



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gatimu & another v Omwenga (Sued on his Own Behalf and as Chairman  
of Amani Self Help Group) & 12 others (Civil Case 288 of 2013)  
[2023] KEELC 19877 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19877 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CIVIL CASE 288 OF 2013  
JO MBOYA, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**CHARLES MUNENE GATIMU ..... 1<sup>ST</sup> PLAINTIFF**

**KAREGI CATHERINE KAMANJA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ERNEST OMWENGA (SUED ON HIS OWN BEHALF AND AS CHAIRMAN OF  
AMANI SELF HELP GROUP) ..... 1<sup>ST</sup> DEFENDANT**

**PETER KINYUA ..... 2<sup>ND</sup> DEFENDANT**

**ABEL OYARO ..... 3<sup>RD</sup> DEFENDANT**

**PROTAS MANDELA ..... 4<sup>TH</sup> DEFENDANT**

**JOHN NGIGE ..... 5<sup>TH</sup> DEFENDANT**

**CHARLES AKUNGA ..... 6<sup>TH</sup> DEFENDANT**

**SAMUEL MOTURI ..... 7<sup>TH</sup> DEFENDANT**

**EVANS OBIERO ..... 8<sup>TH</sup> DEFENDANT**

**FRANCIS NDIRANGU ..... 9<sup>TH</sup> DEFENDANT**

**PETER KIOKO ..... 10<sup>TH</sup> DEFENDANT**

**STEPHENE KIBUNJA ..... 11<sup>TH</sup> DEFENDANT**

**MARY WAMBUI ..... 12<sup>TH</sup> DEFENDANT**

**LUCY NJERI ..... 13<sup>TH</sup> DEFENDANT**



## JUDGMENT

1. The Plaintiffs' herein have filed and/or lodged the suit vide Plaint dated the 21<sup>st</sup> February 2013; and of which same have sought various reliefs pertaining to and or concerning the ownership of L.R No. 209/11970, (hereinafter referred to as the suit property).
2. For good measure, the reliefs sought at the foot of the Plaint are as hereunder;
  - i. An order to vacate from L.R No. 209/11970, grant vacant possession to the Plaintiffs' and in default eviction to issue;
  - ii. Mesne profits from January 2008 till the date of vacation.
  - iii. Costs and Interests of the suit
3. Upon being served with the Plaint and Summons to Enter appearance, the Defendants herein variously entered appearance and thereafter filed a Statement of Defense and Counterclaim, the latter which was filed on the 5<sup>th</sup> of June 2013. Other than denying and disputing the claims mounted by and on behalf of the Plaintiffs, the Defendants also sought for the following reliefs;
  - i. An order cancelling the registration of L.R No. 209/11970 in the Plaintiffs' favor.
  - ii. An order that L.R No. 209/11970 be registered in favor of the Defendants.
  - iii. A prohibitory order against any dealings relating to L.R No. 209/11970.
  - iv. Costs of the suit and of the counterclaim.
  - v. Any other reliefs the court deems fit to grant.
4. Instructively, the Plaintiffs' herein filed a Reply to the Defense and Defense to the counterclaim dated the 27<sup>th</sup> June 2013; and also attached thereto a document christened as a Verifying affidavit, allegedly in verification of the averments contained at the foot of the Defense to the Counterclaim.
5. Be that as it may, the pleading in respect of the instant matter closed and thereafter the matter was scheduled for Pre-trial directions, with a view to ascertaining the filing and exchange of the requisite List and Bundle of Documents; as well as the Witness Statement.
6. Suffice it to point out that whereas the Plaintiffs' duly filed and served the List and Bundle of Documents and Witness statement by the 1<sup>st</sup> Plaintiff, however, the Defendants' only filed a witness statement by the 1<sup>st</sup> Defendant, but no List or bundle of Documents.

Evidence By The Parties:

  - a. The Plaintiffs' Case:
7. The Plaintiffs' case gravitates and/or revolves around the Evidence of one witness, namely, Charles Munene Gatimu, who testified as PW1.
8. It was the testimony of the witness that same is a business person residing within the City of Nairobi. Further, the witness added that same is conversant with the 2<sup>nd</sup> Plaintiff and in any event, the 2<sup>nd</sup> Plaintiff has given unto him the mandate and or authority to appear and/or tender evidence in respect of the instant matter.



9. On the other hand, the witness testified that one Charles Arap Segei, the 2<sup>nd</sup> Plaintiff and himself applied to the Commissioner of Lands to be allocated a vacant Industrial Plot/Land situate in Dandora, within the City of Nairobi, for purposes of establishing a factory.
10. It was the further testimony of the witness that pursuant to and as a result of the application to be allocated land, the Commissioner of Land proceeded to and indeed allocated to and in favor of Charles Arap Segei, the 2<sup>nd</sup> Plaintiff and himself the suit property, vide Letter of allotment dated 20<sup>th</sup> July 1993.
11. Besides, the witness also added that the Letter of allotment in question was attached with a Plan, whose serial number was duly contained and reflected on the face of the Letter of allotment.
12. Additionally, the witness averred that pursuant to and upon being issued with a Letter of allotment, the allottees, including himself proceeded to and complied with the terms of the Letter of allotment; and thereafter same were issued with the Grant/Certificate of title confirming that same were the lawful and legitimate owners of the suit property.
13. Be that as it may, the witness averred that on or about the year 2007/2008, the Defendants herein and other persons entered upon and or trespassed onto the suit property, without the consent, permission and/or authority of the registered owners of the suit property. Furthermore, the witness averred that the Defendants' herein destroyed a barbed wire fence and thereafter same entered upon, took possession of and have remained in occupation of the suit property to date.
14. It was the further testimony of the witness that the impugned actions and/or activities by the Defendants, were taken during the post-election violence and that upon normalcy returning, the witness and the rest of the registered owners of the suit property proceeded to the suit property and engaged the Defendants with a view to obtaining vacant possession. However, the witness added that their attempt to engage with the Defendants and the rest of the persons who had trespassed onto the suit property was met with threats of violence and hence the witness and the 2<sup>nd</sup> Plaintiff were forced to report the matter to the Provincial/Local administration, for purposes of appropriate intervention.
15. Nevertheless, the witness averred that despite various efforts to recover vacant possession, the Defendants have remained in possession and occupation of the suit property and have thus deprived the 2<sup>nd</sup> Plaintiff and himself of the right to enter upon and take vacant possession of the suit property. Consequently and in this regard, the witness contended that the impugned actions and/or activities by the Defendants are therefore unlawful and illegal.
16. Other than the foregoing, the witness produced before the court a copy of the Certificate of title/Grant, Deed Plan and the Letter of allotment, which were variously marked as Exhibits P1 to P3, respectively.
17. On cross examination, by the 1<sup>st</sup> Defendant, the Witness pointed out that the 1<sup>st</sup> Defendant has been sued as a trespasser onto the suit property. In any event, the witness added that the 1<sup>st</sup> Defendant entered onto and has remained on the suit property without the consent and/ or permission of the registered owners of the suit property.
18. Additionally, the witness averred that the 2<sup>nd</sup> Plaintiff and himself lodged a Complaint with the Office of the Chief in the year 2012; and thereafter the chief summoned a Barraza involving the Plaintiffs and the various persons who had invaded the suit property. However, the witness averred that the meeting summoned by the chief did not culminate into any solution and hence same were constrained to file/ lodge the instant suit in the year 2013.
19. Furthermore, the witness testified that the Defendants herein entered upon and/or invaded the suit property in the year 2008/2009 and not otherwise.



20. On cross examination by the 4<sup>th</sup> Defendant, the witness testified that same have never worked with and/or been an employee of the City Council of Nairobi. For good measure, the witness averred that same has always been a business person.
  21. On the other hand, the witness averred that the name of the 4<sup>th</sup> Defendant and the rest of the Defendants, being the persons who have invaded the suit property were given at the chief's office. However, the witness added that the 4<sup>th</sup> Defendant was not personally known to him (witness).
  22. Whilst under further cross examination, the witness testified that the suit property was lawfully and legally allocated to Mr. Charles Arap Segei, the 2<sup>nd</sup> Plaintiff and himself by the Office of the Commissioner of lands.
  23. On cross examination by the 6<sup>th</sup> Defendant, the witness averred that in the year 2002 the suit property was fenced with a site-house. However, it was the testimony of the witness that the Defendants invaded the suit property in the year 2007/2008.
  24. On re-examination, the witness averred that the suit property lawfully belongs to the 2<sup>nd</sup> Plaintiff and himself and not the Defendants. Furthermore, the witness added that the Defendants herein have neither exhibited nor displayed any documents to suggest that same have any right to the suit property.
  25. Additionally, the witness averred that same have procured and obtained the certificate of title to and in respect of the suit property through procedural and lawful means. In this respect, the witness implored the court to find and hold that the Plaintiffs have proven and established their rights to and entitlement over the suit property.
  26. Subsequently, the witness herein was recalled for cross examination by Learned counsel for the Defendants and during the further cross examination, the witness averred that the application to be allocated land by the Commissioner of Land was made in the year 1993. Besides, the witness added that the application was made in writing.
  27. On the other hand, it was the further testimony of the witness that prior to the allocation of the suit property; same was vacant and there was no occupation thereon. In any event, the witness added that the invasion of and the trespass unto the suit property occurred in the year 2007/2008.
  28. Whilst under further cross examination by counsel for the Defendants, the witness averred that when the trespass occurred, same (witness) lodged a complaint with the office of the chief and the police. However, the witness conceded that same did not have the OB Number relating to the complaint that was lodged with the police.
  29. Finally, the witness averred that the Letter of allotment and the certificate of title/Grant were not acquired fraudulently. Further and in addition, the witness also contended that the process of acquiring the suit property was not fraudulent.
  30. On re-examination, the witness herein reiterated that same has neither been shown any Letter of allotment by and on behalf of the Defendants herein. Besides, the witness also averred that the Certificate of title which was issued to and in favor of the 2<sup>nd</sup> Plaintiff and himself was not fraudulent.
  31. Other than the foregoing, the witness also testified that neither the 2<sup>nd</sup> Plaintiff nor himself; have been investigated for any criminal offense, let alone fraud.
  32. With the foregoing testimony, the Plaintiffs' case was closed.
- b. Defendants' Case



33. The Defendants' case similarly revolves of the Evidence of one witness, namely, Ernest Ongari Omwenga who testified that same is the 1<sup>st</sup> Defendant in respect of the suit. Additionally, the witness averred that same resides within the city of Nairobi.
34. It was further testimony of the witness that same is conversant with the Group called Amani Self Help Group. In any event, the witness averred that same resides on the property belonging to the said self-help group.
35. Other than the foregoing, it was the testimony of the witness that the rest of the Defendants herein are also Members of the said Group; and that same are also residing on the disputed property.
36. Furthermore, it was the testimony of the witness that the land in question is substantially developed by the Defendants and the rest of the members and that there are two schools which have been built/constructed on the suit property.
37. In addition, the witness averred that same entered onto the suit property on or about the year 2000, whereas the rest of the Defendants entered onto the suit property variously between the years 2002 and 2003, respectively.
38. On the other hand, the witness averred that in respect of the instant matter, same recorded a witness statement dated the 2<sup>nd</sup> March 2015; and in this regard same sought to adopt and rely on the said witness statement. In this respect, the witness statement dated the 2<sup>nd</sup> March 2015; was duly admitted and adopted as the evidence in chief of the witness.
39. Furthermore, the witness also stated that the Defendants herein had also filed a Statement of Defense and Counterclaim dated the 4<sup>th</sup> June 2013; which was accompanied by a verifying affidavit. In this respect, the witness proceeded to and indeed adopted the contents of the Statement of Defense and the Counterclaim.
40. Nevertheless, the witness averred that despite having filed the Statement of Defense and Counterclaim, the Defendants herein neither filed any List nor Bundle of documents, whatsoever.
41. On cross examination by Learned counsel for the 2<sup>nd</sup> Plaintiff, the witness herein conceded and admitted that though same filed a witness, same (witness) did not indicate in the said witness statement that same ever applied for allotment of land or at all.
42. Further and in any event, the witness admitted that before any person can be allocated land, the person/applicant must make a written application.
43. Whilst under further cross examination, the witness conceded that same has not brought before the Honourable court any application letter to show whether himself or the self-help group ever applied to be allocated the suit property.
44. Other than the foregoing, it was also the testimony of the witness that same has also not brought or availed before the court any Letter of allotment or otherwise.
45. Additionally, the witness herein also testified that same remembers and/or recalls that the rest of the Defendants and himself were summoned to attend a meeting at the office of the chief. However, the witness added that despite the meeting having been summoned and convened; there was no agreement and or resolutions arrived at the said meeting.
46. It was the further testimony of the witness that same has not brought before the court any document to show that the self-help group was ever grant/allocated the suit property. In any event, the witness



added that same has also not brought before the court any document to show that the self-help group is duly registered as the owner of the land.

47. Notwithstanding the foregoing, the witness averred that the certificate of title belonging to and registered in the names of the Plaintiffs is fraudulent. However, the witness added that same has never reported any incidence of fraud to the police or any Government office or at all.
48. Be that as it may, the witness reiterated that same challenges the authenticity of the documents filed by the Plaintiffs herein.
49. Finally, and whilst still under cross examination, the witness conceded and in his own words stated as follows;

“I do agree that I have not filed any documents before the court. I have stayed on the Plaintiffs land”.

50. Subsequently, Learned counsel for the Defendants sought for and obtained an adjournment with a view to procuring additional witness for and on behalf of the Defendants. Besides, Learned counsel for the Defendants also sought for and obtained witness summons against various officers whose details were enumerated at the foot of the order issued by the court on the 17<sup>th</sup> January 2023.
51. Nevertheless, despite procuring and obtaining the adjournment, the Defendants were unable to avail any of the witnesses in respect of whom summonses issued. Consequently and on the basis of the failure to procure the attendance of the various witness, the Defense case was ordered closed on the 14<sup>th</sup> June 2023.

#### Submissions By The Parties:

##### a. Plaintiffs' Submissions:

52. The Plaintiffs' herein filed two sets of written submissions, one by the 1<sup>st</sup> Plaintiff dated the 25<sup>th</sup> July 2023; and the other by the 2<sup>nd</sup> Plaintiff and which is dated the 24<sup>th</sup> July 2023.
53. From the two sets of written submissions, Learned counsel for the Plaintiffs' have itemized, raised and highlighted three (3) salient issues for consideration by the Honourable court.
54. Firstly, Learned counsel for the Plaintiffs have submitted that the suit property was duly and lawfully allocated to and in favor of the Plaintiffs herein, who thereafter complied with the various terms and conditions alluded to at the foot of the Letter of allotment dated the 20<sup>th</sup> July 1993.
55. For good measure, Learned counsel for the Plaintiffs submitted that thereafter, the Plaintiffs indeed issued a Letter of acceptance and thereafter paid the requisite statutory levies; which were duly receipted and acknowledged by the commissioner of land.
56. It was the further submissions by counsel for the Plaintiffs that upon compliance with the terms of the Letter of allotment, the Commissioner of land duly proceeded and thereafter issued the certificate of title to and in favor of the Plaintiffs. In this regard, it was thus contended that the Plaintiffs' are therefore the lawful and legitimate proprietors of the suit property; and thus same are entitled to absolute and exclusive possession thereof, to the exclusion of the Defendants.
57. Secondly, Learned counsel for the Plaintiffs' have submitted that the Defendants herein entered upon and or trespassed onto the suit property on or about the year 2007/2008, albeit without the consent and or permission of the Plaintiffs. In this regard, Learned counsel for the Plaintiffs' have therefore



submitted that the actions by and on behalf of the Defendants constitutes and amounts to trespass as defined vide Section 3 of the *Trespass Act*.

58. To the extent that the actions by the Defendants amounts to trespass, Learned counsel for the Plaintiffs' therefore contended that it is appropriate and expedient that the court be pleased to grant orders of vacant possession to and in favor of the Plaintiffs.
59. Thirdly, Learned counsel for the Plaintiffs' have submitted that as a result of the offensive actions and/or activities by the Defendants; the Plaintiffs have been deprived of their lawful rights to and in respect of the suit property. Consequently, counsel has contended that the Plaintiffs' have thus established a basis for the grant of Damages for trespass.
60. In support of the claim for Damages for trespass, Learned counsel for the Plaintiffs' have cited and relied on various decisions inter-alia Duncan Nderitu Ndegwa versus Kenya Pipeline Company Ltd & Another (2013)eKLR, Philip Ayaya Aluchio vs Chrispinus Ngayo (2014)eKLR; and Total Kenya Ltd (formerly Caltex Oil Kenya Ltd) (2015)eKLR, respectively.
61. Nevertheless, despite making submissions for an award of damages for trespass, Learned counsel for the Plaintiffs have interestingly not proposed any amount to be awarded on account of (sic) General damages for trespass or at all.
62. Finally, Learned counsel for the Plaintiffs' have also submitted that even though the Defendants have filed a Counterclaim, premised on fraud; no plausible, cogent and/or credible evidence was placed before the court to warrant the grant of the orders sought at the foot of the counterclaim.
63. Furthermore, Learned counsel for the Plaintiffs' have submitted that it is not enough for the Defendants to implead fraud, without supplying the requisite particulars thereof and thereafter placing before the court cogent and credible evidence. For good measure, it was contended that it behooved the Defendants to tender credible evidence and prove the allegations of fraud to the requisite standard of proof as underlined vide the decision in the case of Vijay Morjaria versus Nansingh Madhisingh Dabar & Another (2000)eKLR.
64. In a nutshell, Learned counsel for the Plaintiffs' has thus contended that the counterclaim by and on behalf of the Defendants has not only been mounted in vacuum; but in any event; same has not been proven and/or established in the manner required under the law.
65. In view of the foregoing, Learned counsel for the Plaintiffs' have therefore implored the Honourable court to grant the reliefs sought at the foot of the Plaint whilst dismissing the counterclaim mounted by and on behalf of the Defendants.
  - b. Defendants' Submissions:
    66. The Defendants filed written submissions dated the 24<sup>th</sup> July 2023; and in respect of which same have raised, highlighted and amplified five pertinent issues for consideration and ultimate determination by the Honourable court.
    67. First and foremost, Learned counsel for the Defendants has submitted that the Plaintiffs' claim premised and or anchored on Mesne profits has neither been pleaded nor adequately proved, as required under the law. In this regard, Learned counsel has contended that the Plaintiffs did not tender any iota of evidence to show whether same were making any earnings out of the suit property or at all.
    68. Furthermore, Learned counsel submitted that the Plaintiffs herein also did not place before the court any document to underscore the claim for mesne profits. In this respect, it was thus contended that the claim for Mesne Profits is not legally tenable.



69. Secondly, Learned counsel for the Defendants has submitted that even though the court had issued witness summonses to and in favor of various Government officers, the court ultimately declined to grant further adjournment to and or in favor of the Defendants to enable same procure the attendance of the various Government officers against whom witness summons had been issued.
70. Additionally, Learned counsel has submitted that the court ought to have invoked and applied the provisions of Order 16 Rules 12 of the Civil Procedure Rules, 2010; with a view to issuing the requisite Notice to show cause against the Government officers. However, Learned counsel has lamented that the court failed to do so and thus denied and/or deprived the Defendants herein of the opportunity to benefit from the evidence which would have been produced by the various Government officers.
71. Thirdly, Learned counsel for the Defendants has submitted that the title to and in respect of the suit property was acquired fraudulently; and or illegally and it was incumbent upon the Plaintiffs to justify the validity of the impugned certificate of title. However, counsel contended that the Plaintiffs' herein failed to justify the validity and legality of the impugned certificate of title.
72. Further and in addition, Learned counsel for the Defendants has submitted that it was not enough for the Plaintiff to wave the certificate of title on the face of the court and thereafter imagine that the mere fact of issuance of such certificate of title suffices to vindicate its validity. In this respect, learned counsel invited the court to take cognizance of the dictum of the Court of Appeal in the case of *Munyu Maina versus Hiram Gathiha Maina* (2013)eKLR.
73. Fourthly, Learned counsel for the Defendants has submitted that the suit by and on behalf of the 2<sup>nd</sup> Plaintiff is fatally defective and thus ought to be struck out for non-compliance with the provisions of Order 3 Rule 2; Order 4 Rule 3; Order 1 Rule 13(2) and Order 16 and 19 of the Civil Procedure Rules, respectively.
74. In this respect, Learned counsel has agitated a position that it was not enough for the 1<sup>st</sup> Plaintiff to aver that same had the authority of the 2<sup>nd</sup> Plaintiff to swear the verifying affidavit and to appear before the court. For good measure, Learned counsel has submitted that it was mandatory that the authority in question be reduced into writing and same be filed with court in accordance with the prescription of the law.
75. Fifthly, Learned counsel for the Defendants has submitted that insofar as the 2<sup>nd</sup> Plaintiff neither appeared nor participated in the proceedings before the court, the 2<sup>nd</sup> Plaintiff herein cannot partake of and or benefit from any remedies from the court.
76. Furthermore, Learned counsel has added that the failure by the 2<sup>nd</sup> Plaintiff to appear and/or attend court negates the 2<sup>nd</sup> Plaintiffs claims and such failure is not curable vide the provisions of Article 159 2(d) of *the Constitution*, 2010.
77. In support of the foregoing submissions, Learned counsel for the Defendants has invited the Honourable court to adopt and apply the ratio decidendi in the case of *Sendy Kenya Freight Ltd vs Multiple Solution Ltd Mombasa HCC E031 of 2020 (UR)* and *Nicholas K Arap Salat vs IEBC & Others* (2013)eKLR.
78. Premised on the foregoing submissions, Learned counsel for the Defendants has thereafter impressed upon the court to find and hold that the Plaintiffs' herein have neither established nor proved their claim to the requisite standards; and hence the Plaintiffs suit out to be dismissed with costs to the Defendants.



### Issues For Determination:

79. Having reviewed and evaluated the pleadings filed by and on behalf of the Parties and upon taking cognizance of the evidence (both oral and documentary) tendered by the Parties and on consideration on the written submissions filed and which forms part of the record; the following issues do arise and are thus worthy of determination;
- i. Whether the Plaintiffs' herein have placed before the Honorable court cogent and credible evidence to prove ownership of the suit property.
  - ii. Whether the Defendants' herein have any lawful and or legitimate rights or interests over the suit property or otherwise.
  - iii. What Reliefs, if any, ought to be granted.

#### Analysis And Determination

##### Issue Number 1

Whether the Plaintiffs herein have placed before the Honorable court cogent and credible evidence to prove ownership of the suit property.

80. It was the testimony of PW1 that one Charles Arap Segei, the 2<sup>nd</sup> Plaintiff and himself applied to the Commissioner of land to be allocated a vacant Plot which was situated within Dandora Area in the City of Nairobi. Further, the witness averred that pursuant to and as a result of the application under reference, the Commissioner of land proceeded to and indeed issued a Letter of allotment dated the 20<sup>th</sup> July 1993.
81. On the other hand, the witness testified that upon being issued with the Letter of allotment, the allottees, including the 2<sup>nd</sup> Plaintiff and himself proceeded to and complied with the terms of the Letter of allotment culminating into the issuance of the certificate of title/Grant in favor of the 2<sup>nd</sup> Plaintiff and himself (PW1).
82. Furthermore, the witness herein thereafter proceeded to and produced before the Honourable court copies of the certificate of title, the Deed Plan and the requisite Letter of allotment, together with the attachment thereof which were admitted in evidence and marked as Exhibits P1 to P3, respectively.
83. Additionally, it is important to point out that though PW1 was variously cross examined by and on behalf of the Defendants herein his evidence pertaining to the allotment of the suit property and the ultimate issuance of the certificate of title, a copy of which was tendered before the court, was not impugned and or challenged in any manner.
84. Further and in addition, it is also not lost on the court that despite the extensive cross examination by and on behalf of the defendants, same did not place before the Honorable court any single document to underpin their claim to the suit property. In any event, no document was shown to PW1, to contradict the various documents/exhibits produced by and on behalf of the Plaintiffs.
85. There being no other parallel certificate of title which was availed to the Honorable court and upon evaluating the totality of the documents which were produced by and on behalf of the Plaintiffs, there is no gainsaying that indeed the Plaintiffs herein lawfully applied for allotment; were allocated the suit property and upon compliance with the conditions contained at the foot of the Letter of allotment, same were issued with the requisite certificate of title.



86. Additionally, it is important to underscore that upon the issuance of a certificate of title, the Plaintiffs herein became the lawful and legitimate proprietors of the suit property and their title thereto can only be challenged and/or impugned on the basis of fraud and or misrepresentation, if any, to which it is proved that same were privy and/or party to in terms of the provisions of Section 26 1(a) of the [Land Registration Act](#), 2012.
87. On the other hand, the certificate of title/Grant issued to and in favor of the Plaintiffs herein; can also be impugned or vitiated on the basis of illegality, irregularity and corrupt scheme; if any, demonstrated and established in accordance with the provisions of Section 26 1(b) of The [Land Registration Act](#), 2012.
88. Be that as it may, the certificate of title which was issued to and in favor of the Plaintiffs herein remains unassailable, insofar as no evidence whatsoever, has been tendered and or placed before the court to impeach and or impugn the validity or legality thereof.
89. Consequently and in this regard, the certificate if title which was issued to and in favor of the Plaintiffs bestows and or vests upon the Plaintiffs herein lawful and legitimate rights to and in respect of the suit property, to the exclusion of the Defendants. See Sections 24 and 25 of the [Land Registration Act](#), 2012.
90. Furthermore, it is also important to underscore that the issuance of a certificate of title vests in the registered proprietor(s) rights, which cannot be vitiated other than in accordance with the law. Pertinently and in this respect, it is appropriate to take cognizance of the dictum of the Court of Appeal in the case Joseph N.K. Arap Ng'ok versus Moijo Ole Keiwua & 4 others [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.

91. Instructively, the significance of a certificate of title/Grant, which is lawfully and validly acquired in accordance with the prescription of the law; was also re-echoed by the Court of Appeal in the case of Embakasi Properties Ltd vs The Commissioner of Land (2019)eKLR, where the court observed and held thus;

“Although it has been held time without end that the certificate of title is; “...conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the [Land Registration Act](#), 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme”.



92. Before departing from the significance of a Certificate of title and particularly, the nature and extent of the rights conferred upon the proprietors by virtue of the certificate of title, it is imperative to refer to and reiterate the dictum of the court in the case of Elizabeth Wambui Githinji & 29 Others vs Kenya Urban Roads Authority (2019)eKLR, where the court of appeal (per Ouko J A) stated and held thus;

“If a certificate of lease duly issued by the Registrar is prima facie evidence of ownership and if the owner is proved to have exercised due diligence at the point of acquisition, on what basis could the appellants’ petition for protection under Article 40 be defeated?

It has long been accepted beyond debate that the land registration process in Kenya is a product of the Torrens system. This was acknowledged in, among a long line of decided cases, this Court’s judgments in Dr. Joseph Arap Ngok V. Justice Moiyo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997 and Charles Karathe Kiarie & 2 Others V Administrators of Estate of John Wallance Muthare (deceased) & 5 others, Civil Appeal 225 of 2006.”

93. To my mind, the Plaintiffs herein have placed before the Honorable court credible documents, inter-alia Letters of allotment indorsed with a Part Development Plan and ultimately a certificate of title, issued by and on behalf of the Government of the Republic of Kenya and which certificate of title has never been impugned. Consequently and in this respect, the Plaintiffs are entitled to protection under the law and essentially in the manner envisaged by Article 40 (3) of *the Constitution*, 2010.
94. Essentially, my answer to issue number one is to the effect that the Plaintiffs herein have established and proved that same have lawful and legitimate rights to and in respect of the suit property and are thus entitled to exclusive possession and occupation thereof, in accordance with the Provisions of Sections 24 and 25 of the *Land Registration Act*, 2012.

#### Issue Number 2

Whether the Defendants herein have any lawful and or legitimate rights or Interests over the suit property or otherwise.

95. The Defendants herein do not dispute that same entered upon and are in occupation of the suit property. For good measure, DW1, who testified for and on behalf of the Defendants confirmed and acknowledged that the Defendants variously entered upon and have remained in occupation of the suit property to date.
96. On the other hand, even though the Defendants confirm and admit occupation of the suit property, same have however neither tendered nor produced any iota or scintilla of evidence to underscore the basis upon which same entered upon and or have remained in possession of the suit property.
97. Most importantly, it is worthy to recall that even though the Defendants herein have impleaded fraud on the part of the Plaintiffs as pertains to the acquisition and ultimate registration of the suit property, the Defendants were however unable to establish the plea of fraud.
98. Nevertheless, to appreciate whether or not the Defendants herein have any legitimate claim to the suit property, it is important to take cognizance of certain excerpts, arising from the evidence of DW1; and more particularly during cross examination.



99. Consequently and in this respect, I propose to reproduce the evidence adduced by DW1. In this regard the evidence are reproduced as hereunder;

“I know that before one can be allocated land, the person must write a letter/application. I have not brought any letter before the court. I know that I was to do certain things before the allotment can materialize. I have not brought any allotment before the court. I have no document to show that the self-help group was granted/allocated the land. I have not brought any document to show that the self-help group is dully registered.....I do agree I have not file any document before the court. I have stayed on the Plaintiffs land.”

100. From the foregoing excerpts, several facts to arise, inter-alia, that the self-help group, which the Defendants contend owned the land; is admitted not to have been allocated the suit property or at all.

101. Secondly, it is also evident that neither the self-help group nor the Defendants herein have any certificate of registration over and in respect of the suit property. Simply put, the Defendants occupation of the suit property is neither anchored nor premised on any certificate of title.

102. Thirdly and most importantly, the 1<sup>st</sup> Defendant, who testified for and on behalf of the rest of the Defendants made a startling admission that the suit property on which he and the rest of the Defendants occupies; belongs to the Plaintiffs. In this respect, the Plaintiffs ownership is thus vindicated and confirmed.

103. In view of the foregoing observations, the question that remains to be addressed is whether the Defendants herein have any legitimate rights to the suit property, which admittedly belongs to the Plaintiffs.

104. In my humble view, the Defendants herein can only be in occupation and or remain in possession of the suit property albeit with the consent and permission of the Plaintiffs. Absent such consent and such permission, the entry upon and occupation of the suit property by the Defendants amounts to and or constitutes trespass. See Section 3 of the [Trespass Act](#), Chapter 294 Laws of Kenya.

105. Having found and held that the Defendants herein have no lawful rights to the suit property; and having further found and held that the actions by and on behalf of the Defendants constitutes trespass, it thus follows that the Defendants have infringed upon and or violated the proprietary rights of the Plaintiffs.

106. Consequently and to this end, I am obliged to and do hereby adopt, endorse and reiterate the holding of the Court in the case of *Waas Enterprises Limited versus City Council Of Nairobi & another* [2014] eKLR, where the court succinctly held thus;

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

“24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and



- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
1. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  2. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

It therefore follows from the above that only the plaintiff is entitled to enjoy proprietary rights over the suit land. The 2<sup>nd</sup> defendant had no right to the suit land. She must therefore vacate the suit land and hand over possession to the plaintiff. It is my opinion that the 1<sup>st</sup> defendant should ensure that the 2<sup>nd</sup> defendant has vacated the suit land and hands over vacant possession of the suit land to the plaintiff within a period of 30 days from the date hereof.

107. In answer to issue number two, it suffices to state and reiterate that the Defendants herein have no lawful rights and/or interests over and in respect of the suit property. For thee avoidance of doubt, their occupation of the suit property is informed by an intentional and deliberate intransigence, aimed at depriving the Plaintiffs of their right of entry upon and possession of the suit property.

Issue Number 3

What Reliefs, if any, ought to be granted.

108. The Plaintiffs' herein had sought for various reliefs, whose details were reproduced at the onset of this Judgment. For good measure, it is not lost on the court that the Plaintiffs herein had sought for an order of vacant possession, which simply means an order of eviction of the Defendants from the suit property with a view to enabling the Plaintiffs to take possession and benefit from ownership from the suit property.
109. Whilst discussing issue number one, this court has already interrogated the validity and propriety of the documents put forth by the Plaintiffs and indeed the court returned a verdict that the said documents were valid, authentic and establishes the Plaintiffs rights to and in respect of the suit property.
110. Having come to the conclusion that the Plaintiffs are indeed the lawful and legitimate proprietors of the suit property, it is therefore common ground that same are entitled to benefit from and partake of the statutory rights and privileges attendant to such ownership. In this respect, the Plaintiffs are



entitled to vacant possession, occupation and use of the suit property, to the exclusion of all and sundry, the Defendants not excepted.

111. The second relief sought by the Plaintiffs relates to Mesne profits. However, it is worthy to note that despite having sought for Mesne profits, the Plaintiffs herein did not specifically plead Mesne profits in the body of the Plaint, either as required or at all. Furthermore, the Plaintiffs herein also failed to avail and/or supply the requisite particulars including the amount, if any, that was derivable from the suit property and for which same have been deprived of, as a result of the offensive actions by the Defendants.
112. Other than the foregoing, it is also not lost on the court that PW1, who was the only witness who testified on behalf of the Plaintiffs, did not advert to and/or adduce any scintilla of evidence pertaining to Mesne profits or otherwise.
113. In the premises, the question that does arise; is whether Mesne profits has been duly established in the circumstances of this case or better still, whether the court can decree an award of mesne profits albeit in vacuum.
114. To my mind, the Plaintiffs herein have not laid a basis to warrant the grant of an Order for Mesne Profits. Further and in any event, I agree and concur with the Submissions of Learned Counsel for the Defendants that such an award cannot be granted in the absence of pleadings and without the requisite proof.
115. Without belaboring the point, it is appropriate to underscore that the law as pertains to the circumstances in which mesne profits can issue and be granted is now trite and well beaten. In this regard, it suffices to cite and rely on the holding in the case of Christine Nyanchama Oanda versus Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR, where the court of Appeal observed and stated as hereunder;

“Mesne Profits must be pleaded and proved. In the case Peter Mwangi Msuitia & Another v Samow Edin Osman [2014] eKLR, this Court held as follows:  
“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”
116. Other than the prayer for mesne profits, it is also important to point out that in the course of making submissions Learned counsel for the Plaintiffs submitted on the question of General damages for trespass. Nevertheless, despite having made elaborate submission on the question of damages of trespass, no proposal as pertains to quantum was ventilated and/or better still suggested.
117. Be that as it may, it is my humble view that the submissions that were mounted and highlighted as pertains to General damages for trespass, were made in vein. Instructively, the Plaintiffs herein neither sought for nor impleaded General damages for trespass and in the absence of pleadings, the Plaintiffs cannot procure any such award without breaching the Doctrine of Departure. See the Decision in the case of Independent Electoral and Boundaries Commission and Others versus Stephen Mutinda Mule and Another (2013) eklr.
118. On the part of the Defendants, same had raised a counterclaim, premised and anchored on the plea of fraud. However, whilst discussing issue number two, it is imperative to recall that this court has found and held that the Defendants conceded that the suit property belongs to the Plaintiffs.



119. In my humble view, the admission and/or concession by and on behalf of the Defendants negates and/or destroys the plea of fraud which anchored the counterclaim. In any event, the Defendants herein cannot approbate and reprobate, at the same time.
120. Notwithstanding the foregoing, it is also worthy to remember that a claim based and premised on fraud; must not only be pleaded and particulars thereof availed; but same must be proved to the requisite standards. As pertains to the manner and standard of proof of a claim premised on fraud, it suffices to reiterate the dictum in the case of *Kuria Kiarie & 2 others versus Sammy Magera* [2018] eKLR, where the court stated and observed 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.”
121. Nourished by the ratio decidendi, cited and espoused in the decision (*supra*), it is my humble position that the Defendants herein similarly did not establish and/or prove their claim founded on fraud, either to the requisite standard or at all.
122. In any event, it is not lost on the court that Learned counsel for the Defendants also did not make any submissions pertaining to whether or not the counterclaim anchored on fraud was proven. Apparently, no such submissions were ventilated because Learned counsel was convinced that the evidence tendered by DW1, fell short of the requisite threshold.
123. Based on the foregoing, it is common ground that the counterclaim, by and on behalf the Defendants; was not proven or at all.
124. Consequently and in this respect, same is devoid of merits.



## **Final Disposition**

125. From the discussion in terms of the deliberations contained hereinbefore, it must have become evident, nay, apparent that the Plaintiffs herein have duly established and proved their claims as pertain to ownership as pertains to the suit property.
126. Conversely, the Defendants herein have not been able to highlight any legal and/or equitable rights and/or interests, which informs their possession and continued occupation of the suit property; which admittedly belongs to the Plaintiffs.
127. In view of the foregoing, I come to the conclusion that the Plaintiffs suit is meritorious. Consequently, Judgment be and is hereby entered in favor of the Plaintiffs as hereunder;
- i. The Defendants be and are hereby ordered and/or directed to vacate L.R No. 209/11970 and hand over vacant possession thereof to the Plaintiffs within a duration of 120 days from the date hereof.
  - ii. That in default to hand over vacant possession of the suit property in terms of clause (i) hereof; an Eviction order shall issue and the Defendants shall be evicted from the suit property.
  - iii. In the event of Eviction being carried out and/or undertaken by the Plaintiffs in compliance with clause (ii) hereof, the expenses incurred in undertaking such Eviction shall be certified by the Deputy Registrar of the court and same shall thereafter be recoverable as costs from the Defendants.
  - iv. An order of Permanent Injunction be and is hereby issued to restrain the Defendants, either by themselves, agents, servants and/or anyone claiming under the Defendants from entering upon, re-entering, remaining on, trespassing upon and/or otherwise interfering with the Plaintiffs' rights to and interests over the suit property.
  - v. The Plaintiffs' claim for Mesne profits be and is hereby declined.
  - vi. The Defendants' counterclaim be and is hereby dismissed.
  - vii. The Plaintiffs be and are hereby awarded the costs of the suit and counterclaim; to be agreed upon and in default; to be taxed by the Deputy Registrar of the court.
128. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023.**

**OGUTTU MBOYA,**

**JUDGE.**

**In the Presence of:**

Benson - Court Assistant

**Mr. E M Obonyo For The 1St Plaintiff**

**Mr. Odera Were For The 2Nd Plaintiff**

**Mr. Maosa For The Defendants**

