



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ching'ore v Kulali & another (Environment and Land Case 474 of 2013 & 234 of 2016  
(Consolidated)) [2026] KEELC 655 (KLR) (12 February 2026) (Judgment)**

Neutral citation: [2026] KEELC 655 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND CASE 474 OF 2013 & 234 OF 2016 (CONSOLIDATED)**

**CK YANO, J**

**FEBRUARY 12, 2026**

**BETWEEN**

**ISAAC CYPRIAN CHING'ORE ..... PLAINTIFF**

**AND**

**NEHEMIAH KULALI ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS KULALI OMANJA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this suit by way of a Plaint dated 2<sup>nd</sup> September, 2013 and Amended on 9<sup>th</sup> March, 2017 seeking the following reliefs against the Defendants:-
  - a. A declaration that the Plaintiff is the absolute owner of the whole of that parcel of land known as Soy/Soy/ Block 10(Navillus)2143 and the Defendants' actions amount to interference with the Plaintiff's proprietary rights over the suit land.
  - b. An order of permanent injunction to permanently restrain the Defendants, their servants, agents and/or employees from trespassing into, wasting, leasing and/or interfering in any other way or manner whatsoever or howsoever dealing with land parcel known as Soy/Soy/ Block 10 (Navillus)2143.
  - c. Mesne profits.
  - d. Costs of the suit.
  - e. Any other relief this Honourable Court may deem fit and just to grant.
2. In support of the above reliefs, the Plaintiff pleaded that he is the registered owner of land parcel No. Soy/Soy/Block 10(Navillus)2143 measuring 0.08Ha (the suit property herein). He averred that as the registered owner, he is entitled to the enjoyment and use thereof and all other rights and privileges



- appurtenant thereto by virtue of the *Land Act, the Constitution* of Kenya and all other relevant laws. That, however, the Defendants had unlawfully and without any colour of right trespassed into the land since 2005 and begun constructing, cultivating the land and making bricks without his consent, permission and/or authority.
3. The Plaintiff averred that he had never sold or conveyed any interest over the suit parcel of land to the Defendants, therefore their entry and activities on the land are an infringement of his proprietary rights and thus illegal and he sought a declaration to that effect. He averred that the Defendants' actions are fuelled by impunity. The Plaintiff admitted that there is another suit pending between the parties over the same subject matter, being Eldoret ELC Case No. 234 of 2016 (OS) - Francis Kulali Omuanja (the 2<sup>nd</sup> Defendant herein) vs Isaac Cypriano Shing'ore (the Plaintiff herein) & Clement Odhiambo Ooko. The Plaintiff asked that judgment be entered in his favour against the Defendants for the reliefs sought in the Plaintiff.
  4. In response, the 1<sup>st</sup> Defendant filed an Amended Defence on 24<sup>th</sup> April, 2017 denying the averments set out in the Plaintiff. The 1<sup>st</sup> Defendant averred that the suit property was purchased by Ishieywe Self Help Group where the 2<sup>nd</sup> Defendant was a member no. 994 having joined on 30<sup>th</sup> March, 1998. He explained that the Group actually purchased several Blocks being Soy/Soy Block 10 (Navillus)/35, 62, 64, 65, 66, 71, 72, 76, 77, 80, 818 and 82. He claimed that the Plaintiff who initially was a member, was expelled from the group on 5<sup>th</sup> July, 1988 for fraud and he was reimbursed for his KShs. 5,000/- he paid for which no shares were allotted. That as such the Plaintiff could not have purchased any parcel of land in Ishieywe area.
  5. The 1<sup>st</sup> Defendant denied interfering with the Plaintiff's quiet possession. He explained that the 2<sup>nd</sup> Defendant was allocated Plot No. C16 special commercial, which was a subdivision of parcel No. Soy/Soy Block 10(Navillus)66 belonging to Ishieywe Self Help Group, after paying KShs. 80,000/-. He pleaded that the 2<sup>nd</sup> Defendant entered occupation of the suit land on 27<sup>th</sup> July, 1999 and constructed a semi-permanent house. That at the time, the Plaintiff was only 9 years old. The 1<sup>st</sup> Defendant claimed that the 2<sup>nd</sup> Defendant lived peacefully on the suit land for over 16 years, thus he had never trespassed on the land.
  6. The 1<sup>st</sup> Defendant denied that his actions are unlawful, illegal, void or interfered with the Plaintiff's rights of ownership, and averred that the Plaintiff has no rights to the suit land. That the Plaintiff never held any share certificate to the land or any agreement for purchase. He also claimed that the Plaintiff obtained title fraudulently and without consideration. He admitted that he has had user of the land since attaining the age of majority as the 2<sup>nd</sup> Defendant's son, which entitles him to quiet possession of the land.
  7. The 1<sup>st</sup> Defendant averred that the Plaintiff's title is extinguished by operation of Section 7, 15 and 17 of the *Limitation of Actions Act*. The 1<sup>st</sup> Defendants alleged that the Defendants entered the land in 1999 and not 2005 as alleged, and that their rights are protected by Section 28(h) of the *Land Registration Act*, and Sections 7, 15 and 17 of the *Limitation of Actions Act*. The 1<sup>st</sup> Defendant averred that the Plaintiff has never been in occupation of the suit land. He explained that his father, the 2<sup>nd</sup> Defendant is in occupation of the ¼ Acre of land comprised in the suit property, and any title obtained was subject to prescriptive rights and any transfer was equally subject to the same.
  8. The 1<sup>st</sup> Defendant set out the particulars of fraud on the part of the Plaintiff, and claimed that at the time of filing suit, he was incarcerated at Eldoret GK Prison awaiting trial. He added that neither he nor the Plaintiff are in possession, and the person in possession is the 2<sup>nd</sup> Defendant. That the Plaintiff is thus not entitled to the orders sought as the cause of action is not known in law. The 1<sup>st</sup> Defendant



