

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 697 OF 2012

SOSPETER GITHAHU MUMBI 1ST

PLAINTIFF

THOMAS MUKUNYA WANDERI 2ND

PLAINTIFF

**(Suing as Members of and on behalf
of other Plaintiffs members of
GATHARA SELF HELP GROUP**

VERSUS

SAMUEL MUCHOMBA KINUTHIA

DEFENDANT

BY WAY OF COUNTERCLAIM

JAMES KAMERE MURIUKI 1ST

PLAINTIFF

SAMUEL MUCHOMBA KINUTHIA 2ND

PLAINTIFF

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MARGARET NJOKI CHEGE 3RD

PLAINTIFF

PAUL NDIRANGU NDUNG’U 4TH

PLAINTIFF

VERSUS

GATHARA SELF HELP-GROUP

DEFENDANT

JUDGMENT

1. The Plaintiffs commenced this suit vide a plaint dated 6th September

2012 and amended on 6th February 2020. They contend that members of Thome Jua Kali Village Self Help Group (now Gathara Self Help Group), which comprises about five hundred (500) households were settled on **Nairobi /Block 110** in the late 1970’s by the then area Chief in his capacity as a government representative. Further, that they were legally settled there through a vetting process facilitated by

the then local administration. They claim the said parcel of land is not public. They contend that initially the suit parcel of land was not registered but lay on a buffer zone between Marurui Farm and Thome estate. Further, that on or about July 2012, the Defendant emerged claiming that he owns the said suit parcel, has a Certificate of Lease to that effect and demanded that they vacate it.

2. They aver that on or about 16th August 2012, they were served with enforcement notices from the City Council of Nairobi requiring them to vacate the suit parcel within seven (7) days but on following up, the City Council of Nairobi informed them that the said land was public land thus the Council had no jurisdiction to enforce the purported enforcement notice.

3. In the alternative, the Plaintiffs' claim to have acquired title to

Nairobi /Block 110/1030, 1031, 1032 and 1033 or the purported subdivisions thereof by adverse possession having

been in possession, use and continuous occupation without interruption since 1970s.

4. They sought for judgement to be entered against the Defendant for:

a) A permanent injunction restraining the Defendant, by himself, agents, servants and/or anyone working under him from interfering with the Plaintiff's members' quiet possession, alienation, selling, disposing, trespassing or in any other way dealing with Nairobi/ Block 110/1030, 1031, 1032 and 1033.

b) Orders directing that the purported Defendant's title be cancelled.

c) Costs of this suit and interest.

d) Any other relief this Honourable court may deem fit to grant.

5. The suit is opposed by the Defendant who filed a Statement of Defence and Counterclaim alongside three (3) other

Plaintiffs (James Kamwere Muriuki, Margaret Njoki Chege
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and Paul Ndirangu Ndung'u. They aver that they are the registered owners of **Nairobi/Block /110/1030, 1031, 1032 and 1033** respectively. They contend that the Plaintiffs in the main suit wrongfully entered their parcels and have continued to trespass thereon and deprived them of the use including enjoyment of the said properties, thereby causing them to suffer loss and damages.

6. They pray for judgement to be entered against the Defendants for;

a) An order for eviction of Defendant's members, their agents, representatives or any other person claiming under them or under similar claim from the properties known as Nairobi/Block/110/1030, 1031, 1032 and 1033 and the demolition of all the structures erected on the said properties by the Defendant's members, their agents, representatives or any other person claiming under them or under similar claim.

b) Costs of this suit and the interest thereon.

c) Any other relief that this Honourable court may deem just and fit to grant.

7. In response, the Plaintiffs filed a defence to the Counterclaim denying allegations levelled against them by the Plaintiffs in the Counterclaim.
8. The suit proceeded by way of viva voce evidence whereby the Plaintiff in the main suit called six witnesses while the Defendant did not participate in the hearing.

Evidence of the Plaintiff

9. PW1 was Sospeter Githahu Mumbi, the Secretary to Gathara Self Help Group. He averred that **Nairobi/Block 110** is public land as it is a buffer zone between Marurui Farm and Thome Estate. Further, that in the 1970's, the area Chief as a representative of the Government allowed the Plaintiff's members to occupy and build informal structures thereon. He claimed that the members of the Plaintiffs have been

living thereon and their association is registered and recognized by the Ministry of Culture and Social Services.

10. It was his testimony that in 1994, a surveyor named R. Kamwere visited the suit land with an updated map showing that the suit land had been subdivided into nine (9) portions. However, the said subdivision had not been effected on the ground and despite his visit, the Plaintiff's members continued to occupy the suit parcel without any threat of eviction and even developed drainage and sanitation facilities. However, on 9th July 2012, the Defendant, accompanied by a Mr. Kamwere visited the suit land and claimed ownership and showed the Plaintiff's members his alleged lease to **Nairobi/Block 110/1031**.

11. It was his further testimony that on 16th August 2012, the Plaintiff's members were served with an Enforcement Notice from the City Council of Nairobi asking them to vacate the suit land within seven (7) days and on inquiring on the authenticity of

the said Enforcement Notice, the Town Clerk informed them that the notice was issued before City Council of Nairobi had verified that the suit land is public land.

- 12.** He produced the Plaintiff's List and bundle of documents dated 6th September 2012, which included a copy of the Lease Agreement dated 24th March 2000; Certificate of Registration issued on 19th March 2011; Letter dated 27th August 2012 and Enforcement Notice dated 16th August 2012 as exhibits.
- 13.** PW2 was David Gitau Kinuthia who testified that he was born in Marurui in 1960 and was staying on the suit land. Further, that he started school in 1970 at Garden Estate Primary School but in 1974, the suit land was sold to Thome Farmers Co. Ltd and subdivided by surveyors in 1979 into ½ acres.
- 14.** He explained that elders appointed by members of the Plaintiff who included Simon Mwangi, Kario, Mzee Jendu and Pw4 requested their then District Officer (Hassan) to allocate plots in the buffer zone to those who could not afford.

Subsequently, Mr. Hassan ordered the then chief (Mr. Kiarie), to allocate 10ft by 30ft plots and separate 10ft plots for toilets to the Plaintiff's members who were about five (500) squatters who were laborers working at coffee plantations to settle thereon with their children. Further, this is what later became the concentration camps. He averred that the suit land has social amenities like primary schools, churches and chief's camp, water, electricity and a hospital named Marurui Health Center.

15. PW3 was Mary Wambui Gathuna. She testified that she started living in Marurui around 1993. Further, that it is the Provincial Commissioner at Nyayo House who authorized the District Officer, Kasarani to allocate her a plot in Marurui measuring 10ft by 30ft where she lives to date. It was her testimony that on 16th August 2012, eviction notices were dumped across the villages by Nairobi City Council advising them to vacate the parcel, which is private land.

16. PW4 was Pricilla Wanjiku Kimuhu, who said that she occupied

Marurui farm in 1974. She explained that she was employed by a white man by the name Forth (Kwa Forth) as a casual labourer farming and harvesting coffee until 1974 when the land was sold to Thome Farmers Company Ltd, which subdivided it into 1/2-acre portions and the village she was living in got affected by beacons. Further, that the then village elders (Mr. Simon Mwangi, Mr. Kairu -chairman, Mzee Njendu and herself went to the District officer's office at Kasarani, who authorized the assistant Chief to allocate them small portions measuring 10ft by 30ft together with another 10 ft for the toilet and bathroom. She confirms that they were around five hundred (500) members who settled thereon, in 1989 and in 1993, a donor from Italy (Father Usembiu Domiciano) agreed to start water projects which helped the community.

17. PW5 was Grace Wanja Njoroge. She averred that she has lived in Marurui from 1963. Her evidence mirrors that of PW4.

18. PW6 was Joseph Nzioka Kamuti. He said that he started living in a parcel of land opposite Marurui farm in 1960 and went to Marurui farm in 1974, where he was employed by Forth just like Pw4 and PW5.

19. Parties were directed to file written submissions.

Submissions

20. The Plaintiffs submitted that the Defendant's Defence and Counterclaim ought to be dismissed with costs for failure to adduce evidence. To this end, they relied on the case of **Kenya Power & Lighting Co. Ltd v Samuel Gathiari Centre (2019) eKLR.**

21. They also submitted that Article 40 (6) of the Constitution does not protect a title that has been unlawfully acquired and since there is no evidence to support the allegations in the

Defence, and no evidence was led to demonstrate the acquisition of the purported titles or the root or chain of acquisition of the Plaintiffs' in the Counterclaim Leases, they should not be protected.

22. They submitted that their right to housing over public land has crystalized by virtue of their long occupation thereon where they have established homes and raised families thus acquired a right derived from the principle of equitable access to land under Article 60 (1) of the Constitution. To this end, they relied on the case of **Mitu- Bell Welfare Society v Kenya Airports Authority & 2 others (2021) KESC 34 (KLR) 11 Jan 2021.**

23. To buttress their averments, the Plaintiffs also relied on the decisions of **Mbira v Gachuhi (2002) 1 EALR 137, Wambugu v Njuguna (1983) KLR172) and Susan Waithera & 4 Others v The Town Clerk, Nairobi City Council & 2 Others, (2011) eKLR.**

Analysis and Determination

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24. Upon consideration of the pleadings, testimonies of the witnesses, exhibits and submissions, the following are the issues for determination:

- **Whether the Plaintiffs were legally allocated land hived from Nairobi /Block 110 by the provincial administration.**
- **Whether the Defendant should be restrained from the suit properties Nairobi/ Block 110/1030, 1031, 1032 and 1033 and the titles cancelled.**
- **Whether the Plaintiffs are entitled to the orders as sought in the Plaint.**
- **Whether the Plaintiffs in the counterclaim are entitled to the orders as sought in the Counterclaim.**

Whether the Plaintiffs were legally allocated land hived from Nairobi /Block 110 by the provincial administration or if the

Defendant should be restrained from the suit properties Nairobi/ Block 110/1030, 1031, 1032 and 1033 and the titles cancelled.

25. The Plaintiffs claim they were allocated the suit land by the provincial administration where they have occupied from the 1970s. The Plaintiffs who are members of a self-help group describes the suit land as a strip land between what used to be known as Marurui Farm and Thome Estate and that it is now known as **Nairobi/Block 110**.

26. The Plaintiffs' claim their members, numbering about five (500), were legally settled on the suit parcel in the 1970s through a vetting process facilitated by the then local administration and that the parcel is not public land. It is their contention that the then area Chief in execution of directives by the then Provincial Commissioner allowed them to build and occupy portions of the suit parcels, by giving each of them portions measuring 30ft by 10ft and a further 10ft to build their washrooms. In the alternative, they claim

to have acquired the title by way of adverse possession. At the submission stage, they claimed that even if they did not acquire title to the suit land, they have a protectable right to housing over the same having resided thereon for over (54) years, irrespective of whether the same is public land or not.

27. It is also their contention that since the Defendant in the main suit and the Plaintiffs in the counterclaim failed to demonstrate how the land transformed from un-alienated land into private land they failed to prove the root of their alleged Leases and are therefore not entitled to **Nairobi /Block 110/1030, 1031, 1032 and 1033**, which they claim.

28. Even though the Defendant in the main suit and the Plaintiffs in the counterclaim did not tender any evidence, it was still incumbent upon the Plaintiffs to prove their case in accordance with section **107** of the Evidence Act as stated in the case of **Gichinga Kibutha v Caroline Nduku [2018] eKLR;**

“It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest”.

29. The Plaintiffs’ witnesses all testified that they were allocated the suit parcels by the then local chief and have been thereon from the 1970s. PW1 claimed that **Nairobi/Block 110** is public land as it is a buffer zone between Marurui Farm and Thome Estate. It was his testimony that in the 1970s, the area Chief allowed the Plaintiff’s members to occupy and build informal structures on the said land. He testified that the Plaintiff was registered by the Ministry of Culture and Social Services. He averred that in 1994, a surveyor named R. Kamwere visited the suit land with an updated map showing that the suit land had been subdivided into nine (9) portions. However, the said subdivision had not been effected on the ground and despite his visit, the

Plaintiff’s members continued to occupy the suit land without
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any threat of eviction and even developed drainage and sanitation facilities. It was his further testimony that on 16th August 2012, the Plaintiff's members were served with an Enforcement Notice from the City Council of Nairobi asking them to vacate the suit land within seven (7) days and on inquiring on the authenticity of the said Enforcement Notice, the Town Clerk informed them that the notice was issued before City Council of Nairobi had verified that the suit land is public land.

30. PW2 testified that the then District Officer (Hassan) ordered the then chief (Mr. Kiarie), to allocate 10ft by 30ft plots and separate 10ft plots for toilets to the Plaintiff's members who were about five (500) squatters, as they were laborers working at coffee plantations to settle thereon with their children. He averred that the suit land has social amenities like primary schools, churches and chief's camp, water, electricity and a hospital named Marurui Health Center.

31. PW3 testified that she started living in Marurui around 1993 and insisted that it is the Provincial Commissioner at Nyayo House who authorized the District Officer, Kasarani to allocate her a plot in Marurui measuring 10ft by 30ft where she lives to date. PW4 claimed she occupied Marurui farm in 1974. She explained that she was employed by a white man by the name Forth (Kwa Forth) as a casual labourer farming and harvesting coffee until 1974 when the land was sold to Thome Farmers Company Ltd, which subdivided it into 1/2-acre portions and the village she was living in got affected by beacons. Further, that the then village elders (Mr. Simon Mwangi, Mr. Kairu -chairman, Mzee Njendu and herself went to the District officer's office at Kasarani, who authorized the assistant Chief to allocate them small portions measuring 10ft by 30ft together with another 10 ft for the toilet and bathroom. PW5 evidence mirrors that of PW4. PW6 started residing opposite Marurui farm in 1960 and went to Marurui farm in 1974 where he was employed by Forth just like PW4 and PW5.

32. From the testimonies of the Plaintiffs, I note they claim to have been representing around 500 squatters but did not produce the List of the Squatters as an exhibit. Further, they produced a Certificate of Registration of Self Help Group/Project issued on the 19th March, 2011 from the Ministry of Gender, Children & Social Development and it indicates date of registration for Gathara Self Help Group is 17th April, 2000. The Plaintiffs did not produce any documentation from the then local Chief or DO allocating them their portions of suit land. I note from the exhibits produced, the Plaintiffs did not confirm the acreage of the land they all occupy nor did they produce any images/photographs to demonstrate their occupation of the suit land. The Plaintiffs seek a permanent injunction to restrain the registered Leases from their land but failed to prove occupation. To my mind, the Plaintiffs have failed to prove that they have a superior right over the said land or

through adverse possession, to the required standard of the law.

33. On the Plaintiff's challenging of the Defendant's title, Sections 26 (1) (b) of the Land Registration Act states that:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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.”

34. In the case of **Dr. Joseph Arap Ngok - Vs - Justice Moiwo Ole Keiwua & 5 Others, Nai. Civil Appeal No. 60 of 1997** the Court categorically declared that:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the Land Registration Act) gives an absolute and indefeasible title to the owner of the property. The title of such an 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 titleholder 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 would be placed in jeopardy.”

35. Further, under section 80 of the Land Registration Act, it was incumbent upon the Plaintiff to prove that the Defendant acquired his title fraudulently, irregularly and through misrepresentation but they failed to do so. In my view, I find that the Plaintiffs have not discharged their burden of proof to the required standard and will decline to restrain the Defendant from his land or cancel the aforementioned titles.

36. Since the Plaintiffs' claim that the suit land were public land, and it is the local chief who granted them permission to enter thereon, I find that they cannot turn around and claim it by dint of adverse possession as this cannot be over public land. Further, I note the Plaintiffs in their submissions claimed a right to housing. The Court of Appeal held as follows in **David Sironga Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR**;

“It is well established in our jurisdiction that the Court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way,

none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."

37. It is trite that parties are bound by their pleadings and as a Court, I can only make a determination of what the Plaintiffs sought for in their Plaint, which had no prayer for adverse

possession nor right to housing and will hence decline to make any findings on the same.

38. In the circumstances, I find that the Plaintiffs are not entitled to the orders as sought in the Plaint.

39. I note the Plaintiffs in the Counterclaim whose title is under challenge did not tender any evidence. I will hence decline to make any findings on the prayers sought in the Counterclaim.

40. In the foregoing, I find that the Plaintiffs have not proved their case on a balance of probability and will proceed to dismiss it but make no order as to costs. I will further proceed to dismiss the Counterclaim for want of prosecution.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
15TH DAY OF JANUARY, 2026**

**CHRISTINE OCHIENG
JUDGE**

In the presence of:

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Ms Maranya for Plaintiffs

Court Assistant: Joan

ORIGINAL