



REPUBLIC OF KENYA



KENYA LAW

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**Rono & another v Rono & 2 others (Environment & Land Case
19 of 2018) [2023] KEELC 20258 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20258 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 19 OF 2018
MC OUNDO, J
SEPTEMBER 28, 2023**

BETWEEN

JACKLINE CHEPNGETICH RONO 1ST PLAINTIFF

RACHEL CHEPNGENO MIBEI 2ND PLAINTIFF

AND

CRISPINE KIPLANGAT RONO 1ST DEFENDANT

FLORENCE CHEPNGETICH 2ND DEFENDANT

AGNES CHEBET 3RD DEFENDANT

JUDGMENT

1. This matter was initially filed at the Nakuru High Court Family Division as Matrimonial Cause No. 17 of 2016 wherein it had been transferred to this Court vide an order of 7th March 2018. In their Plaint dated the 20th June 2016, and amended on the 1st September 2017, the Plaintiffs herein sought for judgement against the Defendants jointly and severally for:
 - i. A declaration that the parcels of land known as Kericho/Silibwet/4099, Kericho/Silibwet/4089, Kericho/Silibwet/4088 and Kericho/Silibwet/4004 which were bequeathed to the 1st Defendant constitute the matrimonial home and/or matrimonial property for the benefit of the 1st Plaintiff, the 1st Defendant and their children.
 - ii. A declaration that the properties herein known as Kericho/Silibwet/4099, Kericho/Silibwet/4089 and Kericho/Silibwet/4088 and Kericho/Silibwet/4004 being matrimonial properties were held by the 1st Defendant in trust for the 1st Plaintiff and their children and any conveyance of the interest therein in favour of third parties ought to have been done with the informed consent of the 1st Plaintiff.



- iii. In the alternative a declaration that the 1st Plaintiff was a person in actual occupation of the property as a married woman and any sale and/or transfer of the interest therein and any transfer was subject to her interest.
 - iv. An order directing that the conveyance of the properties in favour of the 2nd and 3rd Defendant without the informed consent of the 1st Plaintiff be revoked and the register be rectified to reflect the 1st Defendant as the registered owner of the parcels of land as a trustee for the 1st Plaintiff.
 - v. An order that any consideration received by the 1st Defendant from the 2nd and 3rd Defendant be recovered as a civil debt from him and in personam.
 - vi. Costs of this suit be borne by the Defendants.
2. Upon service of the Plaint, the 3rd Defendant filed her statement of defence dated the 22nd July 2016 denying the contents contained in the Plaint for reason that she was a purchaser of the suit land No. Kericho/Silibwet/4089 for value wherein she had been in occupation since the year 2015. She sought for the suit to be dismissed.
 3. On the 30th January 2019, the matter was subsequently fixed for hearing for the 26th March 2019 wherein Parties had been granted leave to file their amended pleadings respectively.
 4. The 2nd Defendant who had filed her statement of defence dated the 26th October 2016, amended the same on the 7th February 2019 with a counterclaim to which she similarly denied the contents contained in the amended Plaint wherein she stated that the suit property was not matrimonial property, that the 1st Plaintiff was not a wife to the 1st Defendant and if she was, then she had consented to the sale of the suit lands. That she had bought the suit lands in a sale transaction that was lawful wherein she had obtained title and had been put in occupation as a bonafide purchaser for value for which lands she had subsequently developed.
 5. In her counterclaim, the 2nd Defendant sought for the following orders:
 - i. A declaration by the Honorable Court that the 2nd Defendant (now Plaintiff) is the bona fide legal and registered proprietor of land parcels known as (i) Kericho/Silibwet /4004 (ii) Kericho/Silibwet/4088, (iii) Kericho/Silibwet/4099 and (iv) Kericho/Silibwet/4089(sic)
 - ii. An eviction order against the Plaintiff (now Defendant) from the 2nd Defendant's (now Plaintiff's) parcels of land known as (i) Kericho/Silibwet/4004 (ii) Kericho/Silibwet/4088, (iii) Kericho/Silibwet/4099 and (iv) Kericho/Silibwet/4089(sic).
 - iii. Mesne Profits.
 - iv. General damages.
 - v. Cost of this suit
 6. A response, dated the 22nd March 2019, to the amended 2nd Defendant's defence and counterclaim was filed on the 25th March 2019 in which the Plaintiffs joined issue with the 2nd Defendant as to whether the 1st Plaintiff was a wife to the 1st Defendant. Whether her consent was necessary and whether the 1st Plaintiff was in occupation of the suit land. The Plaintiffs denied the contents in the counterclaim.
 7. The 1st Defendant filed his statement of defence dated the 18th November 2019 stating that the 2nd Defendant took advantage of him when he was not in his proper state of mind and that all documents he had signed were done at a time when he could not grasp the consequence of doing so. That he did



not attend the Land Control Board meeting to consent to the sub-division and subsequent transfer of any of the suit parcels of land herein.

8. The matter was confirmed ready for trial wherein it had proceeded for hearing on the 13th May 2019 when the 1st Plaintiff Jackline Chepngetich Rono testified as PW1 to the effect that she came from Kabtebwet and was a farmer. That the 1st Defendant was her husband but she was not related to the 2nd & 3rd Defendants. She adopted her statement of 20th June 2016 as her evidence in chief and then proceeded to testify that her husband was the registered owner of land parcel No. Kericho/Silibwet/4099 4089 and 4088 wherein they had established their matrimonial home.
9. That her husband had sold the above parcels of land to the 2nd & 3rd Defendants without her consent to the sale and that she had only come to learn about the sale when she was issued with a notice to vacate in the year 2016. She produced a photograph showing their matrimonial home and sought that the Court assists her to get their land. She also sought for costs of the suit.
10. When cross examined by Counsel for the 3rd Defendant, the 1st Plaintiff's response was that she did not have her National Identity Card but that she got married in 2012 under Kipsigis customary law and was still married to the 1st Defendant wherein they resided on the suit property. She also acknowledged that the 1st Defendant was aware that she had filed suit against him.
11. In response to the cross examination by Counsel for the 2nd Defendant, she stated that she was 27 years old and a holder of a National Identity No. 31161390. She reiterated that she was married to the 1st Defendant under Kipsigis customary law. That she was aware that that the 1st Defendant had another wife called Lillian Cherotich with whom they got married in church under Cap 151. That the said Lillian had left and now lived in Kapsabet while she and her husband lived in Bomet where he worked at Bomet University. That the land in Nakuru belonged to his parents.
12. She testified that according to the certificate of Confirmation of Grant dated 19th October 2011 in respect to Francis Kiprono Arap Mibei, her husband had been given 8 acres out of his late father's estate. That she did not witness the sale of the suit property however according to the sale agreement dated 9th June 2016, her name appeared as one of the witnesses. She denied having signed the said agreement but confirmed that she had seen the Defendant's houses being constructed. She said she could not remember the number of the suit property but sought for the Court to assist her to remain on the suit land.
13. That neither she nor the 1st Defendant's mother had been paid any money in respect of the land but that there were 9 rental houses on the suit property for which her mother in law (2nd Plaintiff) had been collecting rent, the last which she had collected in the year 2014. She also confirmed that the land had been sold in the year 2016, before which time, her husband used to collect rent.
14. She also confirmed that she knew Grace Kasimbei Rotich before she proceeded to state that her husband worked in Bomet, but had not filed a Defence to the case. That she did not collude with him to deny the 2nd and 3rd Defendants from enjoying peaceful occupation of the suit property which she acknowledged she did not know its size. She also testified that Land parcel No. Kericho/Silibwet/885 had been divided into various portions wherein her husband had been given 1.25 acres. That she did not know whether at the time he had sold the land, if the surveyors had sub-divided the same. She distanced herself from the signature on the mutation form stating that she had no other land to move to and did not know how long it had taken to construct the house on the suit property. That when the NEMA officials visited they did not find her on the land. She denied receiving instructions from her mother-in-law to file suit. She confirmed that she had not produced any demand notice requiring her to vacate from the suit property and confirmed that her husband had willingly sold the land.



