

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ELC CASE NO. 12 OF 2018**

**KIFALU KARISA .....**  
**PLAINTIFF**

**VERSUS**

**MWALIMU KALUME..... 1<sup>ST</sup>**  
**DEFENDANT**

**FRANCIS TSALWA ,.....2<sup>ND</sup>**  
**DEFENDANT**

**JUDGMENT**

**PLEADINGS**

***Plaint.***

1. This suit is about **Kilifi/Mtondia/116** measuring approximately **13** acres (hereinafter also referred to as “the *suit property*” or “the *suit land*”) claimed by the plaintiff herein. Midway through these proceedings, the plaintiff had the suit land subdivided into several portions and the court at some point ordered that *status quo* to be maintained so that there be no further alterations of the subject matter. Pursuant to the subdivision, the defence was amended on **28<sup>th</sup> June 2022** to include the new subdivisions and to seek their cancellation.
2. The plaintiff’s claim has been brought vide a plaint dated **16<sup>th</sup> January 2018**. In that plaint, he states that the defendants are in occupation of the suit property; that they have constructed semi-permanent houses, and the second defendant claims to have acquired 5 acres of the suit property by way of purchase from the

first defendant. In the plaint, the plaintiff discloses the existence of previous litigation - *Malindi Land Case Number 135 of 2011 OS - Francis Mwalimu Charo Vs Kalume Tsalwa Washiali Vs Kifalu Karisa Kitsao* , which was struck out with costs. The plaintiff seeks the following orders:

- a. A declaration that the plaintiff is the owner of parcel number Kilifi /Mtondia /116 measuring approximately 13 acres located in Kilifi County;
- b. A declaration that any purchase of the suit property by the second defendant from the first defendant or any other person for that matter is null and void;
- c. An order that the first and second defendants together with their agents, servants, employees or any other person claiming under them do give vacant possession of the suit property;
- d. Costs and interest at court rates;
- e. Any other further relief that the court deems just and fit.

### **1<sup>st</sup> And 2<sup>nd</sup> Defendants Defence Dated 6<sup>th</sup> February 2018**

3. The first and second defendants filed their defence dated **6<sup>th</sup> February 2018**. They admitted the existence of the previous suit. They added that the plaintiff had filed *Kilifi SRMCC 211 of 2009 Kifaru Karisa versus Mwalimu Kalume and Francis Tsalwa* seeking, *inter alia*, a declaration that he was the rightful owner of the suit property, and an injunction against the defendants; he stated that judgment was delivered on **29<sup>th</sup> October 2014** dismissing the entire suit with costs and no appeal against that judgment was lodged. For that reason, they raised the doctrine of *res judicata* against the entire suit. At the same time, the defendants also counterclaimed for a declaration that the land belongs to the first defendant and his siblings together with the second defendant who

has a purchaser's interest, and that the plaintiff is holding the title in trust for the defendants. They also sought an order that the plaintiff's title be cancelled and be reissued in the names of the defendants as well as an order of punitive costs for what they called vexatious litigation.

4. Pursuant to a subdivision of the suit land, the defence was amended on **28<sup>th</sup> June 2022** to include the new subdivisions and to seek their cancellation.
5. By the consent of both parties, a motion dated **29<sup>th</sup> November 2023** was disposed of by a way of an agreed *status quo* order recorded on **2<sup>nd</sup> October 2024**, to expedite the hearing of the suit, and the hearing resumed from where it had stopped while the matter was being handled by my predecessor, Odeny J.

