



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT THIKA**

**ELCA NO 20 OF 2020**

**MICHAEL GAIKO NGURE.....1<sup>ST</sup> APPELLANT**

**JOSEPH KANIU GAIKO.....2<sup>ND</sup> APPELLANT**

**VS**

**PETER NJOROGE KINYANJUI.....RESPONDENT**

**(Being an Appeal from the whole Judgement and order of**

**the Learned C A OTIENO-OMONDI Hon Senior Principal**

**Magistrate at Ruiru in MCLE NO 20 of 2019 delivered on the 29/4/2020).**

**JUDGMENT**

1. The Respondent/Plaintiff in this Appeal moved the trial Court vide a plaint filed on the 20/4/2019 seeking orders of vacant possession, permanent injunction restraining the Appellants/Plaintiffs from interfering with the quiet possession of RUIRU/RUIRU/EAST BLOCK2/3224 and its subdivisions (suit lands); mesne profits and general damages for trespass.

2. It was his case that he acquired the property from one Njeri Ngugi and upon being registered as owner embarked on the subdivision of the suit land into 16 plots and when he wanted to affix the beacons, the Defendants trespassed onto the suit land and removed beacons without any justifiable reason thus occasioning him loss and suffering.

3. The Plaintiff's claim was denied by the Defendants vide their amended Statement of Defence and Counterclaim filed on the 28/10/2019. They contended that the suit land belonged to their deceased mother Teresia Wanjiku Gaiko who acquired it through her membership at Nyakinyua Investment Limited vide ballot No 1165. That the 2<sup>nd</sup> Defendant is the beneficial owner of the suit land. Interalia, that the Plaintiff has not explained how he acquired the suit land. They accused the Plaintiff of trespassing onto the land and destroyed fences and trees and attempted to affix beacons on the land.

4. In their Counterclaim, the 2<sup>nd</sup> Defendant averred that he is entitled to the beneficial interest in the suit land, being an inheritance from his late Mother Teresia. That the Plaintiff invaded the suit land on the 27/3/2019 and 10/4/2019 and destroyed a fence, felled trees and forcibly took over the land in contravention of the 2<sup>nd</sup> Defendants proprietary rights. The Defendants did itemize particulars of loss and damage in their claim.

5. The Defendants sought the following orders; a declaration that the suit land belongs to the 2<sup>nd</sup> Defendant; a permanent injunction restraining the Plaintiff from interfering with the suit land; damages in the sum of Kshs 205,000 for the destroyed fence and 407,000/- with respect to the destroyed trees.

6. Evidence was led by the Plaintiff as the sole witness at the trial. He relied on the affidavits dated the 26/4/2019 and 13/6/2019 as his evidence in chief. He informed the Court that he purchased the suit land from Njeri Ngugi. In support of the transaction, he stated that he did not produce the following documents; official search of the suit land; copy of the title in the name of Njeri Ngugi; agreement with Njeri Ngugi; land control board consent as well as the transfer in his favour. He also informed the Court that he was not going to produce any document in support of the subdivision of the land into 16 plots as he returned the original title to the Lands office upon subdivision of the suit land. That he went to the property on the 27/3/2019 and 10/4/2019 to affix the beacons and he was repulsed by people who live near the land. That he knows them by appearance. That he knows the 1<sup>st</sup> Defendant and saw him at the land. That he does not live on the land.

7. Next to testify as PW2 was Robert Mugendi, the Land Registrar, Ruiru. He stated that he was in Court pursuant the to witness summons issued by the Court to produce the original documents with regard to the suit land. He produced interalia the certified copies of green card;

allotment; transfer from the Government to Njeri Ngugi; Kenya Gazette Notice of 20/11/2015; title issued in the name of Njeri Ngugi; transfer from Njeri Ngugi to the Plaintiff; Application for land control board; land control board consent dated the 11/10/2016; mutation form and title in the name of the Plaintiff.

