



**Githinji v Hared; Hared (Counter Claimer); Githinji (Defendant to the Counterclaim) (Environment & Land Case E222 of 2023) [2025] KEELC 2915 (KLR) (24 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2915 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E222 OF 2023**

**JO MBOYA, J  
MARCH 24, 2025**

**BETWEEN**

**JAMES MURIMI GITHINJI ..... PLAINTIFF**

**AND**

**MOHAMED ALI HARED ..... DEFENDANT**

**AND**

**MOHAMED ALI HARED ..... COUNTER CLAIMER**

**AND**

**JAMES MURIMI GITHINJI ..... DEFENDANT TO THE COUNTERCLAIM**

**JUDGMENT**

1. The Plaintiff approached the court vide Plaintiff dated the 19<sup>th</sup> June 2023; and wherein the Plaintiff has sought the following reliefs[verbatim]:
  - i. Declaration that the Plaintiff is the lawful owner/proprietor of all that land titled L.R. NO. 15400/470 (IR NO. 162475) Plot No. 298;
  - ii. Permanent Prohibitory Injunction barring the Defendant, his servants, agents or representatives or anyone whosoever from any further construction and/or development on L.R. NO. 15400/470 (IR NO. 162475) Plot No. 298;
  - iii. An Eviction order compelling the Defendant, his family, servants, agents/or representatives or anyone whosoever occupying L.R. NO. 15400/470 (IR NO. 162475) Plot No. 298 to vacate from the said premises immediately and restore permanent quiet possession to the Plaintiff.



- iv. An Order compelling the Defendant to demolish, deconstruct and/or undo any structure erected on all that land titled L.R. NO. 15400/470 (IR NO. 162475) Plot No. 298, and to restore the suit property to its original state before the commencement of the illegal and/or unlawful construction, or if unable to do so, for the Plaintiff to carry out the same at the Defendant's cost;
  - v. Mesne profits at the rate of Kshs. 50,000/= per Month from November 2022 up to the date of removal/demolition and/or deconstruction of the illegal and/or unlawful construction;
  - vi. General damages for trespass
  - vii. Special damages to be provided
  - viii. Costs of the suit;
  - ix. Interest on (f) above at court rates
2. Upon being served with the Plaint and summons to entered appearance [STEA], the Defendant duly entered appearance and thereafter filed a Statement of Defence and Counterclaim dated the 1<sup>st</sup> September 2024; and wherein the Defendant sought a plethora of reliefs. The relief[s] sought at the foot of the Counterclaim are as hereunder;
- i. A declaration that the suit property forms part of the property registered as L.R. No. 11379/3;
  - ii. Declaration that the Plaintiff is the legal proprietor of plot number 212 forming part of L.R. No. 11379/3 held in trust for Kiambu Dandora Farmers Company Limited;
  - iii. Declaration that L.R. No. 11379/3 Komarock Road, Nairobi was bought and hereby vested in Kiambu Dandora Farmers Company Limited for the and on behalf of the members;
  - iv. Permanent injunction restraining the Plaintiff, its servants, employees, agents and workmen from entering on and or erecting or causing to be erected any structures or in any way whatsoever interfering with the Defendant's possession, use and quiet enjoyment of the suit property;
  - v. Mesne profits;
  - vi. Punitive damages;
  - vii. Costs of the suit;
  - viii. Interest on (d), (e) and (f) above at the applicable rates.
3. The Plaintiff thereafter filed a Reply to the Defence and Defence to the Counterclaim dated the 28<sup>th</sup> October 2024. Suffice it to state that the Plaintiff denied the allegations/averments contained in the body of the statement of defence and counterclaim. Further and in any event, the Plaintiff reiterated his entitlement to the suit property and sought that the Defendant be evicted therefrom.
4. The instant matter came up for hearing on the 4<sup>th</sup> November 2024 when the Plaintiff testified and was thereafter cross examined. In any event, the Plaintiff's case is anchored on the evidence of three [3] witness, namely; James Murimi Githinji, Rodger Gachewa and Peter Ayimba Atandi, respectively. Same testified as PW1, PW2 and PW3.
5. It was the testimony of the witness [PW1] that same is an Advocate of the High Court of Kenya. Furthermore, the witness averred that same is conversant with and knowledgeable of the facts of the instant matter.



6. It was the further testimony of the witness that same has since recorded a witness statement dated the 19<sup>th</sup> June 2023; and which witness statement the witness sought to rely on as his evidence in chief. The witness statement was thereafter adopted and constituted as the evidence in chief on behalf of the witness.
7. Furthermore, the witness adverted to a List and Bundle of documents dated the 19<sup>th</sup> June 2023; and which documents the witness sought to tender and produce before the court. However, the production of documents numbers 1, 5 and 10 was objected to. In this regard, the court was called upon to render a ruling as pertains to the admissibility or otherwise of the said documents.
8. Suffice it to state that the court rendered a ruling and wherein it was held that the impugned documents, namely; documents number[s] 1, 5 and 10, respectively are not admissible. To this end, the named documents were marked for Identification as PMFI 1, 5 and 10, respectively.
9. On the other hand, the rest of the documents were produced and admitted as Exhibits 2, 3, 4, 6, 7, 8 and 9, respectively.
10. It was the further testimony of the witness that even though same had filed before the court a copy of the Certificate of title, same [Witness] has however brought before the court the original Certificate of title. To this end, the witness availed the original Certificate of title and showed same to the court.
11. Moreover, the witness testified that same has since filed another List and Bundle of documents dated the 31<sup>st</sup> October 2024; and which documents the witness sought to tender and produce before the court. However, the production of the said Documents was objected to by Learned counsel for the Defendant.
12. Arising from the objection taken by learned counsel for the Defendant, the witness intimated to the court that same was no longer keen to rely on the documents at the foot of the List and Bundle dated the 31<sup>st</sup> October 2024. In this regard, the documents at the foot of the said List were expunged from the record of the court.
13. On the other hand, the witness referenced the Plaint dated the 19<sup>th</sup> June 2023 and the verifying affidavit attached thereto. Furthermore, the witness sought to adopt and rely on the contents of the Plaint. In addition, the witness implored the court to grant the relief[s] sought therein.
14. It was the further testimony of the witness that same has also filed a Reply to Defence and Defence to the Counterclaim dated the 28<sup>th</sup> October 2024. To this end, the witness also sought to adopt and rely on the Reply to Defence and Defence to the Counterclaim.
15. On cross examination by Learned Counsel for the Defendant, the witness averred that same has a Certificate of title to and in respect of the suit property. Furthermore, the witness averred that the Certificate of title was transferred to and in his name by M/s Tradeline Investments Limited.
16. It was the further testimony of the witness that same is a member and shareholder of M/s Tradeline Investment Limited. Moreover, the witness averred that what now constitutes the suit property was bought by M/s Tradeline Investments limited albeit on behalf of its members and Shareholders. Furthermore, the witness averred that upon the purchase and acquisition of the land M/s Tradeline Investment Limited sub-divided the land and thereafter caused various plots [sub-divisions], to be transferred to its shareholders; including what was ultimately transferred to and registered in the name of the witness.
17. Whilst under further cross examination, the witness averred that the agreement for purchase of the land was entered into between M/s Tradeline Investments Limited and M/s Amboseli Court Limited.



18. It was the further testimony of the witness that the land which was bought by M/s Tradeline Investment Limited was referenced as L.R No. 15400/171. In addition, the witness averred that after Tradeline Investment Limited had concluded the payments of the purchase price, the land was sub-divided into plots and the resultant sub-division[s] were transferred to and in favour of various members [Shareholders].
19. Furthermore, the witness testified that the Certificate of Title in respect of the suit property was issued in the year 2015. Nevertheless, the witness averred that same is not aware whether the suit property was curved out of [sic] Land belonging to Kiambu Dandora Farmers Ltd.
20. Additionally, the witness testified that by virtue of being the registered owner of the suit property, same is therefore entitled to exclusive possession and occupation. In any event, the witness testified that the Defendant has no right[s] to and in respect of the suit property.
21. It was the testimony of the witness that the Defendant has since entered upon and trespassed onto the suit property. Moreover, it was averred that the Defendant has since constructed a house on the suit property, albeit without the consent and/or permission of the witness.
22. On further cross examination by Learned Counsel for the Defendant, the witness averred that same lodged a Complaint with the City County Government of Nairobi and thereafter the City County Government issued an Enforcement Notice against the Defendant. However, the witness averred that the Enforcement Notice has not been executed.
23. Whilst still under cross examination, the witness averred that the Certificate of Title which same was issued with is premised on a Deed Plan. In this regard, the witness testified that the Deed Plan number is 346976. In addition, the witness testified that the Certificate of title however shows Deed Plan number 346976.
24. The witness further testified that the land was purchased by M/s Tradeline Investments Ltd from Amboseli Court Ltd. Furthermore, the witness averred that M/s Tradeline Investment Limited paid the full purchase price and thereafter the land was transferred to and in favour of M/s Tradeline Investments Ltd. In addition, the witness averred that the transfer from Amboseli Court Limited to M/s Tradeline Investment Limited could not have been undertaken without the payment of the full purchase price.
25. The second witness who testified on behalf of the Plaintiff was Rodger Gachewa. Same testified as PW2.
26. It was the testimony of the witness [PW2] that same is a Principal Land Surveyor. Furthermore, the witness averred that same is currently attached to the Directorate of Survey based at Ruaraka, within the city of Nairobi.
27. It was the further testimony of the witness that same received witness summons from the Deputy Registrar of the Environment and Land court. Furthermore, the witness averred that the witness summons under reference alluded to various documents which the witness was called upon to bring forth and produce before the court.
28. Additionally, the witness averred that pursuant to the witness summons same has brought before the court a copy of the Survey Plan [F/R] over Land reference number [LR] 15400/470 [I.R No. 162475] for Plot Number 278-Sosian Estate.
29. Besides, the witness also referenced a proposed sub-division scheme and change of user for Plot number 15400/171.



