



REPUBLIC OF KENYA



KENYA LAW
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**Enos & 33 others v Kiarie & another (Environment & Land Case
523 of 2018) [2024] KEELC 5299 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5299 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 523 OF 2018**

**LN MBUGUA, J
JULY 11, 2024**

BETWEEN

REV BUSELENGETE KAKUMBA ENOS & 33 OTHERS PLAINTIFF

AND

MARY NJERI KIARIE 1ST DEFENDANT

TAFUTA DEVELOPMENT COMPANY LIMITED 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs instituted this suit by a plaint dated 30.11. 2018. They claim that on diverse dates, they separately and individually purchased subplots from the 2nd Defendant or from persons who had originally purchased the plots from the 2nd Defendant. That the said sub plots were excised from the parcel of land known as LR No. 6845/154 Embakasi III.
2. It is their case that the 1st and 2nd Defendants litigated as between themselves in ELC Case No. 626 of 2009 on alleged rivals claims over the suit parcel culminating in a judgment delivered on 9.2.2018. The 1st Defendant has severally attempted to evict them allegedly in execution of the said judgment and that her actions are contrary to the findings of the court in the said matter.
3. They contend that any right of entitlement of the suit parcel accruing to the 1st Defendant had by law been extinguished under Section 17 of the *Limitation of Actions Act* upon the 2nd Defendant taking possession and subsequently subdividing the suit land and selling portions thereof to 3rd parties.
4. The Plaintiffs also aver that the 1st and 2nd Defendants jointly and separately acknowledged, acquiesced to and permitted their joint and individual continued possession and use of the suit property thus by their conduct, the defendants have created a constructive trust in favour of the Plaintiffs' ownership of the suit property.



5. The plaintiffs have particularized the market value of each of their alleged plots as at 18.6.2018 at paragraph 14 of the plaint, and they seek judgement against the 1st and 2nd Defendants jointly and separately for;
 - a. A permanent injunction restraining the 1st and 2nd Defendants whether by herself or itself, respectively, or their agents, representative, servants, employees or other person whatsoever from interfering with the Plaintiffs' joint and individual ownership, occupation, use and quiet enjoyment of all the parcel of land known as LR No. 6845/154 situated in Embakasi within Nairobi City County, and the unregistered sub-plots thereof.
 - b. A declaration that the 1st Defendant holds the title, rights and interests in the parcel of land known as LR No. 6845/154 situated in Embakasi within Nairobi City County on constructive trust for the benefit of the Plaintiffs jointly and individually.
 - c. A declaration that each Plaintiff is entitled to be registered as legal proprietor of his or her respectively owned, occupied and currently being used portion of the parcel of land known as LR No. 6845/154, situated in Embakasi within Nairobi City County upon conclusion and registration of the survey plan for the said parcel of land.
 - d. Consequent upon issuance of the order under prayers (b) and (c) above, an order of mandamus compelling the 1st Defendant as current registered proprietor of the parcel of land known as LR No. 6845/154 situate in Embakasi within Nairobi City County jointly with the 2nd Defendant as vendor of the sub-plots comprising the land to cause and undertake at their own costs a sub-division of the land and issuance of individual titles to each Plaintiff for the sub (plot) (s) owned and occupied in the said land.
 - e. In the alternative and strictly without prejudice to the above, an order compelling the 1st and 2nd Defendants jointly and severally to compensate each Plaintiff the full market value of each plot comprising a portion of LR No. 16845/154 situated in Embakasi owned by each Plaintiff as better particularized at paragraph 15 of the plaint together with interest at court rates from the date of each Plaintiff's certificate of ownership until date of filing suit.
 - f. Interest on the amounts at (e) at court rates from the date of judgment until payment in full.
 - g. Costs of and incidental of these proceedings.
6. The suit is opposed by the 1st Defendant vide her statement of defence and counterclaim dated 14.12.2018. She contends that she is the legal owner of parcel LR No. 6845/154 which was hived from LR No. 6845/9 and which she acquired by virtue of her deceased husband's shareholding at Githunguri Njiru Farm (1966) Limited.
7. She further contends that injunctive orders were issued on 18.5.2010 in ELC 626 of 2009 restraining interference with the suit parcel and that she endeavored to place posters of the said orders in the suit parcel, therefore the Plaintiffs are aware that she owns the suit parcel thus any subdivisions by the 2nd Defendants are illegal.
8. She counterclaims for an order of eviction of the Plaintiffs from parcel LR No. 6845/154, a permanent injunction restraining them from interfering with the suit property as well as costs of the suit and interest.
9. Despite entering appearance vide a Memorandum of Appearance dated 9.8.2019, the 2nd Defendant did not file a defence and it did not participate in the suit.



The Evidence

Case for the Plaintiff

10. The Plaintiffs called 6 witnesses to testify. Additionally, by consent of the parties, the Plaintiffs' 16 affidavits in the bundle dated 8.2.2024 were admitted as evidence.
11. The Plaintiffs' 1st witness, PW1 was the 9th Plaintiff (Thomas Ndegwa Kamau). He adopted his witness statement dated 30.11.2018 as his evidence. He produced documents in the Plaintiffs' list of documents dated 30.11.2018 as P. Exhibit 1 (bundle running from page 1-234).
12. In his witness statement, he avers that sometimes in January 2011, he purchased a sub-plot No. 13 hived from LR No. 6845/154, Embakasi III from one Stephen Njuguna Kamau for ksh.415, 000/= which he paid in full.
13. That prior to entering into the transaction, he obtained confirmation from the officials of the 2nd Defendant (hereinafter Tafuta) that Stephen Njuguna Kamau's ownership of the plot and his ownership certificate No. 1135/E3 were genuine. He paid ksh. 20,000/= to Tafuta for transfer approval. He avers that after purchasing the plot, he fenced it and none of the Defendants has ever claimed the said plot from him.
14. In cross-examination, PW1 stated that when he purchased his plot in January 2011, he was not shown a court order issued in ELC 626 of 2009 stopping any subdivision of LR 6845/154. That he was hearing of the court order at the time of testifying.
15. He avers that when he was purchasing the plot, he went with the seller (Stephen Njuguna) to Tafuta where he confirmed through the certificate that the seller was the owner of the land.
16. Referred to the orders of the court in ELC 626 of 2009 between the 1st and 2nd Defendant that; "...the Defendant shall vacate LR No. 6845/154 within 60 days..", he admitted that as per the judgment, Tafuta had no land to sell and if he had known of the said judgment, he could not have purchased the Plot No. 13 from Stephen Njuguna.
17. In re-examination, PW1 stated that he was not a party to the case ELC 626 of 2009, and that Tafuta did not disclose to him the existence of the said case.
18. PW2 is Benson Onyango Osuga (16th Plaintiff). He adopted his witness statement dated 30.11.2018 as his evidence. He states that sometimes in March and April 2006, he purchased sub plot No. 23 and 24 of LR No. 6845/154 Embakasi from Tafuta for ksh.300,000/=.
19. That he was issued with receipts and 2 ownership certificates being registration No. E101284, Certificate No. 1145/E3 and registration No. E101284 certificate No. 1149/E3. At that time, the directors and officials of Tafuta confirmed that they were in the process of completing survey, subdivision and title processing formalities for LR No. 6845/154.
20. That he took possession of the plots and put up a double storey residential property which he occupies with his family. That jointly with the plaintiffs, they have mobilized resources and undertaken developments and turned their plots into a secure gated community which they have named Green view court which action has increased the value of the suit land.
21. He states that as per a joint valuation of LR No. 6845/154 carried out by Tysons Limited, the market value of his plots No. 23 and 24 was ksh.15 million as at 18.6.2018 which value continues to increase.



