



Soroya (Suing as the Legal Representative of the Estate of Mohammed Yusuf Soraya, now Deceased) v Gathura & 2 others (Environment & Land Case 104 of 2019) [2024] KEELC 3724 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3724 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 104 OF 2019**

JO MBOYA, J

MAY 6, 2024

BETWEEN

MOHAMMED YASIF SOROYA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MOHAMMED YUSUF SORAYA, NOW DECEASED) PLAINTIFF

AND

BERNARD MURIITHI GATHURA 1ST DEFENDANT

KEDE ENTERPRISES LIMITED 2ND DEFENDANT

REGISTRAR OF TITLES 3RD DEFENDANT

JUDGMENT

Introduction and Background

1. The instant suit was commenced and/or filed vide Complaint dated the 19th March 2019 and in respect of which the original Plaintiff [is now deceased] sought for various reliefs pertaining to and concerning L.R No. Nairobi/Block 94/184 [suit property]
2. Subsequently, the original Complaint was amended culminating into the filing of the amended Complaint dated the 30th September 2019. Nevertheless, it suffices to point out that the original Plaintiff passed on [died] during the pendency of the instant suit and thereafter same [original Plaintiff] had to be substituted by the current Plaintiff.
3. Arising from the foregoing, the instant suit is now anchored on the re-amended Complaint dated the 16th June 2023 and in respect of which the Plaintiff has sought for the following reliefs;
 - i. An order of eviction against the Defendant from all that piece of land known as Nairobi/Block 94/184 situated in Nairobi;



- ii. A declaration that the Plaintiff is the legal owner of LR. No.Nairobi/Block94/184 situated in Nairobi;
 - iii. A permanent injunction restraining the Defendant whether by himself, employees, servants, agents or any other person(s) whomsoever and howsoever acting in connection with and/or under his instructions from carrying out any construction works, building any structures, carrying out any subdivisions, trespassing, encroaching, alienating, interfering and/or dealing in any manner whatsoever and howsoever with the Plaintiff's parcel of Land known as Nairobi/Block94/184 situated in Nairobi;
 - iv. General damages;
 - v. In the alternative to prayer Nos (a), (b) and (c) above, the Defendants be and are hereby ordered to compensate the Plaintiff for the suit property at the prevailing market value of the property;
 - vi. Costs of the suit;
 - vii. Interest in (d) (e) and (g) thereon at Court rates from the date of filing suit until payment in full.
4. Upon being served with the original Plaint, the 1st Defendant duly entered appearance and thereafter filed a statement of defense dated the 12th April 2019 and in respect of which same [1st Defendant] disputed the claims at the foot of the Plaint.
 5. Subsequently, the 1st Defendant amended his statement of defense culminating into the filing of the amended statement of defense dated the 21st January 2020.
 6. Notably, the 1st Defendant contended that the suit property lawfully belongs unto him [1st Defendant], same having been transferred and registered in his [1st Defendant's name] on the 8th march 1990.
 7. On the other hand, the 2nd Defendant entered appearance and filed a statement of defense in respect of the amended Plaint. For coherence, the statement of Defense on behalf of the 2nd Defendant is dated the 19th October 2021.
 8. Other than the foregoing, it suffices to point out that the 3rd Defendant also entered appearance and filed a statement of Defense on the 6th October 2020. Nevertheless, the statement of defense on behalf of the 3rd Defendant was dated the 8th July 2020.
 9. Be that as it may, the instant matter, came up for pretrial Direction[s] on the 23rd September 2021 and thereafter on the 21st February 2022 whereupon the advocates for the respective Parties covenanted that same had filed all the requisite pleadings, documents and witness statement[s].
 10. In a nutshell, the Parties covenanted that the suit was ready for hearing. Consequently and in this regard, the court proceeded to and indeed confirmed the matter as being ready for hearing.

Evidence by the Parties:

a. Plaintiff's Case:

11. The Plaintiff's case is premised and/or anchored on the evidence of one witness, namely, Mohammed Yasif Soroya. Same testified as PW1.



12. It was the testimony of the witness [PW1] that same is a son of Mohammed Yusuf Soroya, now deceased. Furthermore, the witness averred that Mohammed Yusuf Soroya, now deceased was the original Plaintiff in respect of the instant matter.
13. On the other hand, it was the testimony of the witness that upon the death of Mohammed Yusuf Soroya [now deceased], same [PW1] was appointed and constituted as the Legal Administrator of the Estate of the said deceased. In this regard, the witness averred that same was issued with the requisite Grant of Letters of administration.
14. It was the further testimony of the witness that upon being issued with the Grant of Letters of administration, same [witness] was substituted in place of the deceased and thus same [witness] became the Plaintiff.
15. Additionally, the witness averred that by virtue of being a son of the original Plaintiff, same [witness] is conversant with the facts of this matter. In any event, the witness stated that the deceased had recorded a witness statement dated the 19th March 2019.
16. Furthermore, the witness thereafter sought to adopt and rely on the contents of the witness statement dated the 19th March 2019. Instructively, the witness statement under reference was thereafter adopted and constituted as the evidence in chief of the witness.
17. On the other hand, the witness adverted to the List and bundle of documents dated the 19th March 2019, containing four [4] Documents and which the witness sought to adopt and tender before the Honorable court.
18. There being no objection to the production of the documents at the foot of the List dated the 19th March 2019; same [documents] were tendered and produced before the court as Exhibit[s] P1 to P4, respectively.
19. It was the further testimony of the witness that the original Plaintiff, now deceased also filed a further List and bundle of documents dated the 15th September 2020. In this regard, the witness sought to produce before the Honourable court the documents thereunder.
20. Suffice it to point out that the documents at the foot of the List dated the 15th September 2020 were thereafter produced and marked as Exhibit P5-[s] P9, respectively.
21. Other than the foregoing, the witness adverted to the re-amended Plaint dated the 16th June 2023 and sought to adopt the contents thereof. In any event, the witness implored the Honourable court to grant the reliefs enumerated thereunder.
22. On cross examination by learned counsel for the 1st Defendant, the witness averred that it is the original Plaintiff, now deceased who entered into a sale agreement in respect of the suit property. Furthermore, the witness added that same [witness] has since tendered and produced a copy of the sale agreement before the court.
23. Whilst under further cross examination, the witness averred that the suit property, which was the subject of the sale, was being sold with vacant possession. In any event, the witness added that the sale agreement was entered into in the year 2008.
24. It was the further testimony that even though the suit property was being sold with vacant possession, neither the original Plaintiff [now deceased] nor himself [witness] has taken possession of the suit property.



25. At any rate, the witness averred that the suit property which was being sold to and in favor of the original Plaintiff [now deceased] had a structure that was standing thereon. Besides, the witness adverted to photographs which same [witness] has tendered before the court showing the structure on the suit property and which structure is admittedly, nearing completion.
26. On the other hand, the witness averred that same is aware that the original Plaintiff [now deceased] filed a counterclaim in respect of another suit, namely, Nairobi HCC No 118 of 2010, wherein a Judgment was rendered. In any event, the witness added that same has tendered and produced before the court a copy of the Judgment.
27. Whilst under further cross examination, the witness averred that the Judgment in question related to and concerned the suit property. However, it was the testimony of the witness that same does not agree that the transaction [Sale/ purchase] in respect of the suit property was fraudulent.
28. On further cross examination, the witness averred that neither the original Plaintiff nor himself has since been granted vacant possession in respect of the suit property. Additionally, it was the evidence of the witness that the suit property was never fenced.
29. However, the witness added that the original Plaintiff, now deceased, paid out the sum of Kes.200,000/= only towards fencing of the plot.
30. It was the further testimony of the witness that even though same was aware of the occupation of the suit property by a third-party since the year 2008, same [witness] admitted that no suit was ever filed up to and including the year 2019. In any event, the witness confirmed that the 3rd Party had been in occupation of the suit property since the year 2008.
31. On further cross examination, the witness averred that the suit property was purchased from the 2nd Defendant herein however, the witness added that despite the purchase, the 2nd Defendant did not grant/avail vacant possession.
32. Whilst still under further cross examination, the witness averred that the 2nd Defendant herein also processed and availed unto the original Plaintiff and a Deed of indemnity. Besides, the witness averred that a copy of the Deed of indemnity has been tendered and availed to the court.
33. On further cross examination, it was the testimony of the witness [PW1] that the transfer of the suit property was undertaken by the vendor's advocate and not by the purchaser's advocate.
34. On cross examination, by learned counsel for the 2nd Defendant, the witness averred that the original Plaintiff proceeded to and sued the 2nd Defendant because the 2nd Defendant had failed to grant vacant possession. Furthermore, the witness added that the original Plaintiff had demanded from the 2nd Defendant vacant possession of the suit property.
35. Whilst under further cross examination, the witness averred that even though same has sued the 2nd Defendant, same [witness] has not stated the reliefs being sought as against the 2nd Defendant.
36. However, when pressed further by learned counsel for the 2nd Defendant, the witness averred that same [witness] has impleaded or sought alternative reliefs at the foot of the re-amended Plaint. On the other hand, it was the further testimony of the witness that the claim before the court is against the 1st Defendant.
37. In any event, the witness averred that paragraph 7 of the re-amended Plaint and of the witness statement confirms that the suit property was validly sold and transferred to the Plaintiff. Additionally, the witness testified that same [witness] carried out and undertook due diligence prior to purchasing the



suit property. Besides, it was the testimony of the witness that the due diligence revealed that the suit property was registered in the name of the 2nd Defendant.

38. It was the further testimony of the witness that the original Plaintiff was granted and issued with a lawful certificate of title.
39. Other than the foregoing and upon being referred to Exhibit P9, namely, a copy of the Judgment rendered in respect of Nairobi HCC No. 118 of 2010, the witness averred that the court held that the Defendant in the said suit [now Plaintiff herein], was aware of the circumstance culminating into the sale and transfer of the suit property.
40. In any event, the witness averred that same [PW1] is aware that the suit property was lawfully transferred to the Plaintiff, now deceased.
41. Whilst under further cross examination, the witness statement that the original Plaintiff was indeed issued with a Certificate of title over and in respect of the suit property.
42. On re-examination, the witness averred that the counterclaim which had been filed vide Nairobi HCC No. 118 of 2010 touched on and concerns vacant possession of the suit property or refund of the purchase price.
43. On further re-examination, the witness averred that the counterclaim [which had been filed by the original Plaintiff, now deceased] was heard and determined.
44. With the foregoing testimony, the Plaintiff's case was duly closed.

b.1st Defendant's Case

45. The 1st Defendant's case is anchored and premised on the evidence of three [3] witnesses, namely, Bernard Muriithi Gathura, James Oleria and Babu Allan Kany'out, respectively. Same testified as DW1, DW2 and DW3, respectively.
46. It was the testimony of the witness [DW1] that same is the 1st Defendant in respect of the instant matter. Furthermore, the witness averred that by virtue of being the 1st Defendant, same is therefore conversant and/or knowledgeable with the facts of the instant matter.
47. On the other hand, the witness stated that same has since recorded a witness statement dated the 12th April 2019. In this regard, the with witness sought to adopt and rely on the witness statement dated the 12th April 2019.
48. Suffice it to point out that the witness Statement dated the 12th April 2019 was thereafter adopted and constituted as the Evidence in chief of the witness.
49. Furthermore, the witness also adverted to a List and bundle of documents dated the 28th May 2018 containing nine [9] documents and which the witness sought to adopt and produce before the court as Exhibits. Instructively, the documents at the foot of the List dated the 28th May 2018 were thereafter admitted and produced as Exhibit[s] D1 to D9, respectively.
50. Additionally, the witness averred that same has brought before the court the original certificate of title issued on the 8th March 1999 and the original rates and rents clearance certificate, which were relied upon for purposes of the transfer. Notably, the court examined the original documents and thereafter returned same [original documents] to the witness.



51. On the other hand, the witness adverted to an amended statement of defense dated the 21st January 2020 and invited the Honourable Court to adopt and rely on same, namely, the amended Statement of Defence.
52. On cross examination, by learned counsel for the 2nd Defendant, the witness averred that same bought the suit property in March 1990. In any event, the witness added that a sale agreement was indeed prepared and executed on the 20th September 1990.
53. On further cross examination, the witness averred that same [witness] is aware of a third party, who is also laying a claim to and in respect of the suit property. However, the witness has added that despite being aware of the third-party claim, same [witness] has not sought for an order for cancelation of the parallel certificate of title.
54. When pressed further, the witness stated that same has not sought for an order for cancelation of the Plaintiff's title.
55. It was the further testimony of the witness that same paid the sum of Kes,550, 000/= only as the purchase price towards and in respect of the suit property. In any event, the witness added that the purchase price was paid through the law firm of M/s Kimani Kairu & Co Advocates.
56. On the other hand, it was the testimony of the witness that the payments on account of the purchase price was made in bits. In this regard, the witness added that same first paid the sum of Kes.55, 000/= only which was the stakeholder amount.
57. On further cross examination, the witness averred that the sum of Kes.55, 000/= only [stakeholder sum] was paid to James Horeria, who was the vendor's Estate agent.
58. On the other hand, it was the testimony of the witness that same has paid all the rates and the rents in respect of the suit property. In this regard, the witness averred that the rates and rents certificate had been placed and/or tendered before the court.
59. Additionally, the witness averred that same also paid the requisite stamp duty. For coherence, the witness added that the Stamp Duty was paid through his [witness] advocates.
60. Nevertheless, the witness averred that even though same paid the stamp duty, same [witness] has not produced the payments receipts before the court.
61. On cross examination by learned counsel for the Plaintiff, the witness averred that the purchase price in respect of the suit property was paid for in cash. However, the witness has added that same has not tendered the receipts before the court.
62. It was the further testimony of the witness that the suit property was transferred unto him on the 3rd March 1990. Whilst under further cross examination, the witness averred that same has thereafter proceeded to and constructed a fence around the suit property. In any event, the witness clarified that before same constructed the fence, the suit property was not fenced.
63. It was the further testimony of the witness that on or about the year 2008, same [witness] proceeded to and registered a caveat against the suit property.
64. On further cross examination, the witness stated that same also placed an advertisement in the Newspapers, wherein same [witness] forwarned any Third-party, from dealing with the suit property.



65. Other than the foregoing, it was the testimony of the witness that same commenced occupation of the suit property upon purchase thereon. Nevertheless, the witness added that he [witness] commenced to construct a permanent structure on the suit property in the year 2007.
66. Furthermore, it was the evidence of the witness that same [witness] commenced the construction on the suit property after same [witness] had procured and obtained the requisite approvals from City Council of Nairobi [now defunct].
67. Whilst under further cross examination, the witness averred that the approval which same has availed before the court shows that same [approval] was issued on the 11th of October 2007. In this regard, the witness referred to Exhibit D2.
68. Nevertheless, it was the further testimony of the witness that the approval which had hitherto been issued to him was thereafter amended. In any event, the witness clarified that the amendment was to facilitate the continuation with the building on the suit property.
69. It was also the testimony of the witness that same has since sought for and obtained approval for the building of the suit property.
70. On re-examination, the witness averred that his certificate of title over and in respect of the suit property is lawful and legitimate. In any event, the witness added that same has kept the certificate of title in safe custody, ever since same [certificate of title] was issued unto him.
71. The 2nd witness who testified on behalf of the 1st Defendant was James Horeria. Same testified as DW2.
72. It was the testimony of the witness that same is a Registered valuer and an Estate agent, dealing in real property. On the other hand, the witness averred that same is also conversant with the facts of the instant matter. In this regard, the witness adverted to the witness statement dated the 18th July 2019, which same sought to adopt and rely on as his evidence in chief.
73. Suffice it to point out that the witness statement dated the 18th July 2019 was thereafter admitted and constituted as the Evidence in chief of the witness.
74. On cross examination by learned counsel for the 2nd Defendant, the witness averred that the stakeholder sum [Deposit] amounting to Kes.55, 000/= only was duly paid unto him. In any event, the witness added that same received the purchase price over and in respect of the suit property.
75. Nevertheless, the witness clarified that though he received the purchase price over and in respect of the suit property, the same [purchase price] was not paid in one lumpsum. In any event, the witness added that the purchase price was forwarded/transmitted to the firm of M/s Kimani Kairu & Co Advocates.
76. Whilst under further cross examination, the witness averred that it is himself [witness] who introduced the 1st Defendant to the vendor [seller] of the suit property.
77. However, the witness clarified that despite introducing the 1st Defendant to the vendor, same [witness] did not participate in the transfer of the suit property in favor of the 1st Defendant. Furthermore, the witness added that the transfer in question was processed and handled through the advocates.
78. On cross examination, by learned counsel for the Plaintiff, the witness averred that same was privy to and knowledgeable of the contents of the sale agreement. However, the witness averred that despite being privy to and conversant with the terms of the sale agreement, same [witness] did not sign the sale agreement as one of the witnesses.



79. Whilst under further cross examination, the witness averred that the stakeholder sum was received through his [witness] firm and thereafter same [stakeholders sum] was forwarded to the firm of M/s Kimani Kairu & Co Advocates.
80. On re-examination, the witness averred that the entire purchase price was remitted to and/or paid in favor of the vendor. In any event, the witness added that the vendor has never complained about the payment of the purchase price.
81. The third witness who testified on behalf of the 1st Defendant, was one Allan Babu Kanyotu. Same stated as DW3.
82. It was the witness of DW3 that same is a Broadcasting Engineer and currently residing within the city of Nairobi.
83. Furthermore, the witness intimated to the court that same [witness] is conversant with the 1st Defendant. In this regard, the witness added that same [witness] knew the 1st Defendant when he [1st Defendant] was working for Kenya Breweries.
84. Other than the foregoing, the witness averred that same [witness] also proceeded to and sold the suit property to and in favor of the 1st Defendant. In this regard, the witness stated that the sale of the suit property to and in favor of the 1st Defendant was undertaken on the basis of the sale agreement dated the 20th September 1990.
85. Other than the foregoing, it was the testimony of the witness that the property which was sold to and in favor of the 1st Defendant was L.R No Nairobi/Block 94/184. Besides, the witness averred that the purchase price was agreed in the sum of Kes.550, 000/= only, which sum was duly paid and acknowledged by himself.
86. Additionally, it was the testimony of the witness that thereafter same [witness] executed a transfer instrument in favor of the 1st Defendant which transfer was thereafter utilized for purposes of transferring the suit property to and in favor of the 1st Defendant.
87. Other than the foregoing, the witness alluded to a witness statement dated the 18th July 2019 and which witness statement same [witness] sought to adopt and to rely on as his evidence in chief.
88. Notably, the witness statement dated the 18th July 2019 was thereafter adopted and admitted as the evidence in chief of the witness.
89. On cross examination by learned counsel for the Plaintiff, the witness averred that same [witness] was allocated the suit property by the Government of the Republic of Kenya. Furthermore, the witness added that same was issued with a Lease and thereafter a Certificate of lease.
90. Whilst under further cross examination, the witness averred that the suit property was allocated to and in his [Witness's] favor in the year 1982.
91. It was the further testimony of the witness that after the suit property was transferred and registered in his name, same [witness] deployed the title thereof to procure a loan facility. In this regard, the witness averred that the title of the suit property was utilized as a mortgage.
92. On the other hand, it was the testimony of the witness that later on same [witness] proceeded to and sold the suit property to and in favor of the 1st Defendant. In any event, the witness added that the sale of the suit property was brokered by M/s Horeria, who was the Estate agents.



93. Whilst under further cross examination, it was the testimony of the witness that same ultimately executed the transfer documents to facilitate the transfer and registration of the suit property in favor of the 1st Defendant. Furthermore, the witness confirmed that same was paid the entire purchase price.
94. On further cross examination, the witness averred that the transfer instrument before the court was registered in the year 1999. Besides, the witness clarified that the transfer of the suit property to and in favor of the 1st Defendant was lawful.
95. Other than the foregoing, the witness testified that prior to the transfer of the suit property to and in favor of the 1st Defendant, same [witness] procured and obtained the consent of the commissioner of lands.
96. On further cross examination, the witness averred that the consent to transfer was issued in favor of the 1st Defendant.
97. Other than the foregoing, the witness clarified that same [witness] did not deal with the 2nd Defendant.
98. On cross examination by learned counsel for the 2nd Defendant, the witness averred that same is conversant with the contents of his witness statement. In any event, the witness averred that the suit property was allocated unto him by the Government.
99. Whilst under further cross examination, the witness averred that same has seen the documents relating to how same acquired the suit property before the Court. Nevertheless, the witness clarified that the suit property lawfully belonged to him, prior to the sale of the suit property to the 1st Defendant.
100. With the foregoing testimony, the 1st Defendant's case was duly closed.

b. The 2nd Defendat's Case

101. Though the 2nd Defendant duly entered appearance and filed a statement of defense, same however, did not call any witness. In this regard, no evidence [whether oral or Documentary] was tendered by and on behalf of the 2nd Defendant.
102. Simply put, it suffices to point out that the 2nd Defendant's case was duly closed without any evidence being tendered or at all.

c. 3rd Defendant's Case

103. Similarly, even though the 3rd Defendant duly entered appearance and filed a statement of defense, same [3rd Defendant] also did not call any witness before the court.
104. Suffices it to point out that the 3rd Defendant's case was also closed without any evidence being tendered.

Parties Submissions:

105. At the conclusion of the hearing, the advocates for the respective Parties covenanted [agreed] to file and exchange written submissions. In this regard, the court thereafter proceeded to and circumscribed the timeline for the filing and exchange of the written submissions.
106. Furthermore, it is instructive to note that thereafter the Plaintiff proceeded to and filed written submissions dated the 14th February 2024 whereas the 1st Defendant filed written submissions dated the 28th February 2024.



107. On the other hand, the 2nd Defendant filed written submissions dated the 5th March 2024; whereas the 3rd Defendant filed written submissions dated the 1st March 2024.
108. For coherence, all the sets of written submissions [details in terms of the preceding paragraphs] forms part of the record of the court. Consequently and in this regard, the court shall proceed to consider the written submissions filed by and on behalf of the Parties alongside the evidence tendered by and on behalf of the various witnesses.
109. Be that as it may, it is apposite to state and underscore that the fact that the court has neither reproduced nor rehashed the submissions by the advocates for the respective Parties, is not informed by any contempt.
110. To the contrary, it is imperative to highlight and underscore that the court is indeed grateful to the learned counsel for the respective Parties for the erudite submissions which have been filed and more particularly, which have delineated the salient [Pertinent] issues for consideration by the court.

Issues for Determination

111. Having appraised the pleadings filed by and on behalf of the Parties'; the evidence [oral and documentary] tendered and upon consideration of the written submission[s] filed by the Parties, the following issues do emerge [crystalize] and are thus worthy of determination;
 - i. Whether the Plaintiff herein lawfully and legally acquired the suit property, either in the manner contended or at all.
 - ii. Whether the Plaintiff herein was/is a bona fide purchaser for value without notice of any defect in respect of the suit property.
 - iii. Whether the 1st Defendant has any lawful rights and/or interests to and in respect of the suit property worthy of being protected by the court.
 - iv. What reliefs, if any; ought to be granted.

Analysis and Determination

Issue Number 1

Whether the Plaintiff herein lawfully and legally acquired the suit property, either in the manner contended or at all.

112. The Plaintiff herein has filed the instant suit and wherein same [Plaintiff] contends to be the lawful and legitimate proprietor of the suit property. In any event, it was the testimony of the Plaintiff that same bought [purchased] the suit property from the 2nd Defendant herein.
113. Furthermore, it was the testimony of PW1 that the original Plaintiff [now deceased] indeed entered into and executed a sale agreement dated the 7th February 2008 and in respect of which the 2nd Defendant [who was the vendor] covenanted to sell to and indeed sold to the original Plaintiff the entirety of the suit property.
114. In this regard, PW1 tendered and produced before the court a copy of the sale agreement dated the 7th February 2008. [See exhibit P5].
115. Other than the foregoing, it was also the testimony of PW1 that thereafter the 2nd Defendant executed a transfer instrument [transfer of lease] in favor of the original Plaintiff, which transfer instrument



- was [sic] presented for registration at the land registry on the 14th April 2008. In any event, the witness [PW1] added that upon the presentation of the transfer instrument, same was duly registered culminating into the issuance of a Certificate of title in favor of the original Plaintiff.
116. Notably, the witness [PW1] proceeded to and tendered before the court a copy of the transfer instrument which was [sic] presented to the land registry on the 14th April 2008. [See exhibit P6].
 117. On the other hand, it is also imperative to underscore that the witness also tendered and produced before the court a copy of the certificate of lease which was [sic] issued to and in favor of the original Plaintiff, now deceased. For good measure, the certificate of lease, which was issued on the 14th April 2008, was tendered and produced as Exhibit P1.
 118. Additionally, it is also imperative to state that PW1 also tendered before the court a copy of Certificate of official search showing that the suit property was transferred and registered in the name of the original Plaintiff, now deceased on the 14th April 2008.
 119. Nevertheless, the same certificate of official search reflected that there was a lease in favor of one Allan Babu Kanyotu. [See exhibit P2].
 120. Notably, the witness [PW1] also tendered before the court assorted photographs showing a permanent structure, which was nearing completion. [See exhibit P4], which apparently were taken by the current Plaintiff.
 121. On the other hand, DW1, namely, Bernard Muriithi Gathura testified that the suit property was hitherto registered in the name of one, Babu Allan Kanyotu, who thereafter sold same [suit property] to and in favor of himself [1st Defendant].
 122. Furthermore, it was the evidence of DW1 that upon purchasing the suit property from Babu Allan kanyotu [DW3], the suit property was lawfully transferred and registered in his name. For coherence, DW1 tendered to and produced the original certificate of title [lease] which was issued unto him.
 123. Other than the foregoing, it was the testimony of DW1 that upon purchasing the suit property, same [DW1] entered upon the suit property and caused same to be fenced. Furthermore, the witness [DW1] ventured forward and testified that subsequently same [DW1] sought for and obtained approval to commence construction on the suit property from the city council of Nairobi, [now defunct].
 124. Notably, DW1 thereafter tendered and produced before the court a copy of the approval by the city council of Nairobi [now defunct] which the witness clarified was issued on the 11th October 2007.
 125. Other than the foregoing, it was the evidence of DW1 that upon obtaining the approval from City council of Nairobi, [now defunct] with a view to commencing the construction on the suit property, same indeed commenced the construction of a permanent storey building. To this end, the witness adverted to the photographs showing the structure which is currently standing on the suit property.
 126. Other than the testimony of DW1, there is also the evidence of Babu Allan Kanyotu. Same testified as DW3. On his part, DW3 averred that the suit property was lawfully allocated unto him [DW3] by the Government of the Republic of Kenya in the year 1982.
 127. It was the further testimony of DW3 that thereafter same [Witness] complied with the terms of the allocation culminating into the preparation of a lease, which was subsequently registered. In this regard, DW3, confirmed that same was ultimately issued with a certificate of title.
 128. Furthermore, it was the evidence of DW3, that same [DW3] proceeded and sold the suit property to and in favor of the 1st Defendant. In any event, it was the further testimony of DW3 that upon payment



- of the entire purchase price, the suit property was lawfully transferred and registered in the name of the 1st Defendant.
129. Other than the foregoing, DW3 also testified that same has never dealt with and/or sold the suit property to the 2nd Defendant or at all.
 130. Having taken cognizance of the evidence [details which have been highlighted in the preceding paragraphs], it is now appropriate to interrogate the totality of the evidence and to discern whether the Plaintiff lawfully acquired the suit property or otherwise.
 131. To start with, even though the Plaintiff [PW1] testified that same carried out and undertook due diligence over and in respect of the suit property prior to and before entering into the sale agreement, it is imperative to underscore that no evidence of such due diligence was ever tendered and/or placed before the court.
 132. For good measure, it is appropriate to underscore that if due diligence had been carried out and/or undertaken by and on behalf of the Plaintiff, then no doubt, the Plaintiff would have been issued with a certificate of official search showing the status of ownership of the suit property at the onset.
 133. To my mind, such a certificate of official search would have confirmed that the suit property belonged to and was registered [sic] in the name of the 2nd Defendant.
 134. At any rate, such a certificate of official search, would have been tendered and produced before the court as evidence of authentication that truly, the 2nd Defendant, who was endeavoring to sell the property, truly owned the suit property.
 135. Nevertheless, I have pointed out that no such certificate of official search was ever tendered before the court. Consequently, it is debatable as to whether or not the Plaintiff ever carried out and or undertook an official search or at all.
 136. Secondly, it is not lost on this court that due diligence would also entail visiting the locus in quo [suit property], with a view to ascertaining whether or not there is inter-alia, occupation thereof by a third-party or otherwise.
 137. Additionally, visitation to the locus in quo [which in legal parlance is referred to as physical search] would also have enabled the Plaintiff to ascertain and/or discover whether there were any easements or claims, which are ordinarily not registrable. [See the provisions of Sections 25 and 28 of the [Land Registration Act](#), 2012].
 138. Be that as it may, evidence abound that the Plaintiff herein either by himself or his transaction advocate, did not undertake or carry out any physical search on the property. In any event, it is important to point out that the Plaintiff himself [PW1] admitted and acknowledged that in the year 2008 [which is the year the suit property was sold to and the original Plaintiff, now deceased], there was indeed an existing structure standing on the suit property.
 139. Furthermore, the Plaintiff [PW1] also conceded that the structure which was standing on the suit property belonged to a Third-party. For brevity, it suffices to reproduce the salient aspects of the testimony by PW1 whilst under cross examination by learned counsel for the 1st Defendant.
 140. Same [PW1] stated as hereunder;

“From the year 2008 I have never sued the person who is on the suit property. I can also confirm that the 3rd person who was on the suit property since the year 2008. We purchased



the suit property from the 2nd Defendant. We were not given vacant possession of the suit property”.

141. Quiet clearly, the Plaintiff is conceding that there was indeed a Third-party, who was not only in occupation of the suit property; but had also commenced the construction of a permanent storey building thereon. For good measure, PW1 tendered and produced before the court photographs of the permanent structures which is standing on the suit property.
142. Simply put, it is evident that at the time when the Plaintiff was buying [purchasing] the suit property from the 2nd Defendant, there was a Third-party occupation thereon, whose rights and interests the Plaintiff failed to ascertain and/or authenticate.
143. Thirdly, though the Plaintiff contends that same [Plaintiff] entered into and executed a sale agreement with the 2nd Defendant on the 7th February 2008. [See exhibit P5]; there however appears to be a contradiction as to when the sale agreement was ever entered into.
144. To discern the contradiction, one needs to juxtapose the agreement for sale dated 7th February 2008 [exhibit P5] as against the Deed of indemnity which was also produced by the Plaintiff. [See exhibit P8].
145. From the face of the Deed of indemnity, it is apparent that the directors of the 2nd Defendant are purporting that same entered into a sale agreement with the original Plaintiff, now deceased on the 6th March 2008. Quiet clearly, the 2nd Defendant is not adverting to any sale agreement entered into on the 7th February 2008.
146. Fourthly, it is also important to recall that PW1 also tendered before the court a copy of the transfer instrument [transfer of lease], which was [sic] presented to the land registry on the 14th April 2008 for purposes of registration. [See exhibit P6].
147. Nevertheless, even though it is purported that the transfer of lease instrument was presented to the Land Registry for registration and was indeed registered on the 14th April 2008, a few issues do arise [and are discernable] from the said transfer instrument. To start with , the transfer instrument at the segment relating to certification on the part of the vendors is blank.
148. Simply put, the portion pertaining to the certificate which requires to be updated and filled by the person certifying the execution of the instrument by the vendors, was never filled up or at all. In this regard, the transfer instrument is lacking in essential ingredients and material particulars.
149. Pertinently, the transfer instrument is deficient and cannot pass the test of a valid legal instrument, capable of being registered or at all.
150. Other than the foregoing, there is the aspect relating to the execution by the transferee in this case, the Plaintiff.
151. Notably, the transferee [Plaintiff] executed the transfer instrument on the 12th August 2008 and thereafter a certificate was prepared and executed by his [transferees advocate] on even date.
152. The question that does arise is how possible was it for a transfer instrument which was being executed by the transferee on the 12th August 2008, to be presented prophetically before the land registry on the 14th April 2008.
153. In my humble albeit considered view, something is amiss as pertains to the documentation, that were deployed towards the procurement and issuance and certificate of lease in favor of the Plaintiff, [now deceased].



154. Nevertheless, it is not lost on this court that the transfer instrument would not have been presented for registration and [sic] acted upon by the designated land registrar on the 14th April 2008, long before same [transfer instrument] was executed by the transferee; and even before attestation thereof.
155. Fifthly, it is also curious to note that at the foot of the Deed of indemnity, which was tendered and produced by the Plaintiff, the directors and counsel for the 2nd Defendant were intimating that same did not avail and/or furnish the purchaser with the completion documents to facilitate the transfer and registration of the suit property. [See clause 4 of exhibit P8].
156. First forward, the competition documents which the 2nd Defendant was obliged to avail to and/or surrender in favor of the Plaintiff were well delineated at the foot of the special conditions. For coherence, clause [b] of the special conditions enumerates the competition documents inter-alia a duly copy of executed transfer, original certificate of lease, original rates clearance certificate and original land rent clearance certificate and the consent to transfer from the commission.
157. Surely, if the competition documents, which are paramount in the conveyance of the suit property, were never tendered to nor handed over to the Plaintiff [transferee], then how was the impugned transfer effected and ultimately registered.
158. To my mind, the transfer and registration of the suit property to and in favor of the Plaintiff [transferee], albeit without the completion documents smacks of mala fides and smells of a corrupt scheme propagated by both the transferee and the 2nd Defendant.
159. Sixthly, it is also not lost on the court that the certificate of title which the Plaintiff tendered before the court as Exhibit P7 and which bore the name of the 2nd Defendant showed that the suit property was leased to Babu Allan Kanyotu. For good measure, the name of Babu Allan Kanyotu appears as the Lessee.
160. Arising from the foregoing, it would have been incumbent upon the Plaintiff or the 2nd Defendant, who was the vendor, to demonstrate to the court how the suit property moved from the known lease [Babu Allan Kanyotu] to and in favor of the 2nd Defendant.
161. Worse still, it is also important to point out that the certificate of official search which was tendered and produced before the court by the Plaintiff also shows and reflects that there was an existing lease in favor of Allan Babu Kanyotu. Notably, the lease in favor of Babu Allan Kanyotu, is reflected as an Encumbrance. [See exhibit P2].
162. Notwithstanding the foregoing, it is also worth recalling that Babu Allan Kanyotu [DW3] testified before the court and intimated before the court that same did not have any dealings and/or transaction with the 2nd Defendant over and in respect of the suit property.
163. On the contrary, the same DW3 testified and confirmed that same entered into a lawful sale agreement with the 1st Defendant culminating into the sale and transfer of the suit property to and in favor of the 1st Defendant.
164. In view of the foregoing, it is therefore evident that the 2nd Defendant herein did not acquire any lawful title to and in respect of the suit property. Consequently and in this respect, the 2nd Defendant had no legal interest capable of being conveyed to and in favor of the Plaintiff.
165. Instructively, the doctrine of Nemo Dat Quod Non Habet [he who has no title cannot transfer a better title], suffices and applies in respect of the instant matter.



166. Insofar as the 2nd Defendant did not have any lawful rights to the suit property, then same [2nd Defendant] could not purport to convey any interests. In short, the transaction between the 2nd Defendant and the Plaintiff was vitiated. In this regard, it suffices to invoke and apply the doctrine of Ex- Nihilo Nihil Fit [out of nothing comes nothing].
167. In view of the foregoing observations and coupled with the various perspectives [read anomalies], which the court has highlighted herein before, there is no gainsaying that the certificate of title being propagated by and on behalf of the Plaintiff, is vitiated by illegalities and thus same cannot suffice in the eyes of the law.
168. At any rate, it is not lost on this court that a certificate of title, being an end product, cannot justify itself. Conversely, a certificate of title, like the one beforehand can only be anchored and verified on the requisite documentation which gave birth [rise] to same and not otherwise.
169. Put differently, the fact that one, the Plaintiff not excepted, waves a certificate of title does not ipso facto guarantee its validity. In any event, where certificate of title is procured vide an illegal or corrupt scheme, the resultant certificate of title is invalid and cannot be sanitized by the invocation and reliance on the Concept of Indefeasibility.
170. To this end, it is imperative to adopt and endorse the succinct exposition of the law vide the holding in the case of *Funzi Development Ltd & others v County Council of Kwale, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR* the Court of Appeal, which decision this court affirmed, stated that:
- “...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 gives its seal of approval to an illegal or irregularly obtained title.”
171. Furthermore, the legal position that a certificate of title obtained by deceit and which smacks of illegality cannot be sanctioned by a court of law, was also adverted to and highlighted by the Court of Appeal in the case of *Wambui v Mwangi & 3 others (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) (19 November 2021) (Judgment)*, where the court stated and held as hereunder;
64. The jurisprudence relied upon by the appellant and which we find prudent not to replicate are as already highlighted above. We have given due consideration to them in light of the record as assessed herein by us. Our take on the same is that the jurisprudential thread running through all of them is that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurality or otherwise a product of a corrupt scheme.
172. Arising from the foregoing analysis, my answer to issue number one [1] is threefold. Firstly, the Plaintiff herein entered into and executed a sale agreement over the suit property, with a person who was divested of legal rights thereon.
173. Secondly, the Plaintiff herein neither exercised nor undertook due diligence but instead threw caution to the wind and thus failed to exercise the caution expected of a reasonable person [man].
174. Thirdly, the process underpinning the issuance of the Certificate of title to and in favor of the Plaintiff was irredeemably vitiated by illegalities which invalidate the impugned certificate of title.



Issue Number 2

Whether the Plaintiff herein was/is a bona fide purchaser for value without notice of any defect in respect of the suit property.

175. Learned counsel for the Plaintiff other than contending that the suit property was lawfully sold to and thereafter registered in the name of the Plaintiff, has also invited the court to find and hold that the Plaintiff is also a bona fide purchaser for value without notice of any defect in the Title of her predecessor[s].
176. Put differently, learned counsel for the Plaintiff has submitted that because the Plaintiff bought and/or purchased the suit property from the 2nd Defendant herein, who was hitherto the registered of the suit property herein, same [Plaintiff] satisfies the threshold to warrant being described as a bona fide purchaser for value.
177. Furthermore, learned counsel for the Plaintiff has thereafter invited the court to take cognizance of inter-alia the decision in the case of Elizabeth Wambui Githinji & 29 Others vs Kenya Urban Roads Authority & Others [2019]eKLR, Taraban Company Ltd vs Sehmi & 7 Others [2021]eKLR, Katende vs Haridar & Co Ltd [2008] 2EA 173 and Kigwe Ltd vs Violet Wacuka Ngugi & 2 Others; Susan Wanjiru Muriti [Interested Party] [2021]eKLR, respectively.
178. Nevertheless, even though learned counsel for the Plaintiff has implored the court to find and hold that the Plaintiff is a bona fide purchaser for value, it is imperative to state and underscore that prior to and before a person, the Plaintiff not excepted, is declared to be a bona fide purchaser for value, same[Plaintiff] must demonstrate certain ingredients, which are paramount.
179. First and foremost, it behooves the Plaintiff herein to tender and produce evidence before the court that same indeed undertook due diligence and ascertained that the person [vendor], who was selling the designated property held and/or had a valid title to the designated property.
180. However, in respect of the instant matter, this court has since found and held that the Plaintiff herein failed to undertake any due diligence or at all. Firstly, the Plaintiff did not produce any certificate of official search to demonstrate that any such endeavor was made.
181. Secondly, evidence abound that even as the Plaintiff was undertaking the sale/purchase of the suit property, the suit property was under occupation by a Third-party [namely the 1st Defendant] who had even commenced construction thereof.
182. Other than the requirement that a person seeking to be declared as a bona fide purchaser was/is obligated to undertake due diligence, beforehand, there is also the requirement that the claimant must prove that same [claimant] was not knowledgeable of any fraud affecting the suit property.
183. However, in respect of the instant matter, it is not lost on this court that the original Plaintiff, now deceased established and discovered some fraud affecting the transaction affecting the suit property and thereafter same [original Plaintiff] is on record as having written a complaint letter details whereof were captured in the body of the Judgment [exhibit P9] in respect of Nairobi HCC No. 118 of 2010.
184. For ease of reference, a segment of the letter under reference is reproduced as hereunder;

“I fully paid you the agreed conveyance fee. This notwithstanding, you are ware the transaction latter turned out to be a fraud from which CID Nairobi Headquarters are handling and which I have reliably learnt from m/s Umazi and Kiragu of CID that you have



been uncooperative in their investigations. I am further disgusted to learn that instead of forwarding Kes.4, 400, 000/= only which was the last and final payment of the purchase price to M/s Oyugi & Co Advocate acting for the alleged vendor, you only forwarded Kes.4, 200, 000/= only. What happened to Kes.200, 000/= only.

Your conduct and manner in which you undertook this work coupled with this letter in question, casts a lot of doubt as to your professionalism to this conveyance and makes it hard for me to know whether it was negligence, collusion or omission that resulted in me losing that land and money.

By a copy of this letter, I am also asking the provincial CID Headquarters Nairobi to look into your letter, together with your failure to cooperate with their fraud investigations and see whether you acted in cahoots with fraudsters, Mr. Otachi and his advocates, M/s Oyugi & Co Acocates.

Your only alternative is to recover my money which I lost due to your negligence or leave it to the law to take its course..

185. Notably, the letter whose contents have been reproduced hereinbefore was generated against Mr. Clifford Rachuonyo of M/s Rachuonyo & Rachuonyo Advocates who was the transaction advocate in the matter.
186. For me, I am not interested in whether or not the contents of the letter under reference were defamatory of the advocate or otherwise. Instructively, that was the basis of the suit vide Nairobi HCC No. 118 of 2010, which was heard and disposed of.
187. Suffice it to point out that the interests of this court in respect of the letter under reference, relates to the aspect [perspective] where the Plaintiff [now deceased] was affirming that the transaction turned out to be a fraud.
188. To my mind, to the extent that the Plaintiff, now deceased was privy to and knowledgeable of [sic] the fraud that affects the transaction, same cannot now implead and invoke the doctrine of being a bona fide purchaser for value.
189. Nevertheless, I also wish to underscore that before invoking, the Doctrine of being a bona fide purchaser for value, one must meet or satisfy all the requisite ingredients that underpin the invocation and reliance of the doctrine.
190. Be that as it may, I beg to highlight and underscore that the Plaintiff herein has neither met nor satisfied the said ingredients.
191. Before departing from the issue beforehand, it is imperative to take cognizance of the holding of the Court of Appeal in the case of Mwangi James Njehia versus Janetta Wanjiku Mwangi & another [2021] eKLR, which reflects the current and objective position of the law taking into account the obtaining circumstances impacting on the Doctrine.
192. For coherence, the court stated and observed as hereunder;
 37. In Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of



Katende v. Haridar & Company Ltd (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine as was held in the case of Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996, must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased’ properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.
193. Additionally, the Supreme Court of Kenya [the apex court] has also added its voice to the doctrine of bona fide purchaser for value. [See *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment).
194. Notably, the Supreme Court in the decision [supra] expounded the position that where the certificate of title was vitiated with illegality and thus a nullity, the beneficiary of such a title cannot invoke and succeed on the basis of the Doctrine of bona fide purchase for value.
195. Certainly, if an illegal title would metamorphosize into a valid title merely on the basis of subsequent sale thereof to [sic] a third-party then the Doctrine of Ex-nihilo-nihil-fit [out of nothing comes nothing], would serve no purpose.



196. Similarly, if an illegality can be whitewashed and sanitized, merely on the basis of subsequent sale and transfer [like in the instant case] then the dictum in Benjamin Leonard Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, would be rendered otiose.
197. In a nutshell, I hold the view that the Plaintiff herein, whose title to the suit property was vitiated to the core, cannot invoke and or rely on the Doctrine of bona fide purchaser for value or at all.

Issue Number 3

Whether the 1st Defendant has any lawful rights and/or interests to and in respect of the suit property worthy of being protected by the court.

198. Despite the claim by and on behalf of the Plaintiff to be the registered proprietor and/or owner of the suit property, evidence was tendered before this court that indeed the suit property was allocated to and in favor of one Babu Allan Kanyotu.
199. Furthermore, the said Babu Allan Kanyotu also attended court and testified as DW3. Instructively, same DW3 intimated to the court that the suit property was allocated unto him [DW3] and thereafter same sold and transferred the suit property to and in favor of the 1st Defendant.
200. On the other hand, DW3, who was admittedly the Lessee of the suit property [a fact which is evident even from the Plaintiff's exhibits] testified that same did not sell the suit property to the 2nd Defendant.
201. To the contrary, DW3 vindicated the sale and transfer of the suit property to and in favor of the 1st Defendant.
202. Notably, the 1st Defendant herein held under his custody the original certificate of lease as well as the original rates and rets clearance certificate, which were utilized during the transfer of the suit property unto him.
203. Without belaboring the point, I am duly persuaded that the suit property lawfully belongs to the 1st Defendant and not otherwise.
204. In any event, there is no gainsaying that the 1st Defendant herein entered upon and took possession of the suit property in the year 1990 upon purchasing [suit property] from DW3.
205. Additionally, it is also evident that upon taking possession of the suit property, the 1st Defendant has remained in occupation thereof to date. For good measure, the occupation of the suit property by the 1st Defendant was admitted and acknowledge by the Plaintiff [PW1].
206. In view of the foregoing, there is no debate as to whether or not the 1st Defendant owns the suit property. In any event, even if there was such a debate, the documentation obtaining before the court would vindicate the 1st Defendant's entitlement to the title.
207. Simply put, I come to the conclusion that the 1st Defendant is the lawful and legitimate proprietor of the suit property and same is deserving of the requisite protection in accordance with the provisions of Section[s] 24 and 25 of the *Land Registration Act*, 2012.
208. Besides, it is imperative to underscore that the extent and scope of the rights of a legitimate land owner, the 1st Defendant not excepted, have also been highlighted and expounded in the case of Mohansons (Kenya) Limited versus Registrar of Titles & 2 others [2017] eKLR.
209. For coherence, the court stated and held as hereunder:



- (17) The petitioner as a registered proprietor of the suit property has established a strong prima facie case for the grant of the reliefs for the protection of his property rights sought in the petition. I do not agree that the petition is about ownership of the suit property which should be determined by a civil suit rather than by petition for protection of property rights. Having perused petition, I do not accept that the petitioner has violated the rule of specificity of pleading constitutional claims as propounded by *Anerita Karimi Nejrū v. A.G No. 1 (1979) KLR 154*. The petitioner as registered proprietor asserts his constitutional right to protection of property under Article 40 of *the Constitution*. If he 2nd Respondent contends that the title of the petition is vitiated by fraud, misrepresentation or the certificate of title is illegal, unprocedural or obtained through a corrupt scheme, it is for the said respondent to move the appropriate Court by suitable proceedings in that behalf for such determination. In the absence and prior to any such determination, the petitioner is entitled to protection of his undoubted property rights.
- (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.”

Issue Number 4

What reliefs, if any; ought to be granted.

210. The Plaintiff herein had sought for a plethora of reliefs at the foot of the re-amended Plaint dated the 16th June 2023.
211. Pertinently, the Plaintiff had sought for a declaration that same [Plaintiff] is the lawful owner and proprietor of the suit property and hence obligated to partake of and benefit from the right[s] attendant to and flowing from such ownership.
212. Nevertheless, whilst discussing issue number one [1] hereinbefore, the court came to the conclusion that the certificate of title held by the Plaintiff herein was vitiated and thus incapable of underpinning any legitimate rights to and in respect of the suit property.



213. Having found and held that the certificate of title held by the Plaintiff is vitiated, there is therefore no gainsaying that the declaration sought for by and on behalf the Plaintiff herein cannot issue.
214. On the other hand, the Plaintiff had also sought for an order of Eviction and permanent injunction, ostensibly as against the 1st Defendant, who is the person in occupation of the suit property.
215. However, whilst discussing issue number three, [3] this court has found and held that the 1st Defendant is the lawful and legitimate owner of the suit property. In any event, the documentation that were tendered by the 1st Defendant before the court are superior and legally tenable.
216. To the extent that the 1st Defendant is the lawful and legitimate owner of the suit property, it thus means that same has the requisite rights and authority to remain in occupation of the suit property.
217. Simply put, no order of eviction and permanent injunction can therefore be granted and issued as against the lawful and registered proprietor of the suit property, either as sought by the Plaintiff or at all.
218. To this end, it suffices to take cognizance of the holding of the Court of Appeal in the case of Nguruman Ltd vs Jan Bonde Nielsen [2014]eKLR, where the court stated and held as hereunder;

It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so.

219. Finally, the Plaintiff herein also sought for an alternative relief and in respect of which same sought for compensation on account of the suit property at the prevailing market value thereof.
220. As pertains to the claim for compensation at the prevailing market value of the suit property, two [2] things do arise and are worthy of an address. Firstly, there is no gainsaying that a claim for such compensation is liquidated in nature and hence if the Plaintiff before hand was serious, same [Plaintiff] would particularly pleaded the claim for such compensation in monetary terms and thereafter tender credible evidence towards specifically proving the claim. [See Capital Fish Kenya Ltd vs Kenya Power & Lighting Ltd [2016]Eklr].
221. Secondly, there is no gainsaying that before the court can engage with what constitute[s] the market value of the suit property, the person advertng thereto, namely, the Plaintiff ought to have undertaken a valuation and thereafter tendered before the court an appropriate [apposite] valuation report.
222. Notably, no such valuation report was tendered and/or produced before the court. Consequently, this court is at a lose on how, [if at all] such a compensation at the rate of [sic] the prevailing market value would be arrived at.
223. Thirdly, the compensation on account of the suit property, [if at all], is a claim that can only be raised against the 2nd Defendant and not otherwise. However, other than the failure to properly implead special/liquidated damages, there is also the aspect that the claim for refund was one of the issues that was heard and determined at the foot of Nairobi HCC No. 118 of 2010. [See the evidence and admission by PW1].
224. Premised on the foregoing, there is no gainsaying that the plea for compensation, [if at all], same was available, would collapse on the basis of the Doctrine of Res-Judicata. [See the Holding of the Court of Appeal in the case of Kenya Commercial Bank ltd vs Benjo Amalgamated [2016]Eklr].

Final Disposition:

225. From the foregoing discourse, it must have become apparent and crystal clear that the Plaintiff herein has neither established nor proved his case against the Defendants to the requisite standards.



226. Consequently and in the premises, I am minded to and do hereby make the following orders;

- i. The Plaintiff's suit be and is hereby dismissed.
- ii. Costs of the suit be and are hereby awarded to the 1st Defendant only.
- iii. For good measure, no costs are awarded to and in favor of the 2nd and 3rd Defendants on account of being complicit in the events attendant to the impugned cause of action by and on behalf of the Plaintiff.
- iv. Nevertheless, and to avert any further mischief, the Certificate of title in respect of the suit property bearing the name of the Plaintiff and which was [sic] issued on the 14th April 2008 be and is hereby revoked and canceled.
- v. Furthermore, it is hereby declared that the 1st Defendant is the lawful and legitimate proprietor of L.R No. Nairobi/Block 94/184 [suit property].
- vi. Any other relief not expressly granted is hereby declined.

227. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY, 2024.

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Ccourt Aassistant.

Mr. Njoroge h/b for Mr. Philip Nyachoti for the Plaintiff

Ms. Ngaruiya for the 1st Defendant

Mr. Manyara for the 2nd Defendant

Mr. Motari [Principal litigation counsel] for the 3rd Defendant

