



Kagine & 75 others v Mwailigha & 4 others (Environment & Land Case E009 of 2022) [2024] KEELC 13638 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13638 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E009 OF 2022**

AE DENA, J

DECEMBER 6, 2024

BETWEEN

SAID KALANDONI KAGINE & 75 OTHERS PLAINTIFF

AND

ALBERT MWAILIGHA 1ST DEFENDANT

PATRICK MWANIKI RUNDI 2ND DEFENDANT

DICKSON MZUNGU 3RD DEFENDANT

NGWA MTONGOLO 4TH DEFENDANT

KAMBO FUNDI 5TH DEFENDANT

JUDGMENT

1. The plaint instituting this suit is dated 2nd March 2022. The Plaintiffs states that they are the legal beneficiaries of an unsurveyed parcel of land situated at MacKinnon Road Samburu location measuring approximately 500 acres (Suit property). It is the Plaintiffs case that the 2nd Plaintiff and one Said Kadadile purchased the suit property on 7/11/2005 and 14/12/2005 from one Kikoko Ngoka. That the Plaintiffs state that they have resided on the suit property since then and have been carrying out various development activities like farming until 23/6/2021 when a dispute arose over ownership of the parcel with the Defendants. That the matter was reported to the Chief and a decision made in the Plaintiffs' favour. The Defendants aggrieved with the decision approached the Assistant County Commissioner on 25/6/2021 who also found in the Plaintiffs' favour.
2. The Defendants however again approached the office of the Assistant County Commissioner and found a different officer who made a ruling in the Defendants favour. The Defendants have since trespassed on the land and were undertaking developments thereon.
3. The Plaintiffs pray for judgment against the Defendants jointly and severally for; -



- a. A declaration that the Plaintiffs are the legal and beneficial owners of unsurveyed land in Mackinnon Road location Samburu measuring approximately 500 acres.
 - b. An order of permanent injunction restraining the Defendants by themselves, their agents, servants, agents, employees and/or any persons acting under them from interfering with the Plaintiff's occupation and possession cultivating, subdividing, alienating, occupying or in any way dealing with the Plaintiffs unsurveyed parcel of land situated in Mackinnon Road location Samburu measuring approximately 500 acres
 - c. Costs of this suit and interest.
4. The Defendant's responded to the suit by way of Defence dated 9/6/22 filed on 10/6/2022. It is averred that the agreement between the Plaintiffs and the alleged sellers is null and void and unenforceable for want of title on the part of the sellers. It is stated that the Plaintiffs are the actual trespassers on the suit parcel and have defied every effort by the Defendants to evict them. The Defendants filed a suit at Mariakani Law Courts on 3/12/2015 which the Plaintiff later abandoned. It is also averred that the authorities referred to have no jurisdiction under the law to hear and determine land matters. The jurisdiction of this court is also denied. The Defendants pray that the suit be dismissed with costs.

Hearing

5. The suit was heard on, 5/6/23, 1/11/23, 6/11/23 and 7/02/24. During the hearing the Plaintiffs were represented by Mr. Lianza and the Defendants by Mr. Munyoki.

Plaintiffs Case

6. PW1 was Lamayan Said Kagine ID No. 232XXX16. He adopted his statement dated 2/3/2022 as his evidence in chief. He further referred to the list of documents dated 2/3/2022 and produced them as exhibits in court PEX 1-7 as listed. The witness testified that they entered the suit property in 1992 and found locals living there the family of Chikoko Nguka. They invited the Plaintiffs who continued to live thereon for 13 years. That they, the Plaintiffs, then discussed with them if they could buy the land and in the year 2005 the Plaintiffs bought the land. The witness states that his father Saidi Kalandoni Kagine and his brother the 2nd Plaintiff bought the suit property as per agreement dated 7/11/2005. They then built Bomas and also cultivated the land as depicted by photos produced.
7. PW1 told the court that the Plaintiffs have lived there for over 30 years without dispute until the year 2020 when disputes started between Saidi and the family of Kimuga Maasai the Defendants. That the Defendants entered the land to cultivate and violence was about to erupt. The chief was involved in resolution of the dispute and Kimuga Masai and the Defendants weren't satisfied. They went to the D.O who came and sat with the elders and it was decided the suit property belonged to the Plaintiffs. The court is urged to determine in the Plaintiffs favour.
8. Upon cross examination the witness maintained that the suit property belongs to Said Kalondoni his father who died in July 2022. That he didn't have evidence of the death neither did he approach the court for any document in this regard. He had not obtained letters. The dispute is between the family of Said Kalandoni and Kale Kingondu and the Masai. That Chikoko Nguka the vendor was the Plaintiffs witness but had passed on before the hearing commenced. He also stated that Kaleye Ruwa Kangoro bought land from Chikoko Nguka. His children Nyamawi Mrabu and Ndegwa Charare and Stephen were in the agreement but some were not. The dispute started in 2020 and his father bought the land in 2005 but they had come into the land in 1995.



