



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MERU

ELC NO. 90 OF 2008

WINFRED MAIGENE STEPHEN.....PLAINTIFF

VERSUS

KINYUA MBIJIWE

(Being the Legal Representative

of the estate of Gilbert Kabeere M'Mbijiwe).....DEFENDANT

JUDGMENT

Background/ History

1. For the last 48 or so years, a **plot no. 58** (*herein after the large plot no 58*) in Nkubu market has relentlessly undergone the odyssey of litigation while at the same time metamorphosing into plots numbers **57, 58, 58, and 59**, or **57, 58a, 58b, 57A1, 57A11, 57B1, 57B11, 57B, 33, 33A, 34B and 34C** or **57A, 57B, 58A, 58B and 59**. Currently the plot is registered in form of leases in **plot 33 and 34** both in the names of Gilbert Kabeere Mbijiwe (*herein after Kabeere*).
2. The original large plot no. 58 was allocated to Kabeere in 1967, but was apparently later subdivided in 1971 to give rise to several other plots namely plots no. **57, 58, 58 and 59** triggering an avalanche of no less than 10 lawsuits (I have counted 13) over the decades. The current suit happens to be one of them. Kabeere acquired allotment letters for the large plot no. 58 which was subdivided into parcels 33 and 34 respectively of which he also obtained lease certificates for the same. The current ground status is that the suit plot is subdivided into plots numbers **57A, 57B, 58A, 58B and 59**, where the plaintiff, Winfred Maigene Stephen is claiming ownership to plot no 59.
3. The rationale of identifying the original plot no. 58 as the large plot is because all the other plots appear to have resulted from this plot including the rather unusual identity of plot no. 58 and another no. 58 arising out of the 1971 subdivisions as well as the current ground plots no.s 58A and 58B!.
4. The litigation history of the suit plots is captured in various court rulings and judgments particularly the Court of Appeal case no. 13 of 1980, the Court of Appeal case no. 124 of 2003 and Court of Appeal case no 279 of 2007. The first suit was filed in 1972 as **(1)Meru SRMCC NO. 115/1972 (herein after, the 1972 case)**, where Kabeere sought eviction orders against M'Ikiara M'Rinkanya and Sebastiaan Nyamu from the suit plots, and judgment was given in his favour on 25.1.1979. M'Rinkanya and Sebastian lodged an appeal in **(2) MERU HCCC NO. 4 OF 1979** which case was dismissed on 10.7.1979 by Justice Cocker. The two, M'Rinkanya and Sebastian proceeded to the Court of Appeal in Nairobi where they lodged the case **(3) NAIROBI Court Of Appeal CIVIL CASE NO. 13 OF 1980**, where again they lost the case in a judgment delivered on 21.2.1984. This in essence meant that the decision of the trial court in the 1972 case remained standing.
5. From 21.2.1984 when the Court of Appeal delivered its judgment, there was a lull for a long period of time until 16.11.2001 when Kabeere filed an application seeking warrants to execute the judgement of the trial court triggering the filing of the suit **(4) MERU HCCC. NO 216 OF 2001** by M'Rinkanya and Sebastian where they sought a declaration inter-alia that by virtue of **Section 4 (4) of the Limitation of Actions Act**, Kabeere could not execute the decree/ judgment of the 1972 suit. In a judgment delivered on 23.1.2003, they lost the case but they promptly filed an appeal in **(5) NYERI Court Of Appeal Case no. 124 OF 2003**. In a judgment delivered on 31.7.2007, the Court of Appeal found that the execution of the decree for possession of the land by Kabeere was statute barred, hence the appellants (M'Rinkanya and Sebastian) succeeded.
6. Meanwhile a suit **(6) MERU HCCC. NO. 15 OF 2003** was filed by three people namely **Ephraim Mbae, Sarah Kathure John and Winfred Maigene Stephen** (the current plaintiff) against Kabeere, Jocet Auctioneers and County Council of Meru, where the claimants were seeking compensation for the destruction of their properties which occurred sometime in January 2003 in respect of plots nos. 57A 57B

