



REPUBLIC OF KENYA



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**Fradami Limited v Njogu & 2 others (Environment & Land Case
39 of 2012) [2024] KEELC 877 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 877 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 39 OF 2012
LA OMOLLO, J
FEBRUARY 22, 2024**

BETWEEN

FRADAMI LIMITED PLAINTIFF

AND

LUCY WAMBUI NJOGU 1ST DEFENDANT

SAMUEL KINGO 2ND DEFENDANT

RAVINE FARMERS GROUP "B" 3RD DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit vide a Complaint dated 30th October, 2012.
2. In the Complaint it avers that it is the registered proprietor of the land known as Gilgil/gilgil Block 1/20 (kikohey).
3. The Plaintiff prays for judgment against the Defendants jointly and severally for:
 - a. An order of eviction against the Defendants from land parcel no. Gilgil/gilgil Block 1/20 (kikohey).
 - b. An order of injunction restraining the Defendants from trespassing, entering, constructing or interfering in any other way whatsoever with land parcel no. Gilgil/gilgil Block 1/20 (kikohey).
 - c. General damages for trespass.
 - d. Costs and interest of this suit.
4. On 5th June, 2018 the Defendants' filed their Statement of Defence and Counterclaim dated 28th May, 2018.



5. The Defendants deny the Plaintiff's averments and states that the land was irregularly registered in the Plaintiff's name without their knowledge.
6. The Defendants seek the following orders against the Plaintiff:
 - a. An order dismissing Plaintiff's suit.
 - b. An order declaring that the process leading up to the registration of the Plaintiff's land parcel Gilgil/Gilgil 1/20 (Kikohey) was irregular and null and void in law.
 - c. An order cancelling all titles issued out to the Plaintiff for land parcel Gilgil/Gilgil Block 1/20 (Kikohey).
 - d. A declaration that the Defendants are the legal owners of land parcel Gilgil/Gilgil Block 1/20 (Kikohey).
 - e. Costs of the suit.

Factual Background.

7. The Plaintiff called 2 witnesses in support of his claim while the Defendants called 4 witnesses.

Plaintiff's Evidence.

8. During the hearing of the Plaintiff's case, one David Njoroge Ikua testified as PW1. He stated that he is an advocate as well as a Director in the Plaintiff's company.
9. He prayed that his statement/affidavit sworn 19th August, 2021, filed in court on 27th August, 2021 be adopted as part of his evidence adding that his witness statement and documents give a comprehensive summary of the case.
10. The documents attached to the Plaintiff's list of documents dated 28th February, 2019 were marked and produced as follows;
 - a. Certificate of official search as Exhibit P1.
 - b. Sale agreement dated 19th June, 2010 as Exhibit P2.
 - c. Sale agreement dated 11th January, 2011 as Exhibit P3.
 - d. Copy of the title deed Gilgil/Gilgil/Block 1/20 as Exhibit P4.
 - e. Proceedings before Land Registrar dated 9th August, 2010 as Exhibit P5.
 - f. Surveyor's report dated 9th July, 2015 as Exhibit P6.
 - g. Copy of Green card as Exhibit P7.
 - h. Letter from Agricultural Industrial holding dated 16th August, 2005 as MFI P8.
 - i. Certificate of Incorporation as Exhibit P9.
11. PW1 relied on his statement and states that he is one of the directors in the Plaintiff's company.



12. He states that in 2010 he was instructed by M/S Karura Kirarambi Women Group in respect of the sale of the suit property to one Michael Kamau Chege.
13. He further states that upon conducting a search, it was found that the property had a restriction and they lodged an application to have the same removed.
14. He states that the Land Registrar informed him that he would ask the objector to appear at a scheduled hearing on August, 2010. He states that the objector failed to show up at the hearing despite being notified.
15. He further states that the hearing proceeded after which a ruling was delivered on 13th August, 2019, wherein the Land Registrar had removed the restriction.
16. It was his further evidence that the said purchaser Mr. Chege offered to sell the said property to the Plaintiff and an agreement dated 11th January, 2011 was entered into between him and two others and the Plaintiff company.
17. He states that the title to the suit property was then transferred to the Plaintiff who took possession.
18. PW1 went on to state that the Plaintiff company subdivided the property into 50 by 100 plots for purposes of sale.
19. He further states that they were subsequently informed that the 1st, 2nd and 3rd Defendants had stopped the purchasers from developing their plots.
20. It is also his evidence that they confronted the Defendants who claimed that parcel 20 (the suit land) belonged to the 3rd Defendant and that the suit land had been amalgamated with the other plots and allocated to the 3rd Defendant.
21. He states that the Land Registrar confirmed that the suit land did not belong to the 3rd Defendant and that it was not among the ones consolidated and allocated to the group members and was issued with a green card.
22. He states that they proceeded with the subdivision after which the 1st and 2nd Defendant incited people to uproot the beacons.
23. He adds that they then filed this suit and an order of injunction issued on 1st November, 2012 which has since remained in force.
24. He states that this court ordered the District Land Surveyor to visit the land and file a report which report shows that the parcel being claimed by the defendants does not exist on the ground but that the parcel No. 20 is in the Plaintiff's name. The report is attached to his statement.
25. PW1 further states that the matter was then settled vide a consent filed and duly adopted as the court's judgment and a decree issued. He has attached the consent and decree to his statement.
26. PW1 states that in execution of the decree, the Defendants were duly evicted and the Plaintiff completed the subdivision where the title was cancelled and new ones issued in the 3rd parties' names and that title No. 20 longer exists.
27. He further states that the Defendants have no case over the suit property or its subsequent subdivisions and adds that their claim if any should be against Agricultural and Industrial Holdings Ltd whom they say offered to sell the Parcel No. 20 which had been sold to Karura Kirarambi Women's Group as set



- out in the letter dated 21st January, 2005 from the 3rd Defendant to the District Land Officer. The letter is attached to his statement. He goes on to state that Parcel No. 20 never belonged to the 3rd Defendant.
28. He states that during the purchase of the the suit parcel from Karura Kirarambi Women Group, it was vacant and the only encroachment was by the primary school was stopped. He adds that there was no development on the land until the Plaintiff sold the plots to 3rd parties.
 29. He finally states that the parcel No. 20 does not exist and that several people have already bought and developed the plots out of sale by Fradami and other 3rd Parties.
 30. PW1 states that the titles held by the Defendants are just papers which do not confer any right on any land.
 31. On cross examination, PW1 confirmed that himself, Francis Mwangi and Mr. Chege (deceased) are the directors of the Plaintiff company.
 32. He confirmed that the suit parcel measures about 5 acres and that they bought it from Michael Kamau, Susan Wangechi and Michelle Mumbi Wachira.
 33. He further confirmed that the same is yet to be transferred to them. He added that at the time they were signing the sale agreement, the original title deed was in the name of Karura Kirarambi Women Group.
 34. He stated that he conducted a search before the purchase of the land and that he first visited the land in 2010.
 35. He further stated that the land was partly vacant as a portion had been encroached by a primary school and a vacant shelter at the corner of the land.
 36. PW1 confirmed that after subdivision, the land was invaded and the persons who invaded attempted to put up temporary structures.
 37. He admitted that a consent was entered into and eviction orders issued on 22nd July, 2015. He confirmed that the consent was later set aside.
 38. He also confirmed that the land was bought for a consideration of Kshs. 650,000 which was paid in cash. He added that the vendors acknowledged receipt upon execution.
 39. PW1 further confirmed that the money was contributed by the three directors but admitted he could not remember how much each director's contribution was.
 40. He admitted that they sold some of the plots at a consideration of between Kshs. 250,000 and Kshs. 300,000.
 41. He further admitted that the Plaintiff was incorporated in 2010 and it is located in Nakuru town.
 42. PW1 was referred to Exhibit P6 and confirmed that the survey was done pursuant to a consent order. He went on to confirm that the Defendants have title documents issued to Samuel Kingori and Loyce in 1997. These are the 1st and 2nd Defendants.
 43. He also confirmed that the said persons are non-residents on the suit land.
 44. PW1 further confirmed that the Plaintiff had sold between 10 to 15 of the plots and admitted that he did not have the title then.



45. He stated that after decree, the Plaintiff completed the subdivision of block 1/20 and the original title surrendered and new ones issued to different individuals.
46. He also admitted that he does not know the number of titles issued and that Gilgil/Gilgil/Block 1/20 no longer exists.
47. On re-examination PW1 stated that at the time of purchase of the suit land, there was no title in the Defendants' name.
48. He stated that the agreement was between himself and the vendors who had bought it from Karura Kirarambi Women group on 19th June, 2010. He added that they had not transferred it to themselves.
49. PW1 stated that having been presented with the original title deed, they proceeded to purchase the land. He confirmed that there was no dispute between the vendor and themselves.
50. He also stated that the title document filed by the Defendants which referred to Gilgil/Gilgil Block 1/4820 is not the subject matter in this suit.
51. He further stated that in their counterclaim, the defendants claim that they are the owners of Gilgil/Gilgil/Block 1/20.
52. PW1 explained that he applied for eviction and added that the invasion to the land occurred after the purchase. He also explained that the suit was filed to obtain an injunction which was intended to stop the said invasion.
53. PW1 stated that they are yet to complete selling the land and that the Defendants have come to court claiming that they had not given instructions for the consent. He added that the consent was set aside and the status quo is still pending. He also stated that they have surrendered the original title.
54. He ended by stating that they pray for an injunction against the Defendants for trespass.
55. The second witness to testify was one Robert Etit Ekasiba herein after referred to as PW2.
56. PW2 stated that works as the head of survey County Government of Nakuru. He testified that on 9th July, 2015, he prepared a report to the Deputy Registrar Nakuru regarding the suit land Gilgil/Gilgil/Block 1/20 (Kikopey).
57. He explained that he was investigating encroachment on the parcels Block 1/4819, 1/4820 and 1/4821.
58. He explained that he visited the said parcels and concluded that the Block 1/4820 and Block 1/4821 were fully inside the suit land. He added that Block 1/4819 was partly inside the suit land.
59. He stated that his report gave the necessary recommendations.
60. He produced the report as Exhibit P6
61. On cross examination he confirmed that he conducted a survey on the suit property pursuant to a court order.
62. He further confirmed that he did a physical visit in 2015 but admitted that he was not certain who accompanied him.
63. He stated that there were four parcels including the suit land and that there was encroachment by three other parcels.
64. He stated that he had a copy of the green card with him. He confirmed that the government of Kenya was registered as the owner of the suit land on 9th February, 1994.



65. He added that the 2nd owner was Karura Kirarambi who were registered as owner on 21st January, 1999 and the 3rd owner is the Plaintiff registered as owner on 9th February, 2011
66. PW2 gave a chronology of how the other titles were issued he stated that the first one was to be issued was Block 1/4819 on 22/5/1997, Block 1/4820 was issued on 21/4/1997 and Block 1/4821 issued on 9th February,1997. He added that they do not rely on titles because most of them are not genuine.
67. He stated that the basis of his conclusion on encroachment was as a result of the green card. He also admitted that he did not request the green card for the three other parcels and reiterated that he still recommends their annulment.
68. He further stated that the four parcels refer to one and the same parcel of land.
69. He admitted that the report does not show when he visited the suit land. He however confirmed that he indeed visited the suit land.
70. PW2 admitted that he used the RIM from the Survey of Kenya.
71. The court noted that only the green card was annexed.
72. PW2 denied that there are gaps in his report and admitted that he could not do the work alone.
73. He admitted that he needed help from his office but also admitted that he could not remember who he was with.
74. He also admitted that he could not remember if there were structures on the ground.
75. He further admitted that he could not remember anything else from his ground visit.
76. On re-examination, PW2 stated that he visited the site and reiterated that he is a professional surveyor. He added that it was not possible to determine the physical location of the parcels without a map.
77. PW2 reiterated that his report is based on the map and green card. He confirmed that he did not have copies of the green cards for parcel 4819,4820 and 4821.
78. He stated that the green card for the suit land does not relate to the three other titles because the three titles i.e. 4819,4820 and 4821 do not appear on the title.
79. PW2 was referred to Exhibit P7, the green card, and the Defendants' documents No. 1,2 and 3 on their list of documents and stated that the said titles combined, are more than the acreage for the suit land which is 2.016 Ha. He explained that Block 1/4819 is 0.9514 Ha, Block 1/4820 is 0.9589 Ha and Block 1/4821 is 0.6727 Ha.
80. He stated that they usually start their work with maps, title documents and then green card and added that he did not get copies of green card for land parcels 1/4819, 1/4820 and 1/4821.
81. He denied having done the report from his desk, stated that he had done survey work for 11 years and added that he had no personal interest in this suit.
82. The Plaintiff closed its case.

Defendant's Evidence.

83. Dominic Macharia Karichi testified as DW1. He testified that he is a business man and lives in Gilgil.
84. He prayed that his witness statement dated 25th May, 2018 be adopted as part of his evidence which prayer the court acceded to.



85. He stated that he is the chairman of the 3rd Defendant and has been since 1966. His evidence is that he bought the suit land from Agricultural & Industrial Holdings Ltd.
86. His evidence is that the suit land was 150 acres and was sold at Kshs. 5,000 per acre. He testified that it was not occupied when they bought it.
87. He testified that they bought the land for the 42 members to each get a portion. He added that each member contributed according to the number of acreage they desired to have.
88. It was his testimony that members paid Kshs. 7,000 per acre to Joseph Kinuthia who recorded the same and paid to the Company. When referred to document no. 7 from the Defendant's further list of documents, he stated 42 members contributed to the purchase of the 150 acres.
89. He testified that the 1st and 2nd Defendants were managers of the 3rd Defendant. He added that the 1st Defendant's name is listed at no. 26 where she paid for 2 ½ acres through balloting.
90. DW1 further testified that they entered into an agreement with the company and they received a letter confirming completion as evidenced from the letter dated 6th April, 1989.
91. He testified that the allocation letters refer to the 150 acres and stated that he has receipts for the same.
92. It was his further evidence that they did a survey through Muritu Zacharia and that the said surveyor put beacons on the suit parcel. He added that they paid him Kshs. 84,000 for the survey work. He stated that the 150 acres was divided between the 42 members.
93. DW1 testified that there was a rocky land of 17 acres which they also purchased for Kshs. 3,000 per acre. He testified that they bought a total of 167 acres from the company.
94. It was his testimony that all the 42 members got their titles in 1997 including the 1st and 2nd Defendants who later occupied and built on their portion.
95. He testified that Gema holdings never complained of trespass or encroachment. He further testified that when they bought the land in 1989, there was no block 20. He added that they used the Kamwere plan to purchase the land and that block 20 came into existence when they had already occupied the land.
96. In his written statement, he states that they have been in occupation of the suit land from 1989 while the 3rd Defendant used his portion under his name as a public primary school
97. DW1 produced documents on list of documents dated 28th May, 2018 and further list of documents dated 28th June, 2022 respectively. The same were marked as follows:

List of documents dated 28th May, 2018;

Document No.

4. Letter dated 31st March 1989 from F G Muguku as Exhibit D1
Letter of Allocation dated 6th April, 1989 from F G Muguku as Exhibit D2
6. Letter of allocation dated 6th April 1989 Exhibit D3
12. Ravine Farmers Group "B" Kikopey Ranch Gilgil Plan as Exhibit D4
8. Agreement with Muritu & Associates dated 15th May, 1989 as Exhibit D5

List of documents dated 28th June, 2022;



Document No.

6. A bundle of receipts totaling to Kshs 750,000 being part payment for Kshs. 150 acres Exhibit D6
 5. A bundle of receipts totaling to Kshs 84,000 (survey fees) as Exhibit D7
 4. A bundle of receipts totaling to kshs 51,000 (being payment for 17 acres of rocky land) Exhibit D8
 7. Ravine Farmers Group “B” members list dated 3rd April, 1989 as Exhibit D9.
98. In his witness statement, DW1 states that
99. On cross-examination, DW1 confirmed that he was a member of the 3rd Defendant as at the year 1989 and that he is listed as number 2 in the list of members.
100. He admitted that they do not have a sale agreement and that the allocation letter was issued after sale of the land. He further admitted that the said letter did not state that they paid Kshs. 5000 per acre.
101. He stated that the Land Reference number on Exhibit D3 is 9361/4 and 11106. He further stated that they bought the land in 1989 it comprised of parcels measuring 5 acres each and added that they bought 30 of them totaling to 150 acres.
102. With regard to Land Reference number 9361/4 and 11106 he stated that he was not aware whether the numbers changed.
103. DW1 was referred to document by the survey plans listed as number 14 from the list of documents dated 28th May, 2018. He stated that they engaged them to amalgamate the 5 acres each and they were paid for the work done.
104. He stated that he did not see the report and added that they only showed the beacons for the 150 acres.
105. DW1 confirmed that when they bought the 30 plots, they involved the surveyor to divide the 150 acres according to the acreage as bought by each member.
106. He stated that the rocky land was not surveyed. He further stated that the suit land belongs to the 3rd Defendant and subsequently allocated to the 1st and 2nd Defendant. DW1 confirmed that he had nothing to show that the suit land belongs to the 3rd defendant but confirmed that the parcels were amalgamated.
107. DW1 went on to state that Muritu surveyed the plots for amalgamation and that in its report, the surveyor makes reference to receipt No. 510932 of 15th April, 1997.
108. His evidence is that the 2nd Defendant’s parcel is 1/4820 while the 1st Defendant’s Parcel is 1/4819 and confirmed that the number 20 is not mentioned in their title documents.
109. DW1 stated that Plot No. 20 gave rise to 3 parcels and confirmed that he had nothing to show that Plot No. 20 gave rise to the 1st and 2nd Defendant’s parcels.
110. DW1 was referred to Exhibit P6 which is a copy of the green card showing the 6 entries which he read out as follows
- a. Entry No. 1 Government of Kenya and is s of 1994
 - b. Entry No.2 is Karura Kirarambi and is of 1995



- c. Entry No. 4 is a caution and is of 2005
 - d. Entry No.5 caution is removed and is on 2010
 - e. Entry No. 6 is Fradami Limited and is of 2011
111. He explained that the 1st and 2nd Defendant cannot have No. 20 appearing in their title documents because No. 20 is part of the parcels amalgamated. He stated that the Kamwere plan was used in 1989 when they purchased land but confirmed that it did not bear the stamp and signature of the surveyor.
 112. Witness was referred to Exhibit D4 which is the Kamwere plan and he confirmed that it has no signature and stamp. He also stated that he doesn't know who Kamwere is.
 113. On re-examination, DW1 stated that the Kamwere Plan (Exhibit D4) plan came from Gema holdings and added that they (Gema Holdings) are the ones who sold land to them.
 114. He clarified that when the bought land, they were shown a block of land measuring 150 acres and that the parcel of land had no beacons.
 115. He explained that subsequent to the purchase, a surveyor came to measure 150 acres out of the whole and fixed beacons.
 116. He went on to explain that the 3rd Defendant was present during the survey but Gema Limited was absent but never complained that they took more than 150 acres.
 117. DW1 further stated that the parcels No. 4820 and 4819 belong to the 1st and 2nd Defendants and added that the ground position of these two parcels is different from the suit parcel i.e. Gilgil Kikopey 1/20.
 118. DW1 went on to clarify that the 1st and 2nd Defendant's parcels of land are adjacent to each other and added that the suit parcel being claimed by the Plaintiff is non-existent.
 119. DW1 stated that the report by Surv Plan surveyors has a receipt No. D 510932 which lists 35 parcels but has no acreage. He explained that the amalgamation receipt is dated 15th April, 1997 and added that as at that date, the rocky area measuring 17 acres had already been purchased.
 120. DW1 went on to explain that the letter of allocation (Exhibit D3) bears the Nos 9361/04 AND 11106. He stated that this is the land that the 3rd Defendant bought and added that when they purchased it, there was no title deed.
 121. He reiterated that they bought 30 plots measuring 5 acres each. He stated that they had no separate titles and there were no beacons erected on the 5-acre plots.
 122. DW1 referred to Exhibit P6 (the green card) and explained that the file was open on 9th February,1994. He went on to explain that entry No. 2 shows registration in the name of Karura Kirarambi on 21st January, 1999 and added that as at the time of the second entry, they were already in occupation and members had their respective titles which were issues in 1997.
 123. He further stated that from the letter of allocation, (Exhibit D3), does not mention Kshs. 5000 and confirmed that Exhibit D2 and Exhibit D3 state that 150 acres of land has been allocated to the 3rd Defendant.
 124. He concluded by stating that they could not conduct a search when they purchased land because it did not have a title deed.



125. Duncan Muhia Kibe testified as DW2. He prayed that his statement dated 25th May, 2018 be adopted as part of his evidence in chief.
126. He stated that he has been a secretary of the 3rd Defendant from 8th June, 1991 and added that the 1st and 2nd Defendants are members of the group comprising 42 members.
127. It was his evidence that they formed the group in 1989 so as to purchase land for their members. It was further his evidence that they bought land in Gilgil measuring 150 acres and that they completed the purchase in April 1989.
128. He testified that the 1st and 2nd Defendants were beneficiaries as they bought 2 ½ each. He testified that one acre was being sold for Kshs. 7,000.
129. In his written statement he states that after purchase they were shown the external beacons by the representative of GEMA Holdings and the vendor's surveyor.
130. He also states that the external beacons were based on the Kamwere Plan which had 30 plots of 5 acres each.
131. He further states that they bought 17 acres of the rocky land which totaled to 167 acres.
132. He states that the said plots were combined by Ravine Group B into one parcel of land which was later divided among the 42 members and titles issued for each individual.
133. In respect of the suit parcel, DW2 in his written statement states that the titles for this parcel were issued to the Defendants herein, specifically that the 3rd defendant was issued a title for a public school known as Murindu Primary School.
134. He states that in 2010 they learnt that the Plaintiff had claimed ownership of the suit land yet the Defendants have been in occupation.
135. Upon cross- examination he confirmed that they bought the suit land from Agricultural Industrial Holdings formerly Gema Holdings Ltd.
136. He further confirmed that he did not see the title deed but added that they were issued with an allocation letter. DW2 was referred to Exhibit D2 where and admitted that he did not know whether they were sold two parcels of land.
137. He also confirmed that the suit property 1/20 Kikopey was not mentioned in the allocation letter. When referred to paragraph 8 of his statement, he confirmed that there was no title in any of the Defendants name.
138. He stated that they bought 30 parcels which included the 17 acres of the rocky area. He further stated that the 30 pieces were amalgamated before subdivision to members.
139. DW2 was referred to Exhibit D2 and he admitted that apart from this document, they did not see any document to confirm that the land was in the name of Gema Holdings.
140. He stated that the amalgamation was done by a surveyor known as Muritu and that the area confirmation had been done by South Plan Ltd and the documents given to him.
141. DW2 was referred to document no. 14 in the Defendant's list of documents dated 28th May, 2018. He confirmed that the receipt dated 15th April, 1997 was the only document they provided to the surveyor and added that the surveyors visited the suit parcel. He confirmed that they did not provide the surveyor with copied of the green card because they did not have any.



142. He stated that one of the parcels forming part of the surveyor's report is Gilgil/Gilgil Block 1/20 and added that it is No. 10 on the list.
143. He admitted that he was not aware that the suit property as at 1994 was listed in the government's name. He was referred to Exhibit P7 being the green card for the suit land where he went through the various entries.
144. He confirmed that between 1994 and 1999 there was no entry made. He confirmed that the 3rd Defendant registered a restriction in 2005 which was later removed by the Land Registrar in 2010.
145. He further confirmed that in 2011 an entry had been made in favour of the Plaintiff. He admitted that there was nothing in the green card showing that the 3rd Defendant owned the suit land.
146. Upon reexamination, DW2 while referring to the green card stated that Karura Kirarambi was registered on 21st January, 1999 and added that they never dealt with them at any time.
147. He stated that as at 1999, the 3rd Defendant had already bought the suit land adding that they bought it in 1989 and that the titles were issued in the names of their members in 1997.
148. DW2 stated that the suit parcel is part of the 150 acres which they bought and added that when they did amalgamation, Gema holding was aware and that they, Gema Holdings, are the ones who showed them the external beacons and that the receipt shows payment for amalgamation.
149. When referred to Exhibit D3, letter of allocation, DW2 stated that it refers to parcels s 9361/4 and 11106 and added that line 7 says that the 150 acres are comprised in the two parcels i.e. L.R No. 9361/4 and 11106.
150. DW2 stated that they never saw the title deed and that the records at the Lands office showed that it was owned by Gema Holdings. The court sought clarification on which records DW2 was referring to and he said that he did not know the exact records.
151. On the survey plans, DW2 stated that the surveyors reviewed the receipts, visited the suit parcel and added that before they started their work, they were shown the external beacons. He explained that they needed to confirm that the acreage on the ground tallied with what they had bought.
152. Loice Wambui Njogu testified as DW3. She prayed that her statement dated 28th May, 2018 be adopted as her evidence in chief which prayer the court acceded to.
153. She testified that she resides in Gilgil, Kikopey and that she is sick thus not in active employment or business.
154. She further testified that she has been living in her land measuring 2 ½ acres since 1989. She testified that the parcel is Gilgil/Gilgil Block 1/4819 and that she has a title. It was produced as Exhibit D10.
155. It was her evidence that they used to live in Maji Mazuri forest and added that when they got information that they would be evicted, she came together with other 42 persons and they contributed money towards purchase of land.
156. She went on to testify that 1 share was equivalent to Kshs. 7,000. DW3 stated that she paid Kshs. 17,500 to the 3rd Defendant for the 2 ½ acres.
157. She testified that she was issued with a receipt on 20th March, 1989 and that the receipt is for Kshs. 17500. The receipt was marked and produced as Exhibit D11.



158. DW3 stated that she immediately took occupation and has continued to be in occupation.
159. DW3 testified that in 2010 some people started subdividing the land and that made her report the same to the police who later removed the beacons.
160. She stated that she has another receipt dated 2nd January, 1990 and added that the said receipt shows that she was a member of the 3rd Defendant and that her plot is no. 7. The receipt was marked and produced as Exhibit D12.
161. In her written statement, she states that she built a 2 roomed house on the 21/2-acre parcel of land.
162. On cross-examination, she confirmed that she did not know how the 3rd Defendant bought the land. She stated that they were only told that a parcel of land had been identified for purchase.
163. She further stated that her parcel of land is Gilgil Block 1/4819. She confirmed that her title deed does not say Gilgil Block 1/20. She confirmed that she does not know about the suit parcel and added that she is only interested in her parcel of land which is Gilgil Block 1/4819. She stated that her title was issued on 22nd May, 1997.
164. DW3 stated that the 150 acres were bought for the 42 members and confirmed that she was not involved in the process of subdivision process. She stated that she was not aware that her parcel of land had been subdivided from the suit land.
165. DW3 was referred to Exhibit P7 (the green card) and admitted that the 3rd Defendant was not listed in any entry.
166. Upon re-examination, she stated that only half of her land was being claimed.
167. Samuel Kingete testified as DW4. He prayed that his witness statement dated 28th May, 2018 be adopted as his evidence in chief.
168. He testified that he lives in Gilgil and has been living there since 1989. He went on to state that his parcel of land is 1/4820 and is plot no. 8 as indicated in the ballot.
169. It is DW4's testimony that he bought his parcel of land as part of a group of 42 people and explained that this was after they were evicted from the forest.
170. He stated that his parcel of land is 2 ½ acres, that he paid Kshs. 17,500 for it and continues to be in occupation of it
171. He stated that his parcel is Gilgil/ Gilgil Block 1/4820 and that he was issued with the title on 21st April, 1997. He produced the Title as Exhibit D13 and the receipt for purchase of his parcel of and as Exhibit D14.
172. He explained that the reason for delay in obtaining the title documents is that they all had to be shown their parcels and beacons had to be erected.
173. It was his testimony that in 2010 the Plaintiffs claimed that the land belonged to them. He stated that he was not aware if the Plaintiffs visited his parcel.
174. In his written statement, he states that they planned a meeting with the Plaintiff but they did not show up. He adds that the Plaintiff came back in 2011 and put up beacons and that they reported to the police but the police could not do anything as they didn't have the title.
175. He further states that the Plaintiff removed the beacons and fenced the entire parcel of land. He adds that the Plaintiff alleged that the suit property belonged to it.



176. DW4 goes on to state that the Plaintiff came with police officers and a court order and proceeded to demolish his house and left with the iron sheets.
177. He ends by stating that they bought the suit land as a group and adds that the Plaintiff's claim is an attempt to grab the suit land.
178. Upon cross examination, DW4 admitted that he did not see the Plaintiffs on his parcel of land.
179. He confirmed that his parcel of land is not Gilgil/Gilgil Block 1/20 and added that he does not know it.
180. DW4 confirmed that his parcel of land is 21/2 acres and not 5 and further stated that the parcel of land was in the name of the 3rd Defendant. He admitted that he did not have any documents showing that the land belonged to the 3rd Defendant.
181. When referred to Exhibit P7 (the green card), DW4 admitted that there was not mention of the 3rd Defendant.
182. He stated that the parcel of land he occupied was bought by them as a group.
183. On re-examination, DW4 stated that he did not know the location of the suit property and reiterated that his parcel is Block 1/4820. He stated that it is the same one that the Plaintiff claims to be theirs.
184. That marked the close of the Defence case.

Issues For Determination.

185. The Plaintiff filed its submissions on 26th June, 2023. It identifies the following issues for determination:
 - a. Right to the parcel of land known as Gilgil/gilgil Block 1/20
 - b. Proof of fraud in the acquisition of Gilgil/gilgil Block 1/20
186. The Plaintiff submits that the ownership of the suit property raises a mixed question of law and fact. It submits that both parties had the burden to demonstrate that they are the owners of the said parcel of land.
187. The Plaintiff further submits that it produced a copy of the Certificate of Title as well as the green cards which confirmed that it is the registered owner.
188. It relied on Section 26 and 24 of the *Land Registration Act*.
189. The Plaintiff submits that the Defendants pleaded that they are the registered owners of the suit land. It argues that they failed to produce copies of title to the suit land instead produced titles for different parcels.
190. It submits that the Defendants parcel of land LR 9361/4 and 11106 did not have any connection with the suit land.
191. The Plaintiff further submits that it emerged that the portions owned by the 3rd Defendant were amalgamated and later subdivided. It added that in the said process, the 3rd Defendant either deliberately or in error amalgamated the suit property.
192. It submits that the Defendant never led any evidence to prove ownership of the land in dispute.



193. On the second issue of proof of fraud, the Plaintiff submits that the Defendants set out particulars of fraud in their counterclaim. It submits that the specific acts of fraud must be pleaded and proved. It added that allegations of collusion cannot pass as fraud.
194. The Plaintiff relied on the judicial authorities in *Muriithi Imanyara & 2 Others V Equity Bank Limited & 3 Others* [2019] eKLR and *Njoki Gicheru Ndiuni V Dadson Githenji Wahome & 3 Others* [2016] eKLR.
195. The Plaintiff concludes his submissions by urging the court to find that it has proved its case and that the Defendants counterclaim lacks merit.
196. The Defendant filed his submissions on 9th August, 2023. He identified one issue for determination; Who is the Legal Owner of the Land in Dispute?
197. The Defendants submit that the surveyor did not adhere to the court order which required him and the County surveyor to visit to the suit land.
198. They argue that during cross-examination the surveyor confirmed that he could not recall if he was with someone or alone.
199. They added that the surveyor could not confirm the date of the said visit nor the methodology he used in the visit. They cited the judicial authority in *Ali Mohammed Salim V Faisal Hassan Ali* [2014] eKLR.
200. The Defendants relied on Section 107(1) of the *Evidence Act* and the judicial decision in *Ethics and Anti-Corruption Commission V Wilson Gacancha & 4 Others* (ELC case no. 5 of 2008) quoting with approval the decision in *Munyu Maina V Hiram Gathiha Maina* (2013) eKLR.
201. They submit that the Plaintiff could not show how Karura Kirarambi Women's Group came to be owners of the suit land. They added that the Plaintiff failed to show how payment for the suit land was made and by whom.
202. The Defendants argue that they are innocent purchases for value and that there was nothing that contradicted validity of their title. They relied on the judicial authority in *Katend Vs Haridar & Company Limited* (2008) 2EA 173.
203. They submit that in terms of the chronology the titles that came first are 4819, 4820, 4821 while block 1/20 was issued on 9th February, 2010.
204. The Defendants further submit that on whether block 1/20 and land parcels 4819, 4820 and 4821 are one and the same parcel of land refers to a case of competing titles.
205. They relied on the judicial authorities in *Hubert L. Martin & 2 Others V Margaret J. Kamar & 5 Others* [2016] eKLR, *Wreck Motors Enterprises V Commissioner of Lands and Others* Civil Appeal no. 71 of 1997 and *Gitwany Investment Ltd V Tajmal Ltd & 3 Others* [2006] eKLR.
206. In conclusion, the Defendants submit that the Plaintiff failed to prove its case against them and urge the court to cancel title number Gilgil Block 1/20 (Kikopey).

Analysis And Determination.

207. After considering the pleadings, testimonies and the rival submissions of the Plaintiff and Defendants, the following issues arise for determination;
 - a. Whether the Plaintiff has proved its claim of trespass on Gilgil/gilgil/block 1/20 (kikopey) i.e suit property herein against the Defendants.



- b. Whether or not registration of Gilgil/gilgil/block 1/20 (kikoey) in the name of the Plaintiff was fraudulent, illegal, unprocedural or through a corrupt scheme and should therefore be cancelled.
- c. Whether the Plaintiff is entitled to the orders sought in its Plaintiff.
- d. Whether the Defendants are entitled to the prayers sought in their counter-claim.
- e. Who should bear costs of this suit.

A. Whether the Plaintiff has proved its claim of trespass on Gilgil/gilgil/block 1/20 (kikoey), the suit property herein against the Defendants.

208. The plaintiff's claim is hinged on trespass.
209. My starting point in determining this matter is to establish whether there is a nexus between the suit property and parcels 4819, 4820 and 4821 owned by the Defendants.
210. The Plaintiff produced a title deed for the suit property being Gilgil/Gilgil Block 1/20 (Kikoey) registered in its name. The title deed was issued on 9th February, 2011.
211. The Plaintiff also produced a green card for the suit property. The register in respect of the suit property was opened on 9/2/1994. The history of the suit parcel can be read from the entries in the green card and they are as follows:
- a. Entry No. 1, shows that the suit parcel was registered in the name of the Government of Kenya on 9/2/199e
 - b. Entry No. 2 is dated 21st January, 1999 and it shows that M/S Karura Kirarambi W. Group of P.O Box 57185 was glistered as owner of the suit property.
 - c. Entry No. 3 shows that a title deed was issued to M/S Karura Kirarambi W. Group.
 - d. Entry No. 4 is of 8/2/2005 and it shows that a restriction was registered by the 3rd Defendant (Ravine Farmers Group B.)
 - e. Entry No. 5 is dated 22/9/2010 and it shows that the restriction was removed by the Registrar
 - f. Entry No. 6 is dated 9/2/2011 and it shows that Fradami Limited of P.O Box 5314 Nakuru was registered as proprietor of the suit property.
 - g. Entry No. 7 is also dated9/2/2011 and it shows that title deed was issued to Fradami Limited (The plaintiff)
212. To offer an explanation for the root of their title, the Plaintiff gave evidence that M/S Karura Kirarambi Women's Group had the intention to sell the the suit parcel to one Michael Kamau Chege and they received instruction to act for the said women group in the transaction.
213. It is his evidence that when they conducted a search they found that a restriction had been placed on the suit parcel and the objector was invited to a hearing at the office of the land registrar, his testimony is that the purchaser and officials of the women group attended the hearing but the objector (the 3rd defendant herein) did not turn up. Subsequent to the hearing, a ruling was delivered which ruling had the effect of removing the restriction. The Plaintiff has produced a search showing the restriction, the letter inviting the objector to attend the hearing and the ruling by the registrar.



214. The Plaintiff's further evidence is that the purchaser, Mr. Chege subsequently sold the land to the Plaintiff. The Plaintiff has produced the two sale agreements in evidence which speak to the process of acquisition and is supported by the information on the green card.
215. The Plaintiff has also produced a survey report. PW2 testified and states that the defendant's parcels of land have encroached onto the Plaintiff's parcel in varied proportions. More specifically, he says Gilgil/Gilgil Block 1/4819 has encroached partly while Gilgil/Gilgil Block 1/4820 and Gilgil/Gilgil Block 1/4821 have encroached wholly. He recommends nullification of title as the defendants have no ground to occupy.
216. The 1st, 2nd and 3rd Defendants' on the other hand claim that they are the registered owners of titles block 1/4819, 1/4820 and 1/4821 respectively. They state that the titles were issued in 1997.
217. They further claim that the suit property was as a result of an amalgamation of parcels of land as evidenced in the receipt of amalgamation dated 15th April, 1997.
218. Their evidence is that the 3rd defendant purchased 30 parcels of land measuring 5 acres each. Their evidence is that the parcel of land was purchased from Gema Holding Limited and was to be excised from Land Reference Number 9361/4 and 11106 which is described in Exhibit D3 as being owned and registered in the name of Gema Holdings.
219. The defendants have also produced a plan for Kikopey Gilgil Ranch, receipts to confirm payment and/or contribution towards the purchase of the 150 acres by its members, copies of title deeds for the parcels of land owned by the defendants and which the plaintiff claims are encroaching on the suit parcel, receipts for the survey conducted.
220. DW1 in cross-examination stated that he did not know if the Land Reference No. 9361/4 ad 11106 changed at any time. He maintained that Gilgil/Gilgil Block 1/20 belongs to the 3rd defendant from whom they bought the 150 acres
221. DW2 confirmed that the allocation letter (Exhibit D3) does not mention the suit parcel. He also confirmed that they did not see any document confirming that the land sold to them was in the name of Gema Holdings. He further confirmed that the survey that was conducted by Surv Plan surveyors proceeded on the receipts that they gave the said surveyors. He also confirmed that the green card produced by the plaintiff does not have any entry relating to ownership or registration of the suit land in the name of the 3rd Defendant. In re-examination DW2 reiterated that they never saw the title documents relating to Land Reference No. 9361/4 ad 11106 but alleged that the records at the land Registry show that the two parcels were owned by Gema Holdings. When the court inquired which records the witness had seen at the Lands registry, the witness said he did not know the exact records.
222. DW3 during cross exam confirmed that it was impossible to confirm that her land had been excised from the suit property. She however stated that her title deed was first issued followed by that issued to the Plaintiff.
223. DW4 confirmed that he does not know the suit property and stated that his parcel is not Gilgil/Gilgil Block 1/20. He stated however that the suit parcel belongs to the 3rd defendant and confirmed that he had nothing to show that it belonged to the 3rd Defendant.
224. DW1 testified that the 3rd Defendant was allocated the land from Gema Holdings. This court has perused the allocation letter produced as ExhibitD3 and notes that the properties that were allotted to Gema Holdings are described as LR 9361/4 and 11106.



225. The plan that was produced in evidence by the Defendants which they refer to as the Kamwere plan and which they state is the basis of their occupation of the suit parcel is not signed or stamped. DW1 also confirmed that he did not have anything to demonstrate that the Defendants' parcels arise from the suit property. This court further notes that there were no survey or mutation plans produced by the Defendants to show any form of subdivision.
226. From the above evidence, it is clear that the Defendants' have failed to establish the nexus between the suit property and their three parcels of land i.e. Gilgil/Gilgil Block 1/4819, 4820 and 4821.
227. The documents produced in evidence by them, do not support their counterclaim that Gilgil/Gilgil Block 1/4819, 4820 and 4821 from part of the suit land and that they purchased the suit land and therefore own it.
228. In view of the above, this court has established that there is no nexus between Gilgil/Gilgil Block 1/20 and Gilgil/Gilgil block 1/4819, 1/4820 and 1/4821 and in my view, they are distinct parcels.
229. The Plaintiff through his witness the County Surveyor (PW2) confirmed from his report dated 9th July, 2015 that the Plaintiff's suit had been encroached by the Defendants' parcels.
230. This court appreciates the issues raised by the Defendants with regard to PW2's testimony. I am of the view that even though the surveyor admitted that he could not recall the date or the person who accompanied him to the suit land, he maintained that he visited the suit parcel.
231. It is trite law that he who alleges must prove. Section 107(i) of the Evidence Act provides that:-
- “Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
232. Though the Defendants strongly believe that the surveyor did not conduct a site visit, they did not prove so. If the contents of the survey report were in dispute, nothing would have been easier than for the defendants to call another surveyor to offer a contrary opinion. As things remain, PW2's evidence is on record and has not been rebutted.
233. Taking all the evidence and documents produced into consideration and further in view of the surveyor's (PW2), I am inclined to find that indeed there is encroachment on the suit property by the following parcels:
- a. Gilgil/Gilgil Block 1/4819 (Kikopey)
 - b. Gilgil/Gilgil Block 1/4820 (Kikopey)
 - c. Gilgil/Gilgil Block 1/4821 (Kikopey)

B. Whether or not registration of Gilgil/gilgil/block 1/20 (kikopey) in the name of the Plaintiff was fraudulent, illegal, unprocedural or through a corrupt scheme and should therefore be cancelled.

234. The Defendants, in their counterclaim, have alleged fraud on the part of the plaintiff. This is in paragraph 5 (a)-(e) in their Counter claim. Fraud has been defined in Black's Law Dictionary 11th Edition as

“A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”



235. It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved.
236. The Court of Appeal in the judicial decision of *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another* [2000] eKLR held as follows;
- “It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”
237. In *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23 the court held that:
- “When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”
238. In *Kinyanjui Kamau Vs George Kamau* [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated thus:
- “It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* [2008]1KLR (G & F) 742 wherein the court stated that “. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...”
239. Section 26 (1) of the [Land Registration Act](#) states as follows:
- “The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except-
- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
240. In the instant cases, the Defendants have set out the particulars of fraud against the Plaintiff but have not led evidence to prove the said particulars in relation to acquisition of the Plaintiff’s title.
241. As earlier established, this court is of the view that the Plaintiff has sufficiently explained the root of its title. This is in the evidence of PW1 which has been set out in the preceding paragraphs. The Plaintiff produced sale agreements for the suit property which tallied with the entries in the green card.
242. Furthermore, the Defendants did not dispute the contents of the green card and this court is inclined to rely on it.



243. Based on the foregoing, the standard of proof in cases of fraud ought to be higher than in ordinary cases. In case where fraud is alleged it is not enough to simply infer fraud from the facts. The Defendants ought to have done a lot more in proving fraud but their evidence fell short.
244. I therefore find that the particulars of fraud on the part of the Plaintiff are mere allegations which remain unsubstantiated.

C. Whether the Plaintiff is entitled to the orders sought in its Plaintiff.

245. The Plaintiff has successfully proved the fact of trespass against the defendants. It is therefore entitled to the orders as sought in its plaintiff.

D. Whether the Defendants are entitled to the prayers sought in their counter-claim.

246. This courts finds that Defendants' counterclaim fails for the reasons that the Defendants failed to prove the allegations of fraud against the Plaintiff and further for the reason that the Plaintiff has explained the root of its title.

E. Who should bear costs of this suit?

247. Cost in the Black's Law Dictionary is defined as follows;

“The expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

248. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

249. In the result, I find that the Plaintiff has proved its case on a balance of probabilities. The Defendants have failed to prove their counterclaim and it is hereby dismissed.
250. Consequently, this court enters judgment in the following terms:
- a. An eviction order is hereby issued against the Defendants and they are hereby ordered to vacate the Plaintiff's parcel of land known as Gilgil/gilgil Block 1/20 (kikoepy).
 - b. The order is (a) above shall take effect after 90 days of the date hereof.
 - c. An order of permanent injunction is hereby issued against the Defendants restraining them from trespassing, entering, constructing or interfering in any other way whatsoever with land parcel No. Gilgil/gilgil Block 1/20 (kikoepy).
 - d. The counterclaim is hereby dismissed.
 - e. The Plaintiff shall have costs of this suit and of the counterclaim and interests thereon from date of this judgment until payment in full.
251. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF FEBRUARY, 2024.

L. A. OMOLLO



JUDGE

In the presence of: -

Mr. Githui for the Plaintiff

Mr. Akango for the Defendants.

Court Assistant; Ms. Monica Wanjohi.

