



REPUBLIC OF KENYA



**Kihagi v Yuchoka & 8 others (Environment and Land Case Civil Suit
923 of 2013) [2023] KEELC 17299 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17299 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 923 OF 2013**

MD MWANGI, J

MAY 2, 2023

BETWEEN

BERNARD NGETHA KIHAGI PLAINTIFF

AND

BERNARD GATHUNGU YUCHOKA 1ST DEFENDANT

ELIZABETH SANYA NYONGESA 2ND DEFENDANT

EPHRAIM MWANIKI MURIUKI 3RD DEFENDANT

NAOMI WANJIRU MUNA 4TH DEFENDANT

FLORA MUMBI NGIRIGACHA 5TH DEFENDANT

JAMES GAKOBO KAMAU 6TH DEFENDANT

BENSON MUIRURI KARANJA 7TH DEFENDANT

JOSEPH NGIGI NDUNGU 8TH DEFENDANT

ANTONY MWANGI KARIUKI 9TH DEFENDANT

JUDGMENT

1. The Plaintiff initiated this case by way of a Plaint dated 25th July 2013 against the 1st to the 7th Defendants. He averred that he was the legal and registered proprietor of two parcels of land known as Ruiru/Ruiru East Block 2/3340 and Ruiru/Ruiru East Block 2/3341 (hereinafter referred to as the 'suit properties', both of which he purchased from their previous registered owner, one Emily Wairimu Muhia.
2. The Plaintiff accused the seven (7) Defendants of invading, trespassing and purporting to demarcate, sub-divide and allocate themselves portions in the suit properties without his consent. He asserted



that he had on several occasions issued notices to the said Defendants to vacate his land and to stop developments therein but they have failed, refused and or ignored to heed the notices.

3. Accordingly, the Plaintiff prayed for eviction of the Defendants from the suit properties, mesne profits for the time the Defendants have been in illegal occupation of his properties and the costs of the suit.
4. The Plaintiff in support of his case filed his own witness statement dated 25th July 2013 and a list of documents of even date, listing and attaching eight (8) documents.

Statements of Defence by the Defendants

5. Upon service of the summons to enter appearance, each of the seven (7) Defendants filed a statement of defence individually. All the statements of defence were dated 10th September 2013. Each of the Defendants explained how they acquired their respective plots, either from an entity referred to as 'Cornerstone One Enterprises' or a second one referred to as 'Kiheo Investments'. They denied the Plaintiff's claim putting him to strict proof.

Reply to the statements of Defence

6. In reply to the seven (7) Defendants' statements of Defence, the Plaintiff affirmed that the entities referred to as 'Cornerstone One Enterprises' and 'Kiheo Investments' have never had legal ownership of the suit properties at any one time and could not therefore pass any good or genuine title to the Defendants. The Plaintiff insisted that he was the legal owner of the suit properties terming the two entities referred to by the Defendants as fraudsters. He asserted that the Defendants should pursue the said entities for a refund of their money.

Amended statement of Defence and Counter-claim

7. The seven Defendants thereafter appointed an Advocate who moved the court for leave to amend their statements of Defence and include a Counter-claim against the Plaintiff. Leave was subsequently granted and the Defendants through their Advocate filed a joint statement of Defence and Counter-claim.
8. In the joint statement of Defence, each of the Defendants narrated how he/she acquired his/her plot(s).
9. The 1st Defendant averred that Emily Muhia sold the suit properties (Ruiru/Ruiru East Block 2/3340 & 3341) to one Joseph Ngigi Ndung'u trading as 'Cornerstone One Investments' on or about 29th June 2007 prior to the alleged sale agreement with the Plaintiff. The 1st Defendant purchased plot No. 16 from the said Joseph Ngigi Ndungu trading as Cornerstone One Investments, took possession of the same, commenced and completed construction of a house therein.
10. On her part, the 2nd Defendant averred that Emily Muhia sold the suit properties to one Antony Mwangi Kariuki trading as 'Kiheo Investments' on or about the 3rd January 2007 prior to the alleged sale agreement with the Plaintiff. The 2nd Defendant averred that she paid the full purchase price for the plot sold to her by Antony Mwangi Kariuki trading as Kiheo Investments, took possession and proceeded to construct a house thereon.
11. Similar averments were made by the other Defendants. Each of the Defendants was occupying a plot being a sub-division which they allegedly purchased either from Joseph Ngigi Ndungu trading as Cornerstone One Investments or Antony Mwangi Kariuki trading as Kiheo Investments.
12. The Defendants counter-claimed against the Plaintiff accusing him of unlawfully and without colour of right interfering with their right to occupy their distinct parcels of land being sub-divisions of the



suit properties. The Defendants claimed against the Plaintiff for an order of permanent injunction to prohibit the Plaintiff from trespassing, dealing, evicting, or otherwise interfering with their occupation and use of their parcels of land/sub-divisions of the suit properties. They too sought the costs of the suit.

Plaintiff's reply to Defence and Defence to Counter-claim

13. In reply to the statement of Defence and Defence to Counter claim, the Plaintiff reiterated that Joseph Ngigi Ndungu trading as Cornerstone One Investments and or Kiheo Investments has never been the legal owner of the suit properties and could not pass as good title to the Defendants. The Defendants only option therefore was to pursue the said enterprises for a refund of their money.
14. The Plaintiff further stated that if the said Joseph Ngigi Ndungu and Antony Mwangi Kariuki had entered into a sale agreement with Emily Muhia, then such agreement, if any, was null and void for want of the Land Control Board Consent.
15. The Plaintiff asserted his ownership of the suit properties whose titles he insisted were intact and had not been sub-divided as alleged by the Defendants. He denied that the Defendants are entitled to the orders sought in the Counter-claim. He insisted that the Defendants were trespassers who had invaded his properties without any colour or right. He prayed that the Defendants' Counter-claim be dismissed and that judgement be entered in his favour.

8th and 9th Defendants

16. By an application dated 15th July 2014, the 8th and 9th Defendants moved the court seeking to be joined into the proceedings either as Defendants or Interested Parties. The application was allowed on 10th December 2014, with the court observing that they were not only necessary parties but also proper parties to be so joined as Defendants. They were accordingly joined into the proceedings as 8th and 9th Defendants.
17. The 8th and 9th Defendants filed a joint statement of Defence. They averred that they bought the aforesaid parcels of land from one Emily Wairimu Muhia who was the registered owner of the said parcels of land namely Ruiru/Ruiru East Block 2/3340 and Ruiru/Ruiru East Block 2/3341. Emily Wairimu Muhia, according to the 8th and 9th Defendants, allowed them to take possession of the land and divide it into small portions, which they subsequently sold to the 1st – 7th Defendants.
18. The 8th and 9th Defendants further averred that the said Emily Wairimu Muhia must have colluded with the Plaintiff because by the time he purports to have acquired or to have been registered as proprietor of the parcels of land, the said parcels had already been sub-divided and the 1st – 7th Defendants had already constructed permanent houses in their respective plots.
19. The bid by the 8th and 9th Defendants to join Emily Wairimu Muhia as a third party in this matter was unsuccessful.

Reply by the Plaintiff to the 8th and 9th Defendants' statement of Defence

20. In his response to the 8th and 9th Defendants' statements of Defence, the Plaintiff averred that he had no claim against them and that their joinder as Defendants was not only irregular but unprocedural. He averred that he bought the suit properties from the registered owner, Emily Wairimu Muhia who transferred the same to him. It is the Plaintiff's case that if the 8th and 9th Defendants ever entered into any agreement with Emily Wairimu Muhia as alleged, then the same was null and void for want of the Land Control Board consent.



21. The Plaintiff averred that at the time he entered into the agreement with Emily Wairimu Muhia, in relation to the suit properties, the same was vacant. The 1st – 7th Defendants constructed after he had purchased the suit properties.

Evidence adduced before the court

22. This matter proceeded to hearing. The Plaintiff testified as a witness in his case, affirming his position as pleaded in his Plaint. He adopted his witness statement dated 25th July 2013 as part of his evidence in chief. He produced the ten (10) documents on his list of documents dated 4th March 2021 as his exhibits in support of his case.
23. The Plaintiff asserted that he is the registered owner of the parcel of land number Ruiru/Ruiru East Block 2/3340 and Ruiru/Ruiru East Block 2/3341 which he bought from one Emily Wairimu Muhia. He exhibited the agreement dated 10th October 2009 as his Exhibit number 3. He too produced in evidence the titles in his own name.
24. The Plaintiff stated that after acquiring the titles to the two properties, he travelled out of the country. On coming back, he was shocked to find illegal structures on his land. He reported the issue to Ruiru Police Station.
25. The Plaintiff insisted that when he bought the land comprising of the two parcels, it was vacant. He therefore prayed for eviction orders.
26. In cross-examination by Mr. Nderitu Advocate, the Plaintiff stated that Emily Wairimu Muhia had not told him about an earlier agreement with other parties. He denied that his sale agreement with Emily Wairimu Muhia was backdated.
27. The Plaintiff further alleged that the Defendants had approached him in his home proposing to purchase the plots they were occupying from him but he told them that if he were to sell, he would have had to sell the whole land comprising the two parcels. The Defendants, according to the Plaintiff, told him that the plots had been sold to them using a ballot paper by some other persons.
28. In cross-examination by Mr. Wachira Advocate, the Plaintiff insisted that he was duly issued with title documents. He confirmed that the transfer document (Plaintiff Exhibit 5) was not dated and did not show that it was received in the Lands Registry. It further did not indicate the registration fee paid. The Plaintiff however, insisted that the transfer was registered and that was the reason why he had been issued with title documents. The transfer forms for the two parcels were presented on the same date.
29. The Plaintiff averred that he had visited the Land Control Board for the consent to transfer from Emily to himself though he had not produced it as an exhibit. He could not remember the exact date when he had visited the board.
30. The Plaintiff stated that he bought both parcels of land for the sum of Kshs.1,000,000/= . By the time of the agreement, the plaintiff stated that he had confirmed that there were no structures on the land; the parcels were unoccupied.
31. In re-examination, the Plaintiff explained that the application for registration document marked Plaintiff Exhibit 6 was evidence that the transfer documents were presented to the Lands' Office for registration. He obtained the titles for both parcels Ruiru/Ruiru East Block 2/3340 and Ruiru/Ruiru East Block 2/3341 on 10th January 2012.



Evidence adduced by the Defendants

32. On their part, the Defendants called a total of three (3) witnesses.
33. DW1 was Bernard Gathungu Muchoki, the 1st Defendant in this case. He adopted his witness statement dated 26th January, 2022 as his evidence in chief. He further produced the documents in the Defendants' list of documents as exhibits in support of the defence case.
34. In regard to his plot, the witness testified that he bought the same from Pastor Ngige, the 8th Defendant herein. He averred that after paying him the full purchase price, he took possession of the plot sold to him and commenced constructing thereon in the year 2008.
35. DW1 alleged that the Plaintiff was not known to him. He had not met him at any one time.
36. In cross-examination by Mr. Gachuhi Advocate, the witness, DW1 reiterated that he bought his plot in the year 2007 from Joseph Ngige. Joseph Ngige had a share certificate which he showed him and they signed an agreement with him dated 10th August 2007.
37. DW1 affirmed that he confirmed that Joseph Ngigi owned the land from the Chief's office. The receipt that he was issued with was dated 29th June 2010 being payment for 'capital fee'. He could not explain what 'capital fee' referred to. He was issued with a share certificate in the name of "Cornerstone One Enterprises" after the agreement and told to wait for the title in two (2) weeks. Since then, he has not been issued with one.
38. At the time of the agreement, Joseph Ngigi did not have a title to the land he was selling to DW1. He merely had a share certificate.
39. DW1 confirmed that he had not obtained the approval of the local authority to put up the house that he allegedly did on the suit property. He did not provide the court with any photo or any other evidence to confirm that he had actually built on the suit properties.
40. DW1 stated that he was not aware that Joseph Ngigi had actually sued Emily Wairimu Muhia in a different suit over the sit properties the subject matter of this case.
41. In re-examination, DW1 confirmed that the certificate of ownership given to him upon purchase of his plot was in the name of "Cornerstone One enterprises."
42. In responding to questions from the court, DW1 confirmed that his plot is 40 feet by 60 feet. Each of the Defendants he was representing too was claiming a similar size. Further, DW1 stated he could not tell in which of the two parcels his plot was situated in, either Ruiru/Ruiru East Block 2/3340 or Ruiru/Ruiru East Block 2/3341.
43. DW2 was Ephraim Mwaniki Muiruri, the 3rd defendant in this case. He adopted his witness statement dated 13th October 2017. He claimed that he bought his plot number 14 from Joseph Ngigi of Cornerstone One Enterprises. He identified the agreement in the Defendants' bundle on page 32.
44. DW2 affirmed that his plot was on Ruiru East Block 2/3340 which he bought at Kshs.35,000/= in the year 2007. He allegedly built on the plot in the year 2008.
45. DW2 denied that the Plaintiff bought the suit property in the year 2010 since they were already in occupation. He asserted that he lives on the suit property with his family. His house is permanent. He is not aware of any other suit involving the suit property.



46. In cross-examination, DW2 confirmed that he bought his plot from Joseph Ngigi who in turn told him that he had bought the suit property from someone known as Emily. He actually showed him an agreement with the said Emily. That was the basis upon which he bought the plot from him. He was not shown a title in the name of Joseph Ngigi.
47. DW2 stated that he was not aware of any other case between Joseph Ngigi and Emily.
48. In re-examination, the witness DW2 said that his prayer to the court was that the Plaintiff's title be cancelled. He did not know how the Plaintiff got his title.
49. DW3 was Joseph Ngige Ndung'u who adopted his witness statement dated 18th December 2014.
50. DW3 testified that he had an agreement with one Emily Wairimu Muhia dated 8th June 2007 to buy plot number 1154 together with Antony Mwangi Kariuki, the 9th Defendant. They paid a sum of Kshs.160,000/= leaving a balance of Kshs.100,000/=. The seller nevertheless gave them vacant possession upon execution of the agreement. The title was to be given in fourteen (14) days.
51. Although Emily Wairimu Muhia had been issued with the titles way back on 26th August 1988, she allegedly told DW3 that the titles were held by Nyakinyua Women Group at Gatundu.
52. According to DW3, the 1st agreement was for block 2/3340. Thereafter, they made a further agreement for block 2/3341. DW3 stated that they made an addendum agreement after they breached the 1st agreement.
53. DW3 averred that Emily was to go to the Land Control Board in December 2008 but she never did so, in respect of both parcels of land. The witness said that they sold to the other Defendants (1st – 7th Defendants) on the basis of having bought the land from Emily Wairimu Muhia.
54. In cross-examination by Mr. Nderitu Advocate, DW3 stated that the Defendants who had bought the land from him were already in possession of the plots they bought from him. All but one had built permanent houses on the plots. The sub-divisions were however unofficially done. They had not been registered.
55. In cross-examination by Mr. Gachuhi Advocate, DW3 confirmed that their agreement with Emily Wairimu Muhia was for ballot 1154. It made no reference whatsoever to parcel number Ruiru/Ruiru East Block 2/3340 or 3341. DW3 alleged that he had a confirmation from Nyakinyua Women Group that the two parcels originated from ballot 1154. He did not however produce the confirmation as an exhibit. The witness stated that he was comfortable with the ballot despite there being title documents for the two parcels.
56. DW3 confirmed that he proceeded with the sub-divisions of the land without approval from relevant authorities. He confirmed filing a case, Nairobi ELCC 158/2012 against Emily Wairimu Muhia and that judgement in the case was given on 28th May 2013.
57. Finally, DW3 confirmed that Emily Wairimu did not take them to the Land Control Board for the consent to transfer the land to them.

Court's directions

58. Upon close of the case, the court directed parties to file written submissions. Parties complied and the court has had the occasion to read the submissions with the authorities attached thereto.



Issues for determination

59. Having considered the pleadings filed in this case, the evidence adduced and the submissions by the parties, the court is of the view that the issues for determination in this matter are as follows;-
- a. Whether the 8th and 9th Defendants had and could pass a good title to the other Defendants in regard to the suit properties.
 - b. Whether the 1st – 7th Defendants could be considered to be bona fide purchasers for value without notice.
 - c. Whether the plaintiff's titles over the suit properties is valid.
 - d. Whether the Plaintiff is entitled to the orders sought.
 - e. Whether the 1st – 7th Defendants are entitled to orders sought in their counter-claim.
 - f. Orders on costs.

Analysis and Determination

A. Whether the 8th and 9th Defendants had and could pass a good title to the other Defendants in regard to the suit properties.

60. I choose to start with this issue because this case revolves around it.
61. The 1st – 7th Defendants allege to have bought plots arising from (or subdivisions of) the suit properties from the 8th and 9th Defendants who claimed ownership over the suit properties on the basis of having bought the same from one Emily Wairimu Muhia. The 8th Defendant testified in the case as DW3.
62. In his testimony, DW3 confirmed that he and the 9th Defendant had actually filed a suit against Emily Wairimu Muhia being Nairobi ELCC 158 of 2012 - Joseph Ngigi Ndungu and Antony Mwai Kariuki vs Emily Wairimu Muhia. The witness also confirmed that he was aware that judgment in the case had already been delivered on 28th May 2013.
63. The Plaintiff in his further list of documents attached the judgement in the case Nairobi ELCC 158 of 2012 as his exhibit.
64. This court had further directed that the file Nairobi ELCC 158 of 2012 be availed. That case was in fact to be consolidated and heard alongside this case. However, and from the court record, by the time the consolidation orders were made, the judgement in said case, Nairobi ELCC 158 of 2012 had already been delivered.
65. I have carefully perused the judgement in Nairobi ELCC 158 of 2012 by P. Nyamweya J (as she then was). From the judgement and the pleadings in the case, the subject matter in the case was Ruiru/Ruiru East Block 2/3340 and Ruiru/Ruiru East Block 2/3341; the subject matter of the suit now before me as well.
66. In the said case, the Plaintiffs (now the 8th and 9th Defendants), were seeking for an order of specific performance to compel the Defendant (Emily Wairimu Muhia) to effect the transfer documents to the suit properties. They were relying on the same agreement exhibited before this court in support of their case.
67. The court in the said case, upon considering the 8th and 9th Defendants' evidence dismissed the case with costs. The learned judge further observed that, "the only remedy available to the Plaintiffs in



the circumstances is the refund of money paid to the Defendant as purchase price”. The court went ahead to enter judgement in favour of their favour against Emily Wairimu Muhia for the sum of Kshs.550,000= together with interest thereon at court rates with effect from 1st November 2008, until full payment.

68. From the above judgement, it is clear that the issue has already been determined that the 8th and 9th Defendants claim over the suit property was not legally sustainable. No person can pass a better title than the one he himself has (*nemo dat quod non habet*).
69. It is the finding of this court that the 8th and 9th Defendants could not pass good title to the other Defendants.
70. The purported agreement between the 1st – 7th Defendants and the 8th and 9th Defendants purporting to sell portions of the suit properties were therefore a nullity.
B. Whether the 1st – 7th Defendants could be considered to be bona fide purchasers for value without notice
71. In the Ugandan case of *Katende Vs Haridas & Co. Limited* (2008) 2EA 173, the court stated that for a purchaser to successfully rely on the bona fide doctrine, he must prove that:-
 - i. He holds a certificate of title;
 - ii. He purchased the property in good faith;
 - iii. He has no knowledge of fraud;
 - iv. The vendor had an apparent valid title;
 - v. He purchased without notice of any fraud;
 - vi. He purchased for valuable consideration; and
 - vii. He was not party to any fraud.
72. The Court of Appeal of Kenya in the case of *Mwangi James Njehia Vs Janetta Wanjiku Mwangi & another* (2021) eKLR while largely upholding the decision in the *Katende Case* (supra), did away with the word “apparent” in condition “iv” above and stated that the condition should read, “the vendor had a valid title.”
73. From the foregoing, it is obvious that the 8th and 9th Defendants did not have a valid title(s) over the suit properties. This would have obviously come to the knowledge of the 1st – 7th Defendants had they taken their time to conduct due diligence of the ‘sellers’ title before purchasing as expected of a reasonable purchaser of land. The clear duty on their part as the purchasers in the contract of sale of land, was to conduct due diligence and inform themselves on all the relevant aspects concerning the property that he was seeking to purchase. The rule of *caveat emptor* applies to contracts for the sale of land.
74. In the case of *Joseph Muriithi Njeru vs Mary Wanjiru Njuguna & Another* [2018] eKLR, the Court of Appeal held that:-

“.....A purchaser who does not hold a title to property and who did not exercise due diligence in acquiring a registered property cannot be described as a bonafide purchase or innocent purchaser...”
75. The 7 Defendants did not conduct due diligence neither do they hold a title(s) to the suit properties. They cannot therefore rely on the bona fide doctrine.



C. Whether the Plaintiff's title over the subject properties is valid

76. In their submissions, the 3rd, 8th and 9th Defendants sought to challenge the Plaintiff's title to the suit properties in this case alleging that the transfer documents produced by the Plaintiff were undated and not stamped as having been received in the Lands Registry. Further that there was no stamp to show that the Plaintiff paid stamp duty. They allege that the transfer was fraudulent and illegal.

77. I must be quick to note that the allegations of fraud and illegality of the plaintiff's title were not pleaded in the statements of defence by either of the three (3) Defendants neither in the counter-claim filed by the 1st – 7th Defendants.

78. As regards fraud, the law is settled that fraud must not only be proved but also specifically pleaded. Tunoi JA (as he then was) in the case of *Vijay Morjaria vs Nansingh MadhuSingh Darbar & another* (2000)eKLR stated that:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

79. The Court of Appeal in *Kinyanjui vs George Kamau* (2015) eKLR while affirming the above position reiterated that:

“The burden of proof lies on he who alleges the fraud.”

80. This was not so in this matter. The allegation of fraud and the illegality having not been pleaded, the submissions on the same are baseless. From the pleadings, it is clear that the validity of the Plaintiff's title was never an issue. This court has consistently held that parties are bound by their pleadings.

81. In the case of the Independent Electoral and Boundaries Commission –vs- Stephen Mutinda Mule & 3 others (2014) eKLR the court reiterated the principle that parties in litigation are bound by their pleadings. The court in the case cited with approval the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd –vs- Nyasulu* (1998) MWSC 3 where the court quoted an article by Sir Jacob entitled, “the present importance of pleadings” published in 1960 where the author had stated that,

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rule of pleadings, for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves or at any rate one of the might feel aggrieved for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. In an adversarial system of litigation therefore, it is



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

82. The Supreme court of Nigeria on the other hand in *Adetoun Oladeji (NIG) –vs- Nigeria Breweries PLC SC91/2002* re-emphasized the principle that parties are bound by their pleadings and further stated that:-

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation.”

83. In the case of *Raila Odinga & Another –vs- IEBC & 2 others (2017) eKLR*, the Supreme Court of Kenya pronounced the essence of pleadings and stated that,

“It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

84. The Defendants by attempting to introduce a new issue in their submissions without having made an amendment to their Defence and Counter-claim were seeking to ‘travel beyond their pleadings’. That is not allowable.

85. Furthermore, in their testimonies, the 1st and 2nd Defendants’ witnesses were clear that they did not know how the Plaintiff had acquired his titles.

86. I agree with the Plaintiff’s submissions that under Section 26 of the *Land Registration Act*, a title can only be impeached on the ground of fraud, illegality and corrupt scheme. None of the highlighted grounds about has been proven against the Plaintiff.

87. Section 26 of the *Land Registration Act* provides that the certificate of title issue by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts prima facie evidence that the person named as proprietor of the land is absolute and indefeasible owner.

88. The Plaintiff in this case produced titles confirming that he is the registered proprietor of the two (2) parcels – the subject matter of this suit. This court holds that in accordance with the provisions of Section 26 of the *Land Registration Act*, the Plaintiff is the absolute and indefeasible owner of Ruiru/Ruiru East Block 2/3340 and Ruiru/Ruiru East Block 2/3341.

D. Whether the Plaintiff is entitled to the orders sought

89. The Plaintiff prays for the eviction of the 1st – 7th Defendants from the subject properties. The basis of the 1st – 7th Defendants occupation of the suit property was the agreements which they purportedly entered into with the 8th and 9th Defendants. The court has already made findings to the effect that the 8th and 9th Defendants could not pass good title to the 1st – 7th Defendants; the said Defendants further



cannot rely on the doctrine of bona fide purchaser. Accordingly, this court has no option but to grant the Plaintiff an eviction order against the 1st – 7th Defendants.

90. Having said so, the court will grant the 1st – 7th Defendants one hundred and eighty (180) days within which to remove their properties and vacate the suit properties - Ruiru/Ruiru East Block 2/3340 and Ruiru/Ruiru East Block 2/3341 failing which they be evicted without any further reference to this court.
91. The court is unable to award the Plaintiff's claim for mesne profits. A claim for mesne profits is one in the nature of special damages.
92. In the case of Karanja Mbugua & another Vs Marybin Holding Company Limited (2014) eKLR, the court expressed itself as follows:-

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of *Civil Procedure Act.*”

93. It was incumbent upon the Plaintiff to not only specifically plead but also place evidence before the court to justify the award of mesne profits. That was not done. The claim must fail.

E. Whether the 1st – 7th defendants are entitled to orders sought in their Counter-claim

94. The 1st – 7th Defendants while asserting their rights sought orders to permanently bar the Plaintiff from interfering with their parcels of land/sub-divisions of the suit properties.
95. From the court's findings that the 1st – 7th Defendants have not acquired any proprietary rights over the Plaintiff's land, this order cannot issue in their favour. They are trespassers. The prayer is disallowed and their counter-claim against the plaintiff is dismissed.

F. Costs

96. A successful party in litigation is entitled to costs unless there exists some other good reason or cause for not awarding costs to the successful party. I find no reason to deny the Plaintiff costs for the suit and the counter-claim. Accordingly, the Plaintiff is awarded costs for both the suit and the counter-claim.

Final disposition

97. The final disposition is that:-

A. The Plaintiff is granted an order of eviction against the 1st – 7th Defendants. The 1st – 7th Defendants are granted one hundred and eighty (180) days within which time they must remove their properties and vacate from the Plaintiff's parcels of land Ruiru/Ruiru East Block 2/3340 and Ruiru/Ruiru East Block 2/3341 failing which they be evicted without any further reference to this court.

B. The 1st – 7th Defendants' counter-claim against the Plaintiff is dismissed.

C. The Plaintiff shall have the costs of both the suit against all the Defendants and the cost of the counter-claim against the 1st – 7th Defendants.

98. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF MAY, 2023



M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Gachuhi for the Plaintiff

Mr. Karwanda holding brief for Wachira Maina for the 3rd, 8th and 9th Defendants

No appearance for the 1st, 2nd, 4th – 7th Defendants

Court assistant - Yvette

M.D. MWANGI

JUDGE

