



**Kamau & another (Suing as the administrators of the Estate of Njoroge Kamau (Deceased) v Munene & 2 others (Environment and Land Case Civil Suit 301 of 2019) [2024] KEELC 4769 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4769 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 301 OF 2019**

**OA ANGOTE, J  
JUNE 13, 2024**

**BETWEEN**

**JOHN KAMAU & STEPHEN MUYA NJOROGE (SUING AS THE ADMINISTRATORS OF THE ESTATE OF NJOROGE KAMAU (DECEASED) ..... PLAINTIFF**

**AND**

**PETER KAMAU MUNENE ..... 1<sup>ST</sup> DEFENDANT  
THE CHIEF LAND REGISTRAR, NAIROBI ..... 2<sup>ND</sup> DEFENDANT  
THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Vide a Plaintiff dated 16<sup>th</sup> September, 2019, the Plaintiffs seek the following reliefs against the Defendants;
  - i. An order of declaration that registration of the 1<sup>st</sup> Defendant and the issuance of title to the 1<sup>st</sup> Defendant or any other person over Nairobi/Block 110/901 was illegal and fraudulent and incapable of vesting in the 1<sup>st</sup> Defendant any proprietorship rights over the suit property.
  - ii. An order of declaration that the Plaintiffs, as the Administrators of the Estate of Njoroge Kamau(deceased) are the legal and beneficial owners of Nairobi/Block 110/901 and are entitled to the registration thereof as the proprietors, to the exclusion of the 1<sup>st</sup> Defendant and any other person whatsoever.
  - iii. In the alternative, an order of declaration that the Plaintiffs are entitled to be registered as the proprietors of Nairobi/Block 110/901 as against



the 1<sup>st</sup> Defendant or any other person on account of the Plaintiffs adverse possession of the suit property having been in open, quiet, continuous and uninterrupted occupation and possession thereof for thirty-seven (37) years.

- iv. An order directed at the 2<sup>nd</sup> Defendant to cancel registration of the 1<sup>st</sup> Defendant as proprietor of Nairobi/Block 110/901 and title deed issued to him and to register the Plaintiffs as the proprietors of Nairobi/Block 110/901.
  - v. An order of declaration that Thome Farmers No 1 Limited has been holding Nairobi/Block 110/901 in trust for the Plaintiffs.
  - vi. An order of permanent injunction restraining the 1<sup>st</sup> Defendant, whether acting by himself, his servants, agents, contractors and/or any other persons whatsoever from entering upon, trespassing upon, taking over, remaining, damaging, developing, transferring, charging or registering in the name of the 1<sup>st</sup> Defendant or any person other than the Plaintiffs herein or in any other manner howsoever interfering with the Plaintiffs occupation, possession, proprietorship and quiet enjoyment of the property known as Nairobi/Block 110/901.
  - vii. General damages against the 1<sup>st</sup> Defendant for trespass.
  - viii. General damages against the Defendants.
  - ix. Exemplary damages.
  - x. Costs of the suit.
  - xi. Interest on any sums awarded above at Court rates from date of judgement until payment thereof in full.
  - xii. Any other relief that this Honourable Court may deem fit and just to grant in the circumstances of the case.
2. It is the Plaintiffs' case that they are, and have at all times relevant to this suit, been the Administrators and beneficial owners of the Estate of Njoroge Kamau (deceased); that they were appointed as joint Administrators of the Estate vide a Grant of Letters of Administration issued by the High Court on 6<sup>th</sup> May, 2013 in Nairobi Succession Cause No 251 of 2013: In the matter of the Estate of Njoroge Kamau (deceased) and that they were issued with a Certificate of Confirmation of Grant dated 27<sup>th</sup> January, 2014.
  3. It is their case that as beneficiaries of their father's estate, John Kamau, was bequeathed one half of an acre (0.5) of land situate in Thome Estate Nairobi which their father had acquired for value as a shareholder in Thome Farmers No 1 namely Plot No 325 and that upon completion of the survey exercise of Thome Farm, the plot was assigned property No Nairobi/Block 110/901(herein after the suit property).
  4. According to the Plaintiffs, their father was allocated the suit property alongside other properties for value; that on 4<sup>th</sup> December, 1972, their father paid to Thome Farmers Company No 1 entry fees of Kshs 100 and was assigned entry No 997 and on the same date paid Kshs 1,500 for two shares entitling him to ownership of plots in the farm and that on 31<sup>st</sup> August, 1974, he paid an additional sum of Kshs 2, 500.



