



**Mwangi v Embakasi Ranching Company Limited & another (Environment & Land Case 1486 of 2014) [2025] KEELC 107 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 107 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1486 OF 2014  
OA ANGOTE, J  
JANUARY 23, 2025**

**BETWEEN**

**SIMON GATHECA MWANGI ..... PLAINTIFF**

**AND**

**EMBAKASI RANCHING COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MWAURA GUMBA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. Vide a Plaint dated the 25<sup>th</sup> November, 2014, the Plaintiff seeks the following reliefs against the Defendants jointly and severally:
  - i. A permanent injunction against the Defendants, whether by themselves, their agents, servants, assigns and/or representatives and anybody acting for them, restraining them from alienating, trespassing, entering, disposing off or dealing in any way with the Plaintiffs' parcel of land known as V4564 and V4565 situated at the 1<sup>st</sup> Defendants former ranch at Ruai, Embakasi, Nairobi.
  - ii. An order against the 1<sup>st</sup> Defendant directing it to issue or process the Plaintiffs' title to his suit parcels Nos V4564 and V4565 and general damages.
  - iii. The costs of this suit be provided for.
2. It is the Plaintiff's case that he has at all material times, been the legal owner of the plots known as V4564 and V4565 (hereinafter the suit plots) situated at Embakasi Ranching Company Limited's former ranch having purchased them from one Ernest Gakure Kigumi between February, 2006 and 2010; that the 1<sup>st</sup> Defendant is the principal owner of the entire ranch where the suit plots are situated and that he is a stranger to the 2<sup>nd</sup> Defendant.



3. He asserts that he duly paid the 1<sup>st</sup> Defendant survey fees, fees for the identification of beacons as well as for the issuance of the title deeds and that the 1<sup>st</sup> Defendant's surveyor confirmed his beacons and endorsed all the relevant documentation in respect to the plots.
4. According to the Plaintiff, upon his purchase of the plots, he took possession thereof sometime in 2006, developed them and even interred the remains of his late wife (on plot V4564); that sometime in October, 2014, the 2<sup>nd</sup> Defendant invaded and trespassed onto his property, threatening to destroy and remove his fence as well as exhume his late wife's remains on the false claim that she owns the property and that she has in collusion with officers from Ruai Police Station been harassing and threatening him, interfering with his quiet and peaceful possession of the suit plots.
5. The 1<sup>st</sup> Defendant filed a Defence on the 17<sup>th</sup> January, 2023. It conceded vide the Defence that the Plaintiff is the legal owner of the suit plots, V4564 and V4565 situate at Embakasi Ranching Company farm in Ruai; that the Plaintiff purchased the plots from Ernest Gakure Kigumi, a shareholder of Embakasi Ranching Company who had been allocated the same and that Ernest Gakure Kigumi thereafter sold the plots to the Plaintiff and a transfer in that respect was effected by it.
6. The 1<sup>st</sup> Defendant asserts that after the Plaintiff purchased the plots and paid the requisite fees, he was furnished with all the necessary documents relating to his ownership thereof; that since his purchase, it has strived to ensure the Plaintiff enjoys quiet possession of his property; that it has not in any way trespassed or colluded with the 2<sup>nd</sup> Defendant to trespass on the suit plots and concurs that the 2<sup>nd</sup> Defendant's trespass is illegal and that it has not aided the 2<sup>nd</sup> Defendant's trespass, and the case against it should be dismissed.
7. The 2<sup>nd</sup> Defendant filed an Amended Defence and Counterclaim on the 7<sup>th</sup> July, 2017. She denied the assertions as set out in the Plaintiff stating that on 1<sup>st</sup> August, 1978, her husband legally purchased from the 1<sup>st</sup> Defendant parcels of land originally known as Plots 1309 and 1310, currently plot no D54 and D55; that upon the purchase, her husband was duly registered as the owner of the plots and issued with a share certificate being Embakasi Ranching Share Certificate No 1755 and that he thereafter took possession of, and fenced the plots.
8. It was her case that before his death, her husband paid the 1<sup>st</sup> Defendant Kshs 1,000/= being surveyors fees and she later on, after her husband's death paid the 1<sup>st</sup> Defendant Kshs 7,000/= being engineering fees; that on or about the year 2008, the Plaintiff wrongfully and maliciously entered into the plots, damaged and removed her building materials and buried his wife and that he wrongfully remained on the property and continues in his trespass thereon.
9. She stated that she reported the matter to Embakasi Police Station and the 1<sup>st</sup> Defendant who deliberated and determined that the Plaintiffs' occupation of the plots was illegal.
10. The 2<sup>nd</sup> Defendant averred that her husband purchased the plots long before the alleged sale between the Plaintiff and Ernest Gakure Kigumi sometime between February 2006 and 2010 and the Plaintiff has no claims on the property; that despite her pleas, he has refused to yield possession and that she has, and continues to be deprived of the use and enjoyment of her properties and has suffered loss and damages.
11. She seeks vide the Counterclaim:
  - i. An order declaring that Plots Nos D54 and D55 lawfully belong to the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant do issue the Title Deed to the 2<sup>nd</sup> Defendant.
  - ii. Costs of the suit.



