



Kiattu & another v Muhika & 2 others; Kiattu & 3 others (Defendant) (Environment and Land Case Civil Suit 410 of 2019) [2022] KEELC 14862 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEELC 14862 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 410 OF 2019**

**JO MBOYA, J
OCTOBER 31, 2022**

BETWEEN

ROBERT MWANIA KIATTU 1ST PLAINTIFF

LENAH MUTONGOI KIATTU 2ND PLAINTIFF

AND

PETER NJENGA MUHIKA 1ST DEFENDANT

AGNES MUGURE KIGATHI 2ND DEFENDANT

THE LAND REGISTRAR 3RD DEFENDANT

AND

ROBERT MWANIA KIATTU DEFENDANT

LENAH MUTONGOI KIATTU DEFENDANT

CHIEF LAND REGISTRAR, NAIROBI DEFENDANT

**THE CABINET SECRETARY, MINISTRY OF LAND &
HOUSING DEFENDANT**

JUDGMENT

Introduction and Background :

1. Vide Plaintiff dated the 20th December 2019, the Plaintiffs' herein have approached the court seeking for the following Reliefs;
 - i. A declaration that the plaintiffs' are the Bona-fide registered Proprietors of L.R Block 112/180 Runda Mimosa,nairobi.



- ii. A declaration that the certificate of lease issued on 17th of October 1991 is the valid and genuine title to the suit property.
 - iii. A declaration that any certificate of lease issued to the 1st and 2nd defendants is null and void and for order the cancellation of the 1st and 2nd defendants' title deed.
 - iv. An order of eviction be issued against the 1st and 2nd defendants.
 - v. A permanent injunction restraining the 1st and 2nd defendants whether by themselves, servants, agents, representatives and or employees or anyone claiming under them howsoever from charging, selling, re-entering, taking possession, remaining thereon, erecting or continuing to erect any building or structures upon Nairobi/block112/180, or in any way interfering with the Plaintiffs quiet possession and enjoyment of the suit property.
 - vi. Mesne profits.
 - vii. In alternative Kshs.35,000,000/- being the current value of the suit property.
 - viii. Costs of the suit.
 - ix. Any other Relief the court deems fit.
2. Upon being served with theplaint and summons to enter appearance, the 1st and 2nd defendants duly entered appearance on the April 3, 2020 and thereafter filed a statement of defense and counterclaim on the 21st February 2020. For clarity, the 1st and 2nd Defendants sought the following reliefs at the foot of the counterclaim;
- a. A Declaration that the 1st and 2nd Defendants are the bona-fide purchasers for valuable consideration and the lawful registered Proprietors of all that Property known as Land Reference No. Nairobi/Block 112/180 Runda Mimosa, Nairobi.
 - b. A Declaration that the Certificate of Lease issued on 7th October 1991 in favor of the Plaintiffs in respect of all that Property known as Land Reference No. Nairobi/Block 112/180 Runda Mimosa, Nairobi is invalid, unlawful, null and void and the 3rd Defendant be directed to cancel the said Title forthwith and unconditionally.
 - c. A Permanent Injunction restraining the Plaintiffs and each of them whether by themselves, their servants or authorized agents or any person claiming under them from entering, taking possession, claiming and/or from interfering with the 1st and 2nd Defendants quiet possession and enjoyment of all that Property known as Land Reference No. Nairobi/Block 112/180 Runda Mimosa, Nairobi.
 - d. In the Alternative to Prayer (a) and (b) above, the 3rd and 4th Defendants be ordered to compensate the 1st and 2nd Defendants and consequently, Judgment be entered against the 3rd and 4th Defendants jointly and severally for the total sum of Kshs. 45,820,015/= Only, in terms of Paragraph 35 above
 - e. In further Alternative, General Damages against the 3rd and 4th Defendants jointly and severally for Misrepresentation, Loss and Inconvenience suffered by the 1st and 2nd Defendants towards the acquirement of the suit property and the Quantum of such damages be assessed by this Honourable Court.
 - f. Costs of this suit and the Counter- claim be borne by the Plaintiffs and/or the Defendants in the Counter-claim.



- g. Any other or further relief such as this Honourable Court may deem fit and just to grant.
3. On the other hand, the 3rd Defendant duly entered appearance and filed statement of defense, wherein same essentially denied and disputed the claims at the foot of the Plaint.
 4. Be that as it may, upon being served with the statement of defense and counterclaim, the Plaintiff herein was obliged to and in deed filed a Reply to Statement of Defense and Defense to Counterclaim. For completeness, the reply to statement of defense and defense to counterclaim is dated the 17th April 2020, albeit filed on the 2nd June 2020.
 5. Subsequently, the pleadings in respect of the subject matter closed and the suit was thereafter ripe for hearing.

Evidence by the Parties:

a. Plaintiffs' Case:

6. The Plaintiffs' case gravitates and revolves around the evidence by one Robert Mwanja Kiattu, the 1st Plaintiff herein. For clarity, same testified as PW1.
7. The witness herein testified and stated that same is the 1st Plaintiff and his testimony was made on his own behalf and on behalf of the 2nd Plaintiff, who is his (1st Plaintiff's) wife.
8. Further, the witness also testified that on the 27th June 1990, the 2nd Plaintiff and himself entered into and executed a lawful sale agreement with a company known as Mimosa Plantations Ltd, wherein the latter covenanted to sell to and in favor of the 2nd Plaintiff and the witness all that property referred to as L.R No. Nairobi/Block/180.
9. Besides, the witness added that the sale price was agreed upon in the sum of Kshs.760, 000/= only, whereby the sum of kes.260, 000/= only was payable at the execution of the Sale agreement and the balance thereof was to be paid on the completion dated.
10. Other than the foregoing, the witness testified that the sale agreement was duly executed and thereafter the 2nd Plaintiff and himself paid the requisite deposit, in accordance with the terms of the sale agreement.
11. The witness further testified that on the completion date, the 2nd Plaintiff and himself drew and issued a cheque for the balance of the purchase price, and the cheque was forwarded to the firm of M/s Waruhiu & Muite Advocates, who were the advocates acting for the Parties in the Sale agreement.
12. Other than the foregoing, the witness testified that on the 16th October 1990, the firm of M/S Waruhiu & Muite Advocates wrote a letter to the 2nd Plaintiff and himself, pointing out that the Lease in respect of the property was ready.
13. On the other hand, the witness also testified that on the 7th October 1991, the suit property herein, that is L.R No Nairobi/Block 112/180 was duly transferred and same was registered in the name of the 2nd Plaintiff and himself as the Joint owners of the suit property.
14. At any rate, the witness also testified that upon being registered as the Joint owners of the suit property, the 2nd Plaintiff and himself commenced payments of rates to the City Council of Nairobi. For clarity, the witness added that the 2nd Plaintiff and himself have been paying rates from the date of transfer and registration of the suit property in their names to date.



15. Further, the witness added that on or about March 2017, same visited the suit property and discovered that a temporary gate and a wooden structure had been erected thereon. Besides, the witness also clarified that maize had also been planted on the suit property. Nevertheless, the witness further testified that upon discovering the installation of the temporary gate and the wooden structure, same proceeded to and conducted a search at the Ministry of Lands, which revealed that the suit property was registered in the names of the 1st and 2nd Defendants.
16. Subsequently, the witness added that having discovered that the suit property was registered in the names of the 1st and 2nd Defendants, same proceeded to and lodged a complaint with the DCI with a view to facilitate investigations pertaining to the circumstances leading to the impugned transaction.
17. In any event, the witness further added that upon the lodgment of the criminal complaint, same was constrained to and indeed filed the subject suit as against the Defendants herein, with a view to vindicating the rights of the 2nd Plaintiff and himself over and in respect of the suit property.
18. On the other hand, the witness also testified that same was also obliged to and engaged a Valuer, to carry out or conduct a Valuation exercise over and in respect of the suit property. In this regard, the witness pointed out that a valuation report was thereafter prepared showing that the suit Property is worth Kshs.35, 000, 000/= Only.
19. Other than the foregoing, the witness alluded to the witness statement dated the 20th December 2019 and same sought to adopt and rely on the said witness statement. In this regard, the witness statement was adopted and admitted as the further evidence of the witness.
20. On the other hand, the Witness also referred to the List and Bundle of Documents dated the 20th December 2019 and same sought to adopt and produce the various documents as evidence before the Honourable court.
21. There being no objection to the production and admission of the various documents, the documents at the foot of the List and Bundle dated the 20th December 2019 were produced and admitted as Plaintiffs' exhibits P1 to P15, respectively.
22. On cross examination, the witness testified that the 2nd Plaintiff and himself entered into the sale agreement relating to the purchase of the suit Property. Nevertheless, the witness clarified that the sale agreement shows that the property which was being sold was known as L.R No. Nairobi/Block/180.
23. Other than the foregoing, the witness added that the sale agreement was only signed and executed by one person on behalf of the Vendor. Similarly, the witness also conceded that the same sale agreement was only executed by one person on behalf of the Purchasers.
24. Nevertheless, the witness stated that the suit before the court touches on and concerns L.R No. Nairobi/Block 112/180. At any rate, the witness also pointed out that the property which was being sold to the 2nd Plaintiff and himself was known as LR Nairobi/Block/180.
25. Other than the foregoing, the witness conceded that the two properties, namely the one at the foot of the sale agreement and the one relating to the suit documents, are different in terms of the registration numbers.
26. It was the further evidence that other than the sale agreement, the firm of advocates who acted for both the vendor and themselves, as the purchaser also wrote various correspondence advising and appraising the 2nd Plaintiff and himself about the status of the transaction.



27. Additionally, the witness pointed out that same has been able to produce before the Honourable Court a copy of the Certificate of Lease relating to the suit property. In any event, the witness added that the suit property belongs to the 2nd Plaintiff and himself.
28. Notwithstanding the foregoing, the witness conceded that same has not availed or produced before the Honourable court any Certificate of official search showing that the suit property was ever registered in the names of the 2nd Plaintiff and himself.
29. Contrarily, the witness acknowledged that the Certificate of official search which same has been able to see confirms that the suit property is registered in the names of the 1st and 2nd Defendants and not otherwise.
30. While still under cross examination, the witness also stated that the Certificate of Official search dated the 16th February 2007 shows and confirms that the suit Property was then registered in the name of John Willie Kariuki Kanyi.
31. Besides, the witness added that from the said Certificate of official search, it shows that John Willie Kariuki Kanyi was registered as the owner of the suit property on the 26th November 1998.
32. Be that as it may, it was the testimony of the witness that same bought and purchased the suit Property in the year 1990, but however, the transfer and registration was effected in the year 1991.
33. Nevertheless, it was the testimony of the witness that in between the 1991 and 2017, same visited the suit property but there was nothing going on. For clarity, the witness added that neither the 2nd Plaintiff nor himself cultivated the suit property.
34. On the other hand, the witness stated that the 1st and 2nd Defendants are shown to have bought the suit property in the year 2007. However, the witness clarified that the suit property lawfully belongs to the 2nd Plaintiff and himself.
35. Other than the foregoing, the witness stated that same instructed and engaged a registered valuer who carried out and undertook a Valuation exercise over and in respect of the suit Property.
36. On re-examination, the witness conceded and acknowledged that the sale agreement produced by himself shows that the property which was being sold was L.R NoNairobi/Block/180.
37. Besides, the witness also added that the 2nd Plaintiff also signed the sale agreement. However, the witness stated that the sale agreement which was signed by the 2nd Plaintiff was not in court.
38. On the other hand, the witness also stated that same has produced before the Honourable court a copy of the Certificate of Lease as well as the lease instruments, the latter which shows that the suit property was registered in the name of the vendor.
39. Other than the foregoing, the witness has stated that the certificate of official search which same has produced, was carried out and obtained by himself.
40. Finally, the witness stated that before the year 2017, same did not carryout and or undertake any search over and in respect of the suit property. For clarity, the witness added that the certificate of official search was only carried out from the date same discovered the offensive activities on the suit property.
41. With the foregoing testimony, the Plaintiffs' case was closed.



b. 1st and 2nd Defendants' Case:

42. The 1st and 2nd Defendants' case revolves around the Evidence tendered by one Peter Njenga Muhika. For clarity, same testified as DW1.
43. The witness herein testified and stated that on or about the 24th January 2007, the 2nd Defendant and himself entered into and executed a lawful sale agreement with on John Willie Kariuki Kanyi. In this regard, the witness added that the sale agreement was duly reduced into writing and thereafter signed by all concerned Parties.
44. Further, the witness added that upon the entry into and execution of the sale agreement, the suit property was thereafter transferred and registered in the names of the 2nd Defendant and himself.
45. In this regard, the witness added that the 2nd Defendant and himself thereafter became the lawful and legitimate owners in the respect of the suit property, namely, LR. No. Nairobi/ Block 112/ 180.
46. At nay rate, the witness herein thereafter testified that same recorded a witness statement dated the 20th February 2020, which same sought to adopt and rely on. For completeness, the witness statement was duly admitted as the further Evidence of the witness.
47. Other the foregoing, the witness also referred to the List and Bundle of Documents dated the 19th January 2021 and same invited the Honourable court to adopt and admit the sad documents as Evidence before the Honourable court.
48. There being no objection to the admission and production of the various documents as exhibits before the court, same were duly admitted and marked as exhibit D1 to D30, respectively.
49. On cross examination by counsel for the Plaintiff, the witness stated that prior to and before entering into the sale transaction, same procured and obtained a certificate of official search in respect of the suit property. In any event, the witness added that other than the procurement of the certificate of official search, same also instructed his advocate to conduct and undertake necessary due diligence in respect of the suit property.
50. Further, the witness added that in the course of carrying out due diligence, their Advocates perused a copy of the Green Card relating to the suit property at the Lands offices. However, the witness submitted that same has not produced a copy of the green card before the court.
51. Whilst under further cross examination, the witness testified that same has not been able to sue the person who sold the suit property unto him, because the said vendor availed unto him all the requisite documents to prove that same lawfully owned the suit property.
52. On the other hand, the witness also stated that same has produced before the Honourable court a copy of the certificate of lease, bearing the name of the vendor. Nevertheless, the witness has added that same has not produced a copy of the lease instrument, showing the name of the vendor who sold the suit property to him.
53. On re-examination, the witness reiterated that prior to entering into and executing the land sale agreement, same carried out and undertook due diligence to establish the ownership status of the suit property.
54. The witness further added that same also procured and obtained assorted documents relating to the registration of the suit property.



55. At any rate, the witness has added that the various documents which were handed over unto him, were used and relied upon to facilitate the transfer and registration of the suit property in the names of the 2nd Defendant and himself.

56. With the foregoing testimony, the 1st and 2nd Defendants' case was closed.

c. 3rd Defendant's Case:

57. Though the advocate for the 3rd Defendant was present when the court issued directions relating to the scheduled hearing on the 30th May 2022, same however failed to attend court, either as directed or at all.

58. On the other hand, it is also appropriate to state and underscore that though the 3rd Defendant duly entered appearance and filed defense, same neither tendered nor offered any evidence.

59. Essentially, the 3rd Defendant's case was therefore closed, without any evidence having been offered or tendered, whatsoever.

Submissions by the Parties:

a. Plaintiffs' Submissions:

60. The Plaintiffs filed written submissions dated the 21st June 2022 and in respect of which the Plaintiffs have isolated, highlighted and amplified four issues for consideration. Firstly, counsel for the Plaintiffs' has submitted that the Plaintiffs herein entered into and executed a lawful sale agreement with M/s Mimosa Plantation Limited, over and in respect of a Property known as L.R No. Nairobi/Block/180.

61. Further, counsel for the Plaintiffs also submitted that purchase price over and in respect of the designated property was agreed in the sum of Kshs.760, 000/= only and that the Plaintiffs' were called upon and indeed paid a deposit of Kshs.260, 000/= only, at the execution of the sale agreement.

62. On the other hand, counsel for the Plaintiffs has added that thereafter the Plaintiffs herein paid the balance of the purchase price vide cheque and that upon the payment of the said amount, the designated property was transferred and registered in the names of the Plaintiffs.

63. Premised on the foregoing, counsel for the Plaintiffs has therefore contended that the suit property was duly and lawfully transferred and registered in the names of the Plaintiffs.

64. Consequently and in the premises, counsel for the Plaintiffs has therefore submitted that the sale agreement entered into and executed on the 27th June 1990, was therefore lawful and legitimate. For clarity, counsel for the plaintiffs has invoked and relied on the provisions of section 3 of the [Law of Contract Act](#), chapter 23 Laws of Kenya, prior to the amendment thereof in the year 2003.

65. The second issue that has been highlighted by counsel for the plaintiffs, touches on and concerns the transfer and registration of the suit property in favor of the plaintiffs.

66. According to counsel for the plaintiffs, upon the payments of the balance of the purchase price, the suit property was lawfully and validly transferred to and registered in the names of the plaintiffs.

67. Pursuant to and upon the transfer and registration of the suit property in the names of the Plaintiffs, counsel has contended that the Plaintiffs herein therefore became the legitimate and registered proprietors.



68. Premised on the foregoing, counsel for the Plaintiffs has submitted that upon the transfer and registration of the designated Property in favor of the Plaintiffs, the Plaintiffs acquired and accrued legitimate rights and interests to the property in question.
69. In respect of the foregoing submissions, counsel for the plaintiffs has invited the honourable court to take cognizance of the provisions of section 27 and 28 of The Registered *Land Act* chapter 300, Laws of Kenya, now repealed.
70. Additionally, counsel for the Plaintiffs has also invited the honourable court to take cognizance of the provisions of section 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012. In this regard, the Learned Counsel underscored that the registration of the Suit Property in the names of the Plaintiffs conferred upon the named plaintiffs absolute and exclusive rights to and in respect of the suit property.
71. Effectively, counsel for the Plaintiffs has therefore contended that the Plaintiffs herein have acquired lawful and legitimate rights over and in respect of the suit property. Consequently, counsel has added that the Plaintiffs rights are therefore deserving of protection under the law.
72. The third issue highlighted by counsel for the plaintiffs, relates to whether the 1st and 2nd defendants are bona fide purchaser for value without notice.
73. In this regard, learned counsel for the Plaintiffs has submitted that the 1st and 2nd Defendants have neither established nor satisfied the requisite ingredients necessary to anchor a plea of Bona fide Purchasers for value without notice.
74. At any rate, counsel for the Plaintiffs has submitted that on John Willie Kariuki Kanyi, who is alleged to have sold and transferred the suit property to the 1st and 2nd Defendants had no capacity to sell or dispose of the suit property.
75. In this regard, counsel for the Plaintiffs has pointed out that at no point in time did the Plaintiffs transfer the suit property to John Willie Kariuki Kanyi, to warrant same becoming the registered proprietor thereof.
76. In the premises, counsel for the Plaintiffs has contended that the transfer of the suit property to and in favor of the 1st and 2nd Defendants, by one John Willie Kariuki Kanyi, was therefore tainted and riddled with illegalities and fraud.
77. Based on the foregoing, counsel for the Plaintiffs has therefore submitted that the 1st and 2nd Defendants did not procure or acquire lawful and valid rights over the suit property, to warrant the invocation and reliance on the Doctrine of Bona Fide Purchaser for Value without Notice.
78. In a nutshell, counsel for the Plaintiffs has submitted that the 1st and 2nd Defendants cannot therefore invoke and rely on the doctrine of bona fide purchaser for value, either as contended or at all.
79. In support of the foregoing submissions, counsel for the Plaintiffs has relied on various decisions inter-alia, *Evanson Wambugu Gachugi versus Simon Wainana Gatwiki & 2 others* (2014)eKLR, *Esther Ndengi Njiru & Another versus Leonard Gatei* (2014)eKLR, *Alice Chemutai Too versus Nickson Kipkurui Korir & 2 others* (2015)eKLR and *Elijah Makeri Nyangwu versus Stephen Mungai Njuguna & another* (2013)eKLR.
80. Finally, counsel for the Plaintiffs has submitted that the Plaintiffs herein by virtue of being the lawful and legitimate owners of the suit property are entitled to the orders sought. In this regard, counsel for the Plaintiffs has implored the court to find and hold that the Plaintiffs are entitled to the orders of Permanent Injunction and Mesne Profits.



81. Nevertheless, it is important to observe that counsel for the Plaintiffs has neither quantified nor proposed the amounts to be awarded on account of Mesne Profits.
82. Be that as it may, counsel for the plaintiffs has cited and relied on inter-alia the decision in the case of *Kenya Hotel Properties Ltd versus Willesden Investment Ltd* (2009)eKLR and *Samuel Odhiambo Oluthe & 2 others versus Jubilee Jumbo Hardware Ltd* (2018)eKLR. For clarity, the said decisions have been relied upon to amplify the submissions that the Plaintiffs are entitled to an award of Mesne profits.

b. 1st and 2nd Defendants' Submissions:

83. The 1st and 2nd Defendants filed written submissions dated the 27th July 2022, and same have raised a plethora of issues for consideration. For clarity, counsel for the 1st and 2nd Defendants have highlighted and amplified twelve issues for considerations.
84. Nevertheless, it is important to state and observe that most of the issues are interrelated and therefore capable of being condensed together and canvased as a block.
85. Informed by the foregoing observation and to avert repetition, I propose to highlight the submissions in a globalized manner. In this regard, I will endeavor to consolidate related Issues and deal with same as one.
86. First and foremost, counsel for the 1st and 2nd Defendants has submitted that the suit by and on behalf of the Plaintiffs herein is incompetent insofar as the same has not suitably identified the concerned property, which is the subject of dispute.
87. According to counsel for the 1st and 2nd Defendants, the Plaintiffs' relates to two separate and distinct Properties, namely, L.R No. Nairobi/Block/180 and L.R No. Nairobi/Block112/180, respectively.
88. Given that the Plaintiffs' refers to and touches on two separate Properties, counsel for the 1st and 2nd Defendants therefore contends that the suit before hand violates the provisions of Order 4 Rule 3 of the Civil Procedure Rules 2010.
89. Secondly, counsel for the 1st and 2nd Defendants has submitted that though there are two Plaintiffs in the matter, only one Plaintiff testified. In any event, counsel has added that the Plaintiffs herein neither executed nor filed the requisite authority as required vide the provisions of Order 1 Rule 13(2) of the Civil Procedure Rules.
90. Premised on the foregoing, counsel for the 1st and 2nd Defendants has therefore submitted that the 1st Plaintiff could therefore not purport to represent the interests of the 2nd Plaintiff in the subject matter.
91. Further, counsel for the 1st and 2nd Defendants has also submitted that the Plaintiffs herein have not placed before the Honourable court any credible or sufficient evidence to show that same lawfully purchased and acquired the suit property, either as claimed or at all.
92. In particular, counsel for the 1st and 2nd Defendants has submitted that the Property which was allegedly being bought and purchased by the Plaintiffs is substantially different from the suit property, which the Plaintiffs are now laying a claim to.
93. For coherence, counsel for the 1st and 2nd Defendants has clarified that the sale agreement upon which the Plaintiffs rely, relates to L.R No. Nairobi/Block/180 and not otherwise.



94. The fourth issue that is discernable from the issues canvassed on behalf of the 1st and 2nd Defendants relates to whether the 1st and 2nd Defendants acquired lawful and bona fide rights arising from the sale and ultimate transfer of the suit property in their favor.
95. In this respect, counsel for the 1st and 2nd Defendants has submitted that prior to and before entering into the sale agreement with John Willie Kariuki Kanyi, the 1st and 2nd Defendants undertook due diligence and thereafter authenticated that the said John Willie Kariuki Kanyi, was duly and lawfully registered as the owner of the suit Property.
96. Further, counsel for the 1st and 2nd Defendants has added that upon confirming that John Willie Kariuki Kanyi was the lawful owner of the suit property, same duly executed the requisite transfer instruments, culminating into the transfer and registration of the suit property in favor of the 1st and 2nd Defendants.
97. Premised on the foregoing, counsel has added that upon the transfer and registration of the suit property in the names of the 1st and 2nd Defendants, same became the lawful and legitimate owners of the suit property.
98. It is the further submissions of counsel for the 1st and 2nd Defendants that based on the transfer and registration of the suit property in favor of the 1st and 2nd Defendants, same therefore acquired and accrued legitimate rights and interests thereto.
99. In this regard, counsel has invited the Honourable court to take cognizance of the provisions of section 24, 25 and 26 of The [Land Registration Act](#), 2012.
100. In any event, counsel for the 1st and 2nd Defendants has also cited and relied on various decisions, inter-alia [Mary Ngonyo Kiume versus Charles Muisyo David & 2 others](#) (2022)eKLR, [Republic versus Land Registrar Taita Taveta District & another](#) (2015)eKLR and [Willie Kipsongok Morogo versus Albert K Morogo](#) (2017)eKLR.
101. The fifth issue which has been highlighted and canvassed by counsel for the 1st and 2nd Defendants relates to whether the said Defendants were/are bona fide purchasers for value without notice of any defect in the title of their predecessor.
102. In respect to the subject matter, counsel for the 1st and 2nd Defendants has submitted that the 1st and 2nd Defendants duly entered into a valid sale agreement with John Willie Karuiki Kanyi and that at the time of entry into the sale agreement, the said John Willie Karuiki Kany was duly reflected as the owner of the suit property, in accordance with the Register obtaining at the Land Offices.
103. In view of the foregoing, counsel has submitted that it was not incumbent upon the 1st and 2nd Defendants to go behind the certificate of official search and seek to ascertain how the said vendor acquired the suit property.
104. Essentially, counsel for the 1st and 2nd Defendants has submitted that the certificate of official search which was availed by the Chief Land Registrar constituted sufficient evidence and basis to enable the 1st and 2nd Defendants to transact with the named proprietor.
105. In the premises, counsel for the 1st and 2nd Defendants has therefore contended that the 1st and 2nd Defendants were therefore Bona fide Purchasers for value and thus entitled to the benefit of the law.
106. To buttress the foregoing submissions, counsel for the 1st and 2nd Defendants has cited and relied on the inter-alia the decision in the case of [Lawrence P Mukiri versus Attorney General & 4 others](#) (20130eKLR, [Kuria Kiarie & 2 Others versus Sammy Magera](#) (20180eKLR and [Demutilla Nanyama Pururmu versus Salim Mohamed Salim](#) (2021)eKLR.



107. The sixth issue that has been highlighted and amplified by counsel for the 1st and 2nd Defendants relates to whether the Chief land registrar acted negligently, illegally and fraudulently as against the 1st and 2nd Defendants, as pertains to the documentation leading to the transfer and registration of the suit property in the names of the 1st and 2nd Defendants.
108. In this respect, counsel for the 1st and 2nd Defendants has underscored that prior to and before entering into the sale agreement with John Willie Kariuki Kanyi, the said Defendants duly carried out and undertook official search at the land registry.
109. Further, it has been submitted that upon carrying out the official search, the Chief Land Registrar availed a Certificate of official search which confirmed that the suit property was duly registered in the name of John Willie Karuiki Kanyi.
110. Premised on the foregoing, counsel for the 1st and 2nd Defendants has therefore contended that if it turns out that the said of certificate of official search was erroneous and misleading, then the Chief Land Registrar and the Cabinet Secretary, Ministry of Land and Housing, must be taken to have acted carelessly, negligently and fraudulently.
111. On the other hand, counsel for the 1st and 2nd Defendants has further submitted that if that be the position, then the 3rd and 4th Defendants to the counterclaim owe a duty of care to the 1st and 2nd Defendants.
112. In this regard, counsel has added that if that duty has been breached, then the 3rd and 4th Defendants to the counterclaim are obliged to Indemnify the 1st and 2nd Defendants.
113. To this end, counsel for the 1st and 2nd Defendants has submitted that the compensation and Indemnity would comprise of payment of the equivalent value of the suit property. For clarity, counsel has added that the 1st and 2nd Defendants indeed procured and have placed before the Honourable court a valuation report showing that the suit property is currently worth Kshs.45, 000, 000/=.
114. Finally, counsel for the 1st and 2nd Defendants has submitted that the Plaintiffs are not entitled to the reliefs sought at the foot of the Plaint. In any event, counsel has added that to the extent that the sale agreement relied upon by the Plaintiffs relates to a separate and distinct property, no order can therefore issue in favor of the Plaintiff as pertains to the suit property.
115. On the other hand, counsel has further submitted that even though the Plaintiffs have also impleaded and sought for payments of Mesne Profits, the claim pertaining to Mesne Profits has not been particularly pleaded in accordance with order 21 rule 13 of the *Civil Procedure Rules* 2010.
116. In any event, counsel has added that even if the claim for Mesne Profits had been particularly pleaded (which is not the case), no credible evidence was laid before the Honourable court to warrant an award to that effect.
117. In a nutshell, counsel for the 1st and 2nd defendants has contended that the plaintiffs herein have neither established nor proved their claim as pertains to the suit property. in this regard, counsel for the 1st and 2nd defendants has therefore implored the honourable court to dismiss the plaintiffs suit.

c. 3rd Defendant's Submissions:

118. The 3rd defendant filed written submissions dated the August 29, 2022 and in respect of which same has identified and highlighted three issues for consideration.



119. First and foremost, counsel for the 3rd defendant has submitted that the sale agreement dated the June 27, 1990, which is being relied on by the plaintiffs herein was neither signed nor attested in accordance with the provisions of section 3(3) of the *Law of Contracts Act*, Chapter 23 Laws of Kenya.
120. To the extent that the said agreement was never executed nor attested in accordance with the law, Learned Counsel for the 3rd Defendant has thus contended that the said agreement is therefore invalid and void, for all intents and purposes.
121. Secondly, counsel for the 3rd Defendants has submitted that certificate of lease, which has been relied upon by the Plaintiffs was illegally procured and obtained. For clarity, counsel has added that the Plaintiffs have not been able to prove the validity the said certificate of lease.
122. Premised on the foregoing, counsel for the 3rd Defendant has therefore submitted that the impugned certificate of lease was therefore procured illegally, unlawfully and hence same is incapable of protection under the law.
123. To this end, counsel for the 3rd Defendant has cited and relied on the case of *Richard Kipkemoi Limo versus Hasan Kipkemoi Ng'eny & 4 others* (2019)eKLR. For clarity, it has been pointed out that where the holder of a certificate of title has not been able to lead evidence establishing the validity of the title, such a title ought to be nullified.
124. Thirdly, counsel for the 3rd defendant has submitted that though the plaintiffs have alleged that there was fraud and conspiracy leading to the issuance of certificate of title in favor of the 1st and 2nd defendants, no credible evidence has been placed before the honourable court to warrant such a finding.
125. At any rate, counsel has added that where a claimant impleads fraud, such a claimant must adduce and tender credible evidence to anchor a claim of fraud.
126. Despite the foregoing, counsel for the 3rd Defendant has submitted that the Plaintiffs herein have failed to lead the requisite evidence to prove a claim based on fraud. In this regard, counsel has therefore beseeched the Honourable court to find and hold that the Plaintiffs case has not been proved.

Issues for determination:

127. Having reviewed the Plaint dated the 20th December 2019, the Defense and counterclaim dated the 20th February 2020, the various witness statements and bundle of documents filed and having evaluated the oral evidence tendered by the relevant Parties; and finally, having evaluated the written submissions filed by the Parties, the following issues do arise and are thus worthy for determination;
 - i. Whether the Plaintiffs herein are the lawful proprietors over and in respect of L.R No. Nairobi/Block 112/180 and if so, whether same have accrued lawful rights and interests thereto.
 - ii. Whether the 1st and 2nd Defendants are bona fide purchasers for value over and in respect of L.R No. Nairobi/Block112/180 and if so, whether same are entitled to protection under the law.
 - iii. What Reliefs ought to be granted.



Analysis and Determination:

Issue Number 1 Whether the Plaintiffs herein are the Lawful Proprietors over and in respect of L.R No. Nairobi/Block 112/180 and if so, whether same have accrued lawful Rights and Interests thereto.

128. The Plaintiffs herein have laid a claim to and in respect of the suit property, contending that same was lawfully sold unto them by the previous registered owner thereof.
129. It is important to note and underscore that the Plaintiffs' claim is premised and anchored on the basis of a sale agreement dated the 27th June 1990, which involves the Plaintiffs on one hand and M/s Mimosa Plantation Ltd on the other hand. For clarity, the impugned sale agreement was tendered and produced in evidence as exhibit P2.
130. Given the important role and significance of the said sale agreement, it is important to highlight the details of the property that was being sold to and in favor of the Plaintiffs.
131. For convenience and in this respect, the provisions of clause A states and provides as hereunder;

“The vendor is registered as the proprietor of the whole interests comprised in the pieces or parcels of land known as Nairobi/Block/180 as more particularly shown and delineated on the surveyors plan as plot number 124 subject to the provisions of the Registered *Land Act* and other matters contained in the register relating to the said piece or parcel of land and subject also to the Nairobi City Commission bylaws (hereinafter called the said piece of land)”.
132. From the foregoing excerpt, it is evident and apparent that the parcel of land which was being sold to and in favor of the Plaintiff was well delineated and suitably described.
133. It is also important to state and observe that other than the said sale agreement, the Plaintiffs herein neither tendered nor adduced any addendum or corrigendum before the Honourable court to show that the description of the property which was being sold, was ever adjusted and varied, whatsoever.
134. Having entered into and executed a sale agreement relating to L.R No. Nairobi/Block/180, one would have expected that the plaintiffs herein would have ultimately acquired lawful title to and in respect of the designated property and not otherwise.
135. Notwithstanding the foregoing, the Plaintiffs herein have now contended that even though their sale agreement relates to L.R No. Nairobi/Block/180 same are however entitled to be declared as the legitimate owners of L.R No. Nairobi/Block112/180.
136. To my mind, the two properties, namely L.R No. Nairobi/Block/180 and L.R no. Nairobi/Block 112/180, are separate and distinct Properties. For clarity, the difference in the abbreviations and the title numbers is succinct and devoid of ambiguity.
137. Notwithstanding the foregoing, it also important to recall that PW1 indeed admitted, acknowledged and conceded that in fact that the two properties are different.
138. To this end, it is appropriate to reproduce the evidence of PW1 whilst under cross examination by counsel for the 1st and 2nd Defendants.



139. For convenience, same stated as hereunder;

“I have attached and produced a copy of the sale agreement. Same is exhibit P2. The sale agreement relate to L.R No. Nairobi/Block/180. However, before the court I have filed a case for L.R No. Nairobi/Block 112/180. The two properties are different in terms of registration.”

140. Flowing from the 1st Plaintiff’s testimony, there is no gainsaying that indeed the two properties are separate and distinct. Consequently, it is difficult to discern how a sale agreement relating to L.R No. Nairobi/Block/180 can confer and bestow interest to the Plaintiffs’ over a completely different property.

141. Notwithstanding the foregoing, even assuming that there was an error in the sale agreement, (which is not the case) and in any event for which no evidence was tendered, it would have been incumbent upon the Plaintiffs to procure and obtain an addendum.

142. Be that as it may, I have pointed out herein before that no such addendum or corrigendum was extracted, executed nor availed to the Honourable court, to reconcile the dichotomy between the two properties.

143. Other than the foregoing, I must point out that the Plaintiffs has also not placed before the Honourable court a copy of the transfer instrument, if any, that was executed by the vendors to transfer her interests to and in respect of the Plaintiffs. For clarity, a copy of such Transfer instrument(s) would have highlighted the details of the Property which was being transferred.

144. It is imperative to observe that no transfer/conveyance of interests in land can be undertaken and perfected without a duly executed transfer instrument.

145. Consequently, even if the Plaintiffs herein had not procured and obtained a copy at the point in time, when the property was being transferred and registered in their name, same would still have been able to procure and obtain certified copy from the office of the Chief Land Registrar.

146. There is no gainsaying, that a copy of Transfer Instruments, if any, duly executed by the Parties and presented for registration, would have been helpful in ascertaining the true details of the property which was being transferred to and in favor of the Plaintiffs.

147. It is also imperative to state that even though the Plaintiffs state that same bought and purchased L.R No. Nairobi/Block/180 from Mimosa Plantations Ltd, same have not availed or placed before the Honourable court any evidence that the named vendor ever owned the said property prior to or before endeavoring to dispose of same to the Plaintiffs.

148. Notwithstanding the foregoing, I must point out that the plaintiff herein placed before the Honourable court a copy of a Lease instrument relating to L.R No. Nairobi/Block 112/180, allegedly in the name of Mimosa Plantations Ltd.

149. However, yet again, it is difficult to reconcile the Lease instruments to the sale agreement which was produced by the said Plaintiff.

150. Be that as it may, it is not lost on the Honourable court that the two sets of Documents, that is the Sale Agreement dated the 27th June 1990 and the lease instrument registered on the 1st August 1990, relate to two separate and distinct Properties.

151. On the other hand, another glaring error that is evident is that whereas the sale agreement which was executed on the June 27, 1990 shows that Mimosa Plantations Ltd was the Proprietor of the designated



- Property, the Lease Instrument however suggest that the purported registration of Mimosa Plantations Ltd as owners of L.R No. Nairobi/Block112/180, was only being made on the 1st August 1999.
152. Clearly, the land which M/s Mimosa Plantations Ltd was selling and which same were recorded as the registered proprietor as the 27th June 1990, is obviously not the same as the suit property.
 153. Another perspective that also merits mention relates to the nature of due diligence, if any, that was undertaken by the Plaintiffs prior to and before entering into the impugned sale agreement.
 154. It is important to recall, that the Plaintiffs herein despite stating that same procured and obtained a certificate of lease on the October 17, 1991, however same did not place before the Honourable court any certificate of official search to vindicate or authenticate the issuance of the impugned certificate of lease, if at all.
 155. In my considered view, the issuance of certificate of lease, as pertains to properties registered under the Registered *Land Act* (now repealed) could only be authenticated and verified by two critical Documents.
 156. For clarity, the verification would be anchored on the Green Card held and kept by the designated land registrar or a certificate of official search duly issued and sealed by the authorized officer.
 157. In the absence of a copy of the Green card or the requisite certificate of official search duly sealed by the designated officer, it is difficult, nay impossible to verify and authenticate the validity of the certificate of lease relied upon by the Plaintiffs.
 158. To the extent that the Plaintiffs title was under challenge, it would be incumbent upon the Plaintiffs to place before the Honourable court sufficient and credible evidence to vindicate and verify the validity, if at all, of the impugned title.
 159. However, instead of putting before the court any credible evidence, the Plaintiffs were content and satisfied with waving a copy of the impugned certificate of lease before the court.
 160. Suffice it to point out that it is the said certificate of lease that was under challenge and therefore it was incumbent upon the Plaintiffs to lay before the Honourable court the requisite background documents and instruments, if any, that culminated into the registration and ultimate issuance of the impugned certificate of lease.
 161. In the absence of the requisite background documents and coupled with the numerous loopholes, which I have endeavored to highlight and point out herein before, it is difficult to return a verdict that the Plaintiffs herein are the lawful and legitimate proprietors of (sic) the suit property, either as claimed or at all.
 162. In respect of the foregoing observation, it is appropriate and apt to reiterate and adopt the holding of the Court in the case of *Munyua Maina versus Hiram Gathiba Maina* [2013] eKLR, where the Honourable Court of Appeal stated as hereunder;

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.



163. Other than the foregoing decision, it is also imperative to adopt and endorse the holding in the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR, where the court stated as hereunder;

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme.

I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.

164. From the various perspectives, which I have highlighted and discussed in terms of the preceding paragraphs, it must have become obvious that the Plaintiffs herein are neither the registered proprietors nor the lawful owners of the suit property.

165. Secondly, it also follows as matter of course that by virtue of not being the lawful and legitimate proprietors of the suit property, the Plaintiffs herein have therefore not acquired any lawful rights and interests over and in respect of the suit property capable of being protected pursuant to section 24 and 25 of the *Land Registration Act*, 2012.

Issue Number 2 Whether the 1st and 2nd Defendants are Bona fide Purchasers for value over and in respect of L.R No. Nairobi/Block112/180 and if so, whether same are entitled to protection under the law.

166. During the hearing of the subject matter, the 1st and 2nd Defendants availed and tendered in evidence that same identified a designated property, namely, L.R No. Nairobi/Block 112/180 and upon identifying the said property, same developed an interest to purchase and acquires same.

167. It was the further evidence of DW1 that upon the identification of the suit property, same instructed and retained an advocate to carryout and conduct due diligence over and in respect of the suit property.

168. Further evidence was tendered that arising from the instructions, due diligence was indeed carried out and undertaken and a certificate of official search was obtained. For clarity, it was pointed out that the certificate of official search dated the 16th February 2007 showed and confirmed that the suit property was duly registered in the name of John Willie Kariuki Kanyi, as the Proprietor of same.

169. Following the confirmation that the suit property was indeed registered in the name of John Willie Kariuki Kanyi, DW1 testified that the 2nd Defendant and himself thereafter proceeded to and entered into a sale agreement, which was reduced to writing and thereafter executed by the concern Parties.

170. On the other hand, DW1 further testified that upon the execution of the sale agreement, the requisite transfer instrument was thereafter executed and presented for registration at the Land Registry. For clarity, a copy of the duly executed and registered instrument of transfer was produced as D exhibit 5.

171. Subsequently, it was stated that the suit property was effectively transferred and registered in the names of the 1st and 2nd Defendants. In this regard, the said 1st and 2nd Defendants were thereafter issued with the requisite certificate of lease.



172. From the foregoing analysis, what becomes evident and apparent is that one John Willie Kariuki Kanyi, who latter on sold and transferred the suit property to the 1st and 2nd Defendants, had and held a valid certificate of lease over and in respect of the suit property.
173. Additionally, having held a valid certificate of lease over and in respect of the suit property, it then follows that same was vested and bestowed with the requisite capacity to enter into and execute a valid sale agreement with the 1st and 2nd Defendants.
174. Similarly, based on the fact, that same had lawful and legitimate interests over the suit property, the execution of the requisite transfer instrument then conveyed the rights and interests to and in favor of the 1st and 2nd Defendants.
175. Premised on the foregoing, two issues therefore arise and which deserve to be articulated.
176. First and foremost, the vendor who sold and transferred the suit property to the 1st and 2nd Defendants held a valid title to the suit property. Consequently, same had the capacity to sell and dispose of the suit property.
177. Secondly, the 1st and 2nd Defendants acquired lawful and valid rights to and in respect of the suit property by virtue of being Bona fide Purchasers for value.
178. Suffice it to point out, that at the time when the 1st and 2nd Defendants entered into and executed the sale agreement, there was sufficient and credible evidence that indeed their predecessor in title held and had a Valid title.
179. In the premises, I come to the conclusion that the 1st and 2nd Defendants have proved and established the requisite ingredients that underpin a claim for Bona fide Purchaser for value without notice.
180. In this regard, I beg to highlight and reiterate the holding of the Court of Appeal in the case of *Ardhi Highway Developers Ltd versus Westend Butchery Ltd & 6 others* (2015)eKLR, where the court observed and stated as hereunder;

He cited various authorities including Black’s law Dictionary and Snell’s Principles of Equity for the definition of “Bona fide purchaser” ,“Purchaser without notice” and “Prejudicial Dispositions”. He also relied on the Uganda Court of Appeal case of *Katende v. Haridar & Company Ltd* cited with approval in Kenya High Court case of *LawrenceMukiri v. Attorney General & 4 Others*[2013] eKLR on what amounts to “bona fide purchaser for value, thus:

“... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.



A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

181. Additionally, it is also instructive to cite and adopt the holding in the case of *Mwangi James Njebia versus Janetab Wanjiru James & another* (2021)eKLR, where the Court of appeal re-visited the salient ingredients that underpin the Doctrine of Purchaser for value.

182. For coherence, the Court after citing the previous decisions stated and observed as hereunder;

37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

183. Even applying the adjusted condition number 5, which now highlights the existence of valid title as opposed to apparent valid title, I would still find and hold that the vendor who sold to the 1st and 2nd Defendants, indeed held a valid title to the suit Property.

184. In a nutshell, my answer to the second issue is that the 1st and 2nd Defendants are indeed Bona fide Purchasers for value without notice of any defect, if any, in the title of their Predecessor.

185. In view of the foregoing, it therefore follows that the 1st and 2nd Defendants acquired and accrued valid and lawful rights to and in respect of the suit property and therefore same are deserving of protection under the law.



Issue Number 3 What Reliefs ought to be granted.

186. Both the Plaintiffs and the 1st and 2nd Defendants had sought various reliefs, at the foot of the Plaint and the counterclaim, respectively.
187. Premised on the nature of reliefs that have been sought by the respective Parties, it is appropriate to consider whether the requisite reliefs are available and by extension capable of being granted by the Honourable court.
188. First and foremost, it must be recalled that the Plaintiffs sought, inter-alia a declaration that the suit property, namely, L.R No. Nairobi/Block112/180, lawfully belongs to them.
189. However, whilst dealing with issue number 1, this court found and established that the suit property is separate and distinct from L.R No. Nairobi/Block/180, the latter being the property which was allegedly sold to or purchased by the Plaintiffs.
190. In view of the foregoing, it becomes apparent that the declaratory order which was sought by the Plaintiffs, as pertains to the suit property, cannot lawfully issue or be granted.
191. Secondly, the Plaintiffs had also sought for an order of Permanent Injunction to restrain the 1st and 2nd Defendants, from interfering with their rights and interests over and in respect of the suit property.
192. Nevertheless, it is imperative to observe that the Honourable court has since found, held and established that the suit property lawfully belongs to and is registered in the names of the 1st and 2nd Defendants. In this regard, the question that does arise is whether an order of Permanent injunction can issue against the lawful proprietor/owner of a designated parcel of land.
193. To answer the foregoing question, it suffices to take cognizance of the holding in the case of Nguruman Ltd versus Jan Bonde Nielsen & another (2014)eKLR, where the Court of Appeal observed as hereunder;

“It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so. The 1st respondent’s 50% claim of shares in the appellant company, the resources he used for architectural design, to construct the camp, the airstrip, to grade the road network, US \$ 1,917,333 alleged advanced to the 2nd and 3rd respondents, and US \$ 14 million allegedly used in the management and development of the camp, are all matters that can be resolved by arithmetical calculation and a refund made, if proved at the trial.”
194. Duly guided by the dictum espoused in the Nguruman case (supra), I find and hold that the order of Permanent Injunction being sought by the Plaintiffs herein cannot legally accrue and issue against the 1st and 2nd Defendants, whom the court has found to be the lawful and legitimate proprietors of the suit property.
195. Suffice it to add that by dint of being the lawful and legitimate owners of the suit property, the 1st and 2nd Defendants are duly conferred and bestowed with legal rights over and in respect thereof. In this regard, the provisions of Section 24 and 25 of the Land Registration Act, are relevant and applicable.
196. Other than the foregoing, the Plaintiffs also sought to be awarded Mesne Profits, arising from the offensive action and activities at the instance of the 1st and 2nd Defendants.



197. Be that as it may, it is common knowledge that an award of Mesne Profits can only arise and ensue, subject to proof of ownership of the designated land. However, in respect of the subject matter, the Plaintiffs have since failed to justify ownership over and in respect of the suit property.
198. Consequently and in the absence of ownership rights, the Plaintiffs herein cannot succeed in respect of a claim for Mesne Profits, either as claimed or at all.
199. In this respect, it suffices to reiterate and endorse the holding of the Court in the case of *Rajan Shah T/ A Rajan S. Shah & Partners versus Bipin P. Shah* [2016] eKLR, where the Court observed as hereunder;

“Mesne profits” are the rents and profits which a trespasser has or might have received or made during his occupation of the premises, and which therefore he must pay over to the true owner as compensation for the tort which he has committed. A claim for rent is therefore liquidated, while a claim for mesne profit is always unliquidated.

It follows therefore that a claim for mesne profit is inappropriate when the occupier is still a tenant. It can only be maintained when his tenancy has been duly determined according to law and he becomes a trespasser. In this respect, a tenant such as the Respondent, cannot properly be adjudged to be liable for mesne profit unless and until his tenancy has been duly determined according to law because the element of wrongful and tortuous occupation is absent.

200. Having failed to prove and establish ownership to and in respect of the suit property, the Plaintiffs herein cannot now be heard to contend that the 1st and 2nd Defendants are trespassers over and in respect of the suit property. For clarity, the claim for mesne profits has been ventilated in vacuum.
201. Finally, the Plaintiffs had also laid a claim for compensation/indemnity in the sum of Kshs.35, 000, 000/= only. However, it is not clear against who the claim for compensation was laid.
202. If the compensation was laid and mounted against the 1st and 2nd Defendants, then I must point out that there was no nexus or privity of contract between the Plaintiffs and the 1st and 2nd Defendants, to warrant a claim of such nature and magnitude.
203. On the other hand, if the claim was premised on indemnity, as hitherto provided vide the provisions of the Registered *Land Act*, then it is imperative to observe that in the absence of a certificate of official search, duly sealed on behalf of the Government of the Republic of Kenya, then such indemnity does and can not apply.
204. Notwithstanding the foregoing, it is also appropriate to recall that the Valuation report upon which the Plaintiffs anchored the claim for payment of the said sum of Kshs.35, 000, 000/= only, was similarly produced and tendered in evidence by the 1st Plaintiff himself and not by the registered valuer.
205. In a nutshell, I beg to point out that the valuation report, not having been produced by the registered valuer, has no probative value or at all. In this regard, same cannot even anchor such a claim, that is, assuming the claim was legally tenable.
206. Arising from the foregoing, it is imperative to state and observe that the assorted reliefs, which were claimed by the Plaintiffs, cannot legally issue, either as claimed or at all.
207. Contrarily, I have since found and held that the 1st and 2nd Defendants have proved their case as pertains to ownership of the suit property. Consequently, same are entitled to the benefit and protection of the law.



208. Premised on the foregoing, the 1st and 2nd Defendants herein would therefore be entitled to the reliefs, including a declaration that same are the lawful and legitimate owners of the suit property.
209. Additionally, the 1st and 2nd Defendants would also be entitled to an order of Permanent Injunction to protect and vindicate their lawful rights and interests, over and in respect of the suit Property.

Final Disposition:

210. In conclusion, I beg to state that the Plaintiffs herein were unable to conjure and place before the Honourable court any credible evidence to prove their claim to and in respect of the suit Property.
211. Contrarily, the 1st and 2nd Defendants, placed before the Honourable court persuasive and credible evidence. Consequently, I have reached and arrived at a conclusion that the counterclaim by the 1st and 2nd Defendants has been duly and suitably proved.
212. Consequently and in the premises, I do make the following orders;
- i. The Counterclaim dated the 20th February 2020 be and is hereby allowed in terms of prayers (a), (b) and (c), thereof.
 - ii. The Other Reliefs at the foot of the Counterclaim which have not expressly granted are hereby Dismissed.
 - iii. The Plaintiffs' suit be and is hereby Dismissed.
 - iv. The 1st and 2nd Defendants be and are hereby awarded costs of the suit and the Counter-claim to be borne by the Plaintiffs.
213. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2022.

OGUTTU MBOYA,

JUDGE

In the Presence of;

Kevin Court Assistant

Ms. Kamau h/b for Mrs. Karanu for the Plaintiffs.

Mr. George Kang'ethe for the 1st and 2nd Defendants.

N/A for the 3rd Defendant

