



REPUBLIC OF KENYA



**KENYA LAW**  
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**Export Processing Zone Authority v Mutungei & 3 others (Environment & Land  
Case 130 of 2018) [2025] KEELC 1271 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1271 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 130 OF 2018  
LC KOMINGOI, J  
MARCH 13, 2025**

**BETWEEN**

**EXPORT PROCESSING ZONE AUTHORITY ..... PLAINTIFF**

**AND**

**OSINGITI OLE MUTUNGEI ..... 1<sup>ST</sup> DEFENDANT**

**KOSINGET OLE MUTUNKEI LAMO ..... 2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR KAJIADO ..... 3<sup>RD</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. This suit was initially filed as Nairobi ELC Case No. 1259 of 2016 vide the Complaint dated 12<sup>th</sup> October 2016 and later transferred to this Court. The Complaint was later amended on 13<sup>th</sup> February 2020.
2. The Plaintiff a State Corporation established in 1990 through the Export Processing Zone Authority Act, claimed that the 1<sup>st</sup> Defendant was the initial registered owner of property previously known as Kajiado/Ololoitikoshi/Kitengela/61 which upon sub-division vide the mutation dated 22<sup>nd</sup> September 2014 became Kajiado/Kitengela/74012 registered in favour of the 2<sup>nd</sup> Defendant.
3. Sometime in 1991 pursuant to Gazette notice number 2802 and 2803 of 13<sup>th</sup> June 1991, the Government of Kenya acquired one hectare out of parcel known as Kajiado/Ololoitikoshi/Kitengela/61 belonging to the 1<sup>st</sup> Defendant for purposes of constructing a high level water tank for the benefit of the residents of Kitengela. Following this acquisition, the 1<sup>st</sup> Defendant was duly compensated to the tune of Kshs. 42,550 through a banker's cheque received on 7<sup>th</sup> January 1992. On 13<sup>th</sup> January 1992 the Plaintiff issued the 1<sup>st</sup> defendant with a possession notice, the possession taken and a high level water tank was constructed as per the intended purpose.



4. On 25<sup>th</sup> October 2009, the Plaintiff requested the 3<sup>rd</sup> Defendant to cause excision of the one (1) hectare from Kajiado/ Olooloitikoshi/ Kitengela/ 61 and have it registered in its name. It also asked the 1<sup>st</sup> Defendant to surrender the title to the property so as to effect the changes, but the 1<sup>st</sup> Defendant failed and neglected to surrender the said title. Thereafter, the 3<sup>rd</sup> Defendant caused the District Land Surveyor to survey the area and file a report and in the report dated 8<sup>th</sup> July 2013, the Surveyor advised the 3<sup>rd</sup> Defendant to place a restriction on the title pending repossession by the Plaintiff.
5. On 22<sup>nd</sup> August 2014 a mutation was prepared by the District Land Surveyor delineating and excising the 1 hectare of land, the mutation was registered and the new title Kajiado/Kitengela/74012 issued in favour of the 2<sup>nd</sup> Defendant. On 30<sup>th</sup> July 2015, the Plaintiff sought the 4<sup>th</sup> Defendant's intervention who recommended that the 3<sup>rd</sup> Defendant cancels the title issued to the 2<sup>nd</sup> Defendant and issue one in favour of the Plaintiff. The 3<sup>rd</sup> Defendant however indicated that they lacked jurisdiction to cancel the said title necessitating the filing of this suit. The Plaintiff claimed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were in illegal occupation of the suit property and ought to compensate the Plaintiff from the time the land was acquired until the time they vacate the said land. It sought the following reliefs;
  - a. A declaration that part of all that parcel of land previously known as Kajiado/ Olooloitikoshi/61 and currently known as Kajiado/Kitengela/74012 together with other subdivisions thereof forming 1 hectare belongs to the Plaintiff herein.
  - b. An order to issue directing the 3<sup>rd</sup> Defendant to cancel the title deed unlawfully issued to the 2<sup>nd</sup> Defendant and issue a fresh title to the favour of the Plaintiff for all that parcel of land currently known as Kajiado/Kitengela/74012 together with other subdivisions thereof forming one (1) hectare.
  - c. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants to pay mesne profit for the time they have been in illegal occupation of the Plaintiff's land, until the day they vacate.
  - d. Costs of the suit.
6. The 1<sup>st</sup> Defendant who was duly served neglected to enter appearance and/or file a statement of Defence. He did not participate in these proceedings.
7. The 2<sup>nd</sup> Defendant in his Statement of Defence and Counterclaim while contesting the Plaintiff's claim, stated that the Plaintiff had already fenced off the 1 acre portion of land and was enjoying it to the exclusion of the 2<sup>nd</sup> Defendant despite renegeing on its agreement to supply the 2<sup>nd</sup> Defendant with permanent water connection as per their agreement and was therefore illegally occupying the 2<sup>nd</sup> Defendant's land. In his Counterclaim the 2<sup>nd</sup> Defendant claimed that the Plaintiff was unlawfully utilising his property which was approximately 0.5 hectares as an access road without compensation. The 2<sup>nd</sup> Defendant claimed that as per the agreement the Plaintiff was to excise part of his land on its own costs and in return would supply his household with clean water. The 2<sup>nd</sup> Defendant's case is that the Plaintiff ought to be compelled to supply the water and pay costs of excision and processing of the title. The 2<sup>nd</sup> Defendant went on to claim that the Plaintiff had also installed inlet and outlet water pipes on approximately 0.24 hectares of land Kajiado/Kitengela/96451 without his consent. He thus sought:
  - a. A declaration that the Plaintiff has breached the agreement with the 2<sup>nd</sup> Defendant by not connecting the 2<sup>nd</sup> Defendant with a permanent water supply.
  - b. A declaration that the Plaintiff is a trespasser at the 2<sup>nd</sup> Defendant parcel reference number Kajiado/Kitengela/96451 where it is using as an access road.