5. It is the Plaintiffs' case that on account of the sum of Kshs 4000 paid by their father, and in recognition that he had discharged his payment obligations towards acquisition, Thome Farmers issued him with a Share Certificate No 194 dated 28<sup>th</sup> July, 1979 bearing 2 shares of Kshs 2,000 and that the aforesaid shares entitled him to two (2) plots each measuring one-half acre.
6. According to the Plaintiffs, in September, 1982 balloting for plots was undertaken resulting in allocation of plots 325 and 480 to their father; that their father thereafter took possession awaiting completion of the survey exercise and re-parcellation of the land for titling and that upon their father's death on 6<sup>th</sup> November, 1985, they continued with the occupation and possession of the suit property while engaging Thome Farmers for issuance of the title.
7. It was averred by the Plaintiffs that in this respect, on 20<sup>th</sup> June, 1988, they paid the company Kshs 2,300 being survey fees for the suit property as well as for plot 480; that they planted trees and fenced the property with concrete posts and barbed wire so that they would develop it thereafter and that during the rainy season, they filled the property with soil to stem flooding.
8. It was averred that in 2004 or thereabouts, PCEA church approached them with an offer to exchange the suit property with one of its plots with the intent that the church will have one contiguous plot and that they allowed the church to use the suit property as a parking ground and a children's playing ground as they were not utilizing it.
9. The Plaintiffs assert that to date, the present register of Thome Farmers shows their father as the current owner of the suit property; that notwithstanding their open, quiet, continuous and un-interrupted possession of the suit property on their own account from 1985 and by their father from 1982, on 5<sup>th</sup> July, 2019, the 1<sup>st</sup> Defendant invaded the suit property and that upon conducting a search of the register, they discovered the 1<sup>st</sup> Defendant had purportedly been registered as proprietor of the suit property in 2016 culminating in the issuance of a title deed.
10. The Plaintiffs contend that in a bid to safeguarding their interests in the suit property, they applied for the registration of a caution prohibiting any dealings in the suit property which was registered on 23<sup>rd</sup> July, 2019 and that they reported the matter to the Directorate of Criminal Investigations.
11. It is the Plaintiffs' case that the purported registration of the suit property in the 1<sup>st</sup> Defendant's name was as a consequence of fraud and/or misrepresentation by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for the reasons that they have been in possession of the suit property for over 37 years from 1982 to date; that the 1<sup>st</sup> Defendant is not and has never been a member of Thome Farmers to entitle him to be allocated the suit property and that the 1<sup>st</sup> Defendant and the person under whom he claims did not pay any consideration in the acquisition of the suit property.
12. According to the Plaintiffs, further evincing fraud and misrepresentation are the facts that the 1<sup>st</sup> Defendant did not pay stamp duty to the Government and no Land Control Board Consent was acquired for the suit property and that by virtue of the Certificate of Grant issued in Nairobi Succession Cause 251 of 2013, the property was vested in John Kamau Njoroge as a beneficiary, which rights could not be taken away by the subsequent issuance of the title.
13. In the alternative, the Plaintiffs contend that they have acquired the property by way of adverse possession and any title claimed by the 1<sup>st</sup> Defendant has been extinguished as a result thereof; that upon allocation of the suit property to their father for value and yielding of vacant possession, Thome Farmers could only hold the property in trust for their father as he awaited processing of the title and that the 1<sup>st</sup> Defendant has invaded the suit property, destroyed the fence and barricaded it causing further damage.



14. The 1<sup>st</sup> Defendant filed a Defence and Counterclaim on 19<sup>th</sup> November, 2021. Vide the Defence, he denied the assertions as set out in the Plaint. It is his case vide the Counterclaim that he is and has always been the registered proprietor of the parcel of land known as Nairobi/Block 110 /901 having purchased the same from one Alex Njuguna Gitihia who had a clean and unencumbered title thereof for a consideration of Kshs 28,000,000.
15. According to the 1<sup>st</sup> Defendant, prior to purchasing the suit property, he carried out due diligence by conducting a search at the Nairobi Lands Registry and inquiring about the history of the property; that the foregoing did not reveal that either the Plaintiffs by themselves or their father owned the property at any given time and that upon purchasing the property, he took possession and has remained in possession to date.
16. He avers that that after taking possession, he fenced the property and got into an engagement with one Jackson Mwangi Wangui who put up a carwash on the property; that the carwash is operational to date; that the Plaintiffs have tried to maliciously disposes him the the property; that he lodged a caution and further reported the matter to the DCI and that the DCI vide a letter dated 10<sup>th</sup> June, 2020 concluded that he is the bona fide purchaser of the suit property.
17. The 1<sup>st</sup> Defendant averred that the Plaintiffs are trespassers intent to take the suit property away from him and that he has been gravely prejudiced by their actions because he is unable to enjoy quiet possession of his property. The 1<sup>st</sup> Defendant seeks vide the Counterclaim for the following orders:
  - i. A declaration that the 1<sup>st</sup> Defendant is, and at all times material to this suit has always been the absolute sole proprietor and/or owner of all that parcel of land known as Nairobi/Block 110/910 situate in Thome Estate, Nairobi within the Republic of Kenya.
  - ii. A declaration that the 1<sup>st</sup> Defendant is entitled to exclusive and unimpeded right of ownership and occupation of all that parcel of land known as Nairobi/Block 110/910.
  - iii. The Chief Lands Registrar, Nairobi, the 2<sup>nd</sup> Defendant herein, do forthwith remove and/or cause to be removed the caution/caveat placed over all that parcel of land known as Nairobi/Block 110/901, the suit property herein.
  - iv. A permanent injunction restraining the Plaintiffs whether by themselves, their servants, employees, agents and/or by whomsoever from entering into, trespassing on and/or otherwise howsoever from interfering with the 1<sup>st</sup> Defendants ownership, possession, occupation and/or enjoyment of all that parcel of land known as Nairobi/Block 110/901 purporting to sell, alienate, transfer, mortgage, lease, rent and/or dispose of the said parcel of land or otherwise dealing with any portion thereof at all.
  - v. Costs of this suit together with interests thereon at such rate and for such period as this Honourable Court may deem fit to grant.
18. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a Defence on 14<sup>th</sup> January, 2020. They denied all the allegations set out in the Plaint stating that they were not involved in the allocation of the suit plots 325 and 480 respectively as alleged by the Plaintiffs and that the 1<sup>st</sup> Defendant should prove how he was allocated the suit property and became registered as the proprietor.



