



**Gituathi v Ngurwa & 3 others; Kamiti Farmers Company Limited (Interested Party) (Environment and Land Case 615 of 2013) [2024] KEELC 3390 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3390 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE 615 OF 2013  
OA ANGOTE, J  
APRIL 24, 2024**

**BETWEEN**

**JOSEPH MURIITHI GITUATHI ..... PLAINTIFF**

**AND**

**SIMON KINYANJUI NGURWA ..... 1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**KAMITI FARMERS COMPANY LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

1. The Plaintiff filed this suit by way of a Complaint dated 24<sup>th</sup> May 2013 and sought the following reliefs:
  - a. A permanent injunction restraining the Defendant whether by himself, his agents, servant, relatives or anybody acting on his behalf from interfering/ trespassing on Nairobi Block 117/512;
  - b. A mandatory injunction compelling the Defendant to remove the structure and the fence that he has put up on the Property Nairobi Block 117/512.
  - c. Damages for trespass which shall be assessed by the Honourable Court.
  - d. Costs of the suit.



2. The Plaintiff deponed that it bought the suit property, Nairobi Block 117/512 from Kamiti Farmers Co. Ltd through an agreement dated 2<sup>nd</sup> February 2010, and that he was duly issued with a Certificate of Lease and took possession of the property.
3. The Plaintiff's case is that on or around 2<sup>nd</sup> May 2013, the Defendant trespassed on the suit property and went ahead to fence it and constructed a temporary structure and that despite calling upon the 1<sup>st</sup> Defendant to stop the trespass, the Defendant has continued with said trespass.
4. In his Defence and Counterclaim dated 11<sup>th</sup> August 2013, the 1<sup>st</sup> Defendant opposed the Plaintiff's claim that he bought the suit property and that the Plaintiff is not entitled to the possession of the suit property.
5. The 1<sup>st</sup> Defendant averred that his father, the late Fredrick Ngurwa Gitukui, purchased the suit property for value from Kamiti Farmers Company Limited in 2001 and that the late Fredrick Ngurwa Gitukui thereafter took possession of the suit premises in September 2001 and was using and enjoying the premises until his demise on 16<sup>th</sup> May 2008.
6. According to the 1<sup>st</sup> Defendant, him and his siblings have without interruption continued to possess, occupy and enjoy the use of the suit premises since then; that they have a constitutional right to be protected as the dependants of the late Fredrick Ngurwa Gitukui and that himself, together with his siblings, fenced the suit property in 2009 in order to mark the boundary.
7. It was deposed that on 26<sup>th</sup> April 2013, the Plaintiff, without any color of right and contrary to the law, demolished the fence around the suit premises, causing him to report the incident to Kiamumbi Police Station. In his counterclaim, the 1<sup>st</sup> Defendant asserted that the late Fredrick Ngurwa Gitukui purchased the suit property from the Interested Party for Kshs. 250,000, through a sale agreement, transfer of land and transfer of lease dated 29<sup>th</sup> September 2001.
8. The 1<sup>st</sup> Defendant urged that vide a letter dated 1<sup>st</sup> November 2002, the Interested Party instructed the Commissioner of Lands to issue the Lease in favor of the late Fredrick Ngurwa Gitukui, after his clearance by the Interested Party, and that the title has however never been issued.
9. The 1<sup>st</sup> Defendant averred that the deceased died on 16<sup>th</sup> May 2008; that the deceased never sold, alienated, transferred, charged or leased the suit property prior to his demise, and that his attempts to obtain the Certificate of Lease with respect to the suit property have since been unsuccessful as the file at the lands office constantly and consistently could not be found.
10. The 1<sup>st</sup> Defendant claimed that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants willingly, knowingly, unlawfully and fraudulently registered the Lease for the suit property in favor of the Plaintiffs on 28<sup>th</sup> March 2012, depriving the estate of the late Fredrick Ngurwa Gitukui the suit property.
11. It is his case that the Plaintiff obtained the Lease and Certificate of Lease dated 13<sup>th</sup> November 2012 for the suit property in collusion with the alleged directors of Kamiti Farmers Company Limited, and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
12. The 1<sup>st</sup> Defendant stated that the people who signed the Lease Agreement and the Transfer of Lease were not directors of Kamiti Farmers Company Limited and had no authority or capacity to sign and act on behalf of the company, and that the Interested Party could not convey the suit property to the Plaintiff as it had already sold it to Fredrick Ngurwa Gitukui.
13. The 1<sup>st</sup> Defendant, in his counterclaim, prays for the following reliefs against the Plaintiff and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants:



