



**Twin Properties Investment Limited v Kasarani Settlement Limited (Formerly Known as Kasarani Resettlement Project) & 2 others (Environment & Land Case 532 of 2010) [2022] KEELC 15625 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15625 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 532 OF 2010  
LN MBUGUA, J  
DECEMBER 8, 2022**

**BETWEEN**

**TWIN PROPERTIES INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**KASARANI SETTLEMENT LIMITED (FORMELY KNOWN AS KASARANI  
RESETTLEMENT PROJECT) ..... 1<sup>ST</sup> DEFENDANT**

**GLADYS AUMA ODHIAMBO ..... 2<sup>ND</sup> DEFENDANT**

**COUNCILLOR NOBERT ODUOR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Background**

1. This suit was filed way back on November 5, 2010 and for the better part of its lifespan, it was sustained through various applications, with the actual trial commencing 8 years later in year 2018. By then, the City Council of Nairobi was a party in the suit as a 4<sup>th</sup> defendant. The plaint was amended severally such that with the final amendment of 20.2.2017, the said party was removed from these proceedings. Two other parties namely Simon Nyoro Ngugi and Francis Kariuki were also joined in these proceedings at a latter stage of the suit, but were also removed in the latest amendments.
2. Vide the Further Amended Plaint dated February 20, 2017, the Plaintiff claims to be the bonafide, equitable, beneficial and legal owner entitled to ownership and possession of the premises known as plot No 44 on LR No 14235 (IR Number 61713) situated in Kasarani within Nairobi. They contend that they purchased the suit premises on May 18, 2005 from one Simon Nyoro Ngugi, a former member of the 1<sup>st</sup> Defendant (then known as Kasarani Resettlement Project) to whom the 1<sup>st</sup> Defendant had allotted the subject property on September 29, 2002.



3. The plaintiff further pleaded that sometimes in year 2010, while in the process of developing the suit land, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants appeared at the suit premises claiming ownership thereof. By then, the Plaintiff was constructing a block of 2 bed-roomed self-contained residential flats of which they had constructed the 1<sup>st</sup> floor when the premises were demolished by the Defendants on October 29, 2010. The plaintiff contends that they suffered losses amounting to Kshs 7, 296,000/=.
4. It is the case of the plaintiff that the 1<sup>st</sup> Defendant fraudulently colluded with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to purport to sell the suit property to them while it was not available for sale. In the circumstances, the plaintiff prays for judgement to be entered against the Defendants jointly and severally for;
  - a. Kshs 7,296,000.00.
  - b. A declaration that the Plaintiff is the legal or equitable proprietor of all that parcel of land known as plot No 44 in LR No 14235 situated in Kasarani Nairobi.
  - c. A permanent injunction to restrain the Defendants whether by themselves, their servants, employees or agents or otherwise howsoever from entering the suit premises or in any way interfering with the Plaintiff's quiet possession of the suit premises.
  - d. General damages including damages for loss of expected rental income.
  - e. Exemplary damages.
  - f. Costs of the suit.
  - g. In the alternative to prayer (b) the court be pleased to award compensatory damages plus interest to the plaintiff against the Defendants.
5. The 1<sup>st</sup> And 2<sup>nd</sup> Defendants opposed the Plaintiff's claim vide their joint amended Defence and Counterclaim dated April 11, 2017, where they contend that the 1<sup>st</sup> Defendant was incorporated in 2007 and has never traded as Kasarani Resettlement project, thus Simon Nyoro Ngugi has never been its member, adding that the suit property was transferred to the 1<sup>st</sup> defendant by an entity known as Research and Development Forum for science Led Development in Africa in year 2007.
6. In the Counter Claim, it is contended that the 2<sup>nd</sup> Defendant is the legitimate owner of the suit plot, having acquired the same from the 1<sup>st</sup> defendant at a cost of ksh.3 million. The 2<sup>nd</sup> Defendant denies having carried out any demolitions on the suit land.
7. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants pray for the following orders in the Counter-Claim.
  - a. A declaration that the 2<sup>nd</sup> Defendant is the legitimate and registered proprietor of Plot No 44 on Land Reference No 14235 (IR 61713) situated at Kasarani.
  - b. A Declaration that the Ownership Certificate and Letter of Allotment held by the 2<sup>nd</sup> Defendant was legally obtained and bonafide.
  - c. A Declaration that the Ownership Certificate by the Plaintiff was obtained fraudulently and thus null and void.
  - d. An order of injunction restraining the Plaintiff either by itself, its agents, servants or otherwise from encroaching on, trespassing into, developing, occupying, digging, cutting down trees or in any other manner interfering with the 2<sup>nd</sup> defendant's quiet possession and ownership,



enjoyment, occupation or development of her property known as Plot No 44 on Land Reference No 14235 (IR No 61713) situated at Kasarani within Nairobi.

