



**Mulusya & 2 others v IDB Capital Ltd & 3 others (Environment & Land
Case 307 of 2009) [2023] KEELC 498 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 498 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 307 OF 2009
SO OKONG'O, J
FEBRUARY 2, 2023**

BETWEEN

**JOSEPH WAMBUA MULUSYA 1ST PLAINTIFF
MULUSIAH LAND CONSULTANTS LTD 2ND PLAINTIFF
EAGLE SUPERMARKET LTD 3RD PLAINTIFF**

AND

**IDB CAPITAL LTD 1ST DEFENDANT
JAMES KANIIRI GACHIRI 2ND DEFENDANT
P V R RAO 3RD DEFENDANT
KOLLURI VENKATA SUBBARAYA KAMAstry 4TH DEFENDANT**

JUDGMENT

1. The plaintiffs filed this suit on 26th June 2009 through a plaint of the same date. The plaint was amended with leave of the court that was granted on 17th March 2010. In their amended plaint, the plaintiffs sought the following reliefs against the defendants;
 1. An order of injunction restraining the 2nd defendant by himself, his servants or agents or any of them from trespassing upon the adjacent land, now known as Title No. Nairobi/Block 75/1036(as it appears in the Survey Map F/R No. 131/68) Buruburu (hereinafter referred to as “the suit property”) in respect of which a right to occupy and develop was granted to the 1st plaintiff by the Commissioner of Lands.
 2. An order compelling the 2nd defendant to allow the 2nd and 3rd plaintiffs to enter the 2nd defendant’s premises and the adjacent land now known as Title No. Nairobi/Block 75/1036 (as it appears in the Survey Map F/R No. 131/68) Buruburu (“the suit property”) to collect



and/or remove from the said premises, 300 pieces of heavy-duty wooden chairs and 80 pieces of dining tables, heavy-duty metal chairs with wooden arms, 60 pieces of coffee tables, 24 pieces of JVC 14 inch colour TVs, Hace Safe, a lift Machine, a water heating system machine and 40 KVA Wilson Generator, machine serial No. 39644A/001 and engine serial No. 50317-U91318G which the 2nd defendant has since taken possession of.

3. A mandatory injunction against the 2nd defendant to re-instate the 1st plaintiff into possession and user of the unsurveyed Plot, Title No. Nairobi/Block 75/1036 (suit property) in accordance with the Commissioner of Lands letter dated 16th July 1985.
4. Damages for conversion against the 1st, 3rd and 4th defendants and interest thereon at commercial rate from the date of the conversion of the 2nd and 3rd plaintiff's chattels.
5. General damages and interest thereon at court rates from May 2009.
6. Any other relief that the court may deem fit and just to grant.

The plaintiffs' case:

2. The plaintiffs averred that pursuant to a loan agreement dated 29th December 1998 between the 1st defendant and WAB Hotels Limited, the 1st defendant advanced a loan to WAB Hotels Limited (hereinafter referred to only as "WAB Hotel") secured by a charge over the assets of WAB Hotel and a guarantee by the 1st plaintiff. The plaintiffs averred that in December 2008, the 1st Defendant sold the properties and assets of the 1st plaintiff including Title No. Nairobi/Block 75/1031 (hereinafter referred to only as "the charged property"). The plaintiffs averred that at all material times, the 2nd and 3rd plaintiffs had leased office space and a shop (a supermarket) respectively on the building on the charged property that also housed WAB Hotel which they operated until May 2009.
3. The plaintiffs averred that in the exercise of its power as a chargee over the charged property, the 1st defendant sold and transferred the charged property to the 2nd defendant. The plaintiffs averred that the 2nd defendant took possession of not only the charged property that was sold to him but also an adjacent parcel of land, Title No. Nairobi/Block 75/1036 (suit property) which was not charged to the 1st defendant to secure the loan advanced to WAB Hotel. The plaintiffs averred that the 2nd defendant had commenced massive developments on the suit property which were altering the developments that the 1st plaintiff had put up on the charged property. The plaintiffs averred that the said developments were being undertaken without the consent of the 1st plaintiff, the Commissioner of Lands and the Director of City Planning and Architecture.
4. The plaintiffs averred that the Commissioner of Lands gave the 1st plaintiff the suit property on 16th June 1985 to develop for use by the 1st plaintiff's clients and the general public and the 1st plaintiff went ahead and developed the same at a great cost. The plaintiffs averred that after developing the suit property, the 1st plaintiff used the same for 22 years. The plaintiffs averred that it was the 1st plaintiff who was authorized to occupy and develop the suit property. The plaintiffs averred that the 1st, 3rd and 4th defendants made the 2nd defendant believe that the suit property was part of the charged property which was not the case. The plaintiffs averred that the 2nd defendant should surrender the suit property to the 1st plaintiff as it was not part of the charged property sold to him by the 1st, 3rd and 4th defendants.
5. The plaintiffs averred that on or about 28th August 1998, the 2nd plaintiff purchased a lift machine from Kenya Lift Company Limited at a cost of Kshs. 1,850,000/- with the intention of giving it out on a loan to WAB Hotel but the same had not been installed at WAB Hotel at the time it was placed under receivership. The plaintiff averred that the lift machine was stored at the WAB Hotel premises. The



- plaintiffs averred that the 2nd plaintiff should be allowed to enter WAB Hotel building to collect the said lift machine from the 2nd defendant who should surrender the same.
6. The plaintiffs averred further that by an agreement dated 20th November 1999 between Bhirwatchi Hot Water and the 2nd plaintiff, the 2nd plaintiff purchased a water heating system at a cost of Kshs. 4,089,000/-. The plaintiffs averred that the 2nd plaintiff was entitled to retrieve the said water heating system and all its parts from the 3rd and 4th floors and, the rooftop of WAB Hotel building.
 7. The plaintiffs averred that on 21st August 2000, the 3rd plaintiff purchased a 40 KVA, F.G Wilson Generator from Blackwood Hodge (K) Limited at Kshs. 1,005,000/-. The plaintiffs averred that the said generator that was installed on the suit property was not owned by WAB Hotel. The plaintiffs averred that the 3rd plaintiff allowed the 1st plaintiff and WAB Hotel to use the said generator when needed. The plaintiffs averred that WAB Hotel used to pay to the 3rd plaintiff a monthly rent of Kshs. 59,400/- for the use of the said generator. The plaintiffs averred that the said generator remained the property of the 3rd plaintiff and that the 2nd defendant's use of the same was unlawful.
 8. The plaintiffs averred that the 1st, 3rd and 4th defendants had a duty to ascertain the boundaries of the charged property and the ownership of the movable assets that were found in WAB Hotel at the time it was placed under receivership. The plaintiffs averred that the 1st, 3rd and 4th defendants breached their duty of care by purporting to sell and transfer to the 2nd defendant properties that did not belong to WAB Hotel. The plaintiffs averred that the 1st, 3rd and 4th defendants were liable in damages for conversion of the chattels belonging to the 2nd and 3rd plaintiffs.
 9. The plaintiffs averred that despite the demand made upon the defendants to cease their acts of trespass complained of, the defendants had refused to do so leaving the plaintiffs with no alternative but to file this suit.

The 1st, 3rd and 4th defendants' case:

10. The 1st, 3rd and 4th defendants filed an amended defence dated 16th April 2010 on 19th April 2010. The 1st, 3rd and 4th defendants (hereinafter referred to only as "defendants") averred that the 1st defendant was at all material times known as Industrial Development Bank Limited and that the 3rd and 4th defendants were the joint-receiver managers of WAB Hotel (In receivership) from 5th June 2002. The defendants averred that the 1st plaintiff executed a charge dated 29th December 1998 over Title No. Nairobi/Block75/1031 (the charged property to secure the loan that was advanced by the 1st defendant to WAB Hotel. The defendants averred that the said charge was supplemented by a debenture dated 29th December 1998 over all the movable assets of WAB Hotel.
11. The defendants averred that it was only the 3rd plaintiff that was occupying a space on the 3rd floor of WAB Hotel building on the charged property. The defendants denied that the 2nd and 3rd plaintiffs had leased any office or business space on WAB Hotel building. The defendants averred that they were strangers to the plaintiffs' allegation that the 2nd defendant was in occupation of the suit property and that he had encroached on the same and was illegally developing it. The defendants averred that they were strangers to the letter dated 16th July 1985 through which the Commissioner of Lands allegedly gave the suit property to the 1st plaintiff. The defendants averred that in any event, the letter refers to a public parking space and does not mention any land title. The defendants averred that the plaintiffs had no locus standi to maintain a suit in respect of such land. The defendants averred further that the letter referred to a person who was registered as the owner of the charged property. The defendants averred that since it was the 2nd defendant who was the registered owner of the charged property, it was the 2nd defendant who had clients who could use the suit property.



12. The defendants denied that the 1st plaintiff had developed the suit property and that they failed to point out to the 2nd defendant the beacons of the charged property. The defendants denied that they owed a duty of care to the plaintiffs or to anyone else or that they breached the same duty. The defendants averred that the plaintiff's suit had no merit and that it disclosed no reasonable cause of action against the defendants. The defendants averred that the suit was an afterthought in that the issues raised in the suit were not raised in an earlier suit namely; Milimani HCCC No. 211 of 2004, Mulusiah Land Consultants Limited & Colourgems Limited v. IDB Limited, Lawrence Odori Nabwana & Tact Consultancy Services. The defendants urged the court to strike out and/or dismiss the plaintiffs' suit with costs.

The 2nd defendant's case:

13. The 2nd defendant filed a statement of defence dated 24th February 2016. The 2nd defendant admitted that the 1st defendant sold to him the charged property in exercise of its statutory power of sale. The 2nd defendant denied that he took possession of both the charged property and the suit property. The 2nd defendant denied that the 1st plaintiff was given the suit property by the Commissioner of Lands. The 2nd defendant averred that he was in occupation of the suit property pursuant to a lease dated 29th May 2009 between him and one, Peter Gatheca Gachiri who was the registered owner thereof. The 2nd defendant averred that he was not answerable to the plaintiffs in respect of the suit property.
14. The 2nd defendant averred that the 1st plaintiff was not entitled to an order for the surrender of the suit property since the 1st plaintiff was not the registered owner thereof. The 2nd defendant averred that he was not privy to the events mentioned in paragraphs 12, 13, 14 and 15 of the amended plaint. The 2nd defendant denied that the plaintiffs were entitled to the chattels mentioned in the said paragraphs. The 2nd defendant averred that he purchased for valuable consideration all the goods and machinery that were on the charged property together with the charged property at a public auction. The 2nd defendant urged the court to dismiss the plaintiffs' suit with costs.

The evidence tendered by the parties:

The plaintiffs' evidence:

15. The plaintiffs' first witness was the 1st plaintiff, Joseph Wambua Mulusya (PW1). PW1 told the court that he was a director of the 2nd and 3rd plaintiffs. He adopted his witness statement dated 22nd July 2015 (see pages 8 to 31 of PEXH.1) as part of his evidence in chief. He stated that the plaintiffs' claim against the defendants arose following a forced sale of the charged property, Nairobi/Block 75/1031. He stated that there was a parcel of land adjoining the charged property namely, Nairobi/Block 75/1036 (the suit property). He stated that the suit property was not charged to the 1st defendant. He stated that the suit property was unsurveyed and had no title. He stated that what he had was a letter from the Commissioner of Lands authorising him to develop the same for parking. He stated that the said authority had not been revoked. He stated that there was a charge and a debenture registered against the charged property. He stated that the said securities were provided pursuant to a loan agreement between WAB Hotel and the 1st defendant.
16. PW1 stated that the suit property measured 0.1551Ha. and its user was Hotel. He stated that in the agreement of sale dated 24th October 2008, what was sold to the 2nd defendant was the charged property together with the buildings and improvements erected and being thereon. He stated that the 2nd defendant had inspected the charged property and knew what he was purchasing. He stated that the agreement of sale had a schedule of assets (see pages 37 and 38 of PEXH.1). He stated that the Garden



Bar and Compound referred to in the schedule of the said agreement of sale were on the parking plot and as such on the suit property. PW1 referred the court to the PDP of Buruburu Shopping Centre at page 9 of PEXH.1. He stated that there was a residential hotel and next to it is a car park. He stated that that car park was the suit property. PW1 also referred the court to the survey plan for the charged property at page 10 of PEXH.1. He stated that the said survey plan shows that the charged property was just one plot. He referred the court to another survey plan at page 11 of PEXH. 1 that showed the charged property with the suit property which measured 0.1551Ha. He stated that the suit property should have been indicated as measuring 0.1200Ha. and not 0.1551Ha. PW1 also referred the court to the Registry Index Map (RIM) at page 12 of the same exhibit. He stated that the RIM showed the charged property only. He stated that the suit property was not in the RIM. PW1 also referred the court to the lease at page 293 of PEXH. 1. He stated that the lease was in favour of Peter Gatheca Gachiri and the same was signed by James Raymond Njenga on 6th February 1984 and registered on 17th February 1984. PW1 asked the court to compare this lease with the lease dated 6th February 1984 at page 13 of PEXH. 1. He stated that this lease was registered on 7th February 1984. He stated that the lease for the charged property was altered to make the lease for the suit property. He stated that those who carried out the alteration however forgot and left the user as hotel instead of car park. PW1 referred the court to the lease, certificate of lease and a search in respect of the suit property at pages 283, 287 and 292 of PEXH. 1. He stated that he received copies of these documents after he instituted this suit and that the documents were annexed to an affidavit filed by Peter Gatheca Gachiri in another suit namely, Civil Application No. 45 of 2010. He referred the court to the judgment that was delivered in that application at page 339 of PEXH. 1.

17. He stated that the said application by Peter Gatheca Gachiri in which he sought prohibition of his arrest was dismissed. He stated that upon receipt of these documents, he lodged a complaint with the Commissioner of Lands, the Director of Criminal Investigation (DCI) and the Director of City Planning and requested them to investigate the title held by Peter Gatheca Gachiri in respect of the suit property. He stated that in response to his complaint, the Commissioner of Lands termed the purported title for the suit property fake and a forgery (See page 330 of PEXH.1). He stated that the Commissioner of Lands also informed the DCI that no letter of allotment had been issued to Peter Gatheca Gachiri in respect of the said parcel of land that was reserved for parking and that the purported lease in favour of Peter Gatheca Gachiri was a forgery a fact that was also confirmed by the land Registrar (See page 329 of PEXH. 1).
18. PW1 referred the court to the valuation report by Lloyd Masika dated 9th June 2006 in respect of the charged property at page 183 of PEXH. 1. He stated that there was a reference to the generator and the side elevation of the Beer Garden. PW1 stated that the generator and the Beer Garden were standing on the suit property and as such the same did not form part of the charged property. He stated that the valuation report described the charged property and the suit property as if the same were one. He stated that in the schedule of furniture, equipment, linen and kitchenware, Garden Bar is mentioned again although the same was not part of the charged property.
19. PW1 stated that the directors of WAB Hotel wrote to the 1st defendant several letters about the inclusion of the generator amongst the properties of WAB Hotel (See pages 243, 244 and 245 of PEXH. 1). He stated that the 1st defendant did not respond to the said letters. He stated that he also wrote to the 3rd and 4th defendants seeking the assets register to which letter again there was no response. PW1 stated that he had pointed out to the 1st defendant and the 3rd and 4th defendants that the generator and the Beer Garden were leased to WAB Hotel and did not belong to WAB Hotel (See pages 250 to 257 of PEXH. 1). He stated that the 1st defendant knew all along that only WAB Hotel was on the charged property and that the parking was on a separate plot that did not belong to WAB Hotel. He stated that



- the 1st, 3rd and 4th defendants knew that the generator did not belong to WAB Hotel at the time they were including the same in the sale agreement with the 2nd defendant as they had been provided with proof of ownership of the same (See pages 264 to 273 of PEXH. 1).
20. PW1 stated that the Director of Public Prosecutions had given approval for Peter Gatheca Gachiri and his son James Kaniya Gachiri to be prosecuted. He stated that the signatures of Peter Gatheca Gachiri in the 10 years lease with the 2nd defendant and in the lease with the Government were different. He referred the court to the findings by the DCI at page 338 of PEXH. 1. He stated that the 1st defendant could only transfer to the 2nd defendant the charged property. He stated that the 1st defendant had no authority to transfer to the 2nd defendant anything that was standing on the car park. He stated that the car park remained under his authority and he had not consented to the transfer. He stated that he was forcefully evicted from the car park by the police. PW1 stated that the defendants were supposed to pay rent for the use of the Beer Garden and the generator to the 2nd plaintiff and the 3rd plaintiff respectively. He stated that the 2nd defendant was occupying the car park plot illegally. He stated that the 2nd defendant had been charged with a criminal offence in Criminal Case No. 744 of 2012 and that his father had gone underground.
 21. PW1 stated that the 2nd defendant should be ordered to vacate the suit property. He stated that the defendants should pay damages for occupying the suit property illegally through fraud. PW1 urged the court to grant the prayers sought in the amended plaint. PW1 produced several documents as exhibits that were marked as PEXH. 1.
 22. On cross-examination by the advocate for the 1st, 3rd and 4th defendants, PW1 stated that the plaintiffs were not pursuing their claims with regard to the lift, the water heating system and the television sets that were fixed on the charged property. PW1 stated further that after the generator was sold to the 2nd defendant, the 2nd defendant changed its serial number. He stated that the 2nd and 3rd plaintiffs were sister companies and that the generator belonged to the 3rd plaintiff. He stated that the 2nd plaintiff lent money to the 3rd plaintiff to purchase the generator. He stated that there were two car parks; one in front of the hotel and the car park in dispute which was an additional car park for the hotel. He stated that he got the additional car park later and that the same was not charged to the 1st defendant. He stated that part of the loan WAB Hotel obtained from the 1st defendant was used to purchase furniture and that the 2nd plaintiff's office was on the charged property. He stated that the 2nd plaintiff vacated the charged property after the 3rd and 4th defendants took over WAB Hotel and sued for the recovery of its properties. He stated that he was a director of the 2nd plaintiff and that he was the one who authorized the 2nd plaintiff to develop the suit property that had been allocated to him.
 23. On cross-examination by the advocate for the 2nd defendant, PW1 stated that the 2nd defendant purchased two parcels of land from the 1st defendant while only one of the parcels was charged to the 1st defendant. He stated that the parking was not surveyed and was referred to as L.R No. 1036/R. He stated that he was the owner of the parking (the suit property) pursuant to a letter of allotment dated 16th July 1985 that was issued to him by the Commissioner of Lands. He confirmed that the letter authorized him to use the suit property and was not a letter of allotment. He stated that the letter stated that the parking could not be allocated to him but he was allowed to develop the same. He stated that the said permission that was given to him had not been revoked. He stated that in 1985 he was a practising land consultant under the trade name Mulusiah Land Consultants and before that he worked with the government as a Senior Land Officer at the Ministry of Lands in the office of the Commissioner of Lands. He stated that he had no authority to allocate land. He stated that he applied for the charged property through the then Minister of Lands, Paul Ngei who hailed from Kangundo where he also came from and his request was approved. PW1 stated that as far as he was concerned,



L.R No. Nairobi/Block 75/1036(the suit property) did not exist although that is what he was seeking from the court. He stated that he was seeking the parking plot that was being referred to as L.R No. Nairobi/Block 75/1036 (the suit property). He stated that he was aware that the 2nd defendant was acquitted of the criminal charge that was preferred against him in Criminal Case No. 744 of 2012. He stated that he did not agree with the ruling through which the 2nd defendant was acquitted. He stated that the content of the ruling did not capture the evidence that was tendered in court. He stated that the Director of Survey confirmed to him that the survey for the suit property was forged (See page 4 of PEXH.1). He reiterated that the suit property did not exist as a surveyed plot and that a title had never been issued in respect thereof. He stated that the decision of the Magistrate's Court in the said criminal case was not appealed because the prosecution was not given an opportunity to tender all evidence. He stated that the search at page 292 of PEXH.1 in respect of the suit property was a forgery. PW1 denied that he used his influence at the Lands Office to have the title for the suit property declared a forgery.