8. His brief testimony taken from the Register was that the register was opened on the 13/5/92 in the name of the Government of Kenya (GOVERNMENT OF KENYA). That the land was transferred to Njeri Ngugi and got title on even date. He stated that all the land in RUIRU East Block 2 originally belonged to Nyakinyua Investment Limited and that before the year 2012, the transfers to the allottees of Nyakinyua would be executed by the Commissioner of Lands (COL) on behalf of the Government of Kenya. That Nyakinyua would forward the names of the allottees to the COL through a sheet and the transfers. That the title in the name of Njeri Ngugi having been lost was replaced in 2015 vide the Kenya Gazette Notice dated the 2/11/2015. On the 20/9/2016 the land was transferred from Njeri Ngugi to the Plaintiff. That on the 27/10/2016 the Plaintiff caused the subdivision of the suit land into 16 plots namely RUIRU/RUIRU EAST BLOCK 2/21867 – 21882, see the mutation, land control board consent to subdivide, and the Application for consent.

9. In cross, the witness informed the Court that he did not produce any letter of allotment to support Government of Kenya allotment on behalf of Nyakinyua Investments Limited to Njeri Ngugi in 1992. He admitted that Nyakinyua was a private company and allotment letters are used to convey land by the Government of Kenya. That said he insisted that before 2012 the COL allocated land/ executed the transfer on behalf of Nyakinyua and that explains why the 1<sup>st</sup> entry is the Government of Kenya although he could not support how the transfer was forwarded from the COL to Nyakinyua and vice versa. With respect to the apparent alteration on the allotment letter from 33 to 32, the witness could not explain it. When the witness was asked to explain why the transfer from Government of Kenya was not executed, he stated that the words 'Commissioner of lands on behalf of the Republic of the Government of Kenya' denoted the COL signature. He admitted that the transfer is neither witnessed nor certified, in other words the signature of the Government of Kenya and that of Njeri Ngugi is not certified. That the land Registrar Kiambu namely Alexander Muriuki attested the signature of Njeri Ngugi. That he knew the signature of the said Land Registrar and that in those days there were no stamps denoting the registration of Land Registrars, it having been introduced later. He further informed the Court that the transfers on his record are counterpart copies and are not stamped; no consideration for the land; no duty paid and that the original transfer must be with the person who created the entry in the green card. That after the subdivision, green cards were opened for the resultant plots. In conclusion he stated that the documents in his record are legitimate as far as he has not received any challenge to the legality of the same.

10. With that the Plaintiff closed his case. The Defendants sought leave of the Court to amend their amended statement of defence and counterclaim. After considering the merits of the said Application the Court on the 18/2/2020 declined the Application with reasons that the prayer came too late in the day after the close of the Plaintiffs case creating a difficulty for the Plaintiff to rebut the contents of the amended defence and counterclaim.

11. The case of the Defendants was adverted by the 2<sup>nd</sup> Defendant as DW1 who testified as a sole witness. Joseph Kaniu Gaiko adopted his witness statement dated the 26/7/2019 and produced the documents vide List of Documents dated the 11/11/2019 as interalia; ballot No 1165; certificate of death; amended grant of letters of administration issued in the estate of Teresia Wanjiku Gaiko; various payment receipts by the said Teresia in favour of Nyakinyua Investment Limited; map showing ballot numbers on the ground.

12. In his testimony, the witness stated that the suit land belonged to his mother Teresia Wanjiku Gaiko. Though he claimed to possess a share certificate, the same does not have any reference to the suit land. He informed the Court that the title for the suit land is yet to be processed. He stated that '*we do not have a title*'. That the suit land was included in the estate of her mother vide an amended confirmation of grant issued on the 22/10/2019.

13. In cross, the witness stated that his mother gave him the plot which she acquired from Nyakinyua Investment Limited. That her ballot was 1165 which birth two parcels; 3224 and 3225 upon subdivision. That Teresia died on the 22/3/1996 before processing a title for the ballot. That her mother also owned ballot 940 for land at Maguguni. Finally he stated as follows;

'we did not include the suit property and other properties (in the earlier grant?) because they did not titles. RUIRU/RUIRU EAST BLOCK2/3224 is unoccupied. My brother lives on parcel 3225. I live in Gatundu. I am claiming parcel 3224. I do not have a title. I want to get a title.'

14. Upon considering the case, the Court in its Judgement delivered on the 29/4/2020 held that the Defendants failed to establish a link between ballot No 1165 and the suit property and the Defendants' claim against the Plaintiff therefore failed.

15. This Judgement has provoked this Appeal. See Record of Appeal filed on the 22/5/2020. Having been vanquished at the trial Court the Appellants filed 19 Grounds of Appeal that the Learned trial Magistrate erred as follows;

- a. In evaluation of evidence and therefore reaching a wrong conclusion.
- b. Holding that Njeri Ngugi was the original allottee based on unverified documents.
- c. Holding that a falsified handwritten copy of green cad produced by the Ruiru Land Registrar was a copy of an allotment and relying on the Registrar's evidence that the Government transferred the suit property to Njeri Ngugi on behalf of Nyakinyua Investment Ltd.
- d. Admitting an invalid copy of a transfer that was not assessed for stamp duty; had no endorsement, book number and lacked roof of payment purporting to convey the suit land to Njeri Ngugi.
- e. Failing to note that the lost Title deed number as Gazetted by Njeri was RUIRU/RUIRU/EAST/BLOCK 2/1224 and the

subsequent Title deed issued pursuant to the expiry of the Notice period was fundamentally distinct as RUIRU/RUIRU/EAST/BLOCK 3/1224.

f. Failing to note an official search could not be conducted in 2015

when the title deed of the suit land was allegedly lost.

g. Holding that there was a sale agreement between the Respondent and Njeri Ngugi yet no copy of such sale agreement nor proof of payment was produced as evidence.

h. Holding that the instrument of transfer dated 15/9/2016 was valid despite it falling short of requisite features and as a result an invalid transfer cannot confer valid Title Deed.

i. Holding that the Respondent proved his case despite glaring evidence of irregular and fraudulent acquisition of Title.

j. Noting that a witness from Gatundu Nyakinyua Compny Ltd would have been critical to prove the 2<sup>nd</sup> Appellant's case.

k. Relying on PW2's evidence that was full of falsehoods.

l. Finding that the JOHN NGURE GAIKO occupied the suit land and ordered his eviction yet there was evidence that the said John resided on RUIRU/RUIRU/EAST/BLOCK 2/3225 which is adjacent to the suit land but both parcels share the same ballot no. 1165.

16. The Appellants now urge this Court to allow the Appeal; set aside the aforesaid Judgement; enter judgment in favour of the 2<sup>nd</sup> Defendant as per the counterclaim dated the 18/10/2019; cancel the title issued in the name of the Respondent and reissue the same in favour of the 2<sup>nd</sup> Defendant and costs be awarded to the Appellants.

17. On the 28/6/2021 directions were given with the effect that the Appeal be canvassed by way of written submissions. The firm of **Isaiah Kandie & Company Advocates** filed written submissions on behalf of the Appellants while those of the Respondent were filed by **Musa Boaz & Thomas Advocates**.

18. As to who is the legitimate owner of the suit land, the Appellants submitted that the land belonged to Teresia Wanjiku Gaiko who gifted it to the 2<sup>nd</sup> Appellant. That Teresia acquired the property through her shareholding in Nyakinyua Investment Limited where she was issued with a share certificate (payment receipts referred on pages 33-36 of the Record of Appeal) together with ballot No 1165 that yielded parcel Nos. 3224 and 3225. That Teresia gifted parcel 3224 to the 2<sup>nd</sup> Appellant while 3225 was given to his brother John Ngure Gaiko in 1986. That both properties border each other. That Teresia never processed the title deeds for the parcels, a loop hole that was exploited by the Respondent.

19. In their further submissions the Appellants impugned the title of the Respondent in more than one way. They faulted the Respondent for failing to call Njeri Ngugi as a witness; produce documents in support of the purchase of land from Njeri Ngugi; no proof to show that Nyakinyua forwarded the name of Njeri Ngugi to the Commissioner of Lands for allocation/preparation of transfer; validity of the transfer by Government of Kenya to Njeri Ngugi is questionable - the certificate is neither signed nor attested.

20. As to whether there was any loss of title of the suit land in the name of Njeri Ngugi issued in 1992, the Appellants submitted and faulted the Respondent for failing to show any documents to support the averment in form of police abstract; statutory declaration by the said Njeri Ngugi affirming that the title is lost and the circumstances in which it got lost; the title deed gazetted as lost vide the Kenya Gazette notice produced is for parcel No 1224 and not 3224; That there was no title issued to the said Njeri Ngugi in 1992 at all.

21. Was there a valid sale of the suit land to the Respondent? The Appellants submitted that the failure by the Respondent to produce a title, search, agreement of sale, payment of the consideration inter alia was contrary to Section 3(3) of the Law of Contract Act which states that for a sale of land to be valid it must be in writing, signed by all the parties and the signature of each of the parties must be attested. That none of these steps were taken by the Respondent.

22. Is the title held by the Respondent conclusive evidence of ownership? According to the Appellants the title deed is not valid on the grounds upon which it has been impugned in the preceding paras. Therefore, the law cannot protect the title of the Respondent and as it was acquired illegally. He relied on the decisions in **Francis Raphael Ambeko Vs Anjeline Moraa Amukoye ELC 157 of 2014 and Joseph Kagunya Vs Boniface K Muli & 3 others ELC 268 of 2003**.

23. In conclusion the Appellants decried the inconclusive record of the trial Court in that a section of the proceedings was left out. That they were not allowed to call a witness namely John Ngure Gaiko nor an official from Nyakinyua Investment Limited, the request allegedly having been made after the Plaintiff had closed his case.

24. The Respondent opposed the Appeal and submitted that the Record of Appeal is incompetent on account that the decree or order being appealed against was not annexed. The Respondent sought refuge in section 65 of the Civil Procedure Act read together with Order 42 rule 2 and 13(f) of the Civil Procedure Rules.

25. While maintaining that there is no competent Record of Appeal before the Court, the Respondent relied on the case of **Bwana Mohamed Bwana Vs Silvano Buko Bonaya & 2 others (2015) eKLR** where the Court held inter alia that an incompetent Appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issue.

26. That equally in the Court of Appeal in the case of **Chege Vs Suleiman (1988) eKLR** stated that the issue of failure to attach the decree is a jurisdictional point as follows;

‘But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the Civil Procedure Act which confers a right of appeal from the High Court to this Court from “decrees and orders of the High Court”. **And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal.**’

27. That the Court in **Kilonzo David t/a Silver Bullet Bus Company Vs Kyallo Kiliku & Anor (2018) eKLR** held as follows;

‘Despite the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities, this court took the firm view that omission to include the decree or order to be appealed from in the Record of Appeal was not a procedural technicality for the reason that the word “shall” in Order 42 Rule 2 of the Civil Procedure Act contemplates that the furnishing of the decree or order is mandatory and cannot be wished away.’

28. That the failure to include the decree is a jurisdictional issue as the Court will not have anything to overturn on Appeal. The Respondent urged the Court to strike out the Appeal on that ground of objection.

29. Looking into the merits of the Appeal, the Respondent was of the firm view that the Appeal is for dismissal. The Respondent impugned the amended defence and counterclaim on account that; no leave of the Court was cited or indicated; the amendments were not underlined in red as per the rules; and that the pleadings that should have been entertained by the Court should be the original defence without the counterclaim.

30. As to whether the Court erred in holding that Njeri Ngugi was the original allottee, the Respondent submitted that the evidence of the Respondent and his witness PW2 as to the ownership of the suit land was not controverted. He faulted the Appellants for failing to lead cogent evidence sufficient to impeach the title of the Respondent. That the Appellants failed to call Njeri Ngugi and the officials of Nyakinyua Investments Limited as witnesses.

31. As to whether the trial Court erred in questioning the link between the ballot 1165 and the suit title, the Respondent was of the view that registered land is determined based on the title documents and the Appellants failed to lead evidence to prove that ballot 1165 refers to the title in issue; the share certificate does not show the description of the land; receipt on page 230 of the Record of Appeal does not indicate the title number; the suit property was not initially included in the estate of Teresia and the latter inclusion was a mischievous afterthought.

32. Further that the Appellants failed to adduce evidence in support of fraud. That fraud cannot be imputed on the part of the Respondent by a mere fact that the record at the Lands office was missing. That the Appellants needed to plead particularize and prove fraud before the Court makes a finding. See the case of **Morjaria Vs Nansingh Madhusingh Darbar & Anor (2000) EKLR**.

33. According to the Respondent, the Appellants failed to dislodge the title of the Respondent. Inter alia that the amended, confirmation of grant of administration was sneaked in during the hearing and further that the titles in the names of the Appellants have no legal basis as none has been demonstrated. In conclusion the Respondent argued that the Appeal is hinged on empty and cannot succeed in a vacuum. He urged the Court to dismiss it.

34. Having read and considered the Record of Appeal, the trial Court proceedings, the written submissions and all the material placed before me, I find the issues for determination are;

- a. Whether the Appeal is incompetent
- b. Whether the 2<sup>nd</sup> Appellant has proved title to the suit land.
- c. Whether the Respondent proved trespass against of the Appellants.
- d. What orders should the Court make
- e. Who meets the costs of the Appeal

35. As a first appellate Court, this Court’s duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the Court in a first Appeal such as this one was stated in **Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123** in the following terms:

“I accept counsel for the Respondent’s proposition that this Court is not bound necessarily to accept the findings of fact by the Court below. An Appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an Appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally ( **Abdul Hammed Saif –vs-**

**Ali Mohamed Sholan (1955), 22 E.A.C.A. 270.”**

36. It is commonly accepted that the suit land is parcel 3224. There are arguments and counter arguments with respect of how this land was acquired by the parties in this case. Before I delve into the gist of the Appeal, I find it necessary to note that the Memorandum of Appeal covering 19 grounds was an overkill and an act of *braggadocio* to say the least. It is very repetitive in nature and goes contrary to the provisions of Order 42 Rule 1 of the CPR which states as follows;

‘ the memorandum of Appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order Appealed against without any argument or narrative and such grounds shall be numbered consecutively.’

37. The Appeal must take the form of a memorandum of Appeal setting out briefly under distinct heads and numbered consecutively the grounds of such Appeal. The memorandum should not narrate the grounds nor be argumentative. With due respect I do find that the memorandum of Appeal does not conform to the above procedural law. The essence of clarity of the memorandum is to assist the parties and the Court as to what is being Appealed against/cause of grievance and the real issue for determination.

38. Having said that I shall determine the Appeal on its merits.

39. Is the Appeal incompetent? Appeals from the subordinate Courts to ELC Court require that an Appellant provides the mandatory documents are as listed under Order 42 rule 13(4) Civil Procedure Rules that;

‘ 13. Directions before hearing [Order 42, rule 13.]

(4) Before allowing the Appeal to go for hearing the judge shall be satisfied that the following documents are on the Court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

(a) the memorandum of Appeal;

(b) the pleadings;

(c) the notes of the trial magistrate made at the hearing;

(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) **the judgment, order or decree Appealed from**, and, where appropriate, the order (if any) giving leave to Appeal:

Provided that—

a translation into English shall be provided of any document not in that language;

the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).’

40. Order 42 Rule 13(4) (f) Civil Procedure Rules is clear that what is required at the first appellate Court is the Judgment, order or decree Appealed from. In my view the use of ‘OR’ in the above provisions is that, it is not a mandatory requirement for an Appellant to include both the Judgment and the decree of the subordinate Court in the Record of Appeal.

41. It would however not be useful to attach a decree and leave out the Judgment of the Trial Court. This is because a decree is an extract of the Judgment Appealed from. A decree is defined under Section 2 of the Civil Procedure Act,;

“decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

(a) any adjudication from which an Appeal lies as an Appeal from an order; or

(b) any order of dismissal for default:

Provided that, for the purposes of Appeal, “decree” includes judgment, and a judgment shall be Appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

42. Order 42 rule 4 of the Civil Procedure Rules, 2010 (CPR) therefore mandates the Judge to be satisfied that the documents outlined under the rule are in the Court file and parties have been served. The provision thereto allows the Judge to exercise discretion and exclude some documents other than those mentioned in (a), (b) and (f). If the mandatory documents are not in record the solution is found in Order 42 Rule 2 CPR that:-

“Where no certified copy of the decree or order Appealed against is filed with the Memorandum of Appeal, the Appellant shall file such certified copy as soon as possible and in any event within such a time the Court may order, and the Court need not consider whether to reject Appeal summarily under Section 79B of the Civil Procedure Act until copy is filed.”

43. In the persuasive case of **Nyota Tissue Products v Charles Wanga Wanga & 4 Others [2020] eKLR**, when addressing the issue of failure by an Appellant to file a decree, the Court stated thus-

“The rule applicable to the Appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the “judgment, order or decree Appealed from and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial Court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in Silver Bullet Bus case on the point, that it would be too draconian to strike out the Appeal in these circumstances.”

44. Recently, the ELC Court in **Joel Mwangangi Kithure v Priscah Mukorimburi [2022] eKLR** in determining whether an Appeal was incompetent for want of a copy of decree Appealed against, held that;

“28. Whereas the Appellant failed to annex a certified copy of the decree, he did attach a certified copy of the judgment which would suffice in the absence of a certified copy of the decree. Further, it has not been shown what prejudice the Respondent suffered by the failure to annex the certified copy of the decree. I therefore find that the Appellant’s failure to annex the certified copy of the decree cannot be the basis for dismissing the Appeal.”

45. Ultimately, the view of the Court is that the Judgement annexed sufficed for the Appeal noting the use of the word **OR** by the drafters of the Rules. In any event the Respondent has responded to the Appeal and no grounds of prejudice have been demonstrated on the part of the Respondent on account of the missing decree. This Court declines the invite to hold the Appeal as incompetent.

46. Whether the 2nd Appellant has proved that he is the registered owner of the suit land, I shall refer to Section 107 of the Evidence Act which provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact the burden of proof lies on that person.

47. The standard of proof in civil cases is that of standard of probabilities. The onus of proof lay with the Appellants to show that the suit land belongs to the 2nd Appellant. That is the crux of their case.

48. It is the case of the Appellants that the suit land belongs to the 2<sup>nd</sup> Appellant having inherited it from their deceased mother namely Teresia Wanjiku Gaiko. That the late Teresia died before processing the title. DW1 led evidence and relied on the ballot No 1165 and an assortment of payment receipts in support of their averment. It is not in dispute that the suit land initially belonged to Nyakinyua Investment Limited, a fact which has been admitted by all the parties. It is common knowledge and borne of practice that Nyakinyua being a land buying company acquired large tracts of lands from the outgoing white settlers for purposes of settling its members. Membership was through purchase of shares which shares were equated to plot(s). A member was issued with a share certificate and a ballot to denote the number of shares and equivalent land. The members paid for the land as would be evidenced by receipts to the company. It must be noted that Nyakinyua was a private company comprised of members/shareholders and not a Government entity. The land would be subdivided according to the number of members saving land required for public utilities, giving birth to an area map or RIM as well as the area list comprised of the list of land owners. The company as per law maintained a register of members in which every member’s entitlement is properly recorded in form of shares and ballot number for the land that he or she balloted. The plots would be in various sizes as desired by the members. For a title to be registered the following documents would be necessary; share certificate, ballot number, clearance certificate from Nyakinyua, transfer duly executed by the officials of Nyakinyua, land control board consent, RIM denoting the land on the ground, area list and or members register, payment of stamp duty interalia. In my view this sums up the basic documents required of a party wishing to register a parcel of land emanating from the land buying company.

49. In this case the Appellants failed to produce a certified copy of the share certificate, members register showing the number of shares held by their mother against the ballot. There is no evidence to show that ballot No 1165 relates to parcel 3224. None at all. No doubt the said Teresia may have been a member of Nyakinyua going by the various receipts on pages 30 – 35 of the Record of Appeal for purchase of various shares over a period of time. However the said receipts have no reference to the suit land. There is unchallenged evidence that Teresia also purchased other shares/plots such as parcels 3440 and 3439 as per the confirmed grant of letters of grant of administration on record.

50. It is not in dispute that Teresia died on the 22/3/1996 and her estate was fully succeeded vide the grant of letters of administration and the suit land was not included in the grant of letters of administration in the estate of Teresia issued 20/3/2002. It is to be noted that the land was not part of the estate of Teresia then. Vide an amended certificate of confirmation of grant issued on the 22/10/2019 two parcels to wit 3224 and 3225 are included. The suit land parcel 3224 is disclosed to be allocated to the 2<sup>nd</sup> Appellant as a sole beneficiary.

51. The 2<sup>nd</sup> Appellant led evidence that Teresia died before processing the title. He stated;

“we did not include the suit property and other properties (in the earlier grant?) because they did not titles. RUIRU/RUIRU EAST BLOCK2/3224 is unoccupied. My brother lives on parcel 3225. I live in Gatundu. I am claiming parcel 3224. I do not have a title. I want to get a title.”

52. Up to this point the Appellants have not successfully demonstrated any nexus between ballot No 1165 and parcel 3224, the suit land. I say so because I have perused the survey map produced by the 2<sup>nd</sup> Appellant in which he argued that ballot 1165 yielded two plots ; 3224 and 3225. Ballot 1165 is circled over plot Nos 3220-3224. Again, the mere plot number does not link parcel 3224 to ballot No 1165. I agree

with the finding of the Learned Magistrate on this one. The Appellants failed to call any witness from Nyakinyua to shed light on the true owner of ballot No 1165. I note from the Grant of Letters of Administration that the Administrator of the estate of Teresia is John Ngure Gaiko. The second Appellant was sued yet he is a beneficiary awaiting distribution of the land. I will say no more.

53. The issue is therefore answered in the negative.

54. With respect to issue No 3 – has the Respondent proved trespass and is he entitled to the reliefs sought? The issue before me is a simple one of trespass on land. In Black’s Law Dictionary 8th Edition, a continuing trespass is defined as:-

“A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property”.

55. In Clerk & Lindsell on Torts 16th Edition, paragraph 23 - 01, it is stated that:-

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.

56. In the case of **Charles Ogejo Ochieng - v- Geoffrey Okumu, (1995) eKLR** the Court held that trespass is an injury to a possessory right and therefore the proper Plaintiff in an action for trespass to land is the person who has title to it or a person who is deemed to have been in possession at the time of trespass, similarly in the case of **Okorie & others- Vs- Udom & Others, (1960) 5 FSC 16** the Nigerian Court stated that where there is a claim for trespass coupled with injunction, it is incumbent upon the judge to consider the question of title to the land and exclusive possession of it. In the same judgment, the Nigerian Court stated that a person cannot trespass on his own property. In **Amakor - vs- Obiejuna, (1974) S.C. 67, at 75** the same Court also held that trespass to land in law constitutes the slightest disturbance to possession of land by a person who cannot show a better title or right to possession; and that a Court of law is under a duty to pronounce on the validity or otherwise of documents of title tendered in evidence by the parties in arriving at a decision.

57. In this case it was the Respondent’s case that the Appellants invaded his land and hindered him from affixing the beacons on his subdivisions. It is commonly accepted that the Respondent tried to affix the beacons on two consecutive days. That he was repulsed by some people who live around the area. The Respondent was categorical in his evidence that he knew the 1<sup>st</sup> Appellant and saw him on the land. He stated that the people disrupting the affixation of the beacons were known to him by appearance. He did not disclose the names of those people. He admitted that he does not live on the land and neither does he know the person who had fenced the land. The 2<sup>nd</sup> Appellant led unchallenged evidence that his brother namely John Ngure Gaiko who resides in the adjoining parcel of land namely parcel 3225 occupies the suit land and that he himself resides in Gatundu. The said John Ngure Gaiko was not sued for trespass. No evidence was led to support the claim of trespass against the 2<sup>nd</sup> Appellant.

58. Trespass must be proved. Evidently the Respondent did not lead evidence to proof any trespass by the Appellants. It is still a mystery to the Court why the 1<sup>st</sup> Appellant was sued in this case. I say so because there appears to be no cause of action clearly targeted at the 1<sup>st</sup> Appellant.

59. I find that the Hon. Magistrate erred in allowing the Plaintiffs claim while there was no scintilla of evidence in support. I shall make the relevant orders in the end.

#### 60. Final orders and disposal

- a. The Appeal fails.
- b. The Counterclaim is dismissed.
- c. The claim of the Respondent is not proved. It is dismissed.
- d. I make no orders as to costs. Each party to bear their own costs.

61. It is so ordered.

**DELIVERED, SIGNED & DATED ON THE 25<sup>TH</sup> APRIL 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Kibet for 1<sup>st</sup> and 2<sup>nd</sup> Appellants

Tumu for Respondent

Court Assistant: PhyllisS