



**Munge v Nairobi City County & 3 others (Environment & Land Case E155 of 2021) [2024] KEELC 5201 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5201 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E155 OF 2021**

**JO MBOYA, J**

**JULY 10, 2024**

**BETWEEN**

**CHARLES MUNGE ..... PLAINTIFF**

**AND**

**NAIROBI CITY COUNTY ..... 1<sup>ST</sup> DEFENDANT**

**JOYCE MUNJIRU MWANGI (BEING THE ADMINISTRATOR OF THE ESTATE OF PAUL MWANGI NGUTU, DECEASED) ..... 2<sup>ND</sup> DEFENDANT**

**JANE WAMBUI ..... 3<sup>RD</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction And Background:**

1. The Plaintiff herein approached the Honourable court vide Plaint dated the 6th May 2021 and wherein same [Plaintiff] sought for various reliefs as against the Defendants herein. However, the Plaint under reference was thereafter amended and subsequently further amended.
2. For coherence, the operative pleadings on behalf of the Plaintiff is the Further amended Plaint dated the 13th July 2023; and in respect of which the Plaintiff has sought for the following reliefs;
  - a. An order of permanent injunction do issue directed at the 2nd Defendant through his Administrator Joyce Munjiru Mwangi & 3rd Defendants whether by themselves or through their servant, agent or employee restraining them from entering the suit property or premise on LR No Nairobi Block/107/1/1118 or remaining thereon or from selling offering for sale or in any other way attempting to alienate the suit premise from the Plaintiff



- b. An order do issue directed at the 1st and the 4th Defendants to cancel the Certificate of lease No Nairobi Umoja Block/107/1118 issued to Paul Mwangi Ngutu (Deceased) 2nd Defendant and 3rd Defendants and any other allotment, lease or certificate of lease issued to any other party arising there from.
  - c. A declaratory Order do issue that the Plaintiff is the sole owner of all that parcel of LR No Nairobi Block/107/1/1118 and be held as such.
    - cc An Eviction order with assistance from relevant police station with jurisdiction
  - d. Damages.
  - e. Costs of the suit.
  - f. Interest on [d] and [e].
  - g. Such other or further orders that may be necessary or as the court may deem just.
3. Upon being served with the original Plaint the 1st Defendant duly filed a Notice of appointment of advocates on the 25th May 2021 and thereafter filed a statement of defence on the 11th November 2021. Nevertheless, the statement of defence by and on behalf of the 1st Defendant was amended culminating into the amended statement of defence dated the 21st December 2022.
  4. Suffice it to point out that the 1st Defendant denied the claims by and on behalf of the Plaintiff. Furthermore, the 1st Defendant also contended that the claim on behalf of the Plaintiff did not disclose a reasonable cause of action as against the 1st Defendant.
  5. On the other hand, the 2nd and 3rd Defendant[s] filed a statement of defence dated the 16th January 2022 and wherein the 2nd and 3rd Defendants denied the claims by and on behalf of the Plaintiff. In any event, the 2nd and 3rd Defendants contended that same [2nd and 3rd Defendants] are the lawful and legitimate proprietors of LR No Nairobi/Block 107/1118, which is contended to be separate and distinct from the property claimed by the Plaintiff.
  6. As pertains to the 4th Defendant, same duly entered appearance and filed a statement of defence. Furthermore, the 4th Defendant also proceeded to and filed a list and bundle of documents dated the 20th April 2023.
  7. First forward, the instant matter came up for pretrial directions on the 20th December 2021; and whereupon the advocates for the respective parties confirmed that same [advocates] had filed and exchanged all the requisite pleadings, list and bundle of documents and witness statement. Consequently, the matter was intimated to be ready for hearing.
  8. Premised on the intimation by and on behalf of the advocates for the respective parties, the court proceeded to and confirmed the suit/matter as ready for hearing. Instructively, the court thereafter proceeded to and fixed the matter for hearing.

**Evidence By The Parties’:**

**A. Plaintiff’s Case:**

9. The Plaintiff’s case is premised and predicated on the evidence of one witness, namely Charlse Munge. Same testified as PW1.



10. It was the testimony of PW1 [Charles Munge] that same is the Plaintiff in respect of the instant matter and thus same is knowledgeable of and conversant with the facts pertaining to the instant matter. Furthermore, the witness averred that same has since proceeded to and recorded a witness statement dated the 22nd December 2022 and which witness statement same sought to adopt and rely on as his evidence in chief. Instructively, the witness statement under reference was thereafter adopted and constituted as the evidence in chief of the witness.
11. Additionally, the witness averred that same has also filed a list and bundle of documents dated the 22nd December 2022 and which documents the witness sought to tender and produce as Exhibits before the court.
12. There being no objection to the production of the various documents at the foot of the list dated the 22nd December 2022 same [documents] were admitted in evidence as exhibits P1 to P11, respectively.
13. Other than the foregoing, the witness adverted to the further amended Plaint dated the 13th July 2023 and thereafter sought to adopt and rely on the contents thereof. Furthermore, the witness [PW1] invited the court to proceed and grant the reliefs thereunder.
14. On cross examination, by learned counsel for the 1st Defendant, the witness [PW1] averred that same was allocated what now constitutes the suit property by the City Council of Nairobi. Besides, the witness testified that same was subsequently issued with a certificate of lease pertaining to and concerning the suit property.
15. Whilst under further cross examination, the witness averred that same has been in occupation of the suit property for more than 20 years. Nevertheless, the witness averred that same has variously attempted to erect a perimeter wall round the suit property, but the perimeter wall has been demolished on various occasion[s]. In any event, the witness averred that the 1st Defendant was not responsible for the demolition of the perimeter wall.
16. It was the further testimony of the witness that same [witness] reported the demolition of the perimeter wall to the directorate of criminal investigations.
17. On cross examination by learned counsel for the 2nd and 3rd Defendants, the witness averred that same is not aware whether the 1st Defendant herein has filed any statement of defence. Furthermore, the witness added that the land in question was surveyed. Furthermore, the witness stated that the land in question is known as LR No Nairobi/Block 107/1/1118.
18. On the other hand, it was the testimony of the witness that same has since seen the documents filed by and on behalf of the 2nd and 3rd Defendants. In any event, the witness averred that the documents filed on behalf of the 2nd and 3rd Defendants relates to [sic] LR No Nairobi/Block 107/1118.
19. Other than the foregoing, it was the testimony of the witness [PW1] that his parcel of land is known and abbreviated as LR No Nairobi/Block 107/1/1118.
20. On further cross examination, the witness averred that the land which same contends to have been grabbed by the 2nd and 3rd Defendants is the suit property, namely, LR No Nairobi/Block 107/1/1118.
21. It was the further testimony of the witness that same has since come across some documents which states that the two [2] parcel of lands are one and the same.
22. Furthermore, it was the testimony of the witness that same was issued with a letter of allotment dated the 17th August 1992 and thereafter same proceeded to and complied with the terms of the letter



- of allotment. In particular, the witness averred that same [PW1] paid the stand premium within the stipulated 30 days duration.
23. It was the further testimony of the witness that upon the payment of the monies alluded to at the foot of the letter of allotment, Nairobi City Council generated a receipt indicating that the payments had been made.
  24. Nevertheless, whilst under further cross examination, the witness averred that the documents which same referenced as the receipt was indeed an invoice issued by Nairobi City Council. In any event, it was the further testimony of the witness that the documents in question does not bear any printing at the foot thereof.
  25. Whilst under further cross examination, the witness averred that the 2nd and 3rd Defendants are also claiming to have been allocated the suit property. In any event, the witness added that same has seen the letter of allotment in favour of the 2nd and 3rd Defendants dated the 11th August 1992.
  26. Furthermore, it was the testimony of the witness that the letter of allotment by and on behalf of the 2nd and 3rd Defendant appears to have been issued some days before the letter of allotment in his favour
  27. On the other hand, the witness also averred that the document at page 4 of the 2nd and 3rd Defendants list and bundle of documents relates to a receipt issued by Nairobi City Council. In addition, the witness averred that the receipt in question has/bears some printing on the face thereof.
  28. While under further cross examination, the witness averred that same has availed to the court a copy of the lease instrument which was duly executed and registered at the land registry. Besides, the witness added that same has also tendered and produced before the court a copy of the certificate of lease pertaining to and concerning LR No Nairobi/Block 107/1/1118, which is the suit property.
  29. It was the further testimony of the witness that same procured and obtained the suit property more than 25 years ago. Besides, the witness averred that same has been paying ground rents and rates as pertains to the suit property. In this regard, the witness adverted to the various receipts which have been produced and tendered before the court.
  30. On the other hand, the witness averred that same has also seen copies of demand for rates alluded to on behalf of the 2nd and 3rd Defendants. However, the witness clarified that the same [demands for rates] do not relate to Nairobi/Block 107/1/1118.
  31. Other than the foregoing, it was the testimony of the witness that same applied for and obtained an approval to commence construction on the suit property. In this regard, the witness averred that the approval was dated the 3rd July 2018.
  32. Whilst under further cross examination, the witness averred that same is neither privy to nor knowledgeable of whether the 2nd and 3rd Defendants have constructed on the plot before the court. Nevertheless, whilst still under further cross examination, the witness stated that same is aware that the 2nd and 3rd Defendants have indeed constructed on the suit property.
  33. Be that as it may, the witness added that the structures that have been erected on the suit property were erected after this court had rendered and delivered a Judgment in his [witness] favour.
  34. It was the further testimony of the witness that same has been in occupation of the suit property since 1992. On further cross examination, the witness averred that the 2nd and 3rd Defendants have since subdivided LR No Nairobi/Block 107/1118. In any event, the witness added that it is the said parcel of land that the 2nd and 3rd Defendants contend to have been allocated.



35. Other than the foregoing, it was the testimony of the witness that the documents at pages 35 to 42 of the 2nd and 3rd Defendants, list and bundle of documents are from the survey of Kenya. However, the witness added that same has not tendered any document/letter from the survey of Kenya.
36. In addition, the witness averred that same has not produced nor tendered before the court any search over and in respect of the suit property. However, when pressed further, the witness added that same has indeed tendered a copy of official search before the court.
37. Upon being referred to the document at page 42 of the 2nd and 3rd Defendants 'list and bundle of document, the Witness stated that same is an official search relating to the suit property. However, the witness stated that the name contained therein is different from himself.
38. On cross examination by learned counsel for the 4th Defendant, the witness averred that same was issued with a letter of allotment by the 1st Defendant. Furthermore, the witness added that same was subsequently issued with a certificate of lease by the 1st Defendant.
39. Whilst under further cross examination, by learned counsel for the 4th Defendant, the witness averred that same undertook an official search and indeed confirmed that the suit property is in existence.
40. It was the further testimony of the witness that Nairobi City Council prepared a lease instrument which was transmitted to the land registry and was thereafter registered culminating into the issuance of the certificate of lease in his favour.
41. Upon being referred to paragraph 8 of his witness statement, the witness averred that the contents thereof are correct. Furthermore, the witness added that same was informed of the existence of a parallel certificate of lease by an employee of Nairobi City Council.
42. It was the further testimony of the witness that thereafter same made enquiries from the ministry of lands but same [witness] did not receive any response.
43. Nevertheless, it was the testimony of the witness that he was issued with a lease by Nairobi City Council and thereafter the lease was duly registered by the office of the chief land registrar.
44. On re-examination, the witness averred that upon being issued with the letter of allotment same [witness] proceeded to and paid the requisite stand premium to Nairobi City Council. Furthermore, the witness added that the payment was duly acknowledged and receipted.
45. On the other hand, it was the testimony of the witness that upon compliance with the terms of the letter of allotment same [witness] was issued with a lease instrument and which lease was transmitted to the ministry of lands, culminating into the issuance of certificate of lease.
46. As pertains to the claim by the 2nd and 3rd Defendants, that same [2nd and 3rd Defendants] have been allocated the suit property, the witness contended that the documents by the 2nd and 3rd Defendants are not lawful.
47. With the foregoing testimony, the Plaintiff's case was duly closed.

#### **B. 1st Defendant's Case:**

48. Though the 1st Defendant duly entered appearance and filed a statement of defence [which was subsequently amended]; as well as a list and bundle of documents and a witness statement, learned counsel for the 1st Defendant however sought to close the 1st Defendant's case without tendering any evidence.



49. Suffice it to point out that the application by and on behalf of the 1st Defendant to close her case without calling any witness was vehemently opposed by learned counsel for the Plaintiff, but however the court was called upon to render a ruling. For coherence, the court proceeded to and rendered a ruling wherein the court observed that in an adversarial system, the adverse party cannot purport to take over the conduct of the case for the opposite party and/or seek to compel the opposite party to summon and call evidence.
50. Arising from the rendition of the ruling [details in terms of the preceding paragraph], the court proceeded to and ordered the 1st Defendant's case as be duly closed.
51. For the avoidance of doubt, the 1st Defendant's case was duly closed without adduction or production of any evidence whatsoever.

### **C. 2nd And 3rd Defendants' Case:**

52. The 2nd and 3rd Defendants' case is anchored on the evidence of two [2] witnesses, namely Joyce Munjiru Mwangi and Gerald Kariuki Wambacha. Same testified as DW1 and DW2, respectively.
53. It was the testimony of DW1 [Joyce Munjiru Mwangi] that same is the widow and legal administratrix of the Estate of Paul Mwangi Nguthe, now deceased. Furthermore, the witness averred that Paul Mwangi Nguthe, now deceased was the 2nd Defendant and that upon his death, same [DW1] was substituted in place of the 2nd Defendant.
54. It was the further testimony of the witness that the deceased and the 3rd Defendant herein were allocated the property now known as Nairobi/Block 107/1118 and thereafter same were issued with a certificate of lease.
55. Additionally, the witness averred that same has since recorded a witness statement dated the 24th February 2023. In this regard, the witness sought to adopt and rely on the witness statement dated the 24th February 2023.
56. Suffice it to point out that the witness statement under reference was thereafter adopted and constituted as the evidence in chief of the witness.
57. On the other hand, the witness adverted to the list and bundle of documents dated the 24th February 2023 and thereafter sought to tender and produce the various documents highlighted thereunder. Nevertheless, the endeavor to produce the various documents was objected to by learned counsel for the Plaintiff.
58. In particular, learned counsel for the Plaintiff objected to the documents at pages 34, 35, 36, 37 and 38 respectively. However, upon consideration of the objection by learned counsel for the Plaintiff the court upheld the objection as pertains to the document at the foot of page 35 of the list and bundle of documents only.
59. Other than the foregoing, the court proceeded to and admitted the rest of the documents as exhibits D1 to D9; 10 [b], [c] and [d]; 11 to 13, respectively. However, the documents at page 35 was marked for identification as DMFI 10[a].
60. It was the further testimony of the witness that the property which had been registered in the names of the 2nd and 3rd Defendants was subsequently subdivided into various plots. At any rate, the witness stated that same has alluded to the details of the subdivisions at the foot of her [witness] statement.



