



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 27 OF 2016

DAVIS MWASHAO JOME.....PLAINTIFF

-VERSUS-

DAMARIS KARANJA1ST DEFENDANT

REGISTRAR OF TITLES MOMBASA.....2ND DEFENDANT

JUDGMENT

(Suit by plaintiff seeking inter alia a declaration of ownership of the disputed land; plaintiff having title to the said land; 1st defendant also having title to the same land; both parties tracing their title to a subdivision of a mother land, which subdivision produced the suit land; suit land having been identified in the subdivision plan by a Deed Plan; that Deed Plan number similar to that in the plaintiff's title; 1st defendant alleging that the plaintiff's Deed Plan was surrendered for cancellation upon a resurvey of the suit land and fresh Deed Plans issued; no proof of any amendment survey of the suit land; no survey plan adduced to demonstrate any such amendment survey; Deed Plan in the 1st defendant's title being demonstrated by the Director of Surveys to be of land that was in Nairobi yet the suit land is located in Mtwapa, Kilifi; 1st defendant, transferring title to herself while the case was pending; doctrine of lis pendens; Land Control Board that gave consent to transfer to the 1st defendant being of dubious authenticity, as it was issued prior to the application for consent being made; court holding that it is the title of the plaintiff which is genuine and proceeding to cancel the title of the 1st defendant; general damages for trespass; award thereof being in the discretion of the court; court making an award of Kshs. 1,000,000/= in general damages; costs to be paid by 1st defendant)

A. Introduction and Pleadings

1. This suit was instituted by a plaint dated 17 September 2009, originally only against the 1st defendant, but which plaint was later amended on 19 May 2011 principally to include the Registrar of Titles as the 2nd defendant. In the plaint, the plaintiff pleaded that he and his late wife, Pamela Mwamburi, are the registered proprietors of an interest in fee simple over that piece of land known as Plot No. MN/III/2654 (hereinafter, 'the suit land'). He pleaded that sometime in early September 2009, the 1st defendant's agents and/or servants encroached upon and/or entered into the suit land and erected a wall. He further pleaded that the activities on the suit land were being undertaken without his authority and/or consent and is thus unlawful trespass to the suit land. He pleaded that the defendants had sometime in June 2010 or thereafter, dealt with the title to the suit land to his detriment. In the amended plaint, the plaintiff has asked for the following orders :-

- a) *A permanent injunction restraining the 1st defendant by herself, agents or otherwise from encroaching, entering upon or otherwise howsoever interfering with the plaintiff's property being Plot No. MN/III/2654.*
- b) *A declaration that any title subsisting on the suit property being MN/III/2654 whether in the name of the 1st defendant or any person other than as pertains to the plaintiff's interest is unlawful and/or illegal and an order for cancellation thereof.*
- c) *As against the 1st defendant damages for trespass.*
- d) *Costs*
- e) *Any other or further relief this honorable court deems fit to grant.*

2. The 1st defendant opposed the suit through an amended defence and counterclaim filed on 2 June 2011. The 1st defendant denied the averments of the plaint *in toto*, and put the plaintiff to strict proof. She averred that what she is occupying is the land registered as C.R. No.

4286 Sub-division Number 2654 (original Number 34/2) Section III Mainland North measuring 0.0508 hectares. She pleaded that she purchased the land from one Oscar Muli Kithuka who was the registered owner at the time of purchase. The 1st defendant averred that she could not be a trespasser or encroacher on her own land. She asked that the plaintiff's suit be dismissed. In the counterclaim, she pleaded that on 23 March 2009, she entered into a written sale agreement over the suit land with Oscar Muli Kithuka, whereupon she purchased the suit land. She contended that she is a purchaser for value and not a trespasser. She pleaded that she has been in possession and/or occupation of the suit land since she purchased it; that she has commenced developments on it; and that the plaintiff has never taken possession. She has asked for judgment against the plaintiff for the following orders (slightly paraphrased for ease of clarity):-

- a) A declaration that she (the 1st defendant) is the legal owner of the suit land;
- b) An order that the plaintiff's title to the suit land be cancelled and/or annulled;
- c) The 2nd defendant to correct the register;
- d) The costs occasioned by this suit and interest thereon.

