



REPUBLIC OF KENYA



KENYA LAW
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**Kinuthia v Kariuki & 2 others (Environment & Land Case
896 of 2012) [2022] KEELC 3208 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3208 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 896 OF 2012**

JO MBOYA, J

JULY 28, 2022

BETWEEN

STEPHEN WANYOIKE KINUTHIA PLAINTIFF

AND

CECILIA WAMBUI KARIUKI 1ST DEFENDANT

VIRGINIA WANGUI KARIUKI 2ND DEFENDANT

FREDRICK MBURU KARIUKI 3RD DEFENDANT

JUDGMENT

1. *Vide* the Complaint dated the 5th November 2012, the Plaintiff herein has approached the court seeking for the following Reliefs;
 - i. Special damages of shs.15, 000/=Only, against the First, Second and Third Defendants.
 - ii. That the 3rd Defendant do pay to the Plaintiff shs.2000/= Only, for the Plaintiff's 20 poles and rope he destroyed on 29/9/2012 plus Interests at court rates.
 - iii. That the 1st Defendant do pay Mesne Profits to the Plaintiff calculated at shs.1000/= Only, per Month since 10/9/2011 for her and the 2nd and 3rd Defendants' occupation of the Plaintiff's houses till they vacate therefrom.
 - iv. That the 1st , 2nd and 3rd Defendants do vacate the Plaintiff's 2 houses on Land Reference Number Gatamaiyu/Kambururu/1314 forthwith.
 - v. That the Caution lodged by the 1st Defendant against the Plaintiff's Land Reference Number Gatamaiyu/Kambururu/1314 be removed forthwith.



2. Upon being served with the Plaint and summons to enter appearance, the Defendants herein duly entered appearance on the 20th December 2012. However, the Defendants never filed their Statements of Defense withiS their prescribed statutory timelines.
3. Nevertheless, on or about the 14th June 2013, the Defendants herein filed an Application, whereby same sought Leave of the Court to file and serve Statement of Defense, Bundle of Documents and Witness Statements out of time.
4. *Vide* Ruling rendered on the 31st March 2017, the Notice of Motion Application dated 14th June 2013 was allowed. Consequently, the Defendants herein were granted Leave to file and serve the requisite Statement of Defense.
5. Pursuant to the foregoing, the Defendants herein proceeded to and filed their Statement of Defense and Counter-claim on the 29th May 2017. For clarity, the Counter claim sought for the following Reliefs;
 - i. Cancellation of the Plaintiff's Title to all that piece or parcel of land known as Land Reference Number Gatamaiyu/Kambururu/1314 and an order that the said Title do revert in the name of Fredrick Mburu Joshua, Deceased pending re-distribution to persons entitled as per the Judgment of Nyeri Land Disputes Appeal Tribunal or as ascertained in the Succession Cause No. 480 of 2003- High Court, Nakuru.
 - ii. Cost of the suit.
 - iii. Any other Relief this Honourable Court deems fit and just to grant.
6. Subsequently, the Plaintiff herein filed a Reply to the Statement of Defense and a Defense to Counter-claim dated the 16th June 2017.
7. Thereafter the Pleadings in respect of the subject matter closed.

Evidence By The Parties:

a. Plaintiff's Case:

8. The Plaintiff herein testified as PW1 and same indicated that he is an advocate of the High Court of Kenya and was admitted to the bar in the year 1973.
9. Further, the witness testified that same entered into a Land Sale Agreement with one Fredrick Mburu Joshua, now Deceased which Agreements were entered into on the 27th of May 1997, 23rd August 1997 and 15th September 1997, whereupon the vendor covenanted to and indeed sold in favor of the witness various portions of Land Reference Number Gatamaiyu/Kambururu/1314.
10. On the other hand, the witness further testified that despite entering into the various Sale Agreement with Fredrick Mburu Joshua, now deceased the various portions of the suit property were never transferred to and in his favor during the lifetime of the Deceased.
11. Be that as it may, the witness has stated that after the death of the Deceased, same engaged the Estate of the deceased and in particular, the widow and children of the deceased who thereafter approved of the Sale Agreements which had been entered into between the witness and the Deceased.
12. In any event, the witness further testified that the widow and children of the deceased signaled their approval vide another sale Agreement, which was similarly reduced into writing and signed by all the



- Parties thereto. For clarity, the witness indicated that the said Sale Agreement was entered into and signed on the 9th November 2003.
13. It was the witness' further testimony, that the family of the deceased herein thereafter commenced the process of taking out the Grant of Letters of Administration over and in respect of the Estate of the Deceased by filing Succession cause *vide* Nakuru HCC Succession No. 480 of 2003.
 14. Further, the witness testified that the Succession Cause was duly heard culminating into the issuance of Grant of Letters of administration to and in favor of one Hellen Nyamwiru Mburu and Karen Wangui Mburu, respectively who were constituted as the legal administratrix of the Estate of the deceased.
 15. On the other hand, the witness further testified that the Grant of Letters of Administration which was issued to and in favor of the appointed legal administratrix of the Estate of the Deceased was thereafter confirmed and a Certificate of Confirmation of Grant was issued on the 17th November 2006.
 16. It was the witness' further testimony, that at the time when the legal administratrix applied for the confirmation of grant, same included the witness herein as a legitimate beneficiary of the Estate of the Deceased and thereafter the suit property was duly and lawfully alienated to and in favor of the witness. In this regard, the witness alluded to the schedule at the foot of the Certificate of Confirmation of Grant.
 17. Notwithstanding the foregoing, the witness further testified that after the issuance of the Certificate of Confirmation of Grant, the duly appointed and/or constituted Legal administratrix of the Estate of the Deceased proceeded to and executed the requisite Transfer Instrument over and in respect of the Estate of the Deceased, whereby same transferred to and in favor of the witness the entire of the suit property.
 18. Nevertheless, the witness testified that upon becoming the registered proprietor of the suit property, same proceeded to and endeavored to obtain vacant possession thereof. However, the witness stated that the 1st Defendant and her children were at that point in time resident on a portion of the suit property.
 19. As a result of the occupation and possession of a portion of the suit property by the 1st Defendant and her children, the witness testified that same was constrained to and indeed issued and served a Notice to vacate the suit property *vide* notice issued in the year 2009.
 20. Be that as it may, the witness testified that after the issuance and service of the Eviction Notice the 1st Defendant herein approached same and requested that she be allowed to stay on a portion of the suit property for a duration of two years and thereafter she will vacate and hand over vacant possession to the witness.
 21. Premised on the request by the 1st Defendant, the witness and the 1st Defendant thereafter entered into a Tenancy Agreement between the witness and the 1st Defendant which was reduced into writing on the 28th March 2009, and thereafter duly signed by the Parties thereto.
 22. On the other hand, the witness further testified that when the duration of the tenancy agreement lapsed, the 1st Defendant and her children did not vacate and/or move out of the portion of the suit property, which was under their occupation and possession.
 23. Instead, the witness testified that the son of the 1st Defendant, namely, Peter Karithi Kariuki, wrote to the witness *vide* letter dated the 31 December 2010, wherein the son of the 1st Defendant implored the witness to allow the 1st Defendant and the rest of the family (described in the letter as brothers and sisters) to remain in occupation of the suit property up to and including 30th June 2011.



24. The witness further testified that upon receipt of the letter dated the 31st December 2010, same obliged and allowed the Defendants herein to remain in occupation of a portion of the suit property, pending relocation of same from the suit property by the 1st Defendant's son.
25. However, the witness further testified that despite the promise that the Defendants herein would be relocated and moved out on the suit property on or before the 30th June 2011, the Defendants herein failed and/or neglected to vacate and or grant vacant possession.
26. Based on the foregoing, the witness testified that same was therefore constrained to file and/or commence the subject suit for purposes of recovering vacant possession, or otherwise procuring an Eviction Order.
27. In a nutshell, the witness testified that the suit property was lawfully and legally transferred to and registered in his name and hence same is the lawful proprietor of the suit property.
28. Besides, the witness also testified that by virtue of being the lawful proprietor of the suit property, same is therefore obliged to enjoy exclusive and the absolute rights thereto, to the exclusion of the Defendants thereto who have no legal rights whatsoever.
29. At any rate, the witness further testified that that the 1st Defendant herein together with the rest of her sisters/siblings had filed a Summons of Revocation of Grant issued *vide* Nakuru HCC No. 480 of 2003, whereby same sought to revoke the certificate of confirmation of Grant.
30. Nevertheless, the witness testified and pointed out that the summons of Revocation of Grant, which was filed by *inter-alia*, the 1st Defendant herein was ultimately dismissed *vide* ruling of the court rendered on the 3rd May 2015.
31. In view of the foregoing, the witness testified that the claim and/or interests that the 1st Defendant would have had in respect of the suit property was lawfully adjudicated and resolved by the succession court, which found no merit in the claim.
32. Finally, the witness testified that having entered into a Tenancy Agreement with the 1st Defendant, which allowed the 1st Defendant to remain in occupation and possession of a portion of the suit property as a tenant, the 1st Defendant cannot now turn around and purport to claim any title and/or ownership rights to the suit property in the manner espoused *vide* the counterclaim dated the 29th May 2017.
33. Other than the foregoing, the witness herein referred the Court to his Written witness Statement dated the 5th November 2012 and 14th February 2018. In this regard, the witness sought to adopt and rely on the contents of the said witness statements.
34. Premised on the request by the witness, the two sets of witness statements, namely, the one dated the 5th November 2012 and 14th February 2018, respectively, were admitted as the witness' Evidence in chief.
35. On the other hand, the witness also stated that same had filed two sets of List and Bundle of Documents, namely, the List and Bundle dated the 5th November 2012 and List and Bundle of Documents dated the 14th February 2018, containing a total of 28 documents.
36. Based on the foregoing, the witness implored the Court to admit the said Documents as Exhibits. Consequently, the Documents at the foot of the two Lists and Bundles were admitted as Exhibits P1 to 28, respectively.
37. At this juncture, the Plaintiff's case was closed.



Defendants' Case:

38. Though the hearing date was fixed by consent, neither the Defendants nor their counsel attended court on the 22nd June 2022. Consequently, the counsel for the Plaintiff impressed upon the court to have the matter proceed, taking into account that the Plaintiff was an old person and has been ailing over a period of time.
39. On the other hand, counsel for the Plaintiff also applied to have the Counterclaim filed by and/or on behalf of the 1st Defendant to be Dismissed with cost.
40. Premised on the foregoing, the Court proceeded to and rendered a Ruling whereby the Counter-claim by and/or on behalf of the 1st Defendant was dismissed for want of prosecution. Besides, the court also ordered that the Defendants' case also marked as closed.
41. In a nutshell, the Defendants' case closed without any Evidence being tendered.

Submissions By The Parties:

42. At the close of the hearing, Learned counsel for the Plaintiff sought to make oral submission for and on behalf of the Plaintiff. For clarity, the court granted the request and oral submissions were duly tendered.
43. It was submitted that the suit property was lawfully and legally transferred to and registered in name of the Plaintiff herein pursuant to and in line with the decision of the High Court rendered *vide* Certificate of Confirmation of Grant issued on the 17th November 2006.
44. Secondly, it was submitted that to the extent that the registration of the suit property in favor of the Plaintiff was procured and/or obtained *vide* lawful court orders, the said transfer and registration cannot be impeached and/or impugned on the basis of fraud, either as claimed by the Defendants or at all.
45. Thirdly, it was submitted that the transfer and registration of the suit property, having been carried out and/or undertaken by the Legal Representative of the Estate of the Deceased, in line with the Certificate of Confirmation of Grant, the Plaintiff's title was therefore insulated *vide* the Provisions of Section 93 of the *Law of Succession Act* Chapter 160 Laws of Kenya.
46. On the other hand, Learned counsel for the Plaintiff further submitted that the 1st Defendant herein had hitherto filed and/or lodged Summons for Revocation of Grant *vide* Nakuru HCC No. 480 of 2003, whereby same laid a claim to a portion of the suit property. However, the Summons for Revocation of Grant by and/or on behalf of the 1st Defendant was dismissed *vide* the decision of the court made on the 3rd May 2015.
47. Premised on the foregoing, Learned counsel for the Plaintiff added that the 1st Defendant's counterclaim herein, over and in respect of the suit property, is therefore *Res-judicata* and thus barred by the provisions of Section 7 of the *Civil procedure Act*, Chapter 21 Laws of Kenya.
48. Finally, Learned counsel for the Plaintiff submitted that by virtue of being the lawful and legitimate proprietor of the suit property, the Plaintiff herein is entitled to absolute and exclusive occupation, possession and use of the suit property. In this regard, counsel relied on the provisions of Sections 24 and 25 of the *Land Registration Act*, Number 3 of 2012.



Issues For Determination:

49. Having reviewed the Plaint filed by the Plaintiff together with the List and Bundle of Documents, as well as the witness statements, together with the Statement of Defense and Counter-claim and the attachment thereto; and having evaluated the oral testimony tendered on behalf of the Plaintiff.
50. Similarly, upon consideration of the oral submissions tendered to the court, the following issues are pertinent and thus deserving of Determination;
 - i. Whether the Counter-claim by and/or on behalf of the 1st Defendant discloses a reasonable cause of action and/or is legally tenable.
 - ii. Whether the Plaintiff's Title was acquired by Fraud.
 - iii. Whether the Plaintiff is the lawful and legitimate owner of the suit Property and if so, whether same is entitled to Vacant possession.
 - iv. Whether the Plaintiff is entitled to Mesne Profits and if so, the Quantum thereof.

Analysis And Determination

Issue No 1 Whether the Counter-claim by and/or on behalf of the 1st Defendant Discloses a reasonable cause of action and/or is Legally tenable.

51. Other than the Statement of Defense which was filed by and/or on behalf of the Defendants herein, the 1st Defendant herein proffered a Counter-claim pertaining to and/or concerning the suit property and in respect of which, the 1st Defendant impleaded Fraud against the Plaintiff.
52. Based on the contention by and/or on behalf of the 1st Defendant that the suit property was acquired through and/or vide fraud, it is therefore imperative to discern whether indeed the Counter-claim premised on Fraud is legally tenable.
53. Before resolving the issue herein, it is appropriate to underscore the fact that the suit property was initially registered in the names of Fredrick Mburu Joshua, now deceased, whose Estate was the subject of succession proceedings *vide* Nakuru HCC Succession No. 480 of 2003.
54. Besides, it is also important to recall that the succession cause under reference was heard and concluded and a Certificate of Confirmation of Grant issued to and in favor of the duly appointed and constituted legal administratrix of the Estate of the deceased.
55. Subsequently, the duly appointed administratrix of the Estate of the Deceased executed the transfer *vide* transmission pertaining to and or concerning the suit property and thereafter the suit property was registered to and in the name of the Plaintiff.
56. On the other hand, it is worthy to note that after the issuance of the Certificate of Confirmation of Grant, the 1st Defendant herein alongside some other protestors, who were not Party to this suit filed Summons for the Revocation of the Grant and sought to invalidate the transfer and registration of the suit property in the name of the Plaintiff.
57. Nevertheless, evidence was tendered that the Summons for Revocation of Grant, which was filed by the *inter-alia*, the 1st Defendant herein was dismissed by the court on the 3rd May 2015.



58. Essentially, upon the dismissal of the Summons for Revocation of Grant, which was filed by the *inter-alia*, the 1st Defendant herein, the 1st Defendant's claim to and in respect of the Estate of the Deceased and in particular, to and in respect of the suit property was extinguished.
59. Notwithstanding the foregoing, it suffices that the suit property was transferred to and in favor of the Plaintiff vide lawful court orders, which have not been impeached, reviewed and/or rescinded to date.
60. Based on the foregoing, can the plea of fraud alluded to and mounted on behalf of the Defendants herein stand. In my humble view, a transfer premised on lawful court order which has not been challenged and/or revoked cannot be defeated by an allegation of fraud.
61. Secondly, the 1st Defendant herein had laid a claim to and/or in respect of a portion of the suit property vide Summons for Revocation of Grant, which was heard and determined via court orders issued on the 3rd May 2015.
62. To the extent that the 1st Defendant's claim to and in respect of the suit property was determined vide Nakuru HCC Succession No. 480 of 2003, can the 1st Defendant now approach this court and seek to re-agitate a similar claim, *vide* the Counter-claim in respect of the Subject matter.
63. To my mind, the re-agitation of the 1st Defendant's claim to and or in respect of the suit property or a portion thereof is barred by the doctrine of *Res-judicata*. In this regard, the provision of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, are relevant and applicable.
64. In short, the 1st Defendant's claim to the suit property having been extinguished *vide* the Succession cause, namely, Nakuru HCC Succession No. 480 of 2003, the 1st Defendant cannot come before this court and seek to re-open the same claim, which has since been concluded and/or determined by a Court of competent jurisdiction.
65. In the premises, the plea of *Res-judicata* suffices and same therefore invalidates and/or negates the 1st Defendant's Counter-claim. In this regard, the 1st Defendant is non-suited.
66. To buttress the foregoing observation, it is appropriate to adopt and restate the Dictum in the Decision in the case *Kenya Commercial Bank Ltd versus Benjob Amalgamated Ltd* (2017) eKLR, where the Court of Appeal held as herein;

“Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in *Henderson v Henderson* (1843) 67 ER 313, *res judicata* applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. In the case of *Mburu Kinyua v Gachini Tutu* (1978) KLR 69 Madan, J. Quoting with approval Wilgram V.C. in *Henderson v Henderson* (*supra*)

stated:

Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res



judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time” (emphasis added).

67. Other than the foregoing, it is also imperative to note that the suit property was transferred and registered in the name of the Plaintiff on the 18th February 2009 upon the conclusion of the succession cause *vide* Nakuru HCC Succession No. 480 of 2003.
68. To the extent that the suit property was registered in favor of the Plaintiff in the year 2009, any person seeking and/or intent to challenge and impeach the transfer and registration in question, the 1st Defendant not excepted, is obliged to file and/or mount a claim founded on fraud within three years from the discovery of the impugned transfer and registration.
69. In respect of the subject matter, the 1st Defendant stated that same was served with an Eviction Notice in the year 2009 and it is the Eviction Notice that made her to commence the Summons for Revocation of Grant, *vide* Nakuru HCC Succession No. 480 of 2003.
70. In the premises, if indeed the 1st Defendant (*sic*) discovered the fraud in the year 2009, then the claim anchored on Fraud, if at all, ought to have been filed or mounted within three years. Consequently the claim at the foot of the Counter-claim should have been mounted on or before the year 2012. See Section 4 of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.
71. Notwithstanding the foregoing, it is also appropriate to state that on the 28th March 2009, the 1st Defendant herein entered into a Tenancy agreement, wherein same agreed to be a tenant of the Plaintiff over and in respect of a portion of the suit property and same covenanted to pay Monthly rents agreed in the sum of kes.100/= only.
72. By signing and/or entering into the Tenancy agreement, which was reduced into writing and duly signed by the 1st Defendant and the Plaintiff herein and in the presence of various witnesses, the 1st Defendant was essentially acknowledging that the Plaintiff was the lawful and legitimate owner of the suit property.
73. To my mind, having hitherto admitted and acknowledged that the Plaintiff is the legitimate owner of the suit property, the 1st Defendant, alongside her children cannot now turn around and purport that the suit property was fraudulently acquired by the Plaintiff herein. Simply put, the plea of Fraud is defeated by the unequivocal acknowledgment of the Plaintiff’s title *vide* the Tenancy Agreement dated the 28th March 2009.
74. Finally, it is also important to note that the Estate of the deceased was succeeded by Hellen Nyamuiru Mburu and Karen Wangui Mburu, respectively, who were the duly appointed legal administratrix of the Estate of the deceased.
75. To the contrary, the 1st Defendant herein has never been appointed and/or constituted as the legal administratrix over and in respect of the Estate of the deceased. Consequently, can the 1st Defendant, without being the legal administratrix of the estate of the deceased allude to fraud in the alienation and transfer of the suit property to the Plaintiff.
76. In my considered view, the 1st Defendant, who is not the legal administratrix of the Estate of the deceased is divested of the requisite capacity to make such a claim and/or allegation. Indeed, such capacity only inheres in the duly appointed and/or constituted administratrix. See section 82 of the *Law of Succession Act*, Chapter 160 Laws of Kenya.



77. In the premises, I find and hold that the 1st Defendant's Counter-claim, is not only misconceived, but legally untenable and thus same would not stand the test of the law.
78. In a nutshell, even if the counterclaim had not been dismissed on the basis of Order 17 Rule 3 of the *Civil Procedure Rules* 2010, for want of prosecution, the court would still have reached the same conclusion, even on the merits of the Counter-claim.

Issues No 2 & 3 Whether the Plaintiff's title was acquired by Fraud & Whether the Plaintiff is the lawful and legitimate owner of the suit property and if so, whether same is entitled to Vacant Possession.

79. Having explored the circumstances and/or background leading to the transfer and registration of the suit property to and in favor of the Plaintiff herein, it is now safe to state that the transfer vide transmission of the suit property in favor of the Plaintiff was not only lawful but also legal.
80. On the other hand, it suffices to note that the transfer vide transmission, which led to the Plaintiff becoming the registered owner of the suit property, was executed by the duly appointed administratrix of the Estate of the deceased.
81. Essentially, the Plaintiff herein became the proprietor and/or owner of the suit property on the basis of a disposition and/or conveyance duly executed by the legal administratrix of the Estate of the Deceased and in this regard, the Plaintiff's title to and in respect of the suit property is insulated *vide* the provisions of Section 93 of the *Laws of Succession Act*, Chapter 160 Laws of Kenya.
82. For convenience, it is imperative to reproduce the provisions of Section 93 (*supra*) and same is reproduced as hereunder;

93. Validity of transfer not affected by revocation of representation

- (1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act, by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.
- (2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.

83. Premised on the foregoing, it is my finding and holding that the Plaintiff herein acquired a lawful title to and in respect of the suit property. In this regard, the Plaintiff's title to the suit property is duly insulated and is thus in indefeasible.
84. Consequently and/or on the basis of being the registered proprietor and/or owner of the suit property, the Plaintiff has therefore accrued and/or acquired lawful legitimate interest over the suit property, which are vindicated and/or protected vide Sections 24 and 25 of the *Land Registration Act*, 2012.
85. Perhaps, at this juncture, it is appropriate to underscore the nature and scope of the interests that vests in the registered owner of land, including the Plaintiff herein.



86. To this extent, the provisions of Sections 24 and 25 (*supra*) are worthy of reproduction and the same are re-produced as hereunder;

24. 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.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

87. In the circumstances, it is my finding and holding that the suit property was lawfully and legally transferred and registered in favor of the Plaintiff and in this regard, the plea of Fraud is not tenable.

88. On the other hand, it is similarly my finding and holding that by virtue of being the registered owner of the suit property, the Plaintiff is entitled to absolute and exclusive rights over and in respect of the suit property, inter-alia, the right to occupation, possession and use thereof, without hindrance, whatsoever.

89. To fortify the extent and scope of Rights that vests in a Title holder, it is appropriate and apt to restate the observation of the court *vide* the case of *Ocean View Plaza Ltd versus The Attorney General* (2002) eKlr, where the Court observed as hereunder;

Allotment of land to a citizen or others protected under the [Constitution](#), which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under [Land Acquisition Act](#). It is not in evidence that such procedure was followed.

Issue No 4 Whether the Plaintiff is entitled to Mesne Profit and if so, the Quantum thereof.

90. The 1st Defendant herein entered into a Tenancy Agreement with the Plaintiff, which agreement was reduced into writing on the 28th March 2009 and thereafter duly signed by the Parties thereto.



91. Vide the Agreement under reference, the 1st Defendant, for and/or on behalf of her children, who were also in occupation of the suit property agreed to pay Monthly rents in the sum of kes.100/= only.
92. It is also imperative to note that following the execution of the said Agreement, the 1st Defendant and her children indeed paid the covenanted rents as agreed up to and including the determination of the period of the tenancy.
93. Besides, upon the determination of the Tenancy agreement, the 1st Defendant's son, namely, Peter Kariithi Kariuki, wrote to the Plaintiff and sought indulgence, to relocate the Defendants herein from the suit property on or before the 30th June 2011. See the letter dated the 31 December 2010.
94. For the avoidance of doubt, the Plaintiff testified that upon the request in terms of the letter dated the 31st December 2010, same obliged and agreed to accommodate the Defendants for the duration which was requested, by and/ or at the instance of the 1ST Defendant's Son.
95. Nevertheless, the Plaintiff has contended that upon the lapse of the tenancy agreement, as well as the extension thereto, the Defendants failed to vacate and/or hand over vacant possession in respect of the suit property.
96. It is the Plaintiff's contention that following the expiration of the contractual period, within which the Defendants were to vacate, the Defendants herein became trespassers onto the suit property and consequently, same have deprived and/or denied the Plaintiff of his rightful benefits emanating from the suit property.
97. In the premises, the Plaintiff contends and correctly so, that same is entitled to Mesne Profits recoverable from the Defendants at the rate of kes.1000/= Only, per year, reckoned on the basis of the rents that were agreed on vide Tenancy agreement dated the 28th March 2009.
98. Other than the rate of computation of the Mesne Profits, the other limb and aspect to the claim for Mesne Profits touches on and/or concerns the duration applicable, that is, the Length of time for which the claim for Mesne Profits relates to.
99. In respect of the subject matter, the occupation of the Defendants on the suit property was lawful up to and including the 30th June 2011, but thereafter same became wrongful and/or unlawful. In this regard, the Plaintiff is entitled to a claim for Mesne Profits w.e.f 1st July 2011 up to and including the date of vacant possession.
100. To buttress the preceding legal statement, it is appropriate to take cognizance of the holding vide the case of *Attorney General v Halal Meat Products Limited* [2016] eKLR, where the Court Of Appeal observed as hereunder;

“Consequently, its occupation of the abattoir was unlawful. It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42”.



101. As concerns assessment of Mesne Profits, it is appropriate to take cognizance of the holding of the Court of Appeal in the case of *Mistry Valji v Janendra Raichand & 2 others* [2016] eKLR, where the court stated as hereunder;

Measure for mesne profit was described in the Privy Council decision in *Invergue Investments v Hackett* (1995) 3 All ER 842 cited with approval in the Kenya Hotel Property Ltd case (supra) as follows:

“This is form of an ordinary claim for mesne profit, that is to say, a claim for damages for trespass to land....The question for decision is the appropriate measure of damages.”

The privy council observed that that measure of damages must be reasonable rent. The usual practice is to assess mesne profits down to the date when possession is given.

102. Based on the foregoing guidance, it is now appropriate to compute and/or ascertain the Quantum of Mesne Profit due and payable to the Plaintiff. Consequently, the computation is as hereunder;

Kes.1000 per year x 12 x 21 years

12000 x 21 = 252, 000/=

103. Consequently, and in view of the foregoing, I would therefore make an award in the sum of Kshs.252, 000/= only to and in favor of the Plaintiff on account of Mesne Profits.

Final Disposition:

104. Having dealt with and/or disposed of the issues for determination, it is now appropriate to make and/or enter the final orders of the court.

105. In the premises, it is apparent and/or evident that the Plaintiff herein has established and/or proved his claim over and in respect of the suit property to the requisite standard. In short, the Plaintiff's claim is meritorious.

106. Contrarily, the Defendants herein did not prove their claim to and in respect of the suit property. In this regard, the Defendants' claim, inclusive of the counter-claim are Devoid of merits.

107. In a nutshell, Judgment be and is hereby entered in favour of the Plaintiff in terms of the Plaint herein. For clarity, the following orders are therefore appropriate and expedient;

- i. A Declaration be and is hereby made that the Plaintiff is the lawful and legitimate proprietor over and in respect of L.R No. Gatamaiyu/Kambururu/1314 and thus entitled to vacant possession thereof.
- ii. The Defendants herein be and are hereby ordered to vacate and hand over vacant possession of L.R No. Gatamaiyu/Kambururu/1314 within a duration of 90 days from the date hereof.
- iii. In default of the Defendants to vacate and hand over vacant possession of L.R No. Gatamaiyu/Kambururu/1314 within the stipulated 90 days, the Plaintiff shall be at liberty to evict the Defendants from the suit property and in this regard an Eviction order is hereby issued.
- iv. In the event of the Eviction being carried out and/or undertaken by the Plaintiff, the costs and/or expenses incurred towards the Eviction, shall be certified by the Deputy Registrar and same shall be borne by the Defendants.



- v. The Eviction of the Defendants, subject to clause (iii) shall however be carried out in accordance with and compliance with the provision of Section 152 (F) of the Land Act, 2012 (2016).
- vi. An Order of Permanent Injunction be and is hereby issued to restrain the Defendants whether by themselves, agents, servants and/or employees from returning to, interfering with, cultivating, occupying and/or otherwise trespassing onto L.R No Gatamaiyu/ Kambururu/1314be, in any manner whatsoever and howsoever.
- vii. The Plaintiff is hereby awarded Mesne Profits in the sum of Kshs.252, 000/= only and same shall accrue interest at court rates w.e.f 5th November 2012.
- viii. The Counter-claim by the 1st Defendant lodged in court on the 29th May 2017 be and is hereby Dismissed.
- ix. Costs of the suit and the Counter-claim be and are hereby awarded to the Plaintiff and same to be taxed and certified by the Taxing Officer of the Court.

108. It is ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. King'ara for the Plaintiff

No appearance for the Defendants