## Hearing & Evidence

12. The matter first proceeded for hearing on the 16<sup>th</sup> February, 2022. The Plaintiff, PW1, adopted his witness statement dated 21<sup>st</sup> April, 2016 as his evidence in chief. He produced the bundle of documents dated 25<sup>th</sup> November, 2014 as PEXH1 and a further list of documents dated the 27<sup>th</sup> September, 2019 as PEXHB2.
13. It was his evidence that he purchased plots V4564 and V4565, also known as plots C1309 and C1310 and whose final title number is 136/10253 from Ernest Gakure Kigumi sometime in 2006 and 2010 respectively. After the purchases, he stated, Ernest Kigumi gave him the area map, share certificate and slip from Barclays bank.
14. He testified that he took possession of the property in 2006 and thereafter fenced the same; that he buried his wife on the property in 2009; that it was in 2014 that he was made aware that the 2<sup>nd</sup> Defendant was claiming the property and that she sent goons who demolished a foundation he had begun constructing.
15. PW1 noted that whilst they had agreed to resolve the dispute by approaching Embakasi Ranching, the 2<sup>nd</sup> Defendant escalated the matter by involving the police; that he went to the police station, and they advised him to report the matter to the 1<sup>st</sup> Defendant; that he did and was told to pay Kshs 20,000/= to facilitate the site visit and that they went to the site and it was confirmed the property belongs to him.
16. PW1 maintained that the vendor has never sold the suit property to the 2<sup>nd</sup> Defendant; that he and the vendor gave the original documents to the 1<sup>st</sup> Defendant to process the title deed; that he conducted a search which shows that the property belongs to Ernest Kigumi and that he was in the process of getting the title but was stopped due to the dispute.
17. It was his evidence on cross-examination that at the time he purchased the property there was nothing thereon; that the fence belongs to him; that the stones in the picture are outside his land and were brought after he was already on the site; that he reported the same to the Police and that he was given a yellow document by the 1<sup>st</sup> Defendant indicating that they were preparing the title. According to the Plaintiff, he did not take possession of the other land.
18. In re-examination, PW1 stated that the land's ministry required all the original documents to process the title deed; that he put up the natural fence on the first plot; that the vendor had fenced the plot with a barbed wire and that he planted the fence for the first plot in 2007 and the second fence in 2010.
19. PW2 was Ernest Gakure Kigumi, a farmer. He adopted his witness statement dated 17<sup>th</sup> June, 2015 as his evidence in chief. It was his oral testimony that the Plaintiff is his old-time friend; that he sold him two, out of six plots of land that he had purchased from the 1<sup>st</sup> Defendant being plots V4564 and B4565 vide agreements of sale dated 24<sup>th</sup> November, 2006 and 15<sup>th</sup> April, 2010.
20. It was his evidence that after purchasing the plots, a surveyor from the 1<sup>st</sup> Defendant's company showed him their position on the ground and he confirmed that they were vacant; that he handed over the documents given to him by the 1<sup>st</sup> Defendant to the Plaintiff; that the 1<sup>st</sup> Defendant has confirmed his ownership of the suit property, and that the official search for the two plots indicates that he is the registered owner.
21. In cross-examination, he stated that the land was bushy when he purchased it and he cleared it; that the picture shows the fence he put up; that he bought six neighboring plots from the 1<sup>st</sup> Defendant in 2006 and that he was given share certificates and is unaware of the 2<sup>nd</sup> Defendant's share certificates.



22. He stated on re-examination that the share certificates produced are the ones given to him in respect of the suit plots.
23. The 2<sup>nd</sup> Defendant, DW1, adopted her witness statement dated the 12<sup>th</sup> April, 2016 as her evidence in chief and produced the documents dated the 23<sup>rd</sup> August, 2016 as DEXB1. She produced the further list of documents dated the 5<sup>th</sup> May, 2017 as DEXB2.
24. It was her evidence that her deceased husband purchased the plots and she has the original receipts; that she took the surveyor there and paid for the survey; that her husband was given a certificate no 1755 indicating the land belonged to him and that at the time he purchased the property, there were sisal plants thereon which her husband cleared and planted other crops.
25. DW1 stated that after her husbands' death, she went to check on the property; that her daughter used to check as well; that she found a grave on the property prompting her to report the matter to the Police Station who told the Plaintiff that the land belonged to her and he had buried his wife there without a permit; that when she went to the 1<sup>st</sup> Defendant, they asked her to show them the property; that she paid the sum of Kshs 20,000/= and went to the site accompanied by the 1<sup>st</sup> Defendants surveyor.
26. It was her evidence on cross that the plots in issue are plots 1309 and 1310 but she has no share certificates for the same; that she reported the matter to the CID but she was not given an OB extract; that she has no document to show that the surveyor showed her the plot and that she cannot remember the year the Plaintiff invaded the property.
27. According to DW1, the share certificate has the number C1309/1310 in pen which numbers later changed to D54 and D55 and that after the death of her husband, her deceased's daughter used to check up on the land.
28. DW2 was Charles Kinuthia Mwaura, a businessman and the 2<sup>nd</sup> Defendant's son. He adopted his witness statement dated the 1<sup>st</sup> February, 2019 as his evidence in chief.
29. It was his evidence that the plots in issue are D54 and D55 purchased by their father; that their father was shown all his parcels of land; that he has been on the land which is next to Manyatta Primary School having gone there in 1992 when they went to cultivate the same and that he was 19 years old at the time and it is his sister who informed him about the property.
30. He stated that they paid for a site visit in 2014 after which the 1<sup>st</sup> Defendant took them to plots D54 and D55; that that when they deposited building materials on the property, the same were removed leading them to report the matter to the police; that when they produced their documents before the Police and the 1<sup>st</sup> Defendant, they agreed that the same were legitimate; that they went to the site with the supervisor and according to the map, D54 and D55 are C1309 and C1310.
31. Upon being cross-examined, he stated that he was 5 years old in 1978; that he does not have the map which shows that their father owned the land; that it is his sister and not his father who showed him the land; that he was not given any documents showing that the land belonged to his father; that he was not given a survey report; that he has severally appeared before the 1<sup>st</sup> Defendant's board and that the 1<sup>st</sup> Defendant told his mother to wait and they would give her land.
32. It was his testimony during re-examination that the numbers C1309 and C1310 are in the documents given to them by the 1<sup>st</sup> Defendant; that they sold D54 and D55 to another person; that the surveyor declined to sign twice over the same parcel of land and that the land was vacant in 1993 and they used to cultivate it.



33. DW3 was Jack Kamau Wachira, a land surveyor working at Embakasi Ranching. He adopted his witness statement dated 17<sup>th</sup> January, 2023 as his evidence in chief with an amendment being that he is not a licensed surveyor but a registered surveyor. He produced the documents dated the 16<sup>th</sup> January, 2023 as 1DEXHB1
34. In his testimony, he acknowledged being aware of the dispute and stated that it had been discussed, and concluded that the property belonged to Ernest Gakure. He stated that the 2<sup>nd</sup> Defendant has valid documents entitling her to two plots and was instructed to seek allocation of a different parcel of land. However, this appears not to have been done.
35. He noted that the 2<sup>nd</sup> Defendants husband made the payment of Kshs 1,000/= being survey fees for the plots each being 500/=, and the sum Kshs 7,000/= for engineering fees, each plot being Kshs 3, 500/= was made; that after the payments, neither the deceased nor the 2<sup>nd</sup> Defendant appeared for allocation of the plots; that the plots in contention C1309 and C1320 are also referred to as V4564 and V4565 and as per their records, they belong to Ernest Gakure Gikumu and that he has the register and the maps that were attached to the site visit; that the 2<sup>nd</sup> Defendant has never gone to their offices to be allocated property.
36. He stated that there is a surveyor stationed at the farm and once the shareholder goes there, they are allocated plots; that they are given an allocation number which is written on the map; that Mr Mwaura was given D54 and D55; that after getting the allocation number, Mr Mwaura never went to the farm to be allocated the property; that Mr Ernest went to the farm and was given V4564 and V4565 which is indicated in the map as C1309 and C1310.
37. With respect to the numbers C1309 and C1310 on the share certificates adduced by the 2<sup>nd</sup> Defendant, he noted that the surveyor used to sign that he had given you the number at the back of the certificate; that the stamp is for verification of the certificate; that this has nothing to do with allocation; that the allotment letter was issued after paying Ksh 500 per plot; that the Kshs 1000 was for survey fees and that he hasn't seen the 2<sup>nd</sup> Defendants' allotment letter though he has seen the endorsement of the collection of the letter of allotment.
38. It was his evidence during re-examination that the 2<sup>nd</sup> Defendant has not been allocated land; that the actual shareholder died in 1990 before the engineering fees had been paid; that the representatives would have availed themselves and that if they avail themselves, they will be allocated land.

### **Submissions**

39. The Plaintiff filed submissions on the 2<sup>nd</sup> March, 2024. Counsel submitted that as expressed in, the *Evidence Act* under Sections 107, 109 and 112 sets out the legal and evidentiary burdens placed upon a party who seeks to have the Court render a determination in their favour and that in this respect, a party seeking to have the Court give a judgment as to a legal right or liability on the basis of any facts, must prove the alleged facts. Reliance was also placed on the case of Mumbi'Nabea vs David M Wachira [2016] eKLR.
40. It was submitted that in the case of Mumbi' Nabea (supra), the Court placing reliance on the decisions in Danson Kimani Gacina & Another vs Embakasi Ranching Company Limited [2015]eKLR and Caroline Awinja Ochieng & Another vs Jane Anne Mbithe Gitau & 2 Others[2014]eKLR held that proof of ownership of unregistered land is found in the documentary evidence which establishes an unbroken chain leading to the root of the title.



41. Counsel submitted that the Plaintiff has through his evidence, corroborated by PW2 the vendor and DW3, the 1<sup>st</sup> Defendant's surveyor, affirmed that he is the legitimate proprietor of the suit property; that on the other hand, the 2<sup>nd</sup> Defendant has failed to establish her claim; that subsequently, and in line with the general principle that costs follow the event and the exposition in this respect by the Courts in Cecilia Karuru Ngaru vs Barclays Bank of Kenya & Anor [2016] eKLR, the Plaintiff should be awarded costs of the suit.
42. The 1<sup>st</sup> Defendant filed submissions on the 25<sup>th</sup> March, 2024. Counsel submitted that the burden of proof in civil cases such as herein is establishment on a case on a balance of probabilities as affirmed by the Court in Miller vs Minister of Pensions [1942] ALL ER and Mumbi M' Nabea vs David M Wachira [2016] eKLR.
43. Counsel urged that subsequently, the 2<sup>nd</sup> Defendant does not qualify to receive protection as envisaged under Article 40 of *the Constitution* and Sections 24, 25 and 26 of the *Land Act*; that the Court in George Gatembo vs Elijah Mutegi Rwito & 10 Others [2019] eKLR, relied on the exposition in Albert Mae Gacci vs Attorney General & 4 Others [2006] eKLR where the Court emphasized that it would be a cursed day when a fraudster could acquire a valid title to property through fraud, deceit, or forgery.
44. The 2<sup>nd</sup> Defendant filed submissions on the 15<sup>th</sup> May, 2024. Counsel submitted that the 2<sup>nd</sup> Defendant's deceased's husband was the first registered owner of the suit property having purchased the same in the early 1990's and that subsequently, the 1<sup>st</sup> Defendant could not purport to sell the plots that it did not have as encapsulated in the principle of nemo dat which as explained by the Court in Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina [2019] eKLR means one cannot give what they don't have and works to protect the real title holders of property.
45. It was submitted that the plots having been allocated to the 2<sup>nd</sup> Defendant's husband, the 1<sup>st</sup> Defendant could not purport to re-allocate the same to Ernest Gikure who, also not having any rights, could not sell the same to the Plaintiff; that in the circumstances, the 2<sup>nd</sup> Defendant has established her claim against the Plaintiff on a balance of probabilities. Reliance in this respect was placed on the case of In Re Estate of M'Mugambi M'Mbiro-Deceased [2022] eKLR and William Kabogo Gitau vs George Thuo & 2 Ors [2010] 1KLR 526 and Palace Investments Ltd vs Geoffrey Kariuki.

### **Analysis & Determination**

46. Having carefully considered the pleadings, testimonies and submissions herein, the issues that arise for determination are as follows:
  - i. Who between the Plaintiff and the 2<sup>nd</sup> Defendant is the legitimate owner of plots V4564 and V4565?
  - ii. What are the appropriate orders to issue?
47. The Plaintiff has instituted this suit seeking inter-alia, permanent injunctive orders restraining the Defendants from in any way interfering with the suit plots, V4564 and V4565 and an order directing the 1<sup>st</sup> Defendant to issue or process his titles thereto.
48. It is his case that he is the legitimate proprietor of the suit plots having purchased the same from one Ernest Gakure Kigumi, who had purchased them from the 1<sup>st</sup> Defendant and that after purchasing the plots, he took possession thereof and enjoyed peaceful and quiet possession until sometime in 2014 when the 2<sup>nd</sup> Defendant made a rival claim on the property and attempted to trespass thereon.



49. The Plaintiff maintains that the 2<sup>nd</sup> Defendant has no legitimate claim to the plots and should be restrained from any attempts to interfere with his proprietary rights.
50. The Plaintiff adduced into evidence the sale agreements dated 24<sup>th</sup> November, 2006 and 15<sup>th</sup> April, 2010 between himself and Ernest Gikure for the sale of the suit property, receipts nos. 10948 and 014964 in respect of the suit plots in the name of Ernest Gakure; non-member plot ownership certificates for Ernest Gakure for plot no's V4564 and V4565, site certificates no 7544 and 7545; site visit receipts no 041374 and 041360, photos of the suit property and the death certificate for Ms Rachel Gatheca.
51. Vide a further list of documents, the Plaintiff adduced into evidence a newspaper article dated 19<sup>th</sup> January, 2018 titled-Embakasi Ranching firm to be wound up; Embakasi Ranching notices dated 28<sup>th</sup> December, 2017 and 11<sup>th</sup> February, 2018; application for official search dated the 28<sup>th</sup> May, 2018; beacon certificate dated 24<sup>th</sup> November 2006; site visit receipts dated 049195 and 049281 and bankers cheques no 033177 and 025497 and receipt dated 37811.
52. The 1<sup>st</sup> Defendant concedes that the Plaintiff is the owner of the suit property. They affirm that as per their records, the suit parcels originally belonged to Ernest Gakure who purchased the same from it and that Mr Gakure later on sold the property to the Plaintiff. As regards the 2<sup>nd</sup> Defendant's claim, they contend that while her deceased's husband indeed purchased two plots, he did not go to the farm and was subsequently not allocated specific plots.
53. The 1<sup>st</sup> Defendant adduced into evidence copies of the sale agreements in respect of the suit plots; non-member share certificates issued by the 1<sup>st</sup> Defendant to the Plaintiff; site visit receipts issued by them to the Plaintiff; non-member certificates of plot ownership; pin certificates and correspondence from the 2<sup>nd</sup> Defendant.
53. On her part, the 2<sup>nd</sup> Defendant asserts that she is the legitimate proprietor of the suit plots, the same having been purchased by her husband from the 1<sup>st</sup> Defendant sometime in 1978 and that they took possession of and cultivated the property until sometime in 2008 when the Plaintiff trespassed thereon.
54. She adduced into evidence a share certificate no 1755 issued on 1<sup>st</sup> August, 1978; grant of letters of administration issued on 3<sup>rd</sup> January, 1992; receipt dated 8<sup>th</sup> January, 1982 for Kshs 1000; receipt dated 30<sup>th</sup> November, 1990 for Kshs 7000/= and receipt dated 23<sup>rd</sup> October, 2014 for Kshs 20,000/=.
55. Vide her supplementary list, she adduced photos of the two plots and the Plaintiff's wife's grave as well as photographs of the 2<sup>nd</sup> Defendant's building stones.
56. Considering the foregoing narration, it is apparent that the dispute herein turns on the ownership of the suit plots. Both the Plaintiff and the 2<sup>nd</sup> Defendant lay claim to the same. Sections 107, of the [\*Evidence Act\*](#), 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.”
57. To begin with, it is noted that the Plaintiff lays claim to the parcels of land known as plots V4564 and V4565 whereas the 2<sup>nd</sup> Defendant Counterclaims for the parcels D54 and D55. Subsequently, the first question that lends itself is whether the dispute concerns the same property.



58. It was PW1's testimony in this regard that the suit plots, V4564 and V4565, have alternative numbers being C1309 and C1310 as set out in the map. The 2<sup>nd</sup> Defendant on her part asserts that plots D54 and D55 were originally known as C1309 and 1310. It is also clear from the evidence that both parties make reference to the same physical plots. The Court is satisfied that the dispute concerns the same parcels of land.
59. Considering the parties' claims and the evidence, it is also apparent that whereas the larger parcel of land is titled, individual titles have not been issued with respect to the plots in issue. As such, the property in dispute is untitled.
60. Nonetheless, the fact that the suit property does not have a title does not mean that no rights can accrue thereon. As succinctly expressed by the Court in *Caroline Awinja Ochieng & Another vs Jane Anne Mbithe Gitau & 2 Others* [2015] eKLR:

“In determining the above issue, it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.

The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant's beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”

61. The Plaintiff states that he purchased the suit parcels from Ernest Gakure Kigumi sometime in 2006 and 2010 for due consideration. He has produced the sale agreements in this respect. The vendor, Ernest Gakure affirmed this vide his testimony.
62. On his part, the vendor stated that he purchased the plots from the 1<sup>st</sup> Defendant. This is evinced by non-member certificates of plot ownership issued to him, receipts for payments for the plots as well as the official searches which name him as the proprietor.
63. The 1<sup>st</sup> Defendant affirmed this position through DW3 who stated that they sold the plots to Ernest Gakure who thereafter sold the same to the Plaintiff, which position is reflected in their records. He confirms that the 1<sup>st</sup> Defendant undertook the transfer in this respect.
64. On her part the 2<sup>nd</sup> Defendant contends that the suit plots having initially been allocated to her husband in 1978 were not available to be allocated to anyone else. She adduced the share certificate



- no 1755 in the name of her deceased husband Mwaura Gumba issued on 1<sup>st</sup> August, 1978. She also adduced into evidence payments of shareholders' survey fees as well as engineering fees.
65. She however conceded during cross-examination that apart from the writings in pen on the share certificate no 1755 where it is noted C1309 and C1310, she has no share certificates or indeed any other documents which make reference to the suit plots.
  66. The 2<sup>nd</sup> Defendant, supported by DW2, contended that plots D54 and D55 are plots C1309 and C1310. This assertion was however not demonstrated, there being no map or survey report. It was also explicitly denied by the 1<sup>st</sup> Defendant vide DW3 who stated that D54 and D55 have not yet been allocated on the ground.
  67. Indeed, in contrast to the Plaintiff's site visit receipts in respect of the suit plots which have at the back the notation "site confirmed to belong to Simon Gatheca Mwangi", there is no such indication in the 2<sup>nd</sup> Defendant's site visit receipts to support the assertion that the site visit confirmed the plot to be the plots allocated to her husband.
  68. The Court also notes that the 2<sup>nd</sup> Defendant appears to be unsure of when the alleged trespass occurred. She stated vide her Defence that the Plaintiff entered the property in 2008. However, during her oral testimony, she conceded to being unsure of when the Plaintiff entered the property.
  69. Having regard to the foregoing discussion, it is the finding of the Court that as between the two, the Plaintiff has established his proprietorship of the suit plots on a balance of probabilities.
  70. In the same vein, the 2<sup>nd</sup> Defendant's claim to D54 and D55 cannot lie, as her claim in this respect is predicated on the fact that the aforesaid are plots C1309 and C1310, otherwise referred to as plots V4564 and V4565 which belong to the Plaintiff.
  71. The Court has noted that the 1<sup>st</sup> Defendant does not contest the legitimacy of the 2<sup>nd</sup> Defendant's documents only noting that whereas her deceased husband purchased shares, he did not complete the process and was ultimately not allocated plots on the ground. DW3 stated that the 1<sup>st</sup> Defendant is willing to give the 2<sup>nd</sup> Defendant two plots of land.
  72. Unfortunately, however, the 2<sup>nd</sup> Defendant did not seek any alternatives other than the suit plots. This is even after being aware of the 1<sup>st</sup> Defendant's position as regards her ownership thereof and its willingness to give her alternative plots. In the circumstances, the Court cannot grant her any remedy in this respect.
  73. As expressed by the Court of Appeal in *Lamba vs National Social Security Fund & Another (Civil Appeal E168 of 2021)* [2023] KECA 124 (KLR) (3 February 2023) (Judgment), courts can only grant orders that have been prayed for in the pleadings, or make appropriate orders as it deems fit if need arises in the cause of a trial.
  74. Indeed, where a court has proceeded to grant a relief not contained in prayers in the pleading or not regularly sought by a party expressly or by implication, appellate courts have had no hesitation in annulling or overturning orders granting such reliefs.
  75. In conclusion, the Court has found that the Plaintiff has established his right over the suit plots and by virtue thereof is entitled to have peaceful and quiet possession of the plots to the exclusion of all others. The plea for permanent injunctive orders is merited.
  76. The 1<sup>st</sup> Defendants position has been that the Plaintiff is the proprietor of the plots. It has not been claimed or demonstrated that the 1<sup>st</sup> Defendant has breached any of the Plaintiff's legal rights or that



the attempted trespass by the 2<sup>nd</sup> Defendant was with the consent and or collusion of the 1<sup>st</sup> Defendant. The claim for damages fails.

77. In the end, the Court makes the following final determination:

- i. The 2<sup>nd</sup> Defendant's counterclaim be and is hereby dismissed.
- ii. A permanent injunction does hereby issue against the Defendants, restraining them whether by themselves or anybody acting for them from alienating, trespassing, entering, disposing off or dealing in any way with the Plaintiffs' parcel of land known as V4564 and V4565 situated at the 1<sup>st</sup> Defendant's former ranch at Ruai, Embakasi, Nairobi.
- iii. An order does hereby issue directing the 1<sup>st</sup> Defendant to issue the Plaintiff with titles in respect of plot numbers V4564 and V4565.
- iv. The 2<sup>nd</sup> Defendant will bear the costs of the suit and the counter claim.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23<sup>RD</sup> DAY OF JANUARY, 2025.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Ms Mugalla for Wangui for Plaintiff

Mr. Mogendi holding brief for Gakuo for 1<sup>st</sup> Defendant

Ms Wainaina for Mashua for 2<sup>nd</sup> Defendant

Court Assistant – Tracy

