



REPUBLIC OF KENYA



KENYA LAW
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Muchemi v Attorney General & 3 others (Environment & Land Case 478 of 2017) [2025] KEELC 4054 (KLR) (20 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4054 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 478 OF 2017
LN GACHERU, J
MAY 20, 2025
FORMERLY NAIROBI ELC 574 OF 2016
TRANSFERRED TO MURANG'A**

BETWEEN

FLORENCE NYAGUTHII MUCHEMI PLAINTIFF

AND

THE HON ATTORNEY GENERAL 1ST DEFENDANT

THE COMMISSIONER OF PRISONS 2ND DEFENDANT

THE NATIONAL LAND COMMISSION 3RD DEFENDANT

GEORGE WAWERU MWANGI 4TH DEFENDANT

JUDGMENT

1. The Plaintiff herein Florence Nyaguthii Muchemi brought this suit vide a Plaint dated 19th May 2016, initially against the 1st and 2nd Defendants herein and sought for Judgement against them jointly and severally in the following terms: -
 - a. A Declaratory Order that the 2nd Defendant and/or Kenya Prisons Services have no proprietary right or interest in or over all that piece of land known as Title No. Thika Municipality/Block 9/256, and that therefore the 2nd Defendant's actions of fencing off the said piece of land and denying the Plaintiff access thereto is illegal.
 - b. An order compelling the 2nd Defendant to cause the removal of the Kenya Prisons Service fence from the said piece of land.
 - c. That a permanent injunction restraining the 2nd Defendant, his officers, agents or anybody else claiming any right or authority under him from obstructing, denying access or in any way



howsoever harassing the Plaintiff over her use of her piece of land known as Title No. Thika Municipality/Block 9/256.

- d. General damages for unlawful occupation of and/or obstruction of the Plaintiff's said plot.
 - e. Costs of this suit.
 - f. Any other relief that this Honourable Court may deem fit to grant.
2. In her claim, the Plaintiff averred that she is the registered owner of Land Parcel No. Thika Municipality/Block 9/256, by virtue of a Certificate of lease issued by the Land Registrar, Thika District on or about 4th October 2001. The Plaintiff was registered sole proprietor as a lessee for ninety-nine (99) years from 1st September 1990, from the Government of Kenya.
 3. It was her further averment that she pays to the Government of Kenya an annual rent of Ksh.8000/= (reversible) in respect of the said leasehold interest and also annual rates to the County Government of Kiambu. She further alleged that on or about June 2007, the 2nd Defendant unlawfully directed and caused fencing of her said parcel of land while claiming that it was part of the Prison's land.
 4. Therefore, the Plaintiff has been unable to access her said parcel of land, and cannot develop the same, despite being the registered proprietor who pays annual rent and rates thereon. The Plaintiff further claimed that the Defendants have not formally communicated to her the reasons for fencing off her land nor proven ownership of the said land to Kenya Prisons Service or by any other person apart from the Plaintiff.
 5. She contended that the 2nd Defendant's action is unlawful and has caused and continue to cause irreparable loss to her as she has been unable to take possession and make use of the said property. The Plaintiff's claim is to have the 2nd Defendant ordered by the court to vacate from the suit land and remove the fence from her said parcel of land, as failure to do so, the Plaintiff is apprehensive that the 2nd Defendant will illegally grab her land without any refund to the value of the said land, the annual rent and rates paid, and which she continues to pay. Further that demand and notice to sue was issued, but the Defendants have failed to honour them.
 6. The suit was initially opposed by the 1st and 2nd Defendants vide the Statement of Defence and Counter-claim dated 28th July, 2016 wherein the Defendants alleged that the suit property belongs to the 2nd Defendant herein, and denied that the Plaintiff is entitled to vacant possession of the said land.
 7. The 1st and 2nd Defendants also filed a Counter-claim and averred that if the Plaintiff is registered as the owner of the suit property, then she acquired the said land through fraud, misrepresentation, collusion and connivance. They urged the court to allow their Counter-claim and dismiss the Plaintiff's suit.
 8. However, vide an Application dated 22nd May 2018, the 1st & 2nd Defendants sought to amend their Defence and sought to join the 3rd and 4th Defendants as parties to the suit, which application was allowed, and the 3rd and 4th Defendants were joined to the suit as Defendants. Save for joinder of 3rd and 4th Defendants, the amended Defence and Counter-claim reiterated the contents of the original Defence.
 9. The 1st and 2nd Defendants further averred that any allocation of the said parcel of land which was already gazetted as a public land was a nullity occasioned by the 3rd Defendant in collusion with the 4th Defendant, and the Plaintiff to transfer the public land to private ownership.



