



Kariuki v Harunani & another; Chief Land Registrar (Interested Party) (Miscellaneous Application E050 of 2022) [2023] KEELC 16418 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16418 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION E050 OF 2022
EK WABWOTO, J
MARCH 9, 2023**

BETWEEN

GEORGE NJOROGE KARIUKI APPLICANT

AND

SULEIMAN ABDULSHAKUR HARUNANI 1ST RESPONDENT

KARURA INVESTMENT LIMITED 2ND RESPONDENT

AND

CHIEF LAND REGISTRAR INTERESTED PARTY

RULING

1. The applicant moved this court vide an Amended Notice of Motion dated 25th May 2022 seeking for the following orders;
 1. Spent.
 2. This Honourable Court do and hereby issues an order of eviction against Suleiman Abdulshakur Harunani, Karura Investments Limited and their agents and/or servants from all that parcel of land known as L.R. Number 12422/319.
 3. This Honourable Court do hereby issues an order to Messrs Vince Hamilton Auctioneers to conduct the eviction exercise and in satisfaction of the orders granted herein.



4. The Officer Commanding Police Division, Kasarani be and is hereby directed to provide security to the Applicant and Messers Vince Hamilton Auctioneers during the eviction exercise and to maintain law and order.
2. The application is based on the grounds on the face of it and also supported by the affidavits of James Kariuki Njoroge sworn on 25th May 2022, 3rd August 2022 and 25th October 2022.
3. The application is opposed by the Respondents and the Interested Party. The 1st Respondent filed a Replying Affidavit sworn on 12th May 2022 by Suleiman Abdulshakur Harunani in opposition to the application while the 2nd Respondent filed an affidavit sworn on 9th May 2022 by Sureshchandra Richard Shah. The Interested Party also opposed the application vide affidavits filed by Charles Kipkurui Ngetich the Deputy Chief Land Registrar sworn on 21st July 2022 and Jackson Guyo sworn on 29th August 2022 and Wilfred Muchae sworn on 21st July 2022.
4. Pursuant to the directions issued by this court on 30th June 2022, it was directed that the application be heard by way of oral submissions to be made in open court and the parties were also at liberty to file and exchange their written submissions.
5. The Applicant filed written submissions dated 21st July 2022 and Supplementary submissions dated 04/08/2022, the 1st Respondent filed written submissions dated 14th September 2022 and the 2nd Respondent filed written submissions dated 19th July 2022. No written submissions were filed by the Interested party herein.
6. During the plenary hearing of the application, Learned Counsel Mr. Majimbo Georgiadis submitted on behalf of the Applicant, while Learned Counsel Mr. Ng'ang'a submitted on behalf of the 1st Respondent and Learned Counsel Mr. Elijah Mwangi and Mr. Kimani appeared on behalf of the 2nd Respondent while Learned Counsel Mr. Allan Kamau appeared on behalf of the Interested party.
7. Learned Counsel Mr. Majimbo on behalf of the applicant relied on affidavits sworn by James Kariuki Njoroge on 25th May 2022, 3rd August 2022 and 25th October 2022. It was the applicant's case that he commenced the process of evicting the 1st Respondent together with his agents and/or servants from his parcel of land in accordance with the provisions of Sections 153E of the Land Laws (Amendment) Act that amended the *Land Act* Number 6 of 2012. The Applicant argued that he had approached the court seeking orders against the 1st Respondent and his agents since he had entered into a 25 years lease agreement with the 1st Respondent on 15th October 1996. The 1st Respondent had at some point in the midst of the lease tried to falsify documents and transfer ownership of the said property to the 2nd Respondent therefore according to the Applicant, the 1st Respondent was to be evicted together with his agents that included the 2nd Respondent herein Karura Investments Ltd who were later included in the orders of eviction.
8. The Applicant deposed that he had followed due process in law by 1st issuing a notification to the 1st Respondent that his lease would expire on 15th October 2021 therefore he was to vacate the said land and handover vacant possession to the Applicant. The Applicant dispatched the said notification vide his advocates letter dated 1st October 2021. The letter was equally served on the persons that were found on site of the impugned parcel of land. The Letter was annexed to the Applicant's Bundle of Documents, named Volume 4 at page 987.
9. On 19th October 2021, the Applicant was compelled to do an eviction notice that was served on the 1st Respondent as well as the Deputy County Commissioner Westlands and Officer Commanding Police Division, Starehe. The same was equally served by the Applicant's Advocates upon the Deputy County



Commissioner, Kasarani Sub – County and the Officer Commanding Police Division, Kasarani on 2nd November 2022 after the 1st Respondent protested that the land was not within the jurisdiction of the DCC Westlands and the OCPD Starehe.

10. It was argued that Section 152F of the Act requires the occupant of the land to apply to court for relief against an eviction notice, however, the Respondents herein being aware of the notice, chose not to contest the same compelling the Applicant to approach court by way of a miscellaneous application seeking court's assistance to evict the Respondents from the impugned parcel of land. The Applicant argued that he had in his quest deemed it necessary to place before the Honourable Court all the material facts laying bear the history of the land as well as documents that demonstrated that he was the owner of the impugned parcel of land. The Applicant had anticipated that the said orders would be issued ex-parte once the court is satisfied that the Applicant is the legitimate owner, however, in the spirit of affording parties an opportunity to be heard, the court directed that the Applicant do serve the Respondents with his Application. In support of this contention, the Applicant relied on the case of Margaret Karwirwa vs Francis Kofi (2019) eKLR where Justice Munyao held that; "in as much as a reading of the provisions of section 152E would imply that such an application is heard ex – parte, I think it is good practice that the respondent be served so as to give him an opportunity to respond"
11. The Applicant in his written submissions argued that the validity of the lease agreement had not been challenged but the Respondents only refuted existence of the same contending that the signatures were a forgery. The Applicant questioned the 1st Respondent's expert's report that concluded that the signatures appearing in the lease agreement were forgeries on account of the said expert being biased since he was instructed by the 1st Respondent and had a history of fraud, lies and dishonest conduct. The Applicant referred to the evidence found at pages 13 – 16 of his affidavit sworn on 24th May 2022 in response to the Respondents' affidavits. The Applicant argued that the Respondents had together taken a similar position of merely denying the existence of the lease agreement which demonstrated that they were indeed partners in fraud.
12. It was submitted that the invoices and bills presented by the 2nd Respondents at paragraph 20 of its affidavit were not strange since the lease had given the 1st Respondent the mandate to take care of bills while on the premises. The 2nd Respondent had therefore discharged the said obligation on behalf of the 1st Respondent to further the fraud and cover up.
13. The Applicant relied on the case of Chon Jeuk Suk Kim & Another vs E.J. Austin & 2 others (2013) eKLR to argue that the lease between the Applicant and the 1st Respondent met all the requirements of a valid lease and therefore consists of a contract between the two parties capable of enforcement.
14. On the 2nd issue, the Applicant argued that he had availed the following documents to support the legitimacy of his title deed in respect of the impugned parcel of land; a sale agreement dated 3rd March 1993 between him and Arthur Magugu who was the original owner of the impugned parcel of land, copies of Application for consent, Letter of Consent and an affidavit annexed thereto, letter confirming payment of the balance dated 25th June 1993, a consent from the commissioner of lands dated 16th November 1994 and the transfer instrument itself all annexed at pages 2 - 14 of the Applicant's bundle volume 1. The said documents have been confirmed to be legitimate by the advocate who presided over the transfer of the impugned parcel of land.
15. The Applicant impugned the Respondents documents filed in rejoinder to his Application arguing that the 2nd Respondent had annexed in their documents a transfer obtained from his bundle at pages 234 and 235 meaning that they did not have in their possession any other instrument of transfer. According to the applicant that is the same transfer declared fake by the National Land Commission



- and therefore nothing could have been easier than the 2nd Respondent availing a copy of the original document in its possession if any.
16. The Applicant impugned annexure 5 attached to the 2nd Respondent's affidavit which the applicant submitted that the 2nd Respondent at paragraph 12 of his affidavit had confirmed to be fake as it purported to transfer ownership to the 2nd Respondent.
 17. It was further submitted that that the clearance certificates issued by the Nairobi City County to the 2nd Respondent were part of the scheme to falsify documents and replace the forgeries with the correct records that belong to the Applicant.
 18. The Applicant faulted the Respondents for failing to explain how land transactions processes that range from sub – divisions to land transfer that ordinarily take several weeks or months to conclude had been concluded in a day as a matter of fact in under two hours. It was contended that the said position is confirmed by the Interested Party's Replying Affidavit sworn by Charles Kipkurui Ngetich who at paragraph 4 (a -h) highlighting the process of land transfer which is not possible of being completed within a few hours.
 19. The Applicant also highlighted the following glaring inconsistencies emanating from the Respondents documents.
 - i. At paragraph (33.1 & 33.2) of the 1st Respondent and paragraph (22 d) of the 2nd Respondent's affidavits, the Respondents highlighted an unverified chronology of the birth of the suit land which came about as a result of the subdivision of LR No 12422/9 into LR No 12422/204. They clearly state that after the successful subdivision of LR No 12422/9, the title for LR No 12422/204 was subsequently issued to Arthur Kinyanjui Magugu on 25th October 1993. A perusal of the said title, annexed by the applicant at pages (237, 238 & 239) of the applicant's supporting affidavit and reproduced by the 2nd Respondent at pages (25, 26 & 27) show the time of the registration of the said title as 11.25Hrs on October 25th 1993.
 - ii. At paragraphs (33.4) and (22 g) of the said affidavits, the Respondents further state that the subsequent subdivision LR No 12422/204 resulted in parcel LR No 12422/319 and another. The Respondents stated that the resultant parcel was registered under the name of the 2nd Respondent, Karura Investments Limited, again, on 25th October 1993. A perusal of the said title annexed by the 1st Respondent at pages (41 & 42) of his affidavit and pages (19, 20 & 21) of the 2nd Respondent's affidavit shows the registration of the said title as 11.27Hrs on 25th October 1993., PRECISELY TWO MINUTES after the registration of the mother title for LR No 12422/204,
 - iii. A purported transfer in support of registration of the said title annexed by the Applicant at pages (233, 234, 235 & 236) of the applicants supporting documents and adduced by the 2nd Respondent at pages (22,23 & 24) of its affidavit and curiously executed by the alleged vendor alone is registered on October 25th 1993. A perusal of the said transfer document shows its registration at 11.27Hrs on October 25th 1993., PRECISELY TWO MINUTES after the registration of the mother title for LR No 12422/204,
 - iv. The said transfer not only refers to the transfer of a different parcel (IR No 60756) and not the suit land but is also severally and badly amended with a pen in a way so strange that it would be so frowned upon as fake even by persons with little or no expertise in land matters.
 20. It was also stated that, The National Land Commission in its verified report annexed by the applicant in his response to the Respondents Replying Affidavits at page (41 paragraph g) states "We are of the



view that it is practically impossible to register a discharge, a transfer, a subdivision, value a parcel of land along Kiambu road, assess stamp duty and pay the same all in less than three hours. To be specific by 11:27hrs. all that had been done and Titles L.R 12422/204 and coincidentally L.R No 12422/319. (Purportedly under the name Karura investments Limited) issued the same day” further stating at page (42 paragraph n) “The said irregular Transfer instrument refers to a subdivision of LR No 12422/204 and not specifically L.R 12422/319, a clear case of vague and opaque transfer which cannot be used to convey interest in land”

21. It was also stated that the same report, at page (42 paragraph L) states in regard to the deed plan attached to the title and reproduced at page (242) of the Applicant’s bundle of documents and at page (21) of the 2nd Respondent affidavit and specifically states; “The deed plan attached to the forged title is irregular and any subsequent document procured pursuant to the same is technically a nullity”
22. The applicant’s deed plan has been verified by the director of survey as legitimate and the applicant issued with a Certified True Copy on the 21st of April 2022. The same is attached on pages (48, 49, 50 & 51-64) of the Applicant’s documents in his response to the Respondents Replying Affidavits. It was noteworthy that the 1st Respondent at paragraph 34 alleged that the Applicant’s deed plan was derived from the Director of Survey’s file since its procedural that deed plans attached to a certificate of title issued by the ministry of lands are always initialled by the deed plan officer while the signed copy of the same deed plan is retained by the Director of Surveys as his file copy. The 1st Respondent allegedly gave this information to Inspector Guyo when in the course of his investigations and it appears at page 215 of the Interested Party Affidavit sworn by inspector Guyo. At page 90 of Guyo’s affidavit, he attached a sample title deed with a deed plan which had been signed by the same surveyor as opposed to being initialled which evidence contradicts the 1st Respondent’s allegations.
23. It was contended that Inspector Guyo’s evidence contained at page 90 therefore was in agreement with the Applicant’s deed plan which was certified as a true copy of the original by the Director of Surveys. The Certified True Copy appears at page 48 of the Applicant’s response to the Respondents Replying Affidavits and initially the Applicant annexed it at page 16 of his bundle of documents. This evidence is also in tandem with the two Experts’ reports introduced by the Applicant vide his affidavit in response to Inspector Guyo’s affidavit who attached sample deed plans to their report at pages 233 and 269 of the said bundle.
24. It was further contended that, In respect of the original deed file for LR No 12422/204, the representatives of the Interested Party in the verified hansard of the National Assembly which has been placed before court by the Applicant through his response to Respondents Replying Affidavits at page (28 Paragraph 6), are on record stating thus “Even if you call the Chief Land Registrar here, he will not bring a file because we do not have it. We do not know where it is unless we take time to look. We might never find it. That’s why in my response, I said that we will summon the parties. in some cases, we miss the files because of fraud. That’s the reality of land administration in our country. I want us to appreciate the extent of the problem in our ministry. It is not a small problem. It is true that the Ministry of Lands and Physical Planning is the custodian of the records..... some of them are missing permanently”.
25. According to the applicant, the National Land Commission report stated as follows “We establish that the deed file for LR No 12422/204 has been missing and/or maliciously destroyed” The position is that LR No 12422/319 (Held by Karura Investments Limited) is a forgery for the basic reason that Karura Investments Limited vide Kenya Gazette Notice No 4169 Of 20th June 2014 applied for reconstruction of lost or destroyed land register”. These acts were an attempt to sanitize the records (page 46 paragraph 7 through page 47 paragraph 1), of the Applicant’s response to Respondents Replying Affidavits. This



seemingly happened with the dubious assistance of the Interested Party whose conduct in this matter has been heavily questioned by the Applicant.

26. In that regard, the Applicant was of the view that the manner in which the Interested Party joined the proceedings without being invited, painted a clear picture that the Respondents enjoy a “special relationship” with the Interested Party. It’s possible that the Respondent’s raised the Interested Party to join the suit and support their cause other than present the Ministry’s position.
27. The Applicant argued that the court ought to equally take note that the Applicants ownership information was equally verified by Gimco Limited, a valuation company hired by the Respondents, that evidence was shared by the 1st Respondent at page (115) of his replying affidavit clearly showing results of an independent search conducted by the said company stating that the registered proprietor of LR No 12422/319 is the applicant herein George Njoroge Kariuki. The same information verified at the county rates section vide documents attached on page (129) of the said affidavit.
28. The Applicant urged that since the Respondents as well as the Interested Party had only relied on an unverified letter from the National Land Commission, the same had to be ignored and his relied upon by the court since the National Land Commission had verified the report he was relying on as authentic. The Applicant further submitted that the letter/report sought to be relied upon by the Respondents and the interested Party revealed that the it was speculative since it categorically concluded that the administrative steps to have followed due process in impugned process of transferring land to the 2nd Respondent.
29. The Applicant submitted as contained in his affidavit and backed up by medical evidence that the Respondents took advantage of his illness and tried to erase records of his ownership at the Land’s Ministry.
30. On the two decisions, one at the High Court and the other one at the Court of Appeal, the Applicant submitted that the case at the High Court was determined on a preliminary point of law therefore the court did not delve into the issues of evidence and ownership. The Applicant argued that the statement made at the Court of Appeal on ownership and which had sought to be relied upon by the 2nd Respondent was made in passing, it was not a final order or determination and no orders can be extracted from that statement.
31. The Applicant submitted that he deserved the orders sought due to all the foregoing and primarily since; he supplied the court with duly certified parliamentary Hansards in which the Cabinet Secretary Lands had confirmed that the Respondent’s had tried to interfere with the subject land’s records and that the ministry did not have in their possession any records belonging to the Respondents. The National Land Commission verified report confirmed that the Respondents documents which they have presented in court are forgeries. The Applicant produced a duly certified copy of his deed plan in support of his ownership. The Applicant provided the court with a certificate of provisional title together with certified copies of the documentation used in the process leading to issuance of the Provisional Title Certificate. He further contended that he had pointed out annexure SRS – 13 in the 2nd Respondent’s documents which demonstrated that the current advocates on record for the 1st respondent had acted for the 2nd Respondent in 2016 therefore the Respondents are partners in fraud. The Applicant equally pointed out that at paragraphs 51, 58 and 59 of the 1st Respondent’s affidavit, the 1st Respondent confirmed that he had been making complaints on behalf of the 2nd Respondent therefore he seemed to be the most affected than the 2nd Respondent.
32. He urged the court to consider this case on its own merits founded on the principles set out in the cases of David Morton Silverstein v Atsango Chesoni [2002] eKLR and Moi Education Centre Co. Ltd v



William Musembi & 16 others [2017] eKLR which also underscored the fact that the court has got jurisdiction to issue the orders sought by the Applicant.

33. The Applicant also filed Supplementary submissions that largely highlighted his response to the two affidavits by the Interested Party. The Applicant questioned Mr. Ngetich's capacity to depone upon facts on behalf of the Chief Land Registrar since he had not explained why he was undertaking the said task on behalf of the Chief Land Registrar.
34. It was submitted that Mr. Ngetich had been hand-picked to swear the affidavit since he was there to support the Respondents case other than present the record at the Land's Ministry. This is so because the Applicant attached evidence showing that Mr. Nyandoro is in charge of land registration at the lands ministry therefore he would have been the best placed to inform court on behalf of the Chief Land Registrar of the current legitimate records that the ministry has in its possession.
35. Further and in support of his averments, the Applicant submitted that Mr. Ngetich had indeed just filed documents that had been filed by the Respondents and he had not brought before the court any document that looked like it was from the Lands Ministry. The Applicant pointed out a search at page 53 of Mr. Ngetich's Affidavit which was similar in all aspect with the search presented in court by the 1st Respondent as it appears at page 40 of his documents. The said search was similar even in terms of the time stamp which fact raises an eyebrow. It would have made sense if the searches had different time stamps but the fact that they had similar time stamps points to parties who were sharing documents. According to the applicant, It was therefore extremely shocking how a Deputy Chief Land registrar failed to give the court a current and their own search but had to rely on one filed by the Respondents.
36. It was further contended that the Chief Land Registrar being the custodian of land records was expected to furnish court with what is in their records at the land's registry and not supply court with documents filed by the Respondent's.
37. The Applicant questioned Mr. Ngetich's failure to explain an independent search conducted by GIMCO and which was filed in court as evidence by the 1st Respondent as appears at page 115 of his replying affidavit. To assist the court, the registrar was expected to clear the air around such issues but he chose to ignore and focus on what the Respondent had presented in court as the position of the Chief Land Registrar.
38. The court was urged to disregard Mr. Ngetich's evidence since the court is not bound by an expert's testimony. The court has to subject it to further analysis and weigh it against the other evidence on record. The Applicant relied on the case of Kagina v Kagina & 2 Others (Civil Appeal 21 of 2017) [2021] keca 242 (KLR) (3 December 2021) to support this argument.
39. The Applicant questioned Mr. Ngetich's failure to explain how different process that include subdivision and transfers that would ordinarily take months to conclude were done in a single day.
40. The applicant stated that it was also shocking that Mr. Ngetich relied on a search obtained on ecitizen portal and yet urged the court to disregard the Applicant's search obtained on ecitizen portal on account of notice by the Cabinet Secretary Ministry of Lands issued way later after the said search had been obtained.
41. Just like the respondents, Mr. Ngetich also revisited the issue raised by the Chief Land Registrar in the Preliminary Objection which had been heard and determined, this, the applicant argued that pointed to a registrar who was not in touch with the reality of the matter.
42. The Applicant in his affidavit response to the Interested Party's affidavits at paragraph 7 questioned the charge and discharge introduced into the matter by Mr. Ngetich but largely avoided by the



- Respondents. According to the applicant a perusal of charge indicates that the charge was on Land LR Number 12422/9 as appears at pages 8 – 38 of Mr. Ngetich’s affidavit. The same charge was introduced through Mr. Guyo’s documents who alleged that it was given to him by 1st Respondent. It’s annexed at page 45 of Guyo’s bundle.
43. The Land L.R. NO 12422/9 upon which the charge was taken ceased to exist in 1989. This is per the Interested Party’s Guyo’s Affidavit at pages 174 – 180. Kamwere’s evidence as presented by Guyo seems to tally with Mr. Washington’s evidence appearing at page 908 of the Applicant’s bundle.
 44. The applicant also pointed out that the Mr. Muchae who purported to be a custodian of deed plans attached folio registers for relevant deed plans had failed to attach folio register no 190/199 in respect of LR. NO 12422/9 since it would also confirm when the said land ceased to exist. The folio nonetheless appears at page 916 volume 4 of the Applicant’s documents and its in tandem with Mr. Kamwere and Mr. Washington’s evidence. It cannot therefore happen that the discharge of the said charge on LR NO 12422/9 was done in 1993 when the land and the title were not available for such exercise.
 45. It’s also noteworthy that Inspector Guyo introduced evidence that in some aspects contradicted what had earlier been presented by the Respondents and yet he purported to have obtained the documents from the 1st Respondent who was also the complainant.
 46. It was contended that the 1st Respondent seems to have complained on behalf of the 2nd Respondent whose directors were never interviewed by Inspector Guyo despite them being at the center of the complaint. Inspector Guyo’s report therefore can’t be trusted as well. The Applicant contended that, It would seem that the 1st respondent sought to introduce some evidence through the Interested Party by having the said report.
 47. To controvert the 2nd affidavit by the Interested Party sworn by Mr. Muchae, the Applicant relied on an affidavit sworn by Renson Kakucha Mbwagwa, a licensed physical planner for 45 years. He outlined the process of land subdivision and according to his experience, it was practically impossible to subdivide land, transfer, subdivide then transfer again in a single day. He questioned the motive of Mr. Ngetich acting on behalf of the Chief Land Registrar since no registrar would assume the position he had taken in the matter and the manner he had presented his case in clear support of the Respondents.
 48. The Applicant highlighted the evidence at Page 137 of Guyo’s bundle which introduced Arthur Magugu’s specimen signature as recorded at the registrar of persons. The signature tallies with the signature in the Applicant’s documents. However, at pages 3, 36 and 48 of Mr. Ngetich’s document as well as all the documents presented by the Respondents, the signature drastically changes. This points to another fact that Mr. Ngetich simply presented documents obtained from the Respondents, Mr. Guyo who was to also support Mr. Ngetich’s case as well as the Respondent’s ended up overshooting his mandate and inadvertently presenting evidence that contradict the Respondent and the Registrar but support the Applicant.
 49. The Applicant annexed to his affidavit, an affidavit sworn by Muthaura Kiome on 19th May 2022 confirming that indeed he was present, he presided over the lease agreement between the Applicant and the 1st Respondent as well as the transfer of the impugned parcel.
 50. The Applicant reiterated that owing to the documentary evidence and affidavits filed in this matter, that Respondents herein have never held a legitimate title for L.R. No. 12422/319 and the Respondents evidence in respect to the same should be dismissed as forgeries. The court was urged to grant the orders sought in the application as prayed.



51. The 1st Respondent in opposing the application relied on the 1st Respondent's Replying Affidavit sworn on 12th May 2022 and also associated themselves with the oral submissions made by the 2nd Respondent and Interested party during the plenary hearing of the application.
52. It was averred by the 1st Respondent that the applicant had failed to demonstrate to this court how he had acquired the property. They had not provided any evidence of payment of the suit property, the sale agreement produced by the Applicant has several anomalies, the postal address was missing, the photograph of the alleged vendor Arthur Kinyanjui Magugu appears to have been photoshoped.
53. It was deposed that the 1st Respondent has never entered into any lease agreement with the applicant since the 2nd Respondent is the legal proprietor of the property.
54. It was also the 1st Respondent's case that the signature purported to be for the 1st Respondent in the lease agreement are forgeries as confined in the forensic examination report dated 25th March 2022 by Mr. Emmanuel Karisa Kenya, a Forensic document examiner.
55. It was contended that the court should take judicial notice of the fact that the 2nd Respondent's ownership of L.R. 12422/319 was reiterated by the Court of Appeal in the judgment delivered on 5th April 2019.
56. It was further contended that the applicant's allegations of bias by the Chief Land Registrar should not be allowed to stand since they have no basis.
57. The 1st Respondent also challenged the applicant's action of commencing the matter by way of miscellaneous application instead of a plaint stating that the same was not the proper procedure as it amounted to an abuse of the court process. The court was urged to dismiss the application.
58. The 2nd Respondent's oral submissions were made by Learned Counsel Mr. Mwangi. It was submitted that the 1st Respondent was a shareholder of the 2nd Respondent and not a registered owner of the suit property. It was also submitted that the 2nd Respondent acquired the suit property by way of transfer dated 25th October 1993 for valuable consideration of Kshs 24,727,170/- and since then the 2nd Respondent has had actual occupation and possession of the suit property and that the alleged ownership by the applicant is fictitious and that his documents are duplicitous and fraudulent.
59. It was contended that the orders sought by the applicant cannot be instituted by way of Miscellaneous application brought under sections 152, 152B, 152E and 152G of the Land Laws (Amendment) Act No. 28 of 2016. According to the 2nd Respondent, the applicant ought to have filed a suit through a plaint as provided for under order 3 Rule 1 of the Civil Procedure Rules. Reliance was made to the cases Lynette Nasimiyu Wafula –Vs- David Mwangi & 4 others (2022) eKLR, Rajab Kosgei Magut –Vs- Nuru Jepleting Choge (2020) eKLR, Stephen Mkalla Ngome & 10 others –Vs- Agnes Mutinda Ndeti & Another (2021) eKLR, Wambui Gikuwa –Vs- Paul Kimeri Muraba (2017) eKLR and Julius L. Maten –Vs- Caleb Arap Rotich (2021) eKLR all in support of its case.
60. Learned Counsel Mr. Mwangi also added that no notice was served upon the 2nd Respondent and hence the orders sought cannot be granted and the court was equally urged to dismiss the application with costs.
61. The Interested party did not file any written submissions but participated during the plenary hearing of the application, Learned Counsel Allan Kamau made oral submissions on their behalf. The case of the Interested Party was based on the affidavits of Charles Ngetich sworn on 21st July 2022, Wilfred Muchae sworn on 21st July 2022 and Inspector Jackson Guyo on 29th August 2022.



62. It was contended that the applicant is not the owner of the suit property and the court cannot issue the orders sought. It was also contended that the Court of Appeal in its judgment had confirmed ownership of the suit property to the 2nd Respondent. It was also submitted that the documents in the custody of the interested party do confirm ownership to the 2nd Respondent. The Counsel for the Interested party urged the court to dismiss the application with costs.
63. In response to the oral submissions that had been made by the Respondents together with the Interested party, Learned Counsel Majimbo stated that none of the Respondents or Interested Party had placed before this court its current search to confirm ownership of the property to the 2nd Respondent as alleged. No such evidence had been filed.
64. In respect to the Court of Appeal judgment, Counsel argued that the same was determined on preliminary aspects and did not delve into the merits on the issue of ownership and the same cannot be used to establish ownership of the suit property.
65. Counsel in his rebuttal submissions further submitted that all the documents that were filed by the Interested Party were obtained from the Respondents and further that the Applicant had annexed a report by National Land Commission to the effect that the Respondents documents were forgeries.
66. The court has considered the application as well as the parties affidavits and oral submissions made for and against the application. The main issue for determination is whether the application is merited to warrant the grant of the orders sought herein.
67. The Land Laws (Amendment) Act No. 26 of 2016 amended the Land Act by introducing sections 152A to 152H which deals with issues of unlawful occupation of land and eviction. Eviction arise when a person unlawfully occupies private, public or community land. Section 152 A explicitly prohibits unlawful occupation of land.
68. Section 152 (B) of Land Act as amended by the Land Laws (Amendment) Act of 2016 prohibits unlawful occupation of private, community or public land. However, the section provides that any person who seeks to carry out any eviction must do so in strict compliance with the law. Section 152B, 152C, 152D and 152E of the Act address the issue of eviction notice to unlawfully occupied land.
69. Section 152 (E) provides: -
 - “ 1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
 2.) The Notice under subsection (1) shall: -
 - a) be in writing and in a national and official language.
 - b) In the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land.
 - c. Specify any terms and conditions as to the removal of buildings, the mandatory procedures during eviction, reaping of growing crops and any other matters as the case may require and



- c. Be served on the Deputy County Commissioner in charge of the area as well as the Officer Commanding the police division of the area.”

70. From the foregoing provisions, it is apparent that the Land owner who seeks to procure and or obtain an order of eviction is obliged to issue and serve an eviction notice giving to and in favour of the unlawful occupant a period of 3 months from the date of service of the eviction notice to vacate and move out of the concerned property. On the other hand, it is also a requirement of the law that eviction notice to be served upon the unlawful occupant of the Land in question, must also be served upon the Deputy County commissioner in charge of the sub-county and area where the concerned parcel of land is located.
71. Similarly, it is also a requirement of the law that the same eviction notice must also be served upon the Officer Commanding Police Division of the area in question.
72. Before I proceed further I wish to state that this suit was instituted inter alia pursuant to Section 152E of the Land Act seeking for various orders as outlined in that provision. From a reading of Sections 152A and 152E of the Land Act it is not clear how a party ought to approach the court for a relief. However regardless of the procedure that is adopted, what matters is that the affected party is accorded an opportunity to be heard. In view of the foregoing, the applicant cannot be faulted on the procedure adopted and neither can such be a reason to defeat the Application. On whether or not the suit could be instituted vide a notice of motion, I am guided by the case of Abdi Abdulahi Sinko vs Ben Chikamai & 2 Others (2016) eKLR where Gikonyo J. held that a suit can be properly instituted by way of a notice of motion more so where the specific procedure is not clearly stipulated. The said issued even though it was again raised by the Respondents and the Interested party during the plenary hearing of the application, the same had been addressed by the Court in its ruling on the preliminary objection that was delivered on 30th June 2023.
73. In the instant case, I have seen the eviction notice that was served. The notice is dated 18th October 2021 which was served together with the letter dated 1st October 2021. The notice was also copied to the Deputy County Commissioner and the Officer Commanding Police Division. The service of the said notice was not disputed by the 1st Respondent. However, the same was disputed by the 2nd Respondent who argued that he was the registered owner of the suit property. In response to this issue, the Applicant argued that he had demonstrated that he entered into a lease agreement with the 1st Respondent who has relations with the 2nd Respondent who claims ownership and occupation of the impugned land and the applicant having proved that the 1st Respondent at all material times relevant to this case acted as an agent of the 2nd Respondent confirms the fact that the 1st Respondent introduced the 2nd Respondent to the impugned land in order to defraud the applicant of this ownership and further that since the 2nd Respondent was an agent of the 1st Respondent or vice versa, there was no need to serve the notice to the 2nd Respondent in the first place. It was contended by the Applicant that the 1st Respondent at paragraph 4 of his affidavit confirms that he was officially appointed as a consultant for the 2nd Respondent and at paragraph 13 he confirms that he was present in 1993 with the chairperson of the 2nd Respondent in a purported transfer of the impugned land to the 2nd Respondent and further that at paragraph 20 of his affidavit he confirms that he was appointed a consultant on behalf of the 2nd Respondent in respect to land matters. The applicant submitted that having demonstrated the relationship between the Respondents, the fraud and the legal relations between the applicant and the 1st Respondent in respect to the impugned land, it is imperative that an order evicting both Respondents be issued.



74. In considering this issue, it is worth noting that the applicant had reiterated that on 15th October 1996 he entered into a lease agreement with the 1st Respondent to lease the said land to the 1st Respondent for the purposes of coffee farming for a period of 25 years at a consideration of Ksh 3,800,000/- the said money was paid to the applicant on 17th October 1996 as agreed. In similarity to this position, the 2nd Respondent applied to be joined to this proceedings and actively participated in the same and further stated that it was equally using the said land by growing coffee. The 2nd Respondent in its affidavit also reiterated that the 1st Respondent is a shareholder of the 2nd Respondent and hence therefore confirming its relationship with the 1st Respondent as was averred by the Applicant. In view of the foregoing, the 2nd Respondent having successfully applied and enjoined to these proceedings and further having been given an opportunity to actively ventilate its position cannot distance itself from its existing relation with the 1st Respondent on account that no notice was served upon them.
75. In respect to the previous proceedings relating to the suit property being Court of Appeal Case of Margaret Wairimu Magugu –Vs- Karura Investment Limited & 4 others (2019) eKLR and Margaret Wairimu Magugu (suing as the administratrix of the estate of the late Arthur K. Magugu) –Vs- Karura Investment Limited & 4 others (2017), the applicant argued that the net effect of the said decisions was that the courts did not delve into issues of evidence since the matters were dismissed on pure points of law. The court has had occasion to peruse the said decisions and it agrees with the submissions made by the applicant that indeed both cases were decided purely pursuant to a Preliminary Objection that had been filed and further that the Applicant herein who was the owner of the suit property was never a party to the said matters.
76. From the affidavits that were filed herein and the extensive annexures thereto, it is evident that the applicant had followed due process in law by 1st issuing a notification to the 1st Respondent that his lease would expire on 15th October 2021 and therefore he was to vacate the said land and handover vacant possession to the Applicant. The Applicant dispatched the said notification vide his advocates letter dated 1st October 2021. The letter was equally served on the persons that were found on site of the impugned parcel of land. The Letter was annexed to the Applicant's Bundle of Documents, named Volume 4 at page 987. On 19th October 2021, the Applicant was compelled to do an eviction notice that was served on the 1st Respondent as well as the Deputy County Commissioner. The same was equally served by the Applicant's Advocates upon the Deputy County Commissioner, Kasarani Sub – County and the Officer Commanding Police Division, Kasarani on 2nd November 2022 after the 1st Respondent protested that the land was not within the jurisdiction of the DCC Westlands and the OCPD Starehe.
77. The Applicant has further placed before this court all the material facts laying bear the history of the land as well as documents that demonstrated that he was the owner of the impugned parcel of land. The Applicant also filed an affidavit sworn by Muthaura Kiome on 19th May 2022 confirming that indeed he was present, he presided over the lease agreement between the Applicant and the 1st Respondent.
78. He also availed to the court several documents to support the legitimacy of his title deed in respect of the impugned parcel of land. These documents included the following; a sale agreement dated 3rd March 1993 between him and Arthur Magugu who was the original owner of the impugned parcel of land, copies of Application for consent, Letter of Consent and an affidavit annexed thereto, letter confirming payment of the balance dated 25th June 1993, a consent from the commissioner of lands dated 16th November 1994 and the transfer instrument itself all annexed at pages 2 - 14 of the Applicant's bundle volume 1. The said documents have been confirmed to be legitimate by the advocate who presided over the transfer of the impugned parcel of land. The Applicant challenged the Respondents documents filed in rejoinder to his Application arguing that the 2nd Respondent had annexed in their documents



- a transfer obtained from his bundle at pages 234 and 235 meaning that they did not have in their possession any other instrument of transfer. It is worth noting that the applicant had averred that the same transfer had been declared fake by the National Land Commission and therefore the 2nd Respondent ought to have availed availing a copy of the original in its possession which was not done.
79. Having perused the affidavits together with the extensive annexures that were filed herein by the Respondents and the Interested Party, it is clear that the Respondents and the Interested party were unable to counter the averments made by the Applicant as to how land transactions processes that range from sub – divisions to land transfer that ordinarily take several weeks or months to conclude had been concluded in a day.
80. At this point, I wish again to reiterate inconsistencies emanating from the Respondent’s documents as was pointed out to this court by the Applicant. The same having been highlighted at the earlier part of this ruling; At paragraph (33.1 & 33.2) of the 1st Respondent’s affidavit and paragraph (22 d) of the 2nd Respondents’ affidavits, the Respondents highlight an unverified chronology of the birth of the suit land which came about as a result of the subdivision of LR No 12422/9 into LR No 12422/204. They clearly state that after the successful subdivision of LR No 12422/9, the title for LR No 12422/204 was subsequently issued to Arthur Kinyanjui Magugu on 25th October 1993. A perusal of the said title, annexed by the applicant at pages (237, 238 & 239) of the applicants supporting affidavit and reproduced by the 2nd Respondent at pages (25, 26 & 27) show the time of the registration of the said title as 11.25Hrs on October 25th 1993. At paragraphs (33.4) and (22 g) of the said affidavits, the Respondents further state that the subsequent subdivision LR No 12422/204 resulted in parcel LR No 12422/319 and another. The Respondents state that the resultant parcel was registered under the name of the 2nd Respondent, Karura Investments Limited, again, on 25th October 1993. A perusal of the said title annexed by the 1st Respondent at pages (41 & 42) of his affidavit and pages (19, 20 & 21) of the 2nd Respondent’s affidavit shows the registration of the said title as 11.27Hrs on 25th October 1993. This was on the same date after the registration of the mother title for LR No 12422/204.
81. The court has also perused the transfer in support of registration of the said title annexed by the Applicant at pages (233, 234, 235 & 236) of the applicant’s supporting documents and adduced by the 2nd Respondent at pages (22,23 & 24) of its affidavit and curiously executed by the alleged vendor alone is registered on October 25th 1993. A perusal of the said transfer document show its registration at 11.27Hrs on October 25th 1993 again showing just two minutes apart after the registration of the mother title for LR No 12422/204, the said transfer not only refers to the transfer of a different parcel (IR No 60756) and not the suit land but is also severally and badly amended with a pen in a way so strange that it would be so frowned upon as not being genuine. The National Land Commission in its verified report annexed by the applicant in his response to the Respondents Replying Affidavits at page (41 paragraph g and 42 paragraph h) had also questioned the legitimacy of the same.
82. The court has also perused the applicant’s deed plan and noted that the same has been verified by the director of survey as legitimate and the applicant issued with a Certified True Copy on the 21st of April 2022. The same is attached on pages (48, 49, 50 & 51-64) of the Applicant’s documents in his response to the Respondents Replying Affidavits. It was noteworthy that the 1st Respondent at paragraph 34 alleged that the Applicant’s deed plan was derived from the Director of Survey’s file since its procedural that deed plans attached to a certificate of title issued by the Ministry of Lands are always initialled by the deed plan officer while the signed copy of the same deed plan is retained by the Director of Surveys as his file copy. The 1st Respondent allegedly gave this information to Inspector Guyo when in the course of his investigations and it appears at page 215 of the Interested Party Affidavit sworn by inspector Guyo. At page 90 of Guyo’s affidavit, he attached a sample title deed with a deed plan which



had been signed by the same surveyor as opposed to being initialled which evidence contradicts the 1st Respondent's allegations. Inspector Guyo's evidence contained at page 90 therefore was in agreement with the Applicant's deed plan which was certified as a true copy of the original by the Director of Surveys. The Certified True Copy appears at page 48 of the Applicant's response to the Respondents Replying Affidavits and initially the Applicant annexed it at page 16 of his bundle of documents. This evidence is also in tandem with the two Experts' reports introduced by the Applicant vide his affidavit in response to Mr. Guyo's affidavit who attached sample deed plans to their report at pages 233 and 269 of the said bundle.

83. In respect of the original deed file for LR No 12422/204, the representatives of the Interested Party in the verified Hansard of the National Assembly which has been placed before court by the Applicant through his response to Respondents Replying Affidavits at page (28 Paragraph 6), they are on record stating thus "even if you call the chief land registrar here, he will not bring a file because we do not have it. We do not know where it is unless we take time to look. We might never find it. That's why in my response, I said that we will summon the parties. in some cases, we miss the files because of fraud. that's the reality of land administration in our country. i want us to appreciate the extent of the problem in our ministry. it is not a small problem. it is true that the ministry of lands and physical planning is the custodian of the records..... some of them are missing permanently". The Respondents as well as the Interested Party have not controverted the said Hansard at any point, therefore it remains critical uncontroverted evidence.
84. In conclusion, it is the finding of this Court that the applicant has been able to demonstrate compliance to the provisions of Section 152A, 152B, 152E & 152G of the Land Laws (Amendment) Act No. 28 of 2016 in so far as it relates to the procedure for moving the court while seeking eviction orders against a party and in view of the foregoing the application dated 25th May 2022 is hereby allowed in terms of prayers 2, 3 and 4. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MARCH 2023.

E.K. WABWOTO

JUDGE

In the virtual presence of:

Mr. Majimbo for Applicant.

Mr. Ng'ang'a for 1st Respondent.

Mr. Mwangi for 2nd Respondent.

Mr. Allan Kamau for Interested party.

Court Assistant: Caroline Nafuna.

