



**Popat v Odha (Environment & Land Case 256 of 2018)  
[2023] KEELC 16712 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16712 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 256 OF 2018**

**JO MBOYA, J  
MARCH 29, 2023**

**BETWEEN**

**HASSAN POPAT ..... PLAINTIFF**

**AND**

**WAKO GALGALLO ODHA ..... DEFENDANT**

**JUDGMENT**

**Introduction And Background.**

1. Vide Plaintiff dated the 31<sup>st</sup> day of May 2018, the Plaintiff herein has approached the Honourable Court seeking for the following reliefs:
  - i. A Declaration be issued to the effect that the Plaintiff is the Bona fide owner to all that Property known as L.R No. 209/11208/3, Nairobi.
  - ii. A Declaration that the Defendant's Certificate of Title in respect to L.R No. 209/21799 (I.R No. 118025) is null and void.
  - iii. A Permanent Injunction directed at the Defendant, his agents, servants and/ or employees, restraining them from entering, staying, using, possessing, trespassing or in any way interfering with the Plaintiff's possession of all that property known as L.R No. 209/11208/3, Nairobi.
  - iv. General Damages for unlawful interference with the Plaintiff's possession of L.R No. 209/11208/3, Nairobi.
  - v. Cost of the suit.
  - vi. Interest.



- vii. Any other relief that this Honourable court may deem fit to grant.
2. Upon being served with the Plaint and summons to enter appearance, in respect of the instant matter, the Defendant herein duly entered appearance and filed a Statement of Defense on the 10<sup>th</sup> September 2018, wherein the Defendant denied and disputed the claims contained at the foot of the Plaint herein.
3. On the other hand, upon being served with the Statement of Defense by and on behalf of the Defendant, the Plaintiff proceeded to and filed a Reply to the Statement of Defense. For clarity, the Reply to the Statement of Defense is dated the 15<sup>th</sup> October 2018, albeit filed in Court on the 18<sup>th</sup> October 2018.
4. Subsequently, the pleadings in respect of the instant matter closed and the matter was thereafter subjected to the requisite Pre-trial case conference in accordance with the provisions of the Civil Procedure Rules, 2010.
5. Suffice it to point out that the Parties herein duly confirmed the filing and exchange of all the relevant documents and witness statements. Consequently and premised on the foregoing, the suit was thereafter confirmed to be ripe and ready for hearing.

### **Evidence By The Parties**

#### **a. Plaintiff's Case:**

6. The Plaintiff's case revolves around the testimony of one witness, namely, Hassan Popat.
7. It was the testimony of the named witness that same is the lawful and legitimate proprietor of L.R No. 209/11208/3- Nairobi, (hereinafter referred to as the suit property). Furthermore, the witness added that same purchased and acquired the suit property from a Company known as Property Kays Kenya Ltd, on the 20<sup>th</sup> May 2013.
8. In addition, the witness averred that same is aware that M/s Property Kays Kenya Ltd, purchased and acquired the suit property from Manjeet Singh Gharial and Pritpal Singh Gharial, respectively vide a Sale Agreement dated the 13<sup>th</sup> May 2009.
9. It was the further evidence of the witness that upon the payment of the requisite purchase price/ consideration to the vendors, the suit property was duly and lawfully transferred to and registered in the name of Property kays Kenya Ltd.
10. On the other hand, the witness averred that the initial agreement for sale in respect of the suit property between Manjeet Singh Gharial and Pritpal Singh Gharial, on one hand and Property Kays Kenya Ltd on the other hand, was dated the 13<sup>th</sup> May 2009.
11. Other than the foregoing, the witness testified that the suit property was thereafter sold and transferred unto him on the 20<sup>th</sup> May 2013. In this regard, the witness pointed out that thereafter same extracted and obtained a Certificate of Search dated the 16<sup>th</sup> December 2013, confirming and authenticating that he was the registered proprietor of the suit Property.
12. Additionally, the witness averred that upon the purchase and acquisition of the suit property, same entered upon and took possession thereof. However, it was the further testimony of the witness that on or about December 2013, same noted that a stranger had erected and build a Perimeter wall around the suit property.



13. It was the further testimony of the witness that upon noting the offensive encroachment and (sic) trespass onto the suit Property, same immediately instructed M/s Harunani & Associates, to carry out and undertake investigations, with a view to authenticating the person responsible for the construction of the offensive wall.
14. Furthermore, the witness averred that same also instructed M/s Harunani & Associates to procure and obtain a Certificate of Search in respect of the suit property. In this regard, the witness added that M/s Harunani & Associates thereafter proceeded to and carried out the requisite investigation and ultimately reverted back unto him (Witness) vide letter dated the 14<sup>th</sup> January 2014.
15. It was the further testimony of the witness that vide the letter dated the 14<sup>th</sup> January 2014, M/s Harunani & Associates, intimated to him, namely, (witness) that the investigations carried out and the search, both revealed that the suit property was lawfully registered in the name of the witness.
16. Nevertheless, it was the further testimony of the witness that on or about the 24<sup>th</sup> April 2014 same lodged and mounted a Complaint with the Directorate of Criminal Investigations, ( read, the CID), pertaining to and concerning the trespass onto the suit property.
17. In addition, the witness contended that pursuant to and arising from the complaint lodged with the Directorate of Criminal Investigations, the said office wrote to the DCIO, Embakasi Police Division to commence and undertake the requisite investigations, with a view to establishing the person responsible for trespass and thereafter to take necessary/appropriate action.
18. Other than the foregoing, the witness also testified that same also engaged and instructed a registered valuer, namely, M/s Redfearn Valuers Ltd, to carryout and conduct a valuation over and in respect of the suit property. In this regard, the witness added that the named valuers indeed proceeded to and carried out a valuation in respect of the suit property.
19. Furthermore, it was the testimony of the witness that after the valuation was carried out and conducted in respect of the suit property, the nominated valuers indeed prepared and generated a Valuation report dated the 2<sup>nd</sup> March 2018.
20. Other than the foregoing, it was the further testimony of the witness that same latter on gathered and/or became aware that the Defendant herein was laying a claim to the suit property and in any event, was purporting that the suit property had been lawfully amalgamated with another parcel of land, namely, L.R No. 209/11208/4 and thereafter gave rise to L.R No. 209/21799.
21. However, the witness further averred that the suit Property lawfully belongs to him and hence, it was not possible for the suit property to have been amalgamated with another parcel of land, namely, L.R No. 209/11208/4, albeit without his knowledge, permission and consent.
22. In addition, the witness herein pointed out that same has produced and tendered before the Honourable court assorted documents showing and containing the historical background/information, pertaining to the acquisition of the original L.R No. 209/11208, which was/is the precursor of the suit property.
23. Other than the foregoing, the witness further testified that upon being served with the Statement of Defense and the bundle of documents by the Defendant herein, same had an opportunity to raise the issue of the purported amalgamation with the Ministry of Lands. In this regard, the witness added that the Ministry of Land indicated and clarified that the Certificate of Title relating to L.R No. 209/21799, I.R No. 118025 (propagated by the Defendant), was not authentic.



24. Additionally, the witness also averred that subsequently the Defendant herein also brought yet another amalgamated title, namely, L.R No. 209/21799, (I.R No. 100407).
25. Be that as it may, it was the evidence of the witness that even the second Certificate of Title, which was generated by and on behalf of the Defendant, after the filing of the instant suit, was also fraudulent and thus illegitimate.
26. Other than the foregoing, the witness herein alluded to the Written statement dated the 11<sup>th</sup> September 2020 and which the witness sought to adopt and to rely on. In this regard, the witness statement dated the 17<sup>th</sup> September 2020, was duly admitted as the Plaintiff's further Evidence- in- chief.
27. Besides, the Plaintiff also alluded to the List and Bundle of documents dated the 31<sup>st</sup> May 2018 and sought to adopt and rely on the named documents. For clarity, the Documents at the foot of the List dated the 31<sup>st</sup> May 2018, were duly admitted and produced as Plaintiff's Exhibits 1 to 25, respectively.
28. Furthermore, the witness also alluded to the Supplementary List and Bundle of documents dated the 15<sup>th</sup> October 2018 and same sought to adopt and produce the named documents at the foot of the said list. In this regard, the documents thereunder were admitted and produced as exhibit 26 to 30, respectively.
29. Besides, the Plaintiff alluded to the Further Supplementary List of Documents dated the 22<sup>nd</sup> November 2018 and similar sought to adopt and to rely on same. In this regard and in the absence of any objection from the Defendant, the documents at the foot of the list dated the 22<sup>nd</sup> November 2018, were duly admitted and produced as Exhibits 31 to 33, respectively.
30. Additionally, the witness referred to the Second Further Supplementary List and Bundle of Documents dated the 17<sup>th</sup> September 2020 and same sought to adopt and rely on the named documents. For clarity, the List dated the 17<sup>th</sup> September 2020 contains three sets of the documents.
31. For completeness of record, the documents at the foot of the List and Bundle of documents dated the 17<sup>th</sup> September 2020, were thereafter admitted and marked as Exhibits 34 to 36, respectively.
32. On cross examination, the witness pointed out that the original Certificate of Title in respect of L.R No. 209/11208, belonged to and was registered in the name of Indexico Company Limited. In this regard, the witness pointed out to the copy contained at page 87 of the Plaintiff's bundle of documents.
33. Additionally, the witness testified that the Certificate of Title alluded to and contained at page 87 bore/ reflected the I.R No. 47756.
34. Besides, the witness stated that Annual Rent for the Certificate of Title contained at page 87 of the Plaintiff's bundle shows/ reflected the sum of Kes.81, 200/= only.
35. Similarly, the witness confirmed that the period/duration at the foot of the Certificate of Title bearing the name of Indexico Company Limited, was 99 years w.e.f 1<sup>st</sup> February 1987.
36. Furthermore, the witness averred that it is the said title, namely, L.R No. 209/11208, which was subsequently transferred to Liberty Oils Mills Limited.
37. Other than the foregoing, the witness added that what was transferred to Liberty Oil Mills Ltd is what was hitherto owned by M/s Indexico Company Limited. However, the witness pointed out that the Certificate of Title contained at page 16 of the Plaintiff's bundle bears I.R No. 74239, which is different from the I.R Number, contained at the foot of the Certificate of Title adduced at page 87 of the Plaintiff's bundle.



38. Besides, it was the further testimony of the witness that the I.R Number, namely, I.R No. 74239, is different from the I.R Number on the Certificate of title that was previously held by Indexico Company Ltd.
39. Furthermore, the witness stated that the annual rent that was shown at the foot of the Certificate of title at page 16 of the Plaintiff's bundle of documents is also different. For clarity, the witness pointed out that the annual rent herein is shown/ reflected to be Kes.14, 830/= only.
40. Additionally, the witness admitted that the first title over and in respect of the original parcel of land, namely, L.R No. 209/11208, was issued to Indexico Company Ltd. However, the witness added that the named title does not state that it relates to remainder of the period hitherto granted to Indexico Company Ltd.
41. On the other hand, the witness also testified that there was a further transfer to and in favor of Manjeet Singh Gharial and Pritpal Singh Gharial, respectively.
42. Whilst still under cross examination, the witness stated that same was not aware whether the Defendant has been in possession and occupation of the suit property since the year 2012. However, the witness clarified that same is aware that it is the Defendant who has fenced the suit property.
43. On the other hand, the witness stated that same is aware that the Certificate of Title in respect of L.R No. 209/11208/3 is in existence. For clarity, the witness pointed out that same is not aware that the suit property has since been amalgamated with any other.
44. Furthermore, it was the testimony of the witness that there was a Sale Agreement between Manjeet Singh Gharial and himself. Similarly, the witness also pointed out that there was also a Transfer Instrument duly executed in his favor.
45. Nevertheless, the witness admitted that the Transfer of the suit property unto him (witness) was registered before the one from Manjeet Singh Gharial to M/s Property Kays Kenya Ltd. In this regard, the witness clarified that the transfer was registered on the 9<sup>th</sup> June 2009.
46. Furthermore, the witness averred that same is certain about the validity of his Certificate of Title. For clarity, the witness averred that same does not need any other person to come and confirm the veracity of his title documents.
47. On re-examination, the witness pointed out that the transfer from M/s Property Kays Kenya Ltd to himself was registered on the 20<sup>th</sup> May 2013.
48. On the other hand, the witness pointed out that the suit property was transferred from Manjeet Singh Gharial to Property Kays Kenya Ltd and not to himself (witness). For clarity, the witness added that it was M/s Property Kays Kenya Ltd who ultimately transferred the suit property unto him.
49. Furthermore, the witness added that since the year 2012, it is him (witness) who has been in possession of the suit property.
50. However, the witness added that on or about 2014 some stranger started to lay a claim to and in respect of the suit property.
51. Be that as it may, the witness clarified that same is not aware of any amalgamation involving the suit property. In any event, the witness added that he has faith in the Certificate of Title that same holds over and in respect of the suit property.
52. With the foregoing testimony, the Plaintiff's case was closed.



## **b. Defendant's Case**

53. The Defendant's case gravitates and revolves around the evidence of two witnesses, namely, Wako Galgallo Odha and Gildine Karanu, who testified as DW1 and DW2, respectively.
54. It was the testimony of DW1 that same bought and acquired the suit property, namely, L.R No. 209/11208/3, from one Olo Mohamed vide Sale Agreement dated the 15<sup>th</sup> May 2004, culminating into the transfer and ultimate registration of the suit property unto his name.
55. Furthermore, the witness added that upon the execution of the Sale Agreement and the requisite transfer instrument, the suit property was duly and lawfully transferred and registered unto him/in his name on the 16<sup>th</sup> July 2004.
56. Additionally, the witness testified that upon the transfer and registration of the suit Property in his name, same entered upon and took possession of the suit Property. For clarity, the witness added that he has remained in occupation of the suit property ever since the date of purchase thereof.
57. In addition, it was the further testimony of the witness that other than the suit property, same was also the owner/proprietor of another property, namely, L.R No. 209/11208/4, which was adjacent to the suit property. In this regard, the witness averred that same ultimately sought for and obtained permission to amalgamate the suit property and L.R No. 209/11208/4.
58. Furthermore, the witness proceeded to and averred that following the procurement of the requisite approval, the suit property and L.R No. 209/11208/4, were duly amalgamated culminating into the issuance of a new Certificate of Title, namely, L.R No. 209/21799 (I.R No. 118025).
59. Additionally, the witness further testified that subsequently and after being issued with the Certificate of Title over and in respect of the Suit Property herein, the Chief Land Registrar/ Ministry of Land, wrote to him indicating that there was a problem with the Certificate of Title and hence the Chief Land Registrar, sought and/ or demanded that the Certificate of Title be surrendered for correction.
60. To this end, the witness averred that same was therefore obliged/ obligated to and indeed surrendered the original Certificate of Title in respect of both properties, namely L.R No. 209/11208/3 and 209/11208/4, respectively.
61. It was the further testimony that latter on the Chief land Registrar Wrote to him and demanded that he surrenders the Certificate of Title in respect of the amalgamated parcel of land, namely L.R No. 209/21799 (I.R No. 118025) for purposes of correcting certain errors that were apparent therein. In this regard, the witness added that same duly complied and indeed surrendered the Certificate of Title for correction.
62. Moreover, the witness testified that after the surrender of the certificate of title in respect of L.R No. 209/21799 (I.R No. 118025), the Land Registry thereafter generated and issued unto him Certificate of Title in respect of L.R No. 209/21799 (I.R No. 100407).
63. Other than the foregoing, the witness alluded to the witness statement dated the 10<sup>th</sup> September 2018 and which same sought to adopt and to rely on. In this regard, the witness statement dated the 10<sup>th</sup> September 2018, was duly admitted and constituted as the further evidence in chief of the witness.
64. Furthermore, the witness also identified the witness statement dated the 5<sup>th</sup> August 2019 and same sought to adopt and rely on the said witness statement. Similarly, the witness statement dated the 5<sup>th</sup> of August 2019 was duly admitted and adopted as further evidence in chief.



65. Other than the foregoing, the witness alluded to the List and Bundle of documents dated the 10<sup>th</sup> September 2018, and sought to adopt and rely thereon. In this regard, the documents at the foot of the List dated the 10<sup>th</sup> September 2018, were duly admitted and marked as Defense Exhibits D1 to D17, respectively.
66. In addition, the witness also alluded to the further List and Bundle of documents dated the 5<sup>th</sup> August 2019 containing 9 documents and same sought to adopt and rely on the said documents as further Exhibits..
67. In the absence of any objection by the Plaintiff, the documents at the foot of the List dated the 5<sup>th</sup> August 2019, were admitted and produced as Exhibits D18 to D25, respectively.
68. Furthermore, the witness also alluded to Supplementary Bundle of Documents dated the 18<sup>th</sup> December 2019. In this regard, the witness sought to have the three named documents admitted in Evidence.
69. Save for document number 2 therein, namely, Forensic Document Examiners Report, which was objected to, the rest of the documents were duly admitted and produced as Exhibits D26 and D27, respectively.
70. On the other hand, the witness herein alluded to a further List and Bundle of documents dated the 4<sup>th</sup> May 2011 (but which the witness pointed out ought to have been 4<sup>th</sup> May 2021). In this regard, the witness sought to adopt and rely on the documents alluded to at the foot of the said list.
71. However, the documents at the foot of the list dated the 4<sup>th</sup> May 2021, were objected to by counsel for the Plaintiff, who contended and submitted that same had not been duly served.
72. Owing to the objection taken by Learned counsel for the Plaintiff, the Honourable court was called upon to render a ruling and indeed the court proceeded to and rendered a ruling, culminating into the impugned documents being expunged from the record of the court.
73. On cross examination, the witness pointed out that same bought and purchased the suit property, namely, L.R No. 209/11208/3 from the original owner and/or proprietor. In addition, the witness stated that a sale agreement was duly crafted and executed between himself and the previous registered owner.
74. Furthermore, the witness pointed out that following the execution of the sale agreement and the transfer instrument, respectively, the suit property was duly transferred and thereafter registered in his name.
75. Whilst still under cross examination, the witness admitted and conceded that the copy of Transfer Instrument which same had filed and lodged in court did not contain passport sized photographs, which were supplied and attached to the transfer instrument at the time of the lodgment of the transfer.
76. On the other hand, the witness testified that the Transfer instrument that same has presented and availed into court is not Fake. In addition, the witness averred that the property at the foot of the Transfer instrument is well captured and relates to L.R No. 209/11208/3.
77. On being cross examined on the I.R Number, the witness pointed out that the I.R Number, shown on /against his title reads I.R No. 74241.
78. Additionally, it was the testimony of the witness that the suit land is shown to have originated from grant I.R No. 4756/1.



79. Upon being referred to the documents contained at page 88 of the Plaintiff's bundle of documents, being a copy of the Certificate of Title, the witness pointed out that the named documents does not show that the vendor who sold unto him was registered as the owner.
80. Furthermore, the witness also pointed out that the land in question was sold and transferred to Liberty Oil Mills Ltd. In any event, the witness added that the land in question, which previously belonged to Liberty Oil Mills Ltd measured 2.0 Ha.
81. Other than the foregoing, the witness testified that same was not aware whether the land which hitherto was registered in the name of M/s Liberty Oil Mills Ltd was subdivided into six portions.
82. Whilst still under cross examination, the witness pointed out that the suit herein touches on and concerns L.R No. 209/11208/3. However, the witness pointed out that it is the property which was sold unto him by Olo Momahed Olo.
83. It was the further evidence of the witness that Olo Mohamed Olo appears to have been issued with Certificate of Title by the Government of the Republic of Kenya.
84. In addition, the witness added that the suit property was ultimately transferred and registered in his name.
85. On being cross examined on the number of Certificate of Title that same has produced and tendered before the Honourable Court, the witness pointed out that the Certificate of title which was initially issued unto him and in respect of the amalgamated parcel of land was recalled by the Ministry of Lands and thereafter same was issued with a corrected version on the 17<sup>th</sup> May 2019.
86. On re-examination, the witness pointed out that the transfer instrument which same has presented to the Honourable court does not have any passport sized photograph. In any event, the witness has clarified that in the year 2004, the law did not require that the transfer instrument be attached with copies of the passport photographs.
87. In respect of the various and contradictory I.R Numbers, the witness pointed out that the Certificate of title which was initially issued in respect of the amalgamated Certificate of Title, had errors and therefore the Chief Land Registrar demanded that same be surrendered for correction.
88. In addition, the witness testified that same was obliged to and indeed surrendered the Certificate of title for correction and thereafter the Chief Land Registrar issued unto him a Certificate of Title in respect of L.R No. 209/21799 (I.R No. 100407).
89. Finally, the witness pointed out that it is same who has been in occupation and possession of the suit property following the purchase and acquisition thereof. In any event, the witness added that he has even excavated the property, in readiness for construction.
90. The second witness who testified on behalf of the Defendant is Gildine Karanu who testified as DW2.
91. It was the testimony of DW2 that same is a Land Registrar, currently attached to the offices of the Chief Land Registrar, Ministry of Lands, Public Works, Housing and Urban Development.
92. Furthermore, the witness testified that same is conversant with the dispute beforehand. In any event, the witness added that she had brought forth the documents pertaining to and concerning Certificate of Title number I.R No. 47756.
93. Furthermore, the witness sought to tender and produce before the Honourable court the original Certificate of Title in respect of I.R No. 47756 and which the witness indicated was at variance with



- the Certificate of Title produced by the Plaintiff. In this regard, the witness compared and contrasted the entries on the original Certificate of Title as against the one produced by the Plaintiff and same stated at the entries were at variance.
94. Additionally, the witness testified that I.R No. 100407 relates to the Grant/Certificate of Title issued to and in the name of Wako Galgallo Odha.
  95. Furthermore, the witness indicated that same had the original copies/records pertaining to ownership of the property bearing I.R No. 100407. In this regard, the witness alluded to the documents contained at the foot of the List dated the 20<sup>th</sup> December 2022.
  96. In the absence of any objection from the Plaintiff, the documents at the foot of the List of documents dated the 20<sup>th</sup> December 2022, were thereafter produced and admitted in evidence as exhibits D33 to D37, respectively.
  97. It was the further testimony that the suit property, namely, L.R No. 209/21799 (I.R No. 100407) lawfully belongs to the Defendant.
  98. On cross examination, the witness pointed out that same had a copy of the Certificate of title relating to the suit property. For clarity, the witness pointed out that same was in respect of the I.R No. was 47756.
  99. Other than the foregoing, the witness testified that the first Grant in respect of the suit property was issued to Indexico Company Ltd. In this regard, the witness pointed out that the grant was in respect of L.R No. 209/11208.
  100. Additionally, the witness stated that the Grant which had been produced by the Plaintiff herein, did not correspond with the Grant produced by herself. In this regard, the witness contrasted the contents of the Grant contained at page 87 of the Plaintiff's bundle versus exhibit D37.
  101. Other than the foregoing, the witness further stated that the Grant produced by and on behalf of the Plaintiff contained various discrepancies including the signatures affixed against the various entries.
  102. Whilst under further cross examination, the witness pointed out that entry number 10 contained on exhibit D37 shows/relates to a new Certificate of Title. For clarity, the witness pointed out that it relates to a new title bearing I.R No. 74239.
  103. Be that as it may, the witness added that the Land Reference, was L.R No 209/11208/3 and that the owner of the said Certificate of Title was Liberty Oil Mills Ltd.
  104. On the other hand, the witness testified that L.R No 209/11208/3, shows that the first owner was one Olo Mohamed Olo. In addition, the witness clarified that it is the said Olo Mohamed Olo who transferred the named property to Wako Galgallo Odha.
  105. Furthermore and whilst still under further cross examination, the witness stated that the authentic Certificate of Title would be the one that corresponds with the Deed Plan.
  106. It was the further testimony of the witness that the title in favor of the Defendant herein arose from the amalgamation of two titles, namely, L.R No. 209/11208/3 and 209/11208/4, respectively. Furthermore, the witness added that the amalgamation was registered on the 17<sup>th</sup> May 2019.
  107. Whilst being cross examined on the basis of the Deed of indemnity, the witness pointed out that a Deed of indemnity is ordinarily generated by and at the instance of the person who is seeking to reconstruct the records at the Lands Registry. In this case, the witness pointed out that the Deed of indemnity, which was endorsed on the 6<sup>th</sup> March 2015 was generated at the instance of the Plaintiff.



108. On the other hand, the witness averred that the endorsement of the Deed of Indemnity is not proof of ownership.
109. Notwithstanding the foregoing, the witness denied a suggestion that the suit property belongs to the Plaintiff.
110. To the contrary, the witness stated and reiterated that the suit property belongs to the Defendant.
111. Furthermore, the witness testified that the various documents produced by the Plaintiff herein were not available at the Land Registry. In this regard, the witness added that same is unable to authenticate and/or vouch for their authenticity.
112. Other than the foregoing, the witness testified that the transfer in favor of the Plaintiff herein cannot be traced at the Land Registry.
113. Finally, the witness pointed out that from the documents obtaining at the Land Registry, the suit property belongs to the Defendant.
114. On re-examination, the witness pointed out that entries contained in various documents/Certificate of Title are authenticated by records obtaining at the Land Registry. However, the witness added that the documents supplied by the Plaintiff are not authentic.
115. In addition, the witness further testified that the impugned document availed by the Plaintiff are incomplete and besides, same bear different signatures of the concerned Land Registrars.
116. On the contrary, the witness testified that the Defendant's Certificate of Title is valid insofar as same is supported by a Deed Plan from the Director of Survey.
117. Be that as it may, the witness stated that same does not have any records, to verify the documents relied upon and produced by the Plaintiff.
118. With the foregoing testimony, the Defendant's case was closed.

## **Submission By The Parties**

### **a. Plaintiff's Submissions**

119. The Plaintiff filed written submissions dated the 3<sup>rd</sup> February 2023 and in respect of which same has raised, highlighted and amplified three salient issues for consideration and ultimate determination by the Honourable court.
120. Firstly, learned counsel for the Plaintiff has submitted that the Plaintiff herein lawfully and legitimately acquired the suit property, namely, L.R No. 209/11208/3, on the basis of purchase from the previous registered owner.
121. For the avoidance of doubt, learned counsel for the Plaintiff submitted that the transfer and ultimate registration of the suit property in favor of the Plaintiff is informed by a clear- cut chain of events, culminating into the issuance of Certificate of Title in favor of the Plaintiff.
122. Consequently and in the premises, Learned counsel for the Plaintiff has submitted that the Plaintiff has therefore been able to place before the Honourable Court sufficient and credible evidence to vindicate the manner/process, which culminated into the acquisition of the suit property.
123. Furthermore, learned counsel for the Plaintiff has submitted that even though the Plaintiff's case is anchored and predicated on the evidence of a single witness, it still behooves the Honourable Court



to appreciate that even a single witness can supply and avail cogent and credible evidence to warrant a finding in favor of the Plaintiff.

124. In short, learned counsel for the Plaintiff has submitted that the Plaintiff is the lawful and legitimate proprietor of the suit property and that the totality of the documents tendered is sufficient to vindicate and confirm the ownership of the suit property by the Plaintiff.
125. In support of the foregoing submission, Learned counsel for the Plaintiff has cited and quoted various decisions, inter-alia, Gathenya Ngumi versus Eric Kotut & 4 Others (2022)eKLR, Wainaina versus Kiguru & Another (Environment and Land Case E023 of 2021) (2022) KE ELC 3261 (KLR) (28<sup>th</sup> July 2022), Herbert L Martin versus Margaret J Kamar & 5 Others (2016)eKLR, Peter Gicheru Mungai versus Landline Quest Ltd (2021)eKLR and Munyu Maina versus Hiram Gathiha Maina (2013)eKLR, respectively.
126. Secondly, learned counsel for the Plaintiff has submitted that the Certificate of Title in respect of L.R No.209/21799 (I.R No 118025) which has been relied upon by the Defendant in respect of the subject matter, was procured irregularly, illegally and unlawfully. In this regard, learned counsel has contended that the impugned Certificate of Title is therefore fraudulent and invalid.
127. Furthermore, learned counsel for the Plaintiff has submitted that DW2 who testified on behalf of the Defendant herein, produced documents which were skewed and merely bent in obscuring the true facts pertaining to and concerning ownership of the suit property.
128. In any event, learned counsel for the Plaintiff submitted that the Ministry of Lands, had indeed generated a letter dated the 17<sup>th</sup> November 2016, wherein the Ministry of Lands contended that the Certificate of Title in respect of L.R No. 209/21799 (I.R No. 118025), was fraudulent and not authentic.
129. Based on the foregoing, learned counsel for the Defendant has therefore submitted that the Certificate of title being relied upon by the Defendant herein with a view to staking a claim to ownership of the suit property is therefore illegitimate and incapable of vesting any lawful/legitimate rights on the Defendant.
130. In view of the foregoing, learned counsel for the Plaintiff has therefore contended that the impugned Certificate of Title by the Defendant ought to be revoked and/or nullified. In this regard, counsel has cited and relied upon the provisions of Section 80 of the [Land Registration Act](#), 2012.
131. In addition, learned counsel for the Plaintiff has similarly cited and quoted various decisions including Wainaina versus Kiguru & Another Another (Environment and Land Case E023 of 2021) (2022) KE ELC 3261 (KLR) (28<sup>th</sup> July 2022), George Kamau Njonge & Jane Njeri Mukuna versus Patrick Kagothie Njonge & Erastus Njoroge Kiarie (2022)eKLR, Daudi Kiptugen versus Commissioner of Lands & 4 Others 92015)eKLR and Willis Gitau Njoroge versus Monica Njoroge Gachie & Another (2019)eKLR, respectively.
132. Furthermore, learned counsel for the Plaintiff also contended that the Land Registrar, who testified as DW2, was neither honest nor credible. In this regard, counsel for the Plaintiff has contended that the totality of the evidence which was tendered by the named witness, was therefore calculated to mislead the court.
133. Thirdly, learned counsel submitted that the Plaintiff has tendered and provided sufficient and credible evidence to show that the Plaintiff is the legitimate owner/proprietor of the suit property. In this regard, counsel has therefore implored the Honourable Court to return a verdict/finding that the Plaintiff is the legitimate proprietor of the suit property.



134. Additionally, learned counsel for the Plaintiff has further submitted that by virtue of being the registered owner/proprietor of the suit property, the Plaintiff is therefore entitled to the benefit of such ownership. In this regard, learned counsel has invited the Honourable court to take cognizance of Sections 24 and 25 of the *Land Registration Act*, 2012.
135. Other than the foregoing, learned counsel has submitted that by virtue of being the lawful and registered proprietor of the suit property, the Plaintiff is therefore entitled to an order of Permanent injunction to restrain the Defendant, either by himself or agents and/or servants, from entering upon and/or interfering with the suit property.
136. Besides, learned counsel for the Plaintiff has also submitted that by virtue of such ownership, the Plaintiff is also entitled to General damages for trespass as against the Defendant.
137. As pertains to the question of General Damages for trespass, learned counsel has submitted that an award in the sum of Kes.500, 000/= only, would be reasonable and adequate.
138. In support of the submissions that the Plaintiff is entitled to an order of Permanent Injunction on account for General damages for trespass, learned counsel for the Plaintiff has cited and relied various decisions inter-alia, Keiyian Group Ranch versus Samuel Oruta & 9 Others (2021)eKLR, Duncan Nderitu Ndegwa versus Kenya Power & Lighting Company Ltd & Another (2013)eKLR and Steven Makau Kanyia versus Wilson Njeru Wega & 4 Others (2021)eKLR, respectively.
139. In the premises, learned counsel for the Plaintiff has implored the Honourable court to find and hold that the Plaintiff has tendered and provided cogent/ credible evidence to prove ownership over and in respect of the suit property.
140. In the circumstances, the Plaintiff has therefore submitted that the Honourable court ought to find and hold that the Plaintiff has proved his case on a balance of probabilities and thereafter grant the reliefs sought at the foot of the Plaint dated the 31<sup>st</sup> May 2018.

#### **b. The Defendant's Submissions**

141. The Defendant on his part filed written submissions dated the 27<sup>th</sup> February 2023, and in respect of which same has similarly raised, highlighted and amplified three issues for consideration by the Honourable court.
142. First and foremost, learned counsel for the Defendant has submitted that the suit property, namely, L.R No. 209/11208/3 was lawfully amalgamated with L.R No. 209/11208/4 and thereafter same gave birth to an amalgamated title, namely, L.R No. 209/21799 (I.R No. 100407), belonging to the Defendant herein.
143. Owing to the foregoing, learned counsel for the Defendant has therefore submitted that the Plaintiff's claim touching on and/or concerning L.R No. 209/11208/3, relates to a non-existent parcel of land.
144. Secondly, learned counsel for the Defendant has submitted that in any event, the Plaintiff herein did not tender and/or place before the Honourable court cogent and credible evidence to show that same lawfully acquired the title in respect of L.R No. 209/11208/3.
145. In the absence of credible and cogent evidence to vindicate acquisition of the suit property by the Plaintiff, learned counsel pointed out that the Plaintiff cannot therefore purport to be the lawful and legitimate proprietor of the suit property.



146. Furthermore, learned counsel for the Defendant submitted that where the authenticity and validity of one's title is under challenge, it behooves the title holder (in this case the Plaintiff), to place before the Honourable court evidence to show the process pertaining to the acquisition of the title.
147. Nevertheless, learned counsel added that unfortunately, the Plaintiff herein has not been able to show the process speaking to and culminating into the acquisition of the title pertaining to and concerning the suit property.
148. To this end, learned counsel for the Defendant has cited inter-alia, the case of Hubert L Martine & 2 Other versus Margaret J Kamara (2016)eKLR and Lucy Nguiri Nderi versus Teresia Wanjiku Wainaina (2017)eKLR, respectively.
149. Thirdly, learned counsel for the Defendant has submitted that the Certificate of Title in respect of L.R No. 209/11208/3, which is held by the Plaintiff, is illegal, unlawful and invalid. Consequently, learned counsel has invited the Honourable court to proceed and declare the impugned Certificate of Title as null and void.
150. In a nutshell, counsel for the Defendant has submitted that the Plaintiff has neither proved nor established the claims contained at the foot of the Plaint. In this regard, learned counsel has therefore implored the Honourable court to find and hold that the Plaintiff's case ought to be dismissed with cost.

### **Issues For Determination**

151. Having reviewed the Plaint dated the 31<sup>st</sup> of May 2018, and the various documents attendant thereto and upon considering the Statement of Defense filed in opposition thereto, together with the documents thereunder; and having similarly taken into account the oral evidence tendered by and on behalf of the respective Parties and finally upon considering the written submissions filed, I come to conclusion that the following issues are pertinent and thus worthy of determination:
  - i. Whether the Plaintiff herein is the Lawful and Legitimate owner of L.R No. 209/11208/3, either in the manner alluded to or otherwise?
  - ii. Whether the Defendant herein is the Lawful Owner and Proprietor of L.R No. 209/21799 (I.R No. 100407), (being an amalgamation of L.R No's 209/11208/3 and 209/11208/4)?
  - iii. What Reliefs ought to be granted?

### **Analysis And Determination**

#### **Issue Number 1**

Whether the Plaintiff herein is the Lawful and Legitimate owner of L.R No. 209/11208/3, either in the manner alluded to or otherwise?

152. The Plaintiff herein lays a claim to and in respect of L.R No. 209/11208/3, namely, the suit property herein and same contends that the suit property was lawfully bought, purchased and acquired from M/s Property Kays Kenya Ltd.
153. Furthermore, the Plaintiff further avers that the suit property herein previously belonged to and was registered in the names of Manjeet Singh Gharial and Pritpal Singh Gharial, respectively, who sold and transferred the suit property to and in favor M/s Property Kays Kenya Ltd.



154. For the avoidance of doubt, it was the Plaintiff's evidence that the suit property was transferred to and was registered in the name of Property Kays Ltd on the 13<sup>th</sup> May 2009.
155. Additionally, the Plaintiff further testified that latter on the suit property was transferred unto him from Property Kays Kenya Ltd on the 20<sup>th</sup> May 2013. In this regard, the Plaintiff pointed out that same paid the sum of Kshs. 7,000,000/= Only, on account of the purchase price/consideration in favor of the named vendor.
156. To vindicate the foregoing testimony, the Plaintiff proceeded to and availed to the Honourable court assorted documents, to vindicate and confirm that indeed the suit property moved from M/s Manjeet Singh Gharial and Pritpal Singh Gharial to Property Kays Kenya Ltd and thereafter unto himself (read Plaintiff).
157. Nevertheless, even though the Plaintiff herein testified that the suit property was sold and transferred to and in favor of Property Kays Kenya Ltd on the 13<sup>th</sup> May 2009, it is imperative to take note of the fact that the impugned instrument of transfer was never presented for registration until the 9<sup>th</sup> June 2009.
158. Consequently and in the premises, the contention that the suit property was transferred to and in favor of Property Kays Kenya Ltd on the 13<sup>th</sup> May 2009, is misleading.
159. Secondly, the transfer instrument which the Plaintiff has produced and tendered before the Honourable court to anchor the transfer of the suit property to Property Kays Kenya Ltd, is curious and suspect.
160. To start with, the impugned instrument of transfer is dated the 13<sup>th</sup> May 2009 yet the impugned transfer was allegedly available for signature; was signed and executed by the concerned parties on the 3<sup>rd</sup> April 2009.
161. In this regard, the obvious impression that does arise from the impugned transfer instrument is that same was executed by the Parties long before the same was (sic) prepared.
162. Thirdly, the impugned transfer instrument which the Plaintiff has relied on also contains a certificate at the foot thereof (read page 27 of the Plaintiff's bundle), which was neither executed nor attested either as required under the law or at all.
163. In the premises, what becomes evident and apparent is that the impugned transfer, was not only incomplete but also invalid and thus incapable of conveying any legal interest in favor of Property Kays Kenya Ltd or at all.
164. Fourthly, there is yet another interesting and puzzling aspect. For clarity, this relates to the Transfer and agreement, which were lodged for purposes of assessment of Stamp duty on the 13<sup>th</sup> May 2009.
165. In this respect, it is worthy to note that the Transfer which was lodged for purposes of assessment of Stamp duty and further action concerns Manjeet Singh Gharial, Prital Sign Gharial and Gari Panel Beaters on one hand, as the vendor/transferor and Hassan Popat, as the transferee.
166. Suffice it to point out, that what was being presented was separate and distinct from (sic) the Transfer dated the 13<sup>th</sup> May 2009.
167. Fifthly, even though the Plaintiff herein contended that the suit property was sold to and in favor of Property Kays Kenya Ltd by Manjeet Sigh Gharial and Pritpal Singh Gharial, however no sale agreement, has been placed before the Honourable court as proof of the transaction alluded to.



168. For the avoidance of doubt, the only documents which has been put forth before the Honourable court to speak to the relationship between Manjeet Singh Gharial and Pritpal Singh Gharial on one hand and Properties Kays Kenya Ltd (read not Property Kay Kenya Ltd) is a transfer dated the 13<sup>th</sup> May 2009, but which was executed/signed long before it was generated.
169. On the other hand, the Plaintiff has further placed before the Honourable court a sale agreement between Manjeet Singh Gharial and himself dated the 13<sup>th</sup> May 2009 and in respect of which same contends that the suit property was indeed being sold unto him and not otherwise.
170. Looking at the sale agreement which was entered into between Manjeet Singh Gharial and Pritpal Singh Gharial, on one hand and the Plaintiff; and contrasting same as against the Transfer being executed by Manjeet Singh Gharial and Pritpal Singh Gharial on one hand and Properties Kays Kenya Ltd on the other hand, this Honourable court gets lost as to whether there was indeed a genuine transaction that was being undertaken over and in respect of the suit property.
171. Moving forward, it is also worthy to note that on the 20<sup>th</sup> May 2013, a Company known as Property Kays Kenya Ltd (not Properties Kay Kenya Ltd) was now executing a transfer over and in respect of the suit property to the Plaintiff.
172. However, it is not lost on the Honourable court that the impugned property is said to have been sold to and in favor of the Plaintiff, on the basis of the agreement for sale dated the 13<sup>th</sup> May 2009.
173. As pertains to the Transfer Instrument executed on the 20<sup>th</sup> May 2013, it is worthy to take cognizance of the following salient facts;
- i. The vendor at the foot of the Transfer Instrument, is different from (sic) the person named at the foot of the transfer dated the 13<sup>th</sup> May 2009.
  - ii. The Certificate at the foot of the execution/attestation portion does not state the date when the (sic) Parties, namely, the transferors and transferees appeared before the attesting advocate.
  - iii. There is also no Sale agreement anchoring the transfer dated the 20<sup>th</sup> May 2013.
  - iv. In view of the foregoing, there does arise some doubt as to whether the Parties involved in the impugned transaction, the Plaintiff not excepted, were endeavoring to cover up something from the eyes of the law.
  - v. Furthermore, there is also the other aspect arising from the reply from the Statement of Defense, wherein the Plaintiff stated as hereunder;
 

“Paragraph 3

The Plaintiff in response to paragraph 4 of the statement of defense reiterates paragraphs 6 of the Plaint that he has/is in possession of L.R No. 209/11208/3 since 9<sup>th</sup> June 2009 and put the Defendant to strict proof thereof.
174. From the foregoing averment, the question that does arise is whether or not as at the 9<sup>th</sup> June 2009, the Plaintiff herein had the capacity to be in possession of the suit property.
175. My understanding of the Plaintiff’s case (save for the contradictory aspect attendant to the sale agreement dated the 13<sup>th</sup> May 2009) is that the Plaintiff herein only became the registered proprietor of the suit property, if at all, after same was (sic) transferred to him on the 20<sup>th</sup> May 2013 and not otherwise.



176. It has become imperative and appropriate to single out and identify the foregoing contradictions because what lies before the Honourable court is a contest pertaining to ownership of the suit property, which is being contested by two persons, each laying a claim to ownership/title thereof.
177. At any rate, it is common ground that where two or more people are contesting ownership of a common property and each propagating a different Certificate of Title, then it behooves each and every of the contestants/disputants to place before the Honourable court Documents justifying the process culminating into the issuance/acquisition of the impugned Certificate of Title.
178. Put differently, where a Certificate of Title is under challenge, it is not enough for the title holder/bearer of the impugned Certificate of Title, to merely wave the Certificate of Title; and believe that such Title shall suffice as proof ownership.
179. To this end, it is appropriate to recall and reiterate the holding of the Court of Appeal in the case of *Munyua Maina versus Hiram Gathiha Maina* [2013] eKLR, where the Court of Appeal held as hereunder:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony. We find that a trust exists in relation to the suit property.”

180. Furthermore, the necessity of a title holder to place and/or lay before the Honourable court credible and cogent basis pertaining to the circumstances under which the impugned Title was obtained was re-visited and addressed by the Honourable court in the case of *Daudi Kiptugen versus Commissioner Of Lands Nairobi Lands & 4 others* [2015] eKLR, where the court stated and held as hereunder:

“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.”

181. In my humble albeit considered view, the numerous discrepancies, which bedevil the agreement of sale and the attendant Instruments of transfer, which have been placed before the Honourable Court by the Plaintiff negate the credibility of the process leading to the Issuance of the Certificate of Title in favor of the Plaintiff.



182. Notwithstanding the foregoing position, there is yet another perspective/ nuance that merits mention and appropriate/due consideration by the Honourable court.
183. In this regard, it is worthy to recall that the Land Registrar, who testified as DW2, stated that the transfer instrument and the copy of Certificate of Title, over and in respect of the suit property and which were presented by the Plaintiff, could not be authenticated by the Land Registry.
184. Furthermore, it was the evidence of the concerned Land Registrar (DW2) that the entries, which were contained on the Certificate of Title produced and tendered in evidence by the Plaintiff were at variance with and contradictory to exhibit D37, which was the Certificate of Title held by the Chief Land Registrar.
185. Additionally, it is also not lost on this Honourable Court that the same DW2 also testified that the entries which were contained at the foot of the certificate of title, produced by and relied upon on behalf of the Plaintiff also bore signatures of the concerned Land Registrar's , which were different from the Land Registrar who made the entries in exhibit D37. For clarity, exhibit D37 was the certified copy of the Certificate of Title relating to the suit property (sic) prior to its amalgamation.
186. Perhaps, at this juncture, it is appropriate to reproduce the pertinent aspects of the evidence of DW2 whilst under cross examination by counsel for the Plaintiff:

“The grant at page 87 of the Plaintiff bundle of documents is not the same with entries contained in exhibit D37. The entry number two relates to a charge to Credit Kenya Ltd and the same was registered on the 4<sup>th</sup> October 1998. I do confirm that there is also an entry number 3 and it relates to a caveat placed by Skyline Properties Ltd. The caveat was registered on the 4<sup>th</sup> June 1991. There is also a caveat shown on page 88 of the Plaintiffs bundle. I wish to say that there is a discrepancies in the entry and particularly the signatures and handwriting of the land registrar”.

187. Furthermore, DW2 proceeded and stated as hereunder:

“I wish to say that there is also another endorsement to the effect that a deed of indemnity was registered on the 6<sup>th</sup> March 2019. I did not find any evidence of the deed of indemnity. I have however, produced a copy of the deed of indemnity. I have also produced a copy of the deed plan. It is not true that the suit property belongs to the Plaintiff. I wish to repeat that the suit property belongs to the Defendant. According to the Plaintiff's documents, the plaintiff is shown to be the owner of L.R no. 209/11208/3. I can see a transfer from M/s Liberty Oil Mills Ltd to Manjeet Singh Gharial and Pritpal Singh Gharial registered on 13<sup>th</sup> May 1998. The transfer was endorsed and signed by Mrs. Mule. At page 35 of the Plaintiff's bundle, it shows a transfer from Manjeet Singh Gharial and Properties Kays Kenya Ltd. It was registered on the 9<sup>th</sup> June 2009. The last transfer is between Properties Kays Kenya ltd to Hassan Popat. The transfer was endorsed on the 29<sup>th</sup> July 2013. It was signed by Mrs Betty Yatin. The documents that have been filed by the Plaintiff are not available at our registry. In the premises, I cannot authenticate the validity of the Plaintiff's documents. The transfer in favor of the Plaintiff cannot be traced at the land registry.”

188. From the foregoing excerpts, what becomes crystal clear is that the impugned documents which have been propagated by the Plaintiff can neither be validated nor authenticated by the Land Registry.
189. In any event, if the Plaintiff was of the considered view that his documents were neither available nor obtainable from the Land Registry, then it behooved the Plaintiff to take necessary and appropriate



measures in line with the provisions of Article 35 of *the Constitution* of Kenya as read together with the provisions of the *Access to Information Act* 2016, to compel the concerned authority to avail his certified copies of the documents held by it or better still to account for the loss/misplacement.

190. Other than the foregoing, the Plaintiff was also at liberty to summon a witness from the office of the Chief Land Registrar, to tender evidence in his favor and nay, elaborate on what may have happened to the Documents, bearing the name of the Plaintiff, if at all.
191. However, the totality of the evidence that has been placed before the Honourable court by DW2 casts yet another doubt and/or blemish on the evidence tendered by the Plaintiff.
192. Even though learned counsel for the Plaintiff has castigated DW2 and contended that same was hellbent on defeating the course of justice by giving evidence contradictory to the Plaintiff's documents, it is my humble view that the evidence tendered by DW2 was fairly credible and thus believable.
193. In any event, DW2 could only procure and bring forth evidence that was available and obtaining from the parcel file held by the Chief Land Registrar and not otherwise.
194. In view of the foregoing observation, I come to the conclusion that the Plaintiff herein has not been able to place before the Honourable Court cogent and credible evidence to prove and establish that same is the lawful and legitimate proprietor of (sic) the suit property.
195. Furthermore, it is imperative to point out that it is the Plaintiff who had contended that same is the lawful and legitimate owner of the suit property. Consequently, the burden of proving such ownership of Title laid at the door step of the Plaintiff and not otherwise.
196. To this end, it is my humble view that the holding in the case of Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi & another [2014] eKLR, is succinct and apt.
197. For coherence, the Honourable Court of Appeal stated and held as hereunder:

On perusing the judgment and hearing Mr. Mwangi, what comes through clearly and was repeated several times over, was the position that since the appellant did not deny the facts stated in the affidavits of the 1<sup>st</sup> respondent then he was deemed to have admitted those facts. With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence, when the 1<sup>st</sup> respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the *Evidence Act* to be demanding of a party like the 1<sup>st</sup> respondent that:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

That he did not do.

198. Unfortunately, the Plaintiff has failed to discharge the burden of proof that laid on his shoulders and in this regard, I am unable to find and hold that the Plaintiff is the lawful and legitimate owner of the suit property, either as claimed or at all.

## Issue Number 2

Whether the Defendant herein is the Lawful owner and Proprietor of L.R No. 209/21799 (I.R No. 100407), (being an amalgamation of L.R No's 209/11208/3 and 209/11208/4)?



199. On the other hand, the Defendant herein had contended that same bought and/or purchased L.R No. 209/11208/3 (which is the suit property) from one Olo Mohamed Olo.
200. In addition, the Defendant averred that thereafter the suit property was transferred and registered in his name, culminating into the issuance of a Certificate of Title. For clarity, the Defendant adduced and produced a copy of the said Certificate of Title.
201. Furthermore, the Defendant also averred that by virtue of being the registered owner of L.R No. 209/11208/4, same sought for and obtained the requisite approval to facilitate the amalgamation of the suit property and L.R No. 209/11208/4.
202. Pursuant to and upon the issuance of the requisite approval, the Defendant averred that same thereafter proceeded to and caused the amalgamation to be carried out, undertaken and concluded. In this regard, the authenticity of the amalgamation was underlined by the letter from the Director of Survey dated the 16<sup>th</sup> April 2019 and which was produced D22.
203. On the other hand, following the process pertaining to the amalgamation, the office of the Chief Land Registrar generated and issued a Certificate of Title bearing L.R No. 209/21799 (I.R No 118025), in the name of the Defendant.
204. Be that as it may, the Defendant further testified that thereafter the office of the Chief land Registrar pointed out to him that an error had been discerned in the Certificate of Title which had been issued unto him following the amalgamation process. In this regard, the office of the Chief Land Registrar called unto the Defendant to surrender the Certificate of Title which had been issued at the conclusion of the amalgamation for necessary rectification/amendment. (See letter dated the 13<sup>th</sup> May 2013 – exhibit D23.)
205. Upon receipt of the named letter, the Defendant averred that same was obliged to surrender the Certificate of Title in respect of L.R No. 209/21799 (I.R No. 118025) for rectification.
206. Additionally, the Defendant testified that upon rectification, the office of the Chief Land Registrar issued unto him with a new Certificate of Title in respect of L.R No. 209/21799t, albeit bearing I.R No. 100407. For clarity, the Defendant tendered the said Certificate of Title as evidence before the Honourable court.
207. On the issue of the authenticity of the Certificate of Title held by the Defendant, DW2 testified as hereunder:
- “I wish to confirm that the suit property belongs to the holder of I.R no. 100407. I add and state that the property belongs to the Defendant. For coherence, the owner of the property is Wako Galgallo Odha”.
208. Furthermore, DW2 continued and stated as hereunder whilst on re-examination:
- “The Defendant’s Certificate of Title is valid because the same is duly supported by a Deed Plan from the Director of Survey. I wish to state that we don’t have records to verify the documents by the Plaintiff. The Defendant herein is the valid and lawful owner. The documents by the Defendant are authentic.”
209. From the testimony of DW2, what comes out clear is that the Certificate of Title belonging to and issued in favor of the Defendant is verifiable from the Ministry of Lands/Office of the Chief Land Registrar.



210. It must be remembered that pursuant to the Torrens Principle, the record obtaining at the Land Registry would provide a basis for verification and authentication of any other document that is held by a title holder.
211. Indeed, if there arises any error or defect, then the office of the Chief Land Registrar becomes liable on account of indemnity.
212. To be able to understand the importance of the record held by the office of the Land Registrar/Ministry of Lands, it is appropriate to take cognizance of the ratio decidendi in the case of Elizabeth Wambui Githinji & Others vs Kenya Urban Roads Authority (KURA) (2019) eKLR, where the court stated and observed as hereunder:

It has long been accepted beyond debate that the land registration process in Kenya is a product of the Torrens system. This was acknowledged in, among a long line of decided cases, this Court's judgments in *Dr. Joseph Arap Ngok V. Justice Moiyo ole Keiwua & 5 others*, Civil Appeal No. Nai. 60 of 1997 and *Charles Karathe Kiarie & 2 Others V Administrators of Estate of John Wallance Muthare (deceased) & 5 others*, Civil Appeal 225 of 2006.

Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. Finally, the statutory presumption of indefeasibility and conclusiveness of title based on the register can be rebutted only by proof of fraud or misrepresentation which the buyer is himself shown to have been involved.

The object of the Torrens system was, in very compelling language, explained in the decision of the Privy Council in *Gibbs V. Messer* [1891] AC 247 P.C. at page 254 as follows:-

“The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.”. (Emphasis supplied).

213. To my mind, the Certificate of Title over and in respect of L.R No.209/21799 (I.R No. 100407) is vindicated from the documents obtainable from the Land Registry. Consequently, same is deemed lawful, valid and legitimate under the Torrens principle.
214. To surmise, I find and hold that the Defendant is the lawful and legitimate owner of L.R No. 209/21799 (I.R No. 100407) and thus same is entitled to exclusive and absolute occupation, possession and use thereof.

### Issue Number 3

What Reliefs ought to be granted?



215. Having addressed and calibrated upon the foregoing issues, the question that now remains and thus deserving of due consideration relates to the reliefs available in respect of the instant matter.
216. First and foremost, I beg to restate and reiterate that the Plaintiff herein did not place before the Honourable Court sufficient and credible evidence to warrant the declaration that same is the lawful and legitimate proprietor of the suit property.
217. Secondly, having failed to establish ownership rights over and in respect of the suit property, it thus follows that the Honourable Court cannot decree an order of permanent injunction to restrain and/or prohibit the Defendant from entering upon and/or developing the impugned property.
218. On the contrary, this Honourable Court has found and established that the Defendant herein is the lawful and legitimate owner of the property known as L.R No. 209/21799 (I.R No. 100407). Consequently, the order of permanent injunction can certainly not issue as against the registered owner/proprietor of the impugned property.
219. In this regard, am duly inspired and bound by the holding in the case of Nguruman Ltd versus Jan Bonde Nielsen & 2 others [2014]eKLR, where the Court held as hereunder:
- “It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so.”
220. Other than the foregoing, the Plaintiff had also sought for an order of General damages for trespass. In this regard, the Plaintiff had implored the Honourable court to award recompense in the sum of Kshs. 500,000/= only.
221. However, I beg to point out that an award of general damages would automatically issue to and in favor of the proven owner of the property. Consequently, if the Plaintiff had established the root of his Title to and in respect of the suit property, then no doubt, same would have been entitled to an award of general damages.
222. In this regard, the ratio decidendi in the case of Park Towers Ltd versus. John Mithamo Njika & 7 others (2014) eKLR is succinct, apt and relevant.
223. For coherence, the Honourable Court stated and observed as hereunder:
- “I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ..”
224. As pertains to the quantum of damages, the Plaintiff herein had contended that an award of Kshs. 500,000/= would suffice.
225. Certainly, I would have been inclined to make an award on account of general damages in the said sums, had the Plaintiff proved and established his claim to and in respect of the suit property.
226. Additionally, the Plaintiff herein had also sought to have the Defendant’s Title to and in respect of the suit property to be cancelled, revoked and/or nullified. However, I must state that such an order is not available to and in favor of the Plaintiff, taking into account the determination as pertains to issue number two elsewhere herein before.
227. Lastly, I am alive to the fact that the Defendant herein only filed a Statement of Defense and not otherwise. For clarity, the Defendant did not file any Counterclaim at all.



228. Even though the Defendant did not file any Counterclaim, learned counsel for the Defendant has however made submissions contending that the Honourable Court should proceed and declare the Plaintiff's Title to and in respect of L.R No. 209/11208/3, to be illegal, invalid and void.
229. It is imperative to point out that such a relief/prayer ought to have been canvassed at the foot of a Counterclaim and not vide submissions in the manner adverted to by counsel for the Defendant.
230. However, it is not lost on this Honourable Court that whilst dealing with issue number one herein before, the court found and held that the Plaintiff had neither proved nor vindicated the root of his Title to and in respect of the suit property.
231. Furthermore, the Honourable court has also found and established that L.R No. 209/11208/3, which is the suit property herein, was lawfully amalgamated with another parcel of land and thus gave rise L.R No. 209/21799 (I.R No. 100407), registered in the name of the Defendant.
232. In view of the foregoing, the discourse/ conversation must now revolve around whether to revoke the Title held by the Plaintiff or otherwise leave same alive, despite the findings obtaining elsewhere herein before.
233. Despite the strict application of the law as espoused vide the decisions in the cases of Independent Electoral & Boundaries Commission vs Stephen Mutinda Mule & 3 Others (2014) eKLR, Dakianga Distributors (K) Ltd vs Kenya Seed Company Limited [2015] eKLR, Odinga & another vs Independent Electoral and Boundaries Commission & 2 others, Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (20 September 2017) (Judgment), dealing with the question of parties being bound by pleadings, I am minded to invoke and rely on the provision of Section 13(7) of the Environment and Land Court Act, 2011 as read together with Section 80 of the Land Registration Act; and thus decree that the Certificate of Title currently held by the Plaintiff over and in respect of L.R No. 209/11208/3, be revoked.

### **Final Disposition**

234. Having duly analyzed and considered the itemized issues that were highlighted in the body of the Judgment, it is now appropriate to finalize the Judgment and to make the final pronouncement.
235. To this end, I beg to state that the Plaintiff herein has neither established nor proved his claim to and in respect of the suit property. Consequently, the Plaintiff's suit be and is hereby dismissed with costs to the Defendant.
236. Nevertheless and to avoid further confusion created by the existence of (sic) Certificate of Title over and in respect of L.R No. 209/11208/3, which is no longer in existence, the said Title be and is hereby revoked, canceled and nullified pursuant to and by dint of Section 80 of the Land Registration Act, 2012.
237. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF MARCH 2023.**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE.**

In the Presence of:

Benson - Court Assistant.



Ms. Kimani h/b for Mr. Mwangi for the Plaintiff.

Mr. Ondieki Any'iega and Titus Mahanu for the Defendant

