



REPUBLIC OF KENYA



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**Mburu & 50 others v Ndungu & 5 others (Environment and Land Case
Civil Suit 8 of 2019) [2022] KEELC 3228 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3228 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND CASE CIVIL SUIT 8 OF 2019**

LN GACHERU, J

MAY 26, 2022

BETWEEN

STEPHEN NDUNGU MBURU & 50 OTHERS & 50 OTHERS PLAINTIFF

AND

NELSON NDUNGU 1ST DEFENDANT

PAUL MAINA 2ND DEFENDANT

FREDLICK WAINAINA NJOROGE 3RD DEFENDANT

PETERSON NDUNGU 4TH DEFENDANT

TERESIAH NYAMBURA 5TH DEFENDANT

PUNDAMILIA FARMERS CO-OPERATIVE SOCIETY LTD 6TH DEFENDANT

JUDGMENT

1. Vide an Amended Plaint dated 21st March 2021, the Plaintiffs herein sought for these orders against the Defendants jointly and severally;-
 - a) A Permanent injunction do issue restraining the Defendants, their agents, servants, employees or people working under them from entering into, sub-dividing, demarcating, offering for sale, disposing and/or transferring the whole or part of land parcel Makuyu/Makuyu/Block 1/2097, and the same to remain reserved as a dam for use by the Plaintiffs and the other members of the Public.
 - b) Cost of the suit be borne by the Defendants.
2. The Plaintiffs alleged that they are owners of their distinct parcels of land which were allocated to them pursuant to their shareholding in the 6th Defendant Society – Pundamilia Farmers Cooperative Society Limited. That at the time of subdivision and allocation of plots, to its members, the said



- Pundamilia Farmers Co-operative Society, set aside land for public utilities such as roads, schools and social amenities. That such a facility was a Dam that was allocated land parcel No. Makuyu/Makuyu/Block 1/2097, which measures about 14 acres and it is worth about Ksh.30,000,000/=. That the said land was registered in the name of the said Co-operative Society and reserved for a Dam. Further that the Plaintiffs have been benefitting from the use of the said Dam water that was harvested thereon.
3. However, recently due to misuse, mismanagement and lack of repair, the walls of the said dam broke down and the water was drained. Thereafter, the 1st – 5th Defendants who have been masquerading as official of the Defunct 6th Defendant, took it upon themselves, entered into the said parcel of land and started to subdivide the same. Further, that the Defendants have put beacons on the proposed subdivision using surveyors and have started to sell the suit property to unsuspecting third parties, the subdivided plots which were demarcated out of this parcel of land reserved for a dam for the public use. Therefore, the Plaintiffs are praying for permanent injunction to restrain the Defendants, their agents, servants and/or employees from entering, subdividing, offerings for sale, disposing, transferring or on any other way interfering with the reserved status as a public dam being land parcel Makuyu/Makuyu/Block 1/2097.
 4. Before the Plaint was amended, the 1st – 5th Defendants filed their statement of Defence on 9th April 2019, and denied that the Plaintiffs are the owners of the subject parcel of land having been allocated their distinct parcels of land. They denied that the 2nd-51st Plaintiffs are members of the said Co-operative Society. They also denied that the suit property was put aside for a dam as alleged by the Plaintiffs. They averred that the said land was allocated to 66 members on 12th November 1997, after balloting though the suit land remains registered in the name of the Co-operative Society.
 5. That there is no Dam in existence as the lawful owners are in occupation and farming is carried on by the respective owners of these Plots. Further that the Defendants are the lawful current officials of Punda Milia Co-operative Society. They also denied that they have entered into the said parcel of land for purposes of subdivision. Further, they averred that the 1st Plaintiff owns land parcel No. Makuyu/Makuyu/Block 1/2100, which is adjacent to the suit property and he has been eyeing the same for sometime. The 1st – 5th Defendants urged the Court to dismiss the Plaintiff's suit.
 6. After the amendment of the Plaint, the 6th Defendant - PundaMilia Farmers Cooperative Society Ltd, filed its Defence on 6th September, 2021, and averred that the 2nd – 51st Plaintiffs are strangers to itself. It also denied that the Plaintiffs are owners of the subject parcel of land, and also denied that the 2nd – 51st Plaintiffs were members of the said Co-operative Society. It was denied that the suit land was set aside for a dam, but it alleged that the same was allocated to 66 members on 12th November 1997, after balloting for the same, though the suit land remains registered in the name of the 6th Defendant. Further, that no Dam is in existence as the owners of the suit property have taken occupation and have been farming in their respective parcels of land. It further adopted all the other contents contained in the other Defendants' Defence.
 7. On 3rd February 2021, Francis Kamau Mugo & 65 OtherMembers filed a Notice of Motion Application, and sought to be joined in the suit as Defendants. They alleged that they are the bonafide owners of Land Parcel No. Makuyu/Makuyu/Block 1/2097, (herein after called the suitland). The said Application was not opposed and on 25th May, 2021, the same was allowed and the 66 members were joined as Interested Parties.
 8. Once the 66 members were joined to the suit, they filed a pleading that they referred to as Defence Affidavit drawn by Francis Kamau Mugo, who was representing them in Court. In the said Defence, they alleged that they are the bonafide shareholders or registered members of Punda Milia Farmers



