



Macharia (Suing on her own Behalf and on Behalf of the Estate of Fredrick Kirima Kamau) & 2 others v Mwenda & 2 others (Environment and Land Case Civil Suit 125 of 2018) [2025] KEELC 3961 (KLR) (20 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3961 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 125 OF 2018**

**LN MBUGUA, J
MAY 20, 2025**

BETWEEN

**CATHERINE NJERI MACHARIA (UING ON HER OWN BEHALF AND ON BEHALF OF THE ESTATE OF FREDRICK KIRIMA KAMAU) 1ST PLAINTIFF
RACHEL WACHUKA KIRIMA (SUING ON HER OWN BEHALF AND ON BEHALF OF THE ESTATE OF SAMUEL NDEI KAMAU) 2ND PLAINTIFF
TERESIA KAMAU KIRIMA (SUING ON HER OWN BEHALF AND ON BEHALF OF THE ESTATE OF FREDRICK KIRIMA KAMAU AND THE ESTATE OF SAMUEL NDEI KAMAU) 3RD PLAINTIFF**

AND

**CRISPUS MWENDA 1ST DEFENDANT
NAIROBI CITY COUNTY GOVERNMENT 2ND DEFENDANT
THE CHIEF LAND REGISTRAR 3RD DEFENDANT**

JUDGMENT

(Suing on her own behalf and on behalf of the Estate of Fredrick Kirima Kamau and the Estate of Samuel Ndei Kamau)

1. This suit was initially filed through a plaint dated 1/3/2005 in High Court of Nairobi case NO. 228 of 2005 by the initial plaintiffs namely Fredrick Kirima Kamau and Samuel Ndei Kamau. The 1st plaintiff died on 16/5/2006 while the 2nd plaintiff died on 23/6/2011. An amended plaint was filed on 9/10/2017 in which the current plaintiffs came on board in place of the deceased plaintiffs, while the 4th defendant, Musyoka Hanan Advocate were removed as parties in the case. A further amended plaint was



to be filed on 29.1.2021 in which the 2nd defendant, the City Council of Nairobi was replaced by Nairobi County Government, while the 3rd defendant, The Commissioner of Lands was removed as a party and replaced by the Chief Land Registrar.

2. The plaintiffs claim is that the suit property LR No. 209/11092/15 also known as Nairobi Block 37/74 City Park belongs to the plaintiffs, having been allocated the same by Nairobi City Commission. However, they later discovered that a certificate of lease had been issued to the 1st defendant. They contend that the issuance of the said certificate to the 1st defendant was done through illegal and fraudulent transactions.
3. The plaintiffs therefore seek the following orders;
 - a) A permanent injunction restraining the 1st defendant whether by itself, his servants, agents or employees or howsoever from selling, alienating, transferring, encumbering or in any way dealing with LR No. LR No. 209/11092/15 also known as Nairobi Block 37/74 and from evicting the plaintiffs therefrom or in any other way interfering with the plaintiff's quiet possession thereof pending the hearing and determination of the suit.
 - b) A declaration that the certificate of lease issued to the 1st defendant on 16/5/2005 is illegal, null and void ab initio.
 - c) An order directing the 1st defendant to deliver up the certificate of lease issued to him on 16/5/2005 to the 3rd defendant for cancellation from the register and an order directing the 3rd defendant to cancel the certificate of lease.

SUBPARA d)

An order directing the 2nd defendant to procure and release to the plaintiffs the instruments of title for the suit property.

- e) Costs and interests
 - f) Any other relief or order this honourable court may deem fit to grant.
4. The 1st defendant filed a memorandum of appearance dated 26/5/2005 but no defence was ever filed. The 2nd defendant filed a statement of defence dated 23/3/2005 whereby they have denied the allegations made against them by the plaintiffs. The 3rd defendant did not file any defence in this case.
5. At the trial only the 3 plaintiffs tendered evidence. Pw1 the 1st plaintiff is Catherine Njeri Macharia. She adopted her witness statement dated 28/1/2021 as her evidence and she produced the documents in their list dated 28/1/2021 as plaintiff exhibit 1-7. PW1 was recalled to give further evidence and she adopted her further witness statement dated 22/11/2024 as her evidence and she produced 3 more documents in the list dated 7/11/2024 as exhibits 8, 9 and 10.
6. Pw1 identifies herself as the widow of the late Fredrick Kirima Kamau and a beneficiary of his estate. She contends that her deceased husband co-owned the suit land L.R.NO. 209/11092/15 with his brother Samuel Ndei Kamau. That the said suit property was allocated to the initial plaintiffs, Fredrick and Samuel by the City Council of Nairobi through a letter dated 5/4/1982.



7. She further contended that the 2nd defendant caused the whole portion of parcel L.R NO. 209/11092 to be subdivided into separate plots and named it as City Park Estate. Thus the suit property is within City Park Estate. That in 1996, Fredrick and Samuel were advised to pay the sum of Kshs. 91, 480 as rate approval and clearance certificate, land rent, stamp duty, professional taxes and other incidental disbursements of which the aforementioned payments were made on the understanding that title was to be issued. That still in the same year of 1996 the city council prepared a draft lease in favour of Fredrick and Samuel which was duly executed by the two.
8. That in September 2003, Fredrick and Samuel did a search in respect of the suit property and found that the same was registered in the name of the 1st defendant. Efforts to inquire from the 2nd defendant as to why the lease was not issued to Fredrick and Samuel did not bear any fruits. The plaintiffs therefore contend that the issuance of lease to the 1st defendant was unlawful, fraudulent and unconstitutional. She added that they have occupied the property for a period of 30 years.
9. Pw1 gave an account of how the suit property is captured in the cadastral map F/R No. 197 published in 1988 and that in the Registry Index Map published in year 2000 the same parcel is captured within Nairobi Block 37 as Block 37/74.
10. PW2 is the 2nd Plaintiff Rachel Wachuka Kirima. She adopted her witness statement dated 28/1/2021 as her evidence which statement mirrors that of Pw1. She added that in year 2004, there were attempts to evict her but this was stopped in year 2005 through a court order. Another attempt was made in 2019 but was unsuccessful.
11. On cross-examination by the court, Pw2 stated that they have structures on the suit land including a garage and they also have tenants, adding that it was someone by the name Baraza who was trying to evict them.
12. PW3 is the 3rd plaintiff, Teresia Wairimu Kirima. She adopted her witness statement dated 28/1/2021 as her evidence. She identifies herself as the mother of the two initial deceased plaintiffs (Fredrick and Samuel). Similarly, the contents of her statement are a reflection of what is contained in the statements of Pw1 and Pw2.
13. PW4 is one Rodgers Gacewa the author of the report dated 16/4/2024 (P-exhibit 10). He identified himself as someone who works at the Ministry of Works and his report is signed for the Director of Surveys. His report indicates that the cadastral plan showing LR no. 209/11092/15 among others is plan F/R No. 197/17 which plan was authenticated by the Director of Survey in the year 1988. It is further stated that the corresponding Registry Index Mark (RIM) showing LR No. 209/11092/15 is that of Nairobi Block 37 published in year 2000. Pw4 therefore confirmed that LR 209/11092/15 is the same parcel as Nairobi Block 37/74 situated within City part Estate.
14. In their submissions dated 17/12/2024, the plaintiffs contend that they are the rightful owners of the suit property as evidenced by the letter dated 5/4/1982 as well as exhibit 3, the letter of 11/2/1985 in which the commissioner of lands confirmed the allotment. It is argued that the plaintiffs complied with the conditions of allotment as seen in exhibits 4, 5 and 6.



15. It is further argued that the surveyor PW4 did confirm that parcel LR No. 209/11092/15 is the same parcel as Nairobi Block 37/74 as seen in the maps presented to the court. The plaintiffs therefore contend that they have all along held a lawful and valid interest in the suit property and they were never notified of the conversion of the same. They further contend that the certificate of lease given to the 1st defendant in Nairobi Block 37/74 was issued unlawfully as the plaintiffs ought to have been the rightful registered owners of the suit parcel under the new Registered Land Act System.
16. In support of their case the plaintiffs have relied on several authorities including; *Munyu Maina v Hiram Gathiha Maina* [2013] KECA 94 (KLR), *Kamau James Njendu v Serah Wanjiru & Registrar of Titles-Nyandarua* [2018] KEELR 1412 (KLR), *Murang'a ELC No. 84 of 2017 Margaret Nyokabi Mbugua & 5 Others v Ngenda New Farmers Co. Ltd & 4 Others* [2019] EKLR and *Joseph Kagunya v Boniface K. Mulli, Nairobi City County, Attorney General & Charles Wanduto* [2018] KEELC 1296 (KLR).

Determination

17. The plaintiffs are the administrators of the estates of the two initial plaintiffs, Fredrick and Samuel who passed on during the subsistence of this suit and to this end, they have availed the Grant of letters of administration. They claim that the suit plot was allocated to Fredrick and Samuel as per the letters they have availed in their bundle of documents. They have also availed a search Certificate which indicates that parcel Nairobi Block 37/74 is registered in the name of the 1st defendant. The issue therefore falling for determination is whether the suit parcel L.R.209/11092/15 is the same as Nairobi/Block 37/74 and who as between the estate of the two initial Plaintiffs (deceased) and the 1st defendant owns the suit parcel.
18. It is to be noted that the 1st defendant was a no show during the trial even though he had an advocate throughout the decades, but he never filed a defence. Nevertheless, the plaintiffs have a duty to adduce sufficient evidence to prove their case.
19. In *Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another* [2018] eKLR, it was stated that;

“It is a principle of law that he who asserts must prove, and in this regard, Section 107(1) of the Evidence Act (Cap 80) provides that “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist”.
20. There are two competing claims in respect of the suit parcel, hence each one was required to trace the root of their title and demonstrate that the acquisition of their rights and interests thereof are valid. In the case of *Munyua Maina v Hiram Gathiha Maina, Court of Appeal Civil Appeal No. 239 of 2009* the court stated thus;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove how he acquired the title and show that the acquisition was legal.....”.



21. This court has perused the plan F/R No. 197/17 which though not authenticated, bears certification from Director of Survey. It captures parcel 209/11099/15 in between parcels 16 and 14. The same lay out of the parcel is captured in the RIM for Block 37 where parcel 74 is in between parcels 73 and 75. This far, I come to the conclusion that parcel 209/11092/15 is one and the same parcel as Block 37/74 in city pack estate.
22. Does the suit parcel belong to the plaintiffs? The plaintiffs trace the root of their claim to the letter of allocation dated 5.4.1982 allegedly issued to Fredrick and Samuel. The said letter was produced as exhibit 3 and is to be found at page 41 of the bundle of documents availed by the plaintiffs. At this juncture, it is pertinent to reproduce the contents of the said letter;

“City Hall

Box 30075

Nairobi Kenya

Ref: CV.260/S/21/11

Date: 5th April 1982

Mr. Wanjau

Dear Sir

Re: Letter Of Allocation Plot No 7

City Partk Housing Scheme– LR. 209/6559/R

Further to the resolution of Council’s ordinary monthly meeting held on 5th June, 1979 that approved a recommendation of the Property and Assets Sub-Committee of 23rd May 1979 that you be allocated the above plot and my letter Ref: CV/S/21/11 of 1st October 1979, I have a pleasure to inform you that final cost details of the said plot have been assessed as follows:-

Area: 0.0540 Hectares (.....Acres Approx.)

Term: 99 years from 1st September 1979

Capita Payment: Amount payable Kshs. 56,104/20

Less Deposit already paid Kshs. 37,000

Balance demanded Kshs. 19,104/20

The above costs are exclusive of any other charges incidental to this transaction, such as legal and survey fees which are payable on demand and/or on registration.

Please arrange to pay the outstanding balance which should be made by way of cash or banker’s cheque, within a period of 30 days from the date of this letter so that this matter may be finalised.

Yours faithfully

G.g. Wanjie

Town Clerk

C.C Chief Valuer



Chief Counsel (c)
Chief Revenue Officer”

23. The above letter does not make reference to the initial plaintiffs who were Fredrick Kirima Kamau and Samuel Ndei Kamau. Similarly, the suit parcel 209/11092/15 is not mentioned in the said letter.
24. The other letter cited in support of the allotment is dated 11.2.1985 at page 40 of the plaintiffs bundle (P-Exhibit 2). The contents thereof are as follows;

“ City Hall

BOX 30075

Nairobi Kenya

CV 162/S/21/11Vol.

11th February, 1985

Mr. Samuel N. Kamau

Box 11673

Nairobi

Dear Sir/Madam

Re: Allocation Of Plot No. 7 City Park Housing Scheme

As you are probably aware the allocation of plots in the above scheme was suspended by Government order pending some investigations. The investigations have now been completed and it has been decided that the allocation of the above plot to you are re-affirmed.

You may therefore proceed with your development proposals after clearing any balance you may be owing this Commission.

A formal lease agreement will be drawn by this Commission’s Chief Counsel (C) in due course. Meanwhile, the earlier letter of allocation forms a binding agreement between you and this commission.

Yours faithfully

S.J. Getonga

Town Clerk

C.C Commissioner of Lands

Box 30089

Nairobi

Director of City Planning & Architecture

Chief Counsel (C)”

25. The above letter refers to the initial 2nd plaintiff alone and identifies the parcel as PLOT NO.7 in City Park housing scheme. There is no mention of L.R.NO.209/11092/15 or a joint allocation to the two initial plaintiffs. Further, the 1st letter is directed to Mr. Wanjau while the second one is for Samuel N. Kamau.



26. What resonates from the above analysis is that the proposed, draft or promised lease at page 43 of the plaintiffs' bundle is anchored on nothing as the same does not trace its history to any tangible allotment.
27. In as much as the plaintiffs' claim was not challenged, the plaintiffs were still required to proof their case on a balance of probabilities. In the of Gichinga Kibutha v Caroline Nduku [2018] eKLR, the Court held that;

“It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

28. Similarly, in Samson S. Maitai & another V. African Safari Club Limited & Another [2010] eKLR, the court had this to say in relation to proof.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”

29. In the case at hand, the plaintiffs have not demonstrated that the root of their claim was an allocation of the suit property to the two initial plaintiffs. In the circumstances, the claim of the plaintiffs is hereby dismissed and each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF MAY 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE-ELC NANYUKI

In the presence of:-

Edell C/A

Mr. Muuo for the plaintiff