## **EVIDENCE OF THE PARTIES**

### ***Evidence Of the Plaintiff***

6. The plaintiff testified on **23<sup>rd</sup> March 2023** as PW1 and adopted his written witness statement dated 16<sup>th</sup> January 2018 and 1<sup>st</sup> of December 2021 as his evidence-in-chief. He also produced his documents as evidence as **PExh. No 1 - 27**.
7. The plaintiff's evidence is that the first defendant claims to be the rightful owner of the suit land, and that the second defendant is a purchaser from the first defendant; that in **1977**, the first defendant's mother Kadzo Kalume sold the suit land to the plaintiff's father, Mwalimu Kalume, and left for a place called Mida. In **1989**, the area Chief wrote a letter and the plaintiff's father was confirmed

to be the rightful occupant of the suit property and it was allocated a number **116-Mtondia**. Later, the first defendant and his mother returned to the property, and the first defendant tried to sell it but was informed that it was registered in the plaintiff's father's name; that the plaintiff's father had made all the payments for the land since **1996**, and a Statement of Accounts was prepared on **26<sup>th</sup> of February 1999**; that out of compassion however, the plaintiff's father allowed the first defendant and his mother to stay on the suit premises so that they could get back on their feet.

8. When the plaintiff's father died in **June 2003**, the plaintiff lodged a case with the *Land Dispute Tribunal Being Case Number 106 Of 2007 - Kifalu Karissa vs Mwalimu Kalume and another* which was decided in the plaintiff's favour, and no appeal was lodged against that decision. However, the defendants refused to vacate the suit land. The plaintiff filed then *Kilifi SRMCC Number 211 Of 2009 Kilifi - Kifalu Karisa Versus Mwalimu Kalume and Another*. While that suit was pending, another suit was filed by the defendants being *Malindi ELC Case Number 135 Of 2011 - Mwalimu Kalume and another versus Kifalu Karisa*, seeking cancellation of the registered title issued to the plaintiff, but it was dismissed in **July 2016**. According to the plaintiff, by the time that latter case was decided, his case in the Magistrate's court (Number 211 Of 2009) had already been dismissed and it had been ordered in his case that the matter be dealt within the higher court where the defendants had taken their claim vide *Malindi ELC 135 Of 2011 Malindi*.

9. According to the plaintiff also, there was a counterclaim in the Magistrate's court, case he filed against the defendants - *SRMCC 211 of 2009*- but the same was not allowed because no sufficient material had been availed to satisfy the court that the plaintiff held the entire property in trust for the first or the second defendants.
10. The plaintiff's further evidence is also that in *Kilifi SRMCC 211 of 2009*, the first defendant stated that his father was allocated the property after **1968**, and that it was the first defendant who had allowed the second defendant to live on the land; that his documentation in support of his claim had gotten lost.
11. The plaintiff's further evidence is also that in *Malindi ELC 135 of 2011*, the defendants had filed a claim for adverse possession which was also dismissed by the court which noted some inconsistencies regarding the decree extracted from the lower Court file for *Kilifi Case Number 211 of 2009*. It is the plaintiff's evidence that when the suit was dismissed, he remained in the same position he was in prior to the filing of the suit and so did the defendants.
12. Upon cross-examination by Mr. Akanga for the defendant, he stated that he was born in **1968**. He admitted that at his instance a criminal case was commenced against the defendant in **2006**. In **2018**, filed a case at the Land Dispute Tribunal which was ruled in his favor. In **2009**, he filed *Kilifi SRM CC 211 of 2009 Kilifi* which was dismissed. According to him, he was told he could canvass the same issues in *Malindi ELC NO 135 for 2011 at Malindi*. He denied that the first allottee of the suit land was the defendant's father. He did not

know how his father got the suit land. He was not living on the suit land as at the time of cross-examination. He admitted to having sold 2 acres to a third party.

13. Upon re-examination by Mrs Mwangi, he stated that *Malindi ELC Case Number 135 of 2011* was dismissed; that there was no injunction issued stopping the subdivision of the Land; that he had departed from the suit land about 5 years previously.

### ***Defendant's Evidence***

14. **Mwalimu Kalume**, the first defendant, testified as DW1 on **23<sup>rd</sup> March 2023** and adopted his witness statement dated **24<sup>th</sup> May 2018**. He also produced documents as **DExh No. 1 - 23**. DW1'S evidence was that he was born on the suit land in **1960** and has been on the suit land ever since. The plaintiff filed a case against him in Kilifi which was dismissed. DW1 filed *Malindi ELC Case Number 135 of 2011* which was struck out. The plaintiff has never been on the suit land. DW1 and the second defendant are the ones on the suit land. DW1 repaid the Settlement Fund Trustees (SFT) loan. He sought that the counterclaim to be allowed as prayed and the plaintiff's case be dismissed.