3. The plaintiff filed a reply to defence and defence to counterclaim. He denied all the averments in the counter claim and put the 1st defendant to strict proof. He pleaded that if any title was issued in favor of the 1st defendant, then the same was fraudulent and/or illegal; the particulars being, that title was issued to the 1st defendant while the suit land was already registered in the plaintiff's name, and processing title during the pendency of proceedings contrary to Section 52 of the Registration of Titles Act, Cap 281, Laws of Kenya (repealed in the year 2012). The plaintiff further asserted that he took possession of the suit land immediately after he was issued with the title and denied the 1st defendant's allegations that she has been in possession of the suit land. He asked that the counterclaim be dismissed.

4. I have not seen any defence filed by the 2nd defendant.

B. Evidence of the parties

5. The matter was originally filed in the High Court and came up for hearing on 21 November 2011 before Muriithi J, when the plaintiff testified. He produced the following documents in support of his case:-

- i. Transfer from Patrizia de Carli to David Mwashao (plaintiff) dated 1 August 2007 (exhibit-1),
- ii. Certificate of Title CR No. 34611, land reference number Subdivision No. 2654 (Original No.34/2) Section III Mainland North and deed plan No. 180529 (exhibit -2),
- iii. Survey report by Mr. B. Mwanyungu Licensed Surveyor (exhibit- 3),
- iv. receipt for Kshs. 150 dated 10 December 2008 (exhibit -4),
- v. Survey plan/map FR 243/94 (exhibit -5),
- vi. copy of the deed plan No. 180529 dated 4 February 1994 (exhibit -6), and
- vii. copy of the deed plan No. 242710 dated 25 June 2002 (exhibit-7)

6. The plaintiff testified that in the year 2005, he approached Amesnet Enterprise, dealers in property, who identified for him the suit land in Mtwapa. He testified that the history of the land is that title was first issued on 7 May 2001 to Pamus Econo Investments Ltd, who later transferred the land to Patricia de Carli on 27 October 2004. Patricia de Carli transferred title to him on 7 August 2007. He testified that the deed plan attached to the title is deed plan No. 180529 signed by the director of surveyors on 4 February 1994, and the title is CR 34611 measuring 0.0451 ha. He testified that when he viewed the suit land it had a barbed wire perimeter fence that was in disrepair and which he later repaired. There was also an incomplete borehole which he was advised to deepen to enable it produce water and he paid for its development. He testified that about September 2009, he learnt that the 1st defendant was putting up a wall around the suit land. The plaintiff testified that he knew the 1st defendant before that date in the course of his duty as an official of Kenya Revenue Authority (KRA). He testified that he reported the matter to the police and further instructed a private surveyor to survey the plot and prepare a report. His report affirmed encroachment by the defendant on the suit land. He then commenced this suit. He compared his documents with the documents of the 1st defendant which he stated showed that the plot number is the same as what he has in his title but the acreage in the 1st defendant's title is 0.508 Ha. The 1st defendant had a search showing that the first owner was Oscar Muli Kithuka who became registered as owner on 22 April 2009 with the title certificate number CR 45719 issued on 1 September 2009. That title is accompanied by a Deed Plan No. 242710 dated 22 February 2005. He also referred to the 1st defendant's documents, annexed to a replying affidavit filed by the 1st defendant on 1 October 2009 (in response to the plaintiff's application for injunction). They included a sale agreement dated 9 August 1998 between one Kibwana selling the land to Oscar Muli Kithuka, and a second agreement dated 23 March 2009, between Oscar Muli Kithuka and the 1st defendant, vide which the 1st defendant purchased the suit land at Kshs. 160,000/=. There was also a third agreement between Oscar Muli Kithuka and the 1st defendant, dated 4 September 2009, vide which the 1st defendant was purchasing a borehole on the suit land.

7. Cross-examined, the plaintiff testified that he never met the previous owner of the suit land because she was out of the country. He testified that he was shown the land, and he later signed the transfer in the agent's office. The owner was not there at the time he signed the

transfer but she had already signed her part. He was acting in person. He stated that he did a search although he did not produce it in evidence.

8. PW-2 was one Nyamawi Mwajoto, a Land Surveyor with the Survey of Kenya department. He has been working with the Survey Department since the year 1988, and at the time he testified, he was based at Ruaraka Field Survey Headquarters at the cadastral checking office. They check cadastral surveys before they are authenticated for issue of deed plans. Between the years 2006 and 2010 he served as the District Surveyor, Mombasa. Before that, he was the District Land Surveyor, Kwale. He testified on the survey plan Ref. No. FR 243/94 from which he could identify the suit land as parcel No. MN/III/2654. The Deed plan attached to it, and which he testified was sealed by the Director of Surveys on 4 February 1994, was Deed Plan No. 180592. From the records the land is located in Kilifi District, North of Mombasa Municipality. He testified that the 1st defendant's Deed plan is No. 242710 sealed by the Director of Surveys on 22 February 2005. The same was prepared by EMJ Kiguru, Licenced Surveyor. He testified that from the records, Deed Plan No. 242710 relates to a property LR No. 26312, located in Nairobi. He testified that it is not possible to have one Deed Plan Number applying to two parcels of land and that even with a re-survey, the title number may change but not the Deed Plan, unless there is cross-referencing to an old survey plan. He testified that in absence of cross-referencing, it means that no other survey has been done in relation to the area. It was his opinion that the plaintiff's Deed Plan No. 180529 is the correct one for the survey of the suit land.

9. Cross-examined, PW-2 testified that it is Deed Plan No. 180592 which is reflecting in their survey office. He testified that the deed plan attached to the plaintiff's title is the original linen copy of the original; the original is held at the survey office. He testified that the deed plan in the plaintiff's title is a certified copy, to mean that the linen copy on the title is not the first copy, though he did not know why the certified copy, which is dated 6 March 2001, was issued. He testified that a certified copy is made when the first issue is not available due to loss or destruction. He stated that the applicant must apply for a reissue supported by a police abstract or a letter from the licenced surveyor who did the early survey. He did not know if the licenced surveyor had been contacted before the reissue of the true copy. He had not talked to the licenced surveyor before testifying. He explained that the Director of Surveys receives the Deed Plan, checks, authenticates, and seals it. He was not aware that survey of the scheme where the land fell had been done afresh and was not aware that all initial deed plans were revoked.

10. Parties agreed for recall of PW-2 after the 1st defendant had filed a supplementary list of documents. He was examined on a letter/report dated 10 April 2012 written by EMJ Kiguru, licensed surveyor. He could see that in the letter, Mr. Kiguru stated that fresh Deed Plans were issued which then resulted in two Deed plans, No. 242710 and 242711. He reiterated that the Deed Plan No. 242710 relates to a property in Nairobi, LR No. 26312. He could see that in the letter, it was stated that the initial Deed Plan was surrendered. He explained that when a Deed Plan is surrendered, there is a letter of submission and the other Deed Plan number would be cancelled and would not be used again. He testified that according to the said letter, the deed plan was amended in 2005, but does not specify the date. He testified that up to this day, the deed plan (in the plaintiff's title) has not been cancelled and there is no new drawing that produced the deed plan (in the 1st defendant's title). He testified that the suit land is located on the survey map FR 243/94 and there is no other licensed survey map to support the 1st defendant's deed plan. He testified that if an amended survey had been done, the amendment would have been cross-referenced on the survey map FR 243/94, which has not been done to date. He testified that there was nothing to indicate that there was a resurvey as far as the Director of Surveys office is concerned.

11. Cross-examined the second time, he testified that he did not come across any information that the original deed plan was surrendered or that the plaintiff was issued with a certified copy of the deed plan. He testified that he would not know from the file if the plaintiff was issued with a certified copy though he did not go through the file. He reiterated that a person gets a certified copy when the deed plan is lost or damaged, upon proof by the applicant. He testified that the process of obtaining the certified copy is that the applicant would make a request; the applicant would initiate the process with the surveyor who did the survey; and the Director of Surveys would not issue a certified copy without a police abstract of loss. He could see that the plaintiff's Deed Plan annexed to his title was a certified copy. He did not have any letter requesting the Director of Surveys to issue a certified copy of the deed plan. He testified that the two deed plans were among documents he was asked to produce. He testified that there is no document showing that the plaintiff's deed plan was ever surrendered. He stated that in the normal course of business, the original deed plan would be surrendered by the owner, or his lawyer, and it does not have to be the surveyor. He testified that the deed plans are kept separate from the letters. He asserted that the particulars in the 1st defendant's Deed Plan No. 242710 does not refer to any plot in the space where the subdivision number is supposed to be shown.

12. PW-2 was again re-examined. He testified that the defendant's deed plan is not genuine because deed plans as at June 2005, were not issued in the tracing paper. He further testified that from the entries the title holder to Plot 2654 (the suit land) was registered in the year 2001 in the name of Panus Econo Ltd.

13. After several adjournments by the parties and the transfer of Muriithi J., the matter was transferred to this court upon its creation following the 2010 Constitution.

14. On 15 October 2019, the matter came before me when the plaintiff called as PW-3 Bartholomew Mwanyungu, a private licensed surveyor. He testified that he received instructions from the plaintiff to carry out a survey of the suit land, which he did, and he further prepared a report dated 14 September 2011. He testified that the purpose of the survey was to find out the extent of the suit land and where the boundary wall and the wall reserve were located. He testified that the plot measures 0.0451 ha. The wall that is built annexes 0.0352 Ha of the suit land and a road reserve measuring 0.0099 ha. Mr. Mwanyungu was shown the 1st defendant's title. He testified that the material of the paper of the deed plan attached to that title is not the one used for registration. He testified that the material that is usually used is linen paper which is almost like a cloth. He referred to the plaintiff's deed plan and the material used as being made of linen. He pointed to the material used in the 1st defendant's deed plan and noted it to be of transparent material. He testified that a deed plan is usually sealed by the deed plan officer on behalf of the director of surveys and there is a process before this is done. He elaborated that when a deed plan is lost before registration, and one wants a certified copy, the first step is to report the matter to the police and get a police abstract. One then needs to swear an affidavit; then get a letter from the Land Registrar to say that the deed plan was not registered; and lastly, the licensed surveyor would write a letter to the Director of Surveys. He testified that the plaintiff's title has a certified true copy of the deed plan.

15. Cross-examined, PW-3 testified that his survey report dated 14 September 2009 was for a specific purpose, which was to establish the extent of the development around the suit property. He testified that he did not go to place any beacons on the suit land, nor does he know

who made the developments in the suit land. He further testified that his survey report did not provide the nature of the plaintiff's deed plan, and neither did it give any specific deed plan number. He testified that the survey map referred to in his survey report gives the FR No. 243/94. Mr. Mwanyungu referred to the survey map FR 243/94, and testified that survey maps would indicate the name of the person who conducted the survey though sometimes this can be omitted. He testified that he did not have the deed plan when he went to the site of the suit land; he only had the survey plan, which according to him was sufficient. He testified that he knew EMJ Kiguru, Licenced surveyor, who did the subdivision of the original land. He testified that when one does a subdivision, it would be approved and authenticated by the Director of Surveys, who would then write to the surveyor informing him of the approval, and request the surveyor to submit the deed plan. The deed plan would then be checked against the approved plan, and a deed plan number would subsequently be issued. The deed plan would then be sealed and collected by the surveyor who conducted the survey, or any person authorized by him. He testified that the beneficiary of the deed plan may or may not know about the deed plans, and their quality. He could see that the plaintiff's and 1st defendant's deed plans are different. He testified that deed plan numbers are normally plotted on the survey plan. He stated that the plaintiff's title has a certified copy of the deed plan. He testified that it is the owner of land who initiates the process of getting a certified copy of the deed plan if it is lost before registration. He added that the certified copy would bear the same number as the original. He mentioned that if a deed plan is already registered, a copy can be obtained from the director of surveys. Mr. Mwanyungu was shown the defendant's survey report prepared by EMJ Kiguru, and an attached survey plan. He stated that the survey plan is the same survey plan he used to prepare his report. The survey plan was a subdivision of the Plot MN/III/34. He could see the suit land on the top left corner of the survey plan and it indicates the deed plan number as No. 180529. He stated that a surveyor can get instructions to amend the survey plan if it is not registered. He added that if the deed plan is surrendered to the Director of Surveys, a new scheme plan would have to be prepared anew. He pointed out that from Mr. Kiguru's survey report, he (Mr. Kiguru) stated that he surrendered the original deed plans for all the plots in the subdivision. He testified that a surveyor must surrender all deed plans for the subdivision scheme, and if the original is lost, one can get a duplicate.

16. Questioned by the court, he affirmed that there should not be two titles for the same land, and there can only be one deed plan for one parcel of land. He could not tell how come there are two titles and two deed plans for the suit land.

17. Re-examined, Mr. Mwanyungu stated that it is only in respect of unregistered deed plans that the Director of Surveys would call for one from the surveyor. He added that if one was already registered, Mr. Kiguru's input would not have been required for certification. He testified that a deed plan cannot be surrendered after registration. He stated that one would need a new survey for purposes of consolidation. He explained that in a subdivision survey, the Director of Surveys would inform the surveyor once the subdivision is approved, and will give the parcel numbers. The director would then ask the surveyor to forward the deed plans. He continued that once surrendered, the Director of Surveys will give the deed plan numbers in a manner that there should not be duplication. He reiterated that if a deed plan is lost before registration, the surveyor would communicate this to the Director of Surveys as this is for the interest of his client.

18. With the above evidence the plaintiff closed his case.

19. To support her case, the 1st defendant produced the following exhibits :-

- a) Certificate of Title, CR No. 45719, Subdivision No. 2654 (Original No. 34/2) Section III, Mainland North, with deed plan No. 242710, measuring 0.0508 Ha (D-exhibit-1)
- b) Postal search dated 1 September 2009 indicating one Oscar Muli Kithaka as registered proprietor of the interest contained in the title CR No. 45719 (D-exhibit – 2)
- c) Application for land control board consent dated 4 September 2009 (D-exhibit- 3a)
- d) Land control board consent dated 3 September 2009 (D-exhibit-3b)
- e) KRA duty assessment (D-exhibit- 4a)
- f) KRA pay-in slip (D-exhibit – 4b)
- g) Survey report by EMJ Kiguru dated 10 April 2012 (D-exhibit – 5)

20. The 1st defendant testified that she has been in possession of the suit land since the year 2009, and she has partly developed it by building a perimeter wall, a foundation for a 3 bedroomed house, and a site house. She added that there was a pre-existing borehole. She testified that she purchased the suit land in the year 2009 from Oscar Muli Kithaka, and a transfer was effected in her name; she was later issued with a title deed, which, inside, had the deed plan No. 242710. Before purchasing the suit land, she conducted a search and also obtained consent from the Land Control Board (LCB). She had also visited the site, and there was no development save for the borehole. Upon purchase, she did a wall and started constructing the house but stopped after receiving the order of injunction issued by this court. She stood by the report of her surveyor, Mr. Kiguru, that it was her deed plan which was correct.

21. Cross-examined, she testified that she could only see a signature on her deed plan and not a seal. She testified that the title was first issued to Oscar Muli on 22 April 2009, and it was later transferred to her on 17 June 2010. She was aware that this case was pending when the property was transferred to her and was also aware that an order of injunction had been issued. She was however not aware that transfer of the land was tantamount to interfering with it. She acknowledged that she had not produced as an exhibit the sale agreement between herself and Oscar Muli, but denied that she was concealing it from court. She was nonetheless cross-examined on the same sale agreement dated 23 March 2009, which she had earlier attached to her replying affidavit sworn on 30 September 2009 in response to the plaintiff's application for injunction. Within that affidavit was also annexed a sale agreement dated 19 August 1996, between Oscar Muli and Bai Kibwana with Oscar Muli as purchaser, and the sale agreement dated 4 September 2009 where she purchased the borehole on the suit land from Oscar Muli. It was also put to her that the consent of the Land Control Board (LCB) shows that it was issued on 3 September 2009, yet the application shows it was made on 4 September 2009. Her response was that she could not recall the dates and that the meeting must have

come after the application.

