

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**ELC NO. 52 OF 2011**  
**(AS CONSOLIDATED WITH ELC NO. 57 OF 2022)**

**ABDUL MUTHEE MULAMA-----**

**1<sup>ST</sup> PLAINTIFF**

**ERNEST**

**SIKUKU-----2<sup>nd</sup>**

**PLAINTIFF**

*(Both suing on behalf of themselves and on behalf of members of*

***PEMBENI SQUATTERS SELF-HELP GROUP)***

**SIRIKWA MUMBAI MULTI-PURPOSE**

**CO-OPERATIVE LIMITED-----**

**3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**EGLYNE CHEPCHIRCHIR CHOGE-----1<sup>ST</sup>**

**DEFENDANT**

**BENJAMIN KICHWEN-----2<sup>ND</sup>**

**DEFENDANT**

**CHRISTIAN CHOGE-----3<sup>RD</sup>**

**DEFENDANT**

**JOSEPH ANG'ANG'A-----4<sup>TH</sup>**

**DEFENDANT**

**MIRIAM CHOGE-----5<sup>TH</sup>**

**DEFENDANT**

**LAND REGISTRAR-----**

**6<sup>TH</sup> DEFENDANT**

**DIRECTOR OF SURVEYS-----**

**7<sup>TH</sup> DEFENDANT**

## **JUDGMENT**

### **(A) INTRODUCTION**

- 1.** Following an order issued on **13/7/2000** by Hon. Lady Justice Martha Koome, as she then was, now the Hon. Chief Justice and the President of the Supreme Court of Kenya, **Kitale HCC No. 52 of 2011, formerly Kakamega Civil Suit No. 95 of 1914,** was consolidated with **Originating Summons Misc. No. 89 of 2009.**
- 2.** The Originating Summons was ordered to be treated as the plaint, while the replying affidavit to it was to act as the defence. Parties were at liberty to amend their pleadings. **Kitale HCC No. 52 of 2011** was to be treated as the holding file. In a further ruling made on **4/12/2022. Kitale ELC No. 57 of 2020,** formerly **Eldoret ELC No. 306 of 2016,** was consolidated with this suit, hereinafter the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> suits.

### **(B) PLEADINGS IN THE RESPECTIVE FILES**

- 3.** In the **1<sup>st</sup> Suit,** the 3<sup>rd</sup> plaintiff, hereinafter the Society, relied on an amended plaint dated **27/10/2009.** It avers that it is a Co-operative Society

incorporated under the Co-operatives Societies Act, capable of suing and being sued, and was formed in **1972**, with a view to purchasing the L.R. No. **8915** and L.R. No. **2187**, the suit properties. It avers that it collected monies from its members and transmitted the same to the late Hon. Choge, hereinafter the deceased, with an intention of acquiring the suit properties.

4. The Society avers that they were subsequently registered as proprietors of L.R. No. **8915** and L.R. No. **2187** on **18/7/1999** and **1/10/1987**, respectively. The Society avers that upon registration, the deceased took exclusive possession of the suit properties and evicted them from the land without any colour of right, reasonable or lawful cause. The Society prays for eviction and *mesne* profits from the estate of the deceased, represented by the 1<sup>st</sup> - 4<sup>th</sup> defendants, from **1990** to date, due to the illegal occupation.
5. The suit was initially opposed by the deceased through an amended defence dated **12/11/2009**. He denied the alleged registration of the suit parcels in favour of the Society in **1987** or **1999**, since he has been the registered owner of the suit properties since **1973** and has also been in exclusive possession and

use of the same for all that period as the rightful proprietor.

6. Further, the deceased opposed the suit for being statute-barred and on capacity to sue under the Limitation of Actions Act and the Co-operative Societies Act. The deceased denied that the Society could have been subjected to any loss, damage, or deprivation of the suit properties, which, in the first instance, did not belong to it and had been in his exclusive use, possession, and occupation. The deceased was replaced by the 1<sup>st</sup> - 4<sup>th</sup> defendants as the legal representatives.
7. In the **2<sup>nd</sup> Suit**, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs suing as representative suit on behalf of themselves and on behalf of **34** named members of Pembeni Squatters Self Help Group, hereinafter the Self Help Group (SHG), and pursuant to leave granted on **23/3/2009** by an originating summons, amended on **10/2/2015**, seek the court to determine:
  - (a)(a) **That they are entitled to be registered as the proprietors of 5 acres each, where they have built their homestead on the ground for over 20 years out of the defendants' land title No. 8915/2 and 2187, hereinafter the suit properties.**
  - (b) **A declaration that the initial defendant was the registered owner of the suit**

**properties in trust and for the benefit of the plaintiffs to the extent of 5 acres each, under their use and occupation.**

**(d) That the SHG members are entitled to an order cancelling the defendants as the sole proprietors of the suit properties and compelling the Land Registrar, Kitale, to register them and the defendant as the proprietors of their respective individual shares of the suit properties.**

**(e) Injunction to issue to stop, prevent, and restrain the defendants from evicting or removing from or in any way interfering with the plaintiffs' quiet enjoyment and occupation of the suit properties.**

**(f) Costs for the suit.**

**8.** In support of the amended originating summons, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs relied on several witness statements, among them one dated **1/7/2017**, and other documents filed in the course of the proceedings and affidavits sworn by Abdul Muthee Mulama, among them the ones sworn on **10/11/2014**.

**9.** Briefly, it was deposed on oath by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs that on **1/4/2014**, the High Court in Kitale appointed the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants in the 1<sup>st</sup> Suit as administrators of the estate of the deceased vide Limited Grant of Letters of Administration, annexed as **AMM-(1)**, in charge of

*inter alia* to be in charge of be L.R. No. **2187** situated in Cherangani area Trans Nzoia County, measuring **1612** acres, and L.R. No. **8915/2** measuring **1017** acres situated in Uasin Gishu County Moi's Bridge area hereinafter Moi's Bridge land.

- 10.** The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs deposed that on **10/10/1973**, the suit properties were transferred and registered in the name of the deceased, who, upon taking over the suit properties, permitted the members of the SHG to continue working therein to live, work, occupy, and undertake farming activities on each of their **5** acres of land.
- 11.** Further, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs deposed that the members continued to openly, peacefully, continuously, possess, occupy, develop, and farm each on their respective **5** acres of the suit properties, until they formally joined and registered a Self Help Group on **14/2/2006**. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs urged the court to find that they have become entitled to the respective portions of the suit properties by virtue of adverse possession. The originating summons was also supported by a list of witness statements and documents dated **10/2/2017**.

- 12.** The initial originating summons, dated **10/6/2009**, was opposed by the initial defendant through a replying affidavit sworn by the deceased, now deceased, on **16/11/2009**. It was deposed that the deceased was the registered owner of L.R. No. **2187** and L.R. No. **8915/2**, which he purchased way back in **1972** as per the annexed title deed marked **SKC-(1)**.
- 13.** The deceased deposed that he had farmed and utilised the suit properties since **1973**, while in active occupation todate at the exclusion of any other persons, including the plaintiffs herein. The deceased termed the averments of the claimants to his land strange, since he single-handedly bought the suit properties using his own money without any help or support from any other quarter, and had continued to utilise the suit properties exclusively, uninterruptedly and continuously for his own purposes.
- 14.** The deceased deposed that it was not true that the plaintiffs were squatters on the suit properties, since they had never taken possession or occupied any portion of the suit properties, to be termed as squatters therein. The deponent averred that he was hard pressed to understand how the plaintiffs could lay claim to **5** acres each of his land, when they were

not on the suit properties and had never used the said **5** acres of land as alleged or at all, nor had they contributed in any way towards its purchase.

- 15.** Equally, the deceased deposed that adverse possession could not arise unless the plaintiffs had been on the suit properties continuously for a period of **12** years, which was not the case, and therefore the suit before the court was incurably defective and incompetent, for it also seeks to join a claim of trust and adverse possession in an originating summons.
- 16.** Further, following the death and substitution of the initial 1<sup>st</sup> defendant with his estate's legal representatives, the suit was opposed by the 1<sup>st</sup> - 4<sup>th</sup> defendants, through a list of pleadings dated **11/3/2019**, comprised of witness statements of the 1<sup>st</sup> defendant dated **24/4/2019**, the 4<sup>th</sup> defendant's witness statement dated **24/4/2019**, and a list of documents dated **23/4/2019**.
- 17.** In the course of the proceedings, by an application dated **19/5/2022**, the Society, the 1<sup>st</sup> plaintiff in the 1<sup>st</sup> suit, sought to join the suit and for the consolidation of **ELC No 57 of 2020**, previously **Eldoret ELC No. 306 of 2016**. By a ruling dated **4/12/2022**, the suits were consolidated.

**(C) PLEADINGS IN THE 3<sup>RD</sup> SUIT ELC NO. 57 OF 2020 (FORMERLY ELDORET ELC NO. 306 OF 2016)**

- 18.** The 3<sup>rd</sup> Suit came to Kitale Law Courts following a consent order dated **2/3/2020**, recorded in **Eldoret ELC No. 306 of 2016**, transferring it entered into between the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants in the 1<sup>st</sup> suit, suing as the administrators of the estate of the deceased and the Society.
- 19.** By a plaint dated **27/10/2016**, the estate of the deceased in the 3<sup>rd</sup> suit sued the Society together with the Chief Land Registrar, the Director of Surveys, and the Hon. Attorney General, as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants seeking:
- (a) Cancellation and or revocation of title to Cherangani/Nzoia Block 12 and Moi's Bridge/Moi's Bridge Block 12.**
  - (b) Nullification of the parcellation of L.R. No. 2187 and L.R. No. 8915.**
  - (c) Declaration that the titles in the name of Simon Kiptum Arap Choge are the only genuine and lawful titles to the suit properties.**
  - (d) Permanent injunction against the defendants not to in any way interfere with Title Nos. L.R. No. 2187 and L.R. No. 8915.**
  - (e) Aggravated damages.**

- 20.** The plaintiffs in the 3<sup>rd</sup> suit contended that the land comprised in the suit properties was offered for sale to the deceased by the Agricultural Development Corporation (ADC) on **30/6/1972**. On the deceased's acceptance and compliance with the terms of the offer, it was averred that the suit properties were transferred on **10/10/1973** into his name, after which as the lawful owner, he took over the land and has been in physical occupation of the same until his demise on **13/12/2015**, following which the deceased was buried within the same land, which suit properties now devolve to his estate, 1<sup>st</sup> plaintiff being the surviving spouse.
- 21.** The plaintiffs averred that the Society had on various occasions attempted to lay claims on the said parcels of land, calling them squatters, which claims have all been unsuccessful, as such **Civil Case No 4357 of 1988, Appeal HCC No. 133 of 1989, HCC No. 95 of 1994, and Criminal Case No. 1516 of 2011.**
- 22.** The plaintiffs averred that in **Criminal Case No. 1516 of 2011**, some members and directors of the Society had purported to register certificates of leases over the suit properties, which the court found to be forgeries vide judgment delivered on

**26/1/2016**. The plaintiffs averred that recently they had discovered two letters dated **8/8/2016** addressed to the Secretary of Lands Nairobi by the Society's advocates purporting to surrender titles in respect of the suit properties so that new titles may be issued under the name of **Cherangani/Nzoia/Block 12** (L.R. No. **2187**) and **Moi's Bridge/Moi's Bridge Block 12** (L.R. No. **8915**) to them.

- 23.** The plaintiffs averred that the Society had unlawfully and without the knowledge or consent of the lawful owners of the suit properties caused the original Registry Index Map (RIM), in respect of the suit properties to be amended and new titles to be issue in the guise of **Cherangani/Nzoia/Block 12** (L.R. No. **27**) and **Moi's Bridge/Moi's Bridge Block 12**(L.R. No. **8915/2**) and had also requested for the parcels to be subdivided among its members.
- 24.** The plaintiffs averred that the 7<sup>th</sup> defendant had forwarded some sealed copies of the amended RIM together with an alleged area list resulting from the subdivision of the 3<sup>rd</sup> defendant to facilitate registration and issuance of new title deeds to the Society.

- 25.** Further, the plaintiffs averred that at no time had the lawful owners of the suit properties nor the administrators of the estate called for, or requested or caused the subdivision of the titles to the suit properties, and in any case the distribution of the estate of the deceased which includes the suit properties was yet to be carried out, and must be sanctioned by the **Kitale High Court Succession Cause No. 259 of 2015.**
- 26.** The plaintiffs averred that the Society had allegedly informed its members to be ready to move into the suit properties and to occupy the same at the end of **October 2016**, which actions were not only unlawful but likely to lead to anarchy and physical conflict with loss of property and life as the plaintiffs were duty bound to protect themselves, their families and properties against any such encroachment, trespass and or invasion into suit properties.
- 27.** The plaintiffs averred that at all material times, the deceased was the registered owner of the suit properties, whose title deeds remain in the custody of the administrators of the estate, as the only lawful and genuine titles to the said suit properties, yet, the Society was preparing its members to invade the suit properties and take possession thereby, in disregard

of the plaintiffs' rightful ownership and genuine titles. The plaintiffs averred that the intended action by the 1<sup>st</sup> defendant posed an imminent danger to the plaintiffs' ownership.

- 28.** The plaintiffs averred that the acts of the Society were also a threat to the peace and security of the area and the complete breakdown of law and order, particularly when such actions are founded on a total illegality and absolute untruth concerning whatever instrument of title the 1<sup>st</sup> defendant has purported to surrender to the Secretary of the Land Department to receive a new titles.
- 29.** The Society opposed the suit through a statement of defence and counterclaim dated **17/8/2017**, denying the allegations contained therein. The Society averred that the suit properties were its properties and therefore, they were entitled to use, subdivide, and dispose of them since the deceased had never been the lawful owner of the same.
- 30.** The Society denied ever planning to cause anarchy and physical conflict or loss of property or life to the plaintiffs, but instead it was only keen on settling its members on the suit properties by following the due process of law.

- 31.** The Society denied that the suit properties were ever offered for sale to the deceased as alleged or at all. The Society averred that the orders sought by the plaintiffs could not legally issue in law, since no cause of action was disclosed against it.
- 32.** By way of a counterclaim, lacking a titular heading, the Society reiterated the contents of its defence and averred that it was the legally registered owner of IR **273** of L.R. No. **2187** Trans Nzoia and I.R **12101** of L.R. No. **8915** Uasin Gishu. The Society averred that the plaintiffs in the 3<sup>rd</sup> suit were illegally in occupation of the suit properties without any colour of right and had unlawfully denied the Society and its members their right of occupation and use of the suit properties.
- 33.** The Society prayed for an order of eviction from L.R. No. **2187**, Trans Nzoia, and L.R. No. **8915**, Uasin Gishu, against the plaintiffs in the 3<sup>rd</sup> suit, their agents, servants, and any other person brought out of the suit properties and the structures built therein be demolished. The verifying affidavit was not accompanied by an authority to sue or plead.
- 34.** In a reply to the defence and defence to the counterclaim dated **5/9/2017**, the plaintiffs in the 3<sup>rd</sup> suit reiterated that IR **273** of L.R. No. **2187** Trans

Nzoia and I.R **12019** of L.R. No. **8915** Uasin Gishu were lawfully transferred to the deceased on **10/10/1973** and have remained so; hence, the Society members were not entitled to use, subdivide, and or dispose of the same.

**35.** With respect to the counterclaim, the plaintiffs denied the alleged registration of the suit properties in the name of the Society as alleged or at all, and any such alleged ownership documents were based on forgeries.

**36.** The plaintiffs reiterated that the Society and its members had never lawfully and physically occupied the suit properties from **October 1973**, nor had they had such rights to occupy the same. The plaintiffs insisted that they could not lawfully be evicted from their own land and that any relief for eviction and demolition was vexatious.

**(D) RESPONSES BY THE 6<sup>TH</sup>, 7<sup>TH</sup> & 8<sup>TH</sup> DEFENDANTS**

**37.** Following the ruling dated **4/10/2022**, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants in **ELC No. 57 of 2020** filed a statement of defence dated **6/6/2023** in the consolidated file as the 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants, where they vehemently generally denied the allegations contained in the plaint dated

**27/10/2016.**In particular, the 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants denied the allegations that they had prepared or forwarded an amended RIM, converted the titles to the suit properties from one legal regime to the other, subdivided, and issued any resultant titles in favour of the Society as alleged or at all. The 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants termed the suit against them as a non-starter, without justification, without merit, scandalous, frivolous, and as groping in the dark.

- 38.** The 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants denied being privy to any arrangement between the plaintiffs and George Nicholson and could not confirm or deny whether the Society and its members were or are squatters on the suit properties.
- 39.** Further, the 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants averred that from the available land records, the suit properties, namely LR No. **2187** and L.R. No. **8915**, were initially properties of William Hurbert Nicholson, before they were transferred to Lands Limited on **10/10/1972** and subsequently to the deceased on **10/10/1973**.
- 40.** The 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants averred that the deceased charged the suit properties severally to the Agricultural Finance Corporation (AFC), which charges were discharged at different times. They

denied that the suit properties or titles have been subject to any other or further transfers to any other persons. The 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants averred that contrary to allegations of the plaintiffs in the 3<sup>rd</sup> suit, the process of surrender of titles registered under the repealed Registered Titles Act Cap **280**, for purposes of conversion and subdivision into freehold regime under the repealed Cap **300** was a statutory function regulated by **Section 44** of Registered Titles act and **Section 63** of the Registered Land Act (repealed) and that if properly invoked, the 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants could not be questioned when exercising such statutory mandate.

- 41.** The 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants further contended that under **Section 44** of the repealed Registered Titles Act and **Section 63** of Registered Land Act, only a registered proprietor or his personal representatives or the executors of the will were permitted to execute the instrument of surrender; otherwise, they had not received any such instrument of surrender, let alone an instrument signed by the deceased or his personal representatives or executors for conversion.
- 42.** The 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants averred that the only entity that could clarify the history of ownership of

the suit properties was the ADC and the Lands Limited, which were the entities said to have transferred the suit parcels of land to the deceased.

- 43.** Again, the 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants averred that the 3<sup>rd</sup> suit disclosed no cause of action against them and that the suit was stale, as the exercise which had been initiated to convert the suit properties for purposes of subdivision was abandoned for failing to satisfy **Section 44** of the repealed Registration of Titles Act and **Section 63** of the Registered Land Act.

**(E) PRELIMINARIES BEFORE THE HEARING**

- 44.** At the hearing of the suits, by directions issued on **31/7/2023**, the plaintiffs in the **1<sup>st</sup> suit** were named as the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, while the plaintiffs in the 2<sup>nd</sup> suit were named as the 3<sup>rd</sup> plaintiff in the consolidated suit. The 1<sup>st</sup> and 4<sup>th</sup> defendants in the 3<sup>rd</sup> suit became the 1<sup>st</sup> to 4<sup>th</sup> defendants in the consolidated suit, while Miriam Choge became the 5<sup>th</sup> defendant. The Land Registrar became the 6<sup>th</sup> defendant, while the Director of Surveys and the Hon. Attorney General became the 7<sup>th</sup> and 8<sup>th</sup> defendants in the consolidated suit.

**(F) EVIDENCE BY THE SHG**

- 45. Abdul Muthee Mulama** testified as **PW1**. He relied on a witness statement dated **1/2/2017**. He told the court that he was born in **1957** on the suit properties and that **350** members of Pembeni Squatters were staying at the same place, some of whom have died in the suit properties. He produced the authority to sue as **P. Exhibit No. (25)**. PW1 told the court that other squatters have been coming into the suit land spread both in Trans Nzoia and Uasin Gishu Counties.
- 46.** PW1 told the court that the squatters initially gained possession as former workers of George Nicholson, a mzungu, a settler, while others, like him and Ernest Sikuku, were born there. PW1 told the court that after the mzungu left, ADC became the registered owner. PW1 said that he was born on the land, where his parents had been residing since **1940**, as the former workers of the settler in charge of the chicken farm.
- 47.** PW1 said that at the age of **15** years, he also started working for the settler, pulling ropes for the vehicle to feed the chickens. PW1 said that other squatters joined him and became his neighbours, just as they were his parents' neighbours.
- 48.** PW1 told the court that, as the settler was leaving in **1972**, he wrote a note, donating the land to them since each of them had erected a separate

homestead for their families. PW1 said that George Nicholson gave them the land in accordance with the riverine, as the land was along the Moiben River. PW1 told the court that each of the squatters was given approximately **5 acres** of land.

- 49.** PW1 said that after the settler left, though ADC took over the suit land, they were not removed from the suit land, and therefore they continued cultivating the land by planting seed maize for Kenya Seed Company Ltd. He said that the ADC was cultivating in the middle of the land since the squatters were largely along the river.
- 50.** PW1 said that after one year, the deceased took over the parcels occupied by the ADC land in **1973**, still leaving them to continue occupying along the riverside. PW1 said that in **1984**, the deceased started quarrelling with them, and after he died in **2013**, the deceased's family started chasing them from the land up to **2016**.
- 51.** Similarly, PW1 said that all or most of them had grass-thatched houses on the suit properties. PW1 said that they had a case with the deceased in Nairobi around **1989**, which was brought through their then chairman, the late Mr. Christopher

Kisiangani, in which the court ordered that they should not be removed from the land.

- 52.** As to the Society, PW1 said that they had no relationship with Sirikwa Mumbai; otherwise, the suit in Nairobi had been brought on behalf of SHG. He termed the 3<sup>rd</sup> plaintiff a Society for the rich. PW1 said that any records of membership by the 3<sup>rd</sup> plaintiff showing them as members of the Society were a forgery. PW1 said that he had neither paid anything to be listed as a member of the 3<sup>rd</sup> plaintiff nor had he associated with them in any manner.
- 53.** PW1 said that he did not know where the members of the 3<sup>rd</sup> plaintiff reside or live in the suit properties. PW1 said that he was not a signatory to any documents before the court brought by the 3<sup>rd</sup> plaintiff; otherwise, such signatures were forgeries. PW1 termed the claim by the 3<sup>rd</sup> plaintiff over the suit land as lacking merits, since they do not reside on the suit land, but in Kararu area, which is different from where the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs have resided since **1973**, until the deceased removed them or look over the land, while they had constructed houses on the land and had been planting maize, vegetables, bananas, and yams.

- 54.** Again, PW1 said that the area under cultivation by the settler was distinct from where they were residing, a boundary which the deceased continued honouring. PW1 said that the deceased never filed a suit to evict them from the land, though they had endless disputes until he passed on.
- 55.** PW1 relied on the list of documents filed on **25/11/2021**, namely: copy of title L.R. No. **8915**, list of Pembeni Self Help Group, Registration certificate issued by Department of Social Services Trans Nzoia District, a copy of National Identification card for one Julius Wafula Juma, a copy of the National Identification Card for one Abdul Mzee Mulama, a copy of National Identification Card for one Patrick Wafula Nyongesa, a copy of National Identification Card for Justus Nyongesa Wafula, a copy of National Identification Card for one Ernest Sikuku, photographs, abstract from police records, Leaders meeting held on **11/10/2013**, General Education, letter of consent, newspaper of the Restriction by court, self help group registration certificate, card from G.E.L. Nicholson Pembeni, a copy of title in respect of tile I.R. No. **12019**, a copy of certificate of death of Jotham Wafula Wanyama, N.S.S.F. contribution card of Katia Maroba by G.E.I. Nicholson,

court order in **Nairobi Court of Appeal Civil Appl. No. 12 of 1990, Nairobi HCC No. 4357 of 1988** dated **20/4/1998**, letter from Akhabi & Co. Advocates to Chairman Sirikwa Mumbai Multi-Purpose, letter to Wafula Manyonge from G.E.L. Nicholson dated **26/4/1972**, and correspondence from G.E.L. Nicholson produced as **P. Exhibit No. 1, 2, 3, 4, 5, 6, 7, PMFI-(8)- 23**, respectively.

- 56.** In cross-examination, PW1 told the court that the deceased bought the land while he was **16** years old. He said that the settler gave the former **350** workers each **5** acres of land. PW1 said that it is the former plantation workers who became members of the SHG to follow up on the suit properties.
- 57.** PW1 said that they registered a caveat on the titles to stop the deceased from dealing with the suit properties, as a member of the 3<sup>rd</sup> plaintiff, which he had joined in on **17/3/1987** before he ceased being its member in **1988**. PW1 said that even if his name was still on the 3<sup>rd</sup> plaintiff's list, he had quit the membership in **1988**, as per **P. Exhibit No. (29)** dated **16/4/1991**.
- 58.** PW1 said that it is true that in **1984**, a member of the 3<sup>rd</sup> plaintiff was killed in the suit properties, after which the deceased was charged with the same. PW1

said that in **1990**, some squatters were removed from the land despite the pending suit, which, unfortunately, was eventually dismissed.

- 59.** PW1 said that he quit the 3<sup>rd</sup> plaintiff after the suit was dismissed. PW1 said that he was currently living in the Matunda area, outside L.R. No. **8915/2** and L.R. No. **2187**. PW1 said that he moved out of the suit properties in **2016**, after which his house was destroyed.
- 60.** PW1 said that his late parents had been permitted to live on the suit land by virtue of being plantation workers of George Nicholson, after which he continued residing on the land both as a child and also a farm worker, alongside the rest of the **350** former workers.
- 61.** PW1 said that the settler did not order them to vacate the land, and neither did the deceased, after the land was handed over to the ADC, since the letter written by the settler **P. Exhibit No. (23)**, was clear that he had left the former workers on the land. PW1 said that the ADC did not order them to vacate the land in view of the said letters.
- 62.** Again, PW1 said that after the deceased became the new owner in **1973**, he continued peacefully living side by side with them until **1984**, when

disagreements broke out, and he started letting cattle trespass onto their parcels of land, pulling down the perimeter fence and ordering them to vacate the land, since it belonged to him. Regarding a letter dated **15/6/1987**, PW1 said that the squatters were complaining about the trespass to their land by the deceased. PW1 admitted that since **1984**, there had been no peaceful occupation on the land.

- 63.** As to **Nairobi HCC No. 4357 of 1998**, PW1 said that it had been brought by Christopher Kisiangani and **349** others against the deceased as per **P. Exhibit No. (25)**, to stop him from removing them from the suit properties.
- 64.** PW1 said that on **26/10/1988**, the court in that suit issued an injunction against the deceased, which was later extended on **26/4/1989**. PW1 said that after the former suit was dismissed, an appeal was lodged to the **Court of Appeal as No. 133 of 1988**. PW1 could not tell if the appeal was eventually dismissed on **22/10/1982** as per **P. Exhibit No. (26)**.
- 65.** PW1 said that even if the appeal was dismissed, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs continued residing on the land alongside the deceased. PW1 said that from **1973** until ADC took over, they were still on the land, up to

the time the former suit was filed, heard, and dismissed on appeal to the filing of the current suit, with the permission of either the settler, ADC, or the current registered owner.

- 66.** PW1 said that his group was registered on **14/7/2006**. PW1 admitted signing an affidavit in the former suit in support of an injunction application filed in **April 1988**. PW1 said that between **1988** and **2006**, they did not sue as Society, nor did they use the said name. PW1 admitted to signing the caveat alongside Christopher Kisiangani as directors of the Society.
- 67.** PW1 admitted that the particulars used for member No. **4** in the Society's list of documents belong to him. Shown **P. Exhibit No. (2)**, PW1 admitted that some of the names in Society are also reflected as members of the SHG.
- 68.** PW1 admitted that there would be no problem if the benefits from the suit were shared by both a member of the SHG and the Society. Shown **P. Exhibit No. (25)**, PW1 admitted that the **350** members of the SHG were the same ones in the Court of Appeal case as the original members of Society, whose membership has ballooned to **1,449**. PW1 said that

the **350** members of the SHG are, unlike the Society, the genuine claimants to the suit land.

- 69.** PW1 said that at the time he quit the Society, he was the treasurer. PW1 admitted that **P. Exhibit No. (24)**, giving him leave to file this suit related to only **34** and not **350** members. PW1 said that his members were never former farm workers of the deceased, but neighbours. PW1 said that the settler had given them allotment letters for **5** acres.
- 70.** Further, PW1 said that the caveat lodged in **1987** over the titles related to **350** squatters who sought not to be evicted from the suit properties. PW1 said that he joined the SHG after their claim was spoiled by the officials of the Society at the Court of Appeal; otherwise, the same people in the former suits are the current ones in the SHG, who filed the originating summons on **23/3/2009**.
- 71.** PW1 distinguished the instant suit and the former suit, given that the current suit is by the squatters only, though the names of the claimants remain the same, after they lost in the former suit at the Court of Appeal, where they had prayed not to be evicted from the suit property, on account of adverse possession and fraudulent sale. PW1 said that he could not recall his group members raising money to

buy the land. PW1 was categorical that the Society misled them in the former suit, leading to the change of names to Pembeni Self Help Group.

- 72.** PW1 admitted that in **P. Exhibit No. (26)**, the Court of Appeal had made a finding that there was non-disclosure of sale. PW1 said that his SHG never paid the deceased for the land or agreed with him to sell the land to them. Referred to the caveat raising a beneficial interest, on account of an aborted promise of sale, and the oath he swore on **18/3/1987**, PW1 said that he was misused by the then officials of the Society to swear a false affidavit in support of the caveat.
- 73.** Asked if he was not lying to the court, PW1 said that this time round, he was a different person. PW1 said that he could not recall the members raising money to purchase the land through the deceased or reporting him to the area District Commissioner over the aborted promise to sell the land.
- 74.** PW1 denied that the Court of Appeal decision had made a finding that the particular land claimed on adversity had not been identified since each one was entitled to **5** acres of land, translating to **1017** acres for **350** people. PW1 said that **318** people are occupying five acres each on L.R. No. **2187**, while

two families of Kiplan and Kiplel are on L.R. No. **8915/2**.

- 75.** PW1 said that the claimants used to reside on one land while they would work on the other one. He could not tell the percentage of the two out of the entire suit land. PW1 admitted that he had no letters of administration to represent some of the **10** deceased members of the SHG. PW1 admitted that he had no order of court to sue on behalf of the rest of the **316** members he claimed to represent.
- 76.** The second witness for the plaintiffs testified before this court following directions on **12/3/2025** and **22/7/2025**, that the matter proceeded from where it had reached before the former court.
- 77. Ernest Sikuku** testified as **PW2**. He relied on his witness statement as his evidence-in-chief, and produced a pass issued by his former employer, George Nicholson, and a title as a **P. Exhibit No. (32)** and **(33)**. Further, PW2 relied on a certificate from the former settler dated **6/1/1968** as **P. Exhibit No. (34)**.
- 78.** PW2 told the court that at the settlers' farm, he used to be in charge of pigs and therefore used to live on the suit land together with his fellow farm workers, such as PW1. PW2 corroborated the evidence of the

1<sup>st</sup> plaintiff that there were approximately **350** farm workers that have been living on the suit land since the settler left the land in **1972**, occupying both sides of Trans Nzoia and Uasin Gishu Counties, until they were allegedly evicted from the land in **2016**.

**79.** PW2 relied on an area map as **PMFI-No. (35)**. PW2 told the court that all the **350** occupants on the suit land were occupying each a distinct but separate **5** acres of the land, clearly beacons as it was given to each of them by the departing settler, with respective developments therein, such as his grass-thatched structures as existed before the demolition as per **P. Exhibit No. (30)**.

**80.** PW2 said that after the alleged eviction and demolition, they reported the matter to the police and that the investigations were still pending. It was the 2<sup>nd</sup> plaintiff's witness testimony that after both the ADC and the deceased became owners of the land in **1973**, no action was taken to evict them from the land. PW2 said that from the pass and the certificate of employment, he was permitted to occupy, live, and utilise his **2** acres of land by his former employer, even after he left the country.

**81.** PW2 confirmed that the two exhibits in his possession were not clear on the acreage each of the

claimants was alleging to be entitled to. PW2 said that the only interruption of the claimant's occupation started in **1994**, which eventually was followed by the forced eviction from the land that took place in **2016**, through hired goons who demolished and vandalised all the claimant's buildings or structures on the land.

- 82.** PW2 admitted that **P. Exhibit Nos. (32), (33), and (34)** had unclear details in terms of his identification number, date, and land size, or were illegible. PW2 insisted that the Society was not entitled to lay claim to the suit property. PW2 was unable to reconcile his assertion that the settler had bequeathed the suit properties to the former farm workers, yet at the same time, he had surrendered the land to the ADC as per official government records before the court.
- 83.** Further, PW2 said that the settler had, before leaving the country, convened a meeting with the former farm workers. PW2 said that the squatters had no letters from the ADC confirming that the settler had left and or authorised his former workers to occupy, retain, and live on the **5** acres of the land before it was surrendered or transferred to the new owner.
- 84.** PW2 admitted that he was part of the people who had registered a caveat against the title to the suit

properties. PW2 said that he had no registered instrument to show that he and the rest of his members had been gifted any land by his former employer.

**85.** PW2 admitted that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs had never sued or made the ADC a party to the suit for not honouring the former employer's promise or gift to his former workers, or for unfairly disposing of the land to the deceased, despite their occupation of the land.

**86.** Similarly, PW2 said that he vacated the suit property after armed goons invaded the same with a view to evicting them from the land. PW2 had no OB report for the alleged episode(s). PW2 said that he only recognized members of Pembeni Self Help Group as the genuine claimants and not the 3<sup>rd</sup> plaintiff. PW2 said that the intention of the departing settler was to have his former farm workers occupy the suit properties peacefully.

**87. Alex Mabiri** testified as **PW3**. He told the court that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs contracted him to take photographs of the suit property. He produced **PMFI-No. (8)** as **P. Exhibit No. (8)**, which was accompanied by a single business permit as **P. Exhibit No. 8(a)** and **(b)**, photos showing semi-

permanent structures on the ground belonging to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs. He admitted that his single business permit had expired by the time he was contracted to take the photographs.

- 88.** PW3 could not ascertain the exact locality or particulars of the parcel number in which he took out the photographs, since there was no signage at the land indicating the land Reference number or its coordinates. Similarly, PW3 said that he never used a GPRS system to indicate the locality to the specific place where he visited and captured the images. PW3 could not ascertain which of the photographs were taken in March or **September 2010**.

**(G) EVIDENCE BY THE SOCIETY**

- 89.** **Harrison Opande Murindi** testified on behalf of the Society. PW4 relied on a witness statement dated **3/2/2023** and that of its predecessor, the chairman of the Society, filed in the 3<sup>rd</sup> suit. Further, PW4 relied on a list of documents and a supplementary list dated **14/3/2024** and **14/7/2023**, respectively.
- 90.** PW4 produced a letter dated **30/8/2025** from the Senior Assistant Chief Land Registrar to the District Land Registrar, Trans Nzoia, as **P. Exhibit No. (34)**, ground status report dated **2/11/2023** as **P. Exhibit No. (35)**, letter dated **29/7/2021**, a RIM amendment

for **Moi's Bridge Block 12/1-163** Sirikwa as **P. Exhibit No. (36)**, area list from the Director of Surveys dated **29/7/2021 (MFI-No.(37))**, letter dated **8/8/2016** as **P. Exhibit No. (36)**, rates payment receipts as **P. Exhibit No. (39)(a) and (b)**, letter dated **4/4/2016** from the Ministry of Lands to the Director of Surveys, seeking conversion as **P. Exhibit No. (40)**, letter dated **18/2/2011** from the Ministry of Co-operative to the deceased, **P. Exhibit No. (41)**, notification of approval for development permission dated **9/10/2020** from the County Government as **P. Exhibit No. (42)**, clearance certificate for L.R. No. **8915/2** from the County as **P. Exhibit No. (43)**, land control board letter of land control board dated as **PMFI-No. (44)**, receipt of payment of rates **PMFI-No. 45(a), (b), and (c)**.

- 91.** Further, PW4 relied on a list of documents of bundle dated **3/2/2023**, namely, a certificate of incorporation issued on **11/12/1985** for the Society as **P. Exhibit No. (46)**, list of members for the 3<sup>rd</sup> plaintiff as **P. Exhibit No. (47)**, list of members of the plantation for Pembeni as **PMFI-No. (48)**, workers' contributions as **PMFI-No. (49)**, letter from the Hon. Attorney General dated **14/5/1997** as **P. Exhibit No. (50)**. Letter of offer dated **21/11/1972**

addressed to Pembeni Farm squatters from the Land Ltd as **P. Exhibit No (51)**, letter dated **11/2/1986** from the District Labour officer addressed to the deceased as **P. Exhibit No. (52)**, memorandum of registration as **P. Exhibit No. (53)**, caveat registered against IR No. **273/35** as **P. Exhibit No. (54)**, notification of charge as **P. Exhibit No. (55)**, rejection of the Land Control Board letter dated **6/5/1972** as **P. Exhibit No. (56)**, an application for land control board consent to transfer land on behalf of Pembeni Farmers as **P. Exhibit No. (57)**, memorandum of registration dated **9/10/1997** as **P. Exhibit No. (58)**, bundle of letters dated **24/12/1986, 16/3/2007, 26/9/2005, 22/7/2005, 26/8/2005**, as **P. Exhibit No. 59(a)-(f)**, letter dated **27/11/1972** as **P. Exhibit No. (60)**, task force report published in **June 2007** as **P. Exhibit No. (61)**, an area list **PMFI-No. (62)**, an application for development permission dated **3/9/2016** as **P. Exhibit No. (63)**, payment rates as **P. Exhibit No. (64) (a)-(f)**, rates clearance certificate dated **10/11/2015** as **P. Exhibit No. 65(a) and (b)**, provisional certificate for **I.R No. 12019** as **P. Exhibit No. 66(a) and (b)**, letter dated **29/7/1972** from the Ministry of Lands to the Director of Land

Administration as **P. Exhibit No. (67)**, attaching an uncertified area list.

- 92.** Further, PW4 relied on a list of documents contained in a filed document dated **17/8/2017** as **PMFI-No. 68(a) and (b)**, Kenya Gazette CXX Vol. No. **29** dated **8/3/024** as **P. Exhibit No. (69)**.
- 93.** In summary, PW4 told the court that the Society acquired ownership of the suit land through an application to the Ministry of Lands, following the surrender of the titles by the settler to the government. PW4 said that the Society was currently awaiting the issuance of title deeds from the government after they had paid **Kshs.3,500,000/=**, to discharge the charge following a loan that had taken against the titles by the deceased.
- 94.** PW4 told the court that the late George Nicholson used to have **76** farm workers who are now members of the 3<sup>rd</sup> plaintiff, currently holding share certificates and registration forms as members, whose names are contained in a members register. PW4 said that the Ministry of Lands had told them that the original lease certificates for the suit land had been lost or misplaced, hence the gazettelement herein for issuance of a provisional certificate.

- 95.** PW4 admitted that some of the members of the Society were arrested and arraigned before the court in **Kitale Criminal Case No 1516 of 2015** regarding the alleged forgery of the title deeds for the suit property, but were discharged on **26/1/2015**. PW1 told the court that the initial farm workers had contributed **Kshs. 509,300/=** as per **PMFI-No. 68(a) and (b)** to acquire the suit property and gave the said money to the deceased, only for him to exclusively register the titles under his name.
- 96.** Further, PW4 said that there was a private treaty which was arrived at following negotiations and deliberations between the 3<sup>rd</sup> plaintiff over the repayment of the loan that the deceased had taken against the titles to the suit properties, which were on the verge of auction.
- 97.** PW4 said that after the original title deeds got lost in the hands of both the Ministry of Lands and the deceased, he applied for a provisional certificate in his capacity as the chairman of the Society. PW4 said that the deceased had applied for and obtained the land in trust for himself and the former farm workers.
- 98.** As regards **Nairobi Case Nos. 4357 of 1988**, and **95 of 1994** in Kakamega, PW4 told the court it was finalised at the court of appeal, leading to the filing of

the Kakamega case, later transferred to this court. PW4 told the court that the Society was formed in **1986**, with the intention of purchasing L.R. No. **2187** and **8915/2** from the chargor due to an outstanding loan that had been advanced to the deceased.

**99.** PW4 said that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs are all related as they are composed of the **76** former farm workers, who were occupying the suit land together with some other non- workers. PW4 said that the letter dated **1/11/1972** clearly indicates that Pembeni Farm workers were the initial claimants for the suit properties, as acknowledged by receipt by Lands Limited.

**100.** PW4 clarified that the first chairman and treasurer of the Society were part of the former Pembeni Farm workers. PW4 said that it is true that **P. Exhibit No. 57** and **53** were issued to the squatters. PW4 confirmed that in **1985, 1990, and 2005**, the deceased had issued a notice of eviction to them to vacate the suit property, which was later followed by a forceful eviction and the destruction of their structures on the suit land, despite a pending order to maintain the status quo in the Nairobi case.

**101.** PW4 clarified that the Society was registered on **11/12/1986** as per **P. Exhibit No. (46)** before the

forceful eviction from the land, which took place as per the letter dated **15/4/1986**. PW4 said that according to the register of members of the Society produced as **P. Exhibit No. (47)**, PW1 and PW2 are still their members. He denied forging the names of PW1 and PW2 to include the members of the 3<sup>rd</sup> plaintiff. PW4 clarified that his Society has been active contrary to the Ministry of Co-operative's letter dated **18/2/2011** that the Society has been dormant.

**102.** The PW4 confirmed that his Society was the claimant in the **Court of Appeal Case No. 133 of 1989**. PW4 said that the claim before the court is that the Society was a *bona fide* purchaser of the two parcels of land since they are the ones who cleared the outstanding loan of **Kshs. 3,500,00/=**, that had been advanced to the deceased by the AFC, using the two title deeds on **28/2/1979**.

**103.** PW4 said that a notification of sale was published in **2006** by placing the two parcels of land for auction, following which the Society expressed interest, though they did not come out as the highest bidder in the auction sale.

**104.** PW4 said that once the Society repaid the loan, the deceased ceased being the owner of the suit land. PW4 said that the Society was the only genuine

claimant for the land in this suit; otherwise, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs remain part of the Society. PW4 denied that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs had been given **5** acres each of the suit land by the settler.

**105.** Regarding the survey and the ground status reports, produced as **P. Exhibit No. (35)**, PW4 said that the two were prepared following directives by the Ministry of Lands confirming the current occupant of the suit properties as the family of the deceased.

**106.** PW4 blamed the deceased for using the **Kshs.507,820/=** contribution by the former farm workers, unjustly, to obtain the suit land under his name. PW4 said that after the private treaty, the 3<sup>rd</sup> plaintiff repaid the AFC some money for the loan arrears on **17/11/2014**, which eventually went up to **Kshs.13,500,000/=**. PW4 clarified that PW1 was among the founder members and officials of the Society, hence the reason that he was part of the persons who registered the caveat, as shown in **P. Exhibit No. (54)**, otherwise, he has never formally resigned from the Society.

**107.** **Mark Puison Wambilisa** testified as **PW5**. He relied on a witness statement as his evidence-in-chief. PW5 told the court that he was born in **1956**

and that all his siblings were born and brought up in the suit properties.

**108.** PW5 told the court that his late father used to work for the settler before he left the land in **1972**, after which it was taken over by the ADC. He said that the land was surrendered to the then manager, the deceased, until **1978**, when he retired. PW5 told the court that some monies were being deducted from the wages of the former farm workers and were kept by the farm manager to eventually acquire the land. He could not tell the terms and conditions of the land acquisition agreement between the settler and his former workers. PW4 confirmed vacating the land in **2016**, fearing the impending forceful eviction or invasion.

#### **(H) EVIDENCE BY THE 6<sup>TH</sup> - 8<sup>TH</sup> DEFENDANTS**

**109.** **Jared Sharon** testified on behalf of the 6<sup>th</sup> - 8<sup>th</sup> defendants as **DW1**. As the Deputy Land Registrar, Trans Nzoia County, DW1, told the court that his land registry has no records for L.R. No. **2187** and **8915/2**, or the ones relied upon by the Society in relation to surrender and conversion of the titles subdivisions or issuance of a provisional certificate of lease, since such records are ordinarily kept at the Central Land Registry, Nairobi. DW1 said that until

there was a surrender and conversion of the existing titles for the two parcels of land, the Kitale lands registry had no access to or custody of such land records, given that the titles to the suit properties fell under the repealed Registration of Titles Act and not the Land Registration Act.

**110.** DW1 denied knowledge of the alleged surrender conversion, registration, subdivision, amendment of the RIM, issuance, and registration of new titles of the suit property by her office in favour of the Society. Concerning **P. Exhibit No. (67)** dated **29/7/2021**, relating to Title No. **Cherangani Nzoia Block 12** and an alleged area list, DW1 said that the same appears to have been written from the National Titling Centre and not her office. DW1 said that the letter and its contents were not within her knowledge. DW1 said that she was not aware of the alleged surrender and conversion of the subject parcels of land as contained in a letter appearing on page **153** of the Society's trial bundle Ref. No. **AC74/VOL.9/96**.

**111.** Further, DW1 said that she was not aware of such a surrender and conversion of the titles to the suit properties to create **Cherangani/Nzoia Block 12/Sirikwa**. She could not tell who had issued the

alleged IR Number in favour of the Society. DW1 said that if the old parcel numbers of the suit properties had been converted as alleged by Society, then there would have been a registration section and block called **Cherangani/Nzoia Block 12/Sirikwa**, of which the lands office was not aware of its existence.

**112.** DW1 was categorical that her registry did not possess or was not involved in the processing of such transactions or in the custody of such records as displayed by the Society. DW1 said that the conversion of titles from one legal representative to another is a legal process that comes first before any subdivision could arise.

**(I) EVIDENCE BY THE FAMILY OF THE DECEASED**

**113.** **Eglyne Chepchirchir** testified as **DW2**. She relied on a witness statement dated **24/4/2019** as her evidence-in-chief narrating how her late husband acquired the suit properties, took vacant possession, and developed them until his demise in **2013**. DW2 produced as exhibits a certificate of confirmation of grant issued on **26/9/2016** in **Kitale High Court Succession Cause No. 259 of 2014** as **D. Exhibit**

**No. (70)**, letters dated **8/8/2016**, **17/8/2016**, **30/6/1972**, **21/7/1972**, **24/7/1972**, and **7/3/2017** as **D. Exhibit No. (71)**, and **72(a)**, **(b)**, **(c)**, **(d)**, and **(e)**, copies of title deeds for L.R. No. **2187** and **8915/2**, as **D. Exhibit No. 73(a)** and **(b)**, copy of judgment in **Kitale Criminal Case No. 1516 of 2016, Republic vs Daniel M. Omollo & Others**, delivered on **22/6/2015** as **D. Exhibit No. (74)**, **Court of Appeal, Nairobi Civil Appeal No. 133 of 1989**, between **Christopher Kisiangani & 349 Others vs Simeon K. Choge** as **D. Exhibit No. (75)**, pleadings in **Eldoret ELC No. 306 of 2011** as **D. Exhibit No. (76)**.

- 114.** DW2 told the court that she was a spouse and one of the legal administrators of the deceased's estate, who had three surviving wives, of whom she is the 3<sup>rd</sup> wife, married in **2000**. DW2 told the court that **D. Exhibit No. 72(b)** from Equity Bank confirms that the bank has been in possession of the original title deeds to the suit properties. DW2 said that the letter dated **31/7/1972** was a letter of offer from the ADC over Nicholson and Sarah Farm, followed by a Ministry letter dated **24/7/1972 (P. Exhibit No. 72(c))**, directing that the suit properties

be given to her late husband, who later bought and was transferred the same on **19/10/1972**.

**115.** DW2 said that page **55** of her trial bundle shows the entries to the register for the title, on how her late husband legally became the owner after obtaining a loan from a friend from Kisumu to repay the loan. DW2 denied that her late husband was a manager of the farm, as alleged by the Society, since, before he became a member of parliament, he used to be both a primary school teacher and a businessman.

**116.** DW2 denied that the Society members were initially, allegedly, in occupation before they were evicted from the land by her late husband, before he passed on in **2013**, given that when she got married, the suit properties were solely occupied by the deceased till he passed on. DW2 denied that her late husband was charged and convicted for murder regarding a neighbour over the subject land. DW2 denied that the Society's members allegedly contributed over **Kshs. 508,000/=**, to purchase the land, which was handed over to her late husband, to jointly acquire the suit properties.

**117.** DW2 said that after her late husband passed on, information reached the family that some third

parties, among them the Society, were allegedly collecting monies from innocent parties, claiming to be selling portions of the suit land without the consent or approval of the estate of the deceased, and were also intending to invade their land, hence the report to the police. She said they later sought temporary orders of injunction in the **3<sup>rd</sup>** suit.

**118.** DW2 said that even though her late husband had taken loans over the title deeds with Equity Bank, all the outstanding loans were repaid, and all that remains is a formal discharge of the charges. DW2 denied that any alleged eviction from the suit properties took place in **2016**. She said that none of the plaintiffs had occupied, lived, or developed the land for over **12** years, as alleged or at all, by the SHG.

**119.** DW2 confirmed that the SHG and the Society are the ones who had initially sued her late husband in other suits up to the **Court of Appeal No. 133 of 1989**. DW2 denied being aware of a court order issued on **22/5/1990** to stop the alleged eviction of the SHG and the Society from the suit properties. DW2 insisted that her late husband accepted the letter of offer from ADC to purchase the land, and afterwards paid full consideration to acquire the suit

properties, hence the title deeds were lawfully issued to him.

- 120.** DW2 said that after the certificate of confirmation of grant was issued on **29/9/2016**, all that remains with the succession cause is the distribution of the estate of the deceased to the lawful beneficiaries. DW2 said that the original title deeds for the suit land remain under the custody of Equity Bank (K) Ltd.
- 121.** Regarding photographs produced by the SHG, DW2 said that after **2016**, no structures existed on the suit properties belonging to the SHG and the Society, and that the only house on the suit properties belonged to an in-law by the name Mr. Wamalwa.
- 122.** DW2 termed the SHG and the Society as co-conspirators who have no genuine claim based on either adverse possession or the alleged purchaser's interest in the suit land. DW2 termed the SHG and the Society's membership as similar.
- 123.** DW2 said that before her late husband acquired the land, there must have been a termination of the employee-employer relationship between the former settler and his former farm workers. She said that the suit properties before the land reverted to the ADC

and Land Limited, from whom the deceased acquired the land, free of any encumbrances. DW2 casts doubts on the genuineness, source, authenticity, and legality of the Society's **P. Exhibit Nos. (51), (55), and (57)**; otherwise, the plaintiffs by now could have obtained title deeds for the suit properties, if at all there had been any surrender and conversion of the said titles.

**124.** Further, DW2 said that between **1972** and **1989**, neither the SHG nor the Society had raised any claim over the suit properties. DW2 said that her late husband had the financial capacity to pay for the purchase price to acquire the titles to the suit properties and also clear loans he had obtained against the title deeds, without the alleged assistance from the Society. DW2 said that the title deeds were in safer custody with Equity Bank, following attempts by Mr. Karongo advocate, a family lawyer, who went behind their back, to collude with the Society to allegedly assist them to illegally acquire titles through a purported surrender and conversion, hence the criminal case against some of the Society's members or directors.

**125.** **Miriam Choge** testified as **DW3**. She relied on an affidavit sworn on **21/10/2021** as her evidence-in-

chief. She produced annexures to the said affidavit as **D. Exhibit No. (77) (a), (b), (c), and (d)**. DW3 denied that the deceased upstaged the SHG and the Society as former workers of the settler in acquiring the suit properties. DW3 pointed out anomalies and errors in **P. Exhibit No. (51) and (55)**. DW3 faulted the Society for not producing any receipts to show that they made any contributions to acquire the suit properties, or ever repaid the alleged loan to acquire the same as alleged.

**126.** DW3 said that even though she has been in and out of the country, she never came across the SHG and the Society, either physically living on the suit land for over **12** years or having erected any structures therein as alleged in their evidence before the court. DW3 said that before the deceased bought the suit properties, ADC had been in exclusive occupation of the suit properties after the settler had left, and not the SHG and the Society.

**(J) WRITTEN SUBMISSIONS**

**127.** At the close of the defence, parties were directed to file written submissions. The SHG relies on written submissions dated **11/12/2025**. It is submitted that the SHG's main pleading is the originating summons dated **10/6/2009**, later

amended on **10/2/2015**, seeking a declaration that the SHG members are entitled to **5** acres each, out of L.R. Nos. **2187** and **8915/2** by virtue of adverse possession.

**128.** The SHG submits that as former workers of Mr. George Nicholson, they remained on the land after the land was acquired by the ADC and later the deceased, lodged a caveat, obtained a land control board consent to be transferred the land by the Lands Limited, after it was surrendered to the government, only for the deceased, a farm manager to obtain title, and offer the same as security for a loan.

**129.** Further, the SHG submits that through a letter dated **21/11/1972**, Lands Limited confirmed that Pembeni Farm Squatters had been given a priority to purchase the land, only for the deceased to take advantage of his position as a minister and to have the land registered instead under his name. The SHG submits that as per **Sections 7, 13, 16, 17, 38(1)** and **(k)** of the Limitation of Actions Act Cap **22**, as read together with **Section 28(b)** of the Land Registration Act, they have met the ingredients of adverse possession more so, when DW2 has conceded in her evidence that the late husband did

not seek for any eviction orders against them during his lifetime.

**130.** Reliance is placed on **Kasuve -vs- Mwaani Investments Ltd and 4 others [2004] eKLR, Samuel Khaemba -vs- Mary Mbaisi [2015] eKLR (KECA 853) KLR, Chevron (K) Ltd -vs- Harrison Charo Wa Shutu [2016] eKLR, Githu -vs- Ndeete [1984] KLR 776, and Samuel Miki Waweru -vs- Jane Njeri Richu [2004] KECA 50 (KLR).**

**131.** The Society relies on written submissions dated **15/11/2025**. The Society submits that the primary pleadings they rely upon are the plaint dated **29/10/2009** filed in **Kakamega High Court No. 95 of 1994**, defence and counterclaim dated **17/8/2017** filed in the 3<sup>rd</sup> suit, witness statement dated **17/8/2017**, supplementary statement dated **3/2/2023**, list of documents dated **17/8/2017**, supplementary list of documents dated **14/7/2023**, list of documents dated **3/2/2023**, supplementary list dated **14/3/2024**, further list dated **20/9/2025**, and **21/11/2025** and a witness statement of Mark Poison Webale.

**132.** Regarding the SHG's case, the Society submits that the case is unprecedented as two groups, though claiming the suit properties are not co-joined.

On whether the SHG has established a claim on adverse possession over **L.R. Nos. 2187/2 and 8915**, the Society submits that the doctrine of adverse possession is embodied in **Sections 7 and 13** of the Limitation of Actions Act, while **Section 38** outlines the procedure for the claim.

**133.** The Society submits that a right to adverse possession will cease if the right has accrued and then barred. A fresh right of action will accrue again once a person adversely possesses the land. Further, the Society submits that for a claim on adverse possession to succeed, one must prove: continuous and uninterrupted possession for **12** years, the possession must be open, notorious, hostile, and with *animus possidendi*. The Society, therefore, submits that the deceased allowed the workers to remain in possession of the parts of the suit properties.

**134.** Reliance was placed on **Mtana Lewa -vs- Kahindi Ngala Mwangandi [2015] eKLR, Ruth Wangari Kanyagia -vs- Josephine Muthoni Kinyanjui [2017] eKLR, Celina Muthoni Kithinji & 5 Others -vs- Safiya Binti Swale & Others [2018] eKLR,** and **Mbira -vs- Gachuhi (2002) 1 EALR 137.**

**135.** On the evidence of PW1, the Society submits that the suit is suspect since PW1 and PW2 in their statements allege that the SHG members are **350**, yet the order by Hon. Justice Ombija on **23/3/2009**, the SHG comprised only **32** members. The Society submits that the SHG's claim must fail because time began running from **1973** to **1984**, which is less than **12** years; the area occupied is vague; the deceased had been occupying and titling the parcels; the claim was filed after eviction; and the Society was registered as the owner of the suit properties in **1987**.

**136.** The Society submits that its claim is based on a fiduciary relationship, trust, and purchase of the suit properties with the deceased. Further, the 3<sup>rd</sup> plaintiff submits that the transfers of **L.R. Nos. 2187 I.R 273** and **L.R. No. 8915/2** are suspect having been registered on **10/10/1973**, without any land control board consent and or proof of payment of stamp duty or transfer charges.

**137.** On the land control board consents, the Society submits that the board had initially rejected the deceased's application to acquire the suit parcels, in its meeting of **15/6/1972**. Further, the Society submits that there was apparent political

interference in the events that led to the acquisition of the suit parcels by the deceased. The Society submits that, according to the memorandum of registration, the transfers dated **9/10/1973** produced by them were in favor of Pembeni Farm squatters and were instead illegally and fraudulently transferred to the deceased on **10/10/1973**.

**138.** The Society submits that the deceased was therefore holding invalid titles to the suit properties, since he had breached a fiduciary duty with the former workers, giving rise to a constructive trust. Reliance is placed on **Sections 26 and 27** of the Land Registration Act, *Munyu Maina -vs- Hiram Gathiha* (supra), *Daudi Kiptugen -vs- Commissioner for Lands* (supra), and *Twalib Hatayan -vs- Said Sagar* (supra).

**139.** Similarly, the Society submits that the 1<sup>st</sup> - 4<sup>th</sup> defendants did not adduce any particulars of fraud on the Society's claim. Reliance is placed on **Sections 27, 28, 30, and 126** of the repealed Registered Land Act.

**140.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants rely on written submissions dated **19/12/2025**. It is submitted that the deceased became the lawful and absolute owner of the suit land after purchasing it

from the ADC on **30/6/1972**, the transfer to his name was effected on **10/10/1973**, following which he remained in uninterrupted possession and occupation till he passed on on **13/12/2013**.

**141.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that after the burial of the deceased on the suit properties, the surviving spouse, the 1<sup>st</sup> defendant, and the 5<sup>th</sup> defendant became the duly appointed administrators to the estate.

**142.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that despite undisputed ownership, the SHG and the Society on various occasions have attempted to make unlawful claims over the land, which have always been dismissed, as evidenced by **Civil Case No. 4357 of 1988**, later appealed as **HCCC No. 133 of 1999**, **HCC No. 95 of 1994**, **HCCC No. 52 of 2011**, and **Criminal Case No. 1516 of 2011**, where the directors of the Society purported to register forged certificates of lease over the subject property in the Society's names, which were declared as forgeries on **26/1/2016**.

**143.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants isolate ten issues for determination. On adverse possession, it is submitted that the SHG claim as framed in law was unsupported by facts, and therefore inapplicable as,

the law on adverse possession in **Order 37 Rule 7** of the Civil Procedure Rules, **Sections 7, 13 (1) (4)** and **(3)** of the Limitation of Actions Act where time begins to run when the registered owner is dispossessed or discontinued from possession. In this case, it is submitted that the SHG has failed to discharge the burden and show that there was such dispossession or discontinued possession of the true owner for **12** years.

**144.** Similarly, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the SHG failed to demonstrate the exact date, year, month, of commencement, the specific, identifiable, and demarcated size, boundary of the land claimed, the point of entry, the exact claimants asserting adverse possession, and the individual or personal claim as opposed to a communal or amorphous one.

**145.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that failure by the SHG to plead and prove particulars renders the claim fatally defective, and the period from **1973 to 1984** falls short of **12** years.

**146.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the law does not recognize group adverse possession without specific identification of claimants and their respective portions, and in this case, it makes the

SHG claim speculative, imprecise, and falling short of statutory and procedural thresholds.

- 147.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the evidence of PW1 and PW2, on behalf of the SHG and their membership in both Pembeni Farmers and Sirikwa Society, coupled with **P. Exhibit No. (49)**, alleging contribution to purchase, the land shows a lack of clarity on the identity, which defeats the claim on adverse possession.
- 148.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the **P. Exhibit No. (51)** cannot form a basis of adverse possession since adverse possession cannot arise from permissive use, and further, going by the testimony of PW1, that the deceased had tolerated their use of the suit properties, which facts cannot amount to hostile occupation or takeover.
- 149.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the act of lodging a caveat over the title register to the suit properties was an acknowledgment of the title of the registered owner, which directly contradicts the ingredients of adverse possession.
- 150.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that in his witness statement, PW1 admitted to having voluntarily vacated the suit properties, which in law amounts to a break of the continuity of possession,

and so it was a voluntary vacation of the suit properties, the land until the filing of the suit indicative of a loss of actual and exclusive control. Reliance is placed on **Sisto Wambugu -vs- Kamau Njuguna [1983] KECA 69 [KLR]** and **Mutuku Kasuve -vs- Mwaani Investment Ltd (supra)**.

**151.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that in the SHG own pleadings, coupled with criminal findings, show that there was an attempt to invade the suit properties, based on forged certificates of lease to justify an illegal entry, acting in concert with the Society, to falsely claim to be squatters, which attempts unfortunately did not interfere with the exclusive use of the suit properties by the deceased, since **1973** to his demise in **2013**. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that this evidence shows further that there were hostile possession attempts, violent, contested, unlawful, and repeated disruption of occupation by eviction and court actions, which diminished a claim for adverse possession.

**152.** Regarding constructive trust, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the Society and the SHG have been unable to prove the same in terms of common intention, contributions, financial or

otherwise, conduct of the legal owner, promise, assurance, or passive tolerance.

**153.** On the contrary, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the legal proprietor, until his demise, lacked any trust, mutual understanding, or agreement with the Society and the SHG, more so when there was a caveat lodged against his title registers. Further, it is submitted that the Society and the SHG have unclean hands to approach a court of equity for equitable reliefs. Reliance is placed on *Black's Law Dictionary 9<sup>th</sup> Edition*, **Twalib Hatayan & Another -vs- Said Saggar Ahmed Al-Heidy & Others [2015] KECA 713 [KLR]**, and **William Kipsoi Sigei -vs- Kipkoech Arusei & another [2019] KECA 446 (KLR)**.

**154.** On whether the Society obtained ownership by way of purchase and or auction, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the titles to the suit properties held by the estate are conclusive evidence of ownership under **Section 26** of the Land Registration Act, given that the deceased was a *bona fide* purchaser for value without notice of any adverse claims. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the onus was on the Society and the SHG to prove acquisition from ADC, who had a valid title

and compliance with **Section 3(3)** of the Law of Contract Act.

**155.** In this case, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the Society did not adduce enough and credible evidence of purchase or auction by way of a sale agreement, memorandum of sale, auctioneers notification, advertisement, bank statutory notices, land control board consent, and transfer form, proof of payment of stamp duty and a lawful registered title, otherwise the two narratives by the Society and the SHG remained unsubstantiated. Reliance is placed on **Lawrence Mukiri -vs- Attorney General & Others [2013] eKLR** and **Kariuki -vs- Kariuki [1983] KLR 225.**

**156.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the criminal proceedings that were levelled against some of the directors of the Society confirm forgery and therefore, no title could arise, no right can accrue, and all derivative interests collapse because the Society could not obtain an interest in the suit property based on forged instruments.

**157.** On the allegation of surrender of original titles to the suit properties to facilitate conversion, and or variation of regime or terms or holding mutation and or issuance of subdivision titles or otherwise; the 1<sup>st</sup>,

3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that under **Section 79** of the Land Registration Act, alteration or conversion of titles to land cannot occur without the participation, consent or authority of the registered owner.

**158.** In this case, under **Section 8** of the Land Registration Act, Registration **Order 2017** operationalized nationwide conversion from the repealed Registration of Titles Act, Registered Land Act and Government Land Act regime to the Land Registration Act titles, with a requirement for the original title deed being surrendered, and conversion of title be done through a gazette notice publishing the affected parcels, public notice, verifications of ownership, return of old titles and signing of prescribed form.

**159.** In this case, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that no such conversion can legally occur privately, silently by third parties without the legal owners participation in compliance with **Sections 6, 7, 8, and 9** of the Land Registration Act as read with **Section 8** of the **2017** Order, as read together with **Section 43** of the Land Registration (General Regulations) **2017**, by filing Form LRA **97**, by either

the deceased, or the legal administrators of his estate.

**160.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the same must be through an express grant authorization in **Succession Cause No. 259 of 2015**. It is submitted that rendering any attempt by the Society through a letter dated **8/8/2016** was null and void under **Sections 79 and 80** of the Land Registration Act, or incapable of binding the registered proprietor or his estate.

**161.** Further, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the letters dated **17/8/2016, 29/7/2021, and 4/4/2025**, regarding the alleged conversion and the amendment of the RIM were illegal as they were allegedly carried out without the participation of or consent of the lawful owner, or the law cited above, making them incapable of conferring title or rights over the subject properties to the Society.

**162.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the cited provisions of the law are the safeguards to ensure transparency, participation, and accuracy in land status changes. Without a gazette declaring the conversion of L.R. No. **8915** and L.R. No. **2187**, as per **Sections 6 and 7** of the Land Registration Act. It

is submitted that the alleged actions by the 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants were unconstitutional, illegal, and amounted to intermeddling with the deceased's estate. Reliance is placed on **Livingstone Kunini Ntutu -vs- Minister for Lands & 4 others [2014] KEHC 4566 (KLR)** and **Gladys Nkirote M'itunga -vs- Julius Majau M'itunga & 3 others [2016] eKLR.**

**163.** On whether the 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants had authority in law, equity and fact to issue new titles over L.R. No. **8915** and L.R. No. **2187**, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the roles of the land registrar and the surveyor are administrative and not created to invent titles, regularize illegality and or confer ownership where none exists, based only on prescribed procedures.

**164.** In this case, it is submitted that there was no valid sale agreement or valid memorandum of sale emanating from the true owners, and no lawful transfer or consent from the owner of the suit properties in favour of the Society herein exists, especially when they have admitted that they were squatters on the suit properties. Reliance is placed on **Joseph K. Ngok -vs- Moijo Ole Keiwua & Others [1997] eKLR** and **Arthi Highways**

**Developers Ltd -vs- West End Butchery Ltd**  
**[2015] eKLR.**

- 165.** Further, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the land registrar cannot, in law, convert trespass into ownership, squatting does not create a registrable interest, and without a valid root, no title can issue from the land registrar; equity follows the law. In this case, it was submitted that the 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants had no legal basis to issue titles to the Society, and that any purported certificates of title were founded on fraud, illegality, and contrary to statute and precedents.
- 166.** On the reliefs sought, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the legal remain the only lawful and registered owners of the suit properties, with the Society and the SHG having no valid legal title, right, or interest in the said properties, and under **Sections 24, 25, and 26** of the Land Registration Act, the Society and SHG claim should be dismissed and their suit allowed.
- 167.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that whereas under **Section 80** of the Land Registration Act empowers the court to rectify the land register where titles have been obtained through fraud, or mistakes, based on evidence produced to sustain

such allegations as held in **Arthi Highway Developers -vs- West End Butchery Ltd** (*supra*), **Munyu Maina -vs- Hiram Gathiha** (*supra*) and **Wreck Motor Enterprise -vs- Commissioner of Land & Others [1997] eKLR**.

**168.** In this case, it is submitted that the deceased's acquisition of the land was government/parliament-sanctioned, legal and transparent, with no evidence received by the court of any fraud, illegality in the root of the title, making the same valid and indefeasible under **Sections 24, 25, and 26** of the Land Registration Act.

**169.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that their titles to the suit properties cannot be defeated on account of the Society and the SHG's sporadic, forceful, contested, and unsubstantiated claim, more so, based on alleged forged documents as declared in **Criminal Case No. 1615 of 2011**. The court is urged to find, as held in the **Arthi Highway Developers** (*supra*), that a forgery confers no title and attracts no protection of the law.

**170.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that, given the Society and the SHG's multiple competing claims, a fraudulent and illegal attempt at registration creating an alleged attempted invasion

and subdivision, declaratory orders are necessary to settle ownership of the suit property conclusively, protect the sanctity of title, prevent further illegal dealings, and restore certainty in the land records.

**171.** Lastly, on whether the Society and the SHG members were in occupation of the suit properties and whether there was any eviction whatsoever, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that eviction procedures under **Section 152A, B, C, and F** of the Land Act **2012**, apply only to lawful occupiers and not to protect trespassers and or invaders. It is submitted that from the cited statute and precedent, occupation must be lawful to attract statutory protection; periodic invasion, or attempted illegal settlement, does not amount to legal occupation, and that a trespasser has no proprietary or possessory rights.

**172.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that eviction pursuant to court orders or lawful enforcement actions is lawful, and therefore, the alleged forceful or violent entry by the Society and the SHG's negated any claim of peaceful occupation. Further, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the conduct of the Society and the SHG's presence was sporadic, invasive, and characterized

by an attempted mass entry which did not constitute any occupation recognized by law. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submitted that, therefore, their removal from the suit properties, Society, and the SHG, if any, followed valid court orders and was a lawful police intervention, hence did not constitute arbitrary or extrajudicial eviction as evidenced by the ruling in **HCCC No. 435 of 1989** by Hon. late Justice Akiwumi. In the circumstances, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the Society and the SHG cannot rely on **Sections 152C to 152F** of the Land Act **2012**, since they were not lawful occupiers of the suit properties, but trespassers whose unlawful entry cannot be statutorily covered, but was lawful and justified.

**173.** On whether the issue of sale of the suit properties to the deceased was discussed and resolved in Parliament, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that **Section 60(c)** of the Evidence Act requires the court to take judicial notice of parliamentary proceedings, including Hansard reports, as held in **Institute of Social Accountability and Another -vs- National Assembly of Kenya & Others [2021] KESC 30 [KLR] (6<sup>th</sup> August 2021)**.

**174.** In this instance, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that where Parliament deliberates upon and approves a transaction involving public land, a state corporation such as the ADC, a transaction involving public land, the same confirms the legality and demonstrates due process, and hence cures any allegations of arbitrariness.

**175.** In this case, it is submitted that the sale of the subject land to the deceased originated from a state corporation (ADC), whose disposal of public land was subject to government policy, parliamentary oversight, and public accountability. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the Hansard reflects that the sale of L.R. No. **8915/2** and L.R. No. **2187** was raised on the floor of Parliament, interrogated by members, and was approved, meaning that the sale was not clandestine, it was lawful and transparent, and the government had full knowledge and endorsement of the transaction.

**176.** With the Hansard report, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the allegation by the SHG on an alleged irregular allocation or acquisition of the suit alleged by the deceased, or lack of capacity by the purchasers are cemented by proof of parliamentary deliberations and government

sanctioned approval, reinforcing the indefeasibility of the title under **Section 26** of the Land Registration Act, and supporting the doctrine of *bona fide* purchaser for value without notice, effectively laying legitimacy of the resulting titles and the estate's superior proprietary rights.

**177.** The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants submit that the two suits brought by the Society and the SHG on adverse possession, constructive trust, and purchase or auction without credible evidence should be dismissed, since they are contrary to settled law and the deceased's long-established ownership. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants urge the court to award them costs; otherwise, denying them costs, in the absence of special circumstances, constitutes a reward for illegality, encourages abuse of the court process, and punishes them as registered owners.

**(K) ANALYSIS**

**178.** The court has carefully gone through the pleadings, the evidence tendered by the Society, the SHG, and the defendants, and the written submissions. The issues calling for my determination are:

**(1) *If the suit and the issues raised by the SHG and the Society are res judicata.***

- (2) If the SHG and the Society's officials or representatives have the capacity to represent the respective parties before the court.**
- (3) Whether the SHG and the Society's witnesses have established that they are entitled to the suit properties on account of adverse possession, constructive trust, sale, purchase, and registration.**
- (4) If the SHG and the Society are entitled to the reliefs sought in their respective suits.**
- (5) If the estate of the deceased has established a breach of their ownership rights, irregularities in the issuance of titles, and the intentions of the Society or its members to interfere with the titles register to the suit properties, and to illegally stake claim, and or invade the suit properties, to be entitled to the reliefs sought in the 3<sup>rd</sup> suit.**
- (6) What is the order in terms of costs?**

**179.** It is trite law that parties are bound by their pleadings and issues for determination that arise out of the pleadings. See **Odinga & another -vs- Independent Electoral and Boundaries Commission & 2 others [2017] KESC 32 (KLR).**

The estate has pleaded that the suits by the primary plaintiffs are similar and had been heard and determined finally in previous suits up to the Court of Appeal. In a ruling delivered on **19/10/2015**, E.

Obaga J made a finding that the issues for determination in the judgment in the Court of Appeal were not fully based on matters heard and determined on the merits, to finality, and by a court of competent jurisdiction for the defendants to be entitled to invoke the doctrine of *res judicata*.

**180.** The court said that the judgment of the Court of Appeal shows that the plaintiffs' claim for adverse possession was dismissed, not on merit, but largely on the grounds that it was brought by way of a plaint instead of an originating summons, for not complying with the requirements of representative suits, partly for not disclosing a reasonable cause of action, and lastly, for not annexing a certified copy of the extract of the title to the suit properties.

**181.** The said ruling was not appealed against by either of the defendants herein. The key ingredients of *res judicata* are the identity of parties, identity of subject matter, cause of action, competent jurisdiction, sameness of title, and finality of the judgment. See **John Florence Maritime Service Ltd & Another -vs- C.S. Transport and Infrastructure & Others [2021] eKLR.**

**182.** The doctrine of *res judicata* prevents causes of action or issues from being relitigated once they

have been determined on the merits. In **Communications Commission of Kenya & Others -vs- Royal Media Services Ltd & Others [2014] eKLR**, the court took the view that the doctrine ensures finality to litigation to avoid multiplicity of proceedings, for the protection of the integrity of the administration of justice, and lastly as a cause for fairness in the settlement of disputes.

**183.** In this suit, the defendants did not offer any new material after the ruling above to sustain the plea of *res judicata* in the course of the main hearing. There is no evidence that both the issues of trust and adverse possession were heard and determined by a court of competent jurisdiction on the merits and to finality. Therefore, the court affirms the ruling alluded to above that the two suits before the court are not *res judicata*.

**184.** In the statement of defence, the initial deceased defendant had invoked the Limitation of Actions Act, and the implications of the Co-operative Societies Act were raised. The SHG and the Society have pleaded that they are creatures of law. One is a self-help group, while the other is a registered co-operative under the Cap 490 Laws of Kenya. It is not disputed that leave to file a representative suit in favour of **34**

claimants of the SHG was granted to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, in the course of their testimony, said that they are seeking reliefs on behalf of **350** members of the Pembeni Farmers Self-Help Group.

**185.** Authority to act for more members or parties beyond the initial **34** members was not sought or obtained. Pleadings were not amended to reflect more than **34** members. Authority to act for more than **34** plaintiffs was not sought, filed, or tendered as evidence. In **Ann Wairimu Wanjohi -vs- James Wambiru Mukobi [2021] KECA 476 [KLR]**, the court held that parties should specifically state their claim by properly pleading the facts relied upon and the reliefs sought, since pleadings are the primary documents that guide the court and parties, concerning a given claim and the contesting position of the parties.

**186.** In **David Sironga Ole Tukai -vs- Francis Arap Muge & Others [2014] KECA 155 [KLR]**, the court said that parties in an adversarial system are the ones who set the agenda of trial, formulate their cases, and that a party cannot be allowed to raise a different case from what it initially pleaded without due amendment of the pleadings being made. The

court held that its role is to adjudicate upon pleaded matters and not to give a decision on a claim or defence not pleaded.

**187.** In the 2<sup>nd</sup> suit, leave was granted as requested by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs to file a representative suit for a specific **34** persons. In **Francis Muruatetu & Another -vs- Republic [2016] eKLR**, the court said that any party seeking to join a suit must come to terms with the fact that the overriding interest or stake in any matter is that of the primary or principal parties before the court.

**188.** In **Law Society of Kenya -vs- Communication Authority of Kenya [2023] eKLR**, the court defined a “person” as not open for any passer-by and that a person should be a party with *locus standi* in the matter.

**189.** **Order 1 Rule 1** of the Civil Procedure Rules is to the effect that all persons may be joined in one suit as plaintiffs, in whom any right or relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist. In **Kahindi Katana Mwango & Another -vs- Cannon Assurance (K) Ltd [2013] eKLR**, the court said that in a representative capacity, the plaintiff shall state the capacity in which he sues.

- 190.** In *Yiapas Ole Seese & 4 others -vs- Sakita Ole Narok & 2 others [2008] KECA 223 (KLR)*, the court held that the whole purpose of **Order 1 Rule 8** of the Civil Procedure Rules is to ensure that all persons with un litigated similar causes of action, desirous of having their cause determined are included in the suit for their own convenience and to obviate a multiplicity of suits. Authority in writing for compliance with **Order 1 Rule 12** of the Civil Procedure Rules for the alleged **316** people is not PW1 and PW2, as alleged in their testimony properly before this court.
- 191.** The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs did not seek an amendment of the initial leave to include **316** more plaintiffs in the suit. Equally, the said **316** members did not seek leave of court to join the 2<sup>nd</sup> suit as plaintiffs. The court finds the first and second witnesses incapable of representing more than **34** persons in the suit.
- 192.** Coming to the Society, it is described as a Society under the definition of the Co-operatives Societies Act, Cap 490. A representative in relation to a Society means a person who the court is satisfied has been duly appointed in writing by the Society to represent it. Management of a Cooperative Society is

vested with the members who, through annual general meetings and special general meetings, elect its committee of officials and ratify its decisions or resolutions under **Sections 27** and **28** of the Act.

**193.** *Locus standi* is defined in *Black's Law Dictionary, 9<sup>th</sup> Edition, page 1026*, as the right to bring an action or to be heard in a given forum. In **Pamwhite Limited -vs- Karomo and Seinfert (Suing as the Chairman and Secretary, respectively of the New Nyali Residents Association) & 4 others [2025] KECA 930 (KLR)**, the court held that officials of a society do not derive their mandate from their recognition by the Registrar as officials, but by virtue of their election by members of the Society at an annual general meeting as per **Section 29(1)** of the Societies Act, Cap **108**.

**194.** The court said that the primacy of the election of officials at the annual general meeting is further cemented in **Section 31** of the Act, which provides that where the Registrar has reasonable cause to believe that circumstances have arisen which render it expedient for the proper performance of its jurisdiction, he may require the society to furnish him with documents including a true and complete copy of the minutes of any meeting held by the society at

which officers of the Society were elected or appointed.

**195.** In *Francis Kirima M'ikunyua -vs- Registrar of Societies & Others [2017] KEHC 8354 [KLR]*,

Odunga J, as he then was, observed that a conflict among members of a society as to the proper officials of the Society can be easily resolved by simply organizing a proper and lawful annual general meeting.

**196.** In the 1<sup>st</sup> and 3<sup>rd</sup> suits, the propriety or legality of the membership and the proper officials of the Society have been raised. PW1 and PW2 deny being members of the Society, yet PW4 insists that they are still members of the Society, as per the Society's register, and so are most of the Pembeni farmers who make up the SHG. The Society's witnesses insist that Pembeni farmers before the court, as the SHG are all part of the Society's membership.

**197.** It is trite law that all the decisions and resolutions of a co-operative society are collectively undertaken by all the registered members of the Society at the annual general meeting or a special general meeting, after which the office bearers are collectively allowed to verify the decision by approving, signing, and executing all the decisions on

behalf of the members. A society acts through its designated officials. It is the *bona fide* officials who sign and represent societies in court, based on a written authority to do so.

- 198.** In **Kituo Cha Sheria -vs- John Ndirangu Kariuki & Others [2013] eKLR**, the court held that, as a general rule, an unincorporated legal person, including societies, can only bring proceedings through its registered or elected officials. In **African Orthodox Church of Kenya -vs- Charles Omuruka & another [2014] eKLR**, the court held that a society has no legal status to sue or be sued in its name and can only do so through its registered officials.
- 199.** In **Ephantus Kihara Guchu -vs- Grace Gathoni Matu & Others [2020] eKLR**, the Court of Appeal held that registered societies do not have legal personalities capable of suing or being sued in their own names, but through their officials or trustees in accordance with their respective constitutions. In **Anderson Mole Munyaya & 3 others -vs- Morris Sulubu Hare [2017] KECA 242 (KLR)**, the court said that such an official could be any as provided under **Section 2** of the Societies Act.

- 200.** In the 1<sup>st</sup> suit, the Society's amended plaint dated **20/4/2009** at paragraph **3** states that the Society was formed in **1972** to purchase the suit properties, which, unknown to the Society, were fraudulently, wrongfully, and unlawfully procured by the deceased, despite him collecting money from members. The amended plaint goes on to say that the Society was registered as the owner of the suit properties in **1987** and **1999**.
- 201.** The amended plaint and the counterclaim were accompanied by a verifying affidavit sworn by Daniel Omolo, without evidence of his election or reelection in an annual general meeting, special general meeting, or committee resolution in writing authorizing him to sign, file, sue, execute, represent, and appear on behalf of the Co-operative Society in the two suits.
- 202.** Documents on when the deponent and the Society's witnesses were first elected, its committee members, minutes of the election and the annual returns over the years since **1972** to the present, authority to appear, swear or plead in the capacity as the chairman or committee members, or resolutions to purchase, pursue and seek the suit property on behalf of the members, alleged to be over **1,400**,

were not only not filed before court in the list of documents relied upon by the Society's witnesses, but were also not tendered as evidence before the court. The capacity to plead, appear, and swear or represent the Society, as indicated above, relates to the mandate to exercise delegated powers or authority.

**203.** My finding, applying the foregoing cases, is that the Society pleadings in both suits were not verified and presented in court by authorized officials or witnesses who had written authority or capacity to sue or to represent the Society in the two suits.

**204.** The burden of proof lies with the party who alleges the existence of certain facts to be entitled to the relief, rights, or liabilities claimed to exist. The SHG claims that **34** members claim adverse possession. The Society bases its claim on breach of trust, ownership of land, denial of occupation, threatened or intended invasion, eviction, and interference with land registration records or documents.

**205.** Adverse possession is governed by **Sections 7, 9, 10, 11, 12, 13,** and **38** of the Limitation of Actions Act, as read together with **Section 28(h)** of the Land Registration Act.

- 206.** In **Mtana Lewa -vs- Kahindi Ngala Mwagandi [2005] eKLR**, the court defined adverse possession as essentially a situation where a person takes possession of land and asserts right over it, and the person having title to it omits or neglects to take action against such person in assertion of title for **12** years. The court said that the concept springs into action essentially by default or inaction of the owner.
- 207.** Further, the court held that the essential prerequisites are that the possession of the adverse possessor is neither by force, nor stealthy, nor under the licence of the owner; it must be adequate in continuity, publicity, and in extent to show that the possession is adverse to the title owner.
- 208.** In **Richard Wefwafwa Songo -vs- Ben Munifwa Songoi [2020] eKLR**, the court observed that for a claim to succeed, the person in possession must have a peaceful and uninterrupted user of the land, which includes the physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the actual owner.
- 209.** In **Mbira -vs- Gachuhi [2003] 1EALR 137**, the court said that a claimant must prove non-permissive or non-consensual, actual, open, notorious, exclusive,

and adverse use. Further, in **Wambugu -vs- Njuguna [1983] KLR 171**, the court observed that the true owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it, by acts inconsistent with his enjoyment of the soil for the purpose for which he intended to use the land.

**210.** In **Wilson Kazungu Katana & Others -vs- Salim Abdalla Bakshwein & Another [2015] eKLR**, the court held that the identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. Adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it.

**211.** In **Alfred Welimo -vs- Mulaa Sumba Barasa, CA No 186 of 2011**, the court said that the abandonment of possession must be coupled with the respondent taking possession of the land with *animus possidendi* and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land.

**212.** In **Maweu -vs- Lin Ranching & Farming Co-operative Society [1985] eKLR**, the court said that

adverse possession is a fact to be observed upon the land. Similarly, in **Githu -vs- Ndeete** (*supra*), the court held that a mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such adverse possession.

**213.** Further, the court said that the time for limitation ceases to run either when the owner takes or asserts his rights or when his right is admitted by adverse possession, or the owner takes legal proceedings or makes an effective entry on the land. The court said that giving a notice to vacate does not amount to an effective assertion of right for purposes of stopping time from running. See **M'Riria & Others -vs- Muthomi Civil Appeal 253 of 2019 [2025] KECA 951 KLR.**

**214.** In **Mbasa -vs- Mbasa & Another Civil Appeal No. E034 of 2021 [2025] KECA 1420 [KLR] (31<sup>st</sup> July 2025) (Judgment)**, the court said that it was not tenable for the appellant to claim his entitlement to the suit property in accordance with Luo Customary Law and at the same time claim it through adverse possession, as the two concepts are mutually exclusive.

- 215.** In **Andafu -vs- Akhulunya Civil Appeal No. 70 of 2019 [2025] KECA 714 [KLR] (25<sup>th</sup> April 2025) (Judgment)**, the court said that actual as opposed to constructive possession is key where the test is the degree of the actual use and enjoyment of the parcel of land involved by the claimant or his agent, tenant, or licensee. The court held that open and notorious means that the possession must be open and conspicuous to the common observers, so that the owner visiting the land might readily see that the owner's rights are being invaded. In other words, the possession must be manifest to the community.
- 216.** As to the exclusive possession, the court said that the possession must be of such exclusive character that it will operate as an ouster of the owner of the legal title. Continuous and uninterrupted possession was said to be that the owner, for **12** years, did not re-enter the property under circumstances showing her intention to assert dominion against the adverse user.
- 217.** Permissive possession does not amount to adverse possession. In **Mbui -vs- Maranya [1993] eKLR**, the court held that entry under a license or

permission out of love of the owner does not amount to adverse possession.

- 218.** In **Karnataka Board of Wakf -vs- Government of India & Others [2004] 10 SCC 779**, the court said that in the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. The court said that possession must begin with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile, and continued user for the statutory period.
- 219.** The SHG members have admitted in their pleadings that the initial entry into the land before **1972** was with the permission of the initial owner, George Nicholson, on account of their capacity as farm workers. The SHG averred and testified that they were each occupying and tilling portions of the suit property with the consent and approval of the former owner, before the ADC and the deceased were registered as owners of the suit properties.
- 220.** The SHG and the Society have not demonstrated the nature, extent, particulars, features, and details of their individual occupation, possession, and use before **1972** and thereafter to **2016**. Photographs or material showing that the **34** SHG members lived

and occupied specific portions of the land equivalent to **5** acres within the suit properties are missing. The photographs produced are not specific to any claimant.

- 221.** In ***Thika Garissa Road Developers Ltd -vs- Mwangi & 4 Others [2023] KECA 269 [KLR]***, the court said that evidence of building structures, farming, and even harvesting sand on the suit land without obtaining permission from the appellant, manifested *animus possidendi*, a clear mind and intention of dealing with the suit land as if exclusively theirs and in a manner that was in clear conflict with the appellant's right.
- 222.** The SHG's testimony is that they were in co-existence on the suit properties with both the former owner, later with the ADC in **1972**, and, from **1973**, with the deceased until **2016** or thereabout, when they voluntarily vacated the land.
- 223.** Adverse possession entails exclusive possession and the assertion of rights inconsistent with those of the true owner, with the intention to possess or own the land. To succeed in a claim of adverse possession, the elements of dispossession and discontinuance of possession must be proved. The **34** members of the SHG describe themselves in

various capacities, in various stages and times in the 2<sup>nd</sup> suit. Unfortunately, the specific details of dispossession and discontinuance of possession of the true owner are missing in the pleadings. Evidence of the details of exclusive use and the manner of the occupation is key.

**224.** In **Fanikiwa Limited & 3 others -vs- Sirikwa Squatters Group & 17 others [2025] KESC 79 (KLR)**, a squatter, according to *Black's Law Dictionary 8<sup>th</sup> Edition page 1439*, was defined as a person who settles on property without any legal claim or title. The court observed that whereas Sirikwa had defined itself as members' heritage and lineage, alleged employment as workers and labourers by colonists, there was no evidence of occupation in any of the suit properties. The court said that the failure to take possession and occupy the land meant that Sirikwa were not squatters on the suit parcels. The court asked itself whether workers can turn around and invoke the right to their place of work as squatters, and if so, can they do so over **70** years later?

**225.** The SHG and the Society have placed heavy weather on the caution that was placed against the titles to the suit properties registers. The SHG and

the Society had to prove uninterrupted continuous occupation without force or stealth. The occupation must be peaceful, notorious, open, and exclusive. From the evidence tendered, it is not clear if the SHG and the Society were present when the entry took place.

- 226.** There cannot be, in law, group adverse possession or group adverse occupation of the land. Adverse possession has to set in and remain undisturbed for a cumulative **12** years, without stoppage of the time from running.
- 227.** Adverse possession is reckoned with reference to the time of its inception. See **David Munene Wamwati & Others -vs- Registered Trustees of the Anglican Church of Kenya & Another Civil Appeal No. 36 of 2015**. Disturbance of the entry and occupation is evident throughout the period that the parties have been engaged in the past litigation in the criminal case, the High Court, and the Court of Appeal.
- 228.** Acts of adverse possession include fencing off the land and the cultivation of the surface. See **Githu -vs- Ndeete** (*supra*). In the photographs before the court, there is no substantiation of the parcel numbers among the suit properties. The names of

the owners of the said structures were not tendered before the court. The schedule of the nature and particulars of the adverse acts by each of the **34** plaintiffs, composed of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, as well as the other over **350** plus alleged members of the Society, was not shared with the court.

**229.** Adverse possession succeeds when it is shown that the true owner neglected or omitted to make effective entry, assert his rights, interrupt possession, or stop the time from running by taking legal action to drive out the intruder for a period of **12** years. See **Andafu -vs- Akhulunya** (*supra*).

**230.** In **Kariuki -vs- Mica Civil Appeal No. 196 of 2018 [2015] KECA 31 [KLR] (17<sup>th</sup> January 2025) (Judgment)**, the court cited **Kimani Ruchine -vs- Swift Rutherford & Co. Ltd [1980] eKLR**, that the possession must be continuous, it must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration. In this suit, the SHG and the Society have admitted that they vacated the land severally during the alleged period since **1972**, until all of them vacated in **2016** after the alleged eviction.

**231.** Evidence of the construction of buildings or continuing occupation for **12** years has not been

substantiated, and also when the time for adversity started running for each of some or all the claimants. Unfortunately, was left for the court to establish, verify, and or speculate when the acts of adverse possession crystallized for each of the claimants. It was therefore not substantiated with cogent and tangible evidence.

**232.** When the permissive entry as former workers ceased to exist, for adverse possession to step in and continue for each of the claimants was not specifically pleaded and proved. In **Samuel Miki Waweru -vs- Jane Njeri Richu Civil Appeal No. 122 of 2001**, the court observed that a claim for adverse possession cannot succeed if the person asserting his claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease.

**233.** In the evidence tendered by the SHG and the Society, they also seem to rely on some alleged gifts or donations, a letter of offer, a letter of allotment, repayment of a loan, and the alleged issuance of provisional certificates of titles by the 6<sup>th</sup> and 7<sup>th</sup> defendants. Therefore, the SHG and the Society are at cross purposes on whether to follow the path of adverse possession or beneficial owners, or

purchasers for value, or allottees of the land by the government. The ingredients of adverse possession must be factually established through evidence. See **Mbui -vs- Maranya** (*supra*).

**234.** Forceful occupation cannot amount to adverse possession. See **Nakuru Industries Ltd -vs- S.S. Mehta & Sons [2016] eKLR**. In **Haro Yonda -vs- Sadaka Dzenzo Mbauro & Another [2014] eKLR**, the court was of the view that one cannot claim adverse possession and at the same time allege the land is ancestral, and that one cannot succeed in a claim of adverse possession before conceding that indeed the registered proprietor is the true owner of the said land.

**235.** In this suit, the SHG and the Society seem to have pleaded and testified that the titles held by the deceased were fraudulently obtained, since they are the ones who should be the real owners. Strangely, one of the reliefs sought by the Society is for mesne profits, cancellation of the title held by the 1<sup>st</sup> - 4<sup>th</sup> defendants, and for eviction of the true owner from the land.

**236.** In **Ravindranath Dahybai Bhagat -vs- Hamisi Harod & 5 others [2014] eKLR**, the court held that an adverse possessor is a squatter and he

has no right of his own. The court said that it cannot lie in the mouth of a claimant that the title held by the registered owner was fraudulently acquired and then claim the same land under adverse possession.

**237.** In **Njue -vs- Matiabe & Others [2023] KEELC 17361 [KLR]**, the court said that the moment the person claiming adverse possession contests and impugns the validity of the registered proprietor's title, the claim for adverse possession is defeated and thus becomes legally untenable. The court said that in such a situation, the claimant is at liberty to pursue a cause of action for fraud, or better still, trust, which causes of action are antithetical to and cannot co-exist with a claim of adverse possession.

**238.** Constructive trust is an equitable instrument that serves the purpose of preventing unjust enrichment. In **Shah & Others -vs- Mombasa Bricks & Tiles Ltd & 5 Others [2023] KESC 106[KLR] 28**, the court held that constructive trust can be applied in a land sale transaction to defeat a registered title or limit the right of a property holder, especially where a person takes advantage of his position as a trustee for his own benefit.

**239.** The court said that overriding interests, including trusts, can be invoked under **Articles 24**

and **40** of the Constitution and **Sections 24, 25, and 28** of the Land Registration Act. The court said that constructive trust could arise in a land sale agreement as an equitable remedy, as an intervention against unconscionable conduct whenever justice and good conscience required it.

**240.** In the 2<sup>nd</sup> suit, there is no evidence that the SHG asserted their entitlement to the land against any specific portions of the suit properties against the ADC soon after they were issued with the alleged letters of donation by the departing settler, and immediately before the deceased was offered the suit properties for sale, and soon after he took over.

**241.** The SHG relies on a letter from Lands Limited. The maker was not called to testify. Lands Limited was not sued for breach of the acknowledgement of the same. As much as the SHG sought a summons for evidence to be supplied by the ADC on the circumstances obtaining immediately before the settler and the sale and transfer of the land to the deceased. Such evidence was not tendered in line with the Law of Evidence Act.

**242.** There was no substantiation of the allegations by the SHG that the departing settler, Mr. George Nicholson, had allegedly surrendered to each of them

5 acres of land within the suit properties. Surrender of land is governed by **Section 44** of the Registration of Titles Act (repealed). An independent witness was not called to corroborate the SHG's alleged surrender of the suit properties by the settler to them, followed by an exclusive possession and use of any part of the suit properties for a period of **12** years. The time when adverse possession commenced and ended was not established.

- 243.** In *Mwinyi Hamisi Ali -vs- The Attorney General & Another [1997] KECA 210 (KLR)*, the court said that a surrender of land leased by the government must be registered as evidence of surrender. In *Chief Land Registrar & Others -vs- Nathan Tirop Koech & Others [2018] eKLR*, the court said that a surrender of a grant or instrument of title is not similar to compulsory acquisition.
- 244.** The *Black's Law Dictionary, 7<sup>th</sup> Edition, page 1458*, defines surrender as a return of an estate to the person who has a reversion or remainder. What the late George Nicholson agreed with the former farm workers in relation to the alleged donation of **5** acres each was to be established through evidence.
- 245.** **Section 97(1)** of the Evidence Act provides that when the terms of a contract or a grant or any

disposition of property have been reduced to the form of a document, no parole evidence to prove, except the document itself or secondary evidence of such content, is admissible.

**246.** The SHG pleaded and testified that they were each gifted **5** acres of the suit properties in **1972**. Gifts *inter vivos* in law are irrevocable so long as they are completed. There must be a clear intention to gift, delivery of the gift, and acceptance by the recipient. In *Halsbury's Laws of England 4<sup>th</sup> Edition, Vol 20(1) para 67*, it is stated that where a gift vests merely on promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect and the court will not compel an intending donor or those claiming under him to complete and perfect it, except in circumstances where the donor's conduct give the donee a right to enforce the promise.

**247.** In **Re Estate of the late Gedion Manthi Nzioka (deceased) [2015] eKLR**, the court observed that the law requires that gifts may be granted by deed, an instrument in writing, or by delivery by way of a declaration of trust by the donor or by way of presumption of trust.

**248.** Other than the unverified letters from the settler, the SHG failed to produce a registered

transfer or a declaration of trust in writing perfecting the donation. The letters produced, allegedly written by George Nicholson, were not authenticated, certified, or produced by the maker(s). Evidence that they were received by both the ADC and the lands registry is missing. Above all, the letters and the acknowledgement by Lands Limited were not accompanied by a registered transfer or instrument. The parcel number, its locality, and features forming part of the gift were not included in the letters regarding the suit land in issue.

**249.** More importantly, there was no corresponding admission or acknowledgement of the existence of the surrendered land parcels or portions to the former alleged **76** farm workers or any of the SHG's **34** members, witnessed between the departing settler on one hand and the ADC, who were the incoming new owners of the land.

**250.** There is no evidence tendered by the **34** members of the SHG that they insisted to the departing settler that there be a public disclosure, or admission of the rights of the former farmer workers and the registration of the same against the title registers as an assurance or guarantee to remain, occupy, and use the **5** acres of land each as if the

suit properties were theirs, to the exclusion of the incoming new owner(s) of the land.

**251.** The SHG and the Society's claim is anchored on both adverse possession and constructive trust, given that the Society members are apparently also the members of the SHG. On the one hand, the SHG and the Society are alleging rights accruing as former employees who had been promised or gifted portions of the suit land by the former employer or the land owner, who had made contributions towards the purchase of the suit properties through the deceased, and who were allegedly defrauded by him, and further, who, through the Society repaid a loan and allegedly obtained provisional certificate of lease from the land registrar were promised ownership of the land.

**252.** Evidence of employment by the settler has not been tendered. Employment records, which were handed over to the ADC as a means of recognizing the *bona fide* of the SHG or the Society's claim is not before the court. Evidence of the terms of deductions or of employment or individual contributions to acquire the suit premises is not before the court. Evidence of any payment of some consideration to perfect the gift or donation, and or to acquire interest

or rights to the land, either through the deceased, the ADC, or the AFC, in repayment of a loan has not been availed, substantiated, or tendered in line with the Law of Evidence Act.

**253.** The letters produced through the Society bear footprints of Pembeni Farmers or the SHG alleging purchasers or beneficial rights or interests since **1972**. That evidence alone discounts the SHG assertions based on adverse possession, as the two claims of adverse possession rights are inconsistent and mutually exclusive in law.

**254.** Coming to who between the Society and the estate of the deceased has a better title to the suit properties, when there are two competing titles on one parcel of land, each party has the burden to prove that the paper trail he or she used to acquire the instruments of title was legal, formal, regular, and procedural. The Society claims that the titles to the suit properties held by the deceased's estate were subject to trust for its members out of the alleged monetary contribution that they had made, and gave to the deceased to jointly purchase the suit properties in **1972**, which facts were acknowledged in the letter dated **29/9/1972**, the land control board consent dated **6/5/1972**, letter of offer dated

**21/11/1992** as Pembeni Farm squatters, and the labour officer letter dated **11/2/1986**.

**255.** The Society relies on the said letters and other correspondence in its list of documents from the Ministry of Lands, memoranda of registration dated **9/10/1997, P. Exhibit. No. 59**, development permission, provisional certificate for I.R No. **1299**. Though the said exhibits emanate mostly from government departments, the Society did not find it necessary to call their makers, especially after the 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants in their statement of defence threw the Society under the bus and denied the existence of any conversion of titles and the issuance of any other rival titles to the suit properties, following the alleged surrender and conversion of the existing titles in favour of the Society.

**256.** The 1<sup>st</sup> - 4<sup>th</sup> defendants, to impeach the root of title of the Society, tendered evidence that the deceased followed the law as to the sale, transfer, and registration of the suit land, under his name. The Society did not challenge through rival superior documents the legality of the titles held by the estate of the deceased.

**257.** The evidence tendered by the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants on the root of their title to the suit land has not been shown to suffer from any legality, procedural aspects, fraud, or imperfection. See **Vijay Morjaria -vs- Nansingh Madhusingh Darbar [2000] eKLR**, and **Arthi Highways Developers Limited -vs- West End Butchery Limited and Others (2015) eKLR**. The law is that there can be no two titles for the same parcel of land. The Society did not specifically plead particulars of illegality, fraud, or misrepresentation. Similarly, the Society did not tender credible evidence to impeach the titles held by the deceased's estate tendered to the required standards as per **Arthi Highways Developers Limited -vs- West End Butchery Limited** (*supra*). For instance, evidence of conversion under the law was not tendered. Compliance with **Sections 6, 7, 8, and 14** of the Land Registration Act was not proved by the Society. Replacement of a lost title through gazettelement is not similar to the conversion of the title.

**258.** The Society instead invokes the doctrine of constructive trust, that there was unjust enrichment or taking advantage of their situation by the deceased. Evidence that the SHG and the Society

contributed in any way to the purchase of the suit properties directly or indirectly through the deceased is missing.

**259.** Evidence that the Society members contributed or paid **Kshs.508,000/=** or **Kshs. 3,500,000/=** to the AFC to acquire the suit properties or to repay a loan in an auction is missing. Disbursements of and receipts of those monies to the deceased, the auction, or the chargor are missing. The alleged contribution and the repayment of the contributions to the loan were not reported to the police and the land office for fraud investigation before **2013**, or thereafter.

**260.** In **Twalib Hatayan & Another -vs- Said Saggar** (*supra*), constructive trust was defined as an equitable remedy imposed by the court against one who has, *inter alia*, acquired property through wrongdoing, where the intention of the parties cannot be ascertained, and where a person already in a trust relationship takes advantage of his position for his own benefit. It also arises where a legal owner conducts himself in a manner to deny the other party a beneficial interest in the property acquired.

- 261.** Have the SHG and the Society proved overriding interests? First and foremost, the SHG and the Society are contradicting themselves. The two groups are unable to agree on who the bona fide members are, who form part of the former employees/farm workers, and who are not. PW 1, 2, 3, and 4 allege that the other team does not deserve to be the claimants on the suit properties.
- 262.** All witnesses of the SHG and the Society are unable to demonstrate if and when they made entry into the suit properties. Evidence of who contributed what towards the purchase is not before the court, verified by tangible records of membership and the contribution of either the Society or the SHG. This is where the capacity to sue, plead, and swear by the *bona fide* officials of the SHG and the Society comes in.
- 263.** The mandate to collect funds and to deal with the suit properties and to demonstrate to the court who is a genuine claimant in the two suits, as per the official records held by its committee and the annual returns on membership since registration of the two groups, is key. The chairman of the SHG and the Society acts as part of a management committee on behalf of the *bona fide* registered members.

- 264.** A certified register of members by the Registrar of the Co-operative Societies is not before the court. No wonder the two groups are unable to establish and verify who the genuine members of SHG and the Society are in the absence of share certificates and the official registers and or annual returns.
- 265.** The mode and the nature of developments on the suit properties, sizes, localities, boundaries, and distinct features of occupation, use, and possession for each of the claimants have not been specifically pleaded in the body of the respective plaints.
- 266.** Equally, there are no individual witness statements for each of the members of the SHG and the Society, supporting documents, documentary evidence of occupation, use, contribution, development, and possession of each of the **5** acres of land, in either of the two parcels of land forming the subject suit property. See **Njami -vs- Njami Civil Appeal No. 34 of 2018 [2025] KECA 492 [KLR]**, and **Diasproperty Limited & another -vs- Githae & 8 others [2025] KESC 19 (KLR)**.

**(L) RELIEFS SOUGHT**

- 267.** In the 1<sup>st</sup> Suit, the court is asked by the Society to issue eviction orders and grant it *mesne* profits for

the illegal occupation of the suit properties by the estate of the deceased.

- 268.** In the 2<sup>nd</sup> Suit, the court is asked to declare Pembeni Squatters as entitled to adverse possession of the suit properties.
- 269.** In the 3<sup>rd</sup> Suit, the estate of the deceased seeks a declaration of ownership of the suit properties, that they are the only *bona fide* holders of titles to the land, and that any alleged titles to the suit properties held by the Society are forgeries.
- 270.** As a starting point, a party has to advance evidence to sustain a claim. From the exhibits, **P. Exhibit No. (16)** showing the Society was incorporated on **11/12/1986** under Cap **490. P. Exhibit Nos. 56, 51, 57, 53, 52, 50, 54, 55, 61, 62, 63(a), (b) -(f),** and **67** not authenticated or produced by their makers.
- 271.** The Land Registrar Kitale, in her testimony, denied knowledge of the existence of the title deeds or documents in possession of the Society to entitle them to claim ownership of the suit properties as opposed to the estate of the deceased. A party who wishes the court to find in his favour as to the right or liabilities concerning ownership of land has to show that the acquisition of title instruments was legal,

formal, regular, procedural, and free of any encumbrances, including those not recorded in the register.

**272.** From the documents produced by the estate of the deceased, as **P. Exhibit No. (74)**, there was a finding of the court that officials of the Society were holding forged documents of ownership. It is the same documents that the Society relies upon and wants the court to find that they entitle the Society to ownership of the suit land to the exclusion of the estate of the deceased and to grant eviction orders. When two titles are alleged to be in existence over the same land, the court has to follow the root of title and establish which one is valid or not, for no one parcel of land can have two title deeds.

**273.** The paper trail of the estate of the deceased has been established and verified by the Land Registrar, as opposed to what the Society holds. The findings in the criminal trial have not been set aside or vacated by the High Court.

**274.** A court of law cannot be used to enforce an illegality or be used as an instrument of illegality. The burden was on the SHG and the Society to impeach the titles to the suit properties held by the estate of the deceased, as under the provisions of **Sections**

**24, 25, and 26** of the Land Registration Act, and **Section 38** of the Limitation of Actions Act, to justify why the court should exercise its powers under **Sections 79 and 80** of the Land Registration Act to invalidate the same. Equally, the burden was on the Society to bring evidence from whoever issued it with instruments of ownership for the suit properties as pleaded in the amended plaint, in **1987** or **1999**.

**275.** The Land Registrar, in its statement of defence, was categorical that the process of surrender of titles for conversion in respect to the suit properties had not taken place, was abandoned, and that the estate of the deceased had not invoked the law to set in motion any such conversion of the titles herein.

**276.** The estate of the deceased has confirmed, testified, and submitted that the process of surrender and conversion as set out in the law has not been invoked at all, and therefore the alleged titles in favour of the Society must be as a result of an illegal process, calling for invalidation by this court.

**277.** Despite the clear pleadings and evidence to show that there was no surrender or conversion of the titles and the evidence of the Land Registrar, the Society failed to rebut those assertions or evidence by calling the makers or issuers of its title documents

to prove otherwise. The Society failed to list as witnesses the officers of the line ministries who facilitated the issuance of the amended RIM, Land Control Board consent, memorandum of sale, certificate of title(s), and or received monies from the Society to issue a discharge of charge and subsequently issue it with ownership documents.

**278.** A court of law does not act on speculations or suppositions. It acts on raw evidence of the existence of facts in issue and relevant facts in issue. It is either that the Society is a *bona fide* registered holder of titles to the suit properties or not. The only way to establish that was by calling the makers of the title documents and availing the registers for the titles as evidence that Title No. **Block 12** Cherangani exists in the eyes of the Land Registry Kitale.

**279.** The amended RIM that they used to generate the Society's provisional titles was not available in court. Evidence that the Society paid statutory fees for stamp duty, mutation, subdivision, and registration to acquire the certificates of ownership is missing.

**280.** Evidence that the titles held by the estate of the deceased are forged or overtaken by events, and or were invalidated to pave the way for the Society's

title suit is missing. A party that knows of the existence of a title deed for a particular parcel of land, such as the Society and the SHG lodging a caveat, cannot be heard under the doctrine of estoppel to deny the existence of those facts and to plead that it instead holds a superior title to the suit land.

**281.** In the Court of Appeal and in the previous suits, the Society had not disclosed the consideration that it had paid for the suit land. In the amended plaint, the Society, as the plaintiff, is seeking *mesne* profits from **1990**. In the certificate of registration as a Society, the document shows that the Society was registered in **1986**. The question then is, would the Society have been in existence in **1972** to stake a claim on the suit properties if the registration certificate record shows that it had not been legally born?

**282.** An absolute proprietor of land is entitled to ownership rights to the exclusion of others. In this matter, a party that has no superior rights, such as the Society and the plaintiffs in the 1<sup>st</sup> suit and the plaintiff in the counterclaim, under the circumstances, cannot deserve the relief sought for *mesne* profits and eviction.

- 283.** *Mesne* profits refer to a claim for damages for trespass. In **Rajan Shah T/A Rajan Shah & Partners -vs- Bipin P. Shah [2016] eKLR**, Mativo J, as he then was, said that *mesne* profits relate to damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The court said that wrongful possession is the very essence of a claim for *mesne* profits and the very foundation of the unlawful possessor's liability.
- 284.** Regarding eviction, in **Mitu Bell Welfare Society -vs- The Kenya Airports Authority & Others Petition No. 3 of 2018**, the court observed that actions by state organs carried out in flagrant disregard of court orders do undermine Kenya's constitutional order, more so if they result in the violation of citizens' rights. The court said that the right to housing in its base form need not be predicated upon "title to land", and that courts are there to ensure that such protection of the right to housing is realised.
- 285.** In **Julius L. Marten -vs- Caleb Arap Rotich [2021] eKLR**, the court observed that any eviction has far-reaching implications as it entails the forceful removal of a party from land he has been in possession or occupation of.

**(M) FINAL ORDERS**

**286.** In the circumstances and for clarity, the court grants the following orders:

**(1) The suits by the SHG and the Society are hereby dismissed with costs.**

**(2) The prayers in the 3<sup>rd</sup> Suit are granted in terms of:**

**(a) Cancellation and or revocation of title to Cherangani/Nzoia Block 12 and Moi's Bridge/Moi's Bridge Block 12.**

**(b) Nullification of the parcellation of L.R. No. 2187 and L.R. No. 8915.**

**(c) Declaration that the titles in the name of Simon Kiptum Arap Choge are the only genuine and lawful titles to the suit properties.**

**(d) Permanent injunction against the defendants not to in any way interfere with Title Nos. L.R. No. 2187 and L.R. No. 8915.**

**(3) Costs in the consolidated suit to the plaintiffs in the 3<sup>rd</sup> Suit.**

**287.** Orders accordingly.

**Judgment dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 11<sup>th</sup> day of February 2026.**

**In the presence of:**

Court Assistant - Dennis

Mr. Wanyonyi and Kraido for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs in ELC No. 52 of 2011.

Mr. Murage for the 3<sup>rd</sup> plaintiff and the plaintiff in Kakamega ELC No. 95 of 1994, later Kitale ELC No. 52 of 2011, and also for the defendants in Eldoret ELC No. 306 of 2016, later Kitale ELC No. 57 of 2020.

Mr. Kiprotich for the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants in the consolidated case and the plaintiffs in the Eldoret ELC No. 306 of 2016 and the defendants.

No appearance for the 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> defendants.

A handwritten signature in blue ink, appearing to read 'Wanyonyi', is written over a large, light grey watermark that says 'ORIGINAL' diagonally across the page.

**HON. C.K. NZILI  
JUDGE, ELC KITALE.**