



**Radcliffe v Kena Properties Limited & 4 others; Prime Bank Limited  
& another (Interested Parties) (Environment & Land Petition  
E006 of 2022) [2022] KEELC 936 (KLR) (10 March 2022) (Ruling)**

*Andrian Properties James Radcliffe v Kena Properties Limited & 4  
others; Prime Bank Limited & another (Interested Parties) [2022] eKLR*

Neutral citation: [2022] KEELC 936 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E006 OF 2022  
OA ANGOTE, J  
MARCH 10, 2022**

**BETWEEN**

**ANDRIAN PROPERTIES JAMES RADCLIFFE ..... PETITIONER**

**AND**

**KENA PROPERTIES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL MAGISTRATE’S COURT, MILIMANI ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JOHN M OHAGA ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**PRIME BANK LIMITED ..... INTERESTED PARTY**

**JEPHYS AUCTIONEER ..... INTERESTED PARTY**

**RULING**

1. In the Notice of Motion dated 21<sup>st</sup> February, 2022, the Petitioner has sought for the following orders:
  - a. This Court do exercise its supervisory jurisdiction over the subordinate court and call for the court file in MC ELC No. E008 of 2022 to satisfy itself as to the veracity of the ex parte orders issued by Hon. D. M. Kivuitu PM on 21<sup>st</sup> January 2022.



- b. This Court do issue conservatory orders setting aside the ex parte orders issued by Hon. D. M. Kivuitu on the 21<sup>st</sup> January, 2022 in ELC E008 of 2022 between Kena Properties Limited and Adrian Racliffe Pending the hearing and determination of this application.
  - c. This Court do issue an order reinstating the Petitioner/Applicant and his family back to the suit property known as Land Reference Number 196/32 (Org. No. 196/15/13) Karen, Nairobi pending the hearing and determination of this application and/or petition.
  - d. This Court do issue an order directing the 1<sup>st</sup> Respondent to produce the title document to L. R. Number 196/32 (org. No. 196/15/13) to this court for scrutiny and record.
  - e. The OCS Karen Police Station be tasked to provide security for the enforcement of these orders once granted.
  - f. The Honourable Court provide for costs.
2. The Application is supported by the affidavit of the Petitioner who has deponed that he is 60 years old and a British National currently staying with friends in Karen; that before then, he was staying on L. R. 196/32 (the suit property) situated along Train Lane in Karen and that he has lived in Kenya since February 1986 till now.
  3. The Petitioner deponed that he came to Kenya in 1984 while doing his master's Thesis; that at the end of 1986, he started working in Marsabit; that he came to Nairobi in 1988 and on 1<sup>st</sup> August, 1989, he moved on the suit property after being shown the land by Donald Vincent Limited; that he was never been introduced to the owner of the property by Donald Vincent Limited and that Donald Vincent Limited promised to get in touch with him if the registered owner of the suit property contacted them.
  4. According to the Petitioner, Donald Vincent Limited never got in touch with him about the rent; that sometimes in 1992, he received a letter from the registered owner informing him that they had learnt that there were rates' arrears and asked him if he could pay the rates as demanded by the city council and that the rates' arrears amounted to about Kshs.120,000.
  5. The Petitioner deponed that he paid off all the rates that were due and owing; that over the years and for the time he has been in occupation of the suit property, he always paid the City Council rates as the owner of the property; that particularly in 1996 and 1997, the Nairobi City Council did send him demand notices for rates and that on other occasions, he received instructions from the wife of the registered owner named Daphne Ball, asking him to settle the rates with the City Council of Nairobi.
  6. It is the Petitioner's deposition that he has never had direct communication with the registered owner; that he is aware that the registered owner died sometime in December 2012 while his wife Daphne Ball died in 2019 and that since then, he has never received any communication from any next of kin of the registered owner.
  7. The Petitioner deponed that sometime in 2005, his lawyers, then Sheila Sheikh & Company Advocates, filed summons for adverse possession in regard to the suit property, which suit was dismissed after hearing; that after the dismissal of the case, he got to know John M. Ohaga Advocate, whose daughter went to the same school with his daughter; that he began engaging him in regard to the suit property herein and that the advice he was given by John M. Ohaga who is the managing partner at TripleOK Law as well as the one by Sheila Sheikh & Company Advocates was that he should not appeal against the dismissal of the suit.
  8. It was deponed by the Petitioner that sometime in 2004, Kenya Valuers Limited went to the property to carry out valuation after being instructed by the owners of the suit property; that he received a



- letter from John Ohaga dated 16<sup>th</sup> September, 2014 informing him that the suit property had been transferred to another buyer but did not disclose the identity of the new buyer and that he later on received a letter from John Ohaga dated 25<sup>th</sup> May, 2015 which was a reminder of the previous letters.
9. According to the Petitioner, he does not know at what point Joh Ohaga stopped representing him and begun acting against his interests in regard to the suit property; that he received another letter from John Ohaga dated 24<sup>th</sup> May, 2016 in which he demanded for payment of monthly rent and forwarded to him a tenancy agreement for signing and that he continued to pay rates in respect to the suit property.
  10. According to the Petitioner, he received another letter dated 4<sup>th</sup> February 2018, informing him that the property had been sold and should consider paying rent to the new owner. However, it was the Petitioner's deposition, he had not received communication from the registered owner or their next of kin to the effect that the property had been sold.
  11. The Petitioner deponed that on Friday 4<sup>th</sup> February 2022, at about 4.45 pm, he was working in one of the rooms in the house within the premises when his wife came running to him informing him that there were police officers and some civilians in the house; that he was ordered by the police to secure his possessions; that immediately, a group of about 20 or so goons invaded the house together with the police and started to rip off the house curtains and that they removed everything from the house and dumped them outside the gate.
  12. It is the Petitioner's case that he only learnt of the case filed at the Chief Magistrates court when he saw the Order with the Auctioneer; that his advocate was then able to get the pleadings in MC ELC No. E008 of 2022 together with the order of eviction and that he has looked at the copy of title to the suit property annexed by the 1<sup>st</sup> Respondent in MC ELC No. E008 of 2022 and has had an opportunity to compare it with the copy which was annexed in the valuation report by Knight Frank dated 2<sup>nd</sup> June 2004, and that there are reasons to believe that the title relied upon by the 1<sup>st</sup> Respondent is a forgery.
  13. It was deponed by the Petitioner that the City Council of Nairobi, now the City County Government of Nairobi, has continued to send him demand notices for payment of rates in regard to the property known as L. R. No. 196/32 in the name of John Cecil Ball and that as late as 2021, he received the demand notice and paid the requisite rates.

### **The 1<sup>st</sup> Respondents' case**

14. The 1<sup>st</sup> Respondent's Director deponed that her, together with her other co-Directors, Mrs Leah Ngini and Ms. Jean Ngini Kamau, are Directors and shareholders of St. Christopher's Holdings Limited; that St. Christopher's Holdings Limited is the proprietor of St Christopher's International School which has been in operation for over 40years and that the property on which St. Christopher's International School is built is owned by the 1<sup>st</sup> Respondent and has been owned by the family since 1965.
15. The 1<sup>st</sup> Respondent's Director deponed that John M. Ohaga, the 5<sup>th</sup> Respondent, is her husband; that the law firm of TripleOKlaw Advocates LLP also advises both the 1<sup>st</sup> Respondent as well as St. Christopher's Holdings Limited with respect to all their legal work including property acquisitions and the transactions relating thereto and that the Petitioner and his wife Carlyne are known to her husband and herself.
16. According to the 1<sup>st</sup> Respondent's Director, at the beginning of 2013, the 1<sup>st</sup> Respondent started considering finding a suitable property on which they could erect houses for some of their senior staff; that the property needed to be in Karen area in close proximity to the school campus and that her husband, the 5<sup>th</sup> Respondent, was well aware of this as he was going to be involved in assisting them with the acquisition of the land.



17. The 1<sup>st</sup> Respondent's Director deponed that towards the beginning of 2013, her husband, the 5<sup>th</sup> Respondent, approached her and suggested that they should consider acquiring the suit property and that he explained that if they acquired the suit property, it would enable him to assist the Petitioner and his family with certain legal difficulties that they were in.
18. According to the 1<sup>st</sup> Respondent's Director, the 5<sup>th</sup> Respondent assured her that if they bought the suit property, he would be able to arrange for a formal tenancy with the Petitioner for a limited period at rent to be agreed and that the Petitioner and his family would be able to take their time about finding alternative accommodation whilst they (the 1<sup>st</sup> Respondent) put in place plans for the development of the suit property.
19. It was deponed by the 1<sup>st</sup> Respondent's Director that in due course, an agreement for sale dated 19<sup>th</sup> June, 2013 was executed between Kena Properties Limited, the 1<sup>st</sup> Respondent, and the Attorneys for the registered proprietor, Bora Services Limited, and that the purchase price was agreed at Kshs. 135 Million which is considerably higher than the valuation of the property that had been shown to them.
20. According to the 1<sup>st</sup> Respondent's Director, the 1<sup>st</sup> Respondent agreed to a specific provision at clause 5 of the agreement for sale which allowed the Petitioner and his family to continue in possession of the suit property and that as they had a shortfall in funding, they applied to their bankers, Prime Bank Limited, for a loan facility of Kshs 40 million to enable them complete the purchase.
21. It was deponed that the 1<sup>st</sup> Respondent immediately commenced repayment of the banking facility in the expectation that the rental income would be applied towards meeting a proportion of such repayment and has had to grapple with the various changes in the interest rates regime over an extended period of time and that the title to the property is presently in the custody of Prima Bank Limited who have taken a charge over it.
22. The 1<sup>st</sup> Respondent's Director deponed that the Petitioner declined to pay the requisite rent and that between the period 2017 and the end of 2021, their attention was taken up with the development of the school and did not do anything active to recover possession. However, it was deponed, at the beginning of 2022, they decided that it was necessary to take firm action to secure possession of the suit property which they had purchased and had neither had possession of nor any benefit for nearly eight (8) years and that they were particularly alarmed when they learned that the Petitioner had attempted to acquire the suit property by adverse possession from the previous owners.
23. It is the 1<sup>st</sup> Respondent's case that they instructed the firm of advocates, Ziriba & Company, who filed a suit in Milimani Chief Magistrate's Court ELC No. E008 of 2022, Kena Properties Limited vs Adrian Radcliffe and obtained an order for the eviction of the Petitioner and that the Petitioner was duly served with all court process including the Plaint and the application for vacant possession.
24. The 1<sup>st</sup> Respondent's Director deponed that the 1<sup>st</sup> Respondent has now taken possession of the suit property and has commenced preparations for the development thereof; that this has necessitated the demolition of the old wooden house which was on the suit property; that the Petitioner has no claim to the suit property such as can be recognized in law and that the Petitioner was at best a squatter or trespasser on the suit property.
25. The 1<sup>st</sup> Respondent's Director informed the court that they purchased the suit property in good faith and any suggestion that the acquisition of the suit property by the 1<sup>st</sup> Respondent was fraudulent is malicious and without foundation.
26. It was the deposition of the 1<sup>st</sup> Respondent's Director that had they not repossessed the suit property, the Petitioner would have made a second attempt to grab the land upon the lapse of 12 years from the



date of the purchase thereby dispossessing the 1<sup>st</sup> Respondent the suit property and that they have a substantial claim for mesne profits for the period since they took ownership of the suit property until the date when the Petitioner and his family were evicted, which they fully intend to pursue.

### **The 5<sup>th</sup> Respondent's case**

27. The 5<sup>th</sup> Respondent deponed that he is a senior Counsel and the Managing partner in the firm of TripleOKlaw LLP Advocates; that he was conscious of the provisions of Section 124 of the [Evidence Act](#) which protects communication between advocate and client and that since the Petitioner has consciously elected to join him in this suit as a Respondent, he has waived the protection afforded to him in law and it is necessary for him to make disclosure of all communications that has passed between the Petitioner and himself in the course of the Advocate/Client relationship.
28. It was deponed by the 5<sup>th</sup> Respondent that the protection afforded to the Petitioner is further watered down in light of the deliberate breach of the duty of candor, concealment of material facts in a bid to hoodwink the Court and besmirch him in the eyes of the court and that the affidavits of the Petitioner in support of both the Petition and the Notice of Motion are riddled with lies and half-truths.
29. The 5<sup>th</sup> Respondent deponed that the Petitioner and his wife, Carolyne, are both well known to him as their daughter Katie and his daughter went to the same school and were close friends; that the 1<sup>st</sup> Respondent, Kena Properties Limited, is well known to him and has been a client of the firm for a considerable period of time and that the directors of the 1<sup>st</sup> Respondent are Mrs. Carolla Ohaga, who is his wife, Ms. Jean Kamau, who is his wife's sister, and Mrs. Leah Nini, who is his wife's mother.
30. The 5<sup>th</sup> Respondent deponed that the Petitioner and his wife first went to see him in his professional capacity on 3<sup>rd</sup> March, 2011 for advise in connection with certain proceedings that the Petitioner had commenced in the High Court being High Court Civil Suit No. 1523 of 2005 (OS) – Adreian Radcliffe vs John Cecil Hawley Ball.
31. It was the deposition of the 5<sup>th</sup> Respondent that the Petitioner explained that he had brought those proceedings against the original proprietor of the suit property in an attempt to acquire the suit property by adverse possession, but the suit had been dismissed by Rawal J (as she then was) by a Judgment dated 28<sup>th</sup> February 2011 and that the Petitioner wanted to know whether he stood any chance of success in the event he appealed the decision of the High Court to the Court of Appeal.
32. According to the 5<sup>th</sup> Respondent, he particularly took note of the comments by the Judge that the Petitioner had not been truthful in his testimony; that as found by Lady Justice Rawal, the Petitioner is a pathological liar and that the affidavits in support of both the Petition and the Notice of motion are the product of deliberate misrepresentation of facts and material non-disclosure.
33. It is the 5<sup>th</sup> Respondent's case that he advised the Petitioner that his best course of action would be to regularize his position within the bounds of the law; that he inquired from him as to whether he would be interested in purchasing the suit property and that when the Petitioner answered in the affirmative, he wrote to the firm of Daly & Figgis who were acting for the original proprietor indicating the Petitioner's interest in entering into discussions for the purchase of the suit property.
34. According to the 5<sup>th</sup> Respondent, the firm of Daly and Figgis informed him in writing that firstly, they wished to agree on the costs of the suit for adverse possession and to have this settled; and secondly, that they had filed a suit in the Magistrate's Court being Chief Magistrate's Civil Case No. 2935 of 2010 – John Cecil Hawley Ball vs Adrian Radcliffe for recovery of the arrears of rent for the period from 1989 when the Petitioner first took possession of the land, which suit was to be settled.



35. It was deponed by the 5<sup>th</sup> Respondent that by a letter dated 24<sup>th</sup> March 2011, Daly & Figgis demanded unequivocal acceptance of all the terms set out in their letter by close of business on 12<sup>th</sup> April 2011 before the Petitioner could be entitled to the right of first refusal to purchase the property and that on 31<sup>st</sup> March, 2011, he wrote to Daly & Figgis confirming that the Petitioner had accepted the terms of their letter of 17<sup>th</sup> March 2011 which included the withdrawal of the caveat which the Petitioner had placed against the suit property.
36. In due course, it was deponed, Daly & Figgis forwarded a valuation report of the suit property which was to be the basis upon which any discussion regarding the sale of the property would be premised; that the Petitioner stated that he was not in a position to raise the amount required and that he communicated this position to Daly & Figgis by way of a letter dated 29<sup>th</sup> April 2011.
37. It was the 5<sup>th</sup> Respondent's deposition that by a letter dated 13<sup>th</sup> May 2011, Daly & Figgis informed him, inter alia, that a notice of termination of the Petitioner's month to month tenancy had been served on him and had expired at the end of May 2010; that in his email of 8<sup>th</sup> June 2011, the Petitioner informed him that he thinks that the original owner may have died and requested him to ask his personal assistant, Clementine, to check as he wanted to be discreet about making the inquiry.
38. At about the same time, it was deponed, he was aware that the 1<sup>st</sup> Respondent was looking for property in the Karen area which it could purchase for the purpose of developing accommodation for the senior staff of St. Christopher's School; that he approached his wife and persuaded her and that the 1<sup>st</sup> Respondent should consider purchasing the suit property because its location was not far from the School campus.
39. According to the 5<sup>th</sup> Respondent, in early June 2013, the firm of Daly & Figgis telephoned him to indicate that they were prepared to consider the possible sale of the land to the 1<sup>st</sup> Respondent and that he immediately telephoned the Petitioner on 7<sup>th</sup> June 2013 and informed him that he had identified a party who was prepared to purchase the property and allow him and his family to continue being in possession of the suit property at a reasonable rent until they were able to make arrangements for alternative accommodation.
40. The 5<sup>th</sup> Respondent deponed that he warned the Petitioner that there could be a possible conflict in him acting for both himself and the other party but that any such conflict would be mitigated by the fact that he would be able to secure favourable rental arrangements for him.
41. It was deponed by the 5<sup>th</sup> Respondent that the Petitioner expressed his delight at the arrangement and confirmed that he had no objection to him (the 5<sup>th</sup> Respondent) acting for the other party, and informed him that ideally, they would prefer to stay on the property until the middle of the following year when their daughter would complete her prep school education.
42. The 5<sup>th</sup> Respondent deponed that in January 2017, the 1<sup>st</sup> Respondent appointed an agent, Canaan Properties Limited and instructed him to notify the Petitioner of the appointment of such agent; that it was hoped that the agent would be able to negotiate a suitable rental arrangement as well as manage the collection of the rents from the Petitioner and that there was no response to his letters and the agent was unable to make any contact with the Petitioner.
43. The 5<sup>th</sup> Respondent deponed that in 2018, having reached their wits end, they served an eviction notice upon the Petitioner in terms of Section 152E of the Land Act; that he is aware that under section 152F of the Act, any person served with an eviction notice may apply to court for relief against the eviction notice; that the Petitioner has not to date applied for any such relief and that he advised the 1<sup>st</sup>



- Respondent that in view of the fact that he had acted for both parties, they should instruct a different firm of advocates to file suit and obtain an order for possession of the suit property.
44. According to the 5<sup>th</sup> Respondent, Dr. Khaminwa in advising the Petitioner to join him in the suit as a Respondent and in casting aspersions on him in the Certificate of Urgency that accompanied the Notice of Motion for interim relief has done so without consideration for his status and the potential damage to his name and reputation without making proper enquiry as to the true circumstances of the Petitioner's occupation of the suit property and the manner in which he acted for the Petitioner.
  45. The 5<sup>th</sup> Respondent deponed that he is not only an officer of the court but also a Senior Counsel who is well respected within the profession; that he acted at all times in the best interests of the Petitioner, not only in his professional capacity, but also towards a couple that he believed were his friends and that with the benefit of hindsight, he should have thought more keenly about the observations of Lady Justice Rawal in her Judgment in High Court Civil Suit No. 1523 of 2005 (OS).
  46. The 5<sup>th</sup> Respondent finally deponed that even though he acted for the Petitioner and took every available step to secure his interests, he now realizes that he has never been honest in his dealings and has lived lavishly in a prime piece of real estate in Karen for 31 years without payment of a single shilling in rent; that the Petitioner has attempted to acquire the suit property by adverse possession through deceit and that the present Petition is a further attempt to use the legal process to perpetuate the Petitioner's deprivation of the 1<sup>st</sup> Respondent's right to all rights of ownership pertaining to the property and is an abuse of the process of court.

### **Submissions**

47. This matter proceeded by way of oral submissions. The Petitioner's advocate submitted that the Petitioner is a British national and has been in occupation of the suit property for about 35 years; that the Petitioner had a relationship with the original owner of the suit premises who is now deceased and that the ex parte orders of the lower court which led to the eviction of the Petitioner should be to set aside.
48. It was submitted by the Petitioner's counsel that the land in question measuring approximately five (5) acres is in Karen; That the Plaint that was filed in the lower court is dated 18.01.2022; that in the Plaint, the current 1<sup>st</sup> Respondent sought for a declaration that the Petitioner and his family members are trespassers on the suit property, for a permanent order of injunction and for an order of eviction and that the 1<sup>st</sup> Respondent herein also prayed for mesne profits.
49. Counsel submitted that the suit in the lower court is still pending; that the Magistrate did not have jurisdiction to hear the matter in the first place and issue ex parte eviction orders; that this court has supervisory responsibility over the lower court; that this court is duty bound to correct the Magistrate's mistakes and that the order of the Magistrate dated 21.01.2022 ordering for the eviction of the Petitioner and his family from the suit property was unlawful.
50. Counsel for the Petitioner submitted that the complaint by the Respondent is that the Petitioner has not been paying rent; that the Petitioner had a good reason for not paying rent; that the Petitioner has been in possession of the suit land for 35 years and has been paying rates without any complaint from any quarter and that the company that is claiming the suit land is owned by a person (the 5<sup>th</sup> Respondent) whom the Petitioner regarded as his advocate.
51. The Petitioner's counsel submitted that the Petitioner believed that the 5<sup>th</sup> Respondent, who was his advocate, would guide him on the intricacies of the law; that the letter dated 28<sup>th</sup> September, 2011 addressed to the Petitioner and his wife shows that the 5<sup>th</sup> Respondent was his advocate; that the letter



is an acknowledgement of payment of legal fees and that in the letter of 16<sup>th</sup> September, 2014 addressed to the Petitioner and signed by the 5<sup>th</sup> Respondent, the 5<sup>th</sup> Respondent informed the Petitioner that the land had been transferred to a buyer but did not disclose the name of the buyer, and yet the buyer was the 5<sup>th</sup> Respondent and his wife.

52. Counsel submitted that it is curious that the individual who is supposed to be the lawyer of the Petitioner is now the buyer of the suit property but did not disclose that fact to the Petitioner; that the 5<sup>th</sup> Respondent wants to be the Petitioner's lawyer and the lawyer for himself and that the Petitioner had a lot of trust in the 5<sup>th</sup> Respondent, which trust was breached.
53. Counsel submitted that it is difficult to understand how the Respondents allowed the Petitioner and his family to occupy the suit land for more than 20 years without paying any rent at all and yet they (the Respondents) were required by monthly instalments to liquidate an alleged loan at commercial rates and that the transfer of the suit property to the 1<sup>st</sup> Respondent was suspicious and fraudulent.
54. Counsel submitted that this court should grant his client conservatory orders and reinstate him on the land; that the suit property is currently vacant after the Petitioner's home was demolished after he served the Respondents with the court papers; that the Petitioner and his wife and son are going through a very difficult time and that under Article 50 of *the Constitution*, the Petitioner is entitled to a fair hearing before he can be evicted from the suit premises.
55. It was submitted that the company which was purportedly given the Power of Attorney in respect to the suit land by the owner, John Cecil Hawley Ball, is owned by Kenneth Hemish and Ashwini; that the two individuals are advocates in the firm of Daly and Figgis and that the court should consider the law relating to the Power of Attorney.
56. According to counsel for the Petitioner, the Donor of the Power of Attorney having died in 2012, the Attorney could not transfer the suit property to the 1<sup>st</sup> Respondent and that a Power of Attorney is only operative during the life time of the Donor. According to counsel for the Petitioner, the transfer of the suit property took place after the death of the donor which was illegal.
57. In response, the 1<sup>st</sup> Respondent's counsel submitted that courts do not act in vain; that it has been admitted that the residential house on the suit property has been demolished; that the 1<sup>st</sup> Respondent has taken possession of the suit property and that the Petitioner has failed to mention that the issue of adverse possession was dealt with by Rawal J. in HCCC 1523 of 2005.
58. It was submitted by counsel that the 1<sup>st</sup> Respondent owned the suit land after entering in an agreement of sale dated 19.06.2013 between it and the representatives of the registered owner; that the Petitioner as an unregistered occupant who is not paying rent has no right to the suit property and that the Petitioner was a trespasser to the land.
59. It was argued by counsel that reinstating the Petitioner on the suit property will be sanitizing his illegal occupation; that the lower court matter is still pending; that in the lower court, the Plaintiff is seeking for a declaration that the Petitioner herein is a trespasser and for an order of permanent injunction and that the lower court was not dealing with the issue of ownership of land but trespass. According to counsel for the 1<sup>st</sup> Respondent, a permanent injunction is corollary to the claim of trespass.
60. The 1<sup>st</sup> Respondent's counsel submitted that the Petitioner should have moved the lower court to set aside its orders; that in the Petition, the Petitioner is seeking for damages; that the Petitioner is seeking to re-visit the Judgment of Rawal J and that questioning the decision of the lower court in this Petition cannot arise because the lower court has jurisdiction to hear the matter before it.



61. The 1<sup>st</sup> Respondent's counsel submitted that the orders the Petitioner is seeking have the effect of divesting the registered owner of his land; that the 1<sup>st</sup> Respondent is holding a valid title to the suit property; that the suit property has been charged to Prime Bank to secure monies lent for the purchase of the land and that the orders of equity requires one to go to equity with clean hands.
62. On his part, the 5<sup>th</sup> Respondent's advocate submitted that the suit property was conveyed by the firm of Dally and Figgis to the 1<sup>st</sup> Respondent; that the averments of facts in the 5<sup>th</sup> Respondent's advocate have not been controverted and that this is not the first time the Petitioner is alleging that the original owner of the suit property is dead.
63. It was submitted by counsel that having entered the suit property with the consent of the legal owner, the Petitioner filed a suit for adverse possession and swore a false affidavit; that Rawal J (as she was then) found the Petitioner's claim of adverse possession to have been made in bad faith and without material disclosure and that there was no Appeal or review of the decision.
64. Counsel for the 5<sup>th</sup> Respondent submitted that having entered the premise as a tenant, the previous owner filed a suit for rent; that the 5<sup>th</sup> Respondent acted for the Petitioner against the previous owner; that the Petitioner thereafter breached the terms of the tenancy and after dismissal of the Originating Summons, the Petitioner tried to purchase the land and that the original owner's advocates, Dally and Figgis, did a letter and offered the Petitioner the right of first refusal.
65. According to counsel, it is the 5<sup>th</sup> Respondent who tried to negotiate for the Petitioner favourable terms for the purchase of the suit property; that the Petitioner declined to accept the terms of first refusal; and that the 5<sup>th</sup> Respondent tried everything to negotiate a suitable exit and even dealt with the issue of having rates he had paid to be offset against the purchase price.
66. Counsel submitted that the Petitioner knew about the sale of the suit property; that an agent called him and informed him about the potential buyers who were interested in the suit property; that it is a lie that the Petitioner had a relationship with the previous owner and that the Petitioner cannot claim that he has a proprietary right over the suit land.
67. Counsel submitted that when the land was transferred to the 5<sup>th</sup> Respondent, the 5<sup>th</sup> Respondent informed the Petitioner in writing about the new ownership of the land; that he ignored all the emails and a notice for eviction was issued to him and that the Petitioner has misrepresented facts; failed to disclose material facts and that the 5<sup>th</sup> Respondent is not the registered of the suit property.
68. The 5<sup>th</sup> Respondent's counsel finally submitted that the Petitioner is a British national; that the suit property is free hold property; that Article 65 of *the Constitution* is clear on who can have proprietary rights on freehold land and that the Petitioner does not have a claim against the 5<sup>th</sup> Respondent.
69. In response, the Petitioner's advocate submitted that he was served with the Replying Affidavits on 28<sup>th</sup> February, 2022 and did not have time to file an affidavit in reply; that at this stage, the entire case raises important constitutional issues; that the court should allow the Petitioner to go back to the suit property and that the Petitioner has not had a fair hearing.

### **Analysis and determination**

70. Having read the pleadings and heard the parties' advocates' submissions, the issues for determination are as follows:
  - a. Whether the learned magistrate in Milimani Commercial Court case number ELC E008 of 2022 had jurisdiction.



- b. Whether conservatory orders as prayed should issue.
71. According to the submissions by the Petitioner’s counsel, this court has supervisory responsibility over the lower court; that this court is duty bound to correct the Magistrate’s mistakes and that the order of the Magistrate dated 21<sup>st</sup> January, 2022 ordering for the eviction of the Petitioner and his family from the suit property was unlawful.
72. The Petitioner has called into his aid the supervisory jurisdiction of this court under Article 165(6) of *the Constitution*. A few decisions will guide this court on how the supervisory jurisdiction of this court should be exercised. In Republic vs Chief Magistrate’s Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties); Ex-parte Applicant: Pravin Galot (2020) eKLR, the court held as follows:
- “There is a clear distinction between supervisory jurisdiction, judicial review jurisdiction and appellate jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs. (see, Gallagher v Gallagher 212 So. 2d 281,283(La. Ct.App.1968)).
- This power of superintendence conferred by Article 165 (6) of *the Constitution*, as pointed out by Harries, C.J. in Dalmia Jain Airways Ltd. v Sukumar Mukherjee AIR 1951 Cal.193 is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of *the Constitution* to interfere” (see D.N. Banerji v P.R Mukherji 1953 S.C 58).”
73. In the case of National Social Security Fund vs Sokomania Ltd & another [2021] eKLR, Okongo J held as follows:
- “Where, or if, it is intended to exercise Supervisory Jurisdiction under *the Constitution*, I think the following safeguards should be observed:
- i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro-manage the trial court’s independence in the conduct and management of its proceedings;
  - ii. Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question;



- iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;
  - iv. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;
  - v. Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice.”
74. The reading of the above decisions and the provisions of Article 165 (6) of *the Constitution* shows that this court has the mandate to correct glaring grave dereliction of duty and flagrant abuse of fundamental principles of law or justice by the subordinate courts where grave injustice would be done unless the court interferes. The supervisory duties of this court is meant to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.
75. The Petitioner’s case is that he has been in occupation of land known as L.R No. 196/32 (Original No. 196/15/13) (the suit property) for about 35 years; that he had a relationship with the original owner of the suit premises who is now deceased and that the ex parte orders of the lower court which led to his eviction from the suit property should be set aside.
76. It was submitted on behalf of the Petitioner that the Petitioner and his family were evicted from the suit property pursuant to an order of the lower court without being heard contrary to the provisions of Article 50 of *the Constitution* and that the lower court did not have jurisdiction to deal with the dispute that was before it considering that the value of the suit property is approximately Kshs. 500,000,000.
77. While responding to the issue of the jurisdiction of the magistrate’s court, the 1<sup>st</sup> Respondent’s counsel submitted that the claim that was before the lower court was for trespass and that the order of permanent injunction restraining the Petitioner herein is corollary to the claim of trespass. According to counsel, if the Petitioner was dissatisfied with the decision of the lower court, he should have moved the lower court to set aside the order of eviction.
78. It is trite that jurisdiction is everything, and without it a court has no power to make any valid order. The requirement that a court or tribunal can only deal with a dispute in respect of which it has the requisite jurisdiction cannot be overemphasized. In the case of Lillian “S” vs Caltex Kenya Limited [1989] eKLR, the Court of Appeal held as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other



evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

79. In *Republic vs Karisa Chengo & 2 Others* [2017] eKLR, the Supreme Court held as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

80. In *Kibos Distillers Limited & 4 others vs. Benson Ambuti Adega & 3 others* [2020] eKLR, the Court of Appeal held as follows:

“A party or litigant cannot be allowed to confer jurisdiction on a Court or oust jurisdiction of a competent organ through the art and craft of drafting pleadings. Even if a Court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a Court or body to hear and determine all and sundry disputes. Original jurisdiction only means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta in *Speaker of the National Assembly v. James Njenga Karume* [1992] eKLR where it was stated that where there is a clear procedure for the redress of a particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”

81. The issue of the court’s jurisdiction is a pure point of law that has to be dealt with up front. That is the position that the Supreme Court took in the case of *Mary Wambui Munene vs Peter Gichuki Kingara and Six Others*, [2014] eKLR where it held as follows:

“The question of jurisdiction is a pure question of law. This Court has on several occasions adopted the dictum of Nyarangi J.A in the *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 that it has to be determined from the start, and that where the Court finds it has no jurisdiction, it should down tools. This is the approach this Court adopted when it considered the application for conservatory orders in this matter. We will, therefore consider this issue of nullity first, as it touches on the jurisdiction of this Court.”

82. In the application dated 18<sup>th</sup> January, 2022, that was filed in the Chief Magistrate’s Court ELC Case number E008 of 2022 by the 1<sup>st</sup> Respondent herein, the 1<sup>st</sup> Respondent herein sought for the following orders:

- a. The application be certified as urgent and is heard on priority basis;
- b. An order do issue directing the Defendant/Respondent whether by himself, his servants and or agents be denied possession, occupation of the suit property known and described as LR. No. 192/32 (Orig. No. 196/15/13) Karen (the suit property) and further to allow the Plaintiff/



Applicant through its duly appointed agents, servants and or personal assigns to enter, access, use, develop and enjoy all rights and privileges appurtenant to all that parcel of land known as (sic) pending the hearing and determination of this application.

- c. An order do issue directing the Defendant/Respondent whether by himself, his servants and or agents be removed and or denied occupation of the suit property known and described as LR. No. 196/32 (Orig. No. 196/15/13) Karen (the suit property) pending the hearing and determination of the suit.
  - d. The OCS Karen Police Station do provide security during the enforcement of the orders herein.
  - e. The costs of this application be provided for.
83. In the Grounds in support of the Application in the lower court, the Plaintiff in the lower court (the 1<sup>st</sup> Respondent herein) averred that it was the registered proprietor of parcel of land known as L.R No. 196/32 (Orig. no. 196/15/13) (the suit property) and that the Defendant (the Petitioner herein) was a tenant of the original owner of the suit property and has been occupying the land since 1989 until the year 2014 when the suit property was sold to the Plaintiff.
84. The Plaintiff in the said suit averred that the Defendant has continued to occupy the suit property even after the Plaintiff acquired the title to the same and has refused to enter into a tenancy agreement for the occupation of the suit property nor has he been paying any rent to the previous owner. The record shows that when the application came up for the first time ex parte on 21<sup>st</sup> January, 2022 under a certificate of urgency, the learned Magistrate, Hon. D.M. Kivuti (PM), allowed the application in the following terms:
1. That an order is hereby issued directing that the Defendant/Respondent whether by himself, his servants and/or agents be denied possession, occupation of the suit property known and described as L. R. No. 192/32(Original No. 196/15/13) pending the hearing and determination of the application.
  2. That the OCS Karen Police Station is hereby authorized to provide security in the enforcement of the orders issued above.
  3. That the application be served for interpartes hearing on 27<sup>th</sup> January 2022 before this court.
85. The claim before the subordinate court was for a declaration that the Petitioner herein is a trespasser on the suit property; an order of eviction of the Petitioner from “Land Reference number 196/32 (Original no. 196/15/14) Karen, Nairobi” and for a permanent injunction restraining the Petitioner herein from interfering with the 1<sup>st</sup> Respondent’s occupation of the property known as Land Reference number 196/32 (Original no. 196/15/14) Karen. The Plaintiff also sought for mesne profits from September, 2014 until the Defendant (Petitioner) grants vacant possession to the Plaintiff at the rate of Kshs. 120,000 per month.
86. The law granting the subordinate courts jurisdiction to hear and determine environment and land matters is the *Environment and Land Court Act* and the Magistrate’s Court Act. Section 26 (3) and (4) of the *Environment and Land Court Act* provides that magistrates who are duly gazzated by the Chief Justice have jurisdiction to handle matters of a civil nature involving occupation and title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrate’s Courts Act.



87. Although counsel for the 1<sup>st</sup> Respondent submitted that the suit in the lower court is for trespass and for a permanent injunction, and that the magistrate's court has jurisdiction to handle the dispute notwithstanding the value of the land in question, the reading of section 26 (3) and (4) of the [Environment and Land Court Act](#) shows otherwise.
88. The Black's Law Dictionary, 10<sup>th</sup> Edition defines 'trespass' as an unlawful act committed against the person or property of another, especially the wrongful entry on another's real property. From this definition, it follows that the question of trespass cannot be answered by the court before determining the issue of ownership and or occupation of land.
89. That being the case, it cannot be true that notwithstanding the value of the land in question, magistrates have jurisdiction to handle all disputes relating to trespass, considering that 'trespass to land' and 'occupation of land' are two sides of the same coin, and cannot be determined separately. For the court to determine if the Defendant is a trespasser, it must determine if indeed the Plaintiff is the owner of the land in question.
90. That being the case, it is the finding of this court that in all cases of trespass, the magistrates must, as a matter of law, be satisfied that they have jurisdiction by ascertaining, either from the pleadings or from the parties, the value of the land in question before handling the dispute.
91. Any order made by the subordinate court in a suit for trespass or occupation of land whose value exceeds the court's pecuniary jurisdiction will be a nullity ab initio, and such an order will be set aside by this court either on appeal or in the exercise of the court's supervisory jurisdiction.
92. The claim by the 1<sup>st</sup> Respondent in this matter, and in the subordinate court, is that it purchased L.R No. 196/32 (Original no. 196/15/14) Karen vide an agreement for sale dated 19<sup>th</sup> June 2013 which was executed between itself and the Attorneys of the registered proprietor, Bora Services Limited, and that the purchase price was agreed at Kshs. 135 Million.
93. It is trite that the pecuniary jurisdiction of the Chief Magistrate in Milimani is Kshs. 20,000,000. That being so, and the 1<sup>st</sup> Respondent having admitted that it purchased the suit property for Kshs. 135,000,000 in the year 2013, it follows that the learned Magistrate, Hon. D.M. Kivuti, Principal Magistrate, did not have the requisite jurisdiction to order for the eviction of the Petitioner from the suit property in the manner he did on 21<sup>st</sup> January, 2022 and 27<sup>th</sup> January, 2022.
94. The order of the learned Magistrate was void. As was held in *MacFoy vs United Company Limited* (1961) 3ALL E.R 1169;
- “If an act is void, then it is in law a nullity. It is not only bad but incurably bad.”
95. The ex parte orders of 21<sup>st</sup> January, 2022 and the subsequent orders of 27<sup>th</sup> January, 2022 of the learned Magistrate was a grave dereliction of duty and an abuse of a fundamental principle of law that led, to not only the eviction of the Petitioner from the suit premises, but also to the subsequent demolition of the house that the Petitioner was living in by the 1<sup>st</sup> Respondent. The Learned Magistrate did not have jurisdiction to issue the said orders. The orders were a nullity ab initio and the same are hereby set aside by this court.
96. Having set aside the orders of the subordinate court, the next issue I will deal with is whether the Petitioner should be reinstated on the suit property pending the hearing of the Petition.
97. Although all the parties went into great details on the merits of the Petition, it is my understanding that the Petitioner's prayers in the current application is for him to be reinstated on the suit property under



the court's supervisory jurisdiction pending the hearing of the issue of whether the 1<sup>st</sup> Respondent is entitled to the suit land or not. Indeed, the reading of the application before me shows that it has nothing to do with the issuance of conservatory orders which requires the Petitioner to establish a prima facie case.

98. The 1<sup>st</sup> Respondent's counsel submitted that courts do not act in vain; that it has been admitted that the residential house on the suit property has been demolished and that the 1<sup>st</sup> Respondent has taken possession of the suit property pursuant to the order of the lower court. I have looked at the order of the subordinate.
99. The order of the lower court only denied the Petitioner and his agents 'possession and occupation' of the suit property pending the hearing of the suit. The order of the lower court did not mandate the 1<sup>st</sup> Respondent to demolish the house that was on the land. It is therefore not clear to this court the basis upon which the 1<sup>st</sup> Respondent demolished the house standing on the suit property
100. Be that as it may, it is not in dispute that the Petitioner was evicted from the suit property on 4<sup>th</sup> February, 2022 pursuant to the order of the subordinate order which this court has set aside. It is also not in dispute that after the Petitioner was evicted, the 1<sup>st</sup> Respondent demolished the house that the Petitioner was living in, presumably in execution of the lower court's order.
101. Although counsel for the 1<sup>st</sup> Respondent has argued that courts do not issue orders in vain, it is a truism that where there is a wrong, there is a remedy, which is expressed in the legal maxim, ubi jus ibi remedium. What this maxim means is that once it is proved that a right was breached, then equity will provide a suitable remedy.
102. This principle underlines the fact that no wrong should be allowed to go without any remedy. In fact, it has been stated that if all remedies are gone to enforce a right, the right in point ceases to exist in law. Under section 13 (7) of the *Environment and Land Court Act*, this court can issue orders of restitution, amongst other orders. Having found that the orders of the lower court were null and void, it follows that the status quo ante the said orders in respect of the suit property should be reverted to pending the hearing and determination of the Petition.
103. The house in which the Petitioner was living in with his family having been demolished, the Petitioner will decide how he wants to continue being in possession of the suit property until the issue of proprietorship of the land is determined. If the Petitioner wants to put up a tent or a mobile house on the land, as submitted by Dr. Khaminwa, it is for him to make that decision.
104. For the reasons I have given above, I allow the Petitioner's application dated 21<sup>st</sup> February, 2022 as follows:
  - a. This Court hereby sets aside the ex parte orders issued by Hon. D. M. Kivuti (PM) on 21<sup>st</sup> January, 2022 and confirmed on 27<sup>th</sup> January, 2022 in the Chief Magistrate's Milimani ELC E008 of 2022 between Kena Properties Limited and Adrian Radcliffe pending the hearing and determination of the Petition.
  - b. An order be and is hereby issued reinstating the Petitioner and his family back to the suit property known as Land Reference Number 196/32 (Org. No. 196/15/13) Karen, Nairobi pending the hearing and determination of the Petition.
  - c. The OCS Karen Police Station to provide security for the enforcement of these orders.
  - d. The 1<sup>st</sup> Respondent to pay the costs of the Application.



**DATED, SIGNED AND DELIVERED IN OPEN COURT IN NAIROBI ON THIS 10<sup>TH</sup> DAY OF MARCH, 2022**

**O. A. ANGOTE**

**JUDGE**

In the presence of:

Mr. Kahingu for Dr. Khaminwa for the Petitioner

Mr. Kelvin Njuguna for Mr. Masika for the 1<sup>st</sup> Respondent

Mr. Ochieng Oduol for the 5<sup>th</sup> Respondent

