



Gichatha v Kamau (Suing as the Legal Representative of the Estate of William Kamau Gichatha) & another (Environment & Land Case 445 of 2006) [2023] KEELC 20522 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20522 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 445 OF 2006
LN MBUGUA, J
OCTOBER 5, 2023**

BETWEEN

HANNAH NJERI GICHATHA PLAINTIFF

AND

JAMES GICHATHA MAINA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DAVID MAINA GICHATHA) 1ST DEFENDANT

NELSON MUTURI KAMAU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WILLIAM KAMAU GICHATHA) 2ND DEFENDANT

JUDGMENT

The Pleadings

1. At the heart of the dispute is land parcel No. Loc 15/ Gathukiini/528 situated in Gaturi location of Murang'a district which is registered in the name of the plaintiff. The plaintiff claims that the defendants are trespassers on the said land, while the defendants claim that this is their ancestral land.
2. Vide a plaint dated 3.02.2006, the plaintiff prays for judgement against the defendants in the following terms.
 - i. An injunction against the defendants by themselves or any of their servants or agents or howsoever restraining them from trespassing onto, working on, constructing on, or continuing to construct on land parcel number Loc. 15/Gathukuini/528, pending the hearing and determination of this suit.
 - ii. A mandatory interlocutory injunction against the defendants by themselves or through their servants or agents or howsoever requiring both or each of the defendants to demolish the



structures they have erected on land parcel number Loc. 15/Gathukiini/528, pending the hearing and determination of this suit.

- iii. General damages for trespass.
 - iv. Such other or further relief the court may grant.
3. The defendants filed a statement of defense and counter claim dated 3.11.2006 claiming that the plaintiff had acquired the suit land through fraud by forging the signature of their father, one Gichatha Githindi. In their Counterclaim, the defendants pray for judgement in their favor in the following terms.
- i. The Plaintiff's suit against the Defendants be dismissed with costs;
 - ii. An Order that the Plaintiff's title to the suit premises be cancelled and the register be rectified accordingly;
 - iii. A declaration that the Plaintiff holds the suit premises being Title No. Loc.15/Githukiini/528 in trust for herself and the Defendants in common in equal shares and that the Defendants names be entered in the register accordingly;
 - iv. A declaration that the Defendants have acquired by adverse possession absolute title to the suit premises being Title Number Loc.15/Githukiini/528 by adverse possession;
 - v. An Order that the Defendants be registered as the absolute owners in common in equal shares of the suit premises being Title Number Loc.15/Gathukiini/528 under the provisions of Section 38 of The *Limitation of Actions Act* in place of the Plaintiff;
 - vi. An Order that the Plaintiff and/or failing thereof the Deputy Registrar of this Honourable Court do execute a valid transfer and other documents relative thereto so as to bestow title of the suit premises being Title Number Loc.15/Gathukiini/528 to the Defendants freed from all encumbrances;
 - vii. Costs of this suit and counterclaim and interest thereon.

The Evidence

4. The case of the plaintiff was advanced by two witnesses, herself Hannah Njeri Gichatha testifying as PW1 and her daughter Wambura as PW2. PW1 adopted her witness statement dated 13.02.2020 as her evidence. She also produced the documents in her 2 lists dated 13.02.2020 and 3.03.2020 as her exhibits. She avers that she is the wife of Gichatha Githindi who is now deceased, and that the defendants are the sons of the deceased by his first wife Waithera. That the children of Waithera are the two defendants as well as Eunice Wairimu Mwangi and Geoffrey Macharia Gichatha. Her own children are Nancy Wairimu, Nellius Wanjiku, John Kamau, Joyce Wambura, Joseph Kamori and Patrick Macharia (Deceased).
5. She stated that the suit land was registered into her name on 23.10.1990 long before the death of her husband.
6. She contends that her husband had several properties in various places. That before 1990, the husband called his children and herself and pointed out how his properties were to be shared between the family members. To this end parcel 528 (the suit land) was allocated to her. Parcel Loc 15/Gathukiini/1735 was given to William Kamau Gichatha (1st defendant), while another parcel of 2 acres in the same area was given to David Maina Gichatha (the 2nd defendant). That Geoffrey Macharia Gichatha (DW1) was



given 2 acres of land at Karirwara, John Kamau Gichatha was given 2 acres at Gachima, Joseph Kamori Gichatha was given 1.5 acres at Mugeka while Joyce Wambura Gichatha was given a plot at Pumwani in Nairobi. Further that the deceased bought houses for 1st defendant at Buruburu phase 1 and for 2nd defendant at Umoja estate in addition to the properties he gave them in Murang'a.

7. PW1 also avers that her son Patrick Gichatha died and was buried on the suit land and he left behind a wife and two children who stay with the plaintiff.
8. She further avers that some time in year 2004, the defendants trespassed on the suit land and commenced construction of houses prompting the plaintiff to file this suit.
9. In cross examination, PW1 stated that the mother of the defendants had died and she therefore raised them as her own children on the suit land. She avers that the suit land is hers because she was given the same by her husband. That the defendants used to stay on the suit land before the death of their father but each had been told to go to their respective parcels of land.
10. She contends that she got married to the father of the defendants when he left the detention and she never found the first wife there. That is also the time when adjudication of the land was done. She also says that the wives of the defendants also used to stay on the suit land.
11. She avers that no succession cause was filed in respect of her husband's estate and reiterated that all the children were given their own land.
12. PW2, Joyce Wambura Gichatha a daughter of the plaintiff, adopted her witness statement dated 13.02.2020 as her evidence, and the same mirrors her mother's statement.
13. In her oral evidence, PW2 stated that her mother was registered as the owner of the suit land on 23.10.1990 and a caution was placed on the said land by the 1st defendant on 5.11.2002. She avers that she is not claiming any share of the suit land as the said land belongs to her mother and the family of her late brother known as Patrick Gichatha, adding that the said land measures 4 acres. She contends that none of her father's children were omitted when the family land was shared out, whereby each child was given 2 acres of land except Joseph Kamori Gichatha who was allocated 1.5 acres but he is not claiming anything on the suit land.
14. On cross examination PW2 stated that the suit land belongs to her mother and her deceased brother Patrick. However, Patrick is not registered on that land as he had not attained the age of 18 years when PW2's father was sharing out his properties in the 1990s. She avers that during demarcation period, the suit land was registered in the name of her father.
15. PW2 contends that she was given the property at Pumwani by her father in 1998 and she got a title, her mother got title to the suit land, and the other children also got titles to their respective parcels of land. She avers that her father, her grandmother Wairimu Githindi as well as her brother Patrick were interred on the suit property. However, David Maina, the 2nd defendant was buried on his own land, while the 1st defendant William Kamau was cremated.
16. PW2 stated that the construction of houses by the defendants started in year 2006 and not year 2003 or 2004. That before the aforementioned construction, the defendants did not have their homes on the suit property.
17. The defense case was advanced by 3 witnesses namely a brother of the two deceased defendants and the respective sons of the said defendants. Geoffery Macharia Gichatha testified as DW1, and he adopted his witness statement dated 6.12.2022 as his evidence. He identified himself as the last born son of the late Gichatha Githindi and the late Waithira Githindi. He was born in 1953.



18. DW1 claims that his father married the plaintiff in 1958 after the father was released from detention. That the process of demarcation commenced in 1963 and that is when his father acquired the suit property. That in 1974 his father built a stone house on the suit property where his step mother (the plaintiff) resided thereon with her children.
19. DW1 avers that in 1983 his father called a family meeting and indicated that the suit land being ancestral land was to be divided into 2 portions for each of the 2 houses.
20. That in 1987, DW1 was gifted land by his father at a place called Karirwara where he proceeded to set up his own home. However, his 2 brothers continued staying on the ancestral land which is the suit land.
21. That in year 2006, him and his siblings learnt that his 2 brothers (defendants) were being accused of trespassing on the suit land by the plaintiff. They did a search and established that the land had secretly been transferred to the plaintiff. He contends that at no time were they ever informed that the said land had been gifted to their step mother. That is why DW1 is urging this court to cancel the title which was irregularly and possibly illegally transferred to their stepmother.
22. In cross examination, DW1 stated that he used to have his house on the suit property, but the same was demolished as it was not being used. He contends that the land which he was given by his father measures 2 acres, while the suit land measures 4 acres. He confirmed that his brother David Maina, the 2nd defendant was buried on the land he was given by their father and the same measures 2 acres. He doesn't know that his other brother known as William Kamau, the 1st defendant had also been given two acres of land. However, he is aware that his two step brothers namely John Kamau and Joseph Kamore reside on their respective parcels of land given to them by their father away from the suit property.
23. He further stated that he had a step brother called Patrick who died and was buried on the suit land and he left behind a wife and two children who stay on the suit land. Dw1 doesn't know if Patrick had been given land elsewhere by his father. He also does not know if his step mother was given land elsewhere.
24. Dw1 contends that it is not right for the plaintiff to get the suit land because, his father had two houses, so the suit land belongs to the two houses, and that this was an issue which was resolved by the clan.
25. Dw1 stated that he was aware that the suit land was registered in the name of the plaintiff in 1990, and that his father died 12 years later on 10.9.2002. Thus the suit land was in their step mother's name by the time of their father's death. He added that he did not avail any evidence of fraud in the registration of the suit property in the name of the plaintiff because he was not involved in the transaction.
26. In re-examination, DW1 stated that during demarcation of land, the suit property was 2 acres, so it was consolidated with 2 more acres, and that is when their father built the semi permanent house where all the children and his step mother occupied. He avers that his mother died in 1955. He added that he stayed on the suit land from year 1964 upto 1987, when he moved unto the land he was given by his father. He reiterated that his two defendant brothers and their wives used to stay on the suit land.
27. DW2 is one James Gichatha Maina son of David Maina Gichaga, the 2nd defendant who died in November 2020. He adopted his witness statement dated 6.12.2022 as his evidence. He identifies the suit land as their ancestral land where he was born. He is now 47 years old. He contends that his grandfather who died in year 2002, his great grandmother as well as his step uncle Peter Gichatha Macharia were all buried on the land. He avers that in year 2006 he was shocked to learn that his step grandmother was evicting his father and his uncle from their ancestral land.



28. In cross examination, DW2 reiterated that he is a son of the deceased 2nd defendant. He admitted that his grandfather gave his sons various parcels of land but not on the suit land. Thus, his own father was given land elsewhere and that is where his father was buried. He avers that no child of the plaintiff is claiming the suit land. He identifies the other sons of the plaintiff apart from Patrick as John Kamau and Joseph Kamori, and that they have 3 sisters namely, Wambui, Wanjiku and Wambura. He contends that the plaintiff is entitled to the suit land to the tune of 2 acres.
29. DW2 avers that he is claiming the suit land by way of adverse possession against the plaintiff.
30. In re-examination, DW2 stated that the suit land was ancestral and was divided into two parts. That for the members of the 1st house, that is where they built their permanent houses, but the plaintiff now wants to evict them. He confirmed that his father, the 2nd defendant was buried on a property given to him by his Grand father.
31. DW3 is one Nelson Muturi Kamau who adopted his witness statement dated 6.12.2022 as his evidence. He is the legal representative of his late father who is the 1st defendant who died on 1.11.2021. His evidence is more or less similar to that of DW2.
32. In cross examination DW3 stated that he is the 3rd born child of the late William Kamau and the late Jane Njoki Kamau. He is aged 39 years having been born in 1983. He contends that his father was not buried on the suit land due to a court order from a Murang'a court.

Submissions

33. The submissions of the plaintiff are dated 26.6.2023, where it is argued that the claim of adverse possession has not been proved because in the caution lodged by the 1st defendant on 5.11.2002, he had described his interests in the suit property as a licensee. On the claim of fraud, it is argued that the same is a tort which is statute barred.
34. It was submitted that although the defendants were raised on the suit land, the same was the matrimonial home of Gichatha Githindi and the plaintiff, since the mother of the defendants had died long before the matrimonial home was built up. That the defendants were given land elsewhere but in year 2005 long after the death of their father, the defendants came back to the suit land and started construction of houses.
35. Finally, it was submitted that the case of *Isaack M'Inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR cited by the defendants is not applicable since the defendants had been given land by their father elsewhere.
36. The submissions of the defendants are dated 22.06.2023. They frame the following issues for determination. Whether the plaintiff is the absolute owner of the property, whether the prayers in the counter claim are merited, whether the statements of the deceased defendants should be allowed, and finally which party should bear cost of the suit.
37. It was submitted that the plaintiff has failed to demonstrate that she is the registered proprietor of the suit property as she did not exhibit a title to that effect. Further that even if the plaintiff was so registered, the root of her title is under challenge and the same ought to be impeached on the ground of fraud, misrepresentation, illegality or that the same was acquired unprocedurally or through a corrupt scheme. To this end reference was made to the case of *WW v Severin Kinyanjui Njoroge & another* [2021] eKLR and *Munyu Maina v Hiram Gathiba Maina* (2013) EKL.R.



38. On adverse possession, it was submitted that the family of the defendants had been in physical and continuous occupation of the suit property which was not interrupted and was only challenged in year 2006 when this suit was filed. Thus, the defendants have met the criteria centered on the Latin phrase *Nec Vi, Nec Clam, Nec precario*.
39. On the claim of trust, the defendants contend that there exists an overriding interest on the suit property, thus the plaintiff cannot be deemed to be the absolute owner of the suit land. The defendants aver that the suit land is ancestral land, thus the rights of the defendants are silent but they exist by virtue of kinmanship or affinity where the parties share one patriarch who is Githindi Gichatha and that the defendants, their children and their wives all resided on the suit property. On this point the defendants have cited the case of *Isaack M’Inanga Kiebia V Isaaya Theuri M’lntari & another* [2018] eKLR.
40. It is further averred that this suit was initiated in year 2006 where the plaintiff was terming the defendants as trespassers, yet she had actual knowledge that this was the home of the defendants all along.
41. Finally, it was submitted that the plaintiff’s claim is statute barred under Section 4(2) of the Limitations of Actions Act since the defendants have all along lived on the suit property from 1964, yet the suit was only filed in year 2006.

Determination

42. The protagonists herein are family members whereby the plaintiff is a step mother of the initial two defendants. The husband and father of the plaintiff and defendants respectively was one Gichatha Githindi who passed on sometime in the year 2002. There is no controversy that Gichatha Githindi had two wives. The first wife was known as Waithera, the mother of William Kamau and David Maina (the defendants) as well as Eunice Wairimu and Geoffrey Macharia (DW1). On the other side, the children of the plaintiff are Joyce Wambura (PW2), Nancy Wairimu, Nelius Wanjiku, John Kamau, Joseph Kamori and the late Patrick Macharia.
43. The 2nd defendant died in December 2020 and was substituted with his son James Gichatha (DW2), while the 1st defendant died on 1.11.2021 and was substituted by his son Nelson Muturi Kamau (DW3).
44. A certificate of search availed by the plaintiff indicates that the plaintiff was registered as the owner of the suit land on 23.10.1990 and the said land is measuring 4 acres.
45. The plaintiff is seeking the eviction of the defendants and their families from the suit property, while the latter are staking a claim on the land on the basis that this was their ancestral land. In the alternative, they are claiming the suit land through the doctrine of adverse possession. They also allege that the plaintiff was registered as the owner of that land through fraud.
46. At the close of the defence case. An oral application was made by counsel for the defendants to have the witness statements of the deceased defendants admitted in evidence. The application was opposed by counsel for the plaintiff who averred that the defendants could not add anything after they had closed their case.
47. In light of the above analysis, I deem it fit to frame the issues for determination as follows;
 1. Whether the statements of the deceased defendants should be admitted in evidence.
 2. Whether there was fraud in the registration of the suit property in the name of the plaintiff.
 3. Whether the claim of adverse possession or trust advanced by the defendants is merited.



4. Whether the orders of mandatory injunction requiring the defendants to demolish their buildings and to vacate the suit premises are merited.
5. Whether the plaintiff is entitled to damages; and who should pay costs of the main suit and the counterclaim.

Statements of Deceased persons

48. The law governing the admissibility of statements of deceased persons is stipulated under Section 33 of the *Evidence Act*; See this court's decision in *Pauline Rigiri Muthiora v Zachary Muriki Joseph* [2021] eKLR. In the case at hand, the oral application was made after the defence case had been closed, that is after a brother and sons of the two deceased defendants respectively had given their testimonies. I find that any of the said witnesses would have been in a position to produce the statements in question and be cross examined accordingly. However, none of the said witnesses made reference to the questioned statements. It follows that any inclusion of the statements of the deceased defendants after the closure of the defence case would be prejudicial to the plaintiff as she would not get a chance to challenge the contents thereof through the platform of cross examination. The application to admit the statements of the deceased defendants as evidence at this stage off the trial is therefore rejected.

Fraud

49. In the case of *G. Patel v. Lalji Makanji* cited in the Court of Appeal case of *Denis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & another* [2018] eKLR the court had this to say on the issue of fraud:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

50. In the case of *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR, it was held that allegations of fraud set out in the pleadings must be proved. Thus the onus was upon the defendants to prove that the title issued to the plaintiff was fraudulently registered.
51. At paragraph (f) of the statement of the defence, it is pleaded that the plaintiffs title was obtained through fraud, where the plaintiff had inter alia forged the signature of defendants' father, that there was no consent of the land control board or if there was, then such consent was obtained through fraud and that in the alternative, Gichatha Githindi was incapacitated and was not capable of transmitting the land as a gift to the plaintiff.
52. No evidence was however adduced by the defendants to support the allegations of fraud as set out in their pleadings. What Dw1 stated is that as a family, they were not involved in the transfer of the suit land to the plaintiff. That perhaps may have been the case, but no provisions of law were cited to indicate that failure to involve the family in the transfer of the land to the plaintiff amounted to fraud.
53. On the averment by the defendants that their father was not mentally fit to transfer the suit property to the plaintiff, the position of the law is that it behoves the person who makes such allegations to provide proof thereof as was held in the case of *Patrick Muchiri Vs Patrick Kabiaru* HCCC 113 of 1999 that:-

“It is a very serious thing to say of, and concerning a person, that such person is a person of unsound mind or suffers mental disorder. The law presumes that every person is mentally sound, unless and until he is proved mentally disordered.”



54. The defendants admit that the deceased Gichatha Githindi gave his children other parcels of land of which DW1 settled on his 2 acres piece of land at Karirwara in 1987. It is therefore not plausible that the deceased had no capacity to transfer the suit land to the plaintiff, yet he had capacity to transfer other parcels of land to his children!. In any event, there is no tangible evidence adduced to show that the transfer of the suit land to the plaintiff was done when Gichatha Githindi was incapacitated.

Adverse Possession

55. A person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual, actual, open, notorious, exclusive and Adverse use by him or those under whom he claims, for the statutory prescribed period of 12 years without interruption. See - *Mtana Lewa –v- Kabindi Ngala Mwangandi*- COA MALINDI (2015) eKLR, *Celina Muthoni Kitbinji v Safiya Binti Swaleh & 8 others* [2018] eKLR.
56. The defendants were apparently raised on the suit land. The element of non-permissive or non consensual occupation of the land is therefore missing. Such non permissive occupation of the suit land can however be construed as from the time a caution was lodged on the said land on 5.11.2002, or from year 2006 when the defendants were told to leave the land. However, in both instances, the claim of adverse possession fails as the statutory period of 12 years had not matured by the time the suit was filed. It follows that the claim of adverse possession advanced by the defendants must fail.

Trust

57. It is trite that trust is a question of fact and has to be proved by evidence, See - *Phillicery Nduku Mumo v Nzuki Makau* [2002] eKLR. In the case of *Susan Mumbi Waititu –VS- Mukuru Ndata & 4 others* (19 of 2007) eKLR, it was stated that:-

“As for trust, the plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus family land.”

58. A claimant therefore has to lead evidence on how the customary trust was created. None of the protagonists have given a clear and cogent account of how the suit land was acquired. The plaintiff states that “when people were going to “Gichagi”, it is when the father of David and William left detention and is when she got married to him. That adjudication of the land was done just after detention. Pw2 states that at the time of demarcation, the suit land was in her fathers name. As for Dw1, he states that demarcation of the land occurred in the year 1963 and that is when their father acquired the suit property.
59. What resonates from the foregoing evidence is that the suit land was acquired by Gichatha Githindi during the period of land demarcation. It is hence safely to conclude that the suit property has a flavour of ancestral roots. After all, this is where all the children of Gichatha Githindi were raised.
60. In the Supreme Court of Kenya case of *Isaack M’Inanga Kiebia V Isaaya Theuri M’lintari & another* [2018] eKLR cited by the defendants, the court held that;

“Some of the elements that would qualify a claimant as a trustee are;

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan or group.



3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 5. The claim is directed against registered proprietor who is a member of the family, clan or group.”
61. There is no doubts that the defendants are family members and their relationship with the plaintiff is not remote. That being the case, are the defendants therefore entitled to any portion of the suit land? To answer this question, I make reference to the same case of *Isaack M’Inanga Kiebia V Isaaya Theuri M’lintari & another* (supra), where the SCOK had this to say still on the issue of claims on customary trust;
- “Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land”.
- Emphasize added
62. The evidence of the plaintiff is that her husband distributed his property during his lifetime, where each child was given two acres of land, such that, PW1 was given the suit land which was 4 acres, where 2 acres thereof belonged to Patrick Macharia, her son who is deceased. Pw2 has given a plausible explanation as to why Patrick was not registered as owner of the said land. That he was under age by the time her father was sharing out the land in the 1990s. She added that her brother Joseph got 1.5 acres but he is not claiming the suit land.
63. The defendants too admit that Gichatha Githindi gave land to his children during his lifetime. To this end, Dw1 stated that he was given 2 acres of land by his father in 1987. Both Dw1 and 2 also admit that the initial 2nd defendant was given two acres of land elsewhere. The defendants have not categorically denied the averments set out at paragraph 14 of the recorded statement of the plaintiff where she has given minute details of how Gichatha Githindi distributed his property during his lifetime.
64. The defendants desire that the suit land be divided into two, such that each house gets two acres of land. However, the intention of Gichatha Githindi can be discerned from the fact that he provided for the family members during his lifetime. There is nothing to indicate that the properties which were given to the defendants were not gathered by Githindi in the same manner that he gathered the suit land.
65. It has emerged that the parties have not done any succession proceedings in respect of the estate of the deceased. This again is another tell tale sign that the deceased Githindi had done the distribution of his property during his lifetime.
66. DW1 avers that in 1983, his father called a clan meeting whose agenda was to apportion the ancestral land into two portions for the two houses. There is however no evidence to indicate that the suit land was ever divided into two portions to demarcate the house of Waithera and that of the plaintiff during the lifetime of Githindi. What more, the suit land was registered in the name of the plaintiff 12 years before her husband’s death, which means that Githindi never intended the suit land to be shared into two as alleged by the defendants.



67. In the case of *Peter Nyaga Kairu v Esther Wanjiku Njau & 5 others* [2019] eKLR, a plaintiff was claiming the land of his deceased brother and I had this to say;

“Plaintiff had over 14 years to sort out all these issues during the life time of his brother (deceased). The Latin phrase “Mortui non mordent”, which means dead men don’t tell tales, dead men don’t bite is very much applicable in this case.”

68. Similarly, the defendants cannot purport to assert a claim that their father subdivided the suit land to the two houses, when there was no manifestation of such intentions during the lifetime of their father.

69. Another issue for consideration relates to the size of the land, which is 4 acres. In the case of *Paul Kirinya v Delfina Kathiri* [2019] eKLR, the court (Mbugua J) took into consideration the size of the land stating as follows;

“even if a customary trust somehow could arise in scenarios as in the instant matter, the circumstances of this case are unique in that the land is too small to be economically alienated by any one of the children. It is therefore unrealistic for plaintiff to claim rights and interests in respect of a portion of the suit land”.

70. The house of the defendants has 4 children namely William, David, Eunice and Geoffrey (DW1). They in turn have their own adult children including DW2 aged 47 years and DW3 aged 39 years, of which the family of William even has two households (two wives), which means that Dw3 has step siblings. The house of the plaintiff has 6 children namely Nancy, Nellius, John, Joyce, Joseph and Patrick making a total of 7 family members including the plaintiff. The children of the plaintiff equally have their own children. How is it that all these family members would be entitled to stake a claim in the suit land. It is certainly not economically viable. Gichatha Githindi had surely foreseen this situation and had appropriately and accordingly dealt with the issue in yester years.

71. What is apparently clear is that the defendants are agitating for a share of the suit land on the notion that their mother’s house is entitled to half of that land. However, this is not a probate case relating to division of the property of Gichatha Githindi. It is a claim of the land by the defendants on the basis of trust. However from 1963 or there about when the land was apparently demarcated upto the time of the death of Gichatha Githindi in 2002, there is no evidence to indicate that Githindi intended the land to be shared out by each and every member of the family. Thus the defendants do not fit the description in *Isaack M’Inanga Kiebia V Isaaya Theuri M’lintari & another* (supra) where it is stated that:

“The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances”.

72. The bottom line of the foregoing analysis is that the defendants are not entitled to any portion of the suit property through any kind of trust.

Injunction/ Eviction.

73. The defence witnesses claim that they learnt that the plaintiff was evicting the defendants in year 2006, that that is when they did a search and learnt that the land was registered in the name of the plaintiff way back in year 1990. However, the defendants have not denied that the 1st defendant had lodged a caution on the suit land way back on 5.11.2002 as reflected in the certificate of official search in the title of the plaintiff relating to the suit land. Thus as far back as year 2002, the defendants were aware that the plaintiff was the registered owner of the land.



74. It has emerged that the children of Githindi had each been given land elsewhere save one Patrick (deceased), of which Dw1 had moved onto his land way back in 1987. The defendants were less than candid as to when they were given their lands, but going by the evidence of the plaintiff and the relocation of Dw1, then the lands were given to the children of Githindi long before his death in 2002. It follows that there was no justification for the defendants to either commence the construction of the alleged permanent houses in year 2004 or to continue staying on that land in whichever kind of houses. Thus the injunctive orders sought by the plaintiff are merited.

Damages & Cost

75. I have taken into consideration that the warring parties, despite their deep squabbles are close family members, that the case has been in the corridors of justice for many years and that calamity has hit the defendants who passed on just when the hearing of the case was in progress. In the circumstances, I will not grant any damages for trespass even though the defendants have unjustly been occupying the suit property. On the same breadth, I direct that each side bears their own costs of the main suit and the Counter Claim.

76. Final Orders

1. The Counter claim of the defendants is hereby dismissed.
2. The plaintiffs claim is allowed to the extent that a permanent injunction is hereby issued restraining the defendants, their servants and or agents from continuing to stay on the suit property Loc. 15/Gathukiini/528.
3. A mandatory order of injunction is hereby issued requiring the defendants, their servants and or agents to demolish any of their structures situated on the suit property and vacate the suit land Loc. 15/Gathukiini/528 within a period of 45 days, failure to which eviction of the defendants shall take place and the plaintiff shall be at liberty to demolish the said structures.
4. Each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Masore Nyanga'u for the Plaintiff

Ochieng holding brief for Mr. Muturi for Defendant

