



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT AIROBI**  
**ELC CASE NO. 1050 OF 2014**

**BISHOP ROBERT LANGAT.....1<sup>ST</sup> PLAINTIFF**

**DR. MARY MUCHENDU.....2<sup>ND</sup> PLAINTIFF**

**DR. SAMUEL MWENDA.....3<sup>RD</sup> PLAINTIFF**

**CHRISTIAN HEALTH**

**ASSOCIATION OF KENYA.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**HENRY NDUNG’U.....1<sup>ST</sup> DEFENDANT**

**GOTHARD KAMANDE.....2<sup>ND</sup> DEFENDANT**

**CHARLES MUCHARI NGANGA.....3<sup>RD</sup> DEFENDANT**

**MUGUNA JUA KALI ASSOCIATION.....4<sup>TH</sup> DEFENDANT**

**ALL ILLEGAL OCCUPANTS & CLAIMANTS ON**

**L.R NO. 209/11587 DANDORA, NAIROBI.....5<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are the Chairman, Vice Chairman and Secretary of the 4<sup>th</sup> Plaintiff who filed this suit claiming ownership of the land known as land reference number (L.R No.) 209/11587 situated in Nairobi (“the Suit Property”). The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were sued as the Chairman, Secretary and Treasurer respectively of the 4<sup>th</sup> Defendant. The Plaintiffs also sued other occupants, claimants and persons who acquired possession of parts of the Suit Property through sale or transfer and those who became beneficiaries of the Suit Property by virtue of the 1<sup>st</sup> to 4<sup>th</sup> Defendants’ occupation of the whole or part of the Suit Property.

2. The Plaintiffs claimed that on or about 1/3/1999, the Defendants forcefully and wrongfully entered the Suit Property without the Plaintiffs’ consent by destroying the fence put up by the Plaintiffs and thereafter constructed several illegal structures on the Suit Property with the sole intention of dispossessing and denying the Plaintiffs the right to enjoy their property. The Defendants purported that they had been allocated the Suit Property yet the Plaintiffs claimed to hold the legal title over the Suit Property. The Plaintiffs claimed that as a result of the Defendants’ illegal actions, they had suffered loss and damage and had been denied enjoyment of the Suit Property whose value they claim had depreciated due to the illegal structures that the Defendants haphazardly constructed on the land. The Plaintiffs claimed that they had intended to construct a conference and training institute on the Suit Property which would have generated income for the 4<sup>th</sup> Plaintiff.

3. In the Further Amended Plaint dated 25/2/2020, the Plaintiffs sought a declaration that the 4<sup>th</sup> Plaintiff was the bona fide owner of the Suit Property and that the Defendants had no right over the suit land. They sought possession of the Suit Property and eviction of the Defendants from the Suit Property together with a permanent injunction to restrain the Defendants or their agents from further erecting any structures, fencing or in any other manner interfering with the Suit Property. They also prayed for a mandatory injunction directing the Defendants to demolish all the structures and buildings erected on the Suit Property. The Plaintiffs sought to have the Inspector General of the Police oversee the demolition and eviction of the Defendants and all other illegal occupants living on the Suit Property together with damages for trespass, mesne profits from 1/3/1999 until possession was delivered and the costs of the suit plus interest.

4. In the Amended Defence dated 7/3/2019, the 1<sup>st</sup> to 4<sup>th</sup> Defendants denied the Plaintiffs’ claim. They averred that if the Plaintiffs were the

registered owners or were entitled to possession of the Suit Property as they claimed, then the registration of their ownership was obtained by fraud in cahoots with the Commissioner of Lands and in contravention of the Government Lands Act (GLA) which therefore amounted to an illegality. They contended that there was a purported allocation of trust or public land without compliance with the Trust Land Act, the GLA and the Registration of Titles Act. The Defendants contended that the approval of the full Council of the Nairobi City Council was not sought and that the intended allocation was not advertised in the Kenya Gazette. Further, that the purported allocation of the Suit Property was done only when it was known or ought to have been known that the Defendants were in occupation of the Suit Property.

5. The Defendants denied destroying any fence and averred that their members comprising 250 families first settled on the land in 1985 and later applied to the Nairobi City Council for allocation of the Suit Property in 1993 and were issued with letters of allotment. They contended that the Suit Property belonged to them and added that it was the only source of livelihood for over 250 families of jua kali artisans. They averred that following a notice issued by the Nairobi City Council, they demolished the temporary structures on the Suit Property and constructed permanent buildings at costs running into millions of shillings.

6. Patrick Wesonga Kundu gave evidence for the Plaintiffs. He stated that the 4<sup>th</sup> Plaintiff was a non-profit umbrella organisation which provides training for hospitals, health centres and dispensaries which are run and managed by Christians, Protestant denominations or Missionary groups operating in various parts of the country. He produced a copy of the 4<sup>th</sup> Plaintiff's certificate of registration dated 8/6/1987 together with its Constitution. He stated that in order to improve the services offered by the 4<sup>th</sup> Plaintiff, the former trustees of the 4<sup>th</sup> Plaintiff, that is Reverend John Gatu, Geoffrey Irvine and James Gachina approached former President Moi in May 1990 and requested to be allocated a piece of land on which to develop a training and conference center with other related facilities.

7. He stated that the Commissioner of Lands issued a letter of allotment to the 4<sup>th</sup> Plaintiff dated 14/5/1990 which it accepted but lodged an appeal against the demand in the letter for Kshs. 1,714,787/= as stand premium and other charges. He produced a copy of the letter of allotment dated 19/6/1990 together with the revised letter of allotment dated 6/3/1991 in which the payments for the allocation had been revised to Kshs. 900,740/=. He produced a copy of the receipt dated 10/6/1991 which the lands office issued to the 4<sup>th</sup> Plaintiff upon payment of that sum.

8. He averred that the Plaintiffs procured the services of a land surveyor to identify the beacons from the allocation plan and a deed plan was drawn following which the Plaintiffs fenced the Suit Property. A title over the Suit property was issued to the 4<sup>th</sup> Plaintiff on 22/6/1993 registered in the names of its trustees. He produced a copy of the title which gave the size of the Suit Property as 2.67 hectares and indicated that the lease was for 99 years from 1/5/1990. He also produced various documents including copies of the receipts issued by the Nairobi City Council to the 4<sup>th</sup> Defendant on account of payment of rates for the Suit Property. He also produced the architectural designs for the proposed development of a training center on the Suit Property which he was instructed by the former trustees of the 4<sup>th</sup> Plaintiff to prepare in 1993 together with the extracts of minutes of the Dandora Project Exco Sub-committee meeting of 16/6/1992 and reports of the meetings. When the 4<sup>th</sup> Plaintiff submitted its drawings for approval by the defunct Nairobi City Council it was first directed to settle the land rates arrears together with interest. He produced a copy of the letter dated 23/11/1993 which sought a waiver of rates from the Ministry of Local Government.

9. He stated that sometime in 1999 while on a routine visit to the Suit Property he found the 4<sup>th</sup> Defendant and its members had illegally invaded the Suit Property and put up a sign post reading Muguna Jua Kali. He added that the Defendants had illegally put up structures on the Plaintiffs' land and destroyed the fence put up by the Plaintiffs. When he attempted to inquire from some members of the 4<sup>th</sup> Defendant he was informed that it was their property and that he should leave immediately. He ran into his car and sped off. He informed the 4<sup>th</sup> Plaintiff's former trustees of the incident who wrote to the illegal occupants to vacate the land. He produced copies of the correspondence dated 23/3/1999, 9/4/1999 and 23/4/1999. The 4<sup>th</sup> Defendant instructed G. M. Muhoro Advocates to respond to the Plaintiffs' demand letter vide the letter dated 9/4/1999 in which they asserted that they were not encroaching on the Suit Property as the land was legally allocated to them by the authorities.

10. On cross examination, Mr. Kundu stated that the trustees of the 4<sup>th</sup> Plaintiff applied to be allocated land within Nairobi and that the land was identified between the President and the Ministry of Lands following which they were informed that they had been allocated the Suit Property. He stated that when they wished to fence the land, the Plaintiffs visited the Suit Property in 1999 with the surveyor. There was sisal on the land when it was allocated to the 4<sup>th</sup> Plaintiff. They fenced the whole land using barbed wire while following the sisal plantation fence. He averred that the illegal occupants pushed the Plaintiffs out of the Suit Property and demolished their fence together with the store which was on the land. He stated that there were huge concrete developments on the Suit Property some of which were mixed urban developments. On being asked about the reference to the land as an unsurveyed industrial plot in the letter of allotment dated 14/5/1990, he stated that the Plaintiffs applied for land for use as a training centre and added that they would have applied for change of user after the allocation.

11. He stated that the Plaintiffs' title had not been challenged and the Defendants had not produced title deeds or registered leases for the Suit Property. He was emphatic that when they visited the land after the allocation nobody was occupying it and that it was a wild sisal plantation. He had not seen any approvals granted by the Nairobi City Council among the Defendants documents for the developments built on the Suit Property.

12. Henry Ndung'u, the Chairman of the 4<sup>th</sup> Defendant gave evidence. He stated that in 1985 they came together and formed a group known as Kariti Youth Welfare Society whose objective was to economically empower the youth in Kayole area. He stated that they established their businesses on the Suit Property which was vacant as an open ground. They were advised in 1993 that the government was in the process of promoting jua kali artisans within Nairobi and they needed to form a Jua Kali Association. They changed their name to Muguna Jua kali Association and applied for allocation of the Suit Property. He stated that the change of name was formalised immediately. On 10/11/1993 they were issued a letter of allotment by the Nairobi City Council a copy of which he produced. He also produced a copy of the registration certificate for Kariti Youth Welfare Association as well as the one for Muguna Jua Kali Association which shows that it was registered on 17/6/1997. The association was registered as a member of the Kenya National Federation of Jua Kali Associations on 18/9/2001. He stated

that the 4<sup>th</sup> Defendant's members were 257 in number.

13. He stated that they paid the stamp premium and ground rent required in the letter of allotment on 9/6/1997 upon obtaining clearance from the Town Clerk. They also paid survey fees for the land. He stated that on 23/3/1999 the City Council of Nairobi issued a notice to them to demolish the temporary structures constructed on the suit land. They filed Nairobi **HCCC No. 829 of 1999** and obtained an order restraining the Nairobi City Council from demolishing their structures or evicting them from the suit land. They engaged a physical planner, M/s Ndichu and Associates to undertake the proper planning of the land and paid their fees on 14/8/2000. He produced a copy of the letter dated 30/9/2002 on the proposed sewer extension and reticulation to serve the Suit Property.

14. He stated that having complied with all the requirements of the City Council, their occupation or ownership of the land was formalised by the City Council in 2010 when it valued and apportioned ground rent for each plot and issued plot formalisation cards to the 4<sup>th</sup> Defendant's members. He stated that the 4<sup>th</sup> Defendant's members had been in occupation of the suit land since 1985 and had constructed permanent high-rise buildings on the land. He maintained that at all times the suit land belonged to the City Council of Nairobi and that the Commissioner of Lands did not have power to allocate the Suit Property to the Plaintiffs. He added that in any event the Commissioner of Lands did not follow the laid down procedure for allocation of public land and the title held by the 4<sup>th</sup> Plaintiff was therefore obtained unlawfully.

15. He produced a copy of the letter of allotment dated 10/11/1993 which the Nairobi City Council issued to the 4<sup>th</sup> Defendant. The letter shows that the Council offered the Suit Property to the 4<sup>th</sup> Defendant on certain conditions which included acceptance of the offer within 30 days and payment of Kshs. 148,060/=. He produced a copy of their response dated 25/11/1993 and a sketch map showing the suit land. He produced minutes of the proceedings of the Nairobi City Council for March 2000 which made reference to the issue of grabbing of Jua Kali Associations' land while recommending that the Jua Kali Associations should fence their land. He also produced copies of the letters dated 16/1/1998 and 15/7/1998 relating to the problems of jua kali land in Embakasi Division and sought land for the jua kali artisans respectively. The list had the 4<sup>th</sup> Defendant. The letter from Kenya Power and Company Limited dated 23/2/1999 gave the cost for electricity supplied to the suit land.

16. He produced a receipt issued by the Nairobi City Council dated 9/6/1997 on account of payment of the stand premium and the annual ground rent for the Suit Property in the sum of Kshs 148,060/=. He produced receipts issued by the physical planners in June and August 2000. He also produced a copy of the receipt issued by the City Council of Nairobi and plans inspection fee for the payment of the proposed subdivision of the Suit Property dated 22/8/2000. He produced a copy of the receipt issued by the Nairobi City Council to the 4<sup>th</sup> Defendant dated 29/7/2002 for payment for sewerage extension to serve the Suit Property. He also produced a copy of an undated letter from the Town Clerk's Department of Nairobi City Council directing the Chief Revenue Officer to accept the payment from the 4<sup>th</sup> Defendant for the plot allocation.

17. The letter dated 11/10/2018 from the Nairobi City Water and Sewerage Company Limited which he produced made reference to the application for renewal of the sewer connection or reticulation to serve the Suit Property. It referred to an application dated 30/9/2002 and gave approval subject to certain conditions. He produced a copy of the contract agreement for the proposed sewer extension and reticulation for the 4<sup>th</sup> Defendant which was to be undertaken by a contractor known as Kami Enterprises at a cost of Kshs. 4,450,000/=. The receipt issued by the contractor for payment of Kshs. 350,000/= is dated 3/10/2018. He produced a copy of the City Council of Nairobi's letter dated 31/5/2010, Housing Development Department addressed to all jua kali projects requiring them to supply specified documents to facilitate formalisation of the informal settlements.

18. He also produced a copy of the City Council of Nairobi's letter dated 7/7/2012 addressed to the 4<sup>th</sup> Defendant regarding the sensitisation of stakeholders on the new land and housing statutes. He produced copies of receipts issued by the Nairobi City Council to Zachary Maingi dated 1/2/2018 for plot number 72 account 58011 Muguna. He also produced a copy of the card issued by the Nairobi City Council, Housing Development to Zachary Maingi dated 2/8/2012 for plot number 72 as well as those for Anne Wanjiku dated 9/3/2016 and Peter Kamau dated 8/3/2018. He produced photographs taken in February 2019 showing multi-story developments on the Suit Property which.

19. On cross examination, Mr. Ndung'u confirmed that the Defendants did not have a lease or title for the Suit Property and only had a letter of allotment. He maintained that they were in actual possession of the suit land and conceded that in 1993 when the land was allocated to the 4<sup>th</sup> Defendant it did not have a certificate of incorporation. He agreed that when the Commissioner of Lands signed the Plaintiffs' title over the Suit Property the 4<sup>th</sup> Defendant was not registered and had not been given a letter of allotment over the suit land. He learnt in 1999 that the Plaintiffs had a title over the land which they were occupying but they did not file a suit to challenge the Plaintiffs' title over the Suit Property. He confirmed that the Defendants would not call a witness from the City Council of Nairobi. They did not have minutes from the City Council allocating the land to them. He did not produce the approvals the Council gave for the construction of the structures they erected on the Suit Property.

20. He clarified that by 22/2/1985 when they were operating as Kariti Welfare Group they were in occupation of the Suit Property scooping murrum and selling it by the road side. He maintained that the Suit Property measuring approximately 5 acres was part of Dandora Block Y measuring 500 acres. He stated that the land was divided into small plots for individuals and every member got approval as an individual and not as the jua kali association.

21. Parties filed submissions which the court read and considered. The Plaintiffs submitted that they were the proprietors of the Suit Property through first registration and urged that under Section 23 (1) of the repealed Registration of Titles Act the court was enjoined to take their certificate of title as conclusive evidence that they were the absolute and indefeasible owner of the land unless it was shown that the registration was obtained through fraud or misrepresentation. The Plaintiffs submitted that the Defendants had failed to prove fraud or misrepresentation on their part in acquiring title over the Suit Property. The Plaintiffs pointed out that the 4<sup>th</sup> Defendant was registered on 17/6/1997 which was three years after the Plaintiffs had been registered as proprietors of the Suit Property. They maintained that the Defendants' letter of allotment dated 10/11/1993 was issued to an entity that did not exist and was therefore void.

22. The Plaintiffs submitted that letters of allotment were only issued in respect of unsurveyed and unalienated government land and relied on Section 2 of the Government Lands Act on the definition of unalienated government land. They also relied on Section 3 of the repealed Physical Planning Act which defined unalienated government land as land which was not leased to any person or in respect of which the Commissioner of Lands had not issued a letter of allotment or reservation. The Plaintiff submitted that the Defendant's letter of allotment dated 10/11/1993 was void for being contrary to Section 2 of the Government Lands Act and Section 3 of the Physical Planning Act owing to the fact the Suit Property had already been alienated to the Plaintiffs and registered in their name. They reiterated that the Suit Property was therefore not available for allotment to the Defendants.

23. The Plaintiffs urged that a letter of allotment was not proof or evidence of ownership of land unlike a certificate of title which was to be taken as prima facie evidence of ownership of land. They relied on the decision in **John Mukora Wachihhi v Minister for Lands and 6 others [2013] eKLR** where the court observed that a letter of allotment was not proof of title and that it was only a step in the process of allocation of land. They maintained that the Plaintiffs were the absolute and indefeasible owners of the Suit Property and that their title was unchallenged. They added that they were entitled to protection of their title under Sections 24 and 26 of the Land Registrations Act.

24. The Plaintiffs sought damages of Kshs. 50,000,000/= against the Defendants for trespass of over 21 years and for having erected permanent structures on the suit land measuring 2.267 hectares. They urged the court to take into account the benefits the Defendants have derived from the structures and the hostile nature of the Defendants in assessing the damages payable.

25. The Defendants contended that the procedure for alienation of public land prescribed in Sections 3, 9, 12, 13, 14 and 15 of the repealed Government Lands Act was not followed in the allocation of the Suit Property to the Plaintiffs. They submitted that the powers vested in the President under Section 3 could only be delegated to the Commissioner of Lands to be exercised fairly, justly, openly and without discrimination. They urged that under the Government Lands Act the land should have been divided into plots and disposed of through public auction with the notice of the public auction being placed in the Kenya Gazette. They maintained that it was only after due process had been followed that the Commissioner of Lands could issue a grant under Sections 21 and 22 of the repealed Registration of Titles Act.

26. The Defendant submitted that there was no evidence that the President delegated his powers to the Commissioner of Lands and pointed out that from the letter of allotment produced by the Plaintiffs the Suit Property had been earmarked as an industrial plot. They urged that the Commissioner of Lands issued the grant over the Suit Property to the Plaintiffs without legal authority and without following the formal requirements for alienation of public land. They contended that the Commissioner of Lands failed to take into account the interests of the Defendants who were in possession since 1985.

27. The Defendants relied on **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** in which the court stated that when a proprietor's root of title was under challenge he had to prove the legality of how he acquired the title and show that the acquisition was legal and free from any encumbrances including the interests which did not need to be noted on the register like the rights of those in occupation.

28. The Plaintiffs filed supplementary submissions in which they distinguished the authorities relied on by the Defendants. They urged that in **Munyu Maina v Hiram Maina**, the claim related to family land in which a trust existed and which was therefore an overriding interest unlike in the present case. They contended that the Defendants had omitted some words from the decision in the paragraph which they quoted and furnished the court a full text of the judgement which they noted was different from the one produced by the Defendants.

29. The Plaintiffs pointed out that **Henry Muthee Kathuruma v the Commissioner of Lands [2015] eKLR** which the Defendants relied on in their submissions dealt with public utility land reserved for use by the National Youth Service which had been in possession before the Appellant applied for allotment of that land. The Plaintiffs maintained that the Defendants were trespassers and could not claim possessory rights and relied on the case of **Crispin J. K. Osewe v Jennifer Atieno Ochuodho [2020] eKLR** in which the court observed that the protected rights of a proprietor under Section 28 of the Registered Land Act could not be defeated except as provided in that Act and certainly not at the instance of a trespasser.

30. The issue for determination is whether the court should grant the orders sought by the 4<sup>th</sup> Plaintiff. The Plaintiffs produced a copy of the title deed over the Suit property which was issued to the 4<sup>th</sup> Plaintiff through its trustees on 22/2/1993. They also produced the letters of allotment dated 14/5/1990 and 6/3/1991 which preceded the issuance of the grant over the Suit Property. On the other hand, the Defendants challenged the manner in which the Plaintiffs acquired the title over the Suit Property and contended that the suit land was allocated to them by the Nairobi City Council without leading evidence on how the process was undertaken under the repealed Local Government Act. The Defendants alluded to the fact that the suit land was allocated to a jua kali association but could not explain how the individuals obtained approvals to develop the Suit Property and not the jua kali association.

31. If indeed the City Council owned the Suit Property and could lawfully allocate it to the Defendants, then it would have followed through the procedure under the repealed Local Government Act and had leases issued to the Defendants after payment of the stand premium and other charges set out in the letter of allotment. The leases would have had to be registered at the lands office which is the office that registered the Plaintiffs as the proprietor of the Suit Property.

32. The court is enjoined by Section 23 of the repealed Registration of Titles Act to take the Plaintiffs' title over the Suit property as conclusive evidence that they are the absolute and indefeasible owners of the Suit Property unless their title is challenged on grounds of fraud or misrepresentation which is proved that they participated in. The Defendants failed to prove that the Plaintiffs obtained their title over the Suit Property through fraud or misrepresentation.

33. The other issue that was not proved is when the Defendants moved into the suit land. The Plaintiffs' witness stated that the land was previously a sisal farm before they fenced it when the land was allocated to them in 1993. Had the Defendants been on the land since 1985 as their witness claimed, then the Plaintiffs would not have fenced the land in 1993. From the evidence of the Defendants' witness it emerged that the Defendants first settled on the suit land after 1998 and applied to be formally allocated the suit land by the City Council of Nairobi using the jua kali association as a means to acquire the suit land.

34. The notice which the Nairobi City Council issued to Muguna Jua Kali Association on 23/3/1999 only mentioned construction of unauthorised iron sheets office block, two sheds, a timber structure for a watchman and toilet block on the Suit Property without the Council's approval. That notice further confirms that the Defendants moved into and constructed the other structures on the Suit Property after 1999. Muguna Jua Kali Association sued only the Council in Nairobi HCCC No. 829 of 1999 but has never challenged the Plaintiff's ownership of the Suit Property except in the defence to this suit.

35. The Defendants failed to prove that the Nairobi City Council owned the Suit Property for the Council to have lawfully alienated the land to them. If the Suit Property were public land as the Defendants contended, then they should not be occupying it unless they can prove that it was lawfully alienated to them. Based on the evidence adduced, the court does not think the Defendants have a claim over the Suit Property that is superior to that of the Plaintiffs who were allocated the land and were issued a title over the land on 22/2/1993.

36. The Plaintiffs did not lead any evidence to show and quantify what benefits the Defendants had derived from the Suit Property which would have assisted the court in determining the general damages to award. In the court's view Kshs. 5,000,000/= is reasonable as damages for the Defendants' trespass on the Plaintiffs' land.

37. The Plaintiffs have proved their claim to the Suit Property on a balance of probabilities. The court grants prayers (1), (2), (3) and (4) of the Amended Plaint dated 18/2/2019. The Plaintiffs are awarded general damages of Kshs. 5,000,000/=, costs of the suit and interest at court rates.

**Delivered virtually at Nairobi this 18<sup>th</sup> day of February 2021.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Patrick Lutta for the Plaintiffs

Mr. V. Owuor- Court Assistant

No appearance for the Defendants