



**Kihura v Nderitu & another (Environment & Land Case 249 of 2020)
[2022] KEELC 15546 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15546 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 249 OF 2020
JO MBOYA, J
DECEMBER 20, 2022**

BETWEEN

PATRICIA WANJIKU KIHURA PLAINTIFF

AND

LAND REGISTRAR NAIROBI 1ST DEFENDANT

MARY NJOKI NDERITU 2ND DEFENDANT

JUDGMENT

Introduction And Background.

1. The plaintiff commenced and filed the instant suit *vide* plaint dated the November 30, 2020, and in respect of which the plaintiff sought for the following reliefs;
 - i. That this honorable court finds and holds that the certificate of lease issued to the 1st defendant was obtained un-procedurally, illegally and/or fraudulently.
 - ii. That this honorable court do order the 2nd defendant to cancel the registration of the 1st defendant as the owner of the suit land.
 - iii. That this honorable court do find and hold that the plaintiff is *bona fide* and legal owner of all that parcel of land known as Nairobi/block 117/492.
 - iv. That this honorable court do order the 2nd defendant to issue the plaintiff with a certificate of title of all that parcel of land known as Nairobi/block 117/492.
 - v. That this honorable court do order that the 1ST defendant and its agents to vacate the plaintiff's piece of land plot No Nbi/Block/117/492.



- vi. That there be a permanent injunction against the 1st defendant and its agents from interfering, intermeddling and/or in any way dealing with the suit land.
 - vii. Mesne profits.
 - viii. The costs of this suit.
 - ix. Any other relief as this honorable court may deem just to grant.
2. Upon the filing and service of the plaint herein, the defendants variously entered appearance and thereafter filed their respective statements(s) of defense. For clarity, the 1st defendant entered appearance and filed a statement of defense on the April 14, 2021.
 3. On the other hand, the 2nd defendant duly entered appearance and filed a statement of defense dated the March 7, 2022.
 4. After the close of pleadings, the subject matter was listed for case conference, whereupon same was confirmed to be ready and ripe for hearing. Consequently, the subject suit was thereafter fixed/listed for hearing.

Evidence By The Parties:

A. Plaintiff's case:

5. The plaintiff's case gravitates or revolves around the evidence of three witnesses, inclusive of the plaintiff. For clarity, the plaintiff herein testified as PW1.
6. It was the testimony of PW1 that on or about the year 1970, her husband, namely Suleiman Kihura Kibindu, now deceased, joined and thereafter became a member of Kamiti Farmers Company Ltd, which was a land buying company.
7. Besides, the witness also testified that the said Kamiti Farmers Company Ltd had previously bought and purchased all that parcel of land known as LR No Nairobi/Block 117 (formerly known as LR No 8570) from one, namely Yvonne Jeanne Rameu.
8. On the other hand, the witness further added that the named parcel of land was thereafter transferred and registered in the name of the company.
9. Be that as it may, the witness testified that the company subsequently proceeded to and subdivided the named parcel of land into various plots and thereafter the resultant plots were allocated to the members of the company.
10. Further, the witness added that her late husband was entitled to and received 4 portions of half acres each from the company. For clarity, the witness pointed out that one of the plots which was allocated to her deceased husband was LR No Nairobi/Block 117/492, which is the suit property herein.
11. It was the further evidence of the witness that the allocation of the suit property to and in favor of her late husband was fortified and underscored *vide* a share certificate, was by the company, namely, certificate number 147.
12. On the other hand, the witness further testified that upon being allocated the suit property, her late husband proceeded to and constructed a matrimonial home on the suit property. In this regard, the witness added that same continued to and lived in the matrimonial home to date.



13. Other than the foregoing, the witness added that upon the death of her late husband in the year 2002, same applied for the transfer of the suit property to herself and that in the year 2008, the company successfully transferred the suit property unto her. In this regard, the witness added that she was equally issued with a share certificate number 0201 dated the November 5, 2008.
14. Be that as it may, the witness testified that in the year 2019, same decided to procure and obtain a certificate of title over and in respect of the suit property. Consequently, the witness averred that same proceeded to the offices of the Chief Land Registrar with a view to obtaining a certificate of title.
15. Nevertheless, the witness added that she was shocked and surprised to discover that the suit property had been transferred and registered in the name of the 1st defendant, albeit without her knowledge and blessings.
16. It was the further evidence of the witness that 1st defendant was not known to her and neither had she sold nor transferred the suit property to the 1st defendant.
17. Arising from the fact that the suit property had been transferred and registered in the name of the 1st defendant, the witness herein averred that same was therefore constrained to and proceeded to lodge a complaint with the Police at Kasarani police station *vide* OB No 58/28/12/19.
18. Notwithstanding the foregoing, the witness further testified that same had not sold nor authorized the transfer and registration of the suit property to the 1st defendant. In this regard, the witness averred that the impugned transfer and registration of the suit property in favor of the 1st defendant was therefore fraudulent and unlawful.
19. In any event, the witness has added that the suit property is being taken away from her by persons whom she trusted and allowed to construct a building on a portion of the suit property, albeit on the mutual understanding that same would enter into a formal sale agreement over the named portion of the suit property.
20. Finally, the witness testified that she is and remains the lawful and *bona fide* owner of the suit property. In this regard, the witness averred that the certificate of title in the name of the 1st defendant was fraudulent and thus ought to be cancelled.
21. Other than the foregoing, the witness herein alluded and referred to her witness statement dated the November 30, 2020, which same sought to adopt as her evidence in chief. In this regard, the witness statement was thereafter adopted and constituted as her evidence in chief.
22. On the other hand, the witness also referred to the list and bundle of documents dated the November 30, 2020. For clarity, the witness invited the honourable court to admit the named documents contained at the foot of the list of documents dated the November 30, 2020.
23. Suffice it to point out, that the documents at the foot of the List of documents dated the November 30, 2020, were thereafter admitted and produced in evidence as exhibits P1 to P6, respectively.
24. On cross examination by the 1st defendant, the witness stated that the suit property measured approximately half acre and that currently the suit property is occupied by two other persons, namely, Christopher Musyoki and Christine Kanini. For clarity, the witness added that she is the one who sold portions of the suit property to the named persons.
25. Other than the said two persons, the witness also conceded and admitted that there is a Third person who has also constructed on a portion of the suit property, albeit without her consent and permission. In this regard, the witness identified the third person as Christopher Nderitu.



