



Kimani & another (Administrators of the Estate of Gregory Kimani Thita) v Kanai & another (Environment & Land Case 176 of 2010) [2022] KEELC 13611 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13611 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 176 OF 2010
LN MBUGUA, J
OCTOBER 13, 2022**

BETWEEN

HANNAH WANJIRU KIMANI & REGINA MURUGI (ADMINISTRATORS OF THE ESTATE OF GREGORY KIMANI THITA) PLAINTIFF

AND

JULIA KANAI 1ST DEFENDANT

CITY COUNCIL OF NAIROBI 2ND DEFENDANT

JUDGMENT

1. The dispute herein relates to a claim of ownership of three plots of land situated at Komarock Phase 111 Extension (Spine Road Estate), (the project). The allocation of the said plots was associated with a group known as Embakasi/Njiru Self Help Group, an amorphous outfit not uncommonly found in some parts of Kenya particularly Nairobi. Such groups ordinarily spring up as informal settlements.
2. The plaintiff passed on, on March 14, 2015 and was duly substituted with his legal representatives who are now the current plaintiffs.
3. Through the plaint dated April 13, 2010, amended and Further Amended on November 14, 2016, the Plaintiffs claim to be the owners of the suit properties which prior to August 14, 2000 bore Plot Numbers 122, 123 and 124. It is pleaded that on January 18, 2010, the deceased plaintiff had entered into a sale agreement to sell plots 363 and 365 to Douglas Nyagami / Roselyn Gesare Omanga, and Kariuki Kimani respectively. That the would be purchasers exercised due diligence and carried out searches at the City Council of Nairobi records in Dandora Housing Department and ascertained that the properties had no encumbrances. However, they could not get vacant possession because the 1st Defendant had illegally trespassed on the suit properties and began putting up structures.



4. The Plaintiff has further pleaded that the 2nd Defendant fraudulently, illegally and irregularly issued plot cards to the 1st Defendant knowing very well that the said plots were not available for allocation because they had already been allocated to the Plaintiff.
5. The Plaintiffs thus seeks the following orders:
 - i. A declaration that the Plaintiff is the legal and absolute proprietor and holder of the suit properties, that is to say, Komorock Phase III Extension (Spine Road Estate) Plot Number 363, Plot Number 364 and Plot Number 365.
 - ii. A declaration that the 1st Defendant is not entitled to the suit properties, that is to say, Komorock Phase III Extension (Spine Road Estate) Plot Number 363, Plot Number 364 and Plot Number 365.
 - iii. A permanent injunction restraining the 1st Defendant by herself, servants, representatives and/or agents or otherwise howsoever from entering and/or trespassing upon and/or constructing on the suit properties and/or in any other manner dealing with Komorock Phase III Extension (Spine Road Estate) Plot Number 363, Plot Number 364 and Plot Number 365.
 - iv. The cancellation and expunging from the 2nd Defendant's land registers and/or records or any other register or record of the names Julia Kanai as proprietor/owner of the suit properties, that is to say, Komorock Phase III Extension (Spine Road Estate) Plot Number 363, Plot Number 364 and Plot Number 365.
 - v. Damages and mesne profits for trespass and unlawful occupation and/or allocation.
 - vi. Costs of, and incidental to, the suit including interest thereon till paid in full.
 - vii. Any other and further relief the Honourable Court may deem fit to grant.
6. The 1st Defendant in her statement of defence dated November 15, 2021 contested the Plaintiff's allegation that Gregory Kimani (deceased) was the proprietor of the suit properties stating that the plots referenced as 122, 122A and 123 belonged to her. She alleges to have been issued with a plot card dated January 8, 2012 by the City Council of Nairobi and she proceeded to erect a perimeter wall on the three plots.
7. She further stated that a gentleman by the name Simon Ray boy Mwangi is the one who sold the suit properties to her, then he also tried to sell the same plots to the late Gregory Kimani. When she got wind of the new developments, she filed a complaint to the Director of Criminal Investigation and Ray Boy was arrested. Following this complaint, a consensus was arrived at in which the late Gregory was to surrender the documents relating to the suit properties and to remove any construction material thereon; this agreement was captured in a letter dated June 16, 2006.
8. Despite the aforementioned agreement and the resolution that the properties belonged to her, the late Gregory still tried to stake claim of the suit properties and also attempted to sell them to third parties, knowing very well that he was not the legal owner of the suit properties.

