



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kuria v Clerk, Kiambu County Council & 2 others (Environment & Land
Case 627 of 2013) [2022] KEELC 3512 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3512 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 627 OF 2013**

JO MBOYA, J

JULY 14, 2022

BETWEEN

MUUGU KURIA PLAINTIFF

AND

CLERK, KIAMBU COUNTY COUNCIL 1ST DEFENDANT

PARMUAT FRANCIS LOOREMETTA 2ND DEFENDANT

JAMES GIKONYO HOHO 3RD DEFENDANT

JUDGMENT

Introduction and Background

1. Vide Further Amended Plaintiff dated the 27th May 2013, the Plaintiff has sought for the following Reliefs;
 - a. An Order to compel the Defendant to liaise with the Land Registrar Kiambu and resolve Boundary Dispute of LR. NO. Karai/Karai/352 and LR. NO. Karai/Karai/156.
 - b. An Order to compel the Defendant to transfer LR. NO. Karai/Karai/352 to the Plaintiff for he has been living there with his Family since 1968.
 - c. An Order to restrain Permanently the Defendant, their servants, agents, employees or any other person acting on their Instruction from Trespassing on Land Parcel No. Karai/Karai/352 or from allocating other people any portion of the said Land under the Plaintiff's possession.
 - d. Costs of the suit
 - e. Any Further relief that the Court may deem fit to grant.



2. Upon being served with the Plaint and summons to enter appearance, the 1st Defendant herein duly entered appearance and same filed Statement of Defense whereby same disputed the claim by and/or on behalf of the Plaintiff .
3. Be that as it may, the 2nd and 3rd Defendants herein, were never Parties at the inception of the instant suit. However, same filed an application to be joined as Parties in respect of the subject matter and consequently same were indeed joined as Parties vide the Ruling of the court made on the 28th November 2019.
4. Nevertheless, following the Joinder of the 2nd and 3rd Defendants as Parties herein, same were granted liberty to enter appearance and file Statement of Defense, if any and where appropriate.
5. Suffice it to note, that the 2nd and 3rd Defendants herein thereafter proceeded to and indeed entered appearance and subsequently filed a Statement of Defense and Counter-claim dated the 8th January 2020.
6. For convenience, the Counter-claim by and/or on behalf of the 2nd and 3rd Defendants sought for the following Reliefs;
 - i. The Honourable Court do issue an Order that the District Land Surveyor do visit the Parcels of Land and to place the Beacons for Land Parcels Number Karai/Karai/1133 and 1135, respectively.
 - ii. The Honourable Court do issue an order that the District Land Surveyor demarcate the access Road, accessing L.R No Karai/Karai/1133 and 1135.
 - iii. The Honourable Court do issue an order that the OCS- Kikuyu Police Station do provide security during the exercise by the District Surveyor.
 - iv. Any other favourable Relief as the Honourable Court may deem appropriate and/or expedient to grant.
 - v. The Plaintiff to bear the Costs of the Suit.
7. Subsequently, the Plaintiff filed a Reply to Defense and Defense to Counter-claim dated the 23rd January 2020, and in respect of which the Plaintiff denied and/or disputed the averments at the foot of the Statement of Defense and Counter-claim.
8. With the filing and service of the Reply to Defense and Defense to the Counter-claim, the Pleadings in the matter closed.

Evidence by the parties:

i. Plaintiff's Case:

9. The Plaintiff's case is anchored and/or premised on the Evidence of the Plaintiff, who testified as PW1.
10. It was the Plaintiff's testimony that same is a resident of Kamangu Area, within Kiambu County and that on or about the 25th may 1968, same was issued with an arable Scheme/Parcel of Land by the County Council of Kiambu.
11. Further, the witness testified that upon being allocated and/or issued with the arable Scheme/Land, same entered upon, took possession and has since developed the land in question.



12. On the other hand, the witness further stated that same has been and is still in occupation of the subject Plot together with his family.
13. Other than the foregoing, the witness further stated that the arable land/scheme which was allocated to him Borders and/or shares a common boundaries with other Individual parcels of land. However, the witness has stated that over time the owners of the Individual Parcels of land, which border (sic) the arable scheme, which was allocated unto him, attempted to grab parts of the Scheme that was allocated unto him.
14. Based on the attempts to grab portions of the allocated scheme, the witness has testified that there arose and/or ensued a long struggle to protect the scheme that was allocated unto him and preserve same from being grabbed.
15. Be that as it may, the witness further testified that lately in May 2013, same saw the District Surveyor, Kiambu coming onto the land in question with a view to demarcating the said land, albeit without notice to him.
16. Further, the Witness has testified that as a result of the actions by and/or on behalf of the District Surveyor, who attempted to demarcate the land and to facilitate the grabbing, same was obliged to and indeed lodged a Complaint with the District Commissioner (read Deputy County Commissioner) Kabete sub-County.
17. Notwithstanding the lodgment of the Complaint, the witness testified that the District Surveyor proceeded to and attempted to demarcate the suit property, namely, LR. NO. Karai/Karai/352.
18. In the premises, the witness herein testified that same was therefore constrained to approach the Court to compel the 1st Defendant herein to execute the requisite Transfer Instruments and thereafter transfer L.R No. Karai/Karai/532 to and in his favor, namely, in favour of the Witness.
19. Other than the foregoing, the witness herein adopted his witness statement dated the 27th May 2013 and which statement was thereafter admitted as the Plaintiff's further Evidence- In -chief.
20. Besides, the Witness also alluded to the List and Bundle of Documents dated the 29th September 2014 and which contained 12 Documents. In this regard, the Witness sought to rely on and adopt the contents of the said Documents.
21. In the premises, the Documents listed at the foot of the List of Documents dated the 29th September 2014, were thereafter produced in Evidence and marked as exhibits P1 to P12, respectively.
22. On cross examination by Counsel for the 2nd and 3rd Defendants, the witness herein conceded and admitted that same does not have Title to and in respect of L.R No. Karai/Karai/352.
23. Further, the Witness also conceded that the Land in question belongs to and is currently registered in the name of County council of Kiambu, albeit, now defunct.
24. It was the witness' further testimony that though he does not have title to the suit property, same has minutes, which are relevant and should be looked at. On the other hand, the witness stated that he is aware that his neighbors, that is, the persons owning land in the neighborhood have titles documents and that they are the ones who are seeking to grab his (Plaintiff's) Parcel of land.
25. Finally, the Witness stated that same has written several letters to both the District Surveyor and Land Registrar, Kiambu County, but same have refused and/or declined to attend to and/or address the subject Dispute.



26. With that, the Plaintiff's case was closed.

ii. 1st defendant's case:

27. The 1st Defendant herein neither filed a list of witnesses, witness statement nor Bundle of Documents.

28. On the other hand, the 1st Defendant (now defunct), was never represented during the hearing of the subject matter.

29. In the premises, no Evidence was led and/or tendered on behalf of the 1st Defendant.

iii. 2nd and 3rd defendants' case:

30. The 2nd and 3rd Defendants' case is premised on the Evidence of Two (2) witnesses, namely, Parmuat Francis Loorematta (dw1) And James Gikonyo Hoho (DW2), respectively.

31. According to DW1, same testified that he was hitherto a Squatter, living and residing on a parcel of land, namely, L.R. NO. Karai/Karai/352 belonging to and registered in the name of the 1st Defendant herein.

32. Further, the witness testified that on or about the year 1993, the County Council of Kiambu, proceeded to and issued a Provisional Letter of Allotment unto him, whereby same was allocated a portion of L.R. NO. Karai/Karai/352.

33. Besides, the Witness further testified that after being issued with a Provisional Letter of allotment, same made various payments to and in favor of the 1st Defendant and thereafter, the 1st Defendant duly proceeded to and affirmed the allocation of a portion of L.R No. Karai/Karai/352, unto him.

34. Other than the foregoing, the Witness further testified that the Plaintiff herein who was also a Squatter of L.R No. Karai/Karai/352 was also allocated a portion of the said land, relative to the area where same had erected his house and water tank.

35. Be that as it may, the witness testified that the portion of land which had been allocated unto him by the 1st Defendant, was ultimately surveyed and registered, culminating into the creation of L.R No Karai/Karai/1135, which was thereafter transferred and registered in his name.

36. Based on the foregoing, the Witness herein stated that same is therefore the lawful and legitimate proprietor of L.R No. Karai/Karai/1135 and same was indeed issued with a Title document, to confirm and authenticate the registration thereof in his name.

37. Nevertheless, the witness herein further testified that though he is the registered owner of L.R No. Karai/Karai/1135, same has not been able to freely utilized and develop his parcel of land because of various interference by the Plaintiff herein, who lays a claim to the entire of L.R No. Karai/Karai/352, which is the Mother title that gave rise to inter-alia, L.R No Karai/Karai/1135.

38. On the other hand, the witness has testified that various efforts have been made and/or taken by the Provincial Administration, County Government Officials, as well as the Government Departments to resolve the dispute, but the Plaintiff has been adamant and therefore the dispute remains unresolved to date.

39. Nevertheless, the witness has further stated that even though the Plaintiff herein claims ownership over and in respect of L.R No. Karai/Karai/352, the Plaintiff is however not the registered owner thereof. In this regard, the witness has contended that the orders sought by the Plaintiff are therefore legally untenable and ought not to be granted.



40. Other than the foregoing, the Witness herein sought the liberty of the Court to adopt and rely on the Witness statement dated the 23rd March 2021. For clarity, the said witness Statement was thereby adopted and constituted as the further Evidence in chief of the witness.
41. On the other hand, the witness also alluded to and sought to adopt the Documents at the foot of the List and Bundle of Documents dated the 23rd March 2021.
42. In the premises, the Documents at the foot of the List of Documents dated the 23rd March 2021, were duly adopted and admitted as exhibits D1 to D7, respectively.
43. Besides, the witness also referred to the Statement of Defense and the Counter-claim dated the 8th January 2020 and same implored the Honourable Court to grant and/ or allow the Reliefs thereunder.
44. On cross examination, the witness herein stated that L.R No. Karai/Karai/352 belonged to and was registered in the name of the County Council of Kiambu, now Defunct, and not the Plaintiff.
45. Further, the witness stated that prior to and/or before the creation of his title, namely L.R No. Karai/Karai/1135, the original title was duly surveyed and thereafter subdivided.
46. Besides, the Witness stated that the 3rd Defendant herein is his neighbor and that same owns L.R No. Karai/Karai/1133.
47. Notwithstanding the foregoing, the Witness herein conceded that the title in respect of L.R No. Karai/Karai/1135, belonging to and registered in his name is not reflected and/or captured in the Registry Index Map (RIM).
48. Other than the foregoing, the Witness herein also conceded that same had not provided and/or availed a copy of the Certificate of Official search in respect of his title.
49. Nevertheless, the witness proceeded to and underlined that his title over and in respect of L.R No. Karai/Karai/1135, was lawfully issued and registered in his name.
50. On his part, DW2 testified that same is a resident of Thogoto Area, within Kikuyu Constituency, in the County of Kiambu.
51. Further, the Witness stated that on or about 1983, Kiambu County Council passed a resolution to allocate various portions of L.R No Karai/Karai/352, to persons who were hitherto squatting, residing and living thereon.
52. Pursuant to and in line with the resolutions by the County Council of Kiambu, the witness herein stated that same was thereafter allocated a portion of the said land and that the portion which was allocated unto him was thereafter subdivided and became known as L.R No. Karai/Karai/1133.
53. Other than the foregoing, the witness has further stated that though the Plaintiff herein was also residing on a portion of L.R No. Karai/Karai/352, same did not acquire any allotment and hence was never granted a portion of the suit property, namely, Karai/Karai/352.
54. Other than the foregoing, the witness testified that LR. NO.Karai/Karai/352, which is claimed by the Plaintiff, does not belong to the Plaintiff at all.
55. Contrarily, it was the evidence of the witness that the said property belongs to the 1st Defendant, who generated the resolution to subdivide same and to allocate the resultant portions thereof to 44 Families, who were in occupation and possession of the suit property.



56. Nevertheless, the witness has further stated that the Plaintiff herein never followed up and never complied with the processes that were set out by the County council of Kiambu, for purposes of allotment of portions of the suit property and consequently, the Plaintiff is not seized of any title document, either in respect of L.R No. Karai/Karai/352 or any portion thereof.
57. Be that as it may, the Witness testified that same was allocated a portion of the original title and that his title was assigned and became known as L.R No. Karai/Karai/1133, for which a lawful title was duly issued.
58. Other than the foregoing, the witness referred to the witness Statement dated 22nd November 2021 and sought to adopt same as his Further Evidence in chief.
59. Based on the foregoing, the Court proceeded to and deemed the written witness statement as further evidence by and/or on behalf of the witness.
60. On the other hand, the witness herein also alluded to the List of Bundles of Documents, which are dated the 23rd March 2021, containing 5 Documents. In this regard, the witness sought to have the said Documents, marked as Exhibits.
61. Pursuant to and in line with the request, the Documents alluded to, were duly admitted and marked as Exhibits D 8 to 12, respectively.
62. Further, the Witness testified that the allocation, transfer and ultimate registration of a portion of L.R. NO. Karai/Karai/352, in his name was lawful, legal and legitimate.
63. On cross examination, the Witness herein stated that though he is the registered owner and/or proprietor of L.R No. Karai/Karai/1133, same however, does not reside and/or live thereon.
64. On the other hand, the witness conceded that the title in respect of L.R No. Karai/Karai/1133, does not appear on the face of the Registry Index map, (RIM).
65. Besides, the witness herein also stated that though same holds a Title Deed over and in respect L.R No Karai/Karai/1133, same cannot point to the ground and/or position thereof.
66. Be that as it may, the witness testified that despite being the registered owner of L.R No Karai/Karai/1133, same has been denied and/or deprived of the right to access and utilize the said parcel of land by the Plaintiff herein, though, without any lawful cause or at all.

Submissions by the parties:

Plaintiff's Submissions:

67. Vide Written Submission dated the 14th April 2022, the Plaintiff's Learned Counsel has raised two salient and pertinent issues; which same has thereafter ventilated into details.
68. First and foremost, the Plaintiff's Counsel has submitted that the Plaintiff herein is entitled to be granted access to the portion which same occupies and that the boundaries thereof should demarcated and identified.
69. Further, the Plaintiff's counsel has submitted that by virtue of the longevity of occupation, possession and use of a portion of L.R No. Karai/Karai/352, the Plaintiff herein has acquired a legitimate Expectation and hence entitlement to be allocated the said Parcel of land.
70. At any rate, the Plaintiff's counsel has further submitted that based on the length of time and the duration of occupation of the suit property, the Plaintiff herein has therefore acquired lawful title



to and in respect of L.R No. Karai/Karai/352. In this regard, counsel for the Plaintiff has therefore invoked and relied upon the provisions of Article 40 of *the Constitution* 2010.

71. Besides, the Plaintiff's Counsel has further submitted that on the basis of the length of his occupation on L.R No. Karai/Karai/352, it is only fair, just and expedient that same be deemed to be the owner of the suit Property.
72. To vindicate the claim that the Plaintiff herein is the owner of the suit property, the Plaintiff's Counsel has invoked and relied on the provisions of Article 47 of *the Constitution*, 2010, that underscores the need for fair administrative action by State Organs, Bodies and/or such other person, whose actions are likely to prejudice the Administrative Rights of any citizen, the Plaintiff not excepted.
73. Secondly, the Plaintiff's counsel has submitted that the plaintiff herein ought to be deemed as the allottee of L.R No Karai/Karai/352 and thereafter the County Government of Kiambu ought to issue a Certificate of Lease unto and in favor of the Plaintiff.
74. In support of the Plaintiff's case, Learned counsel has relied on various decisions, inter ali, the case of *Savtriv Gidoomal & 2 Others versus National Land Commission & 2 Others*, ELC Petition No. 9 of 2017 (2018)eKLR.

Submissions' by the 2nd and 3rd defendants:

75. The 2nd and 3rd Defendants filed their written submissions dated the 6th June 2022, and in respect of which same addressed two issues.
76. The first issue that was addressed; relates to validity of the title in respect of L.R No's Karai/Karai/1133 and 1135, respectively. In this regard, it was submitted on behalf of the 2nd and 3rd Defendants' that the said title documents were legitimately issued, after the 2nd and 3rd Defendants had been allocated their respective portions by the 1st Defendant.
77. Owing to the foregoing, Counsel for the 2nd and 3rd Defendants therefore contended that the Honourable Court ought to protect and vindicate the said titles.
78. Secondly, it was submitted on behalf of the 2nd and 3rd Defendants that the Plaintiff herein does not own L.R No. Karai/Karai/352, which same has claimed or at all.
79. Based on the fact that the Plaintiff is neither the owner nor the proprietor of L.R No. Karai/Karai/352, it was submitted that the Plaintiff is thus devoid of any Legal Rights and/or Interests in respect of the said parcel of land.
80. In the premises, it was thus contended that the Plaintiff herein is not entitled to the Reliefs that have been impleaded at the foot of the Further Amended Plaint and essentially, the Plaintiff is not entitled to an Declaration of ownership, either as claimed or at all.
81. Finally, the 2nd and 3rd Defendants having realized that same did not file a Verifying affidavit to the counterclaim dated the 8th January 2020, have proceeded to and contended that the failure to file a verifying affidavit to the counterclaim, ought not to be relied upon and to nonsuit the counter-claimers.
82. In a nutshell, the 2nd and 3rd Defendants, have implored the Honourable court to find and hold that the Counter-claim beforehand has been duly proved and/or established.
83. Consequently and based on the forgoing, the 2nd and 3rd Defendants, have therefore sought to have the Plaintiff's suit be Dismissed with costs. Besides, the 2ND and 3RD Defendants have sought and/ or prayed for the Counter-claim to be allowed.



Issues For Determination:

84. Having reviewed the Pleadings filed by and/or on behalf of the Parties, that is the Further Amended Plaintiff and the Statement of Defense and Counter-claim, and having considered the written Statements and Bundle of Documents; and similarly having evaluated the oral evidence tendered by and/or on behalf of the Parties and finally having taken into account the written Submissions that were duly filed, the following Issues are pertinent and thus germane for Determination;
- i. Whether the Plaintiff herein is the Lawful and Legitimate owner of L.R No. Karai/Karai/352.
 - ii. Whether the Plaintiff herein can stake a claim to the suit property on the basis of the Longevity/ Duration of Occupation thereof since 1968 and whether such a claim, which primarily, is a claim for Adverse Possession can issue in respect for Public Land.
 - iii. Whether the 1st Defendant herein has any Capacity to allocate and/or alienate the Suit Property to and/or in favor of the Plaintiff.
 - iv. What Reliefs ought to be Granted.

Analysis And Determination:

Issue Number 1:

Whether the Plaintiff herein is the Lawful and Legitimate owner of L.R No. Karai/Karai/352.

85. The Plaintiff herein has claimed and/or contended that same is the lawful and legitimate owner in respect of L.R No Karai/Karai/352, otherwise referred to as the suit property.
86. Premised on the foregoing contention, the Plaintiff herein has therefore laid before the Honourable Court the subject suit and same is seeking for a Declaration to that effect, namely, that same is the Lawful owner thereof.
87. Other than the fact that the Plaintiff is seeking to be Declared as the owner of the suit Property, the Plaintiff has similarly sought for an order of Permanent Injunction to restrain the Defendants herein jointly and/or severally, from trespassing onto the suit property and thereby interfering with (sic) the Plaintiff's entitlement and Rights thereon.
88. Nevertheless, even though the Plaintiff contend that same is the lawful and legitimate owner of the suit property, the Plaintiff herein however did not tender and/or avail to the Honourable court any Title documents, to show and/or establish ownership over the suit property.
89. On the other hand, the Plaintiff herein also did not show to the Honourable court any Evidence of having been allocated the suit property by the County council of Kiambu, (now defunct), either as claimed or at all.
90. Suffice it to note, that if the suit property was duly allocated to the Plaintiff by the 1st Defendant, then no doubt, a Letter of allotment would have been issued to and in favor of the Plaintiff designating the terms of the allotment.
91. On the other hand, the Letter of allotment, if any, would also have indicated the terms and conditions upon which the allotment was made to the Plaintiff and thereafter the Plaintiff would have been called upon to comply with the terms of allotment.



92. Nevertheless, it would also be incumbent upon the Plaintiff subject to being issued with the letter of allotment, (which is not the case herein) to endeavor to comply with the terms of letter of allotment, including but not limited to payment of the Stand Premium, Ground Rents as well as Rates, where applicable.
93. Premised on the foregoing, if the Plaintiff was indeed allocated the suit property, in the manner claimed vide the Plaint, as well as the evidence tendered before the court, then it behooved the Plaintiff, to place before the court such Evidence to signify allotment and indeed, compliance with the terms and conditions of (sic) the allotment.
94. Unfortunately, the Plaintiff herein failed to place before the Honourable Court evidence of the Letter of allotment, the acceptance of the allotment, the payment of the requisite levies and even the ultimate issuance of a Certificate of lease in his favor.
95. To my mind, having failed to avail and/or tender before the Honourable court such critical and essential Evidence, it is difficult, nay impossible to fathom the basis of the Plaintiff's claim to be the lawful and legitimate owner of the suit property.
96. Perhaps, at this juncture it is imperative to underscore the position that ownership of land can only arise and/or ensue upon the allotment of land, compliance with the terms of the Letter of allotment and ultimate issuance of a Certificate of lease/grant/title, whichever is applicable.
97. Short of that, it is not legally tenable to lay a claim of ownership to a piece and/or portion of land, premised and/or predicated on (sic) minutes of a County council, namely, the 1st Defendant herein, in the manner sought by the Plaintiff.
98. To buttress the foregoing observation, it is appropriate to take cognizance of the holding in the case of *Dr. Joseph Arap Ngok -v- Justice Moiwo Ole Keiwa & 5 Others* [1997] eKLR where the Court of Appeal held thus:
- “It is trite law that landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.”
99. Other than the foregoing, the importance of the Letter of allotment, if any, and compliance with the terms thereof, was also underscored vide the decision in the case of *Ocean View Plaza Ltd v Attorney General* [2002] eKLR, where the Honourable Court observed as hereunder;
- “Allotment of land to a citizen or others protected under *the Constitution*, which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under the Land Acquisition Act.”
100. Flowing from the foregoing corpus of case law alluded to in the preceding paragraphs, it is common ground that Ownership of land can only arise and/or be based on some Legal Instruments and/or documents known under the relevant registration regime and not otherwise.
101. In view of the foregoing, it is my finding and holding that the Plaintiff's claim to and in respect of the suit property, albeit, without any Title Instrument, has therefore been made in vacuum.
102. Notwithstanding the foregoing, it is also appropriate to state and underline that even when the Plaintiff herein was laying a claim of ownership to the suit property, same produced before the Honourable Court a Certificate of search extracted and issued on the 24th May 2013, which confirmed that the suit



Property belonged to and was registered in the name of County council of Kiambu on the 1st March 1973.

103. Arising from the contents of the said Certificate of official search, it is evident that the suit property, which the Plaintiff is claiming, is indeed Public Land and thus incapable of being claimed, let alone owned by the Plaintiff.
104. In a nutshell, it is my considered finding that the suit property does not belong to the Plaintiff and neither, is same registered in the name of the Plaintiff.

Issue Number 2

Whether the Plaintiff herein can stake a claim to the suit property on the basis of the Longevity/ Duration of Occupation thereof since 1968 and whether such a claim, which primarily, is a claim for Adverse Possession can issue in respect for Public Land.

105. Other than the Plaintiff's claim to be the lawful and registered owner of the suit property, which aspect has been discussed in respect of issue number one herein before, the Plaintiff has also staked a claim to the suit property on the basis of longevity of Occupation thereof.
106. For the avoidance of doubt, it is the Plaintiff's contention that same has been living and/or residing on the entirety of the suit property, together with his Family since 1968.
107. Consequently and based on the foregoing, the Plaintiff has therefore premised his claim and thus entitlement to the suit Property, on the basis of occupation, possession and use.
108. To my mind, what the Plaintiff herein is seeking before the court is a Declaration that same has acquired Adverse Possessory Rights over and in respect of the suit Property, by virtue of the duration of occupation and use thereof.
109. Before venturing to address whether the Plaintiff can accrue and/or attract a Declaration of acquisition of the suit property, by way of Adverse Possession, it is appropriate to authenticate the nature and title of the suit property.
110. It is worthy to recall, that the Plaintiff herein availed and/or tendered in evidence a copy of Certificate of Official search extracted and issued on the 24th May 2013 and which confirmed that indeed the suit property is registered in the name of the County Council of Kiambu.
111. In the premises, it is therefore common ground that the suit property is indeed Public land, registered in the name of the County Council of Kiambu, albeit on Trust for the People/residents of Kiambu County Council, (now defunct).
112. Having ascertained and/or authenticated that the suit property was/is public land, the question that then arises is whether a Declaration of acquisition vide Adverse possession can be made over and in respect of Public land.
113. To this end, it is imperative to take cognizance of the Provisions of Section 41 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya, which provides as hereunder;

41. Exclusion of public land:

This Act does not—

- (a) enable a person to acquire any title to, or any easement over—



- (i) Government land or land otherwise enjoyed by the Government;
- (ii) mines or minerals as defined in the Mining Act(Cap. 306);
- (iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);
- (iv) water vested in the Government by the Water Act(Cap. 372);
- (v) land vested in the county council (other than land vested in it by section 120(8) of the Registered [Land Act](#) (Cap. 300)); or
- (vi) land vested in the trustees of the National Parks of Kenya; or
- (i) Government land or land otherwise enjoyed by the Government;
- (ii) mines or minerals as defined in the Mining Act(Cap. 306);
- (iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);
- (iv) water vested in the Government by the Water Act(Cap. 372);
- (v) land vested in the county council (other than land vested in it by section 120(8) of the Registered [Land Act](#) (Cap. 300)); or
- (vi) land vested in the trustees of the National Parks of Kenya; or
- (b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed by that Act.
- (a) enable a person to acquire any title to, or any easement over—
 - (i) Government land or land otherwise enjoyed by the Government;
 - (ii) mines or minerals as defined in the Mining Act(Cap. 306);
 - (iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);
 - (iv) water vested in the Government by the Water Act(Cap. 372);
 - (v) land vested in the county council (other than land vested in it by section 120(8) of the Registered [Land Act](#) (Cap. 300)); or
 - (vi) land vested in the trustees of the National Parks of Kenya; or
 - (i) Government land or land otherwise enjoyed by the Government;
 - (ii) mines or minerals as defined in the Mining Act(Cap. 306);
 - (iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);
 - (iv) water vested in the Government by the Water Act(Cap. 372);
 - (v) land vested in the county council (other than land vested in it by section 120(8) of the Registered [Land Act](#) (Cap. 300)); or
 - (vi) land vested in the trustees of the National Parks of Kenya; or



- (b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed by that Act.
114. Other than the explicit provision of Section 41 of the *Limitation of Actions Act*, which have been reproduced in the preceding paragraph, the issue as to whether adverse possession can accrue on Public land was also discussed by the Court of Appeal in the case of *Chevron (K) Ltd versus Harrison Charo Wa Shutu* [2016] eKLR, where the court stated as hereunder;
- ‘Until 1994 the property was Government land hence the period before 1994 does not account for the period to be computed in arriving at the statutory 12 years as there cannot be a claim of adverse possession against public land.
115. The Plaintiff and his family may have lived on and/or occupied a portion of L.R No. Karai/Karai/352, since 1968 (though no such evidence was tendered), but such occupation of Public land cannot culminate into acquisition of same, namely, the impugned Public Land, vide Adverse possession or at all.
116. Sadly, I am unable to make a finding that the Plaintiff is entitled to an order for transfer of the suit property in his favor based on the longevity and/or duration of (sic) occupation thereof.
117. Put differently, the Claim by the Plaintiff herein to and in respect of the Suit Property, was essentially, premised on Adverse Possession. However, no Claim for Adverse Possession can accrue and/ or arise in respect of Public Land.

Issue Number 3

Whether the 1st Defendant herein has any capacity to allocate and/or alienate the Suit Property to and/or in favor of the Plaintiff.

118. The other aspect of the Plaintiff’s claim to and in respect to the suit property relates to a prayer that the 1st Defendant do transfer the suit property to the Plaintiff and thereby confer ownership rights thereto.
119. My understanding of this prayer is that the plaintiff is seeking, albeit without being explicit, that the 1st Defendant ought to allocate and/or alienate the suit property to and in his favor and thereafter surrender the title thereto in favor of the Plaintiff.
120. Before addressing the issue as to whether the 1st Defendant can indeed transfer the suit property to the Plaintiff, in the manner alleged, it is worthy to ascertain whether indeed the 1st Defendant is in existence and whether any legal proceedings can be commenced and/ or maintained against the 1st Defendants to date.
121. It is common knowledge that all the County councils and by extension, the Local Authorities, which were hitherto established under the Local Government Act, Chapter 265 Laws of Kenya, now repealed, were all rendered redundant and became defunct immediately following the conclusion of the first General Election under *the Constitution* 2010.
122. To be precise, the lifespan of the 1st Defendant herein alongside other Local Authorities, terminated and/or stood extinguished on the 4th March 2013, when Kenya held the first General Election post the promulgation of *the Constitution*, that is, *the Constitution*, 2010.
123. Following the extinction of the 1st Defendant herein, any proceedings that were hitherto filed against same and/or any other Local Authorities, ought to have been continued, albeit in the name of the



respective County Governments and not otherwise. In this regard, it is appropriate to take cognizance of the provisions of Article 259 3(d), which provides as hereunder;

- (3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things—
 - (a) a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office;
 - (b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;
 - (c) a reference in this Constitution to an office, State organ or locality named in this Constitution shall be read with any formal alteration necessary to make it applicable in the circumstances; and
 - (d) a reference in this Constitution to an office, body or organisation is, if the office, body or organisation has ceased to exist, a reference to its successor or to the equivalent office, body or organisation.
 - (a) a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office;
 - (b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;
 - (c) a reference in this Constitution to an office, State organ or locality named in this Constitution shall be read with any formal alteration necessary to make it applicable in the circumstances; and
 - (d) a reference in this Constitution to an office, body or organisation is, if the office, body or organisation has ceased to exist, a reference to its successor or to the equivalent office, body or organisation.

124. Other than the foregoing provisions, it is also imperative to take cognizance of the Provisions of Section of 55 and 59 of the *Urban Areas and Cities Act*, 2011 which provide as hereunder;

55. Rights and liabilities:

All rights, assets and liabilities accrued in respect of the properties vested in the local authorities established under the Local Government Act (Cap. 265) which shall stand repealed after the first election under *the Constitution* shall be dealt with as provided by law.

59. Pending actions and proceedings:

Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.

125. To my mind, the suit herein, if same was filed during the lifetime of the 1st Defendant, same ought to have been continued albeit in the name of the County Government of Kiambu.



126. In this regard, it is therefore appropriate to observe and restate that the continuation of the suit in the name of the 1st Defendant herein, is actually a nullity in the eyes of the law.
127. Put differently, the 1st Defendant is a non-existent body and/or entity and hence no orders can issue and/or be granted against same. Neither can the 1st Defendant herein, which does not exist, be directed to perform any Legal assignment, whatsoever.
128. Notwithstanding the foregoing, what is however apparent is that the subject suit was filed and/or lodged on the 27th May 2013, long after the 1st Defendant had ceased to exist. Consequently, the question that arises is whether the 1st Defendant could have been impleaded at the onset and/or inception of this suit.
129. Clearly, the subject suit was mounted against a non-existent legal Entity and hence same was a nullity ab initio.
130. Other than the foregoing legal infirmities, it is also appropriate to consider whether the 1st Defendant and/or her successor, in the event the Successor was impleaded (which is not the case), can alienate and/or allocate Public land either to the Plaintiff herein or any one else.
131. To be able to answer the said question, it is imperative to take cognizance of the provisions of Article 62 (2) and 67 (2) of *the Constitution* 2010, which provides as hereunder;

Article 62 (2) of *the Constitution*:

- (2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—
 - (a) clause (1)(a), (c), (d) or (e); and
 - (b) clause (1)(b), other than land held, used or occupied by a national State organ.

Article 67(2) Of *the Constitution*:

- (2) The functions of the National Land Commission are—
 - (a) To manage public land on behalf of the national and county governments;
 - (b) To recommend a national land policy to the national government;
 - (c) To advise the National Government on a comprehensive programme for the registration of title in land throughout Kenya;
 - (d) To conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
 - (e) To initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
 - (f) To encourage the application of traditional dispute resolution mechanisms in land conflicts;
 - (g) to assess tax on land and premiums on immovable property in any area designated by law; and
 - (h) to monitor and have oversight responsibilities over land use planning throughout the country.



132. On the other hand, it is also appropriate to take cognizance of the decision of the Supreme Court of Kenya in the *In The Matter of National Land Commission* (2015)eKLR, where the court held as hereunder;
- (222) The *Land Act* defines “alienation” as the sale or other disposal of rights to land, while the NLC Act confers the power of alienation of public land upon the NLC. Thus, the disposal of such land can only be done by the Commission, with the consent of the National or County Government. The NLC, in effect, has been granted the power to sell or dispose of public land, on behalf of the National and County Governments. The National or County Government has to give consent, for such disposal.
- (223) It may be inferred that, the power of alienation of public land is one of the ways through which the NLC administers such land. The requirement of consent to such a transaction, from the National or County Government, is certainly a check-and-balance relationship between the two State organs. The NLC’s function of monitoring the registration of all rights and interests in land, is another mechanism of checking the powers of the body responsible for registration.
133. My reading of the foregoing Decision, makes it crystal clear that at this juncture the 1st Defendant, even assuming it was alive in the eyes of the law, (which is not the case), would not have been competent to allocate, alienate and therefore transfer the suit property to the Plaintiff, either in the manner claimed or at all.
134. Similarly, I am unable to decree an order for the transfer of the suit property in favor of the Plaintiff, in the manner sought or at all.
135. In any event, such an order would not only illegal, but utterly Unconstitutional, in light of the provision of Article 62 (2) and 67 (2) of *the Constitution* 2010, which confer the mandate to alienate and/ or allocate Public Land in the National Land Commission and not otherwise.

Issue Number 4

What Reliefs ought to be granted.

136. The Plaintiff herein had sought to persuade the court to grant the Reliefs set out at the foot of the Plaintiff dated the 27th May 2013. For clarity, the Plaintiff had sought a plethora of Reliefs.
137. However, having reviewed the Reliefs sought by the Plaintiff and having taken into account the totality of the Evidence tendered, as well as the applicable laws, it is obvious that the Plaintiff is not entitled to the Reliefs sought.
138. At any rate, the nature and kind of Orders that the Plaintiff was seeking are orders that do not lie within the Jurisdiction and/or Competence of this Honourable Court.
139. In the premises, the inescapable and irresistible conclusion is that the Plaintiff’s Suit herein, is bereft and devoid of merits.
140. On the other hand, the 2nd and 3rd Defendants herein have placed before the Honourable Court Evidence to show that same are the lawful and legitimate proprietors over and in respect of L.R No’s Karai/Karai/1133 and 1135, respectively.
141. To the extent that the 2nd and 3rd Defendants are duly registered as the owners of the said properties, same are therefore entitled to the protection underscored vide the Provisions of Sections 24 and 25 of the *Land Registration Act*, 2012.



142. For convenience, the provisions of Section 24 and 25 of the [Land Registration Act, 2012](#) (supra), provides as hereunder;

Interest conferred by registration Subject to this Act—

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

143. Based on the foregoing, it is my humble finding and holding that the 2nd and 3rd Defendants are therefore entitled to enjoy the Rights of ownership of L.R No's. Karai/Karai/1133 and 1135.

144. Essentially, the Counter-claim mounted by and/or on behalf of the 2nd and 3rd Defendants would therefore succeed despite the evident breach of the procedural requirement under Order 7 Rule 5 as read together with Order 4 Rule 1(5) of the [Civil Procedure Rules 2010](#).

Final Disposition:

145. Having reviewed the issues for determination that were outlined and/or contained in the body of the Judgment, it is now appropriate to render the Final Dispositive Orders.

146. To my mind, the Burden of proof; that is of proving the claims mounted by the Plaintiff, squarely laid on the shoulders of the Plaintiff. See Section 107 and 108 of the [Evidence Act](#) Chapter 80 Laws of Kenya.

147. However, the Plaintiff was unable to discharge the requisite Burden of proof. Consequently, the Plaintiff's claim herein is devoid of merits.

148. Conversely, the 2nd and 3rd Defendants have been able to discharge the burden of proof, relating to the Counter-claim dated the 8th January 2020. Consequently, the Counter-claim succeeds.

149. In the premises, I make the following orders;



- i. The Plaintiff's suit be and is hereby Dismissed.
 - ii. The 2nd and 3rd Defendants Counter-claim be and is hereby allowed in terms of prayers (i), (ii) and (iii).
 - iii. For the avoidance of doubt, the Land Registrar and Surveyor, Kiambu sub-county, respectively be and are hereby ordered visit L.R No's Karai/Karai/1133 and 1135 and to demarcate the Road of access leading thereto and also to place the requisite boundaries beacons.
 - iv. The Directions in terms of the preceding order to be carried out and/or be undertaken within 60 days henceforth, albeit without default and/or failure.
 - v. The Report relating to the implementation and/or execution of the terms of this judgment, shall thereafter be filed with the court and same shall form part of the Record of the File herein.
 - vi. Either Party is at Liberty to apply.
150. As concerns costs, it is my considered view that the Defendants have had to defend the subject matter for a duration in excess of 9 years, and in this regard, same have accrued and accumulated various Expenses.
151. In the premises, Costs of the suit and the counterclaim be and are hereby awarded to the 2nd and 3rd Defendants and same to be taxed and certified by the Taxing Officer of this Honourable Court.
152. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY 2022.

HON OGUTTU MBOYA,

JUDGE

In the Presence of;

Kevin Court Assistant.

Mr. C. Kimathi for the Plaintiff.

Ms. Muchangi hlb for Mr. Ngugi for the 2nd and 3rd Defendants.

No appearance for the 1st Defendant.

