



**Sal Yut Services Limited v Ramuka Agencies Limited & 5 others  
(Environment & Land Case 104 of 2015 & 576 of 2011 (Consolidated))  
[2022] KEELC 12660 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12660 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 104 OF 2015 & 576 OF 2011 (CONSOLIDATED)  
EK WABWOTO, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**SAL YUT SERVICES LIMITED ..... PLAINTIFF**

**AND**

**RAMUKA AGENCIES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ANTIQUA AUCTIONS AGENCIES ..... 2<sup>ND</sup> DEFENDANT**

**EQUITY BANK KENYA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI ..... 4<sup>TH</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced the instant suit by way of a plaint dated February 10, 2015 seeking the following prayers: -
  - a. That a permanent injunction be issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants either by themselves, their servants, agents and/or employees from advertising, offering for sale, selling by public auction, private treaty or otherwise, entering into, accessing, alienating, transferring and/or in any manner whatsoever altering or dealing with the plaintiff's property and the suit property herein more particularly described as, Land reference No Nairobi Block 107/1/1129 before, on or after the February 11, 2015.
  - b. The 3<sup>rd</sup> defendant herein be directed by this honourable court to provide a full statement of accounts of dealing between itself and the plaintiff.



- c. General damages.
  - d. Costs and interest in (c) above at prevailing court rates until payment in full.
2. The 1<sup>st</sup> defendant filed its statement of defence dated September 27, 2019, the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's filed their defence dated June 23, 2021 while the 5<sup>th</sup> and 6<sup>th</sup> defendant's filed their defence dated June 23, 2021.

**The Plaintiff's case.**

3. The case of the plaintiff is contained in the plaint dated February 10, 2015, the evidence tendered in court during trial and the written submissions by his advocates dated June 15, 2022. Besides the oral evidence tendered, the plaintiff's witness adopted the witness statement dated May 8, 2019 as part of his sworn evidence in Chief and also Supplementary witness statement dated June 19, 2022 and bundle of documents dated May 8, 2019 and November 25, 2021.
4. It was the plaintiff's case that the plaintiff is the registered owner of LR Number Nairobi/block/107/1/1129 and the plaintiff has never been a customer or an account holder with the 3<sup>rd</sup> defendant. The plaintiff contended that the 3<sup>rd</sup> defendant has never issued it with any notification, statutory notice or any other notice to sell the suit property pursuant to section 96(2) of the *Land Act* 2012. The plaintiff also pleaded and particularized the fraudulent and negligent acts against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant in seeking to disposes it of the suit property.
5. David Kinyanjui Gatimu testified as PW1 during the hearing of the matter that proceeded on March 1, 2022. He stated that he was the director of the plaintiff company. He stated that he was allocated the property in 1992 from the then Nairobi City Commission. The allocation was initially made to Newton Njiri Wachunga and himself. They were then issued with the letter of Allotment dated August 11, 1992 and the part development plan showing them the plot number. It was also his testimony that in compliance with the conditions of the letter of allotment, they paid kshs 88,000/- as stand premium and ground rent. They also paid survey fees of kshs 7,980 and he also produced the said receipts which were at pages 24-25 of schedule B of the plaintiff's trial bundle.
6. He further stated that after the survey had been done, a survey map was prepared on September 21, 1994 and authenticated on May 29, 1997. The survey map showing that plot number 13 was given the reference number 1129. It was also his testimony that they were later issued with a lease on November 15, 1998 by the city council of Nairobi.
7. He also added that they later transferred the suit property to the plaintiff herein, a company which he was a director. According to his testimony, this was done after all the legal requirements had been met including the memorandum of registration of transfer of lands signed by the registrar of titles on November 10, 2006, rates demand notes, payment receipts for the year 2006 and 2007 with clearance certificate endorsed thereon and transfer documents dated January 16, 2007 with consent to transfer from the 4<sup>th</sup> defendant endorsed thereon and subsequently thereafter the plaintiff was issued with the certificate of lease for the suit property and took possession of the property from then to date.
8. The witness, PW1 also stated that they obtained approval of building plans and proceeded to develop the suit property. The said approval was granted on July 23, 2009. He also stated that sometimes in May 2015 he applied and was granted a facility by Co-operative Bank of Kenya for kshs 60,000,000/- upon which the suit property was charged as security.
9. He told the court that sometime in January 2011, the plaintiff received a demand letter from the 1<sup>st</sup> defendant alleging that they were trespassing on their property. Upon receipt of the said demand letter,



he conducted a search dated January 28, 2011 and confirmed that the plaintiff was still the registered owner. Subsequently thereafter his advocate wrote to the 4<sup>th</sup> defendant and sought clarification on the status of the property. The town clerk of the 4<sup>th</sup> defendant responded and confirmed that DK Gatimu and NN Wachunga had transferred the suit property to the plaintiff.

10. He also stated that in February 2015, he learnt that the suit property was being advertised for auction by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant based on the fact that the 1<sup>st</sup> defendant had taken a loan and charged Nairobi/block 107/1129 and had defaulted but it was the plaintiff's property Nairobi/block 107/1/1129 that was being referred to in the said advertisement. Based on this act, he filed the current suit to protect the plaintiff's interest on the land.
11. Upon cross-examination, he stated that he took possession of the land in 1997 and began construction in 2009 after getting the necessary approvals. He also stated that subdivision was created from 107/1 even though the map did not show oblique 1 and he conceded that he did not have a map from the survey of Kenya. He also stated that the 1<sup>st</sup> defendant did not have any documents including a letter of allotment which demonstrated its ownership to the land. He also stated that the property was fully developed and currently had a block of apartments consisting of 60 units which are occupied and that the construction was completed in 2015.
12. PW2, Gildine Karani, the land registrar told the court that her office had a file for each number; one being Nairobi/block/107/1/1129 and another being Nairobi/block 107/1129. She confirmed that Nairobi/block 107/1/1129 was a leasehold registered in the names of Salyut Services Limited and that a certificate of lease had been issued on February 27, 2007 after it had been transferred by DK Gatimu and NN Wachunga. In respect to Nairobi/block 107/1129, she confirmed that the same was registered in the names of Ramuka Agencies Limited and its certificate of lease had been issued on November 23, 2004. She also stated that a restriction had been registered against the title as follows "no dealings until owners clear with city council" She also stated that there was no lease document in the file but there was a charge registered in favour of Equity Bank Kenya Limited for kshs 9,500,000/- on February 23, 2011. She also stated that her office never received any communication from the 1<sup>st</sup> and 4<sup>th</sup> defendant to remove the restriction.
13. On cross-examination by counsel for the 1<sup>st</sup> defendant, she stated that her office never received any correspondence from survey of Kenya on any issue in respect to the number of the property. She also stated that when there is a notable error on any entry they just cancel and enter the correct one and the date for such entry is never indicated. She also stated that she could not tell which of the numbers was fraudulent.
14. Upon further cross-examination by counsel for the 4<sup>th</sup> defendant, she stated that the leases were forwarded from the 4<sup>th</sup> defendant with the alterations which had been signed by the town clerk and that the survey of Kenya was well placed to confirm if the two parcels are the same on the ground.

### **The 1st Defendant case.**

15. The 1<sup>st</sup> defendant's case is contained in the statement of defence dated September 27, 2019, witness statement of Frankline Kamathi Kamau dated September 24, 2019 and together with the oral evidence tendered and the written submissions dated July 20, 2022 that were filed herein.
16. It was the 1<sup>st</sup> defendant's case that it is the registered owner of Nairobi/Block 107/1129 located in Umoja phase 11 estate upon which it had taken a facility with the 3<sup>rd</sup> defendant and used its title as a collateral. The 1<sup>st</sup> defendant accused the plaintiff of interfering with its possession and sought for an



- injunction and damages against the plaintiff. The 1<sup>st</sup> defendant also denied the particulars of fraud and negligence which had been pleaded at paragraph 7 of the plaint dated February 10, 2015.
17. Frankline Kamathi Kamau, testified as DW1. He stated that he was the director of the 1<sup>st</sup> defendant. He adopted his witness statement and the 1<sup>st</sup> defendant's documents that were on record as part of his evidence in chief. He stated that the 1<sup>st</sup> defendant was allocated the land in 2004 and fenced it in 2005. In 2011 the 1<sup>st</sup> defendant took a loan from Equity Bank but before it could develop it, it got information that someone else was putting up a fence in the said property. He later found out that it was David Gatimu who had started undertaking developments in the land. He subsequently obtained orders of injunction against him but he did not comply.
  18. It was also his testimony that the survey of Kenya had confirmed that the 1<sup>st</sup> defendant's property was the correct one even though the ministry of lands had said that it was a case of double allocation. He further stated that he stopped paying rates because the demand note kept showing the plaintiff's name.
  19. On cross-examination by counsel for the plaintiff, he conceded that did the 1<sup>st</sup> defendant did not have an allotment letter and neither did it have receipts for rates, survey fees and standard premium that had been paid. He also conceded that he did not have the lease in court. He further stated that the restriction that was placed against the title was able to secure the 1<sup>st</sup> defendant's property in one way or the other. He denied taking the loan with the intention of defaulting or defrauding the bank. He also stated that the PDP was issued way back before he was allocated the land and that the survey plan was submitted in 1994 and his title issued in 1997.
  20. On further cross-examination by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, he confirmed taking a facility of kshs 9,500,000/- from Equity Bank and was in default when the bank had commenced the execution process.
  21. Wilson Kibichii the head of survey and principal cartographer at the ministry of lands testified as DW2. He testified that he was the author of the letter dated June 10, 2020 which letter had indicated that Nairobi/Block 107/1118-1134 does not exist in their records. He also said that the Registry Index Map (RIM) for Nairobi Block 166 also does not exist in their records and he made reference to the letter dated August 7, 2020.
  22. It was also his testimony that Survey of Kenya is the only entity mandated to issue parcel numbers.
  23. On cross-examination, he stated that he did not author the letter dated August 7, 2020 and neither was he requested to bring the file to court. He also conceded that he did not conduct the survey in this matter. He also stated that if there is an error in the numbers, the same can be corrected using the green card, survey plan and RIM and also by making reference to the available records.

#### **The case of the 2nd and 3rd Defendant.**

24. The 2<sup>nd</sup> and 3<sup>rd</sup> defendant filed their joint statement of defence dated June 23, 2021.
25. It was the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's case that the 1<sup>st</sup> defendant was granted a loan facility of kshs 9,500,000/- which were set out in the letter of offer and acceptance dated February 4, 2011 and loan agreement dated February 11, 2011. The property known as Nairobi/Block 107/1129 was charged in respect to the same. The loan was to be repaid over a period of 36 monthly instalments of kshs 343,448.00 till payment in full and in default the 3<sup>rd</sup> defendant would recover the outstanding amounts due.



26. Mary Mbithi, the head of credit at Fourways Corporate Branch testified on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendant. She relied on her witness statement dated October 23, 2018 and the 2<sup>nd</sup> and 3<sup>rd</sup> defendant bundle of documents dated January 31, 2022 as part of her evidence in chief.
27. She added that the 1<sup>st</sup> defendant had defaulted in repaying the loan and the arrears were kshs 10,520,860.82 as at December 8, 2014 which necessitated the realization of the security contained in the charge.
28. When cross-examined, she stated that she did not have the valuation report in court and neither did she have a search that was done after the property had been charged. She further stated that the bank did due diligence and engaged professional valuers and advocates prior to the issuance of the loan facility. She also stated that no claim was raised by any party in respect to the said property which was charged by the bank.

#### **The case for the 5th and 6th Defendant.**

29. The 5<sup>th</sup> and 6<sup>th</sup> defendant's similarly filed a joint statement of defence dated June 23, 2021. The 5<sup>th</sup> and 6<sup>th</sup> defendants denied the averments in the plaint and stated if there was any registration effected in respect to the suit property then the same was done in accordance with statute and upon presentation of all the relevant documentation. During the hearing of the suit, the 5<sup>th</sup> and 6<sup>th</sup> defendant did not call any witness to testify on their behalf.

#### **The case of the 4th Defendant.**

30. I have perused the entire court record and I was unable to find any defence and written submissions that were filed by the 4<sup>th</sup> defendant. That notwithstanding the 4<sup>th</sup> defendant participated in the proceedings through their counsel even though they did not call any witness to testify on their behalf.

#### **Plaintiff's submissions.**

31. The plaintiff filed written submissions dated June 15, 2022 through the firm of Macharia Nderitu & Co Advocates. counsel for the plaintiff identified six issues for determination by the court:
  - i. Whether Nairobi Block 107/1/1129 And Nairobi Block 107/1129 are one and the same.
  - ii. Who between the plaintiff and the 1<sup>st</sup> defendant is the rightful owner of the suit property.
  - iii. Whether the certificate of lease number Nairobi Block 107/1129 issued to the 1<sup>st</sup> defendant on November 23, 2004 should be cancelled.
  - iv. Whether a permanent injunction be issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant's either by themselves, their servants, agents and or employees from advertising, offering for sale, selling by public auction, private treaty or otherwise entering into, accessing, alienating, transferring and/or in any manner whatsoever altering or dealing with the suit property.
  - v. Who should pay costs on the suit and interests thereon.
  - vi. What further orders the court should issue in the interest of justice.
32. On the first issue, counsel submitted that from the pleadings and the testimony of the parties, the plaintiff and 1<sup>st</sup> defendant are in conflict over the same piece of land. On the 2<sup>nd</sup> issue, it was submitted that the plaintiff is the bonafide owner of the suit property and specifically Nairobi/block 107/1/1129 due to the following reasons; that the plaintiff can demonstrate how they obtained their certificate of lease by producing all the relevant documents and specifically the letter of allotment, part development



plan, survey map, lease, transfer of lease and certificate of lease, the original allottees of the letter of allotment of the land satisfied all the conditions of the allotment and lease, the letter of offer and the lease of the original allottees of the land were never cancelled or revoked, the plaintiff's title was obtained procedurally and lawfully, the plaintiff has satisfied all the requirements of the lease to date including payment of rates and the same has never been cancelled or revoked, the plaintiff can show a consistent relationship with the 4<sup>th</sup> defendant including transfer, building plans and extension of user, the 4<sup>th</sup> defendant has consistently affirmed the lease and title of the plaintiff and denied the existence of the 1<sup>st</sup> defendant's lease and none of the documents produced by the plaintiff as exhibits in this case have been challenged in any way. Counsel cited the following decisions in support of the plaintiff's case, *Daudi Kiptugen v Commissioner of Lands & 4 Others* (2015) eKLR, *Joseph Kagunya v Boniface K Mulli & 3 others* (2018) eKLR, *Abdullahi Muhamed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane v Hagar Abshir & others* (2021) eKLR and *Benja Properties Limited v Syedna Mohamed Burhamudin Sabed & 4 others* (2015) eKLR,

33. On whether the certificate of lease number NairobiBlock107/1129 issued to the 1<sup>st</sup> defendant on November 23, 2004 should be cancelled, counsel made reference to article 40(6) of the *Constitution* and section 26 of the *Land Registration Act* 2012 and submitted that a title that has been unlawfully acquired cannot be protected. It was further submitted that the 1<sup>st</sup> defendant has no single document to confirm ownership or the process of acquiring such title. It was also argued that there is also no lawful process showing how the 1<sup>st</sup> defendant's title was processed since no lease was sent to the registrar by the 4<sup>th</sup> defendant for registration. Counsel urged the court to hold that the 1<sup>st</sup> defendant unlawfully and fraudulently obtained title to Nairobi Block 107/1129 and that the same should be cancelled.
34. On whether a permanent injunction ought to be issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, counsel submitted that the Bank issued a loan to the 1<sup>st</sup> defendant on a non-existent property to which the 1<sup>st</sup> defendant has never paid any money towards resettling of the loan. Counsel argued that in the circumstances, a permanent injunction ought to be issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants from interfering with the plaintiff's ownership and use of Nairobi Block 107/1/1129.

#### **1st Defendant's submissions.**

35. The 1<sup>st</sup> defendant filed written submissions dated July 20, 2022 through Guandaru Thuita & Co Advocates. Counsel outlined two issues for consideration by the court;
- i. Who between the plaintiff and 1<sup>st</sup> defendant is the lawfully registered proprietor of the subject land.
  - ii. What orders should issue in the circumstances and to what extent.
36. On the first issue, counsel submitted that Nairobi/Block 107/1/1129 and Nairobi/Block 107/1129 refer to the same parcel of land on the ground and none of them is a forgery as was confirmed by PW2, Gildine Karani, the land registrar. Counsel submitted that in resolving the issue, the court ought to look at the root of the title. He further stated that the evidence of the land registrar and the surveyor concurred that the numbers of parcel of land originate from the Survey of Kenya and that there was no evidence from the plaintiff that its title originated from the Survey of Kenya. Counsel made reference to sections 22, 30, 32, 33 and 41 of the *Survey Act* in support of this position and also the Court of Appeal decision in *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* (2019) eKLR.
37. It was also submitted that the plaintiff had failed to demonstrate that its parcel number had origins from the Survey of Kenya. It was further submitted that DW2 had confirmed that in the history of



surveying in Kenya, the numbering never followed the pattern taken by the plaintiff's title No Nairobi/block107/1/112, since the pattern followed in all Cap 300 titles was Area/Block/Parcel Number and that unlike GLA and RTA titles, the parcel number of subdivisions under RLA would not retain the original number. It was also argued that the original (mother title) was Title No Nairobi/Block 107/1 and this did not mean that any sub-titles issued would have the number "1" as part of its reference. Relying on the decision of *Andrew Gatui Gichia v Mandugu Holdings Co Limited & 5 others* (2018) eKLR, which dealt with similar circumstances as the case herein, counsel urged the court to cancel the plaintiff's title which was nonexistent.

38. On what orders should issue herein, counsel submitted that the 1<sup>st</sup> defendant had demonstrated that it's the rightful owner and thus is entitled to the reliefs sought including injunctions against the plaintiff. On the aspect of trespass to the land, counsel also submitted that once the court is satisfied that there was trespass to land, no proof of damages is necessary for it to award general damages as was stated in the case of *Duncan Nderitu Ndegwa v Kenya Pipeline Ltd and another* (2013) eKLR. counsel quantified the 1<sup>st</sup> defendant's general damages for trespass as ksh 33,000,000 (3,000,000 x 11 years) as reasonable award in the matter.

#### **2nd and 3rd defendant's submissions.**

39. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their submissions dated July 21, 2022. Their submissions focused on one salient issue for determination, this being who between the 1<sup>st</sup> defendant and the plaintiff is the rightful owner of the suit property. counsel submitted that as per the testimony of PW2, the allegations of fraud against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant are baseless since the land registrar had confirmed both titles being genuine. In respect to the two competing interest over the same parcel of land, counsel urged the court to adopt the doctrine of first in time and confirm the 1<sup>st</sup> defendant as the genuine owner of the property. Reliance was placed on the cases of *Wreck Motors Enterprises v The Commissioner of Lands and others* Civil Appeal No 71 of 1997 and *Gitwany Investment Ltd v Tajmal Ltd & 3 others* (2006) eKLR.

#### **The 5th and 6th Defendant's submissions.**

40. The 5<sup>th</sup> and 6<sup>th</sup> defendant's submissions were dated July 21, 2022 and counsel submitted on two issues, these being, who is the rightful owner of the suit property between the plaintiff and the defendant and whether there was any cause of action against the 5<sup>th</sup> and 6<sup>th</sup> defendants. It was submitted that from the evidence that was tendered both titles had discrepancies as to how they were acquired and it was difficult to tell who between the plaintiff and the 1<sup>st</sup> defendant was the bonafide owner of the suit property.
41. On whether there was any cause of action against the 5<sup>th</sup> and 6<sup>th</sup> defendants, counsel submitted that no fraud had been proved against them and hence the suit ought to be dismissed.

#### **Analysis and Determination.**

42. I have considered the parties' pleadings, evidence and submissions. In my view the following issues fall for determination: -
- i. Whether the plaintiff's suit Nairobi ELC No 104 of 2015 should be struck out for being an abuse of the court process.
  - ii. Who between the plaintiff and 1<sup>st</sup> defendant is the bonafide and lawfully registered owner of the suit property.



- iii. What are the appropriate remedies that can issue herein.
43. On the first issue, counsel for the 1<sup>st</sup> defendant submitted that it was not proper for the plaintiff to file another suit being ELC 104 of 2015 when it had already filed a counterclaim in ELC No 576 of 2011. counsel also pointed out to the court that the plaintiff's director had sworn in the verifying affidavit of ELC 104 of 2015 which accompanied the plaint that there was no suit pending between the parties yet ELC 576 of 2011 was already in existence. This according to counsel amounted to an abuse of the court process. counsel relied on the case of *Rosemary Kariuki v Cooperative Bank of Kenya Ltd & 4 others* (2012) eKLR and urged this court to strike out the same.
44. It is common ground that suit ELC No 104 of 2015 was filed despite the existence of a pending Civil Suit No ELC 576 of 2011 which relate to the same subject property. The practice of filing new and separate cases despite the existence of a similar case relating to the same subject matter amounts to an abuse of the court process. Courts usually frown on this practice since it leads to unnecessary backlog of cases and a waste of precious judicial time. However, since the two ELC 104 of 2015 and ELC 576 of 2011 had already been consolidated, it will be a mere academic exercise to strike out ELC 104 of 2015 at this stage and further the 1<sup>st</sup> defendant never raised the said issue during the consolidation of the said cases.
45. The second issue for determination is who between the plaintiff and 1<sup>st</sup> defendant is the bonafide and registered owner of the subject property. The plaintiff claims to be the owner of the property known as Nairobi Block 107/1/1129 which was allocated to David Kinyanjui Gatimu and Newton Njiru in 1992 by the then city council of Nairobi which was later transferred to the plaintiff and title was issued on 26<sup>th</sup> February 2007 in the names of the plaintiff. The 1<sup>st</sup> defendant on the other hand claims that it was allocated the property in 2004 and issued with title known as Land Reference Number Nairobi Block 107/1129.
46. In determining this issue, I have to look at the root of the title with a view of confirming who among the plaintiff and 1<sup>st</sup> defendant has demonstrated a good root of the title in accordance with the prevailing law. If the same will not be satisfactory then the court may also consider the maxim that, "when two equities are equal, the first in time prevails."
47. In the case of *Munya Maina v Hiram Gathiba Maina* (2013) eKLR, the court of appeal pronounced itself as follows:-

"We stated that when a registered proprietors root of title is under challenge, it is not sufficient to dangle the instrument of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show the acquisition was legal, formal and free from any encumbrances."

Similarly, in the case of *Daudi Kiptugen v Commissioner of Lands & 4 others* (2015) eKLR, the court stated that: -

".....the acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself can't be a good title. If this were not the position then all one would need to do is to manufacture a lease or a certificate of title at a backyard or the owner of a dingy street and by virtue thereof, claim to be the rightful proprietor of the land indicated therein."



48. It is trite law that he who alleges must prove. This is set out under section 107 (1) (2) of the *Evidence Act* Cap 80 of the Laws of Kenya which provides as follows; -
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  2. when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”
- Sections 109 and 112 of the same *Act* states: -
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
- “112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”
49. In our jurisdiction, the standard of proof in civil claims is on a balance of probabilities. This means that the court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable.
50. The plaintiff’s claim to ownership of the suit property is primary founded on the fact that in 1992, the 4<sup>th</sup> defendant allotted the property to Newton Njiri Wachunga and David Kinyanjui Gatimu. They were issued with a letter of allotment dated August 11, 1992 and the part development plan. They subsequently paid kshs 88,000/- as stand premium and ground rent. They also paid survey fees of kshs 7,980/- which was produced as schedule B of the plaintiff’s bundle. Later on February 26, 2007, Newton Njiri and David Gatimu transferred the same to the plaintiff and they proceeded to develop the suit property after seeking approval from the 4<sup>th</sup> defendant. The plaintiff also applied and was granted a facility by cooperative Bank of Kenya of kshs 60,000,000/- and charged the land as security. However, during the hearing of the suit, it emerged from the testimony of DW2, Wilson Kibichii from the survey office that there were no records of the plaintiff’s title No Nairobi/Block 107/1/1129 from the Survey of Kenya. It was the testimony of DW2 that the Survey of Kenya does not have any records for Title No Nairobi/Block 107/1/1129 and the same does not exist in its records. The said witness also stated that numbering of the plaintiff’s title was nonexistence.
51. Counsel for the plaintiff submitted that PW2 who was the land registrar had confirmed that the plaintiff’s lease in respect to Nairobi/Block 107/1/1129 had emanated from the 4<sup>th</sup> defendant and in fact in her records, there was a cancellation of Nairobi/Block 107/1129 to reflect Nairobi/Block 107/1/1129.
52. The 1<sup>st</sup> defendant on the other hand through its witness DW1, Frankline Kamathi Kamu a director of the 1<sup>st</sup> defendant claimed to have been allocated the land from the 4<sup>th</sup> defendant through a subdivision that was done. However, in his testimony he did not produce any letter of allotment confirming that they were allocated the said property in the year 2004. Counsel for the 1<sup>st</sup> defendant submitted that there was no need to avail the letter of allotment since the certificate of title which was in their custody was *prima facie* evidence of proprietorship.
53. The 1<sup>st</sup> defendant may be a holder of a certificate of title for Nairobi/block 107/1129, in respect to the subject property, but has failed to demonstrate and convince the court how the same was acquired.
54. On the other hand, the plaintiff was able to adduce sufficient evidence laying a good root as to how its title was acquired. While the plaintiff claims to be the holder of certificate of title No Nairobi/Block



107/1/1129, it became clear during the hearing of the suit that under the applicable legal regime the same was nonexistent since under the RLA (now deleted) the pattern that would be followed in respect to those titles would be Area/Block/Parcel Number and there was no way that any sub titles would be issued with the number “1” as part of its reference. I have considered this information and, in my view, the same cannot be the singular reason of impeaching the plaintiff’s certificate of title since the process demonstrating its root and acquisition of the plaintiff’s property was regular and lawful. Reference can be made to the case of *Hubert L Martin & 2 others v Margaret J Kamar & 5 others* [2016] eKLR, Munyao J held as follows;

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or certificate of lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

55. In the instant case, PW2 the land registrar in her evidence in chief stated that she did not find any lease from the 1<sup>st</sup> defendant.
56. In view of the foregoing, and having evaluated the evidence that was tendered together with the applicable provisions of the law, it is the finding of this court that the plaintiff has been able to satisfactorily convince this court that it is the bonafide and legitimate owner of the subject property and this court finds as such.
57. On whether this court can grant any reliefs, it is the finding of this court that the plaintiff’s claim in Nairobi ELC No 104 of 2015 and in the counterclaim for ELC No 576 of 2011 having been proven to the required standard on a balance of probability, it is entitled to the relief sought. However, it is worth noting that the plaintiff in its submissions urged the court on interest of justice to order a rectification of the register pursuant to section 80 of the *Land Registration Act*. Unfortunately, the same cannot be granted since in a civil claim, a court of law cannot grant a relief which has not been specifically pleaded and prayed for by the parties. Doing so will be overstretching the court’s powers. The same was neither pleaded nor prayed for in the pleadings and further time without number courts have reiterated that parties are bound by their own pleadings.
58. The 1<sup>st</sup> defendant claim based on the amended plaint filed on December 13, 2011 and the defence filed on September 14, 2019 has not been proved to the required standard and the same is subsequently dismissed.
59. On costs, costs follow the event and considering that the plaintiff has been successful in its case and the counterclaim, it is entitled to the costs of the suit which shall be paid by the 1<sup>st</sup> defendant.

### **Final orders**

60. In conclusion, the plaintiff’s suit Nairobi ELC No 104 Of 2015 And counterclaim filed In Nairobi Elc No 576 of 2011 are disposed as follows:



- a. A declaration that Sal Yut Services Limited is the *bonafide* owner of the land known as Nairobi Block 107/1/1129.
- b. A permanent injunction is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants either by themselves, their servants, agents and or employees from advertising, offering for sale, selling by public auction, private treaty or otherwise entering into accessing, alienating, transferring and or in any manner whatsoever altering or dealing with the plaintiff's property known as Nairobi Block 107/1/1129 and further interfering with the plaintiff's quiet possession of the said property.
- c. An order is hereby issued directing the chief land registrar for cancellation of certificate of lease number Nairobi Block 107/1129 issued to 1<sup>st</sup> defendant on November 23, 2004.
- d. The plaintiff is awarded costs of the suit which shall be paid by the 1<sup>st</sup> defendant.

**DATED, SIGNED & DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2022**

**E.K. WABWOTO**

**JUDGE**

**In the presence of:-**

**Ms. Wangui for the plaintiff.**

**Mr. Thuita for the 1st defendant.**

**Ms. Kihara h/b for Mr. Njenga for the 2nd and 3rd defendant.**

**N/A for the 4th defendant.**

**Ms. Fatma Ali h/b for Mr. Njagi for the 5th and 6th defendant.**

**E.K. WABWOTO**

**JUDGE**

