



REPUBLIC OF KENYA



**Kimari v Gathii & 2 others (Environment & Land Case E015 of 2023)
[2024] KEELC 13793 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13793 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E015 OF 2023
LN GACHERU, J
DECEMBER 5, 2024**

BETWEEN

DUNCAN MAINA KIMARI PLAINTIFF

AND

KAHUNGA GATHII 1ST DEFENDANT

RUTH NJERI KARUNGO 2ND DEFENDANT

DISTRICT LAND REGISTRAR MURANGA 3RD DEFENDANT

JUDGMENT

1. The Plaintiff herein, Duncan Maina Kimari vide an Amended Plaint dated 15th September 2023, sought for Judgement against the Defendants herein jointly and severally for the following Orders:
 - 1). A permanent injunction to restrain the defendants, whether by themselves or their servants or agents or otherwise howsoever from remaining on or continuing in occupation of LR No. LOC.9/Kanyenyaini/1531.
 - 2). A permanent injunction be issued restraining the Defendants herein by themselves, servants, agents and/or whomsoever claiming through them from alienating, offering for sale, selling, charging, transferring and/or in any manner whatsoever interfering with the Plaintiff's ownership and peaceful and quiet occupation of land parcel L.R No. LOC.9/ Kanyenyaini/1531.
 - 3). Eviction of the Defendants, their agents, servants, relatives or otherwise howsoever from L.R No. LOC.9/Kanyenyaini/1531.
 - 4). An Order that the District Land Registrar, Muranga Land Registry do reinstate entries No. 6, 7 and 8 of 21st April 2022, on the title of the suit property and do cancel, withdraw and remove forthwith all entries entered and registered against the title for land parcel LR No.



LOC.9/Kanyenyaini/1531, after registration of the transfer to the Plaintiff registered on 21st April 2022. Correction of the Green card to read the Plaintiff as the owner of the land.

- 5). A declaration that the decision of the Land Registrar, Muranga to expunge or cancel or revoke the title to the Plaintiff over LR No. LOC.9/KANYENYAINI/1531, on or about 14th December 2022, is unconstitutional, invalid, null and void and of no legal effect whatsoever.
 - 6). A declaration that the decision delivered on 12th September 2023, and on the 1st of September 2022, by the Chief Magistrate's Court in ELC CASE No. E056 of 2023, to expunge or cancel or revoke the title held by the Plaintiff over LR No. LOC.9/KANYENYAINI/1531, on or about 14th December 2022, is unconstitutional, invalid, null and void and of no legal effect whatsoever.
 - 7). General damages for trespass.
 - 8). Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit and just to grant.
 - 9). Any other or further relief the Honourable Court may deem fit and just to grant.”
2. In his claim and in his Witness Statement, which was amended and dated 15th September 2023, the Plaintiff averred that he is the bonafide registered owner of land parcel number LR No. LOC.9/Kanyenyaini/1531 (the suit property), which he purchased from the 1st Defendant in year 2022, and that he paid the full purchase price, to the Vendor. Further, that he carried out due diligence prior to purchasing the suit land, whereupon he discovered that it was not subject of any encumbrances. Further, that he obtained the consent of the local Land Control Board, prior to purchasing the instant suit property.
 3. The Plaintiff's also averred that the 2nd Defendant entered the suit property on 24th April 2023, and began cultivating thereon without the Plaintiff's approval, and this action occasioned damages to the Plaintiff's coffee and tea crops that were growing on the suit land.
 4. Further, the Plaintiff averred that he was informed by his bank; Equity Bank, that his title to the suit property which he had offered as security for a loan with the said bank had been cancelled. That he later realized that the 2nd Defendant had filed a suit and obtained Orders against the 1st Defendant in respect of the suit property, without joining the Plaintiff in the above mentioned proceedings.
 5. It was the Plaintiff's further averments that he had sought to be involved in the said proceedings wherein his title to the suit property had been cancelled. However, his Application was dismissed on 17th July 2023, by the trial Court on grounds of being res judicata.
 6. The Plaintiff further claimed that with the exception of MCLE Case No. E009 of 2022, he has never been a party to any other suit between the 1st and 2nd Defendants. Further, that the Court in MCLE Case No. E009 of 2022, directed the 2nd Defendant to seek compensation from the 1st Defendant because the ownership of the suit property had changed hands.
 7. The Plaintiff also relied on witness Statement of Mary Wambui Kimari, dated 15th September 2023, who alleged that she is the wife to the 1st Defendant, and that she was in support of the Plaintiff's case. In the said witness statement, Mary Wambui Kimari averred that her husband conveyed the suit land to the Plaintiff for the entire purchase price of Kshs.2,600,000/=, which amount the Plaintiff paid in full.



8. Further, that the 1st Defendant had executed a lease agreement with the 2nd Defendant in respect of the suit land, prior to disposing of the suit property to the Plaintiff, which lease agreement the 1st Defendant terminated on account of his need for money to pay for his own medical treatment.
9. The said witness also alleged that the 1st Defendant's family do not have any interest whatsoever over the suit property, and their only wish was to hand over possession of the said land to the Plaintiff, as they are not in a position to refund the purchase price rendered by the Plaintiff.
10. Though the 1st Defendant had filed a Replying Affidavit dated 16th May 2023, in response to the Notice of Motion Application which was filed alongside this suit, he did not file any Defence. It was alleged that the 1st Defendant later died during the pendency of this suit. However, the 2nd Defendant entered appearance and filed her Defence and Counter- Claim.