22. He also states that prior to sometime around 23.2.2018 when “eviction notices’ purported to be issued in execution of a decree issued in ELC No. 626 of 2009 were pasted at various places within Green View Court Estate, he had no knowledge of the existence of a court case challenging the 2nd Defendant’s ownership of the suit parcel.
23. PW2 produced a copy of report dated 9.7.2007 by Circuit Valuers as P. Exhibit 2. He pointed out that at page 4 of the report, it is stated that; “ the suit property has been subdivided into approximately 34 sub plots of 40x100 some are developed, construction is going on within 2 sub plots...” He also produced a report dated 11.6.2011 prepared by Falcons Taloni Investigations titled; “investigations on LR 6845/154 Utawala Estate” as P. Exhibit 3. He avers that in their bundle of documents already produced as evidence, the documents at page 103-107 relate to his property.
24. In cross-examination, PW2 stated that he owns the company listed as the 33rd plaintiff, but the said company is no longer active, so he was testifying for himself only as plaintiff No. 16.
25. He avers that when he purchased his plots, he did not do an official search. That he does not know the value of his 2 plots but the valuers estimated it at ksh.18 million.
26. Referred to page 17 of the judgement in ELC No. 626 of 2009, he stated that it reads that; “... the Plaintiffs have proved their case...” and that the Defendant in that case was the current 2nd Defendant (Tafuta).
27. Referred to the title to the suit land, PW2 stated that it shows the 1st Defendant is owner, and that the 2nd Defendant’s name is not on the title. However, when they purchased the suit land, the only name they knew was Kiarie Kirimire (1st Defendant’s husband) and that there was a sale agreement between the said Kiarie and the 2nd Defendant but he did not have it in court.
28. Referred to page 16 of the judgment in, ELC No. 626 of 2009, he stated that it reads; “...The deceased didn’t enter into any agreement with the Defendant...”. He stated that the judge seems to have found that there was no agreement.
29. PW2 also reiterated that the last document in 1st defendants bundle (a caveat issued in the Standard Newspaper of 16.9.2009), did not come to his attention. Similarly, in reference to the second document in 1st defendants bundle, PW2 stated that he was not aware of the restraining orders against Tafuta.
30. He added that in the Falcon report (P. Exhibit 3) dated 11.6.2011, he had built the structures seen at page 107 (a storey building).
31. In re-examination, PW2 stated that he was not a party in ELC No. 626 of 2009, thus the orders issued therein are not directed to him and that he was not served with any documents in that matter.
32. PW3, is Boniface Kinuthia Wangai, the 24th plaintiff. He adopted his witness statement dated 30.11.2018 as his evidence. He states that in September 2009, he purchased Subplot No. 35 hived from LR 6845/154 for ksh.135, 000/= from Tafuta based on a subdivision scheme that was marketed to members of the public by that entity known as Tafuta.
33. That he was issued with receipts and ownership certificate registration No. E100975, certificate 1251/E3 dated 7.9.2009. That as per a valuation by Tysons Limited, the market value of his sub-plot and ongoing developments as at 18.6.2018 was ksh.4.6 million.
34. He also stated that he was not aware of the case ELC No. 626 of 2009, and he was not a party thereof. That he only heard about the case in year 2018. Like PW2, he stated that he is in possession of his plot and that he had invested heavily thereon.



35. In cross-examination, PW3 stated that though he got an eviction notice pasted on his wall, he has not left the suit property as he is waiting for Tafufa to give the way forward.
36. When referred to the 1st Defendant's title, he stated that the suit land belongs to her.
37. In re-examination, PW3 reiterated that his name is not mentioned in the other case. He also stated that the 1st defendant got her title on 4.8.2017.
38. PW4 is James Chege Gatai, the 27th plaintiff. He adopted his witness statement dated 30.11.2018 as his evidence. He states that in year 2004, he purchased sub – plot No. 38 of LR No. 6845/154 Embakasi from Tafuta at ksh. 125,000/=, paid the full purchase price and was issued with ownership certificates.
39. That in 2009, he lost his records and applied to Tafuta for re-issuance of ownership certificate of which he was issued with a replacement ownership certificate Registration No. 100922 certificate No.1109/E3 dated 21.10.2009.
40. He has always Tafuta to be the owner of the suit land, of which the latter assured him that it was processing a title of his subplot. He has ongoing developments which were valued at ksh.4.5 million by Tysons Limited as at 18.6.2018.
41. His evidence on 'eviction notices' arising out of ELC No. 626 of 2009 being pasted at various places within Green view court estate was similar to that of PW1-3. He added that the Plaintiffs had mobilized resources to establish and maintain common infrastructure within their gated community. (Green View Court Estate).
42. In cross-examination, PW4 stated that he purchased 1 plot from Tafuta in year 2004 and moved therein in year 2008 without doing a search. He stated that he did not know the whereabouts of Tafuta though he understands that it closed its offices. He was not aware that Tafuta had a dispute with the 1st defendant.
43. He stated that as things stand, the suit land belongs to Tafuta but according to the judgment in ELC No. 626 of 2009, the suit land belongs to the 1st Defendant.
44. Since there was no objection to production of the report dated 18.6.2018 by Tysons, it was produced as P. Exhibit No. 4 at the end of cross examination of PW4.
45. In re-examination. Pw4 stated that the suit land belongs to the 1st defendant.
46. PW5 was Maxwell Ochieng Oketch, the 15th Plaintiff. He adopted his witness statement dated 30.11.2018 and a further statement dated 20.11.2023 as his evidence. He produced 8 items from the Plaintiffs' further list of documents dated 20.11.2023 as P. Exhibit 5.
47. PW5 states that he was first introduced to Tafuta in August 2004 when it was marketing and selling plots hived out of LR No. 6845/154 and after it had successfully sold Tafuta I & II developments.
48. He states that before purchasing, he conducted a search which showed that LR No. 6845/154 belonged to Githunguri Njiru Farm 1966 Limited. Thereafter, he went back to Tafuta where he was shown a sale agreement between one Kiarie Kirimire and Tafuta.
49. That he was then introduced to the directors of Tafuta namely Stephen Mbithi and George Gachau whom he made a request to allow him meet Stephen Kiarie Kirimiri and the directors agreed.
50. That on 30.4.2004, he visited the offices of Tafuta at Nyota Building along Accra road and paid ksh.110,800/= being ksh.800/= as administrative and registration fees and ksh.110,000/= being the agreed price for plot 25 and he was issued with receipts and an installment passbook.



