

REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT KILGORIS
ELCA E031 OF 2025

OLESOPIA MASIBAI.....1ST

APPELLANT

PERITA NEMISO METTO.....2ND

APPELLANT

DAVID TUMBERIA.....3RD

APPELLANT

STEPHEN MASIBAI TUMBERIA.....4TH

APPELLANT

VERSUS

DANIEL ESEPERWA KAMPA.....1ST

RESPONDENT

DICKSON TUMPO SANKEI.....2ND

RESPONDENT

JACKSON NKAMINEN SANKEI.....3RD

RESPONDENT

OLE LIMPASO SEPEPIARI.....4TH

RESPONDENT

JUDGMENT

1. Vide their Memorandum of Appeal dated 28th of May 2025, the 4 Appellants preferred an Appeal against the whole judgment and decree of Hon. W.K Kitur (SRM) delivered on 29th day of April 2025 in Kilgoris CM ELC No. 20/2018.
2. The Appellants penned a total of 16 grounds of Appeal, and on the strength of the said grounds sought for the following reliefs; -

- (a) The Appeal be allowed and the judgment and decree dated 29th day of April vide Kilgoris ELC No. 20/2018 be set aside, reviewed, varied and/or quashed.
- (b) The Honourable court be pleased to substitute thereof with an order allowing the appellants suit in the subordinate court be borne by the Respondents.
3. The court directed canvassing of the appeal by way of written submissions, which are summarized as follows; -

Appellant's Submissions

4. The Appellants submit that they were allocated Transmara/Shartuka/405, 491, 492 and 493 as members of Shartuka Group ranch by virtue of their membership to the Shartuka Group ranch, which parcel were eventually registered in their names on 14th of August 1998, thus conferring upon them all the rights of the registered owners. That the Respondents started cultivating on their parcels despite their rights as the registered owners therefore.
5. The Appellants submit that the testimony of the Land Registrar and Land Surveyor were to the effect that the Respondents had trespassed on to the Appellants properties. The Appellants contend further that the trial court erred in law in invoking the Limitations of Actions Act hence dismissing the suit property. The Appellants placed reliance on the decision in the case of Ali Wanje Ziro Versus Abdulbasit Said and Another as well as the decision in Jonah Omoyoma vs Boniface Oure and 2 Others.

Respondents Submissions

6. On their part the Respondent's submitted on the grounds of Appeal stated that the Learned Trial Magistrate exhaustively analysed the evidence tendered by both sides and reached the correct decisions.
7. The Respondent submit that there was no trespass by tenant on the Appellants.

8. On limitation of Actions Act the Respondents submit that the suit offended the section 7 of the Limitations of Action Act.
9. The Respondents further submitted that they disputed the Land Registrar and Surveyors reports hence the Appellants evidence was challenged.
10. The Respondents urged the court to dismiss the Appeal.

Issues for Determination

11. Having considered the Record of Appeal, the rival submissions and the cited authorities as well as considered the law, the court frames the following as issues for determination; -
 - (i) Whether or not the Appeal is merited, in determining this issue the court shall consider, and determine
 - (a) whether or not the Appellants suit before the trial court was time barred and offended Section 7 of the Limitation of Actions Act.
 - (b) Whether or not the Appellants proved trespass before the trial court?
 - (ii) What reliefs ought to issue?
 - (iii) Who bears the costs?

Analysis and Determination

12. Being a first Appeal, the court is mandated to ***reconsider the evidence, evaluate it and draw its own conclusion***", as was stated in in Selle and Another Vs. Associated Motor Boat and 3 Others.
13. In the Plaint dated 10th of April 2013 at paragraph 9 thereof, the Appellants as Plaintiffs pleaded the cause of action of trespass to have occurred in 2008.
14. The Appellants as Plaintiffs produced copies of titles in respect of their properties, the said titles were issued on 14.08.1998.
15. The Appellants as Plaintiffs called the Land Registrar and Land Surveyor as their witnesses, and they produced P.Exhibit 11 and P.Exhibit 12, copies of their respective reports which indicated *inter alia*

that on the suit properties the Defendants now Respondents had erected homesteads thereon.

16. Was the Plaintiff's suit before the trial court time barred?
17. In the impugned judgment the Learned Trial Magistrate found *inter alia* that the Plaintiffs were issued with their title deeds on 14th of August 1998 and filed the suit on 11th of April 2013, hence the suit offended Section 7 of the Limitation of Actions Act rendering the suit to be time barred.
18. The pleaded cause of action was trespass, which was pleaded to have occurred in 2008. The action to recover the suit property was commenced in 2013, about 5 years after the alleged trespass.
19. Whereas Section 7 of the Limitation of Actions Act provides for right to recover property within twelve years when the right first accrued, the said section was not applicable in the circumstances of this case, mainly because the Plaintiffs sought recovery of land that they had been disposed, hence their claim for trespass for trespass against the Defendants and the correct provision of the law, upon which the court ought to have calculated time for purposes of Limitation was thus section 9(1) of the Limitation of Action Act; and not section 7 of the said Act.
20. P.W.1 stated in cross-examination that he was evicted in 2008 and repeated the same in re-examination. It was his evidence that he had lived on suit property from time of demarcation.
21. Section 9(1) provides as follows
9.Accrual of right of action of present interest in land.
9(1) "Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land. and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance."

22. From the foregoing, the right of action accrued to the Plaintiffs now Appellants in 2008, and in 2013 the suit was not time barred as the 12 year period under section 7 of the Limitation of Actions Act had not lapsed.
23. The Learned Trial Magistrate thus fell in error in respect of the finding that the suit was time barred.
24. On the second sub issue as to whether or not the Plaintiff proved trespassed.
25. The Appellants as Plaintiff produced copies of their titles and official searches, the said titles were issued in 1998.
26. In the report by the Land Registrar P.Exhibit 11 and the report by the Surveyor P.Exhibit 12, appearing at pages 217-220 of the Record of Appeal, indicated that the Defendants now Respondents, had encroached on the Plaintiff/Appellants parcels.
27. The Defendant's defence is that they were occupying their own parcels which were different from the ones owned by the Appellants, the Respondents indicated that the ground report was prepared on the strength of a site visit in which they were absent.
28. The court finds that on a balance of probabilities, given that the Plaintiffs now Appellants proved ownership of the suit parcels and brought in evidence through the reports of encroachment of the said parcels, the proved that the Defendants had indeed trespassed and/or encroached on their suit parcels, and that the Learned Trial Magistrate thus erred in finding otherwise.
29. Having found that the suit was not time barred and further that trespass was also proved, it follows that the Appeal is merited.
30. On what reliefs ought to issue, having found the appeal to be merited, the same is allowed and the judgment of Hon. W.K Kitur delivered on 29th April 2025 is set aside in its entirety and the Plaintiff suit in the lower court is allowed in terms of the Plaint dated 10th of April 2013.

31. The matter shall be remitted to the trial court to access the award of damages.
32. Costs of the Appeal and the lower court are awarded to the Appellants.

Dated at Kilgoris this 29th day of April 2026

Hon. M.N Mwanyale
Judge

In the presence of

CA Sylvia/Clara

Mr. Bigogo for Respondents

Mr. Ochwangi for Appellants