



**Cheptoo & 2 others v Thomson & 5 others (Environment and Land Case E267 of 2020) [2025] KEELC 5150 (KLR) (8 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5150 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE E267 OF 2020**

**MD MWANGI, J**

**JULY 8, 2025**

**BETWEEN**

**MUSA KIPYEGON CHEPTOO ..... 1<sup>ST</sup> PLAINTIFF  
HENRY KIMAIYO ROTICH ..... 2<sup>ND</sup> PLAINTIFF  
TITUS KASUVE ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**GRAEME THOMSON ..... 1<sup>ST</sup> DEFENDANT  
GRAEME THOMSON AND AFRICA COMPANY LIMITED ... 2<sup>ND</sup> DEFENDANT  
THADDEUS NDEGWA GACII ..... 3<sup>RD</sup> DEFENDANT  
VERNON MARK GACII ..... 4<sup>TH</sup> DEFENDANT  
BRIAN GACII ..... 5<sup>TH</sup> DEFENDANT  
FREDRICK JAMES GACII ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs in this case jointly initiated this suit by way of the plaint dated 15<sup>th</sup> December 2020. Their claim is that; whereas they are the registered proprietors of all that parcel of land known as L.R. No. 13796 situate within Karen Plains in Nairobi City County, the Defendants have without any colour of right made intimations from time to time to the effect that they have interests in the suit property either as tenants, in case of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and or proprietors in the case of the rest of the Defendants.
2. The Plaintiffs alleged that the 3<sup>rd</sup> – 6<sup>th</sup> Defendants have held themselves out to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as the lawful owners of the suit property without any basis; they have further procured or caused to



be procured fake title documentations in respect of the suit property. The Plaintiffs therefore seek judgment against the Defendants jointly and severally for the following orders.

- a. A declaration that the Plaintiffs are the lawful and registered proprietors of the suit property.
- b. A permanent injunction to prohibit the Defendants by themselves, agents or employees from entering or remaining upon the suit property, offering the same for letting or subletting or for sale or in any other way dealing with the suit property.
- c. An order of eviction to remove the Defendants or any of them from the suit property together with any structures whether temporary or permanent erected on the suit property.
- d. General damages for trespass.
- e. Mesne profits.
- f. Costs of this suit.

### **Response by the Defendants**

3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants response is that they are tenants of the 3<sup>rd</sup> – 6<sup>th</sup> Defendants. They have no proprietary claim against the suit property whatsoever.
4. On their part, 3<sup>rd</sup> – 6<sup>th</sup> Defendants contend in their statement of defence and counter-claim dated 23<sup>rd</sup> March 2021 that they are the lawful registered owners of the suit property by virtue of the lease issued to them in their names dated 8<sup>th</sup> December 2017 and the certificate of title issued on 18<sup>th</sup> December 2017 as I.R. 195055/1. The 3<sup>rd</sup> – 6<sup>th</sup> Defendants seek a raft of prayers in their counter-claim as follows:-
  - a. A declaration that the 3<sup>rd</sup> – 6<sup>th</sup> Defendants are the absolute and indefeasible owners of L.R. No. 13786 pursuant to the certificate of title registered as Title No. 195055/1.
  - b. A declaration that the certificate of title registered as grant No. 75632/1 and held by the Plaintiffs over L.R. No. 13786 has been acquired illegally, unprocedurally and or through a corrupt scheme.
  - c. An order of the cancellation of the certificate of title registered as grant No. I.R. 75632/1 and held by the Plaintiffs over L.R. No. 13786.
  - d. An order of injunction to restrain the Plaintiffs by themselves, their agents, their servants, their employees or otherwise howsoever from wrongfully and illegally transacting with L.R. No. 13786 vide grant No. I.R. 75632/1 in any way whatsoever or howsoever as would prejudice the rights, interests and or title of the 3<sup>rd</sup> - 6<sup>th</sup> Defendants over the suit property.
  - e. An injunction to restrain the Plaintiffs from interfering with the 3<sup>rd</sup> – 6<sup>th</sup> Defendants quiet possession.
  - f. All necessary and consequential accounts, directions and inquiries.

### **Evidence adduced before the Court.**

5. On 25<sup>th</sup> April 2022, the parties in this case, by consent, agreed that the Chief Land Registrar be called and heard as a witness first, before the parties could present their respective cases. The Chief Land Registrar upon being summoned sent two officers from his office to represent him both of who testified before the court producing documents under their custody as exhibits in this case. The two officers were the assistant director in charge of land administration, one Mr. Robert Simiyu and a Land Registrar, one M/S. Vincencia Juma.



### **Evidence by the Assistant Director Land Administration.**

6. Mr. Robert Simiyu testified as PW1. He produced as an exhibit the entire correspondence File No. 114780. The officer testified that from the correspondence file, an application was made by one Professor Gacii, to the commissioner for lands for the allocation of the suit property way back on 13<sup>th</sup> October 1984. Pursuant to the said application, an allotment letter, [Ref; 33408/iii/176 dated 31<sup>st</sup> July 1985 was issued in favour of Professor P. Gacii. In the file, there was a receipt No. B68996 dated 7<sup>th</sup> November 1985 confirming payment of the stand premium of Kshs. 23,396.70.
7. The officer affirmed that a letter [Ref L.R. 13786 – Karen] by the commissioner of lands confirm the land L.R. 13786 – Karen, as belonging to Professor Gacii. The commissioner in the letter was seeking to know from the Director of Surveys if a deed plan had been issued to enable him process title.
8. Amongst the other documents in the file was a confirmation of grant in the estate of Peter Gacii issued on 11<sup>th</sup> August 1994 in High Court Succession Cause 778 of 1992 to Alberta Mae Gacii. Further there are letters of administration in the estate of Alberta Mae Gacii issued on 3<sup>rd</sup> July 2008 in High Court Succession Cause 680 of 2008 to Thaddens Ndegwa Gacii, Vernom Mark Gacii, Brian Cege Gacii and Fredrick James Gacii. The letters were confirmed on 5<sup>th</sup> December 2011.
9. It was the officer’s testimony that upon receipt of the confirmed grant, they proceeded to process title in favour of the beneficiaries of the estate of Alberta Mae Gacii. The title was processed on 18<sup>th</sup> December 2017 and forwarded to the registrar of Titles on the same date. It was registered as I.R. 195055 on 18<sup>th</sup> December 2017.
10. The officer confirmed that from the records at their offices, the owners of the land L.R. 13786 are Thaddeus Ndegwa Gacii, Vernom Mark Gacii, Brian Cege Gacii and Fredrick James Gacii; as tenants in common in equal shares. The suit property is registered as I.R. 195055.
11. Responding to questions in cross-examination, the officer confirmed that the subject land was allocated in 1985. The allottee accepted and made the requisite payments; it was therefore entered in the section referred to as Senior Plans Records Office [SPRO] confirming that it was allocated and therefore not available for allocation to any other person. The officer opined that the letter dated 14<sup>th</sup> June 1997, and which the Plaintiffs rely on did not go through the process of allocation. The signatures on the letter purporting to be of the land commissioner and of Mr. S.K.N. Wangila were not their signatures. The officer attested that he knew their signatures having worked with them over a long time. The same applies to the purported signature of Mr. Manthi. The said letter was not even in the correspondence file.
12. Commenting on a letter dated 15<sup>th</sup> April 2021, purportedly signed by Mr. F.N. Orare, the officer affirmed that Mr. F.N. Orare was not under the department of land administration. He was under the office of the Chief Land Registrar and was therefore not competent to talk on matters of land allocation. Land allocation is under the docket of the Director Land Administration.
13. Responding to questions by Mr. Mwicigi, advocate for the 3<sup>rd</sup> – 6<sup>th</sup> Defendants, the officer stated that any correspondence relating to the subject land that is not in the correspondence file is not official correspondence. From the correspondence file there is no letter of allotment in favour of the Plaintiffs. There is no correspondence in the file that mentions the Plaintiffs as allottees or owners of the suit property at all. The letters shown to him and presented by the Plaintiffs are not from the office of the Director in charge of Land Administration.



14. The officer further asserted that a title cannot issue without a lease. The lease precedes the title; it gives birth to the certificate of title. For the purposes of this case, the lease in the correspondence file is in the name of the 3<sup>rd</sup> – 6<sup>th</sup> Defendants and indeed signed by F.N Orare. The valid allottee of the suit property according to the records is one Professor Gacii who duly complied with the conditions in the letter of allotment issued to him.

