



National Social Security Fund Board of Trustee v Jack Projects Limited & 5 others (Environment & Land Case 2387 of 1996) [2022] KEELC 2362 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2362 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 2387 OF 1996**

**JO MBOYA, J
JUNE 23, 2022**

BETWEEN

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEE PLAINTIFF

AND

**JACK PROJECTS LIMITED 1ST DEFENDANT
NATIONAL LAND COMMISSION 2ND DEFENDANT
COMMISSIONER OF LANDS 3RD DEFENDANT
CHIEF LAND REGISTRAR 4TH DEFENDANT
DIRECTOR OF SURVEYS 5TH DEFENDANT
ATTORNEY GENERAL 6TH DEFENDANT**

JUDGMENT

1. Vide a Second Further Amended Plaint dated 03rd September 2019, the Plaintiff seeks Judgement against the Defendants as hereunder:
 - a. Declaration that the Plaintiff is the lawful proprietor of Land Reference Number 9042/179 and has a valid and indefeasible title thereto.
 - b. A Declaration that the 1st Defendant's Grant Number I.R 66359/1 over Land Reference Number 9042/23 is null and void.
 - c. A mandatory injunction directing the 4th Defendant to revoke and/or nullify and/or cancel the 1st Defendant's Grant Number I.R 66359/1 over Land Reference Number 9042/23.



- d. A mandatory injunction directing the 4th Defendant to cancel Deed Plan Number F/R No. 110/150 and to rectify its maps by excluding all and any references to Land Reference No. 9042/23.
 - e. Permanent Injunction restraining the 1st Defendant, by itself, by its servants or agents or otherwise, from entering interfering or in any manner acting inconsistent with the absolute and indefeasible title rights of the Plaintiff or continuing or repeating any of the acts complained of herein.
 - f. Any other or further orders or reliefs that this Honourable court shall deem fit to make.
 - g. Costs of this suit.
2. The 1st Defendant duly entered appearance and thereafter filed her Amended Statement of Defense and Counterclaim on 21st August 2012. Besides, same also filed a List and bundle of Documents on 14th December 2018.
 3. For clarity, the Counterclaim sought the following Reliefs as against the Plaintiff:
 - i. General Damages for trespass.
 - ii. Special damages of Kenya Shillings Three Hundred and Three Million Eight Hundred and Twenty One Thousand and Twelve (Ksh. 303,821,012) Only.
 - iii. Costs of the suit.
 4. On the other hand, the 2nd, 3rd, 4th and 6th Defendants herein never filed any Statement of Defense to the Second Further Amended Plaintiff or to the Counter-claim, the latter which was filed by and/or on behalf of the 1st Defendant.
 5. Based on the foregoing, the dispute beforehand fell for determination as between the Plaintiff and the 1st Defendant, each of whom had a certificate of title/Grant relating to two different parcels of land, but which, apparently shared same ground delineation and/or location.

Evidence By The Parties

a. Plaintiff's Case

6. The Plaintiff herein called two witnesses in support of her case, namely, Caroline Rakama-Odera, who testified as PW1 and Jacob Ogwari Oyato, the latter who testified as PW2.
7. PW1 testified on the 28th January 2016 and same indicated that she was employed by the Plaintiff herein as the Legal officer and hence by virtue of her position, same was conversant with the issues pertaining to and/or concerning the Purchase, acquisition and ultimate registration of the suit property in favor of the Plaintiff.
8. Besides, the witness testified, that on or about December 2004, the Plaintiff herein was in the process of searching for a property for purposes of purchase and/or acquisition with a view to Developing a Housing Estate within the city of Nairobi.
9. Further, the witness stated that later in December 2004, the Plaintiff's agents sighted a piece of land situate within Embakasi Estate and which parcel of land was entirely vacant and same measured approximately 80 Hactares.



10. The witness further testified that after sighting the said parcel of land and being satisfied that same would be ideal and/or conducive for the intended Housing Estate, the Plaintiff carried out a search and established the ownership thereof.
11. Upon identifying the registered owner of the subject property, which had been sighted at Embakasi area, the Plaintiff herein entered into negotiation with the known owner of the subject parcel of land, namely M/s Beta Enterprises Limited, with a view to purchasing and/or acquiring same.
12. It was the witness' further testimony, that after the negotiations were completed and/or concluded, the Plaintiff and M/s Beta Enterprises Ltd entered into a Sale Agreement, which was thereafter executed on the 20th February 1995.
13. On the other hand, the witness testified that after the execution of the Sale agreement, the Vendor of the property, namely, L.R No. 9042/179, proceeded to and executed the requisite Transfer Instruments to facilitate the transfer and registration of the suit property in favor of the Plaintiff.
14. Further, the witness has testified that the suit property, namely, L.R No. 9042/179, was thereafter transferred to and registered in the name of the Plaintiff herein. For clarity, the witness pointed out that the transfer was duly endorsed on the Title of the suit property as entry number 5, with presentation Book number 21.
15. It was the witness' further testimony that at the time of the transfer and registration of the suit property to and in favor of the Plaintiff, the suit property was clear and devoid of any encumbrances and that in any event, the only Encumbrance, which hitherto existed vide Charge had been cleared.
16. Other than the foregoing, the witness testified that upon the transfer and registration of the suit property to and in favor of the Plaintiff, the Plaintiff herein engaged and/or retained a contractor to fence the entire of the suit property and to ready same for the construction of the intended Housing Estate.
17. Besides, the witness testified that later the Plaintiff herein flouted a tender, whereby same invited bids from assorted companies for purposes of construction of the Intended Housing Estate.
18. Further, the witness testified that the Plaintiff herein thereafter settled on Mugoya Construction company Limited to carryout the construction of the Housing Estate and that the said construction company commenced the intended construction and proceeded with same up to and including February 1996, without any interference from any quarter and/or person whatsoever.
19. Be that as it may, the witness has testified that on or about Late February 1996, the Plaintiff's Managing Trustee received a letter from the 1st Defendant herein, who contended and/or claimed that the Plaintiff had fenced her property and same demanded to be granted access to her property or alternatively, that the Plaintiff herein do purchase the said property, which transpired to be L.R No. 9042/23.
20. Other than the foregoing, the witness further testified that on the 1st and 7th days of May 1996, the Plaintiff again received correspondence from the 1st Defendant's advocate, namely, M/s Mwirichia & Company Advocates, demanding that the Plaintiff do address the issue of settlement or in default that the 1st Defendant would resort to alternative action, the details which were however not disclosed.
21. It was the witness' testimony that upon receipt of the two sets of letters, details in terms of the preceding paragraphs from the 1st Defendants advocates, the Plaintiff's Managing Trustee generated and wrote a letter to the Office of commissioner of lands, whereby the Plaintiff's Managing Trustee expressed his surprise over the claim that there was a property belonging to a Third Party which was alleged to be falling within the Plaintiff's property herein.



22. Nevertheless, the witness proceeded and testified that though the Plaintiff's Managing Trustee wrote to the Commissioner of lands vide letter dated 4th June 1996, the Office of the Commissioner of land did not respond to the said letter until the 11th September 1997 when the 2nd Respondent replied to the Plaintiff's Managing Trustee's letter, whereby the Commissioner of land, inter-alia, acknowledged that L.R No. 9042/23, had erroneously been included within the perimeter fence of L.R No. 9042/179, belonging to and registered in the name of the Plaintiff.
23. At any rate, the witness has further testified that vide the same letter, the Commissioner of lands also proceeded to and made a curious suggestion to the Plaintiff that though, L.R No. 9042/23, had erroneously been plotted within the Plaintiff's property, namely, L.R No. 9042/179, the Commissioner Of Land proposed that the Plaintiff should engage the 1st Defendant with a view to purchasing (sic) the 1st Defendant's property.
24. Further, the witness testified that following the claim by and/or on behalf of the 1st Defendant that her property had been fenced within the Plaintiff's property, the witness procured and perused the various documents which underlined the 1st Defendant's claim and the witness discovered, inter-alia, that the Letter of allotment in respect of L.R No. 9042/23 was issued on 24th March 1995, long after L.R No. 9042/179 had been transferred to and registered in favor of the Plaintiff.
25. It was the witness' further testimony that by the time the Letter of allotment in favor of the 1st Defendant was being processed and issued, the suit property herein had long been alienated and/or allocated to the Plaintiff's predecessor in title, who was allocated the suit property in the year 1988 and a Certificate of title/Grant issued on the 31st May 1988.
26. On the other hand, the witness testified that by the time the 1st Defendant was being allocated L.R No. 9042/23, which happens to be located within the Plaintiff's property, the land in question, namely, L.R No. 9042/179, was already Private property and hence same was incapable of being alienated by the office of the Commissioner of Land or at all.
27. Based on the foregoing, the witness herein contended that the process leading to the allocation and/or alienation of L.R No. 9042/23 to and in favor of the 1st Defendant, was therefore fraught with irregularity, illegality and fraud.
28. Other than the foregoing, the witness herein testified that the Plaintiff proceeded to and retained a qualified surveyor to carryout survey over and in respect of the Plaintiff's property and also to ascertain the ground location and de-lineation of the property, that was claimed by the 1st Defendant herein.
29. Further, the witness testified that the surveyor who was retained and/or engaged by the Plaintiff, namely, Mr. Jacob Ogwari Oyato of Jooyato Surveys indeed carried out survey and returned a report which confirmed that the parcel of land claimed by the 1st Defendant was indeed located and/or situated inside the Plaintiff's property.
30. Other than the foregoing, the witness also testified that the surveyor also pointed out various anomalies which were discernable and/or notable from the various documents underpinning the 1st Defendant's title.
31. Finally, the witness testified that at the time when the Plaintiff bought, acquired and became the registered proprietor in respect of L.R No. 9042/179, the 2nd Defendant issued to and in favor of the Plaintiff a clear title, which was devoid of any encumbrance and/or restrictions.



32. Consequently and in this regard, the witness therefore contended that it was not open for the 2nd Defendant to purport to allocate and/or alienate a portion of the suit property to and in favor of the 1st Defendant, without notice to and/or involvement of the Plaintiff.
33. In the premises, the witness testified that it was therefore evident and/or apparent that the allocation and/or alienation of a portion of the Plaintiff's land to and in favor of the 1st Defendant, albeit without the consent of the Plaintiff, was erroneous and amounted to a fraud.
34. In view of the foregoing, the witness therefore implored the court, to invalidate and/or cancel the title in respect of L.R No. 9042/23, belonging and registered in the name of the 1st Defendant.
35. Other than the foregoing, the witness herein adopted the witness statement dated the 12th January 2015, and which was thereafter constituted as the witness' Further Evidence- in chief.
36. On the other hand, the witness herein also referred to the various Documents which were filed and/or lodged by and/or on behalf of the Plaintiff and same were thereafter admitted in evidence and marked as exhibits P1.
37. On cross examination, the witness herein indicated that the Plaintiff became aware of the claim by and/or on behalf of the 1st Defendant on or about the 1st February 1996, upon receipt of the Letter from the 1st Defendant herein.
38. Besides, the witness also stated that upon receipt of the 1st Defendant's letter, the Plaintiff herein responded thereto vide letter dated 30th May 1996.
39. On the other hand, the witness also stated that the property which was claimed by the 1st Defendant, namely L.R No. 9042/23, was indeed falling inside the Plaintiff's and formed part of the Plaintiff's property.
40. Further, the witness stated that having looked at the survey plan in respect of L.R No. 9042/23, it was apparent that same was surveyed on the 7th July 1967, whereas the survey Plan for L.R No. 9042/179, showed that same was surveyed on the 23rd May 1988.
41. Nevertheless, the witness further stated that though the survey Plan for L.R No. 9042/23 show and/or indicate that same was surveyed in 1967, the said property was never allocated and/or alienated to and in favor of anyone.
42. Other than the foregoing, the witness further stated that despite the claim by the 1st Defendant over and in respect of a portion of the suit property, the Plaintiff proceeded to and concluded the Housing Estate which was being developed on the suit property and that the units therein have since been fully sold out to various Purchasers.
43. On re-examination, the witness testified that even though the survey plan showed that L.R No. 9042/23 was surveyed in 1967, the fact of such survey does not create and/or confer any Interest and/or Title, unless there is a Letter of allotment, which was not the case.
44. Further, the witness clarified that the subsequent issuance of a letter of allotment to and in favor of the 1st Respondent over L.R No. 9042/23, was admitted and confirmed to have been erroneous by the Office of the Commissioner of land.
45. Finally, the witness stated that the Plaintiff herein was never the original grantee of the suit property, but that same purchased the suit property from M/s Beta Enterprises Limited, who had hitherto been allocated the land in 1988 and thereafter issued with a Grant in respect thereof in May 1988.



46. Other than the Caroline Rakami Odera, PW1, the Plaintiff herein also called one, namely, Jacob Ogwari Oyato, who testified as PW2.
47. According to PW2, same is a Licensed surveyor, practicing within the entire of East Africa and having an Experience spanning over 28 years, in Survey works and / or activities.
48. The witness testified that same was retained and/or engaged by the Plaintiff to undertake a survey exercise with a view to ascertaining the ground locations in respect of L.R No's 9042/179 and 9042/23, respectively.
49. Further, the witness testified that upon receipt of the instruction from the Plaintiff, same indeed carried out and/or undertook the survey exercise and thereafter authenticated and/or ascertained that L.R No. 9042/23, belonging to the 1st Defendant, was indeed located within the Plaintiff's property, namely L.R No. 9042/179.
50. On the other hand, the witness testified that after carrying out the survey exercise, same proceeded to and prepared a Report dated the 12th September 2014, which detailed his findings, observations and recommendations. For clarity, the report under reference was thereafter produced as Plaintiff's exhibit 2.
51. Other than the foregoing, the witness herein highlighted that the survey plan in respect of L.R No. 9042/23 showed that same was surveyed in 1967. However, the witness pointed out that a Survey Plan does not confer any Title and/or Interests to land.
52. It was the witness' further testimony that ownership and/or title to land is conferred by and/ or upon issuance of a letter of allotment and thereafter issuance of title by the relevant office, in this case the Chief Land Registrar.
53. On cross examination, the witness herein testified that the title in respect of L.R No. 9042/179, belonging to the Plaintiff constitutes and/ or comprises of a total of 80.95 Ha or 200 acres.
54. Further, the witness testified that the acreage which same measured and/or computed on the ground corresponded with the acreage within the certificate of title registered in the name of the Plaintiff.
55. As concerns the Deed Plan in respect of L.R No. 9042/179, the witness testified that same was drawn and signed by the Director of Survey on the 31st May 1988.
56. On the other hand, the witness further testified that the Deed Plan in respect of L.R No. 9042/23, was indicated to have been drawn and signed by the Director of survey on the 16th May 1995.
57. Be that as it may, the witness herein confirmed that L.R No. 9042/23 was surveyed earlier than L.R No. 9042/179. However, the witness clarified that L.R No. 9042/179 was allocated first and earlier than L.R No. 9042/23.
58. Other than the foregoing, the witness stated that same was not aware whether the Deed Plan for and in respect of L.R No. 9042/23 and the title in respect of same had been cancelled by the Commissioner of lands or otherwise.
59. Nevertheless, the witness maintained that the preparation of the Deed Plan in respect of L.R No. 9042/23, which was done on the 16th May 1995, together with the Letter of allotment in respect of same were erroneously issued and were thus illegal.
60. With the foregoing testimony, the Plaintiff's case was closed.



b):1ST Defendant's Case

61. Though the 1st Defendant herein had filed a Statement of Defense and Counter-claim wherein same sought various reliefs, inter-alia, a claim for Special Damages in the sum of Kshs.303, 821, 012/= only, the 1st Defendant did not call any witness or at all.
62. Suffice it to point out, that Counsel for the 1st Defendant proceeded to and closed the 1st Defendant's case without adduction or production of any evidence.
63. Consequently, the Witness statement and bundle of Documents which had been filed by and on behalf of the 1st Defendant remained on record, but were never tendered and/or produced in evidence, whatsoever.

Submissions By The Parties:

(a) :Submissions by the Plaintiff:

64. The Plaintiff herein filed written submissions dated the 17th January 2022 and same raised a number of issues, pertaining to and/or concerning the subject matter.
65. First and foremost, the Plaintiff's counsel submitted that the suit property having been alienated and/or alienated to and in favor of M/s Beta Enterprises Limited in the year 1988, leading to the issuance of certificate of title/grant shortly thereafter, the same property therefore became private property and same could henceforth not be alienated to and/or in favor of any other party.
66. Secondly, the Plaintiff's counsel submitted that the Plaintiff herein entered into a lawful and legitimate agreement for purchase and acquisition of the suit property and after complying with the terms of the Sale agreement, the Plaintiff herein was duly issued with a certificate of title, which was clear and/or devoid of any Encumbrance.
67. Thirdly, the Plaintiff's counsel submitted that the title to and in favor of the Plaintiff was issued on the 1st March 1995 and that upon the issuance of the said title, the Plaintiff herein became the lawful and legitimate proprietor of the entire of the suit property and hence entitled to exclusive occupation, possession and use thereof.
68. Fourthly, it was submitted that by the 24th March 1995 when the 2nd Defendant herein purported to issue a letter of allotment to and in favor of the 1st Defendant, pertaining to L.R No. 9042/23, which is located within the suit property, the said portion of land was not available for allocation or alienation at all.
69. Fifthly, the counsel for the Plaintiff submitted that the purported alienation or allocation of L.R No. 9042/23 to and in favor of the 1st Defendant, whereas the said land had hitherto been allocated, constituted an illegal allocation as opposed to double allocation. Consequently, the counsel contended that the allocation of L.R No. 9042/23 to the 1st Defendant, was therefore an illegality.
70. Further, the Plaintiff's counsel submitted that even if it was to be found that there was Double allocation in respect of L.R No. 9042/179 and 9042/23, it would still be appropriate to find and hold that the Plaintiff's title was alienated and/or allocated earlier in time and hence same takes priority
71. Finally, it was submitted on behalf of the Plaintiff that office of the commissioner of land had vide letter dated the 11th September 1997, confirmed and acknowledged that indeed L.R No. 9042/23, was erroneously included and/or plotted within the perimeter fence of L.R No. 9042/179, belonging to the Plaintiff.



72. In the premises, it was further submitted that the 2nd Defendant having acknowledged the error in the allocation and/or alienation in respect of the 1st Defendants title, the said title was therefore illegal, unlawful and thus void.
73. Other than the foregoing, the Plaintiff's counsel has relied on various cases, inter-alia Benja Properties Ltd v Syedna Mohamed Burhannudin Sahed & 4 Others (2015)eKLR, Kenya Ihenya Company Ltd & Another v Njeri Kiribi (2019)eKLR, Gova Holdings Ltd v Tom Mayani Omani & 2 Others (2004)eKLR, Wreck Motors Enterprises v The Commissioner of Lands & Others Civil Appeal No. 71 of 1997, Gitwany Investments Ltd v Taj Mall Ltd & 3 Others (2006)eKLR and Embakasi Properties Ltd & Another v The Commissioner of Lands & Another (2019)eKLR.

(b):Submissions by the 1st Defendant:

74. The 1st Defendant filed her submissions dated the 5th May 2022, and in respect of which the 1st Defendant has raised Four (4) pertinent issues as hereunder;
75. First and foremost, the 1st Defendant's counsel has submitted that the parcel of land known as L.R No. 9042/23, was surveyed in the year 1967 and therefore the subsequent survey as pertains to and in respect of L.R No. 9042/179, ought to have taken into account the existence of the prior parcel of land, which was surveyed earlier.
76. Secondly, it has also been submitted that to the extent that L.R No. 9042/23 had been surveyed earlier, such survey could not be superseded and or vitiated by the subsequent survey which gave rise to the creation of L.R No. 9042/179, the latter which was surveyed in 1988.
77. Thirdly, the counsel for the 1st Defendant has submitted that upon the allocation of L.R No. 9042/23 to and in favor of the 1st Defendant, same complied with the terms contained at the foot of the Letter of allotment and thereafter acquired a legitimate title thereto. In this regard, it was submitted that the 1st Defendant herein is therefore a legitimate owner and/or proprietor over and in respect of L.R No. 9042/23.
78. Fourthly, it was submitted that having lawfully acquired the title to and in respect of L.R no. 9042/23, the 1st Defendant's title herein is therefore lawful and cannot be defeated on the basis of the negligence, if any, committed by the 2nd and 3rd Defendants herein.
79. Further, it was submitted that by virtue of being the registered owner and/or proprietor of the suit property, the 1st Defendant was entitled to exclusive occupation, possession and use, without the interference of all and sundry, the Plaintiff not excepted.
80. Based on the foregoing, counsel for the 1st Defendant therefore submitted the actions by and/or on behalf of the Plaintiff and in particular, the fencing of L.R No 9042/23 within the suit property, constituted and/or amounted to trespass.
81. Finally, the counsel for the 1st Defendant submitted that having trespassed onto the property belonging to and registered in favor of the 1st Defendant, the Plaintiff herein is therefore liable to compensate the 1st Defendant for Loss of use and deprivation of private property.
82. Premised on the foregoing, the 1st Defendant's counsel has proceeded to and submitted that the 1st Defendant is therefore entitled to compensation and in this regard, it has been submitted that the 1st Defendant ought to be awarded compensation on account of Special Damages amounting to Kshs.303, 821, 012/= only.



83. In support of the foregoing submissions, counsel for the 1st Defendant has relied on various cases, inter-alia, Peter Kamau Ikigu v Barclays Bank Ltd & Another (2013)eKLR and Willesden Investment Ltd v Kenya Hotel Properties Ltd (2006)eKLR.

Issues for Determination:

84. Having reviewed the Pleadings filed by the Parties herein, together with the various documents which were filed alongside the Pleadings and having considered the oral evidence which was tendered by the two witnesses called by the Plaintiff herein and having similarly taken into account the written submissions filed by and/or on behalf of the respective Parties, the following issues do arise and are thus germane for Determination;
- i. Whether L.R No. 9042/23 or the portion constituting same was available for allocation/ alienation as at the 24th March 1995.
 - ii. Whether the Plaintiff acquired lawful title over and in respect of L.R No. 9042/179 and if so, whether the said Title was subject to any Encumbrance or otherwise.
 - iii. Whether the actions and/or activities by the Plaintiff in respect of the impugned Title, namely, L.R No. 9042/23 constitutes Trespass.
 - iv. What Reliefs ought to be granted.

Analysis and Determination

Issue Number 1

Whether L.R No. 9042/23 or the portion constituting same was available for allocation/ alienation as at the 24th March 1995.

85. Though the 1st Defendant herein neither called any witness nor adduced any evidence before the court, however the Plaintiff's witness, namely, PW1 tendered in evidence a copy of the letter of allotment dated the 24th March 1995, in respect of which L.R No. 9042/23 was allocated to and/or in favor of the 1st Defendant.
86. From the said Letter of allotment, it is apparent that the allotment granted to and in favor of the 1st Defendant a Lease hold title over and in respect of the allocated parcel of land for a period of 99 years commencing the 1st April 1995.
87. On the other hand, it is important to recall that upon the allotment of L.R No. 9042/23, to and/or in favor of the 1st Defendant, it later on transpired that what was (sic) allocated to the 1st Defendant indeed fell within and/or otherwise formed part of L.R No. 9042/179, belonging to and registered in the name of the Plaintiff.
88. Suffice it to note that when the 1st Defendant herein raised a complaint with the Plaintiff, whereby the 1st Defendant complained that the Plaintiff had fenced her property, without her consent, the Plaintiff's Managing Trustee wrote to the Office of the Commissioner of land seeking to authenticate and/or verify the veracity of the complaint by the 1st Defendant.
89. Subsequently, on the 11th September 1997, the Commissioner of lands responded to the letter by the Managing Trustee and same conceded that indeed the piece/parcel of land that was allocated to the 1st Defendant fell within the perimeter fence, namely, L.R No. 9042/179 belonging to the Plaintiff.



90. Perhaps, it is instructive to reproduce the pertinent aspects of the Letter dated the 11th September 1997 from the Office of the Commissioner of land. For convenience, same is reproduced as hereunder;
- ‘It has come to my notice that the above L.R No. 9042/23 has erroneously been included within your perimeter fence L.R No 9042/179.’
91. Other than the acknowledgement by the office of the commissioner of land that indeed L.R No. 9042/23 fell within the Plaintiffs property, it is also important to note that PW2, who was commissioned by the Plaintiff herein also returned a Report which confirmed that L.R No. 9042/23, indeed fell with the Plaintiff’s property.
92. In view of the foregoing observations, it is common ground that L.R No. 9042/23 is located and/or situate within the Plaintiff’s property, namely, L.R No. 9042/179.
93. Consequently, the question that needs to be addressed and/or resolved is whether as at the time when L.R No. 9042/23 was being allocated to the 1st Defendant, the ground comprising of the said piece of land was unalienated Government land and thus available for alienation by the office of the commissioner of land.
94. Before venturing to answer and/or address the question under reference, it is important to appreciate what then constituted unalienated Government land, which the Commissioner of land was authorized and/or mandated to alienate.
95. To this end, it is expedient to take cognizance of the provisions of Section 2 of the Government [Land Act](#), Chapter 280 Laws of Kenya (now repealed), which provided as hereunder;
- “Un-alienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.”
96. Armed with the foregoing definition of what constitutes unalienated Government land, it is now appropriate to consider whether the portion which was allegedly being alienated in favor of the 1st Defendant vide the letter of allotment dated the 24th march 1995 was indeed unalienated.
97. It is important to note, that the suit property was hitherto allocated to and alienated in favour of M/s Beta Enterprises Ltd, who was thereafter issued with a certificate of title/Grant on the 19th June 1989.
98. On the other hand, it is also common ground that prior to the issuance of the certificate of lease/Grant to and in favor of M/s Beta Enterprises Ltd, a Deed Plan was duly prepared, signed and engrossed by the Director of Survey on the 31st May 1988.
99. In view of the foregoing, it is therefore evident and/or apparent that as at the 19th June 1989, when the certificate of title was issued in favor of M/s Beta Enterprises ltd, the entire portion of land measuring 80.95 Ha, stood duly alienated and was therefore Private land.
100. Based on the foregoing, it is evident that the Office of the Commissioner of land could not therefore alienate and/or allocate any portion of the suit property to and in favor of the 1st Defendant or any other person or at all.
101. At any rate, it is puzzling that the letter of allotment was even being issued to and in favor of the 1st Defendant on the 24th March 1995, same being a period of more than seven (7) years from the date when the Certificate of Title/Grant was issued over and in respect of the suit property.



102. To my mind, the portion which was purportedly being alienated and/or allocated to the 1st Defendant, was no longer available for such alienation and/or allocation, whatsoever and howsoever. For clarity, the said portion had hitherto been alienated and was thus Private property, belonging to a known Owner and whose Rights thereto, were thus protected under *the Constitution* and the relevant Laws, obtaining at the material time, including , but not limited to the Registration of Titles Act, Chapter 281, Laws of Kenya, now Repealed.
103. In the premises, it is my finding and holding that the purported alienation and/or allocation of L.R No. 9042/23, at the foot of the Letter of allotment issued on the 24th march 1995, was outrightly illegal and therefore void for all intent and purposes.
104. On the other hand, it is also important to underscore the point that there is a difference and/or distinction between illegal allocation and double allocation. In this regard, what transpired was an illegal allocation and by extension an attempt to defraud the Plaintiff of a portion/segment of her property, namely, L.R No. 9042/179.
105. To buttress the foregoing observation, it is imperative to take cognizance of the Decision of the Court of Appeal in the case of Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, where the Court at paragraphs 21 and 22 stated as hereunder;

“The foundation of the appellant’s claim is that the Commissioner of Lands allotted the suit land to the original four allottees who subsequently sold it to the appellant. This may be so; however, the legal question is, was there unalienated government land capable of being allotted to the original four allottees? The trial judge answered this question in the negative. We concur with the court’s finding. The 1st, 2nd and 3rd respondents’ title to the suit property has its root of title to a grant and title issued in 1907 and 1911. By various deeds of assignment the 1st respondent became the registered proprietor of LR No. 209/136/269 registered in 1911 as N64 428/1 20772 while the 2nd and 3rd respondents are registered proprietors of LR No. 209/136/239 registered in 1907 as N64 425/1 20769. The legal effect of the registrations made in 1907 and 1911 was to convert the suit property at that time from un-alienated government land to alienated government land with the consequence that the suit land became private property and moved out of the ambit and confines of the GLA.

This made the suit property unavailable for subsequent allotment and alienation by the Commissioner of Lands or the President of Kenya. The appellant’s title to the suit property was thus anchored on land that was not unalienated government land. We concur with the trial judge’s finding that “the suit land having been owned privately was not GLA land, and was not available for alienation. Its alienation was illegal and void ab initio.”

We hasten to add that the issue in this case is not a question of double allotment of land. Double allotment occurs when a specific unalienated government land is allotted to two different persons. In this case, there is no unalienated government land to be allotted. What we have is a purported allotment of private property – land that is neither government land nor unalienated government land.”

106. Recently, the Court of Appeal re-visited the issue of whether alienation and/or allocation of land could be carried out and/or undertaken over and in respect of a portion of land that has already been allocated



vide the decision in the case of Kenya Ihenya Company Ltd & Another v Njeri Kiribi (2019)eKLR, where the Court held as hereunder;

“Thirdly, it was clear that the 1st appellant had allotted the suit land to both the respondent and the 2nd appellant hence the learned Judge’s conclusion that there was a double allocation. That being the case, since the respondent was first in time, as the evidence is clear that she completed making payments in the year 1983 whilst the 2nd appellant claimed to have purchased the same on 24th June, 1997, she was the bonafide proprietor. In that regard, the law is succinctly spelt out in M’ikiara M’Rinkanya and Another vs. Gilbert Kabeere M’Mbijiwe [1982 – 1988] 1 KAR 196 wherein this Court held that:-

“Where a similar situation as in this case arose, there was a double allocation to a plot issued by the Council of the area. The court had noted that the said first allotted letter to the original plaintiff had never been cancelled. That the council had no power to allocate the same property again without following the laid down procedure of re-allocating the property.”

107. Based on the foregoing jurisprudence, it is my finding and holding that L.R No. 9042/179, having hitherto been allocated and/or alienated to and in favor of the Plaintiff’s predecessor in title and thereafter having been transferred to the Plaintiff, the portion thereof which was allegedly excised and (sic) allocated to the 1st Defendant, was therefore unavailable for such allocation.
108. Put differently, by the time the Commissioner of land was purporting to alienate and/or allocate L/R No. 9042/23, to and in favor of the 1st Defendant, same was indeed interfering with the proprietary rights belonging to and inherent in favor of the Plaintiff.
109. Consequently, the Letter of allotment dated the 24th March 1995, conferred no legitimate rights and/or interests to and/or in favor of the 1st Defendant. For clarity, same was ex-facie a nullity ab initio.
110. To this end, it is important to recall that once the letter of allotment by itself is a nullity, no subsequent processes, if any, including issuance of (sic) certificate of title/ Grant would become legitimate.
111. To vindicate the foregoing observation, I am obligated to and do take cognizance of the holding in the decision in the case of Benjamin Leornard Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169 Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

112. In a nutshell, I find and hold that the property and/or parcel of land, which was purportedly being allocated to and in favor of the 1st Defendant, was non-existent. Simply put, the letter of allotment under reference related to no land and thus same conferred no interest, whatsoever in favor of the 1st Defendant.



Issue Number 2

Whether the Plaintiff acquired lawful title over and in respect of L.R No. 9042/179 and if so, whether the said title was subject to any Encumbrance or otherwise.

113. The Plaintiff herein called two witnesses, who tendered evidence for and on behalf of same. Most importantly, the Plaintiff availed evidence to show that the suit property was hitherto registered in the name of M/s Beta Enterprises Limited.
114. On the other hand, evidence was also tendered to show that upon developing an interest over and in respect of the suit property, the Plaintiff instructed and/or retained a nominated advocate who carried out a search at the land registry and thereby established that indeed that the suit property was registered in the names of M/s Beta Enterprises Ltd.
115. Other than the foregoing, evidence abound that prior to and/or before entering into the Sale agreement with the vendor, namely, M/s Beta Enterprises Ltd, the Plaintiff indeed undertook a physical search and confirmed that the suit property was vacant and devoid of any Third-party occupation.
116. Premised on the outcome of the physical and official search, which were carried out over and in respect of the suit property, the Plaintiff proceeded to and entered into a sale agreement, which ultimately culminated into the transfer and registration of the suit property in favor of the Plaintiff.
117. At any rate, it is also important to note that during and in the course of the registration of the transfer instrument and the issuance of the certificate of title, the office of the Chief Land Registrar, never indicated that the suit property was subject to any restriction and/or encumbrance or at all.
118. To the contrary, the Plaintiff herein was issued with a Certificate of title/Grant, which showed that same was clear and devoid of any encumbrance.
119. To the extent that there was no encumbrance affecting the Plaintiff's title, it is appropriate and/or expedient to find and state that indeed the Plaintiff procured and obtained registration of the suit property clear of any encumbrance.
120. Other than the foregoing, it is also imperative to state that prior to and/or before acquiring the suit property, the Plaintiff had carried out a search and ascertained that the suit property was clear of any encumbrance and such information vindicates the Plaintiff's contention that indeed what same acquired was a clear and valid title.
121. In respect of the foregoing, it is important to take cognizance of the decision in the case of Samuel Murimi Karanja & 2 others vs. Republic [2003] eKLR where the Court held as hereunder;

“The issue of land ownership is volatile, it is for this reason that holders of valid titles to land must be protected by the law, the government and this court. The Court of appeal of Kenya has occasionally dealt with this point and therefore once the court is faced with the claim of a valid title issued by the government, it has no obligation to inquire into the reasons or manner in which the title was obtained, unless of course there is clear evidence of fraud against the holder of the title. Courts must shy away from usurping the authority of the grantor or right to question title deeds issued by the President, except in clear cases of fraud or where the title was not issued in accordance with the Governing Act. This strict observance of the property rights of a title holder is necessary to ensure certainty in transactions regarding land.”



122. Other than the foregoing decision, the accuracy and/or validity of information supplied and/or obtained from the central registry and in particular, the Registrar of Titles was also deliberated upon vide the decision in the case of David Peterson Kiengo & 2 Others versus Kariuki Thuo (2012)eKLR, where the Court held as hereunder;
13. Where, then, does this leave us? There is no elegant way to resolve this issue. There is only a pragmatic way of doing so. It is in keeping with the objectives of the Registered Lands Act, and, indeed, the entire system of registration of land in Kenya. The Registered Lands Act is based on the Torrens' System. Under this system, indefeasibility of title is the basis for land registration. The State maintains a central register of land title holdings which is deemed to accurately reflect the current facts about title. The whole idea is to make it unnecessary for a party seeking to acquire interests in land to go beyond the register to establish ownership. The person whose name is recorded on the register holds guaranteed title to the property. Since the State guarantees the accuracy of the register, it makes it unnecessary for a person to investigate the history of past dealing with the land in question before acquiring an interest. That this is the essence of the Torrens System was stated as early back as 1891 in the case of *Gibbs v. Messer (1891) AC 254*: .
123. To my mind, the Plaintiff herein carried out and/or undertook the requisite steps to authenticate the validity of the title hitherto belonging to and in registered in the name of M/s Beta Enterprises Ltd before entering into the sale transaction.
124. In the premises, the Plaintiff herein acquired and/or procured lawful and legitimate Interest over and in respect of the suit property, which rights are indefeasible.
125. Consequently, it is appropriate to state that the Plaintiff's rights to and in respect of the suit property, deserve protection in line with the provision of Section 24 and 25 of the [Land Registration Act](#), No. 3 of 2012.
126. For convenience, the provisions of Section 24 and 25 of the [Land Registration Act](#), No. 3 of 2012, provides as hereunder;

Interest conferred by registration Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—



- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

127. Based on the foregoing, I come to the conclusion that the Plaintiff herein acquired a valid and clear title over and in respect of L.R No. 9042/179, devoid of any encumbrance and/or third-party claims, the claims by the 1st Defendant not excepted.

Issue Number 3

Whether the actions and/or activities by the Plaintiff in respect of the impugned title, namely, L.R No. 9042/23 constitutes Trespass.

- 128. It is common ground that upon completion of the purchase transaction over and in respect of L.R No. 9042/179, same was duly and lawfully transferred to and registered in the name of the Plaintiff.
- 129. Pursuant to and upon becoming the registered owner of the suit property, the Plaintiff was obliged and/or obligated to enter upon and take possession and/or occupation of the entirety of the suit property.
- 130. For clarity, evidence abound that indeed the Plaintiff entered upon and took possession of the suit property and thereafter instructed a contractor to fence the entire of the suit property.
- 131. On the other hand, it is also important to note that after the fencing of the entirety of the suit property, the Plaintiff commenced and undertook a housing project thereon, which project was ultimately completed and/or concluded.
- 132. However, in the course of carrying out and/or undertaking the designated housing project on the suit property, the 1st Defendant contended that part of the actions, which were being carried out by the Plaintiff, had encroached onto L.R No. 9042/23, albeit without the consent and/or permission of the 1st Defendant.
- 133. In the premises, the 1st Defendant contended that the impugned actions by the Plaintiff constituted and/or amounted to trespass on (sic) land belonging to and registered in the name of the 1st Defendant.
- 134. Be that as it may, it is imperative to recall and/or recollect that the portion of land, namely, L.R No. 9042/23, which is claimed by the 1st Defendant was found to be located within the property belonging to the Plaintiff.
- 135. At any rate, it is also appropriate to recall that the Commissioner of lands conceded and acknowledged that the 1st Defendant's title and parcel of land had erroneously been plotted and located within the suit property belong to the Plaintiff.
- 136. Based on the foregoing facts, can it be said that the actions by the Plaintiff which were being carried out and/or undertaken on a segment of the suit property, belonging to and registered in favor of the Plaintiff, would amount to trespass.



137. To my mind, the actions that are complained of by the 1st Defendant were being carried out within the Plaintiff's property and hence the Plaintiff had every legal and equitable right to engage in the impugned activities.
138. On the other hand, it is appropriate to state that by virtue of being the registered owner of the suit property, whose acreage covered and included the portion claimed by the 1st Defendant, the Plaintiff was not obligated to seek for and/or procure the consent of (sic) the 1st Defendant, whatsoever.
139. In the premises, it is my finding and holding that the actions and/or activities complained of by the 1st Defendant, did not constitute trespass.
140. Suffice it to note, that trespass connotes unlawful and illegal intrusion into a Third Party's property, albeit without the permission and/ or consent of the 3rd Party. However, one cannot trespass onto own property.
141. To buttress the foregoing observation, it is appropriate to adopt and restate the holding of the Court in the case of David Ogutu Onda versus Walter Ndede Owino [2014] eKLR, where the court stated as hereunder;

“Trespass has been defined as any unjustified intrusion by one person upon the land in the possession of another. See, Zacharia Onsongo Momanyi vs. Evans Omurwa Onchagwa [2014] eKLR. To be able to establish the tort of trespass the plaintiff had to establish his ownership of the suit property and the fact that the defendant's occupation of the property is unjustified”.

142. In respect of the subject matter, it was incumbent upon the 1st Defendant to establish and/or justify ownership of the suit property, within which the purported L.R No. 9042/23 was admittedly located.
143. However, the 1st Defendant herein failed to justify and/or vindicate the ownership of the segment and/ or portion of land in question and having failed to do so, the claim predicated and/ or anchored on trespass dissipated.
144. In short, I find and hold that the Plaintiff did not trespass onto the 1st Defendant's land, which Land is non- existent, either as claimed or at all.

Issue Number 4

What Reliefs ought to be granted.

145. Having found and held that the portion of land comprising L.R No. 9042/23, had already been alienated and indeed formed part of the suit property, it is settled that the title over and in respect of L.R No. 9042/23 was therefore illegal and unlawful.
146. On the other hand, L.R No. 9042/179, was lawfully alienated and/or allocated to and in favor of the Plaintiff's predecessor in title and after acquisition of legitimate title thereto, the vendor sold and transferred her rights to and in favor of the Plaintiff.
147. Based on the foregoing, it is apparent and indeed I have found and held that the Plaintiff acquired and/ or accrued lawful rights over and in respect of the suit property.
148. To my mind, the Plaintiff has placed and/or laid before the court sufficient evident and/or material to vindicate her entitlement to and in respect to the suit property.



149. Conversely, the 1st Defendant herein neither called any witness nor tendered any evidence before the court. In this regard, the statement of Defense and Counter-claim, which were filed by the 1st Defendant remained bear statements and unproved.
150. At any rate, what the 1st Defendant placed before the court was merely the written submissions dated the 5th May 2022, through which the 1st Defendant endeavored to justify her ownership rights and/or interests in respect of L.R No. 9042/23.
151. Nevertheless, it is common knowledge that submissions by themselves cannot take the position and/or stead of evidence, in its various and conventional perspectives. Simply put, submissions cannot help a Party to discharge an Evidential burden of proof, as required under the Provisions of Sections 107, 108 and 109 of the Evidence Act, Chapter 80, Laws of Kenya.
152. To vindicate the foregoing, I beg to refer to and adopt the holding of the Court of Appeal in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR, where the court stated as hereunder;
- “Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”
153. Based on the foregoing, it is safe and sound to state that the counterclaim by and/or on behalf of the 1st Defendant in respect of which no Evidence was tendered, remained unproven.
154. Contrarily, the Plaintiff placed before the court sufficient and adequate evidence which confirmed that indeed same purchased, acquired and thus is entitled to ownership rights over the suit property.

Final Disposition:

155. Having appraised, evaluated and analyzed the issues that were outlined in the body of the Judgment herein, it is now opportune to bring the subject matter to conclusion and/ or the harbor the Dispute.
156. Consequently and in the premises, it is my finding and holding that the Plaintiff has laid before the court sufficient evidence and hence the Plaintiff’s case is duly proved on a Balance of probabilities.
157. In the circumstances, I enter Judgment in favor of the Plaintiff as hereunder;
- a. It is hereby declared that the Plaintiff is the lawful proprietor of Land Reference Number 9042/179 and has a valid and indefeasible title thereto.
 - b. It is hereby declared that the 1st Defendant’s Grant Number I.R 66359/1 over Land Reference Number 9042/23 is null and void.
 - c. A mandatory injunction be and is hereby issued directing the 4th Defendant to revoke and/ or nullify and/or cancel the 1st Defendant’s Grant Number I.R 66359/1 over Land Reference Number 9042/23.
 - d. A mandatory injunction be and is hereby issued directing the 4th Defendant to cancel Deed Plan Number F/R No. 110/150 and to rectify its maps by excluding all and any references to Land Reference No. 9042/23.



- e. Permanent injunction is hereby issued restraining the 1st Defendant, by itself, by its servants or agents or otherwise, from entering interfering or in any manner acting inconsistent with the absolute and indefeasible title rights of the Plaintiff or continuing or repeating any of the acts complained of herein.
- f. The 1st Defendants counterclaim be and is hereby Dismissed.
- g. The Plaintiff be and is hereby awarded costs of this Suit, as well as costs of the Counter-claim and same to be taxed and certified by the taxing officer of the court.

158. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Omondi h/b for Mr. Okoth Oriema for the Plaintiff.

Ms. Angawa h/b for Mr. Nelson Havi for the 1st Defendant.

No appearance for the 2nd, 3rd, 4th, 5th and 6th Defendants.