51. That on the same date, he met the directors of Tafuta at the company's offices together with a gentleman who was introduced as Stephen Kirimire and present were 2 men who were mentioned to be his sons. That later in February 2005, he purchased another plot 22 for ksh. 120,000/= which he paid in 7 installments from 3.2.2005 to 29.6.2006.
52. He states that he constructed his home on Plot No. 22 and sold Plot No. 25 to the 17th Plaintiff herein. That while constructing his house, he would occasionally meet Stephen Kirimire and a director of Tafuta known as George Gachau socializing and drinking within Utawala and sometimes he would meet him in the company of his wife or sons but has never met him in the company of the 1st Defendant.
53. That further, Stephen Kirimire used to pass through Green View court estate on his way to inspect his other portion of land he had purchased from Githunguri Njiru Farm and in all their encounters, at no time did Stephen Kirimire or his family raise complaints about people constructing on his land without authority.
54. Just like PW1-PW4, PW5 stated that he became aware of ELC 626 of 2009 after eviction notices were pasted on walls in February 2018.
55. He also states that the Plaintiffs filed an application in ELC No. 626 of 2009 seeking orders of stay of their eviction from their properties, but Hon. S. Okong'o declined to grant the said orders on the basis that his judgment of 9.2.2018 did not apply to any person who had not been enjoined in that suit as a party.
56. He avers that on 11.3.2019, the 1st Defendant's sons accompanied by the directors of Tafuta went to the estate seeking audience with residents. That they left him with their details and copies of their ID numbers. They were accompanied by a man who introduced himself as Nicholas Njenga alias Pastor who said he was a pastor with Greater Glory Ministry. That they held discussions where the 1st Defendant's sons proposed to settle the disputes over ownership of the suit land in a manner that persons occupying the suit land would negotiate to buy it by paying the balance that was due to the late Stephen Kirimire and an additional amount to the 1st Defendant as the current owner.
57. He states that after he had shared the said deliberations with his co-plaintiffs herein, some of them met the 1st Defendant's sons and Pastor Njenga to settle the matter, but their discussions did not bear fruits as the said pastor insisted that the basis for any negotiations had to be that occupiers pay full current market value of their plots.
58. PW5 stated that during the time he had been on the suit land, he never met the 1st defendant until the time when eviction notices were issued.
59. In cross-examination, PW5 stated that the registered owner of LR 6845/154 is unknown to him but when he bought his plot, the registered owner was Kiarie Kirimire. He further states that there was no title deed and the 1st Defendant was not in the picture as Kiarie Kirimire had another wife. However, the land is now registered in the name of the 1st defendant.
60. That additionally, George Gachau, a director of the 2nd Defendant informed him that he was a close friend and neighbors with Mr. Kiarie Kirimire, thus this gave him confidence to purchase the land.
61. Referred to the judgement in ELC No. 626 of 2009, he stated that according to the said judgment, Kiarie Kirimire died in 1993, thus directors of the 2nd Defendant may have given him the wrong information regarding the identity of Kiarie Kirimire since he was meeting Mzee Kiarie in years 2003-2004. He added that he has tried to follow up their issues with Tafuta who are operational, but their offices are ever locked.



62. Referred to page 17 of the judgment in ELC No. 626 of 2009, he stated that there is a conclusion that “the Plaintiffs have proved their case, while Defendant’s claim is not proved.”
63. In re-examination, PW5 stated that, he was not a party in the other case and that he is not a member of Tafuta. He clarified that the directors of Tafuta, Stephen Mbithi and George Gachau are the ones who introduced him to Kiarie Kirimire, but he can’t recall the English name of the latter. He has however been shown a judgment indicating that Kiarie Kirimire died in 1993.
64. The Plaintiff’s final witness, PW6 was Tarsilla Mukwanjiru Kibaara, an ordained reverend of the 34th Plaintiff. She adopted her witness statement dated 21.11.2023 as her evidence. She avers that the 34th Plaintiff church identified sub-plots marked numbers 2, 3, 4, 5, 6 and 7 on the 2nd Defendant’s development plan as being very suitable to establish a church but the subplots had already been sold by the 2nd Defendant to other persons.
65. That the church was introduced to the buyers and it purchased plots 2, 3, 4, 5 and 6 from them at ksh. 250,000/=, 250,000, 125,000/=, 250,000/=, and ksh 1.2 million respectively, of which the church took possession, paid the buyers in installments and upon payment of transfer fees levied by Tafuta, it was issued with the company’s ownership certificates.
66. That around 2012, the church also purchased Plot No. 7 from one Mwika Sebastian for ksh. 1,450,000/= and paid this amount in full, but the process of transferring the 2nd Defendant’s ownership certificate from Mwika Sebastian to the church was not finalized, even though the church has been in possession, occupation and use of the plot from 2012 to date.
67. That at the time of purchasing the subplots, the directors and officials of Tafuta confirmed that they were in the process of completing survey, subdivision and title processing formalities.
68. She avers that the church has developed and erected a church sanctuary and a school block on its subplots and jointly with the co-plaintiffs herein, it has undertaken developments to create, establish and maintain common infrastructure in a secure gated community which they have named Green View Court.
69. She also states that as at 18.6.2018, the combined market value of sub-plots 2-7 with developments thereon was assessed at ksh.45 million. And as per P. Exhibit 3, the church has been on the suit parcel. Like PW1-5, she states that she learnt about ELC No. 626 of 2009 in 2018 when eviction notices were pasted within their estate.
70. In cross-examination, PW6 stated that the 34th Plaintiffs’ plots current monetary value is unknown to her. That further, the church is on the suit land courtesy of Tafuta, and that there was no information that they were illegally on the said land.
71. She stated that by the time they were buying more parcels in 2012, they were not aware of any court orders barring any dealings in that land until 2018 when they saw a notification on the roadside.
72. She stated that she has never known the 1st Defendant, she only heard that she owns the suit land in court. She stated that the church had done due diligence by going to Tafuta’s offices where they were shown the sale agreement between Samuel Kirimire Kiarie and Tafuta. As at that time, titles were not out in that Embakasi area.
73. In re-examination, PW6 stated that the church owns 6 plots in the suit land. She reiterated that she heard of the 1st defendant in 2018 and that the 1st Defendant’s title is dated 4.8.2017 way after the Plaintiffs had acquired their plots and developed them.



74. On 16.1.2024, parties entered a consent to the effect that statements of plaintiffs who had not testified would be admitted as affidavit evidence in line with the provisions of Section 88 of the [Civil Procedure Act](#) as read with Order 19 Rule 1 which allows court to accept affidavit evidence. Subsequently, 16 affidavits were filed on 8.2.2024 pursuant to the consent.

Case for the 1st Defendant

75. By consent of the advocates for both plaintiffs and the 1st defendant, the evidence of the latter was taken at an early stage of the trial on 8.3.2023 on account of her age. The said 1st Defendant (Mary Njeri Kiarie) testified as DW1 and she adopted her witness statement filed on 17.12.2018 as her evidence. She produced the 6 items in her list of documents of the same date as D. Exhibit 1-6.

76. Her case is that she is one of the administrators of the estate of her husband, [Samuel Kiarie Kirimire \(deceased\) vide Succession Cause No. 375 of 1994](#).

77. That prior to his death, her husband was the lawful allottee of Plot 225 Njiru measuring about 1.666 hectares and after subdivision from the mother title, the parcel is now known as LR No. 6845/154.

78. That in the year 2007, Githunguri Njiru Farm (1966) Ltd asked members to pick their deed plans from their offices. That she went to pick the same in the company of her sons and she engaged a surveyor who helped her to locate the parcel. When they got to the suit land, they realized that it had been encroached by land grabbers who were unknown to her and upon inquiry, they told her they had been sold plots hived from the suit land by Tafuta.

79. Upon conducting due diligence, she discovered that the directors of Tafuta were George Matenjwa and Stephen Mutua Mbithi which was shocking as the former individual was their area counselor at Karuri ward.

80. Subsequently, she filed ELC 626 of 2009 which was determined in her favour in a matter where Tafuta herein was fully represented. That during the proceedings, she was issued with injunctive orders on 18.5.2010 which she served the occupants of the suit parcel from house to house. That Githunguri Njiru Farm (1966) Ltd also did severally issue caveat emptor on the local daily for all buyers to be aware.

81. She states that she holds the suit parcel as a trustee for her children and has never subdivided or sold it to anyone.

82. In cross-examination, DW1 reiterated that she started following up on the suit parcel in 2007 accompanied by her sons David Ng'ang'a and Simon Njenja and that she sued Tafuta who had sold plots to the Plaintiffs.

83. She stated that it is not true that the court in ELC 626 of 2009 directed the occupants of the suit parcel to be joined in proceedings in the said matter. That even though she did not sue them, she did not allow them to stay on her land. She added that in the matter, experts gave evidence and produced reports and the court concluded that she owns the suit parcel.

84. In re-examination, DW1 reiterated that they served the occupants of the suit parcel severally but they would even tear court orders.

85. She also stated that Njiru Githunguri Limited was a party to the proceedings in ELC 626 of 2009.

Submissions

86. The Plaintiff's submissions are dated 15.4.2024 where they address the following issues;



- a. Was the right and entitlement of the 1st Defendant's deceased husband, or any person claiming under him or his estate, to the ownership of the suit property extinguished under Section 17 of the *Limitation of Actions Act*?
 - b. Are the Plaintiffs' joint and individual interests in the suit property overriding interests enforceable under Section 28 of the *Land Registration Act*, No.3 of 2012?
 - c. Which party succeeds on the rival claims?
 - d. Who should bear costs of the suit?
87. On the 1st issue, it is argued that Githunguri Njiru Farm was the registered legal proprietor of the suit property and that in 1988, the 2nd defendant had possessed the land and commenced subdividing it into subplots for sale to 3rd parties, thus by virtue of Section 9 (1) of the *Limitation of Actions Act*, Githunguri Njiru Farm's right of action to recover the land lapsed in the year 2010 yet it did not file any suit until 11.6.2013 when it was joined in ELC 626 of 2009 vide an amended plaint dated 28.5.2013 and by that time, its right to title over the suit property had been extinguished.
88. It is also argued that by operation of Section 17 of the *Limitation of Actions Act*, the 1st Defendant's beneficial claim against Tafuta Development lapsed on 21.8.2005, 12 years after her husband's death on 22.8.1993 such that her case against the 2nd Defendant filed in 2009 was filed after her rights had been extinguished. Thus the certificate of title in the name of the 1st defendant is invalid.
89. On the 2nd issue, the Plaintiffs submit that since they have been in possession, their interests fall within the ambit of overriding interests under Section 28 of the *Land Registration act* and need not be recorded on the register. That by operation of Section 24 and 25 of the *Land Registration Act*, the certificate of title issued to the 1st Defendant as personal representative of her deceased husband is and remains subject to all such overriding interests.
90. It is argued that even under Section 20 (1) of the *Limitation of Actions Act*, the judgment in the 1st Defendant's favour issued in ELC 626 of 2009 cannot give her a better benefit than the Plaintiffs.
91. The Plaintiffs also invite the court to draw adverse inference from the 1st Defendant's failure to produce original counterparts of P. Exhibit 2 and 3 despite the fact that the Plaintiffs had issued her with a notice to produce. In this regard, the case of Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR is cited. The case of Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR is relied upon to buttress the claim of constructive trust.
92. On the 3rd issue, it is submitted that the Plaintiffs are entitled to the orders sought since the 1st Defendant failed to plead any legal/statutory defense to the claims under Section 17 of the *Limitation of Actions Act* and Section 28 of the *Land Registration Act*. The case of Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR is relied upon to argue that the Plaintiffs have a better title as they are in possession of the suit land.
93. It is also contended that if the court deems fit to grant prayer (e) and (f) of the plaint, then it ought to be granted against the Defendants jointly and severally since the 1st Defendant has exhibited wrongful conduct notwithstanding guidance from the court in ELC 626 of 2009 that the Plaintiffs herein be enjoined in the said suit.
94. The 1st Defendant's submissions are dated 4.4.2023 (the year should be 2024) where they address the following issues;
- i. Whether the 1st Defendant is the registered owner of the suit land LR No. 6845/154?



- ii. Whether the 1st Defendant has proved her case for eviction?
 - iii. Who bears the cost of this suit?
95. On the 1st issue, it is submitted that the issue of a sale agreement for LR No. 6845/154 between the deceased (1st Defendant's husband) and the 2nd Defendant was addressed in ELC 626 of 2009 – Nairobi where it was subjected to forensic examination and as per the judgment, it was declared a forgery.
 96. It is argued that since the 1st Defendant possess a certificate of title for the suit land, courts are mandated to consider it as evidence of ownership, and it can only be challenged on grounds stipulated under Section 26 of the [Land Registration Act](#) or is found to fall within the exemption of protection under Article 40 (6) of [the Constitution](#).
 97. It is submitted that Section 24 and 25 of the [Land Registration Act](#) affords the Plaintiff the right to peaceful enjoyment of the suit land, thus the Plaintiffs ought to vacate as they have committed acts of trespass as defined under Section 3(1) of [Trespass Act](#).
 98. It is also the 1st Defendant's submission that the alleged interference with the suit parcel from 2004 when the Plaintiffs allege to have purchased it amounts to intermeddling with the estate of Samuel Kiarie Kirimire who died in 1993.
 99. That in any case, Plaintiffs failed to present any evidence of ownership of the land by the alleged Tafuta who did not participate and their alleged ownership certificates are incapable of conveying interest in land.
 100. The 1st Defendant relies on the cases of [Teresiah Wanjiku Koigi v Lincoln Wariua Nginyo \[2022\] eKLR](#), [Dr. Joseph NK arap Ngo'k v Justice Moijo Ole Keiwa and others Nairobi Civil Application No. Nai 60 of 1997 \(unreported\)](#), [Wreck Motors Enterprises v The Commissioner of Lands and others Nairobi Civil Appeal No. 71 of 1997 \(unreported\)](#) as well as [Nairobi Permanent Markets Society and others v Salima Enterprises and others Nairobi Civil Appeal No.185 OF 1997 \(Unreported\)](#).

Determination

101. Having regard to the rival pleadings, evidence and submissions, I deem it fit to frame the issues for determination as follows;
 - a. Whether the Plaintiffs have a legitimate claim to the suit land by way of adverse possession or constructive trust in light of the judgment issued by the court in ELC 626 of 2009. If so, what reliefs are available to them.
 - b. Whether the orders of eviction and permanent injunction sought by the 1st defendant are tenable.
 - c. Who should meet the costs of the suit.
102. The 34 Plaintiff's claim ownership of various plots hived from the land known as LR No. 6845/154 Embakasi currently registered in the name of the 1st defendant. All their alleged rights and interests are derived from the entity known as Tafuta, the 2nd Defendant whom they either directly purchased the plots from, or they purchased the plots from persons who had in turn purchased the said plots from Tafuta, a party who did not participate in the proceedings herein despite entering appearance.
103. The 1st Defendant claims ownership of the entire suit parcel, by dint of registration. The records indicate that she sued Tafuta in ELC 626 of 2009 over the same subject matter. The said case was heard and concluded by Hon. Judge S. Okong'o on 9.2.2018, where he found that the Plaintiffs in that matter



(who are the 1st Defendant herein) and Githunguri Njiru Farm (1966) Ltd had proved their case and further ordered that the Defendant in that matter, who is the 2nd Defendant herein (Tafuta) be evicted.

104. It is trite law that he who alleges bears the burden of proving, see - Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR. To this end, the provisions of Section 107 of the Evidence Act stipulate 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. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

105. While Section 109 there of further provides that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

106. Apparently, it is the final orders of eviction issued in ELC 626 of 2009 that triggered the filing of this suit. The 34 Plaintiffs claim that they were not parties to the aforementioned matter and are in occupation of their respective plots thus evicting them would be tantamount to condemning them unheard.

107. This court is being called upon to consider whether the title to the suit land held by the 1st defendant is encumbered by the doctrine of adverse possession or constructive trust in favour of the plaintiffs. However, these are issues beyond this court’s purview in light of the findings of the court in ELC 626 of 2009 that Tafuta had no rights to the suit property. To delve into the aforementioned issues when the claims of the plaintiffs are anchored on the none existent rights and or interests in land held by the 2nd defendant (Tafuta) would be tantamount to sitting on appeal in respect of the older judgment.

108. I am guided by the holding in Evans Simiyu Sundwa & 97 others v Tawai Limited & 16 others [2022] eKLR, where the Court, faced with a similar issue stated as follows;

“In situations where a party raises the point that he was not heard, he is in essence saying that there was a competent forum which considered the same issues as the ones he is raising or they were directly or indirectly substantially in issue in that former matter, but he was not given opportunity to be heard. Such opportunity could have been denied by virtue of his not being accorded a chance to speak if he was in the proceedings or he was left out of the proceedings. If the latter is, that is to say, that he was left out of the proceedings, he can only go back to the same forum, inform it that he should have been in the proceedings but for reasons beyond his control (not adverted to) he did not find himself in the proceedings, and then request that he be heard.”

109. In light of the foregoing, the plaintiffs are estopped from trashing the judgment given by a court of competent jurisdiction simply because they were not parties in that other matter. Needless to say that the efforts made by the 1st defendant to ward off the trespassers are quite manifest, for instance there was a “caveat emptor” lodged by the owners of the original mother title, the Githunguri Njiru Farm Ltd, in 2009, as well as the injunctive orders issued on 18.5.2010 in 626 of 2009 sought by the current 1st defendant.



110. “Ex nihilo nihil fit” so goes a latin maxim which simply means “out of nothing comes nothing”. A competent court has rendered a decision that Tafuta Had Nothing!. It follows that Tafuta had no title from which a claim of adverse possession could be derived from. In any event, the filing of the suit ELC 625 of 2009 by the true owner interrupted any claim of adverse possession; See James Maina Kinya v Gerald Kwendaka [2018] eKLR.
111. By adverse possession is meant a possession which is hostile under a claim or color of title – see Kweyu v. Omuto [1990] KLR. In the case at hand, plaintiffs do not recognize 1st defendant’s title, where as Tafuta had no title at all. Thus the claim of adverse possession fails.
112. On the same breadth, the claim of constructive trust fails, since at no time did Tafuta hold the suit land in a fiduciary capacity for the benefit of the purchasers. And certainly, the 1st defendant does not hold the suit land in trust for the plaintiffs as the two parties never heard any relationship which can be construed as having given rise to a trust.
113. This far, the claims of the plaintiffs over the suit property as set out in prayer (a) – (d) fails.
114. Are the plaintiffs entitled to the alternative prayer for compensation?. Again the fall back is Section 107 of the *Evidence Act*. Paragraph 11 of the plaint captures the claim of the plaintiffs as follows; “that the defendants jointly and separately acquiesced and permitted the plaintiffs to occupy the suit property”. That averment is not supported by the evidence in so far as the claim against the 1st defendant is concerned. If anything, the judgment in the case ELC 626 of 2009 indicates that the 1st defendant herein had sought the courts intervention to prevent any further disposal of the suit property by the current 2nd defendant (Tafuta). To that end, an injunction was duly issued. Thus prayer (e) and (f) in the plaint too fails as against the 1st defendant.
115. As regards the alternative claim against the 2nd defendant, it is pertinent to note that the plaintiff’s claims to the land are directly rooted to Tafuta. The documents titled “ownership certificates” held by the plaintiffs emanated from the 2nd Defendant. Sadly, the said documents are nothing but mere papers as Tafuta had nothing to sell. Even the searches conducted by some of the plaintiffs (see paragraph 3 of the witness statement of PW5 Maxwell Ochieng) reveals that the Mother title was registered in the name of Githunguri Njiru, and the specific share of the suit property therein was owned by Kirimire.
116. The foregoing is a classic case of lack of conduct of due diligence on the part of the plaintiffs. The transactions carried out by the plaintiffs and Tafuta were unlawful. The particular individuals who were peddling the narrative that “Mzee Kiarie Kirimire”, the real owner of the land by then had agreed to sell the land are known to the plaintiffs. They are two George Gachau and Stephen Mbithi. They are the ones who in year 2003 or there about presented “Mzee Kirimire”, as the seller of land to Tafuta yet the said Kirimire had died almost a decade earlier in 1993!. It is the finding of this court that without the real culprits, (the likes of Gachau and Mbithi) on board this suit, then no award of compensation award can be given to the plaintiffs by Tafuta. Any such award of damages to the plaintiffs in absence of these culprits would be tantamount to sanitization of conmanship.
117. In light of the judgment delivered in ELC 626 of 2009, and taking into account that the claims of the plaintiffs have failed, it follows that the occupation of the suit land by the plaintiffs amounts to trespass. This case has some eerie resemblance to the case of Obade & 299 others & 10 others v Kirima & 60 others (Environment and Land Case Civil Suit 1257 of 2014 & 252 of 2011 & Environment & Land Case 509 & 850 of 2014 & 1496 & 1318 of 2013 (Consolidated)) [2023] KEELC 20868 (KLR)



(23 October 2023) (Judgment), (The Kirima case) where the land of Gerishon Kirima was occupied by third party purchasers, where the court held thus;

“The plaintiffs are in the circumstances entitled to an injunction to restrain the trespass and an order for the eviction of the defendants from the portion of the suit property occupied by them. The plaintiffs are also entitled to damages for trespass”.

118. Similarly, the occupants of the suit property in the instant case are trespassers, hence the orders sought by the 1st defendant for their eviction along with an order of permanent injunction are merited.
119. On costs, I find that the 1st defendant has for decades been denied use of her land courtesy of the plaintiffs, and the entity known as Tafuta. As at the time of her testimony she stated that she was 95 years old. Thus the plaintiffs have harangued the nonagenarian right upto her sunset years. The least the court can do is to award her the costs of the suit.

Final Orders

- i) Plaintiffs suit is hereby dismissed with costs, plus interests on costs at court’s rates to the 1st defendant.
- ii. The counterclaim of the 1st defendant is allowed in the following terms;
 - a) An order permanent injunction is hereby issued against the plaintiffs, their beneficiaries, tenants agents, servants, purchasers, and employees from trespassing, living on, or interfering in any other way whatsoever with parcel L.R Number 6845/154.
 - b. An order is hereby issued for the eviction of the plaintiffs, their beneficiaries, agents, servants tenants, purchasers and employees from parcel L.R. No. 6845/154, and any building erected therein is to be demolished within a period of 45 days from the date of delivery of this judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Elphine Maangi holding brief for Mugo for Plaintiffs

Court assistant: Eddel