- e. An order of mandatory injunction compelling the Plaintiff by itself, its agents, servants and/ or agent to remove all the material and foreign debris brought by the Plaintiff or its servants and/or agents to the 1<sup>st</sup> Defendant's property described as Plot No 44 on Land Reference No 14235 (IR No 61713) situated at Kasarani in Nairobi.
  - f. General damages for trespass.
  - g. Costs of this suit, any other further relief this Honourable Court may deem fit to grant.
8. The 3<sup>rd</sup> Defendant filed an amended statement of defence dated 12.4.2017 denying the allegations contained in the plaint and contended that he purchased the suit property with the 2<sup>nd</sup> Defendant from the 1<sup>st</sup> Defendant.

### **Plaintiff's case**

9. During the trial the case of the plaintiff was advanced by 3 witnesses. PW1, Tom Mogusu Ayienda adopted his witness statement dated March 1, 2017 as his evidence in chief. He described himself as an agent of the plaintiff. That sometime in early 2005, he was tasked by the plaintiff to look for a suitable plot to purchase. He thereafter met his friend one Wanyoike who was working in the office of the 1<sup>st</sup> Defendant and who introduced him to Simon Nyoro Ngugi who then sold the suit plot to the Plaintiff through its director, Robert N. Masese. The plot sold was no. 44 within the parcel of land LR No 14235 (IR No 61613). The sale was witnessed by a lawyer known as John Haran Masese on February 18, 2005.
10. In cross-examination Pw1 stated that in 2004, the Plaintiff instructed him verbally through its director Chad Owando and which instructions were confirmed by the other director Robert Masese to identify a plot. He further stated that he went to Kasarani Resettlement project where he met one Wanyoike at the front office, the said offices were a simple structure at Kasarani. Wanyoike then introduced him to Simon Nyoro Ngugi who was the owner of the available plot No 44 and they proceeded to negotiate the purchase price with him. Wanyoike had also introduced Pw1 to the surveyor known as Kariuki.
11. Pw1 duly informed the plaintiff about the negotiations and the purchase price was agreed at Kshs 650 000. The purchase price was paid to Simon Nyoro and not Kasarani Re-settlement limited, whereby the latter confirmed that Simon Nyoro was the owner of the suit plot.
12. However, when the plaintiff embarked on developing the suit property, some people came along claiming the suit plot. The Plaintiff's development was demolished at night when the ground and first floor had been done.
13. On re-examination, Pw1 stated that Simon Nyoro was a member of Kasarani Resettlement project and the same was confirmed through a Mr Kariuki who was the surveyor of Kasarani Resettlement project and is now a director of Kasarani Settlement Limited and Father Gaitho (deceased) who was a director of the 1<sup>st</sup> Defendant.
14. PW2 is Simon Nyoro Ngugi who adopted his witness statement dated March 2, 2017 as his evidence in chief. He told the court that he is an investor who develops properties for rent. He produced as P Exhibit No 1 a sale agreement for sale of the suit land from himself to the plaintiff and his certificate of its ownership as Exhibits 2.