19. They assert on a without prejudice basis that if there is any wrongdoing in the registration of the 1<sup>st</sup> Defendants' title to the suit property, the same might have been through misrepresentation by the 1<sup>st</sup> Defendant that he indeed owned the property and that if the foregoing is the position, they will seek indemnity as provided for under Order 1 Rule 24 of the Civil Procedure Rules.

### **Hearing and Evidence**

20. The matter proceeded for hearing on 9<sup>th</sup> May, 2023. PW1 was an Advocate of the High Court. She adopted her witness statement dated 16<sup>th</sup> September, 2019 as her evidence in chief. It was her testimony that on 22<sup>nd</sup> May, 1990, she received instructions from Thome Farmers No 1 to prepare transfers for each shareholder in respect of Block 110; that to facilitate the same, they gave her the register of members with details of the plot number, identity card number, parcel number (title number) and the certificate number of the plot.
21. It was her evidence that the certificate was the document showing the owner and it was to be surrendered upon receipt of the title deed; that she prepared the forms under the RLA and the same were to be approved by the Land Registrar; that she handled the issue of Block 110 from 1990 till 2010 when the mother title disappeared from the lands office and that she thereafter received information that persons who were not shareholders had received titles to the property.
22. According to PW1, the suit property herein was initially plot 325 and the register indicates it belonged to Njoroge Kamau with an ID number, and Share Certificate Number being No 901; that she has not processed the title for him; that the title in the name of Peter Kamau is unknown to her and that Peter Kamau never owned Plot 901 nor is he a shareholder in Block 110.
23. It was her evidence that in ELC 163 of 2019, the 1<sup>st</sup> Defendants' title was found to be fraudulent. PW1 produced the register as PEXHB1 and stated that she has the letter of instructions dated 22<sup>nd</sup> May, 1990. She produced the judgement in ELC 163 of 2019 as PEXHB2.
24. In cross-examination, PW1 stated that the register she has adduced into evidence is identical to the one adduced by the 1<sup>st</sup> Defendant save for the stamp marking it a true copy of the original; that she does not know where the 1<sup>st</sup> Defendant got his copy; that the original register has some names that have been cancelled being the members who sold their shares; that she used to replace their names with those of the buyers and that they transacted in 957 plots for the shareholders whereas plots 958 and 964 were dealt with separately.
25. PW1 stated that she still has all the supporting documents for all the shareholders who sold their property including the sale agreements; that her work was to prepare the transfers and forward the same to the Chief Lands Registrar to issue titles and that the titles would be given to her for onward transmission to the owners after they surrendered the Share Certificates.
26. During re-examination, she affirmed that the root of title in Thome Farmers Estate is shareholding in Thome or a shareholder having informally transferred the land in her presence; that she did not process the title for parcel number block 110/901; that she has never processed any transfer in the name of Peter Kamau Munene neither has she collected any title for that parcel and that the 1<sup>st</sup> Defendant's title is fraudulent.
27. PW2 was John Kamau Njoroge, a beneficiary and an administrator of the Estate of the Late Njoroge Kamau. He adopted the witness statement dated 16<sup>th</sup> November, 2019 as his evidence in chief. He produced the documents numbers 7-19 as PEXHB3 and 22-26 as PEXHB 4.



28. It was his evidence that they are laying claim to plot 325; that he inherited the property from his father and has been in possession thereof since 1986 using it to cultivate vegetables which he sells; that he also planted trees and had fenced the property using concrete poles and that the 1<sup>st</sup> Defendant came with a title deed laying claim to the property leading him to report the matter to the police and filing the present suit.
29. He testified that the Defendant broke the concrete fence and put up iron sheet structures on the land; that he never went back to the plot and that currently, the premises has temporary kiosks which are in use.
30. In cross-examination, he stated that he was on the land until 2019 when the 1<sup>st</sup> Defendant laid claim to the land; that he went to the Police after the 1<sup>st</sup> Defendant sent his men to the property; that he is not privy to the letter from the DCI affirming that the 1<sup>st</sup> Defendant is the legitimate owner of the suit property and that he has never seen any report from the police.
31. DW1 was Peter Kamau Munene. He adopted his witness statement dated 19<sup>th</sup> November, 2021 as his evidence in chief and produced the documents of an even date as DEXHB1.
32. DW1 averred that he is the registered proprietor of the suit property having purchased the same from one Alex Njuguna Githina who had a clean and unencumbered title for a consideration of Kshs 28,000,000 and that prior to purchasing the suit property, he had undertaken due diligence characterized by conducting a search at the lands registry and inquiring on the history of the suit property.
33. DW1 stated that the search revealed that the suit property belonged to Alex Njuguna and has never belonged to the Plaintiffs nor formed part of the Estate of the deceased; that prior to purchasing the property, the same was in the possession of its previous owner Alex Njuguna Gitiha and that upon taking possession, he fenced the property and engaged one Jackson Mwangi to put up a carwash thereon.
34. According to DW1, the Plaintiffs have attempted to interfere with his possession of the suit property through lodging a caution and reporting the matter to the DCI; that the DCI undertook investigations which revealed that he is the bona fide owner and that consequently, the Plaintiffs have no claim over the suit property.
35. In cross-examination, it was his evidence that he is not a member of Thome Farmers and neither is any of his family members; that he has never been involved in any dispute with Thome Farmers; that in ELC 163 of 2019, he has sought ownership of a different parcel of land within Thome Farmers; that judgement was delivered against him in the aforesaid matter and he has filed an Appeal and that he is not aware that he was ordered to pay damages.
36. It was his further evidence that Alex Gitiha gave him documents indicating that he had purchased the land; that it is Alex's father who was a member of Thome; that the search he conducted before purchasing shows that Paul Ndegwa was the registered owner; that he does not know Paul Ndegwa and that in the judgement in respect of ELC 163 of 2019, it is noted that he purchased the suit property from Paul Ndegwa and that he knew Paul Ndegwa.
37. According to DW1, the agreement annexed in his bundle is the wrong agreement; that he paid the purchase price by bank transfers and in cash; that the evidence of payment of stamp duty is not before the Court; that he has not annexed a receipt for registration; that they went through the verification of the register of members but he was never told the property was owned by the Plaintiff's father and that he was not told the previous owners of the property.



38. It was his evidence on re-examination that investigations were carried out by Police; that the transfer shows that the same was registered on 8<sup>th</sup> August, 2015; that he signed the sale agreement; that the same was stamped but by a person who should not have stamped it; that he never found the Plaintiff on the land and the person who was there was Alex Gitiha and that the search shows that the title was given to Paul Ndegwa on 25<sup>th</sup> August, 2015.

### Submissions

39. The Plaintiff's Counsel submitted that as held by the Court in *Munyu Maina vs Hiram Gathiha Maina* [2013]eKLR and reiterated by the Court in *Daniel Kiptugen vs Commissioner of Lands & Others*[2015]eKLR, where the root of a proprietor's title is challenged, it is incumbent on the proprietor to prove its acquisition thereof and that in this case, the 1<sup>st</sup> Defendant has failed to prove the root of his title to show how the Plaintiffs' father was dispossessed from the suit property.
40. Counsel urged the Court to take note of the 1<sup>st</sup> Defendant's illegal and fraudulent conduct in perpetrating similar fraudulent acquisitions of properties Nairobi/Block 110/430 and Nairobi Block 110/782.
41. According to Counsel, the 1<sup>st</sup> Defendant's title having been acquired fraudulently and/or unprocedurally is liable to be cancelled as set out in Section 26 of the *Land Registration Act*. Reliance in this regard was placed on the cases of *Joel Munyoki Munene vs Agnes Kagure Kariuki & 2 Others* [2022]eKLR and *Embakasi Properties Limited & Another vs Commissioner of Land & Another* [2019] eKLR; and that in the alternative, the Plaintiffs are entitled to the suit property by way of adverse possession.
42. As regards trespass, Counsel posited that as highlighted by the Court in *Joseph Murimi Gaita vs Susan Mbeke Kasome* [2022] eKLR, trespass is actionable per se, meaning without proof of damage. Counsel also cited the case of *Caroget Investment Limited vs Aster Holdings Limited & 4 Others* [2019] eKLR; that the 1<sup>st</sup> Defendant's establishment of a garage on the suit property constitutes trespass and that having proven that the 1<sup>st</sup> Defendant's title was fraudulent, his Counterclaim is unmerited and should be dismissed.
43. The 1<sup>st</sup> Defendant's Counsel submitted that pursuant to Section 26(1) of the *Land Registration Act*, 2012, only two instances exist for challenging a title, being where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party and where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
44. Counsel submitted that the allegations of fraud were investigated by the DCI and found to be unmerited; that the Court of Appeal in *Kuria Kiarie & 2 Others vs Sammy Magera* [2018] eKLR, placed reliance on the exposition by the Court in *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, which affirmed that fraud must be specifically pleaded and proved.
45. Counsel for the 1<sup>st</sup> Defendant submitted that the standard of proof in a claim for fraud is beyond the balance of probabilities. Reliance in this respect was placed on the cases of *Central Bank of Kenya Limited vs Trust Bank Limited & 4 Others* [1996] eKLR, and *Kinyanjui Kamau vs George Kamau* [2015] eKLR.
46. Counsel submitted that no evidence has been led to prove fraudulent acquisition of the suit property; that the lands office which issued the title has not attested to any illegality and that the Plaintiffs have not proven and/or produced any document indicating that indeed the said Plot No. 325 translated into Nairobi/Block 110/901.