26. Other than the foregoing, the witness further stated that the said Christopher Nderitu is the one who has constructed the permanent building, whose photographs, have been shown and attached in the bundle of documents filed by the 1st defendant.
27. At any rate, the witness added that the said Christopher Nderitu went to her and thereafter she (witness) and Nderitu sat down and spoke about an intention to sell a portion of the suit property to the said Christopher Nderitu.
28. Further, the witness stated that after a discussion with the said Christopher Nderitu, same requested her to sign/give him an agreement for sale, to enable him (Christopher Nderitu) to procure funding/finances from a Financier.
29. Be that as it may, the witness added that an agreement was thereafter crafted and signed between himself and ChristoPher Nderitu, but that the purpose of the said agreement was to bind the plaintiff/witness not to sell the portion of land to any other person.
30. On the other hand, the witness added that the named agreement was merely a formality and same neither identified the size of the portion which was to be sold nor the agreed purchase price.
31. Besides, the witness further added that the named agreement was also signed by her son, namely, Patrick K Kihura.
32. Be that as it may, the witness reiterated that the purchase price was never agreed upon and neither was she paid any money by the defendant. Notwithstanding the foregoing, the witness added that same also gave to Christopher Nderitu a copy of the share certificate in respect of the suit property.
33. Whilst under cross examination by counsel for the 2nd defendant, the witness testified that same has sued the Land Registrar because he/she is the one who issued the certificate of title to and in favor of the 1st defendant without her(witness) consent.
34. Further, the witness testified that though the certificate of title was issued to the 1st defendant without her consent, she has not lodged any inhibition or caution against the title at the Land registry.
35. On re-examination, the witness pointed out that the agreement that same referred to was recorded in her house and in her presence. Besides, the witness also pointed out that at the time of the signing of the agreement Christopher Nderitu was not present.
36. On the other hand, the witness added that thereafter she saw the building being constructed on a portion of the suit property, but she did not stop the construction of the impugned building.
37. Be that as it may, it was the further evidence of the witness that she did not stop the construction of the named building because she knew that Christopher Nderitu would honor the promise and pay unto her the purchase price once same had obtained the resources/finances from his financier.
38. In any event, the witness further added that she also knew that Christopher Nderitu would not be able to obtain a certificate of title without reverting to her or obtaining her consent.
39. On the other hand, the witness reiterated that the agreement which was signed on the September 22, 2006, was to enable Christopher Nderitu to obtain a loan from the bank and same was not a sale agreement.
40. Other than the foregoing, the witness further clarified that she did not transfer the suit property to either Christopher Nderitu or to the 1st defendant. In this regard, the witness pointed out that the transfer in favor of the 1st defendant was therefore a fraud.



41. The second witness that was called by the plaintiff was Patrick Kibindu Kihara. For clarity, same testified as PW2.
42. It was the testimony of the named witness that on the 18th of September 2006, one Christopher Nderitu proceeded to their home situate on the suit property and enquired as to whether the suit property or a portion thereof was on sale.
43. Further, the witness also testified that on the September 22, 2006, the same Christopher Nderitu returned and a draft agreement to sell was prepared/written, wherein an intention to sell a portion of the suit property, namely, LR No Block 117 Nairobi/492/2 was reached and or arrived at. In this regard, the witness added that himself and the another, namely, Samuel Muhia Kihura thereafter appended their signatures on the said agreement.
44. Nevertheless, the witness further added that though no proper sale agreement was ever entered into or executed, the said Christopher Nderitu manipulated the process and commenced to construct on a portion of the suit property, whilst on the other hand engaging the plaintiff on the pretext that same was still seeking for funding from his financiers.
45. Be that as it may, the witness further testified that later on the said Christopher Nderitu refused to formalize the sale agreement and instead resorted to confrontation and issuance of threats.
46. It was the further testimony of the witness that owing to the confrontation, the plaintiff and himself thereafter sought to have the suit property transferred and registered in the name of the plaintiff. In this regard, the witness testified that the plaintiff was obliged to procure and obtain the requisite documents from Kamiti Farmers Company Ltd, to facilitate the transfer and registration of the suit property in her favor.
47. Subsequently, the witness contended that the plaintiff thereafter proceeded to the offices of the Land Registrar with a view to having the suit property transferred and registered in her name, but that the plaintiff discovered that the suit property had been transferred and registered in the name of the 1st defendant.
48. Premised on the foregoing, the witness pointed out that the plaintiff and himself were thereafter constrained to and indeed lodged a complaint with the police at Kasarini Police Station *vide* OB No 53/28/12/19.
49. Other than the foregoing, the witness referred to his written statement dated the March 4, 2022 and sought to adopt same as his further evidence in chief. In this regard, the witness statement was duly admitted as the evidence in chief of the witness.
50. On cross examination by counsel for the 1st defendant, the witness pointed out that the plaintiff herein resides and lives on a portion of the suit property.
51. On the other hand, the witness further testified that the building which stands on a portion of the suit property belongs to Baba Wachira aka Christopher Nderitu.
52. In any event, the witness admitted that same signed the agreement dated the September 22, 2006. However, the witness added that the said document/agreement was meant to enable Christopher Nderitu to obtain money from his financier with a view to purchasing a portion of the suit property.
53. Nevertheless, the witness added that when the named agreement was prepared, Christopher Nderitu was never present and did not personally execute the agreement.



54. Further, the witness pointed out that at the time of the preparation and execution of the agreement dated the September 22, 2006, the 1st defendant herein was similarly not present.
55. Other than the foregoing, the witness pointed out that no money was ever agreed upon by the parties, namely, the plaintiff and the said Christopher Nderitu and neither was any money paid out to or in favor of the plaintiff.
56. On cross examination by counsel for the 2nd defendant, the witness admitted that the named agreement was signed in his presence. For clarity, the witness added that he also signed the agreement in question.
57. In any event, the witness added that despite signing the agreement, same was never meant to give land to Christopher Nderitu.
58. The third witness, was one, namely Samuel Muhia Kihura. For clarity, the witness testified as PW3.
59. It was the testimony of the said witness that same was present on the September 18, 2006, when Christopher Nderitu visited the suit property and made enquiry as to whether the suit property was available for sale.
60. Similarly, the witness testified that on the September 22, 2006, Mr. Christopher Nderitu confirmed his intention and willingness to buy a portion of the suit property. In this regard, the witness added that Mr Christopher Nderitu thereafter requested that the mutual arrangement relating to the intended purchase of a portion of the suit property be reduced into writing to enable same to obtain funds from his Financier.
61. Further, the witness added that the mutual arrangement was thereafter reduced into writing and the resultant agreement was signed and executed by himself together with his brother, namely, Patrick Kibindu Kihara.
62. Nevertheless, the witness added that the agreement was not a sale agreement but was limited for purposes of helping Christopher Nderitu to obtain finance from his financier.
63. Be that as it may, the witness added that on or about the year 2007, same found that Christopher Nderitu had commenced the construction on a portion of the suit property, albeit without the authority and consent of the plaintiff.
64. However, the witness added that when same confronted Christopher Nderitu, the said Christopher Nderitu pointed out that same was still in the process of obtaining finances for purposes of paying the purchase price.
65. Other than the foregoing, the witness testified that despite the various promises, Christopher Nderitu never paid the purchase price or at all.
66. In view of the foregoing, the witness added that the plaintiff and himself were thereafter constrained to follow up on the issue of registration of the suit property in the name of the plaintiff. In this regard, the witness averred that the plaintiff and himself proceeded to the Land Registry with a view to obtaining the certificate of title.
67. However, the witness averred that upon visiting the Land Registry, same established that the suit property had been transferred and registered in the name of the 1st defendant.
68. It was the further evidence of the witness that upon the discovery of the transfer and registration of the suit property in favor of the 1st defendant, the plaintiff and himself were constrained to and indeed



lodged a complaint with the Police at Kasarani Police Station. In this regard, the witness added that the complaint was duly recorded *vide* OB No 53/28/12/19.

69. Other than the foregoing, the witness alluded to his witness statement dated the March 4, 2022 and sought to have the witness statement adopted as evidence in chief. In this regard, the witness statement was duly adopted and admitted as the evidence in chief of the witness.
70. On cross examination by counsel for the 1st defendant, the witness admitted and confirmed that same is a son of the plaintiff. In any event, the witness added that same used to stay/reside on the suit property together with the plaintiff.
71. Further, the witness added that he was not conversant with the 1st defendant, but same only met the 1st defendant once at Kasarani police station.
72. Other than the foregoing, the witness stated that same met Christopher Nderitu for the 1st time on the September 18, 2006, when the said Christopher Nderitu had gone to the suit property to enquire whether the suit property was on sale.
73. On the other hand, the witness added that when Christopher Nderitu went to the suit property on the stated date, same was accompanied by two other persons, who were both male.
74. Be that as it may, the witness clarified that no sale agreement was ever entered into over and in respect of a portion of the suit property. For clarity, the witness pointed out that what was entered into was an arrangement to bind the plaintiff not to sell the suit property to any third party, during the period when Christopher Nderitu was still seeking to obtain funding or finance from his financier.
75. Other than the foregoing, the witness further testified that same saw the building being erected on a portion of the suit property. For clarity, the witness added that the first time he saw the building was in the year 2007.
76. In any event, the witness testified that the impugned building was thereafter completed/concluded and that to date the impugned building is being used for commercial purposes.
77. Be that as it may, the witness added that despite the construction of the building, the said Christopher Nderitu never paid any monies to and in favor of the plaintiff.
78. On cross examination by counsel for the 2nd defendant, the witness pointed out that the suit property is currently registered in the name of the 1st defendant. Nevertheless, the witness added that same was however not aware of how the suit property was transferred and registered in the name of the 1st defendant.
79. With the foregoing testimony, the plaintiff's case was duly closed.

B. 1st Defendant's case:

80. The 1st defendant's case revolves around the evidence of two witnesses, inclusive of the evidence of the 1st defendant, who testified as DW1.
81. It was the evidence of DW1 that in late 2006, same met the plaintiff herein after she was informed that the plaintiff had a plot for sale. In this regard, the witness testified that same thereafter proceeded to and viewed the named plot, which she later on established formed part and parcel of LR No Nairobi/Block 117/492.
82. Further, the witness testified that upon viewing the named plot, the plaintiff and herself agreed on the purchase price in the sum of Kshs 300, 000/= only.



83. On the other hand, the witness further testified that on the September 22, 2006, both herself, her nephew and her son proceeded to the plaintiff's home, which was close to the suit plot and thereafter the plaintiff and the herself (together with her nephew and son) proceeded to an hotel known as Emmacra Hotel, located along Acra road within the City of Nairobi, where a Sale agreement was entered into and executed.
84. It was the further testimony of the witness that whilst at the said hotel, a sale agreement was duly prepared and thereafter signed/executed by all the parties, except her son namely, Joshua Karanja.
85. Other than the foregoing, the witness added that she proceeded to and signed the sale agreement on behalf of her husband namely, Christopher Nderitu. Besides, the witness further testified that upon the execution of the sale agreement, the plaintiff and herself proceeded to Equity Bank, located along Tom Mboya street, wherein the witness withdrew and paid out the sum of Kshs 300, 000/= only, to and in favor of the plaintiff herein.
86. In any event, the witness added that the plaintiff proceeded to and acknowledged receipt of the sum of Kshs 300, 000/= Only on account of full purchase price of the suit property.
87. It was the further testimony of the witness that upon receipt of the purchase price, the plaintiff herein handed over to the witness a copy of the sale agreement.
88. Other than the foregoing, the witness also testified that the plaintiff herein had previously issued/surrendered a copy of her ID card and pin certificate as well as a share certificate number 0133 dated the September 21, 2006 to and in favor of the husband of the witness.
89. Notwithstanding the foregoing, the witness further testified that thereafter, same proceeded to and commenced to construct a one storey building on a portion of the suit property. for clarity, the witness averred that the one storey building was duly completed and same is currently occupied/used as hostel.
90. Besides, the witness further added that same had good relationship with the plaintiff and in any event, same has attended various social functions at the plaintiff's place, including the funeral of the plaintiff's own daughter, namely, Wanjiru.
91. Finally, the witness testified that in the year 2011, her husband executed and signed an affidavit whereby same authorized the transfer of the suit property to and in her favor. In this regard, the witness added that the affidavit in question was presented to and handed over to Kamiti Farmers Company Ltd, who thereafter generated a share certificate number 083 in her (1st defendant's) favor.
92. Further, the witness added that upon being issued with share certificate number 083 by Kamiti Farmers Company Ltd, same proceeded to the Land Registry at Ardhi house and thereafter, same was duly issued with a certificate of lease over and in respect of the suit property.
93. Other than the foregoing, the witness referred to her witness statement dated the June 9, 2021 and same sought to adopt and rely on the said witness statement. In this regard, the witness statement dated the June 9, 2021 was adopted as further evidence in chief of the witness.
94. Further, the witness also referred to the list and bundle of documents dated the June 9, 2022. In this regard, the witness sought to adopt and rely on the said documents.
95. Consequently and at the request and instance of the witness, the documents at the foot of the list dated the June 9, 2022, were adopted and admitted as defense exhibits D1 to D8, respectively.



96. On cross examination by counsel for the plaintiff, the witness herein acknowledged and admitted that currently the suit property is registered in her name. However, the witness also stated that though the entire property is currently registered in her name she was only entitled to a portion of the land.
97. On the other hand, the witness also stated that her name is not contained/ reflected in the sale agreement.
98. Whilst still under cross examination, the witness stated that she is the one who bought the land. In any event, the witness added that same was present when the sale agreement was drawn and executed.
99. Other than the foregoing, the witness stated that her husband, namely, Christopher Nderitu was not present when the sale agreement was prepared and signed.
100. On the other hand, the witness also stated that the sale agreement was signed on behalf of her husband by one of her (witness's) cousins.
101. Further, the witness pointed out that the sale agreement did not allude to or specify the portion of land which was being sold. In any event, the witness also admitted that the sale agreement also did not allude to the agreed purchase price. For clarity, the witness pointed out that no purchase price was stipulated in the body of the sale agreement.
102. Other than the foregoing, the witness also stated that the sale agreement alluded to related to LR No Block 117/492/2. In this regard, the witness further added that there was no sale agreement in respect of the suit property.
103. Nevertheless, the witness acknowledged that the certificate of title which was issued relates to and concerns LR No Nairobi/Block 117/492 and not Nairobi/Block 117/492/2.
104. It was the further evidence of the witness that the suit property was transferred and registered in her name, after her husband had authorized the transfer and registration of same unto and in her favor.
105. Whilst still under cross examination, the witness stated that she would want the larger parcel of land to revert to the plaintiff, but same should be granted her portion out of the suit property.
106. At any rate, the witness admitted and conceded that the suit property previously belonged to the plaintiff.
107. On cross examination by counsel for the 2nd defendant, the witness pointed out that same bought the land from the plaintiff in the year 2006. In any event, the witness added that upon purchase of the land, the vendor duly granted unto her the share certificate/certificate of ownership as well as a copy of her identification card.
108. Further, the witness also stated that same paid to and in favor of the plaintiff the agreed Purchase price of Kshs 300, 000/= only.
109. On cross examination by the honourable court, the witness stated that she has the title over and in respect of the entire suit property. However, the witness conceded that the whole land does not belong to her.
110. At any rate, the witness further stated that the other portion of land for which she has title belongs to the plaintiff.
111. Other than the foregoing, the witness added that her only portion out of the suit property measures forty feet by eighty feet. For coherence, the witness underlined that her portion is 40 by 80 feet.



112. Whilst answering to further question from the court, the witness stated that same would be amenable to return the excess portion of the suit property to the plaintiff. In any event, the witness added that she got the whole land registered in her name by mistake.
113. Further, the witness stated that she admitted and acknowledged that the transfer and registration of the suit property in her name was a mistake.
114. The second witness was Christopher Nderitu Josiah. For clarity, the witness herein testified as DW2.
115. It was the testimony of the witness that on or about the year 2006, his family decided to look for a plot for purposes of purchase with a view to constructing a hostel. In this regard, the witness added that his wife, namely, the 1st defendant thereafter proceeded and searched for a suitable plot for the intended purpose.
116. Further, the witness added that in the course of searching for the suitable plot, the 1st defendant found a suitable plot within Kamiti Farmers Company Ltd and which plot belonged to the plaintiff herein.
117. It was the further testimony of the witness that thereafter, the plaintiff herein, his nephew and son together with the plaintiff proceeded to and executed a sale agreement. For clarity, it was pointed out that the sale agreement was executed on the September 22, 2006.
118. On the other hand, the witness added that upon the execution of the sale agreement, the plaintiff was paid the agreed purchase price in the sum of Kshs 300, 000/= only.
119. Other than the foregoing, the witness testified that same was thereafter shown a copy of the agreement of sale, which indicated and signified that same (witness) was indeed the purchaser.
120. Other than the foregoing, the witness testified that after the execution of the sale agreement and upon the issuance of the share certificate number 0133 by Kamiti Farmers Company Ltd, the 1st defendant and himself commenced to and indeed constructed a one storey building on a portion of the suit property. For clarity, the witness added that the named construction was duly completed and that the premises are currently used as a hostel.
121. Be that as it may, the witness further testified that on or about the year 2011, the 1st defendant and himself sought to process a certificate of title over the parcel/portion of land which same had bought.
122. In this regard, the witness has added that same thereafter proceeded to and swore an affidavit, whereby he authorized that the suit property to be transferred and registered in the name of the 1st defendant.
123. It was the further evidence of the witness that thereafter the 1st defendant procured and was issued with a certificate of title over and in respect of the suit property.
124. On cross examination by counsel for the plaintiff, the witness herein stated that it is him who sent the 1st defendant (his wife) to enter into a sale agreement with the plaintiff.
125. Further, the witness stated that he himself had gone on to the land and he saw the position and ground location in respect thereof. However, the witness stated that same could not remember the date/time when he went and viewed the land in question.
126. Whilst still under cross, the witness stated that he only went to the land after the Sale agreement had been entered into and executed.
127. Additionally, the witness stated that the sale agreement was signed on his behalf. Besides, the witness went ahead and stated that the share certificate was issued in his name.



128. Nevertheless, when pressed further, the witness contended that the share certificate was never handed over to him but was handed over to the 1st defendant (his wife).
129. Other than the foregoing, the witness added that the portion of land which ought to belong to the 1st defendant measure 40 by 80 Feet and not the entire suit property.
130. On cross examination by counsel for the 2nd defendant, the witness herein stated that the 1st defendant and himself commenced the said construction in September 2006.
131. On the other hand, the witness added that the building in question was completed/concluded in the year 2007 and that currently same is being used as a hostel under the occupation of various students from Kenyatta University.
132. With the foregoing testimony, the 1st defendant's case was duly closed.

C. 2nd Defendant's case

133. Though the 2nd defendant duly entered appearance and filed a statement of defense, same however did not file any list of witnesses, witness statement or bundle of documents.
134. On the other hand, counsel for the 2nd defendant chose to close the 2nd defendant's case without calling any witnesses or tendering any evidence.
135. In a nutshell, the 2nd defendant's case was duly closed without production or adduction of any evidence, whether oral or documentary.

Submissions by the parties:

136. Upon the completion of the hearing (production of evidence by all the concerned parties), the advocates for the parties agreed to file and exchange written submissions. In this regard, the honourable court thereafter proceeded to and circumscribed the timeline for filing and exchange of the written submissions.
137. Pursuant to and in compliance with the directions issued by the honourable court, counsel for the plaintiff filed two sets of written submissions. For clarity, the first set of the written submissions is dated the October 30, 2022, whilst the other set is dated the November 14, 2022.
138. On the other hand, counsel for the 1st defendant filed written submissions dated the November 21, 2022, whilst counsel for the 2nd defendant filed written submissions dated the November 10, 2022.
139. Suffice it to point out that the various sets of the written submissions, which have been enumerated in the preceding paragraphs, forms part and parcel of the record of the honourable court. Consequently, same shall be relied upon and taken into consideration whilst crafting the instant judgment.
140. Additionally, it is imperative to observe and underscore that the various case law which have been quoted by and on behalf of the respective parties shall also be taken into account.

Issues For Determination:

141. Having reviewed the plaint dated the November 30, 2020, together with the written statements and the attendant documents attached thereto and having taken into account the statement of defense, as well as the written witness statements and bundle of documents and having evaluated the oral testimony



tendered by the various witnesses; and finally upon consideration of the written submissions filed, the following Issues do arise and are thus germane for determination;

- i. Whether the suit property, namely, LR No Nairobi/Block 117/492 was legally and lawfully transferred to and registered in the name of the 1st defendant.
- ii. Whether the 1st defendant acquired lawful and legitimate rights to and in respect of the suit property.
- iii. Who is the lawful and legitimate proprietor of the suit property.
- iv. What reliefs ought to be granted.

Analysis And Determination

Issue number 1 & 2

Whether the suit Property, namely, LR No Nairobi/Block 117/492 was legally and lawfully transferred to and registered in the name of the 1st defendant.

Whether the 1st defendant acquired Lawful and Legitimate rights to and in respect of the suit property.

142. The plaintiff herein tendered and adduced evidence to the effect that the suit property, namely, Nairobi/Block/117/492, was lawfully and legally allocated to and in favor of one Suleiman Kihura Kibindu, now deceased. For clarity, the plaintiff added that the said deceased was her lawful husband.
143. Other than the foregoing, the plaintiff also testified that upon the death of her late husband, who was the allottee and therefore registered owner of the suit property, same applied to M/s Kamiti Farmers Company Ltd to transfer and register the suit property unto her name.
144. It was the further evidence of the plaintiff that arising from her application, the suit property was lawfully transferred to and registered in her name on or about the year 2008. For completeness, the plaintiff added that upon the transfer and registration of the suit property in her name, same was duly issued with a share certificate number 0201, touching on and concerning ownership of the suit property.
145. Other than the foregoing testimony by the plaintiff, it is common ground and imperative to recall that the 1st defendant herein lawfully admitted that the suit property hitherto belonged to and was registered in the name of the plaintiff. In this regard, there is therefore no gainsaying that prior to and before the transfer and registration of the suit property in the name of the 1st defendant, same lawfully belonged to and was the property of the plaintiff.
146. Consequently, what becomes important is whether or not the transfer of the suit property to and in favor of the 1st defendant was carried out and undertaken with the knowledge and consent of the plaintiff or otherwise.
147. Put differently, the question for determination would therefore be whether the plaintiff sanctioned or authorized the transfer and registration of the suit property to and in favor of the 1st defendant.
148. To be able to unlock the critical question that touches on and concerns the circumstances under which the suit property was transferred and registered in the name of the 1st defendant, it is imperative to recall that the 1st defendant contended that same bought and purchased the suit property from the plaintiff.



149. To this end, the 1st defendant produced and tendered in evidence a copy of (sic) sale agreement dated the 22nd of September 2006, which was stated to have been entered into between the plaintiff on one hand and Christopher Nderitu, on the other hand.
150. Suffice it to point out that whereas the impugned sale agreement was said to have been executed between the plaintiff and one Christopher Nderitu, on the other hand, evidence was variously tendered that the said Christopher Nderitu was not present at the time of the execution of the said sale agreement.
151. Additionally, it is also important to recall that whereas on one hand, the 1st defendant testified that she is the one who bought the suit property, the same 1st defendant quickly admitted that her name was neither contained nor reflected in the said sale agreement.
152. Be that as it may, it is also important to note that the impugned sale agreement, which the 1st defendant relies upon to anchor the transfer and registration of the suit property in her name touches on and concerns LR No Nairobi/Block 117/492/2 and not LR No Nairobi/Block/117/492. For clarity, the latter is the suit property.
153. Other than the foregoing, it is also common ground that the impugned sale agreement, also did not stipulate or authenticate the size/acreage of the parcel or portion of land which was (sic) being sold to and in favor of (sic) Christopher Nderitu.
154. Worse still, it is evident and apparent that the impugned sale agreement also did not contain or stipulate (sic) the purchase price, if any, that was agreed upon, either between the plaintiff and the 1st defendant or between the plaintiff and (sic) Christopher Nderitu.
155. Suffice it to point out that the purchase price or consideration is critical, essential and paramount in any transaction or contract, the impugned contract, not excepted.
156. To my mind, where a contract does not stipulate or allude to the requisite consideration, (save contracts resulting into gifts), such a contract becomes void and legally and enforceable.
157. In the premises, it is therefore my finding and holding that if the impugned transfer and registration of the suit property was anchored and premised on the sale agreement dated the September 22, 2006, then the said transaction was void. In this regard, no legal interests would therefore arise and or vests in the transferee, namely, the 1st defendant.
158. To underscore the significance and importance of consideration, it is imperative to take cognizance of the dictum in the case of *Elizabeth Wanjiru Githinji & Others versus Kenya Urban Roads Authority (KURA) & Others* (2019)eKLR, per Justice Otieno Odek J A (as her then was), where same observed and held as hereunder;

