



**Kimani v Langata Realty Limited; Kimani & another (Defendant) (Environment & Land Case 195 of 2017) [2023] KEELC 21755 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21755 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 195 OF 2017**

**JO MBOYA, J  
NOVEMBER 2, 2023**

**BETWEEN**

**ANDREW MWANGI KIMANI ..... PLAINTIFF**

**AND**

**LANGATA REALTY LIMITED ..... DEFENDANT**

**AND**

**ANDREW MWANGI KIMANI ..... DEFENDANT**

**JAMES KARIMI WAIGANJO ..... DEFENDANT**

**JUDGMENT**

**Introduction and Background**

1. The Dispute beforehand touches on and concerns ownership of L.R No 12641/3, I.R No. 38359, (hereinafter referred to as the suit property); which is situated within the prestigious Karen Area, in the City of Nairobi.
2. On one hand, the Plaintiff contends that same bought and purchased the suit property from the 2<sup>nd</sup> Defendant to the counter-claim and thus acquired a legitimate title, whereas on the other hand, the Defendant to the main suit/Counter-claimer, contends that the suit property lawfully belongs to her.
3. Arising from the foregoing, the Plaintiff filed and/or lodged the instant suit vide Plaintiff dated the 22<sup>nd</sup> March 2017; and in respect of which the Plaintiff has sought for the following reliefs;
  - i. A declaration that the Plaintiff is the registered owner of all that piece of land situate in Karen within Nairobi City County and comprised in the Certificate of Title and registered as Title Number I.R 38539; being Land Reference Number 12641/3 (hereinafter referred to as the suit property) and as such is



entitled to exclusive and unimpeded right of possession and occupation of the same.

- ii. A declaration that the Defendant and/or its agents, servants, employees or otherwise are wrongfully in occupation of the suit property and are accordingly Trespassers on the same.
  - iii. A Permanent Injunction against the Defendant and/or its agents, servants, employees or otherwise restraining them from transferring, trespassing, entering, alienating, disposing, damaging, encroaching onto, wasting, interfering, howsoever with the Plaintiff's quiet enjoyment, use, possession and occupation of the suit property.
  - iv. General Damages for Trespass.
  - v. Costs of the suit together with interests thereon at such rates and for such period of time as this Honorable court may deem fit to grant.
  - vi. Any such or further relief as this court may deem appropriate.
4. Upon being served with the Plaint and Summons to Enter Appearance, the Defendant duly entered appearance and thereafter filed a Statement of Defense and Counterclaim dated the 9<sup>th</sup> December 2019, wherein the Defendant contended that the transfer and registration of the suit property in the name of the Plaintiff was procured and obtained by fraud.
5. Subsequently, the Defendant sought for and obtained Leave to file an amended Statement of Defense and Counterclaim and pursuant to the Leave, the Defendant thereafter filed the amended Statement of Defense and Counterclaim dated the 14<sup>th</sup> January 2022.
6. For coherence, the reliefs sought at the foot of the amended Statement of Defense and Counter-claim are as hereunder;
- a. A declaration that the Plaintiff by way of counterclaim is the registered owner of all that piece of Land known as Land Reference Number 12641/3 situate in Karen within the Nairobi city County and comprised in the certificate of Title and registered as Tile Number I.R 38539.
  - b. A declaration that the registration of the 2<sup>nd</sup> Defendant to the Counterclaim as the owner of piece of land knowns as Land Reference Number 12641/3; was illegal and fraudulent and that no good title passed to the 1<sup>st</sup> Defendant to the counterclaim.
  - c. The registration of the 2<sup>nd</sup> Defendant to the counterclaim as the owner of piece of Land knowns as Land Reference as Title Number IR 38539; and in the subsequent transfer to the 1<sup>st</sup> Defendant to the counterclaim be cancelled forthwith.
  - d. Permanent injunction restraining the Defendant to the counterclaim by themselves, their agents, servants, representatives or any other party claiming title under them from harassing, remaining, entering, trespassing or in any other manner interfering with the Plaintiffs quiet possession of piece of land known as Land Reference Number 12641/3 situate in Karen within Nairobi



City County and comprised in the Certificate of Title and registered as Title number I.R No. 38539.

- e. An order be issued compelling the Defendants to the Counterclaim to hand over to the Plaintiff by way of Counterclaim vacant possession of the suit property failure to which Eviction orders to issue.
  - f. The Plaintiff by way of counterclaim be granted General Damages for Trespass and Mesne Profits.
  - g. The suit by the 1<sup>st</sup> Defendant to the counterclaim be Dismissed.
  - h. The Plaintiff by way of counterclaim be granted Costs and Interests of this suit at court rates
7. Following the amendment of the Statement of Defense and Counter-claim on behalf of the Defendant, there was joinder of an additional Party, namely, James Karimi Waiganjo, who is the 2<sup>nd</sup> Defendant to the counterclaim.
  8. Suffice it to point out that upon being served with the amended Statement of Defense and Counterclaim, the named 2<sup>nd</sup> Defendant to the counterclaim duly entered appearance and filed a Reply to Defense and Defense to the Counter-claim. For good measure, the Reply to Defense and Defense to counterclaim on behalf of the 2<sup>nd</sup> Defendant to the counterclaim is dated the 28<sup>th</sup> November 2022.
  9. Following the close of pleadings, the instant matter was set down for pre-trial directions, whereupon the Advocates for the respective Parties confirmed the filing and exchange of the requisite pleadings, bundle of documents and witness statements, to be relied upon during trial.
  10. Based on the foregoing, the Honourable court confirmed the matter to be ready for hearing and thereafter same was duly certified ready and listed for hearing.

### **Evidence by the Parties:**

#### **a. Plaintiff's Case**

11. The Plaintiff's case gravitates and revolves around the Evidence of one witness, namely, Andrew Mwangi Kimani. Same testified as PW1.
12. It was the testimony of the witness that on or about the year 2009/2010, the 2<sup>nd</sup> Defendant to the counterclaim expressed an intention to sell and dispose of L.R No. 12641/3, which was duly registered in his (2<sup>nd</sup> Defendant to the counterclaim) name.
13. Arising from the expression by and on behalf of the 2<sup>nd</sup> Defendant to the counterclaim, the witness averred that same developed an interests in the suit property and thus retained his advocates to carry out and undertake due diligence over and in respect of the suit property; and in particular, to ascertain whether the proposed vendor was the lawful owner and/or proprietor thereof.
14. Furthermore, the witness added that his transaction advocates duly complied with his instructions and undertook due diligence, inter-alia, obtaining a Certificate of official search from the Land Registry, which confirmed that indeed the proposed vendor was the registered owner of the suit property.
15. It was the further testimony of the witness that arising from the outcome of the due diligence, same duly entered into and executed a Sale Agreement between himself and James Karimi Waiganjo, the 2<sup>nd</sup>



- Defendant to the counterclaim. In this regard, the witness testified that the Sale Agreement was dated the 24<sup>th</sup> of November 2010.
16. It was the further testimony of the witness that thereafter the vendor availed and/or surrendered all the requisite completion documents, inter-alia, the consent to transfer from the Commissioner of Land, culminating into the effective transfer and registration of the suit property unto him.
  17. Other than the foregoing, the witness testified that upon the transfer and registration of the suit property in his name, same entered upon and took possession of the suit property and commenced to erect a perimeter wall fence thereon.
  18. However, the witness averred that on or about February/March 2017, agents of the Defendants herein entered upon the suit property and commenced to demolish the Perimeter Wall fence, which had been erected on the suit property.
  19. Arising from the actions and/or activities by and on behalf of the Defendant, the witness averred that same was constrained to and indeed lodged a Report with the Police at Nairobi area Police Station, whereupon the Parties were advised to maintain the Status quo obtaining on the suit property pending further investigations on the ownership thereof.
  20. Nevertheless, the witness has averred that despite the report to the Police Station, the Defendant herein continued with the offensive activities and has even attempted to gain forceful entry onto the suit property, albeit without any lawful case.
  21. As a result of the foregoing, the witness testified that same was thereafter constrained to and indeed filed the instant suit, with a view to vindicating his rights to and or interests over the suit property.
  22. Other than the foregoing, the witness alluded to the Witness Statement dated the 22<sup>nd</sup> March 2017; whose terms have substantially been reproduced hereinbefore and thereafter sought to adopt and rely on the contents thereof.
  23. At the request and instance of the Plaintiff/Witness, the witness statement dated the 22<sup>nd</sup> November 2018; was duly admitted and constituted as the Evidence- in- chief of the witness.
  24. On the other hand, the witness also referred to the List and Bundle of Documents dated the 22<sup>nd</sup> November 2018; and similarly sought to adopt and rely on same. In this respect, the Documents at the foot of the List and Bundle of Documents were thereafter admitted and constituted as Exhibits P1 to P23, respectively.
  25. On cross examination by Learned counsel for the Defendant/Counter-claimant, the witness reiterated that same entered into and executed a sale agreement with the vendor and that the sale agreement is dated the 24<sup>th</sup> November 2010.
  26. Furthermore, the witness added that prior to and before entering into the Sale Agreement, same retained a firm of advocates who carried out and undertook due diligence over and in respect of the suit property culminating into an Official search being procured and obtained.
  27. Whilst under further cross examination, the witness testified that the suit property was bought at a Purchase price/ consideration of Kes.100, 000, 000/= only, which was duly paid to and in favor of the 2<sup>nd</sup> Defendant to the Counterclaim.
  28. On cross examination by Learned Counsel for the 2<sup>nd</sup> Defendant to the counterclaim, the witness averred that same bought and acquired the suit property after due diligence was carried thereon by his Transaction advocates.