- a. A permanent injunction restraining the 1<sup>st</sup> Defendant in the Counterclaim, his agents or servants from selling, transferring, disposing, charging or leading or in any manner dealing with the land parcel known as Nairobi Block 117/512 or any part thereof;
  - b. A perpetual injunction restraining the 1<sup>st</sup> Defendant in the counterclaim by himself or servants or agents from entering, occupying, using or in any manner, howsoever, interfering with the plaintiff's use, enjoyment, occupation and ownership of the parcel of land known as Nairobi Block 117/512 or any part thereof.
  - c. A declaration that the estate of the Late Fredrick Ngurwa Gitukui is entitled to ownership and possession of all that property known as Nairobi Block 117/512;
  - d. A declaration that the transfer of Nairobi Block 117/512 to the 1<sup>st</sup> Defendant in the Counterclaim, Joseph Muriithi Gituathi was illegal, fraudulent, null and void for all intents and purposes;
  - e. An order directing the Commissioner of Lands, the land registrar to forfeit, cancel and revoke the transfer, lease and the certificate of lease in favour of the Plaintiff/ 1<sup>st</sup> Defendant in the Counterclaim, Joseph Muriithi Gituathi.
  - f. An order directing the Land Registrar to register the administrators of the Estate of the Late Fredrick Ngurwa Gitukui as the true owners of the suit property and to issue them with the lease and certificate of lease.
  - g. General damages for trespass.
  - h. Damages for the value of the fence in the sum of KShs. 15,000/-.
  - i. In the alternative and without prejudice to the foregoing, damages equivalent to the market value of the property at the time of judgement.
  - j. Interest on (g), (h) and (i) above at court rates.
  - k. Costs of this suit plus interest thereon.
  - l. Any other relief this Honourable Court may deem fit and just to grant.
14. In his Reply to Defence and Defence to Counterclaim, the Plaintiff denied that Fredrick Ngurwa Gitukui purchased any interest in the suit property; that he undertook due diligence to ascertain the lawful owner of the suit property and that the Counterclaim should be dismissed with costs in favour.
  15. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants also filed a Defence to Counterclaim dated 26<sup>th</sup> August 2013, in which they denied the assertions made in the 1<sup>st</sup> Defendant's counterclaim.

### **Hearing and Evidence**

16. PW1 was Jane Kirigo Gituathi, who is the Plaintiff's mother. She relied on her statement dated 3<sup>rd</sup> October 2017 as her evidence in chief. She testified that she holds a Power of Attorney from her son, the Plaintiff, who lives in the United States of America and that she is the one, together with the Plaintiff's brother, Peter Njehia, who bought the suit land on behalf of her son.
17. PW1 stated that she visited the suit land and conducted a search before she bought it for Kshs. 1,100,000 as per the sale agreement; that the purchase price was paid in two instalments and the transfer was duly signed and that they found a temporary structure on the land, which was not there at the time they bought the land.



18. In cross-examination, PW1, stated that she saw the land in 2013; that she was accompanied by the Chairman and Secretary of Kamiti Farmers during the site visit; that she has never been to the offices of the Interested Party as the sale transaction was conducted in the office of an advocate called Kerongo and that she signed the agreement while other documents were sent to Joseph for signature.
19. PW2, Peter Njehia Njoroge, the brother-in-law of the Defendant, testified that he found out about the suit property through his neighbour, who informed him of some land in Kamiti, which was being sold by Kamiti Farmers and that he conducted a search at the lands office and found that the land was in the name of Kamiti Farmers.
20. It was the evidence of PW2 that he thereafter paid a commitment fee of Kshs. 400,000 to the Interested Party through their lawyer; that after Kamiti Farmers was issued with a Lease, they paid the balance of the purchase price, which was Kshs. 1,100,000 and that a title deed was later issued in the name of the Plaintiff.
21. PW 2 testified that the negotiations for sale were at the Chairman's house and the officials of the Interested party were there, being Simon Njoroge, the Chairman, Daniel Gathenji, the treasurer and the secretary; that the officials had documents which had the company's seal, and that he did not however have the documents which enabled him to carry out a search.
22. PW2 stated that he carried out a search at the Company's Registry; that Fredrick Ngurwa was a director of Kamiti Farmers Limited and that no receipt was issued when the money was paid; that he had the CR12 when he made the payment and that the sale agreement was made on 2<sup>nd</sup> February 2010 while the CR12 was applied for on 18<sup>th</sup> March 2010.
23. PW3, Simon Njuguna Njoroge, relied on two statements. He averred that he was a director at Kamiti Farmers Company between 2004 and August 2013; that the Interested Party started buying land in 1969 and the process of subdivision was done between 1982 and 1983; that the balloting for the plots was done in 1984 and that the land was sold to the Plaintiff.
24. PW3 testified that he has been a member of Kamiti Farmers Company Limited since 1969 and lives within the land owned by the Interested Party; that he was elected Treasurer in 1981 to 1996, when he was elected Vice-Chair and that he became the Chairman of the company in 2004. It was the testimony of PW3 that he did not have any documents to show that he was an official of Kamiti Farmers Company Limited between 1981 and 2004.
25. PW3 stated that he was not aware that the suit property was allocated to Fredrick Ngurwa; that the Chairman of the Company in 2002 was Mbugua Kariuki; that he (PW3) was elected chairman on 7<sup>th</sup> February 2004; that the order that was issued in CMCC No. 1062 of 2004 was brought to their attention by a process server during a meeting and that their registrar refused to receive the same.
26. PW3 informed the court that he did not have the minutes of the meeting in which he was elected. He stated that they were not given any documents such as the members' register and the letters of allotment by the outgoing officials, Mbugua Kariuki, Michael Chege Mwangi, Esther Njeri and Kimani Wori, who were removed as officials in 2004. He stated that the late Fredrick Ngurwa was a shareholder and board member who was one of the officials that they removed.
27. PW3 admitted to selling the suit property to the Plaintiff; that they followed the advice of the then PC of Nairobi, Mr. Sigei, who advised them to convene a meeting and tell people to bring documents; that they then compiled a register using the documents that were brought and that the purchase price was received by them in the office of Kamiti Farmers Limited which is at Kahawa West.



28. PW3 denied that they went to his house. It was his evidence that the agreement was done at the advocates' office and that he had the authority to sign the Lease on behalf of the Interested Party.
29. The 1<sup>st</sup> Defendant adduced the testimony of two witnesses in support of his case. DW1, the 1<sup>st</sup> Defendant, adopted his witness statement and produced the bundle of documents dated 13<sup>th</sup> August 2013 as DEXB1 and the bundle dated 29<sup>th</sup> January 2015 as DEXB2. These documents include a share certificate and receipt from the Interested Party.
30. DW1 stated that on 7<sup>th</sup> September 2001, the Board of Directors of the Interested Party held a meeting in which they agreed to sell the company plots for profit, which plots included the suit property and that it was agreed that to avoid any fake list of registration, the members' list would be forwarded through the local chief's office and the area district's office.
31. It was the evidence of DW1 that his father entered into a sale agreement with the Interested Party on 29<sup>th</sup> September 2001 for sale of the suit property for Kshs. 250,000, which was paid on the same day; that he was issued with a receipt and a certificate number 453 and that his father immediately took possession of the suit property and they enjoyed exclusive use and occupation of the same as a family.
32. He testified that the Ministry of Lands and Settlement wrote to the Interested Party on 1<sup>st</sup> October 2002 communicating its approval of the sub-division scheme of Land Reference No. 8570, of which the suit property was a part of; that in response, the Interested Party, in a letter dated 1<sup>st</sup> November 2022, stated that the late Fredrick Ngurwa Gitukui had been cleared by the Interested Party and that Kamiti Farmers Company requested the Commissioner of Lands to issue him with a Lease.
33. DW1 stated that following the demise of his father, he pursued issuance of the Lease from the lands office in vain; that he was repeatedly told that the file could not be found and that he later learnt from the Interested Party that there were some people who were attempting to fraudulently sell the suit property.
34. It was the evidence of the 1<sup>st</sup> Defendant, DW1, that the Plaintiff knew the owner of the suit land; that he met the Plaintiff several times in August 2012 in his neighbor's house and informed him that the suit property belonged to his late father and that he met in September 2012 with the Plaintiff and his brother, and told them they were dealing with conmen.
35. DW1 stated that the Commissioner of Lands knew the owner of the plot; that in 2011, Kamiti Farmers informed the 3<sup>rd</sup> Defendant about some people who were trying to acquire the suit land; that the Registrar of Companies knew the Directors of Kamiti Farmers were not the conmen and had a CR12 showing the directorship and that they also wrote a letter to the Commissioner of Lands informing him of the valid directors.
36. DW1 stated that the issue of directorship of the Interested Party was determined by the court in HCCC 300 of 2013 and the Registrar General gave a letter showing the genuine directors of the Interested Party; that the purported directors who signed the Plaintiff's documents were not directors and that they forged the CR12.
37. He stated that him and his siblings fenced the land in 2009; that on 26<sup>th</sup> April 2013, the Plaintiff unlawfully demolished the fence; that he reported the incident to Kiamumbi Police Station where it was entered in the occurrence book number OB 32/26/4/13 and that he has been using the land since 2011.
38. DW2, Anastacia Kaguyu adopted her witness statement dated 11<sup>th</sup> August 2013 as her evidence in chief. She stated that she is the first cousin of the 1<sup>st</sup> Defendant; that her mother, Grace Mugure was



