



REPUBLIC OF KENYA



Tuguta Enterprises Limited v Kenya Agricultural Research Institute & 3 others (Environment & Land Case 454 of 2009) [2024] KEELC 437 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEELC 437 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 454 OF 2009
LC KOMINGOI, J
FEBRUARY 1, 2024**

BETWEEN

TUGUTA ENTERPRISES LIMITED PLAINTIFF

AND

KENYA AGRICULTURAL RESEARCH INSTITUTE 1ST DEFENDANT

**KENYA VETERINARY VACCINES PRODUCTION INSTITUTE 2ND
DEFENDANT**

THE LAND REGISTRAR 3RD DEFENDANT

THE COMMISSIONER OF LANDS 4TH DEFENDANT

JUDGMENT

1. By a Plaint dated 10th September 2009 and Amended on 17th May 2010, the Plaintiff's case is that the 3rd and 4th Defendants fraudulently and without authority allowed the subdivision of parcel LR No. 209/13409 to LR No. 209/17223 which was registered to private parties and then sold to the Plaintiff in belief that the Title to the property was valid, legal and authentic. The Plaintiff outlined the particulars of fraud and misrepresentation against the 3rd and 4th Defendants as follows:

Unlawfully causing subdivision and registration of LR No. 209/17223; causing records regarding the title to be maintained and presented for use as accurate records; the Plaintiff thus purchased the property based on the belief that the title was genuine and free from encumbrance, and was issued title.

2. The Plaintiff then went on and put up developments on the property only for the 1st Defendant to claim ownership of the suit property vide a notice put up on the local newspapers on 8th November 2008. And on 10th July 2009 the 2nd Defendant put up a notice on the local newspapers also claiming ownership of the suit property.



3. On 7th September the 1st and 2nd Defendants moved to the suit property and demolished the houses thereon without a court order leading to loss and damage worth millions of shillings. The Plaintiff thus sought for:
 - a. A declaration that the Plaintiff is the sole registered owner of the suit property.
 - b. A permanent injunction restraining the 1st, 2nd and 3rd Defendants, whether by themselves, their agents, servants, employers or whomever from moving onto, demolishing, continue to demolish, alienating, selling, transferring, wasting, mortgaging, leasing or in dealing with the property in whatsoever manner the suit property herein contrary to the interest of the Plaintiff on LR Number 209/17223, Nairobi Area.
 - c.
 - a. Kshs 300,000,000 being the value of the demolished houses costs and building team expenses,
 - b. Kshs 20,000,000 being purchase price, stamp duty, legal fees, registration fees and miscellaneous expenses.
 - d. General damages for lost profits, interest charged on borrowed capital, lost investment opportunity and trespass;
 - e. And interest on c (a&b) and d at commercial rates.
 - f. Any other or further relief that this Honourable Court may deem fit to grant.
4. This suit was dismissed on 25th May 2015 for want of prosecution. This Judgement is in respect of the 2nd Defendant's Counter Claim.
5. The 2nd Defendant in its Defence and Counterclaim dated 1st October 2009 admitted that it published the notice in the local dailies on 10th July 2009 claiming ownership of the property but denied the allegations of malice stating that it was justified to remove the illegal developments from its property LR No. 209/13409 measuring 29.05 hectares which it claimed has never been alienated, subdivided or sold to anyone. It also claimed not to have been aware of the existence of title No LR. No. 209/17223 until the suit was filed. The 2nd Defendant went on to state that the land was for industrial purposes and the use had never changed. Therefore, the developments were an act of trespass, illegal and irregular and prayed for the following reliefs in the counterclaim:
 - a. A declaration that it is the sole and lawful owner of LR. No. 209/13409.
 - b. A declaration that LR. No. 209/13409 measures 29.05 hectares.
 - c. Permanent injunction restraining the Plaintiff whether by itself, its servants, agents, employees or whomever from encroaching and/or trespassing, erecting any structures and in any other way interfering with LR. No. 209/13409 in any manner whatsoever.
 - d. An order directing the Plaintiff to remove all developments, structures and building on LR. No. 209/13409 and restore it to the condition it was before.
 - e. In the alternative to (d) an order that all the developments be removed and land restored to the condition it was at the cost of the Plaintiff and 3rd Defendant.
 - f. General damages for trespass.



- g. Indemnify from the 3rd Defendant against the Plaintiff's claims and the cost of removing developments and restoring the land.
 - h. Costs of this suit.
 - i. Any other or further relief that this Honourable Court may deem fit to grant.
6. The Plaintiff filed an Amended Defence to the Counterclaim dated 12th October 2020.
7. The 1st Defendant not being party to the Counterclaim did not file any response but tendered written submissions.

Evidence of the 2nd Defendant

8. PW1, Nyamwaya Walter Manyibe an Advocate of the High Court and the legal officer for the 2nd Defendant adopted his witness statement as part of his evidence in chief and produced the documents in the bundle of documents as P. Exhibit 1-25 respectively. He stated that the 2nd Defendant's Headquarter was situated on LR No. 209/13409 and the Ministry of Lands through their letter dated 26th August 2009 confirmed that LR Nos 209/17234, 209/18219 and 209/13293 were forgeries.
9. On cross examination he stated that the original parcel was LR No. 209/8260 measuring 93.02Ha but 84.5Ha was hived off as LR No. 209/8260B. However, in 2009 there was illegal hiving off and subdivision of that parcel into LR No. 209/11969 measuring 77.7Ha and LR No. 209/12345 measuring 43.66Ha leaving the 2nd Defendant with LR No. 209/13409 measuring 29.05Ha. He stated that the hiving off was illegal since they had not surrendered the land and developments had been put up on the illegally acquired land. He went on to state that there was an ongoing court case being Petition No. 939 of 2014 regarding the illegal acquisition of the property pointing out that the Plaintiff's title was issued in 2007 way after the 2nd Defendant had already acquired title to the suit property. He also indicated that the said title stipulated that the land was not for residential purpose which was contrary to what is slated in the Plaintiff's title. He also indicate that the Part Development Plan possessed and produced as evidence showed that the land was allocated to the 2nd Defendant and had not come across any other Part Development Plan showing the contrary.
10. On Re-examination he indicated that the Petition No. 939 of 2014 was in respect of LR No. 209/13409 and LR No. 209/11969 in which the Plaintiff was not party to.
11. PW2, Joseph Kiragu Kariuki, the Principal Land Administrator Officer at the National Land Commission confirmed that the letter dated 26th August 2019, which confirmed authenticity of the 2nd Defendant's title was written by him and it originated from National Land Commission.
12. On Cross examination he confirmed that LR No. 209/17223 was not among the numbers listed in the letter from the 2nd Defendant dated 6th July 2009 neither was it among the parcels listed in any of the reports as having been illegally acquired. He also admitted that there were records from the 2nd Defendant indicating that LR No. 209/11969 was to be subdivided into Nine (9) plots. He stated that as per letter dated 12th February 2013, LR No. 209/17223 was hived from LR No. 209/8260 which was registered in the names of Patrick Osero and Nicholas Owino and later transferred to the Plaintiff. He also confirmed that there was a letter indicating that LR No. 209/17223 was registered in the name of the Plaintiff and there was a file in respect to that parcel at National Land Commission.
13. On re-examination he confirmed that the land being claimed by the 2nd Defendant was hived off from LR No 209/8260 and LR No. 209/17223 was registered on 18th May 2007 and it was not among the parcels of land in the 2001 and 2003 reports.



Evidence of the Plaintiff

14. DW1, Mohammed Abdi Hussein adopted his witness statement dated 15th February 2022 as part of his evidence in chief. He also produced the documents in the bundle of documents as D. Exhibits 1-31 respectively. He stated that he has never been summoned or received communication from the 2nd Defendant regarding his title.
15. On cross examination he stated that he purchased the suit property LR No. 209/17223 from one Patrick Osero and Nicholas Owino for Kshs 6,500,000 and was issued a title deed on 2nd May 2007 although the sale agreement produced as evidence was neither signed nor dated. He pointed out that the suit property and the 2nd Defendant's was separated by a road and that he was not claiming LR No. 209/13409. He indicated that the structures demolished were not inside LR No. 209/13409 although he did not have a map to show that his property was not part of LR No. 209/13409 adding that he did due diligence before purchasing the suit property. On the issue of subdivision he stated that he did not have consent for the subdivision or approval although the process had been stopped due to the pending of this suit. He also acknowledged that from the photographs produced one could not tell where they were taken or who took them. He also did not produce his letter or allotment or PDP.
16. He went on to confirm that as per the Title the property was for residential purposes but as per the 2nd Defendant's title, the property was for light industry and ancillary office and that there were no documents to confirm that there was approval for change of user.
17. On re-examination he clarified that the 2nd Defendant claim was in regards to LR No. 209/13409 and not his property LR No. 209/17223 and that he had acquired it procedurally.
18. DW2, Gildine Gatwiri, a Land Registrar at the Chief Land Registrar's office confirmed that the letter dated 12th February 2013 was indeed drafted by G.S. Birundi who was the Assistant Chief Land Registrar but had since passed on.
19. On cross examination she indicated that the suit property was hived off from the 2nd Defendant's land. She however could not confirm on whether the land was grabbed or not. She confirmed that from their records LR No. 209/8260 was owned by the 2nd Defendant and she had not seen any revocation or surrender from the 2nd Defendant.
20. She indicated that she could not trace records regarding title numbers LR No. 209/13409, 209/8260 or 209/17223 respectively adding that the demolitions done were on structures on LR No. 209/13409 and there was nothing wrong with the 2nd Defendant chasing people from its property. She pointed out that LR No. 209/13409 was issued to the 2nd Defendant and title issued on 17th July 1995. She confirmed that LR No. 209/17223 was legally registered in the names of Patrick Osero and Nicholas Owino on 31st January 2007 although there was no evidence of transfer of that land in favour of the Plaintiff but went on to state that the Plaintiff's title was issued in May 2007.
21. She also indicated that she could not confirm whether the letter dated 12th February 2013 was received by the Attorney General.
22. On re-examination she confirmed that the 2nd Defendant's title was reduced to 29.05ha due to illegal hiving off.
23. At the close of the oral testimonies parties tendered final written submissions;



The 2nd Defendant's Submissions

24. On whether the 2nd Defendant was entitled to the prayers sought in the counterclaim, counsel gave history that the 2nd Defendant was allocated land measuring 95.02ha under LR No. 209/8260 in 1957 but the land was illegally subdivided and allocated to private developers leading to the complaint filed through letter dated 19th August 1991 to the Commissioner of Lands. The Commissioner then allotted it un-surveyed plot 209/8260B measuring approximately 84.5ha. However, the 2nd Defendant was issued title number LR 209/11969 measuring 77.67ha with effect from 1st May 1992 but due to further illegal excisions the 2nd Defendant was once again issued with title LR No. 209/12345 measuring 43.66ha dated 17th July 1994. The excisions continued and they were then issued LR No. 209/13409 measuring 29.05ha which they currently possess as confirmed by a search dated 22nd April 2009 and the letter from the Commissioner of Lands dated 26th August 2009 which was also confirmed by the Land Registrar's testimony. In the said letter, the Commissioner confirmed that any titles issued out of that title were forgeries which was also confirmed by the Ministry of Lands and Housing vide letter dated 4th July 2007. On 8th November 2007 and 10th July 2009 the 1st and 2nd Defendants put up notices warning the public that any developments on the 2nd Defendant's property were illegal. But that notwithstanding, the Plaintiff went ahead and started its developments.
25. In that regard, the 2nd Defendant's title was legally protected by Section 24 and 26 of the [Land Registration Act](#) with reference to [Paul Ngashema Kamau v Halima Said](#) [2020] eKLR, [Willy Kipsongok Morogo v Albert K. Morogo](#) (2017) eKLR and [Jonah Omoyoma v Boniface Oure & 2 others](#) (2021) eKLR.
26. Counsel added that there was no evidence showing that the 2nd Defendant's title was procured illegally, un-procedurally or fraudulently. However, LR No. 209/17223 was illegally excised from LR No. 209/13409 without its consent citing [Peter Rugu Gikanga & another v Hellen Muringe Kabutha](#) [2018] eKLR and [Francis Ngaru Njunguna & another v Onesmus Njuguna Ngaru & another](#) [2019] eKLR. Counsel also submitted that the Plaintiff had clearly indicated that he had no claim over LR No. 209/13409 and that the Land Registrar had also confirmed that LR No. 209/13409 and 209/17223 were distinct and separate as such a concession to prayer (a) and (b) of the Counterclaim.
27. On the issue of trespass, counsel outlined the elements of trespass as per Section 3(1) of the [Trespass Act](#) submitting that the Plaintiff's demolished structures were on LR No. 209/13409 which was an act of trespass. They were thus entitled to damages of Kshs 20,000,000 for trespass citing [Park Towers Ltd v John Mithamo Njika & 7 others](#) (2014) eKLR and [Ajit Bhogal v Kenya Power and Lighting Co. Ltd](#) [2020] eKLR and the Plaintiff should be restrained from encroaching on the 2nd Defendant's land and to remove all structures thereon.
28. Counsel concluded by submitting that the Plaintiff did not prove how he acquired title to its property and did not also prove the claim that the developments were worth Kshs 300,000,000 neither did he adduce evidence of the purchase, payment of stamp duty or any other documentation. And that the 2nd Defendant having proved its case should be granted the prayers as sought.
29. The 1st Defendant adopted the 2nd Defendant's submissions and urged court to grant the prayers sought in the Counterclaim adding that land alienated for public purposes cannot be alienated or transferred for any other purpose citing [Niaz Mohamed Jan Mohamed v Commissioner for Lands & 4 others](#) (1996) eKLR and [Kenya Industrial Estates Ltd v Anne Chepsiror & 5 others](#) (2015) eKLR.



The Plaintiff's Submissions

30. Counsel submitted that in the letter dated 12th February 2013 the Ministry of Lands confirmed that title LR No. 209/17223 measuring 1.87ha was among the many plots that were hived off from LR No. 209/8260 between 1992 and 1997 and that LR No. 209/13409 was a remnant of the original plot. It was thus lawfully acquired and registered in the Plaintiff's name on 18th May 2007 and there was no evidence adduced showing that it did not have proper records pointing out that the NLC's letter dated 20th August 2015 confirmed that the Defendant was allocated LR No. 209/17223 on 27th May 1999 and the offer was accepted on 23rd January 2007. Counsel submitted that it was on record that the 2nd Defendant/Plaintiff had acquiesced subdivisions and allocation of several portions of land and was thus estopped from claiming that the allocations were illegal. Counsel also pointed out that the said property had never been subject to any inquiry including the Ndung'u report. Adding that the two parcels were separate and distinct and the issue of trespass and damages was invalid citing *Cecilio Murango Mwenda & 6 others v Isaac Kimathi Ikunga* [2019] eKLR. Adding that here was similarly no proof of the alleged loss suffered due to the trespass. The counterclaim was thus an abuse of the court process and should be dismissed.
31. Counsel went on to submit that the counterclaim did not disclose any cause of action and that it ought to have taken the structure of a Plaint as per Order 7 Rule 8 of the Civil Procedure Rules. But it was drawn without a basis of the prayers sought and as such it should be treated as a continuation of the Defence citing *Daikyo Japan Motors Ltd & 2 others v Fairuz Feisal yasin & another* [2020] eKLR and Court of Appeal's *Caltex Oil (Kenya) Ltd v Rono Ltd* [2016] eKLR and should be struck out as per Order 2 Rule 15 of the Civil Procedure Rules citing *Odunga J. in Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (intended Plaintiff)* [2022] eKLR.

The 1st Defendant's Submissions

Analysis and Determination.

32. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are:
- i. Is the 2nd Defendant entitled to the prayers sought in its counterclaim?
 - ii. Who should bear costs of the suit?
33. The Plaint having been dismissed for want of prosecution, the hearing of the 2nd Defendant's counterclaim proceeded. However, the Plaintiffs has sought for its dismissal on grounds that it was wrongly drawn and it did not disclose any cause of action. I will first make a determination on this issue since it has the potential of disposing of the entire suit.
34. Order 7, rule 4 of the *Civil procedure Rules* provides:
- ”A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such setoff or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross- claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.”



35. Order 7, rule 5 goes on to outline documents to accompany defence or counter-claim and Order 7 rule 7 provides that:
- “Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall, in his statement of defence, state specifically that he does so by way of counterclaim.”
36. Order 7, rule 8 outlines how the counterclaim should be titled:
- “Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint...”
37. Order 7 Rule 13 stipulates that:
- “If, in any case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.”
38. This court takes note that the counterclaim dated 1st October 2009 is titled as 2nd Defendant’s Defence and Counterclaim. It denies the Plaintiff’s allegation and sets out that 2nd Defendant is the owner of property LR No. 209/13409 which was encroached on by the Plaintiff and that acknowledged that they put up public notices in the newspapers to warn off people from developing or claiming that property and the Plaintiff still went ahead and developed on the cordoned land. And it was in that regard that it prayed for the reliefs outlined. The 2nd Defendant also accompanied the said counterclaim with an Affidavit and a witness statement.
39. Taking cognisance of the above provision, I find that the counterclaim presented by the 2nd Defendant clearly and convincingly meets the established legal threshold required for consideration. It aptly satisfies the requisite elements stipulated under the above legal provisions, it demonstrates a substantive cause of action with significant evidence and legal basis. I therefore find that, it is unequivocally evident that the counterclaim passes the prescribed threshold and warrants due consideration and deliberation by this court.
40. The basis of this suit is the ownership of LR No. 209/17223 and whether the suit property was illegally acquired and is on the 2nd Defendant’s land. The 2nd Defendant claims that the suit land was illegally acquired and that the Plaintiff had encroached on its property. The Plaintiff claimed that the said property was acquired legally and procedurally and that it was separate and distinct from the 2nd Defendant’s parcel.
41. To support its claim, the 2nd Defendant produced 25 documents as exhibits. This court has perused the said documents and takes note of the history of events from 4th November 1993 when the 2nd Defendant was allotted unsurveyed plot number 209/8260B measuring 84.5ha, then in 1994 issued with a title LR No. 209/11969 measuring 77.67hectares, in 1995 issued LR No. 209/12345 measuring 43.66hectares and in 1997 issued LR No. 209/13409 measuring 29.05hectares.
42. There is a letter dated 15th June 2000 from the 2nd Defendant to the Commissioner of Lands concerning illegal subdivisions of LR No. 209/8260 leaving it with only 29.05ha as LR No. 209/13409 and asking that the said titles be revoked. From the documents titled Records of objection to subdivision of LR 209/8260 entry 9 shows that there was a letter dated 22nd August 2001 from the Commissioner of



- Lands which indicated that all excisions were sanctioned by the 2nd Defendant. It is noted that LR No. 209/17223 is not part of the lands shown as having being excised from LR No. 209/8260.
43. On page 4 of the report dated 29th May 2007 on Illegal allocation of public Land LR No. 209/8260, it indicates that the 2nd Defendant learnt that there was LR No. 209/13293 which was apparently excised from LR No. 209/13409 but searches at the Commissioner of Lands had never revealed this.
 44. In the letter dated 4th July 2007 from the surveyor to Kenya Agricultural Research Institute, it indicates that LR No. 209/13409 on the ground is 29.05ha which is equivalent to the area reflected on the deed plan and on the title deed but there is an encroachment of approximately 1.91ha as shaded. PW1 testified that the shaded area is part of the area that had been occupied by the Plaintiff and put up structures which were demolished.
 45. On 4th June 2008 the Kenya Anti-Corruption Commission wrote to Kenya Agricultural Research Institute indicating that: “Records at Survey of Kenya at Ruaraka reveal the creation of the additional parcels labelled as A,D and C as shown in the attached copy of approved Development Plan ... These plots marked as B and C have since been surveyed and assigned LR No. 209/17234 and LR No. 209/18219 respectively. It is interesting to note that survey plan for LR No. 209/18219 was registered on 21.6.2007...”
 46. In the letter dated 26th August 2009 addressed to the 2nd Defendant, the Commissioner of Lands indicated that: “I have perused my records my records and established that the three alleged allocations namely LR No. 209/17234, LR No. 209/18219 and 13293 are forgeries and could not have originated from this office...”
 47. The 2nd Defendant claims that the land grabbed was public land which ought to have been maintained as such and was not available for private allocation. However, the Plaintiff claimed to have legally and procedurally acquired it. The 2nd Defendant questioned the plaintiff’s claim on grounds that there was no evidence of how it acquired the suit property, payment of the alleged purchase price or stamp duty and that even the sale agreement was neither signed nor dated. But the Plaintiff maintained that the land was acquired legally.
 48. I have taken time to go through different cases on the Kenya Law Reports online platform and taken note that there are several cases regarding illegal acquisition and allocation of the 2nd Defendants land. From evidence adduced it is also clear that the 2nd Defendant is in a quest to reclaim land lost through irregular means. It is in public domain of the several cases of public land illegally acquired and converted into private land and the courts have been steadfast not to sanction such illegalities. The Court of Appeal in *Nelson Kazungu Chai & 9 others v Pwani University College* [2017] eKLR dismissed the Appeal as lacking merit in effect upholding Angote J. decision in *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR where he held:

“178. Where land has been reserved for public purpose, like in this case, any allocation of such land to private persons cannot be recognised by the court. Public interest in land will always outweigh an individual’s right to own the same property...”
 49. Article 40(1) (a) (b) of *the Constitution* gives every person the right, either individually or in association with others, to acquire and own property of any description in any part of Kenya with a disclaimer that (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired. Further Section 24 and 26 of the *Land Registration Act* categorically does not aid illegally acquired land.



50. Maraga J.A (as he then was) in the case of *Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others* [2014] eKLR stated:

“As I pointed out, the 3rd Respondent relying on Section 23(1) of the Registration of Titles Act Cap 281 Laws of Kenya, contended that the grant of the suit land conferred on it an absolute and indefeasible title. I hasten to point out that that section refers to a certificate of title issued to a purchaser. In the case of allocated land, even if the section is applicable, a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.”

51. This court finds that based on the evidence on record the 2nd Defendant’s land was not up for sale or subdivision. An illegal decision cannot be legitimate or made legitimate by whatever means. The Plaintiff claims to have purchased the suit property from legally registered owners being Nicholas Owino and Patrick Osero and as such was a bona fide purchaser for value without notice. It went on to acknowledge that their land LR No. 209/17223 was excised from LR No. 209/8260 which the 2nd Defendant has clearly confirmed was allocated to it before it was illegally subdivided. As such, the Plaintiff cannot claim to be a bona fide purchaser for value as was held by the Supreme Court in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) where it stated;

“110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the appellant.

111. Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.”

52. The Plaintiff has also claimed that it’s suit property is separate and distinct from the 2nd Defendant’s. If indeed the two properties are separate and distinct, how come the Plaintiff’s developments were demolished for being on the 2nd Defendant’s land? However, having determined that the title held by the Plaintiff is illegal and invalid, it passes that any structures or developments thereon ought to be removed. The 2nd Defendant has sought an award of damages for trespass in the value of Kshs 20,000,000. This court notes that the parties acknowledged that the developments on the suit property were demolished in the year 2009 which is the year the construction began.

53. I hereby award Kshs 1,000,000/= which in think is reasonable. I rely on the case of *Park Towers Limited v John Mithamo Njika & 7 Others* (2014) eKLR as quoted in the case of *James Njeburi v Ericson Kenya Limited* (2015) eKLR as follows;

“I agree with the Learned Judges that where trespass is proved a party need not prove that he suffered any Specific damage or loss to be awarded damages. The Court in such



circumstances is under a duty to assess the damage awardable depending on the urge facts and circumstances of each case.”

Similarly in the case of Nakuru Industries Ltd v S.S. Mehta & Sons. (2016) eKLR the court held as follows;

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However I have found the defendants did trespass onto the plaintiff’s land and conducted some excavation for this reason. I award the plaintiff damages in the amount of Kshs500,000/= (five hundred thousand) plus interest and costs of this suit from the date of this judgement until payment in full.”

54. In conclusion I find that the 2nd Defendant has proved its case against the Plaintiff on a balance of probabilities.
55. Accordingly Judgement is entered for the 2nd Defendant as follows;
- i. That 2nd Defendant is declared the sole owner of LR No. 209/13409 measuring 29.05 hectares.
 - ii. That a permanent injunction is issued against the Plaintiff its servants or employees from encroaching and/or trespassing, or erecting any structures or in any way interfering with LR No. 209/13409;
 - iii. That Plaintiff is directed to remove all developments/ structures on LR No. 209/13409 within 60 days of issuance of this judgement;
 - iv. Failure to the above, the 2nd Defendant is at liberty to remove all developments/ structures on LR No. 209/13409; at Plaintiff’s the expense.
 - v. General damages for trespass Kshs1,000,000/-
 - vi. The 2nd Defendant shall have costs of the suit to be borne by the plaintiff in the original suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 1ST FEBRUARY 2024.

L.KOMINGOI

JUDGE.

In the presence of:

Ms. Nduva for Mr. Ondieki for the Plaintiff.

Mr Oluoch for the 1st Defendant.

Mr. Muuo for Mrs. Mbaabu for the 2nd Defendant.

N/A for the 3rd, 4th Defendants.

Court Assistant – Mutisya.

