



Olympic Trading Company Limited v Mohamed; Basabra (Suing as the Administrator of the Estate of the Late Said Omar Mohamed Basabra) (Plaintiff); Olympic Trading Company Limited & 3 others (Defendant) (Environment & Land Case 259 of 2012) [2024] KEELC 5313 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5313 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 259 OF 2012**

**AA OMOLLO, J
JULY 11, 2024**

BETWEEN

OLYMPIC TRADING COMPANY LIMITED PLAINTIFF

AND

SAID MOHAMED DEFENDANT

AND

ALI SAID OMAR BASABRA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE SAID OMAR MOHAMED BASABRA) PLAINTIFF

AND

OLYMPIC TRADING COMPANY LIMITED DEFENDANT

SOHAIL DEVELOPMENT LIMITED DEFENDANT

THE CHAIRMAN, NATIONAL LAND COMMISSION DEFENDANT

THE LAND REGISTRAR DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit against the Defendant vide Plaint dated 15th May 2012 seeking for the following orders;
 - a. The Defendant by himself agents, servants, employees or otherwise howsoever be restrained from remaining on, entering upon, trespassing upon and/or interfering with the Plaintiff quite possession of the property known as LR. No. 2/206.



- b. A permanent injunction against the Defendant, prohibiting whether by himself, his servants, officers or agents from entering upon, remaining upon, transferring, occupying, leasing, charging, mortgaging, assigning or interfering with Plaintiff quite possession of L.R No.2/206.
 - c. A mandatory injunction do issue compelling the Defendants, their servants and/or agents and any other person occupying LR. No.2/206 to vacate unconditionally and remove any materials deposited or erected thereon at their own cost.
 - d. A declaration that the Plaintiff is the lawful, legal, absolute and registered owner of the property known as LR. No.2/206.
 - e. Damages for trespass against Defendant
 - f. Costs of this suit together with interest thereon for such period and at such rate as this Honourable Court may deem appropriate.
 - g. Any such other or further relief as this Honourable Court may deem appropriate.
2. The Plaintiff averred that it is the registered owner of LR.NO 2/206 herein after referred to as “the suit property” having purchased the same vide instrument dated 5th December 1988 and took vacant possession. That on 9th May 2012, the Defendant wrongfully entered the suit property and is in continuous trespass depriving the use and enjoyment of the same by the Plaintiff thus suffering loss and damage.
3. The Plaintiff further averred that the Defendant has stationed agents, security on the suit property and has threatened that to continue to remain in wrongful and possession of the said property. The Plaintiff stated that the suit property has been trespassed before but upon demand they vacated however, after the Defendant forcefully re-entering the suit property have been persistent despite notice to vacate being issued.

Defence and Counter Claim

4. The Defendant filed an amended defence and counter claim dated 30th September 2014 seeking for the following orders;
- a. A declaration that the Defendant’s estate is the owner of the property known as Land Reference Number 2/206, Nairobi.
 - b. An order declaring the conversion of Title and the sale and transfer of the suit property thereof as fraudulent and illegal thus void.
 - c. An order directing the 3rd and 4th Defendants to revoke and cancel the illegal conversion of Title from Land Reference Number 2/206 (Original Number 2/88/1), Kilimani, to Nairobi/ Block 17/318 by the Plaintiff;
 - d. A declaration that the invasion of the said Land by the 1st Defendant, its agents, employees and/or servants and the subsequent evictions and demolitions thereupon was unlawful.
 - e. A permanent mandatory order do issue against the 2nd Defendant to vacate the suit premises and to hand over vacant possession to the Defendant.
 - f. Damages appurtenant to the demolition of approximately Kenya Shillings One Hundred Million (Kshs.100,000,000/=) or as shall be assessed by a valuer whichever is greater against the Defendants herein;



- g. General damages for loss of user and trespass
 - h. Interest on (d) and (e) above at Court rates.
 - i. Costs of this suit
 - j. Any other relief that this Honourable Court may deem fit to grant.
5. The Defendant in his defence denied that that the Plaintiff is the owner of the suit property contending that he is the registered owner having purchased the same from the previous registered owner. Further, the Defendant denied that the Plaintiff has been in possession stating that he and his Estate has always been in possession either by himself or his tenants from 12th June 1989 when he purchased the suit property to 18th May 2012 when the Plaintiff illegally evicted tenants and demolished premises and structures thereon.
 6. That also, before the Defendant purchased the suit property, he was a tenant to the Landlord who is the vendor who had also purchased it from the originally registered owner. The Defendant contended that the Estate has been wrongfully deprived of its legal and rightful possession as a result of the illegal eviction and demolition conducted by the Plaintiff causing him loss as particularised in his counterclaim and infringement of his rights.
 7. In his counter claim, the Defendant who is Plaintiff therein stated that during the pendency of this suit, the 1st Defendant who is the Plaintiff in the main suit, proceeded to illegally sell and transfer the suit property after illegally converting the title from LR No.2/206 (Original Number 2/88/1), Kilimani, Nairobi to Nairobi/Block 17/318 without any colour of right.

2nd Defendant's Defence to Counter claim and its counter claim

8. The 2nd Defendant filed a defence to the counter claim by the Defendant in the main suit and its own counter claim dated 5th November 2014 seeking for the following orders;
 - a. An order for special damages against the Plaintiff for the liquidated damages suffered by the 2nd Defendant of Kshs. 3,600,000/- month from the date of stoppage of the constructions until date of judgement.
 - b. In the alternative to (a) above, judgement be entered jointly and severally against the 1st, 3rd and 4th Defendants for the sum of Kshs.582,519,546/- being;
 - i. Costs, expenses, losses and damages suffered by for the 2nd Defendant as at 23rd October, 2014 amounting to Kshs.218,919,546/-; and
 - ii. Future damage, losses and expenses which will be incurred by the 2nd Defendant due to non-performance of the Construction Agreement and non-completion of the project amounting to Kshs.363,600,000/=
 - c. Interests for (a) or (b) and (c) above
 - d. Costs
 - e. Any other or further relief as this Honourable Court may deem appropriate.
9. The 2nd Defendant denied that the Plaintiff in the counter claim is the proper legal representative of the estate of Said Mohammed or that he has an interest in the suit property.



10. They stated that the suit property was converted from GLA to the Registered *Land Act* (now repealed) and is now registered as NAIROBI/BLOCK 17/318 as a leasehold title for a period of 99 years with effect from 1st December 2011 and in accordance with the Registry Index Map for NAIROBI BLOCK 17(KILIMANI) prepared by the Survey of Kenya sometimes in 2005 as duly amended on 15th January 2008.
11. The 2nd Defendant stated that on 16th October 2012, the suit property was registered under RLA in the name of the 1st Defendant with effect from 1st December 2011 and being the first registration under the RLA, the 1st Defendant's rights as the first registered owner thereof as well as other rights subsequently acquired for valuable consideration cannot be defeated except as provided un RLA.
12. The 2nd Defendant further stated that they purchased the suit property from the 1st Defendant vide agreement of sale dated 19th March 2013 for a consideration of Kshs.130,000,000/= after conducting a search which established that the same was registered in the name of the 1st Defendant under RLA with no encumbrance.
13. That pursuant to the sale agreement, the 2nd Defendant obtained from the 1st Defendant, its certificate of incorporation, original certificate of lease for the suit property issued on 16th October 2012, the lease dated 25th June 2012, rent clearance certificate for the year 2013, rates clearance certificate for the year 2013 and other documents incidental thereto confirming its ownership to the suit property.
14. Further, that after upon payment of the consideration and the requisite stamp duty, the 2nd Defendant presented a duly executed transfer of lease dated 26th March 2013 for registration and consequently a certificate of lease was issued in its favour on 5th April 2013 and embarked on obtaining the relevant statutory approvals for developments thereon.
15. The 2nd Defendant contended that they were not aware of any other transaction of the suit property thus is a bonafide innocent purchaser for value without notice.
16. They added that sometimes in July 2013, pursuant to a construction agreement dated 4th July 2013 and after obtaining all the requisite approvals, they contracted Mehlam Construction Limited to undertake the construction of 36 Apartments at a project cost of Kshs.346,000,000/= which constructions commenced on 15th July 2013, set to be completed by 30th September 2014 with a clause on provision of liquidated damages to the contractor in case of any delays not attributable to it.
17. They explained that by an application dated 10th September, 2013, the Plaintiff in the counterclaim moved the court seeking various remedies including substitution of the Said Mohamed as a party, the joinder of the 2nd, 3rd and 4th Defendants as Defendants in the Counterclaim and an interlocutory injunction which ruling was delivered on 8th August 2014.
18. The 2nd Defendant denied the Plaintiffs averments in the Amended defence and Counter claim and stated that the Plaintiff has not made any claim on the title of suit property under RLA save for the allegation that the conversion was fraudulent which they also deny.
19. In their counterclaim, the 2nd Defendant stated that as consequence of the clause in the construction agreement providing for liquidated damages to the developer at Kshs.25,000 per week per apartment, they have been suffering the said damages amounting to loss of Kshs.3,600,000/= occasioned by the order stopping further constructions and stand to suffer more future loss due to non-performance.
20. The 2nd Defendant contended that in the alternative and without prejudice to the foregoing, due to the stoppage of the construction, they have incurred substantial costs and expenses totalling to Kshs.218,919,546/= in acquiring and commencing the developments, payment of salaries for the



employees and continue to suffer liquidated damages for which they claim from the Plaintiff in the counterclaim.

