which could have prevented the transfers of the suit properties to his late mother from taking effect in law.
92. Further, PW1 said that his late grandfather owned shares in Chamgei Farm. Going by copies of records tendered as P. Exhibit Nos. (10) and (11), PW1 said that though there are missing details of the transfer of the parcels of land initially belonging to his late grandfather, it was not true that the defendants were discriminated against on account of gender; otherwise, out of love and affection, his late mother was lawfully transferred the suit properties by her late husband.
93. PW1 confirmed that he was born and brought up in both Nairobi and Kajiado Counties, though he has been occupying and managing the farm since 1985 to the filing of the suit. PW1 said that he had no evidence of the marriage status of his aunties, nor did he have copies of the title deeds referred to in pages 47 and 49 of his witness statement.
94. PW1 confirmed that the 2nd defendant was the 1st grandchild of the late grandfather, who had shortly stayed with them at the suit properties while her father was erecting a house before relocating to her late parents' homestead, which was gifted to them by the late grandfather, measuring 20 acres.
95. In addition, PW1 denied knowledge of the purchase of the land by the 2nd defendant's parents following the disposal of their farm in West Pokot County. PW1 said that the defendants acquired some parcels of land from the late grandfather during his lifetime, as per page 147 of the trial bundle and as per the certificate of confirmation of grant dated 28/1/2019.
96. PW1 said that his late father only inherited 258 acres out of L.R. No. 1800/4 Kitale. PW1 denied that the copy of the record of the suit properties and the grant captured the alleged trusteeship in favour of the defendants, which his late father and mother ignored and or breached.
97. PW1 said that the certificate of confirmation of grant showed that, apart from his late father, there were other beneficiaries to the estate of the late Clement Munga Muna, namely his uncles, John



Arthur Kabiro, Samuel Nganga Munga, Nehemiah Mwaura, and Jeremiah Mangara Munga, whom the defendants have not complained against.

98. PW1 said that pages 106, 111, and 140 of the trial bundle were clear on what his aunties had acquired as part of the estate of the grandfather, to which they have raised and brought up his cousins, the 2nd-6th defendants, which are distinct and separate from the suit properties.
99. PW1 confirmed that the transfers between his late parents occurred after the completion of the Nairobi Succession Cause No. 857 of 1992. Therefore, PW1 said that there was no bar stopping his then-aged father from transferring the parcels of land to his late mother.
100. PW1 said that due to the invasion, the plaintiffs have not been able to continue to commercially develop the suit properties as was the case before the trespass, hence the claim for damages, compensation, and permanent injunction.
101. Corporal. Mukhwana testified as PW1. He produced OB No. 13/15/4/2020 as P. Exhibit No. (2). PW2 confirmed receipt of a report by Juma Martin, a manager of the plaintiffs, regarding the alleged illegal acts of trespass and malicious damage by the 1st defendant, who was accompanied to the suit properties by the assistant chief in the company of police officers of the patrol base situated on the western side of the farm. PW2 said that the ob report indicated that the said Njoki had allegedly broken into one of the houses of the Gutongorio Farm.
102. PW2 confirmed that no suspect was charged for the alleged offence of malicious damage. Equally, he said that the 1st defendant did not report any destruction or blockage of use or entry into the suit premises by the plaintiffs.
103. Solomon Ngugi Kariuki, the chief of Sirende Location, testified as PW3. He confirmed writing the letter dated 23/4/2020, which he produced as P. Exhibit No. (4), regarding the rights or interests of Anne Njoki to the suit premises. Following the lack of cooperation with the plaintiffs who had called the witnesses, learned counsel sought to have the witness declared hostile, which the defendants did not oppose. After the witness was declared a hostile witness, he told the court that Anne Njoki was the daughter of the late Clement Munga Muna, whom he had known since 2000.
104. PW3 admitted that he wrote the letter to the 1st defendant as an introduction to the police so that she could access her house in the suit properties, since she had no court order to that effect. PW3 said that the home belonged to her; otherwise, her late brother Solomon had also called him through his cell phone earlier that day to assist her in moving in. PW3 said that the house was open, and when he visited there, he found some police officers, and after gaining entry, all of them left the suit properties.
105. Further, PW3 confirmed that during the pendency of the dispute at the Nairobi courts, parties met with him and their lawyers to attempt a possible settlement, but he could not tell whether it was achieved. PW3 said that he was not certain the registered owner of the suit properties when he facilitated the said Anne Njoki to gain access. He denied that the facilitation helped the 1st defendant to unlawfully access the 1st plaintiff's land. PW3 said that it was the police officers who opened the house for the 1st defendant to gain entry; otherwise, the residence on the suit properties belonged to her late father.
106. The court noted the demeanour of the witness as that of an unreliable and unbelievable witness out to mislead it. PW3 confirmed knowing both the plaintiffs' family and the defendants since 1985.
107. PW3 said that it was the late Solomon Muna, who authorised him to assist Anne Njoki gain access to the residence, which formed part of her late parents' homestead. PW3 confirmed that the defendants



were not in occupation of the suit properties by 2020, after they had allegedly been chased from there by the late Solomon Muna.

(I). The Evidence of the Defence

108. Anne Njoki Munga testified as DW1. She relied on a witness statement dated 22/1/2025 as her evidence-in-chief.
109. DW1 told the court that she was born in a family of 12 siblings as the 10th born of the late Clement Munga Muna, who passed away in 1992, leaving behind the suit properties. DW1 said that, as per the certificate of confirmation of grant, a substantial part of the estate went solely to the late Solomon Muna, through fraud and misrepresentation; inter alia, by employing alias names to hoodwink various processes and legal procedures.
110. DW1 told the court that the dispute raised in the counterclaim has unsuccessfully gone through various courts, culminating in Nairobi Civil Appeal no. 283 of 2019, now pending before the Court of Appeal. DW1 said that for the last 28 years, the 1st defendant's elder brother's wife has all along been aware that the attempted fraudulent disinheritance of the plaintiffs to the counterclaim was purely predicated on gender, with the sole aim of frustrating and defeating the Court of Appeal hearing.
111. DW1 contended that the late father intended to leave the suit properties to the late brother, to hold in trust for the whole family, including the defendants herein. DW1 told the court that the Kikuyu customary culture on inheritance of property provides that the firstborn son could be entrusted to take care of the entire estate that the father leaves behind for the benefit of all his siblings. In this case, DW1 told the court that her late sister-in-law had obtained titles to the suit properties fraudulently and in collusion with her late brother, without the defendants' consent and to their exclusion.
112. DW1 told the court that the 6th plaintiff was incorporated and operated to generate profits and income, which were not accounted for to the defendants, notwithstanding the overriding interest the defendants held in the suit properties. DW1 particularized the fraud against his late brother and sister-in-law, as transferring the suit properties during the pendency of the Court of Appeal matter, without acknowledging their overriding rights or interests, colluding to disinherit them, misrepresenting or disguising the name of her late brother, purporting to frustrate and defeat the Court of Appeal hearing, transferring the suit properties for no valuable consideration, failing to give them notice over the transfer, presenting false document for registration and lastly; acting in total disregard of the customary trust that automatically attaches to the suit properties, since they have been living on the suit properties since they were born.
113. Similarly, DW1 denied the alleged trespass; otherwise, the plaintiffs have not disclosed material facts specifically on the existence of the Court of Appeal matter to seek interim orders. DW1 blamed the 3rd defendant for authorising the subdivision of Waitaluk/Kapkoi Block 11/Gutongorio B, issuing the title deeds, and further registering the transfer, while there was a pending court matter, in collusion with the late Solomon Muna, negligently and carelessly.
114. DW1 told the court that the 3rd defendant allowed the transfers for no valuable consideration and for neglecting to interrogate the letters of administration in favour of the late Solomon Muna, who had purported to disinherit female members of the family, leaving them with nowhere to live, and with no means of livelihood. She urged the court to dismiss the primary suit and allow the counterclaim. DW1 relied on D. Exhibit No. (1), (2), (3), (4), and (5) also produced as D. Exhibit No. 1(a), (b), (c), and (d). DW1 wondered who Clement Solomon Muna was as described in the referenced exhibits.



115. Further, DW1 also produced the title No. Waitaluk/Kapkoi Block 11/Gutongorio B/58 as D. Exhibit No. (6), copies of the green card for the suit properties as D. Exhibit No. (7), certificate of confirmation of grant for her late father issued on 28/1/1994 as D. Exhibit No. (9), bundle of emails from the Registrar Court of Appeal regarding Civil Appeal No. 283 of 2019 dated 2/10/2019, 22/2/2024, 30/10/2025, and 26/6/2025, as D. Exhibit No. 10(a), (b), (c), and (d).
116. In cross-examination, DW1 told the court that the Chief Land Registrar had been notified of the pending suits. DW1 denied the alleged marriage to a Swiss National, whom she termed as a mere friend and a co-citizen, where she studied. DW1 denied having a homestead on title No. Waitaluk/Kapkoi Block 12/Chamgei/527. DW1 admitted she was the owner of P. Exhibit No. (10) as per the green card, though she insisted it was not a gift to her from her late father
117. Further, DW1 admitted that she has not filed or produced any evidence of purchasing the land or payment of any consideration to acquire it. DW1 insisted that she had lived on the suit properties; otherwise, the transfers were fraudulent or illegal, although she had no evidence to that effect. DW1 said that there was a prohibition order stopping the transfers. None was produced in her defence.
118. DW1 admitted that the Court of Appeal declined to allow her appeal out of time; otherwise, she was not aware of any pending appeal at the moment. However, DW1 denied that the late brother and sister-in-law were the sole exclusive occupiers of the suit properties as alleged, with effect from 1994. DW1 said that she had no photographs to the contrary, that she was in occupation of the suit properties at the time, or evidence of any activities of her own on the land.
119. DW1 denied the alleged willful and wanton destruction of the suit properties as alleged by the plaintiffs, with effect from 13/4/2020, when she is alleged to have forcefully taken over the farm. DW1 denied the alleged entry into the suit properties without justification and or in the company of the area chief and police officer, without a court order. On the contrary, DW1 said that she was the one who went to the DCIO Kiminini Police Station to file a report after her house roof was allegedly removed, leading to an OB report, and was accompanied by the DCIO to the homestead. DW1 did not produce a copy of the said OB report. Equally, DW1 denied knowledge of a temporary injunction issued against her and the defendants dated 27/5/2020.
120. DW1 denied that she only took possession of the suit properties after 30/6/2020, when the interim orders were lifted. DW1 admitted that she sought no consent or authority from the registered owner of the parcels in dispute to take possession thereof, before and after her late brother passed on. DW1 said she has no evidence of the alleged vandalism of her roof by the late sister-in-law.
121. DW1 denied having stationed security guards on the suit properties after 30/6/2020 to stop the plaintiffs' entry into the suit properties. Again, DW1 stated that she only lived in Switzerland for 3 years, after which she came back to the country and was never married to anyone in Switzerland.
122. DW1 said that she has been litigating over the suit properties of land for 30 years, initially with her late brother. She added that the Eldoret JR No. 193 of 1994 was filed while she was still in school by her sisters, and so was Kitale Chief Magistrates' Case No 25 of 1994.
123. Again, DW1 said that Petition No. 5 of 2012 at Kitale High Court was not prosecuted, since their lawyer passed on, leading to a transfer to Nairobi Law Courts. DW1 admitted that all the previous suits were related to the disputed parcels of land, to which they were unsuccessful, hence the counterclaim. DW1 admitted that she had bought some parcels of land next to the suit properties. DW1, however, denied that her late brother was the sole caregiver to their late parents or the sole manager of their estates. DW1 insisted that she was entitled to part of the disputed parcels of land as part of her inheritance from her late father's estate.



124. DW1 said that her house was in the residence belonging to her late parents, where she has lived for over 60 years. DW1 said that the house was a gift from her late mother, as a matter of right, hence the reason she did not need a court order to gain access to the suit properties. DW1 admitted that her counterclaim and the witness statement were silent on the specific details of her occupation, use, and development of the suit premises for the last 60 years.
125. Further, DW1 admitted that her late brother was aged, sickly, and deriving income from the farm. DW1 denied liability or responsibility for her late brother's lack of medical care due to the lack of income, after she took over the suit properties. DW1 admitted that it was the DCIO Kiminini who brought to her attention the transfers and registration of the suit properties by availing her a copy of the title deed in favour of her late sister-in-law, who had demanded that she be ordered to vacate.
126. Revered John Arthur Kibiru, a brother to the 1st defendant, testified as DW2. He relied on a witness statement dated 22/1/2025 as his evidence-in-chief. DW2 told the court that he was the elder brother of the late Solomon Muna. He stated that their late father passed on in 1990, leaving behind a vast estate that he and his brother, Apollos Mwangi Muna, acquired after disposing of ancestral land in Kijabe, Lari Location, to acquire land in Trans Nzoia, through the Agricultural Finance Corporation, namely L.R. No. 1800/5/R, measuring 439 acres in 1970.
127. DW2 said that his late father passed on on 28/7/1990, before he had obtained under his name a title deed for his share from the elder brother Apollo. DW2 said that after their late father passed on, the late Solomon Muna Munga, Samuel Nganga Munga, and Milka Mwihaki Munga were appointed as administrators of the estate.
128. Equally, DW2 stated that the late uncle on 17/3/1999 gave consent to transfer 439 acres of the initial land for subdivision to 13 portions, namely L.R. No. 1800/5/R, which was exactly 9 years after the late Clement Munga Muna had passed on.
129. DW2 said that pursuant to the late father's declaration made on 21/3/1988, the estate was distributed to male children, excluding the daughters, going by a report dated 26/4/2003 from one Joseph Gathonga Wanyoike, produced as D. Exhibit No. (7), with the late Solomon Muna getting the lion's share of 258 acres, to hold the same in trust for himself and the sisters.
130. DW2 said that the transfer of the suit properties from his late brother to his late sister-in-law and their children was fraudulent, since it was aimed at disinheriting all the intended beneficiaries as per the wishes of his late father, who had nowhere else to live. Further, DW2 told the court that it was his late brother who was in charge of the distribution as per D. Exhibit No. (7), together with the late mother, without taking into consideration the interests of the defendants.
131. According to DW2, the three administrators of the estate of his late father were supposed to act jointly. DW2 said that all his sisters were left out and therefore were not party to the succession cause, nor were their interests considered in the distribution.
132. On gifts inter vivos, DW2 stated that he was not aware of any gifts made by his late father to the sisters; he insisted that the issue of any shares due to the daughters was not mentioned in the meeting convened by his late uncle on 18/6/1991.
133. As regards fraud, DW2 admitted that he had no evidence to support such allegations. The court noted the demeanour of the witness as he was answering questions from the plaintiffs' counsel. DW2 insisted that he was not involved in the succession cause for the late father's estate, yet D. Exhibit No. (9) shows otherwise. DW2 said that all his sisters had been married off at the time and that DW1 was living in Switzerland, though she would occasionally visit the country.



134. DW2 admitted that after his father passed on, several cases were filed by the sisters, where he never participated as a party or as a witness. DW2 said that the subject land has been under agricultural use throughout, where his late brother would visit the farm over the weekends.
135. Further, DW2 said that D. Exhibit No. (10) did not list the defendants as beneficiaries to the late father's estate. Answering questions from the court, DW2 said that the 1699 acres acquired by his late father, together with the late uncle, in 1970, were part of the ancestral land. Additionally, DW2 could not tell if the sisters raised a breach of their constitutional rights before the late mother passed on, or with the uncles at the time.
136. Naomi Mukami testified as DW3. She relied on a witness statement dated 23/1/2025 as her evidence-in-chief. She associated herself with the evidence of DW1 and DW2. DW3 confirmed that her residence was in title No. Waitaluk/Kapkoi/Block 11/Chamgei/503, which was bought from but not gifted to her by her late father. DW3 confirmed that DW1 used to live in Switzerland.
137. Again, DW3 confirmed that her late mother was buried on her land No. 503, though she had sued her late uncle in the mentioned cases. DW3 said that even though her late mother lived in her matrimonial home, she was entitled to a share in the late grandfather's estate, which was being utilised by the late uncle before he passed on.
138. Monica Njeri Munga testified as DW4. She relied on a witness statement dated 22/1/2025. DW4 associated herself with the evidence of DW3, her sister. DW4 confirmed that the suit properties were under large-scale farming, operated by her late uncle.
139. Samuel Nganga Gathu testified as DW5. He also relied on a witness statement dated 22/1/2025 as his evidence-in-chief. DW5 told the court that the late Loise was his mother, who used to live on parcel No. 503; otherwise, the suit properties were run by the late uncle.
140. Jane Wangeci Wairuru, the 2nd defendant, testified as DW6. She relied on a witness statement dated 24/9/2023 as her evidence-in-chief. DW6 told the court that she was the daughter of the late Elizabeth Waceke, the firstborn child of the late Clement Munga Muna, and the owner of the four suit properties, measuring approximately 258 acres, that had been left behind under the name of the late Solomon Muna to hold in trust for himself and the sisters, among them her late mother.
141. DW6 told the court that, unfortunately, the late uncle selfishly and fraudulently transferred the same to the late aunt, despite the overriding interests, to the detriment of the sisters and their children. DW6 relied on letters dated 21/3/1988 and 17/3/1999 as D. Exhibit Nos. (11) and (12). DW6 termed the acts of the late uncle in disinheriting the sisters as discriminatory on account of their gender. DW6 said that she was born in West Pokot. She denied that her late mother had been gifted 20 acres of land by her late grandfather; instead, she had actually bought the same from him after disposing of 3 acres of land in West Pokot. However, DW6 had no sale agreement to support her assertion.
142. DW6 confirmed that her father was still alive, even though he did not join the suit. DW6 said that she had no evidence of the alleged fraud or misrepresentation, or a copy of an order stopping the transfers of the suit properties, by the late uncle and the late aunt.
143. Further, DW6 admitted that the dispute before the court was only brought against the late uncle and not against all the joint administrators of the estate of the late Clement Munga Muna. DW6 said that the estate should be redistributed afresh to cater for the interests of the defendants and their children.
144. Following the non-attendance of witnesses at the defence hearing, the 3rd and 4th defendants' defence dated 19/12/2022 was marked as closed. Parties were therefore directed to file and exchange written submissions by 7/12/2025.



(J). The Plaintiffs' Written Submissions

145. The plaintiffs rely on written submissions dated 22/10/2025. After briefly summarising the salient features of the pleadings and the evidence tendered in support, the plaintiffs submit that the 3rd plaintiff to the counterclaim failed to testify; hence, his claim should be disallowed. The plaintiffs submit that there is uncontroverted evidence that the 3rd plaintiff in the counterclaim was gifted land inter vivos by the late Clement Munga Muna, and as such was not discriminated against in any way, going by pages 147 and 130 of the plaintiffs' trial bundle.
146. The plaintiffs isolated five issues for the court's determination. It was submitted that the 1st, 3rd, 4th, 5th, and 6th defendants' counterclaim was res judicata, hence ousting the jurisdiction of the court to hear and determine it in view of past cases captured in pages 119 to 125, 126-130, of the plaintiffs' trial bundle.
147. The plaintiffs submit that the issues in dispute as raised in the counterclaim were directly and substantially the same ones that were raised in the listed cases, already determined, between the same parties and or their collective interests hereto, were litigating the same or similar titles, as admitted by all the witnesses. Further, the plaintiffs submitted that similar or the same reliefs were being sought by the defendants, and the former courts had jurisdiction to hear and determine the cases filed before them, and conclusively determined the issue of distribution of the estate of the late Clement Munga Muna, and the defendants' entitlement to the same.
148. The plaintiffs submit that the succession court in Nairobi Succession Cause No. 857 of 1992 had jurisdiction to hear and determine the issues of customary constructive or resulting trust, which ought to have been raised as early as 1994. Reliance is placed on *Kabata -vs- Mbugua* KECA 524 (KLR), *Bena Nafula Makana & Others -vs- Nyaoro Akoth Muka Crescentia & Others* [2019] KECA 755 KLR and *Kenya Commercial Bank Ltd & Another -vs- Muiri Coffee Estate Ltd & Others* [2016] KESC 6 [KLR].
149. As to the alleged discrimination between male and female beneficiaries of the deceased estate, the plaintiffs submit that the issue was also raised in Nairobi Succession Cause No. 857 of 1992 and in *Anne Njoki Munga & Others -vs- Clement Solomon Munga & Another* [2018] KEHC 613 [KLR], and therefore, as held in *Communications Commission of Kenya & Others -vs- Royal Media Services Ltd & Others* [2014] KESC 53 [KLR], otherwise the doctrine of res judicata also applies to constitutional matters.
150. The plaintiffs submit that in this instance, in the decision delivered on 17/12/2018, the said decision has not been appealed against, and what is allegedly pending is a three-judge bench seeking a review of a ruling from a ruling refusing to grant leave to appeal out of time and not an appeal. Nevertheless, it is submitted that the memorandum of appeal in Civil Appeal No. 283 of 2019, in support of the application, shows that the prayers of equal division of the suit properties being sought by the defendants are the same relief being sought before the Court of Appeal, subject to the appeal being admitted out of time. Consequently, the plaintiffs submit that the 1st, 3rd, 4th, 5th, and 6th defendants are attempting to induce this court to make a judgment on issues before it, which may substantively be in issue at the Court of Appeal, going by pages 143-145 of the defendants' trial bundle.
151. The plaintiffs submit that in view of the plea of res judicata, the counterclaim should be struck out for breach of the doctrine of res judicata and an abuse of the court process, as it is a backhanded attempt by the defendants to relitigate already conclusively determined issues by courts of competent jurisdiction. Reliance is placed on *Bank of Africa Ltd & Another -vs- TSS Investment Ltd & Others* [2024] KECA



- 440 [KLR], Juja Coffee Exporters Ltd & Others -vs- Bank of Africa Ltd & Another [2022] KEHC 9 [KLR], and Elephant Oil Mills Ltd -vs- Njoroge & Others [2024] KEELC 1379 [KLR].
152. The plaintiffs warning is that, if the court were to permit the counterclaim, it would inevitably result in a conflicting determination from two courts of concurrent jurisdiction in respect of the suit properties, which would be repugnant to the principles of public policy as held in *Odongo & Another -vs- Cheptumo & Others* [2025] KEELC 4642 [KLR], more so when the counterclaim is being brought after 10 years from the date the cause of action accrued. The plaintiffs submit that the counterclaim is also filed after an inordinate delay, which has not been explained, as held in *James Kanyitta Nderitu -vs- Attorney General & Others* [2019] KECA 1006 [KLR].
153. Further, the plaintiffs submit that the defendants were all aware of the causes of action, yet they have been litigating in various courts for over 30 years. It is submitted that, having slept on their alleged rights, the defendants are guilty of laches until September 2020, to purport to make a claim founded on trust. The plaintiffs submit that it is 10 years or 8 years since the Environment & Land Court was started, and the delay in filing their claim has not been explained; otherwise, it is an afterthought brought to ambush the plaintiffs in the main suit.
154. The plaintiffs submit that the inordinate delay in filing the counterclaim has prejudiced them, for they have been unable to access crucial decisions in LDT No. 23/94/B, Kitale PMC Case No. 25 of 1994, and Eldoret Misc. Appl. No.193 of 1994, which has been destroyed under the Records Disposal Court Rules, after 12 years from the date of the final judgment or order.
155. The plaintiffs further submit that the principal parties to the suit and counterclaim are elderly and have passed away, leaving the dispute to be between the grandchildren of the deceased patriarch. The plaintiffs submit that no explanation for the delay was offered and that litigation spanning over 30 years must surely come to an end. Reliance is placed on *Daniel Kibet Mutai & Others -vs- Attorney General* [2019] KECA 125 [KLR].
156. Further, the plaintiffs submit that the trend of inordinate delay on the part of the 1st, 3rd, 4th, 5th, and 6th defendants is not an isolated incident; otherwise, despite the ruling in *Nairobi Succession Cause No. 857 of 1992 on 10/12/2018*, an application for extension of time was only filed 13 months later. Reliance is placed on *Kithangari & Others -vs- Mutahi* [2024] KESC 72 [KLR].
157. On ownership, the plaintiffs submit that it is not disputed that the initial 1st plaintiff in the main suit is the currently registered owner of the suit properties. It is submitted that the title deeds have not been impeached by the defendants, through tangible and cogent evidence, on account of fraud, which has to be specifically pleaded and proved to the required standard.
158. The plaintiffs submit that the evidence that there was a pending appeal at the transfer stage has not been availed. The certificate of confirmation of grant has never been revoked; allegations of discrimination against other beneficiaries are discounted by the testimony of Reverend Kubiru. Love and affection is sufficient consideration in transfer among spouses by dint of Sections 37 and 27 of the [Land Registration Act](#) as read together with Section 2 of the [Stamp Duty Act](#). Reliance is placed on *Kuria Kiarie & Others -vs- Sammy Magera* [2018] KECA 467 [KLR].
159. The plaintiffs submit that the 3rd and 4th defendants in the counterclaim have demonstrated that the transfer and registration were a valid and lawful transmission.
160. On customary trust, the plaintiffs submit that the 1st, 3rd, 4th, 5th, and 6th defendants have not met all the ingredients set in *Isaya Kiebia -vs- M'Lintari & Another* [2018] KESC 22 [KLR], since the suit properties in question were not before registration, family, clan, or group land. The origin of the suit properties shows that the deceased and his brothers bought the land but did not inherit it; the 1699



acres were shared among the brothers based on financial contribution as per the evidence of Reverend Kabiro for commercial farming, precluding the concept of intergenerational equity as held in *Mbasa -vs- Mbasa & Others* [2025] KECA 142 [KLR].

161. Further, the plaintiffs submit that evidence from Kikuyu elders as to the customs was not called; documents contained in pages 173-174 by the plaintiffs in the counterclaim were not produced as exhibits to support the claim of customary trust. Exhibits produced by DW6 do not support the concept.
162. The plaintiffs submit that the defendants were given gifts inter vivos, adjacent to the suit properties, by the late father before his death, where they live to date, hence they could not feature in the meeting held on 18/6/1991, to be entitled to additional properties.
163. The plaintiffs urge the court to take judicial notice of the reason for the burial of the late Clement Munga Muna, his late wife Milka Mwhaki Muna, and Ephraim Muna, on the suit properties, and not the rest who had died, since they were settled elsewhere.
164. The plaintiffs submit that the doctrine of constructive trust was not proved or remains unavailable to the defendants, for they have been unable to prove any wrongdoing or the alleged trusteeship, which was abused by taking advantage of the position for personal benefits. Reliance is placed on Black's Law Dictionary, 9th Edition, and Principles of Equity and Trust, 2nd Edition.
165. The plaintiffs submit that the 1st and 2nd defendants to the counterclaim did not and could not have held the suit properties in constructive trust because they did not obtain titles to the same by wrongdoing; the sole proprietorship by the late Solomon Muna was confirmed in the Nairobi Succession Cause No. 857 of 1992; the deceased had a valid title to transfer to his late wife; fraud has not been proved; evidence of fraud on the part of the 1st and 2nd defendants to the counterclaim is missing.
166. On resulting trust, the plaintiffs submit that its ingredients as defined in Black's Law Dictionary (supra) and Principles of Equity and Trust (supra), have not been proved, that the transferor did not intend to confer a beneficial interest upon the transferee, and there was a clear intention of conferring a beneficial interest.
167. Further, it was submitted that the transfer resulted in the plaintiffs occupying the suit properties and developing them until the transferor passed on, and that there is no evidence that the defendants in the main suit financially contributed to their acquisition, maintenance, or improvement, unlike the 1st and 2nd defendants to the counterclaim. Reliance is placed on *Charles K. Kandie -vs- Mary Kimoi Sang* [2017] KECA 775 [KLR].
168. The plaintiffs reiterate that nothing was barring injuncting, prohibiting, or impeding the transfer to cast any doubt that the initial 1st plaintiff was the absolute owner of the suit properties, free of any encumbrances, in favour of the defendants, who have had no proprietary or personal rights to amount to overriding rights or interests.
169. Further, the plaintiffs submit that an action in rem involves determining the status of a thing, and therefore the rights of a person generally with respect to that thing only, or its right of the parties, but also against all persons at any time dealing with them as per Black's Law Dictionary, 9th Edition. In this instance, the plaintiff submit that the succession court in Nairobi Succession Case No 857 of 1992, finally determined as to the beneficiaries of the estate of the late Clement Munga Muna, when it issued the certificate of confirmation of grant, which decision has not been set aside or successfully appealed against as things currently stand, making the issue of whether the defendants and the plaintiffs



to the counterclaim alleged rights incapable of being re-opened for redetermination, by this court, and rendering the alleged rights to the suit properties a nullity.

170. In addition, the plaintiffs submit that an action in personam involves determining the personal right and obligations of the parties as per Black's Law Dictionary (*supra*). In this case, the plaintiffs submit that an action based on trust would be a matter in personam because it would require a determination against a person said to be holding property in trust for another. In this instant case, given that the plaintiffs have established that the plaintiffs in the counterclaim have no basis for a customary, constructive, or resultant trust to be implied in their favour, the defendants have no personal rights over the suit properties.
171. On trespass, the plaintiffs submit that there is no justification for the entry, remaining, and occupation of the suit properties by the defendants. In this case, the plaintiffs submit that they have produced evidence of ownership, legality in obtaining the titles, lack of authority or consent for the trespass between April and June 2020, forceful entry with the assistance of the area chief and the police, immediate exclusive ownership before April 2020 and forceful occupation by the defendants after June 2020 to date, to be entitled to the reliefs sought. Reliance is placed on Kenya Power and Lighting Company & Others -vs- Ringera [2022] KECA 104 [KLR] (14th February 2020) (Judgment) and the [Trespass Act](#), Cap 294.
172. As to the relief in the counterclaim for permanent injunction, the plaintiffs submit that the court cannot be asked by a trespasser to the suit properties subject to confirmation of grant in 1994, lawfully transferred in 2019, which titles they have failed to impeach, and which acts have deprived the lawful owners use, occupation and income generated therefore to be enjoined on an alleged succession related disputes pending or otherwise; contrary to Rule 41(3) Probate Rules, to deny quiet and peaceful enjoyment of the same. Reliance is placed in the estate of Kasia Musau Mbuva alias Kasia Musau Mbuvi (deceased) 2022 KEHC 12706 [KLR].
173. The plaintiffs submit that they have proved the trespass and encroachment, loss, and damage of Kshs. 8,850,746/= to be entitled to damages. Reliance is placed in Gumo -vs- Juma [2022] KEELC 2985 [KLR] and Shah -vs- M&M Science Ltd [2022] KEELC 3420. The plaintiffs urged the court to allow the suit with costs awarded by Rai & Others -vs- Rai & Others [2014] KESC 31 [KLR].

(K). The 1st, 3rd, 4th, 5th, & 6th Defendants' Submissions

174. The 1st, 3rd, 4th, 5th, and 6th defendants rely on written submissions belatedly dated 24/12/2025, and filed outside the timelines set out by the court.
175. The defendants submit that this matter presents a profound constitutional value of honesty and integrity, when it comes to the creation of trustees and the role of Article 10 of the [Constitution](#), in the lives of private citizen and also speaks to the application of trust law principles to family-owned property in Kenya, primarily as envisioned in the [Land Act](#) 2012 as an overriding interest.
176. The defendants submit that this suit arises from a long-standing family dispute between the plaintiffs and the defendants or their respective personal representatives. The defendants' submissions set out the background of the case as to the family ties between the plaintiffs and the defendants in relation to the estate of the late Clement Munga Muna, who passed away in 1992, leaving behind approximately 439 acres, which reveals a systematic pattern of gender based discrimination in its administration and distribution, had the deliberate attempts to sweep under the carpet the unbreakable and unceasing customary trust.



177. Further, the defendants submit that in the early 1960s, the late Clement Munga Muna and his elder brother Appollos Mwangi Muna sold their ancestral land in Kijabe, Kiambu County, and relocated to Trans Nzoia, where they bought L.R. No. 1800/4 through Agricultural Finance Corporation and subsequently divided it according to their respective financial contributions.
178. The defendants submit that upon death, a certificate of confirmation of grant dated 28/1/1994 was issued in Succession Cause No. 857 of 1992, whereof the late Clement Solomon Muna received 258 acres as the largest single share of the estate, then the rest of the beneficiaries, without any single female child receiving any share of the vast estate. The defendants submit that, going by the evidence of Rev. Kabiro, the intention or understanding was that the late Clement Solomon Muna was to hold the land in trust and benefit of all his female siblings, including his sisters and himself.
179. It is submitted that the late Clement Solomon Muna, oblivious of the express trust and indeed customary trust that inheres in such assets, transferred the suit properties to his wife, by way of a gift in July 2019, now under the administration of her son as the administrator, who is the 1st plaintiff. The defendants submit that the suit properties form part of the 258 acres, unlawfully transferred, which the plaintiffs instituted this suit in 2020, alleging that the defendants had unlawfully and forcibly trespassed upon the suit properties, between April and June 2020.
180. The defendants submit that they oppose, on account of asserting their proprietary rights based on a trust having been born and brought up on the suit properties, in which they seek this court to declare as an overriding interest, which the suit properties are subject to which the late Clement Solomon Muna breached by appropriating the whole property unto himself and transferred it to his late wife.
181. On whether the defendants have proprietary and or possessory rights to the suit properties, the defendants submit that the said rights have a constitutional foundation under Articles 27, 40, 60(1) (8) of the *Constitution* and from the evidence tendered by Rev. Kabiro Munga, and the defendants it has been demonstrated, irrespective of gender and based on Kikuyu Customary Law. The defendants submit that they have met the legal framework and the elements of customary trust as discussed in Kiebia (supra).
182. Further, the defendants submit that they have met the statutory recognition of customary trust, as set out under Section 28(b) of the *Land Registration Act*, whose overriding interests were not defeated by the transfer and registration of the suit properties, which occurred in July 2019.
183. On establishing trust, the defendants placed reliance on John & 5 Others -vs- David Mugambi & Others ELC No. 45 of 2014, where it was held that where deceased family members are buried on the suit properties, a strong presumption of an unextinguished customary trust is made.
184. Further, the defendants rely on Mukangu -vs- Mukangu Meru ELC No. 88 of 2015, where the court held that, in the case of combatants born to the same parents, a customary trust was established by dint of the said birth in terms of the requirement in Kiebia (supra). The defendants further rely on Meru ELC No. 41 of 2018, Esther Kanugu Muriungi -vs- John Mbaabu Mwithimbu, where the court, without paying attention to the gender of the plaintiff, held that she was entitled to the land by virtue of a customary trust. Reliance is also placed on Muhingira -vs- Moherai & 2 others [2025] KECA 1164 (KLR)
185. The defendants submit that the certificate of grant distributing the estate only to male children raises a strong presumption of a customary trust in favour of female children and that the distribution of the estate did not extinguish the customary trust. The defendants further submit that such a distribution viewed through the lens of contemporary constitutional values cannot be permitted to



- stand as evidence of absolute ownership to the exclusion of daughters, who have equal inheritance rights under both the *Constitution* and the *Law of Succession Act*.
186. The defendants submit that they have proved constructive trust, which arises where there was wrongdoing, or where a person, already a trustee, takes advantage of their position for their sole personal benefit. Reliance is placed on *Shah & 7 Others -vs- Mombasa Bricks & Tiles Ltd & Others*.
 187. Equally, the defendants submit that, looking at the facts of this case, Solomon Muna was appointed as one of the three administrators of his late father's estate, with a clear understanding and agreement that he held the suit properties in a fiduciary capacity, which, despite its existence, excluded the sisters from their inheritance in clear violation of the statutes and the *Constitution*.
 188. The defendants submit that the principle that equity will not permit a statute to be used as an instrument of fraud, since Solomon Muna fraudulently violated the rights of his sisters, and the said acts should not be permitted to depart from their legitimate claims.
 189. The defendants submit that the subsequent transfer to his late wife represents a further attempt to place the suit properties beyond the reach of the beneficiaries of the trust, in which case a constructive trust arises by operation of law to restore equity.
 190. As to resulting trust, the defendants submit that it arises where the property is transferred under circumstances suggesting that the transferor did not intend for the transferee to have the beneficial interest in the property. Reliance is placed on *Black's Law Dictionary*. In this case, the defendants submit that the evidence demonstrates that the suit properties were inherited from the estate of Clement Munga Muna for no valuable consideration by the late Solomon Muna by transmission to his late wife as a gift. The defendants submit that the late Solomon Muna held the suit properties as an administrator and beneficiary of his late father's estate, not as an absolute owner free from familial obligations.
 191. The defendants submit that, given the customary understanding that he was to hold the suit properties in trust for all siblings, and the constitutional imperative of gender equality in inheritance, a resulting trust arose in favour of all children of the late Clement Munga Muna, which under Section 28 of the *Land Registration Act* is subject to.
 192. The defendants submit that they and the late mother have been in occupation of the family land since birth in an open, continuous, and notorious manner, and that they have a customary right under Kikuyu Customary Law to benefit from family land, more so when evidence shows that the late Solomon Muna, unlike the 1st defendant, was living in Ngong, Kajiado County.
 193. The defendants submit that overriding interests bind registered owners and any other person who acquired land interests, the rationale being that they represent rights so important that they deserve protection even without registration, and which they have established in this suit.
 194. On *res judicata*, the defendants submit that, going by *John Florence Maritime Services Ltd vs Cabinet Secretary, Transport & Infrastructure & Others* [2015] eKLR, the doctrine is only applicable in civil matters and not in judicial review matters. The defendants submit that in *Eldoret JR Misc. Appl. No. 76 of 1995*, the High Court quashed the elders' decision made in favour of the 1st, 3rd, 4th, 5th, and 6th defendants in *LDT No. 23/94/B*, and overturned the decision in *Kitale PMCC Case No. 25 of 1994*, to redistribute the estate as per the elders' decision adopted by the tribunal.
 195. On *Kitale High Court Petition No. 5 of 2012*, the defendants submit that this was a constitutional petition that sought totally different remedies from what the defendants are seeking in the instant



- counterclaim. Besides, the defendants submit that the same was not availed in court as an exhibit for the doctrine to be properly invoked, other than speaking from the bar.
196. On the Eldoret High Court Misc. Appl. No. 193 of 1994, the defendants submit that the decision was not availed as an exhibit during the trial and the proceedings therein, other than speaking from the bar.
 197. Regarding the grant confirmed in Nairobi Succession Cause No. 857 of 1992, the defendants submit that this was not a civil matter and therefore the doctrine of res judicata would not apply.
 198. On Nairobi Civil Appeal Appl. No. 283 of 2019, the defendants submit that they were seeking an extension of time to appeal the above High Court decision out of time, hence, by any stretch of imagination, cannot be interpreted to be res judicata.
 199. Based on the cited past cases, the defendants submit that res judicata only applies where there is a judgment or order on merit. In the cited cases, the defendants submit that the courts were never invited to discuss trusts and that in most of the past cases, the issues were not discussed on the merits but on technicalities.
 200. The defendants submit that the courts concerning Eldoret JR Misc. Appl. No. 76 of 1995, Kitale High Court Petition No. 5 of 2012, Eldoret Misc. Appl. No. 193 of 1994, Nairobi Succession Cause No. 857 of 1992, and Nairobi Civil Appeal Appl No. 283 of 2019, were bereft of jurisdiction to pronounce themselves on the issue of trusts, by dint of Section 8 & 9 of the [Law Reform Act](#), Section 13 of the [Environment and Land Court Act](#) and Article 162(2) of the [Constitution](#).
 201. The defendants submit that the cited past cases must show that there had to be, between the first and second action, identical parties, subject matter, and cause of action. In this case, the defendants submit that in Eldoret JR Misc. Appl. No. 76 of 1995, Kitale High Court Petition No. 5 of 2012, and in Eldoret Misc. Appl. No. 193 of 1994, none of the plaintiffs in the counterclaim were parties.
 202. The defendants submit that in the grant issued in Nairobi Succession Cause No. 857 of 1992 and Nairobi Civil Appeal Appl No. 283 of 2019, Wambui Muna was not a party, and therefore, the identity of the parties is not there.
 203. Therefore, the defendants submit that the above five ingredients must be present for the counterclaim to be said to be res judicata, and in the absence of the plaintiffs' establishing the parameters, the court should find in their favour of the fact that the counterclaim is not res judicata. The defendants submit that this case presents facts of constitutional dimension, where, for over three decades, the defendant, as daughters and grandchildren of the late Clement Munga Muna, have been systematically excluded from their rightful property.
 204. The defendants submit that the plaintiffs in the main suit want to create squatters using the judicial system. The question is, where will the defendants in the main suit go if asked to leave the land of their late father and grandfather?
 205. The defendants submit that equity will not permit the late Solomon Muna's breach of trust and the systemic gender-based discrimination to be perpetuated against his sisters to stand. Again, the defendants submit that the registration of the plaintiffs as proprietors cannot defeat the overriding interest and the beneficial ownership of the defendants.
 206. Lastly, the defendants submit that constitutional values of equality and non-discrimination must prevent over-discriminatory customary practices.



(L). The 2nd Defendant's Submissions

207. The 2nd defendant relies on written submissions dated 2/12/2025. It is submitted that from the evidence tendered, it is clear that the suit properties form part of family land, namely L.R. No. 1800/4, initially belonging to the late Clement Munga Muna, which, after it was transferred to the late Solomon Muna, was fraudulently transferred to the name of the initial 1st plaintiff while there was a pending family dispute.
208. The 2nd defendant submits that her father is elderly and bought the alleged 20 acres from his late father-in-law, and hence it is not true that the place where she lives was a gift inter vivos to her late mother, as alleged by the plaintiffs.
209. The 2nd defendant submits that, going by the evidence of her uncle, Rev. Munga, the late grandfather had 5 boys and 7 girls, but the latter were left out in the distribution of the family land during confirmation of the grant dated 28/1/1994.
210. The 2nd defendant submits that the transfer to the initial 1st plaintiff occurred while she was aware of the family dispute over inheritance, which she terms as an epitome of greed and injustice. The 2nd defendant further submits that the site visit report on 11/10/2024 by the Deputy Registrar, clearly shows massive destruction of the suit properties by PW1.
211. Again, the 2nd defendant submits that what should be done on this massive land is to subdivide it among the 52 descendants of the deceased, who are composed of the 8 families of the 12 children. The 2nd defendant submits that by doing so, the court will have resolved this matter to avoid accentuating the existing bitterness, since all of them are relatives. The 2nd defendant submits that this matter does not warrant the eviction of the defendants from the suit properties, in view of the injustices committed against them, which should not be entertained under any statutory law.

