REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HCC NO. 119 OF 2001

CHEBARAA FARMERS COMPANY LIMITED.....……..…PLAINTIFF

VERSUS

KIROBON FARMERS COMPANY LIMITED ……....……DEFENDANT

AND

HOSEA BARMAO CHEMWENO….....INTERESTED PARTY

JUDGMENT

(Suit by one land buying company against another alleging that they purchased land jointly but they did not get their fair share; evidence showing that there was no agreement on sharing the land according to contribution but that the defendant company was selling a specific amount of land to plaintiff company; no evidence that the plaintiff company got less land than agreed; in any event issues arising in the year 1975 or thereabouts; suit clearly time barred; plaintiff further hinging suit on an award of Land Dispute Tribunal; award being made without jurisdiction cannot be upheld; plaintiff's suit dismissed with costs)

PART A : INTRODUCTION AND PLEADINGS

1. This is an old case that was commenced by way of plaint on 3 April 2001. The plaint was amended on 21 May 2009. The case of the plaintiff as pleaded in this amended plaint (for it will be discerned shortly that there was a further amended plaint but which is not what the plaintiff proceeded with at the trial) is that the plaintiff has been the lawful proprietor of 962.15 acres of land out of the land parcel L.R No. 545 said to consist of 10988.15 acres pursuant to an award and decree issued in Molo Senior Resident Magistrates Court Land Dispute Case No. 1 of 1999. It is pleaded that the defendant then purported to lodge an appeal at the Provincial Appeals Committee, which Committee was never constituted in accordance with the law, and did not have jurisdiction to hear the Appeal. It is the plaintiff's case that the subsequent proceedings after the adoption of the award are a nullity and did not affect the validity of the award. It is pleaded that the defendant has tried to enforce the award of the Appeals Committee and deny the plaintiff its right to the said 962.5 acres. It is further pleaded that the plaintiff has filed proceedings for certiorari and prohibition against the decision of the Appeals Committee, being Nakuru High Court Misc. Application No. 132 of 1999.

2. In the alternative, the plaintiffs have pleaded that together with the defendant, they jointly purchased the land parcels L.R Nos. 545, 546, and 549 and that their respective members took possession and have been occupying the same. It is pleaded that the money used to purchase the said properties was jointly

contributed and deposited in the defendant's Account No. 03455 in National Bank with the plaintiff's Chairman and the defendant's Chairman and their then Advocate being signatories. The plaintiff has pleaded that through its members, it made contribution of Kshs. 2, 749,537.75/= but all the parcels of land were registered in the defendant's name. It is pleaded that on account of its contribution, the plaintiff became entitled to 10, 998.15 acres of land but to date the defendant has only transferred 10,036 acres leaving a balance of 962.15 acres. It is pleaded that the plaintiff and its members are in occupation of the disputed portion which ought to be excised from the land parcel L.R No. 545.

3. In the said amended plaint, the plaintiff has asked for the following orders :-

(i) A perpetual injunction to restrain the defendant, their agents and/or servants from acting upon other decision of any other authority other than the decree of the court in Molo Senior Resident Magistrate Land Dispute No. 1/99 as regards 545 (sic).

(ii) A declaration that the plaintiff is entitled to a further 962.15 acres from LR No. 545.

(iii) An order directing the defendant to transfer to the plaintiff forthwith 962.15 acres from L.R No. 545.

(iv) Costs of this suit.

4. Through a Further Amended Defence filed on 17 March 2010, the plaintiff further amended the plaint to introduce the Trustees African Inland Church as 2nd defendant. It was pleaded that on 4 December 2009 or thereabouts, the 2nd defendant started erecting a permanent structure on the plaintiff's portion of land without any colour of right or consent. I note however, that the prayers in the suit as I have cited them above were never amended, and no specific order was sought against the 2nd defendant. The 2nd defendant did not enter appearance, nor file defence and did not participate in the suit. Later in the proceedings, the plaintiffs withdrew their claim against the 2nd defendant leaving Kirobon Farmers Company Limited as the sole defendant. It is therefore only Kirobon Farmers Company Limited who is defendant in this suit.

