



**Kangaru v Wachira & 4 others (Environment & Land Petition  
001 of 2020) [2023] KEELC 18977 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18977 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION 001 OF 2020**

**EK WABWOTO, J**

**JULY 13, 2023**

**IN THE MATTER OF ARTICLES 2, 10, 19, 22, 23, 35, 40, 47,  
162(2), (B) & 165(3)(B) OF THE CONSTITUTION OF KENYA,**

**2010**

**AND**

**IN THE MATTER OF THE LAND ACT**

**-AND-**

**IN THE MATTER OF THE LAND REGISTRATION ACT (NO 3 OF  
2012)**

**AND**

**IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION  
OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND  
PROCEDURE RULES, 2013**

**BETWEEN**

**GICO KANGARU ..... PETITIONER**

**AND**

**ANDREW MURIUKI WACHIRA ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF ROYSAMBU LOCATION ..... 3<sup>RD</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**DCIO KASARANI ..... 5<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. The Petitioner in the petition dated 1<sup>st</sup> July 2020 seeks the following reliefs;
  - a. A declaration that the Petitioner herein is the lawful owner of land title No. Nairobi Block 110/62.
  - b. An order for eviction of the 1<sup>st</sup> Respondent from land title No. Nairobi Block 110/62.
  - c. An order of permanent injunction against the 1<sup>st</sup> Respondent from encroaching into or in any other manner interfering with the Petitioner's possession of land title No. Nairobi Block 110/62.
  - d. The OCS Kasarani Police Station to enforce the orders of this Honourable court.
  - e. Mesne profits.
  - f. General damages.
  - g. Costs of the suit.
  - h. Any other or further orders that the Honourable Court may deem fit to grant.
2. The Petition was supported by an affidavit sworn by Gico Kangaru on 1<sup>st</sup> July 2020.
3. The Respondents opposed the Petition. The 1<sup>st</sup> Respondent filed a response to the petition together with a counterclaim vide reply sworn by Andrew Muriuki Wachira sworn on 28<sup>th</sup> February 2022 together with his statement and that of his sole witness one Dorcas Nanjero, list of documents dated 28<sup>th</sup> February 2022. The 2<sup>nd</sup> to 5<sup>th</sup> Respondents filed a witness statement by one Gildine Karani, a Principal Land Registrar Officer sworn on 24<sup>th</sup> February 2023.

### **The Petitioner's case.**

4. During trial the Petitioner Gico Kingaru testified as PW1 and the sole witness for the Petitioner. He testified that he is son to the late Kangaru Churu who died on 15<sup>th</sup> July, 2003. Among the properties that the late Kangaru Churu owned was the parcel of land known as Nairobi Block 110/62. The said property was inherited by the Petitioner herein vide Kiambu Succession Cause Number 132 of 2007. This is evidenced by the certificate of confirmation of grant produced in evidence as exhibit "GK 2"
5. The original title deed to the suit parcel of land had been misplaced and the administrators of the estate of the late Kangaru Churu pursued the reissuance of the misplaced title deed which was issued on 28<sup>th</sup> November, 2011. A copy of the said title deed is marked as annexure "GK 3". According to PW1 his late father had acquired the suit property from Thome Farmes Co. (No. 1) Limited. This was evidenced by the copy of the green card marked as "GK 4". The Petitioner also produced a letter dated 1<sup>st</sup> July, 2014 as well as rates demand note dated 18<sup>th</sup> October, 2002 both issued by the Nairobi City County Government and demonstrating that his late father was the registered owner of the suit parcel of land.
6. In addition, PW1 produced a receipt issued by D.A Nanjero & Co. Advocates on 28<sup>th</sup> July, 1990 for the sum of Kshs 5,320/-. The said amount was with respect to payment of rates, fees and VAT with respect to plot No. 62. As early as the year 2009, the Petitioner was involved in a tussle with the late John Njau Wachira who is the father to the 1<sup>st</sup> Respondent. According to PW1, on or about 3<sup>rd</sup> June, 2014 he found the two roomed house he had erected on the suit parcel of land had been destroyed by



- unknown people and he reported the incident to Kasarani Police Station vide O.B. No. 41/3/06/2014. As PW1 was awaiting the outcome of the police investigations, he was informed that the late Mr. John Njau Wachira had also made a report that there was a trespasser on the suit parcel of land.
7. It was his testimony that despite the police carrying out investigations, the outcome thereof was never communicated to him and neither was anyone charged with any offence. Sometime in the year 2017, the 1<sup>st</sup> Respondent, in the company of his sister, found PW1 and his workers on the suit property. PW1 and his workers were fencing the suit property. According to Petitioner, the 1<sup>st</sup> Respondent left and later came back with the local chief, assistant chief as well as three Administration Police Officers and PW1's two workers were arrested and were only released with the directions from the chief who also ordered PW1 not to set foot on the suit property again.
  8. According to PW1, he went back to the suit property in August, 2017 for purposes of clearing bushes. The local assistant chief once again appeared in the company of two Administration Police Officers. The Assistant Chief indicated that he had been instructed by his superior (the area chief) to order PW1 out of the suit property and thus PW1 was kicked out of his own property with no justification. PW1 indicates that he has made numerous attempts to have the 1<sup>st</sup> Respondent vacate the suit parcel of land to no avail. The efforts by PW1 culminated in a notice pursuant to section 152 E of the Land Act and it was only after the 1<sup>st</sup> Respondent declined to vacate the suit property that PW1 moved this court seeking to have his rights to property protected.
  9. On cross-examination, the Petitioner in response to question regarding the origin of the suit land, stated that, the land belonged to the Government of Kenya per the copy of green card and was then transferred to his late father. He stated that, he does not know the whereabouts of the original title neither recall whether a search was conducted prior to Kenya gazette advert.
  10. He testified that, he does not know his father's share number neither aware of transfer of his father's land to somebody else. He also stated that he is not aware of land parcel Nairobi/Block 110/3 neither the transfer thereof.
  11. He testified that, the 1<sup>st</sup> Respondent is in possession of the suit land, that he demolished his house and he want the court to order him to vacate and be restrained from interfering and he be ordered to pay him damages for his two roomed house he demolished.
  12. On cross-examination by Mr. Njagi Counsel appearing for the 2<sup>nd</sup> – 5<sup>th</sup> Respondents he testified as to why he has sued the 3<sup>rd</sup> (Chief Roysambu) and 5<sup>th</sup> DCIO (Kasarani) Respondent, he told court it was because the Chief and his Askaris were there when 1<sup>st</sup> respondent demolished his house. That he sued DCIO because he made a complaint to him. On being asked for OB and whether he got any investigations, if so why he has not exhibited then as evidence, he testified that he was issued with an OB and he was given investigations report which he gave to his lawyer.
  13. On re-examination, he stated that he is still the paying rates in respect to the suit property. He also stated that he does not know how many shares his late father had.
  14. The Petitioner also filed written submissions dated 7<sup>th</sup> March 2023 through Kamwaro & Associates. In the said submissions seven issues were outlined for consideration by the court. This included the following: -
    1. Whether a title deed with respect to the suit property was processed and if so in whose name?
    2. What plot number gave rise to the suit parcel of land?
    3. Who is in possession of the suit parcel of land?



4. Whether any party has reported fraudulent activities with respect to the suit parcel of land and if so what was the outcome of the investigations?
  5. Whether Ms. Dorcas Nanjero was appointed to act on behalf of Thome Farmers No. 1 Co. Limited or its shareholders and if so whether she had authority to manipulate the register of shareholders of Thome Farmers 1 Co. Limited and if so whether the changes admitted were properly and or procedurally carried out.
  6. What orders should the court make.
  7. Who should bear the costs of the suit and counterclaim file hereon.
15. On the first issue it was submitted that a title deed with respect to the suit parcel of land being Nairobi/Block 110/62 was processed and the same was processed in the name of the late Kangaru Churu. It was submitted that the Petitioner has exhibited numerous documents to confirm that indeed a title deed was processed in his father's name. Among the documents that the Petitioner has brought before the court is a copy of the title deed with respect to the suit parcel of land which was issued on 28<sup>th</sup> November 2011. The green card produced in evidence by the Petitioner indicates that it was opened on 29<sup>th</sup> August 1990 with the registered owner being indicated as the Government of Kenya and on the same date it was transferred to the Petitioner's late father Mr. Kangaru Churu.
16. It was submitted that Section 26(1) of the *Land Registration Act* (No. 3 of 2012) provides as follows: -
- “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.”
17. In this case, it was incumbent upon the 1<sup>st</sup> Respondent to demonstrate that the Petitioner acquired the title to the suit property in a fraudulent manner. The 1<sup>st</sup> Respondent failed to do so and his evidence in fact left more questions than answers.
18. Reliance was made to the Court of Appeal at Nairobi Civil Appeal No. 106 of 200 Vijay Morjaria Vs Nansingh Madhusingh Darbar & Another. The appellate court dealt with the issue of fraud and held that;
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
19. It was also submitted that the 1<sup>st</sup> Respondent has pleaded at paragraph 5 of the response to the Petition that the title held by the Petitioner was fraudulently obtained but did not demonstrate how fraud was



perpetuated. Any mistakes there would have been in the registration process cannot be attributed to the Petitioner.

20. In was argued that in the Environment and Land Court at Kajiado ELC Case No. 5 of 2017 Christopher Lempaka Matayian Vs John Ole Waupi Kobaai & Others the court dealt with the issue of fraud and held that:

“From the evidence presented by the Plaintiff and relying on this decision, I find that the burden of proof was upon the Plaintiff to enumerate the acts of fraud which the Defendants perpetrated that culminated in the suit lands being transferred to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively. I find that the Plaintiff failed to sue the Group Ranch Officials who signed the transfer forms on his behalf. The Plaintiff expected the court to make an inference from his evidence that there was fraud perpetrated against him which evidence is not convincing. Further, the District Land Registrar in charge of the records at the Land Registry, in so far as he acknowledged there were irregularities in the registration of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants on the respective parcels of land, as it did not include the history of the land, was emphatic that there no fraud committed. He even confirmed that the transactions relating to the 1<sup>st</sup> to 4<sup>th</sup> Defendants’ parcels of land were done in his office and the said records are available. I find that the 1<sup>st</sup> to 4<sup>th</sup> Defendants could not have been held responsible on maintenance of records at the Land Registry as they were outsiders and it was the duty of the Land Registry to ensure proper records were preserved.”

21. On the second issue, it was submitted that the suit parcel of land was initially known as Plot Number 62. The Petitioner relied on a copy of the receipt issued by Ms. D.A Nanjero (RW 2) on 28<sup>th</sup> July 1990. It was also submitted that Dorcas Nanjero admitted to having issued the receipt though she contended that it relates to a different parcel of land. The said receipt is clear that it relates to Plot No. 62 Thome 1. RW2 attempted to explain that plot number 62 resulted in a parcel of land known as Nairobi Block 110/3 which was subsequently sold. There is no logic in the argument by RW 2 as to why the indicated plot number would relate to a totally different parcel of land. A look at the said receipt shows that the payment was for rates, fees and VAT. The fees referred to in the said receipt could only be transfer of fees and thus there would be no basis for RW 2 to use a number different from the title number of the parcel of land that was being transferred. Interesting enough, the 1<sup>st</sup> Respondent in his document appears to have doctored the subject receipt and added some new narration to mislead the court.

22. On the third issue, the Petitioner submitted that it was admitted by the 1<sup>st</sup> Respondent that he is in possession of the suit parcel of land. At paragraph 15 of the 1<sup>st</sup> Respondent’s reply to the Petition (found on page 3 of the 1<sup>st</sup> Respondent’s bundle) it is indicated as follows;

“That the 1<sup>st</sup> Respondent has been in physical possession, occupation and use of their Title No. Nairobi/Block 110/62”

23. At paragraph 25 of the 1<sup>st</sup> Respondent’s supporting affidavit (found at page 11 of the 1<sup>st</sup> Respondent’s bundle) the 1<sup>st</sup> Respondent depones as follows:

“That to date I being one of the administrators of my late father’s estate, I am in possession of the original share certificate No. 1136 for the title block 110/62 and I am also in possession of the parcel of land which I usually cultivate and the Petitioner has never been in possession.”

24. At paragraph 27 of the 1<sup>st</sup> Respondent’s affidavit, he goes on to say that he cannot vacate their rightfully owned plot. It was submitted that the actions by the 1<sup>st</sup> Respondent clearly contravene the right of



the Petitioner to acquire and own property of any description in any part of Kenya as provided under Article 40 of *the Constitution*.

25. On the fourth issue, it was submitted that the Petitioner made reports about the interference with his peaceful possession of the suit parcel of land but the outcome of the police investigations was never communicated. The exhibit marked as GK – 5 (a) is a letter dated 1<sup>st</sup> July 2014 addressed to the DCIO Kasarani Divisional Headquarters. The said letter refers to a letter from the DCIO dated 19<sup>th</sup> June 2014. It is not a coincidence that the Petitioner had made a complaint at Kasarani Police Station on 3<sup>rd</sup> June 2014 and about three weeks later, the DCIO was carrying out inquiries about the suit parcel of land. The letter addressed to the DCIO is clear that the late Kangaru Churu was registered with the authorities as the rateable owner of the suit property. The assertion by the 1<sup>st</sup> Respondent that investigations by the police had disclosed that his father was the rightful owner of the suit property was clearly meant to mislead the court.
26. The Petitioner contended that, the 1<sup>st</sup> Respondent was put on notice that he is in occupation of the suit property irregularly but chose not to pursue any legal avenues. It would have been expected that a party arguing that no green card or title has been processed would have seen more urgency in pursuing the cancellation of a title alleged to have been issued in a fraudulent manner.
27. On his fifth issue, it was submitted that despite RW 2 indicating that she was the sole Advocate appointed to effect transfers of the resultant subdivisions from Nairobi Block 110, she did not produce any evidence in court to demonstrate that she had been so appointed. Companies operate through directors and resolution by members. RW2 was not a director and there is no evidence she was a member of Thome Farmers (No. 1) Co. Limited. RW2 could therefore not make any alterations to the members' register.
28. It was argued that at page 29 of the 1<sup>st</sup> Respondent's bundle entry number 3 read Dorcas Ayoma Mbalanya. Entry number 41 found at page 29 of the 1<sup>st</sup> Respondent's bundle also reads Dorcas Ayoma Mbalanya. Amending the members register would not have been one of the mandates bestowed upon RW2. In fact, she deleted certain entries completely such that it would not be possible to determine whose name she had replaced. It is not coincidence that the original entry number 3 is missing. We shall never know whether that is what led to Nairobi Block 110/3. Entries Number 39, 58, 65, 66 and a few others appear to be the way that the register ought to have been amended. The 1<sup>st</sup> Respondent did not file the entire copy of the register but the extract filed leaves a lot of unanswered questions. RW2 provided no evidence that she had purchased any of the plots that were appearing besides her name. The motive by RW2 was clearly to ensure that it became impossible to determine the history of the ownership of various plots through the register of Thome Farmers No. 1 Company Limited.
29. It was further submitted that it was not possible to determine who the original members were and how changes were being effected since the changes appear to have been made at the whim of RW2. RW2 pointed out to fraud having been rampant in Nairobi Block 110 which she was purportedly the sole conveyancing Counsel. RW2 could not explain the process of subdivision and how the title numbers were allocated to the different parcels of land but her explanation that plot numbers would be sequential and title numbers appear to be jumbled up is an explanation that the court should not buy.
30. The Petitioner argued that he had been prevented from using his parcel of land by the 1<sup>st</sup> Respondent in conjunction with the area chief as well as police officers for a period of more than eight years. The 1<sup>st</sup> Respondent admitted that he carries out farming activities on the suit parcel of land and thus generating income from the said parcel of land at the expense of the Petitioner and the Court to award the sum of Kshs 10,000,000.00 as mesne profits and general damages for trespass. Reliance was made to the case of Court of Appeal at Nairobi Civil Appeal Nos. E247 & E248 of 2020 Kenya Power



& Lighting Company Ltd Vs Eunice Ringera & Others. The Court of Appeal substituted the trial court's award with an amount of Kshs 6,000,000 and 12,000,000 to the Respondents in circumstances whereby the Appellant had not occupied the entire parcel of land like in the current situation.

31. The Petitioner concluded his submissions by submitting that he had proved his case to the required standard and the court was urged to grant the reliefs sought and dismiss the 1<sup>st</sup> Respondents cross petition with costs.

**The case of the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent's counterclaim.**

32. The 1<sup>st</sup> Respondent filed reply to the petition together with a counter-claim vide reply dated 28/2/2022 together with his statement and that of his sole witness one Dorcas Nanjero, list of documents all bearing the same date 28/2/2022.
33. The 1<sup>st</sup> Respondent challenged the incorrect, false and misleading information advanced by the petitioner and he clearly gave evidence regarding the root of the suit land as follows to the effect that his late father one John Wanjau Wachira paid for one share at Thome Farmers No. 1 Limited (although for the one share his name was joined with another person one Josphat Mwangi Gitubia A , a stranger to him) vide share certificate No. 1136 which gave rise to Plot No. 12 which would translate to tile No. Nairobi/Block 110/62. As such the title held by the Petitioner which he purport to emanate from land parcel Plot No. 62 is incorrect and misleading. He averred that no green card has ever been opened for land parcel plot No. 62 whatsoever up to date.
34. He stated that the Petitioner nor his late father or any of their agents/employees/servants has ever taken possession or occupied the suit land i.e. Nairobi/Block 110/62 at any one time.
35. He admitted having been served with the notice but never complied because the suit land belong to his late father and has never been in possession of anybody else expect his late father and his family. The suit land has been under his administration vide succession cause 81/2017 at the High Court of Kenya at Kiambu.
36. He became aware from information gained from his sole witness, one Dorcas Nanjero an advocate of the High Court of Kenya that, Petitioner's late father Kangaru Churu was also a member in Thome Farmers No. 1 Limited and his particulars are in the register for Nairobi Block 110 Marurui under Certificate No. 206 and the ballot plot he got was No. 62 whose resultant Title Number was Nairobi/Block 110/3 while my late father John Wanjau Wachira was also a member and was joined with one Josephat Mwangi Gatubia A under Certificate No. 1136 ballot Plot No. 12 whose resultant Title Number is Nairobi/Block 110/62.
37. The 1<sup>st</sup> Respondent also learnt from his witness that Petitioner's late father sold his land parcel known as Title No. Nairobi Block 110/3 to one Rahab Njau per transfer of Land from RL 1 dated 9<sup>th</sup> June 1993. The said Rahab Njau was issued with the Title deed title No. Nairobi/Block 110/3 dated 17<sup>th</sup> June 1993. His sole witness played role in the transaction between Petitioner's father and the said Rahab Wambui Njau.
38. It was also the 1<sup>st</sup> Respondent's case that the process of acquisition on the green card and the subsequent processing of Title No. Nairobi/Block 110/62 in the name of Kangaru Churu was unlawful, illegal, null and void ab initio hence the Petitioner is not entitled to the reliefs sought from the court.
39. It was also the 1<sup>st</sup> Respondent's case that the Petitioner, has not set out with a reasonable degree of precision the provision under [the constitution](#) that has been infringed and the manner of any such



infringement. He has not demonstrated any accrued property rights to the 1<sup>st</sup> Respondent's title to warrant any protection by this Honourable Court.

40. The 1<sup>st</sup> Respondent also stated that he has been in physical possession, occupation and use of their land parcel title No. Nairobi/Block 110/62 and is also in possession of the original plot certificate issue in favour of his father and they have not disposed off, alienated or in any way parted with the possession of the land whatsoever.
41. It was contended that the alleged report at the Kasarani Police Station was futile as the Petitioner did not have any legal claim against the 1<sup>st</sup> Respondent's Title No. Nairobi/Block 110/62 whatsoever. In fact it is the 1<sup>st</sup> Respondent who reported the Petitioner's frequent attempts to take possession of their family land. The police carried out investigations and informed both parties their findings and since then they have on numerous occasions repelled such forceful interference with the quiet possession and use of the 1<sup>st</sup> Respondent's family land and advised the Petitioner to pursue his claim in court.
42. The 1<sup>st</sup> Respondent's deceased father was the bonafide purchaser of Plot No. 12 Thome Farmers Co. Ltd under Certificate No. 1136 and the resultant Title Number is Nairobi/Block 110/62. He was issued with the original plot certificate No. 1136 which is still in custody of the 1<sup>st</sup> Respondent to date being one of the administrators of his late father's estate.
43. The said resultant Title No. Nairobi/Block 110/62 forms part of the 1<sup>st</sup> Respondent's deceased father's estate as indicated in the Certificate of Confirmation of Grant issued on 22<sup>nd</sup> February 2018 in Nairobi High Court Succession Cause No. 687 of 2016 which was transferred to the High Court at Kiambu and became succession cause 81 of 2016.
44. The 1<sup>st</sup> Respondent's family have been in quiet possession, occupation and use of the land since 1987.
45. The Petitioner illegally and fraudulently obtained a Title Deed dated 28<sup>th</sup> November 2011 in the name of Gico Kangaru vide Kiambu SPM Succession Cause No. 132 of 2007 purporting that the said Nairobi/Block 110/62 formed part of the estate of late Kangaru churu.
46. The Petitioner illegally relied on an illegal and fraudulent green card for plot No. 12, parcel No. 62 to mislead the 4<sup>th</sup> Respondent to process a Title Deed yet no green card has ever been opened for parcel No. 62 which belongs to the 1<sup>st</sup> Respondent's family.
47. The 1<sup>st</sup> Respondent in counter-claim sought for the following orders;-
  - a. That the Petitioner's petition be dismissed.
  - b. An order for immediate cancellation of the fraudulent Title No. Nairobi/Block 110/62 in the name of the Petitioner Gico Kangaru dated 28<sup>th</sup> November 2011 forthwith.
  - c. An order that the Nairobi Chief Land Registrar do process and issue the 1<sup>st</sup> Respondent with a valid title deed for the suit land title No. Nairobi/Block 110/62 forthwith.
  - d. Costs of the suit and interest.
48. During trial, Mr. Andrew Muriuki Wachira, adopted his statement dated 28/02/2022 and testified that; he is one of the administrators of the estate of his late biological father one John Wachira Wanjau who died on 1<sup>st</sup> day of May 2015 and the land parcel block 110/62 belong to his late father. It is one of the assets forming his estate and it is supposed to be transferred to the family company. He recalled sometimes in the year 1987, his late father John Wanjau Wachira applied for shares at Thome Farmers No. 1 Limited and that is how he acquired the plot. He was issued one share jointly with another applicant known as Josphat Mwangi Gitubia (A) who he did not know at all and he never



- got to meet him. He solely paid for the whole share in full and a share certificate No. 1136 which gave rise to Plot No. 12 title No. 110/62 was issued in his name together with the name of Josephat who remained a stranger to him. The stranger Josephat Mwangi Gitubia (A) did not contribute towards the share purchasing and his late father tried to find out who he was and he learnt that he died in America sometimes in the year 2012 before the changes were effected to remove his name from the share certificate so that his later father could process the title in his own name only.
49. He explained that this was the hitch in processing the title hence the delay and he is still in possession of the share certificate and in actual possession of the plot as one of the administrators of his father's estate. 1<sup>st</sup> Respondent is therefore clear that his late father's asset is plot No. 12 title 110/62 emanating from the said share certificate 1136 Thome Farmers No. 1 Limited but delay of title issuance to his father was occasioned by inclusion of the said Josephat Mwangi Gitubia who his late father was struggling to trace as to effect removal of his name from the share certificate.
50. 1<sup>st</sup> Respondent stated that he was informed by his witness one Dorcas Nanjero Advocate that she is the only one who was instructed by Thome Farmers No. 1 limited to process titles for the shareholders for plots resulting from subdivision of land parcel known as Nairobi/Block 110 which plots were given to the shareholders. She informed him that per register one Kangaru Churu was also a shareholder one one (10 share only which gave rise to one plot, ballot No. 62 whose resultant title was Nairobi/Block 110/3. She processed title for Kangaru Churu after he paid the requisite fees to her office sometimes in July 1990 and title for Kangaru Plot No. 62 became 110/3. She informed him that Kangaru Churu did not own any other share with the company and neither own any other plot. He testified that to date him being one of the administrators of his late father's estate, he is in possession of the original share certificate No. 1136 for title block 110/62 and also in possession of the parcel of land which he usually cultivate and that the Petitioner has never been in possession at any one time. He told court that he cannot vacate their rightfully owned plot and the Petitioner should be restrained by the Honourable Court from intermeddling with the estate of his late father. He prayed that his case should be dismissed and the title be declared fraudulent, fake and an order be granted cancelling the title he is holding.
51. On cross-examination by Mr. Njagi state Counsel, 1<sup>st</sup> Respondent stated that Thome Farmers 1 limited may not be operational. That he has tried severally to locate their offices at Githunguri without any success. On being questioned about plot 110/3 locality and if it is occupied, he said it is not a neighbor to the suit land and he does not know whether it is occupied or not. On being asked why title has not been processed for the suit land, he answered that delay was because the share certificate came out in two names, his late father's name and that of one Josephat Mwangi Gitumbia A who his father did not know. He looked for him and he was not successful hence he paid the full amount for the share alone. His late father tried to remove Josephat name, heard he could be traced in America but before he could assist him remove his name, he heard Josephat died in America hence the changes were not made. 1<sup>st</sup> respondent testified that, the changes can be effected if they trace administrators of the estate of the late Josephat mwangi Gitumbia A. 1<sup>st</sup> Respondent therefore testified that, his late father's title has never been processed. Its plot No. 12 and would be title No. Nairobi/Block 110/62.
52. On cross-examination by Mr. Kamwaro for Petitioner, 1<sup>st</sup> Respondent testified that share certificate no 1136 belong to his late father. On how plot number change once titling is done, 1<sup>st</sup> respondent testified that, he is not conversant with survey matters. That he has never owned land in a land buying company and has no idea who gave ballot numbers and the subsequent title numbers given by the land's office. On being questioned as to how they would process title and, in whose name, 1<sup>st</sup> respondent stated that, they would have to remove Josephat Gitumbia's name. That his late father had not met Josephat and that, he knew that his late father had one share only. That Dorcas his witness has the register and she had instructions exclusively to process titles.



53. On being asked how many shares the father had an in whose name title would be processed he reiterated that, from the advocates record it indicated his late father had one share only no. 1136 which own one plot and that it would be transferred to the family company per certificate of confirmation of grant he exhibited. On how administrators of Josphat Gitumbia A would react, he said he does not know. On whether he know Thome Farmes 1 limited lawyer, he testified that, it is one Dorcas Nanjero who he met sometimes in 2016 after the death of his father. On being asked on what basis he would process title, he said as an administrator of his late father's estate. On being asked about investigations by the police, he testified that Dorcas Najero was contacted by DCIO and she confirmed ownership per register. He further testified that it was during investigations he learnt Kangaru Churu had one share only No. 206 ballot Plot No. 62 which was given title No. Nairobi Block 110/3.
54. On being asked how much he knew about the plot, he testified that, although the was outside the country between 1996 – 2015 he frequently communicated with his late father and he visited him but returned to the County once and for all in the year 2015. On question as to who is in possession, he testified that, his family is in possession, they plant napier grass for their cows and they are in touch with their neighbor employees look after the plot for them.
55. On re-examination on who has possession of the plot, the 1<sup>st</sup> respondent told court that, his family is in possession, has a “mabati” i.e iron sheet structure and cultivate it by growing napier grass which they use to feed their cows. On being asked by the court to clarify what would be the title description of their late father's plot No. 12, 1<sup>st</sup> respondent testified that, it would bear same description as the fake title the petitioner is having.
56. Dorcas Nanjero testified on behalf of the 1<sup>st</sup> Respondent as RW2 adopted her witness statement dated 28/2/2022 filed in court. Her evidence is reproduced in brief hereunder. She produced exhibits; Letter of instruction and register of shareholders, copy of transfer and title of Nairobi Block 110/3 and copy of ruling, Nairobi ELC 163/2019.
57. She testified that she was given instructions in writing by Thome Farmers No. 1 Limited to carry out conveyance process of their land parcel 110 situated near Safari Park Hotel. The company gave her their shareholders register which contained personal details of their member such as their identity card numbers, share certificate number, the number of plot each balloted and the subsequent title number description obtained from the land office which is per the lands office register of that particular area. She testified that the procedure for processing titles for the parcel block 110 was that, she prepared a transfer for approval by Chief Land Registrar and thereafter the respective shareholder/shareholders would come to their office, pay processing fees, execute the transfer document which would then be forwarded to the commissioner of lands for execution and subsequent issuance of the title. Thereafter the plot owner would collect their original title from her office and in return surrender the original share certificate in regard to title exhibited in this petition, she testified that she never processed title to Kangaru Chur nor Gico Kangaru or any other person or entity whatsoever concerning plot subject matter herein. The share certificate is still with the owner.
58. She further testified that Kangaru Churu share certificate No. 206 and had one share only which gave rise to ballot Plot No. 62 and resultant title Nairobi/Block 110/3. Mr. Kangaru Churu sold his parcel of land to one Rahab Wambui Njau and she was involved in the sale transaction per instructions given to her by Kangaru Churu. She testified that Thome Farmers No. 1 limited had shareholders and his parcel of land had already been subdivided into half acre plots. One share was getting one half acre plot only. She also stated that Mr. Kangaru Churu was the registered owner of one (1) share only, certificate no. 206 which gave rise to only one plot, ballot No. 62 whose subsequent title is Nairobi/Block 110/3



- whereas one John Wanjau Wachira & Josphat Mwangi Gitubia “A” jointly owned one share, certificate no. 1136 which gave rise to ballot plot no. 12 whose subsequent title is Nairobi/Block 110/62.
59. She testified that once Kangaru Churu paid the requisite fees to her office sometimes in July 1990 and it was acknowledged vide receipt exhibited by Petitioner, No 1399 dated 28/7/1990 which clearly indicate ballot plot no. 62 and respective resultant/corresponding title is number Nairobi/Block 110/3. That the said Kangaru Churu did not own any other share with the company and neither did he own any other plot. She stated that share certificate No. 1136 had respective ballot No. 12 whose owners are John Wanjau Wachira (Father to 1<sup>st</sup> respondent herein) and one Josphat Mwangi Gitubia (A) which resultant/corresponding title is Nairobi/Block 110/62. The title has never been processed to date.
  60. She further stated that there was no one else except herself who was and still is processing titles for the company parcel of land Nairobi block 110 and she knew that the plot petitioner purport to own and the title exhibited does not relate to any share certificate or any share at all whatsoever, emanating from the company since the would be plot title is yet to be processed.
  61. She testified that it is not clear how the title held by the petitioner was processed, it is fraudulently obtained as she is conversant with the company records and title processing and she has never processed the said title or any at all relating to plot No 12 whose title translate to Nairobi/Block 110/62.
  62. On the certified green card, she testified that it purport that land parcel ballot No. 62 belonged to Kangaru Churu, this is incorrect and misleading because no green card has ever been opened for this ballot plot Plot No. 12 parcel title 110/62 more so with the said Kanguru Churu as the proprietor of the said parcel since his only land parcel is ballot plot no. 62 which translated to title No. Nairobi/Block 110/3 which has since been sold.
  63. She testified that the search no 440/1/12 dated 25/1/2012 attached to the petition indicate that a title deed was reissued vide gazette notice no. 5432 of 20/5/2011 for plot parcel 62 but this is misleading in that no title document has ever been processed for title 110/62 todate and the title exhibited is fake and fraudulently obtained. Re-issue means a title existed which was being replaced which is incorrect and misleading. She told court that the 1<sup>st</sup> respondent has been making reports of attempts by the petitioner to defraud them of the suit land titles irregularly acquired and she has always responded whenever enquiries are made from her office by giving the correct position which is that parcel no 62 does not belong to the petitioner neither has it ever belonged to his late father. The circumstances under which it was included in a succession cause and subsequently a title issued is suspect. In any event no copy of share certificate has been exhibited to demonstrate its origin yet no shareholder acquired land without owning a share. She testified that todate the administrators of the estate of the late John Wanjau Wachira are in possession of the original share certificate for plot No. 12 title No. Nairobi/block 110/62 since title is yet to be processed.
  64. She further testified that there has been a lot of title forgery regarding this block 110 and several cases have been filed in court some of which have been determined. A recent case is Nairobi High Court ELC 163 of 2019 Peter Kamau Munene versus Winfred Wambui Gichuru which has since been concluded. She further testified that, because of several forgery cases the lands office put title processing for block 110 on hold.
  65. On cross-examination by Mr. Kamwaro for the Petitioner, on her name being on the register she told court that she too bought shares and whenever members sold their shares, transfers were effected on the register. She reiterated that she was never involved in the forgeries. On instructions to carry out conveyance she told court that she was instructed by the directors. On current position of the company she told court it is moribund and exist in name. She reiterated that, directors went to her offices and



- handed to her instruction letter, certificates and registers. On who carried out subdivision of Nairobi/Block 110, she told court it was a surveyor by the name James Kamwer Muriuki and she does not know when subdivision was completed because she was instructed after subdivision was complete. On forgery she told court that, title processing for Nairobi/Block 110 had been put on hold by Lands Office due to rampant forgeries. She reiterated that she was the only one instructed by the company to process the titles. That she is therefore the only one with authority to process title for ballot Plot No. 12 title 110/62 and to date she has not.
66. On question as to how she processed title, she testified that using information in the register she would process titles as register indicated all member details such as, a member full name ID No. share certificate number, plot number and the corresponding title number.
67. Cross-examination by Ms. Kubai state Counsel on plot numbering, she told court that, numbers were allocated by surveyor. On when balloting was done, she told court that, it must have been after survey was carried out and ballot numbers given to the plots. On what she used to prepare the transfers, she told court she relied on the information in the register. Upon preparation of the transfer, the respective member would execute the same then she would forward the same to Lands Office where the commissioner would execute on behalf of the company. She testified that, she gave lands office a copy of the Company register.
68. On re-examination she told court that, the copy of the register attached to her statement is an extract reason she availed the original complete register to the honorable court. On why the ballot plot numbers are different from title numbers, she testified that, title numbers are given by lands office based on their register for the particular area. She further testified that Certificate No. 206 got ballot plot No. 62 and its corresponding title was Nairobi/block 110/3 and that certificate No. 1136 got ballot plot No. 12 and its corresponding title is Nairobi/Block 110/62. On being asked about CID involvement she told court she had been reached by CID even when the late John Wachira was still alive.
69. The 1<sup>st</sup> Respondent filed written submissions dated 29<sup>th</sup> March 2023 through the firm of G.N Gichongi & Co. Advocates. The following issues were outlined for consideration by the court:
- i. Who is the rightful owner of the suit land?
  - ii. Whether the Petitioner obtained the title illegally and fraudulently.
  - iii. Whether the registration of the petitioner as owner of the suit land was absolute indefeasible and not liable to challenge.
  - iv. Whether the 1<sup>st</sup> Respondent could impeach the title held by the Petitioner.
  - v. Whether the 1<sup>st</sup> Respondent has a valid claim over the suit land.
  - vi. Whether the Petition herein has any constitutional or legal basis as et out in entire part C of the Petition dated 1<sup>st</sup> July 2020.
  - vii. Whether any rights of the petitioner has been violated/infringed.
  - viii. Whether the 1<sup>st</sup> Respondent is entitled to the prayers in the counterclaim.
70. It was submitted that the Petitioner did not call any witness to corroborate his evidence since he was the only sole witness and thus he had not discharged the burden of prove bestowed upon him.
71. The first Respondent submitted that during trial the Petitioner did not give any disclosure or adduce evidence of circumstances surrounding re-issuance of title. The 2<sup>nd</sup> and 3<sup>rd</sup> entries on green card he exhibited is not signed by the registrar hence does not meet the threshold set out in Section 26(2) of



the *Land Registration Act*. No. 3 of 2012 Laws of Kenya. The following cases were cited in support National Highway Authority –Vs- Shalien Massoo Mughal & 5 others (2017) KLR and Munyu Maina –Vs- Hiram Gathina Maina (2013) eKLR.

72. On whether the 1<sup>st</sup> Respondent has a valid claim over the suit land, it was submitted that the testimony of the petitioner was controverted by that of the 1<sup>st</sup> Respondent's witness Dorcas Najero who testified that she was the only advocate who was mandated by Thome Farmers No. 1 Company Ltd the initial owner of Nairobi Block 110 to prepare titles to shareholders in regard to subdivision emanating from this parcel of land Nairobi Block 110. It was also her testimony that she was given the company register which contained personal details of each shareholder, their name identity card numbers, postal address, ballot number of their plots and corresponding title number respectively.
73. It was also submitted that the 1<sup>st</sup> Respondent's late father was a shareholder in the company and owner of share certificate No. 1136 from which ballot plot No. 12 whose corresponding title No. is Nairobi/Block 110/62 and that she had not processed its title hence no green card has ever been opened.
74. It was further submitted that the late Churu father to the Petitioner and owner of share certificate No. 206 which gave rise to ballot no. 62 and its corresponding title is No. Nairobi/Block 110/3. It was argued that the Petitioner father did not own any other share or plot with the company.
75. It was contended that no evidence has been placed before court to demonstrate any constitutional/legal basis as foundation of the allegations in the petition or violation/infringement of any of the Petitioner's rights whatsoever.
76. On whether the 1<sup>st</sup> Respondent is entitled to prayers sought in the counterclaim, it was argued that overwhelming evidence has been adduced to the effect that the 1<sup>st</sup> Respondent is entitled to the prayers sought. The 1<sup>st</sup> Respondent also pointed out to the court that this case is similar to the case of ELC No. 163 of 2019 Peter Kamau Munene –Vs- Winfred Wambui Gichuru where defendant was being defrauded of her late parents' rights and interests of Nairobi/block 110/430 under more less similar circumstances.

#### **The case of the 2<sup>nd</sup> – 5<sup>th</sup> Respondents**

77. Although the state Counsel represented all the other respondents 2-5 only the 4<sup>th</sup> respondent called one witness one Gildine Gatwiri Karani who testified on 1/3/2023 by adopting her witness statement dated 24/02/2023. She highlighted her statement in her viva voce evidence. She testified that she works with the Ministry of lands and Physical planning as an Assistant Registrar of Lands at Ardhi house. That she was in court to testify on documents from lands office and also because office of the Chief Land Registrar has been sued. She produced documents which were filed in court together with the statement of Mr. Ngetich. The following documents were produced in her evidence in chief;
  - i. Certified copy of green card opened on 29/8/1990.
  - ii. Copy of search dated 15/9/2020.
78. It was her testimony that according to records in their office, land parcel Nairobi/block 110/62 was owned by Thome Farmers but Thome does not appear on the green card exhibited because it is their office which was entrusted to allocate and process titles. She testified that the land is freehold and the process of issuing titles was that documents would be forwarded to the Chief Land Registrar and the Commissioner of Lands would execute the documents and then their title deed would be processed. She further testified that Dorcas Nanjero had the master register which had the numbers and they had to reach her in case the office had a query or required any clarification. She further testified that



it is not easy to tell whether a title has ever been issued to one John Wanjau or Andrew and that the green card shows the owner as Gico Kangaru. That the suit land was transferred to one Kangaru Churu on 29/8/1990 when title was issued to him. That on 20/4/2011 it was transferred to one David Kangaru Kangara and Mburu Samuel Kangara and same day to Gico Kangura by form RL 19 & RL 7 respectively. A title deed was issued vide Kenya Gazette Notice No. 5432 dated 20/5/2011.

79. On cross-examination by Mr. Kamwaro for the Petitioner on who allocates numbers to parcels of land she told court it is the Survey of Kenya but there are earlier numbers given for balloting purposes. On keeping of land records she testified that the Land Registrar has the mandate to keep land records.
80. On cross-examination by Counsel for 1<sup>st</sup> respondent on entry no. 2 on green card, she testified she has observed it is not signed yet it is supposed to be signed by the registrar. She also stated that she had no supporting documents to demonstrate on what basis was gazettement for the loss issued. On being asked why transmission of the title took place before gazettement, she had no response.
81. On re-examination on whether there were documents availed to prove loss of title prior to allowing process of the purported re-issuance, she testified that none were produced. On lack of signature on green card for the 2<sup>nd</sup> entry she testified it was an error and this was irregular. She further testified that it was the administrators of the land who had custody of the documents implying the green card but she had the option of availing the original from the records. After all it was her evidence that lands office is the custodian of lands records. On the documents availed so as to authorize publication on Kenya Gazette of loss of title, she testified that, in succession causes, they do not ask for supportive documents since they rely on grant of representation and her office trust that the court had done its part to verify the matters. The Registrar office is obligated to verify, scrutinize the correctness of every document/case presented to it prior to authorizing any publication in Kenya Gazette and subsequent re-issuance of title.
82. The 2<sup>nd</sup> -5<sup>th</sup> Respondents filed written submissions dated 25<sup>th</sup> April 2023 through Elizabeth Mwalozi, State Counsel. The following issues were outlined for determination by the court:
  - i. Whether the petitioner has been able to prove his claim against 3<sup>rd</sup> and 5<sup>th</sup> Respondent.
  - ii. Whether the Petitioner has been able to prove its case on a balance of probability.
  - iii. Whether the Petitioner is entitled to the prayers sought.
83. On the first issue it was submitted the 4<sup>th</sup> Respondent called one witness Gildine Karani who testified that the Chief Land Registrar would register entries based on documentation as presented by parties so long as they have met the legally requirements. It was also submitted that as per their records, the suit land was first registered in the name of Kangaru Chiru on 29<sup>th</sup> August 1990 and a Certificate of title issued and further that on 20<sup>th</sup> April 2011 a transfer to David Chiru Kangaru and Mburu Samuel Kangaru was registered vide an application for transmission as the administrators of the estate of the deceased. A transfer to Gico Kangaru was registered vide an application for transmission as the beneficiary of the deceased and a certificate of title re-issued vide gazette notice number 5432 of 2011.
84. It was also submitted that the 1<sup>st</sup> Respondent and the Petitioner have failed to show any evidence of fraud as alleged.
85. On their second issue, it was argued that the Petitioner had admitted in his own documents at paragraph 18, 19- 22 of the Supporting affidavit of Gico Kangaru sworn on 1<sup>st</sup> July 2020 that the 5<sup>th</sup> Respondent did address the complaint raised by the Petitioner.



86. It was contended that the Petitioner and the 1<sup>st</sup> Respondent in his counterclaim have not been able to prove their cases to the required standard and neither of them is entitled to the reliefs sought. The court was urged to dismiss the petition with costs.

**Analysis and Determination.**

87. I have read the Petition, the responses filed, the 1<sup>st</sup> Respondent’s counterclaim and written submissions filed by all the parties. I have also considered the evidence adduced during trial by witnesses who testified herein. Having considered all of the aforementioned, this court considers the following issues pertinent for determination: -

- i. Who is the legitimate and rightful owner of the suit property?
- ii. Whether the Petitioner’s constitutional rights and freedoms were violated by the Respondents.
- iii. Whether the 1<sup>st</sup> Respondent’s counterclaim is merited.
- iv. What are the appropriate reliefs to issue herein?

88. I shall now proceed to address the issues sequentially.

89. Article 40 of *the Constitution* of Kenya, 2010, elaborates on the right to own property in Kenya. It provides as follows; -

- “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
  - (a) of any description; and
  - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
  - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
  - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that
    - (i) requires prompt payment in full, of just compensation to the person; and



- (ii) allows any person who has an interest in, or right over, that property a right of access to a Court of law.”

90. Indefeasibility of the title is provided for in Section 26 (1) (b) of the *Land Registration Act* which states;

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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.”

91. The Petitioner and the 1<sup>st</sup> Respondent herein both have a right to own property. While a certificate of title shows that the holder of the same is the indefeasible owner of land in question, it is not in doubt the Petitioner has title to the suit property as contemplated in Section 24 as read together with Section 26 of the *Land Registration Act*, 2012. However, the acquisition of the said title by the Petitioner was challenged by the 1<sup>st</sup> Respondent.

92. During trial, Dorcas Nanjero, an Advocate of the High Court who had been solely engaged by Thome Farmers No. 1 Limited to carry out conveyance process of their land parcel 110, testified that it is not clear how the title held by the petitioner was processed, she further stated that the same was fraudulently obtained as she was conversant with the company records and title processing and she has never processed the said title or any at all relating to plot No 12 whose title translate to Nairobi/Block 110/62.

93. When a person’s ownership to property is called into question, it is trite that the said proprietor has to show the root of his ownership. In the case of *Hubert L. Martin & 2 Others Vs. Margaret J. Kamar & 5 Others* [2016] eKLR, where the Court held that;

“A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

94. Further In the case of *Munyu Maina Vs. Hiram Gathiha Maina*, Civil Appeal No.239 of 2009, the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is



challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

95. Thus, for this Court to effectively determine who is the bonafide owner of the suit property, the Court will first determine which party has been able to show the root of his/her title.
96. In the instant case, having evaluated the evidence tendered herein, it is clear that Petitioner did not give any disclosure or adduce evidence of circumstances surrounding re-issuance of title. The 2<sup>nd</sup> and 3<sup>rd</sup> entries on green card he exhibited was not signed by the registrar hence does not meet the threshold set out in Section 26(2) of the *Land Registration Act*. No. 3 of 2012 Laws of Kenya. Therefore, it follows, that the Petitioner acquired title in a skewed manner, hence he has been unable to establish the root of his title.
97. The Court having analyzed the statement and evidence of the 1<sup>st</sup> Respondent, is satisfied that he has also been able to satisfactorily show and prove the root of his beneficial interest to the suit property. This Court therefore finds and holds that the 1<sup>st</sup> Respondent is the bonafide owner of Nairobi/Block 110/62.
98. The second issue for consideration is, whether the Petitioner’s constitutional rights and freedoms were violated by the Respondents.
99. The Petitioner generally contends that the acts by the Respondents were unlawful, unjust and in contravention of the petitioner’s, constitutional rights. The Petitioner argues that the Respondents contravened Articles 2, 10, 19, 22, 23, 35, 40, 47 among others. However, during trial, regrettably, the Petitioner failed to place before court evidential material to demonstrate that he was the lawful owner of the suit property and that he was at all material times in lawful occupation of the same. He did not place before court any conclusive evidential material to enable the court arrive at a conclusion that he was the owner of the suit property and that the alleged occupation of the same by the 1<sup>st</sup> Respondent property was unlawful. The court therefore has no basis upon which to make a finding of liability against the Respondents, the Petitioner having failed to prove the fact that he was the lawful owner and occupier of the suit property, the very foundation of the Petition, he cannot be said to have established a basis for a claim of violation of any of his rights as enumerated in the Petition.
100. The last issue is whether the petitioner is entitled to any of the reliefs set out in the Petition against any of the Respondents. As I have pronounced myself earlier, having found that the Petitioner has not proved lawful ownership and occupation of the suit property and have similarly failed to establish violations of his constitutional rights by any of the respondents, it follows that he has failed to prove his petition on a balance of probabilities. The net result is that he is not entitled to any of the reliefs sought in the petition.
101. My finding on the second issue therefore is that the Petitioner has not established any violation of his rights by any of the Respondents.
102. In respect to the 1<sup>st</sup> Respondent’s counterclaim, this court having found that the 1<sup>st</sup> Respondent is the legitimate and bonafide owner of the suit property, he has been able to prove the same to the required standard. The same is merited and he is indeed entitled to the reliefs sought.
103. On what are the appropriate reliefs to issue herein, As I have pronounced myself earlier, having found that the Petitioner has not proved lawful ownership and occupation of the suit property and have similarly failed to establish violations of his constitutional rights by any of the Respondents, it follows that he has failed to prove his petition on a balance of probabilities. The net result is that he is not



entitled to any of the reliefs sought in the petition. As regards the 1<sup>st</sup> Respondent's counterclaim, the same is merited and this court will proceed to grant the reliefs sought in the said counterclaim.

### **Final Orders**

104. In the end, It is the finding of this court that the Petitioner has not proved his case to sustain this petition and hence no fundamental rights and or other constitutional rights of the petitioner have been violated an or infringed as alleged.
105. In the circumstances this court makes the following final orders.
- i. The Petition dated 1<sup>st</sup> July 2020 is dismissed.
  - ii. An order is hereby issued for cancellation of title No. Nairobi/110/62 dated 28/11/2011 issued in the names of Gico Kangaru.
  - iii. An order is hereby issued directing the Chief Land Registrar to process and issue the 1<sup>st</sup> Respondent with a valid title deed for Nairobi/110/62 in the name of Barrien Company Limited per certificate of confirmation in Kiambu Succession No. 81 of 2016 Estate of the late John Wachira Wanjau.
  - iv. Each party to bear own costs of the Petition and Counterclaim.

Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF JULY 2023.**

**E.K. WABWOTO**

**JUDGE**

In the presence of:

Mr. Kamwaro for Petitioner.

Ms. Gichuhi for 1<sup>st</sup> Respondent.

Ms. Mwalози for 2<sup>nd</sup> – 5<sup>th</sup> Respondent.

