



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT THIKA
ELC 262 OF 2017
(FORMERLY MILIMANI ELC.NO.994 OF 2012)

NICHOLAS MUNYIRI MUINAMI.....1ST PLAINTIFF
MBUTHIA MUINAMI.....2ND PLAINTIFF

VERSUS

JOHN KAMAU WANDUTU.....1ST DEFENDANT
STEPHEN MWAURA WANDUTU.....2ND DEFENDANT
JOSEPH MWANGI KIARIE.....3RD DEFENDANT
PETER KAMORE WAWERU.....4TH DEFENDANT
COMMISSIONER OF LANDS.....5TH DEFENDANT

JUDGMENT

By a *Plaint* dated 13th December 2012, the Plaintiffs herein brought a claim against the Defendants and sought for the following orders:

a) *Cancellation of titles No.Kiganjo/Kiamwangi/1089, Kiganjo/*

Kiamwangi/1090 and Kiganjo/Kiamwangi/1409 &1410.

b) *The cancelled Titles be reverted to the original title in the names of the Plaintiffs herein.*

c) *The 5th Defendant be and is hereby ordered to rectify the register by cancelling the 1st, 2nd, 3rd and 4th Defendants titles and register the Plaintiffs as the owners of Kiganjo/*

Kiamwangi/486.

d) *Any other relief this Court may deem apt to grant.*

In their statement of claim, the Plaintiffs alleged that they are administrators *Ad Litem* of the estate of the

Late **Muinami Mianya** pursuant to **Eldoret High Court, Ad litem No.113 of 2012**. They further alleged that the late **Muinami Mianya** was their father and in the year **1958**, he was registered as the owner of **Kiganjo/Kiamwangi/486**, and his brother **Wandutu Mianya alias George Wandutu Mianya**, who was the father to the 1st, 2nd and 3rd Defendants registered a caution on the said land in **1971**. The Plaintiffs further alleged that in the year **1986**, the said **George Wandutu Mianya alias Muinami Mianya** caused the said parcel of Land **Kiganjo/Kiamwangi/486**, to be registered in his name and subsequently subdivided into **Kiganjo/Kiamwangi/1089, Kiganjo/**

Kiamwangi/1090 & Kiganjo/Kiamwangi/1091 and the said resultants subdivisions were transferred to the 1st 2nd & 3rd Defendants.

They further alleged that the 1st Defendant who is the registered owner of **Kiganjo/Kiamwangi/1091**, has subsequently sub-divided it into **Kiganjo/Kiamwangi/1409 & 1410** and has sold one portion to the 4th Defendant.

That on discovery of the fraudulent transactions the Plaintiffs complained to the 5th Defendant who in a letter dated **6th May 2008** among others expressed doubt as to how the father of the 1st, 2nd & 3rd Defendants became the registered owner of land parcel **Kiganjo/Kiamwangi/486**, and summoned the 3 Defendants together with their late father to avail evidence of how they became owners of **Kiganjo/Kiamwangi/486**, but to date no evidence has been availed. The Plaintiffs further pleaded that the 1st 2nd & 3rd Defendants' claim of ownership in respect of the resultant subdivisions of the suit land are fraudulent and therefore termed them **null** and **void**.

The particulars of fraud were given as follows:-

a) Registering the late father of the 1st to 3rd Defendants as the owner of Kiganjo/Kiamwangi/486, without transfer and consent of the bonafide owner and in unclear circumstances.

b) Failing to avail evidence of ownership and how a cautioner in 1971 became the registered owner.

The Plaintiffs averred that in so far as the 1st, 2nd, 3rd & 4th Defendants titles were obtained fraudulently, no good and proper titles were passed to them and the same ought to be cancelled and the titles revert to the Plaintiffs who are the sons and administrators of the last *bona fide* registered owner.

The Plaintiffs further sought orders of eviction of the 1st 2nd and 3rd Defendants from the parcels of land which comprise of the original Land Known as **Kiganjo/Kiamwangi/486**, and a declaration against all the Defendants that the Plaintiffs are the bona fide owners of the said parcel of land.

The Plaintiffs further alleged that there was a Land Disputes Tribunal case between the parties which culminated in **Nairobi High Court Judicial Review No.38 of 2006**, which ended on the **20th July 2012**, and hence there is no suit pending between the parties. The Plaintiffs urged the

Court to allow their claim as stated in the Plaintiff.

This suit is contested and the 1st, 2nd & 3rd Defendants filed their **Statement of Defence** together with their **Counterclaim** dated **11th February 2013**, and denied all the allegations made by the Plaintiffs. The 1st, 2nd and 3rd Defendants admitted that the Plaintiffs' father and their father were both first born sons of **Mianya Kamau** by his two wives namely **Wangui and Waberi**. They averred that both sons had the same name of **Muinami Mianya son of Waberi** and **Muinami Mianya son of Wangui** but **Muinami Mianya** son of **Wangui** was also known by his nickname of **Wandutu Mianya**.

They further alleged that by the time of land demarcation adjudication and registration in **1958**, their

father had bought from his three half-brothers share of their father's land being **L.R Kiganjo/Kiamwangi/486**, and that during registration their father had his now two properties namely **L.R Kiganjo/Kiamwangi/485**, in his name of **Wandutu Mianya** and **L.R.No.Kiganjo/Kiamwangi/486**, in his other name of **Muinami Mianya**. They alleged that though the two parcels were registered in his two different names, the identity card used was the same. They denied that **Muinami Mianya** who is the Plaintiffs father was ever registered as owner of **L.R No.Kiganjo/Kiamwangi/486**, which belonged to their father, who was also known as **Muinami Mianya alias Wandutu Mianya**.

It was their contention that neither the Plaintiffs nor their father **Muinami Mianya Waberi** ever stayed on the said land since **1958**, which is fully occupied by the 1st, 2nd & 3rd Defendants and on which they have planted coffee and built their homes. They further denied that their father fraudulently transferred the suit property to himself and also averred that he only changed his name to tally with the one in the national identity card. They admitted that the suit property was legally subdivided into the parcels referred to in paragraph 4 of the Plaint and registered in their names.

The Defendants further denied that the Plaintiffs are entitled to **L.R No.Kiganjo/Kiamwangi/486**, or any sub divisions and they contended that the Plaintiffs interest to the suit property was extinguished by the 1st, 2nd & 3rd Defendants' adverse possession.

In their Counterclaim, the 1st 2nd & 3rd Defendants reiterated the contents of paragraph 5 and 15 of the Defence and prayed for the following orders:

a) A declaration that the Plaintiffs interest right and title and those of their father have been extinguished by the 1st 2nd & 3rd Defendants and their late father's adverse possession thereof exclusively, peacefully openly and as of right for a period over twelve years prior to the institution of this suit.

b) A declaration that the 1st, 2nd & 3rd Defendants are the owners as registered of the subdivision plots of L.R Kiganjo/Kiamwangi/ 1089, Kiganjo/Kiamwangi/1090, and Kiganjo /Kiamwangi/1091.

c) That the costs of this suit and of the counterclaim be awarded to the 1st, 2nd & 3rd Defendants. They urged the court to dismiss the suit with costs.

In reply to the Defence and Counter claim, the plaintiffs denied that the 1st, 2nd & 3rd Defendants father was also known as **Muinami Mianya** like the Plaintiffs' father and averred that Defendants' father was always known as **Wandutu Mianya alias George Wandutu Mianya**, and the two brothers never shared a name. They further reiterated that the Defendants' father's actions were fraudulent and therefore **null** and **void**. The Plaintiffs prayed for Judgment against the Defendants and urged the court to dismiss the Defence and Counter claim.

Viva voce evidence was taken on **2nd February 2018**, wherein **Nicholas Munyiri Muinami**, 1st Plaintiff gave evidence and called no witness. The Defendants too called one witness, **John Kamau Wandutu**, the 1st Defendant herein

THE PLAINTIFF'S CASE

PW1-Nicholas Munyiri Muinami, the 1st Plaintiff herein gave evidence and referred to his witness statement which he fully adopted. He urged the court to declare that the land in question belongs to the

Plaintiffs. He further testified that the Defendants are his brothers and that the Plaintiffs' land is **Kiganjo/Kiamwaga/486**, and the Defendants' is **Kiganjo/Kiamwangi/485**. He further testified that he did not know why the Defendants encroached on their parcel of land. It was his evidence that the Plaintiffs

lived in Eldoret and that could be the reason why the Defendants encroached on their parcel of land and accused the defendants of causing the **Green Card** for the suit land to disappear and also changed the **Green Card** to another name. He testified that his father's brother was called **Wandutu Mianya** or **George Wandutu Mianya**, and that his father never sold the land to anyone.

It was his further evidence that his father was known as **Muinami Mianya**, and that he does not know who placed the caution on the parcel of land **Kiganjo/Kiamwangi/486**, and that the subdivision was not done by his father but **Wandutu Mianya** who was not the original owner of the land because **Muinami Mianya**, his father was the original owner as per the letter from the Lands office. He further testified that the Defendants defrauded them from their own land and asked the court to order the land be given back to them. The witness produced the bundle of documents as Plaintiffs **Exhibit 1**.

It was his testimony that his father did not sell his parcel of land to **Wandutu Mianya** and that he had filed a criminal case against **Wandutu Mianya** and the elders told them to go and discuss the matter at home. He testified that the extract of the register shows that **Wandutu Mianya** was discharged under **Section 87(A)** of the **Criminal Procedure Code**. He further stated that he filed a case at the Land Disputes Tribunal and the elders that the tribunal summoned the Land Registrar and there was a court order to restrain the tribunal from hearing the matter further and he then filed the present suit in **2012**. It was his testimony that the Plaintiffs used to visit the parcel of land and by then, the Defendants had not planted the coffee bushes on the said parcel of land and that the land was open and unoccupied. They also visited their uncle **Wandutu Mianya** and that their father died in **1987** and **Wandutu** died later.

It was his further testimony that they came to know about the changed title deed in **1986**, while their father was still alive. He further testified that the **Land Registrar Kiambu** had confirmed that the land was for **Muinami Mianya** and they did not expect their uncle to take over the land. It was his testimony that if they found strangers on the land, they would have chased them away and reiterated that his father never sold the land. His father had allegedly inherited the land from their grandfather and the suit land belonged to three brothers. He confirmed that he had Limited Grant to file this suit on behalf of the estate of his father.

DEFENDANTS CASE

DW1 - John Kamau Wandutu, the 1st Defendant herein gave evidence and stated that he knew the Plaintiffs who are both brothers and also his cousins. He stated that their grandfather **Mianya** had two wives **Waithera** and **Wangui** and the children of **Waithera** were **Muinami Mianya**, **Kinyanjui**, **Kimunyu** and **Wambui** and the children of **Wangui** were **Wandutu**, **Wanjiru**, **Murugi** and **Wanjiku**.

It was his testimony that his father was **Wandutu Mianya** and that their grandfather had two parcels of land. He divided the two parcels amongst the two families.

It was his testimony that in **1958**, **Muinami Mianya** and his brothers decided to sell their lands and their father **Wandutu** bought it for 80 goats and in **1929**, the **Muinamis** left for the Rift Valley. He testified that in **1953**, after the state of emergency was declared, the Plaintiffs were evicted from the **Rift Valley** and came back to **Central Province** and their father gave the Plaintiffs' family a place to build their houses but not to cultivate. That the Plaintiffs did not stay with them, but only their wives and children. In **1958** demarcation was done and the two parcels of land were registered in the name of their father and their father was given the registration documents and he put a thumbprint on the document.

He testified that when the state of emergency ended in **1959**, the Plaintiffs went back to Rift Valley. It was his evidence that they built their homes in **Kiganjo/Kiamwangi/486**, since their father had bought the land. In **1974** the **Muinamis** and **Kimunys** went back to thank their father and found the Defendants cultivating on the suit land and the Plaintiffs did not ask any land from the Defendants' father.

He further testified that the Plaintiffs son was employed by 1st Defendant's brother in his hotel. He further testified that when his father went to register the land, he found that the registration document read **Muinami Mianya**, However it was his father who had bought it and the chief wrote to confirm that the

land was for **Wandutu Mianya** and the parcels of land were registered in the name of his father and later their father, **Wandutu Mianya** gave them their respective parcels of land.

In **1986**, the Plaintiffs houses were razed down and the children of **Kinyanjui** and **Kimunyu** had bought land elsewhere and the **Muinamis** had not bought land and they were affected by the razing down of their houses and then **Muinami** was frustrated and that's why he committed suicide. He testified that **Mbuthia** informed his brothers that there was land registered in the name of their father **Muinami Mianya**, and that they came with their father's Identity Card at the Land Registry and the Land Registrar summoned all the parties.

It was his further testimony that their father then gave an account of what had happened and the said matter was investigated by the CID and when their father gave an account of what transpired, then the Plaintiffs were advised to file a Civil suit. He further testified that the Green Cards were removed from the records so that they could not be interfered with until the suit was heard and determined and later the Plaintiffs lodged a criminal claim against the Defendants' father who was charged in court but was later discharged under **Section 87(A)** of the **Criminal Procedure Code**. He also testified that the green cards were returned to the land registry. It was his evidence that he sold **1½ acres** to **Peter Kamore Waweru**, after having used all his money on the case filed by the **Muinamis**. The Plaintiffs later filed this suit after the death of the Defendants' father.

He testified that the Plaintiffs saw the **title deed** of the suit land after their house was razed down at the Rift Valley. He testified that when the Plaintiffs obtained the document with the name of **Muinami Mianya**, they took it to the Chief Land Registrar and who sent some officers to the ground and the said land officials saw the land and the Plaintiffs were also present. It was his testimony that the Chief Land Registrar agreed with the Defendants side of the story and that the same was also confirmed by the Assistant chief that the land belonged to **Wandutu Mianya**.

He also testified that the Chief Land Registrar upon being satisfied that the land was for the Defendants, advised the Plaintiffs to file a Civil suit. The Plaintiffs then filed a matter at the Land Disputes Tribunal and the tribunal was directed to refer the matter to court. He testified that they have lived on the suit land all along and that the children of **Kimunyu** and **Kinyanjui** have not claimed anything from the Defendants and only the Plaintiffs have and he reiterated that the land is theirs. He urged the court to dismiss the suit with costs. He produced his bundle of documents as exhibit 1.

On cross examination, the 1st Defendant stated that they did not grab the Plaintiffs' land. He testified that he had the Adjudication form and that the name listed is **Muinami Mianya**. It was his testimony that the thumbprint was for **Muinami Mianya**, and who was also known as **Wandutu Mianya** who was his father and also stated that the matter can be referred to the CID for confirmation of the thumbprint. He further gave evidence that the suit land, **Kiganjo/Kiamwangi/486**, gave rise to the suit properties in dispute. He confirmed that he had seen the letter from the Ministry of Lands that showed that the green card was in the name of **Muinami Mianya**, on the **25th April 1958** and that the **Green Card** was opened in **1958**. He also testified that he has seen another **Green Card** opened on **20th May 1986**, for property **Kiganjo/Kiamwangi/486** and that the document does not show any rectification of the Green Card. He testified that his father was also called **Muinami Mianya** same as the father to the Plaintiffs.

It was his further testimony that his father put a caution in the suit property in **1971**, and that his father and the Plaintiffs father were step brothers and they shared the same name of **Muinami Mianya**. He testified that his father could not have two parcels of land in the same sub location and in that why he used the names **Wandutu Mianya** and **Muinami**

Mianya. It was his further testimony that his father did not use that to have two parcels registered to him and that he put a caution in **1971** and was registered as the owner in **1986**. He further testified that the Land Registrar did not have a representative in court and that the Plaintiffs have had several cases over the suit land. He confirmed that the Plaintiffs' father died because of the suit land. He confirmed that the register for their land was opened in **1986** and not **1958**. He contented alleged that the Plaintiffs have no land and that is why they have brought them to court.

The Parties thereafter filed their written submissions to support their respective positions. In that regard, the **Law Firm of Makhandia & Makhandia Advocates**, for the Plaintiffs filed their written submissions on **11th April 2018**, and urged the court to allow the Plaintiffs case. They relied on various cases among them the case of **Dismass Wafula & 13 Others ...versus.. Dishon Mudembei & 3 Others**, where the court held that;

“Having said that besides the Respondents testimonies, there is nothing else on the record to support the contention that Sabatia Musyani Adsambwa ID card number No. 1932042/64 was also known by the name of Mushangi Asambwa .And even if there was evidence that Sabatia had sought to correct his name, we take the view that there ought to have been other documentation identifying Sabatia as Mushangi Asambwa, hence the necessity to correct his name.....”

The further relied on the case of **Arthi Highway Developers Limited ..v..West End Butchery Limited & 6 Others**, where the Court held:-

“It is our finding that as between West End and Arthi no valid title passed and the one exhibited by Arthi before the trial court was an irredeemably fake. It follows that Arthi had no title to pass to subsequent purchasers and therefore KMAH, Yaamin and Gathoni cannot purport to have purchased the disputed land or portions thereof”

They further relied on the case **of Haro Yonda Juaje ..v.. Sandaka Dzengo Mbauro & Another Malindi Environment & Land Case No.106 of 2007**, where the Court held:-

“One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lies in the mouth of a claimant to aver that the title held by the registered owner was fraudulently acquitted and then claim the same under the doctrine of adverse possession”

Further they relied on the case of **John Baraza Ojiambo ..v.. Veronica Auma Ojiambo & 3 Others**, where the Court stated;

‘.....could the doctrine of adverse possession apply against the parties to the suit before the learned Judge who were related by being mother and step son? We think not.

In conclusion the Plaintiffs submitted that the doctrine of adverse possessions does not arise and urged the court to find in their favour.

The Defendants through the **Law Firm of Kiania Njau & Co. Advocates**, filed their written submissions on **11th June 2018**, and urged the court to dismiss the Plaintiffs’ case and allow their counterclaim. They relied on the case of **Virginiah Wanjiku Mwangi ..vs.. David Mwangi Jotham Kamau ELC Nyeri Civil Case No. 66 of 2011(2013) eKLR** and submitted that five conditions must be fulfilled in order to claim title by adverse possession being;

1. Open and notorious use of the property

2. Continuous use of the property during the period of adverse possession.

3. Exclusive use of the property

3. Actual possession of property

4. Non permissive hostile or adverse use of property.

They further relied on the case of **Githu ..Vs.. Ndeete(1984) KLR 776**, where the Court held;

‘giving notice to quit cannot be effective assertion of right for the purpose of stopping running of time under the Limitations of Actions Acts’.

In conclusion the Defendants urged the court to dismiss the Plaintiffs suit with costs.

The Court has now carefully read and considered the rival written submissions. The Court has further considered the pleadings in totality. The evidence adduced in court and the exhibits produced therein and will make the following findings:-

There is no doubt that the Plaintiffs and the Defendants herein are cousins. The Plaintiffs are the sons of **Muinami Mianya**, who was a step brother to one **Wandutu Mianya**, who was the father to the 1st, 2nd and 3rd Defendants. It is also evident that the said **Muinami Mianya** and **Wandutu Mianya** were sons of one **Mianya**, who allegedly had two wives, **Wangu** and **Waithera**, who were the mothers to **Muinami Mianya** and **Wandutu Mianya**. It is also not in doubt that the said **Mianya** who was the grandfather to the Plaintiffs and 1st – 3rd Defendants owned a parcel of land in Gatundu area which is within the **Kiganjo/Kiamwangi Adjudication Scheme**.

It is also not in doubt that **Muinami Mianya** who was the father to the Plaintiffs lived a better part of his life at the Rift Valley. It was alleged by the Defendants that **Muinami Mianya** moved to the Rift Valley in **1929**. Further, it is evident that the Plaintiffs too lived in Eldoret and PW1 told the Court that he used to teach in schools within the Eldoret area. Further the Letters of Administration were also issued at **Eldoret High Court**.

There is also no doubt that there are two parcels of land herein of interest to this determination. The first parcel of land is not in dispute and it is land parcel **No.Kiganjo/Kiamwangi/485**. The second parcel of land is **Kiganjo/Kiamwangi/486**, which is in dispute herein.

The said parcels of land were allegedly subdivisions of the land that was initially owned by **Mianya**, the father to **Muinami** and **Wandutu Mianya**, the fathers to Plaintiffs and 1st, 2nd & 3rd Defendants. It is also not in doubt that these parcels of land were demarcated in **1958** during the period of Land Demarcation and Consolidation in Central Province or Kiambu County where the disputed parcel of land is situated.

From the evidence on record, land parcel **No.Kiganjo/Kamwangi/ 485**, was registered in the name of **Wandutu Mianya** in **1958**, and there is no dispute about the said parcel of land.

However, land parcel **No.Kiganjo/Kiamwangi/486**, was first registered in the name of **Muinami Mianya** in **1958**, and later another Register was allegedly opened in **1986**. It is unfortunate that no evidence was adduced by any witness from the Lands Office to give the true reflection of what really transpired.

Further, it is evident that **LR.No.Kiganjo/Kiamwangi/486**, is not in existence as it was subdivided in the year **1986**, to give rise to **Kiganjo/Kimwangi/1089, 1090 & 1091**. Further **LR.No.Kiganjo/**

Kiamwangi/1091, was later subdivided into **Kiganjo/Kiamwangi/1409** and **1410** and parcel **No.1410** was sold to the 4th Defendant herein. Those are the title documents that the Plaintiffs want the Court to cancel, revert the title to **Kiganjo/Kiamwangi/486**, and register it in the names of the Plaintiffs herein.

The Plaintiffs have alleged in their evidence that the suit land **Kiganjo/Kiamwangi/486**, belonged to their father **Muinami Mianya**, but the late **Wandutu Mianya**, fraudulently registered it in his name in **1986**, and then subdivided it in favour of the 1st, 2nd & 3rd Defendants. However, PW1 testified that he was born in Nandi District in **1938**. His family lived in the Rift Valley until **1953** during the State of Emergency when they moved to the suit land. He also testified that the late **Wandutu** gave his family a place to put up shelter but in **1957**, the family of **Muinami Mianya** went back to the Rift Valley. That even after the death of his father in **1987**, he was buried at the Rift Valley but not at the suit land.

The Defendants on their part alleged that **Muinami Mianya** and his brothers sold the land parcel

No.Kiganjo/Kiamwangi/486, to their father **Wandutu Mianya** in **1928** and then moved to the Rift Valley. That during the land demarcation in **1958**, their father who was also known as **Muinami Mianya**, registered the suit land in his name and that his step brother **Muinami Mianya** did not object or claim the suit land and that is the reason why he went back to the Rift Valley after the end of State of Emergency in **1959**. That if the said **Muinami Mianya**, father to the Plaintiffs owned the suit land, he could have claimed it in his lifetime. Further that the Plaintiffs claimed ownership of the suit land after the death of their father **Muinami Mianya** and the Defendants' father **Wandutu Mianya**. That though the late **Wandutu Mianya** had been charged in court in **1986**, he was later discharged under **Section 87(A)** of the **Criminal Procedure Code**.

The above are the undisputed facts. The issues for determination are as drawn by the Plaintiffs. These are:-

- i. Whether in 1958, the Plaintiffs' father was the registered owner of LR.No.Kiganjo/Kiamwangi/486.**
- ii. Whether the 1st, 2nd & 3rd Defendants' father ever registered a caution on Kiganjo/Kiamwangi/486 and if so what names?**
- iii. Whether the 1st, 2nd & 3rd Defendants' father subsequent registration of Kiganjo/Kiamwangi/486 to his name was fraudulent.**
- iv. If the answer to the 3 above is in affirmative, are the titles acquired good and proper in law?**
- v. Whether the Defendants have acquired rights over Kiganjo/ Kiamwangi/486 by adverse possession.**
- vi. Whether the Plaintiffs are entitled to any remedies and if so what remedies?**
- vii. Who meets costs of the suit?**
- i) Whether in 1958, the Plaintiffs' father was registered owner of LR.No.Kiganjo/Kiamwangi/486.**

The Parties herein adduced evidence and alleged that the land demarcation was done in 1958 and during that time, the suit land **Kiganjo/Kiamwangi/486**, was registered in the names of **Muinami Mianya**. Both the Plaintiffs and Defendants relied on a letter dated **3rd February 2010**, from the Chief Land Registrar to District Land Registrar Thika, which confirmed that the first proprietor of the suit land was

Muinami Mianya, which land was registered on **25th April 1958**. The Plaintiffs have alleged that the said **Muinami Muanya**, was their father who died in **1987**. However, the **1st – 3rd** Defendants have alleged that indeed the said **Muinami Mianya** was their father who was also nicknamed **Wandutu Mianya**. The Defendants averred that their father who had two parcels of land **Kiganjo/Kiamwangi/485 & 486**, could not have been registered in both during the time of demarcation as it was forbidden at that time to own two parcels using same name within the same location. They also contended that by **1958**, **Muinami Mianya**, the father the Plaintiffs and his brothers had sold the suit land to **Wandutu Mianya** and had moved to the Rift Valley. Unfortunately, none of the parties herein called any independent witness to corroborate their version of evidence.

However, the Plaintiffs have contended that **Muinami Mianya** lived in the Rift Valley and even by **1938**, when PW1 was born, **Muinami Mianya** lived in Nandi District wherein PW1 was born. It is also evident that during the State of Emergency when **Muinami Mianya** came back to his ancestral home, he was only given a place to put up a shelter on the suit land by **Wandutu Mianya**, but not to cultivate. Further, even after the State of Emergency came to an end, **Muinami Mianya** still went back to the Rift Valley in

1959. There was no evidence that he said **Muinami Mianya** ever claimed the suit land after **1958**, when the same was allegedly registered in the name of **Muinami Mianya**. Further it was alleged that **Muinami Mianya** visited the suit land again in **1974**, but he did not claim ownership.

DW1 told the Court that **Muinami Mianya** had come back to thank **Wandutu Mianya**, for sheltering him during the State of Emergency. Further, it was stated that in **1986**, the Plaintiffs' families had their homes razed down at the Rift valley. Instead of coming back to the suit land, their father got frustrated and committed suicide in **1987**. If at all the said **Muinami Mianya**, the father to the Plaintiffs was the registered owner of the suit property in **1958**, would he have failed to assert his right to ownership and live as a squatter at the Rift Valley where he was cultivating in the forest? I do not think so.

The Court finds that though there was no independent evidence to corroborate the evidence of the DW1 that **Muinami Mianya** and his brothers sold the suit land to **Wandutu Mianya**, it is more probable that was the really situation on the ground and that **Muinami Mianya**, who was the first proprietor of **Kiganjo/Kiamwangi/486**, was the father to the Defendants and not the Plaintiffs' father. PW1 stated that the suit land was for **Muinami Mianya** and his other brothers. However **Muinami Mianya** did not claim the suit land in his lifetime and his other brothers or their children are not claiming ownership of the said suit property.

The Court believes that indeed **Muinami Mianya** and his brothers sold the suit property to **Wandutu Mianya** in **1928/29** and moved to the Rift Valley and that is why the said **Muinami Mianya**, the father to the Plaintiffs did not bother with the suit land during demarcation in **1958** and even thereafter. The Court in answer to the issue raised herein finds that though the suit land was registered in the name of **Muinami Mianya** in **1958**, the said **Muinami Mianya** was not the father to the Plaintiffs herein.

ii) Whether the 1st, 2nd & 3rd Defendants' father ever registered a caution on the suit land Kiganjo/ Kiamwangi/456 and if so I what names?

The Plaintiffs produced a copy of Green card which showed that on **19th March 1971**, a caution was lodged on the title by **Wandutu**. The title is **Kiganjo/Kiamwangi/486**. However, as the court stated earlier, there was no evidence from the Land Registrar or the Lands office to confirm why the said caution was placed. In **1987**, the late **Muinami Mianya** the father to the Plaintiffs lived in the Rift Valley. There was no evidence of whether he had claimed ownership of the suit land. DW1 testified that he was born while his parents lived on the suit land and they continued to live there as a family until the time the State of Emergency was declared. The Court finds that indeed a caution was placed on the suit property on **19th March 1971** by **Wandutu** but it is not clear why the said caution was placed or lodged on the title.

iii) Whether the 1st, 2nd & 3rd Defendants father subsequent registration of Kiganjo/Kimwangi/486 to his name was fraudulent.

It is evident that the suit land was registered in the name of **George Wandutu Mianya** on **20th May 1986**. A new Green Card was opened. Though there is a copy of a letter dated **6th May 2008**, from the District Land Registrar to the Chief Land Registrar alleging that there was possibility of having two registers for the suit property, as the court stated earlier, the Court did not have the benefit of receiving evidence from the Lands Office. There was no evidence that the registration done in **1986** was not genuine and/or was fraudulent.

The Plaintiffs have alleged fraud on the part of the Defendants father **Wandutu Mianya**. '**Fraud**' is defined as:-

"A false representation of a matter of fact – whether by works or conduct, by false or misleading allegations or by concealment of what should have been disclosed – that deceives and intends to deceive another so that the individual will act upon it for her or his legal injury."

Further allegations of fraud are serious allegations which should be strictly proved on a higher standard. See the case of **Samuel Samita Namunyu...Vs...Philmon Machina Ndiwa & 3 Others (2014) eKLR**, where the Court held that:-

“Fraud is a very serious allegation and one that warrants and attracts serious consequences under the law. It is trite that for fraud to lie, the alleging party should prove the existence of that fraud not on a balance of probabilities but a much higher standard of proof albeit below beyond reasonable doubt.”

The Plaintiffs are the ones who alleged fraud on the part of the said **George Wandutu Mianya** and the onus was on their part to prove the same. See **Section 107 & 109** of the **Evidence Act** which states:-

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

109 “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

As the Court observed earlier, **Wandutu Mianya** always lived on the suit land even when **Muinami Mianya** came to seek for shelter between **1952 to 1959**. It was contended that the said **Wandutu Mianya** had bought the suit land from **Muinami Mianya** in **1928/29**. If that was the case, then **Wandutu Mianya** was the owner of the suit property and there was nothing wrong in having the suit land registered in his name. The Court has found and held that no evidence of fraud was brought out by the Plaintiffs against **George Wandutu Mianya** and the Court further finds and holds that the registration of **Kiganjo/Kiamwangi/486**, in the name of **Wandutu Mianya** was not fraudulent.

iv) If the answer to 3 above is in affirmative, are the titles acquired a good and proper in law?

The Court has found and held that the registration of the suit land **Kiganjo/Kiamwangi/486**, in favour of **Wandutu Mianya** was not fraudulent. The said registration was governed by **Registered Land Act Cap 300** (now repealed) and **Section 27** of the said Act provided:-

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

As a registered proprietor, **Wandutu Mianya** had a right to deal with the suit property as he so wished. Consequently on **11th November 1986**, he subdivided the suit land to his sons, the **1st to 3rd** Defendants and therefore **Kiganjo/Kiamwangi/486**, was closed after subdivision. The said subdivision was approved by the relevant offices and thereafter new titles were issued as **Kiganjo/Kiamwangi/1089, 1090 and 1091** in favour of the **1st, 2nd & 3rd** Defendants. As the registered proprietors the **1st, 2nd & 3rd** Defendants were deemed to be the absolute and indefeasible proprietors. This position is supported by **Section 26(1)** of the **Land Registration Act** which states:-

“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 a corrupt scheme.

Since the Court has found no ***illegality, fraud*** or ***irregularity*** in the above subdivisions, then the Court finds and holds that the 1st, 2nd & 3rd Defendants were holders of valid titles.

As a holder of a valid certificate of title, the 1st Defendant, ***John Kamau Wandutu*** further subdivided his parcel of land ***Kiganjo/ Kiamwangi/1091***, into two portions being ***Kiganjo/Kiamwangi/1409 & 1410*** and he sold parcel ***No1410*** to ***Peter Kamore Waweru*** the 4th Defendant. The certificate of title for ***Peter Kamore Waweru*** can be traced as DW1 sold his portion of land to 4th Defendant because he also held a valid title and this Court finds no reasons to fault the said subdivision.

As provided by ***Section 24(a) & 25(1)*** of the ***Land Registration Act 2012***, a registered proprietor has absolute rights and privileges over his parcel of land and disposing or subdividing it is one of such rights. See Section ***24(a) & 25(1)*** of the ***Land Registration Act***, which provides:-

24(a)“Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

25(1) “The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever”

Having found that ***Wandutu Mianya*** did not obtain the said registration fraudulently, then the Court finds that the subsequent subdivisions of his land to the 1st, 2nd & 3rd Defendants was valid and was not shrouded in any fraud or misrepresentation.

For the above reasons, the Court finds the titles held by 1st, 2nd, 3rd & 4th Defendants to have been acquired properly and they are therefore good and proper in law.

v) Whether in the alternative, the Defendants have acquired rights over Kiganjo/Kiamwangi/486 by adverse possession.

Even if the Court was to find and hold that ***Muinami Mianya*** was the father to the Plaintiffs and was registered as a proprietor in ***1958***, it is evident that he went to the Rift Valley in ***1920s***. He came back to the suit land in ***1953*** and found the fathers to 1st, 2nd & 3rd Defendants utilizing the land. It was an open and continuous use. He did not assert his right. The said ***Muinami Mianya***, went back to the Rift Valley in ***1959*** and did not claim the suit land until he died in ***1987***. The Defendants’ father ***Wandutu Mianya*** was in actual possession of the suit land. Therefore even if the suit land was to be presumed to have been owned by ***Muinami Mianya***, then ***Wandutu Mianya*** acquired it by adverse possession after 12 years from the date of registration in ***1958***. Adverse possession is a way of acquiring title to land by actual, open, hostile and continuous possession of the suit land to the exclusion of the owner for a period of over 12 years. ***Wandutu Mianya*** was in such open and continuous possession and if ***Muinami Mianya*** had any right over the suit property, he lost the same after 12 years from ***1958***. See the case of ***Wambugu...Vs...Njuguna (1983) eKLR***, the Court held that:-

“In order to acquire by statute of limitation, a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it”.

However, title **No.Kiganjo/Kiamwangi/486** was closed on subdivision in **1986** and this Court cannot find and hold that the Plaintiffs and their father's interest and right over the suit property has been extinguished by virtue of adverse possession of the said land by the 1st, 2nd & 3rd Defendants and their late father.

vi) Whether the Plaintiffs are entitled to any remedies and if so what remedies.

Having found that the Plaintiffs father was not the owner of **Kiganjo/Kiamwangi/486**, as there is a possibility that he sold it to **Wandutu Mianya**, and that is why he did not bother to claim it during his lifetime, the Court finds and holds that the Plaintiffs herein are not entitled to any remedies herein or any of the prayers sought. However the Defendants are entitled to the prayers sought in their Counter-claim.

vii) Who is to meet costs of the suit?

Ordinarily costs do follow the event. Though the Plaintiffs have not succeeded in their claim, the Court finds that the parties herein are relatives and since costs are awarded at the discretion of the court, as provided by **Section 27** of the **Civil Procedure Act**, the Court finds that each of the parties herein should bear their own costs.

Having now carefully considered the available evidence and the rival written submissions and cited authorities, the Court finds that the Plaintiffs have not proved their case on the required standard of balance of probabilities. For the above reasons, the Court finds the Plaintiffs claim is not merited and the suit is dismissed entirely with an order that each party to bear its own costs.

However, the court finds that the 1st, 2nd & 3rd Defendants have proved their claim as per their Counter-claim in terms of **prayer No.(b)**. The Court enters Judgment for the 1st – 2nd Defendants in terms of **prayer No.(b)** of their Counter-claim, with each party bearing their own costs.

It is so ordered.

Dated, Signed and Delivered at Thika this 24th day of May 2019.

L. GACHERU

JUDGE

24/5/2019

In the presence of

Mr. Otenyo for the Plaintiffs

Mr. Kanjai holding brief for Mr. Kiania Njau for the 1st Defendant

for 2nd Defendant

for 3rd Defendant

No appearance for 4th Defendant

No appearance for 5th Defendant

Lucy - Court clerk

Court – Judgment read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

24/5/2019