



**Nyawira v Gitahi & 2 others (Environment & Land Case E072 of 2020)
[2022] KEELC 15141 (KLR) (2 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15141 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E072 OF 2020**

JA MOGENI, J

NOVEMBER 2, 2022

BETWEEN

SCHOLASTICA NYAWIRA PLAINTIFF

AND

PAUL WAIHAKA GITAHU 1ST DEFENDANT

JOHN LAWRENCE MWANGI MUGO 2ND DEFENDANT

CHIEF LANDS REGISTRAR 3RD DEFENDANT

JUDGMENT

1. By a Plaint dated 6/08/2020 the Plaintiff herein sought for Judgment against the Defendants for the following orders: -
 - a) An order of injunction restraining the 1st defendant herein from carrying out any transactions whatsoever on Property Land Reference No. Kiambaa/Ruaka/3252.
 - b) A Declaration that the Plaintiff is the bona fide owner and proprietor of Property Land Reference No. Kiambaa/Ruaka 3252.
 - c) An order directing the Land Registrar, Kiambu County, the 3rd Defendant herein to cancel the title deed purportedly held by the 1st Defendant herein.
 - d) Costs of the suit.



2. The suit is opposed. The 1st Defendant entered appearance on 16/02/2021 and filed a defence and counterclaim dated 15/02/2022. The 1st Defendant herein counterclaims from the Plaintiff as follows:
- a) A declaration that the 1st Defendant is the bona fide owner of Land Title No. Kiambaa / Ruaka / 3252 and the purported registration of the Plaintiff as the owner thereof is, therefore, unlawful, illegal, irregular, fraudulent and of no legal effect.
 - b) Rectification of the Land register and reinstatement of the 1st Defendant as the owner of Land Title No. Kiambaa/Ruaka /3252.
 - c) The Plaintiff to surrender the title document held by him to the 3rd Respondent for cancellation failure whereof the same shall stand cancelled.
 - d) Delivery of Vacant possession of the suit land to the 1st Defendant.
 - e) General damages for trespass.
 - f) Costs of the counterclaim and interest thereon.
3. Upon pleadings thereby being closed, the suit proceeded by viva voce evidence. The Plaintiff called one witness and the 1st Defendant called two witnesses. Both parties testified on 17/05/2022.

DIVISION - Plaintiff's Case

4. It was the Plaintiff's contention that at all material times to this suit, she is the duly registered owner and proprietor of property Land Reference No. Kiambaa/Ruaka/3252 having purchased the same in the year 2016 for valuable consideration from John Lawrence Mwangi Mugo, the 2nd Defendant. That she has been and still is in occupation of Property Land Reference No. Kiambaa/Ruaka 3252 since the date of purchase and transfer.
5. It is her claim that on 4th May 2016, she issued a Public Notice notifying that there would be a change of user of the property from agricultural to residential. There was no objection or opposition to the change of user by any person. After effecting change of user, the Plaintiff avers that she actively commenced construction of apartment blocks on property Land Reference No. Kiambaa/Ruaka 3252, having duly gotten all the requisite approvals.
6. The Plaintiff avers that in the year 2019, the 1st Defendant emerged claiming that property Land Reference No. Kiambaa/Ruaka/3252 is owned by him. The 1st Defendant claimed that he had bought the said property from a separate third party and that he has been issued with a title deed for the same.
7. The Plaintiff contends that the 1st Defendant lodged a complaint at the Land Fraud Department of the Directorate of Criminal Investigations. That the Plaintiff was invited to write a statement, which she did. However, as a consequence of the rival claim by the 1st Defendant, the Plaintiff halted the construction of the apartments on Property Land Reference No. Kiambaa/Ruaka 3252.
8. It is her allegation that on account of the fact that the 1st Defendant holds a rival title deed for the suit property, there is a grave risk and danger that the 1st Defendant could proceed to enter into transactions on property Land Reference No. Kiambaa/Ruaka/3252, without the Plaintiff's knowledge, there is a likelihood that the suit property may be dissipated.



Evidence by the Plaintiff

9. PW1 – Scholastica Nyawera adopted her witness statement dated 6/08/2020 together with a list and bundle of documents dated 4/02/2022 which she relied on as her evidence.
10. During cross examination, she testified that she carried out a search of the suit property and did a physical inspection, she visited the piece of land and found it fenced. It was her testimony that she never got any documents from 2nd defendants but her search confirmed that the land belonged to John Lawrence Mwangi Mugo -2nd defendant. That the last time she was in touch with the 2nd Defendant was when she made her final payment.
11. It was her testimony that when the fraud department contacted her, she asked her lawyer to get a copy of the green card and it confirmed that the land belonged to John Lawrence Mwangi Mugo. The search and green card indicated that the 2nd defendant was the owner. She put him as 2nd defendant because she expected him to shed light on the sale. She confirmed that she never produced a copy of the green card as part of her evidence in Court. She also added that she did not have a copy of the title in the 2nd Defendant's name (John Lawrence Mwangi). She testified that she had been invited to CID headquarters twice and recorded a statement. She was not aware that John Lawrence Mwangi has not been traced. She reaffirmed that the information she got was that the 2nd defendant was the owner of the land through the search.
12. PW1 testified that the 2nd defendant put up an advertisement at the site and put his phone number. She confirmed that she didn't take a photo of that advert. She contended that she did not keep his phone number after the transaction. Although she was informed that the land had been registered in the name of the 1st defendant, the copy of the green card showed the 2nd defendant's name and she bought it from him and was duly signed by the land registrar. She only got to hear that there was a title issued in 2013.
13. Further, it was her testimony that there was no need to seek out the 2nd defendant since the documents for ownership had been issued. She paid the consideration through a banker's cheque. They went to Cooperative bank River Road in the presence of the advocate who did the transaction, she saw no need to bring her lawyer. She added that she had no knowledge of Jane Wanjiku and Lawrence.
14. During re-examination, she testified that the land was vacant. The search at pg.30 shows that the owner is John L. Mugo dated 18/02/2016. There is no obligation to maintain contact of vendor after sale. At pg.79 of trial bundle, there is a copy of the green card and it indicates that the registered current owner in the card is PW1. It was her case that she never needed the advocate because the documents are authentic and that failure to trace a vendor does not nullify a sale.
15. With that evidence, the Plaintiff closed her case.

Defendants'Case

16. The 1st Defendant entered appearance on 16/02/2021 and thereafter filed a statement of defence and counterclaim dated 15/02/2022.
17. The 1st Defendant denies each and every allegation as set out in the Plaint. On the contrary, he avers as follows;
 - a) He is the registered owner of the Land Title No. Kiambaa /Ruaka / 3252 (the suit property) having purchased the same from Jane Wangari Njuguna in in 2013 for a consideration of Kshs. 9,000,000/ - pursuant whereto the Transfer



document was registered at the Lands registry, Kiambu and a title deed issued in the 1st Defendant's favour on 25.06.2013.

- b) Upon transfer of the parcel, the 1st Defendant took possession of the land, erected a barbed wire fence and erected a 'Not for sale' sign' thereat.
 - c) On May, 2019 on a routine visit, the 1st Defendant was surprised to see the barbed wire fence around the property destroyed and a pit latrine in the process of being dug whereupon he reported the matter at Land Fraud Unit of the Directorate of Criminal Investigation Headquarters.
18. The 1st Defendant further avers that a follow-up with the Registrar of Lands, Kiambu revealed that an illegal, irregular and fraudulent act involving replacing a green card, subsequent issuance of a title document in the name of the Plaintiff had been carried out with the connivance of the officers of the 3rd Defendant.
19. The 1st Defendant avers that the replacement of the green card and subsequent issuance of a title document in the name of the Plaintiff is illegal, irregular and fraudulent for the following reasons: -
- a) The 2nd Defendant, from whom the Plaintiff purchased the suit land is still at large.
 - b) The 1st Defendant is in possession of the original title document issued to him on 25.06.2013, completion documents issued in his favour by the vendor, Jane Wangari Njuguna, evidence of payment of price and documents involving her purchase of the suit land from the previous owner.
 - c) The 1st Defendant's firm of advocates was retained by Jane Wangari Njuguna to remove a caution placed by a brother to the 1st owner (Moses Mungai Munyui) during a rectification of land swapping mistake between brothers involving the suit land and its neighbouring land parcel No. Kiambaa / Ruaka / 3251 and the removal of caution is as entry No. 6 of the green card. This was done immediately prior to registration of the land in the 1st Defendant's favour.
 - d) It cannot be mere coincidence that whom the plaintiff allegedly purchased the suit land from was registered on the same day as the 1st Defendant as the owner of the property.
20. The 1st Defendant contends that had he become aware of the aforesaid notice of change of user, he would not have hesitated to raise an objection to the same. Further, no valid change of user could be issued premised on a fraudulent title.
21. It is his case that having purchased the property in 2013 and having overseen the fencing of the same, he was entitled to reasonably expect that he would enjoy quiet and uninterrupted possession over the same.
22. The 1st Defendant prays that the Plaintiff's suit against the 1st Defendant be dismissed with costs.

Counter-claim

23. The 1st Defendant reiterates the contents of paragraphs 3 to 7 of the statement of defence.
24. The 1st Defendant prays for judgement be entered jointly and severally against the Plaintiff, 2nd Defendant and 3rd Defendant as provided in the Counterclaim.



Evidence by the Defendants

25. DW1 – Paul Waithaka Gitahi adopted his witness statement dated 15/02/2022. He also produced and relied on his list and bundle of documents dated 15/02/2022 and marked them as DW1-Exhibit 1-10.
26. During cross examination, he testified that among the documents at pg. 54-57 of the Trial Bundle is an agreement for sale of the agreed purchase price is Kshs.9 million. It was his testimony that pg.58 contained a bank transfer for the sale, an RTGS for Kshs.8,940,000.00. It is drawn from VIVA enterprises, the purchaser in the agreement is DW1. He contended having given instructions for VIPA to buy but he didn't have the documents before the Court. he averred that he carried out a search but he did not produce the same in court. The document at pg.30 shows an official search showing that the 2nd defendant was owner of the property. He contended that he paid a stamp duty of Kshs. 804,000.00 and the declared purchase price in the slip is Kshs. 4,000,000.00. DW1 added that he did not pay stamp duty as required by law but he believed that this was a legal transaction.
27. It was his testimony that although the RTGs transaction is from VIVA, he was the purchaser. He averred that there is a copy of the green card at page 79 and it refers to the suit property and the current registered owner is Scholastica Nyawira. It is his testimony that he bought the property in 2013 and he carried out the due diligence and thereafter obtained a legal title.
28. He testified that at page. 81-84, there is an agreement for sale dated 16/09/2008 between Moses Mungai and Jane Wangari Njuguna involving the sale of Kiambaa/Ruaka/2722.This about an excision of that property which is indicated in feet. He argued that, the property in question is excised from the one from Kiambaa/Ruaka/2722 but it is in feet measures and not acres or hectares. According to him, it was not possible that he bought Kiambaa/Ruaka 3251.
29. It was his case that the document on page 85-86 is a declaration sworn by Peter Njenga on 11/06/2013 but he did not call him as a witness. At paragraph 4, he confirms that Jan Wangari's title was Kiamba/Ruaka/3251.
30. He further testified that the document at page 36 and 37 of the Plaintiff's bundle is a notice of change of user from agricultural to residential published on 4/05/2016. He did not object to the change of user. At page 7-51 of the witness statement, he stated that he was surprised to see the property being destroyed. He averred that he visited the property in 2016 and he had fenced it. He confirmed that there was no occupancy.
31. During re-examination, DW1 testified that page 82 shows that agreement for sale was for a portion of land to be carved out of Kiambaa/Ruaka/2722. On page 58, the document shows VIVA enterprises paid the consideration on his behalf. The purchase price was Kshs. 9 million but she requested that he pays Kshs. 60,000.00 to the advocate so he removes a caution. He asserted that he became aware of the fraud when he the saw notice of change of user and noted the trespass in May 2019. He became aware of the case in court through the summons.
32. It was his case that he got a title deed, I.D card, PIN Number, Land Board consent and a Passport Photo from Jane Wangari. She signed a transfer dated 20/06/2013. On pg.66 the document indicates that it was lodged on 21/06/2013- 1021/06/2013 is the folio number of booking. The green card at Pg.79 shows the transaction of 21/06/2013 which is the transfer to John Lawrence for Kshs. 2 million. It was his testimony that the same was not possible as he lodged the documents that a title could have been issued to another person. He testified being in possession of the title deed at Pg.71.



33. He informed the court that he did not call Jane in this matter as he was not able to access her. They signed the transaction in their advocate's office. He paid the entire consideration and has been following the matter at CID who is the 2nd defendant.
34. DW2 - Ruth Nyamanga, Land Registrar Kiambu county. She testified that her testimony was in regard to Kiambaa/Ruaka 3252. She admitted having had a partition which produced kiambaa-3252 and 3251 from 2722. She averred that the day book shows a transfer booked for registration on 21/06/2013 from Jane Wangari Njuguna to Paul Waithaka.
35. During cross examination, it was her testimony that she had produced a day book for 2016. A search confirms the status of the property with the land registry. They can advise a purchaser to engage in a land transaction. As per this green card, she confirmed that the owner is Scholastica but she suspects fraud, that there was a green card that was plucked. At Pg.30, there is an official search dated 18/02/2016, it shows that the owner of the property is John Lawrence Mwangi even as per the green card. She would not fault a purchaser who relies on the green card and also on the search result. The Registrar can only effect transfer after being satisfied that stamp duty has been fully paid.
36. During re-examination, she testified that entry No.1021 shows property being transferred from Jane Wangari to the 1st defendant, this is same number in the transfer of land dated 20/06/2021. She averred that she did not see any entry regarding Lawrence Mugo. It was her testimony that they suspected fraud when they saw two green cards. The transfer from John Lawrence Mugo was not in her day book. A registrar assesses the stamp duty and they do this from the transfer document. The disclosed value in this document was Kshs. 4 Million and stamp duty is calculated at 4% of the purchase price. The Land Control Board gives consent for agricultural land to allow the sale. She contended that with regard to the suit property, they suspected fraud and so no transaction is allowed.
37. The 1st Defendant closed his case.
Plaintiff's Reply to the 1st Defendant's Defence and Defence to Counterclaim
38. The Plaintiff denies each and every allegation contained in the 1st Defendant's Statement of Defence dated 15/02/2022 and reiterates the averments contained in her plaint dated 6/08/2020.
39. In further response to the averments of the defence, the Plaintiff verily avers as follows: -
 - a) The official Green Card in respect of the suit property herein at the Kiambu Lands Registry, clearly indicates the Plaintiff herein as the registered owner of the suit property;
 - b) The Green Card aforesaid clearly traces the Plaintiff's root of title;
 - c) There is no other existing Green Card save for the one indicating the Plaintiff as registered owner;
 - d) The allegation that the Green Card in favour of the Plaintiff was "replaced" is a creation of the 1st Defendant, for which the Plaintiff puts the 1st Defendant to strict proof; and
40. The 1st Defendant admits that there was a swapping mistake between the suit property herein, Kiambaa /Ruaka/ 3252 and Kiambaa/ Ruaka/3251 and this further demonstrates that there is more to it than the 1st Defendant is disclosing.



41. The Plaintiff avers that she published the Notice of Change of User on 4/05/2016 as the duly registered owner of the suit property and was entitled to do so as the registered owner and further, there was no objection whatsoever by any person to the change of user.
42. The Plaintiff further avers that the 1st Defendant is not entitled to and cannot claim possession of the suit property for the reason that the legitimate owner of the suit property is the Plaintiff and it is only the Plaintiff, as registered owner, who is entitled to possession and is in fact, currently in possession.

Defence to the Counterclaim

43. The Plaintiff avers that save for a mere reiteration of the contents of the Statement of Defence, there is no counter-claim pleaded by the 1st Defendant.
44. The Plaintiff reiterates the averments contained in the Plaintiff dated 6/08/2020 and prays that the reliefs sought therein be granted.

Written submissions

45. The Plaintiff and the 1st Defendant filed submissions that I have considered. The Plaintiff's submissions are dated 19/05/2022 and filed on 7/06/2022. The 1st Defendant's submissions are dated 20/06/2022 and filed on the even date.

Analysis and Determination

46. I have considered the parties' respective pleadings, the evidence tendered by both the plaintiff and the 1st Defendant and the respective submissions by counsel. I have also considered the relevant legal framework and jurisprudence.
47. In my view, the following are the three key issues falling for determination in this suit;
 1. Who between the plaintiff and the 1st Defendant is the bona fide owner of Kiambaa/Ruaka/3252;
 2. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
 3. Whether the 1st Defendant is entitled to the reliefs sought in the counterclaim.
 4. Who should bear the costs of this suit?

Who between the plaintiff and the 1st Defendant is the bona fide owner of Kiambaa/Ruaka/3252;

48. It is trite law that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property.
49. On one hand, evidence tabled by the Plaintiff through supporting documents, was that she entered into an agreement of sale with the 2nd Defendant on 2/02/2016 for the purchase of the suit property for a valuable consideration of Kshs. 8,000,000.00. That she has been and is still in occupation of the suit property since the date of purchase and transfer. Evidence adduced before this court indicates that the 2nd Defendant acknowledge receipt of Kshs. 3,000,000.00 on 23/02/2016 being part payment towards the purchase of the suit property. The Plaintiff further made several payments to the 2nd Defendant towards the said purchase through various cheques. They are: - Co-operative bank cheque no.11-079 dated 25/02/2016 in the amount Kshs. 999,000.00; Barclays Bank cheque no. 03-001 dated 26/02/2016 (003712001860) in the amount Kshs. 999,000.00; Barclays Bank cheque no. 03-001 in



the amount Kshs. 4,000.00; Barclays Bank cheque no. 03-001 dated 26/02/2016 (003712001862) in the amount Kshs. 999,000.00; Barclays Bank cheque no. 03-001 dated 26/02/2016 (003712001861) in the amount Kshs. 999,000.00. the total amount paid towards the said purchase as per the evidence before this court is Kshs. 7,000,000.00.

50. Furthermore, she demonstrated that after making the said payments, she was issued with a transfer of land dated 29/02/2016, which document was presented to the Land's office and registered on 10/03/2016 and the Plaintiff was subsequently issued with her title deed dated the 10/03/2016. She also contended that the copy of the green card before this Court showed the 2nd Defendant's name and that she bought the suit property from him and was duly signed by the land registrar.
51. It was also indicated that the 1st Defendant emerged in the year 2019 claiming that property LR No. Kiambaa/Ruaka/3252 is owned by him and that he bought the said property from a separate third party and was also issued with a title deed for the same.
52. On the other hand, evidence has been adduced by the 1st Defendant to show how the issuance of his title came to be. It was the 1st Defendant's case that he is the registered owner of land Title No. Kiambaa/Ruaka/3252 having purchased the same from Jane Wangari Njuguna in 2013 for a consideration of Kshs. 9,000,000.00 pursuant whereunto the transfer document was registered at the land's registry, Kiambu and a title deed issued in his name on 25/06/2013. He testified and produced a bank transfer for the sale, an RTGS for Kshs. 8,940,000.00 drawn from VIPA enterprises and contended that the remaining Kshs. 60,000.00 had been paid to their advocate to remove a caution. Total amount being Kshs. 9,000,000.00.
53. He contended that he thereafter took possession and erected a fence around the property. He averred that he only found that his fence had been destroyed in May 2019 on a routine visit and he reported the same to the land fraud unit of the DCI. Among the documents adduced in Court by the 1st Defendant is the sale agreement dated 16/09/2008 between one Moses Mungai Munyui and Jane Wangari Njuguna for LR No. Kiambaa/Ruaka/2722. He also produced the title issued to Jane Wangari Njuguna on 9/05/2013.
54. When a person's ownership to property is called into question, it is trite the said proprietor has to show the root of his ownership. In the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR, Munyao J held as follows;

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder”.
55. In this instant case, in determining the above issue, tracing the root of title is key. The court has to perform the task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. The parties must establish an unbroken chain



that leads to a good title or title paramount. This Court has to interrogate the evidence to ascertain the true owner.

56. The Plaintiff produced her copy of title issued on 10/03/2016, agreement of sale dated 5/02/2016 between the 2nd Defendant and herself, deed of acknowledgement dated 23/02/2016 signed by the 2nd Defendant. Various bankers' cheques dated 25/02/2016 and 26/02/2016 in favour of the 2nd Defendant, certificate of official search dated 18/02/2016, transfer document dated 29/02/2016 and LCB consent dated 2/02/2016.
57. The 1st Defendant equally produced an agreement of sale dated 10/02/2013 by the 1st Defendant and Jane Wangari Njuguna, an equity bank deposit slip dated 14/06/2013 in favour of Jane Wangari Njuguna, completion documents in favour of the 1st Defendant comprising of the original title document in the name of Jane Wangari Njuguna, her national ID and pin certificate, LCB consent dated 4/06/2013, transfer documents plus stamp duty receipts, a copy of the agreement of sale dated 16/09/2008 between Jane Njuguna and the first owner of the suit and a statutory declaration executed by a cautioner on 11/06/2013.
58. A look at the copy of the green card indicates that the first owner of the suit property being a partition of no. 2722 was one Moses Mungai Munyui whose title was issued on 29/09/2008. Entry 3 of the said green card indicates that the second owner of the suit property was Jane Wangari Njuguna whose title was issued on 9/05/2013. Entry 7 then indicated that the 2nd Defendant was issued with a title on 21/06/2013 and then entry 9 indicates that the Plaintiff was issued with a title on 10/03/2016. From what I see, the Plaintiff's sole connection to the suit property is the certificate of title. The Plaintiff has only produced her copy of her title and the sale agreement between herself and the 2nd Defendant. The consideration for the purchase of the suit property was Kshs. 8,000,000.00. the records before this court only demonstrate that the Plaintiff paid Kshs. 7,000,000.00. Besides that, a look at the agreement of sale dated 5/02/2016 between the Plaintiff and the 2nd Defendant indicates that the 2nd Defendant was the only party that executed the said agreement. This agreement was also witnessed by one advocate for both the vendor and the purchaser, Osike D. Ombasa. He unfortunately, witnessed for the purchaser, the plaintiff herein, even though she failed to execute the agreement.
59. To begin with, Section 3(3) of the Contract Act provides as follows: -
- “ 3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless
-
- (a) the contract upon which the suit is founded—
- i. is in writing;
- ii. is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
- Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”
60. The Court has carefully perused the agreement of sale dated 5/02/2016 produced as exhibit by the Plaintiff and noted that the said agreement was reduced into writing but only one party (the vendor, 2nd defendant) executed the same. It has thus not met the requirements of Section 3(3) of the Contract



Act and is therefore not a valid sale agreement that is enforceable by the parties. See the case of Nelson Kivuvani v Yuda Komora & Another, Nairobi HCCC No.956 of 1991.

61. The Court further notes that the consideration paid did not amount to the one stated in the sale agreement and no explanation has been given for the Kshs. 1,000,000.00 balance that was remaining.
62. In addition to the above finding, whereas the plaintiff herein alleges to have obtained her certificate of title on 10/03/2016, the 1st Defendant was allegedly registered as proprietor of the suit property on 25/06/2013. It is trite law that when there are two competing titles, the first in time will prevail. This position was emphasized in the case of Wreck Motors Enterprises v The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997, where the court held that:

‘Where there are two competing titles the one registered earlier is the one that takes priority’
63. The same position was held in the case of Gitwany Investment Ltd v Tajmal Ltd & 3 Others [2006] eKLR where the Court held that: -

‘... the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’
64. I find that the 1st Defendant’s title was the first in time and as equity teaches in its maxim that; “when two equities are equal, the first in time prevails”, then the 1st Defendant’s title deed was the first in time and should prevail.
65. Ordinarily, no land should be registered more than once and having two separate title deeds held by separate persons. Therefore, in this case, there must be one title deed which is genuine and one which was issued either unlawfully or through mistake and thus double allocation.
66. Balancing the two competing titles, it is my view that the 1st Defendant holds good title to the suit property. I opine that the 1st Defendant also demonstrated the root of his title without broken chain. The title of the Plaintiff in my view, could only have been obtained either by the fraud, or by the mistake of the Land Registry, or both.
67. The Court is satisfied that the 1st Defendant has established the root of ownership over the suit property better than the Plaintiff has. This Court therefore holds and finds that the 1st Defendant is the bona fide owner of the suit property.

Whether the Plaintiff is entitled to the reliefs sought in the Plaint.

68. I note that these properties were registered under the repealed Registered [Land Act](#) which is now governed by The [Land Act](#), 2012 and the [Land Registration Act](#), 2012. Indeed, the law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the [Land Registration Act](#) provides as follows:

“the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –



- a) On the ground of fraud or misrepresentation to which the person is proved to be a party
 - b) Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme.”
69. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
70. The import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.
71. The Court of Appeal in the case of *Munyu Maina vs. Hiram Gathiha Maina* [2013] eKLR, held as follows:
- “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.”
72. Section 80 (1) of the *Land Registration Act* provides that: -
- “Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
73. From the above provisions it is clear that the court has powers to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
74. That said and done, I hold that the Plaintiff has not proved her case on a balance of probabilities and is therefore not entitled to the prayers sought in the Plaintiff. Consequently, I hereby dismiss the Plaintiff’s suit with costs to the 1st Defendant.

Whether the 1st Defendant is entitled to the reliefs sought in the counterclaim.

75. I have identified that I address myself to the issue of fraud raised by the 1st Defendant/counter claimer and the land registrar. Now, the 1st Defendant submitted that the green card was swapped/replaced. DW2 testified that the transfer from the 2nd Defendant to the Plaintiff was not in her day book for 2016. The 1st defendant also produced a DCI referral form (complaints unit) re. no/ CID/C/GEN/COMP/6/11/2019/592 dated 9/05/2019 to demonstrate that he reported his allegations of trespass and fraud to the DCI.
76. The 1st Defendant alleged fraud on the part of the plaintiff on the purchase of the suit property. It is important to consider whether fraud was properly particularized and proved. Under Order 2 rule 4 of



the Civil Procedure Rules it was incumbent upon the plaintiff to plead fraud specifically. The order succinctly provides as follows: -

5.

- (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
 - a) which he alleges makes any claim or Defence of the opposite party not maintainable;
 - b) which, if not specifically pleaded, might take the opposite party by surprise; or
 - c) which raises issues of fact not arising out of the preceding pleading.
- (2)

77. In the case of *Koinange & 13 Others v Charles Karuga Koinange* 1986 KLR at page 23 Justice Amin citing the case of *Ratilal Patel Makanji* [1957] EA 314 observed as follows:

“When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required”

78. Furthermore, in *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:

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

79. It is clear that the 1st Defendant/Counter claimer did not give particulars of fraud and during the hearing the 1st defendant failed to prove the allegations of fraud. Ultimately, I do find that the pleadings on fraud are insufficient and the evidence did not depict any fraud.

80. With regard to the claim for general damages for trespass by the counter claimer, I have held that the 1st Defendant’s title is lawful as it came out first in time. Therefore, the only question is whether the Plaintiff is a trespasser. It is admitted that the Plaintiff has actively commenced construction of apartment blocks on the suit property having duly gotten all the requisite approvals. The 1st Defendant also testified that around May 2019 he found that his barbed wire fence enclosing the suit property that he had put up had been destroyed and that a pit latrine was in the process of being dug and some construction materials had been delivered on the suit property. It might appear that the Plaintiff acted in good faith and believed that she owned the suit property and that her possession completely entitled her to the land.

81. As stated in *Cheshire and Burn’s Modern Law of Real Property* 15th ed. [1994] at page 26:

“53. “All titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin.



Seisin is a root of title, and it may be said without undue exaggeration that so far as land is concerned there is in England no law of ownership but only a law of possession.” I should rephrase by saying that by its title the 1st Defendant properly entered into occupation and possession believing itself to be owner.”

82. Furthermore, as is stated in Mullah, the Transfer of Property, 9th edition 2003, at Page 358,-

“the expression believing in good faith merely means honestly believing. Honest belief is not incompatible with negligence or with a mistake of law.” The 1st Defendant holding title to land and entering in good faith and with honest belief, came to the conclusion that it was not a trespasser until that title is nullified and then it may be so termed.”

83. I am of the view that the old cause of action in trespass as known to English Law can apply to this case as against the Plaintiff prior to nullification of her title and I so find. My view on the matter is supported by the old case of Wuta-Ofei vs Danquah [1961] 3 All E.R. 596 and the decision in Moya Drift Farm Ltd vs Theuri [1973] E.A. 114 where in the latter case the Court of Appeal in East Africa approving the decision in the former stated: -

(a) Per Spry V-P – “Mr. Hewitt conceded that it was formerly the law in England that a person had to have taken possession of land before he could take proceedings in trespass but he submitted that this cannot be the law of Kenya, as it would make nonsense of s.23 [of the Registration of Titles Act (Cap 281)]. I find this argument irresistible and I do not think it is necessary to examine the law of England. I cannot see how a person could possibly be described as ‘the absolute and indefeasible owner’ of land if he could not cause a trespasser on it to be evicted. The Act gives a registered proprietor his title on registration, and unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession. There is nothing in the Act to say or even suggest that this title is imperfect until he has taken physical possession.”

(b) Per William Duffus P;

(c) “The following passage from the Judgment of the Privy Council delivered by Lord Guest in the case from Ghana of Wuta-Ofei v Danquah [1961] All E.R. 596 at pg.600 sets out in general terms the possession necessary to maintain the action” and this is that;

‘..... In these circumstances, the slightest amount of possession would be sufficient.’

84. To my mind the legal possession established by the 1st Defendant entitles him to possession against the Plaintiff. The Plaintiff falls in this category and once her certificate of title is found to be invalid she can only be termed a trespasser. In Winfield and Jolowic on Tort, 16th edition 2002, the point is graphically put at page 487 para 13.1.

“...it is no defence that the only reason for.....entry was that he [the trespasser] had lost his way or even that he genuinely but erroneously believed that the land was his.”

85. The Plaintiff is accordingly declared to be a trespasser on the suit property as argued by the 1st Defendant and I so hold.



86. As for the prayers for general damages for trespass, the issue that arises is: what is the measure of it? This question was answered by E. Obaga J in the case of Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR where it was held as follows:

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less See *Hostler v Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).”

87. The law on trespass has now crystalized and there is clarity on the fact that once trespass is proven and/or established, then the party aggrieved by the trespass, is entitled to compensation in the form of general damages. See the case of *Park Towers v Moses Chege & Others* [2014] eKLR. However, in this case, the Court has noted that the 1st Defendant/counter claimer has not given some sums to guide the Court in assessing general damages for trespass. The counter claimer did not adduce a valuation report in support of this particular claim.

88. In *Nakuru Industries Limited v S S Mehta & Sons* [2016] eKLR where the court faced such a similar situation it was held as follows:

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff’s land and conduct some excavation. For this reason, I award the defendant damages in the amount of Kshs. 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

89. In the case of *Willesden Investments Limited v Kenya Hotel properties limited* NBI H.C.C. NO. 367 of 2000 (a case cited by the plaintiff), the court stated that;

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that Kshs. 10 000 000 is a reasonable award for general damages”.

90. I have taken into account the fact that the suit property measures 0.048 hectares. The 1st Defendant has admitted that he was only able to erect a barbed wire fence around the same and also erected a ‘Not for sale’ sign thereafter. But given that the Plaintiff admitted that she had actively commenced construction of apartment blocks on the suit property, the Court awards a figure in the sum of Kshs 500,000.00 being a nominal award of general damages in this instant case.

Who should bear the Costs of the Suit?

91. It is trite that costs usually follow the events. Section 27 of the *Civil Procedure Act* gives the Court discretion to grants costs. As the successful party is always entitled to costs except in exceptional circumstances, no exceptional circumstance exists in this suit, and thus the Court finds that the 1st Defendant being the successful litigant is entitled to the costs of the suit.

Disposal orders

92. By way of disposal, having been satisfied that the 1st Defendant has proved his claim to the required standards, the Court enters judgment for the 1st Defendant against the Plaintiff herein and the 2nd and 3rd Defendants jointly and severally in the following terms of:



- a) It is Hereby Declared that the 1st Defendant is the bona fide owner of Land Title No. Kiambaa / Ruaka / 3252 and the purported registration of the Plaintiff as the owner thereof is, therefore, unlawful, illegal, irregular, fraudulent and of no legal effect.
- b) An order be and is hereby issued for the rectification of the Land register and reinstatement of the 1st Defendant as the owner of Land Title No. Kiambaa/Ruaka /3252.
- c) The Plaintiff be and is hereby ordered to surrender the title document she holds to the 3rd Defendant for cancellation failure whereof the same shall stand cancelled.
- d) The 1st Defendant is entitled to an order of vacant possession of the suit property.
- e) The Plaintiff shall pay to the 1st Defendant Kshs. 500,000.00 being the general damages for trespass.
- f) The Plaintiff shall bear the costs of this suit and Counterclaim plus interest at court rate but the same is to be computed after 60 days from the date of delivery of this judgment until payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF NOVEMBER, 2022.

.....

MOGENI J

JUDGE

Judgement read in virtual court in the presence of:

Mr Isaac Rene for Plaintiff

Mr Bibiu holding brief for Mr Gachuna for Defendant

Ms. Caroline Sagina - Court Assistant

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MOGENI J

JUDGE

