



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC 856 OF 2017

(FORMELRY NAIROBI ELC CIVIL CASE NO. 1363 OF 2013)

AMOS KIBATA GITHEKO.....PLAINTIFF

VERSUS

LOISE GACHIKU KINUTHIA.....DEFENDANT

COUNTER CLAIM

LOISE GACHIKU KINUTHIA.....PLAINTIFF

VERSUS

AMOS KIBATA GITHEKO.....1ST DEFENDANT

HON. ATTORNEY GENERAL.....2ND DEFENDANT

THE LAND REGISTRAR KIAMBU.....3RD DEFENDANT

JOSEPHAT GACHERU RUGIRI.....4TH DEFENDANT

JUDGMENT

Introduction/History

1. Years ago, there lived three siblings namely **Felix Kang'ethe** alias **Francis Felix Kang'ethe** alias **Kang'ethe Mbithi**, **John Kinuthia Mbithi** and **Margaret Njambi Mbithi** who are all deceased. The distinctive names of the three siblings are **Kangethe**, **Kinuthia** and **Njambi**. For purposes of the dispute herein, I will identify some of the family members associated with the aforementioned three siblings.

2. In the house of **Felix Kang'ethe**, the identification of his two sons both named **Edward Mbithi Kang'ethe** is very crucial. The eldest one is (**DW 3**), born of the first wife, while the other son (deceased) was born of the second wife of Felix Kangethe. For ease of reference, I will refer to the elder son as **Edward Mbithi Kang'ethe (DW 3)** and the latter one as **Edward Mbithi Kang'ethe (deceased)**. In the house of **John Kinuthia Mbithi**, there is his wife **Rose Gachiku Kinuthia** alias **Loise Gachiku Kinuthia** who is one of the key litigants in this suit. She is the defendant in the main suit and a plaintiff in the counterclaim. I will refer to her as Loise or Loise the defendant. Her daughter **Nancy Njoki David** testified as DW 2. In the house of **Margaret Njambi Mbithi**, one **Patrick Njenga** testified as PW 2 and he is a son of **Catherine Njoki** daughter of **Margaret Njambi**.

3. I have taken time to introduce these family members as the analysis of their identity forms the hallmark of the vicious litigation odyssey which has remained vibrant, often gaining momentum through the decades.

4. The uncontroverted fact is that the family's ancestral land was known as **L.R No. Kabete/Lower Kabete/43**. Adjacent to this parcel was another piece of land **L.R. No. Kabete/Lower Kabete/47** measuring 3.8 acres registered in the name of **John Kinuthia Mbithi** on **3.8.1962** whereby a title was issued to that effect on **6.6.1968**. This parcel forms the subject matter in this suit, hereinafter, the suit parcel or parcel No. 47.

5. **Margaret Njambi** had filed a suit before a land tribunal wanting a share of the ancestral land. The end result in the ensuing proceedings

was that the tribunal award was adopted as a judgment of the court and a decree was issued thereof in **Kikuyu SRM Miscellaneous Application No. 17 of 1998**.

6. It is paramount to give a verbatim extract of the decree in the aforementioned kikuyu suit no 17 of 1998:

“ **DECREE**

CLAIM FOR L.R.NO. KABETE/LOWER KABETE/43 AND 47

This suit coming up on this 3rd day of December, 1998 for the reading of the award and final disposal before C.W.GITHUA Senior Resident Magistrate Kikuyu in the presence of Margaret Njambi Mbithi (Plaintiff/ Applicant) and Loise Gachiku Kinuthia, Josephine Waithera Kangethe (Defendants/ Respondents)

IT IS ORDERED AND DECREED

That the elder's award filed in this court on the 14th August 1995 awarding Kabete/Kabete/43 in the manner following:

- (i) Francis Kangethe 1.7 acres*
- (ii) Edward Kinuthia 1.5 acres*
- (iii) Margaret Njambi Mbithi 1.00 acres*

be and is hereby made a judgment of this Honourable court.

That individual allocations be based on where the homes are built.

That there be no order with regard to plot No. Kabete/Kabete/47 as the same was rightly purchased by the late Kangethe Mbithi with his own personal money”.

7. The last part of the decree relating to **parcel No. 47** is what formed the Gordian knot which kept on tightening in an avalanche of various suits in different courts including the current case.

8. After the issuance of the above mentioned decree, **parcel No. 47** was registered in the name of **Kangethe Mbithi** on **10.12.1999**. Thereafter **Margaret Njambi Kangethe** (note the name Margaret Njambi Kangethe instead of Margaret Njambi Mbithi) and **Edward Mbithi Kangethe (deceased)** obtained a grant on **23.7.2001** in respect of the estate of **Felix Kangethe** in **Succession cause no. 1449 of 2000**. This paved way for the transfer of the suit **parcel no. 47** into their names as reflected in entry no 8 of the green card of the suit parcel. The suit land was then transferred to **Edward Mbithi Kangethe (deceased)**, who acquired a title to that effect on **6.8.2001** and he then sold the suit land to **Amos Kibata Githeko (the current plaintiff)**. Thereafter, Amos Kibata subdivided the suit land into 3 parcels namely **Kabete/L. Kabete/3162, 3163** and **3164** where he was issued with the three title deeds on **31.8.2012**. He then sold the three pieces of land (3162, 3163 and 3164) to **Josephat Gacheru Rugiri** (4th defendant) who then acquired titles on **24.2.2017**.

9. The crux of the matter is that **Loise** claims that the suit **parcel no. 47** belongs to her husband **Kinuthia** while plaintiff (**Amos Kibata**) avers that he lawfully bought the suit land from **Edward Mbithi Kangethe (deceased)**.

The pleadings

10. This suit was filed by **Amos Kibata Githeko** against **Loise Gachiku Kinuthia** vide a plaint dated 10.9.2013 where he averred that he was the registered proprietor of all the parcels of land known as **Kabete/L. Kabete 3162, 3163** and **3164** having purchased the same in year 2010 from **Edward Mbithi Kangethe (Deceased)**. The plaintiff therefore seeks the following orders:

(a) “Permanent injunction restraining the defendant from invading, trespassing, alienating or in any way howsoever interfering with the plaintiff's property known as land reference Number Kabete/L. Kabete/3162, Kabete/L. Kabete/3163 and Kabete/L. Kabete/3164.

(b) An order compelling the defendant to give vacant possession of land reference numbers Kabete/L. Kabete/3162, Kabete/L. Kabete/3163 and Kabete L. Kabete/3164 to the plaintiff and in default eviction do issue.

(c) Costs of this suit and interest thereon.

(d) Any other or further relief as this court may deem fit”.

11. **Loise Gachiku** filed a statement of defence and counterclaim on 6.12.2013, where she brought on board the **Attorney General** and the **Land Registrar Kiambu** as the 2nd and 3rd defendants. Vide a court ruling delivered on 6.11.2018, the plaintiff in the counterclaim (**Loise**) filed an amended counter claim bringing on board **Josphat Gacheru Rugiri** as the 4th defendant. **Loise** has pleaded that **Amos Kibata** was not a bonafide purchaser of the suit parcel 47 and that the titles issued to him were obtained through fraud and misrepresentation as

particularized in paragraph 18 of her statement of defence and counter claim. In the counter claim, Loise contends that she has been in peaceful occupation of **parcel no. 47** since 1968 as a beneficiary of her late husband **John Kinuthia Mbithi**. Her prayers set forth in the counterclaim are as follows:

(a) *“An order compelling the 3rd defendant in the counterclaim to cancel the registration and transfer of Kabete/Lower Kabete/47 in the 1st defendant in the counter claim favour and any subsequent sub-division.*

(b) *An order directing the 3rd defendant to cancel the registration of entries of Kangethe Mbithi, whose entry was made on 10th December 1999, the entry of Edward Mbithi Kangethe and Margaret Njambi Kangethe and the entry of Edward Mbithi Kangethe made on 7th August 2001 on the title number Kabete/Lower Kabete/47.*

(c) *An order directing the 3rd defendant to cancel the entry of Edward Mbithi Kangethe and all other subsequent entries by virtue of revocation of the grant in succession case no. 1449 of 2000 and the registration of the administrators appointed by the court in that cause.*

(d) *An order directing 3rd defendant to cancel all entries of transfer that have been registered the suit premises title number Kabete/lower kabete/3162, Kabete/Lower Kabete/3163, Kabete/Lower Kabete/3164 transferring the same to Josphat Gacheru Rugiri.*

(e) *A prohibitory order against any dealings relating to Kabete/Lower Kabete/47 and the subsequent subdivided titles namely Kabete/Lower Kabete/3162, Kabete/Lower Kabete/3163 and Kabete/Lower Kabete/3164.*

(f) *A declaration that the plaintiff in the counter claim is the rightful beneficiary and/or owner of title number Kabete/Lower Kabete/47.*

(g) *Costs of the suit and of the counter claim”.*

12. In his amended reply to defence and defence to the counter claim filed in court on 16.7.2020, Amos Kibata the plaintiff stated that he conducted due diligence when he was buying the suit land **parcel no. 47**. He contends that the decree in the **Kikuyu case civil miscellaneous application no. 17 of 1998** is the one which determined that the property was purchased by **Kangethe Mbithi** which properly then formed part of the estate of **Kangethe Mbithi** and was vested in his son **Edward Mbithi Kangethe (the deceased)**. He also contends that when he was buying the suit land, all restrictions on the said land had been removed.

13. The office of the Attorney General (2nd & 3rd defendants) filed their defence dated 5.2.2014 generally denying the contents of the counter claim.

14. The 4th defendant filed his statement of defence on 22.11.2018. He contends that he conducted due diligence when he was buying the suit parcels from the plaintiff. The 4th defendant has pleaded that it was a term of the agreement for sale inter alia that Amos Kibata would grant him vacant possession of the suit parcels no. **3162, 3163** and **3164** but the latter did not comply. This prompted the 4th defendant to file the suit **Milimani CMCC No. 6798 of 2016 Josephat Gacheru Rugiri vs Amos Kibata Githeko** in which suit the 4th defendant was granted an order of eviction against **Amos Kibata**.

15. The 4th defendant has further pleaded that he became aware of the claim of **Loise** to the suit land when the latter applied to be enjoined in the **Milimani suit no. 6798 of 2016** which gave rise to the appeal in **Thika ELCA No. 6 of 2017**. The 4th defendant denies the particulars of fraud set out in the counterclaim of Loise and he seeks for the dismissal of the same.

The evidence

Case for the plaintiff (1st defendant in the counter claim)– AMOS KIBATA GITHEKO

16. Plaintiff's case was advanced by two witnesses namely the plaintiff himself and Patrick Njenga (a grandson of Njambi). PW 1, **Amos Kibata** adopted his statement dated 10.10.2013 as his evidence. He also produced the items in his bundle of documents filed on 10.9.2018 as his exhibits. The bundle contains 1-28 items but the exhibits actually run from item 8 -28 respectively. PW 1 contends that he bought a portion of the suit land Kabete/Lower Kabete/47 on 12.8.2010. He then subdivided the property into parcels Kabete/Lower Kabete/3162, 3163 and 3164. He also stated that defendant (Loise) was in occupation of a portion of the suit land hence he desires to have vacant possession of the same.

17. PW 1 further stated that he filed a case **Kikuyu CMCC No. 219/2012** against **Loise**, but he was directed to file the case in a court with jurisdiction. That **Loise** too filed a suit against him (PW 1), the same being **Misc No. 11 of 2012 at Nairobi High** Court but the same was dismissed for being incompetent.

18. During cross examination by counsel for the defendant (Loise), PW 1 stated that as per the green card, there were multiple restrictions on the property but none were there by the time he was buying the suit property in year 2010.

19. PW 1 further admitted having sold the land to the 4th defendant during the pendency of this suit. He however avers that there were no orders against him by then.

20. While being cross examined by the counsel for 2nd and 3rd defendants, PW 1 stated that when he was buying the land, the owner showed him the property, he inspected it and found wooden rental houses. The seller told him that those were his houses. However, when he went to the suit land in year 2012, the 1st defendant chased him away and that is when he decided to come to court.

21. While being cross examined by counsel for 4th defendant, PW 1 reiterated that he bought the land from **Edward Mbithi Kang'ethe (Deceased)** who in turn got the land of his father **Kangethe Mbithi** who got the land vide the **case No. 17 of 1998** at Kikuyu Magistrate's court. He also again stated that he sold the land to the 4th defendant when there was no challenge to his title hence there was no order forbidding him from transferring the land.

22. **PW 2** is one **Patrick Njenga** who adopted his statement recorded on 20.5.2016 as his evidence. He identifies himself as a son of the late **Cathleen Njoki** daughter of **Margaret Njambi Mbithi**. He contends that **Parcel No. Kabete/L.Kabete/43** was family land registered in the name of **Felix Mbithi Kangethe** who held the land in trust for the other family members including himself. Upon the death of **Felix Kangethe Mbithi**, the parcel no. 43 was subdivided amongst the family members as follows:

- Edward Mbithi Kangethe (son of Felix) – 1.7 acres
- Margaret Njambi – 1 acre
- Loise Gachiku Kinuthia (1.5 acres)

23. He further states that parcel **Kabete/L. Kabete/47** was not family land and that it was originally owned by **Felix Mbithi Kangethe** and after his death this parcel was inherited by his son **Edward Mbithi Kangethe (Deceased)**. PW2 therefore states that **Edward Mbithi Kangethe (deceased)** rightfully sold the suit land **parcel no. 47** to the plaintiff herein. He avers that defendant (**Loise**) has unlawfully and illegally encroached on the said land.

24. During cross examination by counsel for defendant, PW 2 stated that the 1st registered owner of the suit **land parcel 47** was one **Kivinda Kiarie** and that this is the person who sold this land to the father of **Edward Mbithi Kangethe (deceased)**. In cross examination by counsel for 2nd and 3rd defendants, PW2 stated that he could not recall if **Kangethe Mbithi** was alive by the time he (PW 2) was born.

25. During cross examination by counsel for 4th defendant, PW 2 reiterated the outcome in the Kikuyu case **Misc No. 17 of 1998** where the three families were to share the family land **parcel no. 43**. Thereafter the **succession case No. 1449/2000** was filed where **Edward Mbithi Kang'ethe (deceased)** and **Margaret Njambi** were appointed as administrators of the estate of **Francis Kang'ethe Mbithi**. The case no. **1449/2000** was then transferred to **Kiambu court** and registered as No. **118 of 2010** where the administrators are:

- **Patrick Njenga**
- **Loise Gachiku**
- **Edward Mbithi Kangethe (a child of Felix Kangethe)**

The new administrators came about because the earlier ones had passed on. They are awaiting titles to be processed.

26. PW 2 stated that **Edward Mbithi Kangethe** and **Margaret Njambi** got the suit land **no. 47** via the Kikuyu case **No. 17 of 1998**, and therefore, the plaintiff bought the land lawfully and he had a right to sell the three parcels to the 4th defendant.

27. He however confirmed that Loise was lodging cautions which had to await the completion of the various cases. He also stated that no appeal was lodged in respect of the kikuyu case **Misc. No. 17 of 1998**. Further PW 2 stated that the grant issued to **Edward Mbithi Kangethe** and **Margaret Njambi** was not revoked. Thus the distribution of the suit land **parcel no. 47** was done in case **no. 1449** and another court cannot do the case again.

Case for defendant (plaintiff in the counter-claim)- LOISE GACHIKU KINUTHIA

28. The case for defendant in the main suit was advanced by the **Loise Gachiku (DW 1)**, her daughter **Nancy Njoki (DW 2)** and one **Edward Mbithi Kangethe (DW3)** son of **Felix Kangethe**. DW 1 stated that she is also known as Rose Gachiku. She adopted her two statements dated 20.5.2014 and 6.3.2019 as her evidence. She also produced the documents in her list of 2.12.2013 as D. Exhibit 1-24 and those in the list of 6.3.2019 as D. exhibit 25 and 26 respectively. She contends that **parcel no. 47** was purchased between **1958** and **1968** by her husband **John Kinuthia Mbithi** from one **Kibinda Kiarie** with his sole financial contributions and she has lived on that land for the last 46 years. She avers that the land **parcel no. 47** has been the subject of protracted litigation since 2000. She gave a chronology of the court cases where the subject matter related to the suit land.

