



**Nanji & 3 others v Njihia & 4 others; National Land Commission (Interested Party)
(Environment & Land Case 1530 of 2016) [2023] KEELC 19148 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19148 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1530 OF 2016**

JO MBOYA, J

JULY 3, 2023

BETWEEN

PYARALI GULAMHUSSEIN NANJI 1ST PLAINTIFF

NASHIRBANU RAMZAN PAREKH 2ND PLAINTIFF

**PARINBANU NAZMUDIN XCHARANIA (SUING AS THE EXECUTORS AND
TRUSTEES OF THE ESTATE OF THE LATE SADRUDIN HABIB KASSAM
KURJI) 3RD PLAINTIFF**

HANIF MOHAMED SADRUDIN KURJI 4TH PLAINTIFF

AND

FRANCIS NJIHIA 1ST DEFENDANT

FRANK LOGISTICS LIMITED 2ND DEFENDANT

JUDY MUTHONI NGUGI 3RD DEFENDANT

FRANCIS NYAGA NJERU 4TH DEFENDANT

THE CHIEF LAND REGISTRAR 5TH DEFENDANT

AND

THE NATIONAL LAND COMMISSION INTERESTED PARTY

JUDGMENT

Background And Introduction:

1. Vide Plaintiff dated the December 7, 2016; the Plaintiffs' herein approached the Honorable court seeking for the following Reliefs;



- i. An Injunction to restrain the Defendants whether by themselves, their servants, agents or otherwise howsoever from entering or using the said property, selling, alienating, disposing, charging or any way parting with the land.
 - ii. Declaration that the registration of the suit property known as Land Reference Number 1870/1/337; in the names of the 2nd Defendant was and is null and void.
 - iii. An order for restitution of the Land known as Reference Number 1870/1/337; to the original owner the late Sadrudin Habib Kassam Kurji.
 - iv. An order directing the 1st, 2nd, 3rd and 4th Defendants to deliver the title improperly issued to them for cancelation by the Honourable court.
 - v. A prerogative order do issue directing the 5th Defendant to cancel the title known as Land Reference Number 1870/1/337; issued to the 2nd Defendant.
 - vi. In the alternative, an order of Declaration that the title of the property does vests in the rightful owner and that a provisional certificate of title be issued and restored in lands records by dispensing with the order for advertisement.
 - vii. Damages for trespass, detinue and conversion of the Plaintiffs' properties.
 - viii. Damages for unlawful Eviction.
 - ix. Mesne profit's from November 24, 2016; on a sum found to be due until payment in full.
 - x. Exemplary and punitive Damages
 - xi. Costs of this suit and interests thereon.
 - xii. Any other relief that this Honorable court deems fit and just to grant.
2. Subsequently, the Plaintiffs' procured and obtained summons to enter appearance, which were thereafter duly served upon the Defendants and the Interested Party, respectively.
 3. Nevertheless, despite being served with the summons to enter appearance and the Plaint, the 1st Defendant herein neither entered appearance nor filed any statement of defense. For good measure, the 1st Defendant did not participate in the proceedings herein and in this regard, the matter proceeded for formal proof as against the 1st Defendant.
 4. On the other hand, the 2nd, 3rd and 4th Defendants duly entered appearance on the December 14, 2016 and thereafter filed a Statement of Defense dated the December 4, 2017, albeit filed in court on February 6, 2018.
 5. Additionally, the 5th Defendant also entered appearance and thereafter filed a Statement of Defense dated the November 18, 2019, albeit filed in court on the November 19, 2019. Instructively, the 5th Defendant denied and disputed the legality and legitimacy of *inter-alia* the Letter of allotment and Certificate of title in favor of the 2nd Defendant.
 6. Notably, the 5th Defendant contended that the impugned Letter of allotment and the Certificate of Lease which were propagated by and on behalf of the 2nd Defendant pertaining to and concerning the suit property were fraudulent and forgeries.
 7. Other than the foregoing, the Interested Party herein neither entered appearance nor filed any pleadings or at all. Furthermore, the Interested Party also did not participate in the proceedings.



8. Having articulated and highlighted the totality of the pleadings which were filed by the respective Parties, it is now appropriate to venture forward and attend to the Evidence that was tendered and/or adduced by the respective Parties.

Evidence By The Parties

a. Plaintiffs' Case:

9. The Plaintiffs' case revolves and gravitates around the Evidence of two witnesses, namely, Hanif Mohamed Sadrudin and Geoffrey Atungu Naburi, who testified as PW1 and PW2, respectively.
10. It was the testimony of PW1, that same is the son of one Sadrudin Habib Kassam Kurji, now deceased, who was the registered and lawful proprietor of Land Reference Number 1870/1/337, located on Jalaram Road, within Westland's Area.
11. Furthermore, the witness testified that the deceased was issued with a Lease over and in respect of the suit property for a term of 99 years. In any event, the witness averred that the Lease which was issued to and in favor of the deceased lapsed on or about the year 2003.
12. Nevertheless, it was the testimony of the witness that the deceased commenced the process of renewal of the Lease in question prior to and before his death. Be that as it may, the witness testified that the deceased passed on the 30th May 2009; and that prior to the death of the deceased, same had executed a will and in respect of which the deceased bequeathed the suit property to Amina Sadrudin Habib Kassam Kurji and the witness herein.
13. Further and in addition, the witness testified that the deceased named Three Executors in the will and the executors to the will were the 1st, 2nd and 3rd Plaintiffs, respectively.
14. It was the further testimony of the witness that when the Lease in respect of the suit property lapsed, the deceased indeed applied for renewal of the lease pertaining to and concerning the suit property. For good measure, the witness averred that the application for renewal was done by the deceased, albeit through the uncle of the witness, who was acting on behalf of the deceased. In any event, the witness added that the sum of KES 20, 000/= was indeed paid on account of the application for renewal of the lease.
15. Notwithstanding the foregoing, the witness testified that on or about the year 2016; a group of persons proceeded to the suit property and broke into the suit property and thereafter chased a way the caretaker who was resident in the suit property. Furthermore, the witness averred that the group of persons who had invaded the suit property thereafter took possession of the suit property and started laying a claim thereto.
16. On the other hand, the witness averred that after the group had taken possession of the suit property same continued to damage assorted fixtures and furniture which were in the suit property.
17. Additionally, the witness testified that later on the group of persons, who had invaded the suit property assumed ownership of the suit property and it subsequently transpired that the invaders were acting on instructions of the 4th Defendant, namely, Francis Nyaga Njeru, who was claiming to be the owner of the suit property.
18. It was the further testimony of the witness that the 4th Defendant herein later on brought a Bulldozer to the suit property and demolished the building that was standing on the suit property, albeit without the permission and/or consent of the Plaintiffs herein.



19. Arising from the foregoing, the witness averred that same was constrained to and indeed lodged a Complaint with the National Police Service, Parklands Police Station, pertaining to and or concerning the offensive activities by and on behalf of *inter-alia* the 4th Defendant.
20. Other than the foregoing, the witness also testified that same also lodged a complaint with the National Land Commission who thereafter undertook a comprehensive review of the circumstances leading to the issuance of certificate of title to and in respect of the 2nd Defendant herein. In this regard, the witness averred that National Land Commission thereafter rendered a determination over and in respect of the complaint.
21. Furthermore, the witness also testified that during the public hearing by the National Land Commission, various witnesses were summoned to testify. In addition, the witness averred that among the witnesses who testified before the National Land Commission were Charles Kipkirui Ngetich, Principal Land Registration Officer; Steven Onyino Mukobe, Principal Land Administrative Officer and Seargent Gilbert Okello, an officer from the Directorate of Criminal Investigations Land Fraud Unit, respectively.
22. It was the testimony of the witness that arising from the testimony/evidence of the named witnesses, it transpired that the Letter of allotment and the certificate of lease, bearing the name of the 2nd Defendant, were never executed by the authors thereof. In particular, the witness averred that the Letter of allotment was never executed by the Stephen Onyino Mukobe, as alleged.
23. On the other hand, the witness also testified that it also transpired that the Certificate of Lease which was bearing the name of the 2nd Defendant was premised and anchored on a fraudulent Deed Plan.
24. Further and in addition, the witness testified that during the time when the 4th Defendant and his team entered upon and took possession of the suit property, same undertook massive destruction of the suit property and especially, the Building that was standing thereon.
25. Other than the foregoing, it was also the testimony of the witness that prior to the offensive activities by and on behalf of the 2nd, 3rd and 4th Defendants; same (witness) had intended to renovate the suit property and thereafter to rent out same to prospective tenants. In this regard, the witness testified that same had received several enquiries from prospective tenants, who were willing to pay monthly rents of KES 150, 000/= only.
26. Owing to the foregoing, the witness has averred that the Plaintiffs herein, himself included, have therefore lost Monthly rents of KES 150, 000/= only with effect from December 2016. Consequently and in this regard, the witness adverted to a claim for mesne profits.
27. Furthermore, it was also the testimony of the witness that arising from the demolition of the building that was located on the suit property, the 4th Defendant herein was duly charged with various and assorted counts before the Chief Magistrate's Court. Be that as it may, the witness averred that arising from the offensive demolition, same proceeded to and engaged Kenstate Valuers, a registered valuation firm, to carryout and undertake a valuation exercise in respect of the suit property.
28. Additionally, the witness averred that pursuant to and arising from the instructions given to the valuation firm, a Valuation Report was duly prepared and same has been availed to the Honourable court.
29. In this regard, the witness stated that the value of the suit property was established to amount to KES 40, 000, 000/= only, whereas the value of the improvement was assessed in the sum of KES 10, 500, 000/= only.