15. DW1 is son to Kalume Charo. Kalume Charo, who died in **1972**, was the initial allottee of the land, having been allocated the same by the Settlement Fund Trustees. According to him, the scheme was established in **1968** and his family has stayed on the land since **1975**. DW1 stated that the plaintiff and his father had land elsewhere and have never resided on the suit land; that the

plaintiff, with his father's assistance in the year **1998**, fraudulently took out letters of administration and carried out an alleged succession to the estate of DW1's late father, Kalume Kacharo, through the court and DW1 was not aware of until it was too late when *Land Case Number 7 of 2008* was going on. None of DW1's family were involved in the alleged succession.

16. In **2006**, the Plaintiff commenced a criminal case against DW1 and his kin in *Criminal Case Number 27 of 2006 - Republic versus Mwalimu Kalume Charo and Francis Tsalwa Washiali*. The alleged offense was forcible detainer, but the criminal case against DW1 resulted in an acquittal; in **2005**, the plaintiff fraudulently discharged DW1's father's interest from the green card alleging to have a purchase interest in the land and named DW1 as the vendor; DW1 has permanent structures on the suit land and has fully utilized the land; in **2009**, the plaintiff sued in *Kilifi SRMCC 211 or 2009 - Kifalu Karisa versus Mwalimu Kalume and Francis Tsalwa* which was determined in favour of the defence herein; that at the Tribunal hearing, the plaintiff had claimed to have purchased the land from the first defendant in **1977** and he had even produced a sale agreement to support the claim; subsequently, DW1 filed *Malindi ELC Number 135 of 2011 O. S* which was struck out; DW1 claimed that the plaintiff's suit herein is *res judicata*. He alleged that even if the plaintiff holds the paper title to the suit land, he holds it solely for the benefit of the first defendant's family and assigns.

17. Upon cross-examination by Mrs. Mwangi, DW1 stated that he sues as an owner of the suit land; that his mother Kadzo, is deceased; that he does not know whether Kadzo sold at the land in **1979**; that he does not know that by **1989** the plaintiff's father owned the land; that he does not have any document showing that his mother owned the land after **1977**. He admitted that the plaintiff's father paid all outgoings required for the land including for the discharge of charge. He does not know why the Land Officer registered the land to the plaintiff's father and not to his own father. He was not aware that the Tribunal decision was that the land be registered in the plaintiff's name. His *Malindi Case Number 135 of 2011* was dismissed in the year **2016** and he appealed. However, he does not know the Appeal Case Number. He does not recall saying that he had the documents of title and that they had gotten lost. He does not know where they got lost at. Despite court cases having existed before, no court has ever ordered him to vacate the premises. The plaintiff has subdivided the land.

18. DW1 sold the second defendant land in **1999** and informed the second defendant of the land used to be his father's; that the second defendant had purchased the land only after confirming with the area list at the Kilifi Land and Settlement Office that the land belonged to DW1's father. However, DW1 did not have the area list from the Lands and Settlement Office. The defendant never made a copy of the area list before executing the agreement. DW1 informed

the second defendant of the dispute between the plaintiff and DW1's father but the defendant nevertheless purchased the land.

19. DW1 maintained that his father was the initial allottee as per the area list. He stated that original letter of allotment issued to his father got lost. DW1 came to know of the succession proceedings lodged by the plaintiff and his father in the year **2006**. However, he never opposed the succession case. He admitted that he has not demonstrated that the plaintiff used fraud to obtain the grant. DW1 does not have any evidence of having complaint to the Lands Office regarding the conduct of the plaintiff. In an apparent contradiction, he stated that he does not know outcome of *Kilifi Case Number 211 of 2009*.

20. He stated that he has lived on the land since **1975**. The land has no utilities connected there to.

21. He admitted that it is the Plaintiff who currently pays the outgoings for the land. He does not have even a single document of ownership for the suit land. He has never caused to be placed and inhibition on the suit land. He has never reported to any Police Station that his ownership documents got lost.

22. Upon re-examination by Mr. Akanga, he stated that he got to know in **2005** that title had been issued in the plaintiff's father's name. He considered that as *fait accompli* and never challenged it.

23. According to DW1, his mother had no land to sell and at **1977**. From that year, he has been farming on the land and there are

mature trees thereon. The plaintiff's grandfathers never lived on the land. Even the Plaintiff's father was not buried on the land.

24. **Francis Tsalwa**, the second defendant, testified as DW2 on **11<sup>th</sup> February 2025** and adopted his witness statement dated **24<sup>th</sup> May 2018**. According to him, he was also sued at the Land Disputes Tribunal as the second respondent. He was discharged in the criminal case for forcible detainer. After *Kilifi Case No 211 of 2019* the defendants were not evicted as had been prayed for by the plaintiff, while *Malindi ELC Case Number 135* was struck out. The present case and the Kilifi case are similar.

25. According to DW2, while Kadzo was alive, she had stated while at the Chiefs office that she had never sold the suit land and the Chief had instructed the plaintiff's father to surrender the documents of title to DW1's family. DW2 purchased 5.5 acres from the first defendant. He had visited the Lands and Settlement office and seen the Nominal Roll, which bore the name of Kalume Kacharo, DW1's father. The plaintiff never demonstrated that he had inherited the suit land from Kalume who is now deceased. DW2 has structures on the suit land and has planted trees which are over **30** years old. The mother and brother of the first defendant are buried on the suit land. He testified that according to **DExh 10**, the plot was offered to Kalume Kacharo and he was not aware of any re-allocation from the said Kalume to the plaintiff's father.

26. Upon cross-examination by Mrs Mwangi, DW2 stated as follows: that he purchased the suit land in **1999**; that by then, the

discharge of the Land was not in progress; that in **1999**, he checked with the SFTs office and found that there was some SFT payments that had been affected by the plaintiff's father. He complained to the settlement office and wrote a letter but he never produced the letter at the hearing of this case. He did not occupy the land immediately but after 2 years from the date of the sale agreement. He, in the company of the plaintiff's father, went to a Chief called Athman in a year which he cannot recall, and later on, the Tribunal held its sittings.

27. According to DW2, the plaintiff's father knew that the defendants were in occupation of the land. The defendants could not bring another suit after *Case No 211 Of 2009* was dismissed because soon after the dismissal, the plaintiff brought another suit against them. However, he admitted that they never secured the orders that they would have wanted in the Kilifi case. He defended the filing of the case by the plaintiff saying that it is not useless because it facilitated the defendants' filing of a counterclaim against the plaintiff. DW2 has never sued the first defendant for specific performance.

28. According to DW2, Alternative Dispute Resolution (ADR) was an option, and it had been explored before Chief Athman that the plaintiff could take **3** acres and leave the defendants with **10** acres. However, he has no idea whether that proposal was put down in writing.

29. Upon re-examination by Mr Akanga he insisted that the plaintiff changed the particulars in the green card without considering that the defendants were in occupation of the land on the ground.
30. With the close of the evidence of DW2, the defendants' case was marked as closed and the parties filed written submissions in accordance with the order of Court. The plaintiff's submissions are dated **5<sup>th</sup> December 2025** while the defendant submissions are dated **10<sup>th</sup> December 2025**. This court has considered the said submissions in the preparation of this judgment

#### **ANALYSIS AND DETERMINATION.**

31. It is indubitable that while the plaintiff holds the title to the suit land in his name, the defendants are in possession on the ground. The plaintiff claims that the suit land was purchased by his father from the 1<sup>st</sup> defendant's mother named Kadzo. It is not denied that Kadzo was the 1<sup>st</sup> defendant's mother. It emerged from the evidence of the 1<sup>st</sup> defendant that the sale of the land by his mother occurred after his father's demise. It was after the sale that the 1<sup>st</sup> defendant's family is admitted to have vacated the suit land and migrated to a place called Mida; that the 1<sup>st</sup> defendant and his mother later returned to the land and that is the point at which the 1<sup>st</sup> defendant's narrative differs from that of the plaintiff. The plaintiff's evidence available is to the effect that the 1<sup>st</sup> defendant's family came back and were given a place to stay on the suit land as

they got back on their feet. the 1<sup>st</sup> defendant's evidence is to the effect that they were normally returning to their land only to find that the same had been taken over by the plaintiff's family.

32. The issues that arise for determination in this suit are as follows:

- a. *Whether the present suit is res judicata;*
- b. *Whether the land was sold by the 1<sup>st</sup> defendant's parents to the plaintiff's father;*
- c. *Whether the plaintiff has good title to the land;*
- d. *Whether the plaintiff holds the suit title in trust for the defendant's family;*
- e. *Who ought to pay the costs of the suit?*

33. The first issue for determination is whether the present suit is *res judicata*. The doctrine of *res judicata* is embodied in the provisions of **Section 7** of the **Civil Procedure Act Cap 21** of the Laws of Kenya. That section provides as follows:

*"7. Res judicata*

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

*Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.*

*Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.*

*Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*

*Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such*

*former suit shall be deemed to have been a matter directly and substantially in issue in such suit.*

*Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.*

*Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”*

34. The doctrine of *res judicata* is purposed to eliminate the possibility of a litigant filing numerous cases on the same cause of action against the same parties and possible abuse of the process of the court. In the case of *John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)* it was stated as follows:

*“54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”*

35. The defendants claimed in their defence that the plaintiff had filed *Kilifi SRMCC 211 of 2009 Kifaru Karisa versus Mwalimu Kalume and Francis Tsalwa* seeking *inter alia* a declaration that he was the rightful owner of the suit property and an injunction against the defendants and that judgment was delivered on 29<sup>th</sup> October 2014 dismissing the entire suit with costs.

36. It is correct that the plaintiff filed the said case seeking orders as follows:

- a. *A declaration that the plaintiff is the rightful owner of the suit land;*
- b. *A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property;*
- c. *A permanent injunction restraining the defendants whether by themselves or their servants or agents or otherwise howsoever from remaining on or continuing in occupation of the suit property and to therefore hand over vacant possession to the plaintiff thereof.*
- d. *Costs of the suit.*

37. I find that the decision rendered by the trial magistrate had an eye on the fact that there was a case that had been filed in the High Court at Malindi regarding the suit land herein which was yet to be concluded. I state that because the magistrate stated as follows in his judgment dated 9/12/2014 dismissing the suit and the counterclaim:

*“As for the counterclaim, the defendants informed the court that they have applied for cancellation of the plaintiff’s title in the high court at Malindi. I think it is fair and just that this issue be dealt with at the high court to avoid conflicting decisions. Furthermore, I find that no sufficient material was availed to satisfy the court that the plaintiff holds the entire 13 acres in trust for the 1<sup>st</sup> defendants and his siblings or the 2<sup>nd</sup> defendant. I therefore decline to grant the prayers sought in the counterclaim. I direct that this issue awaits the determination of the High Court suit.”*

38. In the case of *John Florence Maritime Services Ltd (supra)* the court also stated as follows:

*“This court in the case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another Motion No 42 of 2014 [2016] eKLR (Muiri Coffee case) held as follows regarding the doctrine of res judicata:*

*52 Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights.”*

39. It is clear that the doctrine of *res judicata* can not be of any benefit to a justice system where it is mechanically applied on the basis of whether the cause of action is the same and the parties are the same. It would appear from the Supreme Court judgment in *John Florence Maritime Services Ltd (supra)* that a crucial essence of that doctrine is the conclusive determination of the rights of parties to a dispute through a judicial pronouncement.

40. Coming back to the present dispute, it appears from what the magistrate in stated in *Kilifi SRMCC 211 of 2009 Kifaru Karisa versus Mwalimu Kalume and Francis Tsalwa* in the excerpt set out earlier herein above, that there is no conclusive decision he made on the entitlements of all the parties in that case with regard to the suit land. His dicta is rather hesitant to award any of the tussling parties the suit land. The judgment skirted around the arising issues without coming to a firm conclusion as would lead this court to proclaim that the issues raised in the present suit are *res judicata* for being raised and finally determined in that suit. That is evident in the defendant’s evidence in the present suit when examined by Mrs. Mwangi when he stated as follows:

*“We were advised that the way Case No 211 Of 2009 was framed was the reason for dismissal; we did not initiate another suit because before we could the plaintiff brought*

*another suit against us. We could have. We were satisfied by the Kilifi case. We also never got what we wanted in the Kilifi case. It is not useless to bring this case hence our filing of a counterclaim. We are in the right court."*

41. *Res judicata* therefore has among all other things a vital strand in its cord called "*conclusivity in litigation*". "*Conclusivity*" refers to the quality or state of being conclusive—meaning something is decisive, final, and leaves no room for doubt, debate, or uncertainty. It implies that evidence, arguments, or actions have established a fact beyond question. Thus, where both parties have not been satisfied by the judgment of a court, and that court delivers a judgment that evidently avoids determining the issues with finality simply because it has been informed that there is a case about the same subject matter pending for hearing before a higher court, then that court can not be deemed to have dealt that matter conclusively.

42. It is observable that even in the present case, the defendants lodged their own counterclaim. That filing of a counterclaim is evidence enough that the dispute between the defendants and the plaintiffs was never resolved with finality in the lower court in *Kilifi Magistrates Court Case No 211 of 2009*. To uphold the defendant's claim of *res judicata* and leave the parties in the same mess they sought to escape from by way of previous suits would not advance the cause of justice and may only lead to more litigation after this suit. For those reasons, the defendant's claim of *res judicata* must fail.

43. With regard to the **second issue** the plaintiff relies on a handwritten agreement dated **18/6/1977**. The said agreement suggests that there are “trees” that were sold by one Kalume Kacharo, who according to the 1<sup>st</sup> defendant’s evidence, is his father, to Karisa Kitsao who according to the plaintiff’s evidence is his father. The witness to the agreement was the chief Kilifi town and two other persons.

44. In the proceedings before the Tribunal, the present plaintiff in his testimony spoke of sale of trees and land as one and the same thing. However, one thing is clear: that by the time the 1<sup>st</sup> defendant and his mother came back to the suit land the same had been allocated in favour of the plaintiff’s father. PW1’s evidence before the Tribunal was that when they realized that the plaintiff’s father was already registered against the land, they proposed that the same be eventually shared equally between the two families upon issuance of title to the plaintiff’s father which suggestion the plaintiff’s father rejected. The plaintiff’s father also continued paying for the suit land at the lands office which process the plaintiff continued upon his father’s demise. The evidence of Dama Karisa, the plaintiff’s sister, supported the claim that the land was sold to her father by the 1<sup>st</sup> defendants’ mother and that the full consideration therefor was paid; that later the plaintiff’s, other returned to the land with her grown up children. However, when cross-examined, Dama Karisa stated that the 1<sup>st</sup> defendant’s mother, Kadzo, sold “trees” and not the land to the plaintiff’s father.

One Simeon Karisa Kenga testified for the plaintiff his undisputed evidence was that he was the Assistant Chief at the time of the transaction; that during his tenure, the 1<sup>st</sup> defendant's family wished to leave the area and while they were leaving, they sought another person to purchase their trees. The Assistant Chief, when contacted by the plaintiff's father about the issue promised to investigate whether indeed the trees were on sale, but later he learned from the plaintiff's father that he had bought the trees. Upon cross-examination he stated that he wrote a letter in **1989** for the transacting parties to take to the lands office. He did not however involve himself with the issue of payment of the consideration, but understood that it had been paid.

45. According to the defendant's evidence at the Tribunal, his family left the land on a date he did not specify due to a string of misfortunes and when they returned, they found that the same had been registered in the name of the plaintiff's father. When they were referred to the lands office by the chief through a letter, some informal negotiations arose whereby the plaintiff's father agreed to be given **4** acres out of the suit land. When he was cross-examined, he stated that his family migrated to Mida in **1971** and returned to the land in **1976**. The second defendant's evidence was that he was invited to the suit land by the 1<sup>st</sup> defendant in **1990** and that they began pursuing title documents with the authorities in **1995**. Tribunal DW1, one Karisa Ngumbao, a neighbour about **3** plots away never saw the 1<sup>st</sup> defendant's family being shown the plot by the

allocating authorities, yet the 1<sup>st</sup> defendant, according to his evidence, is his cousin. That is surprising. Given the nature of the agreed points between the present parties in this case, the evidence of Tribunal DW2 at the Tribunal case was not helpful even though he was the immediate neighbour to the disputed land. The substantive part of Tribunal DW3's (Karisa Mramba) evidence before the Tribunal began with the invitation of the 2<sup>nd</sup> defendant to the land by the 1<sup>st</sup> defendant's family which according to the 1<sup>st</sup> defendant's and 2<sup>nd</sup> defendant's admissions before the Tribunal, was an event that took place in the 1990s while the sale transaction and the 1<sup>st</sup> defendant's family's migration took place in the 1970s. He also admitted that the 1<sup>st</sup> defendant's father was buried elsewhere and not on the suit land.

46. In its decision the Tribunal pointed out that after the demise of the 1<sup>st</sup> defendant's father his mother decided to go away and since the land was Settlement Scheme land, she could not sell it and she could only sell the trees thereon, which she sold to the plaintiff's father. There was no doubt that the Simeon Karisa Kenga (Tribunal PW2) was a local administrator at the time of Kadzo's departure and that as would be expected in the circumstances, he gave the plaintiff's father a letter introducing him to the lands office as the new occupant of the now disputed land once he confirmed that he had purchased the trees. The Tribunal found for the plaintiff herein in the dispute that it determined.

47. The evidence that was adduced at the Tribunal clarifies that what could have been sold by a person abandoning his entitlement to land in the Settlement Scheme was only the trees since the land still belonged to the SFT and effectively the Government; that evidence confirms that the selling of the trees signified the sale of the right to occupation of and the right to be allocated, the land one was entitled to, and that the purchaser of the trees could expect to be subsequently registered as the owner of the land and be issued with title thereto.

48. It is noteworthy also that in *Kilifi Case No 211 Of 2009* the trial magistrate after perusing the evidence, noted that there was an agreement that was produced by the defendants herein, showing that the plaintiff's family had permitted the 1<sup>st</sup> defendant's family to live on the suit land. It would be strange indeed that the 1<sup>st</sup> defendant's family, if they believed themselves to be the proper beneficial owners of the suit land, would execute an agreement in which another person was permitting them to stay on their own land if that other person lacked any right or interest in the land. There must then have been a concession by the defendant's family, by reason of that execution, that the plaintiff's father had some right in the land that would grant him power him to permit the defendant's family to reside on the suit land. This court's only logical conclusion is that such concession arose from the knowledge that Kadzo, the 1<sup>st</sup> defendant's mother, had already sold the land to the plaintiff's father. The foregoing therefore supports the plaintiff's claim that the

suit land was sold to his father by the defendant's mother long before the defendant's family returned to it.

49. As to the **third issue** regarding whether the plaintiff has good title to the land, this court is aware that the land was eventually registered in the name of the plaintiff's father. The plaintiff's father died on 7/10/2003 after having commenced the process of seeking title to the suit land but the title was nevertheless issued in his name on 3<sup>rd</sup> November 2005. The plaintiff took out a grant of representation to his estate on 5/9/2006 and was registered by way of transmission as the registered proprietor on 4<sup>th</sup> May 2007. I have seen the **Kenya Gazette Notice No 5164** dated **7/7/2006** in respect of **Kilifi Succession Cause No 16 Of 2006**. There is no doubt in this court's mind that the plaintiff's procurement of the title in his name was through the proper legal channels provided for under the **Law of Succession Act Cap 160**.

50. Regarding the **fourth issue** as to whether the plaintiff holds the suit title in trust for the defendant's family, the finding that the land was purchased by the plaintiff's father being so strong and his claim to title having not been impeached, and the plaintiff having inherited the land from his father through the formal succession mechanisms approved of by the law, the defendants required to present evidence of trust before this court to prove that the land was held on their behalf by the plaintiff.

51. First, when a person claims under a trust the particulars of the trust must be properly set out in the pleading, in this case, in the

defendant's counterclaim to show what kind of trust the claiming is asserting, whether a customary trust, a constructive trust, or any other. Nothing of the sort was done by the defendants who were the plaintiffs in the counterclaim and that counterclaim is right from the outset fatally defective. And perchance it was not defective, it is necessary for the court to examine evidence, for evidence must be adduced in proof because a trust can not be inferred but must be proved.

52. In *Salesio M' Itonga v. M'ithara & 3 Others* (2015) eKLR the Court of Appeal stated as follows:-

*"It is trite law that trust is a question of fact and has to be proved by evidence. In Gichuki -vs- Gichuki - Civil Appeal No. 21 of 1981, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust.....We concur with the following findings by the High Court: -*

*"Trust must be proved by credible evidence adduced by the person claiming that a trust exists.""*

53. In the case of *Njenga Kimani & 2 others v Kimani Nganga K. Wainaina* [2017] eKLR, the plaintiffs stated that their father used to reside on the suit land and that he lived on it between the years 1982 and 1984. Their father had two wives who lived in elsewhere. Their grandfather had built a mud house on the land, which fell apart on its own owing to age, while he was still alive. The case of the plaintiffs was that the defendant holds the suit land in trust for them, and in the alternative, they have claimed that they are entitled to the said land by way of adverse possession. The court dismissed that claim stating as follows:

*“As was pointed out by Kuloba J, in the case of Mbui vs Maranya (1993) KLR 726, it is not unusual in our African societies for one to allow his relatives to live in land that he owns. The fact that a relative lives on another's land, and even has kin buried there, does not by itself prove that the registered proprietor holds the land in trust. A lot more is needed which I am afraid I do not have in this case.”*

54. The defendants in the present case only relied on the claim that the land was fraudulently transferred to the plaintiff's father's name. That claim has been defeated by the available evidence which proved on a balance of probabilities that the plaintiff's father had indeed purchased the suit land from the Kadzo the 1<sup>st</sup> defendant's mother prior to its registration in his name. There was no evidence presented to support the 1<sup>st</sup> defendant's claim that the plaintiff and his father illegally took out succession proceedings in respect of the 1<sup>st</sup> defendant's late father's estate. The plaintiff's family's interest in the land was created upon the execution of the sale agreement vide which the land was sold to the plaintiff's father. Strong evidence showed this court that the plaintiff's father also settled all the SFT dues and obtained a discharge prior to his registration. This court has seen receipts issued in his name as long ago as the period **1996-1999** for land loan repayments and conveyancing fees respectively. The 1<sup>st</sup> defendant's family never took any action to bar the plaintiff's father from making such payments. Whether or not Kalume Kacharo was the original allottee, the issue that was pertinent in the present case was whether the suit land was sold by Kadzo his widow to the plaintiff's father and this court found evidence to support that sale. That sale was

absolute, meaning no interest remained with the 1<sup>st</sup> defendant's family over the suit land. There is therefore no evidence whatsoever to support the claim that the plaintiff holds the suit title in trust for the defendants. Consequently, that claim of trust can not succeed.

55. The upshot of the foregoing is that the plaintiff's claim has merit while the defendant's counterclaim has none. The defendants also ought to pay the costs of the present suit.

56. I therefore enter judgment in favour of the plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally in this case and I issue the following final orders:

- a. The defendant's counterclaim is disallowed;***
- b. The plaintiff's claim vide plaint dated 16/1/2018 is allowed in terms of prayers nos (1), (2), (3), and (4) thereof.***

**Dated, signed and delivered at Malindi on this 7<sup>th</sup> May 2026.**



**MWANGI NJOROGE  
JUDGE, ELC MALINDI.**