

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 18 OF 2015

EUNICE CHEPKOROS SOI.....1ST PLAINTIFF
EMILY CHEPTONUI NGETICH.....2ND PLAINTIFF
EDINA CHEPNGENO BII.....3RD PLAINTIFF

VERSUS

BOMET WATER AND SANITATION COMPANY LIMITED.....1ST
DEFENDANT

LAKE VICTORIA SOUTH WATER SERVICES BOARD.....2ND
DEFENDANT

MINISTRY OF WATER AND IRRIGATION.....3RD
DEFENDANT

BOMET COUNTY GOVERNMENT.....4TH
DEFENDANT

JUDGEMENT.

INTRODUCTION.

1. The Plaintiff commenced the present proceedings vide the
Plaint dated 17th April, 2015 which Plaintiff was amended on
11th March, 2019.

2. In the Amended Complaint, the Plaintiffs aver that they are the administrators and beneficiaries of the estate of **Kiplangat A. Soi** (deceased).
3. The Plaintiffs also aver that the 2nd and 3rd Plaintiffs are the registered proprietors of land parcel No. **Kericho/Mogogosiek/527** which parcel of land they hold in trust for the other beneficiaries of the estate of **Kiplangat A. Soi** (deceased).
4. The Plaintiffs further aver that on or about the year 1978, the Defendants trespassed onto the suit parcel of land, demolished their homestead and constructed various structures for water collection, treatment and supply.
5. It is the Plaintiffs averment that the water was supplied to various parts of Bomet County.

6. It is also the Plaintiffs averment that at the time of trespass, they were minors and their mother **Rucy Soi** (deceased) was ailing.
7. It is further their averment that the 2nd and 3rd Defendants are regulatory agencies of the 1st Defendant and they are therefore vicariously liable for the 1st Defendant's acts of omission and commission.
8. The Plaintiffs aver that as a result of the Defendants actions, they were left with a very small portion of the suit parcel of land which they occupy.
9. The Plaintiffs also aver that they never sold the suit parcel of land and neither did they receive any consideration from the Defendants.

10. The Plaintiffs further aver that the Defendants acts of trespass have led to immense loss and damage to the estate of the late **Kiplangat A. Soi**.

11. It is the Plaintiffs averment that they are unable to fence, occupy and use the suit parcel of land because of the Defendants actions of trespass.

12. It is also the Plaintiffs averment that the Defendants continue to waste the suit parcel of land to their detriment.

13. The Plaintiffs pray for judgement against the Defendants for;

a. An order compelling the Defendants whether by themselves, their agents, employees, servants and/or any other person whosoever to forthwith vacate the suit parcel of land known as Kericho/Mogogosiek/527 in Kericho in default eviction to issue.

b. Mesne profits the exact amount to be assessed by the Honourable Court.

- c. A permanent injunction restraining the Defendants, their agents, employees, servants and/or any other person from trespassing, entering, or in any manner dealing with that parcel of land known as Kericho/Mogogogiek/527.***
- d. Any other relief that the Honorable Court may deem just and fit to grant.***
- e. Interest on mesne profits, B above.***
- f. Costs of the suit be awarded to the Plaintiffs.***

14. The 1st Defendant filed a Statement of Defence dated 15th June, 2015. The Statement of Defence was amended and further amended on 25th April, 2019.

15. The 1st Defendant states that Letters of Administration *Ad Litem* with regard to the estate of the deceased were only issued to the 1st Plaintiff.

16. The 1st Defendant also states that the National Government acquired a portion of land parcel No.

Kericho/Mogogosiek/527 in the year 1978 for purposes of developing a water treatment facility under the Litein Water Supply Project.

- 17.** The 1st Defendant further states that the Lake Victoria South Water Services Board managed the treatment facility from the year 2004 until September, 2014.
- 18.** The 1st Defendant states that it took over the management of the treatment facility on 1st September, 2014 from the Lake Victoria South Water Services Board vide a deed of handover dated the same date.
- 19.** The 1st Defendant also states that the Plaintiff's suit is statute barred as the cause of action arose in the year 1978.
- 20.** The 1st Defendant denies the averments in the Plaint and urges the Court to dismiss the Plaintiffs suit with costs.

- 21.** The 2nd Defendant filed a Statement of Defence dated 30th January, 2023.
- 22.** The 2nd Defendant denies the averments in the Plaint and states that it was established in the year 2004.
- 23.** The 2nd Defendant also states that the allegations that it trespassed onto the suit parcel of land in the year 1978 are non-factual, misconceived and without any legal basis.
- 24.** The 2nd Defendant further states that its statutory mandate under the Water Act, 2002 (Repealed) and the Water Act, 2016 does not include regulation of the 1st and 4th Defendants or any water sector institution.
- 25.** The 2nd Defendant states that the present suit is an orchestrated scheme by the Plaintiffs to illegally benefit from tax payers money through unsubstantiated claims for compensation.

- 26.** The 2nd Defendant denies the other averments in the Plaint and urges the Court to dismiss the Plaintiffs suit with costs.
- 27.** The 4th Defendant filed a Statement of Defence dated 5th April, 2019.
- 28.** The 4th Defendant states that it was only the 1st Plaintiff who was issued with Letters of Administration Ad Litem to sue on behalf of the estate of the deceased.
- 29.** The 4th Defendant also states that the 2nd and 3rd Plaintiffs do not therefore have the *locus standi* to commence the present proceedings.
- 30.** The 4th Defendant denies the averments in the Plaint and states that the Plaintiffs have transferred the suit parcel of land to their names without getting a full grant of letters of administration.

- 31.** The 4th Defendant also states that the title documents in the name of **Kiplangat A. Soi** (deceased) are not authentic.
- 32.** The 4th Defendant further states that **Kiplangat A. Soi** (deceased) died in the year 1968 and yet it is alleged that the suit parcel of land was registered in his name in the year 1974 which was seven years after he died.
- 33.** The 4th Defendant states that the suit parcel of land is public land and the Plaintiffs claim is without any legal justification.
- 34.** The 4th Defendant also states that the land where the Itare Water Treatment Project is constructed does not belong to the estate of **Kiplangat A. Soi** (deceased).
- 35.** The 4th Defendant further states that the construction of the water harvesting plant was for public use and therefore private interests cannot override public interest.

- 36.** The 4th Defendant states that the present suit is statute barred as the cause of action arose in the year 1978.
- 37.** The 4th Defendant also states that the present suit was filed on 23rd April, 2015 after a period of over thirty years had lapsed.
- 38.** The 4th Defendant further states that the Plaintiffs claim for mesne profits is extinguished as per **Section 8** of the Limitation of **Actions Act**.
- 39.** The 4th Defendant states that the Plaintiffs suit is premature as they ought to have first approached the National Land Commission as provided for under **Article 67(2)(e)** of the Constitution of Kenya.
- 40.** The 4th Defendant also states that the functions of the National Land Commission are provided for under **Section 5** of the **National Land Commission Act**.

- 41.** The 4th Defendant further states that the Plaintiffs suit is vexatious as the Plaintiffs failed to follow the statutory framework for a claim of compensation as provided for under **Article 67** of the Constitution and Part VII of the Land Act.
- 42.** The 4th Defendant urges the Court to dismiss the Plaintiffs suit with costs.
- 43.** The 3rd defendant did not enter appearance and neither did it file a Statement of Defence.

PLAINTIFFS EVIDENCE.

- 44. Edna Chepngeno Ngetich** testified as **PW1**. It was her evidence that their deceased father one **Kiplangat Soi** was the registered owner of land parcel No. Kericho/Mogogosiek/527 which measures 3 acres.

- 45.** It was also her evidence that they filed Kericho CM Succession Cause No. 72 of 2016 and were issued with Letters of Administration on 1st March, 2017.
- 46.** It was further her evidence they filed the present suit against the Defendants herein after the 1st Defendant took possession of a portion of the suit parcel of land in the year 1979 without their consent.
- 47.** She testified that the 1st Defendant pumps water for sale from the suit parcel of land.
- 48.** She also testified that the suit parcel of land did not belong to the 1st Defendant.
- 49.** She further testified that the 1st Defendant went to the land, surveyed it and started constructing buildings on it.

- 50.** It was her evidence that at the time the 1st Defendant trespassed onto the suit parcel of land, their father had died but their mother was still alive.
- 51.** It was also her evidence that after they were issued with Letters of Administration, they transferred the suit parcel of land to their names and were issued with a title deed on 14th March, 2017.
- 52.** It was further her evidence that they conducted a search and obtained a certified copy of the green card of the suit parcel of land on 10th March, 2023 and that it shows that the land is registered in their names.
- 53.** She testified that in the Plaint they seek compensation orders against the 1st Defendant who has used their parcel of land for a period of over forty-three years.

54. She further testified that they also seek an eviction order against the 1st Defendant together with costs of the suit.

55. PW1 then produced the following documents;

a. A copy of the grant issued on 1st March, 2017 as Exhibit P1.

b. A copy of the title deed for land parcel No. Kericho/Mogogosiek/527 as Exhibit P2. (The Court had opportunity to compare the copy of the title with the original.)

c. A copy of the Certificate of Official Search for land parcel No. Kericho/Mogogosiek/527 dated 10th March, 2017 as Exhibit P3.

d. A certified copy of the green card for land parcel No. Kericho/Mogogosiek/527 as Exhibit P4.

56. It was **PW1**'s evidence that the 1st Defendant did not purchase the suit parcel of land and that the 1st Defendant's

agents went to the suit parcel of land, demolished the house they were living in and started constructing buildings thereon.

57. It was also her evidence that after their home was demolished, they went to live with their uncle before moving to a posho mill that had been abandoned.

58. Upon cross examination by Counsel for the 1st and 4th Defendants, **PW1** reiterated that her name is **Edna Chepngeno Bii** and upon request, she showed her Identity Card to Counsel.

59. She confirmed that she is fifty-three years old and further confirmed that in the year 1978, she was ten years old.

60. She admitted that their father died on 28th July, 1968 and stated that before her father died, the suit parcel of land was registered in his name and he had the title deed.

- 61.** She, however, stated that she did not know when her father was issued with the said title deed.
- 62.** When referred to the Certified Copy of the Green card that she produced as **Exhibit P4, PW1** confirmed that her father was registered as the owner in the year 1975.
- 63.** **PW1** clarified that before the year 2017, they did not have any title deed but they knew the parcel number of the suit property.
- 64.** She reiterated that the 1st Defendant took possession of a portion of the suit parcel of land between the year 1978 to 1979.
- 65.** She admitted that she did not know the identity of the 1st Defendant but stated that its agents went to the suit parcel of land, surveyed it and started constructing buildings on it.

- 66.** She confirmed that a road was constructed on the suit parcel of land.
- 67.** She further confirmed that water tanks, houses for pumping water and a fence were constructed on the suit parcel of land between the year 1980 to 1981.
- 68.** She reiterated that the 1st Defendant was still in possession of the suit parcel of land.
- 69.** She explained that the river does not pass through the land but water from the said river is pumped from the river to the water tanks that have built on the suit parcel of land.
- 70.** She confirmed that the distance from the river to the water tank is about 100 meters.

- 71.** She also confirmed that there is a swamp between the river and the suit parcel of land and confirmed that there are houses constructed thereon.
- 72. PW1** further confirmed that there was no fence between their land and the land that the 1st Defendant was in occupation of. She later clarified that a fence and/or boundary was constructed by the 1st Defendant between the years 1980 and 1981 that separated their land and the land the 1st Defendant was in occupation of.
- 73.** She also stated that the 1st Defendant took a portion of their land and a portion of their neighbor's land and combined two parcels of land before constructing the Water Treatment Plant.
- 74.** She further stated that at that time, they were not going to school as they had suffered and lived in an abandoned posho

mill and narrated how a hospital van picked them from the abandoned posho mill and took them to hospital.

- 75. PW1** stated that previously, the 1st Defendant was known as Sekem before it became Bomet Water Company.
- 76.** She also stated that since the 1st Defendant took their land, it did not move the boundary or try to chase them away from where they moved to.
- 77.** She confirmed that the 1st Defendant did not ask for extra land and neither did it carry out any extra works on the suit parcel of land.
- 78.** She also confirmed that the 1st Defendant did not disturb them again after it took possession of a portion of the suit parcel of land.

79. She reiterated that land parcel No. **Kericho/Mogogogiek/527** is registered in the name of **Ednah Chepngeno Bii** and **Emily Cheptonui** who are the late **Soi**'s children.

80. She admitted that **Eunice, Hellen** and **Joyce** are her sisters and added that **Eunice** was unwell.

81. PW1 explained that the instant suit was instituted against the County Government of Bomet because it took their land in the year 1978.

82. She stated that in the year 1978, the National Government through the Ministry of Water took possession of their land and constructed a water Plant.

83. Upon further cross examination by Counsel for the 2nd Defendant, she admitted that she did not know the 2nd Defendant.

- 84.** She also admitted that she did not know the 3rd Defendant.
- 85.** She confirmed that she only sued the 1st Defendant and denied suing the 2nd Defendant.
- 86.** She reiterated that their father died in the year 1968 and that a title deed was issued in his name in the year 2017 before they were registered as the owners of the suit parcel of land.
- 87.** She admitted that she could not remember when the land was registered in the name of their father.
- 88.** She stated that their mother who died in the year 2009 told them that their land was “*grabbed*”.
- 89.** She also stated that after the 1st Defendant took their land, their mother fell ill and developed mental health challenges.

- 90.** She further stated that their mother fell in between the year 1979 to 1980.
- 91.** She confirmed that their deceased mother reported the issue to their area Chief one **Kipkemoi Arap Sang** who asked her to give him time to address the issue but did not take any action.
- 92.** She reiterated that the National Government constructed water structures on the suit parcel of land in the year 1978 after surveying it.
- 93.** She also reiterated that they completed construction between the year 1980 to 1981.
- 94.** She confirmed that the instant suit was instituted against the persons who were in occupation of the suit parcel of land.

- 95.** Upon re-examination, she stated that she did not know the people who constructed the water tanks on their parcel of land as they did not introduce themselves.
- 96.** She also stated that the persons who did the construction were employees and added that they have pumped water from the suit parcel of land since the year 1981.
- 97. Joyce Chepkemai Ronoh** testified as **PW2**. It was her evidence that they were in Court because the suit parcel of land was forcefully taken from them.
- 98.** It was also her evidence that the said parcel of land was parcel No. **7** and it belonged to their father one **Kiplangat Arap Soi** who died in the year 1968.
- 99.** It was further her evidence that **Eunice, Emily** and **Edna** are her sisters and they were the ones who instituted the present suit.

100. She testified that her sisters sued the institutions that took their land.

101. She also testified that she did not know the identities of the persons who took their land.

102. She further testified that the suit parcel of land measures around 5 acres and that they only occupy a small portion of it which measures 0.2 acres.

103. It was her evidence that they were in occupation of a small portion of the suit parcel of land which was the portion that remained after the rest of the suit parcel of land was “grabbed” by a water company.

104. It was also her evidence that their land was taken in the year 1978 when she was about ten years old.

105. It was further her evidence that the house which their father had constructed was demolished and they went to live with their neighbor.

106. She testified that their mother became ill and she went to her home to get treatment while persons from Kapkatet Hospital took her and her younger siblings.

107. She also testified that the persons who took their land fenced it off and started selling water.

108. She further testified that sometimes the said persons also plough the suit parcel of land and added that where they were born and raised on it.

109. It was her evidence that they were not asked to vacate the suit parcel of land.

110. It was also her evidence that the 2nd and 3rd Plaintiffs were given Letters of Administration for the estate of their deceased father.

111. It was further her evidence that at the time the suit parcel of land was forcefully taken from them, their father was already dead and the Defendants cannot therefore claim that they purchased the land from him.

112. She testified that their mother was mentally challenged and was not compensated after the suit parcel of land was forcefully taken from them.

113. She also testified that the persons who forcefully took the suit parcel of land should be ordered to vacate.

114. Upon cross-examination by Counsel for the 1st and 4th Defendants, she confirmed that she was older than the 3rd Plaintiff and explained that they were not twins.

115. She confirmed that in the year 1978 she was young and admitted that she was not sure of her age but knows what happened.

116. She reiterated that in the year 1978, persons went to the suit parcel of land, fenced it off, constructed buildings and started pumping water.

117. She stated that thereafter, a certain lady took her to help her raise her child. She admitted that she could not remember the year.

118. She admitted that the suit parcel of land was fenced and stated that the Defendants moved into the suit parcel of land which they also plough.

119. She admitted that there was a road that led to the suit parcel of land and confirmed that the initial fence constructed in the year 1978 was still in place.

120. She also admitted that she was not aware of any complaint filed by her parents in the year 1978.

121. She confirmed that she was married and stated that the suit parcel of land should be given to her siblings who remained at home.

122. She also confirmed that in the year 2017, the suit parcel of land was transferred to the 2nd and 3rd Plaintiffs.

123. Joseph Kipsang Keses testified as **PW3**. It was his evidence that he was called by **Kipkemoi Sang**, the then Paramount Chief Kono Location who told him that the Plaintiffs, who were still children, had no parents, no food and were abandoned.

124. It was also his evidence that at that time he worked for the Ministry of Health.

125. It was further his evidence that he found the Plaintiffs at a posho mill. He testified that the Plaintiffs were malnourished and had Marasmus.

126. He also testified that the Chief told him that the children had come from a neighboring village and he then took them to the hospital.

127. He further testified that after the Plaintiffs got better and returned to their home by themselves.

128. It was his evidence that he did not follow up on their welfare.

129. The Defendants gave up their right to cross-examine **PW2** and the Plaintiffs case was then closed.

THE 1ST AND 4TH DEFENDANTS EVIDENCE.

130. Ruto Fredrick testified as **DW1**. He stated that he lives in Metibsoo Village in Chepalungu Sub County and works for the 1st Defendant.

131. He also stated that he filed a witness statement and prayed that the same be adopted as part of his evidence-in-chief, which prayer the court acceded to.

132. It was his evidence that he was the 1st Defendant's Managing Director.

133. It was also his evidence that the 1st Defendant supplies water and sanitation services in Bomet County.

134. It was further his evidence that the 1st Defendant is owned by the Bomet County Government and he had in Court its Certificate of Registration dated 18th June, 2013. He

produced a Copy of the said Certificate of Registration as **Exhibit D1.**

135. He testified that the 1st Defendant gets water from Itare River within Konoin Sub-County.

136. He also testified that the 1st Defendant's facility was built by the National Government in the year 1978.

137. He further testified that in the year 2014, the 2nd Defendant gave the 1st Defendant the facility to run.

138. It was his evidence that the 2nd Defendant gave the 1st Defendant the building which it (the 1st Defendant) uses to purify the water and added the 2nd Defendant did not however transfer the land.

139. It was also his evidence that the treatment plant is fenced, has stores, tanks, workers houses and a pump house.

140. It was further his evidence that the treatment plant has a road and three entrances.

141. He testified that the road surrounds the Plant on the lower side while on the upper side, the land is fenced.

142. He produced a copy of the transfer of deeds as **Exhibit D2**.

143. He reiterated that the 2nd Defendant gave them the land in the year 2014 and added that the 1st Defendant did not trespass, build or take anybody's land.

144. He testified that the 1st Defendant did not change the boundary and neither did it add or sell any portion of the suit parcel of land.

145. He also testified that they conducted a search and were given a green card for land parcel No. **Kericho/Mogogogiek/527.**

146. He also testified that the green card shows that the suit parcel of land was registered in the name of **Kiplangat Arap Soi** (deceased) in the year 1975 and it measures 4.2 Ha.

147. He further testified that in the year 1996, land parcel No. **Kericho/Mogogogiek/1406** was registered in the name of **Esther Chepkorir Soi.**

148. It was his evidence that in the year 2017, the suit parcel of land was transferred to **Emily Cheptanui Ngetich** and **Edna Chepngeno Bii.**

149. It was also evidence that the transfer was done on 14th March, 2017 from **Kiplangat A. Soi** (deceased).

150.It was further his evidence that **Kiplangat A. Soi** (deceased) signed the green card on 12th May, 1975 while **Esther Soi** signed it on 22nd January, 1996.

151.He testified that the green card had the 2nd and 3rd Plaintiffs signatures. A copy of the green card for land parcel No. **Kericho/Mogogogiek/527** was produced as **Exhibit D3** while the green card for land parcel No. Kericho/Mogogogiek/1406 was produced as **Exhibit D4**.

152.He also testified that he was present in Court when the Plaintiff gave evidence.

153.He further testified that the Plaintiff produced a Copy of Letters of Administration which stated that **Kiplangat Soi** died on 28th July, 1968.

154.It was his evidence that according to the green card, **Kiplangat Soi** was issued with the title deed of the suit

parcel of land in the year 1975 and he signed for it and yet at that time he was deceased.

155. It was also his evidence that the 1st Defendant was not obligated to pay compensation to the Plaintiffs as it took over the facility from the National Government.

156. He reiterated that at the time the 1st Defendant was taking over the facility, it was already fenced and buildings constructed.

157. He also reiterated that the suit parcel of land was yet to be transferred to the 1st Defendant.

158. Upon cross examination by Counsel for the Plaintiffs, **DW1** confirmed that as per the Certificate of Registration produced as **Exhibit D1**, the proprietor of the 1st Defendant was the County Government of Bomet.

159. He also confirmed that the 1st Defendant has a Board of Directors and the County Government of Bomet is one of the shareholders.

160. He admitted that the Department of Water has one share, the Department of Finance has one share while the Office of the County Secretary has one share.

161. He also admitted that the rest of the shares are held by the County Government of Bomet on behalf of the residents of Bomet County.

162. DW1 was referred to the letter attached to the Certificate of Registration that was produced as **Exhibit D1** and he admitted that the said letter was from the Registrar of Companies and it was dated 30th December, 2014.

163. He read the letter and explained that it was addressed to the Directors of the 1st Defendant. He went on to explain that

according to the letter, the 1st Defendant has four directors with each director having one share.

164. He confirmed that Bomet Water Company (sic) was not listed as one of the Directors and instead, the persons who were listed as Directors were persons in charge of the water department.

165. He also confirmed that he had no letters to confirm that the persons listed therein were Directors of the 1st Defendant and further admitted that his name was not in the said letter.

166. When referred to green card which was produced as **Exhibit D4. DW1** admitted that it was for land parcel No. **Kericho/Mogogogiek/1406** and added that the person in charge of land was in a better position to explain matters pertaining to the said parcel of land.

167.When referred to the transfer deed which was produced as

Exhibit D2, DW1 admitted that the land was not handed over to the 1st Defendant.

168.He reiterated that the 1st Defendant was given the facilities that are on the suit parcel of land that include water tanks, stores, houses and the purifying water plant by the 2nd Defendant.

169.He admitted that he did not know in whose name the suit parcel of land was registered.

170.He stated that he started work with the 1st Defendant in the year 2022 and added that his predecessor was one **John Cheruiyot**. He admitted that he did not know if **John Cheruiyot** recorded a statement.

171. He stated that the 1st Defendant begun using the suit parcel of land in the year 2014 and added that the 1st Defendant supplies water to the residents of Bomet County who pay for it.

172. He admitted that he could not give the estimated revenue that the 1st Defendant was getting after selling the water.

173. He also admitted that he was not aware of the quantity of water they purified per day and neither was he aware of the quantity of water they supplied.

174. He reiterated that the 1st Defendant did not make any improvements on the land and also reiterated that the National Government should compensate the Plaintiffs.

175. He admitted that he did not know the acreage of the land and neither did he know the names of the persons living next to the water treatment plant.

176. He also admitted that he did not know the Plaintiffs and further admitted that as per the green card, the suit parcel of land was initially registered in the name of **Kiplangat Soi** before it was transferred to the 2nd and 3rd Plaintiffs.

177. He stated that the 2nd Defendant would be in a better position to give more information about the suit parcel of land.

178. Upon re-examination, he stated that it was not possible for a person to die in the year 1968 and then be registered as the owner of a parcel of land in the year 1975.

179. He also stated that he was not aware of the first registered owner of land parcel No. **Kericho/Mogogogiek/1406**.

180. He reiterated that from the transfer of deeds, the 1st Defendant was only given the buildings and not the land.

181. Langat Kipkosgei testified as **DW2**. He stated that he was the Bomet County Surveyor. He also stated that he became a surveyor in the year 1999.

182. It was his evidence that he has worked with the County Government of Bomet for a period of twenty-three years.

183. It was also his evidence that the Court issued an order that required him to prepare a report with regard to the suit parcel of land.

184. It was further his evidence that he visited the suit parcel of land on 18th October, 2023 in the company of his survey officers and Plaintiffs' Counsel.

185. He testified that the suit parcel of land is located in Konoin Constituency along the Itare river Mogogosiek.

186. He also testified that he went to the suit parcel of land with the area Registry Index Map Sheet No. **4** and a certified copy

of the green card for land parcel No. **Kericho/Mogogosiek/527.**

187. He further testified that he also looked at the existing physical boundaries of the suit parcel of land.

188. It was his evidence that he used the Registry Index Map of the area so that he could get the specific location of the suit parcel of land.

189. It was also his evidence that from the Certified copy of the green card, **Kiplagat Arap Soi** was registered as the owner of the suit parcel of land on 12th May, 1975.

190. It was further his evidence that on 14th March, 2017, the land was transferred and registered in the names of **Emily Cheptonui Ngetich** and **Edna Chepngeno Bii** who were then issued with a title deed.

191. He testified that the transfer was based on Succession Cause No. 72 of 2016.

192. He also testified that as per the Registry Index Map, land parcel No. **Kericho/Mogogosiek/527** was subdivided on 17th June, 1996 into land parcel No's **Kericho/Mogogosiek/1501, 1502** and **1503**.

193. He further testified that the Registry Index Map was amended on 17th June, 1996 to reflect the new parcel numbers.

194. It was his evidence that the current Registry Index Map Mogogosiek Sheet No. **4** shows the said parcels of land.

195. It was also his evidence that land parcel No. **Kericho/Mogogosiek/527** is not reflect on the current Registry Index Map because it was closed upon subdivision.

196. It was further his evidence that he conducted searches on land parcel No's **Kericho/Mogogosiek/1501, 1502** and **1503** at the land registry but was informed that they were not available.

197. He testified that on site, he observed that the physical ground boundaries of land parcel No. 1501 border the land occupied by the Litein water supply plant.

198. He also testified that the boundaries of the water supply plant were demarcated by a chain link fence, concrete posts and a barbed wire fence.

199. He further testified that there was a road along the fence that was adjacent to the enclosed piece of land which road gave access to land parcel No. 1501.

200. It was his evidence that there was another road which led to the Water Supply Plant from which road and explained that

the road that connected land parcel No. 1501 branches from it.

201. It was also his evidence that they established that the land occupied by the Litein Water Supply Plant is fenced off and measures 7.6 acres.

202. It was further his evidence that within the Litein Water Supply Plant, there is a treatment plant, staff houses, water tanks, a laboratory for quality water tasting and a chemical house.

203. He testified that the construction was carried out in the 1980's while the water pipe connections were done in the year 1981.

204. He reiterated that the entire parcel of land occupied by the Litein Water Supply Plant was developed with public facilities.

205. He also testified that the Department of Water and Sanitation Bomet County manages the said Water Supply Plant.

206. He further testified that the boundary between the Water Supply Plant and the other parcels of land was distinct and clear.

207. It was his evidence that the said boundary has never been destroyed, encroached upon or interfered with.

208. It was also his evidence that the owners of the adjacent parcels of land planted trees alongside the fence which also showed the boundary and added that the said trees are very old.

209. He testified that from the Registry Index Map, land parcel No. **1501** overlaps with the land occupied by the Litein Water Supply Plant but on the ground, there was no overlapping.

210. He also testified that the Map Sheet did not reflect the situation on the ground.

211. He further testified that the Map did not show the position of the Water Supply Plant and neither did it show any public land.

212. He reiterated that the Map only showed that land parcel No. **1501** overlaps with the land occupied by the Litein Water Supply Plant.

213. It was his evidence that there was a need to amend the map and the records to define the true state of what was existing on the ground.

214. It was also his evidence that he prepared a report and attached photographs that show the observations he made.

215. It was further his evidence that there was peaceful existence on the ground. He then produced the following documents;

a. A report dated 17th November, 2023 as Exhibit D6.

b. A certified copy of the green card for land parcel No. land parcel No's Kericho/Mogogosiek/527 as Exhibit D7.

c. The Registry Index Map as Exhibit D8.

d. A bundle of photographs as Exhibit D9 a, b, c, d, e, f & g)

216. Upon cross-examination by Counsel for the Plaintiffs, **DW2** admitted that he did not have his employment card in Court.

217. He confirmed that he took the photographs he produced as **Exhibit D9 a, b, c, d, e, f & g** and admitted that he did not have a certificate accompanying the said photographs.

218. He also confirmed that he got the certified copy of the green card of the suit parcel of land that he produced as **Exhibit D7** from the Land Registry Bomet.

219. He further confirmed that the green card was certified as the true copy of the original on 24th October, 2023.

220. He confirmed that the title of the suit parcel of land was not closed and its current registered owners were **Emily** and **Edna**.

221. He also confirmed that the Litein Water Supply Plant was constructed on land parcel No's **1501, 1406** and **259**.

222. He admitted that land parcel No. **1501** was not registered to any person and that the maps were amended.

223. He confirmed that land parcel No. **1501** was one of the resultant subdivisions of land parcel No. **527**.

224. He admitted that he did not do a search on land parcel No. **1406** because he was only instructed with regard to land parcel No. **527**.

225. He also admitted that he did not have the green card for land parcel No. **1501** and reiterated that the only green card he had was for the suit parcel of land.

226. He denied that the Litein Water Supply Plant was constructed on the suit parcel of land.

227. He stated that he did not measure the land occupied by the Litein Water Supply Plant.

228. He was then referred to his report dated 17th November, 2023 that he produced as **Exhibit D6**.

229. He confirmed that from his report, land parcel No's **1406**, **257** and **1501** could be identified and there were clear

boundaries on the map with regard to the said parcels of land.

230. He admitted that from the Map, one could not identify the Litein Water Supply Plant as it only existed on the ground.

231. He also admitted that the Litein Water Supply Plant did not have a title deed.

232. He further admitted that he prepared the report in support of the Litein Water Supply Plant.

233. He reiterated that the Litein Water Supply Plant occupied a portion of land on the ground with distinct borders.

234. He also reiterated that land parcel No. **1501** was one of the resultant subdivisions of land parcel No. **527** and further reiterated that the Litein Water Supply Plant did not have a title deed for the parcel of land it was in occupation of.

235. He admitted that land parcel No. **1501** did not have a green card.

236. He also admitted that he did not observe any water pipes being laid on the suit parcel of land.

237. He further admitted that he did not conduct a search on land parcel No's **1406** and **259**.

238. He confirmed that the total area occupied by the Litein Water Supply Plant measures 7.61 acres.

239. He stated that they were not in a position to find out the size of land parcel No. **527**.

240. He also stated that he was a surveyor and that they were not able to calculate the size of land parcel No. **1501** that Litein Water Supply Plant was constructed on.

241. He reiterated that the map showed the boundaries of the three parcels of land.

242. He admitted that he did not ascertain the physical boundaries of the three parcels of land because they had no physical boundary on the ground.

243. He also admitted that they could not use co-ordinates from one point to another as they needed a physical boundary to pin point one part to another.

244. He confirmed that in his report, he stated the physical boundaries.

245. He reiterated that he was an employee of the County Government of Bomet and admitted that when he went to the ground, he did not call the registered owners of the surrounding parcels of land.

246. He stated that his report was to inform the Court of the physical position of the Litein Water Supply Plant.

247. He admitted that they needed to survey land parcel No. 1501 in order to determine its size.

248. He confirmed that as per the green card, the suit parcel of land measures 4.2 Ha.

249. He also confirmed that land parcel no. 1501 did not exist at the land registry.

250. He stated that they needed to physically check the portion of the suit parcel of land that was not occupied.

251. He reiterated that land parcel No. **1501** was captured on the Registry Index Map while the Litein Water Supply Plant was not captured on the map.

252. Upon further cross examination by Counsel for the 2nd defendant, he confirmed that the Water Supply Plant was established in the 1980's and it was currently managed by the Bomet Water Company.

253. He confirmed that sometimes, Maps did not reflect what was on the ground as they were usually amended.

254. He also confirmed that on the ground, the water plant had not encroached on the other parcels of land.

255. Upon re-examination, he stated that a boundary was a physical enclosure of land.

256. He also stated that Survey Maps were used to place beacons on specific points of a parcel of land to define a boundary.

257. He further stated that a fence also defined a boundary.

258. He stated that on the ground, there was a physical distinct boundary that defined the land occupied by the Water Supply Plant and the neighboring parcels of land.

259. He also stated that on the ground, land parcel No's **1501**, **1406** and **259** bordered the Water Supply Plant.

260. He reiterated that the physical boundaries on the ground did not reflect on the map.

261. He also reiterated that the Water Supply Plant was public property and it did not reflect on the map.

262. He stated that he could not ascertain the portion of land parcel No. **1501** that the Water Supply Plant was in occupation of.

263. He also stated that the boundaries of the three parcels of land were not in the portion of land that was occupied by the Water Supply Plant.

264. He further stated that they needed to ascertain the boundaries of the three parcels of land in order to find out if the Water Supply Plant encroached onto them.

265. He stated that the Summons he received required him to give evidence with regard to the Water Supply Plant and he did not therefore go into the other parcels of land since the Water Supply Plant had a distinct boundary.

266. He reiterated that land parcel no. **527** was not reflected on the map.

267. He also reiterated that the Map was amended on 17th June, 1996 and it showed that land parcel No. **1501** was a resultant subdivision of land parcel No. **527**.

268. He further reiterated that the map was different from what was on the ground.

269. He stated that the amendment on the map did not indicate where the Water Supply Plant was situated.

270. Upon clarification by the Court, he reiterated that land parcel No. **1501** was one of the resultant subdivisions of land parcel No. **527**.

271. He confirmed that even though land parcel No. **1501** reflected on the map, it had no title deed.

272. He also confirmed that the Water Supply Plant had no title deed and neither was it captured on the map.

273. He further confirmed that the map was usually used to generate title deeds.

274. The 1st and 4th Defendants case was then closed.

THE 2ND DEFENDANT'S EVIDENCE.

275. Engineer Michael Opany testified as **DW3**. He stated that he filed a witness statement dated 30th January, 2023. He prayed that the Court adopts the said statement as part of his evidence in chief, which prayer the Court acceded to.

276. It was his evidence that he was the Manager Water Works Planning and Design of the 2nd Defendant.

277. It was also his evidence that he was in Court because the Plaintiffs alleged that the 2nd Defendant trespassed onto land parcel No. **Kericho/Mogogosiek/527.**

278. It was further his evidence that the 2nd Defendant transitioned from Lake Victoria South Water Services Board which was established in the year 2004 after the **Water Act of 2002** was enacted.

279. He testified that in the year 2016, the Water Act was amended to establish the Water Works Development Agency which was operationalized in the year 2019.

280. He also testified that the Itare Water Supply System was developed by the Ministry of Water between 1978 and 1984 for supply of water to Litein and Bomet.

281. He further testified that the 2nd Defendant was not in existence at the time the Itare Water Supply System was being developed.

282. It was his evidence that since the 2nd Defendant was not in existence at the time of construction of the Itare Water Supply System, it cannot be said to have trespassed on the suit parcel of land.

283. It was also his evidence that that being the case, the suit against the 2nd Defendant should be dismissed.

284. It was further his evidence that they have been sued jointly with the 1st and 4th Defendant.

285. He testified that in the year 2004, the Water Services Board was established pursuant to the Water Act of 2002.

286. He also testified that at that time the Bomet Water & Sanitation Company was reporting to the Lake Victoria South Water Services Board on its operations and service provision.

287. He also testified that the Water Act of 2016 which was operationalized in the year 2019, established Water Agencies and transferred the Management of Bomet Water & Sanitation Company to the County Government of Bomet.

288. He further testified that at the national level, in terms of service provision, the Bomet Water & Sanitation Company reports to the Water Services Regulatory Board.

289. It was his evidence that the 1st Defendant no longer reports to the 2nd Defendant.

290. He reiterated that the water supply project was being operated by the Bomet Water & Sanitation Company.

291. In his witness statement, he states that the suit parcel of land has never been in possession, control and/or management of the 2nd Defendant.

292. He also states that the suit property is not among the assets that were handed over by the 2nd Defendant to the 1st Defendant.

293. He further states that the 1st Defendant is a private company owned by the 4th Defendant and it is therefore not under the control of the 2nd Defendant.

294. He states that there is no principal-agent relationship between the 1st, 4th and 2nd Defendants on matters of provision of water and sanitation services.

295. Upon cross examination by Counsel for the Plaintiffs, he confirmed that he was employed by the 2nd Defendant in July, 2010.

296. He admitted that based on the records available, he knew the dealings between the 1st and 2nd Defendants.

297. He confirmed that he did not have any records with him in Court but he had the information.

298. He stated that the 1st and 2nd Defendants had service provision agreements and before the enactment of the Water Act of 2016, the 1st Defendant reported to the 2nd Defendant on the water quality, the amount of water produced and its operation & Maintenance challenges.

299. He also stated that a water plant has many stages of treatment of water.

300. He reiterated that the 1st Defendant gave the 2nd Defendant reports on the water quality, the quantity of water produced and the number of pumps that were working.

301. He confirmed that he made regular visits to Itare and clarified that he visited the water treatment plant three times.

302. He admitted that he knew where the Water Treatment Plant was located and stated that it was on a parcel of land.

303. He also admitted that the 2nd Defendant did not install the water pumps as they were installed in the year 1978 by the Ministry of Water.

304. He confirmed that the water pumps were not handed over to them.

305. He reiterated that the 2nd Defendant was established by operation of the law that is the Water Act of 2002 that came into operation in the year 2004.

306. He admitted that he did not have any handover report from the Ministry of Water.

307. He confirmed that currently, the 2nd Defendant did not have any agreement with the 1st Defendant on operations and maintenance.

308. He reiterated that before the year 2016, the 1st and 2nd Defendants had service provision agreements.

309. He was referred to the transfer deed that was produced as **Exhibit D2** and he confirmed that they handed over the Water Supply System in the year 2014.

310. He also confirmed that they also handed over the Water Treatment Facility which included;

- i. The Water Treatment Plant.**
- ii. Pump House and Pumps.**
- iii. Water tanks.**
- iv. Pipelines.**

311. He admitted that the parcel of land where the Water Supply Plant is located was not handed over because they did not have ownership documents.

312. He also admitted that they did not know the owner of the parcel of land where the Supply Plant is located.

313. He confirmed that before the year 2019, they did not build or add anything on the suit parcel of land.

314. He stated that it will not be right if the 1st Defendant stated that the 2nd Defendant handed over the suit parcel of land to it.

315. He also stated that before the new construction was done on the suit parcel of land, due diligence must have been done.

316. He clarified that they did not find it necessary to do due diligence on land before rehabilitation of an existing facility.

317. He stated that due diligence would be deemed to have been done during the initial construction.

318. Upon further cross examination by Counsel for the 1st and 4th Defendants, he reiterated that he visited the Water Supply Plant on the suit parcel of land three times.

319. He confirmed that the Water Supply Plant has a distinct boundary that was fenced with trees planted alongside the fence.

320. He also confirmed that the land was identifiable and the Water Supply Plant has a gate.

321. He further confirmed that the water intake of the Water Supply Plant was not fenced as it was close to the river.

322. He reiterated that the Water Supply Plant was fenced on the outside.

323. He stated that the current value of the Itare Water System was kshs. 500,000,000/=.

324. He admitted that the 2nd Defendant did not have any documents of title for the land where the Itare Water System is located.

325. He stated that he considered the Itare Water System public property and it is a National Public Water Works Facility.

326. He further stated that he also considered the land where the Itare Water System is located to be public property.

327. He confirmed that what the 2nd Defendant handed over was the treatment facility and not the land.

328. The 2nd Defendant's case was then closed.

329. The 3rd Defendant's case was also closed.

ISSUES FOR DETERMINATION.

330. The Plaintiffs filed submissions dated 5th August, 2025, the 2nd Defendant filed submissions dated 23rd September, 2025 while the 1st and 4th Defendants filed submissions dated 22nd September, 2025.

The Plaintiffs' Submissions.

331. The Plaintiffs reiterate their averments in the Plaint, give a summary of the evidence adduced during the hearing and while relying on **Sections 24** and **26** of the **Land Registration Act** submit that they have proved that the 2nd and 3rd Plaintiffs are the registered owners of the suit parcel of land.

332. The Plaintiffs submit that they produced a copy of the title deed of the suit parcel of land, a certified copy of the green card and a copy of the Letters of Administration issued to them for the estate of their deceased father.

333. The Plaintiffs also submit that the Defendants contend that they (Plaintiffs) obtained the title deed of the suit parcel of land through fraud but they failed to adduce any evidence in support of the said contention.

334. The Plaintiffs further submit that the Defendants admit that they took possession of a portion of the suit parcel of land after the death of the registered proprietor.

335. It is the Plaintiffs submissions that the Defendants therefore trespassed onto the suit parcel of land and begun intermeddling with the estate of the deceased.

336. It is also the Plaintiffs submissions that no evidence was adduced by the 1st and 4th Defendants in support of their contention that the deceased proprietor was paid before the Defendants took possession of the suit parcel of land.

337. It is further the Plaintiffs submissions that the 1st and 4th Defendants contend that they took possession of the suit parcel of land in the year 2014 when the 2nd Defendant handed over the water treatment plant to them.

338. The Plaintiffs submit that the 2nd Defendant on the other hand contends that it did not hand over the suit parcel to the 1st and 4th Defendants.

339. The Plaintiffs also submit that from the totality of the evidence adduced, the Defendants failed to justify their occupation and use of the suit parcel of land.

340. The Plaintiffs further submit that the 1st and 4th Defendants are in possession of the suit parcel of land which land the 2nd Defendant regularly visits.

341. It is the Plaintiffs submissions that the 1st and 4th Defendants pump water from the river and it passes through the suit parcel of land.

342. It is also the Plaintiffs submissions that the continuous pumping of water constitutes independent acts of trespass.

343. On mesne profits, the Plaintiffs submit that the Defendants have been in possession of the suit parcel of land where they have undertaken a business that has enriched them.

344. The Plaintiffs also submit that the 1st and 4th Defendants pump 1,200,000 litres of water per day which they supply to 350,000 customers.

345. The Plaintiffs further submit that they are therefore entitled to kshs. 1,000,000,000/= as mesne profits.

346. It is the Plaintiffs submissions that the 1st and 4th Defendants admit that they are in possession of the suit parcel of land.

347. It is also the Plaintiffs submissions that at the same time the 1st and 4th Defendants contend that they are not the ones who should compensate the Plaintiffs.

348. It is further the Plaintiffs submissions that the 1st and 4th Defendants filed a Preliminary Objection that raised the issue of Limitation of time which Preliminary Objection was dismissed with costs.

349. The Plaintiffs conclude their submissions by urging the Court to grant the prayers sought in the Amended Plaint.

The 1st and 4th Defendants' Submissions.

350. The 1st and 4th Defendants submit on the following issues;

a. Whether all the Plaintiffs have legal capacity to sue.

b. Whether the Plaintiffs obtained lawful and/or valid title to the suit property.

c. Whether the 1st and 4th Defendants have trespassed on the suit property.

d. Whether the Plaintiffs are entitled to the reliefs sought in the Amended Plaint.

e. Who should pay costs of the suit.

351. On the first issue, the 1st and 4th Defendants submit that in the Plaint, the Plaintiffs contend that they have instituted the present proceedings in their capacity as administrators of the estate of **Kiplangat A. Soi** (deceased).

352. The 1st and 4th Defendants also submit that the Grant of Letters of Administration dated 6th February, 2015 that is filed with the Plaint only lists the 1st Plaintiff as the administrator of the estate of the deceased.

353. The 1st and 4th Defendants further submit that the Plaintiffs do not therefore have capacity to sue in the present proceedings.

354. It is the 1st and 4th Defendants submissions that this is not a technical issue that can be cured under **Article 159 (4)** of the Constitution of Kenya.

355. The 1st and 4th Defendants rely on **Section 19(2)** of the Environment and Land Court Act, the judicial decisions of **Veronica Maringa & Others vs ACK Buxton Diocese of Taita Taveta & another, Islamia Madrasa Society vs Zafar Niaz & Others, Trustees Kenya Redeemed Church & another vs Samuel M’Obiya & 5 Others [2011] eKLR** and **African Orthodox Church of Lenya vs Rev. Charles Omuroka & another [2014] eKLR** in support of their submissions.

356. With regard to the second issue, the 1st and 4th Defendants submit that on or about the year 1978, the Ministry of Water constructed a water treatment plant on the suit property.

357. The 1st and 4th Defendants also submit that the suit property is therefore public land and it was not available for subdivision and transfer to the Plaintiffs.

358. The 1st and 4th Defendants set out the evidence of **DW2**, the registration details on the green card of the suit parcel of land and submit that as per the Registry Index Map of Mogogosiek Registration Section, the suit parcel of land has been subdivided into land parcel No's **Kericho/Mogogosiek/1501, 1502 and 1503.**

359. The 1st and 4th Defendants also submit that the resultant subdivisions of the suit parcel of land have not been registered in the names of the Plaintiffs.

360. The 1st and 4th Defendants further submit that the suit parcel of land was acquired unprocedurally by the Plaintiffs and their deceased father.

361. The 1st and 4th Defendants rely on **Sections 108** and **109** of the **Evidence Act** and submit that the Plaintiffs have not demonstrated that they were not involved in irregularities or fraud in the acquisition of the suit parcel of land.

362. It is the 1st and 4th Defendants submissions that at the time of subdivision and transfer of the suit parcel of land, the Ministry of Water was in occupation.

363. It is also the 1st and 4th Defendants submissions that even if the Land Registrar had power to alienate the suit property, he ought to have informed all the parties of the intended alienation.

364. It is further the 1st and 4th Defendants submissions that there were irregularities in the process leading to the registration of **Kiplangat A. Soi** (deceased) as the owner of the suit parcel of land.

365. The 1st and 4th Defendants submit that **Kiplangat A. Soi** (deceased) died in the year 1968 and yet he was registered as the owner of the suit parcel of land in the year 1975.

366. The 1st and 4th Defendants rely on the judicial decision of **Munyu Maina vs Hiram Gathuha Maina [2013]eKLR** and submit that the Plaintiffs ought to have led evidence as to the legality of their title.

367. The 1st and 4th Defendants also submit that even though the Plaintiffs have produced copies of the title deed issued to them and to their deceased father, they failed to produce the transfer forms and mutation forms to enable the Court

make a finding that the title deed of the suit parcel of land was lawfully issued.

368. The 1st and 4th Defendants rely on the judicial decision of **Kenya National Highway Authority vs Shalien Masood Mughal & 5 Others [2017] eKLR** and submit that the suit property is a public utility incapable of giving rise to a private proprietary interest that can be protected by a Court of law.

369. The 1st and 4th Defendants rely on **Section 80** of the Land **Registration Act**, the judicial decisions of **Adan Abdirahani Hassan & 2 Others vs Registrar of Titles, Ministry of Lands & 2 Others [2013] eKLR**, **Joyce Nyanchama Kalya & another vs David Malakwen Terer & another [2017] eKLR**, **Elijah Makeri Nyangwira vs Mungai Njuguna & another [2013] eKLR** and submit that the Court should find that the title of the suit parcel of land was procured unprocedurally.

370. The 1st and 4th Defendants therefore submit that the said title should be cancelled.

371. The 1st and 4th Defendants also rely on the judicial decisions of **Dina Management Limited vs County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021 [2023] KESC 30 (KLR), Funzi Island Development Ltd & 2 Others vs County Government of Kwale & 2 Others [2014] eKLR, Kassim Ahmed Omar & another v Anwar Ahmed Abeid & 5 others [2015] eKLR, Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR, Kinyanjui Kamau vs George Kamau [2015] eKLR** and urge the Court to find that the Plaintiffs have failed to establish that they lawfully acquired the suit parcel of land.

372. On the third issue, the 1st and 4th Defendants submit that they have been in physical possession and use of the suit parcel of land long before the Plaintiffs were registered as the owners.

373. The 1st and 4th Defendants set out the evidence of **DW4**, rely on **Section 3(1)** of the Trespass Act, the judicial decision of **Samuel Mwangi vs Jeremiah M'itobu [2012] eKLR** and submit that the Plaintiffs were not in possession of the suit parcel of land and therefore, they cannot claim trespass.

374. On the fourth issue, the 1st and 4th Defendants submit that the suit was filed thirty-seven years after the cause of action arose and it is therefore statute barred.

375. The 1st and 4th Defendants rely on **Sections 7** and **9** of the Limitation of Actions Act and the judicial decision of **Beatrice Wambui Kiarie vs Beatrice Wambui Kiarie and 9 Others [2018] eKLR** in support of their submissions.

376. The 1st and 4th Defendants reiterate that the 2nd and 3rd Plaintiffs do not have the *locus standi* to commence the present proceedings.

377. It is the 1st and 4th Defendants submissions that the present suit is an abuse of the Court process as the Plaintiffs did not follow the statutory framework for a claim of compensation on account of compulsory acquisition as provided for under **Article 67** of the Constitution of Kenya and Part VIII of the Land Act.

378. The 1st and 4th Defendants conclude their submissions by relying on **Section 27** of the **Civil Procedure Act** and they urge the Court to dismiss the Plaintiffs suit with costs.

The 2nd Defendant's Submissions.

379. In its submissions, the 2nd Defendant sets out a summary of the evidence adduced and submits on the following issues;

a. Whether the 2nd Defendant trespassed on the suit property.

b. Whether the 1st Defendant is an agent of the 2nd Defendant.

c. Whether the orders sought should be granted.

380. On the first issue, the 2nd Defendant submits that the Plaintiffs admit that the alleged acts of trespass took place in the year 1978.

381. The 2nd Defendant also submits that it was established as a Water Services Board on 2nd March, 2004 via Gazette Notice No. 1714 of 2004 pursuant to **Section 51** of the **Water Act, 2002** (Repealed).

382. The 2nd Defendant further submits that its mandate was to ensure efficient and economic provision of water services in Kisumu, Siaya, Homa Bay, Kuria, Bomet, Bondo, Nyando,

Kisii, Nyamira, Gucha, Migori, Karachuonyo, Suba, Kericho, Nandi and Bureti.

383. It is the 2nd Defendant's submissions that no water infrastructure or assets that were developed in its area of coverage prior to its existence were handed over and/or transferred to it.

384. It is also the 2nd Defendant's submissions that the issue of handing over of assets emerged in the year 2013 as a result of the reforms in the water Sector after the promulgation of the Constitution of Kenya, 2010.

385. It is further the 2nd Defendant's submissions that subsequent legal reforms were made in the year 2016, under **Section 65** of the Water Act of 2016 that required it (2nd Defendant) to develop water and sanitation infrastructure.

386.The 2nd Defendant submits that prior to its establishment, development of water and sanitation infrastructure was a preserve of the Ministry of Water and Irrigation.

387.The 2nd Defendant also submits that if at all water infrastructure was developed on the suit parcel of land, then it was done under the direction and supervision of the 3rd Defendant.

388.On the second issue, the 2nd Defendant submits that water provision is a devolved function. The 2nd Defendant relies on Part I and Part II of the Fourth Schedule of the Constitution of Kenya in support of its submissions.

389.The 2nd Defendant submits that the Water Act of 2016 established Water Services Providers who include the 1st Defendant.

390.The 2nd Defendant also submits that the functions of the Water Service Providers is to provide water and sanitation services on behalf of County Governments.

391.The 2nd Defendant further submits that the Water Service Providers are owned by the County Governments but regulated by the Water Services Regulatory Board.

392.It is the 2nd Defendant's submissions that this is provided for under **Section 70** of the Water Act, 2016.

393.The 2nd Defendant relies on **Sections 68** and **69** of the **Water Act, 2016** and submits that **Section 69** mandates it to handover the duly completed water and sanitation infrastructure to County Governments and/or Water Service Providers within its area of jurisdiction for operation and maintenance.

394. It is also the 2nd Defendant's submissions that even before the promulgation of the Constitution of Kenya, it did not supply water directly to consumers and neither did it collect revenue.

395. It is further the 2nd Defendant's submissions that the mandate to collect revenue and/or supply water was bestowed upon the Municipal, City and/or Town Councils.

396. The 2nd Defendant submits that it could only enter into Service Level Agreements with Water Service Providers for purposes of supervision and to ensure supply of clean and adequate domestic water to consumers.

397. The 2nd Defendant also submits that there is therefore no nexus between it and the 1st Defendant in as far as an Agent- Principal relationship is concerned.

398. The 2nd Defendant further submits that any allegations that it handed over the suit parcel of land and/or any infrastructure

under an Agent Principal arrangement is false and unfounded.

399. It is the 2nd Defendant's submissions that it could not hand over what it does not own.

400. On the third issue, the 2nd Defendant relies on **Section 3(1)** of the **Trespass Act** and submits that it was the Plaintiffs evidence that they were minors when the structures were erected on their land.

401. The 2nd Defendant also submits that the Plaintiffs cannot therefore ascertain whether the said structures were developed with the consent of their deceased father.

402. The 2nd Defendant further submits that no complaint was ever filed by either of their parents on account of alleged trespass prior to the institution of the present suit.

403. It is the 2nd Defendant's submissions that the Plaintiffs claim of trespass must therefore fail.

404. The 2nd Defendant relies on **Section 107(1)** of the Evidence Act, the judicial decision of **Kiambu County Tenants Welfare Association vs Attorney General & another [2017] eKLR** and submits that the suit parcel of land hosts the Itare-Litein Water Supply Project which supplies water to thousands of residents of Bomet County.

405. The 2nd Defendant also submits that even though **Article 40** of the Constitution provides for property rights, **Article 43** guarantees the right to clean and safe water.

406. The 2nd Defendant further submits that for the sake of public interest, public policy and national interest, the prayers sought in the Plaint should not be granted.

407. The 2nd Defendant concludes its submissions by urging the Court to dismiss the Plaintiffs suit with costs.

ANALYSIS AND DETERMINATION.

408. After considering the pleadings, the evidence adduced by the Plaintiffs, Defendants and the submissions filed, it is my view that the following issues arise for determination;

a. Whether the Plaintiffs suit is statute barred and whether the Plaintiffs have the locus standi to institute the present proceedings.

b. Whether the Defendants trespassed on parcel of land known as Kericho//527.

c. Whether the prayers sought in the Amended Plaint should be granted.

d. Who should bear costs of the suit.

Summary of Evidence and documents.

409.I shall start by briefly summarizing the evidence of the parties herein and the documents produced either in support of the claim or in opposition to it.

410.It is the Plaintiffs case that their father, one **Kiplangat A. Soi** was the initial registered owner of land parcel No. **Kericho//527.**

411.It is also the Plaintiffs case that sometime in the year 1978, the 1st Defendant trespassed onto the suit parcel of land, demolished their homestead, and begun constructing structures for water collection.

412.It is further the Plaintiffs case that at that time they were young and they were forced to move to a neighbour's home before living in an abandoned posho mill.

413.It is the Plaintiffs case that the Defendants constructed a water supply plant and are in possession of the suit parcel of land to date.

414. In support of their case, the Plaintiffs produced a Grant of Letters of Administration Intestate issued in Kericho CM Succession Cause No. 72 of 2016 in the matter of the estate of **Kiplangat A. Soi** alias **Kiplangat Soi** (deceased) as **Exhibit P1**. It states that **Kiplangat Soi** died on 28th July, 1968.

415. The Grant of Letters of Administration was issued to **Emily Cheptonui Ngetich** and **Edina Chepngeno** on 1st March, 2017.

416. A copy of the title deed for land parcel No. **Kericho//527** was produced as **Exhibit P2**. It shows that **Emily Cheptonui Ngetich** and **Edinah Chepngeno Bii** are its registered owners and they were issued with the title deed on 14th March, 2017.

417. A certificate of official search dated 10th March, 2023 was produced as **Exhibit P3**. It shows that land parcel No. Kericho/527 was registered in the names of **Emily Cheptonui Ngetich** and **Edinah Chepngeno Bii** on 14th March, 2017 and they were issued with a title deed on the same day. The Certificate of Official Search also shows that the land measures 4.2 Ha.

418. A certified copy of the green card for land parcel No. Kericho//527 was produced as **Exhibit P4**. The green card shows that the said parcel of land measures 4.2 Ha and it is on the Registry Index Map Sheet No. 4.

419. Entry No. 1 is dated 12th May, 1975 when **Kiplangat A. Soi** was registered as the owner. Entry No. 2 is dated 14th March, 2017 when **Emily Cheptonui Ngetich** and **Edinah Chepngeno Bii** were registered as the owners. Entry No. 3 is also dated 14th March, 2017 when the title deed was issued.

420. The 1st and 4th Defendants case on the other hand is that the 1st Defendant is a company that provides water and sanitation services in Bomet County.

421. It is also their case, that the 1st Defendant gets water from Itare River and the water is treated in a Water Supply Plant that was built by the government in the year 1978.

422. It is further their case that the Water Supply Plant was handed over to them by the 2nd Defendant in the year 2014.

423. It is the 1st and 4th Defendants case that they have not trespassed on the suit parcel of land and that the Water Supply Plant has been built on public land.

424. A copy of a Certificate of Incorporation of Bomet Water Company Limited was produced as **Exhibit D1**. It is Certificate No. **CPR/2013/106410** and was issued on 18th June, 2013.

425. Attached to the said Certificate of Incorporation is a copy of a letter dated 30th December, 2014. The letter is written by the Assistant Registrar of Companies and addressed to the directors, Bomet Water Company Limited.

426. The letter states that as per the records held at the Companies Registry, Bomet Water Company Limited has four shareholders and eight directors.

427. The names of the shareholders are as follows;

- a. Simon Kiplangat Korir.***
- b. David Kipyegon Cheruiyot.***
- c. Kipkorir Sigi Langat.***
- d. County Government of Bomet.***

428. The names of the directors are as follows;

- a. Alex Kirui***
- b. Joseah Korir***
- c. Sarah Koske***
- d. Livingstone Bii***
- e. Dianah Sang***

- f. Paul Langat**
g. John Cheruiyot
h. Rose Kositany

429. The letter states that the nominal share capital of the company is kshs. 100,000.00 divided into 100,000 shares of kshs. 1 each.

430. The letter also states that the company was registered on 18th June, 2013 and its registered office is situated on LR No. 89241/242 Bomet.

431. A copy of a Deed of Handover from Lake Victoria South Water Services Board to Bomet Water Company Limited was produced as **Exhibit D2**.

432. The Deed of Handover is dated 1st September, 2014 and it states that the Lake Victoria South Water Services Board availed to Bomet Water Company Limited fixed assets and facilities for the provision of water services.

433.The Deed of Handover is signed by **John Weya** and **Eng. Moses Agumba** the Chairman, Board of Directors and the Chief Executive Officer of the Victoria South Water Services Board respectively.

434.The Deed of Handover is also signed by **Paul J.K Langat** the Director and **Eng. John Cheruiyot** the Managing Director of Bomet Water Company Limited.

435.A Certified Copy of the Green Card for land parcel No. Kericho//527 was produced as **Exhibit D3**. It was certified as the true copy of the original on 14th February, 2023. The Plaintiffs also produced a Certified Copy of the said green card as **Exhibit P4** and the entries thereof have been set out in the preceding paragraphs.

436.A Certified Copy of the Green Card for land parcel No. Kericho//1406 was produced as **Exhibit D4**. It was certified as the true copy of the original on 9th March, 2023. The

Green Card shows that the land measures 3.28 Ha and it is on Registry Index Map Sheet No. 4. Entry No. 1 is dated 22nd January, 1996 when **Esther Chepkorir Soi** was registered as the owner. The green card shows that land parcel No. Kericho//1406 is one of the resultant subdivisions of land parcel No. 1152.

437. A copy of a report prepared by the Bomet County Surveyor, one **Langat Kipkoskei** was produced as **Exhibit D6**. **Langat Kipkoskei** testified as **DW2** and set out in great detail the contents of the said report in his evidence.

438. The report made the following conclusion;

- ***An overlay of the map sheet 4, Registration Section on the physical ground provides that the parcel of land Kericho//1501 (part of Kericho//527) overlaps the portion of land occupied by Litein Water Supply.***
- ***There is a distinct boundary between Litein water supply***

parcel of land and the adjoining parcel of lands.

- *The existing fence is believed to have been put in place prior to infrastructure developments within Litein parcel of land. Pipe works in the tanks indicates installation period as at 1981.*
- *The maps and land registration data need to be amended and corrected to reflect the true physical boundaries as they exist on the ground.*
- *The land occupied by Litein water supply need to be registered as public land as it serves public purpose.*

439. A Certified Copy of the Green Card for land parcel No. **Kericho//527** was produced as **Exhibit D7**. It was certified as the true copy of the original on 24th October, 2023. **PW1** and **DW1** also produced certified copies of the Green Card

for the said parcel of land and its entries have been set out in the preceding paragraphs.

440. The Registry Index Map of Registration Section was produced as **Exhibit D8**. It is stamped by the District Surveyor, Kericho on 20th November, 2023. There is a schedule of amendments on the face of the said Registry Index Map. Entry No. 16 states that land parcel No. 527 was subdivided into land parcel No's 1501 - 1503. The date of the said subdivision is not legible.

441. A bundle of photographs was produced as **Exhibit D9 (a)** to **(g)**.

- **Exhibit D9 (a)** is a photograph of a water tank that is on a field with trees planted at the periphery.
- **Exhibit D9 (b)** is a photograph of a Chain link fence with trees planted along it.

- **Exhibit D9 (c) and (d)** are photographs of trees planted along a chain link fence.
- **Exhibit D9 (e)** is an aerial photograph of an area while **Exhibit D9 (f)** is a photograph of a pipe with “1981” marked on it.
- **Exhibit D9 (g)** is a photograph of a chain link fence.

442. The 2nd Defendant’s case is that it was established in the year 2004 and it was therefore not possible for it to have trespassed onto the suit parcel of land in the year 1978.

A. Whether the Plaintiffs suit is statute barred and whether the Plaintiffs have the locus standi to institute the present proceedings.

443. The 1st Defendant in its Further Amended Statement of Defence dated 25th April, 2019 and the 4th Defendant in its Statement of Defence dated 5th April, 2019 contend that the Plaintiffs Suit is Statute barred and that the 2nd and 3rd Plaintiffs do not have the *locus standi* to commence the present proceedings.

444. The 1st and 4th Defendants submit that the cause of action arose in the year 1978 while the present suit was filed on 23rd April, 2015.

445. The 1st and 4th Defendants also submit that the present suit was filed thirty-seven years after the cause of action arose and it is therefore statute barred.

446. The 1st and 4th Defendants further submit that the copy of Letters of Administration Ad Litem attached to the Plaint shows that it was issued to the 1st Plaintiff and therefore the 2nd and 3rd Plaintiffs do not have *locus standi*.

447. The Plaintiffs submit that the 1st and 4th Defendants filed a Preliminary Objection which raised the issue of Limitation of Time and *locus standi*.

448. The Plaintiffs also submit that a ruling was delivered on the said Preliminary Objection and it was dismissed with costs.

449. A perusal of the Court record shows that the 1st and 4th Defendants filed a Notice of Preliminary Objection dated 10th December, 2021. It was on the following grounds;

a. That the 2nd and 3rd Plaintiffs lack Locus Standi to institute this suit. They have no grant of letters of administration Ad Litem Limited for purposes of filing and prosecuting the same.

b. That the claim is time barred and otherwise an abuse of the Court's process. In particular (sic);

i. The same offends the provisions of Section 7 and Section 9 of the Limitation of Actions Act, Cap. 222.

ii. The cause of action arose in 1978, a period over 37 years before filing this claim in this Court on 23rd April, 2015.

c. That the entire suit is otherwise frivolous and/or vexatious as the Plaintiffs ought to have instituted their claim before the National Land Commission pursuant to The National Land Commission Act.

450. A further perusal of the Court record shows that the Court delivered a ruling on the said Preliminary Objection on 19th July, 2022 where the observed and held as follows at paragraphs 19 to 25;

“19. It is on record that the suit land herein being LR No.Kericho//527 measuring 4.2 hectares was registered to Kiplangat Arap Soi on the 12th May 1975. That the said Kiplangat Arap Soi had passed away earlier on the 28 July 1968. Subsequently letters of Administration ad litem were issued to the 1st Plaintiff herein, on the 9th February 2015 in the High Court sitting at Kericho in Succession Cause

No.10 of 2015. I also note from the pleadings that on the 14th March 2017 title to the suit land had been issued to both the 2nd and 3rd Plaintiffs therefore constituting them as the registered proprietors of the suit land pursuant to the provisions of Section 26(1) of the Land Registration Act.

20. The Plaintiffs have via their amended suit sought to have the Defendants evicted there from LR No. Kericho//527 for being trespassers since 1978. The 1st and 4th Defendants in their defence have stated that they were on the land by virtue of the acquisition of the same by the National Government in 1978.

That the suit land was registered to the deceased Kiplangat Arap Soi 7 years after his demise wherein after, the Plaintiffs had registered themselves as its proprietors. That the said registration had been fraudulent. That secondly since the

cause of action occurred in 1978, this suit was time barred by virtue of the provisions of Section 7 and 9 of the Limitation of Actions Act.

21. The law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the Land Registration Act provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer... shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge...”

22. These provisions empowered the Plaintiffs, by virtue of being registered as the owner of the suit land, with vested rights and privileges therein and which no

person could interfere with unless it could be proved that the said title was procured on the grounds of fraud or misrepresentation and this can only be achieved through a full hearing.

23. Secondly, the Plaintiffs' claim is that acts of trespass started in 1978 to date which to me was a continuation of the previous acts.

24. In the case of Isaack Ben Mulwa vs Jonathan Mutunga Mweke [2016] eKLR the Court of Appeal held as follows;

“Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be res ~ judicata simply because the same parties or their parents litigated over the same matter in 1985. It is well settled principle that continuous injuries to land

caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts."

25. It is trite law that continuous injuries to land create separate actions and therefore the statute of limitation does not extinguish a suit or action based on trespass..."

(Emphasis mine)

451. The Court then dismissed the 1st and 4th Defendants Preliminary Objection dated 10th December, 2021 with costs.

452. From the foregoing, it is evident that this Court already made a determination the questions whether the Plaintiffs have *locus standi* and whether the Plaintiffs suit is statute barred vide its ruling delivered on 14th July, 2022.

453. If at all the 1st and 4th Defendants were aggrieved and/ or dissatisfied with the said ruling, they ought to have filed an appeal.

454. As it stands, the Court has already pronounced itself on the said questions and it shall not be therefore necessary for me to address them any further.

B. Whether the Defendants trespassed on the parcel of land known as Kericho/Mogogosiek/527.

455. It is not in dispute that land parcel No. **Kericho/Mogogosiek/527** was registered in the name of **Kiplangat A. Soi** on 12th May, 1975.

456. It is also not in dispute that land parcel No. **Kericho/Mogogosiek/527** is currently registered in the names of the 2nd and 3rd Plaintiffs.

457. It is further not in dispute that Itare Water Supply Plant is constructed on a portion of land parcel No. **Kericho//527.**

458. However, the following issues are in dispute;

a. Whether Kiplangat A. Soi was lawfully/ procedurally registered as the owner of land parcel No. Kericho//527.

b. Whether Emily Cheptonui Ngetich and Ednah Chepngeno Bii were lawfully/ procedurally registered as owners of land parcel No. Kericho//527.

c. Whether land parcel No. Kericho//527 was subdivided.

d. Whether the Defendants trespassed on land parcel No. Kericho//527 and constructed the Itare Water Supply Plant.

459. I will first address the question whether **Kiplangat A. Soi** (deceased) was lawfully and/or procedurally registered as the owner of the suit parcel of land.

460. The 1st and 4th Defendants contend that **Kiplangat A. Soi** (deceased) was unlawfully registered as the owner of land parcel **No. Kericho//527** on 12th May, 1975 because at the time of the said registration, he was already deceased.

461. The Plaintiffs did not address and/or submit on this issue.

462. Section 26 (1) of the Land Registration Act provides as follows;

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions

contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

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

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

463. The Supreme Court in **Dina Management Ltd v County Government of Mombasa & 5 others** [2023] KESC 30 (KLR) held as follows;

“15. Where the registered proprietor’s root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership. It was the instrument that was in challenge, and therefore, the registered proprietor must go beyond the

instrument and prove the legality of the title and show that the acquisition was legal, formal, and free from any encumbrance, including interests which would not be noted in the register.”

(Emphasis mine)

464. As was held by the Supreme Court in **Dina Management Ltd v County Government of Mombasa & 5 others (supra)**, when a registered proprietor's root of title is under challenge, the proprietor must go beyond the instrument and prove legality of the title by showing that the acquisition was legal, formal and free from any encumbrance.

465. In the present suit, the 1st and 4th Defendants have challenged the root of the Plaintiffs' title to the suit parcel of land terming it as unprocedural.

466. It is my view that the issues of ownership and registration of the suit parcel of land in the name of **Kiplangat A. Soi**

(deceased) are central to the determination of the dispute herein.

467. The Plaintiffs produced a copy of a Grant of Letters of Administration Intestate of the Estate of **Kiplangat A. Soi** which grant was issued in Kericho CM Succession Cause No. 72 of 2016 on 1st March, 2017 as **Exhibit P1**.

468. It shows that **Kiplangat A. Soi** died on 28th July, 1968.

469. Certified copies of the green card for land parcel No. **Kericho//527** were produced as **Exhibit P4, Exhibit D3** and **Exhibit D7**. They all show that **Kiplangat A. Soi** (deceased) was registered as the owner of the suit parcel of land on 12th May, 1975; long after he was dead.

470. Further, the 1st and 4th Defendants submit that at the time of subdivision and transfer of the suit parcel of land, the Ministry of Water was in occupation.

471.The 1st and 4th Defendants submit that they have been in physical possession and use of the suit parcel of land long before the Plaintiffs were registered as the owners.

472.It is this background that causes the 1st and 4th Defendants to contend that the registration to the Plaintiffs was unlawful and/or unprocedural.

473.In the circumstances, it was incumbent upon the Plaintiffs to lead evidence on the process that led to the acquisition and registration and sub-division of the suit parcel. The burden was also on the Plaintiffs to also produce documents such as adjudication records which documents would speak to the process of acquisition and registration of the suit land in the name of their deceased father.

474. Section 107 of the Evidence Act provides as follows;

“(1) Whoever desires any Court to give judgment as to any legal right

or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

475. Section 108 of the **Evidence Act** provides as follows;

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

476. Section 109 of the Evidence Act provides as follows;

“The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

477.The Court of Appeal in **Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR** held as follows;

“We have carefully considered the judgement of the superior Court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the

issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail. It also follows that a Court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings.”
(Emphasis mine)

478. Essentially, the Plaintiffs claim is that the suit parcel of land was initially registered in the name of their deceased father. The Plaintiffs contend that they conducted succession proceedings which proceedings culminated to the 2nd and 3rd Plaintiffs being registered as owners.

479. The Plaintiffs' claim of ownership of the suit parcel of land is the basis for their contention that the Defendants have trespassed onto a portion of the suit parcel of land by constructing the Itare Water Supply System.

480. From the totality of the evidence adduced, it is evident that **Kiplangat A. Soi** (deceased), the first registered owner of the suit parcel of land, was registered as the owner seven years after his death.

481. In the absence of any evidence to explain this anomaly, I am inclined to find that this registration was unprocedural. It follows that the 2nd and 3rd Plaintiffs' title is also flawed.

482. The question that follows is whether this court can consider the question of trespass when the persons alleging trespass have failed to prove their proprietary interest in the suit parcel. The answer is in the negative.

483. Trespass is a right attached to land. Halsbury's law of England 3d edition, Volume 38 at page 739 paragraph 1205 defines trespass as follows:

A person trespasses upon land if he wrongfully sets foot on, Or rides or drives over, it, or takes possession of it, or expels the person in possession of pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it, or it seems if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land to another's land.

484. That being the case, the Court cannot therefore address and/or determine the issue whether there was trespass on land parcel No. Kericho//527.

**c. Whether the prayers sought in the Amended
Plaint should be granted.**

485. The prayers sought by the Plaintiffs in the Amended
Plaint are as follows;

- a. An order compelling the Defendants whether by themselves, their agents, employees, servants and/or any other person whatsoever to forthwith vacate the suit parcel of land known as Kericho//527 in Kericho in default eviction to issue.**
- b. Mesne profits the exact amount to be assessed by the Honourable Court.**
- c. A permanent injunction restraining the Defendants, their agents, employees, servants and/or any other person from trespassing, entering, or in any manner dealing with that parcel of land known as Kericho/Mogogosiek/527.**
- d. Any other relief that the Honourable Court may deem just and fit to grant.**
- e. Interest on mesne profits, B above.**
- f. Costs of the suit be awarded to the Plaintiffs.**

486. Given my finding on issue (a) above, the prayers sought in the Amended Plaintiff cannot be granted. I will, nonetheless, determine prayer (a) and (b).

a. An order compelling the Defendants to vacate the suit parcel of land known as Kericho//527 in Kericho in default eviction to issue.

487. It is important to specifically mention the testimony of **Langat Kipkosgei** - Bomet County Surveyor who testified as **DW2**.

488. His evidence is that he visited the suit parcel of land with the area Registry Index Map Sheet No. 4 and a certified copy of the green card for land parcel **No. Kericho//527** and he explained that this was to help him get the specific location of the suit parcel of land.

489. He explained that according to the Registry Index Map, land parcel No. **Kericho//527** was subdivided on 17th June, 1996 into land parcel No's **Kericho//1501, 1502** and **1503** and that the Registry Index Map was amended on 17th June, 1996 to reflect the new parcel numbers.

490. He confirmed that the current Registry Index Map Sheet No. 4 shows the said parcels of land which are sub-divisions of **Kericho//527** and added that on account of this sub-division, **Kericho//527** is not reflect on the current Registry Index Map having been closed upon subdivision.

491. His further evidence, curiously, is that when he conducted searches on land parcel No's **Kericho/1501, 1502** and **1503** at the land registry but was informed that they did not exist in their records. This means that the sub-divisions have not been registered.

492. It was also his evidence that he established that the land occupied by the Litein Water Supply Plant is fenced off and measures 7.6 acres.

493. He testified that on site, he observed that the physical ground boundaries of land parcel No. **1501** border the land occupied by the Litein water supply plant.

494. He also testified that the boundaries of the water supply plant were demarcated by a chain link fence, concrete posts and a barbed wire fence and added that the boundary between the Water Supply Plant and the other parcels of land was distinct and clear. It was his evidence that the said boundary has never been destroyed, encroached upon or interfered with.

495. It was also his evidence that the owners of the adjacent parcels of land have planted trees along the fence which

further shows that the boundary is distinct. he added that the said trees are very old.

496. He testified that from the Registry Index Map, land parcel No. 1501 overlaps with the land occupied by the Litein Water Supply Plant but on the ground, there was no overlapping adding that the Map Sheet did not reflect the situation on the ground.

497. It was his evidence that there was a need to amend the map and land registration data to reflect the true physical boundaries as they exist on the ground.

498. It is my view that what is presenting in this case as a land dispute may very well be a boundary dispute which the Land Registrar, with the help of the surveyor, is mandated to resolve.

499. This is why **DW2** makes recommendation for amendment of the RIM to conform with what exists on the ground.

500. Taking into consideration the report filed by **DW2 (Exhibit P6)** and his evidence that there are mature trees clearly marking the boundaries of the Itare water supply system and the neighbouring parcels, that there is an overlap between one of the resultant sub-division and the Itare water supply system, and also considering that the Itare water supply system has been in existence since 1978 compounded by the lack of evidence pointing to the process of registration of the suit parcel in the name of **Kiplangat A. Soi** (deceased), the allegations of trespass necessitating eviction are improbable. I decline to grant orders of eviction against the defendants.

b. Mesne profits the exact amount to be assessed by the Honourable Court.

501. Under prayer (b) of the Amended Plaint, the Plaintiffs seeks mesne profits. They submit that the Court should award them mesne profits of kshs. 1,000,000,000/=.
(Kenya Shillings One Billion Only)

502. Mesne profits are in the realm of special damages. The law as relates to special damages is that that they must specifically pleaded and proved.

503. In Peter **Mwangi Msuitia & Another Vs Samow Edin Osman (2014) eKLR**, the Court of Appeal held as follows:

“As regards the payment of mesne profit, we think the Applicant has an arguable Appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

504. In **Nakuru Industries Ltd Vs S.S. Mehta and Sons (2016) eKLR** it was held that mesne profits are a form of special damages which must be specifically pleaded and strictly proved.

505. It is evident that the Plaintiffs neither pleaded nor proved their claim for mesne profits and it must fail.

D. Who should bear costs of the suit?

506. The general rule is that costs shall follow the event. This is in accordance with the Provisions of **Section 27** of the **Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

DISPOSITION.

507. In the result, I find that the Plaintiffs' suit lacks merit and it is hereby dismissed with costs.

508. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 12TH DAY OF MARCH, 2026.**

**L. A. OMOLLO
JUDGE.**

In the presence of: -

Mr. Miruka for the Plaintiffs.

Mr. Matwere or the 1st 3rd and 4th Defendants -

Absent

Miss Migaliza or the 2nd Defendant.

Court Assistant; Mr. Joseph Makori.