#### **Evidence by the Land Registrar.**

15. The Land Registrar, M/S. Vincencia Juma testified as PW2. She produced a report dated 21<sup>st</sup> June 2022 explaining the documents in their record in respect of L.R. 13786 [I.R. 195055]. She confirmed that they have in their records a lease dated 8<sup>th</sup> December 2017 and a certificate of title registered on 18<sup>th</sup> December 2017. She attached a search of the suit property to the report, which indicates that the suit property belongs to Thaddeus Ndegwa Gacii, Vernom Mark Gacii, Brian Cege Gacii and Fredrick Gacii as tenants in common in equal shares.
16. Respondent to questions from Mr. Litoro, advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in cross-examination, the officer stated that the grant on page 1 of the Plaintiff's documents though in respect of L.R. 13786 has a different I.R. number from what she had produced in court. The I.R Number is indicated as 75632.
17. PW2 confirmed that the land registrar issues the certificate of title upon receipt of correspondence form the Director of Land Administration accompanied with a lease. The documents produced by the Plaintiffs according to the officer were not official and do not appear in their records.
18. It was PW 2's testimony that Land Numbers are typed on the certificate of title and not handwritten. Looking at the searches on the Plaintiffs' list of documents, the officer asserted that they did not originate from their offices. They do not issue such kind of searches, rather they photocopy the certificate of title itself and stamp and seal it. Online searches are no longer issued because they are prone to manipulation. She urged the court not to rely on online searches.
19. Responding to questions from Mr. Mwichigi, advocate for the 3<sup>rd</sup> – 6<sup>th</sup> Defendants, PW2 affirmed that the only valid title in the deed file was what she had produced before the court; the title in favour of the 3<sup>rd</sup> -6<sup>th</sup> Defendants. She was categorical that the documents on the Plaintiffs' list of documents did not emanate from their office.

#### **Evidence adduced on behalf of the Plaintiffs.**

20. Mr. Morris Lorukia Lomilio testified as PW3. He adopted his witness statement dated 13<sup>th</sup> June 2023 as his evidence in chief. The witness stated that he had been engaged by the 1<sup>st</sup> Plaintiff, Mr. Musa Kipyegon Cheptoo as the caretaker of the suit property between 1999 and 2021.
21. Responding to questions by Mr. Litoro, advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he stated that his employer was Musa. He knew him only by that name. The land that he was allegedly taking care of was at Karen Plains in Nairobi. He worked up to the year 2021. He did not have any written contract of employment to confirm his employment. He was earning a sum of Kshs. 10,000/- per month though it was not always regularly paid. He had no document to prove payment of the salary to him by the 1<sup>st</sup> Plaintiff.
22. The witness stated that he was not registered with NSSF either. He therefore had no evidence to confirm his employment as a caretaker. He stated that he used to live in the suit property with his family. He could only remember a mabati structure on the suit property.



23. The witness alleged that strange people whom he did not know invaded the suit property in 2011 forcing him to flee for his life. He did not know the people then.
24. Responding to questions by Mr. Mwicigi, advocate for the 3<sup>rd</sup> – 6<sup>th</sup> Defendant, the witness confirmed that there is a white man who lives on the suit property and who runs a company known as African Tours. As far as 1999, he remember seeing the white man's house on the suit property and some tractors.
25. PW3 admitted that he did not know how Musa acquired the suit property.
26. On re-examination, PW3 confirmed that the white man was on the suit property as early as 1999. For all the time he had been in the suit property up-to 2011, no one else had come to the suit property claiming ownership.
27. Musa Kipyegon, the 1<sup>st</sup> Plaintiff testified as PW4. He adopted his witness statement dated 15<sup>th</sup> December 2020 as his evidence in chief. Alongside the witness statement he too produced as exhibits the documents listed on the Plaintiffs' list of documents dated 14<sup>th</sup> December 2021 and the documents on the supplementary list of documents dated 4<sup>th</sup> February 2022.
28. Responding to the questions by Mr. Litoro in cross-examination, PW4 stated that he was given the suit property by the government in 1997. It was 5 acres in size. The land was given to him alongside Mr. Henry Kimaiyo and Titus Kasuve. He stated that they had applied for the land after they saw an advertisement in the newspaper. He did not however have the application with him nor the newspaper.
29. PW4 alleged that he personally delivered the application for the suit property to the lands offices but the copy was not stamped in acknowledgement of receipt.
30. PW4 admitted that his co-Plaintiffs are not his blood brothers. They were to share the land once allocated. They allegedly fenced the suit property with posts and a life kai-apples' fence. He had no photos to confirm the position. He further admitted that he has not built on the land.
31. PW4 confirmed that some people entered into the suit property sometimes in the year 2011 and uprooted the kai-apples' fence. He found out when he visited the shamba sometimes in the year 2011. In the year 2012, he found a white man in the land who told him that he had leased the land from Brian Gacii in the year 2012. He showed him the lease and the lease agreement. Though he reported the issue to the police, no action was taken even after visiting the site.
32. Responding to questions by Mr. Mwicigi, PW4 acknowledged that his name was not on title produced by the Land Registrar earlier on; neither was it on the allotment letter produced by the assistant director of land administration.
33. PW5 was one F.N. Orare, an official from the Ministry of lands who stated that he was a Deputy Chief Land Registrar. He was called as a witness by the 1<sup>st</sup> Plaintiff. He adopted his witness statement dated 16<sup>th</sup> October 2023 as his evidence in chief. The witness stated that he had written the letters dated 15<sup>th</sup> April 2021, and 31<sup>st</sup> May 2021 to the County Secretary at City Hall confirming that the subject land L.R. 13786 was allocated to Henry Kimaiyo Rotich, Musa Kipyegon Cheptoo and Titus Kasuve, vide a letter of allotment reference 39399/XVI dated 20<sup>th</sup> January 1998 and subsequently issued a grant I.R. 75632.
34. Responding to questions by Mr. Ingutya, advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs, PW5 affirmed that he was conversant with the registration system regarding land in Kenya. The witness stated that the correspondence file produced by PW1 was a "temporary cover"; meaning it is not the original file. The contents therein are therefore not original documentation. A temporary cover is opened when