140. I am convinced and persuaded by the merits and reasoning in the local and comparative jurisprudence that a title under the Torrens system is defeasible on account of mistake, misrepresentation, fraud and illegality. For this reason, it is not sufficient for the appellants to wave an RLA or RTA title and assert indefeasibility. If a mistake is proved or total failure of consideration or other vitiating constitutional or statutory factors, an RLA or RTA title is defeasible.

159. Notwithstanding the fact that the impugned sale agreement did not stipulate or reflect (sic) consideration, there is yet another aspect to and in respect of the subject matter. In this respect, it is



- imperative to recall and reiterate the evidence that was given by the 1st defendant and essentially the 1st defendant's evidence whilst under cross examination by counsel for the plaintiff.
160. Given the importance and significance of the response by the 1st defendant, it is therefore important to reproduce the salient aspects of the said evidence.
161. For convenience same are reproduced as hereunder;
- “I do confirm that to date I am the one registered as the owner of the land. I am the one who currently holds the title/certificate of ownership of the land. I wish to state that I was only entitled to a portion of the land”.
162. Other than the answers that were given by the 1st defendant during cross examination by counsel for the plaintiff, it is also important to take cognizance of the answers which were given by the same 1st defendant whilst being questioned by the honourable court.
163. For coherence, the 1st defendant stated as hereunder;
- “I have the title to the whole land but the whole land is not mine. The other portion of land for which I have title belongs to the plaintiff herein. My portion of land in the title herein is 40/80 feet. I would wish that the excess portion of land be returned to the plaintiff.
- I got the whole land registered in my names by mistake. I agree that there was a mistake in the transfer and registration of the land in my name. I would only be entitled to a small portion of the land”.
164. My understanding of the evidence that was tendered by the 1st defendant herein, whose details have been quoted in the preceding paragraphs, confirms and authenticates that indeed the transfer and registration of the suit property in the name of the 1st defendant was informed by, *inter alia*, mistake.
165. Nevertheless, even though the 1st defendant concedes and admits that there was a mistake, the totality of the evidence that has been placed before the court, underlines that the transfer was not only mistaken but was also colored by illegality, nay corrupt practice.
166. Thirdly, it is also important to recall that even though the first defendant relies on a sale agreement dated the September 22, 2006, it is evident that even prior to entry into and (sic) execution of the impugned sale agreement, there is evidence that the 1st defendant's husband (DW2), had indeed procured and obtained a fraudulent share certificate pertaining to and in respect of (sic) LR No Nairobi/Block 117/492/2 allegedly on the September 21, 2006.
167. The question that does arise is how would the 1st defendant's husband, who is said to have facilitated the transfer in her favor acquire and obtain the impugned share certificate/transfer number 0133 dated the September 21, 2006, earlier than (sic) the impugned sale agreement dated the 22nd June 2006.
168. In my humble view, the transaction pertaining to and concerning the suit property, culminating into the registration of the suit property in favor of the 1st defendant was premised and predicated on fraud.
169. Fourthly, it is also important to underscore that the totality of the documents which the 1st defendant produced and tendered before the Honourable court and in particular, Exhibits D2, D3, D5, D6 and D7, respectively relates to and concerns LR No Nairobi/Block/117/492/2 and not otherwise.
170. Nevertheless, it is not lost on this court that the suit property which was ultimately transferred and registered in the name of the 1st defendant relate to LR No Nairobi/Block 117/492.



171. Clearly, the documentation which the 1st defendant relied upon or used to procure the certificate of title over the suit property, were foreign/strange and could not, legally facilitate the registration and acquisition of certificate of title over the suit property.
172. To my mind, whereas the 1st defendant chose the diplomatic terminology of mistake, there is clear evidence which denotes and illustrates that indeed the entire transaction was colored by fraud, illegality and corrupt practice.
173. Surely, how would the 2nd defendant (the Chief Land Registrar) facilitate the registration and issuance of a certificate of title in respect of LR No Nairobi/Block 117/492, yet the documentation presented spoke to and concerned a separate and distinct parcel of land.
174. One may wish to imagine that the error that has been itemized and illuminated herein before was innocent and mistaken, but the totality of the evidence, suggests otherwise.
175. In view of the foregoing, it is my finding and holding that in fact the plaintiff has been able to establish, demonstrate and prove incidences of fraud, illegality, un-procedural and no doubt, corrupt practice, in the transfer, registration and ultimate issuance of certificate of title in favor of the 1st defendant.
176. I am aware that a plea of fraud must not only be pleaded and particularized, but the claimant is also obligated to tender cogent, credible and believable evidence to the satisfaction of the honourable court.
177. To this end, it is appropriate to recall, restate and reiterate the dictum in the case of *Ardhi Highway Developers Ltd versus Westend Butchery Ltd & 6 Others* (2015)eKLR, where the Honourable Court of Appeal observed and stated as hereunder;

52. According to Black's Law Dictionary,

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

Section 2 of *RTA* also defines “Fraud” as follows:-

“Fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.”

53. It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly



that fraud is charged (*Wallingford v Mutual Society* (1880) 5 App. Cas.685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd's Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence V Lord Norreys* (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy V Garrett* (1878) 7 ch.D. 473 at 489). "General allegations, however strong may be the words in which they are stated, are insufficient to amount o an averment of fraud of which any court ought to take notice".

See *Insurance Company of East Africa vs. The Attorney General&3 Others*Hccc135/1998.

Whether there was fraud is, however, a matter of evidence.

178. Additionally, the standard of proof required and applicable where there is a plea of fraud was also considered, deliberated upon and affirmed by the Court of Appeal in the case of *Kuria Kiarie & 2 others versus Sammy Magera* [2018] eKLR, where the court stated as hereunder;

25. The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. See order 2 rule 4 of the *Civil Procedure Rules*.

26. As regards the standard of proof, this court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows;-

"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

179. Having calibrated on the totality of the evidence and taking into account the contents of the documentary evidence that was placed before the court, I come to the inescapable conclusion that



indeed the 1st defendant's title to and in respect of the suit property is illegal, unlawful and legally untenable.

180. Premised on the foregoing findings and holding, it is therefore evident and apparent that the answer to issues number one and two, which were enumerated at the onset of this discourse are answered in the negative.
181. For the avoidance of doubt, it is my finding and holding that the transfer and registration of the suit property in favor of the 1st defendant was neither lawful nor legal.
182. Additionally, it is also my finding and holding that borne out of the illegality, which I have alluded to in the preceding paragraph, the 1st defendant did not acquire or accrue, any lawful interests to and in respect of the suit property.

Issue number 3

Who is the lawful and legitimate proprietor of the suit property.

183. At the onset, the 1st defendant herein conceded and acknowledged that the suit property lawfully belonged to and was registered in the name of the plaintiff. In this regard, it is therefore common ground that the ownership rights of the plaintiff at the onset are not in dispute.
184. Secondly, the 1st defendant contended that it is the plaintiff who sold to and in her favor the suit property, culminating into the ultimate transfer and registration of the suit property in her name.
185. Thirdly, during cross examination by counsel for the plaintiff, the 1st defendant stated as hereunder;

“.....I have not brought the sale agreement that my husband executed. I want that the larger parcel of land to revert to the plaintiff but the same should allow that I be granted my portion of the land.
I know that the land previously belonged to the plaintiff.
The plaintiff's share certificate is dated the November 5, 2008”.
186. Premised on the foregoing evidence, which fell from the lips of the 1st defendant, and coupled with the finding of the court in respect of the 1st and 2nd issues, it is therefore common ground that the suit property should and ought to revert to the plaintiff.
187. In a nutshell, it is my finding and holding that the transfer and registration of the suit property in the name of the 1st defendant having been found to be unlawful and illegal, it thus means that the suit property must return and revert to the lawful and legitimate owner thereof.
188. Put differently, I come to the conclusion that the suit property lawfully belongs to and ought to be registered in the name of the plaintiff, who was admittedly, the registered owner thereof prior to the impugned transactions that affected the registration status thereof.
189. To this end, it is important to underscore and observe that the 1st defendant was unable to prove and justify the lawful process culminating into the transfer, registration and the issuance of the certificate of title of the suit property.
190. In this respect, I beg to point out that it is not enough for the 1st defendant or such other litigant, to merely wave a certificate of title and imagine that the existence of such certificate of title suffice as proof of ownership.



191. To the contrary, it behooves the title holder to justify and authenticate the legality of the impugned title, particularly where same is under challenge. For clarity, the title holder is under an obligation to show how, the same came to be registered as the owner of the named parcel of land.
192. Without belaboring the point, it is appropriate to adopt, restate and reiterate the holding/dictum of the Court of Appeal 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.

193. Simply put, the 1st defendant was unable to justify, authenticate and demonstrate the legality of the certificate of lease/title which was issued in her favor.
194. In the absence of justification/ proof of legality and coupled with the credible evidence that has been placed before the honourable court, there is no hesitation on the part of the honourable court in declaring that the suit property lawfully and legitimately belongs to the plaintiff.

Issue number 4

What reliefs ought to be granted.

195. In the course of the hearing of the subject matter, the 1st defendant tendered evidence that though same was registered as the owner of the suit property, her rights and or interests related to only a portion thereof. In this regard, the 1st defendant pointed out that her share of the suit property was 40 by 80 feet.
196. Additionally, DW2 who is the husband of the 1st defendant also echoed and reiterated the 1st defendant's evidence. For clarity, DW2 stated as hereunder whilst cross examination by counsel for the plaintiff

“We bought a portion of the land. The portion was approximately 40 by 80 feet”.

197. Premised on the foregoing evidence, the 1st defendant contended that the honourable court should therefore proceed to order and direct that the named portion measuring 40 by 80 feet be excised from the suit property and be awarded unto same.
198. Similarly, counsel for the 1st defendant also made submissions, wherein same contended that the honourable court should be pleased to excise a portion measuring 40 by 80 feet and to direct that a certificate of title does issue to the 1st defendant.
199. For coherence, it is important to reproduce the segment of the submissions by counsel for the 1st defendant as pertains to this limb.
200. For convenience, same are reproduced as hereunder;

“The above however notwithstanding, in accordance with the said agreement of sale and subsequent share certificates issued by the land selling company what was sold to the defendant was referred to as Nairobi/Block 117/492/2 being a portion to be severed from Nairobi/Block 117/492 the suit premises herein but however it would appear that upon



presenting the transfer documents, the 2nd defendant inadvertently processed and issued the defendant herein with a certificate of lease of the entire suit premises which fact she did not realize until year 2019 when the plaintiff called and informed her of the same.

The defendant in her evidence in court confirmed that what she bought through her husband was a portion measuring 40*80 feet where the hostel (building) sits on”.

That being the case, by dismissing or striking the case herein, the same would not be the solution and by embracing the current trend of working towards an amicable solution in dispute resolutions, I humbly urge your lordship to humbly consider issuing the following orders:-

- I. The 2nd defendant (being the author of the misfortune herein) at its own cost do authorize a government surveyor from its department to survey and demarcate the portion measuring 40*80 Feet on which the building on which the hostel sits in land parcel Nairobi/block 117/492 within such a time as this honorable court may deem fit
- II. Upon the said demarcation, the 2nd defendant at its own cost do issue the 1st defendant with a certificate of lease for the said demarcated portion
- III. The 2nd defendant do issue the plaintiff with a certificate of lease for the remainder of the portion thereof at her own cost (having not incurred any costs in having the disputed lease issued)
- IV. The court do give a mention date to confirm compliance and further orders of the court

201. Despite the invitation by the 1st defendant on the basis of her testimony and coupled with the moving submissions that have been rendered on her behalf by learned counsel, I am unable to accede to the request or invitation for two reasons.

202. Firstly, it is trite and established that no party is at liberty to tender evidence that is at variance with the pleadings that have been placed before the honourable court. In this regard, the contention by the 1st defendant that same is only entitled to 40 by 80 feet out of the suit property is at variance of the statement of defense.

203. Other than the foregoing, it is common ground that the 1st defendant herein did not file any counter-claim. Consequently, the claim that same is therefore entitled to a portion of the suit property, is mounted and propagated in vacuum.

204. In this respect, it is important to underscore and reiterate the importance of the doctrine of departure. For clarity, the provisions of order 2 rule 6 of the *Civil Procedure Rules* 2010 are apt and succinct.

205. Other than the foregoing provisions, the importance and significance of the doctrine of departure was underlined and underscored vide the holding in the case of *Dakianga Distributors Ltd versus Kenya Seed Company Ltd* (2015)eKLR, where the Court of Appeal stated and observed as hereunder;

“A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No 5) where the learned authors declare:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present



their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

Sir Jack Jacob in an article entitled “The Present Importance of Pleadings” published in (1960) Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in *Malawi Railways Limited v Nyasulu* [1998] MWSC 3 states of the importance of pleadings:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...”

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “any other business” in the sense that points other than those specific may be raised without notice.”

In *Libyan Arab Uganda Bank for Foreign Trade and Development & Anor v Adam Vassiliadis* [1986] UGCA 6 the Court of Appeal of Uganda cited with approval the dictum of Lord Denning in *Jones v National Coal Board* [1957] 2 QB 55 that:

“In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”

This court in *Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others* (supra) cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC* SC 91/2002 where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:

“... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

The judges in that case also stated:

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”



Mr Kimamo Kuria, for the respondent, faulted the learned judge for giving credit of sums alleged in evidence as having been paid by the appellant to the respondent Mr Bosire Gichana, for the appellant, while supporting that part of the judgment believed that the learned judge was entitled to give such credit and that it was not necessary to amend the defence.

We are of the respectful opinion that the learned judge, after holding correctly that parties were bound by their pleadings erred in holding that the appellant was entitled to credit on sums which were not pleaded in the defence at all. The appellant was bound by its pleading in the defence where it claimed that it had issued three cheques in replacement of dishonoured cheques which its witness admitted, and the trial court so found, that they were cheques issued in respect of other independent transactions.

206. Secondly, the invitation by the 1st defendant is also not tenable because no evidence was placed before the court to vindicate the claim that what the 1st defendant (sic) was 40 by 80 feet.
207. To the contrary, the document touted as the sale agreement dated the September 22, 2006 and upon which the 1st defendant's claim is anchored, was silent on the portion/ acreage of land, if at all that was being sold.
208. In the premises, it is difficult, nay impossible to ascertain and authenticate the foundation upon which the 1st defendant can now invite the honourable court to find and hold that same is entitled to 40 by 80 feet out of the suit property.
209. Other than the foregoing claim that was mounted on behalf of the 1st defendant, it is also important to point out that the plaintiff also sought for a plethora of reliefs, *inter-alia*, a claim for mesne profits.
210. Nevertheless, even though the plaintiff herein sought for mesne profits, there is no gainsaying that the pleadings before hand did not particularly implead mesne profits or particularize same either in the manner envisaged under the law or at all.
211. Suffice it to point out that a claim for mesne profits is akin to a claim for special damages. Consequently, it behooves the claimant to not only plead and particularize same, but the claimant is also required to tender and adduce credible evidence to prove such a claim. For clarity, it behoved the plaintiff to specifically prove the claim for mesne profits.
212. In the absence of the requisite pleadings and particulars pertaining to mesne profits, it is common knowledge that no award can issue or be granted on that account.
213. In this respect, I beg to cite, adopt and reiterate the holding of the Court of Appeal in the case of [Christine Nyanchama Oanda versus Catholic Diocese of Homa Bay Registered Trustees](#) [2020] eKLR.
214. For clarity, the Court of Appeal stated and stated as hereunder;

“It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved. In the case [Peter Mwangi Msuitia & Another v Samow Edin Osman](#) [2014] eKLR, this court held as follows:



“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

215. In my humble view, the claim for Mesne Profits has neither been established nor proved by the plaintiff herein, either to the satisfaction of the honourable court, or in accordance with the law.

Final Disposition:

216. Having evaluated and analyzed the issues which were highlighted and amplified in the body of the Judgment, it must have become apparent and evident that the plaintiff's claim is meritorious.

217. Consequently and in the premises, I am minded to and do hereby enter judgment in favor of the plaintiff as hereunder;

- i. An order be and is hereby made that the certificate of lease issued to the 1st defendant was obtained un-procedurally, illegally and/or fraudulently.
- ii. The 2nd defendant be and is hereby directed to cancel, rescind and nullify the registration of the 1st defendant as the owner of LR No Nairobi/Block117/492.
- iii. The plaintiff be and is hereby declared to be the lawful and *bona fide* and legal owner of all that parcel of land known as Nairobi/block 117/492.
- iv. Consequently, the 2nd defendant be and is hereby ordered and directed to issue the plaintiff with a certificate of title of all that parcel of land known as Nairobi/block 117/492.
- v. The 1st defendant either by herself, its agents, servants and/or employees be and are hereby ordered to vacate and deliver vacant possession of suit property, namely Nairobi/block 117/492 within a duration of six (6) months (180 days) from the date hereof.
- vi. In default to vacate and hand over vacant possession of the suit property to and in favor of the plaintiff in terms of (v), the plaintiff shall be at liberty to levy eviction against the 1st defendant without further reference to the court. For clarity and eviction order shall issue against the 1st defendant upon the lapse of the stipulated duration.
- vii. In the event that the plaintiff is obliged to levy and execute the eviction of the 1st defendant from the suit property, the costs/charges incurred shall be certified by the Deputy Registrar and same shall be borne by the 1st defendant.
- viii. An order of permanent injunction be and is hereby issued restraining the 1st defendant and its agents from interfering, intermeddling and/or in any way dealing with the property or any portion thereof.
- ix. The claim for mesne profits be and is hereby declined.
- x. Costs of this suit be and are hereby awarded to the plaintiff as against the defendants jointly or severally.

218. It is so ordered.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

Mr. Amuyunzu for the plaintiff.

Mr. Gathoga for the 1st defendant.

Ms. Chesinya for the 2nd Defendant.

