Maru v Wafula (Environment & Land Case 103 of 2008)
[2023] KEELC 20703 (KLR) (16 October 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 103 OF 2008

FO NYAGAKA, J

OCTOBER 16, 2023

BETWEEN

MANSUKHALAL JESANG MARU ..... PLAINTIFF

AND

FRANK WAFULA ..... DEFENDANT

JUDGMENT

1. By a Plaint dated 27/11/2008, filed the same date, the Plaintiff who in evidence gave his name as Mansukhlal Jesang Maru, sued the Defendant herein. He pleaded that he was the sole registered owner of all that land comprised in title Kitale Municipality Block 12/26 measuring approximately, 0.5532 of a Hectare and had a Certificate of Title issued to him for it on 05/12/2001.

2. In paragraph 2 of the Plaint he averred that during or about September, 2008 the Defendant forcefully and without any justification entered on the suit land, without his permission and constructed thereon a semi-permanent house and a toilet. Also, that the Defendant was a trespasser and should be ordered to vacate the suit land or be forcefully evicted therefrom. He averred that the Defendant had deprived him of the use of the land which if leased would earn him Kshs. 10,000/= per annum. Having pleaded that he issued a demand notice, and that there was no suit pending before any court over the same property, and that the Court had jurisdiction, he prayed for;

    a. A declaration that the Plaintiff is the sole legal owner of the land comprised in title No. Kitale Municipality Block 12/26 to the exclusion of the Defendant who should be ordered to vacate the said land, and failing which he be forcefully evicted.

    b. Mesne profits at the rate of Kshs. 10,000/= per annum with effect from 2008 until the final determination of the suit.

    c. Permanent injunction .

d. Cost.

e. Interest.

3. The Defendant entered appearance on 5/1/2009 vide a Memorandum of Appearance dated 31/12/2008. Then on 23/01/2009 the Defendant appointed learned counsel who filed a Notice of Appointment of Advocate dated 22/01/2009. Learned counsel filed also a Statement of Defence dated 22/01/2009 on 23/01/2009.

4. In his Defence the Defendant admitted the descriptive parts of the Plaint. At paragraph 3 he denied vehemently the averment in the Plaint that the Plaintiff was and remained the owner of land parcel No. Kitale Municipality Block 12/26 and that the Plaintiff was issued with a Certificate of Title thereto on 05/12/2001. At Paragraph 4 he also denied that he forcefully and without any justification entered into the said parcel of land in or about September, 2008 and that had remained thereon without the Plaintiff's permission and invited the Plaintiff to strictly proof it. In paragraph 5 he denied being a trespasser on the suit land and refuted that he should be ordered to vacate failing which he be forcefully evicted. Further, in paragraph 6 he denied the loss of Kshs. 10,000/= per annum the by the Plaintiff pleaded and put him to strict proof and in 7 denied that demand had been given.

5. The Defendant pleaded a further denial in paragraph 8 that there was no suit pending over the said parcel of land and instead averred that there was pending in court Kitale Senior Principal Magistrate's Criminal Case No. 3070 of 2008 over the same subject. While admitting the jurisdiction of the Court he prayed for the dismissal of the suit with costs.

6. On 07/06/2016 the Defendant applied to amend the Defence and the prayers were granted on 28/09/2016. Thus, on 11/10/2016 the Defendant filed an Amended Defendant's Statement of Defence and Counterclaim. He introduced to the original Defence a paragraph 4A in which he pleaded that the Plaintiff claimed land parcel No. Kitale Municipality Block 12/26 yet the Defendant's parcel of land was different and was described as L.R. No. 2116/1124 Kitale Municipality upon which he had been in occupation since 1996. Further, at paragraph 4B he pleaded that the Plaintiff's suit was time-barred by the law of *limitation of Actions Act* in that he (the Defendant) had been in peaceful and un-interrupted possession for a period of over twelve (12) years prior to the commencement of the suit.

7. He averred at paragraph 8A that (Kitale) Criminal Case No. 3070 of 2008 was withdrawn under Section 87A (sic). Then he introduced a Counterclaim against the Plaintiff by stating at paragraph 9 that he was the registered owner of land parcel No. L.R. 2116/1124 and the Plaintiff should be ordered to cease interfering with his quiet possession of the same. At paragraph 10 he averred that the Plaintiff's title deed known as Kitale Municipality Block 12/26 measuring 0.5532 hectares was obtained by fraud and should be cancelled to stop him from interfering with the Defendant's plot (sic). He pleaded particulars of fraud as follows:

   a. Obtaining documents which are all forgeries including the letter of allotment dated 28/11/1991.

   b. Misleading the Ministry of Lands about his purported title number Kitale Municipality Block 12/26 hence issuance of a fake title.

   c. Causing registration in respect of the suit land to himself.

   d. Obtaining fake title in respect of the suit plot.

e. Using the title number Kitale Municipality Block 12/26 obtained through corruption knowing very well that he is in breach of special conditions of the same lease and had no good title.

8. At Paragraph 11 he pleaded that the Land Registrar Trans Nzoia County be ordered to cancel title No. Kitale Municipality Block 12/26 forthwith. He then prayed for the following reliefs:-

a. That the Defendant be declared the legal proprietor of land parcel number L.R. No. 2116/1124 Kitale Municipality to the exclusion of the Plaintiff and the certificate of lease being held by the Plaintiff over the manufactured parcel number Kitale Municipality Block 12/26 be recalled for cancellation or be de-registered/ revoked.

b. There be a permanent order of injunction restraining the Plaintiff and his agents, servants/ employees from in any way dealing with or interfering with quiet possession of the Defendant's parcel of land L.R. No. 2116/1124 Kitale Municipality.

c. Any other reasonable relief the honourable court may deem fit to grant.

d. Costs.

9. On 11/07/2017 the Plaintiff filed a Reply to Defence and Defence to Counterclaim. The pleading bore the same date of filing. In reply to paragraph 4A of the Amended Defence he averred that the Defendant was unlawfully in occupation of Kitale Municipality Block 12/26. He denied that the suit was time barred as pleaded at paragraph 4B of the Amended Defence and put the Defendant to strict proof thereof. Further, in reply to the averment that the Defendant was not a trespasser on his property and that he had not suffered any loss the Plaintiff stated that the Defendant was a trespasser and interests of justice demanded that the prayers he made in the Plaint be granted. He averred that Defendant's averments regarding the existence and withdrawal of Kitale SPMC Criminal Case No. 3070 of 2008 was misconceived.

10. In Defence of the Counterclaim, the Plaintiff repeated the content of the Plaint and Reply to Defence. He denied the registration of the Defendant as owner of land parcel No. 2116/1124 (sic) Kitale Municipality and that he (the Plaintiff) fraudulently registered himself as owner of land parcel number Kitale Municipality Block 12/26 and he denied each of the particulars of fraud pleaded in paragraph 10 of the Counterclaim and put the Defendant to strict proof thereof. He pleaded that in obtaining his title due process was followed. Then he averred that the particulars of fraud were at variance with the contents of the Amended Defence and urged for the dismissal of the same. He pleaded that the prayers in the Counterclaim could not be granted and prayed for the dismissal of the Counterclaim with costs.

A Spirited Fight

11. Before I proceed with the decision over the issues in this matter, I must indicate what I noted about the contention over the title in issue here. As the parties herein know and any reader of this judgment will get to know, from the Defendant's evidence and his cross-examination of the witnesses who testified herein that the Defendant has put a very spirited fight to have the title in issue ultimately revert to him by using three fronts. Two were extra-judicial and one is judicial in the nature of the instant suit.

12. One of the ways he did so was to complain to the authorities that the Plaintiff did not have valid documents of entry and residence and therefore was not legally permitted to be in Kenya. That means he was to be deported. The end result was that the Defendant would remain on the parcel of land in question. The other one was that the Commissioner of Lands ought to cancel the title held by the Plaintiff for reason of non-fulfilment of the conditions set out in the letter of allotment. That never

succeeded hence the sustenance of the instant suit. It too did not move smoothly but was met with a bumpy road. But it has now coming to an end. These things, though, will not in any way influence this Court's decision. That is why I have singled them out in this sub-section of the judgment.

Plaintiff's Evidence

13. On 23/10/2018 the Plaintiff called one Bainito Ombudi Hussein, the County Surveyor who testified as PW1 by that he held a Diploma in Land Survey and Mapping from the Kenya Polytechnic. He produced as P.Exhibit 1 a certified true copy of the Registry Index Map (R.I.M.) of Kitale Block 12 which he stated showed the position of the parcels of land as they were on the ground, and that land parcel Kitale Municipality Block 12/26 existed on it. He stated that the P.Exhibit 1 was a copy of the RIM his office (being the Kitale Survey Office) held.

14. He also produced as P.Exhibit 2 a Folio Register in respect of plot Kitale Municipality Block 12/26, being, F/R Number 226/194 which showed how the survey was conducted and the measurements thereof indicating the acreage on the title. He testified that on the Plan the plot number was referred as 2116/1124. His further testimony was that Kitale Municipality had No. 2116 encompassing the whole Block as a Municipality. Further that the Municipality began getting "stroke" 1, 2, and so on. Then it was later given Blocks.

15. His evidence was that plot number 2116/1124 was changed later to Kitale Municipality Block 12/26. He produced as P.Exhibit 3 the certified copy of a conversion table which was prepared by the Director of Surveys. His evidence was that the Kitale office had a copy of the same. He testified that plot No. 2116/1124 appeared in the list, showing that it was changed to Block 12/26.

16. When shown a Certificate of Lease marked as "PMFI.4" and a title deed as "PMFI.5" he identified them as being for land parcel No. 26 within Block 12. The he testified that the procedure in alienation of land was that a parcel of land had first to be planned, surveyed, then allotted and a lease prepared for it. He testified that that was the case for the suit land hence the requirements were complied with.

17. Upon cross-examination on 21/3/2019, he testified that he visited the suit land and made a report thereon on 19/5/2016 but he did not indicate on it when he did the visit. When shown the report he filed on 23/05/2016, he emphasized that he visited the ground but by oversight did not show the date of the visit. He stated that the Report neither indicated who was present nor the equipment he used.

18. He testified that the measurement on the report was as indicated on the title. That the report was based on information in the title. His further testimony was that the ground was occupied by one Frank Wafula. He made that his finding based on information given to him by the plaintiff. He stated that he knew Frank Wafula but never found or met him on the plot. He did not verify the length of the said Wafula's occupation.

19. About the conversion of the land parcel registration from L.R. 2116/1124 to Block 12/26 he testified that he did not have firsthand information as to when it was done. His testimony was that when he took over the office he found a conversion table there. Further that it was the Director of Survey who does the conversion. He stated that the conversion from lease to freehold is different from the kind of conversion that was in issue. He stated that P.Exhibit 3 showed that the conversion was done in 1992.

20. In re-examination he stated that the conversion table was in respect of the whole of Kitale Municipality. Further that it did not change the size or location of a plot.

21. About his report of 19/5/2016 he reiterated that it was in reference to Block 12 and that he visited the suit property but did not take measurement thereof. All he did was to stand, verify the locality of

the plot and how it related with map (RIM). He concluded that the map and position on the ground tallied and that both referred to parcel number Kitale Municipality Block 12/26 which he visited.

22. The Plaintiff testified as PW2. He stated that his name was Mansukhlal Jesang Maru. He testified that he was a medical practitioner and businessman who resided at Milimani (estate) Kitale. He knew the Defendant, Frank Wafula. Further, that he recorded a statement on 21/5/2016 in regard to the instant case. He adopted the statement as his evidence in-chief.

23. In the written statement he adopted as his evidence he stated that he was resident in Trans Nzoia County. He was the registered owner of the land parcel comprised in Kitale Municipality Block 12/26 which measures 0.5532 of a hectare. He was issued with a Certificate of Title thereto on 05/12/2001. Further, that "on or about 2008 (sic), the Defendant without any colour of right forcefully, entered onto his plot comprised in the title he mentioned. That the defendant had without his permission remained on the parcel of land and had gone ahead to construct a semi-permanent house and a toilet and had planted bananas on it. He stated that he repeated all the contents of the Plaint.

24. In his oral testimony he added (to the statement) that the plot Block 12/26 was allocated to him in 1991. He was given an allotment letter dated 28/11/1991 and he paid for it by a Bankers Cheque upon which he was issued with a receipt.

25. Laying the basis for production of a copy of the Allotment Letter, he stated that the original was misplaced/lost and he could not trace it. Thus, he reported to the police on loss and was issued with a police abstract. He produced the abstract as "P. Exhibit 6" to evidence the loss of the documents. He stated that besides the loss of the allotment letter, lost also the receipt issued to him by the Department of Lands and copies of cheques.

26. Then he produced as "P. Exhibit 7(a)" a copy of the Allotment Letter No. 1102/32/32 with PDP Ref. 226/194 as "P. Exhibit 7 (b)" which described the plot location. He produced as "P. Exhibit 8" a copy of receipt dated 14/2/1992 showing payment by way of banker's cheque No. 021271. He produced a copy of a banker's cheque No. 021291 of February, 1992 which he made in favour of the Commissioner of Lands. He produced as "P. Exhibit 9" cheque No. 191856 for Kshs. 35,200/= drawn on 4/4/1995 in favour of the Commissioner of Lands.

27. He also produced as "P. Exhibit 10 (a)" and "10(b)" receipts Nos. 636492 dated 10/4/1995 for Kshs. 35,200/= and 519837 dated 6/7/1998 for Kshs. 44,061/= for rent due. He stated that the receipts appeared on the police abstract as the lost items and that he could not get the rest.

28. He testified that is plot was originally registered as No. 2116/1124 but now as Kitale Municipality Block 12/26. He referred to and relied on the conversion table which he said clarified the new parcel numbers. He repeated that Kitale Municipality Block 12/26 was his land. That he had a lease which was issued to him on 5/12/2001 and a certificate of lease issued the same date. He produced both originals as "P. Exhibit 4" and "P. Exhibit 5" respectively.

29. PW2 also referred to a green card and a white card of the suit land. He stated that entry No.1 on the green card showed the Government of Kenya as owner as at 5/12/2001. Further that the white card read the 5/12/2001 as the first entry and he was then registered as owner on that date and a Certificate of Lease issued to him the same day.

30. He testified that the Defendant registered a caution in his favour against the land, claiming a purchaser's interest. He denied ever selling to him the land. He produced the white card as "P. Exhibit 11".

31. His further testimony was that he received a demand notice from the Trans-Nzoia County Government for rent of Kshs. 6,400/=. He produced the demand as "P. Exhibit 12". He paid the rent

and was issued with a clearance certificate. He produced the clearance certificates as "P. Exhibit 3(a), (b) and (c)", and a certificate of official search over the land, as "P. Exhibit 14".

32. He testified that as at the time of giving testimony he was not in occupation of the plot but the Defendant. That the Defendant moved in around September, 2008 without his consent and he developed temporary mabati structures and toilets. He produced as "P. Exhibit 15 (a) and (b)" photographs of the developments. He prayed for the relief of removal of the Defendant from the plot and in default his removal forcefully. He referred to and relied on the contents of the Plaint filed on 27/11/2008.

33. PW2 referred to a letter from the Lands Office Nairobi addressed to Frank Wafula referring to a request for the cancellation of Kitale Municipality Block 12/26. He also referred to a second letter. He stated that both were meant to cancel his title so that the Defendant could grab his land. He responded to the letters. He produced the letters dated 18/02/2011, 8/02/2011 from the District Land Registrar, 31/1/2011 from the Registrar and 14/03/2018 as P. Exhibit 16, P. Exhibit 17, P. Exhibit 18 and P. Exhibit 19 respectively. He prayed that the Defendant's Counterclaim be dismissed.

34. In cross-examination by the Defendant, PW2 stated that his name was Mansukhlal Jesang Maru. He showed his Identity Card which bore the name as such. He stated that the Plaint read his name as Mansukhalal Jesang Maru, with the first name Mansukhlal having an "A" after the letter "h" and before "l". He stated that the name shown in the Plaint differed from that in the Identity Card and he swore the Verifying Affidavit using that name. He went on to say that even with that difference the name was his and he signed documents by the same name. He repeated that the name was the same his.

35. He stated he was allocated the suit land in 1991 and issued with an allotment letter which he produced as P. Exhibit 7(a). Further, that on the allotment letter indicated the plot as "Unsurveyed Residential Plot - Kitale Municipality" and referred to it as "above plot", but did not have a plot number.

36. He paid for the allotment letter in February, 1992 in the sum of Kshs. 33,190/=. He gave a person the task to help him in processing the letter and that other might have paid it on 15/02/1983 for Kshs.4,300/=. He stated that in 1983 he was in Kenya, working in Kisumu and his wife in Kitale.

37. He stated that he did not have the receipt for the payment of sum of Kshs. 4,300/=. The letter of allotment was made by government but it was his document. He did not sign the letter.

38. PW2 testified further in cross-examination that the plot was surveyed after receiving the allotment but he could not recall the date. He could not remember who surveyed it but he received the documents for it after the survey was done. He finally obtained the title to the land on 5/12/2001, as land reference Kitale Municipality Block 12/26.

39. He testified that his name was written on the lease as Mansukhalal Jesang Maru but it was mine. He admitted the difference in the name on the title and on the Identity Card as being an "A" appearing after letter "kh" (appearing in upper case in the pleadings). He stated that he had not filed an affidavit to show that the name in the Identity Card and title are not same but the lease certificate was genuine.

40. When cross-examined about the survey of the plot as per the Plan produced as P. Exhibit 2 referred to as No. 226/194, he stated that the survey was done and the Plan approved on 31/8/1992. He stated that the plot was situate behind Kitale Club and given L.R. No. 2116/1124. His further evidence was that it was given a new number as Kitale Municipality Block No. 12/26 as per the conversion table dated 27/3/1992, produced as P. Exhibit 3. He repeated that LR No. 2116/1124 was his plot. His evidence was that the conversion table was made by the Survey of Kenya. The copy produced was certified as a true copy of the original by PW1, one Hussein, in 2016. He stated that the Survey office of Kenya (presumably head office) had not signed it where it was shown "checked by".

41. On further cross-examination he stated that there was no title before the conversion table but the converted one was L.R. 2116/1124 which measured 0.5532 Ha and gave rise to the lease he was given. He stated that the conversion table did not show the owner of the plot and it was not endorsed to him but many plots were converted. He testified that he did not obtain consent to convert since he was not the one who initiated the process. He stated further that it was not he who asked the Director of Survey to convert the title.

42. He stated that he was given the allotment in 1991 and the title in 2001 but not in 1992. He explained that he could not be given the title before clearing the rates. He received it after a lease was prepared in Nairobi and then converted.

43. He repeated that he made a number of payments for the plot from 1995 to 1998 and after clearing the dues, he was issued with the title. He paid for the survey plan, produced as P. Exhibit 2. The first payment was on 14/02/1992 for Kshs. 33,190/= vide receipt No. 222155, the second on 03/04/1995 for Kshs. 35,200/= by cheque No. 191856 and receipted as No. 636492 dated 12/4/1995 which he produced as P. Exhibit 10(a), the third on 06/07/1998 for Kshs. 44,061/= and produced as P. Exhibit 10(b). He stated that the plot number was not indicated on P. Exhibit 8 (dated 14/02/1992) but the receipt dated 06/07/1998 (produced as P. Exhibit 10b) bore a plot not known Kitale Municipality 12/26. He did not have a copy of the title for L.R. No. 2116/1124 because the dues had not been paid.

44. He stated that the lease, produced as P. Exhibit 4, was signed by the Ministry of Lands on 20/2/1998. He identified him as one Wilson Gacanja. He stated that on the lease it was not indicated who drew it and nowhere did it bear "drawn by". But he stated he appeared before Kidiavai Advocate and executed it on 05/12/2001.

45. When shown DMFI-5 a Sale Agreement dated 14/3/1996, he stated that it showed the seller as Moses Wabomba Kwengu and the buyer Frank Wafula. Its terms were a sale of the property indicated as parcel No. 2116/1124 measuring 0.5532 Ha, with improvements, at a consideration of Kshs. 750,0009/= (Seven Hundred and Fifty Thousand). He acknowledged that the words on it differed from the figures. The Plaintiff stated that he had not enjoined the purported owner of the plot as a Defendant.

46. He stated that the Plaint did not show plot No. 2116/1124 which was the former number before conversion but only Block 12/26. His evidence was that by the time he filed the case he already had the title for Block 12/26. He repeated the reliefs he sought. That he filed the case in the High Court of Kenya in Kitale but it was transferred to the Environment and Land Court.

47. In regard to the letter dated 7/08/2018 from the Director of Public Prosecution in Nairobi which was marked as DMIF-16, he stated that it referred to a complaint raised by the Defendant as an owner of the same parcel of land, as a subject of investigation. He repeated that he, the Plaintiff, however, proved he was the owner.

48. About a letter dated 14/09/2018 marked as DMFI-17 it showed the subject as unlawful acquisition of Kitale Municipality Block 11/242 and Block 12/26. He appeared before the Kitale DCIO offices in 2018, about 2 months of the letter, recorded a statement over the plot and was cleared by the office which proved that he was the owner of the two plots.

49. When shown the Registry Index Map (RIM) of purportedly for Kitale Municipality Block 12 marked as DMFI-18, made in 2018, he confirmed it did not show the suit land on it. But he pointed that the RIM he produced and which was certified on 21/3/2019 by the Survey Department Kitale showed the existence of plot as Kitale Block 12/26. He stated that the difference between his Exhibit and DMFI-18 regarding the plot was that the latter showed it as number L.R. 2116/1124.

50. However, the Court noted that DMFI-18 did not have a clear number although it has what was shown as an unclear number (#) "/194" (as "stroke 194").

51. Regarding the lease, P. Exhibit 4, he stated that the 2nd condition was that the lease was to be submitted in triplicate to the authority within 6 calendar months. He did not file any building plans because the Defendant trespassed onto the land and he sued him in the instant case. That he filed a letter explaining the situation. He produced it as P. Exhibit 17. He stated that he had for long fenced his plots with barbed wire but people kept removing it hence could not build.

52. Regarding the letter produced as P. Exhibit 16 he stated he did not challenge its contents in court. He stated that P. Exhibit 20 showed that the issue was put on hold until the instant case was heard and determined and that was what he was waiting for. But he did not enjoin the Ministry of Lands in this suit.

53. On re-examination he stated that he obtained the conversion table produced as P. Exhibit 3 from the office of Survey of Kenya in Kitale. It showed that parcel No. 2116/1124 was converted to Block 12/26. He emphasized that he had not developed suit land because the Defendant occupied it. That the Defendant had by P. Exhibit 19 sought for cancellation of his title but he replied to it vide P. Exhibit 17 and on 14/3/2011 the Ministry of Lands put on hold the investigation in P. Exhibit 20 pending the determination of this suit.

54. He stated that P. Exhibit 1 showed that Kitale Municipality Block 12/26 existed and P. Exhibit 2 was a Survey Plan for plot No. 2116/1124 which was the same plot as Block 12/26.

55. He repeated that parcel No. Block 11/242 had no connection with Block 12/26. Upon that evidence the Plaintiff closed his case.

Defendant's Evidence

56. On 10/07/2018 the Defendant filed a written Witness Statement dated the same date. He also filed another Witness Statement dated the same date but signed by one Robert Wafula Kweyu. The said Robert W. Kweyu never ultimately got to testify. Therefore, this Court considers neither important to reproduce the written statement nor of any evidentiary value the content thereof. Needless to sum it that the said Robert Kweyu has written that his late father had been allocated three plots in 1991 within Kitale Municipality and in 1992 one of them was surveyed and registered as L.R. 2116/1124 Kitale Municipality. That they were in possession of the same until 1996 when they allowed the Defendant to buy it and take possession.

57. The Defendant testified as DW1. He stated that he made a Counterclaim dated 10/202016. In it he sought to be declared the legal proprietor of parcel No. L.R. 2116/1124 Kitale Municipality and a cancellation of the Certificate of Lease held by the plaintiff over Kitale Municipality Block 12/26. He also prayed for a permanent order of injunction restraining the plaintiff, his agents, servants/employees from in any way dealing with or interfering with his quiet possession of parcel No. L.R. No. 2116/1124 Kitale Municipality, and costs of the counterclaim.

58. To support his Counterclaim, he relied documents listed in the List filed 11/07/2018 and a further Supplementary List of documents dated 8/10/2018 filed on 22/10/2018. He produced as D. Exhibit 5 a Sale Agreement between Moses Wabomba Kwengu and himself. He also produced as D. Exhibit 2(a), (b) and (c) copies of three Letters of Allotment dated 13/6/1991 referring to plot No. 12, 13 and 14 issued to one Moses Wabomba Kweyu. He stated that they showed that Moses W. Kweyu was allocated "unsurveyed residential" plots, Kitale Municipality. He also produced as D. Exhibit 3 a Survey Plan referenced as Folio Register No. 22/194 generated on 7/09/1992 to show the existence of plot

No. 2116/1124 Kitale Municipality. He stated that the Survey Plan was as a result of a subdivision of plot No. 2116/402 and 2116/4003. He marked for identification as DMFI-15 a RIM to show the plot existed. He produced as D. Exhibit 18 another RIM over the plot. He then adopted his written witness statement made on 10/7/2018 and filed on 11/7/2018.

59. In the written Witness Statement, he stated that he was a businessman based in Nairobi. He stated that he was aware that the Plaintiff intended to obtain his land parcel through fraud and misrepresentation. Further, that he (the Defendant) was the legal owner of plot No. L.R. No. 2116/1124 Kitale Municipality, measuring 0.5532 hectares having purchased the same on 14/03/1996 from Moses Wabomba Kweyu who was in occupation at the time of sale.

60. He stated that he paid the requisite purchase price and was issued with the land ownership documents which included three (3) letters of allotment, a survey plan, and deed plan No. 174447, forms of transfer and cash sale receipt. That before he bought the land he demanded that the seller obtains consent to dispose of the plot from the Commissioner of Lands and it was done.

61. He stated further that the Plaintiff caused him to be arrested and charged in Kitale CMCCR No. 3070 of 2008. He was charged in it with the offence of forcible detainer and as a consequence endured expensive court attendances and hearings for 23 months. He was acquitted of the charges on 23/09/2011 because the evidence of the Land Registrar made it impossible for the case to proceed. That at that time the Plaintiff disobeyed a Court order for further cross-examination and production of original letter of allotment and citizenship documents. After that the Plaintiff filed the instant suit.

62. He stated further that he knew that the plot on which he stayed was L.R. No. 2116/1124 Kitale Municipality which was very different from plot No. Kitale Municipality Block 12/26 which the Plaintiff claimed ownership of.

63. Then he testified that the instant suit was an abuse of the process of the Court because the pleadings (sic) had been heard and determined in Kitale Chief Magistrates' Court Civil Suit No. 334 of 2011. He stated that his Counterclaim was intended to safeguard his fundamental rights to own land and the overriding purchaser's interest to his plot No. 2116/1124 Kitale Municipality of which he had been in occupation without any dispute or complaint from anyone until the Plaintiff filed the instant suit. That the claim herein was filed without leave of court and contrary to procedure.

64. He believed that the Plaintiff held and was using a fake title and or altered title for plot No. Kitale Municipality Block 12/26 which was still under police investigation. He stated that the Ministry of Lands had also investigated the Plaintiff's title and made findings that it was fake. That although the Plaintiff held the title to Kitale Municipality Block 12/26 he was aware and admitted that there were discoveries that he had a forged letter of allotment dated 28/09/1991 which gave rise to the title he held.

65. The Defendant stated further that the Plaintiff's continued stay and presence in Kenya was illegal and suspect for reason that his (identity) documents were dubious and could not stand the scrutiny of laws (of the country). He stated that the Plaintiff was believed to have entered into Kenya in 1981 using a fake Indian nationality passport and a doctor's certificate whose authenticity was suspect. He prayed that the Plaintiff does avail the documents at the hearing of the suit so that they be verified for avoidance of doubt.

66. He stated further that the Plaintiff had been involved in corrupt land practices particularly in relation to the suit land, had dubious citizenship and other documents and had no colour of right, reputation and good title of land (sic) to be protected by the Court. He repeated the prayers in the Counterclaim.

67. He continued with his oral testimony that he had four documents which showed there was fraud in relation to the acquisition of land parcel No. Kitale Municipality Block 12/26. The first one was a letter

dated 20/04/2009, which he produced as D. Exhibit 7, written by the Physical Planning Department. He stated that the Physical Planner stated in the letter that the Plan attached did not show the reference number hence the source of the letter of allotment was not disclosed. He also relied on another letter dated 7/8/2018, written by the office of Director of Public Prosecution (ODPP), which he produced as D. Exhibit 16. He stated that by the letter it showed the ODPP was investigating the issue when he ordered the DCI to conduct investigations into the plaintiff's unlawful acquisition of two parcels of land one of which was the suit land. He stated that the Plaintiff never challenged the investigations.

68. He also relied on another letter dated 14/9/2018 written by the Director of Criminal Investigation (DCI), which he produced as D. Exhibit 17. It was addressed to the CCIO, Kitale. In it the DCI asked the County Criminal Investigation Officer (CCIO) to investigate the Plaintiff's unlawful acquisition of two parcels of land namely Kitale Municipality Block 11/242 and Block 12/26 respectively. He repeated that the Plaintiff admitted that he appeared before the DCIO over the letter.

69. Finally, he relied on a letter dated 18/02/2011 written by the District Land Office Trans Nzoia to the Chief Land Registrar, which he produced as D. Exhibit 13, and which the Plaintiff produced as P. Exhibit 16. He stated that the letter showed that the Plaintiff was served with notice to show cause why his title to the suit land should not be forfeited in terms of the Registered Land Regime (R.L.A.), Chapter 300 of the Laws of Kenya (repealed) regime. His testimony was that to date the Plaintiff had not challenged or made any attempt to challenge the process of having his title forfeited. Upon that evidence he prayed that his Counterclaim be allowed.

70. In Cross-examination he admitted that in his written statement dated 10/7/2018 he stated he was the registered owner of L.R. 2116/1124 but he was never granted a Certificate of Lease or a lease document. He stated that by the time he bought the land from Moses Wabomba Kweyu the vendor did not have either a Certificate of Lease or a lease document. He admitted that he did not have any consent from the Commissioner of Lands to show that Mr. Moses Wabomba was given the consent to sell the land to him. He stated that he did not report the loss of such a consent to the police contrary to his statement that it existed and was lost.

71. He stated that Moses Wabomba signed a transfer of the land in his favour but he did not have any in Court or did show any copy to court.

72. About the copies of the Letters of Allotment he produced as D. Exhibit 2(a), (b) and (c) he stated that they referred to Uns. Residential Plot Numbers 12, 13 and 14. He stated that he had the supporting Part Development Plans (PDP) which gave rise plot No. L.R. 2116/1124 Kitale Municipality but the same did not have the number 2116/1124. He stated that the total acreage of the three allotment letters was equivalent to the acreage appearing in the Survey Plan of 226/194. He admitted that he did not have any letter to show the connection between the three allotment letters and land parcel number No. L.R. 2116/1124 Kitale Municipality.

73. Referred to the notice or letter the Plaintiff produced as P. Exhibit 13 by which the Land Registrar required the Plaintiff's to Show Cause why his lease should not be forfeited, he admitted it was written at his instigation. He admitted further that the letter from the District Land Registrar to the Chief Land Registrar stated that the plaintiff had made a self-explanation letter in answer to the notice to show cause. He stated that his complaint to the Land Registrar against Maru (the Plaintiff) was to seek validity of the title he had on the land. That he wanted a clarification from the Chief Land Registrar hence his letter to the Chief Land Registrar in June or July of 2008. He admitted that it gave rise to the notice to show cause letter dated 31/01/2011 produced as P. Exhibit 19. He admitted further that the notice to show cause was in relation to failure to comply with the special conditions in the title document, specifically condition number 2 and not about the validity of the lease.

74. When asked why he wrote D. Exhibit 17 which referred to plot Nos. Kitale Municipality Block 11/242 and Block 12/26 he stated that his interest in Block 11/242 was that it was a public plot, and that he lodged the complaint in relation to that plot because the Plaintiff had caused him earlier to be arrested hence he reported it to the ODPP to pursue the Plaintiff.

75. It is worth to note that on this, the Court read malice on the part of the Defendant in the move.

76. He admitted that both D. Exhibit 16 which was the letter from ODPP to DCI to investigate the plaintiff's acquisition of the two parcels and D. Exhibit 17, did not show an Occurrence Book (OB) Number.

77. In regard to the letter from the Physical Planning office the Defendant stated that it was about verification of a PDP attached to the allotment letter. The Physical Planner required his lawyers to produce a PDP which was visible but they had directions to produce or abandon it. He was not aware whether they abided with the request.

78. He admitted that D. Exhibit 3 which was a Survey Plan made in 1992 showed that plot No. 2116/1124 existed as at that year. He stated that the Plan was to Moses Wabomba Kweyu. He admitted he did not have any documents to show that Moses Wabomba was registered as owner then. About D. Exhibit 18, which was another RIM, he noted that on it was parcel No. 2116/1124. He admitted that a parcel of land could appear in the RIM if only it was registered in the Chief Land Registry for transmission to the County Land Registry. He admitted that DMFI-15 was the same as D. Exhibit 18. He insisted that plot No. 2116/1124 did not appear on the RIM and that he was the registered owner of the plot No. L.R. 2116/1124 Kitale Municipality because the registration documents were being processed.

79. In reference to the agreement between himself and Kweyu, which he produced as D. Exhibit 5, he stated that it was registered by the Chief Land Registrar on 29/09/2017 at 11.50 hours but the stamp did not indicate the word "registered". He stated that the agreement did not bear a "presentation number".

80. In support of his counterclaim for a declaration that he was the legal proprietor of the land DW1 stated that he entered the land in 1996 but did not have any specific evidence to that effect. He only alleged that he took possession upon the sale of the land to him. He admitted that he did not file any proceedings in regard to Criminal Case No. 3070 of 2008 he referred to but in it the Plaintiff was the complainant. In regard to Kitale Civil Suit CMCC 334/2011 wherein he was Plaintiff the he stated that it was fully determined and he was denied compensation for malicious prosecution.

81. In regard to the complaint he lodged at the DCI's office against the Plaintiff, he admitted he did not have any evidence to show that the Plaintiff was still under investigation or had been found culpable. He admitted the Plaintiff was never charged with fraud over the allegations he made against him.

82. Regarding the particulars of fraud against the plaintiff in his counterclaim he stated the he pleaded that the Plaintiff misled the Ministry about his title hence it was fake. He admitted, however, that he did not have any evidence to that effect. He also did not have the conversion table annulled or pray that it be declared null and void. He admitted that in the particulars of fraud he did not specifically plead that he had issues with the conversion table.

83. Also, in regard to his particulars of bribery or corruption in the counterclaim he stated that he meant that looking at the Plaintiff's letter of allotment it was enough evidence to demonstrate that he used bribery. But he did not have evidence that there was corruption although Mr. Osoro (of Lands Department Kitale) was summoned by the DCI that he issued the fake allotment. About the allegation of forgery of a Letter of Allotment in the particulars of fraud his evidence was that it was in reference to the plot which gave rise to Kitale Municipality Block 12/26 since it had been a subject of investigation.

He admitted though that there was no report that the letter was a forgery. He admitted further that a report of forgery was made since 2008 when the Court handled the criminal case against him but he did not file it in court.

84. He stated that the plot he claimed had been surveyed as L.R. 2116/1124. But he did not have any evidence to show that the seller had parcel complied with the conditions of allotment. He stated that the letters D. Exhibit 2 (a), (b) and (c) showed that the allottee was required to pay Kshs.16,335/= per plot and a down payment of Kshs.1,000/= for each individual plot. He then admitted that the letters showed the allottee paid Kshs.1,000/= and had a balance of Kshs.15,335/=.

85. He alleged, in further cross-examination, that the original owner had evidence of completion of payment. He stated further that he was only convinced that the seller had fulfilled the condition because he was already on the land. He did not bother to confirm whether the seller completed the payment and the seller did not give him receipts of payment.

86. At this point the Court took note of the demeanor of the witness who became evasive and kept lying all the time and refused to answer questions put to him.

87. Nevertheless, he continued later that he saw only in Nairobi the file over the suit land but not the receipts of payment for the allotment. He stated that he conducted a search in 1996 to confirm payment was made but his advocate did not file the search.

88. Asked about the Agreement produced as D. Exhibit 5 he stated that it did not indicate that Mr. Okach was acting for him or whom he acted for. He admitted the lawyer was acted for both him and the vendor, and he should have done due diligence. He stated that at the time of purchase the vendor had processed the parcel of land to L.R. 2116/1124 hence he gave him the three allotment letters for the three parcels of land. He stated that when the vendor and him entered into the agreement they never referred to the Letters of Allotment, and that it was an oversight.

89. DW2, one Sharon Gerald, testified that she was an employee of the Ministry of Lands and a Land Registrar of Trans Nzoia County. That she had in Court the original file for the lease of Kitale Municipality Block 12/26. She stated that the lease she had in it was not the original but a copy whose original was already produced as P. Exhibit 4. She stated that the lease was drawn by the head office in the Ministry of Lands on 20/1/1998. It showed only the signature of the person who drew it. It did not show the address of the place it was drawn at. She stated that the lease holder was Mansukhalal Jesang Maru.

90. When the Defendant showed her a copy of the Identity Card of the Plaintiff she stated that the lease bore the name “Mansukhalal” whereas the Identity Card bore “Mansukhlal”. She stated that the Identity Card did not have an “a” after “h” and before “l” and that the lease did not bear an identity card number. She confirmed that the signatures of the lessee were attested by or witnessed by Aggrey Kidiavai who affixed his stamp to it and there was an indication of it being signed by one Wilson Gachanja in the presence of a Land Registrar. It was registered in Kitale on 5/12/2001.

91. About the conditions on the lease, she testified that special condition No. 2 was that the lessee was required to submit in triplicate building plans and erect houses on the plot within 24 months, in default of which the Commissioner of Lands would be entitled to re-enter the land or any part thereof without any prejudice. The witness did not have any document to show that the Plaintiff complied. The witness stated further that the condition did not provide that the building plans be given to the Land Registrar but time for the 24 calendar months started running upon registration.

92. DW2 did not know when the lease was registered. However, she deduced from the date of the document that time started running from 5/12/2001 and expired on 5/12/2003. She did not have a letter from the lessee that he sought time to comply.

93. The Defendant showed DW2 a letter dated 31/1/2011 produced as P. Exhibit 19, which was from Trans Nzoia Lands Office addressed to the Plaintiff and copied to the Commissioner of Lands, Nairobi, by which he required the Plaintiff to show cause why he should not forfeit the lease in 21 days for failing to comply with the special condition. The witness acknowledged it was written at his instance.

94. The witness did not have in Court the white card for the suit parcel of land. She stated the card was a signification of the registration document for all leases. To her the lease in question was registered in 2001 in the name of Mansukhalal Jesang Maru. There was in her file a copy of an official search to that effect.

95. She testified that in the lands office file was also a letter dated 22/11/2010 from the District Land Registrar of Trans Nzoia and West Pokot to the Chief Land Registrar. It was in relation to an appeal to cancel the title in respect of Kitale Municipality Block 12/26 registered in the name of Mansukhalal Jesang Maru. It was a reply to the letter dated 19/11/2010 Ref. TZA/40/Vol.3/9 written by the Chief Land Registrar.

96. Her evidence was that the records in the Trans Nzoia lands office were that parcel No. Kitale Municipality Block 12/26 was registered in the name of Mansukhalal Jesang Maru of P. O. Box 95, Kitale, vide a lease document. One letter goes on to state that "we visited the parcel No. Kitale Municipality Block 12/26 on 15/11/2010 with the Land Officer and the following ground report was adduced. 1. The plot is developed with 2 residential houses that are partially stabilized buildings. The plot is fenced with barbed wire. There is water available. There are 2 pit latrines. There is also a grass thatched shed. Those on the ground informed us that the houses belonged to Frank Wafula."

97. She testified further that the Plaintiff responded to the letter dated 31/1/2011, produced as P. Exhibit 9, on 8/2/2011 when he wrote to the District Land Registrar and copied to the Commissioner of Lands. She added that regarding the appeal to cancel the title issued to him on the ground that it was fake, Mr. Maru stated he was the lawful owner and was surprised that someone claimed the title to which he had paid rates and further, all neighbours had not submitted plans for development because the plots were having insecurity of which the local authorities were aware, and he had not complied because he had a dispute with one Frank Wafula who had been sued in instant suit. Further that the Plaintiff stated that his title was not fake and he needed more time to comply if needed. DW2 did not confirm whether or not the reply was accepted by the Nairobi office.

98. Regarding the RIM, produced as P. Exhibit 1, she stated that the suit land existed on the map, shown by a tiny No. 26. Shown the RIM produced as DMFI-15, she stated it did not have Block 12/26. She stated further that entry No. 38 made on 12/8/2016 indicated that old numbers 24 -27 were superseded by new numbers.

99. Regarding parcel No. L.R. 2116/1124 the witness did not have a copy of the green card or white card because it had not been registered in Kitale Land Registry. Its title did not exist in their office. She stated that documents pertaining LR. 2116/1124 were a preserve of the Nairobi Office custody.

100. Asked about the conversion table produced as P. Exhibit 3, DW2 stated that it was dated 27/3/1992. It was made by the Chief Land Registrar, Nairobi. She stated that it was not signed and stamped by the issuing authority. She admitted that entry No. 26 was a conversion number, and only the survey office authorized conversions. She stated that once conversion is done, the title in existence becomes obsolete and is taken to the office in Nairobi. She stated that she did not have a document that parcel

L.R. 2116/1124 was converted. But on the conversion table the old No. LR 2116/1124 was changed to number 26.