24. The plaintiffs filed an additional bundle of documents on 1st April 2019 and sought leave of the court for PW1 to be recalled to give further evidence in chief in respect thereof which leave was granted. In his evidence on recall, PW1 produced the said additional bundle of documents as PEXH.2. He stated that land parcels L.R No. 1047 and L.R No. 1048 were excised from L.R No. Nairobi/Block 75/1036 through Survey Plan No. 232/161. He stated that L.R No. Nairobi/Block 75/1036 ceased to exist. In further cross-examination by the advocate for the 1st, 3rd and 4th defendants, he stated that the survey plan that he had produced was not certified but he insisted that it was a valid document. He stated that L.R No. Nairobi/Block 75/1036 ceased to exist in 1992. He stated that he was occupying a portion of what used to be L.R No. Nairobi/Block 75/1036 which was a bigger plot. He stated that what was in dispute was a small portion of L.R No. Nairobi/Block 75/1036 measuring 0.1320 that remained unsurveyed. He stated that after L.R No. 1047 and L.R No. 1048 were excised from L.R No. Nairobi/Block 75/1036, there was a remainder. He stated that when the two plots were created from L.R No. Nairobi/Block 75/1036, he was already in occupation of the parking plot. He denied that the authority that was given to him to occupy the parking plot ceased to have any force following the creation of the two plots from L.R No. Nairobi/Block 75/1036. He stated that the said authority gave him a licence over the parking plot that was valid until revoked.
25. On further cross-examination by the advocate for the 2nd defendant, PW1 stated that L.R No. 1047 and 1048 were created in 1992 and that before the creation of the same, the parking plot was part of L.R No. Nairobi/Block 75/1036. He stated that L.R No. Nairobi/Block 75/1036 was a big parcel of land owned by the government. He stated that the portion of L.R No. Nairobi/Block 75/1036 which he occupied was not surveyed. He reiterated that the ruling in the criminal case did not capture correctly the evidence that was tendered by witnesses.
26. The plaintiffs' next witness was Bibiana Achieng Rabuku Omalla(PW2). PW2 told the court that she was a licensed surveyor. She adopted her witness statement dated 17th October 2017 filed in court on 10th November 2017 as part of her evidence in chief. PW2 stated that only the charged property was surveyed under Survey Plan No. 166/158. She stated that the dots on the plot next to the charged property on Survey Plan No. 232/161 showed that the plot was not surveyed.
27. On cross-examination by the advocate for the 1st, 3rd and 4th defendants, PW2 stated that it was not mandatory for a purchaser of land to carry out survey to establish the position of beacons. She stated that it was optional. On cross-examination by the advocate for the 2nd defendant, PW2 denied that she had a long relationship with the 1st plaintiff and that she was out to assist him. PW2 stated that she purchased two survey plans from the Survey of Kenya in respect of L.R No. Nairobi/Block 75/1031(the charged property) and, Nairobi/Block 75/1031(the charged property) and Nairobi/Block 75/1036(the suit property). She stated that the survey plan No. 166/158 that had the charged



property and the suit property side by side was a forgery. She stated that she arrived at that conclusion upon perusing the survey records and particularly the computation file. She stated that two surveys cannot be on one survey plan. She stated that according to the survey records held by the Director of Surveys, the survey plan for the charged property was the first in time and the genuine survey plan. She stated that according to the same records, the suit property did not exist as a surveyed plot.

28. The plaintiffs' next witness was Pauline Mbaire Kariuki (PW3). PW3 was a Principal Land Registrar. PW3 adopted her witness statement dated 20th November 2017 filed on 22nd November 2017 as part of her evidence in chief. PW3 stated that she made inquiries from the Land Registrar, Nairobi on the status of the suit property, L.R No. 75/1036 and was informed that the same was not registered according to the records held at the Lands Office. She stated that before a title is issued, it is preceded by a letter of allotment and a survey and that the Director of Surveys cannot carry out a survey for the purposes of land allocation without a letter of allotment. She stated further that the Director of Surveys must confirm with the Commissioner of Lands that the land to be surveyed had been allocated. She stated that she did not see the lease for the suit property in the correspondence file No. 112085 relating to the allocation of L.R No. Nairobi/Block 75/1031(the charged property) that was allocated to the 1st plaintiff.
29. On cross-examination by the advocate for the 2nd defendant, she stated that at the time of giving evidence, she was working with the National Land Commission and that she was invited by the 1st plaintiff to testify in the matter on his behalf. PW3 stated that she was authorized by the Commissioner of Lands to write the letter dated 27th January 2010 to the 1st plaintiff. She stated that the letter was written in response to a letter from the 1st plaintiff. She stated that the information that she had given to the court was based on the information that she obtained from a land registrar, Benard Leitich (Leitich). She stated that it was Leitich who told her that the title for the suit property was fake. She stated that she wrote to Leitich because he was her senior at the office. PW3 stated that she wrote a letter dated 2nd March 2011 to the C.I.D to the effect that the Commissioner of Lands did not issue a letter of allotment to Peter Gatheca Gachiri in respect of the suit property. On re-examination, PW3 reiterated that a title cannot exist without a survey.

The defendants' evidence:

30. After the close of the plaintiffs' case, the advocate for the 1st, 3rd and 4th defendants informed the court that the 1st, 3rd and 4th defendants did not intend to call a witness. The 2nd defendant, James Kiniya Gachiri gave evidence as DW1. DW1 adopted his witness statement dated 24th February 2016 as part of his evidence in chief. DW1 told the court that he purchased the charged property on which he had a mall by the name Jimlizer from the 1st defendant through the 3rd defendant who was the receiver of WAB Hotel. He referred the court to the agreement of sale at page 22 of PEXH.1, the instrument of transfer at page 16 of PEXH.1 and the title in his favour at page 17 to 19 of PEXH.1. He stated that his Jimlizer Mall was on one parcel of land. He stated that he paid part of the purchase price for the charged property and the balance was paid through a loan that he obtained from NIC Bank. He stated that it was the seller of the charged property who knew what was sold and what was not for sale. He stated that although his Jimlizer Mall was on the charged property, it extended to the suit property. He stated that the suit property was not owned by him. He stated that the suit property was leased to him by the owner thereof, Peter Gatheca Gachiri (See page 287 of PEXH.1). He stated that before entering into the lease agreement, he confirmed the validity of the title of Peter Gatheca Gachiri over the suit property. He told the court that he was given a copy of the title for the suit property by Peter Gatheca Gachiri (See page 283 of PEXH.1). He stated that he was still in occupation of the suit property.



31. DW1 stated that the 1st plaintiff lodged a complaint against him with the police in relation to the suit property pursuant to which he was charged with a criminal offence. He stated that the criminal case was dismissed. He stated that the charge against him was forgery of a title for the suit property (See the charge sheet at page 22 of PEXH.2). He stated that the court found that he was not the owner of the suit property but a lessee.
32. On cross-examination by the advocate for the 1st, 3rd and 4th defendants, DW1 stated that there was a hotel on the charged property known as WAB Hotel whose name was changed to Jimliser Hotel. He stated that he purchased the said hotel with all the furniture and other things that were inside. He stated that the 1st, 3rd and 4th defendants did not sell to him the suit property. He stated that when he was purchasing the charged property, he discovered the existence of the suit property. He stated that he then started looking for the owner thereof. He stated that after getting the owner, the owner gave him a lease in respect thereof (See page 288 of PEXH.1). He stated that the owner of the suit property acquired the same several years before he purchased the charged property. He stated that he had no relationship with the owner of the suit property, Peter Gatheca Gachiri. He stated that the 1st, 3rd and 4th defendants committed no wrong.
33. On cross-examination by the 1st plaintiff, DW1 stated that his father's full name was James Kabata Gachiri. He denied that Peter Gatheca Gachiri was his father. He stated that he was not aware that Peter Gatheca Gachiri was arrested and that he obtained an order prohibiting his prosecution. He stated that he did not purchase the suit property and that he only purchased the charged property. He stated that the items that were sold to him were all on the charged property. He stated that he purchased the charged property from the 1st, 3rd and 4th defendants through a private treaty and not through a public auction. He stated that the generator claimed by the plaintiffs was on the charged property.
34. On re-examination by Mr. Gachie, DW1 stated that the 1st plaintiff was not happy about the sale of his hotel and that he held a grudge against him. He stated that the 1st, 3rd and 4th defendants sold to him the furniture and all other moveable properties that were on the charged property together with the hotel.

The submissions:

35. After the close of evidence, the court directed the parties to make closing submissions in writing.

The plaintiffs' submissions:

36. The plaintiffs filed submissions dated 25th February 2022. The plaintiffs submitted that the 1st plaintiff's claim was limited to the assets and improvements on the suit property situated next to WAB Hotel on the charged property which were illegally and fraudulently sold to the 2nd defendant through the agreement for sale dated 24th October 2008 (See pages 21 to 45 of PEXH.1). The plaintiffs submitted that the suit property is shown as Parking Plot in the PDP Plan No. 83033/XI/20/3 dated 31st August 1982 (See page 9 of PEXH.1) annexed to the Letter of Allotment Reference No. 83033/XI/22 dated 23rd December 1983 (See pages 8 and 9 of PEXH.1) for the charged property. The plaintiffs submitted that although the suit property is referred to as L. R No. Nairobi Block 75/1036 the same has not been surveyed contrary to what is shown in the second version of Survey Plan FR No. 166/158 (See page 11 of PEXH.1). The plaintiffs submitted that the suit property is the subject of the forged title at page 293 of PEXH.1. The plaintiffs submitted that the suit property was not the subject of the charge, debenture and loan agreement all dated 29th December 1998 at pages 64 to 83 of PEXH.1 between the 1st plaintiff, WAB Hotel and the 1st defendant. The plaintiffs submitted that the suit property and the properties that were thereon were fraudulently, silently and deliberately included in the agreement for sale dated 24th October 2008 between the 1st, 3rd and 4th defendants and,



the 2nd defendant. The plaintiffs referred the court to page 29(PEXH.1) paragraph (l) and page 30 (PEXH.1) paragraph (c) of the said agreement. The plaintiffs submitted that under those paragraphs of the agreement, the 1st defendant openly refused to show the 2nd defendant the beacons of the charged property and the assets thereon. The plaintiffs submitted that at the schedule to the said agreement at page 37(PEXH.1) paragraph F and page 38(PEXH.1) paragraph G of the agreement, the 1st, 3rd and 4th defendants included as part of the assets that were sold the properties that were on the “Garden Bar” and “Compound” which were on the suit property and not the charged property. The plaintiffs submitted that the 1st, 3rd and 4th defendants fraudulently pretended that the suit property and the improvements thereon stood on the charged property which was being sold to the 2nd defendant.

37. The plaintiffs submitted that under paragraph 9(c) of the agreement of sale (page 23 of PEXH.1) the 1st, 3rd and 4th defendants had pretended that everything in the schedule to the agreement belonged to the 1st, 3rd and 4th defendants when they knew that that was not the case. The plaintiffs submitted that the 1st plaintiff was the lawful owner of the suit property having been authorized to use the same by the Commissioner of Lands through a letter dated 16th June 1985. The plaintiffs submitted that the Commissioner of Lands had in several letters denied that he allocated the suit property to Peter Gatheca Gachiri and issued to him a lease in respect thereof. The plaintiffs submitted that it was this Peter Gatheca Gachiri who was alleged to have given the 2nd defendant a 10-year lease over the suit property. The plaintiffs submitted that even the Director of Surveys had disowned the survey plan through which the title for the suit property was alleged to have been processed. The plaintiffs submitted that this position taken by the Commissioner of Lands and the Director of Surveys was confirmed by the Land Registrar, Nairobi, B.K. Leitich in a letter dated 1st April 2010 (See page 329 of PEXH.1). The plaintiffs reiterated that the 1st, 3rd and 4th defendants were aware having been informed that the suit property and the properties thereon did not form part of the charged property. The plaintiffs submitted that it was an act of impunity for them to purport to sell the same to the 2nd defendant. The plaintiffs submitted that the 1st, 3rd and 4th defendants had admitted selling the 40KVA FG Wilson Generator to the 2nd defendant as part of the charged property and the 2nd defendant had admitted purchasing the same. The plaintiffs submitted that these admissions were made in the replying affidavits that were filed by the defendants in response to the application dated 26th June 2009 by the plaintiffs. The plaintiffs submitted that the defendants had admitted their acts of fraud.
38. The plaintiffs took issue with the failure by the defendants to call Peter Gatheca Gachiri as a witness. The plaintiff submitted that Peter Gatheca Gachiri was the father of the 2nd defendant and that the 2nd defendant was afraid that the said Peter Gatheca Gachiri would be arrested should he show up in court since the order he had obtained prohibiting his arrest had been discharged. The plaintiffs submitted that they were denied an opportunity to put questions to Peter Gatheca Gachiri regarding his dealings with the 2nd defendant.
39. The plaintiffs urged the court to make a finding that the suit property was sold by the 1st, 3rd and 4th defendants to the 2nd defendant while it was not part of the charged property and that after acquiring the charged property, the 2nd defendant forged the title of the suit property using the name of his old father who had remained in hiding to avoid arrest. The plaintiffs submitted that the authority that was given to the 1st plaintiff by the Commissioner of Lands on 16th July 1985 to develop the suit property had not been revoked and as such he remained the owner of the property. The plaintiffs urged the court to return the suit property to the 1st plaintiff and to order compensation for his assets that were on the suit property. The plaintiffs submitted that the 1st plaintiff had been denied an opportunity to seek a title for the suit property through adverse possession.



The 1st, 3rd and 4th defendants' submissions:

40. The 1st, 3rd and 4th defendants had not filed their submissions as at the time the date for this judgment was given. I have not seen their submissions on record and I have assumed that none was filed.

The 2nd defendant's submissions:

41. The 2nd defendant filed submissions dated 16th June 2022. In his submissions, the 2nd defendant framed five issues for determination by the court namely; whether the 2nd defendant is a bona fide occupier of the suit property, whether the 2nd defendant was responsible for the loss of the suit property by the plaintiff during the auction, whether the 1st plaintiff has satisfied the court as to the illegality of the title of the suit property, whether the 1st plaintiff had satisfied the conditions for adverse possession and lastly, whether the plaintiffs are entitled to the orders sought in the amended plaint.
42. As a preliminary issue, the 2nd defendant submitted that the amended plaint offended the provisions of Order 8 rule 7 of the Civil Procedure Rules in that the amended plaint was neither dated nor signed. The 2nd defendant submitted that in the circumstances, the plaintiffs' suit was fatally defective and had to fail. On the first issue, the 2nd defendant submitted that he conducted due diligence before entering into a lease with Peter Gatheca Gachiri over the suit property. He submitted that the search that he conducted showed that the property was registered in the name of Peter Gatheca Gachiri. The 2nd defendant submitted that he was a lawful owner of the leasehold interest in the suit property which he acquired for valuable consideration without notice. The 2nd defendant submitted that he was a stranger to the allegations of forgery made by the plaintiffs in respect of the title for the suit property.
44. The 2nd defendant submitted that if the 1st plaintiff had a genuine case of forgery in the process through which the title for the suit property was acquired, he should have brought a claim against the registered owner of the suit property, Peter Gatheca Gachiri and not against the 2nd defendant who occupied the suit property pursuant to a lease from the said Peter Gatheca Gachiri.
45. On the second issue, the 2nd defendant submitted that the movable assets claimed by the plaintiffs were on the charged property. The 2nd defendant submitted that he purchased not only the charged property but also the movable assets claimed by the plaintiffs. The 2nd defendant submitted that he owed no duty of care to the plaintiffs while purchasing the charged property and the said movable assets. The 2nd defendant submitted that it was not responsible for the 1st plaintiff's failure to service the loan he took from the 1st defendant that led to the sale of the said properties.
46. On the third issue, the 2nd defendant submitted that the plaintiffs had failed to establish that the title for the suit property was fake. The 2nd defendant submitted that in any event, any fraud related to the issuance of the title of the suit property could not be attributed to him. The 2nd defendant submitted that PW4 confirmed in her evidence that the title for the suit property was not a forgery.
47. The 2nd defendant submitted further that the 1st plaintiff was authorized by the Commissioner of Lands to develop the suit property for use as parking by his clients and the public. The 2nd defendant submitted that since the 1st plaintiff's WAB Hotel ceased to exist, the 1st plaintiff would no longer need the parking for his hotel clients. The 2nd defendant submitted further that it was unreasonable for the 1st plaintiff to claim land that was not allocated to him. The 2nd defendant submitted that the 1st plaintiff failed to prove fraud and illegality in the creation of the title for the suit property held by Peter Gatheca Gachiri and of the search dated 10th February 2009. The 2nd defendant submitted that the 1st plaintiff had not proved fraud against the 2nd defendant or anyone else in relation to the suit property. The 2nd



- defendant submitted further that the 1st plaintiff had maliciously lodged a complaint against him with the police who charged him with the offence of forgery. The 2nd defendant submitted that the charge was dismissed and he was acquitted after the 1st plaintiff failed to prove the alleged forgery.
48. On the fourth issue, the 2nd defendant submitted that the 1st plaintiff had claimed the suit property by adverse possession in paragraph 10 of the amended plaint. The 2nd defendant submitted that the 1st plaintiff had not been in occupation of the suit property for 12 years preceding the filing of the suit herein and as such he is not entitled to the suit property by adverse possession. The 2nd defendant submitted that he had been in exclusive possession of the suit property since 8th July 2009 when he entered into a lease in respect thereof with Peter Gatheca Gachiri.
49. On the last issue, the 2nd defendant submitted that the plaintiffs were not entitled to any of the reliefs sought in their amended plaint. The 2nd defendant submitted that the plaintiffs were not entitled to the mandatory injunction sought since they had failed to meet the threshold for granting such order. The 2nd defendant submitted that he had demonstrated that he was a tenant in the suit property for a period of 10 years with effect from 1st July 2009 which tenancy was renewable after every 10 years. The 2nd defendant submitted that he produced a lease and an official search in evidence in proof of his leasehold interest in the suit property. The 2nd defendant submitted that he was not a trespasser on the suit property and that the 1st plaintiff was not entitled to damages since he was not the owner of the suit property. With regard to the order sought for the 2nd defendant to allow the 2nd and 3rd plaintiffs to enter the charged property to collect and/or remove fittings thereon, the 2nd defendant submitted that the order could not be issued because the charged property was sold to the 2nd defendant together with everything else that was on and in it including the fittings that the 2nd and 3rd plaintiffs wished to collect. With regard to the reinstatement of the 1st plaintiff into possession, the 2nd defendant submitted that the order could not be issued. The 2nd defendant submitted that the suit property was registered in the name of Peter Gatheca Gachiri a fact that was known to the 1st plaintiff.
50. The 2nd defendant submitted that the plaintiffs failed to prove their claim against the 2nd defendant on a balance of probabilities. The 2nd defendant urged the court to dismiss the plaintiffs' suit with costs to the 2nd defendant.

The plaintiffs' reply to the 2nd defendant's submissions:

51. The plaintiffs filed further submissions dated 12th July 2022 in reply to the submissions by the 2nd defendant. The plaintiffs submitted that the 2nd defendant had failed to respond to the substantive matters that the plaintiffs had raised in the amended plaint. The plaintiffs submitted that the issue of the failure by the plaintiffs to sign the amended plaint should have been raised before the trial of the suit to give the plaintiffs an opportunity to respond to the same. The plaintiffs reiterated that the title for the suit property was fraudulently created and that the 1st, 3rd and 4th defendants did not have the consent of the Commissioner of Lands to transfer the suit property to the 2nd defendant. The plaintiffs reiterated also that the certificate of search dated 10th February 2009 was also a forgery. The plaintiffs submitted that the 2nd defendant was a beneficiary of the 1st, 3rd and 4th defendants' fraud. The plaintiffs submitted that the 2nd defendant was acquitted of the charges he faced in Criminal Case No. 744 of 2012 because he was neither the owner of the suit property nor the person developing the same. The plaintiffs submitted that the 1st plaintiff deserved to be allocated the suit property which in any event he had acquired by adverse possession.



Analysis and determination:

52. The parties did not agree on the issues for determination. Each party framed its own issues on which it submitted. From the pleadings, the following in my view are the issues that arise for determination in this suit;
1. Whether the 1st plaintiff was permitted by the Commissioner of Lands to develop the parcel of land known as L.R No. Nairobi/Block 75/1036 (the suit property) for use as parking by his clients and the public and whether that permission gave the 1st plaintiff title or ownership of the property.
 2. Whether the 2nd defendant dispossessed the 1st plaintiff of the suit property pursuant to the loan agreement dated 29th December 1998 between the 1st defendant and WAB Hotel, the charge dated 29th December 1998 between the 1st defendant and the 1st plaintiff, the debenture dated 29th December 1998 between the 1st defendant and WAB Hotel and the agreement for sale dated 24th October 2008 between the 2nd defendant of the one part and the 1st, 3rd and 4th defendants and WAB Hotel of the other part.
 3. Whether the 2nd and 3rd plaintiffs leased office space and a shop respectively in WAB Hotel building on L.R No. Nairobi/Block 75/1031(the charged property) and whether they had in the premises an assortment of movable properties that were taken over by the 2nd defendant.
 4. Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.
 5. Who is liable for the costs of the suit?

Whether the 1st plaintiff was permitted by the Commissioner of Lands to develop L.R No. Nairobi/Block 75/1036 (the suit property) for use as parking by his clients and the public and whether that permission gave the 1st plaintiff title or ownership of the property.

53. On 23rd December 1983, the 1st plaintiff was allocated a parcel of land that was referred to as “Unsurveyed Hotel Plot-Buruburu-Nairobi” by the Commissioner of Lands. The land that was allocated to the 1st plaintiff was to be used for hotel purposes. According to the part development plan that was attached to the 1st plaintiff’s letter of allotment, there was unsurveyed land adjacent to the land that was allocated to the 1st plaintiff that was reserved for parking. After survey, the parcel of land that was allocated to the 1st plaintiff was given land reference number Nairobi/Block 75/1031(the charged property). The 1st plaintiff was subsequently issued with a lease and a certificate of lease in respect of the charged property. After the 1st plaintiff was allocated the charged property, the 1st plaintiff wrote to the Minister for Lands and Settlement on 10th August 1984 seeking “additional site for hotel parking”. In the letter, the 1st plaintiff stated as follows in part:

“I am just about to present the building plans for construction of my hotel but my Architects have discovered due to the location of the site along two major fast roads, access to the Hotel is difficult. Due to this sir, I would request for the site in red in the plan to be allocated to me for parking purposes. If allocated the site I will use it only for the purposes of a parking for residents and members of the public.”

54. The 1st plaintiff’s application was not responded to immediately. It appears that there was a change of guard at the Ministry of Lands and Settlement. Hon. P.J.Ngei left the office and was replaced by Hon.



E.T.Mwamunga. On 19th April 1985, the 1st plaintiff wrote to the Commissioner of Lands on the issue. In his letter the 1st plaintiff stated as follows in part:

“Sometimes in July, 1984 I applied for additional site for parking purposes to the then Minister for Lands and Settlement Hon. P.J.Ngei...This plot is planned for parking purposes and my application was for the same purpose. The general area is lacking enough parking facilities and since I am just starting developing my hotel I would request authority to develop this site at the same time. ...It is intended that the parking will benefit the public at large as it will be open for their use.”

55. This letter was followed by another one dated 22nd May 1985. On 16th July 1985, the Commissioner of Lands wrote to the 1st plaintiff as follows:

“I wish to inform you that the Parking Site cannot be allocated to you but you can develop the plot for use by your clients and the public to the satisfaction of the Nairobi City Commission.”

56. In a letter dated 22nd July 1985 to the Commissioner of Lands, the 1st plaintiff noted the permission that was given to him to develop the parking site for “the benefit of my clients and the public”. In a letter dated 26th July 1985, the Commissioner of Lands informed the 1st plaintiff that in the event that he constructed a car park at the site at his costs, he would not be entitled to reimbursement of such cost. The 1st plaintiff took possession of the parking site (the suit property) on the said terms and used the same for parking for WAB Hotel and for other unauthorised purposes.

57. Due to the foregoing, it is my finding that the 1st plaintiff was not given exclusive possession or use of the suit property. The suit property was planned and reserved for public parking. The Commissioner of Lands made it very clear to the 1st plaintiff that the suit property was not available for allocation to the 1st plaintiff and that any money used in developing the parking was not reimbursable. Since the 1st plaintiff was putting up WAB Hotel that required parking, the Commissioner of Lands authorised the 1st plaintiff to develop and use the suit property for parking for its hotel clients and the public. The 1st plaintiff undertook to develop the parking site for the benefit of his hotel and the public. I am not persuaded that the 1st plaintiff acquired any proprietary interest in this parcel of land that was reserved for public use. Permission to develop land that was reserved for use by the public for parking as a parking for the 1st plaintiff’s own parking needs and for use by the public cannot by any imagination amount to alienation of such land for exclusive private use by the 1st plaintiff. The 1st plaintiff did not therefore acquire any proprietary or ownership interest in the suit property. I am unable to see how the 1st plaintiff could have continued to hang on to the suit property that he was only permitted to use for parking for his hotel clients after the said hotel was put into receivership and sold to the 2nd defendant.

Whether the 2nd defendant dispossessed the 1st plaintiff of the suit property pursuant to the loan agreement dated 29th December 1998 between the 1st defendant and WAB Hotel, the charge dated 29th December 1998 between the 1st defendant and the 1st plaintiff, the debenture dated 29th December 1998 between the 1st defendant and WAB Hotel and the agreement for sale dated 24th October 2008 between the 2nd defendant of the one part and the 1st, 3rd and 4th defendants and WAB Hotel of the other part.

58. It is common ground that the suit property was not charged to the 1st defendant. The property was therefore not the subject of the sale agreement dated 24th October 2008 between the 2nd defendant on the one hand and WAB Hotel (in receivership) and the 1st, 3rd and 4th defendants on the other hand.



At the trial, the 2nd defendant told the court that he did not acquire the suit property from the 1st, 3rd and 4th defendants. The 2nd defendant stated that he was not the owner of the suit property but a tenant in the suit property courtesy of a 10-year lease from the registered owner thereof, Peter Gatheca Gachiri. The 2nd defendant relied on the Lease dated 17th February 1984(See page 293 of PEXH.1), Certificate of Lease dated 17th February 1984(See page 283 of PEXH.1), Lease Agreement dated 29th May 2009(See page 287 of PEXH.1) and Certificate of Official Search dated 10th February 2009(See page 292 of PEXH. 1) in support of his leasehold interest in the suit property.

59. The 1st plaintiff went to great lengths to prove that the title held by Peter Gatheca Gachiri in respect of the suit property was fraudulent and that the 2nd defendant was a party to the fraud. The 1st plaintiff led evidence that the said lease, certificate of lease and certificate of official search were all forgeries. In my view, the 1st plaintiff may have succeeded in proving the existence of various anomalies in the title documents held by Peter Gatheca Gachiri in respect of the suit property. The court is however unable to make any finding on the legality or otherwise of the title held by Peter Gatheca Gachiri in respect of the suit property. This is because, for reasons only known to themselves, the plaintiffs did not deem it fit to join Peter Gatheca Gachiri as a party to the suit. It would be against the rules of natural justice for the court to condemn Peter Gatheca Gachiri without hearing him. For the 2nd defendant's alleged participation in the said acts of fraud and forgery, the 1st plaintiff lodged a complaint against the 2nd defendant with the police, the police carried out investigations and charged the 2nd defendant with the offence of forgery in relation to the title for the suit property. It is common ground that the 2nd defendant was acquitted of the charge and that no appeal was preferred against the acquittal. In the said criminal case (Milimani CMC Criminal Case No. 744 of 2012), the court (Hon. P.O.Ooko PM) held that the prosecution had failed to prove that Survey Plan No. 166/158, the lease and certificate of lease both dated 17th February 1984 in respect of the suit property were forgeries and that they were forged by the 2nd defendant. In the circumstances, it was only Peter Gatheca Gachiri who could answer the allegations of fraud and forgery directed by the plaintiffs against the title of the suit property. In his absence before the court having not been joined as a party to the suit, the issue will have to remain unresolved.
60. The 2nd defendant having denied that he purchased the suit property from the 1st, 3rd and 4th defendants and having demonstrated that the suit property was on the face of it registered in the name of Peter Gatheca Gachiri and that he is a tenant of the said Peter Gatheca Gachiri, I can find no basis on which to hold that the 2nd defendant acquired the suit property from the 1st, 3rd and 4th defendants. The 1st plaintiff had argued that the inclusion of the movable assets that were in the "Garden Bar" and "Compound" which formed part of the suit property in the schedule of the movable assets sold by the 1st, 3rd and 4th defendants to the 2nd defendant meant that the suit property had also been sold. This is far from the truth since the items referred to in the said schedule are movable properties while the suit property is an immovable property.
61. For the foregoing reasons, it is my finding that the 1st, 3rd and 4th defendants did not sell or transfer the suit property to the 2nd defendant as claimed by the plaintiffs.

Whether the 2nd and 3rd plaintiffs leased office space and a shop respectively in WAB Hotel Building on L.R No. Nairobi/Block 75/1031(the charged property) and whether they had in the premises an assortment of movable properties that were taken over by the 2nd defendant.

