



**Kimuri Housing Company Limited v Wambugu & another (Environment & Land Case E095 of 2021) [2024] KEELC 717 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 717 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E095 OF 2021**

**JO MBOYA, J  
FEBRUARY 8, 2024**

**BETWEEN**

**KIMURI HOUSING COMPANY LIMITED ..... PLAINTIFF**

**AND**

**JOHN KIUMI WAMBUGU ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein approached the Honourable court vide Plaint dated the 13<sup>th</sup> March 2021 and in respect of which same [ Plaintiff], has sought for a plethora of reliefs, namely;
  - i. Declaration that the plaintiff is the bona fide registered owner of the suit property L.R NO. 57/1343 and that the indenture of title issued in the year 2015 to the Plaintiff is genuine, valid and bona fide title to the suit property.
  - ii. A declaration that the title issued in October, 2020; or thereabout and held by the 1st Defendant in respect of L.R NO. 57/1343 is fraudulent and therefore incapable of conferring any proprietary right to the 1st defendant and is therefore null and void ab initio consequently, an order cancelling the said title forthwith do issue.
  - iii. Mandatory order directly the 2nd defendant to immediately avail, reconstruct, create, open or rectify any records [Deed file and correspondences files] that had otherwise been interfered with, hidden and/or destroyed in regard to the title held by the Plaintiff over the suit property.
  - iv. Permanent Injunction restraining the 1st Defendant by himself, his agents, servants, employees, proxies from trespassing, fencing, guarding, dealing,



alienating, disposing, developing, transferring, leasing, encumbering and/or interfering with the suit property L.R NO. 57/1343 (Original No. 57/32/801) and/or the Plaintiff's ownership and quit possession thereof in whatsoever manner.

- v. General damages
  - vi. Costs of this suit.
  - vii. Any other or further relief that the Honourable Court may deem just and expedient in the circumstances.
2. Upon being with served with the Plaint and summons to enter appearance, the 1<sup>st</sup> Defendant herein duly entered appearance and thereafter filed a Statement of Defense dated the 16<sup>th</sup> April 2021. However, the 1<sup>st</sup> Defendant herein subsequently procured and obtained Leave of the court culminating to the filing of an amended statement of defense and counterclaim dated the 5<sup>th</sup> August 2021.
3. For coherence, the relief sought at the foot of the Counterclaim are as hereunder;
- i. The Plaintiff's suit be dismissed.
  - ii. The this Honorable court be pleased to issue an order declaring that the Plaintiff's title is a nullity.
  - iii. The Plaintiff's title be struck off the register of title and all entries thereunder nullified.
  - iv. This Honorable court be pleased to issue an order declaring that the 1<sup>st</sup> Defendant's title as being valid.
  - v. The Plaintiff be ordered to bear the costs of the suit and the counterclaim.
4. On the other hand, the 2<sup>nd</sup> Defendant similarly entered appearance and filed a Statement of Defense dated the 20<sup>th</sup> August 2021, wherein same denied the averments contained at the foot of the Plaint.
5. Suffice it to point out that the instant suit was thereafter subjected to the requisite pre-trial directions whereupon the Parties confirmed filing and exchange of the requisite bundle of documents and the respective witness statements. Consequently and in this regard, the matter was confirmed ready for hearing.

#### **Evidence By The Parties':**

- a. Plaintiff's Case:
6. The Plaintiff's case revolves around the evidence of one witness, namely, Margaret Wambui Ngugi. Same testified as PW1.
  7. It was the testimony of the witness that same is a Director of the Plaintiff company and that by virtue of being a Director of the Plaintiff company, same [witness] is conversant with and knowledgeable of the facts pertaining to the subject matter.
  8. Furthermore, the witness averred that the Plaintiff company purchased the suit property, namely, L.R No. 57/1343 [ Original No. 57/32/801], in the year 2009 for a sum of Kes.35, 000, 000/= only. In any



- event, the witness added that the suit property was purchased from Hon. Njenga Karume and Hon. Matu Wamae, who were the Trustees of Kasarani Clay Works Foundation Trust.
9. It was the further evidence of the witness that the said Trustees, [details in terms of the preceding paragraph], had acquired the suit property from the initial owner of the suit property, namely, M/s Agricultural and Industrial Holdings Ltd.
  10. On the other hand, the witness averred that upon the purchase and acquisition of the suit property, the Plaintiff herein did not immediately cause the suit property to be transferred and registered in her name. Nevertheless, the witness averred that the completion documents were released and handed over to the Plaintiff's advocates, namely, M/s Kagiri & Company Advocates.
  11. Additionally, the witness testified that subsequently, the Plaintiff caused the suit property to be transferred and registered in her name and in this regard, the Plaintiff alluded to an Indenture which was submitted to the Land Registry and was duly registered in the year 2015.
  12. Other than the foregoing, it was the testimony of the witness that upon transfer and registration of the suit property in the name of the Plaintiff, the Plaintiff commenced the process of sub-dividing the suit property into various plots, but, however, the process of subdividing the suit property into various plots was halted/shelved, because the Plaintiff sought to implement some other projects within the city of Nairobi.
  13. Be that as it may, the witness averred that on or about the October 2020, same [witness] was alerted of some persons who were interfering with the suit property and claiming to be the registered owners thereof. In this regard, the witness averred that same was thereafter constrained to lodge a Complaint with inter-alia the District Commissioner Kasarani sub-county; as well as the Directorate of Criminal Investigations [DCI] with a view to ascertaining the identities of the persons who were laying a claim to the suit property.
  14. Nevertheless, the witness averred that the Complaint that was mounted with the said offices, did not yielded any fruit. In any event, the witness averred that same proceeded to and engaged private investigators who subsequently discovered and established that the person who was laying a claim to the suit property was the 1<sup>st</sup> Defendant herein.
  15. Furthermore, the witness averred that same also discovered that the 1<sup>st</sup> Defendant was holding a Certificate of title over and in respect of the suit property, which was allegedly procured and obtained in October 2020. Nevertheless, the witness added that the Certificate of title in favor of the 1<sup>st</sup> Defendant and which was being used to interfere with the Plaintiff's ownership was indeed fraudulent and unlawful.
  16. It was the further testimony of the Plaintiff that the suit property lawfully belongs to the Plaintiff company and hence the Plaintiff is entitled to exclusive possession, occupation and use thereof.
  17. On the contrary, the witness averred that the Certificate of title belonging to and registered in the name of the 1<sup>st</sup> Defendant was illegally and unlawfully procured and hence same ought to be revoked and/or nullified.
  18. Other than the foregoing, the witness alluded to the witness statement dated the 13<sup>th</sup> March 2021; and which same thereafter sought to adopt and rely on as her Evidence- in- chief.
  19. Suffice it to point out that the witness Statement dated the 13<sup>th</sup> March 2021; was thereafter adopted and admitted as the Evidence in chief of the witness.



20. Furthermore, the witness also alluded to a List and Bundle of documents dated the 13<sup>th</sup> March 2021; which same sought to adopt and produce before the court as Exhibits on behalf of the Plaintiff. In the absence of any objection from the adverse Parties, the documents at the foot of the List of documents dated the 13<sup>th</sup> March 2021; were duly adopted and admitted as Exhibits P1 to P7, respectively.
21. Other than the foregoing, the witness also alluded to the Plaint dated the 13<sup>th</sup> March 2021 and which same adopted and implored the court to act upon, by granting the reliefs at the foot thereof.
22. On cross examination by Learned counsel for the 1<sup>st</sup> Defendant, the witness averred that the Plaintiff company bought/purchased the suit property for the sum of Kes.35, 000, 000/= only. However, the witness admitted and acknowledged that same has neither tendered nor produced any evidence before the court to confirm payment of Kes.35, 000, 000/-
23. Furthermore, the witness averred that even though same has not tendered before the court evidence pertaining to payment of the purchase price, same would be able to procure such evidence from Equity bank Limited, if given time.
24. Whilst under further cross examination, the Witness averred that even though the Plaintiff bought the suit property, same has however not tendered a copy of the Sale Agreement to that effect.
25. It was the further testimony of the witness that even though same has intimated to the court that she (witness) is a director of the Plaintiff company, same has however not availed to the court a copy of the CR12; to show the details of the directors/shareholders of the Plaintiff company.
26. On further cross examination, the witness also admitted that same has also not tendered a copy of the Resolutions of the Plaintiff company, authorizing the filing of the suit before the Honourable Court.
27. Other than the foregoing, it was the testimony of the witness that the Plaintiff company bought the suit property on the 11<sup>th</sup> June 2008. However, the witness added that the land was eventually transferred and registered in favor of the Plaintiff company in the year 2015.
28. It was the further evidence of the witness that prior to and before the Plaintiff company purchased the suit property, the company undertook due diligence and in particular obtained a Certificate of official search in respect of the suit property. Nevertheless, the witness admitted that the copy of the official search which the Plaintiff procured, has neither been tendered nor produced before the court.
29. It was the further evidence of the witness that the Plaintiff company however, did not investigate the root/origin of the title of the suit property before same [Plaintiff], bought the property.
30. Whilst under further cross examination, the witness averred that the Transfer documents were duly signed and executed by the transferors. In any event, upon being referred to the Indenture, the witness averred that same was signed by both Honourable Njenga Karume and Hon. Matu Wamae, respectively.
31. It was the further testimony of the witness that by the time the transfer of the suit property was being effected in favor of the Plaintiff Hon. Njenga Karume had already died and/or passed on.
32. Moreover, the witness averred that upon the purchase and acquisition of the suit property, the Plaintiff entered upon and took possession thereof.
33. On cross examination by Learned counsel for the 2<sup>nd</sup> Defendant, the witness admitted and acknowledged that same has neither produced nor tendered any resolution by the company authorizing the filing of the instant suit.



34. Furthermore, the witness also admitted that same has neither produced nor tendered before the court any evidence relating to the payments of the purchase price in the sum of Kes.35, 000, 000/= only.
35. Whilst under further cross examination, the witness averred that even though same has alluded to the sale agreement as the first document in the Plaintiff's List and Bundle of documents, the sale agreement has not been produced before the court.
36. Besides, the witness also acknowledged that same has also not produced before the court any Certificate of official search which was carried out and/or undertaken on behalf of the Plaintiff.
37. On further cross examination, the witness averred that same is not aware whether Stamp duty was paid on the indenture/transfer of the suit property.
38. Furthermore, it was the testimony of the witness that as at the 30<sup>th</sup> September 2009, same [witness], is not aware whether Hon. James Njenga Karume was alive.
39. Other than the foregoing, it was the testimony of the witness that the Plaintiff company lodged a Complaint with the Directorate of Criminal investigations [DCI] with a view to investigating the identity of the person (s) who was interfering with the Plaintiff's ownership rights over the suit property.
40. On the other hand, the witness averred that though the Plaintiff company bought the suit property in the year 2009, the indenture was only registered in the year 2015. In any event, the witness added that the Plaintiff paid the requisite stamp duty at the time of the lodgment of the indenture.
41. Additionally, the witness averred that upon acquisition of the suit property, the Plaintiff took possession of the suit property. However, the witness admitted that the suit property has not been developed.
42. With the foregoing testimony, the Plaintiff's case was closed.
  - b. 1<sup>ST</sup> Defendant's Case
43. Similarly, the 1<sup>st</sup> Defendant's case revolves around the evidence of one witness, namely John Kiungu Wambugu. Same testified as DW1.
44. It was the testimony of the witness that same is an Advocate of Kenya currently practicing under the name and style of M/s Wambugu & Murioki Advocates.
45. Furthermore, the witness averred that same is conversant with the facts pertaining to and concerning the instant matter. In any event, the witness averred that as concerns the subject matter, same recorded a witness statement dated the 16<sup>th</sup> April 2021, which witness statement, the witness sought to adopt and rely on.
46. Suffice it to point out that the witness statement dated the 16<sup>th</sup> April 2021; was thereafter adopted and constituted as the Evidence in chief of the witness.
47. Other than the witness statement, which was duly adopted and admitted as the Evidence in chief of the witness, the witness also alluded to the List and Bundle of documents dated the 16<sup>th</sup> April 2021, containing 22 documents.
48. Similarly, the witness sought to adopt and rely on the various documents and in the absence of objection from the adverse Parties, the documents at the foot of the List dated the 16<sup>th</sup> April 2021; were duly admitted and produced in evidence as Exhibits D1 to D22, on behalf of the 1<sup>st</sup> Defendant.



49. Furthermore, the witness also alluded to a Supplementary List and Bundle of documents dated the 5<sup>th</sup> August 2021; and thereafter sought to produce the documents as Exhibits before the court.
50. Nevertheless, the witness clarified that though the Supplementary List and bundle of documents alludes to Eight [8] documents, the first document was however the sale agreement, which had hitherto been tendered and produced in court as an Exhibit. In this regard, the witness therefore implored the Honourable court to admit documents number 2 to 8, respectively, as Exhibits.
51. For coherence, the named documents, [details in terms of the preceding paragraph], were thereafter admitted and marked as Exhibits 23 to 29, respectively.
52. On the other hand, the witness alluded to the amended Statement of Defense and Counterclaim dated the 5<sup>th</sup> August 2021; and thereafter implored the Honourable court to grant the various reliefs sought thereunder.
53. On cross examination by Learned counsel for the 2<sup>nd</sup> Defendant, the witness herein averred that prior to and before purchasing the suit property, same [witness] undertook an official search and thereafter authenticated the details of the registered owner thereof. In any event, the witness added that the certificate of title in respect of the suit property is currently charged to Housing Finance Corporation.
54. Whilst under further cross examination, the witness averred that the Plaintiff herein also laid a claim to and in respect of ownership of the suit property. In addition, the witness averred that the Plaintiff also lodged a complaint with the Directorate of Criminal Investigations [DCI], pertaining to and concerning ownership of the suit property.
55. Upon further cross examination, the witness averred that the suit property had previously been surrendered to the Government of Kenya [G.O.K] and it is the Government, who proceeded to and allocated same to his (witness) predecessor.
56. Other than the foregoing, it was the testimony of the witness that same bought and acquired the suit property from his predecessors, who were the allottees, for the sum of Kes.100, 000, 000/= only. For coherence, the witness averred that the purchase price was duly paid to and in favor of the vendor and the evidence of such payments is contended at pages 39 to 42 of the 1<sup>st</sup> Defendant's Bundle of documents.
57. On further cross examination, the witness averred that upon purchase and acquisition of the suit property, same took possession thereof and that it is the Plaintiff who is seeking to interfere with his [witness] occupation.
58. In any event, the witness averred that his Certificate of title over and in respect of the suit property, has neither been challenged nor revoked, whatsoever.
59. On cross examination by counsel for the Plaintiff, the witness averred that prior to and before purchasing the suit property, same undertook due diligence and ascertained the ownership status of the suit property. In any event, the witness has averred that same established and confirmed the existence of a valid Letter of allotment that had been issued in favor of his [witness predecessor].
60. Besides, it was the testimony of the witness that the Letter of allotment in question contained special conditions, which were to be met and/or complied with by the allottees. However, the witness clarified that same has not able to confirm the payments of the Stand premium.
61. On further cross examination, the witness testified that same is aware that the land in question was surrendered to the Government by M/s Clay Works Ltd, as part of the conditions for the amalgamation



and subdivision, which had been applied for. However, the witness averred that the same has neither seen nor come across the surrender instrument.

62. It was the further testimony of the witness that the evidence of surrender is premised and predicated on the various correspondence which were exchanged between the City Council of Nairobi, [now defunct] and M/s Clay Works Ltd, who was seeking to undertake the requisite amalgamation and subdivision.
63. On further cross examination, the witness averred that same [witness] had dealt with the suit property long before same entered into and executed the sale agreement. In this regard, the witness averred that it his law firm which had hitherto been engaged in the matter and in fact forwarded the Deed Plan to the Commissioner of Lands.
64. On further cross examination, the witness testified that the Deed Plan, which he [witness] forwarded was in respect of the suit property.
65. Furthermore, the witness averred that the suit property had long been surrendered to the Government and hence same could only be allocated by the Government.
66. On further cross examination, the witness testified that same established that the Plaintiff's title was not obtainable from Lands Registry. In this regard, the witness added that the Certificate of title by the Plaintiff was fraudulent.
67. With the foregoing testimony, the 1<sup>st</sup> Defendant's case was duly closed.

c. The 2<sup>nd</sup> Defendant's Case

68. The 2<sup>nd</sup> Defendant's case revolves around the evidence of two witnesses, namely, Gordon Odeka Ochieng and Inspector James Wanjohi Mwangi, who testified as DW2 and DW3, respectively.
69. It was the testimony of DW2, that same is currently the Director of Land Administration in the Ministry of Lands, Housing, Public works and Urban Development. In any event, the witness averred that at the time when same recorded the witness, he [witness], was a Senior Deputy Director of Land Administration.
70. On the other hand, the witness averred that same is conversant with the facts of this matter and in particular, the ownership status pertaining to and concerning the suit property.
71. Furthermore, the witness averred that same has since recorded a witness statement dated the 20<sup>th</sup> August 2021; and which witness statement same sought to adopt and rely on as his Evidence in chief.
72. For coherence, the witness statement dated the 20<sup>th</sup> August 2021 was thereafter adopted and admitted as the Evidence in chief on behalf of the witness herein.
73. Additionally, the witness alluded to a List and Bundle of documents dated the 20<sup>th</sup> August 2021, which was filed by and on behalf of the 2<sup>nd</sup> Defendant and thereafter sought to produce the documents at the foot thereof.
74. There being no objection to the production of the documents at the foot of the List, same were duly produced and admitted as Exhibits D1 to D24, respectively, on behalf of the 2<sup>nd</sup> Defendant.
75. On cross examination by Learned counsel for the Plaintiff, the witness pointed out that same is the Director of Land Administration and by virtue of his office, same is in charge of inter-alia execution of leases in respect of public and private land. Furthermore, the witness has also averred that same is



- also responsible for coordination with various Investigations agencies on matters pertaining to Land administration.
76. Whilst under further cross examination, the witness averred that in the course of his duties , same also has custody of the records pertaining to ownership status and allocation of land.
  77. On further cross examination, the witness averred that the suit property arose as a result of amalgamation and subsequent subdivision of L.R No's 57/29 and 57/30 respectively, which upon subdivision gave rise to assorted parcels of lands.
  78. Other than the foregoing, the witness averred that the suit property was surrendered to the Government in fulfilment of the conditions which were granted for amalgamation and subdivision. Nevertheless, the witness added that same has never come across the surrender instrument pertaining to and concerning the suit property.
  79. Whilst under further cross examination, the witness averred that if there was no surrender, then the amalgamation and the consequential subdivisions could not have proceeded.
  80. It was the further testimony of the witness that same is also aware that a Letter of allotment was issued in respect of the suit property. In this regard, the witness alluded to the Letter of allotment dated the 10<sup>th</sup> August 1995.
  81. On further cross examination, the witness averred that the Letter of allotment contains special conditions, inter-alia, acceptance and payments of the stand premium within a stipulated period of time.
  82. Furthermore, the witness averred that the allottees of the Letter of allotment dated the 10<sup>th</sup> August 1995; proceeded to and paid the requisite stand premium on the 26<sup>th</sup> October 2012; and that the payment of the stand premium was duly accepted and acknowledged by the Government.
  83. On the other hand, it was the testimony of the witness that subsequently, a Lease instrument was prepared and issued in the names of the various allottees, namely, Peter Wambugu Mureithi and Irene Jacinta Wamboi.
  84. In any event, the witness averred that the Lease instrument was prepared by the Directorate of Land Administration and thereafter same was executed by the Chief Land Registrar.
  85. Additionally, the witness averred that an application for change of user was subsequently made and that the request/application for change of user was duly approved. Nevertheless, the witness averred that the application for change of user was lodged by the Registered planner and surveyor, respectively.
  86. Whilst under further cross examination, the witness averred that National Land Commission was not involved in the process of alienation of the suit property. For coherence, the witness added that National Land Commission was not informed because the land in question ceased to be Public land from the date of allocation.
  87. It was the further testimony of the witness that the allotment over and in respect of the suit property was undertaken by the Commissioner of Lands. Furthermore, the witness averred that subsequently, the office of the Directorate of Land Administration received a letter from the firm of Wambugu and Company Advocates which was forwarding a copy of the Deed Plan.
  88. On further cross examination, the witness averred that the documents which have been tendered before the Honourable court and relied on by the Plaintiff do not exist at the Land Registry. In any event, the witness added that same made efforts to trace the Plaintiff's documents but none was traceable.



89. In response to a question, as pertains to the ownership status of the suit property, the witness averred that the suit property belongs to and is registered in the name of the 1<sup>st</sup> Defendant. Further and in any event, the witness ventured forward and averred that the Plaintiff's claim to and in respect of the suit property is false and misleading.
90. On cross examination by Learned counsel for the 1<sup>st</sup> Defendant, the witness averred that the suit property was duly allocated vide Letter of allotment issued on the 10<sup>th</sup> August 1995. Besides, the witness clarified that upon the allotment, a lease was ultimately prepared and registered over the suit property.
91. Whilst under further cross examination, the witness averred that the Government received and receipted the payment of the stand premium.
92. The second witness who testified on behalf of the 2<sup>nd</sup> Defendant was Inspector James Wanjohi Mwangi. Same testified as DW3.
93. It was the testimony of the witness that same is an employee of the National Police Service and that same is currently attached to the Directorate of Criminal Investigations [DCI] at Mtito Andei.
94. It was the further testimony of the witness that same had been tasked to undertake the investigations over and in respect of the suit property and in particular, to verify the propriety of the documents held by the Plaintiff and the 1<sup>st</sup> Defendant, respectively.
95. Furthermore, the witness averred that arising from his retention, same wrote various Letters to the Ministry of Lands, Housing, Public works and Urban Development and forwarded assorted documents for verification. In this regard, the witness added that same thereafter received communication from the Ministry of Lands, which essentially confirmed that the 1<sup>st</sup> Defendant's titles document were lawful and legitimate.
96. Other than the foregoing, the witness alluded to a witness statement dated the 28<sup>th</sup> June 2021; and thereafter sought to adopt and rely on the contents of the witness statement. Instructively, the witness statement was thereafter admitted and constituted as the Evidence in chief of the witness herein.
97. On the other hand, the witness also alluded to the List and Bundle of documents dated the 20<sup>th</sup> August 2021; and in particular, document number 25, which same sought to tender and produce before the court.
98. In the absence of any objection to production of document number 25 at the foot of the List and Bundle of documents dated the 21<sup>st</sup> August 2021, the said documents was duly admitted and produced as Exhibit D25 on behalf of the 2<sup>nd</sup> Defendant.
99. On cross examination by Learned counsel for the 1<sup>st</sup> Defendant, the witness averred that same was able to take possession of the documents that were availed by the 1<sup>st</sup> Defendant; and thereafter same found and established that the said documents are authentic and legitimate.
100. Whilst under further cross examination, the Witness averred that the documents that were availed by the 1<sup>st</sup> Defendant were found to be part of the records obtaining at the Land Registry.
101. On the other hand, the witness averred that the Documents which are procured and obtained from the Plaintiff were found not to be genuine. In any event, the witness added that the Ministry of land clarified that the documents by the Plaintiff were not obtainable at the Land Registry.



102. Furthermore, the witness averred that the Indenture which the Plaintiff is relying upon, was not traceable at the Land Registry.
103. On cross examination by Learned counsel for the Plaintiff, the witness averred that the Complaint before the Directorate of Criminal Investigation [DCI], was mounted by and on behalf of the Plaintiff, was thereafter obliged to avail her documents to the DCI, to facilitate investigations.
104. On further cross examination, the witnesses averred that upon receipt of the documents from the Plaintiff, same (witness) forwarded the documents for verification to the Ministry of Lands. Nevertheless, the witness added that even though the Plaintiff lodged/mounted the Complaint, same [ Plaintiff] never returned to the offices of DCI to record a Witness Statement.
105. Notwithstanding the foregoing, the witness averred that the Ministry of Land confirmed that the Plaintiff's documents were not genuine.
106. With the foregoing testimony, the 2<sup>nd</sup> Defendant's case was duly closed.

**Parties' Submissions:**

a. Plaintiff's Submissions:

107. The Plaintiff filed written submissions dated the 17<sup>th</sup> November 2023; and in respect of which same has raised, highlighted and canvassed three [3] pertinent issues for due consideration by the Honourable court.
108. First and foremost, Learned counsel for the Plaintiff has submitted that the Plaintiff herein lawfully bought and acquired the suit property from Hon. Njenga Karume and Hon. Matu Wamae, respectively, sometimes in the year 2009.
109. In any event, Learned counsel for the Plaintiff has submitted that upon the payment of the purchase price in the sum of Kes.30, 000, 000/= only, the suit property was ultimately transferred to and registered in the name of the Plaintiff company.
110. It was the further submissions by Learned counsel for the Plaintiff that the Plaintiff herein has tendered and placed before the court cogent, plausible and credible evidence to show the process towards the acquisition of the suit property and hence the court ought to find and hold that the suit property lawfully belongs to the Plaintiff.
111. Secondly, Learned counsel for the Plaintiff has submitted that the contention by the Defendants that the suit property was surrendered to the Government, is misleading and in any event, no credible evidence has been placed before the court to vindicate such a claim.
112. Furthermore, Learned counsel for the Plaintiff has submitted that neither the 1<sup>st</sup> nor the 2<sup>nd</sup> Defendants has tendered or produced before the court the instrument of surrender to confirm that the suit property was indeed surrendered.
113. Other than the foregoing, Learned counsel for the Plaintiff has also submitted that the Defendant has also not produced before the court the approved scheme for subdivision to confirm that the suit property was indeed surrendered by Clay Works Ltd, either as alleged or at all. Furthermore, Learned counsel for the Plaintiff has submitted that no evidence has since been tendered to enable the court to infer that there was indeed surrender over and in respect of the suit property.



114. Thirdly, Learned counsel for the Plaintiff has submitted that as between the Plaintiff and the 1<sup>st</sup> Defendant, the Plaintiff has placed before the Honourable court credible evidence to confirm that the suit property lawfully belongs to the Plaintiff and not otherwise.
115. Conversely, Learned counsel for the Plaintiff has submitted that the 1<sup>st</sup> Defendant has however failed to place before the court and or demonstrate how same acquired the suit property. In this regard, Learned counsel for the Plaintiff has contended that between the Plaintiff and the 1<sup>st</sup> Defendant, the Plaintiff has duly proved her case to the requisite standard and hence her title to the suit property ought to be protected.
116. In any event, Learned counsel for the Plaintiff has contended that no evidence has been placed before the court to show that her acquisition of the suit property was fraudulent so as to defeat her entitlement to and in respect of the suit property.
117. In support of the foregoing submissions, Learned counsel for the Plaintiff has cited and relied on the decision of Dr. Joseph N K Arap Ngok vs Moijo Ole keiwua (1997)eKLR, where the Court of Appeal expounded on the extent and scope of the protection vested upon the registered proprietor of land by dint of Section 23 of the Registration of Titles Act, now repealed.
118. In a nutshell, Learned counsel for the Plaintiff has therefore implored the Honourable court to find and hold that the Plaintiff herein is the lawful and legitimate proprietor of the suit property and hence her title thereto ought to be sanctioned.
- b. The 1<sup>st</sup> Defendant's Submissions:
119. The 1<sup>st</sup> Defendant filed written submissions dated the 20<sup>th</sup> December 2023; and in respect of which same has highlighted and canvassed two [2] issues for due consideration and determination by the Honourable court.
120. First and foremost, Learned counsel for the 1<sup>st</sup> Defendant has submitted that the 1<sup>st</sup> Defendant lawfully purchased the suit property from the persons who had hitherto been allocated the suit property by the commissioner of lands, now defunct.
121. Furthermore, Learned counsel for the 1<sup>st</sup> Defendant has pointed out that long after the suit property was allocated by the office of the commissioner of land; the Directorate of Land Administration processed the lease instrument, which was thereafter duly registered in favor of the allottee, who ultimately sold the suit property to the 1<sup>st</sup> Defendant.
122. At any rate, Learned counsel for the 1<sup>st</sup> Defendant has submitted that the 1<sup>st</sup> Defendant has placed before the court credible evidence to demonstrate the true origin of the suit property, right from its surrender to the Government by M/s Clay Works Ltd and thereafter the issuance of the Letter of allotment.
123. On the other hand, Learned counsel for the 1<sup>st</sup> Defendant has also submitted that the transfer and registration of the suit property to and in favor of the 1<sup>st</sup> Defendant is well documented and that the instruments underpinning the transfer and registration in favor of the 1<sup>st</sup> Defendant were confirmed to be obtainable at the Land Registry.
124. To the contrary, Learned counsel for the 1<sup>st</sup> Defendant has submitted that the documents being relied upon by the Plaintiff were neither obtainable nor traceable at the Land Registry. Consequently and in this regard, Learned counsel for the 1<sup>st</sup> Defendant has contended that the 1<sup>st</sup> Defendant's title was lawfully and legitimately procured and not otherwise.



125. Additionally, Learned counsel for the 1<sup>st</sup> Defendant has submitted that though the Plaintiff has adverted to and made allegations concerning fraud, the said allegations of fraud have neither been proved nor demonstrated to the requisite standard or at all.
  126. In support of the contention that the allegations of fraud have neither been proven nor established, Learned counsel for the 1<sup>st</sup> Defendant has cited and relied on, inter-alia, Vijay Morjaria vs Nansingh Madusingh Dabar & Anothers (2000)eKLR, Koinange & 13 Others vs Charles Karuga Koinange (1986)eKLR, Vivo Energy vs Maloba Petrol Station & 3 Others (2015)eKLR and Fanikiwa Ltd & 3 Others vs Sirikwa Squatters Group & 17 Others (Supreme Court Decision); to demonstrate that the Plaintiff was bound to prove the plea of fraud to a standard beyond the balance of probabilities.
  127. Secondly, Learned counsel for the 1<sup>st</sup> Defendant has submitted that the title held by and on behalf of the Plaintiff herein is illegal and unlawful and in any event, same is incapable of conferring upon the Plaintiff any legitimate rights to and in respect of the suit property.
  128. In any event, Learned counsel for the 1<sup>st</sup> Defendant has submitted that the current investigation that were carried out by both DW2 and DW3, respectively demonstrated that the Plaintiff's documents were neither obtainable nor traceable at the Land Registry.
  129. In the premises, Learned counsel for the 1<sup>st</sup> Defendant has contended that the Plaintiff herein has not been able to demonstrate the root of her title documents, either in the manner required under the law or at all.
  130. In support of the submissions that the Plaintiff herein has neither proved nor established her case to the requisite standard, Learned counsel for the 1<sup>st</sup> Defendant has cited and relied on the decision in the case of Torino Enterprises Ltd vs Attorney (General Petition No. E006 of 2022) (2023) KESC79 (KLR), which underscored the incidence of Burden of proof and on whom same rests.
  131. In view of the foregoing submission, Learned counsel for the 1<sup>st</sup> Defendant has implored the Honourable court to find and hold that the Plaintiff herein has failed to demonstrate her proprietor to the suit property and same ought to be dismissed.
  132. Additionally, Learned counsel for the 1<sup>st</sup> Defendant has also contended that the 1<sup>st</sup> Defendant has adduced and tendered before the court credible evidence to demonstrate that the 1<sup>st</sup> Defendant is the lawful and legitimate proprietor over and in respect of the suit property. Consequently and in this regard, Learned counsel for the 1<sup>st</sup> Defendant has implored the court to find and hold that the 1<sup>st</sup> Defendant has been able to prove her counterclaim to the requisite standard.
- c. The 2<sup>nd</sup> Defendant's Case:
133. The 2<sup>nd</sup> Defendant filed written submissions dated the 16<sup>th</sup> January 2024; and in respect of which same has raised, highlighted and canvassed three [3] pertinent issues for due consideration by the Honourable court.
  134. First and foremost, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that the instant suit by and on behalf of the Plaintiff is incompetent and legally untenable insofar as the Plaintiff herein has neither filed nor lodged a copy of resolution of the company under seal, to demonstrate that the suit has been filed with the authority of the company.
  135. In the absence of the resolution by and on behalf of the company, Learned counsel for the 2<sup>nd</sup> Defendant has contended that the entire suit before the court is therefore fatally defective and thus incapable of redemption.



136. In support of the foregoing submissions, Learned counsel for the 2<sup>nd</sup> Defendant has cited and relied on, inter-alia, the case of *Affordable Homes Africa Ltd vs Ian Anderson & 2 Others Nairobi HCC 254 of 2004 (UR)*, *Automatic Self Cleansing Filters Syndicate vs Cunningham (1906) CH.34, CA*; *East Africa Portland Cement Ltd vs Capital Markets Authority & 4 Others (2014)eKLR* and *Bugerere Coffee Growers Ltd vs Sebaduka & Another (1965) EA*, respectively to underscore the significance of the resolution by a company.
137. Secondly, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that the Plaintiff herein has neither demonstrated nor proved that same is the lawful and legitimate proprietor of the suit property or at all.
138. Furthermore, Learned counsel for the 2<sup>nd</sup> Defendant has contended that the burden of proof laid on the shoulders of the Plaintiff to demonstrate the legitimacy of the Certificate of title/indenture in respect of the suit property.
139. However, Learned counsel has submitted that the Plaintiff herein has failed to place before the court evidence of the sale agreement, if any, between the Plaintiff and [sic] the Vendors. Furthermore, Learned counsel has also submitted that the Plaintiff has failed to avail before the court evidence of the payment of the purchase price, payment of the Stamp Duty; or a certified copy of the indenture, to vindicate its validity.
140. Having failed to place before the Honourable court credible evidence that underpins the process leading to the issuance of the impugned indenture, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that the Plaintiff has therefore failed to prove his case to the requisite standard.
141. In support of the submissions that the Plaintiff was chargeable with proving her case on a balance of probabilities, Learned counsel has since cited and relied on, inter-alia, the case of *Dr. Samson Gwer & 5 Others vs Kenya Medical Research Institute & 3 Others (2020)eKLR*; *Raila Amollo Odinga & Others vs IEBC & Others, (2017)eKLR*, *Agnes Nyambura Muga (Suing as the executrix of the estate of the late William Earl Nelson vs Lita Violet Shefard (Sued in her capacity as the executrix of the estate of the late Bryn Walter Shefered (2019)eKLR* and *Daniel Toroitich Arap Moi vs Mwangi Stephene Mureithi & Another (2014)eKLR*, respectively.
142. Furthermore, Learned counsel for the 2<sup>nd</sup> Defendant has also submitted that the impugned indenture in respect of L.R No. 57/1343 (Original No. 57/32/801) which is relied upon by the Plaintiff herein is fraudulent and illegal.
143. In any event, Learned counsel has added that the said indenture was neither obtainable nor traceable at the Land Registry or at all.
144. To the extent that the indenture being relied upon by the Plaintiff was neither obtaining nor traceable at the Land Registry, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that the reliefs sought by the Plaintiff are neither tenable nor grantable by the court.
145. In support of the submissions that it was incumbent upon the Plaintiff to demonstrate the process leading to the acquisition of the suit property, Learned counsel for the 2<sup>nd</sup> Defendant has cited, inter-alia, the decision in the case of *Samuel Kamere vs Land Registrar Kajiado (2015)eKLR*, *Alice Chemutai Too vs Nickson Kipkirui Korir & 2 Others 92015)eKLR* and *Elijah Makeri Nyamwara vs Stephen Mungai Njuguna & Another Eldoret ELC No. 609B of 2012*, respectively.
146. Thirdly, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that the Plaintiff herein is not entitled to the reliefs that have been sought for at the foot of the Plaint or at all. In any event, Learned counsel has contended that insofar as the Plaintiff's claim is founded on a contract pertaining to disposition of



an interests in land, it was incumbent upon the Plaintiff to tender and place before the court a copy of the sale agreement duly signed/executed by both Parties and thereafter attested by a witness who was present at the time of the execution.

147. Nevertheless, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that in the absence of the sale agreement, the suit by and on behalf of the Plaintiff herein runs contrary to and in contravention of the provisions of Section 3 (3) of the [Law of Contract Act](#), Chapter 20 Laws of Kenya.
148. Furthermore, Learned Counsel has thereafter proceeded to and cited, inter-alia, the decision in the case of Peter Mbiru Michuki vs Samuel Mugo Michuki (2014)eKLR and Leo Investment Ltd vs Estchwering Estate Ltd (2017)eKLR, respectively.
149. Premised on the foregoing submissions, Learned counsel for the 2<sup>nd</sup> Defendant has invited the Honourable court to find and hold that the Plaintiff's case has neither been proven nor established to the requisite standard. Consequently and in this regard, counsel has implored the court to proceed and dismiss the Plaintiff's suit.

#### **Issues For Determination:**

150. Having reviewed the pleadings, the Evidence [both oral and documentary] and upon consideration of the written submissions filed by and on behalf of the respective Parties, the following issues do emerge and are therefore worthy of determination;
  - i. Whether the Plaintiff's suit is fatally defective and incompetent for want of the resolution of the company to file the instant suit.
  - ii. Whether the Plaintiff herein lawfully and legally acquired title to and in respect of the suit property or otherwise.
  - iii. Whether the 1<sup>st</sup> Defendant's title to and in respect of the suit property was procured and obtained vide fraud or at all.
  - iv. What reliefs, if any, ought to be granted.

#### **Analysis And Determination:**

##### Issue Number 1

Whether the Plaintiff's suit is fatally defective and incompetent for want of the resolution of the company to file the instant suit.

151. Learned counsel for the 2<sup>nd</sup> Defendant has contended that the suit beforehand was filed and or commenced by the Plaintiff, albeit without the requisite resolution of the company, authorizing the filing of the suit.
152. Owing to the fact that the Plaintiff herein neither filed nor availed Evidence of the resolution, Learned counsel for the 2<sup>nd</sup> Defendant has thus contended that the entire suit is therefore fatally defective and otherwise legally irredeemable.
153. In support of the foregoing submissions, Learned counsel for the 2<sup>nd</sup> Defendant has cited and relied on, inter-alia, the case of Affordable Homes Africa Ltd vs Ian Anderson & 2 Others Nairobi HCC No. 254 of 2004 (UR), East Africa Portland Cement Ltd vs Capital Markets Authority & 4 Others (2014)eKLR and Bugere Coffee Growers Ltd vs Sebaduka & Another (1967)EA, respectively, to underpin the exposition that where a suit on behalf of a company is mounted without the requisite resolution under seal, then the suit is fatally incompetent and thus legally untenable.



154. Despite the contention by and on behalf of Learned counsel for the 2<sup>nd</sup> Defendant, it is evident from the face of the verifying affidavit that the Deponent thereto has intimated to the court that same is a Director of the Plaintiff company and thus same has the consent and authority of the Plaintiff company to, inter-alia, swear the verifying affidavit.
155. My understanding of the averment alluded to on the face of the verifying affidavit drives me to the conclusion that the Plaintiff company is knowledgeable of the existence of the suit and in any event, has gone ahead and authorized one of her Directors to execute the verifying affidavit which is a critical document in the filing of the suit by and on behalf of a Plaintiff.
156. Furthermore, neither of the Defendants herein tendered and/or produced before the court any evidence to show that the Deponent of the verifying affidavit, who ultimately attended court and testified as PW1, was neither authorized nor mandated to act for and on behalf of the Plaintiff company.
157. In the absence of any evidence, tendered before the court to controvert and/or rebutt the testimony by and on behalf of Margaret Wambui Ngugi, this court is at liberty to act upon and take cognizance of the authority alluded to and underscored on the face of the verifying affidavit.
158. In any event, though the position of the law had hitherto highlighted and amplified the necessity to file the resolution of the company under seal, there has been a shift in Jurisprudence and hence the holding/dictum espoused in the case of Bugerere Coffee Growers Ltd vs Sebaduka & Another (1967)EA, has since been overtaken and rendered otiose.
159. For coherence, the latest position of the law obtains in the case of Ardhi Highway Developers Ltd & Others vs West End Butchery Ltd & 6 Others (2015)eKLR, where the Court of Appeal had occasion to review the obtaining jurisprudential position and thereafter held thus;

44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; Bugerere Coffee Growers Ltd v Sebaduka & Anor(1970) 1 EA 147.The court in that case held:-

“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”

45. To their credit, the appellant’s Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court. The authority is Tatu Naiga& Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000.

The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the Bugerere casewas no longer good law as it had been overturned in the case of United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998.The latter case restated the law as follows:-

“ ... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is



authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

The decision has since been applied in Kenyan courts, for example, in *Fubeco China Fushun v Naiposha Company Limited & 11 others*[2014] eKLR.

160. In view of the holding by the Court of Appeal in the decision [supra], it is my finding and holding that lack of the resolution of the company under seal, does not vitiate and/or negate the validity or legality of a suit filed by and on behalf of the Company.
161. Furthermore, it is imperative to underscore that the decisions that were cited and relied upon by Learned counsel for the 2<sup>nd</sup> Defendant have since been superseded and are thus irrelevant and inapplicable.
162. In view of the foregoing, my answer to issue number one [1] is to the effect that the suit by and on behalf of the Plaintiff is legally tenable and thus deserves to be determined on merits and not otherwise.

## **Issue Number 2**

Whether the Plaintiff herein lawfully and legally acquired title to and in respect of the suit property or otherwise.

163. The suit property herein is stated to have been part and parcel of what was hitherto L.R No. 57/29 and 57/30, which were amalgamated and thereafter subdivided at the request of the previous owner, namely, M/s Clay Works ltd.
164. Furthermore, there is evidence that upon the amalgamation and the subsequent subdivision in terms of the duly approved subdivision scheme, various parcel of lands including the suit property were created.
165. In any event, there is also evidence that as part of the condition towards the amalgamation and subdivision of the original parcel of lands, the registered owners thereof was obliged to surrender certain designated plots to the Government.
166. Notwithstanding the foregoing, it was the testimony on behalf of the Plaintiff that the Plaintiff herein entered into a lawful sale agreement with Hon. Njenga Karume and Hon. Eliud Matu Wame, respectively, who sold the suit property to and in favor of the Plaintiff. In fact, it was the evidence of PW1 that the suit property was purchased on the 11<sup>th</sup> June 2008.
167. On the other hand, PW1 further testified that even though the suit property was bought and/or purchased on the 11<sup>th</sup> June 2008, the same was never transferred to and in favor of the Plaintiff until the year 2015.
168. Furthermore, PW1 also testified that even though the Plaintiff bought the suit property, same PW1, has neither tendered nor produced a copy of the sale agreement before the court. In this regard, it is instructive to reproduce certain salient aspects of the evidence by PW1 whilst under cross examination by Learned counsel for the 2<sup>nd</sup> Defendant.
169. Same are reproduced as hereunder;  

“The first document mentioned in the Plaintiff’s list and bundle of document is a copy of the sale agreement. It is however not produced before the court”.
170. To start with, the transaction pertaining to the suit property touched on disposition of an interest in land. In this regard, it was therefore imperative that the transaction between the Plaintiff and the



vendors, [if any], to be reduced into writing and thereafter to be executed by both Parties chargeable with the contract.

171. To this end, it is important to recall the ingredients that are spoken to and are espoused by the provisions of Section 3(3) of the [Law of Contract Act](#), Chapter 23 Laws of Kenya.

172. For coherence, same states as hereunder;

3. Certain contracts to be in writing

- (1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.
- (2) No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith.
- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
  - (a) the contract upon which the suit is founded—
    - i. is in writing;
    - ii. is signed by all the parties thereto; and
  - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.
- (4) Subsection (3) shall not apply to a contract made in the course of a public auction by a licensed auctioneer within the meaning of the [Auctioneers Act](#) (Cap 526) nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust.
- (5) The terms of a contract may be incorporated in a document either by being set out in it or by reference to some other document.
- (6) For the purposes of subsection (3)— “disposition” includes a transfer and a devise, bequest or appointment of property contained in a will; “interest in land” means any estate in or charge over land, or any estate in or charge over the proceeds of sale of land; “party” includes any agent, auctioneer or advocate duly authorized in writing to act in the absence of the party who has given such authority; “sign”, in relation to a contract, includes making one’s mark or writing one’s name or initial on the instrument as an indication that one intends to bind himself to the contents of the instrument and in relation to a body corporate includes—
  - (a) signature by an attorney of the body corporate duly appointed by a power of attorney registered under the [Registration of Documents Act](#) (Cap. 285);
  - (b) the affixing of the common seal of the body corporate in accordance with [the constitution](#) or the articles of association of the body corporate, as the case may be,



in which case no further attestation shall be required; “transfer” includes a mortgage, charge, lease, conveyance, assignment, assent, vesting declaration, vesting instrument disclaimer, release and every other assurance of property or any interest therein by any instrument other than a will or a codicil.

- (7) The provisions of subsection (3) shall not apply to any agreement or contract made or entered into before the commencement of that subsection. [Act No. 28 of 1968, s. 2, Act No. 21 of 1990, Sch., Act No. 5 of 1996, s. 33, Act No. 2 of 2002, Sch.]

173. Furthermore, the import and tenor of the provisions of Section 3(3) [supra], has since received Judicial interpretation in various cases. In this respect, it is imperative to take cognizance of the holding of the Court of Appeal in the case of Peter Mbiri Michuki vs Samuel Mugo Michuki (2014)eKLR, where the court held thus;

24. Section 3(3) of the *Law of Contract Act* provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested. Section 3(7) of the *Law of Contract Act* excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the *Law of Contract Act*, came into effect on 1<sup>st</sup> June, 2003. The trial court found that the sale agreement between the parties was an oral agreement made in 1964 between the appellant and the plaintiff.

Prior to the amendment of Section 3(3) of the *Law of Contract Act* in 2003, the subsection read as follows:

- (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (1) Has in part performance of the contract taken possession of the property or any part thereof; or
- (11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract. '

174. To my mind, the sale agreement, if any, that was entered into between the Plaintiff and the vendors, is/ was a critical document to underpin the transaction culminating into the indenture that is currently being relied upon by the Plaintiff.

175. Secondly, PW1 is also on record as having stated that even though the Plaintiff herein entered into a sale agreement and purchased the suit property, the Plaintiff however did not undertake due diligence prior to and before purchasing the suit property.

176. Yet again, it is imperative to revert back to the evidence of PW1 whilst under cross examination by Learned counsel for the 1<sup>st</sup> Defendant.



177. Same stated as hereunder;

“Before we bought the land, the company did an official search. I have not produced the certificate of official search before the court. The Plaintiff did not investigate the root/origin the title before we purchased”.

178. In my humble view, the foregoing excerpt, which is discernable from the evidence of PW1, is testament to the perfunctory approach that was deployed by the Plaintiff towards the acquisition of the said property.

179. Thirdly, it is also important to recall that the Plaintiff’s witness placed before the Court an indenture which shows on the face thereof that same was executed by James Njenga Karume and Eliud Matu Wamae, as Trustees of Kasarani Clay Works Foundation and Agricultural and Industrial Company Ltd, respectively.

180. However, the Plaintiff herein neither tendered nor produced before the court any document, whether Certificate of title or Certificate of official search to demonstrate that the vendors who executed the indenture of conveyance were hitherto the registered proprietors of the suit property and were thus seized of the requisite capacity to sell and transfer the suit property to and in favor of the Plaintiff.

181. Quite clearly, if the Plaintiff’s predecessors, were not the proprietors of the suit property, then certainly, same would have no title and/or interests capable of being conveyed to the Plaintiff.

182. In this respect, it is imperative to invoke and apply the Doctrine of Nemo dat quod non habet [he who has no title cannot pass a title better than what he possess]. Similarly, the doctrine of Ex-nihilo-nihil fit [out of nothing comes nothing], will also suffice.

183. To my mind, the absence of any preliminary document [certificate of title/certificate of official search], to show that the Plaintiff’s predecessors in title, ever owned the suit property, leaves a lacuna in the claim mounted by and on behalf of the Plaintiff.

184. Fourthly, it is common knowledge that prior to and or before any transaction affecting an interest in land is conveyed vide an instrument of transfer, an indenture of conveyance not excepted, the transferee is under obligation to pay Stamp Duty as assessed by the collector of stamp duty in compliance with the provisions of Stamp Duty Act, Chapter 480 Laws of Kenya.

185. As pertains to the transaction underpinned by the indenture which is relied upon by the Plaintiffs, the Plaintiff’s witness was unable to authenticate payment of stamp duty or at all. In fact, whilst under cross examination by counsel for the 2<sup>nd</sup> Defendant, PW1 stated as hereunder;

“I am not aware whether stamp duty was paid. I have not produced any evidence of payment of stamp duty”.

186. Yet again, the question that remains outstanding and begging for an answer is how the indenture of conveyance, [ if at all], would have been registered by the Land Registry albeit without payment of the requisite stamp duty in accordance with the law.

187. Fifthly, the Plaintiff’s witness, PW1 is on record as testifying that though the suit property was bought some time in the year 2009 [which is at variance with the initial evidence that same was bought on the 11<sup>th</sup> June 2008], same admitted and acknowledged that by the time the indenture of conveyance was being registered, one Hon. James Njenga Karume was long dead.



188. Nevertheless, it is evident from the face of the indenture of Conveyance that was lodged for registration that the passport size photograph of Hon. Njenga Karume was being utilized to facilitate the conveyance.
189. Quite clear, the passport size photograph of Hon. James Njenga Karume, deceased, could not be used post-humously and this raises yet another blemish/point of concern on the propriety of the Indenture of conveyance.
190. Further and in any event, when PW1 was subjected to cross examination on whether or not Hon. James Njenga Karume was alive as at 2009, same is on record as stating as hereunder;
- “I don’t know whether Hon. James Njenga Karume was still alive by the year 2009”.
191. In my humble , albeit considered view, the indenture of conveyance is a document that could not have been registered, if any of the concerned parties had passed on/died.
192. Sixthly, though the Plaintiff through her witness contended that the indenture of conveyance was duly presented to or lodged at the Land registry and thereafter registered, DW2 and DW3, respectively tendered evidence to show that the indenture of conveyance alluded to by the Plaintiff was neither obtainable nor traceable at the Land Registry.
193. To this end, it is pertinent to reproduce the salient aspects of the testimony by DW2, who is the Director of land administration and under whose custody the various records would have been traceable and obtainable.
194. Same stated as hereunder;
- “The details about the particulars of the Plaintiff’s title could not be traced at the land registry. Referred to a copy of the postal search and the witness state that the entry on the search shows that the land belongs to the Plaintiff. However, the contends of the search could not be verified”.
195. Furthermore, DW2 stated as hereunder;
- “The Plaintiff herein does not own the land. The Plaintiff’s claim is false and misleading because the land had been surrendered and hence not available for ownership by way of an indenture of conveyance”.
196. On the part of DW3, namely, Inspector James Wanjohi Mwangi, same stated that following a complaint received from a Director of the Plaintiff company, same obtained copies of the title document from the Plaintiff as well as from the 1<sup>st</sup> Defendant and thereafter forwarded the assorted title document to the Ministry of Lands, Housing, Public works and Urban Development, for verification.
197. On cross examination by Learned counsel for the Plaintiff, DW3 stated as hereunder;
- “I am aware that I forwarded the complainant’s documents for verification. The ministry of lands confirmed that the complaint’s documents were not genuine”.
198. Suffice it to point out, that the complainant, who had lodged the complaint with the Directorate of Criminal Investigation [DCI] was the Plaintiff company and not otherwise. Consequently, the fact that the certificate of title/indenture of conveyance, which was being relied upon by the Plaintiff could not be traced at the Ministry of Lands, speaks volume.



199. In any event, it is the Plaintiff who had contended that same is the lawful and legitimate owner of the suit property and that her title documents were duly lodged with and registered by the office of the Chief Land Registrar. Instructively, it was therefore incumbent upon the Plaintiff to procure a witness, [if any], from the office of the Chief Land Registrar or better still, the Ministry of Land, to come and corroborate the Plaintiff's testimony.
200. Unfortunately, the Plaintiff did not deem it appropriate and/or expedient to procure a witness from the said Ministry of Lands and thus the averments by and on behalf of the Plaintiff, as pertains to presentation and registration of the indenture of conveyance, remained hanging in the air.
201. As pertains to the consequences and implications of the failure by the Plaintiff to obtain a witness from the Ministry of Land/Chief Land Registrar, it is imperative to cite and adopt the holding of the Court of Appeal in the case of Philemon L Wambia vs Gaitano Lusitsa Mukofu & Another (2019)eKLR, where the court stated and held thus;
39. In Solomon Omwega Omache & another –v- Zackery O. Ayieko & 2 others (2016) eKLR it was stated that the court has the duty to uphold the sanctity of the record at the Lands office. The official record at the lands office in relation to the suit property shows that the first allottee was Mr. Joseph Muturi Mutorania. The Third Party witness testified that the letter of allotment held by the appellant was not available at the lands office record file of the suit property. No evidence is on record to persuade us doubt the integrity and accuracy of the official records at the lands office..
202. The court further proceeded and stated as hereunder;
- “ The authenticity of the appellant’s letter of allotment is therefore in issue. The legal adage is that he who alleges must prove. In this matter, the appellant has not tendered any evidence to support the counterclaim that his letter of allotment is genuine. When the authenticity and genuineness of the appellant’s letter of allotment was raised, it was incumbent upon the appellant to prove the genuineness of his letter of allotment. As the trial court correctly stated, the appellant ought to have called a witness from the Nairobi Lands Office where he claimed he obtained the letter of allotment. Failure on the part of the appellant to call a witness from the lands office means that he did not prove the counter claim on a balance of probabilities”.
203. Arising from the foregoing analysis and coupled with the ratio decidendi espoused in the decision [supra], what becomes evident and apparent is that the Plaintiff herein has failed to demonstrate the process culminating into the issuance of the impugned indenture of conveyance or at all.
204. Notwithstanding the foregoing, it is not lost on this court that where a Certificate of title/indenture of conveyance is under a challenge, it is not enough for the owner thereof to wave/display the indenture of conveyance on the face of the court and thereafter imagine that such document would suffice to underpin ownership rights.
205. Simply put, it behooves the person whose certificate of title is under challenge to venture forward and to demonstrate that the certificate of title in question was procured and obtained procedurally, lawful and legally in accordance with the provisions or the applicable laws, in this case the Registration of Titles Act, [now repealed].



206. To underscore the foregoing position, it suffices to adopt, restate and reiterate the holding in the case of *Munyu Maina versus Hiram Gathiha Maina* [2013] eKLR, where the court held as hereunder;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony. We find that a trust exists in relation to the suit property”.

207. Remarkably, the necessity to demonstrate and place before the court cogent evidence to show the process leading to the issuance of the Certificate of title was also elaborated upon in the case of *Alice Chemutai Too vs Nickson Kipkirui Korir & 2 Others* (2015)eKLR, where the court stated thus;

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

1. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows :-

“...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

I stand by the above words and I am unable to put it better than I did in the said dictum.

208. Arising from the foregoing position, my answer to issue number two [2] is to the effect that the Plaintiff neither acquired nor obtained any lawful rights to the suit property or at all.

### **Issue Number 3**

Whether the 1<sup>st</sup> Defendant’s title to and in respect of the suit property was procured and obtained vide fraud or at all.



209. On behalf of the 1<sup>st</sup> Defendant, it was contended that the suit property was hitherto part and parcel of L.R No's 57/29 and 57/30, which were amalgamated and thereafter subdivided culminating into several plots.
210. However, as a condition towards the approval of the amalgamation and subdivision, the City Council of Nairobi directed that certain plots which were colored in blue on the scheme of subdivision, inter-alia, the suit property were to be surrendered to the Government free of charge.
211. To this end, the 2<sup>nd</sup> Defendant tendered and produced before the court the approval Letter dated the 6<sup>th</sup> October 1993; together with a copy of the proposed sub-division scheme, which was the subject of the letter under reference.
212. First forward, it was the evidence of the 1<sup>st</sup> Defendant that the suit plot having been duly surrendered became part and parcel of Government land which was thus at the disposal of the Commissioner of land, for purposes of allocation and/or alienation.
213. Additionally, the 1<sup>st</sup> Defendant thereafter placed before the Honorable court the evidence relating to the application for allotment of the land and the ultimate issuance of a Letter of allotment dated the 10<sup>th</sup> August 1995; which was issued in favor of inter-alia, K Kerekia, K Kuriga, F King'ori, W Muriithi and J Wambui, respectively.
214. Furthermore, evidence was also placed before the court that ultimately, the allottees of the suit property complied with the terms of the Letter of allotment culminating into a preparation and issuance of a Lease instrument.
215. Subsequently, the 1<sup>st</sup> Defendant averred that same entered into and executed an agreement for sale of land over and in respect of the suit property, culminating into the transfer and registration thereof in his name. In this regard, the 1<sup>st</sup> Defendant has availed to the court the Certificate of title confirming the transfer and registration of the suit property in his name. For good measure, the Certificate of title was tendered and produced in evidence as Exhibit D14 on behalf of the 1<sup>st</sup> Defendant.
216. Be that as it may, when the Plaintiff herein lodged a complaint with the Directorate of Criminal Investigations [DCI] for purposes of investigating the validity and propriety of the title documents that were held by the Plaintiff and the 1<sup>st</sup> Defendant, respectively, the investigation revealed that the 1<sup>st</sup> Defendant's title documents were authentic and legitimate.
217. For the sake of brevity, it is imperative to reproduce the salient aspects of the evidence of DW3 whilst under re-examination by Learned counsel for the 2<sup>nd</sup> Defendant. Same stated as hereunder;
- “The documents that were presented by the complainant were presented to the ministry of lands. The ministry of lands were able to verify the authenticity of the documents. The ministry confirmed that the 1<sup>st</sup> Defendant's documents were genuine”.
218. Additionally, DW3 ventured forward and stated as hereunder;
- “I also received a response from the ministry of lands as pertains to the documents by the complainant (the Plaintiff herein). Referred to the indenture of conveyance at page 105; the witness states that the document was subjected to verification by the ministry of lands. The document was not found at the ministry of lands”.
219. From the foregoing, there is no gainsaying that the title documents belonging to the 1<sup>st</sup> Defendant were duly verified and established to be authentic.



220. Consequently and in the premises, there is no debate as pertains to the legality of the title documents held by the 1<sup>st</sup> Defendant herein and in this regard, it suffices to point out that the 1<sup>st</sup> Defendant has been able to demonstrate his rights to and in respect of the suit property.
221. Before departing from the issue herein, it suffices to underscore that the issuance of Certificate of title in favor of the registered owner, [which title is confirmed as authentic], vests in such an owner absolute and exclusive rights thereto.
222. To underscore the scope and extent of the rights of a registered owner, it suffices to adopt and reiterate the succinct exposition alluded to in the case of Mohansons (Kenya) Limited versus Registrar of Titles & 2 others [2017] eKLR.
223. For coherence, the court stated and held as hereunder;

(18) As held by the Court of Appeal for East Africa held in *Moya Drift Farm Ltd. v. Theuri* (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property. *Spry*, V-P at 116, considered the effect of section 23 of the Registration of Titles Act and held –

“I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”

Sir William Duffus, P. *ibid* at p.117 agreed with *Spry*, JA as follows:

“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”

(19) Similarly, in *Park View Shopping Arcade v. Kangethe & 2 Ors.* (KLR) (E&L) 592, Ojwang, Ag. J. (as he then was) considered the rights of a registered proprietor under section 23 of the Registration of Titles Act and held that-

“*The Constitution* safeguards the sanctity of private property. It was not proper for the defendants to forcibly occupy the plaintiff’s land and then plead public interest in environmental conservation to keep out registered owner. The effect of their action was to deprive the owner of his land without full and fair compensation.”

224. In a nutshell, my answer to issue number three[3] is to the effect that the 1<sup>st</sup> Defendant lawfully acquired the suit property and is therefore the legitimate proprietor thereof.

#### **Issue Number 4**

What Relief, if any, ought to be granted



225. Whilst discussing issue number two [2] herein before, this court has interrogated the propriety and validity of the Certificate of title which was espoused by and on behalf of the Plaintiff.
226. Additionally, it is worth recalling that during the process of interrogating the Plaintiff's title, this court discerned and detected various defects which vitiated the validity of the Plaintiffs title/indenture of conveyance.
227. Having found and held that the indenture of conveyance which is being relied upon by the Plaintiff is vitiated and thus illegal, it becomes evident that the reliefs sought by and on behalf of the Plaintiff herein are not legally tenable.
228. Conversely, whilst discussing issue number three [3] the court has established that the 1<sup>st</sup> Defendant herein procured and obtained his Certificate of title in a procedural and lawful manner; and that the 1<sup>st</sup> Defendant's title is indeed verifiable. For coherence, same was duly verified by the Ministry of lands and more particularly by DW2.
229. To the extent that the 1<sup>st</sup> Defendant has been able to prove and demonstrate the root of his title to the suit property, it suffices to state and observe that the 1<sup>st</sup> Defendant is indeed entitled to the protection of the law as underscore vide Sections 24 and 25 of the Land Registration Act, 2012.
230. Pertinently, it is my finding and holding that the 1<sup>st</sup> Defendant is therefore entitled to the reliefs articulated and alluded to at the foot of the amended statement of Defense and counterclaim dated the 5<sup>th</sup> August 2021.

**Final Disposition:**

231. Having reviewed and analyzed the thematic issues that were highlighted in the body of the Judgment, it must have become evident and apparent that the Plaintiff herein has neither established nor proved his case to the requisite standard. [See the holding of the Supreme Court of Kenya in *Dr. Samson Gwer & 5 Others vs 2Kenya Medical Research Institute (2020)Eklr*].
232. Conversely, the 1<sup>st</sup> Defendant has been able to demonstrate his entitlement to the suit property and thus same has duly proved the counterclaim.
233. Consequently and in the premises, the court hereby proceeds to and do make the following orders;
  - a. The Plaintiff's suit be and is hereby dismissed with costs to the Defendants.
  - b. The 1<sup>st</sup> Defendant's counterclaim dated the 5<sup>th</sup> August 2021, be and is hereby allowed as hereunder;
    - i. The Plaintiff's title to and in respect of L.R No. 57/1343 be and is hereby revoked, nullified and/or canceled.
    - ii. The indenture of conveyance bearing the name of the Plaintiff and pertaining to L.R No. 57/1343 shall be and is hereby struck off the Register.
    - iii. The 1<sup>st</sup> Defendant be and is hereby declared to be the lawful and legitimate proprietor/owner of L.R No. 57/1343.
    - iv. There be and is hereby granted an order of Permanent injunction to restrain the Plaintiff either by herself, servants, agents, employees and/or servants acting on behalf of the Plaintiff



from entering upon, remaining onto, interfering with and/or otherwise dealing with the suit property in manner adverse to the rights and interests of the 1<sup>st</sup> Defendant.

- c. Costs of the counterclaim, be and are hereby awarded to the 1<sup>st</sup> Defendant and same shall be borne by the Plaintiff

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY 2024.**

**OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

Court Assistant: Benson.

Mr. Peter Gachuhi for the Plaintiff.

Mr. Emanuel Eredi for the 1st Defendant.

Mr. Allan Kamau for the 2nd Defendant.