The Evidence

9. During the trial, Regina Murugi the daughter of the late Gregory and one of the administrators of her late father's Estate (hereinafter referred to as PW1) testified and adopted her witness statement dated November 11, 2016 as her evidence. That evidence is a replica of the plaintiffs' pleadings and I need not rehash the same. Pw1 also produced the thirteen documents in her list dated November 14, 2016 as Plaintiff Exhibits 1 to 13.



10. On cross examination by counsel for 1st defendant, pw1 clarified that the grant she has is limited to the prosecution of this case. She also stated that her father had taken her to where the suit plots are located. Counsel for the 2nd defendant had declined to cross examine this witness.
11. The second witness, one Mr Bernard Maina (PW2) introduced himself as the chairman of the group known as Embakasi/Njiru United Self Help Group and he adopted his witness statement dated March 22, 2014 as his evidence. He avers that before becoming Chairman, he had been the Group's Treasurer since its inception in 1998. He avers that the group was the owner of the Project known as Embakasi/Njiru united Komorock Phase III Extension/Spine Road Estate.
12. Pw2 avers that he knows both the Plaintiff and the first Defendant in this case as they were members of the group. That the Project had 533 plots in total and all had been allocated to members of the group. That Mr. Kimani, the Plaintiff had been allocated plots Nos 119, 120, 121, 122, 123, 124, 125 and 125A.
13. In the year 2009, the group carried out a formalization process and the City Council of Nairobi advised them that the numbering of the plots be redone as a consequence of which new numbers were allocated to the plots. After the renumbering, Mr. Kimani's plots were allocated numbers 360-367. In respect to the Plots in dispute in this case, the plots changed in numbering as follows:-
 - (i) Plot No 122 became Plot No 363
 - (ii) Plot No 123 became Plot No 364
 - (iii) Plot No 124 became Plot No 365
14. Upon allocation of the plots, members were issued with an Ownership Certificate, though this was not proof of ownership of the plots. The members were required to take possession thereof by carrying out some developments on them, then one would be issued with a clearance Certificates which one would then present to the City Council of Nairobi for issuance of Plot Cards and await processing of the letter of allotment or other relevant documents.
15. Pw2 further states that the plaintiff, Mr. Kimani took possession of Plots Numbers 360, 361, 362, 363, 364, 365, 366 and 367 by constructing a foundation for a building on the Plots and that is why he was issued with Clearance Certificates for the plots.
16. Pw2 also stated that when reallocation of Plot Numbers was done, the old Plot Nos 122 became Plot No 196, Plot No 122A became Plot No 193 and Plot No 123 became Plot No 159, which plots were allocated to Julia Kanai but she failed to take possession of them and was therefore not issued with Clearance Certificates. That as a Self-help group and the allocations being done on an informal settlement, if a member failed to take possession of the plot allocated to them, no Clearance Certificates to such members were issued.
17. On cross examination by Counsel for the 1st Defendant, PW2 stated that the plots were allocated in the year 2000 when the chairman of the project was Mr. Andrew Saji Kyengo, Kamahuha was a member, Kagai Mwangi the Patron and Mr. Omondi (former Member of Parliament for Kasarani) was the secretary. PW2 also stated that their group was a KANU group and the leadership was mandated with the subdivision of the plots. He however stated that the surveyor was better placed to give an account of that place.
18. Pw2 further indicated that the late Gregory Thuita had 8 plots in the scheme as listed in his witness statement and the plots in contention namely plots 363, 364 and 365 were part of his plots, of which he had sold other five plots. PW2 stated that the 1st Defendant Ms. Julia Kanai was a member of their



