



**Cancer Investments Limited v Nairobi City County Government .....  
 1st Defendant National Construction Authority & 4 others (Environment & Land  
 Case 81 of 2019) [2023] KEELC 21607 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21607 (KLR)

**REPUBLIC OF KENYA  
 IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
 ENVIRONMENT & LAND CASE 81 OF 2019  
 JO MBOYA, J  
 NOVEMBER 15, 2023**

**BETWEEN**

**CANCER INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**NAIROBI CITY COUNTY GOVERNMENT .....1ST  
 DEFENDANT NATIONAL CONSTRUCTION AUTHORITY . 1<sup>ST</sup> DEFENDANT  
 NATIONAL CONSTRUCTION AUTHORITY ..... 2<sup>ND</sup> DEFENDANT  
 NATIONAL BUILDING INSPECTORATE ..... 3<sup>RD</sup> DEFENDANT  
 DIRECTOR OF PHYSICAL PLANNING MINISTRY OF LANDS AND  
 PHYSICAL PLANNING ..... 4<sup>TH</sup> DEFENDANT  
 HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Dispute beforehand touches on and concerns L.R No. 209/14319 (Original Number 209/12152 & G.L), located along Kijabe Street, within the City of Nairobi and which was acquired by and registered in the name of the Plaintiff herein.
2. The Plaintiff contends that despite being the lawful and legitimate Proprietor of the suit property, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants illegally and unlawfully unleashed Bulldozers and Demolition cranes on the 1<sup>st</sup> March 2019; with a view to demolishing the building which the Plaintiff had constructed/erected on the suit Property. Furthermore, the Plaintiff contends that as a result of the impugned actions, the building which was erected on the suit property was substantially destroyed and/or damaged.
3. Arising from the foregoing action, the Plaintiff approached the Honourable court vide Plaintiff dated the 4<sup>th</sup> March 2019; and in respect of which same has sought for a plethora of reliefs, inter-alia [verbatim];



- i. An Order of Permanent injunction be issued restraining the Defendants either by themselves, their agents and or servants from harassing, threatening, intimidating, trespassing upon, demolishing and or in any manner whatsoever interfering with the Plaintiff's perimeter wall and other structures erected on the property known as Title Number LR. NO. 209/14319 along Kijabe street in Nairobi County;
  - ii. A declaratory Order that the Plaintiff's Property being on LR. NO. 209/14319, Kijabe Street [originally known as LR. NO. 209/12152 and G.L], is indeed private property requiring the protection under Article 40 of *the Constitution* of Kenya, 2010;
  - iii. A declaratory Order declaring that the actions of the Defendants of embarking on demolition of the Plaintiff's building erected on all that property known as Title Number LR. NO. 209/14319 is unfair, unjust, unlawful and has indeed infringed upon the Plaintiff's Constitutional rights;
  - iv. An Order for Damages for Trespass;
  - v. An Order for Damages for wanton destruction of property;
  - vi. An Order for Damages for Loss of use of the rental offices and shops on the property from the date of demolition until reconstruction in full;
  - vii. Compensation to the Plaintiff for damaged and looted properties following the wanton destruction of the property thereof;
  - viii. Costs of the Suit and Interest at Court rate.
4. Upon being served with the Plaint and Summons to enter appearance, the 1<sup>st</sup> Defendant duly entered appearance and thereafter filed a Statement of Defense dated the 23<sup>rd</sup> July 2019; and wherein the 1<sup>st</sup> Defendant has denied the allegations made by and on behalf of the Plaintiff herein. In particular, the 1<sup>st</sup> Defendant has contended that the suit property which is claimed by the Plaintiff herein constituted a Public Road Reserve and hence same was not available for allocation or alienation to the Plaintiff, whatsoever.
  5. On the other hand, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants entered appearance and filed a Statement of Defense dated the 14<sup>th</sup> May 2019; and in respect of which the named Defendants also denied the claims mounted by the Plaintiff.
  6. Pertinently, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants have averred that the suit property, which is being claimed by the Plaintiff was curved out of a portion of land that had hitherto been surrendered and which comprise of the Public Road Reserve and was consequently, therefore not available for allocation.
  7. Subsequently, the subject matter came up for Pre-trial directions and whereupon the respective Parties intimated to the court that same had duly filed and exchanged the requisite Pleadings, List and Bundle of Documents; List of Witnesses and Witness Statements, relative to the matter in dispute.
  8. Pursuant to and upon satisfaction that the matter was indeed ready for hearing, the Honourable Court proceeded to and confirmed the matter for hearing and thereafter same was indeed set down for hearing on various dates, up to and including the 6<sup>th</sup> March 2023, when the Defense case was closed.



## **Evidence By The Parties:**

### **Plaintiff's Case:**

9. The Plaintiff's case gravitates and revolves around the Evidence of Four [4] witnesses, namely, Muktar Parkar, Jannat Wanjiru Ahmed, Suleiman Abdul Shakul Arunani and Gervase Kaburu, who testified as PW1, PW2, PW3 and PW4, respectively.
10. It was the evidence of PW1 that same is a Director of the Plaintiff company and that by virtue of being a Director thereof, same is therefore conversant with the facts of the case and similarly authorized to testify on behalf of the Plaintiff Company.
11. Additionally, the witness testified that the Plaintiff company herein bought the property otherwise known as L.R No. 209/12152 (hereinafter referred to as the original property) from Specialized Supply Ltd, albeit through private Contract/Treaty with Standard Chartered Bank Limited, who at the point in time held a Charge over the Property.
12. Furthermore, the witness testified that upon payment of the consideration to and in favor of the Standard Chartered Bank Limited, the title of the Original property was released unto the Plaintiff and same was thereafter transferred and registered in the name of the Plaintiff. In this regard, the witness added that upon registration, the Plaintiff became the lawful and legitimate owner of the property.
13. On the other hand, the witness testified that upon taking possession of the Property and prior to commencing Development thereof, same noted that there existed a Three [3] Meter Lane on either side of the property, which were being occupied and used by many hawkers and the illegal kiosks' proprietors.
14. It was the further testimony of the witness that thereafter the Plaintiff Company sought to be allocated the two sets of three [3] meter lanes, obtaining on either side of the property and in this regard, the Plaintiff company wrote a Letter to the Commissioner of Land seeking be allocated the named Lanes.
15. The witness further testified that upon writing to the Commissioner of Lands and seeking to be allocated the named portions/ Lanes, the Commissioner of Lands circulated the Letter of application to various Government Departments/Government offices, the City Council of Nairobi, (now defunct) with a view to obtaining their respective opinions/ comments on the Letter by the Plaintiff Company.
16. Other than the foregoing, the Witness proceeded and testified that the relevant Government Departments and authorities; indeed thereafter signified their approval, culminating into (sic) the Commissioner of Land issuing a Letter of allotment to the Plaintiff company concerning the Three [3] meter lanes, which the Plaintiff company had sought to be allocated.
17. It was the further testimony of the witness that upon being issued with the Letter of allotment, the Commissioner of Lands thereafter wrote to the Company and instructed same to surrender the Grant/ Certificate of Title in respect of L.R No. 209/12152, namely, the original Property, with a view to facilitating the amalgamation thereof and ultimate issuance an all-inclusive title, and encompassing both the original parcel of land and the subsequent portions, founded on the Letter of allotment dated the 8<sup>th</sup> November 2000.
18. Further, the witness testified that upon receipt of the Letter by the Commissioner of Land which sought for the surrender of the old title, the Plaintiff proceeded to and indeed complied with the terms



- of the Letter by the Commissioner of Lands and thereby surrendered the old Certificate of Title/ Grant.
19. Besides, the witness testified that upon the Surrender of the old Certificate of Title/ Grant, the Commissioner of Land processed and issued to and in favour of the Plaintiff Company the Certificate of Title/ Grant, in respect of L.R No. 209/14319 (Original L.R No. 209/12152 and GL)
  20. Other than the foregoing, it was the testimony of the Witness that the Plaintiff Company, sought for and obtained Development/ the construction Approvals from the City Council of Nairobi, ( now defunct). For good measure, the witness averred that the 1<sup>st</sup> Defendant herein indeed proceeded to and granted approvals' for the Plaintiff's Development Plan and which approval was duly registered as DR.834, dated the 6<sup>th</sup> January 2004.
  21. It was the further testimony of the Witness that subsequent to the issuance of the Development approval, the Plaintiff company commenced to and undertook the construction on the suit property. However, the witness added that on or about the 23<sup>rd</sup> August 2018, the 1<sup>st</sup> Defendant herein generated and served the Plaintiff company with an Enforcement Notice whereby the 1<sup>st</sup> Defendant demanded that the Plaintiff company does remove the building constructed on the suit property.
  22. It was the further evidence of the witness that upon receipt of the Enforcement Notice, the Plaintiff company felt aggrieved and thereafter proceeded to and lodged an appeal to the Liaison Committee against the Enforcement Notice.
  23. Notwithstanding the foregoing, the witness proceeded and testified that on the 1<sup>st</sup> March 2019, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants unleashed bulldozers and Demolition Cranes to the suit property and same commenced the process of demolition of the building that was standing on the suit property and which had been build by the Plaintiff company, albeit upon procurement of the requisite approvals from the 1<sup>st</sup> Defendant herein.
  24. According to the witness, the actions by and on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein and particularly, unleashing the offensive bulldozers and the Demolition Cranes onto the suit property, was illegal and unlawful. In any event, the witness added that the actions complained of constituted a violation of the Plaintiff's Constitutional right to property as vindicated vide Article 40(6) of *the Constitution* 2010.
  25. On the other hand, the witness testified that upon registration of the suit property in the name of the Plaintiff, the Plaintiff paid Land rates to the City Council of Nairobi (now defunct) and thereafter to the 1<sup>st</sup> Defendant herein.
  26. Besides, the witness averred that as a result of the offensive actions by and on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the Plaintiff company proceeded to and engaged a surveyor with a view to ascertaining whether the allegations mounted against the suit property, namely, that the suit property fell on a Public Road Reserve, were true.
  27. Further, the witness averred that the surveyor retained and engaged by the Plaintiff company thereafter undertook the requisite survey works and also gathered assorted cadastral maps from the Director of Survey, before preparing a Survey Report, which the witness contended showed that the property in question was properly acquired and that all the prerequisite steps/procedure were duly followed.
  28. It was the further testimony of the witness that the Certificate of Title/ Grant over the suit property was issued by the Commissioner of Land after procuring and obtaining all the necessary approval; and as such, the Plaintiff's title to the suit property was lawful and legitimate.



29. Other than the foregoing, the witness averred that the actions complained of have subjected the Plaintiff to extreme loss and deprivation of the benefits attendant to the suit property. Consequently and in this regard, the witness implored the Honourable court to grant the various reliefs alluded to and contained at the foot of the Plaint dated the 4<sup>th</sup> March 2019.
30. Furthermore, the witness invited the Honourable court to take cognizance to the undated witness statement filed alongside the Plaint and to deem same as further Evidence in chief.
31. At the instance and request of the witness, the witness Statement contained at pages 14 to 20 of the Plaintiff's Bundle of documents was duly admitted and constituted as further Evidence on behalf of the witness.
32. Additionally, the witness referred to the List and Bundle of Documents dated the 4<sup>th</sup> March 2019; and thereafter sought to adopt and rely on the various Documents thereto. Suffice to point out that there being no objection, the Documents at the foot of the said List of Documents were admitted and constituted as Plaintiff's Exhibit 1 to 16, respectively.
33. Besides, the witness also referred to further List and Bundle of Documents dated the 8<sup>th</sup> October 2019; and similarly sought to adopt same as Exhibits. Instructively, the documents at the foot of the List dated the 8<sup>th</sup> October 2019; were admitted as further Exhibits on behalf of the Plaintiff and same were constituted as Exhibits P17 to P30, respectively.
34. On cross examination by Learned Counsel for the 1<sup>st</sup> Defendant, the witness stated that the Plaintiff bought the original parcel of land from M/s Specialized Supplies Investment Limited, albeit through Private Treaty with Standard Chartered Bank Limited, who at the point in time was holding the Charge over the said Property.
35. Furthermore, the witness averred that at the time when the Plaintiff company bought and acquired the property, the Plaintiff was not aware that the land in question was a Road reserve.
36. Whilst under further cross examination, the witness averred that what currently comprises of the suit property was an amalgamation of L.R No 209/12152 and Government Land (GL), which was standing/ falling in between L.R No's 209/4360/39 and 209/4360/40, respectively.
37. It was the further testimony of the witness that looking at the numbering of the neighboring Plots, it is evident that the original parcel of land, namely, L.R. No 209/12152; does not bare and/or fall within the same numbering.
38. Additionally, the witness averred that the Plaintiff company applied to the Commissioner of Land to be allocated the Three[3] meter lane on either side of the original parcel of land. Instructively, the witness confirmed that at the time of making the application to the Commissioner of Land, the Plaintiff company was aware that what was sought to be allocated were (sic) the three [3] meter Lanes.
39. On the other hand, it was the witness testified that the Plaintiff lodged the Buildings Plans and that same were duly approved. In this regard, the witness referred to the Letter of approval which was issued by the 1<sup>st</sup> Defendant.
40. On cross examination by Learned Counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, the witness herein stated that whilst purchasing the original parcel of land, same dealt with Standard Chartered Bank Limited, who were holding a Charge over the property.
41. However, the witness also admitted that same also dealt with one, namely, Mr. Enock Tuitoek of M/s Specialized Supplies Investment Ltd. Nevertheless, the witness pointed out that during the process of



acquiring the original parcel of land, same was never shown the Letter of allotment, which was issued to the original allottee.

42. Similarly, the witness also testified that same also did not come across the Part Development Plan (PDP), if any, that had been issued over the original parcel of land. In any event, the witness stated that whilst purchasing the original parcel of land, same already had a Grant and/or Certificate of Title.
43. Other than the foregoing, the witness testified that the Plaintiff company herein later on made an application to be allocated the three [3] meter lanes on either side on the property which the Plaintiff had bought from M/s Specialized Supplies Investment Limited. Nevertheless, the witness averred that the Commissioner of Land thereafter considered the application by the Plaintiff company and thereafter issued the Plaintiff company with a Letter of allotment dated the 8<sup>th</sup> November 2000.
44. Whilst under further cross examination, the witness averred that prior to purchasing the Original parcel of land, the Plaintiff's company advocates, the transaction Advocates, did a search in respect of the Land in question. However, the witness admitted that the search which was conducted over the original parcel of land was not availed to the court.
45. Finally, the witness testified that though the Plaintiff is in possession of the suit property, the building on the property is partly demolished. Furthermore, the witness added that the Plaintiff's tenants also vacated the building after same was demolished by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein.

**The Second witness who testified on behalf of the Plaintiff was Jannat Wanjiru Ahmed. Same testified as PW2.**

47. It was the testimony of the witness that same is the Chief Executive Officer [C.E.O] of the Plaintiff company and that by virtue of being the Chief Executive Officer of the Plaintiff company, same is similarly conversant with the facts of the case and thus authorized to testify on behalf of the Plaintiff company.
48. Furthermore, the witness herein averred that the Plaintiff company legally and procedurally acquired all that parcel of land known as L.R No. 209/12152; by way of purchase from M/s Specialized Supplies Investment Limited, who were hitherto the registered owners thereof. In this regard, the witness testified that the acquisition of the original parcel of land was on the basis of bona fide purchase for value without notice of any defect in the title of the Plaintiff's predecessor.
49. Additionally, the witness averred that after the Plaintiff company had acquired/purchased the original parcel of land, the Plaintiff company applied to be allocated to sets of three [3] meter lanes, which were sitting on either side of the property and that ultimately the Commissioner of Land issued a Letter of allotment dated the 8<sup>th</sup> November 2000.
50. It was the further testimony of the witness that after the Commissioner of Land had issued the Letter of allotment, the Commissioner of Land thereafter demanded that the Plaintiff company does surrender the Grant in respect of the original title, to facilitate the issuance of an all inclusive Grant, encompassing the additional land which was the basis of the Letter of allotment.
51. It was the further testimony of the witness that upon receipt of the Letter from the Commissioner of Land dated the 24<sup>th</sup> November 2000; the Plaintiff company complied with the conditions thereto and thereafter surrendered the title in respect of the original parcel of land.
52. Additionally, the witness testified that subsequently the Plaintiff company was issued with a new Grant, namely, the Grant in respect of L.R No. 209/14319, [Suit Property] which comprises of the three [3] meter lanes, which had been allocated to the Plaintiff company.



53. Other than the foregoing, the witness averred that the Plaintiff became the lawful and legitimate proprietor of the suit property and thereafter sought for and obtained Development approval from the 1<sup>st</sup> Defendant herein. However, the witness added that on or about the 23<sup>rd</sup> August 2018, the 1<sup>st</sup> Defendant issued and served the Plaintiff company with an Enforcement Notice, whereby the 1<sup>st</sup> Defendant demanded that the Plaintiff company does remove the building erected on the suit property.
54. Nevertheless, the witness contended that upon service of the enforcement notice, the Plaintiff company proceeded to and mounted an appeal to the Liaison Committee, whereby the Plaintiff Company sought to challenge the offensive Enforcement Notice.
55. Be that as it may, the witness testified that on the 1<sup>st</sup> March 2019, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants unleashed bulldozers and demolition cranes onto the suit property with a view to demolishing the building that was standing thereon. In this regard, the witness contended that the building which was standing on the suit property was thereafter substantially demolished.
56. It was the further testimony of the witness that the demolition of the building standing on the suit property was illegal and unlawful, insofar as the Plaintiff company had acquired the suit property through lawful means and not otherwise.
57. Furthermore, the witness alluded to the undated witness statement, which was filed alongside the Plaint dated the 4<sup>th</sup> of March 2019; and sought to adopt the contents thereof. For good measure, the contents of the witness statement, were duly adopted and admitted as the further Evidence of the witness.
58. On cross examination by Learned C counsel for the 1<sup>st</sup> Defendant, the witness herein stated that the approval for the building plans was undertaken in January 2004. Besides, the witness added that the approvals was procured from the City council of Nairobi, (now, defunct)
59. On cross by Learned Counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, the witness herein pointed that prior to purchasing the original property, the 1<sup>st</sup> witness and herself (PW2), visited the ground. However, the Witness stated that same could not remember whether the land was vacant.
60. Whilst still under cross examination, the witness stated that the Parcel of land which was bought by the Plaintiff was known as L.R 209/12152. Nevertheless, the witness pointed out that same has not brought/ availed a copy of the Transfer Instrument in respect of the original property, namely, the Instrument that was used to transfer the original Property in favor of the Plaintiff.

**The 3<sup>Rd</sup> Witness Who Testified On Behalf Of The Plaintiff Was One Suleiman Abdul Shakul Harunani. Same Testified As Pw3.**

62. It was the testimony of the witness that same is a Licensed Surveyor practicing under the name and style in the name of M/s Harunani & Associates. Besides, the witness testified that same has been a Licensed Surveyor since 1981.
63. As concerns the subject matter, the witness testified that same was engaged by the Plaintiff company to undertake survey works and thereafter to prepare a Survey Report. In this regard, the witness averred that he indeed complied with the instructions of the Plaintiff company and thereafter prepared a Report dated the 14<sup>th</sup> September 2020, which report was produced and marked as Exhibit P27.
64. On cross examination by counsel for the 1<sup>st</sup> Defendant, the witness stated that same is conversant with the process relating amalgamation of land/plots. Further, the witness pointed out that prior



to amalgamation of land, the Commissioner of Lands must call for objections, if any, from relevant Government Departments of land.

65. However, the witness testified that in respect of the subject matter, same was not aware of any objection to amalgamation. Additionally, the witness averred that if there were any objection that were not considered by the Commissioner of Lands, [now defunct] then the objections are deemed to have been overruled.
66. That whilst still under cross examination, the witness herein also pointed out that he did not avail and/or provide the Deed Plan for the suit property.
67. On cross examination by Learned counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, the witness herein testified that according to FR67/12; there was a Road of access. Furthermore, the witness averred that same is conversant with the process attendant to alienation of a Public Road.
68. Furthermore, the witness admitted that before a Road of access is alienated and thereafter allocated for private use, a Part Development Plan is required and which Part Development Plan must be duly approved by both the Director of Physical Planning and the Commissioner of Land, respectively.
69. Be that as it may, the witness herein stated that in respect of the subject matter, same did not come across any Part Development Plan [PDP] underpinning the alienation of the road of access.
70. Besides, the witness admitted that the suit property is situate on/within a Road of access. Whilst still under cross examination by Learned counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, the witness stated that the section which forms the suit property sits on the Road of access.
71. Other than the foregoing, the witness testified that same was in possession of a Deed of Surrender of the Road of access. Nevertheless, the witness ventured forward and averred that same was not aware whether the Deed of surrender has been tendered before the Honourable court.
72. Nevertheless and on re-consideration, the witness averred that Deed of surrender in respect of the Road of access had not been reproduced before the court.
73. Additionally, the witness herein averred that the portions of land(s) which were allocated to the Plaintiffs and added onto the original parcel of land comprised of what was referred to as the “Green area”. Furthermore, the witness averred that the Green area constitutes an area where no Building can be erected and/or constructed on.
74. Finally, the witness herein stated that when he visited the suit property, same found that there was a building which had been constructed on the Green area, but that the building had been damaged.
75. On cross examination by the Court, the witness herein stated that the area where the building was standing was partly on the Green area and partly on the suit property.
76. Other than the foregoing, the witness also stated that even though a portion of the building was standing on the Green area, same did not measure the portion that falls within the Green area or otherwise.

**The Fourth witness who testified on behalf of the Plaintiff was one, namely, Gervase Kaburu. Same testified as PW4.**

78. It was the testimony of the witness that same is a Clerk; and that it is him who prepared and wrote down the Inventory/Quotation contained at page 77 of the Plaintiff’s bundle of documents, namely, Exhibit P28.



79. Nevertheless, the witness testified that the prices which same wrote down and which forms part of the Quotation dated the 9<sup>th</sup> October 2019, were given to him (witness) by Mr. Shamji, whom the witness admitted has not been called to testify.
80. Finally, the witness herein averred that even though he prepared the quotation under reference, same is however not a Quantity Surveyor.
81. On cross examination by Learned Counsel for the 1<sup>st</sup> Defendant, the witness herein admitted and reiterated that same has never been trained as a Quantity Surveyor. In any event, the witness added that same has no knowledge about the Quantity survey.
82. Whilst under further cross examination, the witness averred that the prices which same wrote down and which form the basis of the Quotation were provided to him by Mr. Shamji. However, the witness clarified that he has no idea where the prices came from and cannot therefore verify their source and/or authenticity.
83. On cross examination by Learned counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, the witness stated that the information contained at the foot of the Quotation dated the 9<sup>th</sup> October 2019, was a given to him by Mr. Shamji.
84. With the foregoing, the Plaintiff's case was duly closed.

#### **The 1<sup>st</sup> Defendant's Case:**

85. The 1<sup>st</sup> Defendant's case revolves around the Evidence of two (2) witnesses, namely, Wifred Wanyonyi Masinde and Judith Wamboi Gitau, respectively, who testified as DW1 and DW2, respectively.
86. It was the Evidence of DW1 that same works with the Nairobi Metropolitan Services, now defunct, as a Senior Building Inspector.
87. Furthermore, the witness testified that same was seconded to Nairobi Metropolitan Services, [NMS], from the County Government of Nairobi.
88. Other than the foregoing, the witness herein intimated to the court that same was conversant with the facts pertaining to and concerning the subject matter. Besides, the witness also indicated that same had recorded a Witness statement, which was however undated.
89. Additionally, the witness thereafter implored the Honourable court to adopt the undated Witness statement which was however filed in court on the 28<sup>th</sup> January 2020. For good measure, the Witness statement filed on the 28<sup>th</sup> January 2020 was thereafter adopted and admitted as the Evidence- in- chief of the Witness.
90. Other than the foregoing, the Witness herein alluded to the List and Bundle of Documents dated the 28<sup>th</sup> January 2020; and thereafter sought to adopt and rely on the various Documents enumerated thereunder.
91. In the absence of any objection to the production of the Documents in question, the documents at the foot of the List filed on the 28<sup>th</sup> January 2020 were admitted and marked as Exhibits D1 to D5, respectively, on behalf of the 1<sup>st</sup> Defendant.
92. On the other hand, the witness also alluded to the Supplementary List and Bundle of Documents dated the 23<sup>rd</sup> of January 2020, containing one Document and thereafter sought to produce same as further evidence on behalf of the 1<sup>st</sup> Defendant.



93. Similarly and in the absence of any objection, the documents at the foot of the List dated the 23<sup>rd</sup> January 2020; was produced and admitted as Exhibit D6, on behalf of the 1<sup>st</sup> Defendant.
94. On cross examination by Counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendant, the witness herein averred that Nairobi City County Government did not grant any approval for the construction on the Road of Access. Further, the witness added that the Plaintiff herein has put up a building on a Public Road and not otherwise.
95. Whilst still under cross examination, the Witness averred that the offensive building which has been erected by the Plaintiff blocks and/or restricts access to Central Police Station-Nairobi.
96. It was the further testimony of the witness that the Nairobi County Government also did not issue any Certificate of Occupation in respect of the Building erected by the Plaintiff.
97. Additionally, upon being referred to the Document at page 17 of the 1<sup>st</sup> Defendant's Bundle of documents, the witness identified same and indicated that the Document in question is the Enforcement Notice which was issued to the Plaintiff herein and which demanded that the Plaintiff does remove the offensive building from the Road of Access.
98. On the other hand, it was the testimony of the witness that despite issuance and service of the Enforcement Notice, the Plaintiff failed to comply with the terms thereof.
99. In respect of Building/Development approval number DC834, which had been produced by the Plaintiff, the witness pointed out that same was never issued by the 1<sup>st</sup> Defendant. Furthermore, the witness added that the said Development approval does not obtain at the records of the 1<sup>st</sup> Defendant.
100. On cross examination by Learned counsel for the Plaintiff, the witness herein testified that it is possible for a Public Property to pass over to and be converted into a private property.
101. On the other hand, upon being referred to the Document at page 31 of the Plaintiff's Bundle of Documents, the Witness states that the Document in question is a copy of Certificate of Title/ Grant relating to I.R No. 85234.
102. Other than the foregoing, the witness also testified that the Grant/Title which has been shown to him relates to a portion of the Public Road of Access. As pertains to whether Development Approval Number DC834; was issued by the 1<sup>st</sup> Defendant, the witness pointed out that the said documents was never issued by the 1<sup>st</sup> Defendant. In any event, the witness added that there would be no minutes over and in respect of a non-existent meeting.
103. Other than the foregoing, the witness herein also stated that there was no approval of any Building Plan over and in respect of the portion of the suit property. Further, the Witness added that the allegation that there was an approval issue in January 2004; was misleading and incorrect.
104. Whilst still under cross examination by Learned counsel for the Plaintiff, the witness herein admitted that the 1<sup>st</sup> Defendant duly issued an Enforcement Notice against the Plaintiff. However, the witness added that the terms of the Enforcement Notice were never complied with and/or adhered to.
105. Be that as it may, the witness stated that Nairobi City County Government was not responsible for the demolition of the building standing on the Suit Property, even though same had issued the Enforcement Notice.



**The Second Witness Who Testified On Behalf Of The 1<sup>st</sup> Defendant Was Judith Wambui Gitau. Same Testified As Dw2.**

107. It was the Evidence of the witness that same is a Physical Planner by Profession and currently, same is the Assistant Director- in Charge of Policy Implementation at the City County Government of Nairobi.
108. Furthermore, the witness herein also averred that by virtue of her position, same is conversant and familiar with the facts of this case.
109. Other than the foregoing, the witness intimated to the Honourable court that same recorded a Witness statement in respect of the instant matter and thereafter same proposed to adopt and rely on the witness statement. For good measure, the witness statement by the witness herein was therefore adopted and constituted as the Evidence in- chief.
110. Other than the Witness statement, the witness also alluded to a Letter dated the 5<sup>th</sup> March 1999; and which Letter the witness sought to produce as an Exhibit. For coherence, the Letter dated the 5<sup>th</sup> March 1999; was thereafter admitted and marked as Exhibit- D5.
111. On cross examination by Learned Counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 4<sup>th</sup> Defendants, the witness herein pointed out that in respect of the suit property, there was no approved Part Development Plan [PDP] to underpin the alienation thereon.
112. Furthermore, upon being referred to page 57 of the Plaintiff's Bundle of Documents, the witness identified the documents thereat as the Letter of allotment. In addition, the witness stated that the Letter of allotment was in respect of un-surveyed portion of Land.
113. Other than the foregoing, the witness averred that the Director of City Engineering objected to the consolidation of the three[3] meter lane to the Plaintiff's plot. However, the witness further averred that the objection by the City Engineer was neither taken into account nor considered.
114. On cross examination by Learned counsel for the Plaintiff, the witness stated that the Letter from the City Engineer was objecting to the Development on the Green Space/area.
115. As concerns to whether or not a Part Development Plan [PDP], was prepared and approved towards the allocation of the three [3] meter lanes to the Plaintiff, the witness herein testified that no Part Development Plan was ever issued.
116. Besides, it was the testimony of the witness that a Letter of allotment cannot issue and/or be issued without a duly approved Part Development Plan.
117. With the foregoing testimony, the 1<sup>st</sup> Defendant's case duly closed.

**The 3<sup>Rd</sup>, 4<sup>Th</sup> And 5<sup>Th</sup> Defendants' Case:**

118. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' case revolves around and gravitates around the Evidence of four [4] witnesses, namely, Gordon Odeka Ochieng, Timothy Wayua Mwangi, Engineer Samuel M Charagu and Wilfred Muchai, who testified as DW3, DW4, DW5 and DW6, respectively.
119. It was the testimony of DW3 that same is currently the Director Land Administration in the Ministry of Lands, Public Works, Housing and Urban Development. In any event, the witness added that same has been the Director Land Administration for more than One [1] year, as at the date of his testimony before the Honourable court.



120. On the other hand, the witness testified that by virtue of his portfolio, same is conversant/ familiar with the facts of this matter. Furthermore, the witness ventured forward and intimated that same has recorded a witness statement dated the 14<sup>th</sup> November 2019.
121. Additionally, the witness implored the Honourable court to adopt and reiterate the contents of the Witness statement dated the 14<sup>th</sup> November 2019. In this regard, the Witness statement by the witness was duly adopted and admitted as the evidence in chief of the witness.
122. Other than the foregoing, the witness also alluded to the Supplementary List and Bundle of Documents dated the 15<sup>th</sup> November 2019, containing 21 Documents and thereafter sought to have Documents numbers 1 to 17 thereunder, admitted as Exhibits before the court.
123. In the absence of any objection to the admission of Documents 1 to 17 at the foot of the List dated the 15<sup>th</sup> November 2019, same were thereafter produced as Exhibits 1 to 17, respectively, on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.
124. On cross examination by Learned Counsel for the Plaintiff, the witness pointed out that the allocation of the suit property to and in favor of the Plaintiff was irregular. In any event, the witness added that the Plaintiff herein was aware and knowledgeable of the facts that the suit property constituted a Road Reserve.
125. Whilst under further cross examination, the witness avers that the awareness of the Plaintiff that the suit property fell on a Road Reserve is anchored on the contents on the Letter which was authored by the Plaintiff and which is dated 4<sup>th</sup> August 1998.
126. It was the further testimony of the witness that the Letter in question, namely, the Letter dated 4<sup>th</sup> August 1998; was in respect of the additional portion/parcel of lands, which comprised of the three [3] meter lanes, sitting on either side of the original property which was registered in the name of the Plaintiff.
127. Furthermore, the witness also averred that the Plaintiff herein was aware of the status of the land prior to and before same made the application to the Office of the Commissioner of Land.
128. The next witness who testified on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants was Timothy Wayua Mwangi. Same testified as DW4.
129. It was the testimony of the witness that same is currently the Director of Physical Planning in the Ministry of Lands, Public Works, Housing and Urban Development.
130. Furthermore, the witness averred that same has worked with the Ministry for more than 36 years and by virtue of his office/ position, same is conversant with the facts of the instant matter.
131. Other than the foregoing, the witness averred that same has recorded a witness statement dated the 14<sup>th</sup> January 2020; and in this regard, same sought to adopt and rely on the contents of the said Witness statement.
132. Suffice it to point out that the Witness statement was thereafter adopted and constituted as the Evidence- in- chief of the witness.
133. Other than the foregoing, the witness alluded to the further List and Bundle of Documents dated the 14<sup>th</sup> January 2020; and thereafter sought to produce the documents at the foot of the said List.



134. In the absence of objection from the advocates for the adverse Parties, the Documents at the foot of the further List of Documents dated the 14<sup>th</sup> January 2020; was duly produced and admitted as Exhibits D18.
135. On cross examination by Learned Counsel for the Plaintiff, the witness herein pointed out that the allocation of the suit plot was irregular and illegal. In addition, the witness stated that the allocation of the suit plot was not correct.
136. Whilst under further cross examination, the witness averred that no Part Development Plan was ever prepared or approved to underpin the allocation of the suit Plot.
137. Other than the foregoing, it was also the testimony of the witness that the Part Development Plan [PDP], would have been prepared and thereafter approved by the Director of Physical Planning culminating to assignment of a number thereto before being escalated to the Commissioner of Land for purposes of allocation of land.
138. Be that as it may, the witness averred that the process leading to the alienation in respect of the suit property was irregular, illegal insofar as no Part Development Plan was ever generated and/or approved.
139. The next witness who testified on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants was Engineer Samuel M Charago. Same testified as DW5.
140. It was the testimony of the witness that same is currently the Acting Secretary of the Multi-Agency Committee; Department of Public Works, wherein same has worked for a duration of over 32 years.
141. Additionally, the witness averred that by virtue of his position/ portfolio and office, same is conversant and familiar with the facts of the instant matter.
142. Other than the foregoing, the witness stated that same recorded a Witness statement dated the 2<sup>nd</sup> October 2019; and which witness statement same sought to adopt and rely on as his Evidence- in- chief. In this respect, the Witness statement dated the 2<sup>nd</sup> October 2019; was thereafter admitted and constituted as the Evidence- in- chief of the witness.
143. Besides, the witness herein also alluded to the List and Bundle of documents dated the 2<sup>nd</sup> October 2019; and thereafter sought to produce the Documents at the foot thereof as an Exhibit. Suffice it to point out that the Documents in question was thereafter produced and admitted as Exhibit D19 on behalf of the named Defendants.
144. Other than the foregoing, the witness also alluded to the List and Bundle of Documents dated the 15<sup>th</sup> November 2019; and thereafter sought to produce Documents number 18 to 22 as Exhibit on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.
145. There being no objection to the production of the named documents as Exhibits, same were duly produced and admitted as Exhibits 20 to 24, respectively, on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.
146. On cross examination by Learned Counsel for the 1<sup>st</sup> Defendant, the witness herein pointed out that he was the Secretary of the Multi- sectoral Committee which comprised of various State Agencies, inter- alia, the 1<sup>st</sup> Defendant herein.
147. Furthermore, the witness pointed out that the Multi- sectoral Committee received a Compliant from the National Police Service [NPS], that there was a building that was being constructed and which was blocking and/or restricting access to Central Police Station – Nairobi.



148. It was the further testimony of the witness that upon receipt of the complaint from National Police Service, the Multi- sectoral Committee referred the complaint to various State agencies to facilitate investigations pertaining to the manner in which the suit property was alienated in favor of the Developer, namely, the Plaintiff herein.
149. On cross examination by Learned Counsel for the Plaintiff, the witness pointed out that in the course of the investigations that were undertaken by the Multi sectoral committee, it was ascertained / confirmed that the allocation of the suit property to the Plaintiff was illegal.
150. Furthermore, the witness also admitted that same was aware that the 1<sup>st</sup> Defendant herein proceeded to and issued an Enforcement Notice to the Plaintiff. Nevertheless, the witness stated that even though the duration at the foot of the Enforcement Notice lapsed the Multi- sectoral Committee did not proceed with the demolition of the offensive structure because the Plaintiff herein lodged an appeal with the Liaison Committee pertaining to and concerning the Enforcement Notice.
151. Whilst under further cross examination by Learned counsel for the Plaintiff, the witness herein stated that the allocation of the suit property was unlawful.

**The Last Witness Who Testified On Behalf Of The 3<sup>rd</sup>, 4<sup>th</sup> And 5<sup>th</sup> Defendants Was One, Namely, Wilfred Muchai. For Coherence, Same Testified As Dw6.**

153. It was the testimony of the witness that same is currently a Principal Land surveyor, working with the Ministry of Lands, Public Works, Housing and Urban Development. Furthermore, the witness added that same has worked with the Department of Survey for a duration in excess of a duration 28 years.
154. On the other hand, the witness intimated to the Honourable court that same has since recorded a witness statement dated the 6<sup>th</sup> March 2023; and in respect of which same has explained the facts attendant to the subject matter. Consequently and in this regard, the witness has sought to adopt and rely on the witness statement as his Evidence in chief.
155. Pursuant to and at the instance of the witness, the witness statement dated the 6<sup>th</sup> March 2023; was duly admitted and thereafter adopted as the Evidence- in -chief of the witness.
156. Additionally, the witness alluded to the List and Bundle of Documents dated the 15<sup>th</sup> November 2020; and thereafter sought to produce specific documents, namely, Documents numbers 23, 24 and 25, respectively.
157. Suffice it to point out that the named documents were thereafter produced and marked as Exhibits D23, D24 and D25, respectively, on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.
158. Further and in addition, the witness also referred to the List and Bundle of documents dated the 14<sup>th</sup> January 2020; and sought to produce Document number 2 thereunder.
159. In the absence of any objection by Learned counsel for the adverse Parties, Document number 2 was thereafter produced and admitted as Exhibit D28 on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.
160. On cross examination by learned counsel for the Plaintiff, the witness herein stated that same is conversant with a document referred to as a Deed Plan. In this respect, the witness added that a Deed plan can either be prepared by the Director of Survey or by a Licensed surveyor.
161. Nevertheless, the witness averred that where the Deed Plan is prepared by a Licensed Surveyor, same is required to be submitted to the Director of Survey for approval and authentication.



162. Whilst still under cross examination, the witness herein admitted that in respect of the suit property there was a survey that was done by a Private surveyor. However, the witness hastened to state that the survey which was carried out was irregular insofar same was undertaken over a portion of land that had been reserved as Road reserve.
163. Upon being shown Survey Plan Number FR386/192, the witness pointed out that the said Survey Plan relates to L.R No. 209/12152 and Government Land (GL).
164. Be that as it may, the witness testified that the Survey Plan (FR), which has been shown to him was irregular insofar as same touches on an existing Road reserve. In any event, the witness added that once the Survey is irregular, then the Certificate of title that is underpinned by such irregular survey, is similarly irregular.
165. Finally, the witness pointed out that the Survey Plan (F/R) relating to the suit property was created on a Road reserve.
166. With the foregoing testimony, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants' case was duly closed.

#### **Parties' Submissions:**

167. At the close of the Defendants' case, Learned counsel for the respective Parties covenanted to file and exchange written submissions. Consequently and in this regard, the Honourable court proceeded to and circumscribed the timeline for the filing and exchange of the written submissions.
168. Instructively, Learned counsel for the Plaintiff thereafter proceeded to and filed written submissions dated the 23<sup>rd</sup> May 2023. However, simultaneously with the filing of the maiden submission, the Plaintiff also filed an Application of even date, wherein same sought to have the Plaintiff's case re-opened.
169. Suffice it to point out that the Honourable court was called upon to re-calibrate the directions that had hitherto been granted, with a view to accommodating the Application dated the 23<sup>rd</sup> May 2023.
170. Be that as it may, the application dated the 23<sup>rd</sup> May 2023; was thereafter heard and disposed of vide Ruling dated the 25<sup>th</sup> July 2023, whereupon the Application under reference was dismissed.
171. Subsequently, the 1<sup>st</sup> Defendant proceeded to and filed written submissions dated 6<sup>th</sup> October 2023, whereas the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants also filed very elaborate written submissions comprising of a total of 369 pages.
172. Upon being served with the written submissions on behalf of the named Defendants, Learned counsel for the Plaintiff sought for and obtained leave to file Rejoinder submissions, which were ultimately filed and served the 17<sup>th</sup> October 2023.
173. Suffice it to state and underscore that the various sets of written submissions, (whose details have been highlighted in the preceding paragraph), forms part of the record of the court and hence same shall be considered in the course of crafting this Judgment.
174. Further and in any event, it would be remiss of me not to mention that the advocates for the respective Parties have indeed undertaken thorough-going Research and thereafter rendered elaborate and exhaustive submissions, coupled with numerous authorities.
175. Whereas I have not been able to reproduced the elaborate submissions filed by and on behalf of the respective advocates, it is worthy to observe that serious research went into the written submissions.



176. Without belaboring the point, a commendation suffices.

**Issues For Determination:**

177. Having reviewed the pleadings filed by and on behalf of the respective Parties; upon taking into account the evidence tendered (both oral and documentary) and upon consideration of the elaborate submissions filed by Learned counsels for the respective Parties'; the following issues do emerge and are thus worthy of determination;
- i. Whether the Plaintiff herein was a bona fide purchaser for value as pertains to L.R No. 209/12152 (the Original Property) and whether the original title is indefeasible, either in the manner alleged or otherwise.
  - ii. Whether the acquisition, transfer and ultimate registration of L.R No. 209/14319 (original L.R No. 209/12152 and G.L) was lawful or otherwise.
  - iii. Whether the Plaintiff is entitled to the reliefs sought at the foot of the Plaintiff or otherwise.

**Analysis And Determination:**

**Whether The Plaintiff Herein Was A Bona Fide Purchaser For Value As Pertains To L.r No. 209/12152 (the Original Property); And Whether The Original Title Is Indefeasible, Either In The Manner Alleged Or Otherwise.**

178. It was the Plaintiff's testimony that same bought, purchased and therefore acquired all that piece of land otherwise referred to as L.R No. 209/12152 from Specialized Supplies Investment Ltd, albeit through a Private treaty with Standard Chartered Bank Ltd, who held a charge over the said property, at the time of the sale thereof.
179. Furthermore, PW1 and PW2 respectively testified and contended that at the time when the Plaintiff company bought and thereafter acquired the title to the said property, the Plaintiff was neither privy to nor knowledgeable of any defect in the title of her predecessor or at all.
180. On the other hand, PW1 and PW2 also testified that prior to and before the purchase of the original parcel of land, namely, L.R No. 209/12152, the Plaintiff company engaged a firm of advocate, who undertook due diligence over and in respect of the said property. However, it was admitted that the search arising out of (sic) the due diligence undertaken by the transaction Advocate, was neither tendered nor produced before the court.
181. On the other hand, both PW1 and PW2 also testified that prior to purchasing the said property, same also had occasion to visit the Locus in quo, with a view to appreciating the ground and the obtaining situation thereto. In this regard, PW2 stated that upon the visitation, same established that the land in question was vacant save that there were various hawkers and illegal kiosks proprietors.
182. Furthermore, it was the testimony of both PW1 and PW2 that even though they dealt with both Enock Tuitoek, on behalf of M/s Specialized Suppliers Investment Ltd and Standard Chartered Bank Ltd, same were never availed a copy of the Letter of allotment relative to the allocation of L.R No. 209/12152.
183. Besides, it is also worthy to recall and reiterate that both PW1 and PW2 also testified and stated that same were not also availed a copy of a Part Development Plan [PDP], relating to the allocation of L.R No. 209/12152.



184. Nevertheless, the two named witness, who testified that same are the Directors of the Plaintiff company, pointed out that at the time when L.R No. 209/12152 was sold to the Plaintiff company, same had a Certificate of Title/Grant and hence what the Plaintiff company acquired was a legitimate title, issued by and on behalf of the Government of Republic of Kenya.
185. Premised on the basis that the Plaintiff company bought and acquired a property which was already registered and a Certificate of title issued, it has been contended that the Plaintiff company is therefore Bona fide purchaser for value without notice of any prior defect in the title of her predecessor.
186. Arising from the foregoing contention, the Plaintiff has therefore invited the Honourable Court to find and hold that as concerns her acquisition of the original property, same was lawful and legitimate and thus deserving of protection by dint of Article 40(6) of *the Constitution* 2010.
187. However, before proclaiming that the Plaintiff herein is entitled to the protection espoused and entrenched vide Article 40(6) of *the Constitution* 2010; it is imperative to ascertain and authenticate whether the title, which was ultimately sold and transferred to the Plaintiff was procured procedurally, legally and in accordance with the laid down provisions of the Government Lands Act, Chapter 280 Laws of Kenya (now repealed).
188. To start with, it is not lost on this Honourable court that given the extent to which various persons have gone towards acquiring landed property, it is no longer sufficient for a title holder to wave a Certificate of Title and thereafter to imagine that such certificate of title, by itself, suffices to underpin ownership of land.
189. Invariably, it is important to underscore that before a court of law can proclaim a particular certificate of title as being indefeasible, the court of law is called upon to interrogate the process attendant to the issuance of the impugned certificate of title. Consequently and in this regard, it behooves this court to undertake due examination with a view to authenticating the validity, propriety and legality of the Certificate of title in question.
190. To this end, it suffices to take cognizance of the holding/ ratio decidendi of the court in the case of *Daudi Kiptugen v Commissioner Of Lands Nairobi Lands & 4 others* [2015] eKLR, where the court held thus;

“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.”



191. Furthermore, the position espoused in the decision (supra) was highlighted and amplified by the Court of Appeal in the case of *Munyu Maina versus Hiram Gathiha Maina* [2013] eKLR, where the court stated as hereunder;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony. We find that a trust exists in relation to the suit property.

192. Flowing from the ratio decidendi elucidated in the decisions cited herein before, it suffices to state and underscore that prior to and before the Plaintiff herein can invoke and rely on the Doctrine of Bona fide purchaser for value without notice of any defect in the title of her predecessor, it behooves the Plaintiff to undertake due diligence and thereby ascertain whether her predecessor indeed acquired and possessed a Valid title to the property under reference.

193. In any event, it is not lost on this Honourable court that the ingredients that underpin the plea of bona fide purchaser for value without notice, have since been amplified and re-calibrated upon by the Court of Appeal in the case of *Mwangi James Njehia versus Janetta Wanjiku Mwangi & another* [2021] eKLR, where the court stated and observed as hereunder;

37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have



been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

194. Arising from the dictum, which has been underlined in the preceding paragraph, it is imperative to observe and emphasize that before the invocation and application of the Doctrine of Bona fide purchaser for value without notice, it must be ascertained and authenticated that the predecessor who held the title beforehand had a Valid and legal title and not otherwise.
195. Nourished by the exposition of the law, which is discernable from the various decisions which have been alluded to in terms of the preceding paragraphs, it is now appropriate and expedient to revert back to this matter and to endeavor and ascertain whether the Plaintiff’s predecessor held a valid title, which was capable of being conveyed to the Plaintiffs or at all.
196. Back to the testimony of PW1. It is worthy to recall that PW1 testified that during the course of the transaction attendant to the purchase, transfer and ultimate registration of the suit property in favor of the Plaintiff company, same was never availed a copy of the Letter of allotment in respect of the property in question.
197. Furthermore, it is not lost on this court that the Letter of allotment, if any, in respect of L.R No. 209/12152, was not one of the documents which was produced before the court. Consequently and in this regard, the court was left in darkness, as to whether or not any such Letter of allotment was issued in favor of the Plaintiff’s predecessor.
198. Similarly, to the extent that the Letter of allotment was neither availed nor tendered to court, the court herein is not capable of ascertaining and/or verifying whether, if at all, the conditions attendant to the Letter of allotment were timeously complied with and/ or adhered to or otherwise.
199. Thirdly, it is also worth recalling that the same PW1 also pointed out that in the course of the transaction; same also was never availed a copy of the Part Development Plan attendant to and in respect of the allocation of L.R No. 209/12152 or at all.
200. As pertains to the significance of a Part Development Plan, it is worthy to reiterate that it is the critical document whose preparation would signify the availability of the Plot/land, which is the subject of the intended allocation or alienation. Consequently, the absence of a Part Development Plan will therefore negate the allocation and/or alienation of a particular plot or piece of land.
201. To the extent that the Plaintiff herein was unable to produce or avail to court the Letter of allotment and the Part Development Plan, if any, relative to the allocation of L.R 209/12152, this court is left in a conundrum and thus incapable of speaking to the validity of the title which was hitherto issued in favor of M/s Specialized Suppliers Investment Ltd, who were the Plaintiff’s predecessor in title.
202. Other than the foregoing observation, there is yet another important aspect which merits due consideration and analysis. For good measure, this aspect touches on the evidence that was tendered by PW3, namely, Suleiman Abdul shakul Harunani.
203. At this juncture, it is appropriate to re-produce the evidence of PW3; whilst under cross examination by Learned counsel Mr. Allan Kamau, the Lrincipal litigation Counsel.
204. For coherence, same sated as hereunder;

“ The suit property is within the road of access. The section that forms the suit property sits on the road of access. I have a deed of surrender of the road of access. However, I don’t know



whether same has been produced before the court. I now say that same (deed of surrender has not been adduced before the court)”

205. Interestingly, the Plaintiff own Expert witness, namely, Surveyor, concedes that the entirety of the suit property, namely, L.R 209/142319; which comprises of the original property, which the Plaintiff contend to have bought, is sitting on a road of access.
206. Taking into account the admission/concession by PW3, the question that this court must now grapple with is whether the title of L.R No. 209/12151, which was purchased by the Plaintiff company was valid in the first place.
207. Clearly and to my mind, the root of the title pertaining to and concerning L.R No. 209/12152, upon which the plea of Bona fide purchaser for value is premised, was vitiated and inflicted with grave illegality.
208. Furthermore, it is not lost on this court that whereas the Commissioner of Land was mandated to allocate Government Land subject to the statutory limitations described in the Government *Land Act*, now repealed, the allocation/alienation could only relate to unalienated Government Land and not otherwise.
209. Surely, land which had already been reserved and designated as a Road reserve, for future Public use, cannot by any stretch of imagination, be deemed to constitute unalienated land for purposes of allocation or otherwise.
210. Arising from the foregoing observation, it is instructive to state and underscore that by the time the Commissioner of Land was purporting to alienate L.R No. 209/12152, to the Plaintiff's predecessor, there was no land capable of such allocation or alienation whatsoever. Simply put, the Commissioner of Land and the Plaintiff's predecessor were engaged in mere paper transaction, albeit in vacuum.
211. Notably, the Plaintiff's predecessor did not procure and obtain valid title to L.R No. 209/12152, which could by extension be passed over to and conveyed in favor of the Plaintiff.
212. To buttress the legal position that a Letter of allotment can only be issued to and in respect of an existing and available land and not otherwise, it suffices to adopt and reiterate the dictum of the Court of Appeal in the case of Benja Properties Limited versus Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, is imperative. For coherence, the Honourable of Court of Appeal held as hereunder;

“Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5<sup>th</sup> respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.
213. Simply put, where the title of the predecessor is vitiated by and inflicted with an illegality, the entire title is negated and rendered a nullity and hence any subsequent transactions touching on and/or concerning the said title cannot vest in the successor any legitimate rights and/or interest whatsoever. Suffices to say, that such a title is void ab initio.
214. Before departing from the question of bona fide purchaser for value, which the Plaintiff has highlighted and sought to rely on in vindicating the validity of her title to the parcel of land which was purchased,



namely, L.R No. 209/12152, it is ripe to take cognizance of the dictum of the Supreme Court in the case of Dina Management Limited versus County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), where the court held thus;

“(93) As held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No. 239 of 2009 [2013] eKLR, where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.

(94) To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.

215. In view of the foregoing, I come to the conclusion that the Plaintiff herein cannot implead and invoke the Doctrine of bona fide purchaser for value without any notice of defect on her predecessor’s title, when it is evident that the title under reference is vitiated by illegality and is thus void.
216. At any rate, it is also worth mentioning that even though the Plaintiff anchored her case on the Doctrine of bona fide purchaser for value, it is worth mentioning that the title of the property which was purchased by the Plaintiff was ultimately surrendered for amalgamation with the three (3) meter lanes on either side and thereafter the title of what was purchased ceased to exist.
217. Essentially, the suit property, namely, L.R No. 209/14319, cannot therefore be vindicated on the basis of bona fide purchaser for value. To the contrary, the vindication of the suit property must be anchored on the subsequent transaction, inter-alia, the Letter of allotment dated the 8<sup>th</sup> November 2000; compliance with the terms thereof, if at all, and the attendant procedures underpinned by the Government *Land Act*, Chapter 280 Laws of Kenya, now repealed.

**Whether the acquisition, transfer and ultimate registration of L.R No. 209/14319 (Original L.R No. 209/12152 and G.L) was lawful or otherwise.**

218. Even though the Plaintiff herein had hitherto bought and/or purchased the original property, same thereafter applied vide Letter dated 4<sup>th</sup> August 1998 to be allocated three (3) meter lanes which were existing on either side of the original property which had been purchased by the Plaintiff.
219. Subsequently, the Commissioner of Lands proceeded to and generated a Letter of allotment reference number 157581/24; dated the 8<sup>th</sup> November 2000; whereupon same (sic) allocated the three (3) meter lanes to the Plaintiff company.
220. Arising from the issuance of the Letter of allotment, the Plaintiff herein was called upon to, inter-alia, accept the Letter of allotment and make the requisite payments albeit within 30 days from the date of issuance of the impugned Letter of allotment.
221. Despite having tendered and availed the Letter of allotment as Exhibit P6, the Plaintiff herein, however failed to tender and produce before the court Letter of acceptance and payments of the statutory levies, enumerated in the body of the Letter of allotment.



222. To the extent that the Plaintiff did not avail and/or produce before the court a Letter of acceptance and evidence of payments of the statutory levies within the set timeline, it is difficult, nay, impossible for the court to ascertain whether the conditions at the foot of the Letter of allotment were met or at all.
223. Nevertheless, it is imperative to underscore that the burden of proving that the terms of the Letter of allotment were timeously complied with, rested with the Plaintiff and not otherwise.
224. To this end, it suffices to adopt and reiterate the holding in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR, where the Court of Appeal held as hereunder;

“With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence, when the 1<sup>st</sup> respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the Evidence Act to be demanding of a party like the 1<sup>st</sup> respondent that:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

225. In the absence of evidence to authenticate whether the conditions alluded to under the impugned Letter of allotment were timeously complied with, a critical ingredient that anchors the validity of the title to the suit property, which is being claimed by the Plaintiff remains unsubstantiated.
226. To my mind, the lack of such critical evidence similarly impacts on the process and procedure that was adopted, deployed and applied in the acquisition of the suit property by the Plaintiff.
227. Secondly, PW3 who was the Plaintiff’s Expert witness testified and stated that if the land in question had hitherto been reserved and designated as a road reserve then same was not available for alienation. However, the witness ventured forward and stated that if such land were to be alienated; then a Part Development Plan [PDP], would need to be prepared and thereafter approved by the Director of Physical Planning and the Commissioner of Land, now defunct.
228. Perhaps, it is important to re-visit the testimony of PW3, whilst under cross examination by counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. For coherence same stated as hereunder;

“According to survey plan (F/R67/12), there was a road of access. I am aware of the process of allocation/alienation of a road. A part development plan is required for allocation of a road of access. The same is to be prepared by the director of physical planning under the authority of the commissioner of land, now defunct. I did not see or come across any part development plan for the alienation of the road of access herein. The suit property is within the road of access”

229. Other than the testimony of PW3, the question of whether a Part Development Plan was prepared prior to and before the alienation of the three (3) meter lanes on either side of the original parcel of land was also adverted to by DW2, namely, Judith Wambui Gitau who stated as hereunder whilst cross examination by Learned counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants;

“In respect of the suit property, there was no part development plan for the alienation thereon. Referred to page 57 of the Plaintiff bundle and the witness state that the document thereunder is a letter of allotment. The letter of allotment was in respect of an surveyed portion of land.”



230. Clearly, even DW2 underscores the fact that no Part Development Plan was ever issued and/or approved prior to the impugned alienation of the suit property.
231. First forward, the issue of Part Development Plan, if any, was also adverted to by DW4, namely, Timothy Wayua Mwangi, who intimated to the court that same is currently the Director of Physical Planning; in the Ministry of Lands, Public Works, Housing and Urban Developments.
232. Whilst under cross examination by Learned counsel for the Plaintiff, the witness herein stated as hereunder;
- “The allocation of the suit property was not correct. I wish to state that no part development plan was prepared in respect of suit property. further I wish to add that the procedure under the Government [Land Act](#), Chapter 280 Laws of Kenya, now repealed were not complied with”
233. Additionally, the said witness proceeded to and stated as hereunder;
- “The Part Development Plan would have to be approved by the director of physical planning and the same would be assigned the requisite number. The process of allocation and alienation of the suit property was irregular. The allocation of the suit property was illegal because there was no PDP prepared using the cartographic standards as authorized under the law”
234. Instructively, even though a Part Development Plan was a critical document to anchor the allocation and alienation of the suit property to the Plaintiff, same however, did not find it appropriate and/or expedient to procure one, if any, and to produce same before the court.
235. Suffice it to point out that in the absence of a duly PDP, the alienation of the suit property would similarly be invalidated and vitiated. Simply put, it is the Part Development Plan, if any, that would signify that the land intended to be alienated is indeed available.
236. Consequently and in the absence of the requisite Part Development Plan, it cannot be verified whether the Commissioner of Land; acted within the scope of his statutory mandate or otherwise.
237. As pertains to the import and tenor of a Part Development Plan, it is appropriate to cite and adopt the ratio decidendi enunciated and elaborated upon in the case of Dina Management Limited versus County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), where the court held thus;
104. The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in Nelson Kazungu Chai & 9 Others vs. Pwani University [2014] eKLR as follows:“... It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.
131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co. Ltd vs. The Hon. Attorney General, Mombasa HCCC No. 276 of 2013 where Njagi J. held as follows: “Secondly, all the defence witnesses



were unanimous that in the normal course of events, planning comes first, then surveying follows.

A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.<sup>132</sup> A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...”

105. This process is restated in *African Line Transport Co. Ltd v The Hon. Attorney General, Mombasa*, HCCC No.276 of 2003 [2007] eKLR where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot.
106. We note that the suit property was allocated to H.E. Daniel T. Arap Moi who was not a party to the suit. The 2<sup>nd</sup> to 6<sup>th</sup> respondents on the other hand at the trial court in the replying affidavit of Gordon Odeka Ochieng in response to ELC Petition 12 of 2017 stated that certain documents that were required to support the allocation of the suit property to H.E. Daniel T. Arap Moi were missing. These were, “the letter of application addressed to the Commissioner of Lands seeking to be allocated the suit land; and a Part Development Plan (PDP) showing the suit property in relation to the neighbouring parcels of land.”
238. Lastly, evidence was tendered before the Honourable court that the survey which was carried out over and in respect of the suit property prior to the preparation of the Survey Plan was undertaken on an existing Road of access; and hence the survey Plan arising out of the survey and which gave rise to the Deed Plan was therefore illegal.
239. To be able to appreciate the nature of the evidence tendered in this respect, it is appropriate to reproduce the testimony of DW6, namely, Wilfred Muchai whilst under cross examination by Learned counsel for the Plaintiff.
240. For good measure, DW6 stated as hereunder;

“There was a survey that was done. It was done by a private surveyor. However, the survey was irregular. I do confirm that the survey in question was done over a portion of land that have been reserved/designated as a road. The survey plan namely FR No. 386/192 relates to L.R.No. 209/12152 and Government Land (GL). The survey plan (FR) herein was irregular insofar as same was done on an existing road reserve”
241. From the testimony of DW6, which testimony was not controverted by the Plaintiff, it is evident that the suit property actually sits on a Public Road Reserve and not otherwise.
242. At any rate, the fact that the suit property sits on a Road Reserve was also adverted to and confirmed by Suleiman Abdul shakur Harunani, who testified as PW3.
243. In my humble, albeit considered view, evidence abound to show that the suit property was actually curved out of a Public Road Reserve which had hitherto been reserved for future public use. Quiet clearly, the portion of land which is the subject of the instant proceedings constitutes a Road which cannot be converted into private use or at all.



244. Despite the foregoing, the Plaintiff herein happily holds a Certificate of Title/ Grant; and same has the audacity to approach this Honourable court to proclaim her as the lawful owner thereof.
245. I must say, that this is a very sad day for Kenya, if persons would knowingly appropriate a Public Road of access; and thereafter seek to be declared/ proclaimed as owners of such kind of properties.
246. Invariably, the Country had reached a point of no return and had the People of Kenya not given unto themselves, *the Constitution* 2010, no doubt , the country would have plummeted into the abyss.
247. Without belaboring the point, I opine that it is appropriate to reiterate the holding in the case of Republic versus Minister for Transport & Communication & 5 others ex parte Waa Ship Garbage Collector & 15 others (2004) 1 KLR (E&L), where the court (per Maraga J as he then was) stated as hereunder;

“ Courts should nullify titles by land grabbers whose stare you at your face and wave to you a title of the land grabbed and loudly plead the principle indefeasibility of titles deed. It is clear from Section 75 of *the Constitution* that the doctrine of public trust is recognized and provided for by the superior law of the land and applies in a very explicit way as regards trust land.

The doctrine is, however not confined to trust land and covers all common properties and resources as well as public land. Although the doctrine had origins in roman law, it is now a common heritage in all countries who have adopted the English common law. It is quiet evident that should a constitutional challenge succeed either under the trust land provisions of *the constitution* or under Section 1 and 1(a) of *the constitution* or under the doctrine of public trust a title would have to be nullified because *the constitution* is the supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trusts for the needs of that society. Alienation of land that defeats the public interests goes against the letter of Section 1 and 1(a) of *the Constitution* (retired constitution)”

248. It is imperative to underscore and reiterate that the words of wisdom which have been alluded to and captured in the foregoing paragraph, were spoken long before the promulgation of *the Constitution* 2010.
249. Invariably, the question that does arise is how much more do they ring a bell to date under the provisions of the progressive Constitution 2010.
250. Surely and to my mind, it would amount to dereliction of a Constitutional duty, if this Honourable court were to shut its eyes and countenance/ sanction the kind of alienation that underpin the Grant in respect of the suit property.
251. However, I owe it to Kenyans and to the General Public that public properties, whether immovable or otherwise, the suit property not excepted, are properly protected, preserved and conserved for posterity.
252. Finally, I opine that it would not be mete to terminate the discussion pertaining to the subject issue without reiterating the dictum in the case of Henry Muthee Kathurima versus Commissioner Of Lands & another [2015] eKLR, where the court held thus;

“ 18. We have considered the submissions by the appellant in this appeal and have no hesitation to state that we concur with the findings and decision of the trial court. The Commissioner of Lands had no power to alienate public land and



any action taken without due authorization is a nullity. We cite the case of Said Bin Seif v. Shariff Mohammed Shatry, (1940)19 (1) KLR 9, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity, and not only voidable but void with no effect, either as legitimate expectation, estoppel or otherwise.

253. In a nutshell, my answer to issue number two[2] is to the effect that the suit property was acquired through unlawful and illegal means, which vitiate the entire title/ Grant and thus renders same void, for all intents and purposes.
254. For the avoidance of doubt, the Plaintiff herein cannot invoke the Concept of indefeasibility of title, yet what is alluded to came out of nothing. Suffice it to invoke and cite the Doctrine of Ex-nihilo-nihil-fit (out of nothing comes nothing).

#### **Whether The Plaintiff Is Entitled To The Reliefs Sought At The Foot Of The Plaint Or Otherwise.**

255. The Plaintiff herein has approached the Honorable court and sought for a plethora of reliefs, inter-alia, declaration that same is the lawful owner and/or proprietor of the suit property, namely, L.R No. 209/14319, situate along Kijabe Street, within the city of Nairobi.
256. However, despite the contention by and on behalf of the Plaintiff that same is a legitimate proprietor of the suit property, this court has since found and held that the process leading to the acquisition, transfer and registration of the suit property, in the name of the Plaintiff was vitiated by grave illegalities and improprieties.
257. Having found and held that the Plaintiff's title is vitiated by illegalities, it then means that the prayers pertaining to Declaration and Permanent injunction have been sought for in vacuum. Consequently, same do not suffice.
258. Other than the foregoing, the Plaintiff also sought for General Damages for trespass, arising from (sic) the invasion of the suit property by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the alleged demolition of the building standing thereon.
259. Nevertheless, it is appropriate and expedient to point out that a prayer for Damages for trespass can only be espoused and mounted by a legitimate proprietor of the property. However, in the instant case, the Plaintiff has not been able to vindicate her title to and in respect of the suit property.
260. Essentially, without establishing and demonstrating ownership to the suit property, it is my humble albeit considered view that the plea for recompense on account of trespass, is premised on quick-sand; and must, of necessity be blown away by the Stream of Justice.
261. Lastly, the Plaintiff had also sought for Damages pertaining to destruction of properties; Loss of use of rental offices and shops; and compensation to the Plaintiff for damaged and looted properties following wanton destruction of the suit property. However, despite mounting the foregoing claims, the Plaintiff did not supply the requisite particulars of what was lost or otherwise in the body of the Plaint.
262. Nevertheless, it suffices to underscore that the claims alluded to constitutes and fall within the purview of "Special damages" and not otherwise. Consequently, if the Plaintiff herein was serious as pertains to the said claims, then it behooved the Plaintiff to particularly plead and specifically prove the loses alluded to.



263. Without belaboring the point as pertains to the manner of pleading special damages, it suffices to cite the dictum of the case of Kenya Tourist Development Corporation versus Sundowner Lodge Limited [2018] eKLR

“With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In *dharamshi vs. karsan* [1974] ea 41, the former court of appeal held that general damages are not allowable in addition to quantified damages with *mustafa j.a* expressing the view that such an award would amount to duplication. and so it would be. see also *securicor (k) vs. benson david onyango & anor* [2008] eKLR.

The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent “had suffered serious damages” (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination.

264. The Court went further and stated thus;

It is thus clear that other than for nominal damages – which really represent damages only in name, being in quantum quite negligible – what monies would have been recoverable would have been in the nature of special damages properly quantified, pleaded and proved which, in the event, the respondent laid before the trial but failed to prove.

265. Simply put, the other reliefs which were being sought for by the Plaintiff were Special in nature and thus it behooves the Plaintiff to plead same with the requisite specificity, precision, clarity and particularity; and thereafter place before the Honourable court plausible evidence in proof of same.

266. Sadly though, the Plaintiff neither complied with the established rule on pleading of special damages nor endeavored to place any cogent/ plausible evidence or at all.

267. In short, the omnibus claims at the foot of Plaintiff are unmaintainable.

### **Conclusion And Disposition:**

268. Having canvassed and calibrated upon the diverse issues which were itemized herein before, it must have become crystal clear that the suit property which is being claimed by the Plaintiff herein is indeed Public Road of access; which could not have been alienated or allocated to the Plaintiff or such other person or at all.

269. Arising from the foregoing, the obvious conclusion is to the effect that the Plaintiff is not entitled to the reliefs sought at the foot of the Plaintiff dated the 4<sup>th</sup> March 2019. Consequently, the Plaintiff's suit is devoid of merits.



270. In a nutshell, the Plaintiff's suit be and is hereby dismissed with costs to the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants respectively, such costs to be agreed upon and/or taxed by the Deputy Registrar.
271. Despite the foregoing orders, one issue remains outstanding and thus deserving of a short address. For coherence, the issue relates to the fate of the Certificate of Title/Grant in respect of L.R No. 209/14319, which is currently held by the Plaintiff.
272. Suffice it to point out that neither the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> nor 5<sup>th</sup> Defendants filed any Counter-claim to impeach the Certificate of Title/Grant. Indeed, one would have expected a Counter-claim of sorts, which is/ was not the case.
273. Notwithstanding the foregoing, it is imperative to recall that having found and held that the suit property comprises of Public Road of Access, it would be remiss, nay, foolhardy of me not to revoke and cancel the Certificate of Title/Grant currently held by the Plaintiff.
274. Consequently and on the basis of the provisions of Section 13(7) of The *Environment and Land Court Act*, 2011, I hereby proceed to and do revoke the Certificate of Title in respect of L.R No. 209/14319; and the Plaintiff be and is hereby directed to surrender the Certificate of Title to the Chief Land Registrar within 60 days from the date hereof.
275. Suffice it to state that , upon the cancelation of the title in respect of L.R No. 209/14319, the suit property shall not be allocated and/or alienated whatsoever, but shall be held by the 1<sup>st</sup> Defendant on Trust; and shall only be used for the designated purpose, namely, Public Road of Access.
276. Furthermore, having found and held that the suit property sat on a Public Road of access (which position was conceded to inter-alia by PW3); and having similarly established that the building on the suit property was neither approved nor authorized by the 1<sup>st</sup> Defendant (namely, the mandated planning authority), it suffices to decree that the offensive building/structure erected on the suit property was illegal and thus ought to be brought down by the Plaintiff.
277. Essentially, it is therefore imperative to direct and in this regard, I do hereby direct that the Plaintiff shall put in place appropriate mechanism/ steps to pull down the entire offensive structure; and same to be pulled down within a duration of 60 days from the date of the Judgment hereof.

#### **Final Orders:**

278. In conclusion, the Court proceeds to and Do hereby decree the following orders;
- i. The Plaintiff's suit herein be and is hereby Dismissed.
  - ii. The Certificate of Title/Grant in respect of L.R No. 20914319 (Original L.R No. 209/12152 and GL), currently in the name of the Plaintiff be and is hereby revoked and/or canceled.
  - iii. The Plaintiff herein shall surrender to and in favor of the Chief Land Registrar the Certificate of Title/Grant for purposes of cancelation within a duration of 60 days from the date hereof.
  - iv. Nevertheless and in any event, the Chief Land Registrar shall be at liberty to proceed and effect the cancelation of the Certificate of Title/Grant over and in respect of the suit property in accordance with the provisions of Section 80 of the *Land Registration Act*, 2012, even if the Plaintiff does not surrender the Original Certificate of title/Grant in accordance with clause (iii) hereof.



- v. The Chief Land Registrar shall upon cancellation of the Certificate of Title/Grant in favor of the plaintiff, proceed to publish in the Kenya gazette the cancellation of the said Certificate of title/Grant.
- vi. The Plaintiff shall proceed to and bring down the offensive building/structure which was erected on L.R No. 209/14319; (Original L.R No. 209/12152 and GL), within a duration of 60 days from the date hereof.
- vii. In the event of default by the Plaintiff to comply with clause (vi) hereof, the Nairobi City County Government shall be at liberty to demolish and/or pull down the offensive structure in accordance with the provisions of *Physical and Land Use Planning Act*, 2019; and thereafter surcharge the Plaintiff with the costs of such demolition.
- viii. Upon the cancellation of the title/Grant in favor of the Plaintiff, the portion of land comprising of the suit property, shall not be alienated in any manner whatsoever; but shall be held by the 1<sup>st</sup> Defendant on Trust for the residents of the City County of Nairobi.
- ix. The costs of the suit be and are hereby awarded to the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants respectively; and such costs to be taxed by the Deputy Registrar of the Honourable court.

279. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF NOVEMBER 2023.**

**OGUTTU MBOYA**

**JUDGE**