15. It was his testimony that he bought the suit property on 29.9.2002 from Kasarani Resettlement Project which later became Kasarani Settlement Limited with the late Bishop Gaitho and Mr Kariuki as officials. On 18.2.2005, he sold the plot at the sum of Kshs 650 000 to the plaintiff with approval by officials of Kasarani Resettlement Project, of which he gave the plaintiff a Power of Attorney which he produced in evidence as Plaintiff Exhibit 3. He pointed out the physical property and the beacons to the plaintiff.
16. On cross-examination, pw2 stated that the suit property belonged to Kasarani Resettlement project which later changed its name to Kasarani Settlement limited. He does not have a register of the members of that project. He contends that plot No 44 was carved out of parcel LR No 14235 but he does not know the original owner of the larger plot and that he did not conduct a search before purchase.
17. He reiterated that he is an investor who buys property for developments. He also stated that the power of Attorney indicated that the plot was in a Government of Kenya scheme.
18. PW3, Kennedy Ochoki Masese was the Plaintiff's manager and former director. He told the court that all the Plaintiff's directors now reside in the USA. He adopted his witness statements dated March 1, 2017 and November 9, 2017 as his evidence in chief. It was his testimony that Kasarani Resettlement project is the precursor to Kasarani Settlement Limited and that the certificate of ownership issued to them emanated from Kasarani Resettlement Project. He produced the said document as Exhibit No.4. He also produced as Exhibit 5 a bank slip of Kshs 175, 000/= paid in 2009 to Kasarani Settlement Limited in relation to the suit land. However, the said money has since been refunded back to him. The plot was vacant at the time of purchase.
19. Pw3 avers that after a dispute arose as to the ownership of plot No.44, Mr. Thomas Mogusu Ayienda and himself went to Francis Kariuki who was the former secretary of the 1<sup>st</sup> Defendant and who was also the proprietor of Savanna Land surveyors which had been engaged by the 1<sup>st</sup> Defendant to survey and allocate plot numbers to its members in the larger parcel LR No 14235. Mr Kariuki confirmed through a note to the then chairman of Kasarani Resettlement project, Mr. Gaitho that the Plaintiff was the lawful owner of plot 44.
20. Pw3 avers that in March 2010, just when the plaintiff was about to construct the 2<sup>nd</sup> floor of the suit plot, the defendants appeared claiming ownership of the land. The dispute spilled over to Kasarani police station. However, on 29.10.2010, his building was demolished. The plaintiff consulted a valuer who pegged the destruction at the sum of Kshs 7296235. He avers that had they finished the construction, they could be earning Kshs 450 000 per month.
21. When Cross-examined, Pw1 stated that the Plaintiff bought the suit property from Simon Nyoro and that a search was conducted before the purchase with directors of the 1<sup>st</sup> Defendant and at the DO'S office and not at the lands office as the land was not registered at the time. He further stated that Simon Nyoro told them that he was given the property by the President through a scheme for settlement through provincial administration. On October 29, 2020 when they went to Kasarani police station, Simon Nyoro indicated to the police that he got the property as a squatter.
22. Pw3 further stated that they do not have a certificate of incorporation of Kasarani Resettlement project nor its directors. He also stated that the signatories to the sale agreement in respect to the suit land were Mr Simon Nyoro and Mr Masese and that Mr Nyoro's certificate of ownership of plot No 44 was dated 2002, issued by Kasarani Resettlement Project.



23. PW3 also stated that he learnt from members who had bought and built their properties in the scheme that the initial owner of LR No.14235 was Science and Research in Africa. He further stated that the current directors of Kasarani Settlement Limited include George Gatheca and that the Plaintiff paid Kshs 175,00/- to Kasarani Settlement Limited in order that it could settle a loan to secure the larger title to the suit property since they owned a property in the scheme and the land was about to be auctioned.
24. Pw3 further stated that they had submitted building plans but they did not have approvals at the time of construction and that they have none up to date.
25. He stated that he did not have receipts relating to the claim for special damages and that he was not aware of Milimani HC Commercial Case No 148/2007.
26. He also stated that they don't pay land rates and land rent, adding that every plot owner is a shareholder in Kasarani Settlement Limited.

### **Defence Case**

27. Even though the 1<sup>st</sup> and 2<sup>nd</sup> defendants have proffered a joint defence on one side, with the 3<sup>rd</sup> defendant having a separate defence statement, it is apparent that the three parties have joined issues, noting that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are alleged to be spouses and they bought the suit plot together from the 1<sup>st</sup> defendant. In the circumstances, the case of defendants will be analysed together.
28. DW1, Gladys Auma Adhiambo is the 2<sup>nd</sup> Defendant. She adopted her witness statement dated April 11, 2017 as her evidence in chief. She produced D Exhibits No 1-18 which are documents on the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's bundle dated April 11, 2017. Her testimony is that she is the legitimate owner of the suit property described as plot No 44 on parcel LR 14235. That Kasarani Settlement Limited whose membership she holds got the land from Research Development Forum after a sale through public auction in year 2007. Her membership is N.39.
29. Dw1 further stated that she had found people digging trenches on the suit land and she duly reported the matter to the police; she was told to continue developing the suit land. However, the plaintiffs defied the directions of the police, prompting the 2<sup>nd</sup> defendant to file Case No CMCC No 3552 of 2010 against the plaintiffs. That matter is still pending in court to date. Dw1 denies being responsible for the demolitions carried out on the suit land.
30. On cross-examination, Dw1 stated that she took possession of the suit land in year 2010. She does not know that Kasarani Settlement Limited was preceded by Kasarani Resettlement project. She is aware that there was an original allottee who had failed to pay the purchase price but did not know the name of the said allottee.
31. She stated that the 3<sup>rd</sup> Defendant is her husband and that they raised ksh.3 million to purchase the suit property, but ownership documents only bear her name as her husband is not a member of Kasarani Settlement Limited.
32. Referred to the receipt relating to purchase of the suit property, she stated that it reads February 16, 2030, but they bought the land in year 2010.
33. When re-examined, she stated that year "2030" captured on the receipt for purchase was an error as year 2030 is in the future.
34. DW2, Nobert Oduor is the 3<sup>rd</sup> Defendant. He adopted his witness statement dated April 12, 2017 as his evidence in chief. He produced documents in his bundle of documents as Exhibits No 19-28. It was his testimony that the 2<sup>nd</sup> Defendant is his wife and that they raised the purchase price jointly,



though the sale agreement was signed by the 2<sup>nd</sup> Defendant alone. They were given vacant possession of the suit premises on 17.2.2010, and the 2<sup>nd</sup> defendant started depositing building materials thereon. However, there after, the plaintiff trespassed on the suit land and started a marathon day and night construction even illegally using some of the materials deposited by the 2<sup>nd</sup> defendant. The matter was reported to the police.

35. Dw2 avers that the original grantee of parcel LR No 14235 was an entity known as Research and Development Forum for Science Led Development in Africa registered Trustee. From the entries in the title, he came to learn of the case HCCC 148 of 2007 where judgment had been entered in favour of Equidebt who sought to execute the decree by way of public Auction of parcel LR 14235 whereby the land was transferred to the 1<sup>st</sup> defendant.
36. When cross-examined, Dw3 stated that he learnt about the suit property through his friends Mburu and Eng. Kamande who were members of the 1<sup>st</sup> Defendant and who introduced him and his wife to the company. He further stated that Kasarani Resettlement project was not registered although it was associated with Bishop Gaitho. He also averred that Kasarani Settlement Limited was incorporated in 2007 though he does not know the original allottee prior to registration of the 1<sup>st</sup> Defendant as proprietor of the suit property.
37. Referred to the statement made to the police by Boniface Isack Muturi Kanini who was a treasurer of Kasarani Resettlement project, he stated that Mr Boniface had stated in his statement that Kasarani Settlement Limited was formed to save the larger parcel LR No 14235 from being auctioned and those who did not pay Ksh 175, 000, their plots were repossessed, and that plot No 44 was among those repossessed and sold to the 2<sup>nd</sup> Defendant.
38. Dw2 also stated that he was not aware of the history of the land.
39. DW3, George Gatheca Kinyanjui was introduced himself as a director of the 1<sup>st</sup> Defendant. He adopted his witness statement dated April 10, 2017 as his evidence in chief. He stated that the 1<sup>st</sup> Defendant is the registered owner of Land Reference Number 14235 (IR No 61713) by way of purchase from Research and Development Forum for Science Led Development in Africa Registered Trustees following a public auction after determination of High Court Civil Case No 148 of 2007.
40. He further stated that in 2007, the shareholders and members of the 1<sup>st</sup> Defendant subdivided the land to sell and allot the plots to its members and the 2<sup>nd</sup> Defendant being registered member No 39, she was allotted plot No 44 and upon payment of the purchase price of ksh.3 million, she was issued with an ownership certificate awaiting processing of title deed.
41. He stated that the 1<sup>st</sup> Defendant has never had dealings with the Plaintiff or Simon Nyoro Ngugi and has never approved any transaction between them and that the ownership certificates in the Plaintiff's documents are not genuine certificates issued by the 1<sup>st</sup> Defendant. He also stated that the 1<sup>st</sup> Defendant has never traded under the name and style of Kasarani Resettlement Project and that the 1<sup>st</sup> defendant was incorporated in year 2007. He also stated that the 1<sup>st</sup> Defendant did not receive any payment or cheque of Kshs 175, 000/= from the Plaintiff.
42. When cross-examined, Dw3 stated that the 2<sup>nd</sup> Defendant was an original member of Kasarani settlement and that she got plot No.44 as an original member while he got Plot No's 93 and 17 and that he paid Kshs 350,000 for his plots and nothing else. As per the agreement dated February 16, 2010, they sold to the 2<sup>nd</sup> defendant the suit plot at Kshs 3 million and her certificate of ownership was issued though he could not recall when she became a member.



43. Dw3 stated that the history of the land is long. They had bought the land from one Adhiambo who had taken a loan from the bank with the title as security. Adhiambo was sued by the bank and the title was auctioned but since they had developed the land, they decided to pay Kshs 175, 000/= each so as to salvage the property.
44. He further stated that years ago, the land had been taken by the court but a court order reverting the land back to them was issued and that is when people subscribed as members.
45. He stated that they were never known as Kasarani Resettlement Project at any given time, and that one could only become a member upon member registration but there were no payments for registration. People started entering the suit land about 20 years ago.
46. DW3 also stated that Boniface Isaac Kanini is a director of the 1<sup>st</sup> Defendant but his statement that those who did not pay to salvage the land, their plots were repossessed is something he could not comment on. He stated that he knows plot No 44 was sold to the 2<sup>nd</sup> Defendant which was paid for by her husband, the 3<sup>rd</sup> Defendant. He stated that to say that the original owner of plot No.44 was Simon Nyoro who sold it to the Plaintiff is something he does not know and he is not aware that the Plaintiff deposited Kshs 175, 000/= in their bank.
47. He averred that he knows Mr Gaitho as he was their chairman during the time they had problems but he left and Mr Kariuki was their secretary and surveyor and that the said Kariuki works under Savana Land surveyors to date.

### **Submissions**

48. The Plaintiff's written submissions are dated March 3, 2022, and October 6, 2022. They aver that the 2<sup>nd</sup> Defendant's testimony was contradictory thus Plaintiff's evidence should stand. It was pointed out that in her defence and counterclaim and witness statement, the 2<sup>nd</sup> Defendant avers that she was the original allottee of the suit land from the 1<sup>st</sup> Defendant in 2007 but later stated that she purchased it in 2010 from the 1<sup>st</sup> Defendant and that she did not know the original allottee.
49. It was also submitted that DW3 also contradicted himself when he stated that that the 2<sup>nd</sup> Defendant was an allottee and that allottees were not paying anything but he later changed and stated that the 2<sup>nd</sup> Defendant paid Kshs 3 million as purchase price for the suit land.
50. It was further submitted that there is evidence that Kasarani Resettlement project became Kasarani Settlement Limited, pointing out that Boniface Isaack Muturi Kanini, a director of the 1<sup>st</sup> Defendant recorded a statement with the police in which he stated that all members of Kasarani Resettlement project came together and contributed money to save the plots under the scheme and further that at the police station, he realized that there was no need for repossession of plot No 44 so as to make it available for sale to other persons.
51. The Plaintiff argues that they need injunction orders against the Defendants in order to bar them from any future interference with the suit land against its interest.
52. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' submissions are dated September 28, 2022, where they have addressed the following issues;
  - a. Who is the rightful owner of plot No 44 on LR No 14235 situated at Kasarani area?
  - b. Whether the Plaintiff is entitled to the reliefs sought in the plaint?
  - c. Who bears costs of the suit?



53. They submitted that the 1<sup>st</sup> Defendant's director's evidence that the 2<sup>nd</sup> Defendant is the 1<sup>st</sup> Defendant's member No39 and that during subdivision and allotment, she was allocated plot No 44 after paying a purchase price of Kshs 3 million was uncontroverted. They further submitted that the said witness disputed the share certificates and list of documents produced by the Plaintiff stating that that the same did not emanate from the 1<sup>st</sup> Defendant.
54. They also submitted that DW2's testimony was corroborated by the evidence of DW3 that the 2<sup>nd</sup> Defendant purchased the suit land. They added that Simon Nyoro whom the Plaintiff's claim stems from was not a director of the 1<sup>st</sup> Defendant thus he had no capacity to sell plot No 44 to the Plaintiff.
55. It was their submission that an injunction in the form sought by the Plaintiff under prayer 4 cannot be issued as the same has been overtaken by events. They relied on the cases of *Habiba Ali Mursal & 4 others v Mariam Noor Abdi* [2018] eKLR, *Moses M Wairimu & 24 others v Kenya Power & Lighting Co Ltd & another* [2020] eKLR as well as the case of *Joseph Oduor Anode v Kenya Red Cross Society* [2012] eKLR.
56. The 3<sup>rd</sup> Defendant filed written submissions dated September 30, 2022 addressing the following issues;
- Whether Kasarani settlement limited was formerly known as Kasarani Resettlement Project.
  - Whether Kasarani Settlement Limited was the previous owner of the land, LR No 14235.
  - Whether there was a valid sale of the suit land known as plot No 44 on LR No 14235 and to whom.
  - Whether there was trespass to the land on the part of the Plaintiff in respect to the suit land.
  - Whether an order of injunction should issue.
57. The 3<sup>rd</sup> Defendant submitted that DW3 led evidence that the original registered owner of 14235 (IR No 61713) was Research Development Forum for Science led Development in Africa Registered Trustees and that the 1<sup>st</sup> Defendant became the registered owner of the said land following a public auction after determination of High Court Civil Case No 148 of 2007. Thus the suit land was owned by Kasarani settlement Limited and not Kasarani resettlement project.
58. It was also submitted that the 4 bankers cheques of Kshs 750,000/= being payment of the purchase price of the suit land were drawn by him as the 2<sup>nd</sup> Defendant's spouse and that the 1<sup>st</sup> Defendant issued the 2<sup>nd</sup> Defendant with an ownership certificate and a receipt proving that the suit land was validly sold to the 2<sup>nd</sup> Defendant.
59. He submitted that upon purchase of the suit plot he took possession of the same together with the 2<sup>nd</sup> Defendant and that it is the plaintiff who trespassed on the suit land, fenced it and started erecting a storied building.
60. It was further submitted that the 2<sup>nd</sup> Defendant is entitled to to all the rights and privileges appertaining to her as provided under section 24 and 25 of the *Land Registration Act* thus she should be awarded the prayers sought in the counterclaim as well as Kshs 3 million worth of general damages.
61. He relied on the case of *Park Towers v John Mithamo Njika et all* [2014] eKLR and the case of *Nakuru Industries Limited v SS Mehata & Sons* [2016] eKLR.



## Determination

62. There is no controversy that the suit plot is identified as plot No 44 and is part of a larger parcel registered as LR No 14235 situated in Kasarani - Nairobi. There also appears to be no dispute that the proprietor of the large parcel No 14235 is the 1<sup>st</sup> defendant. I deem it fit to frame the issues falling for determination as follows;
- a. Who is the legitimate owner of plot No 44 situated within parcel LR 14235 as between the plaintiff and the 2<sup>nd</sup> defendant.
  - b. What relief is available to the parties and who should bear the costs of the suit.
63. It is trite law that he who alleges bears the burden of proving the case as was held in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR. In the Court of Appeal case of *Attorney General & 6 others v Mohamed Balala & 11 others* [2014] eKLR, the court made reference to its own decision in *Salem Ahmed Hasson Zaidi v Faud Hussein Humeidan* [1960] EA 92, where it was held that:
- “... If a party neglects to produce evidence and to prove his claim as he is bound to do, the court can proceed to decide the suit on such materials as is actually before it, and that decision so pronounced shall have the force of a decree on the merits notwithstanding the defaults of the party.”
64. The provisions of section 107 of the *Evidence Act* further provides that;
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.
65. While section 109 of the aforementioned *Act* further provides as follows:
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

## Ownership of Plot No 44

66. The Plaintiff claims that it owns the suit plot by virtue of purchase from one Simon Nyoro Ngugi and to this end, they have produced the sale agreement dated February 18, 2005 between the Plaintiff and PW2 (Simon Nyoro Ngugi). PW2 led evidence that he bought the suit plot from an entity known as Kasarani Resettlement Project in 2002, which later registered itself as Kasarani Settlement Limited.
67. On the other hand, the case of the defendants is that the 1<sup>st</sup> Defendant was incorporated in the year 2007 and parcel LR No 14235 was transferred to it on January 15, 2008, thus the 1<sup>st</sup> defendant could not have sold the suit plot to PW2 when it did not even exist in year 2002. It was the defence case that 1<sup>st</sup> Defendant has never traded as Kasarani Resettlement Project, adding that the 2<sup>nd</sup> defendant lawfully bought the suit plot from the 1<sup>st</sup> defendant.
68. The question is, who as between the plaintiff and the 2<sup>nd</sup> defendant has proffered tangible evidence to prove they own plot No 44. It is noted that the said plot is not registered but it emanates from the large parcel registered as LR 14235. The plaintiff has an ownership certificate dated 27.4.2005 in its name issued by Kasarani Resettlement project, having bought the land from Simon Nyoro, who also has a



certificate of ownership issued by the same entity dated 29.9.2002. The 2<sup>nd</sup> defendant too has her own certificate of ownership issued by Kasarani Settlement limited dated 16.2.2010.

69. From the outset, I must point out that these kind of documents (certificate of ownership) do not confer any kind of proprietorship in a parcel of land. Nevertheless, they are analyzed alongside the entire evidence to determine the nature and extent of a claimant's interest in a parcel of land.
70. In the case of *Danson Kimani Gacina & another v Embakasi Ranching Company Ltd* [2014] eKLR, the court stated that;
- “The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property ”.
71. Since plot No 44 is part of the larger parcel No 14235, it then follows that the input of the owner of parcel 14235 is crucial as that entity must have been the allotting authority.
72. The court order found at page 29 of the bundle of documents of the 1<sup>st</sup> and 2<sup>nd</sup> defendants indicate that there was a suit HCCC No 148 of 2007 stating that the property LR 14235 was to be transferred to the Kasarani Settlement limited pursuant to the public auction. The court order was issued on November 16, 2007. The transfer was thereafter effected on 7.12.2007 as per document on page 32 of the aforementioned bundle with the registration thereof being done on 15.1.2008.
73. There before the title to parcel No 14235 belonged to an entity known as Research and Development Forum for science led Development in Africa Registered Trustees of which this entity was registered as the owner of that land on 1.12.1991 (see title at page 61 of the 1<sup>st</sup> & 2<sup>nd</sup> defendants bundle of documents). The implication of this analysis is that neither the 1<sup>st</sup> defendant nor an entity known as Kasarani Resettlement Project could claim to have owned the larger parcel LR 14235 before November 2007. It therefore means that the claim of the plaintiff of having bought the parcel 44 in year 2005 from Simon Nyoro who in turn had bought the land in year 2002 cannot be sustained.
74. The plaintiffs have advanced a claim that the allotting entity was initially known as Kasarani Resettlement Project but later changed its name to Kasarani Settlement Limited. However, there is no tangible evidence of this transformation. On the other hand, the defence has given a consistent account that 1<sup>st</sup> defendant was incorporated in year 2007, the certificate of the said incorporation is their first document at page 23 of their bundle showing date of incorporation as 13.8.2007. Again this evidence of the defence buttresses their claim that 1<sup>st</sup> defendant did not exist in year 2002 when Simon Nyoro is alleged to have acquired the suit plot. I therefore find that plaintiffs have failed to establish that Kasarani Resettlement project is the entity which became Kasarani Settlement Limited.
75. Another point of consideration relates to the credibility of the evidence regarding the acquisition of the suit plot, as well as the general conduct of the parties. In his evidence in court, PW2 (Simon Nyoro) stated that:

“I bought the suit property from Kasarani Resettlement Project.



He reiterated this claim in his recorded statement. However, PW3, in his evidence in chief had stated as follows;

“I bought plot No 44 from Simon Nyoro. He said he was given the property by the President through a scheme for resettlement of landless people. This was through provincial administration.”.

And when the dispute spilled over to the police, PW3 stated during cross examination that:

“On October 29, 2010, we all went to Kasarani police station.

Mr Simon Nyoro was present. He indicated to police that he got property as a squatter...!”

76. The discrepancy of how Pw2 (Simon Nyoro) acquired the suit plot has not been clarified by the plaintiffs.
77. On the other hand, the 2<sup>nd</sup> defendant has given details of her association with the 1<sup>st</sup> defendant, where she was member No 39. She has availed the list of the plot owners at page 47 of her bundle as well as a sketch to indicate where each plot is designated on the ground. DW3 has given an account of how people were being registered as members of 1<sup>st</sup> defendant at no fee. However, to acquire a plot, one had to pay for it. To this end the defendants have availed bankers cheques showing a total sum of Kshs 3,000,000 paid in 4 installments of Kshs 750,000 by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant of which, the latter issued a receipt to that effect. The year 2030 indicated in the receipt has been clarified as an error, and this is a plausible explanation since year 2030 is in the future. Simon Nyoro does not have any evidential trail of his acquisition of the suit plot from which ever entity.
78. The year 2010 is when the plaintiffs commenced the construction on the suit property. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants promptly reported the matter to the police and DW1 was apparently told to continue with the developments on the land. However, according to DW2, the plaintiffs continued with a marathon construction of a storied building upon the suit property. This prompted DW1 to file a suit CMCC No 3552 of 2010 against the current plaintiff. I take cognizance that a copy of the plaint in the aforementioned suit is in this file, indicating that the said suit was filed on 20.5.2010. The plaintiff has maintained a studious silence in its pleadings and evidence in relation to the aforementioned suit. The logical conclusion to make is that the filing of the current suit few months later on 5.11.2010 was meant to scuttle the proceedings before the magistrates court.
79. It is also not lost to this court that after this suit was filed on 5.11.2010, the plaintiff initiated a conundrum through his applications for injunction and cross examination which took their course for a period of close to 8 years. At some point, the plaintiff filed an application to join Simon Nyoro and Kariuki as defendants then proceeded to file yet another application to remove the said parties as defendants and proceeded to make Simon Nyoro as their witness.
80. Further, it is noted that the plaintiffs have admitted to having commenced the construction on the suit property without building approvals. When DW1 found the invaders on the suit land, they were digging trenches but in few months, the building was going to second floor. This gives credence to DW2's claim that the plaintiffs were hurriedly carrying a construction work on the suit land.
81. I find that the general conduct of the plaintiffs in filing this suit when they had already been sued before the magistrate's court, and also embarking on a hurried construction even without building approvals in the face of an ownership dispute paints a grim picture of the plaintiff's case. In such circumstances, there was no justification for the plaintiff to proceed with the marathon construction.



82. I conclude that the 2<sup>nd</sup> defendant is the legitimate owner of the suit property plot No 44 hence plaintiff's claim is unfounded.

### Relief

83. Having made a finding that plaintiffs had no justification in constructing on the land, considering that plaintiffs have remained silent in regard to the initial case filed against them and noting that the court has found 2<sup>nd</sup> defendant to be the legitimate owner of the suit plot, then I find that plaintiffs had unlawfully trespassed on the suit plot. For the last 12 or so years, the 2<sup>nd</sup> defendant has not been able to utilize her land, and has therefore suffered damage.

84. The award of damages for trespass is discretionary in nature; see *Fleetwood Enterprises Ltd v Kenya Power & Lighting Co Ltd* [2015] eKLR.

85. The court has taken into consideration the conduct of the plaintiff particularly in continuing with the construction when there was a dispute on the land. In that regard, I find that the 2<sup>nd</sup> defendant is entitled to damages for trespass which I peg at the sum of Kshs 2,000,000. That amount should also take into account that there are debris on the land hence the court shall not grant prayer No (e) in the counter claim of 1<sup>st</sup> and 2<sup>nd</sup> defendants.

86. In the final analysis I grant orders as follows:

1. The suit filed by the plaintiff is hereby dismissed.
2. The counter claim of 1<sup>st</sup> and 2<sup>nd</sup> defendants is allowed in the following terms:
  - i. An order is hereby issued declaring the 2<sup>nd</sup> defendant to be the legitimate owner of Plot No 44 on Parcel LR No 14235.
  - ii. An order of permanent injunction is hereby issued restraining the plaintiffs from interfering with the suit property Plot No 44 in Parcel LR No 14235.
  - iii. The 2<sup>nd</sup> defendant is awarded damages for trespass as against the plaintiff amounting to Kshs 2,000,000.
3. The plaintiffs are condemned to pay costs of the suit to the 1<sup>st</sup> and 2<sup>nd</sup> defendants only. (I find no plausible reason as to why the defence of 3<sup>rd</sup> defendant was disjointed from that of his wife hence no costs are awarded to 3<sup>rd</sup> defendant).

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF DECEMBER, 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N MBUGUA**

**JUDGE**

**In the presence of:-**

Gachichio for Plaintiff

M/s Kamunya for 1<sup>st</sup> & 2<sup>nd</sup> Defendants

Esami holding brief for Nyamu for 3<sup>rd</sup> Defendant

Court assistant: Eddel/Vanilla