1st Defendant's reply to amended statement of defence and counterclaim

21. The 1st Defendant in the counter claim and Plaintiff in the main suit filed a response to the amended statement of defence and counterclaim dated 9th September 2015. They denied the averments thereof and reiterated that they are the registered owner of the suit property having purchased the same from the original owner Mr. Ronyi Kiptoo and took vacant possession.
22. That they discovered that on 9th May 2012, the Defendant had wrongfully entered the suit property and caused illegal structures to be erected thereon adding that the defendant has never been tenant or a purchaser of the suit property.
23. They denied the allegations of fraud and contended that the same have not been specifically pleaded and also denied that the estate of the deceased was deprived of its legal rightful possession or suffered loss noting without prejudice that they had not availed a valuation report to show the same.
24. They reiterated that the conversion of the suit property was legally done and that the 2nd Defendant obtained a good title thus the lawful registered owner.

Reply to 2nd Defendant's defence and counterclaim

25. The Defendant in the suit and plaintiff in his counterclaim filed a response to 2nd Defendant's defence and counterclaim dated 20th November 2014. He particularised the fraud to be transferring the suit land during the pendency of the suit, fraudulently converting the suit property from freehold to leasehold in a bid to defeat his right to the property, illegally obtaining title to the suit property, conspiring between the 1st and 2nd Defendant to defeat his rights by the 1st Defendant purporting to transfer proprietary interest in the suit property to the 2nd Defendant.

Evidence adduced:

26. Eddy Peter Ndungu Kimemia who testified as PW1 stated that he is director of the Plaintiff that owned the suit property. That sometimes in the year 2012, the land was invaded by strangers claiming ownership of the suit property. That upon instructing his lawyers to take legal action and served the intruders with a demand letter, the intruders vanished but they have responded to the claim.
27. PW1 relied on his filed witness statement and produced the Plaintiff's further list of documents dated 29/6/2015 and filed on 30/6/2015 as PExh 1 to 17 respectively. The witness also relied on the Plaintiff's bundle which at page 1 is an instrument of transfer/indenture dated 10/6/1978 between Jadwiga Winza and Ronyi Kiptoo, registered as Folio 411/22 on 16/12/1978.
28. He testified that at page 4 of the bundle is an agreement dated 17/2/1977 between KCB and Jadwiga Winza which relates to the suit property and at page 6,7 and 8 is the conveyance dated 5/12/1988 that transferred the suit property to the Plaintiff from Ronyi Kiptoo. That he purchased the suit property at Kshs.2,050,000/= and it had involved the services of S.W Waweru & Co. Advocates to handle the transaction on its behalf. However, PW1 did not produce any documents to show how the payment done.
29. He continued to state that the Plaintiff took possession of the suit property but did not develop it and instead put guards who were living with their families on their temporary structures. That in the year 2009, a letter was written to the Director of Surveys concerning the conversion of the suit property to



- leasehold as shown at page 10 of the bundle (dated 29th June 2015) and on page 11 is another letter dated 10/11/2009 addressed to the Commissioner of land concerning the said conversion.
30. At page 12 is a lease that was issued to the Plaintiff and at page 14 is a letter forwarding the said lease dated 9/10/2012. The Rent Clearance certificate dated 5/11/2012 and another one dated 20/3/2013 is produced at pages 15 and 18 of the same bundle. The witness also produced lease issued dated 16/10/2012. He referred to the letter dated 26/11/2014 (page 19) from his advocates on record to the Chief Officer of Physical Planning and Chief Officer Lands at Nairobi City County Government to vail certain documents. Pw1 mentioned another letter addressed to the Director City Valuation asking for genuine records with regard to the suit property.
 31. Page 21 of the bundle consist of a letter dated 29/1/2015 to the Registrar of Lands when the Defendants wanted to reconstitute the records and at page 23 is a letter by Nairobi City County Government to his Advocates on record confirming the documents they had at the material time with regard to the suit property as set out in the letter inter alia, certificate of official search; a copy of conveyance in respect of L.R 2/206; certificate of rates clearance for block 17/318 and copy of certificate of incorporation for the Plaintiff.
 32. He stated that the documents produced at pages 25-35 are copies of receipts for the rate payments made to Nairobi City Council. That at the time he purchased the suit property, there were semi-permanent structures which had been occupied by guards but the rest of the property was vegetation/bushy. PW1 asserted that there were no permanent buildings on the suit property as claimed by the Plaintiff in the counterclaim and denied all the particulars of fraud pleaded in the counterclaim. He stated that the conversion of the suit property from freehold to leasehold was done procedurally and the property sold to the 2nd Defendant in the counterclaim.
 33. Pw1 confirmed the documents filed by the 2nd Defendant's counter claim and defence, inter alia, the agreement for sale of the suit property; a certificate of incorporation of the Plaintiff; the certificate of lease issued to the 2nd Defendant; the rent clearance certificate and at page 20 the rates clearance certificate. He also affirmed the bills for land rates which were duly paid and the payment slip for land rent, the receipt, the stamp duty declaration assessment and pay slip (pages 25, 26 & 29).
 34. The witness averred that the transfer from the Plaintiff in the main suit to the 2nd Defendant in the counterclaim was undertaken by the parties' respective advocates with no complications as shown in documents at pages 30 – 33. Therefore, the counterclaim has no merit.
 35. During cross examination by the Defendant, the witness stated that neither has he ever seen the Defendant before nor sold the suit property to his father in the year 1989. On further cross examination by counsel, the witness confirmed that he was a shareholder in the Plaintiff company with other two shareholders and purchased the suit property registered under the Government Land Act (GLA). From the documents filed by the 3rd and 4th defendants at page 1 is indenture with the original owner stated as Marie Louise Alice Marguerite D. Avvary who transferred the same to Jadwiga by the Indenture at page 3 of the bundle.
 36. He affirmed that the indenture at page 29 (of Defs bundle) is the one through which Jadwiga transferred the suit property to Ronyi Kiptoo at a consideration of Kshs.500,000 on 16/12/1978. Kiptoo then transferred to the Plaintiff through a conveyance dated 5/12/1988 and registered on 7/12/1988. He stated that looking at the Defendant's bundle of documents, the defendant traces his title from Mohamed Jamal Noor through the indenture dated 12/6/1989 registered on 20/6/1989 as Folio No. 411/24. He reiterated that as at 1989, the Plaintiffs were owners of the suit property.



37. The witness explained that when they requested the Lands office for conversion of the suit property to RLA, they surrendered their indenture and the survey department was asked to produce the Registry Index Map. Thereafter, the suit property was certified as Block 17/318 and they were granted a new lease of 99 years from December 2011 and the government gave a new grant different from the one which had been surrendered.
38. PW1 further confirmed that the Plaintiff sold the suit property using the new title to the 2nd Defendant in the counter-claim for Kshs.130,000,000/= without referring to the old title. He said that when the defendant in the main suit brought his claim against the 2nd Defendant in the counter claim, the 2nd Defendant had paid in full the purchase price.
39. The witness confirmed that the indenture dated 5/12/1988 produced as PEXh3 recited the indenture dated 10/6/1970 which indenture is said to have been registered under Folio 411/19. That the indenture he referred to was under Folio 411/22. He also confirmed that the letter dated 9/11/1988 at page 57 of the Defendant's list of documents is addressed to Mohammed Jama Noor from Oraro & Rachier Advocates, demanding payment of Kshs.88,111 being loan arrears secured using the suit property. Further that at page 58 is a notification of sale the suit property dated 25/11/1988 from Rosam Enterprises acting on instructions from Oraro & Rachier Advocates to Mohamed Jama Noor.
40. He was also referred to a letter dated 24th April, 1985 (page 32 of Supplementary List) from savings was an offer letter to be secured by the suit property. further at page 38 is a letter from EAB Society asking for payment to redeem the account. PW 1 was further referred to the letter dated 19th March, 1966 and mortgage dated 19th March, 1966 at pages 49 of Defendant Supplementary List issued to Mohamed Jama Noor. Several correspondences including a letter dated 5th May, 1986 calling on Mohamed Jama to execute the charge.
41. According to PW 1, when these correspondences were being exchanged, the plaintiff had purchased the suit property from Ronyi Kiptoo. He agreed that Kiptoo was not in possession of the suit property personally. Shown the service agreement (page 13 of Defendants bundle). Pw 1 said Johannes Klenn was not occupying the suit property when they purchased it. PW 1 was not aware that said Mohamed was deceased when they filed suit. He got his name from the security guards.
42. He denied destroying property on the suit premises using exparte orders. PW 1 was unaware that vol. 411 is not available at the land's registry. He denies that the indenture transferring the suit property to the plaintiff was fraudulent. PW 1 said they applied for conversion because it was a requirement of the government for land in Nairobi to be converted to leasehold. He confirmed that L.R No. 2/206 was converted to NBI/Block 17/318. The title had not been converted by the time this suit was filed.
43. PW 1 confirmed that after the 2nd Defendant in the Counter-claim purchased, they began construction on the suit property. In re-examination, PW 1 said they purchased the suit property through an advocate and they paid the purchase price in full. He added that he knew the person who sold the plaintiff land and that vendor took them to the suit property.
44. That the property was idle land and they took possession immediately in 1988. Later they received reports from their caretaker of people coming to the property claiming ownership and they left their names. That these are the people they sued. The witness stated that since he is not the custodian of the land records, he is not the one who caused the disappearance of the Folio No. 411. That they did not sell the suit property in a rush.
45. DW1, Mohamed Jamal Noor testified and adopted witness statement dated 22/1/2018 as evidence in chief and relied on supplementary list of documents filed on 23/1/2018. He stated that purchased



- the suit property in 1978 from Jadwiga Wincza and was given an indenture, sale agreement and other documents but misplaced a photocopy of the indenture. That he took possession and rented the property to Johannes Klein as seen in the copy of services agreement dated 25/4/1984 at page 12 of the supplementary bundle of documents which is marked as DMFI2 and the witness copy of ID produced as DWExh1.
46. He stated that he took a loan from East African Building Society(EABS) using the suit property as security and produced the mortgage instrument at page 2 of the supplementary list of documents as DExh2, debit notes on its payment at pages 16 to 23 as DExh 3(a) to (h), letter dated 2/10/1984 from EABS raising a penalty fee as DExh4, his letter to EABS dated 6/3/1985 as DExh 5 and receipt dated 8/3/1985 by Savings and Loan Kenya Ltd as DExh 6.
 47. That at page 30 is a letter dated 18/3/1985 by EABS in respect to a cheque that was issued and was returned unpaid produced as DExh7 and at page 31 is a letter dated 26/3/1985 addressed to EABS by SLK informing them that they would take over the loan produced as DExh8 and the loan application to SLK for Kshs.442,532 as DExh9. SLK loan acceptance letter dated 24/4/1985 as DExh10, letter of offer as DExh 11, letter from EABS informing him that his account was in arrears of Kshs.20,930/= as DEXh12, receipt dated 15/5/'85 issued by EABS for Kshs.10,000 as DExh13 and letter dated 8/6/1985 by SLK requesting him to fulfil certain conditions in the letter of offer produced as DEXh14.
 48. The letter dated 19/7/1985 forwarding a cheque of Kshs.10,000 was marked as DMFI15, the letter dated 30/7/1985 acknowledging receipt of undertaking at page 43 as DExh 16 and DExh17 letter dated 30/7/1985 by J.M Njage & Co. Advocates to Kaplan & Stratton forwarding the following documents in respect to the suit property;
 - i. Conveyance dated 19/3/1966 Volume N17 Fol 29/13
 - ii. Mortgage dated 19/3/1966 Vol.N17 Fol.29/14
 - iii. Wayleave agreement dated 8/12/1967
 - iv. Re-conveyance dated 12/3/1970 reg. in Vil.N17 Fol 29/16
 - v. Mortgage dated 6/8/1970 reg.in Vol N17 Volume N17 Fol.29/17(with Re-conveyance attached, dated 17/2/1977 reg.in Vol.N17 Foli 411/18.
 - vi. Conveyance dated 10/6/1978 reg. in Vol N17 Fol.411/19.
 - vii. Mortgage dated 11/12/1978 reg.in Vol N17 Fol.411/20
 49. The witness also produced a letter dated 31/7/1985 from EABS informing him that the auction of the suit property had been called off as DExh18, letter dated 1/9/1985 on reductions of the loan account as DExh 19, letter dated 25/10/1985 from EABS to Shapley Barret & Co. Advocates on payment of the loan as DEXh 20 and letter dated 17/12/1985 that enclosed some payments to the loan as DExh21.
 50. Letter dated 6/3/1986 at page 48 by Savings & Loans Kenya Ltd informing him that the mortgage was completed on 20/2/1986 was produced as DExh 22 and a card enclosed thereof consisting of the details of the loan as DExh23 and stated that from then on started making repayments to SLK producing a bank order as Dexh24. That through letter dated 5/5/1986 produced as DExh25 by KCB Ltd to Kimumba Mwaura & Co. Advocates requested them to prepare a second charge over the suit property having asked for more money and the firm vide letter produced as DExh26 requested Kaplan and Stratton to release title deeds to conclude the charge.



51. The payment receipts of Ksh.23,205 dated 11/6/1986 to SLK at page 53 was produced as DExh27 and letter dated 18/7/1986 by KCB Ltd with regard to overdraft made was produced as Dexh28. Further there are two letters at page 55 and another dated 1/10/1986 by K. Mwaura & Co. Advocates asking him to report to their offices to sign documents from Kaplan & Stratton produced as D Exh 29 and DExh.30 respectively.
52. That a letter dated 9/11/1988 addressed to him by the firm of Oraro & Rachier Advocates, demanding payment of Ksh.88,111 payable to SLK was produced as DExh31, notification for sale of the suit property on 21/12/1988 by Rosam Enterprises dated 25/11/1988 as DEXh32 and letter dated 6/12/1988 stating that he wanted to sell the suit property by private treaty as DExh33. The witness testified that he made payments of Ksh.88,111 demanded by the firm of Oraro & Rachier Advocates vide two receipts dated 21/12/1988 produced as DEXh34(a) and DEXh 34(b).
53. DW1 sold the suit property to Sayid Omar Mohammed Basaba as exhibited by an indenture dated 12/6/1989 produced as Dexh35. It is his evidence that he did not know Ronyi Kiptoo but admitted that Jadwiga Wincza name appears on the said indenture and also appears on the indenture produced as PExh1. He testified that he was living on the suit property which had a main house while he rented out the guest wing. He averred that he lived on/rented the suit property from 1978 to 1989 when he sold the same without anyone claiming the same.
54. On cross examination, the witness stated that he was in the business of buying and selling property which business was freelanced without operating under a company. That he met Sayid Omar Mohammed Basaba in the course of his business and entered into a sale agreement but did not produce the same nor recall the name of the advocate who was involved.
55. Further, the witness stated that he does not have the indenture in his favour and that he cannot recall the amount he purchased the suit property at. He also confirmed that the mortgage produced as DEX2 which refers to the LR.No.2/88 is only signed on the second page stating that he was not aware the 1st and 2nd pages were of the same document. He confirmed that he had a loan of Ksh.350,000 which was taken over by SLK and when the suit property was sold to Said Omar Mohamed Basabra at 4.5 Million but the demand from the notice from auctioneer at page 58 was for Kshs.2.5 M. That he did not pay the amount as the loan had been taken over.
56. That he received from M.M. Chanduri Advocate between Kshs. 4.5 M -5 M however confirmed that the indenture indicates Kshs.2 M which was put for purposes of cheating the government taxes. The witness confirmed that he purchased the suit property from Jadwiga, a Greek woman, but from mortgage dated 6/8/1970 shows that she was a woman. That the signatures on indenture dated 12/6/1989 and service agreement is the same but the mortgage dated 11/12/1978 he signed as Mohamed Jama but the service agreement has a different signature as Mohamed Jama Noor.
57. DW 1 did not produce a sale agreement between him and Jadwiga neither could he remember the purchase price. That he handed all the documents in his possession to Chaudhri Advocate. He said that the loan of 350,000 advanced by EABS was fully paid after Saving and Loan took over the loan. That when he sold the property, the title was in possession of KCB and S & L Ltd.
58. He added that he did not pay the loan to S. & L Ltd. because it was taken over when he sold the property to the Defendant. He confirmed receiving from M. M. Chandhri between Kshs.4.5 million to 5 million for the suit property. He said that the sum of Kshs.2 million on the indenture was for purposes of paying Stamp Duty and he said this happens all the time.



59. Further, that he owned the suit property between 1978 and 1989 with Johannes Klein as his tenant even before 1984 as seen in the service agreement dated 25/4/1984, however which refers to L.R No.2/88 Ole dume road, a different property from the suit property.
60. DW2, Ali Said Omar Basabra, a son to the defendant in the main suit as shown in the certificate of confirmation of grant issued thereof at page 15 of the documents filed on 3/9/2018. The witness stated that the suit property is owned by his father who had purchased it from Mohamed Jama Noor (DW1), where he used to visit him until 1992 when he passed on and the evidence of ownership is contained in the bundle of documents filed on 23/1/2018.
61. He stated that after the death of his father, his younger brother Hassan Said Omar occupied the suit property and rented the same to several people among them, Baraka Montessori School as shown in tenancy agreement at page 37 of the bundle filed on 2/10/14 and an agreement of lease dated 23/3/2010 at page 31 but confirmed that they had no receipts issued to the tenants.
62. That his family paid for electricity and water for the suit property as shown in the rates demand at page 4, water bill dated 13/5/1997 at page 5 and more water bills at pages 6,7,8 and 9 of documents filed on 2/10/14 stating that for water supplied at LR No.2/88. Further at pages 10-15 are rates demand notes by City Council of Nairobi with the one at page 17 dated 17/10/2011 being paid by himself and the brother vide cheque at page 18, at page 16 is a receipt for the rates clearance certificate and electricity bills being at page 19 to 30 for L.R.2/88 Ole Dume Road.
63. The witness stated that currently they are not in occupation of the suit property as PW1 demolished their house and that at the time of demolishing, they had let it to a lady who had sublet it to several business people. He stated that currently the suit property is not in his father's name as the same was changed at Land's office and the father having not sold the same to anyone, they filed their counter claim for its ownership relying on the bundle of documents dated 3/9/2018 filed on the same date produced as Dexh 36 (a)(b)(c)(d)(e) respectively. Also produced bundle of documents dated 30/9/2014 filed on 2/10/2014 as DExh37.
64. The witness confirmed that his name on I.D is different with the name on the Petition for letters of administration but the same refer to the same person. Further, that the electricity bill at page 19 of DExh37 is for account number 115628003 while the one for page 20 is for account 1069698 and at page 21 is for 0060582-01.
65. The witness stated that he was absent during demolition of the house which was estimated to be Kshs.50,000,000 in the suit property but had photographs of the said demolition. Hassan Said Omar, a brother to DW2 and son to the Omar Mohamed Basaba testified adopting his witness statement dated 4/10/2022 as evidence in chief and adopted the evidence given by his brother who is also deceased.
66. In support of the 2nd Defendant in the counter claim case, DW3, Nadeem Iqbal Ahmed, it's managing director testified and adopted his statement filed on 7th November 2014 as evidence in chief. He also adopted a list of documents dated 5th November 2014 produced as 2nd DExh1 as a bundle; a further list of documents dated 8/4/2016 as Dexh2; and a further supplementary list dated 2nd June 2017 as 2nd DExh3 except document No.3 in the list marked as MFI D4 to be produced by the quantity surveyor.
67. He testified that he purchased the suit property on 19th March 2013 vide agreement from the 1st Defendant in the counterclaim. That having done several developments in Nairobi they knew the documents to be examined and were shown to them were RLA title for NBI Block 17/318-Original certificate of Leases as pages 15-18(a); conducted a search. He stated that the 2nd Defendant (in



- the counter-claim) started development on the suit property in July 2013 before it was stopped in September 2013.
68. The witness stated that they did not conduct any inquiry prior to the issuance of the certificate of lease which they understand was issued pursuant to a conversion. He further stated that prior to signing the sale agreement he visited the suit property on several occasions in the year 2012 and there was vacant possession. He averred that the 2nd Defendant's claim is against the delay in their project as a consequence of it being stalled as against Said Omar Mohamed and reserve their right as against Olympic Trading Co. Ltd in the event the court finds otherwise as regards their title.
 69. DW3, Stephen Karenu Muriithi, a registered quantity surveyor testified in support of the 2nd Defendant's claim stating that his letter dated 21/1/2017 forwarded his report after visiting the site and obtaining the drawings and calculating quantities of the works which were then priced to obtain the BQ estimates as appearing at pages 4-86 of the supplementary bundle. That the estimates give works if completed as at Jan 2017 to be Kshs.370,655,563 inclusive of VAT and produced the report as 2nd DExh3.
 70. He stated that at page 8b item 1 is a provision for preliminaries which are items of temporary nature required before starting to do the permanent works. The preliminaries include items such as security, water, power etc. That mobilisation is wider as it includes monies paid to contractor to begin the works. The witness affirmed that he made provision for preliminaries in spite of the works having been done because the site had become bushy.
 71. DW4, Charles Kipkurui Ngetich, a deputy Chief Land Registrar testified in support of the 3rd and 4th Defendants' claim in the counter claim and adopted his witness statement dated 13/3/2023 and marked the documents in the list dated 4/4/2016 MFI 3rd & 4th DExh1 on promise to produce certified documents therein. The documents presented involved an indenture dated 5/12/1988 between Ronyi Kiptoo and the Plaintiff in the main suit registered on Vol. N17 Folio 411 entry 23 GLA 8854. According to Dw4, this was the last entry. He confirmed that he had not seen entry No.24 but saw mortgage between Mohamed Jama and EABS registered in Volume N17 Folio,411 entry 20 GLA file 8854 dated 16/12/1978.
 72. The witness testified that indenture dated 12/6/1989 can only be confirmed from the register but currently they do not use the register and being a very old title are not able to extract the folio volume but saw it before they were sent to Geospacial counter. That it is in this folio that could show all the instruments registered on the title but in its absence the court has to interrogate the contents of documents.
 73. He stated that while certifying documents filed in April 2016, he saw the original documents in the deed file; page 61 of Defendant's supplementary list is an indenture of Conveyance dated 12/6/1989 between Mohammed Jama and Said Omar Mohammed, page 64 which consist of entry number 24 that is not contained in their deed file. That the indenture of conveyance between Kiptoo and the Plaintiff in the main suit is registered as No.23 on 17/12/1988 presentation day book no.452, volume N17 Folio 4/11 and for the indenture of 10. 6. 1978 the property ought not to have been changed. The mortgage dated 11/12/1978 was registered as entry no.20 and for the indenture to have been registered on 16/12/1978 there ought to have been a re-conveyance of the mortgage.
 74. The witness (for the 3rd and 4th Defendants in the c-claim) stated that he does not have the re-conveyance and that it was not possible to charge and convey at the same time unless the mortgage was cancelled. He further testified that at page 57 of the Defendant's supplementary list is a letter which refers to the mortgage of 11/12/1978, page 32 is the indenture dated 5/12/1988 and the recital stated "by virtue of



indenture dated 10/6/1970 as entry No.19 between Jadwiga and Mohammed” which indenture could not be found in their deed file.

75. The witness stated that in the documents he has produced, the entries missing are 19,20,21,16 and 14 and he could not tell what the missing documents were. That the indenture dated 12/6/1989 in the defendant’s list, the recital reads “by virtue of an indenture dated 10/6/1978 registered in Vol. 17 is entry No.19” which indenture is not in their deed file. He affirmed that in the conversion from GLA to RLA the last indenture is surrendered but because of the missing folios, he cannot tell whether the surrender was done.

Submissions

76. The Plaintiff filed submissions dated 30th January 2024 in support of their claim in the main suit and in opposition to the counter claim. The Defendant filed submissions dated 14th February 2024 in respect to the main suit while the 2nd Defendant in the counter claim filed submissions dated 11th April 2024 and 3rd and 4th Defendants filed submissions dated 1st March 2024.
77. They submitted that they are the legal proprietors of the suit property having purchased the same from Ronyi Kiptoo vide a conveyance dated 5th December 1988 who had purchased the same from Jadwiga Winca on 10th June 1970 who then had purchased from Mary Louise Alice Marguerite D’Avary in the year 1966.
78. That he has been exclusive possession of the suit property since then until around May 2012 when the Defendant trespassed. They argued that the title of the suit property was lawfully converted to Nairobi/Block 17/318 as affirmed by the 4th Defendant in the counterclaim and was issued with a 99 years lease thus in reliance on provisions of Section 26 of the [Land Registration Act](#) 2012, their title is indefeasible as the allegations of fraud by the Defendant remain unproven.
79. The Plaintiff submitted that the Defendant claims to have purchased the Suit property from the DWI, Mohamed Jama Noor vide an indenture dated 12th June, 1989 but has failed to produce a certificate of title and official search to prove ownership.
80. That the Defendant’s claim over the Suit property is riddled with inconsistencies, contradiction and mere unsubstantiated allegations as evidenced by Mohamed Jama Noor’s testimony which was tailored to fit the false narrative portrayed in the fraudulent documents produced by the Defendant. Further, that the Defendant’s claim of having the suit property from Jadwiga without producing a written sale agreement does not stand as provided under Section 3(3) of the [Law of Contract Act](#).
81. Further, that the Defendant admitted to being party to fraud as his witness, Mohamed Jama Noor, admitted that the alleged purchase price contained in the purported indenture dated 12th June, 1989 was false and for the purpose of defrauding the government by lowering and/or evading payment of stamp duty. Therefore, the same is bad in law and in support cited the case of Mapis Investment (K) Limited vs Kenya Railways Corporation [2006] eKLR and Kenya Pipeline Company Limited v Glencore Energy (UK) Ltd [2015] eKLR where the Court of Appeal espoused itself on the issue of enforcement of transactions made in breach of the law and/or through illegal means.
82. They submitted that the Defendant has not pleaded and particularized the incidents of fraud that it alleges against them and also has not proven the said fraud thus should be dismissed. In support they cited the Court of Appeal in the case of C O Okere v Esther Nduta Kiiyukia & 2 others [2019] and Kuria Kiarie v Sammy Magera (2017) eKLR



83. The Plaintiff stated that the alleged demolitions claimed by the Defendant never took place in the suit property thus he is not entitled to the damages sought in the counterclaim. That DW2, Ali Said Omar Basabara admitted that he was not present when the alleged demolitions happened and also did not avail proofs to show the existence of the house alleged or even produce any evidence to support their claims of having suffered the said loss enumerated in his counter-claim.
84. They argued that a claim for special damages must not only be specifically pleaded, it must also be strictly proved to the required standard citing. Further, in reliance to the decision in *Amos Kinyuru Kinani V Housing Finance Company Limited & another* [2008] eKLR that a set-off and counterclaim under Order 8 rule 2 is envisaged only as between a Plaintiff(s) and a Defendant(s) and None is envisaged between two Defendants in the same suit. Thus, the the procedure adopted by the 2nd Defendant was defective and unprocedural and the 2nd Defendant's (in the Counter-claim) Counter-claim dated 5th November, 2014 be struck out with costs.
85. The Plaintiff submitted that having adduced conclusive proof, including but not limited to a Certificate of Lease over the suit property it has a right to immediate and exclusive possession of the suit property and is entitled to an award of general damages as a result of the trespass by the Defendant, his agents, servants, employees, assigns and person acting at his behest.
86. The Defendant in the main suit filed submissions on who is the lawful proprietor of parcel of land previously known as L.R. No. 2/206 and now known as Title No. Nairobi/Block 17/318 and whether the sale and conversion of the same was illegal and void. He stated that the Indenture dated 10th June 1978 purported to be between Jadwiga Wincza and Ronyi Kiptoo is fraudulent because at the time of the alleged transfer there was in place a mortgage (DWI exhibit 2 at page 2 of the Defendant's Supplementary List) which was registered on the same day in favour of The East African Building Society.
87. That the illegality of the said document is further confirmed by interrogating the Indenture dated 5th December 1988 (Item 3 of the Plaintiff's Further List) between Ronyi Kiptoo and the plaintiff where the recital section traces the history of the property to an Indenture dated 10th June 1970 registered as Entry Number 19. That this contradicts the plaintiff's position that Ronyi Kiptoo acquired ownership vide an Indenture dated 10th June 1978 registered as Entry Number 22 and also the evidence of the Land Registrar clarified the year when the said document was drawn as 1978 as opposed to 1970. Further, he submitted that Plaintiff cannot have acquired interest in the property vide the Indenture dated 5th December 1988 because as of then, it was for still charged to M/S Savings & Loan Kenya Limited.
88. In reliance to the case of *Mary Njoki Mburu & another V. Josphat Kamande Kiarie & another, Stephen Harrison Ndungu & another (Interested Party)* [2019] eKLR, *Chemei Investments Limited —vs- The Attorney General & Others Nairobi Petition No. 94 of 2005* and *Herbert L. Martin & 2 Others V. Margaret J. Kamar & 5 Others* [201 61 eKLR], the Defendant submitted that is it is not enough to waive a title on the face of the Court and that the owner must demonstrate that the acquisition was legal.
89. The Defendant submitted that documents listed in the 3rd and 4th defendants List of Documents cannot be treated as conclusive evidence of record because their witness admitted that he certified the documents from copies as opposed to originals contrary to Section 2 of the *Land Registration Act*. Further that Section 35 (2) of the said Act provides that every copy of or extract from a document certified by the Registrar to be a true copy or extract shall, in all proceedings, be received as prima facie evidence of the contents of the document.



90. That also the said documents are inadmissible in evidence is because under Section 68 (2) (c) of the [Evidence Act](#), a certified copy of a copy is not admissible as secondary evidence.
91. The Defendant submitted that the Indenture dated 12th June 1989 between Mohamed Jama Noor and Said Omar Mohamed Basabra is authentic because it is corroborated by the fact that as at 11th December 1978 Mohamed Jama Noor was the registered proprietor of the suit property and as at 30th July 1985, the title documents including the Conveyance dated 10th June 1978 registered as Entry Number 19 and the Mortgage dated 11th December 1978 were in custody of M/S J. M. Njage & Co. Advocates on behalf of The East African Building Society.
92. That also it is corroborated by the fact that Mohamed Jama Noor exercised his right of redemption by making payments towards the loan sum on 21st December 1988, therefore as at that time, he was still the lawful registered proprietor of the suit property as opposed to Ronyi Kiptoo.
93. Consequently, Ronyi Kiptoo not having a good title could not pass it to the Plaintiff and in support cited the case of Satwant Singh Dhanjal 2 Others V. Kenya Revenue Authority [20051 eKLR, James Mogunde Mogunde (suing on behalf of and as Donee of Power of Attorney from Edward Sakawa Nyasaka) V. Fat JIU Micro Finance Bank Limited and Alice Chemutai Too V. Nickson Kipkurui Korir & 2 Others [20151 eKLR,
94. The Defendant submitted that the 2nd defendant's evidence was that it is an innocent purchaser for value but on account of illegality, it matters not noting at the time of purchase, 19th March 2013, the matter herein was ongoing.
95. He added that once an illegality has been proved and or brought to the attention of the court, the court ought not to give effect to a transaction that is illegal thus the conversion and sale of the sale property is illegal and in support cited the case of Kenya Airways Limited V. Satwant Singh Flora [2013] eKLR among other cases.
96. The 2nd Defendant submitted that in view of the incredible nature of DW-I 's evidence full of outright fabrications, particularly on the material facts of the case such as the actual premises or property (if any) that he rented to a Mr. Johannes Kelm, the actual price in which he purportedly sold the property to the Defendant herein and the gender of Jadwiga Wincza who he purportedly purchased the property from, his evidence cannot be relied on by this Court to controvert the tangible and corroborated testimonies backed by documentary evidence that was presented by the witnesses called by the Plaintiff, the 2nd Defendant and the 3rd and 4th Defendants' during trial.
97. In support of their argument that where the testimony of a witness is shown to be inconsistent and contradictory thereby making the witness unreliable and untruthful, the Court must be careful in evaluating such testimony to ensure that the ends of justice are met, the 2nd Defendant relied in the case of Richard Munene v Republic 2018 eKLR.
98. They stated that the Defendant's claim before this Court is founded upon an admitted illegality being a criminal offence for a person to execute any instrument, and in this instance an Indenture, which does not fully and truly set forth the facts and circumstances affecting the liability to duty as provided under Section 10 of the [Stamp Duty Act](#), Cap 480 Laws of Kenya and relied on the case of Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others [2004] eKLR among other cases.
99. The 2nd Defendant submitted that they a bona fide purchaser for value without notice of any impropriety having acquired an RLA Title from the Plaintiff after following the due process. That as per Section 39(1) of the [Land Registration Act](#), Cap 300 [now repealed] which was applicable at the



- time of the acquisition of the suit property they were was only required to do no more than to conduct a search in the register kept under the Registered *Land Act* as cited in the case of Pashito Holdings & Anor -VS- Ndung'u & 2 others KLR (E&L)I, 295 and Attorney General -Vs- Kenya Commercial Bank Ltd & 3 others (2004) eKLR).
100. They stated that even if one was to consider the ownership of the suit property under the old GLA title (LR No. 2/206) the only plausible conclusion from the evidence presented is that the Plaintiff was the owner of the suit property prior to conversion and subsequent sale to them. That DW-5, the only witness called to testify on behalf of the 3rd and 4th Defendants traced the ownership of the suit property as contained in the government's records kept at the Lands Office from one Marie Louise Marguerite D'Avary all the way to Olympic Trading Company, the Plaintiff.
 101. Further, that the Indenture dated 12th June 1989 relied on by the Defendant, is not backed by any sale agreement or a verifiable history of transfer of ownership. That it appears to have been registered as entry No. 24 which is not in the deed file kept by the 3rd Defendant and that the last document in the registry before conversion was Entry no. 23.
 102. The 2nd Defendant stated that there has been no pleading of fraud against it and that there no evidence implicating any fraud on them. That they were not aware of the suit herein until 20th September 2013 when they were served with the pleadings. They urged for their title to be upheld being an innocent purchaser for value without notice as was determined by the Supreme Court in the case of Fanikiwa Limited & 3 others and Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [20131 eKLR.
 103. They also stated that the Defendant has claimed Kshs. 100,000,000.00 as damages arising from the alleged demolition against the Defendants yet there is no evidence adduced in this regard since the claims being made are in the nature of special damages actually occasioned to the Defendant.
 104. The 2nd Defendant submitted that it is entitled to compensation for the losses they have suffered from the Defendant in the main suit since its ill-founded Counterclaim, disrupted and froze their development of the suit-property which had commenced following acquisition, getting into possession and obtaining relevant consents/approvals.
 105. That as per the tort of collateral abuse of process, an injured Defendant is compensated by a Plaintiff for any losses it has sustained in consequence of such ill-founded proceedings as explained by Lord Denning in *Goldsmith v Sperrings* [1977] 1 WLR 478, 489 and analyzed by District Judge Branchflower in *Total Extraction Ltd v Aircentric Ltd* [20211 EW Misc 21 (CC) (30 September 2021) where a judgment was entered for a Defendant against a Plaintiff on a Counterclaim for abuse of process.
 106. The Attorney general filed submissions on behalf of 3rd and 4th Defendants stating that the Plaintiff in the Counter-claim has not specifically pleaded and stated the particulars of fraud alleged on their part. That further, he has not proved any fraud on their part and just stated that they acted fraudulently in transferring and converting the suit property during the pendency of this suit without providing evidence to show that they were aware of these proceedings.
 107. In support of their argument that the Plaintiff in the counter-claim has not met the threshold in proving the fraud allegations, they cited the Court of Appeal case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000]eKLR ,*Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *Muchai v Kinuthia (Environment and Land Appeal E017 of 2022)* [2023] KEELC 19183 (KLR) (27 July 2023) (Judgment).



108. The AG submitted that Plaintiff in the Counter-claim claims damages of Kshs. 100,000,000/= from the Defendants but did not produce any documents to support their claim thus has not proved the special damages sought. In support, they relied in the case of *Benedeta Wanjiku Kimani v Changwon Cheboi & another* [2013] eKLR, *Benard Kanjau Ngamau v Comply Industries Ltd* [2016] eKLR and *Kenya Power & Lighting Co. Ltd v Clement Likobele Shikondi* (personal representative of the estate of Desmond Tutu Likobele deceased) [2018] eKLR.
109. From the pleadings, the documentary and oral evidence as well as the submissions, I frame only one question for determination.
- a. Who between the Plaintiff and the Defendant is entitled to the suit property L.R 2/206 Block 17/378.
 - i. The claim by the 2nd Defendant in the counter-claim depends largely on the out-come of the plaintiff's suit.
 - a. Who is entitled to the payment of damages.
110. The plaintiff produced several documents in support of its case and went ahead to critique the documents relied upon by the Defendant. PW1 stated that the suit property was transferred to Ronyi Kiptoo 1978 and subsequently to Plaintiff 1988 and it took physical possession by engaging security guards who lived on the temporary structures on the suit property. PW1 averred that when the Plaintiff took possession, the property was not developed. In 2009, it successfully sought the conversion from GLA to leasehold. He cited the letter forwarding the lease dated 9/10/2012 and certificate of lease issued on 16/10/2012 in favour of the Plaintiff.
111. From the documents adduced, there is no dispute that both parties trace their title to Jadwiga Wincza who held the indenture after purchasing it from Marie Louise Alice D'AVRAY. The ownership dispute arises on whether Jadwiga sold to Ronyi Kiptoo who subsequently sold it to the plaintiff or whether Jadwiga sold to Mohamed Jama Noor who subsequently sold to the Defendant. Since both parties have brought a claim, the rule of burden of proof captured under the provisions of Sections 107 – 109 of the *Evidence Act* Cap 80 applies to both.
112. Both parties have in their submissions cited the correct position held in law that where a title or certificate of lease is under challenge, it is not enough to dangle the title document only as evidence of ownership. You must explain the root of your title that it was legally and procedurally acquired.
113. The plaintiff cited several cases inter alia *Kenya Pipeline Co. Ltd Vs. Glencore Energy (U.K) Ltd* (2015) EKLR for the proposition that the court has refused to lend aid to those who breach violate or defeat the law then turns to court to seek and as an instrument of validation. This was reiterated in the case of *Festus Ogada vs Hans Mollion*;
- “That no court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality.”
114. The plaintiff equally cited the provisions of Section 26 of the *Land Registration Act* 2012. The Section provides thus;
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner,



subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
115. It is contended for the plaintiff that it purchased the suit property from Ronyi Kiptoo who had initially purchased it in 1970 from Jadwiga Wincza for valuable consideration. Furthermore, that the records held at the City Council of Nairobi indicate the plaintiff as the registered owner at all material times and was therefore entitled to exclusive possession. It avers that no grounds have been led to impugned its title.
116. Mr. Charles Ngetich who is the Deputy Chief Land Registrar while giving evidence on behalf of the 3rd and 4th Defendants in the counter-claim stated that as far as the records in their possession reveal, the suit property belongs to the plaintiff. He confirmed that the indenture between the plaintiff and Ronyi Kiptoo dated 5th December, 1988 was registered on Vol. 17 Folio 411 entry No. 23.
117. The Land Registrar also confirmed that he said the mortgage between Mohamed Jama Noor and EAB Society which was registered in Vol. 17 Folio 411 entry 20 in GLA filed 8854 dated 16th December, 1978. However, in cross-examination by Mr. Osundwa Learned Counsel for the Plaintiff, the witness said there was no entry for mortgage in Dex 35. That they do not require a sale agreement to register the transfer instrument.
118. The Deputy Land Registrar under cross-examination by Mr. Mutua S. C stated that he was not able to get an extract of the Folio Volume register because it is a very old title and the folio volume is torn beyond repair. He agreed that it is in this folio that one would get all the instruments registered sequentially. In the absence of the register, the court has to interrogate the contents of the documents produced. This means that his statement that the suit land belonged to the plaintiff was not supported by evidence.
119. The 3rd and 4th Defendants in the counter-claim are to be faulted for not confirming the completeness of the old record and especially when a request was made to do the conversion. The law gave them power to so act under section 8 of the Registered *Land Act* (repealed) and now restated in section 14 of the *Land Registration Act*. Section 14 provides thus;

“The Chief Land Registrar, County Land Registrars or any other land registrars may, in addition to the powers conferred on the office of the Registrar by this Act—

- (a) require any person to produce any instrument, certificate or other document or plan relating to the land, lease or charge in question, and that person shall produce the same;
- (b) summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation;



(c) refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed.”

120. Consequently, the court proceeds to interrogate the documents produced by both sides (plaintiff's and Defendant). The Plaintiff presented 4 sets of lists of documents dated 15th May, 2012, 11th July, 2012, 29th June, 2015 and 3rd August, 2021 of relevance is the conveyance dated 10th June, 1970 between Jadwiga & Ronyi Kiptoo produced as Pex 1. It has the word “Eight” added in hand after Seventy. It was registered on 16th December, 1978 in Vol. 17 folio 411 entry No. 22.
121. The reconveyance by K.C.B Ltd to Jadwiga dated 17th February, 1977 was registered in Folio 411 as entry No. 18 on 22nd February, 1977. The Deputy Land Registrar admitted that in his document's entries 19, 20 and 21 are missing. The Deputy produced Mortgage document executed between Mohamed Jaya Noor and the East African Building Society dated 11th December, 1978 which was registered in Folio 411 as entry No. 20 on 16th December, 1978.
122. To confirm that the sum of Kshs.250,000 was indeed advanced and repaid, several letters were produced exchanged between Mr. Noor and the EABS. The letters are found produced as Dex 4, 5, 7 and 8. DW 1 also produced debit notes as Dex 3(a) – (h) showing deposits to EABS between 1984 – 1985. He explained that the loan to EABS was taken over by Savings & Loan Kenya Ltd.
123. The application to Savings & Loan (Dex 9) referred to the suit plot 2/206. The application was accepted vide S & L Ltd letter dated 24th April, 1985 produced as Dex-10. These documents exchanged confirm that the Registration of the document in favour of Mohamed Jama Noor was first in tune to the Registration in favour of Ronyi Kiptoo who passed on the title to plaintiff. The plaintiff subsequently sold to the 2nd Defendant in the counter-claim.
124. The 2nd Defendant in the Counter-claim submitted that Mohamed jama Noor did not produce any evidence of purchasing the land from Jadwiga such as sale agreement, purchase price or proof of payment of the purchase price. if this be the yardstick for measuring the authenticity of transmission claimed by both parties, then the same scenario applies to the plaintiff's case. Olympic Trading Limited did not provide any sale agreement between Ronyi Kiptoo and Jadwiga, neither did they produce evidence of the agreed purchase price and if the same was paid.
125. Further the plaintiff while challenging the legality of the transaction between Jadwiga and Noor submitted that this court should take judicial notice of the indisputable fact that the name Jadwiga is a common polish female name. I am not familiar with the naming traditions of the polish people so I cannot take judicial notice of the same. On the face of the documents filed by the 3rd and 4th Defendants in part, the mortgage dated 6th August, 1970, Jadwiga was described as a married woman of P. O. Box 399 Nairobi.
126. Assuming the misdescription of Jadwiga by Mr. Noor proves that the indenture he purports to rely on was is fraudulent as he never purchased the suit property from the said Jadwiga Wincza. Then two things would have happened; the registration of the mortgage in favour of East African Building society would not have been entered on the suit title. Or after registration of this entry No. 20, the said Jadwiga would have took it up before transferring it to Ronyi Kiptoo. There is no evidence that these two events were challenged.
127. The Deputy Land Registrar stated during cross-examination said for the indenture to Ronyi Kiptoo to have been registered on 16th December, 1978, there ought to have been a reconveyance of the mortgage.



That it was not possible to charge and re-convey at the same time. Similarly, the East African Building Society would not have advanced to Mohamed Jama Noor the Mortgage sum of Kshs.350,0000/= if the indenture to the suit property was not registered in his name.

128. The registration of Mohamed Jama Noor is recited in the indenture between him and the Defendant. It states that “by virtue of an indenture dated 10th June, 1978 registered in the Government lands registry at Nairobi in volume No. 17 Folio 411/19 made between Jadwiga Wincza therein described.”
129. There is no evidence presented by the plaintiff that Mohamed Jama Noor’s name did not appear at entry No. 19 of Volume No. 17 Folio 411 of the suit property. While the Defendant has clearly demonstrated by the documents already referred to that such an entry existed. That is the mortgage between him and EABS being registered as entry 411/20.
130. Besides the mortgage in favour of EABS, Savings and Loan Kenya Ltd also provided finances to Mr. Noor using the suit property as security. The existence of entry 411/19 is also exhibited by the letter dated 30th July, 1985 from J. M. Njage & Co. Advocates to Kaplan & Stratton Advocates. It read in part thus;

“Re: L.R No. 2/206 Nairobi – Mr. Mohamed Jama Noor:

We refer to our letter of 3rd July, 1985 and herein forward the title deeds of the property being:-

1. ...
2. ...
3.
4.
5. ...
6. Conveyance dated 10th June, 1978 registered in Vol. No. 17 Folio 411/19.
7. Mortgage dated 11th December, 1978 in Vol. No. 17 Folio 411/20

Please confirm that the documents are released to you as you undertaking to hold them in trust...”

131. In a further correspondence of 17th December, 1985 from J. M. Njage Advocates to Sharpley & Co. Advocates (Dex 21), the advocate wrote at paragraph 2 thus;

“RE: NBI L.R NO. 2/206 Mr. M. J. Noor

Over instructions are that our client is agreeable to paying this said amount forthwith (kshs.60,000 stated in paragraph 1/7 and enclosed the same herewith provided that you release the executed conveyance to us for onward transmission to Kaplan & Stratton for registration together with the Mortgage in favour of Savings & Loans.”

132. There is evidence that the title document was received by Kaplan & Stratton. This is expressed in the letter dated 5th May, 1986 from K.C.B Ltd to Kirumba Mwaura & Co. Advocates (Dex 25 – 29) where the bank instructs them to register a second charge on L.R 2/206. The bank acknowledged that the first charge was in favour of Savings & Loans. In Dex 30, a letter dated 1st October, 1986, K. Mwaura & Co. Advocates wrote to Mohamed Jana Noor regarding Mortgage over L. R No. 2/206 Nairobi



confirming receipt of documents from Kaplan & Stratton duly approved. He was invited to the said advocates offices to execute the said documents.

133. Lastly Dex 31 is a letter dated 9th November, 1988 by Oraro & Rachier Advocates serving Mohamed Noor with statutory notice on behalf of Savings and Loans for loan arrears of Kshs.88,111. Dex 32 was notification of sale. Dex 33 is a letter by M. M. Chandhri advocate to Savings & Loans (K) Ltd. dated 6th December, 1988 requesting for title documents under professional undertaking not to register the transfer in favour of a purchaser until the outstanding amount is paid in full.
134. The property was sold to the present Defendant by Mohamed Jama Noor on 12th June, 1989 and there is a payment made through Oraro & Rachier for Kshs.88,111 (Dex 34(a) received as loan arrears due to Savings and Loan and Kshs.4,000 (Dex 34(b) being legal fees to the said Oraro & Rachier Advocates.
135. The Plaintiff submitted that DW 1 did not hold a good title to pass on to the Defendant. From the sequence of documents presented by the Defendant, I am indeed satisfied that Mohamed Jama had a good title which he passed to the Defendant herein.
136. The provisions of Section 3(3) of the Law of Contract Act relied on by the Plaintiff in disputing the purchase by Mohamed Jama Noor was not the applicable law at the date of the impugned transaction. The applicable law of contract in 1978 when the impugned transaction took place provided under section 3 thus;

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

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

- i. Has in part performance of the contract taken possession of the property or any part thereof.
- ii. Being already in possession in part performance of the contract has done some other act in furtherance of the contract.

137. They further challenged the electricity bills produced by the defendant as referred to L.R 2/88 Ole Dume Road. It is the Water bills which refer to the property as L.R 2/88. All the electricity bills refer to L.R 2/206. I came across a letter from the Nairobi City County dated at page 23 of the Plaintiff's list of documents dated 29th June, 2015 which referred to the suit property as L.R 2/206 Nairobi area (original No. 2/88/1) now Block 17/318. It means that the records held by the City council which billed for water had the records which bore the original number as 2/88/1, thus the copies of the water bills produced by the Defendant refer to the suit property.
138. The plaintiff had averred that the Nairobi City Council also confirmed that they were the owners of the suit property. The Defendant has produced demand rates issued to them and the payments made



to contradict the assertion by the plaintiff. Further, in a letter dated 26th September, 2012 from the City Council to Chandhri & Associates, they wrote thus;

“according to our records the rateable owner of the above named property (LR. 2/206) is Olympic Trading Co. Ltd. This was effected on 26th April, 2012 from Sayid Omar Mohamed Basabra after presentation of original certificate of official search and other documents.”

139. This letter confirms that prior to 26th April, 2012, the rate-able owner was the Defendant. The records at the City Council could only be changed if the defendant transferred the suit property to the plaintiff which is not the case obtaining here. This letter from the City Council also contradicts the rates statements produced by the Plaintiff at pages 26-35 of the list dated 29th June 2015 which had the name of the Plaintiff written in hand below the word “Rates Statement” and the property description entry detail also given in hand.
140. Besides the letter contradicting the rates statement produced by the Plaintiff, the Defendant did not just produce the rates demand but also presented bankers cheques issued in favour of the Nairobi City Council. For instance, in the year 2008, the Plaintiff’s statement say a cash payment of Kshs 40800 was made to the City Council on 21st March 2008 which to me seems to be rates payable for one year. On the other hand, the Defendant made a banker’s cheque payment for the sum of Kshs 47, 175 on 8th January 2008 from I & M Bank, Ltd. This payment was pursuant to an invoice dated 11.1. 2005 for the period 1992 to 2008 which invoice gave the rate payable per year for the period billed. Either the Nairobi City County kept two parallel records or one set of the rates payment was not genuine. If the rates statements of the Plaintiff were genuine, why did the council not state the Plaintiff as the rateable owner prior to April 2012?
141. There was also the question of who was possession to corroborate their claim of ownership. PW 1 admitted that Ronyi Kiptoo did not physically live on the suit property. It is the plaintiff’s case that they took possession immediately after purchasing the suit property in December 1988 by hiring guards to take care of the property. It denied that the property was developed with any permanent house. Instead, the plaintiff avers that what was on the property were temporary structures which was occupied by their security guards and their families. The plaintiff asserted that their possession was only interrupted in May, 2012 by the Defendant and or his agents. Other than the assertion on possession by PW1, the Plaintiff did not call any witness or produce any documents to corroborate his evidence.
142. On his part, the Defendant alleged that the property was developed with a main house and a guest house. DW 1 averred that he first lived on the suit property before he started renting it out to different foreigners. To assert their possession, the Defendant relies on the water bills dated January, 1997 to 1998 (contained in the bundle dated 30th September, 2014). The electricity bills produced date as far as 1993 to 1997. It is my considered view and I so hold that the bills would not have accrued unless there was someone in occupation utilizing water and electricity.
143. There also photographs of what looks like a permanent house with parts demolished. The Defendant pleaded that the plaintiff went to the suit premises and demolished what he describes as a 5 bedroomed Spanish massionette and 7 roomed double storey servant quarters. The plaintiff did not call any evidence to corroborate its occupation before it sold the suit property to the 2nd defendant in the counter claim. In all the 3 sets of bundles of documents, other than the indenture, all documents are dated from 2012.



144. In the demand letter dated 11th May, 2012 (No. 5 in the lit dated 15th May, 2012) drawn by the plaintiff's advocate on record and addressed to Sayid Mohamed, he writes thus;

“Re: illegal occupation of L.R No. 2/206 Kilimani..

Following your unexplained occupation of the above-named property, it is our mandatory instructions that you vacate your illegal and unwarranted occupation of our client's property.”

145. The demand letter on the face of it acknowledges that the Defendant was in occupation albeit illegal. The letter does not mention that the Defendant invaded the property on a certain day. It only states that the occupation is unexplained. Based on the documents presented by the Defendant, there is no iota of doubt that he was in occupation and as the owner.

146. At paragraph 5 of the witness statement of PW1 dated 15th May 2012, he stated thus; “despite notice to vacate the property, the defendant and his agents have wrongfully remained in possession of the same and they intend to do so unless restrained by this court.” Nowhere in the body of the Plaintiff and or the witness statement is a date given when the Defendant entered the suit property or the mode of such entry taking into consideration the evidence of the Plaintiff that it had security guarding the suit property.

147. DW2 said in his evidence that at the time of demolition, the suit property had been leased to a lady who in turn had let it to several other business people. This evidence finds corroboration in one of the interlocutory applications dealt with at the preliminary stages which application was dated 5th December 2012 brought by Kenya seeking to be joined as an interested party in the proceedings. Although, the application was dismissed because he was not considered a necessary party. The judge noted at paragraph 6 of her ruling that the Applicant is neither a tenant of the Plaintiff or the Defendant but was a sub-tenant of the tenant of the Defendant.

148. Besides, the Defendant also produced two sets of tenancy agreement executed between two distinct tenants for the years 2009 and 2010 respectively. For the year 2009, the tenant was Baraka Montessori School. The tenancy was for the period 2009 to 2014. In the second set, the tenant is stated as Defined Property Management Ltd with the tenancy period commencing 1st April 2010. Thus, on a balance of probability, I find the Defendant has demonstrated that he was in possession of the suit property.

149. In conclusion, considering all the evidence adduced in totality, my answer to the first question posed on who is the legal proprietor of the suit property L.R 2/206 and now NBI/Block 17/318, is the holding that the Defendant (in the original claim) is the legal proprietor. Therefore, I find that the Plaintiff has not proved ownership and its claim against the Defendant is dismissed for want of merit.

150. The consequence of this finding is that the plaintiff had no good title to pass to the 2nd Defendant in the Counter-claim. It also follows that any remedy the 2nd defendant in the Counter-claim seek does not lie as against the Defendant in the original suit. This is so because the Defendant was in occupation of the suit premises at the time the suit property was sold to the 2nd Defendant in the Counter – Claim on 19th March, 2013.

151. If the 2nd Defendant undertook a search with the 4th Defendant who appears to have selected documents to bring to court and probably hide some information from the 2nd defendant, the defendant in the original suit did not collude or instruct the 4th defendant to so act. Had this Defendant colluded with the Ministry of Lands then, the witness who came to give evidence for the 4th defendant would have not stated the suit property belongs to the plaintiff (in the original claim).



152. It is the same 4th defendant who carried out the conversion of the suit property without raising questions of on the status of transfer from Mohamed Juma Noor (who appeared as the owner at entry no. 19 of their records) that had transferred the land to the Defendant in June 1989 who was the “current owner” as at the date of conversion given that the Registration in favour of the Plaintiff was done on 5th December, 1988. Thus the 2nd Defendant’s claim if any lies as against the plaintiff (in the original suit) and the 3rd & 4th Defendants in the Counter-claim.
153. The 2nd Defendant pleaded in paragraph 20 of her statement of defence and counter-claim that during the entire transaction, she was not made aware of any ongoing litigation or dispute over the suit property. Such information was to be given to her by the plaintiff (in the original suit) who was selling the suit property. The 2nd Defendant has not demonstrated that the Defendant (now Plaintiff in the counter-claim) was aware of the transaction between them. The Defendant had to file a Notice of Motion application dated 22nd May, 2012 where he obtained interim orders stopping construction on the suit property and subsequently joined the claimant in these proceedings.
154. In fact, the sale to her which occurred almost a year after the filing of suit by the Vendor was done in breach of the doctrine of *lis pendens*. The Defendant cited a case where the parties are similar to this i.e Olympic Trading Company Ltd vs Said Mohamed and 4 others (2014) for the proposition that *lis pendens* is applicable to those who derive their title from a party to a suit. That such acquisition is subservient to the rights of any successful party. Nothing can be further from the truth that once the plaintiff’s title is declared unlawful, the person who claims through him also loses.
155. The plaintiff submitted that the 2nd Defendant’s counter-claim is defective as it is brought against a co-defendant. It cited the case of Amos Kinyuru Kimani Vs. HFCK Ltd & Another (2008) eKLR which quoted order VII rule 2 of the Civil Procedure Rules thus;
- “Under the provisions of Section 26 of the [Land Registration Act](#), 2012 the title of the Plaintiff following their registration as owners of the suit property is absolute and indefeasible and the same could only be impugned on the limited grounds set out under the Act if fraud is established and they are shown to have been parties and/or if the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme.”
156. And the case Cyrus Mucebiu Irungu Vs Alexander Mugambi Miriti & 7 Others (2019) eKLR which repeated the provisions of section 26 of the [Land Registration Act](#) already stated herein above.
157. The Defendant joined the 2nd Defendant to these proceedings because the suit property was transferred to her before the dispute of ownership was determined. It was also to find out who between the 1st to the 4th Defendants in the Counter-claim was liable for interfering with his title and possession of the suit property.
158. I do not think the titling of the 2nd Defendant’s claim as “counter-claim” should be defeated merely because it was not titled as a “claim against co-defendant.” She would still make the same prayers as the ones brought under the counter-claim. In my view, it is a procedural technicality which was not raised by the Plaintiff early in the proceedings and it does not go into the root of the case. I find it as curable under the provisions of article 159 (2)(d) of [the Constitution](#).
159. The claim the 2nd Defendant of bonafide purchaser and for general and special damages can only be directed as against her co-defendants. It is notable from her pleadings that she has sought judgment against the 1st, 3rd and 4th Defendants. Once the Defendant (now Plaintiff in the counter-claim) established that the person who sold the land to the 2nd Defendant had no good title to pass, the Defendant did not have to prove the fraud as against the claimant of the land.



160. In any event, from my analysis stated herein of the presence/occupation of the Defendant on the land, she ought to have noticed something was amiss if she indeed visited the suit land. Even a conversation with the so called security guards of the Plaintiff would have disclosed that some people claiming that land had invaded it and gave the name of the Defendant just like they informed their boss (the Plaintiff). In paragraph 2 of written statement of Nadeem Iqbal, he stated that he was shown vacant land in Kilimani area by a property agent known as Ms Tessie before they started negotiating. This contrary to the evidence of the Plaintiff that the land had temporary structures occupied by the security guards and their families (on the assumption that the Plaintiff did not undertake the demolitions). Thus the due diligence by the 2nd Defendant was suspect.
161. Having found that the Defendant is the lawful owner of the suit property and having found that he was in occupation before being dislodged illegally by the Plaintiff, I find that he is entitled to compensation. On the question of who undertook the illegalities including demolition of the house in the suit property, I am satisfied that all fault is at the Plaintiff's doorstep. It is the Plaintiff who undertook the process of acquiring the title to the suit property illegally, converted it to RLA system and subsequently sold it to the 2nd Defendant. The Demolitions complained of were done in May 2012 before the 2nd Defendant purchased the suit property. The Plaintiff did not lead any evidence that it is the 2nd defendant who demolished the houses on the land when they took over the premises to begin the constructions in July 2013.
162. The Defendant had sought compensation in the sum of Kshs 100,000,000 for the damages for the demolition but did not call a valuer to ascertain this amount. This was more of a prayer for special damages that needed to be specifically pleaded and proved and which the Defendant has failed to meet the threshold. I will not award any compensation under this heading. The Defendant also sought compensation for general damages for the loss incurred including the loss of using the property.
163. I am satisfied that the defendant has led evidence of the unlawful removal from the suit premises which has denied it use/income. He also deserves to be compensated for the damage to his house. The property is in a high-end area of Kilimani in Nairobi and so I assess the general damages in the sum of Kshs 50,000,000 as reasonable to take care of the loss of use (having to get alternative residence) from 2012 to when he will get vacant possession and for the damage to his structures on the land at the time.
164. The 2nd Defendant in the counter-claim did not claim for refund of purchase price as against 1st co-defendant in the counter-claim (the Plaintiff in the original suit). She sought for special damages against the defendant in the sum of Kshs 3,600,000 which I find does not lie for the reasons already stated in this judgement. She also claimed for a sum of Kshs 582, 519, 546 as against the 1st, 3rd and 4th Defendants in the counter-claim. On account of my finding that the title passed to her was a non-starter, her claim for the losses incurred donot lie. As it is, she was illegally on the suit property partly on her fault for not conducting thorough due diligence. I find that the only compensation she is entitled to due to the inconvenience suffered is under the preliminary works of Kshs 17,120,000. The rest of the claims are dismissed.
165. Finally, I enter judgement as follows:
- a. The Plaintiff's suit is dismissed.
 - b. Judgement is entered for the Defendant as per the counter-claim amended on 30th Sept 2014 thus
 - i. A declaration that the Defendant's estate is the owner of the property known as Land Reference Number 2/206, Nairobi.



- ii. An order declaring the conversion of Title and the sale and transfer of the suit property thereof as fraudulent and illegal thus void.
 - iii. An order directing the 3rd and 4th Defendants to revoke and cancel the illegal conversion of Title from Land Reference Number 2/206 (Original Number 2/88/1), Kilimani, to Nairobi/Block 17/318 by the Plaintiff;
 - iv. A declaration that the invasion of the said land by the 1st Defendant, its agents, employees and/or servants and the subsequent evictions and demolitions thereupon was unlawful.
 - v. A permanent mandatory order do issue against the 2nd Defendant to vacate the suit premises and to hand over vacant possession to the Defendant.
 - vi. A sum of Kshs Fifty Million (Kshs 50,000,000=) awarded as general damages for loss of user, for the demolished structures and for trespass due to him from the Plaintiff and payable within 120 days from the date of this judgement.
 - vii. Interest (vi) above at Court rates.
 - viii. Costs of the counter-claim
- c. An order of general damages to the 2nd Defendant in the counter-claim in the sum of Kshs 17,120,000 payable to her by the Plaintiff (in the original claim) within 120 days from the date of this judgement

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY, 2024

A. OMOLLO

JUDGE

