



**Njue v Matiabe & 3 others (Environment & Land Case E050 & E010 of 2021
(Consolidated)) [2023] KEELC 17361 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17361 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E050 & E010 OF 2021 (CONSOLIDATED)**

JO MBOYA, J

MAY 11, 2023

BETWEEN

MORRIS GITONGA NJUE PLAINTIFF

AND

FESTUS MATIABE 1ST DEFENDANT

MICHAEL KIBATHI MUGIA 2ND DEFENDANT

ROSEMARY MUTHOSI 3RD DEFENDANT

CHARLES WANGARI MATHEGE 4TH DEFENDANT

JUDGMENT

1. The Plaintiff herein has approached the Honourable Court seeking various reliefs pertaining to and in respect of LR No Nairobi/ Block63/743, (hereinafter referred to as the suit Property). For ease of reference, the Plaint is dated the February 15, 2021; and same has articulated the following Reliefs:
 - i. An order of Permanent Injunction to restrain the Defendants by themselves, their servants and/or agents from doing any of the following acts that is to say, entering, taking possession of, erecting structure, carrying out business and trespassing on all that Property known as; LR No Nairobi/Block 63/743 and from harassing or interfering with the Plaintiff's quite possession and use of the suit property.
 - ii. An order of Mandatory Injunction compelling the Defendants, their servants, employees and/ or agents to forthwith remove all illegal structures and any Equipments, or Personal effects dumped or stored and vacate the Plaintiff's parcel of land being LR No Nairobi/Block 63/743.
 - iii. General damages for Trespass.
 - iv. Costs.



- v. Any or further reliefs that this Honourable court may deem fit and just to grant.
2. Upon being served with the Plaint and Summons to enter appearance, the Defendants herein duly entered appearance and thereafter filed a Statement of Defense and counterclaim. In respect of the counterclaim, the Defendants/Counter-claimers have sought for a plethora of reliefs, to wit;
- a. A Declaration that Jamuhuri Jua Kali Group is entitled to the entire title, possession, occupation and transfer of the property, namely, LR No Nairobi/Block/63/743 by way of adverse possession on account of continuous and uninterrupted possession thereof for over 25 years since the year 1994.
 - b. A Declaration that the title to the land parcel No LR No Nairobi/Block/63/743 has been extinguished by the adverse possession of the members of the Jamuhuri Jua Kali Group thereof for a period of more than 12 years in terms of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.
 - c. A Declaration that the property, LR No Nairobi/Block/63/743 if registered in the names of the Defendants is held by the Defendants on trust for Jamuhuri Juakali Group Members.
 - d. A Declaration that the property LR No Nairobi/Block 63/743, if registered in the names of the Defendant be canceled and transferred to the Plaintiffs/ Counter-claimers name; as the Jumuhuri Juakali Group has acquired the title to the suit property by adverse possession.
 - e. An order directing the Defendant to execute and deliver to Jamuhuri Juakali Group within 10 days, a transfer of Property LR Nairobi/Block 63/743 as the absolute proprietor together with the original title of the property, procure, execute and deliver all documents necessary to confer title of the property to the Plaintiff's, free from an encumbrance, failing which the deputy registrar of the high court should execute the transfer.
 - f. An order that the Land Registrar be directed that the order herein shall be an Instrument of Transfer of ownership of the suit land from the Defendant to Jamuhuri Jua kali Group.
 - g. An order be issued restraining the Defendants whether by themselves, agents, servants or otherwise, howsoever from interfering with Jamuhuri Juakali Group and/or their servants and members access to, quiet possession, accessing, advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning, subdividing and/or otherwise dealing with the property, namely, LR No Nairobi/Block 63/743.
 - h. A Declaration that the Defendant is not entitled to enter or use a portion of the Plaintiff's land and where necessary, an injunction do issue restraining the Defendant whether by himself or servant or otherwise howsoever in entering or using the said land.
 - i. The Costs of the suit together with Interests thereon for such period and at such rate the Honourable court may deem fit.
 - j. Any such other or further reliefs as this Honourable court may deem fit to grant.
3. Other than the Statement of Defense and Counter-claim, (whose details have been enumerated in the preceding paragraph), the Defendants herein also took out an originating summons dated the 26th February 2021 vide ELC No E010 of 2021 and in respect of which, same sought similar reliefs as the ones contained at the foot of the counter-claim.



4. On the other hand, upon being served with the Originating summons, the Plaintiff herein responded thereto by filing a Replying affidavit sworn on the October 7, 2021; as well as various documents which were attached thereto.
5. Owing to the fact that the issues espoused vide the Complaint, Defense and counter-claim; and the originating summons, were the same and/or substantially similar, the Honourable court ordered and directed that the suit and the originating summons be consolidated. For clarity, the order pertaining to consolidation was made on the October 12, 2021.
6. Subsequently, the Parties herein duly complied with the pre-trial directions, including the filing and exchange of the List and Bundle of documents; as well as the requisite witness statements. Invariably, upon due compliance, the matter was thus ready and ripe for hearing.

Evidence by the parties

a. Plaintiff's case:

7. The Plaintiff's case revolves around the Evidence of Morris Gitonga Njue; who testified as PW1.
8. It was the testimony of the witness that same bought and purchased LR No Nairobi/Block 63/743 from one Mr Ochieng and thereafter the suit property was duly transferred to and registered in his name. In addition, the witness averred that same was thereafter issued with a Certificate of lease, a copy of which same produced before the Honourable Court.
9. Furthermore, the witness averred that upon the purchase, transfer and ultimate registration of the suit property in his name, same entered upon and took possession of the suit property until on the December 6, 2018; when the Defendants herein invaded the suit property and engaged in various acts of wanton destruction.
10. It was the further testimony of the witness that during the time when he was in possession of the suit property, same fenced the entire property using Iron sheet. However, the witness testified that the fence which he had put in place was damaged and pulled down by the Defendants herein.
11. Additionally, the witness testified that as a result of the offensive activities by and on behalf of the Defendants, he was constrained to and indeed commenced civil proceedings vide Milimani CMELC No 10786 of 2018, wherein same sought for various reliefs, *inter-alia*, an order of Permanent Injunction.
12. On the other hand, the witness added that upon the filing of the said suit, same sought for and obtained an order of temporary injunction. In this regard, the witness averred that the order was duly extracted and served upon the Defendants.
13. Nevertheless, the witness testified that subsequently, the civil suit which same had filed before the Chief Magistrate's court was struck out on account of want/ lack of pecuniary Jurisdiction.
14. Further, the witness testified that following the striking out of the suit before the Chief Magistrate's court, same was constrained to and indeed filed the instant suit. In addition, the witness averred that the suit property lawfully belongs to him and hence same is entitled to vacant possession, occupation and use.
15. Other than the foregoing, the witness alluded to the Witness statement dated the February 25, 2021; and sought to adopt and rely on same. In this regard, the witness statement dated the February 15, 2021, was duly adopted and admitted as Evidence in chief.



16. In addition, the witness also referred to the List and Bundle of documents dated the February 15, 2021. In this respect, the witness sought to adopt and rely on the named documents and hence implored the Honourable court to admit same as Exhibits. Suffice it to point out that the documents contained at the foot of the List dated the February 15, 2021, were thereafter adopted and admitted as exhibits P1 to P4 respectively.
17. Furthermore, the witness also alluded to the Replying affidavit sworn on the October 7, 2021, in respect of the originating summons filed by the Defendants; and sought to adopt the contents of the Replying affidavit as further Evidence in chief. In this regard, the Replying affidavit sworn on the October 7, 2021 was duly admitted as further evidence of the Plaintiff.
18. Similarly, the witness sought to adopt a further witness statement dated the 3rd of November 2021. For coherence, the said witness statement was duly admitted as evidence on behalf of the Plaintiff.
19. On cross examination, the witness stated that same bought and acquired the suit property from the original allottee. In addition, the witness averred that he bought the suit property in the year 2000.
20. Furthermore, the witness testified that the previous owner of the suit property was one Mr Ochieng, to whom he paid the entire purchase price/ consideration amounting to Kes.600, 000/= only.
21. Whilst still under cross examination, the witness averred that upon purchasing the suit property, same entered upon, took possession and indeed fenced the suit property. In addition, the witness clarified that the Defendants herein invaded and encroached upon the suit property in the year 2018.
22. On the other hand, the witness averred that when the Defendant entered on to and invaded the suit property, same damaged and removed the fence which had been erected round the suit property. Nevertheless, the witness contended that the Defendants herein do not have any lawful or legitimate rights to and in respect of the suit property.
23. On re-examination, the witness pointed out that he is the one who has the certificate of lease over the suit property. In any event, the witness added that his certificate of lease has never been impugned, challenged or canceled.
24. With the foregoing testimony, the Plaintiff's case was closed.
 - b. The Defendants' Case:
25. The Defendants' case gravitates on the evidence of one Lucas Ochieng, who testified as DW1. For clarity, the witness herein also added that he is the 5th Defendant; and further that same has the authority of the rest of the Defendants to testify on their behalf.
26. In addition, the witness averred that he is a member of Jamuhuri Juakali Group which a self-help group/project duly registered by the Ministry of Gender, Children and Social Development.
27. Furthermore, the witness testified that the organization, namely, Jamuhuri Juakali Group has been operating its garage activities and thus been in occupation and possession of the suit property for more than 26 years. In any event, the witness added that the organization has been on the suit property since 1994.
28. On the other hand, the witness testified that the members of the Group entered upon the suit property peacefully and without force, fraud, mistake and/or collusion. Further, the witness added that the entry of the members of the group onto the suit property was without the permission of the registered owner thereof.



29. Other than the foregoing, the witness testified that the occupation, possession and use of the suit property has been notorious and interrupted. In this respect, the witness also averred that other than the Group members using the suit property for their garage, same have also constructed various premises on the suit property, which have been rented out to other business persons.
30. Additionally, the witness testified that the Group Members have been in occupation of the suit property and that their occupation has never been interrupted, save for an attempted interruption, arising from an order which was procured by the plaintiff herein vide Milimani CMCELC 10786 of 2018. However, the witness added that the purported interruption came after more than 24 years.
31. It was the further evidence of the witness that owing to the duration of their occupation, possession and use of the suit property, the Defendants herein through Jamuhuri Juakali Group have acquired prescriptive rights/ Adverse possessory Rights over and in respect of the suit property.
32. Notwithstanding the foregoing, the witness further testified that the Group members do not acknowledge the Plaintiff's title to the suit property and have not given possession to the Plaintiff. Furthermore, the witness averred that the Group members do not intend to vacate and or grant vacant possession to the Plaintiff herein.
33. Further, the witness also testified that if the suit property is registered in the name of the Plaintiff, then the Plaintiff is holding the suit property on Trust for the Group members, who have been in occupation and possession of the suit property for more than 26 years. In this regard, the witness contended that the Plaintiff suit ought to be dismissed.
34. Other than the foregoing, the witness alluded to the Witness statement dated the March 2, 2022; and sought to adopt and rely on the contents thereof. In this regard, the witness statement dated the March 2, 2022 was adopted and admitted as Further Evidence in chief of the witness.
35. Furthermore, the witness also alluded to the List and Bundle of documents dated the March 2, 2022; containing Four (4) sets of documents. In this regard, the witness sought to adopt and rely on the documents, which were duly admitted and marked as Defense Exhibits 1 to 4, respectively.
36. On the other hand, the witness also referred to the Originating summons dated the February 26, 2021; and sought to adopt the contents thereof. In addition, the witness also relied on the supporting affidavit attached to the originating summons.
37. On cross examination, the witness stated that same has filed a Counter-claim to represent Jamhuri Juakali Association. Further, the witness added that he has the authority of the association to file the Counter-claim.
38. Whilst still under cross examination, the witness however stated that same has not filed the authority of the association before the Honourable court. On the other hand, the witness has pointed out that he has filed a List of the names of the persons who have authorized him to file the case.
39. It was the further testimony of the witness that the association known as Jamuhuri Juakali Association was only registered on the May 6, 2013. In this regard, the witness clarified that the association was thus 9 years old. Furthermore, the witness also admitted that going by the certificate of registration, it is evident that the association has not attain 12 years.
40. In addition, the witness acknowledged that he is aware that the Plaintiff herein had filed a previous suit in the year 2018, wherein same procured and obtained orders of temporary injunction.



41. In answer to a question pertaining to the validity of the Plaintiff title, the witness herein contended that the certificate of lease held by the Plaintiff and in respect of the suit property is Fraudulent. In addition, the witness averred that the Plaintiff's title is doubtful.
42. Notwithstanding the foregoing, the witness admitted that he is not an official of the association. However, the witness added/ averred that he is a member of the association; and that he has been authorized by the rest of the Members to file the Counter-claim.
43. On re-examination, the witness reiterated that Jamuhuri Juakali Association has officials. Nevertheless, the witness clarified that he is not one of the officials.
44. Furthermore, the witness also stated that the Plaintiff does not have a lawful title to the land, namely, the suit Property herein. In addition, the witness contended that the certificate of title held by the Plaintiff is fraudulent.
45. With the foregoing testimony, the Defendants' case, inclusive of the counter-claim was closed.

Submissions By The Parties

a. Plaintiff's Submissions

46. The Plaintiff filed submission dated the March 6, 2023; and wherein same has highlighted three issues for consideration and ultimate determination by the Honourable court.
47. Firstly, learned counsel for the Plaintiff has submitted that though the Defendants herein have alluded to fraud in respect of the certificate of lease held by the Plaintiff, same have however not tendered any cogent, credible or believable evidence to prove the claim of fraud and illegality.
48. In addition, learned counsel for the Plaintiff has submitted that it is not enough to make wild allegations touching and concerning fraud without any evidence. In this regard, counsel emphasized that it behooved the Defendants to place before the Honourable court proof of the contention based on fraud.
49. In support of the submissions touching on and concerning the aspect that fraud has not been established and/ or demonstrated; Learned counsel has cited and relied on, *inter-alia*, the case of *RG Patel v Laiji Makanji* (1957) EA 314 and *Mutsonga v Nyati* (1984) KLR 425, respectively.
50. Secondly, the Learned counsel for the Plaintiff has submitted that Jamuhuri Juakali Association Group, which is alleged to have acquired adverse possession/ prescriptive Rights over and in respect of the suit property; was only registered on the May 6, 2013. Consequently, learned counsel has contended that insofar as the Association was registered on the May 6, 2013, there is no way that same can be said to have been in occupation, possession and use of the suit property for more than 12 years (sic) to warrant a claim for adverse possession.
51. Furthermore, learned counsel has also submitted that even if the group had been in existence for more than 12 years, (which is not the case), a suit for and on behalf of association can only be commenced and maintained by the Officials of the Association, duly authorized under *the constitution* thereof.
52. However, learned counsel added that the Defendants herein, inclusive of the witness are not the officials or (sic) of the Association. In this regard, counsel thus contends that the claim by and on behalf of the Association is therefore a nullity ab initio.



53. In support of the submissions that a suit by and on behalf of an Association can only be commenced by the officials thereof, learned counsel has cited and relied on the case of *Peter Kanuna & Others v Kikuyu District Soup Development Association & Another* (2020)eKLR.
54. Thirdly, learned counsel for the Plaintiff has submitted that a claim for adverse possession cannot be maintained and/or sustained, where the Defendants are challenging the validity and legality of the Plaintiff's title. For clarity, counsel has pointed out that whoever seeks to procure an order of Adverse possession; must concede and acknowledge the title of the registered owner.
55. Owing to the fact that the Defendants herein have challenged the validity and legality of the Plaintiff's title, counsel has thus pointed out that the substratum/ gravamen of the claim founded on adverse possession has thus been destroyed.
56. In support of the submissions relating to the claim for adverse possession, learned counsel for the Plaintiff has cited and relied on, *inter-alia*, the case of *Mtana Lewa v Kabindi Ngala Mwangandi* (2015)eKLR, *Chevron Kenya Ltd v Harrison Charo Wa Sbutu* (2016)eKLR and *Kasure v Mwaani Investment Ltd & 4 Others* IKLR 184, respectively.
57. In addition, learned counsel has also submitted that even assuming that the Defendants herein had acquired adverse possessory rights over and in respect of the suit property, (which is not the case), then such a claim was interrupted by the order of temporary injunction which was issued by the chief magistrate court on the 22nd of January 2019 and which order, interrupted the occupation and possession of the suit property by the Defendants.
58. Based on the foregoing submissions, learned counsel for the Plaintiff has therefore contended that the Defendants have not acquired any adverse possessory rights over and in respect of the suit property. Contrarily, counsel has contended that the suit property lawfully belongs to the Plaintiff and hence same is entitled to vacant possession, occupation and use.
 - b. The Defendants' Submissions:
 59. The Defendants filed submission dated the March 27, 2023; and in respect of which same has raised, highlighted and canvassed two issues for consideration by the Honourable court.
 60. Firstly, learned counsel for the Defendants has submitted that the 5th Defendant herein, namely, Lucas Ochieng, was duly authorized and mandated to institute the proceedings by the Members of Jamuhuri Juakali Group. In this regard, learned counsel has invoked and referred to the List containing the names of various members which was filed together with the Defense and Counter-claim.
 61. Furthermore, learned counsel for the Defendants has also submitted that it is not mandatory that a suit for an on behalf of an association must only be filed by the officials of the Group. In this regard, counsel has added that such a suit can be filed by any Member or members with the authority of the rest of the members.
 62. In support of the contention that a suit on behalf of an Association, like the one beforehand, can be filed by the Members or a member, albeit, with the authority of the other members, Learned counsel has cited and relied on, *inter-alia*, the case of *Jones Muvuti Kisiyula & 2 Others v Harron Gikonge Nyakundi & 11 Others* (2018)eKLR; and *Wilfred Juma Wasike & 11 Others v The Ministry of Interior and Co-ordination & Another* (2022)eKLR, respectively.
 63. Secondly, learned counsel for the Defendants has submitted that the claim by and on behalf of Jamuhuri Juakali Group, premised on adverse possession has been duly established and proved. In this



regard, learned counsel has submitted that the members of the group have tendered evidence that same have been in occupation of the suit property ever since the year 1994.

64. Furthermore, learned counsel has submitted that having entered onto the suit property on or about the year 1994, the Members of the Group have thus been in occupation and possession of the suit property for more than 12 years, albeit without any interruption or disturbance by anyone, the Plaintiff herein not excepted.
65. In view of the foregoing, learned counsel for the Defendants has therefore contended that the Defendants have established and demonstrated a sufficient cause and basis to warrant a finding in their favor.
66. To underscore, the claim based on adverse possession, learned counsel for the Defendants has cited and relied on a plethora of cases, *inter-alia*, [Kasuve v Mwaani Investment Ltd & 4 Others](#) 1KLR, 184, [Wilson Njoroge Kamau v Nganga Mucheru Kamau](#), (2020)eKLR, [Stephen Mwangi Gatuge v Edwin Onesmus Wanjau \(Suing in Her Capacity as the Administrator of the Estate of Kimingi Wariera \(deceased\)\)](#) (2022)eKLR, [Sisto Wambugu v Njuguna \(1993\)eKLR and Joseph Gabumi Kiritu v Lawrence Munyambo Kavura](#) Civil Appeal No 20 of 1993 (unreported).
67. Furthermore, learned counsel for the Defendants has also submitted that the fact that the Association/ Group was only registered on the 6th of May 2013; does not disentitle the Members of the Association from staking a claim premised on adverse possession. In this respect, counsel has contended that the members of the Association could very well have entered onto and taken possession of the Land long before the Association was registered.
68. In addition, learned counsel has added that the evidence tendered by DW1 showed and established that the Defendants, who are Members of the Association had been in occupation of the suit property since 1994. Consequently, counsel pointed out that the subsequent registration of the Association does not therefore disentitle the Members from staking a claim for adverse possession.
69. In support of the foregoing submissions, learned counsel has cited and relied on, *inter-alia*, the case of [Shadrack Mwamuu Nzioka & 2 Others \(suing on their behalf as officials of Crescent Self-help Group v Tropical blooms\)](#) (2020)eKLR, [Jones Mavuti Kisyula & 2 Others v Harron Gekonge Nyakundi & 11 Others](#) (2018)eKLR and [Mbaru Johnson & 9 Others v Taveta Teachers Investment Ltd](#) (2019)eKLR, respectively.
70. In the premises, learned counsel for the Defendant/counter-claimers has therefore contended that the Defendants as members of Jamuhuri Juakali Association, have been able to prove, demonstrate and establish their claim to the suit property on the basis of adverse possession. Invariably, counsel has thus implored the court to grant the reliefs contained at the foot of the Counter-claim, as well as the Originating Summons.

Issues for determination

71. Having reviewed and evaluated the Pleadings filed by the Parties, the oral evidence tendered and ultimately the written submissions filed on behalf of both Parties; the following issues do arise and are thus pertinent for determination.
 - i. Whether the Plaintiff is the lawful and registered proprietor of the suit property; and if so, whether same is entitled to vacant possession, to the exclusion of the Defendants?
 - ii. Whether the Defendants herein have established and proved a claim for adverse possession or otherwise.



iii. What Reliefs ought to be granted.

Analysis and determination

Issue number 1

Whether the Plaintiff is the lawful and registered proprietor of the suit property; and if so, whether same is entitled to vacant possession thereof, to the exclusion of the Defendant?

72. The Plaintiff herein tendered evidence and averred that same bought/purchased the suit property from one Mr Ochieng, on or about the year 2000. Further, the Plaintiff also testified that same proceeded to and indeed paid the purchase price/consideration in full.
73. Furthermore, it was the Plaintiff's testimony that the sale transaction between himself and Mr Ochieng, who was the vendor, culminated into the transfer and ultimate registration of the suit property in his name. In this regard, the Plaintiff tendered and produced before the Honourable court a copy of Certificate of lease bearing his name as the registered owners thereof.
74. Though the Defendants had alleged and contended that the transfer and registration of the suit property in the name of the Plaintiff was informed by fraud and illegality, no credible evidence was placed before the Honourable court, other than the mere allegations adverted to in the counterclaim and particulars alluded to therein.
75. Suffice it to point out that a Party who is keen to propagate a claim or defense of fraud or illegality, is not only called upon to particularly plead such a claim; but also to supply the Honourable court with cogent, credible and verifiable evidence in proof of the particulars cited and alluded to.
76. In respect of a claim/defense founded on fraud, the position of the law is now trite, established and hackneyed. Invariably, the decision in the case of *Kuria Kiarie v Sammy Magera* (2017)eKLR would suffice.
77. For coherence, the Court of Appeal stated and held as hereunder;

25. The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." [Emphasis added].

78. Furthermore, the position as pertains to a claim of fraud as well as the requisite standard of proof attendant thereto, was also adverted to and succinctly illuminated upon in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR, where the Honourable Court expressed itself as follows;-

"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him.

Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof



upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

79. Clearly, if the Defendants herein were keen to propagate the claim and contention that the Plaintiff herein procured and obtained the title to the suit property by fraud and illegality, then it behooved the Defendants to place before the Honourable court credible evidence in proof of the various particulars that were alluded to and contained in the body of the Defense and Counter-claim.
80. Without belaboring the point, it is imperative to state that it is not enough for any claimant, the Defendants herein not excepted, to throw on the face of the court various allegations of fraud and illegality; and thereafter imagine that the mere mention of the word “fraud and illegality”, coupled with some fanciful particulars would suffice. Certainly not.
81. Notwithstanding the foregoing, it is also important to point out that the Defendants herein had neither been registered as the owners nor proprietors of the suit property and hence it is impossible to , nay, apprehend on what basis the plea of fraud and illegality, is premised.
82. Be that as it may, the Plaintiff on his part, was able to place before the Honourable court evidence of a certificate of lease, showing that same is the lawful and registered proprietor of the suit property.
83. Premised on the certificate of title, it is imperative to state and observe that the issuance of such certificate of title, is prima facies evidence of ownership, unless there is Evidence of Fraud, Illegality or impropriety, to defeat the same. In this regard, the provisions of Section 24 and 25 of The [Land Registration Act](#), 2012, are imperative.
84. In addition, it is also important to recall that the person in whose favor a certificate of lease/title has been issued is obliged to partake of and benefit from the rights and interests attendant to such ownership. Consequently, on the basis of certificate of title herein, there is no gainsaying that the Plaintiff ought and should be entitled to enjoy the rights and privileges arising therefrom, unless good cause is shown, which is not the case herein.
85. To underscore the extent of rights, interest and privileges that accrue to the holder of a certificate of title, it is imperative to take cognizance of the decision of the Court of Appeal in the case of [Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others](#) [2019] eKLR, (Per Ouko PCA) where it was stated and held 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 Moiwo 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 PC 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.

86. From the foregoing, it is imperative to underscore that the rights of a title holder, (the Plaintiff herein not excepted), can only be vitiated, if it is proved and established that registration of the property in his name was procured by fraud, misrepresentation and /or on account of some illegality. However, such a claim must be established and proved.
87. Other than the foregoing, the issuance of a certificate of title vests in the registered owner inviolable rights over and in respect of designated property and thus his rights thereto are statutorily insulated and constitutionally sanctioned, as espoused and entrenched in Article 40 of [the Constitution 2010](#).
88. Furthermore, the sanctity of the certificate of title, which was procedurally and legally acquired, was underscored by the court in the case [Ocean View Plaza v The Attorney General](#) (2002)eKLR, where the Honourable court stated and held as hereunder;

Allotment of land to a citizen or others protected under [the Constitution](#), which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under Land Acquisition Act. It is not in evidence that such procedure was followed. Indeed it is categorically denied that the provisions of the said Act were applied to the pieces of land the subject of this case.

89. In my humble albeit considered view, the Plaintiff has placed before the Honourable court credible and believable evidence that same is the lawful, legitimate and registered proprietor of the suit property; and thus same deserves to enjoy the rights, interests and privileges provided for and established by dint of Sections 24 and 25 of the [Land Registration Act, 2012](#).

Issue number 2

Whether the defendants herein have established and proved a claim for adverse possession or otherwise.

90. The Defendants herein had previously filed an originating summons dated the February 26, 2021; and in respect of which same contended that Jamuhuri Juakali Group had acquired adverse possessory rights over and in respect of the suit property.
91. On the other hand, the Defendant herein also filed a Defense and Counter-claim and at the foot of the counter-claim had contended that the suit property has been acquired by the Defendants by operation of law; and on the basis of the doctrine of adverse possession.
92. In the course of his testimony, DW1 averred that the Defendants herein and members of the Group entered onto and commenced occupation of the suit property in the year 1994. Further, DW1 added that the members of the Group have remain in occupation and possession of the suit property for more than 26 years.



93. Additionally, DW1 testified that by the time the Plaintiff procured and obtained the certificate of title over and in respect of the suit property, the Defendants and members of the Group were already in occupation, possession and were using the suit property.
94. On the other hand, the witness added that the occupation and possession of the suit property by the Defendants and members of the Group has been continuous, uninterrupted and open. In short, the witness contended that their occupation had attained due publicity and notoriety.
95. Nevertheless, in the course of his cross examination DW1 stated as hereunder;
- “I do confirm that the Plaintiff have a fraudulent certificate of title. I dispute the title which the Plaintiff has”.
96. On re-examination, DW1 stated;
- “I wish to add that the Plaintiff does not have a lawful title to the land. If he has a title, we have not seen the same. In any event, that title is fraudulent”.
97. From the evidence tendered by DW1, what becomes evident and apparent is that the Defendants are contesting the validity, legality and propriety of the Plaintiff’s title. Simply put, the Defendants have neither acknowledged nor admitted that the Plaintiff is the lawful and legitimate owner of the suit property.
98. Notwithstanding the foregoing, it is also important to revert to the contents of the counter-claim and Defense, which was filed by and on behalf of the Defendants. Notably, paragraphs 13 and 16 of the Statement of Defense and counterclaim adverts to particulars of fraud and illegality and misrepresentation attendant to the procurement of the certificate of title by the Plaintiff.
99. In the premises, the question that does arise that the Honourable court must grapple with; is whether the Defendants herein, who are challenging the validity of the Plaintiff’s title, can in the same vein also stake a claim premised on adverse possession.
100. My understanding of the Doctrine of adverse possession is that the claimant (the person contending to be in adverse possession) must first and foremost concede to, acknowledge and admit the title of the owner of the property which is in question. Indeed, the doctrine of adverse possession is hinged on the provisions of Section 7, 13, 17, 37 and 38 of the *Limitations of Actions Act*, Chapter 22 Laws of Kenya.
101. However, in this respect, the Defendants themselves are contending that same are the lawful owners of the suit property save for the fraud, illegality and misrepresentation applied by the Plaintiff, culminating into the issuance of the certificate of title in his name.
102. In my humble view, the moment the person claiming adverse possession contests and impugns the validity of the registered proprietors title, the claim for adverse possession is defeated and thus becomes legally untenable. In such a situation, the claimant is at liberty to pursue a cause of action for fraud or better still, trust, which causes of action are antithetical to and cannot co-exist with a claim for adverse possession.
103. To buttress the position that one cannot implead fraud and adverse possession or better still trust and adverse possession in the same cause of action; it is instructive to take cognizance of the holding of the



Court of Appeal in the case of *Catherine Koriko & 3 Others v Evaline Rosa* (2020)eKLR, where the Court of Appeal held as hereunder;

A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property. The appellants' application to amend the statement of defence and counterclaim was nothing but an indirect attempt to re-open litigation over the suit property with a view to circumventing the substantive effect of, and the rights of the parties as had been determined in the Kisii High Court Succession Cause No 105 of 2010. I cannot be blind to this attempt and I decline to condone the same.

104. Furthermore, the position that one cannot advance a claim for fraud and adverse possession in the same cause was also discussed in the case of *Haro Yonda Juaje v Sadaka Dzengo Mbauro & Kenya Commercial Bank* (2014) Eklr, where the Court stated:

(29) One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered *Land Act* and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.

105. Clearly, the Defendants herein cannot be heard to impugn the Plaintiff's title and allege that same was procured by fraud, illegality and misrepresentation, on one hand, while advancing the claim for adverse possession on the other hand. It was incumbent upon the Defendants to exercise their right of election and thus discern their appropriate cause of action.
106. However, to the extent that the Defendants did not exercise their right of election, same are caught in between advancing a claim for fraud, trust and adverse possession, which claims constitutes the antithesis of the other. In short, the claim for fraud and adverse possession, are like oil and water.
107. Notwithstanding the foregoing, even assuming that the claim for adverse possession had been legitimately pleaded, I would still have had difficulty in granting same in favor of the Defendants, insofar as no credible evidence was placed before the court to show occupation and possession, save for photographs of assorted motor vehicles with no indication as to when the said motor vehicles were moved or driven to the impugned location.
108. On the other hand, it is also not lost on the Honourable court that DW1 conceded that no one resides or lives on the suit property, save for the fact that same have been using the suit property as a garage.
109. Finally, it is important to underscore that the person seeking to persuade the court that same is entitled to an order for adverse possession, must place before the court, cogent and tangible evidence to demonstrate continuous and uninterrupted occupation, possession and use of the suit property for the requisite statutory duration. (See the holding of the court of appeal in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* (2020)eKLR).



110. Furthermore, while discussing the salient ingredients to be proved and established before a claim for adverse possession can be sustained; the Court of Appeal in the case of *Kweyu v Omutu* [1990] KLR page 716; stated and held as hereunder;

“By adverse possession is meant a possession which is hostile, under a claim or color of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Color of title is that which is a title in appearance, but not in reality). Adverse possession is made out by the Co-existence of two distinct ingredients: the first, such a title as will afford color; and, second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or color of title”) mean nothing more than the intention of the dispenser to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a color of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use, down publicly and notoriously.”

111. Lastly and as concerns the burden of proof, it suffices to point out that same laid on the shoulders of the Defendants, (in accordance with the provision of Section 107, 108 and 109 of The *Evidence Act*, Chapter 80 Laws of Kenya), to place before the Honourable court credible evidence and in the event of default, then their claim must no doubt, fail.
112. In addition, the legal position pertaining to the person who bears the burden of proof as well as the requisite standard of proof, was elaborated upon and duly explicated by the Court of Appeal in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Mureithi* (2014)eKLR, where the court stated and held as hereunder;

It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

113. Arising from the foregoing discourse and having taken into account the evidence on record and juxtaposed same against the applicable law, I come to the conclusion that the Defendants have not been able to prove, establish and or demonstrate the claim pertaining to adverse possession over and in respect of the suit property, either as propagated vide the counterclaim or the originating summons, which were in any event duplicitous.

Issue number 3

What Reliefs ought to be granted.



114. In the course of addressing issues number one and number two, herein before, the court has found and held that indeed the Plaintiff is the lawful and legitimate proprietor of the suit property. In addition, the court also came to the conclusion that by virtue of being the registered proprietor of the suit property, the Plaintiff is entitled to partake of and benefit from the statutory privileges espoused by Sections 24 and 25 of the [Land Registration Act, 2012](#).
115. On the contrary, though the Defendants had laid a claim to the suit property on the basis of adverse possession, the court has found and held that no credible evidence was placed before the court to demonstrate when, if at all, the Defendant entered onto the suit property. Nevertheless, the Defendants did not disprove the evidence by the Plaintiff that same (read, the Defendants) entered onto the suit property in the year 2018 and not otherwise.
116. Furthermore, the Defendants herein had also challenged and impugned the validity of the Plaintiff's title, whilst at the same time ventilating a claim for adverse possession. Invariably, the Honourable court found that the causes of action for fraud and adverse possession are antithetical and cannot be ventilated in the same cause.
117. In view of the foregoing, what becomes evident is that the Plaintiff herein has been able to prove his claim pertaining to ownership over and in respect of the suit property. Consequently, the Plaintiff is no doubt entitled to a suitable declaration, eviction and an order of Permanent injunction.
118. On the other hand, the Plaintiff had also implored the court to grant an order for General Damages for trespass. Having found that the Plaintiff is indeed the lawful and registered proprietor of the suit property, same is therefore entitled to recompense on account of Damages.
119. As pertains to the Quantum of damages, I hold of the opinion that an award of Kes 2, 000, 000/= only would suffice as against the Defendants, taking into account the location of the suit property, the duration of the impugned trespass and the infringement on the rights of the Plaintiffs contrary to the Plaintiffs constitutional right to property, as espoused and entrenched vide Article 40 of [the Constitution, 2010](#).
120. In any event, it is not lost on this Honourable court that an award of Damages is discretionary and depends on the obtaining circumstances. Furthermore, the award of damages is assessed on a case by case basis. Invariably, there is also no mathematical formulae set for purposes of ascertaining General Damages, save that same must be reasonable.
121. In support of the foregoing proposition, the Court adopts and reiterates the holding in the case of [Davis Mwashau Jome v Damaris Karanja & Another](#) (2021)eKLR, where the court stated as hereunder;

She cannot escape payment of general damages for trespass. In his submissions, Mr Mwakisha pitched for general damages in the sum of Kshs 2 million. Mr Oddiaga did not make any submissions on the quantum of general damages. I have seen the case of Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & Another (2013)eKLR referred to me by Mr Mwakisha. In that case, Nyamweya J, awarded general damages in the sum of Kshs 100,000/= for trespass. The quantification of such general damages is in the discretion of the court.

On my part, considering the conduct of the 1st defendant, the length of time that the plaintiff has been kept out of possession, the size of the land, the location thereof, and all other factors, I do award general damages in the sum of Kshs 1,000,000/= in favour of the plaintiff



payable by the 1st defendant. The same shall attract interest at court rates from the date hereof.

122. On the other hand, the Defendants had sought for a declaration that same have acquired the suit property on account of adverse possession. However, the court has found in the negative. In this regard, the Defendants are not entitled to the diverse and numerous reliefs which were articulated at the foot of the counterclaim.

Final disposition

123. Having duly analyzed and addressed the topical issues that were itemized in the body of the Judgment, it must have become crystal clear that the Plaintiff is the Lawful owner of the suit Property and hence entitled to benefit from such ownership.

124. Conversely, it has also become evident that the claim by and on behalf of the Defendants, was not only premature, misconceived and bad in law; but same was inherently contradictory and thus legally untenable.

125. In the premises, the court enters Judgment in favor of the Plaintiff in the following terms;

- i. A Declaration be and is hereby made that the Plaintiff is the lawful, legitimate registered proprietor of LR No Nairobi/Block 63/743.
- ii. The Defendants be and are hereby ordered to vacate the suit property and hand over vacant possession thereof to the Plaintiff within 120 days from the date hereof.
- iii. In default to vacate and handover vacant possession of the suit property to and in favor of the Plaintiff within the 120 days from the date of Judgment; an Eviction order shall issue against the Defendants and same shall be forcefully and forcibly evicted from the suit property.
- iv. In the event of the Eviction being carried out and undertaken by the Plaintiff, in pursuance of clause (iii), the charges and expenses incurred in levying the Eviction shall be certified by the Deputy Registrar and thereafter same shall be borne by the Defendants.
- v. An order of Permanent Injunction be and is hereby issued to restrain the Defendants by themselves, their servants and/or agents from doing any of the following acts that is to say, entering, taking possession of, erecting structure, carrying out business and trespassing on all that property known as LR No Nairobi/Block 63/743 and from harassing or interfering with the Plaintiff's quiet possession and use of the suit property.
- vi. General damages be and is hereby assessed and awarded in the sum of Kes2, 000, 000/= only; and same shall attract Interest from the date of Judgment.
- vii. Costs of the suit be and are hereby awarded to the Plaintiff.

126. Furthermore, the originating summons dated the February 26, 2021 and the counterclaim by the Defendants, be and are hereby dismissed. In addition, the Plaintiff shall have costs of both the originating summons and counterclaim, respectively, to be taxed and certified by the Deputy Registrar of the Honourable court.

127. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY 2023.

OGUTTU MBOYA



JUDGE

In the Presence of;

Benson Court Assistant

Mr Njeru Nyaga for Plaintiff

Ms Chite H/B for Mr Osundwa for the Defendants/Counter-claimers