5. The defendant filed defence and counterclaim which was also later amended. It pleaded that the award in Molo SRMCC No. 1 of 1999 is null and void because the Land Disputes Tribunal was not constituted in accordance with the law and hence lacked jurisdiction to hear the dispute. It is pleaded that the defendant successfully appealed to the Provincial Appeals Committee and the award was overturned. It was further pleaded that the alternative claim of the plaintiff is time barred, and that if there was such contract between the plaintiff and defendant as pleaded by the plaintiff, the same is incompetent for offending Section 3 of the Law of Contract Act, Cap 23, Laws of Kenya. In the alternative, the defendant pleaded that the parties jointly purchased the land parcels L.R No. 545, 546 and 549 on behalf of their respective members. It is averred that according to each party's contribution, the plaintiff was only entitled to 10, 036 acres it received and not 10,998.15 acres as alleged. It was pleaded that the plaintiff's members are unlawfully in the defendant's portion of L.R No. 545 measuring 962.15 acres and the defendant has been trying in vain to evict them. In the counterclaim, the defendant has pleaded to be the registered proprietor of the land L.R No. 545. It further averred that the original title deed has been surrendered to the Ministry of Lands to have it subdivided in favour of its bona fide members who have been in occupation of the property since 1979 and now await issuance of titles. It was stated that various portions of the land have been surrendered to the Government and Public Utilities including the 2nd defendant. In the counterclaim, the defendant sought the following orders :-

(a) A declaration that the award from the Land Disputes Tribunal and the subsequent decree of the Court in Molo Senior Resident Magistrate Land Dispute No. 1 of 1999 are null and void.

(b) A perpetual injunction to restrain the plaintiff, its agents and or servants from interfering with quite possession of all that parcel of land known as L.R No. 545.

(c) A declaration that all members settled in the disputed parcel of land are bona fide and

respective titles be issued to them.

(d) Costs of the suit.

6. A reply to defence and Defence to Counterclaim was filed by the plaintiff vide which the plaintiff refuted the claims of the defendant.

7. In the course of time, one Hosea Chemweno was introduced to the suit as an interested party. He appears to have had some sought of claim but I can see from the proceedings of 16 September 2013, that he stated that he will claim his portion from Chebaraa Farmers (the plaintiff) if the court awards the company the land. I assume therefore that the said Hosea Chemweno has no separate and distinct claim in this suit but claims certain land under the plaintiff.

PART B : EVIDENCE OF THE PARTIES

8. The matter commenced before my predecessor, the Honourable Justice Waithaka, and I took it up after the plaintiff's witnesses had testified. I am not therefore the one who recorded the evidence of plaintiff.

9. From the record, I can see that PW-1 was Francis Kimutai Maiywa. He testified that he is the Chairman of the plaintiff company. He produced his written statement and also gave additional evidence in Chief. In his written statement, he inter alia recorded that Chebaraa Company Limited (Chebaraa) and Kirobon Farmers Company Limited (Kirobon) negotiated to jointly buy land from Keringet Estates. The companies purchased 12 parcels of land being L.R Nos. 7,179 (542 acres) , L.R No. 7,177 (4,007 acres), L.R No. 548 (4,027 acres), L.R No. 11323 (3,972 acres), L.R No. 10380 (1,338 acres), L.R No. 9140 (1,889 acres), L.R No. 545 (995 acres) , L.R No. 547 (1,000 acres) , L.R No. 7178 (215 acres) , L.R No. 549 (4,998 acres) , L.R No. 546 (5,038 acres) and L.R No. 533/15/1 (0.2296 acres). The parcels were valued at the total sum of Kshs. 6,365,420/=. A 10% deposit was required and Kirobon paid the sum of Kshs. 640,000/=. Kirobon was unable to pay the balance and they invited PW-1 who collected the sum of Kshs. 2,749,537.75/= from Chebaraa members who were 602 persons. This money was paid into a joint account No. 03455 at National Bank of Kenya (National Bank) and it is said that it earned interest of Kshs. 300,000/= making a total of Kshs. 3,049,537.75/= as the contribution of Chebaraa. More money was needed, and PW -1 and one Kimulwet Koskei, both of Chebaraa volunteered to borrow Kshs. 4 Million from National Bank. The loan was granted and paid into the joint account. Keringet Estates, the sellers were then paid the purchase price. Another account No. 110429 was opened by Kirobon at National Bank allegedly so that Kirobon could pay the loan and exclude Chebaraa.

10. PW- 1 continued to state that the land that was available after deducting road reserves was 28,000 acres which was being sold at Kshs. 250 per acre. According to PW-1, their contribution of Kshs. 3,049,537.75 divided by Kshs. 250, entitled Chebaraa to 12,198.15 acres while they now have 9,456 acres of land in the parcels No. 546 and 549. He said they still need 2,742 acres. He stated that in the year 1998 Chebaraa proceeded to the Nakuru Land Disputes Tribunal which awarded them 962.15 acres. The award was adopted by the Molo Senior Resident Magistrate's Court and decree issued on 2 February 1999. He said no appeal was made within 30 days. He stated that the 962.15 acres awarded comprised the vacant land parcel No. 545 which is of 1995 acres where they had placed a caveat in the year 1977. He stated that the present residents of the land parcel No. 545 moved from their own farms including Wilson Kiptoo Leitich from parcel No. 548 and Joshua Rono from parcel No. 7177. Other occupants purchased the land from various people. He stated that only Kirobon were present when the farm purchased was handed over on 31 March 1975 before the appointed date of 1 April 1975 which has brought about this dispute. He testified that they have an award in their favour issued by the Land Disputes Tribunal which has not been challenged. He wished that this court endorses that award.

11. In cross-examination, PW-1 stated that as Chebaraa (the plaintiff company), they put together Kshs. 2.7 Million which was placed in the account of Kirobon Farmers (defendant) to buy the farm. He stated that a total of 989 members purchased the farm. Chebaraa had 602 members whereas Kirobon had 387 members. He stated that the land they got is not commensurate with the money they had given. He stated that at the Tribunal, Chebaraa was given the 956 acres that they are claiming. He testified that they have

the land parcel No. 545 measuring 995 acres which is occupied but he did not know who occupies the land.

12. PW- 2 was William Kiptoo arap Kirui. He testified inter alia that he is the current Chairman of Chebaraa Farmers. He testified that Chebaraa agreed with Kirobon to jointly purchase land. They contributed Kshs. 2, 749,537.75/= whereas Kirobon contributed Kshs. 640,000/=. They jointly borrowed Kshs. 4,000,000/= and opened a joint account. He stated that Kirobon went alone for handing over on 31 March 1975 one day earlier than the appointed day. They (Chebaraa) then engaged an advocate, Mr. Kamere, who placed a caution in 8 land parcels being the parcel numbers 7179, 7177, 548, 11323, 10380,9140, 545,and 547 because Kirobon had used the said parcels of land to borrow Kshs. 4.5 Million in the year 1988. He also testified that there have been further dealings on the land despite the suit. In his written statement which was adopted as his evidence, he stated inter alia that the caveat was placed on 1 December 1997. He stated that it is after closing the account (not sure which account for there are two alleged accounts), Kirobon took the 8 mentioned plots for the Kshs. 4.5 Million loan to pay sheep (sic), cattle and machinery using the new account and Chebaraa was not included in the deal. He stated that through a letter dated 2 May 1980, their joint advocate, M/s Cresswell, Mann and Dodd, received a letter that the final figure has been paid in full for land and movable assets. He also mentioned ongoing dealings on the land despite a stay order.

13. In cross-examination, he inter alia testified that the land was purchased in the year 1973. That is the year Chebaraa deposited the sum of Kshs. 2, 749, 537.75/=. He stated that they were purchasing 10, 036 acres but only 9, 456 acres was given to them. He stated that currently there is no vacant land. He was not aware of a meeting held in February 1975 nor one held on 29th August 1975. He stated that in the year 1975 he was a member. He testified that Chebaraa has 602 members and that there are aggrieved members who have never been given land. He stated that in the tribunal they did not have a claim over the land parcel No. 545 as they had their two parcels of land.

14. DW-1 was Rev. David Kimutai arap Metet, a shareholder of Kirobon Farmers Ltd. He stated that he knows the history of the dispute. He testified that Kirobon was formed in the year 1972 to purchase land from white settlers. It had 218 members when incorporated. Each person was to contribute Kshs. 250 per acre. The land was big and comprised of 11 titles. Chebaraa then approached Kirobon so that they can join together to buy the parcels of land. However, the purchaser was to be Kirobon and there was no merger of the two companies. He testified that Chebaraa contributed the sum of Kshs. 2.7 Million and nothing more. Kirobon contributed Kshs. 640,000/= and also approached the National Bank for a loan since the land was being sold at Kshs. 6.4 Million. He testified that National Bank granted Kirobon the sum of Kshs. 4.5 Million and 8 titles out of the 11 were mortgaged. The three titles not mortgaged were L.R Nos. 7178, 549 and 546. He stated that there were regular meetings held between Chebaraa and Kirobon, to discuss how to share the parcels of land. The total land purchased was 28,000 acres and Chebaraa wanted half of it, that is 14,000 acres. In a meeting held in February 1975, it was resolved that Chebaraa will be given 10,000 acres in two land parcels, that is L.R No. 546 and 549 which had a total acreage of 10,036 acres.

15. He testified that of the 28,000 acres purchased, 8,000 acres settled landless persons including former workers in the farms and others who were not members of the two companies. They were granted the parcel numbers 7177 comprising of 4,007 acres and 548 comprising of 4,027 acres. The remaining parcels, equivalent to 10,000 acres and comprising of the land parcels No. 11323, 10380, 9140, 545, 547, and 7178 remained under Kirobon. Kirobon shared out this land to its members based on their contribution and there is now no vacant land. Of these, only 2 parcels, that is the parcel numbers 11323 and 545 await issuance of titles. He testified that Chebaraa accepted the 10,000 acres and the matter put to rest. They distributed their land to their members who now have titles. He testified that there was a discussion held on 29 August 1975 of which he had the minutes showing that Chebaraa Directors accepted the 10,000 acres. In the year 1998, Chebaraa went to the Land Disputes Tribunal claiming dissatisfaction with their acreage of 10,036 acres. It is then that they were awarded 962 acres. He testified that this land is not available and they appealed before the Appeals Tribunal which reversed the award. He produced the area list of the land parcels No. 11323 and 545 showing distribution of the land to Kirobon members and stated that it is because of this case that titles have not been issued. He stated that

there is no vacant land either in the Kirobon or Chebaraa areas and that the dispute between the two was settled in the year 1975. He stated that he is not aware whether some Chebaraa members have no land and that it was upon them to distribute their land to their members.

16. In cross-examination, he stated inter alia that Kirobon also had another farm at Ngata and some of its members got land in both Ngata and in the area under dispute. He testified that 3 parcels were not mortgaged, two of which were handed to Chebaraa, that is the land parcels No. 546 and 549. The parcel No. 7178, also not mortgaged is occupied by a Kirobon member and is 215 acres. He stated that the decision of both Tribunal and the Appeals Committee were nullified by the High Court. He testified that they were not reselling land to Chebaraa at Kshs. 480/= per acre but they were entrusted to purchase the land on behalf of themselves and Chebaraa. He testified that handing over was done to Kirobon. He stated that other persons other than those of Kirobon and Chebaraa were given land. He testified that the parcel numbers 545 and 11323 are still pending issuance of titles. He stated that Kirobon obtained the loan of Kshs. 4.5 Million to pay the land owner and was not to pay for cows, sheep, vehicles and other assets. He stated that L.R No. 545 is 995 acres and was set aside to compensate other members who did not get land in Ngata or Kaptarakwa where Kirobon had purchased farms.

17. DW-2 was Joseph Kimutai Rono. He has been the Chairman of Kirobon from the year 2007 - 2014. He testified that Kirobon owned the whole farm and Chebaraa approached them for two farms, that is the land parcels L.R No. 549 and 546 totalling 10,036 acres. Chebaraa contributed Kshs. 2.7 Million to purchase these two farms and they processed their title deeds. He stated that in respect of L.R No. 545, there are no Chebaraa members on it and that it is Kirobon members on the land. He stated that it is now subdivided and titles have been issued and had been subdivided in the year 2001 when Chebaraa filed this case. He averred that Chebaraa cannot claim this land as it is not available. He asserted that they owe Chebaraa no money and have no land to give them.

18. In cross-examination, he stated that he is not aware that the money contributed by Chebaraa earned any interest. He stated that they are not partners with Chebaraa and that it is Kirobon which took the loan of 4 Million to buy the whole of Keringet Farm. He pointed out that the interested party was at some point a Director of Kirobon. He stated that other smaller companies also purchased land from Kirobon.

19. I allowed the interested party to testify. He stated that he was a Director of Kirobon from 1979. He stated inter alia that 11 land parcels were purchased. He testified that the company has been having wrangles and had two factions. In June 2014 he was elected as director. He stated that in 2008, the Government established Kuresoi District and he had 2 acres where the D.C' s office was established. He sued for it and a consent was recorded but this was quashed. He said that of late, they have been negotiating with Chebaraa and it was agreed that he be given 40 acres, which he has not got. He asserted that he deserves his 40 acres or compensation in money. In cross-examination, he stated that the money contributed by Chebaraa earned interest of Kshs. 300,000/=. He stated that Kirobon took two loans, one to pay for the land and another for the assets. He stated that Kirobon charged 8 properties. He said that land was sold at Kshs. 300 per acre. He further stated that Chebaraa still owes Kirobon money for legal fees and transfer fees. He stated that the parcel No. 545 is fully occupied by Kirobon members and the land is not available. He said that Chebaraa got the land that they paid for and have no claim against Kirobon.

C. SUBMISSIONS OF COUNSEL

20. In his submissions, counsel for the plaintiff reviewed the facts and inter alia submitted that the plaintiff never got land equivalent to its contribution. He submitted that the two companies bought the land together at a price of kshs. 250/= per acre. He submitted that Kirobon contributed Kshs. 3,049,537.75/= (because its contribution was in the bank for 513 days and earned interest of Kshs. 300,000) and thus entitled to 12,198.15 acres but they only got 9,456 acres. He submitted that the plaintiff deserves an additional 2,742 acres. It was his view that the land was jointly purchased. He submitted that the plaintiff therefore deserves to have the land parcel L.R No. 545 which is 995 acres as it had been restricted in the year 1977. He submitted that this land was available for distribution. He also submitted that the plaintiff had filed a case Nakuru HCCC No. 2647 of 1976 which was postponed several times

because the Judge had an interest in the land in dispute. He also stated that other persons not deserving land were given land which they later sold and he mentioned some names. He also submitted that parties had met on 15 June 2015 to attempt a settlement which was not successful. No authorities were referred to me.

21. On the part of the defendant, it was submitted inter alia that the plaintiff has failed to prove its case. He submitted that the land L.R No. 545 already has subdivisions and members have been in occupation since the year 1973.

22. The interested party also filed submissions. I have gone through it but I think in most respects, it is a narration of matters which are tantamount to giving evidence; that is not proper at the submissions stage. He further submitted that no party has opposed his claim for 40 acres and he therefore deserves the same. In the alternative, he has asked that he be paid an equivalent of Kshs. 28 Million for an acre is valued at around Kshs. 700,000/=. He also annexed some photographs, some agreements and other documents in his submissions. This again is improper as evidence is not tabled at submissions stage.

PART D. ANALYSIS AND DECISION

23. I opt to start with this latter claim of the interested party. He contends to be entitled to 40 acres of land. I think his claim cannot be entertained in this suit. This suit concerns a land dispute between Chebaraa Farmers Co. Ltd and Kirobon Farmers Co. Ltd ; the former company of course claiming that the latter owes it some land. It appears as if the interested party is a member of the defendant company and was probably at some point its director. If he feels that he is owed some land by either the plaintiff or defendant company, it is upon him to file a separate suit to claim the same, which suit will then be considered on its merits. I do not think that it is proper for the interested party to barge into a suit between the two parties and attempt to push forward a completely separate claim. That claim by the interested party is completely separate from the dispute that the plaintiff has against the defendant and it cannot properly be determined in this suit. Neither can it be determined on the basis of the pleadings filed by the interested party. For that reason, any claim tendered in this matter by the interested party is hereby disallowed, not on merits, but because such cannot properly be determined in this case.

24. On the suit between the plaintiff and defendant, both parties raised various issues and in my view, the following arise for determination.

(i) Who purchased the various properties comprising of Keringet Farm ?

(ii) What was the relationship between the plaintiff and defendant company in the context of the sale of Keringet Farm ?

(iii) What was the contribution of the parties towards the purchase of the farm and was there any additional contribution by the plaintiff by way of bank interest?

(iv) What acreage of land was the plaintiff company entitled to?

(v) What is the effect of the decision of the Land Disputes Tribunal and of the Appeals Committee ?

(vi) Does the plaintiff company have any claim against the defendant for additional land?

(viii) Does the plaintiff company deserve the land parcel L.R No. 545 ?

(vii) Is the claim against the plaintiff, if any, time barred?

25. Although I have placed the above issues in point form, I will not necessarily address them individually but will address the same collectively in the narrative that follows.

25. The take of the plaintiff company, borne especially from the evidence of PW-1, is that the two

companies in the year 1973, started negotiations to purchase land jointly from Keringet Estates. The plaintiff's view is that the purchase price was that of Kshs. 250 per acre and 28,000 acres was purchased from 12 parcels of land. The position of the defendant, as brought out in the evidence of DW-1, is that it was Kirobon purchasing the land and that Chebaraa approached Kirobon, with a view to join in the purchase. None of the parties produced the sale agreement that was entered into with the sellers of Keringet Estates. Despite the plaintiff stating that the price paid for the purchase was that of Kshs. 250/= per acre, no documentary evidence of this was produced. In fact, save for the oral evidence, I have no other evidence to support the allegation that the purchase from Keringet Estate was a certain price per acre. That said, I think there is sufficient evidence that the entity that purchased the land parcels which comprised of Keringet Estates was actually the defendant company and not the plaintiff company. This is discernible from the various minutes of meetings between the two companies, and the letter dated 2 May 1980, written by the law firm of M/s Cresswell, Mann & Dodd who seem to have been the advocates handling the purchase.

26. The first formal meeting between the plaintiff and defendant company appears to have been held in February 1975 at Stags Head Hotel in Nakuru. I have seen the minutes of this meeting which were produced by the defendant. In the meeting, I can see that the Chairman of Kirobon Company, informed the meeting about the history of the matter. It was set out that in the year 1972, Kirobon started negotiating with the owners of Keringet Estates to purchase their properties and an agreement was reached. In that meeting, Francis Maiywa and Joseph Koskei of Chebaraa Company, requested Kirobon to resell 10,000 acres to them, which request was accepted. In that meeting, it was also mentioned that Kirobon has already taken out a loan. Chebaraa offered that the loan be equally distributed between them, which was rejected by Kirobon. There was also a further request by Chebaraa Company, that the two companies be amalgamated, which again was flatly rejected by Kirobon.

27. It is apparent to me that the entity that was purchasing Keringet Estates was the defendant company. It is the defendant company which negotiated the purchase and appears to have been the company that entered into the agreement with the sellers. The plaintiff company, despite stating that there was a joint purchase of the properties, has not tendered any evidence of such. On this first issue, I do find that it is Kirobon Company and not Chebaraa Company, which purchased the land parcels comprised in Keringet Estates.

28. It is also discernible from the above discourse, that the relationship between Kirobon Estates and Chebaraa Company was that of buyer and seller. I have already mentioned that I am not convinced that the two companies jointly purchased the land but that it was Kirobon who purchased the same. It appears to me as if Chebaraa Company were interested in part of the land that was purchased by Kirobon and they therefore approached Kirobon for the same. Kirobon accepted to resell about 10,000 acres of what they had purchased from Keringet Estates. I have however not seen any concrete sale agreement between the two companies. In the meeting of February 1975, it is noted that Kirobon accepted to sell *"upto a maximum of 10,000 acres at a given valuation."* The understanding was that Chebaraa was to accept whatever valuation Kirobon would tender, which is well brought out in Minute 1/75 of the meeting. In a further meeting held on 29 August 1975, Chebaraa Company stated that they were satisfied with 10,000 acres. In that meeting a valuation was asked for but the Chairman of Kirobon stated that this would be given once banking slips from Chebaraa members had been presented to Kirobon.

29. An issue was raised concerning the contribution of the parties towards the purchase of land from Keringet Estates. The plaintiff stated that it deposited into a joint account the sum of Kshs. 2, 749,537.75/=. It was further claimed that this money remained deposited for a period of 533 days and earned interest of Kshs. 300,000/=. First, no evidence of any such joint account was ever tendered to me by the plaintiff. There would have been nothing easier than to give a bank statement of such account if it ever existed. Secondly, I have no evidence whatsoever, that such money remained in an account for 533 days, or it ever earned interest of Kshs. 300,000/=. Again, only documentary proof would have sufficed in this regard. However, to me, all this is immaterial, because I have already held that the land was not being jointly purchased by the two companies, and the issue of contribution for a joint purchase does not arise.

30. I have already held that the purchaser of Keringet Estates was the defendant company alone and that

the defendant company was only reselling about 10,000 acres of what it had purchased to the plaintiff company. It follows therefore that what Chebaraa Company raised and deposited to Kirobon was never a contribution towards the purchase of the properties from Keringet Estates, but rather, it was towards purchasing the 10,000 acres that Kirobon had offered to resell to Chebaraa Company. The fact that Chebaraa Estates were purchasing land from Kirobon, and were not joint contributors towards the purchase of the properties from Keringet Estates, comes out in the letter dated 1 April 1975 written by Kanti J. Patel Advocate, who stated that he was acting for Chebaraa Company. I will come back again to the import of this letter, but for now it is useful to mention that in the letter, it is stated the advocate is acting for Chebaraa Company, *"who is purchasing from you the L.R Nos. 547, 7179, 546, 7177, 7178, 9140 and 10380 ex-Keringet Farm at the price of Kshs. 3, 156,525./="* (emphasis mine). This letter well brings out the relationship between Kirobon and Chebaraa in respect of the purchase of the ex-Keringet properties. The issue of contribution, alleged by the plaintiff company is therefore completely misplaced and completely unsupported by any evidence. Further, since it was the defendant company making the purchase, the issue of a secret handover does not arise. It was claimed that the properties were to be jointly handed over on 1 April 1974. First I have no evidence of this alleged date as the date for handover. Secondly, as I have stated, I do not see how Chebaraa could be included in the handover, as they were not the ones purchasing from Keringet Estates.

31. In fact to me, it is clear to me that Kirobon Estates was the big brother here, merely accommodating Chebaraa to purchase some land from them. Chebaraa seems to have wanted a closer relationship with Kirobon, but this was rebuffed.

32. What acreage then, was Chebaraa entitled to ? I have already held that Chebaraa was not a joint purchaser of Keringet Estates. What I can see, is that they were only purchasing 10,000 acres and no more, from Kirobon Estates. They were never entitled to a pro rata share of what they had contributed vis-à-vis the total purchase price. Whatever money they were raising was only to go towards purchase of no more than 10,000 acres, period. This position is revealed in the minutes of the joint meetings of February 1975 and 29 August 1975. Those two meetings show that Kirobon was only offering to sell to Chebaraa about 10,000 acres of land. This stand is also revealed in two letters. The first is the letter of 1 April 1975, (which I already earlier briefly mentioned) written by Kanti J. Patel Advocate, and the second is the reply to that letter, written by Kirobon Company, dated 4 April 1975.

33. In the letter of 1 April 1975, Kanti J. Patel, averred that Chebaraa was purchasing the land parcels No. 547, 7179, 546, 7177, 7178, 9140 and 10380. Kirobon promptly replied to this letter vide that of 4 April 1975. They assserted that what was being sold was no more than 10,000 acres which would comprise of no more than two land titles. It was written that Kirobon has offered the land parcels L.R No. 549 and 546 comprising of 4998 and 5038 acres respectively. The plaintiff did not produce any further response to this letter and it appears to me that the two companies proceeded on that basis. It will be seen that in total, the two parcels of land were thought to comprise of 10,036 acres.

34. In their evidence, the plaintiff's witnesses stated that they only have 9,456 acres. Now, save for that mere allegation, no evidence that this is the acreage that they have was ever produced. There would have been nothing easier that to produce the acreages of these two parcels of land to demonstrate that they comprise of 9,456 acres and not 10,036 acres. This was not done and I cannot assume that Chebaraa only got 9,456 acres in absence of actual documentary evidence that is readily available. But even assuming that what Chebaraa got was 9,456 acres, this is not in conflict with what appears to have been agreed, which is *"no more than 10,000 acres."* I really do not see the basis upon which the plaintiff company alleges to be entitled to an additional 962.15 acres.

35. The plaintiff company did however press for a claim of this 962.15 acres before the Land Disputes Tribunal. In their pleadings herein, they do assert that they were awarded this 962.15 acres, and that the award stands to date and should be given effect. The defendant has of course countered this by saying that the award was reversed by the Appeals Committee. If there is such an award by the Land Disputes Tribunal, whether or not reversed, I cannot give effect to it, and I cannot allow such to stand. In the first place, the Land Disputes Tribunal never had jurisdiction to entertain a claim such as that presented by the plaintiffs. This is a huge and complex claim over entitlement to land. It is the sort of case that can only be

heard by a superior court. The Land Disputes Tribunal's jurisdiction was very limited. Section 3 (3) of the Land Disputes Tribunal Act (now repealed by the Environment and Land Court Act, 2011) provided as follows :-

3. *(1) Subject to this Act, all cases of a civil nature involving a dispute as to—*

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land, shall be heard and determined by a Tribunal established under section 4.

36. It will be seen from the above that the jurisdiction of the tribunal did not extend to entertaining disputes over ownership of land yet this was precisely the nature of dispute that was presented before the Tribunal. The Tribunal had absolutely no business sitting over this dispute. Any award rendered by it, is hereby declared to be null and void and of no effect. No party, or any other person, should proceed to give effect to the purported award. The plaintiff cannot come to this court expecting me to affirm such an award. I cannot bring myself to upholding it and the plaintiff's prayer that the same be affirmed is hereby rejected.

37. But even if the plaintiff had a good case, is it within time ?

38. The agreement, or understanding, between the two companies was made latest in the year 1975. This is about 23 years to the dispute being presented before the Land Disputes Tribunal, and 26 years to the dispute being presented to this court. The plaintiff company of course appears not to have been satisfied with the land given to it by the defendant. They state that they placed a caveat in the year 1977. I have seen minutes of a meeting held in the year 1982 still trying to resolve the dispute between the two companies. Even if we take 1982 as the year that the dispute arose, it is clearly out of the 12 year limitation period prescribed for claims of land. This is set out in Section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya which is drawn as follows :-

7. Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

39. The limitation period for recovery of land is 12 as spelt out above. Any claim by the plaintiff is therefore time barred.

40. From the discussion above, it is my considered view that the plaintiff has absolutely no claim whatsoever for additional land from the defendant. If at all it had any such claim, of which I am not convinced, it is time barred.

41. The plaintiff in these proceedings tried to narrow down its right to the land parcel No. 545. It cannot get this land. First, it was never one of the parcels of land assigned to the plaintiff. Secondly, the plaintiff has not established any right over this land. From the evidence tendered, that land has been held by Kirobon or its members for a long time. The plaintiff pointed at a caveat registered in the year 1977. I have no idea what happened to that caveat for the plaintiff never produced any search of the register of this parcel of land. But a caveat alone does not establish a right. If the caveat still exists, then it should be removed, for the plaintiff has not demonstrated any right over this parcel of land.

42. I think it is not necessary for me to say more. It is clear to me that the plaintiff has no case against the defendant. This suit is hereby dismissed with costs. On the counterclaim, I am of the view that the defendant is entitled to a declaration that the award of the Land Disputes Tribunal is null and void and for a perpetual injunction to restrain the plaintiff from the land parcel L.R No. 545. I cannot however issue a

declaration that the people settled in the said land are bona fide and that titles be issued to them for the simple reason that I do not know who is settled there, and I do not know whether everyone settled there is entitled to a title deed. I think that is a separate issue from what the plaintiff presented before this court. What I can say, for sure, is that the plaintiff has no claim over this parcel of land. With my above qualification, the counterclaim is allowed with costs.

43. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 14th day of July, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Ms. Njeri Muiruiri for plaintiff.

Mr T. K. Rutto for defendant .

Interested party present in person.

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU