



REPUBLIC OF KENYA



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**Ndunde Investment Limited v Mwangi & 2 others (Environment & Land
Case 508 of 2015) [2023] KEELC 18252 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18252 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 508 OF 2015**

JO MBOYA, J

JUNE 16, 2023

BETWEEN

NDUNDE INVESTMENT LIMITED PLAINTIFF

AND

JACKSON MUTUGI MWANGI 1ST DEFENDANT

FRANCIS GITHAMBO WAMBURI 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

Background and Introduction

1. Vide Plaintiff dated the 9th June 2015, the Plaintiff herein has approached the Honorable court seeking for the following reliefs;
 - i. An Order of Injunction do issue directed at the Defendants whether by themselves or through their servants, agents or employee restraining them from entering the premises on L.R No. Ruiru Township/239 or remaining thereon or from selling, offering for sale or in other way attempting to alienate the suit premise from the Plaintiff.
 - ii. An order directed to Chief Land Registrar to cancel certificate of lease dated the 20th February 2015 in the name of Jackson Mutugi Mwangi and Francis Githambo Wamburi.
 - iii. Damages.
 - iv. Costs of the suit.
 - v. Interests on (ii) and (iii).



- vi. Such other or orders as may necessary as the court may deem just.
2. Upon being served with the Plaint and Summons to enter appearance, the 1st and 2nd Defendants duly entered appearance and thereafter filed a Statement of Defense and counter-claim on the 16th May 2018. For good measure, the Counter-claim is dated the 10th May 2018, albeit filed on the 16th May 2018.
3. Instructively, the Reliefs sought at the foot of the Counter-claim are as hereunder:
 - a. A Declaration that the parcel of land known as Ruiru/Township/239 is the lawful property of the Defendants, namely Jackson Mutugi Mwangi and Francis Githambo Wamburi.
 - b. An Injunction against the Plaintiff stopping her, her personal representatives, heirs or agents from evicting the Defendants from the parcel of land known as Ruiru/Township/239.
 - c. An Order directing that the parcel of land known as Ruiru/Township/239 be registered in the Defendants, namely Jackson Mutugi Mwangi and Francis Githambo Wamburi.
 - d. Costs and interests of the suit.
 - e. Any other orders that this honourable court may deem fit and just in the circumstances of the suit.
4. On the other hand, the 3rd Defendant also entered appearance and filed a Statement of Defense dated the 23rd August 2017 and in respect of which same denied and/or disputed the claims at the foot of the Plaint dated the 9th June 2015.
5. Nevertheless, the 3rd Defendant also contended that in the unlikely event that the 3rd Defendant is found liable and/or culpable for undertaking the impugned registration of the suit property in the names of the First and Second Defendants, albeit on misrepresentation; then same shall seek indemnity as against the 1st and 2nd Defendants.
6. First forward, even though the instant suit was filed on the 9th June 2015, the substantive hearing only commenced on the 23rd January 2023, when the Plaintiff's case was indeed heard and thereafter closed on even date.

Evidence By The Parties:

a. Plaintiff's Case:

7. The Plaintiff's case gravitates and revolves around the evidence of two witnesses, namely, Isaac Gichia Mbugua and Emanuel Karisa Kenga, who testified as PW1 and PW2 respectively.
8. It was the evidence of PW1 that same is a director of the Plaintiff company and that furthermore the Plaintiff company duly authorized and mandated same to execute various pleadings and documents on behalf of the company, as well as to attend court and testify in respect of the subject matter.
9. In addition, the witness testified that the Plaintiff company was the lawful and legitimate proprietor/owner of the suit property, which property was lawfully transferred to and registered in the name of



- the company with the authority of the previous registered owner. In this regard, the witness averred that the Plaintiff was registered as the owner of the suit property in the year 2001.
10. Further, the witness testified that sometime on or about the year 2015, the Plaintiff company learnt and/or discovered the existence of another title, which same contended was illegally and fraudulently issued to and in favor of the 1st and 2nd Defendants. In this regard, the witness testified that the Plaintiff company was therefore constrained to and indeed undertook an official search at the Land registry, with a view to authenticating the circumstances under which the impugned parallel title was issued.
 11. Additionally, the witness testified that in the course of undertaking the official search, same procured and obtained a copy of the Green card, which confirmed that the suit property had been transferred and registered in the names of the 1st and 2nd Defendants and thereafter a Certificate of Lease was issued on the 12th February 2015.
 12. Premised on the foregoing, the witness added that same was therefore constrained to and indeed proceeded to lodge a Complaint with the Directorate of Criminal Investigation with a view to facilitating investigations pertaining to and concerning the circumstances leading to the impugned transfer and registration of the suit property in favor of the 1st and 2nd Defendants.
 13. Other than the foregoing, it was the further testimony of the witness that the Plaintiff also endeavored to register a Caution over and in respect of the suit property, so as to protect the suit property from alienation and/or disposal of the 1st and 2nd Defendants.
 14. Be that as it may, the witness averred that the transfer and registration of the suit property to and in favor of the 1st and 2nd Defendants was fraudulent, illegal and unlawful and in this regard, same has implored the court to revoke the impugned certificate of lease issued on the 12th February 2015 and to revert the ownership of the suit property to the Plaintiff company.
 15. Furthermore, the witness added that upon the filing of the instant suit the 1st and 2nd Defendants filed a Replying affidavit; and in respect of which same attached, inter-alia, a copy of a sale agreement which was allegedly entered into with himself over and in respect of the suit property.
 16. However, the witness added that when same examined the alleged sale agreement, he discovered that the signature affixed thereto was not his signature. In any event, the witness also averred that the Identity card number which was alluded to and contained in the impugned sale agreement also did not belong to him.
 17. Moreover, the witness also testified that same also had occasion to examine the transfer instrument which was presented to the Land Registry and upon which the impugned transfer and registration of the suit property to the 1st and 2nd Defendant was anchored.
 18. Upon examining the transfer instrument, the witness testified that same discovered further anomalies including, inter-alia, the forgery of the signature, the inclusion of passport size photographs that did not belong to him and the reflection of an identity card number which does not belong to the witness.
 19. As a result of the various anomalies which were discovered and unearthed in both the sale agreement and the transfer instrument, the witness testified that same was constrained to and indeed caused the impugned documents, namely, the sale agreement and the transfer instrument, respectively, to be presented to a Forensic Document Examiner for purposes of examination.
 20. Furthermore, the witness testified that subsequently the impugned documents were examined by Emanuel Karisa Kenga, a Document Examiner, who thereafter prepared an Examination Report confirming, inter-alia, that the signature alleged to belong to the witness was indeed false.



21. On the other hand, the witness herein also averred that the impugned transfer and registration of the suit property to and in favor of the 1st and 2nd Defendants could not have taken place without surrender of the original certificate of lease. Furthermore, the witness averred that the original certificate of lease was under his custody and care and in any event same was availed to court during the hearing.
22. Owing to the foregoing, the witness testified that the process culminating into the transfer and registration of the suit property to and in favor of the 1st and 2nd Defendants was fraudulent and illegal; and in any event, same was facilitated by the 3rd Defendant herein.
23. Other than the foregoing, the witness alluded to his witness statement dated the 9th June 2015 and sought to adopt and rely on the contents thereof. In this regard, the witness statement dated the 9th June 2015, was duly admitted and constituted as Further Evidence on the part of the witness.
24. Additionally, the witness also referred the court to the List and Bundle of documents dated the 9th June 2015; and sought to rely on the documents contained thereunder. In the absence of any objection by the Defendants, the documents at the foot of the List were admitted and marked as Plaintiff's P1 to P8 respectively.
25. Further, the witness also referred to a Further List and Bundle of documents dated the 2nd November 2015; and similarly sought to adopt and rely on same. Instructively, the documents at the foot of the list dated 2nd November 2015 were produced and admitted as exhibit P9 and P10 respectively.
26. Finally, the witness herein alluded to the Document Examination report which was prepared by one Emanuel Karisa Kenga, a Document examiner.
27. On cross examination by Learned counsel for the 3rd Defendant, the witness herein stated that the suit property hitherto belonged to and was registered in the name of the Plaintiff. In any event, the witness added that the suit property was transferred to the Plaintiff by the previous owner, namely, Moses Mbugua Mwangi.
28. Whilst under further cross examination, the witness testified that the Plaintiff has sued the 3rd Defendant because it is the 3rd Defendant who is responsible for effecting and effectuating registration of various Instruments and was therefore liable for the offensive registration of the suit property in favor of the 1st and 2nd Defendants.
29. In addition, the witness contended that it behooved the 3rd Defendant to undertake appropriate review of any Instrument of transfer, with a view to ascertaining its propriety, completeness and validity before proceeding with registration.
30. Nevertheless, it was the further testimony that the 3rd Defendant failed in her responsibility and role and thereafter proceeded to and effected the offensive transfer in favor of the 1st and 2nd Defendant despite various improprieties which were evident on the face of the transfer instrument.
31. In any event, the witness averred that the offensive transfer and registration of the suit property was undertaken without Surrender of the original Certificate of Lease, which the witness added remains under his safe custody to date.
32. In this regard, the witness added that the entire process leading to the transfer and registration of the suit property in the names of the 1st and 2nd Defendants was therefore fraudulent.
33. The Second witness who testified on behalf of the Plaintiff was Emanuel Karisa Kenga, who testified as PW2.



34. It was the testimony of the witness that same is a qualified document examiner and was thus competent of undertaking the document examination, over and in respect of the assorted documents and thereafter preparing an Examination report.
35. Furthermore, the witness added that same was previously a Forensic Document examiner in the employment of the National Police Service and that during his tenure with the Police Service, same rose to the rank of a Commissioner of Police.
36. Additionally, the witness testified that same received assorted documents from the law firm of M/s Mogeni & Company Advocates vide letter dated 3rd March 2022; and which Letter requested him (witness) to carry out and undertake examination of the various documents, with a view to preparing a report thereon.
37. It was the further testimony of the witness that pursuant to the request at the foot of the Letter dated 3rd March 2022, same indeed undertook the examination and thereafter generated a report detailing his findings and conclusions. In this regard, the witness alluded to the report dated 7th March 2022, which was thereafter produced as Exhibit P11.
38. Whilst giving an over view of the document examination report, the witness pointed out that upon examination of the assorted documents, same found and established that the purported signatures, which were alleged to belong to PW1; did not correspond with the known signature of PW1.
39. Instructively, the witness herein was neither cross examined by the 1st and 2nd Defendants nor by the 3rd Defendant. For good measure, the 1st Defendant who was present indicated that same was not keen to cross examine.
40. With the foregoing testimony, the Plaintiff's case was duly closed.

b. 1st And 2nd Defendants' Case:

41. Prior to the commencement of the hearing on the 23rd January 2023, Learned counsel for the 1st and 2nd Defendants sought for an adjournment in respect of the scheduled hearing. However, the application for adjournment was vehemently opposed by counsel for the Plaintiff and the 3rd Defendant, respectively.
42. Arising from the foregoing, the court was called upon to render a ruling on the application for adjournment, whereupon the court found inter-alia that the subject matter was an old matter and that in any event, no plausible reasons had been availed to warrant an adjournment.
43. Premised on the foregoing, the request for adjournment was declined and the hearing was directed to proceed.
44. On the other hand, when the matter was called out during the allocated timeline, Learned counsel for the 1st and 2nd Defendants who had hitherto applied for adjournment failed and or refused to attend court, most probably in a bid to abort the scheduled proceedings.
45. Nevertheless, the 1st Defendant was present and in attendance. In addition, the 1st Defendant similarly endeavored to procure an adjournment but same was declined, premised on the basis that an application for adjournment had been canvassed and determined by the Honourable Court.
46. Notably, even though the 1st Defendant was present and despite having been afforded the opportunity to cross examine the witnesses on behalf of the Plaintiff, same declined to do so.



47. Other than the foregoing, after the close of the Plaintiff's case, the 1st Defendant was afforded an opportunity to tender evidence, but yet again same declined and indeed intimated to the court that same would not be giving any evidence.
48. Confronted with the foregoing situation and taking into account the provisions of Orders 17 and 18 of the Civil Procedure Rules, 2010; the court was left with no alternative but to close the 1st and 2nd Defendants case.
49. In a nutshell, the 1st and 2nd Defendants' case was closed without any evidence being tendered on their behalf.

c. THE 3RD DEFENDANT'S CASE

50. The 3rd Defendants case revolves around the evidence of one witness, namely, Robert Mogendi Mbugua, who testified as DW1.
51. It was the testimony of the said witness that same is a Land Registrar currently stationed at Ruiru Land Registry. For clarity, the witness added that same has been the Land Registrar at the said station since 22nd May 2019.
52. It was the further evidence of the witness that even though same is the Land Registrar stationed at Ruiru land Registry, he was however not the Land Registrar at the time when the impugned transaction and registration touching on the suit property was undertaken.
53. Other than the foregoing, the witness alluded to a witness statement dated the 26th January 2023 recorded by himself and thereafter sought to adopt and rely on the contents of the named witness statement. Instructively and for good measure, the witness statement dated 26th January 2023 was thereafter admitted and adopted as the evidence of the witness.
54. Furthermore, the witness also alluded to a List and Bundle of documents dated the 8th January 2018; and same sought to produce same. In the absence of any objection, the documents at the foot of the List dated 8th January 2018, were produced and admitted as exhibit D1 to D6 respectively.
55. In addition, the witness also referred to a Further List and Bundle of documents dated the 14th March 2018 and similarly sought to rely on the named documents. Even though an objection was taken to two of the documents at the foot of the List dated the 14th March 2018; the objection by and on behalf of Learned counsel for the Plaintiff was overruled and the named documents were admitted as exhibit D7 to D9, respectively.
56. On cross examination by counsel for the Plaintiff, the witness confirmed that same was not the Land Registrar at Ruiru Land Registry at the time when the offensive transaction and registration was undertaken.
57. In addition, the witness also averred that prior to the offensive transfer and registration of the suit property in the names of the 1st and 2nd Defendants, the suit property was registered in the name of the Plaintiff. In any event, the witness also added that the Plaintiff was also issued with a Certificate of lease.
58. Whilst under further cross examination, the witness testified that even though same has availed to court and produced various documents, same has however not availed the original Certificate of Lease, if any, that was surrendered at the time of the transfer and registration of the suit property in favor of the 1st and 2nd Defendant.



59. Furthermore, the witness conceded that the Instrument of transfer which was registered and thus culminated into the issuance of the Certificate of Lease in favor of the 1st and 2nd Defendants was not signed by the transferee. For good measure, the witness added that in the absence of execution by the transferee, the instrument of transfer ought not to have been registered.
60. It was the further evidence of the witness that the transfer over and in respect of the suit property could also not be undertaken without the consent from the Commissioner of Land. Nevertheless, the witness conceded that no such consent was ever procured and/or availed prior to the registration of the suit property in favor of the 1st and 2nd Defendants.
61. Other than the foregoing, the witness also conceded that no rates nor rents clearance Certificate was also tendered prior to the offensive registration. In any event, the witness submitted that in the absence of rates and rents certificate, the impugned transfer ought not to be undertaken.
62. Additionally, it was the testimony of the witness that the transfer instrument which was presented for purposes of registration and which was latter on registered, by the then Land Registrar, was incomplete and thus unlawful.
63. Furthermore, the witness contended that if same were the Land Registrar presented with the instrument of transfer in question, same would not have undertaken the offensive registration. Instructively, the witness admitted that the offensive registration of the incomplete and unattested transfer instrument was irregular and unlawful.
64. Finally, the witness testified that in his view the instrument of transfer, which culminated into the registration of the suit property in favor of the 1st and 2nd Defendants ought to have been registered.
65. With the foregoing testimony, the 3rd defendant's case was duly closed.

Submissions By The Parties

66. Upon the close of the hearing, the advocates for the Plaintiff and the 3rd Defendant covenanted to file and exchange written submissions over and in respect of the subject matter. In this regard, the court thereafter proceeded to and indeed set timelines for the filing and exchange of the written submissions.
67. Instructively, both the Plaintiff and the 3rd Defendant proceeded to and filed their respective submissions. For good measure, the submissions filed by and on behalf of the Plaintiff and the 3rd Defendant are duly on record.
68. Additionally and for good measure, the court has had occasion to peruse the written submissions duly filed and same shall be taken into account while crafting the Judgment herein.

Issues For Determination

69. Having reviewed the Pleadings filed by and on behalf of the respective Parties, inter-alia, the Plaintiff dated 9th June 2015, the Defense and Counter-claim dated 10th May 2018; and the Statement of Defense dated 23rd August 2017, respectively; and upon taking into account the evidence tendered by the respective Parties and upon consideration of the written submissions filed by and on behalf of the Plaintiff and the 3rd Defendant; the following Issues do arise and are thus worthy of determination.
 - i. Whether the Plaintiff herein was hitherto the Lawful Proprietor of the suit property.



- ii. Whether the Transfer and Registration of the suit property to and in favor of the 1st and 2nd Defendant was Fraudulent.
- iii. What Reliefs ought to be granted.

Analysis And Determination

Issue Number 1

Whether the Plaintiff herein was hitherto the Lawful Proprietor of the suit property.

70. It was the evidence of PW1 that the suit property was hitherto registered in the name of Moses Mbugua Mwangi, who was a Father to the witness. Furthermore, the witness added that the said Moses Mbugua Mwangi thereafter transferred and caused the suit property to be registered in the name of the Plaintiff Company.
71. Additionally, PW1 testified that following the transfer and registration of the suit property in favor of the Plaintiff company, the Plaintiff herein become the lawful and legitimate owner of the suit property, with effect of the year 2001.
72. On the other hand, the witness also testified that upon transfer and registration of the suit property in favor of the Plaintiff, the Plaintiff was duly and lawful issued with a certificate of lease. For good measure, the witness tendered and availed to court the original certificate of lease which was issued to and in favor of the Plaintiff.
73. Other than the foregoing, the Land Registrar who testified as DW1; also confirmed that the Plaintiff company was hitherto the lawful and registered proprietor of the suit property. In any event, the Land Registrar added that the Plaintiff was also issued with a Certificate of Lease over and in respect of the suit property.
74. From the foregoing testimony, there is no gainsaying that indeed the Plaintiff company was hitherto the lawful and legitimate proprietor of the suit property on the basis of the certificate of lease which was issued in favor of the Plaintiff.
75. Premised on the foregoing and taking into account the provisions of Section 24 and 25 of the [Land Registration Act](#), 2012, it is my conclusion that prior to and or before the registration of the transfer instrument in favor of the 1st and 2nd Defendant, the Plaintiff company was indeed the Proprietor of the suit property.
76. For good measure, the ownership of the suit property by the Plaintiff was vindicated by the certificate of lease. In this regard, it is instructive to take cognizance of the holding of the court in the case of Dr. Joseph N.K. Arap Ng'ok Vs Moijo Ole Keiwua [1997] eKLR, where the court stated and held thus:-

Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.
79. Furthermore the importance of a certificate of lease and/or title in confirming the ownership rights of the registered proprietor/owner thereof, was also elaborated upon and underscored by the Court of



Appeal in the case of Elizabeth Wambui Githinji & 29 Others versus Kenya Urban Roads Authority & Others (2019)eKLR, (per Ouko JA) where the court stated thus;

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

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

77. To surmise, it is my finding and holding that indeed the suit Property hitherto belonged and was registered in the name of the Plaintiff company. In this regard, the denial by the Third Defendant that the Plaintiff herein was never the owner of the Property beforehand, was misleading and mistaken.
78. Consequently and in view of the foregoing, my answer to issue number one is in the affirmative.

Issue Number 2

Whether the Transfer and Registration of the Suit Property to and in favor of the 1st and 2nd Defendant was Fraudulent.

79. Having found and held that the suit property was hitherto registered in the name of the Plaintiff company, the next issue for determination thus revolves around whether the Plaintiff herein effected any transfer of the suit property to and in favor of the 1st and 2nd Defendants or otherwise.
80. Instructively, the witness who testified for and on behalf of the Plaintiff herein averred that the Plaintiff neither entered into nor executed any sale agreement over and in respect of the suit property.
81. In any event, the witness added that after the filing of the instant suit, the 1st and 2nd Defendants filed an Agreement which was purported to have been entered into between himself (witness) and the 1st and 2nd Defendants on the other hand.
82. Nevertheless, PW1 testified that upon coming into contact with the impugned sale agreement, which was alluded to by the 1st and 2nd Defendants, same established that the signature thereon did not belong to him (witness). Furthermore, the witness also added that even the identity card number which was contained on the face of the purported sale agreement did not belong to him.
83. Other than the foregoing, PW1 also pointed out that upon procuring and obtaining documents from the Land Registry, same came across the transfer instrument, which was used and relied upon to facilitate the transfer and registration of the suit property to and in favor of the 1st and 2nd Defendants.
84. Upon procuring and obtaining the offensive instrument of Transfer, PW1 averred that the said Instrument was defective in various ways, inter-alia, same was neither signed nor executed by the transferee.
85. Furthermore, it was also the testimony of PW1 that the signature which was affixed against his name also did not belong to him. Besides, the witness also added that both the passport photographs and the identity card number that were affixed to the instrument of transfer also did not belong to him.



86. It was the further testimony of the witness that the instrument of transfer was similarly not attested by any advocate, (sic) witnessing the execution thereof, either by the transferor of the transferee.
87. Other than the testimony by PW1, it is also important to recall that the Land Registrar who testified as DW1 also made several pointed admissions. Firstly, the Land registrar conceded that the original Certificate of Lease over and in respect of the suit property was never surrendered at the time of the offensive transfer of the suit property to and in favor of the 1st and 2nd Defendants.
88. Secondly, the Land Registrar also conceded that the Instrument of transfer which was presented to the Land registry and which was ultimately registered, culminating into the transfer and registration of the suit property in favor of the 1st and 2nd Defendants was neither executed by the transferee nor attested by any advocate, either on behalf of the transferor or transferee.
89. Thirdly, the Land Registrar conceded that the suit property could not be transferred in manner, whatsoever, without procurement of the consent of the Commissioner of land. However, the witness admitted that having checked the entire parcel file relating to the suit property, same did not come across any consent from the Commissioner of Land.
90. Fourthly, the Land Registrar also admitted that no rates/rents clearance certificate was ever presented and/or availed to the Land Registry prior to and before the registration of the Instrument of transfer in favor of the 1st and 2nd Defendants.
91. Finally, the Land Registrar conceded that in his view the instrument of transfer which was presented to the Land Registry and which culminated into the transfer and registration of the suit property in favor of the 1st and 2nd Defendants, was not only incomplete, but was irregular, illegal and unlawful.
92. My understanding of the import and tenor of the evidence of the Land Registrar is to the effect that the impugned transfer and registration of the suit property in favor of the 1st and 2nd Defendants was ipso facto irregular, illegal, unlawful and for good measure fraudulent.
93. Surely, the Land Registrar who undertook the offensive registration ought to have been diligent in handling and/or dealing with the offensive instrument of transfer, prior to and or before effectuating the registration thereof.
94. However, despite the statutory obligation cast upon the Land registrar to undertake due evaluation over and in respect of all instruments lodged for registration, it appears that the designated Land Registrar herein (who undertook the offensive registration) chose to throw caution to the wind and thereafter proceeded in a care free manner.
95. It is interesting and baffling to discern that there still exist civil servants; who pay little or scant respect for the Rule of law and instead utilize their positions for extraneous and collateral purposes.
96. To my mind, the circumstances underlining the offensive transfer and registration of the suit property in favor of the 1st and 2nd Defendants was wrought with illegality, collusion and evident corruption on the part of, inter-alia, the 3rd Defendant's officer stationed at Ruiru land Registry.
97. Before departing from the issue herein, it is important to observe that upon being served with the Plaint and the summons to enter appearance, the 1st and 2nd Defense filed a statement of defense and counterclaim and in respect of which same contended that same (the 1st and 2nd Defendants) dealt with Isaac Gichia Mbugua who sold the suit property unto them. For good measure, the 1st and 2nd Defendants conceded that same did not deal with the Plaintiff herein.



98. Assuming for purposes of arguments only' that the 1st and 2nd Defendants bought and purchased the property from Isaac Gichia Mbugua, which is not the case, could same have transferred the property belonging to the Plaintiff to and in favour of the First and Second Defendants? Certainly not.
99. In my humble view, the suit property belonged to the Plaintiff which a duly incorporated company; and thus separate and distinct from her directors and shareholders.
100. Consequently and in the premises, where the property of a company is to be dealt with, sold or disposed of, such a transaction can only be undertaken by the Company itself and not otherwise.
101. To this end, it is instructive to recall and reiterate the decision in *Salmond vs Salmond & Co. Ltd (1897) A.C* in which it was stated inter alia as follows:

“The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the shareholders of the subscribers or trustees for them nor are the subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act.”

102. Additionally, the principle that it is only the company that can deal with and/or transact over properties registered in her name was also highlighted, amplified and elaborated upon in the case of *George W M Omondi & another versus National Bank of Kenya Ltd & 2 others [2001] eKLR*, where the court stated thus;

It is a basic principle of company law that the company has a distinct and separate personality from its shareholders and directors even when the directors happen to be the sole shareholders (see *Salmon v a Salmon & Co Ltd [1897] AC 22*). The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company's property apart from the shares they own. From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights. The contention by counsel for the plaintiff that the investment in LVF is by the plaintiffs and they are accordingly the proper plaintiffs in this action is manifestly without legal foundation. And although it is true that the appointment of a receiver manager has the effect of rendering the board of directors *functus officio*, it does not destroy the corporate existence and personality of the company. That appointment makes the directors unable to act in the name of the company but, as I understand the law, it does not make them in their capacity as members equally disabled. On that view, it was open to the two plaintiffs in the name of the company, but only in the name of the company, to institute the present proceedings which relate to alleged wrongs against the company *qua* company. But they definitely lacked legal competence to institute the suit in their own names in their capacities as directors and shareholders of LVF.

103. In a nutshell, it is evident and apparent that the impugned transactions culminating into the transfer and registration of the property in favor of the 1st and 2nd Defendants was clearly fraudulent and aided by the care free 3rd Defendant. Invariably, the Plaintiff company herein was never involved and thus her property cannot be expropriated without her involvement and participation, whatsoever.
104. To my mind and based on the totality of the materials on record, the Plaintiff has been able to place before the Honourable court cogent, credible and plausible evidence in proof of not only fraud, but also illegality, as against the Defendants jointly and/or severally.



105. As pertains to what constitutes fraud, it is imperative to take cognizance of the definition supplied by the Court of Appeal in the case of Arthi Highway Developers Limited versus West End Butchery Limited & 6 others [2015] eKLR, where the court cited and referred to Blacks Law Dictionary and reproduced same as hereunder;

52. According to Black's Law Dictionary,
"Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another".

106. Additionally and as concerned proof of fraud, it suffices to take cognizance of the holding of the Court of Appeal in the case of Kuria Kiarie versus Sammy Magera (2018)eKLR, where 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 vs 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].

The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules.

26. As regards the standard of proof, this Court in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR expressed itself as follows:-

"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs 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."

107. Taking into account the foregoing and coupled with the totality of the evidence tendered before the Honourable court, it is evident and apparent that fraud, in its various perspectives, was duly and suitably proved, as against all the Defendants in this case.



Issue Number 3

What Reliefs ought to be granted.

108. The Plaintiff herein had sought for a plethora of reliefs at the foot of the Plaint dated the 9th June 2015, inter-alia declaration that the transfer and registration of the suit property in favor of the 1st and 2nd Defendants was fraudulent and illegal.
109. Furthermore, the Plaintiff has also sought for an order of cancellation of the offensive certificate of lease dated the 20th February 2015; and issued in favor of the 1st and 2nd Defendants.
110. Notably, the court has found and held that the Plaintiff herein neither sold nor transferred the suit property to and in favor of the 1st and 2nd Defendants. Consequently, there is no gainsaying that the impugned transfer and registration of the suit property in favor of the 1st and 2nd Defendants was fraudulent and thus deserving of cancellation.
111. Other than the foregoing, the Plaintiff has also sought for Damages as against the Defendants. Though not clearly stated whether the damages being sought are general or otherwise, it is clear in my mind that the only damages that can ensue from the offensive transaction are General damages and not otherwise.
112. In respect of the claim for Damages, it is my humble position that the Plaintiff herein having been denied and deprived of her legitimate rights and entitlement to the suit property, is certainly entitled to recompense.
113. In addition, it is imperative to state and underscore that whilst reckoning and computing damages payable to a claimant for unlawful denial and deprivation of rights to land, the court is enjoined to take cognizance of, inter-alia, the size of the land, the location thereof and the duration of deprivation.
114. Consequently and having taken into account, the ingredients alluded to in the preceding paragraph and being mindful of the fact that assessment of General damages is an exercise of Judicial discretion, I am minded to assess and award General damages to the Plaintiff in the sum of Kes.7, 000, 000/= only, payable by the 1st and 2nd Defendants.
115. In arriving at Quantum of damages awarded in the preceding paragraph, I have taken cognizance of the holding in the case of Davis Mwashau Jome versus Damaris Karanja & Another (2021)eKLR, stated and held 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 vs 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.

116. Furthermore, the issues and factors to be considered before assessing and awarding Damages for trespass, were also ventilated and articulated in the case of Kenya Power & Lighting Company Ltd



versus Ringera & 2 Others (2022)KECA 104 KLR (4th February 2022) where the Court of Appeal stated and held as hereunder;

38. The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distill and replicate as hereunder:
- I. Harlshurys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.
 - II. Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.
 - III. Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.
 - IV. Ephantus Mwangi & Another vs. Duncan Mwangi [1981 – 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence.b) a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.
 - V. Kiambu Dairy, Farmers Co-operative Society Limited vs. Rhoda Njeri & 30 Others [2018] eKLR, - the extend of an award of compensatory damages lies in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well settled principles.vi)Kemfro Africa Limited vs. Lubia & Another [No. 2] [1987] KLR 30 as approved in Peter M. Kariuki vs. Attorney General [2014] eKLR,



- before interference with the quantum of damages awarded by a trial court the appellate court must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or short of the above, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages payable.

- VI. Johnson Evans Gicheru vs. Andrew Martin & Another [2005] eKLR, - this Court on appeal will be disinclined to disturb the finding of the trial Judge as to the amount of damages awarded by the trial court merely because if it had tried the case itself in the first instance, it would have awarded either a higher or lesser sum) justification for reversing a trial Judge on an award of damages only applies where the court is convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very low as to make it an entirely erroneous estimate of the damage to which the aggrieved party is entitled.
 - VII. Sumaria & Another vs. Allied Industries Limited [2007] 2 KLR I, - an appellate court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence or based on a misapprehension of the evidence or that the Judge had been seen demonstrably to have acted on a wrong principle in reaching the finding he/she did.
 - VIII. Butt vs. Khan [1981] KLR 349, - an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate
 - IX. it must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.
 - X. Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited vs. Janevans Limited [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss;
- (b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass;
 - (c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass.



117. Notably, the assessment and award of General damages was also calibrated upon and succinctly explained in the case of Carogt Investments Ltd versus Aster Holdings Ltd & Another (2019)eKLR, where the court stated as hereunder;

“In awarding Kshs. 100,000,000 the learned Judge, as we have seen earlier, considered several factors, including the appellant’s own valuation of the suit property undertaken on 17th June, 2013 and estimated at Kshs.1,800,000,000 given, the fact that the 1st respondent was kept off its property for over 10 years, the size of the suit property, its strategic location, the lost investment opportunities to the 1st respondent, the fact that prior to the invasion by the appellant, 1st respondent had failed for over 14 years after acquiring the property to carry out any development on it. In a passage from the judgment which we reproduced earlier the Judge reasoned that this failure to develop the property for this long period did not;

“mean that the property would have remained undeveloped until now. Considering the location and value of the suit property I assess general damages in the sum of Kshs. 100,000,000”.

118. Finally, it is also not lost on the court that the 1st and 2nd Defendants had also filed a counterclaim dated the 10th May 2018. However, it is worthy to recall that the 1st and 2nd Defendants neither testified nor tendered any documents in proof of the counterclaim.

119. In the premises, it is common knowledge that where pleadings are filed before the court and thereafter no evidence is tendered to support such pleadings, same remain bare and are thus devoid of any probative value. In this regard, it suffices to point out that the counterclaim by the 1st and 2nd Defendants has not been proven.

120. Invariably, the Burden of proving the allegations contained and alluded to at the Foot of the Counterclaim rested with the First and Second Defendants, in terms of the provisions of Sections 107,108 and 109 of the *Evidence Act*, Chapter 80, Laws of Kenya. See also the holding of the Court of Appeal in the case Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi (2014) Eklr.

Conclusion And Disposition

121. In my humble view, the circumstances that have been captured and enumerated in the body of the Judgment herein exhibit a deliberate and intentional dereliction of duty by the 3rd Defendant, culminating into a care free attitude, where any document/ Instruments, irrespective of propriety or otherwise, can be registered despite the clear provisions of the law.

122. Without belaboring the point, it is instructive to state and underscore that I have come to the conclusion that the Plaintiff’s suit is meritorious and same deserve being allowed.

123. Consequently and in the premises, Judgment be and is hereby entered in favor of the Plaintiff in the following terms;

- i. The certificate of lease issued on the 20th February 2015 in favor of the 1st and 2nd Defendants herein be and is hereby revoked, canceled and nullified.
- ii. The Register in respect of L. R No. Ruiru Township/239 be and is hereby rectified and same shall reflect the name of the Plaintiff as the lawful and legitimate proprietor thereof.



- iii. For good measure, the Plaintiff be and is hereby declared to be the Lawful and Legitimate proprietor of L. R No. Ruiru Township/239.
- iv. An order of Permanent Injunction be and is hereby issued against the 1st and 2nd Defendants restraining and/or prohibiting same, either by themselves, agents, servants and/or employees thereof from entering upon and/or interfering with L. R No. Ruiru Township/239 belonging to the Plaintiff herein.
- v. In any event, if the 1st and 2nd Defendants have since taken possession and/or in occupation of the suit property, same shall vacate and hand over vacant possession of the suit property to the Plaintiff within 90 days from the date hereof.
- vi. In default to vacate and/or hand over vacant possession of the suit property within the stipulated 90 days then the Plaintiff shall be at the liberty to levy eviction and in such events, the costs/expenses of such eviction shall be borne by the 1st and 2nd Defendants.
- vii. General damages for trespass be and are hereby awarded in the sum of Kes.7, 000, 000/= only in favor of the Plaintiff.
- viii. The award of General damages shall attract and accrue interests at court rates (14%) per annum.
- ix. The Counterclaim by the 1st and 2nd Defendants be and is hereby dismissed.
- x. Costs of the suit and the counterclaim be and are hereby awarded to the Plaintiff against the Defendants jointly and or severally.

124. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH ____ DAY OF JUNE, 2023.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – court assistant

Mr. Chaha h/b for Mr. Kelvin Mogeni for the Plaintiff

Ms. Ndundu for the 3rd Defendant

N/A for the 1st and 2nd Defendants