- scheme but he could not recall the number of plots she owned, though they were definitely more than one plot.
19. On Cross examination by counsel for the 2nd Defendant, PW2 emphasized that he had not made reference to double allocation but had stated that the 1st Defendant also owned plots in the scheme but were different from the plots in dispute. He also confirmed that the certificates issued by City Council were issued to individual members.
 20. Pw3, one Mr. William Omondi, introduced himself as a former Member of Parliament for Kasarani and he is also a registered surveyor. He adopted his witness statement dated March 25, 2014 as his evidence. He avers that in the year 2000, he was engaged by the Embakasi/Njiru United Self Help Group to demarcate a project which was then known as Embakasi/Njiru United Komorock Phase III on L.R Number 11344/R (part). The land was by then an informal settlement and the group needed to formalize it for distribution to their members.
 21. Pw3 carried out the demarcation process as instructed and prepared a Map comprising of 425 plots, which were then allocated to the members of the group.
 22. “ After the issuance of the Plots, it emerged that there was double numbering in respect of Plot Nos 122 and 123 in the names of one Gregory Kimani Thuita occupying one set of plots numbers 122 and 123 in the block containing other plots also allocated to Mr. Kimani Thuita, i.e Plot Numbers 119, 120, 121, 124, 125 and 125A and Julia Kanai occupying a different set of plots with same Numbers in a different block i.e Plot Nos 122 and 123 appearing on a block also containing plot Nos 122A allocated to Julia Kanai.”
 23. On realizing the double numbering, pw3 informed the Group’s officials who ensured that during formalization and rearrangement of the Plots, the said error in numbering was corrected. As a result, the Plots allocated to Mr. Kimani Thuita were renumbered as follows:
 - a) Plot No 119 became Plot No 360
 - b) Plot No 120 became Plot No 361
 - c) Plot No 121 became plot No 362
 - d) Plot No 122 became Plot No 363
 - e) Plot No 123 became Plot No 364
 - f) Plot No 124 became Plot No 365
 - g) Plot No 125A became Plot No 366
 - h) Plot No 125 became Plot No 367
 24. On the other hand, the Plots that had been allocated to Julia Kanai and which had the overlapping Numbering were re-numbered as follows:
 - a) Plot No 122 became Plot No 196
 - b) Plot No 123 became Plot No 159
 25. On cross examination by Counsel for the 1st Defendant, PW3 stated that he knew Gregory but could not with certainty state whether the said Gregory had sold any plots to Julia Kanai (1st Defendant) and could also not certainly state how many plots the 1st Defendant owned. He stated that he was familiar



- with the 1st Defendant because in the year 2009, she visited his home asking to get confirmation for plots 122 and 123.
26. He stated that the common procedure was that once a plot was allocated, the City Council would then ratify the allotment. However he was not sure if that was the same procedure followed in the current case.
 27. On further cross examination by Counsel for the 2nd Defendant, Pw3 stated that he had no role in the land allocation as that was the mandate of the officials of the project.
 28. On re-examination he stated that he could not speak on the issue of the purchase of plots by the 1st Defendant since he was not conversant with the same.
 29. The 1st Defendant, Julia Kanai testified as DW1 and she adopted her witness statement dated November 15, 2021 as her evidence of which the same appears to be her pleading. She also produced the 14 items in her bundle of documents dated November 15, 2021 as her Exhibits 1 to 14.
 30. On cross examination by counsel for the Plaintiff, Dw1 stated that she purchased the suit properties in the year 2000 for Kshs. 20,000 from one Ray boy Mwangi who then re-sold the plots again, but she lodged a complaint with the police and they were arrested. PW3 was the person who was allocating the plots. She initially had five plots of land but sold two and retained the three in contention. She was issued with an ownership card by the City Council and had availed those documents in court.
 31. On further Cross examination by counsel for the 2nd Defendant, DW1 stated that after her complaint, they signed an agreement with the late Gregory that the suit properties which belonged to her would be returned, which they did. She stated that the said Rayboy who was a patron at the scheme was murdered.
 32. The 2nd defendant did not tender any evidence.

Submissions

33. The submissions of the Plaintiff are dated May 19, 2022, where the following issues have been framed for determination; Whether the deceased was the legal and rightful owner of plots 363, 364 and 365 (formerly known as plot number 122, 123 and 124) Komarock Phase III Extension/ Spine Road Estate; whether the Plaintiff has proved ownership of the disputed properties on a balance of probabilities; whether a permanent injunction should be issued against the 1st Defendant; and whether the court should grant the other prayers.
34. On the first issue, it was submitted that the Plaintiff had produced evidence of certificates for the plots allocated to him before they were re-numbered to 363, 364 and 365 as well as plot cards and receipts of payments issued by the 2nd Defendant in his favour as owner of the suit properties. Reference was made to the provisions of Section 107 of the *Evidence Act* and the Court of Appeal case of *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR to buttress the point that he who alleges must prove. That the Plaintiff through the evidence produced in Court had proved that he was the owner of the suit properties and went further to call two witnesses who also confirmed the status of the suit properties.
35. It was further submitted that the documentary evidence of the 1st Defendant is contradictory and inconsistent hence unreliable. That the 1st Defendant had testified of having purchased the suit properties for Kshs. 20,000 but she did not adduce evidence of such sale. In support of this point, reference was made to the case of *Abmed Mohammed Noor v Abdi Aziz Osman* [2019] eKLR.



36. On whether the Plaintiff had proved his case, it was submitted that the plaintiff, being the owner of the suit properties should not be deprived of the same without just compensation as enshrined under Article 40 of *the Constitution* and as was held in *Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another* [2013] eKLR, *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, *Gladys Wanjiru Ngacha v Theresa Chepsaat & 4 Others* [2013] eKLR.
37. It was submitted that no evidence had been adduced to indicate that the plaintiff had acquired the said properties by fraud and the 2nd Defendant ought to be ordered to expunge the 1st Defendant from their records as the owner of the suit properties.
38. On the issue of issuance of a permanent injunction against the 1st Defendant, it was submitted that plaintiff had proved they had a prima facie case with high chances of success as was held in the case of *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358.
39. On the issue of other prayers sought, it was submitted that 1st Defendant had trespassed on the Plaintiff's property and urged the court to grant the prayers sought plus costs of the suit.
40. The submissions of the 1st Defendant are dated May 19, 2022, where it is avered that the allegations against the 1st defendant remained unsupported, and the allegations of irregularities and fraud directed upon the officers of the County Government of Nairobi set out in paragraph 15 of the plaint were also not proved.
41. The submissions of the 2nd Defendant are dated July 1, 2022 where they framed issues for determination as; Whether the allocated suit properties were within the mandate of Nairobi City County and whether the Plaintiff was entitled to the reliefs sought. It was submitted that the suit involved private properties which were not in the jurisdiction of the 2nd Defendant, as the allotment and certificates were issued by Embakasi/ Njiru Self Help Group and not the 2nd Defendant. It was argued that the suit properties records ought to be available at the land's office but none of the parties had produced any title documents registered at the Land Registry as proof of their ownership and the case lacked merit. As such it should be dismissed with costs to the 2nd Defendant.

