



Muhoro v Nairobi City County (Environment and Land Case Civil Suit E141 of 2021) [2024] KEELC 6430 (KLR) (16 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6430 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E141 OF 2021**

JO MBOYA, J

SEPTEMBER 16, 2024

BETWEEN

JOSEPH KAMAU MUHORO PLAINTIFF

AND

NAIROBI CITY COUNTY DEFENDANT

JUDGMENT

1. The suit herein was commenced vide Plaintiff dated the 22nd April 2021. However, the Plaintiff was thereafter amended in terms of the amended Plaintiff dated the 7th March 2022. Subsequently, the amended Plaintiff was re-amended vide Further amended Plaintiff dated the 18th November 2022, which is the operative pleading on behalf of the Plaintiff.
2. Vide the Further amended Plaintiff dated the 18th November 2022, the Plaintiff has sought for the following reliefs [verbatim]:
 - i. A permanent injunction restraining, the Defendants by themselves and/or employees and/or whomsoever from trespassing, taking possession and /or carrying on construction and blocking the Plaintiff's sewer from the main, on that parcel of land known as LR. No. 209/22184 (209/8240/2) and/or dealing with the said land known as LR, No, 209/22184 (209/8240/2) in any way whatsoever.
 - ii. A permanent injunction restraining, the Defendants by themselves and/or their agents, and/or servants from claiming ownership, and/or interfering with the Plaintiff's ownership, peaceful possession enjoyment of all that parcel of land known as L.R No. 209/22184 (209/3240/2) and/or dealing with the said laid known as LR. No. 209/22184 (209/8240/2) in any way whatsoever.



- iii. A declaration that the Plaintiff is the bona-fide owner of the parcel of land L.R No. 209/22184 (209/8240/2) vide a lease agreement by the former Nairobi City Council dated 23rd December, 2009 for a term of 99 years whose dimensions and abutments are delivered delineated in a deed plan number 432832.
 - iv. An Order that the defendants either by themselves and/or servants do forthwith unblock the Plaintiff's sewer on his L.R No.209/22184 (209/8240/2).
 - v. An order of eviction of the Defendants either by themselves and/or their agents. Police Station for compliance.
 - vi. An Order that the defendants do demolish the development on the Plaintiffs must to public toilet, Nairobi County, the same to be supervised by OCS Pangani
 - vii. General damages for trespass and unlawful destruction on the property including disconnecting the sewer line from the mains
 - viii. Costs of the suit
 - ix. Any others alternative reliefs that the honourable court deems fit to grant
3. Suffice it to point out that upon being served with the Plaintiff, the Defendant duly entered appearance and thereafter filed a statement of defence. Thereafter the statement of defence was amended culminating into the amended statement of defence dated the 16th June 2023, and wherein the Defendant denied the averments at the foot of the Further-amended Plaintiff.
 4. The suit herein was subsequently listed for pretrial directions, whereupon the advocates for the parties intimated to the court that same had duly filed and exchanged the requisite pleadings, list and bundle of documents and witness statements.
 5. Premised on the foregoing, the court proceeded to and confirmed the suit as being ready for hearing.

Evidence By The Parties:

a. Plaintiff's Case:

6. The Plaintiff's case is premised on the evidence of five [5] witnesses, namely, Joseph Kamau Muhoro, Wesonga Sijey Ogola, Steve Rodger Kobado, Simon Ngumi Munyi and Cecilia Koigu. Same testified as PW1, PW2, PW3, PW4 and PW5, respectively.
7. It was the evidence of PW1 that same is the Plaintiff in respect of the instant matter. Furthermore, the witness averred that by virtue of being the Plaintiff, same is conversant with the facts of the matter. At any rate, the witness averred that same has since recorded a witness statement dated the 18th November 2022. In this regard, the witness [PW1] sought to adopt and rely on the contents of the witness statement.
8. Suffice it to point out that the witness statement dated the 18th November 2022 was thereafter adopted and constituted as the evidence in chief of the witness. Besides, the witness also adverted to the list and bundle of documents dated the 8th February 2023 containing a total of sixteen [16] documents.