10. Further, it was averred that the action of the 4th Defendant to acquire the 2nd Defendant portion of land was illegal, unlawful and irregular and if any damage has been suffered by the Plaintiff, then the same was occasioned by the action of the 4th Defendant.
11. They particularized the particulars of fraud, misrepresentation, collusion and connivance by the 4th Defendant, and among these particulars were; acquiring public land knowing that the same was Prison's land, and transferring the said suit land to the Plaintiff while knowing that the said land was not available for transfer.
12. The 1st and 2nd Defendants prayed for the Plaintiff's suit to be dismissed, and Judgement be entered in terms of the Counter-claim. In the alternative, that the 3rd and 4th Defendants do indemnify the 2nd Defendant from any costs, loss and damages that it would have been condemned to.
13. The Plaintiff filed an amended Reply to Defence and Counter-claim and denied all the allegations made in the Defence and Counter-claim. The Plaintiff further denied that the 2nd Defendant has been using the Plaintiff's suit land and did put the 2nd Defendant to strict proof thereof.
14. The Plaintiff also denied the claims made in the Counter-claim and further denied that the 2nd Defendant was always in occupation of the suit land. Further, the Plaintiff alleged that she purchased the suit land from the 4th Defendant and the transfer was duly sanctioned by the Commissioner of lands and the said land was duly registered by the Land Registrar.
15. Further, that despite the 2nd Defendants' knowledge of the Plaintiff's ownership of the suit property, the 2nd Defendant neither challenged her ownership nor placed any caution against the said property. The Plaintiff claimed that she had no dispute with the 4th Defendant, the previous owner of the suit land, as she is in possession of a clear title. Consequently, the Plaintiff denied all the allegations of fraud, illegality, misrepresentation and/or irregularity as set out in the Counter-claim and urged the court to dismiss the said Counter- claim.
16. The Plaintiff urged the court to dismiss the Defence and Counterclaim with costs to the 1st and 2nd Defendants and enter judgment for the Plaintiff as prayed in the Plaint.
17. The 3rd Defendant filed its Defence which was not dated, and admitted paragraphs 17, 18, 20 and 21 of the Counter-claim as filed by the 1st and 2nd Defendants. However, it denied the contents of paragraphs 19 and 20 of the said Counter-claim. Further, the 3rd Defendant averred that the suit land was reserved for use by the Prisons Department, and was never surrendered by the Commissioner of Prisons, and therefore, the said land was not available for alienation, allocation and registration.
18. It was its further allegation that the suit land was gazetted for use by the Prisons Department and its allocation if any was null and void. Therefore, the 3rd Defendant prayed that judgement be entered as per the prayers sought in the Defence and the Counter-claim, as admitted by it, but the other prayers denied be dismissed.
19. The 4th Defendant did not Enter Appearance nor file any Defence, and there was no evidence that he was ever served with Summons to Enter Appearances as per the Amended Defence and Counter Claim. The matter proceeded for hearing in his absence, and the suit land was visited on 19th October 2022, also in his absence too.
20. This suit was canvassed via viva voce evidence wherein the Plaintiff gave evidence for herself and called no witness. The 1st and 2nd Defendants called one witness and closed their case. The 3rd Defendant participated in the proceedings, but called no witness.



Plaintiff's Case

21. PW1 Florence Nyaguthii Muchemi, a public servant adopted her witness statement dated 19th May 2016, as her evidence in chief. She further testified that she is the proprietor of Thika Municipality Block 9/256, which is situated within Thika Municipality near Thika G. K. Prisons. Further, that the plot measures 0.0805Ha, and is amongst other plots.
22. It was her evidence that though this land is next to Thika G.K. Prisons, it has never been part of Prison's land, as it belonged to Thika Municipal Council. It was her further evidence that the land was surrendered to the Commissioner of Lands, who later subdivided it into several plots, and these plots were allocated to several people, and among the allottees was George Waweru Mwangi, who was allotted the suit land in 1990, and he sold it to the Plaintiff in 1992. She produced a sale agreement dated 17th June 1992, and that after she purchased the suit land, the vendor passed over the Letter of allotment to her.
23. Further, that she paid to Thika Municipal Council all the pending land rent and rates charges and she obtained the consent of transfer. Thereafter, she paid the Stand premium as indicated in the Letter of allotment, and later the transfer was effected and a Certificate of lease was issued to her on 4th October 2001. She also produced the Certificate of lease as her exhibit in court.
24. It was her further evidence that she has been paying the requisite fees; that is the land rates and rent, but she has not developed the said land. She also testified that when she planned to develop the said land in 2005, she found that the whole block had been fenced off and the fencing was done by Thika G. K. Prisons. It was her further testimony that when she inquired from Thika Prisons, she was told that the Commissioner of Prisons had directed that all the parcels of land near Thika Prisons which were not developed be acquired by Prisons.
25. With that information, she wrote to the Commissioner of Lands in 2004, inquiring about the said acquisition, and the Ministry of Lands confirmed that the suit land was not Prison's land, and she was advised to follow up through the legal process and thus this case.
26. Further, it was her testimony that the County Government of Kiambu even confirmed that the land belongs to her, and she produced the said letter of confirmation as an exhibit in court. She claimed that she has not been able to access the land as she faces hostility from Prisons officers and therefore she filed this case to claim what is due to her.
27. The Plaintiff produced her demand letter as exhibit in court, and after the Attorney General wrote to the Ministry of Interior and Coordination of National Government seeking for further explanation, she has never received any other communication in regard to this particular land, and she has never received her land back.
28. Further, the Plaintiff testified that though the Attorney General filed a Defence and Counter-claim, the suit property does not belong to the 2nd Defendant, and the said 2nd Defendant has never claimed the land from her, and has never communicated to her about the said acquisition of her land.
29. She also claimed that she has never taken possession of the suit land because the 2nd Defendant fenced off the said land, although she has documents of ownership to show that she is the absolute owner of the suit land. On the claim that the suit land was among the land allocated to the 2nd Defendant as per referred Gazette Notice, she denied ever having seen the said Gazette Notice that was referred to. Further, she testified that the said Gazette Notice was never attached to the Defence.



