



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC CASE NO. 409 OF 2006 (OS)

(CONSOLIDATED WITH ELC 1084 OF 2007, 81 OF 2013 AND 837 OF 2014)

JARED WAINAINA WAWERU & 4 OTHERS

(Suing on their behalf and on behalf of

42 other Persons).....PLAINTIFFS

VERSUS

MUTIRITHIA WA ANDU

COMPANY LIMITED.....1ST DEFENDANT

MARTIN NJOROGE NGUGI.....2ND DEFENDANT

RAPHAEL THUKU GAKERE.....3RD DEFENDANT

ENOCENT GUGUYU MUDINDI.....4TH DEFENDANT

GRACE WANJIRU GICHUHI.....5TH DEFENDANT

JUDGEMENT

1. This dispute relates to ownership of the land known as land reference number (L.R. No.) 8479 registered as IR. No. 10794/1 situated at Kasarani, Nairobi (“the Suit Property”). The Plaintiffs claim that through effluxion of time, prescription or adverse possession, they are entitled to a portion of the Suit Property which they described as a tenement occupied by them forming part of the Suit Property. They filed the Originating Summons in court on 20/4/2006 seeking a declaration that the 1st Defendant did not acquire a good title to the Suit Property and that it held the Suit Property as a trustee for the Plaintiffs. The Plaintiffs sought to be registered as the owners of that portion of land or tenement forming part of the Suit Property which they occupied. They sought to have the 1st Defendant restrained from interfering with their possession of the portion of the land which they occupied.

2. The 1st Defendant together with six other persons filed **HCCC No. 676 of 2003** against John Njoroge Chege claiming certain portions of Nairobi/Block 144 which were excised from the Suit Property. They sought an injunction to restrain the Defendant from interfering with their possession of the parcels of land known as Nairobi/Block 144/1121 to 1130, 2040, 94, 1008 and L.R. No. 8479. The Defendant in that case

filed a defence on 9/7/2007 denying the Plaintiffs' claim while averring that he had no control over the persons who had developed portions of the Suit Property. That suit was transferred to the Environment and Land Court and registered as **ELC Case No. 1084 of 2007**.

3. Raphael Thuku Gakere filed **ELC No. 81 of 2013** against Stephen Mbugua Kuria, Jared Wainaina Waweru, Johannes Siago, Samuel Kuria, Pharaoh Omoke and Charles Munala seeking a permanent injunction to restrain the Defendants from dealing with Nairobi/Block 144/1121 claiming that he was registered as the owner of this land on 26/2/2002.

4. Enocent Guguyu Mutindi filed **ELC Suit No. 837 of 2014** seeking an injunction to restrain Francis Wanjohi from interfering with his possession of plot number 2093 which formed part of the Suit Property. He also sought an order to evict the Defendant from the suit land which he claimed purchased in 2007 from John Mbugua Mungai. He sought to be declared the lawful owner of that plot.

5. The suits were consolidated and the court gave the heading above for ease of the conduct of the proceedings. Hearing of the suits commenced on 12/11/2018 when Charles Munala Opeko gave evidence. He stated that they brought the suit for adverse possession on behalf of 42 other persons residing and possessing a tenement of the Suit Property. He produced a copy of a consent and authority dated 9/2/2006 which gave 47 names of the claimants. He produced a copy of the title over the Suit Property issued to Jane Wambui Kenyatta on 21/5/1970 which gives the area of the land as 184 acres. Four entries were registered against the parcel of land with the last one being a transfer to Mutirithia wa Andu on 13/2/1989.

6. He stated that they had lived at Kasarani, Ruaka within Nairobi since 1984. They used to work in a quarry for an Asian contractor and when the Asian contractor left they started working independently as small scale individual miners on a portion of the Suit Property. He claimed that the initial owner of the Suit Property was a white settler known as Whitegam alias Whitney and that upon Kenya attaining independence, Whitegam left the country and the government took over his land. He added that in 1970 the late President of Kenya, Jomo Kenyatta made a free hold grant of the Suit Property to his daughter Jane Wambui Kenyatta.

7. Mr. Munala went on to state that in 1971 they and 47 other persons moved to the present tenement of the Suit Property without Jane Wambui's permission openly and peacefully. He claimed that they had occupied and possessed the said tenement of the Suit Property from 1971 to 1988 without any interference from Jane Wambui Kenyatta. They learnt in 1987 that Jane Wambui Kenyatta had transferred the Suit Property to Mutirithia wa Andu Company Limited which subjected some of the Plaintiffs to continuous harassment and caused them to be arraigned before court and charged with criminal trespass for the tenement of the Suit Property. He urged that they had no other place of abode and that they had come to regard the tenement of the Suit Property as their only home. He added that the Plaintiffs comprised households or families with persons born and brought up on the Suit Property for over 20 years.

8. He stated that their unauthorised entry onto the tenement of the Suit Property as squatters in 1971 with their uninterrupted stay on the tenement until 1989 when Mutirithia wa Andu acquired title over the Suit Property entitled them to be registered as owners of the tenement they occupied and that Jane Wambui Kenyatta lost ownership of the particular tenement on or about 1983 when the twelve years of their uninterrupted possession of the tenement expired. He urged that Mutirithia wa Andu could not have acquired title over their tenement of the Suit Property.

9. He disclosed that some of the Plaintiffs or their representative filed **HCCC No. 1974 of 1994 (OS)** against Mutirithia wa Andu seeking orders similar to those they now seek in this suit but the suit was dismissed for want of prosecution on 5/2/1999 when their advocate failed to attend court. He was quick to mention that that suit was never heard on merit. He added that they learnt of the dismissal of the suit in 2005 and they were unable to trace their former advocate to advise them.

10. He stated that towards the end of January 2005 Mutirithia wa Andu's agents threatened them with

eviction and expressed their intention to demolish their houses and the structures which were on the suit land. He claimed that over the years they had established houses and schools and had developed the Suit Property without any resistance or interference from Mutirithia wa Andu or the previous registered owner, Jane Wambui Kenyatta. He annexed copies of the pleadings in the other case and photographs showing some developments on part of the land.

11. On cross examination he stated that he was born in 1975 in Kasarani. He stated that he used to work for a white settler called Whitegam but later changed his evidence that it was his parents who worked for Whitegam. He did not know Whitegam. His parents told him that he left the country at independence. He stated that his evidence was based on what his parents told him. His father had died but his mother was alive. He was told that the first President of Kenya moved people from the land before giving part of the land to his daughter Jane Wambui Kenyatta. He stated that the first President built houses for them where they stayed without paying rent. He claimed that his father was extracting stones from the suit land for himself. He knew Samuel Kuria whose house was demolished and was accused of trespass.

12. When Mr. Munala was cross examined by Mr. King'ara, he stated that they were claiming a portion of the Suit Property measuring about 50 acres. He knew the 3rd Defendant Mr. Thuku and stated that the 3rd Defendant went with the police to the land in 2007 and told them to vacate the plot which had been sold to the 3rd Defendant. He conceded that the narrative he had given on the history of the land happened before he was born. He knew the 5th Defendant who was the mother of Susan Wangui Gichuhi and who used to work for the 1st Defendant.

13. When he was cross examined by Mr. Odongo, he confirmed that he knew Francis Wanjohi as one of the persons claiming adverse possession of the Suit Property. He conceded that Francis Wanjohi's name was not on the list of the persons who had given his consent to be represented in this suit. He was not aware that the Suit Property had been subdivided. He stated that each one of them had built a house on the land and knew the demarcations and where each one of them lived. He knew the 4th Defendant who was the complainant in Criminal Case No. 764 of 2010 in which there was a conviction and he was put on probation. He denied that they chased the 4th Defendant away. He was not aware that the 1st Defendant had sold part of the land to the 4th Defendant by October 2007. He stated that Francis Wanjohi stayed on the 4th Defendant's land. The search over L.R. No. 8479 which he produced in evidence was done on 1/3/2006.

14. When the court asked the witness how much land the Plaintiffs occupied his response was that he occupied land measuring 25 feet by 50 feet which was approximately an 1/8 of an acre. He stated that some of the Plaintiffs occupied land measuring about 50 feet by 50 feet which would be slightly bigger than 1/8 of an acre. The 1st Plaintiff stated that Jared Wainaina occupied the biggest plot measuring 50 by 100 feet which was approximately ¼ an acre. He stated that the biggest plot occupied by the Plaintiffs was ¼ an acre.

15. Mr. Musyoki, the Advocate who represented the Plaintiffs applied to amend the suit to strike out the word portion and replace it with 50 acres. The Defendant's advocates objected to the amendment but the court allowed it while stating that the Defendants would have an opportunity to present their evidence to deal with the Plaintiffs' claim for 50 acres of the Suit Property.

16. When the suit came up for further hearing on 8/4/2019, the court directed Mr. Mwangi Advocate for the 1st Defendant to procure the registry index map (RIM) for Nairobi Block 144 for all the parties in the suit to identify the specific parcels of land that their claims related to.

17. Frank Rimiru Mututo, a director of Mutirithia wa Andu Limited gave evidence for the 1st Defendant. He stated that the facts raised by the Plaintiffs in this suit were substantially the same as those raised in **Nairobi HCCC No. 1974 of 1994 (OS)** by Hesbon Odit Waore and Samuel Kuria Muhia which was dismissed by the court on 5/2/1999. He relied on the response he filed in that suit disputing the Plaintiffs' claims that they had lived on the Suit Property and clarified that they were tenants of Mr. Whitney and

later Jane Wambui Kamau and produced some receipts to show that the Plaintiffs used to pay rent. He stated that the 1st Defendant bought the Suit Property from Jane Wambui Kenyatta in 1987 but the transfer was registered in 1989.

18. He admitted that the 1st Defendant had harassed the Plaintiffs on the Suit Property because of their failure to pay rent as agreed. He relied on the judgment in **Makadara Criminal Case No. 6950 of 1993** in which the 3rd Plaintiff, Samuel Kuria Muhia was convicted of trespassing on the 1st Defendant's land. He denied that the Plaintiffs had lived on the Suit Property as owners and maintained that their stay on the land had not been peaceful, uninterrupted or open. He produced receipts issued by the 1st Defendant to Chege and Peter Maina dated 26/10/1985 and 11/10/1985. He denied that the 1st Defendant had threatened to evict the Plaintiffs or demolish any houses on the Suit Property in January 2005 and pointed out that in fact the houses shown in the Plaintiffs' exhibit belonged to the 1st Defendant and that the Plaintiffs had been defaulting in paying the agreed rent. He produced a copy of the affidavit he filed in HCC No. 1974 of 1994 (OS) a copy of the judgement in Makadara PMCC Criminal Case No. 6950 of 1993.

19. He expressed doubts as to whether some of the Plaintiffs listed on the consent and authority to sue actually existed while pointing out that the identity number for Samuel Kirago was repeated for the Plaintiffs at numbers 14 and 35 on the list; and that the Plaintiffs' names appearing at numbers 27, 30 and 44 had the same national identity card number which in itself was strange and unusual and raises doubt as to whether the Plaintiffs were indeed 42 as the list showed.

20. He stated that the 1st Defendant surrendered the title over L.R. No. 8479 to the government after obtaining consent to subdivide and sell the Suit Property which he stated no longer existed. He stated that the new number issued by the government for the Suit property was Nairobi Block 144 and that the 1st Defendant subdivided the land and created more than 2000 plots which it sold to members of the public. He stated that the members of the public who bought the plots created have titles for their individual plots and that many of them had developed their plots. He added that if an order of adverse possession were to be granted in respect of the Suit Property it would cause a tremendous breakdown of law and order for it will affect persons who are not parties to this suit by giving the Plaintiffs rights over other people's land which does not belong to the 1st Defendant anymore.

21. He emphasised that the suit lacked merit and averred that the 1st Defendant started selling the plots excised from the Suit Property to members of the public from 1985 and that by 1992 it had sold all the plots. He maintained that it was incorrect for the Plaintiffs to claim that they had occupied the 1st Defendant's land for more than twelve years openly, peacefully and without interference from the 1st Defendant. He clarified that the 1st Defendant owned the Suit Property for more than twelve years and after 1995 was only finalising the process of the surrender of the old title over the Suit Property so that new titles could be issued to the purchasers. He added that Jane Wambui Kenyatta permitted the 1st Defendant to take possession of the Suit Property and subdivide the land before it was transferred to the 1st Defendant to enable it raise the purchase price for the entire 184 acres so that it could pay her. He produced F/R No. 235/100 for Nairobi Block 144 bearing parcel numbers 1 to 685 which was authenticated on 26/2/1993 and F/R No. 235/99 for Nairobi Block 144 with parcel numbers 1132 to 1438 authenticated on 26/2/1993.

22. On cross examination, Mr. Mututo stated that by 2006 when this suit was filed the 1st Defendant had sold all the plots created from the subdivision of the Suit Property. He referred to the deed of surrender for the Suit Property prepared on 15/12/1999, which was the date when the 1st Defendant surrendered the Suit Property to the government of Kenya.

23. Mr. Mututo confirmed that he knew that Raphael Thuku Gakeri was the owner of Nairobi Block 144/1121 having been so registered on 26/2/2002. He confirmed that the 1st Defendant had no dispute with the 3rd Defendant over this plot. The witness stated that he had not gone to the land since 2006 and

only knew what was on the land in 2006. He added that after the 1st Defendant sold its plots, it retained a few plots which had been constructed on by unknown people.

24. Martin Njoroge Ngugi, the 2nd Defendant gave evidence. He entered into an agreement on 14/9/2005 with Lucy Wairimu Nyaga for the purchase of plot number 2023 which formed part of the Suit Property at Kshs. 350,000/=. He produced a copy of the sale agreement. The plot he bought came to be known as Nairobi Block 144/934. Lucy Wairimu Nyaga purchased that plot from the 1st Defendant in 1985 and paid the purchase price over time. When he entered into an agreement with Lucy in 2005, he took over ownership of the plot and continued making payments to the 1st Defendant and was issued a share certificate when he completed payment to the 1st Defendant on 26/3/2010. He applied for and was issued a letter of allotment for Nairobi Block 144/934. A certificate of lease over this land was issued to him in 2011.

25. He averred that he embarked on development of his plot in June 2010 and started erecting a residential house on the plot. A few months into the construction the Plaintiffs interfered and harassed his workers on the site claiming that the plot belonged to them. That was when they brought the existence of court orders to his attention. He maintained that he purchased and acquired possession of his plot in 2005 before this suit was filed. He maintained that when he took over ownership of his plot he was given vacant possession and did not displace anyone on the land when he commenced construction. He did not evict anyone from his plot. He added that a claim for adverse possession cannot be sustained by the Plaintiffs who had never been in actual possession of his plot, which is Nairobi Block 144/934.

26. He stated that the Plaintiffs had misrepresented the facts to the court on what exists on the ground by failing to disclose that they only occupied a portion of the land and the rest of the Suit Property had been subdivided into commercial plots occupied by other individuals who have titles and that those parcels of land were separate from the portions which the Plaintiffs occupied. He relied on a copy of the sketch plan showing his plot. He emphasized that the Plaintiffs had not defined what portion of the Suit Property they occupied and lay claim to. He added that he was informed by the 1st Defendant that upon subdivision of the Suit Property into commercial plots the 1st Defendant left out a portion of the land which was to be utilised for a playing ground, school and other facilities and that that was the portion that the Plaintiffs had been in occupation of even though not adversely against the 1st Defendant. He maintained that the Plaintiffs obtained court orders to restrain the 1st Defendant from interfering with the Suit Property on 27/9/2007 without indicating the exact portion of the land that they were on and added that the Plaintiffs have been using that court order to vex all persons.

27. He emphasised that his plot was distinct and separate from the portion of land occupied by the Plaintiffs. He claimed that during the pendency of this suit, the Plaintiffs entered his parcel of land in 2012 and erected a semi-permanent structure in order to establish possession. He maintained that when he took up possession of the land the Plaintiffs were not in occupation. He argued that he was a good purchaser for value of plot number 2023 now known as Nairobi Block 144/934 created out of the Suit Property without any notice of any defect in the title or encumbrance. He opined that the orders the Plaintiffs seek could not issue against his parcel of land. He produced copies of the receipts dated 10/10/1987, 29/8/1985, 6/11/1985 which the 1st Defendant issued to Lucy Wairimu Nyaga on payment of the purchase price. He also produced a copy of the lease dated 8/3/2011 issued to him for his plot as well as the certificate of lease dated 8/3/2011. He produced a photograph showing a small iron sheet structure and another incomplete stone structure on his plot.

28. On cross examination, Mr. Ngugi stated that he was not served with the order of injunction and that the 1st Defendant did not tell him there was a court order when he bought the plot on 26/3/2010. He was added to the suit in 2010 by which time he stated that he had constructed on his plot. He had not completed the house he was constructing on the plot. He maintained that none of the Plaintiffs laid claim to his plot. When he bought the plot from Lucy Wairimu Nyaga, they went to 1st Defendant's offices who confirmed that it was her plot and they transferred the land to him. He stated that nobody stayed on his plot and that what was on it was the house he had built. He added that someone went to build a small

structure on his land.

29. Raphael Thuku Gakere gave evidence. He stated that he was the registered proprietor of Nairobi Block 144/1121 situated in Mwiki, Kasarani area of Nairobi which measures approximately ½ acre. He purchased the land in 2000 and took possession immediately. The Commissioner of Lands issued a title to him on 26/2/2002. He went to the plot in March 2012 with the intention of commencing development of the plot but the Defendants interfered with his visit stating that he could not proceed with any construction to the land. He reported the matter to the District Commissioner and was referred to the area Chief who summoned all of them and after listening to both sides informed the Plaintiffs to stop interfering with him since he was the owner of the land. He went back to the land in December 2012 intending to start developing the plot and the Plaintiffs again objected and he went to the Chief. He found the Plaintiffs had dug up trenches for the construction of a house on his land. The area Chief warned the Plaintiffs against proceeding with construction on his plot but they ignored the Chief's warning. He stated that on 24/12/2012 the Plaintiffs threatened his life and told him that if he went back to the land he would be trespassing and they would deal with him as they wished. He decided to file suit. He produced a copy of the certificate of lease issued to him on 26/2/2002 for Nairobi Block 144/1121 together with the lease. He also produced a copy of the rates demand note dated 14/8/2012 issued by the Nairobi City Council.

30. In their defence to Mr. Gakeri's claim, the Plaintiffs averred that he was registered as the owner of the plot in contravention and disobedience of the court order issued in this suit. They maintained that they had acquired the land through adverse possession before it was registered in Mr. Gakeri's name and argued that the registration of Mr. Gakeri was subject to overriding interests including the Plaintiff's occupation of the land.

31. On cross examination, Mr. Gakeri stated that he had sued the five people who stopped him from constructing on his plot. He went to the land with the surveyor who was assigned to him by the 1st Defendant to show him the beacons. He saw the land before he bought it. When he bought the land it had no people on it and even when he went to construct on the land there was nobody on his land.

32. Anthony Njung'e Gichuhi gave evidence. He stated that he was a co-administrator of the estate of his late sister Susan Wangui Gichuhi. His mother, Grace Wanjiru Gichuhi, the 5th Defendant in this suit was his co-administrator. His mother was ailing and could not attend court. He adopted his mother's affidavit filed in **Milimani CMCC No. 5106 of 2009**. In that affidavit, Grace Gichuhi deponed that her late daughter, Susan Gichuhi purchased plot numbers 1801, 1806 and 1807 from the 1st Defendant and was issued share certificates. At the time she swore the Affidavit only plot number 1801 had a dispute while the other two plots had not been interfered with. She averred that Simon Muhia Kuria trespassed on plot number 1801 in April 2009 and hurriedly constructed a two room house. When he was cautioned to stop construction and reported to the Chief he did not stop and claimed that he had a court order over the Suit Property. She produced the correspondence exchanged between the advocates on the matter.

33. Grace Gichuhi maintained in the affidavit that Simon Muhia was neither in possession nor occupation of plot number 1801 in September 2007 when the court order was given and that he moved into the plot in April, 2009. She produced a photograph of an incomplete house on plot number 1801 which she maintained was newly constructed. She maintained that the court order issued in this case did not relate to her or suit plot rather that it related to the old houses from which Simon Muhia had been relocated. She sincerely believed that Simon Muhia was taking advantage of the fact that the owner of plot number 1801 had died and was hiding behind the court orders with the aim of grabbing and unlawfully acquiring the property of her late daughter.

34. Mr. Gichuhi stated that this dispute arose when Simon Kamau Muhia trespassed onto plot number 108 and later onto the other two plots. The Magistrates' court transferred **CMCCC No. 51 of 2009** to be heard with the suit which was pending before this court. He stated that the trespass by Simon Kuria Muhia took place in April, 2009 and they caused a demand letter to be issued to him on 5/5/2009. He denied that Simon Muhia had been on the suit plot for more than 25 years and maintained that it was a fact that the plots were vacant prior to 2009 and that he hurriedly put up structures on the land. He stated that Mr.

Muhia took advantage of his sister's death to enter the plot in 2009. He clarified that their claim was for three plots and that no title had been issued for the plots. They had share certificates from the 1st Defendant. He knew where the land was and averred that Susan Wangui Gichuhi died in 2001. He stated that Simon Kuria was now living on the three plots which he was seeking to recover. He stated that they used to go to the land before his sister died. He relied on the share certificate issued in his sister's name.

35. Enocent Guguyu Mutindi gave evidence. He purchased plot number 2093 sometime in 2007 for Kshs. 155,000 from John Mbugua Mungai. Sometime in July 2009 while visiting his plot he realised that Francis Wanjohi had trespassed and encroached on part of his property without his consent or any justifiable cause. He attempted to access his plot on several occasions in 2009 while accompanied by construction workers intending to commence construction but Francis Wanjohi with the aid of hired goons physically threatened and chased them away from the plot claiming ownership of the land. He reported the incident at the Mwiki Police Station and an accomplice of Francis Wanjohi was charged in court and prosecuted for malicious damage to property.

36. He reported the matter to the 1st Defendant which wrote a letter to the Officer Commanding the Police Division in Kayole informing the police that John Mbugua Mungai who sold him the plot was the owner of the property. At the time the plot had not been transferred to his name but he had taken actual possession. The Provincial Administration issued summons to Francis Wanjohi to attend the Mwiki Chief's Office so as to settle the issue but he refused to honour the summons. He stated that Francis Wanjohi continued to illegally occupy his plot and was developing a permanent structure on it to his detriment. He had not had quiet enjoyment of his plot despite paying land rates and rent which occasioned him great loss when Mr. Francis Wanjohi occupied his land. He produced a copy of the acknowledgement of payment dated 26/4/2007 from John Mbugua Mungai.

37. Mr. Mutindi produced copies of the plot allocation certificate the 1st Defendant issued to him on 9/1/2012 together with the 1st Defendant's letter dated 15/7/2009 addressed to the OCPD Kayole Division. The letter clarified that the court orders in HCCC No. 409 of 2006 only required the 1st Defendant not to evict the Plaintiffs from the old temporary structures but did not give them power to go and build on private plots. He produced a copy of his letter dated 11/9/2009 addressed to Jared Wainaina Waweru and Charles Munala and other persons giving them a week to remove the temporary structures that they had erected on his plot. He also produced a copy of the Chief's letter dated 8/11/2010 requesting the Assistant Chief for Mwiki to check what was happening and whether someone was constructing on the land. He also produced a copy of the summons to appear issued by the Chief on 8/11/2010 regarding the complaint of encroaching on private land. He produced the rates demand note dated 28/6/2013 and 29/1/2014 in respect of Block 144/2035 issued in the name of J. W Kenya.

38. Francis Wanjohi denied the claim in his defence filed in court on 24/5/2017 and averred that John Mbugua Mungai did not have a good title that he could pass to Enocent Mutindi. He claimed that he had been on the plot for a long time and as a party to **HCCC No. 409 of 2006 (OS)** he had a right to remain on the land. He claimed that it was Enocent Mutindi who attempted to evict him from the suit plot despite the existence of a lawful court order and contended that the Provincial Administration had no power to determine disputes relating to land.

39. On cross examination, Mr. Mutindi stated that he bought the plot in 2007 from someone who had previously bought it. He did not know that there was a court case. Francis Wanjohi was among the people who chased him away when he attempted to construct on the land. Those who chased him away had not constructed on the land. He added that Francis Wanjohi built on his land in 2009. His plot was Nairobi Block 144/2035. The 1st Defendant processed their titles and surrendered the big parcel of land. He stated that plot number 2093 became Nairobi Block 144/2035. He maintained that Francis Wanjohi was not among those listed in **HCCC No. 409 of 2006 (OS)**. He clarified that John Mbugua who sold him the land informed him that his father bought the land from the 1st Defendant. He added that by the time the court order was issued and became effective in October 2007, the 1st Defendant had already sold the plot to John Mbugua. He went to see the land and found that it was vacant. When he attempted to build on the plot people would come and chase him away with his workers. He reported the matter to the Kayole

Police Station and a person who was not Wanjohi was arrested.

40. Parties filed submissions which the court has considered. The Plaintiffs submitted that they have been in occupation of the Suit Property for over twelve years. They referred to the 1st Defendant's Replying Affidavit in **HCCC No. 1974 of 1994** in which the 1st Defendant acknowledged that the Plaintiffs were on the land as its tenants. They denied that they were tenants of the previous owner. They pointed out that the receipts relied on by the 1st Defendant for payment of rent were issued in 1985 before the 1st Defendant bought the land and that they did not relate to the Plaintiffs in this case. They urged that Jane Kenyatta's title had been defeated by effluxion of time by the time she sold the land to the 1st Defendant. They contended that the filing of **HCCC No. 1974 of 1994** should have given the 1st Defendant notice of the Plaintiffs' claim to the Suit Property through adverse possession. The Plaintiffs submitted that the 1st Defendant sued John Njoroge Chege in **HCCC No. 676 of 2003** which later became **ELC No. 1084 of 2007** when it knew that the Plaintiffs were on its land and yet the 1st Defendant chose to sue John Njoroge Chege and not the Plaintiffs who were on the land.

41. The Plaintiffs claimed that the Defendants had not proved that the title over L.R. No. 8479 had ceased to exist or that upon the subdivision the Defendants ceased to be the owners of the land. The Plaintiffs invited the court to look at the documents which referred to the Suit Property as L.R. No. 8479 after this suit was filed and maintained that if indeed the subdivision was done then the 1st Defendant would not have referred to the land as L.R. No. 8479. In any event they urged that the Plaintiffs can still be declared as legal owners through adverse possession. They contended that the subdivision and sale of the plots was done in breach of the court order dated 27/9/2007 and that the 1st Defendant effected the transfers to defeat this case. They urged that the mere change of ownership of land which was occupied by another person under adverse possession did not interrupt such a person's adverse possession while relying on the case of **Samuel Nyakenogo v Samuel Orucho Onyaru [2010] eKLR**. They urged that subsequent owners were aware of the existence of the Plaintiffs on the Suit Property and that there was a court order. They contended that in the circumstances the titles of both Jane Kenyatta and the 1st Defendant to the Suit Property had been extinguished.

42. On **HCCC No. 81 of 2007**, the Plaintiffs submitted that no correlation had been shown between L.R. No. 8479 and the parcel number indicated in the pleadings in that case. They urged that by the time the Plaintiff in that case acquired the title he claims to have, the 1st Defendant's title over L.R. No. 8479 had been extinguished. They contended that the Plaintiff in that case had not shown how he acquired the land yet a title deed was the end product and one had to show the process followed in the acquisition of the title. They urged that the Plaintiff's suit must fail for failing to show a relationship between L.R. No. 8479 and Nairobi Block 144/1121.

43. Regarding **HCCC No. 837 of 2014**, the Plaintiffs submitted that by the time that suit was filed they had already filed their own suit being **HCCC No. 409 of 2006 (OS)** and obtained a court order restraining the 1st Defendant from disposing of any part of L.R. No. 8479. They claimed that that transaction contravened a court order. They urged that the certificate of title in respect of the suit land was dated 9/1/2012. They claimed that the Plaintiff in that case had no reason for suing Francis Wanjohi because the structures on the land were put up by Charles Munala and Jared Wainaina Waweru. They urged that the receipts for payment of rates did not relate to plot number 2093 and that Francis Wanjohi had never attempted to trespass on Nairobi Block 144/2035.

44. The 1st Defendant submitted that if the court were to issue an order to the effect that the Plaintiffs acquired ownership to L.R. No. 8479 through adverse possession the orders would be in vain since such property does not exist and the court order would be incapable of enforcement. It argued that if indeed the Plaintiffs entered the Suit Property in 1954 and had lived on it to date then they should have joined Quarries Limited, Jane Wambui Kenyatta and the 2144 current plot owners as parties to the suit because any orders for adverse possession would have had a bearing on them as previous and current owners of the Suit Property. They urged that the court ought to observe the rules of natural justice by not issuing orders against people who were not parties to the suit.

45. The 1st Defendant submitted that the Plaintiffs failed to pinpoint which 50 acres of the 184 acres of L.R. No. 8479 they claimed to occupy. Further, that the Plaintiffs did not submit a surveyor's report to guide the court and added that an order of adverse possession must be precise by showing which portion of the 184 acres the 50 acres the Plaintiffs claim to occupy was to be hived from for the Plaintiffs to succeed in their claim. The 1st Defendant submitted that these proceedings must fail because of the Plaintiffs failure to join all the necessary parties who would be condemned unheard if the court were to grant the orders sought by the Plaintiffs.

46. The 1st Defendant submitted that the Plaintiffs' evidence in **ELC No. 1084 of 2014** (formerly HCCC No. 676 of 2003) was not challenged because the Defendant in that case did not participate in those proceedings. The 1st Defendant urged the court to grant the orders sought in that suit and contended that it had established that the Defendant in that case had trespassed on the suit land.

47. The 1st Defendant also urged the court to grant the orders sought in **ELC No. 81 of 2007** while urging that the Plaintiff in that case had demonstrated that he had a genuine title issued over a plot that resulted from a subdivision of the Suit Property and that he had proved his case to the standard required by law. The 1st Defendant submitted that the Plaintiff in **ELC No. 837 of 2014** had demonstrated that he had a good title to that plot and that the Defendant had trespassed onto the land. The 1st Defendant urged the court to grant the orders sought in that suit.

48. The 3rd Defendant submitted that the Plaintiffs' suit was filed four years after he had been registered as the proprietor of the suit plot. The 3rd Defendant submitted that the Plaintiffs' claim to adverse possession could not extend to his land because the Plaintiffs had never occupied his land. He added that the Plaintiffs were only seeking declaratory orders relating to the portion of the Suit Property which they claim to occupy. He further contended that the Plaintiffs could not succeed in the claim which related to a title surrendered to the government of Kenya in 1999 way before they filed their suit.

49. The 3rd Defendant contended that from the evidence of the Plaintiffs' witness who stated that the Plaintiffs occupied $\frac{1}{4}$ or an $\frac{1}{8}$ acre each then their claim for adverse possession cannot exceed 13 acres out of the 184 acres which the 1st Defendant initially owned. The 3rd Defendant maintained that there was no evidence to show that the Plaintiffs occupied his parcel of land and added that he got his title four years before the Plaintiffs filed suit.

50. The 4th Defendant submitted that the Plaintiffs had not demonstrated ownership over the Suit Property through adverse possession or other means of acquisition of title under the law. The 4th Defendant pointed out that Francis Wanjohi was not a party in **HCCC No. 409 of 2006 (OS)**. The 4th Defendant submitted that Francis Wanjohi encroached on his plot in July 2009 which was two years after the 4th Defendant had purchased the suit plot and two years since this suit was filed. The 4th Defendant contended that the Plaintiffs' claim for adverse possession cannot be sustained because the Plaintiffs entered the land as workers in the quarry hence their occupation of the land was permitted.

51. He contended that the Plaintiffs had failed to show that they had been in continuous possession of the Suit Property for twelve years or more and that their possession was open, notorious and that they had asserted a hostile title to that of the owner of the property. The 4th Defendant submitted that when he purchased the suit plot in 2007 nobody was occupying it. The 4th defendant submitted that Francis Wanjohi averred in his defence that he was the one occupying the suit plot and was therefore rightfully sued. The 4th Defendant claimed that he had tendered documents in court to show the legality of the process through which he acquired title to the suit plot and that the evidence of the 4th Defendant had not been challenged. He added that the court order was issued on 18/10/2007 after he had bought his plot on 26/4/2007. The 4th Defendant concluded that Francis Wanjohi had no basis for continuing to occupy the suit plot which he did not own and urged that his title over the suit plot was indefeasible.

52. The 5th Defendant submitted that Samuel Kuria Muhia trespassed on the three plots which were

owned by Susan Wangui Gichuhi in April 2009 and that the suit against him was commenced on 5/8/2009. The 5th Defendant maintained that the three plots which were owned by the late Susan Gichuhi did not fall within the area the Plaintiffs claimed to have occupied.

53. The main issues for determination in this suit are firstly whether the Plaintiffs have met the ingredients for the court to make a finding that they are entitled to the Suit Property and secondly, whether the 2nd to 5th Defendants have proved that they were entitled to the orders they sought in the suits they filed.

54. To prove their claim, the Plaintiffs needed to show that they had been in continuous possession of the Suit Property for at least twelve years and that their possession was open, notorious and that they had asserted a hostile title to that of the owner of the property. The burden of proving the period when their possession was without the true owner's permission and that the Defendants were dispossessed of or that their possession of the Suit was discontinued lay on the Plaintiffs. The Plaintiffs needed to show that they had undertaken acts on the land which were inconsistent with the owner's enjoyment of the Suit Property. (See **Chevron (K) Limited v Harrison Charo wa Shutu [2016] eKLR.**)

55. Mr. Charles Munala Opeko who gave evidence for the Plaintiffs stated that he was born in 1975. He could not have been on the Suit Property before Kenya attained independence in 1963 and could not possibly have worked for Mr. Whitgam as he claimed. What emerged from the evidence of Martin Njoroge Ngugi, Anthony Njunge Gichuhi, Grace Gichuhi and Enocent Guguyu is that the trespassers who went to the portions of land claimed by the 2nd to 5th Defendants went there after this suit had been filed and injunctive orders issued by the court. Martin Njoroge Ngugi testified that he was harassed by the Plaintiffs when he started developing his plot in 2010. Raphael Thuku stated that he was blocked by the Plaintiffs from developing his plot in 2012 and that the land was vacant then. Anthony Njunge Gichuhi's testimony was that Simon Muhia Kuria trespassed on one of his late sister's plots in April 2009 and hurriedly constructed a two roomed house on the plot. He later took possession of the three plots.

56. Martin Njoroge Ngugi and Anthony Njunge Gichuki produced photographs to show that when they commenced development or visited the land prior to 2006, it was vacant. They stated that they were only stopped by those laying claim to the land when they commenced construction which was when they learned of the existence of a court order issued in this case. Enocent Mudindi stated that he realised in July 2009 that Francis Wanjohi, who is not a Plaintiff in this suit, had trespassed on his land. He stated that he involved the provincial administration and that Francis Wanjohi's accomplice was charged in court.

57. The court has looked at the order issued on 18/10/2007. The order restrained the 1st Defendant and its agents or servants from trespassing, demolishing the Plaintiffs' developments or houses or evicting the Plaintiffs from L.R. No. 8479. The 1st Defendant was also restrained from interfering with the Plaintiffs possession of the Suit Property. A copy of the order was to be served on the 1st Defendant through advertisement in the print media. The court order did not authorise the Plaintiffs to trespass onto private land, which is what the evidence led showed was what they did.

58. The list of the Plaintiffs contained 47 names. The court noted that some of the persons appearing on that list did not give their national identity card numbers and others did not sign the consent and authority. The 1st Defendant's director who gave evidence pointed out the anomalies on the list of the Plaintiffs and that the national identity card number for Samuel Kirago was repeated for Plaintiffs numbers 14 and 35 on the list. He also pointed out that the Plaintiffs' names appearing at numbers 27, 30 and 44 had the same national identity card number which would raise serious doubt as to whether the Plaintiffs were indeed 47 as the list showed.

59. The Plaintiffs amended the suit to indicate that they were seeking 50 acres out of the Suit Property measuring approximately 184 acres. The witness who gave evidence on behalf of the Plaintiffs confirmed that each Plaintiff occupied about 1/8 of an acre with the one having the biggest portion occupying approximately ¼ an acre. Assuming that each of the Plaintiffs actually occupied ¼ an acre it would

therefore mean that the 47 Plaintiffs could only occupy less than 13 acres of the land and not 50 acres as they claim.

60. On 8/4/2019, the court directed the 1st Defendant's advocate to obtain and file in court the amended RIM for Nairobi Block 144 so that all the parties in the suit could identify the specific parcels of land that their claims related to. The Plaintiffs' witness stated that he was not aware that the Suit Property had been subdivided. The court is persuaded that the land known as L.R. No. 8479 registered as IR. No. 10794/1 later became Nairobi/ Block 144 based on F/R No. 235/100 for Nairobi Block 144 parcel numbers 1 to 685 and F/R No. 235/99 for Nairobi Block 144 parcel numbers 1132 to 1438 which were produced by the 1st Defendant's witness. Both the survey plans were authenticated on 26/2/1993. One would have expected the Plaintiffs to give the new parcel numbers for the specific plots on the RIM which they claimed to be entitled to through adverse possession. Despite the Plaintiffs' witness stating at the hearing that each one of them had built a house on the land and knew the demarcations and where each one of them lived, the Plaintiffs failed to show the specific portion of the suit land which they occupied and the land reference for those specific plots.

61. The 1st Defendant's witness stated in his testimony that most of the 2000 parcels of land which the 1st Defendant created out of the Suit Property were sold and transferred to the respective owners save for plots which the 1st Defendant left to be utilised for a playing ground, school and other facilities. Frank Rimiru Mututo stated that the few plots which the 1st Defendant retained after it subdivided the large parcel of land into more than 2000 plots had been occupied by unknown people as at 2006 when he last visited the disputed land. One would have expected the Defendants who were sued in the other suits which were consolidated with this Originating Summons to have attended court and given evidence. This did not happen. Presumably, they were relying on the evidence of Charles Munala Opeko who gave evidence for the Plaintiffs.

62. Having failed to prove the fifty acres of the Suit Property or the specific parcels of land for that matter which the Plaintiffs claim to occupy on the land registered as Nairobi/ Block 144; and having failed to prove that the Plaintiffs had occupied the land owned by the 2nd to 5th Defendants openly, peacefully and continuously for at least twelve years, the court declines to grant the orders sought in Originating Summons dated 20/4/2006. The Plaintiffs' suit being **ELC Case No. 409 of 2006 (OS)** is dismissed with costs to the Defendants in that suit.

63. The court grants prayer (a) of the plaint dated 4/7/2003 filed in **ELC No. 1084 of 2014** (formerly HCCC No. 676 of 2003). The Plaintiffs in that case are awarded the costs of that suit.

64. Raphael Thuku Gakere proved his case on a balance of probabilities. The court grants prayers (a) and (b) of the plaint dated 16/1/2013 filed as **ELC No. 81 of 2013**. The Plaintiff in that suit is awarded general damages of Kshs. 100,000/= together with costs of the suit.

65. Enocent Guguyu Mudindi proved his claim filed in **ELC Case No. 837 of 2014**. The court grants prayers (a), (b) and (c) of the plaint dated 13/6/2014. The Plaintiff in that suit is awarded the costs of the suit.

66. Grace Wanjiru Gichuhi proved her claim in Milimani **CMCCC No. 5106 of 2009**. The court grants prayers (a) and (b) of the plaint dated 6/10/2014 together with the costs of that suit.

Delivered virtually at Nairobi this 15th day of February 2021.

K.BOR

JUDGE

In the presence of:-

Mr. O. Obera holding brief for Mr. B. Musyoki for the Plaintiffs

Mr. Stanley Kingara for the 3rd and 5th Defendants

Mr. Nelson Odongo for the 4th Defendant

Mr. N. Odongo holding brief for Mr. J. Mwangi for the 1st Defendant

Mr. N. Odongo holding brief for Mr. Mburu for the 2nd Defendant

Mr. V. Owuor- Court Assistant