



Kayoyo Investment Limited v Nesclay Limited & 3 others; Nesclay Limited (Plaintiff to the Counterclaim); Kayoyo Investment Limited & 6 others (Defendant to the Counterclaim) (Environment & Land Case E006 of 2022) [2025] KEELC 3027 (KLR) (2 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3027 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E006 OF 2022**

**LN MBUGUA, J
APRIL 2, 2025**

BETWEEN

KAYOYO INVESTMENT LIMITED PLAINTIFF

AND

NESCLAY LIMITED 1ST DEFENDANT

**THE PRINCIPAL SECRETARY, MINISTRY OF LANDS & PHYSICAL
PLANNING 2ND DEFENDANT**

DIRECTOR OF SURVEYS 3RD DEFENDANT

COUNTY GOVERNMENT OF NAIROBI 4TH DEFENDANT

AND

NESCLAY LIMITED PLAINTIFF TO THE COUNTERCLAIM

AND

KAYOYO INVESTMENT LIMITED .. DEFENDANT TO THE COUNTERCLAIM

THE CHIEF LAND REGISTRAR DEFENDANT TO THE COUNTERCLAIM

THE DIRECTOR OF SURVEYS DEFENDANT TO THE COUNTERCLAIM

**COUNTY GOVERNMENT OF NAIROBI DEFENDANT TO THE
COUNTERCLAIM**

**THE HONOURABLE ATTORNEY GENERAL DEFENDANT TO THE
COUNTERCLAIM**

**GEPEE GENERAL TRADING LIMITED DEFENDANT TO THE
COUNTERCLAIM**



**SAINT BENJAMIN MEMORIAL CLINIC SUPPLIES LIMITED DEFENDANT
TO THE COUNTERCLAIM**

JUDGMENT

The Pleadings

1. The plaintiff commenced this suit by a plaint dated 13.1 2022 where it contends that it is the registered owner of parcel LR No.7716/16/2 which land was unlawfully trespassed upon by the 1st defendant. The plaintiff therefore prays for judgement against the Defendants for;
 - a. A declaration that the Plaintiff is the sole and lawfully registered proprietor of all that property known as Land Reference No.7716/16/2 situate along Runda along Limuru Road measuring 0.415 HA (the suit property).
 - b. A permanent injunction restraining the Defendants, their agents, servants, directors and/or assigns from interfering with the suit property in any way.
 - c. An order be issued ordering the Defendants to remove all structures and offending materials they have placed on the suit property.
 - d. In the alternative, an order of eviction be granted against the Defendants, their servants or agents from the suit property.
 - e. An order that the OCS Gigiri Police Station do assist in compliance with the orders of the court for purposes of maintaining peace and order.
 - f. Mesne profits for loss of use of property from 16th December 2021 till vacation date.
 - g. General and exemplary damages on account of the Defendants' fraudulent and willful malicious acts of trespass on the suit property.
 - h. Costs of this suit and interest thereon.
 - i. Any other or further relief as this court may deem fit.
2. The 1st Defendant opposed the suit through a defence and counterclaim dated 19.4.2022 where it denies the allegations levelled against it by the Plaintiff and contends that it is the registered proprietor of parcel LR 7716/16 IR 7990 and that the Plaintiff is the recipient of a fake title for the parcel known as LR No.7716/16/2 which is curved out of its title.
3. In its counterclaim, the 1st Defendant (Plaintiff in the counterclaim) avers that in 1987, it had commissioned a licensed surveyor, to draw up a subdivision of its property and despite getting approval, it did not proceed with the subdivision but it appears that the subdivision was irregularly registered on the basis of 16 deed plans No.s 425249-425264 and that out of the alleged subdivision, parcels LR No.s 7716/16/2 and 7716/19-33 were created.
4. The 1st defendant further pleaded that parcel LR 7716/16/2 was allegedly allotted to the 7th Defendant who in turn sold that land to the plaintiff. The 1st Defendant accuses the 1st, 6th and 7th Defendants in the counterclaim of trespassing on its parcel and conspiring to defraud it of the same and counterclaims for the following orders;



- a. A declaration that the Plaintiff is the sole and lawfully registered proprietor of the suit property LR 7716/16 IR 7990 that it lawfully purchased the title issued by the Government of Kenya in 1972 and its title is absolute and indefeasible.
 - b. A declaration that the allotment of the suit property to the 6th and 7th Defendants and the certificate of title over LR 7716/16 /2 that was transferred to the 1st Defendant was obtained illegally, unprocedurally and through a corrupt scheme and the allotment and certificate of title are unlawful, irregular and void ab initio.
 - c. A declaration that the 16 deed plans Nos. 425249-425264 for LR No.s 7716/16/2 and 7716/19-33 issued to the 1st,6th and 7th Defendants are unlawful, irregular and void ab initio and cannot confer any benefit to the 1st,6th and 7th Defendants and any subsequent third parties.
 - d. An order be given directing the 2nd and 3rd Defendants to forthwith cancel the 16 deed plans No.s 425249-425264 for Land Reference Nos. 7716/16/2 and 7716/19-33 and any certificate of Titles issued to the 1st,6th and 7th Defendants and any subsequent 3rd parties.
 - e. An order directing the 2nd and 3rd Defendants to forthwith reconstruct the Plaintiff's Deed File in respect of its property LR No. 7716/16 IR 7990 pursuant to the indemnity letter dated 28th October 2015 and restore its original and indefeasible title.
 - f. An order directing the Chief Land Registrar and Director of Surveys to issue a concise report as to how illegal Deed Plans and fake titles were created in contravention of the Nesclay's Limited property (LR 7716/16 IR 7990) in spite of its numerous Complaints.
 - g. A permanent injunction be issued restraining the 1st,6th and 7th Defendants whether by themselves, their agents, employees and/or servants from charging, selling, leasing, transferring or dealing in any manner howsoever with the Plaintiff's property LR No. 7716/16 IR 7990 and from asserting any ownership on the basis of the 16 deed plans No's 425249-425264 and certificates of title over LR No. 7716/16/2 and 7716/19-33.
 - h. Damages for trespass and exemplary damages for interfering with the Plaintiff's property LR 7716/16 IR 7990 by illegally, unprocedurally and through a corrupt scheme sub-dividing its land and obtaining 16 deed plans No.s 425249-425264 and certificates of Title over LR No.s 7716/16/2 and 7716/19-33.
 - i. Exemplary and aggravated damages against the 2nd to 4th Defendants for allowing the acquisition of illegal titles by the 1st,6th and 7th Defendants through an illegal, unprocedural and corrupt scheme.
 - j. Costs of the suit against the Defendants on a full indemnity basis based on the value of the Plaintiff's property LR 7716/16 IR 7990 with interest thereon at court rates from the filing of the counterclaim until payment in full.
5. On 10.7.2023, counsel for the plaintiff in the main suit informed the court that they had filed a defence to the counter claim, but had not served the same, of which the court gave them (as well as the rest of the parties) a final chance to identify their pleadings. However, the plaintiff did not file a defence and also did not turn up on the next pretrial date set for 27.9.2023.
 6. The 2nd, 3rd and 5th defendants were robustly present in these proceedings, but similarly, their pleadings were not identified and I found none in the file.



7. The 4th defendant in the main suit filed a statement of defence dated 31st January 2022 denying allegations contained in the plaint.
8. The 6th Defendant did not file any pleadings at all.
9. The 7th Defendant in the counterclaim filed a defence dated 24th September 2022 where it contends that its acquisition of parcel LR No.7716/16/2 was devoid of any illegalities, corruption and or procedural defects and that its decision to dispose off the suit land to the 1st Defendant in the counterclaim was arrived at in strict adherence to its constitution.
10. On 13.2.2024, the case of the Plaintiff in the main suit was dismissed for want of prosecution. Thus, the court proceeded with the counterclaim. To this end the court will identify the parties as per their status in the counter claim where Nesclay is the Plaintiff.

The Evidence

Plaintiff's Case

11. Nesclay's (plaintiff's) sole witness, PW1 was its director, Nicholas A. Nesbitt. He adopted his witness statement dated 13.9.2023 as his evidence in chief and he produced documents contained in their list of documents dated 13.9 2023 as P.Exhibit 1-54.
12. In his testimony, Pw1 stated that Nesclay purchased plot IR 7990 LR 7716/16 on 16.6.1972 from Neswa Limited of which it is in possession of the current tile and has been paying land rates to date. He explains that over the years, the property has been leased and charged at different times pointing out that from 1.10.1975, it was leased to the US embassy then to Pfizer corporation for 4 years from 1.11.1979 and subsequently charged to Commercial Bank of Africa until 1994 when it was discharged.
13. He contends that in 1987, the Plaintiff commissioned a licensed surveyor, Mr. Walter Absalom to draw up a proposed subdivision of the entire property. It was then submitted to Nairobi City Commission by Lloyd Masika on the Plaintiff's behalf and subsequently to the Director of City Planning & Architecture in the 4th Defendant's predecessor which forwarded it to the Ministry of Lands and Settlement which in turn approved the subdivision vide its letter dated 23.5.1989 subject to fulfillment of 12 conditions. That one of those conditions was that a portion of the land would need "to be reserved for public purpose (a Clinic) and to be surrendered to the Government for free".
14. PW1 avers that Nesclay did not proceed with the subdivision and it did not surrender its title, but unbeknown to it, the 7th Defendant began the process of fraudulently acquiring the plot that had been reserved for public purpose (clinic) of which it wrote to the Commissioner of lands requesting for approval for allocation of the said plot and by a letter dated 6.6.1997, the 4th Defendant's predecessor wrote to the Commissioner of lands stating that it had no objection to the 7th Defendant being allotted the plot in question.
15. Subsequently, by a letter dated 10.7.1997, the Commissioner of lands wrote to Lloyd Masika, the Plaintiff's representative forwarding an amended subdivision of LR 7716/16 yet the plaintiff had not presented any amendments, and on 15.12.1997, the hospital plot clinic now 7716/16/2 was allotted to the 7th Defendant which never complied with the terms contained in the said allotment letter.
16. He states that following this development, on 18.5.1998, Nesclay wrote to the Ministry of lands and settlement asking for intervention, but it was not assisted and it appears that the subdivision was irregularly registered on the basis of 16 deed plans No.s 425249-425264. That in a bid to protect its



land, AH Malik & Company, Nesclay's lawyers published a caveat emptor over parcel LR7716/16 in the local newspapers on 8.6.1998.

17. He avers that as early as 1999, the Director of Survey disowned the title 7716/16/2 as per correspondence of 8.4.1999 pointing out that the said plot was a surrender as a result of the alleged subdivision of 7716/16 and the said parcel should not exist since the purported subdivision never went through. Further, the above position was buttressed by the letter dated 7.3.2015 addressed to Director, City Planning at the 4th Defendant by Kyaloka Property Development Company which was Nesclay's agent, categorically stating that the Plaintiff did not wish to proceed with subdivision of its parcel 7716/16.
18. Pw1 was to learn that numerous deed plans had been generated for Nesclay's parcel 7716/16 pursuant to an internal memo addressed to the Permanent Secretary Ministry of Lands and pursuant to correspondence dated 27.5.2019 from Mr. Water J Absaloms, the original surveyor in which he was requesting the firm of CK Musyoki & Co. Advocates to assist him and his developer with obtaining the release of 17 deed plans 7716/16/1-2 and LR 7716/16/19-33.
19. He avers that on 20.10.2021, agents of the 1st, 6th and 7th Defendants sent hired laborers on Nesclay's property to tear down its prominently displayed "Not for sale" sign and had planned to install new beacons, of which they were accompanied by Nairobi Metropolitan Services staff who produced a fake title for LR 7716/16/2 dated 1.12.1997 showing that the 6th and 7th defendants are the alleged rightful owners.
20. In cross-examination, PW1 stated that he was a director of Nesclay but had no authorization letter to represent it in the suit. That he had the original title to the suit property though he did not produce it in court. He reiterated that LR 7716/16 was not subdivided by Juma Absalom, the surveyor it had appointed to carry out the subdivision.
21. When referred to the letter dated 10.4.1989 from Lloyd Masika addressed to the Director, City Planning & Architecture, Nairobi City Commission submitting a proposed subdivision on behalf of the Plaintiff and a similar letter dated 28.10.1989 from Gatome Associates addressed to Dr. James S. Nesbitt stating that it had completed subdivision of LR 7716/16 into 19 parcels and requesting for pay, Pw1 stated that there were various versions of proposed subdivisions of LR 716/16 but none went through. He also admitted that Nesclay paid Gatome Associates for the work done.
22. He stated that there are correspondences from the 4th Defendant stating that it had no objection to allocation of LR 7716/16/2 to the 7th Defendant, but he had no correspondences to show communication between the Town Clerk and the Commissioner of lands, as well as correspondences addressed to the Plaintiff regarding that allocation.
23. He stated that Nesclay cancelled subdivision for LR 7716/16 vide a letter dated 7th March 2015 addressed to the Director of City Planning, Nairobi City County and reiterated that Nesclay never surrendered its title.
24. Pw1 is aware that a space was to be created for a clinic if the subdivision was approved. He was aware of the amended subdivision in 1997, but there was no activity on the parcel hence Nesclay did not raise any objection. However, the amendment was mysteriously approved of which Nesclay filed several complaints to the police but investigations are not complete. He pointed out that he is aware that Absalom pursued getting deed plans for the property and got fake deed plans.



25. Pw1 also contended that he had no documents to show that Nesclay withdrew instructions from Walter. He is also not aware of any beacons placed on the suit land in 1989. He disputes the veracity of the deed plans in the 2nd Defendant's bundle as the suit land was never subdivided.
26. On cross examination by counsel for the 2nd, 3rd and 5th defendants, Pw1 reiterated that they bought the land in year 1972. That Absolom drew the subdivisions but they never proceeded with the same, thus their land parcel 7716/16 remains intact. The reason as to why they declined to proceed with the subdivision was because one condition was for the surrender of a portion of the land, and the plaintiff felt that it was not worth proceeding with the subdivision. Thus, the plaintiff never surrendered any land and it would be impossible for St Benjamin to get the land without a surrender.
27. Pw1 further stated that they sued the 2nd, 3rd and 5th defendants because of the allegations of existence of other titles. He averred that they never lost any deed plans and they never authorized anyone to collect such deed plans on their behalf. But they did complain of the new deed plans collected by Joseph Bungei.
28. In cross-examination by counsel for the 4th Defendant, Pw1 stated that the 4th Defendant did not play a role on the contested deed plans and that it made no attempts to facilitate grabbing of their land as it only played its statutory role at the time of Nesclay's intention to subdivide its parcel. Adding that their intention to subdivide the land was abandoned.
29. In re-examination, Pw1 stated that he never instructed Mr. Bungei to collect deed plans from Director of Survey and that Nesclay never paid for any deed plans as it abandoned the process of subdivision midway. He also reiterated that Nesclay made complaints at Gigiri police station, DCI headquarters and to the then Principal Secretary and former cabinet secretary for lands regarding the illegal activities on the suit land but it was not assisted.

Case for the 1st, 6th and 7th Defendants

30. DW1, Joseph Bungei, was the sole witness for the 1st, 6th and 7th defendants in the counter claim. He is a director of the 7th Defendant. He adopted his witness statement dated 26.9.2022 as his testimony and produced documents contained in a bundle dated 1.8.2023 as D. Exhibit 1-5.
31. He states that about January 1997, he learnt that Nairobi City Council had approved subdivision of LR No.77/16 giving rise to parcel LR No.7716/16/2 which was set aside for public utility purposes. That on 4.3.1997, he made an application for allocation of LR No.7716/16/2 on behalf of the 7th Defendant for setting up a clinic.
32. That he was subsequently issued with a letter of allotment on 15.12.1997, subject to acceptance within 30 days and payment of ksh.128,140/= but the 7th Defendant was not able to raise the finances until 25.1.1999 when it bought a banker's cheque of ksh,128,140/= in favour of the Commissioner of lands as the parcel was still available.
33. That subsequently, he entered into a joint venture with the 6th Defendant and an agreement was then drawn to secure the 6th Defendant's interest, thus its name was included in the title to parcel LR No.7716/16/2. Their title was then issued in 2020 but the 2 parties elected to dispose the land to the 1st Defendant in the counterclaim.
34. In cross-examination by counsel for the Plaintiff, Dw1 stated that he is a director of the 1st Defendant, 6th Defendant and 7th Defendants in the counterclaim. He contended that he was not aware of the caveat placed on the suit land.



35. Referred to the letter dated 8.4.1999 from Director of Survey to the Ministry of Lands stating that “... LR No.7716/16/2 ...ought to be surrendered by owner. It is unprocedural for the deed plans to proceed without authority of the owner”, he stated that he was not aware of the same.
36. He admitted that he did report the loss of deed plans 425249-64 to the police but contended that the deed plan for parcel LR No.7716/16/2 which he was interested in was inside the other deed plans, that is why he was interested in the other deed plans too. He stated that he was referred to Walter Juma Absalom by the Director of survey who told him that the said Walter had done the original subdivision of LR No.7716/16, adding that he had no other allotment letters in respect of the subdivisions of the suit property.
37. Referred to the letter at page 65 of Nesclay’s bundle, Dw1 stated that the document indicates that he (Joseph Bungei) had received 16 deed plans. That the deed plan annexed to their title is no. 421249 which is different from the one filed by the 2nd Defendant which is 425249.
38. In cross-examination by counsel for the 4th Defendant, Dw1 stated that he did not avail rates receipts and that he learnt about the property from a newspaper cutting posted on the 4th Defendant’s notice board. He contended that the 7th Defendant is a private clinic and that the 4th defendant was not involved in processing of the 7th Defendant’s title deeds.
39. In re-examination, Dw1 stated that the 4th Defendant should have documents depicting their involvement in the suit land but it did not, adding that the 4th Defendant holds records of rates payments and there is no document alleging that the 7th Defendant has not paid rates.
40. He also averred that there is no evidence that the 4th Defendant was not contacted before subdivision of LR No.7716/16, adding that the survey plans he produced had a stamp of verification while deed plan No.425249 filed by the 2nd Defendant has no verification signatures on stamps. He stated that he only has deed plans to LR No.7716/16/2, the others are with the Chief Land Registrar.
41. The case for the 2nd, 3rd and 5th Defendants was closed as they did not tender evidence. On 18.12.2024, counsel for the 4th Defendant indicated that they would not tender any evidence.

Preliminary Objections

42. At the close of hearing, counsel for the 1st, 6th and 7th Defendants in the counterclaim applied to have the case for the 1st Defendant in the counterclaim dismissed under Order 4 Rule 1 of the Civil Procedure Rules since Pw1 had nothing authorizing him to represent Nesclay in the suit. Counsel for Nesclay and the 4th Defendant urged the court to choose substantive justice over technicalities.

Submissions

43. The submissions of the plaintiff are dated 13.1.2025 where it argues that no evidence has been adduced to contradict that it owns the suit property where its title is absolute and indefeasible by didn’t of Article 40 of *the Constitution*, Section 23 of the Registration of Titles Act(repealed) and Section 26 of the *Land Registration Act*.
44. It is contended that the law does not contemplate 2 titles over the same parcel of land and that no subdivision of land can proceed without surrender of the mother title. That since Nesclay confirmed that it never surrendered the mother title as it abandoned the subdivision of its land, of which that evidence was not rebutted, then clearly LR No.7716/16 was not subdivided.



45. It was submitted that the 1st Defendant acquired LR No.7716/16/2 through a fraudulent and corrupt process in that the terms of the letter of allotment allegedly conferring the parcel were not accepted within 30 days, adding that a letter of allotment does not confer legal title. To this end, the case of Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment) was relied upon.
46. The court was urged to consider its decision in Hassan v Registrar & another [2024]KEELC 13987(KLR) and exercise its inherent jurisdiction and powers under section 80 of the [Land Registration Act](#) and order the immediate cancellation of the title issued to the 1st Defendant suit and direct the Chief Land Registrar to forthwith cancel all the illegal deed plans created over Nesclay's property together with all titles that may have been issued and issue a report to the court. The case of Wambui v Mwangi & 3 others (Civil Appeal 456 OF 2019) [2021] eKLR was also relied upon.
47. It was also submitted that the 1st, 6th and 7th Defendants should pay damages for trespass and complicity in corruptly obtaining 19 deed plans from the abandoned sub-division process and that the same should be assessed at Kshs.5 million. To this end, the case of Kenya Power & Lighting Co. Ltd v Ringera & 2 others [2022] KECA 104 (KLR) was relied upon.
48. On their part,the 1st, 6th and 7th Defendants filed submissions dated 29.1.2025 where they contend that the suit is time barred by dint of Section 7 of the [Limitation of Actions Act](#) since it was not filed within 12 years, which is the limitation period for recovery of land.
49. It was pointed out that as per the letter dated 3.6.1998 at page 32 of the Plaintiff's bundle, Nesclay had notice of existence of LR No.7716/16/2 as at 1998 and if it was aggrieved, it ought to have filed suit for recovery of the parcel within 12 years.
50. It was also argued that the suit is defective for offending Order 4 Rule (1) (6) of the Civil Procedure Rules, in that Pw1 admitted in cross-examination that he was not duly authorized by Nesclay Limited and there was no document to prove he was a director of Nesclay either. To this end, the case of Leo Investments Limited v Trident Insurance Company Limited and Republic v Registrar General and 13 others Misc. Application No.17 of 2005 [2005] eKLR were relied upon.
51. It was submitted that Nesclay lost all its interests in LR No.7716/16/2 by surrendering it to the government, following which the parcel was allocated to the 7th Defendant vide a letter of allotment dated 29.8.1997 as there was no evidence of cancellation of approved subdivision scheme plan.
52. It was submitted that there is no proof of fraudulent misrepresentation, concealment /mistake attributed to the 7th Defendant in the process of allotment of LR No.7716/16/2 to cause it to be impeached under Section 26 of the [Land Registration Act](#). To this end, the case of Elijah Makeri Nyangw'ara v Stephen Mungai Njuguna & Another [2013] eKLR was cited.
53. The case of Re estate of David William Kigumi Kimemia (Deceased) [2021] eKLR was also to submit that Nesclay pleaded fraud against the 1st, 6th and 7th Defendants but failed to prove those allegations to the required standard.
54. The submissions of the 4th defendant are dated 13.3.2025 which are hereby disregarded on account of the fact that they refer to factual issues relating to allocation and subdivision of the suit land. The court cannot condone the practice of adducing evidence on the platform of submissions.
55. The plaintiff filed submissions dated 13.1.2025 in rebuttal to the 1st, 6th and 7th Defendant's submissions, arguing that since no defence to the counterclaim has been filed by the 1st and 6th Defendants, then judgment should be entered against them automatically.



56. It was also submitted that the 7th Defendant's defence dated 24.9.2022 did not raise any jurisdictional point of law on issues pertaining to limitation of actions and the allegation that the counterclaim was non-compliant for failure to exhibit authority to file suit, adding that the authority was filed on 19.12.2024, 24 hours after the objection was raised by the 7th Defendant's advocate without amending his pleadings.
57. It was submitted that the Court of Appeal has affirmed that any director has the powers of the board to act on behalf of a company and to this end, the case of Space Geo Enterprises Limited v Kenya National Highways Authority [2019]eKLR was cited to submit that proceedings can be ratified after filing a case in a meeting of the shareholders or by authority of the Board.
58. The court of Appeal decision in Basu Mining Limited v Commissioner of Mines & another; Cortec Mining Kenya Limited & 5 others (Interested Parties)(Civil Appeal 187 of 2016)[2021] KECA 175 (KLR) (Environment and land)(5 November 2021) (Judgement) as well as in Dakianga Distributors (k) Ltd v Kenya Seed Company Limited [2015] eKLR were cited to submit that the court is bound by the pleadings of the parties

Determination

59. Having regard to the pleadings filed herein, the evidence tendered and the rival submissions, I find that the issues falling for determination are; Whether Pw1 had authority to file this suit, whether the suit of the plaintiff is time barred, whether the prayers sought by the plaintiff in the counterclaim are merited.
60. As noted earlier in the body of this judgment, the 1st and 6th defendants in the counterclaim did not file a defence. As for the 7th defendant, his statement of defence did not touch on the issues of limitation and authority. It is noted that the said issues were raised at the tail end of the proceedings when all parties had closed their cases.
61. In the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR cited in Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, it was stated that;-

“No party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”
62. This far, I am in agreement with the legal proposition proffered by the Plaintiff that the 1st, 6th and 7th defendants are estopped from raising the issues of time bar and authority as the said issues were not captured in their pleadings and in their evidence.
63. On the status of the title now held by the 1st defendant in respect of parcel LR No.7716/16/2, I find that there is no controversy that the said parcel is a subdivision of parcel LR No.7716/16 registered to the plaintiff. The bone of contention relates to the subdivision of the mother title LR 7716/16 in which a portion thereof (LR 7716/16/2) was registered in the name of the 1st defendant.
64. It is not lost to this court that the case for Kayoyo Investment (1st defendant) was dismissed and it did not file a defence to the counterclaim. To this end, the Plaintiff has urged this court to automatically enter judgment against the 1st and 6th Defendants.



I however differ with that proposition. It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in court. He must discharge the burden of proof. See *Gichinga Kibutha v Caroline Nduku* [2018] eKLR.

65. Nesclay admits to initiating a survey and subdivision of its parcel through a proposed subdivision scheme submitted to the 4th Defendant by its agent, Lloyds Masika on 10.4.1989, it claims that it ended that process midway after it became apparent that conditional approval granted by the Ministry of Lands and Settlement was unacceptable on Nesclay's part, especially the condition that it had to surrender a portion of the land free of charge for public purpose (a clinic). That nevertheless, the process was un-procedurally completed and led to illegal registration of deed plans and creation of illegal parcels being LR No.s 7716/16/2 and 7716/19-33 .
66. It was alleged that the parcel in contention (LR 7716/16/2) was allocated to the 7th Defendant and subsequently transferred to the 1st defendant (Kayoyo Investment).
67. the 7th Defendant on the other hand contends that it was allocated the suit parcel by the Commissioner of Lands vide a letter of allotment dated 29.8.1997. This is the parcel which was set aside for use as a clinic.
68. The input of the 2nd , 3rd , 4th and 5th defendants in these proceedings would have gone a long way in unravelling the process which culminated in the issuance of the title to the 7th defendant, seeing that the ministry of lands and the county government of Nairobi were the entities which had the mandate to undertake the process in question. Unfortunately, the said entities never tender any evidence before this court. The court cannot however wring its hands in despair in such a situation. Instead, the court will make a determination based on the evidence so far adduced by the protagonists.
69. I find that both the plaintiff and the 7th defendant have availed a copy of the letter dated 23.5.1989 from the 4th defendant to the allocating authority who was the commissioner of lands. The same indicates that the approval of the subdivision of parcel L.R. 7716/16 was subject to several conditions including "a surrender of a portion to the Government for public utility use , that is a clinic". Thus, in the scheme of things, there ought to have been some land availed to the Commissioner of lands to pave way for allocation. There is however a missing link in the form of a surrender.
70. A perusal of the mother title for parcel L.R. 7716/16 availed by the plaintiff reveals that the last entry is number 15 dated 24.1.1994 for a discharge of charge. No other entry has been made thereafter depicting an endorsement of a surrender. No instrument of surrender was availed by the 7th defendant or any party thereof to confirm that a certain portion of parcel L.R. 7716 was handed over to the Commissioner of lands.
71. So, was there any land available for allocation to the 7th defendant? In *Cancer Investments Limited v Nairobi City County Government ...1st Defendant National Construction Authority & 4 others* (Environment & Land Case 81 of 2019) [2023] KEELC 21607 (KLR) (15 November 2023) (Judgment), the court stated that;

"Furthermore, it is not lost on this court that whereas the Commissioner of Land was mandated to allocate Government Land subject to the statutory limitations described in the Government *Land Act*, now repealed, the allocation/alienation could only relate to unalienated Government Land and not otherwise."
72. In the case of *Registered Trustees of Sheik Bayed Bin Sultan Al Nahyan v Pelican Engineering & Construction Company Limited & 4 others* (Environment & Land Case 639 of 2015) [2024] KEELC



6534 (KLR) (3 October 2024) (Judgment) Neutral citation: [2024] KEELC 6534 (KLR), where a claim was pegged on land surrendered to the government, the court (Mbugua J) stated thus;

“The title held by the Kenya Railways was governed by the legal regime under the Registration of Titles Act. Ordinarily under this regime, any registrable transaction would be endorsed as an entry in a chronological order in the title document. The last entry in the surrendered mother title L.R was on 5.9.1969 when the land was vested to the East African Railways Corporation! There is no evidence that the purported surrender was endorsed in the surrendered title or any other title document and given a description as an ENTRY NUMBER. Thus there is no basis upon which the Government could have embarked on allocating “its own land” to entities such as the plaintiff without a manifestation of the surrender in the title document.”

73. Similarly, in the case at hand, the registration regime relating to the suit property although dating as far back as year 1951 is one where the registrable transactions were reflected in a chronological order in the title document.
74. As it were, Nesclay never wrote to the Commissioner of Lands to formally confirm compliance with the subdivision conditions, particularly the condition calling for surrender of the plot in contention.
75. Additionally, the mother title was not surrendered and the department of survey itself in the letter dated 8.4.1999 authored by Mrs. P. Gitima on behalf of the Director of Survey confirmed so (page 30 of Nesclay’s bundle). Thus, all the fervent endeavors to subdivide parcel L.R. 7716/16 complete with 19 or so plots and deed plans amount to nothing in so far as the suit property parcel L.R. 7716/16/2 is concerned.
76. How then was the conditional subdivision scheme implemented without confirmation? It could only have been done unprocedurally, illegally and through corrupt schemes.
77. This far, I find that there is nothing to indicate that the Commissioner of lands acquired any “freed land” from the plaintiff. Put it differently, the commissioner of lands had no mandate to alienate private land, as his mandate related to unalienated Government land and in the case at hand, there was no such unalienated government land emanating from parcel L.R. 7716/16.
78. Even assuming somehow somewhat that there was a surrender and the land became government land, there is still no evidence to indicate the nature and extent of the powers exercised by the Commissioner of lands enabling that office to issue the allotment letter to private entities. To this end, I again refer to the letter of 23.5.1989 availed by the protagonists where the land was set aside for public purpose. Even Dw1 admitted in his witness statement that the land in question was “set aside for public utility purposes”. The title for parcel L.R. 7716/16/2 is with the 6th and 7th defendants as well as the 1st defendant. During the trial, Dw1 stated that he is a director of 7th, 6th and even 1st defendants, of which the entities are in a joint venture, a vehicle set up for purposes of constructing a clinic on the disputed parcel. The land in question is therefore in the hands of entities who are in their own private joint ventures.
79. The mandate of the Commissioner of lands to allocate government land was majorly governed by the Government Lands Act. In the case of Henry Muthee Kathurima v Commissioner Of Lands & another [2015] KECA 892 (KLR), the Court of Appeal while citing several sections of the aforementioned statute including section 3, 7, 9, and 12 stated that;

“The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity. We cite the case of Said Bin Seif v. Shariff Mohammed



Shatry, (1940)19 (1) KLR 9, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity, and not only voidable but void with no effect, either as legitimate expectation, estoppel or otherwise”.

80. Thus, the powers of the Commissioner of lands were not a carte blanche to allocate government land in any manner it desired. Also see *Niaz Mohamed Jan Mohamed v Commissioner for Lands & 4 others* [1996] KEHC 2 (KLR).
81. What more, by Dw1’s own admission, the 7th Defendant did not meet the conditions for allocation within 30 days as required in the letter of allotment as it paid the required premium after a period of 2 years.
82. Additionally, a site visit report conducted in the course of these proceedings indicated that the suit land is inhabited by the Nesclay family and it is not subdivided.
83. This far, the 7th Defendant’s evidence was not enough to convince this court that the 1st Defendant’s title is indefeasible. What emerged is that the process of acquisition of the title by the 7th defendant was nothing but an intricate web of corrupt schemes geared towards grabbing the suit parcel from the Nesclay family. The fact that Dw1 is the director of the 1st, 6th and 7th defendants is a tell tale sign of the crafty machinations of grabbing the suit land birthed by the 7th Defendant via an application for land allocation dated 6.5.1997 and natured to maturity by personnel in various government entities, particularly the Commissioner of lands and the Ministry of Lands. To this end, it is noted that although the 7th Defendant was making an application for the allocation of land on 6.5.1997 (page 6 of 7th Defendant’s bundle), the Ministry of Lands was on 14.3.1997 (2 months earlier!) already inquiring from the 4th Defendant if it had any objections to the proposed allocation!.
84. In *Dina Management Limited v County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR), the court held that :

“Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible...”.
85. While in *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title.”
86. I come to the conclusion that the title issued to the 7th and 6th defendants, and now apparently in the hands of the 1st defendant is a nullity. Thus, as rightly submitted by Nesclay, the provisions of Section 80 of the [Land Registration Act](#) must take effect for the said title to be nullified.
87. On damages, Nesclay through Pw1 has given a step by step account of how the invasion on their property was carried out by the invaders, who even turned up with cement and shovels to install beacons, an averment which has not been rebutted by the 1st, 6th and 7th defendants. I find that Nesclay is entitled to damages for the incursions made into their property by the aforementioned defendants. Nesclay has sought for an award of Kshs.5 million. However, I have taken into consideration that the land is still in the hands of Nesclay’s family. To this end, the court will give an award of damages to the tune of Kshs.1.5 million.



88. In the end, I find that the plaintiff in the Counterclaim has proved its case on a balance of probabilities and I proceed to give the following orders;
- i. A declaration is hereby made that the Plaintiff is the sole and lawfully registered proprietor of parcel LR 7716/16.
 - ii. A declaration is hereby made that the allotment of the suit property to the 6th and 7th Defendants and the issuance of the certificate of title LR 7716/16 /2 to the 6th and the 7th defendants as well as a subsequent registration to the 1st Defendant was illegal, unprocedural and was through corrupt schemes, thus the allotment and certificate of title are unlawful, irregular and are hereby cancelled.
 - iii. A declaration is hereby made that any deed plans generated out of subdivision of parcel L.R.7716/16 including 16 deed plans Nos. 425249-425264 for LR No.s 7716/16/2 and 7716/19-33 are unlawful and are hereby cancelled.
 - iv. An order is hereby issued directing the 2nd and 3rd Defendants to forthwith reconstruct the Plaintiff's Deed File in respect of its property LR No. 7716/16 and restore its original title.
 - v. A permanent injunction is hereby issued restraining the 1st, 6th and 7th Defendants whether by themselves, their agents, employees and/or servants from charging, selling, leasing, transferring or dealing in any manner howsoever with the Plaintiff's property LR No. 7716/16 IR 7990.
 - vi. An award of Kshs.1 500 000 is hereby made in favour of the plaintiff in the counterclaim as against the 1st, 6th and 7th defendants as damages for trespass.
 - vii. The plaintiff in the counterclaim is awarded costs of the suit in the counterclaim as against the 1st, 6th and 7th defendants, plus interest thereon at court rates from the filing of the counterclaim until payment in full.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF APRIL 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE-ELC NANYUKI

In the presence of:-

Mutugi holding brief for Gichuhi Senior Counsel for plaintiff

Ogado for 1st, 6th & 7th Defendants

