



**Kiniu v Ann Wairimu Ndung’u and Stanley Ndung’u Murigi Both t/
a Annrose Nursery & Primary School & another (Environment & Land
Case 179 of 2009) [2022] KEELC 2387 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2387 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 179 OF 2009**

**LN MBUGUA, J
JUNE 23, 2022**

BETWEEN

JOSEPH NDICHU KINIU PLAINTIFF

AND

**ANN WAIRIMU NDUNG’U AND STANLEY NDUNG’U MURIGI BOTH T/A
ANNROSE NURSERY & PRIMARY SCHOOL 1ST DEFENDANT**

EMBAKASI RANCHING COMPANY LTD 2ND DEFENDANT

JUDGMENT

1. The suit herein was filed on 23.4.2009, of which the plaint was amended severally culminating in the further amended plaint filed in court on 9th November 2018. In his pleadings, the plaintiff states that having purchased shares from the 2nd Defendant sometime in January 1976 he became a shareholder and was issued with a share certificate number 2874 dated 1st August 1978. On or about November 1982, the 2nd Defendant being the registered owner of property LR No. 10904/2 allotted him two plots of land A69 and A70 currently demarcated as Nairobi Block 105 (Embakasi Ranching) 1927 and Nairobi Block 105 (Embakasi Ranching) 1928. He was consequently shown the plots beacons by the 2nd Defendants’ surveyor and took possession. However, he never developed the plots but would often visit the land just to ascertain that they had not been encroached upon.
2. During the said visits, on or about 7th February 2008 he found some construction being undertaken on the said plots. Upon inquiry, he found out that the 1st Defendants were constructing a school and when he visited them to inquire why they were undertaking constructions on his plots, they informed him that they had purchased the said plots. They however did not disclose from whom they purchased the plots from. The Plaintiff requested them to stop further constructions since the suit plots were his but they did not prompting him to file this suit where the following orders have been sought.



- i. A declaration that the Plaintiff is the rightful owner of the suit property being plots nos. A69 and A70 and mapped out and demarcated as LR No. Block 105 (Embakasi Ranching)/ 1927 and LR No. Block 105 (Embakasi Ranching)/ 1928.
 - ii. An order of permanent injunction directed against the Defendants jointly and severally, their relatives, servants or agents and / or employees or whomsoever acting on their behalf from trespassing, alienating, disposing, procuring the registration of any title documents in their names, charging and / or dealing with the suit property in any manner whatsoever and from further construction of the said or any other structures upon the said suit property being plots nos. A69 and A70 on LR 10904/2 and mapped out and demarcated as LR No. Block 105 (Embakasi Ranching)/ 1927 and LR No. Block 105 (Embakasi Ranching)/ 1928.
 - iii. An order for the eviction of the defendants, their servants, agents, relatives and / or employees from the suit property being plots nos. A69 and A70 on LR 10904/2 and mapped out and demarcated as LR No. Block 105 (Embakasi Ranching)/ 1927 and LR No. Block 105 (Embakasi Ranching)/ 1928.
 - iv. Mesne profits for trespass and encroachment.
 - v. An order for the revocation of any and all Title or Ownership documents issued in the names of the defendants, their servants, agents, relatives and / or employees for the suit property mapped out and demarcated as LR No. Block 105 (Embakasi Ranching)/ 1927 and LR No. Block 105 (Embakasi Ranching)/ 1928.
 - vi. Costs of the suit and interest thereon.
 - vii. Such or further orders as this Honourable Court may deem fit to grant.
3. The 1st Defendants filed a statement of defence on 10.7.2009, with the latest amendment being the one dated 4th March 2021. The said defendants pray for the dismissal of the suit with costs. They deny the plaintiff's averment that plots A69 and A70 are mapped out and demarcated as Nairobi Block 105 (Embakasi Ranching)/1927 and 1928. This is because the property in question belonged to them having been lawfully sold and allocated to Stanley Ndung'u Murigi. They stated that the said plots had been assigned plot nos. V4510 and V4511 now Nairobi Block 105 (Embakasi Ranching)/1916 and 1917 which they had subsequently developed. They added that the Plaintiff's claim should be against the 2nd Defendant who was in charge of allotting plots to them.
 4. The 2nd Defendant did not enter appearance.

The evidence

5. The Plaintiff's case was advanced by two witnesses; himself Joseph Ndichu Kiniu and one Josphat Karongo. The plaintiff adopted his witness statement filed on 3rd February 2012 as his evidence. He also produced 13 documents in his list of 23.5.2017, 26.9.2018 and another bundle as Plaintiff Exhibits 1 to 13.
6. In his Witness Statement, PW1 stated that he became a share holder of the 2nd defendant way back in 1978-1981 when he purchased shares from the said defendant. He was then allocated plots number A69 and A70 sometime in November 1982 and upon payment of survey fees the 2nd Defendant's surveyor took him to the site and pointed out beacons of the said plots and he thereafter took possession. He indicated that due to his financial status, he could not develop the said plots immediately but he made regular visits to the site.



7. In February of year 2008, he visited the suit plots and found ongoing constructions. He learnt that 1st defendants were the ones who had encroached unto the land. The latter refused to leave the land, so PW1 filed a suit. He also lodged a complaint with 2nd defendant and he was assigned the Company surveyor who confirmed that the plots were his and had been encroached upon, but the 2nd Defendant did not aid in settling the dispute.
8. On cross examination PW1 stated that he purchased shares at the 2nd Defendants Company in 1976 and 1977, was issued share certificates in 1978, was allocated plots in 1982 and provisional letters of allocation. The receipts were issued by Gatuguta & Manek who were agents for the 2nd Defendant. He stated that the receipts on page 25-28 of his bundle were marked as cancelled.
9. He further pointed out that he was allocated plots on map 100, which were for the bonus plots numbers P69B and P70B as reflected on the document on page 31 of his bundle, while Map 7 was for the original plots A69 and A70. He reiterated that his plots were surveyed and given numbers 1927 and 1928.
10. He indicated that the document filed on 28th November 2018 was obtained on 23rd January 2018 during the pendency of this suit.
11. PW1 also restated that the school was constructed on his piece of land, and that there was a Presidential Committee dealing with the disputes on Embakasi Ranching.
12. On re-examination, PW1 stated that the receipts were marked cancelled because the new directors who took on the management made the endorsement. However, his original certificate of allocation was intact. He added that apart from the amount of money paid for the shares he discharged all his obligations stating that he paid Kshs. 1,000 for survey in 1981 and Kshs. 7,000 for civil engineering works in 1983. He confirmed that his original plots A69 and A70 were on Map 7. And that in 1996 he received bonus plots 69B and 70B which were on Map 100 and clearly distinct from the plots encroached upon by the 1st Defendant.
13. He also noted that the encroached plots were given number 1927 and 1928 by the surveyor and he had a receipt dated 23rd January 2018 in respect of the site visit undertaken following the Presidential Directive.
14. PW2, Josphat Karongo Kimotho is a retired secondary school teacher who adopted his witness statement dated 22nd May 2017 as his evidence. Therein, he stated that sometime in 1976, himself, the plaintiff and their friends purchased shares from the 2nd Defendant through their agents, Gatuguta & Menek, and they became shareholders of the company and were duly issued with the Share holders certificates. That the 2nd defendant owned the land L.R. 10904/2 which land was distributed in form of plots to the shareholders. They were shown the plots beacons and they took possession. Pw2 built a house on his plots but the Plaintiff did not develop his plots, though he planted a 'green fence'. Pw2 avers that he is the one who was looking after the Plaintiff's plots since they were close to his own plots.
15. Sometime in 2008, PW2 noted some constructions were going on on the suit property and he asked the plaintiff whether he was the one doing the developments. It turned out that plaintiff was not the one doing the construction. And upon further investigations they found out that the culprits were 1st defendants. PW2 accompanied the Plaintiff to talk to the 1st Defendants at their other school in Utawala and the latter admitted to be the owners of the said plots.



16. On cross examination, PW2 stated that the plots claimed by the parties are different with plaintiff's plots being 69A and 70A, while those of defendant as per what he could see in defence bundle were B4511 and B4510 and the lease certificate bore numbers Nairobi Block 105/1917 and 1916.
17. On re-examination PW2 affirmed that the plots owned by the 1st Defendant according to their documents were different from the plots held by the plaintiff, hence defendants had no right to be on the Plaintiff's land.
18. The Defence case was advanced by one of the 1st defendant Anne Wairimu Ndung'u who is DW1. She adopted her witness statement dated 23rd May 2012 as her evidence. She also produced four documents in her list dated 23.5.2012 as well as 4 more documents in the list dated 25.2.2020 as Defence exhibits. In her recorded statement, Dw1 states that her school Annrose Academy is located in Utawala. However, her husband has constructed another school on the plots V4510 and V4511. That her husband only informed her that he was allocated the two plots by 2nd defendant.
19. In her testimony in court, Dw1 stated that one of the documents was a lease agreement for plot number 105/1917 which they got from Embakasi Ranching Scheme, the other document was a certificate of lease for the same plot of land and the other two documents were lease and certificate of lease for plot number 105/1916 also received from Embakasi Ranching Scheme. She testified that they were shown the said plots by a surveyor and there was no one on them. They then went ahead to develop them in 2006, completed the development and tenants moved in.
20. On cross examination DW1 stated that she had titles to the suit parcels of land 1916 and 1917, where they have built eight houses. She contends that Plaintiff's plots are different from their plots since the Plaintiff's plots as per the further amended plaint are indicated as 1927 and 1928. She stated that she had built a school but it was not on someone's property. She also stated that she had rental houses which were occupied as at the day of the hearing. She stated that she was not aware of the Court order dated 4th February 2011 but her advocate was aware of that order. There were tenants in the building before the court order was issued.
21. On re-examination she stated that the court order stopped her from developing plots A69 and A70 but her plots were different.
22. At the close of the Defence case, counsel for the Plaintiff sought leave to recall PW2 to produce the map that had been Marked for Identification. Counsel for the Defendants agreed to its production and it was hence marked as an Exhibit for plaintiff.

Submissions

23. The plaintiffs outlined the following issues for determination in their submissions dated 12th February 2022: Whether the Plaintiff was the rightful owner of the suit property; whether Plot Nos. V4510 and V4511 are separate and distinct from the suit property Plot No.s A69 and A70; whether the 1st Defendant is lawfully in occupation of the suit property; whether the 1st Defendant is in contempt of Court; whether the Plaintiff is entitled to mesne profits and if so, how much.
24. On the first issue, it was submitted that the Plaintiff was the rightful owner of the suit property by dint of Section 7(a) of the *Land Act* on acquisition of land by allocation. To buttress this claim of ownership, the plaintiff drew the attention of the court to the plaintiff's share certificate No. 2874 and the Provisional Letter of Allocation including receipts of payments made to fulfil his obligations as a purchaser, adding that the Plaintiff had also seen the location of the said plots and their beacons as per the confirmation receipt also produced in court. It was also pointed out that Exhibit 10 was



- confirmation from the 2nd Defendant that the Plaintiff was the owner of Share certificate No. 2874 for plot numbers A69 and A70. On this point, the plaintiff cited the case of *Danson Kimani Gacina & Another v Embakasi Ranching Company Ltd* [2014] eKLR where the court stated that: "... The law on unregistered land ... is slightly unclear... There must be shown an unbroken chain of documents showing the true owner...". Reference was also made to the case of *Julius Kamau Karanja v Elvis Melita Suyianka & Another* [2021] eKLR.
25. On the second issue, it was submitted that if indeed the 1st Defendants had put up the construction on their alleged properties V4510 and V4511, then this suit would not have been necessary. But the construction was undertaken on the Plaintiff's properties A69 and A70 without authority. It was submitted that the Plaintiff had led evidence which showed that the Defendant's property was across the road from the Plaintiff's and even produced a Map to proof this averment. Additionally, the 1st Defendant had pleaded that their properties were V4510 and V4511 mapped as Block 105 (Embakasi Ranching) 1916 and 1917. Reference was made to the Court of Appeal case of *Prafulla Enterprises Limited v Norlake Investments Limited & Another* [2014] eKLR: "... A court of law must act on tangible evidence and not on the whims and beliefs of a party if the same is not proved..."
 26. On whether the 1st Defendant was in lawful occupation of the suit property, it was submitted that vide a ruling delivered on 4th February 2011 restraining further construction on the suit property until the dispute was resolved, the Court found that the Plaintiff had a prima facie case. He therefore contends that 1st defendant has committed acts of trespass in terms of the provisions of section 2 & 3 of the *trespass act*. He added that in the case of *Rhoda S. Kiilu v Jianxi Water and Hydropower Construction Kenya Limited* [2019] eKLR, *Nakuru industries Limited v S.S. Mehta & Sons* [2016] eKLR, *Susan Njoki Njuguna v Juja Constituency Development Fund Committee & 3 Others* [2020] eKLR, the different courts pronounced themselves on the issue of trespass.
 27. On the issue of contempt of court, it was submitted that plaintiff had filed an application dated 25th August 2021 for citing and convicting the 1st Defendant for contempt for resuming occupation on the suit premises, however to save on judicial time, that application was not prosecuted. He however noted that DW1 had testified as to having operations on the suit land despite the court order. Reference was made to the case of *Samuel M.N. Mweru & Others v National Land Commission & 2 Others* [2020] eKLR where the court held, "... A court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with..."
 28. On mesne profits, it was submitted that the same ought to be awarded based on reasonable rent from the date the 1st Defendant had been in possession of the suit property. In this case the 1st Defendant had been in occupation for 164 months from 7th February 2008 to 3rd November 2021 and the Plaintiff could not utilise the said property in any way. It was submitted that the monthly rent would be Kshs. 80,000 and as such the relief sought was for Kshs. 13,120,000. Reference was made to *Mistry Valji v Janendra Raichand & 2 others* [2016] eKLR and *Rachel Njoki Mucina & Another v John Mwaura* [2020] Eklr."
 29. The 1st Defendant in their submissions dated 11th March 2022 set out the issues for determination as: Whether the Plaintiff's plots A69 and A70 now LR Nairobi/Block 105/1927 and 1928 were distinct and separate from V4510 and V4511 now LR Nairobi/Block 105/1916 and 1917; whether there was double allocation of the same plots; whether the Plaintiff had proved his case on a balance of probabilities.
 30. On the issue of whether the parcels were separate, it was submitted that it was clear that the lands in question were different and the map produced showed that both numbers/ plots existed adding that no plot could be issued two different numbers since the Survey of Kenya gives numbers sequentially.



31. On the issue of the location of the plots, it was submitted that the Plaintiff did not show how the 1st Defendant had encroached on his land restating that the survey map produced showed existence of the Plaintiff's and 1st Defendant's plots. It was submitted that the Plaintiff had sought for witness summons for the attendance of the 2nd Defendant's Chairman to clarify the issue but the Plaintiff later withdrew the request.
32. On whether the Plaintiff had proved his case on a balance of probabilities, it was submitted that the Plaintiff had not proved the location of his plots. The 1st defendant proffered the following authorities in support of their claim; *Palace Investment Limited vs Geoffrey Kariuki Mwenda & Anor* [2015] eKLR on burden of proof and *Eastern Produce (K) Ltd – Chemoni Tea Estate vs Bonfas Shoya* [2018] eKLR on balance of probabilities.

Analysis and determination

33. This court finds that the issues for determination are:
 - i. Who is the bonafide owner of the suit property?
 - ii. What orders should be issued?
34. The dispute herein is who is the owner of the suit property? Both the Plaintiff and Defendant are claiming the same plots of land, albeit with different parcel numbers. The Plaintiff claims that his plots are number A69 and A70 which were mapped out and demarcated as LR No. Block 105/ Embakasi Ranching/ 1927 and LR No. Block 105/Embakasi Ranching/ 1928. The 1st Defendant however refutes this asserting that they are the owners of the suit properties identified as plots numbers V4510 and V4511 now Nairobi Block 105 (Embakasi Ranching) 1916 and 1917. It is noted that the 1st defendant has since been issued with titles to the suit properties.
35. It is not in contention that both parties agree that the plot numbers are different. However, the protagonists are claiming the same land on the ground. It is rather unfortunate that the 2nd Defendant neither entered appearance nor testified into the issue. However, one way or the other, the court has to make a determination of the dispute. To this end, the first point of call is the provisions of Section 107 of the *Evidence Act* which stipulates that:
 - (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.”
36. Litigation sprouting from Embakasi Ranching Co. are in abundance. In the case of *Beatrice Wambui Maina v Embakasi Ranching Company Ltd & another* [2022] eKLR, the court stated that;

“The court is alive to the fact that there are circumstances where a property in dispute has no title. This does not however mean that no rights can accrue therefrom. In such circumstances the court will set out to establish whether the documentary evidence establishes an unbroken chain leading to the root of the title as persuasively stated by Onguto J in the case of *Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 others* [2015] eKLR;



“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.....”

37. This is what this court will embark on, wade through the documentary evidence availed to discern the claims advanced by the two parties (plaintiff and 1st defendant).
38. To support his claim, the Plaintiff has availed a share certificate No.2874 dated August 1978. The letter of allotment issued to the plaintiff is dated 28.11.1982 bearing allocation of plots A69 and A70 for the share certificate no. 2874. This evidence corroborates the claim of the plaintiff and his witness to the effect that the persons who had purchased shares in the company were issued with share certificates and thereafter allotted plots. (see pexh 1 & 2). This far, the plaintiff has established a connection with the allotting company which is the 2nd defendant.
39. The plaintiff has also availed various receipts of payment for shares in the 2nd Defendant’s company. At the back of the letter of allotment dated 28.11.1982, there is endorsed some notes where plaintiff was required to pay sh.2000 for site visit in respect of Map no.7 for plots A69 and A70. Another receipt on page 15 of plaintiff’s bundle dated 7.2.2008 indicates that plaintiff paid sh.2000 for the site visit for the share certificate no. 2874 for plots A69 and A70. The plaintiff has further provided receipt dated 19.2.2008 for beacon certificates, for the plots A69 & A70 for share certificate no 2874 (page 16 of plaintiff’s bundle). The subsequent document on page 17 dated 19.2.2008 depicts the plaintiff as having seen the beacons and location of the plots A69 & A70 in relation to share certificate no. 2874 on map no. 7. This documentary evidence buttresses plaintiff’s evidence that he was allotted the plots, and he was shown the same on the ground.
40. There is a Ruling dated 4th February 2011 restraining the 1st Defendant from further construction of the school or in any way dealing with plots A69 and A70 until the ownership dispute of the plot upon which the construction of the school is being carried out is resolved.
41. Has the 1st defendant managed to successfully rebut this evidence of the plaintiff? The documents of purchase, transfer and registration of the property allegedly owned by the 1st Defendants are shrouded in mystery. There is no chronology of how the 1st Defendants acquired the suit property. The claim of ownership of the suit land by 1st defendants is captured in Dw1’s very scanty recorded witness statement dated 23.5.2012 as follows;

“ ... However my husband owns the plots on which we have constructed another school being plots Nos. v4510 and V4511 which he informed me were allocated to him by the 2nd Defendant company...”
42. That evidence can only be termed as hearsay as neither DW1 nor her husband has given any clear and cogent testimony as to how they came to claim the suit land. In the 1st defendants list of documents dated 23.5.2012, the only documents purporting to depict ownership are the plot ownership document in the name of Stanley Ndungu Murigi. They are titled “ Non member certificate of plot ownership” for plots V4511 and V4510 both dated 3.2.2006. I find that the aforementioned documents imply that the 1st defendants had not been members of the 2nd defendant and it was therefore crucial for them to establish the nexus as to how they derived their interests in the suit land as non-members.



43. As regards the 4 documents in 1st defendant's list of 25.2.2020, the same are a lease for Nairobi/block 105/1917 in the name of the 2nd defendant issued on 1.1.1988, and the certificate of lease for the same parcel in the name of Stanley Ndungu Murigi issued on 16.5.2019. The other two documents have corresponding similarity save that they are for parcel 1916.
44. The evidence of the 1st defendants lacks clear and cogent history as to the root of their interests in the suit land. There is no mention of how the 1st defendant acquired the land from 2nd defendant or how they came to identify the suit parcels on the ground as theirs.
45. In the Court of Appeal case of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR, the court stated thus;

“When the appellant's documents are compared with those of the 1st respondent, what is apparent is that the appellant's attempts to secure proprietorship of the suit property were earlier in time than that of the 1st respondent. In our view, there was sufficient documentation to show that appellant maintained a claim in respect of the suit property, which claim was valid and continued to subsist until otherwise determined. In saying so, we find that the appellant has established a prima facie case with chances of success.”

46. Likewise, the plaintiff has maintained a plausible claim on the suit land which has subsisted for decades as from 1976 or there about. To this end, I find that plaintiff is the rightful owner of the suit properties.
47. On mesne profits, I make reference to the ruling of this court delivered on 4.2.2011, where the court gave orders as follows:

“I find that there is some substance in the applicant's contention that the plot upon which the 1st Defendant is constructing a school is the same plot claimed by the applicant. In the circumstances, it would be fair and just that the 1st Defendant be restrained from further construction until the dispute concerning the ownership of the plot upon which the construction of the school is being carried out is resolved. Moreover land is such an emotive issue in this country that it cannot be said that damages would be an adequate remedy to the applicant.”

48. During the trial, it emerged that the 1st defendants ignored the aforementioned orders and proceeded to operationalize the school. During cross examination, Dw1 was feigning ignorance of the said court order, while admitting that her advocate was aware of the same. It is therefore crystal clear that the 1st defendants have been deriving profits from the suit land yet they have not established even an iota of evidence as to how they came to own the land.
49. In the case of *Willesden Investments Limited v Kenya Hotel properties limited* NBI H.C.C. NO. 367 of 2000, cited in my decision in *Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR, it was stated that;

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that Ksh. 10, 000, 000 is a reasonable award for general damages”.

50. In the instant suit, I have taken into consideration that in defiance of court orders, the 1st defendant has continued to utilize the suit property for a period of over 10 years on the pretence that they were



not aware of the court order and that the order was not related to their parcels of land. To this end, I award the plaintiff mesne profits for trespass in the sum of Ksh. 7,000,000.

51. On whether the titles held by the 1st defendants should be revoked, I note that Stanley Ndungu Murigi was issued with Certificate of Leases dated 16th May 2019 for Nairobi/Block 105/1916 and 1917 during the pendency of this suit. The Court of Appeal in *Rose Wakanyi Karanja & 3 others v Geoffrey Chege Kirundi & another* [2016] eKLR held:

“The doctrine of lis pendens rests upon the foundation that it would plainly be impossible that any action or suit could be brought to a successful conclusion if alienations pendent lite were permitted to prevail.

In *Bellamy v Sabince* IDEG & J 566 it was held:

“The doctrine of lis pendens intends to prevent not only the defendant from transferring the suit property when litigation is pending but it is equally binding on those who derive their title through the defendant, whether they had or had no notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suit so as to defeat the rights of the other party...”

52. I find that there are detailed processes which precede the issuance of tiles and Certificate of leases at the lands registry, particularly documents of transfer of the land and clearance certificates. The 1st defendants are mute on whether they were pursuing these processes behind the scenes of this case. The logical conclusion to make is that they were aware of the aforementioned processes even as the suit was going on.

53. In the case of *Esther Ndegi Njiru & another v Leonard Gatei* [2014] eKLR, the court was dealing with a land ownership issue relating to title vis a vis a share certificate in a land buying company and it was observed that;

“The clearance certificate used by the 2nd Defendant to process the title was fake and/or forged. The resultant title was of no consequence and therefore the plaintiffs title cannot supersede the share certificate of the true owner of the parcel of land. The Land Registrar could only properly process a title against a validly issued clearance certificate by Githunguri Constituency Ranching Company and once it is proved that no proper clearance was tendered for issue of a title such a title in my view would have been unlawfully and unprocedurally procured and therefore voidable”.

54. In the Court of Appeal case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal number 239 of 2009, cited in a plethora of decisions, see *Samuel Kamere v Lands Registrar, Kajiado* [2015] eKLR, *Rebecah Njeri Kariuki v Elizabeth Ng'endo & another* [2015] eKLR, it was held that;

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



55. It is not enough for the 1st defendants to dangle their certificate of leases when they have failed to establish the root of acquisition of the same. In the case of *Daudi Kiptugen v Commissioner of Lands Nairobi Lands & 4 others* [2015] eKLR, the court while cancelling a lease certificate stated that;

“On this point, it does not have to be proved that the plaintiff was a party to the illegality, lack of proper procedure or corruption. The plaintiff certainly did not get title procedurally, for what he was supposed to obtain a lease over, was the property described as "unsurveyed plot B26". It was not procedural for the Commissioner of Lands to issue the present lease to the plaintiff. Such action cannot be defended as being legal. I have no evidence that there was any corrupt dealings, but at the very least, there was a procedural impropriety that led to the Lease being issued to the plaintiff”.

56. Similarly, I find that there was no basis for the issuance of the certificate of leases to one Stanley Ndungu Murigi. In that regard, the prayer for revocation of the lease certificates is merited.

57. The issuance of titles to the plaintiff is however to follow the due process of the law hence I decline to grant any further orders to that effect.

58. The summary of final orders is as follows:

- i. An order is hereby issued declaring the plaintiff as the owner of the suit land being plots Nos. A69 and A70 mapped out and demarcated as L.R. No. Block 105 (Embakasi Ranching) 1927 and 1928 respectively.
- ii. A permanent injunction is hereby issued against the defendants, their servants or agents from trespassing, alienating or in any way dealing with the suit property in any manner whatsoever and from further construction of the said or any other structures upon the said suit property being plots Nos. A69 and A70 on LR 10904/2 and mapped out and demarcated as LR No. Block 105 (Embakasi Ranching)/ 1927 and LR No. Block 105 (Embakasi Ranching)/ 1928.
- iii. An order is hereby issued for the eviction of the defendants, their servants, agents, relatives and / or employees from the suit property being plots nos. A69 and A70 on LR 10904/2 and mapped out and demarcated as LR No. Block 105 (Embakasi Ranching)/ 1927 and LR No. Block 105 (Embakasi Ranching)/ 1928.
- iv. The Registration of the suit properties bearing particulars of plot Nos. V4510 and V4511 and or Nairobi Block 105 (Embakasi Ranching) 1916 and 1917 in the names of Stanley Ndungu Murigi or the 2nd defendant are hereby cancelled.
- v. The plaintiff is awarded mesne profits amounting to Ksh.7, 000, 000 as against the 1st defendants.
- vi. The plaintiff is awarded the costs of this suit as against the 1st defendants plus interest at courts rate (the interest to be calculated from the date of delivery of this judgment).

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Njoroge Nganga for the Plaintiff



Muchangi Nduati for the Defendant

Court Assistant: Eddel.

