



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kitur & 2 others v Birech & 6 others; Kimaiyo & 50 others (Interested Parties)  
(Land Case 81 of 2015) [2023] KEELC 109 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 109 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
LAND CASE 81 OF 2015  
FM NJOROGE, J  
JANUARY 19, 2023**

**BETWEEN**

**KIPSOIMO KITUR ..... 1<sup>ST</sup> PLAINTIFF  
BENJAMIN KIBIATOR KETER (SUING AS LEGAL REPRESENTATIVE OF  
THE ESTATE OF KIPKETER MURWON – DECEASED) ..... 2<sup>ND</sup> PLAINTIFF  
RONALD SOME NG'ELECHEI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JACOB KIBITOK BIRECH ..... 1<sup>ST</sup> DEFENDANT  
ALBERT KIPTANUI BOEN ..... 2<sup>ND</sup> DEFENDANT  
BENJAMIN KOECH ..... 3<sup>RD</sup> DEFENDANT  
PRISCILLA CHEPCHIRCHIR TALAM ..... 4<sup>TH</sup> DEFENDANT  
TRANS NZOIA COUNTY LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 6<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL ..... 7<sup>TH</sup> DEFENDANT**

**AND**

**PATROBA CHEMNGETICH KIMAIYO ..... INTERESTED PARTY  
KIBIWOT ARAP MAIYO ..... INTERESTED PARTY  
KIPROB ARAP KOECH ..... INTERESTED PARTY  
KIMNGETICH CHIRCHIR ..... INTERESTED PARTY  
ERASTO CHEPSIROR ..... INTERESTED PARTY  
KIBET ARAP KOGO ..... INTERESTED PARTY**



PAUL KIPLANGAT KORIR ..... INTERESTED PARTY  
 WILSON KIPSIGEI ROP ..... INTERESTED PARTY  
 MARGARET KEMBOI ..... INTERESTED PARTY  
 KIPKASIO ARAP KETER ..... INTERESTED PARTY  
 HELLEN JEPWAMBOK BUTURU ..... INTERESTED PARTY  
 KIPTARUS ARAP SITIENEI ..... INTERESTED PARTY  
 ISAACK KIPKEMBOI BOEN ..... INTERESTED PARTY  
 ABRAHAM KIBET BOEN ..... INTERESTED PARTY  
 DAVID KIPKOSGEI BOEN ..... INTERESTED PARTY  
 MUSA ARAP TALAM MALAKWEN ..... INTERESTED PARTY  
 CO-OPERATIVE LIMITED ..... INTERESTED PARTY  
 KIPRUGUT KIPROTICH ..... INTERESTED PARTY  
 HEPSIBA NYABOKE OKERIO ..... INTERESTED PARTY  
 PHLEMON KIPRUGUT TALAM ..... INTERESTED PARTY  
 KASSIM NYONGESA LUPAO ..... INTERESTED PARTY  
 JOSEPH KIPYEGO NGENY ..... INTERESTED PARTY  
 KIPRONO ARAP KIPCHUMBA ..... INTERESTED PARTY  
 LINUS KIPKEMBOI KOROS ..... INTERESTED PARTY  
 JOSEPH KIPSANG TANUI ..... INTERESTED PARTY  
 FRANCIS LIMO SAINA ..... INTERESTED PARTY  
 EZEKIEL KISORIO KEMBOI ..... INTERESTED PARTY  
 JANE MOUREEN MURURI ..... INTERESTED PARTY  
 KOBOS SECONDARY SCHOOL ..... INTERESTED PARTY  
 JANIFARI WAKHUNGU VIKETI ..... INTERESTED PARTY  
 WILSON SOME MURGOR ..... INTERESTED PARTY  
 CHEBWAMBOK KIBASA ..... INTERESTED PARTY  
 MARY CHEBET BIWOT'T ..... INTERESTED PARTY  
 JENIFER CHEBET TALAM ..... INTERESTED PARTY  
 JOB KIPKEMBOI TALAM ..... INTERESTED PARTY  
 ISAAC WAWERU MBUTO ..... INTERESTED PARTY  
 MUGEIYOT PRIMARY SCHOOL ..... INTERESTED PARTY  
 KIPKINYOR WILLIAM ARAP KOECH ..... INTERESTED PARTY  
 JOSEPH MALAKWEN KILI ..... INTERESTED PARTY  
 MAUA CHEPKOSGEI KISORIO ..... INTERESTED PARTY



<b>SAMUEL KIPKOSGEI YEGO .....</b>	<b>INTERESTED PARTY</b>
<b>JONATHAN KEMBOI BUTURU .....</b>	<b>INTERESTED PARTY</b>
<b>KIPKEMBOI WILSON BUTURU .....</b>	<b>INTERESTED PARTY</b>
<b>SAMUEL K. KIRONGO .....</b>	<b>INTERESTED PARTY</b>
<b>KIMARU ARAP MARITIM .....</b>	<b>INTERESTED PARTY</b>
<b>EZEKIEL KISORIO KEMBOI .....</b>	<b>INTERESTED PARTY</b>
<b>EVALINE CHEBICHI SAMOEI .....</b>	<b>INTERESTED PARTY</b>
<b>PETER CHISIANGANI .....</b>	<b>INTERESTED PARTY</b>
<b>JACKSON OMWAHA ASINULI .....</b>	<b>INTERESTED PARTY</b>
<b>CHARLES NAKEN LOCHERIO .....</b>	<b>INTERESTED PARTY</b>
<b>VIOLET AFANDI .....</b>	<b>INTERESTED PARTY</b>

## JUDGMENT

### Background

1. The present suit arises from a very convoluted dispute between members of a group that purchased land in the 1970s. The plaintiffs are dissatisfied with the manner in which the land purchased through group efforts was distributed amongst members and they claim that they were shortchanged by the defendants who forcibly seized control of the farm affairs and allocated themselves and their family members huge chunks of land at the expense of members.
2. It appears that disputes regarding distribution of the land amongst members led to legal battles in which the plaintiffs and other members sued the defendants and others before panels of elders, tribunals, the Magistrates' Courts and the High Court leading to a number of legal decisions affecting the land.
3. It is apparent that the previous litigation failed to resolve the plaintiff's grievances and therefore the present suit was lodged on 9/6/2015, some 51 years since the members are said to have taken possession of the suit land. This suit seeks to have the subdivision scheme adopted by Mugeiyot Farm and the resultant titles cancelled.
4. In this suit, while the plaintiffs maintain that they were given a raw deal, the defendant's defence is that they were mandated by Mugeiyot Farm members, who included the plaintiffs, to manage farm affairs and that plaintiffs participated in the affairs of the Farm and they are estopped from impugning the titles subject matter herein. They aver that all the portions represented by the 300 or so titles now in existence in respect of what used to be the Mugeiyot Farm are occupied by farm members. The 5<sup>th</sup> – 7<sup>th</sup> defendants, the public officers in whose government offices the impugned transactions were carried out or registered and titles issued, support the 1<sup>st</sup> -4<sup>th</sup> defendants claim that the surrender and subdivision of the suit land was devoid of any illegality or irregularity.



## PLEADINGS

### The plaint

5. By the amended plaint dated 25/9/2017 the Plaintiffs sought the following orders:
  - (a) A declaration that the surrender of the head title for the property known as LR NO. 8417/1 – Mugeiyot Farm and the resultant subdivision thereof and issuance of individual titles was illegal and irregular in view of the stay orders issued by the Honourable court in Kitale High Court Miscellaneous No. 22 of 1997 on 25/6/1997 which remained in force until 19/2/2015 hence the same was null and void ab initio.
  - (b) Mandatory orders of injunction do issue revoking the title deeds issued in respect of land parcels known as Kapomboi/Kapomboi Block 2 (Mugeiyot/1 up to Kapomboi/Kapomboi Block 2 (Mugeiyot/111 which all emanated from LR 8417/1 (Mugeiyot Farm) as well as those that resulted from the subdivision of any of the said titles and directing the 5<sup>th</sup> and 6<sup>th</sup> defendants to amend their records and issue fresh title deeds reflecting the names and acreages of proprietors and their legal representatives where necessary as set out as paragraph 25 herein above.
  - (c) Costs of the suit and interest thereon at court rates.
  - (d) Such further and/or other orders as this Honourable court shall deem fit to grant.
6. The evidence given by Kipsoimo Kitur, the 1<sup>st</sup> plaintiff, which will be set out herein after, tallies to a great extent with the contents of the plaint. However, in brief the plaintiffs' claim is that in 1965 they and other persons purchased LR No. 8417/1 (which they named Mugeiyot Farm) for a consideration of Kshs. 160,000/= . That purchase was financed by cash contributions from the partners (Kshs. 70,000/=) as well as a loan from the Agricultural Finance Corporation (AFC) (Kshs. 90,000/=). The land was to be held by two of the partners in trust for the whole group until the land was subdivided and title deed issued to the parties. These two were Joshua Kiberenge Kogo and Erasto arap Samoei and to date, to the knowledge of PW1, no fresh directors have ever been elected to the management of the Farm.
7. There were 18 original members whose names are given in the plaint who contributed the Kshs. 70,000/= and who borrowed the balance from AFC to pay off the entire purchase price. 8 other members joined the group thereafter; their names are also given in the plaint. One of the group members was appointed a manager of the farm. The Farm was temporarily demarcated amongst the members in 1972 as per their contributions and allowance was given for public utilities including the Farm house. A resolution was arrived at that whoever contributed in repayment of the AFC loan would have that contribution added to his share so that his entitlement to land would increase. In the 1980s however, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants arrogated themselves to leadership of the Farm without consulting members and took custody of the Farm records.
8. It would appear from the record that from the time that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants are said to have assumed control of Mugeiyot Farm in the 1980s, there lingered in the plaintiffs' minds serious apprehension that the subdivision of the farm would not be fair to them. A dispute arose which went before panels of elders, administrators, tribunals and the courts.
9. It has been alleged that the 2<sup>nd</sup> defendant as well as one Musa Talaam abused their positions as area chief and councillor respectively to take over the Farm's affairs. This did not please the plaintiffs and they filed a claim before a panel of elders which ruled on the dispute on 18/3/1982 ordering



equitable subdivision of the Farm according to members' shares. That decision was not effected and a fresh complaint was raised by the plaintiffs and others before another panel of elders which made an award on 11/6/1986 dismissing the complaint. Thereafter, Kitale SRMC Land Case No. 62/1982 was filed against the award and it was set aside on 18/6/1987. The court ordered trial by a new panel within 90 days. The new panel constituted in accordance with that order filed an award in court on 14/4/1988 which was adopted formally as an order of the court on 3/10/1988 requiring distribution of the land according to shares held. Attempts by the defendants to review the award failed leading to their filing of Eldoret HCCA 35 of 1991 which declared the Magistrates Court Case a nullity on 22/7/1996. Thereafter, Kitale PMCC 11/1997 was filed and some orders were obtained which the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs were not happy about and so they lodged Eldoret HC Misc. Appl. No. 146/1997 which became Kitale High Court Misc. Civil Appl. No. 22/1997 seeking to quash the proceedings and decision of the tribunal which had been adopted in Kitale PMCC 11/1997. The plaintiffs claim that the award was finally quashed in Eldoret HC Misc. 188/1997 on 19/2/2015 for being a nullity. It was alleged that while all this litigation was going on, and despite stay orders issued by court on 25/6/1997 in Kitale HC Misc. Appl. 22/1997, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in collusion with the 5<sup>th</sup> and 6<sup>th</sup> defendants clandestinely surrendered the main title, caused subdivision and obtained titles to the subdivisions and in doing so the 1<sup>st</sup> to 3<sup>rd</sup> defendants allocated themselves and their family members huge chunks of land at the expense of members.

10. The portions that arose from the subdivision were baptized Kapomboi/Kapomboi Block 2 (Mugeiyot)/1-111 (inclusive). It is claimed that 35 out of those 111 subdivisions are still registered in the Government of Kenya. It is also alleged that the surrender and subdivision was illegal, irregular and fraudulent and that it led to dispossession of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs and their families of their entitlement in terms of proper acreage and it also led to total dispossession of the 3<sup>rd</sup> plaintiff who has been displaced. It is claimed that the interested parties are beneficiaries of the purportedly illegal subdivision and that the titles they hold lack a legal foundation. It is sought that all the title deeds emanating from the said subdivisions ought to be cancelled for illegality.

## DEFENCE

### The 1<sup>st</sup> to 4<sup>th</sup> Defendants' Defence

11. The 1<sup>st</sup> to 4<sup>th</sup> Defendants filed a joint amended defence dated 12/1/2016. They admitted some of the averments of the plaint as follows: that the sum of Ksh.70,000/= was collectively raised by all partners of Mugeiyot Farm including the 1<sup>st</sup> to 4<sup>th</sup> Defendants (inclusive); that the Farm members secured the loan sum Kshs.90,000/= from AFC which they all participated in the repayment of; that the 3<sup>rd</sup> plaintiff paid for a portion of the land that had been allocated to one Zakayo Korir who had failed to complete the payments due; that eight other members i.e. Theophilus Kipsang Lelei, Chepwambok Butturu, Benjamin Koech, Kipkinyor Koech, Kipkemboi Kositany, Clara Cheptalam, Kibasa Arap Keino, Joseph K. Ngeny subsequently joined the Farm membership; that members appointed Joshua Kiberenge Kogo to manage the farm. The Defendants averred that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were mandated by members including the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to obtain title deeds for the allocated plots and that the plaintiffs, having allegedly participated in sanctioning it, are estopped from impugning the results of the title issuance process; that the 3<sup>rd</sup> plaintiff is not a member of Mugeiyot farm and his claim is res judicata Eldoret HCCC 307/1977; that the original title was surrendered to the government and the farm legally and regularly subdivided with members' consent and about 300 titles processed leaving nothing out of the original farm for reallocation as proposed; that the directors of the farm were appointed by members and none imposed himself; that the entire suit is res judicata, it being a replica of several previous proceedings; that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs and their families have not been dispossessed



as claimed and that the claim is statutory time barred under the Section 7 of the *Limitation of Actions Act*. They also maintain that the suit discloses no cause of action; that the titles being first registration titles cannot be challenged in court; that the plaintiffs have no capacity to bring a representative suit without authority to plead and without leave of court and that the plaint should be struck out for misjoinder and non-joinder of parties and misjoinder of causes of action. It is further pleaded that the 300 title deeds obtained the consent of the Land Control Board and the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs benefited from the subdivisions as they were issued with titles and that all the portions of land emanating from the subdivision are now occupied by members.

12. The 5<sup>th</sup> – 7<sup>th</sup> defendants filed their joint statement of defence on 12/4/2016 denying the claim. They averred that the Mugeiyot Farm land parcel was registered on 23/4/1997 and individual title deeds were issued at the instructions of the Chief Land Registrar dated 20/3/1997; that due to Eldoret High Court Civil Appeal No. 35 of 1991 the titles were restricted by a court order issued on 2/10/1995; that however, the restriction was lifted at the end of that appeal; that the process of registration followed the surrender of the head title and the alleged stay orders in Kitale HC Miscellaneous 22/1997 do not feature in the land records as they were not served upon the Lands Office; that some of the land parcels had already been charged or transferred to third parties. It is denied that the surrender of the head title and the subsequent subdivision and issuance of titles were irregular, illegal malicious or fraudulent. The defendants also raised an objection that the suit is fatally defecting for seeking to cancel titles issued to persons who had not been made parties to the suit and that the plaintiffs are guilty of laches and that the suit is time barred.

### **The Evidence of the Parties**

13. The hearing of this suit commenced on 23/1/2018 with the evidence of Kipsoimo Kitur, the 1<sup>st</sup> Plaintiff who adopted his statement dated 25/9/2015. His evidence is that a European settler by the name “Bedford” wanted to sell his land known as LR 8417/1 in the year 1965 and one Erastus Samoei approached him over the intended sale; he agreed to sell the land measuring 1509 acres for a consideration of Kshs. 160,000/=. Erastus approached some persons who originated from Nandi County including the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs who agreed to partner in the purchase of the land. They raised Kshs. 70,000/=. They borrowed the balance of Kshs. 90,000/= from the Agricultural Finance Corporation (hereinafter “AFC”). The 1<sup>st</sup> plaintiff contributed Kshs. 18,600/=:, the 2<sup>nd</sup> plaintiff 23,300/= and the 3<sup>rd</sup> plaintiff Kshs. 10,800/=. The 3<sup>rd</sup> plaintiff is said to have taken up the share of one Zakayo Arap Korir who had defaulted in his payment. The parties moved into the farm on 5/7/1965 and named it “Mugeiyot Farm.” The original members of that farm who contributed Ksh. 70,000/= were 18 in number. They were: Erastus Chepsiror Samoei, Joshua Kiberenge Kogo, Kibiwot Arap Maiyo, Japheth Arap Rop, Kiprono Arap Chumba, Thomas Arap Koros, Jacob Kibitok Arap Birech, Paulo Arap Kogo, Sebastiano Kimelil Arap Too, Kiptarus Arap Sitienei, Kipkering Arap Too, Chepterwai Bus Service, Kipketer Arap Murwon, Kipsoimo Arap Kitur, Ronald Some Ng’elechei, Kilele Arap Maina, Samwel Arap Amiani and Kidogo Arap Samoei. They were joined by 8 other members thereafter as follows: Theophilus Kipsang Lelei, Chepkwambok Butturu, Benjamin Koech, Kipkinyor Koech, Kipkemboi Kositany, Clarah Cheptalam, Kibasa Arap Keino and Joseph K. Ng’eny. Members appointed one Joshua Kiberenge arap Kogo as farm manager and he lived in the farm house.
14. In 1972 a temporary demarcation of the farm was done and the land was distributed amongst the members depending on each members’ share contribution. Members then agreed that the AFC loan would be repaid by individual members. Upon such payments each member was to keep his receipts and such payments were to be deemed as further shareholding in the farm. There has never been any change of farm directors to date and the original title to the land has never been surrendered.



15. The 40 acres comprising of the farm house and its surrounding area was reserved as a public utility plot. Consent to transfer the property was issued on 11/11/1973.
16. However, in the 1980s the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants arrogated themselves the position of directors in the farm without consulting the plaintiffs. By then the 2<sup>nd</sup> defendant was the area chief and he abused his position to impose himself as the farm secretary and took custody of the farm records. One Musa Talam (now deceased and represented by the 4<sup>th</sup> defendant, his widow) was a Councillor and he also used his position to impose himself into the leadership affairs of the farm. A complaint was lodged before a panel of elders chaired by the Sabaot/Kwanza District Officer which made an award directing subdivision of the land amongst all members according to their shares. The panel also ruled that each member had to get a share of the swampy areas. The panel also referred the parties to the AFC to obtain advice on the outstanding balance and to have it repaid by members who would then by that payment acquire additional shareholding in the farm after which a new survey would be done. That decision was not fully effected to the satisfaction of the plaintiffs who raised a fresh complaint before another panel of elders which made an award on 11/6/1986 dismissing the complaint.
17. The plaintiffs then filed Kitale SRMCC Land Case number 62/1986 against Musa Talam and others seeking the setting aside of the award and it was set aside on 18/6/1987 with orders that the old panel not having been properly constituted, a new panel properly constituted should hear and determine the dispute within 90 days.
18. The new panel was constituted as ordered and it filed its award in court on 14/4/1988 which was formally adopted as an order of the court on 3/10/1988. That award also ordered allocation of land to each member in proportion to his paid-up shares. All members were ordered to share the arable and swampy areas of the farm in equal proportions.
19. The defendants in the Magistrate's Court case Kitale SRMCC Land Case number 62/1986 sought review of the decision which was declined on 31/7/1991 upon which they filed High Civil Appeal No. 35/1991 which was allowed on 22/7/1996 declaring the proceedings in Kitale SRMC 62/1986 a nullity.
20. Later the plaintiff learned that other proceedings had been commenced before a panel of elders by persons who faked their names which led to an award adopted as an order of the court on 18/4/1997 in Kitale PMCC Land Case No. 11/1997. Upon learning that the plaintiffs filed Eldoret HC Misc. Civil Application Number 146/1997 which later became Kitale HC Misc. No. 22/1997 to quash the proceedings of Kwanza Lands Disputes Tribunal. The leave granted on that application on 25/6/1997 served as a stay of the enforcement of the tribunal's decision which had cleared the processing of title deeds for members. A substantive application was filed on 14/7/1997 but George Kapten, the plaintiff's Advocate died, the file record got misplaced, and the plaintiffs lost track of the matter. The original court file for Eldoret HC Misc. No. 188/1997 was also misplaced. It is also alleged that Kiarie & Co. Advocates, the firm of advocates who succeeded George Kapten, did nothing in the matter and the case file allegedly disappeared while under their custody with resultant loss of crucial information including service of orders that could have been confirmed in the court file that had also disappeared. Notwithstanding all these problems, the Judicial Review Notice of Motion in Eldoret HC Misc. No. 188/1997 was determined on 19/2/2015 and the decision of the Kwanza Land Disputes Tribunal was declared a nullity ab initio. However, during the pendency of those proceedings, and despite the stay orders issued on 25/6/1997 in the judicial review, the defendants in collusion with land officers surrendered the farm's head title, effected subdivision of the land, and obtained individual title deeds without involving other members. Consequent to that subdivision, the defendants allocated themselves and their children huge chunks of land. The titles issued out of that subdivision were



assigned LR Numbers Kapomboi/Kapomboi Block 2 (Mugeiyot)/1-111. The witness averred at the hearing that 35 of these plots are still registered in the name of the government of Kenya. The witness further stated that the surrender of the head title and subdivision and issuance of titles was irregular, illegal and fraudulent in that: other members were not consulted; fake proceedings were filed in the names of the plaintiffs without their knowledge; the defendants sought to dispossess the plaintiffs of their rightful shares of the land and that the defendants allocated themselves portions meant to become public utilities without the approval of the members. It is stated that the 3<sup>rd</sup> plaintiff was deprived of his entire entitlement despite having been among the original members who joined the farm in 1968; that the farm register was tampered with, leading to the irregular exclusion of some farm members. Restrictions placed against issuance of titles were removed and titles were issued to strangers while proceedings were pending before court and as a result the 2<sup>nd</sup> plaintiff and the 1<sup>st</sup> plaintiff's family have been dispossessed of their entitlement while the 3<sup>rd</sup> plaintiff is said to be totally dispossessed and he has been compelled to live in a different parcel of land notwithstanding his membership in the farm.

21. The witness averred that the farm members fell into two categories:
  - a. Those who contributed to the Kshs. 70,000/=;
  - b. Those who contributed in repaying Kshs. 90,000/= AFC loan.
22. According to the witness the contributions of the parties led to their shareholding as follows:



No	Shareholders	1 <sup>st</sup> Contribution	2 <sup>nd</sup> Contribution	Total
a.	Erasto Chepsiror Samoei	105	83	188
b	Kibiwott Arap Maiyo	35	45	80
c	Japheth Arap Rop	35	-	35
d	Kiprono Arap Chumba	35	24	59
e	Thomas Arap Koros	35	-	35
f	Jacob Kibitok Arap Birech	35	105	140
g	Paulo Arap Kogo	35	43	78
h	Sebastiano K. Too	35	5	40
i	Kiptarus Arap Sitienei	35	40	75
j	Albert Kiptanui Arap Boen	35	15	50
k	Daniel Kimaru Maritim	35	10	45
l	Kipketer Arap Murwon	34	84	119
m	Kipsoimo Arap Kitur	35	65	100
n	Ronald Some Ng'elechei	35	25	60
o	Kidogo Arap Samoei	20	-	20



p	Theophilus Kipsang Lelei	30	-	30
q	Chepwambok Buturu	-	34	34
r	Benjamin Koech	-	32	32
s	Kipkinyor Koech	-	40	40
t	Kipkemboi Kositany	-	130	130
u	Clarah Cheptalam	-	24	24
v	Kibasa Arap Keino	-	25	25
w	Joseph K. Ng'eny	-	30	30
x	Farm house	20	-	20
y	Secondary school	10	-	10
z	Nursery school	5	-	5
aa	Centre plot	5	-	5
-	-	650	859	1509

23. The gist of the current suit was succinctly put forward in very clear terms by the 1<sup>st</sup> plaintiff when he averred that he has only been allocated 15.76 acres out of his entitlement of 100 acres and the 2<sup>nd</sup> plaintiff 25 acres out of 119 acres while the 3<sup>rd</sup> plaintiff lost his entire entitlement of 60 acres.
24. At the same time the 1<sup>st</sup> defendant allocated himself parcels number 10 and 51, the 2<sup>nd</sup> defendant parcel numbers 28 – 32 (inclusive) and also allocated to himself jointly with his sons parcel number 33; the 3<sup>rd</sup> defendant took parcels number 3 and 4; the 4<sup>th</sup> defendant and her family took parcels numbers 34, 35, 40, 66, 68, 79, 80 and 81, the last parcel which they have already disposed of to a third party and which was the farm house plot which the plaintiffs claim should be reallocated amongst the 18 original members pro rata. The witness asserted that the title deeds issued to the interested parties lack a legal foundation hence they ought to be cancelled and fresh title deeds as per the distribution list hereinbefore given by the witness which has been set out at paragraph 21 hereinabove.
25. PW2, Benjamin Kibiator Keter testified on 24/1/2018 and adopted his witness statement dated 25/9/2017. His evidence is that he is son to Kipketer Murwon who died on 9/4/2016 and he holds a grant of letters of administration from Kapsabet PMC Ad Litem Cause No. 2/2016 and so he has



- authority to pursue this suit on behalf of the deceased's estate. His further evidence is that the deceased was among the original members of Mugeiyot farm; that in 1976 he was shown 12 acres of arable land and 13 acres of a swampy area allocated to his father and cultivated 10 acres before he left for Kitale for employment; his father paid Kshs. 18,000/= to AFC; later those 25 acres "went missing" as there was no increment in the number of shares to reflect the additional payment. His evidence is that out of 119 acres, his family now has only 17 acres with 3 acres situate in an arable area and 14 in a swampy area while 9 acres are held by Daniel Maritim, his uncle.
26. He reiterated PW1's narrative regarding a complaint the plaintiffs raised in 1982 and the subsequent litigation and other events.
27. PW3, Ronald Some Ngelechei testified on 18/10/2018 and adopted his witness statement dated 25/9/2017. His evidence is that Erastus Chepsiror Samoei and Joshua Kiberenge Kogo informed him that one Zakayo Arap Korir had failed to pay the Kshs. 3,500/= required for membership in Mugeiyot farm; Zakayo had only paid Kshs. 1,500/=; PW3 viewed the land; all the other members convened and approved his membership in the farm subject to payment of Kshs. 6,000/= which he then paid to Erastus and Joshua who refunded Zakayo the Kshs. 1,500/= the latter had paid to the group, after which Zakayo left the farm. According to PW3, he moved into the farm the following week after payment and lived there till 1972 when members agreed to subdivide the land; each acre was valued at Kshs. 200/=; by 1972 he had increased his shareholding in the farm to the worth of Kshs. 10,800/= and was thus entitled to 54 acres which were reduced by one acre for public utilities leaving him with 53 acres; out of these 53 acres, 40 were arable while 13 were swampy; his land was near the 2<sup>nd</sup> defendant's, who had 20 acres of arable land; some further 16 acres were offered to him and the 2<sup>nd</sup> defendant and it was shared equally between them and they paid for it by way of repayment of the AFC loan. However, he states that Kshs. 600/= was paid to Joshua while Kshs. 1,000/= was paid directly to AFC; Joshua sold all his land and left the farm in 1973. According to the witness, there were 22 members as at the time of subdivision of the land and more members joined the farm; after subdivision, a portion of land remained which, it was resolved, would be used to cover the AFC loan. According to PW3, issues arose when attempts were made to establish how much each member had paid to AFC and Jacob Kibitok Birech, Albert Bowen, Musa Talam and Benjamin Koech commenced what he calls "unnecessary wrangles". PW3 then resolved to sell his portion to one Attanas Wepukhulu (41 acres) in 1976 and Kimase Chepkwony (12 acres); the sale to Attanas was rejected by the members and he refunded the buyer the purchase price through his advocate; Kimase Chepkwony was not refunded his money by Ngelechei and has not taken up possession of the portion he bought from PW3 and so he also lost everything; after Wepukhulu was refunded his money, Jacob, Albert, Musa and Benjamin seized PW3's land and barred him from re-entry to the farm upon which he made a complaint to the Paramount Chiefs who resolved that his land be returned; according to the witness the elders dealt with that dispute after they were authorized by the High Court in Eldoret HCCC 307/1977. Later, a challenge was mounted in the Kitale High Court against the decision of the panel of elders but thereafter the court file record disappeared and has never been recovered to date. The rest of his evidence as regards the dispute and its mutation into the cases before the panels of elders headed by the Kwanza D.O and the manner in which the defendants allegedly abused their administrative positions to defraud members of their land resembled that of PW1 in all material respects.
28. PW4, David Kiplimo Barngetuny testified on 3/7/2019 and adopted his witness statement dated 25/9/2017 as his evidence-in-chief. His evidence is that he was a member of several panels of elders in the then Trans Nzoia District in the 1980s which resolved many disputes in the area; that the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> plaintiff filed a claim before a panel; that the panel's practice was to resolve the disputes by visiting the disputed land and involving all members after which a decision was made and forwarded to the District Commissioner and a copy to the court for adoption; according to him the case filed by



- the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs did not proceed and no decision was ever made because the claimants and the respondents never turned up after summons were issued; he terms the alleged findings arising from that dispute as a fabrication and states that the panels' members' names had been misused by some persons to defraud members of the farm of the land.
29. PW5, Joseph Kipyego Seronei, testified on the same date as PW4 and adopted his witness statement dated 25/9/2017. His evidence is that he moved to Mugeiyot farm from Nandi County in 1973 and he lived with Kiprono Arap Chumba an original member of the farm with whom had been jointly allocated 40 acres. In 1974 he was the Interim Secretary of the farm. In 1978, Musa Talam orchestrated his ouster and replacement by the 2<sup>nd</sup> defendant (Albert Kiptanui Bowen) as Farm Secretary. The two gentlemen then seized the farm register and ran the affairs of the farm as they wished, locked out some members and reduced some acreages of some others. In 1982 one Joseph Ngeny was contracted to survey the land and PW5 was present at the exercise; thereafter, a splinter group led by Jacob Birech the 1<sup>st</sup> defendant sought the services of another surveyor without consent of the other members and that surveyor interfered with the map drawn by Joseph Ngeny and the area list by allocating plots to the defendant's group. By the time PW5 came to the farm, an acre was costing Kshs.220/= and he and Arap Chumba paid Ksh. 12,980/= which translated to 59 acres which they shared in the ratio of 22 acres for PW5 and 37.7 acres for Arap Chumba. PW5 pointed out that the 2<sup>nd</sup> defendant was Chief of Kapomboi and also the Farm Secretary in 1975. The rest of his evidence tallied with that of PW1.
30. PW6, Francis Kipngetch arap Bor, testified on 17/7/2019 and adopted his witness statement dated 25/9/2019 as his evidence-in-chief. His evidence is that he was an Assistant Chief of Kobos Sub-Location of Kapomboi Location and the 2<sup>nd</sup> defendant was his Chief; at that time, the dispute regarding land at Mugeiyot farm had emerged; Some Ngelechei was brought to PW6 by the elders. According to PW6, at that time he used to receive information from the village elders including Joseph Seronei and he appointed assistants for village elders in his area of jurisdiction and therefore he had all the proper intelligence. He recalls that a panel of elders of three Senior Paramount Chiefs was sent by the then Trans Nzoia District Commissioner, Nicholas Mberia to resolve the dispute at Mugeiyot Farm between the 3<sup>rd</sup> plaintiff and the farm directors. As the 2<sup>nd</sup> defendant who was the Chief was an interested party to the dispute, PW6 oversaw the proceedings in that dispute. Witnesses testified but no decision was arrived at. According to him, the evidence taken from the witnesses during the proceedings was that Some Ngelechei had bought back his share from Attanas Wepukhulu who was rejected by the directors and therefore Some was still a farm member. When he was sent a letter for renewal of his contract as an Assistant Chief for another 3 years, his senior, the 2<sup>nd</sup> defendant who received the letter concealed it from PW6 and his contract was therefore not renewed. He only learned later of that concealment when his salary was stopped. He attributed the loss of the opportunity for renewal of his contract to his honesty and transparency in handling public affairs and the 2<sup>nd</sup> defendant's alleged liking for underhand dealings.
31. PW7, Andrew Kiptanui, testified on the same date as PW6 and adopted his witness statement dated 25/9/2017 as his evidence-in-chief. His evidence is that he holds a grant of letters of administration to the estate of Theophilus Kipsang Lelei, his late father. According to him, his father narrated to him matters relating to his early life. He stated that his father and Joshua Kiberenge Kogo who was PW7's uncle conceived the idea of purchasing land and other people including Erastus Samoei joined the two men as they were discussing their idea while still in Nandi County. As a result of these discussions, the suit land was bought. They raised Kshs. 70,000/= and borrowed the balance of Kshs. 90,000/= from AFC; his late father sold his land at Nandi and purchased shares at Mugeiyot farm and they entered Mugeiyot in 1966 when the land became available for settlement. Joshua Kogo became the first Farm Manager and he was assisted by Erastus Samoei. According to the witness, his father was a



clerk at the Chief's office in the 1960s and later worked as a clerk in the Ministry of Labour in Eldoret and other stations within the country. His father gave 30 bags of maize to the common store as his contribution for the repayment of the AFC loan and also paid Kshs. 4,200/= to Joshua Kogo who acknowledged receipt in a statement before the Kwanza Disputes Land Tribunal; PW7's father had a strange quarrel with the 1<sup>st</sup> defendant: when he built a house on Mugeiyot farm, he suffered some losses after a tussle with the 1<sup>st</sup> defendant who vandalized the house. When he built another house in 1966, it was burned down and he had to start all over again by building a new one. Theophilus' brother-in-law Stephano Sang also paid Kshs. 2,200/= for land and the amount was to be shared between Theophilus and his brother Kapkasio. However, when Theophilus retired from the civil service, he returned to the Mugeiyot farm only to find that that his name had been substituted with that of his brother Kapkasio; when AFC demanded the repayment of the outstanding loan, 18 out of 26 members attempted to bar the remaining members from repaying the loan but later they were allowed to contribute. According to him there was a case handled by the DO Kwanza Division by some members against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants and Musa Talam who were directors of the farm who had imposed themselves on the farm affairs without having been elected. In 2007, there was an attempt to resolve the dispute between Kapkasio Keter and Theophilus which failed to resolve anything. The matter was then taken to the D.O Kwanza Division who directed that the matter be taken before the Kwanza Land Disputes Tribunal in Case No. Kwanza LDT Case No. 81/2007 in which Theophilus demanded to be allocated his proper share of the land as per his contribution and the Tribunal awarded him 15.3 acres which award was formally adopted as an order of the court in Kitale Chief Principal Magistrates' Court Land Case No 17 of 2010 on 23/4/2008. The directors filed an appeal at the Rift Valley Land Disputes Appeals Committee at Nakuru which appeal was dismissed and the award upheld. That decision of the Rift Valley Land Disputes Appeals Tribunal was adopted as an order of the court in Kitale Magistrates Court Land Case No. 17/2010 on 9/12/2010. The directors then filed an appeal at the High Court in Kitale HCCA 42/2010 which was withdrawn on 27/1/2014. The witness stated that the orders in Kitale Magistrates Court Land Case No. 17/2010 have not been effected. According to the witness, the parcels that were fraudulently registered in the name of Kipkasio Keter are Kapomboi/Kapomboi Block 2 (Mugeiyot)/21 and Kapomboi/Kapomboi Block 2 (Mugeiyot)/95 and these need to be cancelled and issued in Theophilus' name alongside any other additional acreage the court may find Theophilus to be entitled to by virtue of his contribution to the acquisition of the farm.

32. PW8, Collins Kipruto a registry official at the Kitale Law Courts, ELC Registry produced the original file record for Kitale Misc. 22 of 1997 and Kitale Misc. 23 of 1997. According to him Kitale Misc. 22 of 1997 used to be Eldoret Misc. 146/1997 while Kitale Misc. 23/1997 was previously Eldoret Misc. No. 188/1997. The applicants in both matters are the 1<sup>st</sup> plaintiff and two others versus Kwanza Land Disputes Tribunal. Kitale Misc. 22/1997 was concluded on 19/2/2015 in a ruling while Kitale Misc.23/1997 was dismissed for want of prosecution on 7/12/2017. According to PW8, a skeleton file had been opened in respect of Kitale Misc. 22/1997 pursuant to an order of the court and it appears that the original file had disappeared.
33. At that point the defendants case was marked as closed and the court subsequently took the evidence of the 22<sup>nd</sup> and 24<sup>th</sup> interested parties before taking the evidence of DW1.
34. Interested Party Number 22, Joseph Kipyegon testified on the same date as PW8. His witness statement was filed on 25/9/2017. His evidence is that he bought 27 acres from Some Ngelechei and entered the land in 1974; he also paid some money to AFC (Kshs. 16,600/=) as his contribution to liquidation of the loan which entitled him to 37 more acres. In 1982, Musa Talaam hired him to survey the farm on the basis of a plan prepared in 1972. He demarcated the land, created roads, made provisions for public utilities. He stated that by 1982 there were 99 members. According to him the plaintiffs were



not given sufficient acreage and Some Ngelechei had been removed from the membership of the farm by Musa Talaam on the basis that he had sold his shares. When Some Ngelechei went to court, his land entitlement was ordered reinstated to him. Later the 22<sup>nd</sup> Interested party was removed from his surveying duties when he questioned the defendants' decision to give less acreage to the plaintiffs. The witness stated that by the time he had left Mugeiyot farm many people who were in the area list were omitted including Theophilus Lelei and Busienei Kundule and Koskei arap Kunya.

35. The 24<sup>th</sup> Interested Party, Linus Kipkemboi Koros, testified on 29/1/2020. His evidence is that he is the son of one of the original members called Thomas Koros. He adopted his statement filed on 27/1/2020 as his evidence-in-chief. He has a grant of representation in respect of his late father Thomas Koros's estate. He stated that Thomas died in 1980; he gave a narrative just like the 1<sup>st</sup> plaintiff, of how the land was acquired through contribution by members and through a loan from AFC. His father paid Kshs. 4,200/= the equivalent of 35 acres; he is the registered owner of Kapomboi/Kapomboi Block 2 (Mugeiyot)/47 and 62 which he holds in trust for his father's other heirs. Both parcels measure an aggregate of 18 acres leaving a deficit of 17 acres. 15.5 acres of those 18 are located in swampy ground and only 2.9 acres are arable. On the other hand, all the defendants and their children had been allocated only arable land yet marsh land and arable land were to be equitably distributed among the members. It is his case that the defendants took more than their fair share of land and avoided marshy grounds. The rest of his evidence is on all fours with the evidence given by the 1<sup>st</sup> plaintiff.

#### **The 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> Defendants' evidence.**

36. DW1, Nelson Otieno Odhiambo, Land Registrar Trans Nzoia County testified on 1/12/2020. His evidence is that the mother title to the Mugeiyot farm, LR No. 8417/1 was issued under the Registration of Titles Act (RTA) (repealed) and it was surrendered to the government in consideration of approval of subdivision on 3/3/1997 and an area list was prepared. Parcels number 1 – 106 were created. A registry index map (R.I.M.) was forwarded through a letter dated 13/9/1995. A restriction was lodged against the title based on the Eldoret Civil Appeal Number 35/1991. That restriction was later lifted by virtue of Chief Land Registrar's letter dated 17/7/2003. Upon the lifting of the restriction, titles were issued to the respective owners and no other restrictions were ever lodged against the resultant titles. No orders of stay emanating from Kitale HC Misc. 22/1997 were ever lodged for registration. No person has ever lodged a complaint regarding the area list from the date the titles were issued and the instant suit is the first complaint.
37. Upon cross-examination by Mr. Wanyama, DW1 stated that no one ever lodged contempt proceedings against land officers for any violation of any court orders issued in Kitale HC Misc 22 of 1997; that originally the transfer of the main title was effected on 5/7/1965 into the name of Joshua Kiberenge arap Kogo and Erasto C. Arap Samoei as tenants in common in equal shares. Surrender of the title was also done by the two gentlemen for the purpose of subdivision and his office received the original title deed according to that surrender. He stated that the area list has public utilities which were registered separately and which were not allocated to any individuals. The initial plot numbers ended at 106 but later extended to 280 – 287, signifying subdivision and increase in number of parcels on the ground and on the map. As at the time of his testimony DW1 could not tell how many plots there were on the land that originally comprised the Mugeiyot Farm.
38. Upon cross-examination by Mr. Magut, DW1 stated that a Registry Index Map (RIM) was forwarded to his office in 1995. He admitted that records of land registered under the Registration of Titles Act (RTA) (now repealed) were normally to be found at the Central Registry at the Nairobi Ministry of Lands Headquarters. He admitted that a Land Control Board consent for the surrender has to be obtained but he was not aware whether that consent was obtained in respect of LR. No. 8417/1 -



Mugeiyot Farm. According to him, his records indicate that J. K. Birech as chairman of Mugeiyot farm wrote a letter on 17/2/1997 surrendering the head title to the government. That letter accepted the conditions set by the government. The surrender itself is dated 3/3/1997 and it is from the two former owners on behalf of the entire farm. According to him, there was no evidence on record that they had been authorized by the Mugeiyot Farm members to surrender the title; further, there is also no LCB consent authorizing subdivision into 106 plots and in his view no transaction cannot take place without consent. His further evidence on cross-examination is that his office acted on a letter dated 11/4/2001 in respect of an order in Civil Appeal No. 35 of 1991 by restricting the titles and the plaintiffs never served his office with any other order. The persons reflected on record as officials of Mugeiyot Farm were Jacob Birech- chairman, Kiprop Koech -Secretary, and Kiprop Maiyo - treasurer and they endorsed their signatures on the area list having 106 plots on 5/9/1996 which list was also countersigned by the Surveyor and the District Commissioner. However, some members had not signed against their names on that area list. These included Paul Some Kogo (number 19), Kipketer arap Murwon (number 41), Japheth Kipkemboi Rop (number 43), Joseph Kipyego (number 44), Thomas arap Koros (number 47), Thomas Koros (number 62), Paul Some Kogo (number 82), Kipsoimo arap Kitur (number 91) and Kipketer arap Murwon (illegible number). The names of the defendants featured in the list; there were numerous names bearing the surname “Boen” as in the 2<sup>nd</sup> defendant’s surname name and “Talaam” as in the 4<sup>th</sup> defendant’s surname. According to DW1 the information leading to preparation of an area list and issuance of title should emanate from a members’ register but he is not aware of any members’ register in his records. Also, the area list and a forwarding letter from a farm gives the Land Registrar authority to issue title. In other words, the determination as to who obtains title in their name is not normally made by the Land’s office. He confirmed that plot number 81 is now registered in the name of Priscilla Kipchirchir Talaam (the 4<sup>th</sup> defendant) as from 18/3/2004. He also learned that the Land Registrar who effected that transfer had been relieved of his duty.

39. Upon re-examination by Mr. Kuria, DW1 stated that the decree in Civil Appeal No. 35/1991 declared the lower court proceedings a nullity and that as per his records the order issued in Eldoret HC Misc. 146/1997 was not lodged for registration by his office. He confirmed that an area list is compiled after the survey of the land is complete and is endorsed by the local administration, that is the District Commissioner and Chiefs. Thereafter the minutes are forwarded to the Land Registry for issuance of title. DW1 stated that no disgruntled persons lodged any complaint with his office except three persons including Kipsoimo Kitur, Paul Kogo and others who were dissatisfied. At that juncture the case of the 5<sup>th</sup> to 7<sup>th</sup> defendants was marked as closed.

#### **Evidence of the 1<sup>st</sup> to 4<sup>th</sup> defendants**

40. These defendants gave the evidence through DW2, Albert Kiptanui Arap Boen who is named as the 2<sup>nd</sup> defendant. His evidence is that he knows the plaintiffs; that a group of persons from Nandi agreed to buy land and sent two persons, that is Joshua Kogo and Erastus Samoei, to seek land in Trans Nzoia; in the 1965 the two gentlemen found land belonging to a white man which was being sold at a consideration of Kshs.160,000/=; the group, then consisting of 18 persons, contributed Kshs.70,000/= and borrowed Kshs.90,000/= from AFC, aggregated the two sums and purchased the land; the loan from AFC was conditional on 6.5% interest per annum for over 20 years; when the Land Control Board confirmed that the purchase price had been paid, the group was allowed to access the land and some of them began to farm the land; some of them built dwellings on the land while others did not. According to the witness, Kipsoimo Kitur, Arap Murwon, Paul Kogo, and Thomas remained at home in Nandi but they would occasionally come to the farm for cultivation. Ten years after entry, it was resolved that the land be demarcated so that members could farm and repay the



AFC loan. Members continued to repay the loan. Other loans were borrowed besides the first loan and members continued to repay. Later on, some trouble arose concerning the management of the land; the government wanted the land subdivided and distributed amongst members and the Local District Officer was keen on that purpose. Subdivision and distribution was therefore conducted on the basis on the original contributions and any other further contributions toward the repayment of the AFC loan and members got their portions in 1975; later those who had not taken possession of portions of the suit land came to the farm and discovered that they have been allocated land only in accordance with their original contribution towards the Kshs.70,000/= capital sum raised in 1965 and that their portions were therefore small and consequently they started complaining; the witness averred that those members had not been involved in the repayment of the AFC loan while the ones who had settled on the land were involved in the repayment of the loan until the land could be subdivided; DW2 averred that it is the subdivision of 1975 that still stands to date and that some members already possess titles to their portions in accordance to that subdivisions. That is the subdivision which generated complaints among some members because those who had settled on the land earlier had large portions since they had taken part in the repayment of the AFC loan. The complaints ended up in the form of cases lodged in court in the 1970s; one Some Ngelechei lodged a case in the High Court Eldoret HCCC 307/1977 which decided that he had no land as he had sold it. He was declared no longer a partner in the farm and it was ordered that he be evicted in that case; he is the 3<sup>rd</sup> plaintiff in this case. According to the witness the complaint by the 1<sup>st</sup> plaintiff, Kipsoimo Kitur, commenced in 1971.

41. DW2 also testified that the title to the suit land was transferred by the seller to Joshua K. Kogo and Erasto Chepsiron Arap Samoei as tenants in common in equal shares on 5/7/1965 and the AFC loan was also advanced on the same date; on 3/3/1997 Joshua and Erasto surrendered the head title to the suit land for approval for subdivision. According to the witness no one has ever been prosecuted in court on any criminal charges based on allegations that the surrender was false. It is that surrender that caused members to get their own parcels. Planning was conducted by a Mr. Odongo, a Surveyor from Eldoret and he charged some fees which the members paid according to the sizes of their respective parcels; the members who had not settled on the land never paid survey fees; thereafter titles were issued. According to the witness plot number 41 was just like all the other sub-plots emanating from the subdivision registered on 21/4/1997 in the name of the Government which he states was the date of the surrender of the main title; after the land committee agreed that everyone had obtained their entitlement, members shared their portions with their children and titles were issued in their children's names and DW2 was such one person so affected. He maintained that Mugeiyot farm was a partnership and that the defendants never colluded with the government officers to rob the plaintiffs of the land. 106 titles were issued in the beginning yet 111 titles were sought to be cancelled and there is no indication by the plaintiffs as to who owns the 111 titles; he maintained that even the plaintiffs who are complaining in this case are in possession of some land; according to him Joshua Kogo and Erasto Samoei are the sole persons who collected contributions from members.
42. DW2 produced, copy of the transfer of the main parcel of land (DExh.5) and a copy of the charge over the suit land (DExh.6); he maintained that from 1966 there was a committee which had a clerk, one Theophilus who was also a member of the farm and who wrote down all the payments by the members as the money was being paid; the monies paid were obtained from the sale of the harvest and milk from the cows; the money from the milk was paid through the Kenya Cooperative Creameries; DW2 also produced a list of share members between 1966 – 1970 (DExh.7) and a record of members from 1965 to 1984 (DExh.8); he produced DExh.9 which was said to be a record of how land rents and rates were being paid and according to him that record had been kept by one Benjamin Koech (now deceased) who had succeeded Theophilus as clerk; he produced the deed of surrender of title dated 1996 as DExh.10; he stated that in Eldoret HCC 307/1977 Some Ngelechei was declared not



- to be a partner of the farm and it was ordered that he be evicted forthwith and Atanaa Wepukhulu be refunded Kshs.32,000/= as the sale of the land to him was void; Atanas was also to vacate the land. Up to now Some Ngelechei does not live on the land and he is not in the list of the members of the farm.
43. DW2 testified that HCCA 39/1991 was filed between Jacob Birech and Kipsoimo Kitur (1<sup>st</sup> plaintiff) and 4 others and he produced the judgment in that case as DExh.12 and the decree emanating therefrom as DExh.13.
44. According to the witness, a list of all members was made by members of Mugeiyot farm after payment of all debts of the farm previously owed; even the plaintiffs are in that list. The list is for all purposes like a normal area list; it shows the acreage of each member, the survey fees due and balance payable. According to that list the witness stated, the 1<sup>st</sup> plaintiff got plot number 22 and plot number 99 and was given the title deeds; the 2<sup>nd</sup> plaintiff is listed at entry number 41; he never paid anything but he still obtained the title deed; according to the witness, the 1<sup>st</sup> defendant is now old and has lost his memory due to age and evidence to that effect was produced in the form of DExh.15; the 4<sup>th</sup> defendant is also unwell and is almost 100 years old; all in all more than 20 original members have died according to the evidence of DW2; the witness stated that the farm members trusted Joshua Kogo and Erasto Samoei; there are schools and churches on the land; the witness faulted the plaintiffs for not indicating how the land should be dealt with if the title is nullified as proposed.
45. Upon cross-examination by Mr. Magut, DW2 admitted to being a member of the farm committee in 1967; that he bought the 18 acre parcel previously owned by Kidogo Arap Samoei but he did not have evidence of that purchase; that he also purchased 40 acres from Kipkering Arap Too; that he does not recall when he was included in the register; his name is at entry number 11 on page 1 and on page 2; that others had joined the farm membership before him but their entries come after his e.g. Thomas Koros' entry number 25 and Kidogo Samoei at entry number 17 in DExh.7; he explained Kidogo's names presence in that exhibit by stating that it was the first list made as per members' payments. When further cross-examined by Mr. Magut he stated that he was included in the list in place of Kipkering; he stated that DExh.8 was made in the presence of the committee; that entry number 16 in DExh.7 was cancelled due to sale to Kibitok; entry number 27 was cancelled due to departure of one person and by the taking up of his shares by another; he stated that the list reflected what was happening on the ground at the farm; he admitted that Some Ngelechei's name at entry number 12 had not been crossed out. He denied ever being an official of the farm but admitted that he may have assisted in the administration of the farm as a member; when pressed further he testified that he volunteered his services as a Secretary during the processing of title deeds and that he is a retired chief whose office was located within the Mugeiyot farm; when referred to his letter dated 14/5/1986 (to the Kwanza Land Control Board, he averred that he wrote it in his capacity as the area chief; that he was not aware of any Land Disputes Tribunal case lodged by the 1<sup>st</sup> plaintiff or Number Kitale SRMC Land Case 62/1986 or any meeting at the District Officer' office in 1992; that a Land Control Board consent dated 9/4/1987 (PEXh.49) was issued in respect of the suit land and subdivision into the 48 plots was allowed but nevertheless 106 titles were issued; he explained the additional titles by stating that they were issued in respect of family members of original members who opted to distribute their shares amongst their kin; the issue of the number of members was revisited in cross-examination whereupon he stated that the original members were 18 in number who came to the farm in 1965 and he was not one of them; that at contribution there were 26 members; he averred that he took the place of one of the original members. He admitted that Erasto Samoei added some more money to his contribution; that on the farm there were tractors and other assets and the development loan was meant to pay for both the land and the assets but no machinery was active. By the time he became a member all the settlers' cows had been distributed and he never benefited therefrom; he stated that he was testifying on behalf of the 1<sup>st</sup>



defendant; that he never got a tractor but he received a car from the assets of the farm. When pressed further, contradicted himself by saying that there were no cows on the farm when the land was being purchased and that the defendants did not allocate themselves land on account of the proceeds of sale of cows. However, every member had cows and milk therefrom was aggregated and sold; he does not recall how much money he paid towards the contribution of Kshs. 70,000/= used to purchase the land; that the entry dated 23/10/1980 in DExh.8 shows that he paid Kshs. 16,940/= to AFC through the management; that all the debt monies were forwarded to AFC; he admitted that some pages in DExh.8 are missing and that there were inconsistencies in the order of dates of the members in the exhibit. However, he admitted that the record shows that Kipsoimo Kitur paid 3549/=-, Murwon paid 4985/=-, Thomas Koros paid 4360/=-, Some Ngelechei paid 8783/=-, Kipkoskei Kunya paid 4169/=-, Samoei paid 3363/=-, Lelei paid 5587/=- and that he himself paid 7500/= as per the list and that all those persons obtained titles to their parcels. He stated that after all those payments some members continued paying the loan debt. When he entered into an agreement with Samoei, the latter left the farm; Samoei was to get 30 acres. Another person called Kositany bought Kipkosgei's share. According to DW2, there was so much trust that members were not issued with receipts; they just paid the money. Kipsoimo was to get 31 acres; however, he does not recall how those entitlements were computed yet he was a committee member; according to him they only got to know that Some Ngelechei had sold land when the purchaser came to settle on the land; he denied that Attanas Wepukhulu was rejected due to his non-Kalenjin ethnic origins but because it was wrong for Some to sell shares while the land was not meant to be sold haphazardly while a loan was still yet to be paid; he admitted that Some refunded the purchase price to Attanas after a court order was issued and added that he had sold some of his shares to another person called Kimase; he stated that Theophilus and his brother had one share and his brother was repaying the loan and that the land title was issued in both their names; when shown P.Exh 42, he admitted that the premises are registered in the name of a member but he did not have any record of a resolution to sell; he does not know how the 4<sup>th</sup> defendant obtained title to the farm house and the land it is on and he never played any role in that process; he averred that everybody pursued his own title and that he does not know much concerning other titles; when shown DExh.14, he averred that he did not know who effected the change; however he averred that many people signed on that exhibit save those who had outstanding issues. He stated that it was agreed that a member could have any person including their children registered but added that he did not have any minutes to that effect. He reiterated that those who had land in Nandi paid just once to the founders of the group and that no member appropriated any other members' share. Land was allocated as per the members' payments and officials never gave them any receipts; he admitted that his children are listed in DExh.14. When shown PExh.2, he stated that it is in the name of Joshua Kogo and partners and that it was only those persons who would know who was involved in the payment. According to him he paid his contribution in the repayment of the AFC loan through the elected officials and the committee kept the record book which ultimately helped members obtain title. He stated that those who paid directly to AFC did not do the right thing. According to DW2, GMR did not apply to the persons who were not farming and who were remained settled at Nandi rather than on the farm. No one was locked out; land was allocated as per payments. The consent of the Land Control Board was sought. When shown the LCB consent dated 9/4/1987, he could not recall whether it was that the consent that farm management obtained and for how many portions the consent was issued. He accused the plaintiffs of remaining in Nandi as matters relating to the farm were being processed by the defendants. He averred that the population on the farm has increased and that the swampy land has now turned into arable land. He averred that Musa Talam bought many parcels of land from members whose names he could not recall and admitted that Priscilla, Talam's wife was a nominated councillor but maintained that all members were equal; that his land measures about 80 acres in total; that he never invaded Some Ngelechei's land or appropriated his building materials



46. Upon cross-examination by Mr. Odongo, he reiterated that the farm was bought from one Mr. Bedford through contributions of members and that some of the consideration was paid by way of a loan from AFC and sale of produce; that the transfer (PEXh.5) was between Bedford on one side and Joshua and Erasto on the other as tenants in common in equal shares and that it does not describe them as partners of Mugeiyot farm. When shown exhibit number 1 entry number 5 thereof he admitted that title was issued to the two gentlemen and they charged the land to the AFC without involving any other person; he averred that the two were supposed to repay the loan by themselves. Further he admitted that the statement of payment attached to DEXh.6 showed that the loan to AFC had been paid in full and a discharge (DEXh.1) registered on 7/8/1995; that Joshua and Erasto surrendered the head title to get subtitles for members. He is not aware whether Joshua is alive though he is aware he used to live in Kapsabet; he is not aware of any complaint by Joshua over the surrender of the head title; Erasto Samoei died in 2018 or thereabouts and before his demise he raised no complaints regarding the surrender and there is no litigation on that issue; that it is Joshua and Erasto who gave instructions to the issuance of titles to the members and so the government came in to issue titles; the subtitles were first issued on 2/4/1997 after subdivision and they reflected the government as owner in the first entry; there are over 300 homesteads on the farm and public schools both primary and secondary churches as well as a public dam of about 40 acres with a swamp around it which serves the public with water for domestic use; there are government roads; electric power which was to be connected has been halted by the present litigation and many people are affected by it; the 1<sup>st</sup> plaintiff has about 16 acres, the 2<sup>nd</sup> plaintiff about 20 acres while the 3<sup>rd</sup> plaintiff lacks land on the farm since the court ruled that he be evicted from the farm; that besides the 3 plaintiffs, no other persons has complained.
47. At that point the case of the 1<sup>st</sup> to the 4<sup>th</sup> defendants was marked as closed and the cases of all the interested parties were deemed as closed and parties were ordered to file submissions.
48. Parties filed submissions which I have considered in this judgment.

### **Determination**

49. This is a claim that to a large extent depends on the documents produced by the parties. Owing to the sheer number of documents produced by the parties and the complexity of the claim this court has taken quite some time to sufficiently analyze them alongside the oral evidence adduced in order to circumspectly address the issues involved.
50. The present dispute revolves around the division among the members of a group of land they bought jointly. PW5 captured the essence of the dispute in a succinct statement in his evidence as follows:

“The court has often given decisions. The decision was that each member’s payments be verified to ascertain his share of the land.”

On his part the 24<sup>th</sup> Interested Party also did so by stating as follows:

“Our case is that the land be re-subdivided.”

### **Issues for determination**

51. The following are the issues arising for determination in the present suit:
- a. Is the suit a representative suit?
  - b. Whether the present suit is res judicata;



- c. Whether the 1<sup>st</sup> -4<sup>th</sup> defendants were properly appointed by the members as directors of the Mugeiyot Farm and whether they abused their office while running the farm affairs by:
  - i. fraudulently reducing the plaintiffs' entitlements to land within the farm?
  - ii. wrongfully allocating parcels of land to their kin;
  - iii. appropriating public utilities within the farm;
- d. Should the titles to all those parcels known as Kapomboi/Kapomboi Block 2 (Mugeiyot/1 up to Kapomboi/Kapomboi Block 2 (Mugeiyot/111 which all emanated from LR 8417/1 (Mugeiyot Farm) as well as those that resulted from the subdivision of any of the said titles be revoked and the 5<sup>th</sup> and 6<sup>th</sup> defendants be compelled to amend their records and issue fresh title deeds reflecting the names and acreages of proprietors and their legal representatives where necessary as per the distribution set out in paragraph 25 of the further amended plaint?
- e. Who ought to meet the costs of this litigation?

**Is the present suit a representative suit?**

52. The plaintiffs filed their original plaint on 9/7/2015. In that plaint, as in the further amended plaint they averred that they were instituting the suit “on their own behalf and on behalf of other members of Mugeiyot Farm interested in the fair distribution of the farm amongst the members as per the shares each contributed.”
53. No application for leave to institute a representative suit was filed before or with the plaint. Order 1 Rule 8 provides as follows:
  8. One person may sue or defend on behalf of all in same interest [Order 1, rule 8.]
    - (1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
    - (2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.
    - (3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the court to be made a party to such suit.
54. When the matter came up before court on 19/1/2015 the court ordered joinder of the persons holding title deeds to the plots emanating from the subdivision of the Mugeiyot Farm. An application dated 4/11/2015 was filed and later withdrawn on 21/4/2016 and another one filed dated 6/6/2016 which was granted. Orders were issued granting the plaintiffs leave to serve the interested parties by way of substituted service and a temporary order of inhibition restraining the 5<sup>th</sup> defendant from registering all dealings in respect of the suit parcels of land. It is noteworthy that the plaintiffs never sought to join the interested parties for the reason that they were the persons likely to have been shortchanged by the defendants. Ground no (f) of the notice of motion stated that the defendants and “the interested parties are currently selling off huge portions of the said parcels” and the suit risked “being rendered nugatory” should judgment be in favour of the plaintiffs; there was therefore need to stop further dealings on the suit property pending the determination of the suit. By their reported acts of selling off land, it



is clear that the interested parties were not joined as representatives of all those persons who may be interested in the fair distribution of the farm amongst the members as per the shares each contributed as expressed in the plaint. Also, the notice authorized in the suit was only in respect of the interested parties and no other persons.

55. PW2 stated as follows under re-examination by Mr Magut:

“We have brought the case for many people. There are 51 interested parties. Interested parties are beneficiaries of illegal subdivision as their titles have illegal subdivision.”

56. In the circumstances described above, it also cannot be said that the plaintiffs brought the suit on behalf of the interested parties. It is not clear from the pleadings and the interlocutory application as to who, other than themselves, the plaintiffs were intent on bringing the suit on behalf of. Since no notice or advertisement of the suit was issued to any other persons, the plaintiffs were clearly suing only on their own behalf in the instant suit and it does not therefore fall under the category of a representative suit. Consequently, only the plaintiffs’ private rights and no other can be adjudicated in the present suit. For those reasons, this court agrees with the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants that this is not a representative suit, but it hereby declines to strike the suit out for misjoinder or non-joinder of parties as this would be contrary to the provisions of Order 1 Rule 9 of the Civil Procedure Rules which are as follows:

“9. Misjoinder and non-joinder [Order 1, rule 9.]

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

Consequently, it was within the plaintiffs’ rights to proceed with the suit as presented before court.

### **Is the present suit res judicata?**

57. The 1<sup>st</sup> - 4<sup>th</sup> defendants pleaded res judicata at paragraphs 8 and paragraph 8D of their joint defence dated 12/1/2016. The defendants also aver that the contents of paragraphs 15-22 of the further amended plaint show that the suit is res judicata as the dispute has been litigated and re-litigated in several other previous proceedings and decisions. It is stated that the 3<sup>rd</sup> defendant’s claim as a member was determined in Eldoret HCCC No 307 of 1977.

58. The defendant’s submission is that the first panel of elders was constituted and it dealt with the dispute. The first panel ordered on 18/3/1982 that the land be distributed equitably among the members having regard to the arable and swampy areas and the payments made by the members. The award was not properly implemented and the plaintiffs lodged yet another complaint before a second panel of elders which was dismissed on 18/6/1986 prompting the plaintiffs to file Kitale SRMC Land Case No 62 of 1986 which on 18/6/1987 set aside the elders’ decision dismissing their complaint and thereafter a new, third panel was constituted which again ordered, just like the first panel, that the land be distributed in accordance with the amounts each member paid shares and that the arable and the swampy lands were to be shared in equal proportions; it was adopted as an order of court on 3/10/1988 and the defendants tried to have the order of court reviewed to no avail but they succeeded on appeal in Eldoret HCCA 35 of 1991 to have it set aside, which appeal decision stated that the proceedings in the magistrate’s court was a nullity.

59. In the ruling of 18/6/1987, the ruling of the elders dismissing the plaintiffs’ second complaint was set aside by the magistrates’ court in Kitale SRMC Land Case No 62 of 1986 and the magistrate’s own decision was subsequently set aside by the High Court in Eld. HCCA 35 of 1991 thus affirming



the elders' dismissal, and thus leaving the plaintiffs without any remedy for their second complaint. That left the first elder's panel award, that the farm "be subdivided amongst all members according to members' shares and that all had to get a portion of the swampy areas." still intact. However, the court is not told whether that award was adopted as an order of the court. It is the award of the third panel which was adopted by the court on 3/10/1988 which stated that "each member of Mugeiyot Farm was to be allocated land in similar proportions in both arable and swampy areas of the farm."

60. According to the defendants, the plaintiffs then filed Eld. JR NO 146 of 1997 (later named Kitale JR NO 22 of 1997) which quashed the second elder's panel's award of 18/6/1987. The defendants therefore aver that the only order that remained intact is the court order of 3/10/1988 adopting the 3<sup>rd</sup> panel's award. This court however fails to see any major difference between the awards by the different panels as they all appear to target the equitable distribution of land in the Mugeiyot Farm.
61. The defendants aver that the purpose of the present suit is simply to enforce the stay orders in Kitale JR NO 22 of 1997. The defendants liken the present suit to an application to cite them for contempt of court for allegedly failing to comply with the stay orders in Kitale JR NO 22 of 1997.
62. It is at that point that this court notes that the defendant's claim of res judicata ought to fail for these reasons:
  - a. The tribunal orders of 3/10/1988 which the defendants cite only directed that the "each member of Mugeiyot Farm was to be allocated land in similar proportions in both arable and swampy areas of the farm."
  - b. The judicial review orders sought and obtained were based on the claim of procedural impropriety or jurisdiction or constitution of the second panel and had nothing to do with the propriety of the subdivision of the Mugeiyot Farm.
  - c. There has never been any other case save the present suit that could have determined that the subdivision of the suit land was conducted in accordance with the third elders' panel's award, which is the only decision among the awards left standing, so to speak.
63. It is noteworthy that under Article 168(2) (b) of *the Constitution* and Section 13 of the ELCA, this is the court empowered to hear and determine matters regarding title to, use and occupation of land and that the plaintiffs have come to the proper forum. The defendant's claim of res judicata lacks merit for the aforesaid reasons and it is hereby dismissed.

**Whether the 1<sup>st</sup> - 4<sup>th</sup> defendants were properly appointed by the members as directors of the Mugeiyot Farm.**

64. The parties in this case never organized themselves into an incorporated limited liability company. The term "director" is therefore used in these proceedings loosely to refer to a position of leadership in the farm affairs. All the benefits ordinarily derived from incorporation under CAP 487 including the certainty of process of appointment of directors and secretary inter alia have been unavailable to the land purchase partnership during the whole of its existence.

PW2 stated and DW2 admitted that Albert Boen was secretary and chief of Kapomboi at the same time; PW2 stated that the plaintiffs did not know who elected him to the former office. Joshua Kiberenge Arap Kogo was the first manager of the farm. It is said that there was a farm committee. The mechanisms that went into forming a farm committee were not made clear to this court by the parties. This court was not informed how the farm committee was formed. There is no indication that



the farm members ever held any elections of whatever nature for the chairman's post, director's post, committee posts, manager's or any other post. PW1 stated as follows:

“Jacob was chairman. Albert Boen was a chief. The defendants chose the 1<sup>st</sup> defendant as chairman.”

By this statement PW1 was disowning any role in the election or appointment of the 1<sup>st</sup> defendant as “chairman.” PW 3 stated as follows without much elaboration:

“Birech (1<sup>st</sup> defendant) was elected chairman.”

Later on he stated:

“We never elected Boen (2<sup>nd</sup> defendant) secretary to the farm. He would say that the matters be taken to the chief yet he was the chief. The DO would refer us to the chief too... Boen was in custody of the farm documents.”

65. Of all the evidence that was given concerning the ascent of the 1<sup>st</sup> - 4<sup>th</sup> defendants or any of them to power in the farm management, the 3<sup>rd</sup> plaintiff appear to be more balanced. Despite having allegedly lost all his land entitlement through the machinations of the 1<sup>st</sup> -4<sup>th</sup> defendants and other persons, he stated as follows:

“The secretary ought to have records of ownership of the land. Joseph Seroney was appointed secretary. He left, then the chief Boen was installed by the members as secretary.”

66. The 1<sup>st</sup> – 4<sup>th</sup> defendants are the persons in the eye of a storm with regard to the allegation that they were not properly appointed. What is their evidence on the issue at hand?
67. DW2 testified as follows: that from 1966 there was a committee with a clerk who was also a member of the farm; that DW2 was registered as a member of the committee in 1967; that DW2 volunteered services as a secretary during the processing of the titles to the land; that it was the committee that allocated land to members; that members elected those officials who administered the Farm; that partners sat and made decisions concerning the farm; that ultimately it was the ostensible registered owners of the land who gave instructions for the issuance of titles to members.
68. Under Section 107 of the *Evidence Act* the burden of proof lay on the plaintiffs to demonstrate that the 1<sup>st</sup> -4<sup>th</sup> defendants were not properly appointed or elected as the leaders of Mugeiyot Farm. This court finds no evidence, from either the plaintiffs or the defendants, of an established system of rules by which leaders of the group were to be elected, appointed or chosen. All that is evident is that at any given time there were persons in control of the farm affairs. It is therefore not possible to tell whether or not the 1<sup>st</sup> -4<sup>th</sup> defendants were properly appointed as directors of the Mugeiyot Farm, and the plaintiffs' claim that they were not properly appointed must fail.

**Did the 1<sup>st</sup> - 4<sup>th</sup> defendants fraudulently reduce the plaintiffs' entitlements to land within the farm?**

69. Illiteracy may have contributed to many of the problems that beleaguered the farm affairs; for example, PW1 stated as follows while under cross-examination by Mr Odongo:

“I don't know how to read. I don't know how to write. There was someone who used to write for me. He died. I don't know his name. ...I would tell him what to write...”



70. It is critical to note that in this environment of lack of sufficient formal education, absolute trust was the currency in which members, who all came from one location in Nandi, dealt the farm affairs. There were no receipts issued to members for payments made in contribution to the capital sum of Kshs 70,000/= raised towards the purchase of the farm. PW1 stated:
- “I paid Kshs 3600/= for the shamba and didn’t get a receipt but I was given another letter by Samoei. The letter was an agreement to await the receipt.”
71. According to DW2, members’ contributions meant to defray the loan from AFC were supposed to be paid to the directors and not directly to AFC, and therefore even the original receipts members held after paying directly to AFC were not of any aid to them in acquiring land. DW2 stated as follows:
- “People trusted one another. There were not even receipts. They just paid the money.”
72. Later on in his evidence DW2 also stated as follows:
- “... (Joshua Kogo & Partners) are the only persons who can know who was involved in the payment. I paid AFC through the elected officials. The committee kept the book. That is the book that helped us get title. Those who paid directly to AFC did not do the right thing.”
73. PW3 stated as follows in examination by Mr Magut:
- “I took the place of Zakayo. I paid Kshs 6,000/=. They recorded it in the register in the presence of the chairman and vice chairman. There were no receipts then.”
74. PW1 himself observed as follows in his evidence under cross-examination by Mr. Wanyama:
- “I don’t know how much was paid to AFC. Kogo used to receive the money and then take it to AFC. That was the procedure.”
75. This position appears to have disadvantaged many including PW1 who has a receipt for Kshs 5000/= (P. Exh 3) and PW2 who has 2 receipts for Kshs 10,000/= and Kshs 15,000/= respectively issued to them but in the name of Joshua Kogo & Partners with their handwritten names overleaf allegedly to show who has paid the sum on the front page. These appear to have been for the liquidation of the AFC loan. It is a perplexing thing that even as PW1 claims entitlement under the receipt PMFI-1, a different name, Kibiwott Kipsienei, appears on the receipt. The probable reason why the loan repayment contributions from members were supposed to be made through the Farm leadership may have been the mode of loan repayment agreed upon between the actual borrowers (Joshua and Erasto) and the lender. DW2 stated as follows:
- “We were to pay the AFC loan by instalments.”
76. It would appear that the AFC loan accrued interest over time which also had to be met by the members. Produced as P. Exh 8 is a letter dated 12/06/1987 from the Agricultural Finance Corporation to Kipsoimo Kitur & Others with the reference as Loan No. 000044 J.K Kogo & Partners indicating the balance to be Kshs. 162,100/= broken down as follows: Principal sum Kshs. 90,000/= and interest of Kshs. 72,100/=. DW2 also testified that further loans were borrowed besides the first one.



77. To make matters worse for the members, it also mattered which AFC office received the direct payments from the members when they chose to repay the loan directly. PW1 stated:

“We were told only the Nairobi AFC office is recognized not the Kitale office.”

78. As a result, PW1 and his son had to travel to Nairobi as recommended by the panel of elders to obtain evidence of PW1’s payments towards the clearing of the AFC loan in order to demonstrate how much land he was entitled to.

79. From the evidence of the parties it is also evident that members also farmed on the suit land and obtained maize and milk yields which were credited towards the repayment of the AFC loan. DW2 stated as follows:

“Every member had cows. Milk was aggregated and sold.”

80. I have set out the above excerpts from the evidence of the witnesses to underscore the amount of trust that the members had in one another, in the group’s founders and in the management of the farm, and the uphill task that it is bound to be to establish if the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs were shortchanged or the 3<sup>rd</sup> plaintiff robbed of his entitlement altogether as alleged in the plaint.

81. Some glitches in the flow of trust may have cropped up along the way; while before the Kapomboi panel of elders on 25/9/1987, PW1 testified as follows regarding why he paid Kshs 15,000/- directly to the AFC instead of through the directors:

“I did not trust the directors.”

82. Thereafter in those proceedings, he was questioned as to whether he found the AFC manager with a note barring members from paying in unless accompanied by the directors and he answered:

QUOTE{startQuote “}

No. I paid much earlier before you had written your note.”

83. His further testimony was that he paid Kshs 5000/= to the directors and the rest of the money to the AFC, but when he took the AFC receipts to the directors, they rejected them. This evidence underscores the fact that there may have been some kind of reward to those who unquestioningly trusted, obliged and paid to through the directors as it signified loyalty in contrast to those who distrusted them and paid to the AFC, notwithstanding the fact that the payments went to clear the same loan. PW1 was uncomfortable with the request that members do repay the loan since according to the evidence he gave before that panel of elders, the Mugeiyot Farm could pay up the loan since they were ploughing the farm and the directors used to say that they are repaying the loan. Clearly, going by that evidence, it is possible that the proceeds of farming had found their way to other destinations. PW1 also testified that as at the time he was paying for the loan through the AFC, he was not aware that the farm had already been subdivided. He admitted that at the time he only had 22 acres instead of the 116 and a quarter which he had anticipated to get. Clearly, his loan repayments through the AFC did him considerable harm.

84. It is vital to note that despite the contributions having been received from 18 members the land was registered in the names of only two persons, Joshua and Erasto, and no entry on the title evinced that they held it in trust for the rest of the members; the most perilous aspect was that they were described in the title as “tenants in common in equal shares” as though they held the land only between themselves without any interest being claimed by any of the members. However, the redeeming fact is that they



did not deny the member's contributions and eventually the land was distributed amongst members although the plaintiffs now claim some foul play and seek nullification of that distribution. So what is the evidence provided by the plaintiffs that there was foul play?

### **The 1<sup>st</sup> plaintiff**

85. The 1<sup>st</sup> plaintiff's evidence is that the amount he contributed entitled him to 150 acres; he was allocated plot no 22 on swampy ground measuring about 5.513 ha and plot No 99 on an arable location measuring about 0.7932 ha. He also stated that Plot No 22 is of lesser size than what is indicated on the title deed that he holds. He complained that the land he got is too small considering that he sold half of another parcel that he had in Nandi in order to buy land in Trans Nzoia. DW2 concurred with PW1 only in so far as the land allocated to him was concerned and stated that in his evidence that the 1<sup>st</sup> plaintiff has about 16 acres.

### **The 2<sup>nd</sup> plaintiff**

86. The 2<sup>nd</sup> plaintiff's evidence is that his father ought to have gotten 119 acres; that his father showed him a 12-acre portion in 1976 in an arable spot and 13 acres in a swamp. After farming on 10 out of the 12 acres for 1 year he was informed by the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant and another unidentified person that his father's land had been relocated to a swampy area and therefore he was unable to farm any more. That presently the only portion that was realized of his father's entitlement of 119 acres is 17 acres, 14 of them being on swampy ground and 3 on an arable spot. Consequently, there is a balance of 102 acres. DW2's evidence was that the 2<sup>nd</sup> plaintiff has 20 acres on the ground and not 17 as he claimed.

### **The 3<sup>rd</sup> plaintiff**

87. The 3<sup>rd</sup> plaintiff stated that he had no land at all. This was despite his having been compelled to refund the person who had purchased his land all the purchase price. On his part, DW2 stated that the court had ordered that the 3<sup>rd</sup> plaintiff, having been found to be no longer a member, should be evicted from the farm. However, DW2's evidence that Some Ngelechei was not a partner is invalid in this court's view for the reason that evidence shows that he repaid back to Atanas Wepukhulu the consideration he had received and repossessed or had a right to repossession of his land as it was before minus the 12 acres he had sold to Kimase Chepkwony. It is noteworthy that DW2 could not account for the reason why Some Ngelechei's name was not cancelled out in the register.

88. Having examined the separate claims of the three plaintiffs, this court must now determine whether they have demonstrated that they were denied their full entitlement by the defendants. The 1<sup>st</sup> - 4<sup>th</sup> defendants' response is that the plaintiffs were some of the persons who remained in Nandi, apparently for the reason that they had other land there, while other members who lacked land in that place of origin quickly settled on the newly purchased farm and commenced farming activities thereon immediately after it was transferred from Bedford to Joshua and Erasto.

89. The exercise of ascertaining that claim is beleaguered by certain problems: the farm was comprised of both marshy and arable land and there had to be clarity as to how much area was covered by each topography. Public utilities were provided for from the Farm land. Even assuming that this court could perform its own computations based on data given, neither the plaintiffs nor the defendants availed credible information as to how many parcels were public utilities, including roads, dams, schools and so on, and their total acreage; in the 1<sup>st</sup> - 4<sup>th</sup> defendant's records, there are so many cancellations and illegible entries such that it is difficult to know the truth from falsehood. Some of the alleged minutes are undated. In this court's view, only a wholistic audit of the farm records and a reconciliation of land allocation with all the members' actual contributions could have created a true picture as to what



happened; also, the number of members increased from the original 18 to 22 without any evidence of special provision being made as to how the new members' entitlements would be catered for in view of the original 18 members' earlier contributions towards Kshs 70,000/= save the general indication that any person's whose funds were applied to repayment of the AFC loan would be entitled to land or more land. The plaintiffs may have produced their own receipts, but the decision as what acreage each member is entitled to finally rests on a computation based on exactly the total each member paid to the farm management from their pockets including monies paid directly to AFC and monies paid to AFC through the directors. There is also required evidence of how much was paid to AFC through the agricultural activities, and how that is to be apportioned to members who surrendered their hard earned produce to the company for sale for the purpose of loan repayment. Clearly this is no mean task. There was no evidence that any specific formula was to be applied in sharing out the land amongst farm members save the very general statement that members had to share in both the arable and swampy lands which is very unhelpful to this court; there was therefore no allegation or evidence of breach of such algorithm; that kind of formula as juxtaposed with evidence of how much land was arable or swampy, when presented by an expert witness with a well-grounded mathematical background ought to have aided this court in arriving at a conclusion as to the exact acreage that each member was entitled to. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs did not give such a proper background for their computations. There is therefore no basis for stating that the plaintiffs' theory as to how much land each member was entitled to in in paragraph 21 of this judgment is correct. It does not demonstrate how such acreages were arrived at in respect of all the named persons who include people who never participated in the present suit. The plaintiffs have therefore failed to persuade this court to find that the defendants gave them less land than they were entitled to.

90. The case of the 3<sup>rd</sup> plaintiff is somewhat different from the others'. He sold his land, was compelled to refund the purchase price to the buyer, and even after that refund, he lost all his land represented by that refund. His evidence-in-chief went as follows:

“I refunded the purchase price through Wafula J.M. Advocate. I produce a bundle of 5 receipts as P. Exh 29(a) – (e). I returned to the land and cultivated the land. I then went to Turbo. I came back and found Kiptarus Sitienei had planted on it. I took him to the chief who told him to move. I went to other offices.”

91. On 12/3/2019 while being examined by Mr. Magut the 3<sup>rd</sup> plaintiff stated as follows:

“I had houses. I built in 1977. I never demolished the houses. One was semi-permanent, one grass-thatched hut and a kitchen. There was a toilet for each. There were fences of barbed wire around the land with about 128 posts. There were 48 trees I had planted. I had a store on the land. it was grass thatched. When I came back I found all the houses but the chief Boen later demolished the mabati house and took 3 houses. The grass thatched hut was demolished by Arap Kogo. He took everything from the house without my consent. Even today I can tell and show where my land was. That my former land is now occupied by about 5 people. There is Kogo, Kiplimo Rugut, Musa Talaam and a Kisii lady- she is Okerio, the 19<sup>th</sup> Interested party and Kiptarus Sitienei. Boen moved into 11 acres of my land. He allowed his sons to reside there.”

92. The 3<sup>rd</sup> plaintiff is therefore aware of where his land is located and the persons in possession thereof Albert Boen, Kogo, Kiplimo Rugut, Musa Talaam, Okerio and Kiptarus Sitienei. However, the bane of the 3<sup>rd</sup> defendant's case is that he has not sought specific orders in this suit that the land be recovered from those persons and some of them have not been joined to the present suit. He seems content with



the general orders that the 111 titles issued be cancelled and the 5<sup>th</sup> and 6<sup>th</sup> defendants be directed to amend their records and issue fresh title deeds reflecting the names and acreages of proprietors and their legal representatives where necessary as set out as per paragraph 25 of the plaint.

93. In this court's view, this should not have been the case. Since he had known the full extent of his land, all the 3<sup>rd</sup> defendant ought to have done in this case was to call independent evidence of the occupation of his land by the persons he names and establish the specific portion of his land that each had trespassed into. He ought to have sought specific orders against the trespassers. I would hardly deem it proportionate or just to nullify an entire farm's subdivision and also cancel hundreds of titles on his account alone while he had a specific remedy against identified individuals. Consequently, his claim must fail.

Should the titles to all those parcels known as Kapomboi/Kapomboi Block 2 (Mugeiyot/1 up to Kapomboi/Kapomboi Block 2 (Mugeiyot/111 which all emanated from LR 8417/1 (Mugeiyot Farm) as well as those that resulted from the subdivision of any of the said titles be revoked and the 5<sup>th</sup> and 6<sup>th</sup> defendants be compelled to amend their records and issue fresh title deeds reflecting the names and acreages of proprietors and their legal representatives where necessary as per the distribution set out in paragraph 25 of the further amended plaint?

94. Cancellation of title is an exercise which if not properly handled may wreak havoc on persons whose ownership is not subject to doubt. In this case not less than 280 titles would be cancelled if this court acceded to the plaintiffs' claim. A title may be cancelled in accordance with the provisions of section 26(1) of the LRA which provides as follows:

“26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

95. The principal basis of the plaintiffs' prayer that the titles above be revoked is premised on the allegations that they were denied their rightful share of the farm land and that the surrender of the head title for the property known as LR NO 8417/1-Mugeiyot Farm and the subdivision thereof and issuance of subtitles are illegal. This court has already established that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs have failed to establish to the required standard that they were denied their rightful shares. This court has found that the 3<sup>rd</sup>



plaintiff is still a member of the Farm but that he knows the persons who have been in occupation of his land and he has not sued them and so his claim has also failed. Consequently, the claim of denial of the plaintiffs of their rightful shares of the Farm land does not afford this court a good reason to issue orders nullifying the titles to the suit land. Concerning the illegality of the surrender, this court notes that the evidence of DW1 was that originally the transfer of the main title was effected on 5/7/1965 into the name of Joshua Kiberenge arap Kogo and Erasto C. Arap Samoei as tenants in common in equal shares. Surrender of the title was also done by the two gentlemen for the purpose of subdivision and his office received the original title deed according to that surrender. He stated that his records indicate that J. K. Birech as chairman of Mugeiyot farm wrote a letter on 17/2/1997 surrendering the head title to the government which letter accepted the conditions set by the government. The surrender itself is dated 3/3/1997 and it is from the two former owners (Joshua Kogo and Erasto Samoei) on behalf of the entire farm. According to him, there was no evidence on record that they had been authorized by the Mugeiyot Farm members to surrender the title. However, in view of the fact that Joshua and Erasto were perfectly entitled to surrender a title which was in their name, I find that there is nothing that barred them from doing so, or that there was any knowledge, or obligation on the part of the Chief Land Registrar to inquire from the plaintiffs whether their authority had been issued, or that there was a special mechanism put into place by the members for its issuance. The plaintiffs having failed to demonstrate that it was essential, that lack of authorization has not been shown to have been necessary.

96. However, there is a claim by the plaintiffs that the subdivision and issuance of individual titles to the resultant parcels was illegal and irregular and null and void ab initio in view of stay orders issued by the court in Kitale High Court Miscellaneous No. 22 of 1997 on 25/6/1997 which remained in force until 19/2/2015.
97. I have perused the original court record in respect of Kitale High Court Miscellaneous No. 22 of 1997 and found that there was indeed an order that was issued by the Hon Justice Nambuye (as she then was) on 25/6/1997. The order states as follows:
1. That leave is hereby granted to the applicants to apply for an order of certiorari, to remove into this court and quash the proceedings and decision of Kwanza Land Disputes Tribunal and which was adopted as a judgment of the court on the 18<sup>th</sup> April 1997 vide Kitale PMC Land Case No 11 Of 1997;
  2. That the grant of leave do operate as a stay of the enforcement of the tribunal decision and which was to the effect that members of Mugeiyot Farm L.R. No 8417/1 are free to go ahead and obtain their titles;
  3. That the substantive application should be filed within 21 days from today;
  4. That the substantive application once filed be served on all the interested parties.
98. It is therefore clear that by the above order the court stayed the enforcement of the tribunal decision that gave members the go ahead to obtain titles to their portions. It was upon the plaintiffs to demonstrate to this court that that order was effectively served on the respondents in that suit, or that it was otherwise registered in the land register in respect of LR NO 8417/1. The plaintiffs never proved any of those things. It was the evidence of PW1 that after they obtained leave their advocate died mysteriously and their case file was misplaced. The original court file for Eldoret HC Misc. Appl. 188 Of 1997, vide which the main judicial review motion was filed after leave was granted, also got misplaced. When they got a new advocate, he misplaced their file which allegedly contained evidence of service of the orders of stay. The plaintiffs may genuinely have suffered such a string of misfortunes or setbacks at the hands of their counsel but it remains a requirement of the law that any case filed before court rises or falls on the strength of evidence adduced to support it.



99. It was the Land Registrar's uncontroverted evidence that no such order was registered against the Mugeiyot Farm title and no contempt proceedings have ever been lodged against any of the lands officials for violation of such an order; the Land Registrar admitted that only an order made in Eldoret Civil Appeal No 35 Of 1991 was acted on by his office by way of restricting the Mugeiyot Farm title and that order is not the basis of the plaintiff's claim that the suit titles should be nullified, and in any event it was said to have been discharged when the appeal was concluded long ago. This court can not therefore uphold their claim for nullification of titles and subdivision on the basis of such the stay order made in Kitale High Court Miscellaneous No. 22 of 1997 for proof of lack of service.
100. Further, on the issue of cancellation of titles, this court has found that this being not a representative suit, prayer no (b) in the amended plaint seeks the nullification of all titles including those that resulted from further subdivisions of the original parcels; this court takes note that ordinarily subdivision denotes the purpose of disposal.
101. It has been stated by DW1 that the initial number of plots was 106 but by the time of the hearing the number had grown to more than 280. The implication here would be that the increase in the number of plots is a result of numerous transfers to third parties who may not have known of the present dispute at the time of their purchase. This court finds the request for nullification of such titles in a non-representative suit to be quite misconceived. The owners deserved a hearing and got none owing to the plaintiff's approach to their suit. DW2 also testified as to why members' children were issued with titles. I find that considerable injustice may result from nullification of their titles. This observation is not an exculpation from wrongdoing by persons who appropriated public utilities. This court has noted that DW1 testified that there were numerous public utilities and they were not allocated to individuals. The claim on illegal appropriation of public utilities ought to be dealt with in a different suit so that in default of any explanation as to how those holding titles came by them, they may be nullified.
102. It is also clear that other disputes that have been identified in this suit can only be adjudged strictly between the parties involved in them, for example, the dispute between Theophilus' estate represented by Andrew Kiptanui (PW7) on the one hand and one Kapkasio to whom Theophilus' land was allegedly issued. It is indeed clear that Kitale CMC Land Case No 17 Of 2010 was filed against Theophilus and a decree (PEXh.44) was issued on 9/10/2010 in which the court stated that Kipkasio could not have afforded to buy his own shares in Mugeiyot Farm; that his contribution during his Theophilus' absence enabled final allocation of LR Kapomboi/Kapomboi Block 2/Mugeiyot /21 and LR Kapomboi/Kapomboi Block 2/Mugeiyot 95; that the title in the name of Kipkasio be cancelled in respect of the 25 acre piece of land and it be subdivided and Theophilus be issued with 15.3 acres therefrom. That decree being in existence, all that matters now is whether the decree holder has enforced it and the dispute between Theophilus and Kipkasio is therefore res judicata.
103. So have the plaintiffs established that all the titles should be cancelled under Section 26(1) of the LRA?
104. In this court's view, though some irregularities can be noted in the process of surrender and issuance of titles, this court is not able to state that the plaintiffs have established their claim to the required standard. The land having been purchased for distribution amongst Farm members, that purpose was on to a large extent achieved and I find that the three plaintiffs before me are the only persons having express grievances about the entire surrender, subdivision and issuance of titles; the bulk of the members were content with what they got.
105. I also find that the plaintiffs were partly to blame in that they failed to attend to their entitlements keenly soon after payment in contrast with other persons who settled on the land and began farming. The plaintiffs are also victims of time lapse. It is either that the plaintiffs approached the panels of elders, tribunals and the courts with no specific claims as to the sizes of the portions of land they claimed in the



farm or that their claim was not well understood; the decision in Eldoret Civil Appeal No 35 of 1991 exemplified this in that it found that there was lack of pleadings in the dispute before it was referred to the panel of elders, and it came to court for the first time by way of filing of an award; those with specific decrees against other farm members should have gone for their execution; for those like the 3<sup>rd</sup> defendant who had earlier settled and who already knew the original extent their land on the ground, boundary disputes which could have resolved the disputes easily were not lodged in good time before titles issued; as a result and save for only a few individual determinations, decision after decision only generally recommended subdivision and distribution of the farm “equitably” amongst all members with regard to their total contribution towards purchase and loan repayment, and consideration for arability or otherwise of the portions so distributed. If that had been done, decrees for their specific entitlement and which could have been enforced against the farm management in the earlier days of the dispute could have helped resolve it long ago. As the dispute continued, their claims became hazier as time went by and it is clear that 41 long years after the suit land was subdivided and distributed amongst members who are now already settled, and the farm records and systems being in shambles, and some of the original parcels having been subdivided or disposed of, their hope of tracing their claims diminished. I have perused the documents produced by the defendants. The plaintiffs’ names feature in some of the records. However, there are so many cancellations and illegible entries such that it is difficult to know the truth from falsehood. Some of the alleged minutes are undated. In this court’s view, only a wholistic audit of the farm records and a reconciliation of land allocation with all the members’ actual contributions could have allowed the real truth to emerge as to what happened and I am aware of the uphill task that faced the plaintiffs in establishing their claims. However, the fact remains that the prayers sought in this claim by the plaintiffs are disproportionate to the harm that may be occasioned to innocent owners by the blanket nullification of titles that they now seek.

106. Some of the blame may be apportioned to greed on the part of the 1<sup>st</sup> - 4<sup>th</sup> defendants amongst other members they were in cahoots with. For example, the minutes of the panel of elders that sat on 25/9/1987 stated as follows:

“We have carefully listened to both parties and we have also examined the documents presented before us. When they met and decided to contribute towards the purchase of land all had good intentions. But as time went by those who initially entered the farm reaped the early fruits and found them to be sweet. So that brought all these differences as they did not want the others to enjoy as much as they were enjoying.

Our ruling is as follows: -

- (a) For Kipter Murwon, Kipsoimu Kitur, Paul Kogo and T. Lelei, its true that they produced enough document supporting their claim. We rule that everybody who contributed money towards purchase of the farm be allocated land equal to the amount of money paid.

As for Mansela Koross we the panel elders visited the area. It is true that the place is a swampy area. We rule that when they bought the farm, they bought also the rocky areas, swampy areas etc. so our ruling is that they should share the swampy area. This lady should be given some arable land and let all members share the swampy area.”

107. It is clear from the above that the panel that sat over the dispute noticed improper conduct of the farm affairs but pinned such conduct on no person. This case has been made the more difficult by the fact that the farm buyers never incorporated themselves into a company and pursuit of individual interests was left to the rule of the law of the jungle. It is not without much sympathy for the plaintiffs that



this court comes to the foregoing findings. However, no depth of desire for perfection or correction of the mistakes in the management of the internal affairs of Mugeiyot farm can persuade this court to intervene in the manner urged by the plaintiffs under the prevailing circumstances.

108. This court is, for the reasons given above, bereft of any ground upon which to nullify all the titles issued to land in Mugeiyot Farm or to compel the 5<sup>th</sup> and 6<sup>th</sup> defendants to amend their records and issue fresh title deeds reflecting the names and acreages of proprietors and their alleged legal representatives as per the distribution set out in paragraph 25 of the further amended plaint.
109. The upshot of the foregoing is that this court finds that the plaintiffs have failed to establish their claim to the standard required by law and I therefore dismiss the present suit. However, noting the circumstances of this case and being of the view that the plaintiff's failure to prove their claim is not absolute evidence of lack of any wrongdoing on the part of the defendants, I order that each party shall bear their own costs of the suit.
110. Lastly, I must commend all counsel in this matter for their diligence in their quest to bring this very old dispute to an end. Mr. Magut worked tirelessly in having all the witnesses for the plaintiffs testify before this court. Mr. Odongo and Mr. Wanyama are also not to be left behind as their efforts and cooperation in the matter greatly helped in having the matter heard to its conclusion with the least of setbacks.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 19<sup>TH</sup> DAY OF JANUARY 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU.**