- the original goes missing. It is the directorate of land administration that does that. Once the original one is found, the temporary cover is usually surrendered. The original file is superior to the temporary cover. The temporary cover is created from documents supplied by the owner of the land.
35. Despite the fact that PW5 is not attached to the Directorate of Land Administration, he claimed to have the original file. His evidence was allegedly based on the said original file.
  36. Referring to the allotment letter issued to P. Gacii, he noted that the same had alterations that were not counter –signed against. He described it as having short-comings.
  37. PW5 admitted authoring the letter dated 15<sup>th</sup> April 2021. At the time, he was acting Chief Land Registrar. He further admitted his signature, stamp and number on the transfer documents on the temporary cover. He however stated that he could not precisely state whether the signature thereon was his or not.
  38. PW5 stated that between the years 2015 – 2020 he was responsible for signing leases which were previously signed by the commissioner of lands, when that office was in existence. He stated that if he had signed the lease, it must have been accompanied by the temporary cover. He had no choice then but to sign it. He nevertheless was obligated to check and confirm the allotment letter and the deed file before signing the lease.
  39. Responding to questions by Mr. Mwichigi, advocate for the 3<sup>rd</sup> – 6<sup>th</sup> Defendants, PW5 clarified that the lands office has four divisions, namely;
    - i. Land Administration
    - ii. Land Registration
    - iii. Surveys and
    - iv. Physical planning.
  40. PW5 affirmed that the directorate of land administration deals with processing of titles assisted by the records office. The letter of allotment and processing of leases is under the directorate. Once issued, the lease is then forwarded to the office of Chief Land Registrar for issuance of title. A correspondence file therefore would ordinarily be produced by the directorate of land administration. A search on the other hand is issued from the office of the Chief Land Registrar.
  41. PW5 admitted signing the lease in favour of the 3<sup>rd</sup> – 6<sup>th</sup> Defendants. He further admitted that creating a temporary cover is not illegal; the temporary cover is indeed a legal record.
  42. The land records in respect of any specific parcel of land constitute of the Deed File and the correspondence file. The correspondence file is for administrative purposes. He admitted that the errors on the face of the allotment letter issued to P. Gacii were not material errors as they did not contradict the details in the title.
  43. Responding to questions by Mr. Litoro, PW5 stated that the temporary cover had not been recalled at the time of his testimony despite him alleging to have the original file. Further, he affirmed that the issuance of the title was confirmation that the terms and conditions in the allotment letter had been complied with.
  44. Considering the somewhat contradictory testimonies of the officers from the lands office, the court exercising its authority under Section 22[b] of the *Civil Procedure Act*, summoned the Chief Land Registrar and the Director Land Administration to personally appear before the court as witnesses. They both indeed appeared and testified before the court.