101. Asked by the Defendant if there was a court order directing the Ministry of Lands that title No. Kitale Municipality Block 12/26 be not forfeited she stated that she did not have any. She testified that if a title holder did not comply with conditions of allocation, there were procedures to be followed before cancellation of the title could be made. If the steps were followed then any dispute arising was to be decided by the court.

102. Upon cross-examination, DW2 stated that a ground report was made after a complaint was raised that the conditions of the lease had not been fulfilled. She acknowledged that the complaint was for cancellation of the parcel of land both on the ground and office. The Land Registrar was asked to give certified copies of the record and he did on 22/11/2010. He made a finding that Frank Wafula occupied the land. That a notice to show cause was issued to the plaintiff and he replied that he had not developed the plot because Frank Wafula had intruded and that he had actually sued Frank in this court.

103. DW2 confirmed that P. Exhibit 11 was a certified copy of the white card, certified on 14/9/2018 by one N. O. Odhiambo, the then County Land Registrar of Trans Nzoia whose work number was 286. He signed the card.

104. She admitted that there was a complaint for cancellation of title to Kitale Municipality Block 12/26. It was made by Frank Wafula vide a letter dated 5/10/2010. Following that the Land Registrar issued a notice to show cause why cancellation should not be made. It was after the Chief Land Registrar wrote to the Land Registrar of Trans Nzoia asking him to give comments on status on the land.

105. DW2 stated further in cross-examination that a parcel file of a lease, should contain a lease document, the forwarding letter and the documents for the registered proprietor, for instance, the copy of the Identity Card (ID), Kenya Revenue Authority Personal Identification Number (KRA PIN) and others. She stated that the lands office did not have in court the Register of the parcels, and it was the one which contains the white card. She admitted that from the white card in Court the plaintiff was registered on 1/12/1991 for a term of 99 years and a Certificate of Lease issued to him on 5/12/2001.

106. On being cross-examined on the lease document produced as P. Exhibit 1, the witness stated that it was dated 20/1/1998 and was generated from the Nairobi office. Regarding the letter dated 14/3/2011 referring to Kitale Municipality Block 12/26 (Mansukhalal Jesang Maru), produced as P. Exhibit 20, the letter was done after the plaintiff responded to the Notice to Show Cause why his title would not be canceled. She admitted that it stated that before any action on the parcel would be taken, the suit Kitale HCCC No. 103/2008 should be determined. To her, the Chief Land Registrar was aware of the instant court case.

107. The witness then stated that issues to do with the conversion table could only be answered by the survey office and their word was final on it and she would go by it. She concluded her cross-examination by stating that she (the lands office) did not have any document to show that Frank Wafula was ever registered as proprietor of Kitale Municipality Block 12/26. Upon the conclusion of the cross-examination the Defendant did not re-examine the witness.

108. DW3 one George Wambura was a retired Advocate of the High Court of Kenya. He stated that on 28/6/1994, almost 30 years before the testimony, he was approached by one Moses Wabomba Kweyu, to witness a "Form of Transfer" in relation to parcel No. 2116/1124 Kitale Municipality. The said Moses Kweyu appeared before me and duly identified himself by his identity card No. 0140703. He signed the transfer form freely and willingly DW3 countersigned it.

109. He stated that whatever went on before or after he did not have any business regarding the land hence did not concern himself with it. He only confirmed that the form in Court was the one he attested. He stated that his role ended at attesting the form and he had heard that the vendor was since deceased. He stated that he noted the Land Registrar later signed the form and he knew him. Also, that the Land Registrar too was since deceased. He produced the document as D. Exhibit 19.

110. On cross-examination he stated that the document was titled "Form of Transfer" and was dated 28/6/1994. He noted that what was being transferred was a piece of land described in the schedule, which was No. 2116/1124 Kitale Municipality. He admitted he did not verify whether Moses Wabomba Kweyu was the owner of the plot. Further, that the document did not bear the date of presentation to the Land Registry. It did not also bear any seal or stamp of the Land Registrar. Further, it was not franked to show that stamp duty was paid for it.

111. He also admitted that document did not indicate that the purchaser, Frank, was present. Further that it did not provide for the signature of Frank Wafula. He also admitted that the document was not accompanied with a certificate that he, George, witnessed the document and there was no provision for certification. He admitted that the document was a photocopy. He stated the document was meant for transfer land but he did not know that the vendor did with it after he signed it.

112. On re-examination he stated that he was not the maker of the document. Upon that, the Defence case was closed.

Submissions

113. The parties filed their respective submissions. The Plaintiff filed his dated 31/03/2023 on the same date. The Defendant filed his dated 24/04/2023 on 25/04/2023. This Court has considered the pleadings, both case law and statutory law on the issues in the instant matter, the evidence of the respective parties and their submissions. On the one hand, after giving a brief summary of the case and the reliefs he sought, the Plaintiff did not single out in his submissions the issues he needed the Court to consider but he proceeded to make his arguments generally. He summed that he and his only witness are the ones who gave oral testimony while the Defendants testified and called two witnesses. He then contended that the evidence of DW2 (the Land Registrar, Trans Nzoia corroborated the evidence of both the Plaintiff and his witness. His other submissions will be taken into account in the body of the judgment.

114. On the other, after making a preliminary point on the submissions and gave a brief summary of facts of the case the Defendant raised thirteen (13) issues for determination. In summary, the issues were whether he was issued with a demand notice; whether the Plaintiff litigated under a fictitious name; whether Order 11 of the *Civil Procedure Rules* was complied with and whether the suit was statute barred; whether the Criminal Case No. 3070 of 2008 for trespass which was withdrawn under Section 87A of the *Criminal Procedure Act* could be reopened after many years; whether the Plaintiff pleaded conversion and what the fate of evidence given outside the Pleadings was; whether LR. No. 2116/1124 and Kitale Municipality Block 121/26 were surveyed or not; whether or not parcel No. Kitale Municipality Block 12/26 did exist on the current Amended and Sealed Registry Index Map for Block 12; whether the Defendant was a trespasser on the suit land; whether the Defendant pleaded fraud and raised particulars of fraud; whether the Plaintiff was in breach of special conditions for title No. Kitale Municipality Block 12/26; who was in occupation of Plot No. Kitale Municipality Block 12/26; what the interest of the Defendant on the Plaintiff's plot was; and whether the ELC had jurisdiction to determine a suit originally filed in the High Court.

115. The Court will infuse and consider the parties submissions with the analysis of the issues, the law and evidence herein hence there is no need to summarize first what each party's arguments in submission.

Issues, Analysis And Determination

116. First, the Court will sieve the issues that the Defendant has set out for determination at this stage yet they had been determined by the Court before. So much so that the Court will consider the same as res judicata at this stage or the Court has become functus officio on them.

117. In his submissions the Defendant put in alphabetically ordered paragraphs as A, B, C, D, etc the issues he wished the court to address. First, at issue number "C" the Defendant contended that the Plaintiff's suit was statute barred in terms of Section 7 of the *Limitation of Actions Act*. In answer to this Court notes that the same was raised by the Defendant on 01/03/2023 and through its Ruling delivered on 02/03/2023 the Court settled the matter. This Court cannot therefore determine the same issue now: that would amount to the Court sitting on its own decision yet before me is not an application for review or setting aside. For this Court to sit on appeal of the decision would be an illegality.

118. In paragraph "M" the Defendant raised the issue of whether this court had jurisdiction over this matter since it had been instituted in the High Court at first, before being transferred to this Court. This is an issue that the Defendant raised before this Court on 14/11/2022 and the Court rendered itself on it on 05/12/2022. Thus, insofar as the issue is concerned it is fully determined by this Court and cannot be raised again before the Court.

119. Having distilled the issues the Defendant put forth that should not go for determination at this stage, this Court formulated the following questions for consideration at this state:

    i. Whether the instant suit is a public interest litigation;

    ii. Whether the Plaintiff should have enjoined the Moses Wabomba Kweyu and the Land Registrar to the case;

    iii. Whether failure to comply with Order 11 on Pre-trial Directions delayed the hearing and determination of this suit;

    iv. What the effect of failing to issue a Demand Notice to a Defendant is;

    v. Whether the Plaintiff is litigating under a fictitious name;

    vi. Whether the filing of the instant suit amounted to reopening of Kitale CM Criminal case No. 3070 of 2008;

    vii. Whether the Plaintiff should have pleaded conversion, and if the Defendant pleaded fraud and the particulars thereof;

    viii. Who between the Plaintiff and the Defendant is the legal owner of the suit land;

    ix. Whether Kitale Municipality Block 12/26 and LR. No. 2116/1124 were surveyed ;

    x. Whether plot No. Kitale Municipality Block 12/26 exists on the Current Amended RIM

    xi. Who is in occupation of Kitale Municipality Block 12/26 ;

    xii. Whether the Defendant is a trespasser on the suit land;

    xiii. Whether the Defendant proved the particulars of fraud pleaded;

    xiv. Whether the Plaintiff was in breach of conditions for title No. Kitale Municipality Block 12/26;

xv. Whether the Plaintiff should be awarded mesne profits.

120. This Court now shall consider the issues sequentially.

(i) Whether the instant suit is a public interest litigation

121. As summarized above the Plaintiff brought this suit principally for three reliefs, being a declaration that he is the sole legal owner of the suit land to the exclusion of the Defendant, Mesne profits and a Permanent injunction. The Defendant filed an Amended Defence and Counterclaim by which he prayed for the dismissal of the Plaintiff's claim and two main reliefs, being, to be declared the legal proprietor of land parcel number L.R. No. 2116/1124 Kitale Municipality a cancellation or revocation of the Certificate of Lease for number Kitale Municipality Block 12/26 and a permanent order of injunction against the Plaintiff and his agents, servants/employees from in any way dealing with or interfering with quiet possession of the Defendant's parcel of land L.R. No. 2116/1124 Kitale Municipality.

122. After the suit was heard to the end, the Defendant raised the issue that his interest in land parcel No. Kitale Municipality Block 12/26 registered in the name of the Plaintiff was "more strictly in public interest" for cancellation of the title as it was tainted with illegality. He stated that public policy did not permit those who flout the law to benefit from illegalities. He submitted that based on the advice by the Chief Land Registrar he (the Defendant), in public interest, placed a caution on the suit land to block the Plaintiff from soliciting money from innocent members of the public. He accused the Plaintiff of failing to raise an issue with that since he knew the title may be cancelled under Section 79 of the *Land Registration Act*.

123. In light of the pleadings, the evidence tendered herein and the submissions by the Plaintiff, the Court is called upon to determine whether this suit falls within a public interest litigation parameters. Public interest litigation is that which centres on public interest. Thus, it apt to define public interest. Bryan A. Garner, 2019, *Black's Law Dictionary*, 11th Edition, St. Paul MN, p. 1486 fines 'public interest' as:

> "...the general welfare of a populace considered as warranting recognition and protection. ... something in which the public as a whole has a stake: especially an interest that justifies Governmental regulation".

124. In *Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 Others* [2014] eKLR the Supreme Court of Kenya explained the essence of public interest litigation thus:

> "Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the *Constitution*'s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret the *Constitution* in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance".

125. In the case of *Kenya Anti-Corruption Commission vs. Deepak Chamanlal Kamni and 4 Others*, [2014] eKLR it was held that:

> " ...a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large."

126. In *Thakur Bahadur Singh and Another vs. Government of Andhra Pradesh* and ... on 23 September, 1998 the Andhra High Court stated:

> 5. PIL has a significant American development. The Council for Public Interest Law set up by the Ford Foundation in USA, in its report (1976) at pp.6-7 defined PIL thus:
>
> > "Public Interest Law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in recognition that the ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interest. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others."

127. In *Brian Asin & 2 Others v Wafula W. Chebukati & 9 Others* [2017] eKLR the learned judge stated that:

> " According to *Black's Law Dictionary* [40] "Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.

128. In *Lonyala & 26 Others v Lodio & 11 Others; Cabinet Secretary Ministry of Lands and Settlement & 11 Others (Respondent)* (Environment & Land Petition 2 of 2014) [2023] KEELC 19332 (KLR) (10 August 2023) (Ruling) this Court held as follows:

> " Public interest should is a feature that points to a benefit by way of the reliefs sought to be to the general public as a result of the litigation but not in favour of the litigant/s. A litigant may well be a member of the public but as long as he/she has a direct or indirect benefit to gain from the litigation, then it ceases to be a matter of public interest per se."

129. In the instant case, the Defendant argues that his actions relating to and of Defending this suit and filing a counterclaim were in public interest. This Court does not agree with him whatsoever. He seeks, among others, a declaration that he is the owner of land parcel L.R. No. 2116/1124 Kitale Municipality and an injunction against the Plaintiff in respect of that parcel of land. These are not actions in public interest. Even the claim that he lodged a caution over land parcel No. Kitale Municipality Block 12/26 or desires the cancellation or revocation of the title thereof in public interest is far from the truth. He wants, and the Court understands him well, that he said title be cancelled or revoked so that the one which he claims to be his, being LR. No. 2116/1124 Kitale Municipality which the Plaintiff claims was converted to give rise to Kitale Municipality Block 12/26 can remain to be the only "standing" title by registration so that he be declared as legal owner. The Defendant is clever in his argument on the ultimate end of the prayers he seeks but the Court is a step ahead of him. Thus, his submission and argument fails.

ii. Whether the Plaintiff should have enjoined the Moses Wabomba Kweyu and the Land Registrar to the case

130. The Plaintiff raised the issue that the Plaintiff failed to enjoin the alleged previous owner of land parcel number LR. No. 2116/1124 Kitale Municipality and the Ministry of Lands to the suit. His contention was that failure to do so rendered the suit defective.

131. Indeed, the two parties were not enjoined to the suit. However, it is the finding of the Court that if the Defendant was of the view that there were reliefs that the named individual and office he should the court should have decided as between himself and them, it was his obligation to apply to the Court to order that they be enjoined in terms of Order 1 Rule 10 of the *Civil Procedure Rules*.

132. The above notwithstanding, this suit cannot be defeated on account of that contention. This is because Order 1 Rule 9 of the *Civil Procedure Rules* provides:-

> " No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

(iii) Whether failure to comply with Order 11 on Pre-trial Directions delayed the hearing and determination of this suit

133. The next issue the Defendant raised was rather curious and the Court did not understand where it was to lead him to. He blamed the delay of the hearing and determination of this matter on the trial judge, my predecessor, who began the hearing. He argued that the judge did not call on the parties to go through the Pre-trial Conference as provided under Order 11 of the *Civil Procedure Rules*. Of course, as of now the issue of delay of this matter is neither here nor there.

134. That notwithstanding, with due respect to the Defendant, nothing of the sort that he claims can be attributed to the learned trial judge. Much as the Pretrial Conference process as contemplated in Order 11 of the *Civil Procedure Rules* was not carried out, the suit progressed very well. The trouble came about when the Defendant realized that the matter was progressing fast, yet he was in occupation of the land, that he decided to drag the hearing to the hilt by filing numerous frivolous and or unmerited applications and preliminary objections, and applications for adjournment and appeals (unprosecuted to date) from decisions of the Court. He did this so much that the Court had on two occasions to deliver Rulings in which he was barred from bringing any applications except with leave of the Court. The Court fell short of declaring him a vexatious litigant. The history of the Applicant's trickery in delaying this matter is well detailed in two Rulings delivered earlier in the matter. This Court does not need to repeat them.

135. In making this argument, the Defendant must have realized now that the day of reckoning that he used to push back has now come: the chicken has come home to roost. Thus, the Defendant should look back and rue his actions rather than blaming them on the Court. I reject his argument.

(iii) What the effect of failing to issue a Demand Notice to a Defendant is

136. The Defendant argued that he was not served with Notice of Intention to Sue - what is commonly known as a demand notice. He stated that this was contrary to the law. He did not go deeper to submit the reason why he brought the issue at this stage of the proceedings. Needless to state this suit was filed in 2008 which was before the *Civil Procedure Rules 2010* came into operation. Under Order 3 Rule 2 of the 2010 *Civil Procedure Rules* the Plaintiff is required to file with the Plaint documents he intends

to rely on, including the demand letter over the claim. The question is, what is the purpose of a notice of intention to sue?

137. Simply put, it is to notify the party allegedly at fault that he/she/it in indeed at fault or has violated a right and therefore has opportunity to remedy it before a suit is instituted. If he/she/it receives the notice and acts towards rectifying the acts complained of, then he/she/it shall have averted the costs of filing a suit to obtain reliefs that would compel the correction of the error or violation or compensation that would ensure. To that extent one can state that if a notice of intention to sue was not given to him he/her before a suit was filed he should not incur costs. But if the party alleged to be in violation is not given a notice before institution of suit and gets to be served with it and immediately remedies the situation (without putting up a fight, for instance admits the claim), in my view, the interests of justice militate against an award of costs against such a party. However, where a party is sued without the notice being issued first and defends the suit or claim while knowing, and which is true, that costs are being incurred by the Claimant, Petitioner, Plaintiff or one who counterclaims, then he cannot cry foul about an award of costs made against him. He has by so doing invited the flood into his premises.

138. Faced with an appeal challenging the discretion of the trial Court in failing to award costs for reason of default to issue a demand letter, the High Court in *Stanley Kaunga Nkarichia v Meru Teachers College & Another* [2016] eKLR held as follows

> "It has never been the law that a defendant should always have notice of intention to bring suit against him before action is filed in court. There are cases which, by their very nature or due to obtaining circumstance, it is impractical to issue a notice of intention to sue or issuing such notice of intention to sue will only be to the detriment of the interests of the Plaintiff and justice. For instance, in trade-marks and patent rights cases or where Anton Pillar orders or ex parte temporary injunctions are the subject of the suit, issuance of notice of intention to sue will militate against the very core of the litigation. So, where there is a possibility that by giving notice of intention to sue, the defendant may dissipate or destroy evidence, or blow away the substratum of the plaintiffs' cause of action, the law does not place an necessity to issue a notice` of intention to sue before an action is commenced; it will be overlooked. And in such circumstances, it will be injudicious to deny a successful suitor his costs of suit merely on the basis that Notice of Intention to sue was not given.... However, I should also state here that absence of or failure to issue notice of intention to suit is just one of the considerations that the court must take into account in awarding costs. If a court makes it the sole determinant factor, then, the said court must give good reason to deny the successful party his costs."

139. In *Esther Buchere Maki v South Nyanza Sugar Co. Ltd* [2018] eKLR the Appellate superior Court awarded costs to a claimant successful in the subordinate court even though she had not produced the demand letter.

140. I have perused the Plaint, and the Amended Defence and Counterclaim. The Plaintiff pleaded at paragraph 7 that he had given notice of intention to sue. The Defendant pleaded at paragraph 7 of the Amended Defence and Counterclaim that he had not received any such notice. Since a Counterclaim is akin to a suit, does it mean that the Defendant is not to be entitled to costs of his Counterclaim if he succeeds, only for the reason that he never issued a demand notice? It would be absurd to hold that a Defendant would be entitled to raise a Counterclaim and be awarded costs just because he was sued, and in answer to the Plaintiff's claim he raises a Counterclaim but on the other hand deny a successful claimant costs for failure to produce a demand letter.

141. Indeed, there are many instances where it would be impractical to issue a demand letter before instituting a suit. Justice F. Gokinyo, in *Stanley Kaunga Nkarichia v Meru Teachers College & Another* [2016] eKLR gave the example of a suit seeking a relief for an Anton Pillar. Even that example aside, supposing someone suddenly descends on another's house with bull-dozers and gets to the busy process of pulling it down or a part thereof, should the owner issue a demand notice before instituting suit for injunction? Should the owner not be entitled to costs in the event his suit for injunction ultimately succeeds? In every general rule there are exceptions. The instance case is one such exception, for reason that the Defendant allegedly moved onto the Plaintiff's land and upon being sued not only put a spirited fight but filed numerous frivolous applications and objections thus expensing the Plaintiff unnecessarily. If the allegations by the Plaintiff would in the end succeed then this case is an exception which would warrant an award the Plaintiff costs of the suit.

142. The only legal exception cases where costs are not necessarily awarded to litigants or against parties or where costs are slow and cautious is in so ordering are public interest litigation ones. Even then, where it is shown that a party to such a matter has unnecessarily abused the process this general rule is not a bar to an award of costs. In any event the proviso to Section 27 of the *Civil procedure Act* is clear that costs will follow the event unless the court or judge for good reason order otherwise.

(iv) Whether the Plaintiff is litigating under a fictitious name

143. In "*Romeo and Juliet", Shakespeare, W.* (1973). Romeo & Juliet, National Book Store, playwright William Shakespeare asks one important question: "what is in a name?". In essence he wants to bring out the sense that of itself a name is nothing. It does not have any worth. However, in the African context, and the Biblical one, names had a lot of meaning. This Court will not venture into that area because it has no time. Be that as it may, William Shakespeare brings out in that classical play material an important aspect of a name: it is a convention to distinguish people or things. Is the Plaintiff herein fictitious as argued by the Defendant or he is distinguishable from other human beings?

144. The Defendant contended that the Plaintiff has sued using a fictitious name. He recounted the evidence of the Plaintiff that his name is Mansukhlal Jesang Maru of Identity Number 22170711. He argued that the said Mansukhlal is a different person from the owner of the pleadings herein (filed on 27/11/2008) whose name is shown as Mansukhalal Jesang Maru hence the name on the Plaint is a fictitious one. Further, that the Plaintiff's Advocates did not apply to amend the pleadings to reflect the validity or otherwise of the Plaintiff. He urged the Court to find that the Plaintiff herein is a fictitious litigant and the law does not allow fictitious pleadings.

145. If I understand the Defendant correctly, he contends that the Plaintiff's suit should not stand for the reason that the spelling of the middle name of the Plaintiff differs by one letter "A" having been added to read Mansukhalal rather than Mansukhlal. Is the Defendant litigating against a fictitious party? Why would he file a Counterclaim against such a party if indeed his contention is true? My simple answer to the above questions is that, if indeed the argument were to hold substance, then by the same token it means that the Counterclaim filed herein is fundamentally flawed and cannot be maintained. That, though, seems to me not to be the case because the Defendant, after admitting the description of the Plaintiff continued to plead and deny the allegations of the Plaintiff and put him to strict proof thereof.

146. Also, the Defendant filed a Counterclaim against him. One does not do this to a fictitious party. Instead he/she raises a preliminary objection immediately the fictitious person "shows up". If the Plaintiff's claim were to fail on this technicality rather than being tried on merits, the Counterclaim too would. It cannot succeed against a fictitious individual, it would be an absurdity and a travesty of justice which this Court cannot participate in.

147. The Defendant filed an Amended Counterclaim dated 10/10/2016 on 11/10/2016. In the relevant paragraphs of the Amended Defence and Counterclaim the Defendant pleads as follows: in paragraph 2, "The Defendant admits the contents of paragraphs 1 & 2 of the plaint only so far as the same are merely descriptive of the parties...."

148. In what manner did the Plaintiff describe himself in the relevant paragraphs the Defendant admitted? Having given his name on the title of the Plaint he described himself in paragraph 1 as a male adult of sound mind residing and working for gain in Kitale. He verified this averment by swearing an Affidavit on 27/11/2008. In paragraph 2 of the Affidavit he deponed that he was the Plaintiff herein and competent to swear the Affidavit while at paragraph 5 he deponed that the facts were true to his knowledge and belief.

149. I have carefully perused the Plaint. Indeed, the pleading is as it is contended by the Defendant that the first name reads as "Mansukhalal". When this question was put to the Plaintiff, he did not hesitate to repeat that the name was his just as the one, being "Mansukhlal", on the national identity card is. Not only did he testify so but he confirmed that he swore the verifying Affidavit whose contents I have repeated above. Furthermore, I have looked at the documents produced by the Plaintiff as P.Exhibit 7(a) - the copy of the letter of allotment, P.Exhibit 4 and P.Exhibit 5 being the Lease and the Certificate of Lease respectively. While retaining the other two components of the name of the Plaintiff herein, they referred to Mansukhlal (the allotment) and Mansukhalal (the lease and certificate of lease) respectively. They were all addressed to the same address, being P. O. Box 95 Kitale which the Plaintiff claims to be his and has used even in the verifying Affidavit.

150. Moreover, the Defendant adduced evidence that the Plaintiff filed charges against him at the Kitale Police Station on 8/11/2008. This culmination in Kitale CM Criminal Case No. 3070 of 2008 which was brought to Court on 19/11/2008. The charges were withdrawn on 23/09/2010. Subsequent to that the Defendant sued both the Plaintiff herein one Mansukhalal Jesang Maru and the Attorney-General in Kitale CMCC No. 334 of 2011. The claim was for malicious prosecution and special damages of Kshs. 50,000/= for malicious arrest. In a judgment delivered on 11/12/2015 the trial Court dismissed both the Plaintiff's claim and the Defendant's Counterclaim in that suit. All this evidence came out in cross-examination of the Defendant.

151. That being the case, this Court finds that the Defendant has all along since 2008 known who the Plaintiff was by the name he has sued herein. That is why he (the Defendant) would maintain a claim in the subordinate Court against the same person. It did not dawn on him recently that the Plaintiff is fictitious. In any event, since the letter of allotment was in the proper name of the Plaintiff save that the lease and certificate of lease were printed with that inclusion of letter "A" to the first name, I find that for the Defendant to raise such a frivolous contention is to split hairs. To sustain the contention would be against Article 159(2)(d) of the *Constitution* of Kenya and determine the suit mechanically on a technicality while denying the parties herein substantive justice. This suit has been in Court since 2008 and the Defendant never raised such as issue except in cross-examination, to hand on it as a reed in a sinking act. This Court bears in mind also that Section 3(1) of the *Environment and Land Act*, 2012 and Section 1B of the *Civil Procedure Act* give the overriding objective of the Court as to elevate and do justice to parties over and above technicalities. Thus, I reject the Defendant's argument and submission on the issue. I would say no more.

(v) Whether the filing of the instant suit amounted to reopening of Kitale CM Criminal case No. 3070 of 2008

152. This Court has given a snapshot of the facts surrounding the filing of charges against the Defendant in Kitale CM Criminal Case No. 3070 of 2008 in the previous paragraphs, 147 above. As is clear, the charges were preferred against the Defendant on 19/11/2008 while this suit was filed on 27/11/2008. Later the charges were withdrawn. It is beyond peradventure that both matters were began at the same time. This suit was not filed after the determination by way of withdrawal of the charges in the criminal case hence cannot amount to a re-opening of the criminal case.

153. In any event, this is a civil suit filed by the Plaintiff against the Defendant. The fact that there were criminal charges preferred against him over the same subject matter is not a bar to filing of a suit against him. The two proceedings are independent of each other and the standards of proof in each are different. These are two different jurisdictions within the same legal system.

154. The Defendant relied on the decision of Nairobi H.C. Case No. Criminal Application No. 271 of 1985 Republic of Kenya vs Stanley Githunguri. My view was that the authority is not only distinguishable but irrelevant to the argument herein. The decision related to the filing of criminal charges against the applicant. This is different from the case herein.

155. The Defendant must have confused his view with the provisions of Section 193A of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya. While dealing with the issue of whether or not to stay criminal proceedings because there were civil proceedings pending over the same issue, Mrima J. in *Amir Lodges Ltd & Another V Mohammed Omar Shariff & Another* [2022] eKLR discussed the distinction of the two jurisdictions. He held as follows:-

> " This Petition, therefore, hinges on the provisions of Section 193A of the *Criminal Procedure Code*, Cap. 75 of the Laws of Kenya relating to concurrent criminal and civil proceedings. In Nairobi High Court Constitutional Petition No. E033 of 2021 *Maura Muigana vs. Stellan Consult Limited & 2 Others* (unreported) this Court dealt with the issue and expressed itself thus: -
>
> 60. In Kenya, the aspect of concurrent civil and criminal proceedings is provided for in Section 193A of the CPC.
>
> 61. First, is a look at the said provision, which states as follows: -
>
> > Concurrent criminal and civil proceedings:
> >
> > Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.
>
> 62. In an Article titled '*Unjust Justice in Parallel Proceedings: Preventing Circumvention of Criminal Discovery Rules*, the author, Randy S. Eckers, defines concurrent proceedings as independent, simultaneous investigations and prosecutions involving substantially the same matter and parties.
>
> 63. More often than not, the currency of the twin proceedings is challenged before Courts. In the above article, the author reiterates that a determination to either

stay or allow the continuation of parallel proceedings depend on existence of certain requirements. He observes: -

> The Courts only block parallel proceedings in special circumstances. A defendant may move for a stay to block parallel proceedings, which will be granted only if the defendant can prove either that the government is acting in bad faith and using malicious tactics to circumvent the strict criminal discovery rules, or that there is a due process violation....
>
> Even if a defendant meets one of these requirements, a stay is not guaranteed. The Court takes many other factors into account in deciding whether a stay is appropriate in a specific situation. These factors include the commonality of the transaction or issues, the timing of the motion, judicial efficiency, the public interest, and whether or not the movant is intentionally creating an impediment." Absent special circumstances, both cases will probably proceed.

64. It is, hence, deducible that the quest to stay concurrent proceedings must first be premised on the fact that there is in existence two or more active cases of civil and criminal nature in respect of the same entity or person. While discussing the general principles applicable in such scenarios, the Supreme Court of Appeal of South Africa in */Law Society of the Cape of Good Hope v MW Randell* (341/2012) [2013] ZASCA 36 (28 March 2013) stated as follows: -

> ...it applies where there are both criminal and civil proceedings pending which are based on the same facts. The usual practice is to stay the civil proceedings until the criminal proceedings have been adjudicated upon, if the accused person can show that he or she might be prejudiced in the criminal proceedings should the civil proceedings be heard first....

65. The Learned Judges of the Supreme Court of Appeal further stated that it was not automatic for an Applicant to be awarded stay of the civil proceedings. It found support in numerous English decisions among them, *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108 (CA) and *R v BBC, x p Lavelle* [1983] 1 All ER 241 (QBD) and observed as follows;

> [24]. In dismissing the application, the Court emphasized that there was no established principle of law that if criminal proceedings were pending against a defendant in respect of the same subject matter, he or she should be excused from taking any further steps in the civil proceedings which might have the result of disclosing what his defence or is likely to be, in the criminal proceedings.
>
> [25]. Jefferson was followed in *R v BBC, x p Lavelle* [1983] 1 All ER 241 (QBD) at 255 where Woolf J stressed that there should be no automatic intervention by the court. The learned judge pointed out that while the court must have jurisdiction to intervene to

> prevent serious injustice occurring, it will only do so in very clear cases in which the applicant can show that there is a real danger and not merely notional danger that there would be a miscarriage of justice in criminal proceedings if the court did not intervene

66. Closer home, our Courts have also had the occasion to address the issue of parallel proceedings. Before the Court of Appeal in Nairobi Civil Appeal No. 181 of 2013, *Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others* [2018] eKLR was the contention whether the High Court was right in granting orders restraining the Inspector General of Police, as well as the Director of Criminal Investigations from commencing, sustaining or proceeding with any investigations against Investments & Mortgages Bank Limited in connection with an alleged criminal conduct of its officers on account of a charge instrument whose execution was the subject of contention in a pending civil suit.

67. In determining the issue, the Learned Judges of Appeal acknowledged that the Office of the Director of Public Prosecutions is an independent constitutional office. However, that office is subject to the control of the Court in appropriate instances where illegality, irrationality and procedural impropriety is demonstrated. The Court made reference to the decision of the Supreme Court of India in Criminal Appeal No. 590 Of 2007, *State of Maharashtra & Others -vs- Arun Gulab & Others* where the power of the Court in checking excesses of the prosecutorial agency was discussed as follows: -

> The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.
>
> The provisions of Articles 226, 227 of the *Constitution* of India and Section 482 of the *Code of Criminal Procedure*, 1973 (hereinafter called as "Cr.P.C.") are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.

68. The Appellate Court further discussed limitations Courts ought to impose on Section 193A of the *CPC*, the provision that allows parallel prosecution of civil and criminal cases and remarked as follows: -

> [47]. In terms of Section 193A of the *Criminal Procedure Code*, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings does not bar the commencement of criminal proceedings. However, where the criminal proceedings are oppressive, vexatious and an abuse of the court process or amounts to a breach of fundamental rights and freedoms, the High Court has the powers to intervene. But this power has to be exercised very sparingly as it is in the public interest that crime is detected and suspects brought to justice.

69. The Learned Judges cited with approval its earlier decision in *Commissioner of Police & the Director of Criminal Investigation Department & another -vs- Kenya Commercial Bank Ltd & 4 others* [2013] eKLR, where the role of the Court in ensuring prosecutorial powers are exercised while having regard to public interest, the interests of administration of justice and to avoid abuse of legal process was discussed as under:

> ...in terms of Article 157(11) of the *Constitution*, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution.

70. Further, the Court of Appeal in *Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others* Nairobi Civil Appeal No. 56 of 2012 [2013] eKLR held that:

> While the law (section 193A of the *Criminal Procedure Code*) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved

in the settlement of what is purely dispute litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations.

71. The High Court in *Kuria & 3 Others vs. AG* (2002) 2 KLR appreciated the validity of existence of concurrent civil and criminal proceedings when it made the following findings: -

> .... The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution...A prerogative order should only be granted where there is an abuse of the process of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution... It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the Applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds.... it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts. The effect of criminal prosecution on an accused person is adverse but so also are their purpose in the society, which are immense... an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial. (emphasis added).

72. In the current Petition, the Petitioner has been charged in the criminal case, but there are no civil proceedings in place. On that basis, the Petitioner contends that the criminal case was instituted to settle a civil dispute hence it is an abuse of the Court process. That now takes me to the next sub-issue."

156. I do not find the instant proceedings a re-opener of a concluded matter. Thus, the submission by the Defendant that this suit is an abuse of the process of the court, vexatious and frivolous is neither here nor there.

(vi) Whether the Plaintiff should have pleaded conversion, and if the Defendant pleaded fraud and the particulars thereof

157. On the one hand, the Defendant contended and submitted that the Plaintiff should have pleaded the title relating to Kitale Municipality Block 12/26 was as a result of a conversion from parcel No. L.R.

No. 2116/1124 Kitale Municipality. His submission was that the Plaintiff only gave the evidence about the conversion of the land parcel from the *Registration of Titles Act*, Chapter 281 of the Laws if Kenya (repealed) to the *Land Registration Act*, 2012. He singled out P.Exhibit 3 which was a table that gave a conversion matrix of how the suit land was converted to the current one. He stated that the document was not signed by the maker or the Survey of Kenya office that made it, and that the same was never published as required under the *Land Registration Act*, 2012.

158. The Defendant relied on the Court of Appeal decision of the *Independent Electoral and Boundaries Commission & another versus Stephen Mutinda Mule & 3 Others* [2014] eKLR which brought out the importance of pleadings and that each party is bound by their pleadings and cannot be permitted to raise a different or fresh case without due amendment properly made, and that the court is also bound by the parties' pleadings. He also relied on the Nigerian Supreme Court decision of *Adetoun Oladeji (NIG) Ltd v Nigeria Breweries PLC* S. C. 91/2002 which is about the same issue. I agree with him insofar as the authorities reiterate this important point of law. But are they applicable in the circumstances of the instant case? I think not because the Plaintiff pleaded his claim sufficiently as required by law and led evidence therein within the parameters of the law.

159. It should be clear to the Defendant that the regime of law he referred to was enacted many years after the alleged conversion took place. Thus, it is imperative to look at the then existing law. Needless to say, that the contention that the Plaintiff should have pleaded the conversion of the suit land from the previous land regime to the one whose title the he holds is not an issue. This is because a Plaint or Claim just as any other pleading is a concise summary of facts: it is a formal document in which a party to a legal proceeding sets forth or respond to allegations, claims, denials or defences. It is not evidence.

160. In the instant case, the Plaintiff pleaded that he owned parcel No. Kitale Municipality Block 12/26. His prayer was that the Court finds that he was the sole owner of the same and that the Defendant be evicted from it. In that regard, the fact of conversion in any event how he was allocated the parcel all the way to how he became registered owner in the Certificate of Lease are only facts relevant to facts in issue. They needed not to be pleaded.

161. This finding goes to answer to the negative the Defendant's argument that the Plaintiff's evidence that the title he held was a conversion of the same from LR. No. 2116/1124 Kitale Municipality to Kitale Municipality Block 12/26 should not have been led. Indeed, the evidence was properly led.

162. On the other hand, the Defendant contended that he had pleaded fraud and its particulars. This Court finds that indeed he did, at paragraph 10 of the Amended Defence and Counterclaim. But as to whether he proved it and each or any of the particulars is the issue. This I will address when I consider the evidence as to who between the Plaintiff and Defendant is the legal owner of the suit land.

(vii) Who between the Plaintiff and the Defendant is the legal owner of the suit land

163. The Plaintiff averred that he was the sole owner of land parcel No. Kitale Municipality Block 12/26. He prayed for a declaration to that effect and the eviction of the Defendant from it. He adduced evidence through both PW1 and himself as PW2 that on 28/11/1991 he was allocated the land parcel which was at first identified in the letter of allocation as Unsurveyed Residential Plot - Kitale Municipality, measuring 0.553 Hectares. It later would be referenced as LR. No. 2116/1124 Kitale Municipality, under the old land regime, the Registration of Titles Act (now repealed). I will turn to the detailed analysis of the evidence shortly hereafter.

164. Incidentally, the Defendant's own witness, DW2, the government Land Registrar of Trans Nzoia County gave evidence which supported the Plaintiff's claim that he was the registered owner of the suit land.

165. The Defendant pleaded that he was the registered owner of land parcel No. LR. 2116/1124 which was totally different from land parcel No. Kitale Municipality Block 12/26. He averred that the registration of the latter parcel of land in the name of the Plaintiff was fraudulent and should be canceled. What did not make sense in the said pleadings is that if indeed the two parcels of land were very different from each other, why would the Defendant claim that the latter was fraudulently acquired? Why would he pray that the court cancels the registration of a title which is different from his and which he has no interest in?

166. Be that as it may, the Defendant gave evidence that he bought the suit land from one Moses Wabomba Kweyu on 14/03/1996. I will analyze the Defendant's evidence in detail herein after.

167. I have given the summary of the two clashing sides of the case to show that the point of convergence of both parties is that each of them claims to be the owner of parcel No. LR. 2116/1124 Kitale Municipality measuring approximately 0.553 Hectares. Therefore, who is the lawful owner thereof? I start with the analysis of the Plaintiff's evidence.

168. The Plaintiff testified the he was issued with a Certificate of Title Kitale Municipality Block 12/26 to the suit land on 05/12/2001. That the land had been allocated to him on 28/11/1991. He produced the copy of the Allotment Letter of Ref. No. 1102/32/32 as "P. Exhibit 7(a)" a copy of the PDP Ref. 226/194 as "P. Exhibit 7 (b)". He produced as "P. Exhibit 8" a copy of receipt dated 14/2/1992 for Kshs. 33190/= for payment by way of banker's cheque No. 021271 in favour of the Commissioner of Lands a copy of which he produced as "P. Exhibit 9". The sum of money indicated on the cheque was the same as that on the Letter of Allotment. What is unclear was whether payment, having been made on 14/02/1992 which was outside of the 30 days was due to a negotiation between the Plaintiff and the Commissioner of Lands for extension of the period. Be that as it may, since the Commissioner of Lands accepted the payment and proceeded to process the lease in favour of the Plaintiff, and the Commissioner of Lands has not complained or moved the Court to challenge the transaction, this Courts finds no basis to decide that the acceptance of that sum was indeed proper and pursuant to the allotment of the parcel to the Plaintiff.

169. The Defendant argued that the copy of the Letter of Allotment the Plaintiff produced as P.Exhibit 7(a) was not certified as a true copy of the original by the relevant office what issued it, contrary to the rules of evidence. Indeed, the copy produced in Court was purported to be certified as a true copy by a lawyer by name Wanyama C. S., a Commissioner for oaths. Although the loss of the original was reported to the police by Plaintiff, as evidenced by P.Exhibit 6, the certification was not in line with Section 80 and 81 of the *Evidence Act* as required of copies of public documents. I would reject it.

170. The rejection notwithstanding, the question is whether it renders the root of the title of the Plaintiff flawed. To answer the question the Court has to look at why the rejection and whether there is evidence that points as to the existence of the document since the Plaintiff's burden is to proof his case on a balance of probabilities. Thus, on a balance of probabilities, is there evidence cogent independent evidence that an allotment letter has been issued by the relevant office, and in whose favour? Thus, this Court is called upon to look at the totality of the evidence.

171. PW1 testified that he was the County Surveyor in Trans Nzoia County. DW2 testified that she was a Land Registrar in Tranz Nzoia County. The two offices are local government offices which house documents in relation to the suit land. The Plaintiff (PW2) produced as "P. Exhibit 4" and "P. Exhibit 5" respectively the originals of the Lease issued to him on 5/12/2001 and a Certificate of Lease issued the same date. He also produced "P. Exhibit 10 (a)" and "10(b)" being original receipts Nos. 636492 dated 10/4/1995 for Kshs. 35,200/= and 519837 dated 6/7/1998 for Kshs. 44,061/= for rent due. He relied on the certified copy of the conversion table which PW1 produced as P.Exhibit 3 to show that

the land was originally registered as No. 2116/1124 and converted to Kitale Municipality Block 12/26. He produced as "P. Exhibit 14" a Certificate of Official Search confirming that the land was registered in his name.

172. On cross-examination PW1 confirmed that the P. Exhibit 7(a), the Allotment Letter, only the parcel as "Unsurveyed Residential Plot - Kitale Municipality" and did not have a parcel number. Explaining this he, indicated that Allotment Letters issued did not bear numbers. That numbers would only be allocated once a survey of the plot was done and numbers allocated by the Director of Surveys.

173. Regarding the survey of the plot in question, PW2 testified that it was done and it gave rise to the number LR. 2116/1124 Kitale Municipality. Further, that said land parcel was converted to give rise to parcel No. Kitale Municipality Block 12/26. He testified that in respect of the instant case, the land was planned, surveyed, allotted and a lease prepared on it. DW2 gave evidence on preparation and registration of the same lease in favour of the Plaintiff.

174. The evidence of PW1 one Bainito Ombudi Hussein, the County Surveyor, on the existence, survey and conversion of the suit land was clear and unshaken. He produced as P.Exhibit 1 a certified true copy of the Registry Index Map (R.I.M.) of Kitale Block 12 which showed the position of the parcels of land as were on the ground. He stated further that land parcel Kitale Municipality Block 12/26 existed on the RIM. He also produced as P.Exhibit 2 a Folio Register in respect of plot Kitale Municipality Block 12/26, being, F/R Number 226/194 which showed how the survey was conducted and the measurements thereof indicating the acreage on the title. That on the Plan the plot number was referred as 2116/1124.

175. He stated that plot number 2116/1124 was changed later to Kitale Municipality Block 12/26. He produced as P.Exhibit 3 the certified copy of a conversion table prepared by the Director of Surveys in respect of the whole of Kitale Municipality. About the time of conversion, he said he did not have firsthand information as to when it was done but it was done by government through the Director of Survey.

176. The Defendant called DW2, one Sharon Gerald, a Land Registrar in Trans Nzoia County lands office. She gave evidence that turned out to be in favour of the Plaintiff. Her evidence as to who was the owner of the suit land was unshaken too: it was the Plaintiff.

177. She testified that she had in court the original file in relation to P. Exhibit 4, the lease in favour of the Plaintiff. She stated that the lease was drawn by the head office in the Ministry of Lands on 20/1/1998, in favour of Mansukhalal Jesang Maru. She confirmed that the signatures of the lessee were attested by or witnessed by Advocate Kidiavai and it was signed by one Wilson Gachanja in the presence of a Land Registrar. It was registered in Kitale on 5/12/2001. She emphasized that although she did not have the white card in Court, the lease in question was registered in 2001 in the name of Mansukhalal Jesang Maru. That it was registered in his name vide the lease document and his address was P. O. Box 95, Kitale. Later, in cross-examination she admitted that P. Exhibit 11 was a certified copy of the white card. That it was certified on 14/9/2018 by one N. O. Odhiambo, the then County Land Registrar of Trans Nzoia. She too confirmed that the parcel of land existed on the RIM produced as P. Exhibit 1. DW2 did not have the green card for parcel No. L.R. 2116/1124 the records of that nature were a preserve of the Nairobi Office custody. About P. Exhibit 3, the conversion table she stated that it was dated 27/03/1992 and that it was not signed and stamped by the issuing authority. However, the Court notes that the document, which was produced by PW1 was a copy certified by the office of the County Surveyor Trans Nzoia as a true copy of the original. The evidence of PW1 and that of DW2 agrees that the office of survey is the one that prepares the document.

178. DW2 stated further that once conversion is done, the title in existence becomes obsolete and is taken to the Nairobi Lands Nairobi. That although she did not have a document that parcel L.R. 2116/1124 was converted, the conversion table showed the old No. LR 2116/1124 was changed to number 26 (meaning Kitale Municipality Block 12/26).

179. She concluded her cross-examination by stating that she (the lands office) did not have any document to show that Frank Wafula was ever registered as proprietor of Kitale Municipality Block 12/26. The Defendant did not re-examine the witness.

180. Turning to the evidence of the Defendant, although in his oral evidence he testified that he was the owner of the suit land, the documents he produced did not support that at all. This was besides the fact that his own witness confirmed that indeed it was the Plaintiff who was the owner of the suit land. His other witness, DW3, did nothing better in proving that he was the owner.

181. Starting with DW3, one George Wambura, he stated that he was an Advocate of the High Court now retired. That on 28/06/1994 he witnessed a "form of Transfer" done by one Moses Wabomba Kweyu relating to parcel No. 2116/1124 Kitale Municipality. That the said Moses appeared before him and duly identified himself by his identity card No. 0140703 and signed the transfer form freely and willingly, and DW3 attested it. He did not know the goings on before or after he countersigned the form which he produced as D. Exhibit 19. He stated that he had heard that both the vendor and the Land Registrar who later signed it are since deceased.

182. On cross-examination, he stated that the piece of land being transferred was described in the schedule and it was No. 2116/1124 Kitale Municipality. He admitted he did not verify whether Moses Wabomba Kweyu was the owner of the plot. He admitted too that D. Exhibit 19 neither bore a date of presentation to the Land Registry nor any seal or stamp of the Land Registrar and did not show it was ever franked to show stamp duty was paid.

183. Further, he admitted that the document did not show that the Defendant was present. It also was not accompanied with a certificate that the witness attested it. That it was a photocopy. In re-examination he stated that he was not the maker of the document.

184. Looking at the document the witness produced as D. Exhibit 19, indeed it was a photocopy. DW3 testified that it was not the maker. Even though the witness testified that he attested it, he only vouched for the veracity of his signature and nothing more. It was incumbent on the Defendant to call evidence from the office of the Commissioner for Lands (now succeeded by the National Lands Commission) to first of all show that indeed the document emanated from that office. Moreover, the content of the Schedule to the document whose copy was produced was not certified as a true copy of original in terms of Sections 80 and 81 of the *Evidence Act* as regards certification of copies of public documents. The proof thereof would be rejected on that account.

185. That notwithstanding, the document does not comport with the documents the Defendant produced as P.Exhibit 2(a), (b) and (c). These were copies of Letters of Allotment purported to have been issued to Moses Wabomba Kweyu on 13/06/1991. On the one hand, all the three letters of allotment bear the same Ref. No. 20089/XXIV in respect of the plots No. UNS. Residential Plot No. 12, 13 and 14. Each of the plots measured approximately 0.18 hectares. The Schedule to D. Exhibit 19 refers to a piece of land measuring 0.5532 hectares and it was known as LR. No. 2116/1124 Kitale Municipality which was allocated to the said Moses Wabomba Kweyu on 13/06/1991.

186. From the above documentary evidence, it is clear that if at all Moses Wabomba Kweyu was allocated land which he sold to the Defendant herein it was not the one being referred to by the Plaintiff as a combination of the three plots herein above referred to as Plots UNS. Residential Plot No. 12, 13 and

14. That evidence it the content of D. Exhibit 19 means that Moses W. Kweyu was allocated another parcel of land on the same date of 13/06/1991, and by that time, going by the evidence of the Surveyor, PW1, for such a plot to bear a specific number it must have been surveyed already.

187. If indeed the plot referred to in the Schedule to D. Exhibit 19 was the one the Defendant wishes this Court to believe to have been a combination of the three plots, there is no evidence from the Commissioner of Lands on behalf of the Defendant to show that the three plots were ever combined and when it took place. And if indeed that took place, then it must have been after the Letters of Allotment referred to as P. Exhibit 2(a), (b) and (c) were issued, and accepted if any, and an application for a combination of the three made to the Commissioner of Lands and an approval made. That could not possibly be on 13/06/1991 so as to give rise to another Letter of Allotment to be issues in favour of the said Moses W. Kweyu the same date as the Schedule indicates.

188. Worse, if indeed as at the 13/06/1991 the three plots 12, 13 and 13 Kitale Municipality were unsurveyed when did they get surveyed the same date and their records finalized in the survey office in Nairobi in order to generate the parcel number referred to in the Schedule as LR. No. 2116/1124 in respect of a Letter of Allotment Ref. No. 20089/XXIX issued on 13/06/1991? In my view, even if the D. Exhibit 19 could have satisfied the provisions of Section 80 and 81 of the *Evidence Act*, it could have still amounted to nothing but a 'cooked' document, one that was subtly and fraudulently made by the parties involved in its preparation in order to deceive the public and Court that indeed the said Moses W. Kweyu transferred a parcel of land, specifically LR. No. 2116/1124 to the Defendant.

189. In regard to the Defendant's own evidence as to ownership of LR. No. 2116/1124 Kitale Municipality, in regard the Claim by the Defendant that he was the registered owner of land parcel LR. No. 2116/1124, the Defendant relied on his averment of allotment of the same parcel of land to one Moses Wabomba Kweyu. But he admitted in cross-examination that although in his written witness statement dated 10/7/2018 he stated he was the registered owner of L.R. 2116/1124, he was never granted a Certificate of Lease or a lease document. Thus, the assertion and testimony was a lie. Needless to say, that during cross-examination the witness was so evasive and kept shifting goal posts to dodge questions that the Court noted down his demeanor: that he was an untruthful witness.

190. He testified that when Moses Wabomba Kweyu sold him the land they entered into an agreement. He produced it as D. Exhibit 5. He also produced as D. Exhibit 2(a), (b) and (c) copies of three letters of allotment dated 13/6/1991 each of which was referenced as Ref. No. 20089/XXIV in relation to "Uns. Residential Plot Nos. No. 12, 13 and 14 Kitale Municipality, issued to one Moses Wabomba Kweyu. Each measured 0.18 hectares and was for a term of 99 years from 01/06/1991. He produced as D. Exhibit 3 a certified copy of a survey Plan referenced as Folio Register No. 22/194 generated on 7/9/1992 to show the existence of plot No. 2116/1124 Kitale Municipality as at that time.

191. This Court notes that in cross-examination he admitted that he did not have any letter to show the connection between the three Allotment Letters and land parcel number No. L.R. 2116/1124 Kitale Municipality. Moreover, as noted above when this Court analyzed the evidence of DW3, the letters did not accord with D. Exhibit 19 which referred to the transfer of a plot No L.R. 2116/1124 Kitale Municipality whose letter of allotment was referenced as 20089/XXIX issued the same date as the abovementioned letters. Even then, P. Exhibits 2(a), (b) and (c) and D. Exhibit 19 were all copies not certified in accordance with Sections 80 and 81 of the *Evidence Act*. Therefore, they do not have any evidentiary value which can have the required weight to prove ownership of the suit land by a Mr. Moses W. Kweyu and subsequently the Defendant herein. To the extent that the said Mr. Kweyu did not have an Allotment Letter in relation to the suit what he purported to sell to the plaintiff was nothing but hot air. Here the nemo dat quo non habet rule applies squarely.

192. But DW1 continued his testimony that the Survey Plan he had was as a result of a subdivision of plot No. 2116/402 and 2116/4003. He marked for identification as DMFI-15 a RIM to show the plot existed but he did not produce it. Therefore, this Court finds that the evidence on that issue was inadmissible hearsay.

193. He produced as D. Exhibit 18 another RIM over the plot. He stated further that he knew the plot on which he stayed was L.R. No. 2116/1124 Kitale Municipality which was different from plot No. Kitale Municipality Block 12/26 which the Plaintiff claimed ownership of. He believed the Plaintiff held and was using a fake title for plot No. Kitale Municipality Block 12/26.

194. He testified further that he had in his possession four documents which showed the Plaintiff committed fraud in relation to the acquisition of land parcel No. Kitale Municipality Block 12/26. The first one was D. Exhibit 7, a letter dated 20/4/2009, which was written by the Physical Planning Department. He stated that the Physical Planner noted in the letter that the Plan attached did not show the reference number hence the source of the Letter of Allotment was not disclosed.

195. On this the Court examined the letter carefully and found that in D. Exhibit 7 the Physical Planner referred to Plan which was attached to a letter issued by lawyers who acted then for the Defendant. They were M/S. Chepkwony and Company Advocates on 14/04/2009. The Defendant did not give a copy of the letter and the Plan it attached. Thus, as to whether it referred to a Plan which was in relation to the suit land or any other is only but guesswork. That was correspondence was generated in reference to the Defendant. In any event the Physical Planner did not say that the Plan or Letter of Allotment was fake. She only stated that without a reference number she could not trace the Plan.

196. He also relied on a letter dated 7/08/2018, written by the office of Director of Public Prosecution (ODPP) to show the ODPP was investigating the issue. Its subject was unlawful acquisition of two parcels of land namely Kitale Municipality Block 11/242 and Block 12/26 respectively. He produced it as D. Exhibit 16. He produced also as D. Exhibit 17 another letter dated 14/09/2018 written by the Director of Criminal Investigation (DCI) to the County Criminal Investigation Officer (CCIO), Kitale.

197. I have looked at the two Defence Exhibits. It is in evidence that the Defendant admitted that the two offices wrote the letters at his instigation or his complaint. Nothing in their content suggests anything fraudulent on the part of the Plaintiff. Moreover, the Defendant admitted in cross-examination that he lodged the complaints in relation to the plot so the ODPP would pursue the Plaintiff because the Plaintiff had caused him earlier to be arrested. For this reason, the Court read malice on the part of the Defendant in the move, and his abuse of the process of investigations by a body that is supposed to be independent in its work.

198. Finally, DW1 relied on letter dated 18/02/2011 which the Plaintiff produced as P. Exhibit 16 the same one which he produced as D. Exhibit 13. It was written by the District Land Office Trans Nzoia to the Chief Land Registrar. Its content was that the Plaintiff was served with a Notice to cancel his title. He stated that the letter showed that the Plaintiff was served with notice to show cause why his title to the suit land should not be forfeited in terms of the Registered Land Regime (R.L.A.) now repealed. For that he testified that to date the Plaintiff had not challenged or made any attempt to challenge the process of having his title forfeited.

199. Regarding the Defendant's testimony on D. Exhibit 13, this Court notes that in cross-examination he admitted that Land Registrar wrote the letter at his (DW1's) instigation which he said was in his letter to the Chief Land Registrar written in June or July of 2008. The Court notes that the letter was not written out of the independent action of the office. Moreover, DW1 admitted in further cross-

examination that the letter from the District Land Registrar to the Chief Land Registrar stated that the Plaintiff had made a self-explanation letter in answer to the notice to show cause.

200. DW1 admitted further that the notice to show cause was in relation his complaint about the alleged failure by the Plaintiff to comply with the special conditions in the title document, specifically condition number 2 and not about the validity of the lease.

201. Apart from the inference this Court has drawn that the complaint by the Defendant to the Chief Land Registrar that the Plaintiff's title be canceled for reason of failure to comply with condition 2 of the Letter of Allotment was actuated by a hidden intention by the Defendant to use the authorities to take away the Plaintiff's title so that he (Defendant) applies to be registered as owner, there was malice in the move. First of all, it is surprising that the Chief Land Registrar could be influenced by a private person to carry out its work. The Defendant is not an official of the National Land Commission as to initiate a process of cancellation of one's title for failure to meet a condition in the Letter of Allotment. The Chief Land Registrar ought to have been wiser than acting rashly unless one or two of his officers were involved in the Defendant's scheme of things.

202. In reference to the agreement produced as D. Exhibit 5 he stated that it was registered by the Chief Land Registrar on 29/9/2017 at 11.50 hours but the stamp did not indicate the word "registered". He stated that the agreement did not bear a "presentation number".

203. Regarding the agreement, after a thorough examination of the same, the Court observes that it purports to have been executed on 14/03/1996. The subject matter of the sale was described as "a residential plot No. LR. 2116/1124 situated in Grasslands sublocation, Kitale Municipality, Trans Nzoia District. It stated that the purchaser had paid a sum of Kshs. 750,000/= for the plot.

204. When this Court compared the agreement with the contents of document D. Exhibit 19 (though rejected), it could not make sense at all. The reason is that if the contents of the Defendant's D. Exhibit 19 is anything to go by, as at 20/06/1994 the purported seller had transferred the interest in parcel No. LR. 2116/1124 to the Plaintiff. How come the agreement for sale is drawn one year and nine months later? Why does it not refer in any way to D. Exhibit 19 if at all the "Form of Transfer" or the agreement was done by the said Moses W. Kweyu?

205. The Court has keenly compared the two signatures purporting to be of Moses W. Kweyu each appearing on D. Exhibit 5 and D. Exhibit 19. I find them not similar. They differ particularly from the middle all the way to the left end. If at all the said Moses W. Kweyu signed any of the documents, then one must not be genuine but a forgery.

206. Consequently, and particularly based on the contents of P. Exhibits 3, 4 and 5 and the evidence of PW1, PW2 and DW3, I find that plot number LR. No. 2116/1124 Kitale Municipality measuring 0.5532 hectares and Kitale Municipality Block 12/26 of similar measurements are one and same, contrary to the averment and oral contention by the Defendant save that the former was the number the same parcel of land bore before being converted to the new land regime, R.L.A. Chapter 300 (now repealed). I find further that the Plaintiff is the lawful owner of all that parcel of land initially registered as LR. No. 2116/1124 Kitale Municipality and converted to Kitale Municipality Block 12/26 to the exclusion of the Defendant.

207. With the preceding issues having been determined, the subsequent ones which the Defendant raised are not as complex: but straightforward. Nevertheless, I will determine them.

(viii) Whether Kitale Municipality Block 12/26 and LR. No. 2116/1124 were surveyed

208. The Defendant raised the contention that the plot he claimed to be his, being number LR. No. 2116/1124, which the Court has found not to be his, was surveyed. On that, I find that indeed the plot was surveyed but not by the vendor who purported to sell the land to the Defendant but the Plaintiff. The reason for this holding is that there was no evidence at all by the Defendant that the unsurveyed plots whose purported Letters of Allotment produced as D. Exhibit 2 (a), (b) and (c) were ever surveyed. Further, the Defendant did not adduce any evidence that the parcel of land number LR. No. 2116/1124 Kitale Municipality was ever owned and therefore surveyed by Moses Wabomba Kweyu. Rather he admitted that he did not have any evidence to show that the seller had parcel complied with the conditions of allotment, whether the payments of Kshs.16,335/= per plot or otherwise than a down payment of Kshs.1,000/= for each individual plot leaving a balance of Kshs.15,335/=.

209. DW1 stated that he was only convinced that the seller had fulfilled the condition because the seller was already on the land. He did not bother to confirm whether the seller completed the payment and the seller did not give him receipts of payment. This Court finds that such a believe cannot hold water and is not evidence of fulfillment of conditions of allotment.

210. The Defendant submitted that the survey Plan F/R No. 226/194 was not in existence within 45 days. Contrary to the submissions which did not have any evidence in support, this a survey of the plot was done, giving rise to the Plan, produced as P. Exhibit 1.

211. On the contrary to the above evidence by DW1, the Plaintiff stated the plot allocated to him was surveyed although he did not know the exact time. On cross-examination, using P. Exhibit 2, he stated that it was done on 31/08/1992 when the plot was allocated parcel number LR. No. 2116/1124. Additionally, PW1 confirmed that the plot was surveyed and the acreage thereof taken as evidenced by P. Exhibit No. 1 which was Folio Register Number 226/194.

(ix) Whether plot No. Kitale Municipality Block 12/26 exists on the Current Amended RIM

212. The Defendant submitted that the certified copy of the RIM produced by PW1 as P. Exhibit 1 did not originate from the office of the Director of Surveys. But he did not have any evidence to the effect that the County Surveyor who worked with the said office but in the Trans Nzoia County and testified as PW1 did not obtain from the Director's office the record which he certified as true copy of original.

213. The Defendant relied on the evidence of DW2 who confirmed that the suit land appeared on P. Exhibit 1 but not on DMFI-15 which he said was the sealed RIM. The Court notes that the said DMFI-15 was an uncertified photocopy of a RIM. Its production was objected to and it was marked as for identification. To the extent that it was not produced in evidence the evidence thereon was inadmissible hearsay. It cannot be said to constitute evidence of a current RIM yet there was no evidence to the effect that P. Exhibit 1 which was certified as a true copy as at 26/09/2018, a date much later than that on DMFI-15 did not contain the true records held by the office of the Director of Survey. The court does not agree with the Defendant that DMFI-15 which is not evidence can constitute the current RIM.

(x) Who is in occupation of Kitale Municipality Block 12/26

214. The Plaintiff testified that the Defendant moved onto the suit land in or about September, 2008. The Defendant denied having ever occupied the land without the permission of the Plaintiff. When he testified, it became clear that in June or July, 2008 the Defendant wrote to the Chief Land Registrar about the suit land, seeking his finding that the Plaintiff had not fulfilled the condition No. 2 of the Letter of Allotment. Later the Plaintiff attacked the existence of the letter, produced as P. Exhibit 7(a).

If the letter did not exist and was a forgery as the Defendant alleged then there was no need to obey a condition therein: it is either the letter was genuine hence required its condition 2 to be fulfilled by the Plaintiff or it was not.

215. The Plaintiff testified further in cross-examination that he reported the Defendant's acts of trespass on the land and on 19/11/2008 (two months later) the latter was charged in Kitale CMCR No. 3070 of 2008. This the Defendant testified to. It is the Court's finding that the actions of the Defendant in writing to the Chief Land Registrar only two months before the alleged trespass are evidence of the fact that contrary to the testimony of the Plaintiff that he entered the suit land in 1996 when he allegedly bout the land, he entered the Plaintiff's land soon after he wrote to the Land Registrar.

216. Again, the Defendant submitted that nobody is on the suit land. Nothing can be farther from the truth. PW1 testified that when he visited the land he found that the Defendant was in occupation: he had built some houses on it. PW1 too testified that the Defendant was in occupation of the land. The Defendant himself testified that he was in occupation of a parcel of land known as LR. No. 2116/1124 Kitale Municipality. This Court has already found that the plot is the same as the one whose title is Kitale Municipality Block 12/26. Thus, the Defendant is in occupation of the suit land.

(xi) Whether the Defendant is a trespasser on the suit land

217. From the totality of the evidence above, the Defendant is a trespasser. This Court has found that the Plaintiff is the lawful owner of the suit land. Therefore, since the Defendant in occupation thereof without the permission of the Plaintiff his presence is nothing short of trespass.

(xii) Whether the Defendant proved the particulars of fraud pleaded

218. At paragraph 10 of the Amended Defence and Counterclaim the Defendant pleaded fraud on the part of the Plaintiff and gave five particulars thereof. Then he testified that the Plaintiff was engaged in corrupt deals. He did not provide evidence of the allegation. He also testified that he had four letters which would evidence fraud. He singled them out as D. Exhibits 7, 16, 17, and P. Exhibit 16. At paragraph 191-195 I have dealt with the import of the letters, their content and the allegations they sought to proof. I have not found them worthy. That shows that the particulars of fraud have not been proved.

219. What remains to address regarding this allegation is particular number 10(a) about the Letter of Allotment. The Plaintiff raised much hype about the date of the payment of the deposit of Kshs. 4,300/= said to have been paid as a deposit for the suit land on 15/02/1983 as shown on P. Exhibit 7(a). The sum is indicated to have been paid and received vide a receipt No. A 688238 of that date.

220. This Court finds nothing wrong with the said payment because it bear a notification of a deposit, paid earlier. There is nothing on the Letter of Allotment which indicates the period within which a deposit can be made before issuance of a Letter of Allotment. In any event the Plaintiff stated that by 1983 he was present in Kenya and he had given someone money to pay for a Letter of Allotment. In any event even D. Exhibits 2(a), (b) and (c) indicate that by the time the letters were issued a deposit of Kshs. 1,000/= had already been received.

221. As I conclude the analysis of this issue, I remind the parties that I have indicated that all the four documents I have alluded to in this Section did not comply with Sections 80 and 81 of the *Evidence Act*. Any testimony on them unless corroborated by independent documentary evidence was therefore neither here nor there. For the reasons hereinabove, I do not find any proof of the allegations of fraud on the part of the Plaintiff.

(xiii) Whether the Plaintiff was in breach of conditions for title No. Kitale Municipality Block 12/26

222. The Defendant submitted that the Plaintiff was in breach of the special conditions in regard to the title of the suit land. He stated that the Plaintiff admitted to being in breach of the conditions and that DW2, the Land Registrar, informed the Court as much. Then he submitted on Condition No. 2 of the letter of allotment, produced as P. Exhibit 7(a). He reproduced Sections 58 and 59 of the *Registered land Act* (repealed) to argue that by virtue of them the title should be canceled.

223. This Court has stated earlier that by the submission, the Defendant is confirming that the Plaintiff was issued with the said Letter of Allotment and that he ought to have fulfilled Condition No. 2 thereof. A title of the nature of that of the suit land does not exist in vacuo. It has the Letter of Allotment whose conditions are to be fulfilled hence the said letter.

224. From the evidence of the Plaintiff himself, the letter produced as P. Exhibit 7(a) existed. That is why he moved the Chief Land Registrar to cancel the Plaintiff's title that emanated from it, for reason of alleged failure to fulfill the condition. Indeed, the Chief Land Registrar, having satisfied himself that he issued a Letter of Allotment which was finally processed leading to the title held by the Plaintiff wrote a letter, Ref. No. TZA/A/40/VOL.III/14 asking the County Land Registrar of Trans Nzoia to issue to the Plaintiff a Notice to Show Cause why the title should not be canceled for non-compliance of the condition. It was dated 31/01/2011, produced as P. Exhibit 19. The District Land Registrar wrote to the Plaintiff the Notice and upon receipt of the Plaintiff's reply dated 08/02/2011, produced as P. Exhibit 17 wrote to the Chief Land Registrar the letter dated 18/02/2011, produced as D. Exhibit 16. Later, on 14/03/2011, vide a letter Ref. No. TZA/A/40/VOL.III/14 wrote a letter, produced as P. Exhibit 20, to the Defendant herein advising that before any action would be taken, this case should be concluded.

225. It is my finding that the Plaintiff gave a satisfactory explanation as to why he had not developed the land, and the Chief Land Registrar accepted it. That is why he put it in abeyance pending the determination of this case. Needless to say, that the Plaintiff testified that he always wanted to develop the land but elements of crookedness prevented him from doing so. Again, he stated that he could not do so when the Defendant had actually invaded the land. Furthermore, I have found that the process of cancelation of the Plaintiff's title by the Chief Land Registrar was started off by the malicious push by the Defendant for it. It is the same that he continued to do even by the submission and (his failed) evidence herein. The Defendant cannot be permitted to reap from his acts of trespass, misdeeds and trickery so as to have the Plaintiff's rightly acquired title cancelled on that account. Had the Defendant not been on the land the Plaintiff would have developed the land thereby fulfilling the condition alleged. I therefore find that even though the Plaintiff has not fulfilled that condition, it is because his efforts have been frustrated by people such as and including the Defendant.

(xiv) Whether the Plaintiff should be awarded mesne profits

226. The Plaintiff claimed mesne profits. But he did not prove the same. I therefore do not award the same.

Final Disposition

227. I find that the Plaintiff's case succeeds and I grant him the reliefs sought except for the relief of mesne profits which he did not proof. The Defendant's Counterclaim fails.

228. Consequently, I enter judgment for the Plaintiff against the Defendant as follows:-

    a. There be and is hereby issued a declaration that the Plaintiff is the sole legal owner of the land comprised in title No. Kitale Municipality Block 12/26 to the exclusion of the Defendant who

hereby ordered to vacate the said land forthwith, but in any event not later than fifteen (15) days, failing which he be forcefully evicted.

b. A permanent injunction be an is hereby issued against the Defendant, his servants, agents, assigns and or any other party claiming through him from entering, remaining on, encroaching, using and or in any way interfering with the Plaintiff's use of land parcel No. Kitale Municipality Block 12/26.

c. Costs of the suit.

d. Interest on the costs.

229. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC EMAIL THIS 16TH DAY OF OCTOBER, 2023

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE