



**Kathyaka v Muchiri & another; Ngunyu (Interested Party) (Environment & Land Case E111 of 2021) [2024] KEELC 4829 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4829 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E111 OF 2021**

**JA MOGENI, J  
JUNE 13, 2024**

**BETWEEN**

**FREDRICK MUTISYA KATHYAKA ..... PLAINTIFF**

**AND**

**JAMES NGIGI MUCHIRI ..... 1<sup>ST</sup> DEFENDANT**

**EMBAKASI RANCHING CO. LTD ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**LILIAN WAMBUI NGUNYU ..... INTERESTED PARTY**

**JUDGMENT**

1. The Plaintiff instituted a suit vide a Plaint dated 23/03/2021 and sued the Defendants seeking the following orders:
  - i. A declaration that Plot No. P.9455 belongs to the Plaintiff and the Plaintiff is entitled to be registered as such and a title thereto be issued to him.
  - ii. A declaration that the 2<sup>nd</sup> Defendant's negligence cannot affect and/or defeat the Plaintiff's ownership claim over the property occupied by the Plaintiff.
  - iii. A declaration that the Plaintiff was an innocent purchaser for value of the property currently occupied by the Plaintiff.
  - iv. A declaration that the Plaintiff is entitled to be registered as the rightful owner of the Land Parcel the Plaintiff currently occupies and as identified and demarcated by the Land Surveyors, be it Plot No. P. 9455 or Nairobi/block 136/9732.



- v. A declaration that the 1<sup>st</sup> Defendant is by Estoppel by Representation estopped from Claiming the property currently occupied by the Plaintiff, be it Plot No. P.9455 or Nairobi/block 136/9732.
  - vi. A permanent injunction to issue restraining the 1<sup>st</sup> Defendant whether by himself, servants, agents and/or relatives from evicting, trespassing, or in any manner whatsoever interfering with the Plaintiffs' ownership rights and proprietary interests over land Parcel Plot No. P. 9455 located at Ruai, within Nairobi County.
  - vii. A permanent injunction to issue restraining the 1<sup>st</sup> Defendant whether by himself, servants, agents and/or relatives from evicting, trespassing, or in any manner whatsoever interfering with the Plaintiffs' ownership rights and proprietary interests over the Land Parcel the Plaintiff currently occupies and as identified and demarcated by the Land Surveyors, be it Plot No. P. 9455 or Nairobi/block 136/9732.
  - viii. An order be issued directing the 2<sup>nd</sup> Defendant to immediately take the necessary steps to process the title of the Suit Property in the name of the Plaintiff.
  - ix. An order be issued directing the 2<sup>nd</sup> Defendant to immediately take the necessary steps to process the title of the property bought and currently occupied by the Plaintiff in the name of the Plaintiff.
  - x. Any other remedy that this Honorable Court may deem just in the circumstances.
  - xi. General damages
  - xii. Costs of the suit at Court rate.
2. The suit is opposed. The 1<sup>st</sup> Defendant entered appearance and filed a Defence and Counterclaim dated 27/05/2022. The 1<sup>st</sup> Defendant prays for judgment against the Plaintiff as follows: -
- a. A declaration that the Defendant is a trespasser onto the Plaintiff/Counterclaimant's parcel of land known as Nairobi/block/136/9732
  - b. An Eviction Order be issued to evict the Defendant his servants and or agents or anyone claiming under him, from a part of the Plaintiff/Counterclaimant's parcel of land known as Nairobi/block/136/9732 and in default the OCPD Kayole Police Division do ensure compliance with this order and do provide security during the eviction.
  - c. Costs of the counterclaim.
3. The 2<sup>nd</sup> Defendant did not enter appearance or file a defence. Upon pleadings being closed, the suit proceeded by way of viva voce evidence. The Plaintiff called one witness who testified on 9/11/2022 and the 1<sup>st</sup> Defendant called two witnesses who testified on 9/11/2022 and 12/06/2023.

**Plaintiff's Case: -**

4. The Plaintiff asserts that the 2<sup>nd</sup> Defendant was the registered proprietor of land parcel L.R No. 10904/2, which was subdivided and sold, with the Plaintiff acquiring Plot No. P.9455 in 2010 from Lilian Wambui Ngunyu (the Interested Party herein). The Plaintiff claims to have confirmed ownership through a 2009 letter from the 2<sup>nd</sup> Defendant and took possession after full payment, developing the land without interference until 2014, when the 1<sup>st</sup> Defendant claimed ownership, alleging Plot No. 9455 was Nairobi/block 136/9732. The Plaintiff contended that the 2<sup>nd</sup> Defendant did not resolve this dispute nor issue a title to the Plaintiff, leading to eviction threats from the



1<sup>st</sup> Defendant. The Plaintiff claims the 1<sup>st</sup> Defendant's actions are illegal and the 2<sup>nd</sup> Defendant's negligence and fraudulent misrepresentation are to blame for the confusion. The Plaintiff seeks redress for these breaches and damages suffered.

**Plaintiff's Evidence: -**

5. PW1 – Fredrick Mutisya Kathiaka adopted his witness statement dated 23/03/2021 together with a list of documents dated 23/03/2021 and a supplementary list of documents dated 23/06/2022. He produced them as his evidence in chief and exhibits. He gave a brief summary of his case. It was his testimony that he conducted due diligence on Plot No. P9455 before purchasing it. After hearing from a friend that the plot was for sale, he visited the site and contacted the owner through Embakasi Ranching. The owner provided the necessary documents, and he received a letter dated 26/11/2009 from the 2<sup>nd</sup> Defendant, confirming the Interested Party's ownership. PW1 testified that he occupied the property on 4/05/2010 and has lived there since. The 2<sup>nd</sup> Defendant has never asked him to vacate the property.
6. During cross-examination, PW1 testified that he is a small business trader in Ruai and bought the land in December 2009, receiving an ownership certificate on 6/04/2010. He moved in and began developing the plot shortly after. Despite not presenting a sale agreement in court, he conducted due diligence by visiting Embakasi Ranching, where he received a letter dated 26/11/2009, confirming the Interested Party as the owner. This letter was not specifically addressed to him, and he returned the attached documents to Embakasi Ranching. PW1 paid Kshs. 300,000 for the plot but did not provide proof of payment in court. The Interested Party showed him the land, and a surveyor from Embakasi Ranching verified it. Although he holds a non-member ownership certificate, he did not inquire about the original member from whom the Interested Party bought the land. PW1 did not possess a share certificate or a map showing the exact plot location but relied on a surveyor who identified the plot for him. He mentioned that the Interested Party paid Kshs. 17,000 in survey fees in 1999. Despite his certificate being issued in 2010 and considering it complete, he did not have the title deed but instead held a non-member certificate. The plot was confirmed to be P9455-4582 which was indicated on the reverse side of document at page 66 of the Defendant's bundle. Although aware of title collection advertisements, he took no action due to the ongoing court case. He confirmed that the house he built is within the marked beacons. He also mentioned that Embakasi Ranching transferred the land to him, with transfer documents retained by them.
7. It was his testimony that the interested party asked the 2<sup>nd</sup> defendant to transfer. Embakasi ranching transferred the land to him. Transfer papers are retained by Embakasi Ranching. The transfer document at page 71 of the 1st defendant's bundle shows the transfer by Lilian which refers to plot 4582 and the receipt no. 8470 is the number also on my non-member certificate 8470 at the top it also shows a TR 5909/06 and the transfer at page 68 refers to plot no. 4582. The documents show as though it is a different property but that is the one, he was shown. He went to Embakasi Ranching to lodge a complaint.
8. He became aware of the 1<sup>st</sup> Defendant's eviction intentions and was summoned to Ruai Police Station. Despite the eviction notice dated 13/11/2017, PW1 did not present evidence of efforts taken between 2017 and 2021 and claimed not to be a fraud victim, blaming Embakasi Ranching for the confusion.
9. In re-examination, PW1 testified that he took action for processing of title. There is a banker's cheque dated 1/12/2009 paid towards that. His non-member certificate was issued by Embakasi Ranching. Dispute of his plot has been before the board since 2013. The surveyors erected beacons in 2007, the non-member certificate was issued in 1999 for the interested party.



10. After hearing the testimony of the one witness, the Plaintiff's case was closed.

### **Defendants' Case: -**

11. The 2<sup>nd</sup> Defendant did not enter appearance or file a defence.

### **1<sup>st</sup> Defendant**

12. The 1<sup>st</sup> Defendant denies all factual allegations presented by the Plaintiff in the claim, specifically contesting that the 2<sup>nd</sup> Defendant was the registered proprietor of the land parcel L.R No. 10904/2, located in Ruai, Nairobi County. Additionally, the 1<sup>st</sup> Defendant disputes the assertion that Plot No. P.9455 is a subdivision of L.R No. 10904/2. Despite the Plaintiff's claims of purchasing Plot P.9455 in 2010 from the Interested Party, the 1<sup>st</sup> Defendant points out that no sale agreement or evidence of this transaction has been provided. Furthermore, the 1<sup>st</sup> Defendant denies that the 2<sup>nd</sup> Defendant confirmed the Interested Party as the rightful owner of Plot P.9455 or that the letter dated 26/11/2009 was legitimate, alleging it was not signed by Kariuki Mwaganu.
13. The 1<sup>st</sup> Defendant highlights that the Plaintiff has failed to produce any evidence, such as the receipt for the survey fees allegedly paid in 1999, which is inconsistent with the Plaintiff's claimed purchase date in 2010. The 1<sup>st</sup> Defendant asserts that the Plaintiff has not disclosed or evidenced the purchase price, payment, or transfer of the alleged title for Plot P.9455. Instead, the 1<sup>st</sup> Defendant avers that the Plaintiff illegally trespassed and encroached on part of the 1<sup>st</sup> Defendant's land, L.R No. NAIROBI BLOCK 136/9732, and a road reserve, rather than occupying Plot No. P.9455.
14. Contrary to the Plaintiff's claims, the 1<sup>st</sup> Defendant states that he has repeatedly informed the Plaintiff of the illegal trespass since 2014 and demanded vacating the property. These demands were ignored, and subsequent eviction notices were also not complied with. The 1<sup>st</sup> Defendant maintains that he is the bona fide owner of L.R No. NAIROBI BLOCK 136/9732, a fact confirmed by the issuance of a title deed in 2019 after being cleared by the 2<sup>nd</sup> Defendant.
15. The 1<sup>st</sup> Defendant denies that the Plaintiff's Plot P.9455 is located within his property and asserts that no beacons or surveys for Plot P.9455 were erected on his land. He refutes all allegations of breach of the Plaintiff's ownership rights and claims that the Plaintiff's occupation is illegal. The 1<sup>st</sup> Defendant argues that the Plaintiff cannot be considered an innocent purchaser for value without notice, as the Plaintiff has not met the required legal conditions, including lacking a sale agreement and deriving title from registered land.
16. Furthermore, the 1<sup>st</sup> Defendant argues that equitable doctrines do not support the Plaintiff's claims and denies any prejudice, loss, or damage suffered by the Plaintiff. He asserts that title issuance is handled by the Ministry of Lands & Physical Planning, not the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant also highlights that his application for the Plaintiff's eviction was previously dismissed by the Magistrates Court. In conclusion, the 1<sup>st</sup> Defendant seeks dismissal of the Plaintiff's suit with costs.

### **Counterclaim**

17. In its counterclaim, the 1<sup>st</sup> Defendant reiterates the contents of paragraph 1 to 32 of the defence. The 1<sup>st</sup> Defendant avers that he was an original shareholder of Embakasi Ranching Company, where his shares entitled him to two plots of land which were allotted to him. Sometimes in 2014 the Plaintiff illegally trespassed and begun occupying a part of the 1<sup>st</sup> Defendant's said parcel of land known as Plot No. C.2066 now known as Nairobi/block/136/9732. The 1<sup>st</sup> Defendant avers that on or about November



2017, he issued the Plaintiff with an Eviction Notice under section 152 of the Land Act giving him 90 days within which to vacate the parcel of land.

18. The 1<sup>st</sup> Defendant asserts that he was issued with a Certificate of Title for the parcel of land now known as parcel Nairobi/block 136/9732, and is now desirous of disposing of the said parcel of land. He avers that despite expiry of the 90 days' notice to vacate issued to the Plaintiff and the issuance of a Certificate of title to the 1<sup>st</sup> Defendant, the Plaintiff is still in illegal occupation of part of the 1<sup>st</sup> Defendant's parcel of land, and has even constructed a residential premise thereon. The 1<sup>st</sup> Defendant is unable to use and or sell his parcel of land, despite having potential purchasers, owing to the Plaintiff continued illegal occupation of a part thereof.
19. The 1<sup>st</sup> Defendant avers that the Plaintiff's continued failure to vacate his land, despite being served with an Eviction Notice, has caused and continues to cause the 1<sup>st</sup> Defendant loss. The 1<sup>st</sup> Defendant listed particulars of loss as follows: Loss of user since 2014, Mesne profits.
20. The 1<sup>st</sup> Defendant's claim against the Plaintiff is for an order to evict the Plaintiff from the portion of the 1<sup>st</sup> Defendant's land he illegally occupies, and for mesne profits for loss of user.

**Defendants' Evidence: -**

21. DW1 – James Ngige Muchiri adopted his witness statement dated 29/05/2022 together with a list of documents dated 27/05/2022, a supplementary list of documents dated 21/06/2022 and a further supplementary list of documents dated 18/10/2022. He produced them as his evidence in chief. He testified that he filed a defence and counterclaim. He adopted his prayers in his defence and the counterclaim. His property is Nairobi Block 136/9732 previously identified as C2066. He is not claiming P9455. It is not his plot. The Nairobi Block 136/9732 is the plot that has brought them to court.
22. In cross-examination, the DW1 testified that he resides in Uthiru and works in the Jua Kali sector. He is a member and shareholder of Embakasi Ranching since 1978 and was allocated the suit property in 1982. His bundle of documents includes evidence at page 18, showing the allocation number T84/85, which translates to C2066. He discovered trespass on his property in 2014 and subsequently reported it to Embakasi Ranching, writing a letter found at page 25 of his bundle and receiving confirmation at pages 28 and 29. He visited the site with the board and found the plaintiff on the property. Upon finding the plaintiff trespassing, he reported to the police and sought clarification from Embakasi Ranching. He never pursued legal action but had been in the process of obtaining a title deed since 1982, finally receiving the document at page 40 in 2019. Page 19 of his bundle includes a police report about the loss of the allocation certificate. Since discovering the trespasser, he issued notices for the plaintiff to vacate but had not taken any actions on the property since 1982.
23. During a visit, the Embakasi Ranching Board did not indicate any encroachment, but he found the plaintiff had built on his plot. He reported the trespass to the police, receiving OB Number 40/21/8/2014, though he did not follow up on the investigation. The surveyors did not file a formal report but made notes on the back of documents. He confirmed that Nairobi Block 136/9732 is his allocated plot and that he was also allocated bonus plots. The surveyors of Embakasi Ranching have filed a claim showing that he is the owner.
24. In re-examination, he testified that at page 17, there is a share certificate and has entries at the back showing a confirmation for title to be issued to him. The document at page 20 is a receipt for 1983, at page 21 is a receipt for 1990 for civil engineering. At page 22 is a receipt for site visit for 2013. The letter at page 25 is a letter clearly showing the references of T and C. If the parcel of land did not belong to him, he would not have the title. Once the title was allocated, it was his responsibility to take care of the



land. For him to get the title, one goes for site visit, beacon re-established, beacon certificate and the last step was signing of the lease which was on 29/03/2019. He served the plaintiff with an eviction notice and he applied to the court for eviction order. The orders were not issued until the lawful owner was established. The last site visit by the board was done on 24/10/2019 before clearing him for processing of title. Page 82 of the defendant's bundle. If there was any dispute, the title would not have been issued to him. The plaintiff occupies part of his property. He is not on the entire piece of land. The board in Embakasi Ranching has never declined to confirm that the land is his. Having obtained the title, he did not need assistance of the 2<sup>nd</sup> Defendant.

25. DW2- Eric Nyandimo testified that he is a licensed surveyor practicing under the firm of Oakar Services Limited. He has prepared a report dated 21/04/2022 which he has adopted as his evidence before the Court. His findings regarding the property is that they were retained to conduct a survey on the original Block No. 136/9732, to determine the original plot number and to confirm from Embakasi Ranching the location of Plot No. P9455. Their client has a title for Plot no. 136/9732 having obtained it 1973 as a shareholder. They were informed that a second party was living on the land. The second party challenged the ownership. From their findings, the plot is the one shown on the registry map and they confirm that Plot No. C.2066 is the one that is being referred to as Nairobi Block 136/9732. They further confirm that the second party has encroached onto the road. The road that is supposed to be 12 meters. Only 6 meters is left. They noted that the second party has non-member certificate no. 018359 issued by Embakasi Ranching. On the second page, it is shown that plot no. is P9455 which has been correlated to survey map FR 227/18 which is annex 3 and it is further related to Nairobi Block 136/4582 which from RIM index map is now given as LR 136/9731. In their conclusion, they recommend that there is need to confirm the exact owner of LR No. 136/9731 because this seems to be the land where the second party should be located. The second party is Fredrick Mutisya Kathyaka. From the records, Plot No. C2066 from RIM is Nairobi Block 136/9732. The one that the Plaintiff is claiming P9455 should be LR 136/9731 and that is where the Plaintiff's land should be and not what he is claiming.
26. During cross-examination, he testified that he has never been employed by Embakasi Ranching. At page 30, they obtained a copy of the title from their client. At paragraph (e), they compared RIM and FR at the survey of Kenya. They relied on certificates presented to their client. They never found the certificates at Embakasi Ranching. At paragraph (f), they never undertook a search of plot No. C2066, they have not presented any search in Court. They traced one plot on the ground, C2066. They did not trace P9455 on the ground. They went with the client to the ground and with Fredrick. At page 59, the first sentence, they did not interact with Embakasi Ranching. They tried to probe further in this matter but the lands registry stated that they would not give further information unless they are involved. The letter referred to at page 59 was not produced in court. DW2 testified that he is a private surveyor but they never involved the allocating authority. Whereas the client took them to the ground he showed them where the disputed plot was. The report does not indicate that Embakasi Ranching nor Fredrick were with them on the ground.
27. In re-examination, DW2 testified that on the back side of the document, the location of the plot is indicated. They did not need Embakasi Ranching. The documents he was given by the 1<sup>st</sup> Defendant are the same documents that the 1<sup>st</sup> defendant gave. On the search, both the maps and search certificate are important. The maps are the ones that determine location of a property. On the ground, they found that on plot C2066, had been fenced though it had encroached on the road. They wrote to the 2<sup>nd</sup> Defendant, scheduled meetings but they never showed up. Membership certificates have information on the plots at the back. He has not been supplied by any documents filed by Embakasi Ranching despite asking and writing letters, which are not before the court. The 1<sup>st</sup> defendant had a title and so did the plaintiff but they never had any interactions with Embakasi Ranching which could have



clarified on the Plaintiff's plot ownership beyond writing to them. They could not have done more. They produced a professional report. They made comparison with existing records. From what DW2 saw, there is misdirection for parcel of land. The plaintiff has settled on wrong parcel.

28. With that evidence, the 1<sup>st</sup> Defendant closed his case.
29. After hearing, parties closed their respective cases and the Court gave directions of filing of written submissions on 23/04/2024.

**Submissions: -**

30. The Court gave directions on filing of written submissions on 23/04/2024. By the time of writing this Judgment, none of the parties had duly submitted.

**Issues For Determination: -**

31. The Court has now carefully read and considered the pleadings, the submissions filed by both parties together with the evidence adduced by the Plaintiffs and the Defendant and I find the issues for determination are as follows.
  - i. Whether the Plaintiff is occupying property known as C.2066 also known as L.R No. NAIROBI BLOCK 136/9732 or Plot No. P. 9455.
  - ii. Who is the lawful owner of the suit property?
  - iii. Whether the Plaintiff is entitled to the orders sought.
  - iv. Whether the 1<sup>st</sup> Defendant is entitled to the orders sought in the counterclaim.
  - v. Who should bear the costs of this suit and the counterclaim?

**Analysis And Determination**

**Whether the Plaintiff is occupying property known as C.2066 also known as L.R No. Nairobi Block 136/9732 or Plot No. P. 9455.**

32. It is the Plaintiff's assertion that he is the owner and occupies Plot No. P9455 and is in lawful occupation of the same. He avers that the 1<sup>st</sup> Defendant is wrongly and mistakenly claiming that the property occupied by the Plaintiff is NAIROBI/BLOCK 136/9732 and not Plot. No. P.9455 whereas it is the 1<sup>st</sup> Defendant's assertion that the plot where the Plaintiff claims is C.2066 and that the Plaintiff has illegally trespassed and encroached on a part of his land.
33. The first contentious issue in this matter therefore is whether the Plaintiff is in occupation of Plot known as P.9455 or C.2066 as alleged by the 1<sup>st</sup> Defendant.
34. The Plaintiff avers that Land Surveyors provided by the 2<sup>nd</sup> Defendant have numerously confirmed that the land occupied by the Plaintiff is Plot No. P. 9455 and not Nairobi/block 136/9732. He gave an example, in 1999 when the Interested Party bought the suit property as well as in 2010 when the Plaintiff bought the suit property, the 2<sup>nd</sup> Defendant provided Land Surveyors who physically visited the farm and identified and/or confirmed by erection of beacons that the land bought and occupied by the Plaintiff is Plot No. P. 9455. He did not provide evidence to demonstrate the same. In trial, he admitted that land surveyors did not erect beacons as he alleged. Without prejudice to this, the Plaintiff averred that if indeed the land that he occupies is Nairobi/block 136/9732 and not Plot No. P. 9455, then the 2<sup>nd</sup> Defendant is wholly and entirely to blame for negligent and/or



fraudulent misrepresentation. The Plaintiff is an innocent purchaser for value and therefore he cannot be punished for the mistakes and/or negligence of the 2nd Defendant who confirmed that the property bought and currently occupied by the Plaintiff is Plot No. P. 9455 and not Nairobi/block 136/9732. However, the Plaintiff could not demonstrate that the letter he produced purportedly written by the 2nd Defendant confirming that the interested party was the owner of plot no. P9455 was addressed to him.

35. I have perused the final report dated 21/04/2022 prepared by DW2. It confirms that the original land parcel LR No. 10904/2 was owned by the 2<sup>nd</sup> Defendant. The report also confirms that the Plaintiff is living on the suit property. The Plaintiff has challenged his threatened eviction on grounds that he purchased the suit property in 2010 from the Interested Party. The Plaintiff claims that he was issued with a non-member certificate no. 018359 by the 2<sup>nd</sup> Defendant. According to him, he is duly settled on Plot No. P9455. He has not produced a copy of title to P.9455. The 1<sup>st</sup> Defendant claims that he was issued with a Title No. Nairobi/Block 136/9732. It is the 1<sup>st</sup> Defendant's case that he was allocated the property in 1983 by the 2<sup>nd</sup> Defendant as a shareholder and that the Plot where the Plaintiff is living was previously referred to as C.2066 now Nairobi/Block 136/9732.
36. The surveyor's task was to determine the exact location of Nairobi/Block 136/9732, to determine the original plot number for the same and to confirm the ownership and location of Plot No. P9455 and its equivalent title number from the 2<sup>nd</sup> Defendant. The surveyor's report indicated that interactions with the 2<sup>nd</sup> Defendant showed that they have no reference for Plot No. P9455. The surveyor's findings were that the parcel references in the title deed is the one shown on the Registry Index Map and from their measurements, the parcel is the one located in the area in dispute. They also confirmed that Plot No. C.2066 is the one referred to as Nairobi/Block 136/9732.
37. DW2, a licensed surveyor states that from the records, Plot No. C2066 from RIM is Nairobi Block 136/9732. The one that the Plaintiff is claiming P9455 should be LR 136/9731 and that is where the Plaintiff's land should be and not what he is claiming. The Plaintiff also confirmed that the reverse side of the Interested Party's non-ownership certificate no. NMC 001787 dated 19/02/1999 indicated that the plot is P9455=4582 as seen on page 66 of the 1<sup>st</sup> Defendant's bundle. I have also perused the same and confirm that it shows map FR as 227/18 correlates to Plot P9455=4582. This information was included on the reverse side sometime on 31/05/2007 and the same is executed. The reverse side of the Plaintiff's non-member certificate no. NMC 018359 dated 6/04/2010 also indicates the same information, that is, FR 227/18=4582 for Plot No. P9455.
38. During hearing, the Plaintiff lead evidence that he has built his house in location for C-maps and not P though he was not aware. He was adamant that the surveyor showed him the beacons. The entire area where he has built his house falls within the beacons and that the Interested Party showed him the plot first the he confirmed with surveyors. He also testified that the transfer document at page 71 of the 1<sup>st</sup> Defendant's bundle shows the transfer by Lilian which refers to plot 4582 and the receipt no. 8470 is the number also on his non-member certificate 8470 at the top it also shows a TR 5909/06 and the transfer at page 68 refers to plot no. 4582. According to him, the documents show as though it is a different property but that is the one that he was shown.
39. It was DW2's finding that the Plaintiff has encroached onto the parcel in question as well as on the road reserve by constructing a permanent house and fencing the land in question. The evidence before me indeed demonstrates that the Plaintiff has trespassed onto property known as Nairobi/Block 136/9732 and partly encroached on a road reserve. DW2 led evidence that the Plaintiff's non-member certificate of plot ownership showed that Plot No. P9455 correlates to FR 227/18 which is annexed as Annex 3 and Nairobi/Block 136/4582 which is now LR No. 136/9731. The surveyor recommended that there



is need to confirm the exact owner of LR No. 136/9731 as it seemed to be the land where the Plaintiff should be located on.

40. The Plaintiff has not produced sufficient evidence to demonstrate that he is occupation of Plot known as P.9455. He has not adduced any evidence to support that he was indeed taken for a site visit or to demonstrate that the 2<sup>nd</sup> Defendant's surveyor indeed erected beacons on the land where is in residing as he has alleged or evidence to demonstrate the alleged confirmations showing beyond any doubt that the Plaintiff's Plot P9455 is not located within the area of the 1<sup>st</sup> Defendant's Plot No. C.2066 now L.R No. Nairobi Block 136/9732.
41. In light of the foregoing, it is my considered view that the 1<sup>st</sup> Defendant has demonstrated to the required standard by law that the plot where the Plaintiff has occupied and is claiming is Plot No. C.2066 also known as LR No. 136/9732 and not Plot known as P.9455.

### **Who is the lawful owner of the suit property?**

42. Both the Plaintiff and the 1<sup>st</sup> Defendant claim ownership of the suit property. One party is relying on a non-member certificate of plot ownership while the other is relying on a certificate of lease. The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property.
43. Where a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register. See *Munyu Maina..Vs..Hiram Gathiha Maina*, Civil Appeal No.239 of 2009.
44. The Plaintiff has laid claim to the suit property and averred that he is the owner of the suit property. He asserted that plot P.9455 was as a result of the 2<sup>nd</sup> Defendant's land known as LR No. 10904/2 Ruai. He purchased the same from the Interested party herein who had been issued with a Non-Member Certificate of Plot Ownership issued to her by the 2<sup>nd</sup> Defendant on the 22/02/1999. He also produced a non-member certificate no. NMC 018359 dated 6/04/2010 issued to him, detailing the 2<sup>nd</sup> Defendant's details.
45. The Plaintiff claims to have conducted due diligence for Plot No. P9455 before purchase and that the 2<sup>nd</sup> Defendant, through their letter dated 26/11/2009, confirmed that the Interested Party was the rightful owner of Plot No. P.9455 as per the 2<sup>nd</sup> Defendant's N.M.C No. 001787. It was the Plaintiff's testimony that he went to Embakasi Ranching and was given a letter dated 26/11/2009. He admitted that this letter is not addressed to him specifically. He has no evidence to show that the letter was addressed to him. On the face of the letter dated 26/11/2009, there is no evidence that it was written to him as it only reads "To whom it may concern – Plot No. P.9455".
46. He testified that he got information from his friend, who was not before the Court, that the plot was for sale. He asserted that he went to view it and then went to the 2<sup>nd</sup> Defendant so as to get in touch with the owner. He admitted that he did not produce a copy of the sale agreement and proof of payment of purchase price before this Court. He claimed to have purchased the suit property at Kshs.



300,000.00. He did not have a map that shows the exact location. He knew location because he was taken by a surveyor in 2009 December. Whereas his statement says they erected beacons, they actually went to show him the land. The survey fees was Kshs. 17,000 and was paid by the interested party in 1999. The receipt for payment of Kshs. 17,000 is not before the court. The only proof of payment produced by the Plaintiff was cheque no. 121445 dated 1/12/2009 in the amount Kshs. 25,000.00. it was the Plaintiff's testimony that the same was payment towards the processing of a title but that is not possible considering the Plaintiff was only issued with a non-member certificate of plot ownership on 6/04/2010. Besides the two copies of non-member certificates of plot ownership, the Plaintiff also produced and relied on receipt no. 46191 dated 31/05/2007 confirming payment for site visit, erection of beacons and issuance of the certificate of ownership.

47. The 1<sup>st</sup> Defendant on the other hand avers that the Plaintiff illegally trespassed on a part of his property and a part of the road, and not on the Plot No. P.9455, which he allegedly bought. That his property is known as L.R No. Nairobi Block 136/9732, which was previously known as C. 2066. He contended that there can be no complaint pending determination by the 2<sup>nd</sup> Defendant over the 1<sup>st</sup> Defendant's property, as the 2<sup>nd</sup> Defendant confirmed that the 1<sup>st</sup> Defendant was the bona fide owner of Plot No. C. 2066 and cleared him for the issuance of the title deed which was issued on 29/03/2019.
48. He maintained that that he is not wrong or mistaken in his claim that the property occupied by the Plaintiff is L.R No. Nairobi Block 136/9732 and not Plot No. P. 9455, as the 1<sup>st</sup> Defendant ownership of the property dates back to the beginning of the 2<sup>nd</sup> Defendant where the 1<sup>st</sup> Defendant was an original shareholder, unlike the Plaintiff who's claim of ownership is based on Non-Member Certificates. He was issued with a certificate of ownership no. 1425 and he produced a copy of the same before me. This meant that his shares entitled him to two plots of land which were allotted to him. He averred that he is the bona fide owner of the property known as L.R No. Nairobi Block 136/9732, which the Plaintiff illegally occupies a part of, a fact which has been verified and confirmed on several occasions by the 2<sup>nd</sup> Defendant, as evidenced by the 1<sup>st</sup> Defendant's title deed which is valid an indefeasible.
49. Who between the Plaintiffs and 1<sup>st</sup> Defendant has certainly shown the root of their title? It is evident that the right to own and acquire property in Kenya is premised under Article 40 of *the Constitution* of Kenya, 2010. Further, a certificate of title is prima facie held to be evidence of ownership of the stated land as provided for in Section 26(1) of the *Land Registration Act*. However, the said ownership can be challenged on grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
50. Both the Plaintiff and the 1<sup>st</sup> Defendant have claimed the suit property but it is only the 1<sup>st</sup> Defendant who has claimed to be the registered as owner of property known as LR No. Nairobi/Block 136/9732 previously known as C.2066. The Court already found that the plot where the Plaintiff has occupied and is claiming is Plot No. C.2066 also known as LR No. 136/9732 as findings of DW2 were that the Plaintiff has non-member certificate no. 018359 issued by Embakasi Ranching and on the second page, it is shown that plot no. is P9455 which has been correlated to survey map FR 227/18 which is annex 3 and it is further related to Nairobi Block 136/4582 which from RIM index map is now given as LR 136/9731. Therefore, the property in contention is not P.9455 but C.2066.
51. The Supreme Court in the Presidential Election Petition No. 1 of 2017 between Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR had this to say:

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness



with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.....”

52. Both the Plaintiff and the 1<sup>st</sup> Defendant claim ownership. One party relied on a non-member certificate of plot ownership issued on 6/04/2010 and the other relied on a Certificate of Lease registered in his name on 29/03/2019. The 1<sup>st</sup> Defendant averred that he acquired the suit property as an original shareholder in 1978 and was issued with certificate of ownership no. 1425 dated 1/01/1978 for plot C.2066. He also adduced a copy of a provisional letter of allocation of plot dated 28/11/1982. He produced a copy of the 1<sup>st</sup> Defendant’s Embakasi Ranching Company Ltd Share Certificate No. 1425 dated 1/01/1978, a copy of the 1<sup>st</sup> Defendant’s Provisional Letter of allocation for plots dated 28/11/1982, a copy of receipt No. 7688 dated 10/01/1983 issued to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant for Kshs. 1000 being payment of Shareholder Survey Fees, a copy of receipt No. 6719 dated 11/11/1990 issued to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant for payment for Kshs. 7000 being Shareholder Civil Engineering Fees, a copy of receipt No. 4922 dated 25/04/1995 issued to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant for Kshs. 12,000 being payment of Member Registration & Survey Fees for Bonus Plot, a copy of 1<sup>st</sup> Defendant’s ERC receipt No. 038353 dated 10/12/2013 for Kshs. 20,000 being payment for Site Visit, a copy of 1<sup>st</sup> Defendant’s ERC receipt No. 040529 dated 22/07/2014 for Kshs. 40,000 being payment for Beacon Reestablishments among other documents. He also produced a Lease dated 4/03/2019 and registered on 29/03/2019 together with a certificate of lease registered in his name on 29/03/2019.
53. The 1<sup>st</sup> Defendant tendered evidence of ownership of property known as Nairobi/Block 136/9732 and his evidence was corroborated by DW2. The Plaintiff failed to successfully challenge the testimony of DW2, a surveyor that Plot No. C.2066 is the one that is being referred to as Nairobi Block 136/9732. The effect of this would mean that the Plaintiff will likely lose, which means the burden of proving his ownership and how he got documents shifts to him.
54. I note that the 1<sup>st</sup> Defendant averred that the Plaintiff has neither disclosed the alleged purchase price paid nor has he produced any evidence of the alleged payments made or a copy of the transfer of the allegedly title to the suit property, as not title deed has been produced by the plaintiff for Plot No. P.9455. Further, he averred that the Plaintiff is misguided by alleging that survey fees were paid on 5/01/1999, vide receipt No. 002918, as the alleged payment was made well over a decade before the Plaintiff allegedly purchased the property, and secondly, as not such receipt has been produced in evidence.
55. The Plaintiff’s claim of ownership falls short. He has failed to establish an unbroken chain of root of title, or lack thereof. He has admitted that he does not have a title to the suit property. He testified that he is aware that adverts on page 84 to 92 of the 1<sup>st</sup> Defendant’s bundle were calling for people to collect



titles but he did not do anything because this matter was already before the Court. I note that the suit was filed in 2021. The public notices indicated that the Ministry of Lands has been issuing title deeds for Embakasi Ranching Co. Ltd plot owners since August 2020. There is no evidence that the Plaintiff has been following up on the issue of ownership and processing of a title from the 2<sup>nd</sup> Defendant since 2010. The purported cheque produced by the Plaintiff does not indicate what the payment was for even though the Plaintiff alleges that it was for issuance of a title.

56. Aside from the above, the root of title is not sufficient. Both the Plaintiff and the Interested Party have non-member certificates of plot ownership. The Plaintiff testified that he did not inquire from the Interested Party which member she bought the land known as P.9455 from. The Plaintiff did not produce a copy of the sale agreement between himself and the Interested Party for the purchase of Plot No. P9455. Additionally, he also failed to produce proof of payment of purchase price before this Court. He only alleged that he purchased the plot known as P.9455 for Kshs. 300,00.00. He did not mention this in any of his pleadings.
57. Under the provisions of Section 112 of the *Evidence Act*, it was incumbent upon the Plaintiff to demonstrate with sufficient evidence how he acquired the suit property as alleged which he failed to do so. The Court has already held that the plot where the Plaintiff has occupied and is claiming is Plot No. C.2066 also known as LR No. 136/9732. Balancing the two competing interests, it is in my view that the 1<sup>st</sup> Defendant has proved his ownership to the suit property. From the evidence that was adduced, the 1<sup>st</sup> Defendant became the owner in 1978 and he was subsequently issued with a title in 2019. From the above analysis and having carefully analyzed the available evidence, it is the finding of this court that the 1<sup>st</sup> Defendant has satisfactorily established his root to the ownership of the suit property. The 1<sup>st</sup> Defendant herein is the lawful owner of the suit property having satisfactorily explained the root of the title.

#### **Whether the Plaintiff proved his case to be entitled to the orders sought.**

58. Having found that the plot where the Plaintiff has occupied and is claiming is Plot No. C.2066 also known as LR No. 136/9732 and that the 1<sup>st</sup> Defendant herein is the lawful owner of the suit property, it is my considered view that the Plaintiff has failed to prove his case to any of the required standard and it would therefore mean that he is not entitled to the reliefs sought in the Plaintiff.
59. More particularly, on whether the Plaintiff is a purchaser without notice, a bona fide purchaser for value and criteria to be met has been discussed by the Court in the case of Lawrence Mukiri ...Vs... Attorney General & 4 Others [2013] eKLR as well as in the Ugandan case of Katende V Haridar & Company Limited [2008] 2 E.A.173 which was quoted by the Court of Appeal in Nakuru CoA App No. 291 of 2013: - Weston Gitonga & 10 others Vs Peter Rugu Gikanga & another [2017] eKLR. The Court found that the suit property where the Plaintiff is occupying is a plot previously known as C.2066 and not plot P.9455 that he allegedly purchased from the Interested Party. Therefore, the Court has no reason to deal with this issue as it will be an academic exercise.
60. All in all, the Plaintiff's suit totally fails. It follows that the Plaintiff is devoid of merit and is hereby dismissed with costs to the 1<sup>st</sup> Defendant.

#### **Whether the 1<sup>st</sup> Defendant is entitled to the orders sought in the counterclaim.**

61. Having found that the plot where the Plaintiff has occupied and is claiming is Plot No. C.2066 also known as LR No. 136/9732 and that the 1<sup>st</sup> Defendant herein is the lawful owner of the suit property, I shall now focus on the prayers sought in the Counterclaim.



62. The 1<sup>st</sup> Defendant's claim is based on proprietorship of the suit property and entitlement to the rights in respect to ownership of land. He has produced documentary evidence in form of a certificate of lease over the suit property in his name as proof of ownership.
63. Section 24 of the [Land Registration Act](#) 2012 states that 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. Section 25 of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—to encumbrances charges or leases shown on the register and the overriding interests as stated in section 28 of the Act.
64. Section 26 of the [Land Registration Act](#), 2012 provides;
- (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
65. By dint of the above provisions, the 1<sup>st</sup> Defendant has the right to have his title protected by this Court. The Courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and as conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated as above. In the present case the title produced by the 1<sup>st</sup> Defendant shows that the suit property is registered in his name. That position was not successfully challenged by the Plaintiff as was found somewhere hereinabove.
66. Among the rights to be enjoyed by a registered owner of any land is the right for peaceful and quiet enjoyment of the land he owns, in other words the rightful owner to the land has a right to possession, occupation and use of the suit land. The 1<sup>st</sup> Defendant conducted evidence that shows that he was an original shareholder of the 2<sup>nd</sup> Defendant where his shares entitled him to two plots of land which were allotted to him. That sometime in 2014, the Plaintiff illegally trespassed and begun occupying a portion of the suit property and is utilizing it for his own benefit, those actions of the Plaintiff amount to violation of the 1<sup>st</sup> Defendant's right as guaranteed in [the constitution](#) and must be stopped. In a nutshell, it is the 1<sup>st</sup> Defendant's case that the Plaintiff's occupation of his land is without his consent or legal basis as he contended that the Plaintiff's occupation on the suit property is illegal and is trespass. It has been demonstrated that he has issued him with various eviction notices.
67. The dispute herein involves ownership of a parcel of land, and the specific prayers sought by the 1<sup>st</sup> Defendant in the counterclaim filed herein is for eviction orders to issue against the Plaintiff herein. These are clearly orders relating to the use, occupation and title to land and within the jurisdiction of this Court.
68. It is my finding that the 1<sup>st</sup> Defendant has proven his claim on a balance of probability and established that the Plaintiff has no legal right to remain on the suit property based on the evidence placed before



this court. Consequently, I find that the 1<sup>st</sup> Defendant's counterclaim succeeds. The 1<sup>st</sup> Defendant is entitled to the reliefs that he has sought. It also follows that the Counterclaim dated 27/05/2022 is merited and is hereby allowed as prayed.

**Who should bear the Costs of this Suit and the Counterclaim?**

69. It is trite law that costs follow the event. Section 27 of the *Civil Procedure Act* gives the Court discretion to grant costs. As the successful party is always entitled to costs except in exceptional circumstances, no exceptional circumstance exists in this suit, and thus the Court finds that the 1<sup>st</sup> Defendant being the successful litigant is entitled to the costs of the suit and the counterclaim.

**Disposal orders**

70. The Plaintiff has failed to prove his case to the required standard and it would therefore mean that he is not entitled to the reliefs sought in the Plaint. The Plaintiff's suit totally fails as it is devoid of merit. The suit is hereby dismissed with costs to the 1<sup>st</sup> Defendant.

71. Accordingly, having been satisfied that the 1<sup>st</sup> Defendant has proved his claim to the required standards, I enter judgment for the 1<sup>st</sup> Defendant against the Plaintiff as prayed in the Counterclaim dated 27/05/2022 in the following terms: -

- i. The Plaint dated 23/03/2021 is hereby dismissed with costs to the 1<sup>st</sup> Defendant.
- ii. It is hereby declared that the Plaintiff (Fredrick Mutisya Kathyaka) is a trespasser onto the 1<sup>st</sup> Defendant (James Ngigi Muchiri)'s parcel of land known as Nairobi/Block/136/9732.
- iii. An eviction order is hereby issued to evict the Plaintiff (Fredrick Mutisya Kathyaka), his servants and/or agents or anyone claiming under him, from a part of the 1<sup>st</sup> Defendant (James Ngigi Muchiri)'s parcel of land known as Nairobi/Block/136/9732 and in default the OCPD Kayole Police Division do ensure compliance with this order and do provide security during eviction.
- iv. The 1<sup>st</sup> Defendant (James Ngigi Muchiri) is awarded the costs of the suit and the counterclaim.

72. It is so ordered.

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

.....

**MOGENI J  
JUDGE**

In the virtual presence of:

- Mr. Wanjohi for 1<sup>st</sup> Defendant
- Ms. Cheruiyot for Plaintiff
- Ms Mutua holding brief for Mr. Macharia for 2<sup>nd</sup> Defendant
- No appearance for Interested Party
- Caroline Sagina - Court Assistant