



Shah & another v Juma & 2 others (Environment and Land Case Civil Suit 312 of 2009) [2022] KEELC 3969 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3969 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 312 OF 2009**

LC KOMINGOI, J

JULY 28, 2022

BETWEEN

ASHOK RUPSHI SHAH 1ST PLAINTIFF

HITENKUMAR AMRITLAL RAJA 2ND PLAINTIFF

AND

JACOB JUMA 1ST DEFENDANT

COMMISSIONER OF LANDS 2ND DEFENDANT

REGISTRAR OF TITLES 3RD DEFENDANT

JUDGMENT

1. By a plaint dated June 26, 2009 and amended on May 27, 2010, and further amended on August 15, 2012. The plaintiffs pray that judgment be entered against the defendants jointly and severally for:
 - a. An order of injunction to restrain the 1st defendant and /or his servants /agents from selling, transferring, charging, interfering, or otherwise dealing with the suit property LR No 18485 (IR No 64014), Loresho, Nairobi Kenya.
 - b. An order of permanent injunction to restrain the 1st defendant and/or agents from trespassing, interfering, alienating, constructing, charging, or in any other way dealing with LR No 18485(IR No 64014), Loresho, Nairobi, Kenya pending hearing and determination of the suit.
 - c. An order of declaration that the plaintiffs are legal owners of LR 18485(IR No 64014), Loresho, Nairobi, Kenya by virtue of transfer dated March 21, 2007 and registered in the lands registry, Nairobi.



- d. An order of declaration that the title held by the 1st defendant is fake and fraudulent and therefore the 1st defendant has no legal right or claim over LR No 18485 (IR No 64014), Loresho, Nairobi, Kenya.
 - e. Hold the 1st defendant is a trespasser.
 - f. Damages for loss of bargain and loss of profits.
 - g. Interest on damages at commercial rates.
 - h. Costs.
 - i. Any further or alternative relief which this Honourable Court may deem fit to grant.
2. The 1st plaintiff's case is that on March 21, 2007, he entered into a sale agreement for the purchase of LR No 18485(IR No 64014), Loresho, Nairobi, Kenya from Liney Company Limited which had in turn purchased it by a sale agreement dated November 18, 1994.
 3. The plaintiffs averred that by a joint venture agreement made on or about September 2007 between the plaintiff and the 2nd plaintiff, it was an express and/or implied term of the contract between the parties that the 2nd plaintiff would invest an initial sum of Kshs 55 million in September 2007, making him a 50% partner and co-owner of the suit property.
 4. They averred that a criminal Case Number 3143 of 2009 was instituted at the Kibera Chief Magistrate's court against Kiran Kumar and Dipti Kiran Shah (plaintiff's predecessors) to contest and/or determine the authenticity of title which case was terminated by way of a nolle prosequi dated April 24, 2009 and presented to court on July 29, 2009.
 5. Their case is that the 1st defendant has fraudulently obtained an illegal title to LR No 18485 (IR No 64014), Loresho, Nairobi, Kenya. They gave the particulars of alleged fraud against the 1st defendant and contended that if the court does not declare them to be legal owners, they stand to suffer substantial loss and damages.

The 1st Defendant's Case

6. The 1st defendant filed his defence dated July 27, 2009. He averred that that the suit property was allocated to him on March 1, 1992 by the Commissioner of Lands, surveyed and a deed plan was issued. He contended that the property was registered in his name on August 16, 1994 where after he took possession and has occupied the suit property since then.

The 2nd and 3rd Defendant's Case

7. The 2nd and 3rd defendants filed the amended statement of defence dated July 31, 2010. The 2nd defendant contended that on or about March 12, 1993, the 2nd defendant issued a letter of allotment to a company identified as Liney Company Limited. It further contended that prior to the issuance of the allotment letter a part development plan; being part development plan No 42/19/93/1 was prepared by the director of physical planning and approved by the 2nd defendants on March 3, 1993.
8. The 2nd defendant stated that subsequent to the part development plan, the chief valuer valued the suit land for purposes of payment of stand premium and upon issuance of the letter of allotment to Liney Company Limited, a parcel file was opened and a deed plan was prepared by the Director of survey on or about August 19, 1993. It averred that a grant was processed and registered in favour of Liney



Company Limited on or about December 5, 1994 and that the said company transferred the suit land to the plaintiffs by way of sale in the year 2007.

9. The 2nd and 3rd defendants prayed that judgement be entered for the plaintiff in terms of prayers number (c) and (d) of the plaint and that the suit in terms of prayers number (e),(f),(g),(h) be dismissed as against the 2nd and 3rd defendants.

Evidence of the Plaintiff

10. PW1, Ashok Kumar Rupshi Shah, the 1st plaintiff testified on December 8, 2014. His witness statement dated June 18, 2014 was adopted as part of his evidence in chief. He stated that by a written transfer dated March 21, 2007, the 1st and 2nd plaintiffs entered into a sale agreement for purchase of LR No 18485 (IR No 64011), Loresho, Nairobi from the erstwhile owner, Liney Company Limited for a consideration of kshs.33 million and that it measures 7.390 hectares. He further stated that Liney Company Limited had sold the suit property by virtue of a sale agreement between it and Dipti Kiran Shah and Kiran Kumar Shah. He also stated that the suit land is registered as IR No 64011/2 and is jointly owned by the 1st and 2nd plaintiffs and the 1st defendant has fraudulently obtained illegal title to the suit land necessitating the suit.
11. When he was cross-examined, he stated that he is familiar with the property LR 18485 having acquired it in 2007 after purchasing from Liney Company Limited for a consideration of Kshs 33 million. He added that Mr Kiran Kumar Shah handed over possession of the property to him in March 2007 and that there was no gate or boundary wall at the property but it now has a wall built by an unauthorized person. He further stated that he does not have the sale agreement with Liney Company Limited and evidence of payment but they paid consideration to their lawyer who then forwarded to Liney Company Limited.
12. He told the court that the property was transferred to them at the end of the year 2007 and that he paid stamp duty upon the transfer. On land rates and rent, he stated he was informed by his lawyer that all premium land rates and rent had been paid and clearance certificates issued but he does not know if there is evidence that Liney Company Limited paid rates. He added that the plaintiffs have not paid rates since 2008 due to the pendency of this suit. He stated that he paid stamp duty upon the transfer.
13. He told the court that he believes his lawyers conducted a search. When referred to the title issued in his name, he stated that it was signed by the Commissioner of Lands on December 1, 1994 and registered on December 5, 1994. When referred to the copy of title in the 1st defendant's name, he stated that it is signed on August 9, 1994 and registered on August 16, 1994 and that it looks like it was issued and registered before his.
14. When referred to the sale agreement dated November 18, 1994 between Liney Limited and Dipti Shah and Kiran Kumar Shah, he stated that he cannot remember if it was shown to him at the time he was purchasing the suit land. He also stated that the directors of Liney Company Limited who signed their sale agreement were Kiran Kumar Shah and Dipti Kiran Shah.
15. He stated that he has no claim against the Commissioner of Lands other than seeking a confirmation that the suit title issued to him is genuine as stated in the plaint.
16. When he was re-examined, he stated that the sale agreement of January 2007 between Liney Company Limited and the plaintiff was prepared by his lawyer PJ Kakad who is a witness in these proceedings. He further stated that the dispute herein is on the title and not rent and rates.
17. PW2, Zablun Agwata Mabea a former Commissioner of Lands testified on February 17, 2015. His witness statement dated September 15, 2014 and a letter dated October 1, 2009 attached to his



statement were adopted as part of his evidence in chief. He stated that he served as commissioner of lands until 2010.

18. When he was cross-examined, he stated that the correspondence file for the suit property was missing but he got records from various Sections at the time he wrote the letter dated October 1, 2009. He added that a correspondence file normally has details, data, the commissioner's transactions relating to the property as well as commissioner's letters and the Letter of allotment of the property. He told the court that he got details of the letter of allotment from the file number 97474 which was the original/general file where the letter of allotment was initially procured. He stated that the other documents referred to; being the part development plan, valuation report, and grant he got from other sections like Director of Survey, and valuation, among others between 2006-2008 from officers in those sections.
19. When referred to the memo dated December 17, 2008, he stated that there were two deed plans in respect of the suit property belonging to the plaintiff and the 1st defendant and that is why he sought clarification. When referred to the letter dated December 29, 2008, he stated that it was a response to his memo and according to the letter, the property was allocated to Jacob Juma but he was doubtful because he knew there was a syndicate working in favour of Jacob Juma who had the fraudulent deed plan.
20. He outlined the process leading to issuance of title to the plaintiffs stating that there was an approval of the request by Liney Company Limited by the Commissioner of Lands who approved the survey. He further stated that the survey plan was signed/approved by the Commissioner of Lands in March 1993 then a letter of allotment was issued. He stated that the land has to be valued to determine the rent and that valuation was completed on March 12, 1993 and a letter of allotment issued to Liney Company Limited on March 12, 1993.
21. He also stated that planning precedes the letter of allotment and that the Director of physical planning referred to the Part development plan. When referred to the statement of Timothy Wanjau Mwangi, the Deputy director of physical planning, he stated that it is clear that the proper procedure is that part development plan is prepared before a letter of allotment is issued.
22. He stated that he is aware that the police conducted investigations over the title to the suit land but he is not aware of the findings. He added that the police must have taken statements from the officers at the Ministry of Lands. When referred to statements of Fredrick I Lubulellah, he stated that, the said Fredrick I Lubulellah was an officer at the Ministry of lands and that he disowned his signature in the title issued to Liney Company Limited and that he contradicted his position and that is why he concluded that he was part of the syndicate. When referred to the statement of Mr Joseph Wang'ombe Kanyuru, he stated that he is an officer at the Ministry of lands and that he also contradicted his position.
23. When referred to the letter dated September 17, 2009 from PJ Kakad & Co Advocates to him, he stated that it was a request by the plaintiff for him to put the record straight. When referred to the letter dated November 11, 2008 from the Ministry of lands to PJ Kakad Advocate, he stated that the hard copy record at the Ministry of lands had been destroyed at the time of investigation thus they got copies from the plaintiff to reconstruct the file. The records had been destroyed by the officers involved in the syndicate. He added that he wrote to the Ethics and Anti-Corruption Authority to investigate the matter but he does not know the outcome.
24. When referred to his letter dated October 1, 2009, he stated that the 1st defendant is not the bona fide owner of the suit land, one of the reasons being that there was no evidence of payment of the stand premium. He further stated that he has seen the letter of allocation to the 1st defendant dated March 1, 1992 and it is a forgery and that the receipt dated August 25, 1992 needs to be interrogated.



25. He told the court that according to the repealed *Government Land Act*, it was the commissioner of lands who allocated government land. He stated that the duties of the Registrar of Titles was to register documents executed by the commissioner of lands under the title.
26. He stated that in the case of a plot which is not planned, when an application is received, the first thing is to check if the plot is planned and if it is not, the commissioner requests for planning of the plot by the Director of Physical Planning who forwards the part development plan to the Commissioner of Lands for approval. He added that upon approval, the commissioner authorizes relevant officers to process the letter of allotment. He also stated that the preparation of a part development plan comes before a letter of allotment thus if a letter of allotment comes before a part development plan, it would be strange as one cannot allocate land based on a sketch since the location and acreage of the plot has to be verified. He stated that the part development plan was approved on March 3, 1993 thus the Letter of Allotment could only be issued after this date. He added that the letter of allotment to the 1st defendant is dated March 1, 1992 before the approval of the part development plan.
27. He stated that there was a syndicate manipulating signatures at the Ministry of Lands and that he went to the Attorney General's Office and found that in some instances, there were documents filed in court which were not even in the Attorney General's office. He stated that when a title is issued, it has an IR number which is an inland register serialized from No 1 and when the document is presented for registration, the IR number is given by the officer at the registry and relates to a specific plot. He added that it is not possible for a plot to have the same IR numbers in the two titles of the 1st defendant and the plaintiff which are registered on different dates.
28. When he was re-examined, he stated that he has seen the 1st defendant's letters of allotment and it is for 6 hectares with a receipt for 6 hectares issued on August 25, 1992 which did not meet condition 4 of the letter of allotment that required payments within 30 days and that his title refers to an acreage of 7.390 hectares. He further stated that the acreage in the plaintiff's title is also 7.390 hectares.
29. PW3, Antipas Nyanjwa, the head of investigation and Forensic Section at the National land commission testified on 24th February 2015. His witness statement dated 30th September 2014 was adopted as part of his evidence in chief. He stated that he was requested to examine two sets of title deeds which he did and concluded that the one in the name of Ashok Kumar Rupshi Shah is genuine and the one belonging to Jacob Juma is a forgery. He produced his report as an exhibit in this case.
30. When he was cross examined, he stated that the report is dated 4th February 2011 and at the time he was working at Criminal Investigations Department. He added that the complainant was Ashok Kumar Rupshi Shah through M/S Guram & Company Advocates and the offence complained of was forgery. He told the court that he knew a Fredrick Indoko Lubullehah and Joseph Wang'ombe Kanyuru who are Land Registrars at the Ministry of lands. When referred to the findings in his report, he stated that he did not take samples of signatures or statements from the said officers.
31. PW4, Kiran Kumar Shah, testified on February 24, 2018. He adopted his witness statement dated June 18, 2014 as part of his evidence in chief. He stated that on November 18, 1994, together with his wife Mrs Dipti Kiran Shah bought Liney Company Limited complete with its assets from Mr Paul Kipsang Kosgei and Mr Philip Kimaiyo Kandie; directors of the said company at Kshs 16 million. He further stated that the company's main asset was a plot measuring about 7.390 hectares being LR 18485 and deed No 176003. He also stated that Liney Company Limited later sold the suit land to the plaintiffs and that that the purchase price paid by Ashok Kimar Rupshi Shah and Hiten Kumar Amritlal Raja was Kshs 33 million and that he executed the sale agreement between them.



32. He produced the transfer of the suit property to Ashok Rapshi Shah and Hiten Kumar Amritlal Raja, a letter dated August 21, 1996 addressed to Liney Company Limited from the Ministry of lands, a nolle prosequi entered in the criminal proceedings against him and his wife and an application of registration of transfer.
33. When he was cross-examined and referred to the sale agreement dated November 18, 1994, he stated that he was buying shares in Liney Company Limited and the suit land. When referred to the grant of the of the property issued to Liney Company Limited, he stated that it was signed on December 1, 1994 and registered on December 5, 1994 and their sale agreement was of November 18, 1994; thus there was no title in the name of the company at the time of sale. He also stated that the transaction with Liney Company Limited was at the advice of lawyers and the directors shareholders of Liney Company Limited were also lawyers. He added that at the time of signing the agreement, he was given the letter of allotment issued to Liney Company Limited.
34. He stated that Mr Kandie asked for an advance of Kshs 3,385,234/= to pay for the outstanding costs and other liabilities and that there were receipts produced to show money was paid to the lands office. He stated that he has been to the suit property Many times as he owned it from 1994 and he would take prospective buyers to see it and when he transferred to Ashok R Shah, there was no boundary wall.
35. PW5, Pravinchandra Jamnadas Kakad was an Advocate of the High court who acted for the plaintiffs in the sale transaction with Liney Company Limited, testified on November 15, 2018. His witness statement dated September 15, 2014 was adopted as part of his evidence in chief.
36. When he was cross-examined and referred to the sale agreement dated January 23, 2007, he stated that it is not stamped as he handed over the original copy to his client. When referred to the letter dated October 31, 2008, he stated that they raised concerns of the transfer to the plaintiffs as the transfer had been deliberately blocked since the entire file was missing from the Ministry of Lands. He stated that he obtained a rent clearance certificate and a consent to transfer but he did not have them in court. He also stated that the suit property had a rates account at Nairobi City Council.
37. When referred to the internal memo from the Commissioner of Lands and the response thereto from the Director of Survey regarding the suit land, he stated that there was an investigation going on but he does not recall the outcome. When referred to the charges facing the directors of Liney Company Limited of forgery, he stated that he was informed that the charges were withdrawn and that the issue of validity of title is pending in this court.
38. He stated that he did conduct due diligence and established that the title was not encumbered and it was registered in the name of Liney Company Limited. He further stated that he conducted a manual search at the Registrar of Companies and confirmed that the vendors acquired shares of the company together with the property from the previous directors.
39. When he was re-examined, he stated that the lands office confirmed that his client's title was genuine.

Evidence Of The 1st Defendant

40. DW1, Miriam Wairimu, Mr Jacob Juma's widow testified on December 7, 2019. Her witness statement dated January 18, 2019 was adopted as part of her evidence in chief. She stated that the suit land belonged to the late Jacob Juma and that he followed the right procedure to acquire it. She produced the documents in the 1st defendant's bundle as exhibit D1-D46 respectively
41. She stated that she is aware that on November 7, 1991, the 1st Defendant wrote to the Commissioner of Lands requesting to be allotted the property and vide the letter of allotment dated March 1, 1992,



he was allotted the suit property on terms and conditions set out therein. She further stated that he complied with the terms and paid stand premium and other charges on August 25, 1992. He added that vide the letter dated February 2, 1993, the Commissioner of Lands wrote to the Director of Physical planning, forwarding a plan of the property to enable the preparation of a part development plan for the same and on February 24, 1993, the Director of Physical Planning wrote to the Commissioner of Lands forwarding drawings for the property to facilitate the completion of documentation towards its registration.

42. She stated that she is aware that grant number IR 64011 dated August 9, 1994 was prepared in the 1st defendant's name, registered on August 16, 1994 and released to the 1st defendant. She further stated that A-book (presentation Book) obtained from the Ministry of Lands for the period of the month of August, 1994 confirms issuance of the registration of the grant to the 1st defendant and the same does not confirm purported issuance and registration of the plaintiff's grant.
43. She stated that the 1st defendant constructed a stone wall around the property and a worker's house and has since registration been in occupation and that rates account was opened in the 1st defendant's name. She added that a valuation report on the property was conducted by Tysons Limited confirming the fact of its registration. She also stated that the survey map kept by the Director of Surveys, a copy of which was purchased by the 1st defendant on April 11, 2014 confirms preparation of deed plan No 176003 dated August 19, 1993 pursuant to which the grant for the property was issued to and registered in the 1st defendant's name.
44. She stated that claims of entitlement to the suit property on account of a parallel grant were first made to the Commissioner of Lands on October 31, 2008 and that on December 17, 2008, the Commissioner of lands wrote to the Director of Surveys, forwarding the deed plans for the 1st defendant's property and the grant claimed by the plaintiffs seeking to know which of the two was genuine and on December 29, 2008, the Director of Surveys wrote to the Commissioner of Lands notifying him that that the deed plan for the grant claimed for the plaintiff was not genuine and that the property was surveyed and approved for allotment to the 1st defendant.
45. She stated that on October 15, 2008, Shah Kiran Kumar Dharamshi and Dipti Kiran Shah, directors of M/S Liney Company Limited, the company in whose name the parallel grant is claimed were charged with forgery of the said Title in Criminal Case No 3134 of 2009; Republic v Shah Kirankumar Dharamshi and Dipti Kiran Shah and a nolle prosequi was entered on April 24, 2002 by the director of Public Prosecutions despite investigations returning the finding that the grant held by the plaintiffs is a forgery. She further stated that the 1st defendant attempted to commence private prosecution of directors of Liney Company Limited but the same was rejected by the Chief Magistrates court on March 11, 2014. She added that this suit was interfered with by officers from several Government departments to sanitize the illegal grant held by the plaintiffs to the point that the defence filed earlier herein was substituted vide this court orders of 1 July 9, 2012. She added that the said ruling is the subject matter of Civil Appeal No 40 of 2013, Jacob Juma v Commissioner of Lands & 3 others pending before the Court of Appeal.
46. When she was cross-examined, she stated that she was aware of this case before the deceased passed on. She further stated that the deceased applied for land in Kabete and got it. She also stated that she met her late husband in 1994 and she was aware he had land in Kabete. When referred to the letter of allotment, she stated that the deceased got it before they met and that she did not see it then. When referred to the acreage in the title being 7.390 hectares and the acreage in the letter of allotment being 6 hectares, she stated that she cannot explain the discrepancies. She further stated that her late husband paid for 6 hectares and that she has no letter to her late husband to show the acreage had increased.



47. When referred to the sale agreement between Liney Company Limited and the plaintiffs, she stated that her husband owned the suit land. When referred to the nolle prosequi entered following the charges against shareholders of Liney Company Limited, she reiterated that her husband legally obtained the suit land. When referred to the deed plan dated August 19, 1993 which came much later after title, she stated that her husband could not backdate documents and that he did not commit fraud.
48. When further cross-examined, and referred to the part development plans herein, she stated that she is not sure what plan was approved by the commissioner of lands. When referred to the terms in the letter of allotment issued to her late husband, she stated that acceptance of the offer was to be done within thirty (30) days but her late husband paid six (6) months later. When referred to the difference in payment of stand premium, she stated that 1.389 hectares was not paid for and that it is the mistake of the Ministry of Lands officials. She stated that the title to her husband was not the subject of a criminal trial. She added that the directors of Liney Company Limited were charged but she is not sure it is the 1st defendant who instigated the charges and that the title has not been revoked. When referred to the letter from the Registrar of Titles, she stated that the 1st defendant was not responsible for blocking the transfer of the title and that his title is genuine while the plaintiff's title is not genuine.

The 2nd And 3rd Defendant's Evidence

49. DW2, Timonay Waiya Mwangi, the Deputy Director, Physical planning at the Ministry of lands testified on May 30, 2019. His witness statement dated November 13, 2014 was adopted as part of his evidence in chief. He told the court that there is no other part development plan except the one dated February 15, 1993 and approved on March 3, 1993. He added that there was no plan before this and that it has not been amended.
50. When he was cross-examined and referred to the letter of allotment issued to Liney Company Limited and to the one issued to the 1st defendant, he stated that the suit property appears to be the same but there cannot be two legitimate letters of allotment to the same property. He added that the one issued to the 1st defendant has no part development plan and that part development plans should have an approved plan and a number.
51. He stated that part development plans once prepared, the director assigns a departmental reference number and forwards to the Commissioner of Lands for approval then the director of physical planning makes an entry in the register and assigns an approved development plan number at the bottom. He added that the part development plan will form the number for purposes of issuing a letter of allotment thus the part development plan comes before a letter of allotment.
52. When referred to the letter of allotment issued to the 1st defendant, he stated that it was issued on March 1, 1992, a physical development plan processed and approved on March 3, 1993 hence it was prepared after the allotment letter had been issued. He added that there have been case of part development plans being fabricated and the 1st defendant's part development plan is not genuine. He stated that that he was not involved in preparation of the letter of allotment and other documents.
53. He stated that a part development plan is prepared to allocate public land. He added that somebody goes to the ground to get data for preparation of the base map. He further stated that it indicates the area to be alienated and this guides the commissioner of Lands to issue a letter of allotment. When referred to the letter of allotment issued to the 1st defendant, he stated that it is not in their records. When referred to the dates of the respective grants, he stated that the grant to the 1st defendant was issued first but it does not matter which comes first. When referred to the respective deed plans, he stated that he cannot tell which one is genuine and that it is the Director of Survey who would tell.



When referred to the Memo by the Commissioner of Lands to the Director of Surveys to authenticate the two deed plans, he stated that Director of Surveys response was that the deed plan to Jacob Juma was the genuine one.

54. DW3, Gordon Ochieng, a deputy director, Land administration at the Ministry of lands testified on October 8, 2019. His witness statement dated December 3, 2014 was adopted as part of his evidence in chief. He told the court that under the repealed *GLA* (cap 280) laws of Kenya the procedure for allotment would be an applicant makes an application to the commissioner of lands, the Commissioner of Lands verifies the status of the land applied for and ascertains whether it is available for allocation and whether it is planned. He added that if it was not planned the Commissioner of lands would request the Director of physical planning to prepare the necessary part development plan and after this, the director approving submits it to the Commissioner of lands for approval. He further stated that subsequently, valuation of the suit land would follow and that it was impossible to issue a letter of allotment before a part development plan as it cannot be issued based on a sketch.
55. He stated that the part development plan approved on March 3, 1993 was the basis of alienating the suit property. He stated that there are two grants with same LR No and IR No and that it is not possible to have one property with two grants and LR numbers. One of them would be a fraudulent document.
56. When referred to the letter dated October 1, 2009; he stated that it was written by Zablun Mabea confirming that the 1st defendant's title is a forgery since allocation was done on March 1, 1992 and valuation was carried out on March 1, 1993.
57. When he was re-examined by Mr Kamau he told the court that a title alone cannot stand. He also stated that in 2009, Zablun Mabea (PW2) was a more senior officer than Silas Kiogora Mburugu. He also stated that this was not a case of double allocation. He told the court that there was no document justifying the increase in acreage in the 1st defendant's title from that in the letter of allotment. He also reiterated what DW2 stated; that an allotment cannot be based on a sketch. He also stated that the Commissioner of Lands was the one responsible for allocating government land.
58. At the close of oral testimonies parties tendered final written submissions.

The 1st Plaintiff's Submissions

59. They are dated November 8, 2021. They raise four (4) issues for determination:-
 - i. Who between Liney Company Limited and the 1st defendant was allotted the suit property, LR No 18485 (IR No 64011) Loresho?
 - ii. Who between the plaintiffs and the 1st defendant was the lawful registered owner of the suit property.
 - iii. Whether the 1st defendant's alleged title was acquired through fraud and was fake and fraudulent?
 - iv. Whether the reliefs sought by the plaintiffs should be granted.
60. The counsel submits that there is overwhelming evidence that Liney Company Limited was the legitimate allottee of the plot. The evidence of PW2, PW3, DW2 and DW3 show that the title was initially issued to Liney Company Limited and sold by PW4 to the plaintiffs. Their evidence clearly shows that the 1st defendant alleged letter of allotment dated March 1, 1993 was issued before the 1st defendant's alleged part development plan on March 3, 1993. The 1st defendant's letter of allotment dated March 1, 1992 shows the area allocated as six hectares while in the title it shows 7.390 hectares.



In the plaintiffs' case there is a letter dated June 24, 1993 by the Commissioner of Lands explaining to Liney Company Limited that the area of the land had increased from 6 hectares to 7.390 hectares hence the stand premium had gone up by Kshs 403,400/-. It is on record that Liney Company Limited proceeded to pay the additional premium.

61. DW2, explained in detail the procedure of alienating unalienated land. The 1st defendant alleged letter of allotment has been disowned by three senior officers from the Ministry of Lands. DW1's evidence was not corroborated in any manner. She gave largely hearsay evidence and did not have personal knowledge of the actual manner in which her late husband acquired the suit property.
62. The plaintiffs have proved that the legitimate and genuine initial allottee of the plot was Liney Company Limited. He has put forward the case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR.
63. It is further submitted that the 1st defendant's title is fake and fraudulent. The evidence of PW2, PW3, PW4, DW2 and DW3 demonstrated so. No evidence was adduced by the 1st defendant to contradict their testimonies. The note from Justice Paul Kipsang Kosgei produced as EX-P1 demonstrates the root of the plaintiffs' title, that the suit property was initially allocated to Liney Company Limited.
64. There is nothing to demonstrate how Jacob Juma (deceased) became the registered owner of the suit property. No single witness was able to support the 1st defendant's claim. All the documents produced in the 1st defendant's bundle of documents dated August 12, 2014 consists of documents which were never explained in evidence and are therefore inadmissible. It is well settled law that a party cannot just throw documents to the court and expect the court to decipher the information for itself.
65. It is well settled law that a court cannot compel a party to bring certain important evidence before it. It is also settled law that if a party fails to bring certain important evidence before court, which is within its control or interest then the court is entitled to make an inference that the omitted evidence would have been against the interest of the omitting party. He has put forward the case of *Stanley Mombo Amuti v KACC* [2019] eKLR.
66. The plaintiff's claim ought to be upheld while 1st defendant's ought to be dismissed. He has put forward the cases of *Arthi Highways Ltd v West End Butchery Ltd & 6 others* [2015] eKLR; *Caroget Investment Limited v Aster Holdings Limited & 4 others* [2019] eKLR.
67. The 1st defendant unlawfully interfered with the plaintiff's right to possession of the suit property since 2008 hence the plaintiff is entitled to damages for, trespass. It submitted that an award of Kshs 20,000,000/- per year for the 13 years is reasonable. The total translates to Kshs 260,000,000/-. He has put forward the case of *Coroget Investment Limited (supra)*. It is further submitted that the deceased herein used all unlawful means to interfere with the plaintiff's lawful title and possession. He went as far as fabricating a title and other documents to assert ownership. He also caused Mr Kiran K Shah and his wife to be charged in a court of law. His actions were acts of impunity for which the plaintiff ought to be compensated.
68. Counsel further submitted that the plaintiffs having sought an order for nullification of the 1st defendant's title are not seeking damages for loss of bargain or loss of profit. The plaintiffs pray that the 1st defendant be condemned to pay the plaintiffs and the 2nd and 3rd defendants costs of this suit.

2nd Plaintiff's Submissions

69. They are dated November 10, 2021. Counsel for the plaintiff submitted that the following issues arose for determination;



- a. Who between Liney Company Limited and the 1st defendant was allotted suit property No 18485(IR No 64011) Loresho?
 - b. Who between the plaintiffs and the 1st defendant was the lawful registered owner of the suit property?
 - c. Whether the 1st defendant's alleged title was acquired through fraud and was fake and fraudulent?
 - d. Whether the reliefs sought by the plaintiffs should be granted.
70. On the issue of who was allotted the suit property, counsel submitted that the plaintiffs have proved on a very high threshold that the initial and genuine allottee of the suit property was Liney Company Limited. It was his submission that they explained their root of title as was required of a challenged title by the court of appeal in *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR.
71. On the issue whether the 1st defendant's title was acquired through fraud, he submitted that all facts and legal logic points to the fact that the 1st defendant's title was fraudulent, fake and the result of a corrupt scheme within the meaning of section 26(1)(a) and (b) of the *Land Registration Act* thus the alleged letter of allotment and purported title cannot stand the overwhelming weight of the evidence adduced by the plaintiffs. He relied on the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR and the case of *Caroget Investment Limited v Aster Holdings Limited & 4 others* [2019] eKLR.
72. He prayed for an award of damages in the sum of Kshs 20,000,000/= per year for the 17 years between 2008 and 2021. He relied on the case of *Caroget Investment Limited v Aster Holdings Limited* (*supra*).

1st Defendant's submissions

73. They are dated March 30, 2022. Counsel for the 1st defendant raised the following issues for determination;
- a. Whether this is a case of double allotment or not and if so, which grant prevails?
 - b. Which grant is valid and lawful?
 - c. Whether the plaintiffs are entitled to the reliefs prayed in the plaint?
74. On whether there is double allotment of the suit property, It was counsel for the 1st defendant's submission that it is not a case of double allocation at all as evidence establishes that the plaintiffs have no genuine grant to the property. He pointed out the letter dated March 16, 2009 from the Criminal Investigations Department, the fact that directors of Liney Limited were prosecuted for forgery and the letter dated November 11, 2008 from EN Gicheha, Principal Registrar of Titles addressed to the plaintiff's Advocates; PJ Kakad as evidence that the plaintiffs title is not genuine.
75. Counsel also submitted that there is documentary evidence affirming that the deed plan attached to the grant held by the 1st defendant is genuine. He also submitted that no claim of forgery against the 1st defendant was established. He added that the challenge on the 1st defendant's title based on disparity in area of acreage was not pleaded in the amended plaint and that land is allocated as unsurveyed and the exactitude of its area ascertained only upon issuance of a deed plan and grant. He submitted that the Commissioners of lands questioned the deed plan attached to the 1st defendant's title in his memo dated December 17, 2008 and in the response dated December 29, 2008, Director of surveys stated



that the 1st defendant's deed plan was genuine. He argued that PW2 took a position inconsistent with the official documents held at the Lands office thus his evidence should be discredited.

76. Counsel submitted that the testimony of the document examiner cannot sustain a charge of fraud for reasons that there are before court statements of Wilson Gachanja and Fredrick Indokolo Lubullellah and forensic document examiners reports confirming that the two signed the grant held by the 1st defendant, that they did not sign the one held by the Plaintiffs and that it is on the basis of those statements that criminal charges were instituted against directors of Liney Company Limited. He also argued that the testimony of the forensic document examiner is a mere opinion. He relied on the case of *Lawi Ongweya v Republic* (1964) EA 129, *Asira v Republic* [1983] KLR 227 and the case of *Re Estate of Gitau Njoroge 'B' (Deceased)* [2018] eKLR.
77. Counsel submitted that even if the plaintiff's grant was to be considered as a case of double allocation, such grant would be second in time and therefore invalid even if paid for. He relied on the case of *Joseph NK Arap Ng'ok v Moiyo Ole Keiwua & 4 others* [1997] eKLR, the case of *Wreck Motor Enterprises v The Commissioner of Lands & 3 others* [1997] eKLR and *Gitwany Investment Limited v Tajmall Limited & 3 others (supra)*. He further submitted that section 26 of the *Land Registration Act* codifies the sanctity of the grant held by the 1st defendant and put forward the case of *West End Butchery v Arthi Highway Developers Limited & 6 others* [2012] eKLR.
78. On the issue of which grant is lawful, he submitted that it was incumbent upon the plaintiffs to prove that they have a valid, lawful grant and that the grant held by the 1st defendant was fraudulent but they failed to discharge the burden. Counsel also submitted that the plaintiffs did not prove their claim for bona fide purchaser without value to the standards in *Katende v Haridas and Company Limited* [2008] 2 EA 173 and are therefore not entitled to the orders sought.

The 2nd & 3rd Defendants' Submissions

79. They are dated November 30, 2020. It was the Attorney General's submission that documents from the Ministry of Lands and Physical planning clearly demonstrate that the plaintiff is the registered owner of the suit land. He relied on the case of *Dennis Noel Mukhulo Ochwada v Elizabeth Murungari Njoroge & another* [2018] eKLR.
80. He further submitted that there is a process which must be followed for one to be issued with a letter of allotment. He pointed out that a part development plan was prepared by the director of physical planning (part development plan) plan No 42/19/93/1 dated February 15, 1993, which was approved by the commissioner of lands on March 3, 1993 and valuation to determine what figures were to be contained in the letter of allotment was carried out by the chief valuer on March 12, 1993, who returned Kshs 1,600,000/= as the stand premium and an annual rent of Kshs 320,000/= and a letter of allotment ref 97474/45 dated March 12, 1993 was issued to Liney Company Limited. He added that upon issuance of the allotment, file No 149220 was opened in respect to the subject plot in favour of Liney Company Limited and a deed plan No 176003 dated August 19, 1993 and a grant was registered in favour of the plaintiff as IR No 64011 on December 5, 1994.
81. Counsel also submitted that absence of clear evidence on the root of title defeats any claim of indefeasibility of title by the 1st defendant. He relied on the case of *George Kamau Njuguna & another v Florence Wairimu Mbugua & 4 others* [2018] eKLR. He pointed out that the 1st defendant merely produced a copy of title and alleged that he was allocated the suit land. He argued that a letter of allotment cannot precede the part development plan.



82. He beseeched the court to consider the fact that grants held by the plaintiff and the 1st defendant have the same grant number yet they were presented for registration on two different dates. He submitted that the 1st defendant should not be allowed to benefit from a process that was fraudulent. He relied on the case of *Faustine Omwana Kweyu v Carol Majuma Wanyonyi & another* [2017] eKLR.
83. He put forward the case of *Surkbdev Singh Laly v Philip Ojwang Kamau & 3 others* [2018] eKLR to submit that the 2nd & 3rd defendants commenced investigations into the issues surrounding the titles held by the plaintiffs and the 1st defendant, therefore they exercised due diligence.
84. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the parties and the authorities cited. The parties agreed on issues dated August 24, 2014 which I summarize as follows:-
- i. Who between Liney Company Limited and the 1st defendant were allocated the suit property LR No 18485 (IR No 64011) Loresho?
 - ii. Who between the plaintiffs and the 1st defendant is the lawful registered owner of the suit property?
 - iii. Have the plaintiffs established fraud against the 1st defendant with respect of acquisition of his title?
 - iv. Are the plaintiffs entitled to the reliefs sought?
 - v. Who should bear costs of this suit.
85. The plaintiffs and the 1st defendant claim ownership of No 18485 (IR No 64011) Loresho. The plaintiffs claim that they bought the suit property from Liney Company Limited. They led evidence that Liney Company Limited was co-owned by Philip Kimaiyo Kandie and Paul K Kosgei. Liney Company Limited was issued with a letter of allotment dated March 12, 1993. Before issuance with the said allotment letter, a part development plan was prepared by the Director of Physical Planning plan No 42/19/93/1 dated February 15, 1993 and was approved by the Commissioner of Lands on March 3, 1993. The land was valued for stand premium of Kshs 1,600,000/= and annual rent of Kshs 320,000/=. Liney Company Limited sold its shares and only asset to PW4 and his wife on November 18, 1994. They became the directors of Liney Company Limited and sold the suit land to the plaintiffs. The plaintiffs led evidence to that effect.
86. PW2, Zablon Mabea, a former Commissioner of Lands referred to a letter written by himself to the Attorney General dated October 1, 2009. It was in connection to the suit property LR No 18485 (IR No 64011) situated in Loresho, Nairobi. In his view the Plaintiffs are the ones with a valid title. The said letter gives a summary of events that resulted to the dispute herein. The said letter reads as follows:-

“Department of Lands
1st Ngong Avenue
Off Ngong Road
Box 30089
Nairobi
Date: October 1, 2009
Hon Attorney General



Box 40112,

Nairobi

Re: ELC Civil Suit No 312 of 2009; Ashok Rupish Shah Hiten Kumar Amritlal Raj v Jacob Juma, Commissioner of Lands Registrar of Titles

This has reference to letter ref: 9747/49 dated September 1, 2009 and replying affidavit of one Silas Kiogora Mburugu touching on the above suit which was sworn on September 18, 2009.

The information contained in the said letter and the material facts contained in the replying affidavit totally contradict the position of this office. although the files containing details of correspondence in respect of LR 18485 are missing, there is sufficient and incontrovertible evidence that the plaintiffs are the legitimate owners of the land.

The letter of allotment was issued vide letter fef: 97474/45 dated March 12, 1993 as an unsurveyed plot measuring 6.0 Ha. the said letter of allotment was issued to a company going by the name of of Liney Company Limited for a term of 99 years with effect from March 12, 1993. That the 1st defendant could not have been allocated the suit land on March 1, 1992 since valuation to determine the figures was carried out on March 12, 1993. That the 1st defendant has failed to produce any form of payment receipt in respect of his purported allocation, there is no evidence support this. That the 1st defendant has not explained how he came to be in possession of a grant for LR 18485 measuring 7.389 hectares when the letter of allotment he has produced read 6.0 hectares. That a title is the result of a process and the 1st defendant ought to produce correspondence that led to the production of the purported title.

From the foregoing, therefore it is clear that the plaintiffs are the bonafide owners of the suit land and not the 1st defendants as had been inferred by Mr Silas Kiogoro Mburugu.

Kindly amend our defence accordingly.

ZA Mabea

Commissioner of Lands

CC Permanent Secretary

Ministry of Lands - Att: Mr CW Ngatia

Nairobi”

87. By a letter dated November 20, 2008, the Principal Registrar of Titles confirmed to the plaintiffs’ advocates that their title was the only genuine title to the suit property. The said letter reads as follows:-

“Department of lands

1st Ngong Avenue

Off Ngong Road

Box 30089

Nairobi



Date: November 20, 2008

Kakad & Co. Advocates

Box 57762-00200

Nairobi

Dear Sir,

LR No. 18485 IR No 64011

In reference to your letter dated November 17, 2008 and my earlier letter to your dated November 11, 2008, please be informed that our scanned records reveal that the title originally granted to Liney Company Limited and thereafter transferred to Ashok Rupushi Shah and Hitenkumar Amritlal Shal is the only genuine title to the referenced piece of land.

Please be advised accordingly,

Yours faithfully,

EN Gicheha (Mrs)

For: Principal Registrar of Titles”

88. There is also a letter dated November 11, 2008 to the plaintiff's advocates informing them that the transfer in favour of the plaintiffs had been deliberately blocked. The contents of the letter are follows:-

“Department of lands

1st Ngong Avenue

Off Ngong Road

Box 30089

Nairobi

J Kakad & Co Advocates

Box 57762-00200

Nairobi

RE: LR No 18485-IR No 64011

In reference to your letter dated October 31, 2008, Ref: PJ/MISC/101/08, please be informed that I have checked the records of title and found out that the transfer entry to your clients Ashok Rupsih Shah and Hitenkumar Amritlal Shah registered on March 29, 2008 as entry No 2 were deliberately blocked and a photocopy of the title made apparently to defeat the said transfer.

However, according to our scanned records, the transfer to your clients, is reflected thereto.

In light of the foregoing, please forward a copy of the title to enable us open another file and regularize the records.

In addition, forward also a withdraw of the caveat registered on October 17, 2008.

The inconvenience and anxiety caused are highly regretted.

Yours faithfully.



EN Gicheha (Mrs)

For: Principal Registrar of Titles”

89. PW2 was cross examined by the 1st defendant’s advocates and he reiterated;

“According to the letter the property was allocated to Jacob Juma but I was doubtful because I knew there was a syndicate working in favour of Jacob Juma who is the one who had the fraudulent deed plan”

“I have seen Mr Lubelellah statement that he gave to the police at page 73 of the 1st defendant documents. He disowned his signature in the title to Linely Company Limited. He contradicted my position. That is why I say it was a syndicate.....The records have been destroyed by the officers involved in the syndicate”.

When he was cross examined by the 2nd and 3rd defendants’ counsel he stated as follows:-

“The preparation of the part development plan would be strange. One cannot allocate land based on a sketch. The location and acreage of the plot has to be verified....The part development plan was approved on March 3, 1993....The letter of allotment could only have been issued after this part development plan. The letter of allotment to the 1st defendant at page of his document is dated March 1, 1992 before the approval of the part development plan.

There was a syndicate manipulating signatures at the Ministry of Lands with respect of their specific case”.

90. From the evidence of PW2 it is clear that there is a process leading to the issuance of a title deed. He told the court that there was an approval of the request by Linely Company Limited by the Commissioner of Lands who approved the part development plan. The part development plan was signed and approved by the Commissioner of Lands in March 1993. It was only after approval that a Letter of Allotment is issued. The land has to be valued to determine the rent. The Valuation was completed on March 12, 1993 and a letter of allotment issued to Linely Company Limited on March 12, 1993.

91. The 1st defendant on the other hand was issued with a letter of allotment dated March 1, 1992.

92. DW1 led evidence that the 1st defendant was issued with a letter of allotment dated March 1, 1992 over the suit property on terms and conditions set out therein. Stand premium and other charges were payable 30 days of the letter of allotment. DW1 stated that the 1st defendant paid stand premium and other charges on August 25, 1992. For failure to comply with the conditions on payment, the letter of allotment was invalidated as at April 1, 1992.

93. DW1 also led evidence that the part development plan with respect to the 1st defendants allocation came after the letter of allotment. Counsel for the 1st defendant submitted as much, that the 1st defendant was allocated an unsurveyed plot therefore survey came later. PW2, PW5, DW2 and DW3 were unanimous on the process of allocating land under the *Government Land Act* (now repealed.) They all stated that a letter of allotment cannot precede a part development plan thus allocation to the 1st defendant is invalid for preceding a physical development plan thus flouting procedure. In *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR, the court held;

“It is trite law that under the repealed *Government Lands Act*, a part development plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any



unalienated Government land could be allocated. After a part development plan (physical development plan) has been drawn, a letter of allotment based on the approved physical development plan is then issued to the allottees.”

94. The grants held by the plaintiffs and the 1st defendant show that they have the same grant number. They were presented in different dates. The one for the plaintiffs was presented on December 5, 1994 while the one for the 1st defendant on August 16, 1994. This confirms PW2’s assertion that the discrepancies in the date of the title held by the 1st defendant point out to a well organized syndicate to misrepresent facts and defraud the Plaintiffs of the suit property.
95. The letter of allotment allegedly issued to the 1st defendant showed the area to be six (6) hectares but the title in his name gives the area to be 7.390 hectares. According to the said letter of allotment he was to pay Kshs 1,943,000/- within thirty (30) days. There are receipts to show that he paid the said amount on August 25, 1992, six (6) months later.
96. In the letter of allotment to Liney Company Limited the stand premium for Kshs 1,600,000/- was increased to Kshs 2,887,134 after the acreage for the land increased from 6 hectares to 7.390 hectares upon survey. This was paid by Liney Company Limited. The acreage was also reflected in the title issued to Liney Company Limited. DW1 admitted that in respect of the 1st defendant’s title 1.390 hectares was not paid for. The discrepancy could not be explained. In summary the letter of allotment issued to Liney Company Limited had an approval number and date. The letter of allotment allegedly issued to the 1st defendant was without an approval number. The alleged letter was issued before the part development plan was prepared, approved and allocated a number. This proves the fraud the deceased had attempted to commit against Liney Company Limited and by extension the plaintiffs.
97. PW2, Antipas Nyanjwa a forensic document examiner, told the court that the title in the 1st defendant’s name was a forgery and that of the plaintiffs was genuine. From the foregoing, I find that Liney Company Limited was lawfully allotted the suit property. The procedure for allocation outlined by PW2 was confirmed by DW2, Deputy Director of Physical Planning. He told the court that there cannot be two legitimate letters of allotment for one property. His evidence was also confirmed by that of DW3, the Deputy Director, Land Administration.
98. From the evidence of PW2, PW3, DW2 and DW3, it is clear that the Plaintiff’s title is the genuine one. The 1st Defendant relied on the witness statements of Fredrick I. Lubulellah and Joseph Wangombe Kanyuru made in the cause of the investigations as to which title was valid. The said witnesses were not called to testify. The 1st Defendant sought to rely on the response to the Commissioner of Lands memorandum dated December 17, 2008 seeking clarity in the two competing Deed plans. The Director of Surveys in a response dated December 29, 2008 stated that the 1st defendant deed plan was regular. Evidence at the trial however showed there was a syndicate that had covered up the preliminary investigations. The fraud would never have been uncovered had the Commissioner of Lands relied on the response from the Director of Surveys dated December 29, 2008. In the case of *Munyu Maina v Hiram Gathiba Maria* [2013] eKLR the Court of Appeal stated as follows:

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



99. I agree with the 2nd and 3rd defendants' submissions that the 1st defendant ought not be allowed to benefit from the process that was fraudulent. In the case of *Faustine Omwana Kweyu v Carol Majuma Wanyonyi* [2017] eKLR, the Court held thus:-

“A court of law cannot allow a party to benefit from an illegal process especially where illegality is brought to the attention of the court”.

100. It is clear from the evidence on record that the 1st defendant's title was acquired irregularly. The plaintiffs' title is the genuine one. Section 26(1) of the *Land Registration Act, 2012* provides as follows:-

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

101. In the preceding paragraphs, I have stated that the 1st defendant is unable to explain the root of his title. There is evidence that he acted in collusion with some officers at the Lands Registry in an attempt to defraud the plaintiffs of the suit property. His title was obtained illegally, and unprocedurally as the same had been allocated to Liney Company Limited. It was no longer available for allocation to the 1st defendant. The 1st defendant tried to put forward a proposition that this was a case of double allocation. This claim was vehemently denied by PW2, DW2 and DW3.

102. From the foregoing, I find that the plaintiffs are entitled to the reliefs sought. The 1st defendant unlawfully interfered with the Plaintiffs' right to possession of the suit property. The interference started in 2008 about 13 years ago. The suit property is situated in Loresho, Nairobi. It is a prime land. The valuation in 2007 was given at Kshs 252,000,000/-. In the case of *Park Towers v Moses Chege & others* [2014] eKLR, Mutungi J held:

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. As observed in the cases referred to there is no mathematical or scientific formula in such cases for assessment of general damages. However, in the case before me I consider that the suit properties are sizeable parcels sitting on nearly three quarters of an acre of land located in the Central Business District (CBD). This is a prime property in the city centre and any unlawful act of aggression and/or intrusion that prevents the rightful owner of the property from enjoyment of his ownership rights of possession and use is to be frowned at and is punishable by way of an award of damages.”



103. In the case of *Caroget Investment Ltd v Aster Holdings Ltd & 4 others* [2019] eKLR the Court of Appeal upheld the judgment of Obaga, J which had awarded general damages of Kshs 100,000,000/- against the trespasser. The Court of Appeal stated as follows:-

“The final matter we propose to address before we turn to the cross-appeal, is the award of general damages for trespass. In the first place we reiterate that, in an act of impunity the appellant, with a questionable title forcefully invaded the suit property, evicted the 1st respondent and occupied it for over 10 years. The invasion was unlawful and the taking of possession of a privately owned property amounted to trespass. The 1st respondent’s efforts to get assistance from the police was futile compelling it to institute an action for trespass.

In awarding Kshs 100,000,000 the learned judge, as we have seen earlier, considered several factors, including the appellant’s own valuation of the suit property undertaken on June 17, 2013 and estimated at Kshs 1,800,000,000 given, the fact that the 1st respondent was kept off its property for over 10 years, the size of the suit property, its strategic location, the lost investment opportunities to the 1st respondent, the fact that prior to the invasion by the appellant, 1st respondent had failed for over 14 years after acquiring the property to carry out any development on it. In a passage from the judgment which we reproduced earlier the Judge reasoned that this failure to develop the property for this long period did not;

“mean that the property would have remained undeveloped until now. Considering the location and value of the suit property I assess general damages in the sum of Kshs 100,000,000”.

104. I have taken into consideration the location of this suit property and the value. I assess general damages for trespass in the sum of Kshs 50,000,000/-. Which I think is reasonable.

105. In conclusion, I find that the plaintiffs have proved their case on a balance of probabilities. I enter judgment in their favour as follows:-

- a. That an order of permanent injunction is hereby issued to restrain the 1st defendant and /or his servants /agents from trespassing, selling, transferring, constructing, charging, interfering, or in any other manner dealing with the suit property LR No 18485 (IR No 64014), Loresho, Nairobi Kenya.
- b. That a declaration is hereby issued that the Plaintiffs are legal owners of LR 18485 (IR No 64014), Loresho, Nairobi, Kenya by virtue of transfer dated March 21, 2007 and registered in the lands registry, Nairobi.
- c. That a declaration is hereby issued that the title held by the 1st defendant is fake and fraudulent and therefore the 1st defendant has no legal right or claim over LR No 18485 (IR No 64014), Loresho, Nairobi, Kenya.
- d. General damage for trespass Kshs 50,000,000/-.
- e. Costs of the suit and interest

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

.....
L KOMINGOI

JUDGE



In the presence of:-

Ms Kimani for Mr Mwangi advocate for the 1st plaintiff.

Mr Moriasi advocate for the 2nd plaintiff.

Mr Havi advocate for the 1st defendant.

Mr A Kamau advocate for the 2nd and 3rd defendants.

Steve - Court Assistant.