and 59 at Nkubu Market. This suit was withdrawn by Ephraim Mbae, but this move was challenged by the plaintiffs and in the ruling of Lenaola J (*now Judge of the Supreme Court of Kenya*) delivered on 23.10.2007, the prayer to sustain the suit was dismissed. The plaintiffs lodged an appeal in **(7) NYERI COURT OF APPEAL CIVIL APPEAL NO.279 OF 2007** where they lost vide the judgment dated 13.6.2013.

7. Before lodging the appeal no.279 of 2007, the plaintiffs Ephraim Mbae, Sarah Kathure and Winfred Maigene had filed another suit at the Court of Appeal in Nairobi, the same being **(8) NAIROBI COURT OF APPEAL CIVIL APPLICATION NO. 324 OF 2007** seeking an order of injunction from the ruling of 23.10.2007 by Judge Lenaola (as he then was). In a ruling delivered on 18.4.2008, the application was dismissed.

8. Winfred Maigene Stephen filed the current suit in **(9)MERU H.C.C.C NO. 90 OF 2008 on 4.7.2008** seeking a declaratory order that she is the owner of plot no. 59 at Nkubu market and that Kabeere's structures on the suit property should be removed. M'Rinkanya and Sebastian also filed a suit **(10) MERU H.C.C.C NO. 62 OF 2008** challenging the allotments and leases issued to Kabeere which suit I believe is active before this very court.

9. I have also stumbled upon some pleadings in this file in respect of cases **(11) SRMCC 78 OF 2003 FREDRICK M'Ithinji against Kabeere and Jocet auctioneers**, where plaintiff is challenging the demolition of his plot on 1.2.2003, and **(12) MERU H.C.C.C NO. 821 OF 2004** where **Sarah Kathure John** sued **Kabeere and Jocet Auctioneers** challenging the demolitions and evictions visited upon her plot no 57 at Nkubu Market on 27.1.2003 . I have also seen a plaint in **(13) MERU H.C.C.C NO. 89 OF 2007** dated 22.8.2007 (with no date of filing) where **Kabeere had sued M'Rinkanya and Sebastian** seeking a declaration inter-alia that the plots no's 57, 58A, 58B and 59 at Nkubu Market do not exist. The fate of these three files which I have itemized as no's 11, 12 and 13 is unknown to this court.

10. Further, I cannot state with absolute certainty that there are no other suits born out of the large plot 58 or its resultant subdivisions. What is crystal clear is that the disputes are intertwined and they formed a **GORDIAN KNOT** which keeps on tightening over the decades. Severing the aforementioned knot is no simple task especially considering that some cases are active but not consolidated with this particular case. I have highlighted the two Court of Appeal Cases no's **NAIROBI COURT OF APPEAL CIVIL APPEAL NO.13 OF 1980** and **NYERI COURT OF APPEAL CIVIL APPEAL NO.124 OF 2003** to emphasize the impact of the decisions there in the dispute at hand even though the current plaintiff was not a party in the aforementioned suits.

11. It is also noted that Kabeere passed on in the month of November 2017 and his legal representative, one **KINYUA M'MBIJIWE** stepped in his father's shoes.

Case for the Plaintiff

12. By a plaint filed in court on 4.7.2008, the plaintiff sought a declaration that **Plot No. 59 Nkubu** belongs to her and the Defendants structures ought to be removed. She also sought Costs and interests of the suit. She pleaded that she is the lawful owner of Plot No. 59 Nkubu market having acquired it through purchase from the original allottees who were allowed to transfer to her the said plot vide Min No. 55/75 (c) and (e) 5 of 1975 and she pays rent to the local authority for the same to date. She further pleaded that she developed the aforementioned plot by building permanent commercial premises which the defendant demolished unlawfully. She therefore sought compensation through the suit **Meru HCCC No. 15 of 2003** which was struck out on 23.10.2007 due to technicalities. She however appealed in **Nyeri Court Of Appeal Civil Appeal No. 279 of 2007**. She contends that defendant has erected temporary structures on the plot and is operating a garage thereon inhibiting the plaintiff's user and intended development.

