



**Kihara & 2 others v Njehia & 4 others (Environment & Land Case E014 of 2021) [2024] KEELC 5106 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5106 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE E014 OF 2021**

**LN GACHERU, J**

**JULY 4, 2024**

**BETWEEN**

**NAFTARI NDUMBI KIHARA ..... 1<sup>ST</sup> PLAINTIFF  
BEATRICE MUMBI KARIUKI ..... 2<sup>ND</sup> PLAINTIFF  
JACKSON NJUGUNA NDIRANGU ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**NJUGUNA NJIHIA ..... 1<sup>ST</sup> DEFENDANT  
KAMAU NJIHIA ..... 2<sup>ND</sup> DEFENDANT  
NDIRANGU NJIHIA ..... 3<sup>RD</sup> DEFENDANT  
MWANGI NJIHIA ..... 4<sup>TH</sup> DEFENDANT  
MAINA NJIHIA ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs herein brought this suit against the Defendants herein vide a Complaint dated 25<sup>th</sup> May 2021, and sought for Judgment against the said Defendants, jointly and severally for the following orders;
  - a. An order of eviction of the Defendants, either by themselves, servants, agents or whomsoever claiming through them from all those parcels of land known as Loc 2/ Makomboki/ 1877, Loc 2/ Makomboki/ 1876, Loc 2/ Makomboki/ 1881, Loc 2/ Makomboki/ 1882 and Loc 2/ Makomboki/1883.
  - b. An order of permanent and /or perpetual injunction against the Defendants, either by themselves, servants, agents and / or whomsoever may be claiming through them from interfering with the Plaintiffs’ absolute ownership of all those parcels of land known as Loc 2/ Makomboki/ 1877, Loc 2/Makomboki/



1876, Loc 2/ Makomboki/ 1881, Loc 2/ Makomboki/ 1882 and Loc/ Makomboki/ 1883.

- c. Mesne profits.
- d. Costs and interests of the suit.

2. In their claim, the Plaintiffs averred that the 1<sup>st</sup> Plaintiff is the registered and absolute owner of all that parcel of land known as Loc 2/ Makomboki/ 1877, registered in his name on 4<sup>th</sup> November 2015, whereas the 2<sup>nd</sup> Plaintiff is the registered and absolute owner of Loc 2/ Makomboki/ 1876, from the same date, and the 3<sup>rd</sup> Defendant got registered as the absolute owner of the suit properties Loc 2/ Makomboki/ 1881, 1882 and 1883.
3. They also averred that the suit parcels of land known as Loc 2/ Makomboki/ 1876, and 1877 are subdivisions of Loc 2/ Makomboki/ 116 and Loc 2/ Makomboki/ 1881, 1882, 1883 are subdivisions of Loc 2/ Makomboki/ 1874, which is also a subdivision of Loc 2/ Makomboki/ 116, which was initially owned by the parties grandfather, Mubia Wairuko.
4. It was their contention that land parcel No Loc 2/ Makomboki/ 116, ceased to exist upon subdivision into Loc 2/ Makomboki/ 1874 in the name of the 3<sup>rd</sup> Plaintiff, Loc 2/Makomboki/1875, in the name of Jane Njeri Kimani(deceased), Loc 2/Makomboki/ 1876, in the name of the 2<sup>nd</sup> Plaintiff and Loc 2/ Makomboki/ 1877, in the name of the 1<sup>st</sup> Plaintiff.
5. The Plaintiffs also contended that the root of their titles can be traced in Succession Causes which were prosecuted in Nakuru High Court, being Succession Causes Nos 500 and 501 of 2010, Nairobi High Court Succ Cause No 243 of 1999, as well as Nyahururu Principal Magistrates Court Succession Cause No. 34 of 2010, and the outcomes of these proceedings have never been challenged in any Appeal.
6. It is the Plaintiffs' case that despite the suit properties belonging absolutely to the Plaintiffs, the Defendants have trespassed onto the said parcels of land, and/or have refused to give vacant possession to the Plaintiffs. Further that the Defendants have instead been using the said parcels of land for various activities to the detriment of the Plaintiffs.
7. Further, that the Defendants have used constant threats of violence and connivance with the local national government and administration to prevent the Plaintiffs from accessing and using their properties, despite demand and notice to sue.
8. It was the Plaintiffs claim that the Defendants' actions have caused the Plaintiffs to suffer loss and damages, and they continue to suffer the same. Therefore, the Plaintiffs claim is for the Defendant to yield vacant possession to the Plaintiffs in respect of the above-named suit properties. The Plaintiffs also claim mesne profits from the Defendants herein.
9. The Plaintiffs also admitted that there are various unprosecuted applications by the Defendants in Nairobi Succ Cause No. 243 OF 1999, and Nakuru High Court Succ Causes No. 501 of 2010, as well the Succession Cause No 34 of 2010, at Nyahururu Principal Magistrates Court.
10. The suit is opposed by the Defendants who filed their Statement of Defence dated 9<sup>th</sup> June 2021, and averred that they have challenged the Succession Causes enumerated in the Plaint and they vehemently denied that there are unprosecuted applications in the said suits. Further that the courts have variously barred the Plaintiffs from interfering with the Defendants' quiet enjoyment of the suit properties.



11. Further, the Defendants denied all the claims made by the Plaintiffs, such as suffering loss and damage and that there is no justification for vacant possession to the Plaintiffs. They claimed that the Plaintiffs are illegal entrants, who are hell bent to take possession of suit premises through fraudulent means.
12. The Defendants also claimed that there are several suits challenging the fraudulent transfer of ownership of the suit properties to the Plaintiffs, and as such, the matter is sub-judice and an abuse of court process. The Defendants denied having trespassed onto the suit properties. They also averred that the doctrine of adverse possession should apply as they are all adults over the age of 30 ages, and were born on the suit property, being Loc 2/ Makomboki/ 116, and have been in occupation of the said land since birth.
13. That the Defendants have only known the said suit land as their home, and they have enjoyed peaceful and uninterrupted occupation and possession, until recent past when the Plaintiffs started harassing and claiming ownership of the said property, Loc 2/ Makomboki/ 116.
14. The Defendants further denied ever committing any acts of violence towards the Plaintiffs, and even averred that the Plaintiffs have unsuccessfully manipulated the local authorities to interrupt the Defendants' peaceful occupation and possession of the suit property.
15. Therefore, the Defendants denied the Plaintiffs' claim and urged the court to dismiss the instant suit with costs.
16. The suit proceeded via viva voce evidence, wherein the Plaintiffs called two witnesses to support their claim and the Defendants called five witnesses to advance their case/ and or Defence.

#### **Plaintiffs Case.**

17. PW1, Jackson Njuguna Ndirangu, told the court that he is the 3<sup>rd</sup> Plaintiff and lives in Nyandarua County. He adopted his witness statement dated 10<sup>th</sup> July 2023, as his evidence in chief. He also produced his list of documents as P. Exhibit1. He insisted that the suit properties, Loc 2/ Makomboki/1881, 1882 and 1883 are owned by him and that the Defendants have refused to give him vacant possession thereof.
18. In his witness statement, PW1, testified that the Defendants are his cousins by dint of the fact that their father Njihia Mubia, was a brother to the Plaintiffs' father, Ndirangu Mubia, who were sons of Mubia Wairuko, the initial proprietor of land parcel Loc 2/ Makomboki/116, the suit land.
19. Further, that the suit land was allocated to their common grandfather, Mubia Wairiuko, during the land adjudication in Muranga County, together with land parcel No Loc 2/Makomboki/ T.48. Loc 2/Makomboki/117 and Loc 2/Makomboki/116.
20. Further that their grandfather chose land parcel No Loc2/ Makomboki/ 117, to be demarcated and registered in the name of the father to the Defendants, Njihia Mubia, while Loc 2/ Makomboki/T.48 and Loc2/Makomboki/116, was demarcated and remained in their grandfather's own name.
21. It was his further evidence that when the father to the Defendants was allocated Loc 2/ Makomboki/117, then he was excluded from the other parcels of land, and therefore, the father to the Defendants did not have any interest over land parcel No Loc 2/Makomboki/ 116, and Loc 2/ Makomboki/ T.48. That the said parcels of land remained for use by the Plaintiffs' father. However, greed engulfed the Defendants and they began litigations over the said parcels of land.



22. He claimed that the Defendants have no known recognisable claim to Loc 2/ Makomboki/ T.48, as well as Loc 2/ Makomboki/116, and that even in the succession proceedings, the Defendants recognised the property of their deceased father as Loc 2/ Makomboki/ 117, and no other.
23. Further, that the Defendants have no locus standi , to claim on behalf of their deceased father, given that they are not the administrators of the said estate, as his father had another set of family, and which family had not claimed anything from Loc 2/ Makomboki/ 116, because they have chosen to go by the truth.
24. He reiterated that he is the current registered owner of land parcels Loc 2/ Makomboki/ 1881, 1882, and 1883, which are the subdivisions of Loc 2/Makomboki/ 1887, which in itself was a subdivision of Loc 2/Makomboki/116, whereas the 2<sup>nd</sup> Plaintiff is the registered owner of Loc 2/ Makomboki/ 1876, which was also a subdivision of Loc 2/ Makomboki/116.
25. He urged the court to allow their claim.
26. When cross examined by counsel for the Defendants, PW1, confirmed that he has three title deeds for the suit properties, and the three properties are registered in his name. He further stated that the properties are being utilized by others, specifically the Defendants, as he has been prevented from using the said parcels of land.
27. He further testified that he was given the land by his father in a year that he could not recall. That he was born on the suit land in 1953, but later the family moved to Nyandarua County, and since then, he has never lived on the suit land. That his father used to utilize the land and he showed him the said parcel of land.
28. He also confirmed that the land initially belonged to his grandfather, Mubia Wairiuko, who had two wives, and the Defendants are his cousins, and that they are all grandchildren of the initial owner of the suit land. That the land is now being utilized by the Defendants, and that this matter has been in court for over 20 years.
29. It was his further testimony that the Defendants have prevented him from using the land. However, he sold some portion of land to Naftari, the 1<sup>st</sup> Plaintiff and Beatrice, the 2<sup>nd</sup> Plaintiff. He also confirmed that the Defendants live on the suit land, and they have built their houses thereon, but he did not know when they built the said houses/ structures.
30. In re exam, he testified that the Succession Cause NO. 243 OF 1999, was completed a long time, and the land was transmitted to his father through a court order. It was his further testimony that the case in Nairobi is succession one, and the current case is over ownership of the suit land, and thus the two cases are not the same.
31. PW2, Naftari Ndumbi Kihara, from Makomboki area of Kigumo Sublocation also adopted his witness statement dated 10<sup>th</sup> July 2023, as his evidence in chief. He also relied on the exhibits produced in court, and it was his evidence that he owns land parcel No Loc 2 Makomboki/ 877, which he purchased from Pw1, and his ownership was confirmed by the Court. He urged the court to allow his claim.
32. In cross exam, he stated that he is claiming interest over Loc 2/ Makomboki/ 877, and that he obtained that land during the confirmation of grant. He identified his title deed in court, which was issued on 4<sup>th</sup> November 2015. He was later evicted from the suit land in 2015, and he did not know about another case, nor about any Court order.
33. It was his evidence that he bought ¼ acre from the family of Daniel Ndirangu Mubia, who is the father to the 3<sup>rd</sup> Defendant. He claimed that he has never utilized the suit land since 2015, and the Defendants



