



**Ogada v Osewe & 2 others (Environment and Land Case Civil Suit 53 of 2013) [2025] KEELC 5056 (KLR) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5056 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE CIVIL SUIT 53 OF 2013**

**SO OKONG'O, J**

**JULY 3, 2025**

**BETWEEN**

**PAUL OGANGA OGADA ..... PLAINTIFF**

**AND**

**JOASH ELIAKIM OSEWE ..... 1<sup>ST</sup> DEFENDANT**

**PERIS OKUMU ..... 2<sup>ND</sup> DEFENDANT**

**JANE AWUOR SULE ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants through a plaint dated 6<sup>th</sup> March 2013. The plaint was amended on 11<sup>th</sup> March 2013 and further amended on 28<sup>th</sup> February 2024 to join the 3<sup>rd</sup> Defendant to the suit. The Plaintiff averred that he was the registered owner and proprietor of all that parcel of land known as L.R. No. 18160 (Survey Plan No. 218199), measuring approximately 0.460 Ha. located within Kisumu Municipality (hereinafter referred to as “the suit property”). The Plaintiff averred that without any colour of right, legal and/or equitable entitlement, or the Plaintiff’s permission, the Defendants encroached onto, entered and were carrying out activities on the suit property. The Plaintiff set out several particulars of encroachment and the activities which the Defendants were carrying out on the suit property.
2. The Plaintiff averred that the 1<sup>st</sup> Defendant had destroyed, damaged and/or pulled down the common boundary between the 1<sup>st</sup> Defendant’s parcel of land, L.R. No. 18161 and the suit property, and created a road of access through the suit property, which he used to access his said parcel of land. The Plaintiff averred that the 1<sup>st</sup> Defendant had also constructed pit latrines on the suit property for the 1<sup>st</sup> Defendant’s use. The Plaintiff averred that the 2<sup>nd</sup> Defendant, on the other hand, had put up a wall fence within the suit property and had also erected a house in such a way that part of the said house



was within the suit property. The Plaintiff averred that the 2<sup>nd</sup> Defendant had, in effect, taken and developed part of the suit property.

3. The Plaintiff averred that as a result of the said acts by the Defendants, he had been denied the use and enjoyment of the suit property, and had suffered loss and damage for which he held the Defendants jointly and severally liable.
4. The Plaintiff prayed for judgment against the Defendants jointly and severally for;
  1. A declaration that the Plaintiff was the rightful, legal owner/proprietor of the suit property.
  2. A permanent mandatory injunction directed at the Defendants jointly and severally to vacate and surrender the suit property in vacant possession.
  3. Mesne profits for loss of use and unlawful occupation of the suit property at the rate of Kshs. 10,000/- per month with effect from March 2010 until eviction or surrender of the suit property to the Plaintiff in vacant possession.
  4. Special damages of Kshs. 390,000/- being the cost of material and labour for erecting the destroyed and/or damaged perimeter fence.
  5. Costs of the suit.
  6. Interest at court rates with effect from the date hereof until payment in full.
5. The 1<sup>st</sup> Defendant filed a statement of Defence on 10<sup>th</sup> April 2013. The 1<sup>st</sup> Defendant's statement of defence was amended on 8<sup>th</sup> March 2017 and further amended on 20<sup>th</sup> June 2023 to introduce a counterclaim. The 1<sup>st</sup> Defendant denied the allegations made against him in the plaint. The 1<sup>st</sup> Defendant averred that he was the legal owner of the suit property, having lawfully purchased the same from the 3<sup>rd</sup> Defendant, who was the representative of the original owner, one Benard Sule Osir. The 1<sup>st</sup> Defendant averred that if he carried out any activities on the suit property, the same were done lawfully in exercise of his rights as the proprietor of the suit property. The 1<sup>st</sup> Defendant averred that the Plaintiff had no proprietary interest in the suit property and as such, he was not entitled to any damages.
6. The 1<sup>st</sup> Defendant averred that if the Plaintiff was registered as the owner of the suit property, such registration was done fraudulently, irregularly and illegally. The 1<sup>st</sup> defendant contended that it was the plaintiff who had encroached on the 1<sup>st</sup> Defendant's land and, as such liable to the 1<sup>st</sup> Defendant for damages in the form of mesne profits.
7. In his counterclaim, the 1<sup>st</sup> Defendant reiterated that the Plaintiff acquired registration as the owner of the suit property irregularly, illegally and fraudulently. The 1<sup>st</sup> Defendant averred that he was a purchaser of the suit property for value without notice. The 1<sup>st</sup> Defendant averred that he was holding the title to the suit property in trust for Redeemed Gospel Church which was not a party to this suit.
8. The 1<sup>st</sup> Defendant averred that Redeemed Gospel Church had occupied the suit property for the last 12 years. The 1<sup>st</sup> Defendant prayed for the Plaintiff's suit to be dismissed and for judgment to be entered against the Plaintiff for; a permanent injunction restraining the Plaintiff, his agents, servants and employees from interfering with the 1<sup>st</sup> Defendant's occupation of the suit property, a declaration that the 1<sup>st</sup> Defendant was a purchaser of the suit property for value without notice having purchased the same on behalf of the Redeemed Gospel Church, Kisumu, a declaration that the suit property was properly and legally allocated to Benard Sule Osir who was the absolute owner of the same, an order cancelling all the fraudulent documents of title in the possession of the Plaintiff, general damages for



- trespass and costs of the suit and interest. The Plaintiff filed a reply to the 1<sup>st</sup> Defendant's defence and defence to counterclaim dated 4<sup>th</sup> July 2023.
9. The 2<sup>nd</sup> Defendant in her amended statement of defence dated 30<sup>th</sup> April 2013 denied the allegations in the plaint. The 2<sup>nd</sup> Defendant averred that she was the registered owner of the parcel of land known as L.R No. 18159/24, having purchased the same from one George Otieno Onyango on 17<sup>th</sup> August 2007. The 2<sup>nd</sup> Defendant averred that the said parcel of land was surveyed, subdivided and fenced by the owner. The 2<sup>nd</sup> Defendant prayed that the Plaintiff's suit be dismissed with costs.
  10. The 3<sup>rd</sup> Defendant filed a statement of defence and counterclaim dated 6<sup>th</sup> June 2024. The 3<sup>rd</sup> defendant denied all the allegations made against her in the plaint. The 3<sup>rd</sup> defendant averred that the Plaintiff had no proprietary rights over the suit property and was not entitled to the special damages sought. The 3<sup>rd</sup> defendant averred that if the Plaintiff was registered as the owner of the suit property, then such registration was irregular, fraudulent and illegal.
  11. In her counterclaim, the 3<sup>rd</sup> Defendant reiterated that the Plaintiff acquired the suit property fraudulently. The 3<sup>rd</sup> defendant averred that the 1<sup>st</sup> Defendant purchased the suit property from the 3<sup>rd</sup> Defendant, who was the legal representative of the estate of Benard Osir Sule, the original registered owner of the suit property.
  12. The 3<sup>rd</sup> Defendant averred that she paid all the land rates and land rent for the suit property and obtained the necessary clearances. The 3<sup>rd</sup> Defendant averred that the 1<sup>st</sup> Defendant was holding the title for the suit property in trust for Redeemed Gospel Church which was not a party to the suit. The 3<sup>rd</sup> Defendant contended that the Redeemed Gospel Church had been in occupation of the suit property for 12 years. The 3<sup>rd</sup> Defendant prayed that the Plaintiff's suit be dismissed and judgment be entered for the 3<sup>rd</sup> Defendant for; a permanent injunction restraining the Plaintiff, his agents, servants and employees from interfering with the 3<sup>rd</sup> Defendant's occupation of the suit property, a declaration that the 1<sup>st</sup> Defendant was a purchaser of the suit property for value without notice, a declaration that the suit property was properly and legally allocated to Benard Sule Osir who was the absolute owner of the property, an order for the cancellation of all the fraudulent title documents in the possession of the Plaintiff, general damages for trespass and costs of the suit and interest. The Plaintiff filed a reply to the 3<sup>rd</sup> Defendant's defence and defence to the counterclaim dated 7<sup>th</sup> June 2024.

### **The evidence**

13. At the trial, the Plaintiff, Paul Oganga Ogada (PW1) adopted his statement dated 6<sup>th</sup> March 2013 as part of his evidence in chief. The Plaintiff also produced the documents in his list of documents dated 6<sup>th</sup> March 2013 as exhibits. He stated that George Onyiro, Muthurania and he formed a company known as Rivanza Enterprises. He stated that the suit property was allocated to Rivanza Enterprises by the Commissioner of Lands. He stated that they subsequently agreed among the partners of Rivanza Enterprises that the suit property should be in his sole name. He stated that he bought the shares of the said partners in the suit property and in 1991 the suit property was registered in his name. He stated that he had been the sole owner of the suit property from 1991 and there was no dispute over the suit property until 2013.
14. In his witness statement, the Plaintiff reiterated that he was the registered owner of the suit property having been registered as such on 20<sup>th</sup> July 2005. The Plaintiff averred that after the identification of the boundaries of the suit property, he erected a perimeter fence around the same at a cost of Kshs. 390,000/-. The Plaintiff stated that the 1<sup>st</sup> Defendant was the owner of L.R No. 18161 situated adjacent to the suit property. He stated that the 2<sup>nd</sup> Defendant also owned a parcel of land adjacent to the suit



- property. He stated that the 1<sup>st</sup> Defendant had a church and conducted church services on L.R No. 18161, which was normally attended by many people who come to worship. The Plaintiff reiterated the acts of trespass pleaded against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the plaint and the loss and damage he claimed to have suffered. The Plaintiff stated that he could receive a rental income of Kshs. 10,000/- per month if he had leased out the suit property. He stated that he was claiming the said sum of Kshs. 10,000/- from the Defendants jointly and severally. He prayed for judgment against the Defendants as prayed in the plaint.
15. On cross-examination by the advocate for the 1<sup>st</sup> Defendant, the Plaintiff stated that the suit property was allocated to Rivanza Enterprises by the Commissioner of Lands. The Plaintiff stated further that he paid Kshs. 67,500/- to the Commissioner of Land and he was issued with a receipt. He stated that he was not aware that the suit property was being claimed by another party until 2013. He stated that the suit property was vacant when it was allocated to them and it measured 0.460 Ha. in size.
  16. The Plaintiff stated that he had a deed plan for the suit property which he obtained in 2007. The Plaintiff stated that he was issued with a Grant in 2005 by Mrs. Okungu. He admitted that there appeared to be two Grants in his favour one issued in 2002 and the other in 2005. He stated that it was the Commissioner of Lands who could comment on the two Grants. The Plaintiff denied that he acquired the suit property fraudulently. He stated that he was paying rates for the suit property and was not aware that the 1<sup>st</sup> Defendant was also paying rates for the same property.
  17. On cross-examination by the advocate for the 2<sup>nd</sup> Defendant, the Plaintiff stated that the 2<sup>nd</sup> Defendant had encroached on a portion of the suit property. He stated that there was a wall encroaching on the suit property. He stated that it was a matter that they could have discussed with the 2<sup>nd</sup> Defendant.
  18. On re-examination, the Plaintiff stated that the 1<sup>st</sup> Defendant seems to have purchased a parcel of land known as Plot No. 1860, Kisumu measuring 0.033 Ha which was different from the suit property. The Plaintiff stated that they were issued with the allotment letter and the Part Development Plan. The Plaintiff stated that if the 1<sup>st</sup> Defendant bought any land, it was not the suit property.
  19. The Plaintiff's next witness was Gordon Odeka Ochieng (PW2). PW2 testified as follows: He was working at the Ministry of Lands, Public works, Housing and Urban Development (the Ministry). He was based at Ardhi House, Nairobi. He joined the Ministry in 1989. He was the Director Land Administration. He was dealing with development control applications, leases and grants. They kept documents concerning land in individual land files. He was aware of the dispute relating to L.R No. 18160 (the suit property) located within Kisumu Municipality. According to their correspondence file No. 134500, the suit property was allocated as unsurveyed plot through a letter of allotment Ref; 30973/XL11/273 dated 27<sup>th</sup> August 1991. The property was allocated to Rivanza Enterprises. File No. 134500 was opened by the Commissioner of Lands. All correspondence relating to the suit property were filed in the file. Rivanza Enterprises accepted the allotment through a letter dated 22<sup>nd</sup> January 1996 and thereafter paid a sum of Kshs. 54,886.70 for which the Commissioner of Lands issued a receipt at page 24 of the file. Rivanza made a further payment of Kshs. 66,500/- to the Commissioner of Lands and an official receipt for the same was issued.
  20. PW2 stated that on 21<sup>st</sup> March 1996, Rivanza Enterprises requested the Commissioner of Lands through a letter of the same date for consent to transfer the suit property which at the time had been surveyed and given L.R No. 18160. The Deputy Commissioner of Lands granted the consent on 28<sup>th</sup> June 1996 subject to payment of all government fees. Rivanza Enterprises paid the necessary charges after which the transfer of the suit property to the Plaintiff was processed and effected. The Commissioner of Lands thereafter wrote to the Director of Survey to prepare a Deed Plan for the property. The Director of Surveys through a letter dated 30<sup>th</sup> April 1998 submitted a Deed Plan



No. 218199 in respect of L.R. No. 18160. On receipt of the Deed Plan, the Commissioner of Lands commenced the preparation of the title in favour of the Plaintiff. A lease was prepared and executed by the Commissioner of Lands, but the same was not registered because the Commissioner of Lands who was in office at the time, left. The process of issuing a title for the suit property started afresh. The Ministry of Lands thereafter learnt of this suit and stopped the process. PW2 produced a certified copy of the file No. 134500 as P.EXH.21. He stated that, according to their record, the owner of the suit property was the Plaintiff.

21. On cross-examination by the 1<sup>st</sup> Defendant's advocate, PW2 stated as follows: He had brought to court certified copies of the documents in the file. He was not involved in the allocation of the suit property and the processing of the title. His role was to produce the file. Rivanza Enterprises transferred the suit property to the Plaintiff on 7<sup>th</sup> August 1996. What was being transferred to the Plaintiff was unsurveyed land. Upon survey, the land became L.R. No. 18160. The Grant in the list of documents filed on 15<sup>th</sup> November 2018 was signed by the Commissioner of Lands, who by then was Judith Okungu, on 20<sup>th</sup> July 2005 while the Grant in the file he had produced dated 24<sup>th</sup> January 2013 was signed by the then Commissioner of Lands, Zablon Agwata Mabea.
22. PW2 stated that the lease in his file was signed on 10<sup>th</sup> December 2019 but no title had been issued in respect of the suit property. None of the two (2) Grants had been registered. The second Grant was issued because the first one had been overtaken by events. The Plaintiff had no registered title in his name. When shown a copy of Grant No. I.R. 68939 for L.R. No. 18160 in the name of Bernard Osir Sule registered on 6<sup>th</sup> February 2002 and Deed Plan No. 218199, PW2 stated that he had not come across any letter of allotment in favour of Bernard Osir Sule. PW2 stated that the payment for the allotment which was supposed to be made within 30 days was made by the Plaintiff after 5 years. He stated that if the payment was not made the offer was supposed to lapse. He stated that he had no evidence that the offer was extended. He stated that the letter of allotment in favour of Jane Awour Sule dated 11<sup>th</sup> June 1999 was signed P. Amiani (Mrs.). He stated that there was a Mrs. Amiani working with the office of the Commissioner of Lands. In 2018 the file he has produced was in the land office.
23. On re-examination, PW2 stated that it was possible to be allocated land with a land reference number, which is normally given after a survey. He stated that he had no other file in respect of L.R. No. 18160 apart from the file he had produced. He stated that they halted the process of issuing a title to the Plaintiff upon learning of the suit. He stated that it was for the Commissioner of Lands to revoke the offer. He stated that in this case, the Commissioner of Lands accepted the payment for the allotment after the lapse of time within which the offer was to be accepted. He stated that they did not have in their records a Grant in the name of Bernard Osir Sule and that he did not have a file for the allotment of the suit property to 3<sup>rd</sup> Defendant.
24. The 1<sup>st</sup> Defendant, Joash Eliakim Otieno Osewe (DW1), gave evidence after the close of the Plaintiff's case. He told the court that he was the Regional Bishop of the Redeemed Gospel Church. He adopted his witness statement dated 7<sup>th</sup> November 2018 as part of his evidence in chief. He produced the 1<sup>st</sup> Defendant's bundle of documents filed on 24<sup>th</sup> February 2017 as D.EXH. 1 to 9 respectively, the 1<sup>st</sup> Defendant's further bundle of documents filed on 7<sup>th</sup> November 2018 as D.EXH.10 and 11 respectively and the 1<sup>st</sup> Defendant's further bundle of documents filed on 26<sup>th</sup> February 2024 as D.EXH. 12 to 14 respectively. He testified further as follows: He purchased the suit property from the 3<sup>rd</sup> Defendant, who was the widow of Bernard Osir Sule. They entered into a holding agreement with her, awaiting her obtaining a Grant of Letters of Administration in respect of her husband's estate. He was buying the land on behalf of the Redeemed Gospel Church (the church).



25. The 1<sup>st</sup> Defendant stated that there was no title document bearing his name or the name of the church since the 3<sup>rd</sup> Defendant was in the process of obtaining a Grant. He stated that they did not take possession of the suit property and that the land was vacant. He stated that they wanted to expand the church, which was on the land adjacent to the suit property. He stated that he was wrongly sued. The 1<sup>st</sup> Defendant denied that they were putting up a building on the suit property. He stated that the building shown in the photograph produced by the Plaintiff did not belong to them. He stated that the Plaintiff should have sued the 3<sup>rd</sup> Defendant and not him. He urged the court to find that the suit property belonged to Bernard Sule and cancel the documents of title held by the Plaintiff. He stated that they were also praying for the costs of the suit. He stated that they had not used the land since they purchased it. He stated that the documents that he had produced were given to them by the 3<sup>rd</sup> Defendant.
26. On cross-examination by the Plaintiff's advocate, the 1<sup>st</sup> Defendant stated as follows: The church was not mentioned in the agreement of sale that he entered into with the 3<sup>rd</sup> Defendant. The land which they bought measured 0.03Ha. and the land reference number was not mentioned. The land he was purchasing belonged to the 3<sup>rd</sup> Defendant, Jane Awuor Sule. Jane Awuor Sule did not have a title but had an allotment letter in her name. The 1<sup>st</sup> Defendant stated that he saw a letter of allotment in the name of the 3<sup>rd</sup> Defendant, but never saw evidence of acceptance of the offer and payment of the allotment fees. He stated that apart from what the 3<sup>rd</sup> Defendant showed him, he had not seen any other documents from the Lands Office.
27. On re-examination, the 1<sup>st</sup> Defendant reiterated that they had not put up a structure on the suit property. He stated that the structures they had put up had been put up on their land adjacent to the suit property. He stated that he had not seen any allotment letter in favour of Bernard Sule and that the documents given to them by the 3<sup>rd</sup> Defendant were in the 3<sup>rd</sup> Defendant's name. He stated that the 3<sup>rd</sup> Defendant did not sell any other land to them apart from the suit property.
28. On examination by the court, the 1<sup>st</sup> Defendant stated that he purchased land measuring 0.03Ha. He clarified that when he entered into the agreement of sale with the 3<sup>rd</sup> Defendant, he was buying land owned by the 3<sup>rd</sup> Defendant and not the 3<sup>rd</sup> Defendant's husband. He stated that the sale was conducted on the strength of the 3<sup>rd</sup> Defendant's letter of allotment. He told the court that they had paid the full purchase price for the suit property to the 3<sup>rd</sup> Defendant.
29. The next witness for the Defendants was the 3<sup>rd</sup> Defendant, Jane Awuor Sule (DW2). The 3<sup>rd</sup> Defendant adopted her witness statement dated 28<sup>th</sup> May 2024 as part of her evidence in chief and produced her bundle of documents dated 28<sup>th</sup> May 2024 as exhibit D.EXH.15 save for the letter dated 7<sup>th</sup> December 2013 from the Survey of Kenya, which was marked as "DMFI 16". The 3<sup>rd</sup> Defendant also produced her further bundle of documents dated 20<sup>th</sup> August 2024 as D.EXH. 17, save for the document No. 24 in the list, which was also marked as "DMFI 16". The 3<sup>rd</sup> Defendant stated that her husband died in 2010, and he was known as Bernard Osir Sule. She stated that her husband had a parcel of land on Kibos road next to Steel Factory which was known as Plot No. 1003. She stated that her husband owned the land for 4 years prior to his death.
30. The 3<sup>rd</sup> Defendant stated that the land was about 1 acre in size. She stated that before the death of her husband, he had entered into an agreement for the sale of the land with some church. She stated that after the death of her husband, she gave the land to the church. She stated that the agreement she entered into with the church did not have a title number because the title was being processed. She stated that the church gave her Kshs. 60,000/- to help her in processing the title. She stated that they



were to enter into a formal agreement after she had obtained a title for the land. She stated that the Plaintiff should have sued her instead of the 1<sup>st</sup> Defendant.

31. The 3<sup>rd</sup> Defendant stated that she had not transferred the land to the 1<sup>st</sup> Defendant because she had not yet been issued with a title. She stated that the suit property did not belong to the Plaintiff. She stated that no one came to claim the suit property from her husband while he was alive. She stated that the suit property belonged to her and would transfer the same to the 1<sup>st</sup> Defendant.
32. On cross-examination by the Plaintiff's advocate, the 3<sup>rd</sup> Defendant stated as follows: She obtained a Grant of Letters of Administration in respect of her husband's estate. Her husband's letter of allotment was transferred to her. Her father-in-law did not have a Grant of Letters of Administration in respect of the estate of her deceased husband. The suit property was transferred from her deceased husband to her in 2023. On re-examination, the 3<sup>rd</sup> Defendant stated that she obtained the Grant of Letters of Administration to enable her join the suit on behalf of the estate of her late husband.
33. The next witness was Mary Roslida Otieno (DW3). DW3 adopted her witness statement dated 28<sup>th</sup> May 2024 as part of her evidence in chief. She stated that the 3<sup>rd</sup> Defendant was known to her and that after the death of the 3<sup>rd</sup> Defendant's husband, the 3<sup>rd</sup> Defendant asked her to help her in obtaining a title for the suit property. She stated that the 3<sup>rd</sup> Defendant wanted to sell the property. She stated that the 3<sup>rd</sup> Defendant entered into an agreement for the sale of the property, but the parcel number was not indicated in the agreement because the title was being processed. She stated that the land measured 0.04Ha. She told the court that the 1<sup>st</sup> Defendant gave the 3<sup>rd</sup> Defendant Kshs. 60,000/- to enable her to process the title. DW3 stated that they were issued with a letter of allotment and asked to take the same to the Director of Surveys for the preparation of a deed plan. She stated that the land belonged to Bernard Sule Osir. She told the court that there was no adverse claim over the land until they obtained the deed plan.
34. On cross-examination by the Plaintiff's advocate, DW3 stated that the initial letter of allotment was in the name of Benard Sule Osir, while the second letter of allotment was in the name of the 3<sup>rd</sup> Defendant. She stated that she surrendered the first letter of allotment. She stated that she did not see an application by the late Benard Sule Osir to be allocated the suit property, or a similar application by the 3<sup>rd</sup> Defendant. She stated that she had not seen a document of transfer through which the 3<sup>rd</sup> Defendant acquired the suit property. She stated that the suit property was vacant and was not being used by the church.
35. On re-examination, DW3 stated that her role was limited to assisting the 3<sup>rd</sup> Defendant to acquire a title for the suit property. She stated that they were told that they would only be given the parcel number after all the processes had been completed.
36. The last witness was Zakaria Mosongo Ndege (DW4). DW4 stated as follows in his evidence in chief: He was working at the National Land Commission (NLC). He initially worked at the Ministry of Lands from 1999 to 2015, then he moved to the NLC. At the NLC, he was the Principal Land Administration Officer. He had with him their file No. 242618. According to the file, the suit property was allocated to the 3<sup>rd</sup> Defendant, and the process of issuing a title to her had been initiated. The process went through, but before the title deed could be prepared, they needed a deed plan, which was not available. The Director of Surveys issued a certified copy of the deed plan for the suit property after the deed plan was declared lost.
37. DW4 stated that the title was not issued to the 3<sup>rd</sup> Defendant because they were informed that there was someone else claiming the suit property. He stated that he had looked at the documents which were produced in court by PW2. He stated that the officer who opened file No. 134400 for the suit



property did not consult other departments in the lands office from which he could have learnt that the land was already committed in another file.

38. DW4 stated that he could see the lease in favour of the Plaintiff. He stated that the same was not registered. He stated that it was Wiak who applied for allocation. He stated that he did not know how the land moved from Wiak to Rivanza Enterprises. He stated that George Onyiro was a planner in the Ministry of Lands before he retired, while Joseph Muthurania was a valuer in the Ministry of Lands at Kisumu. He stated that the Plaintiff was not known to him. He stated that in the processing of a title for the allotment in favour of Rivanza Enterprises, there were gaps which were not filled. He stated that it was difficult to determine who the owner of the suit property was. He stated that the two files for the two allotments produced in evidence by the parties had gaps. DW4 stated that in both files, payments were made after the offer of allotment had lapsed. He produced certified copies of two files as exhibits. File No. 134500 was produced as D.EXH. 18 while File No. 242618 was produced as D.EXH. 19.
39. On cross-examination by the Plaintiff's advocate, DW4 stated as follows: In file No. 242618, there is no application for allocation of land, but there was a document forming the foundation of the allotment. The allotment was done in 1999. The 3<sup>rd</sup> Defendant requested in 2012 to make payment for the allotment. The land was allocated to the 3<sup>rd</sup> Defendant. The suit property was not allocated to Bernard Sule Osir. It was only the 3<sup>rd</sup> Defendant who had featured in the file. An allottee of land is supposed to secure the ground upon receipt of the letter of allotment. The 3<sup>rd</sup> Defendant asked for a certified copy of the deed plan because the original could not be traced. The 3<sup>rd</sup> Defendant paid Kshs. 42,420/- in 2012 for the allotment. There was nothing on record showing that in 2010, the suit property belonged to Bernard Sule Osir.
40. Regarding file No. 134500, DW4 stated that there was also no application for allocation. He stated that there was a letter of allotment which was not based on an application. The application in the file was made by Wiak, while the allotment was made to Rivanza Enterprises. The allotment offer was accepted, and there was an application for consent to transfer the property to the Plaintiff, which was approved.
41. DW4 stated that the 3<sup>rd</sup> Defendant and Rivanza Enterprises paid different amounts for the suit property, and there was a slight difference in the sizes of the land in the two allotments. He told the court that the sizes in the two letters of allotment were approximations and that a survey that was done in 1998 confirmed the area of the suit property to be 0.460Ha. He stated that the original deed plan was not available in the file for allocation of the suit property to the 3<sup>rd</sup> Defendant, and that was why the Director of Surveys issued a certified copy. He stated that for the allocation to Rivanza Enterprises, the original deed plan was available. He stated that the processing of the Plaintiff's title was based on the original deed plan while that of the 3<sup>rd</sup> Defendant was based on a certified copy.
42. On re-examination, DW4 stated that both deed plans were prepared by the Director of Surveys. He stated that there was an application for allotment in Rivanza Enterprises' file by Wiak but the allotment was made to Rivanza Enterprises. He stated that there was no mention of Bernard Sule Osir in the 3<sup>rd</sup> Defendant's file. On examination by the court, DW4 stated that of the two files, File No. 134500 was the first one to be opened and that File No. 242618 was opened subsequently.
43. The 2<sup>nd</sup> Defendant did not tender evidence at the trial. After the close of evidence, the parties were directed to make closing submissions in writing. The Plaintiff, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants filed submissions, while the 2<sup>nd</sup> Defendant did not file submissions.



## The Plaintiff's submissions

44. The Plaintiff filed submissions dated 15<sup>th</sup> October 2024 in which he framed the following issues for determination by the court;
- a. What is the legal position of file No. 134500 and file No. 242618 that relate to the same parcel of land, L.R. No. 18160?
  - b. How did the late Bernard Osir Sule relate to L.R. No. 18160?
  - c. Did the 1<sup>st</sup> Defendant acquire L.R. No. 18160 by way of purchase from the 3<sup>rd</sup> Defendant?
  - d. Who is the rightful, legal and lawful owner of L.R. No. 18160?
  - e. Was the 1<sup>st</sup> Defendant in occupation of L.R. No. 18160 and if so, was he a trespasser?
  - f. Is the Plaintiff entitled to the orders sought in the Further Amended Plaintiff?
  - g. Are the 1<sup>st</sup> and 3<sup>rd</sup> Defendants or either of them entitled to the prayers set out in their respective counterclaims?
  - h. Who is liable for the costs of the suit and counterclaims?
45. The Plaintiff submitted that from the facts of the case, the suit property had two files at the lands office, namely, file No. 134500 in the name of the Plaintiff and file No. 242618 in the name of the 3<sup>rd</sup> Defendant. The Plaintiff submitted that the file in the name of the Plaintiff was opened earlier than that which was in the name of the 3<sup>rd</sup> Defendant. The Plaintiff cited Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mivaura v. Attorney General & 4 others [2017] eKLR and submitted that the file in the name of the Plaintiff which contained the documents that speak to the history of and the process of acquisition of the land by the Plaintiff prevails and hence establishes that the Plaintiff as the lawful, rightful and legal owner of the suit property.
46. The Plaintiff submitted that according to the testimony of the Plaintiff, PW2 and DW 4, the suit property had never been in the name of the late Bernard Osir Sule as alleged by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and DW 3. The Plaintiff submitted that if the said parcel of land was once in the name of the late Bernard Osir Sule as alleged, the next question was whether the 3<sup>rd</sup> Defendant had the capacity and locus standi to deal with the same without a Grant of Letters of Administration in respect of the estate of the deceased who died either in 2000 or 2010. In support of this submission, the Plaintiff cited Alfred Njau and Others v. City Council of Nairobi (1982)1 KAR 229 and Julian Adoyo Ongunga & Another v. Francis Kiberene Bondeva, Suing as the Administrator of the Estate of Fanuel Evans Amudavi (Deceased).
47. The Plaintiff submitted that the 3<sup>rd</sup> Defendant lacked the capacity and or locus standi to deal with the property of the late Benard Osir Sule. The Plaintiff submitted that the 3<sup>rd</sup> Defendant lacked the capacity to dispose of the suit property by way of sale to the 1<sup>st</sup> Defendant, and hence no good title could pass to the 1<sup>st</sup> Defendant. The Plaintiff submitted that the 3<sup>rd</sup> Defendant, who allegedly sold the suit property to the 1<sup>st</sup> Defendant, could not pass a good title to the 1<sup>st</sup> Defendant. The Plaintiff submitted that the 1<sup>st</sup> Defendant could not purport to have been an innocent purchaser of the said property, as the 1<sup>st</sup> Defendant did not fit the description of an innocent purchaser for valuable consideration as he purported to be. The Plaintiff submitted that the 1<sup>st</sup> Defendant did not hold a certificate of title, and the vendor did not have an apparent title. In support of this submission, the Plaintiff cited Katende v. Haridar & Company Limited [2008] 2 E.A. 173, Daniel Kiprugut Maiywa v. Rebecca Chepkurgat



Maim [2019] eKLR and Dina Management Limited v. County Government of Mombasa & 5 others, Petition 8 (E010) of 2021) [2023] KESC 30 (KLR).

48. The Plaintiff submitted that he produced a survey report dated 30<sup>th</sup> September 2013 in which there was a finding that there were new developments and activities on the suit property. The Plaintiff submitted that the report was not challenged. The Plaintiff submitted that the Defendants did not tender any evidence contradicting the findings in the survey report. The Plaintiff submitted that there was evidence and an admission by the 1<sup>st</sup> Defendant that he was in possession of the suit property. The Plaintiff submitted that on account of the said possession, the Plaintiff had been denied the use of the same, and hence he was entitled to mesne profits. In support of this submission, the Plaintiff relied on Attorney General v. Halal Meat Products Limited [2016] eKLR. The Plaintiff submitted that he was entitled to the prayers sought in the Further Amended Plaint, including mesne profits at the rate of Kshs. 10,000/- per month with effect from March 2010 until eviction of the Defendants and/or surrender of the suit property.
49. The Plaintiff submitted that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had failed to prove their cases as pleaded in their counterclaims. The Plaintiff submitted that it was clear from the evidence that neither the 1<sup>st</sup> Defendant nor the 3<sup>rd</sup> Defendant had a good title to the suit property. The Plaintiff submitted that neither of the Defendants could claim to be the lawful, rightful and/or legal owner of the suit property. The Plaintiff submitted that under the doctrine of nemo dat quod non-habet the 3<sup>rd</sup> Defendant had no title that she could pass to the 1<sup>st</sup> Defendant to entitle them to the prayers set out in their counterclaims. The Plaintiff submitted that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had failed to prove their counterclaims to the required standard. The Plaintiff urged the court to dismiss the counterclaims. The Plaintiff submitted that costs follow the event. The Plaintiff submitted that he had proved his case against the Defendants, while the Defendants had failed to prove their counterclaims. The Plaintiff submitted that he was entitled to the costs of the suit and the counterclaims.

#### **The 1<sup>st</sup> and 3<sup>rd</sup> Defendants' submissions**

50. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants filed submissions dated 24<sup>th</sup> November 2024. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants framed the following issues for determination;
1. Who is the lawful owner of L.R No. 18160 (Deed Plan No. 218199) (suit property)?
  2. Whether the Plaintiff's right to use, enjoy and exercise his rights as the proprietor of the suit property was infringed.
  3. Whether the Plaintiff is entitled to mesne profits.
  4. Whether the Plaintiff is entitled to special damages.
  5. Whether the 1<sup>st</sup> Defendant is entitled to damages for trespass.
  6. Who should bear the costs?
51. On the 1<sup>st</sup> issue, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that Rivanza Enterprises through which the Plaintiff acquired his title to the suit property accepted the allotment of the suit property and made payment of the requisite charges and fees 5 years after the allotment although the letter of allotment stated that acceptance and payment should have been made within 30 days from the date of the allotment letter. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the allotment should have been accepted by 1<sup>st</sup> October 1991. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the offer had lapsed by the time the Plaintiff purported to accept and make payment for the allotment. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that there was no evidence that the Plaintiff and his partners were issued with a new letter of allotment.



The 1<sup>st</sup> and 3<sup>rd</sup> Defendants averred that the Plaintiff had no valid letter of allotment capable of being accepted. In support of this submission, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants cited *Miroro v. Nyarumi & 5 others* (Environment & Land Case 23 of 2019) [2023] KEELC 21533 (KLR) (15 November 2023) and SC Petition No. 5 (E006) of 2022, “the Torino case” where the courts held that a letter of allotment was not a title deed and could not confer any interest in land. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the Plaintiff could not claim to have acquired a valid title to the suit property in the absence of a valid letter of allotment, which was accepted in the prescribed manner and/or within the stipulated timelines. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that Rivanza enterprises which allegedly transferred the suit property to the Plaintiff, had not rights in the property to transfer to the Plaintiff since it did not have any. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the documents that were used by Rivanza Enterprises to transfer the suit property to the Plaintiff were obtained fraudulently. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that any other transaction that followed the purported allotment of the suit property to Rivanza Enterprises was null and void ab initio.

52. On the 2<sup>nd</sup> issue, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the Plaintiff did not have the right to use, enjoy and exercise proprietary rights over the suit property and as such none of such right was infringed by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein.
53. On the third issue, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that mesne profits are sums of money payable to a person for the occupation of land to which he has a right of immediate occupation, where no permission has been given for such occupation. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the 1<sup>st</sup> Defendant lawfully occupied the suit property after it was sold to him by the 3<sup>rd</sup> Defendant, who was the rightful owner thereof. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the Plaintiff’s mesne profits claim against the Defendants had no basis because the suit property did not belong to him. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that in any event, the Plaintiff had not produced any evidence to support his mesne profits claim at the rate of Ksh.10,000/- per month. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the Plaintiff was not a valuer and as such, his claim had no basis. In support of this submission, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants cited *Peter Mwangi Mbuthia & another v. Samow Edin Osman* [2014] eKLR.
54. On the fourth issue, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the Plaintiff was not entitled to the special damages claimed. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants cited *Hann v. Singh* (1985) KLR 716 and submitted that special damages must not only be specifically claimed but must also be strictly proved. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that although the Plaintiff had specifically pleaded special damages amounting to Ksh. 390,000/- no evidence was adduced in proof of the same.
55. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants proved the fraud pleaded against the Plaintiff. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that Rivanza Enterprises (Rivanza), a firm where the Plaintiff was one of the partners, was issued with a letter of allotment in 1991, the letter of allotment had special conditions regarding acceptance and payment which had to be complied with failure to which the offer would be considered to have lapsed. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants reiterated that the offer to Rivanza lapsed before it was accepted, and as such, when the offer was purportedly accepted by Rivanza, there was no offer capable of being accepted. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the Plaintiff colluded with persons in the office of the Commissioner of Lands to illegally and fraudulently transfer interests in the suit property to the Plaintiff, devoid of any document allocating the land to the Plaintiff by the Government.
56. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the Plaintiff could not claim to have any rights over the suit property having not procured the title document legally. In support of these submissions, the 1<sup>st</sup>



and 3<sup>rd</sup> Defendants cited Section 24 of the *Land Registration Act* 2012, *Vijay Morjaria v. Nansingh Madhusingh Darbar & another* [2000]eKLR, *Kinyanjui Kamau v. George Kamau* [2015] eKLR, *Yalwala & 3 others (Sued in their capacity as Board of Trustees of Chavakali Yearly Meeting of Friends (Quakers)) v. Kadenge & 3 others (Environment & Land Case 4 of 2021)* [2022] KEELC 2510 (KLR) (21 July 2022) (Judgment) and *Koinange & 13 others v. Charles Karuga Koinange* [1986] KLR 23.

57. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the documents filed in court on 16<sup>th</sup> March 2021 by the Plaintiff were an afterthought. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the Plaintiff had not discharged the burden of proof of his case, which was on a balance of probabilities. In support of this submission, the Plaintiff cited Sections 109 and 112 of the *Evidence Act* Chapter 80 Laws of Kenya, *Anne Wambui Ndiritu v. Joseph Kiprono Ropkoi & another* [2005] 1 E.A 334, *Evans Nyakwana v. Cleophas Bwana Ongaro* [2015] eKLR, *William Kabogo Gitau v. George Thuo & 2 others* [2010] 1 KLE 526 and *Palace Investment Ltd v. Geoffrey Kariuki Mwenda & another* [2015] eKLR.
58. On the fifth issue, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that it was clear from the evidence that the Plaintiff had no title to the suit property that could confer upon the Plaintiff legal rights to the property. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the Plaintiff went ahead and erected a perimeter fence and a latrine on the suit property even though he had no right to the land. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the 3<sup>rd</sup> Defendant proved that she was the owner of the suit property. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the evidence of the 3<sup>rd</sup> Defendant's title was not challenged. In support of this submission, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants cited Section 3 (1) of the *Trespass Act*, Chapter 294 Laws of Kenya, *Philip Ayaya Aluchio v. Crispinus Ngayo* [2014] eKLR and *Willesden Investments Limited v. Kenya Hotel properties limited NBI H.C.C. NO. 367 of 2000*. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the 1<sup>st</sup> Defendant, being the lawful owner of the suit property, was entitled to general damages for trespass from the plaintiff. On the issue of costs, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that costs follow the event.

### **Analysis and Determination**

59. I have considered the pleadings, the evidence tendered by the parties in support of their cases and the submissions by the advocates for the parties. From the pleadings, the following are the issues arising for determination in this suit and the counterclaims;
1. As between the Plaintiff, and the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, who is the lawful owner of the suit property;
  2. Whether the Defendants are trespassers on the suit property;
  3. Whether the Plaintiff is entitled to the reliefs sought in its further amended plaint;
  4. Whether the 1<sup>st</sup> and 3<sup>rd</sup> Defendants are entitled to the reliefs sought in their counterclaims; and
  5. Who is liable for the costs of the suit and the counterclaims?
60. As between the Plaintiff, and the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, who is the lawful owner of the suit property;

It was common ground that the suit property is not registered under any land registration system in the name of any of the parties due to the dispute that arose over its ownership, which is the subject of this suit. The Plaintiff and the 3<sup>rd</sup> Defendant claim ownership of the suit property on the strength of letters of allotment, while the 1<sup>st</sup> Defendant claims the suit



property as a purchaser of the same from the 3<sup>rd</sup> Defendant. In *Hubert L. Martin & 2 Others v. Margaret J. Kamar & 5 Others* [2016] eKLR, the court stated as follows:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain...Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

61. In *Nairobi Civil Appeal No. E789 of 2023, Mas Construction Ltd. v. Abdul Waheed Sheik & 6 others*, the Court of Appeal stated as follows:

68. It is an indisputable fact that the appellant and the Abduls claim ownership and/or title to the same parcel of land. This Court in *Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School (Civil Appeal 64 of 2014) [2023] KECA 371 (KLR) (31 March 2023) (Judgment)* stated as follows regarding a claim over the existence of two titles in respect of the same parcel land:

“The best evidence of ownership of immovable property is the title deed to it and that is why the question of the root of title is important. Root of title is the deed to which title to a property is ultimately traced to prove that the owner has good title. Accordingly, when there are competing interests as in this case, the parties are required to give evidence of title, starting with a "good root of title." A good root of title and an unbroken chain of ownership is required. To be a good root of title, a document must satisfy each of the following requirements: (a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question; (b) it must contain a recognizable description of the property; (c) it must not contain anything that casts any doubt on the title.”

69. In the same vein, this Court in *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR held that:

“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.”

62. In *Republic v. City Council of Nairobi & 3 others* [2014] eKLR, the court stated as follows:

“From the case as presented by the Applicant they no doubt had beneficial interest in the suit plot. As was held by Warsame, J (as he then was) in *Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004* once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or



proprietary unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

63. In *Kamau James Njendu v. Serah Wanjiru & another* [2018] eKLR the court stated as follows:

“In essence therefore I find that there could have been double allotment of the suit land and the blame would therefore lay squarely on the Settlement Fund Trustee. In the case of *M’ikiara M’Rinkanya & Another –v- Gilbert Kabeere M’Mbijiwe*, (1982-1988) 1KAR 196, the court held that where there was a double allocation of land, the first allotment would prevail. That therefore there was no power to allot the same property again.”

64. In *Benja Properties Limited v. Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR, the Court of Appeal cited with approval the High Court case, *Gitwany Investment Limited v. Tajmal Limited & 2 others* [2006] eKLR where the court stated that:

“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in *Wreck Motors Enterprises vs. commissioner of Lands*, C.A. No. 71/1997 (unreported) “– is the “grant [that] takes priority. The land is alienated already.” This decision was again upheld in *Faraj Maharus vs. J.B. Martin glass Industries and 3 others* C.A 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity...”

65. In Supreme Court Petition No. E033 of 2023, *Harcharan Singh Sehmi & another v. Tarabana Co. Limited & 5 others*, the court stated as follows:

“(ii) Whether the doctrine of Innocent Purchaser for value Without Notice protects a purchaser of an illegally/irregularly allocated title over public land

(66) This issue persistently continues to rear its head whenever the legality of a subsequent title over land following a purchase is called into question. The main bone of contention, has always revolved around the concept of “indefeasibility of title” where holders of such titles under challenge, not only erect the latter as a shield, but also tend to fall back upon the doctrine of innocent purchaser for value without notice. This Court has since pronounced itself authoritatively and with finality on the question of indefeasibility of title in circumstances where a title is called into question regarding its legality. Holders of impugned titles, especially those acquired before the promulgation of the 2010 Constitution always call into service the provisions of Section 23 of the Registration of Titles Act Cap 281 (now repealed).



- (67) Pursuant to Section 23 of the repealed Act, a certificate of title was held as conclusive evidence of proprietorship. It read:

“ 23.

- (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

- (68) Upon repeal (of the Registration of Titles Act), the effects of registration are now governed by Section 26 of the [Land Registration Act](#) No. 3 of 2012 which provides;

“ 26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in



the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original [emphasis added].

66. This draws from Article 40 that the right to property does not extend to any “property that has been found to have been unlawfully acquired.” See Article 40(1) and (6) of *the Constitution*.

(69) It is important to take note of the critical shift in terminology from the repealed Act to the current statute. Under the Registration of Titles Act, a certificate of title was to be regarded by courts as conclusive evidence that the person named therein was the absolute and indefeasible owner of the land. However, under current legislation, a certificate of title is to be regarded by courts as prima facie evidence that the person named therein is the absolute and indefeasible



owner of the land. It is therefore no longer possible for a title holder to erect the certificate of title as a barrier to an inquiry into its legality or otherwise.

- (70) In *Dina Management Limited vs. County Government of Mombasa & 5 Others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), this Court held that to determine whether a party is a bona fide purchaser for value, a court must first go to the root of the title, we stated:
- “ 94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.”
67. The Plaintiff's case is that; he was a partner in the firm known as Rivanza Enterprises (Rivanza). Rivanza was allocated the suit property by the Commissioner of Lands on 27<sup>th</sup> August 1991. Rivanza accepted the allotment on 22<sup>nd</sup> January 1996 and made the necessary payments for the allotment on the same date and on 28<sup>th</sup> March 1996. Rivanza's payments were accepted by the Commissioner of Lands, and official receipts were issued for the same. Rivanza thereafter sought the consent of the Commissioner of Lands to transfer the suit property to the Plaintiff. The consent was granted and endorsed on the form of transfer dated 7<sup>th</sup> August 1996. While the process of issuing a title for the suit property in favour of the Plaintiff was in progress, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants trespassed on the suit property. The Plaintiff brought this suit to assert his right over the suit property. The processing of a title in favour of the Plaintiff stalled after the filing of the suit. The Plaintiff produced evidence in support of his case as narrated.
68. The 1<sup>st</sup> Defendant's case, as pleaded, is that the suit property was originally owned by one Bernard Osir Sule, deceased. The 1<sup>st</sup> Defendant purchased the suit property on 14<sup>th</sup> July 2011 from the 3<sup>rd</sup> Defendant, who was the representative of the deceased, at a consideration of Kshs. 1,500,000/-. The 1<sup>st</sup> Defendant denied that he had trespassed on the suit property. The 1<sup>st</sup> Defendant averred that if he had undertaken any activity on the suit property he did so as of right being the lawful proprietor of the suit property. The 1<sup>st</sup> Defendant contended that if the Plaintiff was registered as the owner of the suit property then such registration was irregular, illegal and fraudulent. The 1<sup>st</sup> Defendant produced the agreement of sale between him and the 3<sup>rd</sup> Defendant and several other documents in support of his case.
69. The 3<sup>rd</sup> Defendant's case was that she was the legal representative of her deceased husband, Bernard Osir Sule, who was the original registered owner of the suit property, and in that capacity, she sold the suit property to the 1<sup>st</sup> Defendant. The 3<sup>rd</sup> Defendant contended that if the Plaintiff was registered as the owner of the suit property, such registration was procured by the Plaintiff fraudulently, illegally and irregularly. The 3<sup>rd</sup> Defendant produced several documents in support of her case.
70. I am satisfied from the evidence on record that the Plaintiff is the lawful beneficial owner of the suit property. The Plaintiff proved that the suit property was allocated to Rivanza on 27<sup>th</sup> August 1991, Rivanza accepted the allotment on 22<sup>nd</sup> January 1996 and thereafter paid the necessary charges, which were accepted by the Commissioner of Lands. Rivanza transferred the suit property to the Plaintiff with the consent of the Commissioner of Lands. The Plaintiff thereafter took possession of the suit property and fenced it. Apart from the undated Grant No. 68939 in the name of Bernard Osir Sule, deceased, together with the attached Part Development Plan, purportedly registered on 6<sup>th</sup> February 2002, no other evidence was placed before the court in support of the deceased's ownership of the suit property. There was no evidence showing that the deceased was allocated the suit property, accepted the allotment and paid the necessary charges for the allocation. I have also noted that according to this Grant, the suit property was allocated for residential use. This is contrary to the Part Development Plan on which the purported allocation was based. According to the Part Development Plan, the



suit property was planned for industrial use. The two witnesses from the Ministry of Lands and the National Land Commission (PW2) and (DW4), who gave evidence on behalf of the Plaintiff and the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, told the court that they had no record of the allocation of the suit property to the deceased. In the absence of any evidence to support the deceased's title to the suit property apart from the Grant aforesaid, which was challenged, it is my finding that the deceased Bernard Osir Sule had no valid title to the suit property. This finding finds support in the fact that if indeed the deceased had title to the suit property, the 3<sup>rd</sup> Defendant did not need to be issued with another letter of allotment. I can see no logic in the 3<sup>rd</sup> Defendant being allocated land that was registered in the name of her deceased husband. The land could not have been available for the purported allocation. If the deceased was the lawful registered owner of the suit property, the 3<sup>rd</sup> Defendant could have acquired the property through succession and not otherwise.

71. Contrary to her pleadings, the 3<sup>rd</sup> Defendant told the court that she was not claiming the suit property in her capacity as the legal representative of the estate of the deceased, Bernard Osir Sule. As mentioned earlier, the 3<sup>rd</sup> Defendant claimed the suit property as an allottee thereof under the letter of allotment dated 11<sup>th</sup> June 1999. According to the 3<sup>rd</sup> Defendant, following the allotment of the suit property to her on 11<sup>th</sup> June 1999, she accepted the allotment and made the required payment on 13<sup>th</sup> June 2012. I am of the view that the suit property was not available for allocation to the 3<sup>rd</sup> Defendant. The property had already been allocated to Rivanza in 1991. Rivanza accepted the allotment and made the payment in 1996, about 3 years before the purported allotment of the suit property to the 3<sup>rd</sup> Defendant. The comments on the letter at page 6 of D.EXH.17 leave no doubt that even the land officers at the office of the Commissioner of Lands were aware that the suit property was not available for allocation to the 3<sup>rd</sup> Defendant when they embarked on the journey of processing a title for the 3<sup>rd</sup> Defendant. It is my finding that the suit property, having been allocated to Rivanza and Rivanza having accepted the allotment and made the payment for the same in 1996, the property was not available for allocation to the 3<sup>rd</sup> Defendant in 1999. The purported allocation was therefore illegal, null and void and was not capable of conferring any interest in the suit property upon the 3<sup>rd</sup> Defendant.
72. The 1<sup>st</sup> Defendant is said to have acquired an interest in the suit property through an agreement of sale dated 14<sup>th</sup> July 2011 between the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant. I have already made a finding that neither Bernard Osir Sule, deceased, nor the 3<sup>rd</sup> Defendant had any proprietary interest in the suit property. It follows that the 3<sup>rd</sup> Defendant had no interest in the suit property either as a legal representative of the deceased or in her personal capacity to transfer to the 1<sup>st</sup> Defendant. I have also noted that the 3<sup>rd</sup> Defendant obtained a Limited Grant of Letters of Administration Ad Litem for the purposes of joining this suit on 8<sup>th</sup> April 2024. This means that the 3<sup>rd</sup> Defendant was not the administrator of the estate of Bernard Osir Sule, deceased on 14<sup>th</sup> July 2011, when she purported to enter into an agreement with the 1<sup>st</sup> Defendant for the sale of the suit property. The purported agreement also did not refer to the suit property, and the measurement of the land sold was given as 0.03Ha. while the suit property measured 0.4600Ha. For the foregoing reasons, it is my finding that the 1<sup>st</sup> Defendant did not acquire any proprietary interest in the suit property from the 3<sup>rd</sup> Defendant.
73. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants had claimed that the Plaintiff had acquired the suit property irregularly, illegally, and fraudulently. The burden was upon the 1<sup>st</sup> and 3<sup>rd</sup> Defendants to prove the allegation. In Black's Law Dictionary, 9<sup>th</sup> Edition at page 731, fraud is defined as:

“a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”



74. In *Railal Gordhanbhai Patel v. Lalji Makanji* [1957] E.A 314, the court stated as follows at page 317:
- “Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
75. In *Virani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 E.A KLR 269, it was held that:
- “Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt”.
76. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants did not prove any of the particulars of fraud pleaded in their respective defences and counter-claims. The fact that the application for allotment was made by an entity known as Wiak Investments, while the letter of allotment was issued to Rivanza Enterprises, in my view, was not sufficient evidence of fraud. There was no evidence that Wiak Enterprises had complained that it was dispossessed of the suit property. The mere fact that the Plaintiff’s partners in Rivanza were employees of the Ministry of Lands without more could similarly not amount to fraud, nor could it render the allotment of the suit property to Rivanza irregular or illegal. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants did not prove the alleged breach of the Public Service Code of Conduct. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants had also taken issue with the offer of allotment of the suit property to Rivanza, having been accepted outside the time that was prescribed in the letter of allotment. The offer to Rivanza was accepted and payment made 5 years after the lapse of the time that was prescribed in their letter of allotment. I do not understand why the issue was raised because the 3<sup>rd</sup> Defendant’s purported allotment was accepted and paid for 12 years after the expiry of the time that was prescribed in her letter of allotment. I wonder how a 5-year delay would render an allotment invalid and not a 12-year delay. My take is that Rivanza accepted the allotment and made payment for the same before the Commissioner of Lands allotted the suit property to any other person. The acceptance and the payment, although made out of time, were accepted by the Commissioner of Lands. The 3<sup>rd</sup> Defendant’s letter of allotment was issued 3 years after Rivanza had accepted the allotment and made payment. In the circumstances, the late acceptance of the offer of allotment and payment of the allotment fees did not invalidate the allotment of the suit property to Rivanza.
77. Due to the foregoing, it is the finding of the court that the Plaintiff is the lawful beneficial owner of the suit property.

#### **Whether the Defendants are trespassers on the suit property.**

78. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, *Clerk & Lindsell on Torts*, 18<sup>th</sup> Edition, page 923, paragraph 18-01. In *Gitwany Investments Limited v. Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession.
79. Section 3 of the *Trespass Act*, Chapter 294 Laws of Kenya defines a trespasser as:
- (1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.
80. I have already made a finding that the Plaintiff is the lawful beneficial owner of the suit property. As the owner of the suit property, the Plaintiff was entitled to quiet possession and enjoyment of the property.



I have also held that the 1 and 3<sup>rd</sup> Defendants have no valid interest in the suit property. As for the 2<sup>nd</sup> Defendant, it was common ground that her interest was in the parcel of land known as L.R No. 18159/24. She had no claim over the suit property. It follows, therefore, that all the Defendants had no reasonable excuse or justifiable cause for being on the suit property.

81. The Plaintiff had accused the 1<sup>st</sup> Defendant of pulling down and destroying the boundary fence between the suit property and L.R No. 18161, and thereafter creating an access road through the suit property to L.R No. 18161. The 1<sup>st</sup> Defendant was also accused of putting up pit latrines on the suit property. For the 2<sup>nd</sup> Defendant, she was accused of putting up a wall fence within the suit property and erecting a house on her parcel of land that extended to the suit property.
82. The Plaintiff produced in evidence a survey report dated 9<sup>th</sup> August 2012 prepared by George Otieno of Olweny & Associates Licensed Surveyors. In the report, the surveyor stated that the 1<sup>st</sup> Defendant, who was the owner of L.R No. 18161, had created an access road through the suit property. The surveyor did not mention the pit latrines. The 1<sup>st</sup> Defendant denied carrying out any construction on the suit property, but did not comment on the issue of the road. The survey report was not challenged. It is my finding that the 1<sup>st</sup> Defendant had unlawfully created an access road through the suit property. Concerning the 2<sup>nd</sup> Defendant, the surveyor had indicated that part of her house extended to the suit property. The 2<sup>nd</sup> Defendant did not tender evidence at the trial; the evidence given against her by the Plaintiff was not controverted. I therefore find that the 2<sup>nd</sup> Defendant trespassed on the suit property by extending part of her house to cover a portion of the suit property.

#### **Whether the Plaintiff is entitled to the reliefs sought in his further amended plaint.**

83. I have set out earlier in the judgment the reliefs sought by the Plaintiff against the Defendants. From my findings above, I am satisfied that the Plaintiff is entitled to a declaration that he is the beneficial owner of the suit property. The Plaintiff is also entitled to a mandatory injunction compelling the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to hand over possession of the portions of the suit property under their occupation to the Plaintiff.
84. The Plaintiff claimed mesne profits at the rate of Kshs. 10,000/- per month with effect from March 2010 until vacant possession of the suit property is handed over to the Plaintiff. In *Attorney General v. Halal Meat Products Limited* [2016] eKLR, the Court of Appeal stated as follows on mesne profits:

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See *McGregor on Damages*, 18thEd. para 34-42.”
85. In *Rajan Shah t/a Rajan S. Shah & Partners v. Bipin P. Shah* [2016] eKLR the court stated as follows:

“The term ‘mesne profits’ relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.”



86. I am satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants occupied portions of the suit property at the time of the filing of this suit. The Plaintiff did not present evidence as to the areas or sizes of the portions of the suit property which were occupied by each of the two Defendants for assessment of mesne profits. The Plaintiff also did not present to the court a scientific or objective method of how he arrived at the sum of Kshs. 10,000/- per month being claimed, and the commencement date of March 2010. Doing the best I can in the circumstances, I will award the Plaintiff Kshs. 200,000/- as mesne profits to be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants equally.
87. The Plaintiff also sought Kshs. 390,000/- as special damages. The law on special damages is settled. Special damages must be specifically pleaded and strictly proved. In *Zacharia Waweru Thumbi v. Samuel Njoroge Thuku* [2006] eKLR, the court stated that:
- “The law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Law Reports and Text Books on Torts, are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in *Hahn v. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
88. In *Kenya Power & Lightning Company Limited v. Philip A. M. Kimondi* [2018] eKLR, the Court of Appeal stated as follows:
- “In the case of *Storms Bruks Aktie Bolag vs Hutchison* (1905) AC 5515 Lord MacNaughten sought to distinguish between the nature of special and general damages and explained that:- ...‘Special damages’ on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore must be claimed specifically and proved strictly. In other words...while in the case of special damages, the respondent would be required to show proof of actual loss on matter that cannot be said to be a natural or direct consequence of the Appellant’s trespass.”
89. The Plaintiff averred that the claimed sum of Kshs. 390,000/- were the expenses that he incurred in restoring the boundary fence that was brought down by the 1<sup>st</sup> Defendant. The sum claimed was said to comprise the cost of the materials used and labour. The Plaintiff did not give the particulars of the materials used and the cost thereof. There were also no particulars of the labour employed and the cost. It is my finding that the sum of Kshs. 390,000/- claimed as special damages has not been proved.

**Whether the 1<sup>st</sup> and 3<sup>rd</sup> Defendants are entitled to the reliefs sought in their counterclaims**

90. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants failed to prove that they had proprietary rights or any other rights recognised by law in the suit property, which had been infringed or violated by the Plaintiff. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants are therefore not entitled to the orders sought in their counterclaims against the Plaintiff.



### **Who is liable for the costs of the suit and the counterclaims**

91. Section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, provides that costs are at the discretion of the court and as a general rule, costs follow the event unless the court, for good reason, orders otherwise. In Halbury's Laws of England, 4<sup>th</sup> Edition (Re-issue), [2010] Vol. 10, para 16 the authors have stated as follows:

“The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the Court, a party has no right to costs unless and until the Court awards them to him and the Court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”.

92. The Plaintiff has proved his claim against the Defendants, while the 1<sup>st</sup> and 3<sup>rd</sup> Defendants have not proved their counterclaims. The Plaintiff is therefore entitled to the costs of this suit and counterclaims.

### **Conclusion**

93. In conclusion, I hereby enter judgment for the Plaintiff against the Defendants as follows;

1. I declare that the Plaintiff is the lawful beneficial owner of the suit property, L.R. No. 18160.
2. A mandatory injunction is issued compelling the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to vacate and surrender to the Plaintiff the portions of the suit property under their possession or occupation within 60 days from the date hereof in default of which, the Plaintiff shall be at liberty to apply for warrants for their forceful eviction from the said portions of the suit property.
3. Kshs. 100,000/- as mesne profits payable by the 1<sup>st</sup> Defendant, together with interest at court rates from the date hereof until payment in full.
4. Kshs. 100,000/- as mesne profits payable by the 2<sup>nd</sup> Defendant, together with interest at court rates from the date hereof until payment in full.
5. Costs of the suit and the counterclaims.

**DELIVERED AND SIGNED AT KISUMU ON THIS 3<sup>RD</sup> DAY OF JULY 2025**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Onsongo for the Plaintiff

Mr. Mwamu for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants

N/A for the 2<sup>nd</sup> Defendant

Mr. A. Lore-Court Assistant