- Cooperative Society, and are also holders of Mogera shares in the Society. That the said members were entitled to be allocated plots in Mogera Coffee estate. That the said members were not allocated plots in Mogera Coffee estate, though they were entitled to. That as a result of failing to get plots in Mogera Coffee estate, the said 66 members were settled in the suit property Makuyu/Makuyu Block 1/2097, to compensate them for their plots not given. That when the 1st Plaintiff's failed to get land in the suit land, he joined up with nonmembers of Punda Milia Cooperative Society to claim that the suit land was a dam area which was meant to benefit all the shareholders of 6th Defendant.
9. Further that the 1st Plaintiff owns parcel of land Makuyu/Makuyu/Block 1/2100, which neighbours the suit land. That the 1st Plaintiff is the only shareholder of Pundamilia Cooperative Society and the details of parcels of land alleged owned by the other Plaintiffs is fictitious and they are not registered in Pundamilia register. That the 1st Plaintiff is trying to deny the 66 members ownership of the plots by falsely alleging that the said land is a dam. It was there averments that they do recognize the current officials as the bonafide officials of PundaMilia Co-operative Society, who were legally elected. It was their contention that Murang'a lands office was aware of the subdivision of the suit land and allocation of the same to the 66 members. Further that Makuyu Urban Council had no objection to the said Suitland being changed from Agricultural to Residential use. Further, that Makuyu Land Control Board, gave consent for the said subdivisions and the other Government Offices also did not object to the subdivisions. They also contended that the 1st Plaintiff had engaged the 6th Defendant in other Court cases demanding to be given part of land parcel No. 2097, to compensate him for land parcel No. 2100, even if he claims now that this suit land was a dam.
 10. Further, that the list of Plaintiffs attached to the Plaint is fictitious and that the suit land was not subdivided in November 2019, as alleged by the Plaintiffs, but was allocated to the 66 members who were shareholders on 12th November 1997. They also contended that PundaMilia Cooperative Society, surrendered the public utility land and that the rest of the parcels of land were allocated to shareholders. Further, the suit land was registered as arable Agricultural land belonging to the Society and it was not surrendered as public utility land. They urged the Court to issue an order directing that the 66 shareholders be issued with title deeds to their respective plots.
 11. Several witness statements were attached to the said Defence Affidavit. These witness statements were signed by Francis Kamau Mugo, Veronica Njoki Ndungu, George Githua Kinuthia and James Kamau Mungai. They reiterated what was alleged by Francis Kamau Mugo, and further emphasized that they were issued with their respective plots on the suit land and they have been farming thereon as they waited issuance of title deeds. That they were allocated their plots in 1997. Several receipts were attached to their pleadings to confirm payment for the shares at PundaMilia Farmers Cooperative Society – 6th Defendant herein.
 12. At the hearing of viva voce evidence, the Plaintiffs called two witnesses and closed their case. The Defendants called one witness and closed their case. The Interested Parties called three witnesses.

