



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC.578 OF 2005

FRANCIS MBURU GITU.....1ST PLAINTIFF

GATAMA NDUNGU.....2ND PLAINTIFF

CHEGE KARANJA.....3RD PLAINTIFF

(Suing on their own behalf

and on behalf of 97 others)

-VERSUS-

NANGA KIHOTO FARMERS

CO-OPERATIVE SOCIETY LTD.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

JUDGEMENT

By a *Plaint* dated 13th May 2005, the Plaintiffs herein filed a Representative suit on behalf of other 97 persons against the Defendants herein and sought for the following orders:-

a. A permanent injunction restraining the Defendants whether by themselves, their servants and/or agents from taking possession, subdividing, alienating, selling, transferring, leasing, charging, utilizing or otherwise dealing in any manner whatsoever with the property known as LR.No.10864 (IR.No.10383)-Thika District.

b. A declaration that the transfer of the suit property to the 1st Defendant is null and void.

c. An order directing the 2nd Defendant to forthwith cancel the transfer registered in favour of the 1st Defendant on 16th November 1978.

d. A declaration that the Plaintiffs are the lawful and rightful owners of the property known as LR.No.10864 (IR.No.10383)-Thika District or alternatively an order that the Plaintiffs

have acquired the suit property through adverse possession.

e. An order directing the 2nd Defendant to forthwith transfer and register the suit property in favour of the Plaintiffs.

f. Costs of this suit plus interest thereon.

g. Any other relief as this Court may deem fit to grant.

In their statement of claims, the Plaintiffs alleged that together with the 97 other persons, they were all employed by the 1st Defendant in various capacities. It was also their claim that prior to being employed by the 1st Defendant, the Plaintiffs and the 97 others were originally employed in various capacities by *Nanga Estates Ltd*, which Company was the original owner of the property known as **LR.No.10864 (IR No.18383)** measuring **850 acres** or thereabout situated in Thika District. Further that the said company also owned **LR.No.10863 (IR No.10384)**.

It was further alleged that on or about **1963**, **LR.No.10863** was sold to *East West Coffee Estates Ltd* by the original Company whereas **LR.No.10864**, was handed over to the said Company with a clear understanding from the original owner (*Nanga Estates Ltd*), that the subject land would be held by the said Company in **trust** and **benefit** for the Plaintiffs and all the other employees aforesaid as compensation, and/or gratuity for having worked for *Nanga Estates Ltd*, for many years. The Plaintiffs further alleged that *East West Company Ltd*, would up its operations and the Plaintiffs and 97 others continued to work for *Gatanga*

Farmers Cooperative Society Ltd, which also would up and the Plaintiffs were finally absorbed by *Nanga Kihoto Farmers Co-operative Society*, 1st Defendant on or about **1975**.

It was their further contention that during their working period they resided on the suit property **LR.No.10864**, together with their families. That the 1st Defendant continued to hold the subject property in trust and benefit of the Plaintiffs herein. Alternatively that the Plaintiffs stay and possession of the subject property was quiet and uninterrupted for a period of more than twelve (12) years and they accordingly acquired the property through **adverse possession**. It was their further allegations that despite the above understanding, on or about **1997**, the 1st Defendant cunningly without any justification evicted the Plaintiffs and others from the suit property while promising to resettle them elsewhere. That the Matter was reported to the local **District Officer at Makuyu** and **Thika District Cooperative Officer**, who arbitrated the matter for a while but did not give a decision of the said arbitration. They later learnt that the suit property was registered in the name of the 1st Defendant herein.

It was the Plaintiffs contention that the purported transfer of the suit property to the 1st Defendant in **1978**, was illegal, null and void and the said illegal transfer was entered, accepted, registered fraudulently in connivance with the 2nd Defendant. The Plaintiffs particularized the instances of fraud and illegality in paragraph 12 of the Plaint.

Further that though the Defendants are aware of the fraudulent transfer of this suit property to the 1st Defendant, the Defendants have deliberately shielded these facts from the Plaintiffs in a bid to defeat their legal right and/or claim over the subject property.

It was their further contention that the 1st Defendant is intending to subdivide the property amongst its shareholders and has already instructed the surveyor to subdivide the same. Therefore the Plaintiffs are apprehensive that they stand to suffer irreparable loss if the 1st Defendant is not stopped from subdividing the suit property. The Plaintiffs therefore urged the Court to allow their claim entirely.

The suit is contested. The 1st Defendant filed its statement of Defence on **15th June 2005** and denied all the allegations made in the Plaint. They further alleged that the suit is time barred under the provisions of

Limitation of Actions Act Cap 22 Laws of Kenya and should be struck out or dismissed with costs.

The 1st Defendant denied any existence of any understanding that the Plaintiffs and others would be paid their employment benefits by use of this disputed parcel of Land, **LR.No.10864**. The 1st Defendant denied that it was a party to such understanding and that such agreement was not legal and enforceable in law against the Defendants. Further, 1st Defendant denied that the Plaintiffs were in exclusive possession or stayed on its land as alleged and averred that a claim of adverse possession cannot lie in the circumstances of this case. The 1st Defendant also denied ever evicting the Plaintiffs as alleged and did put the Plaintiffs to strict proof thereof.

The 1st Defendant further denied the allegations and particulars of fraud and/or illegality as alleged by the Plaintiffs and did put them to strict proof thereof. It was the 1st Defendant's averments that the purchase and transfer of the suit land in its favour was proper and in accordance with the law. Further the 1st Defendant denied that it acquired the suit land in an illegal manner as alleged by the Plaintiffs and it averred that it is perfectly entitled to utilize its property in the manner that it deems fit. Further it denied that the Plaintiffs have absolute and legitimate and/or sustainable claim against the 1st Defendant. Therefore the 1st Defendant urged the Court to dismiss the Plaintiffs suit entirely with costs.

The 2nd Defendant filed its Amended Statement of Defence on **23rd February 2006**, and denied in *toto* all the allegations made in the Plaint. Further, the 2nd Defendant averred that the suit land **LR.No.10864**, was first transferred to **Gatanga Farmers Co-operative Society Ltd** on **11th October 1977**, for a consideration of **Kshs.3,320,000/=** who subsequently transferred the same to **Nanga Kihoto Farmers Co-operative Society Ltd**, the 1st Defendant on or about **16th November 1978**, for a consideration of **Kshs.3,320,000/=**. The 2nd Defendant further averred that pursuant to the above transaction, the 1st Defendant is the rightful and legitimate owner of the suit land herein. It further averred that the suit herein is **scandalous** and **discloses no cause of action** against the 2nd Defendant. Further that the suit is fatally defective and should be struck out. The 2nd Defendant further prayed for dismissal of the Plaintiffs suit with costs.

The Plaintiffs filed their reply to the 1st Defendant's Defence and averred that the 1st Defendant took over the successive employment of the Plaintiffs herein and 97 others with the full knowledge of the matters pleaded therein. The Plaintiffs reiterated that the 1st Defendant's title to the suit land was **illegal, null and void**. It was the Plaintiffs contention that the suit herein discloses sustainable cause of action as pleaded and the same should be allowed wholly as pleaded and the Defendants statement of defence dismissed with costs.

After various interlocutory applications, the hearing commenced on **10th March 2015**. The Plaintiffs called three witnesses in support of their claim. The 1st Defendant called three witnesses whereas the 2nd Defendant did not call any witness though it participated in the proceedings. Thereafter the parties filed their respective written submissions.

The Plaintiffs Case

PW1 – Gatama Ndung'u, one of the Plaintiffs herein told the Court that he signed his witness statement on **31st January 2010**, and he adopted it fully as part of his evidence. He confirmed that he filed the suit for himself and on behalf of 97 other persons who gave him authority to represent them. He referred to the order of the court that granted them leave to file the suit out of time. It was his evidence that their claim is for **LR.No.10864 (IR No.18383)**, which is approximately **850 acres**, and situated in Thika District.

It was his testimony that the Plaintiffs and 97 other persons were all employees of the 1st Defendant. He also testified that they were first employed by **Nanga Estate Ltd**, and the Director then was one **Mr.Crest**. He attached his documents to show that he was first employed by **Nanga Estates Ltd**. Later

Nanga Estates Ltd sold the land to **Gatanga Farmers**. Later the parcel of land in issue was transferred to **East & West Coffee Estates Ltd** on **6th September 1963** and the Plaintiffs and other 97 employees remained as employees of **East & West Coffee Estates Ltd**. He also testified that the understanding was that **East & West Coffee Estates Ltd**, was to hold the suit land in **trust** for the employees as it had been given to them by the previous owner.

After some time **East & West Coffee Estates Ltd**, ceased operating in the said farm and sold it to **Gatanga Farmers** on **11th October 1977**. Further that when **Gatanga Farmers** came in, the Plaintiffs and other 97 persons continued working on the farm with the understanding that the suit land would be subdivided and given to the Plaintiffs. That the said understanding was in writing and the said written understanding was given to one of them and the said letter was written by **Mr. Patel**, who was the owner of **East & West Coffee Estates Ltd**, and he confirmed the land belonged to the employees of the said estate. He also testified that this letter was later taken to the area chief, one **Njenga Gachigo** who later took it to **Mr. Mwicigi** who was one of the leaders in Gatanga.

The witness further testified that instead of being given the land as promised, they were evicted from the said land and they did not see the said letter again. That the understanding was that the property was supposed to be held in trust for the employees and that is why they have filed this suit. He also testified that **Gatanga Farmers Co-operative Ltd** moved out of the farm and left it to **Nanga Kihoto Farmers Co-operative Society**, the 1st Defendant herein and the said Society became registered as the owners of the suit land in **1978**. That when **Nanga Kihoto** took over the management of the farm, the Plaintiffs were still working there, but were evicted gradually from **1992**. He also stated that after their eviction, they reported the matter to the District Officer, Makuyu and to the District Co-operative Office. He produced the minutes of the Division Tribunal at Makuyu. That the tribunal held that it had no power to cancel any title deed and advised them to file a suit in court.

Further that after the Plaintiffs realized that the suit land had been transferred to **Nanga Kihoto** (1st Defendant), they noted that there was no consent from **Muranga Land Control Board**, and that the consent found in the file was not a proper consent. That the Plaintiffs were never informed about the sale of this suit land to the 1st Defendant. Further that given that the 1st Defendant was a **Co-operative Society**, they noted that the 1st Defendant did obtain consent of **Commissioner of Co-operative Societies** to purchase the suit land. He also testified that they never saw any sale agreement between **Nanga Kihoto** and **Gatanga Farmers Ltd** and no transfer was signed and therefore the said transfer of the suit land was not proper.

That the above anomalies made them to come to court and after filing the suit, an injunction order was granted but the Defendants have disobeyed the same as they have sold the land to other persons. It was his further testimony that the suit land is now idle and there is no farming of coffee. However, people have been building on the said suit land. He urged the Court to allow their claim as they have lived on the suit land for **over 50 years**. It was his prayer that the court should cancel the transfer and title issued in favour of the 1st Defendant and then directs that the land be distributed to the Plaintiffs and 97 others.

In cross-examination, he stated that he could not remember the date when he started working on the suit land. That the suit land was promised to them in **1963** and they were about 100 employees and these 100 persons are the Plaintiffs herein. He confirmed that he left employment in the suit land in **1992**, and there were no additional employees and that this suit is on behalf of 100 initial employees of **Nanga Estates Ltd**.

He also confirmed that after he was sacked, he was paid all his terminal dues. He also clarified that this suit land was initially owned by one **Mr. Crest** who granted the land to them and informed **Mr. Patel** of **East & West Coffee Estates Ltd** of the said grant. He also stated that before being evicted, he had worked in the farm for about **20 years**. That he was evicted in **1992**, and was paid his terminal dues. That the suit land was compensation for the many years they had worked on the said farm. He clarified that the letter was given to the chief by **Mr. Patel** and the chief was to take it to the District Officer so that they could get the land. However, the chief never returned the letter to them. He further clarified that

from the time of filing the suit, two Plaintiffs have now died during the pendency of this suit. He further reiterated that the suit land was transferred without consent from the Land Control Board and therefore this transfer was not done according to the laid down laws. That the reasons why the Plaintiffs have sued the Commissioner of Lands is because the transfer was fraudulent and they would wish the Commissioner of Lands to cancel the said title document.

PW2 – Francis Mburu Gitu, the 1st Plaintiff herein, also adopted his witness statement which is dated **30th January 2012**. He told the Court that he knows about the issue herein of **LR.No.10864**, which is about **850 acres**. He further told the Court that he has brought this matter to court together with 99 other persons who have an interest in the suit land. It was his testimony that he started working for **Nanga Estates Ltd** in **1962**, as a pruner. The other 99 persons were also working in the said Company in different capacities. Later the estate was sold to **East & West Coffee Estates Ltd** in **1963**, and they continued to work on the said land. It was his further testimony that the suit land was given to them by **Nanga Estates Ltd** as a gift for having worked on the said land for long. That even when the land was handed over to **East & West Coffee Estates Ltd**, the understanding was that the said Company would hold the land in trust for the employees. The Director of **East & West Coffee Estates Ltd** was mandated to distribute this land to the employees. However, **East & West Coffee Estates Ltd** did not transfer the land to them as promised by **Mr. Patel**, the Director of this Company. He further testified that **Mr. Patel** gave a letter of that understanding to one **Njoroge Gachiengo**, in the presence of a Director from **Nanga Estates Ltd**. That when **East & West Coffee Estates Ltd** operated the farm, all the 100 employees worked for the said Company with understanding that they would receive their shares from **LR.No.10864**. Later **East & West Coffee Estates Ltd** sold the land to **Gatanga Farmers Ltd** who also did not transfer the land to the employees. However, the employees continued to work for **Gatanga Farmers Ltd** and believed that the land was theirs. Later **Nanga Kihoto Farmers Co-operative Society** came in **1978** and the Plaintiffs continued to work therein as employees still hoping to get the land distributed to them.

However when they sought for the truth in **1992**, the 1st Defendant evicted them one by one. They were given their terminal dues and chased out of the land. All the Plaintiffs herein were evicted from the suitland between **1992 – 1993**, and the said land was never distributed to them. It was his testimony that after eviction, they reported the matter to **District Officer, Makuyu** and the matter was referred to a tribunal. However, they were not given a verdict for the said hearing at the tribunal. They were later informed that the land had been transferred to the 1st Defendant and they were urged to file a case in court. He further testified that the 1st Defendant is a Co-operative Society and it did not have permission to purchase the land from the Ministry of Co-operative. Further that the 1st Defendant did not obtain consent to transfer the land to its name from the Muranga Land Control Board.

That the consent attached to the file was not genuine as it had no official stamp from the Land Control Board. He urged the Court to summon the Chairman of Muranga Land Control Board to explain about the said transfer. Further that there was no sale agreement and therefore the transfer was not proper. It was his further testimony that the 1st Defendant stopped operating on the land since **1995**, and there are no activities going on now. That after they filed this suit, the Plaintiff obtained an injunctive order to stop any subdivisions and/or any dealings by the 1st Defendant on the suit land. However, this order of the court was not obeyed because the 1st Defendant continued to subdivide the land even with the clear order of the court. He urged the Court to cancel the transfer of this land to 1st Defendant and then distribute the same to the Plaintiffs as per the wishes of the Directors of **Nanga Estates Co.Ltd**. He reiterated that this land was not properly subdivided and transferred to the 1st Defendant and thus their prayers in the Plaint.

In cross-examination, he confirmed that he did not have any documents to show that he worked for the 1st Defendant. He further reiterated that he started working for **Nanga Estates Ltd** in **1962** when he was about **20 years** old. He confirmed that he worked with the 99 other people who are claimants herein. He further stated that this land **LR.No.10864**, was given to 100 persons who are the Plaintiffs herein and it was given to them as a gift for the number of years they had worked on the said land. He confirmed that he worked for **Nanga Estates Ltd, East & West Coffee Estates Ltd, Gatanga Farmers Ltd** and finally

Nanga Kihoto Co-operative Ltd, the 1st Defendant herein.

He however had no documents to prove such employment because his house was razed down by fire and subsequently his documents got destroyed too. He further stated that he was not given any employment documents by **Nanga Kihoto Farmers Ltd**. He also reiterated that the Directors of **East & West Coffee Estates Ltd** were given the land to hold in trust for the employees. That the letter to that effect was given to the area chief, one **Njenga Gachiengo**. It was his further testimony that **East & West Coffee Estates Ltd** handed them over to **Gatanga Farmers Co-operative Society** and the said **Gatanga Farmers** also held the land in trust for them. Further that they only came to know the land was registered in the name of the 1st Defendant in **2003**, when they held a meeting at the DO's office at Makuyu. He also testified that when he worked in the farm, he lived in the employees houses in the said land.

In further cross-examination, the witness confirmed that they had nothing to show that the land was allocated to them. He however reiterated that the land was unprocedurally sold as there was no consent from Muranga Land Control Board.

PW3- Kula Hache, the County Commissioner, Muranga County stated that she was served with Summons to attend Court and produce documents relating to the consent dated **20th September 1978**. The said consent authorized the sale and transfer of the suit property. She identified the consent in court. However she stated that she could not trace the documents for **1978**, as she tried to search for the documents but could not trace them. The documents had been transferred to the archives and she could not trace them. That she exhausted all her effort but could not trace the documents for **1978** which is a very long time. Therefore she could not confirm if the consent was given by their office or not.

In cross examination she confirmed that documents are kept for **10 years** and later taken to the archives. The documents are later destroyed with the authority of the Permanent Secretary. She could not tell how long the documents stay before being destroyed. To her, she could not tell whether the documents produced in court (consent) was genuine or not in the absence of original documents from their office. She further stated that if parties have no registered interest, they cannot complain.

The 1st Defendant's Case

DW1 – Richard Kamau Gathungu, testified that he is the Chairman of 1st Defendant. He also adopted fully his witness statement dated **27th May 2013**. He further testified that he was elected in the management in 1996 and later as Chairman in **1999**. It was his testimony that there is a similar case filed in **Nyeri High Court**, which has not been concluded. To him the Plaintiffs claim has no merit. He alleged that he has the title deed for the suit land which is registered in the name of the 1st Defendant and it is for **LR.No.10864**, which is **850 acres**. That this title is related to **LR.No.10863**, and they are indicated that the titles are 'inseparable' and they are to be treated as one parcel of land. He produced the titles in court and said that the two titles speak for themselves.

In cross-examination, he confirmed that he was not in the management in **1963**, and he could not tell what happened then. He also confirmed that **East & West Coffee Estates Ltd** bought the suit property from the original owner. He also confirmed that the 1st Defendant and Plaintiffs held a meeting at the District Officer's office, Thika in the **year 2003**, and that the transfer of the suit land to 1st Defendant was done in the **year 1978 (16th November 1978)**. He identified the original title deed in court but confirmed that he did not have the sale agreement with him. He also confirmed that he did not have the consent from the Land Control Board. He also did not have transfer to show how the land was purchased. That the land was purchased on **16th November 1978**, for **Kshs.3,320,000/=** and he confirmed that he did not have any documents to show that payment was done for the land. That the Land Board Consent was dated **20th September 1978**, but it did not have the stamp of the Land Board. To him the consent was genuine. He also confirmed that they did not obtain consent of the Commissioner of Co-operative. He reiterated that the Plaintiffs were not employees of **Nanga Kihoto Farmers Ltd**. Further that **Nanga Kihoto Co-op. Ltd**, did not agree to give the Plaintiffs land as alleged by them.

He also confirmed that there was another case filed in **Nyeri High Court**, over the same land and in the said case there are 100 persons just like in this one. He further reiterated that they bought the land genuinely and he had in his possession the title deed for the parcel of land. He also refuted the claim that they have disobeyed the Order of the Court or injunction. To him, there are no more subdivisions after the injunction. The subdivisions had been done before injunction. He also reiterated that the land had been demarcated and given to various individuals before subdivision and that the 1st Defendant does not utilize the land to date.

In re-examination, the witness confirmed that the Plaintiffs were not employees of **Nanga Kihoto Co-op. Society**, and that he did not follow up how the title was obtained. He further reiterated that this land is for 1st Defendant and not for the Plaintiffs as alleged in the Plaint.

DW2 – Joyce Nyambura Ngarachu, the Secretary Manager of 1st Defendant also adopted her witness statement dated **27th November 2013**. She told the Court that she was employed by 1st Defendant in April 1981 and became Secretary Manager in **1983**. It was her testimony that she maintains the records of the Society and when she looked through the file after this case was filed, she only traced 16 Plaintiffs as former employees of the 1st Defendant. That the 16 Plaintiffs were named in her statement and after termination, they were paid their full terminal dues. By that time, the farm was managed by **SCEM(Standard Chartered Estate Management)**, on behalf of the 1st Defendant. She also confirmed that the 1st Defendant owns the two farms **LR.No.10863** which comprises of **1272 acres** and **LR.No.10864**, which comprises of **850 acres** and that the two farms are being managed together. Further that **LR.No.10864**, had been subdivided and given to various members of the Society and therefore the Plaintiffs have no right to claim the said land as it belongs to the 1st Defendant. She urged the Court to dismiss the Plaintiffs' case with costs to the Defendants.

In cross-examination, she confirmed that she maintains the Society's records and that in **1963**, she was not an employee of the Society. That from her records, only 16 Plaintiffs were employed by the 1st Defendant. Further that the 16 Plaintiffs were paid their terminal dues by **SCEM** after termination, but she did not avail any documents as evidence of payments of the said terminal dues. However, she stated that she was an employee of the said Society then and she is aware of the said payment of terminal dues. She further stated that the land was demarcated into **1768 portions** of land for its shareholders before the injunction order was issued. Further that there is no further subdivision and allocation of the suit property after the injunction order as the allocation had been completed by the time the injunctive order was issued. She also confirmed that she was not in possession of the sale agreement, consent and transfer document for the suit property.

DW3 – James Mwangi Muiruri, also adopted his witness statement of **27th May 2013**. He testified that he was the secretary of the 1st Defendant and was elected in **May 2005**. The land in issue is **LR.No.10864**, which measures **850 acres**. That the 1st Defendant (Co-operative Society) has **1768**, members and the suit land was demarcated into $\frac{3}{4}$ plots and allocated to individual members and therefore there is no land now remaining from **850 acres**. He testified that the land was subdivided before the Court Order was issued but the said Order stopped the Surveyor from processing the title deeds. Though the said **1768 members**, had been shown their respective plots, the title deeds had not been processed. It was his evidence that the Plaintiffs have no legitimate cause to lay their claim over the suit land. He urged the Court to dismiss the Plaintiffs claim with costs.

In cross-examination, he reiterated that the Society distributed the land to its members before the Court Order was issued. It was his evidence that by the time he was elected, subdivision had been completed and further that he did not know what was happening prior to the **year 2005**. He reiterated that it is his duty to keep records and he ensures that proper books and records are kept.

The 2nd Defendant did not call any evidence and parties were directed to file their respective written submissions.

In compliance of the Court's directions, the *Law Firm of Kagwimi Kangethe & Co. Advocates* for the Plaintiffs filed their written Submissions on **9th June 2016**, and submitted that the Plaintiffs and 97 others have ably demonstrated that they deserve the orders sought in the Plaint. The Plaintiffs relied on the case of **Richard Kamiri Gachwe Kahia (the Administrator of the Estate of the late Ms Rahab Waithera Kahia)...Vs**

...Edward Kamau Nganga, Civil Appeal No.16 of 2001, on the effect of failure to obtain the *Land Control Board's Consent*. Further the Plaintiffs relied on Section **28(b) and (h) of the Land Registration Act No.3 of 2012**, which provides:-

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and effect the same without them being noted on the register:-

a.

b. Trusts including customary trusts.

h) Rights acquired or in process of being acquired by virtue of any written law relating to the limitation of action or by prescription.

On the part of the 1st Defendant, the *Law Firm of Muthoga Gaturu & Co. Advocates*, filed their written submissions on **18th November 2016** and urged the Court to find that that Plaintiffs have miserably failed to adduce sufficient evidence to prove their case against the 1st Defendant on the required standard of balance of probability. They urged the Court to dismiss the Plaintiffs' case with costs to the Defendants. The 1st Defendant submitted that the Plaintiffs' claim was legally time barred and should be dismissed since the Order of the Court issued on **29th April 2005** was specific that:-

“The Applicants be and are hereby granted leave to file suit out of time without prejudice to the Defendants' right to plead to limitation and raise other issues in defence of the claim”,

The 1st Defendant further submitted that it is the registered owner of the suit property and that is conclusive evidence that it is the owner of the same. They relied on **Section 26(1) of the Land Registration Act No.3 of 2012** which provides:-

“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.

The 1st Defendant also relied on various decided cases and urged the Court not to allow the Plaintiffs' claim.

The 2nd Defendant through *Mr. Stephen Terel*, the Litigation Counsel for the Attorney General Chamber, filed their written submissions on **6th February 2017**, and urged the Court to dismiss the Plaintiffs' case with costs to the Defendants. The 2nd Defendant relied on various decided cases among them the case ***of***

Ann Itumbi Kiseli...Vs....James Muriuki Mureithi (2013) eKLR, where the Court held as follows, while referring to *Halsbury Laws of England*:-

“No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land..... To constitute dispossession, the acts must have been done which are inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it, thus the term adverse”.

Further, the 2nd Defendant relied on the case of *Wambugu...Vs...Njuguna (1983) KLR 173*, where the Court held that:-

“For an order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeat his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.... The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years”.

This Court has now carefully considered the available evidence and the exhibits thereto. The Court has also read and considered the written submissions, the cited authorities and the relevant provisions of law and it renders itself as follows:-

There is no doubt that the suit property herein *LR.No.10864*, was initially owned by *Nanga Estates Ltd*, who had acquired the same alongside *LR.No.10863*. There is also no doubt that the two parcels of land later changed hands to *East & West Coffee Estates* in the year 1963 (6th September 1963). Further, it is evident that in the year 1977 (11th October 1977) the suit land was transferred to *Gatanga Farmers Co-operative Society*. From the available evidence, *Gatanga Farmers* ceased operating the farm in 1978 and *Nanga Kihoto Farmers Co-operative Society*, 1st Defendant took over management of the two farms. It is also evident that the two parcels of and are now registered in the name of the 1st Defendant, *Nanga Kihoto Farmers Co-operative Society Ltd*. The said registration was done on 16th November 1978. Prima-facielly, as provided by Section 26(1) of the Land Registration Act, the 1st Defendant is the absolute and indefeasible proprietor of the suit property and its title can only be challenged if it was acquired *fraudulently*, through *misrepresentation*, *illegally* or *through corrupt scheme*. The said Section provides as follows:-

“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.**

It is also evident that the Plaintiffs have alleged that the said transfer and registration of the suit property to the 1st Defendant was done *unprocedurally* and *fraudulently* as the suit land *LR.No.10864*, had been gifted to them by its original owner. It is also clear that the 1st Defendant has denied the said allegations

and have testified that the transfer of the suit land to them was done **procedurally** and they are perfectly the **absolute** and **indefeasible owners** of the suit land. Further, the 2nd Defendant has also supported the 1st Defendant's allegations and averred that the suit property is legally registered in favour of the 1st Defendant. It is also evident that in the alternative, the Plaintiffs have alleged that they have lived on the suit property **LR.No.10864** for long and they are entitled to acquire the said property by prescription or adverse possession. The Plaintiffs have therefore urged the Court to allow their claim.

Further, it is very clear that the Plaintiffs herein are the ones who have alleged. Therefore it was incumbent upon them to prove. It is trite that '**he who alleges must prove**'.

Further, **Sections 107 and 109 of the Evidence Act** behove the Plaintiffs to discharge their onerous task of proving the alleged facts. The said Sections provides as follows:-

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.

Therefore the Plaintiffs herein had the onerous task of calling sufficient evidence to prove their case on the required standard of balance of probability. See the case of **Kimani Kandari....Vs....David Gitau Manyeki, Civil Appeal No.18 of 1993**, where the Court held that:-

"The burden of proof is upon a person alleging that his land is being occupied by the other party"

It is also not in doubt that before the Plaintiffs filed this suit, they filed a **Misc. Appl. No.438 of 2005(OS)** seeking to be allowed to file suit out of time. As submitted by the 1st Defendant, the Court granted the Plaintiffs leave to file suit out of time but without prejudicing the Defendants' rights to plead limitation of time in their defence.

Further, it is also not in doubt that the Plaintiffs herein have filed a Representative suit as provided by **Order 1 Rule 8(1)** of the Civil Procedure Rules. The Plaintiffs have claimed that together with the other 97 persons, they were all employees of 1st Defendant and have an interest in the suit land **LR.No.10864**, as it was gifted to them by the original owner for having worked on the suit land for long. Therefore it is evident that there are commonality of issues, commonality of interests, sufficient numerosity of parties and consent to represent the group. Therefore the suit herein fit the prerequisite of a representative suit. See the case **of Lawi Kinoti M'magiru & Others ...Vs....The Attorney General, Nairobi High Court, Civil Case No.147 of 2005 (OS)**.

The above are therefore the undisputed facts. The Court finds that it will have to comb through the available evidence and juxtapose it with the pleadings, exhibits and the relevant provisions of law in determining whether the Plaintiffs have proved their claim. The Court therefore finds that the issues for determination are as set out by the Plaintiffs herein.

These issues are:-

i. Whether the Plaintiffs' suit is time barred.

ii. Whether the Plaintiffs and 97 others were employees of Nanga Estates Ltd and/or the 1st Defendant.

- iii. Whether there was any agreement, oral or written to the effect that **LR.No.10864** would be held by 1st Defendant in trust for the Plaintiffs.
- iv. Whether the Plaintiffs and 97 others ever resided on the suit property, and whether they have acquired title in the suit property by adverse possession.
- v. Whether the Plaintiffs were illegally evicted from the suit property by the 1st Defendant.
- vi. Whether the 1st Defendant acquired transfer and registration of the suit property in its favour procedurally or unprocedurally.
- vii. Whether the Defendants have acted fraudulently or illegally against the Plaintiffs and 97 others as alleged in the **Plaint**.
- viii. Who is the lawful owner of the suit property?
- ix. *Are the Plaintiffs entitled to the prayers sought in the **Plaint**?*
- x. *Who should bear the costs of the suit?*

i)Whether the Plaintiffs suit is time barred

Indeed it is clear that Section 7 of the Limitation of Actions Act provides that an action to recover land should be filed within a period of **12 years** from the time the cause of action arose. It is also very clear from the evidence of the Plaintiffs' witnesses that the 1st Defendant allegedly evicted them from the suit land from **1992**. If that is the case the cause of action arose on or about **1992** and **12 years** would lapse in **2004**. However, the Plaintiff also alleged that even as they agitated for their share of land from the 1st Defendant, they did not know that the suit land had been registered in the name of the 1st Defendant. They stated that they only got to know about the said registration in the **year 2003** and to them that registration was fraudulent and therefore Section 26 of Cap 22 came to their aid. That time does not begin to run until the Plaintiffs have discovered fraud on the mistake.

However, the 1st Defendant has submitted that the suit herein is time barred as the action complained of, is the alleged eviction of **1992**, and in the **year 2005**, that was a period of **13 years** and therefore the suit was time barred. However, the Court has noted that the Plaintiffs were granted leave to file suit out of time by the Court on **29th April 2005**. The Plaintiffs claim is based on fraud and they alleged that they discovered the said fraud in the **year 2003**. This suit was filed in the **year 2005**. Therefore as provided by section 26 of the Limitation of Act Cap 22, time began to run when the alleged fraud was discovered and that is in the **year 2003**. This suit is therefore not time barred as alleged by the 1st Defendant.

ii) Whether the Plaintiffs and 97 others were employees of Nanga Estates Ltd and/or 1st Defendant

As this Court held earlier, the Plaintiffs are the ones who have alleged.

They had the onerous task of proving their allegations. The Plaintiffs alleged that together with the other 97 persons, they were all employees of **Nanga Estates Ltd**, who handed them over to **East & West Coffee Estates Ltd**, with the understanding that **LR.No.10864**, was gifted to the 100 employees and would be held by the said Company in **trust** for them and the said Estate would subdivide and distribute the land to the said employees. Apart from oral evidence, there was no evidence or records of such employment. The 2nd Plaintiff - **Gatema Ndungu** produced some receipt from NSSF which showed that he was an employee of **East & West Estates Ltd, Nanga Estates Ltd** He did not produce any other documentary evidence or records of employment. He testified that his employment records got destroyed in his house in **1975**, when his house was razed down by the fire. However, that was not sufficient evidence of why he had not obtained other records produced by PW1 to confirm that he was an employee

of *Nanga Estates Ltd* and later *East & West Coffee Estates Ltd*. There were also no other employment records produced on behalf of the 97 other persons. Though the Plaintiffs also alleged that *East & West Coffee Estates Ltd* handed them over to *Gatanga Farmers Co-operative Society* and later to *Nanga Kihoto Farmers Co-operative Society* there was no such records of employment and handover produced by the Plaintiffs. The 1st Defendant alleged that from their records only 16 of the Plaintiffs herein were employees of the 1st Defendant and were paid their terminal dues after termination of their employment.

The Plaintiffs alleged that the 1st Defendant did not produce the employment records to dispute the Plaintiffs' allegation. However, it was incumbent upon the Plaintiffs to marshal all the relevant evidence to support its claim. The burden of proof was not on the Defendants but the Plaintiffs. The Plaintiffs did not even file a Notice to produce as provided by Order 11 Rule 3(2)(d) of Civil Procedure Rules. The Court finds that on the issue of whether the Plaintiffs were employees of *Nanga Estates Ltd* and later *Nanga Kihoto Farmers Co-operative Society (1st Defendant herein)*, what is available are just mere allegations which were not proved to the required standard. Therefore in answer to issue No.2, the Court finds and holds that there is no sufficient evidence to prove that indeed the Plaintiffs and 97 others were employees of *Nanga Estates Ltd* and/or 1st Defendant herein.

iii) Whether there was any agreement oral or written to the effect that LR.No.10864 would be held by the 1st Defendant in trust for the Plaintiffs herein.

The Plaintiffs claim is based on the allegation that the original owner of the suit land *LR.No.10864*, had gifted this parcel of land to the employees of the said land for having worked thereon for long. The Plaintiffs alleged that they were 100 in number and that they are the claimants herein. It was their evidence that the said award of the land was made to them by one *Mr. Crest*, the owner of the land in *1963*. That all the Plaintiffs and 97 others were employees in *1963* and have remained unchanged to date.

However, it is not possible that persons who were in employment in *1963* can remain unchanged to date as the Court takes Judicial notice of natural attrition. Again it was evident that there was another group of 100 persons who had lodged a claim over the same suit land in *Nyeri High Court*. The said group had even sought to be enjoined in this suit as interested parties. Therefore it is not correct that all the 100 claimants herein were employees of *Nanga Estates Ltd* in *1963* and did remain unaffected until *2005*, when the suit herein was filed.

The Plaintiff alleged that *Mr. Crest*, the original owner of the suit land bequeathed the Plaintiffs the suit land for their long service on the said land. The Plaintiffs are in their 70s or 80s. Then in *1963*, they must have been in their 20s and the Court cannot possibly hold that they had dedicated long service on the suit property to warrant *Mr. Crest* to bequeath them the suit land and because of their alleged long service.

Further, the Plaintiffs alleged that when *Mr. Crest* handed over the suit land to *Mr. Patel*, the Director of *East & West Coffee Estates Ltd*, there was a further understanding that *East & West Coffee Estates Ltd* would hold the land in trust for the Plaintiffs. That the said understanding was written in form of a letter which letter was later handed over to the area chief, *Njenga Gachiengo*, who misplaced and/or destroyed the same. However, there was no copy of such letter produced in Court. The title document produced in court does not show that the land was held *in trust* for the Plaintiffs. The mere allegations made by the Plaintiffs is not sufficient to prove that the suit land had been gifted to the Plaintiffs herein by the original owner.

Further, it is evident that the suit land *LR.No.10864*, was registered in the name of the 1st Defendant on *16th November 1978*. No evidence that *Gatanga Farmers Co-operative* indicated to the 1st Defendant that the suit land was being held *in trust* for the Plaintiffs. Further the 1st Defendant's title does not indicate existence of any trust. If the Plaintiffs had been allocated the suit land in *1963*, what was so difficult in having the same demarcated and distributed to them at that time? This Court finds that evidence not tenable or believable and consequently, the Court finds and holds that there is no sufficient evidence availed by the Plaintiffs to prove that there existed an oral or written agreement to the effect that

the suit land **LR.No.10864**, was being held by the 1st Defendant in trust for the Plaintiffs herein.

iv) Whether the Plaintiffs and 97 others ever resided on the suit property and whether they acquired title over the said property by adverse possession.

It was the Plaintiffs evidence that they were employees of **Nanga Estates Ltd** and the successive companies and finally the 1st Defendant herein. Though the 1st Defendant admitted the employment of the 2nd Plaintiff herein, the Court finds that it had held earlier that there was no sufficient evidence to proof that the other claimants were employees of **Nanga Estates Ltd** and later 1st Defendant. However even if the Plaintiffs were employees of **Nanga Estates Ltd** and later 1st Defendant, then they resided on the suit land as employees of the said **Coffee Estates**. As employees, provision of housing by their employer was a benefit. The said employees benefited from the said housing as long as they remained in employment. The said employees entered into the said suit land with the **permission** and **knowledge** of the employer as long as they remained employees. The Court found and held that there was no evidence of existence of any agreement that this suit land had been bequeathed to the Plaintiffs. This Court finds and holds that if at all the Plaintiffs ever resided on the suit property, then it was by virtue of their employment and housing was an employee's benefit enjoyed as long as that employee remained in employment of the owner of the land and that occupation cannot grant the employee title to the land through adverse possession. The said occupation was with the permission of the employer and cannot constitute dispossession. See the case of **Wambugu...Vs.... Njuguna (1983) KLR 173 (supra)**, where the Court held that:-

“For an order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeat his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.... The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years”.

Having now carefully considered the available evidence, the Court finds that even if some of the Plaintiffs did reside on the suit land their residing thereon was by virtue of employment and they did not acquire title to the said land by adverse possession.

v) Whether the acquisition, registration and transfer of the suit property in favour of the 1st Defendant was procedural in accordance to the law or unprocedural.

The Court did find that there was no evidence that this suit land **LR.No.10864**, had been gifted to the Plaintiffs herein and was being held in trust for them. The suit land was transferred to the 1st Defendant by **Gatanga Farmers Co-operative Society** on **16th November 1978**. There was no indication on the title held by **Gatanga Farmers Co-operative Society** that it held the same as a trustee. The 1st Defendant therefore acquired a clean title from **Gatanga Farmers Co-op Ltd** on **16th November 1978**, and is the rightful owner. As provided by Section 26(1) (a)&(b) of Land Registered Act, the said title can only be challenged if it was acquired fraudulently. It was therefore incumbent upon the Plaintiffs to prove the existence of the exceptions set out in Section 26(1)(a)&(b) of the Land Registration Act. It is trite that allegations of fraud are serious and should be strictly proved. The standard of prove of such allegation is high. See the case of **Urmilla W/O Mahendra Shah..Vs...Barclays Bank International Ltd & Another (1979) KLR 76**, where the Court held that:-

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required.”

The Plaintiffs alleged that the said transfer was not proper or procedural as there was no consent from the Land Control Board. That the existing consent in the file was not genuine. However when PW3 gave evidence she told the Court that this transaction was for **1978**, and she could not trace the documents because after **10 years**, the documents are normally sent to the archives and later destroyed with the permission of the Permanent secretary. PW3 was not explicit, that no Land Control Board Consent was obtained. There was no witness called to confirm that indeed the transfer was done without the Muranga Land Control Board Consent.

Further, on allegation that there was no consent from the Ministry of Co-operative to purchase and sell the land since the parties were Co-operatives, there was no witness or evidence called from the said Ministry to confirm that indeed the said transfer was not proper as there were no consents given to the transacting parties.

The 1st Defendant is the registered proprietor of the suit land. The 2nd Defendant has confirmed that the said transfer and registration was rightful and legitimate. The Court finds that though the Plaintiffs alleged fraud and illegality, no sufficient evidence was called to prove the said allegations. The Court finds and holds that the 1st Defendant's acquisition, registration and transfer of the suit property was procedural and this Court has no reason to fault the same.

vii) Whether the Defendants have acted fraudulently, illegally against the Plaintiffs and 97 others as alleged in the Plaint.

This Court has held that the Plaintiffs allegation of **fraud** on the part of the Defendants was not proved. The Court has also found that there was no evidence that the 1st Defendant acquired the suit property fraudulently. Therefore the Court finds that the Defendants have not acted fraudulently against the Plaintiffs. On illegality, the Plaintiffs alleged that they were evicted from the suit land from **1992**. However, there was no sufficient evidence adduced to the effect that all the Plaintiffs and 97 others resided on the suit land. No evidence of their eviction as the Plaintiffs never reported the alleged illegal eviction to the law enforcers such as the police. No criminal charges were preferred against the Directors of 1st Defendant for the alleged illegal eviction. The 1st Defendant alleged that the employed 16 Plaintiffs moved out of the houses they had been given by their employer after their services were terminated and they were paid terminal dues. As the Court held earlier, the employees are only entitled to housing by the employer as long as they remain employees of the said employer. If the Plaintiffs' services were terminated from **1992**, they had no reason of remaining as residences in the 1st Defendants' parcel of land. The Court finds and holds that there is no evidence that the Defendants acted fraudulently and illegally against the Plaintiffs and 97 others.

viii) Who is the lawful owner of the suit property?

It is evident that the suit property **LR.No.10864**, and the other **LR.No.10863** are registered in favour of the 1st Defendant. There is no evidence that the said land was registered in the name of the 1st Defendant **fraudulently, illegally** or **through corrupt scheme**. Therefore without any evidence to challenge the said title, then as provided by Section 26(1) of the Land Registered Act, the 1st Defendant is the **absolute** and **indefeasible** proprietor of the suit property. The 1st Defendant is therefore the lawful

owner of the suit property. DW3 had even testified that **LR.No.10864** and **10863** cannot be held separately as stated in the said title deeds. The described piece of land is to be held as an **'inseparable portion'** of **LR.No.10863(IR 18384)**.

ix) Whether the Plaintiffs are entitled to the prayers sought in the Plaint?

The Court has found that the Plaintiffs have failed to call sufficient evidence to prove all the allegations made in the Plaint. Since the Court has not faulted the transfer of the suit property to the 1st Defendant, it cannot direct the 2nd Defendant to cancel the said transfer. There was no evidence that this suit land was

ever gifted to the Plaintiffs and 97 others and that 1st Defendant is holding it in trust for Plaintiffs. The Court cannot direct that they be declared the rightful owners of the suit property herein. Further, the Plaintiffs are not even in possession of the suit land now and did not dispossess the 1st Defendant at any given time. They therefore never acquired the suit property through adverse possession. This Court therefore cannot direct the 2nd Defendant to transfer the suit property in favour of the Plaintiffs.

Having carefully considered the available evidence, the Court finds that the Plaintiffs and 97 other claimants are not entitled to the prayers sought.

x) Who is to pay costs of this suit?

As provided by Section 27 of the Civil Procedure Act, costs are awarded at the discretion of the Court. However it is trite that costs normally follow the event. Costs are ordinarily awarded to the successful litigants. The Court had found that the Plaintiffs are not entitled to the prayers sought in their Plaint. The Defendants are therefore the successful litigants and are entitled to costs.

Having now carefully considered the available evidence, 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 and 97 other claimants' claim is unmerited. Consequently, the Court dismisses the Plaintiffs' claim dated **13th May 2005** entirely with costs to the Defendants.

It is so ordered.

Dated, Signed and Delivered at Thika this 23rd day of February 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Kangethe for Plaintiffs

Mr. Mwiti for 1st Defendant

No appearance for 2nd Defendant

No appearance - Court clerk.

L. GACHERU

JUDGE

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

L. GACHERU

JUDGE

23/2/2018