



Gathumbi & 2 others v Kioko & 3 others (Environment & Land Case E027 of 2023) [2025] KEELC 3434 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3434 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E027 OF 2023**

NA MATHEKA, J

APRIL 30, 2025

BETWEEN

**SYLVIA WAIRIMU GATHUMBI 1ST PLAINTIFF
PATRICK NARORET NKUO 2ND PLAINTIFF
TOM NDETO 3RD PLAINTIFF**

AND

**VERONICA KIOKO 1ST DEFENDANT
OFFICER COMMANDING POLICE DIVISION (OCPD) ATHI
RIVER 2ND DEFENDANT
OFFICER COMMANDING POLICE STATION (OCS) MLOLONGO 3RD
DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT**

JUDGMENT

1. The Plaintiffs state that they are joint proprietors of all that parcel of land LR No. 337/1931 (IR 247768) measuring 4.00 Hectares and situated in Mavoko Municipality in Machakos County. On or about the 14th day of January, 1997, the Government of Kenya, pursuant to Government Authority No. 102749/1/V, issued the Plaintiffs with a Letter of Allotment over Plot L.R. NO. 337/1931. The Plaintiff duly accepted the Letter of Allotment and the terms thereof and on 22nd day of February, 2018 duly satisfied the terms of the Letter of Allotment by particularly paying up to the Government of Kenya Kshs. 171,720 for Stand Premium, Rent, Conveyancing fees, Registration fees, Stamp Duty and Approval fees as demanded in the Letter of Allotment, where after the Ministry of Lands duly issued the Plaintiff with a receipt serial No. 4897473 dated 22nd February 2018 to acknowledge receipt by the Government of Kenya of Kshs. 171,720 from the Plaintiffs. On 21st January, 2019, the Plaintiffs paid



to the Director of Surveys, Survey approval fees for L.R. No. 337/1931 which approval, the Director of Surveys granted under File No. CT221/VOL.106/135 entered on 23rd January, 2019. Having met all the conditions of allotment of the suit land, the Plaintiffs applied to the Government of Kenya for issuance of a Lease over L.R. NO. 337/1931, which the Government duly issued to the Plaintiffs, pursuant to the transitional provisions of Sections 160 and 161 of the Land Act and Section 108 of the Land Registration Act. The Government of Kenya subsequently duly registered the Lease over L.R. No. 337/1931 in favour of the Plaintiffs and issued the Plaintiff with Certificate of Title L.R. No. 337/1931 (IR 247768) over the suit land, under File Reference Number 235661. As endorsed by the Registrar of Titles on the copy of Certificate of Title, a search of title done on 25th November 2022 confirmed that L.R. No. 337/1931 (IR 247768) is registered in the name of the Plaintiffs. The Plaintiffs are therefore the registered owners of L.R. No. 337/1931 (IR 247768). The latest rates assessment invoice by the County Government of Machakos, Mavoko Sub-county dated 6th December 2022 acknowledges the Plaintiffs as the registered owners of L.R. No. 337/1931 (IR 247768).

2. That without the Plaintiffs' consent or knowledge, the 1st Defendant, with the aid and supervision of the 3rd Defendant, encroached on the Plaintiffs' suit land L.R. No. 337/1931 (IR 247768), and are in the process of erecting a perimeter boundary wall on the land with the intention to eventually settle on the suit land. The Plaintiff does not know the 1st Defendant and has never dealt with the Defendants in regard to the suit property herein or any other property. The 1st Defendant's encroachment on the suit land L.R. No. 337/1931 (IR 247768) not only deprives the Plaintiffs of their land, but also denies them access to, use and peaceful enjoyment of the suit land. The 3rd Defendant is actively supervising the 1st Defendant's encroachment, trespass and construction of perimeter wall on the Plaintiff's land L.R. No. 337/1931 (IR 247768) under the power of the gun, to forcefully take over the suit land, leaving the Plaintiffs with only this Honourable Court to protect their suit land from unlawful deprivation by the Defendants. That attempts by the Plaintiff to report the trespass and encroachment claim to the 2nd Defendant, whose is the superior to the 3rd Defendant, at Athi River Police Station under OB Number 84/24/03/2023, fell on deaf ears. The 2nd Defendant sent the Plaintiffs to go back to report their complaint to the 3rd Defendant that is already conflicted and is actively aiding the 1st Defendant to deprive the Plaintiffs of their suit land L.R. No. 337/1931 (IR 247768) thereby clearly demonstrating that the 3rd Defendant is complicit in the 1st Defendant's deprivation of the Plaintiffs' of their suit land. The Plaintiff is apprehensive that the Defendants will complete constructing the perimeter wall that they are erecting on Plaintiffs of their suit land L.R. No. 337/1931 (IR 247768) and eventually occupy the land, thereby depriving the Plaintiff of his land. That despite notice and demand issued to the 1st Defendants by the Plaintiff to stop constructing the perimeter wall on L.R. No. 337/1931 (IR 247768), the Defendants have failed, refused to clear the suit land of the shanties.
3. The Plaintiff pray for Judgment against Defendants for;
 1. Permanent order for injunction restraining the Defendants, whether by themselves, their servants, agents, hired goons, clients or anybody else claiming through any of the Defendants, from entering into, trespassing on, encroaching on, remaining upon, developing, continuing to develop or in any manner whatsoever, interfering with the Plaintiffs' land known as L.R. No. 337/1931 (IR 247768).
 2. Mandatory order for injunction compelling the 1st Defendants, whether by herself, servants, agents, employees, hired goons or anybody else claiming through 1st Defendant, to, within seven days of the judgment hereof or such period as the Court directs, remove all structures, development, perimeter wall, foundations, that the Defendants, Defendants' agents or clients erected on L. R. No. 337/1931 (IR 247768).



3. An Order of eviction issues to empower the Plaintiffs to evict the 1st Defendant, Defendant's agents, tenants, customers or clients from L.R. NO. 337/1931 (IR 247768).
 4. The Officer Commanding Police Division (OCPD) Athi River Police Station, to supervise eviction of the Defendants, Defendants' agents, customers or clients from L.R. No. 337/1931 (IR 247768) by providing requisite security to the Plaintiffs, their agents and or auctioneers executing the eviction.
 5. Mesne Profits.
 6. General damages.
 7. Interest in (5) & (6) above at Court's rates.
 8. Costs of this suit; and
4. The 1st Defendant denies that the Plaintiffs are proprietors and or registered owners of parcel of land L.R No. 337/1931 (I.R.63387). The 1st Defendant states that the Letter of Allotment dated 14th January 1997 is fraudulent, irregular and or a forgery. In the alternative, the 1st Defendant states that the said Letter of Allotment is null and void because it was issued without authority and or capacity. The 1st Defendant states that as at 14th January 1997, the suit property was not available for allocation and or allotment. It was incapable of being allotted or allocated to a third party.
 5. The 1st Defendant states the suit property is part of the Estate of Daniel Kitheka Kioko (Deceased) having been allocated to him way back in 1994. Following a lawful process, the deceased acquired the suit property and was issued with a Grant Number 63387, L.R. 337/1931. The deceased has been in actual possession and occupation of the suit property. At no point did the President of the Republic of Kenya exercise any right of re-entry or revoke the Allotment Letter or cancel the Grant issued to the deceased. On or about February 2023, the 1st Defendant embarked on erecting a perimeter fence over the property. The 1st Defendant learned that the Plaintiffs had laid a claim of ownership over the suit property and had hired goons who attempted to prevent her from erecting the fence. The Plaintiffs are trespassers and have no interest whatsoever over the suit property. That unless restrained by way of an injunction, the Plaintiffs are likely to alienate the suit property, destroy the 1st Defendant's property and or continue with their illegal activities of hiring goons to disturb the 1st Defendant's enjoyment and occupation of the suit property. The 1st Defendant prays for the Plaintiffs' suit to be dismissed with costs and judgement to be entered against the Plaintiffs jointly and severally for;
 - a. A permanent injunction to restrain the Plaintiffs from claiming ownership and or any interest in parcel of land L.R. No. 337/1931 (I.R. 63387) and or alienating, selling, charging, occupying or in any other way interfering with the said property.
 - b. A declaration that parcel of land L.R. 337/1931 is owned and or registered in the name of and or is part of the estate of Daniel Kitheka Kioko (Deceased),
 - c. A declaration that the Certificate of Title I.R. 247768 L.R. No. 337/1931 dated 4th June 2021 issued in favour of the Plaintiffs is null and void and or an order for its cancellation.
 - d. General Damages.
 - e. Costs of the suit.
 6. The instant case relates to suit property I.R No. 337/1931. PW1 testified on behalf of the other Plaintiffs and stated that they acquired the ownership documents through an allotment dated 17th



January 1997. That in compliance with the terms and conditions of the letter of allotment they paid the requisite sums on 22nd February 2018. That on or about the 4th June 2021 a certificate of title was issued in their favour. DW1 testified on behalf of the estate of her husband Daniel Kitheka Kioko (Deceased) she produced the death certificate and the certificate of confirmation of grant. That by a letter of allotment to the deceased dated 3rd December 1993 the suit property was allocated to the deceased. That in compliance with the terms and conditions stipulated in the letter of allotment the deceased paid the requisite fees and was issued with receipts which were produced. The deed plan No. 184150 was drawn and through a memorandum of registration of transfer of land a grant was issued in favour of the deceased dated 21st September, 1994.

7. It appears to me that the suit property has two deed files but with the same land reference number. The Plaintiffs title document for the suit property is a certificate of title under deed file I.R 247768, LR No. 337/1931 issued on 4th June 2021 (page 38 of the Plaintiffs bundle of documents) and the 1st Defendant's title document is grant under deed file I.R 63387 LR. No. 337/1931 dated 21st September 1994 (page 26 of the 1st Defendant's bundle of documents).

8. The court has considered the pleadings, evidence presented before it, submissions made as well as the authorities relied upon by the parties. The issues for determination are:

- a. Who is the lawful proprietor of the land parcel known as L.R No. 337/1931?
- b. What orders should this court issue?

9. The *Land Registration Act* is very clear on issues of ownership of land and Section 24(a) of the *Land Registration Act* provides as follows;

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

10. Section 26 (1) of the *Land Registration Act* states as follows;

“The Certificate of Title issued by the Registrar upon registration ... 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.”

11. I have carefully perused the documents produced as exhibits and find that the 1st Defendant's letter of allotment and grant were first in time compared with the Plaintiff's. The Court of Appeal in *Munyuu Maina vs Hiram Gathiha Maina* (2013) eKLR held that;

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on



the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony.”

12. The Plaintiff has led evidence that on or about the 14th day of January, 1997, the Government of Kenya, pursuant to Government Authority No. 102749/1/V, issued the Plaintiffs with a Letter of Allotment over Plot L.R. No. 337/1931. That they accepted the Letter of Allotment and the terms thereof and on 22nd day of February, 2018 duly satisfied the terms of the Letter of Allotment by particularly paying Kshs. 171,720 for Stand Premium, Rent, Conveyancing fees, Registration fees, Stamp Duty and Approval fees as per the Letter of Allotment and were issued with a receipt serial No. 4897473 dated 22nd February 2018 on 21st January, 2019, the Plaintiffs paid to the Director of Surveys, Survey approval fees for L.R. No. 337/1931 which approval, the Director of Surveys granted under File No. CT221/VOL.106/135 entered on 23rd January, 2019. Subsequently duly registered the Lease over L.R. No. 337/1931 in favour of the Plaintiffs was issued the Plaintiff with Certificate of Title L.R. No. 337/1931 (IR 247768) over the suit land, under File Reference Number 235661 on the 4th June 2021. It is the view of this court that it is suspicious if not fraudulent as the Letter of Allotment is dated 14th January, 1997 and the Letter of Acceptance is dated 22nd February, 2018 (over 20 years later). The condition for the allotment was that the same was to be accepted within 30 days. The payment receipt in respect of approval of Deed Plan 184150 is dated 21st January, 2019 while the said Deed Plan No, 184150 is drawn and issued on 24th May 1994. The Lease document is not executed. I find that the purported Letter of Allotment is dated 14th January 1997, the Certificate of Title was issued on 4th June 2021 (over 20 years later). The Certificate of Title was also not based on Original Deed Plan but a certified copy of the Deed Plan. The I.R. Number given in respect of the Certificate of Title is 247768 as opposed to the original number I.R. No 63387. The 1st Defendant established that their allotment was issued to the deceased dated 3rd December 1993. After compliance with the terms and conditions stipulated in the letter of allotment the deceased paid the requisite fees and was issued with receipts which were produced. The deed plan No. 184150 was drawn and through a memorandum of registration of transfer of land a grant was issued in favour of the deceased dated 21st September 1994.

13. I find that, by the time the letter of allotment, lease document and certificate of title were issued to the Plaintiff the land had already been alienated and was not available for allocation. In the Court of Appeal case of Benja Properties Limited vs Syedna Mohammed Burhannudin Sahed & 4 others(2015) eKLR the court held as follows;

“The legal effect of the registrations made in 1907 and 1911 was to convert the suit property at that time from un-alienated government land to alienated government land with the consequence that the suit land became private property and moved out of the ambit and confines of the GLA. This made the suit property unavailable for subsequent allotment and alienation by the Commissioner of Lands or the President of Kenya. The appellant's title to the suit property was thus anchored on land that was not unalienated government land. We concur with the trial judge's finding that “the suit land having been owned privately was not GLA land, and was not available for alienation. Its alienation was illegal and void ab initio”

14. Similarly, in the case of Bahati Properties Limited vs Attorney General & 7 others(2019) eKLR the court held that;

“It is not in dispute that in 2001 when the Letter of Allotment was issued to the 2nd – 6th Defendants, Kwale Diani Beach/Block/59 was already leased out to a private person for a term of 99 years with effect from 1st January 1914 and a Certificate of Title duly issued. The lease was due to expire in 2013. That means that in 2001, the land was already allocated



to a private person and was therefore not available for allocation or alienation to the 2nd – 6th Defendants. Put differently, there was no unalienated government land capable of being allotted to the 2nd – 6th Defendants. Brother.”

15. The court has no reason to believe the evidence adduced by the Plaintiffs as to how it acquired the certificate of title. The Plaintiffs acquired title to the suit land long after it had been allocated to the 1st Defendant.

16. The court in *Joseph Kiprotich Bor vs Tabutany Chepkoech Chebusit (2021) eKLR* held that;

“I find that the Respondent’s title was the first in time and as equity teaches in its maxim that; “when two equities are equal, the first in time prevails”, then the Respondent’s title deed was the first in time and should prevail the evidence called by the Respondent having been cognate and not displaced by the Appellant. No evidence was called to confirm how the 2nd title deed came into being and whether the title deed held by the Appellant was genuine or not. In fact of interest to note is that the Appellant’s title had been registered after the death of the original proprietor of the suit land and without any probate proceedings conducted.

Ordinarily, no land should be registered more than once and having two separate title deeds held by separate persons. Therefore in this case, there must be one title deed which is genuine and one which was issued either unlawfully or through mistake and thus double allocation, that was for a new title to be issued the older title has to be surrendered to the lands office for cancellation. No evidence was tendered by the Respondent that she had surrendered her title, which had been issued earlier than the Appellant’s title, for cancellation.

Balancing the two competing titles, it is my view that the Respondent holds good title to the suit property. The title of the Appellant in my view, and in the absence of evidence to rebut the same, could only have been obtained either by the fraud, or by the mistake of the Land Registry, or both.”

17. The 2nd, 3rd and 4th Defendants submitted that they were wrongly enjoined in the suit and they had no interest in the suit property. That their role is limited to law enforcement, protection of life and property and does not extend to asserting ownership rights over private or public land. That this is a civil dispute between parties and they cannot be held liable. I concur with these submissions.

18. Section 26 of the *Land Registration Act* which guarantees the concept of indefeasibility of title does not extend to any property that has been found to have been unlawfully acquired. The Court of Appeal in *Attorney General vs Torino Enterprises Limited (Civil Application 84 of 2012) (2022) KECA 78 (KLR) (4 February 2022) (Judgment)* held that;

“We have considered the provisions of section 26 of the *Land Registration Act* (repealed) in light of the provisions of Article 40 of *the Constitution* which guarantees protection of right to property and it is our considered view that the concept of indefeasibility of title is subject to Article 40 (6) of *the Constitution* which states that: “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.” Guided by the provisions of Article 40 (6) of *the Constitution*, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the suit land was unlawfully acquired. See *Denis Noel Mukhulo & Another v. Elizabeth Murungari & Another [2018] eKLR.*”



19. I find that the 1st Defendant having established that they are the legitimate proprietors of the suit property and hence entitled to part of the said orders in the counter claim.
20. Section 80 of the [Land Registration Act](#) provides as follows;

“ 80.

- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2). The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

21. This section gives the court powers to order for rectification of a register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. The Plaintiffs have failed to prove their case on a balance of probabilities and I dismiss it with costs. The prayer for general damages was not proved and the same will not be awarded and I find that the 1st Defendant has proved her counter claim on a balance of probabilities and I grant the following orders;

1. A permanent injunction to restrain the Plaintiffs from claiming ownership and or any interest in parcel of land L.R. No. 337/1931 (I.R. 63387) and or alienating, selling, charging, occupying or in any other way interfering with the said property.
2. A declaration that parcel of land L.R. 337/1931 is owned and or registered in the name of and/ or is part of the estate of Daniel Kitheka Kioko (Deceased),
3. A declaration that the Certificate of Title I.R. 247768 L.R. No. 337/1931 dated 4th June 2021 issued in favour of the Plaintiffs is null and void and an order for its cancellation is issued.
4. Costs of the suit to be borne by the Plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF APRIL 2025.

N.A. MATHEKA

JUDGE