30. Consequently and based on the foregoing, the witness herein has thus implored the court to proceed and grant various reliefs, *inter-alia*, compensation on account of Mesne Profits.
31. Furthermore, the witness alluded to the witness statement dated the October 2, 2020 and thereafter sought to adopt and rely on the contents of the said witness statement. In this regard, the witness statement dated the October 2, 2020 was duly admitted and constituted as the Evidence- in- chief of the witness.
32. The witness thereafter alluded to the List and Bundle of Documents dated the July 6, 2020; containing a total of 22 Documents. In this regard, the witness sought to adopt and rely on the documents in question.
33. At the instance and request of the Witness, documents numbers 1 to 16; 18, 19, 21 and 22 were produced and marked as Plaintiffs Exhibits, seriatim. However, documents number 17 and 20 were Marked for identification.
34. Further and in addition, the witness also alluded to the List and Bundle of Documents dated the October 2, 2020; containing 28 Documents and same sought to adopt and rely on the various documents enumerated thereunder. In this regard, the various documents alluded to at the foot of the List dated the October 2, 2020; were duly admitted as Exhibits before the Honourable court, save for documents number 17 and 20, respectively.
35. For good measure, documents numbers 17 and 20 were marked as Plaintiff's MFI P39, and P42 respectively, awaiting production by the authors thereon.
36. Other than the foregoing, the rest of the documents contained and alluded to at the foot of the List dated 2nd October 2020; were produced and marked as Plaintiffs' Exhibits P23 to P50, respectively.
37. Additionally, the witness also alluded to a List and bundle of documents dated the 7th December 2016; containing 9 documents. In this regard, the witness sought to adopt and rely on the named documents, which were enumerated at the foot of the List dated the 7th December 2016.
38. In the absence of any objection to the said documents, (details in terms of the preceding paragraph), same were duly admitted and produced as Exhibits 51 to 59, respectively.
39. On cross examination by Learned Counsel for the 2nd, 3rd and 4th Defendants, the witness averred that the suit property in question had a Lease. Further, the witness added that the Lease in respect of the suit property expired in the year 2003.
40. Nevertheless, the witness averred that his uncle made an application , albeit on behalf of the deceased for purposes of renewal of the Lease over and in respect of the suit property.
41. Whilst under further cross examination, the witness testified that the deceased herein, who was the owner of the suit property had generated a will and in respect of which the suit property was bequeathed to the witness and his Mother, respectively.
42. Additionally, the witness testified that after the expiry of the Lease, the land/suit property reverted to the Government of the Republic of Kenya. In any event, the witness added that the Lease in respect of the suit property was not renewed in the names of the Plaintiffs' herein.
43. It was the further testimony of the witness that after his (witness) uncle had applied for renewal of the Lease, the witness herein made various follow ups to facilitate the renewal of the Lease.



44. Other than the foregoing, the witness testified that same was neither issued nor served with an Enforcement notice. However, the witness added that same has produced and tendered before the Honourable court a copy of the Enforcement Notice relating to the suit property.
45. In answer to a further question on cross examination, the witness averred that the Enforcement notice which same has produced before the Honourable court was procured and obtained during the Public hearing, which was conducted before the National Land Commission.
46. Furthermore, the witness testified that even though same procured and obtained a copy of the Enforcement Notice, same however did not challenge the contents of the Enforcement notice or at all.
47. Further and in addition, the witness also averred that the impugned demolition, which was carried out over and in respect of the property/building, which was standing on the suit property, was neither carried out nor undertaken by the City County Government of Nairobi. To the contrary, the witness added that the demolition was carried out by the 4th Defendant herein.
48. On cross examination by Learned counsel for the 5th Defendant, the witness stated that same is testifying for an on behalf of the rest of the Plaintiffs. However, the witness admitted that same has not filed any written documents/authority executed by the rest of the Plaintiffs.
49. Additionally, the witness herein admitted and acknowledged that the 2nd Plaintiff has since died/passed on. Nevertheless, the witness added that the 1st and 3rd Plaintiffs are however alive.
50. It was the further testimony of the witness that the Lease over and in respect of the suit property (albeit erroneously alluded to as L.R No. 1870/1/377) has not been extended in favor of the Plaintiff.
51. Be that as it may, it was the testimony of the witness that the Lease in question is in the process of being extended. In addition, the witness averred that the question of renewal/extension of the Lease was being pursued by the 3rd Plaintiff.
52. Whilst under further cross examination, the witness averred that there was a demolition which took place in December 2016. In this regard, the witness averred that arising from the impugned demolition, same lodged a complaint/made a report to Parklands Police Station.
53. Other than the foregoing, the witness averred that same received and enforcement notice from the City County Government of Nairobi. However, the witness clarified that the copy of the Enforcement notice which same received and has been availed to the court was procured during the public hearing that was conducted before the National Land Commission.
54. The 2nd witness who testified on behalf of the Plaintiffs was Geoffrey Atungu Naburi. Same, testified as PW2.
55. It was the testimony of the witness that same is a holder of Bachelors of Arts (Land Economics) from the University of Nairobi. Further, the witness added that same is a licensed and registered valuer.
56. In addition, the witness also averred that by virtue of being a registered valuer, same is competent and authorized to undertake valuation of properties. In this regard, the witness testified that same indeed visited the suit property and thereafter prepared a Valuation Report dated the 22nd November 2019.
57. Having identified the Valuation Report dated the 22nd November 2019, the witness herein thereafter sought to produce the valuation report as an Exhibit before the Honourable court. For good measure, the valuation report dated the 22nd November 2019; and which had hitherto been marked for identification as MFI 20; was thereafter admitted and produced as Plaintiffs' Exhibit P20.



58. On cross examination by Learned counsel for the 5th Defendant, the witness averred that same was duly instructed on the October 7, 2019, with a view to undertake site visitation and preparation of a valuation report.
59. Further and in addition, the witness averred that upon receipt of the instructions, same proceeded to and visited the suit property. However, the witness added that by the time he visited the suit property, the Main house which was located on the Suit Property had long been demolished.
60. Be that as it may, the witness testified that the Servant Quarters was however still standing on the suit property.
61. Further and in addition, the witness averred that by the time same carried out and undertook the valuation exercise, the Lease over and in respect of the suit property had expired in the year 2003.
62. Whilst under further cross examination, the witness averred that by the time he did the valuation exercise, the main house had been demolished. However, the witness added that same was able to ascertain and confirm that what was hitherto standing on the suit property was a Three bedroomed Mansionate.
63. Additionally, the witness testified that same was able to ascertain the nature of the building that was sitting on the suit property. For good measure, the Witness confirmed that the Building was a mansionate, based on the Building Plans which were availed to him by the Plaintiffs herein.
64. Other than the foregoing, the witness has averred that whilst preparing the valuation report, same undertook comparative analysis as against comparative Properties situate and or located within the neighborhood. However, the witness admitted that the Valuation Report does not however, contain details of the properties, if any, that were used for purposes of comparison.
65. It was the further testimony of the witness that same thereafter reached and or arrived at the figures contained at the foot of the Valuation Report and that same are based on the remainder of the Leasehold Interests.
66. Nevertheless, the witness admitted that the valuation exercise and the figures contained therein, would drastically change, if the term of the Lease was not renewed.
67. With the foregoing testimony, the Plaintiffs' case was duly closed.

b. 1st Defendant's Case

68. Though the 1st Defendant was duly served with the summons to enter appearance and Plaintiff, same neither entered appearance nor filed any Statement of Defense.
69. Having neither entered appearance nor filed any Statement of Defense, the 1st Defendant herein therefore never participated in the instant proceedings. For good measure, the case against the 1st Defendant proceeded on the basis on Formal proof.

c. 2nd, 3rd and 4th Defendants' Case:

70. The 2nd, 3rd and 4th Defendants case revolves around the Evidence of one witness, namely, Francis Nyaga Njeru, who testified as DW1.
71. It was the evidence of the witness that same is a Director of the 2nd Defendant herein. Furthermore, the witness also clarified that the 3rd Defendant is also a Director of the 2nd Defendant. Consequently, the



- witness adverted to the Statement of Defense dated the 4th December 2017; and thereafter intimated to the Honourable court that same was testifying on behalf of the named Defendants.
72. Additionally, the witness herein averred that same was aware that what comprises of the suit property was hitherto known as Land Reference Number 1870/1/290, but which was subdivided and thereafter gave rise to, *inter-alia*, Land Reference Number 1870/1/337 (now the suit property) and Land Reference Number 1870/1/338, respectively.
 73. Furthermore, the witness testified that the suit property herein was previously registered in the names of one Sadrudin Habib Kassam Kurji, now deceased, whereas Land Reference Number 1870/1/338 was registered in the name of Nazmudin Habib Kassam Kurji, respectively.
 74. On the other hand, the witness averred that the registration of the suit property to and in the name of Sadrudin Habib Kassam Kurji, was however dependent on the term of the Lease and not otherwise. For good measure, the witness added that the original owners/leasee of the suit property were granted a Lease over and in respect of the suit property for a period of 99 years WEF June 1, 1904.
 75. Additionally, the witness testified that the Lease interests over and in respect of the suit property and which was conveyed to and in favor of the Plaintiff's predecessor was bound to lapse and indeed lapsed on the 2nd June 2003. In addition, the witness averred that neither the Plaintiffs herein nor their predecessor in title applied for renewal of the Lease over and in respect of the suit property before the June 2, 2003.
 76. Furthermore, the witness averred that insofar as the Lease over and in respect of the suit property was not renewed in favor of the Plaintiffs' or their predecessor in title; the suit property reverted back to the Government of the Republic of Kenya and therefore the Republic of Kenya was at liberty to alienate and/or allocate the suit property to any deserving person, the 2nd Defendant not excepted.
 77. It was the further testimony of the witness that upon the reversion of the suit property to the Government of the Republic of Kenya, the Government of the Republic of Kenya subsequently allocated the suit property comprising of the old and abandoned house thereof to the 2nd Defendant. In this regard, the witness added that by the time the suit property was being allocated to the 2nd Defendant there was no one/ person residing within the suit property.
 78. On the other hand, the witness also testified that on the 2nd December 2016, the City County Government of Nairobi directed that the old and abandoned structure which was standing on the suit property was unfit for human habitation. In this regard, the witness averred that the City County Government thereafter issued a Letter dated the 2nd December 2016; and in respect of which same demanded that the 2nd Defendant does demolish the structure standing on the suit property and in default same (2nd Defendant) to stand/face prosecution under the provisions of the Physical Planning Act.
 79. Additionally, the witness testified that vide the same Letter dated the 2nd December 2016, the City County Government of Nairobi had also indicated that in the event of default by the 2nd Defendant to comply with the terms of the Letter, the City County Government will proceed to demolish the impugned structure, albeit of the expense of the 2nd Defendant.
 80. Arising from the foregoing, the witness averred that the 2nd Defendant, being a law-abiding company thereafter proceeded to and complied with the directives issued by the Nairobi City County.
 81. Other than the foregoing, the witness testified that the allotment of the suit property and the consequential registration of the suit property in the name of the 2nd Defendant, has vested and or



