



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CAUSE NO. 475 OF 2017**

**PAMELA MONYANGI BITANGE.....1<sup>ST</sup> PLAINTIFF**

**DANIEL N. KIMORO.....2<sup>ND</sup> PLAINTIFF**

**GEORGE KIBASO MOKONGI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**DAVID KASYAKU.....1<sup>ST</sup> DEFENDANT**

**MALUNI MUIA.....2<sup>ND</sup> DEFENDANT**

**MUNINI MATOLO.....3<sup>RD</sup> DEFENDANT**

**DAMIAN KYENGO MWANGANGI.....4<sup>TH</sup> DEFENDANT**

**JOSEPH NZETI KATUE.....5<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

By a Plaint dated 19<sup>th</sup> December, 2016 and filed on 29<sup>th</sup> December, 2016. The Plaintiffs' sought the following orders;

- a) An eviction order directed to the defendants ordering them forthwith to vacate the plaintiffs parcel of land namely L.R. No. Kajiado/Kaputei - Central/ 2305 failing which they be forcefully evicted under the supervision of the Officer Commanding Police Division, Kajiado County.
- b) A permanent injunction restraining the defendants, their kin, agents, servants or anyone claiming under them from trespassing upon, ingressing into, cultivating, selling, disposing off or in any other manner interfering with the Plaintiffs' quiet possession, and ownership of land reference number Kajiado/Kaputei-Central/ 2305.
- c) General damages.
- d) Mesne profits from the date of illegal encroachment.
- e) Costs of this suit.
- f) Interest on (c), (d) and (e) above until payment in full.
- g) Any other relief that this Honourable court may deem just and fair to order.

The Defendants filed a Joint Statement of Defence dated 20<sup>th</sup> February, 2017 where they denied the allegations in the Plaint except the descriptive and jurisdiction of the Court. They denied that the Plaintiffs are the registered proprietors of land parcel number Kajiado/ Kaputei Central/ 2305 hereinafter referred to as the 'suit land.'. They denied encroaching on the suit land and insist they have resided thereon including cultivated the same between 1988 – 1995. They contend that they are the rightful owners of the suit land having purchased a portion on diverse dates between 1988 upto 1995 from the registered owner of Kajiado/ Kaputei Central/ 448, one Mututua Ole Sirinket. Further, it is from Kajiado/ Kaputei Central/ 448 where the suit land was excised from. They explain that Kajiado/ Kaputei Central/ 448 before its subdivision was subject to succession proceedings vide Machakos Succ Cause No. 564 of 2010 where they had sought for summons for revocation of grant. Further, they realized the Petitioners in the said succession cause had already subdivided Kajiado/ Kaputei

Central/ 448 into 2303; 2304; 2305; 2306; 2307 and 2308 respectively, leading them to file a suit in Machakos to wit Machakos ELC No. 26 of 2015 Bernard Itumo Mungai & 7 Others V Paul Kimanon & 3 Others seeking injunctive reliefs against the owners of the aforementioned parcels of land, and the said orders were granted. They insist the Plaintiffs' title was obtained illegally, unlawfully and fraudulently as there was a Court Order issued on 27<sup>th</sup> February, 2015 in Machakos ELC No. 26 of 2015 restraining the registered owners from transferring or alienating or dealing with the suit land. They itemized their respective particulars of illegality and fraud on the part of the Plaintiffs. They averred that if the Plaintiffs purchased the suit land, then they failed to exercise due diligence by undertaking a search as well as conducting a site visit and if they did so, they could have found the Defendants residing thereon. They reiterated that the Plaintiffs title can be defeated and an eviction order cannot issue against them as the said title was obtained fraudulently.

The Plaintiffs filed a reply to Defence where they reiterated their claim and insisted the Defendants are trespassers. They denied knowledge of the aforementioned Machakos Succession Cause and ELC No. 26 of 2015. They insisted that they had undertaken due diligence at the time of purchase of the suit land and there was no court order nor inhibition registered against their title. Further, that the Defendants have no registrable interest on the suit land. They denied disobeying any court order.

The matter proceeded for hearing where the Plaintiff called one witness while the Defendants' had six.

