



Huts of Gold Limited v Waithaka & another (Environment & Land Case E009 of 2024) [2025] KEELC 1048 (KLR) (11 February 2025) (Judgment)

Neutral citation: [2025] KEELC 1048 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E009 OF 2024
LN GACHERU, J
FEBRUARY 11, 2025**

BETWEEN

HUTS OF GOLD LIMITED PLAINTIFF

AND

SUSAN WANJIRU WAITHAKA 1ST DEFENDANT

HON NJOROGE MARY WAMAUA WAITHIRA 2ND DEFENDANT

JUDGMENT

1. The suit herein is related to ELC Petition No E002 of 2022, where the Defendants herein are the Petitioners, and wherein they sought for various constitutional remedies, against the Respondents therein; and the Plaintiff herein (Huts of Gold Ltd), is an Interested Party in the said Petition, wherein it sought for dismissal of the said Petition.
2. In its Amended Plaint dated 10th May, 2022, the Plaintiff herein Huts of Gold Limited, sought for judgment against the Defendants herein jointly and severally for the following prayers: -
 1. A declaration that the Plaintiff is the proprietor of title numbers Mitubiri/Wempa/Block 1/13337 and Mitubiri/Wempa/Block 1/13338, and is at liberty to evict any trespasser/s.
 2. A declaration that the Defendants are trespassers on the Plaintiff's parcels of land known as title number Mitubiri/Wempa/Block 1/13337 and Mitubiri/Wempa/Block 1/13338.
 3. A permanent injunction restraining the Defendants from remaining on, cultivating, interfering with or doing any other act which is prejudicial the plaintiff's quiet enjoyment and occupation of title numbers Mitubiri/Wempa/Block 1/13337 and Mitubiri/Wempa/Block 1/13338.



4. The Defendants to immediately vacate the suit land failing which the plaintiff shall be at liberty to evict them and orders for warrant of eviction to be executed by the plaintiff's preferred auctioneer/court broker or police officers.
 5. Cost of the suit plus interest.
 6. Any other relief that this Honourable court deems fit to grant.
3. In its claim, the Plaintiff averred that it is the registered owner of title number Mitubiri/Wempa/Block 1/12345, situated in Gikono areas Kabati, in Murang'a County measuring approximately 80 acres. The Plaintiff further averred that it purchased the land parcel from Kandere Muhethu Company Limited in 2020
 4. Further, the Plaintiff averred that following the purchase of the said parcel of land, Mitubiri/Wempa/Block 1/12345, it applied for change of user of the title from agricultural to residential, and also erected a perimeter wall around it. Further, that the Plaintiff subdivided the title into smaller plots among them title numbers Mitubiri/Wempa/Block 1/13337 and 13338 measuring 1.32ha and 1.323ha respectively, and that the two parcels of land are adjacent to each other.
 5. The Plaintiff also averred that the previous owner of title number Mitubiri/Wempa/Block 1/12345 Kandere Muhethu Co. Limited, and owners of neighbouring land agreed to set aside land for the construction of a dam, known as Ganami Dam (also known as Nagami Dam). Part of t this Ganami Dam is therefore a private dam constructed within private land belonging to the Plaintiff herein.
 6. It was the Plaintiff's further claim that the said Dam riparian reserve was cultivated by a group of people from Gikono area. However, the said Group of people without consent encroached on title numbers Mitubiri/Wempa/Block 1/13337 and 1/13338(the suit properties), which are private land now owned by the Plaintiff.
 7. Further, the Plaintiff averred that the said group of people destroyed the perimeter wall that the Plaintiff had constructed around its entire parcel of land contained in title number Mitubiri/Wempa Block 1/12345, causing the Plaintiff a loss of Ksh.500,000/= spent in its construction.
 8. It was its further claim that the County Surveyor of Murang'a, prepared a report of Survey and boundary beacons dated 25th August 2021, over the subdivided title for Mitubiri/Wempa/Block 1/12345. This Report of County Surveyor Muranga, established that the said group of people had encroached and forcibly carried out agricultural activities on the Plaintiff's land.
 9. Further, that upon confirmation of the boundaries by the County Surveyor, the said group of residents except the Defendants voluntarily agreed to leave the area demarcated as private land, being contained in the two titles. Consequently, the Defendants have refused and/or failed to leave the said suit land and have insisted on continuing with illegal trespass and cultivation over the said land. Further, that the 2nd defendant who is a politician had organized goons wielding crude weapons to enforce the illegal occupation of the two parcels of land.
 10. The Plaintiff contended that the action of the Defendants to trespass on the two parcels of Land is without its consent and therefore illegal The Plaintiff reported this illegality to the authorities and to the Police at Gikono Police Post, and further issued a notice of intention to sue the Defendants, but they have refused, failed and/or neglected to comply with the said demand. The Plaintiff urged the court to allow its claim.
 11. The suit is opposed by the Defendants through their Statement of Defence dated 19th December 2022, wherein they denied all the allegations made by the Plaintiff. The Defendants further denied that



- the people from Gikono area who are represented by the Defendants herein, have without consent encroached on the property known as Mitubiri/Wempa/Block 1/13337 and 13338, and they did put the Plaintiff to strict proof thereof.
12. Further, the Defendants denied that they destroyed the perimeter wall that the Plaintiff had constructed around the entire parcel of land, and that the Plaintiff went at a loss of Kshs.500,000/=, and the Plaintiff was put to strict proof thereof. In the alternative the Defendants alleged that it is the Plaintiff who destroyed their crops worth Kshs.1,000,000/=.
 13. Further, that the Defendants have been cultivating on the said portion of land for over 20 years peacefully until 2020, when the Plaintiff herein made several attempts to evict them.
 14. The Defendants also denied that the 2nd Defendant organized goons wielding crude weapons, and the 2nd Defendant contended that she only intervened with the situation after the farmers who are her constituents complained of numerous harassments, consistent threats and destruction of their crops by a private developer; the Plaintiff herein. She also contended that upon being informed of the matter by the farmers, she took up the said complaint with the area OCS Kenol Police Station, and the Murang'a County Commissioner.
 15. It was the Defendants contention that the suit is incurably defective, vexatious and an abuse of the process of the court, because the subject matter of the suit herein is the same as the subject matter in Murang'a ELC Petition No. E002 of 2022, and therefore this suit is an abuse of the court process.
 16. Further, that NEMA, Water Resources Authority, National Water Harvesting and Storage Authority, have not clarified and/or laid proper demarcation between the suit properties and Nagami Dam Reservoir and Spill way among other grounds.
 17. Further, that the Plaintiff failed to demonstrate that it owns the said property herein and that it only annexed a copy of title and search which is neither certified by the Land Registrar as a true copy of the original.
 18. Consequently, the Defendant urged the court to dismiss the suit with costs.
 19. After various interlocutory Applications and the Pre-trial Conference, the matter proceeded by way of viva voce evidence. The Plaintiff through its Director gave evidence and as the only witness, whereas the Defendants too gave evidence through the 1st Defendant and closed its case.

Plaintiffs Case

20. PW1 Peter Mwangi Maina, one of the Directors for the Plaintiff gave evidence for the Plaintiff and testified that the Plaintiff Company buys and sells land. Further, he adopted his witness statement dated 10th May 2022, as his evidence in chief, and also produced his list of documents as P. Exhibits 1-7.
21. He further testified that he knows Susan Waithaka, the 1st Defendant herein, who is one of the people he found cultivating on his parcels of land. He also testified that the said Susan is representing many other trespassers, and that he held several meetings with the said trespassers in the presence of local administration, in an attempt to resolve the issue amicably. However, after the trespassers were asked to move out of the suit land, they declined to do so, but they continued with the illegal cultivation and thus the reasons why the suit herein was filed.
22. He contended that after Huts of Gold Co. Limited (Plaintiff), involved the local administration, and there about 80% of the trespassers moved out, but only a few have refused to move out, the 1st Defendant and another one person are among the people who have refused to move out of the suit land.



23. It was his evidence that the suit land belongs to the Plaintiff herein, having purchased it and that before purchase, the Company carried out due diligence and confirmed the size of the land, and ownership. He produced the survey's report, as an exhibit.
24. It was his further evidence that the said Ganami Dam is a private Dam, and it borders three parcels of land, and that the Plaintiff had bought the said land from Kandere Muhethu Co. ltd.
25. Further, it was his evidence that the Plaintiff sued Hon Mary Wamau because she is the one who has encouraged the trespassers to be on the suit land. He denied that the Plaintiff moved the beacons illegally since he is not a surveyor, and that the surveyor has never told him that the beacons were changed.
26. On cross-examination by Mr. Yegon for the Defendants, PW1 confirmed that the Plaintiff has two Directors, and that he was one of the Directors, though he did not have documents to show that he was one of the Directors. He further testified that the Plaintiff purchased the suit land in 2019, but the sale agreement was drawn and signed on 14/1/2020. Further, that before the purchase, he had carried due diligence, though he did not have any report for the due diligence, that was carried out as he did it privately.
27. He also testified that he ensured that the land had proper titles and boundaries, as the land borders the Dam. He also carried out due diligence by going to the Ministries of Lands and Water and he was shown the boundary of the Dam. He also testified that he was told about Nagami Dam spill way and he denied that the said farmers were cultivating the spill way.
28. It was his further evidence that the spill way is part of the Plaintiff's land as per the Map that he was given by the former owner of this parcel of land. Further, that the Spill way was a small portion of land, but not 13 acres as alleged. He confirmed that after buying the land, he subdivided it and no one has ever said that the said parcel of land was not owned by the Plaintiff.
29. The witness confirmed that the court had directed the County Surveyor to visit the disputed area, and out of that visit a Report was filed in court dated 23/3/2023. However, he did not agree with the said Surveyor's report, and he denied that the Plaintiff has interfered with the initial boundaries of the Ganami/ Nagami Dam.
30. PW1, also alleged that Hon. Mary Wamaua had coerced him to sell the said land to her, but he declined and since the said land is in her constituency, she be grudged him. He also testified that most of the trespassers have moved out apart from the 1st Defendant.
31. He further alleged that the trespassers destroyed his fence, though he did not have evidence of the persons who demolished the said fence. However, he reported the matter to the police though no criminal charges were preferred against Susan, the 1st Defendant and/or the other trespassers. It was his evidence that he has tried reconciliation to no avail, though he did not file any evidence of such attempted reconciliation.
32. In re-examination, he testified that the Spill way belongs to the owner of the Dam or forms part of the Dam. Further, he confirmed that the trespassers had agreed to move out of the suit land, apart from the 1st Defendant who remained thereon. He denied ever adding beacons to his parcels of land, and he reiterated that the Dam was privately owned, and the provincial administration was involved in trying to resolve the matter.



Defence Case

33. DW1 Susan Wanjiru Waithaka, the 1st Defendant gave testified on her own behalf, and on behalf of the other Defendants. She denied the Plaintiff's claim, and adopted her witness statement as her evidence in chief. She also denied having trespassed on the Plaintiffs land parcels, and also denied that the Defendants never claimed the Plaintiff's land.
34. She testified that the Defendants have been cultivating on the Dam Spill way for over 20 years, and they cultivate this area during the dry season. She also alleged that the Defendants did not have any issues with the former owner of the parcel of land, Kandere Muhethu, and the said former owners never claimed the Spill way at all.
35. It was her evidence that the Plaintiff claimed the spill way in 2020, and after that claim, the Plaintiff gave them a verbal warning to move out. It was her further testimony that this land is near Nagami Dam, and the said Dam was built in 1980-85. She also alleged that the group of farmers have been cultivating the said spill way, but not the Plaintiff's parcel of land.
36. She reiterated that the Plaintiff gave them a verbal warning to move out of the Spill way, and thereafter Pw1, on behalf of the Plaintiff destroyed their crops, and they did not harvest anything at all. She also testified that she had taken a loan to grow tomatoes and vegetables on the said land, and she was unable to repay the loans, and therefore the creditors have attached her goods. Further, that the goons sent by the Plaintiff went and attacked them at night and they alleged that the Defendants had refused to move out of the spill way.
37. These attacks were reported to the Police at Kenol Police Station, and thereafter, their Member of Parliament, who is Hon. Mary Wamaua, defended them. Further that the said Hon Mary Wamaua, just wanted them to get justice as they had never been attacked by the previous owners, of the suit land. Further, that because of this case, they have never gone back to the suit land.
38. On cross-examination by Mr. Mwangi for the Plaintiff, she confirmed that they were attacked by goons at night who threatened and warned them of dire consequences for refusing to move out of the spill way.
39. With the said attacks and threats, the Defendants reported the matter to the Police, and they have never been charged with any criminal charges/ offences. She testified that she does not live far from Nagami Dam, and she denied that she has built her home on the spill way. However, she alleged that she lives in Gikono areas, which is near Nagami Dam. It was also her testimony that the spill way is part of the Nagami Dam, and that the group of farmers started cultivating the Spill way more than 20 years ago, and that the said Spill way area is about 40 acres.
40. DW1 also claimed that the Plaintiff removed the beacons from the Dam area, and also interfered with the said beacons, though she did not report the matter to the Police, but only reported about the attacks by the goons. Further, that this issue was discussed before the Assistant County Commissioner (ACC), and that at no point was it agreed that the group of farmers (Defendants) had trespassed on the Plaintiff's land. She admitted that Nagami Dam is a private dam, which was built by three owners being Nanga, Gatina and Mitubiri thus the name Nagami, but reiterated that the Spill way is public land
41. On re-examination, she admitted that there is a path that leads to the Spill way, and they were not allowed by anyone to use the land, as the Spill way is a dam reserve, thus public
42. After the close of viva voce evidence, the parties were directed to file and exchange written submissions. The Plaintiff filed its written submissions dated 11th April 2024, through Wachira Muturi and Co.



Advocates. On their part, the Defendants filed their written submissions dated 10th June 2024, through Keaton & Keaton Advocates. This court has read and considered the said respective submissions as follows: -

43. The Plaintiff gave a summary of facts and identified three issues for determination being:
 - i. Who owns the subject land cultivated by the 1st Defendant,
 - ii. Have the Defendants trespassed on the land owned by the Plaintiff;
 - iii. if the subject area is a riparian reserve, who should occupy the same?
44. On the issue of ownership of the suit area, it was submitted that the said area is immediately behind Ganami dam wall, and that the subject area forms part of title numbers Mitubiri/Wempa/Block/13337 and 13338, as can be seen from figure 4 of the Survey report dated 22/8/2023. Further that part of land parcel number 13337 extends into the water mass.
45. Further, that the Survey report dated 25th August 2021, was clear that the Plaintiff is the proprietor of the encroached land, and that the subject area is owned by the Plaintiff herein.
46. Further, the Plaintiff submitted that the Defendants action of trespass was confirmed by the witnesses who testified that a group of people from Gikono area encroached on the said land, and carried out agricultural activities within the subject area.
47. Upon having been engaged by local authorities, the said group of people left apart from the 1st Defendant, and the 2nd Defendant who is a local Member of Parliament assisted the Defendants to illegally encroach on the said land, and even addressed Media within the subject land. Further, that 1st Defendant had conceded that she grows crops on the suit land, and that the said land does not belong to her. Therefore, the above acts are blatant acts of illegal trespass, and the court was urged to find as such.
48. On whether the area in dispute is a riparian reserve, it was submitted that even it was, the Defendants as third parties may not be granted access/occupation to carry out farming activities thereon, but such access can be given to the Plaintiff who owns the adjacent land, and have control of the riparian reserve.
49. The Plaintiff relied on the provisions of the Land Act 2012, which defines riparian reserve as follows: -

“riparian reserve” means the land adjacent to the ocean, lake, sea, rivers, dams and water courses as provided under the Survey Act, Cap. 299 or any other written law.”
50. Further, the Plaintiff referred to the Water Resource Regulation 2021, which provides: -

“Riparian area is land which by virtue of the proximity of the land to a water body, management obligations shall be imposed on the owner of the land by the authority.”
51. It was the Plaintiff's further submissions that the land adjacent to the water mass can lawfully belong to a private owner like the case herein, only that the use of such land is subject to consent by the government authority. Further, that since the Defendants do not own any adjoining land next to Nagami(Ganami) Dam, then it is illegal and absurd that they can lay claim over private land, or even a riparian area that exist between private land and a water resource.
52. For the above submissions reliance was sought in the case of Peter Mbae –vs- NEMA and 2 others; Law Society of Kenya and 2 others (interested parties) 2020 eKLR, which dealt with an issue of private dam that breached its wall.



53. On the issue of General damages, the Plaintiff submitted that an award of Kshs.10,000,000/= would be sufficient compensation for trespass over its property. Reliance was sought in the case of Rhoda S. Kiilu vs Jiangxi Water and Hydropower Construction Kenya Limited (2019)eKLR, where the court gave an award of Kshs.10,000,000/= for trespass on a vast piece of land.
54. In conclusion, the Plaintiff submitted that *the constitution* guarantees the right to property vide Article 40(2) and further Section 7 of the *Land Act*, provides various means of acquiring title to property. Further, that since the Plaintiff has demonstrated that it owns the disputed area, then its right to property should be protected.
55. Further, that since the Defendants have not demonstrated that they own and/ or are entitled to the disputed area, through any of the known means, then their action of encroaching on the Plaintiff's parcels of land is illegal and the court should condemn it, as the Plaintiff's right to own and enjoy its private property is on the verge of being arbitrary deprived and restricted by the Defendants, which action is against Article 40 of *the Constitution* of Kenya. The court was urged to allow the Plaintiff's case.
56. The Defendants herein filed their written submissions dated 10th June 2024, through Keaton & Keaton Advocates, and identified two issues for determination being;
- i. Whether Defendants have trespassed on the Plaintiff's parcel of land known as Mitubiri/Wempa/Block 1/13337 and 13338;
 - ii. Whether the dam spill way area forms part of the Plaintiff's suit property, and the Plaintiff has exclusive use of the Dam and riparian/spill way area.
57. On the first issue, the Defendants relied on the definition of trespass as defined in the Black's Law Dictionary 8th Edition to mean;
- “A trespass in the nature of permanent invasion of another's property.”
- They also relied on section 3(1) of the *Trespass Act* which define trespass on private land as: -
- “(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
58. For the above submissions, reliance was placed in the case of M'Mukanya –vs- M'Mbijiwe [1984]IKL 761, which was also cited in the case of Municipal Council of Eldoret –vs- Titus Gatitu Njau [2020]eKLR , where it was held that:
- “Trespass is violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership.”
59. It was the Defendants further submissions that considering the definition of trespass and the evidence on record to the effect that the Defendants have been carrying out their small farming activities during low rainy season on spill way of Nagami Dam, which does not form part of the Plaintiff's parcels of land, then there is no trespass.
60. Further, it was submitted that Nagami dam was constructed on Ginia stream, which is a distributary of Kabuku river, and it would be unsustainable to anyone to lay claim to that area, as it is a dam reserve, and thus public land.



61. The Defendant also submitted that the Survey report dated 23rd August, 2023, which was prepared after a site visit by the Surveyor, and the concerned parties, confirms that the area in dispute is not owned by the Plaintiff. Of importance is the paragraph that states, “The Dam spill way area cannot belong to a different owner other than the dam itself as it forms part of the dam.....”
62. Further, the Defendants submitted that Plaintiff’s parcels of land borders the dam, and the area cultivated by the Defendants is the Spill way, and therefore, the Plaintiff cannot lay claim this spill way area, as it is a riparian reserve, and if the Plaintiff would annex the same to itself, that would be illegal and unlawful.
63. The Defendants further emphasized in their submissions that the Surveyors report has clearly and without any contradiction indicated that the dam cannot belong to a different owner, other than the dam itself as it forms part of the dam, and therefore the Defendants have not trespassed on the Plaintiff’s parcel of land, but it is the Plaintiff who has trespassed on the waterways/and or dam reserve.
64. On the issue of Riparian reserve, and its control and use, the Defendants submitted on the definition of riparian reserve given in Article 62(1) of *the Constitution* 2010, the *Land Act* 2012, and also on the definition of public land. They also relied on the *Water Act* 2016, to emphasize on the said definition.
65. It was their submission that Nagami Dam forms part of public land and therefore the spill way area does not belong to the private owner owning the land adjacent to the dam. Therefore, the Plaintiff’s submissions that they can be allocated the land adjacent to the Dam by virtue of its closeness with their property is misplaced and does not have any grounding in law.
66. From the above submissions, the Defendants relied on the case of *Nzioka and 2 others vs Tioman Kenya Limited* (2001)eKLR where the court held that an environmental degradation is not necessarily an individual concern or loss but a public loss. The Defendants also relied on the case of *Edith Wangari Gitata –vs- Athi Water Services Board* [2012]eKLR, where the court held that public right will be upheld over the right of an individual.
67. Further, the Defendants submitted that Nagami Dam has never been within the Plaintiff’s parcels of land, but only borders the said Dam on one side, and that the dam was constructed for agricultural use. Further, that the Defendants have been in use of the spill way area for a very long time, way before the Plaintiff bought their parcel of land 4 years ago. Therefore, the Plaintiff’s titles for Mitubiri/Wempa/Block 1/13337 and 13338, cannot be protected under Article 40 of *the Constitution*.
68. On the issue of compensatory damages, the Defendants submitted that the Plaintiff did not deserve an amount of Ksh.10,000,000/= ,or any at all since the Defendants have not trespassed on its parcel of land, and the Plaintiff was not able to prove any trespass.
69. Reliance was sought in the case of *Fleetwood Enterprises Limited –vs- Kenya Power and Lighting Company Limited* [2015]eKLR, where the court held that an award of damages for trespass is discretionary in nature, but which discretion should be exercised by the court judiciously, after taking into consideration all relevant facts.
70. Further reliance was sought in the case of *Capital Fish Kenya Ltd vs The Kenya Power and Lighting Company Limited* [2016]eKLR, where the court applied the holding in the case of *Ryce Mors Limited and another –vs- Muchoki* [1995-98]2 E.A 363, where the court held that “it is not sufficient for a party to wave a piece of paper with figures on it and ask the court to award the amount as special damages, which the law require not only to be pleaded but also specifically proved”
71. In conclusion the Defendants submitted that the Nagami Dam, area and its water is not an exclusive property of the Plaintiff, and it cannot claim that a spill way reserved for the dam belong to its exclusive



- us. Therefore, the Plaintiff cannot legally claim exclusive use and ownership of such an area. That the Defendants' role remains protective one, as the spill way area and the Dam play a very important role to their social and economic livelihoods since independence. They urged the court to dismiss the Plaintiff's suit with costs.
72. The court has carefully considered the pleadings herein, the exhibits produced by the parties, the rival written submissions, and relevant provisions of law and it finds that the main issue for determination is whether the Plaintiff is deserving of the orders sought in its claim amended on 14th February, 2024.
 73. As pointed out earlier in the preamble of this Judgement, the claim herein is related to ELC Petition No. E002 of 2022, where the Defendants herein were the Petitioners thereon, and the Plaintiff herein is the Interested party, opposed to the said Petition. In the above referred Petition, this court did find and hold that the disputed area(spill way of Nagami/Ganami Dam), is a riparian reserve, and as per the District Surveyor's report, the Plaintiff's parcels of land have subsumed the said riparian land and/or reserve of Nagami Dam.
 74. The court further directed that the two title deeds held by the Plaintiff herein being Mitubiri/Wempa/Block1 13337 & 13338, be rectified by being cancelled and proper boundaries of the two parcels of land be drawn thereafter the two titles to be re-issued to the Plaintiff, with proper measurements, after deducting the dam spill area, which is subsumed in the two titles.
 75. The dispute herein in basically a boundary dispute between the riparian reserve of Nagami Dam and the two parcels of land owned by the Plaintiff herein. A boundary dispute is ordinarily resolved by the Land Registrar, with consultation with the Surveyor of the area in dispute. The county Surveyor herein prepared a survey Report after being directed so by the court. The said Report id dated
 76. There is no doubt that the Plaintiff owns the certificate of titles for the two parcels of land being Mitubiri/Wempa/Block 1/13337 and 13338, which the court has directed that they be cancelled and after the boundaries have been properly drawn, then the said titles can be re-issued to the Plaintiff with the proper measurements, and having properly marked and defined the riparian reserve of Nagami Dam.
 77. As stated above by this court, a claim of boundary dispute can only be resolved by the Land Registrar with the assistance of the surveyor. The court had directed the District Land Surveyor to visit the disputed are and thereafter prepare a report.
 78. In compliance thereof, the District Land Surveyor Assistant 1; Lazarus M. Ndivo, visited the disputed area and prepared a survey report which Report, in its conclusions recommended that the Dam ground situation differ with the Map situation as represented on Mitubiri/Wempa sheet number 2.
 79. Further the District Surveyor urged the court to order that the Registry Index Map (R.I.M), for Mitubiri/Wempa sheet number 2, be amended as it was erroneously planned, and it created improper encroachment to the existing dam prior to subdivision of the original LR No.10729.
 80. Further that the land parcels No. Mitubiri/Wempa/Block 1/13337 and 13338, be amended respectively on the Map and the area for the said Dam be excised from the said land parcels Mitubiri/Wempa/Block 1/13337 and 13338, and the area changes resulting from the Map amendment be entered in the title deed registers.
 81. From the available evidence, it is evident that the Plaintiff herein were not the original owners of the suit land, that borders the Nagami Dam. The Plaintiff had purchased the original land parcel number LR 10729 form Kandere Muhethu Investments Co. Limited in 2020. Thereafter the said purchase, they



- subdivided the said land into various subdivisions and Mitubiri/Wempa/Block/13337 and 13338, were some of the subdivisions.
82. There is no doubt the 1st Defendant and a group of other farmers were using the water spill way for Nagami Dam for cultivation and grown of traditional crops during the dry seasons, for a long time. There was no dispute from the former owners of the parcel of land bought by the Plaintiff that the Defendants were not using the said area, and that they were encroachers.
 83. It is not clear whether the original owner of the said land, Kandere Muhethu Investment Ltd, had any issue with the said group of farmers cultivating the water spill way. However, it is clear that a dispute arose after the Plaintiff purchased the said land, and then issued the group of farmers with Notice to vacate. The Defendants alleged that the Plaintiff using goons, destroyed their crops, attacked them at night, threatened and warned them not to use the spill way. Indeed, such a report made was made to the police. The dispute between the Plaintiff and the group of farmers led to the cutting down or uprooting of the crops belonging to the said farmers.
 84. Further, there is no doubt that this group of farmers led by the 1st Defendant had admitted that they do not own the said disputed area of land, but they have always had access to the said spill way area, and have been growing traditional crops during the dry seasons. To the Defendants, this access granted them right to food, and economic rights.
 85. It is clear that the District Land Surveyor's report indicated that part of the Plaintiff's land parcels number Mitubiri/Wempa/Block 1/13337 and 13338, lie within the water mass and in the dam area, and that the dam spill way cannot belong to a different owner, than the Dam itself, as it forms part of the Dam.
 86. The said disputed area having been found to belong to the Dam itself, and thus a riparian land reserve which cannot be a private land, but a public land, as per the meaning of riparian reserve found in the Article 67 of *the Constitution* and the *Land Act*, then this court cannot certainly declare that the said riparian reserve belong to the Plaintiff herein.
 87. The court having found that the disputed area is a riparian reserve, which part of land has been subsumed in land parcels numbers Mitubiri/Wempa/Block 1/13337 and 13338, then the said disputed land area cannot be declared to be a private land belonging to the Plaintiff herein. Further the said disputed area being a riparian reserve needs to be protected, and the Defendants cannot be held to have exclusive use of the said area.
 88. For the above reasons, the court finds and holds that it cannot declare the Plaintiff herein to be the proprietor of the two parcels of land Mitubiri/Wempa/Block 1/13337 and 13338, as the court had directed that the said titles to be cancelled and be rectified accordingly.
 89. Having found that the disputed area is a riparian reserve, and thus a public land, this court cannot find and hold that the Defendants herein are trespassers on the Plaintiff's parcel of land; Mitubiri/Wempa/Block 1/13337 & 13338, which the court has already directed that the two titles be cancelled and rectified as provided by section 80 of the *Land Registration Act*.
 90. Further the court cannot issue a permanent injunction as sought by the Plaintiff, as permanent injunction is issued to protect a proprietor's land, which has no dispute at all. See the case of *Kimathi & 6 others (t/a Umoja Investors SHG) v Maina t/a Geomath Management & 2 others (Environment & Land Case 22 of 2022) [2024] KEELC 1381 (KLR) (7 March 2024) (Judgment)*
 91. Ultimately, this court having carefully considered the available evidence, has come to a conclusion that the Plaintiff has not proved its case against the Defendants herein on the required standard of balance



of probabilities. For the above reasons, the Plaintiff's suit as contained in the Amended Plaint dated 14th February 2024, is found not merited, and the said claim be and is hereby dismissed entirely.

92. On the issue of costs, the court is guided by section 27 of the *Civil Procedure Act*, which states that costs are awarded at the discretion of the court, but ordinarily costs follow the event, and is awarded to the successful litigants. The Plaintiffs suit has been dismissed, and the Defendants are the successful litigants, however, the court finds that the circumstances of this case warrant each party to bear its own costs.
93. Having dismissed this suit and having noted that this suit related to ELC Petition No E002 OF 2022, the court further finds that all the other final Orders granted in Muranga ELC Petition No. E002 of 2022, to abide in this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF FEBRUARY 2025

L. GACHERU

JUDGE

11/02/2025

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Mr Mwangi for the Plaintiff

Mr Keaton & Mr Yegon for all the Defendants