30. Suffice it to underscore that the witness sought to produce the two documents but an objection was taken as pertains to the production of the proposed sub-division scheme and change of user. To this end, the proposed sub-division scheme was marked as PMFI 11; whereas the Survey Plan [R/R] was duly produced as an Exhibit.
31. Moreover, the witness testified that the Survey Plan relates to L.R No. 15400/470. Besides, the witness testified that the Survey Plan [F/R] contains Plot number 298.
32. On cross examination, the witness averred that the Survey Plan which same has produced before the court relates to L.R No. 15400/171. Furthermore, the witness testified that before a Survey Plan can be prepared and approved, there must have been an Original land.
33. It was the further testimony of the witness that prior to the Survey Plan which same has produced before the court, there were other survey plans. To this end, the witness referenced original plan numbers 420/93; 381/57, 293/63, 293/63; 220/146 and 113/29, respectively.
34. Whilst under further cross examination, the witness averred that before a particular land can be subdivided, the original Certificate of title must be surrender. Furthermore, the witness averred that survey does not interfere with ownership of land.
35. It was the further testimony of the witness that the certificate of title before the court shows that the original Land was L.R No. 15400/172/289. In any event, the witness averred that the number in the certificate of title should correspond with the one shown in the Deed Plan.
36. It was the further testimony of the witness that same [Witness] undertook investigations over the land in question and ascertained that the land in question [suit property] falls within L.R No. 11379/3.
37. On further cross examination, the witness averred that the acreage of the suit property shows that the suit property measure[s] or is 0.0165 HA whereas the acreage shown in the Certificate of title is 0.0163 HA. To this end, the witness clarified that there is a difference in acreage in of approximately 0.0002 HA.
38. The third witness who testified on behalf of the Plaintiff was Peter Ayimba Atandi. Same testified as PW3.
39. It was the testimony of the witness [PW3] that same is a registered Land Surveyor. Furthermore, the witness averred that same works under a licenced surveyor known as Benson Okumu.
40. It was the further testimony of the witness that same is conversant with the facts of this matter. In this regard, the witness averred that same was instructed to visit the suit property and to undertake survey works thereon. In this respect, the witness averred that same undertook the exercise and thereafter prepared and signed a Survey Report. The Survey Report was tendered and produced as Exhibit P10.
41. On cross examination, the witness averred that same is conversant with the term licenced surveyor. In this regard, the witness clarified that a licenced surveyor is one who has been approved by the Surveyor's Licencing Board and thereafter issued with a licence.
42. On the other hand, the witness testified that a registered surveyor is approved by surveyor's licence board, but same is allowed to work under a Licenced surveyor. Nevertheless, the witness averred that a registered surveyor is authorized to undertake survey works.
43. It was the further testimony of the witness that same undertook the survey exercise and thereafter prepared the report before the court. In any event, the witness averred that the survey exercise was undertaken on the instruction[s] of the client.



44. Whilst under further cross examination, the witness averred that the client who gave instruction for purposes of survey was M/s Tradeline Investments Limited. In addition, the witness averred that the survey exercise was undertaken in the year 2023 and the survey report was also prepared in the year 2023.
45. Additionally, the witness averred that prior to undertaking the survey, same procured and obtained the relevant survey plan [R/R] from the Directorate of Survey.
46. With the foregoing testimony, the Plaintiff's case was duly closed.
47. The Defendant's case is premised on the evidence of two witnesses, namely; Mohamed Ali Hared and Joseph Mwangi Karanja. Same testified as DW1 and DW2, respectively.
48. It was the testimony of DW1 that same is the Defendant in respect of the instant matter. Furthermore, the witness averred that same has since recorded and filed a witness statement. To this end, the witness referenced the statement dated the 1<sup>st</sup> September 2024 and thereafter sought to adopt and rely on the witness statement as his evidence in chief.
49. The witness statement dated the 1<sup>st</sup> September 2024 was thereafter adopted and constituted as the evidence in chief of the witness.
50. Moreover, the witness adverted to the list and bundle of documents dated the 1<sup>st</sup> September 2024 and thereafter sought to tender and produce the Document[s] thereunder as exhibits before the court.
51. The production of the various documents was objected to by learned counsel for the Plaintiff. To this end, the court was called upon to render a ruling and thereafter the documents were admitted in evidence save for document[s] number 9 and 12, respectively, which were marked for identification.
52. Additionally, the witness testified that same has since filed a statement of defence and counterclaim dated the 1<sup>st</sup> September 2024. Furthermore, the witness also adverted to the verifying affidavit of even date. Thereafter, the witness sought to adopt and rely on the contents of the statement of defence and counterclaim.
53. On cross examination by Learned counsel for the Plaintiff, the witness averred that same resides, within the City of Nairobi. In particular, the witness averred that same resides on Plot number 214, Sosian Estate.
54. Whilst still under cross examination, the witness [DW1] averred that same purchased Plot number 212, Sosian Estate. Nevertheless, the witness averred that Plot number 212 and Plot number 214 relates to one and the same Plot.
55. It was the further testimony of the witness that Plots numbers 212 and 298 are different. Moreover, the witness averred that same has no claim[s] to and in respect of Plot number 298.
56. On further cross examination, the witness averred that the house wherein same resides stands on Plot number 298. For good measure, the witness reiterated that same resides, on Plot number 298.
57. Whilst still under cross examination, the witness averred that the plot on which same [DW1] resides does not have a certificate of title. Nevertheless, upon being shown a copy of the certificate of title [exhibit P2] the witness said that same is not aware whether the said certificate of title is lawful.
58. It was the further testimony of the witness that same was served with a demand notice by the Plaintiff. Furthermore, the witness averred that upon being served with the demand notice, same instructed his advocates on record to respond to the demand notice. In this regard, the witness averred that his



- advocates proceeded to and responded to the demand notice. To this end, the witness averred that the response to the demand notice has been tendered and produced before the court.
59. It was the further testimony of the witness that same purchased Plot number 212 from someone who had bought the plot from M/s Kiambu Dandora Farmers Company Limited. In addition, the witness testified that same has since tendered and produced a copy of the sale agreement.
  60. Whilst still under cross examination, the witness averred that same was issued with a share certificate and that the share certificate relates to Plot number 298. In any event, the witness averred that same has tendered and produced various documents before the court relating to the plot which he bought.
  61. On further cross examination, the witness averred that the documents which same has tendered and produced before the court touched on plot number 298. In any event, the witness added that the construction which same undertook is situated on Plot number 298.
  62. Furthermore, it was the testimony of the witness that by the time same was being served with the court order and the pleading[s] herein, the building in question was finished. In addition, the witness testified that same had already entered upon and was in occupation of the building.
  63. Nevertheless, the witness averred that same has not tendered and or produced a copy of the inspection card or the occupation certificate to demonstrate that the house was completed as alleged.
  64. The second witness, who testified on behalf of the Defendant was Joseph Mwangi Karanja. Same testified as DW2.
  65. It was the testimony of the witness [DW2] that same is a Director and shareholder of M/s Kiambu Dandora Farmers Company Ltd.
  66. The witness further testified that by virtue of being a Director and shareholder of M/s Kiambu Dandora Farmers company Ltd, same is therefore conversant with and knowledgeable of the facts of this matter. Furthermore, the witness has averred that same has since recorded a witness statement dated the 1<sup>st</sup> September 2024 and which witness statement same [DW2] sought to adopt and rely on as his evidence in chief.
  67. Suffice it to state that the witness statement dated the 1<sup>st</sup> September 2024 was thereafter adopted and constituted as the evidence in chief of the witness [DW2].
  68. Additionally, the witness adverted to the List and bundle of documents filed by and on behalf of the Defendant and which documents the witness adopted in furtherance of his witness statement.
  69. It was the testimony of the witness that the plot under dispute is well known to him. Furthermore, the witness averred that the plot in question arose from L.R No. 11379/3, which parcel of land belongs to and is registered in the name of M/s Kiambu Dandora Farmers Ltd.
  70. Moreover, the witness testified that the plot in question was originally plot number 212 in the Sub-division Scheme plan. However, the witness added that after forwarding the Sub-division Scheme for approval, the plot in question was assigned and became as Nairobi Block 173/214.
  71. It was the further testimony of the witness that the plot in question was previously sold to Fatuma Hammed Jama. In addition, it was averred that it is Fatuma Hammed Jama who thereafter sold the plot to the Defendant.
  72. The witness further testified that the plot in question arose from L.R No. 11379/3 which is registered in the name of M/s Kiambu Dandora Farmers Company Ltd.



73. It was the further testimony of the witness that the land which is being claimed by the Plaintiff was excised from L.R No. 11379/3 belonging to Kiambu Dandora.
74. On cross examination, the witness averred that same is conversant with and knowledgeable of Sosian Estate. Nevertheless, the Witness averred that same is not aware of any land owned by Amboseli Ltd.
75. Whilst still under further cross examination, the witness averred that same heard that the Plaintiff herein is claiming ownership of Plot number 298. However, the witness averred that the Plaintiff herein does not lawfully/legally own the suit property.
76. Regarding Survey Plan [F/R] number 383/70, the witness testified that same shows that the owner is Amboseli Court Ltd. Nevertheless, the witness added that same is not aware of how M/s Amboseli Court Limited acquired the land.
77. With the foregoing testimony, the Defendant's case was closed.
78. The advocates for the respective parties sought for leave to file and exchange written submissions. To this end, the court circumscribed the timelines for the filing and exchange of the written submissions.
79. The Plaintiff filed written submissions dated the 31<sup>st</sup> January 2025; and wherein the Plaintiff has canvassed three [3] salient issues, namely; that the Plaintiff herein is the lawful and legitimate proprietor of the suit property; that the Plaintiff is therefore entitled to exclusive occupation, possession and use of the suit property; and finally, that the Plaintiff is entitled to general damages assessed at Kenya 1, 000, 000/= only payable by the Defendant.
80. The Defendant filed written submissions and same has similarly highlighted three [3] key issues, namely; that the certificate of title bearing the name of the Plaintiff and which has been referenced by the Plaintiff is unlawful and illegal; that the Defendant is the lawful owner of plot number 212 [Nairobi Block/173/214]; and that the Defendant is entitled to the various reliefs sought at the foot of the counterclaim.
81. Having reviewed the pleadings filed by and on behalf of the parties as well as the evidence tendered [both oral and documentary], and upon consideration of the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the subject matter turns on three [3] key issues, namely; whether the Plaintiff has demonstrated/proven his entitlement to the suit property or otherwise; whether the Defendant has trespassed onto the suit property or otherwise; and what reliefs [if any] ought to be granted.
82. Regarding the first issue, namely; whether the Plaintiff has demonstrated/proved his entitlement to the suit property or otherwise, it is imperative to recall that the Plaintiff testified that what constitutes the suit property was hitherto part of L.R No. 15400/171, belonging to and registered in the name of Amboseli Court Ltd.
83. Moreover, the witness averred that Amboseli Court Limited entered into a land sale agreement with Tradeline Investment Limited and wherein Amboseli Court Limited sold to Tradeline Investments Limited various sub-plots arising from L.R No. 15400/171 [hereinafter referred to as the original parcel of land].
84. It was the further testimony of the Plaintiff that same was/is a Member and Shareholder of tradeline investment limited. Furthermore, the witness averred that Tradeline Investment Ltd bought/acquired the various sub-plots on behalf of her members and that thereafter the sub-plots were transferred to and in favour of the members. To this end, the Plaintiff averred that same was the beneficiary of plot number 298 and which plot upon registration became L.R No. 15400/470, which is the suit property.



85. It was the further testimony of the Plaintiff that the suit property is situate in between Plots numbers 297 and 299, respectively. In addition, the Plaintiff averred that the owners of plot numbers 297 and 299, respectively; have since constructed on their plots leaving the suit property as the only undeveloped plot.
86. Additionally, the Plaintiff testified that on or about the year 2023, the Defendant herein encroached upon and commenced to construct on the suit property, albeit without the permission, knowledge and consent of the Plaintiff. In this regard, it was averred that it became necessary to lodge a Complaint with inter-alia the City County Government of Nairobi.
87. It is imperative to state that the Plaintiff herein has since availed and adduced before the court documentation showing that what is now the suit property emanated from L.R No. 15400/171, which belonged to and was registered in the name of M/s Amboseli Court Ltd. Furthermore, documents have been availed to show that Amboseli Court Ltd sold various sub-plots excised from the original parcel of land and in favour of M/s Tradeline Investment Ltd.
88. On the other hand, evidence has also been tendered that what was hitherto sub-plot 298 was registered and thereafter assigned as L.R No. Nairobi Block 15400/470 [I.R No. 162475] and same was registered in the name of the Plaintiff.
89. Suffice it to underscore that the origin of the suit plot has been clarified by PW2, namely; Mr. Rodger Gachewa who testified that same is a Principal Land Surveyor attached to the Directorate of survey at Ruaraka-Nairobi. [See the survey plan exhibit P10].
90. Other than the testimony tendered by the Plaintiff, it was contended on behalf of the Defendant that the suit property was illegally excised from L.R No. 11379/3 belonging to and registered in the name of Kiambu Dandora Farmers Company Ltd.
91. Despite the testimony by the Defendant and one Joseph Mwangi Karanja [DW2] that the suit property was legally excised from L.R No. 11379/3, evidence abound that the suit property emanated from L.R No. 15400/171 and not otherwise.
92. Furthermore, even though both DW1 and DW2 contended that the certificate of title held by and on behalf of the Plaintiff was illegal and unlawful, no evidence was tendered and/or produced to show the foundation of [sic] the fraud alluded to by the Defendant.
93. Notwithstanding the foregoing, it is also not lost on this court that neither the Defendant nor DW2 has impleaded and/ or sued M/s Amboseli Court Ltd who hitherto owned L.R No. 15400/171, which birthed the suit property.
94. To my mind, the Plaintiff herein has tendered and placed before the court plausible, cogent and credible evidence to demonstrate the root of his certificate of title. Furthermore, it is also important to outline that the Plaintiff has a certificate of title whereas the Defendant's claim to the suit property is premised on [sic] equitable pieces of papers and not certificate of title.
95. Moreover, it is worthy to recall that the plot claimed by the Defendant is said to have arisen from L.R No. 11379/3; whereas the suit property traces its origin to L.R No. 15400/171.
96. In my humble albeit considered view, the Plaintiff has indeed established and demonstrated that same is the lawful and legitimate proprietor of the suit property. For coherence, the evidence tendered by and on behalf of the Plaintiff is clear, consistent and credible and thus same has demonstrated his entitlement to the suit property.



97. Pertinently, where a dispute arises touching on and concerning two parallel claims in respect of the same properties, then it behoves the disputants to place before the court clear, coherent and plausible evidence capturing the chain of events underpinning the certificate of title.
98. This is what has variously been referenced as demonstrating the root of the Certificate of Title, or better still, the root of Title. [See the case of Munyu Maina versus Hiram Gathiha Maina [2013]eklr]
99. In the case of Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016] KEELC 1092 (KLR), the court addressed the manner of interrogating the competing rights over title to Land and stated thus;
31. A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.
100. Likewise, the need for each of the disputants to clearly establish the root of his/her own title was also highlighted by the Court of Appeal in the case of Mas Construction Limited v Sheikh & 6 others (Civil Appeal E789 of 2023) [2025] KECA 349 (KLR) (28 February 2025) (Judgment), where the court held as hereunder;
68. It is an indisputable fact that the appellant and the Abduls claim ownership and/or title to the same parcel of land. This Court in Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School (Civil Appeal 64 of 2014) [2023] KECA 371 (KLR) (31 March 2023) (Judgment) stated as follows regarding a claim over the existence of two titles in respect of the same parcel land:
- The best evidence of ownership of immovable property is the title deed to it and that is why the question of the root of title is important. Root of title is the deed to which title to a property is ultimately traced to prove that the owner has good title. Accordingly, when there are competing interests as in this case, the parties are required to give evidence of title, starting with a "good root of title." A good root of title and an unbroken chain of ownership is required. To be a good root of title, a document must satisfy each of the following requirements:
- (a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question;
  - (b) it must contain a recognizable description of the property;
  - (c) it must not contain anything that casts any doubt on the title."



69. In the same vein, this Court in *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR held that:

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.”

101. Before departing from this issue, there is one more perspective that requires mention and a short discussion. The perspective touches on and concerns the Defendant's claim that what constitutes the Plaintiff's title is part of the land which belong[s] to M/s Kiambu Dandora, but which was improperly acquired.
102. In particular, the Defendant contended that the Plaintiff herein has not bought the suit property [Plot] from the rightful legal owners being Kiambu Dandora Farmers Company Limited and as such the Plaintiff's ownership claim is illegal and an attempt to encroach and invade the suit premises. [See paragraph 4 [j] of the statement of defence].
103. What I hear the Defendant to be contending is that even though the Plaintiff has a certificate of title, the land was not purchased from the legal owners thereof and hence the Certificate of title is invalid.
104. Be that as it may, it is worthy to recall and reiterate that the Plaintiff tendered evidence to demonstrate that the suit property was birthed by L.R No. 15400/171, whose title has never been impugned, set aside and/or invalidated.
105. To my mind, the contention by the Defendant herein is not only misconceived but same are also legally tenable. In any event, the documentation espoused by the Defendant are incapable of dislodging the certificate of title issued to and in favour of the Plaintiff.
106. Respecting the second issue, namely; whether the Defendant has encroached onto the suit property, it is important to underscore that the Defendant contended that same had bought and/or purchased plot number 212 Sosian Estate from Fatuma Hammed Jama.
107. Additionally, the Defendant contended that upon purchasing plot number 212 Sosian Estate, same was issued with various documents, including the sale agreement; share certificate and incidental documents.
108. It was the further testimony of the Defendant that even though same bought Plot number 212 Sosian Estate, the Plot in question was re-numbered and became Plot number 214. For good measure, the evidence of the Defendant as pertains to the conversion of Plot Number 212 to Nairobi Block 173/214 [plot 214] was corroborated by DW2.
109. Nevertheless, whilst under cross examination, the Defendant who testified as DW1 conceded that the construction complained of and which is the subject of the dispute beforehand stands on plot number 298, which is claimed by the Plaintiff.
110. For ease of appreciation, it is apposite to reproduce the pertinent aspects of the evidence of DW1 whilst under cross examination by Learned Counsel for the Plaintiff. Same stated as hereunder;

“The sale agreement is what I have tendered as defence exhibit before the court. The sale agreement does not relate to plot number 298. I do wish to state that I have produced a copy



of the share certificate before the court. The share certificate is at page 5 of my bundle of documents”.

111. Whilst still under cross examination, the witness [DW1] stated thus;

“The share certificate does not relate to plot number 298. I have produced the various documents before the court. I do confirm that the documents relates to plot number 298. I do confirm that I have no documents that touches on plot number 298”.

112. Moreover, DW1 proceeded to and stated thus;

“I wish to confirm that I undertook construction on the suit plot. I wish to state that the court order was brought to me after I have finished the construction of the house”.

113. My understanding of the testimony of DW1 is to the effect that same is admitting that the offensive construction is standing on plot number 298 [L.R No. 15400/470] belonging to the Plaintiff.

114. On the other hand, the Plaintiff testified that the entry upon the suit property and the incidental construction thereon by the Defendant was undertaken without his consent and/or permission. To this end, the Plaintiff contended that the impugned activities constitute trespass.

115. In my humble view, the Plaintiff has placed before the court cogent and credible evidence to demonstrate that the impugned actions indeed constitute trespass. [See Section 3 of the [Trespass Act](#), Chapter 294 Laws of Kenya.]

116. What constitutes trespass has also received various judicial pronouncement[s]. The Court of Appeal in the case of *Church Commissioners for Kenya of the Anglican Church of Kenya v Wayuga* (Civil Appeal 111 of 2018) [2024] KECA 1048 (KLR) (16 August 2024) (Judgment); spoke to and highlighted the meaning and tenor of what constitutes trespass.

117. For coherence, the Court stated thus;

53. Trespass is described under the [Trespass Act](#) Cap 294 to mean “any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof”.

On the other hand, a continuing trespass is defined in Jowitt’s Dictionary of English Law 2nd Edition (page or paragraph?) as follows:-

A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor’s land”.

In Black’s Law Dictionary 8th Edition (page or paragraph?), a continuing trespass is defined as:-

A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property.”



Finally, in Clerk & Lindsell on Torts 16th Edition, paragraph 23 - 01, it is stated that:-

Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.”

54. From the above definitions of the term “trespass” by the eminent learned authors, it is clear that any unauthorized entry whether present or continuous is trespass. In this case, it is indeed common ground that the appellant entered into and has remained in occupation of the suit property. The appellant’s continued occupation of the said property from the 1st date of entry in so far as it is unauthorized by the respondent amounts to trespass and remains as such to date. The respondent’s claim for trespass being a continued tort is, therefore, not time-barred. We find no fault with that finding by the trial court”.
118. At any rate, it is worth recalling that the Defendant himself has conceded and acknowledged that the offensive construction was undertaken on plot number 298 [L.R No. 15400/470] in respect of which same has no lawful documents to.
119. Without belabouring the point, I come to the conclusion that the Plaintiff has indeed established and proven that the Defendant has indeed encroached upon and trespassed onto the suit property.
120. Next is the question of what relief[s], if any, ought to be granted. Notably, both the Plaintiff and the Defendant have sought a plethora of reliefs touching on and concerning the suit property.
121. On behalf of the Plaintiff; a declaration that the Plaintiff is the lawful owner and proprietor of the suit property has been sought. Suffice it to state that whilst discussing issue number one [1], this court has found and held that the Plaintiff has placed before the court plausible, cogent and credible evidence that same is the lawful owner and proprietor of the suit property.
122. Flowing from the said finding, it is common ground that the Plaintiff is truly entitled to a declaration. To this end, I venture forward and decree that the Plaintiff is the lawful owner and proprietor of the suit property.
123. Moreover, the Plaintiff has also sought for an order of eviction of the Defendant from the suit property as well as an order of permanent injunction. Having found and held that the Plaintiff is the lawful and legitimate owner of the suit property, there is no gainsaying that the Plaintiff is thus entitled to the right of absolute and exclusive occupation, possession and use of the suit property. [See Section 24 and 25 of the *Land Registration Act*].
124. In addition, the scope of the rights of a land owner have equally been elaborated upon in a plethora of decisions. It suffices to mention just but a few.
125. In the case of Mohansons (Kenya) Limited v Registrar of Titles & 2 others [2017] KEELC 2730 (KLR), the court stated as hereunder;
- (18) As held by the Court of Appeal for East Africa held in Moya Drift Farm Ltd. v. Theuri (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property.



Spry, V-P at 116, considered the effect of section 23 of the Registration of Titles Act and held –

I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”

Sir William Duffus, P. *ibid* at p.117 agreed with Spry, JA as follows:

“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”

The third member of the Court, Lutta, JA agreed with the judgment prepared by the Spry, V-P.

126. Likewise, it suffices to adopt and reiterate the holding in the case of *Waas Enterprises Ltd v The City County of Nairobi* [2018]eKLR, where the court stated as hereunder;

To my understanding since the 2<sup>nd</sup> defendant has been in the suit property illegally, she is a trespasser. As a registered proprietor, the plaintiff is entitled to enjoy all proprietary rights to the exclusion of all others. This includes the right to exclusive possession of the suit land. The rights of a proprietor of land are set out in Sections 24 and 25 of the [Land Registration Act](#) which provide as follows :-

24. Subject to this Act—

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free



from all other interests and claims whatsoever, but subject—

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

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

It therefore follows from the above that only the plaintiff is entitled to enjoy proprietary rights over the suit land. The 2<sup>nd</sup> defendant had no right to the suit land. She must therefore vacate the suit land and hand over possession to the plaintiff. [Emphasis Supplied].

127. To my mind, the Plaintiff is entitled to the orders of eviction and permanent injunction as pertains to the suit property. Absent the orders of eviction and permanent injunction, the Plaintiff's rights to and in respect of the suit property shall be rendered illusory, otiose, redundant and useless, which should never be the case.
128. The Plaintiff herein has also sought for Mesne Profits at the rate of Kes. 50, 000/= only per month from November 2020 to date of eviction/handing over vacant possession. However, it is imperative to underscore that the claim for Mesne profits has neither been pleaded nor particularized in the body of the Plaintiff.
129. Additionally, it is worthy to state that other than the figure which has been sought for as part of the reliefs, the Plaintiff did not tender any documentary evidence to underpin the claim for Mesne profits. Suffice it to state that a claim for Mesne profits is akin to a claim for special damages and must therefore be particularly pleaded and strictly/ specifically proved. [See *Karanja Mbogua v Marybin Holdings Ltd* [2014]eKLR.] [See also *Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees* [2020] KECA 536 (KLR)].
130. The other relief that has been sought by the Plaintiff is general damages for trespass. Whilst dealing with the second issue, the court found and held that the Plaintiff has established the plea of trespass. Furthermore, it is common ground that trespass is actionable per se.
131. Simply put, a claimant who demonstrate and establishes trespass is entitled to recompense. However, the quantum of recompense depends on various and diverse factors, including the size of the land, the location thereof, the gravity of the acts complained of and the duration of trespass. [See *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] KECA 782 (KLR)] [See also the supreme court decision in *Attorney General v Zinj Limited (Petition 1 of 2020)* [2021] KESC 23 (KLR) (3 December 2021) (Judgment)].
132. Arising from the foregoing, I come to the conclusion that the Plaintiff is indeed entitled to recompense on account of general damages. To my mind, I would have awarded the sum of Kes. 5, 000, 000/= only



given the nature and gravity of trespass. However, the Plaintiff has sought for the sum of Kes.1, 000, 000/= only. [See paragraph 24 of the written submissions dated the 31<sup>st</sup> January 2025].

133. In the premises, I am constrained to and do hereby decree and award general damages in the sum of Kes.1, 000, 000/= only.
134. The Plaintiff also sought for special damages. However, the Plaintiff ventured forward and stated that the special damages sought shall be provided. Suffice it to state that the matter was heard and concluded before [sic] the special damages was provided.
135. The law as pertains to pleadings and proof of special damages is settled. Simply put, a claimant seeking to be awarded special damages must not only plead and particularize special damages, but same must also strictly prove the damages claimed. Furthermore, there is no gainsaying that such damages must be captured and particularized in the pleading [statement of claim] see *Superior Homes (Kenya) PLC v Water Resources Authority & 9 others (Civil Appeal E330 of 2020) [2024] KECA 1102 (KLR) (19 August 2024) (Judgment)*
136. The Defendant on his part sought for various reliefs, including a declaration that the suit property forms part of L.R No 11379/3. However, there is no evidence that the Defendant herein is the owner of L.R No. 11379/3, to warrant the Defendant making such a prayer.
137. Furthermore, the Defendant also sought for a declaration that same is the proprietor of Plot number 212 forming part of L.R No. 11379/3; held in trust for M/s Kiambu Dandora Farmers Company Ltd. However, it is crystal clear that Plot number 212 which the Defendant adverted to is non-existent. [See the evidence of DW2 when confirming that [sic] what was plot number 212 was re-numbered upon [sic] the approval of the sub-division scheme].
138. The other relief that has been sought for by the Defendant is a declaration that L.R No. 11379/3 belongs to Kiambu Dandora Farmers Company Ltd and that same is held by the said Company for and on behalf of its members.
139. Without belabouring the point, it is common knowledge that a claim for and on behalf of the company can only be mounted by the company itself. In this regard, the Defendant who is purporting to procure orders on behalf of Kiambu Dondora Company Ltd is devoid of locus standi. In any event same is a busybody. [See *Omondi v National Bank of Kenya [2001]eKLR*] [See also *Salmond v Salmond [1897] AC 22*].
140. Additionally, the Plaintiff has sought an order of permanent injunction. Suffice it to state that an order of permanent injunction would ordinarily issue to protect the rights and interest of the registered owner/proprietor of the land. However, in respect of the instant matter, it has been shown that the Defendant is not the registered owner and/or proprietor of the suit property.
141. Can the Defendant procure and obtain an order of permanent injunction? I am afraid that the Defendant herein who is not the registered owner of the suit property cannot by any stretch of imagination procure an order of permanent injunction.
142. In any event, it is common knowledge that an order of permanent injunction cannot issue and/or be granted against the registered owner and/or proprietor of the designated property. For coherence, the issuance of such an order, will no doubt negate the import and tenor of Sections 24 and 25 of the [Land Registration Act, 2012](#).



143. Moreover, the Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR), addressed the issue and stated 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.

144. Next is the claim pertaining to Mesne profits. Suffice it to state that Mesne profits is only claimable by and awarded to the registered owner or leaseholder, who has been deprived of the benefit of the designated landed property. [See the decision of the five Judge bench of the court of appeal in the case of Embakasi Properties Limited & another v Commissioner of Lands & another [2019] KECA 1001 (KLR)]

145. Finally, the Defendant sought for punitive damages. It is not clear on what basis the Defendant is seeking for punitive damages. In any event, it is common ground that punitive damages can only issue in circumscribed instances, subject to proof of aggravating factors. [See the decision in Municipal Council of Eldoret v Titus Gatitu Njau [2020]eKLR] [See also Christine Nyanchama Ohanda v The Catholic Diocese of Homa Bay Registered Trustees [2020] KECA 536 (KLR)].

146. Sadly, the Defendant has neither established nor proved a basis to warrant the award of [sic] punitive damages.

**Final Disposition:**

147. Flowing from the analysis [which have been enumerated in the body of the Judgment], it is crystal clear that the Plaintiff herein has duly established and proved his claim to and in respect of the suit property.

148. On the contrary, the Defendant has neither established nor proved his claim to Plot number 212 Sosian Estate. If anything, the Defendant acknowledged and admitted in the course of his cross examination that the offensive construction was undertaken on Plot number 298 [L.R No. 15400/470] and not on Plot 212.

149. In the premises, the final orders that commend themselves to the court are as hereunder;

- i. A declaration be and is hereby issued that the Plaintiff is the lawful and legitimate owner of all that parcel of land known as L.R No. 15400/470 [I.R No. 162475] or better still known as Plot number 298 Amboseli Court.
- ii. The Defendant be and is hereby ordered to vacate and hand over vacant possession of the suit property within 120 days from the date hereof.
- iii. The Defendant shall also undertake the requisite process to remove and/or demolish the offensive construction erected on the suit property within the same timelines, namely, 120 days from the date hereof.
- iv. In default by the Defendant to vacate and hand over vacant possession of the suit property in terms of clause [ii] and [iii] hereof, the Plaintiff shall be at liberty to evict the Defendant and in this regard, an eviction order shall issue.
- v. In the event of eviction being issued and/or levied by the Plaintiff, the costs if any, incurred by the Plaintiff shall be certified by the Deputy Registrar and thereafter same shall be recovered from the Defendant.



- vi. An order of permanent injunction be and is hereby issued to restrain the Defendant from re-entering upon, remaining on and/or otherwise dealing with the suit property in any manner whatsoever and/or howsoever.
- vii. The Plaintiff herein be and is hereby awarded General Damages of Kes. 1, 000, 000/= only.
- viii. The Defendant's counterclaim be and is hereby Dismissed.
- ix. Costs of the suit and the counterclaim be and are hereby awarded to the Plaintiff.
- x. Any other relief[s] not expressly granted is hereby declined.

150. It is so ordered.

**DATED SIGNED AND DELIVERED AT NAIROBI ON THE 24<sup>TH</sup> DAY OF MARCH, 2025.**

**OGUTTU MBOYA**

**JUDGE.**

In the presence of.

Mr. Benson/Mutuma – Court Assistant

Mr. Kimamo for the Plaintiff

Mr. Odera Were; Mr. Omar and Mr. Hussein for the Defendant.