62. The plaintiffs had abandoned their claims in respect of the moveable properties that were on the charged property at the time WAB Hotel was put under receivership. It is not necessary therefore to determine this issue.



Whether the plaintiffs are entitled to the reliefs sought in the amended plead.

63. I have set out earlier in the judgment the reliefs sought by the plaintiffs. The 2nd defendant had contended that the plaintiffs' amended plead was neither signed nor dated as such the same was fatally defective. I have noted from the court file that the amended plead in the court file is signed by the plaintiffs' previous advocates. It is however not dated. I am of the view that failure to date a pleading does not render it fatally defective. I am of the view that this is an error that could have been corrected had it been raised earlier by the 2nd defendant. I have noted that all the defendants including the 2nd defendant responded to the amended plead without raising any objection to the same. This means that no prejudice has been occasioned to any of the defendants by the plaintiffs' failure to date the amended plead. In the circumstances, I will overlook the said irregularity in the amended plead for the sake of substantive justice.
64. The first relief sought by the plaintiffs is an injunction restraining the 2nd defendant from trespassing on the suit property. From my findings above, I am of the view that a case has not been made out for the grant of this relief. The 1st plaintiff has not proved that the 2nd defendant is occupying the suit property unlawfully. First, the 1st plaintiff has not established his interest in the suit property and secondly, the 2nd defendant's claim that he is a tenant in the suit property and not the owner thereof has not been rebutted by the plaintiffs.
65. The second relief sought by the plaintiffs is an order compelling the 2nd defendant to allow the 2nd and 3rd plaintiffs to enter the charged property and the suit property for the purposes of collecting and/or removing therefrom, 300 pieces of heavy-duty wooden chairs and 80 pieces of dining tables, heavy-duty metal chairs with wooden arms, 60 pieces of coffee tables, 24 pieces of JVC 14 inch colour TVs, Hace Safe, a lift Machine, a water heating system machine and 40 KVA Wilson Generator, machine serial No. 39644A/001 and engine serial No. 50317-U91318G which the 2nd defendant had taken possession of.
66. As mentioned earlier, the plaintiffs had abandoned their claims in respect of the movable properties that were on the charged property at the time WAB Hotel was put under receivership. The plaintiffs are therefore not seeking to enter the charged property to collect and/or remove anything therein. With regard to the suit property, I am in agreement with the plaintiffs that some of the movable properties that were on the suit property at the time WAB Hotel was put under receivership and ultimately sold by the 1st defendant belonged to the 2nd and 3rd plaintiffs. The 1st plaintiff seems to have entered into well-crafted agreements with his two companies, the 2nd and 3rd plaintiffs to ensure that most of the properties that were required for WAB Hotel were purchased in the names of the two companies and leased to WAB Hotel so that the same did not form part of WAB Hotel's assets that were the subject of a debenture in favour of the 1st defendant. The plaintiffs have demonstrated that the 40 KVA Wilson Generator in contention belonged to the 3rd plaintiff and that various movable properties that were on what was referred to in the agreement for sale dated 24th October 2008 as "Garden Bar" and "Compound" belonged to the 2nd plaintiff.
67. In their prayer seeking the recovery of these properties from the 2nd defendant, the 2nd and 3rd plaintiffs have not indicated separately the movable properties that they seek to collect from the suit property and those that were on the charged property the claim in respect of which they have abandoned. The court will assume that the 2nd and 3rd plaintiffs are seeking to recover the movable properties set out in the schedule to the agreement for sale dated 24th October 2008 under "Garden Bar" and "Compound". I have however noted that not all that is set out under "Garden Bar" and "Compound" in the said agreement have been claimed and some of the items claimed are not listed under Garden Bar and Compound. The quantities of the various items are also different. I have noted that even for the



Generator, the Serial Number is different. Doing the best I can for the 2nd and 3rd plaintiffs and using the agreement for sale dated 24th October 2008 as a guide, I will grant them access to the suit property to collect the following items in case the same are still in existence on the suit property; 40 KVA Wilson Generator Serial No. 39644A/001, 13 wooden square tables, 56 metal framed visitors' chairs and one (1) 14 inch JVC Super Multi (F Series) Television Set: Model AV-14FMG3B. These items belonged to the 2nd and 3rd plaintiffs and were not charged to the 1st defendant.

68. The other relief sought by the plaintiffs is an order reinstating the 1st plaintiff into the suit property. The suit property appears to be registered in the name of Peter Gatheca Gachiri who is not a party to this suit. The lease, certificate of lease and a search produced in court showing that he is the owner of the suit property cannot be ignored. Although the plaintiffs have termed all these documents fake, there has been no judicial pronouncement on the legality of the title held by Peter Gatheca Gachiri in respect of the suit property. This court is unable to make that pronouncement due to the plaintiffs' failure to join Peter Gatheca Gachiri to the suit. As things stand now, this court cannot reinstate the 1st plaintiff in a property owned by a person who is not a party to the suit before the court.
69. The court has also held that the 1st plaintiff has not established that he has any proprietary interest in the suit property. In the circumstances, a case has not been made out for the reinstatement of the 1st plaintiff into the suit property.
70. The last relief sought by the plaintiffs is damages. The plaintiffs have sought damages for conversion and general damages. The plaintiffs have established that the 1st, 2nd, 3rd and 4th defendants converted some of the movable properties owned by the 2nd and 3rd plaintiffs. I have however found it difficult to assess damages payable for the conversion. Normally, damages for conversion is a fair market value of the property converted. The 2nd and 3rd plaintiffs have sought orders allowing them to take possession of the properties that were converted. I am unable to see how the 2nd and 3rd plaintiffs can have the said properties and damages for their conversion at the same time. A case has therefore not been made out for damages for conversion. For general damages, the plaintiffs have not indicated the nature of the loss that they suffered that would attract general damages. Due to the foregoing, it is my finding that the plaintiffs are not entitled to the damages sought.

Who is liable for the costs of the suit?

71. Under section 27 of the Civil Procedure Rules, costs are at the discretion of the court. As a general rule, costs follow the event unless the court orders otherwise for good reason. In this suit, the plaintiffs have succeeded partially. A significant part of their claim has been disallowed. In the circumstances, I will order each party to bear its own costs.

Conclusion:

72. In conclusion, I hereby make the following orders:
 1. The 2nd defendant shall within 14 days from the date hereof grant to the 2nd and 3rd plaintiffs access to the suit property, L.R No. Nairobi/Block 75/1036 to enable the 2nd and 3rd plaintiffs to collect the following items in case the same are still in existence on the property; 40 KVA Wilson Generator Serial No. 39644A/001, 13 wooden square tables, size 3.1' x 3.1'x 2.5' Height, 56 metal framed visitors' chairs and one (1) 14 inch JVC Super Multi (F Series) Television Set: Model AV-14FMG3B.
 2. Each party shall bear its own costs of the suit.

DELIVERED AND DATED AT KISUMU THIS 2ND DAY OF FEBRUARY, 2023.



S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Mulusya in person for the Plaintiffs

Mr. Maweu for the 1st, 3rd and 4th Defendants

Ms. Wanjiku h/b for Mr. Gachie for the 2nd Defendant

Court Assistant