### **Evidence by the Chief Land Registrar.**

45. PW 6 was one Geoffrey Komen who introduced himself as an assistant director of surveys. He adopted the affidavit he had sworn on 5<sup>th</sup> June 2025 as his evidence in chief.
46. Responding to questions in cross-examination from Mr. Ingutya the witness stated that the Deed Plan 202203 corresponded with grant I.R. 75632 which was in favour of the plaintiff. He however admitted that on matters ownership of land he was not an authority. Only the Chief Land Registrar could confirm ownership.
47. Responding to questions by Mr. Mwichigi he reiterated that he was not an authority on land ownership. At the surveys of Kenya they do not keep documents of ownership of land. He had therefore not come to court to justify ownership of the suit property. He had no basis to contradict the Chief Land Registrar on the ownership of the suit property.
48. The Chief Land Registrar Mr. David Nyambaso Nyandoro, testified that he had worked in the lands office for a total of 19 years. He was appointed as the Chief Land Registrar in the year 2023. It was his testimony that his office is in charge of and keeps custody of deed files. The directorate of Land Administration on the other hand maintains the correspondence file; therefore, only the director of land administration can produce and speak on the contents of the correspondence file; not a Land Registrar.
49. The Chief Land Registrar had with him the deed file for L.R. No. 13786 [the suit property]. He confirmed that the registered proprietors of the suit property according to the records in the deed file were Thaddius Ndegwa Gacii, Vernon Mark Gacii, Brian Cege Gacii and Fredrick James Gacii. The title was issued in their favour on 18<sup>th</sup> December 2017. It is registered as I.R. 195055 and is supported by a lease. The lease was signed by Mr. F.N. Orare on behalf of the Chief Land Registrar. The said officer who had testified before the court, works under the Chief Land Registrar as a deputy. He does not work for the Director of Land Administration.
50. The Chief Land Registrar explained that there are six technical departments under the state department for land and physical planning, namely;
  - a. Directorate of physical planning.
  - b. Directorate of surveys;
  - c. Directorate of land adjudication;
  - d. Directorate of valuation;
  - e. Directorate of land administration and
  - f. Directorate of land registration
51. The Chief Land Registrar testified that after he received the court summons he called for the file but a 2<sup>nd</sup> one emerged purporting to be grant I.R. 75632, in the names of Henry Kimaiyo Cheptoo and Titus Kasuve. On opening this 2<sup>nd</sup> file, the same was already marked as a forgery, on the grant. He therefore went further to interrogate the grant I.R. 75632 and found out that the parcel of land registered under the grant I.R. 75632 is a parcel of land known as L.R. No. 20857/58 in the name of Clay City Developers currently transferred to John Kumwaka Mutihani.
52. The Chief Land Registrar asserted that from the above discovery, it was clear to him why the grant I.R. 75632 was marked as a forgery. He stated that he further found documents in the said file marked



as a forgery, that should not ordinarily be in the file. One such document is a copy of the purported allotment letter that should have been in the correspondence file. There was also a memorandum of registration of transfer of lands whereby the transferor is indicated as the President of the Republic of Kenya whereas the transferees are Henry Kimaiyo Musa Kipyegon and Titus Kasuve. It is dated 5<sup>th</sup> August 1998.

53. According to the Chief Land Registrar, a memorandum of transfer would only be issued when a property changes hands; not at the initial point of registration. In this case, the title was a grant anyway and did not require a memorandum of transfer. He further pointed out that the deed plan indicates “District of Nairobi” instead of “Nairobi area”, since Nairobi was both the capital city, a district and a province, all at once.
54. Commenting on the witness statement of F.N. Orare [PW5] dated 16/10/2023, the Chief Land Registrar stated that as at the date of the witness statement, F.N. Orare was in charge of conveyancing division, in particular registering certificates of incorporation of trust. He was further not authorized to attend court on behalf of the Chief Land Registrar.
55. Responding to the questions by Mr. Kiptoo, advocate for the 1<sup>st</sup> Plaintiff, the Chief Land Registrar stated that in registration, they have no temporary files. From his office, the deed file for I.R. 75632 is not authentic. He reiterated that after receiving the court summons, he called for the deed file of the suit property and found the 2<sup>nd</sup> file inserted therein.
56. Responding to questions from Mr. A.K. Mwangi for the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs, the Chief Land Registrar stated that he could not tell when the document marked as a forgery was marked as such. The Chief Land Registrar further affirmed that the searches exhibited by the Plaintiffs were not from his office; they were not authentic.
57. Responding to Mr. Litoro, the Chief Land Registrar reiterated that he had not authorized Mr. F.N. Orare to come to court and testify in this case. Mr. F,N Orare had actually had not informed him nor sought his authority to produce any document in this matter on behalf of the office of the Chief Land Registrar.
58. Responding to Mr. Mwicigi, the Chief Land Registrar on the other hand stated that Mr. Robert Simiyu was authorized to testify and produce the correspondence file. Ms. Vincesia Juma too was authorized since she was from the court section.

#### **Evidence by the Director in charge of land administration.**

59. The director of land administration, Mr. Gordon Odeka Ochieng too testified before the court. He had with him the original correspondence file and two temporary files which had been opened when the original file for L.R. No. 13786 went missing. He confirmed from the records that the parcel L.R. No. 13786 was allocated to P. Gacii on 21<sup>st</sup> July 1985. The information in the original file was identical to the information in the two temporary files.
60. Responding to the questions from Mr. Kiptoo, advocate for the 1<sup>st</sup> Plaintiff, the director affirmed that the letter of allotment in favour of P. Gacii corresponds with the carbon copy in the file. Failure to counter-sign for corrections on the allotment letter cannot invalidate the same according to the director. The National Land Commission had nothing to do with the suit property since it was private land.
61. Responding to Mr. Ingutya, the director stated that in order to establish ownership of a parcel of land, one must go to the deed file.



