



**REPUBLIC OF KENYA**  
**IN THE LAND AND ENVIRONMENT COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC NUMBER 1991 OF 2000**

**NGARA MUCOKANIRIRIA COMPANY LIMITED.....1<sup>ST</sup> PLAINTIFF**

**PHILIP MUTURI WANJERU.....2<sup>ND</sup> PLAINTIFF**

**ESTHER WAIRIMU THUMI(as legal representative and administrator**

**of the estate of LEONARD THUMBI NYANJI.....3<sup>RD</sup> PLAINTIFF**

**DONALD WACIENI KANIARU.....4<sup>TH</sup> PLAINTIFF**

**DAVID GATHUNGU KIGWA.....5<sup>TH</sup> PLAINTIFF**

**VERSUS**

**JANE MUTHONI KIMANI & GEOFFREY KIMANI(as legal**

**representatives and administrators of the estate of**

**MUYA MACHARIA(DECEASED).....DEFENDANTS**

**JUDGMENT**

The Plaintiffs instituted this suit through a plaint dated 29<sup>th</sup> November 2000, which was amended on **22<sup>nd</sup> September 2004, 15<sup>th</sup> October 2007, 17<sup>th</sup> October 2011**, and orally amended in court on **13<sup>th</sup> March 2013** and **30<sup>th</sup> April 2013**. The plaintiffs alleged that the 1<sup>st</sup> Plaintiff was the original registered owner of **LR No.8788/9** which after subdivision was referred to as **Ruiru/Kiu/Block 12**. The Plaintiffs contended that following the subdivision, the 2<sup>nd</sup> plaintiff was allocated plot number 282 which was registered as **Ruiru/Kiu Block 12/282** while the 3<sup>rd</sup> defendant's deceased husband Leonard Thumbi Nyanji, the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs were jointly registered as the owners of **Ruiru/Kiu Block 12/280 and 281**.

It was alleged that on 16<sup>th</sup> November 2000, Muya Macharia(deceased) entered into the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> plaintiffs parcels of land without their consent and further, that he erected a fence and constructed semi permanent iron sheet rooms on plots no.s 280, 281 and 282 (hereinafter referred to as the suit properties). The Plaintiffs averred that following the death of Muya Macharia, on 11<sup>th</sup> December 2002, the Defendants had refused to remove the illegal structures and to vacate form the suit properties. The Plaintiffs sought the following orders against the Defendants:-

- a. An order/declaration that Ruiru/Kiu Block 12/280 formally plot 280 formally plot no. 280 and Ruiru/Kiu Block 12/281 formally plot no. 281 belong to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> plaintiffs whereas Ruiru/Kiu Block 12/282 formally plot no. 282 belongs to the 2<sup>nd</sup> plaintiff.*
- b. A permanent injunction restraining the Defendants, their servants, employees and or agents from entering, trespassing, alienating, fencing, dealing, wasting, contracting, or erecting any building on Ruiru/Kiu Block 12/280, 281 and 282 formally plot 280, 281 and 282 respectively, subdivided from LR No. Ruiru/Kiu Block 12.*
- c. An order of eviction of the defendants from Ruiru/Kiu Block 12/280, 281 and 282.*
- d. Damages for trespass to land.*
- e. Any other relief the court may deem fit to grant.*

The Defendants filed a statement of defence dated **11<sup>th</sup> April 2001** which was amended on 14<sup>th</sup> October 2004. The defendants contended that Muya Macharia (deceased) was the bonafide owner of plot **no.390** in block **8788/6**, Kasarani and not LR No. 8788/9 as alleged in the amended Plaint. According to the defendants, the deceased lawfully entered and commenced construction on LR No. 8788/6 which he lawfully acquired and therefore, that the issue of vacating did not arise.

Substantive hearing of the suit commenced on **13<sup>th</sup> March 2013**, when the 5<sup>th</sup> plaintiff (PW1) testified that he was a retired teacher carrying out farming. He stated that together with **Leonard Thumbi Nyanji** (deceased) and the 3<sup>rd</sup> plaintiff, they bought land in 1976 from the 1<sup>st</sup> Plaintiff who sold them, two shares at **Kshs 17,500** /- per share, as well as an additional 200/- for other services. He averred that the three of them were going by the name **Thuwaga** and he produced two receipts for **Kshs 17,500/-** dated 15<sup>th</sup> October 1993, as Plaintiff Exhibits 2(a) and 2(b) as well as two receipts for 200/- dated 30<sup>th</sup> July 1993 and 17<sup>th</sup> September 1994, as Exhibits 3(a) and 3(b). PW1 contended that the shares were later converted into plots and he produced a document evidencing payment of the shares as Exhibit 1.

While stating that they purchased plots no. 280 and 281, PW1 averred that they were issued with receipts bearing the name **Thuwaga**, which was created from their names Thumbi, Wacieni and Gathugu, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> plaintiffs respectively. He stated that they also paid for survey fees and he produced the receipts issued to them as Exhibits 4(a) and (b). The evidence of PW1 was that they further submitted next of kin forms which were produced as Exhibits 5(a) and (b). Clearance certificates issued to PW1 for plots no. 280 and 281 in 1993 were produced as Exhibits 6(a) and (b) respectively.

According to PW1, plots nos. 280 and 281 were shown to them in 1993 after they had cleared the payments. He contended that they believed that the plots were theirs and fenced them off. PW1 averred that in the year 2000, the late Muya Macharia trespassed on their land and erected a fence and semi-permanent iron sheet single rooms. It was the evidence of PW1 that upon reporting the matter to the chief, Muya Macharia (deceased) was instructed to remove the structures on the suit properties which he refused to do.

PW1 produced the photographs of the developments carried out by Muya Macharia (deceased) as Exhibit 7 and further produced certificates of lease and titles in respect to plot no. 280 and 281 in the names of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> plaintiffs as Exhibits 8 and 9 respectively. An index map showing the location of plots 280, 281 and 282 was produced as Exhibit 10 while certificates of official searches for the two plots dated 28<sup>th</sup> March 2013 were produced as Exhibits 11(a) and (b). PW1 informed the court that he received letters from the Ministry of Land dated 22<sup>nd</sup> August 2006 informing them that their leases for plots no. 280 and 281 were ready and he produced the letters as Exhibit 12(a) and (b).

In cross-examination, PW1 averred that although they acquired the shares in 1993, they began the acquisition process in 1976. He stated that the shares were for **LR No. 8788/9** and not for a particular plot

and further, that acquisition of plots no. 280 and 281 was after subdivision. PW1 made reference to the index map he produced in court and he averred that it was for **LR No. 8788/9** where they bought the shares. He reiterated that they owned shares 280 and 281 and he maintained that their plots were in LR No. 8788/9. PW1 averred that the land reference number and the index map were not different since LR No. 8788/9 was the original land reference number.

In further evidence, PW1 stated that they paid the 1<sup>st</sup> plaintiff in installments and further, that there were no sale agreements. PW1 was referred to the photos he had produced as exhibits and he contended that they did not show that the structures were on their plots. He stated that there was no letter given to them by the chief showing evidence of their meeting.

During re-examination, PW1 referred to Exhibit 1 and averred that when the constitution was made, the 1<sup>st</sup> Plaintiff had not purchased the land. He contended that the 1<sup>st</sup> Plaintiff intended to buy parcel no. 8788/9. PW1 contended that their shares crystallized into plots in 1993 when they were shown the plots and took possession. He stated that they had already been shown their plots when the late Muya Macharia put up his structures on their plots. On being referred to the index map, PW1 stated that the heading was **Ruiru/Kiu Block 12/Ngara Mucokaniriria** where their plots nos. 280 and 281 were.

The 3<sup>rd</sup> Plaintiff (PW2) stated that he was an advocate of the High Court of Kenya. He informed the court that the 4<sup>th</sup> plaintiff was his cousin and that he was also related to the other plaintiffs. He stated that they were in court since they had bought two plots from the 1<sup>st</sup> Plaintiff and had made payments and obtained titles for plots 280 and 281. He averred that the plots were jointly registered in his name, Leonard Thumbi Nyanja (deceased) and David Gathungu Kigwa.

PW2 informed the court that in the year 2001, the defendant entered their plots without permission and further, that their attempts to have him vacate had been futile. He contended that they did not buy the plots from the defendant and that the defence filed herein was not relevant to this case. PW2 stated that the defendant's claim should be to the person he bought the property from.

In cross-examination, PW2 affirmed the documents produced in court. He stated that a sale agreement dated 1993 had not been produced in court as an exhibit. He contended that they purchased plot nos. 280 and 281 on LR No. 8788/9 which were co-owned by the plaintiffs. According to PW2, LR No. 8788/6 was a different area directly opposite the 1<sup>st</sup> plaintiff's plot. He averred that some of their payment receipts were handwritten on foolscaps and further, that there was no acknowledgement of the payment. The evidence of PW2 was that although there was no sale agreement, the sale transaction was not invalid.

In further evidence, PW2 averred that the 1<sup>st</sup> plaintiff bought the land from Mukinye Enterprises Ltd. He however admitted to not having evidence on the same in court. He informed to the court that the suit properties were located in Githurai and further, that they did not obtain any documents evidencing payment of statutory fees. He stated that the share certificates were issued by the 1<sup>st</sup> plaintiff and not the Ministry of Lands.

In re-examination, PW2 stated that he relied on all documents which had been produced by PW1 and further, that the documents showed how they purchased the properties from the 1<sup>st</sup> Plaintiff. He averred that the 1<sup>st</sup> Plaintiff issued them with certificates and facilitated issuance of their title deeds. The evidence of PW2 was that they had not been charged with obtaining the titles fraudulently.

The 2<sup>nd</sup> Plaintiff (PW3) testified that she was a housewife residing in Banana in Kiambu. She stated that she was the wife of Leonard Thumbi Nyanji (deceased) who passed on in 2010. PW3 averred that the other Plaintiffs were related to her husband. She produced the death certificate of her late husband and grant of letters of administration issued to her as Exhibit 20 and 21 respectively. PW3 stated that the disputed plots were situated in Githurai and were plots no. 280 and 281. She adopted the evidence of PW1 and contended that the defendant who had trespassed on their properties and put up houses and refused to vacate. PW3 contended that she was seeking her husband's entitlement and she urged the court

to issue eviction orders and grant them damages for trespass.

In cross-examination, PW3 stated that she was a peasant farmer in Rumuruti in the Rift Valley. She contended her claim was against Muya Macharia (deceased) in respect to plot no. 282 which she bought from the 1<sup>st</sup> Plaintiff in 1994. PW3 averred that she made a payment of Kshs 25,000/= and that she was issued with a share clearance certificate which she produced as Exhibit no. 22. She informed the court that she made a further payment of Kshs 5,000/- to the 1<sup>st</sup> Plaintiff for the title deed. She produced a lease and title document as Exhibit no. 23 and 24 respectively and averred that her title to plot no. 282 had never been challenged. PW3 averred that a search conducted on **28<sup>th</sup> March 2013**, revealed that the land was in her names and the certificate of official search was produced as Exhibit no. 24.

While stating that her documents were not fake, PW3 contended that plot nos. 280 and 281 neighboured hers. She averred that she had approached the court since Muya Macharia (deceased) had put up a house on all the three plots as shown by the photographs. She stated that the deceased had also erected a barbed wire fence on the suit properties. She averred that documents produced by the deceased before the chief were to the effect that the deceased bought the property from a member of Mukinye Enterprise Ltd. The evidence of PW3 was that they had no connection with Mukinye Enterprises Ltd.

PW3 contended that she did not enter into any contract with the 1<sup>st</sup> Plaintiff and stated that she had no agreement. She stated that she paid Kshs 13,000/- to the 1<sup>st</sup> Plaintiff for shares in plot no. 8788/9. Upon being referred to exhibit 22, PW3 averred that there was no indication as to who had issued the receipt and further, admitted that the receipt did not bear her name. She averred that she had a photocopy of the receipt since her original got lost. PW3 did not have in court the land and rate clearance certificates.

During re-examination, PW3 stated that her receipt issued by the 1<sup>st</sup> Plaintiff in 1994 was for **Ruiru/ Kiu Block 12/27- plot no. 282**. She stated that the 1<sup>st</sup> Plaintiff was buying the land and selling to them and reiterated that their plots were on LR No. 8788/9. PW3's evidence that her title deed had not been challenged in a criminal court marked the close of the plaintiff's case.

**Geoffrey Mwaura Kimani** (DW1) testified that he was a business man and sought to rely on his witness statement dated 23<sup>rd</sup> February 2012. He averred that the suit had been brought against Muya Macharia (deceased) who was his brother in law. DW1 averred that the deceased bought **LR No. 8788/6** in Kasarani area. The evidence of DW1 was that the deceased paid for the plot and a payment receipt for transfer fees of Kshs 6,500/- dated 3<sup>rd</sup> September 1996 was produced as defendant Exhibit 1. DW1 stated that Muya Macharia received a share certificate of the plot from the person who sold the plot to him and the share certificate dated **29<sup>th</sup> July 1976 for LR No. 8788/6** Kasarani was produced as defendant exhibit 2.

It was the evidence of DW1 that the plot was vacant when they erected structures in the year 2000. His evidence was that the vendor informed them that he had lived on the plot for 20 years. According to DW1, nobody attempted to evict them in the year 2000 and that later, some people whose plot was LR No. 8788/9 laid claim to their plot no. 8788/6 which was a different plot.

In cross-examination, DW1 stated that he was not present when Macharia Muya (deceased) bought the property from Charles Kariuki Kiiru and did therefore not know the history of the case. He averred that the deceased bought the plot in 1996 and that the structures were erected in the year 2000 when there were no other structures on the plot. DW1 stated that he had not seen the map and only had a certificate. His contention was that they did not go to Mukinye Enterprises Ltd to be shown the plot on the ground. He stated that the plot measured about quarter an acre and contended that he had no other document to show that the plot was owned by the deceased. His evidence was that he did not know where Mukinye's Enterprises Ltd land was.

In re-examination, DW1 reiterated that he had no map to show where the plot was on the ground. He averred that although the land was in Kasarani area, the deed plan showed that the plot was in Thika which was far from Kasarani. He contended that LR No. 8788/6 was sold to Muya Macharia (deceased) and averred that it was in Njiru, Kiambu.

The 2<sup>nd</sup> defence witness was **Jane Muthoni Kimani** (DW2). She relied on her witness statement dated 23<sup>rd</sup> February 2012 and averred that the late Muya Macharia who was her husband bought LR No. 8788/6 from Charles Kariuki Kiiru in 1996. She averred that the land was in Kasarani and that her late husband had a share certificate for plot 8788/6 issued on 20<sup>th</sup> July 1976. DW2 averred that the stamp on the share certificate was dated 3<sup>rd</sup> September 1996 when they acquired the plot. The evidence of DW2 was that they commenced construction in 1996 and that in 2000, some people attempted to evict them.

DW2 stated that whereas the plaintiffs claimed that their land was 9788/9, their plot was 8788/6 which was different. She made reference to a sale agreement and stated that it showed that the land was in Njiru, Kiambu District and that it measured about 108.526 acres. She averred that the deed of surrender for LR No. 8788/9 indicated that the acreage was 24.12 acres which was different from what was in the agreement. The evidence of DW2 was that the clearance certificate in the name of the 2<sup>nd</sup> plaintiff did not show the acreage.

In cross-examination, DW2 stated that they bought the land in 1996 and further, that they were not living and had never lived suit on the land. She stated that the plot where they put up structures was the same plot the Plaintiff's were claiming. DW2 informed the court that the structures on the property were made of iron sheets and that she had hired someone to take care of the structures. She averred that their plot was no. 390 on LR 8788/6 measuring a quarter acre.

In further evidence, DW2 stated that the 2<sup>nd</sup> Plaintiff's Certificate was no. 213 for plot no. 288. She stated that she did not have in court the map showing the location of plot no. 390 and further, that she never went to Mukinye Enterprises Ltd to ask them to show her the title. Her evidence was that she was shown the plot by the person who sold the same to them. According to DW2, the name of Charles Kiiru had been cancelled and had been replaced with the name of her late husband. DW3 could not tell whether the 1<sup>st</sup> Plaintiff had been issued with a title deed for a portion of the land they purchased.

During re-examination, DW2 stated that their share certificate was for plot no. 390 whereas the 1<sup>st</sup> Plaintiff's plot number was 218 which were different plots. She stated that her late husband had been shown where their plot was.

The last defence witness was Charles Kariuki Kiiru (DW3). He stated that he learnt about this suit when enquiries were made about a plot he sold to Muya Macharia (deceased). He adopted his witness statement dated 23<sup>rd</sup> February 2012 as part of his evidence. His evidence was that the disputed plot no. 390 in block 8788/6, Kasarani was his, having bought the same from Mukinye Enterprises Ltd in 1977. He stated that he paid survey and registration fees to the advocates who were selling the plots and that the balance was paid in installments. He contended that he paid Kshs 120/- for survey in 1975.

DW3 informed the court that he was issued with a receipt dated **24<sup>th</sup> December 1975**, for Kshs 320/- which he produced as exhibit 3. He stated that he made further payments of Kshs 7,500/- and Kshs 2500 on 24<sup>th</sup> December 1996 and 2<sup>nd</sup> July 1976 respectively and the receipts issued to him were produced as exhibits 4 and 5. DW3 contended that upon paying the installments, he was issued with a letter dated 26<sup>th</sup> August 1979, by Mukinye Enterprises to show that he was a member which he produced as exhibit 6.

DW3 made reference to exhibit 2 and stated that he was issued with a share certificate dated 20<sup>th</sup> July 1976 for plot no. 390. His evidence was that he owned the property from 1976 till 1996, when he surrendered the same to Muya Macharia (deceased). He stated that after selling the plot, he showed the deceased the beacons which had also been shown to him. His evidence was that the share certificate was his only evidence of ownership and further, that he took the deceased to Mukinye Enterprises Ltd where his name was cancelled and replaced with the deceased's name who was issued with receipts and a share certificate. He produced as exhibit 7 a letter dated 3<sup>rd</sup> September 1996 which he wrote to Mukinye Enterprises Ltd informing them that he had surrendered the land to Muya Macharia (deceased). DW3 averred that he was the first person to purchase the land from Mukinye Enterprises Ltd and that no one claimed the land from him.

In cross-examination, DW3 stated that he could not tell the size of Mukinye's land which was a huge parcel. He averred that he bought a small parcel measuring a quarter of an acre which was plot no. 390. He contended that he was issued with a share certificate and not a title deed. He admitted that the receipts produced in court did not show the plot number but only showed that he was buying a quarter acre plot on LR 8788/6, Kasarani. He stated that he made payments before the plots were pointed out to them.

DW3 did not know if the 1<sup>st</sup> Plaintiff purchased the plot. He averred that he bought the property as an individual and that Mukinye Enterprises Ltd pointed out the land to him. He averred that he was not issued with a beacon certificate. The evidence of DW3 was that he had not obtained title from 1976 to 1996 and he could not tell whether Muya Macharia (deceased) had been issued with a title deed.

In re-examination, DW3 stated that he paid for the plot before he was issued with a share certificate and that he became aware of the location of his plot after paying for it. He maintained that his plot was no. 390 and averred that the plot was near a railway line.

At the close of evidence, parties were directed to file written submissions. The Plaintiffs in submissions dated **20<sup>th</sup> April 2015**, reiterated the facts as pleaded and testified by the witnesses. Counsel averred that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs were joint registered owners of indefeasible titles nos. **Ruiru/Kiu Block 12/280 and 281** while the 2<sup>nd</sup> plaintiff was the registered owner of Ruiru/Kiu Block 12/282. Reference was made to section 24 and 26 of the Land Registration Act and authority in **Paul Audi Ochodho vs. Joshua Ombura Orwa Kisii ELC No. 102 of 2012** where the court held that the plaintiff who had placed before the court a copy of the title deed for the suit property and a certificate of official search confirming the registration had proved his case.

Counsel argued that the Plaintiffs herein had produced their certificates of lease, current search certificates as well as the registry index map identifying the three plots on the ground. It is the Plaintiffs submission that they are indefeasible owners of plots nos. 280,281 and 282 and that the Defendant's action of trespassing and claiming ownership of their plots was done arbitrary without any colour of right since the Defendant does not hold any legal or equitable interest in the suit properties.

It was submitted that the Defendant's continued illegal occupation of the suit properties denied the Plaintiffs of their rights to the suit properties and continued to expose them to risks of dissipation and wastage. The plaintiffs argued that the Defendant's actions were in contravention of the provisions of the Land Act and the Constitution. The Plaintiffs submitted that having proved their ownership to the suit properties, they were entitled to an order of permanent injunction restraining the defendant or any other person whatsoever from interfering with the suit properties.

The court was referred to the case of **Gitathuru Kariobangi Compnay Ltd vs. James Gacheru Muiru & 9 others Nairobi ELC No. 1825 of 1999** and it was submitted that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs who had proved that they were the absolute and indefeasible owners were entitled to damages for trespass having been deprived of their land since the year 2000. The court was urged to award Kshs 3,000,000/- for each of the plots for the 15 years the Plaintiffs were deprived of their property amounting to Kshs 9,000,000/-. For this submission, the plaintiffs relied on the case of **Alfred Kaplaman Bor vs. Bonface Mutua Kiilu & 2 others Eldoret ELC No. 1002 of 2012**, **Musa Angira Angira vs. Silfanus Ngoje Ochieng' Kisii HCCC No. 161 of 2008** and **Waas Enterprises Ltd vs. City Council of Nairobi & another Nairobi ELC No. 537 of 2005**.

In respect to the eviction orders sought, Counsel for the Plaintiffs contended that the Defendant ought not to be allowed to retain a position of advantage that was unlawfully obtained. Reliance was placed on the case of **Mucuha vs. The Ripples Ltd CA No. 106 of 1992** where the Court of Appeal stated that as far as possible, a party ought not be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act. Counsel argued that the defendant who encroached on the Plaintiffs' plots cannot be allowed to continue dispossessing the Plaintiffs and that eviction orders should issue forthwith.

The defendant in submissions dated 2<sup>nd</sup> June 2015 made reference to the case of **Lucy Mirigo & 550**

**others vs. Minister for Lands and 4 others(2014)eKLR** where the court stated that the Law of Contract Act stipulates the requirement for a valid instrument to convey an interest in land.

It was submitted that none of the Plaintiffs produced a sale agreement in relation to the properties they allegedly purchased. Counsel argued that the defendants were the legal owners of the suit properties having acquired the same through an oral agreement made between Muya Macharia (deceased) and DW3. The defendants relied on section 3(7) of the Law of Contract Act and submitted that the aforesaid agreement was exempted from the application of the current section 3(3) since the agreement was entered into in 1996 before the commencement of the amendments which introduced the said section on 1<sup>st</sup> June 2003.

The defendants relied on the cases of **Nancy Muthoni Kirigo vs. Ruffus Kangethe Manyeki (2010)eKLR** and **James Muthuti Mungania vs. Margaret Karema(2014)eKLR** and contended that the defendant paid a consideration of Kshs 240,000/- and subsequently took possession of the property. Counsel urged the court to infer and affirm that the defendants were lawfully entitled to ownership of the plots based on a valid sale agreement.

In further submissions, the defendants averred that the Plaintiffs' claim had been defeated by limitation period pursuant to section 7 and 9 of the Limitation of Actions Act. Counsel stated that the evidence of DW3 that he had been in actual, open and uninterrupted occupation of the property from 1976-1996 when he sold and transferred the same to the defendant was not disputed by the Plaintiffs. The Defendants submitted that DW3 acquired the property by way of adverse possession when he purchased and took possession of the land and further, that Mukinye Enterprises Ltd approved his possession and transfer to the Defendant. The court was referred to the case of **Peter Mbiru Michuki vs. Samuel Mugo Michuki (2014) eKLR** and **Kimani Ruchire vs. Swift Rutherfords & Co. Ltd (1980)KLR 10** for the proposition that an adverse possessor must prove that he had actual and/or constructive possession and further, that the possession must be open, uninterrupted and continuous.

Counsel contended that since DW3 enjoyed quiet use and enjoyment of the land from 1976-1996, any claim the 1<sup>st</sup> Plaintiff may have had in relation to the suit property expired in 1988. The defendants submitted that a claim for adverse possession can arise where one has entered the suit property pursuant to sale agreement as a bonafide purchaser for value and reference was made to the case of **Peter Mbiru Michuki vs. Samuel Mugo Michuki (2014) eKLR** where the court stated that the period of limitation can run in favour a purchaser in possession after having paid the purchase price.

The defendants submitted that the Plaintiffs had failed to offer cogent evidence to prove ownership of the disputed properties and that they same were legally acquired. Counsel averred that the evidence adduced in respect to plots 280, 281 and 282 could not conclusively confer ownership and further, that there was no sale agreements produced by the Plaintiffs showing the specific parcel of land purported to have been bought from the 1<sup>st</sup> Plaintiff. The defendants cited the case of **David Kiptugen vs. Commissioner of Lands & 4 others (2015) eKLR** for the proposition that acquisition of title cannot be construed only in the end result since the process is material.

It is the defendants' submission that the title documents in possession by the plaintiffs were unprocedurally acquired and the court was urged not to aid in the said illegality. Reference was made to the case of **Republic vs. Land Registrar Taita Taveta District & another (2015)eKLR** for the submission that the court ought not to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations arising from illegal transactions if the illegality is brought to the court's attention and the person seeking the court's aid is implicated in the illegality. Counsel referred to Article 40(6) of the Constitution and section 26(1) of the Land registration Act and submitted that a certificate of title though conferring absolute rights can be challenged. The defendants contended that since the plaintiffs procured their titles unlawfully and illegally, the court should revoke the unprocedurally acquired titles.

While submitting that the Plaintiffs had failed to prove their case on a balance of probabilities, the defendant argued that the evidence presented in court did not conclusively establish that the parcels of

land the Plaintiffs were claiming was the exact plot owned and possessed by the defendant. It was submitted that the Plaintiffs claim was for **LR No. 8788/9 Ruiru/Kiu Block 12** which was different from the defendant's plot **no. 390 on LR No. 8788/6**. The defendant contended that from the sale agreement on record, the 1<sup>st</sup> plaintiff only purchased 58 acres out of the 105 acres owned by Mukinye Enterprises Ltd the original owner of LR No. 8788/6.

Counsel averred that DW3's testimony was that the directors of the said company took him to the land and pointed out his portions and the boundaries therein. It is the defendant's submission that the Plaintiffs had failed to prove that the plot pointed out to DW3 was the same as the land purchased by the 1<sup>st</sup> Plaintiff and therefore, that the Plaintiffs had failed to prove their case on a balance of probabilities.

The Court has now carefully considered the available evidence, the exhibits produced in Court and the written submissions and the court makes the following findings.

The issues for determination are:-

- a. Who owns the suit property herein?*
- b. Have the Plaintiffs herein proved their case on a balance of probabilities*
- c. Whether the Defendants are legally entitled to the ownership of the suit property .*

From the available evidence there is doubt that Mukinye Enterprises Ltd owned a parcel of land known as **LR No. 8788/6** comprising of 108 526 acres . It is also evident that the said Mukinye Enterprises Ltd entered into an Agreement of Sale with Ngara Mucokaniriria Co.Ltd for purchase of 59.607 acres as evidenced by the sale agreement dated 20<sup>th</sup> July 1993 and produced as exhibit by the Plaintiffs. There is also no doubt that the 1st Plaintiff **Ngara Mucokaniriria Co. Ltd** was purchasing this land from the subdivision of a LR NO. 8788/6 and the same was known as LR NO. 8788/6/B. There is also no doubt that after the sale and subdivision of the initial parcel of land, the land held by 1<sup>st</sup> Plaintiff Ngara Mucokaniriria became known as LR NO. 8788/9 as evidenced from the Deed Plan NO. 88386 dated 3<sup>rd</sup> August 1994. It is also evident that Ngara Mucokaniriria Co. Ltd was a land buying company and after purchase of this parcel of land from Mukinye Enterprises Ltd, it subdivided the land into various plots as per the Registry index map produced in court as Exhibit No.10

After the subdivision, the area became known as **Ruiru/Kiu Block 12** (Ngara Mucokaniriria) it is evident that Ngara Mucokaniriria Co. Ltd had been registered as the proprietor of **LR NO. 8788/9** as evidenced by the Certificate of Title dated 3<sup>rd</sup> June 1996 and produced as exhibit by the Plaintiffs. It is also not in doubt that Ngara Mucokaniriria Co. Ltd (1<sup>st</sup> Plaintiff) had applied for subdivision of **LR No. 8788/9** comprising of 24.12 ha and the same was approved as evidenced by the letter dated 22<sup>nd</sup> February 1999, from the Commissioner of Lands. Prior to the approval, the 1<sup>st</sup> Plaintiff had prepared a Deed of Surrender over LR. No. 8788/9, Thika which was prepared by Kamere & Co. Advocates on 19<sup>th</sup> December 1997. It is also evident that Ngara Mucokaniriria Co. Ltd had many members and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Plaintiffs were among the members of this Company. It is also evident that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> , & 5<sup>th</sup> Plaintiffs bought shares from the 1<sup>st</sup> Plaintiffs as is evident from the various receipts produced in court as exhibits. The 2<sup>nd</sup>, 3<sup>rd</sup> ,4<sup>th</sup> & 5<sup>th</sup> Plaintiffs paid for shares in 1<sup>st</sup> Plaintiff as evident by receipts Nos. 0456 and 0455 and 408 produced as exhibit No.2(a),2(b),3(a), and 3(b). This purchase culminated in the issuance of clearance certificates **No. 009** and **No.010** for Leonard Thumbi, Donald Wacieni K. David G. Kigwa as registered properties of Plots No. 280, and 281 clearance certificate No. 213 for Philip Muturi as proprietor of plot No. 282. It is also evident that after the subdivisions and payment of the requisite fees, the 2<sup>nd</sup>, 3<sup>rd</sup> 4<sup>th</sup> ,& 5<sup>th</sup> Plaintiff's were registered as proprietors of the suit plots. From the certificate of leases produced as Exhibits, it is evident that **Ruiru/Kiu Block 12/282** was registered in the name of Philip Muturi Wanjema on **10<sup>th</sup> November 2004**, **Ruiru/Kiu Block 12/281** was registered in the name of Dornald Wacieni Kaniaru, Leonard Thumbi Nyanji and David Gathungu Kigwa on **2<sup>nd</sup>**

**November 2006** and **Ruiru/Kiu Block 12/280** was also registered in the names of Dornald Wacieni Kaniaru, Leonard Thumbi Nyanji and David Gathungu Kigwa on **2<sup>nd</sup> November 2006**. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants are therefore the registered proprietors of the above stated parcels of land. The Plaintiffs being the registered proprietors, then as provided by Section 26 (1) of the **Land Registration Act 2012**, they are the indefeasible owners of the said suit properties.

It is also evident from the documents produced by the Defendant and evidence of Dw3 **Charles K. Kiiru** that he had purchased a plot on Mukinye Enterprises Ltd in the year (1976). He paid for the plot as per the various receipts produced in court as exhibits. Form Defence Exhibit No.5, it is evident that the said **Charles K. Kiiru** purchased plot No. 390 from the large parcel of land known as LR NO. 8788/6 from Mukinye Enterprises Ltd. It is also evident that the said Charles K.Kiiru (DW3) further sold his plot **No. 390- LR 8788/6** to Muya Macharia who was the initial Defendant herein. That is evident from Exhibit NO. 6 dated **3<sup>rd</sup> September 1996**. Further, it is evident that the said Muya Macharia was issued with share certificate by Mukinye Enterprises Ltd on 20<sup>th</sup> July 1976. But that is the furthest that Muya did in his attempt to acquire titles ownership document for his plot No. 390-LR No. 8788/6. There is no evidence that the said Muya Macharia endeavoured to have the plot subdivided and registered with the Ministry of Lands. The said Muya Macharia has only a share certificate but not certificate of lease or Title.

It is also not in doubt that the said Muya Macharia did erect some Mabati houses on the suit property. That is evident from the photographs produced in court and the evidence of all the witnesses who testified in court. The said erection of the buildings culminated in the filing of this suit and issuance of an injunction order that restrained the Defendant from further constructions. The parties have now come to court seeking solution to the conflict herein.

There is no doubt that the Defendants have put up some buildings on what the Plaintiffs are claiming to be their land as evident from the Registry Index Map and the certificates of leases. The Plaintiffs are the registered owners of the suit plots they are referring to and there is no evidence that anyone has challenged their titles.

The Defendant in their submissions have submitted that they are entitled to the suit plot because their plot is No. 390 which is in block 8788/6 whereas the Plaintiffs suit property are in block 8788/9. To the Defendants, those are totally two different plots. However the Defendants did not produce the Beacon certificate nor any Registry Index Map for their plot. The Defendants further submitted that they are entitled to the suit property as the suit by the Plaintiffs has been caught by limitation period. It was their submissions that Muya Macharia purchased the property in 1976 and the suit herein was filed in the year 2000. That the suit was therefore time barred as per provision of Section 7 of the Limitation of Actions Act. Defendants also submitted that they are entitled to the ownership of the suit property by virtue of adverse possession. The court has considered the Defendants Defence as Amended on 14th October,2004. The Defendants just raised a mere denial and did not file a counter-claim claiming ownership of the suit by adverse possession. They also did not plead that the Plaintiffs' suit has been caught by limitation period. Parties are bound by their pleadings and Defendant cannot advance their case through submissions, which issues were not pleaded for in their Amended Defence.

The Defendants also submitted that the Plaintiffs titles of ownership are questionable as they were not acquired procedurally. However, the court has considered the documents or exhibits produced in court by the Plaintiffs. It is evident that there was subdivision of **LR.8788/9** into various plots and different members of 1<sup>st</sup> Plaintiff were allocated various plots as is evident from the members Register book produced as exhibit. From the said members Register, the Plaintiffs 2<sup>nd</sup>, 3<sup>rd</sup> 4<sup>th</sup> & 5<sup>th</sup> Plaintiffs were allocated plots **No. 280, 281 and 282 in Ruiru/Kiu block 12** and that is what is reflected in their certificates of lease. Also from the letters dated **22<sup>nd</sup> August 2006** from the Ministry of Lands to the District Land Registrar, Thika the lease documents for **Ruiru/Kiu Block 12/280 and 281** were forwarded to the said office for registration purpose. The Registration of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Plaintiffs as registered owners of the suit properties was procedural and there is no evidence tendered to this court to impeach the same.

Having found that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Plaintiffs are the registered proprietors of the suit property, then as provided by section 26(1) of the Land Registration Act 2012, the court declares them to be the indefeasible owners of the suit property. Section 26 (1) of the said Act reads as follows:

***“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—***

***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***

The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Plaintiffs being the indefeasible owners of the suit properties, then they are entitled to certain interests and rights as provided by Section 24 (a) and 25(1) of the Land Registration Act. These sections provide as follows:

***24(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and***

***25(i) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject***

Some of the rights that the proprietors of land are entitled to are free access and occupation of their property. The right of such proprietors shall not be liable to be defeated except receipt as provided by the Act. There is nothing provided by the Defendants herein to warrant this court defeat the Plaintiffs rights under section 24(a) of the Land Registration Act.

Having carefully considered the available evidence and the submissions herein, the court finds that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Plaintiff's are the legally registered owners of the land parcels ***No. Ruiru/Kiu Block 12/280, 281 and 282.*** The court further finds that the Plaintiffs suit has not been barred by the limitation period as submitted by the Defendants as the encroachment happened in the year 2000 and the suit was also filed in the year 2000. The Court further finds that though Muya Macharia ( deceased) did purchase plot No. 390 from LR.8788/6, that plot was never registered and it is evident that there is a Registry Index Map specifying the Plaintiffs suit properties which do not include plot No. 390 referred to by the Defendants. The Defendants are therefore not entitled to ownership of the suit properties herein. There is no evidence tendered to warrant this court to cancel the Plaintiffs certificates of lease or their ownership documents. For the above reasons the court find that the Plaintiffs herein have been able to prove their case on a balance of probabilities. Consequently the court enters Judgement for the Plaintiffs against the Defendants as prayed in the plaint.

As for the issue of damages, the court finds that the plaintiffs have not utilized their suit properties from the year 2000, when Muya Macharia (Deceased) encroached on it. I will be persuaded by the findings in the case of ***Gitathuru Kariobangi Company Ltd vs. James Gacheru Muiru & 9 others HCCC No. 1825 of 1999*** where the court held that:

***“on the remedy sought for general damages for trespass, it is an established principle of law that trespass to land is an indirect interference with possession of another person's land without lawful authority”.***

For the above reasons, the court finds that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Plaintiff's are entitled to damages for trespass on their parcels of land. The court finds that damages in the tune of **Kshs.1000,000/=** in total is sufficient to compensate the Plaintiffs herein for trespass by the Defendants.

The totality of this Judgment is that the court enters judgment for the Plaintiffs against the Defendants in terms of prayers, **No. (a), (b) (c)** of the Plaint.

In terms of prayer No. D, the court awards the Plaintiffs general damages of **Kshs.1000,000/-** for trespass. On prayer No. (e) I will deal with costs and costs normally follow the events. The Plaintiffs herein are entitled to costs to be borne by the Defendants.

Judgment accordingly.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **22<sup>nd</sup>** day of **February,2016**

28 days Right of Appeal

**L. GACHERU**

**JUDGE**

In the presence of :-

L .Gacheru : Judge

Court Clerk : Hilda

M/s Oswera holding brief Mrs Ngala for the Plaintiff

Mr Kibet holding brief Mr Odhiambo for the Defendants

**L. GACHERU**

**JUDGE**

**Kibet:** I apply for certified typed copies of the proceedings and judgement.

**M/s Oswere :** No objection . May the Title Deed be released.

**Court:**

The certified typed copies of proceedings and Judgement to be supplied to the Defendants upon payment of the requisite fees . The application for release of the exhibits after expiring of the 28 days Right of Appeal.

**L. GACHERU**

**JUDGE**