

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. E146 OF 2022

PETER THIONGO MUCHIRI PLAINTIFF

VERSUS

GATHURA INVESTMENT LIMITED1ST DEFENDANT

ATTORNEY GENERAL2ND DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by way of a Plaint dated 25th November 2022. In the said Plaint, the Plaintiff alleges that he was the registered owner of the land parcels known as L.R Number GTHUNGURI /KIMATHI /776 measuring 15.0Ha (12.3 acres) GITHUNGURI/KIMATHI/459 measuring 0.815 Ha (2.013 acres)and GITHUNGURI/KIMATHI/1460 measuring 0.815Ha (2.013 acres. It is the plaintiff's case that after consolidating the three parcels of land, he sold 10 acres thereof to the 1st Defendant, leaving a balance of 6.405. However, the 1st and 2nd defendants conspired to have the entire 16.405 acres transferred to the 1st Defendant thus depriving him of his land measuring 6.405 acres.

2. The Plaintiff thus seeks the following reliefs:

- a) *A permanent injunction restraining the defendants whether by themselves, their servants, agents, employees or any other persons whosoever and howsoever from interfering in any way whatsoever*

with the Plaintiff's occupation of 6.405 acres out of the suit land known as GTHUNGURI/ KIMATHI/776, 1459 and 1460.

- b) A declaration that the land measuring 6.405 acres out of land parcels number GITHUNGURI/KIMATHI/776, 1459 and 1460 belongs to the Plaintiff.*
- c) A declaration that the plaintiff is entitled to ownership and exclusive use, occupation and vacant possession of 6.405 acres out of Land Reference Number GITHUNGURI/ KIMATHI/776,1459 and 1460 based on the dimensions and areas specified in the mutations to the exclusion of the defendants or any person claiming through any of them.*
- d) An order compelling the 1st and 2nd defendants to forthwith carry out a survey and amend the Registry Index Map (RIM), Survey map and green cards for Land Reference Number GITHUNGURI/KIMATHI/776,1459 and 1460 and issue a title to the Plaintiff for 6.405 acres at their cost*
- e) The Director of Survey do and is hereby ordered to formalize the sub-division of Land Reference Numbers GITHUNGURI/KIMATHI/776,1459 and 1460 to reflect the Plaintiff's parcel of land as shown on the mutation forms in the event that the defendants do not produce the Registry Index Map and Mutation Forms.*
- f) General and exemplary damages in addition to the other prayers above.*
- g) Costs of the suit and interest.*

3. Upon being served with the Plaint and Summons to enter appearance, the 1st Defendant filed a Statement of Defence dated 8.2.23 in which it denied the Plaintiff's claim.
4. The 1st Defendant contends that the suit properties were surveyed long before he entered into a sale agreement with the Plaintiff and the Plaintiff was issued with a title dated 10.4.1978 indicating that Land Reference Number GITHUNGURI/KIMATHI/776 measures 2.42ha (5.977acres).
5. He further denies that land parcel number GITHUNGURI/KIMATHI/776 was ever surveyed after he had purchased it and states that the purported replacement mutation forms are intended to mislead the court. He therefore prays that the Plaintiff's suit be dismissed with costs.
6. The case proceeded for hearing between 7.11.23 and 24.4.25. The Plaintiff's case was heard before my predecessor Hon. Justice B. M Eboso after which I took over the case at the Defence stage. The plaintiff relied on his witness statement dated 25.11.2021 and produced the 8 documents in his list of documents as Plaintiff's exhibits 1-8.
7. According to his witness statement the Plaintiff states that he was the registered owner of land parcels number GITHUNGURI/KIMATHI/776. 1459 AND 1460 which he consolidated and sold a portion measuring 10 acres to the 1st Defendant vide a sale agreement dated 31.1.2013.

8. It was his testimony that the total acreage of his land was approximately 16.405 acres and he was therefore claiming 6.405 acres from the 1st Defendant. He pointed out that the mutation form he produced as PEX 3 which was prepared in 2015 shows that parcel no. GITHUNGURI/ KIMATHI/776 measures 5.01 Hectares.
9. Upon cross-examination, he stated that sale agreement indicates that all

the three parcels measured approximately 10 acres. He conceded that the acreage indicated on the search certificates were Parcel No. GITHUNGURI/KIMATHI/776 2.42 Ha; parcel No GITHUNGURI/ KIMATHI/1459-0.815 Ha and parcel No. GITHUNGURI /KIMATHI/1460-0.815 Ha.
10. He admitted that at the time of sale, the green card indicated that parcel No. 776 measured 2.42 Ha but he subsequently conducted a survey by one Wallace M. Mbugua, a Licensed surveyor who prepared a new mutation form.
11. He told the court that he lodged a complaint against his advocate with the Law Society of Kenya on the grounds that she had sold his three parcels comprising 10 acres at Kshs. 12,000,000 which was very little money.
12. Jacelyn Wangare Mukoma, the Land Registrar Kiambu County testified as PW2. She produced the certified copy of the green card for parcel number GITHUNGURI/KIMATHI/776 as Plaintiff's exhibit 9. She stated that the green card indicated that parcel No. 776

measures 2.42 Ha and it is registered in the name of Gathura Investments (1st Defendant). He told the court that parcel number 776 was created from parcel number GITHUNGURI/KIMATHI/664 in 1978.

13. The Defendant called 2 witnesses. The first witness Reverend Felix Gichunge Mureithi testified as PW1. He testified that he had been approached by the Plaintiff's wife who was a Deacon in his church to buy the Plaintiff's land. He later met the Plaintiff and after negotiations, he agreed to sell 10 acres to the 1st Defendant. He said he had never come across a situation where one sells less or more land than was intended.
14. Mercy Wambui Kamau, an advocate of the High Court of Kenya testified as DW2. She told the court that she represented both the Plaintiff and the 1st Defendant in the transaction involving the sale of the suit property.
15. She testified that she prepared a sale agreement for land parcel no. GITHUNGURI/KIMATHI/776 measuring 2.42 Ha, land parcel no, GITHUNGURI/KIMATHI/1459 measuring 0.815 Ha and parcel no. GITHUNGURI /KIMATHI/1460 measuring 0.815 Ha.
16. It was her testimony that the 3 parcels had a combined acreage of 10 acres. Prior to preparing the sale agreement, she conducted an official search and established that two of the suit properties were charged to the bank. It was therefore agreed that the loan be repaid before the transfer could be effected. After the loan was paid

in full, she obtained the consent of the Land Control Board and the titles were transferred to the 1st Defendant.

17. DW2 stated that sometime in 2014, she received a letter from the Disciplinary Committee of the Law Society of Kenya claiming that she had failed to advise the Plaintiff and he sold his property at an undervalue. The said complaint was subsequently dismissed.
18. Upon being shown the mutation form for parcel number GITHUNGURI/KIMATHI/664 she said she was seeing it for the first time as she had only dealt with the titles for the suit properties. She said she was not aware that the Plaintiff sold 16.4 acres as the sale agreement she prepared states that he was selling three parcels with a combined acreage of 10 acres.
19. In re-examination she clarified that the mutation for parcel number GITHUNGURI/KIMATHI/664 which was shown to her was prepared on 1.4.2015 which was 2 years after the sale of the suit properties.
20. Engineer Stanley Gathura Njenga, a director of the 1st Defendant, testified as DW3. He adopted his witness statement dated 8.2.23 and produced the 13 documents in his List of documents dated 8.2.23 as Defendant's exhibits 1-13.
21. He told the court that he was introduced to the Plaintiff through the Plaintiff's late wife and he dealt with him through DW1. He stated that although he had been told that the Plaintiff was terminally ill, he appeared to be in good health when they transacted. He said he bought the three suit properties at a go at an agreed purchase

price of Kshs. 10 million. He denied that the three parcels were consolidated as each parcel had its own title.

22. He confirmed that before the sale, the firm of Kagwe Kamwe which acted for both vendor and purchaser conducted an official search and parcel number GITHUNGURI/KIMATH/776 measured 2.42 Ha while parcels number 1459 and 1460 measured 0.815 Ha respectively. The 3 parcels had a combined acreage of 10 acres.
23. He told the court that before he signed the sale agreement, he visited the suit properties in the presence of the Plaintiff. The three titles were later transferred to him. He stated that he had since taken possession of the suit properties and he was using them for farming and he had never seen a surveyor visit the land since then.
24. He said he found it ridiculous that the Plaintiff claims to have sold him 16 acres. He denied having colluded with the Land Registrar to steal the Plaintiff's land.
25. Upon cross-examination, he stated that he bought a total of 10 acres from 3 titles. Upon being shown the mutation form for parcel no. GITHUNGURI/KIMATHI/664, he said that the said parcel had been divided into several parcels including parcel no. 776. On being shown a mutation for parcel no. 776 indicating that it measures 5.01Ha, he said he had a mutation form indicating that it measures 2.42Ha, although he did not produce it as an exhibit. He said he would be willing to have his land measured if the court so directed.

26. The Defendants called Bernard Gitonga, a Land Surveyor based at Kiambu Survey Office as their 4th and last witness. He produced the mutation form for land parcel number GITHUNGURI/KIMATHI/664 which shows that the said parcel measures 5.01Ha. He told the court that he had in his possession a mutation form indicating that land parcel no. Ha. 776 measures 5.01Ha but from the dimensions shown on the mutation, parcel number 776 measures 2.71Ha which is approximately 6.71acres. He alluded to an error in recording the acreage on the mutation form. He attributed the error to the private surveyor who carried out the sub-division.
27. DW4 told the court that mutation form that was prepared in 1978 when parcel number 776 was created was missing from the file and the replacement mutation was prepared in the absence of the 1st Defendant. He stated that the diagram of the surveyor indicates that parcel number 776 measures 6.7 acres. He observed that there was an error of about 7% which in his view was within the acceptable margin of error of 10% in cases of general boundaries. He proposed that the error be rectified in the presence of the parties so that the mutation form could be corrected.
28. After the Defendant closed his case, the parties were directed to file their closing submissions.
29. In his submissions dated 11.8.25 learned counsel for the Defendant summarized the evidence of the parties and identified the following issues for determination;

- i) Whether the three suit properties were consolidated;
 - ii) What is the credibility of the mutation form for land parcel number Githunguri/ Kimathi /664/ (PEX3)
 - iii) Whether land parcel number GITHUNGURI/KIMATHI/776 measures 2.42 Ha or 5.01Ha
 - iv) Whether the Plaintiff is entitled to any portion of land parcel GITHUNGURI/KIMATHI/776
 - v) Whether there was any fraud on the part of the Defendant.
 - vi) Whether the Plaintiff is entitled to the reliefs sought.
30. In regard to the consolidation of the three suit properties counsel submitted that the plaintiff's own evidence was to the effect that at the time of sale, the three parcels were not consolidated as they existed as three distinct parcels. The alleged consolidation is therefore misleading.
31. With regard to the mutation form for land parcel number GITHUNGURI/KIMATHI/664, counsel submitted that land parcel number GITHUNGURI/KIMATHI/776 is indicated as measuring 5.01 Ha which is equivalent to 12.3 acres. The said mutation form is a Replacement Mutation prepared on 1st April 2015 by a private surveyor known as Wallace Mbugua at the request of Jane Wangui Muchiri, Joseph Muchiri Githara and Emily Mumbi Muchiri all of whom were not called as witnesses.
32. He submitted that the reason for the said mutation was simply indicated as Replacement yet the acreage of land parcel

GITHUNGURI/ KIMATHI/776 was altered from 2.42Ha to 5.01 Ha without any justification. Counsel submitted that the procedure for altering land sizes as explained by PW3 was not followed.

33. He termed the said exercise fraudulent as the register for parcel 664 had been closed way back in 1978. He pointed out that it was not possible to resurvey the land without first consolidating the three parcels that were created from parcel number 664 in 1978 and involving all the registered owners.
34. He pointed out that by the plaintiff's own admission, he did not know who went to the land to take measurements. Furthermore, the Defendant who was the registered owner of parcel 776 was never notified of the resurvey and he denied that any surveyor went to his land.
35. It was counsel's submission that the said Replacement Mutation was not registered at the Lands office and is therefore of no probative value. He placed reliance on the case of **Oyaro v Oisebe & Another ELC Case No. 399 of 2015 (2024) KEELC 5976(KLR)**
36. With regard to the acreage of land parcel 776 counsel submitted that the Land Registrar Kiambu who testified as PW2 produced a green card confirming that parcel number 776 measures 2.42Ha. This was the acreage at the time the said parcel was transferred to the Defendant. He relied on Section 30 of the Land Registration Act which stipulates that :

“A certificate of title or certificate of lease shall be prima facie evidence of the matters shown in the certificate and the land or lease shall be subject to all entries in the register.

37. It was his contention that the register at the Land office indicated that as at 1978, land parcel number 776 measured 2.42 Ha.
38. Counsel wondered how the plaintiff could have owned and utilized a parcel that was bigger by 6 acres for 37 years before realizing it and only came to realize the actual size after he had sold it. He pointed out that the Plaintiff admitted having sold the land based on the records disclosed in official government records.
39. He specified the instances when a title can be cancelled or rectified. Section 79(1) provides as follows:

“Section 79 (1)

The Land Registrar may only rectify the register or any instrument presented for registration in the following cases:

- a) In formal matters and in case of errors, mistakes or omissions not materially affecting the interests of any proprietor;*
- b) In any case and at any time with the consent of all the parties;*
- c) If upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case, the registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel;*
- d) For purposes of updating the register; or*

e) *For purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.*”

40. Section 79(2) of the Act provides that:

“No alteration affecting the title of the proprietor may be made pursuant to subsection (1) without the consent of the proprietor unless the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or where it would for any other reason be unjust for the alteration not to be made provided that a written notice of 90 days shall be given to the proprietor of such intention to make the alteration.”

41. The court’s power to order rectification of the register is found under section 80 of the Act which provides as follows:

“Section 80: Rectification by the court

(1) Subject to subsection (20), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought or cause such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

ANALYSIS AND DETERMINATION

42. Having considered the pleadings, oral and documentary evidence, the rival submissions and the existing legal framework as well as

the authorities cited to me, there are only two issues for determination; whether there is a discrepancy between the records at the land registry and the ground regarding the actual size of land parcel no. GITHUNGURI/KIMATHI/776 and whether the Plaintiff is entitled to the reliefs sought.

43. The Plaintiff maintains that by sale agreement dated 31.1.2013, he sold 10 acres to the Defendant out of his 3 parcels of land being land parcel number GITHUNGURI/KIMATHI/776, 1459 and 1460 respectively. Although he seems to suggest that the three parcels were consolidated at the time of sale, this is not borne out by the evidence on record.
44. What emerges is that the original mutation form that created the three suit properties and others not in dispute out of land parcel no. GITHUNGURI/KIMATHI/664 is missing. In its place is a "Replacement Mutation" created in 2015 which indicates that land parcel no. GITHUNGURI/KIMATHI/776 measures 5.01 Ha or approximately 12.3 acres as opposed to 2.242Ha indicated on the register and title deed issued in 1978.
45. It is on this basis that the Plaintiff believes that he sold the Defendant an extra 6.405 acres.
46. PW2 testified that upon examining the mutation and conducting a site visit, he noted inconsistencies between the documents and the existing physical boundaries. He accordingly recommended that a

re-survey be undertaken to regularize the position on the ground with what appears on record.

47. On the other hand, Bernard Gitonga, a Land Surveyor based at Kiambu Survey Office who testified as DW4 informed the court that the mutation form for land parcel number GITHUNGURI/KIMATHI/664 shows that land parcel no. GITHUNGURI/KIMATHI/776 measures 5.01Ha.
48. However, he stated that from the dimensions shown on the said mutation, parcel number GITHUNGURI/KIMATHI/776 measures 2.71Ha which is approximately 6.71acres. He alluded to an error in recording the acreage on the mutation form. He attributed the error to the private surveyor who carried out the sub-division. He also confirmed that the error was within the acceptable margin of error which is usually 10%.
49. In view of the admission that an error occurred during the survey exercise in 1978 that created land parcel no. GITHUNGURI/KIMATHI/776, it is necessary to correct that error and restore clarity. I must however point out that the 1st Defendant did not contribute to the mistake.
50. Consequently, the Plaintiff's case succeeds partially. In the interest of justice and pursuant to Section 80(1) of the Land Registration Act, I make

the following final orders:

- a) That a re-survey be conducted by the County Surveyor, Kiambu under the supervision of the County Land Registrar, Kiambu to reconcile the discrepancy between the mutation form and the actual acreage on the ground with respect of land parcel number GITHUNGURI/KIMATHI/776.**
- b) That the re-survey be conducted in the presence of the parties and each party is at liberty to engage their own private surveyor to be present during the exercise.**
- c) Following the re-survey, the Registry Index Map (RIM), Survey Map and green card for Land Reference Number GITHUNGURI/KIMATHI/776 shall be amended accordingly.**
- d) The Land Registrar and County Surveyor shall file their report in court within 60 days.**
- e) The costs of the survey shall be shared equally between the parties.**
- f) In view of the circumstances of this case, each party shall bear their own costs.**

Dated, signed and delivered virtually this 21st day of October 2025.

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J. M ONYANGO
JUDGE

In the presence of:

1. Mr. Mshindi for Mr Wandaka for the Plaintiff
 2. Mr Gathiru for Mr Kimani for the 1st Defendant
- Court Assistant: Hinga_