



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 2419 OF 1992

LUCY MBUGUA NDACHI.....1ST PLAINTIFF

FRANCIS GATHUKU KIHOTO.....2ND PLAINTIFF

VERSUS

STEPHEN NDUNGU NJENGA.....1ST DEFENDANT

MINEH WANJIRU MBURU.....2ND DEFENDANT

MOSES NJENGA NGANGA.....3RD DEFENDANT

NJERI GITAHU.....4TH DEFENDANT

JUDGEMENT

1. Robert Mbugua Ndachi and Francis Gathuku Kihoto filed suit against Stephen Ndungu Njenga, Mineh Nyambura Mburu, Joseph Njenga Ng'ang'a and Njeri Gitahi on 6/5/1992 seeking to be declared the sole proprietors of the land known as Ndeiya/Ndeiya/718 ("the Suit Property") and an injunction to restrain the Defendants from dealing with that land. They claimed that they bought the Suit Property from the Kiambu County Council in 1973 and that the Defendants had encroached onto their land and were cultivating it. The Defendants filed a defence on 1/11/1993 denying the claim and averred that they had resided on the Suit Property peacefully until 1988 when the Plaintiffs laid claim to it.

2. The plaint was amended on 16/12/2019 and Lucy Wambui Mbugua substituted Robert Mbugua Ndachi as the 1st Plaintiff. The Defendants amended their defence on 10/1/2020 and pleaded a counterclaim that the land known as Ndeiya/Ndeiya/718 was part of the parcels known as Ndeiya/Ndeiya/566, 577 and 578 before it was subdivided into parcel numbers 987, 988, 917 and 915 which were returned to the Defendants after the emergency. They claimed that Ndeiya/Ndeiya/718 was non-existent and counterclaimed for mesne profits, damages, cancellation of the title over Ndeiya/Ndeiya/718, rectification of the register plus costs and interest. In the alternative, they sought a declaration that the Defendants had acquired title to the Suit Property by prescription.

3. It is unfortunate that the hearing of this suit took almost 20 years. The hearing commenced on 7/5/2002 before Hayanga J. (as he then was) when Gachimo Gacheri, the District Land Registrar gave evidence. He confirmed that Ndeiya/Ndeiya/718 was registered in his registry but he could not trace the file. He sought two weeks and was stood down so that he could bring the register to court on 22/2/2002.

4. Zaverio Kinyua Gitonga the District Land Surveyor of Kiambu also testified before Hayanga J. He was directed by the court in October 1992 to prepare a report on the Suit Property. He visited the land and prepared a report on 26/1/1993. He stated that there were no physical boundaries on the ground relating to parcel numbers 718, 566, 577, 988, 917 and 916. He stated that for the boundaries to be replaced, they would require a court order to be issued to the District Land Registrar making an order on ownership. He confirmed that his registry prepared a registry map for the Survey of Kenya and produced the map for the area showing the Machine plots. He stated that the boundaries were obliterated. On cross examination, he stated that the pecked lines on the map showed the proposed layout after the demolition of the emergency village which meant that people were there. The witness was also stepped down so that he could bring the relevant correspondence relating to parcel number 718.

5. George Gatimo Gacheri testified further on 22/5/2002. He produced a copy of the abstract of the register relating to Ndeiya/Ndeiya/718 which was on the registry map sheet number 9. He stated that the register was opened on 1/3/1973 with entry number 1 being the name of Kiambu County Council. Entry number 2 dated 18/12/1974 had the name of Robert Mbugua Ndachi to whom a land certificate was issued on 19/12/1973. There was no transfer form to support that entry. Entry number 4 against the register was made on 14/4/1988 vide which Robert Mbugua was registered as the joint owner of the Suit property with James Thuo Kihoto with the latter owning 4 acres while Robert retained

10 acres.

6. He stated that the supporting documents, transfer form and the necessary consents could not be traced. Entry number 5 was the issuance of the joint title deed while entry number 6 was a restriction dated 20/4/1988 registered by the District Land Registrar prohibiting dealings with the land without his permission. The restriction was removed vide entry number 7 dated 26/5/1989. He had no idea where the missing documents were. He stated that the plots were neighbouring plots and were adjacent to plot number 718, which existed in his records. He added that the correspondence in his file did not tally with the abstract of title with regard to the registration. He referred to a letter dated 3/5/1988 from the District Land Registrar to the Director of Surveys stating that the suit land was registered under Kiambu County Council.

7. On cross examination, he referred to a letter dated 3/9/1974 from Kiambu County Council to the Kiambu Land Registrar seeking to have the register cancelled because there was no such plot on the ground. One of the letters shown to him stated that there were no beacons on the ground while the other letter stated that the plot did not exist. On being asked by the court about the note on the map for Machine Area which stated that plot 718 had only pecked lines on its boundary, he responded that the pecked boundaries would have been a contribution of boundaries emanating from other parcels being parcel numbers 566, 577 and 578. This had to be done by a surveyor and it meant that parcel number 718 would be abolished. He stated that looking at the Machine Area map, there was no emergency village apart from parcel number 718. He added that parcels numbers 577, 576 and 578 did not form part of the village. He stated that as at May, 2002 the alignment had not been done and that the emergency village had been abolished by 1/3/1973 when the register for parcel number 718 was opened in the name of the County Council of Kiambu. He made reference to the letter dated 3/9/1974 vide which the Kiambu County Council advised the Registrar to close the register. The register was not closed. The report from the Kiambu District Surveyor dated 26/1/1993 stated that no boundary existed on the ground between parcel numbers 718, 577, 576, 578, 916 and 917. If the boundaries were to be placed a consent order had to be served on the District Land Registrar.

8. Zaverio Kinyua Gitonga went further testified on 6/6/2002. He had two letters, the first one dated 3/5/1988 from the District Land Registrar to the Director of Survey inquiring if the map had been amended to show that the former owners had gone back into the Mau Mau lands. The Director of Surveys responded on 16/5/1988 confirming that the map had not been amended. He referred to the letter from the Kiambu County Council dated 3/9/1974 asking for the renewal of the boundary. There was no record that that letter had been acted upon. He informed the court that he visited the area in 1993 and produced the map which showed that parcel numbers 566, 577 and 578 were on the map. He confirmed that parcel number 718 was superimposed on parcel numbers 566, 577 and 578. He maintained that the records for parcel number 718 were still intact even though there was no boundary. He added that an order can be made for the boundary to be put in place.

9. Parties recorded a consent before Kihara Kariuki J. (as he then was) on 16/9/2004 for the proceedings to be completed by any other judge from where Hayanga J left off.

10. Robert Mbugua Ndachi gave evidence on 20/2/2007 before Aganyanya J. (as he then was). Mr. Ndachi who was 82 years old then stated that he lived in Ndeiya, Limuru. He stated that parcel number 718 measuring 14 acres was his land and that it was situated about one kilometer from where he lived. He stated that he was allocated the land by the Kiambu County Council in 1970 and was issued a certificate of title. He sold a portion measuring 4 acres to James Thuo Kihoto. He relied on the certified copy of the abstract of title reflecting the shares he and James Thuo Kihoto held in the Suit Property. He stated that he had the transfer document from the Kiambu County Council. He was not in possession of the Suit Property which he admitted was occupied by the Defendants. He had never occupied the land since it was allocated to him. The land was a village and he claimed that he was shown the land by the County Council in 1988 after the people occupying it had left.

11. The court record shows that the Plaintiffs closed their case at that point but page 50 of the typed proceedings shows that the 1st Plaintiff's testimony went further and is what the court summarised at paragraphs 11 to 13 of this judgement.

12. Mr. Robert Ndachi further stated that Muigai had built a permanent house on his land while Njenga had built a water tank on his land even though his own house was outside the land. Njenga's son had built on his portion of the land but was not a party to this suit. Wanjiku had built a mud house on his land. He stated that he was given the land after independence when he applied to the County Council.

13. He stated that he gave a copy of the application letter to an officer in the Kiambu land Registry called Paul Kimotho and that the 2nd Plaintiff who was a Councillor informed him that he had been allocated land reference number 718. He claimed that he was shown the land by a surveyor known as Kamau in 1988 and that the land was previously an emergency village. The occupants left in 1978 but he did not have the money to pay for the survey work until 1988. He stated that he fueled the surveyor's vehicle at Kshs. 1,800/=. He was given the transfer documents by the County Council but he never paid for the land.

14. On cross examination he maintained that the land in dispute did not belong to other people before independence. He was not born in that area. He was laying claim to Ng'ang'a Mworira's shamba. He had never paid any rent to the County Council from the time the land was allocated to him. He explained that he did not plough the Suit Property because any time he attempted to the Defendants chased him away. He stated that the 1st Defendant's land which is parcel number 566 bordered his as well as the 2nd Defendant's land. The 3rd Defendant was also his immediate neighbour and the 4th Defendant's land bordered his. In relation to these plots his land was on the lower side while the others fell on the other side. He knew the boundary of his land and maintained that of all the Defendants, the 1st Defendant had encroached on a larger portion of his land.

15. Philip Thuo Wanyugi gave evidence. He was employed at the Kiambu County Council to enforce court orders and Council by laws. According to his register the parcels of land went up to 714 and plot number 718 did not exist. He maintained that there were no minutes supporting the title in respect of parcel number 718. Most of the plots in their register had title deeds issued by the Kiambu Land Registry. He referred to the letter dated 3/9/1974 from the Clerk to the Council addressed to the lands office in Kiambu informing the Land Registrar to cancel the title in respect of parcel number 718 because it did not exist on the ground. He had a copy of the relevant page of the register which he produced in evidence. He maintained that where there was an allocation of land, a letter had to be written to show the person allocated the land. The allocation was to be adopted by the full Council and whoever was allocated a piece of land would have their name shown on the register.

16. He stated that Ndeiya/Ndeiya/566 was allocated to the 2nd Defendant, Ndeiya/Ndeiya/577 was in the name of the 3rd Defendant while Ndeiya/Ndeiya/578 was in the name of the 4th Defendant. Ndeiya/Ndeiya/916 and Ndeiya/Ndeiya/917 were created from the subdivision of 578. He made reference to the order given on 1/10/1992 for the mapping of parcel number 718 in relation to parcel numbers 566, 577, 578, 916 and 917. Prior to the court order being made he had complained to the District Lands office in Kiambu through the letter dated 19/5/1988. He referred to the correspondence between the District Officer Limuru and the Kiambu Lands Registry. He recalled the letter dated 4/7/1991 and stated that he had been approached by people from Kenya Power and Lighting Limited to give permission for power posts to be put on the land. He gave them permission and signed a wayleave agreement dated 16/3/1988.

17. Philip Thuo Wanyugi further gave evidence on 27/2/2007 and produced the correspondence he had alluded to earlier. He maintained that the register only showed allocations up to number 714. He stated that the Plaintiffs' names were not in the register. He had only heard of Mau Mau Village but had never seen it. He maintained that they did not have a record of plot number 718 which was allocated after parcel numbers 566, 577 and 578.

18. The court record shows that on 9/7/2007 Philip Thuo Wanyugi was recalled to give evidence. He produced the Council minutes and stated that the Committee approved the allocation of arable buildings both in Ndeiya and Karai locations to tenants shown in appendix A of the minutes. Number 32 had the name of Ng'ang'a Muoni against plot number 577, J. Mburu Kihoro plot number 566 and Gitahi Njuguna plot number 578. He confirmed that the initial allocations were for 12 acres parcels while the subsequent ones were for 5 acres. The Defendants' advocate sought time to physically inspect the registers after 1957 before he could finish with the witness. The witness was stood down and the court directed that further hearing would proceed on 4/10/2007.

19. Thereafter the case was adjourned a couple of times. Further hearing continued before Aganyanya J. (as he then was) on 27/6/2008 when Moses Njenga Ng'ang'a gave evidence. He was the son of Njenga Mworio who was allocated parcel number 577 measuring 12 acres by the Kiambu County Council in 1957. He stated that he was born on the land in 1930 when his father was some sort of squatter on the land. He produced a copy of the letter dated 30/1/1980 vide which the Council allotted the land to his father. They paid the sum of Kshs. 2485/= through instalments supported by the receipt issued from 8/1/1973 to 7/8/1974. They ploughed the whole land after it was allocated to his father but after the emergency the government took other people who were more than 100 to their land. The people remained on the land until 1974 when they were allocated land elsewhere leaving them with their 12-acre piece of land.

20. He knew their neighbours and both Plaintiffs were not their neighbours. He clarified that he lived on parcel number 577 and not 718. He could see plot number 577 on the registry index map (RIM) with another number 718 appearing below it. There was a line on the map dividing parcel number 577 from 718. He maintained that that dividing line was not there since their land ran from the road to the swamp. According to him, the area marked 718 on the map was where the people brought during the emergency were settled. They had never received any letter from the government indicating that their land measuring 12 acres had been reduced. He insisted that the dividing line shown on the RIM was not there on the ground. He had never seen the Plaintiffs using part of their land. He knew the 2nd Defendant who was his neighbour and had 12 acres. The 1st Defendant came to the land later after buying land from the 4th Defendant who also had 12 acres.

21. He maintained that the Plaintiffs did not stay near him and that it was not true that he occupied the Plaintiffs' land. Their own land had always been 12 acres since it was allocated to them. When the emergency village was built about 2 acres of their land was affected. The emergency village affected 6 parcels of land including those of the 2nd and 4th Defendants. After the people who occupied the village were given their own land the Defendants returned to their portions. No surveyor went to the land when the village was built and none went there after the people left the village. They did not have a title deed for parcel number 577 but knew that it measured 12 acres. The 4th Defendant sold part of her land to the 1st Defendant who became his immediate neighbour. At the time they bought the land an acre was worth Kshs. 200/= and they paid a total of Kshs. 24,485/= with Kshs. 85 being payment for the title.

22. Mineh Wanjiru Mburu gave evidence on 17/11/2009 before Aganyanya J. who by then had been elevated to the Court of Appeal. She stated that she lived in Nyandarua. Prior to that she lived in Ndeiya parcel number 566 which she owned from 1957 having bought it for Kshs 2485/= from Kiambu County Council who gave her a document to show that she had bought the land which was about 12 acres. She was farming on part of the land and kept cattle on the other part. She left her mother on the land in 1965. Her mother died in 1980 and was buried on her land. Her two children, Henry Muigai Mburu and Smith Muturi Mburu remained on the land and were still living on it and had put up permanent houses. They planted trees and Napier grass on the land. There was no boundary on the land. She was given a title to her land even though she could not recall the year when she deposited it with the Kenya Commercial Bank at Nakuru for security purposes.

23. This court heard the case on 21/1/2020 when Mineh Wanjiru Mburu further testified and produced the search dated 7/1/2020. On cross examination she maintained that she had been on the land in Ndeiya since it was given to her by the government. The Plaintiffs were not her neighbours, she stated that they came from a different village which was far from Ndeiya. Neither of the Plaintiffs bought land near her. At the time she acquired her land it was a village. She was emphatic that the Plaintiffs never bought the land and had never been on the land. After the land was demarcated, she registered her land. Her house was on the land even when the land was a village. She could not recall when demarcation was done. She recalled the 1st Plaintiff who she stated was doing agriculture. According to her, the Plaintiffs were from Teikulu which was far from where she stayed.

24. Stephen Ndung'u Njenga gave evidence. He stated that he lived in Limuru, which is not far from where Ndeiya/Ndeiya/566, 577 and 578 were located. He stated that these parcels measuring 12 acres each belonged to Mineh Wanjiru Mburu, Nganga Mworio and Gitahi Njuguna respectively. The three acquired their parcels in 1956 from Kiambu African District Council. He stated that Mineh's husband was buried on her land. The late Nganga Muoria lived on Ndeiya/Ndeiya and later moved to Ol Kalou with two of his wives leaving one on the land. He had buried one of his wives on his land. Nganga Muoria divided his land into three equal portions for the three homes and the subdivision was effected on the ground. One of Nganga's widows called Njeri sold her portion to Moses Njenga who also inherited his mother's share. Wairimu, Moses Njenga and his wife were all buried on their portion of land.

25. He stated that Gitahi Njuguna divided his land being Ndeiya/Ndeiya/578 into three portions for Njeri Gitahi, Nyambura Gitahi and Boro Gitahi. Nyambura Gitahi sold her portion to the 1st Defendant and Nelson Kamari in 1982 and moved to her son's place about 5kms away. He stated that the subdivision of the land was undertaken by the government surveyor without any complaint from anyone. Boro Gitahi also

sold his portion of about 4 acres to the 1st Defendant and moved to Nyahururu.

26. He stated that Njeri Gitahi sued as the 4th Defendant in this case died in the 1990's and he was not aware if letters of administration had ever been taken out for her estate. He only came to know of the claim when the Plaintiffs filed this suit claiming that Ndeiya/566, 577 and 578 had encroached on his land. He confirmed that Mr. Mwachane the District Surveyor undertook survey work on the land in 1992 and produced a map confirming that on the ground, Ndeiya/Ndeiya/566, 577 and 578 measured 11 ¼, 12 ¼ and 12 ¼ acres respectively.

27. He stated that as far as they were concerned, the 1st Plaintiff never went to the suit land physically to map out boundaries for Ndeiya/Ndeiya/718 or to place any beacons on the land. He maintained that the 1st Plaintiff knew he was the owner of the two plots arising from the subdivision of Ndeiya/Ndeiya/578 but had never made any demands of him all those years. He referred to the inquiries they conducted showing how the 1st Plaintiff was registered as the owner of Ndeiya/Ndeiya/718 measuring 14 acres in 1974 and another entry in the register showing he transferred 4 acres to the 2nd Plaintiff on 5/4/1988. He adverted to the letter dated 3/9/1974 vide which the Clerk of the Kiambu County Council instructed the Kiambu Land Registrar to cancel the title over Ndeiya/Ndeiya/718 on the ground that there was no such land even though it appeared on the map and had been reserved for the emergency village. He referred to the minutes of the Kiambu County Council for the meeting held on 9/10/1957 where the Council approved the allocation of parcel numbers 566, 577 and 578 appearing as entries 33, 32 and 31 on map number 2 to James Mburu Kihoro, Nganga Mworia and Gitahi Njuguna respectively. He stated that the County Council of Kiambu duly transferred the portions to these persons upon payment of the purchase price in 1968 and 1980. He stated that James Kihoto was a Councillor in the area in the late 1960s and early 1970s. He added that once the emergency village was removed those affected by the creation of the emergency village reclaimed their portions. He added that the land registrar confirmed on 3/5/1988 that some of the portions of land in this dispute for which titles had not been issued were still registered in the name of the County Council of Kiambu.

28. He produced various documents including a lease dated 11/9/1957 between Nganga Mworia and the Kiambu African District Council over Ndeiya/Ndeiya/577 measuring 12 acres; the letter dated 27/2/1959 confirming that Nganga Mworia's land was partially occupied by the emergency village; the handwritten note dated 18/11/1961 stating that emergency village no. 718 would be laid out once the emergency village had been demolished; the letter dated 3/9/1974 vide which the County Council of Kiambu directed the Kiambu Land registrar to cancel the registration of Ndeiya/Ndeiya/718 because it had been found that there was no such plot on the ground although it was shown on the map; the letter dated 18/9/1979 from the Secretary to the Commission addressed to the Kiambu Land Registrar which stated that the emergency village was no longer there and that the area was then owned by the people.

29. He also produced a letter dated 4/7/1991 addressed to the Limuru District Officer mentioning that parcel numbers 566,577 and 578 had encroached onto parcel number 718; letter dated 26/1/1983 stating that a court order would be required to replace the boundary between parcel numbers 718, 566, 577 and 578; receipts dated 5/7/1958, 6/12/1960, 4/6/1965 and 12/9/1961 issued by the African District Council to Nganga Muoria over plot number 577 and those dated 27/7/1970, 30/7/1970, 2/5/1972 and several others issued in 1973 to him by the County Council of Kiambu; the agreement dated 3/8/1985 between Njuguna Gitahi and Ndungu Njenga for the sale of 4 acres from parcel 578; and copies of title deeds issued to Ndungu Njenga for parcel numbers 918 and 988 on 22/1/1986 and 8/11/1988.

30. He stated on cross examination that his land was parcel number 578 and that parcel numbers 566 and 577 were adjacent to his land. He acquired his land in 1956 from the Kiambu County Council. The land was initially given to Gitahi Boro. He bought the land from Gitahi Boro's children. Before Gitahi was given the land it covered a large area of over 50,000,000 acres. Each person was given 12 acres. He did not know where parcel number 718 was but he averred that there was no dispute when he bought the land.

31. Joseph Muchungu, the Kiambu County Surveyor gave evidence. He received a court order in 2014 directing them to go to the ground and prepare a report in respect of parcel numbers Ndeiya/Ndeiya/566, 577, 578 and 718. They visited the ground in the presence of all the parties, and he prepared the report dated 18/9/2014 which he produced. He attached 4 plans generated from the ground and the RIM. The first plan showed the plots as they appeared on the other end and their sizes in the records of District Land Registrar. Parcel number 566 measured 3.8 ha (9.4acres), parcel number 577 measured 3.8 ha (9.14 acres), parcel number 578 measured 3.3 ha (8.15 acres) and parcel number 718 measured 5.6 ha (13.84 acres).

32. The second plan showed the boundaries and sizes on the ground. Parcel number 718 did not exist on the ground and had been swallowed up by parcel numbers 566, 577 and 578. A green edge indicated the existing boundaries between these three parcels of land. The sizes on the ground were as follows: parcel numbers 566, 577 and 578 measured 11.73 acres, 12.2 acres and 11.61 acres respectively. The third plan showed the structures and developments on the ground. According to his evidence, parcel number 578 had been subdivided into 4 portions being parcel numbers 987 measuring 1 acre, parcel number 988 measuring 1.72 acres, parcel number 917 measuring 2.72 acres and 916. According to the records held in the registry, they were registered in the names of Reuben Karegi Njenga, Ndung'u Njenga and Boro Gitahi respectively. Parcel Number 916 measuring 2.72 acres was registered in the name of Njeri Gitahi. Parcel number 577 measuring 12.2 acres was registered in the name of Nganga Mworia and Moses Njenga Ng'ang'a in equal shares.

33. Ndeiya/Ndeiya/566 was registered in the name of Mineh Wanjiru Mburu. He stated that there were graves on parcel numbers 916, 577 and 566. According to his fourth plan which showed parcel numbers 578, 577 and 566 on the ground, parcel number 718 could only be curved out on the ground based on the RIM. The plan showed that the three parcels would encroach on parcel number 718. The total encroachment measured approximately 3.574 ha. Parcel number 987 did not share any boundary with parcel number 718. The size for parcel number 718 which was 5.6 hectares did not agree with the RIM and what was on the ground which meant that the size registered was not computed from the map and that there was no visit made to the ground to ascertain the area of the parcel. He conceded that the Plaintiffs were the registered owners of the Suit Property. He opined that it was always advisable to get a ground status report and an authenticated cadastral map showing the size of the parcel being registered from the Director of Surveys before any first registration. The surveyor concluded that parcel numbers 566, 578 and 577 had encroached onto parcel number 718.

34. Parties filed submissions which the court has considered. The Plaintiff summarised the main issues for determination as follows: whether the land known as Ndeiya/Ndeiya/718 existed; whether the Defendants had encroached on the Suit property; and whether the Plaintiffs were entitled to the orders they sought. The Plaintiffs relied on the evidence of the District Land Registrar who testified that parcel number 718 in

fact existed in the land register which was opened on 1/3/1973 and an entry made for Kiambu County Council as the proprietor. Subsequent entries were made showing the Plaintiffs as joint proprietors of the Suit Property. A title deed was issued on 5/4/1988. Sheet number 9 of the RIM showed that parcel number 718 measured 5.6 ha. A certificate of official search conducted in 2019 showed that the Suit Property still existed and was owned by Robert Mbugua and James Thuo Kihoto both of whom are now dead.

35. In addition, the Plaintiffs relied on the letter from the Kiambu County Council requesting the Land Registrar of Kiambu to cancel the register relating to parcel number 718. The Plaintiffs submitted that since there was no evidence of the cancellation of the registration of Ndeiya/Ndeiya/718 from the register, then the registration of that land was legal and valid.

36. The Plaintiffs relied on Sections 23 of the repealed Registration of Titles Act and Section 108 of the Land Registration Act in support of the validity of their title. They also relied on Section 24 of the Land Registration Act which provides that registration of a proprietor of land vests the absolute ownership of that land on the registered proprietor. The Plaintiffs submitted that the Defendants did not have any interest in the Suit Property and relied on the correspondence which the late Robert Mbugua Ndachi wrote to different government offices seeking to recover the Suit Property. The Plaintiffs maintained that the Defendants' use of the Suit Property had not been open, notorious, adverse, continuous and uninterrupted for the statutory period of 20 years. They relied on Section 32 of the Limitation of Actions Act on when an easement becomes absolute and indefeasible. The Plaintiffs submitted that the Defendants had over time encroached onto the Suit Property until it became non-existent on the ground. They urged that the Defendants had trespassed and encroached onto their land. They urged the court to grant the orders they sought in their plaint.

37. The Defendants analysed the evidence tendered before court and pointed out that the Plaintiffs' advocate did not pursue a physical inspection of the register from 1957 to confirm whether parcel numbers 717 and 719 were issued outside the register held by the Kiambu County Council. They emphasized that the evidence of the 1st Defendant who was conversant with the history of the land and who resided in Ndeiya was not shaken during cross examination. The Defendants pointed out that the 2nd Plaintiff died in the 90s and no letters of administration were taken out. They urged the court to dismiss this claim.

38. The Defendants contended that the law was not followed in the allocation of the Suit Property to the 1st Plaintiff, while in their case they had produced minutes to show how the land was allocated to them together with evidence of the payments they made for the land. They pointed out that the 3rd Defendant was informed in 1959 not to pay the rent of Kshs. 60/= for his 12 acres because the land was occupied by an emergency village. The 2nd Defendant produced a transfer dated 24/3/1980 which showed that she had paid the full purchase price of Kshs. 2,485/=. The Commissioner of Lands was instructed to transfer to her parcel number 566 following the approval under minute 12/68 (d) of the full council meeting held on 30/8/1968. They relied on Article 40 of the Constitution of the right not to be deprived of property. They maintained that once they paid for the transfer the land became theirs and could not be sold, transferred or alienated to any other person without due process being followed.

39. The Defendants relied on Section 158 of the Land Act on the issue that a certificate of ownership of land which was obtained by corruption was void if the court so determined. They pointed out that the 1st Plaintiff had admitted that he did not pay stamp duty or registration fees for the transfer to the 2nd Plaintiff. The Defendants added that they had a legitimate expectation to the land after they surrendered part of their land for the creation of the emergency village. They relied on the previous survey of 12/11/1992 done by Mr. Mwathame which confirmed that on the ground each parcel measured approximately 12 acres and urged that this was confirmed by the minutes of the Kiambu County Council on the land allocation. They urged the court to cancel the title over the Suit Property and grant the orders they sought in the Amended Defence and Counterclaim.

40. When the court first retired to write the judgement in October 2020, it realised that the exhibits produced during the hearing were missing from the court file. The court therefore requested the parties to furnish it with copies of the documents which were produced during the trial that spanned almost 20 years.

41. The Plaintiffs prepared a list of documents dated 17/2/2020 which included an unclear letter addressed to Muigai Mburu requesting him to stop construction on parcel numbers 566 and 577. There was an undated letter from the Kiambu Land Registrar in response to the District Officer's letter dated 22/7/1991 which pointed out that if there was a problem of ground ownership then that was a matter for the Council and the District officer to resolve and if not the parties had to resort to court. Robert Ndachi wrote a letter dated 28/1/1991 to the District Commissioner seeking his intervention in the resolution of the dispute over his land while giving the history of the matter. The search dated 26/10/1992 done on the Suit Property showed that the Plaintiffs were registered as the owners of the Suit property on 5/4/1988.

42. The Plaintiffs also produced a letter dated 2/2/1973 from the Kiambu Land Registrar to the Kiambu County Council regarding the transfer of Council plots in Ndeiya and Karai locations. The letter dated 22/7/1991 vide which the Limuru District Officer urged the Kiambu District Land Registrar to convene a meeting of between the lands officers and the parties to the dispute so that the sizes of the land in dispute could be ascertained by the District Surveyor was also availed to the court. Copies of the titles issued to the Plaintiffs on 5/4/1988 were furnished to the court. The letter dated 10/1/1992 which the Plaintiffs submitted to the court confirmed that a meeting was held on 19/11/1991 regarding this dispute following which a letter was expected from the Chief Land Registrar. Robert Ndachi made a claim to the Kenya Power and Lighting Company Limited on account of damage to blue gum trees on the Suit Property on an unclear date. The letter dated 19/5/1988 from the Kiambu Land Registrar to the District Officer confirmed that according to their records, parcel number 718 was registered in the joint names of both Plaintiffs.

43. The Plaintiffs also produced a copy of the abstract of title in respect of parcel 718 showing seven entries registered against that parcel of land. The first entry dated 1/3/1973 shows the proprietor as the County Council of Kiambu. The land was transferred to the 1st Plaintiff on 18/12/1974. Entry number four depicts the transfer of 4 acres to the 2nd Plaintiff while the 1st Plaintiff retained 10 acres. The Plaintiffs also produced other correspondence exchanged by the lands offices pertaining to the dispute over the Suit Property. Through the letter dated 22/12/1991, Robert Ndachi sought the intervention of President Daniel Arap Moi in the recovery of the Suit property.

44. It is not in dispute that parcel numbers 566, 577 and 578 were created in the 1950's before parcel number 718 which was created after the emergency village. The Plaintiffs claim is that they acquired parcel number 718 after the emergency village was demolished and that the County Council of Kiambu sold this parcel to the 1st Plaintiff in December 1973. Apart from the abstract of title, there was no other evidence adduced to show how parcel 718 was created. The evidence that Philip Thuo Wanyugi who was employed at the Kiambu County Council gave was that plot number 718 did not exist in their records and that their records showed that the plots only went up to 714. He added that there were no minutes from the Council to support the allocation of the Suit Property to the 1st Plaintiff. He also adverted to the letter dated 3/9/1974 from the Clerk of the Kiambu County Council to the Kiambu lands office recommending the cancellation of parcel number 718 because it did not exist on the ground. This therefore means that by the time the 1st Plaintiff's name was being entered on the register for the Suit Property on 19/12/1974 the County Council of Kiambu had taken the position that parcel number 718 did not exist. It is not clear how parcel 718 was subsequently allocated to the 1st Plaintiff after the Council stated that that parcel did not exist on the ground. The court is inclined to believe that parcel number 718 did not exist on the ground.

45. Sheet number 10 for the Land Trust Board Ndeiya which contains subdivisions implemented from 10/3/1989 to 19/2/2007 shows parcel numbers 566, 577 and 916, 917 and 987 all of which are adjacent to a swamp marked as parcel number 725. That sheet does not have parcel 718. Sheet number 9 which shows the emergency village as parcel 718 and as abutting parcel numbers 566, 577, 988, 916 and 917 confirms the fact that these parcels of land have always existed separately and have always been distinct from parcel 718.

46. In the court's view, the 1st Plaintiff should have pursued the Kiambu County Council to grant him possession of the land it had allocated to him in 1974. The Plaintiffs argued that they held a valid title to the Suit Property because there was no record that the title over the Suit property was ever cancelled by the lands office. In the court's view, land allocation incorporates both the aspect of document of ownership and the physical possession or actual occupation of the land for otherwise the document of title would be a meaningless piece of paper if the land were not there.

47. The 1st Plaintiff obtained a title over parcel number 718 in 1988 and from the evidence adduced, he has never taken possession of the Suit property. He claimed to have sold a portion of this land to the 2nd Plaintiff on 5/4/1988. It is expected that the 1st Plaintiff would have had to go physically to the Suit property with surveyors to excise the 4 acres from parcel 718 to transfer to the 2nd Plaintiff. There is no indication of how the excision of the 4 acres was done.

48. Under Section 18(4) of the repealed Registered Land Act (RLA), the parcels in each registration section, which in this case was Ndeiya, had to be numbered consecutively which in itself corroborates the fact that parcel numbers 566, 577 and 578 were created before parcel 718. If indeed parcel number 718 was superimposed over these parcels of land, then under Section 15 of the RLA, parcel numbers 566, 577 and 578 would have had to be cancelled if they were being replaced by parcel number 718 as the Plaintiffs contended. Those parcels would have had to be cancelled under Section 17 of the RLA. By the same token, parcel number 718 should have ceased to exist in 1988 under Section 25(2) of the repealed RLA when the 1st Plaintiff purported to transfer 4 acres of the Suit property to the 2nd Plaintiff. New parcel numbers should have been issued to the 1st Plaintiff for the 10 acres he was retaining and the 2nd Plaintiff for the 4 acres he was acquiring.

49. The Plaintiffs failed to prove that the Defendants had over time encroached onto the Suit Property until it became non-existent on the ground. The Plaintiffs' suit is dismissed with costs to the 1st and 2nd Defendants. The court grants prayers (c) and (d) of the counterclaim filed in court on 10/1/2020 together with the costs of the counterclaim.

Delivered virtually at Nairobi this 1st day of February 2021.

K. BOR

JUDGE

In the presence of:-

Mr. John Njuguna for the Plaintiffs

Mr. Mwaniki Gitau for the Defendants

Mr. V. Owuor- Court Assistant