The 2nd Defendant's Response

11. In her Statement of Defence dated 16th October 2023, the 2nd Defendant opposed the Plaintiff's suit and refuted the claims set out in the Plaintiff's Amended Plaint dated 15th September 2023, save for the averments set out in paragraphs 15 and 16 thereon, wherein, the Plaintiff had affirmed that the caution over the suit land initially registered by the 2nd Defendant was reinstated by the Court vide an Order issued in ELC No. E056 of 2021, and that the Plaintiff's Application dated 17th July 2023, was dismissed by the trial Court.
12. The 2nd Defendant averred that she had been in occupation of the suit land since year 1987, during which period she planted 3,100 tea bushes, 450 coffee bushes, and built gabions on the suit property. Further, that the 1st and 2nd Defendants executed a lease agreement in respect of the suit property on 7th December 2012, which lease was expressed to be for a duration of five (5) years, terminating on 6th December, 2017.
13. Further, that prior to the expiry of the above-mentioned lease, the 1st and 2nd Defendants mutually-agreed that in the event that the 2nd Defendant renewed the said lease early, that is, in year 2016, the 1st Defendant would not charge any amount in respect of the annual lease amount due for year 2018.
14. That the 1st and 2nd Defendants executed another agreement dated 26th November 2016, wherein it was mutually agreed that the 1st Defendant would lease the suit property to the 2nd Defendant for a term of six (6) years commencing on January 2019 to January 2025, for the entire consideration of Kshs.150,000/=, and which consideration the 2nd Defendant paid in full to the 1st Defendant. Further, that the agreement dated 26th November 2016, did not contain a termination clause. [The date 26th November 2016 is expressed as 26th November 2018B], in some paragraphs of the 2nd Defendant's Statement of Defence.
15. It was the 2nd Defendant's further averment that the Plaintiff failed to carry out due diligence prior to entering into a transaction to dispose the suit land. She argued that had the Plaintiff undertaken due diligence, he would have established that an already-existing written lease in respect of the suit property existed, and by virtue of which the 2nd Defendant was in occupation of the property.
16. She also averred that the Plaintiff entered into the suit land and illegally harvested the tea, avocado and coffee crops growing thereon, which action disrupted the term of her lease for a period of eight (8) months from May 2022 until February 2023. The 2nd Defendant urged the Court extend the term of her lease for a period of eight (8) months, that is, from January 2025 until September 2025, owing to the above-mentioned unlawful activities by the Plaintiff.



17. The 2nd Defendant referred to the following four (4) cases between the 1st and 2nd Defendants concerning the suit land:
 - a. Kangema MCLE No.17 of 2018: Kahuga Gathii vs Ruth Njeri Karungo.
 - b. Muranga ELC Appeal No.6 of 2020: Kahuga Gathii vs Ruth Njeri Karungo.
 - c. Muranga MCLE No. E56 of 2021: Kahunga Gathii vs Ruth Njeri Karungo.
 - d. Muranga ELC MISC.Case No. E003 of 2023: Kahunga Gathii vs Ruth Njeri Karungo.
18. The 2nd Defendant further averred that the Plaintiff's title to the suit property was cancelled by the 3rd Defendant herein pursuant to a lawful Order of the Court issued in Muranga MCLE No. E56 of 2021 Kahunga Gathii vs Ruth Njeri Karungo, wherein the 1st Defendant's suit against the 2nd Defendant was struck out. She further stated that the 1st Defendant died on 12th September 2023, at the Nakuru Provincial General Hospital.
19. In her Counterclaim dated 16th October 2023, the 2nd Defendant sought two reliefs from this Court against the Plaintiff as follows:
 - a. The Lease dated 26th November 2016, be extended for eight (8) months from January 2025 till September 2025.
 - b. Costs and interests.
20. The 2nd Defendant also filed a Witness Statement dated 16th October, 2023, and reiterated the averments contained in her Statement of Defence, and also annexed a lease Agreement dated 7th December 2012, which was drawn by the Law Firm of N.M. Kiriba & Co. Advocates, which lease Agreement is signed by the 1st Defendant in the role of Lessor, and the 2nd Defendant in the capacity of Lessee and witnessed by John Kihara Thuo and Mary Wambui Kamau.
21. She further annexed a Lease Agreement dated 26th November 2016, which was drawn by the Law Firm of Mose, Mose & Milimo Advocates. The 2nd Defendant also annexed the Judgment of the Court dated 13th February 2020, issued in MCL&E No. 17 of 2018, Kahuga Gathii vs Ruth Njeri Karungo, and accompanying Decree dated 20th March 2023. She also attached the Judgment of this Court (differently constituted) delivered on 26th May 2021, in Muranga ELC No.6 of 2020 Kahuga Gathii v Ruth Njeri Karungo.
22. The 2nd Defendant further annexed a Ruling of the Court dated 1st September 2022, rendered in ELC Case No. E056 of 2021 Kahuga Gathii vs Ruth Njeri Karungo (The Chief Magistrate's Court – Murang'a), and accompanying Order of the Court dated 25th November 2022. She also annexed a Ruling dated 12th September 2023, issued in the said case. Also annexed was a Ruling of this Court dated 6th July 2023, delivered in ELC MISC. Case No. E003 of 2023: Kahuga Gathii vs Ruth Njeri Karungo.
23. The 3rd Defendant filed its Statement of Defence dated 8th November 2023, on 23rd November 2023, and denied all the allegations made against it by the Plaintiff, and did put the Plaintiff to strict proof.
24. The 3rd Defendant further averred that its act of cancelling the title deed were not illegal, but it was in compliance with the court order in Murang'a CMC, MCLE No. E056 of 2021, which is an ongoing matter at the said court.
25. Further, the 3rd Defendant denied having received any demand and notice of intention to sue and did put the Plaintiff to strict proof.



26. The matter proceeded for hearing by way of viva voce evidence wherein, the Plaintiff gave evidence for himself and called one witness. The 2nd Defendant also gave evidence for herself and did not call any witness. However, the 3rd Defendant did not participate in the matter after filing its Defence, and did not call evidence or participate in the suit, and therefore, the matter proceeded in its absence.
27. Further, the 1st Defendant did not participate in the hearing, as there was no defence tendered by him, and it was also alleged at the time of the inter-parties hearing, that he was deceased, and there was no substitution.

The Plaintiff's Case

28. PW1 Duncan Maina Kimari, a peasant farmer, testified that the 2nd Defendant has trespassed on the suit land, which he had purchased from the 1st Defendant. He adopted his Witness Statement dated 15th September 2023, as his evidence in chief, and also produced a List of Documents as exhibit in support of his case, marked as P. Exhibit 1.
29. It was the Plaintiff's testimony that he purchased the suit land from the 1st Defendant and in April 2022, he was sued by Ruth Njeri (the 2nd Defendant herein) together with the person who sold the suit property to him (the 1st Defendant herein). Further, that in the said suit at Kangema Law Courts, the Court directed the Plaintiff to demand a refund of the purchase price in respect of the suit land.
30. Further, that later his bank called him and informed him that the title to the suit property had been cancelled pursuant to a Court Order issued in ELC Case No. E056 of 2021; Kahuga Gathii vs Ruth Njeri Karungo (The Chief Magistrate's Court – Murang'a). That he subsequently approached this Court seeking for the removal of the caution placed on the suit property so that he could utilize the said land, and also for the costs of the suit.
31. Upon being cross-examined by Mr. Thuku for the 2nd Defendant, the Plaintiff testified that he was seeking that the decision of the Court in ELC Case No. E056 of 2021; Kahuga Gathii vs Ruth Njeri Karungo (The Chief Magistrate's Court – Murang'a), be set aside by this Court. He admitted to not having brought a suit against the Chief Magistrate's Court at Murang'a.
32. Further, he testified that he entered onto the suit land in April 2022, during which time he was not aware that it was the subject of a lease, wherein the 2nd Defendant was the Lessee. He confirmed to having been aware of a court case between the 1st and 2nd Defendants. That at the time of purchase of the suit property, he did not know that someone else was utilizing the said land.
33. He further testified that he filed an Application to be joined in Muranga CMELC Case No. E056 of 2021: Kahuga Gathii vs Ruth Njeri Karungo, but the said Application was declined by the trial Court.
34. PW1 stated that he purchased the suit land for the full consideration of KShs.2.6 million, and that he did not know that he could have filed the present suit before the Kangema Law Courts. It was his further testimony that he is in possession of a consent from the Land Control Board, which he had not produced as an exhibit in court. That he did not file a response to the 2nd Defendant's Counter-claim, and that it was his bank that called to inform him about the cancellation of his title to the suit property. He confirmed that the suit land is currently registered in the name of Kihunga Gathii, and he disclaimed knowledge of the other lawsuit involving the suit property.
35. On re-examination, PW1 testified that he paid for the consent from the Land Control Board, dated 15th March 2022, and added that he was not a party to the other cases in respect of the suit land. It was his further testimony that he carried out a search at the Lands Office, which search did not disclose the



existence of any Lease in regard to the property. Further, that he was already a customer of Equity bank for a long period and that the said bank called to inform him of the cancellation of his title.

36. PW2 Mary Wambui, a peasant farmer testified that the only reason as to why the present matter was before the Court is because her husband sold the suit property to the Plaintiff. She also testified that the 2nd Defendant procured the cancellation of the Plaintiff's title to the suit land, without involving her husband, who was the vendor. She further testified that her husband died on 12th September 2023, and she admitted to not having produced his death certificate before the Court.
37. It was her further testimony that her husband was not substituted in the suit, and that he had disposed of the suit property owing to financial constraints on account of his own medical treatment, and of their son who had a broken spinal cord. That her son can now walk, and that her husband died due to the effect of the cancellation of the Plaintiff's title to the suit property.
38. She affirmed that her family has no interest in respect of the suit land, and that her husband sold the property to the Plaintiff while the 2nd Defendant was a Lessee on the said land. She admitted that the 2nd Defendant was entitled to some money from the 1st Defendant's family, as per the terms of the said Lease Agreement. She urged the Court to allow the Plaintiff's claim.
39. On cross-examination by Mr. Thuku for the 2nd Defendant, PW2 testified that she lives in Mau Narok area of Nakuru County, where she has been a resident for over 30 years. That the 2nd Defendant has been utilizing the suit property as a Lessee for a long period of time, but was unsure of the actual number of years. It was her further testimony that the husband to the 2nd Defendant is a brother to her husband.
40. She affirmed that the lease period had not expired at the time of the conveyance of the suit land to the Plaintiff, and that her husband filed a suit before the Kangema Law Courts, but she was not certain about the said suit. PW2 further testified that the 2nd Defendant was not a party to the agreement for the disposal of the suit land, and that as per the terms of the Lease Agreement executed between her husband and the 2nd Defendant, the 2nd Defendant covenanted to be paying Kshs.22,500/=, every year to her husband. She admitted to not being aware of the other suits involving the suit property.
41. During re-examination, PW2 reiterated that her husband approached the 2nd Defendant before he disposed of the suit property, and requested her to purchase it, but the 2nd Defendant responded by saying that she was not in a position to purchase the suit land.

The 2nd Defendant's Case

42. DW1 Ruth Njeri Karungo, who lives in Gitugo area and who is a small-scale farmer adopted her Witness Statement dated 16th October 2022, as her evidence in chief, and produced her List of Documents as D. Exhibits 1-9. It was her evidence that she was not contacted when the suit land was sold to the Plaintiff by the 1st Defendant.
43. On cross-examination by Mr. Oluoch for the Plaintiff, DW1 testified that the governing Lease agreement did not contain a termination clause. Further, that she is in possession of the Green card in respect of the suit property, and that the caution placed on the suit land was later removed, without her knowledge through a court order. That the Plaintiff came to fix a boundary in respect of the suit property, without informing her, whereas she has been in occupation of the suit property since 1987. Further, that Kangema Court conclusively determined the matter, and that the boundaries were removed illegally.
44. It was PW2's further testimony that she only saw the Plaintiff at the Police Station, and was unaware of the disposal of the suit property. That the Lease Agreement contained a Default Clause, and in light



of the said clause, she could not pursue compensation. That although the Court ruled that she should not remove the caution until January 2025, the said caution was removed in crude manner.

45. Further, DW2 testified that she was unaware of the reasons for the sale or the disposal of the suit land, and that it was not her intention that her brother-in-law (the 1st Defendant) should die. She affirmed that the 1st Defendant is the registered owner of the suit land following the Order of cancellation of the Plaintiff's title.
46. Dw1 further confirmed that she utilizes the suit property wherein she has planted coffee, tea and Napier grass. She further testified that she lives in Gitugo area, which is the locality in which the suit land is situated, and that the 1st Defendant is now deceased, but his wife is alive. Furthermore, both have never lived on the suit property.
47. After the close of the 2nd Defendant's case, parties were directed to file their respective written submissions, since the 3rd Defendant did not participate in the viva voce proceedings.

The Plaintiff's Submissions

48. The Plaintiff filed undated written submissions through the Law Firm of Betty Wamukore & Owiti Co. Advocates, wherein he set out the history of the present dispute and identified four (4) issues for determination:
 1. Whether the 1st Defendant is the owner of parcel number LR. No. LOC.9/Kanyenyaini/1531.
 2. Whether the Plaintiff bought the said land procedurally from the 1st Defendant.
 3. Whether the 2nd Defendant had another remedy available to her in the lease agreement other than to cancel the title of the Plaintiff.
 4. Whether the 3rd Defendant had authority to cancel the said title without satisfying itself of the appearance of all parties involved including the Plaintiff in the matter.
49. It was the Plaintiff's submissions that during the trial, the 2nd Defendant admitted having seen the Plaintiff on the suit property from time to time. Further that before the 1st Defendant had passed on, he had filed a Replying Affidavit in response to the Plaintiff's Application dated 8th June 2023, wherein he disclaimed any interest over the suit property, and admitted to having conveyed the property to the Plaintiff. He further submitted that in the said Replying Affidavit, the 1st Defendant expressed his willingness to compensate the 2nd Defendant as a result of the sale of the suit land.
50. It was the Plaintiff's further submissions that the Lease Agreement dated 7th December 2012, relied upon by the 2nd Defendant in the suit, contains a termination clause; therefore, the said lease cannot operate as a bar to prevent the registered owner of the suit land from disposing the same, particularly, to offset medical expenses. The Plaintiff argued that he purchased the suit land for Kshs.2,600,000/=, while the 2nd Defendant is on occupation of the suit property pursuant to a lease for the amount of Kshs.225,000/= per annum, which amount is considerably less in terms of value.
51. Further, the Plaintiff asserted that the contract executed between himself and the 1st Defendant was valid as the 1st Defendant was possessed of the requisite capacity to dispose the same being the registered proprietor thereof. Moreover, the transaction conveying the suit property obtained the consent of the relevant Land Control Board. Further, that the 2nd Defendant was informed of the Plaintiff's purchase of the suit land, and the Court cancelled the Plaintiff's title without affording him an opportunity to be heard.



52. For the above submissions, reliance was placed in the holding of the Court in the cases of *Weston Gitonga & 10 Others vs Peter Rugu Gikanga & Another and Katende Vs Haridar & Company Ltd* [2008] 2 E.A. 173, to buttress the proposition that the Plaintiff is a bonafide purchaser of the suit property. Further reliance was placed in the provisions of Sections 24 and 26 (1) of the [Land Registration Act](#), 2012.

The 2nd Defendant's Submissions

53. The 2nd Defendant filed written submissions dated 12th July 2024, through the Law Firm of Thuku & Associates Advocates, wherein she submitted and refuted the Plaintiff's claim that he paid the sum of Kshs.2,600,000/=, to the 1st Defendant being the purchase price in respect of the suit property.
54. It was her further submissions that the Plaintiff failed to disclose whether he delivered the stated purchase price money in cash or through a cheque. Further, that the account statement produced by PW1 is in respect of the period from 5th May 2022, until 17th November 2022, which period does not cover 17th March 2022, when the 1st Defendant and the Plaintiff are claimed to have executed a contract disposing the suit property.
55. She controverted the Plaintiff's contention and submission that he obtained the consent of the Land Control Board, and that the document appearing on page 11 of the Plaintiff's bundle of documents shows the payment of Kshs.1,000/=, being booking charges in respect of the Land Control Board. Further, that the document appearing on page 12 of the Plaintiff's bundle of documents does not contain either the signature of the Plaintiff or the 1st Defendant, which renders both documents incomplete and a sham.
56. The 2nd Defendant further submitted that the Plaintiff cannot benefit from an illegality committed by the 1st Defendant namely by filing a multiplicity of suits concerning the suit property in a bid to defeat the 2nd Defendant's leasehold interest over the same. It was further submitted that the Plaintiff is not an innocent purchaser for value without notice, of the suit land as claimed, and that had he carried out due diligence by visiting the suit property, he would have established that the 2nd Defendant was cultivating the said land, and had even placed a caution over the said suit property.
57. Reliance was placed in the decision of the Court in the case of *Kukan & Another (Administrators of the Estate of the Late Jason Kukan Lila) vs Kibutha* (Civil Appeal 339 of 2018) [2023] KECA 742 (KLR) (22 June 2023) (Judgment), on the question of what is meant by the term "bona fide purchaser for value".
58. Before delving into the disputed issues, this court will first set out the undisputed facts. There is no doubt that Kahunga Gathii, was the original registered owner of land parcel No. Loc 9 Kanyenyaini/1531, having been registered so on 12th November 2012, as is evident from the copy of the Green Card attached to the Plaintiff's bundle of documents.
59. There is also no doubt that on 13th November 2012, the 2nd Defendant Ruth Njeri Karungo, placed a caution on the suit land. However, the Green card does not give the reasons for placing of a the said caution, but from the 2nd Defendant's Pleadings, it is evident that she had entered into a lease agreement with the 1st Defendant on 7th December 2012, for a period of 5 years, which lease was to terminate on 6th December 2017. However, it is evident that the caution was placed before the signing of the lease agreement.
60. Further, it is evident that the 1st and 2nd Defendants entered into another lease agreement on 26th November 2016, for a period of 6 years , which lease was to terminate in January 2025. However, the



1st Defendant sold the suit land to the Plaintiff herein in April 2022, and the question herein is whether the Plaintiff is bound by the existing lease agreement.

61. It is also evident that a dispute arose between the two, and this dispute culminated in the 1st Defendant filing a case in Kangema Law Courts, being Kangema MCLE NO.17 OF 2018, wherein the 1st Defendant had sought for removal of caution on the suit land. However, the court ruled in favour of the 2nd Defendant herein. The 1st Defendant appealed that decision, and this ELC constituted differently dismissed the said Appeal.
62. It is also not in doubt that the 1st Defendant filed another suit at the Chief Magistrates Court at Muranga, being Muranga MCLE No. E056 of 2021, wherein the 1st Defendant sought for removal of caution. The said matter was heard ex-parte and orders were granted.
63. However, the 2nd Defendant later filed an application for setting aside the said Judgement and striking out the suit. The said Application was allowed and the ex-parte judgement was set aside, and the Muranga MCLE E056 of 2021, was struck out. However, by then the suit land had already been sold to the Plaintiff herein, and a title deed in his name had been issued on 21st April 2022.
64. With the striking out of the suit, and reverting to the original status, the title deed that was issued in the name of Duncan Maina Kimari, the Plaintiff herein was cancelled, and the said title reverted to the name of the 1st Defendant herein. This cancellation is the one that led to filing of this suit.
65. Further, it is not in doubt that the 1st Defendant died during the pendency of this suit. Though no death certificate was produced in court, the Plaintiff and his witness, who is the wife to the deceased confirmed that Kahunga Gathii, the 1st Defendant died on 12th September 2023. The 2nd Defendant attached a Eulogy booklet to confirm that the 1st Defendant died on 12th September 2023, and was buried on 19th September 2023, in Nakuru County.
66. At the time of filing of this suit, the suit land was registered in the name of the 1st Defendant, who is now deceased, and who had confirmed through his Replying Affidavit that he had sold the suit land to the Plaintiff herein, and he was ready to compensate the 2nd Defendant for the remainder of the lease term. This position was also confirmed by PW2, the wife to the 1st Defendant, who is now deceased.
67. The above are the undisputed facts, and the court will now set out the issues for determination over the disputed facts, while considering all the circumstances herein.
68. The court has considered the available evidence, the rival written submissions, together with the cited authorities, and finds the issues for determination are; -
 - I. Whether the 1st Defendant herein Kahunga Gathii is deceased, and if so, what is the ramification?
 - II. Whether the 1st and 2nd Defendants had entered into a valid lease agreement?
 - III. Whether the Plaintiff is entitled to the orders sought in his plaint?
 - IV. Whether the 2nd Defendant is entitled to the Orders sought in her Counterclaim.
 - V. Who shall bear the costs of the suit and the Counterclaim?

i). Whether the 1st Defendant herein Kahunga Gathii is deceased and if so, what is the ramification?

69. From the disputed facts, this court noted, held and found that there is no doubt that the 1st Defendant Kahunga Gathii, died during the pendency of this suit. This position was alleged by the 2nd Defendant



- who produced a Eulogy booklet to confirm that indeed the 1st Defendant died on 12th September 2023, and was thereafter buried in Nakuru county.
70. This allegation was confirmed by PW2, who is Wife of the 1st Defendant (now deceased), who testified that her husband died in September 2023, due the stress brought about by this case, and was buried in their farm in Nakuru County. Though no death certificate was produced, there was enough oral evidence to confirm that indeed the 1st Defendant is now deceased, and he died during the pendency of this suit.
71. What is the ramification of the death of the 1st Defendant during the pendency of this suit? Order 24 Rule 1 of the Civil Procedure Rules provides that the death of the plaintiff or the defendant shall not cause the suit to abate if the cause of action survives or continues. Bearing this provision of law in mind, it means that even if the 1st Defendant is deceased, and the cause of survives him, then the suit herein has not abated, as it survives him, and continues.
72. Further, Order 24 Rule 2 of the Civil Procedure Rules provides;
- “ where there are more plaintiffs or defendants, and any one of them dies, and where the cause of action survives or continues surviving plaintiff or plaintiffs alone, or against the surviving Defendant or Defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving Plaintiff or plaintiffs, or against the surviving Defendant or Defendants”
73. Does this suit survives the 1st Defendant, so that the provisions of Order 24 rule 2, of CPR can kick in ? To answer this question, the court will consider the prayers sought in in the suit herein, and then determines whether they can be sustained against the surviving Defendants, after the demise of the 1st Defendant.
74. The Plaintiff is seeking inter alia a permanent injunction to restrain the Defendants from interfering with his quiet enjoyment of the suit property, Eviction of the Defendants, Further, in prayer No. 4, the Plaintiff is seeking the ownership over the suit property to revert to his name, and a declaration that the action of the 3rd Defendant to cancel his title was unconstitutional. A glimpse of the above prayers show that the Plaintiff can proceed with the prosecution of the suit in the absence of the 1st Defendant, and thus the suit survives as against the remaining Defendants.
75. During the trial, it emerged that that 1st Defendant who is the registered proprietor of the suit property died on 12th September 2023. PW2 testified that her husband died on the above stated date, which claim was confirmed by the 2nd Defendant who is a sister-in-law to the 1st Defendant. PW2 further testified that the 1st Defendant was not substituted in the suit following his demise. It is clear that the Plaintiff chose not substitute the 1st Defendant, but proceeded with his claim against the remaining Defendants, as the cause of action survived or continued.
76. When the 2nd Defendant brought to the attention of the court that the 1st Defendant was deceased, during the pendency of the suit, the court requested the Plaintiff to avail the death certificate to confirm that indeed the 1st Defendant was deceased, but he failed to do so. However, the 2nd Defendant attached a booklet which had the funeral program for the 1st Defendant. Pw2 too confirmed that the 1st Defendant who was her husband was deceased.
77. Though the court did not cause an entry to the effect that the 1st Defendant was deceased, it allowed the Plaintiff to proceed with his case as against the 2nd and 3rd Defendants as the suit survived and continued against them as provided by Order 24 rule 2 of the Civil Procedure Rules.



78. Therefore, even if the 1st Defendant is deceased, the cause of action survives or continues as against the surviving Defendants, and it was proper to proceed against the surviving Defendants, being the 2nd and 3rd Defendants herein, as the suit has not abated as submitted by the 2nd Defendant. It is very clear that the Plaintiff's main contention is the cancellation of the title deed over the suit property and the occupation of the said parcel of land by the 2nd Defendant.

ii) Whether the 1st and 2nd Defendants had entered into a valid lease agreement?

79. The 2nd Defendant in her defence averred that she had entered into a valid lease agreement with the 1st Defendant, which lease commenced in January 2019, and was to terminate in January 2025. The said lease contains terms and conditions. Among the conditions herein is that the lease amount was ksh 25,000/= per annum, and for the period of 6 years, the lessor was paid ksh 150,000/=.

80. In clause 9, it was specified what would happen in the event of breach, by any of the parties. Though the said lease agreement had not been registered, it is evident that it contained terms and conditions, and therefore the same was a valid lease agreement. See the case of Mega Garment Ltd vs Mistry Jadva Parbat & Co (EPZ),Ltd (2016) eklr, which looked at the issue of unregistered lease and quoted the case of Bachelor's Bakery Ltd vs Westlands Securities Ltd (1982) KLR 366, wherein the court held as follows;-

“first that a lease for immovable property for a term exceeding one year can only be made a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute does not require to be registered to be enforceable; that such an agreement is valid inter parties even in the absence of registration, but gives no protection against rights of third parties”

81. As observed above, the said valid lease between the 1st and 2nd Defendants contained a clause of what would happen in the event of breach of the terms of the said lease. However, the said lease did not forbid the registered owner from selling the suit land during the pendency of the lease.

82. It was alleged by PW2, and the 1st Defendant in his Replying Affidavit, that though he had entered into a lease agreement with the 2nd Defendant, he fell unwell and was in need of money, and consequently, he sold the suit land to the Plaintiff so that he could use the purchase price for his medical needs, and those of his son who had broken his spinal cord. Further, Pw2 testified that her husband had given the 2nd Defendant the first opportunity to purchase the suit property, but she failed to purchase the same due to lack of money.

83. Having considered the available evidence, this court finds and holds that the 1st and 2nd Defendants had entered into a valid lease, which provided the consequences of breach of the same, and which lease did not bar the registered owner from offering the suit land for sale, in the event there was need to dispose the same.

85. Therefore, if there was any breach of the lease agreement between the 1st and 2nd Defendants, then the 2nd Defendant should have enforced the terms of the said agreement against the 1st Defendant and/ or against his estate.

iii). Whether the Plaintiff is entitled to the orders sought in his plaint?

86. Before determining this issue, it is crucial to hold and find that there is no doubt that the 1st Defendant who was the registered owner of the suit land sold the suit land to the Plaintiff in March 2022, vide the Sale agreement dated 17th March 2022. The said property was sold for ksh 2.600,000/=, which the



Plaintiff has acknowledged to have paid in full, and which allegation was confirmed by Pw2, the wife to the vendor, and the 1st Defendant vide his Replying Affidavit dated 16TH May 2023.

87. Though the 2nd Defendant had averred and had claimed that the said purchase price was not paid in full as there was no evidence of such payment, this court finds and holds that the 2nd Defendant was not the owner of the suit land, and she could therefore not dispute payment of the purchase price, since the former registered owner and his wife acknowledged receipt of the full purchase price. 2nd Defendant had no mandate to dispute whether the full purchase price was paid or not, as she was not the registered, but a lease holder, who had no right over the purchase price.

88. From the available evidence, it is clear that after the purchase of the suit land, the Plaintiff was issued with a title deed in his name on 21st April 2022, and consequently, he became the absolute and indefeasible owner of the said parcel of land, as provided by section 24(a) of the [Land Registration Act](#), which states;

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;

3. However, the said title was later cancelled through a court order issued by the court in Murang'a MCELE NO E056 OF 2021. The bone of contention is that the 1st Defendant sold the suit land while there was an existing lease agreement between the 1st and 2nd Defendants. Further, that the 2nd Defendant had placed a caution on the suit land, and the same was removed without her knowledge, and therefore, it was her allegation that the Plaintiff is not an innocent purchaser for value, as he failed to carry out due diligence. That if the Plaintiff had carried the due diligence, he could have noted that the 2nd Defendant was in occupation and use of the suit land through the existing lease.

89. From the available evidence, it is evident that the 1st Defendant Kahunga Gathii, was the registered owner of the suit land prior to 2022. As the registered owner, he was deemed to hold the said land absolutely with all the privileges appurtenant thereto. See section 24 of the [Land Registration Act](#), as quoted above.

90. As the registered owner of the suit land, the 1st Defendant had the right to deal with it as he wished, and that is why he had leased it to the 2nd Defendant. See the case of Penmain Company Limited vs Likoni Community Development & 6 others [2021] eKLR where the court held;

“It will be seen from Section 26 above, that the certificate of title is to be taken as prima facie evidence that the person named therein is the proprietor of that land. Sections 24 and 25 above, in essence, do provide that it is the title holder who is entitled to the proprietary rights comprised in the subject land. The defendants have not come to court to contest the title of the plaintiff. It is therefore my finding that as against the defendants, the plaintiff is the absolute proprietor of the suit land.”

91. Further, section 25(1) of the said Act, provides that such right cannot be taken away, but can only be denied as provided by the Act. See section 25 of [Land Registration Act](#), which provides;

“25.



- (1) 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—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

92. Therefore, the 1st Defendant was the absolute and indefeasible owner of the suit land, and he had a superior right over the said parcel of land, as against the 2nd Defendant, who was a leaseholder. Though the 2nd Defendant was a leaseholder, this lease holding was an encumbrance on the land, but it was not an absolute right, as the 1st Defendant was the one with absolute holding. The leasehold by the 2nd Defendant could not be elevated to the same right as that of the 1st Defendant who had absolute right, safe for the said encumbrance of the lease, vide the lease agreement with the 2nd Defendant
93. Further, it is evident that the 1st Defendant breached the lease agreement, by selling the suit land to the Plaintiff. However, the lease agreement was very clear on what could happen in the event of breach by the Lessor. The 2nd Defendant had a leeway to claim against the 1st Defendant and/or his estate.
94. From the evidence and exhibits produced in court, it is not in doubt that the court in Kangema had declined to remove the caution placed on the suit land by the 2nd Defendant, and the Appeal against that decision was also dismissed.
95. However, mischievously, the 1st Defendant filed another suit in Murang'a Chief Magistrate court, and obtained orders for removal of the said caution over the suit property. The Plaintiff was not a party to the said suit, and he cannot be blamed for the actions of the 1st Defendant. The Plaintiff purchased the suit land, which had no caution or encumbrance, and therefore, he was an innocent purchaser for value without notice. See the case of *Katende vs Haridar & Company Limited* [2008] 2 E.A.173 as 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, where the former held:

“.....For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- (a) He holds a certificate of title;
- (b) He purchased the property in good faith;
- (c) He had no knowledge of the fraud;
- (d) He purchased for valuable consideration;
- (e) The vendors had apparent valid title;
- (f) He purchased without notice of any fraud;



(g) He was not party to any fraud.”

96. The Plaintiff herein having purchased the suit land, and having the title deed registered in his name, he became an absolute owner, and his title deed could only be cancelled as provided by section 26(1)(a)&(b) of the *Land Registration Act* which states;

“ 26.

(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.

97. The trial court ordered the title to revert to what it was before 1st March 2022, but it is clear that by then the suit land had changed hands, and the Plaintiff was not a party to the said suit, and thus he was condemned unheard. This was against the rule of natural justice. See the case of Sangram Singh vs Election Tribunal Kotch (AIR 1955 SC 664) where the court held;

“ there must be ever present to the mind; the fact that our laws of Procedure are guided on a principle of natural justice which require that men should not be condemned unheard, that decisions should not be reached behind their back, that the proceedings that affect their lives and property should not continue in their absence and that not precluded from participating on them”.

98. There are several decisions on when a title can be cancelled, and one of them is when the root of the title cannot be traced, or if the title was acquired through fraud of misrepresentation. The root of the Plaintiff's title could be traced, and this court holds that the Plaintiff did not participate in the court's proceedings that led to the removal of caution. There was no evidence of fraud on his part or misrepresentation, but there was evidence that he purchased the said land from the registered owner.

99. Therefore, the Plaintiff is entitled in the ownership of the said land, and also to enjoy quiet possession and occupation of the same. How does he enjoy quiet possession? By being given vacant possession by the 2nd Defendant.

100. How could the 2nd Defendant give vacant possession? The 2nd Defendant could give vacant possession to the Plaintiff by voluntarily vacating the suit land, and failure to do so, by being evicted by the Plaintiff, and eviction of the 2nd Defendant is one of the prayers sought herein by the Plaintiff.

101. Therefore, this court finds and holds that the Plaintiff is entitled to the orders sought of being given vacant possession of the suit land by the 2nd Defendant, and in default, eviction order to issue.



102. The Plaintiff has sought for an order of permanent injunction to restrain the Defendants and their agents from dealing with the suit land or interfering with the Plaintiff's ownership and peaceful occupation of the said land. When is permanent injunction issued? This injunction is issued after the hearing, and after the court has considered the evidence for and against the claim, it is also issued to protect the rights of the Plaintiff and prevent breach of an existing obligation. See the case of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR where the Court held inter alia as follows:

“...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

103. This court has heard the matter and has determined that the Plaintiff is an innocent purchaser for value, and is entitled to ownership of the suit land. The 2nd Defendant, who is a lease holder cannot be elevated to an absolute owner, safe to hold that her lease hold is an encumbrance to the land, which was binding against the 1st Defendant, who is now deceased.

104. A permanent injunction fully determines the rights of the parties before the court, and this court having found and held that the Plaintiff is bona fide purchaser for value and is entitled to ownership of the suit land, thus entitled to the orders of permanent injunction. See the case of Rono & 8 others v Kenya Forest Service & 4 others (Environment and Land Miscellaneous Application E102 of 2024) [2024] KEELC 5247 (KLR) where the court held that;

“It is apparent from the pleadings that the Respondent was seeking a permanent injunction against disconnection of his electricity by the Appellant. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

105. The Plaintiff also sought for orders against the Land Registrar, Murang'a to reinstate entries No. 6,7 and 8 of 21st April 2022, on the main title. The court has found and held that by the time the trial court issued an order that the titles should revert to what it was before 1st March 2022, the suit land was already in the name of the Plaintiff, and he was not given an opportunity to defend his title. This court too has not faulted his purchase of the suit land, and has held that he was an innocent purchaser for value without notice.

106. Having found that the Plaintiff was condemned unheard, and that he is entitled to ownership of the suit land, then this court further finds that he is also entitled to prayer No 4 of his claim.

107. On prayer No 5, this court takes cognizance of the fact that this suit is not an Appeal, and will not proceed to declare whether the action of the Land Registrar, Murang'a was unconstitutional or not.



Further, it is clear that the said Land Registrar, acted on a court order, and therefore, that action of complying with a court orders cannot be said to be unconstitutional.

108. On prayer No 6, this court cannot declare the decisions of the Magistrates' court issued on 12th September 2023, and 1st September 2022, in Muranga CMELC NO E056 OF 2023, unconstitutional, null and void, as this not an Appeal against the said decisions or a Constitution Petition, against those decisions, and therefore this court cannot allow the said prayer.
109. On the claim for General damages, it trite that general damages are awarded in respect of such damages as the law presumes to result from infringement of a legal right or duty. See the case of *Mwaka vs Karua & another* (Civil Case E261 of 2022) [2024] KEMC 29 (KLR) as quoted in the Court of Appeal decision in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177, where the court that;

“General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it.
110. The Plaintiff had alleged that his right to own and enjoy quiet possession of the suit land had been breached by the 2nd and 3rd Defendants, as the 2nd Defendant has denied his vacant possession of the suit land, and the 3rd Defendant cancelled his title deed, without according him an opportunity to defend the same. However, the Plaintiff did not advance any evidence to support this claim, and this remained a mere allegation or prayer, without any backing of evidence.
111. For a claim of General Damages to succeed, the said claim must be pleaded and evidence adduced to support and prove it. Though the Plaintiff prayed for General Damages, no evidence was adduced to support the said claim. See the case of *Pascal vs Ouko* (Civil Appeal E005 of 2022) {2023} KEHC 24463(KLR)(18TH October 2023) JDGT, where the court observed that in principles, whoever lays a claim, must prove , and the burden to prove is upon him/ her as provided by sections 107 & 108 of the [Evidence Act](#). This prove is by calling sufficient evidence to support such claim of General Damages.
112. Therefore, from the above analysis, this court finds that the Plaintiff is not entitled to the prayer of General Damages.
113. On the prayer of costs of the suit, the court finds that costs are awarded at the discretion of the court, but ordinarily, costs follow the event, and are awarded to the successful litigant. The Plaintiff has succeeded in a number of his prayers, and is thus awarded costs of the suit.

iv). Whether the 2nd Defendant is entitled to the Orders sought in her Counterclaim.

114. In her Counterclaim dated 16th October 2023, the 2nd Defendant sought two (2) reliefs from this Court against the Plaintiff as follows:
 - a. The Lease dated 26th November 2016 be extended for eight (8) months from January 2025 till September 2025.
 - b. Costs and interests.
115. The Court has perused the Lease Agreement dated 26th November 2016, on record, and notes that the said lease agreement is executed by the 1st Defendant as Lessor, and the 2nd Defendant as a Lessee. The witnesses to the said Agreement are John Kihara Thuo and Mary Wambui Kamau (PW2). Therefore, the Plaintiff herein was not a party to the said Lease Agreement, and the 2nd Defendant cannot seek to enforce the said lease agreement against the Plaintiff herein.



116. The question that this court should seek answers is whether the lease agreement that bound the 1st and 2nd Defendants, was enforceable to the Plaintiff, who was not a party to the said lease, and who purchased the suit land from then registered owner, and paid the full purchase price. Further, after the death of the 1st Defendant, was the lease obligations transferable to the Plaintiff or the estate of the deceased 1st Defendant?
117. The reason as to why the 2nd Defendant is seeking the reliefs set out in her Counter-claim as against the Plaintiff is premised on allegations that the Plaintiff entered unto the suit property in May 2022, and interfered with the harvesting of tea, coffee and avocado crops growing thereon for a period of eight (8) months until February 2023, which crops were planted by the 2nd Defendant pursuant to the terms of the Lease Agreement, between herself and the 1st Defendant (now deceased).
118. The 2nd Defendant testified that the suit land was leased to her by the 1st Defendant at the annual fee of Ksh.25,000/=, which figure was confirmed by the Plaintiff in his written submissions. The 2nd Defendant has not provided any evidence to demonstrate that the Plaintiff's allegedly interference with her occupation and cultivation of the suit property to entitles her to compensation equal to eight (8) months of her being on the suit property, and cultivating the same for profit.
119. It is trite that he who alleges must prove. See the provisions of Sections 107, 109 and 112 of the [Evidence Act](#). In the case of *CMC Aviation Ltd vs. Crusair Ltd (NO.1) (1987) KLR 103* the Court held as follows:
- “The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”
120. Therefore, this Court is unable to fathom how the 2nd Defendant settled on eight (8) months as constituting sufficient compensation from the Plaintiff's alleged interference with her utilization of the suit land, as opposed to any other duration of time. The 2nd Defendant needed to have drawn a nexus between the damage or loss suffered as a result of the Plaintiff's alleged interference with her utilization of the suit property and the period by which she sought to extend the governing lease agreement, which she has failed to do.
121. Accordingly, the Court dismisses the 2nd Defendant's Counter-claim dated 16th October 2023, entirely.

iv). Who shall bear the costs of the Counterclaim?

122. It is trite that pursuant to the provisions of Section 27 of the [Civil Procedure Act](#), costs follow the event, and are awarded to the successful party in a suit, except where there is existence of any exceptional factors. Bearing in mind that the Plaintiff did not respond to the Counter- claim, the court directs the parties to bear their own costs in respect of said Counterclaim.
123. In a nutshell, this court finds and holds that the Plaintiff has proved his case against the 2nd and 3rd Defendants on the required standard of balance of probabilities in respect of prayers No 1, 2, 3, 4 and 8 of the Amended Plaint dated 15th September 2023.
124. Consequently, this court enters judgement for the Plaintiff against the 2nd and 3rd Defendants jointly and severally in terms of prayers Nos, 1,2,3,4 and 8 of his amended claim above dated.
125. Further, the court dismisses the 2nd Defendant's counter- claim, as against the Plaintiff with an order that each party to bear its costs for the counter-claim.



126. On prayer No 8, of the Plaintiff's suit, he is entitled to costs and interest at the court's rate from the date of this Judgement until payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF DECEMBER 2024.

L. GACHERU

JUDGE

5/12/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Mr Owiti for the Plaintiff

N/A for the Defendant

L. GACHERU

JUDGE