61. Other than the foregoing, the witness averred that same is also aware that a statement of defence dated the 16th January 2022 was filed on behalf of the 2nd and 3rd Defendants. Furthermore, the witness sought to adopt and rely on the contents of the said statement of defence.
62. On cross examination by learned counsel for the 1st Defendant, the witness averred that same was not involved in the acquisition of the property under reference. In any event, the witness averred that same only became involved in the matters pertaining to the claim herein following the death of Paul Mwangi Nguthe, now deceased.
63. On the other hand, it was the testimony of the witness that the information contained at the foot of her witness statement have been obtained from one Gerald Kariuki Wambacha, who is more knowledgeable of the facts and circumstances attendant to the acquisition of the plot.
64. On cross examination, by learned counsel for the 4th Defendant, the witness reiterated that same was not involved in the acquisition of the plot. Furthermore, the witness added that the information pertaining to the acquisition and ownership of the plot was obtained from Jane Wambui and Gerald Kariuki Wambacha.
65. Whilst under further cross examination, the witness averred that same is not aware of the parcel of land that belongs to the Plaintiff herein.
66. On cross examination by learned counsel for the Plaintiff, the witness testified that her husband died in the year 2016. Besides, the witness averred that the plot in question belonged to and was registered in the name of her husband [Paul Mwangi Nguthe and Jane Wambui].
67. It was the further testimony of the witness that the 3rd Defendant herein who was a co-owner of the plot is no longer in Kenya. For good measure, the witness testified that the 3rd Defendant is resident [domiciled] outside Kenya. However, the witness clarified that same [witness] is not aware of when the 3rd Defendant left the country.
68. Other than the foregoing, it was the testimony of the witness that the letter of allotment in favor of Paul Mwangi Nguthe [now deceased] and the 3rd Defendant herein was issued by Nairobi City Council.
69. Whilst under further cross examination, the witness averred that same has not availed to the court a copy of the lease that was executed by Nairobi City Council. However, the witness added that what same has availed is a copy of the certificate of lease.
70. Other than the foregoing, it was the testimony of the witness that the plot which was allocated to and was subsequently registered in the name of Paul Mwangi Nguthe and Jane Wambui has since been subdivided. At any rate, the witness averred that same has since tendered and produced before the court copies of certificate of titles in respect of the resultant parcels of land.
71. On re-examination, by learned counsel for the 2nd and 3rd Defendant, the witness averred that the information contained at the foot of her witness statement were gathered from Gerald Kariuki Wambacha. Further and in any event, the witness added that the said Gerald Kariuki Wambacha is one of her witness.
72. It was the further testimony of the witness that same has since availed to the court the subdivisions scheme denoting the subdivision of the plot which was registered in the names of Paul Mwangi Nguthe and the 3rd Defendant herein.
73. The second witness who testified on behalf of the 2nd and 3rd Defendant was Gerald Kariuki Wambacha. Same testified as DW2.



74. It was the testimony of the witness [DW2] that same is conversant with the facts pertaining to the subject dispute and in particular the acquisition and registration of the property known as LR No Nairobi/Block 107/1118.
75. It was the further testimony of the witness that same has since recorded a witness statement dated the 24th February 2023 and which witness statement same [witness] sought to adopt and rely on as his evidence in chief.
76. Suffice it to point out that the witness statement dated the 24th February 2023 was thereafter adopted and constituted as the evidence in chief of the witness.
77. On cross examination by learned counsel for the 1st Defendant, the witness averred that the contents of the witness statement dated the 24th February 2023 are correct. Furthermore, the witness averred that same is aware of the fact that the deceased [Paul Mwangi Nguthe] was allocated the suit property in the year 1992.
78. It was the further testimony of the witness that even though the property was allocated to Paul Mwangi Nguthe and Jane Wambui, same [witness] is not aware whether the deceased wrote a letter accepting the allotment.
79. Whilst under further cross examination, the witness averred that the deceased was allocated the property/plot in 1992. However, it was the testimony of the witness that though the plot was allocated in the year 1992, the deceased only took possession of the plot in the year 2010.
80. It was the further testimony of the witness that the delay to enter upon and take possession of the plot was caused because the plots in the area had various disputes and which disputes were only sorted out in the year 1996.
81. Whilst under further cross examination, the witness averred that the city council of Nairobi addressed and sorted out the dispute pertaining to and concerning the plots in the area and that the resolution of the disputes was contained in the minutes of the city council of Nairobi. Furthermore, the witness averred that the minutes of the city council of Nairobi have since been tendered and produced before the court.
82. It was the further testimony of the witness that the plot in question was allocated to and in favor of the deceased by the housing department of Nairobi city council. In any event, the witness added that the deceased thereafter commenced to and paid rates pertaining to the suit property.
83. Other than the foregoing, the witness averred that same [witness] is also aware that the deceased paid the monies at the foot of the letter of allotment. In this regard, the witness adverted to the revenue receipts which had been tendered and produced by DW1.
84. It was the further testimony of the witness that the Plot which was allocated to and thereafter registered in the name of the deceased was subdivided into various plots. Furthermore, the witness contended that the subdivision has since been issued with the requisite certificate of leases.
85. On cross examination by learned counsel for the 4th Defendant, the witness averred that the deceased was allocated the plot which is now known as LR No Nairobi/Block 107/1118.
86. It was the further testimony of the witness that upon the allocation of the plot in question a dispute arose involving various plots in the area.





87. Whilst under further cross examination, the witness averred that same is aware of double allocation which affected the entire scheme. In any event, the witness averred that the suit plot was part of the scheme which was affected by the dispute.
88. Nevertheless, it was the testimony of the witness that the dispute that had affected the plots in the area were subsequently addressed by Nairobi city council and thereafter the deceased was issued with a certificate of lease.
89. On the other hand, the witness averred that same is able to confirm and verify ownership of the suit plot. Besides, the witness added that it is him [witness] who helped the deceased to procure and obtain a certificate of lease over and in respect of his plot.
90. On further cross examination, the witness averred that the Plaintiff's plot is non-existent. In any event, the witness added that the property being claimed by the Plaintiff has a different abbreviation/nomenclature.
91. It was the further testimony of the witness that same has since also discovered that the Plaintiff does not even own the property, namely, LR No Nairobi/Block 107/1/1118, which same [Plaintiff] is claiming before the court.
92. On cross examination by learned counsel for the Plaintiff, the witness averred that same [witness] got to know the deceased around the year 2007. Furthermore, the witness averred that same is aware that the deceased was allotted the suit property.
93. At any rate, the witness added that the deceased was in possession of a letter of allotment which was duly issued by Nairobi City Council.
94. Other than the foregoing, it was the testimony of the witness that the deceased was also issued with a lease which was prepared over and in respect of LR No Nairobi/Block 107/1118. Besides, the witness testified that the lease in question was duly signed/executed by the mayor and the town clerk, respectively.
95. Whilst under further cross examination, the witness averred that upon the execution of the lease same was escalated to the office of the chief land registrar culminating into the issuance of a certificate of lease in favor of the deceased and the 3rd Defendant.
96. On further cross examination, the witness averred that by the time same [witness] got to know of the deceased, the deceased [Paul Mwangi Nguthe] already had a letter of allotment in his favour. Nevertheless, when pressed further on the question of the lease instrument, the witness admitted that same has not seen a copy thereof before the court.
97. It was the further testimony of the witness that the deceased was however issued with a certificate of lease. Besides, the witness averred that the deceased commenced to pay rates to Nairobi City Council.
98. Furthermore, it was the testimony of the witness that even though the deceased was allocated the plot in the year 1992, the deceased did not enter upon and take possession up to the year 1996.
99. Be that as it may, the witness averred that the delay by the deceased to enter upon and take possession of the plot was occasioned because of squabbles pertaining to and concerning ownership of plots in the area.
100. Other than the foregoing, the witness averred that the dispute which had affected the various plots in the area were later addressed and resolved by Nairobi City Council.



101. Whilst under further cross examination, the witness averred that the lease instrument was surrendered to the ministry of land. Nevertheless, the witness testified that same has since availed a copy of certificate of lease pertaining to the plot in favor of the deceased.
102. On the other hand, the witness averred that the plot which was allocated to and registered in the name of the deceased has since been subdivided. In any event, the witness added that same [witness] has been given two plots out of the subdivision of the plot in question.
103. Whilst under further cross examination, the witness averred that same bought the two [2] plots arising out of the subdivision. However, it was the testimony of the witness that even though same bought two plot[s] therefrom, same [witness] has not produced any evidence of such purchase.
104. On re-examination by learned counsel for the 2nd and 3rd Defendants, the witness averred that the land being claimed by the Plaintiff is different from the one belonging to the deceased.
105. Other than the foregoing, the witness also testified that the deceased had a lease and that the lease document was surrendered to the chief land registrar. Furthermore, it was the testimony of the witness that it is the lease instrument which was utilized to generate the certificate of lease in favour of the deceased.
106. On the other hand, it was the testimony of the witness that the dispute which had hitherto affected the plots in the area, including the plots that was allocated to the deceased was addressed and sorted out. In this regard, the witness adverted to the minutes of Nairobi city council, which were tendered and produced before the court.
107. Whilst under further re-examination, the witness averred that the deceased was indeed issued with a letter of allotment and that the letter of allotment stipulated that the plot was to be used for residential purposes.
108. It was the further testimony of the witness that same is privy to the contents of the document at page 42 of the list and bundle of documents tendered on behalf of the 2nd and 3rd Defendants. For good measure, the Witness averred that the document under reference is a copy of certificate of official search relating to the land being claimed by the Plaintiff herein.
109. Additionally, the witness averred that the certificate of official search shows that the plot being claimed by the Plaintiff does not belong to the Plaintiff.
110. With the foregoing testimony, the 2nd and 3rd Defendants' case was duly closed.

#### **D. 4th Defendant's Case:**

111. The 4th Defendant's gravitates upon the evidence of one witness namely Vincensia Juma. Same testified as DW3.
112. It was the testimony of the witness [DW3] that same is a land registrar attached to the office of the chief land registrar. Besides, the witness averred that by virtue of her portfolio same is conversant with and knowledgeable of the facts of this matter.
113. Additionally, the witness averred that same has since recorded a witness statement dated the 20th April 2023 and which witness statement same [witness] has sought to adopt and rely on as her evidence in chief. For coherence, the witness statement dated the 20th April 2023 was thereafter adopted and constituted as the evidence in chief of the witness.



114. On the other hand, the witness adverted to the list and bundle of documents dated the 20th April 2023 containing three [3] documents and which documents the witness sought to tender and produce before the court. Instructively, the documents under reference were thereafter admitted and constituted as exhibits D1 to D3 on behalf of the 4th Defendant.
115. Furthermore, the witness alluded to the statement of defence dated the 20th April 2021; and which statement of defence the witness herein sought to adopt and to rely on.
116. On cross examination by learned counsel for the 1st Defendant the witness averred that a lease instrument was presented to the office of the chief land registrar and thereafter same was duly registered. For good measure, the witness averred that there was no misrepresentation attaching to the registration of the lease.
117. On cross examination by learned counsel for the 2nd and 3rd Defendants, the witness averred that the registration process is ordinarily presided over by the chief land registrar. In any event, the witness averred that registration is a critical process.
118. Whilst under further cross examination, the witness stated that same has had occasion to look at the records obtaining at the land office. However, the witness averred that the office of the chief land registrar does not have any records in respect of the plots claimed by the 2nd and 3rd Defendants.
119. It was the further testimony of the witness that the certificate of lease in respect of LR No Nairobi/Block 107/1118 and which is claimed by the 2nd and 3rd Defendants is not traceable at the ministry of lands. In any event, the witness added that same cannot confirm whether the certificate of lease in favor of the 2nd and 3rd Defendants was issued by the chief land registrar.
120. Upon being referred to the consent to subdivide the suit property, the witness averred that the consent relates to and concerns LR No Nairobi Umoja/Block 107/1118.
121. On the other hand, it was the testimony of the witness that the office of the chief land registrar and the office of the directorate of survey falls under the ministry of lands. In any event, the witness added that land must be surveyed before same can be registered.
122. It was the further testimony of the witness that parcel numbers is ordinarily given by the directorate of survey. Furthermore, the witness added that upon the issuance of parcel numbers, the directorate of survey will forward a letter to the office of the Chief Land Registrar.
123. Upon being shown document[s] at pages 36 to 38 of the list and bundle of documents by the 2nd and 3rd Defendants, the witness averred that same appear to have come from the office of survey of Kenya. However, the witness clarified that the contents of the said documents are not within her knowledge and hence same [ Witness] cannot be able to verify the contents thereof.
124. On cross examination by learned counsel for the Plaintiff, the witness averred that the blocks constituting the properties before the court hitherto belonged to Nairobi city council. Furthermore, the witness averred that the lease that was received by the office of the Chief Land Registrar related to Nairobi Umoja/Block 107/1/1118.
125. It was the further testimony of the witness that same has since availed to the court a copy of the white card and green card relating to LR No Nairobi/Block 107/1/1118. To the contrary, the witness averred that same [office of the chief land registrar] does not have any records in respect of LR No Nairobi/Block 107/1118.



126. On the other hand, it was the testimony of the witness that Nairobi city council issued a lease in favour of the Plaintiff. At any rate, the witness added that a lease instrument is a critical document.
127. Other than the foregoing, it was the testimony of the witness that a certificate of lease cannot issue in the absence of a lease instrument. In any event, the witness clarified that where a lease is missing the certificate of lease would be invalid and irregular.
128. On re-examination by learned counsel for the 4th Defendant, the witness averred that same was not able to confirm whether the certificate of lease in favour of the 2nd and 3rd Defendants came from the chief land registrar because there are no records to that effect.
129. On the other hand, the witness averred that same does not work with the directorate of survey and hence she cannot authenticate the veracity of any document from the directorate of survey.
130. Whilst under further re-examination, the witness averred that the office of the chief land registrar received a lease in favour of the Plaintiff and thereafter proceeded to registered same. In any event, the witness added that a certificate of lease cannot issue without a lease instrument having been availed.
131. Finally, it was the testimony of the witness that if a certificate of lease is issued without a lease instrument then the resultant certificate of lease would be irregular, illegal and void and illegal.
132. With the foregoing testimony, the 4th Defendant's case was duly closed.

#### **Parties' Submissions:**

133. At the close of the defence case, the advocates for the respective parties covenanted to file and exchange written submissions. Consequently, the court proceeded to and circumscribed the timeline for the filing and exchange of the written submissions.
134. Suffice it to point out that the Plaintiff thereafter proceeded to and filed written submissions dated the 1st March 2024 and in respect of which same highlighted and canvassed three [3] issues for consideration by the court. On the other hand, the 1st Defendant filed written submissions dated the 18th March 2024 and wherein same highlighted two [2] issues for consideration by the court.
135. Other than the foregoing, the 2nd and 3rd Defendants filed written submissions dated the 16th May 2024 and wherein same has canvassed one pertinent issue for consideration. For good measure, the 2nd and 3rd Defendants have contended that the Plaintiff herein has neither established nor demonstrated any basis to warrant the grant of declaratory orders sought as against the 2nd and 3rd Defendants.
136. On behalf of the 4th Defendant, the submissions are undated. Nevertheless, the undated written submissions were availed to the court and same [undated written submissions] forms part of the record of the court.
137. Notably, the court has appraised and taken into account the contents of the written submissions filed by and on behalf of the respective parties. Pertinently, the contents of the written submissions have been considered in the course of crafting the Judgment.
138. Nevertheless, it is apposite to point out that even though the court has neither rehashed nor reproduced the contents of the written submissions in the body of the Judgment, such failure is not informed by contempt.
139. To the contrary, the court is extremely grateful to the advocate of the respective parties for highlighting and canvassing the pertinent issues which are paramount and critical to the determination of the dispute pertaining to and concerning ownership of the suit property.



### **Issues For Determination:**

140. Having reviewed and considered the pleadings; the witness statement[s] and the totality of the evidence [oral and documentary] as well as the written submissions [whose details have been highlighted in the preceding paragraphs], the following issues crystalize and are therefore worthy of determination;
- i. Whether or not LR No Nairobi/Block 107/1118 and Nairobi/Block 107/1/1118 are one and the same property; or fall on the same geo-space or otherwise.
  - ii. Whether the Plaintiff herein has established and demonstrated ownership to and in respect of LR No Nairobi/Block 107/1/1118 or otherwise.
  - iii. Whether or not LR No Nairobi/Block 107/1118 lawfully exists and if so whether same belongs to the 2nd and 3rd Defendants.
  - iv. What reliefs or orders, ought to issue.

### **Analysis And Determination:**

#### **Issue Number 1 Whether or not LR No Nairobi/Block 107/1118 and Nairobi/Block 107/1/1118 are one and the same property; or fall on the same gio-space or otherwise.**

141. The Plaintiff herein filed the instant suit contending that same [Plaintiff] is the lawful and legitimate proprietor of LR No Nairobi/Block 107/1/1118 [hereinafter referred to as the suit property]. Furthermore, the Plaintiff ventured forward and contended that despite being the owner of the suit property, the 2nd and 3rd Defendants have entered upon and interfered with his [Plaintiff's] rights to and in respect of the suit property.
142. Additionally, the Plaintiff contended that the 2nd and 3rd Defendants have grabbed the suit property albeit under the guise and pretext that the suit property is known as LR No Nairobi/Block 107/1118.
143. To put the Plaintiff's case and evidence into perspective, it suffices to take cognizance of the evidence that was tendered by the Plaintiff and who testified as PW1. For good measure, the Plaintiff testified and stated thus whilst under cross examination by learned counsel for the 2nd and 3rd Defendants;
- “The land in question was surveyed. The land in question is LR No Nairobi/Block 107/1/1118. I have seen the Defendant's documents. The documents by the 2nd and 3rd Defendants relates to LR No Nairobi/Block 107/1118. My parcel of land is LR No Nairobi/Block 107/1/1118. It is the land which is being grabbed”.
144. Furthermore, PW1 testified as hereunder;
- “I can see that the certificate of titles relates to two different parcel of lands. The land which has been grabbed is LR No Nairobi/Block 107/1/1118. I have come across some documents which states that the two parcels are one and the same”.
145. Whilst under further cross examination, PW1 stated thus;
- “I was issued with a letter of allotment. The letter of allotment is dated the 17th August 1992. The property being allocated is Umoja II/Extension Block 107”.
146. On the other hand, DW2 [Gerald Kariuki Wambacha] contended that the parcel of land/property being claimed by and on behalf of the Plaintiff herein is separate and distinct from the plot which was



allocated to and thereafter registered in the names of Paul Mwangi Nguthe and Jane Wambui. For good measure, DW2 contended that the two plots namely, Nairobi/Block 107/1/1118 and Nairobi/Block 107/1118 are separate and distinct.

147. To this end, it suffices to take cognizance of the testimony of DW2 whilst under cross examination by learned counsel for the 4th Defendant.

148. Same testified thus;

“I do confirm that I was able to verify the ownership of the suit plot. I am the one who helped the deceased to procure and obtain a certificate of lease. I got to know that the Plaintiff herein was also laying a claim to the suit property in 2016. The Plaintiff’s plot is however non-existent. The property being claimed by the Plaintiff has a different abbreviation”.

149. From the testimony of DW2, what becomes apparent is that the Plaintiff herein was also laying a claim to the suit property, which in my understanding relates to the same portion of land [read, geo-space] despite the diverse abbreviation/ registration nomenclatures.

150. Notwithstanding the foregoing, it is also important to take cognizance of the letters of allotment which were tendered and produced before the court by and on behalf of both the Plaintiff and the 2nd and 3rd Defendant[s]. For good measure, the letter of allotment by the Plaintiff was tendered and produced as exhibit P1.

151. For ease of reference, it suffices to reproduce the sub-heading only and same states thus;

Charles Munge.

C/o Nairobi City Commission

Dear Sir/madam

Ref: Letter Of Allotment-

Residential Block – Umoja Ii Extension [block 107].

152. On the other hand, the letter of allotment which was produced by and on behalf of the 2nd and 3rd Defendant[s] herein states as hereunder;

Paul Mwangi Nyutu & Jane Wambui Gakure

Nairobi City Commission

Dear Sir/madam

Ref: Letter Of Allotment- Residential Block – Umoja Ii Extension [block 107].

153. Taking into account the details of the property that was alluded to at the foot of the letters of allotment, which have been tendered and produced before the court, there is no gainsaying that the geo-space [the ground on the planet earth] which was being allocated relates to one and the same ground.

154. Further and in any event, it is also evident that the ground at the foot of the allocation measures 0.4Ha in both instances.

155. To my mind and taking into account the totality of the evidence beforehand, there is no gainsaying that what is being contested between the Plaintiff on one hand and the 2nd and 3rd Defendants on the other hand, relates to the same geo-space and not otherwise.



156. In a nutshell, I come to the conclusion that the property in question, whether referenced as LR No Nairobi/Block 107/1/1118 or Nairobi/Block 107/1118; refer to the same ground [geo-space] and not otherwise.
157. Furthermore, it is not lost on this court that a similar dispute like the one beforehand had been considered by this court and wherein this court calibrated upon the Issue[s] vide Nairobi ELC Case No 1382 of 2016: Murang'a Road Motor Mart Ltd v Rockville Junior Academy Ltd & 6 others as Consolidated with ELC No 174 of 2017 and ELC No.706 of 2011 [Unreported], and stated as hereunder;
180. Back to the critical question, the contest before the court is whether the parcel of Land known as LR No Nairobi Block 107/1/1133 and the sister number LR No Nairobi Block 107/1133, are sitting on the same ground or otherwise.
180. In my respectful view, the Letter by the Cown clerk of the City Council of Nairobi dated the 1<sup>st</sup> July 2011 is succinct, clear and apt. For good measure, it does confirm that the subsequent Leases, whose origin is not traceable to the lessor were being superimposed on the corresponding numbers.
180. Arising from the foregoing, there is therefore no gainsaying that the two numbers which are being disputed before the Honourable court actually relates to the same ground position. Consequently, irrespective of whether one uses LR No Nairobi Block 107/1/1133 or LR No Nairobi Block 107/1133, the connotation is that the ground which is situated on the Planet Earth is one and the same.
180. Owing to the foregoing, I come to the conclusion that the usage of the two set of abbreviations, were merely caused by shrewd and cunning persons, sitting at the office of the Chief Land Registrar, who was desirous to circumvent and defeat the intendment of the city council of Nairobi/the Lessor.
158. Simply put and for good measure, I reiterate and re-affirm the same position, [that the Geo-space in contest], is as alluded to and/or postulated in the decision [supra].

**Issue Number 2 Whether the Plaintiff herein has established and demonstrated ownership to and in respect of LR No Nairobi/Block 107/1/1118 or otherwise.**

159. Having dealt with and disposed of issue number one, which concerned itself with the determination as to whether or not the disputed property falls on the same geo-space, it is now appropriate to venture forward and to engage with the claims raised by and on behalf of the competing parties.
160. To this end, I beg to start with the claim by and on behalf of the Plaintiff. Pertinently, the Plaintiff's claim to and in respect of the suit property is predicated on the letter of allotment dated the 17th August 1992 and which letter of allotment is said to have been complied with by the Plaintiff on account of payment of the stand premiums and incidental payments alluded to in the body of the letter of allotment.
161. Additionally, the Plaintiff averred that upon compliance with the terms of the letter of allotment [details in terms of the preceding paragraph] Nairobi City Council [now defunct] generated a lease in favour of himself [Plaintiff] which lease instrument was thereafter escalated to the office of the chief land registrar for further action. For good measure, the lease which was executed on behalf of Nairobi City Council [now defunct] was tendered as Exhibit P6.



162. At any rate, it is also worthy to recall that the lease which was executed by Nairobi City Council [now defunct] and thereafter escalated to the chief land registrar for registration was also produced and tendered before the court as exhibits D1 on behalf of the 4th Defendant. Instructively, the witness who testified on behalf of the 4th Defendant was a land registrar under whose custody the lease instrument would be kept and reposed.
163. Other than the lease which was tendered by the Plaintiff herein, it is also instructive to recall that the Plaintiff ventured forward and tendered a copy of the certificate of lease which was issued on the 16th March 2006, and wherein it is indicated that the Plaintiff is the registered proprietor in respect of LR No Nairobi/Block 107/1/1118 [suit property].
164. At any rate, it is not lost on this court that DW3 [Vincensia Juma] a land registrar also tendered and produced before the court copies of the white card and green card relating to LR Nairobi/Block 107/1/1118 and showing that the suit property is registered in the name of the Plaintiff.
165. Furthermore, whilst under cross examination by learned counsel for the Plaintiff, the witness [DW3] stated as hereunder;
- “The Blocks all belong to City Council of Nairobi. I wish to state that the lease that we received was in respect of Nairobi Umoja/Block 107/1/1118. I have not come across the lease in respect of Nairobi/Umoja/Block107/1118. The document that I have availed to court is a white card. The white card that I have relates to LR No Nairobi/Umoja/Block 107/1/1118. I don’t have any records over and in respect of Nairobi/Umoja/Block 107/1118”.
166. From the testimony of DW3, it is evident that the office of the chief land registrar is only in possession of record[s] pertaining to and concerning the property namely, LR No Nairobi/Block 107/1/1118, which is claimed by and in any event, which bears the name of the Plaintiff.
167. I have endeavored to interrogate the totality of the evidence that have been tendered and produced by both the Plaintiff and DW3 [land registrar] and in the course of my endeavor, it has become apparent that the Plaintiff has been able to place before the court plausible and cogent evidence to demonstrate the manner in which same [Plaintiff] acquired the suit property.
168. For coherence, it is imperative to state and underscore that the acquisition and ultimate registration of the suit property in favor of the Plaintiff is well documented and backed by paper trail, right from Nairobi City Council [now defunct] to the office of the Chief Land Registrar.
169. To my mind, where there is a dispute pertaining to the veracity, legality of a title, it is trite that the disputants are called upon to demonstrate the process leading to and underpinning the issuance of the requisite certificate of title. For good measure, it behooves the concerned parties to demonstrate that the acquisition of the property in question was procedural, formal and legitimate.
170. To this end, I beg to take cognizance of the often-cited decision of the Court of Appeal in the case of *Munyu Maina v Hiram Gathiba Maina* [2013]eKLR, where the court stated and observed as hereunder;

We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on





the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony. We find that a trust exists in relation to the suit property.

171. Further and in any event, the need and/or necessity to prove the process [read root] pertaining to and culminating into the issuance of the certificate of title was also highlighted and amplified by the Supreme Court [ the Apex Court] in the case of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), where the court stated thus;

“It is not enough for a party to state that they have a lease or title to the property. 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.”

172. Without belaboring the point, it is my finding and holding that the Plaintiff beforehand has indeed established and demonstrated that same was duly allocated what ultimately became the suit property and thereafter same [Plaintiff] complied with the terms of the letter of allotment culminating into the execution of a lease in his favour.
173. Furthermore, there is no gainsaying that the lease which was issued to and in favour of the Plaintiff was escalated to the chief land registrar for necessary registration culminating into the issuance of a certificate of lease.
174. Other than the foregoing, it is imperative to underscore that the documentation by and on behalf of the Plaintiff were proven to be authentic and legitimate by DW3 [land registrar], who tendered both the white card and the green card pertaining the suit property.
175. In view of the foregoing, my answer to issue number two [2] is to the effect that the Plaintiff has placed before the court credible evidence to warrant a finding that same is the lawful and legitimate owner of the suit property. For the avoidance of doubt, the suit property is LR No Nairobi/Block 107/1/1118.

**Issue Number 3 Whether or not LR No Nairobi/Block 107/1118 lawfully exists and if so whether same belongs to the 2nd and 3rd Defendants.**

176. Suffice it to point out that the 2nd and 3rd Defendants also contended that same were issued with a letter of allotment dated the 11th August 1992 and thereafter same [2nd and 3rd Defendants] proceeded to and complied with the terms of the letter of allotment.
177. Instructively, DW1 [Joyce Munjiru Mwangi] tendered and produced before the court a copy of the letter of allotment as well as a copy of the revenue receipt, attesting to the payment of the stand premium and the incidental payments.
178. On the other hand, DW1 ventured forward and testified that upon compliance with the terms of the letter of allotment Nairobi City Council [now defunct] proceeded to and issued a lease in favour of one Paul Mwangi Nyutu and Jane Wambui Gakure, respectively. Besides, it was contended that the lease was thereafter escalated to the chief land registrar culminating into the issuance of a certificate of lease a copy of which was produced as exhibit D5.



179. Nevertheless, during the course of cross examination, both DW1 and DW2 conceded that the Lease instrument, if any, that was [sic] issued in favor of Paul Mwangi Nyutu, [now Deceased] and Jane Wambui Gakure had neither been tendered nor produced before the court.
180. Other than the failure to tender and produce before the court a copy of the lease, if any, that was generated by Nairobi City Council, it is also important to highlight that DW1 and DW2 also failed to tender before the court any certificate of official search to authenticate the veracity/validity of certificate of lease which was allegedly issued in favour of Paul Mwangi Nyutu and Jane Wambui Gakure on the 7th April 2014.
181. Pertinently, it is important to point out that where there is a dispute pertaining to the validity or otherwise of a certificate of lease and title, it behooves the holder of certificate of lease/title to avail to court a certificate of official search or better still a copy of the green card, duly executed by the chief land registrar or his designate. For good measure, it is the issuance of such certificate of official search/green card that would authenticate the validity of certificate of title.
182. Nevertheless, in respect of the certificate of lease held by and on behalf of the 2nd and 3rd Defendants there is no evidence as pertains to its origin, authenticity and/or validity.
183. Other than the foregoing, it is also not lost on this court that DW3 [land registrar] testified before the court and averred that the certificate of title bearing the name of Paul Mwangi Nyutu and Jane Wambui Gakure relating to LR No Nairobi/Block 107/1118 is not traceable and could not be found at the offices of the chief land registrar.
184. For good measure, DW3 testified as hereunder whilst under cross examination by learned counsel for the 2nd and 3rd Defendants;
- “I had occasioned to look at the record at the land office. However, I do wish to state that the chief land registrar does not have any record in respect of the plot claimed by the 2nd and 3rd Defendants.
- .....shown the certificate in respect of Nairobi Umoja/Block 107/1118 and the witness said that same cannot confirm whether the title was issued by the Chief Land Registrar”.
185. Whilst under further cross examination by learned counsel for the Plaintiff, DW3 stated thus;
- “I have not come across the lease in respect of Nairobi Umoja/Block 107/1118. I don't have any records over and in respect of Nairobi Umoja/Block 107/1118”.
186. On re-examination by learned counsel for the 4th Defendant, the witness stated thus;
- “I was not able to ascertain/confirm whether the certificate of lease by the 2nd and 3rd Defendants actually came from the chief land registrar. I cannot confirm the veracity of the letter from the department of survey. I do confirm that for a lease from the City Council of Nairobi, the ministry of land would proceed to register same and thereafter issue a certificate of lease. I wish to add that a certificate of lease cannot be issued without a lease having been availed’.



187. On further re-examination, DW3 stated thus;
- “If a certificate of lease is issued without a lease instrument then the resultant certificate of lease will be void and illegal”.
188. In my humble view, the 2nd and 3rd Defendants are anchoring their claim to LR No Nairobi/Block 107/1118 on a certificate of lease, whose root and origin, cannot be authenticated. In any event, in the absence of a lease instrument, one wonders how the certificate of lease being dangled by the 2nd and 3rd Defendants came about.
189. Other than the foregoing, it is worth pointing out that the same 2nd and 3rd Defendants have also contended that same proceeded to and subdivided LR No Nairobi/Block 107/1118 and thereby creating several sub-division[s] inter-alia Nairobi/Block 107/1708 to 1718, respectively.
190. However, yet again, the 2nd and 3rd Defendants have failed to tender and/or produce before the court any credible/ plausible evidence to authenticate such sub-division. For good measure, I beg to state and underscore that [sic] the copies of the Sub-division scheme that were tendered by and on behalf of the 2ND and 3RD Defendants, were not neither proven nor validated insofar as the Author thereof, if at all, was not called as a Witness.
191. In addition, it is my finding and holding that the Copy of the Certificate of Grant of Letters of Administration in favour of the Second Defendant and referencing [sic] the details of the resulting Title[s] is not proof of the existence of such Titles. In any event, there is no gainsaying that the mother Title, which was purportedly being sub-divided could not be traced at the Offices of the Chief Land Registrar; who is the Custodian of records.
192. To my mind, the documentation by and on behalf of the 2nd and 3rd Defendant[s] fall short of establishing and/or proving [sic] ownership to and in respect of LR No Nairobi/Block 107/1118 or otherwise.
193. Additionally, there is no gainsaying that no parcel of land can exist without the title thereof being registered at the designated/appropriate land registry. For good measure, under the Torrens system [which Kenya subscribes to], it is the register obtaining at the land registry which is the final and authentic document. [See the holding of the court of appeal in the case of *Elizabeth Wambui Gitbinji & 29 others v Kenya Urban Roads Authority & another* [2019]eKLR].
194. Finally, it is important to underscore that a certificate of lease/title, which is not anchored on any legitimate process known to law, cannot bestow and confer upon the bearer thereof any lawful rights or at all.
195. To vindicate the foregoing exposition of the law, it suffices to restate and reiterate the holding of 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 held thus;
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, unprocedural or otherwise a product of a corrupt scheme.



196. Flowing from the foregoing, my answer to issue number three [3] is threefold. Firstly, the certificate of title being dangled by and on behalf of the 2nd and 3rd Defendants was procured in vacuum and hence same [Certificate of Lease] is illegal and unlawful, insofar as same is not anchored on any lawful lease or at all.
197. Secondly, the certificate of title which is being relied upon by the 2nd and 3rd Defendants did not emanate from the office of the chief land registrar. For good measure, no records are obtainable [traceable] at the office of the Chief Land Registrar to vindicate the same. [See the holding of the Court of Appeal in the case of *Philemon L. Wambia v Gaitano Lusitsaa Mukofu* [2019]eKLR]
198. Thirdly, the certificate of title being relied upon by the 2nd and 3rd Defendants emanates from nothing and thus fits within the parameters of the Doctrine of Ex-Nihilo-Nihil-Fit [out of nothing comes nothing]. [See the explication of the Doctrine in the case of *Caroget Investments Limited v Aster Holdings Limited and another* [2019] eKLR].

#### **Issue Number 4 What reliefs or orders, ought to issue.**

199. The Plaintiff herein sought for various reliefs at the foot of the Further amended plaint. Notably, the Plaintiff sought to be declared as the lawful and legitimate proprietor of LR No Nairobi/Block 107/1/1118 [suit property].
200. Be that as it may, whilst dealing with issue number two [2] hereof, the court found and held that the Plaintiff has indeed placed before the court sufficient and credible evidence to demonstrate that same is truly the registered owner of the suit property. In this regard, there is no gainsaying that by virtue of being the lawful and registered proprietor of the suit property, the Plaintiff is indeed entitled to a declaration.
201. Other than the declaratory orders that was sought by the Plaintiff, same has also sought for an order of permanent injunction to bar and/or prohibit the 2nd and 3rd Defendants from interfering with his [Plaintiff] rights to and in respect of the suit property. For good measure, as the registered owner of the suit property, the Plaintiff is truly entitled to the protection of his rights and interests thereto.
202. In addition, the Plaintiff also sought for an order of eviction. To this end, there is no gainsaying that by virtue of being the registered owner of the suit property, the Plaintiff deserves to partake of and benefit from his ownership rights.
203. In any event, the extent and scope of the rights and interests of the owner of a designated land [Property] have since been highlighted and amplified. For coherence, it suffices to cite and adopt the ratio decidendi in the case of *Mobanson [Kenya] Ltd v Registrar of Titles & another* [2017]eKLR, where the court stated and held thus;
- (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.”

204. Finally, the Plaintiff also sought for general damages for trespass. In this regard, I wish to underscore that as a result of the actions and/or omissions by the 2nd and 3rd Defendants, the Plaintiff herein was denied and/or deprived of the opportunity to develop the suit property and thereafter benefit therefrom.
205. In my humble view, the activities by and on behalf of the 2nd and 3rd Defendants [ and which were/ are anchored on illegal Documents/ Title] constitutes and amounts to trespass and this regard, the Plaintiff is indeed entitled to recompense on account of loss and damages attendant thereto.
206. As pertains to the quantum, I hold the view that the sum of Kshs 5, 000, 000/= only will suffice taking into account the size of the property, the location thereof, the duration/longevity of trespass and the loss of use [income]; which would have been derivable from the suit property were it not for the offensive and intrusive activities by the 2nd and 3rd Defendants.
207. To buttress the foregoing position, I beg to adopt the succinct affirmation at the foot of the decision in the case of *Kenya Power & Lighting Company Ltd v Ringera & 2 others* (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment), where the court stated as hereunder;
38. The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distill and replicate as hereunder:
- i. *Harlsburys Laws of England* 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner’s land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.
  - ii). *Duncan Nderitu Ndegwa v Kenya Pipeline Company limited & another* [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.



- iii). *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.
- iv). *Ephantus Mwangi & another v Duncan Mwangi* [1981 – 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence.
  - b) a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.
- v). *Kiambu Dairy, Farmers Co-operative Society Limited v Rhoda Njeri & 30 others* [2018] eKLR, - the extend of an award of compensatory damages lies in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well settled principles.
- vi). *Kemfro Africa Limited v Lubia & another [No 2]* [1987] KLR 30 as approved in *Peter M. Kariuki v Attorney General* [2014] eKLR, - before interference with the quantum of damages awarded by a trial court the appellate court must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or short of the above, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages payable.
- vii). *Johnson Evans Gicheru v Andrew Martin & another* [2005] eKLR, - this Court on appeal will be disinclined to disturb the finding of the trial Judge as to the amount of damages awarded by the trial court merely because if it had tried the case itself in the first instance, it would have awarded either a higher or lesser sum(b) justification for reversing a trial Judge on an award of damages only applies where the court is convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very low as to make it an entirely erroneous estimate of the damage to which the aggrieved party is entitled.
- viii). *Sumaria & another v Allied Industries Limited* [2007] 2 KLR I, - an appellate court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence or based on a misapprehension of the evidence or that the Judge had been seen demonstrably to have acted on a wrong principle in reaching the finding he/she did.
- ix). *Butt v Khan* [1981] KLR 349, - an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate
- x). it must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.
- vii.. *Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited v Janevans Limited* [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss;



- (b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass;
- (c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass.

**Final Disposition:**

- 208. Flowing from the discourse [details highlighted in the body of the Judgment] it must have become apparent that the Plaintiff herein has indeed established and proved his case as pertains to ownership of LR No Nairobi/Block 107/1/1118, to the requisite standard.
- 209. On the contrary, the 2nd and 3rd Defendants have neither demonstrated nor proved the legality and/or validity of the title in respect of LR No Nairobi/Block 107/1118 or at all
- 210. In any event, the existence of such a title is also in doubt, taking into account the succinct and apt testimony of DW3 [ the Land Registrar]; which testimony was neither impeached nor controverted by the Second and Third Defendants.
- 211. Arising from the foregoing, I proceed to and do hereby make the following Final Orders;
  - a. A declaratory Order be and is hereby issued that the Plaintiff is the sole and Legitimate owner of all that parcel of LR No Nairobi Block/107/1/1118 and be held as such.
  - b. The 1st and the 4th Defendants be and are hereby ordered to cancel and revoke the Certificate of lease relating to [sic] LR No Nairobi Umoja Block/107/1118 issued to Paul Mwangi Ngutu (Deceased), 2nd Defendant and 3rd Defendants and any other allotment, lease or certificate of lease issued to any other party arising there from.
  - c. The cancellation and revocation of the Certificate of Lease/ Title held by and on behalf of the Second and Third Defendants herein shall thereafter be gazetted by the Fourth Defendant in the Kenya Gazette, albeit at the Expense of the Plaintiff herein.
  - d. The 2nd and 3rd Defendants, either by themselves, agents, servants and/or anyone claiming under them be and are hereby ordered to vacate and grant vacant possession in respect of LR No Nairobi/Block 107/1/1118 [ the Suit Property] within 120 days from the date hereof.
  - e. In default to comply with clause [d] hereof, the Plaintiff shall at be at liberty to levy eviction and to demolish whatever structures standing on the suit property namely, LR No Nairobi/ Block 107/1/1118 and in this regard an eviction order shall issue without further reference.
  - f. In the event of Eviction being levied by the Plaintiff, the costs/expenses, if any, incurred shall be certified by the Deputy Registrar and thereafter same shall be borne by the 2nd and 3rd Defendants.
  - g. A permanent injunction be and is hereby issued and directed at the 2nd Defendant through his Administrator Joyce Munjiru Mwangi & 3rd Defendants whether by themselves or through their servant, agent or employee restraining them from entering the suit property or premise on LR No Nairobi Block/107/1/1118 or remaining thereon or from selling offering for sale or in any other way attempting to alienate the suit premise from the Plaintiff



- h. General damages be and is hereby awarded in the sum of Kshs 5, 000, 000/= only and same to be borne by the 2nd and 3rd Defendants.
- i. The award of general damages in terms of clause [h] herein above shall attract interests at court rates [14%] from the date of Judgment until payment in full.
- j. Costs of the suit shall be borne by the 2nd and 3rd Defendants.
- k. The claim as against the 1st and 4th Defendants be and is hereby dismissed albeit with no orders as to costs.
- l. Any other reliefs not expressly granted are declined.

212. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JULY 2024.**

**OGUTTU MBOYA**

**JUDGE.**

In the presence of:

Benson/ Brian: court Assistant.

Ms. Purity Makori for the Plaintiff.

Mr. Delson Ojong'a for the 1st Defendant.

Mr. J M Jenga for the 2nd and 3rd Defendants.

Mr. C N Menge [Deputy Chief Litigation Counsel] for the 4th Defendant.

