



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 75 OF 2019

(FORMERLY EMBU ELC NO. 73 OF 2014 AND FORMERLY EMBU H.C.C.C NO. 67 OF 2012)

BENSON GICHOHI MUTAHI.....PLAINTIFF

VERSUS

ALEX NJUE KITHANGARI.....1ST DEFENDANT

MURIITHI KITHANGARI.....2ND DEFENDANT

BONIFACE MUTHEE NJERU.....3RD DEFENDANT

PETERSON MUGO KITHANGARI.....4TH DEFENDANT

MWANIKI KITHANGARI.....5TH DEFENDANT

NJERU TETU.....6TH DEFENDANT

MURIITHI MUCHARO.....7TH DEFENDANT

KITHANGARI KING'ANG'I.....8TH DEFENDANT

JUDGMENT

Background

1. This suit was filed in Embu ELC vide a plaint dated 26th April 2012 and proceeded for hearing before that court. However before judgment could be delivered, the matter was transferred to this court. Further, the 5th defendant passed on during the pendency of the suit, hence the claim against this party has abated. The cases against the 3rd and 7th defendants were withdrawn by consent dated 26/11/2014. It is also pertinent to note that the defendants had filed their statement of defence which included a counterclaim.

Plaintiff's case

2. The plaintiff filed his amended plaint on 22nd June 2012 where he avers that he is the sole registered owner of land parcel no. **MBEERE/KIRIMA/3066** measuring about 8.09 Hectares and the defendants without the plaintiff's consent are illegally occupying the suit land which amounts to a breach of his constitutional right to private property. He therefore seeks the following orders;

a. An eviction order directing the defendants by themselves their family members, servants, employees and/or agents or any other person claiming under them to vacate the parcel MBEERE/KIRIMA/3066 forthwith, failing which they be forcefully evicted.

b. An order of permanent injunction prohibiting the defendants by themselves, their family members, servants, employees and/or agents or any other person claiming under them from occupying, entering, encroaching, cultivating or in any other way interfering with the plaintiff's parcel MBEERE/KIRIMA/3066.

c. Costs of the suit.

d. Any other or further relief deemed just and fit by the Honorable Court.

3. **PW1, Benson Gichohi Mutahi** is the plaintiff. He introduced himself as a businessman and a contractor residing in Kirinyaga County. He adopted his statement dated 21/06/2012 and a further statement dated 6/04/2019 as his evidence. His case is that he bought the parcel of land **MBEERE/KIRIMA/3066**, (the suit land) from Mururi clan under the chairmanship of Abiud Njue through an **agreement dated 15th November 2007** measuring approximately 20 acres of which he acquired the title in the year 2008. That the suit land **MBEERE/KIRIMA/3066** was part of land parcel no. **MBEERE/KIRIMA/2955** which had been mutated from **MBEERE/KIRIMA/2244** which belonged to the 17 clans. He avers that parcel **MBEERE/KIRIMA/2955** had been allocated to Mururi clan and his name was included in the list of beneficiaries after making payment.

4. In the year 2009, he visited the suit land and found people cultivating it while others had put up sheds. He reported the matter to the area chief where the said persons were requested to vacate, some did and others didn't. Three people namely David Ileri Kithangari, Benjamin Ileri Njeru and Jackson Muriithi Kithangari were arrested, charged with criminal cases and convicted in Siakago and were placed on probation on 12.6.2012. The trespass however continued and again he reported the matter to the police, whereby Jackson Muriithi Kithangari was arrested and charged. Pw1 however withdrew the case as the family of Jackson had vacated the suit land.

5. He further stated that on 29/8/2014, some of the defendants and other people invaded the suit land, burnt and destroyed property worth Kshs. 7,000,000 (7 million) and the matter is being heard at Embu Chief Magistrates Court criminal case no. 1558 of 2014.

6. The plaintiff avers that he is in full occupation of the land and there are no squatters on it. Further, the defendants do not belong to Mururi clan nor are they his relatives and they belong to another clan that was allocated land elsewhere. Thus if the defendants have any claim, they should go to the clan that sold him the land.

7. In support of his case, the plaintiff produced the documents in his bundle dated 19.2.2019 as his exhibits. That bundle contains just about everything including all pleadings, statement of witnesses and documents of both the plaintiff and defendants. It is not paginated. I however discern that plaintiff's documents are those running immediately after the ones of the defendant and include; a sale agreement dated 15/11/2007, order by Judge Olao dated 18.3.2014, proceedings in Siakago criminal case no. 1084 of 2013, proceedings dated 14.9.2012 before the District Officer, Kiritiri-Gachoka Division and a green card for parcel 2955 showing that Abiud Njue representing Mururi clan was registered as the owner of the said parcel on 7.4.2008. I have also stumbled upon a title deed as well as a copy of the search for parcel 3066 which shows that the said parcel was registered in the name of the plaintiff on 4.9.2008.

8. On cross examination, pw1 stated that he bought the suit land in November 2007 from Mururi clan through its chairman at Kshs. 20,000 per acre. By then, the suit land did not have a number nor was it demarcated but the original number was **2244**. He bought the suit parcel when it was part of parcel **2955** which belonged to the Mururi clan. He did not see any occupants and the defendants came into his land in 2009 though he does not know if they were born there, there are no graves on the suit land nor are the defendants on the land.

9. He averred that he has never forcefully evicted the defendants or destroyed their homes. He is aware of the two criminal cases, and that by the time the last person left the suit land in February 2014, that person who happens to be the second defendant was at the police station. He is not aware if the 2nd defendant was denied bail, or that he was in custody when his family moved out of the suit land.

10. In re-exam he averred that he did not know the defendants at the time of purchasing the land and he withdrew the criminal charges when the defendants vacated the suit land.

11. **PW2, Abiud Njue**, adopted his statement dated 6/04/2019 as his evidence. He avers that he has been the chairman of Mururi clan for over 10 years and he was also one of the members who deliberated and allocated the plaintiff 20 acres of the clan land block **MBEERE/KIRIMA/2955** so as to meet the survey costs and other related expenses. That the suit land herein **MBEERE/KIRIMA/3066** was a mutation from **MBEERE/KIRIMA/2955** which was also a mutation from **MBEERE/KIRIMA/2244** which was a creation of the adjudication of Kirima Adjudication section. He avers that adjudication process was followed strictly and the Mururi clan was awarded **MBEERE/KIRIMA/2955** which the clan committee agreed to share equally among its members and they included the plaintiff as he had financed the surveying and other costs and no one from the clan has ever complained.

12. Pw2 further stated that the plaintiff did move unto the suit land and has put up several structures. The people opposing his ownership are not members or agents of the clan and they should have joined their clan blocks when the adjudication process was going on. Further they were not in occupation during adjudication and they moved in after the determination and mutation of their clan allocation. He added that his own parcel is close to the plaintiffs and none of the defendants live or use the suit land as they evicted themselves unless they are asking the court to resettle them on the plaintiffs land.

13. On cross examination he averred that he has been chairman since 2007 and is familiar with the history of **parcel 2244**. Initially, people were settling anywhere but upon allocation they moved to the areas their clan were allocated. He knows that the 2nd defendant and the Kithangari family belong to the Mbandi clan and they are not related to him. He is also not aware that the defendants were living on the suit land when it was sold to the plaintiff.

14. In re-exam, he reiterated that there was no claim by any member of the Mururi clan on the suit land and it was not occupied at the time it was sold to the plaintiff.

Case for the 1st, 2nd, 4th, 5th, 6th & 8th defendants

15. The 1st, 2nd, 4th, 5th, 6th & 8th defendants filed their defence and counter-claim dated 2nd July 2012, denying all allegations and averring that they are in occupation of the suit land as of right and have carried out substantial developments over it for a period exceeding 50 years.

Further, there is a criminal case no. 370 of 2011 in Siakago and also HC JR NO. 38 of 2008 which are both pending and are in respect to the suit land.

16. In the counter-claim the aforementioned defendants averred that the suit land is a resultant sub division of parcel no. **MBEERE/KIRIMA/2955** which is a resultant sub division of the original parcel no. **MBEERE/KIRIMA/2044** which was owned by the 17 clans including the clans of the defendants and they settled therein as the rightful owners of the said land. When the parcel of land was being divided, it was agreed among the clans that none of the clan members would be evicted from the portions they were occupying and the defendants herein were not given parcels of land elsewhere when the said parcel was distributed.

17. They aver that the plaintiff as the registered owner of **MBEERE/KIRIMA/3066** holds the suit land in trust for them, and they therefore seek the following orders;

a. A declaration that the plaintiff holds portions measuring 10 acres out of MBEERE/KIRIMA/3066 in trust for the 1st, 2nd, 4th & 8th defendants and 5 acres of MBEERE/KIRIMA/3066 in trust for the 6th defendant.

b. An order that the trust held by the plaintiff in respect of parcel MBEERE/KIRIMA/3066 be determined and that the title be rectified accordingly.

c. Costs of the suit.

18. **DW1 Alex Njue Kithangari** the 1st defendant adopted his statements dated 2.7.2012 and 26.11.2018 as his evidence. He is a son of the 8th defendant. He contends that he was born in 1983 on the suit land. His mother who died in 1992 is buried on the suit land, when he came of age his father, the 8th defendant showed him a parcel of land to utilize and he lives on the said portion with his family having established a homestead and developed the same by farming.

19. That in the year 2011, they were summoned by the area chief where they met the plaintiff who wanted them to vacate the land. However, they refused having no other land to move unto. A few days later, tractors came and cultivated the whole land at night and their houses were hit with stones. Eventually, the plaintiff evicted him and his family and he now lives on rental premises.

20. In cross examination, Dw1 stated that he is 32 years old and a member of Mbandi clan, he was shown the land in 1997, his father did not have title to the land and he did not know the plaintiff at the time. He also does not know if the suit land is the land that Mbandi clan was allocated. He does not know why his father was never allocated clan land. He knows no other home apart from the suit land.

21. **DW2 Jackson Mureithi Kithangari**, the 2nd defendant adopted his statements dated 2.7.2012 and 26.11.2018 as his evidence. He is also a son of the 8th defendant and a sibling to 1st 4th and 5th defendants. He avers that he was born on the suit land in 1975 where his parents and grandparents also lived as early as 1949 and he established his home with a wife and children on this land. His grandmother was buried on this land in 1986, while his mother was buried in 1992. He also states that plaintiff was aware of their occupation of the land by the time he was buying the same.

22. Dw2 further stated that when this suit was filed, the plaintiff started using the police to harass them to the extent that he was arrested and charged though plaintiff withdrew the complaint later. His property was destroyed and his family was rendered homeless and destitute.

23. In cross examination he stated that he is 44 years old and hails from Mbandi clan. The chairman in charge of the 17 clans of Mbeere tribe had agreed that members who had already settled on parcel 2244 would not be evicted but would be allocated the respective portions they were occupying. Mbandi clan was allocated land and none of his uncles are in occupation of the parcel no. 2244.

24. In support of their case, Dw2 produced the documents in their list dated 2.7.2012 as exhibits 1-4. These are green card for parcel 2244, order dated 16.7.2008 in JR Case no. 38 of 2008, Proceedings and award in objection cases no. 172, 572 and 1130 all of 1983, and the memorandum to the D.C. Mbeere District dated 25.1.2005. He also produced the three documents in their further list dated 26.11.2018 which are; proceedings in Siakago criminal case no. 1084 of 2013 and proceedings in Siakago criminal case no 370 of 2011 and a burial permit.

25. **DW3 Njeru Tetu** the 6th defendant too adopted his statements dated 2.7.2012 and 26.11.2018 as his evidence. He avers that he occupies 5 acres of the suit land with his family. He belongs to the Marigu clan, who were part of the 17 clans who owned parcel **2244**. In January 2014, he got a call from his eldest son informing him that his family had been forcefully evicted by the plaintiff and his agents in the company of police officers and on arrival, he found that all his houses and personal effects had been burnt down together with crops. He was forced to squatter in a neighboring land where he built temporary structures for his family. He urges the court to give him the 5 acres.

26. **DW4 Kithangari Kingangi**, the 8th defendant adopted his statements dated 2.7.2012 and 26.11.2018 as his evidence. He was born in 1949 and by then, his father was utilizing the suit land. His children too live on the suit land. His wife and son (the 5th defendant) are buried on the suit land. The plaintiff forcefully chased them away from the suit land and burnt their homes destroying the graves and crops. He has no other land and the suit land is his only source of livelihood.

27. In cross examination, he averred that he did not have a title to the land as it had not been demarcated, he was working in Nairobi between the year 1984-2000 and his sons were contributing towards the adjudication process. He has no problem with Mbandi clan, does not remember when the adjudication process started or ended. All he knows is that he was born and raised on the suit-land.

28. **DW5 Beatrice Mbuco Muriithi** adopted her statement dated 18.1.2019 as her evidence. She is the wife to the 2nd defendant. When she got married in 2004, the 2nd defendant was living on the parcel of land **MBEERE/KIRIMA/3066** together with his father, his brothers some

of whom are defendants, they all had their respective portions which they were occupying and farming. That in 2008 the plaintiff started disrupting their occupation and the brothers had to move away to look for work as they could no longer till the land in peace.

29. She avers that the plaintiff caused her husband to be arrested and charged on two different occasions. During the second incident of arrest in 2013, her husband was denied bail. That is when the plaintiff moved onto the land and started utilizing it. In 2014 the plaintiff came to the land with police and workers and destroyed crops, dug up the land using a tractor and burned their houses forcing them out of the suit land. They have never recovered from the loss, have no land to cultivate and pray that the said land reverts back to them.

30. **DW6 Raphael Gichovi Munene** adopted his statement dated 26.11.2018 as his evidence. He avers that the 8th defendant and his father were close friends. He remembers visiting 8th defendant's home home in 1978 and they would assist each other with bulls for ploughing the suit land. The 8th defendant resided with his family and had extensively developed the suit land, his sons also settled on the land and established their own homes. His mother, wife and sons are buried on that land.

31. Dw 6 avers that the suit land was awarded to the 17 clans and it was determined that the same would undergo adjudication process, however the concerned officer did not establish the rights of the persons already in occupation of land though it had been agreed by the heads of the 17 clans and all parties involved that the persons already living on the land would be given the portions that they were utilizing and no one would chase them from the said land. This did not happen and large tracts of land were unfairly given to a few individuals who later sold it to 3rd parties including the plaintiff, who started harassing the original settlers. The defendants were forcefully evicted from the land with all their property being burned and destroyed.

32. In cross-exam he stated that he is a member of Muruga clan and he resides on the suit property, he was not allocated any land nor was his father allocated land but he has a pending court case over the land.

33. **DW7 Erastus Ndege Machuke** also adopted his statement dated 26.11.2018 as his evidence. He hails from Ikambi clan. He knows the defendants as they have been close friends with the 8th defendant who started farming cotton on the suit land in 1969. The land initially belonged to the 8th defendant's father. That 8th defendant's deceased wife and son are buried on the said land and his other sons have settled on the suit land with their families. However, they were forcefully evicted by the plaintiff while this suit was pending in court. That the suit land was awarded to 17 clans and it was determined that the same would undergo adjudication process to determine the real owners. However several steps of the adjudication process were passed over including determining the rights of the people already in occupation of the land and large chunks of land were wrongly given to a few individuals who later sold it to 3rd parties including the plaintiff. He contends that the defendants are entitled to the suit land as they were not given land anywhere else.

34. On cross examination he stated that his parcel of land is about 1KM away from the suit land **MBEERE/KIRIMA/3066**, he does not have a title to his land but he has a case pending. The 8th defendant was residing on the suit land since the late 1960's and both their fathers were already in occupation as at 1968.

Submissions

35. It was submitted for the plaintiff that he is the absolute registered proprietor of the suit land and he does not hold the same in trust for the defendants, that the defendants have failed to establish any form of trust known in law and that plaintiff is a purchaser for value. It was argued that defendants claim for trust is far-fetched and their claim if any lies with their clan who did not allocate them land and not Mururi clan who sold the plaintiff the suit land. Further the 8th defendant admitted to not participating in the land adjudication process as he was away and thus the other defendants, his sons cannot claim land directly but only through their father. The defendants also moved out of the suit land while this suit was still pending, hence plaintiffs claim has technically succeeded. He prays for the dismissal of the counterclaim. He also prays for costs.

36. For the defendants, it was submitted that the adjudication process did not kick off as expected when the 17 clans got back **MBEERE/KIRIMA/2244** and instead they were told to file appeals to the minister where the 17 clans were pitted against each other and it is not clear what they were appealing against. That the appeals were heard and determined without the rights of the members already settled including the defendants not being ascertained. Further the sub division of **MBEERE/KIRIMA/2244** was closed yet the mutation was incomplete, hence there was mischief that occurred which led to the defendants being turned into squatters. That vital steps in the adjudication process were not undertaken since under Section 5 of the Land Adjudication Act, parcel **MBEERE/KIRIMA/2244** ought to have been declared an adjudication section but this never happened and as a result, the defendants were denied the chance to make a claim in respect to the said parcel under section 13(1), 20, 21 & 22 of the same Act.

37. It was further submitted that defendants' claim is based on trust, the defendants have proved that they were forcefully chased away by the plaintiff from the suit land, further they could not have voluntarily vacated the parcel of land while their application to restrain the plaintiff from interfering with their peaceful occupation was pending in court. It was argued that the suit parcel **MBEERE/KIRIMA/2244** was owned by 17 clans and the defendants are members of one of these clans, the Mbandi clan and the defendants have adduced evidence showing they have been in occupation since 1949 and have even buried their relatives on the said parcel of land. They urge the court to dismiss the case of the plaintiff and allow their counter claim.

38. In support of their case, the defendants relied on the case of **Isack M'Inanga Kiebia V Isaaya Theuri M'Lintari & another [2018]eKLR.**

DETERMINATION

39. I have carefully analyzed the pleadings, the evidence adduced during the trial as well as the written submissions of the rival parties. The un-controverted issues are that the plaintiff is the registered owner of the suit parcel. **No. Mbeere/Kirima/3066** measuring 8.09 hectares, that

this parcel resulted from the subdivision of parcel **Mbeere Kirima/2955**, which in turn came from **parcel 2244**. It is also not in dispute that parcel **no. 2244** which was about 6, 820 acres belonged to 17 clans and the determination to that effect was through objection proceedings.

40. Plaintiff's case is that he bought his land from Mururi clan through their chairman who is pw2. The defendants contend that the land which the plaintiff claims is the one they have occupied throughout their lives.

41. The issues arising for determination are;

a. Whether the plaintiff is holding the suit land in trust for the defendants?

b. Whether the Plaintiff is entitled to the prayers sought in the plaint?

c. Who meets the cost of the main suit and counterclaim?

Whether the plaintiff is holding the suit land in trust for the defendants?

42. Section 28 of the Land Registration Act provides that ;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(a)

(b) trusts including customary trusts;

43. However, trust must be proven. In the case of **Pius Mugo Njogu – vs – Kirwere Njogu [2015] eKLR**, it was held that;

“the Court never implies a trust save in cases of absolute necessity. A party relying on the existence of a trust must lead evidence to prove the same.”

44. Similarly in **Felista Muthoni Nyaga v. Peter Kayo Mugo [2016] eKLR**, The court held that;

“while it is the law that the registration of a party as the proprietor of land does not defeat a claim of trust nor relieve such proprietor of his obligation as a trustee, there must be evidence upon which a court can conclude that in fact the registered proprietor of the land subject of the suit before it is in fact holding the same as a trustee for the benefit of others.”

45. The defendant's claim to the land is based on their lengthy occupation. They know no other home. The 8th defendant who happens to be the father of the 1st, 2nd, 4th and 5th defendants found his own father living on that suit land. His mother known as Nugu Kangangi, his wife known as Ann Mbandi and his son, the 5th defendant (who died during the pendency of the suit) are all buried on the suit land.

46. The DW 7, Erastus Machuke Ndege a 79 year old man remembers that 8th defendant's father was farming cotton on that land way back in 1969, so was the witness.

47. The Criminal proceedings in **Siakago SPM's case no. 1084/2013 and 370 of 2011** in which the 2nd defendant herein was an accused person are a clear manifestation of the endeavors made by the plaintiff to take over the land.

48. The pleadings of the plaintiff in prayer (a) is for ***“eviction of the defendants and their families from the suit land”***.

49. What resonates from the above analysis is that the defendants are the ones who had been in occupation of the suit land even though they have since left the land.

50. Save for 3rd and 7th defendants who apparently consented to withdraw their claims against each other with the plaintiff the rest certainly left due to forceful eviction.

51. The 2nd defendant has given an account of how he was arrested, charged and denied bail in the criminal case at Siakago court and that is when the plaintiff evicted his family. Indeed in cross examination, the plaintiff admitted that at that time, the 2nd defendant was at the police station. It is therefore not fathomable that the defendants evicted themselves. The vicious dispute is clearly what led to their forceful eviction by the plaintiff during the pendency of the suit.

52. To this end, I am inclined to find that the defendants have been in occupation of the land for a long period of time, thus acquiring possessory rights to the suit land.

53. The question is do these possessory/occupation rights of the defendants affect the proprietorship interests of the plaintiff as the registered owner of the land?.To answer this question, the court has had to examine the root of the title of the plaintiff. As already stated herein, it is not disputed that the suit land emanated from parcel 2955 which in turn came from parcel 2244 owned by 17 clans.

54. The plaintiff traces his interests in that land to a purchase of which the said rights crystallized into rights of proprietorship via the issuance of a title deed. He avers that he bought the land from the Mururi clan who owned parcel 2955 through their chairman. A critical examination of the plaintiff's claim paints a grim picture in relation to the root of the title.

55. Firstly there is nothing to indicate that the Mururi clan sold the land to plaintiff through PW 2. *What is a clan?* The plain meaning of a clan is a close knit group of interrelated families or a large family in customary settings. **The Blacks Law Dictionary** defines a clan as follows:

“A group of people having a common descent and sharing an interest and heritage in a particular geographical area”.

56. At this juncture, I find it necessary to reproduce pertinent contents of the **agreement** made on **15.11.2007** between plaintiff and Pw2 to determine if the Mururi clan was involved in the sale of the land; The agreement reads as follows:

“This agreement is made this 15th Day of November year 2007 between Abiud Wilson Njue ID 1910353 of P.O Box 1194 Embu in the Republic of Kenya hereinafter referred to as the vendor which expression shall where the context so admits include his personal representatives and assigns of the one part and Benson Gichohi Mutai ID 5510636 of P.O Box 2547 Embu, in the Republic of Kenya (herein after referred to as the purchaser which expression shall where the context so admits include his personal representatives and assigns on the other part.

1) Whereas the vendor is the registered proprietor of land parcel no. Mbeere/Kirima/ approximately 20 acres inclusive of 2 acres on the Thiba river frontage and he is desirous of selling the same agreed consideration of Kenya Shillings Four Hundred Thousand (Kshs.400,000/-) only payable as follows.....

CONDITIONS

That the land is sold free from all the encumbrances.....”.

57. There is no mention of Mururi clan in that agreement, instead, pw 2 was presenting himself in his individual capacity. What resonates from the definition of a clan is that a clan is not a one man show as depicted in that agreement of **15.11.2007**. If indeed PW 2 was selling the land as per the clans wishes, then the manifestation of those wishes ought to have been evident in that agreement. There is nothing to indicate that the clan had made resolutions to that effect nor was any other member of the clan present in the signing of the agreement.

58. The second point to note is that even if mururi clan did own **parcel 2955**, their title to that land came to be on 7.4.2008 when the parcel was first registered. The agreement was made way back on **15.11.2007** which means that by then the rights and interests of mururi clan had not been defined or severed from the expansive mother **parcel no. 2244** belonging to the 17 clans.

59. The third point for consideration is that even the mother title no. 2244 was none existent by the time the plaintiff and pw2 were entering into an agreement for sale of the suit land. An issue has been raised by the defendants that the process of adjudication was not done properly hence they had no opportunities to claim their interests under sections 13 of the Land Adjudication Act. It would be a rather convoluted issue if this court was to dig into the process of adjudication conducted in 1972 in Kirima adjudication area. On the same breadth, this court cannot delve into the issue as to whether adjudication ought to have been carried out in respect of **parcel 2244** in order to ascertain the rights and interests of individual or clan members. This is because the subject of context as defined in the pleadings relates to the claims of the current parties to the suit.

60. What is crystal clear is that the **objection proceedings** lodged in cases no's **172, 572 and 1130** all of **1983** culminated in the award of the expansive **parcel 2244** jointly to the **17 clans** namely:

1. Ngithi clan
2. Mbandi clan
3. Rweru clan
4. Marigu clan
5. Mwilila clan
6. Nguli clan
7. Ikandi clan
8. Ikambi clan
9. Nditi clan
10. Mururi clan

11. Kere clan
12. Mwendia clan
13. Giira clan
14. Irema clan
15. Kiragwa clan
16. Ngai clan
17. Rwangondi clan

61. The title for **parcel 2244** was issued on 2.4.2008 (see Dexh-1). What this means is that when the plaintiff was buying a portion of this land in November 2007, the mother title for the 17 clan was not in existence. What then was the plaintiff buying?. The averment made by pw2 (Abiud) in the agreement of November 2007 that **“the land was sold free from all encumbrances”** was totally false. The land was encumbered in that the rights and interests of the clan members including the defendants were bundled together and binding on the land. The plaintiff cannot feign innocence when he himself admits that he bought the land when it was not demarcated.

62. Under these circumstances, it was crucial for the plaintiff to adduce evidence of how the Mururi clan land was alienated on the ground to the extent that they knew which land they could dispose off to 3rd parties before the issuance of titles.

63. The fourth point for consideration relates to the manner and speed in which **parcel 2244** was disposed off. I have perused the green card for **parcel 2244** which shows that the same was registered on **2.4.2008** in the name of the **Seventeen Clans (17)**, on the same date, a restriction was lodged in the following terms:

“Except by the order of the chief land registrar, no dealings should be registered against the titles until the appeals before the minister are finalized”.

64. The restriction was removed two days later on **4.4.2008**. Then three days later on **7.4.2008** not only were there mutations on the mother title resulting in subdivision, but the title to **parcel 2955** (where the suit parcel came from) was born on the same day of **7.4.2008**!. Thus a title (**parcel 2244**) belonging to 17 clans and measuring close to **7000 acres** had a lifespan of exactly **5 DAYS** on this earth!. Here, there is no rocket science needed to discern that something was amiss and a prudent purchaser would have seen the red flag.

65. In light of the foregoing analysis, the plaintiff cannot claim to be an innocent purchaser as the writings were there in black and white. I find that the plaintiff had purchased land which was already encumbered on the ground. The encumbrance took the form of possessory/occupational rights by the defendants.

66. In the case of **Mbui Mukangu vs Gerald Mutwiri (2004) eKLR**, the court of appeal held that:

“Overriding interests which arise in right only of possession or actual occupation without legal title are equitable rights which are binding on the land, therefore on the registered owner of it, under section 30 (g) of the Registered Land Act (Cap 300 repealed) they possess legal sanctity without being noted on the register. They have achieved legal recognition in consequence of being written into statute; they are not subject to interference or disturbance such as by eviction save when inquiry is made and they are not disclosed (Emphasize added)”.

67. The Court of Appeal in **Munyu Maina vs. Hiram Gathiha Maina (2013)eKLR** stated that;

“We are reminded of Madan, JA (as he then was) in Chase International Investment Corporation and Another vs Laxman Keshra and others (1978) KLR 143; (1976-80) 1 KLR 891 to the effect that; If the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed. When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the judge is to pass through them undeterred”.

68. The plaintiff has made all endeavors to take over the suit land to the extent of having some of the defendants arrested and charged in criminal cases. However, such manoeuvres will not stand in the path of justice. In the final analysis, I find that the 1st, 2nd, 4th, 6th and 8th defendants have proved their case, **thus the plaintiff is not entitled to the orders sought in the plaint.**

Final orders

69. I proceed to give final orders as follows:

- 1. Plaintiff’s case is hereby dismissed.**
- 2. Defendants counter claim is allowed.**

3. An order is hereby issued for the excision of 10 acres out of land parcel MBEERE/KIRIMA/3066 to be registered in favour of the 1st, 2nd, 4th and 8th defendants jointly and a further 5 acres is to be excised from land parcel no.MBEERE/KIRIMA/3066 and to be registered in the name of the 6th defendant.

4. The defendants (1st, 2nd, 4th, 6th and 8th) are to immediately be restored on the suit land in terms of the status quo existing when this suit was filed.

5. The plaintiff is condemned to pay the costs of the main suit and the counter-claim.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 21ST DAY OF JULY, 2021.

HON. LUCY. N. MBUGUA

ELC JUDGE