PLAINTIFFS' CASE.

13. PW 1 Stephen Mburu Ndungu, who was representing the 50 Others Plaintiffs relied on his witness statement as the evidence in chief. He also produced the list of documents as exhibits for the Plaintiffs. It was his evidence that the shareholders of Pundamilia Farmers Co-operative Society, were issued with their respective plots after balloting and paying 5000/= each. That the suit land was left intact as a dam which was to serve the shareholders. That the said dam had waste water and was used by the Plaintiffs for irrigation of their farming. However, during the EL-NINO rains, the walls of the dam broke down and the dam was drained off the water. After the water was cleared, the officials of



- Pundamilia illegally subdivided this suitland – Makuyu/Makuyu/Block 1/2097, and issued the suit plots to different people to the prejudice of the Plaintiffs who were using the dam water to irrigate their farms and water their cattles.
14. It was his evidence that Pundamilia Society did not use proper process to allocate the land to the 66 members. That the real shareholders were not informed of the said subdivisions and they did not authorize the same. It was his further evidence that the documents produced by the Interested Parties were not genuine.
 15. In cross-examination, he stated that the suit land was subdivided by the officials of Pundamilia Society. He denied ever taking them to Court. He also denied ever claiming land that he now alleges is a dam. He also admitted that his land is near the dam and the dam occupies land parcel No. 2097. He denied ever demanding a portion of land from 2097. He confirmed that though he had two searches which showed that the suit land was for Pundamilia Society, however, the searches did not indicate that the suit land was a dam. He also confirmed that in the year 2003, he was a member of the Management Committee. It was his evidence that the 50 Other Plaintiffs herein are original shareholders of Pundamilia. He denied that he came to Court because he was dissatisfied with the decision of the Court.
 16. On cross-examination by the Interested Parties, he admitted that the 50 Plaintiffs are shareholders of Pundamilia. He also confirmed that he was once an official of Pundamilia Cooperative Society, and that the suit land was not subdivided then. He also denied that the suit land was subdivided in 1997. He also denied that he brought this suit because he lost in a Court case at Thika Chief Magistrates Court. It was his evidence that the dam broke down during the Elnino rains. It was his further evidence that the 66 Interested Parties are not known to him.
 17. In re-examination, he confirmed that there was no record to show that some people missed land in Mogera Coffee Estate. He also stated that the officials of PundaMilia Cooperative Society never made returns to the Ministry of Cooperative.
 18. PW 2: Geoffrey Muna Kagia, the 3rd Plaintiff also adopted his witness statement as evidence in chief. He stated that his parcel of land is No. 1886 and he bought it from Joseph Gitau Mungai, who was an original shareholder.
 19. Further that his land is near the dam. That the dam drained its water and then the surveyor went to survey and subdivided the said land. That then the Plaintiffs reported the matter to the area Member of the Parliament and placed a caution on the title. That the said Dam used to benefit them in farming and watering their cattle. That he bought his land in 2011, and he is not an original shareholder. He opposed the subdivision of this dam area.
 20. In cross-examination, he stated that he bought the land in 2011, and he has built on this land. He confirmed that there was water when he bought his land. However, there is now very little supply of water and that he uses the water from this dam. He confirmed that he saw the dam area being subdivided by the people who were cultivating on the said dam area.
 21. On further cross-examination, he stated that he did not know of issuance of land on the dam area. He also admitted that he is not a member of PundaMilia Cooperative Society. He said the land was subdivided in 1997, but he bought his parcel of land in 2011. Further, that when he went to the area, people were still cultivating on the dam area. However, the dam broke down during the Elnino rains. That he saw the surveyor subdividing the land and they reported the matter to the area MP.
 22. In re-examination, he reiterated that the water from the dam is used by all the occupants of that area – (Pundamilia). That the said subdivision was authorized by the officials of Pundamilia and thus this case.



DEFENCE CASE

23. DW 1; Nelson Ndungu Wainaina, the 1st Defendant relied on his Replying Affidavit dated 8th April, 2019, as his evidence in Court. He told the Court that Land Parcel No. 2097, the suit land was subdivided and given to 66 shareholders who had balloted for plots at PundaMilia Cooperative Society.
24. That the land was still in the name of Pundamilia Cooperative Society and title deeds had not been processed. That the officials who were in the office were removed. That when the 66 members asked to be shown the beacons of their plots, the Plaintiffs sued the Defendants. Further, that the 1st Plaintiff had sued the Defendants at Thika Law Courts and the said case was dismissed. After the said dismissal, the 1st Plaintiff appealed and the said appeal was also dismissed. He denied that land parcel No. 2097, was a water dam, but admitted that it was a dumpsite. That the area was later subdivided and the plots were issued to the 66 members, who are still occupying the said plots.
25. He produced a list of documents as exhibits in Court. That when the 1st Plaintiff filed a suit against Punda Milia Cooperative Society, he wanted to attach land parcel No. 2097. That he could not have attached a water dam. He denied that land parcel No. 2097, was a dam. He produced documents to show that the said plots were balloted for. That the two searches produced by the Plaintiffs did not show that the area was a water dam. That the County Council of Murang'a allowed the said parcel of land to be distributed among the members. He urged the Court to dismiss the Plaintiffs' suit with costs and the 66 members be allowed to continue occupying the said land.
26. On cross-examination, he averred that his duties are to facilitate owners of portions of land to obtain their titles. That he was ready to facilitate the 66 members, to obtain their titles. He also stated that they hold their meetings yearly and they invite Cooperative Officers to their meetings.
27. He further stated that they have never held an illegal meeting as their meetings are held under the supervision of the Cooperative Officer. He confirmed that the 66 members were owners of land parcel No. 2097. It was his evidence that only the 1st Plaintiff is a member of the PundaMilia Cooperative Society. That the other Plaintiffs are fake members as they did not ballot at Pundamilia Farmers Cooperative Society and were not coopted members.
28. On further cross-examination, he confirmed that he is an official of Pundamilia Society and he was giving his evidence on behalf of himself and the Cooperative Society. He also confirmed that this case has 51 Plaintiffs and that he did not know the other 50 Plaintiffs apart from 1st Plaintiff. He further confirmed that the suit land was not a dam, but a proper land being utilized by the owners. He stated that there were no minutes from the Society approving subdivision of the suit land. He also stated that though the ballots had different colours, they did not show that some shareholders had been moved to the suitland – 2097. He also did not have minutes to show that the 66 persons had balloted for Mogera Coffee estate, and were later shifted to parcel No. 2097. It was his further evidence that the suitland No. 2097, was subdivided in 1997, and it used to be known as Taka dam before. He denied that the dam broke out in 1997, during the Elnino rains. He denied that land parcel No. 2097, the suit land was reserved for the dam.
29. In re-examination, he confirmed that the Taka Dam – (Land Parcel No. 2097), had its user changed with the consent of Makuyu Urban Council.

INTERESTED PARTIES' CASE

30. IP 1; Francis Kamau Mugo, from Makuyu also adopted his witness statement dated 3rd March, 2021, as his evidence in Court. He also produced the list of document as exhibits Nos. IP.E.1 – 15. He averred



that the Interested Parties were allocated the suit property being No – 2097, in 1997. That they have waited for their title deeds since then. He alleged that he is the Chairman of these 66 members, who were allocated the suit land and have no title deeds. That they applied to be joined as parties in this case when they noted that there was such a case. That they balloted for the suit land using the yellow ballots and the officials who were in the office then are all deceased. That the Government departments did not object to the subdivision of the suit land. However, Makuyu Urban Council had no objection to the change of user and the subdivision. He reiterated that the suit land – 2097, is not a dam and that the Plaintiffs are not shareholders of PundaMilia Cooperative Society, but the 66 Interested Parties are shareholders of the said society.

31. In Cross-examination, he stated that the 66 members, who got plots in the suit land missed in Mogira Farm. He also stated that the 1st Plaintiff got his plot in Mogira area, but got agitated because he alleged that it was less in acreage and he wanted another Plot in 2097, the suitland, to compensate for his undersize. He denied that land parcel No. 2097 – the suit land was a public utility land. That due process was followed in subdividing the said land into plots.
32. In further cross-examination, he stated that though they are 6 members, he did not have a register for the said members. He also stated that he is not an official of Pundamilia Cooperative Society. He further stated that there was no resolution from the Society to show that the suit land would be given to the 66 members. He also confirmed that the suit land No. 2097, was a dam ie. Taka Taka Dam, which had waste water that was used to irrigate Mugira and Karagwa coffee estates. He also confirmed that the said dam was subdivided and the subdivided plots were allocated to the 66 members. That the said members do farm on the said subdivided plots. He further stated that though Makuyu Urban Council did not object to the change of user and subdivision, there was no confirmation from Makuyu Land Control Board giving the consent to the same.
33. IP 2: George Githua Kinuthia, who had recorded his statement on 1st March 2021, adopted it as his evidence in Court. He stated that he does not live on Land Parcel No. 2097.
34. In cross-examination, he confirmed that land parcel No. 2097, was subdivided into 66 plots which were given to the Interested Parties. That the said Plot No. 2097 was Taka dam. He also confirmed that there was no resolution for subdivision of this dam. He also confirmed that he did not have documents to show the list of these 66 members.
35. IP 3: James Kamau Mungai, a peasant farmer too also adopted his written statement as evidence in Court. He also stated that he is a resident of PundaMilia area, and a member of the said Society. He confirmed that he has been farming on Plot No. 66, since 1997. He further stated that the said land is not a dam and that the Plaintiffs are trying to grab the land. It was his evidence that the suit land is being occupied by the 66 Interested Parties.
36. After the close of viva voce evidence, the parties filed and exchanged written submissions. The Plaintiffs filed their written submissions dated 11th February 2022, through Jessee Kariuki & Co. Advocates. They urged the Court to allow their claim.
36. The Defendants filed their written Submissions dated 17th March 2022, and urged the court to dismiss the Plaintiffs case in totality.
37. The Interested Parties too filed their written Submissions dated 5th April 2022, and urged the Court to find in their favour.



38. The Court has carefully considered the pleadings herein, the evidence adduced by the parties and the exhibits produced thereon. The Court has considered the rival written submissions and finds as follows:-
39. There is no doubt that the suit land Makuyu/Makuyu/Block 1/2097, is registered in the name of the 6th Defendant- Punda Milia Farmers Cooperative Society Limited. There is a certificate of official search dated 28th November 2018, which shows that this parcel of land is in the name of PundaMilia Farmers Cooperative Society, from 23rd August 1994.
40. There is also no doubt that there is a caution placed on the said title by Stephen Mburu Ndungu on 5th October, 2018, claiming beneficial interest Stephen Mburu Ndungu is the 1st Plaintiff herein. It is also evident that there is a proposed subdivision of this parcel of land Makuyu/Makuyu/Block 1/2097, into 66 plots. The 66 Interested Parties have stated in their claim that they were allocated the said 66 plots and they are in occupation of the said plots, though they do not have title deeds to their respective parcels of land.
41. From the document produced by the Plaintiffs, this Block 1/2097 is a remnant of subdivision of a large Block 1, where several parcels of land were issued to different individuals and land parcel No. 2097 remained in the names of Pundamilia Farmers Cooperative Society Ltd, which was the initial owner of the large Makuyu/Makuyu/Block 1. In particular, the 1st Plaintiff herein Stephen Mburu Ndungu is the registered owner of Makuyu/Makuyu Block 1/2100, which borders the Suitland.
42. Further from the documents produced in Court as exhibits, the 1st Plaintiff was once on official of the 6th Defendant and had also filed a Civil Suit at Thika Chief's Magistrate Court and vide an Application dated 6th February 2018, he had sought a warrant of attachment of the 6th Defendant's land parcel No. Makuyu/Makuyu Block 1/2097, the suit property herein.
43. In the said suit- Thika CMCC DO 38 of 2003, the 1st Plaintiff did not allege that the suit property Makuyu/Makuyu Block 1/2097, was a public utilities land, but he had sought attachment of the same. The Defendants have averred that the 1st Plaintiff whose land is adjacent to the suit property has been eyeing the suit land for some time and thus the reasons why he filed this case after failing in Thika case.
44. Further, it is evident from the exhibits produced in Court that vide a Ruling delivered on 27th September, 2018, at Thika CM's Court, the 1st Plaintiff's Application for attachment of the suit property was dismissed.
45. Further, it is also evident that after the said dismissal, the 1st Plaintiff and 50 others filed this suit on 2nd March 2019.
46. The Plaintiffs have alleged that that they are all shareholders of Pundamilia Farmers Cooperative Society Limited. This fact has been disputed by the Defendants and the Interested Parties. It was therefore incumbent upon the Plaintiffs to prove that they are indeed shareholders of the 6th Defendant.
47. The Plaintiffs have further alleged that the suit land herein is a public utility land which was reserved as a Dam and it is worth Ksh.30,000,000/= (30 Million) This fact too has been disputed by the Defendants and the Interested Parties. The Plaintiffs had the onus of proving that this suit land is worth Ksh. 30 Million. This could be done by production of evidence.
48. The Plaintiffs have further alleged that they have been benefitting from the use of this Dam Water, until recently when the said Dam was misused and mismanaged and the walls broke down and the water was drained. The Defendants denied these allegations and averred that the suit land was allocated to



the interested parties in 1997, and the Plaintiffs have not been benefitting from any Dam water at all. The Plaintiffs too have a duty to call evidence and prove these allegations.

49. The Plaintiffs are the ones who have alleged. It is incumbent upon them to call sufficient evidence and prove their case on the required standard of balance of probabilities. This is provided for in Sections 107 and 109 of the Evidence Act, which state;-

107.(1) 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. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

50. Having considered the available evidence, the Court finds the issue for determination is “whether the Plaintiffs have called sufficient evidence to prove that the suitland No. 2097, is a public utility land i.e. a Dam and that the Plaintiffs are shareholders of 6th Defendant and have a stake in the said Public Utility land.”
51. The Defendants and the Interested Parties have denied that all the 51 Plaintiffs herein are shareholders of the 6th Defendant. It was admitted by the Defendants and Interested Parties that only the 1st Plaintiff is a shareholder in the 6th Defendant Cooperative Society. The Defendants and Interested Parties confirmed that the 1st Plaintiff owns parcel of land being Makuyu/Makuyu Block 1/2100. The 1st Plaintiff too had alluded to the fact that he owns land parcel No. 2100.
52. As has been observed by the Court, the Plaintiffs are the ones who have alleged and they needed to call enough evidence to prove their allegations. Have the Plaintiffs herein discharged this onerous task?
53. Given that the capacity of the other 50 Plaintiffs has been disputed, by the Defendants, then the Plaintiffs needed to avail evidence through production of documents to show and confirm that indeed the named Plaintiffs owned the parcels of land as per the schedule attached to the Plaint dated 20th March 2019. These documents are title deeds and share certificates.
54. It is worth note that the Plaintiffs case was supported by the evidence of the 1st Plaintiff, Stephen Mburu Ndungu and PW 2 Geoffrey Muna Kagia, who stated that he bought his parcel of land in the year 2011, from the original shareholder. His parcel of land is No. LR 1886, which he allegedly bought from one Joseph Gitau Mungai. The said Joseph Gitau Mungai, was not called as a witness. PW 2, further stated that when he bought his land in 2011, he knew about the Dam in issue. He later found that the said Dam had drained. However, in their submissions, the Plaintiffs alleged that the subdivision of this suit land was done in 1997. That is also the evidence of the Defendants and Interested Parties too. Certainly, if subdivision was done in the year 1997, then when PW 2 bought the suit land in the year 2011, there was no Dam at all. He could not have then used any water from the said dam. It was his evidence that the said dam broke down during the *EL NINO* rains. The *EL NINO* rains were experienced in 1997.
55. Though the other 50 Plaintiffs allegedly, gave their consent to the 1st Plaintiff to plead on their behalf, they ought to have attached their documents such as certificates of titles or share certificates to confirm that they are shareholders of 6th Defendant and residence of this area, and that they have an Interest over the suit property. The Plaintiffs merely alleged without going further by calling of tangible evidence.



See the case of Pinnacles Tours & Travel Ltd & 3 Others Vs Pauline Ngigi t/a Safari Market Tours (2019) eKLR, where the Court held;

It is trite law that he who alleges must prove”.

56. Even if the Court is to find that the Plaintiffs have proved that they are shareholders of the 6th Defendant, have they called sufficient evidence to prove that the suit land Makuyu/Makuyu Block 1/2097, is a Public utility land, to wit a dam and that the same has now been interfered with by Defendants. How could they prove this? This could have been achieved by calling Government Officials to confirm that this parcel of land had been reserved as a dam which is a public utility.
57. The Plaintiffs in their case have propelled a narrative that the suit land which is registered in the name of the 6th Defendant, was reserved as a dam known as Taka Dam, for the benefits of the shareholders of 6th Defendant. Certificate of official search dated 7th December 2017, was produced by the Plaintiffs as their exhibits. The said certificate indicates that the suit land was registered in the name of PundaMilia Farmers Cooperative Society – reserved for a Dam. The Defendants have denied such reservation.
58. The words “reservation for Dam”, are additional words. The Plaintiffs are the ones who have alleged and they needed to call a witness from the lands office to confirm that indeed the suit land herein was reserved as a Dam which is a public utility Dam and that now the said land has been subdivided illegally.
59. The Defendants alleged that though the suit land was holding waste water from the Sisal Factory, the said land was allocated to 66 shareholders in 1997. These 66 shareholders were the 66 Interested Parties herein. These allegations have been admitted by the Plaintiffs, but the Plaintiffs averred that this subdivision and allocations were irregular and that the Plaintiffs as shareholders were not involved.
60. The Defendants and Interested Parties relied on the Presidential Probe Committee Report for 1987 – 1990, which showed that land parcel No. 2097 was registered as Taka Dam. However, the Defendants stated that the suit land was called Taka Dam, because it held dirty water, but it was not earmarked as a public utility land. Indeed, there was no indication or evidence that Taka dam was a Public Utility plot.
61. Further, there was evidence by the Defendants and the Interested Parties, which is a letter dated 12th November 1997, on the proposed subdivision and change of use of Makuyu/Makuyu/Block 1/2097. The attached subdivision plan was approved by Makuyu Urban Council, with a comment “No objection”.
62. The Plaintiffs had averred that even though the said proposed subdivision plan was copied to several Government offices, only one office approved the same. However, it is noteworthy that the said application was done in 1997. The Interested Parties have alleged that they have been on the suit land since then. The Plaintiffs who have alleged ought to have called evidence from the said Government offices to confirm that indeed the said approval was never given. It is trite that the who alleges must prove.
63. Failure to call any evidence to the contrary, leaves this court with no option but to find that indeed the proposed subdivision of 1997, met no official objection and the Subdivision Plan was indeed passed and the suit land was subdivided into 66 plots in 1997.
64. If the Interested Parties have been on their respective parcels of land since 1997, and the Plaintiffs cannot turn around in the year 2019, and allege that the Defendants have interfered with their enjoyment of the alleged use of Dam water in the recent past (recently) as stated in their Plaint.
65. Further, as the court observed earlier, the 1st Plaintiff had filed an Application in the year 2018, at Thika CM’s Court wherein he sought to attach the 6th Defendant’s parcel of land being Makuyu/Makuyu



Block 1/2097, which is the suit land herein. The 1st Plaintiff had alleged at that time that the suit land belonged to the 6th Defendant. He never alluded or averred at all that the said land was a public utility land, which needed to be preserved for the benefit of the Plaintiffs and other shareholders.

66. This turn around by the 1st Plaintiff give credence to the Defendants defence that the 1st Plaintiff has been eyeing this suit land and only came to Court via this suit after his Application for attachment of this suit land was dismissed by the Court in Thika in September, 2018
67. Even assuming that the Defendants allocated this suit land to the Interested Parties herein in 1997, after the Elnino rains broke down the walls of the said dam, why did the Plaintiffs not file a suit then? Why wait until the year 2019 after a period of about 22 years?. If the cause of action arose in 1997, then this period is more than 12 years and the suit is caught up by *Limitation of Actions Act* as provided by Section 7 which states;

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

68. Section 112 of the *Evidence Act* is very clear that when any fact is especially within the knowledge of any party in Civil Proceedings, then the burden of prove or disproving those facts is upon such a party. See the case of case of Munyu Maina vs Hiram Gathiha Maina (2013) eKLR, where the Court of Appeal held;

“Under Section 112 of the *Evidence Act*, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

69. The Plaintiffs herein have alleged several facts. They alleged that the suit property was worth Kshs. 30 Million. They did not avail a Valuation report to that effect to confirm that the value of this suit was indeed Ksh. 30 Million. They further alleged that the Defendants have put Beacons on the proposed subdivisions by using surveyors. These allegations were not proved. Further the Plaintiffs alleged that the Defendants have started to sell the alleged subdivisions to the unsuspecting third parties. There was no evidence to that effect that indeed there were third parties who were ready to buy these subdivisions.
70. However, the court is satisfied that the suit land is occupied by the 66 Interested Parties, who were allocated the said subdivided plots in 1997, and they have been in occupation all along, and their occupation cannot be said to be recent.
71. There is no evidence that the suit land is a public utility land which was set aside for roads, schools and *social amenities. The Plaintiffs made allegations which they did not substantiate and thus this court cannot hold and find that the suit land is a public utility land.
72. The Court further finds that indeed the suit herein is a brain child of 1st Plaintiff, who has had other court proceedings with the 6th Defendant. In the previous Court proceedings, he never alleged or alluded that the suit land was a Public utility land. Infact, he wanted to attach the said land as he alleged that it was a property of the 6th Defendant herein. The 1st Plaintiff is estopped from claiming that the suit land herein is a Public utility land, and the Plaintiffs herein have interest in it as shareholders of the 6th Defendant.
73. The Court has considered what the Interested Parties have sought in their submissions. This suit is by the Plaintiffs. The suit was not filed by the Interested Parties. The Interested Parties were joined in the suit to protect their interests, and they cannot seek for substantive orders in their submissions. If they have any claim, the Interested Parties should have filed their own separate claim.



74. In conclusion, the Court finds that the Plaintiffs have failed to prove that apart from 1st and 3rd Plaintiffs, that the other Plaintiffs are shareholders of the 6th Defendant, and that they own the named parcels of land. Further the Plaintiffs have failed miserably to prove that the suit property herein Makuyu/Makuyu Block 1/2097, is a public utility land;- that is a Public dam, and that they have an interest in the said public utility land, which interest needs to be protected and/or preserved through a Permanent Injunction.
75. For the above reasons, the Court finds and holds that the Plaintiffs have failed to prove their case against the Defendants herein on the required standard of balance of probabilities.
76. Consequently, Court finds that the claim herein is not merited and the suit is dismissed entirely with costs to the Defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26TH MAY, 2022.

L.GACHERU

JUDGE

Delivered virtually in the presence of;

Alex Mugo – Court Assistant

Mr Macharia H/B for Jesse Kariuki for the Plaintiffs

N/A for the Defendants

N/A for the Interested Parties

L.GACHERU

JUDGE

26/5/2022