- a shareholder of Kamiti Farmers and that she bought the property known as Nairobi/ Block 117/513 in 2001, at the same time that her uncle, Fredrick Ngurwa Gitukui bought the suit property Nairobi/ Block 117/512.
39. DW2 testified that her uncle's property was near her mother's land; that her cousins fenced the suit property on or about 2009 and that in September 2012, there was a meeting between herself, the Plaintiff, the Plaintiff's brother-in-law, the 1<sup>st</sup> Defendant and others, in which the 1<sup>st</sup> Defendant sought to know who had sold the property to the Plaintiff.
40. The Interested Party adduced the evidence of one witness, Esther Njeri, DW3, who adopted her statement dated 10<sup>th</sup> February 2023 as her evidence in chief, and produced the bundle of documents of even date as 1D Exb1.
41. These documents included an official search from the Registrar of Companies dated 200<sup>th</sup> February 2012, in which she is listed as an elected official of the Interested Party; a register of shareholders of Kamiti Farmers; a copy of the share certificate of Ngurwa Gitukui; minutes of the meeting of Kamiti Farmers Company held on 7<sup>th</sup> September 2001; the sale agreement and transfer of the suit property to Mr. Ngurwa Gitukui; the subdivision scheme approval dated 1<sup>st</sup> October 2012; the introduction letter dated 1<sup>st</sup> November 2012 and directions issued in Nairobi ELC 300 of 2013.
42. It was the evidence of DW3 that she was a treasurer of the Interested Party; that the suit land belongs to Simon Kinyanjui Ngurwa; that she knows Simon Njuguna who has never been a director and that she does not know the Plaintiff and that the Plaintiff has never been a shareholder of the Interested Party.

### Submissions

43. Counsel for the Plaintiff submitted that the Plaintiff has established that he is the owner of the suit property; that the Plaintiff produced transfer forms which were duly filled and effected, and a title deed, which was issued in his favour upon payment of the requisite fees.
44. Counsel relied on Sections 24(a) and 26(1) of the *Land Registration Act* and the cases of *Dr. Joseph Arap Ngok v Justice Moiwo Ole Keiwa & 5 Others* Civil Appeal No. CA 60 of 1997, *Ali Wanje Ziro v Abdubasit Abeid Said & Another* [2022] eKLR, *Elijah Makeri Nyangw'ra v Stephen Mungai & Another* (2013) eKLR.
45. Counsel submitted that while the 1<sup>st</sup> Defendant claims that his late father bought the suit property, the receipt of Kshs. 250,000 that he produced does not indicate whether the said amount was paid in cash or cheque and that although the transfer forms were executed in his favor, the parcel of land was never transferred to him.
46. It was Counsel's submission that the Plaintiff is protected by the doctrine of indoor management because he was neither a director nor shareholder. Counsel relied on the case of *Royal British Bank v Turquand* (1885) E&B 327, *Patrick Sagwa Kisia t/a Steg Consultants v Kay Construction Company Limited* [2021] eKLR and *Florence Wangu Mwangi & Another v British American Insurance Company Limited & Another* [2010] eKLR.
47. On the issue of fraud, Counsel submitted that the 1<sup>st</sup> Defendant failed to prove any fraud on the part of the Plaintiff. Counsel relied on the cases of *Eveline Karigu (Suing as the Administratrix of Estate of Late Muriungi M'Chuka alias Miriungu M'Gichugua) v M'Chabari Kinoro* [2022] eKLR and the Court of Appeal case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR, where the courts held that fraud must be specifically pleaded and strictly proved.



48. Counsel also relied on the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR where the court articulated the standard of proof in fraud cases. Counsel submitted that the Plaintiff has established that the 1<sup>st</sup> Defendant has trespassed on the Plaintiff's property.

### **Analysis and Determination**

49. Upon consideration of the Plaint and Counterclaim filed before this court, the following issues arise for this court's determination:
- a. Whether the Plaintiff was lawfully registered as the owner of suit property.
  - b. Whether the late Fredrick Ngurwa Gitukui acquired the suit property lawfully.
50. This suit concerns the ownership of Nairobi Block 117/512, the suit property, which traces its root in the name of the Interested Party, Kamiti Farmers Company Limited, which is a land-buying company.
51. The Plaintiff's case is that he bought the suit property from the Interested Party vide an agreement dated 2<sup>nd</sup> February 2010. It is his case that he was thereafter duly issued with a Certificate of Lease and took possession of the suit property. It is the Plaintiff's case that the 1<sup>st</sup> Defendant unlawfully trespassed on the suit property and constructed a fence on 2<sup>nd</sup> May 2013.
52. The 1<sup>st</sup> Defendant has opposed the Plaintiff's claim and asserts that the suit property was duly purchased by his late father and was not available to be sold to the Plaintiff. The 1<sup>st</sup> Defendant has claimed that him and his siblings put up a fence around the suit property in 2009 and not in 2013, as averred by the Plaintiff and that on 26<sup>th</sup> April 2013, the Plaintiff, without any color of right and contrary to the law, demolished the fence around the suit premises.
53. The 1<sup>st</sup> Defendant further claims that the persons who signed the lease agreement and the transfer of lease in favour of the Plaintiff were not directors of Kamiti Farmers Company Limited and had no authority or capacity to sign and act on behalf of the company.
54. The Plaintiff in this case was registered as the proprietor of the suit property on 13<sup>th</sup> November 2012. The 1<sup>st</sup> Defendant has however alleged that the said title was acquired fraudulently.
55. Section 26 of the *Land Registration Act* prescribes that a certificate of title is to be held as conclusive evidence of proprietorship. Such title can however be challenged on grounds of fraud and misrepresentation. The said provision of the law states as follows:
- “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”



56. This court is bound by the decision of the Court of Appeal in *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR, where it asserted that where a title has been challenged, a party must prove the legality of how he acquired such title. The court held as follows:

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

57. The Supreme Court in *Dina Management Limited v County Government of Mombasa & 5 Others* [2023] eKLR relied on the Court of Appeal’s decision above and reiterated that to establish whether the appellant is a bona fide purchaser for value, we must first go to the root of the title.

58. Similarly, in *Mwangi James Njebia v Janetta Wanjiku Mwangi & Another* [2021] eKLR, the Court of Appeal held that:

“In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased’ properties which later turn out to belong to other people when the correct



documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title.”

59. All parties to this suit trace their root of title to the suit property, Land Reference No. Nairobi Block 117/512 measuring 0.0490 hectares or thereabouts to Kamiti Farmers Company Limited, a land buying company. A claim for land bought through a land buying company is highly dependant on documentary evidence.

60. In *Lucia Wambui Kariuki & Another v Grace Wanjiru & Another* [2022] eKLR, this court considered the question of ownership of land through a land buying company and the requisite documentation to prove that one acquired title from a land-buying company lawfully. The court stated as follows:

“It is not in dispute that the suit land originated from Githunguri Constituency Ranching Company Limited, a cooperative Company owned through membership. It incorporated Kenyans of all walks of life in the quest to acquire land and so it was basically a land buying company which acquired large chunks of land at the advent of Independence from the white settlers who were folding up their agricultural activities to return to their native countries. The members pay a membership fee to join and acquire shares in the company. The shareholding was critical as it was the basis of allocation of land. One would then be issued with a share certificate and various receipts for all manner of payments that was demanded for by the company. At the right time, the land would be surveyed by the land buying company and subdivided into smaller portions according to the number of its members and to cater for common utilities as and when desired by the membership. Membership was therefore denoted by the share certificate. The company would maintain a register of members indicating their details, the share certificate number, plot number and such other details as may be peculiar to the membership.

Allocation of land would be through balloting. Members would then be issued with a ballot denoting the plot number balloted for. The instruments required to process the title therefore would be the share certificate, the ballot, the payment receipts and the clearance certificate by the company informing the Land Registrar that the holder of these documents is the rightful proprietor of the land. The ballot number must agree or correspond with the land reference number as shown on the Registry Index map, which denotes the land on the ground.”

61. It is then expected that a person who seeks to prove that he acquired title procedurally through a land buying company would present a share certificate; receipts of payments made to the company and the ballot and a clearance certificate from the company to the Land Registrar informing them that the holder of these documents is the rightful proprietor of the land.

62. In support of his title, the Plaintiff has produced in evidence a sale agreement dated 2<sup>nd</sup> February 2010, a lease document registered on 28<sup>th</sup> March 2012, a transfer of lease registered on 13<sup>th</sup> November 2012, a certificate of lease dated 13<sup>th</sup> November 2012 in the Plaintiff’s name and photographs of the suit property. The Plaintiff however failed to adduce in evidence a share certificate, a ballot and a clearance certificate from the company.

63. The Plaintiff contends that the suit property was purchased from the Interested Party, whose Chairman was Simon Njuguna Njoroge and the Secretary was Daniel Nderitu Githenji. Indeed, the sale agreement presented by the Plaintiff was signed by Simon Njoroge and Daniel Nderitu Githinji as directors of Kamiti Farmers Company Limited.



64. There is however contention with respect to the directorship of the Interested Party at the time the Plaintiff purported to buy the suit property from the company.
65. The issue of the Interested Party's directorship has been subject to multiple cases before the High Court and the magistrate's court. That issue was addressed in High Court Civil Case No. 682 of 2204, *Ephraim Kamau Njenga & 6 others v Mbugua Kariuki*; Nairobi ELC Case No. 300 of 2013 *Gatei wa Nganda v Kamiti Farmers Company Limited & others* and in Milimani Commercial Courts CMCC No. 1062 of 2004.
66. The issue of the directorship of the company stems from the Annual General Meeting held on 7<sup>th</sup> February 2004, in which Simon Njoroge was elected Chairman. The 1<sup>st</sup> Defendant has produced an order issued in CMCC No. 1062 of 2004 on 6<sup>th</sup> February 2004, which restrained Mr. Simon Njoroge and other Defendants in that suit from holding or continuing with the Annual General Meeting pending inter partes hearing.
67. Mr. Simon Njoroge conceded in his testimony that he was aware of the court order dated 6<sup>th</sup> February 2004, issued by the Magistrates Court in Milimani CMCC No. 1062 of 2004, but that the Registrar supposedly refused to accept service of the order, and proceeded with the Annual General Meeting in which he was elected chairman.
68. The elections of the of the officials of the Interested Party in 2004 appears to have resulted in the splintering of the company, because although Simon Njoroge and others were elected as officials, the previous chairman did not avail critical documents such as the members' register and the letters of allotment. Simon Njoroge presented a letter dated 18<sup>th</sup> January 2004 from the Provincial Commissioner issued to the former Chairman, Michael Chege, directing him to hand over company documents to the then directors of the Interested Party.
69. Simon Njoroge averred that in the absence of company documents, and following the advice of the Police Commissioner of Nairobi, the Interested Party convened a meeting and told its shareholders to bring their documents, and that based on those documents, they compiled a register. This is the genesis of the confusion in this case.
70. The issue of whether Simon Njoroge and Daniel Nderitu Gethenji were properly elected as directors of the Interested Party is not for this court's determination. This court is only concerned with the issue of ownership of the suit property.
71. Having perused the record, the court observes that neither the Plaintiff nor Simon Njoroge, the then Chairman of the Interested Party, have presented essential documentation of the Plaintiff's shareholding in the Interested Party. This is a critical document to prove the Plaintiff's allegations.
72. The 1<sup>st</sup> Defendant has asserted that his father, the late Fredrick Ngurwa Gitukui, purchased the suit property for value from Kamiti Farmers Company Limited in 2001. It is the 1<sup>st</sup> Defendant's case that the late Fredrick Ngurwa Gitukui thereafter took possession of the suit premises in September 2001 and was using and enjoying the premises until his demise on 16<sup>th</sup> May 2008.
73. The 1<sup>st</sup> Defendant produced a register of shareholders of the Interested Party in which Ngurwa Gitukui is listed as the owner of Share Number 41; a share certificate in favour of Ngurwa Gitukui; a sale agreement and transfer of the suit property from the Interested Party to Mr. Ngurwa Gitukui dated 29<sup>th</sup> September 2001; a receipt for the payment of the purchase price dated 29<sup>th</sup> September 2001; a clearance certificate in favour of Ngurua Gitukui; and a letter dated 1<sup>st</sup> November 2012 from the Interested Party to the Commissioner of Lands seeking issuance of title to Fredrick Ngurua Gitukui, with respect to the suit property .



74. The Interested Party has supported the ownership of the late Fredrick Ngurwa Gitukui. DW2, the current Treasurer of the Interested Party, Esther Njeri, testified that the suit property was sold and transferred to the late Fredrick Gitukui in 2001. She produced in evidence a bundle of documents containing similar documents as those produced by the 1<sup>st</sup> Defendant.
75. On this basis, the court is satisfied that the late Fredrick Gitukui legally and procedurally acquired title to the suit property in 2001. That being so, the suit property was not available to be allocated to the Plaintiff in 2010. The suit property therefore belongs to the 1<sup>st</sup> Defendant and not the Plaintiff.
76. Both parties have claimed that there has been trespass by the opposing party. Section 3 (1) of the Trespass Act, Cap 294 provides as follows:
- “Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
77. To establish trespass, one must prove that he/she is the legal proprietor of the suit property, and that another person has entered such property without reasonable cause. This court has found that the suit property was legally sold to the 1<sup>st</sup> Defendant in 2001 and was therefore not available to be sold to the Plaintiff in 2010.
78. The question then is whether the Plaintiff entered onto the suit property without the consent of the 1<sup>st</sup> Defendant. The cardinal rule of evidence is that he who alleges must prove. In this case, while the 1<sup>st</sup> Defendant has asserted that the fence he had constructed was demolished by the Plaintiff, the existence and subsequent destruction of the alleged fence has not been proved to the satisfaction of this court.
79. The 1<sup>st</sup> Defendant has further not presented any evidence linking the purported destruction of the fence to the Plaintiff or his agents. The upshot is that the 1<sup>st</sup> Defendant has failed to discharge its burden of proof with regard to its claim for damages for destruction of the fence, and general damages for trespass.
80. In conclusion, it is the finding of the court that the Plaintiff has failed to establish that he lawfully acquired title to the suit property. The 1<sup>st</sup> Defendant on his part has proved to the satisfaction of this court that the estate of the late Fredrick Gitukui is the lawful proprietor of the suit property. While the 1<sup>st</sup> Defendant has successfully proved title to the suit property, his claim for trespass fails for lack of evidence.
81. For those reasons, the Plaintiff’s suit is hereby dismissed with costs. The 1<sup>st</sup> Defendant’s counterclaim is partially successful and is hereby allowed as follows:
- a. A permanent injunction be and is hereby issued restraining the Plaintiff, his agents or servants from selling, transferring, disposing, charging or leading or in any manner dealing with the land parcel known as Nairobi Block 117/512 or any part thereof;
  - b. A perpetual injunction be and is hereby issued restraining the Plaintiff by himself or servants or agents from entering, occupying, using or in any manner, howsoever, interfering with the 1<sup>st</sup> Defendant’s use, enjoyment, occupation and ownership of the parcel of land known as Nairobi Block 117/512 or any part thereof.
  - c. A declaration be and is hereby issued that the Estate of the late Fredrick Ngurwa Gitukui is entitled to ownership and possession of all that property known as Nairobi Block 117/512;



- d. A declaration be and is hereby issued that the transfer of Nairobi Block 117/512 to the Plaintiff, Joseph Muriithi Gituathi was illegal, fraudulent, null and void for all intents and purposes.
- e. An order be and is hereby issued directing the Chief Land Registrar to cancel and revoke the transfer, Lease and the Certificate of Lease in favour of the Plaintiff, Joseph Muriithi Gituathi.
- f. An order be and is hereby issued directing the Chief Land Registrar to register the administrators of the Estate of the late Fredrick Ngurwa Gitukui as the true owners of the suit property and to issue them with the Lease and Certificate of Lease.
- g. The Plaintiff to pay the 1<sup>st</sup> Defendant the costs of the Counter claim.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Odero for Plaintiff

Ms Wambui for Defendant

Mr. Kago for Interested Party

Court Assistant - Tracy