- bestowed upon the 2nd Defendant lawful and legitimate rights and interests to the 2nd Defendant. In this respect, the witness averred that the 2nd Defendant is therefore entitled to exclusive occupation, possession and use of the suit property.
82. Furthermore, the witness testified that any title held by the Plaintiffs over and in respect of the suit property, would therefore be illegal and bad in law. In any event, the witness added that the Plaintiffs herein never applied for renewal of the Lease which inhered in their predecessors or at all.
 83. Other than the foregoing, the witness alluded to the Witness statement dated the January 2, 2018; and whose contents have been reproduced herein before. For good measure, the witness sought to adopt and rely on the contents of the named witness statement.
 84. For completeness of record, the contents of the witness statement dated the January 2, 2018; were therefore admitted as the Evidence- in chief of the witness herein.
 85. Further and in addition, the witness herein alluded to the List and Bundle of documents dated the January 2, 2018; comprising of 8 documents and sought to adopt and produce same as Evidence/ Exhibits before the Honourable court.
 86. Consequently and at the instance of the witness, the documents at the foot of the List dated the January 2, 2018; were produced and marked as Exhibits, save for document number 8; which was marked for identification. For good measure, documents number 1 to 7 were admitted and marked as exhibits D1 to D7, respectively.
 87. On cross examination by Learned Counsel for the 5th Defendant, the witness herein admitted and acknowledged that same is one of the Directors of the 2nd Defendant. Further and in addition, the witness stated that the 2nd Defendant is indeed claiming ownership of the suit property.
 88. On the other hand, the witness averred that same (witness) got to know of the existence of the suit property from a Land Registrar by the name of Mr. Birundu.
 89. It was the further testimony of the witness that after he (witness) got to know of the availability of the suit property from Mr. Birundu, same visited the offices of land, namely, Ardhi House, and talked to a Land registrar working thereat.
 90. Nevertheless, the witness admitted and conceded that it was not common for a Land Registrar to call Parties and inform same about the details of Plots whose Leases were about to expire.
 91. Additionally, the witness averred that after Mr. Birundu had called and alerted him (witness) about the properties whose Leases were expiring, same proceeded to and applied for allotment over and in respect of four (4) properties, *inter-alia*, the suit property.
 92. Furthermore, the witness herein averred that after same applied for allotment of the 4 properties, *inter-alia*, the suit property same took the application Letters to the Ministry of Land. However, the witness conceded that application Letter in respect of the suit property did not bear the date of preparation.
 93. On the other hand, the witness averred that after same had applied for allotment of the four Plots, *inter-alia*, the suit property, same received verbal approval that his application for allotment had been approved.
 94. Other than the foregoing, the witness also testified that Mr. Birundu, Land Registrar; who had called him and alerted him (witness) about the availability of the suit property, was however was not working at Ardhi House in the year 2008. For good measure, the witness clarified that Mr. Birundu was at the point in time working at the Lands Offices at Mombasa.



95. Other than the foregoing, the witness stated that the Letter of allotment was issued in favor of the 2nd Defendant herein. Nevertheless, the witness added that same is not aware of any denial/dispute emanating from the Ministry of Land.
96. Whilst under further cross examination, the witness stated that same is aware of an officer known as Stephen Onyino Mukobe. In any event, the witness added that the said officer works at the Ministry of Lands.
97. Further and in addition, the witness stated that he has since gathered and established that the officer (Mr. Onyino Mukobe) who is said to have signed the Letter of allotment in favor of the 2nd Defendant; has indeed denied the signature at the foot of the Letter allotment.
98. On the other hand, the witness admitted that though the Letter of allotment had indicated that the allottee (read 2nd Defendant) was to generate a Letter of acceptance and make payments of the statutory charges within 30 days from the date of issuance; same however admitted that no Letter of acceptance and no payments were made within the stipulated 30 days period.
99. For good measure, the witness herein acknowledged that the Bankers cheque, a copy of which has been tendered before the Honourable court was extracted on the October 28, 2015.
100. Furthermore, the witness averred that same was not aware that the impugned Letter of allotment had lapsed or at all. In any event, the witness added that same went to the Ministry of Lands and was informed that the suit property had not been allocated to anyone else.
101. It was the further testimony of the witness that after he visited the Ministry of Lands and talked to two officers, namely, Enock Otuori and Mochoge, respectively same (witness) was allowed to proceed and pay the statutory levies alluded to at the foot of the Letter of allotment.
102. Whilst under further cross examination, the witness however admitted that same did not procure and or obtain any written document from the officers whom he spoke to, with a view to confirming that the suit property was still available for him (witness) to proceed and pay.
103. Additionally, the witness alluded to the Enforcement Notice which was said to have been issued by the City County Government of Nairobi. However, when referred to paragraph 17 of the witness statement wherein the witness had admitted that it is the 2nd Defendant, who carried out the offensive demolition, the witness stated that the impugned demolition was not carried out by the 2nd Defendant.
104. For the avoidance of doubt, the witness stated that he now wishes to change his testimony and to state that neither the 2nd Defendant nor himself undertook the offensive demolition.
105. On the other hand, the witness herein also admitted that he was aware that Mr. Charles Kipkirui Ng'etich, the Land registrar, who is said to have signed the certificate of Lease has since denied the signature at the foot of the certificate of lease. In any event, the witness also admitted that he is aware that both the Letter of allotment and certificate of lease have been subjected to Forensic Document Examination by the Directorate of criminal Investigations.
106. Further and in addition, the witness herein also admitted that arising from the investigations pertaining to the propriety and validity of the Letter of allotment and the certificate of Lease, same has since been arrested and charged with various counts of forgery vide Criminal Case Number 1998 of 2016.
107. Whilst responding to a further question in cross examination, the witness herein acknowledged and admitted that same is aware that a complaint was lodged with the National Land Commission, who proceeded to and undertook investigations pertaining to the propriety and validity of the Grant/



- Certificate of Lease over the suit property. Furthermore, the witness also admitted that he is aware that the report by the National Land Commission has been filed before the Honourable court.
108. Nevertheless, the witness stated that even though he is aware that the report by National Land Commission has been filed before the Honourable court, same has never bothered to read or appraise himself of the outcome of the said proceedings.
 109. On cross examination by Learned Counsel for the Plaintiffs, the witness averred that the application for allotment of the suit property was made by the 2nd Defendant herein. Further, the witness added that the application was signed by himself (witness), albeit on behalf of the 2nd Defendant.
 110. Furthermore, the witness admitted that at the time when he applied for allotment of the suit property on behalf of the 2nd Defendant, same indicated that the suit property had an Old and abandoned House.
 111. Other than the foregoing, the witness admitted that the Letter of allotment which was issued to and in favor of the 2nd Defendant contained special conditions relating to and concerning issuance of Letter of acceptance and payments of the statutory levies alluded to in the body of the Letter of allotment.
 112. Additionally, when referred to the Lease instrument, the witness herein admitted that the Lease Instrument does not have the date of execution thereof by the Leasees. Further, the witness also admitted that the Lease document is also not registered.
 113. For good measure, the witness acknowledged that the segment of the Lease instrument which has been produced on behalf of the 2nd Defendant relating to execution is blank.
 114. Whilst under further cross examination by the Plaintiff, the witness stated that the structure which was standing on the suit property was not demolished by himself or the 2nd Defendant. In fact, the witness added that his people who were on the suit property were indeed chased away.
 115. Other than the foregoing, the witness averred that he did not personally attend and/or appear before the National Land Commission. However, the witness added that same sent/dispatched an advocate to represent us (2nd, 3rd and 4th Defendants).
 116. As concerns the proceedings before the National Land Commission and the outcome thereon, the witness stated that same is privy to and aware of the fact that the report has been filed before the court. Nevertheless, the witness reiterated that despite the fact that the report has been filed before the Honourable court, he has not bothered to read it.
 117. In respect of the Enforcement Notice, the witness stated that same was addressed to the owner/ developer of the suit property. Furthermore, the witness added that the Enforcement Notice was in respect of stopping further developments on the suit property.
 118. Further and whilst still being cross examined on the enforcement notice, the witness stated that though same is aware that the enforcement notice was duly issued and served; same is however not aware of who signed the enforcement notice.
 119. Other than the foregoing, when asked why he has not bothered to read the report and the findings by National Land Commission, the witness stated that he has not read same because he has his own documents, to prove ownership of the suit Property.
 120. With the foregoing testimony, the case by the 2nd, 3rd and 4th Defendants was duly closed.



d. The 5th Defendant's Case

121. The 5th Defendant's case revolves and gravitates on the Evidence of three witness, namely, Mr. Charles Kipkirui Ng'etich, Stephen Onyino Mukolwe and Seargent Gilbert Okello, respectively. For good measure, the witnesses herein testified as DW2, DW3 and DW4.
122. On the part of DW2, same testified that he is currently the Deputy Chief Land Registrar, working in the Ministry of Lands, Public Works Housing and Urban Development.
123. Furthermore, the witness testified that by virtue of his office, same is charged with various duties, *inter-alia*, registration of titles, signing of searches, building plans, Deed Polls, Power of Attorney and other Registrable Instruments, lodged with the Ministry of Lands.
124. It was the further testimony of the witness that same has come across two certificate of leases relating to, *inter-alia*, Land Reference Number 1870/1/337 (the suit property) and Land Reference Number 1870/1/338, respectively which are said to have been signed by himself. However, the witness stated that having looked at the signatures which are purported to belong to him, same clarifies that the said signatures do not belong to him.
125. Further and in addition, the witness also averred that having looked at handwriting affixed against the 1st entries in the Certificate of Leases bearing the name of the 2nd Defendant, same also confirms that the impugned handwriting does not belong to him.
126. In respect of the usage of the impression C. K Ng'etich -212; the witness avers that his stamp impression has apparently/evidently been forged.
127. Other than the foregoing, the witness herein pointed out that having reviewed the totality of the documents, *inter-alia*, the Memorandum of registration, the Certificate of Lease and the various entries relating to the suit property, same avers that he did not act on and/or attend to the impugned transactions.
128. Further and in addition, the witness herein alluded to the witness statement dated the November 18, 2019; and sought to adopt and rely on the contents of the named witness statement. In this regard, the contents of the named witness statement were thereafter adopted and constituted as the Evidence-in chief of the witness.
129. Other than the witness statement, the witness herein also alluded to the List and Bundle of documents dated the 18th November 2018; containing a total of 59 documents. However, the witness stated that same was only privy to and conversant with 6 documents therein.
130. At the request and instance of the witness, documents numbers 24, 25, 26, 27, 34 and 55 were thereafter produced as Exhibits on behalf of the 5th Defendant.
131. On cross examination by Learned Counsel for the Plaintiffs, the witness herein averred that the suit property herein had a Part Development Plan which had hitherto been prepared and which delineates the extent and acreage of the suit property.
132. Furthermore, the witness averred that even though it is purported that the Certificate of title/Leases were issued in favor of the 2nd Defendant over and in respect of the suit property, same however clarified that he (witness) did not sign the certificate of lease. For good measure, the witness stated that the impugned signature contained at the foot of the Certificate of lease does not belong to him.



