



REPUBLIC OF KENYA



KENYA LAW
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**Kagwi & 5 others v Kenya Railways Authority; Land Registrar
Murang'a & 2 others (Third party) (Environment & Land Case
29 of 2020) [2025] KEELC 1137 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 1137 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 29 OF 2020
LN GACHERU, J
FEBRUARY 11, 2025**

BETWEEN

**PATRICK THUO KAGWI 1ST PLAINTIFF
LUCY WAMBUI KARINA (SUNG AS A LEGAL REPRESENTATIVE OF JOHN
KARINA MUCHAI – DECEASED) 2ND PLAINTIFF
DANIEL THUMBI MWANGI 3RD PLAINTIFF
JANE BETTY NYAMBURA MACHARIA 4TH PLAINTIFF
CHRISTOPHER MWANGI GITAU 5TH PLAINTIFF
JOSEPH NJENDU KIMANI 6TH PLAINTIFF**

AND

KENYA RAILWAYS AUTHORITY DEFENDANT

AND

**LAND REGISTRAR MURANG'A THIRD PARTY
DISTRICT SURVEYOR MURANG'A THIRD PARTY
MURANG'A COUNTY GOVERNMENT THIRD PARTY**

JUDGMENT

1. The Plaintiffs herein vide an original Plaint dated 23rd October 2020, and later amended on 6th December 2023, sought for judgement against Defendant herein for the following orders;
 - i. A permanent injunction restraining the defendant by themselves, their agents or servants or any other person or body from trespassing, entering or in any other way encroaching into the



plaintiffs' parcels of land and all that are affecting the disputed land parcels for purposes of demolishing, fencing or unlawfully acquiring the same as it is property.

- ii. Any other orders as the court may deem fit and just.
 - iii. Cost of this suit.
2. On his own behalf and of the rest of the Plaintiffs, the 1st Plaintiff Patrick Thuo Kagwi, deposed that the Plaintiffs are the registered owners of the parcels of land in contention and annexed various documents in support including copies of title deed, mutation forms, land certificate and applications for official search.
3. The Plaintiffs parcels of land are as follows: -
- i. 1st Plaintiff - Loc 11/Maragi/ 8425, one of the four parcels that were subdivided from land parcel no Loc 11/ Maragi / 1146.
 - ii. 2nd Plaintiff - Loc /11/ Maragi/ 10202- was later subdivided into sixteen parcels registered as parcels numbers 11141-11156.
 - iii. 3rd Plaintiff- Loc 11/ Maragi/ 9223 which is one of three (3) parcels subdivided from land parcel Loc 11/Maragi/ 8424
 - iv. 4th Plaintiff - Loc 11/ Maragi/ 9029
 - v. 5th Plaintiff - Loc 11/ Maragi/ 1153
 - vi. 6th Plaintiff- Loc 11/ Maragi/9222, which is one of the three parcels that were subdivided from land parcel Loc 11/ Maragi/8424
4. The Plaintiffs' case is that on or about July 2020, the Defendant entered into the Plaintiffs' parcels of land, marked all their houses and structures therein with an X mark and claimed that the said homes and structures were constructed on the Defendant's land.
5. That the Defendant trespassed and encroached on the Plaintiffs' parcels of land by digging holes and erecting concrete poles with the intention of putting up a fence, thereby preventing the Plaintiffs from entering into their homes and land, resulting in curtailment of their rightful use and enjoyment of their said parcels of land.
6. The Plaintiffs further averred that the parcels of land in question have been in the uninterrupted and private ownership of individual persons since the land registration process in 1963, and at no time has the land in question been transferred to any government department as evidenced from the official land registry and official map, which documents were both produced as evidence.
7. It was their allegations that efforts to bring the Defendant on the table to compromise and settle the issue have been without success.
8. They further claimed that the District Surveyor who was notified of the land dispute vide a letter dated 18th June 2020, recommended to the Defendant that it provide the survey report that it relied on in marking boundaries on the ground as the true and original map clearly marks out the disputed land has been privately owned.
9. However, the Defendant disregarded the District Surveyor's recommendations and continued with unlawful acts of trespass and encroachment.



10. The Plaintiff was accompanied by an application seeking for a temporary injunction against the Defendant, which was allowed via a Ruling dated 4th March 2021.

The Defendant's Response

11. The suit herein is opposed by the Defendant who filed its amended Statement of Defence dated 30th August, 2022 and counter-claim, where it averred that the official searches for all the parcels of land alleged to be affected had not been attached to the Plaintiffs pleadings for purpose of confirming their ownership rights. The Defendant filed its Replying Affidavit dated 3rd May 2020 sworn by one Stanley Gitari, the Assistant Legal Manager in charge of Litigation at the Defendant's office.
12. In response to the Plaintiff's contention that the Railway line is constructed on its land, the Defendant averred that if the encroachment did occur, it was with the implied consent of the Plaintiffs as they did not bar the Defendant from the said encroachment, yet the same began in the month of July 2020, and they applied for temporary injunction in the month of October 2020.
13. Further, the Defendant averred that the title documents which were attached to the Plaintiffs Claim show that they were issued between year 2014 and 2015, yet the Plaintiffs claim that they have had uninterrupted and private ownership rights of the parcels of land since 1963, which is contradictory and raises doubt as to the Plaintiff's proprietary rights.
14. The Defendant's Defence was enumerated through the witness statement of, Edgar Selebwa, a Senior GIS Technician at the Defendant's Corporation, who stated that the Corporation used Survey Plan FR No. 606/49 of 2018, to arrive at a finding of the encroachment of the subject area which was an extension on the North East part of the Station, initially reserved for a turning triangle for trains.
15. Further, that the parcels of land in contention was later allocated to private individuals by the Commissioner for lands without the Corporation's consent or involvement, and there was no evidence that the said parcel of land had been surrendered to the Local government or national government for re-allocation to private individuals.
16. The Defendant filed a Counter-Claim and averred that it is the rightful owner of the parcels of land alleged owned by the Plaintiff. It was its contention that it has been its rightful owner of the said parcel of land since 1943 when the said parcels of land were designated to the Railway line.
17. In its Counter Claim the Defendant prayed for the following orders: -
 - i. The Plaintiffs suit against the Defendant be dismissed with costs.
 - ii. A declaration that the title and all documents relating to the ownership of Loc.II/Maragi/429, Loc.II Maragi/1153, Loc.II/Maragi/7611, Loc.II/Maragi/7610, Loc.II/Maragi/7609, Loc.II/Maragi/8424, Loc.II/Maragi/8425 held by the Plaintiffs were irregularly obtained hence be cancelled and declared null and void ab initio.
 - iii. A declaration that the Plaintiffs forcefully and unlawfully and illegally occupied and took possession of the properties title Nos Loc.II/Maragi/429, Loc. II Maragi/1153, Loc.II/Maragi/7611, Loc.II/Maragi/7610, Loc.II/Maragi/7609, Loc.II/Maragi/8424, Loc.II/Maragi/8425 and any titles processed due to subdivision of any of the said parcels which acts amounts to encroachment of Defendant's properties.
 - iv. An order for the eviction of Plaintiffs from the suit premises and the correction of any records interfered with by the Plaintiffs at the land register and the survey of Kenya.



- v. An order directed to the Land Registrar Murang'a to rectify respective records to reflect the Defendant as the owner of Loc.II/Maragi/429, Loc. II Maragi/1153, Loc.II/Maragi/7611, Loc.II/Maragi/7610, Loc. II/Maragi/7609, Loc.II/Maragi/8424, Loc.II/Maragi/8425 and any other title from any of the above properties due to subdivision and to cancel the titles held by the Plaintiffs and its predecessor in titles and or titles held by any other person or entity.
 - vi. A declaration that the defendant is the rightful owner of the parcels of land known as Loc.II/Maragi/429, Loc.II/Maragi/1153, Loc.II/Maragi/7611, Loc.II/Maragi/7610, Loc. II/Maragi/7609, Loc. II/Maragi/8424, Loc. II/Maragi/8425 and any titles processed due to subdivision of any of the said parcels
 - vii. Cost of this suit be borne by the Plaintiffs and the 3rd parties.
18. All the Third Parties herein did not enter appearance nor file their defence. The matter proceeded without their input and their absence.
19. The matter proceeded by way of viva voce evidence wherein the Plaintiffs gave their evidence through PW1 to PW5. Equally the Defendant gave evidence through DW1 and DW2.

Plaintiffs' Case

20. PW1: Patrick Thuo Kagwi, from Kadundu area, and a peasant farmer adopted his witness statement dated 12th June 2020, as his evidence in chief, and further testified that he acquired his parcel of land from his father after a succession cause, and he has lived on the said land since birth.
21. He further stated that he was born in 1967, has lived all his lifetime on the suit land, and no one has ever evicted him and his family from thereon until the year 2020, when a dispute arose. It was his further evidence that in June 2020, National Youth Service employees went to the suit land and marked the houses and structures therein with an X, which meant they were targeted for demolition.
22. It was his further evidence that the Railways Corporation claimed that the land belonged to it, but the District Land Registrar and Surveyor told them that there was no problem. When the Land Registrar wrote to Kenya Railways, there was no response, and it did not remove the marking X. He alleged that he had a title deed for his parcel of land, being Loc 11/ Maragi/ 8425, and which he produced as exhibit 1.
23. Pw1, also produced letter from the District Surveyor as exhibit 2, another letter from District Surveyors as exhibit 3, and letter from PW1 to the Defendant as exhibit 4. He also produced the Surveyor's Report as exhibit 5, and the Cadastral Map as exhibit 6.
24. Pw1 urged the court to allow their claim as the suit land belongs to them as is evident from all the documents produced as exhibits. He also urged the court to award them costs of the suit.
25. Upon cross exam by Mr. Ndegwa for the Defendant, he reiterated that he has lived on the suit land since 1967, when he was born, and that his father was allocated the suit land in 1963. Further, that though the District Surveyor wrote a Letter to the Defendant, the said District Surveyor was not a witness in this case. It was his evidence that his title deed is dated 20th June 2014, which he acquired after the death of his father.
26. Further, that though he had mutations for 2013, he did not seek consent from Kenya Railways, and that he had not produced any Green card. He also identified the Surveyor's report, which report showed that there was no boundary dispute. Further, even if they saw the NYS personnel marking their parcels of land, they did not stop them because they were many, and they could not chase them away.



27. In re-exam, he confirmed that even if they did not chase away the NYS personnel who marked their parcels of land with X, they obtained an injunction from the court to restrain them from further action.
28. PW2: Daniel Thumbi Mwangi, a businessman adopted his witness statement too as his evidence in chief, and also testified that he owns land parcel No Loc 11/ Maragi/ 9223, and produced his title deed as exhibit 7. He also produced the original search as exhibit 8. It was his evidence that he acquired the suit land upon purchase from Francis Ndegwa, the son of Samuel Kagwi Ndegwa, and that he bought the said land in 2004.
29. Further, that upon purchase, he has lived thereon since 2006. It was his evidence that he came to court because in 2020, National Youth Service personnel went to the said parcel of land, marked the houses thereon with an X, on allegation of trespass. He testified that the affected persons reported the said incident to the Land Registrar, who advised them to file a suit in court. Further, that the District Surveyor prepared a report, and indicated that there was no problem with their parcels of land.
30. He urged the court to allow their claim, as the Defendant has fenced off their parcels of land.
31. Upon being cross examined by Mr. Ndegwa for the Defendant, he affirmed that he bought the suit land from Francis Ndegwa, and that he had a sale agreement with him which he produced as exhibits. Further, that when he bought the suit land, he did not know that it was near the Railways land, and he did not obtain consent from Kenya Railways to have the land transferred to him. He confirmed that he followed the process of transfer, after he was assured that the land was clean, and after doing due diligence.
32. It was his further evidence that he carried an official search, and he produced the said official search as exhibit, and further confirmed that he had a copy of his title deed which was issued on 27th August 2015, whereas he had bought the land in 2006, as the Surveyor delayed with the title deed.
33. He also testified that they did not stop the National Youth Service from marking their parcels of land, though they reported the same to the District Commissioner, and later obtained a court order. Further that the District Surveyor prepared a report which showed that their land was clean. The witness also testified that even after serving the Defendant with the court order, it increased the numbers of National Youth Service Personnel.
34. On re-exam he affirmed that he did a search, and confirmed that Kenya Railways was not the owner of the suit land. Further, that before the transfer of the land to him, he obtained Land Control Board Consent, and he acquired the land lawfully.
35. PW3: Jane Betty Nyambura Macharia, who lives in Mumbi estate adopted her witness statement as her evidence in chief. She further testified that she owns Land Parcel No. Loc 11/ Maragi/ 9029, which she bought from one Leah Wanjiru in 2020. Further, that before she bought the suit land, she carried a search, and noted that the title was clean, and the land did not have any restrictions, and after the search, she accompanied the vendor to the Land Control Board, and after obtaining a consent, she signed the transfer and the said land was transferred to her.
36. The witness produced the title deed for Loc 11/Maragi/9029, as exhibit No 9, and reiterated that after obtaining the said title, she took possession of the suit land and has been using it since then. However, in June 2020, some NYS personnel put mark X on their parcels of land. The owners of the marked land reported the said action to District Surveyor, who prepared a Report, and he contacted Kenya Railways about the said markings. However, Kenya Railways did not respond to the demand notice. She informed the court that the surveyor's Report has been produced as exhibit in court. Further, she



- produced the official search as exhibit No. 10 in support of her case. She urged the court to allow her claim.
37. Upon being cross examined by Mr. Ndegwa for the Defendant, she confirmed that she had a sale agreement, and that she had carried a search before buying the suit land. Further, that when she bought the suit land, she did not know that it was near the Railways line. It was her evidence that when they went to the site with the District Surveyor, she did not know if the surveyor had a Survey plan or not. Further, that she has lived on the suit land since 2020, and that the title deeds were issued to them by the Government, and therefore, the land belongs to them.
 38. On re-exam, she affirmed that she did not need to obtain consent from Kenya Railways, as they did not own the land, and that all the parcels of land were depicted in the R.I.M.
 39. PW4: Joseph Njendu Kimani, from Kadundu area also adopted his witness statement as his evidence in chief. He testified that bought his parcel of land from Francis Ndegwa Kagwimi, after following the right procedure, by visiting the lands office, and obtaining consent from Land Control Board. It was his evidence that he carried due diligence, by obtaining a search of the suit land, and noted that the title was clean. He built his house in 2008, and in 2020, Kenya Railways claimed the land belonged to them.
 40. He further testified that his land parcel is Loc 11/Maragi/ 9222, and he had a title for the suit land, which he produced as exhibit No.11. Pw4 further testified that he has lived on the suit land from 2008, and in 2020, Kenya Railways personnel marked the buildings on their parcels of land with an X, and alleged that they had encroached on their land.
 41. The aggrieved proprietors reported the matter to the District Surveyor who prepared a Report, and when Kenya Railways failed to respond, he carried a search, which showed the land belonged to him. He produced the said search as exhibit No. 12. He urged the court to order for removal of beacons that were placed by the Defendant.
 42. Upon being cross-examined by Mr. Ndegwa for the Defendant, he affirmed that he bought his parcel of land in 2006, from Francis Ndegwa, who had obtained his land legally, and there was no restriction on the land. He did due diligence and noted that the title was clean, and he obtained his title deed in 2014. He denied that the land was near the Railway station, and he identified his original title in court.
 43. It was his evidence that even if Kenya Railways fenced the land, they did not stop them, they are still using the same, and he did not get consent from Kenya Railways before building his home. He also testified that his land is far from the Railway line and Station, and when he did a search, the said search showed who the owner of the land was, but the owner was not Kenya Railways.
 44. PW5: Lucy Wambui Karina, adopted her witness statement, and further stated that John Karina Muchai was her husband, and that she was representing him, as he died in 2022, and the land in issue belonged to her husband John Karina Muchai. She also testified that they have lived on the suit land since 1979, when she got married. She identified their parcel of lands as Loc 11/Maragi/ 10202, in the name of John Karina Muchai, which was marked as exhibit No.13.
 45. She further testified that her husband had started the process of subdivision and she produced mutation form as exhibit 14, certificate of compliance as exhibit 15, and consent to subdivide from the Local LCB as exhibit 16. It was her evidence that after had husband had done all the above, Kenya Railways went and fenced off the said land in 2020, and put up a barrier.
 46. The proprietors who were affected by the Defendant's action protested and reported the matter to the Lands office, wherein a report was prepared to the effect that the affected parcels of land belonged to



the Plaintiffs and not Kenya railways. The Plaintiffs were declared the rightful owners of their parcels of land, as they had not encroached on the Defendant's land.

47. On cross examination, she confirmed that the land belonged to her husband since 1963, and he obtained it during consolidation and demarcation, although she did not have the allotment letter. However, she produced the title deed, and the map, and that her husband got her title deed in 2017. She did not have anything to show that before 2017, her husband owned the said land. Though she carried a search which showed that her husband was the owner of the land, she did not have a copy of the certificate of official search.
48. It was her claim that her wall was marked with a big X, and although the court was not invited to the site, her advocate saw the said mark X, and she had the original title deed. She claimed that her land was allocated to her husband during the colonial days, and that they did not seek the consent of Kenya Railways to acquire the suit land, as the land do not belong to them.
49. In re-exam, it was her evidence that though they did not have the allotment letter, she had a copy of the title deed for the suit land, which belonged to her later husband. Further that the photos produced were a true reflection of what was happening on the ground. They did not need the consent of Kenya Railways as the land did not belong to them.

Defendant's Case.

50. DW1: Edgar Selebwa, a Senior Geographic Information System Technician, at Kenya Railways, testified that he participated as a Kenya Railways Surveyor in relation to Muranga Railways station. He also adopted his witness statement as his evidence in chief, and he further added that the disputed land has been in ownership of Kenya Railways since 1943.
51. Further, that though there was a Registry Map, Kenya Railways was not involved in preparation of the said map. He testified that Kenya Railways acquired the land in question in 1943, and they had records to show the boundaries of Kenya Railways land, which records differed with the Registry Index Map, and therefore the land was for Kenya Railways, and not the Plaintiffs, and it never sold the suit land to the Plaintiffs.
52. He further testified that the Plaintiffs have encroached on the Defendant's parcel of land, and they fraudulently acquired the said land which belongs to Kenya Railways. He produced a list of documents as his exhibits marked D. Exhibits 1&2. Further, he testified that R.I.M is not an authority in determining the boundaries, as most R.IM, are generated using hedges and the surveyor has to go to the ground to determine the boundary.
53. DW1, urged the court to dismiss the Plaintiffs case with costs, as the land in dispute is a public land.
54. Upon being cross examined by Ms. Murira for the Plaintiffs, he testified that the Map produced by him is not an authority on boundaries, as the Map is dated 1943, and land was consolidated and demarcated in 1963. He also confirmed that ordinarily land is normally allocated by the Government, and not by an individual. Further, that even if the land was allocated to the Plaintiffs by the Government, Kenya Railways needed to give consent.
55. He also admitted that they marked the Plaintiffs structures which were erected on Kenya Railways land, although he did not have any documents to show that the land was not for the Plaintiffs. It was his evidence that the Lands office is mandated to allocate and manage land, though he had not seen the Report from the District Surveyor.



56. The witness confirmed that their office received the letter dated 18th June 2020, but he was not sure whether it was responded to. He also confirmed that they produced a Survey plan for 2018, and he urged the court to allow their claim, as the Plaintiffs are not the rightful owners of the suit land. However, he also confirmed that the Surveyor found that there was no encroachment, and he did not inquire how the Plaintiffs acquired their land.
57. Further, that though their claim is legitimate, he did not produce any documents to proof fraud or illegality on the part of the Plaintiffs. It was his evidence that he did not know when the Plaintiffs were born, and whether one of them has lived on the suit land since 1963, and he/ she is still alive.
58. On re-exam, he affirmed that Kenya Railways obtained the land in 1943, and that all Kenya Railways land were put under vesting order of 1986, and the suit land has been under the ownership of Kenya Railways since then. However, he could not vouch for the authenticity of the Map, and that R.I.M was not an authority on boundaries, and he engaged a private surveyor in 2018 to confirm the boundaries for Kenya Railways.
59. DW2: Mwarua Mativo, who works for Kenya Railways Corporation in Nairobi as the Rail Development Manager adopted his witness statement as his evidence in chief. He further reiterated that the suit land became a property of Kenya Railways in 1943, and was vested in 1986. It was his evidence that when Kenya Railways decided to rehabilitated the Thika - Nanyuki Railway line, it decided to fence off its land, and when they reached Muranga Station, they noted that the land had been encroached upon.
60. Further, that the Corporation used the Survey Plan and Map to get the extend of its land, as the Railway line had a wide corridor, which was 30 meters on each side, meaning 60 meters for both sides. He further testified that Kenya Railways has never transferred the land to anybody, and therefore the title deeds held by the Plaintiffs were fraudulently acquired.
61. He claimed that though the court has not visited the site, he was certain that the land does not belong to the Plaintiffs, and the procedure used to acquire the suit land was not proper. He urged the court to dismiss the Plaintiffs case.
62. On cross examination, he stated that he has worked for Kenya Railways since 1993, and the issue herein had never risen before, as the Corporation had never fenced the land. It was his evidence that when they fenced the land, they did not fence the Plaintiffs land, but only fenced the Railways land. To him, the Plaintiffs engaged in fraud in acquisition of the suit land, although they did not respond to the letter by the District Surveyor, but he disputed the ownership of this land by the Plaintiffs, as the said land is owned by Kenya Railways.
63. He alleged that the Plaintiffs titles are a forgery although he did not visit the Lands office to ascertain that allegation, but he was sure that proper procedure was not followed to acquire the said land, though he did not know whether due process was followed or not.
64. DW2 also admitted that their Survey Plan was prepared by a private Surveyor, and not a government surveyor. He also alleged that the Plaintiffs failed to show that they were in occupation of the suit land since 1963, and he reiterated that the suit land became the property of Kenya Railways in 1943. Further, that the Map produced by the Defendant was for 1943, and they did not have a recent Map. He confirmed that the Plaintiffs did produce a Map from the Survey of Kenya, and that the Survey Map is the correct representation of an area. He could not tell when the Plaintiffs started to live on their respective parcels of land / or suit land.



65. On re-exam, he testified that he is not in the Communication Department of Kenya Railways, and he could not know whether the letter in issue was responded to or not.
66. The hearing was concluded on 22nd July 2024, and the parties were each granted 21 days, in which to file and exchange their respective written submissions, which directives they complied with, and the rival written submissions are summarized as follows;

Plaintiffs' Submissions

67. The Plaintiffs filed their written submissions dated 29th August 2024, through Murira Winnie and Company Advocates submitted that the Station survey produced by the Defendant was undertaken by a Private surveyor, who was paid by the Defendant to do a Report favorable to it, and as such, it should be disregarded. They further submitted that the Court should consider the Report by the Government Surveyor, who is an independent party in the case, and was not paid by any party to write the Report, but prepared the said Report, as being the true representation on the ground.
68. The Plaintiffs further submitted that DW2 confirmed during cross examination that the Defendant did not find any fraud or illegality related to the Plaintiffs' land acquisition process at the Lands Office. They refuted the Defendant's claim that there was illegality attending to the process of acquisition of the suit properties by themselves. The Plaintiffs reiterated that the suit properties were properly and legally allOcated to them, and they sought refuge in the provisions of Section 26 of the [Land Registration Act](#).
69. Further, they submitted that the 1st Plaintiff who is over 50 years old was born on the suit land, and the 2nd Plaintiff (deceased) who died aged 79 years had been living on his parcel since the same was allOcated to him. That, the 2nd Plaintiff during his lifetime had already begun the subdivision process where he ended with all the requisite consent and mutation forms. It was their argument that if their respective parcels of land had been illegally acquired, those consents would not have been granted.
70. The Plaintiffs argued that while the Defence alleged fraud on part of the Plaintiffs, it failed to offer and adduce evidence in support of such allegations as is required under the law.
71. Further, it was their argument that the Defendant lacks the mandate to investigate the acquisition of the said parcels of land, and alleged that the same were acquired irregularly as only the National Land Commission has that mandate as is provided under Article 65 of [the Constitution](#) of Kenya 2010.
72. The Plaintiffs also submitted that they were legitimately allOcated the said parcels of land, a claim that was supported by the Report written by the National Land Commission, and as such they are entitled to protection under Article 40 of [the Constitution](#). It was also argued that the same position was backed by the Report from the Ministry of Lands and Physical Planning through the Murang'a District Surveyor's letter dated 7th October 2020, that was prepared after a site visit on 14th August 2020.
73. Further reliance was placed on the holding of the Court in the case *Funzi Island Development Ltd & 2 others vs County Government of Kwale & 2 others* (2014) EKLRL to support the proposition that a registered owner of land enjoys absolute and indefeasible title if the allOcation was legal, proper and regular.
74. Further, that even if the Defendant believed that the title to the said parcels of land were acquired un-procedurally, it had to accord the Plaintiff's due process of the law, and it is only this court that has the power to cancel such title.



75. It was the Plaintiffs' further submissions that the land parcels in dispute were never registered in the names of East Africa Railway Corporation, awaiting the vesting of the same to the Kenya Railways Corporation, and thus cannot be regarded as their property.
76. Ultimately, the Plaintiffs' submitted and argued that they have proven their case on the required standard of balance of probabilities, and relying on the evidence so far on record, they are entitled to the Permanent injunction as prayed in their Plaint, and also to costs of the suit and interests.

Defendant's Submissions

77. The Defendant filed its written submissions dated 24th September 2024, and isolated the following issues for determination by the Court:
- i. Who between the Plaintiffs and the Defendant does the suit properties belong
 - ii. Whether the Plaintiff's title deeds were fraudulently or unlawfully obtained
 - iii. Whether the Plaintiff's title deeds were fraudulently or unlawfully obtained
78. The Defendant submitted that the subject properties were demarcated from the Murang'a Railway Station subject to the Kenya & Uganda Railways & Harbors- Fort Hall- Station Yard Layout (Station Layout Drawing No. 5439 of 1943), which was marked as the Defendant's exhibit "DExh-7".
79. The Defendant also submitted that the suit properties were also clearly demarcated, surveyed and alienated as land for the station in Survey Plan FR No. 606/49 of 2018 appearing as the Defendant's exhibit "DExh-6". It was argued that from the foregoing documentation, it was clear that the suit properties belong to the Defendant by virtue of it being part of Railway Station land that vested in the East Africa Railways and Harbors Administration (the Defendant's predecessor) by enactment of the Kenya (Vesting of Land) Regulations 1963, which was reproduced by this Court in *Katangi Developers Limited Vs Attorney General & another* [2021] eKLR.
80. It was also submitted that on 31st May 1969, all land which vested in the East Africa Railways Corporation and Harbors Administration was vested in the East Africa Railways and Harbors Administration pursuant to [*Legal Notice No. 20 of 1969*](#), issued under the East Africa Railways Corporation Act. 1967. This thereafter vested in the Kenya Railways Corporation vide [*Legal Notice 24 of 1986*](#).
81. Further, that there is no evidence of alienation of the suit property by the Defendant since 1943, and therefore, the property has consistently been designated as Station land, and has not been transferred to the Plaintiffs or any other party.
82. It was the Defendant's further submission that the suit land has always been reserved for public use by the Railway, any title issued for such land would be invalid. Reliance was placed in the reasoning of the Court in the case of *Adan Abdirahani Hassan & 2 others vs Registrar of titles & 2 others* [2013] EKLK.
83. It was also submitted that according to Section 26 of the [*Land Registration Act*](#), a title can be cancelled if it was obtained illegally, unprocedurally or through corrupt means. Further, that the Plaintiffs have not proven any lawful process through which they acquired the suit properties. It was its further submissions that the Plaintiffs have also failed to demonstrate that the process of obtaining their titles complied with the law. Reliance was sought in the decision of the Court in the case of *Kassim Ahmed Omar and another Vs Awuor Ahmed Abel & others*, Malindi ELC No. 18 of 2015.
84. On whether the Plaintiff's title deeds were fraudulently or unlawfully obtained, the Defendant submitted that the parcels of land in question were never surrendered for allocation to any party,



including the Plaintiffs herein. These lands have consistently been reserved for the Murang'a Railway Station, and are therefore not unalienated land. Consequently, there is no lawful basis for the Plaintiffs to claim ownership or acquire any proprietary rights over the said parcels of land. The Defendant was not involved in any transfer of the suit land to the Plaintiffs, or any other persons. As such, any alleged allocation or ownership by the Plaintiff is not only illegal and fraudulent, but also null, void and irregular. Reliance was placed on Survey Plan FR No 606/49 of 2018 and the Station Layout.

85. Further, it was submitted that the Plaintiffs failed to clearly demonstrate how they gained ownership of the said property from the Government or the Defendant itself. The Plaintiffs have also not adduced any ownership documents from 1963 to prove ownership, yet they claim to have had uninterrupted and private ownership of the suit land.
86. The Defendant also submitted that the Plaintiffs misled the Court by alleging that they had attached a copy of a search over the said property when, in fact, only an application for a search was produced, which casts doubt as to the authenticity of their titles.
87. On whether the Plaintiffs are entitled to the reliefs sought in the Plaint, the Defendant asserted ownership rights over the said suit properties, and argued that it cannot be enjoined from occupying and using its own land. Reliance was sought in the decision of the Court in the case of *Biwott vs Kenya Railways Corporation* (Environment and Land Case E004 OF 2021) [2023] KEELC 21860 (KLR).
88. The Defendant ultimately submitted that the Plaintiffs' case has not met the threshold required for the grant of a Permanent injunction, and therefore, the Plaintiffs are not entitled to any costs as they brought this matter without any lawful basis.
89. The court has considered the available evidence, the exhibits produced thereon, the rival written submissions and cited authorities and finds the issues for determination are;
 - i. Whether the Plaintiffs are entitled to the Orders sought.
 - ii. Whether the Defendant is entitled to the orders sought in counterclaim.
 - iii. Who shall bear the costs of the suit and counterclaim?

i. Whether the Plaintiffs are entitled to the Orders sought

The Plaintiffs' main prayer herein is for a Permanent injunction to restrain the Defendant from interfering with their ownership and occupation of their respective parcels of land in contention.

90. Section 26(1) of the *Land Registration Act* stipulates as follows:

“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, un-procedurally or through a corrupt scheme.”

91. The Defendant on the other hand asserted ownership of the said suit properties in contention on the basis of [*Legal Notice No. 20 of 1969*](#), that was issued under the East Africa Railways Corporation Act 1967, as read together with [*Legal Notice No. 24 of 1986*](#). The Defendant further relied on its exhibits marked “DExh-6” and “DExh-7” being Survey Plan FR No. 606/49 of 2018, and Kenya & Uganda Railways & Harbors- Fort Hall- Station Yard Layout (Station Layout Drawing No. 5439 of 1943) respectively.
92. The Plaintiffs, on their part annexed various documents to support their claim, including copies of Title Deeds, mutation forms, land certificates and applications for official search, to anchor their claims of ownership of the disputed properties.
93. In the case of Katangi Developers Limited vs Attorney General & another [2021] eKLR, the Court appreciated the meaning and import of [*Legal Notice No. 20 of 1969*](#), issued under the East Africa Railways Corporation Act. 1967 in the following terms:

“Legal Notice No. 20 of 1969 issued under the East African Railways Corporation Act, 1967 provided that in exercise of the powers conferred by Section 4 (1) of the East African Railways Corporation Act 1967, the Authority hereby determines-

- (a) That the fixed assets of the General Manager of the East African Railways and Harbours Administration which are recorded as Railways assets in the classification of Assets of the East African Railways and Harbours Administration as at 31st May 1969 and for which provision for depreciation and amortisa made in the estimates (1st June, 1969) to 31st December approved by the Board of Directors shall be transferred vest in the East African Railways Corporation on the api day and the corresponding loan liabilities of the General Manager of the East African Railways and Harbours Administrate reduced by sinking fund provisions accumulated up to the appointed day shall be deemed to have become liabilities of the East African Railways Corporation on the appointed day subject to the certification by the Auditor-General of the accounts of the East African Railways and Harbours Administration for the period 1st January, 1969 to 31st May, 1969 and such accounts shall be divided in all respects to show such Harbours and Railways assets and liabilities separately; and
- (b) All other Railways assets and liabilities of the General Manager of the East African Railways and Harbours Administration as at 31st May, 1969 shall be transferred to and vest in the East African Railways Corporation on the appointed day in accordance with the arrangements agreed between the Board of Directors of the east African Railways Corporation and the Board of Directors of the East African Harbours Corporation at the joint meeting held on 28th November, 1968 as recorded in minutes 66/68 and 676/68 and subject to the certification by the Auditor – General of the accounts of the east African Railways and Harbours Administration for the period 1st January, 1969 to 31st May, 1969 and such accounts shall be divided in all respects to show such Harbours and Railways assets and liabilities separately.”



94. In the above mentioned case of Katangi Developers Limited vs Attorney General & another [2021] eKLR, the Court reiterated the substance of [Legal Notice No. 24 of 1986](#) as hereunder:

“In exercise of powers conferred by Section 95 (4) of the [Kenya Railways Corporation Act](#), the Minister for Transport and Communication makes the following order:

The Kenya Railways Coporation (vesting of land) Order, 1986

1. This order may be cited as the Kenya Railways Corporation (vesting of Land) Order, 1986.
2. The Land described in the schedule is this Order shall rest in the Kenya Railway Corporation.

Schedule

All land of the East African Railway Corporation vested in that Corporation by any written law as well as any land conveyed to that Corporation or otherwise placed at that Corporation’s disposal, whether such land is in use or reserved or use by that Corporation and includes-

- (a) Premises used for the administration and control of the services provided by the Administration;
- (b) Railway lines (including marshalling yards and sidings);
- (c) Workshops and training schools;

Together in each case with the curtilage thereof or other land then enjoyed therewith.

3. The Kenya (vesting of Land) Reregulation’s, 1963 are revoked.”

95. In the instant dispute, it is necessary for this Court to establish whether the foregoing Legal Notices cited by the Defendant affected the acquisition of the suit parcels by the Plaintiffs, who claimed to have resided on the suit land since the early 1960s, when the Land Consolidation and Demarcation exercise was underway in the former Central province of Kenya.

96. The Defendant argued and submitted that the Plaintiffs acquired titles to their respective parcels of land fraudulently and illegally, thus the said titles are prime candidates for cancellation by the Court pursuant to the provisions of Section 26 of the [Land Registration Act](#). Further, that the official searches for all the plots alleged to be affected were not attached to the Plaintiffs’ pleadings for the purpose of confirming their ownership rights.

97. It is trite that ‘he who alleges must prove’. This position is provided for in Sections 107, 108 and 109 of the [Evidence Act](#). Further, the standard of proof with respect of allegations of fraud is higher than



in the ordinary civil cases. In the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR the Court stated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* [2008]1KLR (G & F) 742 wherein the court stated that “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

98. In the case of *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23 the Court held that:

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

99. From the dictum of the Court in the foregoing cases, it is clear that where fraud is alleged, it is not enough to simply infer fraud from the facts.

100. In this case, the Plaintiffs attached copies of title deeds in respect of the suit properties, mutation forms, land certificates and applications for official search as evidence of ownership of the same. The Defendant, on its part, did not supply any copies of title deeds in respect of the said parcels of land to demonstrate ownership of the said land. Upon careful evaluation of the totality of the evidence adduced by the parties, the Court was not persuaded that the Plaintiffs acquired their parcels of land through fraud as claimed by the Defendant.

101. Further, this Court takes judicial notice of the Defendant’s conduct of forcibly entering into and fencing off the said parcels of *Katangi Developers Limited vs Attorney General & another* [2021] eKLR, the Court noted as follows:

“This court visited the disputed parcels of land and found that the same had been fenced and that the petitioners could not access the land and that in an act of impunity the second respondent had even secured a title for the suit properties in its names despite the fact that the suit was pending hearing.”

For the avoidance of doubt, the Respondent referred to in the quotation above is KENYA RAILWAYS CORPORATION.

102. The Court is invested with the mandate to cancel title deeds procured illegally and through fraud pursuant to the provisions of Sections 26 and 80 of the [Land Registration Act](#), to the exclusion of any other entity. Accordingly, parties are well-advised to avoid usurping the Court’s legal mandate.

103. Having regard to the foregoing, the court finds and holds that the Plaintiffs have proved their case on the required standard of balance of probabilities. For the above reasons, the court finds and holds that the Plaintiffs’ claim herein is merited, and finds the Defendant’s Defence is not merited and the said Defence is dismissed entirely.



ii. whether the Defendant is entitled to the prayers sought in its Counter Claim

104. Having found and held that the Plaintiffs are the owners of their respectful parcels of land, and having held that there was no prove of fraud or illegality in their acquisition of their parcels of land, the court finds and holds that the Counter Claim herein cannot stand. The same is dismissed entirely for lack of sufficient evidence.

iii. Who should bear the costs of the suit

105. On the issue of costs, the Plaintiffs being the successful parties in the case are entitled to costs of the suit herein, there being no special factors that would operate to deny them the said costs, pursuant to Section 27 of the *Civil Procedure Act*.

It is so ordered.

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

L. GACHERU JUDGE

11/2/2025

Delivered online in the presence of;

Joel Njonjo - Court Assistant.

M/s Murira for all the Plaintiffs

Mr. Okoli for the Defendants

L. GACHERU

JUDGE.

11/02/2025

