



Muturi & another v Kibicho & another (Environment & Land Case 1263 of 2015) [2024] KEELC 720 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 720 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1263 OF 2015**

EK WABWOTO, J

JANUARY 25, 2024

COURT FOUND THE PLAINTIFFS HAVE NOT PROVED THEIR CASE TO THE REQUIRED STANDARD AND THE SUIT DISMISSED WITH AN ORDER THAT EACH PARTY TO BEAR OWN COSTS OF THE SUIT.

BETWEEN

EUNICE WAIRIMU MUTURI 1ST PLAINTIFF

WASHINGTON MUCHIRI MUTURI 2ND PLAINTIFF

AND

DANIEL MWANGI KIBICHO 1ST DEFENDANT

ANDREW KEITH SAVAGE 2ND DEFENDANT

JUDGMENT

1. By a plaint dated 10th December, 2015, and filed in Court on the same day, the plaintiffs prays for judgment against the defendants for:-
 - a. A declaration that the transfer and registration of the Defendants as the joint proprietor of plot No. A78-2 UMOJA INNERCORE is null and void.
 - b. An order do issue directing the Chief Land Registrar to cancel the lease and certificate of title known as Nairobi block 83/14/476 issued on 22nd July 2015 and further delete entries in respect of the Defendants.
 - c. A permanent injunction be issued against the Defendants, their agents. Servants and/ or employees restraining them from entering into trespassing, constructing, erecting any



structure and/or building and/or dealing in any manner whatsoever with all that parcel of land known as plot No. A78-2 UMOJA INNERCORE.

- d. An eviction order do issue directing the Defendants to vacate all that parcel of land known as plot No. A78-2- UMOJA INNERCORE.
 - e. General damages.
 - f. Costs and interest.
2. The defendants upon being served with the plaintiffs pleadings contested the suit vide an amended statement of defence dated 28th February, 2018 wherein they sought for the dismissal of the plaintiffs case with costs.

DIVISION - The Plaintiffs case __.**

3. The plaintiffs' case is that on or about 1997, the late Gerald Muturi Maina was allotted by the then City Council of Nairobi all that parcel of land known as plot No. A78 Section II Umoja Innercore and immediately took possession of the said plot.
4. That at all material times, the late Gerald Muturi Maina paid to the then City Council of Nairobi all land rates and other charges up to and including the year 2012.
5. That on or about the month of May 2009, the deceased applied for approval of building plans from the said Council and the same was duly approval upon payment of the pre-requisite charges.
6. He stated further that on or about 31st July 2010, the deceased commenced construction work by digging a foundation on the suit plot.
7. On or about 29th September 2015, the defendants and/or their agents, servants and/or employees without any just cause trespassed into the suit plot and committed acts of waste by erecting the fence and further commenced construction works.
8. That on 10th October 2015 the City County Government confirmed the suit plot belongs to the deceased and allowed the plaintiffs to pay all outstanding land rates and charges.
9. On 19th October 2015, the plaintiffs were issued with a clearance certificate payment of rates and other charges by the Nairobi City County in respect of the said plot.
10. It was averred that the defendants have continued with their illegal and unlawful construction despite the plaintiffs attempt to stop them and further they are alleging to have purchased the suit plot and are also claiming to hold a joint certificate of title.
11. The plaintiffs contended that the defendants' joint claim of the suit plot is illegal, unlawful and founded on fake documents and consequently untenable in law.
12. The plaintiffs further contended that the defendants' joint certificate of title is null and void as it was obtained through a party who did not have good title to pass.
13. It was also averred that as a consequence of the said trespass and subsequent acts of waste committed by the defendants on the suit plot, the estate of Gerald Muturi Maina has suffered loss and damages.
14. It was stated that the plaintiffs' claim against the defendants jointly and severally is for a declaration that the transfer and registration of the defendants as the joint proprietor of plot No. A78-2 Umoja Innercore is null and void; an order be issued directing the Chief Land Registrar to cancel the lease and certificate of title known as Nairobi/Block 83/14/476 issued to the defendants on 22nd July 2015



and further delete all entries in respect of the defendants, a permanent injunction be issued against the defendants, their agents, servants and/or employees restraining them from entering into, trespassing, constructing, erecting any structure and/or building and/or dealing in any manner whatsoever with all that parcel of land known as plot No. A78-2 Umoja Innercore; an order of eviction do issue against the defendants directing them to vacate all that parcel of land known as plot No. A78-2- Umoja Innercore, general damages, cost and interest.

15. During trial, Gildine Gatwiri Karani, the Land Registrar testified as PW1. She stated that she was in Court pursuant to summons issued to the Chief Land Registrar and she had the official records relating to NRB/83/14/476. She stated that she had a lease issued to Mary Wanjiru. The lease was issued by Nairobi City Council. She also stated that their records showed that a total of 4 transfers had been done and that the defendants are registered in the 4th transaction.
16. Upon Cross-examination, she stated that the current registered proprietors of the suit property are the defendants. She also stated that she has not seen any order on cancellation of the defendants' title.
17. Washington Muchiri, the second Plaintiff herein testified as PW2. He stated that he was the son to the late Gerald Muturi Maina and that he is also one of the administrators of his estate. He also adopted and relied on his witness statement dated 10th December, 2015 and the bundle of documents on record.
18. Upon cross-examination, he stated that Gerald Maina Muturi was his father and that he is currently 51 years old and a graduate of University of Nairobi.
19. He also stated that the name "Jerald" was not his father's name. He also stated that the letter of grant did not indicate the deceased was his father. He however stated that his father was buried in Murang'a in the year 2011.
20. On further cross-examination, he stated that the plaintiffs are not suing on behalf of any estate. He also stated that he had come to Court to testify on behalf of plot No. A78 -2 Umoja Innercore as indicated in his witness statement. He also stated that the 1st plaintiff had given him the authority to testify on her behalf.
21. He also stated on cross-examination that they had no letter of allocation from Nairobi City Council though they continued paying rates until 2015. He also stated that he was not aware that the property had been leased to Mary Wanjiru.
22. When asked why he continued paying for the rates despite the property belonging to someone else, he stated that the County records had not been interfered with.
23. When asked on the outcome of case No. 984 of 2013, he stated that he was not aware that the same had been dismissed for want of prosecution. He also stated that his late father did not have a lease of the said property. He further stated that his father had done some excavation to the property with a view of constructing on the same.

The Defendant's case

24. The defendants averred that they have never dealt with plot A78-2, Section 11 Umoja Innercore. They also averred that they are the registered owners of Nairobi/Block 83/14/476.
25. The Defendants contended that the rates clearance obtained posthumously by the plaintiffs does not constitute proof of ownership of the plot A-78-2 Section 11 Umoja Inner-Core. They also contended that the City Council of Nairobi had way back in January, 1987 granted a lease to the first lessee Mary



Wanjiru who proceeded and obtained a duly registered Certificate of lease for a term of 99 years over the property known as Nairobi/Block 83/14/476.

26. The defendants also pleaded particulars of malice and bad faith on the part of the plaintiffs in their quest to acquire ownership of the defendants' property. The particulars of bad faith and malice that were pleaded included the following:
 - a. Paying for rates after the demise of deceased for plot A78-2 Umoja Inner Core.
 - b. Paying for transfer after demise of deceased for plot A78 -2 Umoja Inner Core.
 - c. Alleging that the Defendants' property Title Number Nairobi/Block 83/14/476 is one and the same as plot A78 -2 Umoja Inner Core.
 - d. Purporting while knowing it not to be true that the Deceased is the owner of the Defendant's property while knowing it that the Deceased has never held any registered title over the Defendant's property title number Nairobi/Block 83/14/476.
27. During trial, the 1st Defendant, Daniel Mwangi Kibicho and Stephen Matheka Mutisya, a Court Administrator at the Environment Land Court, Milimani testified on behalf of the defendants.
28. Stephen Matheka Mutisya – DW1 testified pursuant to witness summons that were issued by this Court due to an application made by the defendants. He stated that he had been summoned to produce ELC Court file No. 984 of 2013, which indicated its parties as Eunice Muturi and Washington Muturi as the plaintiffs and Nairobi City County and Mary Wanjiru as the defendants. he stated that the suit was filed on 13th August, 2013 and was later dismissed on 20th March, 2019 with costs to the Defendants pursuant to an order issued by – Justice Komingoi.
29. When Cross-examined, he stated that from the record, there was a Notice to Show Cause which was issued on 27th August, 2018 and was scheduled for hearing on 20th March, 2019 but he could not see any evidence of its service.
30. Daniel Mwangi Kibicho testified as DW2. He adopted his witness statement and bundle of documents as part of his evidence in chief. He stated that the suit property Nairobi/Block 83/14/476 was registered in the names of the defendants and that the 2nd defendant is his business partner who he had authority to testify on his behalf.
31. It was his testimony that he obtained interest on the suit property on 22nd July, 2015 pursuant to a sale agreement and purchase from one Boniface Otieno Okwach. He also stated that when he acquired the said property, the same was completely vacant. He also stated that he did due diligence and he confirmed its ownership. He also stated that the initial lessee was Mary Wanjiru. He stated that the testimony of the Land Registrar was consistent with how the defendants acquired the property. He also stated that the plaintiffs had not adduced any evidence of fraud on their part. He further stated that there was no evidence produced to show how the plaintiffs were related to the deceased. He also stated that the plaintiffs had not produced any allotment letter.
32. On cross-examination, he stated that he bought the land jointly with the 2nd Defendant for a sum of Kshs 5,750,000/= and they paid the entire purchase price, though he did not have the evidence of its payment in Court. He also stated that the sale agreement indicated Kshs 2,000,000/= for the purposes of stamp duty. He also stated that the land was sold to them by Boniface Okwach. He further stated that the property was vacant at the time of its purchase. He also stated in cross-examination that in their documents, there was no indication that the property was known as A78-2 Umoja Inner-Core.



He further stated that the property is fully developed and has flats which were constructed during the pendency of the suit as there were no injunctive orders.

33. On re-examination, he stated that the evidence of the Land Registrar was that the property is registered in the names of the defendants. He also stated that the purchase price was never raised by the previous owner to the suit property and there was no complaint that the purchase price was never paid. He also stated that the registrar never raised any issue with regard to the purchase price. He also stated that no issue was ever raised in respect to the registration of the lease. He also stated that the registrar did not state whether there was no consent that was issued. He also stated that from his map, he could not see any property marked as A78 – 2 Umoja Inner-Core.

Plaintiffs submissions

34. The plaintiffs filed two sets of written submissions dated 2nd December, 2022 and 21st February, 2023 respectively. It was submitted that the first transfer from Mary Wanjiku (Lessee) to Jane W. Ngambi is illegal and unlawful since Mary Wanjiku did not have powers to transfer a free hold interest to Jane W. Ngambi. It was also submitted that it was unlawful for the Town Clerk of the City Council of Nairobi to have endorsed the transfer with consent to transfer interest instead of a leasehold. It was also argued that the purported consent endorsed on the transfer was in contravention of the provisions of Section 48 of the then Registered Land Act which provisions made mandatory requirement of a written consent.
35. It was also submitted that, in respect to the 2nd transfer dated 9th May, 2013 from Jane W. Ngambi to Boniface Otieno Okwach for a consideration of Kshs. 5,750,000 was registered on 7th June 2013 is still illegal and irregular since it is endorsed with consent to transfer and executed by the Town Clerk of the City Council of Nairobi which office was repealed pursuant to the provisions of Section 134 of the County Government Act No. 17 of 2012.
36. In respect to the 3rd transfer of lease, it was argued that the defendant deliberately omitted to produce a copy of the transfer executed by Boniface Otieno and themselves. It was submitted that the clearance Certificate was issued by Nairobi City County and was issued on 21st May 2015. It was issued to Jane W. Ngambi and not Boniface Otieno Okwach. The said clearance certificate issued to Jane W. Ngambi was used to transfer Nairobi/Block 83/14/476 to Daniel Mwangi Kibicho and Andrew Keith Savage. The said Jane W. Ngambi ceased being the owner on 7th June 2013 when the transfer in favour of Boniface Otieno Okwach was effected. According to the plaintiffs the clearance certificate was irregular, unlawful, illegal, null and void and that the same ought not to have been registered by the Land Registrar.
37. The plaintiffs also submitted that the defendant jointly and severally committed statutory offences when they failed show the actual cost of the purchase price. The sale agreement showed the purchase price was Kshs. 5,750,000 instead of Kshs. 2,000,000. The following cases were cited to support the Plaintiff Case; Bhatia versus Gane Bank Bank Limited (2014) I FA 154, A.J. Limited versus Catering Levy Trustees & 3 Others, Elijah Makeri Nyawira versus Stephen Mungai Njuguna & Another [2013] eKLR Joseph Kiprotich Bor versus Tabutany Chepkoech Chebusit [2022]eKLR and Munyu Maina versus Hiram Gathina Maina [2013]eKLR.



The Defendants submissions

38. The Defendants filed written submissions dated 9th February, 2023. The defendants submitted on the following issues;
1. Whether Gerald Muturi Maina was allocated the Plot A78 Section 11 Umoja Innercore 1997?
 2. Whether the Plaintiff have any registrable interest on plot A78 Section 11 Umoja Innercore?
 3. Whether the Plaintiffs have locus standi to maintain the suit.
 4. Whether the deceased Gerald Muturi Maina paid all the land rates and charges for plot A78 Section 11 Umoja Innercore and whether payment of land charges conferred title or registered interest upon the Plaintiff.
 5. Did Gerald Muturi Maina commence construction on the Plot A78 Umoja Innercore?
 6. Whether the Plaintiffs have suffered any loss and if so whether the alleged loss is attributable to the defendants.
 7. Who should bear costs of the suit.
39. On their first issue, it was submitted that the allotment to Mary Wanjiru was first in time with the allotment having been done on 1st January 1987. No documentary evidence was presented by the plaintiffs to show a contrary position or any allotment in favour of Gerald Muturi Maina (Deceased).
40. It was also submitted that while the plaintiffs maintained that the Nairobi City Council records were in favour of Gerald Muturi Maina they did not avail those records or any minutes from the Nairobi City Council cancelling the allotment in favour of Gerald Muturi Maina (Deceased).
41. It was further submitted that failure to produce a document in one's power, possession and custody that would help the court to resolve the controversy before it should lead the Court to draw an adverse inference that the document withheld from the court contains information that is adverse to the party in possession of the document. Records from Nairobi City County were cited severally by the 2nd plaintiff but they were not produced. The defendants urged the court to draw an adverse inference that the reason they were not brought to court or produced in evidence was because the record was unfavorable to the plaintiffs claim.
42. It was also submitted that the Nairobi City County did not allocate the property; Nairobi/Block 83/14/476 formerly Plot A78 Umoja Innercore previously to the Late Gerald Muturi Maina. The defendants urged the court to find that the plaintiffs have failed to prove that Gerald Muturi Maina was allotted the plot A78 Section 11 Umoja Innercore in 1997.
43. The defendants also submitted that the deceased Gerald Muturi Maina had not paid land rates and charges for plot A78 Section II Umoja Innercore and that any payment of land charges made, did not confer any title or registered interest upon himself or the plaintiffs in the absence of due process being followed. It was also submitted that the receipt produced by the plaintiffs in respect to payment of rates were questionable and hence the plaintiff did not acquire any interest by the payment of rates made post hearing in the names of Gerald Muturi Maina.



44. The defendants further submitted that the deceased never commenced any construction on plot A78 Umoja Innercore. In expounding on this issue, the defendants made reference to Paragraphs 8 and 11 of the affidavit sworn by the 2nd Plaintiff in respect to Nairobi ELC 984 of 2013.
45. On whether the plaintiffs have suffered any loss, it was submitted that there was no evidence of trespass as the defendants were confirmed by the Land Registrar to be the registered properties of all that property Nairobi/Block 83/14/476, and in the circumstances they were not capable of suffering any loss.
46. It was further submitted that the plaintiffs had not proved the allegation of fraud as against the defendants and neither have they adduced sufficient evidence to impeach the defendants' title. Reliance was placed to the cases of Munyu Maina versus Hiram Maina [2013]eKLR Vijay Morjana versus Nansigh Madhusingh Darbar & Another [2000]eKLR and Kinyanjui Kamau versus George Kamau [2015]eKLR among others.
47. The court was urged to dismiss the plaintiffs' case with costs to the Defendants.

Plaintiffs rebuttal submissions

48. The plaintiffs filed further submissions dated 21st February, 2023 and responded to the following thematic areas; locus Standi, illegality and fraud and purchaser for value without notice and statutory offences.
49. The plaintiffs submitted that Section 82 (a) of Succession Act Cap 160 empowers personal representatives to sue on behalf of the Estate and that there are no provisions in the Succession Act which requires personal representatives to sue only after confirmation of the grant. It was further submitted that the Plaintiffs at Paragraph 1 of the Plaint have described their capacity as Administratrix and Administrator of the Estate of Gerald Muturi Maina and further at Paragraph 13 of the Plaint they had averred that the Estate of Gerald Muturi Maina has suffered loss and damages and PW2 Washington Muchiri Muturi had produced a grant of letters of Administration Intestate issued by the High Court on 14th October, 2011.
50. On the aspect of illegality and fraud, it was argued that the defendants neither pleaded any illegality nor fraud despite submitting on the same.
51. On the aspect for purchaser for value without notice it was submitted that the defendants lied from the outset about the value of suit property and hence cannot purport to be the purchases for value without notice of defects in the title since the sale agreement was Kshs. 5,750,000 and the transfer indicated as Kshs. 2,000,000.
52. On the aspect of statutory offences, it was submitted that, the offences committed by the defendants are expressly provided for in the [Land Registration Act](#), the [Stamp Duty Act](#), County Government Act and the [Advocates Act](#). It was contended that the defendants were not candid to the court as they never produced a transfer, consent to transfer and Rates Clearance Certificate. The Plaintiff concluded their submissions by urging the court to allow the reliefs sought in their plaint.

Issues for determination

53. Parties framed and filed a list of agreed issues dated 13th June, 2017 which included 15 issues for determination by the court: -
 1. Whether the Plaintiffs have the requisite locus standi to maintain this suit?



2. Was the late Gerald Muturi Maina allotted by the City Council of Nairobi all that parcel of land known as Plot No. A78-Section II Umoja Innercore in 1997?
 3. Whether the Plaintiffs have any registerable interest over Plot A78 –Section II Umoja Innercore?
 4. Whether Plot A78 –Section II Umoja Innercore is one and the same as Title Number Nairobi/83/14/476?
 5. Whether Letters of Allotment override a Certificate of Lease?
 6. Whether the Defendants acquired the property known as Title Number Nairobi/83/14/476 as bona fide purchasers for value?
 7. Whether the Defendants conducted any official search at the lands office prior to acquiring the property? If so, bona fide purchasers for value?
 8. Whether the Defendants are the registered owners of the property known as Title Number Nairobi/83/14/476?
 9. Whether the Certificate of Lease for Title Number Nairobi/83/14/476 issued by the Registrar in favor of the Defendants is prima facie evidence that the Defendants hold an indefeasible title over Title Number/83/14/476?
 10. Whether the deceased Gerald Muturi Maina paid all land rates and other charges for Plot No. A78- Section II Umoja Innercore up to the year 2012 and whether payment of land rates over Plot No. A78-Section II Umoja Innercore conferred any title or registered interest upon the Plaintiffs?
 11. Whether the Plaintiffs have any registerable interest over Title Number Nairobi/83/14/476?
 12. Did the Deceased Gerald Muturi Maina commence any construction on the property known as Title Number Nairobi/83/14/476?
 13. Whether the Plaintiffs have suffered any loss and if so, whether the illegal loss is attributable to the Defendants?
 14. Whether the Plaintiffs are entitled to the reliefs sought in the Plaint?
 15. Which Party should bear the costs of this suit?
54. The court having considered the pleadings filed herein, evidence adduced and written submissions filed by the parties together with the agreed issues filed by the parties herein, is of the view that the following are the germane issues for determination herein;
- i. Whether the Plaintiffs have the requisite locus standi; to maintain this suit.
 - ii. Who among the parties has a clear root of ownership of the suit property?
 - iii. Whether the plaintiffs are entitled to the reliefs sought against the defendants.
 - iv. What orders should be issued as to court.

Analysis and determination



The Court shall now proceed to address the said issues sequentially.

Issue No. 1

Whether the Plaintiffs have the requisite locus standi to maintain the suit.

55. The defendants pleaded at paragraphs 5 and II and 16 of their defence that the Plaintiffs lacked the requisite locus standi to maintain this suit on behalf of the deceased Gerald Maina Muturi.

They also went further and submitted in their written submissions that the Plaintiffs filed this suit against their defendants on 10th December, 2015 in their personal capacities and not as the legal representatives of the Estate of the Late Gerald Muturi Maina.

The Plaintiffs in respect to this issue submitted that at paragraph 1 and 13 of their plaint, they had averred that they had described themselves as Administratrix and Administrator of the Estate of Gerald Maina Muturi. Muturi Maina and further they had produced a grant of letter of administrator Intestate issued by the High Court on 11th October, 2011. The Plaintiffs also urged the court to refer to Section 82(a) of Succession Act Cap 160.

56. Section 2 of the Civil Procedure Act defines legal representative as follows:-

“Means a person who in law represents the estate of a deceased and where a party sues at is sued in a representative character, the person on who the estate devolves on the death of the party so suing or sued.”

57. Locus Standi simply means the right to appear and to be heard before court.

58. Section 82(a) of the Laws of Succession Act Provides that;

“Personal representatives shall subject only to any limitation imposed by their grant have parties to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate.”

59. In interpreting the above provision of law, the Honourable Court in the case of Alexander Mutunga Wathome –Vs- Peter Lavu Tumbo & Another [2015] eKLR noted that;

“In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. In addition section 82 of the Law of Succession Act provides that it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person.”

60. Section 45 of the Law of Succession is to the effect that no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

61. The plaintiffs witness PW2, Washington Muchiri Muturi produced a grant of letters of Administration Intestate issued on 14th October, 2011 which listed the plaintiffs as administrators of the deceased estate and further the plaintiffs had filed this suit as Administrator and Administratrix of the Estate of Gerald Muturi Maina and in view of the foregoing, it is the finding of this court that the plaintiffs have locus standi to institute this suit. The defendants objection on that basis fails.



Issue No. 2

Who among the parties has a clear proof of ownership of the suit property?

62. It was the plaintiffs' case that on or about 1997, the late Gerald Muturi Maina was allotted the suit property by the then City Council of Nairobi and that the deceased paid land rates and other charges upto and including the year 2012.
63. The defendants' case on the other hand was that they acquired the suit property Nairobi/Block 83/14/476 after purchasing the same from Boniface Otieno Okwach who had purchased the same from Jane W. Ngambi who had acquired it from the original allottee Mary Wanjiru. It was also the defendants' case that the lease had been issued to Mary Wanjiru in 1987.
64. Whoever alleges must prove. That the burden of proof was on the Plaintiffs is not in doubt. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:
'Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.'
65. On evidentiary burden of proof, Sections 109 and 112 of the *Evidence Act* provide as follows:
- “ 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 the fact shall lie on any particular person.
112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”
66. The two provisions were dealt with in the case of Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:
“ As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden, that is, placed upon a party..... the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
67. During trial, the plaintiffs' witness PW2 Washington Muchiri Muturi conceded in cross-examination that he did not have a copy of the allotment letter issued to the deceased by the then Nairobi City Council in 1997.
68. The Land Registrar Gildine Gatwiri Karani who testified as PW1 adduced evidence demonstrating the following, that the suit property was Plot A78-2 Umoja Innercore however, the same did not exist among any records held by the then Nairobi City County. The Plaintiff also did not call any witness from Nairobi City County to confirm if indeed Plot A78-2 was allotted to Gerald Muchiri Maina (deceased).
69. The testimony of PW1 Land Registrar Gildine Karani confirmed that the lease in respect to the property Nairobi/Block 83/14/476 formerly Plot A78 Umoja Innercore was issued by Nairobi City Council in favour of Mary Wanjiru. PW1 testified and produced documentary evidence containing the full sequence of the transfers lodged at the Ministry of Lands for registration and demonstrated



clearly how the suit property was transferred over the years from the initial lease Mary Wanjiru to Jane W. Ngambi and to Boniface Otieno Okwach and eventually to the defendants herein. The testimony of PW1 was consistent with the evidence adduced by the 1st Defendant herein.

70. The Plaintiffs and the Defendants herein both have a right to own property. While a certificate of title shows that the holder of the same is the indefeasible owner of land in question, it is not in doubt the Defendants have title to the suit property as contemplated in Section 24 as read together with Section 26 of the [Land Registration Act](#), 2012.

71. Section 26 of the [Land Registration Act](#) provides as follows:

“(1) 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

71. The defendants produced copies of certificates of lease and certificates of official Search issued to their predecessor in support of their case. In *Munyu Maina v Hiram Gathiha Maina* (supra) the Court of Appeal stated that:-

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

In *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”



In Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

72. Being guided by the above authorities and having evaluated the evidence that was adduced herein, it is evident that the suit property was initially leased to Mary Wanjiru in 1987 and hence the same could not have become available for allocation to the deceased as averred by the plaintiffs. In view of the foregoing, it is the finding of this court that indeed the plaintiffs have failed to satisfactorily establish their root of ownership of the suit property. This only confirms that the defendants have laid a basis and established a good root of their title to the suit property. The said property once it was allotted to Mary Wanjiru as the initial lease it could not have been available for allotment to the deceased in 1997. Reliance is also placed to the case of Augustine Thuo v James Maina Thuita & Another [2020] eKLR where the court stated as follows:

“The property was not available for allocation as it had already been allocated to the Plaintiff. The allocation of the property to the 1st Defendant was in the circumstances null and void. An illegal allocation of the suit property by the 2nd Defendant to the 1st Defendant could not confer upon the 1st Defendant any lawful interest in the suit property”.

Issue No. 3

Whether the Plaintiffs are entitled to the reliefs sought.

72. The plaintiffs sought for several reliefs as was pleaded in their plaint. The plaintiffs sought for a declaration that the transfer and registration of the defendants as the joint proprietors of plot No A78-2 Umoja Innercore is null and void, a cancellation of the defendants’ title, an eviction order and a permanent injunction against the defendants together with costs of the suit.
73. Regarding the prayer for an Order of permanent injunction, I align with the holding in the case of Kenya Power & Lightning Company Ltd –Vs- Sheriff Molana Habib (2018) eKLR, where the court made the following pronouncement as regards a perpetual permanent injunction;

“A permanent injunction also known as a perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the Plaintiff to be protected.”

In the instance case, the plaintiffs have not made a case for issuance of an order of Permanent injunction their favour.

72. This court having made a finding that the defendants have been able to establish and trace a good root of their title to the satisfaction of this court, it therefore follows that the plaintiffs claim against the defendants has not been proved to the required standard and as such the orders sought by the plaintiffs are not for granting



73. In respect to costs, the same is at the discretion of the court. As a general rule, costs follow the event, unless the court for good reason orders otherwise. In the present case, the plaintiffs instituted the suit in their capacity as Administratrix and Administrator of the Estate of the Late Gerald Muturi Maina and also looking at the circumstances of the suit this court directs each party to bear own costs.

Final orders

74. In conclusion, it is the finding of this court that the plaintiffs have not proved their case to the required standard and the suit is hereby dismissed with an order that each party to bear own costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JANUARY, 2024.

E.K. WABWOTO

JUDGE

In the virtual presence of:

Mr. Manyara holding brief for Mr. Oyugi for the Plaintiffs.

Mr. Kariuki for the Defendants.

Court Assistant: Caroline Nafuna.