Analysis and determination

42. Before delving into the determination of the dispute, I must point out that the advocates herein have failed to embrace the Overriding Objectives set out under Section 1A and 1B of the *Civil Procedure Act*. This is a case where only 4 witness testified, and their evidence was quite short. The documents produced were not voluminous. Nevertheless, the case has marked time in the court corridors for a hiatus of 12 years!. During the lifespan of the suit, the advocates, particularly those of the 1st and 2nd defendants made it difficult for the trial to proceed to the extent that the court gave a last adjournment order on July 17, 2019. That however did not stop the said advocates from resisting the progression of the trial when I took over the matter on November 9, 2021 and declined to adjourn the case.
43. On Case Management, the plaintiff's trial bundle dated November 14, 2016 was disorganized as it did not have the statements of pw2 and 3 causing more derailment; The court only accepted the aforementioned witness statements because they had been filed way back in year 2014. As for the 1st defendant, the situation was no better as they filed their trial bundle on 30.11.2021 long after the trial had commenced on November 9, 2021. In the said trial bundle, they have availed a document titled "First Defendants Statement of Defence" which appear to double up as their pleading and witness statement!. As for the 2nd defendant, they did not have any trial bundle, nor did they tender any evidence during the trial, yet they were purporting to tender evidence in the submission stage which is irregular



and unacceptable. These infractions perpetuated by all the advocates did not deter this court from shepherding the trial to its logical conclusion.

44. Having considered the pleadings, the evidence and the respective submissions, I find that there is no controversy that the 1st defendant is the one in possession of the suit plots. Way back on May 26, 2010, H.M. Okwengu J (as she then was) had delivered a ruling stating that it was inappropriate to restrain the respondent (read 1st defendant) from entering the suit property when she was already in possession of the same. Twelve years down the line, there are no records to indicate that that position had changed.
45. The issues therefore falling for determination are:
- i. Who is the legal and lawful proprietor of the 3 suit plots known as plot numbers 363, 364 and 365 or 122, 122A and 123 Komorock Phase III Extension (Spine Road Estate);
 - ii. Whether the 1st Defendant trespassed on the Plaintiff's plots known as plot numbers 363, 364 and 365 Komorock Phase III Extension (Spine Road Estate);
 - iii. If the answer to the above is in the affirmative, what remedies are available to the Plaintiff.
46. As rightly submitted by the plaintiff, he who alleges must prove in tandem with the provisions of Section 107 of the *Evidence Act*. See- *Susan Kanini Mwangangi & another v Patrick Mbiti Kavita* [2019] eKLR.
47. At this juncture, it is pertinent to note that none of the parties has a title or a lease to the suit plots, neither does any of them have a clear allotment letter from a known allotting authority. It is not fathomable that the 2nd defendant is submitting that the warring parties ought to trace their claims of ownership from the lands office, yet the gravamen of this dispute, like many other similar disputes in informal setups are perpetuated by the nonchalant machinations of the 2nd defendant who gives such documents as plot cards and collects revenue in form of various charges but leaves the protagonists at the mercy of the elements. It is no wonder that the 2nd defendant whose defence is on record had failed to tender any evidence to shed light on the matter, particularly on how these informal settlements are formalized.
48. In the case of *Danson Kimani Gacina & another v Embakasi Ranching Company Ltd* [2014] eKLR, the court stated that;
- “The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property ”.
49. In both their pleadings and the recorded statement of Regina Murugi, the plaintiffs claim that the suit plots bore the numbers 122, 123 and 124 prior to the date of August 14, 2000 of which thereafter, they became parcels 363, 364 and 364. The document on page 15 of plaintiff's bundle bears plot No 122A which is not in tandem with the pleadings and the evidence of Regina (Pw1).
50. Back to the documents availed by the plaintiffs as exhibits 1 (on pages 14-16 of plaintiff's Trial Bundle), the ownership certificates in the name of Gregory Kimani Thuita bears the plot no, as 122 (new number 363) dated 14,8,2000, Plot No 122A (no new number) dated July 19, 2000 and plot No 123 (new number 364) dated August 14, 2000. According to Pw2 Bernard Maina, a person of clout in the



project having been its secretary at the inception in 1998 and now being the chairman avers that the new numbers came about in year 2009 (see paragraph 5 of his recorded statement). The elephant in the room is; if the new numbers came about from year 2009, how were the new numbers miraculously reflected in the documents dating almost ten years earlier in year 2000 !.