47. Counsel maintained that the 1<sup>st</sup> Defendant is a bona fide purchaser for value as defined by the Courts in *Lawrence Mukiri vs Attorney General & 4 Others* [2013]eKLR, *Samuel Kamere vs Lands Registrar*, [2015] eKLR; *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] KESC 30 KLR and *Eunice Grace Njambi Kamall and Another vs The Hon. Attorney General & 5 Others*[2019]eKLR.
48. Counsel submitted that the 1<sup>st</sup> Defendant's title is indefeasible; that the same cannot be impeached by the Plaintiffs on the basis of an allotment letter and/or Share Certificate because as affirmed by the Court in *Shadrack Kuria Kimani vs Stephen Gitau Nganga & Another* ELC Case No. 439 of 2017, an Allotment Letter in law is not a document of title and that the Supreme Court in *Torino Enterprises Limited vs Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) affirmed this position reiterating that an Allotment Letter is incapable of conferring interest in land.
49. Counsel urged that that the registration of the 1<sup>st</sup> Defendant as the proprietor of the suit property conferred on him the status of an absolute and indefeasible proprietor of the suit property and in light of the provisions of Section 24 and 26 of the *Land Registration Act*, his title ranks higher than the Plaintiffs and that the Plaintiffs' case is unmerited and should be dismissed.
50. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed submissions on 13<sup>th</sup> March, 2024. Counsel submitted that the Plaintiffs have proved the root of their title; that they have demonstrated their father's acquisition of the property being a plot from Thome Farmers Ltd until its re-survey and issuance with registration number as Nairobi block 110/901.
51. It was submitted by the Attorney General that as stated by the Supreme Court in *Dina Management Ltd vs Attorney General*(supra) and *Torino Enterprises Limited vs Hon. Attorney General*, Petition Number 5 (E006) of 2022, waving a title is not enough in itself and that one must demonstrate the history of the suit and demonstrate that indeed there is a process that was followed in acquiring the suit land.
52. It was submitted that the title in the 1<sup>st</sup> Defendant's name is impeachable and the Counterclaim filed did not point out to any fraud on the Plaintiffs nor on the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants part; that the invalidation of interest anchored on the illegal ownership of documents and ordering the cancellation of the registered title is guided by the Supreme Court decision of *Dina Management Limited vs County Government of Mombasa & 5 Others*(supra) in which the Court affirmed that interest acquired illegally and or unprocedurally does not enjoy the protection of the law.

### **Analysis and Determination**

53. The Plaintiffs instituted this suit seeking, inter-alia, a declaration that the 1<sup>st</sup> Defendant's title to the suit property is fraudulent and that they are entitled to be registered as the proprietors and an order that Thome Farmers No 1 Limited has been holding the suit property in trust for them.
54. The Plaintiffs have also sought for a permanent injunction restraining the 1<sup>st</sup> Defendant from interfering with the suit property; general damages for trespass as well as general and exemplary damages. In the alternative, they lay claim to the suit property by virtue of adverse possession.
55. It is the Plaintiffs' case that they are the legitimate owners of the suit property previously known as Thome Farmers Plot 325 and that the property initially belonged to their father who was allocated the same in 1972 for due consideration and took possession in 1982 as he awaited completion of the survey exercise and re-parcellation of the land.