have now built on the suit land, and that the Defendants were on the suit land when he bought the said land from the administrators of the estate of Daniel Ndirangu, but he was told they were licensees.

34. In re-exam, he stated that he had never been told about the court case in Nakuru High Court, as he had not been served with the court order, which changed or cancelled his suit land. That he tried to enter into the suit land in 2015, but he was chased away by the Defendants, who prevented him from entering into the suit land. He confirmed that there are no restrictions on the suit land since he searched it in June/ July 2023. He urged the court to allow his claim.

### **Defence Case**

35. DW1, Francis Mwangi Njihia, the 4<sup>th</sup> Defendant testified that the other Defendants are his brothers. He also testified that one of the Plaintiff is a purchaser of the suit land, and the others are his relatives.
36. He adopted his witness statement dated 7<sup>th</sup> Sept 2022, as his evidence in chief. He also produced the list of documents as his exhibits. He testified that when his father died, Mwangi Mubea took the title deed and the title deed was for Loc 2/ Makomboki/ 116, and he did not know how the other title deeds came about.
37. He testified that land parcel No, Loc 2/ Makomboki/ 116, was for Mubea Wairiuko, who was their grandfather, and is buried on the suit land. He claimed that there was no Succession cause filed before distribution of the suit land. However, there is a pending Succession Cause No 243 of 1999, and the said case is on-going.
38. That in the said Succession Cause, the assets for distribution included land parcel No Loc 2/ Makomboki/ 116, which is the suit property herein. It was his evidence that they have lived on the suit land since birth, and his parents were buried thereon, and other family members too.
39. He claimed that he has never seen any beacons on the suit land, and that they got their title deeds in 2015, and he did not know that the parcel of land had been subdivided. That the Plaintiffs wanted to evict them in 2015, but there is a court order to that prohibited the Plaintiffs from evicting them from the suit land. He denied the Plaintiffs' claim in totality.
40. When cross examined by counsel for the Plaintiffs, Dw1 claimed that Mwangi Mubea, was a step brother to his father. He also confirmed that the Succession Cause is still on going. He also confirmed that he filed Summons for revocation of Grant, which he filed in 1999. However, the grant was never revoked.
41. He also confirmed that he is the administrator of the estate of his father, Njihia Mubia(deceased), and there are five beneficiaries. It was his further testimony that when his father died, he was 8 years old, but he knew about the case, as his father told him about it. He confirmed that he knows all the land parcels in the name of Wairiuko, and that the suit land is his inheritance.
42. In re exam, he claimed that the case filed in Nairobi was dismissed, as they had no financial power to follow it up. That the Succession Cause is over their grandfather's parcel of land, and the grant in Nairobi case was issued to Njuguna.
43. Dw2, Samuel Maina Njihia, stated that he is one of the Defendants, and he has allowed the 5<sup>th</sup> Defendant to give evidence on their behalf.
44. DW3, James Ndirangu Njihia, the 3<sup>rd</sup> Defendant also confirmed that the other Defendants have authorized the 5<sup>th</sup> Defendant to give evidence on their behalf.



45. Dw4, David Kamau Njihia, the 2<sup>nd</sup> Defendant also stated that they authorized the 5<sup>th</sup> Defendant to give evidence on their behalf.
46. DW5, John Njuguna Njihia, the 1<sup>st</sup> Defendant confirmed to have authorized the 5<sup>th</sup> Defendant to testify on his behalf.
47. Thereafter the parties filed written submissions to support their respective positions. The Plaintiffs filed their submissions dated 8<sup>th</sup> Feb 2024, through the Law Firm of Kivuva Omuga & CO. Advocates and raised various issues for determination.
48. On who are the registered proprietors of all those parcels of land known as Loc 2/ Makomboki/ 1877, 1876, 1881, 1882 and 1883, it was submitted that the Defendants did admit in their Statement of Defence that the Plaintiffs are the registered owners of the above suit properties, and as provided by section 61 of the *Evidence Act*, Order 2 of the Civil Procedure Rules, no proof is required by way of evidence, since the facts have been admitted by the Defendants that the Plaintiffs are the registered owners of the above named parcels of land.
49. On the issue of whether the said registration of the Plaintiffs as the proprietors of the suit land was procured by fraud and/ or illegality, it was submitted that though the Defendants pleaded that the Plaintiffs acquired registration of the suit land fraudulently and clandestinely, the Defendants did not adhere to the provisions of Order 2 rules 4 and 10 of the Civil Procedure Rules, wherein they were supposed to specifically plead the specific fraud and illegality and also provide particulars of the said fraud/ illegality.
50. Reliance was placed on the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another (2000) eklr*, where the Court of Appeal held;
- “it is mandatory requirement of law that any allegation of fraud must be particularised. This requirement cannot be met by mere allegation that the registration of the suit premises in the name of the appellant was fraudulent because the appellant knew that the money had been fully repaid”.
51. Further in the same case, the court held;
- “it is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The act alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently”
52. Therefore, the Plaintiffs submitted that based on the above case law, though the Defendants pleaded fraud and illegality, they did not comply with the law by providing the particulars of fraud, and thus in the absence of proper pleadings of fraud and/ illegality, the issue of the Plaintiffs acquiring their titles through fraud/ illegality does not arise.
53. Reliance was placed in the case of *Kuria Kiarie & 2 others vs Sammy Magera (2018) eklr*, where the court held;
- “it is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”
54. On the issue of whether the Plaintiffs have established the root of their titles, the Plaintiffs submitted that the suit parcels of land trace their origin to Loc 2/Makomboki/ 116, which is a position taken by the Defendants too.



55. They further submitted that Land Parcel No. Loc 2/Makomboki/ 116, was first registered on 27<sup>th</sup> July 1962, in the name of Mubea Wairiuko, as is evident from the green card produced by the Defendants as exhibits.
56. It was further submitted that the said land parcel No. Loc 2 Makomboki/ 116, moved from Mubea Wairiuko to Daniel Ndirangu Mubea, Mwangi Murima and Mwangi Mubea, and title deeds were issued to the said three persons.
57. Further, that the entries in the Green Card emanated from the Succession Cause No 243 of 1999, which grant was later confirmed on 26<sup>th</sup> July 2000. That it was the implementation of this Certificate of Confirmation of Grant that led to the entries in the register for Loc2/ Makomboki/ 116.
58. It was further submitted that this grant has never been revoked since 26<sup>th</sup> July 2000, which is 24 years ago. Therefore, the root of the Plaintiffs titles is traceable and has been established, being the Succession Cause No 243 of 1999 in Nairobi, Succession Cause No 500 of 2010, in Nakuru and Succession Cause no 501 of 2010, in Nakuru, as well as Succession Cause No. 34 of 2010 in Nyahururu SPM Court.
59. On the issue of whether there is any other pending litigation between the Plaintiffs and the Defendants in any other court, it submitted that despite the Defendants alleging that there are several suits challenging the transfer of ownership of the suit properties to the Plaintiffs, no evidence was adduced to proof the same.
60. It was the Plaintiffs submissions that the Summons for revocation of grant dated 13<sup>th</sup> December 2000, in Succession Cause No 243 of 1999, in Nairobi is the only litigation pending, but even the same is an application whose Respondents died several years back.
61. Therefore, it is incorrect for the Defendants to claim that there are several suits regarding the subject matter since those applications and/or suits were against very different people from the current Plaintiffs.
62. On the issue of whether the Defendants' claim of adverse possession is tenable, it was submitted that it was not open for the Defendants to pursue a plea of adverse possession, while at the same time argue that they have always been the owners of the suit land.
63. For this submissions, the Plaintiffs relied on the case of Richard Wefwafwa Songoi vs Ben Munyifwa Songoi( 2020) eklr, where the Court of Appeal held;

“ 42. The appellant testified he started using the suit property when he was given by his father. In the same vein, the appellant claims title to the parcel by way of adverse possession. The appellant's claim is founded on title by way of gift from his father. He prevaricates and lays claim to the land parcel by way of adverse possession against the respondent. The pleas of title and a claim for adverse possession are mutually inconsistent and exclusive.

43. Comparatively, the Supreme Court of India in Mohan Lal –v- irza Abdul Gaffar, 1996, 1 SCC 639 faced with an inconsistent claim of title by agreement and adverse possession stated that since the appellant admitted he came into possession of land lawfully under an agreement and continued to remain in possession till date of the suit, the plea of adverse possession was not available to the appellant. That having come into possession by agreement, he must disclaim his right thereunder and plead and prove assertion of his independent



hostile adverse possession to the knowledge of the transferor and that the latter had acquiesced to his illegal possession during the entire period of 12 years.

44. Persuaded by the merits of the legal principle enunciated by the India Supreme Court and which we hereby adopt, in the instant matter, the appellant cannot found his claim to possession of the suit property on a gift from his father then also assert a claim over the parcel founded on adverse possession. He either proves he had a gift or proves independently his claim for adverse possession. The appellant's claim founded on a gift fails as his father had no proprietary interest in the suit property that he could gift to the appellant in 1970."

64. Therefore, it was the Plaintiffs submissions that the Defendants are not permitted to pursue the issue of adverse possession given the dominant aspect of their Defence that the suit properties should be their inheritance from their grandfather and/ or father.

65. The Plaintiffs also relied on the case of Catherine Koriko & 3 others vs Evaline Rosa [2020] eKLR, where the court held;

"In the application, the appellants sought to lay claim to the suit property on the basis of adverse possession. A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property. The appellants' application to amend the statement of defence and counterclaim was nothing but an indirect attempt to re-open litigation over the suit property with a view to circumventing the substantive effect of, and the rights of the parties as had been determined in the Kisii High Court Succession Cause No. 105 of 2010. I cannot be blind to this attempt and I decline to condone the same. A party cannot be allowed to amend pleadings in one case in order to re-open litigation between the same parties in another case."

66. On whether the Plaintiffs are entitled to the orders sought, it was submitted that as the registered proprietors of the suit land, the Plaintiffs are entitled to the prayers sought in their Complaint. It was their further submissions that they are entitled to mesne profit of Ksh 4,346,265/= for 1<sup>st</sup> Plaintiff, being the owner on Loc 2/Makomboki/ 1877, and ksh 1,975,575/= for 2<sup>nd</sup> Plaintiff and ksh 4,346, 265/= for 3<sup>rd</sup> Plaintiff being the owner of Loc 2/ Makomboki/ 1881-1883.

67. They also sought for costs of the suit and interests thereon.

68. On their part, the Defendants filed their written submissions dated 11<sup>th</sup> December 2023, through the Law Firm of Frashian Githinji & Co Advocates, and submitted on two issues.

69. Firstly, that the suit herein is sub judice as the subject properties are also the subject of litigation in Nairobi HCC Succ Cause no 243 of 1999. Secondly that the suit violates the express provisions of section 6 of the *Civil Procedure Act*, and therefore an abuse of the court process.

70. On whether the suit is sub judice, it was submitted that it was evident that during the hearing of this case that there exists a Succession Cause over the suit property being Succession Cause No P& A 243 OF 1999, wherein, the parties are the same.

71. It was their submissions that the said suit is yet to be finalized, and three of the parties are the Plaintiffs herein, and the properties are the same, and the properties herein have caveats against them, and there is an application for appointment of fresh administrators of the estate dated 13<sup>th</sup> May 2019, which list the subject properties as comprising the estates of the late Daniel Ndirangu Mubea, who was the



administrator of the estate of Mubea Wairiko, and all the properties listed are from the subdivision of land parcel No. LOC 2 Makomboki/ 116., which was owned by the Defendants' grandfather.

72. Therefore, the filing of the instant suit is an abuse of the court process as the suit is sub judice. Reliance was placed in section 6 of the Civil Procedure Act, which provides;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

73. The Defendants also relied on the case of Daniel Kipkemboi Bett & Another vs Joseph Rono (2022) Eklr, where the Court upheld a preliminary objection raised and in part relied on Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties), where it was held; -

“..... This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

74. The Defendants emphasised that since the issues being substantive issues for determination in the Succession Cause, the court lacks jurisdiction to entertain the issues herein and therefore, the court herein should down its tools.

75. On the main suit, it was submitted that the 3<sup>rd</sup> Defendant did not adduce evidence that the suit property, being Loc 2/Makomboki/116, which was later subdivided into various parcels of land, comprised the property subject of succession in Muranga SPM Succession Cause, and never comprised property for their grandfather's estate.

76. It was further submitted that the Plaintiffs did not call anyone from the Ministry of Lands to confirm that indeed the transfers were done above board, and thus it was their submissions that the said transfers were done fraudulently, and were effected with the sole intention of depriving the Defendants of their rights to inherit their father's share of the estate.

77. On the claim by Naftari Ndumbi Kihara, that he bought the suit property from Mwangi Mubea, who was the administrator of the estate of Mubea Wairiuko, it was their submissions that it is clear that he bought the suit land while the succession cause was still pending. Reliance was placed in the case of re Estate of Isaac Kaburu Marete (deceased) 2017, eklr, where the case court held;

“Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents.”

78. They submitted that the vendor did not own the property at the time of sale, and had no right to transact with the property, and in transacting, this was against of the Law of Succession Act, and this



position was upheld in the case of re Estate of Isaac Kaburu Marete (deceased) 2017, eklr, where the court held;

“acquisition of land before confirmation of grant is unlawful and does not enjoy property rights under *the constitution*..... I will restate once again what I stated in the case of the Matter of the Estate of M’Ajogi M’Ikiugu Ajogi(deceased) on sale of estate property before confirmation of grant as follows: - Courts have said time and again, and I will not be tired of stating it again, that under section 82(b)(2) of the Succession Act, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the Succession Act, the law had placed a restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents....”

79. Therefore, it is evident that the Plaintiffs acquired the suit land unprocedurally or through corrupt scheme, and the titles are impeachable under section 26(1) a& b of the *Land Registration Act*.

80. The Defendants also submitted that they have lived on the suit land since birth and all their adults’ lives, and therefore, they own the suit land by virtue of adverse possession. Reliance was placed in the case of Samuel Kihamba vs Mary Mbaisi(2015)EKLR, where the court held;

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”

81. It was their further submissions that the Defendants have proved that they have been in open, and exclusive occupation of the suit properties for over a period of 30 years, wherein they have put up their homes, farmed and buried their relatives thereon, and also dealt with the property as rightful owners, which they are.

82. Further, they submitted that before the Plaintiffs became the registered owners of the suit land through fraudulent means, the Defendants were already in actual occupation for quite a long time, given that their father died in 1979, and they were born on the suit land.

83. It was also the Defendants submissions that since they have been in occupation of the suit land for long, they have acquired equitable rights by virtue of being in possession and occupation.

84. Reliance was placed in the case of Racheal Mukami Ngugi vs Mercy Wanjiru Thogo (2018) eklr, which had quoted the case of Mwangi & Another vs Mwangi (1986) KLR 128, where the Court of Appeal held that;

“The right of a person in possession or occupation of land is an equitable right which are binding on the land”.

85. In conclusion, the Defendants submitted that the Plaintiffs are not entitled to the orders sought as they are unfair and capable of unsettling the Defendants from their properties. They urged the court to dismiss the Plaintiffs suit with costs.



86. The above is the summary of the Pleadings by the parties herein, the evidence tendered in court together with the exhibits produced thereon, the written submissions and cited authorities, which this court has carefully considered. The court too has considered the relevant provisions of law and finds as follows;
87. There is no doubt the parties herein are related, as they share a common grandfather, Mubea Wairiuko, who was the initial registered owner of the suit land. Loc2/ Makomboki/ 116, and thus the parties herein are cousins.
88. It is not in doubt that there are several Succession Causes that were filed over the succession and/ or distribution of the estate of the late Mubea Wairiuko. This succession proceedings culminated in the confirmed Grant of 26<sup>th</sup> July 2000, wherein Ndirangu Mubea, Mwangi Murima and Mwangi Mubea were confirmed as the beneficiaries of this land parcel No. Loc. 2/ Makomboki/ 116.
89. Further, it is evident that after the said confirmation of grant, the Defendants filed an Application for revocation of the said grant. However, the said grant has not yet been revoked and remains the order of the court.
90. Further, there is evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs got registered as the owners of their respective parcels of land, through court orders that were issued at Nakuru High Court in Succ Causes No. 500 and 501 of 2010.
91. The said court orders have not been cancelled and or set aside in an Appeal. Consequently, the Plaintiffs obtained their title deeds on 4<sup>th</sup> November 2015. However, it is not in doubt that even with the title deeds, the Plaintiffs have not been able to utilize their respective parcels of land, as the Defendants have not given them vacant possession, and thus this suit.
92. Having now considered the available evidence, and the rival written submissions and the undisputed facts, the court finds the issues for determination are as follows;
- i. Is this suit sub judice and contrary to section 6 of the *Civil Procedure Act*?
  - ii. Does this court have jurisdiction to hear and determine this suit?
  - iii. Do the Defendants have locus standi to Defend the suit?
  - iv. Was the registration of the Plaintiffs as proprietors of their respective parcels of land procured through fraud?
  - v. Have the Plaintiffs established the root of their titles?
  - vi. Are the Plaintiffs entitled to the orders sought?
  - vii. Are the Defendants entitled to the suit land Loc2/ Makomboki/116, by virtue of adverse possession?
  - viii. Who should pay costs of the suit?

**I) is the suit herein sub judice and contrary to section 6 of the *Civil Procedure Act*?**

93. The Defendants have submitted that the suit herein offends the provisions of section 6 of the Civil Procedure Rules, and thus is sub-judice. The Defendants alleged that Succession Cause No. 243 of 1999, is on-going, and it involves the same parties herein and the same parcel of land, Loc2/ Makomboki/ 116, and thus this suit is sub judice and an abuse of the court process.



94. The Plaintiffs on their part denied that the suit herein is sub judice and submitted that Succession Cause No. 243 of 1999, is a concluded matter and the Grant was confirmed and the suit land was distributed and title deeds were issued.
95. The doctrine of sub judice is invoked to prevent parties from litigating over the same matters in different cases and/ or courts, and thus abusing the court process. Section 6 of the *Civil Procedure Act* provides;
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
96. Courts have severally given guidance on what amounts to sub judice and why the doctrine is invoked. See the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR, where the Court held;
- “The sub judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.”
97. What is clear herein is that the Succession Cause No 243 of 1999, was concluded in the year 2000. The Defendants have filed several Applications which have not been successful. Though the Defendants alleged that there is an application for revocation of grant pending, that application has not been allowed, and the Confirmed grant has not been set aside. The title deeds in favour of the Plaintiffs were issued following court orders. This court cannot hold and find that there is and active court case involving the parties herein.
98. Nairobi Succ Cause No 243 of 1999, dealt with distribution of the estate of Mubea Wairiuko, whereas the Plaintiffs herein have certificates of titles, issued on 4<sup>th</sup> November 2015, and which have not been revoked and/cancelled. The Plaintiffs claim herein is over ownership of the parcels of land, and thus, it is different from the Succession Cause.
99. Consequently, this court, finds and holds that the suit herein is not Subjudice.

**ii.) Does this court have jurisdiction to hear and determines this suit?**

100. The Defendants also submitted that this being an issue that deals with succession matter, this this court lacks jurisdiction to hear and determines it. It is evident that jurisdiction is everything, and without jurisdiction, the court has no option, but to down its tools. See the case of Owners of Motor Vessel “Lilian S” – Versus - Caltex Oil (Kenya) Limited (1989) IKLR, where the Court held:
- “Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without



jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.

101. Though the genesis of the parcels of land in issue, was the Succession Cause No 243 of 1999, it is clear that the Plaintiffs claim herein is on ownership of the suit properties, and possession, but not succession. The dominant issue herein is a claim over land, but not succession, and therefore, this court finds that it has jurisdiction to hear and determine this suit as stipulated in Section 13(1) & 2(a) of Environment and Land Act, which provides;

### 13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land. (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

102. Consequently, this court too finds and holds that the Preliminary Objection on the issue of lack of jurisdiction by this court is not merited and the same is dismissed entirely.

### **iii. Do the Defendants have locus standi to bring a claim of adverse possession, since they are not administrators of the estate of their father**

103. It is the Defendants claim that even if they are entitled to the suit land by virtue of inheritance, they have lived on the suit land since birth and have acquired ownership by virtue of adverse possession.
104. The Plaintiffs in their evidence alleged that the Defendants have no locus standi, to bring this claim on behalf of their deceased father, as they are not the administrators of his estate, and their late father also had another family, which family is not claiming from the suit land.
105. However, it is clear that the Defendants have alleged that they have been in long occupation of the suit land, thus entitled to adverse possession. Even if the Defendants have not filed a claim for adverse possession on behalf of the estate of their father Njihia Mubea, it is clear that a claim for adverse possession attaches to the land and not the title.
106. The Defendants have brought the claim of adverse possession on their own individual capacities, but not administrators of the estate of their father. Therefore, they have locus standi to bring the said claim.

### **iv. Was the Registration of the Plaintiffs as proprietors of their respective parcels of land procured through fraud and/ or illegally?**

107. The Plaintiffs claim is that they are the registered owners of the suit lands, having acquired them above board and through court orders. On their part, the Defendants alleged that the Plaintiffs obtained the suit land fraudulently, clandestinely, and/ or through non -disclosure of material facts and thus through deceit.
108. It is trite that he who alleges must prove, as provided by Section 107 of the Evidence Act. The Defendants have alleged fraud on the part of the Plaintiffs, and they had a duty to prove the existence of



such fraud. It is trite that fraud must be specifically proved. See the case of *Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another* [2000] eKLR, where the Court held:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

See also the case of *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23, where the court held that:

“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.”

109. Though the Defendants alleged fraud, and / or illegality, they did not specifically plead it in their Defence. Further, in their testimonies in court, no evidence of fraud was availed by the Defendants. The Plaintiffs were able to prove how they obtained registration of the suit properties in their favour.
110. The Certificate of titles were acquired by the Plaintiffs in 2015, though a Court order. After such registration and as provided by Section 24 of the *Land Registration Act*, then the Plaintiffs became the absolute and indefeasible owners of their respective parcels of land.
111. As the absolute owners, their registration can only be defeated as provided by the Act, as stated by Section 25 of *Land Registration Act*, which states;
  25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject— (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
  - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
112. The registration of the Plaintiffs having been procured through a court order, and given that there is no evidence that the court was misled to issue such orders, this court finds and holds that the registration of the Plaintiffs as the owners of the suit properties, was not procured through fraud and/ or illegality or clandestinely as claimed by the Defendants.

#### **V. Have the Plaintiffs established the roots of their titles?**

113. It is not in doubt that the Plaintiffs got registered as the owner of the suit property on 4<sup>th</sup> November 2015. The root of their titles can be traced from the court orders after the grant was confirmed. The confirmed grant dated 26<sup>th</sup> July 2000, in Nairobi Succ Cause 243 of 1999, and Nakuru Succ Causes No 500 & 501 of 2010, that gave rise to the suit titles has not been revoked, and or set aside by any court of law.



114. As the registered owners, then the Plaintiffs have all the rights of absolute owners, possession being one of them, as provided by Section 24(a) of the [Land Registration Act](#), which states;
- “ a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
115. The Defendants have filed several applications for revocations of Grant, which applications were dismissed, and thus the estates of Mubea Wairiuko, Ndirangu Mubea, Mwangi Murima and Mwangi Mubea, remain as per the Confirmed Grants, which grants led to the registration of the suit properties in the name of the Plaintiffs.
116. Even though the court issued prohibitory orders against Naftari Ndumbi, 29<sup>th</sup> August 2017, on the said Prohibitions were to persist for 90 days, which 90 days have long lapsed. There are no inhibitions or prohibitions against the titles, as after 90 days, the Prohibitions lapsed, and the said orders were not extended. Indeed, the restrictions still existing on the titles are wrongly subsisting.

**Vi. Are the Plaintiffs entitled to the orders sought?**

117. The Plaintiffs have sought for various orders against the Defendants among them orders of eviction and permanent injunction. The court has found and held that the Plaintiffs titles are traceable and were not acquired fraudulently, but through valid court orders which have not been set aside. Therefore, the Plaintiffs are entitled to rights of absolute owners as provided by section 24 of the [Land Registration Act](#). Possession and occupation of their land is one of such rights, which occupation has been allowed by the Defendants.
118. The Plaintiffs can only enjoy their right to property if the Defendants would give them vacant possession, and also if they would be restrained from interfering with the Plaintiffs ownership of their parcels of land.
119. For the above reasons, the court finds and holds that the Plaintiffs are entitled to the orders of vacant possession and permanent/ perpetual injunction as prayed in their claim. Consequently, the court allows prayers no a & b of the Plaint dated 25<sup>th</sup> May 2021.
120. On the issue of damages, the court finds that mesne profits were not specifically proved. However, the Plaintiffs have proved that they are the owners of the suit properties, and Defendants have refused to give them possession. Therefore, the Defendants are trespassers on the suit properties.
121. The Plaintiffs having proved trespass on the part of the Defendants, the court finds that they are entitled to general damages of ksh 500,000/= each payable with interests at courts rate. See the case of Duncan Nderitu Ndegwa vs Kenya Pipeline Co & Another (2013) eklr;
- “ where the court held; “ ..on the issue of quantum and general damages, once a trespass to land is established , it is actionable per se and indeed no proof of damages is necessary for the court to award general damages”
122. On the issue of costs, the Plaintiffs are the successful litigants and are entitled to costs of the suit, as provided by Section 27 of the [Civil Procedure Act](#).



**vii. Are the Defendants entitled to the suit land Loc2/ Makomboki/116, by virtue of adverse possession?**

123. The Defendants raised the issue adverse possession in their submissions. They alleged that they have been on the suit land since birth and are entitled to ownership of the suit land through adverse possession.

124. It is clear that the Defendants are claiming ownership of the suit land through inheritance, and have challenged the Plaintiffs titles. As admitted by the Defendants, there were several cases filed over the issue of inheritance of the suit land. Therefore, the Defendants have not been in peaceful possession, since there are several litigations over the suit land culminating in the confirmed grants that gave the Plaintiffs the suit properties and thus the root of their titles can be traced.

125. Further, in their statement of Defence, the Defendants did not plead adverse possession, and therefore, they could not advance such a claim through written submissions, as submissions are not pleadings. See the case of Hannington Oloo Ogumbe vs Albert Makau Kyambo & Another (2021) eKLR; where the court held;

“in any event, the Plaintiff cannot claim the suit property by way of adverse possession and in the same breath challenge the 1<sup>st</sup> Defendant’s title. By mere fact that the Plaintiff is claiming the suit property by way of adverse possession, he has conceded to the fact that the 1<sup>st</sup> Defendant is the bonafide registered proprietor of the suit property”

126. The Defendants are challenging the Plaintiffs ownership of the suit properties, and have claimed that they are entitled to their share of inheritance from the estate of Mubea Wairuiko, the initial owner of Loc 2 /Makomboki/ 116. They cannot again claim to have acquired the suit land through the doctrine of adverse possession. See the case of Richard Wefwafwa Songoi v Ben Muniyifwa Songoi [2020] eKLR, where the Court of Appeal opined that; “the pleas of title and a claim for adverse possession are mutually inconsistent and exclusive.”

127. Consequently, the court finds that the Defendants are not entitled to a claim of adverse possession. However, the Plaintiffs are entitled to the prayers sought in their Complaint and thus they have proved their case on the balance of probabilities. The Plaintiffs suit is allowed in terms of prayers no a, and b of the Complaint dated 25<sup>th</sup> May 2021.

128. Further, each of the Plaintiff is awarded General damages of Ksh 500,000/= plus interests at court’s rate.

129. Further, the court directs the Defendants to move out of the suit land/ properties and give vacant possession to the Plaintiffs within a period of 120 days from the date hereof.

130. Failure to do so, the Plaintiffs to issue, the usual Notice as provided by the law. The Plaintiffs are also awarded costs of the suit and interests thereon at Court’s rate.

131. Penultimately, the Defendants’ Counter claim and Preliminary Objection are found not merited and are both dismissed entirely with costs to the Plaintiffs.

**It is so ordered.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 4<sup>TH</sup> DAY JULY OF 2024.

**L. Gacheru**

**Judge.**



~~4/7/2024~~

**Delivered online in the presence of;**

**Mr. Malanga for Plaintiffs**

**Ms. Githinji for Defendants**

**Joel Njonjo – Court Assistant**

**L. Gacheru**

**Judge.**

~~04/07/2024~~

TABLE

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