



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 101 OF 2014**

JOSPHAT WAGONYA KIBERU ..... 1<sup>ST</sup> PLAINTIFF  
GEOFFREY MACHARIA ..... 2<sup>ND</sup> PLAINTIFF  
JASON GAKUU ..... 3<sup>RD</sup> PLAINTIFF  
GLADYS NGOIRI ..... 4<sup>TH</sup> PLAINTIFF  
SOSPETER MAINA ..... 5<sup>TH</sup> PLAINTIFF  
SARAH NJOKI Alias LYDIA WANJIRI ..... 6<sup>TH</sup> PLAINTIFF  
FREDRICK MAGONDU GATITU ..... 7<sup>TH</sup> PLAINTIFF  
JOHN MUTHEE KIMANI..... 8<sup>TH</sup> PLAINTIFF

VERSUS

NEW KENYA TEA DEVELOPMENT AGENCY ..... 1<sup>ST</sup> DEFENDANT  
COMMISSIONER OF LANDS ..... 2<sup>ND</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT  
THE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT

**JUDGMENT**

The plaintiffs moved this Court by their plaint filed in this Court on 23rd April 2014 in which they sought judgment against the defendants jointly and severally in the following terms:-

***(a) A declaration that they are entitled to be settled in 9.12 acres out of land parcel No. MUTIRA/KAGUYU/168 measuring 21.12 acres.***

***(b) The Ministry of Lands be ordered to remove caution and restriction lodged on 9.12 acres since the land was surveyed on 7th February 2003.***

***(c) K.T.D.A has failed to honour power of State Corporations under Sections 7 (1) and 4 and Agriculture Act Chapter 318 Section 192 – 4 even after all ministries concerned approved the***

**settlement.**

**(d) Costs of the suit.**

**(e) Any other or further relief the Honourable Court may deem just to grant.**

From their pleadings, the plaintiffs' case is captured in paragraph six (6) of the plaint where it is averred as follows:-

***“On diverse dates between year 2003 upto date, the plaintiff had engaged themselves and the Ministry of Lands and Settlement settling them in 9.12 acres out of parcel No. MUTIRA/KAGUYU/168 measuring 21.12 acres as they are landless which effects have turned sore”***

In its defence, the 1st defendant denied the contents of paragraph six (6) of the plaint in toto and put the plaintiffs to strict proof. The 1st defendant added that no cause of action has arisen in favour of the plaintiffs as they lack any entitlement registered interest or legal rights over the property MUTIRA/KAGUYU/168 as the 1st defendant is not mandated in law to resettle the landless. It pleaded further that the Government of Kenya gave priority to and only resettled persons and beneficiaries whose land had been compulsorily acquired by the Government and the plaintiffs are busy bodies who never surrendered any land and were never allocated any portion of the suit property. The 1st defendant further pleaded that the plaintiffs can only be resettled by the Government subject to availability of public land. The 1st defendant therefore sought the dismissal of the plaintiff's suit with costs.

The 3rd and 4th defendants filed a defence on 10th September 2014 in terms not too dissimilar to those of the 1st defendant but by that time, the plaintiffs had sought leave to apply for interlocutory judgment against them as well as the 2nd defendant for failure to enter appearance or file any defence.

In support of their case, the plaintiffs filed a list of documents together with the plaint and a supplementary list on 4th November 2015. The 1st defendant filed their list of documents on 7th October 2015. This is in addition to the witness statements filed by the 1st plaintiff **JOSEPHAT WAGONYA KIBERU** who had the authority to file pleadings on behalf of the other plaintiffs. **JULIET GACHIHI KINYUA** the 1st defendant's Property Coordinator filed a statement in support of its case. It was agreed by counsel that the parties' respective list of exhibits be produced as part of their evidence.

**JOSEPHAT WAGONYA KIBERU** (PW1) testified on behalf of the other plaintiffs and relied on his statements filed in Court. He told the Court that he and the other plaintiffs had applied since 1976 to be settled on 09.12 acres of the land parcel No. MUTIRA/KAGUYU/168 (the suit land) belonging to the Forest Department. Following a request by the then Kirinyaga County Council to settle landless people, some 21.12 acres was set aside but the plaintiffs were allocated 9.12 acres after making several applications. However, after the land was surveyed, the 1st defendant put a caution on the land yet it had no lease. The plaintiffs thereafter engaged the Ministry of Agriculture in their quest for land and the then Minister for Agriculture Mr. Kipruto Kirwa recommended that they be given land. This recommendation was forwarded to the Ministry of Lands which in turn forwarded it to the Commissioner of Land who made a similar recommendation to the Chief Lands Registrar. In pursuit of their claim to land, the plaintiffs went upto the office of the President and finally to this Court. He referred the Court to the various correspondences which are part of the evidence recommending that they be allocated land.

**JULIET GACHIHI KINYUA** (DW1) is the 1st defendant's Property Coordinator. She too referred the Court to her statement and told the Court that she has worked with the 1st defendant for over 30 years and is in charge of its properties. She testified that the suit land had originally been leased to the Special Crops Development Authority, the precursor to the 1st defendant, in 1959 for a period of 99 years. However, in 1994, the then Kirinyaga County Council as lessors, alleged that the 1st defendant had breached the agreement and asked for the surrender of the lease so that it (the Kirinyaga County Council) could settle persons who had surrendered their land for public utilities such as schools and dispensaries. The 1st defendant was initially reluctant to do that but eventually it surrendered part of the land to

**NELSON KIBARA** (3 acres) **PERMINUS MURAGE** (3 acres) and **KIBUCHI MURAGE** (3 acres) since those three persons had surrendered their land to the Kirinyaga County Council to put up schools and other utilities. The witness added that she was present in a meeting on 31st July 2003 when that decision was made although the actual sub-division is yet to be done and the 1st defendant holds the title to the suit land. She added that the 1st plaintiff who has been writing letters and the other plaintiffs are not part of the group that surrendered their land to the Kirinyaga County Council and therefore their claim is misguided and should be addressed to the Kirinyaga County Council.

Submissions have been filed by **Mr. GACHERU advocate** for the plaintiffs and **J.K. KIBICHO advocate** for the 1st defendant. I have considered the oral and documentary evidence by the parties herein and the submissions by counsel.

The plaintiffs' case, as indicated above, is to be settled on 9.12 acres out of the suit land which measures 21.12 acres since they are landless. Although the lease to the suit land was not produced as Mr. Ngigi advocate who prosecuted the 1st defendant's case on behalf of Mr. Kibuchi advocate decided to proceed without it after Mr. Gacheru advocate for the plaintiffs appeared to object to its production, it is not really in dispute that the suit land is registered in the names of the 1st defendant who hold the lease. The various letters exhibited by both parties also confirm that. Indeed in cross-examination by counsel for the plaintiffs, **JULIET GACHIHI KINYUA** the 1st defendant's Property Coordinator said:-

***“We have the original lease to the land subject of this suit. It is in our office. I thought our lawyer had produced it as exhibit. I also have the search to the land”***

Similarly, among the documents produced by the 1st defendant is a letter dated 3rd February 2009 addressed to the Managing Director Kenya Tea Development Authority by the Permanent Secretary Ministry of Agriculture. It reads in part;

***“RE: COMPLAINT ON PARCEL NO. MUTIGA/KAGUYU/168 UNDER LEASE TO KENYA TEA DEVELOPMENT AGENCY LIMITED (K.T.D.A) FROM KIRINYAGA COUNTY COUNCIL***