9. Similarly, the witness sought to adopt and rely on the various documents contained at the foot of the list of documents dated the 8th February 2023. In this regard and there being no objection to the adoption of the documents at the foot of the list, same [documents] were adopted and admitted as exhibits P1 to P16, respectively.
10. In addition, it was the testimony of the witness that same [PW1] has since filed a Further amended Plaintiff dated the 18th November 2023 and which Further amended Plaintiff, the witness sought to adopt and rely on. Furthermore, the witness also implored the court to grant the reliefs sought at the foot of the Further amended Plaintiff.
11. Other than the foregoing, it was the testimony of the witness that he [witness] is the owner of the suit plot. In this regard, the witness contended that by virtue of being the owner of suit plot, same [witness] is thus entitled to the reliefs/remedies sought.
12. On cross examination by learned counsel for the Defendant, the witness [PW1] averred that same was allocated the plot before the court. In addition, the witness averred that the suit plot was allocated unto him by the City Council of Nairobi, [now defunct].
13. It was the further testimony of the witness that the plot was allocated to him in the year 1993. Besides, the witness averred that before the suit plot was allocated to him, same [witness] had written a letter requesting to be allocated the plot in question. However, the witness averred that same has not produced the application letter which he [witness] wrote to the City Council of Nairobi prior to being allocated the suit property.
14. Whilst still under cross examination, the witness testified that the letter of allotment was issued unto him [witness] through the offices of the City Council of Nairobi. Nevertheless, the witness averred that same has not tendered any minutes by the City Council of Nairobi to underpin the allotment of the suit property unto him.
15. It was the further testimony of the witness that the letter of allotment is dated the 2nd July 1998. Furthermore, the witness averred that the letter of allotment was issued unto him [PW1] in pursuance of the directive of the President, namely, his Excellency Daniel Toroitich Arap Moi.
16. On further cross examination, the witness averred that same has neither tendered nor produced a copy of the Part Development Plan [PDP] before the court. However, the witness reiterated that the letter of allotment was issued on the 2nd July 1998.
17. On the other hand, it was the testimony of the witness that same has not been issued with a certificate of lease to date. However, the witness averred that same has since been issued with a lease instrument.
18. Whilst under further cross examination, the witness averred that he is still pursuing the issuance of the certificate of lease. Be that as it may, the witness added that same was issued with a beacon certificate over and in respect of the land in question. At any rate, the witness averred that same has since tendered and produced a copy of the beacon certificate before the court.
19. Other than the foregoing, the witness averred that same duly complied with the terms of the letter of allotment. To this end, the witness intimated to the court that same wrote an acceptance letter as well as paid the standard premium and the statutory levies which were highlighted at the foot of letter of allotment.
20. The second witness who testified on behalf of the Plaintiff was Wesonga Sijey Ogola. Same testified as PW2.



21. It was the testimony of the witness [PW2] that same is currently the principal legal counsel to the City County Government of Nairobi. Furthermore, the witness averred that same had worked with the City Council of Nairobi [now defunct] since the year 1999.
22. Upon being referred to the agreement for lease which had been produced by the Plaintiff as exhibit P10, the witness confirmed that same [witness] had indeed attested the agreement for lease. Nevertheless, the witness stated that though he attested the agreement for lease, same [witness] does not know who drew the documents.
23. It was the further testimony of the witness that same had the authority to attest the documents on behalf of the City Council of Nairobi [now defunct] and on behalf of the City County Government.
24. On cross examination by learned counsel for the Defendant, the witness averred that the agreement for lease [exhibit P10] does not show the name of the drawer. At any rate, the witness added that the segment relating to the person who drew the document is blank.
25. On further cross examination, the witness averred that the only role he [witness] played was to attest the document on behalf of the City Council of Nairobi. However, the witness added that prior to the attestation, same [witness] did not read the document.
26. The third witness who testified on behalf of the Plaintiff was one Steve Rodgers Kobado. Same testified as PW3.
27. It was the testimony of the witness [PW3] that same is a licensed surveyor. Furthermore, the witness averred that same was retained by the Plaintiff to undertake re-survey of the suit property and thereafter same generated a beacon certificate. In this regard, the witness adverted to the beacon certificate which had been produced by the Plaintiff. See exhibit P13.
28. On cross examination by learned counsel for the Defendant, the witness averred that same is a licensed surveyor. Furthermore, the witness intimated to the court that his license number is 242. Besides, the witness stated that by virtue of being a licensed surveyor, same [witness] is mandated to undertake survey works as well as to place beacons on boundaries after survey.
29. Whilst still under cross examination, the witness averred that even though same was retained and thereafter proceeded to place the boundary beacon he [witness] however did not notify Nairobi City County Government of his engagement by the Plaintiff. At any rate, the witness averred that he was not obligated to inform the City County Government of Nairobi of the intention to affix the boundary beacon.
30. The fourth witness who testified on behalf of the Plaintiff is one Simon Ngumi Munyi. Same testified PW4.
31. It was the testimony of the witness [PW4] that same is a civil servant working at the department of survey in the Ministry of Land, Public Works, Housing & Urban Developments. Furthermore, the witness averred that same has filed a report before the court dated the 31st May 2023. In any event, the witness added that the report was addressed to the deputy registrar of the court.
32. The witness thereafter sought to tender and produce the report before the court. In this regard, the report dated the 31st May 2023, was duly tendered and produced before the court as exhibit P17.
33. On cross examination by learned counsel for the Defendant, the witness stated that the land in question belongs to the City Government of Nairobi. Besides, the witness averred that same is not aware whether



- any Part Development Plan [PDP] has ever been prepared in respect of the suit property. Nevertheless, the witness added that a PDP would ordinarily be under the domain of the Director of Planning.
34. On further cross examination, the witness averred that same does not work at the offices of the Director of Planning. In this regard, the witness pointed out that he would not be able to know whether or not a PDP was ever prepared.
 35. It was the further testimony of the witness that same does not know whether a certificate of lease has ever been issued over the suit property. However, the witness added that same has seen a letter of allotment. For good measure, the witness averred that the letter of allotment bears the name of the Plaintiff.
 36. The last witness who testified on behalf of the Plaintiff was one Cecilia Koigu. Same testified as PW5.
 37. It was the testimony of the witness [PW5] that same is a surveyor by profession. Furthermore, the witness averred that same is duly licensed. In this regard, the witness pointed out that her license number is 198.
 38. It was the further testimony of the witness that currently she is employed by the City County Government of Nairobi. In this regard, the witness intimated to the Court that she is the Chief Officer, Lands.
 39. Other than the foregoing, the witness averred that same received witness summonses from the court which directed her to attend court and give evidence in respect of the instant matter. In this regard, the witness pointed out that she was obliged to attend court and give evidence in accordance with the directions of the court.
 40. It was the further testimony of the witness that the land in question is known as L.R No. 209/22184. Besides, the witness pointed out that the land in question is captured/reflected at the foot of Deed Plan number 432832. Besides, the witness averred that the land measures 0.0015HA.
 41. On the other hand, the witness averred that a Deed Plan is prepared by the director of Survey. In any event, the witness added that a Deed Plan arises out of a survey plan. For good measure, the witness averred that the Deed Plan number 432832 arose out of survey plan No. FR/630/155.
 42. It was the further testimony of the witness that the Deed Plan does not identify the owner of the property. Nevertheless, the witness averred that a Deed Plan can only be generated out of a survey plan. Besides, the witness averred that a survey plan is ordinarily prepared on the basis of a letter of allotment.
 43. Additionally, the witness averred that the survey plan which gave rise to the Deed Plan before the court was prepared by one S. G Mwangi. However, the witness added that same [PW5] took over the survey from Mr. S. G Mwangi, when the latter was promoted to be the Chief Officer – Land in the year 2013.
 44. It was the further testimony of the witness that immediately the Deed Plan is executed by the Director of Survey same [deed plan] is ordinarily handed over to the owner of the plot. In this respect, the witness averred that same believes that the Deed Plan was handed over to the Plaintiff with a view to pursuing the issuance of the certificate of lease.
 45. It was the further testimony of the witness that what same has in her custody is a copy of the Deed Plan and not the original. In this regard, the witness referenced exhibit P12.
 46. On cross examination by learned counsel for the Defendant, the witness posited that same is conversant with the process pertaining to the preparation of a Deed Plan. In particular, the witness averred that a



Deed Plan cannot be generated unless there is in existence a Part Development Plan [PDP] and a letter of allotment.