### **Evidence of the Plaintiffs**

The Plaintiffs are the registered proprietors of the suit land and have a Certificate of Title issued on 18<sup>th</sup> January, 2012 to that effect. PW1 David Kimoro produced the Certificate of Title and Certificate of Search as exhibits. It was his testimony that they intended to use the suit land for gain. Further, that a surveyor identified the beacons on the suit land and they sank a borehole in 2015. It was his testimony that they commenced fencing to secure the suit land but met resistance from the defendants who had encroached thereon. Further, they sought intervention from the provincial administration but it was futile.

On Cross examination he confirmed that they purchased the suit land in 2011, paid the purchase price and obtained their Certificate of title in 2012. He explained that they bought the suit land from three brothers but did not have a sale agreement in court. He further could not recall appearing before the Land Control Board nor did he have a copy of the consent from the said Land Control Board. He was categorical that they signed the transfer forms with the vendors. He further testified that at the time of purchase, the three brothers were the owners of the suit land. He confirmed that they did not reside on the suit land but wanted to use it for agriculture and even dug a borehole therein. He denied knowledge of land title number Kajiado/Kaputei- Central/448 but assumed the same existed before the suit land. He however confirmed that the suit land mutated from Kajiado/Kaputei-Central/ 448. It was his testimony that they partly fenced the suit land and at the time of purchase, they visited it with the co-owners but never saw the Defendants thereon as the land is vast. He however confirmed seeing temporary structures and in his understanding, these were not part of the suit property. They hired a surveyor to identify the beacons so as to do the fencing and utilized the services of a lawyer to undertake the transactions on their behalf. In respect to Land Parcel Kajiado/ Kaputiei Central/ 448, he testified that he did not know if the land was subject to mutations or any subdivisions done on 23<sup>rd</sup> December, 2011 but they bought the suit land and it indicates the title deed was opened on 23<sup>rd</sup> December, 2011. He was not aware that the defendants bought their portion of land which was part of Parcel No. Kajiado/ Kaputiei Central/ 448 from the registered owner back in the 1990's. He was also not aware that they entered the suit land in the 1990's and had never been evicted therefrom. He asserts that they had not abandoned the suit land because of pending cases. He was not aware of an order issued in Machakos ELC No. 26 of 2015 nor of any caution subsisting over Kajiado/ Kaputiei Central/ 448.

On re-examination, he testified that there has never been a caution over the suit land.

### **Evidence of the Defendants**

DW1 David Kasyaku Tuva testified that he bought a portion of land within Kajiado/Kaputiei-Central/448 from Mututua ole Sirinket on 16<sup>th</sup> July, 1989. He had a sale agreement with Mututua Ole Sirinket and his son Jonathan Mututua Kituli which he produced as an exhibit. It was his testimony that he had been cultivating the land and planting trees since 1989. Further, he built a permanent (block) house with an iron sheet roof. He explained that he started having problems in 2008 and asked the Vendor for a title deed but he was told to wait. Further, the vendor later died and his children started interfering with the land. He contended that when he purchased the land, the vendor showed him his boundary which was a sisal vegetation. He denied being a trespasser thereon despite not knowing the parcel number and was aware the suit land was sold when he was in occupation. Further, he had never seen a notice of eviction from the suit land and he neighbours with the other defendants. He insisted there is no fencing on the suit land.

On cross examination, he confirmed purchasing six (6) acres of land and when taken through the Sale Agreement, he noted there is no signature of the vendor but only for the son, Jonathan Mututua. Further, there was no indication of the title number being sold. He insisted he bought land from Mututua but did not know the parcel number. He confirmed the Certificate of Title is dated 13<sup>th</sup> December, 1995. Further, the dispute only arose in respect to the suit land when Mzee Mututua died. It was his testimony that they never brought a surveyor to subdivide for him the portion he had purchased but the said six (6) acres was measured out to him by Mzee Mututua. He did not know the size of land the Plaintiffs' purchased and they never went to the Land Control Board. He further confirmed registering a caution on the 2<sup>nd</sup> August, 2004 against Land Parcel Kajiado/ Kaputiei Central/ 448.

On re-examination he clarified that that he bought the land, which is within Kajiado/ Kaputiei Central / 448. Further, that he had a Sale Agreement with Mzee Mututua which was recorded by the son. He confirmed that the land he purchased is where the dispute was. He contended that he paid the full purchase price as indicated in the agreement. As for the Machakos case, they sued Mzee Mututua's estate because the sons sold suit land when they were already in occupation.

