Kones & 582 others v Johnstone Kipkoech Langat, Julius Kipkurui Langat & Laurence Kimutai Langat (As Personal Representatives of Isaiah Kiplangat Arap Cheluget) & 3 others (Environment & Land Case 53 of 2018) [2024] KEELC 4577 (KLR) (11 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4577 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT & LAND CASE 53 OF 2018

CG MBOGO, J

JUNE 11, 2024

BETWEEN

SAMWEL KIPKIRUI KONES & 582 OTHERS ..... PLAINTIFF

AND

JOHNSTONE KIPKOECH LANGAT, JULIUS KIPKURUI LANGAT & LAURENCE KIMUTAI LANGAT (AS PERSONAL REPRESENTATIVES OF ISAIAH KIPLANGAT ARAP CHELUGET) ..... 1ST DEFENDANT

REGISTRAR OF TITLES,NAROK COUNTY ..... 2ND DEFENDANT

COUNTY SURVEYOR,NAROK COUNTY ..... 3RD DEFENDANT

ATTORNEY GENERAL ..... 4TH DEFENDANT

JUDGMENT

1. The plaintiffs filed a plaint dated 31st July, 2018 praying for judgment against the defendants jointly and severally for: -

    a. A declaration that the process under which the 1st defendant was registered as the proprietor of the suit land LR. No. Narok/Cis-Mara/Ilmotiok/54 between 1974 and 1980 was unlawful, illegal, null and void.

    b. A declaration that the 1st defendant holds the title for the part of the suit property, LR. No. Narok/Cis-Mara/Ilmotiok/54 occupied by the plaintiffs herein in trust for them.

    c. An order of cancellation of title no. LR No. Narok/Cis-Mara/Ilmotiok/54 in the name of Isaiah Kiplang'at Arap Cheluget, the 1st defendant herein.

d. An order that the defendants herein do enter the suit land, LR. No. Narok/Cis-Mara/Olmotiok/54, demarcate and survey respective portions of suit land occupied by the plaintiffs herein as well as all the public utilities and plots and issue fresh title documents to the plaintiffs.

e. A permanent injunction restraining the defendants from interfering with the plaintiffs' possession and use of the part of the suit property LR. No. Narok/Cis-Mara/Ilmotiok/54 occupied by them.

f. A permanent injunction restraining the 1st defendant from selling, charging, or otherwise dealing with title no. LR. No. Narok/Cis-Mara/Ilmotiok/54.

g. General damages.

h. Any other, further or better relief this honourable court may deem fit to grant.

i. Costs of this suit.

2. In the plaint, the plaintiffs averred that at all material times, they were in occupation, use and possession of various parcels of land comprised in LR. No. Narok/Cis-Mara/Ilmotiok/54, which measures approximately 4,900 acres but which they occupy a third of the suit land.

3. The plaintiffs averred that the suit land was registered in the name of the 1st defendant on 11th September, 1980 through a first registration pursuant to an alleged adjudication and demarcation process that took place between 1974 and 1978 in the area known as Ilmotiok Adjudication Section. They further averred that before 1970 and before the adjudication process took place, they were in occupation, use and possession of their respective parcels of land as indicated in the map. They averred that they had already settled in the suit land long before 1970 and that there was a complete community with public facilities established.

4. They averred stated that they inherited their respective parcels of land from their parents, who had possession of the same before 1970, and which they still occupy. They also averred that before the suit land was registered, the same was unalienated land occupied by the members of Kipsigis community and that between 1974 and 1978, the 3rd to 6th defendants (sic) undertook the demarcation and adjudication process. That pursuant to this process, they were entitled to be registered as owners of the suit land, but through the collusion with the 2nd to 4th defendants, the 1st defendant was registered as the owner of the land in 1980.

5. The plaintiffs averred that the registration of the suit land to the 1st defendant was done through fraud, unjust enrichment, unreasonable conduct and undue influence. They pleaded particulars of fraud, unjust enrichment, duress and undue influence on the part of the defendants as follows: -

a. Causing the said Isaiah Kiplang'at Arap Cheluget to be registered as the owner of the land, through adjudication and demarcation of the land when he was not the lawful owner of it.

b. Causing the said Isaiah Kiplang'at Arap Cheluget to be registered as the owner, through adjudication and demarcation of the land, when he was not in possession of it.

c. Causing the said Isaiah kiplang'at Arap Cheluget to be registered as the owner of the land after threats and intimidation by virtue of him being a powerful provincial administrator.

d. Causing the said Isaiah kiplang'at Arap Cheluget to be registered as owner of the land even after the Land Adjudication and demarcation committee had declined his offer to illegally demarcate the land for him.

e. The said Isaiah Kiplangat Cheluget demarcating the land for himself, after intimidating the police and the Government surveyors, contrary to the law.

f. Ignoring the rights of the plaintiffs who were already in occupation, possession and use of the suit land.

g. Ignoring the rights of the plaintiffs who were already settled on the land with their families.

h. Ignoring the rights of the plaintiffs who had already developed their respective parcels of land and growing crops.

i. Ignoring the rights of the plaintiffs when there was already a school on the land to which their children were attending.

j. Ignoring the rights of the plaintiffs when there was already a catholic church on the suit land in which the plaintiffs were worshipping.

k. Ignoring the rights of the plaintiffs who had already complied with the direction of the demarcation committee and had indeed fixed their land boundaries between themselves and the neighbouring groups such as Sogoo and Marinwa and were ready for visitation by the wider adjudication and demarcation committee for final confirmation of boundaries and fixing of permanent beacons.

l. Ignoring the rights of the plaintiffs when the area demarcation committee had already recognized their right to the suit land and rejected to demarcate the land for the said Isaiah Kiplang'at Arap Cheluget.

m. Humiliating the plaintiffs by causing them to be arrested and locked up in jail for alleged trespass to enable Mr. Cheluget to demarcate the land for himself peacefully without resistance.

n. Humiliating and degrading the plaintiffs and their children by demolishing their houses and the schools as well as the church in order to forcibly evict them from the suit land.

o. Humiliating the plaintiffs and causing family disharmony by arresting pupils of Sagamian Primary School in order to forcibly evict the plaintiffs from the suit land.

p. Causing all the government teachers of Sagamian Primary School to be transferred to other schools so as to cause the plaintiffs to move from the suit land.

6. The plaintiffs pleaded that the title to the suit land was issued subject to the trust, and by dint of Section 28 (b) of the repealed Registered *Land Act*, the said title is subject to the trust in their favour and the 1st defendant is not relieved from his duty as a trustee of the plaintiffs. They went on to aver that they have rights against the 1st defendant stemming from occupation and possession of the suit land.

7. The plaintiffs pleaded that during the process of adjudication and demarcation, they were not heard about their rights and interests, making the process unlawful, illegal, null and void for offending the clear provisions of Section 14 of the *Land Act*. They further averred that the 1st defendant's certificate of title obtained in 1980 was obtained or acquired illegally, unprocedurally and through corrupt means.

8. The 1st defendant filed their statement of defence and counter claim dated 22nd August, 2018. While denying the contents of the plaint, the 1st defendant averred that the plaintiffs are in illegal occupation and possession as trespassers in breach of the deceased estates' right to property under Article 40 (1) of *the Constitution*. He further averred that by virtue of the repealed Registered *Land Act*, the court lacks

jurisdiction to interfere with the title even where such first registration was obtained by fraud. That Section 144 (1) of the said Act provided a remedy in the form of an indemnification by the Government out of the money provided by the legislature.

9. The 1st defendant denied ownership of the respective parcels of land by the plaintiffs and averred that it is not true that the plaintiffs or any of them were in possession of any portion of the suit land before 1970, and during the adjudication process. He also averred that any transaction that is not sanctioned by consent of the Land Control Board is null and void and any purchase price paid is recoverable under Section 7 of the Act. The 1st defendant averred that the persons from whom the plaintiffs bought their respective parcels of land ought to have known that he did not have legal title capable of being passed to them. He averred that the plaintiffs have not pleaded that they filed objections or claims under the *Land Adjudication Act*. That in this case, the plaintiffs' suit is an afterthought without legal or factual basis intended to mislead the court.

10. The 1st defendant denied that the ownership of the suit land by the deceased was acquired through fraud. The 1st defendant averred that the suit land is in an area owned by the Purko clan of the Maasai tribe and the deceased was given the same by one Ole Sandale, who was the senior chief before Ilmotiok was declared an adjudication section in 1973. He further averred that many of the plaintiffs have denied giving authority to the institution of the suit in their names.

11. The 1st defendant pleaded that the deceased was in peaceful enjoyment of the suit land until the year 1999 when some people invaded the land claiming to be members of Sagamian community disrupting farming activities on the property. He also averred that the deceased filed a criminal complaint against some of the invaders, who were charged, convicted and served jail terms.

12. The 1st defendant further averred that the plaintiffs filed Originating Summons vide Misc. Civil Appl. No. 400 of 2003 (OS) which was dismissed and further unsuccessfully appealed against the said decision which was also dismissed by the Court of Appeal. He averred that the deceased applied for eviction of the plaintiffs' and members of the Sagamian Community which is still pending before the High Court and that the issue of the plaintiffs' entitlement is res judicata and the deceased's pending application for eviction against the plaintiffs is sub judice.

13. The 1st defendant averred that the manner in which the deceased became the owner of the suit land cannot be raised or litigated afresh in view of the decision of the Court of Appeal which was a final decision made by a competent court. He went on to aver that if any of the plaintiffs had any customary law rights on the suit property, such rights would have been extinguished upon registration of the land under the repealed Registered *Land Act*. The claim of trust was thus denied.

14. The 1st defendant averred that the deceased's title was acquired through a legal and open procedure and he had no duty created by any law or equity from which any relations of trustee may be legally inferred or implied. It was further pleaded that the cause of action is the same as the one in Nairobi HC Misc. Civil Appl. No. 400 of 2003 (OS), and that the parties are the same.

15. The 1st defendant filed a counter claim against the plaintiffs herein. The 1st defendant pleaded that the plaintiffs have illegally used, and continue to reside and use the suit land in contravention of the law, and in breach of the property rights of the deceased estate. He averred that the plaintiffs are hostile to the extent that they have been involved in acts of arson and pilferage against the deceased's property and assets.

16. The 1st defendants claim against the plaintiffs is for: -

    a. Mesne profits.

b. An order of eviction against the plaintiffs jointly and severally, and all others claiming through them, from the 1st defendants (deceased's) property known as Title No. Narok/ Cis-Mara/ Ilmotiok/54.

c. Costs of the suit and this counter claim.

17. The plaintiffs filed a reply to the 1st defendant's defence and counter claim dated 13th September, 2018. The plaintiffs reiterated the contents of the plaint and further averred that this court has jurisdiction to hear this suit. They averred that their claim is based on trust against the 1st defendants' late father who was the registered owner of the same, and they admitted that they have no titles to their parcels of land hence the suit.

18. The plaintiffs further averred that the deceased did not pay any money for the land, and there is no way that Senior Chief Ole Sandale could have given out the land since he lived in Narok North. That at the time, the prominent Maasai families who lived in Narok South were Ole Ntutu and Lemein families as well as the Ndorobo. They averred that the deceased occupied a portion of the expansive suit land from the year 1979 after he had demolished the school and jailed some of the plaintiffs.

19. The plaintiffs averred that in Nakuru Criminal Case no. 1987 of 2000, the dispute was between the deceased and other communities like Sogoo and Marinwa ranches over the suit land. They went on to aver that in Misc Appl. No. 261 of 2000 not all the plaintiffs were parties to that dispute. They admitted to being aware of the proceedings in Nairobi HCCC No. 400 of 2003 and Civil Appeal No. 289 of 2009 which they averred are clear and self-explanatory. The plaintiffs acknowledged the pendency of the application for eviction in HC Misc. No. 400 of 2003, but they averred that the same is misguided and does not lie in law.

20. The plaintiffs denied that the suit is res judicata and sub judice, and averred that this suit is based on a totally different cause of action from that in HCCC No. 400 of 2003 (OS). They went on to aver that the issue of trust was not ventilated in the Originating Summons and that the Court of Appeal declined to entertain the issue as the same had not been ventilated in the High Court, as it was one of adverse possession. They averred that a cause of action based on trust has no time limitation and that they are not barred by equity. They averred that their current cause of action is based on fraud and illegalities in the adjudication process that took place on the suit land between the year 1974 and 1978, and that the issue of legality of the title has never been litigated in any court.

21. In their defence to the counter claim, the plaintiffs denied that they are in illegal occupation and they averred that they are in lawful possession of the suit land, and that it is the 1st defendant's title that should be cancelled.

22. The 2nd, 3rd and 4th defendants filed their statement of defence dated 28th May, 2019. The 2nd to 4th defendants averred that the plaint is in blatant violation of Section 7 and 26 of the Limitations of Actions Act. They averred that Ilmotiok was declared an adjudication section on 25th July, 1975 and the rights regarding the suit land was ascertained as belonging to Isaiah Kiplangat Cheluget. It was also averred that the adjudication register was published, completed and opened for inspection on 22nd May, 1978 for a period of 60 days.

23. The 2nd to 4th defendants averred that there is no person who raised an objection as required under Section 26 (1) of the *Land Adjudication Act*. They denied the allegations of fraud and they further averred that the registration of Isaiah Kiplagat Cheluget was done lawfully and procedurally, and who was registered as a sole proprietor after strict compliance of the provisions of the *Land Adjudication Act*.

24. They averred that the promulgation of *the Constitution*, and the enactment of the current land statutes did not bring the cause of action from 11th September, 1980 and the suit remains caught by limitations of actions which deposes the court of jurisdiction.

25. The hearing of this matter proceeded de novo on 14th November, 2022. Stanley Kisang Towett (PW1) adopted his witness statement dated 31st July, 2018 as his evidence in chief and he produced P. Exhibits 1 to 31 as evidence. He informed the court that he is a farmer and resides on a portion of the suit land which he inherited from his father, and that some plaintiffs reside on 1/3 portion of the suit land. He testified that there are developments on the suit land comprising of trading centres, churches and schools. PW1 produced a map and testified that it was prepared in 1971, and that the plaintiffs seek for an order to go to the ground to carry mapping/survey and they be issued with their respective title deeds. He testified that the registered owner of the suit land is the 1st defendant, who was registered on 1st September, 1980, and that the land is about 5000 acres. According to him, the 1st defendant had the land registered in his name while they were still in occupation.

26. PW1 further testified that the demarcation of 1970 caused a lot of chaos and that the 1st defendant was not issued the land by a Maasai chief as he claims. He went on to state that their parents were on the suit land before the demarcation of 1970, and that it is not true that some of the plaintiffs have withdrawn from the suit.

27. On cross examination, PW1 testified that he was born in 1976 in Sagamian location and that when the adjudication process commenced in 1974, he would not have known who was living where, as at the said year. It was his evidence that he resides on a portion of the suit land but they do not have a deed plan or sub division of the area they occupy. He testified that they allocated the parcel numbers to themselves and that they did not involve the surveyor in the exercise. According to him, his parents told him that they purchased the land in the area. He further agreed that in petition number 41 of 2013, they wanted the school to be re-registered, and that the school was not claiming any land from the 1st defendant as it was already in place. He agreed that they did not initiate discussion with the owners of the land over the delineation and compensation of the land.

28. PW1 testified that he was a party to the petition in Nakuru, and that they are yet to deal with the order that requires them to initiate dialogue over delineation of the boundary and compensation. He testified that he is a member of the Board of Governors of the school, and that they have not provided evidence of authority from the school to bring this suit. He admitted that he is aware of the Originating Summons in Nairobi High Court Civil Case No. 400 of 2003 as he was one of the plaintiffs in the case, which suit was dismissed with costs. That in that case, they were claiming adverse possession of the entire land. He agreed that they appealed against the decision in Civil Appeal No. 289 of 2009 which was dismissed with costs. He further agreed that their parents do not have titles up to now, and the same case applies to those who inherited or bought land from others. He also testified that those who bought land never went to the Land Control Board and he is not aware that Section 6 of the *Land Control Act* requires consent to be obtained within 6 months or else it becomes null and void. He testified that the matter that was before the Tribunal concerned parties who wanted to get back their land, which case was taken to the High Court in Nakuru by John Barbaret. It was his testimony that the matter was dismissed.

29. PW1 further testified that he was not aware that a school can be established on land without owning it, and that it is not possible for a school to be erected on a parcel of land without owing the land. On further cross examination, PW1 testified that the plaintiffs in the originating summons No. 400 of 2003 were claiming the whole land, and that his group occupies a third of the land. He informed the court that the position changed upon filing this case in 2013 as they now claim 1/3 of the land. With

regard to the map, PW1 testified that he drew the same and whereas he is not a trained surveyor, he got the map through Makilot Sang who informed him that he got the same from the Lands/survey office in Nakuru. He denied that he had falsified a public document and stated that he only wanted to illustrate the position. He also said that in this case, they seek for a declaration that the land is held in trust for them.

30. On re-examination, PW1 testified that his parents were living on the suit land when he was born in 1976 and that he got the information regarding the suit land from his parents and other elders as well as Magdalene who is a witness in this case. He said that in petition number 41, he was one of the petitioners because he was a parent in Sagamian School, and that they did not initiate dialogue with the 1st defendant over the boundary, delineation and competition because the owner of the suit land did not come. He testified that the school is not one of the plaintiffs in this case and that he has the authority of the other plaintiffs to file this suit.

31. PW1 further testified that the purchasers bought the land from the original dwellers, and that he does not know if the purchasers obtained consent from the Land Control Board. He added that he got the first map from the Director survey, and that he identified parcel number 54 by looking at the neighbouring group ranches. In addition, he said that the maps show settlement before 1971 and that the second map is for the suit land, which he has not falsified, but only marked it to illustrate the position where they occupy.

32. Kiprop Arap Mosonik (PW2) adopted his witness statement dated 31st July, 2018 as his evidence in chief.

33. On cross-examination, PW2 testified that Sagamian belonged to Kipsigis on one side and Maasai on the other. He said that up to Mulot, Longisa and Bomet, the area is occupied by the Kipsigis. He went on to say that Ilmotiok belongs to the Maasai. He testified that the adjudication committee was comprised of Maasai and Kipsigis, since the Maasai were complaining that the Kipsigis had taken over their land. He agreed that there was a procedure for objection for those who were not satisfied and that there was a provision for one to appeal to the Minister.

34. On re-examination, PW2 testified that he knows the suit land and that he was a member of the adjudication committee. He testified that he does not know Cheluget, and that the suit land belongs to the persons whom they found on the ground. It was his evidence that his statement was never read out to him and that there was a day the statement was translated to them.

35. The plaintiffs' case proceeded for further hearing on 15th November, 2022. Dickson Cheluget, PW3, a retired teacher, adopted his witness statement dated 31st July, 2018 as his evidence in chief.

36. On cross-examination, PW3 testified that he was born in 1951 and that he is a trained teacher. He said that was posted to Sagamian Primary School. He testified that he was appointed as the headmaster on 5th December, 1977 and that he has not visited the school since he retired. He admitted that he did not have the authority from the board of Sagamian Primary School to testify on their behalf. It was his testimony that while serving as a teacher at the said school, he was not involved in issues to do with adjudication. He testified that he wrote the letter dated 19th October, 1978 and he did not receive a reply from the District Education Officer. He testified that he knew Mr. Cheluget and maintained that he was not involved at all with issues of land adjudication. According to him, the history is that the land belonged to the Maasai, and some Kipsigis went to stay in Maasai land. He furthers that all plaintiffs are members of the Kipsigis community and that they were given the land by the Maasai. He testified that after the school was demolished, the teachers were transferred to Mogoigwet primary school.

37. On re-examination, PW3 testified that the school was registered by the time of registration of the title in the year 1979. On being shown the letter dated 26th July, 1973 he informed the court that the school was registered in 1973 and that he is the one who wrote the letter dated 19th October, 1978. He said that he later met the District Education Officer and that he was present when the school was demolished in the year 1979.

38. On 15th September, 2022, Magdalene Chepkemoi Tapaikok (PW4) adopted her witness statement dated 31st July, 2018 as her evidence in chief.

39. On cross-examination, PW4 testified that as per her ID, she was born in the year 1942 in Ilmotiok. According to her, her witness statement was written by the secretary and that she does not understand anything to do with measurement of land. PW4 testified that she only saw people who include Cheluget, and PW1 measuring the land. She testified that she owns land in Sagamian which was given to them by the Maasai. She said that it was the family of Ole Ntutu that gave them the land and that she does not remember when this happened. She testified that all the plaintiffs came from Bomet.

40. On re-examination, PW4 testified that her statement was not translated to her before she thump printed it and that she cannot remember the time when she moved into her farm in Sagamian. She further testified that all the plaintiffs came from Bomet and were welcomed by the Maasai.

41. Charles Tangus (PW5) adopted his witness statement dated 31st July, 2018 as his evidence in chief.

42. On cross-examination, PW5 testified that he is a resident of Emilik village, and that he was born in 1965 in Mulot Narok. He further testified that he owns plot number 229 measuring 6.5acres which acreage he estimated and that he does not have a plan of the area. He testified that he was charged in court for the offence of trespass and imprisoned in Narok prison for 3 to 5 months. It was his testimony that he inherited his parcel of land from his father, one Arap Mosonik. He testified that his late father was a Kipsigis, and that he heard that his father originally came from Longisa in Bomet which is the same place he got his identity card from as it was easier to acquire the same from Bomet.

43. PW5 testified that about 2 of the members took the photos but they are not witnesses to this case. He went on to say that the pictures do not show clearly who the person was and that he is not able to read the registration number of the bulldozer. It was his evidence that he went to Koibeyon Primary School after Sagamian Primary School was destroyed. He testified that he was not one of the parties in petition no. 41/2013, and that he does not have any document to show that his parents used to live on the land. It was his testimony that his parents are deceased and that his father inherited the land from his grandfather. He further testified that his grandfather was given the land by the Maasai.

44. On re-examination, PW5 testified that when Sagamian Primary School was demolished, he went to Koibeyon primary school.

45. Joseph Kiptoo Koyumin (PW6) adopted his witness statement dated 31st July, 2018 as his evidence in chief. PW6 testified that he was born in 1960 in the suit land, and that he went to Sagamian Primary School starting from Nursery in 1969 and left school in 1979. He testified that the school was demolished before they could sit for their examination and that some pupils were forced to stop schooling.

46. On cross examination, PW6 testified that he is not conversant with adjudication, and he does not know if adjudication took place between 1970, 1971, 1972 and 1973. He testified that it was his parents who told him that he was born in 1960. He testified that his now deceased parents told him that they were born in Bomet in the then Kericho District. He agreed that Sagamian belongs to the Maasai, and that

he owns plot number 337 which is approximately 2 ½ acres. He also agreed that he inherited the land from his father who owned 9 acres that was allocated to him by a Maasai known as Lemein.

47. PW6 further testified that his father told him that he had a pass which allowed him to occupy the land, and that the leaders of the Maasai community were the ones who were issuing out the passes. It was his testimony that he has the right to inherit the parcel of land from his father since that is where he left him. He testified that the map showing where his land is, was drawn by the Secretary, one Towett Kipsang, and that he was not sure if the latter is a Surveyor. According to him, the value of his land could be Kshs. 300,000/-. He testified that by referring to the baptismal certificates, his intention is to show that there used to be a church. He testified that he did not have any document to show that he owns plot number 337, and that if someone else claims plot No. 337, he cannot succeed as they are the ones complaining.

48. PW6 testified that he knows Cheluget as he used to be a Provincial Commissioner for Nyanza Province, and that he came to know that Cheluget was the registered owner of the suit land. He admitted that his parents were arrested in 1979 over a land dispute but he does not know if they were charged for any offence. He admitted that this is their first dispute against the 1st defendant and that he was not involved in the other case brought by their Group. That as at 2003, he did not have any complaint, but that he heard from his parents that they were not involved in the adjudication that took place in 1970s.

49. On re-examination, PW6 testified that the members of Kipsigis community were the residents of Sagamian when he was born. He testified that he has built a house on the suit land and that would differentiate him from the other person laying claim on it.

50. On 8th February, 2023, Joseph Kipkemoi Morusoi (PW7) adopted his witness statement dated 31st July, 2018 as his evidence in chief.

51. On cross examination, PW7 testified that whereas he does not understand the English language, his statement was read to him by his children. He testified that he was born in Bomet at the border of Narok and Bomet and that his parents were also born in the same area. It was his evidence that the members of the Kipsigis community did not grab Maasai land and that he was a friend to one Lemein. He said that his parcel of land is 86 and that it has a map which was prepared by the Surveyor. He did not know if there was a deed plan but he admitted that he does not have a title deed to it. According to him, his long stay on the land shows that he owns it.

52. PW7 further testified that he inherited his parcel of land from his parents and that they used to live peacefully since Lemein gave it to him. He further testified that he came to know Cheluget on the day he went to the area, which day he does not remember. It was his evidence that he understood the process of land adjudication and that he learnt of the same in the 1970s. He testified that he attended some of the adjudication meetings, and title deeds were not issued after the adjudication process was completed. According to him, it is only Cheluget who was issued with a title deed as well as a few other people. He agreed that he had no document to show that he owns land in Sagamian. He denied using force to enter into the land. He testified that his land is about 2 acres and that he does not reside in the same but he recalls seeing a bulldozer enter into the disputed land in the 1970s.

53. Bangwot Arap Chamdany (PW8) adopted his witness statement dated 31st July as his evidence in chief.

54. On cross-examination, PW8 testified that he is 85 years and he was born in Sagamian. He admitted that he was one of the plaintiffs in Nairobi case No. 400 of 2003, and in the said case, he wanted the court to declare him an owner of land through adverse possession. He further testified that he was aware that the case was dismissed and they filed an appeal in Civil Appeal No. 289 of 2009 which was equally dismissed. He testified that the difference between this case and the one of 2003 is that they

were not given a fair hearing in the 2003 case. He agreed that the subject matter in this case and that of 2003 is the same.

55. PW8 testified that he owns 3 ½ acres of land which is not officially surveyed. He testified that whereas he does not have any document of ownership, his long stay on the land shows that it belongs to him. He testified that he inherited his land from his father who was allocated the same by Pastor Montet ole Leimut from Mulot. He went on to testify that the document his father and the pastor signed over the land is now lost and included a list allowing members of their community to occupy Maasai land. He said that he heard of the adjudication and that he attended adjudication meetings. That apart from Isaiah Kiplangat Cheluget, there are other people who were issued with title deeds. He testified that the chairman of the adjudication committee was Arap Sankei who was a Maasai, and that the area was known as Sagamian adjudication section. He also testified that the secretary of the committee was Kimwalel Kaliyasoi who is now deceased. It was his evidence that he raised an objection to the adjudication committee, and that he is not aware of an appeal arising from the adjudication process. He testified that he does not know the value of his land and that he has not bought any piece of land.

56. In re-examination, PW8 testified that he was born on the suit land in 1938 and that he has never moved out of the said land since then. He added that he lodged a verbal complaint with the adjudication committee.

57. Julius Kipronoh Yomdo (PW9) adopted his witness statement dated 31st July, 2018 as his evidence in chief.

58. On cross examination, PW9 testified that he was born in Mau Summit in 1950 and that his identity card shows that he is from Bomet Central. He testified that he got his land from Lemein who was from the Maasai community. He further testified that his grandfather was given 9 acres which his father inherited as he was the only son. It was his testimony that they selected some of their colleagues who include Kipsang Towett who is not a Surveyor to re parcel the plots. It was his evidence that he does not have any documents to show that plot no. 85 is his but that he built on the same. PW9 recalled Nairobi case No. 400 of 2003 where he was a party and that in the case, they were claiming the same subject matter as in this case and that it was dismissed. He testified that they appealed against the decision but their appeal was also dismissed. According to him, there is a big difference between case No. 400 of 2003, Civil Appeal no. 289 of 2009 and this case in that in the former case, they were not given the chance to testify in court. He however agreed that the people who testified did so on their behalf.

59. PW9 testified that Sagamian belongs to the Maasai community, and that they came to be on the land courtesy of the agreement between their forefathers and members of the Maasai community. He admitted that he was arrested and charged for trespass, and that he was remanded in custody for 3 months and imprisoned for 3 months. That according to him, adjudication means surveying, and that it is his parents who told him that they were born in the suit land. He testified that the suit concerns the school because they are the ones who built it and it shows that they reside on the suit land. He further stated that in 1970, he was 20 years old and that he was not involved in the adjudication process in the 1970s.

60. On further cross-examination, PW9 testified that he does not know the process that led to the Maasai to allocate land to the Kipsigis but that he is aware that the Kipsigis were allocated land by the Maasai. He testified that by the time he was born, the Maasai had allocated land to his grandfather and no one has come forward to challenge the Maasai who gave the land. He further testified that there was a list that was prepared when the Maasai community gave them land and that he was told that all allocations were being done through a list. It was his evidence that he was arrested and charged for trespass and that he was released after serving the sentence. He did not know what adjudication and demarcation

is. He disagreed that the 1st defendant was allocated the suit land after finalization of adjudication and demarcation. He also admitted that he did not file an objection when the land was allocated to someone else and that they did not object to the process.

61. On re-examination, PW9 testified that they were not notified of the adjudication process, and that they were not advised to appeal.

62. Zachary Kiprono Arap Sigiria, (PW10) adopted his witness statement dated 31st July, 2018 as his evidence in chief. He testified that he was among others who were charged, convicted and sentenced for trespass.

63. On cross examination, PW10 testified that the suit land is in the name of the 1st defendant who did not sub-divide the land to him while he found them residing on the land. He said that by including his wife and children in his statement, it shows that he resides in Sagamian. He testified that he was born in 1961 in Kimaech village in Kericho District and that his parents migrated in 1967. It was his testimony that his father was allocated the land by Maasai known as Kimintet Ole Mtito. He did not remember High Court No. 400 of 2003(OS) and neither was he involved in Nakuru case No. 41 of 2013. He further stated that the value of his land is Kshs. 5,000,000/-, whose size is 1.8 hectares. He agreed that the plot is not surveyed, and that their secretary, Kipsang Towett, was the one who allocated the plot numbers to them.

64. On cross-examination, PW10 testified that he was told by his mother that the land was given to them by one Kimintet Ole Mtito in exchange for a cow. He also admitted that it was Stanley Kipsang who allocated the land to them and that his land is not registered. He further testified that there were conditions imposed on each member which was to respect the boundaries set.

65. On re-examination, PW10 testified that he was imprisoned in 1979 and that the 1st defendant was issued with a title deed in 1980. It was also his evidence that their secretary prepared a map and allotted numbers.

66. The defendants case proceeded for hearing on 10th May, 2023. The 1st defendant, Johnstone Kipkoech Arap Langat testified that together with his brothers Lawrence Kimutai and Julius Kipkurui, they are the personal representatives of the estate of Isaiah Kiplangat Cheluget. The 1st defendant adopted his witness statement dated 22nd August, 2018 as his evidence in chief. The 1st defendant produced D. Exhibits 1- 26 as evidence.

67. On cross examination, the 1st defendant testified that he is one of the 3 administrators of the estate of their father and that he was born in 1959 in Kericho. He testified that by 1975, he was a minor when the suit land was declared an adjudication section. He testified that his father was born in Kericho and not in the suit land. It was his testimony that his father got the land pursuant to an adjudication process and that he was not involved in the process himself. He said that he was not party to case No. 400 of 2003. It was his testimony that he first set foot on the suit property in 1974, and by 1990, the process of adjudication had been completed. He added that in 1974 the boundaries of the suit land had been established but he did not witness the boundaries being set. He agreed that the land did not have number 54 in 1974. He testified that his father was given the land by a Senior Chief Ole Sankale of the Purko clan in 1973 and that he does not know if there was a written agreement.

68. The 1st defendant testified that he does not know if Chief Sankale was in charge of Narok North and the Chief for the area in question was Ole Ntutu. He also does not know if his father gave any consideration for the land and that he does he know if the plaintiffs gave a consideration of a goat. He also did not know if there was a witness when his father was given the land. He could not confirm if by 1973 the area was already settled. On being shown the letters from the District Education Officer, the 1st defendant

testified that the letters do not convince him that that there was a school in the area by 1973, 1975 and 1977. He admitted that his late father was involved in building of another primary school and that he does not know if the new school was built as a result of demolition of the old school at Sagamian.

69. It was also his evidence that the letter does not convince him of existence of people on the suit land, and that based on the certificates of imprisonment of the people, he is convinced that there were trespassers on the ground by 1979. He also did not know if his father was using his position in 1979 as a Provincial Commissioner to harass people. He denied that his father used his influence to acquire title, and that he does not know that in 1979, his father used Government tractors to demolish houses. He stated that the adjudication notice was issued by the Land Adjudication Officer Narok which letter was copied to the District Commissioner. He said that he does not know if the District Commissioner had a big role to play in the adjudication. He added that in 1975 his father had employees on the ground and that his father had a matrimonial home in Litein and Narok. He disagreed that the place was so remote that the chances of the people on ground getting to know of the notice was almost zero. He further agreed that the adjudication process involved other parcels apart from 54. He further stated that the certificate of finality is dated 9th August, 1980 and the final adjudication register is dated 23rd August,1980 and he could not confirm that if there was a window given for objections. He disagreed that during the period the plaintiffs were being harassed by his father and that it also doesn't strike him that there were no appeals against the suit land. He added that there were Group Ranches surrounding the area and that there were no people in the suit land.

70. He disagreed that it is only the suit land which was registered under an individual while the others were registered as group ranches. He said that in D. Exhibit No. 22, the people Barbaret has referred to were not residing in Sagamian, and that his father did not make it impossible for them to present their claim to the adjudication record. He added that at page 45 of the adjudication record, the only person who made a claim for the suit land was his father. That as of 1977, there were people squatting on my father's land, and that he does not know if the people were re-allocated land to some other ground as recommended. With regard to the matter before the High Court, the 1st defendant testified that the plaintiffs were claiming adverse possession and that the plaintiffs in that case are the same ones in this case. He agreed that the Land Registrar, the County Surveyor and the Attorney General were not parties to High Court Misc Appl. No. 400 of 2003 and that he does not see any difference in the prayers that they sought in the previous case and the present suit.

71. On further cross examination, the 1st defendant testified that about 4 plaintiffs did not give authority to plead as they had informed him that their signatures were forged. However, he agreed that the said 4 plaintiffs have not applied to withdraw from the suit. With regard to the application for eviction, the 1st defendant testified that the same is pending, and further, that the plaintiffs have waited for over 30 years to bring their claim based on trust. He testified that the Sagamian of 1973 is not the same as in the current suit, and that the judgment with regard to registration was against his father, who did not appeal against the said decision. He testified that the order for re-registration of the school was not conditional on dialogue and he did not know if the school was re-registered as per the order. He further testified that he is not ready to dialogue as per the court judgement.

72. The 1st defendant testified that the plaintiffs have occupied the entire suit land and he is not aware of a group called Sogoo or Marinwa. He testified that he does not know if there are over 15,000 people on his land apart from the plaintiffs. The 1st defendant testified that he is aware that there are shops on the suit land but not a trading centre.

73. On re-examination, the 1st defendant testified that he was 16 years during the process of land adjudication and that he was not in a position to know what was happening but at that age, he knew what his father owned. He agreed that he was not a party to Nairobi Originating Summons No. 400

of 2003 but he knew that the case as well as the appeal was dismissed. He testified that he started living on the suit property in 1990 and that he was in school till the late 80's when he went to settle in the suit land. He testified that the plaintiffs invaded the farm and destroyed everything. He also agreed that the land was given to his father in 1973 by Chief Sankale and that he was shown proceedings to show that the land was given to his father by Chief Ntutu. He would not also be able to know if his father gave something in return for the land as he was not part of the process that led his father to acquire the land. He testified that in D. Exhibit No. 25 the representatives of the community wanted the school to be registered and that his father had no capacity to register any school as an examination centre.

74. The 1st defendant testified that part of the judgment shows that within 45 days from 21st November, 2014 the parties were to negotiate on the land occupied by Sagamian Primary School but it was never done, and as an administrator of the estate, he is not to do any of the orders issued since to his knowledge, his late father was never approached for negotiations. He said that negotiations cannot take place after 20 years. It was his testimony that the plaintiffs have not complied with the part of the judgement. He agreed that his father contributed Kshs. 100,000/ towards the setting up of Mokoiyet Primary School, and that his father did not wish Sagamian Primary School to be in his land. He further testified that he knew people were imprisoned for trespass and that before the title deed was issued in September, 1980 his father was farming on the land way back in 1972 and that the adjudication process found him on the land. He said that apart from the suit land, there were other parcels both individual and group ranches. He further said that it is not true that the notice of adjudication was only known to his father, and that the adjudication process has never been set aside by a court of law. He also agreed that the plaintiffs in 400 of 2003 brought the case for and on behalf of the members of Sagamian Community, and that the current case is brought for and on behalf of the members of Sagamian community. He pointed out that in case number 400 of 2003 on claim of adverse possession, the plaintiffs sought to be registered as owners of the suit land instead of his father, which is similar to what they are claiming in this case. He agreed that he made an application for eviction after the Court of Appeal made a determination and that he would not have made the request for eviction before this court if the plaintiffs had not sued.

75. On 11th May, 2023, Christopher Kiplangat Bore (DW1) adopted his witness statement dated 11th October, 2018 as his evidence in chief.

76. On cross examination, DW1 testified that he was the assistant chief when the adjudication process was ongoing and that he knows that the late Isaiah Cheluget was allocated the suit land by the Maasai. He testified that the land was allocated to an individual person and not to a group ranch. It was his testimony that the plaintiffs entered into the suit land after Cheluget had already been allocated the land and that he (Cheluget) had carried out development on the suit land. He said that between 1999 and the year 2000, the plaintiffs started invading the suit land, and he does not remember when the deceased passed on, and that the latter was not buried on the suit land. He further testified that as the area assistant chief, he reported to his seniors when the suit land was invaded but he does not know what steps that they took.

77. DW1 testified that allocation of land took place between 1975 and 1979 and that the title deeds were issued in 1980. He said that the Government announced that it would allocate land to people and a committee of 25 people comprising the Maasai and Kalenjin communities was constituted to oversee the exercise and that no one objected when Isaiah Cheluget was allocated land.

78. On further cross examination, DW1 testified that he was born in Bomet in the year 1954 and that he does not own any property in the suit land. He said that he went to reside in Sagamian in 1975 during which time he came to know Cheluget. He added that his land was allocated to him by the Maasai and that it is not true that he bought it from one Arap Musonik. He agreed that he started residing in the

area in 1980 and he had been allocated the land in 1975 to 1979. He further agreed that from 1980 to 2018, the period being 38 years, the adjudication process was already complete by the time he was appointed as an assistant chief, and that he had already been allocated land in 1975. He added that a number of them were allocated land outside the suit land and that he cannot testify on the allocation of parcel number 54. He also said that he would not be able to know the occupants of the suit land before 1980. According to him, he knew that the committee allocated the land to Cheluget in 1980, even though he was not in the meeting where the Maasai allocated the land to the said Cheluget and neither does he know the year when the Maasai gave Cheluget the land. He said that during the adjudication process, there were no people in the suit land since it was covered by forest.

79. DW1 further testified that some people left their parcels in the group ranch and invaded the deceased's parcel of land, which was between 1999 and 2000. He went on to say that when the plaintiffs invaded the land, they occupied a small portion of it, but he does not know the number of persons who are in occupation of the land and neither does he know if there are churches in the suit land. He informed the court that his land was part of Selguet Group Ranch, which group ranch does not neigbour the suit land. He further testified that the group ranch had 87 members and that people could be allocated land either as individuals or as a group ranch. He went on to testify that the group ranch was issued with a title deed in 1980. It was also his evidence that he came to know the parcels of land which were allocated to individuals during his tenure as a chief. He informed the court that the suit land became a reference point for subsequent surveys.

80. On re-examination, DW1 testified that he knew his subjects and where they resided as well as their relationships. He added that the later Isaiah Cheluget did not assist him to become an assistant chief and later a chief. He stated that he was not involved in the adjudication process nor was he a member of the adjudication committee, but as an Assistant Chief and later Chief, he was privy to the on goings in his area. He testified that the plaintiffs never at any time complained to him about the suit land, and that the late Isaiah Cheloget carried out development on his parcel of land. He stated that the parcel of land belonging to the deceased was surveyed before he was issued with a title deed, and that from his experience as an assistant chief, no title can be issued before land is surveyed. He said that in all the barazas that he attended as a citizen or in his official capacity, no one complained about the suit land and that he has never carried out a census of the people residing in the suit land. It was his testimony that those who were neighbouring the suit land invaded it, and they are the ones in occupation of the land.

81. Josephine Njeru Njoroge (DW2) adopted her witness statement dated 25th November, 2019 as her evidence in chief. She produced D. Exhibits Nos. 27, 28, 29 and 30 as evidence. DW2 testified that the adjudication process in respect of the suit land began on 25th July, 1975 with the declaration of Ilmotiok as an adjudication section, and that following the adjudication process as laid out in the *Land Adjudication Act*, they handed over the adjudication to the Chief Land Registrar. It was her testimony that no objection was raised in respect of the suit land as a result of which the title deed was issued to Isaiah Kiplangat Cheluget. She testified that the copy of the finality was prepared by the Director of Land Adjudication and Settlement and the same was sent to the Chief Land Registrar.

82. On cross-examination, DW2 testified that it is necessary to undertake land adjudication so as to find out the persons with rights and interests in specific parcels of land, and that it is subjected to areas which have not been subjected to surveying and registration of title. She went on to say that the *Land Adjudication Act* provides for the procedures and processes. It was her testimony that the adjudication process that commenced as per the letter dated 25th July, 1975 was for all titles and that there were not less than 158 parcels judging from the record that shows that some parcels were subject of appeal to the Minister. She said that with respect to the suit land, there was no objection nor appeal to the Minister and that the adjudication record register (D. Exhibit No. 30) was signed by the Director of

Land Adjudication as per the record, and that 3 parcels were subjected to appeal to the minister, and they were 156, 158 and 149. She testified that the certificate of finality is dated 9/8/1980, which led to the issuance of titles.

83. On further cross examination, DW2 testified that the documents produced is from their record and they are relevant to this case. She testified that the purpose of the adjudication is to confirm the rights and interest of the persons on the land and that the adjudication committee decides who is entitled to land. She went on to testify that in D. exhibit No. 28 the declaration of Adjudication Section commenced the adjudication process where Mr. A.K. Mungai was appointed and that there were not less than 158 parcels of land. It was her evidence that she did not have the list of the committee members in court and that she could not recall if one Kiprop Musonik was one of the committee members. According to her, only one person made a claim for the suit land and that the said person was Isaiah Cheluget. She stated that she does not know the date when the surveyor and the demarcation officer went to the ground, but that there were no objections with regard to the suit land. She agreed that there must have been objections because there were 3 appeals to the Minister but she does not know how Isaiah Cheluget made the claim. She said that according to the record, Isaiah Cheluget is indicated as the owner of the suit land. She testified that the adjudication register was published on 22nd May, 1978, which information is contained in their register. She further testified that if an area is settled and it has people, churches and a school, the person concerned should lodge claims. She testified that she does not know Isaiah Cheluget and that she is not aware that he was a District Commissioner for Narok.

84. On re-examination, DW2 testified that there were no objections or appeals in respect of the suit land and the title was issued after all the processes were carried out. She added that she only selected the documents that were relevant to this case.

85. The plaintiffs filed their written statements dated 29th May, 2023 were they raised the following issues for determination: -

    a. Whether the suit is res judicata in view of the proceedings and determinations in Nairobi HCCC No. 400 of 2003 (OS) and Court of Appeal Civil Appeal No. 289 of 2009.

    b. Whether the process of adjudication and demarcation carried out between 1974-80 resulting in registration of the 1st defendant as the owner of LR No. Narok/Cis-Mara/Ilmotiok/54 was fraudulent, unjust, vitiated by duress and undue influence, unconsciable and hence illegal.

    c. If the answer to b) above is in the affirmative, whether the 1st defendant holds that part of Narok/Cis-Mara/Ilmotiok/54 in trust for the plaintiffs.

    d. Whether the registration of the 1st defendant as the owner of the suit land was subject to the plaintiffs' overriding interest of possession and occupation.

    e. Whether the plaintiffs have proved other and new causes of action under *the Constitution* of Kenya, 2010, *Land Registration Act* and *Land Act*, 2012.

    f. Whether the plaintiffs are entitled to the reliefs sought.

    g. Whether the 1st defendant is entitled to the reliefs sought in the counter claim.

86. The 1st defendant filed their written submissions dated 20th June, 2023 where he raised the following issues for determination: -

    a. Whether as a matter of fact the suit herein is a representative suit or whether indeed there are 583 plaintiffs in this case.

b. Whether as a matter of fact the 39 persons named in paragraph 9 of the plaint were in occupation of the suit property before 1970 and long before Land Adjudication between 1974-1978, and first registration of the suit property in the name of the late Isaiah Kiplangat Cheluget.

c. Whether as a matter of fact the 447 people mentioned and listed in paragraph 11 of the plaint inherited their respective parcels of land from their parents who had possession before 1970 and before the adjudication in 1974-1978 and first registration of the suit property in the name of the late Isaiah Kiplangat Cheluget (i.e. from the people mentioned in paragraph 8 of the plaint)

d. Whether as a matter of fact the 231 people mentioned and listed in paragraph 12 of the plaint purchased and/or acquired their respective parcels from the persons mentioned and listed in paragraph 9 of the plaint i.e. those who had possession before 1970 and long before adjudication in 1974-1978 and first registration of the suit property in the name of the late Isaiah Kiplangat Cheluget.

e. Whether as a matter of fact the plaintiffs or any of them were entitled to be registered by first registration as owners of the suit property or any part thereof and if so why they were not so registered.

f. Whether the first registration of the suit property in the name of the late Isaiah Kiplangat Cheluget was obtained or done by fraud, unjust encroachment, unreasonable conduct or undue influence and is therefore null and void, and if so whether the 1st defendant held the title to the suit property in trust for the plaintiffs.

g. Whether the plaintiffs or any of them are entitled to an overriding interest not required to be noted in the register, and therefore to a declaration that the estate of the late Isaiah Kiplangat Cheluget holds the title to the suit property in trust for the plaintiffs or any of them.

h. Whether the suit is untenable without merit, misconceived or an abuse of the process of court by dint of the doctrines of res judicata and issue estoppel the plaintiffs' failure to utilize the process under the applicable law and in previous court proceedings.

i. Whether the plaintiffs or any of them are in illegal occupation or possession of portions of the suit property in breach of the deceased'd estate's constitutional property rights.

j. What reliefs may be granted in favour of the plaintiffs or any of them under the plaint.

k. What reliefs may be granted in favour of the 1st defendant under the counter-claim.

l. Who should bear the costs of the suit and counter claim.

87. The 2nd, 3rd and 4th defendants filed their written submissions dated 26th June, 2023. They raised five issues for determination as listed below: -

a. Whether the process of adjudication and demarcation carried out between 1974-1980 resulting in registration of the 1st defendant as the owner of LR. No. Narok/Cis-Mara/Ilmotiok/54 was lawfully done in accordance with the provisions of the *Land Adjudication Act*.

b. Whether the plaintiffs have proved any cause of action under *the Constitution* of Kenya, 2010 and the *Land Registration Act*.

c. Whether the plaintiffs' suit is barred by the provisions of Limitations of Actions Act, Cap 22 of the Laws of Kenya.

d. Whether the plaintiffs are entitled to the reliefs sought herein.

e. Whether the 1st defendant is entitled to the reliefs sought in the counter claim.

88. Since the 2nd to 4th defendants did not highlight their submissions, I will briefly capture their submissions as follows: - On the first issue, the 2nd to 4th defendants submitted that DW2 informed the court that during the adjudication exercise, there was no person either from the plaintiffs' side or any of their representatives who raised an objection to the adjudication officer as required by Section 26 (1) of the *Land Adjudication Act* concerning the allocation of the suit land to the 1st defendant. The went on to submit that under Section 29 of the Act, the plaintiffs never followed that route on appeals and instead they decided to file this suit in a different forum. While relying on the case of Speaker of the National Assembly versus Karume [1992] KLR 22, the 2nd to 4th submitted that the plaintiffs should have appealed any of their grievances to the Minister as provided by the law. To buttress on this submission, the 2nd to 4th defendants relied on the cases of Julia Kaburia versus Kabeera & 5 Others, Nyeri Civil Appeal 340 of 2002, John Masiantet Saeni versus Daniel Aramat Lolungiro & 3 Others [2017] eKLR and Mutanga Tea & Coffee Company Limited versus Shikara Limited & Another [2015] eKLR.

89. On the second issue, and while relying on the case of Mohamed Ahmed Khalid (Chairman) & 10 Others versus The Director of Land Adjudication & 2 Others [2013] eKLR, the 2nd to 4th defendants submitted that where a specific dispute resolution mechanism is prescribed by *the constitution* or statute, parties need to resort to that mechanism first before going to court.

90. On the third issue, the 2nd to 4th defendants submitted that the plaintiffs were aware that the 1st defendant was declared as the owner of the suit land sometime in the year 1980 and went to slumber on their rights. They submitted that they cannot wake up now and claim something that has been overtaken by the limitation period as provided.

91. On the fourth issue, the 2nd to 4th defendants submitted that the plaintiffs have not proved their case on a balance of probabilities and they are not entitled to the prayers sought.

92. On the fifth issue, and while relying on the case of African Inland Church versus County Council of Nakuru & 2 Others [2006] eKLR, the 2nd to 4th defendants submitted that the title of the 1st defendant as the indefeasible owner has been proved and it was acquired legally and procedurally.

93. On 3rd May, 2024, the parties highlighted their submissions. Mr. Gacheru, the learned counsel for the plaintiffs submitted that 583 plaintiffs each representing a family, live in the suit land, and exhibit number 30 shows where each of them reside. He submitted that the 583 Plaintiffs fall into 3 categories, and that the plaintiffs occupy about a third of the suit land.

94. On whether the suit is res-judicata, the learned counsel submitted that the defendant has approbated and reprobated at the same time. He submitted that the issues in this suit were not the same as in HCCC No.400 of 2003 as the latter was an Originating Summons for adverse possession. He further submitted that the issue in this suit are overriding interest and trust where there has been community rights and historical injustice. He relied on the cases of East Africa Development Bank versus Blueline Enterprises Limited [2013] 2 EA 52, Samuel Kiiru Gitau versus John Kamau Gitau, Nairobi HCCC No. 1249 of 1998, Greenfield Investment Limited versus Baber Alibhai Mawji [2000] eKLR and submitted that new rights have been created by the new land laws and that if the first claim is based on adverse possession, a subsequent claim based on trust cannot be said to res-judicata and vice versa.

95. On whether the adjudication process carried out in 1974 was fraudulent and unjust, the learned counsel submitted that the plaintiffs were in the suit land before the adjudication process commenced, and that there is an admission by the defendants that there were people on the said suit land before the process commenced. He submitted that they have given several aspects of how the 2nd defendant interfered with the process. He submitted that in the proceedings of Nairobi Misc. Appl No. 400 of 2003 (OS), the evidence given regarding the process of adjudication was irrelevant to the originating summons on adverse possession. He relied on the cases of Peter Kimondio versus Land Adjudication officer Tigana West District and 4 Others [2016] eKLR and Joel Phenehas Nyaga and Joseph Nyaga Nzau (Suing as the Chairperson and Treasurer of Kemagui Electrification Self Help Group) versus Alysius Nyaga Kanyua & Julia Gicuku Nyaga [2020] eKLR.

96. It was his submission that they have proved undue influence citing demolitions of schools and harassment of the plaintiffs which as a result, the plaintiffs could not participate meaningfully in the process of adjudication and to successfully lodge their claims under the *Land Adjudication Act*. Reliance was placed in the cases of Abu Chiaba Mohammmed versus Mohammed Bwana Bakari & 2 Others [2005] eKLR and Solomon Meme Muthamia versus Ntaari Kabutura & Land Adjudication Officer, Meru [2001] eKLR.

97. On the issue of trust, the learned counsel, while relying on the case of Kanyi versus Muthiora [1984] KLR 712 submitted that a person does not cease to be a trustee and that the circumstances of this case give rise to constructive trust.

98. On whether the 1st defendant as the owner of the suit land was subject to the plaintiff's overriding interest, the learned counsel submitted that they have proved an alternative cause of action based on possession as an overriding interest under Section 30 (g) of the repealed Registered *Land Act*, Cap 300 and submitted that even though the *Land Registration Act* of 2012 did not retain these rights, the Supreme Court in the cases of Isack M'inanga Kiebia versus Isaaya Theuri M'lintari & Another [2018] eKLR recognized those rights of occupation to constitute customary trusts as one of the overriding interests introduced under the new Act. He submitted that Mr. Cheluget's title as of today is still subject to the overriding interest of occupation by the plaintiffs.

99. On whether the plaintiffs have proved other new causes, the learned counsel submitted that *the Constitution* creates a right of community rights. He relied on the cases of John Riungu M'mutea and 5 Others vs Gladys Njeri Waruiru & 2 Others [2022] eKLR and Mudamba Ojwang versus John Opondo Onyango & 4 Others [2022] eKLR. The learned counsel submitted that the plaintiffs had constituted themselves as Sagamian Community, and that there is another new right under Section 7 of the *Land Act* which can be challenged under Section 26 (2) (b) of the *Land Registration Act* where a title has been acquired illegally, un-procedurally or under a corrupt scheme. Reliance was placed in the case of Stephen Kirimi M'rinturi vs Land Adjudication and Settlement Officer-Igembe District & 3 Others; Peter Kumbu Kimunya & Another (Interested Parties) [2020] eKLR.

100. The learned counsel submitted that the fact that they did not file objections or appeal does not stop them from approaching this court, and as such the plaintiffs are entitled to the reliefs sought, as they have demonstrated this through the evidence.

101. Mr. Lubulellah, the learned counsel for the 1st defendant submitted that from the evidence given, a matter which is not contested is that the deceased was the registered owner of the suit land through the process of first registration. He went on to submit that it was after culmination of the adjudication process which started in July, 1975 and that the 1st defendant was issued with a title deed on 11th September, 1980. It was also his submission that a matter which is acknowledged by the plaintiffs is that they are members of the Kipsigis community and that the suit land is in Maasai Land. He

submitted that it is also acknowledged by all the parties that there have been legal disputes between sons of the plaintiffs and the deceased regarding the occupation of the land, and that as confirmed by learned counsel for the plaintiff, even before the adjudication process began and was concluded, some plaintiffs had been arrested and prosecuted for trespassing into the deceased's land. He submitted that also admitted and a common ground of these proceedings is that a substantial number of the plaintiffs filed Nairobi HCC MISC No. 400 of 2003 through which they claimed to have been entitled by adverse possession to portions which they occupied.

102. The learned counsel submitted that it is common ground that the originating summons was heard and determined by Justice Jackson Ojwang (as he then was) who observed that it was the 1st defendant who was the wronged party. He also submitted that the plaintiffs were dissatisfied with the decision of the High Court and they appealed in Nairobi Civil Appeal No. 289 of 2009 which was dismissed. He submitted that the finding by the Court of Appeal is binding and that it has not been set aside. He submitted that the learned counsel for the plaintiffs has cited various constitutional provisions including those that he says have established new causes of action, and that no proceedings have been taken with regarding to the finding of the Court of Appeal on issues that may have arisen with respect to the finding. He submitted that in these proceedings, there is an attempt by the plaintiffs to answer the criticisms of the Court of Appeal by showing where each one of them now resides.

103. The learned counsel further submitted that apart from the Originating Summons in 400 of 2003 and the Court of Appeal in Civil number 289 of 2009, there have been proceedings involving the parties in court in Nakuru Civil suit number 241 of 2013 in which the representatives moved to court seeking registration and recognition of Sagamian Primary School as a national examination centre. He submitted that it is clear that the deceased had no authority to register primary schools or to recognize them as a centre for national examinations and that the school was operating illegally from the deceased's land. He also submitted that Emukule, J granted certain orders with regarding to the registration of the school as an examination centre, and that the learned judge directed the petitioners to initiate dialogue with the deceased within 45 days. He submitted that there has been no engagement between the plaintiffs and the school management with regard to the portion of the deceased's land.

104. The learned counsel further submitted that even though it has been addressed severally by the learned counsel for the plaintiff that there are several public amenities, it has not been suggested to the court that those public amenities have any valid legal title to any portion of the deceased's land. He also submitted that the churches, the schools or the trading centers are not parties to this suit which shows where these parties have come from. The learned counsel further submitted that before this matter was in this court, the deceased had applied for an order of eviction of the plaintiffs from his land, and that application was overtaken by the events of this case. He submitted that PW1 in his cross examination said that most of what is in his statement was hearsay. He submitted that PW1 indicated that he is not a trained surveyor or cartographer, and that he was the one who prepared the map that the plaintiffs are relying upon to show the portions of land that they occupy which map does not show who prepared it.

105. With regard to ownership of the suit land, the learned counsel submitted that there is no deed plan, survey plan or other document recognized under the law to show where the plaintiffs occupy in the suit land. More importantly, the counsel submitted, PW1 did not provide any documents on the people whom he alleged bought land. He identified documents marked as 1 to 31 of the Plaintiffs documents at page 115, which were not produced as exhibits in this case.

106. With regard to the evidence by PW2, the learned counsel submitted that it is not their intention to look down upon people who do not understand English or are illiterate since an illiterate person is a competent witness in court but if he purports to adduce evidence in English language which he does not understand, his competence becomes crucial. The counsel submitted that PW2 did not identify the

person who translated he document into Kalenjin language which means that the original document should be in Kalenjin and translated into English and not vice versa. That as such, the statement was imposed upon the witness.

107. With regard to the evidence by PW3, the learned counsel submitted that his evidence is hearsay in the absence of the production of the letter that he claimed to have received and that the suit is not about demolition of Sagamian Primary School. He submitted that PW3 is not one of the plaintiffs who reside in the suit land. The counsel went on to submit that the evidence of PW4 applies to PW2 and that the evidence of PW5 and PW6 is hearsay evidence and none of them gave evidence regarding fraud.

108. The learned counsel further submitted that the evidence of PW7 falls in the same category as PW2 and PW4 and that this particular witness purported to indicate that he witnessed the deceased carrying out surveying work on the property. He submitted that the deceased was not a surveyor and could not have undertaken survey work. He submitted that the evidence of PW8 and PW9 also fall in the same category as PW2 and PW4. He submitted that PW10 is one of the parties who said that he was imprisoned in 1979 for trespassing the land.

109. With regards to the documents identified by the plaintiffs and not formally produced, the learned counsel relied on the case of Kenneth Nyaga Murige versus Austin Kiguta and Others [2015] eKLR. The learned counsel further submitted that an important aspect of litigation right from 400 of 2003, Court Appeal 289 of 2009, Mr. Gacheru Nganga, the learned counsel, has acted for the plaintiffs while he has acted for the deceased and now 1st defendant, and that there is no reason why someone can say that these proceedings were filed by people who do not understand the litigation between the parties.

110. The learned counsel further submitted that the proceedings have been brought by members of Sagamain community which has always been the position in other proceedings. He submitted that the record will show that Mr. Jacob Kipkoech was never cross-examined on that part of his evidence and neither was Mr. Bore who was the area chief cross-examined on it. On this, he submitted that their evidence remains unchallenged. He also submitted that on the face of it, it would show that there are 583 plaintiffs in this case, however, the document referred to as authority as "authority to plead" is not "authority to testify". He submitted that the witness statement by Mr. Stanely Kipsang Towett is that he does not purport to testify on behalf of the other 583 witnesses since he prayed that the title be cancelled and he be registered as the owner of the portion he occupies. The counsel submitted that majority of the plaintiffs if they exist have not testified, and none of the witnesses indicate that they were testifying on behalf of anyone else.

111. The learned counsel submitted that this is not a representative suit. It was also his submissions that it was incumbent upon each of the plaintiffs to personally testify and that apart from the 39 persons who claimed to have been in occupation of the suit property before 1970 long before adjudication in 1974 to 1978, broadly, there is no evidence that has been adduced to indicate so. To go back to the evidence by PW2, the counsel submitted that the witness indicated that he was a member of the Land Adjudication and Settlement Committee, but he did not produce any document to show how he was appointed or provide record of any proceedings. The counsel went on to submit that PW2 had no answer when it was suggested to him that nothing had been done for 38 years.

112. On whether 447 people inherited their parcels of land from their parents, the learned counsel submitted that there is absolutely no evidence. He submitted that the *Law of Succession Act* came into force on 1st July, 1981 and except Moslems everyone is bound by it. The learned counsel further submitted that this being Maasai land, there is *Community Land Act* which deals with land not registered under the former Registered *Land Act* and this is not what is before this court. He submitted

that if they are talking of purchase and acquisition, there was no sale agreements produced as evidence as it is required under Section 3(1) and (2) of the *Law of Contract Act*.

113. The learned counsel further submitted that there is no explanation given by the plaintiffs for their inaction or why they did not participate in land adjudication process, and that the plaintiffs have tried through submissions to explain that there was intimidation and undue influence. He submitted that the standard of proof of fraud and illegality is higher. He went on to submit that the reason that the deceased was a Provincial Commissioner, and that he intimidated people, cannot take the place of evidence. He submitted that the 500 plus witnesses claim a portion of the suit land, and that the only common factor about them is that they are claiming the same property owned by the same individual. He pointed out that each claim is separate and all the plaintiffs do not have a common cause of action.

114. With regard to the suit for adverse possession, the learned counsel submitted that one recognizes the validity of the registered owner. He relied on the case of Trade Bank Limited versus LZ Engineering Construction Limited [2001] EA266. He further submitted that a number of the plaintiffs have been added because they were avoiding to plead the issue of res judicata and estoppel, and whether those plaintiffs exists, it is not enough to include names and ID numbers which are not authenticated. He further submitted that the learned counsel submitted that the documents produced by DW1 and DW3 were fabrication yet they did not prove the said fabrications, through an expert report.

115. On whether the title by Isaiah Kiplagat was obtained by fraud, the learned counsel submitted that the evidence of fraud, unjust enrichment and unjust conduct has not been proved in this court. The learned counsel relied on the case of Kinyanjui Kamau versus George Kamau [2015] eKLR and submitted that never before has the issue of fraud, unjust enrichment come before the parties. He submitted that the submission by the plaintiffs that the 1st defendant was not in the suit land is misconceived as the burden to prove rests on the plaintiffs.

116. The learned counsel further submitted that the submission on customary trust is misconceived and that customary trust does not apply under the Registered *Land Act* which was before the *Land Registration Act*. The counsel submitted that it is absurd for the plaintiffs to claim customary trust for land in Maasai land. He relied on the cases of Gituanja versus Gituanja [1983] KLR 575 and Gathiba versus Gathiba KLR (E&L) 1 cited by the plaintiffs and submitted that the authorities cited applies to family land, and this is not family land. The learned counsel urged the court to make a finding that an illegal occupation of a person's registered land is incapable of creating customary right because the Court of Appeal has made a finding that the plaintiffs were in illegal occupation as squatters.

117. As to whether there are new rights which have accrued on the plaintiffs, the learned counsel submitted that the parties herein had rights which had accrued, and settled as adjudicated by the court, and those rights could not have been disturbed by *the Constitution* of Kenya which itself recognizes rights under Article 40.

118. On the issue of res judicata, the learned counsel relied on the cases Daniel Kirui & Another versus Monicah W. Macharia & Another C.A No. 261 of 2002, Independent Electoral & Boundaries Commission versus Maina Kiai & 5 Others [2017] eKLR, Ibrahim Wakhayanga & Others versus Peter Mubatsi Nambiro CA. No. 84 of 1998, Apondi versus Canuals Metal Packaging [2005] 1 EA 12 and Gladys Nduku Nthuki versus Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] eKLR. He submitted that the issue in this case has been determined in 400 of 2003 and in the Court of Appeal and that there has to be an end to litigation.

119. On whether the plaintiffs are in illegal possession and occupation of the deceased's estate, the learned counsel submitted that the 1st defendant had sought for an order for eviction and that the plaintiffs do not deny that they are in illegal occupation. He submitted that in the final analysis, the reliefs that the

plaintiffs claim cannot be granted and that this is a typical example of reprobating and approbating. He went on to submit that if the title is null and void, the learned counsel questioned what consequence would be there for the 1st defendant to be holding an illegal title in trust for the plaintiffs. He submitted that the analysis of evidence does not satisfy the standard of proof on a balance of probability.

120. With regard to the counter claim, the learned counsel submitted that by their own admission of Misc Appl. No. 400 of 2003 and the appeal in the Court of Appeal, the plaintiffs are in illegal occupation of the suit property.

121. The learned counsel for the 2nd, 3rd and 4th defendants relied entirely on his written submissions.

122. In rejoinder, the learned counsel for the plaintiffs submitted that if indeed the claim is res judicata, the counterclaim is also res judicata particularly to the other pending application for eviction. He submitted that even if the parties were the same, the issues were not the same. He further submitted that in the originating summons they have admitted the authenticity of title which is true, but in this suit, they are not admitting that the title is valid. The learned counsel submitted that the customary trust referred to was in respect to the case of Isack M'inanga Kiebia versus Isaaya Theuri M'lintari & Another [2018] eKLR.

123. On estoppel, the learned counsel submitted that this is an exclusive claim, and the plaintiffs are entitled to raise it, and that it is not correct to say that the plaintiffs do not have a common cause of action. He further submitted that the plaintiffs common cause of action is the illegality that occurred in 1979. He submitted that all the plaintiffs gave authority to PW1 to testify on their behalf and that there is nothing wrong in law with that.

124. With regard to the issue of inheritance, the learned counsel submitted that the learned counsel for the 1st defendant does not understand the plaintiff's claim which is on adjudication, and that under the *Environment and Land Court Act*, the court is to determine their interest since they are in possession and they cannot prove that they have undertaken succession cause. He submitted that all the witnesses filed their witness statements pursuant to the Civil Procedure Rules and that there is no legal basis for the learned counsel to say that those statements are not valid. He also submitted that according to the Law of Evidence, a fact may be proved either through oral or documentary evidence.

125. The learned counsel submitted that the judgment in Nakuru petition 421 of 2013 recognized the presence of the school in the suit land which required that the school gets its own title. He submitted that the judgement was not appealed against.

126. I have considered the pleadings filed, the oral evidence by the witness and the documentary evidence relied upon by the parties. I have also considered the written submissions filed by the parties as well as the highlighted submissions. In my view, the issues for determination are as follows: -

    1. Whether the instant suit is res judicata.

    2. Whether the plaintiffs have established a case to warrant the orders in the plaint.

    3. Whether there is merit in the counter claim by the 1st defendant.

    4. Who should bear the costs.

127. It is not in dispute that there is history of litigation over the suit land that has been before the court Nairobi HC Misc. Civil Appl. No. 400 of 2003, Civil Appeal No. 289 of 2009, Nakuru Criminal Case No. 1870 of 2000 and Nakuru Constitutional Petition No. 41 of 2013. The plaintiffs argued that the there is a new cause of action in the present suit and not all parties were present in the former suit i.e. Nairobi HC Misc. Civil Appl. No. 400 of 2003 (OS). The plaintiffs argued that the former suit was

a claim for adverse possession and that in the present case, they are challenging the legality of the title and claim ownership of the suit land by virtue of a constructive trust. Most notable, the majority of the witnesses recognize the existence of previous cases filed in court with regard to the suit land save that they claim that they were either parties or not to the former suit.

128. PW1 in his testimony sought to distinguish the two cases. He informed the court that in the former suit, they were claiming the whole of the suit land through adverse possession, but in the present case, they now claim a portion thereof. The same applied to PW8 and PW9 who were parties in the former suit and are also parties in this suit. Interestingly, PW6 stated that as at 2003, he did not a complain but he now seeks to claim a portion of the land that he owns.

129. The principle of res judicata is provided under Section 7 of the *Civil Procedure Act*, which provides as follows :-

> " 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."

130. From the above, it will be observed that for res judicata to apply, the issue in the latter suit must have been directly and substantially in issue in the former suit between the same parties, or between parties under whom they are litigating. The Court of Appeal in the case of Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996 held that: -

> " In order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit."

131. In the case Nancy Mwangi t/a Worthlin Marketers versus Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others (2014) eKLR Gikonyo, J while dealing with the issue of res judicata stated that: -

> " The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and others (2001) EA 177, the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In that case the court quoted Kuloba J.. in the case of Njangu Vs Wambugu and another Nairobi HCCC No. 2340 of 1991 (unreported) where he stated, if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata."

132. With regard to Misc. Civil Application No. 400 of 2003 (OS), the plaintiffs were John Kiplangat Barbaret, Christopher Kiptonui Maritim, William Makilot Sang, Joseph Kipkosgei Maritim, Simeon Kiplangat Ngerechi, Kimutai Arap Kenduiywo, Philip Kipkirui Chesimet, Barta Tesot and Chemiywa Arap Chepkelat as the 1st to 9th plaintiffs and suing on behalf of themselves and on behalf of and as representing and for the members of Sagamian Community. The defendant in this case was Isaiah Kiplangat Arap Cheluget. The plaintiffs in this case filed Originating Summons dated and filed on 17th April, 2003 where they sought to be declared to have become entitled by adverse possession for over 12 years to the suit land measuring approximately 2329 hectares. They also sought that they be registered as the proprietors of the suit land in place of the 1st defendant. The court in its judgment, noted that the plaintiffs in a representative suit brought together 600 or so claimants but failed to specify the portion of the suit land which each one of them was claiming. The judgment as I have read, noted the manner in which the plaintiffs invaded the suit land, and the evidence of the defendant was not controverted. In a judgment delivered on 19th August, 2009 by J.B Ojwang (as he then was) was that he dismissed the planitiffs' case with costs to the defendant.

133. From the reading of the judgment, the plaintiffs made it clear that they brought forth the suit on their own behalf and on behalf of the 'Sagamian Community' which the judgment noted has over 600 claimants. (See pages 199 of the said judgment). In the instant case, the plaintiffs herein are 583 and the defendants included the estate of the defendant in the former suit as well as the Registrar of Titles, the County Surveyor, and the Attorney General. The claim in the instant suit is for declaratory orders against the legality of the title by the 1st defendant, cancellation and injunctions orders against any dealings on the suit land by the defendants from interfering with the plaintiffs' possession and use of the same.

134. I have drawn similarities from the two cases as follows: - the issue in the latter suit is directly and substantially in issue in the former suit, the plaintiffs in the present suit are claiming ownership of the suit land by challenging the validity of the title held by the 1st defendant on claims of fraud and undue influence and also that the 1st defendant holds the title in trust for them. In the former suit, the plaintiffs who had filed the suit on behalf of Sagamian community were claiming ownership of the suit land through adverse possession. The parties are also similar since the former is a representative suit whereas in the present suit, all who claim to have lived on the suit land or who refer to themselves as belonging to the Sagamian Community have now filed the present suit as plaintiffs. The 1st defendant is the defendant in the former suit and the plaintiffs in this case have now sought to introduce three

other defendants. The parties are also litigating under the same title save that in the former suit it was Originating Summons whereas the present suit it is a plaint. The common factor in all the above is the claim by the plaintiffs who are seeking ownership of the 1st defendant's property through all available means necessary.

135. The case in the former suit proceeded to the Court of Appeal which noted in paragraph one thereof that the nine appellants filed the appeal as representatives and part of Sagamian Community. The Court of Appeal in dismissing the appeal vide the judgment delivered on 29th December, 2017, noted the presence of the plaintiffs in the suit land as trespassers. (See paragraph *22*).

136. From my analysis, this court finds that the instant is res judicata. The attempt by the plaintiffs herein is trying to introduce a different cause of action and introduce additional defendants to mask their initial suit. A decision has been made both by the High Court and the Court of Appeal over the subject matter and concerning the plaintiffs' ownership claims over the subject matter yet they still attempt to device a tactic to claim similar ownership of the same subject matter. In my view, this is gross abuse of the court process to say the least. This court has not been informed whether the decision by the Court of Appeal has been set aside and as it is, the Superior Court's decision stands.

137. This court will not be caught in disrepute over such claims. Having said the above, I find it not necessary to delve into the other issues. In conclusion, I find no merit in the plain dated 31st July, 2018. The same is hereby dismissed with costs to the 1st defendant. Whereas I note that there is a pending application for eviction as adduced by the 1st defendant, this court will not therefore proceed to grant the order for eviction as sought in the counter claim save to find merit in the counter claim in terms of prayer (c). Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 11TH DAY OF JUNE, 2024.

HON. MBOGO C.G.

JUDGE

11/06/2024.

In the presence of: -

Mr. Meyoki Pere – C. A