- c. A declaration that the Plaintiff is a trespasser at the 2<sup>nd</sup> Defendant parcel reference number Kajiado/Kitengela/96451 where it has installed its inlet and outlet pipes.
  - d. The sum of Kshs 50,000 being the cost of processing the title to the Plaintiff's name.
  - e. Compensation for the access road for parcel reference number Kajiado/Kitengela/96451.
  - f. An order compelling the Plaintiff to remove the installed inlet and outlet pipes over parcel reference number Kajiado/ Kitengela/96451.
  - g. Cost of this suit plus interest.
  - h. Any other relief this Honourable court may deem fit to grant.
8. The Plaintiff filed a reply to the 2<sup>nd</sup> Defendant's Statement of defence and counterclaim denied all allegations.
9. The 4<sup>th</sup> Defendant in its statement of Defence dated 17<sup>th</sup> May 2024 confirmed that one (1) hectare out of Kajiado/ Oloolotikoshi/ Kitengela/61 was public land having been acquired by the Government of Kenya on 13<sup>th</sup> June 1991 through Gazette Notices 2802 and 2803 and the 1<sup>st</sup> Defendant duly compensated for the same. It is also its case that the said parcel; Kajiado /Oloolotikoshi/ Kitengela/61 was subdivided into parcel; Kajiado//Kitengela/8222 and 8223 which gave rise to parcel Kajiado/ Kitengela/74012, the suit property, which was registered in the 2<sup>nd</sup> Defendant's name without taking into consideration the Plaintiff's proprietary interests. It is further stated that the 2<sup>nd</sup> Defendant had refused to surrender the said title for rectification despite being notified of the same on several occasions. The 4<sup>th</sup> defendant also admitted that notice was equally issued to the 3<sup>rd</sup> Defendant to cancel the title issued to the 2<sup>nd</sup> Defendant and cause it to be registered in the Plaintiff's favour. It confirms that, the 2<sup>nd</sup> Defendant was in wrongful occupation of the suit property.

### **Evidence of the Plaintiff**

10. PW1, Andrew Njuru, Assistant Property Manager of the Plaintiff adopted his witness statement dated 10<sup>th</sup> February 2020 as part of his evidence and produced his bundle of documents dated 5<sup>th</sup> October 2016, 10<sup>th</sup> February 2020 and 3<sup>rd</sup> August 2020 which were marked as P. Exhibit 1 to 2, P. Exhibit 1 to 27 and P. Exhibit 1 to 5 respectively. He testified that as a property manager he was in charge of titling, managing and safeguarding the Plaintiff's properties. He stated that the property in dispute measuring 1 hectare was initially part of parcel Kajiado/Oloolotikoshi/61 belonging to the 1<sup>st</sup> Defendant. It was compulsorily acquired in 1991 by the Government of Kenya and duly gazetted. The 1<sup>st</sup> Defendant was then compensated for the same and the Plaintiff took possession and constructed a water tank on one acre of the parcel of land and the remaining portion remain un-utilised because it has been denied ownership by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. He testified that the portion in dispute was to be excised from the original parcel and registered in the Plaintiff's name but when the excision was done and became Kajiado/Kitengela/74012 it was registered in the 2<sup>nd</sup> Defendant's name instead of the Plaintiff's. The Plaintiff had tried to get the said title cancelled and registered in its name including seeking intervention of the National Land Commission, but the Land Registrar Kajiado advised that cancelling the title could not be done without a Court order.
11. The witness indicated that parcel Kajiado/Kitengela/96451 claimed in the Counter Claim was unknown to them and was non-existent on the map. He added that they did not promise the 2<sup>nd</sup> Defendant any water. On the issue of wayleaves, he stated that the National Land Commission (NLC) being in charge of wayleaves was aware of their existence as well as the requirement for compensation



and that there were ongoing negotiations on the same. He urged the court to grant the reliefs sought in the Plaintiff.