30. The witness clarified that the land changed to Thika Municipality, who later surrendered it to the Commissioner of Lands, and the Commissioner of Lands allocated this land to George Waweru Mwangi, the 4th Defendant who sold it to the Plaintiff. She denied that she ever participated in fraud, and testified that before she bought the land, she inspected it at Thika Municipality Council and lands office and found that it had no encumbrances.
31. Therefore, it was her evidence that the 2nd Defendant encroached on her land, even though she had all documents of ownership. She urged the court to dismiss the Defence and Counter-claim and that the court should allow her claim.
32. When the matter proceeded for hearing on 2nd November, 2017, the 1st and 2nd Defendants failed to attend court and the matter proceeded ex-parte. However, before the Plaintiff could file her written submissions as directed by the court, the Attorney General filed a Notice of Motion Application dated 11th December 2017, wherein it sought to stay the proceedings and be allowed to tender its evidence in support the Defence and Counter-claim dated 12th October, 2016.
33. Vide a Ruling delivered on 13th April 2018, the Court allowed the said application to the extent that the 1st & 2nd Defendants were allowed to cross-examine the Plaintiff, and also tender their evidence in support of their Defence and Counter-claim.
34. Thereafter, the 1st and 2nd Defendants sought to amend the Defence and join the 3rd and 4th Defendants to the suit. After the joinder of the 3rd and 4th Defendants, the 3rd Defendant filed its Defence, but the 4th Defendant did not to Enter Appearance nor file his Defence. There was no evidence of service of Summons to Enter Appearance against the 4th Defendant as the 1st and 2nd Defendants through the Attorney General failed to file an Affidavit of Service.
35. On 19th June 2019, the Plaintiff was recalled for cross-examination by the Counsels for 1st 2nd and 3rd Defendants. In addition, she produced two documents being Kenya Gazette Notice No.6864 by National Land Commission dated 17th July 2017, and the said Kenya Gazette Notice contains parcels of land which were allegedly grabbed and illegally allocated within Kiambu County. The suit property was not among the said parcels of land.
36. She also produced a Map from the Director of Survey, which was issued on 20th December 2018, and it covers Thika Municipality Block No.9, which covers her parcel of land. It was her evidence that from the said Map, her plot was far from Thika Prison's land and her land is between Thika Prisons land and other plots. She further testified that she does not know how the Prisons land is secured. The said Map was produced as P.Exhibit 3.
37. On cross-examination by Mr. Motari for the 1st & 2nd Defendants, she confirmed that she had the Letter of allotment, and the said Letter of allotment had certain conditions for payment of fees to the Government. She confirmed that she paid all the fees but did not have receipts to that effect, and that she was issued with a certificate of lease which was a confirmation that she had paid all the fees. It was her further evidence that she did not have evidence of acceptance of the offer by George Waweru, the person who sold the land to her, and she did not know where George Waweru was.
38. It was her further evidence that she purchased the suit land in 1992, and she was given physical possession of the said land. She claimed that she was shown the beacons of the suit land by the Surveyor, but she has not developed the said land to date. She acknowledged that Thika Prisons fenced off the suit land, and they have been farming it since 2000.



39. Further, she reiterated that she has a title deed of the suit land, and that Prison is encroaching on her land. However, she confirmed that the said land was a Government land before allocation, but she did not know the land had been reserved for what before it was allocated. The Plaintiff denied that the suit land was reserved as Prison's land, and that the said land was still Prison's land.
40. On cross-examination by Ms. Masinde for the 3rd Defendant, she confirmed being in possession of Kenya Gazette of 17th July, 2017, and that her land is not named thereon. She also stated that she could not trace the 4th Defendant who sold the suit land to her. However, she claimed that she conducted due diligence before purchasing the suit land.
41. Further, she confirmed that the Commissioner of Lands had power to alienate any Government Land, and that Government land can be allocated to individuals after proper procedures are followed. To her, the Legal Notice of 1968, was ambiguous and that the said land was available for allocation. It was her further evidence that the Commissioner of Lands could not have allocated the land if it was still reserved for Government use.
42. On re-examination, she confirmed that the referred Legal Notice did not refer to her parcel of land, and it was ambiguous. She also confirmed having conducted due diligence by carrying out a search at the Lands Office. It was her evidence that the suit land was allotted to 4th Defendant who sold it to her. Further, she alleged that if the payments had not been made, she would not have been issued with the title deed, and that she pays rent and land rates for the suit land.

1st and 2nd Defendants' Case

43. DW1 Inspt. Leonard Ogutu, a Land Surveyor for Prisons Department testified that he has worked for Prisons Department since 2006. He adopted his witness statement as his evidence in Chief, and further testified that the suit land belongs to Prisons Department and currently Thika Prisons are in occupation of the said land. Further, that the Prisons Department acquired that land since 1954, through reservation by the Government vide a [Legal Notice No. 1134 of 1954](#).
44. The witness further produced the list of documents as exhibits in court, and also testified that since the land was allocated to Prisons by Commissioner of Lands, it has never surrendered the said land back to the Commissioner of lands for it to be allocated to other parties. Further, that though the Plaintiff has a title deed to the suit property, the said title was null and void as the said Prisons land was never degazetted to allow it to be allocated to 3rd parties. He urged the court to dismiss the Plaintiff's case.
45. On cross-examination by Mr. Wanjama for the Plaintiff, he confirmed that [Legal Notice No.1134 of 1954](#), made reference to certain land where there was a detention camp, and it was made Prisons land. Further, that the said Legal Notice does not indicate this Prisons land is on which land as the land reference number was not given. He confirmed that the documents he referred to were obtained from the Ministry of Lands.
46. He alleged that he was protecting the Prison's land, and the Map that he produced represents the reality on the ground. He urged the court to order that all the grabbed land goes back to Thika Prison, and that Prison has not allowed the Plaintiff to take over the suit land. Further, he testified that he knows all the boundaries of the Prison's land, and that Prison is carrying out farming on the suit land.
47. He also testified that he was not aware that the Plaintiff was not the original allottee of the suit land, but a purchaser for value and that the entire land had been alienated to the Municipal Council of Thika. Further, he confirmed that Prisons had not placed any encumbrances on the suit land, but it was reserved by a Legal Notice, and that reservation by a Legal Notice was enough. It was also his evidence



- that the Plaintiff committed fraud, and that the Commissioner of Lands' action of allocating the suit land to other parties was wrong.
48. On re-examination, he testified that the 3rd Defendant did not surrender the suit land for allocation to the Plaintiff, and that the suit land was allocated to Prisons for its use, and it was never allocated to any other party for use or otherwise.
 49. The 3rd Defendant did not call any witness and it relied entirely on its Statement of Defence.
 50. After the close of viva voce evidence, the court fixed the matter for site visit on 24th March 2020. However, due to Covid 19 Pandemic, the site was not visited. Eventually, the visit to the site happened on 19th October 2022, in the presence Mr. Wanjama Counsel for the Plaintiff, Ms Nyakora holding brief for Mr. Motari, for 1st and 2nd Defendants, and Ms Masinde for 3rd Defendant. Ms Ann Mwangi, the Surveyor Thika was present and so was Mr. Kamuyu the Land Registrar Thika, and Mr. Leonard Ogutu, the Prisons Surveyor, who had testified as DW1.
 51. Thereafter, the District Surveyor filed a report dated 28th October, 2022 and subsequently, the parties filed their written submissions
 52. In her Report, the Government Surveyor stated that her office pointed out the beacons for Thika Municipality Block 9/256, wherein she noted that three Beacons were missing being 8M'' 9M'' and 11M'', and only one beacon 10M'' was positively identified on the ground. She also attached the overlay (sketch map) which illustrated the relationship between the suit land and the alleged Prison's land claimed by the 2nd Defendant.
 53. The Plaintiff through the Law Firm of Wanjama & Co. Advocates filed her written submissions dated 6th August 2024, and submitted that the suit land was initially owned by the Municipal Council of Thika, and it was later transferred to Commissioner of Lands. Further, that the Commissioner of Lands subdivided the land into many plots including the one owned by the Plaintiff.
 54. It was her further submissions that initially the land was allotted to George Waweru Mwangi on 28th September 1990, and the same was sold to the Plaintiff on 17th June 1992. Further, she submitted that there has been no dispute between the Plaintiff and the Commissioner of Lands or the Municipal Council of Thika over the Plaintiff's ownership of the suit Property.
 55. The Plaintiff also submitted that she discharged her onerous task of availing sufficient evidence to prove her case on the required standard of balance of probabilities. She relied on various decided cases among them being; *Murungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua* [2015]eKLR, *Munyu Maina vs Hiram Gathiha Maina* [2013]eKLR, *The National Land Commissioner & others Exparte Vivo Energy Kenya Ltd* [2015]eKLR, and various provisions of law such as section 26 of the [Land Registration Act \(Act No. 3 of 2012\)](#), Section 33 of the [Survey Act](#) and she urged the court to allow her claim.
 56. The 1st and 2nd Defendants through J. Motari Matunda, Principal State Counsel filed their submissions dated 8th October 2024, and urged the court to allow its Defence and Counter-claim and dismiss the Plaintiff's case.
 57. The 1st and 2nd Defendants identified four issues for determination;
 - i) On whether the land was available for allocation, they submitted that the Land Planning Committee purported to have allocated the suit land, which land was reserved for Thika Prisons but the said allocation was illegal, irregular and a nullity as the said land belonged to Thika Prisons and was not available for allocation. Further, that the Plaintiff did not produce



the plan for Thika Municipality showing the extent of the land, and hence no land could be allocated without a plan.

58. Further that the land in question is a public land and the procedure for allocation was not followed. They relied on Article 40(6) of *the Constitution* on the limitation to the extent which the right to property should be exercised. They also relied on Section 3(a) of the Government *Land Act* Cap 280 Laws of Kenya (repealed) and Section 7 of the same Act.

59. The 1st and 2nd Defendants also relied on various decided cases among them; Benja Properties Limited vs Syedna Mohammed Burhannudin Sahed & 4 others [2015]eKLR; Isaac Gathungu Wanjohi & Another vs Attorney General & 6 others [2012]eKLR; and James Joram Nyaga & another vs The A.G & another [2007]eKLR, to support their submissions.

60.

ii. On whether the Plaintiff had a good title, the 1st and 2nd Defendants relied on the Maxim nemo dat quod non habet on the principle that since the initial allocation was a nullity, the sale and transfer of the suit property to Plaintiff was also a nullity. They also relied on the case of Samuel Kamere vs Lands Registrar Kajiado Civil Appeal No. 28 of 2005[2015] and KENHA vs Shalien Massod Mughal, Court of Appeal No.327 of 2014 among others.

61.

iii). On whether the 1st and 2nd Defendants Counter-claim is merited, they relied on the case of Munyu Maina vs Hiram Gathiha Maina Civil Appeal No.239 of 2009 [2013]eKLR, and Article 40 of *the Constitution*, wherein they submitted that they have proved their claim that there was no allocation of the suit land to the 4th Defendant, as the said land was owned by 2nd Defendant and any title deed to the Plaintiff is a nullity.

62.

iv. On who should bear costs of the suit, it was submitted costs follow the event, and costs herein should be awarded to 1st and 2nd Defendants. Reliance was placed on various decided cases; David Kiptum Korir vs Kenya Commercial Bank & Another [2021]eKLR and Rosemary Wairimu Munene (Ex parte Applicant) vs Ihururu Dairy Farmers Cooperative Society Ltd Judicial Review Application No.6 of 2004, where the court held that: -

“the issue of costs is the discretion of the court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party.”

63. The 3rd Defendant filed its submissions through Masinde Cecilia Advocate and submitted on four issues;

i. On whether the suit land was available for allocation, it was submitted that the suit land was reserved for public use specifically for Kenya Prisons, and was not available for allocation. Reliance was placed on Article 40 of *the Constitution*, and on the case of James Joram Nyaga & Another vs The Hon. Attorney General & others (Supra) and Dina Management Ltd vs County Government of Mombasa & 5 others[2023]eKLR; where the Supreme court held; -

“... a title document was not sufficient proof of ownership of property where the origin of that title has been challenged.”



64.

- ii. On whether the Plaintiff is a bonafide purchaser for value without notice, the 3rd Defendant relied among other cases on *Gitwany Investment Ltd vs Tajmal Ltd & 3 others* [2006]eKLR; where the court held; -

“Without attempting to modernize the law, all I am saying is that as is stated in Mullah, the *Transfer of Property*, 9th edition 2003, at page 358, “the expression believing in good faith merely means honestly believing. Honest belief is not incompatible with negligence or with a mistake of law.”

65.

- iii. On whether the 3rd Defendant should be held solely responsible for actions of the Commissioner of Lands, the 3rd Defendant relied on Section 30(b) of *National Land Commission Act*, and the case of *National Land Commission vs Attorney General & 5 others, Kituo Cha Sheria & another (Amicus Curiae)* (Advisory Opinion Reference No.2 of 2014) [2015]KESC 3[KLR] 2nd December 2015)(Advisory Opinion); where the court held that; -

“ in conducting the duties, the Ministry and Commission must ensure that they adhere to the National value and principles espoused vide Article 10 of *the Constitution* of Kenya and that the relationship between the two must be one of cooperation.”

66.

- iv. On whether the Plaintiff is entitled to the prayers sought, the 3rd Defendant submitted that the Plaintiff did not avail sufficient evidence to prove her case on the required standard. Further, that though she alleged that the said land was initially allocated to 4th Defendant, she did not call the said 4th Defendant to support her case. The 3rd Defendant urged the court to dismiss the Plaintiff's case with costs and also the 1st and 2nd Defendants Counter-claim.

67. The court has considered the pleadings herein, the available evidence and the rival written submissions and finds the issues for determination are: -

- i. whether the plaintiff has proved her claim on the required standard;
- ii. whether the 1st and 2nd Defendants have proved their claim in the Counter- claim;
- iii. who should bear costs of this suit and the Counter claim.

68. From the available evidence there is no doubt that the Plaintiff is claiming ownership of the suit property being; Thika Municipality/Block 9/256, which measures 0.0805 Ha situated in Thika Town. To support her claim, the Plaintiff produced a Certificate of lease dated 4th October 2001, which was issued in her favour and the suit land is registered under the regime of The Registered *Land Act* Cap 300(repealed), and emphasize will be laid on Sections 27 and 28 of the said Cap 300(repealed).

69. As provided by Section 27 of the repealed Cap 300, the registration of a person as the proprietor of land shall vest in such person the absolute ownership of such land together with all rights and privileges belonging on appurtenant thereto.”

This provision of law is now mirrored in Section 24 of the *Land Registration Act* 2012, and the Plaintiff herein being registered as the owner of the suit property has the absolute ownership of such land,



unless there is prove that she acquired the said Certificate of Lease through fraud, illegally or through misrepresentation, irregularly or through corrupt scheme. The burden of proof of such allegations shall be upon the party making such allegations.

70. Further section 28 of the said repealed Cap 300 provides that no rights of such proprietor shall be liable to be defeated except as provided by the Act, and it shall be held by the Proprietor together with all privileges and appurtenances belonging thereto. The said provision of law is now found in Section 25 of the [Land Registration Act](#) 2012. From this provision of law, the Plaintiff's proprietorship over the suit land can only be defeated as provided by the law, and not through actions of any party herein, which actions have not been sanctioned by the law or courts.
71. Therefore, flowing from the above provisions of Law, and on the face of it, the Plaintiff can be deemed to be the absolute owner of the suit property. However, such absolute proprietorship can be impeached if there is evidence that the suit land was acquired illegally or through fraud. The 2nd Defendant has alleged that the suit property belongs to itself since 1954, and that the Plaintiff acquired the said property through fraud, illegally and/or through misrepresentation. The 2nd Defendant sought through its Counter-claim to have the suit property declared to belong to the itself and the Certificate of Lease held by the Plaintiff be revoked, cancelled and nullified.
72. From the pleadings herein, there is an allegation by the Plaintiff, and a Counter allegation by the 1st and 2nd Defendants. It is trite that he who alleges must prove, and therefore the Plaintiff and 2nd Defendant had a duty to avail sufficient evidence and prove their respective claims on the required standard of balance of probability. See section 107 of the [Evidence Act](#) which provides;
- “ 1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
73. The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes the burden of proof as follows;
- “ The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
- The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”
74. In the case of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] KECA 290 (KLR); the Court of Appeal held as follows;
- “ The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.



As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence”

75. From the available evidence, there is no doubt that though the Plaintiff is in possession of a Certificate of Lease, she has not been able to take possession and make use of the suit land because the 2nd Defendant fenced it off on allegation that the suit land belongs to itself. Further, the 2nd Defendant alleged that this land was wrongfully alienated and allocated to the 3rd parties, the Plaintiff included.
76. Based on the evidence adduced, it is evident that the Plaintiff has not been able to access the suit property since 2005, and the 2nd Defendant is laying claim to the said land.
So has the Plaintiff herein called sufficient evidence to prove her case on the required standard? Did the 1st and 2nd Defendants adduce sufficient evidence to prove the allegations made in their counter-claim? These issues will be answered to in the analysis and determination as follows;
77. The suit land in question is Thika Municipality Block 9/256, which was registered in the name of Florence Nyaguthii Muchemi on 4th October 2001. The said Certificate of Lease was issued by the lands office, and is signed by a Land Registrar by the name of Ngechu . The said Certificate of Lease has not been cancelled and/or revoked by the lands office, nor renounced by the Municipal Council of Thika.
78. Therefore, this court finds that the Certificate of Lease was issued by Lands Office and there was no claim that the said Certificate of Lease was fake/ not genuine or was non-existent. The question that calls for answers is whether the said Certificate of lease guarantees the Plaintiff an absolute ownership of the suit land, or whether the same can be impeached, revoked and/ or cancelled, for having been irregularly or illegally acquired.
79. The Plaintiff alleged that she acquired the suit land after purchasing the same from one George Waweru Mwangi, who had been allocated the said parcel of land vide a letter of allotment dated 28th September 1990, which was allotted to him by the Commissioner of Lands. The letter of Allotment in question was signed by F.O Onyaye for Commissioner of Lands, and there was no evidence availed to dispute the said letter of allotment, and or deny that it was issued by the Commissioner of Lands.
80. The 1st, 2nd and 3rd Defendants averred that the alienation of the suit land, which led to allocation of this plot to George Waweru Mwangi was illegal and was actuated by fraud, misrepresentation and/or collusion. This letter of allotment emanated from the Ministry of lands, and for it to be declared illegal, evidence supporting such allegation was necessary.
81. It is trite that for an allegation to have probative value, sufficient evidence must be availed to prove it. The 1st, 2nd and 3rd Defendants therefore had the onerous task of proving this allegation of illegality of the allotment letter. The Defendants needed to call evidence from the Ministry of Lands to confirm that indeed the alienation of the suit land was wrong and/ or illegal and was done without following the rightful procedure. With the evidence of illegal alienation of the suit land, then the Defendants would have proved that the allocation of this property to George Waweru Mwangi was unlawful, and eventual registration of the same in favour of the Plaintiff was illegal.
82. Though the 3rd Defendant denied that the suit property was legally alienated by the Commissioner of Lands and later allocated to George Waweru Mwangi, it never called any witness from the Ministry of land , where the defunct Commissioner of lands was domiciled, to adduce any evidence to support its defence and the allegations that the suit land was not available for allocation.



83. It is trite that Defence itself is not evidence, and a party needs to call witnesses and or avail evidence to support the allegations made in the Defence. See the case of *Adembesa & another vs Gweno (Civil Appeal E192 of 2023)*[2024] KEHC 5379 (KLR) (17 May 2024) where the court stated as follows; -

“It is trite that where a Plaintiff gives evidence in support of her case but the Defendant fails to call any witness in support of its allegations then the Plaintiff’s evidence is uncontroverted and the statement of defence remains mere allegations. In Janet Kaphiphe Ouma & Another vs Marie Stopes International (Kenya) Kisumu HCC No.68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga through *Stanley Muriga vs Nathaniel D. Schulter Civil Appeal No.23 of 1997* held that; “In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations... Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support same by way of evidence.”

84. The Plaintiff while testifying in court produced the Letter of Allotment, which letter confirmed that George Waweru Mwangi had been allotted the suit land, by the Commissioner of Lands. There was no evidence adduced by the Defendants to refute the said allocation, The Plaintiff further produced a sale agreement to confirm that she indeed purchased the suit land from George Waweru Mwangi on 17th June 1992, for Kshs.200,000/=.

85. Further, the Plaintiff did produced as her exhibit a letter from the Ministry of Lands and Settlement dated 27th March, 1997 addressed to the Town Clerk, Thika Municipality which letter confirmed that Land Parcel No.4953/1619, which is now referenced as Thika Municipality Block 9/256, was transferred to Florence Nyaguthii Muchemi, the Plaintiff herein.

86. The Plaintiff also produced a Form for transfer of Lease from George Waweru Mwangi to herself, which document was signed by the Commissioner of Lands. No evidence was called to dispute the said transfer document, and that the said transfer Form was used to have the land registered in the name of the Plaintiff She also produced copies of receipts to confirm that she paid for the said transfer, for land rates, land rent and stamp duty. All the payments were made to the Government agencies and if at all the said transfer was illegal, then the said Government agencies ought not to have accepted such payments.

87. Further, in the Plaintiff’s list of documents is a letter dated 29th August 2007 from the Municipal Council of Thika, which letter confirmed that according to the records held by the said Municipal Council, the suit property belongs to Florence N. Muchemi , who is the Plaintiff herein.

88. The above exhibits were not disputed by the Defendants, and having emanated from Government offices, then the said documents support and confirm the root of the Plaintiff’s title. The Plaintiff is in possession of a Certificate of Lease, which confirms her ownership of the suit land. She also produced further documents, such as receipts for payment of the requisite land rates and rent, which documents support the root of her title.

89. The Plaintiff’s Certificate of Lease was issued by the Ministry of Lands, and no evidence has been called to dispute the root of the said Certificate of lease. In the case of *Munyu Maina vs Hiram Gatbiha Maina Civil Appeal No 239 of 2009*, the Court of Appeal held: -

“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 the



legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

90. The Defendants further alleged that the Plaintiff illegally acquired the suit land, which land had been reserved as Prisons Land. However, the Plaintiff produced the Kenya Gazette No.6864 of 17th July 2017, which listed the illegally acquired properties and her parcel of land was not among the listed properties. If the Plaintiff’s land was acquired illegally and or through fraud, could it not have been among the listed parcels of land in the above referred Kenya Gazette?

91. The 3rd Defendant made allegations against the Plaintiff, but it failed to call sufficient evidence to controvert her claim. Failure to call evidence to controvert the Plaintiff’s evidence means that her claim stands, and therefore this court holds and finds that the Plaintiff is the absolute proprietor of the suit land as confirmed by her Certificate of lease.

92. On the Counter-claim the 1st, and 2nd Defendants alleged that the Plaintiff acquired the suit property through fraud. Fraud is a serious allegation, which allegations must be strictly proved. It is trite that whoever pleads allegation of fraud must strictly prove the said allegations. See the case of Christopher Ndaru Kagina v Esther Mbandi Kagina & amp; Another [2016] eKLR, where the Court pronounced itself as follows:

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations.....”

93. Further, in the case of Vijay Marjario Vs Nansingh, Madhusingh Darbar & another [2000] eKLR; the Court of Appeal held that:-

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

94. On the standard of proof required for claims based on fraud, courts have variously held that the standard of proof is higher than in the ordinary civil cases. In Koinange & 13 others Vs Charles Karuga Koinange 1986 KLR; the court held that:

“When fraud is alleged by the plaintiffs the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required”.

95. Further, in the case of Kinyanjui Kamau Vs George Kamau [2015] eKLR; while dismissing an Appeal, as it was not demonstrated that the appellants had proved fraud to the required degree, the court stated that;

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo Vs Ndolo [2008] 1KLR (G&F) 742 wherein the court stated that “... We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the respondent was making a serious charge of forgery



or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil case, namely; proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal case...”

96. In cases where fraud is alleged, as in the instant suit, it is not enough to simply infer fraud from the facts. The Defendants needed to call sufficient evidence to prove the allegations of fraud against the Plaintiff herein and the 4th Defendant.

The witness called by the 1st and 2nd Defendants only gave evidence on how the suit land was reserved as Prisons land in 1954, and did not at all adduce evidence to support allegations of fraud and/or collusion of the part of the Plaintiff herein.

97. The 3rd Defendant supported the Counter-claim by the 1st and 2nd Defendants but did not adduce any evidence to prove the allegations of fraud and/or illegality. There was no witness called from the Ministry of Lands to confirm that the Commissioner of Lands never alienated the suit land and later allocated it to George Waweru Mwangi and other parties. Further, there was no witness called from Thika Municipality to confirm that this suit land was wrongly allocated to the Plaintiff.

98. Failure to call crucial witnesses left this court with an inference that if called, the said witnesses would have given evidence that was detrimental to their case. See the case of *Bukenya & others v Republic, Mann Holdings Pte Ltd & another vs UNG Yoke and Elgin Finedays Lts vs Webb*.

99. For the above reasons, the court finds that the claim made in the Counter-claim was never proved on the required standard of balance of probabilities. However, the Plaintiff is in possession of a Certificate of Lease, which was never revoked by the Commissioner of Lands. Having in her possession Certificate of lease, which was issued by the Land Registrar is prima facie evidence that the Plaintiff is the absolute owner, unless contrary evidence is adduced.

100. Sections 24, 25 and 26 of the [Land Registration Act](#) provide as follows-;

24.(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging thereto.

25.(1) the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrance set in this section.

26.(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, unprocedurally or through a corrupt scheme.

101. From the above provisions of law, it is very clear that a title to land may be impeached on the ground that the same was acquired fraudulently as alluded to by the 1st & 2nd Defendants in their Counter-claim. However, the question is whether the said Defendants have proved the alleged fraud to the required



standard? Have the Defendants herein proved that the Plaintiff acquired the suit land fraudulently? It is trite law that he who alleges must prove.

102. No such evidence was adduced by the Defendants and therefore, this court finds and holds that the Plaintiff is the registered as the owner of the suit land is the absolute proprietor of the said land. When the 2nd Defendant fenced off this parcel of land, the Plaintiff was never alerted of the said action. She was condemned unheard and that action of the 2nd Defendant was illegal. See the case of Onyango v. Attorney General (1986-1989) EA 456 where The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v Election Tribunal, Kotah, AIR 1955 SC 664, at 711:

“There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

103. Further, even after the 2nd Defendant noted that the suit land was registered in the name of the Plaintiff, they did nothing to assert their alleged proprietary rights like lodging a caution/restriction and or inhibition against the said Certificate of lease. The 2nd Defendant simply took the law unto their hands, without any findings from competent tribunal/ and or court of law that the Plaintiff's ownership of the suit land was illegal. See the case of The National Land Commission & others ex parte Vivo Energy Kenya Ltd [2015]eklr where the court held that; -

“The impugned Gazette Notice seems to suggest that there was an illegality, involved in the registration of the suit land in the name of the applicant. No doubt under the provisions of Article 40(6) of *the Constitution*, property rights protected under Article 40 of *the Constitution* do not extend to any property that has been found to have been unlawfully acquired. Therefore, there must be a finding that the property in question was unlawfully acquired.”

104. The Plaintiff has proved her case on the required standard of balance of probabilities. For the above reasons the court enters Judgement for the Plaintiff as against the Defendants jointly and severally as prayed in the Plaint dated 19th May 2016, in terms of prayers No.(a), (b), (c), (d) and (e).
105. As for General damages the Plaintiff is awarded Ksh.500,000/= as damages for unlawful occupation and/or obstruction of the Plaintiff from accessing, occupation and/ or use of the suit land.
106. However, the court finds that the 1st and 2nd Defendants' Counter-claim is not proved on the required standard of balance of probabilities and the said Counter-claim is dismissed entirely with costs to the Plaintiff herein .

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 20TH DAY OF MAY 2025

L. Gacheru

Judge.

20/5/2025

Delivered online in the presence of



Meyoki - Court Assistant

Mrs Githaiga H/B for Mr Wanjama for the Plaintiff

Mr Motari for 1st & 2nd Defendants

Ms Masinde for 3rd Defendant

N/A for 4th Defendant.

L. Gacheru

Judge.

20/5/2025