(M). Issues for the Court's Determination

212. The court has carefully gone through the record of this matter, the various pleadings that are properly on record and in compliance with the rules of pleadings and the timelines set in law, the evidence tendered by the respective parties, and the written submissions. The issues calling for my determination are:
1. Whether the court has jurisdiction to entertain the counterclaim on account of time limitation, res judicata, inordinate delay, and abuse of the court process.
 2. If the plaintiffs have proved trespass to the suit properties by the defendants to be entitled to the reliefs sought.
 3. If the registration of the titles to the suit properties in favour of the 1st plaintiff were subject to any overriding interests in favour of the defendants in the counterclaim.
 4. If the defendants have impeached the title deeds to the suit properties as transferred and registered fraudulently by the initial 1st and 2nd defendants, in collusion with the 3rd and 4th defendants in the counterclaim.
 - (5) If the defendants' counterclaim is res judicata, an abuse of court process, guilty of laches, and lacking merit.
 - (6) If the plaintiffs and defendants are entitled to the reliefs sought.



- (7) What is the order as to costs?
213. It is trite law that parties are bound by their pleadings and issues for the court's determination flow therefrom. Order 2 Rule 4(2) of the Civil Procedure Rules provides that, without prejudice to Subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence in which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

(N). Legal Analysis

(i) Time Limitation

214. In *Kutima Investment Ltd -vs- Muthoni Kihara & Another* [2015] eKLR, and *Stephen Onyango Achola -vs- Edward Sule Hongo & Another* [2004] eKLR, the court was confronted with the question of whether a defendant who has not pleaded limitation can raise it during the course of the proceedings as a preliminary point of law. The court said that the defendant who wishes to rely on limitation as a defence must plead it in its defence. The court in *Kutima* (supra) said that the duty that the 1st defendant bore to specifically plead the statute of limitation in his defence is plain, express, and inescapable from a reading of that provision, which is in terms such as found in *Halsbury's Law of England* 4th Edition Vol. 36 at paragraph (48).
215. In *Mohamed Fugicha -vs- the Methodist Church of Kenya, suing through its Registered Trustees & Others* [2016] eKLR, the court said 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 sufficient notice to the party impleaded to enable him know what case to answer. See also *Sila -vs- Attorney General Civil Appeal No 224 of 2019* [2015] KECA 498 [KLR] (21st March 2025) (Judgment).
216. A cause of action refers to acts on the part of the defendant that give rise to a cause of complaint on the part of the plaintiff. See *DT Dobie and Company Kenya Limited -vs- Muchina* 1982 KLR). The cause of action as pleaded by the plaintiffs in this suit was set out in paragraphs 10, 14, 16, 20, 22, 23, 24, 26, and 27 of the further, further, further, further, further amended plaint dated 31/7/2025, that on 15/4/2020 the defendants without any colour of right and or justification whatsoever, forcefully invaded the suit properties and committed acts of destruction, which they had been in exclusive possession, use and occupation since 1994.
217. In reply to the 1st, 3rd, 4th, 5th, and 6th defendants' amended defence and counterclaim dated 23/9/2025, at paragraphs 6, 7, 8-13, the defendants pleaded fraud, customary, constructive, or resulting trust, negligence, and collusion in the manner the plaintiffs obtained the titles to the suit properties. By way of a counterclaim, the 1st, 3rd, 4th, 5th, and 6th defendants on paragraphs 5, 6, 7 - 13, repeat the contents of the statement of defence and allege that they have lived and or resided on the suit properties since they were born, made developments thereon as part of their late father and grandfather's land.
218. The 1st and 2nd defendants to the counterclaim averred that the acts of allowing them to live on the suit properties by virtue of being born and raised thereon, that the primary plaintiffs created a customary, constructive, or resulting trust in their favour.
219. The 1st, 3rd, 4th, and 5th defendants set out the particulars of the trust and pleaded that the defendants hold the suit properties in trust. The 1st, 3rd, 4th, 5th, and 6th defendants seek cancellation of the transfers and titles for non-recognition of the said trust or, in the alternative, declaration of customary, constructive, resulting trust, and a permanent injunction.



220. In a reply to the amended defence and defence to the counterclaim dated 16/10/2025, at paragraphs 3 (a), (b), (c), (d), and (e), the primary plaintiffs deny the alleged customary trust or any alleged overriding interest over the suit properties. The plaintiffs invoke decisions in the previous cases or suits, which did not bar them from any dealings with the suit properties as they deemed fit, without reference to the defendants.
221. As to the amended counterclaim at paragraph 3(a) of the reply, the plea of res judicata is raised. In paragraphs 4-7, the primary plaintiffs plead immediate exclusive possession, use, and occupation of the suit properties; manner of trespass, encroachment, forceful occupation, destruction, loss, and damage by the defendants; the history of the suit properties, and how the defendants acquired gifts inter vivos from the late Clement Munga Muna.
222. Further, the primary plaintiffs aver that, going by the decisions by the probate court on 10/12/2018 declining redistribution of the estate, the counterclaim is res judicata. It is averred that the participation of the defendants in the previous proceedings leading to the various decisions, and the lack of stay orders stopping them from any dealings with the suit properties after 10/12/2018; the sole and exclusive investments of the suit properties, the non-discrimination of the defendants on account of gender, past and current residences of the defendants before and after April and June 2022, which amount to gifts inter vivos, the defendants amended defence and counterclaim are untenable, lacking merits and res judicata.
223. From the foregoing, there is nowhere that the principal plaintiffs had raised a specific defence that the cause of action, as pleaded by the defendants and the plaintiffs in the counterclaim based on fraud, illegality and trust in its various facets, was heard on merits, and conclusively determined by a court of competent jurisdiction and or was statute barred or an abuse of the court process.
224. It is not disputed in all the pleadings that the initial 1st plaintiff became the registered owner of the suit properties in July 2019. Therefore, any cause of action based on fraud, illegality, or misrepresentation should have been lodged within 3 years. A claim for recovery of land has to be filed within 12 years under Section 7 of the [Limitation of Actions Act](#). Accrual of right of action in case of present interest in land is governed by Section 9 thereof.
225. Further, any claim concerning trust property, or an alleged fraudulent breach of trust to which a trustee was a party or privy to or by a beneficiary to recover trust property or breach of trust, falls under Sections 18 and 20 of the [Limitation of Actions Act](#). Section 20(1) of Cap 22 is specific that there is no limitation of time as regards a claim based on trust.
226. Abatement or limitation of a suit or a cause of action based on trust was addressed in *Macharia Kihari -vs- Ngigi Kihari* [1994] eKLR. The court held that a claim based on customary trust under Section 20(2) of the [Limitation of Actions Act](#) has no time limitation.
227. Section 20 of Cap 22 therefore provides that there is no prescribed period of limitation on an action by a beneficiary under a trust, fraud, or fraudulent breach of trust to which the trustees were a party or privy to, to recover from the trustee, trust property.
228. In *Macharia Kihari* (supra), it was a matter involving family land. The court held that under customary law, the land, even after the right of action has accrued, is held in trust for decades before any step is contemplated, for formal transfer or subdivision. The court further held that the limitation does not apply in customary law.



(ii). The Doctrine of Res Judicata

229. The primary plaintiffs in their reply to the amended defence and defence to the amended counterclaim have specifically pleaded that this court has no jurisdiction to hear and determine the defence and counterclaim raised by the 1st, 2nd, 3rd, 4th, 5th and 6th defendants, since the issues raised herein were previously raised, canvassed heard and determined to finality in the previous suits, paving way for dealing with the suit properties as the two deceased administrators to the various estates pleased them, and therefore making the subject titles to the suit properties absolute and free of any encumbrances in favour of the defendants, and the plaintiffs in the counterclaim.
230. The defendants, on the other hand, have pleaded, testified, and submitted that the court should find that the issues raised herein are not res judicata and were not heard and determined on the merits by courts competent to hear and determine matters failing on trust, since the former courts were bereft of jurisdiction.
231. The causes of action, as pleaded by the parties, are based on trespass and a justification on overriding interests, which the purported transfer and registration of the titles to the suit properties failed to appreciate, or are subject to in favour of the defendants and the plaintiffs in the counterclaim. The secondary plaintiffs urge the court to find and hold that they are justified to live, occupy, use, and develop the suit properties by virtue of overriding interests, which had accrued before and supersede the alleged transfer, hence are not trespassers thereon as alleged by the defendants in the counterclaim.
232. The secondary plaintiffs urge the court to find that the initial registered owner and the subsequent registered owner were and remain a trustee to the suit properties, who allegedly breached the same, and want to deny them their accrued overriding interests, which are not registrable in law but subsist with the ground. It is on this basis that the court has to determine if the causes of action are res judicata.
233. The primary plaintiffs pleaded that this court lacks jurisdiction based on the doctrine of res judicata to entertain the counterclaim by the defendants. The doctrine of res judicata is being invoked as shown above, in view of the confirmation of the grant in 1994, the dismissal of suits where there were past attempts by the defendants to revoke, challenge, or invalidate the initial grant, and other instances to have them declared as bona fide beneficiaries to the estate of their late father and grandfather.
234. For a suit to be deemed as res judicata, five elements have to be established, as set out in *Kenya Commercial Bank Ltd -vs- Benja Amalgamation Ltd* [2017] eKLR, and in *Maina Kiai -vs- Independent Electoral & Boundaries Commission* (2017) eKLR:
- (a) The suit or issue was directly or substantially in issue in the former suit.
 - (b) The former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating on the same title.
 - (d) The issue was heard and determined in the former suit.
 - (e) The court that formerly heard and determined the issues was competent to try a subsequent suit or the suit in which the issue is raised.
235. In *John Florence Maritime Services Ltd* (supra), the court held that the doctrine is based on the principle of finality as a matter of public policy that prevents multiplicity of suits clogging courts and ensures finality to litigation. In *Maina Kiai* (supra), the court held that the doctrine is based on the fact that a party should not be vexed or hounded by issues or suits that have already been determined by a competent court, and that it rests in public interest for swift, sure, and certain justice.



236. There is no dispute that the confirmation of the grant in respect of the estate of the deceased Clement Munga Muna was made in 1994. The burden of proof is on he who alleges the existence of certain facts to be entitled to a right or liability before a court of law. The burden herein was on the plaintiffs in the primary suit and the 1st and 2nd defendants to the counterclaim to establish the elements of res judicata, that this court is bereft of jurisdiction in view of the final determination of the overriding interests with respect to the subject properties, which were transferred and registered in favour of the initial 1st plaintiff in July 2019, or thereabouts.
237. The starting point to determine is whether, after obtaining the titles to the suit properties in 2011 and later in 2019, any dispute(s) was filed, heard and determined by a competent court to finality concerning whether there was; a breach of fiduciary duty, or duties; a fraudulent transfer and registration of the suit properties, oblivious of overriding interests of the defendants and the plaintiffs in the counterclaim and or; is pending in any other court of competent jurisdiction.
238. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. See Phoenix of E.A. Assurance Company Limited -vs- Simeon Muruchi Thiga t/a Newspaper Service [2019] eKLR. It is the plaintiffs who filed this suit in 2020 against the defendants and pleaded as to the previous litigation on the matters. The plaintiffs did not plead the existence of any suits over the issue of justification on account of overriding interest, or accrued interests or rights over inheritance, or trusts against the defendant as having been heard and determined on merits, to finality, and by a competent jurisdiction on the law of trusts.
239. In Kenya Airports Authority -vs Mitubell Welfare Society & Others [2016] KECA 432 [KLR], the court held that once a court has fully and finally adjudicated upon a matter, it cannot reopen the case, save under limited circumstances. The plaintiffs have submitted that the court in Nairobi Succession Cause No. 857 of 1992 had jurisdiction to hear and determine in manifestation of trust.
240. The question, therefore, is not whether the probate court then was competent to do so, but whether the said court or any other competent court was seized of the causes of action as pleaded by the parties, which were finally determined on the merits. If the answer is that such proceedings took place, then the plaintiffs in the counterclaim would be said to be seeking a second bite of the cherry, to try to reach a different holding.
241. Such acts would then amount to res judicata, multiplicity of suits and an abuse of the court process as held in Bena Nafula Makana (supra), Communications Commission of Kenya (supra), in Bank of Africa (K) Ltd (supra), Kenya Commercial Bank Ltd (supra), Juja Coffee Exporters Ltd (supra), Elephant Oil Mills Ltd (supra), and Odongo (supra).
242. To determine the foregoing question, the court, in the circumstances, has to keenly look at all the material before it and make a finding whether the counterclaim is res judicata. Starting with the ruling delivered in High Court Milimani Succession Cause No 857 of 1992 on 10/12/2018, it was an application for revocation of the grant, injunction, and for the income generated by the farm estate to be deposited in an income-generating account. The applicant was Ann Njoki Munga, the objector was Clement Solomon Muna, and Samuel Nganga was the administrator.
243. The court dismissed the application as res judicata and as an abuse of the court process. There is nowhere in the body of the ruling that the issues raised in the counterclaim were heard and determined on the merits to the conclusion, for the bar of res judicata to be invoked.
244. As regards the ruling in High Court Kitale Petition No. 5 of 2012 delivered on 11/12/2018, the prayer was for an injunction by Clement Solomon Munga and Samuel Nganga, the respondents, through an



application dated 15/5/2018. The petition was dismissed for being in the wrong forum since it was not a constitutional petition, but should have been filed as a succession matter. The restraining orders barring the respondents in the matter were vacated regarding the suit properties herein, including the caution on the land registers. I do not find anywhere where the issues raised in the counterclaim were heard on the merits, to finality, and by a court of competent jurisdiction.

245. Coming to Eldoret Judicial Review No. 76 of 1995 and other related previous litigation, thereof, the pleadings, proceedings, and determination in those matters are not before this court for it to make a finding that the issues pleaded as the causes of action herein have been heard and determined in terms of Section 7 of the *Civil Procedure Act*.
246. Regarding the jurisdiction of this court vis-à-vis that of the family division of the high court, Musyoka J in Re Estate of Yawaya Shitanda Nyatati (deceased) [2022] KEHC 1143 [KLR], observed that the office of an administrator is for life, and a court can intervene even where the administration is complete and the file closed, under Section 83(g) and (i) of the *Law of Succession Act*.
247. Pendency of a matter at the Court of Appeal filed by the defendants herein with respect to the ruling in Nairobi Succession Cause No. 857 of 1992, does not in my view, bar the defendants herein and the plaintiffs in the counterclaim to raise a defence of overriding interests, fraud or illegality in how the initial 1st plaintiff became and was transferred ownership of the suit properties in July 2019.
248. The jurisdiction of the Family Division of the High Court and of this court, after the 2010 Constitution, is clearly defined by both the *Constitution* and the statutes.
249. In Re Estate of Alice Mumbua Mutua (deceased) [2017] eKLR, the court held that the function of the Probate Court is to facilitate the collection and preservation of the estate, identify the survivors and beneficiaries, and distribute the assets.
250. In Disaproperty Ltd & Others -vs- Jack Kaguu Githae & Others, Petition No. E019 of 2024, the court observed that to ascertain whether or not the jurisdiction of the court has been properly invoked, the court considers the nature of the pleadings and proceedings in the trial court, the remedy or remedies sought, and the decision made.
251. The plaintiffs have pleaded that the initial 1st plaintiff is the absolute sole owner of the suit properties, whose constitutional and statutory rights to exclusive ownership, use, possession, and occupation, with effect from 30/4/2020 have been infringed, violated, and breached by the defendants, who are trespassers with no justification to enter, remain, use, and occupy the suit properties. On the other hand, the defendants invoke overriding interests that the title deeds held by the initial 1st plaintiff are subject to and which the court should determine and enforce.
252. The jurisdiction to handle such a dispute falls under this court and not the Family Division of the High Court. In Njoroge & Others -vs- Sikuta ELC No. 170 of 2016, this court held that disputes on land registered by transmission after a confirmed grant fall for determination before the Environment & Land Court. There is no dispute that the causes of action as pleaded by the parties were triggered by the transfer and registration of the suit properties in the name of the initial plaintiff in this suit, who is the late wife of the late Clement Solomon Muna and the mother to PW1, in July 2019, and 30/4/2020, which was during the lifetime of the late Clement Solomon Muna. My finding, therefore, is that the court is properly seized of jurisdiction to hear and determine this matter, which is not in any way res judicata.



253. The plaintiffs have submitted that the issues raised herein are subject to the alleged pending application for leave to appeal at the Court of Appeal. Even if that were so, the High Court under Article 165(b) of the Constitution is precluded from handling matters reserved for the Environment & Land Courts.

(O). Whether the Plaintiffs Have Proved Trespass and Rebutted the Presumption of Trust

254. The next issues tied together are whether the plaintiffs have proved trespass, and if so, whether the defendant's justification of overriding interests has been established. To prove a claim on trespass, a party must establish immediate exclusive occupation and violation of their rights by the intruder without justification.

255. In *Vaz -vs- Oyatsi & Others* Civil Appeal No. E035 of 2022 [2025] KECA 251 [KLR] (21st February 2025) (Judgment), the court cited *Ben Mulwa -vs- Jonathan Mutanga Mweke* [2016] eKLR and *Muthiora -vs- Marion Muthama Kiara* [2012] KECA 28 [KLR], that trespass is described under the Trespass Act Cap 291 as, where any person who, without reasonable excuse enters, to or remains upon, or erects any structure on, or cultivates, or tilts or, grazes stock, or permits stock on private land, without the consent of the occupier thereof.

256. Trespass implies violation of the right to possession. In *M'Rinkanya -vs- M'Mbijiwe* [1984] eKLR, the court observed that a plaintiff must prove that he has a right to immediate and exclusive possession of the land, which is different from ownership. The court said that an intentional entry, though one honestly believed the land was their own and had a right of entry on it, or if they did so under an inevitable mistake of law or fact, may also amount to trespass.

257. In *Margaret Iminza Luyayi -vs- Moses Opudo Mudaka* [2014] eKLR, the court observed that there was no wrongful entry or violation of the plaintiff's right of possession, since it was the plaintiff who had invited the respondent to the suit property as a man friend.

258. In *Ochako Obinchu -vs- Zachary Oyoti Nyamongo* [2018] eKLR, the court cited Clark & Lindsell in *Torts* 18th Edition page 923, that the onus was on the plaintiff to prove that he was the owner of the suit property and that the defendant had invaded and occupied the same without any justifiable cause.

259. In *Winfield & Jolowicz on Torts, Sweet & Maxwell* 19th Edition, page 428, it is stated that trespass to land constitutes interference with possession, and that their presence on the land does not necessarily amount to possession, sufficient to bring an action for trespass, and that a claimant should have some legal interest in the land.

260. In *Bundi -vs- Nzomo & Others* [2022] KECA 584 [KLR] (24th June 2022) (Judgment), the respondent had denied trespass and counterclaimed on alleged ownership right and long occupation as ancestral home, terming the appellant's land title as fraudulently obtained.

261. On appeal, the court held that the appellant had an evidential burden to show that he acquired the title to the land in a regular, law-compliant fashion and not in an opaque manner. The court cited *Munyu Maina -vs- Hiram Gathiha Maina* [2013] eKLR, that when a root title is under challenge, it is not enough to waive the instrument of title without evidence that the process of acquisition was legal, formal, and free of any encumbrances, and interest, including those that would not necessarily be noted in the register.

262. Impeachment of a title is a legal process. In *Torino Enterprises Ltd -vs- Hon. Attorney General* Petition No. 5 (E006) of 2022, the court held that, for it to determine the legal status and validity of the title, it must inquire into the root title of the suit property. When a title is under challenge, it is not enough to waive the instrument of ownership. A party must show that the title was obtained in a formal, regular,



- procedural, and legal manner. See *Dina Management Ltd -vs- County Government of Mombasa & 5 others* [2023] KESC 30 (KLR).
263. What the primary plaintiffs are alleging is that the titles held by the deceased are absolute, indefeasible, and subject to no overriding interests in favour of anyone, save the kids of the late Mr. and Mrs. Solomon Muna, who were bona fide holders of the title deeds free of any encumbrances.
264. In *Sehmi & Another -vs- Tarabana Co. Ltd & Others* Petition No. E033 of 2023 [2025] KESC 21 [KLR] (11th April 2025) (Judgment), the court held that equity follows the law and that legal rights were good against all the world, while equitable rights were good against all persons except bona fide purchasers of a legal estate for value without notice. The court said that under Section 26 of the [Land Registration Act](#), a certificate of title was to be regarded by courts as prima facie evidence that, the person named thereon was the absolute and indefeasible owner of the land, and that it was no longer possible for a title holder to waive the certificate of title as a barrier to an inquiry into its legality or otherwise.
265. In *Roche -vs- Roche & Another* Civil Appeal No. 177 of 2019 [2025] KECA 1637 [KLR] (30th October 2025) (Judgment), what was before the Court of Appeal by the Roche family was whether registration of a person as the proprietor of land confers on them absolute rights over and above those interests which are unregistered, to defeat a justifiable claim over the same land on account of customary trust.
266. The litigants were 9 siblings in total, including two brothers and 7 sisters. The court cited *Kiebia* (supra), that not every claim of right qualifies as a customary trust, and that it was upon the respondents to lead evidence proving that indeed, a constructive trust existed. The court cited *Black's Law Dictionary*, 6th Edition, on the definition of trust as a fiduciary relationship regarding property and charging the person with the title to the property with equitable duties to deal with it for the members' benefit, and that a trust arises as a result of a manifestation of an intention to create it.
267. The court further observed that a customary trust in the context of Kenyan land law is a legal concept where land is held by one person or entity, for the benefit of a group or family members, often across generation; as an intergenerational equity concept, where the current holder of the land is entrusted to hold or manage it for the benefit of another or others and where ingredients to establish were set out in *Kiebia* (supra), as overriding interest that need not be noted in the register of title. Section 25 of the [Land Registration Act](#) now provides that some may be noted.
268. The court said that the [Constitution](#) and the Law of Succession promote non-discrimination in inheritance matters, ensuring equal rights for both sons and daughters, regardless of gender or marital status. Again, the court held that Article 27 of the [Constitution](#) guarantees that every person is equal before the law and has the right to equal protection and benefit of the law, which includes the full and equal enjoyment of all rights and fundamental freedoms and specifically addresses the right of men and women to equal treatment in different spheres of life. The court said that Article 27 of the [Constitution](#) provides for equality and freedom from discrimination, while Article 10(b) thereof states that justice shall be done to all, irrespective of status.
269. Further, the court said that under Section 28(a) of the [Land Registration Act](#), trusts, including customary trusts, are overriding interests over registered land, and that a trust in respect of land as held in *Mumo -vs- Mueni* [2002] 1EA 170, is a question of fact to be proved by evidence. The court held that PW1, as the unmarried daughter of the deceased, had occupied the homestead, which she had heavily renovated, and was entitled to a share. The court said that just like brothers, she was entitled to her father's share by virtue of Section 38 of the [Law of Succession Act](#), which John held in trust for her.



270. The locus classicus on customary trust is *Kiebia* (supra). The court said that the customary trust, as long as the same can be proved, upon a first registration, is one of the trusts to which a registered proprietor is subject to under Section 28 of Cap 300 (repealed), taking such form as if it is reserved for family, clan or group, is used for traditional rights, and bind the registered owner.
271. The court said that trust is proved on the merits and the quality of the evidence based on the nature of holding and the intention of the parties, as held in *Kiarie -vs- Kinuthia*. The court held that it would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land, as long as the five essential elements are met.
272. In *Maingi -vs- Maingi & Others Civil Appeal 310 of 2019 [2025] KECA 1431 [KLR]* (31st July 2025) (Judgment), the contention was that the registration was subject to a customary trust under Kikuyu Customary Law, in favour of all siblings, entitling each to an equal share. The court confirmed the holding by the trial court that a customary trust can be presumed solely based on a shared lineage, since they shared the grandfather, who was the original registered owner of the suit property.
273. In *Mburu -vs- Wainaina Civil Appeal 143 of 2019 [2025] KECA 191 [KLR]* (6th February 2025) (Judgment), the court took judicial notice that the elder son, who was the appellant's father, as was customary at the time, could be registered in trust for his siblings. The court, based on the history and the explanation given by the respondent, found his version more plausible, that the subject land was family land.
274. In *M'IKilima -vs- Kiriinya & Another Civil Appeal 126 of 2019 [2025] KECA 2243 [KLR]* (19th December 2025) (Judgment), the court observed that the assertion by the 1st respondent that the appellant had been given land elsewhere by their father, while correct, failed to fully explain the whole situation.
275. In *Githae -vs- Mwai & Others Civil Appeal 230 of 2018 [2025] KECA 1563 [KLR]* (3rd October 2025) (Judgment), the court confirmed the holding of the trial court based on the decision in *Gichuki -vs- Gichuki Civil Appeal No. 21 of 1981* and *Mbothu & Others -vs- Waitimu & Others [1986] [KLR]* 173, that a party relying on the existence of a trust must prove through evidence the creation and the existence of such trust. The intention of the parties to create the trust must be clearly determined before a trust is implied, and, under Kikuyu customary law, to which the parties were subject, land is usually held by the eldest son in trust for the family as held in *Machari Kihari* (supra).
276. In *Re Estate of Susan Mwelu Mutia (deceased) P & A No. 36 of 2017 [2025] KEHC 2202 [KLR]* (23rd January 2025) (Judgment), the court held that family trust is part of trust law having been introduced through Section 3D of the Trustee (Perpetual) Succession Act 2011, providing for registration of or incorporation of a family trust. The court observed that the thinking is an intra-generational equity, which implies fairness of the 1st plaintiff as the owner for the incoming generation of family members, which is not far removed from the African tradition that aimed at keeping families within and the clan together, and preserving their wealth.
277. The court said that it forms the functional foundation for how the court should assist parties to realise, sustainable use, preservation, and creation of family properties or wealth in succession causes.

(P). Determination of Overriding Interest

278. Applying the foregoing case law, the question is whether the defendants have impeached the title deeds held by the initial 1st plaintiff on account of breach of trust, or fraudulent transfer in breach of fiduciary duties or obligations. The court takes judicial notice that the late Clement Solomon Muna, before he passed on and at the filing of this suit, had signed a witness statement dated 7/8/2020. Section 33 of



the *Evidence Act* provides that statements, written or oral, of admissible facts made by a person who is dead, are themselves admissible as an opinion to public right or custom, relating to the existence of a relationship, relating to family affairs, or relating to a transaction.

279. In the said witness statement, at paragraphs 7 – 17, the deceased witness narrated the past litigation, the manner in which he had facilitated his sisters to acquire other properties belonging to his late father, his investments on the suit properties out of his pension benefits and contribution towards the purchase and acquisition of the suit properties and how they were devolved and transferred to him.
280. Documents in support of those assertions were not disclosed to the court to substantiate the same.
281. At paragraph 21, the deceased witness stated that there was no court order for an injunction or prohibition against any of the suit properties, barring him from transferring to members of his family, and in particular, his wife.
282. Further, the deceased stated that he lodged documents to remove the caveat and transfer when no application or court case was pending against him, hence he did not breach the doctrine of *lis pendens*. Again, documents in support of those assertions were not filed against the witness statement.

(Q). Liability on the Part of the 3rd and 4th Defendants

283. Breach of the fiduciary duties by the 1st and 2nd defendants has also been blamed on the 3rd and 4th defendants, who are said to have acted negligently and contrary to the standards expected of a land registrar. The question is whether the plaintiffs in the counterclaim have proved that there was collusion, fraud, misrepresentation or not.
284. The 3rd and 4th defendants filed a reply to the counterclaim dated 19/12/2022. At paragraph 3, they reiterate that the orders issued in Petition No. 5 of 2012 were lifted and discharged unconditionally over the suit properties titles, hence the transfer by the 2nd defendant to the 1st defendant was done in good faith by the 3rd defendant in accordance with the land laws.
285. The 3rd and 4th defendants deny that they were aware of any pending dispute, as there was no communication of any such made to them. Again, the 3rd and 4th defendants deny any negligence or collusion in the transfers between the 1st and 2nd defendants, for they were not presented with any letters of administration.
286. Further, the 3rd and 4th defendants reply to defence was accompanied by a list of documents namely the green card for the suit properties, an application for registration dated 8/3/2019, payment receipt dated 19/7/2019, a transfer form dated 4/7/2019, marriage certificate, Kenya Revenue Authority Personal Identification Numbers and Identification Cards for the transferor and transferee, an application for consent for Land Control Board, dated 8/7/2019, a letter of consent dated 9/7/2019, valuation registration for stamp duty dated 19/7/2019, original titles for the suit properties surrendered by the transferor and a court order dated 11/1/2019.
287. In the copy of record for Waitaluk/Kapkoi/ Block 11/Gutongorio/54, it shows that the register was opened on 7/4/2011 in the name of Clement Solomon Muna, and a title deed was issued to him on 19/9/2011. A caution was registered by Anne Njoki Munga on 17/4/2012, alleging a beneficial interest. A court order was registered on 10/7/2012 in view of Petition No. 5 of 2012. Entry No. 5 shows that on 4/4/2019, the order and caution entry were withdrawn after the disposal of Petition No. 5 of 2012.
288. Between 4/4/2019 and 22/7/2019, when the late Ann Wambui Muna became the registered owner, there is no evidence of any court order or fresh caution that was filed by any of the defendants herein,



based on a pending suit or an alleged overriding interests. The only other entry is No. 8 on 24/9/2020, maintaining the status quo. The same position obtains in copies of the register for title Nos. Waitaluk/ Kapkoi/ Block 11/Gutongorio B/58, 70, and 71.

289. Fraud is defined under Black's Law Dictionary as a deceitful practice or willful device resorted to with intent to deprive another of his right or in some manner to do him injury. Elements of fraud include a false statement that is made deliberately in the knowledge that it is false, reliance on the false statement by the victim, resulting in damage to the victim. In *Fanikiwa Ltd & Others -vs- Sirikwa Squatters Consolidated Petition No. 32 (E036) of 2022* and 35 and 36 (E308 and E309) of 2022, the court held that concrete evidence to prove the subject allegation to the required degree as to defeat and deprive Sirikwa squatters of their rights to the suit parcel and to illegally confer title to the suit parcel of land to other purported beneficiaries had to be tabled, as held in *Central (K) Ltd -vs- Trust Bank Ltd & Others [1996] eKLR*, *Vivo Energy (K) Ltd -vs- Maloba Petrol Station Ltd & Others [2015] eKLR*, *R G Patel -vs- Lalji Makanji [1957] EA 314* and *Koinange -vs- Koinange [1996] KLR 23*.
290. In *Republic & Others -vs- Kipruto & Another [2025] KECA 1610 [KLR] (30th October 2025)* (Ruling), the court cited Black's Law Dictionary 10th Edition, that fraud is misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment, making a false, or a misleading assertion about something, usually with intend to deprive. A mistake is defined as an error, misconception, or misunderstanding, or erroneous belief.
291. In *Frank Investment Ltd -vs- Kenya Anti-Corruption Commission & Others, Mombasa CA No. E038 of 2021*, the court cited *Dina Management Co. Ltd (supra)*, that a court, based on indefeasibility of title, cannot sanction irregularities or illegalities in the acquisition of title. In *Vijay Morjaria -vs- Nansingh Madhusingh Darbar & Another [2000] eKLR*, the court examined whether the transfer of the suit property was improper, fraudulent, or based on a valid safe agreement. The court found that the parties were bound by their pleadings. Fraud had not been particularised or proved to the required standards.
292. In this suit, the plaintiffs in the counterclaim cite particulars of fraud against the 1st plaintiff under paragraphs 3(a), (b), (c), (d), (e), (f), (g), and (6) of the amended defence and counterclaim dated 23/9/2025. Evidence on a balance higher than in the ordinary standards as per the definition of fraud, going by the cited case law was not availed, tendered, and produced. No evidence was tendered of any complaint to the police, the Land Registrar, and the Land Control Board, to show that any investigations were instituted, concluded, and reports made to show fraud, misrepresentation, concealment of material facts, collusion, and the ignorance of a pending suit as at the time of the transfers and registration arose.
293. The documents used for transfer and registration, which are before the court, were never attacked by the defendants for being false or forged. There was no demonstration made through the defendants' witnesses that they were fraudulent, a misrepresentation of facts, amounted to concealment of material facts, amounted to collusion, and eventually were out to defeat any pending suit or an existing order between the time the caution and order were lifted and the registration effected.
294. Coming to the prove of the elements of trust, fiduciary duties, or breach of trust and failure to disclose the same to the 3rd and 4th defendants, the particulars were pleaded in paragraphs 4(a), (b), (c), (2), (e), (5), (6), (7), (13), (14), (15), and (16), of the ammended defence, as well as in paragraphs (6), (7), and (8) of the counterclaim dated 23/9/2025. The plaintiffs in the counterclaim at paragraph (6) refer to L.R. No. 1800/4 and its resultant subdivisions.
295. As a starting point, a copy of the records and a search certificate of the status of the mother title, which resulted in the suit parcels of land, was not availed before this court. All that is available are documents



relating to the suit properties from 1999, going by the list of documents filed by the 2nd defendant and the evidence of Rev. Kabiro.

296. In Nairobi High Court Succession Cause No. 857 of 1992, the certificate of confirmation of grant was issued on 28/1/2012 in favour of Samuel Nganga Munga, Clement Muna, and Milka Mwihaki, in respect to 439 acres, out of which 258 acres went to the late Clement Solomon Muna Munga.
297. The certificate of confirmation of grant does not include the words “to hold in trust”. A copy of the records showing that the deceased, Clement Munga Muna, was the registered owner as of the date of confirmation of the grant is missing. He who alleges must prove.
298. Despite the scanty historical data from the land registry, the court is nonetheless asked to infer that there was an intention to create a constructive or a resultant trust in favour of the daughters of the deceased at his death, which ought to have been included in the grant.
299. Though that was not the case, the defendants who were not expressly included in the said grant, urge the court to infer constructive or resultant trust, since to hold otherwise would play against the constitutional and statutory rights of women. Further, the defendants and the plaintiffs in the counterclaim invoke Kikuyu customary law that the late Clement Solomon Muna, as the eldest son, was holding the largest single share of the estate, with express or implied understanding to hold the same on his behalf and on behalf of the female siblings.
300. In Arvind Shah & Others -vs- Mombasa Bricks Petition No. 18 (E020) of 2022, the court, based on the Trustees Act Cap 169, Black’s Law Dictionary 9th Edition and Halsbury’s Law of England 4th Edition Vol. 48 paragraph 696 held that trusts are created either expressly, where the trust property, its purpose and the beneficiaries are clearly stated or by operation of the law. The court said constructive trust is a right traceable to equitable title in connection with where a party conducts himself in a manner to deny the other party beneficial interests in the property acquired, or takes advantage of his position for his own benefit while already a trustee, and that they are part of Section 3(1) of the Judicature Act.
301. The court held that the doctrine of constructive trust may be applied to land sale transactions and that under Section 28 of the Land Registration Act, overriding interests include trusts in the absence of any limitation as to the trusts and that under Article 24 of the Constitution, through trusts, a title holder’s land certificate under Article 40 thereof, can be limited, to treat him as a trustee under equity.
302. Further, the court held that a constructive trust may be imposed to address a situation where it would be unjust for one party to retain legal ownership of property under unequitable circumstances, or where one is a victim of wrongdoing, who is then given a right to the property. The court said that courts are an integral part of Kenya’s judicial system, viewed as vehicles for redressing wrongs, by adjudicating disputes and administering justice in accordance with the constitutional ethics, values, and principles.
303. In Mbaso vs Mbaso & Another Civil Appeal E034 of 2021 [2025] KECA 1420 [KLR] (31st July 2025) (Judgment), the court said customary trust is a recognised legal principle in cases where land is passed down through generational inheritance within communities. The court said that the ingredients as outlined in Kiebia (supra), include:
 - (a) The land must have been historically owned by the claimant’s lineage or family, meaning it should have passed down through generations as part of traditional inheritance.
 - (b) The claimant must prove that he was entitled to the land under customary law practices and demonstrate that he had a recognised right to possess or use the land according to communal traditions.



- (c) The registered owner must have acquired the land subject to the customary rights of others, meaning that even though they hold titles to the land, they must have acknowledged the existing customary claim over it at the time of the registration.
- (d) The claimant must show continued occupation or possession consistent with the alleged trust, proving that his presence on the land has not been interrupted and aligns with the customary arrangement under which he claims ownership.
304. In *Mbui Mukangu -vs- Gerald Mutwiri Mbui* [2004] eKLR, the burden of proving customary trust was said to fall on the party alleging it. In *M'Inoti Nthai -vs- Naomi Karegi M'Manyara* [2014] eKLR, the court held that, since African Customary Laws in Kenya generally have the concept or notion of a trust inherent in them, where a person holding a piece of land in fiduciary capacity with the instrument acquisition either describing or not describing him by the fiduciary capacity, that registration signifies the recognition by the law on registration of the consequent trust with the legal effect of transforming the trust from customary law to the provision of Section 28 of Cap 300 (repealed), such registration does not relieve a proprietor from any duty or obligation to which he is subject as a trustee. The court held that the trust arose from the possession and occupation of the land by Gerald, under which he had protection under Sections 28 and 30(g) of the Act.
305. In *Kiebia* (supra), the court said that each case has to be determined on its own merits and the quality of its evidence. In *Kiarie* (supra), the court held that what is essential is the nature of holding and the intention of the parties, and that if the said holding is for the benefit of other members of the family, then customary trust could be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land.,
306. In *Githae -vs- Mwai & Others* [2025] KECA 1583 [KLR] (3rd October 2025) (Judgment), the court cited *Kihari* (supra), that it was now well established that under Kikuyu Customary Law, land is usually held by the eldest son in trust for the family.
307. In *Joseph Gitau Githongo -vs- Victoria Mwihaki Munya* Civil Appeal No. 227 of 2005, the court held that the burden is upon a party who wishes to rely on customary law to prove the custom in question, as held in *Njoki -vs- Muthuru* [2008] 1KLR (G & F).
308. In *Mwai Kabuthi -vs- Kariuki Kabuthi* [2017] eKLR, the court had found that the land was acquired through the father's contribution while working in Eldoret, with Mwai as the registered proprietor in trust. The appeal court affirmed the same, noting Mwai's contradictory evidence and the family's shared use of the land, and since there was evidence that the late father had directed the registration of the land to be held in trust.
309. In *Macharia Kihari* (supra), the deceased father had purchased the land using dowry from the marriage of their sisters and registered it in the young son's name. Both parents had lived and were buried on the property. The court found that whilst the eldest son typically holds the trust, the father's unavailability justified appointing the youngest son as a trustee. The court said that under Kikuyu Customary Law, the younger son can validly hold land in trust if the eldest son is unavailable, and that the trust's validity was not contingent on the eldest son being the trustee.
310. In *M'Karichia -vs- Nkarichia* [2023] KEELC 426 (KLR), the court observed that the manner of pleading for and against a trust is governed by Order 2 Rules 3, 4, 9, 10, and 11 of the Civil Procedure Rules.
311. The court said that under the Trustees Act, a trust extends to implied and constructive trust on those created by operations of law, when a person already a trustee take advantage of his position for his own



- benefit, in which case a proof of the intention of the parties is immaterial, for the trust nonetheless will be imposed by law for the benefit of the settler, to guard against unjust enrichment. The court cited Gladys Njeri Muhura -vs- Lipsa Wagaturi Muthiguro [2019] eKLR, the customary trust is anchored under Article 60(1)(a) of the Constitution as an intergenerational and intra-generational equity with its statutory underpinnings under Sections 24 - 28 of the Land Registration Act.
312. The court cited Henry Mwangi -vs- Charles Mwangi C. A No. 245 of 2004, which echoed the concept of “muramati” to hold in trust for himself and other heirs under Kikuyu Customary Law. The court cited Omollo -vs- Oduor [202] KECA 371[KLR], on where a father lives before registration of land. The court also cited Esther Nyamweru Waruhiu & Another -vs- Georgia Kagethe Waruhiu [2019] eKLR, on the weight to be given to family negotiation attempts to amicably resolve the issue before coming to court.
313. In Mary Rono -vs- Jane Rono & Another Civil Appeal No. 66 of 2002, the court said that Kenya subscribes to International Customary Laws such as the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), and the African Charter of Human & Peoples' Rights (ACHPR), which are against discrimination on account of gender and that this should be reflected in the distribution of the deceased estate.
314. In Mary Nyambura Kangara -vs- Paul Ogari Mayaka and Petition No. 9 of 2021, the court cited Eves -vs- Eves [1975] 1WLR 1338 and Cooke -vs- Head [1972] and Barker -vs- Linklater & Another [2007] QCA 363, that they were convinced that the two parties had contributed to the acquisition and development of the suit property, which led to their proprietary rights.
315. Further, the court cited Jutelabi African Adventure Ltd & Another -vs- Christopher Lockley [2017] eKLR, that in the absence of an express trust, there are trusts created by the operation of law, constructive trust, being imposed where a party has acquired property by wrongdoing, and where the intention of the parties cannot be ascertained, and where a trustee takes advantage of his position for his own benefit, to safeguard against unjust enrichment.
316. The plaintiffs have pleaded that the defendants were all married and had properties in their husbands' residences, hence it is not true that they are destitute. In Kanyi Muthiora -vs- Maritha Nyokabi Muthiora Civil Appeal No. 19 of 1982, the court said that the registration of the suit land in the name of Kanyi did not extinguish Nyokabi's rights under the Kikuyu Customary Law and that Kanyi was not relieved from the duty or obligation to which he was a trust to Muthiora's land. The court said that, having been in occupation of a portion of the land and no enquiry having been made, Martha had created rights of an overriding nature to which the owner was subject.
317. In DiasProperty Ltd (supra), the 1st respondent, alleging an overriding interest, had contended that a presumptive and or an implied trust was created in his favour and that such trust was not subject to Cap 22 and therefore was legally enforceable, as an overriding interest, and a burden to the title. Unlike in this case, there were efforts to perfect the overriding interests, including execution of the application for Land Control Board consent and consent issued to transfer the 200 acres for the suit property, and what was challenged was assent vesting and transferring the suit property and the subsequent entries to the title to the 2nd and 9th respondents. The deceased's occupation of the land was also disputed.
318. At the trial court, it was held that the legal administrator was aware that his late father had sold 200 acres of the property, and proceeded to file succession proceedings, obtained a grant and caused the entire 200 acres to be registered in his name jointly with his siblings, after which the 2nd - 9th respondents sold the entire suit land to the 1st and 2nd appellants.



319. Further, the trial court declared that a constructive trust existed between the 1st respondent and the estate of the deceased and directed that the vesting and transfer of the property to the 2nd to 9th respondents be cancelled for the land to be restored to its prior position. The sale and transfer by the 2nd - 9th respondents of the sold 200 acres subject to constructive trust was illegal. The 2nd - 9th respondents were directed to surrender the titles for cancellation, and thereafter, the mother title was to be subdivided at the 1st respondent's expense for the excision of the 200 acres and issuance of a title for the same.
320. At the Court of Appeal, the issue was that the decision of the Environment & Land Court overrode a decision of a court of concurrent jurisdiction. The Court of Appeal held that under Section 28 (b) of the *Land Registration Act*, proof of purchase and occupation thereof of 200 acres created a constructive trust over the portion, thus becoming an overriding interest, which was necessary. The court said that the said constructive trust was a necessary remedy in equity, to enable the 1st respondent obtain justice against the unconscionable conduct of the appellants.
321. On the interplay between the jurisdiction of the Environment & Land Court and that of the High Court under the *Law of Succession Act*, the Court of Appeal found that when the 2nd respondent approached the succession court, he did not notify the 1st respondent of his action as he sought to have the further that even if the purchaser went as a creditor, the succession court would not have had jurisdiction, and would only have referred him to the Environment & Land Court after adjourning the confirmation of the grant, to allow for such determination. The Court of Appeal found that the correct procedure was not followed, since the 2nd respondent concealed the succession proceedings from the 1st respondent. The matter went to the Supreme Court, which declined to hear the matter, affirming the Court of Appeal.

(R). A Critical Analysis of the Evidence of Evidence on Trust

322. In this suit, the defendants led evidence on the manner in which the late Clement Munga Muna jointly acquired the land measuring 1699 acres with his elder brother after relocating from Kijabe, Kiambu County. It was their evidence that the two had disposed of ancestral land to acquire land in Kitale. The evidence of Rev. Kabiro was that Apollos Mwangi and the late father shared out the land, with the late father getting 439 acres for his family, which had relocated and settled in Trans Nzioa.
323. Though the plaintiffs have said that the late Clement Solomon Muna was justified in acquiring a large share of the estate compared to his male siblings, no evidence has been tendered to justify the same. The plaintiffs failed to call a Kikuyu elder to rebut the evidence of Rev. Kabiro and that of the defendants on the Kikuyu norms on the role of the eldest son.
324. Even though the plaintiffs urged the court to find that apart from the 439 acres, the deceased had other parcels of land which were gifts inter vivos to the female children during the deceased's lifetime, the plaintiffs failed to lead credible evidence to show the origin, nature, and the particulars of those parcels of land in relation to the deceased before he passed on.
325. Gifts inter vivos in law require a deed, an instrument in writing or by delivery, or by way of declaration of trust by the donor. In *Re Estate of late Gedion Manthi Nzioka (Deceased)* [2015] eKLR, the court held that gifts of land must be by way of registered transfer or, if the land is not registered, must be in writing or by a declaration of trust in writing. The court went on to say that gifts inter vivos must be complete for the same to be valid.
326. In this suit, the burden was upon the primary plaintiffs to prove that the late Clement Munga Muna had gifted and perfected part of his other parcels of land or estate inter vivos to the defendants in



relation to Chemgei Farm. Evidence that the deceased was the initial owner or shareholder in Chemgei Farm was not tendered. Evidence that the deceased made an instrument of transfer to that effect is missing. Similarly, evidence of a copy of records to show that the deceased was the registered owner of the parcels of land to have the capacity to bequeath them to the defendants is lacking.

327. The defendants and the plaintiffs to the counterclaim called Rev. Kabiro, a brother to the later Clement Solomon Muna, whose evidence was consistent on the history of the suit properties and the circumstances under which all the male siblings got not more than 40 acres each as opposed to 238 acres given to the late brother out of the 439 acres of the estate of their deceased father. The witness invoked the Kikuyu Customary Law on the existence of a “Muramati”.
328. The plaintiffs did not avail a witness to challenge such a custom or to show a contrary view of the events and the circumstances of the 1st registration of the suit properties in 2011, which occurred 9 years after their late father had passed on.
329. In this suit, there is therefore an irresistible evidence in existence by the defendants and the plaintiffs in the counterclaim, which the plaintiffs have not rebutted to presume the existence of a trust in the way that the late Clement Solomon Muna became the registered owner in 2011.
330. In *James Henry Mundiar T/A Kabarak Development Services -vs- Tradewheel (K) Ltd* [1987] eKLR, the court observed that the plaintiff could not merely attack the relative weakness of the defendant’s title by pleading justifiably that the “council owns the land” without calling evidence on the strength of the title. In *Caroget Investment Ltd -vs- Aster Holdings Ltd & Others* [2019] eKLR, the court observed that where there are competing interests over one parcel of land, each party must produce evidence in support of their claim.

(S). Burial Sites

331. In this suit, the initial 1st plaintiff pleaded that she obtained the title deeds to the suit properties solely as the wife of the late Clement Solomon Muna. The plaintiffs trace their exclusive use, possession, and occupation of the suit properties to 1994. There is evidence that the late Clement Munga Muna and his late wife, Milka Munga, were buried on the suit properties, where their matrimonial home is situated.
332. PW1 confirmed those facts. Asked where his late father, Solomon Munga Muna, and his late wife were buried, the answer was that it was not within the suit properties. Asked whether the late parents had established a matrimonial home on the suit properties, PW1 said that there was none. PW1 said that he was born in 1979 and did not see his aunties live, work, or farm on the suit properties whilst he was living there. He, however, confirmed that there was a time the 2nd defendant was living there.
333. PW1 only mentioned acting as a farm manager since 1994. This obviously was after his late grandfather had passed on. To my mind, PW1, as the plaintiff’s star witness, appeared ignorant of basic facts relating to the day-to-day happenings on the farm, including the historical facts. On the other hand, the plaintiffs in the counterclaim advanced facts in relation to the Kikuyu customary law, constructive and resultant trust, which the primary plaintiffs did not controvert. A trust is a question of fact. The ingredients of customary, constructive, and resultant trust are proved through evidence that is credible, reliable, and believable. Rebuttal of the existence of the same must equally be based on evidence of the same standard.

(T). Breach of Trust

334. There is no dispute in this suit that the late Mr. and Mrs. Solomon Muna became the registered owners of the titles to the suit properties in 2011 and July 2019, respectively, going by the copies of record



before the court. Between 1992 and December 2020, there is enough evidence to show that some, if not all, the defendants were in active litigation over the subject matter with the late Solomon Muna.

335. There is also uncontroverted evidence that the 1st defendant had registered cautions and orders against the title registers, and that immediately the same were lifted, the late Solomon Muna embarked on the transfer of the suit properties to his late wife.
336. These facts were admitted by the deceased both in his statement of defence and in the written witness statement filed herein. The initial 1st and 2nd defendants invoke the doctrine of innocence and legality in the transactions, for the alleged interests of the defendants and plaintiffs to the counterclaim either did not exist, or had not been determined or crystallized as a bar to the transactions.

(U). Whether the Late Mr. and Mrs Solomon Muna Were Innocent Owners of the Suit Properties

337. In *Sehmi* (supra), the court discussed the concept of an innocent purchaser for value. It defined innocence as where a purchaser acts in good faith, his conduct must not raise any doubt as to whether indeed he did not have any notice or knowledge of the existence of a rival interest in the suit land. The court said that the element of innocence connotes the exercise of diligence as expected of any reasonable purchaser, who must demonstrate acting diligently and having conducted a reasonable inquiry into the status of the estate or land he sought to purchase.
338. On value, the court said that a purchaser must actually pay all the money, and a person who took land without giving value in exchange must take it with all the burdens, equitable as well as legal, and that even if he pays, he will be bound if, before he obtained land, he knew of the existence of an equitable interest.
339. The court said that the doctrine was to the effect that equity follows the law and that the innocent purchaser doctrine only protects the purchaser against those basing their claim upon an equitable interest in the land. The court said that the doctrine does not protect a purchaser of an illegally or irregularly obtained title deed and that such a transaction could not attract the protection of equity since equity follows the law.
340. In this suit, there is enough and credible evidence that the plaintiffs have not refuted that the suit properties were inherited from the late Clement Munga Muna, who had obtained the land out of the proceeds of the disposal of ancestral land in Kijabe, together with his late brother. For all intents and purposes, I find the land to be family land. Secondly, the plaintiffs and the defendants are siblings of that family of one patriarch, Clement Munga Muna. Thirdly, the relationship between the parties is not remote or tenuous.
341. The circumstances in which the late Clement Solomon Muna became the registered owner of a larger share as compared to his male siblings point to the fact that he was holding the suit properties in a fiduciary capacity. I say so because one of his co-administrators to the estate was his late mother, Milka. It could not be legal and constitutionally possible for all the land to become solely his, while his late mother was still alive.
342. Coming to whether he breached the fiduciary capacity by transferring and registering the same in the name of his late wife in 2019, the burden was on the plaintiffs in the counterclaim to prove that there was such a breach. There is evidence that the deceased parents were buried on the suit premises where their homestead was situated. Evidence of the late Anne Muna and her family exclusively occupying, using, and possessing the entire farm is missing.
343. In this suit, the plaintiffs to the counterclaim claim gender and the need to uphold the *Constitution*; otherwise, they were not factored into the distribution.



344. Looking at the evidence, it is clear that the late Clement Solomon Muna, soon after the dismissal of the Petition No. 5 of 2012, hurriedly and within a span of less than five months, opted to transfer all the title deeds of the suit properties to his late wife for a consideration of love and affection.
345. The transferor moved speedily and lifted all the existing cautions and court orders to pave the way for the transfers and registration in favour of his late wife. There is no evidence on the part of the plaintiffs on whether they were in exclusive occupation, use, and possession of the suit properties from the death of their late mother or grandmother. From the site visit report, several facts can be established on the status of the land.
346. The burial site for the family members who passed on speaks volumes and leaves no doubt in my mind that this was family land. There is no evidence that the plaintiffs and the late parents of PW1 were exclusively living on the suit properties as of the date of the transfers. If indeed the suit properties exclusively belonged to the PW1's late parents, it goes without saying that he would have interred their remains next to the grandfather's final resting place.
347. Overriding interests are not captured in the titles register but go with the land. Transferring the suit properties without disclosure to the defendants, the circumstances obtaining show that the 1st and 2nd defendants in the counterclaim deliberately put them beyond the reach of the plaintiffs to the counterclaim. It does not matter that the defendants had lost in the previous litigation, hence the need to transfer the same, since there was no bar. As held in the estate of Njuguna Igwima Nakuru Civil Appeal No. 119 of 2017, disputes based on customary trust must be addressed in the Environment & Land Court, and not the probate court, especially post-transmission disputes such as this one.
348. There is no evidence tendered by the plaintiffs to show that the initial 1st plaintiff conducted any due diligence to verify who was on the suit properties before the transfers were effected, to rule out any possessory or occupatory rights generally and in particular, any adverse interest or overriding rights by the late husband's siblings in general and in particular, the 1st defendant, who had been staking a claim in court since 1992.
349. The transferee cannot plead innocent title holder without showing that she acquired the title deeds in good faith, free of any encumbrances, even those not noted in the title registers, visiting the suit properties and verifying who was in occupation, possession, or use as part of due diligence, as held in *Torino Enterprises* (supra).
350. In the circumstances, I find that the transfer and registration of the titles to the suit properties between the 1st and 2nd defendants in the counterclaim was subject to overriding interests in favour of the defendants, and the plaintiffs to the counterclaim. Regarding the nature, particulars, and details of the overriding interests of each of the plaintiffs to the counterclaim, no evidence was tendered.

(V).The Reliefs Sought by the Parties

351. The court record shows that the initial pleadings filed by the parties have undergone numerous amendments, some of which are not in tandem with the rules of amendment of pleadings. The plaintiffs are seeking eviction orders of the defendants from the suit properties, damages for trespass, mesne profits, and a permanent injunction.
352. On the other hand, the 1st, 3rd, 4th, 5th, and 6th defendants and the plaintiffs in the counterclaim are seeking declaration orders that the suit properties were transferred and registered in the names of the 1st and 2nd defendants in the counterclaim, subject to overriding rights; cancellation and invalidation



- of the same on account of fraud, and for a permanent injunction. The 2nd, 3rd, and 4th defendants in the counterclaim have not prayed for any relief, since they have no substantive counterclaim.
353. The plaintiffs must tender evidence to substantiate their prayers. The court has not been supplied with any valuation reports, crop damage assessment, or forester's report to show that there has been wanton destruction of the suit properties by the defendants.
354. The plaintiffs have pleaded that they have invested heavily in the suit properties, in commercial crops and dairy farming. The court was not supplied with any expert reports, and licences were issued to the plaintiffs as recognised farmers or suppliers of farm products such as vegetables, dairy products, silage, and other related farm produce.
355. Further, the court was not supplied with any veterinary, agricultural, and forestry reports showing that the plaintiffs have been running a massive horticultural, dairy and or commercial farming activities on the suit premises.
356. There are no audited reports before the court encompassing the various alleged commercial farming activities, ranging from before 1994 and up to the filing of this suit.
357. In *Rajan Shah T/A Rajan S. Shah & Partners -vs- Bipin P. Shah* [2016] eKLR, the court held that mesne profits relate to damage or compensation recoverable from a person who has been in wrongful possession of immovable property. The court said that it is a settled principle of law that wrongful possession is the very essence of the claim for mesne profits and the very foundation of the unlawful possessor's liability. The court went on to say that, as a rule, liability to pay mesne profits goes with actual possession of the land, and is awarded in place of rents.
358. Order 21 Rule 13 of the Civil Procedure Rules provides that where a suit is for recovery of possession of immovable property, the court may pass a decree for rent or mesne profits which may have accrued on the property during a period prior to the institution of the suit and delivery of possession to the decree holder.
359. In *Peter Mbutia & Another -vs- Samow Edin Osman* [2014] eKLR, the court said that a claimant would demonstrate how the amount was arrived at, in the absence of which it would be disallowed. Therefore, mesne profits must be proved to the required standard. See *Kenya Power and Lighting Company* (supra).
360. Mesne profits in relation to property are defined under Section 3 of the *Civil Procedure Act*. It must be pleaded and provided to the required standards. It is not enough to file and produce documents without substantiation by their makers, who are professionals in the relevant field. See *Kagina -vs- Kagina & 2 others* (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment). The plaintiffs have not specified the nature and extent of the trespass by each of the defendants and the manner in which the value of the suit properties has been diminished by each of them in the claim. See *Capital Fish Kenya Limited -vs- The Kenya Power & Lighting Company Limited* [2016] eKLR.
361. The upshot is that even if the court had found the defendants liable for trespass, which is actionable per se, without proof of any loss or damage, as held in *Duncan Nderitu Ndegwa -vs- Kenya Pipeline Company Limited & another* [2013] KEHC 6408 (KLR), still the relief for special damages, in terms of mesne profits remain unsubstantiated under Section 2 of the *Civil Procedure Act* and Order 21 of the Civil Procedure Rules.
362. As to the other reliefs, the court in *Antony Francis Wareham t/a AF Wareham & 2 others -vs- Kenya Post Office Savings Bank* [2004] KECA 166 (KLR), the court held that in an adversarial system, the



- only facts to be adduced are evidence of the existence or non-existence of the facts in issue or facts relevant to the issue. Therefore, any evidence that does not support the facts pleaded makes the case fail. Similarly, the court observed that following this, a court should not make any findings on unpleaded issues or grant any relief that is not sought by a party in the pleadings.
363. Flowing from this, a party must decide in its pleadings, based on the evidence available, what appropriate reliefs to seek before a court of law. Sufficient material must be placed before the court to prove that there is good cause for granting the relief.
364. In *Muthama & Another -vs- Muthama* Civil Appeal No. 76 of 2022 [2024] KECA 1864 [KLR] (20th December 2024) (Judgment), one of the issues on appeal was whether the Environment & Land Court had erred in determining the respondent's claim based on the issue of trust, which had not been pleaded. Though the issue had not been pleaded, the Court of Appeal observed that from the issues identified by the Environment & Land Court, it was evident that the issue of trust was central to the court's analysis and determination. The court cited *Odd Jobs -vs- Mubia* [1970] EA 476, that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial, that the issue had been left to the court for determination.
365. In *David Saronga Ole Tukai -vs- Francis Arap Muge & Others* [2014] eKLR, the court held that it is an established practice in our jurisdiction that the court will not grant a remedy which has not been applied for and will not determine issues not pleaded by a party.
366. Further, the court held that in an adversarial system, the parties who set the agenda and the subject matter are left to formulate their case on its ways. The court in *Muthama* (supra) said that pleadings are the primary documents that grant the court and the parties concerning the claim and the contesting position of the parties.
367. The court said that if a party seeks to anchor a trust claim, the issue should be pleaded and particulars of the trust given. The court said that where there is none, the opposite party has the right to move the court to have the pleadings struck out, and if not so, and the issue of trust is addressed in evidence at the hearing, and in submissions, it is assumed that the party has opted to forge his right to challenge the pleadings and acquiesced to the issue being determined by the court.
368. In this suit, the secondary plaintiffs have pleaded generally on the issue of trust. What the plaintiffs have not pleaded with clarity in the counterclaim is how much they would want the court to grant as their entitlement out of all or any portion(s) of the suit properties. The court made a site visit order, dated 12/11/2024, in the presence of the parties. This was followed by a site visit report dated 28/10/2024.
369. From the said report and pictorial, the court makes several observations. One, as much as overriding interests can subsist in this suit, there is no evidence by both parties herein of any exclusive existence, development, actual or constructive occupation, or possession of the suit properties, as pleaded in their pleadings before the court.
370. The court takes judicial notice that none of the deceased parents of the parties herein, including the daughters of the patriarch Clement Munga Muna, are buried on the suit properties. Equally, there is only one residential house on the suit properties, presumably belonging to the late Clement Munga Muna and Milkah Mwihaki Muna. The court, therefore, is not convinced that the plaintiffs and the defendants and the plaintiffs in the counterclaim were in actual, physical occupation, use, and possession of the suit properties since they were born on a day-to-day basis, generally and in particular, the period between 1990 and 2014. So then, the question is based on the reliefs sought to evict the defendants by the primary plaintiffs compared to the declaratory orders sought by the plaintiffs in the counterclaim; are the said reliefs substantiated?



371. The plaintiffs in the counterclaim have urged the court to find that the discrimination on account of gender where only male siblings were involved in the distribution of the estate of the deceased. Article 27 of the [Constitution](#) provides that everybody is equal and no one should be discriminated against on account of gender.
372. In *Re Estate of Tapoya Amuruk Silaure (Deceased) (Succession Cause 194 of 2004) [2023] KEHC 17482 (KLR) (17 May 2023) (Judgment)*, the court cited *Peter Karumbi Kangata & Others -vs- Dr. Anne Nyokabi Nyanguthi & Others [2014] eKLR*, that it was disingenuous to argue a married daughter would not benefit from her parents since her husband too would benefit from such inheritance.
373. The court termed such a culture as retrogressive, backward, and repugnant to justice and morality, since Article 27 of the [Constitution](#) outlaws discrimination on account of gender, marital, or social status.
374. In *Fatuma Athman Abud Faraj -vs- Ruth Faith Mwawasi & Others Supreme Court Petition No E035 of 2020*, the court ruled that all children, whether born within or outside marriage, have a right to inherit from their Muslim father, otherwise; to deny them inheritance merely based on their birth status was unjust, discriminatory and a violation of their constitutional guarantee of equality and non-discrimination.
375. Article 60(f) of the [Constitution](#) provides for the elimination of gender discrimination in respect to land. A marital status of a daughter is therefore not a basis to deny her the right to inherit her father's estate, as the plaintiffs have pleaded and submitted in this matter. Reality must sink in that in the 2010 Constitution, any culture or tradition locking out daughters from invoking overriding interests or rights of inheritance of their parents' property is unconstitutional.
376. In *Re Priscilla Kamau (2005) eKLR*, the court said that the law does not distinguish between the children of a deceased based on their gender or marital status. To uphold patriarchal norms, custom beliefs, and practices discriminative of daughters, as submitted by the plaintiffs in the main suit, will be akin to asking the court to abdicate its constitutional responsibilities. See *Mutheu Agatha Khimulu -vs- Raheem Mehdi Aziz Azad & Others Petition No.2 (E003) of 2022*.
377. In *Charles Muturi Macharia & Others -vs- Standard Group & Others Petition No. 13 (E015) of 2022*, the court held that courts in Kenya must construe the provisions of the [Constitution](#) in a general and purposive manner, guided by the principle set out under Article 25 of the [Constitution](#), through a holistic manner to promote the purposes of the [Constitution](#), its values, principles and in a way that advances the Bill of Rights.
378. Courts in Kenya have embraced the inheritance rights of daughters from their father's estate regardless of their marital status. See *Ripples International -vs- The Attorney General & Others Petition No. E017 of 2021 [2022] KEHC 13210 [KLR]*.
379. There is no dispute that, whereas the plaintiffs in the counterclaim and in the submissions appear to be speaking on behalf of the seven daughters of the late Clement Munga Muna, 5 of them have since passed on at the filing of the counterclaim. It is only 3 out of 5 who are represented in this suit. From the 3, only the 1st plaintiff in the counterclaim is claiming to be living on the suit properties.
380. Her evidence was that the events of 30/4/2020 were provoked by the alleged issuance of titles to the suit properties to her late sister-in-law. The area chief and the OCS who testified herein confirmed that even though she had sought assistance to access her home, the 1st defendant did not provide them with any ownership documents. If indeed the 1st defendant used to live on the suit properties, as she wants



the court to believe, it makes no sense why she had to seek the assistance of the DCIO, area chief, and the police to regain entry.

381. It is not lost to this court that the 1st defendant and her sisters' cases pending in the courts by 10/12/2018, and especially Petition No 5 of 2012, had been disposed of, and the interim orders discharged. Equally, the 1st defendant and her sisters must have known that nothing stopped their late brother Solomon Muna from causing the cautions and restrictions, the 1st defendant had registered against the titles to the suit properties from being lifted.
382. It is also notable from the evidence herein that the plaintiffs to the counterclaim did not appeal against the dismissal of the petition in Kitale High Court, or the Eldoret Judicial Review proceedings. As of July 2019, when the transfer and registration of titles to the suit properties occurred in favour of the initial 1st plaintiff, this court has not been supplied with any notice of appeal, court order, notice given to the Land Registrar, and or the late Solomon Muna, that there was a pending appeal or suit, hence there should be no adverse dealings with the titles to the suit properties.
383. Equally, the court has not been supplied with any letter or affidavit seeking to register a caution duly signed by all the daughters of the late Clement Munga Muna or their legal representatives as of July 2020, seeking to give notice to the Land Registrar that they were beneficiaries of the suit properties, having or expressing overriding interests on the suit parcels of land, including possessory interests thereto.
384. The court also notes that in the former suits, one of the prayers by the 1st defendant was for the income being generated from the farm be deposited in court and or shared out with the claimants. So the plaintiffs to the counterclaim cannot turn around and deny that the late brother was running some farming on the suit properties allegedly inherited from their late father and grandmother.
385. This then begs the question, why the 1st defendant in particular and generally, the plaintiffs in the counterclaim would take the law into their own hands, forcefully enter into the suit properties, and later come to court through a counterclaim for equitable reliefs. He who comes to equity must come with clean hands. Equity also follows the law. Equity cannot override a statute but seeks to ensure compliance with the law.
386. In *Sehmi* (supra), the court held that a court of equity cannot sanction an illegality or give its seal of approval to an illegal act. Two wrongs cannot make a right. The 1st defendant had not been declared as holding overriding interests on the suit properties against his late brother at the time that she forcefully gained entry and purported to use the police, DCIO, and the area chief to give her a stamp of legality. Already, the defendants in the counterclaim knew or must have known that the existing orders in the Kitale Petition No. 5 of 2012 had been lifted, and their late brother was confirmed as a bona fide owner.
387. The 1st defendant has not told this court and proved that she had sought and obtained consent or authority of the late brother to gain entry into the suit properties. The defendants were, therefore, in the circumstances, unwelcome guests of the registered owner of the suit properties before July 2019 and 30/4/2020. With this background, the plaintiffs are seeking a permanent injunction before the court to stop the registered owners from enjoying their proprietary rights.
388. An injunction is an equitable remedy granted where the loss of property would render the applicant helpless, in the presence of a prima facie case, irreparable loss or damage, and where a balance of convenience tilts in favour of granting the same.
389. A permanent injunction is granted after the determination of the parties' rights. In *Jaj Super Power Cash and Carry Ltd -vs- Nairobi City Council & Others* CA No. 112 of 2002, the court held that it



is the trespasser who should give way, pending the determination of a dispute and that a wrongdoer cannot keep what he has taken by force even though he is capable of paying damages, or that the alleged acts of trespass are compensable in damages.

390. Similarly, a permanent injunction perpetually restrains the commission of an act by the defendant to protect the rights of the plaintiffs. See Peter K. Mwaniki & Others -vs- Peter Njuguna Gicheha & Others [2008] eKLR.
391. In this suit, I do not believe that, in the circumstances obtaining, the court should grant any permanent injunction until the alleged overriding interests of the plaintiffs in the counterclaim are fully settled and crystallised as rights.
392. This now takes me to the question of what appropriate reliefs, in the prevailing circumstances, the court should grant. Faced with a controversy whether an issue is on land or succession, the court in Suzanne Butler & Others -vs- Redhill Heights Investment Ltd & Another [2016] eKLR, said that courts shall utilise the predominant purpose test.
393. Jurisdiction is everything; without it, a court must lay down its tools. See Motor Vessel Lillian “S” -vs- Caltex Oil (K) Ltd [1989] KLR. The jurisdiction of this court does not include determining beneficiaries to the estate of a deceased person. During the course of this suit, both the initial and the subsequent registered owners of the suit properties in 2011 and 2019 passed away and were replaced in both the main claim and in the counterclaim.
394. It is not clear whether there have been substantive succession proceedings touching on the estate of the said deceased persons. The role of the probate court, as contemplated in Section 29 of the [Law of Succession Act](#), includes the identification of beneficiaries to the estate.
395. In this suit, I have found that the 1st and 2nd defendants in the counterclaim were privy to the previous litigation involving the sister(s) or sister(s) -in-law, claiming some interest in the land and trying to challenge the confirmed grant, even though they had not succeeded as of July 2019.
396. While undertaking the transfer and registration, the said deceased person(s) had pleaded that there was no obligation to disclose, seek consent, involve, or notify the plaintiffs in the counterclaim about the same.
397. Applying the foregoing case law, the late Solomon Muna and his late wife, before this court and at the previous litigations, confirmed non-involvement of the sisters and sisters-in-law, both in the filing of the succession proceedings, confirmation of the same, transfer and subdivision of the 439 acres into 14 portions in 1999, registration of and issuance of title deeds to the suit properties in 2011, and subsequently the transfer and registration of the same to the initial 1st plaintiff in July 2019.

(W). Final Orders

398. For clarity, the orders issued are;
- i. The plaintiffs' claim dated 31/7/2025 is dismissed.
 - ii. The 1st, 3rd, 4th, 5th, and 6th defendants' amended counterclaim dated 10/1/2025 is allowed in terms of prayers (c) and (d) only. The rest of the prayers are dismissed
 - iii. In view of the declaratory orders issued, the land comprised in the radius of 300 metres surrounding the homestead of the late Clement Munga Muna and the late Milka Mwhiki shall remain family land belonging to the 1st - 5th plaintiffs in the main suit, the plaintiffs and the 1st and 2nd defendants in the counterclaim.



- iv. The rest of the land comprised in the suit properties outside the referenced family land shall be shared equally among the 1st - 5th plaintiffs in the main suit and all the plaintiffs in the counterclaim.
- v. There shall, from the date of this judgment, be unlimited use, occupation, and access to the suit properties as declared in this judgment to be family land, by the 1st - 5th plaintiffs in the main suit, the plaintiffs, and the 1st and 2nd defendants in the counterclaim.
- vi. This being a family matter, there shall be no order as to costs.

399. Orders accordingly.

**JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT
AT KITALE ON THIS 21ST DAY OF JANUARY 2026.**

In the presence of:

Court Assistant - Dennis

Shah & Omamo for the 1st - 6th plaintiffs

1st and 2nd defendants present

Njeri for Simiyu for 1st, 3rd, 4th, 5th, and 6th defendants and plaintiffs in the counterclaim

Chilaka for 3rd and 4th defendant in the counterclaim present

Wangechi for Interested Party present

Jane Wangechi Waruiru, 2nd defendant present

HON. C.K. NZILI

JUDGE, ELC KITALE.