29. Furthermore, the witness averred that upon purchase and acquisition of the suit property, same entered upon and took possession of the suit property. Further and in any event, the witness added that it is him (Witness) who is in occupation of the suit property to date.
30. With the foregoing testimony, the Plaintiff's case was duly closed.

**b. Defendant's Case:**

31. The Defendant's case revolves around the testimony of two witnesses, namely, Pankaj Shah and Njoki Karanja; who testified as DW1 and DW2, respectively.
32. It was the evidence of DW1 that same is a Director cum shareholder of the Defendant company and that by virtue of being such a Director, same was duly authorized to tender evidence on behalf of the Defendant.
33. Additionally, the witness averred that the Defendant company was duly registered and issued with a Certificate of incorporation on the 27<sup>th</sup> December 1985. In this regard, the witness referred to Certificate of Incorporation Number C30999.
34. It was the further testimony of the witness that the Defendant company bought the suit property from Mrs. Njoki Karanja and thereafter paid the purchase price/ consideration amounting to Kes.310, 000/= only, which was duly acknowledged by the vendor.
35. On the other hand, it was the further testimony of the witness that upon payment of the purchase price, the suit property was duly transferred and registered in favor of the Defendant. In any event, the witness added that the memorandum of registration of transfer was presented to the Land Registry on the 30<sup>th</sup> December 1985.
36. Other than the foregoing, the witness averred that upon the lodgment of the Transfer Instrument, same was duly registered culminating into a Certificate of Title being issued to and in favor of the Defendant company. In this regard, the witness avers that the suit property lawful belongs to the Defendant.
37. Furthermore, it was the testimony of the witness that upon the transfer and registration of the suit property in favor of the Defendant company, the Defendant company entered upon and took possession of the suit property.
38. On the other hand, the witness averred that the company also applied to the Commissioner of Land for change of user, namely, to have the property converted from residential to commercial. However, the witness added that the request for change of user, which was made in 1986 was declined by the Commissioner of Lands.
39. Nevertheless, it was the testimony of the witness that upon acquisition of the suit property, the Defendant variously paid the Land rents to the Government and land rates to the City Council of Nairobi and that the payments on account of Land rates were duly receipted and acknowledged.
40. Besides, it was the testimony of the witness that on or about the year 2015, the Defendant company applied for change of user in respect of the suit property and that upon due gazettment of the application for change of user, same was ultimately approved by the County Government of Nairobi.
41. Notwithstanding the foregoing, the witness averred that on or about the 14<sup>th</sup> January 2017, the Defendant company discovered that there was trespass onto the suit property by and at the instance of persons who were hitherto unknown, but who latter on turned out to agents of the Plaintiff.



42. It was the testimony of the witness that arising from the foregoing, the Defendant Company was constrained to and indeed lodged a Complaint with the Police at Hardy Police Station; and which Report was duly booked vide Occurrence Book Number 13/14/01/2017.
43. Additionally, the witness also testified that other than the trespass onto the suit property, the Defendant also discovered that there were interferences with the records at the County Government Offices. In this regard, the witness averred that same was obliged to lodge a Complaint with the County Government for purposes of rectification of the Rates records pertaining to ownership of the suit property.
44. Moreover, the witness averred that on or about the 22<sup>nd</sup> March 2017, the Plaintiff herein ultimately filed and/or lodged the instant suit and in respect of which the Plaintiff was laying a claim to ownership of the suit property.
45. Be that as it may, the witness testified that the Plaintiff's claim to and in respect of the suit property are based and/or anchored fraudulent documents, inter-alia, Certificate of Title.
46. At any rate, the witness averred that the suit property was lawfully sold to and transferred in favor of the Defendant by Mrs. Njoki Karanja, who was the lawful and registered owner thereof.
47. Other than the foregoing, the witness averred that the 2<sup>nd</sup> Defendant to the counterclaim who purported to have sold the suit property to and in favor of the Plaintiff did not have a valid title. In the premises, the witness averred that the Plaintiff therefore did not acquired any title.
48. On the other hand, the witness also testified that during the pendency of the instant suit, same also discovered that some persons filed falsified resolutions with the Registrar of Companies and wherein same sought to strike out the name of the Defendant company. However, the witness added that the impugned Resolutions were never authorized by the Defendant company.
49. Furthermore, the witness averred that upon discovery of the filing of the falsified Resolutions aimed at striking out the name of the Defendant company, same lodged a complaint with the Registrar of Companies.
50. It was the further testimony of the witness that other than the lodgment of the Complaint with the Registrar of Companies, same also filed a Civil suit vide Milimani Commercial Magistrates Court case No. 7361 of 2019, culminating into the restoration of the register pertaining to the Defendant company.
51. Other than the foregoing, the witness alluded to the witness statement dated the 27<sup>th</sup> June 2022; and which statement the witness sought to adopt and rely on as his Evidence-- in chief.
52. On the other hand, the witness also alluded to the List and Bundle of documents dated the 27<sup>th</sup> June 2022, containing 34 documents and which documents, the witness sought to adopt and rely on.
53. There being no objection to the admission of the various documents on behalf of the Defendant, same were duly admitted and marked as Exhibits D1 to D34, respectively.
54. On cross examination by Learned Counsel for the Plaintiff, the witness averred that the Defendant company was incorporated on the 27<sup>th</sup> December 1985. Additionally, the witness averred that the incorporation of the company was done by his brother, who was also the advocate for the Defendant Company.
55. Nevertheless, the witness testified that his brother/advocate thereafter died on the 24<sup>th</sup> December 1985. Whilst under further cross examination, the witness averred that the suit property was bought and/



- or purchased from Njoki Karanja. Besides, the witness stated that even though the suit property was purchased from Njoki Karanja, he [witness] has however not availed a copy of the sale agreement or the transfer instrument signed between the Defendant company and Njoki Karanja.
56. Additionally, the witness admitted that same has also not tendered before the court any evidence to show that stamp duty was ever paid on the basis of the transfer of the suit property to the Defendant.
  57. Whilst under further cross examination, the witness averred that upon the transfer of the suit property, the Defendant company was duly issued with a Certificate of Title, a copy of which the witness intimated has been tendered before the Honourable court.
  58. Furthermore, it was the Evidence of the witness that sometime in January 2017, same discovered offensive activities being carried out over the suit property and as result of the impugned activities, same was constrained to and duly lodged a Complaint with the Police at Lang'ata.
  59. At any rate, the witness testified that during the pendency of the suit there was an attempt to fraudulently wind-up the Defendant company. However, the witness averred that the attempt to wind-up the Defendant company was challenged by the Defendant through a suit filed before the commercial court.
  60. Nevertheless, the witness contended that despite having filed the said suit before the Milimani Commercial court, same was however not familiar with the outcome/ status of the said suit.
  61. On cross examination by Learned Counsel for the 2<sup>nd</sup> Defendant to the Counterclaim, the witness testified that the company in question was incorporated on the 27<sup>th</sup> December 1985. However, the witness averred that the transfer and registration of the suit property was effected on the 30<sup>th</sup> December 1985.
  62. Other than the foregoing, the witness averred that the purchase price/consideration in respect of the suit property was paid/made before the 24<sup>th</sup> January 1986. Besides, the witness also added that the Defendant has been paying rates to the City Council of Nairobi/ City County Government over the suit property.
  63. The 2<sup>nd</sup> witness who testified on behalf of the Defendant was one; Margaret Njoki Karanja. Same testified as DW2.
  64. It was the testimony of the witness that same bought and/or acquired the suit property from Muturi Investment Ltd; on or about the year 1984.
  65. Further and in addition, the witness averred that upon purchase of the suit property, same was duly and lawfully transferred to and registered in her name on the 17<sup>th</sup> February 1984. In this regard, the witness alluded to the Certificate of title which was issued on even date.
  66. It was the further testimony of the witness that in December 1985, same sold the suit property to and in favor of the Defendant company at a consideration of Kes.310, 000/= only. Furthermore, the witness added that upon receipt of the purchase price same executed a transfer instrument dated the 20<sup>th</sup> December 1985.
  67. On the other hand, the witness averred that the transfer instrument dated the 20<sup>th</sup> December 1985; was thereafter lodged at the Land Registry on the 30<sup>th</sup> December 1985, whereupon same was duly registered.



68. Other than the foregoing, the witness averred that same sold the suit property to the Defendant company and thereafter surrendered all the ownership documents, including Certificate of title to the Defendant company.
69. Additionally, the witness alluded to the Witness statement dated the 4<sup>th</sup> July 2022; and thereafter sought to adopt the witness statement. In this regard, the witness statement dated the 4<sup>th</sup> July 2022, was duly admitted and constituted as the Evidence -in -chief of the witness.
70. On cross examination by Learned Counsel for the Plaintiff, the witness stated that same entered into a sale agreement with the Defendant company between the year 1984 and 1985. However, the witness admitted that same did not have a copy of the said Sale Agreement.
71. Further, the witness also stated that same executed a Transfer Instrument to and in favor of the Defendant company. Nevertheless, the witness again admitted that the Transfer Instrument has neither been availed nor presented before the Honourable court.
72. Whilst under further cross examination, the witness admitted that the Memorandum of Transfer, which has been availed and presented to Honourable court is dated the 20<sup>th</sup> December 1985.
73. Other than the foregoing, the witness referred to her Witness statement and thereafter admitted that despite being aware of the Sale Agreement alleged to have been executed by her in favor of the 2<sup>nd</sup> Defendant, same has never lodged any Complaint with the Police.
74. On cross examination by Learned Counsel for the 2<sup>nd</sup> Defendant, the witness admitted and acknowledged that Geoffrey Kariithi was her Father. However, the witness averred that her Father was never involved in the acquisition of the suit property.
75. It is also the evidence of the witness that same entered into a Sale Agreement with the Defendant company and thereafter sold the Suit Property to the Defendant company herein.
76. It was the further testimony of the witness that same received and was the entire purchase price from the Defendant.
77. Finally, the witness averred that same was unable to confirm whether a consent to transfer from the Commissioner of Lands, was ever issued in favor of the Defendant company.
78. With the foregoing testimony, the Defendant's case was duly closed.

**c. 2<sup>nd</sup> Defendant to the Counterclaim's Case:**

79. The 2<sup>nd</sup> Defendant to the counterclaim case revolves around the Evidence of one witness, namely, James Karimi Waiganjo. For good measure, same testified as DW3.
80. It was the testimony of the witness that same was previously employed by the Ministry of Environment and Natural Resources, at the Department of Forestry. Further, the witness added that upon his Employment, same was deployed to and stationed at Nakuru Forestry Training Centre.
81. Additionally, the witness testified that same opened a timber yard business, wherein same (witness) would sell assorted timber material to various customers.
82. It was the further testimony of the witness that during the course of his timber business, same dealt with and sold assorted timber materials to Geoffrey Kariithi Karekia, but which assorted timber to the said Geoffrey Kariithi, was not fully paid for.



83. Furthermore, the witness added that though he sold assorted quantities of Timber to Geoffrey Kariithi Kereka, same however, did not pay the purchase/ consideration of the assorted Timber.
84. Owing to the failure by and on behalf of Geoffrey Kariithi Karekia to pay for the purchase price of the assorted timber, the witness averred that same sought audience with Geoffrey Kariithi Kareikia over and in respect of the outstanding monies due and payable on account of the Timber which had been sold, albeit on credit.
85. It was the testimony of the witness that during the course of his meeting with Geoffrey Kariithi, the latter intimated to the witness that same had a property which was on sale. However, it was the further testimony of the witness the Geoffrey Kariithi Karekia also intimated to same that the property in question was registered in the name of his (Geoffrey Kariithi Karekia's) Daughter, namely, Njoki Karanja.
86. Additionally, the witness testified that Geoffrey Kariithi Karekia similarly intimated to him (witness) that same had the requisite authority and mandate to deal with the suit property, even though same was registered in the name of the Daughter.
87. Arising from the foregoing, the witness has testified that thereafter Geoffrey Kariithi instructed and advised the advocate, who had been summoned by the witness, to proceed and prepare the requisite sale agreement and affidavit, which Geoffrey Kariithi agreed to take to her Daughter to sign and/or execute.
88. Instructively, the witness testified that both the sale agreement and the affidavit, both which had been crafted on the advice of Geoffrey Kariithi Karekia, were the handed over to the said Geoffrey Kariithi Karekia, for onward transmission to her Daughter, namely, Njoki Karanja, for due execution.
89. Furthermore, the witness added that subsequently, the sale agreement, the Affidavit and the Transfer Instrument, which had similarly been prepared; and pertaining to the suit property were returned duly executed by Njoki Karanja.
90. It was the further testimony of the witness that upon the return of the documents namely, the affidavit, sale agreement and the transfer instrument by Geoffrey Kariithi Karekia; same were handed over to Mr. Gatuguta, Advocate for purposes of procuring registration and transfer of the suit property in favor of the 2<sup>nd</sup> Defendant to the counterclaim.
91. Besides, the witness averred that the transfer documents were thereafter presented to and or lodged with the Registrar of Titles, culminating into the transfer and registration of the suit property to and in favor of the witness in terms of the Certificate of title issued on the 30<sup>th</sup> December 1985.
92. Further and at any rate, the witness averred that upon the transfer and registration of the suit property in his [Witness] name, same entered upon and took possession of the suit property up to and including the year 2010, when same entered into and executed a sale agreement in favor of the Plaintiff.
93. Other than the foregoing, it was also the testimony of the witness that same was in actual possession of the suit property and indeed carried out timber business on the said property and thus anyone would have discerned his presence of the suit property.
94. Moreover, the witness testified that upon entry into and execution of the sale agreement with the Plaintiff, same surrendered all the completion documents, inter-alia, the Original Certificate of Title, the rates clearance certificate and the consent to transfer from the Commissioner of Lands, to the Plaintiff and thereafter the suit property was transferred to and in favor of the Plaintiff.



95. Besides, the witness added that the Plaintiff remained in occupation and possession of the suit property without any interruption for a period of five years before the Defendant herein started laying/ staking a claim to and in respect of the suit property.
96. Nevertheless, the witness reiterated that same acquired a genuine and lawful title to the suit property and he was therefore the lawful owner thereof, before the suit property was lawfully transferred to and registered in the name of the Plaintiff.
97. Other than the foregoing, the witness alluded to the witness statement dated the 28<sup>th</sup> November 2022; and thereafter sought to adopt and rely on same. In this regard, the witness statement dated the 28<sup>th</sup> November 2022, was duly admitted and constituted as the Evidence- in chief of the witness.
98. Furthermore, the witness also alluded to the List and Bundle of Documents dated the 28<sup>th</sup> November 2022; and sought to produce the documents as Exhibits before the Honourable Court.
99. There being no objection to the production of the documents, same were duly admitted and constituted as Exhibits 1 to 7, respectively, on behalf of the 2<sup>nd</sup> Defendant to the counterclaim.
100. On cross examination by Learned Counsel for the Plaintiff, the witness testified that it is him who sold the suit property to the Plaintiff. Furthermore, the witness added that prior to the sale of the suit property, same was in possession of a lawful and a genuine Certificate of title in respect of the suit property.
101. Whilst under further cross examination, the witness added that the suit property was transferred unto him by Njoki Karanja, albeit through her Father; and Njoki Karanja duly signed a sale agreement and transferred instrument, both of which have been produced before the Honourable court.
102. Additionally, the witness added that the legitimacy of the Sale Agreement and the Transfer Instrument which were duly signed by Njoki Karanja, have never been challenged by the said Njoki Karanja or at all.
103. In any event, the witness added that the legitimacy of the said documents has never been the subject of any complaint and/or investigations, by any State Agency.
104. On the other hand, the witness averred that when an issue arose as pertains to the true Certificate of ownership between the Plaintiff and the Defendant herein, a Complaint/ report was made to the Directorate of Criminal Investigations [DCI], who thereafter undertook investigations over the competing title.
105. It was the further Evidence of the witness, that after investigations by the Directorate of Criminal Investigations, the Land Registry filed a report which confirmed that his Certificate of title was the legitimate certificate of title.
106. On cross examination, by the Defendant, the witness stated that though same did not transact personally with Njoki Karanja, the transactions were carried out on behalf of Njoki Karanja through her Father, namely, Geoffrey Kariithi Karekia.
107. Besides, the witness averred that both the sale agreement and the transfer instrument were taken to Njoki Karanja for execution and same were duly executed the documents.
108. Furthermore, the witness averred that the Father of Njoki Karanja thereafter signed an affidavit to confirm that same witnessed Njoki Karanja signing/executing both the sale agreement and the transfer instrument, respectively.



109. Other than the foregoing, the witness added that though Njoki Karanja appeared before the Honourable court and denied having sold the land to him, same however, reiterated that the documents which were executed by Njoki Karanja and which were used to facilitate the transfer of the suit property in his favor, have never been challenged by the said Njoki Karanja.
110. Finally, the witness averred that upon the transfer and registration of the suit property in his name, he (Witness) paid the rates to and in favor of the City County Council of Nairobi. In this regard, the witness alluded to the receipt which was issued in 1998.
111. With the foregoing testimony, the 2<sup>nd</sup> Defendant to the counterclaim's case was duly closed.

### **Parties' Submissions:**

#### **a. Plaintiff's Submissions:**

112. The Plaintiff filed written submissions dated the 13<sup>th</sup> September 2023; and in respect of which same has raised, highlighted and amplified three [3] issues for due consideration by the Honourable court.
113. Firstly, Learned counsel has submitted that the Plaintiff herein bought and/or purchased the suit property from the 2<sup>nd</sup> Defendant to the counterclaim, who was hitherto the lawful and registered proprietor of the suit property.
114. Furthermore, Learned counsel for the Plaintiff has contended that prior to and before purchasing the suit property, the Plaintiff commissioned and undertook due diligence over and in respect of the suit property, culminating into the issuance of a Certificate of official search, which confirmed that the 2<sup>nd</sup> Defendant to the counterclaim was the lawful proprietor of the suit property.
115. As pertains to the manner in which the 2<sup>nd</sup> Defendant to the counterclaim acquired the suit property, Learned counsel for the Plaintiff has submitted that the 2<sup>nd</sup> Defendant to the counterclaim bought the suit property from Mrs. Njoki Karanja who was the registered owner thereof.
116. Further and in addition, Learned counsel for the Plaintiff has submitted that the Sale Agreement and the transfer instrument, both of which were executed by Njoki Karanja, to and in favor of the 2<sup>nd</sup> Defendant to the counterclaim, have never been challenged and/or impugned.
117. Based on the foregoing, Learned counsel for the Plaintiff has therefore contended that the 2<sup>nd</sup> Defendant to the counterclaim held lawful title to and in respect to the suit property, which title was thereafter conveyed to and in favor of the Plaintiff.
118. Consequently and in the premises, Learned counsel for the Plaintiff has submitted that the Plaintiff has therefore demonstrated and proved the root of his title to the suit property.
119. In support of the foregoing submissions, Learned counsel for the Plaintiff has cited and relied on, inter-alia, the case of *Munyu Maina vs Hiram Gathiha Maina* (2013)eKLR and *Hubart L Martine & 2 Others vs Margaret J Kamal & 2 Others* (2016)eKLR, respectively.
120. Secondly, Learned counsel for the Plaintiff has submitted that on the contrary the Defendant herein has neither demonstrated nor proved the root of her title to the suit property. In particular, Learned counsel for the Plaintiff has submitted that though the Defendant is laying a claim to the suit property, same has neither tendered nor availed the sale agreement, transfer instrument, letter of consent of Commissioner of Lands and evidence of payments of Stamp Duty, if any, that was ever made by and on behalf of the Defendant.



121. Additionally, Learned counsel for the Plaintiff has also submitted that it is inconsiderable that the Defendant herein could have entered into a sale agreement and thereafter executed a Transfer instrument over and in respect of the suit property on the 20<sup>th</sup> December 1985, earlier than her incorporation. Instructively, Learned counsel has invited the Honourable court to take cognizance of the fact that the Defendant company was incorporated on the 27<sup>th</sup> December 1985.
122. Arising from the foregoing, Learned counsel for the Plaintiff has thus submitted that the purported Certificate of title to which has been exhibited by and on behalf of the Defendant and which anchors the Defendant's claim to the suit property, was illegally obtained.
123. Owing to the fact that the Defendant's title was procured and obtained in the absence of the requisite backgrounds documents, Learned counsel has thus invited the court to take cognizance of and to apply the provisions of Section 26(1) of the [Land Registration Act, 2012](#).
124. Furthermore, Learned counsel for the Plaintiff has similarly cited and relied on, inter-alia, the case of Peter Njoroge Ng'ang'a vs Statutory manager for United Assurance Company Ltd & Another (2020)eKLR, Wreck Motors Enterprise vs The Commissioner of Lands & Others, respectively, to contend that a Certificate of title obtained in vacuum does not confer any legitimate interests to the proponent thereof.
125. Thirdly, Learned counsel for the Plaintiff has submitted that the Defendant company was struck out from the Register of Companies on or about the 14<sup>th</sup> September 2016, following the filing of CR18 and CR12, respectively, which were signed by the Directors of the Defendant company.
126. Furthermore, Learned counsel for the Plaintiff has submitted that even though DW1 contended that the striking out of the Defendant's name from the Register of Companies was fraudulent and that same thereafter proceeded to challenge the said striking out, counsel has submitted that no evidence was tendered before the court to show that the striking out of the Defendant's name was reversed.
127. On the other hand, Learned counsel for the Plaintiff has also submitted that even though DW1 also spoke about filing a Civil suit before the Commercial Court, touching on and concerning the fraudulent striking out of the name of the Defendant company, no evidence was presented to court to underscore the outcome of the said suit.
128. Arising from the foregoing, Learned counsel for the Plaintiff has therefore submitted that the Defendant company having been struck out from the Register of companies, same ceased to exist as a Legal entity capable of owning any property.
129. Lastly, Learned counsel for the Plaintiff has submitted that the Plaintiff herein has been able to prove his claim to and in respect of the suit property and thus same is entitled to the reliefs sought at the foot of the Plaint dated the 22<sup>nd</sup> March 2017.
130. On the contrary, Learned counsel for the Plaintiff has submitted that the Defendant herein has however failed to prove the allegations of fraud, which were articulated in the body of the counterclaim.
131. In any event, Learned counsel for the Plaintiff has submitted that it is not enough to plead fraud and thereafter supply particulars of fraud to the Honourable court. However, Learned counsel has submitted that it is incumbent upon the litigant and in this case, the Defendant to supply plausible and cogent evidence in a bid to prove the allegations of fraud.
132. Nevertheless, Learned counsel for the Plaintiff has submitted that the Defendant was unable to tender and/or produce any cogent evidence before the court as pertains to fraud.



133. In support of the submissions that the Defendant failed to meet the requisite threshold for proving fraud, Learned counsel for the Plaintiff has cited and relied on inter-alia, the case of Gladys Wanjiru Ngacha vs Theresa Chepsat & 4 Others (2013)eKLR; Elizabeth Kamene Ndolo vs George Matata Ndolo & Another (1976)eKLR, respectively.
134. Based on the foregoing submissions, Learned counsel for the Plaintiff has thereafter implored the Honourable court to find and hold that the Plaintiff has proved his case to the requisite standard and hence the court ought to grant the reliefs sought at the foot of the Plaint dated the 22<sup>nd</sup> march 2017.
135. Conversely, Learned counsel for the Plaintiff has contended that the Defendant has however failed to prove the root of her title to and in respect of the suit property and hence the Defendant's counterclaim has not been proved.
136. Consequently and in view of the foregoing, Learned counsel for the Plaintiff has invited the Honourable court to dismiss the counterclaim with costs.

**b. Defendant's Submissions:**

137. The Defendant herein filed written submissions dated the 25<sup>th</sup> September 2023; and in respect of which same has raised, highlighted and canvassed five [5] salient issues for due consideration by the Honourable court.
138. First and foremost, Learned counsel for the Defendant has submitted that the Defendant was duly incorporated and thereafter issued with a Certificate of incorporation dated the 27<sup>th</sup> December 1985.
139. Additionally, Learned counsel for the Defendant has submitted that upon being issued with the certificate of incorporation, the Defendant became a Legal entity and therefore entitled to acquire and own the property.
140. Nevertheless, Learned counsel for the Defendant has submitted that even though the name of the Defendant was struck out from the Register of Companies, the striking out of the name of the Defendant company was fraudulent and in any event was a scheme devised to defraud the Defendant of the suit property.
141. On the other hand, Learned counsel has submitted that upon the discovery of the fraudulent of striking out of the name of the Defendant, the Directors of the Defendant Company lodged a Complaint with the Registrar of companies; and with the Directorate of Criminal Investigations, to facilitate appropriate investigations into the matter.
142. Other than the foregoing, Learned counsel for the Defendant also submitted that the fraudulent de-gazettement and de-registration of the Defendant company was remedied vide gazette notice published on 18<sup>th</sup> October 2019, which deleted certificate Number C30999; Lang'ata Realty Ltd.
143. In a nutshell, Learned counsel for the Plaintiff has submitted that the Defendant company is therefore alive and in existence.
144. Secondly, Learned counsel for the Defendant has also contended that if the Plaintiff's position pertaining to the fact that the Defendant company was struck out from the Register in accordance with the gazette notice dated the 13<sup>th</sup> February 2017 is to hold sway, then the question that does arise is whether the Plaintiff's suit is legally tenable.



145. In addition, Learned counsel for the Defendant has submitted that no suit can be lodged and/or mounted against a non-existent Legal entity and thus, if any suit is filed against such an entity, then the suit is a nullity ab initio.
146. In support of the foregoing submissions, Learned counsel for the Defendant has cited and relied on, inter-alia, the case of *George Orito Kuia vs Vegi Thow Thousand & Seven Ltd* (2015)eKLR and *Charles Kipng'eny Limo vs Cherutich Chepkemoi Chebii & 2 Others* (2021)eKLR.
147. Thirdly, Learned counsel for the Defendant has submitted that the Defendant bought, purchased and acquired the suit property from Mrs. Njoki Karanja, who was the lawful and legitimate owner thereof.
148. Furthermore, Learned counsel for the Defendant has contended that upon the purchase of the suit property, the vendor, namely, Mrs. Njoki Karanja executed the transfer instrument which was thereafter lodged with the Land Registry for purposes of registration.
149. It was the further submissions of Learned Counsel for the Defendant that the transfer instrument was thereafter duly registered culminating into the issuance of a certificate of title in favor of the Defendant.
150. Be that as it may, Learned counsel for the Defendant has contended that even though the Defendant was not able to tender the copy of the transfer instrument to court, the failure to do so does not invalidate the Certificate of title, which was issued in favor of the Defendant.
151. On the other hand, Learned counsel for the Defendant has also submitted that the failure to produce and tender a copy of the sale agreement which was entered into between the Defendant and Mrs. Njoki karanja does not also negate the certificate of title which was issued in favor of the Defendant.
152. Instructively, Learned counsel for the Defendant has contended that the requirement that transaction touching and concerning disposition of an Interest in land must be reduced into writing, was not in force prior to the amendment of the *Law of Contract Act*, Chapter 23, Laws of Kenya.
153. In a nutshell, Learned counsel for the Defendant has submitted that the Defendant herein has been able to demonstrate that her title to the suit property was neither procured nor obtained by fraud.
154. Fourthly, Learned counsel for the Defendant has submitted that the 2<sup>nd</sup> Defendant to the counterclaim did not acquire any lawful or legitimate title to the suit property, which same could in turn be transferred to the Plaintiff.
155. Additionally, Learned counsel for the Defendant has submitted that the sale agreement and the transfer instrument which were relied on to facilitate the transfer and registration of the suit property in favor of the 2<sup>nd</sup> Defendant to the counterclaim were not lawful nor legitimate.
156. Based on the foregoing, Learned counsel for the Defendant has thus impeached the process leading the alleged transfer and registration of the suit property in the name of the 2<sup>nd</sup> Defendant to the counterclaim.
157. To underscore, the submissions, that the transfer and registration of the suit property in favor of the 2<sup>nd</sup> Defendant to the counterclaim was informed by fraud, Learned counsel for the Defendant has cited and relied on, inter-alia, the case of *Joseph Kinyanjui Wanjiru vs Silas Muriithi Nguchu & 2 Others* (2020)eKLR and *Avtrar Singh Chauhang & Another vs Ruth Wanjiru Shadrack & Another* (2007)eKLR and *Peter Muiruri Kamau vs Mary Muihaki Kamau* (2017)eKLR.
158. Lastly, Learned counsel for the Defendant has submitted that the Plaintiff herein is not an Innocent Purchaser for value and thus same cannot lay a claim to the suit property on the basis of being a Bona fide Purchaser for value without Notice.



159. At any rate, Learned counsel for the Defendant has submitted that the Plaintiff did not demonstrate that same carried out and or conducted appropriate due diligence over and in respect of the suit property.
160. In addition, Learned counsel for the Defendant has also submitted that it is disturbing that the Plaintiff herein would purport to have executed a sale agreement on the 24<sup>th</sup> November 2010; but wait to transfer the suit property in his name in the year 2016, after the Defendant had procured and been issued with an approval for change of user.
161. According to Learned counsel for the Defendant, the title in favor of the Plaintiff is vitiated and thus the Plaintiff herein cannot contend that same is a bona fide purchaser for value in respect of the suit property.
162. In support of the submissions, that the Plaintiff has not demonstrated that same is a lawful purchaser for value without notice, Learned counsel for the Defendant has cited and relied on inter-alia the case of Dina Management Ltd vs County Government of Mombasa & 5 Others (2023)KECS 30 (KLR); Elijah Makari Nyangwara vs Stephen Munguai Njuguna & Another (2013)eKLR and Samuel Kamere vs Land Registrar, Kajiado (2015)eKLR.
163. Finally, Learned counsel for the Defendant has submitted that insofar as the Plaintiff and the 2<sup>nd</sup> Defendant to the Counter-claim admitted to have entered upon and been in possession of the suit property, same are therefore liable to the Defendant on account of trespass.
164. Arising from the foregoing, Learned counsel for the Defendant has therefore impressed upon the Honourable court to decree payment of General damages for trespass in the sum of Kes.5, 000, 000/= only.
165. In support of the claim for payment of General Damages in terms of the preceding paragraph, Learned counsel for the Defendant has cited and relied in the case of Kenya Power & Lighting Ltd vs Ringera & 2 Others Civil Appeal No. E247 and E248 of 2020 (Consolidated) (2022)KCA 104 (KLR).
166. In short, Learned counsel for the Defendant has implored the Honourable court to find and hold that the Plaintiff herein has not proved his case to the requisite standard, whereas the Defendant has established the counterclaim to the requisite standard of proof.
167. Consequently and in this regard, Learned Counsel has invited the Honourable court to dismiss the Plaintiff's case.

**c. Submissions by the 2<sup>nd</sup> Defendant to the Counterclaim:**

168. Though the Learned Counsel for the 2<sup>nd</sup> Defendant to the counterclaim was afforded the requisite opportunity to file written submissions, same failed to file written submission.
169. Arising from the failure by the counsel for the 2<sup>nd</sup> Defendant to the counterclaim to file written submissions, the Honorable court was constrained to and indeed activated the default clause at the foot of the orders that were issued on the 26<sup>th</sup> September 2023.
170. For good measure, clause three (3) of the orders which were issued on the 26<sup>th</sup> September 2023; were couched as hereunder;

“However if the Defendant to the counterclaim fails to file and serve written submissions within the set timelines in terms of clause (i) hereof, the 2<sup>nd</sup> Defendant to the Counterclaim shall be deemed to have forfeited the opportunity to file written submissions and the court



shall proceed to craft and deliver judgment herein, notwithstanding the failure of and/or by the 2<sup>nd</sup> Defendant to the counterclaim to file written submissions”

171. Instructively, the 2<sup>nd</sup> Defendant to the counterclaim failed to file written submissions by the scheduled date and thereafter the default clause prohibited and/or barred the 2<sup>nd</sup> Defendant to the counterclaim from filing written submissions.

#### **Issues for Determination:**

172. Having reviewed the Pleadings filed; the Evidence tendered (both oral and documentary) and upon consideration of the written submissions filed by and n behalf of the Parties, the following issues do emerge and are thus worthy of determination;
- i. Whether the Plaintiff's suit has been mounted against a Non-existent Legal entity or otherwise.
  - ii. Whether the 2<sup>nd</sup> Defendant to the counterclaim procured and obtained a Legitimate title to the suit property or otherwise.
  - iii. Whether the Plaintiff herein is a Bona fide Purchaser for value without notice of any defect in the title of his predecessor; and if so, whether the Plaintiff is entitled to the suit property.
  - iv. Whether the Defendant acquired lawful rights to and in respect of the suit property or otherwise.
  - v. What reliefs, if any; ought to be granted.

#### **Analysis and Determination**

##### **Issue Number 1 Whether the Plaintiff's suit has been mounted against a Non-existent Legal Entity or otherwise.**

173. It was the submission by Learned counsel for the Defendant that if the Plaintiff's position that the Defendant company had been struck of the Register of companies by dint of gazette notice number 1822; published on 10<sup>th</sup> March 2017; was to hold sway then it is obvious and evident that the Plaintiff's suit which was filed on the 22<sup>nd</sup> March 2017, would be a nullity.
174. Nevertheless, the Defendant also submitted that contrary to the position taken by the Plaintiff, the name of the Defendant company was duly restored to the Register of companies vide gazette notice published on the 18<sup>th</sup> October 2019, which effectively canceled the previous gazette notice.
175. What I hear Learned counsel for the Defendant to be stating is that even though there was a fraudulent attempt to strike out the name of the Defendant from the Register of companies, the striking out of the name of the Defendant from the Register of companies was reversed and canceled vide gazette notice published on the 18<sup>th</sup> October 2019.
176. In any event, the Defendant herein tendered before the Honourable court a copy of the CR12 which was produced as exhibits D34; and which showed the status of the Defendant company as at 27<sup>th</sup> June 2022. Instructively, the said CR12 authenticate and confirms that the Defendant company remained in existence and was thus a legal entity.



177. Arising from the foregoing, the contention by the Defendant that the Plaintiff's suit is a nullity, for having been filed against a non-existent legal entity, is therefore misconceived and otherwise Legally untenable.
178. Furthermore, the Defendant herein cannot on one hand, propagate a position that the Plaintiff's suit is a nullity for having been filed against a non-existent company whilst at the same time, the Defendant maintains that the Gazette Notice that struck out the name of the Defendant from the Register of the companies was reversed.
179. In my humble view, the Defendant herein and his legal counsel cannot approbate and reprobate at the same time. Suffice it to point out that the Defendant must elect and stand firm with one precipitate position, without oscillating between two extreme positions, which are not reconcilable.
180. Additionally, it is curious for the Defendant to attack the validity of the Plaintiff suit on the basis having been filed against on a non-existent entity, yet the Defendant also lays a claim of ownership of the suit property, which presupposes that same is a lawful Legal entity which is capable of owning property.
181. Before departing from the issue herein, it is also appropriate to mention that even, if I were to find and hold that the name of the Defendant was struck off the register of companies, (which is not the obtaining position as at the time of hearing of the suit);, I would still not have come to the conclusion that the Plaintiff's suit is incompetent because the Plaintiff seeks to revoke and/or cancel the parallel certificate of title, which was issued and continues to exists in the name of the Defendant company.
182. Remarkably, the question that would arise is whether the court can grant any orders and/or reliefs, inter-alia revocation and/or cancelation of the titles in the name of the Defendant, without the Defendant herself being sued.
183. To my mind, the Defendant in whose name the impugned certificate of title was issued, is and would be a necessary Party in any such proceedings.
184. Be that as it may, it is my finding and holding that on the basis of Gazette Notice Number CXX1-140 published on the 18<sup>th</sup> October 2019, the status of the Defendant company as a legal entity was duly restored and thus the Defendant company remains in existence and thus capable of being sued.
185. Furthermore, the import and tenor of the gazette notice published on the 18<sup>th</sup> October 2019, no doubt founds and/or anchors the issuance of the CR12 which was produced by the Defendant as Exhibit D34; and which essentially, underscores that the Defendant Company remains in existence to date.
186. Arising from the foregoing, it is my finding and holding that the Defendant company remains a Legal entity and thus in existence. Further and in addition, it is also my finding and holding that the Plaintiff's suit as against the Defendant is not a nullity, either in the manner contended or at all.

**Issue Number 2 Whether the 2<sup>nd</sup> Defendant to the Counterclaim procured and obtained a Legitimate Title to the suit property or otherwise.**

187. The 2<sup>nd</sup> Defendant to the counterclaim tendered before the Honorable court elaborate evidence pertaining to and/or concerning the circumstances surrounding the purchase, acquisition and ultimate transfer of the suit property in his name.
188. To start with, the 2<sup>nd</sup> Defendant to the counterclaim intimated to the court that same entered into timber selling transactions with one Geoffrey Kariithi Karekia, who was the Father of one Njoki Karanja.



189. Furthermore, the 2<sup>nd</sup> Defendant to the counterclaim tendered evidence that same sold assorted quantity of timber to the said Geoffrey Kariithi Karekia, but the latter failed to pay for the timber.
190. Moreover, the 2<sup>nd</sup> Defendant to the counterclaim thereafter narrated how Geoffrey Kariithi Karekia, intimated to same that the suit property was available for sale and thereafter offered to broker the sale of the suit property.
191. Additionally, the 2<sup>nd</sup> Defendant to the counterclaim tendered evidence of how a sale agreement was crafted and thereafter handed over to Geoffrey Kariithi Karekia, for onward execution by Njoki Karanja, who was the registered proprietor of the suit property.
192. Other than the foregoing, the witness also intimated to the court that a transfer instrument was also crafted and surrendered to Geoffrey Kariithi Karekia, for purposes of procuring the execution thereof by Njoki Karanja.
193. First forward, the 2<sup>nd</sup> Defendant to the counterclaim tendered evidence that the sale agreement and transfer instrument, respectively, were duly executed by Njoki Karanja and thereafter same were returned to and handed over to the transaction advocate, namely, Mr. Gatuguta; for onward presentation to the Land Registry.
194. Additionally, the 2<sup>nd</sup> Defendant to the counterclaim also tendered evidence that Geoffrey Kariithi Karekia, who was the Father of Njoki Karanja, also swore an affidavit to confirm that he witnessed Njoki Karanja executing the sale agreement, as well as the transfer instrument, pertaining to and concerning the suit property.
195. Other than the foregoing, it is also not lost on the court that the sale agreement and the transfer instrument, bearing the signatures of Njoki Karanja, were also attested by the transaction advocate, namely, Mr. Gatuguta.
196. Arising from the foregoing facts, the question that the court must grapple with is whether the sale agreement and the transfer instrument, culminating into the transfer and registration of the suit property in favor of the 2<sup>nd</sup> Defendant to the counterclaim, were lawful and legitimate.
197. The second and incidental question that will also deserve consideration by the Honourable Court is whether Njoki Karanja, who is indicated to have executed the sale agreement and the transfer instrument, duly executed same or otherwise.
198. I beg to start with the second question. Suffice it to point out that even though Njoki Karanja appeared before the Honourable court and testified as DW2, on behalf of the Defendant, it is instructive to note that same did not speak to the signatures affixed to the sale agreement and the transfer instrument, which underpin the transfer of the suit property to the 2<sup>nd</sup> Defendant to the counterclaim.
199. Notably, Njoki Karanja, DW2 did not contend that the signatures contained on the sale agreement , which was Exhibit D2 and the transfer instrument, which was produced as Exhibit D4; did not belong to her.
200. First forward, the same DW2, also did not tender any evidence as to whether same as ever lodged and/ or mounted any complaint with any established State agencies, inter-alia, the Directorate of Criminal Investigations or the Inspector General of Police, to facilitate investigations over the signatures which are deemed to hers.
201. To my mind, if DW2, did not execute the sale agreement and the transfer instrument, which informed the transfer and registration of the suit property in favor of the 2<sup>nd</sup> Defendant to the counterclaim,



- then no doubt, DW2 would not have sat pretty and watched (sic) the fraud/forgery being perpetrated against her, without any complaint.
202. In my humble view, the failure by DW2 to impugn her signatures in both the sale agreement and the transfer instrument, which culminated into the transfer and registration of the suit property in favor of the 2<sup>nd</sup> Defendant to the counterclaim, portrays DW2 as being dishonest and less than candid to the court.
  203. On the other hand, it is also not lost on the court that the Father of DW2 swore an affidavit and confirmed that same witnessed DW2 execute the sale agreement and the transfer instrument, respectively. For good measure, the affidavit sworn by the Father of DW2 was tendered in evidence as Exhibit D3 on behalf of the 2<sup>nd</sup> Defendant to the counterclaim.
  204. Similarly, it is imperative to recall and reiterate that despite the averment on oath by DW2's Father, DW2 has never reacted to the said affidavit.
  205. To my mind, this court did not hear DW2 to contest and/or challenge the averment by Geoffrey Kariithi Karekia or otherwise.
  206. In the absence of any challenge to the contents of the affidavit which was sworn by DW2's Father; the Honourable court forms the impression that DW2 was unable to contradict the explicit exposition by her own Father.
  207. In view of the observations, that have been made in the preceding paragraphs, it is my finding and holding that Njoki Karanja, who was hitherto the registered proprietor of the suit property, knowingly executed the sale agreement and the transfer instrument, which underpinned the transfer and registration of the suit property to and in favor of the 2<sup>nd</sup> Defendant to the counterclaim.
  208. Back to the first question, which the court had also itemized and which touches on whether the sale agreement and the transfer instrument were lawful and legitimate.
  209. Having examined the sale agreement and the instrument of transfer, I hold the firm position that same were duly prepared and executed in compliance with the provisions of Section 3 of the [Law of Contract Act](#), Chapter 23 laws of Kenya, which existed prior to the amendment thereof; and in particular, the introduction of Section 3(3) of the [Law of Contract Act](#), Chapter 23; Laws of Kenya.
  210. At any rate, there is no gainsaying that the Defendant and/or her Legal counsel were at liberty to summon and cross examine Mr. Gatuguta advocate, who appears to be the proprietor of M/s Gatuguta & Co Advocates and thereafter cross examine same on whether or not the Parties to the sale agreement appeared before him.
  211. Nevertheless, I beg to point out that Learned counsel for the Defendant indeed conceded to both the sale agreement and the transfer instrument being produced and admitted before the Honourable court without seeking to have the drawer thereof appear before the court.
  212. On the other hand, I also beg to underscore that after the execution of the sale agreement and the transfer instrument, same were presented to the Land Registry on the 30<sup>th</sup> December 1985; and the presentation was acknowledged vide Presentation Book Number 1360. Clearly, the details of the presentation book number and the time are duly reflected on the face of the transfer instrument dated 20<sup>th</sup> December 1985.
  213. Furthermore, it is also evident that upon the presentation of the transfer instrument, by and on behalf of the 2<sup>nd</sup> Defendant to the counterclaim, the transfer instrument was duly acted upon and was thereafter registered on the 30<sup>th</sup> December 1985 at 11:30 hours.



214. Flowing from the registration of the transfer instrument in favor of the 2<sup>nd</sup> Defendant to the counterclaim, it suffices to point out that the previous registered owner, namely, Njoki Karanja, stood divested of any rights and/or interests over the suit property.
215. Consequently and in the premises, it is worthy to emphasize that henceforth from the 30<sup>th</sup> December 1085, 11:30 hours, the previous registered owner of the suit property, could not purport to transact over the same property, without first and foremost impeaching the preceding transactions.
216. In my humble view, the totality of the evidence tendered and placed before the court by the 2<sup>nd</sup> Defendant to the counterclaim and coupled with the failure by DW2, to impugn the sale agreement and the transfer instrument, respectively, drives me to the conclusion that the 2<sup>nd</sup> Defendant to the counterclaim procured and obtained lawful and legitimate title to the suit property.
217. Conversely, if DW2, was not happy with the transaction to and in favor of the 2<sup>nd</sup> Defendant to the counterclaim, it was not enough for her to burry her head in the sand, like an ostrich bird; and purport to enter into another competing transaction/ sale agreement, prior to and before addressing (sic) the previous transfer over the same property.
218. In a nutshell, it is my finding and holding that the 2<sup>nd</sup> Defendant to the counterclaim indeed procured a legitimate title and thus his rights to and in respect of the suit property were vindicated vide the provisions of the Section 23 of the Registration of Title Act, Chapter 281 Laws of Kenya (now repealed).
219. To buttress the foregoing holding, it suffices to cite and take cognizance of the holding in the case of Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others [1997] eKLR, where the court held thus;
- Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.
220. Additionally, the import of transfer and registration of a property in favor of the ultimate owner was also considered by the Court of Appeal in the case of Embakasi Properties Limited & another versus Commissioner of Lands & another [2019] eKLR, where the court held as hereunder;
- “With respect, there has been no confusion on the application of the Torrens system in Kenyan land law. Since the enactment of the repealed Registration of Titles Act and the Registered *Land Act*, it has consistently been acknowledged in countless judicial decisions that the law on registration of titles in Kenya is based on the Torrens System. Souza Figueredo V Moorings Hotel, [1960] EA 926; Cross V Great Insurance Company Limited of India, [1966] EA 94 and Charles Karathe Kiarie & 2 others V Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR are some of the authorities that have unequivocally applied the principles of Torrens system.



The three main principles of the Torrens system were aptly summarized by the Canadian Court of Appeal in the case of *Regal Constellation Hotel Ltd Re* 2004 Can LII 2006 Ontario C.A.) Page 13 para 42 as follows:

“ 42. The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy.”

221. In a nutshell, my answer to issue number two [2] is to the effect that the 2<sup>nd</sup> Defendant to the counterclaim, procured and obtained lawful and valid title to the suit property, following the transfer and registration thereof in his favor on the 30<sup>th</sup> December 1985; and thereafter same was entitled to the protection attendant to and underpinned by the Torrens Principle.

**Issue Number 3 Whether the Plaintiff herein is a Bona Fide Purchaser for Value without notice of any defect in the title of his predecessor; and if so, whether the Plaintiff is entitled to the suit Property.**

222. It was the Plaintiff's case that same entered into and executed a lawful sale agreement with the 2<sup>nd</sup> Defendant to the counterclaim over and in respect of the suit property, whereby the 2<sup>nd</sup> Defendant to the counterclaim covenanted to sell and transfer unto the Plaintiff the suit property, albeit upon payment of the mutual consideration.

223. Furthermore, the Plaintiff herein tendered evidence that prior to and before entering into the sale agreement dated the 24<sup>th</sup> November 2010, same commissioned and undertook due diligence in respect of the suit property, with a view to ascertaining the status of ownership thereof.

224. On the other hand, the Plaintiff averred that arising from the due diligence, it transpired that the suit property was lawfully registered in the name of the 2<sup>nd</sup> Defendant to the counterclaim. In this regard, a copy of the certificate of official search was tendered and produced before the court.

225. Nevertheless, it is important to recall and reiterate that whilst dealing with issue number two [2], this court has found and held that the transfer to and in favor of the 2<sup>nd</sup> Defendant to the counterclaim was lawful and legitimate.

226. Having found and held as much, the question that I must now deal with is whether the 2<sup>nd</sup> Defendant to the counterclaim was competent to sell and transfer the suit property to and in favor of the Plaintiff.

227. To my mind, the 2<sup>nd</sup> Defendant to the counterclaim was seized of the lawful rights and mandate to transact over the suit property. For good measure, the extent, scope and nature of the rights inherent in the 2<sup>nd</sup> Defendant to the counterclaim, includes the right to use (usus); right to benefit from (fructus) and the right to alienate/ transfer (abusus).

228. Premised on the foregoing, there is no gainsaying that the 2<sup>nd</sup> Defendant to the counterclaim was therefor entitled to alienate and transfer the suit property to and in favor of the Plaintiff, albeit upon the payment of the purchase price, which was agreed upon by the respective Parties.



229. Flowing from the foregoing, it is therefore apparent that the purchase and acquisition of the suit property by the Plaintiff, who bought same from a person who held a valid certificate of title was therefore lawful.
230. Consequently and in the premises, I hold that the Plaintiff herein acquired legitimate title and was in any event a bona fide purchaser for value without notice of any defect, if any, on his predecessors title.
231. To my mind, the Plaintiff herein meets and satisfies all the requisite conditions that underpin the Doctrine of Bona Fide Purchaser for value, in the manner which was articulated and/or espoused by the Court of Appeal in the case of *Mwangi James Njehia v Janetta Wanjiku Mwangi & another* [2021] eKLR, where the court stated thus;

37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

232. Instructively, the circumstances and/or ingredients to be surmounted before one can benefit from the Doctrine of bona fide purchaser for value were also re-visited by the Supreme Court of Kenya in the case of *Dina Management Ltd vs The County Government of Mombasa & 5 Others* (2023) KESC PETITION NO. 8 (E010) OF 2021, where the court stated thus;

[90] The Black’s Law Dictionary 9th Edition defines a bona fide purchaser as:

““One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s



title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

- (91) The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 E A 173, defined a bona fide purchaser for value as follows:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:

- (1) he holds a certificate of title;
- (2) he purchased the property in good faith;
- (3) he had no knowledge of the fraud;
- (4) he purchased for valuable consideration;
- (5) the vendors had apparent valid title;
- (6) he purchased without notice of any fraud; and
- (7) he was not party to the fraud.”

- (92) On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No. 28 of 2005* [2015] eKLR stated as follows:

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a VALID and LEGAL title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

233. Without hesitation, it is my finding and holding that the Plaintiff herein fits within the description and parameters of a Bona Fide Purchaser for value without notice.

234. Consequently and in the premises, I proceed to proclaim and the declare the Plaintiff as such.

**Issue Number 4 Whether the Defendant acquired Lawful rights to and in respect of the suit Property or otherwise.**

235. On behalf of the Defendant herein, it was contended that same bought and/or purchased the suit property from Mrs. Njoki Karanja, who thereafter executed a transfer instrument in favor of the Defendant. Instructively, it was averred that the transfer instrument between the Defendant and Njoki Karanja was dated the 20<sup>th</sup> December 1985.

236. Nevertheless, despite contending that same entered into a sale agreement with Njoki Karanja who thereafter signed a transfer instrument, it is worthy to recall that the Defendant herein neither tendered nor availed to the court a copy to the sale agreement or the alleged transfer instrument, if any, that was ever executed by Njoki Karanja.



237. Additionally, though it was contended that the transfer instrument was submitted to the Land Registry for purposes of registration, again the Defendant herein did not endeavor to and/or produce before the court any evidence pertaining to whether Stamp Duty was ever assessed on the transfer instrument or paid in accordance with the *Stamp Duty Act*, Chapter 480 Laws of Kenya.
238. Suffice it to note that the Defendant contended that the transaction pertaining to and/or concerning the suit property was being handled by the advocate, namely, Mr. veljee, who unfortunately passed on the 24<sup>th</sup> December 1985.
239. It was contended that as a result of the unfortunate demise of the advocate who was handling the transaction on behalf of the Defendant, it became impossible to trace and obtain copies of various documents and/or instruments, relative to the transfer of the suit property.
240. In particular, the Defendant contended that as a result of the untimely death of the transaction advocate, same were unable to procure a copy of the sale agreement, the transfer instrument, stamp duty receipt or even the Letter of consent to transfer from the Commissioner of Lands, which was an integral document prior to and before any transfer could be effected over the suit property.
241. Whereas the transaction advocate may have passed on, prior to the effective transfer and registration of the instruments, it is not lost on the Honourable court that the instruments, if any, would have been presented to the Land Registry and therefore if any person, the Defendant not excepted, required certified copies, no doubt, same would have been availed subject to payment of the requisite court fees.
242. Arising from the foregoing, the question that comes to the fore is why didn't the Defendant or her Legal counsel procure and obtain certified copies of the assorted instruments, if any, were ever presented to the Land Registry.
243. To my mind, the attempt to explain the failure to produce the essential documents and transfer instruments, (sic) on the basis of death of the transaction advocate, sounds fanciful and constitute a red-herring.
244. Other than the foregoing, there is yet another startling issue that needs to be mentioned and addressed. For coherence, the issue relates to the contention that the Defendant entered into a sale agreement with Mrs. Njoki Karanja and thereafter procured and transferred instrument in her favor dated the 20<sup>th</sup> December 1985.
245. Despite the foregoing, it is worthy to note that the Defendant company was not in existence as at 20<sup>th</sup> December 1985. Instructively, the Defendant company was only incorporated and issued with a Certificate of incorporation on the 27<sup>th</sup> December 1985.
246. Premised on the foregoing, the issues that does arise is whether an entity, which was non-existent and had not been conceived, could purport to be entering into a sale agreement and procuring a transfer in her name, long before her birth. Clearly, the position being propagated by the Defendant herein as pertains to purchase and acquisition of the suit property is, with humility, unthinkable.
247. Furthermore, it is also important to recall that even though the Defendant herein has neither tendered a copy of the sale agreement and the transfer instrument, which would have been presented for registration at the Land Registry curiously, the Defendant procured a Certificate of title using Presentation Nook number 1360, which is the Presentation Book Number that had been assigned to the transfer instrument presented on behalf of the 2<sup>nd</sup> Defendant to the counterclaim.
248. To my mind, if the Defendant herein or her transaction advocate ever presented the transfer instrument as alleged at the foot of Exhibit D5 (on behalf of the Defendant), then, no doubt the Defendant



documents would have been assigned a clear Presentation Book Number which would then inform the transfer and registration in her favor.

249. Certainly, two [2] separate and distinct transfer instruments by (sic) separate persons/entities, cannot be assigned the same Presentation Book Number. Further and in any event, it is worth remembering that Presentation Book Number is a unique number that speaks to a particular presentation number and hence Presentation Book Number 1360; having been affixed on the transfer instrument on behalf of the 2<sup>nd</sup> Defendant to the counterclaim; same would not have been availed to the Defendant.
250. However, in the absence of the transfer instrument, if any, that was presented by the Defendant, one wonders wherefrom the Presentation Book Number, which was affixed to the impugned certificate of title in favor of the Defendant, came forth.
251. Lastly, it is also interesting that the Defendant herein was able to trace and locate the Memorandum of Registration of transfer bearing Serial Number 841/86 (which is the same serial number to the memorandum of registration of documents which was assigned to the 2<sup>nd</sup> Defendant to the counterclaim but conveniently failed to get the attendant documents, which would have been attached to the memorandum).
252. Furthermore, it suffices to observe that the copy of the memorandum of transfer, which has been tendered on behalf of the Defendant, is not the copy which was lodged and received at the Land Registry. For good measure, it appears to be (sic) the file copy of the transaction advocate insofar as same does not bear the receiving stamp of the Land Registry.
253. Again the puzzle as to whether there was any transfer instrument executed between the Defendant and Njoki Karanja, remains beckoning.
254. Finally, the Defendant has without providing the background/foundational documents, produced before the Honourable court a copy of the Certificate of title showing the transfer and registration of the suit property in her name.
255. Clearly, what the Defendant has endeavored to do is to avail a Certificate of title which was procured and obtained in vacuum and or in Empty space.
256. However, it is trite and established that one cannot achieve the end result, albeit without complying with the requisite procedure/process and documenting the means to the eventual end. To my mind, it suffices to reiterate that “the means justifies the end and not the reverse”.
257. Simply put, it is not enough for the Defendant to wave on the face of the court a certificate of title and various rates payments receipts and thereafter imagined that a conscientious court of law will return a proclamation in favor of such a Party.
258. Fortunately, the Court of Appeal has clearly held and underscored the position that where title is under challenge, it is not enough to wave the Certificate of title and expect a favourable verdict, predicated on the basis of the waved Certificate of Title.
259. To this end, it suffices to adopt and reiterate the holding in the case of Munyu Maina versus Hiram Gathiha Maina [2013] eKLR, where the court stated thus;

“It is our considered view that the respondent did not discharge the evidential burden to rebut the testimony of the appellant that it was their deceased father who put both of them into possession of the suit property and to occupy the same in equal share. 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.

260. Before departing from this issue, it would be remiss of me not to mention and underscore that the suit property being a leasehold, could not have been transferred to and in favor of the Defendant without the consent to transfer from the Commissioner of Lands, now defunct.
261. Nevertheless, the Defendant herein appears to have procured (sic) the transfer and registration of the suit property in her name, even though no consent from the Commissioner of Land, now defunct; was ever procured and/or obtained. Notably, none was tendered or availed to court by the Defendant.
262. Having not availed the consent to transfer from the Commissioner of Lands, no doubt, the implication of such failure is to the effect that none was ever obtained. Consequently, no transfer could have been effected and/or registered in favor of the Defendant.
263. However, if any transfer was effected and registered then same was invalid, illegal and thus a nullity. Consequently and in this respect, it suffices to invoke and apply the doctrine of Ex-Nihilo-Nihil-Fit (meaning out of nothing comes nothing).
264. To buttress the foregoing position of the law, it suffices to take cognizance of the holding in the case of Embakasi Properties Limited & another v Commissioner of Lands & another [2019] eKLR, where the court stated and observed as hereunder;

Our final reason why Safe Cargo is not entitled to compensation is this. Even though the Commissioner, in error allocated the suit property to Safe Cargo, and the latter acting on that assurance developed the suit property, the fact remains that the allocation was a nullity and “ex Nihilo Nihil fit” ( out of nothing comes nothing).

265. Furthermore, the import and tenor of the Doctrine of Ex-Nihilo-Nihil-Fit was also expounded by the court of appeal in the case of Caroget Investment Limited v Aster Holdings Limited & 4 others [2019] eKLR, where the court held thus;

The totality of what we have said is that the 1<sup>st</sup> respondent's title was unimpeachable while that of the appellant was tainted with fraud, illegalities and irregularities. The lightning speed with which the entire transaction was executed, from the moment the suit property was transferred to the appellant to the point it was set to sell it to White Horse Investment Limited, all within four months, smacked of fraud, bad faith and deceit. 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.

266. In view to the foregoing, my answer to issue number four (4) is to the effect that the Defendant herein did not acquire any lawful and or legitimate title to the suit property. In any event, the certificate of title which was issued in favor of the Defendant, is a nullity ab initio.

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

267. At the foot of the Plaint filed by and on behalf of the Plaintiff same has sought for various reliefs, pertaining to and concerning the suit property.



268. After evaluating the totality of the evidence that was tended by and on behalf of the Plaintiff and after taking into account the evidence by the 2<sup>nd</sup> Defendant to the counterclaim, it suffices to point out that the Plaintiff has proved her case on a balance of convenience.
269. Other than the general prayers that have been sought at the foot of the Plaint, the Plaintiff has also sought for a prayer for General damage for trespass. In the course of the submission by counsel for the Plaintiff, no proposal was made as to the quantum of damages, if any, payable to the Plaintiff.
270. Be that as it may, it is trite and established that where trespass is proved, the registered owner of the property becomes entitled to recompense on account of damages.
271. Put differently, the registered owner of land who has been deprived of the right of possession and use is entitled to compensation without proof of any actual loss suffered. In this respect, it is underscore that trespass is actionable per-se.
272. Based on the foregoing and taking into account that the Plaintiff has sought for General damages for trespass, I find it fit, just, expedient and meet to award to and in favor of the Plaintiff General damages in the sum of Kes.5, 000, 000/= only; taking into account the size of the suit property, the location thereon and the duration for which the Plaintiff has been prevented from taking any development thereof.
273. In this regard, I adopt and apply the ratio decidendi 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 thus;

“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 extend 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 b) 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.

274. In view of the foregoing, I hold the opinion that the sum of Kes.5, 000, 000/- only, proposed in the preceding paragraph is not only reasonable, but just and mete in the circumstances of the instant matter/case.

275. On the other hand, the Defendant herein has not been able to vindicate the root of her title to and in respect of the suit property. In any event, it worth remembering that the the certificate of title that was being propagated by the Defendant, runs afoul the provisions of Section 26(1) (b) of the [Land Registration Act](#), 2012.

**Final Disposition:**

276. From the foregoing discourse, it is apparent that the Plaintiff herein has been able to establish and demonstrate that same acquired lawful and legitimate title to and in respect of the suit property. Further and in any event, it suffices to reiterate that the Plaintiff is a Bona fide Furchaser for value.

277. On the contrary, the Defendant procured and obtained a Certificate of Title over the suit property, albeit in the absence of the requisite background and foundational documents, which thus negates the end result.

278. In view of the foregoing, I find and hold that the Plaintiff has proved his case on a balance of probabilities and thus same is entitled to Judgment. Consequently and in the premises, I proceed to enter Judgment in the following terms;

- i. Declaration be and is hereby issued that the Plaintiff is the registered owner of all that piece of land situate in Karen within Nairobi City County and comprised in the certificate of title and registered as Title Number I.R 38539 being Land Reference number 12641/3 (hereinafter referred to as the suit property) and as such is entitled to exclusive and unimpeded right of possession and occupation of the same.
- ii. Consequent to the foregoing, the certificate of title in respect of L.R No. Land Reference number 12641/3; bearing the name of the Defendant herein is hereby declared unlawful and hence same be and is hereby revoked.
- iii. The Defendant shall surrender the certificate of title in respect of Land Reference number 12641/3; to the Chief Land Registrar for purposes of cancelation and same to be surrendered within 60 days from the date hereof.
- iv. Nevertheless, the Chief Land Registrar shall be obligated to and undertake the cancelation of the Defendant certificate of title pursuant to the provisions of Section 80 of the [Land Registration Act](#), 2012, irrespective of whether the certificate of title is surrendered or otherwise.



- v. Declaration be and is hereby granted to the effect that the Defendant and/or its agents, servants, employees or otherwise are wrongfully in occupation of the suit property and are accordingly trespassers on the same.
- vi. Consequent to the foregoing, the Defendant either by herself, agents, servants and/or anyone claiming under the Defendant shall vacate and/or hand over vacant possession of the suit property to the Plaintiff within 90 days from the date hereof.
- vii. In the event of default to comply with clause (iii) hereof, the Plaintiff shall be at liberty to levy Eviction against the Defendant and/or agents and/or servants from the suit property and in the event of such Eviction, the costs attendant thereto, if any, shall be certified by the Deputy Registrar and thereafter be recoverable from the Defendant as part of costs in respect of the subject matter
- viii. Permanent injunction be and is hereby granted against the Defendant and/or its agents, servants, employees or otherwise restraining them from transferring, trespassing, entering, alienating, disposing, damaging, encroaching onto, wasting, interfering, howsoever with the Plaintiff's quiet enjoyment, use, possession and occupation of the suit property.
- ix. General damages for trespass be and are hereby awarded in the sum of Kes.5, 000, 000/- only to be borne by the Defendant.
- x. The counterclaim by the Defendant/Counter-claimant be and is hereby dismissed.
- xi. Costs of the suit be and are hereby awarded to the Plaintiff.
- xii. Costs of the Counter-claim be and are hereby awarded to the Defendants to the counterclaim, respectively.

279. It is ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2023.**

**OGUTTU MBOYA,**

**JUDGE.**

**In the Presence of:**

Benson - Court Assistant.

Mr. Muganda for the Plaintiff.

Mr. Pamba Ouma for the Defendant/Counterclaimant.

Mr. Getanda for the 2<sup>nd</sup> Defendant to the counterclaim.