15. On being re-examined by her Counsel, she stated that she had lived on the suit property since the year 2012 upon which she had been cultivating a portion. She denied having seen any surveyor on the suit property and that she didn't know what happened on the land in the year 2011 as she was not married by then.
16. The 2nd Plaintiff, Rachel Chepngeno Mibei, testified as PW2 to the effect that she came from Bomet County and was a retired teacher currently engaged in farming. That the 1st Defendant was her eldest son but there was no relationship between her the 2nd & 3rd Defendants. That she was in Court because sometime early February 2016, the 2nd Defendant went to her in Bomet and informed her that she was looking for a plot to buy. That she had asked her if she had any plot for sale wherein she had informed her that the plots she had were for her children and grandchildren. The 2nd Defendant had then left. Later she had been notified by her daughter-in-law PW1 that there was someone alleging to have bought their land and PW1 wanted to know if she was aware of the sale of the land to the 2nd Defendant. She'd had denied knowledge.
17. That she had earlier learnt that her son Chrispin (1st Defendant) had sold a portion of the land to the 3rd Defendant. The suit land was originally known as land parcel No. Kericho/Silibwet/885 wherein Chrispin had been given 1.25 acres out of his late father's estate. That Chrispin was to hold the land in trust for himself and his children. After he sold the first portion to the 3rd Defendant, she had warned him not to sell any more land. That Land parcel No.885 had been sub-divided into land parcel No. Kericho/Silibwet 4098, 4099, 4088 and 4004 but she never heard that Chrispin had obtained consent from the Land Control Board to transfer. She sought that the suit land be returned to Chrispin so that he could safeguard it for her grandchildren.
18. On being cross examined by Counsel for the 3rd Defendant, she had responded that she had learned about the sale of the land to the 3rd Defendant wherein she had accepted but warned her son. She conceded that the 3rd Defendant should not have been sued.
19. On cross examination by Counsel for the 2nd Defendant, the witness confirmed that she lived in Bomet and that her son the 1st Defendant (Chrispin) was 45 years old and had 3 children. That Jackline (The 1st Plaintiff) was Chrispin's 2nd wife after the 1st wife (Lillian) left. That she was not aware if he had divorced his 1st wife with whom they had a marriage certificate and were legally married. She also confirmed that Chrispin's 1st wife was legally entitled to the suit property but that she did not live on the suit property. That she had not set aside any land for Lillian because it belonged to her husband and his family. That she was the administrator of her late husband's estate and had a share of his estate which included land in Ngata, Njoro, Ndaraweta and Silibwet, land which she held in trust for her grandchildren.
20. That the case was in Court because the land that was sold comprised her son's matrimonial home. That Kericho/Silibwet/885 was sub-divided into several plots and sold to various people who had not been sued. That she had not sold the portion where she lived. She also confirmed that she lived with her daughter-in-law and grandchildren and when in Bomet, she stayed in her son's house because she did not have a house of her own in Bomet. She denied that the land was sold so that the 1st Defendant could move to Nakuru. She confirmed that she had some twin houses in Bomet before they were sold to the 2nd Defendant. That she and her husband lived on land parcel No. Kericho/Silibwet/885 where according to the certificate of Confirmation of Grant, she had been given 2.25 acres.
21. That the 1st Defendant had sold her home together with 7 rental houses for which he was still living in one of the houses. That he did not have a right to sell the land and that she had resisted its sale to Florence. That although by the time Chrispin sold the land, the title deed was in his name, yet he still had no right sell it as he was holding it in trust for her grandchildren. That Chrispin got 8 acres out of



- the land in Ngata and she was aware that there was a 3 storied building on the suit property. That the buildings on the matrimonial home were still there. That the storied building was in her homestead. Her evidence was that should the land be given back to them, she was prepared to compensate the 2nd Defendant. She also confirmed that she did not know why her son did not file a Defence to this case yet he was aware of the suit together with the Indemnity Notice.
22. Her evidence was that her son lived in Bomet and that the surveyors had gone to sub-divide land parcel No. 885 after the succession matter although she was not aware of the subsequent sub-divisions because she had not been involved although she ought to have been since she was the original owner of parcel No. 885. That further she could not tell on which parcel number her house or Chrispin's house stood.
 23. In re-examination, the witness reiterated that there were no beacons on the 4 portions but the three storied structure was on parcel No. 4004 and Jackline and Chrispin's matrimonial home was on the suit property.
 24. The next witness PW 3 Athaman Otine Juma, the Bomet Land Registrar testified that he had received summons to avail Minutes for sub-division of land parcels No. Kericho/Silibwet/3262, 4087, 4003 and the Transfers thereto. He stated that he did not get the minutes which he thought had been misplaced because there seemed to have been some procedural lapses in the manner the matter was handled. He testified that Parcel No.4004 has a subdivision from parcel No.3262. That the mutation form showed that land parcel No.3262 was subdivided into land parcels No 4003 and 4004 wherein Parcel No 4004 was transferred to Florence Chepngetich. That Parcel No 4003 was further subdivided into parcels No 4087, 4088 and 4089 and Parcel No 4088 was transferred Florence Chepngetich (2nd Defendant) whereas Parcel No 4089 was transferred to 3rd Defendant, and that the transferor of all the parcels had been the 1st Defendant. That although he had the green cards for parcel No. 4089 he did not have it's transfer documents.
 25. At this juncture. the witness was given time to avail the documents for parcels No 4099 and 4089 wherein further hearing proceeded on the 15th February 2021 when the witness testified that in regard to parcel No.3262, he only had the Agenda for the 11th December 2014 which he produced as Pf Exh 3. He then went on to state the procedure involved before the issuance of consent before the Land Control Board to wit that before the board convened, the secretary to the Board would prepare the Agenda to be discussed, then the minutes followed. That although he had the Agenda, he did not trace the minutes.
 26. In regard to parcel No. 4087, being a sub-division and subsequent registration of mutation, the meeting was held on 12th November 2015. There had been an agenda but the minutes were also not there. He produced the Agenda as Pf Exh 3. In regard to parcel No. 4003, he referred to an Agenda which he produced as Pf Exh 4 wherein he stated that the meeting was held on 12th November 2015. He produced the Consent as Pf Exh 5 and proceeded to testify that the board normally convened once a month.
 27. That in respect of 4003 being a sub-division where a mutation was raised, the meeting was held on 12th November 2015 wherein he believed that once the consent was acquired, the mutation was prepared, a number given, a sub-division scheme plan attached which was to be endorsed by the Regional Physical Planner, for which the County Physical Planner was to approve and the documents presented for regularization before payments could be done.
 28. That it was not possible to have agendas for parcel No. 4003 and 4087 on the same date. That the absence of the minutes of the meeting was probably due to misplacement of documents. He produced



- the Consent for 4087 as Pf Exh 6 and stated that the minutes were part of the process of transfer and the Agenda could not be the minutes because the minutes are generated from the Agenda. That he believed that the minutes had been raised but he could not trace them. That the Agenda usually showed what had been discussed in the minutes. That because he could not trace the minutes, he had just decided to carry the files to show the Court what he could find. That the importance of the meeting was to confirm that the due process had been followed.
29. That before registration, they normally considered the Agenda of the minutes. In reference to parcel No. Kericho/Silibwet/4099, he had the transfer documents, the letter of consent and the applications for the consents. That he had two sets of consents transferring the property. That there had been one meeting held on 14th April 2016 transferring property. The other letter of consent showed that a meeting had been held on 17th May 2016. The transferor was Chrispin Kiplagat Rono wherein the transferee had been Florence Chepngetich which applied to the second consent. That the green card confirmed that Florence Chepngetich was registered as proprietor on the 18th May 2016.
 30. His evidence was that the transfers were not proper. He then proceeded to explain that the normal procedure was that transferor and transferee would agree via a sale agreement, from there the vendor would file an application for consent of transfer to be signed by both parties. Money would be paid and an official payment attached before it could be presented at the registry. The applicant would then be notified on the day of the meeting. Once the consent was there, both parties would execute the transfer. There was then an evaluation report to enable the land Registrar calculate the stamp duty payable wherein an e-slip would generate a deposit slip which was to be followed by a registration fee of Ksh. 500/= and Ksh. 500/= for title. These documents were then to be presented at the registry for verification where a Presentation Book would be opened and a specific number given to that Registration which then confirmed the official registration and issuance of title. That in relation to parcel No.4099 the due process was not followed because the execution process was missing, parties did not sign and there was no valuable report. Secondly, the signature of land Registrar and seal were absent. That the documentation should not have been used to produce a title. He produced the documentation as Pf Exh7.
 31. In regard to parcel No.4089, his evidence was that he was not able to trace the transfer documents. That had there been any registration or issuance of the title deed, he would have confirmed from the Presentation Book for which there had been no evidence of registration of the suit land in the 'Presentation Book'. That the Green Card showed the owner as Agnes Chebet having been registered on 26th May 2016. He produced it as Pf Exh 8.
 32. In regard to Parcel No. 4088 his testimony was that he had had both the green card and transfer documents and that its story was similar to the one in parcel No 4099. That there had been a meeting on 10th March 2016 and another on 21st April 2016. There were two consents and he had the Agenda. That it was not possible to have two consents of the same properties. The transfer was not proper. The transferor was shown as Chrispin Kiplagat Rono whereas and the transferee was Florence Chengetich. He produced the two consents for parcel No. 4088 as Pf Exh 9(a), the green cards as Pf Exh (b) and the applications as Pf Exh 9(c).
 33. In reference to land parcel No 4004, his evidence was that there had been two letters of consents for the 11th February 2016 and 24th February 2016 which he produced as Pf Exh 10(a), and the two applications as Pf Exh 10(b). He confirmed that the meetings had been held in the same month. That again the due process had not been followed. He produced the green card as Pf Exh 10 (c).
 34. The Court then ordered for the copies of the documents to be supplied to by close of today. Wherein the Land Registrar sought to have them photocopied and arranged in order before supplying them.



35. On being cross examined, the Land Registrar had responded that he had come to Court to produce documents in relation to the transfer of the land parcels. He illustrated the general duties and responsibilities as Land Registrar were as follows:
- i. To receive and record applications for land registration which entails the Presentation Book
 - ii. Process land title deed searches.
 - iii. Prepare and process application for Land Control Board which included sitting in the Land Control Board.
 - iv. Receipt of complaints from members of public.
36. That receiving and recording was part of issuance of titles. That given the activities they had as Land Registrars, they did not sit regularly. The land Administration Office also sat in the meetings as secretary. That in preparing applications for the Land Control Board, they would start with the applications. The 1st document being the receipt of applications signed by the parties. That it was mandatory that parties sign the Application. The Application had to be dated and he sometimes did the verifications which was a must. That pursuant to the provisions of Section 45 of the [Land Registration Act](#), it was not mandatory to verify.
37. That once the Application for consent had been received, an Agenda was prepared and it was the responsibility of Land Registrar and Land Administration Office to prepare and sign it. That were the Agendas not prepared, it would be an administrative fault. That the Agendas he had brought to Court had not been signed. That following preparation of the Agenda, the matter would go to the Land Control Board, where a decision would be passed. The letter of consent was part of the proceeding thereto to the effect that it was the verdict of the Board. That once the consent was signed, its implication was that the Application and Agenda had been approved. That Parties would then forward the said consent to the Land Registrars who would then do the registration of title. The issuance of a title deed was at the tail end.
38. That once a party had been given the title, the import of the law was that it emanated from their office. That they could not question the title unless there were criminal investigations filed. In this instance there was no criminal investigation. That fraud had to be proved at a higher standard and Criminal investigations would fortify one's case. Before an entry is made on the green cards for parcels of land, the land Registrar would confirm that all processes were done. That in respect to transfer documents, they would guide the parties on what to do. Once the Application was received and a registration done, the presenter would be given the documents duly registered which was an administrative responsibility which he was supposed to do.
39. That after having found these documents, one had to sanitize them by asking the parties to regularize titles. (Shows an example in parcel No 4004). He then stated that the documents he had produced had not been signed.
40. He also confirmed that normally, minutes were filed in a separate file. That once the Agenda had been discussed, the generation of the minutes was the next step which would be generated by the secretary. That normally a land Registrar would sit at the Land Control Board as the secretary or appoint a clerk.
41. When referred to exhibit 10 (parcel No 4004), the Land Registrar stated that the forms contained the details of the transferor. There was a photo, pin, and signature. That it also contained the details of the transferee. That in his bundle, the photo, pin certificate and identity card were not certified. That by looking at the documents, he believed the party's signatures had been appended. The transfer certificate



was signed by the two parties. The letter of consent was signed by Deputy Commissioner. That had there been two consents, one had to be cancelled by the Deputy Commissioner. That he could not tell which consent had been used to transfer. That the entry of the green card was done on the basis of receipt wherein the registration was done on 26th February 2016 and the title deed issued.

42. When referred to title to parcel No 3262 (Pf Exh 2.), he confirmed that the title was okay. That it had been issued on the 27th February 2013 when the entries were made. That there had been a sub-division of parcel No. 885. That he could not see a sub-division scheme plan on the mutation form. That the application for consent had been approved and everything on the file was regular. That parcel No 885 was sub-divided into parcels No. 3262-3281 making 21 portions. That parcel No. 3262 gave "birth" to parcels No 4003 and 4004.
43. In reference to parcel No. 4003, the Land Registrar confirmed that the title deed was regular. That there was a green card and mutation which was signed by a surveyor and the land Registrar had approved it. There was also a compliance certificate for the same and a letter of consent and Application.
44. In relation to Parcel No. 4004, he testified that he did not have a title deed to the land. That he had a green card and two letters of consent as well as two applications that were not approved. That although the forms had "approved" written, it did not necessarily mean that the Agenda had been approved.
45. In reference to parcel No. 4087 (Pf Exh 3), he testified that he had the green card registered to Crispin Kiplangat Rono. That he also had the mutation from duly executed, the application and consent. That parcel No. 4087 was sub divided into 4098 and 4099. There was no approval on the Application form.
46. In reference to parcel No 4098, he had responded that they only had a green card with no transfer documents.
47. As for parcel No.4099, he confirmed that they had the transfer documents, Applications and two sets of consents.
48. For parcel No. 4089, his response was that there were no transfer documents, only a green card.
49. In regard to parcel No. 4988, he stated that he had 2 letters of consent, two application forms, a Green card and Transfer documents.
50. His evidence was that the transfer documents existed, only that they had been misfiled or misplaced. That there was no evidence that the consents had been appealed against. The Land Control Board and the land Registrar had not been sued as parties to the suit. That both the Plaintiffs were not registered as proprietors to the suit lands.
51. In re-examination, he stated that the initiator of criminal proceedings and the conduct of the investigation was the preserve of the DCI. That the land Registrar could also initiate the proceedings. That he was privy to the anomalies when there was a search conducted in regard to parcel No. 4004. That he had not raised the issue with the DCI. That where there were irregularities and fraud, one would sit with the parties, advise them, and show them how it is done.
52. That sometimes one party would not be satisfied and thus choose to go the criminal way. That where the process was flawed the titles would be cancelled through a Court order. That the transfer documents were not attested which was important and lack of attestation confirmed that the transfer was not proper.

The Plaintiffs thus closed their case.



Defence case

53. The defence case kicked off on the 6th October 2021 with the evidence of Florence Chepngetich the 2nd Defendant as DW1 wherein she had testified that she was a holder of identity card No. 25301767. That she lived Bomet and was a businesswoman as well as a farmer and contractor. That pursuant to being sued by the Plaintiffs, she had also filed her amended statement of Defence and Counterclaim as well as an Indemnity Notice against the 1st Defendant. She adopted her statement dated the 20th March 2019 as her evidence in chief where she proceeded to state that she was a wife to the late Benjamin Kibet Mutai who died in the year 2015. That her late husband used to work for Kengen. That prior to his death, she lived with him in Nakuru and after his demise, she had been given his death benefits which she had used to buy the parcels of land No. Kericho/Silibwet/4004, 4088, 4098 and 4099 from Chrispin Kiplangat Rono, the 1st Defendant, land which had previously been LR No. Kericho/Silibwet/3262.
54. That she had executed a sale agreement with the owner of land on the 22nd February 2016, 15th April 2016, 16th May 2016 and 7th June 2016 as per the original agreements she produced as 2nd DF Exh 1 (a-d).(the Court noted the original agreements and returned them to the witness).
55. She proceeded to testify that the land had initially belonged to Francis Kiprono Mibei, the late father to the 1st Defendant, with the title LR No. Kericho/Silibwet/885. That she had confirmed that there had been a Succession Cause where part of the land had been transferred to the 1st Defendant through Succession Cause No. 18 of 2006 where Chrispin and the 2nd Plaintiff had been administrators. She produced the Grant of Letters of Administration and Rectified Certificate of Registration of Grant as 2nd Df Exhibit 2 (a&b).
56. Her evidence was that before execution of agreement, she had talked to Chrispine's wife. That Chrispine had given her a certificate of marriage to one Lilian Cherotich whom he had married in the year 2002. She marked the marriage certificate as 2nd Df MFI 3 after an objection had been raised by the Plaintiffs' Counsel. She proceeded to testify that the 1st Defendant had given her the certificate to confirm consent to sell. That Chrispin did not inform her that the 1st Plaintiff was his wife and that was why he had given her the marriage certificate.
57. That she had made payments of the land through the electronic funds transfer through co-operative Bank to the 1st Defendant's account for the 4 titles. She tendered in the evidence as follows;
- i. Bank transfer dated 22nd February 2016 of Kshs. 945,000/=.
 - ii. 15th April 2016 for Ksh. 744,000/=
 - iii. 16th June 2016 for Ksh. 1,256,000/=
 - iv. 7th May 2016 for Ksh. 350,000/=
 - v. 16th May 2016 for Ksh. 300,000/=
 - vi. 10th August 2016 for Ksh. 20,000/=
 - vii. 15th June 2016 for Ksh. 30,000/=
 - viii. 15th June 2016 for Ksh. 1,000/=
 - ix. 3rd June 2016 for Ksh. 10,000/=
 - x. 5th August 2016 for Ksh. 40,000/=



58. That from (from iv-x) the total installment for the 4th plot, the 1st Defendant had received a total of Ksh. 750,000/= instead of Ksh. 740,000/= that they had agreed upon. Upon an objection from Counsel for the Plaintiff that he only had evidence of the 1st three payments, the 2nd Defendant produced the first three bank statements as 2nd Df Exh 4 (a-c) and marked the Mpesa transactions as 2nd Df MFI 5 (a-g).
59. The witness then proceeded to testify that she had followed the right process to acquire the title. That the 1st Defendant had applied for consents for Kericho/Silibwet/3262, 4004, 4087, 4099 and 4098 which consents she had marked as 2nd Df MFI 6 (a-e) (after the Plaintiff's Counsel sought that she calls the Land Registrar.) The Land Control Board had then given them a letter of consent certified by the land Registrar herein marked as 2nd Df MFI 7(a-e) which was in relation to the application.
60. Her evidence was that the land had belonged to Francis Mibei as parcel No.885 wherein it had been subdivided into 26 portions. That the family members were 7 whereas the rest had been buyers. She marked the mutation forms as 2nd DMFI 8 (a-d) and proceeded to testify that upon subdivision, the 1st Defendant had executed a transfer of land. She produced the duly executed certified copies of the four parcels of land as Df Exh 9 (a-d). That after the transfer had been executed, she had been issued with 4 titles to the land which she produced as 2nd Df Exh 10 (a-d) (The Court noted the original title before returning them to the witness for safe keeping. The copies were retained as exhibits.)
61. The 2nd Defendant then testified that at the time she was purchasing the land, she had an intention of building a residential place wherein after she received the title, she had gone ahead to get approvals from National Construction Authority vide a letter dated the 20th May 2016 wherein she had begun building in 2016. That she had made payments to the National Construction Authority on the 20th May 2016 totaling to Ksh. 61,488/= She produced the Letter and receipt as 2nd Df exhibit 11 (a-b).
62. That she then got an assessment report from NEMA, a building permit, an approved plan as well as a certificate from County Government Bomet which documents she produced as 2nd Df Exh 12 and 2nd Df Exh 13 (a-d). Thereafter she had started her construction as evidenced in the photographs produced as 2nd Df Exh 14 (a-b).
63. That she filed a counter-claim and indemnity against the 1st Defendant after valuation of her property as per a valuation report from Keriasek and Co. Limited dated the 15th December 2018 which she tabled as follows;
- i. Parcel No. 4004 it was valued at Ksh. 28,000,000/= as at the time and at completion at Ksh. 50,000,000/=.
 - ii. Parcel No. 4098 was valued at Ksh.15 million.
 - iii. Parcel No. 4099 was valued at Ksh.4.6 million.
 - iv. Parcel No. 4088 was valued at Ksh.5.15 million.
64. That she had been given a certificate and gazette for Keriasek Co. Ltd which she marked 2nd Defendant MFI 15 (a-d). That after starting the construction, the Plaintiffs sought for an interim injunction which was granted and she had been unable to proceed with the constructions as she and her children had been removed from the land. That the people who had sold to her the land had been living in Nakuru while her building remained abandoned.
65. That even though she had filed a counterclaim and indemnity against the 1st Defendant, he did not respond. She sought that the Court grants her the orders in the counterclaim. That in the event her



- counterclaim was not granted, that she be indemnified by the 1st Defendant based on her valuation report of 2018.
66. Her evidence was that the case had been filed by the 1st Defendant's wife and mother. That when the land was registered, the 1st Defendant's mother, Rachel Mibei, the 2nd Plaintiff, was given parcel No. 3261 and therefore she had no business with Chrispin's parcel of land. That out of the 18 buyers, she being the 15th buyer, they had not contested the transaction by the other buyers but chose her and the 3rd Defendant. That the 1st Defendant's mother had also sold a portion of parcel No. 3261. That Chrispin had never filed any claim against her and it was her testimony that his mother and wife were jealous because she had made a big development on the land. That indeed the 1st Plaintiff had executed the agreement.
 67. When the witness was referred to 2nd Df Exh 1(a-d), she confirmed that the 1st Plaintiff had participated as a witness to all the transactions, wherein she had signed and given out her identity card. That she did not protest when the money was being paid and she was the only witness not in Court
 68. On being cross examined by Counsel for the Plaintiffs, the witness responded that the 1st Plaintiff was the same witness as her witness in the agreement. That her identity card number was the same to the effect that when she testified in Court, she gave out her identity card and the Court confirmed that it was the same identity card as the one contained in the documents.
 69. She reiterated that the mother title was No. Kericho/Silibwet/885 and that she had not participated in the succession proceedings where there were two administrators. That Rachael Mibei was the mother to Chrispin Rono and the wife of Francis Kiprono Mibei was not a witness but she had given her Power of Attorney. She confirmed that she had not filed a counter claim against the 1st Defendant.
 70. When she was referred to the mutation form she had responded that the former Land Registrar Mr. Ngeno had signed the same as well as the title deeds. That she had attended the Land Control Board at Bomet at the District Commissioner's Office and had the letter of consent from the Bomet Land Registry. That after she had made payments to the government, she had been given the title.
 71. She also confirmed that she could not remember the date of the application for the Land Control Board, but that it had been Chrispin who had made the application to the Land Control Board. That Land parcel No. 4004 was registered in her name but that the transfer had no date.
 72. When she was referred to her counterclaim, she stated that the photographs she had produced were in relation to parcel No. 4004 and part of parcel No.4098.
 73. That in regard to parcel No. 4099, there had been a house which she had renovated, put new tiles and extended the bedroom. That was the house she had been living in.
 74. She also consented that at the time of succession, the 1st Defendant was an administrator, while at the time of she was buying the land, he did involve other siblings and the mother who did not sign the documents.
 75. She reiterated that out of the 18th other buyers, only she and the 3rd Defendant had been targeted. That the mutation forms showed that there were other buyers. She confirmed that the indemnity was against the 1st Defendant only from whom she intended to recover monies if the case did not go her way.
 76. When re-examined, she stated that at the time Chrispin approached her, the land was registered in his name. That the building she built was on parcel No. 4004 and partly on parcel No. 4098, which parcels of land she possessed their title deeds.



77. The next defence witness DW2 Alexander Kipkoskei Sigilai testified that he lived in Longisa and was a farmer. That the 2nd Defendant who was his daughter had been sued over the land she bought. He adopted his statement that had been recorded on the 20th March 2019 as his evidence in chief before he proceeded to testify that his daughter had bought land parcel No. 3262 on 22nd June 2016 wherein he had witnessed the transaction and had been one of the people who had signed the agreement DF Exh. 1(a).
78. That his daughter had bought the land from Crispin Kiplangat Rono the 1st Defendant who had been paid Ksh. 945,000/= through a bank transaction while they were inside the banking hall. That after his daughter had bought the land she started developing it and Crispin did not object to the development. His evidence was that after the bank transfer, he did not follow up later but he knew that his daughter had put up a 3 storied building on that land which measured about 0.1 acre.
79. DW3, Micah Tangus, also adopted his statement recorded on 20th March 2019 as his evidence in chief. He testified that he lived in Longisa in Bomet and was engaged in boda boda business. That he knew Florence Chepngetich who had been sued. That he was present when she bought the land from Crispin who had informed them that it was his land. That the 2nd Defendant had seen the title deed and conducted a search before she bought the land. That he had seen the sale agreement Df Exh 1 (a) and had signed the same. That after the 2nd Defendant and Crispin had agreed on the purchase price, they went to the bank and were given a form (Df Exh 4 (a-c) and the money had been transferred by Florence to Crispin. That after buying the land, Florence took occupation and started constructing a building in February, 2016. The title deed was transferred from Crispin to Florence. That he would not know if Crispin objected to her building on the land.
80. On being examined by the Court, the witness responded that it had been Crispin who was his neighbor at Bomet who had called him to witness the agreement.
81. During the course of the hearing and whilst the matter had been adjourned for further defence hearing, the Plaintiff filed a Notice of withdrawal of the suit dated the 8th November 2022 seeking to withdraw the suit against the 3rd Defendant and since there had been no objection to the same the suit against the 3rd Defendant was marked as withdrawn on the 6th December 2022 on which day the Court after considering the submission by Counsel and the fact that the Plaintiff had closed its case and further that it did not want to lock out anybody from the seat of justice, also gave leave to the 1st Defendant to file his defence, documents and witness statements within 21 days.
82. On the 28th February 2023 when the matter came up for further defence hearing, there was no appearance by the Plaintiffs and their Counsel, the 1st Defendant had not complied with the orders of the Court and was absent without leave of Court and without evidence that he was indisposed. The matter was slated for hearing at 11:30 am.
83. At 12:00 pm both the Plaintiffs and the 1st Defendants and their Counsel were not present. Having noted the 1st Defendant's conduct since inception of the matter, and the absence of the parties herein, the Court directed that the matter proceeds for further defence hearing wherein Counsel for the 2nd Defendant made an application, pursuant to the provisions of Order 18 Rule 10 of the Civil Procedure Rule, to recall the 2nd Defendant to produce the documents in her possession which had earlier been marked for identification. The application was allowed and the 2nd Defendant was recalled to produce the marked document.



84. DW1 was recalled and sworn afresh wherein she confirmed that she had been recalled to produce the documents that had been marked for identification. She proceeded to produce them according to her list of documents as follows;
- i. A letter of acknowledgement of Impact Assessment report dated 23rd May 2016 issued by National Environment Management Authority (NEMA) together with the receipts, Df Exhibit 11 (a-b)
 - ii. A valuation report and certificates Df MFI 5 (a-d) herein produced as Df Exhibit 5 (a-d)
85. She testified that the value indicated was for the year 2018 when land was valued at Ksh. 5,000,000/=, and buildings were valued at Ksh. 23,000,000/= totaling to 28,000,000/=
86. The next witness was DW4 Kennedy Bosire, who was the current the County Registrar of Bomet at the time and who stated that he had been summoned to testify in regard to parcels of land Kericho/Silibwet/3262, 4003, 4987, 4088, 4098 and 4099 which lands had originated from Kericho/Silibwet/885. That parcel No.3262 had been sub-divided on 25th February 2016 pursuant to a consent to sub-divide dated the 11th December 2014. That the land had been sub-divided into 2 portions giving rise to parcels No. 4003 and 4004. He sought to produce the consent as an exhibit before he proceeded to testify that there had been the mutation prepared for subdivision. That parcel No.4003 had further been subdivided on 27th April 2016 giving rise to parcel No.4087, 4088 and 4089 after the consent to subdivide had been issued on 12th November 2015.
87. That parcel No.4088 had been transferred to Florence Chepngetich by Chrispin Kiplangat Rono wherein consent to transfer had been issued on 10th March 2016. That parcel No. 4087 had also been sub-divided into two on the 16th May 2016 creating two parcels of land being 4098 and 4099 vide a consent to sub-divide which had been issued on the 12th November 2015. That parcel No.4098 had been transferred to Florence Chepngetich on 14th June 2016 by Chrispin Kiplangat Rono via a consent to transfer issued on 13th June 2016. He went on to testify that parcel No.4099 also been transferred to Florence Chepngetich by Chrispin Kiplangat Rono on 18th May 2016. That all the letters of consent had been accompanied with letters of Application from the Land Control Board. He then produced the following documents as exhibits;
- i. Certified mutation form for sub-division of parcel No.Kericho/Silibwet 3262, Df Exhibit 8(b).
 - ii. Consent for sub-division of the same and Application for the same, Df Exhibit 6 (a)(i) and (ii).
 - iii. Mutation for sub-division for No.Kericho/Silibwet 4004, Df Exhibit 8(d).
 - iv. Application for consent and letter for consent, Df Exhibit 6(e) (i) (ii)
 - v. Mutation form for No. Kericho/Silibwet 4087, Df Exhibit 6 (c).
 - vi. Letter of consent and Application for Consent, Df Exhibit 6(f) (i) (ii)
 - vii. Transfer form for No. Kericho/Silibwet 4098. Df Exhibit 9 (d)
 - viii. Application and letter for consent, Df Exhibit 6(d) (i) (ii).
 - ix. Transfer form for No. Kericho/Silibwet 4099 Df Exhibit 9 (c)
 - x. Application and letters of consent Df Exhibit 6 (c) (i) (ii)
 - xi. Certified copies of green cards for parcels No. No.Kericho/Silibwet 3262, 4003, 4087, 4088, 4098 and 4099, Df Exhibit 16 (a-f).



