



**REPUBLIC OF KENYA**

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

**ELC NO. 20 OF 2017**

**(FORMERLY NAKURU 131 OF 2012)**

**HENRY MWANGI WAINAINA.....PLAINTIFF**

**VERSUS**

**STEPHEN KIMANI GACHURI.....1<sup>st</sup> DEFENDANT**

**STEPHEN NGIGI KIMANI (Sued as the Legal Representative of the estate of**

**JOHN KIMANI MUNYAKA).....2<sup>nd</sup> DEFENDANT**

**JUDGEMENT**

1. The present matter is a consolidation of file No.229 of 1988 and No.131of 2012 whereupon the passing away of the original 2<sup>nd</sup> Defendant, the plaint amended on the 27<sup>th</sup> April 2016. In his Plaint, the Plaintiff sought for orders of permanent injunction restraining the Defendants by themselves, their agents and/or servants and all persons allied to or associated with the Defendants from entering, cultivating, remaining, trespassing or in any way dealing with LR Nyandarua/Milangine/515. The Plaintiff also sought for general damages for trespass as well as for costs and interest at court rate
2. The Defendants on the other hand had filed a defence dated the 7<sup>th</sup> August 2008 seeking that the Plaintiff's case be dismissed for reasons that the deceased, John Kimani Munyaka had bought parcel No. 19 Milangine Scheme from one Mumbi Kiboi after which the parcel of land was subsequently subdivided into two, resulting into parcels of land being No. LR Nyandarua/ Milangine/514 and 515 land in which they were in occupation as purchasers.
3. The matter proceeded for hearing on the 31<sup>st</sup> January 2019 where the Plaintiff testified to the effect that on the 24<sup>th</sup> March 1987, he entered into a sale agreement, with one Kiboi Nganga Waweru who is now the deceased, dated the 24<sup>th</sup> March 1987 herein produced as Pf exhibit 1 wherein it had been agreed that Mr. Kiboi (deceased) sells to him 1.21 hectares, approximately 3 acres to be excised from Nyandarua/Milangine plot 19. Parties agreed that the Plaintiff would purchase the said land for Ksh 45,000/= and also pay the outstanding bill of the Settlement Fund Trustee which was Ksh 28,862.09/=. The Plaintiff produced the receipt for the payment of Ksh 28,862.95/= dated 23<sup>rd</sup> January 1987 as Pf exhibit 2.
4. That after the parties had finalized with their agreement, the Plaintiff had been shown the land which was plot 19 at the time. That he asked that they go to the surveyor so that the same could be subdivided so that each party could get their own share. They then went to the Land Control Board at Olkalou wherein they were given the consent which was marked for identification PMFI 3 because he had misplaced the original copy.
5. That upon getting the land consent, the land surveyor had sub divided plot 19 giving rise to plot No. Nyandarua/Milangine/515 and 514. Mr. Kiboi transferred plot No. Nyandarua/Milangine/515 to him wherein both parties had had signed the transfer forms. That he had paid the stamp duty as evidenced by the receipts dated the 28<sup>th</sup> November 2003, receipts which were produced as Pf exhibit 4.
6. That he had also paid Ksh 250/= for the registration fee and Ksh 105/= for the certificate making it a total of 375/= as evidenced by the receipts dated 28<sup>th</sup> November 2003, which he produced as Pf exh 5. That the fee had been assessed at Ksh 6,375/=. He produced the transfer of land form as Pf exh 6.
7. The Plaintiff further testified that he had been registered as the proprietor of the suit land and issued the title deed to land ref No. Nyandarua/Milangine/515 herein produced as Pf exh 8, on the 28<sup>th</sup> March 2008.
8. That after the surveyor had sub divided the land, he had been shown the boundary wherein he had put a fence in the presence of about 18

villagers, and had also built a semi-permanent house. He had ploughed the land wherein in essence he had taken possession of the land in the year 1994.

9. The Plaintiff also produced the green card to the original Plot No. 19 as Pf exhibit 8 which showed that Kiboi Nganga Waweru was registered as the owner on the 13<sup>th</sup> June 1989. That entry No. 2 showed that John Kimani Munyaka had put a caution on the land on the 10<sup>th</sup> July 1989 because he had a case with the vendor. That the said John Kimani Munyaka (deceased) was the father to the 2<sup>nd</sup> Defendant who was claiming purchasers' interest on the land.

10. That on the 19<sup>th</sup> April 1995 as per entry No. 3, there had been a restriction placed on the suit land by the Director of Land Adjudication and Settlement wherein after, vide an order of the court, the said caution in entry No. 2 had been removed as evidenced in entry No. 4.

11. He further testified that as per the order of Nakuru HCCC No. 229 of 1998 herein produced as Pf exh No. 9, between John Kimani and Kiboi, both of whom were now deceased, regarding Plot No. 19, the case had been dismissed. That entry No. 5 on the green card depicted the removal of restriction of entry No. 3 vide DLASO's letter of the 27<sup>th</sup> March 2008, wherein he had been issued with his title the next day the 28<sup>th</sup> March 2008 as per entries No. 6 and 7.

12. That on the 20<sup>th</sup> February 2008, the Respondents had trespassed on his land and had started ploughing thereon without his permission. That the first to trespass on the land had been the 1<sup>st</sup> Defendant Stephen Kiman Gachuri who had started cultivating therein and grazing his animals after destroying the fence he had erected. The Plaintiff had sought for legal advice from Waiganjo & Co Advocate based in Nakuru who wrote a demand letter to the 1<sup>st</sup> Defendant, dated the 2<sup>nd</sup> April 2008. That in the said letter the 2<sup>nd</sup> deceased Defendant, Mr. John Kimani was also enjoined as a party. He produced the demand letter as Pf exh No. 10. That pursuant to service of the demand letter, the Defendants had responded to the same vide theirs dated the 7<sup>th</sup> April 2008 herein produced as Pf exh 11.

13. The Plaintiff also produced photographs taken on the 17<sup>th</sup> April 2008, as evidence of the developments he had made on the suit land, photos which showed a semi-permanent house, the cattle he had kept on the land, the fence that had been destroyed, himself standing on the suit land as well as the photos depicting the destroyed trees, as Pf exh 12 (a) (b) (c) and (d).

14. He testified that the 1<sup>st</sup> Defendant, Stephen Kimani Gachuki, was the one who was still using his land and that he had filed suit against the deceased John Kimani Munyaka because he was the person who had a land suit with the vendor, for reason that he had thought that if he did not sue him, he would later complicate issues.

15. That at the moment, he could not use his land, because the 1<sup>st</sup> Defendant had threatened his life. That the reason he had filed the suit on the 18<sup>th</sup> April 2008, was because they had tried solving the same with the elders and the assistant chief but the 1<sup>st</sup> Defendant had refused to leave his land.

16. He sought that the court issues orders of eviction and an injunction to the 1<sup>st</sup> Defendant so that he could leave the suit land. That although the 1<sup>st</sup> Defendant had not built on that land, yet he was cultivating and grazing his animals thereon. The Plaintiff also sought for cost of the case as well as mesne profit of Ksh 12,000/= per acre per year regarding the cost of lease of land, which totaled to Ksh 360,000/-. He also sought for special damages of ksh 200,000/= because both the Defendants had no right to use his land.

17. The Plaintiff testified that he knew that the Defendants had filed their defence on the 12<sup>th</sup> August 2008, which defence he did not understand, because the defence was to the effect that the 2<sup>nd</sup> Defendant John Kimani Munyaka had bought the land in 1969 wherein that case had been dismissed for want of prosecution.

18. During his cross examination the Plaintiff had admitted to having bought the suit land in 1989, that he had not taken possession immediately, but took possession in 1994 where he had found Kiboi on the land. That at the time he was not aware of the court case John and Kiboi.

19. He also confirmed that whereas the 1<sup>st</sup> Defendant was using about 1 ¼ acres, he utilized the rest of the land. He also confirmed that he had not seen the 2<sup>nd</sup> Defendant on the land and that the previous years he had reported the matter to the District Officer wherein the 1<sup>st</sup> Defendant had been asked to move out of the land but he had refused and that was why he had filed the present suit.

20. His testimony on cross examination by the 2<sup>nd</sup> Defendant had been that he had not asked Kiboi on the proprietorship of the suit land because he had the documents and that he was not aware of the case pending in court. That he knew Kiboi got the land through succession and they were unable to pay the loan which he had paid before he bought the suit land.

21. That when he bought the 3 acres of land, there had been no case pending in court. That it was not John Kimani Munyaka who had sold him the land, but Kiboi. That he neither knew Mumbi Kiboi or the 2<sup>nd</sup> Defendant's father John Kimani Munyaka.

22. When examined by the court, the Plaintiff testified that he had lived on the suit land from the year 1984 to 2008 when he had left the land because of harassment by the 1<sup>st</sup> Defendant who used to go to cultivate on the land while he was still on the same.

23. The Plaintiff's second witness PW 2 Lucy Wangechi Kiboi testified that Mr Kiboi was her husband. That he had passed away on the 26<sup>th</sup> June 2008. That in the year 1982 when they got married, Kiboi was the proprietor of parcel of land No. 19 Milangine scheme in Nyandarua wherein he had sold 3 acres of land to Henry Mwangi Wainaina, the Plaintiff in this case. That after her husband had sold the piece of land to the Plaintiff, Plot 19 had been sub divided into two portions wherein they had sold plot No. 515 to the Plaintiff and had remained with plot

No.514.

24. She confirmed from the abstract of the title herein produced as Pf exh 13, that the same depicted the acreage of parcel of land No. Nyandarua/Milangne/19 to be 3.9 hectares. That entry No. 1 dated the 1<sup>st</sup> August 1986 had been registered to the Settlement Fund Trustee. That entry No. 2 dated the 16<sup>th</sup> June 1987 showed that the land had been registered in her husband's name, Kiboi Nganga Waweru who had been issued with a title on the 16<sup>th</sup> June 1987 as per entry No. 3. That on the 13<sup>th</sup> June 1987, the title had been closed on sub division resulting into plots No. 514 and No. 515 wherein Plot No. 514 was registered to her husband's name as per entry No. 4. She produced the green card as Pf exh 13.

25. She also testified that she did not know the Defendants and that neither she nor her husband had sold to them any part of the land being parcel No. 515. That both the Defendants have no right to claim any land that her husband sold to the Plaintiff.

26. She also confirmed that Mumbi Kiboi was her mother in law and that she would not know if she had sold any land to the Defendants. That at the time Mumbi Kiboi had been registered as a proprietor of land parcel No. 19 as per the green card herein produced as exhibit 12, he had filed the case against the Defendants whom she did not know.

27. On cross examination by the 1<sup>st</sup> Defendant, it was PW2's evidence that she did not know him and had never seen him. That when her husband got the land, the same had been belonged to the Settlement Fund Trustee. When her mother in law died, she had given her husband the land. That her husband was then asked to pay the loan but since they had no money to repay the loan, they had decided to sell 3 acres to Henry Mwangi.

28. That after he had paid them, her husband filed a Succession Cause and they were subsequently given the title to the land. That it had been her husband who had been dealing with plot No 19 and therefore she did not know the Defendant. That after the Plaintiff had informed her of this case, she had been surprised that the 2 Defendants were claiming the same as she and her husband had been the ones who had paid for the loan and had been issued with the title deed.

29. That she did not know who got the 1<sup>st</sup> allotment letter in 1964 and neither did she know when the Defendant trespassed into the Plaintiff's land. That she was aware that the Defendant had a case with her husband. She sought that the Defendants be removed from plot no 515 because she had sold it to the Plaintiff.

30. On cross examination by the 2<sup>nd</sup> Defendant, PW 2 testified that she also did not know him and neither had she seen him. That she did not know his father one Munyaka and that if the suit land had been theirs, then Settlement Fund Trustee would have asked him to pay the loan and then register the same in his name.

31. She also confirmed that indeed there had been a case between his father and her husband. She also confirmed that her mother in law used to have a mental problem, and therefore she was not in a position to know whether she had sold the land or not.

32. That she got married in 1982 but that her mother in law had started living on the suit land in the year 1960 up to the time when she got sick and they took her away to the 2<sup>nd</sup> plot whereby they sold the land in the year 1987. That when they removed her mother in law from plot 19 her husband used to utilize the land.

33. That she did not know whether the 2<sup>nd</sup> Defendant had documents to that land, but that her mother in law had given the land to her husband. That it was not true that they had started interfering with the land after the Succession Cause. She was categorical that they had sold the land to repay the loan for plot No. 19 and that even before the Succession Cause, they used to deal with plot No. 19.

34. That they had built on plot No. 19 in the year 1984 after they had removed her mother in law from the said plot wherein they had employed somebody to look after that plot. That after sub-dividing plot No. 19, they had sold plot No. 515 to the Plaintiff. That they had also sold land to two other people who had not acquired titles to their respective parcels of land.

35. In re-examination, the witness reaffirmed her earlier testimony to the effect that her mother in law had a mental problem. That she could therefore not enter into any agreement and therefore she did not know whether she had sold the land to the 2<sup>nd</sup> Defendant's father.

36. That at the time they were selling the land to the Plaintiff, the Defendants were not involved. That she had sold part of plot No. 514 which is registered in her husband's name and which plot had nothing to do with the case before court. That her husband had filed a Succession Cause pertaining to his mother's property wherein the Defendants were not involved and neither did they object.

37. That there was no case pending at Nakuru Court between herself and the Defendants pertaining land parcel No. 515 or No. 514. The Defendants therefore had no right to interfere with land which her husband sold to the Plaintiff and that they should be evicted from thereon.

38. The next witness was the land Registrar who testified as PW3 to the effect that he had received the court's order dated 19<sup>th</sup> May 2019 directing him to avail and produce the parcel file of land parcel No. Nyandarua/Milangine/515. That after receiving the order, he could not trace the parcel file because of the state of their office where documents were not properly filed.

39. That concerning the suit land, he had searched in the presentation book which received all records brought to the office for registration. From the presentation book, he got the records from December 2007 – March 2010. That the entry of 27<sup>th</sup> March 2008, showed that the suit land was transferred as presentation book No. 254 which had been taken to their office on the 27<sup>th</sup> March 2008. The said entry showed that the transfer of the suit land was from one Kiboi Ng'ang'a Waweru to Henry Mwangi Wainaina for a consideration of Kshs.300,000/-There was a receipt that had been issued being No. 0825534 which was for 250/- for registration fee of transfer.

40. That the documents that ought to have been forwarded to their office were the transfer documents, sale agreement consent for Land Control Board, stamp duty receipt and registration fee, which documents were the ones expected to be filed in the parcel file which could not be traced.

41. That he only managed to trace the green card which is like a title and which remained in their office after a title had been issued. That all details on the dealings on the land were reflected on the green card which showed that the suit land was first registered to Kiboi Ng'ang'a Waweru on the 13<sup>th</sup> June 1989.

42. That the 2<sup>nd</sup> entry was on the 10<sup>th</sup> July 1989 wherein a caution had been registered by John Kimani Munyoka claiming purchaser's interest. That the 3<sup>rd</sup> entry was also a restriction from the Director of Land Settlement Ref No. LD/218/19/80 of 2<sup>nd</sup> March 1995 which was registered on the 19<sup>th</sup> April 1995.

43. The 4<sup>th</sup> entry was dated the 19<sup>th</sup> March 2008 vide a court order removing the entry No. 2, via the Nakuru Case No. 229/1998 whereas the 5<sup>th</sup> entry was on the 27<sup>th</sup> March 2008 removing the 3<sup>rd</sup> entry vide a letter Reg. No. DSO/NYA/5706/28/VOL.1 of 27<sup>th</sup> March 2008. He testified that all these entries were signed by the Land Registrar.

44. That entry No. 6 was a transfer entered on 27<sup>th</sup> March 2008 transferring the land to Henry Mwangi Wainaina of ID No. 1372547 of P.O Box 65 Dundori who had paid Ksh 300,000/-. This was the entry shown in the presentation book.

45. That entry No. 7 was the issuance of a title deed on 28<sup>th</sup> March 2008. As per the record, the owner of the land was Henry Mwangi Wainaina. The title had no encumbrance. That the title could not be given without consent of the land control board.

46. When referred to MFI 3, the Land Registrar testified that the same was a photocopy and that he could not testify on the same because the document did not emanate from his office, but that he could see that it pertained to the parcel of land known as Milangine 515 depicting Kiboi Ng'ang'a Waweru as the vendor and Henry Mwangi Wainaina as the buyer and the person to whom they had issued the title deed to the suit land.

47. That the document showed the consideration as Kshs.300,000/-, the same price which reflected on the presentation book, and the document had been signed by the District Officer Olkalou. He produced the copy of the presentation book as Pf exhibit No.13.

48. When cross examined by the 1<sup>st</sup> Defendant, the witness testified that when a caution is placed on land, there were two ways of removing the same. The 1<sup>st</sup> way would be that the Land Registrar calls the parties to hear them, while the 2<sup>nd</sup> way would be for the complainant to go to court and get an order to remove the caution and only after the Land Registrar receives the order, would he remove the caution.

49. That a consent was normally given by the District Officer, and it was only the District Officer who could answer the question as whether or not he gave consent in the present case. He also conformed that LR. No. 515 was a subdivision of No. 19 Milangine and that he had not carried documents pertaining to parcel No. 514.

50. The 2<sup>nd</sup> Defendant also cross examined the witness who responded that the present suit was in regard to land parcel No. 515. The Plaintiff thus closed its case.

#### **Defendants' case.**

51. The Defendants' case was led by the 1<sup>st</sup> Defendant Stephen Kimani Gachuri ID No. 7050694 who testified as DW1 to the effect that he had been employed by John Kimani Munyaka on his plot No. 19 Milangine in 1979 where he had worked for him for 8 years during which period there had been nobody on that land.

52. That on the 6<sup>th</sup> February 1987 he had been served with summons by the village elder called Gachuki summoning him to his office at 10:00am. That when he arrived at the Chief's office, he found Gachuki and another man called Ruchu Njuguna and two other persons namely Kiboi Ng'ang'a Waweru and his brother David Ng'ang'a, persons whom he did not know at the time.

53. That the Chief had asked him in whose land he was living wherein he had told him that he was living in Munyaka's land and that the said Munyaka lived in Limuru. Thereafter he had been ordered by the chief to go to Limuru to fetch Munyaka and present him to the chief on the 19<sup>th</sup> February 1987. He produced the summons as Df exh 1.

54. That after the encounter at the Chief's office, Kiboi wrote to him a demand letter asking him to vacate the land. That the said demand letter was addressed to him and his father. That he did not leave the land. He produced the letter dated the 23<sup>rd</sup> February 1987 as Df exhibit 2.

55. That later he in the company of Munyaka had gone to the District Officer's office Olkalou wherein they had been informed that all the parties were to meet at the District Officer's office on the 17<sup>th</sup> March 1987, on which date their case was heard by a panel of elders wherein the District Officer told them to go home and live in peace.

56. On the 25<sup>th</sup> March 1987, he received another letter from the Chief stopping him from continuing with his work on that land, which letter he produced as Df exh 3. That subsequently, Kiboi then sought legal assistance from Counsel who wrote to him a demand notice dated the 29<sup>th</sup> March 1988 which he produced as Df exhibit 4.

57. That he did not leave the suit land to the effect that on the 8<sup>th</sup> May 1988, he and his cattle were arrested and he was charged with the offence of illegal grazing via Nyahururu PM case No. 948 of 1988. He was released on bond which he produced as Df exh 5.
58. That in 1990 he had been charged with the offence of trespass in Nakuru High Court Civil Suit No 66 of 1990 wherein the case had proceeded for 7 years and judgment was delivered on the 2<sup>nd</sup> October 1996 dismissing the case. He produced the proceedings and judgment as Df exh 6.
59. That on the 1<sup>st</sup> April 1995, the Plaintiff reported him and the sub-chief of Milangine to the District Officer wherein he had been served with two letters, one for which required him to call elders to arbitrate and the 2<sup>nd</sup> letter directed him go to Olkalou to conduct their case. He produced that said letters as Df exh 7 (a – b).
60. That in the year 2003, the Plaintiff gave the village elder a letter dated 22<sup>nd</sup> March 2003 herein produced as Df exh 8, which was copied to 8 other persons wherein in the same month the Plaintiff reported him to the Chief who summoned him via a letter dated 10<sup>th</sup> March 2003, herein produced as Df exh 9.
61. That on the 26<sup>th</sup> July 1998, he went to the settlement office in Nairobi where he met the Director of Lands and Settlement who gave him a letter dated the 20<sup>th</sup> July 1998 to take it to the Settlement Fund Trustee and which letter he produced as Df exhibit 10. He testified that he was just a worker on the suit land and that he would like the case dismissed as he was not claiming the suit land.
62. In cross examination, DW1 confirmed that he was not claiming the land. That he was an employee of John Kimani who upon his demise, his son, the 2<sup>nd</sup> Defendant had asked him to continue working for him as his farm hand.
63. That Case No. 229 of 1998 was in regard to Munyaka and not him. He confirmed that although the Plaintiff wanted to evict them from the land, yet he had the right to work on the said because he had not been fired by Munyaka.
64. That if the court determined the ownership, he was willing to abide. That he did not know Henry the proprietor and had not seen the title to the land. That he did do not know whether his former advocate had been served with the documents regarding the case.
65. The 2<sup>nd</sup> Defendant had no questions to ask the 1<sup>st</sup> Defendant.
66. The 2<sup>nd</sup> Defendant's testimony was that his father was the proprietor of Plot No. 19. That the 1<sup>st</sup> Defendant had been employed in 1979 by his father to work on the land, where he was been working to date. That after Kiboi Ng'ang'a filed the Succession Cause in the year 1982 upon the demise of his mother, that was the time when they had come to the suit land. That since 1969-1982 there had been nobody on the land.
67. That after filing the succession, Kiboi had proceeded to sub-divide and sell part of the land which land had already been sold by their mother. That the Plaintiff had been one of the people to whom the land had been sold to.
68. That he was not in agreement with the Land Registrar's evidence that the Plaintiff had the land control board consent. That he had the agreement of sale between his father and Mumbi Kiboi dated 16<sup>th</sup> April 1969 which he produced as Df exhibit 12, he also had the Power of Attorney which he produced as Df exh 13, the Application for consent herein produced as Df exhibit 14 and the Transfer document which he produced as Df exhibit 15.
69. He proceeded to testify that at that time the title had not been procured. That Mumbi had no relation with the Plaintiff and that Henry did not buy the land from his father, but from Kiboi Ng'ang'a, the son of Mumbi Kiboi.
70. That he did not know why the Plaintiff, had filed suit against the 1<sup>st</sup> Defendant who was an employee. That since buying the land, that they had been utilizing 1 ½ acres of land wherein Henry also utilizes 1 ½ acres of the land. That they had been on that land since his father bought 10 acres of it. That there were other parties who were sold to 2 acres of land, and ½ acre respectively wherein they were using the rest of the land measuring 6 acres.
71. That his father had bought the land and paid all the dues. Subsequently after the Plaintiff had upon lodging their succession cause, fraudulently sold his father's land to other people. That since the year 1982 after the Succession Cause, there had been numerous complaints advanced and cases filed because of the suit land. That the case had been filed before the Nyahururu Magistrate's Court, then it was filed in the Nakuru High Court before it was transferred to this court. He sought that the case be dismissed so they could proceed with the case involving Plot No. 19 which belonged to Kiboi Ng'ang'a.
72. In cross examination, DW2 testified that he knew Kiboi Ng'ang'a now deceased. That John Kimani who was his father had filed case No. 229 of 998 in the Nakuru High Court where he had sued Kiboi Ng'ang'a Waweru. That he did not know that the case had been dismissed. That further, he did not understand the issues surrounding the case that had been reinstated as Nyahururu ELC No. 21 of 2017.
73. That there had been no case between him and the Administrators of Kiboi Ng'ang'a. That his father had bought Plot No. 19 on the 16<sup>th</sup> April 1969 wherein he had filed suit in 1987. That there was no case between his father and Mumbi Kiboi who had no title to plot No. 19.
74. That Plot No. 19 first belonged to the Settlement Fund Trustee. That the records at the headquarters were clear to the effect that the land belonged to his father. That during that time, there were no title deeds. That Henry and Kiboi procured his documents fraudulently because the 2<sup>nd</sup> Defendant's father used to pay the loan to Settlement Fund Trustee, the receipts which were in the court file, copies which he did not

carry.

75. When referred to Pf exh 2, he confirmed that the same depicted payment by Kiboi but stated that Henry should not have paid for the loan since it was his father's land.

76. When referred to Pf exh 13, the 2<sup>nd</sup> Defendant confirmed that indeed the Settlement Fund Trustee had transferred the land to Kiboi Waweru and not to Mumbi Kiboi, who then received the title on the 16<sup>th</sup> June 1987. He also confirmed that suit land was subdivided thus resulting into plot No. 514 and 515 but stated that this was fraudulent because that the payment of the loan had been made by persons who were not supposed to have paid for the same. He also confirmed that they never got any title.

77. When referred to Df exh 15, he testified that although the document had been filed at the land registry, yet it had no stamp. That although he had heard the testimony of the Plaintiff and his witness yet, he had documents which gave him the right to use the land on which they had lived for 32 years and had continued using it to date.

78. There was no cross-examination from the 1<sup>st</sup> Defendant wherein the defence closed its case and parties filed their respective submissions.

#### **Plaintiff's submission.**

79. The Plaintiff vide his submissions dated the 7<sup>th</sup> June 2019 and filed on the equal date framed his issues for determination as follows;

- i. Whether the Plaintiff is the sole registered proprietor of Nyandarua/Milangine/515 with all the privileges belonging or appurtenant thereto.
- ii. Whether the Defendants were trespassers on the suit land and whether they should move therefrom and in default be evicted therefrom.
- iii. Whether the Plaintiff is entitled to permanent injunction and general damages.
- iv. Who should bear the costs of the case.

80. On the first issue for determination as to whether the Plaintiff was the sole registered proprietor of land parcel No. Nyandarua/Milangine/515, it was the Plaintiff's submission that as evidenced by the abstract of title for Nyandarua/ Milangine/19, the same was clear that the land was registered to the Settlement Fund Trustee as proprietor on 1<sup>st</sup> August 1986 wherein after, its interest had been transferred to Kiboi Ng'ang'a Waweru wherein on 16<sup>th</sup> June 1987 a title deed was issued to him. Therein after the said Kiboi Ng'ang'a Waweru caused the land to be subdivided giving rise to No. Nyandarua/Milangine/514 and 515, the latter of which he transferred by a sale agreement to the Plaintiff on 27<sup>th</sup> March 2008 who then became registered as proprietor of the said parcel of land thereby gaining protection and under sections 27 and 28 of the repealed Registered Land Act. That his rights were now protected under the new land regime as captured in Sections 24, 25 and 26 of the Land Registration Act

81. It was the Plaintiff's submission that if at all John Kimani Munyaka had any valid claim over plot No.19, he ought to have enforced the contract within six years as provided for under Section 4 of the Limitation of Actions Act. It therefore followed that the entry on the suit land and continued occupation by the present Defendants was unlawful and incapable of ousting the Plaintiff's registered proprietorship.

82. That the courts in the country had upheld the sanctity and indefeasibility of a title that was legally acquired. Such title could only be defeated on the grounds of fraud and misrepresentation or where it had been acquired illegally, un-procedurally or through a corrupt scheme. In the present case, there was no ground upon which the title issued to the Plaintiff could be cancelled. There was no counterclaim for cancellation of the Plaintiff's title and no particulars of fraud, misrepresentation or illegality was pleaded by the Defendants in their defense. The court could therefore not consider the Defendants' allegations in court that the Plaintiff got his title through unlawful means. The Plaintiff relied on the case of **Shimoni Resort vs Registrar of Titles and 5 Others [2016]e KLR**

83. The Plaintiff further submitted that from the evidence adduced in court it was clear that he had complied with the provisions of the law of the contract the Land Control Act, the Stamp Duty Act and the Registered Land Act. That the purported transfer between Mumbi Kiboi and John Kimani Munyaka was void ab initio on the ground that Mumbi had not acquired a registrable interest on plot No. 19. That the purported sale could not be completed because the loan owed to the Settlement Fund Trustee had not been paid and the certificate of consent to transfer was not acted upon therefore the transaction was a non-starter.

84. That on the other hand, PW2 had confirmed that her husband Kiboi Ng'an'ga Waweru who was the registered proprietor of plot No.19 had subdivided it into plots number 514 and 515 wherein he had legally sold and transferred the latter Plot to the Plaintiff who then became a proprietor and was entitled to enjoy proprietary rights to the exclusion of all others which rights included the right to exclusive possession and occupation.

85. On the second issue for determination as to whether the Defendants were trespassers on the suit land and whether they should move therefrom and in default be evicted, it was the Plaintiff's submission that the word trespass as defined in the Concise Oxford English dictionary the 12<sup>th</sup> edition, as **entering someone's land or property without permission**. Since the sale and transfer between Mumbi Kiboi and John Kimani Munyaka was of no legal consequence, the Defendants were therefore unlawfully and illegally occupying the suit land. There was neither evidence adduced by the Defendants that John Kimani Munyaka was the proprietor of plot No. 19 or that DW1 was his employee. That the 1<sup>st</sup> Defendant was therefore using the suit land as a trespasser as he did not have the Plaintiff's consent. That since the

Plaintiff had proved that the Defendants were trespassers on the suit land, they should be ordered to vacate the same forthwith or within such time as the court may deem fit failing for which they should be evicted therefrom.

86. The Plaintiff's submission on the third issue for determination as to whether he was entitled to permanent perpetual injunction and general damages for trespass he relied on **Richard Kuloba's book on the Principles of injunction** at paragraph 1.2.1, which was explicit on perpetual injunctions as well as on **Hon Sir Robert Megarry's work in Snell's Principles of Equity** to submit that perpetual/permanent injunctions are granted only after a party had established his right and the actual or threatened infringement of it by the other party.

87. That the Plaintiff's evidence on record clearly showed that he was the registered and absolute proprietor of Nyandarua/ Milangine /515, that the Defendants were trespassers on the suit land hence they had interfered with his rights and interests as well as his quiet possession and occupation. He was thus entitled to a grant of permanent injunction as prayed.

88. On the issue of general damages for trespass, it was the Plaintiff's submission that the same be awarded to him the Defendants having obstructed him from making use of his land since the time of its purchase. That they had been cultivating on the land and cutting down trees that had been planted by himself without any color of right. That he had suffered loss and damage by reason of denial of his rights to use his property. The Plaintiff relied on the case of **Nakuru Industries Ltd vs. S.S Mehta and Sons [2016] eKLR** which case set out the principles on computation of damages in an action for trespass.

89. The Plaintiff also relied on the decided case of **Duncan Nderitu Ndegwa vs Kenya Pipeline Company Ltd & Another [2013] eKLR** to submit that an award of Ksh 300,000/= as general damages for trespass was fair and reasonable in the circumstance of the case. That since they had proved that they were entitled to the prayers sought in the plaint that the court awards them costs of the suit as sought.

#### **Defendants' Submission.**

90. The Defendants submitted that it was not in dispute that the initial parcel of land being plot No. 19 Milangine scheme which was under the management of the Settlement Fund Trustee was allotted to Mumbi Kiboi as evidence by a letter from the Director of Lands Adjudication, herein produced as Df exh 11.

91. That the said letter confirmed that the Settlement Funds Trustees were unaware that the said plot had been sold by Mumbi Kiboi to John Kimani Munyaka wherein they had obtained the relevant consent of the said sale and that any documentation that was done contrary was irregular.

92. That the Plaintiff herein did not produce any letter of allotment from the Settlement Fund Trustee to show that the suit land had been allotted to him and neither did they produce any letter of cancellation of the allotment issued to Mumbi Kiboi nor cancellation of the relevant consent referred to by the Director of Adjudication which consents were meant to facilitate the transfer of plot No. 19 Milangine scheme to John Kimani Munyaka.

93. It was their submission that the 2<sup>nd</sup> Defendant had produced a sale agreement between Mumbi Kiboi and John Kimani wherein there is no evidence from the Plaintiff that that agreement had either been rescinded or repudiated by the parties. The said agreement was never challenged in any Court of law or declared null and void. The Defendants relied on the decided case in **Joseph Mathenge Kamutu vs Joseph Karanja Wainaina & Another** (sic) to buttress their submission.

94. It was further their submission and while relying on the decided case of **Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri [2014] eKLR** that by selling plot No. 19 Milangine scheme and handing over its possession to John Kimani Munyaka, the parties had created a constructive trust. In the circumstance any dealings that would affect the said plot of land was subject to the existence of a constructive trust that subsisted between Mumbi Kiboi and John Kimani Munyaka. That after the said agreement on the 16<sup>th</sup> April 1969, John Kimani Munyaka had employed the 1<sup>st</sup> Defendant as his caretaker of the land.

95. That the abstract of the title to plot No. 19 Milangine scheme did not indicate whether the registration to Kiboi was through transmission or not as it appeared that the transfer was direct meaning that Kiboi was the allottee of plot No.19 Milangine scheme which was not the case. PW2 did not produce the certificate of confirmation that was used to transfer plot No. 19 Milangine to Kiboi and so the registration of Kiboi as the proprietor of plot No. 19 Milangine scheme was tainted with fraud and as such was null and void. The Defendants relied on the decided case of **Daudi Kiptugen vs Commissioner of Lands & 4 Others [2011] eKLR**.

96. The Defendants submitted that Kiboi and lacked any legal capacity to deal with plot No. 19 Milangine and therefore its subsequent sub divisions into two parcels of land was of no legal effect. That the registration of the Plaintiff therein to the subsequent sub division of plot No.19 Milangine, being Nyandarua/Milangie/515 was of no legal consequence and therefore the Plaintiff could seek to have the fraudulently acquired title protected by the court.

97. The Defendants also submitted that the current suit had been caught up by the law on limitation. That the said agreement dated 16<sup>th</sup> April 1969 permitted John Kimani Munyaka to take possession of the parcel of land. In the year 1979 and the said the John Kimani Munyaka employed the 1<sup>st</sup> Defendant as his care taker and since then, the possession has been retained by the Defendants and/or the said to John Kimani Munyaka.

98. Further, that since the Plaintiff was registered as proprietor of the suit land on 13<sup>th</sup> June 1989, by the time he acquired the proprietorship rights, the Defendants were already in possession of the suit land. The instant case was filed in the year 2008 by which time, the law of limitation had caught up with the Plaintiff who did not seek extension of time to institute the suit out of time. The Defendants thus sought that the court do find that the Plaintiff had not proved his case on a balance of probabilities and to dismiss the suit with costs.

## Analyses and Determination.

99. I have considered the matter before me the, evidence as well as the submission, the authorities and the applicable law. What comes out clearly in evidence is that the suit land herein which was originally known as Plot No. 19 Milangine Scheme was allocated to the deceased one Mumbi Kimboi by the Settlement Fund Trustee. That subsequently on the 16<sup>th</sup> April 1969, the said Mumbi Kimboi entered into a sale agreement with John Kimani Munyaka to sell to him the said parcel of land. That Mumbi Kimboi had proceeded to obtain the necessary consents and it was while he was in the process of the execution of the transfer of the said property to one John Kimani Munyaka in the year 1975 that the said Mumbi Kimboi passed away before the whole process of the transaction and registration could be completed.

100. Up to this point and keeping in mind that there had been an intention and an ongoing process to transfer Plot No 19 to John Kimani Munyaka by Mumbi Kimboi, that John Kimani had placed the 1<sup>st</sup> Defendant on Plot No 19 as its caretaker, pending the completion of the transaction. The caretaker continues to remain the land to date.

101. While these issues were pending and following the death of Mumbi Kiboi, her son Kiboi Nganga Waweru petitioned for letters of administration wherein after the issuance of a Grant, he had registered Plot No. 19 to his name on the 16<sup>th</sup> June 1987 and had been issued with a title deed on the same date.

102. Following the said registration as the proprietor of parcel No. Nyandarua/Milangie/19, the said Kiboi Nganga Waweru subdivided Plot No 19 into two giving rise to No. Nyandarua/Milangie/514 and 515 which he registered in his name and sold the latter to the Plaintiff in the present suit vide the sale agreement of 24<sup>th</sup> March 1987. The title to parcel No. Nyandarua/Milangie/19 had thus been closed upon sub division.

103. It was upon the transmission of parcel No 19, its subdivision and sale of part of it herein that gave rise to the filing of Nakuru High Court Civil Suit No. 229 of 1998 wherein John Munyaka sought declaratory orders against Kiboi Nganga Waweru to the effect that he had acquired No. Nyandarua/Milangie/515 as a trustee for him. The suit was dismissed on the 4<sup>th</sup> July 2007 for want of prosecution wherein the Plaintiff herein, Henry Mwangi Wainaina was subsequently registered as proprietor of parcel No. Nyandarua/Milangie/515 on the 28<sup>th</sup> March 2008 and a title issued pursuant to which he filed the present suit against the 1<sup>st</sup> Defendant and John Munyaka, the original 2<sup>nd</sup> Defendant who passed away in the pendency of the suit and was substituted by his son the current 2<sup>nd</sup> Defendant.

104. It is thus against this background, and keeping in mind the pleadings of both parties that bind them, that I find the issues that arise for my determination as being;

- i. Whether there was a valid sale agreement between Mumbi Kiboi and John Kimani Munyaka on the 16<sup>th</sup> April 1969.
- ii. Whether Kiboi Nganga Waweru was the registered proprietor of parcel No. Nyandarua/Milangie/19
- iii. Whether the Plaintiff was the registered proprietor of parcel No. Nyandarua/Milangie/515
- iv. Whether the Defendants are trespassers to the suit land

105. On the first issue for determination, I find that from the evidence on record as well as the register to parcel No. Nyandarua/Milangie/19 that the said parcel of land No. 19 was registered to the Settlement Fund Trustee on the 1<sup>st</sup> August 1986, in essence therefore it simply means that by the time Mumbi Kiboi and John Kimani Munyaka entered into an agreement for sale of the same on the 16<sup>th</sup> April 1969, the said Mumbi Kiboi had no title to pass. There was no evidence placed before court that parcel of land No 19 was ever transferred to Mumbi Kiboi and that she had been issued with certificate of lease

106. In the case of **Evans Kafusi Mcharo v Permanent Secretary, Ministry of Roads, Public Works and Housing & another [2013] eKLR** the court looked at the legal position of a letter of allotment and stated that;

*In making a distinction between petitioners who held letters of allotment and those who were registered proprietors of the land in question, this Court in the case of **John Mukora Wachuhi & Others –vs- Minister For Lands & Others High Court Petition No. 82 of 2010** observed that the distinction is based on the fact that the right to property protected under the law and the Constitution is afforded to registered owners of land; that a letter of allotment is not proof of title (my Emphasis) as it is only a step in the process of allocation of land. The Court relied in that regard on the position enunciated by the Court of Appeal in the case of **Wreck Motors Enterprises –vs- The Commissioner of Lands and 3 Others Nairobi Civil Appeal No. 71 of 1997 (Unreported)**, where the Court of Appeal stated as follows:*

*‘Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to provisions held.’*

107. I find that although the 2<sup>nd</sup> Defendant was put in possession of parcel of land No 19 in the year 1979, a look at the green card to the said parcel of land speaks of a scenario whereby the contract entered between Mumbi Kiboi and John Kimani Munyaka was entered into at the time when the Mumbi Kiboi had no title to pass. The sale agreement was entered into in the year 1969, subsequently the suit land was registered to the Settlement Fund Trustee on the 1<sup>st</sup> August 1986.

108. On the second issue for determination as to whether Kiboi Nganga Waweru was the registered proprietor of parcel No. Nyandarua/Milangie/19

109. From the oral evidence as well as the documentary evidence adduced, it is clear as evidenced by the abstract of title for Nyandarua/Milangine/19, that the land was registered to the Settlement Fund Trustee on 1<sup>st</sup> August 1986 wherein after, its interest had been transferred to Kiboi Ng'ang'a Waweru who on the 16<sup>th</sup> June 1987 was issued with a title deed. Therein after the said Kiboi Ng'ang'a Waweru caused the land to be subdivided into two giving rise to No. Nyandarua/Milangine/514 and 515 which were registered in his name. Parcel No 19 was closed upon its sub division on the 13<sup>th</sup> June 1989.

110. On the 3<sup>rd</sup> matter for determination, again a look at the abstract of title for Nyandarua/Milangine/515, the same is clear that Kiboi Ng'ang'a Waweru was registered as its proprietor on the 13<sup>th</sup> June 1989. Vide a sale agreement entered between him and the Plaintiff Henry Mwangi Wainaina on the 24<sup>th</sup> March 1987, there had been a transfer of the same to the Plaintiff wherein he had been registered as its proprietor on the 28<sup>th</sup> March 2008

111. The provision of section 24(a) and 25 and 26(1) of the Land Registration Act No. 3 of 2012 outlines the interests and rights of a registered proprietor as follows; Section 24 of the Land Registration Act provides as follows:

*Subject to this Act—*

*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; and*

112. Section 25 of the Land Registration Act provides as follows

*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.....*

113. Based on the above provisions of the law as well as the evidence adduced in court, I find in affirmative issues for determination in (ii) and (iii) above. The proprietors therein by becoming registered as proprietors their respective parcels of land gained protection and under Sections 27 and 28 of the repealed Registered Land Act now captured under sections 24, 25 and 26 of the Land Registration Act.

114. On the last issue for determination, having found that indeed the Plaintiff herein was the registered proprietor of parcel No. Nyandarua/Milangine 515, by virtue of the provisions of the law which provisions empower the Plaintiff by virtue of being registered owner of the suit land with vested rights and privileges therein and which no person should interfere with it, I find that the Plaintiff is indeed entitled to protection by the law against the Defendants who have interfered with his rights and privileges over the suit land.

115. The issue as to whether the Plaintiff suffered any loss or damage on account of the impugned activities by the Defendants, I find that there being evidence that the Defendant's action of entering into the Plaintiff's land and carrying out the impugned activities was lawful or otherwise legally sanctioned, the Defendant's action therefore constituted trespass to land.

116. It is trite law that trespass to land is actionable *per se* (without proof of any damage). See the case of **Park Towers Ltd v. John Mithamo Njika & 7 others (2014)** eKLR where J.M Mutungi J., stated:-

*'I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ...'*

117. In the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013)** eKLR P. Nyamweya J. held:-

*"...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' trespass"*

118. The net result is that I find and hold the Plaintiff's suit against the Defendants has been proved on a balance of probabilities. I accordingly enter judgment in favor of the Plaintiff as against the Defendants in the following terms;

i. The Defendants and members of their family, their agents and/or servants and all persons allied to or associated with the Defendants do forthwith vacate land parcel No. Nyandarua/Milangine/515 within 60 days upon delivery of this judgment and if they fail to so vacate, an order of eviction be issued against them.

ii. That a permanent injunction is hereby issued restraining the Defendants, by themselves, their agents and/or servants and all persons allied to or associated with the Defendants from entering, cultivating, remaining, trespassing or in any way dealing with LR Nyandarua/Milangine/515.

iii. General damages for trespass of Kshs.100,000/=.

iv. Costs and interests of the suit at court rates.

**Dated and delivered at Nyahururu this 17<sup>th</sup> day of December 2019**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**