13. In her reply to the defence and counter-claim filed on 1.8.2008, the plaintiff states that she has a reasonable and probable cause. She contends that the leases were obtained through fraud. That the maps and the illegally obtained leases do not affect the existence of Plot No.59 Nkubu which is different from Plot No. 58 Nkubu which the defendant is grabbing by baptizing it as Plot No. 33 and 34. She therefore seeks for the dismissal of the counter claim and that her prayer as set out in the plaint should be allowed.

14. The plaintiff **Winfred Maigene Stephen** testified as **PW1**. Her evidence was anchored on her two recorded statements, one dated 10.2.2012 and filed on 6.3.2012 and another dated 24.4.2018 filed on 25.4.2018. She also relied on documents in her list dated 10.2.2012, where the 6 documents were produced as Pexh1-6 respectively, and another supplementary list filed in court on 25.4.2018 where the five items were produced as Pexh- 7 to 11 respectively. It was her testimony that she bought the suit premises from Stephen Mutai and Jacob Mwiti in the year 1975 and the transfer was duly effected vide min 55/75 (c) (c) of 1975 pursuant to councils meeting held on 22/08/1975. She developed the plot and also continued to pay land rent to the Meru County Council. However, in year 2003, Kabeere descended on her plot demolishing her buildings. Together with Sarah Kathure and Ephraim Mbai they filed **Meru Elc case No. 15 of 2003** for compensation of their damaged buildings. She avers that the case was dismissed as it was filed wrongly.

15. The plaintiff further stated that in her list of documents, she has exhibited a physical planning map and a letter from the then District Planning officer confirming the existence of her plot no. 59. She denies that her plot encroaches on plot no. 58 or that the latter plot has been subdivided into plots 33 and 34 where leases have been issued.

16. She contends that as per the joint report of 20.6.2017 by the physical planner and county surveyor, the defendants plots numbers 33 and 34 allegedly belonging to Kabeere overlap on the ground with plots of several other persons who are not parties to this suit but does not overlap to her plot no. 59. She also states that the acreage claimed in the certificate of leases is a total of 15910 square feet which is more than what he claimed in the 1972 court proceedings where his claim was 11400 square feet. She further states that her plot on the ground is 23 feet by 100 feet hence 2300 square feet and she fears that Kabeere's plot may expand to reach her plot.

17. The plaintiff further stated that her plot was not in any way associated with the plots of Sebastian and M'Ikiara as they were her adjacent neighbours on both sides. The plaintiff stated that she was aware of the dissatisfaction of Sebastian and M'Ikiara with the High Court decision in case no. 4 of 1979. However, she was not aware of the determination of the Court of appeal in **Nairobi C.O.A. No. 13 of 1980** particularly the contents of page 4 of the judgment where the suit plot was apparently divided as follows;

-Plot No. 57 to M'Rimberia,

- Plot No. 58 to M' Mbijiwe

-Plot 58 M' Mukanya and Nyamu.

- Plot No/ 59 to M' Mulagwa.

She is not aware that her plot was adversely mentioned in that Court of appeal decision.

18. Regarding the current state of affairs on the plot, plaintiff stated that she is the one in the possession of the plot. She however went ahead to state that after the demolitions occasioned by Kabeere, she did not build on that plot again. She also stated that there is a garage and kiosk in the plot, but she does not know the name of the tenants of the garage and kiosk. Plaintiff also stated that she does not know that plot No. 58 measured 45m by 36m and that the defendants leases for plot No. 33 measures 0.0940 ha, while that for plot No. 34 measures 0.052 hectares.

19. During re-examination, plaintiff told the court that in so far as the Court of Appeal Judgment no. 13 of 1980 is concerned, her plot and that of M'Rimberia were not affected. She also added that she has given the land to her son Evans Kirimi who has since rented it out.

Case for the defendant

20. The defendant Gilbert Kabeere Mbijiwe filed a defence and counterclaim on 21.7.2008, which was amended on 22.5.2018 claiming to be the registered absolute proprietor of **Plot Nos. 33 and 34 Nkubu Market** pursuant to letters of allotment and subsequent issuance of a grant in his favour on 29th April 20008 and 13th May 2008 respectively. He contends that the leases are a conclusion of a registration process. In his counterclaim defendant seeks the following orders;

a) A declaration that the grants issued over Plot Number 33 and Plot No. 34 Nkubu Market creates an absolute indefeasible title over the same for a period of 99 years and that the same operates prospectively from the dates of the grants in favour of the Defendant.

i. An order for eviction do issue against the plaintiff, their agents, servants, employees or any other person acting on his behalf from all the parcels of land known as Plot No. 33 and Plot No. 34 Nkubu Market and OCS Nkubu Police station to execute the same within 7 days.

ii. Declaration that all the resultant subdivisions from the original allotment of plot No. 58 (now plot No. Plot 33 and Plot No. 34) to wit; 57A1, 57AII, 57B, 59, 34A, 34B, 34C are all illegal, null and void.

b) A perpetual injunction do issue barring, restraining and stopping and/or prohibiting the plaintiffs by themselves or any one claiming through them or their servants, agents, employees or any other person whomsoever and whatsoever from entering into, taking possession of, or interfering with the defendants proprietary rights of ownership and possession or interfering with the defendants quiet enjoyment of the suit land I.E. plot No. 33 and Plot No. 34 Nkubu Market.

c) A permanent injunction do issue against the plaintiff by themselves, their servants, agents and or employees or any one claiming through them or any other person whomsoever and whatsoever from trespassing on Plots No. 33 Nkubu Market, plot No. 34 Nkubu Market and or interfering with the defendants absolute proprietary rights of ownership and his quiet enjoyment of his rights of possession of the suit property to the exclusion of anyone else on the suit properties situated.

d) Costs of the suit.

21. **Dw1 Kinyua Mbijiwe** son of the late *Gilbert Kabeere Mbijiwe* testified that he is the legal representative of his father's estate. He adopted his statements filed on 22nd May 2018 as his evidence. He also relied on the list of documents filed on 11/4/2014 items 1-40 which were produced as Dexh 1-40 respectively. He avers that his father applied for a plot in 1966 and he was allocated the same in 1967 as plot no 58 vide min No. 13/67B. That in 1970, the commissioner of lands approved the development plan for Nkubu market, hence the market was surveyed including plot no. 58.

22. In 1971, his father learnt that his plot had been invaded upon by two persons who went ahead to build some structures prompting the father to file the 1972 suit. Apparently the plot no. 58 had illegally been subdivided into plots numbers 57, 58a, 58b, 57A1, 57A11, 57B1, 57B11, 57B, 33, 33A, 34B and 34C. He stated that his father won the case but the dispute went all the way to the Court of Appeal where the rights of the parties were decided. It was his testimony that the court (Court of Appeal case no. 13 of 1980) had in 1984 declared that the only legitimate plot is Plot No.58 belonging to Kabeere and that the other plots did not exist.

23. Dw1 further stated that the plot no.58 has since been subdivided into plots No. 33 and 34. He produced lease certificates for plot No. 33 measuring 0.0940 ha and Plot No. 34 measuring 0.0520 ha. He testified that his father has been fighting for the land since 1972 and asked this court to allow his counterclaim.

24. In cross-examination he informed the court that his father was to get the suit premises solely and not in conjunction with other people. DW1 is not aware of the final decision of the Court of Appeal or the High Court decision on whether or not his father can execute his judgement after the lapse of the 12 year period. He was not aware of the documents that gave his father the size of the plot. He conceded that

the size in the two leases is bigger than 11400 sq. feet which his father was claiming in the initial 1972 suit. The size according to DW1 is bigger by 0.0401 Ha. Put to task on the acreage on the ground according to the physical planner, DW1 stated that the plaintiff is on the ground illegally as a trespasser on part of Plot No. 34.

25. In re-examination he restated that he is only seeking eviction as per the measurements in the lease which total upto 0.1460 hectares..

Analysis and Determination

26. I have considered the pleadings, testimonies of the parties and the documents presented. I have also given due considerations to the submissions filed by the advocates for the parties. At the core of the dispute is **the question of the legitimacy of the lease certificates issued to Kabeere in respect of plots 33 and 34 in Nkubu Market, whether plaintiff is entitled to the declaratory orders regarding plot number 59 Nkubu market and what relief is available to the parties.**

Legitimacy of the leases of plots 33 and 34.

27. Protection of right to property is enshrined in our **Constitution under Article 40**. However, the protection is qualified under subsection (6) thereof where it is stipulated that;

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired”

28. **Section 26 of the Land Registration Act** provides that:

“(1) The Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally unprocedurally or through corrupt scheme.[Emphasis added]

29. The court has to analyse the evidence adduced herein and determine if the leases issued to Kabeere can be challenged on the basis of the law set out in the Constitution and in the Land Registration Act. However, it is trite that he who alleges is the one who bears the burden of proof, See **section 107 of the evidence Act**. During cross examination, plaintiff had denied knowledge of the leases while stating as follows;

“I only hear that he got a lease. I don’t know that he got leases for no. 33 on 29.4.2008 and 34 on 13.5.2008”

30. A perusal of the court record however reveals that soon after Kabeere acquired the leases for the two plots, it is then that this suit was filed contemporaneously with an application seeking injunctive orders against Kabeere filed an application on 4.7.2007 acknowledging that Kabeere purportedly acquired leases. This culminated in the ruling of Judge Ouko W. (as he then was) delivered on 30.10.2009 in favour of the plaintiff. Thus the plaintiff was aware of these leases. In her reply to the defence and counterclaim, she makes reference to the illegally obtained leases.

31. In the case of **Galaxy Paints Company Ltd V Falcon Guards Ltd [2000] eKLR** the court held as that;

“the issues for determination in a suit generally flowed from the pleadings.”

Also see **Dakiaga distributors (k) Ltd v. Kenya Seed Company Limited (2016) eKLR, Independent electoral and boundaries Commission & Another v. Stephen Mutinda Mule & 3 Others (2014) eKLR.**

32. In her evidence and in her submissions, the plaintiff only cast aspersions in the manner of acquisition of the suit plots by Kabeere contending that there was no basis for the allotment of the two plots to Kabeere. It was incumbent upon the plaintiff to adduce evidence establishing the element of fraud but she didn’t.

33. In the Court of Appeal case of **Charles Karathe Kiarie & 2 Others -vs- Administrators of Estate of John Wallace Mathare (deceased) & 5 Others [2013]eKLR**, the court stated as follows in regard to indefeasibility of title:-

“The Registration of Titles Act is entirely a product of the Torrens System of registration. The word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of government compensation. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens System can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved (emphasize added).”

34. In **Joseph Arap Ng'ok Vs Justice Moiwo Ole Keiwua, Nairobi Civil Application No. 60 of 1997**, the Court of Appeal at Nairobi had this to say with regard to sanctity of title:

“Section 23(1) of the Act [the RTA] gives an absolute and indefeasible title to the owner of the property. The title of such owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya will be placed in jeopardy”

35. In light of the foregoing, it is clear that interests acquired by Kabeere on the suit parcel did crystallize into rights of proprietorship which are protected by the law. It would have been a different scenario if the competing interests of Kabeere were at par with those of the plaintiff. However the plaintiff's interests in the suit plot did not mature into the ambit of registration.

36. The other point of consideration in so far as the legitimacy of the leases of Kabeere is concerned is that the rights appertaining to the large plot No. 58 were litigated upon from the magistrates court in the 1972 case, through the High court in civil appeal no 4 of 1979 all the way to the Court of Appeal in case no 13 of 1980 (Nairobi). As pointed out in the submissions of the defendant, the Court of Appeal case no. 13 of 1980 (Judgment of Kneller J) captured the following;

“Sometime in 1971, a committee of the council approved M'Mukunya and Nyamu's joint application for a plot in the market which the council passed and then Mbijiwes' large plot 58 was subdivided and renumbered 57, 58, 58 and 59.....

This manoeuvre was not apparently passed on to the commissioner and so he did not authorize it.....

There is apparently no resolution of the council to subdivide the large plot 58 so Mawira, the council's clerk seems to have done this without authority”

37. At page 10 of the aforementioned judgment, it was stated as follows;

“the latter division of it into 4 or 5 smaller one and the allocation of the smaller 58 to Mukanya and Nyamu was irregular and of no effect..”

38. Chesoni AG JA in the same judgment held as follows;

“What of the appellants? The plot they were granted was not available for allocation since 1967 when it was granted to the respondent. The council had no plot No 58 at Nkubu Market to allocate and it could not allocate what it did not have. This may explain the fact that although the appellants exhibited the letter of indication requesting them to report at the Council's office and be shown the plot allocated to them, they neither spoke of nor exhibited in their evidence any Letter of Allocation granting to them the plot, which the respondent exhibited. The alleged allocation to the appellants is of no effect in law. On the other hand the respondent's interest (read Kabeere) whether as a licensee, which he is not, or a lessee, which I say he is, was never determined by the Council, and he remains the legal owner of plot No 58, Nkubu Market.....”

39. The current plaintiff was not a party to the litigation triggered by the suit of 1972. However, the Court of Appeal in case no 13 of 1980 took into consideration that there were other parties who may have been affected by the suit premises in Plot No. 58 but who were not party to the suit. Indeed on page 9 of the judgment of Kneller J, the court observed that M'Rimberia and **Winfred Maigene Stephen** (current plaintiff) plots numbers 57 and 59 were part of the original plot 58.

40. What resonates from that Judgment of the Court of Appeal no 13 of 1980 is that Kabeere Mbijiwe was recognized as the rightful owner of the large plot No. 58 and the purported subdivisions were a nullity. One of those subdivisions of 1971 happens to be parcel 59, which forms the subject matter of this suit.

41. An argument has been advanced by the plaintiff to the effect that vide the Court of Appeal judgment of 31.7.2007 in Civil Case No. 124 OF 2003, Kabeere was barred from executing the judgment in the 1972 case. True, the court held that Kabeere could not execute the judgment while stating as follows;

“if the judgment is not enforced within the stipulated period. The rights of the decree holder are extinguished as stipulated in section 17 of the Act (limitation of Actions Act), and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings”.

42. The proceedings herein are not anchored on the doctrine of adverse possession. The fact that Kabeere could no longer enforce the 1972 judgment, did not in any way sanctify the 1971 subdivision of the large plot no. 58. The persons who benefit from the extinction of rights of an owner of land under section 17 of the Limitation of Actions Act are the claimants who invoke the doctrine of adverse possession of which this is not one of such claims.

43. Finally, I must make my comment regarding the report of the County Surveyor and Planner filed in court on 20.6.2017. The report has a table containing plots no.s 57A, 57B, 58A, 58B and 59 and that the plot numbers 33 and 34 overlap plot no. 57A, 57B, 58A, and part of 58B. This information was obtained from the records of the County Government registry. However, in the same report, it was stated as follows;

“Note that the register shows plot no 58 is registered in the name of Gilbert Kabeere Mbijiwe and the measurements as in the register are indicated as 150 ft (45cm) by 118 ft (36 cm). The register does not indicate that the same is subdivided into 58A and 58B.”

44. The report does not explain how the records of the County Council/ County Government have such contradicting information. In particular, the authors of the report have not given any information on how the plots itemized in the table came to be. After all, during the litigation in the 1972 case, the plots were only 4 that is **no. 57, 58, 58 and 59.**

45. Judge Kneller in the 1984 Judgment in the Court Of Appeal Case No. 13 of 1980 did note that “ **so many things the council did were not explained**”. 33 years later (by 2017 when a report was availed by the County Surveyor and Physical Planner) the situation only got worse in terms of the mess created by the County Council/County Government. As noted by the defendant in his submissions, “*Anything that can go wrong will go wrong*” as per Murphy’s law. Under the watch of the County Council/ County Government of Meru, things did go wrong in so far as the dispute appertaining to the large plot no. 58 is concerned.

46. Nevertheless, there is a fall back which is the Court Of Appeal decision in case no. 13 of 1980. Going by that decision, the the overlap occasioned upon other plots by plots 33 and 34 is because the latter two plots are the original large plot no. 58 which belongs to Kabeere.

47. On the issue of acreage, I find that the leases of Kabeere came about because he was issued with the relevant allotment letters for the two suit plots. The allotments of the two plots were issued on 11.2.2008. They bear a heading “*un-surveyed*”. However, in the allotment letters, the approximate acreage for plot 33 was given as 0.09 hectares where the lease issued reflected 0.0940 hectares. For plot 34, the approximate acreage in the letter of allotment was 0.048 hectares, while the lease indicated 0.0520 hectares. It follows that the approximated acreage in the letters of allotments is almost what was captured in the leases. I find no fault in terms of the acreage captured in the lease certificates.

48. In the final analysis, I find that the leases issued to Kabeere are legitimate and consequently, he ought to occupy his suit plot in terms of the acreage indicated in the leases.

Ownership of plot 59

49. This is the plot being claimed by the plaintiff. Her interests are anchored on the minutes of 1975 (P-exh1) where under minute No.25/75(c) (e) 5, applications by Mwititi and Mutai for permission to transfer their plot No.59 Nkubui market to Winfred Maigene Stephen was approved. She then continued paying rent and that her plot No. 59 appears in the physical development plan.

50. The first question to ask is “*What nature of land interest did Stephen Mutai and Jacob Mwititi pass on to plaintiff in 1975.*” Going by the Court of Appeal judgement in Nairobi Civil Appeal No. 13 of 1980, NONE!. This is because, that Court of Appeal had already determined the question of rights appertaining to the large parcel NO. 58 as belonging to Kabeere ; See the Judgment of Kneller J and Chesoni J.

51. The second point to analyse is with regard to the issue of acquisition of Rights and Interests in land.

52. In the Pre-2010 regime, County Council land could be acquired through allotment, whereby Minutes of the relevant Council had to sanction the process. In addition, the allotment process had terms of engagement like offer and acceptance which had to be followed. See **Paul Mworira Bagine & 2 others v Pauline Kagendo Mwari [2019] eKLR**. The title of the land being allocated would only come into existence after issuance of letter of allotment, meeting the conditions stated in it and actual issuance of the title. This was so expressed by the Court of Appeal in the case of **Joseph N.K. Arap Ng’ok v Moijo Ole Keiwua & 4 others [1997] eKLR** where it was held that:

“It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.”

53. Majanja J in the case of **Philma Farm Produce & Supplies & 4 Others V Attorney General & 6 Others [2012] eKLR** expressed the issue as follows:

“These letters do not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated therein. The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract. It is in this respect that the petitioner’s claim must fail.

...

There were no allocation letters issued to the company and therefore any payment by the company was purely gratuitous. It could not create a legal obligation on the part of the Commissioner of Lands to process titles in the petitioners’ favour in accordance with the offer nor confer a proprietary interest in the suit properties.”

52. PW1’s claim to the suit land no 59 is basically anchored on the **minutes of 1975** , as well as the averment that she was paying land rent to the council. What then is the nature of interest in land that is acquired by a party through minutes from a county council similar to those issued to the plaintiff in 1975.

53. Minutes alone do not confer any proprietary interest in land. This is because minutes are an expression of an intention to allocate land. The commitment to actualize the intent to allocate is manifested in the issuance of the letter of allotment from the allotting authority.

Demarcation of the parcel of land in question is then carried out through the process of survey. Thus the resolution of the council as captured in the minutes must be put into effect in order to give rise to a bundle of rights in land capable of being protected.

54. Even if it was to be assumed that Mwitai and Mutai had acquired some interest in land parcel 59, which interest they passed on to the plaintiff, it is apparent that the interest did not progress to anything else thereafter. The intent to allocate the plot number 59 was never manifested and actualized by issuance of an allotment letter in order to give rise to rights of proprietorship. The judgement of Chesoni J in the Court of Appeal Case No. 13 of 1980 from page 14 gives an in depth analysis of how a person could acquire trust land under the Trust Land Act and under the Old Constitution. Such acquisition of land was certainly not through payment of land rent or having a physical development plan.

55. 45 years have gone by since 1975 when plaintiff allegedly acquired plot No. 59 but her interest in that land has never gone beyond the approval to have the plot transferred. There is no evidence that there was even the slightest move from the County Council (County Government) to give the plaintiff an allotment letter. The plaintiff has also not directed her claim to the County Government. In the circumstances, I find no basis to declare plaintiff as the owner of plot No 59 at Nkubu Market.

What relief is available to the parties?

56. Plaintiff's case certainly fails. Defendant's counter claim succeeds, but not in all the prayers. I hesitate to make a declaration

“that all the subdivisions from original allotment of the plot No 58 (now plot 33 and 34) to wit plot 57A1, 57A2, 57B, 59, 34A, 34C are illegal, null and void and ought to be cancelled” for the following reasons;

Firstly, the Court of Appeal Case No. 13 of 1980 pronounced itself on the matter stating that the subdivisions of the large plot No.58 had no effect. It is however noted that the plots mentioned in that Court of Appeal case were plot Nos **57, 58, 58, and 59**. The plots mentioned in the counterclaim are **57A1, 57A2, 57B, 59, 34A, 34C**, while the County government also has some records of **plots 57A, 57B, 58A, 58B and 59** (going by the report of the county surveyor and county physical planner). This court is not seized with sufficient (or any) information as to how these subsequent numbers or subdivisions came about. The County Council (now the County Government of Meru) has not been sued in these proceedings for them to explain the circumstances under which these plots came to be.

Secondly litigation in this suit concerns only plot No. 59 where the claimant is Winfred Maigene Stephen. It would not be just and fair to make such a declaration affecting parties who are not in these proceedings and who have no opportunity of commenting on the matter. It will however suffice to affirm the rights of the defendant.

Final orders

I. A declaration is hereby issued to the effect that the defendant is the lawful and absolute proprietor of the certificate of leases issued in Title Nos. NKUBU MARKET/33 and NKUBU MARKET/34, in accordance with the acreage reflected in the aforementioned lease certificates.

II. A permanent injunction is hereby issued against the plaintiff Winfred Maigene Stephen and her servants and agents, restraining them from entering, occupying, trespassing or in any other way interfering with plots No.33 and 34.

III. As to costs, this Court considers that the mess was perpetuated and sustained by the County Council now the County Government of Meru. However, the said County Government is missing in action as none of the parties have deemed it fit to enjoin them in these proceedings. In the circumstances, I direct that each party bears their own costs of the suit.

DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF NOVEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgement was given to the advocates for the parties through a virtual session via Microsoft teams on 22.09.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE