



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 110 OF 2015 (O.S)

IRENE WANGUI KURIA.....1ST APPLICANT

JOYCE KANYI NJAU.....2ND APPLICANT

VERSUS

GEORGE NJOROGE NJAU.....1ST RESPONDENT

HANNAH WANJAU NJAU.....2ND RESPONDENT

DAVID MURIUKI THIONG'O.....3RD RESPONDENT

VIRGINIA THINGO CHIIRA.....4TH RESPONDENT

KYANJAU CO-OPERATIVE SOCIETY LTD.....5TH RESPONDENT

DISTRICT LAND REGISTRAR, KIAMBU.....6TH RESPONDENT

RULING

The Applicants brought this suit by way of Originating Summons dated 9th February, 2015 seeking the determination of a number of questions. The Applicants also sought a number of reliefs. The questions which the Applicants want the court to determine are the following:-

1. Whether the Respondents held the following properties namely, Kiambaa/Kanunga/1043, a portion of Kiambaa/Kanunga/434, 6 plots on block No. 18/782 situated in Kyanjau Co-operative Society and House on Block 209/4401/137 in Makadara along Hamza Road within Nairobi in trust for the Applicants.
2. Whether the sale of a portion of land previously known as KIAMBAA/KANUNGA/1043 combined together with a portion of land previously known as KIAMBAA/KANUNGA/434 to the 3rd Respondent herein was illegal and fraudulent and should be declared as null and void and any titles arising therefrom cancelled by the 6th Respondent.
3. Whether the sale and rent collection by 1st, 2nd, 4th and 5th Respondents with respect to 6 plots on Block No. 18/782 situated in Kyanjau Co-operative Society and House on Block/209/4401/137 in Makadara along Hamza Road within Nairobi is illegal and fraudulent and whether any titles issued thereto should be canceled.
4. Whether the disputed parcel of land among them land KIAMBAA/KANUNGA/1043 as combined with a portion of land previously known as KIAMBAA/KANUNGA/434 should be surveyed and/or visited to ascertain the true position on the ground.

5. Whether appropriate orders of injunction should be issued by this Honourable court to preserve the disputed parcels of land.
6. Whether the 1st, 2nd, 4th and 5th Respondents should be ordered to petition for grant of letters of administration and the Applicants be entitled to inherit the estate of their late father Samuel NjauNjoroge.

The Applicants have in addition sought the following orders in the Originating Summons:-

1. That pending the hearing and determination of this application, this Honourable court be pleased to issue a temporary injunction against the Respondents and their agents restraining them from selling, transferring, charging or disposing any property that is or was forming part of the estate of the deceased namely the late Samuel NjauNjoroge, namely;
 - a) Land parcel Kiambaa/Kanunga/1043.
 - b) Land parcel known as Kiambaa/Kanunga/434.
 - c) 6 plots on Block No. 18/782 situated in KyanjauCoperative Society Ltd in Thika.
 - d) House on Block/209/4401/137 in Makadara along Hamza Road.
2. That this Honourable court be pleased to declare that a parcel of land presently known as KIAMBAA/KANUNGA/1043 which is a portion of land previously known as KIAMBAA/KANUNGA/538 which was combined with a portion of KIAMBAA/KANUNGA/434 and measuring 1.5 acres now registered in the name of the 1st Respondent is held in trust for the Applicants as regards 0.5 acres thereof.
3. That subsequent to prayer one (1) above, IRENE WANGUI KURIA and JOYCE KANYI NJAU be declared as rightful heirs/beneficiaries or owners of subject land by virtue of trust.

AND OR IN THE ALTERNATIVE

That subsequent to prayer one (1) above IRENE WANGUI KURIA and JOYCE KANYI NJAU be declared as the rightful heirs/beneficiaries of a portion of all that parcel of land known as and/or formerly known as KIAMBAA/KANUNGA/434 as regards 0.5 acres in equal proportions by virtue of trust.

4. That subsequent to prayer 3 above the 1st Respondent's subdivision and combination of a portion of land presently known as KIAMBAA/KANUNGA/1043 and a portion of land previously known as KIAMBAA/KANUNGA/434 and sale thereof to the 3rd Respondent be declared as null and void and any titles arising therefrom be cancelled by the 6th Respondent.
5. That the 1st Respondent, 2nd Respondent, 4th Respondent and 5th Respondent held the following parcels of land in trust for the Applicants as rightful heirs and/ or beneficiaries:-
 - a) 6 plots on Block No. 18/782 situated in KyanjauCooperative Society Ltd. in Thika.
 - b) House on Block/209/4401/137 in Makadara along Hamza Road.
6. That subsequent to prayer 5 above this Honourable court be pleased to order that any subdivisions, combination and sale of the following parcels of land was null and void and any titles arising therefrom be cancelled,namely;
 - a) 6 plots on Block No. 18/782 situated in KyanjauCooperative Society Ltd. in Thika.
 - b) House on Block/209/4401/137 in Makadara along Hamza Road.
7. That subsequent to prayer 6 above, the Honourable court be and is hereby pleased to order the 1st,

2nd, 4th and 5th Respondents to petition for letters of administration within 30 days from the date of judgment and include the Applicants as beneficiaries of the estate of the late Samuel NjorogeNjau who died on 26th July, 1977.

8. That subsequent to prayer 7 above and upon hearing and determination of this application this Honourable court be pleased to issue a permanent injunction restraining the Respondents, their agents or servants from selling, transferring, charging or disposing of any property that forms part of the estate of the deceased namely:-

a) Land parcel Kiambaa/Kanunga/1043.

b) Land parcel known as Kiambaa/Kanunga/434.

c) 6 Plots on Block No. 18/782 situated in Kyanjau Cooperative Society Ltd. in Thika.

d) House on Block/209/4401/137 in Makadara along Hamza Road.

9. That pending the hearing and determination of this application this Honourable Court be pleased to order a survey of the land presently known KIAMBAA/KANUNGA/1043 and previously known as KIAMBAA/KANUNGA/434 AND/OR visit the site to establish the status of the disputed parcels of land as they stand on the ground.

10. That the costs of this Application be borne by the 1st Respondent.

The Originating Summons was supported by the Affidavit and further affidavits of the Applicants and the affidavit of one, James KirokoWangombe. The dispute between the parties revolves around the ownership of LR. No. Kiambaa/Kanunga/1043, LR. No. Kiambaa/Kanunga/434, six (6) parcels of land on Block No. 18/782 situated at Thika and a house on Block 1209/4401/137 in Makadara along Hamza road. The Applicants are the 1st Respondent's sisters. They are the children of Samuel NjauNjoroge ("the deceased"). The deceased died in the year 1977. The deceased had three (3) wives and a number of children by each of the said wives. The Applicants have contended that the deceased owned several parcels of land one of which was LR No. Kiambaa/Kanunga/538 which was held in trust for the deceased by his mother WangoiNjoroge and L.R No.Kiambaa/Kanunga/434 which was in the deceased's name.

The Applicants have contended that following the death of their grandmother WangoiNjoroge and the deceased, an application for grant of letters of administration of their grandmother's estate was made and after the grant was issued and confirmed, LR No. Kiambaa/Kanunga/538 ("Plot No. 538") which was the only property indicated to be owned by their said grandmother, WangoiNjoroge, was shared between the deceased's three (3) sons from his three (3) houses with each getting a portion of the said parcel of land measuring 2.2 acres. Plot No. 538 was subsequently sub-divided into three portions namely, LR. No. Kiambaa/Kanunga/1041,1042and1043.LR.No.Kiambaa/Kanunga/1043("Plot No. 1043") was transferred to the 1st Respondent as his share of the original Plot No. 538. The Applicants have contended that the other parcel of land that was owned by the deceased, namely, L.R No. Kiambaa/Kanunga/434 ("Plot No. 434") was given to the deceased's daughters from each of his three (3) houses the sons having shared Plot No. 538 as a foresaid. The Applicants have contended that the deceased's daughters from each of the three houses got portions of Plot No. 434 measuring 0.5 acres each. The Applicants who were from the house of the deceased's wife, Naomi NjokiNjau got their 0.5 acres of the said parcel of land. Their step sisters from the deceased's other two wives, PeninahMumbiNjau and Hannah WanjiruNjau also got their respective shares measuring 0.5 acres each.

The Applicants have contended that after being given the said portion of Plot No. 434 measuring 0.5 acres, they took possession of the same and started cultivation thereon which activity they carried out until the year 2012 when they were forcefully evicted from the said parcel of land by the 1st Respondent in collusion with his step brother who is the son of PeninahMumbiNjau, one, John NjorogeNjau. The Applicants have contended that the 1st Respondent has caused the boundary that existed between his parcel of land, Plot No. 1043 and Plot No. 434 to be removed and a portion of Plot No. 434 that had been given to the Applicants and the daughters of the deceased's wife PeninahMumbiNjau to be consolidated

with Plot No. 1043. The Applicants have contended that the third portion of Plot No. 434 that was given to the daughters of the deceased wife, Hannah WanjiruNjau, the 2nd Respondent herein was not affected. The applicants have contended that their portion of Plot No. 434 and that of the deceased's daughters from the house of PeninahMumbiNjau have now been sold fraudulently to the 3rd Respondent by the 1st Respondent without the Applicants' consent and without the process of succession in respect of the estate of the deceased in relation to Plot No. 434 having been undertaken. The Applicants have contended that following these fraudulent dealings by the 1st Respondent, the 1st Respondent has interfered with the land registers at the Kiambu land registry to conceal the fraud. The Applicants have contended that although the information relating to Plot No. 434 at Kiambu Land Registry has been altered, the situation on the ground clearly shows the fraudulent annexation of the Applicants' portion of Plot No. 434 by the 1st Respondent. The Applicants have contended that Plot No. 434 was never part of Plot No. 538 which was the subject of succession proceedings in respect of their grandmother's estate. They have contended that Plot No. 434 could not be part of Plot No. 538 because, whereas Plot No. 538 was registered in the name of their grandmother to hold in trust for their deceased father, Plot No. 434 was in the name of the deceased who had given the same to his daughters.

The Applicants have also contended that the deceased also had interest in L.R No. Ndumberi/Ndumberi/980 ("Plot No. 980") which has been subjected to secret succession proceedings with the knowledge of the 1st Respondent with a view to disinherit the Applicants. The Applicants have contended further that the 1st and 2nd Respondents have failed to account for the 6 plots that the deceased owned on Block No. 18/782 which is in the name of Kyanjau Co-operative Society. The Applicants have contended further that the deceased owned a house on Block/209/4401/137 in Makadara along Hamza Road jointly with one, Samuel Chira whose rent has not been accounted for by the 1st, 2nd and 4th Respondents who are receiving the same.

The Applicants have contended that the Respondents have no right to mismanage and to fraudulently deal with the estate of the deceased. The Applicants have contended that the Respondents should account for the assets of the deceased before application is made for grant of letters of administration in respect of the estate of the deceased. The Applicants have also contended that in view of the controversy surrounding Plot No. 538, Plot No. 1043 and Plot No. 434 a survey should be carried out to determine the status thereof.

So far, only the 1st and 3rd Respondents have responded to the Originating Summons. In his affidavit sworn on 7/4/2015 the 1st Respondent has stated that Plot No. 434 and another plot known as L.R No. Kiambaa/Kanunga/536 ("Plot No. 536") were registered in the name of their grandmother, WanguiNjoroge (the deceased's mother) and that the two parcels of land were consolidated in the year 1966 to give rise to Plot No. 538. The 1st Respondent has stated that when Plot No. 434 is said to have been shared among the deceased's daughters, the same had been consolidated with Plot No. 536 to form plot No. 538 and as such the same was not in existence. The 1st Respondent has denied that he removed the boundaries between Plot No. 1043 and Plot No. 434 and caused a portion of Plot No. 434 to be combined with Plot No. 1043. With regard to Plot No. 980, the 1st Respondent has stated that succession has been done in respect thereof by one, Samuel NjauNjoroge and an agreement had been reached that the interest which the deceased had on the property would be transferred to the Applicants. With regard to the 10 parcels of land said to have been owned by the deceased at Kyanjau Co-operative Society, the 1st Respondent has stated that the same were sold by the deceased's wives several years ago and as such the issue of him colluding with the 2nd Respondent to dispose of the same does not arise. With regard to the house at Makadara, Nairobi, the 1st Respondent has stated that the same belonged to one, Samuel ChiiraNgure and that the same is under the management of the 4th Respondent. He has denied that he has been receiving the proceeds of rent from the said house. The 1st Respondent has contended that the issues raised by the Applicants herein had been raised by them through their late mother Naomi NjokiNjau before the Chief Magistrate's court at Kiambu and were determined by the said court in favour of the 1st Respondent and that an appeal against the said Magistrate's court decision was dismissed by the High court. The 1st Respondent has termed the Applicant's Originating Summons as frivolous, vexatious and

an abuse of the process of the court.

On his part, the 3rd Respondent has stated in his replying affidavit sworn on 13/5/2015 that he purchased from the 1st Respondent a portion of Plot No. 1043 measuring ¼ acre which is yet to be excised from the said parcel of land although he was given possession thereof after paying substantial portion of the purchased price. The 3rd Respondent has stated that he has started developing the said portion of land that was sold to him by the 1st Respondent. The 3rd Respondent has stated that he purchased the said portion of Plot No. 1043 in good faith for value. He has denied any knowledge of Plot No. 434 which is claimed by the Applicants.

When the Originating Summons came up for mention on 1/10/2015 for directions, the Applicants informed the court that there were some new developments that had made it necessary for them to amend the Originating Summons. On that day, the court directed that the Applicants do file a formal application for leave to amend the Originating Summons.

What I have before me now is the Applicants Notice of Motion dated 14th December 2015 in which the Applicants have sought not only leave to amend the Originating Summons but also an interlocutory Injunction and an order for the intended 8th Respondent to re-survey some of the parcels of land in dispute. The application is opposed by the 1st, 2nd and 3rd Respondents through Grounds of opposition dated 14th January 2016. The Applicants' application which is supported by the affidavit of the 1st Applicant is brought to a large extent on the same grounds on which the Originating Summons is based which I have highlighted herein earlier at length. The Applicants have contended that it is necessary to join, the County Surveyor of Lands, Kiambu County and John NjorogeNjau in the suit because they participated actively in the consolidation of a portion of Plot No. 434 with Plot No. 1043 and the sale of that portion to the 3rd Respondent.

In their grounds of Opposition, the 1st, 2nd and 3rd Respondents ("the Respondents") have contended that the application is frivolous, vexatious and without merit. They have termed the application misconceived, bad in law and a gross abuse of the court process.

The application was argued by way of written submissions. The Applicants and the Respondents filed their submissions on 29th February, 2016 and 29th March 2016 respectively. I have considered the Applicants' application together with the affidavit filed in support thereof. I have also considered the grounds of opposition that was filed by the Respondents and the parties' respective submissions. As I have stated earlier in this ruling, the Applicants' application has three (3) limbs which I will consider separately. The first limb of the application seeks the joinder of County Surveyor of Lands, Kiambu County, the Attorney General and John NjorogeNjau as Respondents/Defendants in this suit. As I have stated above, the joinder of the three intended parties is sought on the ground that they participated in one way or the other in the alleged fraudulent consolidation of Plot No. 1043 and a portion of Plot No. 434 and the sale of the said portion of Plot No. 434 to the 3rd Respondent. I have noted from the material on record that Plot No. 434 and Plot No. 536 are said to have been consolidated to give rise to Plot No. 538 which was later sub-divided to give rise to Plot No. 1041, 1042 and 1043. The Applicants have contested the alleged consolidation and have contended that it was a fraudulent scheme by the 1st Respondent in collusion with the 6th Respondent to disinherit them of their share in Plot No. 434. The Applicants have contended that Plot No. 434 and Plot No. 538 were distinct and separate and that at no time was Plot No. 434 consolidated with Plot No. 536 to give rise to Plot No. 538. The Applicants have contended that it was in the year 2012 that the 1st Respondent and John NjorogeNjau, the intended 9th Respondent working together with the County Surveyor of Land Kiambu County, the proposed, 8th Respondent purported to consolidate or combine Plot No. 1043 and a portion of Plot No. 434 and to dispose of that portion to the 3rd Respondent.

I have perused the agreement for sale annexed to the 3rd Respondent's affidavit sworn on 13/5/2015. I have noted that John NjorogeNjau, the proposed 9th Respondent is a party to the agreement which seeks

to combine Plot No. 1041, Plot No. 1042 and Plot No. 1043 before transferring a portion of the consolidated plot measuring one (1) acre to the 3rd Respondent. In view of the allegations made by the Applicants against the County Surveyor of Lands, Kiambu County and John Njoroge Njau, I am of the opinion that a case has been made out for their joinder in this suit. The Applicants have met the conditions for joinder of parties set out under order 1 Rule 10(2) of the Civil Procedure Rules. If it is not for what I will say later in this ruling, I would have allowed the Applicants' prayer for joinder of the intended 7th, 8th and 9th Respondents.

The second limb of the application seeks leave to amend the Originating Summons. The joinder of the proposed additional respondents to the suit as parties would have necessitated the amendment of the Originating Summons under order 1 Rule 10(4) of the Civil Procedure Rules. I am satisfied that in the normal circumstances, the Applicants could have been allowed to amend the Originating Summons. I will however not allow the amendment sought. I have set out at the begging of this ruling the parties' respective cases and the issues in contention between them. In the proposed amended Originating Summons, the Applicants want the court to determine the following issues;

1. Whether the Respondents held the following parcels of land in trust of the Applicants, namely Kiambaa/Kanunga/1043, a portion of Kiambaa/Kanunga/434, 6 plots on Block No. 18/782 situated in Kyanjau Co-operative Society and House on Block/209/4401/137 in Makadara along Hamza Road within Nairobi.
2. Whether the subdivisions, combinations and sale of a portion of land presently known as KIAMBAA/KANUNGA/1043 as combined together with a portion of land previously known as KIAMBAA/KANUNGA/434 and sold to the 3rd Respondent on 29/9/2014 for Kshs.9,000,000/= was illegal and fraudulent and should be declared as null and void and any titles, combinations or sub-divisions arising therefrom be cancelled by the 6th Respondent.

2A. Whether the survey, mapping and mutations (if any) conducted by the 8th Respondent in respect of land presently known as KIAMBAA/KANUNGA/1043 together with a portion of land previously and/ or known as KIAMBAA/KANUNGA/434 in favour of the 3rd Respondent herein was illegal and fraudulent and should be declared as null and void and any survey, mapping and mutations arising therefrom be cancelled by the 8th Respondent.

2B. Whether the sale agreement executed on 29/9/2014 between the 1st and 9th Respondents on one hand and the 3rd Respondent purporting to sell land parcels number Kiambaa/Kanunga/1041, Kiambaa/Kanunga/1042 and Kiambaa/Kanunga/1043 after combination but actually selling land parcel No. Kiambaa/434 is illegal, null and void and all subsequent subdivisions, transfer and titles arising therefrom should be cancelled.

2C. Whether land actually sold on the ground by the 1st and 9th Respondents is 1 acre of Kiambaa/Kanunga/434 and not Kiambaa/Kanunga/1042, Kiambaa/Kanunga/1042 and Kiambaa/Kanunga/1043.

2D. Whether land parcel number Kiambaa/Kanunga/434 was combined with Kiambaa/Kanunga/1043 before 1990.

2E. Whether it is practically possible to combine land parcels No. Kiambaa/1043 and Kiambaa/Kanunga/434.

2F. Whether at the time of execution of the sale agreement on 29/9/2014 the 1st Respondent's parcel of land known as Kiambaa/Kanunga/1043 measured 2.20 acres (as per his inheritance pursuant to certificate for confirmation of grant issued on 9/9/1992 arising from Succession Cause No. 210 of 1990 – Estate of Wangui W/O Njoroge or 2.7 acres.

2G. Whether any developments and buildings erected on a portion of land belonging to the

Applicants measuring 0.5 acres arising from Kiambaa/Kanunga/434 should be demolished and the 3rd Respondent ordered to vacate from the suit property immediately.

3. Whether the subdivisions, combination, sale and rent collection by 1st, 2nd, 4th and 5th Respondents with respect to 6 plots on Block No. 18/782 situated in Kyanjau Co-operative Society and House on Block/209/4401/137 in Makadara along Hamza Road within Nairobi is illegal and fraudulent and whether any titles issued thereto should be canceled.
4. Whether the disputed parcel of land among them being land KIAMBAA/KANUNGA/1043 as allegedly combined together with a portion of land previously and or known as KIAMBAA/KANUNGA/434 should be resurveyed and or visited to ascertain the true position on the ground.
5. Whether appropriate orders of injunction should be issued by this Honourable court to preserve the disputed parcels of land.
6. Whether the 1st, 2nd, 4th, 5th and 9th Respondents should be ordered to petition for grant of letters of administration and Applicants be entitled the estate of their late father Samuel NjauNjoroge.

The Applicants have also sought the following orders in the proposed amended Originating Summons:-

1. That this Honourable court be pleased to declare that a portion of land presently known as KIAMBAA/KANUNGA/1043 formerly subdivided from a portion of land previously known as KIAMBAA/KANUNGA/538 and later combined or allegedly combined with a portion of KIAMBAA/KANUNGA/434 measuring 1.5 acres now registered and or allegedly registered in the names of the 1st Respondent is held in trust for the Applicants jointly as regard 0.5 acres.
2. The subsequent to prayer one (1) above **IRENE WANGUI KURIA and JOYCE KANYI NJAU** be declared as rightful heirs/beneficiaries and or joint owners of 0.5 acres of a portion of the subject land being Kiambaa/Kanunga/434 by virtue of trust **AND OR IN THE ALTERNATIVE**.

That subsequent to prayer one (1) above IRENE WANGUI KURIA and JOYCE KANYI NJAU be declared as the rightful heirs/beneficiaries of a portion of all that parcel of land known as and/or formerly known as KIAMBAA/KANUNGA/434 as regard 0.5 acres by virtue of trust.

3. That subsequent to prayer 2 above the 1st respondent's and 9th Respondent's sale and subsequent subdivisions, combination and sale of a portion of land presently known as KIAMBAA/KANUNGA/1043 as allegedly combined together with a portion of land previously known as KIAMBAA/KANUNGA/434 and sold to the 3rd Respondent herein be declared as null and void and any titles, combination and sub-divisions arising therefrom be cancelled by the 6th Respondent.
4. That the 1st Respondent, 2nd Respondent, 4th Respondent and 5th Respondents held the following parcels of land in trust for the Applicants as rightful heirs and or beneficiaries;
 - a) 6 Plots on Block No. 18/782 situated in Kyanjau Co-operative Society Ltd in Thika.
 - b) House on Block/209/4401/137 in Makadara along Hamza Road
5. That subsequent to prayer 4 above, this Honourable court be pleased to order that any subdivisions, combinations and sale of the following parcels of land was null and void and any titles, combination and subdivisions arising therefrom be cancelled;
 - a) 6 Plots on Block No. 18/782 situated in Kyanjau Cooperative Society Ltd in Thika.
 - b) House on Block/209/4401/137 in Makadara along Hamza Road.
6. That subsequent to prayer 5 above, the Honourable Court be and is hereby pleased to order the 1st,

2nd, 4th and 5th Respondents to petition for letters of administration within 30 days from the date of judgment and include the Applicants as beneficiaries to the estate of the late Samuel Njoroge Njau who died on 26th July 1977 with respect to the following properties;

- a) Land parcel kiambaa/Kanunga/1043.
- b) Land parcel known as kiambaa/Kanunga/434.
- c) 6 plot of Block No. 18/782 situated in Kyanjau Cooperative Society Ltd in Thika.
- d) House on Block/209/4401/137 in Makadara along Hamza Road.

7. That subsequent to prayer 6 above and upon hearing and determination of this application this Honourable court be and hereby pleased to issue a permanent injunction against the Respondent, his agents or servants restraining them from selling, transferring, charging or disposing of the properties that was forming part of the estate of the deceased namely:

- a) Land parcel kiambaa/Kanunga/1043.
- b) Land parcel known as kiambaa/Kanunga/434.
- c) 6 Plots on Block No. 18/782 situated in Kyanjau Cooperative Society Ltd. in Thika.
- d) House on Block/209/4401/137 in Makadara along Hamza Road.

8. That pending the hearing and determination of this application this Honourable court be pleased to order a survey of land presently known KIAMBAA/KANUNGA/1043 and land previously known as KIAMBAA/KANUNGA/434 AND OR visit the site to establish the status of the disputed parcels of land as they stand on the ground.

8A. That subsequent to prayer 1 and 3 above an order is hereby issued demolishing all developments and buildings erected on a portion of land belonging to the Applicants measuring 0.5 acres arising from Kiambaa/Kanunga/434 and 3rd Respondent is hereby ordered to vacate from the suit property immediately.

8B. That the OCS Kiambu Police Station do supervise the enforcement of the orders of this Honourable Court.

8C. That in the alternative to prayer 8A above this Honourable Court do order that the 1st and 3rd Respondents compensate the Applicants the current market value of 0.5 acres of land arising from Kiambaa/Kanunga/434 jointly and severally within 30 days from the date of judgment and/or to transfer to the Applicant's an equivalent land measuring 0.5 acres from land parcel No. Kiambaa/Kanunga/1043.

8D. That the 1st and 3rd Respondents be ordered to pay the Applicants mesne profits from the year 2012 when they were evicted from a portion of land known as Kiambaa/Kanunga/434 measuring 0.5 acres to the date of judgment.

9. That the costs of this Application suit be borne by the 1st Respondent.

The Respondents have objected to the Applicant's prayer to amend the Originating Summons on several grounds among others that this suit should not have been brought by way of Originating Summons. I am fully in agreement with the Respondents' submissions that the issues raised in this suit cannot be determined by way of Originating Summons. Originating Summons is normally employed in simple cases where facts are not disputed. There is no doubt that this is not one of such cases. The Applicants

have pleaded fraud and collusion against the Respondents. These have been denied. The Respondents have been accused of breach of trust, intermeddling with the estate property and failure to account. In the case of **Kibutiri Vs. Kibutiri (1983)eKLR** that was cited by the Respondents, it was held that;

“The scope of an inquiry which could be made on an Originating Summons and the ability to deal with contested case was very limited when it becomes obvious that issues raise complex and contentious questions of facts and law, a judge should dismiss the summons and leave the parties to prove their claim by ordinary suit.”

I am of the view that the Applicants should not have brought this suit by way of Originating Summons. It is clear from the issues raised for determination that the reliefs sought and the parties involved that the dispute between the parties is beyond the scope of Originating Summons. The applicants should have brought a normal civil suit. This being my view, I believe that it would not serve any useful purpose to allow the amendment sought that would add more parties and more complex issues into this suit which was brought in a wrong form. For the foregoing reasons, I would disallow the Applicants prayers seeking to amend the Originating Summons to join more parties to the suit.

The 3rd limb of the application seeks an order compelling the Kiambu County Surveyor of Lands to re-survey Plot No. 1041, 1042 and 1043 and the parcel of land immediately adjoining Plot No. 1043 which is or was Plot No. 434 and file a report in court and in the alternative, an order for the court to visit the site of the said parcel of land to assess their status on the ground. I am of the view that no basis has been laid for this prayer. The Applicants have not told the court what is to be gained at this stage of the proceedings by re-survey of the said parcels of land or the site visit by the court. The case of **Chemoiwa Ole Sayialel& another vs. Joseph Saitian& 2 Other (2015) eKLR** that was cited by the Applicants is distinguishable. The dispute in that case involved the boundaries of various parcels of land and the survey that was sought was to determine and fix the said boundaries which had the effect of narrowing the issues before the court. That is not the case here. The dispute here is not over the boundary of the parcel of land claimed by the Applicants and the other parcels owned by the 1st, 2nd and 3rd Respondents. The Applicants claim is over title to land in respect of which they claim to have been dispossessed of fraudulently. I am of the view that the order sought by the Applicants is premature and amounts to fishing expedition. I don't think that the Applicants have done their best to establish the history of Plot No. 536, 538 and 434 more particularly whether Plot No. 538 was a standalone plot or was as a result of consolidation of Plot No. 434 and Plot No. 536. I am of the view that there is enough material out there from which the Applicants can obtain this information instead of coming to court to assist them obtain evidence. The court can assist but only at an appropriate stage and when the justice of the matter would call for such assistance to be rendered. I would not allow this prayer.

The last limb of the application is seeking an order of injunction pending the hearing and determination of this suit. As I have stated above, this suit should not have been brought by way of Originating Summons. The issues raised can only be determined by the court in a normal civil suit. In the circumstances, I would not consider the Applicants prayer for injunction on merit. I will disallow the prayer but give the Applicants liberty to renew the application should they be advised to move the court by way of a normal civil suit. I have considered whether this suit can be treated as if the same was originated by a plaint but I have decided against that. This case would not be ideal for that procedure.

In the final analysis, the Applicants application dated 14/12/2015 is dismissed with costs to the 1st, 2nd and 3rd Respondents.

Delivered and Dated at Nairobi this 4th day of November, 2016

S. OKONG'O

JUDGE

In the Presence of

N/A for the Applicants

Mr. Gitari for the Respondents

Kajuju Court Assistant