averred that he has wrongly been sued. Further, that the Defendants have obtained rights in rem over the suit land by virtue of occupation nec clam, nec vi nec pricario, and are entitled to lease or utilise it to the Plaintiffs exclusion. That the Plaintiff's claim is time barred by virtue of Section 7 and 12 of the *Limitation of Actions Act*. He also claimed that the suit is vitiated and a non-starter by virtue of the orders sought in ELC No. 234 of 2016. The 1<sup>st</sup> Defendant averred that there is no cause of action disclosed against him and asked that the Plaintiff's case be dismissed with costs.

9. The Plaintiff filed a Reply to the Defence stating that the same was full of mere denials and did not raise any triable issues. The Plaintiff averred that the suit property, whose provisional number was C16, was allocated to him by Ishieywe Self Help Group where he was a shareholder and he has title over it. He denied being expelled from the group and claimed that he continued to purchase shares even after 5<sup>th</sup> July, 1998, and he accused the 1<sup>st</sup> Defendant of relying on forged documents to mislead the court. The Plaintiff averred that he paid KShs. 80,000/- for the land, while the 2<sup>nd</sup> Defendant paid KShs. 24,000/- and was allocated parcel no. 13 in Block 59.
10. As regards to the allegations that the Defendant's father entered the land on 27<sup>th</sup> July, 1999, the plaintiff averred that by then Block 66 had not been sub-divided. He stated that it was subdivided in September, 1999 and allocations done in October 1999. He claimed that share certificates were not issued in respect of special commercial plots, thus the 1<sup>st</sup> Defendant entered the land after obtaining a fake allotment letter from one Meshak Sitako Mwanga. He pleaded that he obtained his title to the suit land legally and without fraud, and his transfers were signed by the Registered Officials of Ishieywe Self Help Group.
11. The Plaintiff averred that the structure on the land was constructed by the Plaintiff and not the 2<sup>nd</sup> Defendant, who he asserts does not live on the property. Further, that the 1<sup>st</sup> Defendant brought in a woman to occupy the structure he put up on the land. That upon service of the Demand Notice, she left and the 1<sup>st</sup> Defendant brought in a man who still occupies the land while the 1<sup>st</sup> Defendant visits continuously. The Plaintiff asserted that the 1<sup>st</sup> Defendant has no proprietary rights over the suit land and cannot be protected by the law. The Plaintiff denied the particulars of fraud and reiterated that the 1<sup>st</sup> Defendant had trespassed onto the suit land. The Plaintiff insisted that the 1<sup>st</sup> Defendant is the right party to sue as he is the one in possession of the land. He asked that the Defence be struck out and judgment entered as prayed in the Plaint.

#### **ELC Case No. 234 OF 2016 (OS);**

12. The 2<sup>nd</sup> Defendant filed this second suit on 1<sup>st</sup> August, 2016 by way of Originating Summons against the Plaintiff as the 1<sup>st</sup> Defendant and one Clement Odhiambo Ooko as the 2<sup>nd</sup> Defendant, seeking for orders that:-
  - a. The Applicant has obtained title over land parcel No. Soy/Soy Block 10(Navillus)2143 by way of adverse possession for having occupied the said parcel of land for a period of 12 years, nec vi, nec clam nec pricario.
  - b. Consequent upon the foregoing, the Applicant be registered as the sole absolute and indefeasible proprietor of the aforesaid parcel of land being Soy/Soy Block 10(Navillus)2143.
  - c. The District Land Registrar, Uasin Gishu County or such registrar is situate, where the register do enter the name of Francis Kolali Omuanja as the proprietor of the said parcel of land No. Soy/Soy Block 10(Navillus)2143 in lieu of the 1<sup>st</sup> Defendant's name.
  - d. The Defendants do pay the Plaintiff the costs of this suit and interest thereon at court rates.



13. The 2<sup>nd</sup> Defendant filed a Supporting Affidavit dated 1<sup>st</sup> August, 2016 in support of the Summons. He deponed that he was registered as a member of Ishieywe Self Help Group in 1998. That he balloted for land among other members and was allocated the suit land and was issued share certificate no. 994. That thereafter he was issued with a letter of allotment after satisfying all the requirements and he moved into the plot in July, 1999. That he has extensively developed it by fencing it, planting trees, and building a home. The 2<sup>nd</sup> Defendant claims that the Plaintiff unjustifiably acquired title to the land in his name, despite the fact that he had obtained it and resided thereon openly, freely, exclusively and uninterrupted for 16 years.
14. The 2<sup>nd</sup> Defendant claims that all his children have grown up on the suit land and it is the only place they know as their home. He averred that it is not clear how the Plaintiff acquired the land, but stated that his title had been extinguished by virtue of Section 7 of the Limitation of Actions Act as at 31<sup>st</sup> December, 2011. He claimed that it is only fair that he be registered as the sole, absolute and indefeasible proprietor of the aforesaid title by way of adverse possession. He concluded that the registration of the Plaintiff as proprietor was subject to prescriptive rights.
15. The Plaintiff filed a Replying Affidavit opposing the Originating Summons, where he deponed that he obtained the suit property legally and obtained a title on 27<sup>th</sup> February, 2008. He clarified that the 2<sup>nd</sup> Defendant had not been in occupation of the land, but his son, Nehemiah Kulali is the one who trespassed thereon in 2005 and he had filed suit seeking his eviction. He averred that he was allocated the suit land by Ishieywe Self Help Group, and that the OS was not made in good faith, but full of half-truths, immaterial facts and malice. He averred that the 2<sup>nd</sup> Defendant had met the threshold required for adverse possession. He denied that the 2<sup>nd</sup> Defendant had enjoyed peaceful possession and accused him of being guilty of laches and approaching the court with unclean hands. He asked that the OS be dismissed with costs.
16. The 2<sup>nd</sup> Defendant in the OS Clement Odhiambo Ooko filed a Supplementary Replying Affidavit dated 6<sup>th</sup> September, 2016. He fully associated himself with the Plaintiff's Replying Affidavit. He deponed that the OS does not disclose any cause of action against him and that the claim is based on fraud. He deponed that the Plaintiff is the proprietor of the suit land having been allocated the same by Ishieywe Self Help Group when he was the chairman. That the 2<sup>nd</sup> Defendant's son, Nehemiah Kulali, trespassed into the Plaintiff's land in 2005. That the 2<sup>nd</sup> Defendant had not met the threshold required in adverse possession. He concluded that the 2<sup>nd</sup> Defendant's claim is bad in law, lacks merit and should be dismissed with costs.
17. The 2<sup>nd</sup> Defendant responded to the Replying Affidavits by filing a Supplementary Affidavit sworn on 21<sup>st</sup> November, 2018. He deponed that his plot no. C16 was part of Soy/Soy Block 10(Navillus)66 which was transferred to Meshack Sitako, Harrington Oriedo and Fance Mwenje, before being transferred to the 2<sup>nd</sup> Defendant in the OS as a trustee of the Group. That the allocation and subdivision of the suit parcel was done in July, 1999 and that there has been no further subdivision of the said parcel. He claimed that by the time the Plaintiff obtained title in 2008, he had occupied the suit land for over 8 years. Further, that as at the date of registration of subdivision on 28<sup>th</sup> July, 2006 he had occupied the land for 6½ years. He referred to the 2<sup>nd</sup> Defendant's letter dated 27<sup>th</sup> July, 1991 as showing that the land belonged to him.

**Consolidation:**

18. On application by Counsel for the 1<sup>st</sup> Defendant, on 17<sup>th</sup> January, 2019 the court directed that ELC Case No. 474 of 2013 be consolidated with ELC Case No. 234 of 2016 (OS). The OS filed in



ELC Case No. 234 of 2016 (OS) was deemed as a counterclaim, the Replying Affidavit a Defence to the Counterclaim, and the Supplementary Affidavit was deemed as a Reply to Defence to the Counterclaim.

### **Hearing & Evidence:**

#### **The Plaintiff's Case;**

19. The case was heard on 28<sup>th</sup> October, 2025 with the Plaintiff testifying under oath as PW1. He introduced himself as a businessman and a resident of Langas. He adopted his witness statement dated 10<sup>th</sup> October, 2016. In his statement, the Plaintiff reiterated the averments in his Amended Plaintiff and Reply to Defence. He reiterated that the 2<sup>nd</sup> Defendant was allocated plot no. 13 Block 59, which had a dispute that was resolved and the 2<sup>nd</sup> Defendant took possession. He testified that he obtained title in 2008 and the transfer was overboard. He stated that he was never expelled from the group. He accused the Defendants of relying on forged documents.
20. PW1 testified in court that the suit land is in his name and that he got title on 27<sup>th</sup> February, 2008. PW1 produced the documents in his list of documents dated 29<sup>th</sup> June, 2016 as PEXb 1-7 respectively. He testified that he obtained an order from court to show that the documents filed by the Defendants were forgeries and the DCI found that they were forgeries. PW1 testified that thereafter, he filed a Further List of Documents dated 26<sup>th</sup> September, 2019. PW1 produced the documents in his Further List of Documents dated 26<sup>th</sup> September, 2019 as PEXb 8-10 respectively. PW1 prayed for the reliefs in the Amended Plaintiff. PW1 was not cross-examined.
21. The Plaintiff then called Meshack Sitako Mwangi who testified under oath as PW2. He testified that he recorded a witness statement dated 10<sup>th</sup> October, 2016 and filed on 11<sup>th</sup> October, 2016 which he adopted as his evidence-in-chief. In the said statement, PW2 stated that he, the Plaintiff and the 2<sup>nd</sup> Defendant were all members of Ishieywe Self Help Group. That the Plaintiff and the 2<sup>nd</sup> Defendant paid for their respective shares and they were allocated plot no. C16 in Block 66 and plot 13 in Block 59 respectively.
22. PW2 stated that there was a dispute in the group that led to the formation of two groups whereby he led one group, while Clement Odhiambo Ooko led another. PW2 also stated that in the process he issued some allotment letters including one to the 2<sup>nd</sup> Defendant, and he clarified that this was an error. PW2 testified that they held a meeting at the District Commissioner's Office and it was resolved that the Chairman was Clement Odhiambo Ooko. PW2 testified that at the said meeting, it was observed that some people like the 2<sup>nd</sup> Defendant had fake receipts.
23. PW2 stated that it was thus resolved that only those with genuine receipts would be given Title Deeds. PW2 testified that Plot No. C16 Block 66 was a Special Commercial Plot. PW2 further testified that the 2<sup>nd</sup> Defendant had approached him with a fake ballot, but at the time, he did not know that it was a fake ballot. He explained that the ballot was fake because it has a fake stamp. He further clarified that it is the 1<sup>st</sup> Defendant who entered the Plaintiff's land and not the 2<sup>nd</sup> Defendant.
24. PW2 was also not cross-examined. At the end of PW2's testimony, the Plaintiff closed his case.

#### **The Defendants' Case;**

25. On the date of hearing, the Defendants and their Advocate on record failed to attend court despite the fact that the date was taken by consent. In the absence of the Defendants, who the court confirmed were aware of the date, the Defence case was closed.



### **Submissions:**

26. At the close of the hearing, the Court directed the parties to file their final written submissions. The Plaintiff complied and filed his written submissions dated 14<sup>th</sup> November, 2025. The Defendants however did not file any submissions in support of their case.

### **The Plaintiff's Submissions;**

27. Counsel started by pointing out that the Defendants did not attend court for hearing of the matter despite the fact that the date was taken by consent. Counsel then submitted that parties must offer evidence to substantiate the allegations in their pleadings. Counsel argued that where a Defendant fails to offer evidence, the Plaintiff's evidence remains unchallenged. Counsel cited *Motex Knitwear Limited vs Gopitex Knitwear Mills Ltd (2009) eKLR* and *Autar Singh Bahra & Another vs Raju Govindji, HCCC No. 548 of 1998 (unreported)* in support of his submissions.
28. Counsel submitted that the Plaintiff produced a Title Deed for the suit land, and argued that as the registered proprietor, he is entitled to the rights and benefits under Section 24 of the [Land Registration Act](#). Counsel submitted that Section 26 of the said Act obligates the court to accept the Certificate of Title as conclusive evidence of proprietorship, unless it is challenged under Sections 26(1)(a) or (b). Counsel submitted that the Defendants had not offered any evidence to impeach the Plaintiff's Title Deed neither did they provide any evidence for the fraud they alleged on the part of the Plaintiff.
29. Counsel submitted that fraud must be specifically pleaded and not inferred from the facts, and must also be proved to the required standard. Counsel relied on the case of *Kuria Kiarie & 2 Others vs Sammy Magera (2018)*, *John Mbogua Getao vs Simon Parkoyet Mokare & 4 Others (2017) eKLR* and *Kinyanjui Kamau vs George Kamau Njoroge (2015) eKLR*. Counsel argued that the Defendants are the ones who sought to acquire the Plaintiff's land fraudulently per the Forensic Document Examiner's Report produced by the Plaintiff in evidence. Counsel asserted that the Plaintiff had proved his case on a balance of probabilities and that the prayers sought in the Amended Plaintiff should be granted.

### **Analysis and Determination:**

30. Having considered the pleadings, the witness testimonies and the evidence produced in court, as well as the submissions filed herein, I am convinced that the issues for determination are as follows:-
- i. Who is the legal owner of the suit property herein?
  - ii. Whether the Plaintiff is entitled to the orders sought in the Amended Plaintiff against the Defendants
  - iii. What are the consequences of the Defendants' failure to testify in support of the 2<sup>nd</sup> Defendant's Counterclaim?
  - iv. Who should bear the costs of this suit?
31. Before proceedings to determine the suit on its merits, I must point out that while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in this case entered appearance and filed their Defences to the suit, they however were absent on the date of hearing, and the court closed their respective cases. As a result of this, they failed to testify or call any witness to testify on their behalf and no evidence was produced to support their cases. Their Advocates on record also were absent and thus they lost the opportunity to cross-examine the witnesses.



32. It is trite that pleadings are not evidence and in the absence of evidence, the pleadings of a party remain mere allegations. This position was affirmed by the Court of Appeal in *Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau* (2016) eKLR where the court held that:-

“First and foremost, there can be no quarrel with the statements in the above judgments that averments by the parties do not constitute evidence. Madan, JA (as he then was) made this abundantly clear in *CMC Aviation Ltd v. Crusair Ltd (No1)* [1987] KLR 103 when he stated:

“The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence.

As stated in the definition of “evidence” in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven... The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.’

The suggestion, however, implicit in some of the decisions quoted above, that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff’s case is proved on a balance of probabilities cannot possibly be correct.”

33. However, the fact that the Defendants did not testify or produce evidence does not relieve the Plaintiff of his burden of proof. The Plaintiff still has a duty to formally prove his case on a balance of probabilities as is required by law, because failure to testify and produce evidence does not mean that the Plaintiff’s case will automatically succeed.
34. The Court of Appeal in the *Charterhouse Bank Limited (Under Statutory Management) Case* (Supra) further held that:-

“We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the defendant has not testified. The proposition that failure by the defendant to call evidence lessens the burden on the plaintiff to make out his case on a balance of probabilities as propounded in *Karugi & Another v. Kabiya & 3 Others* (supra) is totally different from the proposition advanced by the appellant in this appeal, namely that the failure by the defendant to call evidence invariably entitles the plaintiff to judgement, irrespective of the



quality and credibility of the evidence that the plaintiff has presented. In our view the latter proposition has no sound legal basis.”

35. Similarly, even in this suit, the burden still remains on the Plaintiff to prove his case on a balance of probabilities. The failure by the Defendants to testify and produce evidence in this case does not absolve the Plaintiff of the duty to prove the case to the required standard. The burden on the Plaintiff to prove his case remains the same and that burden of proof is in no way lessened because the Defendants did not adduce any evidence.

#### **Who is the legal owner of the suit property herein;**

36. The Plaintiff brought this suit claiming ownership of the suit property herein, out of which he seeks various reliefs premised on his claim of ownership. From the pleadings and the testimonies given, the suit land was initially part of a larger parcel belonging to a land buying entity known as Ishieywe Self Help Group and was subdivided and sold to the members of the said group.

37. The Plaintiff herein claims to have been a member of the said group, through which he bought land and was allocated the suit property, for which he later obtained title legally. In support of his claim that he is registered proprietor of the land, the Plaintiff produced a membership certificate dated 23<sup>rd</sup> May, 1998 showing that he was a member no. 3023 of Ishieywe Self Help Group.

38. In addition to this, the Plaintiff produced a Title Deed over the suit property dated 27<sup>th</sup> February, 2008 in his name. He also produced a Certificate of Official Search dated 9<sup>th</sup> October, 2013 which confirms that as at that date, he was still the registered owner of the suit property. The strength of these two documents with regards to proof of ownership of land is expressly stated at Section 26 of the [Land Registration Act](#), which provides that:-

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

39. It goes without saying therefore, that per the title deed produced before this court and the Certificate of Official Search, the Plaintiff is in fact the duly registered proprietor of the suit property.

40. The Defendants claims as per their Defences is that the land does not belong to the Plaintiff, but was in fact allocated to the 2<sup>nd</sup> Defendant who is the 1<sup>st</sup> Defendant’s father. The 1<sup>st</sup> Defendant in particular pleaded that the Plaintiff acquired the land and registration thereto as well as title through fraud. Notably, the issue of fraud is one of the ways through which a certificate of title may be challenged under Section 26(1) of the [Land Registration Act](#).



41. The courts have time and again affirmed the position that allegations of fraud must be strictly pleaded and strictly proved. As to the standard of proof, courts have held that it may not be so heavy as to require proof beyond reasonable doubt, but it must be something more than a mere balance of probabilities.
42. Similarly, in a case where fraud is alleged, it is not enough to simply plead or infer fraud from the facts. The party alleging the fraud must tender evidence that points towards the fact of the alleged fraud. This position was reiterated by the Court of Appeal in *Kinyanjui Kamau vs George Kamau (2015) eKLR* where it had expressed itself as follows:-

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo (2008) 1 KLR (G & F) 742* wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
43. The 1<sup>st</sup> Defendant pleaded and set out the particulars of the alleged fraud. However, the 1<sup>st</sup> Defendant did not testify or tender any evidence to support his case, therefore, there was no evidence backing the claim that the Plaintiff acquired property in dispute through fraud.
44. Furthermore, I have seen the letter dated 19<sup>th</sup> September, 2019 from the Directorate of Criminal Investigation who stated that they had subjected copies of the documents presented by the Defendants and confirmed that there was an aspect of fraud (forgery). The report specifically indicates that the signatures on the 2<sup>nd</sup> Defendant’s receipts were found to differ from the specimen signature submitted by Clement Odhiambo Ooko. The stamps on the receipts presented by the Defendants were also compared to the specimen stamp impression collected from the Group and was found to have been made by a different instrument.
45. The Defendants had also sought to rely on a letter dated 5<sup>th</sup> July, 1998 which purported to expel the Plaintiff herein from Ishieywe Self Help Group and a letter of allotment dated 27<sup>th</sup> July, 1999 issuing a plot in Block 66 being Special Commercial Plot No. C16 measuring ¼ of an Acre to the 2<sup>nd</sup> Defendant. However, according to the DCI’s Investigation report, the signatures on the said letters were found to have been copy pasted from another letter dated 18<sup>th</sup> July, 2000 where the Officials were notifying their members about processing of titles.
46. This letter of allotment was also denied by PW2 who stated that he is the one who issued it to the Plaintiff, yet he was only a member of Ishieywe Self Help Group and not an official. PW2 stated expressly that the said letter of allotment was issued in error. PW2’s testimony that the receipts held by the 2<sup>nd</sup> Defendant were fake were collaborated by the findings of the DCI in their aforementioned report.
47. It emerges therefore, that it is in fact the Defendants who employed fraud in obtaining the documents they sought to rely on to claim ownership and interests over the suit property. These findings totally discredit the Defendants’ claim over the suit property, while strengthening the Plaintiff’s claim that he legally acquired the suit property herein. The issue herein is thus determined by the finding that the Plaintiff is the legal owner of the suit property herein.



## **Whether the Plaintiff is entitled to the orders sought in the Amended Plaintiff against the Defendants**

48. The Plaintiff seeks several reliefs from this court. The first is a declaration that he is the absolute owner of the whole of the suit parcel of land, and that the Defendants' actions amount to interference with the his proprietary rights over the suit land. Going by the finding above, the Plaintiff is indeed the legal and absolute owner of the suit property. It follows therefore that any actions by the Defendants without his express permission, consent and authority, as is the case herein, interferes with the Plaintiff's proprietary rights, thus this prayer is merited.
49. Secondly, the Plaintiff seeks an order of permanent injunction to restrain the Defendants from dealing with the suit land parcel of land. The question here is whether the Plaintiff has met the requirements for the grant of the injunctive relief sought. In *Kenya Power & Lighting Company Limited v Habib* (Civil Appeal 24 of 2016) [2018] KEHC 5027 (KLR), the court held that:-

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

50. The instant suit has been determined on merit in favour of the Plaintiff, who has been found to be the legal registered owner of the suit land. Under Section 24(a) of the *Land Registration Act*, his registration as the owner vests in him the absolute ownership of the suit land together with all rights and privileges belonging or appurtenant thereto. Such rights and privileges include the right to peaceful possession and enjoyment of the land, and the right to use the suit land as he wishes. This he cannot do if the Defendants remain in possession of the land without his permission. Consequently, therefore, he is entitled to the order of permanent injunction to enable him enjoy quiet possession, use and enjoyment of his land.

51. The Plaintiff also asked for mesne profits. Section 2 of the *Civil Procedure Act* defines Mesne Profits as follows:-

“mesne profits, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession...”

52. Mesne profits are thus awarded to an owner of land with respect to profits earned by a person in wrongful possession of land, see *Rajan Shah T/A Rajan S. Shah & Partners vs Bipin P. Shah* (2016) KEHC 1880 (KLR), where the court defined mesne profits as follows:-

“Mesne profits are the rents and profits which a trespasser has or might have received or made during his occupation of the premises, and which therefore he must pay over to the true owner as compensation for the tort which he has committed.”

53. Mesne profits may also be awarded in rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined (see *Rajan Shah T/A Rajan S. Shah & Partners vs Bipin*



P. Shah (Supra). A landlord claiming for mesne profits is claiming for the profits earned from the date the tenant ought to have given up possession and the date he actually gives up possession.

54. In essence therefore, while mesne profits do relate to trespass and/or wrongful possession of immovable property, there must be inferred therein an element of profits earned from the land, or in the alternative, a landlord and tenant relationship, because they are calculated from the date the tenant ought to have surrendered possession of the property to the date they actually give up possession.
55. That aside, Nyamweya J (as he then was) in the case of *Karanja Mbugua & another vs Marybin Holding Co. Ltd* [2014] eKLR, stated as follows with regard to mesne profits:-

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of *Civil Procedure Act*.”

56. In the present case however, there is no indication that there was any landlord and tenant relationship between the Plaintiff and the Defendants, or that the Defendants earned any profit on the suit land by way of renting or leasing it to another party. This prayer thus fails.

#### **What are the consequences of the Defendant’s failure to testify on the 2<sup>nd</sup> Defendant’s Counterclaim?**

57. The 2<sup>nd</sup> Defendant herein filed ELC Case No. 234 of 2016(OS) seeking to be declared as the owner of the suit property by way of adverse possession. On 17<sup>th</sup> January, 2019 when this matter was consolidated with ELC Case No. 234 of 2016 (OS) which was filed by the 2<sup>nd</sup> Defendant herein, the court further directed that the Originating Summons filed therein would be deemed as a counterclaim. The Replying Affidavit filed by the Plaintiff in this suit was deemed to be a Defence to the Counterclaim, and the Supplementary Affidavit by the 2<sup>nd</sup> Defendant was deemed as a Reply to Defence to the Counterclaim.
58. As is evident from the record and from earlier observation in this decision, the Defendants failed to testify or produce any evidence in support of their cases, which also includes the 2<sup>nd</sup> Defendant’s Counterclaim. This means that no evidence was provided in support of the counterclaim.
59. The law is very clear that he who alleges must prove. This principle is codified under Sections 107 - 109 of the *Evidence Act*, which provides that:-
107. Burden of proof.
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. Incidence of burden.
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. Proof of particular fact.
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



60. By failing to testify or produce evidence, the 2<sup>nd</sup> Defendant failed in his obligations to prove his counterclaim presented through the OS as required under the law. The effect of a party's failure to testify and produce evidence on a counterclaim was explained in Charterhouse Bank Limited (Under Statutory Management) Case (Supra), where the Court of Appeal further held that:-

“It is also obvious to us that in some of those decisions the question whether the plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the defendant's failure to testify when he had filed a defence and a counterclaim. While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities.”

61. As a result, the 2<sup>nd</sup> Defendants claim presented through the OS filed in ELC Case No. 234 of 2016 was not proved. The same thus fails and must be dismissed.

### **Who should bear the costs of this suit?**

62. Section 27 of the Civil procedure Act is instructive on the issue of costs, and in particular, Section 27(1) thereof provides that:-

27. Costs

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

63. With respect to costs the court finds that the Defendants herein necessitated the filing of this suit through their trespass into the Plaintiff's land. They then remained in possession of the suit land despite being served with a demand letter by the Plaintiff requiring them to vacate the land. The Plaintiff has proved his case against them and has emerged successful.

64. In addition, by the fact of refusal to prosecute the OS, the same is for dismissal, which again renders the Plaintiff successful on that front too. The Plaintiff is thus entitled to both the costs of the suit as well as the costs of the OS. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall thus be condemned to meet the costs of the suit and the Originating summons.

### **Orders:-**

65. In determining this suit, the Court finds that the Plaintiff has proved his case on a balance of probabilities and enters judgement in his favour as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the following terms:

a. The 2<sup>nd</sup> Defendants counterclaim presented through the OS filed in ELC Case No. 234 of 2016 and which is dated 1<sup>st</sup> August, 2016 lacks merit and is dismissed.



- b. A declaration be and is hereby issued that the Plaintiff is the absolute owner of the whole of that parcel of land known as Soy/Soy/ Block 10(Navillus)2143 and the Defendants' actions amount to interference with the Plaintiff's proprietary rights over the suit land.
- c. An order of permanent injunction be and is hereby issued to permanently restrain the Defendants, their servants, agents and/or employees from trespassing into, wasting, leasing and/or interfering in any other way or manner whatsoever or howsoever dealing with land parcel known as Soy/Soy/ Block 10 (Navillus)2143.
- d. The costs of this suit and of the Originating Summons shall be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

66. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2026 VIDE MICROSOFT TEAMS.**

**HON. C. K. YANO**

**ELC, JUDGE**

In the virtual presence of;

No appearance for Plaintiff.

No appearance for Defendants.

Court Assistant - Laban.