51. In any event, if the plots were identified as numbers 122, 123 and 124 only upto August 14, 2000, why were the alleged beacon certificates (on pages 38 and 39 of plaintiff's bundle) referring to plots 122, 123 and 124 in year 2009(all of them are dated November 24, 2009). This far, it is clear that plaintiff's claim of ownership which is anchored on the allocation of plots 122, 123 and 124 converted to 363 364 and 365 has not been proofed.
52. Further discrepancy is to be found in the document produced as Plaintiff Exhibit 7 (page 28 of the bundle) which is a confirmation of ownership for plot No 365 by the City Council of Nairobi. The said document bears two dates that is; January 15, 2010 and October 2, 2009. No explanation has been offered for this contradiction.
53. Further, Plaintiff Exhibit 9 (page 33 of plaintiff's bundle) is a letter dated June 16, 2006 from the Embakasi Njiru/ United Self Help Group addressed to the Director of CID signed off by the Chairman, Secretary and Treasurer (read pw2) which reads:

“... We refer to the double allocation of plots Numbers 122, 122A and 123. Initially the plots belonged to Julia Kanai and through Symon Mwangi, they were transferred to Gregory Kimani Thuita in exchange of other three plots. We learnt through Mwangi that after they were constructed, Julia refused to take possession of alternative plots... We would wish to state that the officials of the project met and resolved as follows: That the said Gregory Kimani should remove the building materials from the said plots; ... that Mr. Kimani should surrender the three certificates in exchange with those of new alternative plots; That Julia Kanai should retain the original certificates for the said plots; that Julia should take possession of vacant plots after materials removal...”

54. Plaintiff Exhibit 10 is another letter dated March 25, 2010 (page 35 of plaintiff's bundle), once again from the Embakasi Njiru/ United Self Help Group addressed to the Chief Kayole location also signed off by the Chairman, Secretary and Treasurer (again read pw2) stating that:

“With reference to copy of a letter purported to have been written to the Director CID from our office and that authorising Julia Kanai to own the said plot, was not written by us. As per our records plot Nos, 122, 122A and 123 were changed to Nos 363, 364 and 365 (new survey plan) and were submitted to Nairobi City Council Department of HDD for formalization in the names of Gregory Kimani Thuita who had erected permanent foundations on them in the year 2001...”

55. What comes to mind is, if the letter marked as Plaintiff Exhibit 9 was addressed to the CID by whoever wrote it, why did the officials of the Embakasi Self Help Group not address their own letter (Plaintiff Exhibit 10) denouncing the former letter to the CID?; Instead they addressed it to the chief. Further, it is noted that pw2 who happens to be part and parcel of the project where the suit plots are situated is mute in relation to the two letters in so far as his recorded statement is concerned. It is worthy to note that the letter to the police was authored in year 2006. At what point did the said officials of the project including pw2 discover the existence of the said letter (plaintiff Exhibit 9) such that they only commented on the same 4 years later in year 2010 !.



56. What emerges is that the contents of the letter of 16.6.2006 is in tandem with the evidence of 1st defendant to the effect that the suit plots had been sold to her but were apparently resold to the plaintiff and when the matter was tabled before the police, the 1st defendant was found to be the rightful owner of the said plots.
57. The Plaintiff further produced Plaintiff Exhibit 12 (page 37 of the bundle) which is a letter from Hon. William Omondi (who testified as PW3) dated March 29, 2010 which reads:
- “ This is to confirm that plot Nos 122, 122A and 123 in Embakasi/Njiru United S/H project were surveyed and shown to the owner Julia W. Kanai on 17/4/2000. The beacon certificates for the said land duly signed by me were consequently issued to the owner. Kindly assist the bearer sort out problems that have arisen due to double allocations, alterations...”
58. At no point was the above letter ever expunged from the records or disowned by the plaintiffs and their witnesses, particularly pw3. However, the said Hon. William Omondi in his recorded statement gave contrary evidence stating that plots 122, 123 and 124 which became 363, 364 and 365 belonged to the plaintiff!
59. The situation is worsened by the said Hon Omondi (Pw3) where in paragraph 5 of his witness statement, he alludes to double allocation of the suit plots in terms of numbering where he gives an account of how plaintiffs’ plots 122, 123 and 124 were re numbered, but he is mute on what became of plots nos 122 and 123 belonging to 1st defendant.
60. Moreover, Bernard Maina and William Omondi, PW2 and PW3 respectively adopted their witness statements as their evidence, where by PW3 talked of there having been double allocation in respect of plots 122 and 123, necessitating renumbering. However, pw2 was rather evasive, merely stating that it is the City Council of Nairobi which gave advise on renumbering during the formalization process.
61. Another inconsistency is that PW2, Bernard Maina has stated that in total, they had 533 plots, which were all allocated to their members. However, PW3, Hon. Omondi avers that there were 425 plots. This evidence emanates from a person who was an official of the group from its inception in 1998 (PW2) and the other one carried out demarcation and even prepared maps (PW3) !.
62. The totality of the evidence tendered by pw1, 2 and 3 is that the same is fraught with material discrepancies which renders the evidence incredible.
63. On the other hand, the documents availed by the 1st Defendant appertaining to ownership, that is the ownership certificate, payments receipts, beacon certificates and plot card from the city council are consistent in so far as the plot numbers are concerned as they all refer to plot No 122, 122A and 123 in the name of the 1st defendant. Thus the said documents are in tandem with the 1st defendant’s pleadings and evidence that her plots were and still are identified as 122, 122A and 123.
64. Going by the documents produced by both the plaintiffs and 1st defendant, it appears that the initial document a claimant was acquiring towards assertion of an interests in the suit plot was an ownership certificate issued by the project. And to this end, both claimants have availed their respective ownership documents issued by the same outfit, Embakasi/Njiru United self help group. These documents cannot be termed as ownership of land documents, but in terms of tracing the history of the respective claims, they are the earliest documents the parties have. Those of the plaintiffs are dated August 14, 2000 and July 19, 2000, while those of the 1st defendant are all dated April 28, 2000. Thus in terms of the two competing interests, the 1st interests in time was that of the 1st defendant. This also buttresses



the claim of the 1st defendant that an alleged patron of the project sold the plots to her, then he later purported to sell the same plots to the plaintiff.

65. To this end, I make reference to the Court of Appeal case of *Naftali Rutbi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR, where the court stated that;

“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.”

66. This is a situation whereby the 2nd defendant appears to have been the entity entrusted with formalization of plot ownership in the informal setups by issuing plot cards as well as being the keeper of records in their Housing Development Department. To this end, they were receiving revenue by demanding ground rent and rates from both claimants! However, during the trial, they stood in the periphery, abdicating their role as an impartial arbiter in the murky waters of unregistered land. That however does not mean that the rights and interests of the parties in such situations do not accrue. See *Beatrice Wambui Maina v Embakasi Ranching Company Ltd & another* [2022] eKLR.

67. It is settled law that in civil cases the standard of proof is on a balance of probability. This in effect is to say that the courts will make a finding based on which party’s version of the story is more believable. And in the instant dispute, the version of the 1st defendant is more plausible. I therefore find that the suit plots belong to the 1st defendant.

68. In conclusion, the entire claim of the plaintiff fails. However, I must point out that the mess galore was birthed by the rogue officials of the Embakasi/Njiru United Self help Group and the likes of pw3 and nurtured to maturity by the 2nd defendant. In such circumstances, I will not condemn the plaintiff to pay costs. The suit is hereby dismissed and each party is to bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY
OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Akoth Aluoch holding brief for Mr. Gachoka for plaintiff

Kamiro for 1st Defendant

Arati for the 2nd defendant

Court assistant: Eddel/Joan