133. Further and in addition, the witness added that his signature which has been affixed at the foot of the impugned certificate of Lease is a forgery.
134. Other than the foregoing, the witness averred that same has previously given evidence before the National Land Commission and in a criminal case, wherein the 4th Defendant has been charged with various counts of forgery and utterance of fraudulent documents.
135. On cross examination by Learned Counsel for the 2nd, 3rd and 4th Defendants, the witness stated that same does not recall/remember having signed the impugned certificate of lease in respect of the suit property.
136. On the other hand, the witness averred that there is usually a day book and wherein the entries relating to documents lodged for registration are entered on a daily basis. However, the witness added that same has not adduced and/or tendered before the Honourable court a copy of the day book.
137. Whilst under further cross examination, the witness admitted that the stamp impression C. K -212 belongs to him, but the one affixed on the Certificate of Lease respecting the suit property appears to have been forged.
138. Furthermore, the witness added that the impugned document and in particular, the Certificate of Lease in respect of the suit property does not appear to have originated from the Lands office.
139. The other witness who testified on behalf of the 5th Defendant is Stephen Onyino Mukolwe. For good measure, the witness stated that same is the Principal Land and Administration Officer currently station at Kisumu. In addition, the witness clarifies that he is an employee of the National Land Commission.
140. It was the further testimony of the witness that between the years 2007 and 2008, same was working at Ardhi House/Ministry of Lands Headquarters and that same is privy to and aware with the application that was made by Kurji Family pertaining to and concerning Land Reference Number 1870/1/337 and Land Reference Number 1870/1/338, respectively. For coherence, the witness pointed out that the Kurji Family brought an application for extension of Leases in respect of the two named parcel of lands.
141. Additionally, the witness testified that upon receipt of the Application for extension of Leases as pertains to the two named properties, same proceeded to and called for the respective files and thereafter same confirmed that indeed the parcel filed showed that the parcels of land in question belonged to the Kurji family.
142. Furthermore, the witness averred that after confirming the contents of the parcel file and upon ascertaining that the named properties belonged to the Kurji family, same wrote a letter dated 2nd April 2007; and referenced number 80995/32; for extension of the Lease relating to Land Reference Number 1870/1/337 and Land Reference Number 1870/1/338.
143. Other than the foregoing, the witness also added that same also visited the two properties, in respect of which he had issued the Letter for extension of Lease and confirmed that indeed the two properties, inclusive of the suit property, were developed and were under the occupation of the Kurji Family.
144. Besides, the witness averred that after he had initiated the process relating to the extension of the Lease, same referred the Plaintiffs herein, who were following up on the extension of Lease to a surveyor for purposes of complying with other aspects necessary towards processing the extension of the lease.



145. Other than the foregoing, the witness herein has alluded to a Letter of allotment dated the 6th January 2009; and which is said to have been signed by himself. However, the witness has averred that having looked at the signature affixed at the foot of the impugned Letter of allotment, same confirms that the signature does not belong to him. For good measure, the witness contended that the impugned signature is a forgery.
146. Additionally, the witness has alluded to the witness statement dated the 18th November 2019; and has sought to adopt and rely on same. In this regard, the witness statement dated the 18th November 2018 was thereafter adopted and constituted as the further Evidence of the witness.
147. On the other hand, the witness herein referred to the List and Bundle of documents dated the 18th November 2019; and same identified Three documents namely, documents number 8, 22 and 23 respectively. In this regard and in the absence of any objection, the named documents were admitted as further Exhibits on behalf of the 5th Defendant.
148. On cross examination by Learned Counsel for the 2nd, 3rd and 4th Defendants, the witness stated that same was not aware whether a document lodged at the Ministry of Land would require a day book. However, the witness added that there is ordinarily a procedure when a document was/ is lodged at the Land registry.
149. Furthermore, the witness pointed out that depending on the nature of the documents, the Registry staff would minute the receipt/lodgment of such documents.
150. Whilst under further cross examination, the witness herein further clarified that same is the one who worked/acted upon the parcel file in respect of the suit property. In any event, the witness added that when a Lease expires the land at the foot of the expired Lease reverts to the Government of the Republic of Kenya.
151. It was the further testimony of the witness that where land reverts to the Government, the Government would have a right to alienate the land to any deserving Party.
152. Upon being referred to the Letter of allotment dated the 6th January 2009 and which was alleged to have been signed by same; the witness clarified that the impugned signature at the foot of the said Letter of allotment does not belong to him.
153. When pressed further on the question of the signature, the witness repeated and reiterated that he did not execute and/or sign the impugned Letter of allotment. For good measure, the witness underscored that the impugned signature was a forgery.
154. On cross examination by Learned Counsel for the Plaintiffs, the witness testified that same is the one who wrote and executed the Letter dated 2nd April 2007; relating to the extension of the Lease in respect of Land Reference Number 1870/1/337 and Land Reference Number 1870/1/338, respectively.
155. Further, the witness added that the Letter for extension was addressed to the Director of Physical Planning, Director of Survey and The Commissioner of Land, respectively.
156. On the question of execution of the Letter of allotment dated the 6th January 2009; the witness repeated that same did not execute the impugned Letter of allotment. In any event, the witness added that same had hitherto testified before the National Land Commission, wherein he confirmed that the Letter of allotment was a forgery
157. The last witness who testified on behalf of the 5th Defendant was Sargent Gilbert Okello; Police No. 81416, attached to the Directorate of Criminal Investigations Land Fraud Unit.



158. It was the testimony of the witness that a complaint was lodged with the Directorate of criminal investigations (DCI) by the Ministry of Land and Physical Planning vide Letter dated the 6th December 2016 and in respect of which the Ministry of Lands, requested that the investigation commence and undertaken over and in respect of, *inter-alia*, the validity of the Letter of allotment dated the 6th January 2009 and the Certificate of lease which was issued in respect of the suit property.
159. Furthermore, the witness averred that upon the complaint being lodged with the DCI, the investigations was assigned to Inspector Mohamed and himself (witness). In this regard, the witness testified that same thereafter proceeded to and commenced investigations pertaining to and concerning the ownership of, *inter-alia*, the suit property herein.
160. It was the further testimony of the witness that in the course of investigation, same summoned various claimants including the 4th Defendant herein as well as the Plaintiffs. Besides, the witness also added that same also perused various correspondence and documents relating to ownership of the said property.
161. Other than the foregoing, the witness testified that in the course of his investigations, same proceeded to the Survey of Kenya, wherein he subjected two Deed Plans which were availed to him by the 2nd Defendant herein for verification.
162. In this regard, the witness testified that it transpired that the Deed Plan which was purported to have been signed by one P. F Njoroge; was indeed a forgery. In any event, the witness added that it also transpired that the impugned Deed Plan was signed on the 20th October 2015, which was a public holiday.
163. Furthermore, the witness also testified that the signature of another officer, namely, Francis Kimani Ngugi, who is also said to have verified and signed the Deed Plan also turned out to be a forgery.
164. Other than the foregoing, the witness added that he also had occasioned to interrogate Mr. Stephen Onyino Mukobe and Mr. Charles Kipkirui Ng'etich, who are said to have signed the Letter of allotment and the Certificate of Lease, respectively, in favor of the 2nd Defendant.
165. Be that as it may, the witness pointed out that the two officers clarified and confirmed that the signatures appearing at the foot of the Letter of allotment and the Certificate of Lease, respectively, did not belong to same. For good measure, the witness clarified that the impugned signatures were forgeries.
166. On the other hand, the witness also testified that same was also able to visit the Ministry of lands ICT office and wherein same established that the ICT system was being manipulated by an officer named Abner Bangi; with a view to distort the obtaining records and to legitimize the fraudulent certificate of lease in respect of, *inter-alia*, the suit property in favor of the 2nd Defendant.
167. Further and in addition, the witness herein also testified that same also visited the offices of the City County Government of Nairobi to authenticate the validity of an Enforcement Notice, which was said to have been issued by the City County Government. However, it was the evidence of the witness that the impugned Enforcement notice was similarly a forgery and same had no records from the City County Government of Nairobi.
168. In fact the witness procured and obtained assorted documents from the City County Government of Nairobi including the memo dated the 15th December 2016, which clearly confirm that no such notice had been issued in respect of, *inter-alia*, Land Reference Number 1870/1/337 and Land Reference Number 1870/1/338 or otherwise.



169. Finally, the witness herein testified that at the conclusion of the investigations, same complied the findings and outcome of investigations which were thereafter escalated to the office of the Director of Public Prosecution for further action and advise.
170. Furthermore, it was the testimony of the witness that the office of the Director of Public Prosecution thereafter advised that the 4th Defendant be arrested and charged with various offenses, *inter-alia*, forgery and fraudulent utterance of documents. For good measure, the witness added that indeed the 4th Defendant was thereafter arrested and charged vide Criminal Case Number 1998 of 2016, which is still on going.
171. Other than the foregoing, the witness alluded to the witness statement dated the 18th November 2019; and thereafter sought to adopt and rely on the contents of the witness statement. In this regard, the witness statement under reference was duly admitted and constituted as Evidence in chief of the witness.
172. Furthermore, the witness also alluded to the list and bundle of documents dated the 18th November 2019; and sought to produce assorted documents contained therein. For coherence, the witness herein sought to produce documents numbers 1 to 7; 9 to 21 and 24 to 59, respectively.
173. There being no objection to the production of the named documents, same were produced and admitted as Evidence before the court on behalf of the 5th Defendant herein.
174. On cross examination by Learned Counsel for the Plaintiffs, the witness herein averred that same was the investigating officer arising out of the complaint that has been mounted on behalf of the Ministry of Lands and Physical Planning. Furthermore, the witness also stated that in the course of carrying out the investigations, same procured and obtained assorted documents from the Ministry of Lands as well as from the 4th Defendant herein.
175. Additionally, the witness testified that after procuring and obtaining assorted documents from various quarters, same arrived at the conclusion that the Letter of allotment and the Certificate of Lease which were issued in favor of the 2nd Defendant were forgeries. In this regard, the witness added that he thereafter recommended the arrest and charging of the 4th Defendant who is a director of the 2nd Defendant.
176. On cross examination by Learned Counsel for the 2nd, 3rd and 4th Defendants, the witness pointed out that the criminal case wherein the 4th Defendant has been charged is still pending before the Chief Magistrate. For good measure, that even though there was an appeal arising out of an Interlocutory matter, the said appeal was heard and disposed of.
177. Further and in addition, the witness averred that the criminal matter before the Chief Magistrate is currently having a date for mention.
178. In respect of the Letter of allotment, the witness repeated and reiterated that same turned out to be a forgery. In this regard, the witness stated that the officer who is purported to have signed the impugned Letter of allotment has disowned/denied the signature thereunder.
179. Similarly, the witness also pointed out that the Certificate of Lease in favor of the 2nd Defendant and concerning the suit property was also found to be a fraud. Instructively, the witness reiterated that the signature of the Land registrar was also forged.
180. With the foregoing testimony, the 5th Defendant's case was duly closed.



Submission By The Parties

181. Upon the close of the 5th Defendant's case; the advocates for the Parties, namely Plaintiffs, 2nd, 3rd and 4th Defendants and the 5th Defendant, respectively; agreed to file and exchange written submissions.
182. Pursuant to and in line with the agreement of the advocates for the Parties (details in terms of the preceding paragraph), the Honourable court proceeded to and circumscribed timelines for the filing and exchange of written submissions. In this regards, the Parties thereafter filed and exchanged written submission, which submissions formed part of the record of the court.
183. Without belaboring the point, the Plaintiffs herein filed two set of written submissions dated the 2nd May 2023; and Rejoinder submissions dated the 29th June 2023, respectively.
184. On behalf of the 2nd, 3rd and 4th Defendants, it is instructive to underscore that elaborate submissions dated the 30th May 2023 were duly filed and in respect of which Learned counsel for the named Defendants implored the Honourable court to dismiss the Plaintiffs suit on the basis that the claims therein had not been proved to the requisite standard as prescribed by the provisions of Section 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya.
185. For completeness, it is instructive to point out that the Honorable Attorney General does not appear to have filed written submission on behalf of the 5th Defendant. Instructively, no such submission were discernable from Case Tracking System (CTS) of the court or otherwise.
186. Having highlighted the details of the submissions that have been filed by and on behalf of the respective Parties, I beg to point out that the issues amplified therein shall be considered in the body of the Judgment herein and the case law cited shall also be examined, where appropriate.

Issues For Determination

187. Having reviewed the Pleadings filed by and on behalf of the respective Parties; having taken into account the Evidence tendered (oral and documentary); and upon consideration of the written submissions, whose details have been highlighted elsewhere herein before; the following issues do arise and are thus worthy of consideration.
 - i. Whether the Plaintiffs' suit pertaining to and concerning the suit property is lawful and legitimate.
 - ii. Whether the Letter of allotment dated the January 6, 2009 and issued in favor of the 2nd Defendant is lawful and legitimate.
 - iii. Whether the 2nd, 3rd and 4th Defendant have any lawful rights and/or interests over and in respect of the suit property.
 - iv. Whether the Plaintiffs herein have any legitimate rights and/or interests to and in respect of the suit property or better still; whether the suit property Lawfully belongs to the Plaintiffs.
 - v. What Reliefs, if any; ought to be granted.



Analysis And Determination

Issue Number 1; Whether the Plaintiffs' suit pertaining to and concerning the suit property is lawful and legitimate.

188. It is common ground that the suit property belonged to and was registered in the name of Sadrudin Habib Kassam Kurji, now deceased, in whose favor a certificate of lease was duly issued.
189. Furthermore, there is no gainsaying that the Lease to and in favor of the named Sadrudin Habib Kassam Kurji was to subsist up to and including the 1st June 2003, same being the last Date of the Lease.
190. Be that as it may, it is imperative to state and underscore that upon the lapse of the lease over and in respect of the suit property, the leasee thereof, namely Sadrudin Habib Kassam Kurji, now Deceased, commenced the process of renewal thereof and indeed generated a Letter dated the 2nd April 2007, wherein same sought for renewal of the lease over and in respect of the suit property.
191. For good measure, the Letter under reference was thereafter acted upon by the Commissioner of Lands who signaled her indication to renew/extend the Lease in question and *inter-alia*, sourced for comments from the various Departments and/or concerned bodies. See the letter dated the 2nd April 2007.
192. Be that as it may, prior to and or before the process leading to the renewal of the lease could be completed and/or completed; one Sadrudin Habib Kassam Kurji passed on the 30th May 2009. However, before same passed on, the deceased had generated a will and in respect of which same appointed the 1st, 2nd and 3rd Plaintiffs as the Executors/ executrix of his will.
193. On the other hand, evidence was also tendered that pursuant to the will which was left behind by the deceased, same had bequeathed the suit property to and in favor of Amina Sadrudin Habib Kassam Kuriji and Hanif Mohamed Sadrudin Habib Kassam Kurji, the latter who is the 4th Plaintiff herein.
194. Instructively, it is evident and apparent that the two beneficiaries pursuant to and by dint of the last Will of the deceased were Amina Sadrudin Habib Kassam Kurji and the 4th Plaintiff herein. Consequently, it suffices to underscore that the 4th Plaintiff is by virtue of the last will of the deceased a beneficiary of the said Estate.
195. Arising from the fact that the 4th Plaintiff is a beneficiary of the Estate of the Deceased and not the executor and or administrator thereof; Learned counsel for the 2nd, 3rd and 4th Defendants has therefore raised and canvassed the issue of legal capacity by the said 4th Plaintiff to mount and/or commenced the instant suit.
196. According to Learned counsel for the 2nd, 3rd and 4th Defendants, suits/ proceedings on behalf of the Estate of a deceased can only be commenced by either the executors or the duly appointed Legal administrators of the named Estate and not otherwise.
197. Premised on the foregoing, Learned counsel for the 2nd, 3rd and 4th Defendants has therefore implored the Honourable court to find and hold that the suit by and on behalf of the 4th Plaintiff has therefore been mounted by and on behalf of a person without the requisite Locus standi. Consequently and in this regard, Learned counsel has therefore implored the Honourable court to find and hold that the suit on account of the 4th Plaintiff is incompetent and legally untenable.
198. Whilst urging the foregoing submissions, Learned counsel for the 2nd, 3rd and 4th Defendants had cited and quoted the case of [*Patrick Kiseki Mutisya \(Suing as the personal representative of the Estate of*](#)



Nzomo Mutisya v K B Shaghani & Sons Ltd & Another (2012)eKLR, *Lawrence Gachau Kibu v Mary Wangu Maina & another* (2014)eKLR and *Haym v CITI Bank NA* 1987 1AC 730, respectively.

199. Having reviewed the submission by and on behalf of the 2nd, 3rd and 4th Defendants, pertaining to and concerning whether the 4th Plaintiff as a beneficiary of the Estate of the Deceased, can mount and/or maintain the instant suit, I beg to state and underscore that under the Law of succession, a suit by and on behalf of the estate of a deceased can only be commenced and maintained the Executors/Executrix under will; or a duly appointed Legal administrator.
200. For good measure, it is important to underscore that the capacity to file and or commence a suit on behalf of the Estate of a Deceased is only donated vide a Will, (which is subject to grant of probate) or vide grant of Letters of administration, pursuant to and in line with the provisions of Section 82 of the *Law of Succession Act*, Chapter 160 Laws of Kenya.
201. Consequently and in the premises, it is therefore common knowledge that only the Executors/ Executrix or the Legal Administrator/Administratrix of the Estate of the deceased; can mount and maintain a suit and not otherwise.
202. For the sake of clarity, it is imperative to highlight and amplify that neither a Son nor Daughter of the deceased; or such other beneficiary of whatsoever nature can commence and/or originate a suit on behalf of the Estate of a deceased and in the event such a suit is filed, then same is incompetent and legally untenable.
203. For good measure, it is instructive and worthy to take cognizance of the succinct exposition of the law by the Court of Appeal in the case of *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR, where the court stated and observed as hereunder;

As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased's estate. That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled.

A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In Otieno v Ougo (supra) this Court differently constituted rendered itself thus:

"... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception."

204. Furthermore, the Honorable court proceeded and stated as hereunder;

It therefore matters not that the respondent had a cause of action. Indeed the issue was not whether he had a cause of action or not but that he lacked the requisite locus standi to seek relief from the Court without first obtaining letters of administration. In any case being aware that there was a purported Will alleged to be in existence, he ought to have moved the court to have the appellant propound the Will or renounce the executorship and if need be then proceed to challenge the "Will".

205. Notably and without belaboring the point, it is apparent and discernable that one only accrues and acquires Locus standi to commence and originate a suit for and on behalf of the Estate of a deceased person, where one is an executor/executrix or where a Grant of Letters of administration has been issued by a court of competent Jurisdiction.



206. Other than the foregoing, there is no gainsaying that a beneficiary, irrespective of the affinity to the deceased, cannot originate and/or commence a suit, on behalf of the Estate of the deceased, for whatsoever purpose. Simply put, if any suit be commenced by such a beneficiary, then the suit is incompetent.
207. Having made the foregoing remarks, it is now appropriate to revert back to the subject matter and to make a proclamation as to whether or not the 4th Plaintiff herein has the requisite Locus standi to commence and or maintain the instant suit for and on behalf of the Estate of the Deceased.
208. To my mind and taking into account the clear position of the law, which has been repeated times without number, dating back to the dictum in the Trouistic International Limited case, there is no gainsaying that the 4th Plaintiff herein is not imbued and/or seized of the requisite legal capacity to commence and/or maintain the instant suit.
209. Consequently and in the premises, it suffices to point out that the suit by the 4th Plaintiff herein is no doubt a non-starter. In this regard, the suit by and on behalf of the 4th Plaintiff is therefore premature, misconceived and legally untenable.
210. In a nutshell, the suit by and on behalf of the 4th Plaintiff therefore merits being struck out. Consequently, same is hereby struck out.
211. Nevertheless, it is imperative to point out and to underscore that even though the suit by and on behalf of the 4th Plaintiff has been struck out, the striking out of the suit on behalf of the 4th Plaintiff does not mean that the evidence which was tendered by the 4th Plaintiff becomes meaningless and devoid of probative value.
212. Further and in addition, it is worthy to recall that the 4th Plaintiff, who testified as PW1 pointed out that same was not only testifying on his own behalf but also on behalf of the rest of the Plaintiffs, even though same latter on admitted that the 2nd Plaintiff is since deceased.
213. In the premises, I beg to state and underscore that even though I have struck out the suit by and on behalf of the 4th Plaintiff on account of lack of Locus standi, the evidence which was tendered however remains in situ. For good measure, it is worthy to reiterate that a Party to a suit can endeavor to prove his/her claim, either by personal testimony or through the testimony of a competent witness, who is knowledgeable of and conversant with the facts of the case.
214. Notably, PW1 who testified before the Honourable court indicated that same was knowledgeable of and conversant with the facts of the matter before the court. In this regard, even though the witness lacked the requisite locus standi to sue by himself, but nevertheless, the witness could very well appear before the Honourable court and testify as a competent witness in respect of a suit filed by and on behalf of the lawful Executors of the Estate of the deceased.
215. In this regard and to highlight the point that Parties to a suit do not necessarily need to testify by themselves, it is instructive to adopt and reiterate the dictum of the court of appeal in the case of *Julianne Ulrike Stamm v TiWi Beach Hotel Ltd* [1998] eKLR, where the court held thus;

“There is no reference in this rule to plaintiff himself, giving evidence first or at all. But a plaintiff is bound to produce evidence in support of the issues, which he is bound to prove and which evidence can be given by any competent witness not necessarily himself. A plaintiff does not have to be personally present when he is represented by duly instructed counsel as was the case here. It is for a plaintiff’s counsel to decide how to prosecute his case. If a plaintiff can prove his case by the evidence of someone else he does not have to be



present at the hearing of the suit. Similarly, if a plaintiff can prove his case by means of legal arguments only, he does not also have to be physically present at the hearing of the suit so long as his advocate is present to prosecute his suit. In short, according to Order 17 rule 2(1), a plaintiff can prove his case by the evidence of a witness or witnesses other than himself, or by the arguments of his counsel and we say with no hesitation whatsoever, that the point taken by Mr. Kirundi could be described as an abuse of the process of court and that the acceptance of this point and the reasons for this in the ruling by the learned judge were not only surprising but also totally erroneous.”

216. Finally, it is worthy to reiterate that the last Will of the deceased was duly proved and propounded before the court culminating into a Grant of Probate which was issued by the court on the 5th April 2011 vide Nairobi HCC Succession Cause No. 292 of 2010. See the Certificate of confirmation of grant duly signed by Hon. Justice D K Maraga, Judge,(as he then was), and which was produced as exhibits on behalf of the 5th Defendant herein.
217. Additionally, the certificate of confirmation of grant named the 1st, 2nd and 3rd Plaintiffs as the executors of the Estate of the deceased. Consequently, there is no gainsaying that the 1st, 2nd and 3rd Plaintiffs herein were/are seized of the requisite capacity to commence and maintain the instant suit.
218. Other than the forgoing, PW1 conceded that the 2nd Plaintiff has since died and/or passed on. In this regard, it is trite and established that the suit by and on behalf of the 2nd Plaintiff thereof ceases to exist by operation of the law. See the Provisions of Order 24 of the [Civil Procedure Rules, 2010](#).
219. Notwithstanding the foregoing, it is imperative to highlight that the death of one or more of the co-administrators/executors, does not negate and/or invalidate the validity of the Grant of Probate or Letters of administration. For good measure, the Grant of probate/grant of Letters of administration, shall remain valid and effective under auspices of the surviving executors/legal administrators.
220. Premised on the forgoing exposition, it is therefore my humble finding and holding that the 1st and 3rd Plaintiffs herein who are the survivors, are seized of the legal mandate to continue with the administration of the Estate of the Deceased and where necessary, to mount any civil proceedings for purposes of protecting/vindicating the rights of the Estate.
221. In respect of the foregoing, it is worthy to take cognizance of Section 81 of the [Law of Succession Act](#), Chapter 160 Laws of Kenya.
222. For ease of reference, Section 81 (*supra*) is reproduced as hereunder;

81. Powers and duties of personal representatives to vest in survivor on death of one of them
Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.

223. In view of the foregoing, it is my humble albeit considered position that despite having struck out the name of the 4th Plaintiff from the suit; the instant suit remains alive on behalf of the 1st and the 3rd Plaintiff in their capacities as the Executors of the Estate of the deceased in terms of the grant of probate issued on the 5th April 2011 and duly signed by Justice Maraga J, (as he then was).



Issue Number 2; Whether the Letter of allotment dated the 6th January 2009; and issued in favor of the 2nd Defendant is lawful and legitimate.

224. As pertains to the Letter of allotment, it is instructive to recall the testimony that was given by DW1, being a director of the 2nd Defendant herein.
225. To rehash the testimony of DW1, it is worthy to recall that same testified that he (witness) received a phone call from a Land Registrar, namely, Mr. Birundu; who informed him of the availability of the suit property herein for allocation. Further, the witness added that upon receipt of the call from the named Land registrar, he visited the Ardhi House/Ministry of Land and thereafter he (witness) made an application to be allocated *inter-alia* the suit property.
226. First forward, the witness testified that pursuant to and rising from the Letters of application which were made to the Ministry of Land, the Letter of allotment dated the January 6, 2009 was crafted and ultimately issued in favor of the 2nd Defendant herein.
227. Furthermore, the witness testified that upon receipt of the Letter of allotment, the 2nd Defendant ultimately generated a Bankers cheque dated the 20 October 8, 2015; which was thereafter transmitted to the Office of the Commissioner of Lands for purposes of payments of the monies alluded to at the foot of the Letter of allotment.
228. It is instructive to note and underscore that the impugned bankers cheque which is dated the 28th October 2015; was issued to and in favor of the Commissioner of lands. However, there is no gainsaying that the office of the commissioner of land was abolished and rendered non-existent upon the promulgation of the Constitution 2010, which came into effect on the 27th day of August, 2010.
229. Additionally, it is imperative to highlight that upon the promulgation of the Constitution 2010, an Independent and Constitutional Commission known as National Land Commission was established by dint of Article 67(2) of the Constitution 2010.
230. Without going for the overkill, it would be remiss and/or foolhardy of me not to mention that thereafter the National Assembly enacted the National Land Commission Act, No. 5 of 2012; which was duly assented to and became effective on the May 7, 2012.
231. Having made the foregoing remark and observations, the point that needs to be held in suspense herein and which shall be thereafter reverted to; presently is whether a Bankers cheque could be issued and be payable to the office of the Commissioner of Land on the October 28, 2015 or at all. Besides, the big question would be whether a Bankers cheque can be payable to a non-existent body?
232. I will endeavor to keep the debate in terms of the preceding paragraph in abeyance for a short while. Nevertheless, what I must now engage with relates to the fact as to whether or not the terms of the Letter of allotment dated the 6th January 2009; were (sic) ever complied with or otherwise.
233. To begin with, there is no gainsaying that the impugned Letter of allotment had indicated that the addressee/allottee thereof was called upon to, *inter-alia*, accept the terms of the Letter of allotment and to make payments pertaining to the statutory levies within 30 days of the issuance thereof.
234. Taking into account the express and explicit terms of the Letter of allotment, it is important to state and observe that the allottee was therefore obliged and obligated to ensure that a Letter of acceptance was generated and submitted within 30 days and further to ensure that the payment of the statutory levies was also made within the prescribed timeline.



235. However, it is evident and apparent that the allottee of the suit property, namely, the 2nd Defendant neither generated a Letter of acceptance nor made the payment of the statutory levies within the statutory/prescribed duration alluded to at the foot of the Letter of allotment.
236. The question that does arise and which merits discussion is whether the impugned Letter of allotment dated the January 6, 2009; was still alive and available as at the February 11, 2016, when the Bankers cheque dated the October 28, 2015; was allegedly being paid to and received by the Commissioner of land, which in any event was non-existent.
237. To my mind, the Letter of allotment alluded to very explicit and clear terms, which ought to have been complied with. Furthermore, the moment the terms of the Letter of allotment were not complied with, same lapsed, expired and became extinct.
238. Legally speaking, as at the 11th February 2016, when the 2nd Defendant was purporting to pay for the Letter of allotment, same was long dead and buried, so to speak and hence; could not therefore attract any payment, whatsoever and howsoever.
239. In this regard, it is appropriate to take cognizance of the holding in the case of *Joseph Kamau Muboro v Attorney General & another* [2021] eKLR, where it was held thus:
34. Besides, I also hold the humble opinion that having not formally accepted the Letter of Allotment, [in writing as required], the Letter of Allotment, on which the Plaintiff/Applicant has premised his claim, was rendered void and non-existent.
35. In support of the foregoing holdings, it is important to take cognizance of the Decision in the case of *Dr. Syedna Mohammed Burhannuddin Saheb & 2 others vs Benja Properties & 2 others* [2007] eKLR;
- “ In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for Defendant’s argument, that the expired letter, when acted upon, had been “revived” through conduct. The letter had expired. It was dead. There was nothing to “revive”.
240. Furthermore, the position that once the terms of a Letter of allotment are not complied with, same lapses and becomes extinct, was also canvassed and elaborately highlighted in the case of *Bubaki Investment Ltd v The National Land Commission* (2016)eKLR, where the court stated and held thus;
- “My view is that no acceptance and/or payment was made in accordance with the letter of allotment and therefore there was no compliance with the conditions of the letter of allotment. The petitioner acknowledges that allotment of the same property was made to a 3rd party presumably who is the 3rd Respondent but contends that this allotment to the 3rd party was made after the allocation to the petitioner. The petitioner has not furnished any evidence to show that the allotment to the 3rd party was made after the allocation to it. Indeed not even a search has been exhibited to show the current status of the property and the court is being asked to be presumptuous and accept that the 3rd Respondent is the registered proprietor of the suit property and that his allocation was after the property had already been allocated to the petitioner. Where is the evidence to support this? The cardinal rule of evidence is that he who asserts and/or alleges must prove. I do not think the petitioner has proved its allocation of the suit property was earlier in time that the allocation to the 3rd Respondent and I hold that the petitioner has not proved that fact.



Thus in my view the petitioner did not comply with the terms and conditions of the letter of allotment dated 30th May 1997 and that as at the time the petitioner made payment of the charges stipulated under the letter of allotment the offer had lapsed and was therefore in ineffectual.

241. Consequently and in view of the foregoing, I come to the conclusion that by the time the 2nd Defendant was purporting to act on the basis of the impugned Letter of allotment dated the 6th January 2009; same was dead and thus was incapable of being acted upon.
242. Other than the foregoing, there is yet a second critical issue touching on the impugned Letter of allotment. For good measure the issue relates to whether or not the impugned Letter of allotment was lawfully issued and executed.
243. In this respect, it is worthy to recall the testimony of DW3, namely, Stephen Onyino Mukobe, who is alleged to have signed/executed the impugned Letter of allotment.
244. For good measure, DW3 whilst under cross examination by counsel for the 2nd, 3rd and 4th Defendant stated as hereunder;
- “I wish to state that I did not sign the said letter of allotment dated the 6th January 2009. I wish to add that during my tenure at the Ministry of Lands I signed various of letters of allotment. However, I did not sign the one before the court”
245. Whilst still under cross examination the witness added as hereunder;
- “I did not sign the letter of allotment in question. I wish to add and reiterate that I did not execute the letter of allotment referred to. The signature on the letter of allotment is not mine. The signature is a forgery”
246. It is imperative to underscore that even the witness statement which was adopted and relied on as the evidence in chief of DW3; same had also highlighted the position that the impugned Letter of allotment was a forgery.
247. Despite the fact that this particular witness had indicated that the impugned signature was a forgery, the 2nd Defendant who is the beneficiary of the Letter of allotment did not controvert and in any other way challenge the veracity of the evidence and adduced by DW3.
248. From the foregoing testimony, which colors the entire record of the court, there is no gainsaying that the impugned Letter of allotment was ex-facie a fraud and a forgery. Consequently, the impugned Letter of allotment could not ground and or found the basis of any Legal interest over and in respect of the suit property.
249. For good measure, there was nothing that could arise out of nothing. In this regard, it is appropriate to take succor in the Doctrine of Ex-Nihilo Nihil Fit- (which underscores that out of nothing comes nothing).
250. To highlight the import and tenor of the foregoing Doctrine, it is appropriate to take cognizance of the holding in the case of Carogit Investment Limited v Aster Holdings Limited & 4 others [2019] eKLR, where the court stated succinctly thus;

From the Council to the appellant and from the appellant to White Horse no title could be passed because ex nihilo nihil fit – out of nothing comes nothing.



251. In view of the perspectives which have been highlighted herein before, there is no gainsaying that the impugned letter of allotment was incapable of conferring any lawful and or legitimate rights to and in favor of the 2nd Defendant or at all.

Issue Number 3; Whether the 2nd, 3rd and 4th Defendant have any Lawful rights and/or interests over and in respect of the suit property.

252. Arising from the impugned Letter of allotment dated the 6th January 2009, the 2nd Defendant herein purported to pay the statutory levies alluded to and enumerated in the body of the Letter of allotment.

253. Subsequently and upon (sic) paying the monies alluded to at the foot of the Letter of allotment, it is said that the office of the Land registrar processed and ultimately issued a Certificate of Lease to and in favor of the 2nd Defendant herein. In this regard, the 2nd Defendant tendered and adduced before the Honorable court a copy of the certificate of lease as Exhibit DW2, in proof of her ownership of the suit property.

254. Furthermore, having produced the certificate of lease as evidence of ownership of the suit property, the 2nd Defendant has thereafter invoked the provisions of Section 24 and 25 of the [Land Registration Act, 2012](#); in an endeavor to justify her entitlement to the statutory rights and privileges attendant onto the suit property.

255. Whereas the person in whose favor a valid and lawful certificate of title has been issued, is entitled to statutory protection in accordance with, *inter-alia*, the provisions of Sections 24 and 25 of the [Land Registration Act](#), it is imperative to underscore that where a certificate of title is procured contrary to law; then such a certificate of title is vitiated and thus rendered useless.

256. In respect of the instant matter, it is imperative to recall that the impugned Certificate of lease, is said to have been signed by one Charles Kipkirui Ng'etich, the Deputy Land Registrar. However, when the impugned certificate of lease was subjected to investigation and due interrogation, it transpired that same was neither issued nor signed by the named Deputy Chief Land Registrar.

257. Instructively, the Deputy Chief Land Registrar, who is said to have processed, issued and signed the impugned certificate of lease was indeed summoned to testify and testified before the court as DW2.

258. For good measure, DW2 (Charles Kipkirui Ng'etich) was thereafter cross examined by Learned counsel for the 2nd, 3rd and 4th Defendant and same stated as hereunder.

“The title in respect of L.R No. 1870/1/337 is purported to have been issued in the name of the 2nd Defendant. I did not sign/execute the same. The said certificate title/lease is a forgery and fraud. I have give evidence in a criminal matter against the 4th Defendant.

I have also given evidence before the National Land Commission. I denied being the author of the said certificate of title/lease. The signature is not mine”.

259. Yet again, evidence abound that the impugned certificate of title/lease was procured in the manner contrary to and in contravention of the law.

260. Clearly and to my mind, one cannot procure and obtain a title in a manner that bespeaks of illegality and corrupt practice, let alone forging signature of Public officers; and thereafter approach the Honourable court and contend that he deserves protection of the law.



261. In my humble view, the nature of evidence that has been tendered in respect of the subject matter is testament to the length and depth to which Kenyans are now prepared to go, in manufacturing certificate of title in a bid to attract unjust enrichment; and defraud the cause of Justice.
262. In my humble view, the Nation of Kenya and in particularly, Kenyans needs to re-examine their conscience. Instructively, the provisions of Article 10(2) of the Constitution 2010 must be inculcated and cultivated by us, Kenyans.
263. Be that as it may, it is my holding that the manner in which the impugned title was procured and obtained by and on behalf of the 2nd Defendant fits within the four corners of the provision of Section 26(1) (b) of the Land Registration Act.
264. For ease of reference, the named provisions provides and states as hereunder;
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
265. Before departing from the issue herein, it is appropriate to underscore that it is not enough for the 2nd Defendant and her Directors to wave unto the court a certificate of Lease and thereafter imagine that the documents in question is sufficient to warrant a proclamation in her favor.
266. For the avoidance of doubt, both the Court of Appeal and the Supreme Court of Kenya, respectively, have now underscored that whoever has a certificate of title must justify the root of the Certificate of title, particularly where same is under challenge. For good measure, the position underscored by the Court of Appeal and the Supreme Court espouses the clarion call namely; the means justifies the end and not vice versa.
267. Notably and for ease of reference, the foregoing position was elaborated in the case of Munyu Maina v Hiram Gathiba Maina (2013)eKLR, where the court stated and held thus;
- “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony. We find that a trust exists in relation to the suit property”.
268. To surmise, it is evident and apparent that neither the 2nd Defendant nor her Directors procured and/or obtained any lawful interests over and in respect of the suit property.



Issue Number 4; Whether the Plaintiffs herein have any legitimate rights and/or interests to and in respect of the suit property or better still; whether the suit property lawfully belongs to the Plaintiffs.

269. Whilst discussing issue number one, this court highlighted the fact that the suit property herein was hitherto registered in the name of Sadrudin Habib Kassam Kurji, now deceased, on the basis of a Certificate of Lease, whose term was to expire on the June 1, 2003.
270. Furthermore, the court also observed and established that on or about the 2nd April 2007 Sadrudin Habib Kassam Kurji, now deceased, commenced the process of renewal of the Lease over and in respect of the suit property and the application for renewal was duly acted upon by the Commissioner of lands; who generated a letter dated the 2nd April 2007 acknowledging the application for extension of the lease and thereafter soliciting the requisite comments from the concerned department, *inter-alia*, the Director of Physical Planning, Director of Survey and Director of City Planning, respectively.
271. On the other hand, DW3 who was the designated officer in the office of the Commissioner of land testified before the Honorable court and indicated that same received the application for extension of lease in respect of *inter-alia* the suit property and that upon receipt of the application for extension, same called for the file in respect of the suit property.
272. Further and in addition, DW3 also testified that after calling for the file in respect of the suit property, same confirmed that everything was in order and thereafter he (witness) generated a Letter dated the 2nd April 2007 relating to extension of the lease in respect of *inter-alia* L.R No. 1870/1/337 (suit property) and L.R No. 1870/1/338; both in favor of the Kurji family.
273. From the testimony of DW3 and the evidence that was tendered, including the Letter dated the 2nd April 2007, it is imperative to note and underscore that the commissioner of land, who was at the material point in time tasked to extend leases, gave and created a Legitimate expectation and an assurance to Sadrudin Habib Kassam Kuriji, now deceased; pertaining to the extension of the Lease.
274. Furthermore, no evidence was ever tendered by and on behalf of the 2nd, 3rd and 4th Defendants or otherwise that the contents of the Letter dated the 2nd April 2007, relating to extension of the lease in favor of the deceased was ever rescinded and/ or countermanded.
275. In my humble, having issued and generated the Letter dated the 2nd April 2007; and whose contents were reiterated by DW3 during his testimony before the Honourable court; there is no gainsaying that the Commissioner of land created a legitimate expectation that the lease in favor of the name of the deceased was going to be renewed.
276. Having created the legitimate expectation, the 1st and 3rd Plaintiff herein, who are the Executors of the Will of the Estate of the Deceased are therefore within their right to cling to and hold on to the suit property as the legitimate owners thereof. For good measure, the Legitimate expectation cannot be taken away from the 1st and 3rd Plaintiff without compliance with the Due process of the law and in particular; compliance with Articles 10(2), 47 and 50(1) of the *Constitution*, 2010.
277. As concerns the import and tenor of the Doctrine of Legitimate expectation, I beg to adopt and reiterate the position espoused by the Court of Appeal in the case of *Justice Kalpana H. Rawal v Judicial Service Commission & 3 others* [2016] eKLR, where the court held thus;

“The decision of the Supreme Court that we have just cited adds that legitimate expectation involves a representation that must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate. Other important



aspects of the doctrine is that the law does not protect every expectation save only those which are legitimate (*South African Veterinary Council v. Szymanski* 2003 ZASCA 11); clear statutory words override any contrary expectation, however founded (*R. v. DPP ex parte Kebilene* and *Republic v. Nairobi City County & Another, ex parte Wainaina Kigathi Mungai*, HC. JR. Misc. C. No 356 of 2013; the representation must be one which the decision-maker can competently and lawfully make without which the reliance cannot be legitimate (*Hauptfleisch v. Caledon Divisional Council* (1963) (4) SA 53); legitimate expectation does not arise when it is made ultra vires the decision-maker's powers (*Rowland v. Environment Agency* (2003) EWCA Civ. 1885; and a public authority which has made a representation which it has no power to make is not precluded from asserting the correct position which is within its power to make (*Republic v. Kenya Revenue Authority, ex parte Aberdare Freight Services Ltd* [2004] 2 KLR 530).

278. Arising from the foregoing, it is pertinent to point out that to the extent that the office of the Commissioner of Land had signaled her indication as pertains to renewal of the Lease, same is estopped from renegeing and/or abdicating from the said position.
279. Nevertheless, it is not lost on the court that neither the commissioner of land now defunct, nor the National Land Commission; is endeavoring to renege from the position that was espoused vide Letter dated the 2nd April 2007.
280. To the contrary, it is worthy to reiterate that even National land Commission vide their Report which was produced before the Honorable court as Exhibits P14; have vindicated that Sadrudin Habib Kassam Kurji is owner of the suit property. In this respect, what I understand the National Land Commission to implying is that same is amenable to issuing a Lease to and in favor of the Estate deceased within her mandate pursuant to the provisions of Section 13 of the [Land Act, 2012](#) (2016).
281. In short, I am disposed to find and do hereby hold that the 1st and 3rd Plaintiffs have lawful and legitimate rights to and in respect of the suit property; both on account of the doctrine of legitimate expectation, Estoppel, but also on the basis of the recommendation of the National Land Commission in terms of Exhibit P14.

Issue Number 5; What Reliefs, if any; ought to be granted.

282. The Plaintiff herein has sought for a plethora of reliefs at the foot of the Plaint dated the December 7, 2016.
283. However, in the course of addressing issues number 2, 3 and 4, herein before, this court has since made various proclamations, *inter-alia*, declaring that the impugned certificate of title issued in favor of the 2nd Defendant was illegal, unlawful and void.
284. Further and in addition, the court has also calibrated on the question as to whether or not the Estate of Sadrudin Habib Kassam Kurji, now deceased, was/is entitled to renewal of the Lease in respect of the suit property. In this regard, the court has addressed the Doctrine of Legitimate expectation and has come to the conclusion that indeed the Estate is entitled to the renewal, on the basis of the assurance at the foot of the Letter dated 2nd April 2007; as well as the recommendations at the foot of the report by National Land Commission. See Exhibit P14.
285. Having come to the conclusion that the Estate of the deceased are indeed legitimately entitled to the suit property dating back to the 2nd April 2007 when the intimation on renewal was issued, it then becomes evident and apparent that the impugned activities which were undertaken by and on behalf



of the 2nd, 3rd and 4th Defendants, over and in respect of the suit property, were therefore undertaken without any lawful cause and/or basis.

286. Instructively, the actions and/or activities by and on behalf of the 2nd, 3rd and 4th Defendants constituted and amounts to trespass and in this regard, the impugned activities must no doubt found indemnification by an award of General damages.
287. In short, I am prepared to and do hereby find and hold that the 1st and 3rd Plaintiffs, who are the only Plaintiffs remaining in respect of the instant matter, are entitled to recompense on account of General damages for trespass. In this regard, I opine that an award of KES 10, 000, 000/= only would suffice.
288. In arriving at the figure of KES 10, 000, 000/= only, details in terms of the preceding paragraphs, I have taken cognizance of the elaborate principales guiding assessment and award of General damages which were espoused in the case of *Kenya Power & Lighting Company Ltd v Ringera & 2 others* (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment), where the court stated and held as hereunder;

“The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distill and replicate as hereunder:

- i) Harlburys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner’s land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.
 - ii) Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.
 - iii) Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs’ property immediately before and immediately after the trespass or the cost of restoration whichever is less.
 - iv) Ephantus Mwangi & Another vs. Duncan Mwangi [1981 – 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court’s findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence.
- b) a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown



demonstrably to have acted on wrong principles in reaching the findings he did.

- v) *Kiambu Dairy, Farmers Co-operative Society Limited vs. Rhoda Njeri & 30 Others* [2018] eKLR, - the extent of an award of compensatory damages lies in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well settled principles.
- vi) *Kemfro Africa Limited vs. Lubia & Another* [No. 2] [1987] KLR 30 as approved in *Peter M. Kariuki vs. Attorney General* [2014] eKLR, - before interference with the quantum of damages awarded by a trial court the appellate court must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or short of the above, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages payable.
- vii) *Johnson Evans Gicheru vs. Andrew Martin & Another* [2005] eKLR, - this Court on appeal will be disinclined to disturb the finding of the trial Judge as to the amount of damages awarded by the trial court merely because if it had tried the case itself in the first instance, it would have awarded either a higher or lesser sum) justification for reversing a trial Judge on an award of damages only applies where the court is convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very low as to make it an entirely erroneous estimate of the damage to which the aggrieved party is entitled.
- viii) *Sumaria & Another vs. Allied Industries Limited* [2007] 2 KLR I, - an appellate court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence or based on a misapprehension of the evidence or that the Judge had been seen demonstrably to have acted on a wrong principle in reaching the finding he/she did.
- ix) *Butt vs. Khan* [1981] KLR 349, - an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate
- x) it must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.
- vii. *Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited vs. Janevans Limited* [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss;
 - (b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass;



- (c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass.

289. Other than the prayer for General damages, the Plaintiff herein had also sought for Mesne profits as well as damages for unlawful Eviction. In this respect, it is imperative to state and observe that the actions and/or activities that gave rise to unlawful eviction are the same actions that constitutes and underpin trespass. For good measure, trespass denotes unlawful and illegal entry and taking possession of a property of another, without the consent and permission of the other.
290. Implicit in the illegal and unlawful entry and taking possession of the property of another, is the fact that the other, whose property is illegally taken over, is indeed evicted therefrom.
291. To my mind, one cannot therefore seek and obtain recompense for General damages for trespass and at the same time be heard to seek for damages for unlawful eviction. Clearly, to award both would be tantamount to duplicity and thus amount to unjust enrichment, if not, Double Jeopardy, against the Judgment Debtor.
292. Similarly, the Plaintiffs herein had also sought for Mesne profits to be awarded from the 24th November 2016 until payment in full. However, it is instructive to note that though a prayer has been made for Mesne profits same has however not been particularized in the body of the Plaint, either as required by the law or at all.
293. For good measure, it is important to remind Learned counsel for the Plaintiffs that a claim for Mesne profits is akin to a claim for Special Damages and therefore same requires to be particularly pleaded and thereafter specifically proved by adduction cogent and credible evidence and not otherwise.
294. In this regard, the position of the law, was elaborated upon and succinctly expounded in the case of *Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees* [2020] eKLR, where the court held as hereunder;

Mesne Profits must be pleaded and proved. In the case *Peter Mwangi Msuitia & Another v Samow Edin Osman* [2014] eKLR, this Court held as follows:

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

295. Other than the fact that the claim for Mesne profits was not particularly pleaded nor specifically proven, there is yet another outstanding issue that merits short mention and discussion. For good measure, the issue herein relates to the fact that ones a court has decreed and awarded General damages for trespass; then the court cannot in the same vein grant an order for Mesne profit.
296. To underscore the foregoing position of the law, I must return to the same decision in the case of *Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees* [2020] eKLR, where the court stated and held thus;

“It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both”.

297. Lastly, the Plaintiff sought for Exemplary and Punitive damages. In this respect, I beg to point out that the manner in which the 2nd, 3rd and 4th Defendants endeavored to procure and obtained the suit



property, was no doubt, calculated to attract and to obtain unjust enrichment and accrue due mileage. Consequently, I am satisfied that the ingredients that warrant an award of Exemplary Damages, are evident and discernable.

298. In view of the foregoing, I am therefore minded to decree and to award the sum of KES 2, 000, 000/= only on account of Exemplary Damages as against the 2nd, 3rd and 4th Defendants.
299. To anchor the award on account of Exemplary damages, I beg to point out that the Dictum of the Court of Appeal in the case of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR, are instructive and appropriate.
300. For coherence, the court stated and hold as follows;

28. This Court, in *Nation Media Group v Gideon Mose Onchwati & Kenya Oil Company Limited* [2019] eKLR stated as follows:

“ The bulk of the learned Judge’s award fell under the head of exemplary damages for which she granted some Kshs. 12,000,000. Now, exemplary damages are awardable in very rare instances where the conduct of the defendant is deserving of punishment, and they are meant to vindicate the law. They have nothing o do with compensating the plaintiff.

301. Elsewhere herein before, this court had underscored the need and necessity for Kenyans to reconsider and re-examine the import and tenor of the National values and Principles of Good governance as entrenched in Article 10(2) of the *Constitution* 2010. However, there is no gainsaying that the activities that belie the complaints herein were indeed grave and ought not to be glossed over.
302. It is in this regard, that I feel obligated that an award of Exemplary damages are indeed merited. Invariably, the decision of the Court of Appeal cited and alluded to (*supra*), vindicates the position that an award of Exemplary damages is meant to punish and not to compensate.
303. In a nutshell, I reiterate the position that the impugned circumstances whose details, I have alluded to in the body of the Judgment, truly merits some degree of punishment and retribution as against the 2nd, 3rd and 4th Defendants.

Final Disposition

304. Having considered the various perspectives, which were enumerated in the body of the Judgment herein, it must have become evident and apparent that the claims by and on behalf of the 1st and 3rd Plaintiffs, (whom I have found to be the only Plaintiffs) is truly meritorious.
305. Consequently and in the premises, I am minded to and do hereby enter Judgment in favor of the 1st and 3rd Plaintiffs in the following terms;
 - i. An order of Permanent Injunction be and is hereby issued to restrain the Defendants whether by themselves, their servants, agents or otherwise howsoever from entering or using the said property, selling, alienating, disposing, charging or any way parting with the land.
 - ii. Declaration be and is hereby issued that the registration of the suit property known as Land Reference Number 1870/1/337; in the names of the 2nd Defendant was and is illegal, unlawful and null and void.
 - iii. An order be and is hereby issued directing the 1st, 2nd, 3rd and 4th Defendants to deliver and/or surrender the certificate of title improperly issued to them for cancelation by the Honourable court.



- iv. In any event, the certificate of lease issued to and in favor of the 2nd Defendant herein over and in respect of the suit property be and is hereby canceled, nullified and/or revoked.
- v. Further and in addition, an order be and is hereby issue directing the 5th Defendant (Chief Land Registrar) to cancel/ revoke the title known as Land Reference Number 1870/1/337 issued to the 2nd Defendant.
- vi. A declaration be and is hereby made that land known as Reference Number 1870/1/337 belongs to the Estate of Sadrudin Habib Kassam Kurji, now deceased.
- vii. To actualize the declaration in terms of the preceding order, the Interested party and the 5th Defendant be and are hereby directed to generate and issue the requisite provisional Certificate/title to and in favor of the 1st and 3rd Plaintiffs, as the Executors of the Will of Sadrudin Habib Kassam Kurji, now deceased.
- viii. In the event that the 2nd, 3rd and 4th Defendants are still in possession and occupation of the suit property, an order of Eviction shall and is hereby issued to evict same from the suit property forthwith and with immediate effect.
- ix. General damages for trespass be and is hereby awarded in favor of the 1st and 3rd Plaintiff in the sum of KES 10, 000, 000/= only; to be borne by the 2nd, 3rd and 4th Defendants jointly and/or severally.
- x. Exemplary damages are awarded in the sum of KES 2, 000, 000/= only as against the 2nd, 3rd and 4th Defendants jointly and/or severally.
- xi. Costs of the suit be and are hereby awarded to the 1st and 3rd Plaintiffs and same to be borne by the 2nd, 3rd and 4th Defendants jointly and or severally.
- xii. Any other relief not expressly granted is hereby declined.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JULY 2023.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – Court Assistant

Mr. Mwaniki Gitau for the Plaintiffs.

Mr. Odera Were for the 2nd, 3rd and 4th Defendants.

Mr. Allan Kamau for the 5th Defendant.

N/A for the 1st Defendant.

N/A for the Interested Party

