



Njeri (suing as the Administrator of the Estate of the Late Mary Gathoni Kanyingi) v Karimi (sued as the Administrator of the Estate of the Late Eunice Muthoni Kahenia) (Environment and Land Case Civil Suit 334 of 2016) [2022] KEELC 2502 (KLR) (7 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2502 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE CIVIL SUIT 334 OF 2016
LA OMOLLO, J
JULY 7, 2022

BETWEEN

ANTHONY KAMAU NJERI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE MARY GATHONI KANYINGI) PLAINTIFF

AND

DANIEL KARIMI (SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE EUNICE MUTHONI KAHENIA) DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff filed the Plaintiff dated August 18, 2016. He avers that he has always been one of the beneficiaries and the personal representative of the deceased with regards to land parcel No. Nakuru Municipality Block No. 21/309.
2. He further avers that the Defendant encroached onto his property and constructed semi-permanent structures on it. He tried to evict the Defendant but was not able to.
3. The Plaintiff prays for judgement against the Defendant for:
 - i. A permanent injunction be issued against the Defendant restraining her either by herself, her servants, agents and/or employees from entering, alienating and/or in any manner dealing with land reference number Nakuru Municipality Block 21/309.
 - ii. An eviction order.
 - iii. Costs of the suit.



Factual Background.

4. The Defendant filed her statement of Defence and Counterclaim dated 23rd November, 2016. She avers that she is the registered owner of land parcel No. Nakuru Municipality Block No. 21/307 and has been in occupation since the year 1985 to date.
5. The Defendant has then denied all the other averments in the Plaintiff.
6. In her Counter Claim, she avers that the deceased Mary Gathoni Kanyingi was the registered owner of land parcel No. Nakuru Municipality Block No. 21/309 while she was the registered owner of land parcel No. Nakuru Municipality Block No. 21/307.
7. She further avers that on the ground land parcel No. Nakuru Municipality Block No. 21/309 rests on parcel No. Nakuru Municipality Block No. 21/307 and vice versa.
8. She also avers that her husband purchased land parcel No. Nakuru Municipality Block No. 21/307 on or about the year 1985 and later transferred it to her.
9. She avers that she has been in occupation of the suit land and has developed it with permanent and semi-permanent structures.
10. It is her averment that her claim is for an order restraining the Plaintiff from interfering with her quiet possession and occupation of the property.
11. In the counter claim, the defendant sought judgement against the Plaintiff (Defendant in the counter claim) as follows:
 - i. An order that the Defendant does surrender parcel No. Nakuru Municipality Block No. 21/307 Nakuru to the Plaintiff on the ground.
 - ii. An order of eviction against the Defendant from parcel number parcel No. Nakuru Municipality Block No. 21/307.
 - iii. An order of a permanent injunction restraining the Respondent's by himself, by his servants, agents and/or employees from interfering with the Plaintiff exclusive use, possession and enjoyment of parcel No. Nakuru Municipality Block No. 21/307.
12. During the pendency of the suit the Defendant died and was substituted by Daniel Karimi as the administrator of her estate.

Plaintiff's Evidence.

13. Anthony Kamau testified as PW1. It was his evidence that he is the son to the late Mary Gathoni Kanyingi who died in the year 2000. He produced Letters of Administration *Ad Litem* as Exhibit P1.
14. He testified that he sued Eunice Muthoni Kahenia because she was occupying their land. He testified that on 27th September, 2015, he was called by his sister Rahab Wamuyu who asked him if he knew an old man by the name of 'Babu' with whom they used to live with in Bondeni Estate.
15. It was his evidence that his sister informed him that 'Babu' was in possession of a title given to him by their late mother.



16. It was his further evidence that he went to collect the title the following day and while there 'Babu' told him that he had been given the title deed by his late mother to keep for her as his parents were not in good terms.
17. He further testified that he did a search which confirmed that the land was registered in the name of his late mother. He then engaged a surveyor to show him where the land was as he did not know the location and the surveyor took him to the ground where he found that there were developments done on the parcel of land.
18. He also testified that the plot is not fenced and it is about 50 x 100 feet with developments done thereon. He produced five photographs as Exhibits P 2(a) to (f).
19. Upon inquiry from the next plot, he was informed that it was the Defendant who had developed the suit property. He then went to the chief to direct him to the Defendant and the chief organized a meeting in his office between him and the Defendant.
20. He testified that at the said meeting, the Defendant stated that the land belonged to her and sought for fourteen days to bring her documents.
21. It was his evidence that the Defendant brought the documents to the chief before fourteen days were over but declined to leave them with the chief.
22. It was his further evidence that the documents fell out of the Defendants belongings and the Chief kept them. Later, the Chief gave the documents to the Plaintiff which documents identified the Defendant's land as plot 307.
23. He testified that he went to the rates department and confirmed that plot No. 307 belonged to Kehenia Gathiru who was the Defendant's father. He then produced the document as Exhibit P3.
24. PW1 further testified that after confirming from the rates department, he went back to the Chief who called another meeting with the Defendant. At the meeting the Defendant insisted that the land belonged to her and that the surveyor made a mistake by giving him parcel No. 309 instead of parcel No. 307. He then produced his title deed as Exhibit P4.
25. He also testified that he was advised to go to court and so he filed this case. It was his evidence that he engaged a surveyor who confirmed that the Defendant was on his land and he therefore sought for the land to be declared his and be paid costs.
26. On cross examination, he admitted to not knowing the date of the death of his mother. He also admitted that through the *Ad Litem*, he was authorized to file the present suit and that he has not used the grant anywhere else.
27. He also admitted that that he has never lived on the land and that is why he could not identify it at first. He admitted further that he does not know if the developments on the land were done by his mother.
28. He confirmed to have done a search which he did not produce. He stated that he took a private surveyor called Mr. Mark to the land and paid him Kshs. 2,000/= but was not issued with a receipt.
29. He also confirmed that he found plot No. 309 developed as evidenced in exhibit P2. He confirmed further that in the photos, some structures were made of timber and that he found some people occupying them as tenants.



30. He further confirmed that he inquired from the neighboring plot but he does not know who owns it. He stated that they did not take minutes at the meeting with the chief and that the Chief informed him of how he got the document produced as exhibit P3.
31. He also confirmed that his title deed was issued on 3rd of April, 1989 as it was the one that was given to him by 'babu' and bears the name of Mary Gathoni Kanyingi.
32. He stated that if they did a search, it will show that the land is in his name and not the name of his mother as he had been told by the land Registrar that they can change the register to show his name.
33. He stated further that he filed another succession cause No. 74 of 2017 and was given a grant. The grant is with respect to the estate of Mary Gathoni Kanyingi (deceased) issued to Anthony Kamau (deceased) on 12th January, 2018 pursuant to Chief Magistrate's Court at Nakuru Succession Cause No. 74 of 2017.
34. He admitted that apart from the suit property his mother did not own any other property and that he filed the succession cause for the purposes of the suit land.
35. He was then referred to document (e) on the Defendant's list of documents filed on 28th November, 2016 which is the copy of the register.
36. He stated that he could see the restriction over payment of stamp duty. He admitted to paying Stamp Duty on 3rd May, 2016 and that Entry No. 7 shows that the title was issued to him on 16th February, 2016 *vide* succession Cause No. 288 of 2015 in which case he had been granted letters of administration *ad litem*.
37. He confirmed that he went with the letters of grant *Ad Litem* to the Lands Office and was told that he could use it to get the land registered in his name.
38. He further confirmed that he did not pay any money as transfer charges and that there was no one at the Lands Office who was specifically helping him.
39. He admitted that he did not surrender the original title deed that was in the name of his mother. He stated that he did not get the title deed in his name because he was told that he will only get it after a full succession is done.
40. He reiterated that if a search is done, it will show that the land is registered in his name. He stated that the Defendant's parcel of land is No. 307 and the problem is that she occupies parcel No. 309.
41. He stated further that the Defendant indicated that the surveyor who demarcated the land made an error by pointing her to her land.
42. He confirmed that plot No. 307 is also developed as there is a permanent development of rental units. He admitted that he was not living with his mother when she was alive and does also not know what she owned.
43. He stated that he would be surprised if it is mentioned that she sold plot No. 309 to the Defendant. He admitted to not knowing Samuel Sagero and that his mother never lived in that area. That if she had lived there then they would know as she was their mother.
44. He also admitted that he wouldn't know what was happening on the ground and that the Defendant should move to her plot No. 307 as he is not ready to surrender the parcel of land that his mother owned.



45. He further admitted that neither him nor his mother developed plot No. 307 as it is occupied by someone he does not know. He admitted that he was not a party to the sale of parcel No. 307.
46. He stated that he does not see a problem with the manner in which he transferred and registered plot No. 309 in his name and he therefore wants the Defendant to be evicted from the land.
47. He stated that he did not have any claim over parcel No. 307.
48. On re-examination, he stated that it was true that he had effected transfer of the suit property to his name even though he was yet to get the title deed as he was told to await the full succession.
49. He also stated that it was not true that his mother occupied plot No. 307 as he does not know who occupies it.
50. He further stated that he visited the Land's office for a restriction and was asked to pay stamp duty of Kshs. 1,080/= and also informed that the green card would reflect his name but he would not get the title deed.
51. When questioned by the court he stated that he was born in 1989 and was living in Solai with his grandmother from his maternal side while his birth mother was living in Bondeni.
52. PW1 was recalled for further cross examination and he stated that that his mother Mary Gathoni Kanyingi is deceased. He confirmed that his father and mother had separated and that he didn't know much about his father.
53. He confirmed that his name is Anthony Kamau Njeri as it appears on his identity card and which he admitted he did not have in court.
54. He further confirmed that in the Kikuyu custom, children either take the last name of their father or mother but in his case, he did not take his mother's name but instead he was given his aunt's name but the deceased was his mother.
55. He stated that his siblings were Anne Wangui Waruiru, Rahab Wamuyu Waruiru and Anthony Mwangi. He stated further that he is the fourth child and that Joyce Waruiru took the name 'Waruiru' that belonged to a stranger.
56. He also stated that Anthony was earlier known as Ibrahim Mukuru. That when the case was filed those were their names and that he didn't know that the witnesses say that their father's name is Wachira.
57. He confirmed that land parcel No. Nakuru Municipality 21/309 belonged to his mother. He was referred to the document appearing as No. 7 on the Defendant's further list of documents and stated that he was not aware of the acknowledgement of a sum of Kshs. 20,000/= paid by Samuel Ogero Maruri to Mary Gathoni Kanyingi.
58. He confirmed that the said document bears an ID No. of Mary Gathoni which as 3630011/66 and admitted that he did not have a copy of his mother's Identity Card and neither did he know it.
59. He also confirmed that a chief wrote a letter from Kiamaini Location which is No. 10 in the further list of documents which lists the names of the children of the deceased which he admitted to not knowing.
60. He further admitted that on both parcels of land No's 309 and 307 there were people in occupation but he was not sure who was in occupation of parcel No. 307.



61. He stated that he is claiming parcel No. 309 but he also did not know who was in occupation and that he thought it was Eunice Kahenia. He stated further that he has interest in the suit property but denied that he is an imposter.
62. On re-examination PW1 stated that his mother's name is Mary Gathoni Kanyingi and that there are people who have showed up claiming that they are the children of his late mother.
63. He stated further that his case was about his interest in land and not about anything else. That he had for the first time that day heard that the land had been sold after he was shown an agreement.
64. He stated also that on the ground was Eunice Muthoni Kahenia is in occupation of plot No. 309 and that 307 is occupied by someone else.
65. This marked the end of the plaintiff's testimony.
66. It was also noted by the Court that PW2 was present in court as PW1 was giving his evidence.
67. Alex Oduori Jutley testified as PW2. It was his evidence that he knows Anthony Kamau Njeri adding that Kamau's mother was his neighbour at Bondeni for a period of ten years.
68. He testified that the plaintiff's mother was known as mama Kamimi and that she had four children; two girls and two boys. He stated that the eldest child was a son whose name he could not remember.
69. He also testified that Mama Kamimi had given him a title deed to a property that was located at "London" for safe keeping because her husband wanted to sell it.
70. It was his evidence that he had kept the title deed for a period of over fifteen years. He stated that the title deed was for land parcel known as Nakuru Municipality Block No. 21/309.
71. PW1 testified that after fifteen years he managed to find Kamimi and told her about the title deed. He explained that Kamimi preferred to first talk to her brother about it.
72. He further testified that later Kamimi and her younger brother went to collect the title deed from him and he advised them to conduct a search as he did not know where the land was located.
73. It was PW1's testimony that while at the Lands office, they were informed that the suit parcel was located in "London" and they were further advised to visit the area Chief.
74. PW1 testified that apart from the area Chief, they also engaged a surveyor and they established that one Eunice Muthoni Kahenia was in occupation of the suit property. He further testified that the Chief informed Eunice Muthoni Kahenia that the Plaintiff had in his possession the title deed to the suit land.
75. It was his further evidence that Eunice Muthoni Kahenia said that she had been paying rates and presented the receipts.
76. He testified that he knows that Anthony Kamau filed a case against the Defendant and that another family showed up claiming that they also had a mother by the name of Mary Gathoni Kanyingi and also claimed the suit parcel.
77. He further testified that the court should investigate the second family and that they, the second family, should also present a copy of their title deed.
78. He testified that the plaintiff should be granted the prayer's sought in the plaint and that the defendant should be evicted from land parcel No. 309.
79. He ended by praying that the suit land be given to the Plaintiff.



80. On cross examination, he admitted that he was the one who had the title deed of Mary Gathoni Kanyingi for a period of fifteen years.
81. When he was referred to his statement he conceded that it had his signature even though it was not dated. He also conceded that it contained the information that he had given to his lawyers.
82. He admitted that the reason he was given the title deed for safe keeping was because Mary had family problems. That the late Mary's husband was known as Warira and that Mary Kanyingi had four children; two girls and two boys. The eldest was a girl, followed by a boy, another girl and the youngest was a boy.
83. PW2 stated that Anthony Kamau- the Plaintiff is the youngest of Mary's children. He clarified that he has no claim to the property and was only interested in seeing Mary Kanyingi's children inherit the suit parcel.
84. He denied that he was given the title deed to the suit land as security for a debt and also denied that his statement mentioned a loan of Kshs. 4,000 to the deceased's husband.
85. PW2 stated that after fifteen years, he did not know what had happened to the deceased or that she had passed on. It is his testimony that he asked around and was told that Mary Kanyingi passed on in the year 2000.
86. He admitted that he advised the children of the deceased to do a search of the suit land but he did not have the search.
87. He also stated that he was shown a title deed which he confirmed belonged to the deceased and admitted that he didn't know the status of the title.
88. He confirmed that he was not surprised that the Plaintiff had changed the title deed to his name as the land belonged to his mother. He also confirmed that he assisted the Plaintiff transfer the parcel of land to his name.
89. He was then referred to a copy of the title deed and he confirmed that the title was in the name of the deceased. He stated that he didn't know the process of changing the title of a deceased person adding that they did not surrender the original title deed.
90. He confirmed that they didn't know where the suit parcel was located and that they used the Chief and the Surveyor to locate it. PW2 further confirmed that he didn't know the name of the surveyor and that he didn't visit the suit parcel.
91. He also admitted that it was the Plaintiff who had told him about the rates certificate that had fallen in the Chief's Office and that he did not see it falling.
92. He also stated that it was not true that Mary Kanyingi was not the owner of the suit parcel of land and that Samwel Ogero's statement that the title deed was lost by his advocate after purchasing the land from Mary Kanyingi cannot be true.
93. He confirmed that the defendant should be evicted from the suit parcel.
94. PW2 also admitted that he didn't have the history pertaining to the defendant's Land and could he tell the position of land parcel No 309 and 307.
95. He further admitted that he had heard about the second family claiming to be Mary Gathoni Kahenia's children and that he did not know Mary Gathoni Kahenia's.



96. On re-examination, he stated that he didn't know the deceased's official names.
97. This marked the close of the Plaintiff's case.
98. Daniel Karimi Kahenyi testified as DW1. He adopted his witness statement dated 18th of August, 2021 as part of his evidence.
99. He testified that in his written statement he had stated that his mother was Eunice Kahenia and that he had in Court Grant of Letters of Administration *Ad Litem* which he produced as Exhibit D1.
100. It was his evidence that his mother was the registered owner of land parcel No. Nakuru Municipality Block No. 21/307.
101. DW1 was referred to a bundle of documents filed on 28th November, 2016 and produced the following documents as exhibits;
 - a. The title deed of land parcel No. Nakuru Municipality Block No. 21/307..... Exhibit D2 (a)
 - b. Copy of search dated 18th May 2016.....Exhibit D2 (b)
 - c. Green card for land parcel No. Nakuru Municipality Block No. 21/307..... Exhibit D3
 - d. Map showing ground position of parcel 307..... Exhibit D4.
 - e. Transfer forms.....Exhibit D5.
102. Dw1 testified that the suit parcel was previously owned by his father who transferred the suit land to his late mother before he died.
103. He referred to the Green card and testified that it shows the history of the property. He explained that entry No. 1 and 2 is in the name of his father while entry No. 3 is in the name of his mother.
104. He testified that to date, the suit parcel of land is in his mother's name and that his parents had built permanent and semi-permanent houses on the land and have always been in occupation.
105. He further testified that there was a dispute between Eunice Kahenia and Mary Gathoni Kanyingi as Mary Gathoni was the registered owner of land parcel No. 309 while his mother was the registered owner of land parcel No. 307.
106. It was his evidence that the dispute related to the location of the plot on the ground and it was resolved that everyone would stay in their plot because they were the. DW1 stated that the advocate who brokered the deal was by S. K Patel Advocate.
107. It was further his evidence that the Plaintiff has no right to seek eviction because the dispute was resolved and that according to paragraph 5 of the plaintiff's statement of defence he mentions one Ogero to whom Mary Kanyingi had sold the suit land and that there is no dispute between the family of Ogero and themselves.
108. DW1 prayed that the court gives orders that everyone should live on the land they purchased as agreed between his mother and the family of Ogero and that the Plaintiff should be stopped from disturbing them.



109. He also prayed that if the court finds that his mother's parcel of land is No. 309, they should be allowed to take Mary Kanyingi's parcel since there was an agreement that each one settles on the parcels despite the mix up.
110. In addition to his oral evidence, DW1 s in his written statement states that he is the administrator of the estate of Eunice Muthoni Kahenia vide the Limited Grant ad Litem dated 17th September, 2020.
111. On cross examination, he confirmed that his mother's parcel of land is Nakuru Municipality Block No. 21/307. He stated that land parcel No. Nakuru Municipality Block No. 21/309 should belong to them as the purchaser had said that despite the mix up they should stay on.
112. He admitted that they have a title deed is in respect to land parcel No. 307 adding that it is in the name of his mother Eunice Kahenia. He also stated that they have a claim in respect to land parcel No. 309.
113. He stated that if the Plaintiff is given land parcel No. 309 there will be a problem as the earlier owner of the property Mary Gathoni had already sold the plot.
114. He stated further that it would be impossible to move the houses as they will suffer loss and admitted that they have built on land parcel No. 309.
115. DW1 admitted further that there was a dispute on the numbering of the plots and that they went to S.K Patel who stated that each party continues to stay on the portion already occupied by them for the reason that both parcels were equal.
116. He confirmed that he had nothing in writing and that he didn't know why they didn't go to the Surveyor.
117. On re-examination, he stated that they have a counter claim for land parcel No. 309 and that his mother had already addressed the issues pertaining to the two parcels of land in the Counter Claim.
118. He stated that there was no written agreement between his mother and father and Mary Kanyingi but he had a witness from the family of Mary Kanyingi.
119. Joseph Njuguna Ndung'u testified as DW2. He adopted his witness statement dated 28th November 2016 as his evidence. He testified that he knew Eunice Muthoni having worked with her husband at Union Carbide/Eveready Batteries.
120. He explained that Eunice Muthoni's husband and himself were scouting for a parcel of land to purchase and they eventually found land at Hilton.
121. It was his testimony that his parcel of land is Nakuru Municipality Block No. 21/311. Eunice's plot was No. 307 while Mary Kanyingi's plot was No. 309.
122. It was his evidence that Mary Kanyingi informed him that she wanted to sell her parcel of land and asked him to help her get a buyer.
123. He testified that after sometime the plot was sold to a person known as Ogero who then started building. He also testified that the plot belonging to Eunice had both permanent and semi –permanent structures while Ogero's plot has permanent structures.
124. It was his evidence that both Ogero and Eunice's family are living on the properties and that they are both deceased but their families are still there.
125. It was further his evidence that there was a problem between land parcel No. 307 and land parcel No. 309 as there was a mix up on the ground position.



126. He testified that they went to K.M Patel who advised that they should not move as it would cause too much trouble for them and he advised them not to demolish structures already erected.
127. It is his testimony that the said K.M Patel promised to process titles that were reflective of their respective ground positions. He further testified that the two families agreed to this proposal and promise.
128. In addition to his oral evidence, DW2 in his written statement states that they bought parcels of land from one K.M Patel advocate. He states further the Defendant's deceased husband had bought plot No. Nakuru/Municipality Block 21/307 while he purchased Nakuru/Municipality Block 21/311.
129. On cross examination he stated that he had an Identity Card but he did not carry it. He confirmed that he met Eunice Muthoni in the years 1970's and that he met her when she was living in Elburgon adding that she was a farmer.
130. He also confirmed that he knew Mary Gathoni when they lived in Lumumba Estate Nakuru and that she was a business woman selling fruits and vegetables at the market.
131. He admitted to knowing one child of Mary Gathoni and that the name of the said child is Njoroge. He added that in 1985 Mary Gathoni had two children and both were under eighteen years of age.
132. Dw2 stated that he did not remember when admitted to not remembering when Mary Gathoni died. He stated that he was born in 1952 and Mary Gathoni must have been older than him by about ten to fifteen years.
133. He also confirmed his parcel of land neighbours Mary Gathoni Kanyingi's parcel and that there is a road separating them. He added that his parcel is to the North, Mary Muthoni's parcel to the South while Eunice's parcel is behind Mary's. He also confirmed that Eunice and Mary did not know each other.
134. On re-examination he stated that he only knew one Mary Kanyingi and that even if they shared a name, the Identity Card Numbers would not be same.
135. John Waweru Githa testified as DW3. He adopted his statement dated 7th May, 2018 as his evidence and testified that he is the owner of plot numbers 21/298 and plot No. 4 of 452/2.
136. It was further his evidence that he had documents that evidence ownership explaining that they documents are an indenture and a deed plan. He further explained that the documents are contained in the Further List of Documents dated 7th June, 2018 which he produced as Exhibit D6(a) and (b).
137. He testified that he knew Peter Kahenia Gathiru in 1982.He explained that they met when Peter Kahenia went to build on his land parcel No. 307 adding that he, peter, built semi-permanent houses which he improved overtime.
138. He further testified that he knew Mary Gathoni Kanyingi who was in occupation of land parcel No. 21/307. He also stated that Ogero, who was his tenant, expressed interest in purchasing land and so he took him to Mary Gathoni.
139. It was his evidence that Ogero bought the land and later he came to know Eunice Kahenia as the wife of Peter Kahenia.
140. It was his further evidence that Samuel Ogero demolished the structures that he found there and built permanent houses on the property. It was his testimony that Ogero subsequently moved to the parcel he had purchased and that Ogero's family lives on the said parcel to date.



141. It was his testimony that Ogero is deceased and his wife died thereafter as the present case was ongoing.
142. DW3 confirmed that he knew that the Plaintiff is claiming parcel No. 309 saying that it belongs to his mother and wants the defendant Eunice Kahenia to be evicted.
143. He further testified that there was a problem relating to the location on the ground and they went to an advocate and the problem was solved.
144. He also testified that the family of Ogero and Kahenia never had any squabbles.
145. On cross examination he confirmed that he did not know Mary Gathoni Kanyingi and that he only took Ogero to her where she was working in the market as he knew that she was selling the land.
146. He admitted to not knowing her children but described her to be average height and fair skin. He stated that he was eighty one years old and that she was younger than him.
147. He stated that they have a problem as the plaintiff, Anthony Kamau, says that that his mother is Mary Gathoni Kanyingi while there are other children who say that Mary Gathoni Kanyingi is also their mother and he therefore sought help.
148. He admitted to not being sure about the children and that he did not know whether Mary Gathoni and Eunice Kahenia knew each other.
149. He further admitted to not knowing where Mary Gathoni worked.
150. On re-examination he stated that he didn't know if the children of Mary Kanyingi were testifying in this case.
151. Charles Ariemba Nyaigoti testified as DW4. He adopted his witness statement dated 7th June 2018 as part of his evidence.
152. He testified that he is the son in law to Samuel Ogero who is the owner of land parcel No. Block 21/309. He further testified that he had bought the plot from Mary Gathoni on 15th August 1995 and the last payment done on 5th September 1996.
153. He then produced a sale agreement prepared by Omwega Omanwa which appeared as No. 7 of the Further List of Documents and an acknowledgement as Exhibit D7.
154. He also testified that after purchase, Ogero built a residential house together with rental units and upon completion, he relocated his family.
155. It was his evidence that his mother in law was Dinah Kemunto Ogero who wrote her statement but died in April 2021. It was his testimony that they have been paying rates to show compliance with statutory obligations and made reference to documents appearing as No. 4 and 5 on the Further List of Documents which were demand notices and Rate Payment Receipts that were produced as Exhibits D8 and D9 respectively.
156. It was his further evidence that his father in law had conducted a search whose purpose was to facilitate a transfer which he produced as Exhibit D10.
157. He testified that his father-in-law did not get a title deed because Mary Kanyingi was deceased and that her family was willing to assist them.
158. He also testified further that he knew Eunice had a son who works in Mombasa and that the family had not file a succession cause.



159. He further testified that his family is in occupation of land parcel No. 309 that is registered in the name of Mary Muthoni Kanyingi and he had a copy of the title deed which he produced as Exhibit D11.
160. He also produced the green card as Exhibit D12 which shows that entry No. 1 was made on 2nd December 1985 in favor of Ramack Kangi & Salim, entry No. 2 in favour of Mary Gathoni Kanyingi entered on 30th March 1989 with entry No. 7 in favor of Anthony Kamau with ID No. 27714264 pursuant to succession cause 288 of 2015.
161. He testified that that he was in court when Anthony testified and that the grant produced is ad-litem for purposes of filing the suit.
162. He also testified that the judge did not order transfer of the parcel to his name and that the original title was produced by Anthony.
163. It was his evidence that that his father-in- law had approached advocate Omwenga to transact on his behalf but Omwenga died and the title which was deposited with him could not be found.
164. It was further his evidence that they contacted the family of the deceased lawyer and they were still not able to get the original title. That the title produced by the Plaintiff in court and the one he produced were one and the same.
165. It was also his evidence that there is no dispute between his family and the family of Eunice Kahenia and that Anthony seeking the eviction of Eunice Kahenia baffles him.
166. He testified that with regard to the dispute pertaining to the location of the plots, the people on the ground had no problem and that they are not claiming anything from plot 307.
167. He also testified that he only came to know of Anthony Kamau at the Police Station where the OCS sat with them in a meeting with Eunice- the defendant.
168. He further testified that the OCS dismissed Anthony and that he was not in agreement with Anthony on the eviction. He then produced as Exhibit D13 his identity card that was filed in his list of documents.
169. In addition to his oral evidence, he had indicated in his statement that his father in law had purchased plot No. 309 from Mary Gathoni Kanyingi vide the sale agreement dated 15th August, 1995.
170. He also stated that unfortunately his father-in- law died before he could transfer the title to his name. That he tried to contact Mr Otachi Advocate who was the brother to the deceased to try and locate the title deed but they were not able to.
171. He further stated that he got to learn of this suit when his late mother-in- law was contacted by John Waweru Githi and the Defendant herein.
172. On cross examination he confirmed that he was not known to Mary Gathoni Kanyingi, he had not met her and neither did he know how she looked like.
173. He also confirmed that he was in court on behalf of his father-in-law as he is married to his second born daughter. He further confirmed that Samuel Ogero had six children adding that his eldest child is a teacher in Kitale.
174. He admitted to not having Letters of Administration or authority from the family or a power of attorney adding that he was present in court as a witness.



175. He also confirmed that the family of Ogero was not joined to the suit either as a Defendant or Interested Party.
176. He stated the chronology of the purchase was as follows; that the land was purchased in 1985 but he did not know the purchase price, that the entire purchase price was paid as there was an acknowledgement.
177. When he was referred to a copy of the title deed in the further List of Documents, he stated that he is a procurement officer and the title was in the name of Mary Gathoni Kanyingi.
178. He admitted further that there was an insertion of the ID number by a pen that is handwritten. When he was referred to the copy of title produced by the Plaintiff, he also admitted that the title was in the name of Mary Gathoni Kanyingi.
179. He also confirmed there is no ID number written on it. He confirmed that he produced a copy of the green card with entry No. 3 showing that the title deed was issued on 3rd April 1989.
180. He was then referred to the document appearing as No. 6 on the Further List of Documents which was the Official Search and he confirmed that it shows that the title was re-issued on 26th May, 1993 and he stated that he could not tell why it was re-issued.
181. He reiterated that he could not tell the court why it was re-issued and that he did not know the age of the seller. He stated that his father-in-law was born in 1944 while Mary Kanyingi died in 2003.
182. He further stated that in 2003, Mary Kanyingi was 60 years old which means she was born in 1943 while DW3 stated that he is eighty years old as he was born in 1941.
183. He also stated that DW3 stated that he is older by 10 to 15 years and that from the chronology, Eunice and Mary might have known each other.
184. He confirmed that the late Mary Gathoni was a seller at the market, moved to a place known as Kiamaina and that the property was purchased about 1985.
185. He stated that the reason for delay in transfer is that Omwenga had died and his office closed and that since he was the custodian of all the documents, it was difficult to get them as the office was closed.
186. He stated further that the reason for the delay was that is father-in-law was ailing and that they had been trying to get in touch with the late Omwenga's brother but it proved difficult because he was living in Tanzania.
187. He admitted that he had been liaising with Mary Gathoni's children especially Lucy. He added that her son is about fifty years old. He stated that he didn't think that Eunice Kahenia disposed Mary Gathoni's land by crooked means.
188. He stated further that Eunice and Mary knew each other by the location of their plots and that he didn't know if she took advantage of her friend.
189. He confirmed that they did not take any action against Anthony but they wrote to the CID but he was not taken to court.
190. He further confirmed that Anthony reported to the police and they were called but the OCS dismissed Anthony's allegations of having been hijacked.
191. On re-examination he stated that the family of Ogero had not instituted the suit and he then reiterated that he was in court as a witness.



192. He stated that at the time of the filing of his witness statement, his mother-in-law was alive and her witness statement has been filed.
193. He further stated that Anthony Kamau instituted the suit and did not sue the family of Ogero. When he was referred to the title produced by the Plaintiff, he stated that the ID number was missing which was not normal and the title was dated 3rd April, 1989.
194. He also stated that in the title deed that he produced the ID had been indicated. He further stated that Lucy should be coming to testify as the representative of the Plaintiff's family.
195. When he was referred to the search he indicated that as per entry No. 2 Mary Muthoni was registered as the owner on 30th March, 1989 while entry No. 3 was made on 26th May, 1993 which shows that the title deed was re-issued but they do not know to whom it was re-issued.
196. He stated that the Land Registry issued the search and that the date on the search does not tally with the date of registration of the Plaintiff's title deed.
197. He confirmed that the search at entry No. 2 does not tally to the date of registration on the title deed that was produced by the Plaintiff.
198. He stated that on the age difference, he was not privy to the date of birth of Mary Kanyingi and neither did he know her children but he knew someone who knows.
199. He also stated that he was not privy to any relationship between Mary and Eunice and that it was Mary Gathoni who sold the land to his father in law.
200. He confirmed that the family of Ogero has not brought any action and that while his statement was filed in 2016 Anthony had not joined him to the suit and that the OCS had dismissed his claims.
201. Lucy Wangari Kanyingi testified as DW5. She adopted her witness statement dated 28th May 2018 as part of her evidence.
202. She testified that that Mary Gathoni Kanyingi was her mother. She produced her death certificate as Exhibit D14.
203. She testified further that her father was Gideon Kanyingi adding that he is also deceased. She produced his death certificate as Exhibit D15.
204. It was her evidence that her father died first and left six children all listed at paragraph 3 of her witness statement.
205. In her statement the children are listed as John Njoroge Kanyingi, Hellen Wanjiru Kanyingi (deceased), Lucy Wangari Kanyingi, Esther Wanjiku Kanyingi, John Kariuki Kanyingi and Mercy Waithira Kanyingi.
206. It was her further evidence that Hellen Wanjiru was deceased at the time she wrote her statement and subsequently Esther Wanjiku Kanyingi died. She then produced a letter from the Chief dated 6th May 2018 as Exhibit D16.
207. She testified that land parcel No. Nakuru Municipality Block 21/309 belonged to Mary Gathoni Kanyingi her deceased mother. She referred to Exhibit D12 which was the green card and that it showed the history of the parcel of land.



208. She further testified that the parcel of land should be in the name of Mary Gathoni Kanyingi and that she had sold it to Samuel Ogero for Kshs. 100,000/=. That she was paid the full amount as there was an agreement. She referred to the acknowledgement produced as exhibit D7.
209. She also testified that there is no money that they are claiming from the family of Ogero as they had taken possession and were building on it.
210. She testified further that the family of Ogero is living on the parcel of land where they have also built rental units and they have had a cordial relationship with her family.
211. She denied knowing Anthony Kamau Njeri who is claiming to be the owner of the parcel and that all their names end with Kanyingi who was their father.
212. It was her evidence that if the Plaintiff was her brother then his name would be Anthony Kamau Kanyingi. That as per the Kikuyu custom, if a child has no father, then they take up the mother's name and therefore he was her mother's child as he would be Anthony Kamau Gathoni.
213. It was further her evidence that Njeri would be his mother's name and that his mother is not Njeri. That Anthony Kamau had said that his father's name is Wachira then his name would be Anthony Kamau Wachira.
214. It was her evidence that Anthony had said that his parents lived in Bondeni but they have never lived there as they lived in Kaloleni.
215. She testified that after they moved from Kaloleni they moved to Engashura and that she did not know Oduori who had testified as PW2. Neither did she know any arrangement that he had with her mother on the keeping of the title deed.
216. She stated that she knew Eunice Kahenia as the parcel which she occupied she exchanged with her mother. That it was discovered that Eunice was on her mother's parcel of land and had started building.
217. It was also her evidence that they agreed with her mother that instead of bringing down the building, she would retain the parcel.
218. She testified that her mother and Eunice never had a dispute as Eunice also developed her land and that they have no claim against the family of Eunice as the family of Mary Gathoni Kanyingi.
219. She testified further that they do not know Anthony Kamau Njeri and they therefore want the suit instituted by him to be dismissed as he is a fraud.
220. She prayed that the court orders Eunice to remain on her parcel of land and Ogero to remain on his parcel of land.
221. On cross examination, she confirmed that Gathoni Kanyingi is her mother and is deceased. She confirmed further there are six children, and she is the third born.
222. She stated that her father's name is Gideon Kanyingi Wandindu and that their mother was a business woman who was selling at the market in Nakuru.
223. She also stated that her mother lived in Nakuru Municipality at Kaloleni C for many years and that she was born in Nakuru. She stated further that her mother had a parcel of land in Gacura Bahati and a plot in London.
224. She confirmed that the two plots are the ones she could remember and that her mother had died in the year 2003. She stated that her mother was chocolate skinned.



225. She stated further that Anthony Kamau Njeri had gone to court to claim plot No. 309 in London which plot she said belonged to them.
226. She admitted that they received a call from people at London and were informed that Anthony Kamau Njeri was claiming her mother's assets.
227. She then stated that they went to court and filed a succession cause which they finalized and that Anthony Kamau Njeri did not participate in the proceedings.
228. She stated further that Nakuru/Municipality Block 21/309 did not form part of the estate of her late mother because it had been sold to Mr Ogero.
229. She also stated that Mr Ogero was in the process of transferring the suit property to himself.
230. She stated that she was 58 years old and that it is true that people share the same name and that it is usually two names as the third one cannot be the same.
231. She was then referred to exhibit D3 and stated that it says Nakuru Municipality Block 21/309 is for a plot in London. That she never saw the title deed for the property as it got lost at the Lawyer's office.
232. She admitted that she never gave evidence on the title during examination in Chief and that on the title there is an ID number that is written by a biro pen and not typed.
233. She confirmed that ID No's on titles are usually typed and that she did not know who wrote the ID number with a pen.
234. She was then referred to exhibit P(4)(a) which was a title deed for land parcel No. Nakuru Municipality Block 21/309. She confirmed that it was in the name of Mary Gathoni Kanyingi and does not have an ID number.
235. She admitted to not knowing if the original is in court and would not be surprised if it was adding that she does not know the witness that testified as DW2 as their last born was born in the year 1972 and in 1985 she was thirteen years.
236. She stated that DW2 stated that the deceased had children that were below eighteen years which is true as there were two children who were below eighteen years.
237. She also stated that she did not know that Anthony had three other siblings and that she further did not know that Eunice Muthoni Kahenia had documents for the suit parcel.
238. She confirmed that she also did not know about Eunice Kahenia had sold land parcel No. Nakuru Municipality Block 21/307.
239. She also confirmed that she did not know about the involvement of the police with the Plaintiff and neither did she know that the Plaintiff had been hijacked on account of the suit parcel.
240. She further confirmed that the title to the suit parcel was lost when it was at the advocate's office and that the suit property was sold but she could not remember the date of sale.
241. She admitted to not knowing when the title deed to the suit property got lost and that she also did not know the procedure for getting a new title deed when the original one is lost.
242. She stated that the suit property was sold for Ksh.100,000/= and the transfer not effected as the Ogero's were following up on the process.



243. She admitted that the lawyer died but she could not remember the year and that she did not know the process after an advocate is deceased.
244. She stated that they got information that Anthony has their mother's title but they did not do anything as they did not know him.
245. She admitted that she knew Anthony in 2018 but they did not report to the police or the CID and that they have only come to court as witnesses for the Defendant.
246. She further admitted that it was the Ogero family that had called them to testify in court and not Eunice as they are living on land parcel No. 309 while Eunice lived on parcel 307.
247. She admitted to knowing Daniel Kalungi who testified as DW1 as he is the son of Eunice Kahenia but she did not know what his testimony was about.
248. She confirmed that Eunice and Mary Gathoni knew each other and that Eunice did not sell plot No. 307 to the Ogeros and that it's not true that she went to live on plot No. 309.
249. She stated that the plaintiff discovered that Eunice was on plot No. 309 which does not belong to him and added that their presence in court is not to bring confusion.
250. She admitted that the original title in the possession of Anthony belonged to their mother and that she does not know how it got to his possession as it was with the Lawyer.
251. She confirmed that Anthony instituted a suit against Eunice admitting that in the succession cause that was filed, they had listed her mother's assets.
252. She also confirmed that when the plaintiff came to court and was asked about the shamba at Gacura, he stated that he did not know it but only knew about plot No. 309 which she does not agree that it belongs to him.
253. She stated that if the court makes an order that the plot belongs to Anthony then it would not be right as it belongs to the Kanyingis.
254. She restated that they did not mention it in the succession cause because it had been sold and that there was no fraud in the transaction involving the sale to the Ogero's.
255. She stated that the insertion of the ID number by use of a pen is not fraudulent and that their postal address is 990 Nakuru and they had used it in the past but were not using it now.
256. On re-examination, she was referred to exhibit D12 which is the green card and confirmed that plot No. 309 is registered in the name of Mary Gathoni Kanyingi.
257. She stated that entry No. 7 shows that the owner is Anthony Kamau and that it was transferred to him on account of succession cause No. 288 of 2015.
258. She was then referred to exhibit P1 and she stated that it was a limited letters of *Ad Litem* and that it's clear that it is Anthony who is fraudulent.
259. She stated that the green card shows that Anthony was issued with a title deed and yet the original is in the name of Mary Gathoni Kanyingi.
260. She stated further that it is not possible that the title deed was transferred to Anthony's name and yet the title deed that was produced shows that it belongs to Mary Gathoni Kanyingi.



261. She also stated that in Misc Application No. 12 of 2018, Justice Mwangi gave an order that on 15th August 2018 the Letters of Administration issued in the name of Anthony Kamau Njeri be suspended.
262. She stated that when the file came back to Nakuru, Justice Ndung'u gave directions that Lucy Wangari be appointed administrator of the Estate of Mary Gathoni for purposes of pursuit of land parcel No. Bahati/Kabatini Block 1/563 pending the determination of the dispute relating to plot 309 on 24th September, 2018 where Anthony was part of the proceedings.
263. She stated that the Gacura shamba is the name of Mary Gathoni and that Anthony did not object to its distribution which is now complete.
264. She also stated that they were six children with some alive and others deceased and that Anthony was not one of his mother's children.
265. She reiterated that her mother's name was Mary Gathoni Kanyingi while her father's name was Gideon Kanyingi Wadudu and that she did not know Anthony's siblings.
266. She also reiterated that she is as a witness in this matter and that Mary Gathoni's parcel of land was 309 while the plot belonging to Eunice was number 307.
267. She stated that she is testifying on behalf of her deceased mother and that her evidence is that her mother had sold land to the Ogero's.
268. She also stated that it was the Ogero family who should pursue any other claim in respect of the suit parcel and that Justice Ndungu had stated that they finish this case and then they can go to the succession cause and state that they sold plot 309.
269. She stated that on the ground there was a mix up as her mother is the registered owner of plot 309 while Eunice is the registered owner of plot 307 but they occupy each other's plots and so they agreed that each one retains their respective ground positions.
270. She further stated that there was never a dispute on the ground positioning or otherwise even from Anthony who now wants to take what is not his.
271. She stated that she wanted the court to resolve this case and if not everyone to retain their position on the ground. That the title with the ID number inserted with a pen was issued by the Land Office adding that they have not been charged with fraud.
272. She also stated that no officer has been called from the Lands Office to negate the authenticity of the title and that there is no evidence that the ID number on the title does not belong to her mother as no title is ever issued without an ID number inserted.

Plaintiff's Submissions.

273. The Plaintiff in his submissions gave a summary of his case, the defense case and analyzed the evidence of each of the witnesses and sought that the Plaintiff's case be allowed.
274. The plaintiff did not rely on any judicial decision and has sought to answer 6 questions which I will summarise as follows:
 - a. The survey report, the ground position of the parcel of Land No. 307 and 309 and their occupation.
 - b. The filing of a further list of witnesses and introduction of DW5 and documents produced by her



- c. The question of the ID number appearing on the title produced by the defendant
- d. The finding of the surveyor and his alleged refusal to come to court, the evidentiary value of the testimony of DW5 and the demeanour and relevance of evidence by DW4.
- e. The relevance and/or introduction of evidence of purchase of LR 21/309 by the Ogero family.
- f. Rate payment for L.R 21/ 309, whether the rates were paid by the Ogero family or the defendant and its relevance.

275. In essence, the Plaintiff's submissions are punching holes in the evidence as presented by the defence and reiterating the evidence of the Plaintiff.

Defendant's Submissions

276. The Defendant in his submissions gave the history of the matter, the summary of the evidence and addressed the court on the following issues:

- a. Whether the Plaintiff has the locus standi to institute this suit.
- b. Whether the Plaintiff is entitled to the prayers sought.
- c. Whether the Defendant is entitled to the prayers sought in the counterclaim.
- d. Who should bear the costs of the main suit and counterclaim.

277. On the first issue, the Defendant submitted that the Plaintiff herein does not have the *locus standi* to institute the suit and cited the case of *Alfred Njau & 5 Others vs. City Council of Nairobi* [1983] eKLR among other cases.

278. The defendant submits that the Plaintiff has instituted the suit on account of letters of administration *ad litem* issued to him on the grounds that he is a son of the deceased Mary Gathoni Kanyingi.

279. The Defendant further submits that DW5 testified that she, together with other 5, are the children of Mary Gathoni Kanyingi and that they do not know the plaintiff.

280. The defence also takes issue with the date of death of Mary Gathoni Kanyingi. According to DW5, her mother died in the year 2000 while the Plaintiff in his written statement states that Mary Gathoni Kanyingi died in the year 2004.

281. The defence states that the plaintiff has failed to prove his relationship with the deceased Mary Gathoni Kanyingi and that it is this relationship that provides him with the right to institute the suit and seek orders contained in the plaint.

282. The defence further state that the grant of letters of administration *ad litem* issued to the Plaintiff were revoked were revoked *vide* a court order issued on 15th August, 2018 in Nakuru Misc. Application No. 12 of 21018.

283. The defence submits that the plaintiff lacks capacity to institute the suit and that the suit should be struck out.

284. On whether the Plaintiff is entitled to the orders sought, the Defendant reiterated that since he does not have *locus standi* he is undeserving of the prayers sought.



285. The Defendant further relies on the decision in *Nguruman Limited Vs Jan Bonde Nielson & 2 Others* [2014] eKLR wherein it was held that the three pillars for grant of orders of injunction- whether permanent or interlocutory must be met and must be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. The three pillars are:
- a. Establish his case only at a prima facie level
 - b. Demonstrate irreparable injury if a temporary injunction is not granted and,
 - c. Allay any doubts as to (b) by showing that the balance of convenience is in his favour.
286. The defence submits that the plaintiff is neither entitled to orders of permanent injunction or eviction.
287. On whether the Defendant is entitled to the prayers sought in the counterclaim, he relied on Section 24 and 26(1) of the *Land Registration Act* and the case of *Kitamaiyu Limited vs County Government Kiambu & Another* [2018] eKLR and submitted that the late Eunice Muthoni Kahenia (Deceased) as the registered owner of the land is protected under the above mentioned sections of the law.
288. It was also submitted that the court should not interfere with and/or disturb the obtaining *status quo* on the ground as both families had mutually agreed to maintain the respective parcels of land they are in occupation of.
289. In conclusion it was submitted that the Plaintiff's suit should be dismissed and the counter claim allowed as it has been proved on a balance of probabilities.

Analysis And Determination

290. I have perused the pleadings in this matter, heard witnesses testify, read the rival submissions and judicial decisions cited. I have also perused all the documents produced as evidence in this suit and all documents forming part of the court record and have taken them into consideration in making my determination.
291. I have also called for the file and perused proceedings in Miscellaneous Application No. 12 of 2018 filed at the High Court of Kenya at Nakuru. These proceedings were brought to my attention in the submissions filed by the defendant and will invariably have a bearing on the determination of this matter.
292. While the questions for determination in this matter may appear complex and I must state that this court thought as much. However, they boil down, in summary, to ownership of the suit parcel and whether the parties have proved ownership and/or beneficial interest in it so as to warrant the grant of orders sought by either of them.
293. Having said that, it is my considered view that the issues for determination are:
- a. Whether the plaintiff had locus standi to institute and maintain this suit.
 - b. Whether the plaintiff is the registered owner and/ or has beneficial interest in the suit land.
 - c. Whether the plaintiff is entitled to grant of orders of eviction and permanent injunction against the defendant.
 - d. Whether the defendant is entitled to grant of orders that the plaintiff do surrender Nakuru Municipality Block No. 21/ 307, orders of eviction and orders of permanent injunction against the plaintiff as set out on the counterclaim.



- e. Who should bear the cost of the suit and interest thereon?
294. I will address the first issue which is a question of law. I reckon that if the answer to this is in the affirmative it has the potential of disposing off this suit but I am inclined to make further orders so as to settle the issues raised by the defendant in the counterclaim and provide a sense of finality in the resolution of this dispute.

A. Whether the plaintiff has locus standi to institute and maintain this suit.

295. This question for determination is in the nature of a preliminary objection.
296. While it might be seen and it is indeed true to have come rather late in the day, this court appreciates that it was nevertheless brought to its attention. It would otherwise have been a travesty of justice.
297. It is trite law that a preliminary objection can be raised at any time when the action is still alive. It is preferred, however, that it is raised at the earliest possible opportunity to avoid wasting of scarce and precious judicial time. The reason, as pointed out earlier, that it often has the potential of disposing off a suit.
298. In *Mukisa Biscuits Manufacturing co. td -vs- West End Distributors Ltd* (1969) E.A 696 it was held that
- “A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
299. The defendant in his submissions state that the grant of letters of administration *ad litem* produced as Exhibit P1, pursuant to which the plaintiff derives authority to institute this suit were revoked *vide* a court order dated August 15, 2018.
300. The defendant’s counsel invited the court to peruse the proceedings in Miscellaneous Application No. 12 of 2018 filed at the High Court of Kenya at Nakuru.
301. I confirm that I indeed called for the file and summarise my findings in the subsequent paragraphs.
302. Misc. Application No. 12 of 2018 was instituted at the High court of Kenya in Nakuru under vacation rules. The said application is dated 7/8/18 and sought the following orders:
- a. That service of this application be dispensed with in the first instance.
 - b. That the grant of letters of Administration to Anthony Kamau Njeri made on 12th day of January, 2018 be revoked and/or annulled.
 - c. That the Petitioner/Respondent be restrained from administering the Estate of the deceased pending the hearing and determination of this application.
 - d. That the applicants be allowed to file a Notice of Objection, Answer to petition and cross- application to petition out of time.
 - e. That the Petitioner/Respondent do pay costs of this application



303. The file was placed before Justice Mwongo on 15th August, 2018 and the learned Judge issued directions for hearing of the application which included an order suspending the use and validity of the grant of letters of administration issued to the plaintiff herein.
304. The order suspending the use and validity of the grant of letters administration was to remain in force till 29th August, 2018 on which date the court would issue further directions.
305. On the 29th August, 2018, the order of suspension of the grant of letters of administration issued to the plaintiff herein was extended to 24th September, 2018 when the application for revocation/ annulment of grant would be heard.
306. The counsel appearing in the instant suit were appearing for the plaintiff herein and DW5 (Lucy Wangari Kanyingi).
307. On 24/9/18 the parties entered into a consent as follows;

“By consent the application dated 7/8/18 is allowed with no order as to costs. These proceedings to go on in respect of Bahati/Kabatini-Block 1/563. Lucy Wangari Kanyingi is hereby appointed the administrator of the estate of Mary Gathoni Kanyingi the registered proprietor of Bahati/ kabatini-Block 1/563. Letters of administration to issue.

This matter is marked as settled.”

308. My deduction from these proceedings is that whatever power and/or authority that the plaintiff herein purported to have and exercised in relation to the estate of the Mary Gathoni Kanyingi was suspended on 15/8/18 and revoked and/or annulled on 24/9/18.
309. *Black’s Law Dictionary* 11th Edition at page 1128 defines locus standi as follows;
- The right to bring an action or to be heard in a given forum
310. The decision in *Alfred Njau & 5 others v City Council of Nairobi*[1983] eKLR offers useful guidance on the meaning of locus standi. The court of appeal held, inter alia, that;

The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt’s Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.

311. What then is the legal effect of revocation and/ or nullification of grant of letters of administration? In *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* [2016] eKLR, the learned judge held as follows;

Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit (emphasis is mine) even where a valid cause of action subsists.

Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. (Emphasis is mine)

It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person (Emphasis is mine) since in most cases the estate involves several other beneficiaries or interested parties.



this matter therefore, the Respondent lacked the requisite locus standi to institute and/or maintain the suit. The result is that all the proceedings before the trial court were instituted and maintained by a person who lacked the legal capacity to do so. They are indeed a nullity and as such lack the legal leg to stand on. (Emphasis is mine)

312. As at the time of cross examination of the plaintiff i.e on 29/9/21, his purported rights as administrator had been annulled and the annulment was by his consent. He could therefore not sustain this suit as an administrator or at all.
313. I find, therefore, that the plaintiff had no had no locus standi .
314. I find, therefore, that the plaintiff had not right to institute and maintain this suit.

B. Whether the plaintiff is the registered owner and/ or has beneficial interest in the suit land.

315. The supporting affidavit to the summons for revocation of grant in Nakuru HCCC. Miscellaneous application No. 12 OF 2018 is sworn by DW5 – Lucy Wangari Kanyingi.
316. She depones that her mother died intestate on 3rd June, 2003 and not on 13th July, 2000 as alleged by the petitioner (the plaintiff herein). She attached the same death certificate that has been produced in this suit as Exhibit D14.
317. Dw5 deposes as she has also given evidence herein, that prior to Mary Gathoni Kanyingi’s demise, she acquired two assets one of which is the suit property i.e LR . No. Nakuru/ Municipality Block 21/309. The title deed is annexed thereto. In this suit she produces Exhibit D12 – The green card as evidence of the history of the title.
318. The importance of this narrative is to show that:
- a. The plaintiff herein was well aware that the suit property featured prominently in the pleadings filed in Nakuru HCCC. Misc. application No. 12 of 2018.
 - b. That the said pleadings also acknowledge that Mary Gathoni Kanyingi sold Nakuru/ Municipality Block 21/309 to one Samuel Ogero deceased.
 - c. That the family of Mary Muthoni Kanyingi and that of Samuel ogero were in the process of initiating succession proceedings when they were informed that the plaintiff herein had filed a suit seeking eviction of Enice Kahenia from Nakuru/ Municipality Block 21/307.
 - d. DW5 deposes that she was shocked to learn that the suit parcel i.e Nakuru/ Municipality Block 21/309 had been transferred to the plaintiff herein despite ongoing litigation in this suit and that the transfer was effected on account of letters of administration ad litem.
319. The deposition in the affidavit in support mirrors the evidence adduced by the defence in the instant suit, particularly, the evidence of DW5. The importance of highlighting the deposition contained in the affidavit in support of the summons for revocation of grant is that the facts were not challenged and that on account of these facts that remained unchallenged, a consent was recorded to revoke the grant issued to the plaintiff herein.
320. What then would be the basis for the plaintiff’s continued claim of interest over property forming part of the estate of Mary Gathoni Kanyingi?



321. It is also important to point out that evidence led in this case by the defendant is to the effect that though the defendant is the registered owner of the parcel of land known as Nakuru/ Municipality Block 21/307, she is in possession of Nakuru/ Municipality Block 21/309. This mix up in the ground position dates back to 1985 when the families of Mary Gathoni Kanyigi and Eunice Kahenia took occupation of their respective parcels and by way of an oral agreement of gentleman's agreement, agreed that each family retains occupation of the parcels they had settled on.
322. Curiously, the plaintiff and his witness had no knowledge of the mix- up in ground position. In both their evidence. PW1 and PW2 allege that they retained the services of a surveyor who pointed out the suit land and demarcated it.
323. I find that the plaintiff has failed to prove the existence of beneficial interest in the suit land generally and specifically in light of the proceedings revoking the grant issued to him in respect of the estate of Mary Gathoni Kanyingi, through whom he claims.
324. The Plaintiff also Admits that he transferred the suit land to himself on account of orders issued in Probate and administration cause No. 288 of 2015, which granted him letters of administration ad litem. Letters of administration ad litem are granted for purposes of filing suit and representing the estate of a deceased person. Exhibit P1 states clearly, on its face, the purpose for which they were granted.
325. Further, the endorsement on the green card – Exhibit D12 is a confirmation of this illegality- that the transfer of the suit land to the plaintiff was on account of letters of administration ad litem.
326. The *Law of succession Act* at Section 45 provides that:
- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
327. Section 45 of the *Law of Succession Act* speaks to the illegality of the acts of the plaintiff who had no authority to deal in the property of the deceased Mary Muthoni Kanyingi.
328. Section 26 of the *Land Registration Act*, 2012 provides;
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—



- a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b) where the certificate of title has been acquired illegally, unprocedural or through a corrupt scheme.

329. Section 26 of the land Act speaks to the sanctity of title There is no doubt that the transfer of Nakuru/ Municipality Block 21/309 to the plaintiff herein was illegal and unprocedural and should never have happened.

330. Consequently, I find that the plaintiff has no beneficial interest in the suit land and that the suit land was illegally and unprocedural registered in his name.

C. Whether the plaintiff is entitled to grant of orders of eviction and permanent injunction against the defendant.

331. On account of my finding in (A) and (B) above, I decline to grant orders of eviction and permanent injunction against the defendant.

D. Whether the defendant is entitled to grant of orders that the Plaintiff do surrender Nakuru Municipality Block No. 21/ 307, orders of eviction and orders of permanent injunction against the plaintiff as set out on the counterclaim.

332. In my view, the genesis of this prayer is apprehension on the part of the defendant that this court might find in favour of the plaintiff herein, in effect issuing orders for her eviction from Nakuru Municipality Block 21/ 309.

333. I have expressed in the preceding paragraphs that the plaintiff lacked *locus standi* to institute and maintain this suit, that the transfer of LR. No. Nakuru Municipality Block 21/309 was illegal and unprocedural.

334. I have also found that there existed a gentleman's agreement between the families of Mary Gathoni Kanyingi (deceased) and Eunice Kahenia (Deceased) that each family would maintain the ground position occupied by them after they found that there was a mix- up at the time of occupation- sometime in 1985.

335. I find no need to interfere with the status quo but find it necessary to state that there is need for the defendant and the family of Ogero (represented by DW4) to regularize their titles so as to represent the actual ground position of the parcels of land Nakuru Municipality Block 21/307 and Nakuru Municipality Block 21/309.

336. The plaintiff in cross examination sates that he has no claim over Nakuru Municipality Block 21/307.

337. For the foregoing reasons, the grant of orders that the Plaintiff surrenders the parcel known as Nakuru Municipality Block No. 21/ 307 is superfluous.

338. I note that Section 13(7) of the Environment and Land Court Act provides that this court has power to make any orders and grant any relief as the court deems fit and just. The defendant might not have expressly sought certain orders but having interrogated the facts in this case, I will proceed to issue orders which in my view will bring a legal and logical conclusion of this matter.



D. Who should bear the cost of the suit and interest thereon?

339. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21).
340. In the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC. Petition No. 4 of 2012: [2014] eKLR. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs.

Disposition.

341. The upshot of the forgoing is that I find no merit in the claim by the Plaintiff.
342. Consequently, I enter judgement in the following terms;
- a. The Plaintiff's suit is struck out.
 - b. An order of permanent injunction is hereby issued restraining the plaintiff by himself, his servants, agents and/ or employees from interfering with the defendant's exclusive use, possession and enjoyment of Nakuru Municipality Block no. 21 / 307.
 - c. A declaration is hereby issued that land parcel Nakuru Municipality Block no. 21 / 309 belongs to the estate of the deceased Mary Gathoni Kanyingi.
 - d. A declaration is hereby issued that land parcel Nakuru Municipality Block no. 21 / 309 was illegally and unprocedurally transferred to the plaintiff.
 - e. The Land Registrar shall rectify the register of Nakuru Municipality Block no. 21 / 309 by deleting the plaintiff's name and restoring the name of Mary Gathoni Kanyingi
 - f. The defendant shall have costs of this suit and interest thereon from the date of judgment until payment in full.
343. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 7TH DAY OF JULY, 2022.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Simiyu for the Plaintiff.

Mr. Ouma for Mr. Mukiri for the Defendant.

Court Assistant; Ms. Jeniffer Chepkorir