DW2 Francis Muinde Karuri adopted his witness statement dated 27<sup>th</sup> July, 2017 as his evidence in chief. He testified that the defendants are his neighbours on a different parcel of land. On cross examination he testified that he resides on the suit land that was initially Kajiado/ Kaputiei Central/ 448. He confirmed the Defendants were being asked to move from suit land which is owned by the Plaintiffs whom he had

never met and did not know when they got registered as its owners. Further, he was not present when the Plaintiffs purchased suit land and did not know the vendor. He denied being a party to Machakos case no. 564 of 2010 nor ELC 26 OF 2015. He did not witness the defendants who are his neighbours fencing the suit land.

On re-examination he explained that the Defendants purchased their respective parcels of land when it was land parcel number Kajiado/Kaputiei/Central/448. He denied knowledge of the Plaintiffs, their title 2305 and insisted it is the children of the vendor that sold the Plaintiffs land. Further, that he was in a meeting when the Plaintiffs purchased their land around 7 years ago, in 2010 while he bought his land in 1996.

DW3, Joseph Nzeti Katue testified that he had a sale agreement with Mututua Ole Sirinket who sold him a portion of land parcel number Kajiado/Kaputiei / Central 448 which has been subdivided into land parcel Nos. 2303; 2304; 2305; 2306; 2307 and 2308 respectively. He confirmed registering a caution in respect to land parcel Kajiado/ Kaputiei Central /448 on 21<sup>st</sup> February, 2004 when he noticed the vendor was transferring land to them. He did not know the land was subdivided on 23<sup>rd</sup> December, 2011. He confirmed that the vendor died without transferring his portion of land to him. Further, the vendor's children applied for a grant of letters of administration intestate and omitted them. They applied for revocation of grant. Further, a court order was issued restraining any interference with their occupation of the said land. He explained that in the year 2011 the deceased children wanted them to increase the purchase price that they had paid but they refused. Further, they filed ELC Case no. 26 of 2015. It was his testimony that he had constructed a brick house which is a permanent structure on suit land. Further, that people came to fence their land but they rebuffed them as he had resided thereon from 1993 together with his children and grandchildren. He explained that the deceased had promised to transfer land to them but died before doing so. Further, that they never went to the land control board to obtain consent.

He produced various documents including: sale agreement, copy of a map for subdivision of Kajiado /Kaputiei central 448, copy of the land caution, copy of green card, certificate of confirmation of grant, application for revocation of grant, court order issued on 21<sup>st</sup> October, 2013, photographs, copy of the title deed for Kajiado/ Kaputiei/ Central/448 as exhibits.

During cross examination, he explained that the deceased obtained his title in 1995 and prior to that the owners of land in Kajiado did not have their title deeds. He confirmed buying his land in 1993 but the vendor got his title on 13<sup>th</sup> December, 1995. He further explained that he registered a caution over the suit land in 2004 at the office of the Land Registrar. They instituted a case in Machakos ELC No. 26 of 2015. Further, an order was issued on 16<sup>th</sup> February, 2015 in ELC 26 of 2015 but did not affect the Plaintiffs herein, whom they never served with the said order. He had an agreement in court to prove he paid the purchase price. He further confirmed that land parcel Kajiado/ Kaputiei Central / 448 was subdivided and the title deed closed. He testified that the grant was not revoked and was not aware of legal steps that were taken afterwards. Further, that in 2010 his caution was removed without his knowledge or participation. He confirmed that he never went to the land control board. Further, that when he bought his land, the vendor put sisal boundaries thereon but no surveyor has demarcated their land in 26 years. It was his testimony that they opposed installation of beacons on the suit land. Further, that the Plaintiffs had installed a borehole on suit land which was almost 10 years ago. He insisted the Plaintiffs made a mistake by failing to visit the suit land before purchasing it to confirm they were residing thereon.

On re-examination, he testified that before 1995 some people in the area had title deeds but in 1993, the vendor did not have his title deed. Further, the vendor only had a plot number which was indicated in their agreement. He confirmed registering a caution in 2004 because he noticed the vendor was not transferring land to him. Further, they sued the vendors' children but not the Plaintiffs. He further confirmed they served the vendors' children with the Court Order from Machakos and the Sale agreement shows he finalized payment of purchase price. He did not know the person who removed the caution. They objected to fencing but not installation of beacons nor drilling of borehole.

DW4, Damian Kyengo Mwangangi testified that his father purchased land in 1993 vide a Sale Agreement dated 15<sup>th</sup> February, 1993, at a cost of Kshs. 18, 000. It was his testimony that his father had an Agreement with Mututua which he produced as exhibit. He testified that he has resided on the land from 1993 to date with his family but only saw the Plaintiffs around 2 years ago. He confirmed that the dispute herein begun in 2011. Further, that the land had never been transferred to them. They sought for the vendor to transfer the land to them but he failed to do so. He insisted the Plaintiffs obtained their title fraudulently. Further, that their dispute relates to parcel number Kajiado/ Kaputiei Central/ 448, while his portion is within the suit land. It was his testimony that he had constructed a brick house with iron sheet roof on the land. He produced photographs as exhibit to this effect. He reiterated that the Plaintiffs did not reside on the suit land and sought for their title to be cancelled and for the same to revert to Kajiado/ Kaputiei Central/ 448.

On cross examination, he testified that it is his father who bought the suit land and he was not present when the Sale Agreement was drawn, although his father and brother were present. He confirmed filing a succession cause in respect of his father's estate but did not have the documents in court. He insisted that he has a right to testify over his father's estate as he represents the same. Further, that the Sale Agreement was genuine and he has not done any alterations. He did not know who drafted the sale agreement and only had an interest on Kajiado/ Kaputiei Central / 448 which has since been subdivided. He participated in the application for revocation of grant which was in respect to the Vendor's estate. Further, the deceased estate was distributed. He has never sued the Plaintiffs who bought land when they were already in occupation thereon. He has never sought for cancellation of title, or sued the vendor in any forum or tribunal because he had promised to give them their title. He referred to the Agreement and contended that they occupy six (6) acres of land which his father purchased from Mututua Ole Sirinket (vendor) in 1993 but he never transferred the said land to them as he received his title in 1995. It was his testimony that the Plaintiffs had put beacons in the land, and drilled a borehole more than three years ago.

In re-examination, he reiterated his claim above and insisted they had resided on their land from 1993 to date. He knew land parcel Kajiado/ Kaputiei Central / 448 was subdivided but the vendor had shown them their portion. Further, they reside in a portion which is around 1 and 1/2 acres. He insisted the Plaintiffs must have known his father bought part of the suit land because they found them residing thereon.

DW5, Maluni Muia testified that on 27<sup>th</sup> September, 1990 she bought a portion of the suit land from Mututua Ole Sirinket and has resided thereon from the said year to date. Further, that she built a brick house with iron sheet roof thereon. She produced photographs of the developments on her land as exhibits. She explained that she purchased a portion of land parcel No. Kajiado /Kaputiei Central/ 448 and had no idea where the suit land emanated from. She bought two (2) acres from the vendor and planted trees to demarcate her boundary. She

resides in the suit property but did not know the size or acreage.

On cross examination she testified that she never signed a sale agreement nor did Mututua do so. She explained that the Sale Agreement was prepared by Mututua who brought it to her as she was not there when it was being drafted. The agreement did not indicate the parcel of land being purchased. Further, they stopped the Plaintiffs from fencing but never sued them. She was aware of the succession cause in respect to the deceased estate wherein the Court issued a Grant. Further, they lodged objection proceedings thereon but the Grant was not revoked.

In re-examination she clarified that she entered into a sale agreement and bought land from Mututua. The sale agreement is signed by Jonathan Mututua as a witness. After the agreement, she entered into the land, and resided thereon to date. She has never sued Plaintiffs over the suit land because it is their workers on the land.

DW6, Munini Matolo testified that her husband purchased a portion of land parcel number Kajiado/ Kaputiei Central/ 448 vide a Sale Agreement dated 19<sup>th</sup> May, 1994 which she produced as an exhibit. She explained that they entered the suit land which is one acre in 1994 and she has constructed a brick house thereon and fenced the said land with sisal including thorns. She produced photographs as exhibits to that effect. She explained that the dispute over the suit land arose in 2011. Further, that the Plaintiffs procured the Certificate of title fraudulently as she has never seen them on the land.

During cross examination she testified that the land was bought from parcel land Kajiado/ Kaputiei Central /448. In respect to the sale agreement she was categorical that the same was drafted by Jonathan Mututua wherein Mututua Ole Sirinket is the vendor. She was taken through the Sale Agreement wherein she noted the same was not signed by the vendor, her husband or witnesses because they did not know how to sign. She insisted the Sale Agreement was genuine.

In re-examination she confirmed that Jonathan Mututua is the one who prepared the sale agreement as the son to the vendor. Further, that land parcel number Kajiado/ Kaputiei Central / 448 was indicated at the time the sale agreement was drafted. She explained that Mututua ole Sirinket did not sign the sale agreement as he did not know how to write. Further, that her husband did not sign, but indicated his Identity Card Number and name on the Sale Agreement. She had also put her name and Identity Card Number as a witness to the sale agreement. She sought for only one (1) acre of land and not the rest of the suit land.

The Plaintiffs and Defendants filed their respective submissions which I have considered.

### **Analysis and Determination**

Upon consideration of the Complaint, Joint Defence, Witness Testimonies, Exhibits and Submissions, the following are the issues for determination:

- Whether the Plaintiffs are the bonafide purchasers for value without notice of land parcel number Kajiado/ Kaputei Central/ 2305
- Whether the Defendants have any legal claim over land parcel number Kajiado/ Kaputei Central/ 2305.
- Whether the Plaintiffs are entitled to the Orders Sought in the Complaint.

As to whether the Plaintiffs are the bonafide purchasers for value without notice of land parcel number Kajiado/ Kaputei Central/ 2305 and if the Defendants have any legal claim over it.

The Plaintiffs claim to be owners of land parcel number Kajiado/Kaputei Central/ 2305 and produced a Certificate of Title to that effect. They contend that the Defendants have encroached on their land and have no claim over it. They have disputed the Sale Agreements produced by the Defendants and insist none of them was signed by the Vendor. Further, that the Defendants have not produced any consent of the Land Control Board. They insist the Caution the 5<sup>th</sup> Defendant registered over land parcel number Kajiado/ Kaputei Central/ 448 was procedurally removed. Further, since the Defendants never filed a Counterclaim and never sued the purported vendor, they have failed to assert their rights. They contend that the said Kajiado/ Kaputei Central/ 448 which the Defendants claim to have purchased portions of, has been extensively subdivided. They reiterate that the Defendants should hence be evicted from the suit land. They proceeded to rely on the decisions of **Reuben K. Arap Serem V Zipporah Meli (2017) eKLR** and **John Chelimo Seguton V Joseph Kitur Kiplangat (2018) eKLR** to buttress their arguments. The Defendants in their submissions insisted the Plaintiffs failed to adduce any evidence on how they acquired the suit land. They contended that insofar as the Plaintiffs held a Certificate of Title, under the provisions of section 26 of the Land Registration Act, the same could be challenged as the same was obtained through a corrupt scheme. They further submitted that they lawfully acquired the suit land as at the time of the alleged acquisition by the Plaintiffs, they were already in occupation, use as well as possession of the same. Further, that the Plaintiffs never conducted due diligence at the time they were acquiring the suit land. They relied on the decisions of **Jennifer Kobil Kandie Vs James Ondiek (2019) eKLR**; **Munyua Maina V Hiram Gathiha Maina , COA Civil Appeal No. 239 of 2009 quoted with approval in the case of M'bechi Nkandau & 19 Others Vs Attorney General & 3 Others (2019) eKLR** and **Esther Ndegi Njiru & Another V Leonard Gatei (2014) eKLR** to support their averments.

Except for the Certificate of Title which was produced as an exhibit, PW1 did not produce Consent of the Land Control Board, Transfer of Land Form and Sale Agreements. He did not confirm whether the Plaintiffs proceeded to the Land Control Board. He confirmed in his testimony that they purchased the suit land from three brothers but none of them was called to court as a witness. Further, they visited it and saw a few temporary shelters which they assumed were not part of the suit land. PW1 stated that the land is expansive and they never saw anybody thereon. All the Defendants' witnesses in their evidence insisted they had purchased their respective portions from the late Mututua who owned land parcel number Kajiado/ Kaputiei Central/ 448 and had their respective Sale Agreements to that effect. All the parties herein confirmed that the said land was distributed vide the abovementioned Machakos Succession Cause and subdivided. The Plaintiffs purchased

one of the resultant subdivisions from the beneficiaries. Which brings me to the question as to whether the Plaintiffs were aware of the Defendants' presence on the suit land at the time of purchase. In the Plaintiffs' witness testimony, they never availed the vendor to confirm they sold them suit land and if the Defendants had occupied their respective portions of the said land or not, at the time of purchase. From the Defendants averments, they all produced Sale Agreements which they claim were drawn by one Jonathan Mututua who was the Vendor's son. I note the Defendants occupied their respective portions of land at different times between 1988 upto 1995 and produced photographs showing their respective developments thereon. To my mind, I am unable to discredit the said pictures as the same were not controverted. I note all the Defendants had actually put up permanent houses on their respective portions of the suit land and were cultivating it. It is further curious to note that the Plaintiffs never brought any member of the family of Mututua to controvert the Defendants averments that they had been on the land before it was sold to them.

Section 30 of the repealed Registered Land Act, Cap 300 which was in place when the Plaintiffs acquired their title to the suit land provided that: **“Unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same without their being noted on the register –**

**(a)...(f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or prescription. (g) the rights of a person in possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where an enquiry is made of such person and the rights are not disclosed”.**

Section 28 (h) of the Land Registration Act states thus: **‘ 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— (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;’**

From the evidence before Court it is quite clear that by the time the Plaintiffs were purchasing the suit land, the Defendants had already been occupation thereon from different periods ranging from 1993 upto 1995. DW1 confirmed he purchased 6 acres from Mututua on 16<sup>th</sup> July, 1989 and put up permanent structures thereon. DW3 Joseph (5<sup>th</sup> Defendant) confirmed he bought 6 acres in 1993 and constructed a permanent house on the land. DW4 (4<sup>th</sup> Defendant) testified that his father purchased 6 acres from Mututua vide a Sale Agreement dated the 15<sup>th</sup> February, 1993 and have put up a brick house thereon. DW5 (2<sup>nd</sup> Defendant) testified that he purchased 2 acres of land from the said Mututua vide an Agreement dated the 27<sup>th</sup> September, 1990 and put up a brick house thereon. DW6 Munini Matollo testified that her husband purchased one (1) acres of land from Mututua on 19<sup>th</sup> May, 1994 and they have constructed a brick house thereon. The Plaintiffs mainly dwelt on the fact that the Defendants purchased a non existent land as they bought their respective portions before the register for Kajiado/ Kaputei Central / 448 was opened. The Defendants on the other hand contended that it is the owner Mututua who sold them their respective portions of the suit land when he had not acquired a title. He however obtained his title in 1995 but failed to transfer to them their portions of land. Upon his death the beneficiaries undertook succession proceedings vide Machakos Succ Cause No. 564 of 2010 but the Defendants took out summons for revocation of grant, but the Grant was still issued. Further, once the Grant was issued, the beneficiaries subdivided Kajiado/ Kaputei Central /448 into 2303; 2304; 2305; 2306; 2307 and 2308, and sold 2305 to the Plaintiffs.

In the case of **Wensley Barasa v Immaculate Awino Abongo [2017] eKLR** the Court of Appeal while allowing an appeal dealing with facts as similar as the one herein held that:’

**The existence or not of the title notwithstanding, what the learned judge failed to consider was Aggrey’s evidence that by 1993, the mud structures belonging to Barasa had been constructed on the suit property. They remained undisturbed until Aggrey sold the suit property to Immaculate in 2010. Having found as we have that Barasa was in occupation by this time, it would have in any event, been 17 years from 1993, to 2010 since Barasa was in occupation of the suit property. Hence, by the time Immaculate purchased the suit property, an overriding interest had been created. Evidently, Barasa’s occupation of the suit property started long before Immaculate became the registered owner, and therefore in terms of section 30 of the retired Registered Land Act his rights were in the nature of an overriding interest over the land. The change of ownership of the suit property did not affect those rights as they were attached to the land in question, in this case, the suit property. Furthermore, contrary to the learned judge’s finding, Immaculate had notice of Barasa’s occupation and therefore she was not a bona fide purchaser without notice. It is our finding that the learned judge misconstrued the evidence that the appellant had not established any interest in the suit property, despite the distinct evidence pointing to the existence of an overriding interest on the basis of Barasa’s occupation and possession of the suit property, which occupation had remained uninterrupted for a period of 17 years. For these reasons, the court ought not to have ordered the eviction of Barasa from the suit property, and we find it necessary to interfere with that decision. In view of these circumstances, the appeal is allowed, we set aside the judgment and decree of the High Court ordering the eviction of Barasa from the suit property with costs to him.’**

Further in the case of **Janet Ngendo Kamau vs Mary Wangari Mwangi, Civil Appeal No. 173 of 2003**, the Court of Appeal held that:’ **“The suit land is and has been at all material times registered under the Registered Land Act, Cap 300 laws of Kenya. Under section 30(f), above, rights in the process of being acquired under the Limitation of Actions Act, are in the nature of overriding interests and go with the land and not the registered proprietor. Change of ownership does not affect those rights as they attach to the land. In the circumstances as the plaintiff’s occupation started long before the defendant became the registered owner, his rights were in the nature of an overriding interest over the land and could be enforced at the expiry of the limitation period.”**

In relying on these decisions and applying them to the circumstances at hand, I find that the Defendants having purchased their respective portions of land between 1988 – 1995 from the registered owner of Kajiado/ Kaputei Central/ 448, one Mututua Ole Sirinket, prior to the Plaintiffs purchasing the suit land in 2011, and resided thereon, they have indeed established an interest over it which is enforceable. Insofar as the Plaintiffs hold their Certificate of Title over the suit land, this does not affect the Defendants’ rights which were already attached to the land. It is against the foregoing that I find that the Defendants indeed have a legal claim over the suit land and since PW1 admitted seeing structures on the land at the time of purchase, the Plaintiffs cannot be deemed as bona fide purchasers for value without notice.

As to whether the Plaintiffs are entitled to the orders sought in the Plaint.

The Plaintiffs sought for orders of eviction, permanent injunction, general damages, mesne profits and costs as against the Defendants. Based on my findings above, I hold that the Plaintiffs' cannot enforce eviction orders as against the Defendants from their respective portions of land as their interest supersedes theirs. Further, since I have held that the Defendants have proprietary rights over their respective portions of land, I am unable to grant the said orders of injunction nor mesne profits against them. It is further my considered view that the Plaintiffs failed to demonstrate what damages they had suffered as they acquired the suit land when the Defendants were already in possession and occupation thereon. In the circumstances, I find that the Plaintiffs have failed to prove their case on a balance of probability and will proceed to dismiss it with costs to the Defendants.

It further emerged in the proceedings herein that the Defendants were yet to acquire their respective portions of the land which they had purchased and in in relying on the recent decision of **Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii Muturi & another [2020] eKLR** where the Court of Appeal held as follows: ' **The issues that the parties proceeded on and which the judge made findings on all arose from the pleadings and the operation of the 1st respondent's account by the appellant. As was held by the predecessor of this Court in the case of Odd Jobs v Mubea [1970] EA 476, a court may base its decision on a non-pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision. The trial court did not err in the way it reached its decision in the matter that was before it. The judge proceeded on the prayers set out in the amended plaint and the findings made were in accord with the pleadings and the issues that arose in the proceedings.**'

I will direct that the Plaintiffs do effect transfer to the Defendants of their respective portions of the suit land as follows: David Kasyoki Tuva (1<sup>st</sup> Defendant) 6 acres; Joseph Nzeti Katue (5<sup>th</sup> Defendant) 6 acres; Damian Kyengo Mwangangi (4<sup>th</sup> Defendant) 6 acres : Maluni Muia (2<sup>nd</sup> Defendant) 2 acres of land: and Munini Matolo (3<sup>rd</sup> Defendant) one (1) acre within 120 days from the date hereof failure of which the Deputy Registrar, Environment and Land Court is directed to do so.

**Dated Signed and Delivered at Kajiado this 29<sup>th</sup> September, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**