



Case Number:	Civil Suit 298 of 2003 & Civil Suit 394 OF 2004
Date Delivered:	09 Jul 2012
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Hannah Magondi Okwengu
Citation:	SAMMY MWANGANGI & 9 OTHERS V COMMISSIONER OF LANDS & 9 OTHERS[2012]eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA  
IN THE HIGH COURT  
AT NAIROBI  
MILIMANI LAW COURTS**

**Civil Suit 298 of 2003 & Civil Suit 394 OF 2004**

**SAMMY MWANGANGI .....1<sup>ST</sup> PLAINTIFF**

**MUSYOKA ILIMA .....2<sup>ND</sup> PLAINTIFF**

**NZULA MUEMA.....3<sup>RD</sup> PLAINTIFF**

**MULI MWANGO .....4<sup>TH</sup> PLAINTIFF**

**MATHEKA MALEI .....5<sup>TH</sup> PLAINTIFF**

**MAUNDU MUTHOKA .....6<sup>TH</sup> PLAINTIFF**

**MUTHUSI MUEMA.....7<sup>TH</sup> PLAINTIFF**

**KISILU MUNYWOKI.....8<sup>TH</sup> PLAINTIFF**

JANE MUIKIA .....9<sup>TH</sup> PLAINTIFF

NZULE MUSYOKA .....10<sup>TH</sup> PLAINTIFF

VERSUS

COMMISSIONER OF LANDS .....1<sup>ST</sup> DEFENDANT

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

THABITI FINANCE COMPANY LIMITED..... 3<sup>RD</sup>  
DEFENDANT

NATIONAL BANK OF KENYA LIMITED  
.....4<sup>TH</sup> DEFENDANT

JAMES GAMAU WAINAINA  
.....5<sup>TH</sup> DEFENDANT

LUCY NYAWIRA  
.....6<sup>TH</sup> DEFENDANT

SERA WANJIKU  
.....7<sup>TH</sup> DEFENDANT

**SIMON MUTURI WANGUO**

.....8<sup>TH</sup> DEFENDANT

**RAPHAEL MUIGAI MWANGI**

.....9<sup>TH</sup> DEFENDANT

**PAUL KIHUTI KONDIAH**.....10<sup>TH</sup>  
**DEFENDANT**

**CONSOLIDATED WITH**

**SAMMY MWANGANGI &** .....1<sup>ST</sup>  
**PLAINTIFF**

**MUSYOKA ILIMA**.....2<sup>ND</sup>  
**PLAINTIFF**

**JOSEPH KARANJA**.....3<sup>RD</sup>  
**PLAINTIFF**

**PAUL KIMENYE**.....4<sup>TH</sup>  
**PLAINITIFF**

**BEN  
MUNYWOKI**  
.....5<sup>TH</sup> PLAINTIFF

**JOSEPH MUTHIANI**.....6<sup>TH</sup>  
**PLAINTIF**

**KYULE**

**MWIMBI.....7<sup>TH</sup> PLAINTIFF**

**FRANCIS MUSAI.....8<sup>TH</sup>  
PLAINTIFF**

**MICHAEL NDAKA.....9<sup>TH</sup>  
PLAINTIFF**

**PHILIP MAINGI.....10<sup>TH</sup>  
PLAINTIFF**

**NZULA MUEMA.....11<sup>TH</sup>  
PLAINTIFF**

**VERSUS**

**COMMISSIONER OF LANDS.....1<sup>ST</sup>  
DEFENDANT**

**JAMES GAMAU WAINAINA.....2<sup>ND</sup>  
DEFENDANT**

**SIMON MUTURI WANGUO.....3<sup>RD</sup>  
DEFENDANT**

**RAPHAEL MUIGAI MWANGI.....4<sup>TH</sup>**  
**DEFENDANT**

**PAUL KAHUTI KONDIAH.....5<sup>TH</sup>**  
**DEFENDANT**

**JUDGMENT**

1. This is a judgment in regard to High Court Civil Case No. 298 of 2003 and High Court Civil Case No. 394 of 2004, which were consolidated for hearing and determination pursuant to an order made by Ransley, J. on the 18<sup>th</sup> July 2005. In the first suit, the plaintiffs were; Sammy Mwangangi, Musyoka Ilima, Nzula Muema, Joseph Karanja, Paul Kimenye, Ben Munywoki, Joseph Muthiani, Kyule Mwimbi, Francis Musai, Michael Ndaka and Philip Maingi; while in the second suit, the plaintiffs were; Sammy Mwangangi, Musyoka Ilima, Nzula Muema, Muli Mwango, Matheka Malei, Maundu Muthoka, Muthusi Muema, Kisilu Munywoki, Jane Muikia, and Nzula Musyoka. Therefore, three of the plaintiffs were common to both suits.

2. The defendants in Civil Case No. 298 of 2003 were the Commissioner of Lands, the Attorney General, Thabiti Finance Company Limited, National Bank of Kenya, James Gamau Wainaina, Lucy Nyawira, Sella Wanjiku, Simon Muturi Wanguo, Raphael Muigai Mwangi, Paul Kahuti Kondiah hereinafter referred to as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants respectively. In Civil Case No. 394 of 2004 the defendants were; Commissioner of Lands, James Gamau Wainaina, Simon Muturi Wanguo, Raphael Muigai Mwangi and Paul Kahuti Kondiah. All these defendants were also defendants in Civil Case No. 298 of 2003 and will therefore, for ease of reference be referred to as 1<sup>st</sup>, 5<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants respectively as already stated above.

3. The plaintiffs' claim which was identical in both suits was as follows: that the plaintiffs in the two suits are descendants of Malei Mwengenyne and Kyania Mwengenyne. They have been living on a piece of land in Embakasi since the year 1923 when the said Malei Mwengenyne and Kyania Mwengenyne settled on the land. The family has grown to about 1500 people. The plaintiffs believed that the land upon which they were settled belonged to them and their ancestors, until the year 1994, when they were informed by the Area Chief that the land was government land. The plaintiffs applied for allocation of the land through the 1<sup>st</sup> defendant who is the government officer responsible for allocation of government land.

4. The government through its agent, authorized the plaintiffs to survey, demarcate and settle on the land. This was done through the Area Chief and the District Officer. However, the 1<sup>st</sup> defendant fraudulently demarcated the land upon which the plaintiffs were settled, and subdivided the land into various land parcels which he allocated to the 3<sup>rd</sup> to 10<sup>th</sup> defendants and other persons. The plaintiffs contend that the 1<sup>st</sup> and 2<sup>nd</sup> defendants' actions were fraudulent as 1<sup>st</sup> and 2<sup>nd</sup> defendants were aware that the land upon which the plaintiffs were settled was not vacant or available for allotment. The plaintiffs maintain that they deserved to be allocated the land upon which they had settled, as they have lived on the land for a long time, and have no other place to call home.

5. In HCCC 394 of 2004, the plaintiffs further aver that the 1<sup>st</sup> defendant and the 5<sup>th</sup> defendant fraudulently forged a letter of allotment and certificate of lease for LR. No. 18278 which they purported to

allocate to Wanga Jua Kali Association, and conspired with the provincial administration to have the plaintiffs evicted from the land. The 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants are also alleged to have fraudulently conspired with the 1<sup>st</sup> defendant purporting to have acquired LR. No. 209/11543 and 209/11546 from Kimakwe Enterprises (also referred to as Kamakwe Enterprises), an institution which is not in existence. The 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants are also alleged to have fraudulently obtained a grant for LR. No. 209/11543 and 209/11546 by purporting that the land was meant for a welfare group known as Mwituiria Self Help Group, which was not registered. The plaintiffs maintain that land parcels Nos. LR. 209/11543, 11544, 11545, 11546, 18276 and 18270, are all part of the land upon which the plaintiffs have been living (hereinafter referred to as the suit land). The plaintiffs therefore sought judgment in HCCC No. 298 of 2004, as follows:

***(i) An order compelling the defendant to give priority to the plaintiffs and register the suit land in the plaintiffs' names.***

***(ii) An order restraining the defendants or their agents, servants, employees and or proxies from evicting, threatening to evict or in any way interfering with the plaintiffs' quiet possession of the suit land and a declaration that the suit land is the plaintiffs' ancestral land and hence belongs to them.***

***(iii) An order compelling the 1<sup>st</sup> defendant to cancel all the grants or any allocation in respect of the suit land and particularly LR. No. 209/11543, 11545, 11544, 11546, 18270, 18278.***

6. In HCCC No. 394 of 2004 the plaintiffs seek orders as follows:

***(i) an order restraining the defendants or their agents, servants, employees and or proxies from evicting, threatening to evict or in any way interfering with the plaintiffs quiet possession of the suit land and a declaration that the suit land is the plaintiffs' ancestral land and hence belongs to them, and an order compelling the 1<sup>st</sup> defendant to give priority to the plaintiffs and register the suit land in the plaintiffs' name.***

***(ii) An order compelling the defendant to cancel all the grants or any allocation in respect of the suit land and particularly L.R. Nos. 209/11543, 11545, 11544, 11546, 182 70 and 182 78 and any other order this Honourable Court may deem just to grant.***

***(iii) Cost of this suit.***

7. The suit against the 1<sup>st</sup> defendant in HCCC No. 394 of 2004 was discontinued as per orders made by Ransley, J. on 18<sup>th</sup> July 2005. No defence was however filed by the 1<sup>st</sup> defendant in HCCC No. 298 of 2003 nor was any defence filed by the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> or 7<sup>th</sup> defendants. In HCCC 298 of 2003, the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants filed a joint amended defence and counterclaim in response to the plaintiffs' claim. The plaintiffs' claim in HCCC No. 298 of 2003 was struck out by P. Kihara Kariuki, J. as against the 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants following an application made by the defendants that no cause of action was disclosed against them. However, the counterclaim filed by the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants is still pending for determination as the plaintiffs' claim filed in HCCC No. 394 of 2004. No defence appears to have been filed by the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants. Nonetheless, no evidence was adduced in support of the claim against them, and the plaintiffs appear to have abandoned the claim against them. The suit against the 8<sup>th</sup> defendant also abated because he is deceased and no substitution was made within the required time.

8. In the counterclaim, the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants maintain that they are the registered

proprietors of LR. Nos. 209/11543, and 209/11546; that they have an absolute and indefeasible title, having purchased the suit property on 18<sup>th</sup> September, 1997, from Kimakwe Enterprises who had been allotted the suit land. The 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants contended that in February, 2002 the plaintiffs together with their families, unlawfully entered into the suit land, and constructed temporary structures. The plaintiffs have also purported to sell the suit land to some unknown persons. The 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants therefore prayed for judgment in their counterclaim for orders against the plaintiffs as follows:

***(a) A perpetual injunction restraining the plaintiffs, their families, servants or agents and any other person or group of persons claiming under them from continuing in occupation of, trespassing or interfering with the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants' ownership of the parcel of land known as LR. No. 209/11543 and 209/11546.***

***(b) An order of eviction from the land, of the plaintiffs, their families, servants and/or agents and any other person or group of persons claiming under them from those parcels of land known as LR. No. 209/11543 and 209/11546.***

9. Four of the plaintiffs testified in proof of the plaintiffs case. These were; Musyoka Ilima (PW1), who claims to be the chairman of Mwengenyee, John Muthusi Muema (PW2), Joseph Karanja Kamunyu (PW3), and Sammy Kimwele Mwangangi (PW4). Briefly their evidence was that they have all been born on the suit land, the oldest among them being Musyoka Ilima who was born in 1936. Their descendant Mwengenyee was father to Musyoka Ilima. He was employed by a European farmer who used to own the suit land and who allowed Mwengenyee and his family to live on the suit land. The ownership of the land changed hands severally to other Europeans, but the families of Mwengenyee continued to live on the suit land. At some stage, the last European left leaving the plaintiffs and their families still living on the land. Musyoka Ilima and other senior members of the community approached the Chief and the District Officer of the area for allocation of the land, and they were referred to the Provincial Commissioner one Mr. Maina. Mr. Maina gave the plaintiffs the authority to survey the suit land and subdivide plots amongst themselves. The suit land was surveyed and the plaintiffs took possession of their respective plots and put up houses. However, the plaintiffs were not given any official documentation.

10. In the year 1990, some people invaded the suit land claiming ownership. They brought a surveyor and attempted to subdivide the suit land. The plaintiffs resisted and chased away the surveyor. The plaintiffs were then advised by the Area Chief that the land did not belong to them, as it had been allocated to other people. The plaintiffs who maintain that they had the right to the suit land wrote to the Minister for Lands & Settlement, requesting for the land to be formerly allocated to them. They also reported the matter to the area Member of Parliament, the District Officer and the District Criminal Investigation Officer (DCIO), Buruburu contending that they were being fraudulently deprived of the suit land.

11. The people who claimed ownership produced seven titles to the DCIO, claiming that the suit land had been subdivided, and allotted to them. Among the groups which claimed the suit land, were groups described as Ngumo's group, Wahome's group, Thuo's group and Mwituiria's group. Searches done at the Lands office were not helpful as some files could not be traced. The plaintiffs maintained that the titles produced to the DCIO were fake as the plaintiffs had the right to be given priority in the allotment of the suit land. Searches carried by the plaintiff at the Companies registry also revealed that the Mwituiria group was not registered, and that Kimakwe Enterprises was registered on 13<sup>th</sup> August, 1997, long after the land had allegedly been allocated to it in 1995.

12. During the hearing the plaintiffs explained that most of their original documents which they intended to use in evidence got lost as they moved up and down in government offices pursuing the



allocation of the suit land to them. They therefore prayed to be allowed to produce photocopies of the documents as the originals could not be traced. Although the defendants' counsel opposed the application contending that there was no basis for production of copies of the documents, I overruled the objection and allowed the plaintiffs to produce photocopies of documents listed on the plaintiffs' list of documents.

13. This was taking into account that the plaintiffs had originally been pursuing this matter without legal assistance. Their explanation that the documents got misplaced when they were moving up and down government offices is credible. The documents were also mainly letters written by the plaintiffs to the Ministry of Lands, minutes of meetings held between the plaintiffs and the DO Embakasi, and Member of Parliament for Embakasi, letters written by the plaintiffs to the Provincial Commissioner, letters from the Ministry of Lands, CID and copies of receipts from City Council, as well as ownership certificate issued by Mwengenyu Settlement Scheme. In my view, these documents were important to the plaintiffs' case and no prejudice is caused to the defendants by the admission of secondary evidence.

14. Only one witness testified on behalf of the defence. This was the 10<sup>th</sup> defendant, Paul Kihuti Kondiah (Kondiah). He testified that he is a member of Mwituiria Self Help group, a group which was registered under the Ministry of Culture & Social Services in 1993. The objective of the group is to provide shelter for its members. The group started with 10 members, but currently has about 200 members. In 1997 the group entered into an agreement with Kimakwe Enterprises to purchase Plot Nos. 11543 and 11546 at a consideration of Kshs. 4.2 million. The two plots had been allotted to Kimakwe Enterprises by the Commissioner of Lands. Kimakwe Enterprises transferred their interest to Mwituiria Self Help Group, and the two properties were registered in the names of the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants as trustees of Mwituiria Self Help Group. In the year 2000, members of Mwituiria Self Help group who had bought the land with the intention of subdividing it amongst themselves, had the land surveyed and obtained approval from the City Council for the subdivision.

15. Originally there were no people on the two properties. In the year 2001 the group went to the property and started constructing a road. It was then that some people from Siranga, a nearby village came, armed with bows and arrows, and threatened the person who was grading the road. The Chief advised the members of the group to stop constructing the road until the matter is sorted out. The defendants went to the area DO who tried unsuccessfully, to talk to the Mwengenyu people. The defendants were therefore advised to go to court. The plaintiffs however, filed their claim first.

16. Kondiah maintained that the titles issued to their group were properly issued by the Commissioner of Lands. He asserted that in the year 1997 when they bought the land from Kimakwe Enterprises, there was no one on the suit land. In the year 2002 members of Mwengenyu entered the two properties and uprooted the beacons which the group surveyor had put on the two properties. The defendants therefore filed a counterclaim for the plaintiffs to be evicted from the suit land. Kondiah produced the two titles for the suit land, the agreement signed between Kimakwe Enterprises and Mwituiria Self-help group, letters of allotment, notification of approval of development permission, etc.

17. Under cross-examination Kondiah denied being aware that Kimakwe Enterprises was registered after the allotment of the suit land to it by the Commissioner for Lands. He maintained that before the group bought the two properties, they confirmed from the Lands office that the two properties belonged to Kimakwe Enterprises. He explained that the plots were under industrial use but the group obtained a change of user to residential in the year 2000.

18. This court issued summons for the Chief Land Registrar to appear before this court to produce

documents in his record relating to the suit land, and throw light on the ownership of the suit property. In response to the summons, one Edwin Munoko Wafula (Wafula), a Land Registrar based in Nairobi Ardhi House, attended court and testified. Wafula explained that upon receiving the court summons, he had endeavoured to obtain records pertaining to the suit land, i.e. LR. 209/11543, 11544, 11546, LR. 18278 and LR. 18270. He succeeded in obtaining searches for all the properties except LR. 209/11543. The search in respect of LR. 209/11544 revealed that the registered proprietor of that property is Thabiti Finance Limited who holds a leasehold interest for a term of 99 years, with effect from 1<sup>st</sup> December, 1991. That property is also charged in favour of National Bank of Kenya Limited for a sum of Kshs. 15 million. As regards LR. 209/11546, the search revealed that the registered proprietor is Simon Muturi Wanguo, Raphael Muigai Mwangi and Paul Kihuti Kondiah as trustees of Mwituria Self Help Group. They hold a leasehold interest for 99 years from 1<sup>st</sup> April 1995. LR. No. 18278 is registered in the name of Hammer Heads Limited as leasehold proprietors for 99 years with effect from 1<sup>st</sup> April 1992, while LR. No. 18270 is registered in the name of Industrial Corroborative Limited who hold the leasehold interest for 99 years.

19. In regard to LR. 209/11543, Wafula traced a Deed of Indemnity filed in the central registry by Maina Makome, advocates on behalf of Simon Ruturi Manguo Raphael Muigai Mwangi and Paul Kihuti Kondiah indicating that the original title is lost. The witness produced copies of the documents in evidence. Under cross-examination, Wafula conceded that he was not conversant with the procedure for issuing titles, and that his evidence was confined to carrying out a search in regard to the titles relating to the suit land. Mr. Wafula also clarified that the titles he had relied on, in regard to LR. 18278 and LR.18270 appeared to have emanated from a subdivision but he was not able to trace the original mother title.

20. Both counsel for the plaintiffs and counsel for the 9<sup>th</sup> and 10<sup>th</sup> defendants filed written submissions. For the plaintiffs, it was submitted: that the plaintiffs were challenging the authenticity and manner in which the land they had lived in for a long time was demarcated and dished out to the 3<sup>rd</sup> to 10<sup>th</sup> defendants; that the 1<sup>st</sup> and 2<sup>nd</sup> defendants colluded with the other defendants to issue fake titles; that the suit land was occupied by more than 1,500 people by the time the defendants appeared on the scene.

21. It was argued, that the issue of granting leases and allotment of the suit land is a matter within the special knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, as they are the custodians of the records relating to the title to the suit land including receipts for payment, letters of allotment and documents relating to the grant; that under section 112 of the Evidence Act, the burden of proving that the titles were genuinely issued to the 3<sup>rd</sup> to 10<sup>th</sup> defendants was on the 1<sup>st</sup> and 2<sup>nd</sup> defendants who chose to remain silent on the issue; that the defendants having failed to produce these documents, the court should infer under section 172 of the Evidence Act, that the production of the documents would have been adverse to the defendants' case, and conclude that the titles which were relied upon by the defendants were not genuine, more so, since no evidence was produced to confirm that the 3<sup>rd</sup> to 10<sup>th</sup> defendants paid any money to the government in accordance with the terms of the grant.

22. Further, it was pointed out to the court that the alleged allotment of the suit land to Kimakwe Enterprises, having been done before any survey of the land, and before registration of Kimakwe Enterprises as a legal entity, the allotment was fraudulent and a nullity; that Mwituria Self Help Group on behalf of whom the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants purported to hold the land was also not registered, and the purported agreement entered into with Kimakwe Enterprises was nothing other than a fraudulent misrepresentation; that the backdating of the grants to the year 1995 was done fraudulently to defeat the plaintiffs' efforts to have the land allocated to them as promised. Therefore, it was clear that the titles were issued irregularly and unlawfully.

23. It was submitted that Mr. Wafula, the witness from the Lands office called by the Court was not useful to the defendants' case. Firstly because the witness was not familiar with the process of issuing titles; and secondly, the documents produced by Wafula were not certified by him and therefore he is not the one who physically conducted the search in respect of which he testified. The Court was urged to exercise powers under Section 64 of the Registration of Titles Act and order cancellation of the titles relating to the suit property. In support of these submissions, the case **of Malindi HCCC No. 30 of 2006 Prof. Samson Kagendo Ongeri vs. Greenbays Holdings and 2 Others**, was relied upon.

24. For the 9<sup>th</sup> and 10<sup>th</sup> defendants, it was submitted that the plaintiffs' claim against the 9<sup>th</sup> and 10<sup>th</sup> defendants having been struck out in HCCC No. 298 of 2003, the claim against the 9<sup>th</sup> and 10<sup>th</sup> defendants was only the one in regard to HCCC No. 394 of 2004; that the plaintiffs had not proved their case against the 9<sup>th</sup> and 10<sup>th</sup> defendants, as the plaintiffs' claim to the suit land was based on adverse possession hinged on the plaintiffs' allegation that they had lived on the suit land for a long time; that since the suit land was government land until it was allocated to Kimakwe Enterprises, under section 41 of the Limitations of Actions Act, the plaintiffs could not acquire the land by adverse possession, as prescriptive rights cannot be acquired over government land; that the plaintiffs had not called any evidence to confirm the allegation that the suit land was previously owned privately.

25. It was pointed out that assuming that the plaintiffs' claim for adverse possession was proper, the claim could not be entertained through the procedure used by the plaintiffs, as a claim for adverse possession has to be brought by way of originating summons; that the plaintiffs had neither proved their claim that they were authorized by the government to occupy the land nor established that the land was surveyed; that the plaintiffs had demonstrated that they were squatters seeking to be allowed to reside on government land; that since the plaintiffs were the ones claiming that the land was fraudulently demarcated and allocated, under Sections 107 and 109 of the Evidence Act, the burden was on the plaintiffs to prove the allegations yet the plaintiffs did not call any evidence to support the allegations.

26. It was further submitted that the 10<sup>th</sup> defendants' evidence regarding how the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants acquired the suit land, was not rebutted nor were the titles held by the defendants proved to be a fraud. To the contrary, the evidence established that the suit land was un-alienated government land, governed by the provisions of the Government Lands Act, Cap 280; that the witness from Lands office had confirmed that the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants were the registered proprietors, in regard to LR. 209/11543 and 11546; that section 23(1) of the Registration of Titles Act gives an indefeasible title to the registered owner of the property; that the title of such owner can only be challenged on grounds of fraud or misrepresentation of which the holder of the title is proved to be party to; that if Kimakwe Enterprises was not registered when the allotment letters were issued to them, the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants were not party to such action; that the plaintiffs have unlawfully occupied the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants land and therefore the defendants' counterclaim should be allowed and orders of eviction issued against the plaintiffs, their families, servants, agents or any persons claiming under them; and that an order of perpetual injunction should issue against the plaintiffs to restrain them from continuing in occupation, trespassing or interfering with the 9<sup>th</sup> and 10<sup>th</sup> defendants' ownership of the suit land.

27. The issues for determination were agreed upon between the identified as follows:

- (i) Whether the plaintiffs have complied with section 13A of the Government Proceedings Act.
- (ii) Whether the plaintiff has capacity to institute the suit on behalf of the alleged 300 persons in the list attached to the plaint.
- (iii) Whether the two parcels of land were vacant at the time of the alleged purchase and transfer to

the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants.

(iv) Whether the 9<sup>th</sup> and 10<sup>th</sup> defendants have the locus standi to bring the counterclaim.

(v) Whether the plaintiffs or their forefathers lived in the suit land prior to the purchase of the property by the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants.

(vi) Whether the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants (4<sup>th</sup> and 5<sup>th</sup> defendants in HCCC No. 394 of 2004) obtained the title documents in respect of LR. No. 209/11543 and LR. No. 209/11546 by fraud.

(vii) Whether the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants are Trustees of Mwituiria Self Help Group.

(viii) Who between the plaintiffs and the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants is entitled to ownership of those parcels of land known as LR. No. 209/11543 and LR. No. 209/11546.

(ix) Whether Kimakwe Enterprises could legitimately sell the suit properties to the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants.

(x) Whether the plaintiffs are entitled to the orders sought in the plaint.

(xi) Whether the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants are entitled to the orders sought in the counterclaim.

(xii) Whether the entry of the plaintiffs in the suit land, if any, was lawful.

(xiii) Whether there was any allocation of the suit land by the 1<sup>st</sup> defendant to the plaintiffs.

28 On the first issue as to whether the plaintiffs complied with Section 13A of the Government Proceedings Act before filing suit, a notice to the Attorney General dated 28<sup>th</sup> February, 2003 under Section 13A of the Government Proceedings Act, was exhibited by the plaintiffs. On the face of the notice there is a "received stamp" showing that the notice was received by the Attorney General on 3<sup>rd</sup> March, 2003. The plaintiffs' original claim, i.e. Civil Suit No. 298 of 2003 having been filed on 31<sup>st</sup> March, 2003, the claim was filed before the plaintiffs' suit in HCCC No. 298 of 2003 expiry of the notice period and 298 of 2003 is to that extent defective. In regard to HCCC No. 394 of 2004, the suit was filed on 21<sup>st</sup> April 2004. No notice other than the one dated 28<sup>th</sup> February, 2003 was produced. However, since the circumstances upon which HCCC No. 394 of 2004 is based, are the same circumstances set out in the notice, the plaintiffs must be taken to have complied with Section 13A of the Government Proceedings Act, with regard to that suit.

29 The plaintiffs brought their suit on their own behalf and on behalf of 300 others. Order 1 Rule 8 of the former Civil Procedure Rules states as follows:

**"8.(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested.**

**(2) The court shall in such case direct the plaintiff to give notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause service is not reasonably practicable, by public advertisement, as the court in each case may direct.**

**(3) Any person on whose behalf or for whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit."**

There have been conflicting interpretations of this provision, one interpretation being that leave of the court is not necessary be representative suit although it is necessary to obtain directions, while the other interpretation being that both leave of the court and directions is mandatory. In this case, the plaintiffs did not seek leave of the court to bring a representative suit, or to sue the defendants in a representative capacity, nor did they seek directions of the Court under Order 1 Rule 8(2) with regard to notice.

30. Order 1 Rule 8(1) of the Civil Procedure Rules, 2010 now states as follows:

**"Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the court otherwise orders, continued, by or against anyone or more of them as representing all or as representing all except one or more of them."**

Thus, any ambiguity that there may have been regarding the necessity for leave of the Court, has been removed as it is evident from the above provision that the authority or leave of the court before such a representative suit can be filed, is clearly not necessary. This is consistent with the spirit of the Constitution of Kenya which provides right of access to justice for all. However, Order 1 Rule 8(2) of the Civil Procedure Rules, 2010 still requires that notice of the suit must be given to all persons represented and the Court may give directions in that regard. Although the plaintiffs' suit was filed long before Order 1 Rule 8(1) of the Civil Procedure Rules, 2010 came into effect, and ought therefore to have obtained leave from the court before filing suit, that omission is a simple procedural to which has not occasioned any injustice. Moreover, a schedule bearing the names and signatures of the persons on behalf of whom annexed to the plaint in HCCC No. 394 of 2004, such that it is clear on whose behalf the suit has been brought.

31. One of the agreed issues was whether the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants are trustees of Mwituiria Self Help Group. In paragraph 4 of the Plaint in HCCC 394 of 2004, it is pleaded that the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants are being sued as the trustees of Mwituiria Self Help Group. This fact has been admitted by the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants in their Therefore, there is really no dispute regarding that fact. A certificate was produced confirming the registration of Mwituiria Self Help Group under the Ministry of Culture & Social Services, and therefore the existence of the group has been established. The Plaintiffs did not obtain leave of the court to bring a representative suit or seek directions regarding notice to the group members. The plaintiffs cannot now turn round and claim that the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants have no capacity to lodge a counterclaim to the plaintiffs' suit on behalf of Mwituiria Self Help Group. For if the defendants have the capacity to pursue a claim on behalf of the self-help group. Otherwise, both the plaintiffs' claim against the defendants and the defendants' counterclaim ought to have been dismissed for having been brought without leave. In the spirit of Article 159(2) (d) of the Constitution of Kenya, that technicality must be overlooked, and the objection with regard to the *locus standi* of the defendants must also fail.

32. It is not disputed that the plaintiffs have no title to the suit land. Although the plaintiffs claim that the suit land originally belonged to some Europeans who allowed the plaintiffs' ancestors to live on the land, the plaintiffs have not been able to produce any evidence to confirm the alleged ownership by the Europeans, or identify the nature of the Europeans interest in the suit land. Nor have the plaintiffs been able to identify the suit land without reference to the titles held by the defendants. The plaintiffs' claim to the suit land as their ancestral land is contradicted by the admission that their ancestors and their descendants have been living on the land pursuant to authority or permission from the Europeans who owned the land. There is no evidence that the land was at any time owned by the plaintiffs' ancestors,

clan or community. Indeed, the plaintiffs appear to have recognized that the land belonged to the government hence their request through the District Officer and Provincial Commissioner to be allowed to occupy and subdivide the land, after the Europeans left.

33. Under the Government Lands Act, Cap 280, un-alienated government land means '*government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment*'. What has come out is that the suit land was government land which was previously un-alienated, and which the plaintiffs sought to have alienated to them on the basis that they have been in occupation of the suit land. Unlike the position in the case of **Prof. Samson Kagendo Ongeru vs. Greenbays Holdings & 2 Others, Malindi Civil Case No. 30 of 2006**, which was relied upon by the plaintiffs, there is no evidence that the suit land is public land, nor are the plaintiffs claiming the land as such. To the contrary, the plaintiffs are seeking an order to compel the 1<sup>st</sup> defendant to give them priority and have the land allocated to the plaintiffs and the other persons on behalf of whom the plaintiffs have sued. They are seeking allocation of the land to them as individuals. The procedure for allocating government land is provided under Section 3 of the Government Lands Act, pursuant to which the President has been given special powers to make grants or disposition of any estate or interest or rights over un-alienated government land. The power of the President has been delegated to the Commissioner for Lands. In this case, evidence has been adduced with regard to LR. Nos. 209/11543 and 209/11546, to the effect that the two properties were allotted by the Commissioner for Lands to Kimakwe Enterprises who transferred their interest to Mwituiria Self Help Group, to whom titles have been issued. The plaintiffs maintained that the allocation of the suit land was fraudulent and intended to defeat their interest. The plaintiffs have not however produced any authority or allotment in their favour from the Commissioner of Lands in regard to these properties. Nor have they demonstrated that they have any interest in law in the suit land.

34. The plaintiffs have not established any directive from the government that the land should be allocated to them; nor have they adduced any evidence regarding the demarcation of the suit land; or proved their allegation that the 1<sup>st</sup> defendant fraudulently demarcated the suit land into various parcels, and allocated the same to the 3<sup>rd</sup>, 5<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants. Indeed the suit against the 1<sup>st</sup> defendant in HCCC 394 of 2004 where this allegation was made, was struck out and the claim against the 3<sup>rd</sup> and 5<sup>th</sup> defendant was not pursued, while the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants have adduced evidence confirming that they acquired the two properties pursuant to an agreement entered into with Kimakwe Enterprises.

35. Moreover, the plaintiffs pleaded that 1<sup>st</sup> and 2<sup>nd</sup> defendants fraudulently allocated the properties to Kimakwe Enterprises, and 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants. That was an averment of fact made by the plaintiffs upon which the plaintiffs' suit was anchored. The burden to prove this fact lay squarely on the plaintiffs who were asserting that fact. The plaintiffs cannot turn round and contend that the matters are within the special knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The issue of the allocation may be within the special knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, but the fraudulent allocation is an allegation of fact which must be proved by the person asserting that fact. The plaintiffs' allegation of fraud rests on the fact that the alleged properties were apparently allocated to Kimakwe Enterprises in 1995, while the record from the Registrar of Companies indicates that Kimakwe Enterprises was registered as a business name on 13<sup>th</sup> August, 1997. The 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants have denied any knowledge of this fact. Moreover, in the absence of any other evidence, and Kimakwe Enterprises not being a party to this suit, the legal status of Kimakwe Enterprises before 1995 has not been established, and the Court cannot assume that it was not in existence in some other form prior to that date.

36. Further, Section 2 of the Registration of Titles Act states that:

***"fraud" shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration."***

The plaintiffs have not adduced any evidence to show that they have any unregistered interest in the suit land recognized in law. Nor have they shown that the defendants were aware of any such interest. Further, no evidence was adduced which implicated the defendants in the alleged irregular allocation to Kimakwe Enterprises. To the contrary, the 9<sup>th</sup> and 10<sup>th</sup> defendants have demonstrated that they acquired the interest in the suit land from Kimakwe Enterprises for valuable consideration, on the strength of an allotment letter issued by the Commissioner for Lands to Kimakwe Enterprises. It is evident that the agreement between Kimakwe Enterprises and the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants was signed on the 18<sup>th</sup> September, 1997. According to the letter dated 22<sup>nd</sup> July, 2009 from the Registrar of Companies, Kimakwe Enterprises was in existence as at that date. Kimakwe Enterprises had therefore the legal capacity to enter into the agreement. Further, the titles to the two properties were actually issued to the defendants and not Kimakwe Enterprises. Thus, the plaintiffs have failed to prove that the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants were involved in any fraud relating to the suit land, such as would justify the cancellation of the titles issued to the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants.

37. With regard to LR. No. 209/11544, LR. 18278 and LR. 18270, the plaintiffs did not adduce any evidence regarding the ownership of these properties. The only evidence before this Court was that of Wafula who testified that the records in the Lands office confirmed that the properties were owned by Thabiti Finance Co. Limited (3<sup>rd</sup> defendant), Hummer Heads Limited and Industrial Corroborative Limited respectively. It is noteworthy that the suit against Thabiti Finance Co. Limited was not pursued, whilst Hummer Heads Limited and Industrial Corroborative Limited were not made party to this suit. Thus, their titles cannot be impeached on grounds of fraud. I find that the plaintiffs have not been able to establish any rights over the suit land, such as to entitle them to the orders they seek in HCCC No. 394 of 2004 as against 9<sup>th</sup> and 10<sup>th</sup> defendants.

38. As regards the counterclaim by the 9<sup>th</sup> and 10<sup>th</sup> defendants in HCCC No. 298 of 2003, it is submitted by the plaintiffs that they are in occupation of LR. 209/11543 and LR. 209/11546, which is being claimed by the 9<sup>th</sup> and 10<sup>th</sup> defendants. The 9<sup>th</sup> and 10<sup>th</sup> defendants have proved that they have titles to the two properties. The plaintiffs having failed to establish that the two titles were fraudulently obtained, or that the plaintiffs have any registered or unregistered interest in the two properties, their continued occupation of the properties amounts to trespass and is detrimental to the interest of the 9<sup>th</sup> and 10<sup>th</sup> defendants. In the circumstances, it is only fair and just that the orders sought by the 9<sup>th</sup> and 10<sup>th</sup> defendants for an injunction restraining the plaintiffs, their families, servants or agents from continuing in occupation of the two properties, and an order of eviction) be granted.

39. In summary, the outcome of the above suits is as follows:

(i) Plaintiffs' suit in HCCC No. 394 of 2004 as against 1<sup>st</sup> defendant was discontinued (as per orders of Ransley, J. made on 18<sup>th</sup> July, 2005).

(ii) The plaintiffs' suit in HCCC No. 394 of 2004 as against 8<sup>th</sup> defendant has abated, whilst suit against 5<sup>th</sup> defendant was abandoned.

(iii) The plaintiffs' suit in HCCC No. 394 of 2004 as against 9<sup>th</sup> and 10<sup>th</sup> defendants is hereby dismissed.

(iv) The plaintiffs' suit in HCCC No. 298 of 2003 as against the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants marked

as abandoned, while the suit against the 8<sup>th</sup> defendant marked as abated.

(v) The plaintiffs' suit in HCCC No. 298 of 2003 as against the 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants was struck out (as per order made by Kihara Kariuki, J.).

(vi) The plaintiffs' suit as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants in HCCC No. 298 of 2003 is hereby dismissed.

(vii) Judgment is hereby given in favour of the 9<sup>th</sup> and 10<sup>th</sup> defendants as against the plaintiffs, in regard to the counterclaim in HCCC No. 298 of 2003, and orders are hereby issued as prayed in the counterclaim.

(viii) In view of the circumstances of the plaintiffs, I do not find it appropriate to award any costs. Each party shall therefore bear their own costs in both suits and the counterclaim.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>th</sup> DAY OF JULY 2012.**

**H.M OKWENGU**

**JUDGE**

***In the Presence of:***

.....*Counsel for the Plaintiffs*

.....*Counsel for the Defendants*

.....*Attorney General*

.....*Court Clerk*



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