***This Ministry is in receipt of a letter from the Ministry of Lands on the above.***

***We have noted the following issues concerning this case:-***

- ***The parcel No. MUTIGA/KAGUYU/168 measuring 21.12 acres was leased to Kenya Tea Development Agency (K.T.D.A) by Kirinyaga County Council in 1961 for research purposes.***
- ***The Kirinyaga County Council attempted to cancel the lease and re-negotiated the allotment with Kenya Tea Development Authority (K.T.D.A) due to underutilization.***
- ***Both parties (Kirinyaga County Council and K.T.D.A met and resolved to sub-divide and re-distribute the land to the following:-***

***1. Nelson Kibara Kibuga - 6 acres***

***2. Perminus Mundia - 3 acres***

***3. Francis Kibuchi Murage - 3 acres***

***4. K.T.D.A - 9.12 acres***

***The above sub-division and redistribution was subject to the three new beneficiaries surrendering their ancestral land to the Council for construction of a Primary School and Health Centre***

*Yours Sincerely*

**ROMANO M. KIOME PhD CBS**

**PERMANENT SECRETARY”**

As the registered proprietor of the suit land (this Court is satisfied that the land being referred to variously as MUTIGA/KAGUYU/168 and MUTIRA/KAGUYU/168 is really one and the same land), the 1st defendant is entitled to enjoy all the rights and privileges that go with that registration and which are protected by **Sections 27 and 28 of the repealed Registered Land Act** and Sections **25 and 26 of the new Land Registration act 2012**. It can therefore only surrender its right to the suit land on its own volition or where it is proved that it obtained the said proprietorship through fraud, misrepresentation or other illegal, unprocedural or corrupt means. The plaintiffs are not alleging any of those. The plaintiffs case, as I understand it, is that being landless, they are entitled to 9.12 acres out of the suit land. I think this is best captured in a letter authored by the 1st plaintiff and addressed to the then President Mwai Kibaki dated 17th October 2003 which, as far as is necessary, reads as follows:-

***“The President is in charge with the responsibility of seeking redress for all the injustices that may have occurred in the past (government). We landless appeal to Hon. Vice President Moody Awori kindly to intervene since K.T.D.A was compensated like (1) Perminus Mundia Murage who was compensated with 3 acres after surrendering Ndiriti for Ndiriti Secondary School the same case with his brother Francis Kibuchi Murage (2) late Kibuga Kaguma also who exchanged his land MWERUA/BARICHO/90 6 acres was also compensated with 6 acres at Mutira/Kagumo/168 the remaining 9 acres was the one the government settled landless with letter Lnd 16/6 Vol XXX (77) of 21/1/2002 the D.C wrote to Commissioner of Lands and gave a copy to K.T.D.A HQ. The case of landless started long time ago 30 years and landless had been following their case since 1972. The case is known by (1) Office of the President since 1988 (2) Ministry of Local Government since 1990 (3) Ministry of Lands and Settlement since 1990 (4) P.C Central Province since 1981 (5) D.C Kirinyaga since 1970”.***

In her evidence on behalf of the 1st defendant, its Property Coordinator stated that the 1st defendant agreed to surrender part of the suit land to **NELSON KIBARA, PERMINUS MURAGE** and **KIBUCHI MURAGE** who were each to receive 3 acres having surrendered their land to the Kirinyaga County Council to put up schools and other utilities. Indeed this is captured in the 1st defendant’s letter dated 17th July 2009 addressed to the Town Clerk Kirinyaga Town Council and which has also been referred to by the plaintiffs. That letter partly reads as follows:-

**“RE: MUTIRA/KAGUYU/168 - KIRINYAGA DISTRICT**

***We refer to the above long outstanding matter. K.T.D.A is considering releasing a portion of the land measuring 12 acres comprised in its title over Mutira/Kaguyu/168 for allocation by the Council to the individuals listed herein:***

**1. Kibuga Kaguma - Deceased (Son) Nelson Kibara**

***Kibuga - 6 acres***

**2. Perminus Mundia Murage - 3 acres**

**3. Francis Kibuchi Murage - 3 acres**

***These individuals have been occupying the land after the Council took their land to build a school at Baricho and Ndiriti respectively.***

***K.T.D.A 's consideration is on condition that the County Council of Kirinyaga grants its consent for the sub-division of land which will see K.T.D.A issued with a separate title for the remaining 9.12 acres”***

The above letter was simply a reinforcement of what I have already captured as the legal position of the parties herein vis-a-vis the suit land. That position is that as the proprietors of the suit land, the 1st defendant's rights thereto are protected by law including ***Article 40 of the Constitution***. Nonetheless, the 1st defendant could surrender part of the suit land voluntarily as indicated in the above letter. It cannot however be deprived of the suit land or any part thereof unless such deprivation is done in accordance with the law.

In my view, therefore, two issues come up for this Court's determination and these are:-

- 1. Whether the plaintiffs have any interest in the suit land capable of enforcement.***
- 2. Whether the various correspondences by the plaintiffs to the various Government Departments are capable of conferring any interest in the suit land to the plaintiffs.***

With regard to issue No. 1 above, it is the submission by the plaintiffs advocate that they are entitled to 9.12 acres out of the suit land. The 1st defendant's advocate has submitted that the plaintiffs have no locus standi to claim the suit land and there is no legal nexus between the plaintiffs and the 1st defendant. It must be borne in mind that the plaintiffs claim to be allocated 9.12 acres out of the suit land is not hinged on any Constitutional obligation of the defendants herein to provide them with land since they are landless. Their claim is specific. It is targeted on being allocated 9.12 acres of the suit land which is the property of the 1st defendant. They have no relationship with the 1st defendant nor any known legal interest in the suit land to warrant the orders sought. The 1st defendant, on its own volition agreed to have a portion of the suit land allocated to three other persons for the simple reason that those persons had surrendered their land for purposes of putting up public utilities. It was within the 1st defendant's right to do so. It was not obliged to extend a similar gesture to any of the plaintiffs. To force them to do so would be in violation of their Constitutional right to own property which is protected by ***Article 40 of the Constitution***. It is not even suggested that the 1st defendant obtained the suit land fraudulently or through other illegal or corrupt means. Neither is it the plaintiffs' case that the 1st defendant holds the suit land in trust for them. In short, there is absolutely no nexus between the plaintiffs, the 1st defendant and the suit land to warrant the grant of the orders sought in the plaint herein. I therefore find and hold that the plaintiffs have no interest in the suit land capable of being enforced in the manner which they seek either against the 1st defendant or indeed any of the other defendants notwithstanding that they did not take part in the trial.

As regards issue No. 2, the plaintiffs have produced numerous letters between them and various Government Departments including the 1st defendant to support their claim to 9.12 acres out of the suit land. Indeed no effort was spared in their quest for land which went up to the office of the then President Mwai Kibaki. There is no doubt that the plaintiffs' pleas to be allocated land was received with sympathy. Indeed on 1st September 2000 the Permanent Secretary Ministry of Local Government addressed the 1st plaintiff as follows:-

***“RE: LAND FOR SETTLEMENT***

***Your letter dated 14th June 2000 refers.***

***The Ministry has no objection to the District Commissioner allocating you land if there is suitable land and proper allocation mechanisms are followed. However, there is embargo currently in force on land allocations until the Njonjo Commission completes its work.***

***A.N. KIRAGU***

***Permanent Secretary”***

There is also a letter dated 9th March 2001 addressed to the 1st plaintiff by the Commission of Inquiry into the Land Law System of Kenya. It reads:-

**“RE: SPECIAL PERMISSSION FOR SETTLEMENT**

***We acknowledge receipt of your letter dated 1st November 2000.***

***As advised by one of our Commissioners, kindly refer your request to the District Commissioner Kirinyaga for allotment of any available land once the present ban on allocation of Government land is lifted.***

***Yours faithfully***

***Victoria Kattambo Emma Njogu***

***Joint Secretaries”.***

I may also refer to the letter dated 22nd September 2009 addressed to the District Commissioner Kirinyaga Central by the Provincial Commissioner Central Province. It reads as follows:-

**“RE: MUTIRA/KAGUYU/168**

***The above subject here refers;***

***Josephat Wangonya Kiberu has written to this office stating that K.T.D.A Headquarters has been frustrating the efforts to have the allocation of the above land to the landless people formalized.***

***However correspondences in our possession attests to the fact that the Ministry of Land could be the one contributing to the said stalemate by keeping on passing the issue to Kenya Tea Development Authority which, according to a letter from the Permanent Secretary, Ministry of Local Government dated 17th July 2009 (herein attached) has no capacity to surrender the lease as no exists.***

***The Ministry of Lands therefore should be asked to do this because it is the Ministry mandated with Land Registration to facilitate the transfer of the land to the landless.***

***The same information we have indicate that your office (Office of the District Commissioner) has handled this matter and are in favour of the land being transferred to the landless including the complainant.***

***Kirinyaga County Council has no objection either.***

***It is in view of the above and especially because the complainant has raised the matter with this office and the office of the Permanent Secretary, Provincial Administration & Internal Security that this office is directing that in order to bring this matter which has persisted so long, you convene a meeting of all stake holders involved within 21 days and resolve the matter once and for all.***

***MUGWE H***

***FOR PROVINCIAL COMMISSIONER***

***CENTRAL PROVINCE”***

Lastly, I wish to refer to the letter dated 31st July 2000 from the Permanent Secretary Office of the President and addressed to the 1st plaintiff. It reads:-

**“RE: SPECIAL PERMSSION TO SETTLE**

***Your letter dated 18th February, 2000 in the above subject refers.***

***There is a Presidential ban on the allocation of land which has not been lifted yet. Truly as you put it the hands of the District Commissioner are tied, but you should wait like all other needy persons in the country to be considered when the ban is lifted.***

**OMAR A. DHADHO**

**PERMANENT SECRETARY**

**SECRETARY TO THE CABINET AND**

**HEAD OF THE PUBLIC SERVICE”.**

I need not refer to all the correspondences produced herein. Suffice it to state that all the above letters including the others not mentioned in this judgment taken either singly or jointly did not create or convey to the plaintiffs any interest in the suit land. The manner in which land was conveyed from one party to another during that period was well known. There is no letter of allotment addressed to the plaintiffs by any of the defendants allocating the suit land or any portion thereof to them. There is no contract between the 1st defendant and the plaintiffs transferring 9.12 acres of the suit land to the plaintiffs. All that those letters did was to sympathize with the plight of the plaintiffs and the other landless persons with a promise to try and alleviate their suffering by addressing their request. This Court is certainly similarly sympathetic to the plaintiffs. However, all those letters did not go further than offering solace to the plaintiffs. They certainly did not confer any interest to 9.12 acres of the suit land to the plaintiff and could not alienate the 1st defendant’s proprietary rights to the same. That is my answer to the issue No. 2 above.

The plaintiffs obtained an interlocutory judgment against the 2nd, 3rd and 4th defendants. However, they were still obliged to lead evidence to formally prove their case against those defendants as required in law notwithstanding the fact that the said defendants did not lead any evidence. From the evidence on record however, the plaintiffs have failed to prove their case against either of the defendants herein.

Ultimately therefore, and upon considering all the evidence herein, I find no merit in the plaintiff’s case against either of the defendants. This suit is accordingly dismissed with costs to the 1st defendant.

**B.N. OLAO**

**JUDGE**

**25<sup>TH</sup> NOVEMBER, 2016**

Judgment dated, delivered and signed in open Court this 25<sup>th</sup> day of November 2016.

Mr. Ngigi for 1st Defendant present

No appearance for the other Defendants

Mr. Gacheru for Plaintiffs absent but the 1st Plaintiff is personally present

**B.N. OLAO**

**JUDGE**

**25<sup>TH</sup> NOVEMBER, 2016**