REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

LAND CASE NO. 277 OF 2013

(FORMERLY NAKURU HCCC NO 45 OF 2010)

YUNIS MALIK.....PLAINTIFF

VERSUS

JOSEPH D. HALAKE.....DEFENDANT

JUDGMENT

1. By a plaint dated **25/2/2010** and filed in court on the same date the plaintiff sought the following orders against the defendant: -

(a) Eviction orders against the defendant from L.R No. 19912/6 and L.R No. 19912/7, Nakuru Municipality.

(b) General Damages for the loss of user.

(c) Costs of the suit.

The Plaintiff's Case

2. The plaintiff averred that he is the registered and legal owner of the parcels of land **L.R No. 19912/6** and **L.R No. 19912/7 Nakuru Municipality,** the suit properties herein (herein also referred to as "*the suit lands*") and that the defendant had entered into the suit property and constructed a house; that in the year **2004** the defendant sued the plaintiff in **HCCC No. 230 of 2004** claiming purchaser's interest but that suit was dismissed after a full hearing; that the plaintiff then served the defendant with a notice to vacate but the defendant failed to comply therewith thus necessitating filing of the instant suit. The plaintiff claims that he has suffered general damages for loss of user.

The Defendant's Defence

3. The defendant filed his defence and counterclaim dated **19/03/2010**. He denied that the plaintiff is the registered proprietor of the suit properties**.** He admitted to receiving the notice to vacate but added that he had the legal right to be on the suit properties, claiming to be a purchaser for value. He averred that the plaintiff represented himself to him as the beneficial owner of the suit properties and that the plaintiff would deliver to the defendant registrable transfer deeds but the plaintiff failed to do so. He averred that he rightfully took possession of the suit land in **2002**, that he has extensively developed the suit properties with the plaintiff's knowledge and that the plaintiff ought to be compelled to comply with the court orders in **HCCC No. 230 of 2004**.

Reply to defence and counterclaim.

4. On **26/3/2010**, the plaintiff filed a reply to defence and counterclaim denying the matters set out therein and averred that the defence and counterclaim is *res judicata* the judgment made in **Nakuru HCCC No. 230 of 2004.**

The Plaintiff's Evidence

5. At the hearing of the case on **14/12/2021** the plaintiff commenced his case by calling **PW1 Collins Oluoch Odumba** the court administrator Nakuru Law Courts who produced the original file in **HCCC No. 230 of 2004** (herein also referred as "*the former suit*") a case between the plaintiff and the defendant, where judgment was delivered in respect of the suit property.

6. The plaintiff testified as **PW2**, adopted his witness statement dated **8/5/2013** and filed on **29/5/2013** as his evidence in chief, and further

stated as follows: that he knows the defendant as he had earlier sold to the defendant a plot adjacent to the two plots which are the subject of this suit and a determination made in **Nakuru HCCC No. 230 of 2004**; that he sold to the defendant the first plot and out of the friendship they had and allowed the defendant to use the other two plots to park his cars; that he fell ill and during the period of sickness the defendant started constructing on the suit properties without his consent; that the claim by the defendant that he had sold him the suit properties was the subject matter in **Nakuru HCCC No. 230 of 2004;** that the defendant's application for leave to appeal against the judgment in that suit out of time was dismissed; that about **6** years before the hearing a valuation was done on the suit property and the defendant offered him **Ksh. 1,000,000** which he refused; that he then offered the defendant an option to purchase the suit properties on different terms but the parties never agreed; that the judgment in **Nakuru HCCC No. 230 of 2004** did not order that he sells the land to the defendant and for that reason he urged the court to direct that he be given back possession of the plot as well as costs.

7. On cross-examination, the plaintiff confirmed that he is not the registered owner of the suit properties as they are still registered in the name of one Mohammed Karama who has since passed on; that the deceased never testified in **Nakuru HCCC No. 230 of 2004** and that he had tried to register the suit properties in his name but was advised by his lawyer to hold on until the dispute between him and the defendant in **Nakuru HCCC No. 230 of 2004** was finalized; that the defendant has been in occupation of the suit land for **20** years and that he never sued the defendant to stop the said developments. He also confirmed that during the attempted negotiations he received some money.

8. On re-examination, the plaintiff stated that he is the owner of the suit properties and that the defendant offered to purchase the suit properties for **Ksh. 4,000,000/=.**

The Defendant's evidence.

9. The defendant testified as **DW1**. He adopted his statement filed on **28/08/2014** as his evidence–in-chief. His further evidence was that he is a high school teacher running a Non-Governmental Organization from the suit properties; that construction for the organization in the suit properties started in **2002** and finished in **2004**; that following the determination in **Nakuru HCCC No. 230 of 2004** no appeal was preferred, and he offered a solution by way of valuation as recommended in the judgment but the plaintiff's conduct has since barred the parties from arriving at a resolution; that the plaintiff is yet to show him proof of ownership to the suit properties and that he in fact paid the plaintiff part of the purchase price with his authority. He averred that in the event the plaintiff proves ownership then he would be willing to proceed to purchase; he further stated that the valuation of the suit properties was done several years ago and that the current value of the property may have appreciated to the tune of over **Ksh. 20,000,000.**

10. Upon cross-examination, the defendant stated that he would want the plaintiff to confirm ownership for them to proceed with the transaction**.** He stated that the prayers sought in the counterclaim are similar to the case in **Nakuru HCCC No. 230 of 2004** but the court gave the parties a window to resolve their issues. He further stated that he did not have evidence to confirm that he runs an NGO in the suit properties and that the counterclaim for **Ksh. 4,172,950** is for the developments done. That he only discovered later that the plaintiff did not have ownership documents to the suit properties.

11. On re-examination the defendant stated that there has to be a determination of the true nature of ownership regarding the suit properties and that the plaintiff gave him Karama's documents which cannot be used for registration. He further stated that the plaintiff failed to inform the court the direction it should take regarding the developments and that the plaintiff has never told him to vacate the suit properties and thus it would be unfair for the court to order his eviction **20** years after he settled thereon.

Submissions

12. The plaintiff filed his submissions dated **2/02/2022** on **15/02/2022** where he raised three issues for determination. One is whether the prayers in the counterclaim by the defendant are *res judicata*. His answer to that question is in the affirmative and he thus submits that the counterclaim should be struck out. He argued that the defendant had admitted in his testimony that the issues he has raised in his counterclaim are similar to the ones raised in **Nakuru HCCC No. 230 of 2004**. The second issue the plaintiff raises is whether the observations made by the court in **Nakuru HCCC No. 230 of 2004** amount to *obiter dicta* or a substantive judgment of the court capable of effectuation by this court. While placing reliance in the case of **Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 Others [2017] eKLR** the plaintiff answers that question in the affirmative and argues that the court's said observation regarding finalization of the agreement does not have a binding effect and thus it cannot be enforced as a judgment of the court. The final issue for determination raised by the plaintiff in his submissions is whether he is entitled to vacant possession of the suit properties. He answers that question in the affirmative and submits that since the judgment in the previous suit between him and the defendant had not compelled him to sell the properties to the defendant he could not be thus compelled. The plaintiff argues that the defendant had confirmed that the plaintiff had sold to him an adjacent plot previously and that there had been no dispute as to ownership thereof. The plaintiff averred that in the previous suit the defendant who claimed the existence of an agreement then never raised the issue of ownership as he is doing in the instant suit; that therefore the issue of lack of proof of ownership is an afterthought and an attempt to deprive the plaintiff of his land, which the court should ignore. He stated that the defendant's claim that he had sought proof of ownership from him in order to complete the transaction was false as the same was not contained in his pleadings. He maintained that the only issue arising in the present suit is whether the defendant should give him vacant possession of the premises, having failed to prove his claim in **HCCC NO 230 of 2004**.

13. The defendant filed submissions on **1/3/2022.** Citing **Section 7** of the **Civil Procedure Act** and the case of **Cosmos Mrombo Maka vs Cooperative Bank of Kenya Ltd & Another, [2012] eKLR**, the defendant urged that the prayers made in the defence and counterclaim are not *res judicata*. Regarding whether the observations of the court in **HCCC 230 of 2004** were *obiter dictum* or not, the defendant, citing the decisions of **Dr Ekuru Aukot Vs Independent Electoral & Boundaries Commission & Others [Petition No 471 Of 2017], Central London Property Trust Vs High Trees House Ltd [1947] KB 130**, **Sarwan Singh Lamba Vs Union of India** (citation not provided) and **Sections 1A, 1B** of the **Civil Procedure Act**, stated that they were not *obiter*. He averred that Ouko J (as he then was) had in that former case pronounced the words in the judgment to be a preliminary decree in terms of **Order 21 Rule 16** of the **Civil Procedure Act 2010** while Emukule J had considered those words *obiter dictum*. While submitting that he has not been in trespass on the suit lands and while emphasizing that he is rightfully in possession as a purchaser for value, the defendant stated that the plaintiff never demonstrated that he had title to the suit lands, and therefore the plaintiff had not demonstrated either legal or beneficial ownership of the land and he is therefore not entitled to vacant possession. He stated that he entered into possession of the suit lands peacefully in the year **2002** pursuant to the purchase

agreement between the parties and developed the lands with the knowledge of the plaintiff. He stated that it was a legitimate expectation and an implied term of the oral agreement that the plaintiff would deliver to him the registrable transfer deeds in respect of the suit land. He also avers that the plaintiff never counterclaimed for any reliefs in **HCCC 230 of 2004.** He urges that if the plaintiff is found to be possessed of any ownership rights then his counterclaim ought to be granted.

Determination

14. It is this court's view that the issues in the instant case can be narrowed down to **4** main issues for determination as follows: -

> **i. Whether the claims in the defence and counterclaim are *res judicata* and if not, whether the prayers in the counterclaim can be granted;**
>
> **ii. Whether in the circumstances of this suit the plaintiff is entitled to the orders of eviction sought;**
>
> **iii. What orders should issue?**
>
> **iv. Who should pay the costs of these proceedings?**

Whether the claims in the defence and counterclaim are res judicata.

15. The issue of *res judicata* was raised in **paragraph 4** of the plaintiff's reply to defence and defence to counterclaim filed on **26/3/2010**. In this court's view the preliminary objection ought to have been taken before the suit proceeded to hearing but it has now been established that a preliminary objection on an issue of law that has potential to dispose of a suit may be taken at any stage in the proceedings before judgment once raised. It having been pleaded and submitted on, this court must therefore deal with it before any other issue as it is capable of disposing of the entire suit.

16. The plaintiff argued that the defendant's defence and counter-claim are *res judicata* and should be struck out. Can the contention by the plaintiff herein that the present counterclaim is *res judicata* suffice to dispose of it?

17. In Kenyan law the doctrine of *res judicata* is embodied in **Section 7** of the **Civil Procedure Act**. That section provides as follows:

> **"7. Res judicata**
>
> **No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

18. In the case of Independent **and Electoral Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR**, the Court of Appeal delivered itself as follows: -

> ***"Thus for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms: -***
>
> ***a) The suit or issue was directly and substantially in issue in the former suit.***
>
> ***b) The former suit was between the same parties or parties under whom they or any of them claim.***
>
> ***c) Those parties were litigating under the same title.***
>
> ***d) The issue was heard and finally determined in the former suit.***
>
> ***e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."***

The same Court explained the role of the doctrine as follows: -

> ***"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of res judicata thus rests in the public interest for swift, sure and certain justice."***

19. For a plea of *res judicata* to succeed, all the five **(5)** requirements as stated above must be met and if even one requirement fails, then the

doctrine cannot apply as the five requirements must be construed conjunctively.

20. This court notes that the judgment in **Nakuru HCCC No 230 of 2004** was a final adjudication on the rights of the parties after hearing on the merits and that it involved the instant suit properties as well as the plaintiff and defendant herein. In **Nakuru HCCC No. 230 of 2004,** the defendant herein who was then plaintiff sought the following orders: -

> **a) An order of specific performance of the sale agreement between the plaintiff and defendant for the sale and transfer of L.R No. 19912/6 and L.R No. 19912/7;**
>
> **b) An injunction to restrain the defendant, his servants, agents and all who claim by or through him from disposing the said plots L.R No. 19912/6 and L.R No. 19912/7 to any other party save the plaintiff; and**
>
> **c) Costs of the suit.**

21. The matter was heard on its merits and judgment was delivered on **18/10/2007** by Hon. L. Kimaru J. wherein he dismissed the suit and made recommendations on how the parties could, if they wished, resolve the dispute. The judge made a determination that there was an oral agreement between the parties herein the terms of which could not be ascertained as they were not clear or specific regarding the amount to be paid as purchase price. The court in effect left the decision to finalize the agreement in the hands of the parties. Subsequently the parties failed to agree hence the present suit. The defendant herein who was the plaintiff in that suit never succeeded in filing an appeal. His application for extension of time to file an appeal was dismissed.

22. As I assess the present suit for susceptibility to *res judicata*, I must begin by addressing the one main issue that never formed part of the parties' pleadings and/or evidence in the former suit but which has featured prominently in the instant suit: whether the transaction failed primarily because the plaintiff is registered owner or not of the premises that are occupied by the defendant.

23. The preliminary observation is that this issue was first raised in form of evidence at the hearing in this case by the defendant and, even then, not by way of pleadings.

24. The next major observation is that I must distinguish this claim from the claim in **paragraph 13** of the counterclaim to the effect that the plaintiff *failed to deliver registrable transfer deeds to the defendant to enable completion.* This is a perfect challenge to title, the juggernaut that the defendant precariously hung on till the end of the hearing and in submissions. It is the opinion of this court that the issue of ownership in a sale transaction is crucial as it is an implied warranty in land sale contracts that the seller has proper root of title to the property he intends to sell. However, it is the observation of this court that interests in land can take different forms and even be unregistered and a hurried conclusion that the plaintiff had nothing to sell without deeper investigation may not be proper.

25. The doctrine of *res judicata* is so inextricably intertwined with the drafting of pleadings such that it may be a futile exercise to examine it without perusing the pleadings in the affected suits, and this is what this court must do now.

26. In this court's opinion, the allegation raised by the defendant at the hearing regarding lack of proof of title in the name of the plaintiff being a hindrance to the conclusion of the transaction ought to have been first and substantively raised in the pleadings in the present suit and in the previous suit. In addition it is worthy of note that the defendant herein had sued the plaintiff claiming him to be the owner of the premises and he should be estopped from denying the fact of ownership.

27. The importance of proper pleading in all kinds of litigation, from petitions to plaints to originating summons, can not be understated. In the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** it was observed as follows:

> **"Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:**
>
> **"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."**

28. In the case of **Ayub Ndungu V Marion Waithera Gacheru [2006] eKLR** it was stated as follows:

> **"I find it necessary to point at this stage that parties are bound by their pleadings and the issues that the court is called to determine are those issues as can be said to flow from the pleadings themselves, or put in another way, those disputed facts in which parties can be said to have "joined issue" at the close of the pleadings. The plaintiff's claim being founded on an alleged trespass and illegal occupation of his land by the Defendant and the Defendant's defence being that she is lawfully on the land having acquired a right thereto by virtue of a sale transaction between the Plaintiff and her late husband and as administratrix (therefore as beneficiary), the main issue for determination is whether the alleged Sale Agreement, which is not denied, did give rise to a legal interest capable of conferring a legal right over the suit property to the Defendant."**

29. And finally regarding the issue of the need for precision in pleadings this court must advert its mind to what was stated in the Kenya

Airports Authority case by the Court of Appeal of Kenya which cited the decision of the Malawi Supreme Court in **Malawi Railways Ltd. -vs- Nyasulu [1998] MWSC 3** the latter which, quoting an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal problems, at page 174 said as follows:

> **"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….**
>
> **In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."**

30. Considering that the claim that the plaintiff was not proprietor was not pleaded this court should not even advert its mind to it any further or make any determination on it as parties are strictly bound by what they plead as is evident from the above cited decisions.

31. No party having brought up the issue of propriety of ownership on the part of the plaintiff in the previous suit this court must refer to the appropriate law governing that situation. **Section 7** of the **Civil Procedure Act** states that any matter that could have been raised as a basis for attack or defence but was not so raised in a previous suit can not be raised in a subsequent suit as it is *res judicata*. The exact wording of that explanation in that section is as follows:

> **"Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."**

32. Therefore, the issue as to whether the plaintiff is or is not the registered proprietor of the suit properties having not been raised when it was supposed to be raised as a point of attack in the previous suit, heard or adjudicated upon in so far as the dispute over the suit property was concerned, is now *res judicata*.

33. Based on the pleadings in the former suit, it must be taken to be the truth that the defendant has never had any doubts as to the plaintiff's claim to ownership of the suit premises. In any event the admission by the defendant that the plaintiff had earlier on sold him an adjacent plot bearing the same attributes as the current subject matter plots as far as ownership status is concerned renders it to be possibly true the plaintiff's averment that the defendant's claim is a mere afterthought.

34. In addressing the issue as to whether the rest of the matters in the counterclaim in the present proceedings are *res judicata* it is good to enumerate them here and then examine whether they appear or should have appeared in the pleadings or otherwise be subject of dispute in **HCCC No 230 Of 2010.** They are the claims as to whether:

> **a. There was a sale transaction between the plaintiff and the defendant concerning plots Nos LR 19912/6 and 19912/7 in respect of which the defendant paid some monies to the plaintiff as part consideration and took possession of the suit premises;**
>
> **b. The defendant carried out extensive developments on the suit premises with the plaintiff's knowledge;**
>
> **c. There was an oral agreement that the plaintiff herein would deliver to the defendant transfer deeds to enable completion;**
>
> **d. In the alternative the plaintiff should refund the sums of funds paid as part consideration in the sale;**
>
> **e. The plaintiff should pay the defendant the sum of Ksh 4,000,000/= as the value of the developments effected on the suit premises by the defendant;**
>
> **f. The plaintiff herein ought to be compelled to comply with the orders of the court in Nakuru HCCC No 230 of 2004;**
>
> **g. A valuer should be appointed to determine the purchase price which should be paid by the defendant whereupon the defendant would become entitled to the completion of the sale.**

35. From a perusal of the plaint and defence in both this suit and **HCCC No 230 of 2004** it is plain to see that the issues nos **(a), (b)** and **(c)** in the paragraph immediately preceding were issues common to the two suits and they were directly expressed in the pleadings and evidence. Also, from the construction of the pleadings in **HCCC No 230 of 2010** this court is of the opinion that issues no. **(d)** and **(e)** should have formed part of the pleadings of the defendant in that case but they were not expressly included. That notwithstanding and as earlier observed, **Section 7** of the **Civil Procedure Rules** considers matters that should ordinarily have been raised in the previous suit in attack or defence but were not so raised to be *res judicata* and I would categorize them as such.

36. It is clearly evident that only issues **(f)** and **(g)** above are new as between the plaintiff and the defendant in this dispute, and both relate directly to whether the plaintiff is compellable to complete the sale by virtue of the judgment in **HCCC No 230 of 2004.**

37. A perusal of the judgment in **HCCC No 230 of 2004** shows that there was no order made therein to compel the plaintiff in the instant suit to transfer the suit land to the defendant; the outcome of that suit was that the case was dismissed with no orders as to costs, with the *obiter* observation that the court had left the decision to finalize the agreement in the hands of the parties. Just before it concluded by dismissing the case the court opined that the parties, if unable to agree on the consideration, may seek the opinion of a land valuer to resolve the disagreement on the value of the parcels of land.

38. While the court may not have been explicit on the issue I now observe that the situation in **HCCC No 230 of 2004** was that the contract was not enforceable at the instance of either party for uncertainty of terms regarding consideration as the parties had entered into the serious mistake of not having the agreement reduced into writing.

39. In this court's view, the matters in **(f)** and **(g)** above purely concerned enforcement of the court's judgment and no more and the defendant herein ought to have pursued the appropriate avenues for execution within the confines of that suit and there was therefore no need for any second suit or counterclaim to enforce it. The court in the former case however held that the defendant had failed to establish his claim and it dismissed the suit and gave an advisory that the parties were not, in my view, bound by. That explains the orders sought in the counterclaim herein.

40. In conclusion on the issue this court finds that five of the issues that the counterclaim raises are *res judicata* and the remaining two are matters not fit to be entertained in the instant suit for the reason that they relate to execution in the already concluded former suit.

Whether in the circumstances of this suit the plaintiff is entitled to the orders of eviction sought

41. The plaintiff seeks eviction orders. The plaintiff's claim is that he is the registered owner of the suit premises though he has failed to establish that claim. The evidence of the parties shows that the advice given by the court in **HCCC 230 of 2004** failed to take root and the parties are still in the same situation as they were at the time of dismissal of that suit. Had the parties taken the advice of the court, exercised goodwill and arrived at a reasonable conclusion as to what the appropriate consideration in the agreement is, this court may not have had to give this judgment. However, the defendant brought in the issue of his uncertainty as to whether the plaintiff is the owner of the suit land in his evidence and though not claimed in the defence and counterclaim it is clear that this issue has somehow been a major stumbling block in the conclusion of the dispute.

42. In this court's view, subject to whether the plaintiff properly bought the suit land from the Karamas and if the title held by the Karamas was proper, then he has some interest in the land which awaits registration. It was the evidence of the parties in this suit that the Karamas have never bothered the defendant during his **20** year stay on the suit premises. The defendant has acknowledged that though the plaintiff is not the registered owner he is in possession of the suit premises with the knowledge and permission of the plaintiff; he also acknowledges that the plaintiff had, save for the failure to agree on the price, originally intended to sell the suit properties to him.

43. This court may not know why there was such lengthy delay in the procurement of the title documents in the plaintiff's name, or whether the plaintiff will ever thus secure those documents; however, the relevant fact is that the defendant has admitted that to his knowledge, the ownership of the suit premises is attributable to the plaintiff by way of purchase from the Karamas and no other finding can stand especially while nobody else other than the two parties herein is involved in the land dispute. The provisions of the **Civil Procedure Act and Rules** are to the effect that court of law must determine on the relative merits the claim before it in so far as the interests of the parties actually appearing before it are concerned. **Order 1 Rule 9** of the **CPR** provides as follows:

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

44. The successful sale of the first plot which never raised any dispute between them and which led the defendant to desire to purchase the remaining two plots subject matter herein is a light beacon in the darkened waters of this litigation. This court has understood the plaintiff to say that the sale of that first plot took place without any title documents registered in his name and that the sale agreement was executed before an advocate. The court in **HCCC 230 of 2004** was puzzled as to how the defendant herein could have entered into an oral agreement for sale of additional land yet the first agreement was written; it also expressed its abysmal dissatisfaction with the allegations that the defendant herein paid the plaintiff in cash for the sale of the land without securing any acknowledgment or other proof of payment to the plaintiff. It is only equitable to state that if the defendant herein did not raise any complaint in respect the sale of the first plot this court thinks that the he ought not to have any in respect of the intended second sale.

45. To take advantage of **Section 26** of the **Land Registration Act** and to avoid a rigmarole regarding proof of title, landowners need bear title documents to the land in respect of which they seek eviction of trespassers. However, this court is aware that in view of **Section 28** of the **Land Registration Act**, there are instances in which persons own interests in land without any interest being reflected in the land register. It is not therefore necessarily the position that that eviction orders cannot issue in favour a party who bears no registration documents to the property in question against third parties, especially where the the target of the intended eviction has admitted that they are on the suit land by consent of the claimant. A perusal of the provisions of **Section 28** of the **Land Registration Act** provides as follows:

> **"28. Overriding interests.**
>
> **Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—**
>
> **(a) deleted by Act No. 28 of 2016, s. 11a.**

(b) trusts including customary trusts;

(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;

(d) natural rights of light, air, water and support;

(e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(f) deleted by Act No. 28 of 2016, s. 11b.

(g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and

(j) any other rights provided under any written law.

46. Owing to the provisions in **Section 28** of the **Land Registration Act** set out as above I would not consider the plaintiff to be in an impotent position where he can not, given the proper environment, secure orders protecting his interests as recognized by the defendant. In the light of the foregoing I would state that of the two parties before me the plaintiff has a greater claim to the land even in the absence of registration in his name and that he would be in a proper case be automatically entitled to orders of eviction without such inquiry as is underway in this suit.

47. Regarding the plaintiff's claim for damages for loss of user, an award under this head of damages ought to be supported by evidence. This was the position in the Court of Appeal case of **Grace Anyona Mbinda v Jubilee Insurance Company Limited [2021] eKLR** where the court held as follows: -

"I therefore find that the Appellant in the present case did not prove that the vehicle was bringing an income of Kshs. 200,000/= per month. The mere production of a note book is not sufficient proof that the Appellant used to earn Ksh. 200,000 per month… "

"I accordingly find that the Respondent is not liable to pay the loss of user and I dismiss the appeal."

48. The plaintiff never intimated that he had as much as commissioned an actuarial report on damages. Awarding the plaintiff any sum would in the absence of such evidence in proof of the claim would amount to plucking it from the air which is not proper for the administration of justice in an adversarial system. It is this court's view that since the same has not been established by way of evidence the claim under that heading should fail.

49. The foregoing notwithstanding, it appeals to this court to state here that the plaintiff's weapon of choice, the sword of ***res judicata,*** must cut and be seen to cut both ways in this case if the decision of this court is to be and to appear fair to all parties. This court can not afford to selectively apply the *res judicata* doctrine against the defendant and except the plaintiff therefrom for in the defence that the plaintiff filed on **1/9/2004** in **HCCC 230 of 2004,** he failed to counterclaim for possession or eviction of the defendant from the land. Consequently, his entire claim in this suit, now falling victim to the very doctrine he raised against the defendant, can not succeed in law so as to secure him any of the orders he seeks.

50. The substantive prayer that the defendant seeks regarding the appointment of a valuer was already advice of the court that determined **Nakuru HCCC No. 230 of 2004**. The plaintiff argued that that part of the judgment issued by L. Kimaru J where he ordered that the parties are the ones to decide whether they will finalize the agreement is *orbiter dicta* and therefore not binding. It is my view while in agreement with the plaintiff that the decision to finalize on the agreement was left to the parties and at no point did the court make it mandatory for them to finalize the same as it was left to them to agree then proceed to appoint a valuer.

51. In view of the matters discussed above in this judgment, it is this court's opinion that the plaintiff's claim is *res judicata* by virtue of the judgment in **HCCC 230 of 2004** and the defendant's counterclaim is also *res judicata* by virtue of the same judgment. That being the conclusion, should both the plaint and the counterclaim be dismissed at this juncture?

52. Perchance this court does not resolve what else to do with the case of the parties, that conclusion would be the sad denouement to this age old litigation: a judgment in which none of the problems that have perennially beleaguered the disputing parties' minds has been resolved by the law for the legal reasons given.

53. This court realizes that even in circumstances entailing the utmost uncertainty, in its execution of the constitutional mandate of aiding all parties who willfully submit to its jurisdiction access justice without impediment, and whose successors risk the unfortunate assumption of heirship to an unresolved dispute, it should in so far as is possible avoid letting them leave after decades of wait without orders clearly demarcating their respective rights, whatever it perceives them to be.

54. Contrary to the normal practice, the doctrine of *res judicata* came into play rather late in the day after the full hearing of the suit on its merits and unleashed lethal effects on the parties' respective cases, but the silver lining in the cloud of all that travail and application of much valuable judicial time to this suit is that this court has benefited from a harder and deeper look into the true nature of the dispute. This court is therefore disinclined to leave the parties to their own devices, for it is convinced that the mandate of the court is to bring to an end disputes with finality without leaving any part thereof for the parties to resolve as that is the essence of any impartial arbitration save in the case of unjusticiable matters. In saying this I must recognize that the judgment of my brother Kimaru J in **HCCC 230 of 2004** bore no structural interdicts requiring a return to court but gratuitously after dismissal of the entire suit and in good faith left the matter to the goodwill of the parties, which failed to yield final and positive results. It was nevertheless a final judgment in my view that found for the defendant. however, both parties were left dissatisfied hence the claim and counterclaim herein.

55. In the case of **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR** the Court of Appeal appeared to be in favour of a determination that would put a legal dispute to rest with finality. It recalled its previous decision in **Telkom Kenya Ltd -vs- John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd.) (2104) eKLR** where it had earlier observed as follows:

> **"We respectfully reject the notion that Article 159(2) (d) of the Constitution and the overriding objectives of the Civil Procedure Act and Rules could be invoked to justify the departure from well used procedure for perfecting declaratory judgments by inviting parties to compute entitlements and filing affidavits as happened in this case. We reiterate that it would be a serious abdication of the judicial function was the same to be delegated to the parties who come to courts for that very determination."**

56. In the same case of **Kenya Airports Authority supra,** the Court of Appeal stated as follows:

> **"102. The South African Constitutional Court in Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) paragraphs 19 and 69 where Ackermann J, writing for the majority expressed:**
>
> > **"Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights. ... Particularly in a country where so few have the means to enforce their legal rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."**

57. By reason of the foregoing, notwithstanding the dicta in the **Malawi Railways Ltd case (supra),** the **Mumo Matemu case (supra)** and the **Ayub Ndungu case (supra)** this court will not shunt this dispute aside with a dismissal order and forget that there dispute still simmers on the ground. The reasons are first, that on the basis that much time has already been spent on the hearing of the parties' cases, and secondly, that it is foreseeably bound to continue to fester and probably later saddle our already backlog-riddled judicial system with further needless litigation in the same manner the numerous post-judgment applications in **HCCC 230 of 2004** did, some element of justice has to be dispensed to both parties by court since subsequent to **HCCC 230 of 2004** the parties have failed to amicably resolve the dispute between themselves.Society thrives on amity. Resolution of disputes with finality by the bodies mandated to do so promotes that amity. It is quite certain that none of the parties here is comfortable with the unresolved dispute and a bold step away from the doctrine of *res judicata* by this court is needed to conclude it, otherwise it will consume more resources than necessary. While observing the protracted litigation in a land buying company that resulted in shareholders waiting for decades in a different case, that **Kitale Petition No. 7 of 2016 Peter Njogu Karanu, Ann Njoki Njoroge, Margaret Wambui Kimiti, Charles Njama Wangai, Martin Mitheo & Others -vs- Nyakinyua Mugumo Trees Co.Ltd., Chief Land Registrar, Director of Surveys and the Attorney General, eKLR** this court held as follows:

> **"In this our beloved country today, it is a regrettable reality that urgently requires to be specifically addressed by stringent policy and possibly legislative measures, that some land buying firms some incorporated about fifty years ago, have failed to promptly deliver what their now old, wizened, bent over and walking-stick wielding shareholders expected in their youth: land or title documents to land. It is even more regrettable where that delay was occasioned by leadership wrangles. This is a serious omission in an economy where land is one of the most cherished capital assets.**
>
> **The consequence is that investors may have been denied access to billions of shillings worth of assets, their securitization and other potential that comes along with land and land ownership documents.**
>
> **Turning to the instant case, some 27 years after LR. No. 1803 was bought to benefit the shareholders of the 1st respondent a group of shareholders are in court seeking to bar at an interlocutory stage of these proceedings, the completion of the title issuance process on the basis that another survey had been conducted earlier, yet they are unable to demonstrate any prejudice that would be occasioned them by the re-survey, that is, if there is indeed any such exercise going on."**

58. If this dispute is not resolved one way or another the result will be further dissatisfaction and uncertainty on the part of both plaintiff and defendant. Great tribulation may arise in the hearts of the parties if this court failed to resolve the dispute between the two parties with finality and left the task to their partisan minds notwithstanding that subjecting themselves to the jurisdiction of this court without demur evinced an undying hope for a resolution by an impartial arbiter mandated by the law and the Constitution. Indeed, **Article 50** of the Constitution provides that:

> **"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."**

59. It is the function of the courts in so far as it is possible, and save for obvious unjusticiable causes, to ensure that disputes before it are resolved with finality. I do not consider this an unjusticiable cause. Court decisions may occasionally attract various criticisms on certain findings and awards made therein but in cases like the present suit such decisions surpass the abandonment of parties to eternally and painfully wallow in the miasma of their ugly self-made mess, possibly with repercussions beyond their own lives, for generations after them. It was *inter alia* the need to cater for situations not envisaged by the law, or to dull the sharp edges of the law that birthed doctrines of equity in English jurisprudence in the fifteenth century.

60. Turning back to the facts of the present dispute, the court in **HCCC 230 of 2004** gave the parties free advice to agree by themselves or to have a valuer assess the value of the premises for the purpose of setting the purchase price but it is clear from what transpired that each party would rather have his way in the matter. The definitive order that the suit had been dismissed had been given in the judgment and in that very respect the decision of the court in that case differed from that of the High Court in the **Mitu-bell case**. In view of those events it is therefore a vain hope that the dispute can be resolved soon if this court leaves the matter in parties' hands yet again especially after a full hearing.

61. I must hasten to clarify at this juncture that the decision in the **Kenya Airports Authority Case** was in respect of a petition and not a civil suit. That petition concerned a claim of violation of constitutional rights relating to land and dwellings of the petitioners therein and was in respect of public land upon which the petitioners had been settled. It must also be recalled that private citizens' property rights in Kenya, including rights to land which is an emotive issue, are protected by the provisions of **Article 40** of the Constitution; when they are under threat of violation by the state or by individuals it is to this court that the citizens turn for relief. It may be the case that the pleadings of the parties in the instant case are unsatisfactory but they look up to the court for a judgment that will finally resolve their issues. Much would be their consternation if this court fails to exercise its mandate to do so and their next stop would be uncertain; this outlook is quite inauspicious for the promotion of public confidence in the administration of justice in this nation.

62. For the foregoing reasons this court will open its eyes to what each party considers to be justice in this case and thereafter strike an objective balance in order to arrive at an equitable award for each which may dispose of the dispute with finality, for it is only thus that a final resolution may be found, the parties' claims expressed in the suit having not found favour under the statute and common law. This court's inquiry must therefore consider certain peculiar aspects of the transaction between the parties in this case.

63. The defendant voiced feelings of insecurity for the reason that the plaintiff is yet to show him proof of ownership to the suit properties; that the plaintiff gave him Karama's documents which cannot be used for registration; he avers that in the event the plaintiff proves ownership then he would be willing to proceed with the purchase transaction. While submitting that he has not been in trespass on the suit lands and while stating that he is rightfully in possession as a purchaser for value, the defendant submitted that the plaintiff never demonstrated that he had title to the suit lands, that the plaintiff had consequently not demonstrated either legal or beneficial ownership of the land and that he is therefore not entitled to vacant possession. On the other hand, the plaintiff averred that in the previous suit the defendant who claimed the existence of an agreement then never raised the issue of ownership as he is doing in the instant suit; that therefore the issue of lack of proof of ownership is an afterthought which the court should ignore, and an attempt to deprive the plaintiff of his land. He stated in his evidence that the defendant's claim that he had sought proof of ownership from him in order to complete the transaction was false as the same was not contained in his pleadings.

64. Regarding title documents, this court has already stated that it may not know why the plaintiff delayed so long in obtaining title in his name or whether he will ever get them in order to satisfy the defendant's demands and that matter is best not left to hopeful speculation. It would then appeal to the logical mind that in a liberal market, the defendant should take the plaintiff as he found him, and the plaintiff requires protection from unjustified deprivation of whatever is attributed by both parties to be his, however sterile his claim may end up being; ironically, the defendant has already acquiesced under sale to him by the plaintiff of one plot while the plaintiff held no title documents to it in his name and in this court's view, the same case ought to apply to the other two; however this court can and will not embark on any odyssey to assuage the defendant's fears regarding the validity of the plaintiff's title. However, in crafting appropriate remedies for both parties, rather than compel them to proceed on unjust terms with a transaction they lack confidence in or be perceived to redraw their contract contrary to established law (**see National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR,)** this court must draw an inspiration from the dream remedies expressed in their pleadings.

65. The plaintiff on his part does not wish to continue with the sale on the basis that the defendant failed to pay the purchase price that the plaintiff perceived the parties to have agreed upon long ago hence his suit for eviction and consequent vacant possession. On his part the plaintiff does not deny that the defendant has developed the suit lands without the plaintiff's demur or that he entered into possession of the suit lands peacefully in the year **2002** pursuant to the purchase agreement between the parties. His main response to the claim for refund of purchase price and related costs and the development expenses is that those matters are *res judicata* but as observed herein before the strict application of that doctrine in this dispute amounts to the proverbial case of an eye for an eye that leaves both parties blind.

66. Arising from the special matters expressed in the two foregoing that this court is inclined to hold that where the defendant has not agreed to wholeheartedly purchase the suit lands owing to his perception of defect in the plaintiff's title and the plaintiff has declined to sell to him for reason of the defendant's failure to pay a certain price demanded, that an equitable approach demands that the defendant be deemed to be holding the lands in trust for the plaintiff. It is this trust that the court, noting that the parties do not appear to be inclined to agree in the foreseeable future, must determine under certain conditions to disentangle the parties for them to go separate ways amicably; it is crystal clear that in doing so the court may have to recognize and apply certain "*rights*" of the parties that the statute law and the common law would not have otherwise recognized in the circumstances of this suit. Those are the defendant's "*right"* to refund of the consideration and expenses used in developing the suit land and the plaintiff's "*right"* to damages for loss of user otherwise construed to be *mesne profits* and vacant possession.

67. It is the case that the defendant admitted that the valuation of the suit properties was done several years ago and that the current value of the property may have appreciated to the tune of approximately **Ksh. 20,000,000,** which is a far cry from the **Ksh 525,000/= or** the **Ksh 1,000,000/=** the parties respectively put forward as the agreed purchase price during the hearing. The defendant's own estimate of the value of developments he has effected on the premises is **Ksh 4,000,000/=** while he puts the purchase price paid to the plaintiff at **Ksh 172,950/=.** The fact remains that the parties never conducted a joint valuation exercise yet this would have aided this court extensively in the determination of the instant dispute. All that the court is left with are estimates primarily submitted by the defendant and the question arises

as to whether these are dependable in the just resolution of the dispute. In considering the same, this court must state that it does not recall hearing the plaintiff to dispute those figures.

68. The defendant has admittedly been utilizing the premises for over **20** years and no indication was given that he was paying any rent therefor. The presumption is that the parties having been hopeful of arriving at a successful sale there was no rent demanded by the plaintiff. The plaintiff failed to secure rents from him during his occupation and his claim for *mesne profits* has been disallowed by the law as herein before stated. I would not conclude that the defendant would be unjustly enriched if his stay was adjudged to be not yoked to any obligation to pay rent for there was no agreement produced by the plaintiff to that effect and also that such an arrangement is not an entirely impossible thing.

69. At this point this court calls in its aid the normal practice regarding leases in order to address the issue of whether the defendant deserves any remedy. In ordinary lease agreements permanent fixtures coming into being at the tenant's instance normally accrue with the lease unless otherwise provided for. However, there was no lease between the parties herein and the defendant understandably erected the subject developments under the plaintiff's acquiescent watch, supposedly under some understanding that the premises were on sale to the defendant for his needs. In his answer to defence at **paragraph 8**, the plaintiff denies authorization or liability therefor and avers that the defendant did the construction at his own risk and refutes the claim that the defendant is entitled to any reimbursement. His evidence is that he sold to the defendant the first plot, and that out of the friendship they had he allowed the defendant to use the suit premises to park his cars, and that he fell ill and during the period of sickness the defendant started constructing on the suit properties without his consent. He failed to produce any evidence of illness. He does not aver that he tried at any time to stop the construction which the defendant states occurred between the years **2002** and **2004**. I find that the plaintiff misconducted his affairs by failing to halt the developments which he knew were done on the basis of trust that the agreement would go through, and which developments would be now left to his reign if this court ordered the defendant's eviction. That in my view does not seem just. Besides the plaintiff, intent on securing vacant possession of the developed properties, was disinclined to engage in the process of valuation after judgment in **HCCC 230 of 2004** recommended it. Only the spirit of the plaintiff within him would know the truth as to whether indeed the orally agreed purchase price was as per his evidence and not as per the defendant's, yet disagreement on that price is, according to him the main basis on which the sale deal fell through. It is for this reason that I am inclined to accord the defendant the benefit of doubt regarding the sums he claims. I am persuaded that the defendant's aggregated claim for **Ksh 4,172,950/=** for reimbursement for developments and refund of purchase price provides a proper guiding light in this case and consequently, having had no opposition to that valuation and having failed to present his own valuation, the plaintiff must be compelled to reimburse the defendant for any permanent developments and refund the purchase price to the extent of that expressed sum.

70. No other issue now remains outstanding except that of eviction and vacant possession and to which I now turn. At the risk of suffering this judgment to much reiteration, it is observable that the defendant admittedly took possession of the suit premises, remained thereon with consent of the plaintiff and subsequently purported to purchase them but he developed butterflies in his stomach when he learned the title documents thereof are not in the plaintiff's name. If the plaintiff's version is to be believed, it is the defendant who failed to pay the agreed purchase price, with the inevitable consequence that the deal fell through. This Court having relied on the provisions of **Section 28** of the **Land Registration Act** herein before finds a pungent odour of manifest injustice to be reeking from the defendant's rather bold proposition that since the plaintiff has failed to prove that he is the registered title holder he is not entitled to eviction orders or vacant possession. Also, as observed before, just as the plaintiff can not be compelled under the circumstances of this case to sell the suit lands to the defendants, the defendant can not be compelled to be content with the lack of title documents in the plaintiff's name, or to pay consideration not mutually agreed upon. This court has already stated that in the circumstances of this case the equitable position to hold is that the defendant holds the land in trust for the plaintiff. The ordinary sequel of these observations is that the court by its orders ought to as gently as possible disentangle the combatants in order to write *finis* to this litigation which has overstayed its welcome in the corridors of justice. The only path to that goal is by granting the plaintiff's claim in terms of **prayer no (a)** of the plaint and awarding the defendant a token for his developments on the suit land as well as refund of purchase price paid.

71. The upshot of the foregoing is that I issue the following final orders in this case:

> **a. The plaintiff shall pay to the defendant in full the aggregated counterclaim for reimbursement of development expenses and refund of purchase price of Ksh 4,172,950/= in default of which the defendant shall have right to remain on the suit premises until the said sum has been settled in full.**
>
> **b. Within 90 days of payment to him of the sum of Ksh 4,172,950/= in order no (a) above, the defendant shall grant the plaintiff vacant possession of the suit lands that is L.R No. 19912/6 and L.R No. 19912/7, Nakuru Municipality to the plaintiff in default of which he shall be forcibly evicted therefrom.**
>
> **c. Each party shall bear their own costs of the suit and of the counterclaim.**

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 10TH DAY OF MARCH, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU