



**Kikwai (Suing as the Administratrix of the Late Joseph Kipngetich Kikwai) v Siele & 17 others
(Environment & Land Case 41 of 2017) [2024] KEELC 198 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 198 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 41 OF 2017
MC OUNDO, J
JANUARY 25, 2024

BETWEEN

**CHRISTINE CHEPNGENO KIKWAI (SUING AS THE ADMINISTRATRIX OF
THE LATE JOSEPH KIPNGETICH KIKWAI) PLAINTIFF**

AND

JULIUS CHERUIYOT SIELE 1ST DEFENDANT
PAUL KIKWAI 2ND DEFENDANT
ALFRED KOECH 3RD DEFENDANT
CHARLES KOECH 4TH DEFENDANT
BENARD TONUI 5TH DEFENDANT
ISMAIL TOO 6TH DEFENDANT
JOSEA KIRUI 7TH DEFENDANT
JOSEPH KIRUI 8TH DEFENDANT
BENARD TONUI 9TH DEFENDANT
ERICK TONUI 10TH DEFENDANT
GEOFFREY TONUI 11TH DEFENDANT
SHADRACK BORE 12TH DEFENDANT
STANLEY SIELE 13TH DEFENDANT
GIDEON YEGON 14TH DEFENDANT
ANDREW NGENO 15TH DEFENDANT
BONIFACE SIELE 16TH DEFENDANT



GIDEON KIPROTICH 17TH DEFENDANT
NAHASHON LANGAT 18TH DEFENDANT

JUDGMENT

1. Vide a Plaintiff dated 18th April, 2017, the Plaintiff herein sought for the following orders;
 - i. An order declaring the deceased Joseph Kipngetich Kikwae alias Kipngetich arap Kikwae as the joint registered proprietor of all that parcel of land known as Kericho/Boiywek/526 in equal undivided shares.
 - ii. 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/Boiywek/526.
 - iii. Mesne profit, the exact amount to be assessed by the honorable court
 - iv. Interest on the mesne profit above.
 - v. Costs of the suit be awarded to the Plaintiff
 - vi. Interest
 - vii. Any other relief
2. The Defendants filed their joint Statement of Defence and a Counterclaim dated 20th February, 2019 wherein they denied the contents of the Plaintiff and stating that Land Reference No. Kericho/Boiywek/526 (the suit land) was one of the properties of the family of the late Kiproop Chebotungo alongside Kericho/Ainamoi/139 and that the two joint registered owners, that is Chepkwony Arap Rop and Kipngetich arap Kikwae were merely trustees for the larger family. They thus sought for the following orders;
 - i. A declaration that L.R No. Kericho/Boiywek/526 is one of the properties of the heirs of the late Kiproop Chebotungo alongside Kericho/Ainamoi/139 and that the two joint registered owners Chepkwony arap Rop and Kipngetich arap Kikwae were merely trustees for the larger family
 - ii. In the alternative, the Defendants (now Plaintiffs) and other heirs be declared owners of the suit land by prescription having been in occupation for close to 50 years.
 - iii. A permanent injunction restraining the Plaintiff (now Defendant) herself, her agents and/or servants from laying exclusive claim over the property.
3. The Defendants thus sought for the suit against them be dismissed with costs and judgement be entered in the Counterclaim as prayed.
4. Parties having complied with the provisions of Order 11 of the Civil Procedure Rules, the matter proceeded for hearing on 13th June, 2019 where the Plaintiff herein, Christine Kikwai testified as PW1 to the effect that she came from Ainamoi in Kericho County and was a farmer. That she had sued the Defendants who were her brothers in law in respect with land parcel No. Kericho/Boiywek/526 which was registered in the names of Chepkwony Arap Rop and Kipngetich Kikwae. That she had conducted an official search at the land's office and discovered that the suit property had been registered



in the name both her deceased husband Kipngetch Kikwae and Chepkwony Arap Rop who were now deceased. That Chepkwony Arap Rop had pre-deceased her husband.

5. That he husband had died 10 years ago wherein she had been granted Letters of Administration. That she resided on the suit property which was her matrimonial home, with her children and the children of Chepkwony Arap Rop. That she had planted sugarcane and maize on the suit property which measured 15.5 hectares which was approximately 40 acres.
6. She testified that the Defendants were not her husband's relatives. That whereas the 1st Defendant was a brother to her husband's grandfather, she did not know the rest of the Defendants who were her neighbours and who had forcefully invaded and occupied the suit land two years ago without her consent. That she had reported the Defendants to the chief after they had threatened to unleash violence on her and her family wherein they had been summoned by the chief who had cautioned them from harming her.
7. She stated that the Defendants had no proprietary interest in the suit property and that she did not attend any meeting at a place called Kapchebotungo where it had been resolved that the suit property belonged to one Arap Chebotungo and therefore should be divided amongst his sons. That she did not know the sons of Arap Chebotungo or whether they had taken out letters of administration as they did not involve her in their Succession Cause.
8. She sought for declaration that the suit land belonged to her and the family of the late Chepkwony Arap Rop and that the Defendants be evicted from the same. She confirmed that she was in occupation of land measuring 3.5 acres only and that were she cultivating the same, she would be earning Kshs. 100,000/= from the sugar cane proceeds. That if she had planted maize, she would be getting 55 sacks of maize from 2 acres. That she had not utilized the suit property since 2017 after its occupation by the Defendants. She produced the Letters of Grant Ad Litem as Pf exhibit 1 and marked the certificate of official search is marked as PMFI 2. She also adopted her witness statement as her evidence in chief.
9. On being cross-examined the Plaintiff denied knowing Paul Kikwai but confirmed that Francis Chepkwony was the son of Chepkwony arap Rop. That she did not want to evict Francis Chepkwony the cause he too would have wanted the 2nd – 18th Defendants to vacate from the suit land.
10. She confirmed that she lived in Ainamoi which was far from the suit land. That she did not know Arap Chebotungo. That while she lived on the suit land, her children lived on land parcel No. Kericho/Ainamoi/139. She reiterated that she had planted maize, sugarcane and trees on the suit land and had a house thereon which house she built in the year 2017. She however admitted that there had been no house on the suit land at the time when her husband died.
11. She admitted that she knew the 9th Defendant Julius Siele as a son to the 1st Defendant. That she did not know Eric Tonui, Geoffrey Tonui, Shadrack Bore, Gideon Kimutai Yegon, and Andrew Ngeno, but knew Stanely Siele the 13th Defendant as a brother to the 9th Defendant and a son to the 1st Defendant and Boniface Siele. She also knew Nahashon Langat (the 17th Defendant) as a cousin to the 9th and 13th Defendants. He was also a grandson of Chepkwony arap Rop. That she also did not Know Gideon Kiprotich. That in total she knew 5 out of the 18 Defendants. She confirmed to having sued the defendants because they had invaded her land and she had been saying 13 of them on her land. That she had found out their names after the invasion.
12. She proceeded to testify that the suit land was registered to Chepkwony arap Rop and Joseph Kipngetch Kikwae and that she was also aware of the land parcel No. Kericho/Ainamoi/139 upon which she lived. On further probing she admitted that whilst she had been tilling the suit land, she was living on land parcel No. Kericho/Ainamoi/139 with her brother in law and the children of Kiprop



- arap Chebotungo who were tilling the suit land as well. That during her husband's life time, there had been no dispute over the suit land and that only her husband and Arap Rop used to till the land. The she knew the deceased Francis Kipsile Chepkwony (a son to Chelombochet) whom she had initially sued and who was the father of Julius Cheruiyot Siele, the 1st Defendant herein. That the said Francis had wanted to exclude them from the suit land on claims the same ought to be shared between Kipngetch arap Kikwai and Chelombochet Arap Rop and had therefore restrained her from tilling the land. That Francis had also declared that the land belonged to the family of Chebotungo as a whole.
13. She also stated that she had sued Paul Kikwai, her late husband's brother because he had violently occupied the suit land wherein he had chased her children out of the said suit land. She reiterated that she had reported the matter to the Chief before filing the instant suit.
 14. She also confirmed that she knew the 6th and 7th Defendants who belonged to the family of Chebotungo but that she did not know how many children the said Chebotungo had.
 15. She confirmed that her father in law's name was Arap Maridany and that the only land registered to Chebotungo was the one in Bomet. She further admitted that the whole family had been tilling the suit land. That the rest of the family of Chebotungo resided on land parcel No. Kericho/Ainamoi/139. That there had been no dispute over the suit land during her husband's lifetime and that she had only discovered that the suit land was registered in her deceased husband's name when she visited the land's office.
 16. She reiterated that Chebotungo had four sons, namely;
 - i. Kipkoech Arap Rop alias Kimuyet,
 - ii. Kipkurui Arap Rop,
 - iii. Chepkwony Arap Rop and
 - iv. Kikwai Arap Rop who had shared the suit land.
 17. That whereas she was aware that Francis Chepkwony lived both on the suit land and on land parcel No. Kericho/Ainamoi/139, she did not know why the said Francis got a bigger portion of the suit land. She confirmed that she went to court after she discovered that the suit land had been registered in her husband's name. That every time they went to the suit land they would be chased away. That it had only been by a consent order that the court had given her 3.8 acres of the suit land, which portion she was tilling.
 18. It was their evidence that just before her husband passed away, he had informed her that the suit land was to be shared between himself and Chepkwony Arap Rop. That she was not there for aware of any succession cause relating to the estate of Chebotungo.
 19. In her re-examination, the Plaintiff had clarified that the suit land is registered in the names of Chepkwony Arap Rop and Kipngetch arap Kikwae and that Chepkwony arap Rop was like her father. That before the filing the instant matter, she used to farm together with Arap Rop on the suit land. She also confirmed that she knew all the Defendants as they had all invaded the suit land. She reiterated that although at some point Francis had informed her that the suit land used to belong to his father's and Arap Rop, she had not been at the meeting where it was decided that the land belonged to Arap Chebotungo. She also further confirmed that the court had given her the land almost 10 years ago and that before her husband died, the Defendants did not lay claim that the suit land had belonged to Chebotungo.



20. PW2, Boniface Kiptoo Ngetich, the Plaintiff's eldest son testified to the effect that he lived in Ainamoi and was a farmer. That he was in court because the Defendants attacked them on the suit land hence he had come to testify on behalf of his mother Christine, the Plaintiff herein. He adopted his witness statement dated 2nd February, 2018 as his evidence in chief and proceeded to testify that the Defendants violently took occupation of the suit land between the years 2016-2017 while armed with pangas and rungas wherein they had given them 10 minutes to vacate. That after the Defendants chased them away, they had started sub-dividing the portion of the suit land where the Plaintiff and her children had planted sugarcane and maize.
21. That before filing the instant suit, they had reported the incident to the Chief as well as at Kipsitet Police station wherein the police and the Chief had visited the suit land and advised them to go to court. That the suit land belonged to Chepkwony Arap Rop and Kipngetich Arap Kikwae. That it was upon going to the lands office that he knew that the land was theirs and that only the families of Chepkwony Arap Rop and Kipngetich Arap Kikwae were using the suit land.
22. His evidence was that before the proprietors of the suit land died, the Defendants had not lay claim on it and it had been after the invasion that they had proceeded to sub-divide the same and had were still in occupation of the said suit land which measures 38 acres. He was categorical that the suit land did not belong to his grandfather Chebotungo but to his father.
23. That although his family were aware of the meeting held by the Defendants to sub-divide the suit land, he did not attend the said meeting but it had been after the attendance of the meeting by the Defendants that they (Defendants) had proceeded to sub-divide the suit land which was now currently invaded by weapon brandishing youths who claimed that they can only be removed therefrom by the Government. The witness sought for eviction of the Defendants from the suit land.
24. On cross-examination, the witness reiterated that he was born in the year 1981. That he had been with his mother when they were chased from the suit land between the year 2016 and 2017 and that he had only gone back to the land in the year 2020 to check on his mother's crops.
25. He also reiterated that in the year 2016, the two families used to cultivate the suit land and that because he used to work for his mother, they had planted sugar cane on a portion of the land measuring 3 acres. That the Defendants including the family of Francis were cultivating on the rest of the 35 acres. He reiterated that it was the Defendants who attacked them between the year 2016 and 2017 wherein he had reported the incident at Kipsitet Police Station in April, 2017 and had been given an OB which he gave to his counsel.
26. He maintained that he had recorded his complaint at the police station although the police did not arrest the Defendants. That they also reported the incidence to the retired Chief one Arap Koech although he did not bring the Chief's Letter to court.
27. That whereas Chebotungo was his father's grandfather, he had never met him. That the said Chebotungo had four sons, That his grandfather called Maridany, that Chepkwony arap Rop was one of his great grandfathers while Francis Siele was Chepkwony arap Rop's son.
28. That the said Francis was one of the people who had subdivided the suit land out of fear of the defendants although he did not agree to the subdivision of the suit land.
29. He proceeded to reiterated that his father was buried in Ainamoi that the Chebotungo family lived in Ainamoi and he also lived in Ainamoi. That his father died in the year 2002 and before his death, there had been no dispute over the suit land. He reiterated that he had discovered that the suit land was registered in his father's name when he visited the lands office



30. He was also categorical that the land was not registered in the names of the two proprietors on behalf of the Chebotungo family, but for the said two proprietors. That 35 acres of the suit land was forcefully taken away.
31. In re-examination he confirmed that he had started working on the suit land in the year 2012 and that they worked on the said farm as two families only.

The Plaintiff thus closed her case.

32. The Defence case opened with the testimony of one Alfred Kiptoo Koech, the 3rd Defendant who testified as DW1 to the effect that he lived in Ainamoi and was a farmer. He adopted his witness statement as his evidence in chief and proceeded to give evidence that all parties in the instant matter were members of his grandfather Kiprop Arap Chebotungo's family. That his grandfather had two parcels of land, one in Ainamoi and the other at Kapkormon. That the one in Ainamoi was land parcel No. Kericho/Ainamoi/139 while the one in Kapkormon was known as Kericho/boiywek/526 (the suit land).
33. That the said Chebatungo had 4 (four) sons namely:
 - i. Kipkoech Arap Rop alias Kimuryet
 - ii. Kipkurui Arap Rop alias Kibolgon
 - iii. Chepkwony Arap Rop alias Chelimbochet
 - iv. Kikwai Arap Rop alias Maridany
34. That the suit land had been registered to Joseph Kipngetich Arap Kikwae and Chepkwony Arap Rop. Joseph Kipngetich was Chebatungo's grandson wherein the Plaintiff herein was Joseph's wife. He confirmed that both Joseph Kipngetich Arap Kikwae and Chepkwony Arap Rop were now deceased.
35. His evidence was that the Joseph and Chepkwony were registered to hold the suit land in trust for the rest of the family and that as a family, they utilized both parcels of land. That whereas all residential houses were in Ainamoi, the suit land had only structures that were utilized during cultivation.
36. He confirmed that they lived together with the Plaintiff in Ainamoi and that Kikwae was his first cousin. That the said Kikwae did not make any claim on the suit land during his lifetime since he had declared that the suit land belonged to the family. That upon Joseph's demise, the Defendants wanted to subdivide the suit land but the Plaintiff refused. That the said Plaintiff had also sued Francis Chepkwony who was a son to Chepkwony Arap Rop who had jointly been registered as proprietor of the suit land with Joseph.
37. That during his lifetime, the said Chepkwony had also declared that the land belonged to the whole family. That subsequently, the family sat in a meeting in the year 2015 and agreed that the suit land be divided into 4 portions to represent the children of Chebotungo and that the Plaintiff's family were to get a share. He confirmed that Paul Kikwai and Joseph Kikwae were brothers and sons to Maridany arap Rop.
38. He reiterated that the suit land belonged to all the family members of Arap Chebotungo and that the registered proprietors were to hold the same in customary trust for the family. That he was 56 years old and had been using both properties since he was young. He acknowledged that PW2 was Kipngetich arap Kikwai's son and was way younger than himself hence he had no knowledge of the usage of the suit land. That they did not use any violence against Joseph's family and neither had they denied them the use of the land.



39. On being cross-examined, he confirmed that he was 66 years having been born in the year 1956. That he was Chebotungo's grandson and that the said Chebotungo died in the year 1976 before subdividing the suit land although they used to use the said farm as a family wherein each person had a portion measuring around 4 acres to do farming activities.
40. That there were 4 families in addition to the people in the village who knew how the suit land was used. That apart from farming on the suit land, they also grazed their cattle therein. He confirmed that Chebotungo had 4 sons and that the suit land was registered to Joseph who was Chebotungo's grandson and Chepkwony Arap Rop who was Chebotungo's son, to hold it in trust for Chebotungo's family. That although he was not there when Chebotungo registered the suit land to the two, yet he had been aware that the said land had been given to the two in the year 1973 after it had been surveyed. He could not however remember when the title was issued.
41. He proceeded to testify that around the month of June 2015, they sat as a family of Arap Chebotungo, discussed on the suit land and decided to sub-divide it among 5 members after which they had proceeded to the suit land by which time the Plaintiff was ploughing, sub-divided it and started ploughing as well.
42. He contended that the Plaintiff did not report them to the police and that he had built a house on the suit land a long time ago. He also confirmed that Chepkwony Arap Rop had died before Joseph and that during their meeting in the year 2015, where they had sat with the village elders they were aware that the proprietors of the suit land were deceased. He also confirmed that the Plaintiff had planted sugar cane on the suit land.
43. His evidence was that at the time of registration of the suit land, his father was in Kapkormon and that had been why Chebotungo had registered the same in his grandson's name. He maintained that they utilized the suit land during the lifetime of their grandfather and when they tried to subdivide the said land during the lifetime of Joseph, he had asked them to wait since it was during a rainy season and the children had gone to school.
44. In re-examination, he confirmed that whilst he did not have a document showing that they had been grazing and living on the suit land, everybody knew about the activities they were carrying on it. That his grandfather had registered the land to Chepkwony because all his sons had passed away.
45. He confirmed that the survey started in the year 1973 wherein titles were issued in the year 1977. That Chepkwony died in 1980's while Joseph died in the year 2000. That they had subdivided the land so that each of them could get a place to graze and that Francis Chepkwony (1st original Defendant) was present when the said subdivision was done.
46. That they had filed a succession cause to the estate of Chepkwony Arap Rop in Succession Cause No. 201 of 2016 whereby the Grant had been issued in June 2016. That there had been no confirmation of the Grant as the process had awaited finalization of the instant suit. He also confirmed that they had not filed a Succession Cause to the estate of Joseph as the Plaintiff was not co-operative and had refused to give them the death certificate. That in their division, Francis Chepkwony had been given an extra 2 acres because the clan had said so.
47. When the court examined him, the 1st Defendant had explained that they wanted to subdivide the suit land in the year 2015 because the children were all grown up and each member wanted to subdivide their parcel and that he knew that a trust land could be sub-divided.
48. Paul Kipngetchik Kikwai, the 2nd Defendant herein, testified as DW 2 to the effect that he lived in Ainamoi and was a farmer. He adopted his witness statement dated 1st March 2019 as his evidence in



chief and proceeded to testify that he was Chebotungo's grandchild and that the parties herein were family members of Chebotungo. That Kipro Arap Chebotungo had four children namely;

- i. Kipkoech Arap Rop alias Kumuryet,
- ii. Chepkwony Arap Rop alias Chelimbochet,
- iii. Kipkurui Arap Rop alias Kibolgong and
- iv. Kikwai Arap Rop alias Maridany.

49. That his father was called Kipkwai Arap Rop alias Maridany and had two sons namely Joseph Kipngetch Kikwae now deceased and himself. That the Plaintiff was his sister in law as she was Joseph Kikwae's wife. That his grandfather had land parcel No. Kericho/Boitwek/526 (the suit land) and Kericho/Ainamoi/139. That the suit land was registered in the names of Chepkwony Arap Rop and Joseph Kipngetch Kikwae.
50. That while the family of Chebotungo lived in Ainamoi together with the Plaintiff, they carried out farming on the suit land whereby they had planted sugar cane. That he was 59 years old having been born in the year 1964 and had started cultivating on the suit land around 5 years ago although the other Defendants including, Francis Chepkwony and Alfred Koech had started planting on the suit land before him. That Francis Chepkwony was a son to Chepkwony arap Rop while Alfred Koech was a son to Kipkoech arap Rop alias Kimuryet.
51. He reiterated that they live with the Plaintiff in Ainamoi and that when Joseph was alive, he never told them that the whole suit land was his alone. Further that the family of Chepkwony arap Rop alias Chelimbochet had never stated that suit land was his alone.
52. His evidence was that the suit land was held in trust for the family. That owing to the fact that the registered proprietors of the suit land were both deceased, they held had a family meeting in the year 2015 and agreed to subdivide the land between the 4 sons of Chebotungo whereby every household was to get 3.593 hectares. That Francis Kipsele Chepkwony got an extra 1.21 hectares as a gift because he had established his home on the suit land. He explained that land parcel No. Kericho/Ainamoi/139 had already been subdivided and urged the court to confirm the sub-division of the suit land as they had done.
53. When he was examined by the court, the 2nd Defendant maintained that the suit land was a family land where the cattle used to be kept. That land parcel No. Kericho/Ainamoi/139 was where their homesteads were and was also where they planted maize in accordance with the tradition that dictated that where the cattle were kept and where homesteads were built should be separate.
54. On cross-examination, the Defendant reiterated that he was born in the year 1964 and was 58 years old. That his elder brother now deceased was called Joseph Kipkwei. That Chebotungo had two parcels of land, Kericho/Ainamoi/139 and Kericho/Boiywek/526 (the suit land). That the family of the said Chebotungo lived and ploughed on land parcel No. Kericho/Ainamoi/139 whereby everybody had their share since the said land was subdivided equally into 4 portions in the year 1979 after the death of his grandfather. That subsequently, there had been no dispute with regards to land parcel No. Kericho/Ainamoi/139.
55. He reiterated that they had discovered that the suit land had been registered in the names of Chepkwony Arap Rop and Joseph Kikwai when they visited the lands office in the year 2014. That whereas the suit land had not been registered in his grandfather's name, it used to be a grazing ground for the said grandfather's cattle when he was still alive although he did not know for how long it had been a grazing ground and neither did he see his grandfather grazing cattle thereon.



56. His further evidence on cross-examination was that he got onto the suit land for the first time in the year 2017 when he went to visit Francis Chepkwony and had requested for a portion of the suit land to plough. That the said Francis had given him 3.8 acres to plough whereby he had cleared the bushes and had started planting sugar cane and which sugar cane he had been cultivating to date. That he had started ploughing his portion of land earlier in 2015 whilst the suit land was still a grazing ground because he could not manage to keep cattle.
57. He confirmed that indeed they had had a sitting with both the Chief and the District Officer whereby they had been advised to settle the matter after which they had agreed to sub-divide the suit land. That before they could sub-divide the land, the Plaintiff had reported them to the District Officer who had summoned them and after a sitting, had advised them to look for a surveyor to sub-divide the land. That they had looked for money to sub-divide the suit land and which sub-division was to be done on 30th August, 2018.
58. That before the intended subdivision, they had requested the area chief to inform the Ainamoi Chief to let the Plaintiff know that the land would be sub-divided on 30th August 2018. On the said date, the suit land was sub-divided in the presence of all the family members, a surveyor, village elders and neighbors, except the Plaintiff. That to date they had not received their titles as at 2014, the land was still registered to Chepkwony arap Rop and Joseph Kipngetch Kikwae in trust for the family.
59. He explained that the surveyors were the ones who had registered the suit land to the two because at the time they had visited the land, they had found only Chepkwony but since they required the land to be registered in the names of two people, Chepkwony had gone to Ainamoi to look for the second person and that was how Joseph was registered as the second proprietor.
60. That it had not been his grandfather who had registered the suit land in the names of the two proprietors since at the time of the said registration, he had already passed away. He confirmed that Land parcel No. Kericho/Ainamoi/139 was still registered in the name of his grandfather but that he was not there during the adjudication when the land was registered. He also confirmed that the Plaintiff had not reported them to the police when they sub-divided the suit land.
61. His evidence was that Chepkwony Arap Rop used to graze his grandfather's cattle on the suit land and had continued grazing them there even after the demise of the said grandfather.
62. When the 2nd Defendant was examined by the court, he explained that the suit land had been given to his grandfather as dowry for his sister and was known as Kaptugut in Kipsigis language.
63. In re-examination he confirmed that after the demise of his grandfather, his children continued to use the suit land as grazing ground and that at the time of registering the suit land, Chepkwony arap Rop and Kipkurui Arap Rop were alive. That surveyors had requested that the suit land be registered in the name of two family members because the said land was a family land. However, after the death of his grandfather, their parents had taken the cattle.
64. That in the year 2017, he had asked for land from Francis and Alfred who were already on the suit land. That at the time, Chepkwony had been left to look after the land as a trustee as only the cattle were on the suit land. That afterwards, in addition to rearing the cattle on the suit land, Francis and Alfred had started ploughing sugar cane on the said land. That he did not rear cattle on his portion of the land because he considered taking care of cattle to be hard work.
65. That the dispute over the suit land only began in the year 2015 after the death of his brother Joseph Kimwetich Kikwae. He confirmed that the District Officer had advised them to sub-divide the suit land wherein they had complied before the instant matter was filed in court. He confirmed that the



family of Chepkwony Arap Rop had participated in the sub-division but that they were yet to receive title deeds because they were summoned in court.

66. William Kipkemoi Ngeny testified as DW3 to the effect that he lived in Kapkormom in Kericho County and was a farmer. He adopted his witness statement dated 1st March, 2019 as his evidence in chief before proceeding to testify that he knew the family of Arap Chebotungo. That the elder son was Kimuryet, followed by Kablgong then arap Maridany. That he was a neighbor to the parties at Kapkormom although they also had another land in Ainamoi.
67. That whereas he did not know the registration number of his land yet their parcels of land were separated by river/a stream called Kipkoes River. That he had visited the land in Ainamoi and noted that the same had been subdivided into 4 just like the way the suit land had been subdivided. He confirmed that the parties practiced farming in Ainamoi where they also had the residential homesteads.
68. That the suit land was occupied by Chepkwony and when he died, it had been subdivided into 4. That Chepkwony was a son to Chepkwony arap Chelimbochet who was a son to Chebotungo. That he had seen Arap Chebotungo during his lifetime as he used to come to the suit land. That Chebotungo's wife did not live on the suit land but his sons visited the suit land which was known as "Kaptegut" until it was sub-divided into 4 portions.
69. That whilst he did not know who held the title to the suit land, he confirmed that it belongs to Arap Chebotungo but was now the property of his sons. That he knew the deceased Joseph who was the eldest son of Arap Maridany. That he was aware that there was a dispute over the suit land because it had been registered to the name of two people instead of four persons. He also confirmed that he had not seen Joseph, who was born in Ainamoi, graze on the suit land.
70. His evidence was that they used to interact with Chelimbochet because he used to take care of the suit land but the said Chelimbochet never claimed ownership of the suit land because it belonged to his father and now to the four sons after his death.
71. His evidence was that he had been present and in the company of the chief when they had all agreed on how the land was to be subdivided. He thus urged the court to allow the subdivision of the suit land into 4 (four) portions as had happened with land parcel No. Kericho/Ainamoi/139.
72. In cross examination the witness explained that the first meeting took place in the Chief's office while the second meeting took place on the suit land although he could not remember the exact dates. He confirmed that there was no dispute in respect of land parcel No. Kericho/Ainamoi/139. That the subdivision of the suit land happened some years back although he could not remember the exact year.
73. He also confirmed that although he lived in Kapkormom, he could not tell the distance between his land and the suit land despite the fact that they shared a stream. That during the adjudication, he was on his land and his father had been given his title in the year 1972 which title he had given them.
74. That at the time of the adjudication he had heard that whoever had been found on the land was registered as its proprietor wherein they would share the land later. That in this case, two people had been registered.
75. He confirmed that Chebotungo had 4 sons and that he used to live in Ainamoi together with his wife and that only one person used to take care of Chebotungo's cattle on the suit land. That notwithstanding the fact that he was not present during the adjudication, he knew that the suit land belonged to 4 people and the same was sub-divided into four portions thus one person could not take the family land.



76. He maintained that land parcel No. Kericho/Ainamoi/139 was subdivided into four and so should the suit land, which had sugar cane which had been planted by people who did not reside there, and it was also used to graze cattle. That although he had talked with Chebotungo, who was an old man, he had not informed him of the family land.
77. On re-examination, he was referred to the first paragraph of his witness statement wherein he had explained that “Kaptich” meant where cattle graze. When he was further referred to the last paragraph of his Witness Statement, he explained that the 4 portions referred to in the said paragraph were in regard to land parcel No. Kericho/Ainamoi/139 which had been our divided into 4 portions. He confirmed that he did not participate in the adjudication and he only came to learn of the same when the dispute over the suit land arose.
78. DW4, Julius Cheruiyot Siele, the 1st Defendant herein testified to the effect that he lived in Ainamoi and was involved in the business of buying and selling cattle. He adopted his witness statement dated 1st August, 2022 and proceeded to testify that he substituted his father, the deceased Francis Chepkwony as the 1st Defendant herein. That whereas the rest of the Defendants were brothers in the Chebotungo’s family, the Plaintiff was a wife to his uncle who was known as Joseph Kipngetich.
79. That he got the information about the instant suit from his grandmother and his father. That Arap Chebotungo had 4 sons who were his grandfathers and they included;
- i. Kimurwet Arap Rop,
 - ii. Chepkwony Rop,
 - iii. Kipulgong Arap Rop and
 - iv. Kikwai Arap Rop.
80. That Arap Chebotungo had two parcels of land No. Kericho/Ainamoi/139 in Ainamoi and the suit land in Boiywek. That he suit land had been gifted to Chebotungo after his sister got married wherein during adjudication, it had been registered in the names of Joseph Kikwae and Chepkwony Arap Rop. That whilst Chepkwony Arap Rop was his grandfather, Joseph Kipngetich Kikwae was a brother to his father. That the two had been registered to hold the suit land in trust for the whole family.
81. His evidence was that on land parcel No. Kericho/Ainamoi/139 everybody lived on their own land and they also had a ‘boma’ therein while the suit land was used by the whole family for ploughing. That his father had built a house on the suit land to use while looking after the land and taking care of cattle.
82. That land parcel No. Kericho/Ainamoi/139 had been sub-divided into 4 portions by his grandfathers. That they had held a meeting on how to sub-divide the suit land wherein his family had been given the biggest of 4.803 hectares because his father had been taking care of the same, Kikwai’s family was given 3.593 hectares, Kipkorir Rop’s family was given 3.539 hectares while Kipkoech Rop’s family was given 3.593 hectares.
83. That there had been no succession conducted on the estate of his grandfathers and uncles. That the Plaintiff was ploughing around 3 acres of the suit land on behalf of her husband Joseph Kikwae. That during his lifetime, Joseph had not complained that his land had been taken away. He thus sought for the land to be shared according to how the elders had sub-divided it.
84. On cross-examination, he confirmed that he was 48 years old and that he could not remember the year that Joseph Kikwae had died. That he had come to court on behalf of his father Francis who was alive



when the instant matter began. That he did not have succession documents with regards to his father's estate and that most of the evidence he had given, was what he had been told.

85. That although his father had been living on the suit land, he was buried in Ainamoi on land parcel No. Kericho/Ainamoi/139. He confirmed that he was living on Land Parcel No. Kericho/Ainamoi/139 where his father's houses were. He explained that his father lived on the suit land alone since he had built them a home on land parcel No. Kericho/Ainamoi/139.
86. He confirmed that he was an administrator of his father's Estate although he did not know what kind of defence his father had put in the instant matter. He confirmed that the suit land was registered in the names of Joseph Kikwae and Chepkwony Arap Rop but he did not know when the two were given title to the said land.
87. He further confirmed that despite not having orders from the court, they had sub-divided the suit land between the years 2016 and 2017 because the land belonged to his grandfather Chebotungo who had told them that it had belonged to his grandfather. That suit land was used by the Chebotungo's family to graze cattle while his father and the Plaintiff had used it to plough. That the house on the suit land was built a long time ago and the land was currently being used for other activities since after they sub-divided it, everybody had started using it differently.
88. He maintained that at the time they had agreed to sub-divide the suit land, the Plaintiff was not present and they did not know that the Plaintiff's husband had the title to the suit land.
89. In re-examination, he explained that when his father died on 26th September, 2017, he filed his application to substitute his father dated 3rd May, 2018 on 7th May, 2018. He further explained that his father who used to guard and take care of the suit land lived in an old house thereon that had belonged to his grandfather Chepkwony Arap Rop one of the registered proprietors of the suit land. That Chebotungo was his great grandfather.
90. He also confirmed that he had no information about succession process.
91. The Defence closed its case and parties were directed to file their written submissions to which I shall herein summarize as follows;

Plaintiff's submissions.

92. The Plaintiff framed one issues for determination to wit; whether the she has a valid claim against the Defendants and whether the Defendants' counterclaim is sustainable.
93. The Plaintiff submitted that the suit land was currently jointly registered in the names of two deceased persons. That the Plaintiff obtained Letters of Administration ad litem for purposes of filing the instant suit while the Defendants herein without a grant of whatever nature had interfered with the deceased's property hence their acts amounted to intermeddling. That the Defendants' acts of commission, omission, interfering with the use and possession, encroachment and subdivision of the suit land had caused her irreparable loss thus an order of injunction should be granted in her favour.
94. That the Defendants having admitted that indeed her husband Joseph Kipngetch Kikwae was the registered owner of the suit land, the enjoyment of the said land rested upon the Plaintiff. That the Defendants had further admitted in their evidence that after holding their meeting in the year 2015 and agreeing that the suit land be sub-divided into small portions, they had only apportioned her family 4 acres while they possessed and used the remaining 37.75 acres for their own benefits thus enriching themselves unlawfully by enjoying the deceased's property. She sought that the court grants her Kshs. 2,000,000/= as mesne profit.



95. It was the Plaintiff's further submission that the Defendants having admitted that they had come into the suit property in the year 2015 wherein the instant suit had been filed in the year 2017, their claim that they had been in occupation for more than 50 years ought to fail. Further that the said Defendants were not residing on the suit land but were only grazing and tilling the same. That the Defendants contradicted themselves in their evidence in court in that whilst they alleged that the deceased Chebotongo's wish was that the subject parcel of land be used only for grazing, the said Defendants had proceeded to sub-divide it.
96. On the issue of trust as alleged by the Defendants, the Plaintiff submitted that for a customary trust to arise, the Defendants had to prove that both they and the Plaintiff belonged to such family, clan or group; that the land in question was for the family, clan or group; the relationship of the claimant to such family, clan or group was not so remote as to make his/her claim idle; the claim has to be directed against the registered proprietor who was a member of the family, clan or group; and that the claimant had been entitled to be registered as owner or other beneficiary of the land but for some intervening circumstances was not registered as such.
97. That the Defendants' claim of trust having not been laid down in an instrument, the same could be classified as customary trust to be guided by the aforementioned principles. That the Defendants' evidence was not clear since some of the Defendant witnesses were not aware of who exactly were the registered owner of the suit land. That the Defendants and their witnesses had relied on hearsay evidence since all of them were not present during the land demarcation and yet the late Chebotungo had parcels in his name and that the Plaintiff's husband was a grandson. That the suit land was not family land before its registration. Further that the Defendants and the Plaintiff were not the immediate family of the late Kiprop Chebotungo as they were grandchildren, great grandchildren and the great great grandchildren hence their relationship to the said Chebotungo was remote.
98. The Plaintiff further submitted that the Defendants were not the registered owners of the suit land and that no Letters of Administration had been issued to the estate of the late Joseph Kikwae. She submitted that the original 1st Defendant was the only one in occupation of the suit land wherein after his demise, he had been buried on L.R No. Kericho/Ainamoi/139. That his occupation had been as a result of the meeting held by the Defendants in the year 2015 which had sanctioned the 1st Defendant's trespass.
99. The Plaintiff reiterated that the suit land belonged to her late husband who was jointly registered with the late Chepkwony arap Rop and wherein the Defendants, without any justifiable cause had invaded it between year 2016 to 2017, laid claim that the same was family land belonging to the larger Kiprop Chebotungo's family and had proceeded to commence sub-division which then led to the filing of the instant suit.
100. She further submitted that the Defendants' actions had amounted to intermeddling with the deceased's estate since no citation proceedings had been instituted against the Plaintiff for purposes of taking out letters of administration. That before the Defendants herein laid claim on the suit land, she and her family had been using the land without interference. That the Defendants had not proved their claim of trust over the subject parcel of land hence their claim ought to be dismissed.
101. That the Defendants' prayer to be declared owners of the suit land by prescription could not be granted because the land was still registered in the names of the two deceased proprietors wherein the Defendants were not administrators of their estates.
102. The Plaintiff sought for the Defendants' counterclaim to be dismissed with costs and judgment be entered in her favour with costs.



Defendants' Submissions.

103. The 1st to 18th Defendants summed up the brief background of the evidence adduced in court before framing their issues for determination as follows:
- i. Whether the Plaintiff had established a cause of action against all the 18 Defendants to justify their being dragged through the whole legal process.
 - ii. Whether a customary or generational trust could be implied as subsisting in favor of the Defendants with regards to L.R No. Kericho/Boiywek/526 vis-a-vis the concept of first registration.
 - iii. The consequential orders to be issued by the Honorable Court.
104. On the first issue for determination, the Defendants' reliance was hinged on the definition of a cause of action in the decided cases of Attorney General & another v Andrew Maina Githinji & Another [2016] eKLR and Letang vs Cooper [1964] 2 All ER 929 at 934 to submit that the Plaintiff had to lead evidence of a wrong meted on her and connect it to all the Defendants jointly and severally. That the Plaintiff's narrative of circumstances that prompted her to file the instant suit was contradictory since in her plaint, she had alleged that the Defendants had first invaded the suit land in the month of August 2016 and subsequently on 10th October, 2017 while armed with pangas, rungas and all sorts of crude weapons whereby they had proceeded to forcefully evict her and her children while threatening them with violence. That she had notified the area chief and on his advice coupled with imminent fear of violence she had vacated from the suit land and was unable to attend to her crops and other properties therein.
105. PW2 on the other hand lead evidence in court to the effect that the incidents were reported not only to an unidentified chief's office but also at Kipsitet Police Station. However, when challenged to produce the police report (O.B) or Chief's Letter identifying the 18 Defendants as the invaders, no evidence had been produced hence the Plaintiff's allegations of invasion by the Defendants had no foundation at all.
106. Plaintiff's claim against all the 18 Defendants was wanting in that whereas in her evidence in chief she had refuted there being any relationship between them and her husband, on cross-examination she reiterated that she did not know the Defendants whereas after further probing, she had admitted knowing some of them and also admitted that the 2nd Defendant was her late husband's brother. 1st Defendant
107. Going by the Defendants' testimony, it came out clear that they were all descendants of Arap Chebotungo but of different generations. That the 2nd and 3rd Defendants identified themselves as the grandsons of Arap Chebotungo and so was the late Chepkwony and the Plaintiff's husband. The rest of the Defendants were great-grandsons to Arap Chebotungo although it had not been clarified why they were all hauled to court.
108. That the 2nd and 3rd Defendants admitted that they went into the suit land in the company of a surveyor, village elders and others and in the absence of the Plaintiff who had admitted as such. Which then begged the question as to how she could have been attacked with pangas in her absence.
109. Evidence adduced had been to the effect that the Plaintiff's late husband, other than having the suit land registered in his name, had never set foot on the same and neither had the Plaintiff known that the land was registered in his name until shortly before filing suit. That given that fact that majority of the Defendants were great-grandsons of the family's patriarch, it went without saying that the cause of action, being grazing by family members, took place decades before majority of the Defendants were



- born. That the Plaintiff had failed to disclose a cause of action against the Defendants whom she had unfairly dragged through the legal process for 5 years, compelling them to retain legal Counsel and subjecting them to expense.
110. Reliance was placed on the provisions of Order 2 Rule 15 (1) to urge the court to find that the Plaintiff had failed to disclose a reasonable cause of action against the Defendants and thereafter dismiss the Plaintiff's suit against them with costs.
 111. On the second issue for determination as to whether there subsisted a customary or generational trust, the Defendants relied on the evidence adduced in court by the 1st, 2nd and 3rd Defendants to wit that the suit land was registered in the names of the two family members to hold it in trust for themselves and the rest of the family. In fact, the Plaintiff had also admitted that the parties herein were descendants of Arap Chebotungo who had four sons. DW2 led evidence on how the registration took place. That the patriarch had two properties and as was the custom of the Kipsigis people where one property was meant for a homestead while the other for grazing cattle. In the instant case, land parcel No. Kericho/Ainamoi/139 was where the homesteads stood while the suit land was meant for grazing. That at the time of adjudication, land parcel No. Kericho/Ainamoi/139, which had been a gift to the patriarch upon marriage of his sister, had been registered in the name of the Patriarch's only son and grandson who already had identity cards.
 112. Reliance was also placed on the provisions of Article 63 of *the Constitution* to submit that community land may be held as communal, family, clan land or as a reserve. That in the instant matter, the majority of the family members had agreed to divide the land into four portions to represent the four sons of Arap Chebotungo. That the courts had always protected customary interests in land even where the land in question was registered in favour of an individual. That the Defendants had demonstrated that the suit land had been used for grazing (kaptugut) by majority of family members for decades.
 113. That to prove a trust in land, one needed not be in actual physical possession and occupation of land. Reliance was placed on the decision in the case of James N. Kiarie vs. Geoffrey Kinuthia & Another [2012] eKLR. and on the the Supreme Court's decision in the case of Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] which cases had brought out the elements to be proved in a claim of a customary trust.
 114. The Defendants submitted that the instant case met the criteria set out in Isack M'inanga Kiebia case (supra). They had demonstrated that the suit land was a gift to the patriarch long before its registration, and that they were members of the same family where any of them could have been registered in trust for the entire family. That customary or generational trust had been proved as subsisting in their favour and urged the court to declare as such. They also sought that since all the registered owners were deceased, the family members be at liberty to take out letters of administration in respect of their estate. That consequently, the court ought to dismiss the Plaintiff's suit for lack of merit.

Determination.

115. I have carefully and anxiously considered the Plaintiff's claim against the Defendants, the Defendants' defence and Counterclaim against the Plaintiff, the evidence, submissions as well as the applicable law and the authorities herein cited.
116. To bring into perspective the facts of the matter in question, I shall summarize the evidence as adduced in court. The Plaintiff's case against the Defendants was that despite the suit property No. Kericho/Boiywek/526 which was registered in the names of Chepkwony Arap Rop and Kipngetch Kikwae, the latter having been her deceased husband upon whom she had taken out Letters of Administration ad



- litem, sometime in the year 2017, the Defendants had violently evicted her from the said land wherein they had taken possession and occupation and proceeded to sub-divide the same amongst themselves.
117. That while she lived on the suit land which measured 15.5 hectares, approximately 40 acres, where she had planted maize, and sugarcane, her children lived on land parcel No. Kericho/Ainamoi/139. That after her eviction, the court had allowed her to cultivate a portion of the land measuring 3.5 acres only, for which she was now in occupation.
 118. That during her husband's life time, there had been no dispute over the suit land as only he and Arap Rop used to till/cultivate it. That just before her husband passed away, he had informed her that the suit land was to be shared between himself and Chepkwony Arap Rop. She now sought for a declaration that Chepkwony Arap Rop and Kipngetich arap Kikwae were joined proprietors of the suit land with equal shares that the Defendants be evicted from the suit land and thereafter permanent injunctive orders be issued against them. The Plaintiff also sought for costs for the suit and mesne profits with interest therein.
 119. The Defendants' defence on the other hand while denying violent entry onto the suit land, was that they were descendants of Kiproop Arap Chebotungo who was the owner of the suit land. That the same had been registered to the two persons namely Chepkwony Arap Rop and Kipngetich arap Kikwae to hold in trust for the larger family.
 120. That Kiproop Arap Chebotungo had two parcels of land, one in Ainamoi and the other at Kapkormon. That the one in Ainamoi was land parcel No. Kericho/Ainamoi/139 while the one in Kapkormon was registered as Kericho/Boiywek/526 (the suit land). That in accordance to the Kipsigis culture, one property was meant for a homestead while the other for grazing cattle. In the instant case, land parcel No. Kericho/Ainamoi/139 was where the homesteads stood while the suit land was meant for grazing.
 121. That Kiproop Arap Chebotungo, had four sons namely; Kipkoech Arap Rop alias Kumuryet, Chepkwony Arap Rop alias Chelimbochet, Kipkurui Arap Rop alias Kibolgong and Kikwai Arap Rop alias Maridany. After his death land parcel No. Kericho/Ainamoi/139 had been subdivided into 4 portions wherein they had lived without any problems.
 122. That it had been upon the death of both Chepkwony Arap Rop and Kipngetich arap Kikwae that they had held a meeting as a family in the year 2015, in the absence of the Plaintiff, where it had been decided that, just like parcel No. Kericho/Ainamoi/139 had been divided into 4, so should the suit land be divided into 4 portions to represent the children of Chebotungo. That was how they got into occupation of the suit land. They sought a declaration that L.R No. Kericho/Boiywek/526 being one of the properties of the late Kiproop Chebotungo that the two joint registered owners Chepkwony arap Rop and Kipngetich arap Kikwae were merely trustees for the larger family. That there be a permanent injunction restraining the Plaintiff from laying exclusive claim over the property and her case be dismissed.
 123. Having laid down in brief the background of this matter. I find the issues arising therein as being;
 - i. Whether the Plaintiff has proved her case against the Defendants on a balance of probabilities.
 - ii. Whether the Defendants' counterclaim is merited.
 124. 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, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts 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 the 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
- b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

125. Section 24 (a) of the [Land Registration Act](#) further stipulates as follows:

' subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto....'

126. It is trite law, pursuant to the provisions of Sections 107-109 of the [Evidence Act](#), that 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 are clear to this effect.

127. The filing of documentary evidence is governed by the [Evidence Act](#) (Cap 80) and the Civil Procedure Rules under Order 3 Rule 2, Order 7 Rule 5 and Order 16 Rules 6 and 7 which evidence plays a crucial aspect in any trial to either prove or disapprove a claim. The production of the said documents further adds value to a suit and therefore it is trite law, pursuant to the provisions of Sections 107-109 of the [Evidence Act](#), that 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.

128. In the present case, although the Plaintiff's case was that the suit land herein No. Kericho/Boiywek/526 had been registered jointly in Chepkwony Arap Rop and Kipngetich arap Kikwae (who was her husband), there had been no production of the title deed to the said parcel of land in support of her evidence. It is trite law that the foundation of ownership to land is the registration of the same as its proprietor and issuance of a title deed that is free of any illegality, fraud and un-procedural practices and misrepresentation. I find that the Plaintiff did not prove proprietorship of the said parcel of land and therefore her suit must fail.

129. The court of Appeal in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR had held that;

"Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account."

130. In *Des Raj Sharma -v- Reginam* (1953) 19 EACA 310, it had been held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence.

131. I have also considered the Plaintiff's case in that she was pursuing the matter on behalf of her deceased husband Kipngetich arap Kikwae as per the Grant of Letters of Administration ad litem herein



produced as Pf exh1. The evidence adduced at the hearing, which evidence was not rebutted by the parties herein was that the alleged proprietors of the suit parcel of land being Chepkwony Arap Rop and Kipngetich arap Kikwae were now deceased. In the absence of the Title deed and/or Register to the suit land, it would not be possible for the court to determine whether the alleged registration was joint ownership or ownership in common so as to give a just determination and/or effective orders.

132. Section 91 of the *Land Registration Act* provides as follows:

In this Act, co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.

- (2) Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.
- (3) An instrument made in favour of two or more persons and the registration giving effect to it shall show—
 - (a) whether those persons are joint tenants or tenants in common; and
 - (b) the share of each tenant, if they are tenants in common.
- (4) If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—
 - (a) dispositions may be made only by all the joint tenants;
 - (b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; and
 - (c) each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.
- (5) If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.
- (6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.
- (7) Joint tenants, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joint ownership and the severance shall be complete by registration in the prescribed register of the joint tenants and tenants in common.

133. There was also no evidence adduced at the trial that the Defendants had applied for and obtained letters of administration in respect of the estate of the alleged 1st proprietor of the suit land which in essence leaves the court in limbo as to what basis the Plaintiff had filed suit against them.



134. The Court of Appeal has authoritatively delivered itself on the issue of locus standi in Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1982-99) 1 KAR, Morjaria v Abdalla [1984] KLR 490 and in Trouistik Union International & Another v Jane Mbeyu & Another Civil Appeal No. 145 of 1990 to the effect that Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.
135. In Alfred Njau & Others v City Council of Nairobi [1982-88] 1 KAR 229 the court of Appeal gave meaning to the term locus-standi by stating:
- “to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”
136. I find that this suit was a non-starter, the Defendants lay claim to the suit land as beneficiaries of a trust created through the alleged registration of Chepkwony Arap Rop and Kipngetchich arap Kikwae, who were descendants of Arap Cheptungo. In the absence of the registration documents as herein above stated, their claim would also follow the same fate as the Plaintiff’s suit. It must fail.
137. Before I pen off, I wish to remind Counsel that they must at all material times be diligent in their calling and therefore give their best whilst representing their clients. Indeed I would borrow the holding in the case of Omwoyo –vs- African Highlands & Produce Company Limited [2002]1 KLR, where it had been held as follows:-
- “ Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavor.”
138. In the end, the Plaintiff having failed to either establish the proprietorship of the suit land or locus standi of the parties, in relation to the said suit land, I find that both the Plaintiff’s suit as well as the Defendants’ counterclaim lack merit and are herein dismissed with no costs.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 25TH DAY OF JANUARY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