9. He stated that he had never gone to court in Mariakani over the suit property. That the dispute has been resolved before the chief, two assistant County Commissioners and the DO. That the last Assistant County Commissioner had made a verdict in favour of Masai Kimunga. The Plaintiffs were aggrieved and came to this court to change the said verdict. He denied any knowledge of the Divisional Land Tribunal and any of its verdicts.
10. On re-examination the witness testified that his father was one of the Plaintiffs before died. He referred to PEX 3 and stated that the name Waphande to him meant the Nguka's and his father bought from Chikoko Nguka. He denied knowing about the Divisional Land Disputes Tribunal.
11. PW2 was Joseph Nyamau Mrabu ID No. 22XXX15 he adopted his statement dated 27/11/22 as his evidence in chief. He stated that the suit property was sold by his elder father Chikoko Nguka to Said and Kalara (sic Kalea) the 2nd Plaintiff. That he was present when the sale happened. He identified the name "Mwandishi Joseph Nyamawi" in the agreement as his name. That after the sell the purchases stayed for a least 10 years before any emerging issues. That he participated in the meetings before the chief.
12. On cross examination PW2 confirmed drafting the agreement herein on 7/11/2005. After sale to Chikoko the purchasers came into the land on the said year 2005 starting with the 1st and 2nd Plaintiff. Waphande is himself and Chikoko and his family. Waphande were the who ones sold the property. When referred to the Division Tribunal proceedings of 20/7/2006 he admitted that the tribunal decided the land belonged to Kimunga Masai. That he was aware of the outcome but did not challenge the same. They received payment on 27/8/2006 as stated in the agreement. The witness maintained that there was no dispute before for 10 years but there were issues taken to the chief.
13. On re-examination the witness clarified that Kalandoni had entered the land before the sale in 2005. That the Plaintiffs were presently the ones in occupation of the land.
14. PW3 was Stephen Kiribai Bashora ID NO. 160XXX06. He adopted his statement dated 20/3/2023 as evidence in chief. He stated that he found it necessary to inform the court that one of his relatives Matsakani Badoha sold this land. Chikoko sold the land to Masai but the taitas came and said the land belongs to them.
15. On cross examination PW3 stated that he is 75 years old. The shamba was sold to Said and Kalea by Chikoko Mwiru Nguka. That he had lived with Chikoko Nguka since 1974 until he died around 2001/2 and left behind his son Nyamawi who was about 50 years. That Chikoko sold the land to the maasai before he died. On re-examination the witness testified that he was not sure of when Chikoko died.
16. PW4 Boniface Mwatela Kamanza ID NO. 02XXX27 a retired chief and also District Officer (D.O) adopted his statement dated 28/11/2022 as his evidence in chief. He admitted to having attended meetings with respect to the land dispute between the parties herein and referred the court to attended No. 10 of those present in letter dated 23/6/2020. The decision was that the land belonged Waphande. They sold the land to Kalandoni.
17. On cross examination he stated that by 1987 Chikoko Nguka and his family were in the suit property. That the Plaintiffs entered the land around 1990's though he could not remember. They first leased from Chikoko.
18. With the above evidence the Plaintiffs case was marked as closed.



Defendants Case

19. DWI Hussein Kimunga Masai ID NO. 125XXX74 adopted his statement dated 9/6/22 as part of his evidence in chief. He stated that he was the owner of the suit property. That conflicts over ownership of the suit property started in 1992 when visitors entered the land that is Maasais who requested to graze due to drought. They approached the elders there and it was agreed that they would graze and entertain tourists in their Manyatta. It was agreed that they would pay “tax” to the elders. After a while they refused to pay the tax on the basis, they had now purchased the land from the Waphande/Durumas. DW1 testified that Masai Kimunga was his father who never sold land to the wamasai. It is Chikoko Nguka who sold though he was not the owner of the land.
20. The witness told the court when the dispute arose over the land, Chikoko was sent to evict the Plaintiffs. That Chikoko's involvement was that when the maasai grew in numbers and the elders went to the Chief Boniface Mwatela Kimanza, the Chief appointed Chikoko since he was old to step in and remove them. That Chikoko however told the maasai that the land was his and proceeded to sale the same. When referred the proceedings dated 20/7/06 the witness noted that judgement stated the land belongs to Kimunga Masai. The witness added that after the tribunal decisions there was peace and quiet until recently when the maasai started alleging the land belongs to them. That Masai Kimunga was sued in Mariakani law courts - see the affidavit of Dickson Mzungu (DM2). The suit was dismissed for non-attendance. That Another case was by Lamayan Said Kagine. He stated that both the Plaintiffs and the defendants were in use of the land and they wanted justice and the truth.
21. On cross examination DW1 testified that the matter had been resolved three times by the chief Boniface Mwatela Kamanza in favor of Kimonge family though he could not produce evidence of the same. That the said Mwatela was not a defence witness. When referred to the Divisional Land Disputes Tribunal proceedings he stated that the sale is given as 20/7/06. He agreed that the earlier decisions of 14/7/2006 do not exist. He noted there was no stamp on the tribunal proceedings but pointed signatures of the members were appended. That he was before court to state that the land belongs to Kimunga family. The Defendants are relatives of the Kimunga family.
22. On re-examination DW1 referred to the letter dated 26/6/21 (DEX 5) and clarified the complainants were Lemeiyani Vs Kimonge families which was after the tribunal decision. On the minutes of 16/12/21 (PEX 6) he pointed the dispute was between Kimonge family (wataita) and Chikoko Nguka (Waphande) and the Lemaiyan family were not involved in the dispute. Lemayan bought the land from Chikoko Nguka (Wamasai) the Kimonge family complained against Chikoko. That the minutes had a stamp for DCC Kinango Sub County. That Chikoko Nguka has never been sued, it's the maasai who have sued. Masai Kimonge got the land from BASHORA and have lived there since 1954 before he was born.
23. DW2 was Dickson Kimwari Mzungu ID NO. 10XXXX07 referred to the authority to act dated 13/11/2022 and his witness statement of 9/6/22. He adopted the same as evidence before court. He testified that the dispute stated in 1992. Lamayan and the maasai entered the Kimonge's family land. The matter was taken before the chief Boniface Mwatela because they refused to leave. Boniface resolved the dispute and directed that the shamba belonged to Kimonge family. He stated that both parties were utilizing the land but a decision had to be made on who was the owner of the land. On cross examination the witness confirmed that Boniface Mwatela gave evidence to the court that the land belonged to Chikoko. On the tribunals decision the witness stated it bore no tribunal stamp. On reexamination DW2 testified that the land has no title, adjudication has never happened on the same.



24. DW3 was Albert Mwaligha Fundi ID NO. 3079636 a retired railway employee testified that he is among those who live in the suit property having inherited the land from Kimonge Masai. He adopted his statement dated 9/6/22 as part of his evidence in chief. The witness stated that he was born and has lived on the suit property since 1976. That he was 63 years old. That conflicts started in 1992 when the masai entered to graze on the land. The matter was reported to the chief. That the land doesn't belong to Chikoko Nguka, he has never farmed there. He admitted that Chikoko had sold the land to the masai in 2005. Between 1992 and 2005 they were not in the shamba. That the chief led wazees to the Maasai asking them to leave the land but they refused. The witness was aware of the case before the tribunal. The DO attended the land and the parties showed the boundaries and the shamba was given to Kimonge Masai father who died in 2016. That Chikoko died in 2017. Only relatives are on the land.
25. On cross examination he testified that Boniface Mwatela the then chief was known to him. That he had made a verdict that the land belonged to Chikoko. He stated that the land tribunal committee verdict (PEX 1 20/7/2006) did not bear a stamp. That after the tribunal the case was taken to the Assistant County Commissioner and the DO and a verdict was made. That he knew Chikoko sold the land to the Plaintiffs in 2005 and today they have the cattle and homes in the shamba. There is a church in the land where they attend. The maasai entered the suit property in 1992 and were to date in the shamba though the land does not belong to the maasai.
26. On re-examination the witness testified that he did not attend the tribunal whose decision was made in 2006. That PW1 had gone to challenge the decision at Mariakani but never pursued the case to the end. That the Defendants went back to Assistant County Commissioner and not Deputy County Commissioner because they didn't meet the Deputy County Commissioner. The ACC made the decision to award them the land after looking at the previous proceedings over the land.
27. DW4 was Emmaline Ngua Mtongolo ID NO. 31XXXX61. She adopted her witness statement dated 9/6/22 as here evidence. It is her evidence that she is an occupant and beneficial owner of the suit property. That the land belongs to Kimonge Maasai and she was certain of that as she has been cultivating the same since 1980. That she had been given the portion upon which she was cultivating by her uncle Kimonge Maasai. On cross examination DW4 admitted that she was aware there was a dispute between the parties and which was before the chief on 23/6/20. The Chief decided the land belonged to Waphande and who sold the land to the Defendants. After the 23/6/20 the dispute was before the Deputy County Commissioner on 25/6/21 and a decision made that the land belonged to the Plaintiff's. She was present during the said decision.
28. With above evidence the Defendants case was marked as closed.

Submissions

The Plaintiffs Submissions

29. The Plaintiff's submissions are dated 4/4/2024. The following issues for determination are highlighted; -
 1. Who is the rightful owner of the suit property?
 2. Whether the court has the power to grant the orders sought by the Plaintiffs
 3. Who bears the costs of the suit
30. On the first issue for determination, it is submitted that the Plaintiffs have adduced and proven by evidence that they are indeed the owners of the suit property having purchased the same from



Chikoko Ngoka. That the ownership dispute has been adjudicated upon at different levels between the Waphande and Wataita community clans and the seller of the land hailed from the waphande clan. The plaintiffs refer to PEXH 1 and 2 which are the sale agreements in evidence of purchase of the land, PEXH3 the proceedings at the chief's office when the matter was first adjudicated upon, PEXH4 the proceedings before the Assistant County Commissioner and PEXH5 the letter from the Deputy County Commissioner indicating the issue had been resolved and upholding the resolution.

31. It is stated that PEXH6 is a letter from one Charles Wesamba an ACC HQ who signed the same on behalf of the Deputy County Commissioner. This was viewed as an anomaly by the Plaintiffs and who submit that DW3 agrees in cross examination that it is the court that would have been approached in this scenario. The Plaintiffs state that the Divisional Lands Dispute Tribunal proceedings dated 20/7/2006 DEXH1 which awarded the land to Kimonge Maasai were unreliable as the same did not contain a date of the claim, the claims serial number and the date of the final decision. That the area Chief one Boniface Mwatela Kamanza PW4 had confirmed that the land belongs to the Plaintiffs. That from this evidence it is confirmed that the land rightfully belongs to the Plaintiffs by way of purchase. The court is urged to find that the Plaintiffs are the legal beneficial owners of the suit property.
32. On the second issue for determination it is submitted that section 13 of the *Environment and Land Court Act* grants this court jurisdiction to hear and determine the suit before it. That the Plaintiffs having proved their case to the required standard ought to be granted the prayers sought. The court is finally urged to award the costs of the suit to the plaintiffs.

Defendants Submissions

33. The Defendant's submissions are dated 24th April 2024. The following issues for determination were curved out
 1. Whether the matter is Res Judicata
 2. Whether the Plaintiff has proved his case on a balance of Probabilities.
 3. Whether the Plaintiff has a cause of Action against the Defendants
34. On whether the matter is Res Judicata reference is made to several authorities and the provisions of Section 7 of the *Civil Procedure Act*. It is submitted that the claim by the Plaintiff from the evidence adduced descends from Chikoko Ngoka (waphande Family). The Plaintiffs have adduced evidence to illustrate to the court that the land in dispute belongs to the Chikoko Ngoka (Waphande) and it doesn't belong to Kimonge Maasai. (wataita). That all the correspondence that the Plaintiffs rely upon to proof ownership seeks to show that the land belongs to Waphande. There is no decision/correspondence where an administrative decision or otherwise was arrived at declaring the Plaintiffs, Lemaiyan family to be the owners independent of the Waphande. The last administrative decision adduced as PEx-6 however declared that the land belonged to Kimonge family. The dispute was between same parties Chikoko Ngoka (waphande) vs Kimonge Maasai was heard and determined by a properly constituted Divisional Land Disputes tribunal on the 20th July 2006. The decision of the tribunal was in favour of the Kimonge Masai (The defendants herein). The said decision was not appealed either/or quashed by the Waphande or the Plaintiffs as interested parties having acquired interest from Waphande the previous year. It is submitted that the decision of the tribunal has never been appealed against and further that the tribunal having heard the matter and made a determination on it, then the suit before court is res judicata.
35. On whether the Plaintiff has proved his case on a balance of Probabilities, it is submitted that there are two agreements before this court the first agreement is of the 7th Nov, 2005 between Mzee Kikoko



Ngoka and Mzee Kalea Roini. The consideration is 40,000, and the purchaser paid a deposit of 2000 and the balance was quantified and paid in form of 4 cows. The second agreement is of 14th Dec 2005 is between Mzee Kikoko Ngoka and Saidi Kadadile. The consideration is four Cows, Kenya Shillings 30,000 and two goats. The Plaintiff is said to have completed payment as per the agreement on the 27/8/ 2006. That these agreements have proven not useful in determining the ownership of the property in question or even defining the suit land with precision capable of making it identifiable. The Plaintiffs did not present anything proof to this court that indeed the purchase price was paid. The Plaintiffs did not call any of the persons that appear as witnesses in the sale agreement, neither did they enjoin the waphande to the case to help the court appreciate these transactions. This was to the detriment of their case. Further the claim by the Plaintiffs is for ownership of land estimated to be 500 Acres however the sale agreement makes no mention of the size of land being sold. At the face of it the Plaintiffs have not proven their case on a balance of probabilities.

36. On whether the Plaintiff has a Cause of action against the Defendants it is submitted that the Plaintiffs case is based on their root of Ownership of unregistered land. That if there is any claim as to rights over land then such claim lies against the vendor of the land in question. It is the defendant's submission that the Plaintiff has no cause of action against the Defendants. The court is urged to dismiss the Plaintiffs case.

Determination

37. The Court has carefully read and considered the pleadings, the submissions and the evidence adduced by the Plaintiffs and the Defendants. The following issues commend determination;
1. Is the suit resjudicata?
 2. Who is the lawful beneficial owner of the suit property?
 3. Whether the Plaintiff proved its case to be entitled to the orders sought.
 4. Who should bear the costs of this suit?

Is this suit resjudicata?

38. The Defendants denied the jurisdiction of this court in their defence herein. The Defendants contend that the present proceedings are resjudicata. It is submitted that the decision of the tribunal has never been appealed against and further that the tribunal having heard the matter and made a determination on it, then the suit before court is res judicata.
39. I will first rehash what the doctrine of resjudicata entails. The legal foundation of the doctrine is anchored on the provisions of Section 7 of the [Civil Procedure Act](#) chapter 21 laws of Kenya thus; -

“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.”



40. The Black's law Dictionary 10th Edition defines "res judicata" as
- "An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."
41. The Court of Appeal in the case of Independent Electoral and Boundaries Commission vs Maina Kiai and 5 others (2017) set out the guidelines to be applied in determining whether a suit is resjudicata thus; -
- "Thus, for the bar of Resjudicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied as they are rendered not in disjunctive but conjunctive terms;
- a) The suit or issue was directly and substantially in issue in the former suit,
 - b) That former suit was between the same parties or parties under whom they or any of them claim
 - c) Those parties were litigating under the same title
 - d) The issue was heard and finally determined in the former suit
 - e) The Court that heard and finally determined the issue was competent to try the subsequent suit in which the issue is raised.
42. Also see the Supreme Court decision in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR. which restated the above criteria.
43. Arising from the case law above all the above criteria must be satisfied and failure of one would thus render a suit not resjudicata. In this case the former suit is the dispute that was referred to the Divisional Land Disputes Tribunal. The former suit is to be compared with the present proceedings. Applying the criteria above and having undertaken a comparison of the former suit and the present suit, I think the criteria listed in a), b), c) and d) above has been satisfied. This leaves criteria e) that is the tribunal was clothed with jurisdiction to render the orders given. This therefore leads me to a discussion of the jurisdiction of the Land Disputes Tribunal.
44. Under Section 3(1) of the Lands Disputes Tribunals [Act 1990 \(No. 18 of 1990\)](#) (the Act), a specific jurisdiction is conferred upon the tribunals, the jurisdiction is limited to disputes involving:
- 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;
45. Arising from the above it is clear that beyond the three areas, the Tribunals would be treading illegally when they make a declaration on ownership of land. This position was persuasively stated by Khamoni J in Wamwea Vs. Catholic Diocese of Muranga Registered Trustees [2003] KLR 389 as follows -
- "Tribunals and Land Disputes Appeals Committees do not have jurisdiction to hear disputes over title to land. Disputes over contracts are also not under their jurisdiction."



46. The Divisional Land Disputes Tribunal in Samburu clearly had no jurisdiction to make the findings that it did with regards to the issue of ownership of the suit property herein. Additionally, assuming the tribunal had jurisdiction, section 7 of the Land Disputes Tribunal Act requires that the decision of the tribunal shall be filed with the Magistrates court to enter judgement in accordance with the decision of the Tribunal. This in my view is what gives the decision the force of law and its finality. While the court notes that the same was copied to the various departments including the Magistrate Kwale, there is no evidence that has been placed before this court that the decision was adopted.
47. Consequently, the defence of res judicata does not arise, and therefore clothing this court with jurisdiction.

Who is the lawful beneficial owner of the suit property?

48. The Plaintiff claim they are the owners of the suit property having purchased the same from Chikoko Ngoka. The burden of proof pursuant to section 107 of the *Evidence Act* Chapter 80 of the Laws of Kenya lay on the Plaintiff to prove that these facts exist. From the evidence on record the suit property is unregistered. How does a claimant prove a beneficial interest over unregistered land?
49. In the case of *Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others* [2015] eKLR Onguto J (May his soul rest in peace) addressed the issue of determining ownership of an unregistered parcel of land, he stated that:

“In determining the above issue, it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’; per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437. The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoing, confirmations by the title paramount, notices, et al”.

50. From the evidence on record it is clear that the Plaintiffs came into occupation of the suit property in the year 1992 and they were not the original occupants of the land. It is PW1 evidence that upon staying thereon for over 13 years, it is until 2005 when wrangles started on the grazing and use of the land. They decided to buy the same so that they could own the land. In cementing their claim over the suit parcel, the Plaintiffs have produced Sale agreements dated 7/11/2005 and 14/10/2005. I have noted the Defendants submissions impugning the agreement for failure to indicate the exact acreage of the purchased parcel and further that Chikoko the vendor did not have capacity to sale the land as he was not its owner.



51. A quick perusal of the agreement confirms that the acreage of the purchased parcel has not been indicated. The Plaintiff claims 500 acres. However it is clear that after settling into the suit property there existed arrangements where the Plaintiffs purchased the land. This is corroborated by PW2 whose name appears as a witness in the agreement for sale. PW3 and PW4 also corroborated this evidence. DW1 clarified in reexamination that Lemayan bought the land from Chikoko Nguka. DW3 also stated in cross examination that he knew that Chikoko sold the land to the Plaintiffs in 2005 and that presently the Plaintiffs have their cattle and homes therein. This in my view further corroborates the photos produced by the Plaintiffs showing their structures on the ground.
52. Further on capacity to sell, the proceedings before Charity S Mwadziwe Assistant County Commissioner established that the boundary to Mzee Chikoka started from Kilisa to Dimbwini, the minutes of the meeting that took place on 16/12/2021 indicate that Chikoka Ngoka had purchased the land from Matsakani Mwangulu. The Defendants at one point stated that Chikoko the vendor died before the sale of the land but this argument was never pursued.
53. The Defendants plead that the suit property belongs to them by virtue of having inherited the same from their forefathers. There is no documentary information that has been presented before court as to their ownership. DW3 admitted that he had no evidence of any of his structures on the land before court. He confirmed in his evidence in chief that Chikoko was their neighbor.
54. Persuaded by the dictum of Onguto J above (may his soul Rest in Peace) it is this court's view that the sale agreements presented in evidence give the history as to the Plaintiffs' presence on the suit property. I think having paid for the land, they are entitled to be in occupation. Moreover, the Plaintiffs have demonstrated occupation. In this regard I'm persuaded by the Dictum of Cheronon J in *Mohamed Ibrahim Alio & 6 Others Vs Manderu County Government & 6 Others* (2021) eKLR where occupation was seen as a significant factor. However, the Plaintiffs' occupation should only appertain to the portion that they are in use and occupation of and which seems to be known to the parties on the ground.
55. The foregoing analysis automatically answers the second issue for determination. The plaintiffs have through their documentary evidence and occupation proved their stake on the area they are in use and occupation of the suit property on a balance of probability.

Are the Plaintiffs entitled to the orders sought?

56. But having made the above finding the court has noted that parties herein intimated to wrangles arising from time to time with regards to trespass on the sections owned and occupied by each other. Indeed, this is depicted in the application dated 2nd March 2022 that was filed alongside the Plaintiff. In the application the Plaintiffs were seeking orders of injunction against the Defendants from trespassing into the suit property and cultivating thereof. The court in its ruling dated 13/10/23 opted for a compromised position that secured the interest of both parties by directing for the maintenance of the status quo.
57. It is noteworthy during the proceedings of 24/7/2023 when the matter was before me the Plaintiffs had taken the position that they did not want any farming to continue on the suit property. The Defendants through their advocate on record wanted to be permitted to continue with farming activities. The court ordered that the parties and the litigants convene a meeting to deliberate on the issue in the presence of the local administration and both counsels. The meeting was held on 13/7/23 and a report filed with the court on 1/11/23. It is clear from the report that there are people having farms in the suit property, parties therein were aware of their boundaries and this buttresses my earlier observations that both the Plaintiffs and defendants were in use of the suit property.



58. Each case is decided upon its own merits. I have already pointed earlier the land is unadjudicated. Further it is clear from the proceedings that wrangles arise from time to time. It behooves the court therefore to make interventions that will ensure harmonious co- existence. In fact, this resonates with the observations made during the proceedings held on 16/12/2021 before Charity S Mwadziwe Assistant County Commissioner that both the Kimonge and Chikoko families to maintain their boundaries. The Plaintiffs having established a stake in a portion of the suit property must maintain the area it is in current in use and occupation of and in accordance to these boundaries. This also goes for the Defendants.
59. It is noteworthy that the land is unadjudicated. On reexamination DW2 clarified that the land has no title, adjudication has never happened on the same. Until adjudication happens it is imperative that the status quo is maintained as aforesaid. The court must also be seen to be a peacemaker and further do equity as envisaged under Article 10 of the *Constitution* of Kenya. It is apparent from my analysis herein that the Plaintiff cannot have the entire 500 acres of land. The court also mulled over the proverbial infant during the reign of King Solomon where a verdict issued the infant be spilt into two for an equal share to both women laying a claim on the baby. However, as I have already noted from the evidence presented the boundaries appear to be known by the parties and the local administration.
60. The Environment and Land Court in exercise of its jurisdiction is empowered under Section 13 (7) of the *Environment and Land Court Act* to make any orders and grant any relief as the court deems fit and just. The courts have a wide discretion to do so for justice and expediency.
61. Accordingly judgement is entered in favor of the Plaintiffs against the Defendants in the following terms; -
1. A declaration be and hereby issues that the Plaintiffs have on a balance of probabilities established a beneficial interest in a portion of the unsurveyed land in Mackinnon Road location Samburu.
 2. That the portion above shall be ascertained as per the existing known boundaries on the ground with the assistance of the area Chief, the Kwale County Land Surveyor and in the presence of the County Commissioner Kwale and the National Land Commission.
 3. Counsels for both parties shall be at liberty to attend the exercise and appoint their own surveyors.
 4. The above exercise shall be undertaken within 120 days of the date of this judgement in view of the forthcoming December holidays.
 5. That upon the ascertainment of the boundaries above an order for permanent injunction restraining the Defendants by themselves, their servants, agents, employees and/or persons claiming under them from interfering with the Plaintiffs occupation and possession, cultivating, constructing, subdividing alienating, occupying the Plaintiffs identified portion of the unsurveyed parcel of land in Mackinnon Road location Samburu.
 6. That pending Land adjudication, the Plaintiffs and the Defendants are hereby bonded to keep the peace within their areas of occupation as ascertained in 2 above.
 7. The OCS Kinango shall provide security during the enforcement of the orders above.
 8. Costs are at the discretion of the court. To promote peaceful co -existence of the parties, each party shall bear their own costs.

Orders accordingly.



JUDGEMENT DATED SIGNED AND DELIVERED THIS 6TH DAY OF DECEMBER 2024.

A E DENA

JUDGE

Mr. Lisanza for the Plaintiff

Mr. Munyoki for the Defendant

Mr. Daniel Disii – Court Assistant

HON. LADY JUSTICE A.E DENA