29. That in **Kikuyu RMCC Misc. App no. 3 of 2000** one **David Kimani** filed a suit for her eviction from the suit **parcel No. 47**, but the court's decree stated that **Kabete/L. Kabete/47** was purchased by **John Kinuthia Mbithi** (DW1's husband).

30. That in year 2000 **Edward Mbithi Kangethe** (deceased) and **Margaret Njambi Mbithi** (also deceased) filed **succession case no. 1449 of 2000** in respect of the estate of **Francis Felix Kangethe (deceased)** where the two were issued with a grant on **23.7.2001** which grant included the administration of the suit **land parcel No. 47**. DW 1 contends that the grant was revoked by the court on **18.11.2003**, and another one was issued on **26.8.2009**. Thus any action taken in relation to the said grant was illegal. Further DW 1 states that despite the

revocation of the grant, the said **Edward Mbithi Kangethe (deceased)** filed a suit in **Kiambu RMCC No. 95/03** against her (DW 1) claiming ownership of the suit land **no. 47** and seeking removal of restrictions and cautions lodged on that land. The case was allegedly stayed pending the outcome in the **Succession cause no. 1449/2000**.

31. DW 1 further avers that **Edward Mbithi Kangethe (deceased)** again filed a suit **Nairobi HCCC No. 412/2009** against her seeking the latter's eviction from the suit land whereby an order of maintenance of status quo was issued on **15.6.2010** by **Judge Mbogholi Msagha**.

32. She contends that in **kikuyu Principal Magistrate's court civil misc. application no. L/C 014 of 2010 (Loise Gachiku Kinuthia vs Edward Mbithi Kangethe)**, the court adopted the Land Tribunal award which expressly stated that; *'The Kiambu Land Registrar to consider the court decisions in Miscellaneous Application no. 17 of 1998, Miscellaneous Application 3/2000 and High Court Succession cause no. 1449/2000 and make the necessary corrective entries in the green card for Kabete/Lower Kabete/47'*.

33. She further stated that the district commissioner kikuyu also issued a letter dated 18.8.2010 to Kiambu land registry directing the latter to lodge restrictions on the suit land.

34. However, despite the restrictions, the court orders and the various litigation, **Edward Mbithi Kangethe (deceased)** went ahead to sell the suit land to the current plaintiff. DW 1 contends that **Edward Mbithi Kangethe (Deceased)** had no good title and he had no capacity to transact in respect of the suit parcel **no. 47**. DW 1 therefore prays that the title which was acquired by **Edward Mbithi Kangethe (Deceased)** and the subsequent titles emanating from the subdivisions of the suit land be cancelled.

35. DW 1 still holds the original title to the suit land **no. 47** to date and she presented the same during the trial for court's observation. The same is still in the name of her husband **John Kinuthia Mbithi** issued on **6.6.1968**.

36. During cross examination by counsel for plaintiff, DW 1 stated that she did file a case seeking to be the administrator of her husband's estate but she did not take any steps in September 2008. She however contended that she has sued in her own capacity in respect of **parcel no. 47**. She also stated that she had all along been residing on **parcel no. 47** until she was evicted. She also stated that **Kangethe Mbithi** was not claiming to have bought the suit land.

37. During cross examination by counsel for the 2nd and 3rd defendants, DW1 stated that the suit land was bought by her husband of which they moved onto that land after the purchase. They built many houses and one was large with 4 rooms but were burnt down by goons during her eviction. She also states that she appealed against the decision of the tribunal but she can't recall the number.

38. Upon cross examination by counsel for 4th defendant, DW 1 stated that she was aware of the tribunal decision which stated that **parcel No. 47** belongs to **Kangethe Mbithi**.

39. **DW 2, Nancy Njoki** adopted her statement dated 20.5.2014 as her evidence. The contents thereof are more or less similar to those in her mother's statement (DW 1). She added that her mother was born in 1932 hence she is 88 years while herself she is 69 years old.

40. During cross examination by plaintiff's counsel, Dw 2 stated that she was aware of the **Kikuyu Misc. case no. 17 of 1998** and that there was a problem with that case as **Kangethe Mbithi** was not claiming **parcel No. 47**. Further, the claim in the tribunal case was in respect of **parcel no. 43** and not **47** lodged by **Njambi**. They however appealed in Nyeri. She further stated that they stay on **parcel 43** because they were evicted from **parcel no. 47**.

41. While being cross examined by counsel for 2nd and 3rd defendants, DW 2 stated that since she was born, they were staying on **parcel no. 47** on a 4 bed-roomed house and there was one building with many houses for rentals. They were evicted on **23.10.2016**. She also added that **Kangethe Mbithi** used to stay on **parcel 43** with his family.

42. During cross examination by counsel for 4th defendant, DW 2 stated that the succession case at **Kiambu No. 118/2016** is finalized and they are awaiting titles. Surveyor has gone unto the land and each family knows their respective portion of the land in so far as **parcel no. 43** is concerned. She contends that it is her mother who was staying on **parcel 47** and when she was evicted she went to stay with DW 2 on **parcel 43**.

43. She further reiterated that they lodged an appeal at Nyeri against the decree in **Kikuyu case no. 17/1998** and they were informed that a tribunal could not cancel a title.

44. She also stated that her mother lodged restrictions upon the suit land only after the discovery that the title had changed hands. She denies that the tribunal had found that her father was given money by Kangethe Mbithi to buy land for the latter and that Kinuthia registered the land in his name.

45. In re-examination, DW 2 stated that they went to Nyeri provincial tribunal where it was stated that the tribunal had no mandate to cancel the title. So they came to the high court in case no. **1449 of 2000** for **parcels 47 and 43**. They were however told to remove **parcel 47** in that case. She contends that the **succession case no.118/2016** is for **parcel no. 43** which was in the name of **Francis Kang'ethe Mbithi**, but it was ancestral land.

46. **DW 3** is one **Edward Kangethe Mbithi**, another son of **Felix Kangethe Mbithi**. He adopted his statement dated 20.5.2014 as his evidence. His evidence is similar to that of DW 1 & 2. He added that he is the eldest son of **Francis Felix Kangethe (deceased)** who was the elder brother of **John Kinuthia Mbithi (deceased)**. DW3's mother was Christine Njeri, the deceased first wife of **Francis Felix Kangethe**. He also identifies the other **Edward Mbithi Kangethe** aka **Peter Mbithi Kangethe (deceased)** as another son of **Francis Felix Kangethe** born of the second wife Esther Njoki.

47. Dw3 contends that the land **parcel no. 43** is ancestral land which devolved to his father **Francis Felix Kang'ethe** through customary laws. This ancestral land is the one which was eventually inherited by the three families where **Francis Felix Kangethe** got 1.7 acres, **John Kinuthia** got **1.5 acres** while **Margaret Njambi** got **1 acre**, pursuant to the decision in the **tribunal case no 17 of 1998**. He avers that his father never bought or lived on **parcel No. 47**. He died in 1971 and was buried in **parcel No. 43**. He further states that **parcel 47** was bought by **John Kinuthia** between 1958 and 1960 from one **Kibinda Kiarie**. When **John Kinuthia** died in October 1981, he was buried on parcel 47 and so was his son Anderson Mbithi Kinuthia.

48. He contends that the tribunal did not make any award in respect of **parcel 47**, but a grave error was made where it was stated that **parcel 47** was purchased by the late **Kangethe Mbithi** with his own money.

49. DW 3 avers that the decree in the lands tribunal case was the genesis of the dispute touching on **parcel 47**. He contends that **Edward Mbithi Kangethe** aka **Peter Mbithi Kangethe** aka **Kabiru** took advantage of the erroneous decree and claimed that **parcel 47** was bought by their father **Francis Felix Kangethe** by filing the **Succession case no. 1449/2000** at the High court and they got a grant. The said grant was eventually revoked and in came new administrators namely himself (**DW 3**), **Patrick Njenga (Pw2)** and **Loise Gachiku (Dw1)**.

50. During cross examination by counsel for the plaintiff, DW 3 reiterated that his step brother (who bears the same name as himself) **Edward Mbithi Kangethe – deceased** is the one who sold the **land parcel no. 47** belonging to his younger father after filing the **Succession cause no. 1449/2000**. However DW 3 lodged an objection. He emphasized that land **parcel no. 47** belonged to his younger father known as **Kinuthia** and not his father **Kangethe Mbithi**.

51. During cross examination by counsel for 2nd and 3rd defendants, DW 3 again emphasized that **parcel 47** did not belong to his father. He stated that his real brothers are two while his step siblings including **Edward Mbithi Kangethe** (deceased) are 3 and that him and his siblings did not get parcel 47 because it was not their father's land.

52. While being cross examined by counsel for 4th defendant, DW 3 stated that there was a dispute between Njambi and her brothers because Njambi was married but she came back and claimed the ancestral land. The **kikuyu case no. 17 of 1998** was then lodged in respect of **parcel 43** and **not 47** and she (Njambi) got her share of the land. But in the process, **Njambi** teamed up with **Edward Kangethe Mbithi** (deceased) and did something wrong in **parcel No. 47**.

53. Dw 3 confirmed that every family now has a share of the ancestral land **parcel No. 43** and they are awaiting for titles. He also stated that all the initial siblings namely: **Margaret Njambi**, **John Kinuthia** and **Francis Felix Kangethe** have passed on. He added that **John Kinuthia** used to live on **parcel 47** with his wife and he was buried on that plot. He further stated that the tribunal caused a mistake by stating that parcel 47 belonged to his father. He does not know if an appeal was lodged in respect of the tribunal case.

Case for 2nd and 3rd defendants -ATTORNEY GENERAL/ LAND REGISTRAR

54. No evidence was adduced for these parties.

Case for 4th defendants- JOSEPHAT GACHERU RUGIRI

55. **DW 4** is one **Josephat Gacheru Rugiri**. He adopted the contents of his statement and the verifying affidavit to his defence both dated 21.11.2018 as his evidence. He also produced documents in his list dated 21.11.2018 containing three items as his exhibits. In addition, he showed the court the original titles to the three parcels namely **Kabete/L. Kabete/3162, 3163** and **3164** all issued on **24.2.2017** in his name.

56. He contends that he was an innocent purchaser of the three parcels which he bought from the plaintiff and which were transferred to him in February 2017. However the plaintiff failed to hand over possession to him which compelled him to institute **Milimani CMCC No. 6798 of 2016** in which an eviction order was issued and executed.

57. Thereafter, 1st defendant started claiming the land, yet DW4 had not been aware of this claim. An appeal was lodged in **Thika ELC Appeal no.6 of 2017** in respect of the magistrate's order in **CMCC no. 6798/2016** where the court ordered that Loise be restored in the suit parcels.

58. During cross examination by counsel for the plaintiff, DW 4 stated that he was aware of how the plaintiff acquired the suit land from **Edward Mbithi Kangethe (deceased)** but he did not know **Felix Kangethe**. However when he went to that land, the woman called **Njoki (DW 2)** made noise at him. Efforts to put up a fence were futile as the same was demolished.

59. Upon cross examination by counsel for Loise (defendant in main suit), DW 4 stated that he was with the plaintiff (**Amos Kibata**) when the latter was buying the suit land and he (Dw 4) was even a witness of the plaintiff. He later bought the same land from the plaintiff after it was subdivided. He denied that they tried to defeat justice in the transfer of land from the plaintiff to himself.

60. While being cross examined by counsel for 2nd and 3rd defendants, DW 4 stated that they followed all due process including land board requirements as well as payments of stamp duty in the transfer of the suit parcels to himself. He avers that when he bought the suit parcels, there was a timber house on that land but no one was staying in it. When he tried to take over the land, a woman made noise at him. He also states that he was not aware of any ongoing cases concerning the suit land by the time he was buying the land from plaintiff.

Submissions

Submissions of the plaintiff

61. The plaintiff has framed the issues for determination as follows:

(a) *Does the 1st defendant have the locus standi to claim ownership of the suit property?*

(b) *Does beneficial ownership override registered ownership?*

(c) *Is the plaintiff a bonafide purchaser for value without notice of the 1st defendant's claim to the title of the suit property?*

62. On the first issue, the plaintiff submits that defendant (**read Loise**) has no locus standi to claim the suit land. This is because her assertion is that the land belonged to her husband, the late **John Kinuthia Mbithi** but she never got a confirmed grant for her husband's estate. She therefore has no legal capacity to sue or be sued on behalf of the said estate. It is submitted that the counter claim is a nonstarter, null and void ab initio for want of locus standi and the same should be dismissed. On this point, the plaintiff relied on the case of **Rajesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama (2014) eKLR**, where the court addressed itself on the issue of locus standi in succession matters as follows:

“...but in our view the position in law as regards locus standi in succession matter is well settled. A litigant is clothed with locus standi upon obtaining a limited grant or a full grant of letters of administration in case of intestate succession...”

63. Reference was also made to the case of **Isaya Masira Momanyi vs David Omwoyo & another (2017) eKLR** where an Environment and Land Court stated as follows while pronouncing itself on the effect of institution of a suit on behalf of the estate of a deceased without grant of letters of administration;

“...where a suit is commenced without letters of administration in respect of a deceased estate such a suit is null and void ab initio and cannot be cured by a party subsequently obtaining the letters of administration”.

64. Further, the case of **Ojwang Kombundo & another vs Clement Otieno Ondiek & another (2017) eKLR**, was cited where the High Court ruled that:

“Defendants counterclaim is aimed at having the entries made in favour of the plaintiffs in respect of land parcel Kisumu/Dogo/670 cancelled and to revert the land to the names of the two deceased's, yet they are not the appointed legal representatives or administrators of their estates in accordance with the provisions of law of Succession Act, Chapter 160 of Laws of Kenya. The defendants are therefore without capacity to file and prosecute a counterclaim on behalf of the estate of the late Okongo Randa and Ondiek Randa”.

65. On the second issue, it was submitted that registered ownership overrides all other interests in a property subject to encumbrances registered against the said property. To buttress this point, the plaintiff cited the provisions of **Section 24 (a)** of the **Land Registration Act** which stipulates that *“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....”*

66. It is submitted that beneficial ownership of property is only an equitable interest. That in the case of defendant (**Loise**), the claimed beneficial interest allegedly stems from her late husband's disputed ownership of the suit property. Registered ownership on the other hand bestows upon the proprietor the absolute right over the suit property. It is further submitted that no evidence has been adduced to show that the plaintiff obtained the title to the suit land through fraud or misrepresentation. He added that the defendant (**Loise**) or her late husband never instituted any suit whatsoever against **Edward Kangethe Mbithi (deceased)** or the plaintiff seeking to assert their proprietary rights until now hence defendant's claim is an afterthought.

67. The plaintiff also relied on the following cases to emphasize the aspect of indefeasibility of a title:

- **Obiero vs Opiyo (1972) EA 227.**
- **Arthi High way development limited vs West End Butchery Limited & 6 others (2015) eKLR.**
- **Dr. Joseph Arap Ngok vs Justice Moijo Ole Keiwua & 5 others Civil Appeal No. 60 of 1997 Nairobi.**

68. On the claim that he was a bonafide purchaser, plaintiff submitted that he conducted proper and sufficient due diligence prior to purchasing the suit land from **Edward Mbithi Kangethe (deceased)**. He contends that there is no evidence of plaintiff's involvement in illegalities in acquisition of the suit land by himself. That at no point was the title in the name of **Edward Mbithi Kangethe** cancelled and that all the restrictions on the suit land were legally and procedurally removed.

69. To emphasize the point that he was a bonafide purchaser, plaintiff cited the following cases:

- **Ibrahim vs Hassan & Charles Kimenyi Macharia interested party (2019) eKLR.**
- **Elizabeth Wambui Githinji & 29 others vs Kenya Urban Roads Authority & 4 others (2019) eKLR.**
- **Eunice Grace Njambi Kamau & another vs Hon. AG & 5 others civil suit no. 976/2012.**

- **Shimoni Resort vs Registrar of Titles & 5 others (2016) eKLR.**

70. The plaintiff has further submitted that the decree in the **Kikuyu case No. 17 of 1998** is the one which declared that the suit land **parcel No. 47** belonged to **Kangethe Mbithi**. That there is no evidence to indicate that there was a review or an appeal against the said decree, hence the said decree remained valid. On this point, plaintiff relied on the case of **Econet Wireless Kenya Ltd vs Minister for information & communication of Kenya & another (2005) IKLR 828**.

71. The plaintiff submits that the late **Edward Mbithi Kangethe** applied for a grant of letters of administration in **HCCC No. 1449 of 2000** and was issued with a grant on **29.12.2000** which was confirmed on **23.7.2001**. The certificate of the confirmed grant indicated that the suit land was to be inherited by **Edward Mbithi Kangethe** (now deceased). He contends that defendant's (**Loise**) refusal to vacate the suit land as well as her claim of beneficial interests are an afterthought. The plaintiff therefore urges the court to grant the prayers sought in his pleadings.

Submissions of defendant in the main suit (Loise)

72. The defendant (**Loise**) outlined the question for determination as follows; “*How did the proprietorship of the defendant’s husband get cancelled from the green card for the suit premises to change hands to come into the hands of the plaintiff?*” It is submitted that nowhere in the decree in **Kikuyu case No. 17 of 1998** was it stated that the registered owner of the suit land was to be struck out and be replaced by **Kangethe Mbithi**. Thus the decree did not bestow a mandate for the instrument of title to change ownership and that in any event the tribunal had no mandate to cancel the title held by **Kinuthia**.

73. It is submitted for the defendant that the name “*Kangethe*” was an error indicated in the decree in **Kikuyu case No. 17/1998** instead of “*Kinuthia*”, that the said mistake was corrected by a letter from the same elders dated **27.8.1999** (D. exhibit 7) where the elders clarified that the suit land parcel **no. 47** was bought by **John Kinuthia** and not **Kangethe Mbithi**. However, the Kikuyu SRM’s court failed to rectify the mistake. The fraudsters led by **Edward Mbithi Kangethe** (deceased) used the erroneous decree and had the suit land registered in the name of **Kangethe Mbithi** who was already deceased.

74. It is further submitted that the suit land was taken up by **Edward Mbithi Kangethe** from **Kangethe Mbithi** as shown in entries **no. 8, 9 & 10** of the green card through transmission in terms of the **Succession case no. 1449 of 2000**. However the fraudulently acquired grant was revoked vide the court order of **18.11.2003**. Defendant claims that the aforementioned revocation also revoked any titles purportedly issued under the said grant.

75. It is also submitted that the green card of the suit land (at page 41-44 of plaintiff’s bundle) shows the numerous restrictions and cautions registered against the title. The entries clearly show that **succession case no. 1449 of 2000** was active as per entry **no. 16 of 1.12.2009**.

76. Defendant submits that plaintiff proceeded to buy the suit land when he was aware of all the restrictions lodged in the green card of the suit land and that he was also aware that the grant in **case no. 1449 of 2000** had been revoked. The plaintiff therefore knew that the title of the suit land was obtained through fraud and he compounded this fraud by actively participating in the same hence the title he acquired was unlawful. The purported subdivisions of the suit land and the subsequent transfer to 4th defendant is also unlawful, and therefore, even the 4th defendant does not hold a good title.

77. It is further submitted that defendant, (**Loise**) is an 88 year old great grandmother, who despite her age could remember vividly material facts concerning her case, and where she could not remember, her written statements will suffice. That defendant confirmed that she is in court pursuing the suit premises as property of her late husband to which she is the administrator of his estate and that she had produced letters of administration to that effect. She is also pursuing the land as a beneficiary. The claim by the plaintiff that she (**Loise**) has no locus standi in bringing the suit herein is therefore a legal absurdity. It was pointed out that the plaintiff is actually the one who sued the defendant, and thereafter the defendant in her defence brought her counter-claim against the plaintiff and then enjoined other defendants.

78. In support of the case of the defendant (**Loise**), the following authorities were proffered:

- **Alice Chemutai Too vs Nickson Kipkurui Korir and 2 others (2015) eKLR.**
- **Arthi Highway Developers Ltd vs. West End Butcheries & 6 others (2015) eKLR.**
- **Esther Ndegi Njiru & another vs Leonard Gatei (2014) eKLR.**
- **Munyu Maina vs Hiram Gathiba Maina (2013) eKLR.**

Submissions of 2nd and 3rd defendants

79. The issues framed by the 2nd and 3rd defendants are as follows:

- (i) *Whether John Kinuthia Mbithi was the bonafide owner of the land parcel No. Kabete/Lower Kabete/47.*
- (ii) *Whether the land tribunal had jurisdiction to revoke title held by Kinuthia Mbithi.*
- (iii) *Whether the title held by the plaintiff in the original suit is indefeasible.*

80. On the first issue, the 2nd and 3rd defendants submits that the suit land **parcel no. 47** was acquired by **John Kinuthia Mbithi** and that his title is absolute and indefeasible. On this point the 2nd and 3rd defendants relied on the provisions of **Section. 26 of the Land Registration Act** as well as the case of **Kiplagat Shelisheli Mutarakwa vs Joseph Rotich Kones (2018) eKLR**.

81. On the issue of jurisdiction of the tribunal, the 2nd and 3rd defendants cited the provisions of **Section 3 (1) of the Land Dispute Tribunal Act** which gives the tribunal its mandate. They aver that the tribunal had no mandate to cancel the title held by **John Kinuthia** and on this point, they relied on the cases of; **Stephen Kangethe Kariuki vs Samuel Kangethe Gatoto (2015) eKLR**, **Karanja vs Attorney General Appeal no. 310 of 1997 Nyeri** and **Republic vs Mwea Land Disputes Tribunal (2009) eKLR**.

82. On whether the title held by plaintiff is indefeasible, the 2nd and 3rd defendants submitted that **Edward Mbithi Kangethe** got registered as the owner of **parcel 47** pursuant to the grant issued in **HCCC 1449/2000**, but the said grant was revoked on 18.11.2003. Knowing that the grant was revoked, **Edward Mbithi Kangethe (deceased)** went ahead to sell the suit land to the plaintiff. Thus **Edward Mbithi Kangethe** had no title in the suit land and consequently, he could pass no title to the plaintiff, hence the plaintiff could have no better title than the vendor.

83. It is further submitted that by the time the plaintiff was buying the suit land, there were restrictions lodged on the land as reflected in the green card.

84. The 2nd and 3rd defendants have submitted that the title in the hands of an innocent 3rd party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through corrupt scheme as was stated in **Elijah Makeri Nyang'wara vs Stephen Mungai Njuguna & another (2013) eKLR** and in **Esther Ndegi Njiru & another vs Leonard Gatei (2014) eKLR**.

Submissions of 4th defendant

85. It has been submitted for the 4th defendant that the issue of ownership of the **suit parcel no. 47** was settled and determined in the **Kikuyu case no. 17 of 1998** and the restrictions placed on the title pending the determination of the tribunal case was also put to rest. It then followed that **Kangethe Mbithi** was right to use the decree to remove the restrictions placed on the title and transfer the land to himself from **Kinuthia Mbithi**.

86. The 4th defendant also submitted that the decree in **Kikuyu case no. 17 of 1998** was not appealed against and the same remains a judgment to date. Further, the suit land **no. 47** was included among the assets of the deceased **Felix Kangethe** in the **succession case HCSC No. 1449 of 2000** whereby **parcel No.47** was wholly given to **Edward Mbithi Kangethe (deceased)**.

87. On the issue of revocation of the grant, the 4th defendant submits that this was only in reference to the administrators and not on the distribution of the assets.

88. It is further submitted that defendant (Loise) only attempted to obtain a grant in respect of her husband's estate but the process was not completed. In the circumstances, her counter claim is incompetent for lack of capacity.

89. On the issue of Loise's claim of having occupied the land since 1968, it is averred that such occupation has been interrupted by the institution of various suits hence she cannot claim the land through the doctrine of adverse possession.

90. The 4th defendant therefore urges the court to dismiss the counter claim of the defendant (**Loise**) with costs while allowing the claim of the plaintiff (**Amos Kibata**)

Determination

91. As stated earlier in the introductory part of this judgment, the facts appertaining to **parcel no. 43** are not disputed, that the said land was ancestral and was to be shared between the three families of the three siblings (**John Kinuthia**, **Felix Kangethe** and **Margaret Njambi**) in line with the determination in the **Kikuyu case no. 17 of 1998**. The relationship of the parties including the existence of two sons of **Francis Felix Kangethe** who bear same name "**Edward Mbithi Kangethe**" is also not disputed.

92. It is also not in dispute that the suit **parcel no. 47** was not family land, that the said land was registered in the name of **Kangethe Mbithi** and thereafter in the name of **Edward Mbithi Kangethe (Deceased)** after the decree was issued in **Kikuyu case No. 17 of 1998** and that **Edward Mbithi Kangethe** proceeded to sell the said land to the plaintiff herein.

93. The gravamen of the dispute is how the suit **parcel no. 47** came to be registered in the name of **Kangethe Mbithi** from **John Kinuthia**. The genesis of the dispute can therefore be traced to the decree in **Kikuyu case no. 17 of 1998**.

94. In light of the foregoing, I frame the issues for determination as follows;

(i) *Whether the transfer of the land parcel 47 from John Kinuthia Mbithi to Kangethe Mbithi and the subsequent transfer of the suit parcel to Edward Mbithi Kangethe, then to plaintiff and finally to 4th defendant were lawful.*

(ii) *Whether the plaintiff and 4th defendant were innocent purchasers.*

(iii) *Whether the defendant (Loise) has capacity to sue and be sued.*

(iv) *The relief available.*

Transfer of parcel Kabete/Lower Kabete/47 from Kinuthia Mbithi to Kangethe Mbithi and subsequent dispositions

95. The green card appertaining to the suit land is to be found on page 41-44 of the plaintiff's bundle which is also produced as D. exhibit 5 by defendant (Loise). The said green card shows that **Kinuthia Mbithi** became the registered owner of the suit **parcel No. 47** on **3.8.1962** and he was issued with the title deed on **6.6.1968**. (See entry no. 2 & 3 of the green card). Entry no. 5 of the said green card shows that the land **parcel no. 47** was registered in the name of **Kangethe Mbithi** on **10.12.1999** vide **Misc. application no. 17 of 1998**.

96. It is clear that the singular reason as to why the land was transferred from **John Kinuthia Mbithi** to **Kangethe Mbithi** was because of the decree in the **Kikuyu case NO. 17 of 1998**.

97. The defendant (**Loise**) and her witnesses have averred that they lodged an appeal against the said decree and were informed that the tribunal had no mandate to cancel the title. However, I have not seen any records of such an appeal.

98. Nevertheless, this court must analyze the impact of that decree to determine if there was any justification of the alienation of the land thereafter. I have already set out the verbatim contents of the decree in the introductory part of this judgment (see paragraph 6 of this judgment). The crucial bit for analysis before this court is the wording;

“That there be no order with regard to plot No. Kabete/Kabete/47 as the same was rightly purchased by the late Kangethe Mbithi with his own personal money”.

99. The plaintiff and his witness as well as the 4th defendant trace the sanctity of the title to this decree, that the Kikuyu court is the one which determined that the land **parcel no. 47** belonged to **Kangethe Mbithi**. There is however no rocket science needed to discern from that decree that nothing was to happen in so far as **parcel no. 47** is concerned. That decree did not give any order or a mandate for the cancellation of the title from the name of **John Kinuthia Mbithi** to **Kangethe Mbithi**. There was no verdict, no determination, no rendition or declaration to the effect that the suit **parcel No. 47** in the name of **John Kinuthia** belonged to **Kangethe Mbithi** and this is clearly observed from the words ***“That there be no order with regard to plot No. Kabete/Kabete/47”***. Thus the words completing the sentence ***“as the same was rightly purchased by the late Kangethe Mbithi with his own personal money”*** were but an obiter dictum which did not flow from a determination.

100. Secondly, it is also apparent from the decree that what was adopted as a judgment of the court was the decision of the elders award with regard to **parcel no. 43**. I deem it fit to extract this part of the decree for emphasize;

“IT IS ORDERED AND DECREED:

That the elder's award filed in this court on the 14th August 1995 awarding Kabete/Kabete/43 in the manner following:

(iv) ***Francis Kangethe 1.7 acres***

(v) ***Edward Kinuthia 1.5 acres***

(vi) ***Margaret Njambi Mbithi 1.00 acres be and is hereby made a judgment of this Honourable court”.***

101. If there had been a determination regarding **parcel No. 47**, then the decision thereof would certainly have been part of what was adopted as a judgment of the court. This again buttresses the point that the words in the decree regarding **parcel 47** were an obiter dictum. To this end, I am in agreement with the submissions of the defendant (Loise) to the effect that the decree did not indicate that **John Kinuthia Mbithi** was to be struck out and be replaced by **Kangethe Mbithi** in the registration records of **parcel 47**.

102. It is not fathomable how reference to **“Kangethe Mbithi”** in the decree of **Kikuyu case no. 17/1998** in respect of **parcel 47** has caused untold havoc and unending litigation for decades. Even without an appeal or a review, and even without further evidence, I do find that the registration of the land **parcel no. 47** into the name of **Kangethe Mbithi** on the basis of the aforementioned decree was unlawful and irregular as it was done through misrepresentation since the decision thereof did not divest the rights and interest in the suit land as held by **John Kinuthia Mbithi**. The decree did not disturb the bundle of rights and interests in **parcel No. 47**, that is why there was no order given in respect of that land.

103. **Dw3, Edward Mbithi Kangethe** has termed the situation as a grave error in the insertion of the name of **Kangethe Mbithi** in reference to **parcel No. 47**. I totally agree. It is not lost to this court that the name of **Kinuthia** was also muddled up even in relation to **parcel no. 43**, where he was referred to as **“Edward Kinuthia”!** yet the three initial siblings were **Felix Kang'ethe** alias **Francis Felix Kang'ethe** alias **Kang'ethe Mbithi**, **John Kinuthia Mbithi** and **Margaret Njambi**. At no time was **Kinuthia** or his brother **Kangethe** identified as Edward.

104. It appears that the Tribunal did try to set the record straight through their letter produced as defendant's exhibit 7 dated 27.8.1999, where they indicated that there was a clerical error, hence the name **Edward Kinuthia** should read **John Kinuthia** in relation to **parcel 43**. The tribunal went further to state that the suit land was rightly bought by **John Kinuthia** and not **Kangethe**. Despite this clarification, the transfer was still effected four months later where **Kangethe Mbithi** became the registered owner of the suit **parcel No. 47** on **16. 12. 1999**.

105. Even without the clarification from the tribunal, there are other tell-tale signs indicating that the **suit parcel No. 47** belonged to **John Kinuthia Mbithi** and not **Kangethe Mbithi**. Firstly it is apparent from the registration records that **Felix Kangethe Mbithi** was never registered as the owner of the suit land prior to the decision in the Kikuyu case. **PW 2, Patrick Njenga** has advanced a claim to the effect that **Kangethe** bought the suit land **No. 47** from the first registered owner of the suit parcel, one **Kivinda Kiarie**. In paragraph 15 of the amended reply to defence and defence to counter claim, **Amos Kibata** also avers that **Kinuthia Mbithi** never owned the suit land **parcel no. 47**. Nothing can however be further from the truth. The green card of the suit parcel shows that **Kivinda Kiarie** was indeed the first registered owner of this parcel, but the second registered owner was **Kinuthia Mbithi** and not **Kangethe Mbithi** (see- in plaintiffs bundle, the green card for parcel 47, entry no.2 on 3.8.1962).

106. It is also apparent that **Felix Kangethe** died way back on **9.7.1971** as per the grant of letters of administration availed by the plaintiff on page 47 of his bundle. How then can the 4th defendant argue that **Kangethe Mbithi** was right to use the decree to have the land transferred into his name from his brother's name in **1999**, **28** years after his (**Kangethe Mbithi's**) own death!. Again this is not fathomable and it was certainly unprocedural that **Kangethe Mbithi** was being registered as the owner of the land in **1999** many years after his death when there was no determination that he was the owner of the suit **parcel 47**.

107. Another issue for consideration touches on the transmission of the suit land from **Kangethe Mbithi** to **Edward Mbithi Kangethe (deceased)**. The plaintiff and 4th defendant contend that the confirmed grant on page 48 of plaintiff's bundle dated 23.7.2001 is the one which gave the whole of the suit land to **Edward Mbithi Kangethe (deceased)**. True. However, that grant was revoked as per the order dated **18.11.2003** in the **High Court succession case no. 1449 of 2000** - (see Defendant's (Loise) exhibit 9).

108. It has been submitted by the 4th defendant that the revoked grant only affected the administrators and not the distribution of the assets. However, the order issued on 18.11.2003 made reference to the revocation of the grant issued on 29.12.2000 and confirmed on 23.7.2001. The confirmed grant was riding on the earlier order of 29.12.2000 and was therefore rendered invalid in light of the revocation.

109. Further it is pertinent to note that the new administrators included one "**Edward Mbithi Kangethe**" with no clarification as to whether this person is the one who sold the land and who has since died or whether he is DW 3. However going by the evidence of the family members particularly PW 2 regarding the status of succession case **no. 1449/2000** which became Kiambu case **no. 118/2016**, DW 3 is one of the administrators and not the **Edward Mbithi Kangethe** who is deceased.

110. From the foregoing analysis, the entries no. 8 in the green card of **parcel No. 47** where the suit land was registered in the name of **Edward Mbithi Kangethe** and **Margaret Njambi Kangethe** were unlawful and irregular and so was entry no. 9 where again the suit land was registered in the name of **Edward Mbithi Kangethe**. One even wonders how **Margaret Njambi Mbithi** acquired the name of his brother **Kangethe** when it came to the acquisition of the suit **parcel No. 47**.

111. Having made a pronouncement that **Edward Mbithi Kangethe (deceased)** acquired the title to the suit land **parcel no. 47** unlawfully, it then follows that the transactions entered into by the said **Edward Mbithi Kangethe (deceased)** and plaintiff in year 2010 for the sale of the suit land were illegal and were anchored on nothing. The subsequent subdivision of the suit land by plaintiff and further alienation of the suit land to the 4th defendant was null and void.

112. The plaintiff has submitted at length on the indefeasibility of his title to the suit land. However, the provisions of **Article 40 (6) of the Constitution** stipulate that;

"The rights under this article do not extend to any property that has been found to have been unlawfully acquired".

Section 26 of the Land Registration Act provides that:

"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

113. In the case of **Munyu Maina vs Hiram Gathiba Maina (2013) eKLR**, it was held as follows;

"We state that when a registered proprietor's root of title is under challenge it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register".

114. In the case of **Esther Ndegi Njiru & another vs Leonard Gatei (2014) eKLR**, it was held that:

"It would thus in my view follow that if the 2nd defendant did not have a good title in the property he could not pass a good title to anybody else. As regards the issue whether the registration of the plaintiffs as the owners of the suit property is absolute and indefeasible and not liable to be challenged, I would answer in the negative. Having held and found that the 2nd defendant fraudulently processed and acquired the title to the suit property in his name my view is that he did not acquire a good title to the property and no interest in the property could pass to him. The 2nd defendant therefore not having any good title or interest in the suit property could not pass a good title to the plaintiffs".

115. And in the case of Elijah Makeri Nyang'wara vs Stephen Mungai Njuguna & another (2013) eKLR it was held that:

“.....the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

116. What resonates from the laid out legal regime is that the indefeasibility of a title can be challenged. In the instant case, the decree in **Kikuyu case No. 17 of 1998** was unlawfully mis-represented and implemented to divest the rights and interests in the suit parcel no.47 from **John Kinuthia** to his brother **Kang'ethe Mbithi** both deceased. The subsequent title acquired by **Edward Mbithi Kangethe (Deceased)** and all other titles are therefore invalid as they are tainted with illegality. The same ought to be cancelled.

Whether the plaintiff and 4th defendant are innocent purchasers.

117. The plaintiff has rightly restated the legal position set out in the case of Ibrahim vs Hassan & Charles Kimenyi Macharia Interested party (2019) eKLR where the Ugandan case of Katende vs Haridas & Company Ltd (2008) 2 EA 174 was cited and where a bonafide purchaser was described as follows:

“A bonafide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bonafide doctrine he must prove the following: He holds a certificate of title, he purchased the property in good faith; he has no knowledge of fraud; He purchased for valuable consideration; the vendors have apparent good title; He purchased without notice of any fraud; he was not party to any fraud”.

118. The question that I pose is ; *Does the plaintiff and the 4th defendant fit the definition of bonafide purchasers?* There are tell-tale signs that these two parties are not innocent purchases. Firstly, it is quite apparent that the suit land had numerous restrictions lodged against the land. The two litigants contend that those restrictions had been removed when **Amos Kibata** bought the land. The registration records indicate otherwise. Starting with **entry no. 11** in the green card which indicates as follows; **“13.8.2001 restriction, No dealing until the different decrees are sorted out; case 17 of 1998 & 3 of 2000 Kikuyu SRM's court”**. That **entry no. 11** was lifted via **entry no. 13** vide a **miscellaneous suit no. 8 of 2009** in Kiambu on 30.7.2009. Twenty one days later on 21.8.2009 as per **entry no. 14**, a similar restriction was lodged **“No dealings until 17/98 and 3/2000 are finalized”**. There is no indication that this **entry no. 14** had been lifted by the time plaintiff (**Amos Kibata**) was signing the sale agreement with **Edward Mbithi Kangethe (Deceased)** on **12.8.2010**. Indeed there is no indication that this entry was ever lifted! Instead, there was an avalanche of other restrictions of which two were lodged on same date of 1.12.2009 (**entry no.15 and 16**). The restriction in **entry no. 15** was removed on **29.2.2012** vide **entry no. 18** while **entry no. 16** was removed on an unclear date in the year 2012 (see **entry no. 20**). It follows that the **entries no. 15 and 16** in the green card were also lawfully in place when plaintiff embarked on buying the suit land parcel no. 47 on **12.8.2010**. Thus in total, there were 3 restrictions in place by the time plaintiff was buying the suit parcel.

119. As for **entry no. 17**, this is a restriction lodged on 23.8.2010 and removed vide **entry no. 19** on 24.2.2012. It is pertinent to note that the said restriction was lodged only 11 days after the sale agreement between **Edward Mbithi Kangethe (deceased)** and plaintiff was made on 12.8.2010. That was another warning indicating that all was not well.

120. The fact that restrictions had been lodged on the land not once but severally in respect of the suit land due to cases no. **17 of 1998** and **no. 3 of 2000** at Kikuyu was sufficient red flag to ward off prospective buyers.

121. It is not lost to this court that the case referred to in both **entry no. 11** and **no. 14** of the green card as **Kikuyu Misc. No. 3 of 2000** is the one where a decree was issued on **27.3.2000** indicating that land **parcel no. 47** was bought by the late **John Kinuthia Mbithi**. In essence that decree is at variance with the decree in **case no. 17 of 1998**. Even a not so diligent purchaser would have seen that something was amiss regarding the suit land.

122. The signs were all there in black and white for the plaintiff to see that the land was not up for grabs. There were numerous encumbrances by way of restrictions and cautions as well as pending suits and inconsistent decrees. Thus the plaintiff cannot feign ignorance of the historical aspect of the dispute relating to the suit **parcel no. 47**.

123. The other point for consideration is that the physical land itself was not free for plaintiff to take possession during the sale or even after the acquisition of the title. Plaintiff told the court that he sued defendant (Loise) for the first time in 2012. On page 84 of the hand written proceedings, PW 1 stated as follows:

“I sued the 1st defendant (Loise Gachiku) for eviction from my land”.

Further, in paragraph 7 as well as the final prayers in the plaint, the plaintiff **Amos Kibata** instituted this suit primarily because of;

“a claim against defendant (Loise) for vacant possession of the suit property which defendant continues to occupy without the plaintiff's consent” This is a clear indication that plaintiff bought the land when he knew very well that the same was in possession of defendant (Loise Gachiku).

124. As for the 4th defendant, he stated as follows during cross examination by counsel for defendant (Loise):

“I was with Amos (read plaintiff) when he was buying the land and I was his witness”.

125. This is a clear sign that the 4th defendant participated in the sale of the land by the plaintiff from **Edward Mbithi Kangethe (deceased)**. When the 4th defendant tried to take over the suit land, he was prevented from doing so by **DW 2** (Njoki daughter of defendant). Attempts to put up a fence were futile as the fence was demolished.

126. The crafty machinations of the plaintiff and 4th defendant are manifested in the filing of the suit **Milimani CMCC No. 6798 of 2016 Joseph Gacheru Rugiri vs Amos Kibata Gicheko** (see paragraph 6 of the statement of defence of 4th defendant). Apparently, the 4th defendant obtained an order of eviction which he executed in the aforementioned case. The question is who was evicted?. Certainly not **Amos Kibata** as the latter was not in occupation of the suit land! The person who was actually evicted was the current defendant (Loise). The matter became the subject of an appeal in **Thika ELC No. 6 of 2017** (see paragraph 8 of the statement of defence of 4th defendant), of which the court delivered a ruling on **16.2.2018** restoring and reinstating Loise back into the suit property.

127. What resonates from the foregoing analysis is that both the plaintiff and the 4th defendant do not in any way fit the definition of bonafide purchasers.

128. In the case of **Chemey investment Limited vs Attorney General & 2 others (2018) eKLR**, the court posed the question;

“We ask ourselves which innocent purchaser without notices would accept to purchase a property that is being used for public purposes just next to the provincial headquarters and the law courts without any form of inquiry?”

129. The current suit is certainly not public land, but how do you buy a property with numerous restrictions in place where you cannot even step on the land due to the hostilities emanating from its occupants? How comes that plaintiff filed a suit to evict defendant in 2012 immediately he obtained the title to the land in the year 2012? And when it became apparent that defendant (Loise) was staying put, plaintiff sold the land to 4th defendant who was his own witness in the transaction of 12.8.2010, then the said 4th defendant sued the plaintiff !.

130. It is not lost to this court that the transactions of the plaintiff (**Amos Kibata**) and 4th defendant including sale and transfer of the suit land as well as the filing of the case against each other was being done during the pendency of this suit. This is again another pointer that the two litigants are not innocent.

Does the defendant (Loise) have capacity to sue?

131. In paragraph 47 of defendant’s counterclaim (Loise) she seeks the following orders:

“A declaration that the plaintiff in the counterclaim is the rightful beneficiary and/or owner of the title number Kabete/Lower Kabete/47”.

132. Thus defendant is claiming the suit land in a beneficial capacity and not as a legal representative of her deceased husband. In paragraph 31 of her counter claim, she states that she had peacefully occupied the suit land no. 47 since 1968. The plaintiff and 4th defendants had to file other suits to have her evicted which they successfully managed to do albeit temporarily in year 2016.

133. It is not lost to this court that defendant (Loise) did take deliberate steps to pursue the issue of a grant in respect of her husband’s estate. She acquired the grant on 14.6.1983 (see first item in her list dated 6.3.2019), though the same was apparently not confirmed and the property of her husband became the subject of numerous litigation in years to come.

134. Having established that plaintiff and 4th defendant acted in cahoot with each other in their transactions and having established that the root of the title as from the time it was registered in the name of **Kangethe Mbithi**, was tainted with illegality, then the logical conclusion to make is that the land should be in the hands of its beneficial owner who is the defendant in the main suit and a plaintiff in the counter claim (Loise).

Relief/Conclusion

132. Echoing the words of the Judges in the Court of Appeal case of; **Richard K. Bunei & 8 others t/a Geo-Estate Development Services v Lorien Ranching Company Limited & 799 others (being sued on behalf of themselves and on behalf of alleged 795 Members) [2017] eKLR** I decry the; *“startling decree of misuse of the judicial process in the pursuit of an insatiable greed and varice that stops at nothing to achieve its ends, including subverting the legal process”*. For this is exactly what happened in the implementation of the decree in the **Kikuyu case no. 17 of 1998**. In the aforementioned case of **Richard K. Bunei & 8 others (supra)** the court was dealing with a case of intricate and convoluted fraud which had run for decades and it was stated thus:

“A court of law once informed of such fraud and properly moved by evidence, cannot shirk its responsibility to strike the resultant orders and decrees with infirmity and nullification”.

133. In like manner, I shall not hesitate to sever the **Gordian knot** which has choked the rights of proprietorship in **land parcel no. 47** for decades thus keeping an octogenarian (read **Loise**) in an endless litigation odyssey. I proceed to give the following orders:

(1) Plaintiff’s (Amos Kibata Githeko) case is hereby dismissed.

(2) The defendant’s (Loise Gachiku Kinuthia) counter claim is hereby allowed in the following terms:

(i) An order is hereby issued declaring the plaintiff in the counter-claim (Loise Gachiku Kinuthia) as the beneficial and rightful owner of Parcel No. Kabete/Lower Kabete/47.

(ii) An order is hereby issued directing the 3rd defendant to cancel the registration of entries as well as all title deeds issued in the name of Kangethe Mbithi, Edward Mbithi Kangethe and Margaret Njambi Kangethe, Edward Mbithi Kangethe and Amos Kibata Githeko in respect of parcel No. Kabete/L. Kabete/47.

(iii) An order is hereby issued directing the 3rd defendant to cancel all entries of transfer and registration in respect of the land parcels Kabete/Lower Kabete 3162, Kabete/Lower Kabete/3163 and Kabete/Lower Kabete/3164 which are a resultant subdivision of parcel Kabete/L. Kabete/47 and which parcels are registered in the name of Josephat Gacheru Rugiri.

(iv) An order is hereby issued directing the 3rd defendant to cancel the subdivisions of parcel Kabete/Lower Kabete/47 into parcel Kabete/Lower Kabete 3162, 3163 and 3164, and for the said land to be registered in the name of Loise Gachiku Kinuthia as parcel Kabete/Lower Kabete/47.

(3) In the event that defendant (Loise Gachiku Kinuthia) is not on the suit land, she is now restored back to the same with immediate effect.

(4) A prohibitory order is hereby issued prohibiting the plaintiff and the 4th defendant from dealing with land parcels No's Kabete/Lower Kabete/47 or its resultant subdivisions namely Kabete/Lower Kabete 3162, 3163 and 3164.

(5) Any orders of injunction and or inhibition that may be subsisting in respect of the suit parcels Kabete/Lower Kabete 3162, 3163 and 3164 are hereby discharged in order to facilitate the implementation of this Judgment.

(6) The Deputy Registrar of this court is hereby authorized to sign all the requisite documents that are necessary to effectuate the implementation of this Judgment.

(7) As to costs, I find that the conundrum was birthed by Edward Mbithi Kangethe (deceased) and nurtured by the plaintiff and 4th defendant who knowingly and craftily perpetuated illegalities to the point of having defendant evicted. In the circumstances, the plaintiff and the 4th defendants are condemned to pay costs of the Main Suit and Counter Claim.

DATED AND SIGNED AT MERU THIS 4TH DAY OF MARCH, 2021

HON. LUCY N. MBUGUA

ELC JUDGE - MERU

DELIVERED AT THIKA THIS 18TH DAY OF MARCH 2021

HON. LUCY GACHERU

ELC JUDGE - THIKA