47. On further cross examination, the witness averred that there was in existence a Part Development Plan [PDP] in respect of the suit property. However, the witness stated that same does not know whether the Part Development Plan [PDP] has since been tendered or produced before the court.
48. On the other hand, the witness averred that same saw a copy of the letter of allotment. Nevertheless, the witness averred that the letter of allotment was for an unsurveyed plot. It was the further testimony of the witness that after the preparation of the Deed Plan same was escalated for purposes of issuance of certificate of lease.
49. Whilst under cross examination, the witness averred that same is not aware whether a lease instrument has since been issued in favour of the Plaintiff. Be that as it may, the witness added that same visited the suit ground and discovered that there was a temporary hotel and an incomplete public toilet.
50. With the foregoing testimony, the Plaintiff's case was duly closed.

b. Defendant's Case:

51. The Defendant's case is premised on the evidence of one witness, namely, Geoffrey Cheruyiot. Same testified as DW1.
52. It was the testimony of the witness [DW1] that same is a surveyor by profession. Furthermore, the witness averred that same is currently the deputy director of survey at the City County Government of Nairobi. In any event, the witness added that same has been the Deputy Director of Survey for the last 6 years.
53. It was the further testimony of the witness that in respect of the instant matter, same has since recorded a witness statement dated the 5th September 2023. In this regard, the witness sought to adopt and rely on the contents of the witness statement as his evidence in chief. Suffice it to point out that the witness statement was thereafter adopted and constituted as the evidence in chief of the witness. Nevertheless, the witness posited that the Defendant herein did not file any list or bundle of documents in respect of the instant matter.
54. On cross examination by learned counsel for the Plaintiff, the witness averred that same [witness] is conversant with one Cecilia Koigu whom the witness stated was the chief officer-lands with the City County Government of Nairobi. Besides, the witness intimated that Cecilia Koigu is his superior.
55. On further cross examination, the witness averred that the suit property is public land. At any rate, the witness averred that same is aware that the land in question was re-surveyed and subdivided into two [2] portions. In particular, the witness added that one portion is comprised of where the public toilet is constructed, whilst the other portion belongs to the Plaintiff.
56. On re-examination, the witness averred that the suit property was subdivided into two portions. Furthermore, the witness added that the subdivision arose as a result of re-survey.
57. On further re-examination, the witness averred that same is not aware of whether the Plaintiff was issued with an approved Part Development Plan [PDP]. In any event, the witness added that same has not seen any copy of the approved PDP before the court.
58. On the other hand, it was the testimony of the witness that a PDP is prepared by the Directorate of Physical Planning and hence a copy of the PDP will be ordinarily be under the domain of the Director



of Planning. Furthermore, the witness added that a copy of the approved PDP would also be under the custody of the City County Government of Nairobi.

59. Nevertheless, it was the testimony of the witness that same [witness] has neither tendered nor produced a copy of the PDP.
60. With the foregoing testimony, the Defendant's case was duly closed.

Parties' Submissions:

61. At the close of the Defendant's case, the advocate of the respective parties covenanted to file and exchange written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
62. Suffice it to point out that the Plaintiff proceeded to and filed written submissions dated the 13th May 2024, whereas the Defendant filed written submissions dated the 17th May 2024. For good measure, the two [2] sets of written submissions are on record.
63. Whereas the court has neither rehashed nor reproduced the contents of the written submissions filed on behalf of respective parties, it is however worthy to underscore that the contents of written submissions have been taken into account and considered by the court.

Issues For Determination:

64. Having reviewed the Further amended Plaintiff and the statement of defence and having taken into account the evidence tendered on behalf of the parties and upon consideration of the written submissions filed by the respective parties, two [2] issues do crystalize and are thus worthy of determination.
65. The issues are as hereunder;
 - i. Whether the Plaintiff herein has demonstrated and/or proved that same is the bona fide owner of L.R No. 209/22184 [original L.R No. 209/8240/PT] or otherwise.
 - ii. Whether the Plaintiff is entitled to the reliefs sought at the foot of the further amended plaintiff or otherwise

Analysis And Determination:

Issue Number 1. Whether the Plaintiff herein has demonstrated and/or proved that same is the bona fide owner of L.R No. 209/22184 [original L.R No. 209/8240/PT] or otherwise.

66. The Plaintiff's case before the court is captured vide paragraphs 4 and 5 of the further amended Plaintiff. For good measure, the substratum/crux of the Plaintiff's case states as hereunder;
 4. The Plaintiff is a bona fide owner [leasee] of all that parcel of land know as L.R No. 209/22184 [original L.R No. 209/8240/PT] [209/8240/2] measuring approximately 0.0516HA and whose dimensions and abutments are delineated in the deed plan number 432832, situated off Desai Road, Pangani Area, Nairobi City County.
 5. The Plaintiff has been in peaceful and uninterrupted possession of L.R No 209/22184 [209/8240/2] [original L.R No. 209/8240/PT] since the year 1993 as a licensee of former Nairobi City Council



On 2nd July 1998 he was issued with a letter of offer and allotment for the said plot which offer was accepted and payment of annual ground rent and premium made on 4th August 1998 within the requisite period.

On or about the 25th March 2019 plot No. L.R No 209/8240/PT was re-surveyed for preparation of deed plan and two deed plans namely number 432832 measuring 0.0519HA for the Plaintiff and deed plan number 422831 measuring 0.0312HA were issued by the director of survey. The Plaintiff's plot is now L.R No. 209/22184 [209/8240/2] deed plan number 432832 whilst the Defendant has completed a toilet block on plot number L.R No 209/8240/1 deed plan number 422831. The Plaintiff is awaiting issuance title by land office.

67. From the paragraphs of the further amended Plaint, which have been reproduced hereinbefore, it is evident that the Plaintiff has contended that same [Plaintiff] is the bona fide owner of the suit property. In this regard, it was therefore incumbent upon the Plaintiff to tender and produce before the court evidence confirming that indeed same [Plaintiff] is the owner of the suit property.
68. Suffice it to point out that in an endeavour to demonstrate and prove ownership of the suit property, it was incumbent upon the Plaintiff to place before the court evidence including a letter of allotment relative to the suit plot, letter of acceptance, if any, speaking to the letter of allotment, evidence of payment of statutory levies, a duly approved PDP, duly approved Deed Plan and finally evidence of a certificate of lease/title, denoting that indeed the process relating the suit property was concluded.
69. Be that as it may, I beg to state that the Plaintiff herein neither tendered nor produced any document showing that same was ever allocated the suit property. Furthermore, the Plaintiff has also failed to tender and produce any certificate of title relating to the suit property.
70. In the absence of a certificate of lease/title relative to the suit property, it is difficult to comprehend the foundation and/or basis upon which the Plaintiff contends that same is a bona fide owner/lease. For coherence, it is the issuance of a certificate of lease/title that bestows upon a person, the Plaintiff not excepted, ownership of a particular property.
71. In the circumstances, one would have expected the Plaintiff to tender and adduce before the court evidence of registration the suit property in his name to found and anchor the claim of being the bona fide owner thereof. [See Section 24 and 25 of the [Land Registration Act, 2012](#)].
72. Furthermore, it is also imperative to cite and reference the holding in the case of Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others [1997] eKLR, where the court of appeal stated and observed as hereunder;

It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held."

73. Premised on the foregoing, there is no gainsaying that the Plaintiff herein had the primary obligation of tendering and placing before the court plausible and cogent evidence to underpin the claim to be the bona fide owner of the suit property. However, the Plaintiff failed to do so.
74. On the contrary, it is worth recalling that the Plaintiff herein placed before the court a copy of a letter of allotment dated the 2nd July 1998 and in respect of a property known as plot No. 209/8240/



PT. However, it is worthy to state that the Letter of allotment herein does not relate to [sic] the suit property, which has been impleaded by the Plaintiff.

75. Other than the foregoing, the Plaintiff also placed before the court a copy of letter of acceptance dated the 4th August 1998 as well as a copy of revenue receipt dated the 4th August 1998, speaking to L.R No. 209/8240/PT. For coherence, it is worth repeating that the documents herein do not relate to the suit property pleaded by the Plaintiff and hence same are unhelpful.
76. Be that as it may, it is imperative to observe that the letter of allotment together with the letter of acceptance and the revenue receipts which have been tendered and produced before the court, do not relate with the suit property which colours the further amended plaint. For good measure, the Plaintiff's case is to the effect that same is the bona fide owner of the suit property and not plot number L.R No. 209/8240/PT.
77. To my mind, if the Plaintiff herein had intended to propagate a claim pertaining to and concerning L.R No. 209/8240/PT, then it behooved the Plaintiff to file appropriate pleadings speaking to that particular property. Barring any pleading relative to L.R No. 209/8240/PT, it is pertinent to underscore that the documentation that have been tendered by the Plaintiff are at variance with the pleadings. In this regard, the evidence tendered contradict the pleadings. [See Order 2 Rule 6 of the Civil Procedure Rules, 2010].
78. Furthermore, it is worthy to point out that a party, the Plaintiff not excepted, is bound by the pleadings filed. In this regard, the Plaintiff cannot postulate one position in the pleadings, but advert to a separate and distinct cause in the evidence. Such an endeavour is prohibited by the law.
79. To this end, I beg to adopt and reiterate the holding in the case of Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR, where the court stated and observed as hereunder;

“A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

Sir Jack Jacob in an article entitled “The Present Importance of Pleadings” published in [1960] Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in Malawi Railways Limited v Nyasulu [1998] MWSO 3 states of the importance of pleadings:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the



case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings.

Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

80. Premised on the foregoing decision, it is my humble view, that any document relating to and referencing plot no. L.R No. 209/8240/PT, is therefore unhelpful in propagating the Plaintiff’s claim. [See also the decision in the case of David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR].
81. Notwithstanding the foregoing, it is also worthy to recall that the Plaintiff called one, namely, Cecilia Koigu. Same testified as PW5. According to PW5, the plot referenced as plot L.R No. 209/8240/PT had long been subdivided culminating into two plots and thus same [Plot No L.R No. 209/8240/PT] is non-existent.
82. Be that as it may, it is pertinent to state that the parties are called upon to articulate their cases with the requisite particularity and specificity. The parties cannot keep oscillating between various positions and perhaps imagine that the court would find favour with one position or the other.
83. In short, it is my finding and holding that the Plaintiff herein has neither established nor demonstrated that same [Plaintiff] is the bona fide owner of the suit property, whose details are articulated at the foot of the Further of amended Plaint.
84. Suffice it to point out that the obligation to place before the court credible evidence laid on the shoulders of the Plaintiff and not otherwise. To the extent that the Plaintiff has failed to discharge the burden of proof, the court has no obligation other than to return a finding that the Plaintiff’s case is not proved. [See Section 107, 108 and 109 of the [evidence Act](#), Chapter 80 Laws of Kenya].
85. Before departing from the issue herein, it suffices to reference and take cognizance of the ratio decidendi in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR, where the court of appeal stated and observed as hereunder;

“With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence, when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the [Evidence Act](#) to be demanding of a party like the 1st respondent that:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

86. Furthermore, the obligation of the Plaintiff/claimant to place before the court plausible and credible evidence towards discharging the burden of proof was also elaborated by the Supreme Court of Kenya



[the apex Court] in the case of Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR, where the court stated and held thus;

(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that,

“the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

(50) This Court in Raila Odinga & Others *v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

87. In the premises, my answer to issue number one [1] is to the effect that the Plaintiff herein has failed to place before the court evidence to demonstrate and/or vindicate the claim that same [Plaintiff] is the bona fide owner of the suit property.

Issue Number 2. Whether the Plaintiff is entitled to the reliefs sought at the foot of the further amended plaint or otherwise

88. The Plaintiff herein has sought for a plethora of reliefs at the foot of the Further amended Plaint. The various reliefs which have been sought for at the foot of the Further amended Plaint were rehashed and reproduced at the onset of this judgment.

89. It is worthy to recall that the Plaintiff herein has sought for inter-alia a declaration that same [Plaintiff] is the bona fide owner of the suit property, namely, LR. No 209/22184 [209/8240/2] allegedly on the basis of a lease agreement between Nairobi City Council [now defunct] dated the 23rd December 2009.

90. For good measure, the lease agreement which the Plaintiff adverts to was tendered and produced as exhibit P10. At any rate, the lease agreement under reference does not advert to and/or reference the suit property which the Plaintiff herein claims to be the bona fide owner thereof.

91. Notwithstanding the foregoing, it is also worth reiterating that a declaration that one is the bona fide owner of a designated property, the suit property not excepted, can only be made/issued on the basis of a certificate of lease or title, which is the end product denoting registration of rights. This position has been adverted to and elaborated upon in a number of decisions, including the case of Embakasi Properties Limited v Commissioner of Lands and Others [2019]eklr; Mohanson Food Distributors Limited & another v Registrar of Titles [2017] eKLR and also Moya Drift Farm Ltd v Theuri 1973 E.A page 114].



92. Without belabouring the point, it is my finding and holding that the Plaintiff herein is not entitled to a declaration of ownership in respect of the suit property. Certainly, such a declaratory order would be in vain, taking into account that the Plaintiff does not hold any certificate of lease/title to the suit property.
93. Secondly, the Plaintiff herein has sought for order of permanent injunction to restrain the Defendant from entering upon, taking possession of and/or otherwise remaining on the suit property. However, there is no gainsaying that an order of permanent injunction can only issued to protect the ownership rights/interests of a legitimate owner and not one who has no demonstrable rights to the designated property. [See the holding in the case of *Waas Enterprises Limited versus City Council of Nairobi* [2014]eklr]
94. Thirdly, the Plaintiff has sought for an order of eviction to evict the Defendant from the suit property. Nevertheless, it is not lost on the court that the suit property belongs to the City County Government of Nairobi and same is thus public property. In this regard, an order of eviction cannot issue as against the legitimate owner of the suit property. For good measure, if such an order were to issue it would amount to a gross absurdity.
95. Finally, the Plaintiff has sought for general damages for trespass and unlawful destruction of the property. Suffice it to point out that had the Plaintiff demonstrated and/or proved his title to the suit property, same [Plaintiff] would have been entitled to recompense on account of trespass.
96. Nevertheless, the court has found and held that the Plaintiff herein is not the bona fide owner and/or proprietor of the suit property. In this regard, there is no foundation and/or basis upon which the claim for general damages for trespass can be anchored.
97. Be that as it may, if I had found and established that the Plaintiff had proved his claim to ownership of the suit property [which is not the case], I would have been obliged to decree an award of Kes.5 Million [Kes 5,000,000] only, on account of general damages for Trespass. [See the decision of the Court of Appeal in *Kenya Power & Lighting Company Ltd v Ringera & 2 others (Civil Appeal E247 & E248 of 2020* (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment),].

Final Disposition:

98. The Plaintiff was obliged to tender plausible and cogent evidence before the court in an endeavour to prove his case. Suffice to underscore that proof of the Plaintiff's case was dependant on the production of documentation to vindicate the contention that the Plaintiff was truly the bona fide owner [Proprietor] of the suit property.
99. However, the Plaintiff herein failed to discharge the requisite burden of proof. Consequently, the Plaintiff's case is devoid of merits and same courts dismissal. In short, the Plaintiff's suit be and is hereby dismissed.
100. Suffice it to state that cost would ordinarily follow the event. However, having taken cognizance of the totality of the evidence and the circumstances attendant to the instant case, I am minded to decree that either party shall bear own costs.
101. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF SEPTEMBER 2024

OGUTTU MBOYA

JUDGE.



In the presence of:

Benson – Court Assistant.

Mrs. Lucy Njiru for the Plaintiff.

Mr. Adawo h/b for Mr. Kwanga Mboya for the Defendant.