56. According to the Plaintiffs, upon their father's death in 1985, they continued with occupation and possession of the property and continued engaging Thome Farmers to process the title deed and that by a Certificate of Grant issued in Nairobi Succession Cause 251 of 2013, the suit property was vested to John Kamau Njoroge.
57. The Plaintiffs contends that notwithstanding their possession of the suit property since 1985 on their own behalf and 1982 by their father, on 5<sup>th</sup> July, 2019, the 1<sup>st</sup> Defendant forcibly invaded the suit property; that upon conducting a search, they discovered that the 1<sup>st</sup> Defendant was purportedly registered as proprietor of the land in 2016 culminating in the issuance of a title deed and that the aforesaid registration is fraudulent.
58. They adduced into evidence, copies of Grant of Representation and Certificate of Confirmation of Grant dated 6<sup>th</sup> May, 2013 and 27<sup>th</sup> January, 2014 respectively; official receipts No's 997 and 1261 dated 4<sup>th</sup> December, 1972 and No 2474 dated 31<sup>st</sup> August, 1974; Share Certificate No 194 issued on 28<sup>th</sup> July, 1979; Balloting Card checked on 30<sup>th</sup> September, 1982 and Judgements in Nairobi ELC No 163 of 2019 and 299 of 2019.
59. The Plaintiffs also adduced into evidence copies of the Registry Index Map for Block 110; Shareholders Registry; Certificate of Death no 147943 dated 1<sup>st</sup> July, 1986; receipt no 135 dated 20<sup>th</sup> June, 1988; Deed of Exchange dated 17<sup>th</sup> October, 2016 and letter dated 12<sup>th</sup> August, 2014 from PCEA church requesting the use of suit property as parking and play area.
60. On the other hand, the 1<sup>st</sup> Defendant maintains that he is a bona fide purchaser for value having purchased the property in the year 2016 from one Alex Njuguna for a consideration of Kshs 28,000,000; that prior to purchasing the land, he carried out due diligence characterized by conducting a search at the Nairobi Lands Registry and inquiring on the history of the suit property and that upon purchase, he took possession of the property wherein he has engaged one Jackson Mwangi who has put up a carwash business thereon.
61. Vide the Counterclaim, the 1<sup>st</sup> Defendant seeks declaration that he is the legitimate owner of the suit property and is entitled to exclusive possession thereof; removal of the caveat placed on the property and permanent injunctive orders restraining the Plaintiffs' interference with the suit property.
62. The 1<sup>st</sup> Defendant adduced into evidence a copy of the search dated 25<sup>th</sup> August, 2015; a copy of transfer documents dated 8<sup>th</sup> December, 2015; Sale Agreement dated 18<sup>th</sup> October, 2016; Title Deed of Nairobi/Block 110/901; map of Nairobi/Block 110/901; letter dated 10<sup>th</sup> June, 2020; his Identity Card; his Pin Certificate and Thome Farmers Company's Limited list of Members.
63. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not adduce any documents nor participate in the trial. In view of the foregoing narration and upon keen consideration of the pleadings, testimonies and submissions, the following arise as the issues for determination;
  - i. Who between the Plaintiffs and the 1<sup>st</sup> Defendant is the legitimate proprietor of L.R Nairobi/Block 110/910, Thome Estate?
  - ii. What are the appropriate reliefs to issue?
64. The present case revolves around the ownership of the parcel of land known as Nairobi/Block 110/901 situate in Thome Farmers Estate which the Plaintiffs and the 1<sup>st</sup> Defendant each lay claim to. Each party is therefore obligated to prove its case on the required standard of proof being on a balance of probabilities.



65. This position is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. The said sections provide as follows:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

66. And Sections 109 and 112 of the same Act which states;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

67. In the present case, the Plaintiffs and the 1<sup>st</sup> Defendant lay claim to L.R Nairobi/Block 110/901, Thome Estate. The Plaintiffs admit that they are yet to be issued with a title to the property aforesaid.

68. Indeed, the evidence before the Court shows that the 1<sup>st</sup> Defendant is the registered proprietor of the suit property having been so registered on 20<sup>th</sup> December, 2016 pursuant to the provisions of the Land Registration Act.

69. The provisions of Section 24(a) and 25(1) of the Land Registration Act, 2012 outline the interests and rights of a registered proprietor. Section 24(a) provides as follows:

“Subject to this Act-

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;

70. Whereas Section 25 (1) under the heading rights of a proprietor provides;

“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...”

71. Section 26(1) of the Land Registration Act, while affirming the principles of indefeasibility of title, also sets out the circumstances under which a party’s title is amenable to challenge. The section provides as follows:

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



- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

72. It can be seen from the above provisions that whereas title is protected, the protection can be removed and title impeached, if it is proved to have been procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.

73. The Plaintiffs herein seek to impeach the 1<sup>st</sup> Defendants’ title under both heads claiming that the title was fraudulently and/or unprocedurally acquired. While the onus is on them to prove what they claim, the Courts have made it clear that a registered proprietor must do more than just sit back and dangle his title. When it is called into question, he must of necessity establish its root.

74. This was aptly expressed by the Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR thus;

“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.”

75. Beginning with the question of fraud, the same is defined in the Black’s Law Dictionary as;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another.”

76. The prevailing jurisprudence on fraud is that any allegations thereof must be pleaded and strictly proved. As expressed by the Court of Appeal in case of *Kuria Kiarie & 2 Others vs Sammy Magera* [2018]eKLR;

“The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].



77. The Plaintiffs have indeed pleaded fraud. It is the Plaintiffs' case that the suit property emanates from Thome Farmers 1 and was allocated to their father and thereafter to one of them, John Kamau as a beneficiary who has never ceded possession and occupation thereof for over 37 years; that the 1<sup>st</sup> Defendant is not a member of Thome Farmers and that the 1<sup>st</sup> Defendant paid no consideration for the suit property.
78. The Court has keenly considered the evidence in this regard. The Plaintiffs, through PW2, led evidence showing Njoroge Kamau was a balloting shareholder of Thome Farmers Co Ltd. They also adduced evidence which showed that he purchased plot 325 for due consideration, balloted and was issued with a Share Certificate in that regard.
79. This evidence by PW2 was corroborated by PW1, an Advocate engaged by Thome Farmers No. 1 Limited to carry out conveyance processes of their land parcel 110. She testified that Njoroge Kamau was a member of Thome Farmers and a shareholder. She adduced into evidence the Register for Thome Farmers which indicates that plot no 325 belonged to Njoroge Kamau. The register further shows that as mapped under Block 110, plot 325 was no 901.
80. It was PW1's evidence that she was solely responsible for transactions in respect of Block 110 and she has in that respect never processed the title held by the 1<sup>st</sup> Defendant or indeed any title in respect of plot 325, being Nairobi/Block 110/910.
81. On the other hand, the 1<sup>st</sup> Defendant maintains that he purchased the property from one Alex Gitiha. He states that he carried out due diligence which revealed that the property was owned by Alex Gitiha aforesaid and that the DCI carried out investigations which revealed that he is the bona fide proprietor of the suit property.
82. The 1<sup>st</sup> Defendant has produced a Sale Agreement in respect of the suit property which shows that he purchased the property from Alex Gitiha. However, the certificate of search he adduced in support of his claim of having undertaken due diligence make reference to Paul Ndegwa. He states that Paul Ndegwa is the person from whom Alex Gitiha purchased the property from and has adduced a transfer from Paul Ndegwa to Alex Gitiha.
83. While stating that he duly believed Alex Gitiha to be the duly registered owner of the suit property, it was DW1's evidence on cross-examination that he went through verification of Thome Farmers' members and was not told that the Plaintiffs' fathers ever owned the property. According to him, he was told that the property's previous owners had moved but was not informed who they were.
84. The Court notes that the 1<sup>st</sup> Defendant has not by way of contrary evidence challenged the fact that plot 325 owned by Thome Farmers 1 morphed into the suit property herein being parcel Nairobi/Block 110/910. Indeed, he also produced the Thome Farmers Members list. It shows Njoroge Kamau as the proprietor of the suit property.
85. A title emanating from a subdivision title in a scheme that is owned by a land buying company is a product of a conveyancing process by the land buying company, and without conveyancing or clearance documents by the owner of the subdivision scheme, no subdivision title can be legitimately generated.
86. PW1 supports the Plaintiff's assertion maintaining that the plot belongs to them. PW1 disowned the title held by the 1<sup>st</sup> Defendant. Considering that the Plaintiffs are categorical that they have not given up possession of the suit land, or sold it, and in the absence of evidence to show that the people who purportedly sold the suit land to the 1<sup>st</sup> Defendant were members of Thome Farmers, or purchased the



land from a member, the logical conclusion is that the said title not having originated from Thome or from the Plaintiffs is a fraudulent and illegal title.

87. In the circumstances, is the remedy of bona fide purchaser available to the 1<sup>st</sup> Defendant as he so claims? The simple answer is no. In the case of *Mwangi James Njehia vs Janetta Wanjiku Mwangi & Another* [2021] eKLR, the Court of Appeal re-defined the concept of bonafide purchaser thus;

“...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.

We have no hesitation in concluding that the appellants do not fall in the category of innocent purchasers. Their appeal is destined to fail for two reasons. First, because as we have demonstrated in this judgment, the deceased had no good Title to pass to anybody; second because the appellants were not innocent purchasers for value without notice and they cannot call in aid the provisions of Section 26 (1) of the *Land Registration Act*.”

88. The new position as set out in *Mwangi James Njenga*(supra) is that before one can benefit from the doctrine of bona fide purchaser for value, it must be established that the vendor had a valid title, as opposed to apparent valid title.
89. The Supreme Court in the case of *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR) also pronounced itself on the question as to whether the holder of an irregularly obtained title can convey a valid interest in land. The learned justices stated as follows:

“A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”



90. In the circumstances of the case, it is noted that in light of the Plaintiffs claim and evidence that neither themselves, their father nor Thome Farmers Ltd parted with possession of the suit property, whatever title Alex Gitiha held was illegitimate and was incapable of being passed on to another party, in this case the 1<sup>st</sup> Defendant. In a nutshell, it is the Court’s finding and holding that the 1<sup>st</sup> Defendant’s title is vitiated and in this regard, the same is defeasible.
91. As aforesaid, both the Plaintiffs and the 1<sup>st</sup> Defendant lay claim to the suit property. The Court has found that the 1<sup>st</sup> Defendant’s title is liable to be impeached as per Section 26 of the Land Act. In this respect, the 1<sup>st</sup> Defendant has failed to prove its Counterclaim which subsequently fails.
92. The Plaintiff seeks several reliefs including a declaration that the 1<sup>st</sup> Defendant’s acquisition of the suit property is illegal and unlawful; cancellation of the title in the 1<sup>st</sup> Defendants’ name; permanent injunctive orders; general damages for trespass, and exemplary damages. They also seek a declaration that Thome Farmers 1 was holding the property in trust for them and an alternative prayer that they own the property by virtue of adverse possession.
93. Having found that the 1<sup>st</sup> Defendants title is fraudulent, the same is amenable to revocation and/or cancellation pursuant to the provisions Section 80(1) of the Land Registration Act.
94. As regards general damages for trespass, Section 3(1) of the Trespass Act provides;
- “ 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.”
95. As it were, where the Plaintiff proves trespass, he is entitled to recover damages even where he has not suffered any actual loss. In this case, it is not disputed that the 1<sup>st</sup> Defendant has been and is admittedly still on the suit property. The Plaintiffs aver that the 1<sup>st</sup> Defendant entered into the property in 2019 and remains there to date. This means that the Plaintiffs have been denied the full benefit of their property for approximately 6 years.
96. Taking into consideration the length of time for the trespass which has denied the Plaintiffs the use of the suit land, the acreage involved and location of the property, it is the opinion of the Court that the sum of Kshs 5,000,000/= (Five Million only) would be reasonable compensation to the Plaintiff.
97. Apart from general damages sought for trespass, the Plaintiffs have also sought for “General Damages” as against the Defendants. It is unclear the nature of the damages sought under this head. Having granted damages for trespass, no other damages under this head are available.
98. The Plaintiffs also seek exemplary damages. Exemplary damages, also known as punitive damages, are awarded in two instances. First, where the Government action or conduct complained of is oppressive, arbitrary or unconstitutional. Second, where the Defendant has calculated that its conduct will result in a profit for himself and may well exceed the compensation payable to the claimant.
99. This was affirmed by the Court in Godfrey Julius Ndumba Mbogori & Another vs Nairobi City County [2018] eKLR as follows:
- “The Appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of Rookes v Barnard [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are:



- i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
- ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
- iii) where exemplary damages are expressly authorized by statute.”

100. The Court does not consider that any of the circumstances exist herein warranting the grant of exemplary damages and this prayer is unmerited.

101. The Plaintiffs also seek, in the alternative, the property by virtue of adverse possession and ask the Court to make a finding that Thome Farmers hold the property in trust for them. Considering the Court's determination above, the aforesaid issues are moot.

102. In the end, the Court finds that the Plaintiffs have established their case on a balance of probabilities and proceeds to make the following final orders;

- i. The 1<sup>st</sup> Defendant's Counterclaim be and is hereby dismissed.
- ii. An order does hereby issue declaring that the Plaintiffs, as the Administrators of the Estate of Njoroge Kamau(deceased) are the legal and beneficial owners of Nairobi/Block 110/901, Thome Estate and are entitled to the registration thereof as the proprietors, to the exclusion of the 1<sup>st</sup> Defendant and any other person whatsoever.
- iii. An order does hereby issue directing the 2<sup>nd</sup> Defendant to cancel the registration of the 1<sup>st</sup> Defendant as proprietor of Nairobi/Block 110/901, Thome Estate, and the Title Deed issued to him and register the Plaintiffs, being legal representatives of the Estate of Njoroge Kamau(Deceased as the proprietors of Nairobi/Block 110/901, Thome Estate.
- iv. A Permanent Injunction does hereby issue restraining the 1<sup>st</sup> Defendant, or any person acting under his authority from entering upon, trespassing, taking over, remaining, damaging, developing, transferring, charging or howsoever interfering with the Plaintiffs' occupation, possession, proprietorship and quiet enjoyment of the property known as Nairobi/Block 110/901, Thome Estate.
- v. The Plaintiffs are awarded damages for trespass of Kshs 5,000,000.
- vi. The 1<sup>st</sup> Defendant shall bear the costs of the suit and the counter claim.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13<sup>TH</sup> DAY OF JUNE, 2024.**

**O. A. Angote**

**Judge**

In the presence of

Mr. Angwany for 1<sup>st</sup> Defendant

Mr. Motari for 2<sup>nd</sup> and 3<sup>rd</sup> Defendant

Mr. Ndaige for Njoroge for Plaintiff

Court Assistant: Tracy

ELC NO. 301 OF 2019

JUDGMENT



