



**Gathuru v Nyamboki & another (Environment & Land Case  
412 of 2018) [2023] KEELC 18394 (KLR) (19 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18394 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 412 OF 2018**

**JO MBOYA, J  
JUNE 19, 2023**

**BETWEEN**

**PETER MUJUNGA GATHURU ..... PLAINTIFF**

**AND**

**HARUN OSORO NYAMBOKI ..... 1<sup>ST</sup> DEFENDANT**

**NESCO SERVICES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein filed and or commenced the instant suit vide Plaint dated the 27<sup>th</sup> September 2018; and in respect of which same sought for the following Reliefs;
  - i. Permanent Injunction restraining the Defendants whether by themselves, their servants or agents or any person acting under their direction, permission and/or authority from interfering with the Plaintiff quiet and enjoyment, use and possession of all that parcel of land known as L.R No. 12767/44 (I.R No. 12767/11/2).
  - ii. Declaration that the Plaintiff is the owner of land known as L.R No. 12767/44 (I.R No. 12767/11/2)..
  - iii. The Defendant to demolish the wall that is built across L.R No. 12767/44 (I.R No. 12767/11/2).
  - iv. The Defendant to demolish the gate that is on the access road to allow the Plaintiffs to access their property L.R No. 12767/44 (I.R No. 12767/11/2).
  - v. The OCS Karen Police Station does assist in the said demolition of the wall and the gate.
  - vi. In default of the Defendant demolishing the said structure, the Plaintiff with the assistance of the OCS Karen Police Station to demolish the wall and the costs be borne by the Defendants.



- vii. The OCPD Karen Police Station do assist in enforcing the orders of this court and maintain peace.
  - viii. General damages for inconvenience together with interests at court rates.
  - ix. Costs of the suit together with interests at court rates.
  - x. Such other or further relief as this honorable 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 filed a Statement of Defense and Counterclaim. For good measure, the counterclaim was filed and mounted on behalf of the 2<sup>nd</sup> Defendant.
  3. Vide the Counter-claim dated the 30<sup>th</sup> October 2018; the 2<sup>nd</sup> Defendant/counter-claimer has sought for the following reliefs;
    - a. An Order of Permanent injunction to restrain the Plaintiff/Defendant from trespassing onto the 2<sup>nd</sup> Defendant's/Plaintiff's Land.
    - b. General damages.
    - c. Costs and interest and
    - d. Any other or further relief as the Court may deem fit and just to grant.
  4. Suffice it to point out that the Plaintiff herein duly responded to the Statement of Defense and Counterclaim by filing a Reply to Defense and Defense to counter-claim dated the 24<sup>th</sup> July 2020; and in respect of which the Plaintiff denied and disputed the claims on behalf of the Defendants.
  5. Following the completion of the case conference, the subject matter was eventually listed for hearing on the 30<sup>th</sup> May 2022, whereupon the Plaintiff herein proceeded to and withdraw the suit. For good measure, it is instructive to note that the dispute between the Plaintiff and the 1<sup>st</sup> Defendant was hitherto the subject of an appeal before the Court of Appeal vide Civil Appeal No. 184 of 2004, which appeal was ultimately heard and disposed of vide Judgment rendered on the 30<sup>th</sup> January 2015.
  6. Instructively, the Honorable Court of Appeal allowed the appeal and made certain orders, which impacted on the subject matter. Consequently and for good measure, the prosecution of the Plaintiff's suit would have run afoul the Judgment of the of the Court of Appeal.
  7. In view of the foregoing, the only outstanding segment of the case is the counterclaim mounted by and on behalf of the 2<sup>nd</sup> Defendant/Counter-claimer. Consequently, the Judgment herein shall be confined to the claims at the foot of the named counterclaim.

## **Evidence By The Parties**

### **a. Counter-claimer's Case**

8. The Counter-claimer's case is premised and anchored on the evidence of one witness, namely, Esther Katheu Maingi. Same, testified as CW1.
9. It was the testimony of the witness that same is a Director of the 2<sup>nd</sup> Defendant/Counter-claimer. Furthermore, the witness stated that the 2<sup>nd</sup> Defendant/Counter-claimer has two directors and the other director is known as Harun Osoro Nyamboki.



10. In addition, the witness averred that the said co-director is also her husband. Nevertheless, the witness stated that same is privy to and knowledgeable of the facts pertaining to the subject matter. In any event, the witness added that same recorded a witness statement dated the 20<sup>th</sup> January 2022, which witness statement, the witness sought to adopt and rely on as her evidence in chief.
11. For good measure, the witness statement dated the 20<sup>th</sup> January 2022 was thereafter adopted and admitted as the Evidence in chief of the witness herein.
12. Furthermore, the witness testified that the 2<sup>nd</sup> Defendant/Counter-claimant filed a List and bundled of Documents and in this respect the witness alluded to the List and document dated the 20<sup>th</sup> January 2022. In the absence of objection to the said documents, same were duly admitted and marked as Exhibits 1 to 4, respectively on behalf of the counter-claimant.
13. Finally, the witness alluded to the counterclaim dated the 30<sup>th</sup> October 2018 and implored the court to proceed and grant the reliefs contained at the foot thereof.
14. On cross examination, the witness herein testified that same is a director of the 2<sup>nd</sup> Defendant/Counter-claimant. Further, the witness added that the other co-director is the 1<sup>st</sup> Defendant to the instant suit.
15. Further and in addition, the witness testified that the 2<sup>nd</sup> Defendant/Counter-claimant was incorporated on the 8<sup>th</sup> January 1993. For good measure, the witness indicated that same has availed and produced before the Honourable court a copy of certificate of incorporation.
16. Whilst still under cross examination, the witness averred that the suit property which is the subject of the instant proceedings was hitherto registered in the names of the 1<sup>st</sup> Defendant. However, the witness added that the property was thereafter transferred to and registered in the name of the 2<sup>nd</sup> Defendant/Counter-claimant in October 2001.
17. On the other hand, the witness testified that same was not aware that a portion of the suit property, had been sold to and in favor of the Plaintiff. Similarly and in any event, the witness added that same was not aware that the suit property had been restricted pursuant to an order of the Court Appeal.
18. Additionally, the witness also testified that she was not aware of any proceedings between the Plaintiff and the 1<sup>st</sup> Defendant and neither was she aware of a Judgment that has been passed by the Court of Appeal pertaining to and concerning the suit property.
19. Other than the foregoing, the witness testified that the 2<sup>nd</sup> Defendant is before the court seeking for an order of Permanent Injunction to restrain the Plaintiff/Defendant to the counterclaim from interfering with the counter-claimant's property.
20. Moreover, the witness testified that same is also aware that this court had previously issued and granted an order of temporary injunction restraining the Defendants, including the counter-claimant from interfering with the Plaintiff's/ Defendant to the Counter-claimant's possession and use of the suit property.
21. Whilst under further cross examination, the witness averred that at the inception of the 2<sup>nd</sup> Defendant, she was the majority shareholder but however on or about the year 2017, the 1<sup>st</sup> Defendant herein acquired more shares and thereafter became the majority shareholder.
22. On re-examination, the witness testified that the Plaintiff herein has no legal rights to and in respect of the suit property which lawfully belongs to the 2<sup>nd</sup> Defendant/Counter-claimant.



23. In addition, the witness averred that the Plaintiff herein did not have the permission and/or consent of the 2<sup>nd</sup> Defendant/Counter-claimer to enter upon and/or remain on the suit property. In this regard, the witness contended that the Plaintiff is therefore a trespasser.
24. With the foregoing testimony, the Counter-claimer's case was duly closed.

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

25. The Defendant to the counterclaim herein called forth one witness, namely, Peter Mujunga Gathuru, who testified as DW1.
26. It was the testimony of the witness that same entered into a Lawful sale agreement with the 1<sup>st</sup> Defendant herein on or about the 22<sup>nd</sup> February 1983, whereupon the 1<sup>st</sup> Defendant in the suit sold to the witness 2 ½ acres of Land to be excised to be L.R No 12767/11.
27. Furthermore, the witness testified that arising from the sale agreement same entered into with the First Defendant herein, same entered upon and took possession of the sold portion of the suit property.
28. Nevertheless, it was the further testimony of the witness that despite entering into and executing the sale agreement, the 1<sup>st</sup> Defendant who was the registered proprietor of the suit property failed and neglected to comply with the terms of the Sale agreement, culminating into the filing of a suit by him in the High Court.
29. Further and in addition, the witness testified that the suit which was filed in the High court was latter dismissed culminating into him filing an appeal before the Court of Appeal, vide Civil Appeal No. 184 of 2004, which appeal was latter heard and concluded vide Judgment rendered on the 30<sup>th</sup> January 2015.
30. Other than the foregoing, the witness intimated to the court that same had recorded a witness statement dated the 24<sup>th</sup> December 2021 and in this respect, the witness sought to adopt and rely on the witness statement as his Evidence in chief. For completeness, the witness statement was thereafter adopted and admitted as the Evidence in chief of the witness.
31. On the other hand, the witness also alluded to the List and bundle of documents dated the 24<sup>th</sup> of December 2021 and also sought to adopt and rely on same. In the absence of any objection, the documents at the foot of the List of documents dated the 24<sup>th</sup> December 2021 were duly admitted and produced as Exhibits before the court.
32. On cross examination, the witness averred that same had hitherto filed a suit before the High Court, which suit was heard and concluded. In addition, the witness also averred that thereafter he filed an appeal before the Court of Appeal and which Appeal was similarly heard and finalized.
33. Furthermore, the witness testified that vide the Judgment of the Court of Appeal, the Court found and held that he (witness) was entitled to 2 ½ acres out of the suit property or in the alternative, the value of the 2 ½ acres of the suit property, subject to Valuation by the Chief Government Valuer.
34. Moreover, the witness herein testified that after the Court of Appeal rendered and delivered its Judgment, the Defendants herein proceeded to and fenced the portion of land which had hitherto been sold to himself. In this regard, the witness added that same was constrained to and indeed filed the instant suit.
35. Additionally, the witness testified that upon filing of the instant suit, same also filed an Application seeking various reliefs and/or orders, inter-alia, an order of Temporary Injunction. For good measure,



- the witness added that the Application which sought for orders of Temporary injunction was indeed heard and allowed by the court.
36. Other than the foregoing, the witness also testified that after the decision of the Court of Appeal same commenced and undertook survey of the suit property and a sub-division scheme was prepared in the year 2021.
  37. Furthermore, the witness stated that same have been in occupation of the 2 ½ portion of land which was sold unto him by the 1<sup>st</sup> Defendant, prior to and before the same was transferred to and registered in the name of the Counter-claimer herein.
  38. On the other hand, the witness also testified that arising from the Judgment of the Court of Appeal, same proceeded to and lodged a caveat on the suit property. For good measure, the Plaintiff added that the caveat that was lodged on the suit property has not been rescinded and/or discharged.
  39. Additionally, the witness stated that same is aware that the suit property was duly subdivided and that the sub-division scheme was done with the authority of the Judgment of the Honourable Court of appeal.
  40. On re-examination, the witness stated that the 1<sup>st</sup> Defendant herein consented to the subdivision of the land. In any event, the witness added that the consent of the 1<sup>st</sup> Defendant relating to the subdivision of the suit property was confirmed by the Court of Appeal.
  41. Further and in addition, the witness added that the 1<sup>st</sup> Defendant was knowledgeable of the subdivision of the suit property.
  42. As concerns the removal of the gate and the perimeter wall, the witness clarified that same were removed and demolished on the basis of a lawful court order issued on the 6<sup>th</sup> May 2021.
  43. Other than the foregoing, the witness also testified that same is aware of the fact that the Defendants herein thereafter reverted to court seeking to discharge the orders of the court issued on the 6<sup>th</sup> May 2021, which related to the Temporary Injunction, but the court declined the application.
  44. Finally, the witness testified that the 2<sup>nd</sup> Defendant/Counter-claimer is not entitled to the reliefs sought at the foot of the counterclaim. In this respect, the witness invited the Honourable Court to dismiss the counterclaim.

## **Submission By The Parties**

### **a. Counterclaimer's Submissions**

45. The Counter-claimer filed written submissions dated the 3<sup>rd</sup> April 2023; and in respect of which the Counter-claimer has raised, highlighted and canvassed two (2) issues for due consideration by the Honourable court.
46. Firstly, Learned counsel for the counter-claimer has submitted that the suit property, namely, LR No. 12767/11, lawfully belongs to and is registered in the name of the 2<sup>nd</sup> Defendant/Counter-claimer. In this regard, counsel has thus contended that by virtue of being the registered owner and proprietor of the suit property, the 2<sup>nd</sup> Defendant/Counter-claimer is therefore entitled to exclusive possession, occupation and use of the suit property.
47. Further and in addition, Learned counsel for the 2<sup>nd</sup> Defendant/Counter-claimer has submitted that despite the fact that the 2<sup>nd</sup> Defendant/Counter-claimer is the registered proprietor and owner of



the suit property, the Plaintiff herein has encroached upon and trespassed onto a portion of the suit property, albeit without the consent and permission of the counter-claimant.

48. Consequently and in the premises, Learned counsel for the counter-claimant has contended that the actions and/or activities by the Plaintiff herein constitute and amounts to trespass to land.
49. Additionally, Learned counsel for the Counter-claimant has therefore contended that the impugned actions and/or activities by and on behalf of the Plaintiff/Defendant to the counterclaim have therefore interfered with the Rights and Interest of the 2<sup>nd</sup> Defendant/Counter-claimant.
50. In a nutshell, Learned counsel for the 2<sup>nd</sup> Defendant/Counter-claimant has therefore invited the Honourable court to find and hold that the Plaintiff/Defendant to the counterclaim is a trespasser.
51. Secondly, Learned counsel for the 2<sup>nd</sup> Defendant/Counter-claimant has submitted that the counterclaim herein by virtue of being the proprietor of the suit property is entitled to protection under the law.
52. Furthermore, Learned counsel has submitted that by dint of being the registered owner and/or Proprietor of the suit property, the 2<sup>nd</sup> Defendant to the counterclaim is thus entitled to an order of Permanent Injunction.
53. Additionally, Learned counsel for the Counter-claimant has also submitted that insofar as the impugned actions by and on behalf of the Plaintiff/Defendant to the counterclaim constitutes trespass, same (2<sup>nd</sup> Defendant/Counter-claimant) is therefore entitled to compensation on account of General Damages.
54. In any event, Learned counsel for the 2<sup>nd</sup> defendant/Counter-claimant has proceeded to and proposed an award of Kes.5, 000, 000/= only, payable on account of trespass.
55. In support of the foregoing submissions, Learned counsel for the 2<sup>nd</sup> Defendant/Counter-claimant has cited and relied on various decisions inter-alia Park Towers Ltd versus John Mithamo Njika & 7 Others (2014)eKLR, Kenya Power & Lighting Company Ltd v Fleetwood Enterprises Ltd (2017)eKLR, Kenya Power & Lighting Company Ltd versus Ringera & 2 Others (2022) KECA 104 KLR and Total Kenya Ltd (Formerly Caltex Oil Ltd) versus Jenevans Ltd (2015)eKLR, respectively.

#### **b. Defendant To The Counterclaim's Submissions:**

56. The Defendant to the counterclaim herein filed written submissions dated the 18<sup>th</sup> May 2023; and in respect of which same has raised, highlighted and canvassed three issues for consideration and ultimate determination by the Honourable court.
57. First and foremost, Learned counsel for the Plaintiff/Defendant to the counterclaim has submitted that the counterclaim before the court was filed without the requisite authority and resolution of the counter-claimant. In this regard, Learned counsel contends that insofar as the counter-claimant is a Corporation/company, no pleadings could have been generated and filed in court without the resolution of the company under seal.
58. Furthermore, Learned counsel for the Plaintiff/Defendant to the counter-claimant has also submitted that the verifying affidavit was executed by a person without the requisite mandate, authorization and sanction of the 2<sup>nd</sup> Defendant/Counter-claimant.
59. In addition, Learned counsel for the Plaintiff/Defendant to the counterclaim has also contended that even the Learned counsel who has appeared for and acted on behalf of the 2<sup>nd</sup> Defendant/Counter-claimant has not been duly mandated and authorized under seal of the company, either as required under the law or at all.



60. Consequently and in the premises, Learned counsel for the Plaintiff/Defendant to the counterclaim has therefore submitted that the entire counterclaim before the Honourable court ought to be struck out for being incompetent and in contravention of the law.
61. In support of the foregoing submissions, Learned counsel for the Plaintiff/Defendant to the counterclaim has cited and quoted various decisions, inter-alia, the case of Affordable Homes Africa Ltd versus Ian Henderson & 2 Others HCC No. 524 of 2004 (UR), Automatic Self Cleansing Filter Syndicate versus Cuninghane (1906) CH.34; CA and Bugerere Coffee Growers Ltd versus Sebaduka & Another (1968) EA, respectively.
62. Secondly, Learned counsel for the Plaintiff/Defendant to the counterclaim has submitted that following the sale of a portion of the suit property to and in favor of the Plaintiff vide sale agreement dated 22<sup>nd</sup> February 1983, the Plaintiff herein entered upon and took possession of the sold portion of land, pending/awaiting official survey and subdivision thereof.
63. Furthermore, Learned counsel added that insofar as the Plaintiff/Defendant to the counterclaim has been in possession and occupation of the designated 2 ½ acres thereof, an order of Permanent injunction cannot therefore issue and/ or be granted against one who is already in occupation.
64. Thirdly, Learned counsel for the Plaintiff/Defendant to the counterclaim has also submitted that the counter-claimer herein is not entitled to the reliefs sought at the foot of the counterclaim. In this regard, Learned Counsel has contended that the order for Permanent injunction is not only misconceived but legally untenable.
65. On the other hand, Learned Counsel has submitted that the order of payment of General Damages is similarly unavailable to the counter-claimer insofar as the Plaintiff/Defendant to the counterclaim entered upon and took possession of the designated portion of the suit property pursuant to and in line of the terms of a lawful sale agreement.
66. Further and in any event, Learned counsel for the Plaintiff/Defendant to the Counterclaim has also submitted that by the time the 2<sup>nd</sup> Defendant/Counter-claimer was acquiring the suit property from the 1<sup>st</sup> Defendant herein, same knew and/or had opportunity to know that the Plaintiff/Defendant to the counterclaim was already in possession and occupation of a portion of the suit property.
67. In a nutshell, the counsel for the Plaintiff/Defendant to the counterclaim has therefore contended that the counter-claimer is not entitled to the reliefs sought at the foot of the counterclaim.
68. Premised on the foregoing, Learned counsel for the Plaintiff/Defendant to the counterclaim has therefore impressed upon the Honourable court to find and hold that the counterclaim is bereft of merits and same be Dismissed with costs.

**Issues For Determination:**

69. Having reviewed the Counterclaim filed by and on behalf of the 2<sup>nd</sup> Defendant/Counter-claimer and having taken into account the Replies thereto; and upon consideration of the evidence tendered by the Parties; and finally upon considering the written submissions filed by the Parties, I come to the conclusion that the following issue do arise and are thus worthy for determination;
  - i. Whether the Counterclaim by and on behalf of the 2<sup>nd</sup> Defendant/Counter-claimer is lawful and legally tenable.
  - ii. Whether the Plaintiff/Defendant to the Counterclaim is a trespasser or otherwise.



- iii. Whether the Counter-claimant is entitled to an order of Permanent Injunction, either as sought or otherwise.
- iv. Whether the Counter-claimant is entitled for General Damages for Trespass.

### **Analysis And Determination**

#### **1. Whether The Counterclaim By And On Behalf Of The 2<sup>nd</sup> Defendant/counter-claimant Is Lawful And Legally Tenable.**

70. Learned counsel for the Plaintiff/Defendant to the counterclaim has made extensive submissions wherein same contends that insofar as the 2<sup>nd</sup> Defendant/Counter-claimant is a Limited liability Company; no actions can be undertaken by and on her behalf albeit without the requisite authority or resolution under seal. In this regard, Learned Counsel has contended that the counterclaim beforehand could not have been filed on behalf of the 2<sup>nd</sup> Defendant/Counter-claimant without a resolution under seal.
71. Similarly, Learned counsel for the Plaintiff/Defendant to the counterclaim has also ventured to and submitted that even the verifying affidavit has also been sworn by person without the requisite authorization and/or mandate of the 2<sup>nd</sup> Defendant/Counter-claimant.
72. Finally, Learned Counsel has also invited the Honourable court to find and hold that even the firm of M/s Oyugi & Company Advocate, who crafted and filed the counterclaim on behalf of the 2<sup>nd</sup> Defendant/Counter-claimant, were not properly instructed and/or retained.
73. Arising from the foregoing, Learned counsel for the Plaintiff/Defendant to the counterclaim has thus implored the Honourable court to find and hold that the entire counterclaim is therefore premature, misconceived and legally untenable and thereafter to proceed and strike out the same.
74. However, it is instructive to point out that the submissions which have been ventilated and canvassed by Learned counsel for the Plaintiff/Defendant to the counterclaim echo and reiterate the position of the law as was enunciated in the case of Bugerere Coffee Growers Ltd versus Sebaduka & Another (1968)EA; wherein the court held that suit by and on behalf of companies can only be commenced upon the resolution of a company passed by the board of directors and recorded in the minutes of the company culminating into a resolution under seal.
75. Furthermore, the decision in the Bugerere Coffee case (supra) also ventured and held that even an advocate has to procure and obtain the resolution under seal appointing same to act for and on behalf of a company, before commencing any court proceedings. In any event, the ratio in the said case also proclaimed that where an advocate acts without such authority, the advocate will be liable to meet the costs of the Defendant.
76. Furthermore, it is also imperative to state and underscore that the ratio decidendi which was enunciated in the Bugerere case (supra) was thereafter adopted and ratified in various cases within our jurisdiction, inter-alia Affordable Homes Africa Ltd versus Ian Anderson & 2 Others Nairbi HCC 524 of 2004 (UR) and most recently in the case of East African Portland Cement Ltd (2014)eKLR.
77. Nevertheless, it is instructive to recall that the Bugerere Coffee Growers Ltd decision was made by the Ugandan High Court but henceforth the ratio decidendi in the Bugerere case has since been superseded by the Supreme Court of Uganda in the case of Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000.



78. Additionally, the Supreme Court of Uganda also endorsed the decision of the Court of Appeal of Uganda in the case of United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998.

79. For coherence, the latter case restated the law as follows:-

“.... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

80. Fast forward, the Court of Appeal of Kenya has also had occasioned to speak to the issue as to whether or not a resolution of a company is a pre-condition to the filing of a suit by and on behalf of a company; and whether anyone swearing an affidavit on behalf of the company must attach the resolution under seal.

81. For good measure, the position taken by the Court of Appeal is to the effect that the resolution under seal is not a pre-condition; and neither does absence of same, negate and/or vitiate lawful proceedings filed and commenced on behalf of a company.

82. Furthermore, it was explained that where there is an averment under oath that the Deponent of an affidavit has the requisite authority for and on behalf of a company, then it must be taken that the averment is correct until and unless impeached and/or impugned by the adverse party.

83. For good measure, the foregoing position of the law was elaborately enunciated and canvassed in the decision in the case Arthi Highway Developers Limited versus West End Butchery Limited & 6 others [2015] eKLR, where the court stated thus;

“The decision has since been applied in Kenyan courts, for example, in Fubeco China Fushun v Naiposha Company Limited & 11 others[2014] eKLR.

84. Instructively, the position that the Court of Appeal was emphasizing was the one adopted and applied by the Supreme Court of Uganda, which overruled the ratio in Bugerere Coffee Growers case (supra). Consequently and in this respect, it can no longer be fashionable for the Plaintiff/Defendant to the counterclaim to invoke and adopt the position which has since been rendered otiose in the country of origin.

85. To surmise, it is my finding and holding that the counterclaim which was filed and mounted by and on behalf of the 2<sup>nd</sup> Defendant/Counter-claimer is lawful, valid and legally tenable. In this regard, the court shall now venture to deal with the substantive issues and in particular, the merits of the same.

## **2 AND 3. Whether the Plaintiff/Defendant to the Counterclaim is a Trespasser or otherwise.**

### **Whether the Counter-claimer is entitled to an order of Permanent Injunction, either as sought or otherwise.**

86. The 2<sup>nd</sup> Defendant/Counter-claimer has submitted that even though the suit property was hitherto registered in the name of the 1<sup>st</sup> Defendant, same sold and transferred the entire of the suit property to and in favor of the 2<sup>nd</sup> Defendant/Counter-claimer upon payment of a consideration of Kes.1, 000, 000/= only. For good measure the counter-claimer was thereafter issued with a Certificate of lease on the 11<sup>th</sup> October 2001.



87. In addition, Learned counsel for the Counter-claimant has submitted that upon the transfer and registration of the suit property to and in favor of the counter-claimant, the counter-claimant became the lawful and legitimate proprietor of the suit property and hence same is entitled to possession, occupation of the suit property, to the exclusion of all and sundry.
88. Nevertheless, counsel for the counter-claimant has submitted that despite the fact that the 2<sup>nd</sup> Defendant/Counter-claimant is the lawful and legitimate owner of the suit property, the Plaintiff/Defendant to the counterclaim has interfered with the rights and interests of the 2<sup>nd</sup> Defendant/Counter-claimant.
89. Owing to the foregoing, Learned counsel for the 2<sup>nd</sup> Defendant/Counter-claimant has thus contended that the impugned actions by and on behalf of the Plaintiff/Defendant to the Counterclaim constitutes and amounts to trespass, which is actionable per se.
90. Additionally, Learned counsel for the Counter-claimant has also submitted that the Plaintiff/Defendant to the counterclaim also proceeded to and demolished a perimeter wall fence and gate which had been erected and/or constructed by the 2<sup>nd</sup> Defendant/Counter-claimant.
91. Arising from the foregoing, Learned counsel for the 2<sup>nd</sup> Defendant/Counter-claimant has therefore contended that by virtue of being the lawful and legitimate proprietor of the suit property, same is thus entitled to an order of Permanent Injunction, so as to protect her lawful and legitimate right over the suit property.
92. On his part, Learned counsel for the Plaintiff/Defendant to the counterclaim has submitted that the Plaintiff entered into and executed a lawful sale/purchase agreement with the 1<sup>st</sup> Defendant, whereupon the Plaintiff acquired a portion of the property measuring 2 ½ acres.
93. Furthermore, Learned counsel for the Plaintiff/Defendant to the counterclaim has also submitted that upon entry to and execution to the sale agreement, the 1<sup>st</sup> Defendant who was hitherto the registered owner and/or proprietor of the suit property, allowed the Plaintiff to enter upon and take possession of the suit property pending completion of the contract and survey thereof.
94. In addition, Learned counsel for the Plaintiff/Defendant to the counterclaim has also submitted that pursuant to and in line with the sale agreement, the Plaintiff/Defendant to the counterclaim indeed entered upon and took possession of the sold portion of land.
95. Moreover, Learned counsel has also submitted that the question of whether or not the Plaintiff/Defendant to the counterclaim took possession of the sold portion of land was indeed confirmed by the Honorable Court of Appeal whilst delivering the Judgment vide Court of Appeal Civil Appeal No. 184 of 2004.
96. Having calibrated on the rival positions taken by the 2<sup>nd</sup> Defendant/Counter-claimant and the Plaintiff/Defendant to the counterclaim, respectively, it is appropriate to consider whether or not the Plaintiff/Defendant to the counterclaim is indeed a trespasser to the suit property or otherwise.
97. In addition, it would also be necessary to interrogate the import, tenor and scope of an order of permanent injunction and thereafter to ascertain the circumstances under which same can and does issue.
98. Back to whether the Plaintiff/Defendant to counterclaim is a trespasser. In this respect, it is common ground and there is no dispute that the suit property was hitherto registered in the name of the 1<sup>st</sup> Defendant herein. Consequently, the 1<sup>st</sup> Defendant was thus bestowed with the requisite mandate and authority to alienate, sale and/or otherwise dispose of the suit property.



99. Pursuant to and in line with the mandate that hitherto vested upon the 1<sup>st</sup> Defendant, same entered into and executed a sale agreement with the Plaintiff/Defendant to the counterclaim, whereupon the 1<sup>st</sup> Defendant sold to and in favor of the Plaintiff/Defendant to the counterclaim a portion to the suit property measuring 2 ½ acres.
100. Moreover, there is evidence on record that upon entry into and execution of the sale agreement dated the 22<sup>nd</sup> February 1983, the Plaintiff/Defendant to the counterclaim indeed entered upon and took possession of the 2 ½ portion of the suit property.
101. For good measure, the fact that the Plaintiff/Defendant to the counterclaim had entered upon and took possession of the sold portion of the suit property was confirmed in the Judgment of the Court of Appeal rendered on the 30<sup>th</sup> January 2015 vide Court of Appeal Civil Appeal No. 184 of 2004.
102. In any event, during cross examination of DW1 same testified as follows;

“I have stated that the survey was commenced by the 1<sup>st</sup> Defendant in the matter herein. By the time of survey, I was already on the land. I wish to add that I was already in occupation of the land”
103. Instructively, this bit of the evidence which was tendered by DW1 (Plaintiff/Defendant to the counterclaim), was neither controverted nor impeached.
104. Additionally, it is not lost on this court that when the Defendants herein proceeded to and constructed a perimeter wall and thereafter mounted a gate interfering with the Plaintiff/Defendant to the counterclaim, this Honorable court, albeit, differently constituted, issued inter-alia orders of temporary injunction and demolition. For good measure, the orders were issued on the 6<sup>th</sup> May 2021.
105. From the foregoing analysis, two things becomes evident and apparent. Firstly, there is no gainsaying that the Plaintiff/Defendant to the counterclaim entered upon and took possession of the disputed portion of land with the consent and concurrence of the previous registered owner.
106. Secondly, by the time the 2<sup>nd</sup> Defendant/Counter-claimer became the registered owner of the suit property, the Plaintiff/Defendant to the counterclaim was already in occupation and had possession of the designated portion of the suit property.
107. To my mind, the 2<sup>nd</sup> Defendant/Counter-claimer became the registered owner of the suit property subject to the overriding interests, to which the suit property was subjected to, at the time of her acquisition thereof.
108. Furthermore, the 2<sup>nd</sup> Defendant/ counter-claimer cannot purport that same acquired a clean and clear title devoid of any encumbrance and overriding interests, whereas by the time of her acquisition, the Plaintiff/Defendant to the counterclaim was already on the land.
109. Granted, the 2<sup>nd</sup> Defendant/Counter-claimer is the lawful and registered proprietor of the suit property and thus entitled to the benefit and privileges stipulated by dint of Sections 24 and 25 of the [Land Registration Act, 2012](#); but it must be remembered that the said provisions are subject to the overriding interests.
110. To this end, it is appropriate and expedient to take cognizance of the provisions of Section 28 of the [Land Registration Act, 2012](#).
111. For ease of reference, the named provision are reproduced as hereunder;
  28. Overriding interests.



Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a) spousal rights over matrimonial property;
- (b) trusts including customary trusts ;
- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- (d) natural rights of light, air, water and support;
- (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- (f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
- (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- (j) any other rights provided under any written law.

112. Taking into account the fact that the Plaintiff/Defendant to the counterclaim was already in occupation and possession, can the 2<sup>nd</sup> Defendant/Counter-claimant now be heard to say that the person who was in occupation long before she acquired ownership is now a trespasser. In my humble view, the contention by the 2<sup>nd</sup> Defendant/Counter-claimant is misconceived and legally untenable.

113. In this respect, I am duly persuaded by the holding in the case of David Ogutu Onda versus Walter Ndede Owino [2014] eKLRc, where the court observed as hereunder;

“It follows therefore that when the plaintiff acquired a title to the suit property the defendant was in possession hereof. The plaintiff’s title was therefore subject to the defendant’s right of possession thereof which, was an overriding interest on the title of that was acquired by the plaintiff under the provisions of section 30 (g) of the Registered *Land Act*, Cap 300 Laws of Kenya (now repealed). I have no evidence before me that the plaintiff acquired the suit property fraudulently. The standard of proof of fraud is above a balance of probability. Fraud must not only be pleaded and particularized but must also be proved to the standard stated above. The defendant pleaded fraud but neither particularized it nor tendered evidence in proof thereof. The mere fact that a portion of Plot No. 542 that had been sold to the defendant was on sub-division of Plot No. 542 registered in the name of plaintiff is not per se evidence of fraud. I am however in agreement with the defendant’s contention that the plaintiff’s title to the suit property was acquired illegally to the extent that the parcel of land that had been purchased by the defendant and that was in the defendant’s possession was included in the plaintiff’s title”.



114. Furthermore, the court proceeded and stated as hereunder;

“The defendant has no title to the portion of the suit property in dispute. This does not mean however that the defendant has no right over the portion of the suit property. As I have stated above the plaintiff acquired the suit property while the defendant was in possession. The defendant’s possession of the suit property was lawfully acquired. As I have stated above, the defendant has an overriding interest in the suit property arising from his possession of a portion of the suit property as of the date when the plaintiff acquired title thereto.”

115. Instructively, the reasoning and decision of the Learned Judge, whose details have been highlighted in the preceding paragraphs, was ratified and upheld by the Honourable Court of Appeal.

116. Before the Court of Appeal, and while dealing with the case of David Ogutu Onda versus Walter Ndede Owino [2016] eKLR, the court stated and held thus;

“When the appellant registered the entire disputed land as his own, that registration failed to take cognisance of the existence of the respondent’s portion of the disputed land, where he was in occupation. As a consequence, the appellant’s title became subject to the respondent’s overriding interest in respect of the portion he occupied, notwithstanding that it was not noted on the register. This being the position, we find that the learned judge rightly concluded that, the respondent held an overriding interest against the appellant’s title, and in so doing, we further find that the question of trespass could not be said to arise.”

117. In respect of the instant matter, the 2<sup>nd</sup> Defendant/Counter-claimer acquired title to and in respect of the suit property on the face of Third-party occupation and possession by and at the instance of the Plaintiff/Defendant to the counterclaim. In this regard, the 2<sup>nd</sup> Defendant/Counter-claimer must just contend with the impugned occupation and possession.

118. In short, I am not prepared to proclaim and declare that the Plaintiff/Defendant to the counterclaim is a trespasser to the suit property, merely because the 2<sup>nd</sup> Defendant/counter-claimer has a certificate of title/lease in her name, which was no doubt, acquired on the face of the occupation of the designated portion of Land by the Plaintiff/ Defendant to the Counter-claim.

119. Further and before departing from the issue herein, there is the question as to whether the 2<sup>nd</sup> Defendant/Counter-claimer is entitled to an order of Permanent injunction.

120. Invariably, an order of Permanent injunction is meant and/or intended to prohibit, restrain and bar the happening of an event. For good measure, such an order operate to forestall invasion of, inter-alia, land by a Third-Party, who has no legitimate rights and Interests to the land in question.

121. However, in respect of the instant case, evidence abound that the Plaintiff/Defendant to the counterclaim is already on the land and yet there is no prayer for eviction that has been mounted by the 2<sup>nd</sup> Defendant to the counterclaim.

122. Consequently, the question that does arise and which must now be resolved is whether an order of permanent injunction can by itself operates to remove the Plaintiff/Defendant to the counterclaim from the suit property.

123. In my humble view, the order Permanent injunction cannot evict and/or remove the Plaintiff/ Defendant to the counterclaim. Indeed, such an order would amount to an exercise in futility and/or vanity, yet court orders are never issued in vanity.



124. Without belaboring the point, I am afraid that the order of Permanent injunction which has conspicuously been sought at the foot of the Counterclaim, is neither tenable nor efficacious.

#### **4. Whether the Counter-claimer is entitled for General Damages for trespass.**

125. Other than the prayer for Permanent Injunction, the 2<sup>nd</sup> Defendant/Counter-claimer has also sought for an order of General Damages as against the Plaintiff/Defendant to the counterclaim.

126. Nevertheless, I must confess that the General damages that has been sought for has neither been explained nor delineated. Consequently, it is not possible to discern whether the General damages relate to conversion, fraud, trespass or otherwise.

127. Be that as it may, because the 2<sup>nd</sup> Defendant/Counter-claimer had sought for an order of injunction to stop the Plaintiff/Defendant to the counterclaim from trespass, I presume and hence beg to proceed on the basis that the General damages being proclaimed are for trespass.

128. To start with, it is not lost on this Honourable court that up to and including the 30<sup>th</sup> January 2015, when the Court of Appeal delivered its Judgment, it is deemed that the Plaintiff/Defendant to the counterclaim had lawful rights to and in respect of the portion to the suit property under his occupation.

129. Moreover, it is also important to recall that upon the filing of the instant suit, the Plaintiff/Defendant to the counterclaim sought for and obtain an order of temporary injunction to bar the Defendants herein from interfering with his right to and occupation of the designated portion of the suit property. For coherence, an order of Temporary injunction was indeed issued on the 6<sup>th</sup> May 2021.

130. In any event, the order of Temporary injunction which was issued on the 6<sup>th</sup> May 2021 subsisted up to and including the 30<sup>th</sup> May 2022, when the Plaintiff's suit was withdrawn.

131. In my humble view, it is evident and apparent that the occupation, possession and use of the disputed portion of the suit property up to and including the 30<sup>th</sup> May 2022 was premised and anchored on lawful court orders. In this regard, no issue of trespass can arise.

132. Further and in any event, it must be remembered that after this court granted the orders of temporary injunction on the 6<sup>th</sup> May 2021, the Defendants herein endeavored to review the orders of injunction, but the Application for review was Dismissed.

133. Other than the foregoing, there is yet another aspect of this matter that merits mention and a short discussion. For the avoidance of doubt, this aspect relates to Judgment of the Court of Appeal where the Honorable court stated as hereunder;

“In the meantime, we order that a caveat be registered against the parcel of land till completion and satisfaction of our order”

134. My understanding of that limb of the order of the Court of Appeal drives me to the conclusion that the Plaintiff/Defendant to the counterclaim shall hold some Equitable interests and rights over the suit land until the orders of the Court of appeal are complied with and adhered to.

135. In any event, the registration of the caveat denotes that the beneficiary of such caveat have some Equitable rights to the land in question.

136. Based on the various perspectives/ nuances that I have calibrated upon and coupled with the fact that the terms of the Judgment of the Court of Appeal vide Court of appeal civil appeal 184 of 2004; have



not been satisfied, it would be unjust and inequitable, to dignify the 2<sup>nd</sup> Defendant/Counter-claimant with an award of Damages.

137. Furthermore, it is also not lost on this court that though the 2<sup>nd</sup> Defendant/Counter-claimant is a separate and distinct legal entity from her directors and shareholders, but there is a golden thread that is so evident that the 1<sup>st</sup> Defendant herein who is currently a majority shareholder, is keen to use the cloak/ veil of the 2<sup>nd</sup> Defendant to attract unjust enrichment as against the Plaintiff/Defendant to the counterclaim.
138. In my humble view, any award of General Damages to and in favor of the 2<sup>nd</sup> Defendant/Counter-claimant, who is closely associated with the 1<sup>st</sup> Defendant and is in any event a Family company, would constitute a gross violation of the provisions of Article 10(2) of *the Constitution*, 2010; and pertinently; Equity and Social Justice.
139. Be that as it may, if I were persuaded that the 2<sup>nd</sup> Defendant/Counter-claimant was entitled to an award to General Damages, despite the fact that her majority shareholder remains contemptuous of the terms of the Judgment of the Court of Appeal, I would have been constrained to award the sum of Kes.100/= only on account Nominal Damages.

### **Conclusion And Final Disposition**

140. After due deliberation and painstaking analysis, I come to the conclusion that the 2<sup>nd</sup> Defendant/Counter-claimant has neither established nor demonstrated that the Plaintiff/Defendant to the counterclaim is a trespasser to the suit property.
141. Moreover, despite the fact that the suit property is currently registered in the name of the 2<sup>nd</sup> Defendant/Counter-claimant; the totality of the facts surrounding the subject matter, do not commend themselves to an award of General Damages in favor of the 2<sup>nd</sup> Defendant/Counter-claimant.
142. Consequently and in the premises, I am constrained and do hereby find and hold that the Counterclaim by the 2<sup>nd</sup> Defendant/Counter-claimant is devoid and bereft of merits. In this regard, same be and is hereby Dismissed with costs to the Plaintiff/Defendant to the counter-claim.
143. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JUNE, 2023.**

**OGUTTU MBOYA**

**JUDGE**