88. He also stated that he had the Green Card to parcel No.4004 but he did not know whether the same was required in Court.
89. DW5, Kipkemoi Ngeno testified that he was a professional Civil and Structural Engineer registered and licenced by Engineer Board of Kenya, registration No. A3363. That he lived and worked in Bomet County in Kyogong location within Bomet. That he had been engaged by Florence Chepngetich on the 19th July 2019 to carry out inspection and draw a structural integrity report for a 2 bedroomed flat on Kericho/Silibwet/4004 in Zebra location in Bomet Municipality wherein after he had prepared a report.
90. That at that time he had visited the site where he had seen a 3 storied building which in British terms meant the ground, 1st floor slab, 2nd floor slab and 3rd floor slab. That he took photographs of the said building which he attached to his report which also contained the architectural reports. That he had also sought from the owner of the building documents on ownership and documents to show that the drawing was done according to the plan. He got approved plans by the County government of Bomet which were approved by the County Works Officer on 4th April 2016, by the Public health officer on 29th March 2016, by the County Survey Office on 5th April 2016 and County Architect on 4th April 2016. That he had signed and dated his report on 19th July 2019 which report he produced as Df Exhibit 17.
91. The 2nd Defendant then closed its case and sought that the 1st Defendant's case be closed as well. The Court obliged. Parties were then directed to file and exchange their written submissions for which only the 2nd Defendant complied, for whose submissions I shall summarize as herein under.

2nd Defendant's written submissions.

92. The 2nd Defendant framed her issues for determination as follows;
- i. Whether the 2nd Defendant was a bonafide purchaser for valuable consideration.
 - ii. Whether the 1st Defendant had the capacity to sell the parcels of land to the 2nd Defendant.
 - iii. Whether the Plaintiffs had the capacity to bring this suit against the 2nd Defendant.
 - iv. Whether the title deed issued to the 2nd Defendant was validly issued.
 - v. Whether the 2nd Defendant is entitled to be declared the bonafide purchaser and legal registered owner of all the parcels listed in the counterclaim.
 - vi. Whether the 2nd Defendant is entitled to the prayers sought in the counterclaim and the indemnity notice.
 - vii. Whether the 2nd Defendant had taken actual possession use and occupation.
93. The 2nd Defendant submitted that the matter before the Court was a very weighty issue that needed great consideration by the Court. That this was a unique case where a mother together with an alleged daughter in law brought suit against the 1st Defendant, her son and alleged husband respectively, together with other purchasers who had brought land from the said 1st Defendant.
94. That parties were supposed to be bound by their own pleadings wherein they were not legally allowed to deviate from the same unless with compliance with Order 8 of the Civil Procedure Code which dealt with amendments of pleadings. Reliance was placed on the decision in the case of Daniel Oyieno Migore vs. South Nyanza Sugar Co. Ltd (2018) eKLR which was reaffirmed by Court of Appeal in



Independent Electoral and Boundaries Commission and Another vs. Stephen Mutinda Mule & 3 Others (2014) eKLR cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) Versus Nigeria Breweries PLC SC 91 of 2002.

95. That the suit herein had commenced as a matrimonial one and eventually ended in the Environment and Land Court. Therefore the first issue for the Court to determine was whether the Plaintiff's had any locus standi to file the suit herein. That although the Plaintiffs' evidence was that PW 1 was a wife to the 1st Defendant, yet no evidence was led in respect to proof of the existence of the alleged marriage through a marriage certificate nor birth certificate for the alleged children which evidence was critical the matter having been instituted under the matrimonial Cause Act before it had been transferred to the Environment and Land Court. That indeed 2nd Defendant produced as Df exh 3 a marriage Certificate between the 1st Defendant and a different lady who was not PW1.
96. That the *Marriage Act* advocated and stipulated for a monogamous marriage, however under the customary law, consent of the 1st wife was to be obtained to legitimize a marriage, which aspects were not met by PW1 in order to prove her marriage to the 1st Defendant. That the Plaintiff (PW1) having failed to prove her marriage to the 1st Defendant, her requisite consent for any transaction under the *Land Registration Act* was unnecessary or never required. All the transactions between the 1st and 2nd Defendant were therefore valid, legal and within the ambit of the law thus the Court was legally bound to accept the same. That the 1st Defendant did not testify to rebut nor controvert the 2nd Defendant's testimony in relation to the said transactions. The 2nd Defendant relied on the provisions of Section 9 of the *Matrimonial property Act* to buttress her submissions.
97. That from the evidence of PW2, who was the mother to the 1st Defendant, it had been clear that the parcels of land were inherited by virtue of succession proceedings where a Grant had been issued and the estate had been distributed amongst the deceased's beneficiaries. It was therefore hard to fathom why the 1st Defendant's mother PW2 would file a suit against her son the 1st Defendant when under the Probate and Administration Cause, once the property had been distributed, the Administrator or other beneficiaries ceased to have any control or ties in others beneficiaries' share and after title has been issued, the provisions of Section 26 of the *Land Registration Act* kicked in. That PW1 had and PW 2 had no locus standi to sustain any suit against the Defendants for any transactions that occurred between the 1st Defendant and the 2nd Defendant or any other party since the 1st Defendant had exclusive rights to deal with his property to the exclusion of all others.
98. The 2nd Defendant then submitted that she was a bonafide purchaser for valuable consideration and relied on the Black's Law Dictionary 8th Edition which defined the meaning of a bonafide purchaser. Reliance was further placed on the decision in the case of Katende vs. Haridar & Company Limited (2008) 2EA 173 to submit that the 1st Defendant who had sold parcels of land No's Kericho/Silibwet/4003, 4004, 4087, 4088, 4098 and 4099 had derived their Title Deed from Court proceedings, being a Grant of Letters of Administration dated 23rd May 2006 and a Rectified Certificate of Confirmation of Grant dated 19th October 2011 herein produced as Df exh 2(a & b), which had confirmed distribution of the estate of his late father.
99. That after distribution of the estate of his late father, the 1st Defendant had been registered as a proprietary wherein he had exercised his proprietary rights and sold his portion to the 2nd Defendant via sale agreement herein produced as Df exh 1(a-e). That the 1st Defendant had received the purchase price accordingly via transfers which were exhibited as Df exh 4(a-c) wherein the relevant applications and consents from the Land Control Board had been sought and issued.



100. That subsequently, the land had been subdivided, transferred and the title deeds issued to the 2nd Defendant herein for Kericho/Silibwet/4004, 4088, 4098 and 4099 wherein she had embarked on the construction of 2 bedroomed houses after having acquired the relevant license from the National Environmental Management Authority (NEMA), an Environmental Impact Assessment Licence and certificates of Compliance.
101. As to whether the 1st Defendant had the capacity to sell the said parcel of land, the 2nd Defendant's answer was in the affirmative having had demonstrated how he had acquired the parcels of land out of inheritance of his father's estate. Reliance was placed on the decision in the case of Wambui vs. Mwangi & 3 Others (Civil) Appeal No. 465 of 2019 (2021) RECA 144 submit that the 2nd Defendant had acquired good title that had been passed by the 1st Defendant.
102. The 2nd Defendant further submitted that the title deed issued to her had been valid in terms of Section 2 of the *Land Registration Act* and Sections 6 and 9 of the *Land Control Act* and thus she had obtained a good title from the 1st Defendant after a due and lawful process wherein the title became protected under the provisions of Section 25 and 26 of the *Land Registration Act* and therefore she was entitled to the prayers sought in her Counterclaim and the Indemnity Notice.
103. That pursuant to the sale of the said parcels of land, the 1st Defendant, had given her vacant possession, occupation and use of the same until when the Plaintiffs invaded the said parcels of land and removed her before taking possession of the same illegally thus an eviction order be issued against the Plaintiffs, their agents, assigns, heirs and representatives to vacate the said parcel of land Nos. Kericho/Silibwet/4004, 4088, 4098 and 4099. Reliance was placed on the decision in the case of Ringera vs. Muhindi (Environment and Land Miscellaneous Application No. E128 OF 2021 (2022) KEELC 2481 (KLR) (7) July 2022) Judgment.
104. That upon the Plaintiffs forcefully and illegally occupying the 2nd Defendant's parcels of land which had complete constructions and tenants in occupation as well as an incomplete structure on the same parcels of land that was stopped by the Plaintiff's actions, the Plaintiffs had been deriving benefits from those premises to the detriment of the 2nd Defendant who had since suffered loss and incurred damage for loss of income from the period of the Plaintiffs' illegal occupation.
105. In regard to the prayer for mense profits, the 2nd Defendant, while relying on the provisions of Section 2 of the *Civil Procedure Act*, sought for mense profits pursuant to the evidence adduced by the 2nd Defendant that the premises therein were for rental and used to bring a monthly rent of Kshs.30,000/=. That the Plaintiffs took illegal possession on the 21st June 2016 after an order of injunction had been issued by the Court, hence the calculation ought to be done for the whole period of time.
106. Secondly the 2nd Defendant submitted that the Plaintiffs' illegal occupation stopped her from completing her residential property which had been valued by Dr. C.S Keriasek as per Df exh 4 (a-d). That had the same been completed within a year or less after the Plaintiffs' illegal occupation, the 2nd Defendant would have earned substantial income from the three (3) storied residential building. Reliance was placed on the decision in the case of Fredrick Korir vs. Soin United Women Group (sued through Eunice Towett, Jane Mwolomet, Lucio Chebocho [2018] eKLR and Attorney General vs. Halal Meat Products Limited [2016] eKLR.
107. The 2nd Defendant thus submitted that on the issue of mense profits, she was entitled to the same as follows: A



- i. Complete Residential Houses as stated in the Valuation Report Kshs.10,000/= X 8 Houses X 12 Months X 7 Years since Plaintiffs took illegal occupation = Kshs. 6,720,000/= for Kericho/Silibwet/4098
 - ii. Kshs.15,000/= X 1 House X 12 Months X 7 Years since Plaintiffs took illegal occupation = Kshs. 1,260,000/= for Kericho/Silibwet/4098
 - iii. Kshs.20,000/= X 1 House X 12 Months X 7 Years since Plaintiffs took illegal Occupation = Kshs. 1,680,000/= for Kericho/Silibwet/4099
- Total Kshs. 9,660 000/=

B) Anticipated income of the incomplete residential houses:

- i. Ground Floor-Kshs. 120,000/= X 12 Months X 6 Years since the Plaintiff stopped construction = Kshs. 8,640,000/=
- ii. 1st Floor-Kshs. 120,000/= X 12 Months X 6 Years since the Plaintiff stopped construction = Kshs.8,640,000/=
- iii. 2nd Floor-Kshs. 120,000/= X 12 Months X 6 Years since the Plaintiff stopped construction = 8,640,000/=

Total Kshs. 25,920,000/=

108. On the issue of damages in her prayer (d) in the Counter-Claim, the 2nd Defendant submitted that Courts had always defined damages in relation to the occupation of land by persons illegally in occupation. That a party when hindered to access and occupy their lawful property by another party would be entitled to damages. That when the Plaintiffs invaded the 2nd Defendant's property, they had caused her not to complete the residential structures thus the damage suffered during the rainy season and human activities by the Plaintiffs had been calculated by Engineer Kipkemoi Ngeno-DW 5 in his Structural Integrity Report dated 29th July 2019 and produced as Df exh 17, at a figure of Kshs.8,233,500/= as the estimated costs to repair the damage caused therein.
109. That the 2nd Defendant was also entitled to a total of Kshs. 348,160/= being the cost of 512 bags of cement (Kshs.680/= per bag) which cement had been stored in a store in land parcel No. Kericho/Silibwet/4098 and which cement the Plaintiffs had confiscated and sold when they illegally took possession of the land.
110. The 2nd Defendant further sought for a nominal fee of a minimum of Kshs.2,000,000/for damages, the 2nd Defendant having been denied occupation and use of her land. Reliance was placed on the decision in *Neem Properties Limited vs. Wells Fargo Limited* [2021] eKLR and *Stephen Olang Misigah vs. Lush Home Properties Limited* [2021] eKLR.
111. On Costs, the 2nd Defendant submitted that costs usually followed the event as provided for under Section 27 of the [Civil Procedure Act](#) unless there were exceptional circumstances to be noted by the judge to warrant a departure from that general principle. Reference was made to the decision in the case of *Joseph Oduor Anode vs. Kenya Red Cross Society* Nairobi High Court Civil Suit No. 66 of 2009: [2012] eKLR.
112. Lastly on Indemnity Notice against the 1st Defendant, the 2nd Defendant relied on the provisions of Order 1 Rule 24 (1) of the Civil Procedure Rules to submit that this was a green area that had rarely been explored nor exploited by parties who directly caused a seller who never sued the Defendant and had no interest in the land nor case, to indemnify a party. That the Court has authority to



award an indemnity order where a party had faulted another in a transaction. That should the Plaintiff obtain judgment against the Defendants, which was unlikely, then it would be fair and just that the 1st Defendant indemnify the 2nd Defendant all the losses incurred as per the Valuation Report dated 31st December 2018, for all the expenses incurred in the construction of the incomplete structure and purchase price of the parcels of land. On the other hand should the Court render its judgment in favour of the 2nd Defendant, then the Indemnity Notice would suffer a natural death. Reliance was placed on the decision in the case of Swalehe Mohamed Mwakiruwa vs Samuel Njoroge Waruhiu [2020] eKLR and Multiserve Oasis Company Limited Versus Kenya Ports Authority & Another [2020] eKLR.

113. The 2nd Defendant sought for judgment in her favour as she had proved her case on a balance of probability.

Determination.

114. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law. I have also considered the fact that this matter was initially filed as a Matrimonial Cause in the Nakuru High Court Family Division in Cause No. 17 of 2016 before it was transferred to the Bomet High Court, then the Kericho High Court before it subsequently found its way in this Court, being the Environment and land Court. In the previous suits as in the present suit, the Plaintiff's claim against the Defendants had been similar.

115. Although Section 18 of the [Civil Procedure Act](#) bestows upon the High Court (read ELC) the powers to transfer suits of a civil nature, however it is trite that if a matter is filed in a Court that has no jurisdiction when the claim was filed, it would mean that the said suit is incompetent and the Court does not have jurisdiction to transfer the matter.

116. In the case of Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & Another [2012] eKLR, the Court held as follows:-

“The law relating to transfer of suits from subordinate Courts to the High Court or any transfer for that matter is very clear. In *Kagenyi vs. Musiramo* (supra), Sir Udo Udoma, CJ made it clear that an order for the transfer of a suit from one Court to another cannot be made unless the suit has been in the first instance brought to a Court which has jurisdiction to try it. In *Ali Abdi Sheikh vs. Edward Nderitu Wainaina & Others* (supra), Koome, J (as she then was) found that since the Plaintiff had filed a suit in respect of a claim to land whose value exceeded Kshs. 500,000.00 in the subordinate Court the suit could not be transferred since the general powers of the Court to transfer suits under section 18 of the [Civil Procedure Act](#) cannot be exercised in a matter where the suit was filed in a Court without jurisdiction. A similar view was taken by the same Judge in *Rainbow Manufacturers Limited vs. National Bank of Kenya* (supra).”

117. Further in *Boniface Waweru Mbiyu vs. Mary Njeri & Another* [2005] eKLR the Court had held that:

“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by Counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its



status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court”.

118. And lastly in *Wamathu Gichoya v Mary Wainoi Magu* [2015] eKLR the Court held that:-
- “ Furthermore, according to *Kagenyi v Musiramo and Another*, supra, the power to transfer a case to the High Court for hearing may only be exercised if the Court before which it is filed is a Court vested with competent jurisdiction to try and dispose of the matter. In other words, if the suit filed is incompetent, the High Court lacks jurisdiction to effect a transfer.”
119. It is therefore clear that since this suit had been instituted before Courts that lacked jurisdiction, it could not in the first instance, have been transferred, pursuant to the provisions of Section 18 of the *Civil Procedure Act*, to the Environment and Land Court, where it ought to have been instituted in the first instance, as the same was a nullity in law. The suit was thus dead on arrival to this Court. Be as it may and incase I am wrong, I will then have to consider the merits of the case as herein under.
120. This is a matter that pities a mother, 2nd Plaintiff in conjunction with an alleged daughter in law, the 1st Plaintiff herein, against her son and alleged husband respectively, the 1st Defendant herein in conjunction with other purchasers of land for value being the 2nd and 3rd Defendants.
121. Briefly the Plaintiffs’ case was that the suit parcels of land herein being No. Kericho/Silibwet 4098, 4099, 4088 and 4004 resulted from a subdivision of an original parcel of land known as land parcel No. Kericho/Silibwet/885 which belonged to the 2nd Plaintiff’s husband, the deceased Francis Kiprono Arap Mibei who was also the 1st Defendant’s father. That upon his demise, his estate had been shared amongst his beneficiaries vide Succession Cause No. 18 of 2006. The land was subsequently subdivided and the 1st Defendant was registered as proprietor to No. Kericho/Silibwet/3262 which he had later subdivided resulting to land parcels No. Kericho/Silibwet/ 4099, 4089, 4088 and 4004.
122. That subsequently the 1st Defendant Chrispin had sold his share of land to the 2nd and 3rd Defendants amongst others not in Court. Their argument was that the 1st Defendant was to hold the land in trust for himself and his children, and therefore his act of disposing off the same was the illegal and fraudulent as that land contained their matrimonial home and had been sold without seeking the consent of his wife the 1st Plaintiff.
123. In the cause of the hearing, Plaintiffs withdraw the matter against the 3rd Defendant and although the 1st Defendant filed his defence albeit out of time and without leave of the Court, he did not avail himself in Court to tender any evidence in defence. The matter then proceeded for hearing between the Plaintiffs and the 2nd Defendant whose evidence was to the effect that indeed the original land No.885 had belonged to the deceased Francis Mibei wherein after the succession process, it had been subdivided and distributed amongst his beneficiaries.
124. That she had subsequently purchased parcels No. Kericho/Silibwet/4004, 4088, 4098 and 4099 from Chrispin Kiplangat Rono, the 1st Defendant, land which had previously been registered to him as LR No. Kericho/Silibwet/3262. That she had paid him the purchase price through electronic funds transfer through his account at the Co-operative Bank wherein the 1st Defendant had then put her into vacant possession and occupation of the same. That after she had obtained the titles, during the same year of 2016 she had sought for and obtained approvals from the relevant authorities wherein she had started constructing a 3 storied two bed-roomed residential building but the Plaintiffs filed suit, obtained an interim injunction against her wherein she and her children had been removed from the land and the Plaintiffs took possession thereafter thereby stopping her from finishing her construction.



125. Having given a summary of the matter in issue I find the issues arising for determination thereto as follows;
- i. Whether the suit properties herein were matrimonial properties.
 - ii. Whether the Plaintiffs had the locus standi to file suit against the Defendants.
 - iii. Whether the 2nd Defendant's titles are valid.
 - iv. Whether the 2nd Defendant is entitled to the prayers sought in her counterclaim and Indemnity Notice.
 - v. Who should bear the costs of the suit and counterclaim.
126. On the first issue for determination as to whether the suit parcels of land herein No. Kericho/Silibwet/4099, 4089, 4088 and 4004 were matrimonial properties, I have considered the evidence herein adduced. There is no dispute that the said parcels of land were subdivisions to an origin land parcel No. Kericho/Silibwet/885 which had been registered to the deceased Francis Kiprono Arap Mibei who was the 2nd Plaintiff's husband and the 1st Defendant's father. It is also not in contention that pursuant to the deceased death, the family instituted Succession Cause No. 18 of 2006 at the Nakuru High Court wherein the 1st Defendant, Chrispin Kiplangat Rono and his mother the 2nd Plaintiff had been made administrators. On the 19th October 2011, vide a Rectified Grant of Confirmation, the deceased's estate, in regard to No. Kericho/Silibwet/885, had been subdivided and distributed amongst his beneficiaries wherein the 1st Defendant had inherited 1.25 acres.
127. It is also not in contention, and according to the evidence of the land Registrars PW3 and DW4 that pursuant to the subdivision of No. Kericho/Silibwet/885, into parcels No. 3262-3281 making 21 portions, the 1st Defendant had been registered as proprietor to No. Kericho/Silibwet/3262 measuring 0.308 hectares wherein title had been issued to him on the 27th February 2013.
128. It is also not in contention that the 1st Defendant having acquired No. Kericho/Silibwet/3262 through transmission and having been registered as its proprietor as a share of his inheritance, and there having been evidence from PW3 that the title had been acquired legally and lawfully, his proprietorship was hence protected by law and specifically under the provisions of Section 25 and 26 of the [Land Registration Act](#) wherein he now had exclusive rights to deal with the property as he pleased to the exclusion of all the others.
129. Indeed he did deal with the property as he pleased in that he subdivided No. Kericho/Silibwet/3262 which gave rise to parcels of land No. Kericho/Silibwet/4003 and 4004 wherein he had sold and transferred parcel No. Kericho/Silibwet/4004 to the 2nd Defendant. Subsequently he had also subdivided Kericho/Silibwet/4003 which gave rise to No. Kericho/Silibwet/4087, 4088 and 4089 wherein he had transferred Parcel No 4088 to Florence Chepngetich (2nd Defendant) whereas Parcel No 4089 was transferred to 3rd Defendant. The 1st Defendant then subdivided parcel No. 4087 which gave rise to parcel No. 4098 and 4099 which parcels he also sold and transferred to the 2nd Defendant in a transaction that cannot be faulted as evidenced by both the oral and documentary evidence as herein above stated.
130. The 1st Plaintiff's claim is that these parcels of land constituted matrimonial property she having been married, to the 1st Defendant in the year 2012 under Kipsigis customary law wherein they had resided on the land, and therefore the 1st Defendant ought to have sought consent before disposing off the land.



131. Evidence on record is that pursuant to the sale and transfer of the suit land, the 2nd Defendant had been put into occupation and possession in the year 2016 when she began her project of putting up two bed-roomed residential apartments. That it had only been after the Plaintiffs had been granted an interim injunction order that they had thrown her out of the suit properties. This bit of evidence raises eyebrows as to whether or not indeed the 1st Plaintiff and the 1st Defendant had been residing on the suit premises. Secondly doubt was further created when evidence emerged that the 1st Defendant had indeed contracted a monogamous marriage to someone else and not the 1st Plaintiff. Indeed the evidence that clearly came out was that the 1st Defendant had married one Lillian Cherotich in church. That the said Lilian lived in Kapsabet while the 1st Plaintiff and the 1st Defendant lived in Bomet where the 1st Defendant worked at Bomet University.
132. No evidence had been adduced as to whether the 1st Defendant's legally wedded wife, Lilian had consented to the alleged marriage between the 1st Plaintiff and the 1st Defendant, no evidence had been adduced as to whether there had been any Koita performed for the 1st Plaintiff and neither had there been evidence that dowry had been given for her hand in marriage in accordance to the Kipsigis customs. Indeed no evidence had been adduced of a marriage between the 1st Plaintiff and the 1st Defendant save for allegations of them being husband and wife which allegations in this instance will remain as such.
133. Lastly I find that the suit land herein having emanated from land parcel No. Kericho/Silibwet/3262, where the 1st Defendant was registered to as proprietor through transmission, the same did not constitute matrimonial property as no evidence had been adduced pursuant to the provisions of Section 9 of the *Matrimonial Property Act* that alluded to the fact that the 1st Plaintiff had made any contribution towards the improvement of the properties. Indeed the evidence on record was that no sooner had the 1st Defendant been registered as proprietor to parcel No. Kericho/Silibwet/3262, then he had begun sub dividing and disposing of the same.
134. Section 9 of the said *Matrimonial Property Act* provides as follows;
- “Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”
135. Section 2 of the *Matrimonial Property Act* defines contribution as follows;
- “contribution” means monetary and non-monetary contribution and includes—
1. domestic work and management of the matrimonial home;
 2. child care;
 3. companionship;
 4. management of family business or property; and
 5. farm work;
136. I thus find that not only was there no proof that the 1st Plaintiff was a wife to the 1st Defendant, but the suit properties herein did not constitute matrimonial properties and therefore the consent of the 1st Plaintiff was none consequential. Her line of argument that she was the wife to the 1st Defendant



and that the suit lands herein constituted matrimonial property where her consent ought to have been obtained before the disposal therefore fails flat.

137. The 2nd Plaintiff's issue was that the 1st Defendant held the suit properties, in trust for her grandchildren/his children and therefor the sale and transfer to the 2nd Defendant was illegal and unlawful. It is trite that one could become a proprietor by transmission and that should such transmission have a restriction to it then it would be made clear that the proprietor was holding the land transmitted to him as trustee. In the present case no evidence had been adduced of such a restriction in the rectified certificate of Confirmation of Grant dated the 19th October 2011 herein produced as Df Exhibit 2(b). There was nothing indicated there to the effect that the 1st Defendant had been bequeathed the suit land to hold in trust for his children and/or the 2nd Plaintiff's grandchildren. Indeed the evidence that came out clearly was that the 1st Defendant was the sole proprietor of land No. Kericho/Silibwet/3262 where as its owner he had been free to use the same as he pleased. He was protected by virtue of the provisions of Section 25 and 26 of the Land Registration Act. This line of argument by the 2nd Plaintiff also fails.
138. Having found as above, the next issue for determination would be whether the Plaintiffs herein had the locus standi to file suit against the Defendants herein.
139. The issue of locus standi was defined in the case of Alfred Njau & 5 Others vs. City Council of Nairobi [1983] eKLR to mean- "the right to appear in Court." Indeed the Court of Appeal in this case had held as follows:
- “.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”
140. Further, the Court of Appeal has authoritatively delivered itself on the issue of locus standi in Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & Another (1982-99) 1 KAR, Morjaria vs. Abdalla [1984] KLR 490 and in Trouistik Union International & Another s.v Jane Mbeyu & Another Civil Appeal No. 145 of 1990 to the effect that Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.
141. A party instituting legal proceedings of any nature must show that they have a real interest in the matter being brought to Court. This is a person who has suffered a legal grievance, a person against whom a decision has been pronounced and wrongfully deprived them of something or wrongfully refused them something or wrongfully affected their title to something or their interest particularly has been prejudiced or was about to be prejudiced or that the matter complained of has injured them for which they have suffered loss or damage. Having found as herein above that the suit land herein had been registered to the 1st Defendant through transmission and therefore he had enjoyed the protection of the law to deal with the same as he so pleased, and further having heard the evidence that neither of the Plaintiffs herein were registered proprietors to the said suit properties. A person must have a sufficiency of interest to sustain his standing to sue in a Court of law. That was the holding in BV Narayana Reddy –vs- State of Karnataka Air (1985) Kan 99, 106 (The Constitution of India, ARD 226). I adopt the same as a correct proposition of the law and I so hold and find that since both the Plaintiffs had no locus standi to file suit, their suit as against the Defendants was therefore incompetent and must fail too.
142. On the third issue for determination as to whether the titles held by the 2nd Defendant were obtained illegally, I have considered both the oral and documentary evidence herein adduced, by the 2nd Defendant herein as well as both the land Registrars who testified as PW3 and DW4 respectively. I have further taken note of the fact that the 1st Defendant refused to have his day in Court to defend the case and/or contradict this evidence.



143. Going by the evidence herein adduced to the effect that pursuant to the 1st Defendant having obtained proprietorship to land parcel No. Kericho/Silibwet/3262 through transmission, he had proceeded to sub divide and dispose of the same where portions were sold to the 2nd Defendant and other third parties. I have also considered the fact that it had not only been the 2nd Defendant who had bought a portion of the deceased's estate, but that she had been the only one who had been hauled to Court, wherein her project had been stalled. Indeed midway during the hearing the Plaintiffs had sought to withdraw the suit against the 3rd Defendant pointing irresistibly to their biasness against the 2nd Defendant.
144. The rights of a proprietor are set out in Section 26 of the [Land Registration Act](#), which provides as follows:-
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. “
145. From the above provision of the law, it is clear that the 1st Defendant having been registered as the proprietor of the suit land, he became the absolute and indefeasible owner of the said property and he could do anything he wanted to do with it. His registration/ title could only be challenged as provided by Section 26(1) (a) & (b) of the [Land Registration Act](#) 2012. In the instance case, none of the two scenarios have been pleaded.
146. Indeed the evidence on record was to the effect that the subdivision, sale and transfer of the suit parcels of land to the 2nd Defendant had been conducted legally. This had been buttressed by the production of the sale agreements herein produced as Df exh 1(a-e), applications for the fund transfer to the 1st Defendant's account herein produced as Df exh 4(a-c), Certified mutation form for sub-division of parcel No.Kericho/Silibwet 3262 as Df Exhibit 8(b), Consent for sub-division of the same and Application for the same as Df Exhibit 6 (a)(i) and (ii), Mutation for sub-division for No. Kericho/Silibwet 4004 as Df Exhibit 8(d) and its Application for consent and letter for consent as Df Exhibit 6(e) (i) (ii), Mutation form for No. Kericho/Silibwet 4087 as Df Exhibit 6(c) and its Letter of consent and Application for Consent as Df Exhibit 6(f) (i) (ii), Transfer form for No. Kericho/Silibwet 4098 as Df Exhibit 9(d) and its Application and letter for consent as Df Exhibit 6(d) (i) & (ii), Transfer form for No. Kericho/Silibwet 4099 as Df Exhibit 9(c) and its Application and letters of consent as Df Exhibit 6 (c)(i) & (ii). Lastly there were certified copies of green cards for parcels No. Kericho/Silibwet 3262, 4003, 4087, 4088, 4098 and 4099 produced as Df Exhibit 16 (a-f).
147. DW4, the land Registrar Bomet had confirmed in his testimony that the suit parcels of land had indeed been transferred to Florence Chepngetich the 2nd Defendant by Chrispin Kiplangat Rono the 1st Defendant who had been its proprietor. No evidence to the contrary had been adduced and with this in mind, I find that the titles held by the 2nd Defendant to land parcels No. Kericho/Silibwet 4004, 4088, 4098 and 4099 had been obtained legally.



148. As to whether the 2nd Defendant was entitled to the prayers sought in her counterclaim and Indemnity Notice, I find that having established that she was the legal proprietor to the suit parcels of land, as a bonafide purchaser for value wherein the Plaintiffs had maliciously, discriminatorily and without any cause of action dispossessed her of the said property from the year 2016, thereby stalling her project, that justice has finally knocked on her door, wiped away her tears and established that she is entitled, to the prayers sought in her counterclaim.
149. The Court of Appeal in the case of Attorney General vs. Halal Meat Products Limited [2016] eKLR had held as follows;
- “It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42.”
150. The 2nd Defendant’s evidence had been that she had commenced on putting up residential apartments, as per photographs produced as 2nd Df Exh 14 (a-b). That subsequently after the Plaintiffs had evicted her from the suit lands, the said construction had stalled wherein she had suffered loss and damages to which she sought mesne profits. The valuation report dated the 15th December 2018 herein produced as Df exh 5 had only assessed the value of the suit land as follows:
- i. Parcel No. 4004 it was valued at Ksh. 28,000,000/= as at the time and at completion at Ksh. 50,000,000/=.
 - ii. Parcel No. 4098 was valued at Ksh.15 million.
 - iii. Parcel No. 4099 was valued at Ksh.4.6 million.
 - iv. Parcel No. 4088 was valued at Ksh.5.15 million.
151. And although in the written submissions the 2nd Defendant has sought for mense profits of a total of Kshs. 9,660 000/= for Complete Residential Houses and a total of Kshs. 25,920,000/= for the anticipated income of the incomplete residential houses, yet there was no material evidence placed before the Court to demonstrate how the amount that was claimed as mesne profits had been arrived at save for what was stated in the written submissions. It is trite that mesne profits, being special damages must not only be pleaded but also proved.
152. The Court of Appeal in the case of Peter Mwangi Mbuthia & another vs Samow Edin Osman [2014] eKLR was of the opinion that it was upon a party to place evidence before the Court upon which an order of mesne profits could be made. The Court stated as follows:-
- “We agree with Counsel for the appellants that it was incumbent upon the respondent to place material before the Court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”
153. In Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR, the Court of Appeal had held that;
- “Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally



parties’ “marketing language”, each side endeavouring to convince the Court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

154. And further the Court of Appeal in *Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu* Civil Appeal No. 302 of 1997 had also held that no judgment could be based on written submissions and that such a judgment is a nullity since written submissions is not a mode of receiving evidence set out under Order 18 Rule 2 of the Civil Procedure Rules. I find that on this limb the 2nd Defendant’s prayer fails.
155. On the issue of damages in prayer (d) of her Counter-Claim, the 2nd Defendant had submitted that Courts had always defined damages in relation to the occupation of land by persons illegally in occupation. That a party when hindered to access and occupy their lawful property by another party would be entitled to damages. That when the Plaintiffs invaded the 2nd Defendant’s property, they had caused her not to complete the residential structures. The damage suffered during the rainy season and human activities by the Plaintiffs had been calculated by Engineer Kipkemoi Ngeno-DW 5 in his Structural Integrity Report dated 29th July 2019 and produced as Df exh 17 at a figure of Kshs.8,233,500/= which was the estimated cost needed to repair the damage caused therein. I find in favour of this prayer and award the damages as prayed.
156. In her submissions, the 2nd Defendant had further sought for Kshs. 348,160/= being the cost of 512 bags of cement (Kshs.680/= per bag) which cement had been stored in a store in land parcel No. Kericho/Silibwet/4098 and which cement the Plaintiffs had confiscated and sold when they illegally took possession of the land. Again this issue was only brought out in the submissions, the 2nd Defendant did not table any evidence before this Court to enable the Court make a determination on the same. Submissions cannot take the place of evidence and the Court will again rely on the decision in the case of *Daniel Toroitich Arap Moi* (supra) to deny the 2nd Defendant this prayer.
157. The 2nd Defendant further sought for a nominal fee of a minimum of Kshs.2,000,000/for damages for trespass, the 2nd Defendant having been denied occupation and use of her land. Again looking at the authority herein cited by the 2nd Defendant being *Neem Properties Limited* (supra) it is clear that the matter is distinguishable from the current suit wherein the Plaintiff in the former suit had sought for damages for trespass. In the current suit, the issue of trespass was not pleaded and neither did it arise in evidence but seems to have suddenly appeared in the final submissions. It is trite that parties are bound by their own pleadings as alluded to by the 2nd Defendant at the beginning of her submissions. See *Independent Electoral and Boundaries Commission & another* (supra) I am afraid the said prayer shall have to face the same axe as its predecessor herein above and is therefore rejected.
158. In the end what the Court is saying is that I find in favour of the 2nd Defendants’ counterclaim and hold that the Plaintiffs’ case against the 2nd Defendant has not been proved on a balance of probabilities and the same is herein dismissed with costs.
159. On the other hand, I uphold the 2nd Defendant’s counterclaim and issue the following orders:
 - i. It is herein declared that the 2nd Defendant (now Plaintiff in the counterclaim) is the bona fide legal and registered proprietor of land parcels known as No. Kericho/Silibwet/4004, No. Kericho/Silibwet/4088, No. Kericho/Silibwet/4098 and No. Kericho/Silibwet/4099.
 - ii. An order is herein issued against the Plaintiffs (now Defendants in the counterclaim) to vacate from the 2nd Defendant’s (now Plaintiff in the counterclaim) parcels of land known as No. Kericho/Silibwet/4004, No. Kericho/Silibwet/4088, No. Kericho/Silibwet/4098 and No.



Kericho/Silibwet/4099 within 14 days upon delivery of this judgment in default to which an order of eviction shall be issued against them.

- iii. The 2nd Defendant (now Plaintiff in the counterclaim) is herein awarded general damages of Ksh. 8,233,500/= (Eight Million, two hundred and thirty three thousand, five hundred shillings only)
- iv. Now that the Court has rendered its judgment in favour of the 2nd Defendant, the Indemnity Notice against the 1st Defendant therefore suffers a natural death.
- v. Cost of the suit and counterclaim is awarded to the 2nd Defendant (now Plaintiff in the counterclaim)

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 28TH DAY OF SEPTEMBER 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

