



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC SUIT NO. 131 OF 2017

(FORMERLY NAIROBI ELC 621 OF 2011)

SIGONA JUAKALI ASSOCIATION.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....1ST DEFENDANT

LAND CONTROL BOARD, KIAMBU.....2nd DEFENDANT

REGISTRAR OF LAND.....3rd DEFENDANT

THE ATTORNEY GENERAL.....4th DEFENDANT

JANE WANGECHI KIMANI.....5th DEFENDANT

GRACE WAMBUI KAMUIRU.....6th DEFENDANT

GRACE WANJIRU MBUGUA.....7th DEFENDANT

JOSEPH KIBIRU WACHIRA.....8th DEFENDANT

JOHN MUTUA KAMENE.....9th DEFENDANT

JUDGMENT

Introduction

1. The initial plaint was filed as NAIROBI ELC NO.621 of 2011 on 9th November 2011, but was amended via a court order of 10.10.2017 to replace the defunct Kikuyu town council with the County Government of Kiambu. The matter was transferred to Thika ELC on 8th February 2017 where it was registered as ELC No. 131 of 2017.

2. The plaintiff, Sigona Jua Kali Association is a registered society consisting of about 180 members. They are claiming entitlement to a parcel of land which WAS known as SIGONA/934 (hereinafter referred to as the suit land which is no longer in existence). The plaintiffs claim that they applied for and were allotted the suit land by the defunct Kikuyu town council in year 2001. The parcel of land was to be re-planned and sub divided to accommodate the plaintiff, council utility land and provincial administration offices. However, the public records at Kiambu Land's registry were altered and the land was transferred to 5th defendant and was then further subdivided to yield 31 more plots, which plots are in the hands of the 5th- 9th defendants and other parties. The prayers sought by the plaintiff are;

1) A permanent injunction restraining the Defendants by themselves, their servants, or any person claiming title through them, from trespassing on, constructing on, transferring, disposing off, alienating, wasting, or in any manner interfering with the parcel of land known as Sigona/934 pending the hearing and final determination of this suit.

2) A declaration that the plaintiffs are the beneficial owners of parcel Sigona/934.

- 3) A cancellation of the title documents purportedly issued on 30th day of April 2002 to date.
- 4) Eviction of the defendants from the suit premises.
- 5) An order directing the 2nd and 3rd Defendants to facilitate registration of Sigona/934 in the name of the Plaintiffs.
- 6) Mesne profits
- 7) Costs of the suit and interest.

3. The 1st Defendant was a local authority established under the Local authority Act, but was subsequently replaced by the county government of Kiambu. It filed its statement of defence on 29.6.2012 where plaintiff's claim is generally denied. However, in paragraph 13 thereof, the Kikuyu County Council avers that it had learnt that the suit land was government land and therefore, it had no powers to allocate the said land.

4. The 2nd Defendant is an entity constituted under the Land Control Act Cap 302 Laws of Kenya, the 3rd Defendant is the land Registrar, while the 4th defendant is sued on behalf of the National Government. Their statement of defence is dated 28.5.2012 whereby, the pleading therein contains a general denial of plaintiff's claim.

5. The 5th defendant was the registered owner of the suit land before it was subdivided into parcels No's Sigona 935-965. The other defendants appear to be purchasers of these smaller parcels (No.s 935-965). A memorandum of appearance was filed on behalf of 5th to 9th defendants and is dated 11.4.2012 (excluding 6th defendant). However, the statement of defence dated 25.4.2012 only mentions 5th defendant, but the submissions have been filed for 5th to 9th defendants. Since Messrs. Muhuhu advocates have been acting for these defendants throughout the trial, then I will consider that the said defendants are represented. These defendants aver that there is no land known as No. Sigona 934 as the same was subdivided in year 2002. The 5th defendant has also pleaded that she was the absolute proprietor of the land and therefore, she had all the powers to cause the said subdivision. She also states that the suit is Res-judicata as the matter was determined in Kikuyu P.M.C.C No. 53 of 2004.

Plaintiff's case

6. Pw1, John Kamau Ndere testified and he adopted his statement dated 2.11.2011 as his evidence. The statement is rather lengthy but I will endeavor to summarize the evidence. PW1 is the Secretary of Sigona Jua Kali Association which he joined in the year 1998 and which has 180 members. He testified on behalf of his group members. He avers that their association was allocated the Property, Sigona/934 by the Kikuyu County Council vide minutes dated 15th January 2002 through minute No: EX-MIN/WTPM/86/2001. That initially they had approached the commissioner of lands who referred them to the Council. The council would later issue them with the minutes. At the time there was no one on the land and the Council resolved that they were to be granted the land. He however admitted that the minutes did not give the reference Number of the plot.

7. He also testified that he knew John Kimani Munyi (deceased), as the Husband of the 5th Defendant and was the proprietor of a large parcel of land known as Sigona/41 which gave rise to Sigona/830 and 832. PW1 avers that the parcel no. 934 was located in a prime area in Kikuyu town. Thus a plan was hatched by various influential government officers at the location, division and district levels on how the parcel would be grabbed smoothly. The government officers did approach Jane Wangechi Kimani, the 5th defendant and convinced her to lodge a claim in Kiambu Land's office, that there was part of her land no.832, which was supposed to be part of the bigger portion of land No. Sigona 41 which was demarcated in 1962. The parcel no Sigona 832 was measuring 0.55 hectares.

8. PW1 Further stated that parcel 832 was therefore subdivided to give rise to more parcels running from 930-934. Parcel 934 was in turn subdivided to many other parcels running from No. 935-965 (31 plots). It is during the subdivision of 832 that the dubious transactions allegedly took place to make parcel 832, which had the acreage of 0.55 hectares bigger to read 1.55 hectares such that it ate up the land which had been reserved for the plaintiff and some public utilities. On page 2 and 3 of PW1's statement, he has given an account of how parcels number 935-965 were taken up by third parties.

9. He further stated that he placed a caution on the property but the land registrar did not lodge the same due to his interest in the property.

10. PW1 has given a detailed account of their quest to recover the land. They tried to engage the council, the lands office, the ministers in the ministry of lands, the commissioner of lands and even the Kenya Anti-Corruption Commission, but were not successful, hence the filing of this suit.

11. Plaintiff avers that after the fraudulent transactions, the 5th defendant, Jane Wangechi filed a suit Kikuyu R.M.C Civil Suit No. 53 of 2004 against the plaintiff and Kikuyu County Council seeking for an order to restrain the defendants (Sigona group and the Council) from trespassing on the suit land. PW1 contends that the case in Kikuyu only dealt with trespass and that the Judgment of the Court stated that the Court did not have jurisdiction for cancellation of titles, hence the court did not resolve the dispute.

12. In support of their case, Plaintiffs relied on their bundle of documents (bound in a blue bundle) dated 12.7.2018, which are items 1-40.

13. In their submissions plaintiffs prayed for orders that the title for Sigona/934 (now 935-965) be cancelled, an eviction order to issue and that the physical planning department to draw a plan to accommodate Sigona Jua Kali Association. It was further submitted that a title ought to be issued in the name of Sigona Jua Kali Association and they be paid costs of the suit.

14. Plaintiffs have submitted that the suit is well within the time limitation by virtue of Section 26 of the limitation of Actions Act. They also submit that they have proved the fraud occasioned by the 1st to 5th Defendants hence the latter cannot be shielded by Section 25 and 26 of the Land registration Act.

15. Plaintiffs have proffered the following authorities in support of their case;

a) Arthi Highways Development Ltd vs West End Butchery Limited.

b) Dr. Joseph Arap Ngok vs Justice Moiwo Ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997.

c) Alice Chemutai Too vs Nickson Kipkurui Koriri & 2 others (2015) eKLR.

Case for the 1st defendant

16. The county government of Kiambu did not tender any evidence, nor did it file any submissions.

Case for the 2nd, 3rd and 4th defendants

17. John Matheka, a Land registrar from Kiambu is the one who testified on behalf of the defendants (read government officials). He adopted his statement dated 30.7.2018 as his evidence. He averred that the 5th Defendant was registered as the absolute proprietor of all that land known as Sigona/934 on 30th April 2002 and that she has since sold the same to various persons subsequently subdividing the same as parcels Sigona/935 to 965.

18. He averred that the land in Sigona/934 does not fall under the Jurisdiction of Kikuyu County Council and that the plaintiff does not have any documents of ownership and that the minutes from Kikuyu County Council cannot lay a basis of ownership to land.

19. On being cross examined by the plaintiff, he stated that he does not have the green card to parcel No. Sigona/934. He also stated that on 4th March 2002, the titles in Parcel No.s 930 to 934 which add up to 1.55ha were closed. He is however not aware of the measurement of Parcel No. Sigona 832 hence, he cannot affirm that the same measures 1.55 ha. That he is not aware of the position on the ground because it is the surveyor who determines how the numbers are given for the parcels that are subdivided. He however, admitted that in the green card of parcel no. 832, there is cancellation of 0.55 hectares to read 1.55 hectares.

20. The Land Registrar denied there being a caution placed on the properties and that the caution being referred to by plaintiff was never lodged since it does not contain the stamp of the land's registry.

21. On being cross- examined by the advocate of the 5th to 9th Defendants he stated that he would internally lodge a restriction if a complaint is raised on the land. He however averred that in this case there was no fraud.

22. The land registrar produced as exhibits, the documents in their list filed on 6.11. 2018, item 1-32 as their exhibits 1-32 respectively.

23. In their submissions, the 2nd to 4th defendants state that Sigona 934 has a long standing history of conflict between the plaintiffs and the 5th defendant. However, according to their records, this land belonged to 5th defendant. It is also submitted that the minutes relied on by the plaintiff are undated and not signed by the Town clerk, they don't mention the particular land allocated and that plaintiff has failed to prove the root of their entitlement and has similarly failed to prove any allegations of fraud.

24. In support of their case, the 2nd to 4th defendants proffered the following authorities; **Hanniel Gichina Mwangi vs Joe Mwaniki Mwangi & 2 others [2018] eKLR & Evans Otieno Nyakwana vrs Cleophas Bwana Ongaro.**

Case for the 5th- 9th defendants

25. Dw2, one Jane Wangechi Kimani is the 5th Defendant herein. She adopted her statement dated 25.4.2012 as her evidence. She avers that this suit is *Res judicata* since the issues raised herein had already been determined in Kikuyu Civil Suit No. 53 of 2004. She avers that the parcel Sigona 934 is non-existent since the same has been sub divided into new parcels a fact known by the plaintiff hence the suit is fatally defective.

26. Wangechi further stated that she legally acquired the suit land (Sigona 934) in the year 2002 and it is after the plaintiff attempted to evict her from the same that she lodged the suit in Kikuyu PMCC No. 53 of 2004 which was determined in her favour. She has no knowledge of the allegations of fraud as alleged by the plaintiff.

27. Her explanation of how parcel no. Sigona/934 came to be was that it was a result of subdivision of Sigona/41 and Sigona/832 which bordered the railway line. She stated that Sigona/41 was owned by her husband, allocated to him in the year 1964 and registered in the year

1972. She has since sold the land parcel Sigona/934 to the 6th to 9th Defendants, a result of which the same is subdivided to Sigona/935-965. That the sub division followed due process and to date she has never received any complaint from the council. She only became aware of the complaints vide these proceedings.

28. In support of her case, Wangechi produced as exhibits, the documents in their list dated 25.4.2012 item 1-6 as exhibits 1-6 respectively.

29. In their submissions, the 5th- 9th defendants have stated that 5th defendant was the lawfully registered proprietor of the suit land in accordance with provisions of section 25 and section 26 of the Land Registration Act after the said land was transferred to her from her husband. It is further submitted that the suit land No.934 no longer exists as the same was subdivided to yield parcels no. 935-965 and sold to third parties.

30. It was submitted that fraud has not been proved and that plaintiffs are mere busy bodies.

31. In support of their case, 5th - 9th defendants relied on the following authorities;

a) **John Chelimo Seguton vs Joseph Kitur Kiplangat, (2005) ELC No. 97 of 2015.**

b) **Urmila S/O Mahendra Shah vs Barclays Bank International Ltd & another (1976-80) 1 KLR 1168.**

c) **Theodore Andrew Ochieng vs David Shiundu Masieyi ELC NO. 308 of 2017.**

Analysis and determination

32. I frame the issues for determination as follows;

- a. Whether the suit herein is Res judicata.
- b. Whether there was fraud in the alienation of land parcel no.934
- c. Whether plaintiffs are entitled to the suit land
- d. Which orders should this court grant

Whether the suit is Res judicata.

33. The existence of the Kikuyu case no. No. 53 of 2004 and the Judgment thereof is not disputed as documents appertaining to this case have been availed. The 5th defendant (Wangechi) had sued Sigona Jua Kali and the Kikuyu Town Council as the defendants. The orders sought there in were;

a) *“The defendants their agents or servants be restrained by a temporary injunction and perpetual injunction from trespassing or in any way interfering with the plaintiff’s parcel of Land i.e. Sigona 934*

b) *General Damages*

c) *Costs of the suit”.*

34. The Sigona group had responded to that suit vide a statement of defence on 6th April 2004 stating that the suit property did not belong to the plaintiff’s husband and that the same was allotted to Sigona group vide minutes No. (E) EX-MIN/WTPM/86 2001. It alleged fraud on the part of Jane Wangechi Kimani including misrepresentation and collusion with the Land Registrar and also obtaining the title without taking up letters of Administration.

35. The Court (**Kikuyu RMCC 53/2004**) made its determination on 23rd June 2006 where it held thus;

“Having considered the evidence before court, I find that the plaintiff has proved that she is the registered owner. 1st Defendant has stated that the registration is fraudulent. Having been registered as an absolute owner the forum to challenge the title is not this court and the court has no basis upon which to interfere with the plaintiff’s title. 1st Defendant has acknowledged having entered the disputed land on the basis that the land was theirs.

They have no document of ownership and minutes produced from 2nd Defendant cannot lay basis of ownership.....Defendant has counterclaimed declaration that plaintiff's title is null and void. They are also seeking injunction against the plaintiff. Plaintiff in this case has proved the ownership and there cannot be any basis upon which 1st Defendant's claim may be granted. The application for cancellation of title should be made in the High Court, the counterclaim herein must fail.

36. The doctrine of Res judicata is set out in the Civil Procedure Act at Section 7 as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

37. In John Florence Maritime Services limited vs. Conken Cargo Forwards and Another, Malindi Court of Appeal Case No. 42 of 2014 It was stated that;

“The ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (emphasize added)”.

38. It is clear that in Kikuyu R.M.C.C. No. 53 of 2004, the only prayers sought by plaintiff was a temporary and perpetual injunction restraining the defendants from interfering with the parcel Sigona/934, along with the prayer for damages. It is also evident that the Sigona group had raised the issue of fraud, collusion and misrepresentation in form of a counterclaim. However, the court stated that the forum to challenge the title was not the Magistrate's court. The Sigona group was advised to seek redress in the High court and that is exactly what they did. It follows that the issues raised before the Magistrate's court, particularly the counter claim of the Sigona group were not fully determined on account of want of competency of the court. This matter is therefore not Res judicata.

Whether there was fraud in the alienation of parcel no. Sigona/934

39. The 5th Defendant gave evidence of how she acquired the title to the suit land averring that the same belonged to her husband, and she acquired the same in the year 2002. The said property was allegedly excised out of Sigona 832 which in turn had been excised out of Sigona/41 which the plaintiff admits belonged to the 5th Defendants husband.

The law

40. Section 80 of the Land Registration Act provides that:-

“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake”.

41. Section 26 of the Land Registration Act stipulates as follows;

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

42. Article 40 of the constitution makes provision for the protection of right to property. However, this protection is not absolute as Subsection (6) thereof provides that;

“The rights under this article do not extend to any property that has been found to have been unlawfully acquired”

43. In **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKL**, the Court held;

“.....where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part.

44. In **Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012**, it was held that:-

...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, un-procedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder”.

45. From the foregoing legal analysis, it is apparent that the title No. 934 or the subsequent subdivisions are liable to be impeached in the event that the court makes a finding that there was fraud, misrepresentation, illegality, and/or that the titles were acquired un-procedurally or through corrupt schemes.

46. Land ownership in Kenya has always emerged as an issue of interest because of the political context in which land was historically allocated and acquired by individuals through political patronage, as was highlighted by the findings of the Ndungu Commission of Inquiry into the Irregular and Illegal Allocation of Public Land in Kenya (Ndungu Commission, 2003).

47. It is also common ground that land is an extremely precious commodity in Kenya and the insatiable appetite for the same has been there for decades. People go to great lengths often resulting to unorthodox and illegal means to own this precious commodity.

48. The pre-2012 land ownership legal regime was governed primarily by the Government Lands Act, Trust Land Act, Registered Lands Act and Registration of Titles Act. Under the government Lands Act, one could apply to the Commissioner of lands for allocation of the land. The physical planning department would come into the picture which would lead to allotment of an un-surveyed parcel. The land would then be surveyed and demarcated leading to registration.

49. A private individual could also get land through the Adjudication process of ancestral Land under the Land Adjudication Act (Cap 284) and the Land Consolidation Act (Cap 283) which would lead to crystallization of the rights and interests in land via registration under the Registration of Lands Act.

50. There is another process of getting land through the process of setting apart of Trust land held by the county councils on behalf of the residents ordinarily residing in the area. The process is rigorous and was guided by the Trust lands Act particularly section 13 thereof.

51. Once the land is privatized, it could be inherited, gifted away, sold, charged or dealt with in any manner that the owner deemed fit.

52. The Land Registrar has affirmed that the parcel of land no. 934 belonged to the 5th defendant. However, there are some telltale signs that the creation of parcel no. 934 was shrouded in mystery. There are many unanswered questions regarding how this parcel came to exist.

53. The first point of call is to examine the root of the title Sigona/934. The 5th defendant avers that she inherited the suit land from her deceased husband. That doesn't help as there is no evidence to support that claim, that parcel 934 was ever part of the land of John Kimani's parcel no 41. The land registrar stated that he doesn't have records of parcel 832 and 934, yet he is the custodian of such documents. There ought to exist a file known as the parcel file at lands office where all documents appertaining to a particular land parcel are kept. The Land registrar was mute on such issues.

54. Further, it remains a mystery as to how the acreage of parcel No. 832 was cancelled from 0.55 hectares to read 0.155 hectares. Apparently, the husband of 5th defendant owned a huge parcel of land known as Sigona no.41. This land was then sub divided to yield No. 831 ad 832. Then parcel no.832 was subdivided to yield no's 930-934. And here lies the problem. Plaintiffs aver that parcel no 832 was 0.55 hectares, whereas parcel 934 is 0.970 hectares. The green card availed by plaintiffs (item 10) is for parcel no. 832 which has acreage of 0.55 hectares cancelled to read 1.55 hectares. The land Registrar confirmed this anomaly but gave no explanation for the same. There is no rocket science herein. It is plainly clear that there was illegality in creation of parcel 934 which was far much bigger than the mother parcel no.832. It is also not lost to this court that no one appears to know what became of parcels no.930-933. This information is crucial in determining the circumstances under which parcel no 832 came to be cancelled.

55. The land registrar has stated that registration of land is the last step in land acquisition. However, such acquisition must emanate from somewhere. The Land registrar has stated that mutation of subdivisions emanate from the office of the surveyor who is also responsible for giving the numbers. Plaintiff has availed a letter ,item no. 26 which is from the director of survey to the commissioner of lands and it reads as follows;

“RE: SIGONA 934 (NOW SIGONA 935-965)

Refer to your letter ref No. 209163/A/121 Dated 8.3.2010. This is to confirm to you that parcel No. Sigona/934 has not been subdivided, the same is still intact from our map (Sigona sheet no 3)”.

56. If the subdivisions were done lawfully as the land Registrar alleges, why are the records at survey department not in tandem with what they have at the Land Registry? Since the Land registrar has been aware of the dispute for a long time, did they try to verify the records at the survey department especially when faced with the allegation that parcel 832 was subdivided to become bigger? Land does not suddenly sprout from the ground like trees! It was not enough for the Land Registrar to state that they deal with the tail end of registration of the land. It was incumbent upon him to shed light on the basis upon which the land 934 came to be and how it was alienated thereafter.

57. The court has also considered the fact that the dispute was in the open and was brought to the attention of the relevant authorities. Way back on 31.3.2009, the commissioner of lands had written to the Kiambu Lands officer as follows; (item 21 on plaintiffs bundle).

“COMPLAINT OVER PARCEL SIGONA/934

I have received a complaint from Sigona Jua Kali Association that parcel 935-965 meant for public utility have irregularly been allocated to private individuals as there are no records in this office concerning any allocation of these plots. You are requested to liaise with the District Land Registrar and the County Council and establish the status of the land. Please let me know your findings to enable me to act accordingly”.

58. A further letter was again written by the Commissioner of Lands on 8.4.2010 as follows;

“RE: SIGONA/934 (NOW SIGONA 935 – 965)

REFERENCE IS MADE TO MY LETTER Ref. No. 2019163/a1/119 of 7th October, 2009 and your rejoinder unreferenced dated 27th October, 2009 regarding the above. Also refer to a letter Ref No. SK/1/6/49 Vo. XII/10 of 17th March 2010 from the Director of Surveys and numerous other correspondence in connection with the above mentioned matter.

From the outset it appears that an illegal sub-division was carried out and titles issued thereafter without following the due process of law. Indeed, that is why the Director of Survey has confirmed that parcel number Sigona/934 remains intact.

In this respect therefore, the caution against parcel number Sigona/934 issued in favour of James N. Wambari and others on behalf of Jua Kali Associations is of no consequence since parcel numbers Sigona/935-965 still exists in your register. In the meantime you are hereby requested to register Government restrictions against the said parcels of land.

Please confirm the above in writing to enable me take further action”.

59. In still another letter by the commissioner of lands dated 10. 8.2009, the office wanted the district commissioner to shed light on the dispute. The response by the District Commissioner was as follows (in the letter of 20.8.2009

“RE: PARCEL NO. SIGONA/934

Refer to your letter 209163/A/11/64 dated 10th August 2009 requesting my office to liaise with the relevant authorities and stakeholders with a view of resolving the land issue.

Kindly note that after going through the correspondences and searches in possession by the Jua Kali group, it is quite clear that all the pre-requisite procedures were followed by the lands officer albeit questions of who the land should have been registered to.

Further, it emerges also that no records can be traced at Kiambu Land registry and therefore this calls your office to get to the bottom of this matter and take action particularly on officers who were involved”.

60. There is not the slightest evidence of how the land registrar dealt with these queries. Instead the office of the Land registrar appear to have acted like an autonomous entity not answerable to any one including the Commissioner of lands.

61. It is also apparent that attempts were made by the plaintiff and other bodies to preserve the land but this turned out to be an exercise in futility. The plaintiffs tried to lodge a caution on the suit land 934 but the Land Registrar is confident to state that no caution was ever lodged at their office yet it is very clear that plaintiff did apply for the caution to be registered way back on 12.6.2002 (item 22 in plaintiffs bundle). In another letter of 14.4.2010 (item 5 in plaintiff’s documents), the Land registrar is confirming to the Commissioner of lands that they had registered restrictions on the land no 934 (935-965) and that there was a caution also lodged in favour of Sigona Jua Kali. However, when being cross examined by PW1, the Land registrar denied the existence of the caution and was vague on whether the restrictions were registered. The logical inference to make is that the Land registry ignored and neglected to heed to the queries made by plaintiffs and the commissioner of lands because they were the master minds of the fraud. This fraud was so well orchestrated that only the fraudsters knew what was happening.

62. Another issue the court has considered is the speed at which parcel no 934 was alienated. The title deed for parcel No. 934 had a lifespan of six DAYS on planet earth! The title was issued on 23.4.2002, However, SIX DAYS thereafter, on 30.4.2002, the land had already been subdivided into 31 parcels numbering 935-965 and title deeds had been issued. And few days thereafter, these new portions of land were already registered in the name of third parties; i.e. parcels numbers 956, 961, 955 ,954, 953, 952, 951, 950, 949, v947, 959, 958, 957, 945, 942, 937,were all registered between 21.5.2002 and 22.5.2009. The period of the month of April 2002 when the parcel 934 was registered to May 2002 when the land was disposed off was spent in a whirl of feverish activity in a rush to dispose off the land no.934. It is therefore a fallacy for the land registrar to claim that there was no dispute, no fraud and no other claims on the suit land save the claim of 5th defendant.

63. In a record 6 days, the fraudsters managed to get the consent from 2nd defendant (land control board), caused the subdivision of the land to obtain mutation (which is a rather rigorous exercise), had the mutations registered at Lands office and like the mythical abracadabra the parcel no 934 was gone!

64. It is a well-known fact that for years, ownership of some properties acquired under the pre- 2012 legal regimes, were questionable as people hid behind the shield of indefeasibility of title. Thus even titles which were acquired illegally remained protected by this doctrine. I have no doubts that the parcel of land 934 was alienated illegally through corrupt schemes and hence the resulting titles ought to be impeached.

Whether plaintiffs are entitled to the Suitland?

65. The plaintiffs are claiming that they are the ones who are entitled to the suit land because it had been allocated to them by the county council of Kikuyu. They are relying on the minutes by the council, item 38 in their bundle of documents. I have already pointed out the various methods in which one could acquire land in the former (pre 2012) legal regime. The plaintiffs appear to base their claim on the notion that the land was under the mandate of the town council. It is however not clear under which laws the plaintiffs were basing their claims. Could it have been the setting apart process anchored under section 117 of the old constitution and section 13 of the Trust Land Act? Whatever law was being applied, the fact remains that the process of acquisition was at the infancy stage and was never concluded and the applicable law is not clear.

66. There is no certainty that the suit land was trust land held by the county council. What is apparent is that the 1st defendant has taken a fence sitting position, falling on either side now and then. For instance when the Kikuyu County Council was sued by Wangechi in case Kikuyu court case No. 53 of 2004, the defence of the County council was that the land in question did not belong to Wangechi as it belonged to the council (see paragraph 5 of the defence statement of 27.4.2004). But at paragraph 13 of their statement of defence in the present suit, the Council is stating that the land in question was government land. This party did not tender any evidence nor did it file any submissions, yet the suit land is at the heart of kikuyu town. Such plots ordinarily were under the custody of the county councils. However, since the 1st defendant has not come out clean on this issue, then it cannot be said that the county council had any land to give out.

67. I do hail the plaintiffs for gallantly standing up to speak out about the land grabbing menace. However, I would consider their claim as based on legitimate expectation of the citizenry. Article 61 (1) of the constitution stipulates that; “*all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals*”.

68. Thus whereas plaintiffs rights and interests in the suit land did not go anywhere near crystallization into rights of proprietorship, they did have a legitimate expectation that they would get this land as the same was alleged to be public land available for alienation. But at no time did parcel no.934 belong to the plaintiffs either.

Which orders can this court give?

69. My conclusion is that parcel no 934 measuring 0.970 Hectares did not belong to the 5th defendant. It did not belong to the plaintiffs either. It was hence government land and any alienation of the same ought to have been through the laid down mechanisms available at that time. In particular, the land ought not to have been lumped up with parcel no 832. In the circumstances, I proceed to give orders as follows.

- 1) It is hereby declared that the registration of parcel No. Sigona/934 in the name of Jane Wangechi Kimani was illegal, un-procedural and it was through corrupt schemes.
- 2) It is hereby declared that the alienation of parcel no.934 leading to subdivisions running from 935-965 was unlawful.
- 3) An order is hereby issued for the green card for title number 832 to revert back to its original format bearing the acreage of 0.55 hectares in the name of the 5th defendant (Jane Wangechi Kimani).
- 4) All the titles forming the series SIGONA no.935-965 and any further titles arising out of subsequent subdivisions are declared to be null and void and are hereby cancelled forthwith to revert back to parcel no. Sigona 934 measuring 0.970 Hectares.
- 5) Upon reversion in point 4, the land Sigona no.934 is to be categorized as public land under article 62 (1) (d) of the Constitution of Kenya.
- 6) The Survey records, to be amended accordingly to reflect this change if at all such records had been affected by the alienation of parcel no.934 into parcels 935-965.
- 7) The plaintiffs are still at liberty to pursue their claim after the aforementioned reversion in line with provisions of Article 62 (4) of the constitution.
- 8) The Deputy Registrar of the court is hereby authorized to sign all requisite documents to give effect to this Judgment.
- 9) As to costs, each party is to bear their own costs of the suit.

Dated, signed and delivered at Thika this 2nd day of May, 2019.

MBUGUA LUCY

JUDGE

2/5/2019

In the presence of

Court Assistant: Diana

M/s Ndundu H/B for Mr. Terer for Attorney General (2nd -4th Defendants)

David Njoroge Mwando – Chairman of the Plaintiff

Ainsworth Githinji Karani – Treasurer of Plaintiff

Jane Wangechi 5th Defendant