



Inonda & 4 others v County Government of Nairobi & 3 others (Environment & Land Case E156 of 2020) [2022] KEELC 13716 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELC 13716 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E156 OF 2020
JO MBOYA, J
SEPTEMBER 22, 2022**

BETWEEN

**PETER MANYONYA INONDA 1ST PLAINTIFF
PETJU ENTERPRISES LIMITED 2ND PLAINTIFF
PAULINE MUMBI MWANGI 3RD PLAINTIFF
FRANCIS MAINA GITERO 4TH PLAINTIFF
RUTH NJERI NJAU 5TH PLAINTIFF**

AND

**COUNTY GOVERNMENT OF NAIROBI 1ST DEFENDANT
REGISTRAR OF LANDS, SUED THROUGH THE ATTORNEY
GENERAL 2ND DEFENDANT
EMBAKASI RANCHING COMPANY LIMITED 3RD DEFENDANT
JOHN KAMANGU NYUMU 4TH DEFENDANT**

JUDGMENT

1. Vide the Complaint dated the September 28, 2020, the Plaintiffs herein have approached the Honourable Court seeking for the following Reliefs;
 - a. An order of Permanent Injunction restraining the Defendants jointly and/or severally and through their officers, agents and/or servants from trespassing into, taking over and interfering in any way with the Plaintiffs ownership, possession and use of their respective persons/plots of land namely;
 - i. 1st Plaintiffs plot number V6415, V6416 and V6417.



- ii. 2nd Plaintiffs plot number P2916B.
 - iii. 3rd Plaintiffs plot numbers V6410 and V6411.
 - iv. 4th Plaintiff plot numbers V6413 and P2915B.
 - v. 5th Plaintiffs plot number V6414.
- b. A Declaration be made that the 1st and 4th Defendants decision and action to invade, trespass and attempt to take over the Plaintiff's plots above has no basis in law and it is therefore Fraudulent, illegal and therefore null and void.
 - c. The Defendants be ordered jointly and severally to pay damages to the Plaintiffs severally and individually for the illegal trespass, destruction of property and for the attendant loss of use of their properties and loss of income therefrom.
 - d. An Order be issued for the 3rd Defendant and the 2nd Defendant to proceed to execute all necessary land transfer documents, register the same and issue titles for the said plots in favor of the Plaintiffs individually.
 - e. The Defendants do jointly and or severally pay the Plaintiffs costs of this case and interests thereof.
2. Upon being served with the Plaint and summons to enter appearance, the Defendants herein variously entered appearance and thereafter filed statement of defense. Firstly, the 1st and 4th Defendants entered appearance and filed statement of defense on the May 31, 2021.
 3. On the other hand, the 2nd Defendant entered appearance and filed a statement of defense on the November 15, 2021. For clarity, the 2nd Defendant disputed the claims as alleged against herself.
 4. On her part, the 3rd Defendant entered appearance on the November 25, 2020 and thereafter filed a statement of defense on even date.
 5. It is not evident from the record, whether the Plaintiffs herein ever filed a reply to defense of at all.
 6. Suffice it to point out, that the pleadings in respect of the subject matter thereafter closed upon the lapse of 14 days when the last statement of defense was served.

Evidence by the parties:

a.Plaintiffs' Case

7. The Plaintiffs' case is premised on the evidence tendered by 4 witnesses. For clarity, the witnesses included the 1st, 3rd, 4th and 5th Plaintiffs herein.
8. Nevertheless, the evidence by the said witnesses bore great similarities and semblance, in all aspects, save for the details of the titles that were purchased and/or acquired by each Plaintiff.
9. According to PW1, same testified that on or about the year 2011, he got information that the 3rd Defendant herein was selling and/or disposing of various plots, situated within her (3rd Defendant's Land comprising Embakasi Ranching)
10. Further, the witness added that upon receipt of the information, same went to the offices of the 3rd Defendant and sought to authenticate the veracity of the information, pertaining to and/or concerning the sale of plots situate within the Embakasi Ranch.



11. However, the witness testified that whilst at the offices of the 3rd Defendant, same was informed that the 3rd Defendant was not selling any Plot, but it was clarified to him that various members of the 3rd Defendant, who had been allocated plots, were indeed selling and disposing of their plots.
12. Premised on the foregoing, the witness herein stated that the 3rd Defendant was therefore able to link the witness with the specific members, who had signaled their intention to sell their plots. For clarity, the witness added that same was linked to Francis Kuria Kamau, Godfrey Mwangi Kamau, who were the owners of Plots No's V6415, V6416, V6417 and P2916B, respectively.
13. Further, the witness testified that upon being linked to the said members of the 3rd Defendant, same called the said members and thereafter same were able to meet at the offices of the 3rd Defendant, culminating into negotiations over and in respect of the named properties.
14. Subsequently, the witness added that same was able to reach mutual understanding with both Francis Kuria Kamau and Godfrey Mwangi Kamau, respectively, over and in respect of the suit property and thereafter sale agreement were crafted and executed.
15. It was the further testimony of the witness that after entering into and executing the respective sale agreements, the vendors handed over to the witness their respective share certificates and allotment letters over and in respect of the sold plots.
16. In any event, the witness also testified that thereafter the share certificate and the letters of allotment, which were handed over by the vendors, were surrendered to the 3rd Defendant, who thereafter entered the names of the witness in her register of members.
17. On the other hand, the witness added that upon acquiring ownership rights to and in respect of the named plots, the 3rd Defendant requested same to pay the sum of Kshs.50, 000/-, Only, per plot for purposes of survey, which same duly and promptly paid.
18. Subsequently, the witness added that he instructed her surveyor to proceed and identify the named plot to the witness. In this regard, the witness added that the named plots were duly identified unto him and he thereafter entered upon and took possession of the plots in question.
19. It was the further testimony of the witness that he commenced to develop the named plots and in particular he constructed and established commercial premises on the named properties in line with guidelines stipulated by the 3rd Defendant. For clarity, the witness clarified that the 3rd Defendant had signaled that the plots falling within the area, where the witness had acquired the plots, were reserved for commercial purposes and not otherwise.
20. Be that as it may, the witness testified that on or about the February 2019, the 4th Defendant herein who was a Member of the County assembly, Ruai Ward, forcefully invaded his plots and purported that the said plots formed and/or constituted public land, to wit a portion of Ruai open air Market.
21. On the other hand, the witness added that other than the invasion by the 4th Defendant, same also caused to be erected a sign board that the suit plot belonged to the City County of Nairobi, the 1st Defendant herein.
22. Other than the foregoing, the witness added that the 4th Defendant under the pretext that the named plots belonged to the 1st Defendant, also commenced assorted excavation activities on the named plots.
23. As a result of the actions complained of, the witness testified that same was denied and/or deprived of the right to use and benefit from the named plots. In this regard, the witness added that the actions and/or activities by the 1st and 4th Defendant constituted trespass onto the named plots.



24. Other than the foregoing the witness referred to the statement dated September 28, 2020 and sought to adopt same in its entirety.
25. Pursuant to the request by the witness, the witness statement dated the September 28, 2020 was admitted and adopted as further evidence in chief by the witness.
26. Besides, the witness herein also alluded to a list and bundle of documents dated the September 28, 2020 containing a total of 10 documents. In this regard, the witness sought to adopt and rely on the said documents and same were thereafter produced and admitted as exhibits P1 to P10, respectively.
27. On cross examination by counsel for the 1st and 4th Defendants, the witness herein stated that same bought and purchased the named plots from persons who were hitherto members/shareholders of the 3rd Defendant company.
28. Further, the witness added that at the time when he bought the named plot, same did not have any title or certificate of lease. In this regard, the witness clarified that what was handed over to him were therefore the original share certificate and the plot allotments letters, which had been issued to the vendors by the 3rd Defendant.
29. As concerns whether the witness has been paying rents and rates to the 1st Defendant, the witness clarified that same has not been paying such rates and/or rents, insofar as the plots are yet to be formally registered and issued with certificate of title.
30. In respect to a question whether the named plots constitutes public land, the witness stated that same did not constitute public land. In fact, the witness added that the named plots were subdivided from a Private land belonging to the 3rd Defendant and having arisen from private land, same could not therefore be termed as public land.
31. At any rate, the witness also added that after purchasing the named plots from the two vendors, the plots in question were duly identified and/or pointed out by the agents/employees of the 3rd Defendant.
32. Further, the witness also clarified that ever since he bought and purchased the named plots, the 3rd Defendant, who is the holder of the Mother title, has never interfered with his occupation, possession and use of the named properties.
33. On cross examination by counsel for the 2nd Defendant, the witness herein reiterated his evidence in chief and affirmed that the named plots were sold unto him by the vendors, who were previously members of the 3rd Defendant.
34. In answer to a question whether the 2nd Defendant had interfered with his rights over the named plots, the witness answered in the negative.
35. The 2nd witness who testified was Pauline Mumbi Mwangi and same testified as PW2. According to the witness herein, same received information about some plots that were being sold by the 3rd Defendant and upon receipt of such information same visited the offices of the 3rd Defendant.
36. However, the witness added that upon visiting the offices of the 3rd Defendant, it was pointed out unto same that it was not the 3rd Defendant who was selling the plots, but members of the 3rd Defendant who were hitherto had been allocated the plots.
37. Based on the foregoing, the witness testified that same was linked to a Shareholder, namely, Lucy Wangari Mwangi, who was the owners of plots Numbers V6410 and V6411, respectively.



38. The witness herein proceeded to and stated that after being linked to the said shareholder, same entered into lawful sale agreements, whereupon the vendor sold to and unto her the two named plots.
39. Further, the witness clarified that upon the sale of the two plots, the vendor handed over unto her the original share certificate and the allotment letters. Consequently, the witness added that same became the lawful owner of the two named plots.
40. Other than the foregoing, the witness reiterated that the original shareholding certificate and the allotment letter, which were handed over to her by the vendor, were thereafter surrendered to the 3rd Defendant, who proceeded to and issued new certificate to the witness.
41. Besides, the witness clarified that same was thereafter taken to the named plots by the surveyor appointed by the 3rd Defendant for purposes of identification of the beacons.
42. At any rate, the witness added that upon the identification and/or pointing out of the named plots, same commenced to carryout developments on the named plots, without any interference and/or interruption by any one.
43. Nevertheless, the witness pointed out that on or about February 2019, the 4th Defendant herein who was a Member of County Assembly, Ruai Ward, forcefully invaded the named plots and claimed that same were public land belonging to the 1st Defendant and reserved for Ruai Open Market.
44. On the other hand, the witness added that later, the 4th Defendant caused to be erected a signed board on the named Plots, purporting that the named plots belonged to the 1st Defendant. In this regard, the witness clarified that the claim by the 4th Defendant, was misleading and erroneous.
45. Owing to the actions by and/or on behalf of the 4th Defendant, the witness testified that same has been denied and deprived of her right to occupy, use and develop the named plots.
46. Be that as it may, the witness referred to her written statement dated the 28th September and also sought to adopt same as Further Evidence in chief.
47. Nevertheless, the witness also alluded to the List and Bundle of Documents, which has been produced as exhibit P1 to P10, respectively and pointed out that the documents relating to her plots were at pages 47 to 56 of the bundle of documents.
48. On cross examination by counsel for the 1st & 4th Defendant, the witness herein substantially adopted the response by PW1. However, the witness clarified that when same bought the named plots, same was not informed that the plots formed part and parcel of public land.
49. Further, the witness clarified that upon purchase of the named plots, she proceeded to and developed same for commercial purposes, insofar as the area where the named plots are situated, was designated for use as a commercial/shopping center.
50. The third witness was Francis Mwangi Gitero who testified as PW3. In this regard, the witness referred to his witness statement dated the September 28, 2020 and sought to adopt same.
51. On the other hand, the witness also alluded to the list and bundle of documents dated the September 28, 2020 which has been produced as exhibit P1 to P10 and reiterated the contents thereof.
52. In particular, the witness pointed out that the documents relating to the named plots, belonging to him were contained at pages 57 to 61 of the bundle.
53. Essentially, the testimony by PW3 rehashed the evidence that was tendered by PW1 and PW2, respectively.



54. The final witness on behalf of the Plaintiffs was one Ruth Njeri Njau. Same testified as PW4.
55. The witness herein referred to her witness statement dated the June 30, 2021 and sought to adopt and rely on same. In this regard, the witness statement in question was adopted as the evidence in chief by the witness.
56. Other than the foregoing, the witness referred to the list and bundle of documents dated the September 28, 2020 by PW1.
57. In a nutshell, the Evidence by PW4, reiterates the evidence issued by PW1, PW2 and PW3, respectively.
58. On cross examination by counsel for the 1st and 4th Defendants, the witness pointed out that same bought and/or acquired her plot from a previous shareholder of the 3rd Defendant. For clarity, the witness pointed out that same was not an allottee by the 3rd Defendant.
59. On cross examination by counsel for the 3rd Defendant, the witness pointed out that ever since same bought and acquired the named plots, the 3rd Defendant has neither disputed her rights thereto nor disturbed same in any manner whatsoever.
60. On re-examination, the witness stated that after purchase and/or acquisition of the named plots, same has never been served with any notice purporting that the named plot is a public utility plot.
61. At any rate, the witness added that same has also not been served with any notice for Compulsory acquisition. Consequently, the witness repeated that the named plot lawfully belongs to him and that the activities complained off were calculated to defeat his rights.
62. With the foregoing the Plaintiffs' case was closed.

b. 1st & 4th Defendants' Case:

63. Upon the close of the Plaintiffs' case, counsel for the 1st and 4th Defendant sought for and obtained an adjournment to be able to call own witness. In this regard, the adjournment was duly granted and the hearing was adjourned to the May 23, 2022.
64. On the resumed hearing, counsel for the 1st and 4th Defendants sought for an adjournment and contended that the witness who was to be called was engaged elsewhere. However, when pressed to avail further details pertaining to the engagement of the witness, counsel indicated that the witness was busy campaigning.
65. Premised on the foregoing and upon listening to the objection by counsel for the Plaintiffs and 3rd Defendants, the court declined the adjournment.
66. Consequently, the 1st and 4th Defendants' was closed without any evidence being tendered and or offered, whatsoever.

c. 2nd Defendants Case

67. The 2nd Defendant herein indicated that same would not be calling any witness. Consequently, the 2nd Defendant's case was similarly, closed without any evidence being adduced.

d. 3rd Defendants Case

68. The 3rd Defendant herein called one witness, namely, Walter Kigera Waireri, who testified as DW1.



69. According to the witness, same is the Vice chairman of the 3rd Defendant herein and that by virtue of being the vice chairman, same is conversant with and knowledgeable of the facts pertaining to the subject matter.
70. Further, the witness also added that the 3rd Defendant bought and purchased a huge chunk of land within Embakasi and same is identified as Embakasi Ranch.
71. It was the witness' further testimony that after purchasing the huge chunk of land, the 3rd Defendant caused same to be subdivided, culminating into the creation of *inter-alia* L.R No 105/8590.
72. On the other hand, the witness further testified that after the subdivision of the larger piece of land, which gave rise to L.R No. 105/8590, the 3rd Defendant proceeded to and subdivided L.R No. 105/8590 into various plots, which were thereafter allocated to her members.
73. The witness herein added that after the subdivision of the suit property into various plots, the allottees were at liberty to develop their plots or to deal with them, as same deemed appropriate. For clarity, the witness pointed out that the allottees could even sell to third parties.
74. In respect to the subject matter, the witness stated that the Plaintiffs herein all bought the named plots from the previous members of the 3rd Defendant and that after the purchase, the 3rd Defendant proceeded to and registered the names of the Plaintiffs as members of the 3rd Defendant.
75. On the other hand, the witness also stated that the Plots which were sold to the Plaintiffs were part of private land belonging to the 3rd Defendant and same were not public utility plots.
76. In any event, the witness herein clarified that in the course of subdividing the Mother title, which was owned by the 3rd Defendant, the 3rd Defendant created various plots which were deemed as public utility plots and such plots were voluntarily handed over to the 1st Defendant for purposes of constructing public amenities.
77. Nevertheless, the witness clarified that the plots which were sold to the Plaintiffs herein fell within an area that was designated by the 3rd Defendant as a commercial/shopping center. Consequently, the witness added that any one who was allocated plot in the said area or who bought a plot in the said area, could only use it for commercial purposes and not otherwise.
78. Other than the foregoing, the witness herein referred to his witness statement dated the February 14, 2022 and same sought leave to adopt the statement as his further evidence in chief.
79. Pursuant to the request by the witness, the witness statement dated the February 14, 2022 was indeed admitted as further evidence in chief.
80. On cross examination by counsel for the 1st and 4th Defendant, the witness herein pointed out that L.R No. 105/8590 belongs to and is registered in the name of the 3rd Defendant.
81. Further, the witness also added that it is the 3rd Defendant who carried out and undertook the subdivision of the said property into various sub-plots, which were thereafter allocated to her members.
82. As concerns the Plaintiffs herein, the witness stated that though same were not original members of the 3rd Defendant, same bought the named plots from original members/allottees of the 3rd Defendant. In this regard, the witness added that the Plaintiff are therefore the lawful owners of the named plots.
83. At any rate, the witness herein also clarified that L.R No. 105/8590, is not leased to the 3rd Defendant. For clarity, it was pointed out that the 3rd Defendant owns a title over the said property.



84. In answer to a question whether the Plaintiffs have since procured and obtained titles, the witness stated that the 3rd Defendant is in the process of procuring titles in respect of the individual plots thereafter the resultant titles shall be transferred to and in favor of inter-alia, the Plaintiffs.
85. Finally, in respect of a suggestion that L.R No. 105/8590, is public land, the witness stated that is an erroneous statement. For clarity, the witness reiterated that the suit property is private land belonging to the 3rd Defendant, who is the one who has subdivided same into plots.
86. On cross examination by counsel for the 2nd Defendant, the witness reiterated that the Plaintiffs herein lawfully acquired their plot and the plots falls within an area designated as a Shopping/commercial center.
87. On the other hand, the witness also clarified that the term marked as shopping/commercial center was meant to clarify nature of structures that were to be build on the designated plots.
88. With the foregoing testimony, the 3rd Defendant's case was closed.

Submissions By the Parties:

89. At the close of the hearing, the Parties sought for liberty to file and exchange written submissions. In this regard, the court proceeded to and grant liberty to the Parties to file and exchange their respective written submissions.
90. On their part, the Plaintiffs filed written submissions dated the June 8, 2022 and wherein same raised two pertinent issues for consideration.
91. Firstly, counsel for the Plaintiffs submitted that the suit plots were subdivided and/or created from the lager parcel of land, namely, L.R No. 105/8590, belonging to the 3rd Defendant.
92. To the extent that the suit plots arose from a Private land, it was contended that the suit plot could therefore not be termed as public utility plots, unless same were compulsorily acquired subject to the provisions of Article 40(3) of *the Constitution*.
93. Secondly, counsel for the Plaintiffs submitted that the actions and/or activities complained off and which were taken by the 4th and 1st Defendants, constituted and/or amounted to trespass.
94. Thirdly, counsel for the Plaintiff submitted that as a result of the impugned actions by the 1st and the 4th Defendants, the Plaintiffs' have been deprived of their rights and/or entitlements to the suit plots.
95. Consequently, counsel contended that the Plaintiffs' were therefore entitled to Damages for trespass and loss of use.
96. In support of the foregoing submissions, counsel cited and relied on two decisions namely, *Dim Agencies Ltd versus Kenya Airports Authority* (2021)eKLR and *Rhoda S Kiilu versus Jiangxi Watter & Hydro Power Construction (K) Ltd* (2019)eKLR.
97. On behalf of the 1st and 4th Defendants, written submissions dated the June 27, 2022 were filed. In this regard, counsel for the 1st and 4th Defendants submitted that the suit plots were Public utility plots and same were therefore not available for allocation or alienation to any one, the Plaintiffs not excepted.
98. Secondly, counsel for the 1st and 4th Defendants also submitted that the Plaintiffs herein cannot pretend and/or purport to be bona-fide Purchasers for value over and in respect of the suit plots. In any event, counsel contended that the Plaintiffs had not satisfied the threshold to warrant a finding that same are bona-fide purchasers for value.



99. Other than the foregoing, counsel for the 1st and 4th Defendant submitted that given that the suit Properties were Public plots, it cannot be contended that the 1st and 4th Defendants, have thereafter trespassed, yet, the suit plots are public utility plots.
100. In support of the 1st and 4th Defendants case, counsel cited and relied on *inter-alia*, the case in [Republic versus Commissioner of Lands & 4 Others Ex-parte Associated Steel Ltd](#) (2014)eKLR, [Daudi Kiptugen versus Commissioner of Lands & 4 Others](#) (2015)eKLR and [Republic versus Registrar of Lands in Kilifi Ex-parte Daniel Ricci](#) (2013)eKLR.
101. On behalf of the 2nd Defendant, the submissions are dated the June 27, 2022. For clarity, counsel for the 2nd Defendant has identified two issues for consideration.
102. Firstly, it has been submitted that the Plaintiffs' herein have not established and/or proved their case as against the 2nd Defendant. For clarity, it has been submitted that no evidence has been tendered to show that the 2nd Defendant has acted in any fraudulent or in illegal manner as against the Plaintiffs titles.
103. Secondly, it has been submitted that the Plaintiffs' case touches on and/or concerns fraud and hence it behoves the Plaintiffs to specifically plead fraud and to supply particulars thereof, before venturing to prove fraud.
104. However, counsel for the 2nd Defendant has submitted that the Plaintiffs herein have not only failed to specifically plead fraud, but same have also failed to tender any credible evidence in proof of the alleged fraud.
105. In support of her submissions, counsel for the 2nd Defendant has cited the decision in the case of *R. G Patel versus Makanji* (1957) E A and *Kenleb Construction Ltd versus New Gatitu Service Station Ltd & Another* (1990)eKLR.
106. Suffice it to point out that the 3rd Defendant herein did not file any written submissions, despite latitude and opportunity having been availed.

Issues for Determination:

107. Having reviewed the Complaint dated the September 28, 2020, the written statement filed therewith, the statement of defense and the written statements attached thereto and having evaluated the oral evidence tendered by the Parties; and respective witnesses and having similarly considered the written submissions filed, the following issues do arise and are germane for determination;
 - I. Whether the Plaintiffs' have established that same are the lawful owners of the Suit plots and if so, whether same are entitled to protection under the law.
 - II. Whether the activities complained of by the 1st and 4th Defendants constitutes trespass.
 - III. Whether the Plaintiffs are entitled to the Reliefs sought.

Analysis and Determination:

ISSUE NUMBER 1 - Whether the Plaintiffs' have established that same are the Lawful Owners of the suit Plots and if so, whether same are entitled to Protection under the law.

108. The Plaintiffs' herein tendered evidence and outlined the circumstances under which same discovered that plots that hitherto belonged to the 3rd Defendant were being sold and/or disposed of.



109. Pursuant to and upon discovering that there were plots that were available for purchase, the Plaintiffs expressed their interests in the acquisition of the named plots. In this regard, evidence abounded that the Plaintiffs entered into lawful sale agreements with the previous allottees of the plots, culminating into the sale and disposal and interests in the named plots.
110. Further, the Plaintiffs also tendered evidence that upon entering into the various Sale agreements, the previous allottees handed over the original share certificates and the letters of allotment to the Plaintiffs and that the said documents were ultimately surrendered to the 3rd Defendant.
111. On the other hand, evidence was also tendered that upon the surrender of the original share certificates and the allotment letters, the 3rd Defendant proceeded to and issued unto the Plaintiff new share certificate confirming and authenticating that same were now the lawful proprietors of the named plots.
112. To vindicate the position taken by the Plaintiffs, the witness called by the 3rd Defendant acknowledged and admitted that truly, the Plaintiffs herein bought the named plots from previous Members/allottees of the 3rd Defendant.
113. Further, the witness for the 3rd Defendant also testified that the named plots herein are sub-divisions arising from L.R No. 105/8590, belonging to and registered in the name of the 3rd Defendant.
114. Premised from the totality of the evidence that was tendered, it is apparent and evident that the named plots which are the subject of dispute before this Honourable court were hitherto part and parcel of L.R No. 105/8590 belonging to the 3rd Defendant.
115. Similarly, it is also apparent that the Plaintiffs herein lawfully bought and purchased the named plots from the persons who had legally and lawfully acquired same from the 3rd Defendant.
116. In the circumstances, I find and hold that the Plaintiffs herein lawfully acquired property rights to and in respect of the named plots and that the rights which were acquired by the Plaintiffs herein, can only be defeated subject to the known statutory limitation and not otherwise.
117. Nevertheless, even though the Plaintiffs have not been issued with the certificate of title, which is said to be in the process, the absence of title cannot vitiate and/or negate the legitimate Interests that inhere on the Plaintiffs.
118. To underscore the foregoing position, it is appropriate to refer to and take cognizance of the holding in the case of *Kenya Ihenya Company Ltd & another versus Njeri Kiriba* [2019] eKLR, where the Court of Appeal observed as hereunder;
 21. Having appraised ourselves of the facts and the evidence tendered before the trial court, we see no reason to interfere with the learned Judge's findings. We say so because, firstly, the respondent produced several receipts issued by the 1st appellant in respect of the transaction between them. Those receipts corroborated the respondent's version of events, that is, she began paying for the plots as early as May 4, 1973; and she continued making payments until she had finished paying for two plots on diverse dates, that is, on August 10, 1980 and June 5, 1983; thereafter she was issued with a share certificate on June 5, 1983.
 22. It is not lost on us that some of the receipts bore an inscription of Plot No. 145. However, contrary to the appellants' contention that they did not prove that the respondent had only paid for the said plot. There were other receipts which were produced, though they did not specifically mention that they were in respect of the suit land, in our view, they established the respondent's case.



23. Secondly, in as much as the appellants maintained that the 2nd appellant had derived a clean title from David Mbugua, the appellants' evidence was silent with respect to how Christopher K. Saina (who is alleged to have passed the title to David Mbugua), acquired the suit land let alone whether he had been issued with a share certificate by the 1st respondent.
119. From the foregoing excerpt, it becomes evident that even the issuance of letter of allotment or share certificate, where appropriate, pending issuance of formal certificate of title is sufficient to confer property rights in favor of the holder thereof.
120. In the premises, the fact that the Plaintiffs herein are yet to be issued with and/or formally be registered as the proprietors of the suit plots, cannot found a basis for negating the lawful rights, which have since been accrued.
121. Be that as it may, it is also important to point out that once property rights have accrued or vested in a particular person, it behooves the court to protect and vindicated such property rights, and therefore underscore the sanctity of title.
122. To this end, it is apt to recall the dictum of the Court of Appeal in the case of *Samuel Murimi Karanja & 2 others vs. Republic* [2003] eKLR, where the court observed as hereunder:
- “The issue of land ownership is volatile, it is for this reason that holders of valid titles to land must be protected by the law, the government and this court. The Court of appeal of Kenya has occasionally dealt with this point and therefore once the court is faced with the claim of a valid title issued by the government, it has no obligation to inquire into the reasons or manner in which the title was obtained, unless of course there is clear evidence of fraud against the holder of the title. Courts must shy away from usurping the authority of the grantor or right to question title deeds issued by the President, except in clear cases of fraud or where the title was not issued in accordance with the Governing Act. This strict observance of the property rights of a title holder is necessary to ensure certainty in transactions regarding land.”
123. In the circumstances, it is my considered view that the Plaintiffs herein have established and or proved that same are the lawful and legitimate owners of the suit plots and thus same are deserving the protection of this court.

Issue Number 2 - Whether the activities complained of by the 1st and 4th Defendants constitutes Trespass.

124. Having found and established that the Plaintiffs' have lawful rights and interests over the suit plots, the next critical question to interrogate is whether any third party, the 1st and 4th Defendants not excepted, can interfere with such rights at will.
125. Before venturing to interrogate the main issue herein, that is the issue raised vide the preceding paragraph, it is appropriate to discern the contention by the 1st Defendant on the basis of their impugned actions.
126. It is worthy to recall that the 1st and 4th Defendants filed a statement of Defense and in respect of which same made various averments, including the following;



127. For convenience, it is appropriate to reproduce certain paragraph of the statement of defense. In this regard, paragraphs 3, 10, 11, 14 and 19 are reproduced as here bellow;

“Paragraph 3

“the 1st and 4th Defendants deny the contents of paragraphs 6, 19 and 32 of the plaint. They aver that the Plaintiffs do not qualify as innocent purchasers for value without notice. The Plaintiffs were aware or ought to have known with reasonable diligence that the suit properties were reserved for public purposes yet they went ahead to purchase the suit properties and more so, without the 1st Defendants consent and therefore same are put to strict proof of the allegations contained therein”

Paragraph 10

“in addition, the said development are illegal as the 1st Defendant never permitted or approved any construction on the suit properties and therefore if the Plaintiffs ever developed the suit properties, the same are unlawful and illegal and indeed to be liable of their illegal acts”.

Paragraph 11

“The 1st and 4th Defendant deny the contents of paragraph 12, 25 and 38 of the Plaint in entirety. The Defendants aver that at no point have they tried to excavate the property that does not belong to the public with a view of trying to develop it. The suit properties have never at any time whatsoever been owned by the Plaintiffs. They were and still are public land. The Plaintiffs are put to strict proof to the allegations made under paragraphs 12, 25 and 38 of the plaint”.

Paragraph 14

“Further, the 1st and 4th Defendants aver that the property are public utilities and therefore the Plaintiffs cannot allege that their rights have been infringed”.

Paragraph 19

“The 4th Defendant avers that him being the member of the county assembly of Ruai Ward, same has an obligation to hold in trust, protect and develop any public land including the suit properties for the benefit of the people of Ruai”

128. What becomes apparent from the various paragraphs that have been lifted from the Statement of Defense, is that the 1st and 4th Defendants seem to suggest that the suit Plots are public utility plots or better still public land.
129. However, despite contending that the suit plots are public land, the 1st and 4th Defendants have not challenged the fact that the suit plot arose from and or are subdivision of L.R No. 105/8590, which is private land, belonging to and registered in the name of the 3rd Defendant.
130. Be that as it may, to the extent that the suit plots arose from the subdivision of a private property belonging to the 3rd Defendant, it is difficult to understand the basis upon which the 1st and 4th Defendants can contend that the suit plots are public land, unless, it can be shown that the said plots were later on subjected to Compulsory acquisition, in accordance with the obtaining Law.
131. At any rate, it is appropriate to reiterate that having made the averments that the suit plots are public land, it was therefore incumbent upon the 1st and 4th Defendants to prove that allegation.



132. For clarity, the Evidential burden of proving the allegation that the Suit plots are Public land laid on the shoulders of the 1st and 4th Defendants. See Section 107, 108 and 109 of the [Evidence Act](#), Cap 80 Laws of Kenya.
133. Notwithstanding the fact that the burden of proof laid on the shoulders of the 1st and 4th Defendants, it is important to recall that no Evidence was tendered to prove the allegation of the 1st and 4th Defendants.
134. Consequently, it is my finding and holding that the averments that were made in the body in the Statement of Defense on behalf of the 1st and 4th Defendants, have remained bare statements, devoid of any probative value.
135. To buttress the fact that where no evidence is called in proof of a Statement of Defense, same remains bare statements, I adopt and endorse the holding in the case of [Kenya Power & Lighting Co Ltd ...Versuss... Rassul Nzembe Mwadzaya](#) [2020] eKLR, where the Court stated and held that;-

It is noteworthy that the Appellant in its amended Statement of Defence filed on October 15, 2012, denied all the allegations raised by the Respondent and attributed contributory negligence on the part of the Respondent. Although a defence was filed on behalf of the Appellant, no witness was called to prove that defence. Since no evidence was adduced in support of the defence case, the defence on record therefore remained as a mere allegation. This is the position in law and was restated in the case of Edward Muriga through Stanley Muriga...Vs...Nathaniel D. Schuler, Civil Appeal No.23 of 1997, where the Court of Appeal stated:-

“In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the [Evidence Act](#) are clear that he who asserts or pleads must support the same by way of evidence”.

136. Having not proved and or established that the suit plots were public land, the question is have the 1st and 4th Defendants justified the basis for the invasion and/or intrusion onto the suit plots.
137. In my considered view, the 1st and 4th Defendants have not justified the basis upon which same encroached upon on to the suit plots, which I have since found and held to be Private properties.
138. In the premises, it is evident and apparent that the actions by and/or on behalf of the 1st and 4th Defendants constituted and amounted to trespass.
139. To this end, the provision of Section 3 [Trespass Act](#), Cap 294 Laws of Kenya would suffice.
140. For convenience, the said Section 3 (supra) is reproduced as hereunder;
 3. Trespass upon private land
 - (1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.
 - (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.



Premised on the foregoing, my answer to issue number two is that the impugned activities by and on behalf of the 1st and 4th Defendants, over and in respect of the suit Plots amounted to trespass.

Issue Number 3 - Whether the Plaintiffs' are entitled to the Reliefs sought.

141. Trespass is actionable per-se. In this regard, one only needs to prove and/or establish the incidence of trespass and upon such proof, even if no loss has accrued and/or occurred, the person suffering trespass is entitled to recompense.
142. In respect of the subject matter, the Plaintiffs' have laid before the Honourable court sufficient and credible evidence to show that the 4th Defendant, on behalf of the 1st Defendant, unlawfully invaded the suit plots and purported to arrogate unto himself the powers of National Land Commission, same being the only Constitutional Body authorized to determine what constitutes Public Land or otherwise.
143. At any rate, the Plaintiffs also placed before the court evidence, that as a result of the impugned actions or activities by the 1st and 4th Defendants, their use and or entitlement to the suit plots, were substantially prejudiced and/or affected.
144. Indeed, it was contended that as a result of the actions by the 1st and 4th Defendants, some tenants who were hitherto renting the premises belonging to the Plaintiffs vacated. However, no evidence of the existence of such tenancy was tendered.
145. Nevertheless, I have found and held that trespass was indeed proved and established. In this regard, it is my considered finding and holding that the Plaintiffs are indeed entitled to Damages for trespass.
146. As concerns the Quantum of Damages, it is appropriate to state that there is no Mathematical or scientific formula for calculating and/or computing damages for trespass.
147. Suffice it to point out, that the computation of such Damages is an exercise of discretion and such damages are at large, hence entirely depends on the court, subject to taking into account the obtaining circumstances and the extent of loss, if any suffered.
148. In this regard, I share and endorse the sentiments of the Honourable court vide the holding in the case of *Park Towers Limited versus Moses Chege & 7 others* [2014] eKLR, where the court observed as hereunder;

“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.

149. Based on the foregoing, I am inclined to make awards on account of General damages as hereunder;
 - i. 1st Plaintiff kes.6, 000, 000/=
 - ii. 2nd Plaintiff kes.2, 000, 000/=



- iii. 3rd Plaintiff kes.4, 000, 000/=
 - iv. 4th Plaintiff kes.4, 000, 000/=
 - v. 5th Plaintiff kes.2, 000, 000/=
150. The differential awards in terms of the preceding paragraphs, is premised and/or anchored on the number of plots each, which has been trespassed onto and invaded by the 4th Defendant with the connivance and concurrence of the 1st Defendant.
151. As pertains to the basis of arriving at the awards made herein before, I am guided and suitably inspired by the decision in the case of *Joshua Ngeno versus Kenya Power & Lighting Company Limited & County Government of Kericho* [2021] eKLR, where the Honourable stated and court observed as hereunder;
- Judgment is however entered for the Plaintiff against the 1st Defendant wherein I award him Kshs 5,000,000/= (five million shillings only) plus interest from the date of this judgment until payment in full, as compensation of the infringement of his right to use and enjoy the suit property.
152. For the avoidance of doubt, the persons responsible for the invasion, trespass and thus infringement upon the rights of the Plaintiffs are the 1st and 4th Defendants. Consequently, the award of General damages lies against same and not otherwise.

Final Disposition

153. Having considered and/or addressed the various issues that were highlighted herein before, it is now appropriate to make the final and dispositive orders.
154. Consequently and in the premises, I enter Judgment in favor of the Plaintiffs as hereunder;
- a. An order of Permanent Injunction be and is hereby granted restraining the 1st and 4th Defendants jointly and/or severally and through their officers, agents and/or servants from trespassing into, taking over and interfering in any way with the Plaintiffs ownership, possession and use of their respective persons/plots of land namely;
 - i. 1st Plaintiffs plot number V6415, V6416 and V6417.
 - ii. 2nd Plaintiffs plot number P2916B.
 - iii. 3rd Plaintiffs plot numbers V6410 and V6411.
 - iv. 4th Plaintiff plot numbers V6413 and P2915B.
 - v. 5th Plaintiffs plot number V6414.
 - b. A Declaration be and is hereby issued that the 1st and 4th Defendants decision and action to invade, trespass and attempt to take over the Plaintiffs plots above has no basis in law and same was therefore fraudulent, illegal and therefore null and void.
 - c. General Damages be and is hereby awarded as hereunder;
 - i. 1st Plaintiff kes.6, 000, 000/= Only.
 - ii. 2nd Plaintiff kes.2, 000, 000/=Only.
 - iii. 3rd Plaintiff kes.4, 000, 000/=Only.



- iv. 4th Plaintiff kes.4, 000, 000/=Only.
- v. 5th Plaintiff kes.2, 000, 000/=Only.
- d. The Award of General Damages in terms of (c) above shall bare Interests at court rates (14%) from the date of judgment.
- e. The Plaintiffs case against the 2nd and 3rd Defendants be and are hereby dismissed with no orders as to costs.
- f. The 1st and 4th Defendants shall bear the Plaintiffs costs and same to be taxed and certified by the Taxing Officer of the Court.

155. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Namada for Plaintiffs.

Ms. Kimaru for the 1st and 4th Defendant.

Mr. Benson Njagi for the 2nd Defendant.

Mr. Chege for the 3rd Defendant