12. On cross examination he confirmed that the suit property was acquired by the Plaintiff in 1991 and a water tank constructed on one acre portion of the land which they also fenced off. However the remaining parcel was not fenced. He stated that there was documentary evidence to show how the property was acquired. He stated that the 2<sup>nd</sup> Defendant ought to have surrendered title to the property for excision of the acquired portion but the 2<sup>nd</sup> Defendant had refused to. He stated that the Plaintiff did not bear costs of the subdivision. He confirmed that the Plaintiff had inlet and outlet pipes to the water tank and was willing to negotiate with the owners of the land that the pipes had passed through. He noted that as much as the issue of pipes was different from the dispute at hand, the 2<sup>nd</sup> Defendant had asked for their removal from property 96451. It is his case that parcel No. 96451, does not exist on the map. He also stated that asking for the pipes to be removed was unreasonable because they had been on the property the 1990s. He added that the water tank was to provide water to Kitengela residents and that the 2<sup>nd</sup> Defendant wanted free water which was not possible. He also confirmed that the issue of wayleaves and compensation was an issue that was being handled by NLC although he could not confirm when the said compensation would be effected.
13. On re-examination PW1 stated the issue of compensation of wayleaves was being handled by National Land Commission. The owners of the affected properties would need to prove ownership. He reiterated the prayers of the Plaintiff in the Plaintiff.

#### **Evidence of the Defendants**

14. DW1, Philip Parletuan Koisinget the 2<sup>nd</sup> Defendant's son who had Specific Power of Attorney for purposes of this suit, adopted the witness statement dated 25<sup>th</sup> June 2019 together with his bundle of documents as exhibits in this case. He testified that the Plaintiff was seeking transfer of the parcel of the parcel of land which was according to them was only the one acre fenced portion. However, the plaintiff was claiming 1 hectare. He further stated that the subdivision was carried out by the 2<sup>nd</sup> Defendant in 2014, pointing out that the Plaintiff had promised them free water connection and water supply which they failed to do. He also indicated that only one acre of land was fenced and the rest was intact and un-utilized. He also stated that the 2<sup>nd</sup> Defendant was ready to transfer the suit property to the Plaintiff if they pay the costs of the subdivision, costs of legal fees, as well as costs of the pipes on the 2.5 acres of land. It is his case that 2.5 acres was equivalent to 1 hectare but the Plaintiff was occupying more than 1 hectare.
15. On cross examination he stated that the Plaintiff's land was 1 hectare out of property Kajjado/Kitengela/74012 which they were willing to transfer to the Plaintiff if it agrees to pay the legal fees. DW1 stated that the 2<sup>nd</sup> Defendant spent Kshs. 50,000 for the subdivision and had receipts to confirm. He confirmed that prior to the subdivision, the original parcel was Kajjado/ Olootikoshi/ Kitengela/ 61 and that parcel Kajjado/Kitengela/96451 was registered in the 2<sup>nd</sup> Defendant's name.
16. On re-examination he confirmed that the property was not transferred to the Plaintiff due to the issue of subdivision fees as well as the pipes on the other parcels of land which was more than the 1 hectare. He pointed out that they had several meetings with officials of the Plaintiff to resolve the dispute but with no success. He confirmed that the mutation form produced as evidence is what resulted into the suit property and that there were other ongoing subdivisions from the original property.
17. Counsel for the 3<sup>rd</sup> Defendant indicated that they were supporting the Plaintiff's case and would not call any witnesses.



18. DW2 Kenneth K. Mutahi for the 4<sup>th</sup> Defendant adopted his witness statement dated 17<sup>th</sup> May 2024. He testified that the suit property was acquired by the Government of Kenya in 1991 on behalf of the Plaintiff and compensation done as per the documents produced. The 1<sup>st</sup> Defendant was informed to surrender the title to the property to the 3<sup>rd</sup> Defendant for purposes of cancellation. Later on 22<sup>nd</sup> August 2014, a mutation was prepared by the Kajiado Surveyor for 1.01 hectares from parcel Number 8222 which was later subdivided and registered to the 2<sup>nd</sup> Defendant's name without taking into consideration the Plaintiff's proprietorship interest. On 1<sup>st</sup> October 2015, the 4<sup>th</sup> Defendant asked the 3<sup>rd</sup> Defendant to cancel the title in favour of the 2<sup>nd</sup> Defendant. And on 18<sup>th</sup> March 2016, the 4<sup>th</sup> Defendant wrote to the 2<sup>nd</sup> Defendant asking him to surrender the title for purposes of having it registered in the Plaintiff's name. On 1<sup>st</sup> October 2016, the 4<sup>th</sup> Defendant asked the 3<sup>rd</sup> Defendant to register a restriction against the suit property. On 13<sup>th</sup> March 2020, the Plaintiff requested the 4<sup>th</sup> Defendant for valuation to show the 1<sup>st</sup> and 2<sup>nd</sup> Defendants case occupation and on 17<sup>th</sup> August 2020, the 4<sup>th</sup> Defendant wrote to the Plaintiff stating that they had undertaken the valuation and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were in occupation of the parcel of land belonging to the Plaintiff having been acquired by the Government. He stated that the Government followed due process in acquiring the said land on behalf of the Plaintiff.
19. On cross examination he stated that the suit property belongs to the Plaintiff. And that during the valuation, there were water tanks on the property but he could not verify who the owner of the water tanks was. He stated that in acquiring the suit property, the Government carried out due diligence and the 1<sup>st</sup> Defendant was duly compensated. He confirmed that the property acquired was 1 hectare and in compulsory acquisition it was the Government's obligation to excise the land. He confirmed that from the record, it was the 2<sup>nd</sup> Defendant who carried out the subdivision. He confirmed that the Plaintiff took possession of the property in 1992 but could not explain why it took them so long to excise the property. He maintained that title number 74012 ought to be cancelled and a new one issued in favour of the Plaintiff. He also stated that he was not aware that the Plaintiff had taken more land than what it was entitled to. He indicated that while the 4<sup>th</sup> Defendant was in charge of handling compensation for way leaves, he was not aware that there was procurement of any wayleaves and there was no mention of any wayleaves during the acquisition process. He added that the 2<sup>nd</sup> Defendant had neither contested compensation nor surrendered title to the suit property. He pointed out that under the Gazette notice number 2803, there was no clause for the Plaintiff to provide water to the 2<sup>nd</sup> Defendant and that the water tanks were for public use.
20. At the close of the oral testimonies, parties tendered final written submissions.

### **The Plaintiff Submissions.**

21. Counsel submitted on the following issues summarised here under.
22. On whether there was lawful compulsory acquisition of one hectare excised from parcel Kajiado/Ololoitkoshi/Kitengela/61, counsel submitted that it was on record that one hectare of land was acquired by the government of Kenya in 1991 vide Gazette notices 2802 and 2803 and payment of Kshs. 42,550 made to the 1<sup>st</sup> Defendant. The settlement was vide a bankers cheque collected on 7<sup>th</sup> January 1992 by one Daniel Sanchi Ntapayia on behalf of the 1<sup>st</sup> Defendant as the co-registered owner. On 13<sup>th</sup> January 1992 a notice of taking possession was issued to the 1<sup>st</sup> defendant and the Plaintiff took possession and constructed water infrastructure on one acre of the land acquired. The Government therefore followed legal procedure in acquiring the property as was held in *Mutuma Angaine vs M'Marete M'Muronga* [2011] eKLR.



23. On whether the one hectare of land excised from Kajiado/Ololoitikoshi/Kitengela/61 also known as Kajiado/ Ololoitikoshi/61 through Gazette notices 2802 and 2803 was available for alienation, counsel submitted that once the suit property was acquired, it was not open for re-alienation citing Kenya Anti Corruption Commission vs Frann Investmnets Ltd & others [2020] eKLR. Adding that after its excision, the title to the 2<sup>nd</sup> Defendant was erroneously issued while attempts to have the issue settled amicably were futile as evidenced. The 2<sup>nd</sup> Defendant should therefore not benefit from this illegality as was held by the Court of Appeal in Chemey Investmnet Ltd vs Attorney General & 2 others [2018] eKLR. Counsel also pointed out that DW1 in evidence acknowledged that the land belonged to the Plaintiff but would only transfer the same subject to the Plaintiff meeting their conditions, whereas the Plaintiff had no contractual obligation with the 2<sup>nd</sup> Defendant. Counsel went on to submit that the Plaintiff was entitled to protection of its rights under Article 40 of *the Constitution* and that the land acquired should be used for the purposes it was acquired for, citing Supreme Court case of Town Council of Awendo vs Nelson O. Onyango 1<sup>st</sup> – 13<sup>th</sup> Respondents, Attorney General 14<sup>th</sup> Respondent, Abdul Malik Mohammed & 178 others [2019] KESC 38 (KLR).
24. On whether the Plaintiff was entitled to mesne profits, counsel submitted that the 2<sup>nd</sup> Defendant had been in illegal occupation of the suit property and should thus pay mesne profits as per Section 2 of the *Civil Procedure Act* and Order 21 Rule 13 of the Civil Procedure Rules. And that the appropriate compensation for lost income was USD 188,463.48 with reference to Kenya Hotels Properties Ltd vs Willesden Investments Ltd [2009] eKLR.
25. On whether the 2<sup>nd</sup> Defendant’s counterclaim was merited, counsel submitted that the 2<sup>nd</sup> defendant had made reliance to an agreement that was not proved to allegedly connect permanent supply of water and the he had used Kshs. 50,000 to process the Plaintiff’s title, an allegation that was unsupported. The Counter claim should thus be dismissed because his claims were unsupported contrary to Sections 107, 108, 109 and 112 of the *Evidence Act* citing Kyalo Elly Joy vs Samuel Gitahi Kanyeri [2021] eKLR. Counsel also submitted that the alleged property Kajiado/Kitengela/96451 was a completely different parcel from Kajiado/Kitengela/74012.
26. On whether the Court should cancel title to property Kajiado/Kitengela/74012 held by the 2<sup>nd</sup> Defendant, counsel submitted that Section 80 of the *Land Registration Act* granted Court the authority to cancel and order for rectification of titles obtained by fraud or mistake with reference to Mary Ruguru Njoroge vs Samuel Gachumu Mbugua & others [2014] eKLR.
27. As such, the Plaintiff should be granted the reliefs sought together with costs of the suit and the 2<sup>nd</sup> Defendant’s counterclaim be dismissed with costs to the Plaintiff.

### **The 2<sup>nd</sup> Defendant’s Submissions.**

28. Counsel for the 2<sup>nd</sup> Defendant submitted that when the Plaintiff took possession of the suit property on 13<sup>th</sup> January 1992, he did not take any steps to excise the 1 hectare from parcel 61 despite having taken the original title during the compulsory acquisition process. In 2014, the 2<sup>nd</sup> Defendant subdivided his land parcel Kajiado/Kitengela/8222 which was a subdivision of the original parcel 61 getting parcel Kajiado/Kitengela/74012 the suit property herein and bore the costs. However, after subdividing and setting it aside for the Plaintiff, the 2<sup>nd</sup> Defendant raised issues that the Plaintiff was to settle before the transfer could be effected to its favour. The issues included reimbursement of the Kshs. 50,000 the subdivision fees, connecting the 2<sup>nd</sup> Defendant’s home with water and compensating for the wayleave inlet and outlet pipes that had gone over and above he compulsorily acquired 1 hectare of land. The issue of compulsory acquisition was therefore not in contention but whether the Plaintiff occupies more than the compulsorily acquired 1 hectare. Counsel submitted that the issue of



compensation for the wayleave pipes had been a subject of negotiations and there being no resolution, the matter proceeded for trial and hearing. Counsel submitted that the surveyor's report showed that the project occupied 1.2 hectares adding that PW1's witness statement indicated that the Plaintiff could consider procuring the wayleave but the excise had not taken place due to financial constraints. Counsel submitted that in a situation where land acquired was greater than what had been awarded, then compensation shall be paid for the excess area as per Section 18 of the then applicable law Land Acquisition Act which was similar to Section 119 of the *Land Act*, and as held in *Omar & another (As Executors of the Will of Omar Bin Khamis) vs Kenya Airports Authority & another* [2024] KEELC 964 (KLR). Counsel went on to submit that Section 117 of the *Land Act* which is similar to Section 17 of the Land Acquisition Act (repealed) provided that after land has been acquired, the Commissioner should as soon as possible cause a final survey to be made of all the land acquired. However, this had not been done and the excision of parcel 74012 was undertaken by the 2<sup>nd</sup> Defendant at his cost and in good faith. Had this been done, then it would have been noted that the land was over and above the acquired one (1) hectare and the 2<sup>nd</sup> Defendant was entitled to compensation for the extra land.

29. On whether the 2<sup>nd</sup> Defendant should be refunded the excision costs of Kshs. 50,000, counsel submitted that the 2<sup>nd</sup> Defendant incurred costs for the excision and subdivision despite the Plaintiff claiming that there was no evidence of the same and should thus be compensated for that.
30. On whether the Plaintiff should supply the 2<sup>nd</sup> Defendant's homestead with water, Counsel submitted that the purpose of the acquisition and construction of the water tank was for public interest which the Plaintiff should be compelled to adhere to.
31. On whether the 2<sup>nd</sup> Defendant should be compensated for the access road that the 2<sup>nd</sup> Defendant provided for purposes of the Plaintiff accessing parcel 74012, counsel submitted that the 2<sup>nd</sup> Defendant had decided not to claim for compensation of the same.
32. On whether the Plaintiff was entitled to mesne profits, counsel submitted that the Plaintiff was not entitled to this relief. This is because it was on record that it was in occupation of more than the 1 hectare acquired and it was the 2<sup>nd</sup> Defendant who was entitled to compensation as per Section 119 of the *Land Act* for, he who comes to equity must come with clean hands, or be compelled to remove the wayleaves from the extra parcel.
33. The 2<sup>nd</sup> Defendant thus prayed for compensation of the extra parcel of land or removal of the wayleaves, reimbursement of Kshs. 50,000 as well as costs of the suit.

### **The 3<sup>rd</sup> Defendant Submissions.**

34. On whether the suit property was compulsorily acquired, counsel affirmed this position stating that the compensation was also done in line with Section 19 of the Land Acquisition Act (repealed). Counsel submitted that the 2<sup>nd</sup> Defendant's prayer to have water supplied to his homestead ought to be dismissed because there was no agreement for this and should they require water connection, then they should follow the set procedure. On the issue of registration of parcel 74012, counsel submitted that the 2<sup>nd</sup> Defendant had admitted that the excision was on behalf of the Plaintiff. As such, he should be compelled to effect the transfer in favour of the Plaintiff and should he fail to adhere to this, then the deputy Registrar be ordered to sign the transfer documents.
35. On the issue of costs, counsel submitted that the suit was as a result of the 2<sup>nd</sup> Defendant's actions and should thus be compelled to pay the costs citing *David Kiptum Korir vs Kenya Commercial Bank & another* [2021] eKLR.



## Analysis and Determination

36. I have considered the pleadings, evidence on record, the written submissions, and the authorities cited. I find that the issues for determination are:
- i. Who is rightful owner of land known as Kajiado/Kitengela/74012;
  - ii. Whether the 2<sup>nd</sup> Defendant's Counter claim is merited and entitled to the reliefs sought;
  - iii. Whether the Plaintiff is entitled to Mesne profits;
  - iv. Whether the Plaintiff is entitled to the reliefs sought;
  - v. Who should bear costs of the suit?
37. It is not in contention that on 13<sup>th</sup> June 1991 through Gazette Notices number 2802 and 2803, the Government of Kenya acquired one (1) hectare out of parcel Kajiado/Ololoitokoshi/Kitengela/61 at the time registered in the name of 1<sup>st</sup> Defendant, on behalf of the Plaintiff. There was also evidence of compensation for the said compulsory acquisition. This acquisition and status of the said 1 hectare parcel of land was confirmed by the 2<sup>nd</sup> and the 4<sup>th</sup> Defendants. The 2<sup>nd</sup> Defendant also stated that parcel Kajiado/Kitengela/74012 was excised from parcel Kajiado/Kitengela/8222 on behalf of the Plaintiff. It is therefore not in contention that the suit parcel Kajiado/Kitengela/74012 duly and rightfully belongs to the Plaintiff.

### **What is in contention is why the said parcel was yet to be transferred to the Plaintiff.**

38. The Plaintiff claims that after taking possession of the one (1) hectare parcel of land, they tried to have the same excised from the original parcel without success. There are letters dated 28<sup>th</sup> October 2009, 5<sup>th</sup> February 2010 and 14<sup>th</sup> February 2013 from the Plaintiff to the 3<sup>rd</sup> Defendant demonstrating their difficulty in getting title for the suit property. It sought the 3<sup>rd</sup> Defendant's assistance. On 17<sup>th</sup> March 2015, the Plaintiff in a letter addressed to the 2<sup>nd</sup> Defendant requested for transfer of title number 74012 to its name and offered to meet the transfer charges by itself for speedy conclusion. In a letter dated 24<sup>th</sup> April 2015, the Plaintiff once again informed the 3<sup>rd</sup> Defendant of the challenges in obtaining title to the suit property and sought its assistance. On 8<sup>th</sup> July 2015 the District Surveyor in his letter addressed to the Plaintiff confirmed that the parcel in question had been subdivided into parcels 8222 and 8223 and further subdivided into smaller subdivisions that cover up to the marked area measuring one (1) hectare. On 30<sup>th</sup> July 2015, the Plaintiff addressed a letter to the 4<sup>th</sup> Defendant informing them of their difficulty in getting title to the suit property and on 1<sup>st</sup> October 2015, the 4<sup>th</sup> Defendant asked the 3<sup>rd</sup> Defendant to cancel the title issued to the 2<sup>nd</sup> Defendant and to register it in the Plaintiff's name. In a letter dated 7<sup>th</sup> March 2016 the 3<sup>rd</sup> Defendant asked the Chief Land Registrar for directions regarding cancellation of title 74012 since the Land Registrar had no authority to cancel the title without a court order. It is on record that the 4<sup>th</sup> Defendant on 18<sup>th</sup> March 2016 wrote to the 2<sup>nd</sup> Defendant asking him to surrender title 74012 to the 3<sup>rd</sup> Defendant for purposes of the same being registered in favour of the Plaintiff. It is clear that the Plaintiff unsuccessfully has over the years tried to have the suit property transferred and or registered in its name.
39. The 2<sup>nd</sup> Defendant in his Defence and Counterclaim as well as during his testimony acknowledged that the parcel indeed belonged to the Plaintiff and that he could only transfer it on certain conditions.



40. One of the conditions was reimbursement of Kshs. 50,000 used to excise and subdivide the parcel. Is the 2<sup>nd</sup> Defendant therefore entitled to re-imbursement of Kshs. 50,000 being costs of excising parcel 74012? The 2<sup>nd</sup> Defendant stated that he incurred costs in the excision of parcel 74012 in favour of the Plaintiff and was entitled to reimbursement of the costs incurred. His counsel submitted that despite the Plaintiff claiming that there was no evidence of this cost, it was common knowledge that excision and subdivision costs money and the 2<sup>nd</sup> Defendant was entitled to reimbursement of the same.
41. The 2<sup>nd</sup> Defendant in his Defence and Counterclaim, stated that he was desirous of subdividing his parcel of land Kajiado/Kitengela/ 8222 into eight portions. This connotes that the 2<sup>nd</sup> Defendant did not undertake the subdivision solely for purposes of excising the 1 hectare of the suit property on behalf of the Plaintiff. This excision was undertaken in the year 2014, while it is on record that the Plaintiff had since 2009 been trying to get the 1 hectare excised and registered in its name in futility. It is also on record that even after the said parcel 74012 was excised it was registered in the 2<sup>nd</sup> Defendant's name. If at all the 2<sup>nd</sup> Defendant claims to have excised it on behalf of the Plaintiff, shouldn't he have registered it as such? It is also on record that the Plaintiff was willing to cater for the transfer, but even then, the 2<sup>nd</sup> Defendant did not oblige. The evidence on record is that the 2<sup>nd</sup> Defendant neglected to transfer the suit property to the Plaintiff over the years despite attempts to reach an amicable settlement. It would therefore be unfair to condemn the Plaintiff to reimburse costs incurred in an action that was not beneficial to the Plaintiff which action lead to this suit.
42. I therefore, find that the 2<sup>nd</sup> Defendant is not entitled to reimbursement of Kshs. 50,000 as sought.
43. The second condition set out by the 2<sup>nd</sup> Defendant for the transfer of the suit property to the Plaintiff was to have the Plaintiff compelled to supply him with water as per the agreement. It is on record that the alleged agreement was not in writing but it was an informal agreement. The said agreement which is based on mutual respect and trust, is not legally binding or enforceable, and the Court cannot compel one party to act. The 2<sup>nd</sup> Defendant's prayer to have the Plaintiff compelled to supply him with water is hereby dismissed.
44. The final condition set by the 2<sup>nd</sup> Defendant is either compensation for the wayleaves on the excess parcel of land or the Plaintiff be compelled to remove them. The 2<sup>nd</sup> Defendant claimed that the Plaintiff's inlet and outlet water pipes occupied more than the one (1) hectare acquired and he was thus entitled to compensation for the extra parcel of land in the Plaintiff's occupation. In the alternative the Plaintiff be compelled to remove the water pipes

**Is the 2<sup>nd</sup> Defendant entitled to compensation for the extra land in occupation by the Plaintiff?**

45. The Plaintiff contested this claim on grounds that the 2<sup>nd</sup> Defendant had not produced evidence that he was the owner of property 96451 which was the alleged parcel of land where the inlet and outlet water pipes were on. It is on record that on 24<sup>th</sup> June 2016, the Plaintiff wrote to the 4<sup>th</sup> Defendant applying for creation of a wayleave running from parcel 74012 to Namanga road. The letter states that the pipeline is approximately 5 km and cuts across several plots in Oloolotikoshi area in Kitengela. The 4<sup>th</sup> Defendant in its response through a letter dated 11<sup>th</sup> July 2016 indicated that "...to undertake its mandate for compulsory acquisition under Section 107 of the Land Act, the National Land Commission will require the following preliminary information and documents by the acquiring body before the wayleave can be procured..."
46. From the above, what is on record is that the Plaintiff has shown interest in acquiring additional land for its wayleaves. Sections 107 to 133 of the Land Act outline at length the process of compulsory acquisition, including awarding compensation as per Section 113 and 115. Sections 128 and 133



also outline dispute resolution mechanisms and channels for disputes arising from such acquisition. Therefore, the 2<sup>nd</sup> Defendant seeking compensation at this juncture is putting the cart before the horse. The prayer for compensation or removal of pipes from extra land is also dismissed. In essence the 2<sup>nd</sup> Defendant's counterclaim is dismissed.

**Is the Plaintiff entitled to mesne profits of USD 188,463.48 against the 2<sup>nd</sup> Defendant for illegal occupation?**

47. The Plaintiff claims that it is entitled to mesne profits for the years the 2<sup>nd</sup> Defendant has been in occupation of the suit property. Section 2 of the *Civil Procedure Act* defines mesne profits as: those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession...

48. It is on record that the water tank occupies 1 acre of the 1 hectare of land belonging to the Plaintiff and the rest of the land remains unoccupied and unutilised. It is also on record that as of 2016, the Plaintiff sought to create a wayleave from the suit property all the way to Namanga road. A plain reading of this means that while the Plaintiff does not have actual title to the suit property, it has not been hampered or hindered in any way from utilising the property. The 2<sup>nd</sup> Defendant also stated that he was not utilizing the suit property. Courts have also held that mesne profits are special damages, which must be specifically pleaded and proved. The Court of Appeal in *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] KECA 27 (KLR) held:

“126. In *Karanja Mbugua & another vs. Marybin Holding Co. Ltd* [2014] eKLR ... mesne profits, being special damages must not only be pleaded but also proved...

127. A claim for mesne profit is a claim akin to special damages. It must be pleaded and proved. (See *Mohammad Amin and Ors –v - Vakil Ahmed and Ors* 1952(1) SCR1133).”

49. The Plaintiff's figure of USD 188,463.48 as the mesne profits was only pleaded but there was no evidence to prove how it was arrived at. As such, the same is denied.

50. Having determined that the suit property legally belongs to the Plaintiff, by the power granted to this Court by Section 80 of the *Land registration Act*: “...the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake...”, the Plaintiff is entitled to be registered as the proprietor.

51. On the issue of costs, Section 27 of the *Civil Procedure Act* provides that costs shall follow the event unless for good reason otherwise ordered. The court of Appeal in *Supermarine Handling Services Ltd v Kenya Revenue Authority* [2010] eKLR held:

“In the case *Devram Dattan v Dawda* [1949] EACA 35 it was held,

“It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts....”

52. Accordingly Judgement is entered for the Plaintiff against the Defendants as follows;



- i. That a declaration is hereby issued that parcel of land previously known as Kajiado/Ololoitikoshi/61 and currently known as Kajiado/Kitengela/74012 together with other subdivisions thereof forming 1 hectare belongs to the Plaintiff herein.
- ii. That the 3<sup>rd</sup> Defendant is hereby ordered to cancel the title deed issued to the 2<sup>nd</sup> Defendant and do issue a fresh title to the favour of the Plaintiff for all that parcel of land currently known as Kajiado/Kitengela/74012 together with other subdivisions thereof forming one (1) hectare.
- iii. The prayer for mesne profits is dismissed.
- iv. The 2<sup>nd</sup> Defendant's counterclaim is hereby dismissed.
- v. That costs be borne by the 1<sup>st</sup>, 2<sup>nd</sup> Defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO, THIS 13<sup>TH</sup> DAY OF MARCH 2025.**

**L. KOMINGOI**

**JUDGE.**

IN THE PRESENCE OF:

Ms. Wagatha for Mr. Simiyu for the Plaintiff.

N/A for the 1<sup>st</sup> Defendant.

Ms. Wanjiku for the 1<sup>st</sup> Defendant for Ms. Moinket for the 2<sup>nd</sup> Defendant.

Mr. Motari for the 3<sup>rd</sup> Defendant.

N/A for the 4<sup>th</sup> Defendant.

Court Assistant – Mutisya.