62. Responding to Mr. Mwicigi, the director stated that at the time of allocation, the subject property had not been surveyed. One would only know the deed plan number after the survey. The GLA allowed the government to allocate unallocated government land.
63. From the record, the director confirmed that Professor Gacii had paid the stand premium. The land was therefore not available for allocation to any other person. The director confirmed that the Plaintiffs' names were not on any of the documents in his possession.

#### **Evidence adduced by the defendants**

64. The parties by consent conceded to the admission of the documents on the 1<sup>st</sup> and 2<sup>nd</sup> defendant's list of documents without calling their makers. They were produced as exhibits by consent.
65. The 3<sup>rd</sup> – 6<sup>th</sup> defendants called one witness Vernom Mark Gacii, the 4<sup>th</sup> defendant in the case. He adopted his witness statement dated 17<sup>th</sup> January 2022 as his evidence in chief. He confirmed that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were tenants in the suit property since 2002 – to date. Previously there were other tenants.
66. DW2 further produced the fifty five documents on the 3<sup>rd</sup> to 6<sup>th</sup> defendants list and bundle of documents as exhibits in support of their case.
67. Responding to Mr. Kiptoo, DW2 confirmed that the I.R. No. of the suit property was 195055. The title was only issued to them in 2017. They had tenants in the suit property even before they acquired the title in 2017.
68. Responding to Mr. Ingutya, DW2 confirmed that he did not have the leases of the tenants who were on the land before the 1<sup>st</sup> and 2<sup>nd</sup> defendants became tenants. The witness confirmed the acceptance letter written by his father was dated 24<sup>th</sup> September 1985. He however indicated that he had received the allotment letter on 23<sup>rd</sup> September 1985, that explains why the payment was made forty five days after the allotment letter but it was accepted. He had paid the stand premium within a day upon receipt of the allotment letter.

#### **Submissions by the parties**

69. Upon close of the hearing, the court directed parties to file written submissions. Parties complied and the court has had the opportunity to read and consider the submissions.

#### **Issues for determination.**

70. Having carefully considered the pleadings filed in this case, the evidence adduced as well as the submissions by the parties, the following are the issues for determination in the court's considered opinion;
  - a. Whether the Plaintiffs have established ownership over the suit property.
  - b. Whether the Plaintiffs are entitled to the orders sought in their plaint.
  - c. Whether the Plaintiffs have made a case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  - d. Whether the 3<sup>rd</sup> -6<sup>th</sup> Defendants have established that they are the absolute and indefeasible owners of the suit property.
  - e. Whether the 3<sup>rd</sup> – 6<sup>th</sup> Defendants have made a case for the cancellation of the certificate of title I.R. 75632/1 held by the Plaintiffs.



- f. Whether the 3<sup>rd</sup> – 6<sup>th</sup> Defendants are entitled to an order of injunction against the Plaintiffs.
- g. What orders should issue in respect to the costs of the suit and the counter-claim.

### **Analysis for determination.**

#### **A. Whether the Plaintiffs have proved ownership of the suit property.**

71. It is trite law that he who alleges must prove. Section 107 [1] of the *Evidence Act* is clear on that issue. It provides that,

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

72. In the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi and another* [2005] IEA 334, the court of appeal held that,

“As a general proposition under Section 107[1] of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue”.

73. In the case of *Raila Odinga & another v IEBC & 2 others; Aukot & another* [interested parties]; *Attorney General & another* [Amicus Curie] [presidential Election Petition 1 of 2017] [2017] KESC 42 [KLR], the Supreme Court of Kenya had this to say on the burden of proof.

“On this sole important issue, the law is clear that he who alleges must prove. The term burden of proof draws, from the latin phrase *Onus probandi* and when we talk of burden we sometimes talk of *onus*. Burden of proof is used to mean an obligation to adduce evidence of a fact.

According to Phipson on the law of evidence, the term burden of proof has two distinct meanings;

1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one’s way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue, one that will be critical to the party with the obligation. The penalty that one suffers if they fail to prove their burden of proof is that they will fail, they will not get whatever judgment they require and if the Plaintiff, they will not sustain a conviction or claim and if Defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence”.

74. The Plaintiffs asserted that they were the registered owners of the suit property which they referred to as L.R. 13786 described in the grant I.R. 75632. They accused the Defendants of falsely, without any



colour of right at law or in fact representing themselves and intimating that they have rights over the same either as tenants in the case of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or as proprietors, in the case of 3<sup>rd</sup> – 6<sup>th</sup> Defendants. Amongst the documents they presented in evidence in support of their claim was the grant I.R No. 75632 as proof of their ownership of the suit property, a letter of allotment dated 20<sup>th</sup> January 1998, and memorandum of transfer of lands dated 5<sup>th</sup> August 1995. The Defendants challenged the documents presented by the Plaintiffs terming them as forgeries. The Defendants asserted that the 3<sup>rd</sup> – 6<sup>th</sup> Defendants were the lawfully registered owners of the suit property.

75. The Torrens System of registration is the applicable system in Kenya. As the Court of Appeal held in the case of Embakasi properties Limited & ano v Commissioner of Lands & ano [2019] KECA 1001 [KLR];

“With respect, there has been no confusion on the application of land registration in Kenya land law. Since the enactment of the repealed Registration of Titles Act, it has consistently been acknowledged in countless judicial decisions that the law on registration of titles in Kenya is based on the Torrens System. Souza Figuiredo v Moorings Hotel [1960] EA 926; cross v Great Insurance Company Limited of India [1966] EA 94 and Charles Karathe Kiaire & two others v Administrators of the Estate of John Wallace Mathare [deceased] & 5 others [2013] eKLR, are some of the authorities that have unequivocally applied the principles of Torrens System”.

76. The Court of Appeal went ahead to enumerate the three main principles of the Torrens System as summarized in the Canadian Court of Appeal case of Regal Constellation Hotel Limited Re 2004 can LII 2006 Ontari Court of Appeal] page 13 paragraph 42 as follows;

“The philosophy of land titles system embodies three principles, namely, the mirror principle where the register is a perfect mirror of the state of title; the curtain principle which holds that a purchaser need not investigate the history of past dealings with the land, or search being the title as depicted on the register; and the insurance principle where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of the inaccuracy”.

77. The mirror principle is a guarantee that the register is a perfect mirror of the state of the title.

78. I did state that parties in this case by way of a consent, on 25<sup>th</sup> April 2022, agreed that the Chief Land Registrar be called and heard as a witness in the case. The Chief Land Registrar sent two officers, one Robert Simiyu an Assistant Director of land Administration who testified as PW1 and M/S. Vincensia Juma, a Land Registrar who testified as PW2. PW1 testified that from the correspondence filed no. 114780, the allottee of the suit property was one P. Gacii who had applied for allocation on 13<sup>th</sup> October 1984. An allocation was made in his favour and he duly paid the sum of Kshs. 23,396.70 on 7<sup>th</sup> November 1985. Upon the death of P. Gacii, his legal representative one Alberta Mae Gacii was substituted. She too however passed on and was substituted by the 3<sup>rd</sup> – 6<sup>th</sup> Defendants who are her legal representatives pursuant to a grant issued in High Court Succession Cause 680 of 2008. Title in respect of the suit property was subsequently processed in the name of the 3<sup>rd</sup> – 6<sup>th</sup> Defendants herein on 8<sup>th</sup> December 2017, and forwarded to the Registrar of Titles on the same date where it was registered as I.R. 195055 on 18<sup>th</sup> December 2017. The registered owners of the suit property according to PW1 and based on the information in the records under his custody are the 3<sup>rd</sup> – 6<sup>th</sup> Defendants.

79. PW1 confirmed that none of the documents on the Plaintiffs’ list and bundle of documents were not in the correspondence file.



80. PW2 too affirmed that the documents in their possession in respect of the suit property, L.R. 13786 I.R. 195055 confirmed the 3<sup>rd</sup> – 6<sup>th</sup> Defendants as the registered owners of the suit property. She further clarified that the searches produced by the Plaintiffs did not originate from the lands office. She pointed out that the grant produced by the Plaintiffs had a different I.R. number; different from what was in their records. According to her, the Plaintiffs grant was not authentic.
81. The 1<sup>st</sup> Plaintiff called as a witness an officer from the lands office by the name of F.N. Orare. The said officer came to court as a witness for the 1<sup>st</sup> Plaintiff. The said officer stated that he was a Deputy Chief Land Registrar. He contradicted his colleagues alleging that they had relied on a temporary file [TC] instead of the original file which strangely was in his possession. According to him, the registered owners of the suit property were the Plaintiffs, vide grant no. I.R. 75632.
82. In spite of his evidence to the contrary, F.N Orare admitted signing the lease in favour of the 3<sup>rd</sup> – 6<sup>th</sup> Defendants. He further admitted that he was not attached to the office of the Director of Land Administration. He did not explain how he came across what he termed as the original file.
83. The contradictions in the evidence prompted the court to exercise its authority and discretion under the provisions of Section 22[b] of the *Civil Procedure Act* summoning the Chief Land Registrar and the Director Land Administration in person to appear and testify before the court.
84. According to the Chief Land Registrar, the registered proprietors according to the records of documents under his custody were Thaddius Ndegwa Gacii, Vernom Mark Gacii, Brian Cege Gacii and Fredrick James Gacii. The title to the suit property was issued in their favour on 18<sup>th</sup> December 2017. It is I.R. 195055 which is supported by a lease that was registered on 18/12/2017. The lease was signed by F.N. Orare.
85. The Chief Land Registrar went further to testify that after receiving court summons he called for the file for L.R. 13786. A 2<sup>nd</sup> file surprisingly emerged purporting to be grant I.R. 75632 in the names of the Plaintiffs. On opening the same, it was already marked as a forgery on the face of the grant. On investigations, the Chief Land Registrar found out that the grant I.R. 75632 was in respect of a completely different parcel of land known as L.R. No. 20857/58 in the names of Clay City Developers currently transferred to John Kumwaka Muthihani. The other documents in the said file which Mr. F.N. Orare had referred to as the original file were documents that would not ordinarily be in a deed file. An example was the memorandum of registration of transfer of lands, yet the title to the Plaintiffs was allegedly a grant; it was not a transfer. Even the deed plan was not authentic. On its face, it indicates “District of Nairobi” rather than “Nairobi Area”.
86. The Chief Land Registrar was categorical that Mr. F.N. Orare was not authorized to attend court and produce documents on behalf of his office.
87. The Director Land Administration also confirmed that the suit property was allotted to P. Gacii on 31<sup>st</sup> July 1985. The letter of allotment in favour of P. Gacii corresponds with the carbon copy in the file in all aspects. From the record, P. Gacii had paid stand premium. The suit property was therefore not available for allocation to any other person.
88. From the evidence of the officers of the lands office under whose custody the records of the suit property are placed, the registered owners of the suit property are the 3<sup>rd</sup> – 6<sup>th</sup> Defendants. There is nothing on record to support the Plaintiffs’ claim over the suit property.
89. From the totality of the evidence presented before the court, the Plaintiffs claim is based on unauthenticated documents; not even the searches purported to be from the Ardhisasa platform were authentic.



90. The conclusion therefore is that the Plaintiffs have not established ownership over the suit property. They have not satisfied the burden of proof. Consequently, it goes without saying that they are not entitled to the reliefs sought in their plaint against either the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or the 3<sup>rd</sup> – 6<sup>th</sup> Defendants. Their case is dismissed in its entirety.

B. Whether the 3<sup>rd</sup> – 6<sup>th</sup> Defendants have established that they are the absolute and indefeasible owners of the suit property.

91. From the analysis of the evidence before the court, the testimony of the Chief Land Registrar and the Director Land Administration, the 3<sup>rd</sup> – 6<sup>th</sup> Defendants documents mirror the records in the custody of the Chief Land Registrar. The 3<sup>rd</sup> – 6<sup>th</sup> Defendants have satisfied the burden of proof. The root of their title is also traceable all the way from the application by the late P. Gacii to registration.

92. The court holds and declares that the 3<sup>rd</sup> – 6<sup>th</sup> Defendants are the absolute and indefeasible owners of L.R. 13786 [I.R. 195055]. The court further declares that the Plaintiffs' certificate of title registered as L.R. 75632 over the parcel of land known as L.R No. 13786 was acquired unlawfully, unprocedurally and or through a corrupt scheme. The court orders the cancellation of the same.

93. Having said so, the registration of a person as a proprietor of land as provided for under section 24 of the *Land Registration Act*, vests in that person absolute ownership of that land together with all rights and privileges belonging to or appurtenant thereto. Consequently, the 3<sup>rd</sup> – 6<sup>th</sup> Defendants as the registered proprietors of the suit property are entitled to enjoy absolute ownership of the same together with all the rights and privileges appurtenant thereto to the exclusion of the Plaintiffs and any other person. They are entitled to an order of injunction restraining the Plaintiffs by themselves, their agents, servants, employees or otherwise howsoever, from wrongfully and illegally transacting with the suit property or interfering with their quiet possession of the same. The court grants them the injunction orders sought

#### **C. What orders should issue on costs.**

94. The costs of the suit are awarded to Defendants against the Plaintiffs jointly and severally. The 3<sup>rd</sup> – 6<sup>th</sup> Defendants are further awarded the costs of the counter-claim as against the Plaintiffs, jointly and severally.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 8<sup>TH</sup> DAY OF JULY 2025.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. A.K. Mwangi for the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs.

Mr. Kiptoo for the 1<sup>st</sup> plaintiff

Mr. Litoro for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

M/S. Wangui holding brief for Mr. Mwicigi for the 3<sup>rd</sup> -6<sup>th</sup> defendants

Court assistant- Mpoye

**M.D. MWANGI**

**JUDGE**