22. DW-2 was Edward Marenye Kiguru, Licenced Surveyor. He has been in private practice since the year 1989. Prior to that, he was employed in the civil service including a stint as the Provincial Surveyor, Coast Province, between 1981 and 1989. He had a report which he prepared on 10 April 2012 in relation to the suit land plot No. MN/III/2654. He offered that the suit land is a subdivision of a mother Plot No. 34. He testified that he is the surveyor who did the subdivision of the Plot No. 34 into the plot numbers No. 2654 to 2692 (the suit land being the Plot No. 2654). He stated that the deed plan for the suit land was No. 180529. He explained that what happened is that this deed plan was reported lost by the person who was holding it. He stated that in the year 2005, the registered owner wished to alter the shape of the suit land because of a road that was redundant so as to create another plot. He testified that he did that, and in the process of doing so, he surrendered the certified copy of the deed plan No. 180529 to plot No. 2654. Two plots were then created, being plot No. 2654 and plot No. 6075, bearing deed plan numbers 242710 for the plot no. 2654 and deed plan No. 242711 for the plot no. 6075. His view was the plaintiff's title is irregular as it is based on a deed plan that was surrendered. He testified that he knows PW-3, Mr. Mwanyungu, and the deed plan he attached is what was surrendered. He offered that a cancelled deed plan should not issue a title, as that would be irregular.

23. Cross-examined, he testified that he is aware that the Director of Surveys has a deed plan register which should not be altered as it gives integrity to deed plans. He testified that it is a live register, and as the deed plans come, they are recorded. He testified that the original deed plan is given to the client and the Director of Surveys is left with a copy, and if a deed plan disappears before it is registered, the surveyor who did the survey would request for a certified copy of it. He stated that he did the subdivision survey in 1993 after being instructed by the administrators of the estate of the deceased owner. He added that over the years, one of them lost the deed plans. He could not remember who instructed him to re-parcel the plot No. 2654 in the year 2005. He testified that he was to surrender the deed plan on behalf of the person who instructed him. He explained that a surrender is done through a letter to the Director of Surveys. He did not have this letter but offered that such letter would be obtained from the Director of Surveys. He believed that there are a lot of documents in the recent past, 20 years or so, in the Surveys of Kenya which have been subject to irregular interference. He mentioned that some even got lost.

24. He testified that the deed plan No. 180529 (relied upon by the plaintiff) is the original deed plan, and deed plan No. 242710 (relied upon by the 1st defendant) replaced it after the area was resurveyed. It was put to him that according to the Director of Surveys, the deed plan no. 242710 relates to a plot No. LR No. 26312 in Nairobi. His response was that this is a mistake attributable to the Director of Surveys as this was not the first time a deed plan number is repeated. DW-2 was also asked to testify on the issue that the deed plan no. 242711 (said to be of the second plot after his subdivision survey of the suit land) according to the Director of Surveys also relates to a plot in Nairobi. He testified that this too is a mistake by the Director of Surveys as it would be a duplicate and he attributed it to poor record keeping by the Director of Survey. He was aware that he was to give evidence from 2017 but he did not consider it prudent to correspond with the Director of Survey as the matter was pending in court. He did not consider getting copies of letters he had written. He thought that the records at the Director of Surveys have a lot of confusion, and that the person handling them did not handle them competently. He could not confirm if the person he acted for in 2005 was the same person he acted for in 1993. He added that if he did a long search, he could retrieve that information.

25. Re-examined, he stated that the survey for subdivision of Plot No. 34 is in computation file No. 30753. He testified that if there is an amendment, to the FR, it would appear in the computation file. Lastly, Mr. Kiguru testified that on the two deed plans, his position is that the deed plan No. 24710 is the correct deed plan, as deed plan No. 180520 was surrendered and subsequently cancelled. Questioned by the court, he stated that the registered owner of plot 2654 in the year 2005 was one Khamisi K.K. Tabibu and others, but he did not have any document to substantiate this averment.

26. With the above, the 1st defendant closed his case.

27. No evidence was forthcoming from the 2nd defendant. I thereafter gave directions on filing of written submissions.

C. Submissions of Counsel

28. Mr. Mwakisha, learned counsel for the plaintiff, inter alia submitted that at the point of filing her defence, the 1st defendant, though trespassing on the suit land, was not registered as proprietor. He pointed out that transfer in favour of the 1st defendant was done after the commencement of this case. He referred to the sale agreement between Oscar Kithuka and Bai Kibwana dated 19 August 1996, and wondered how this could be, yet the title displayed showed that it was first issued to Oscar Kithuka in 2009. He further pointed out that the sale agreement between the 1st defendant and the plaintiff shows the title CR No. 4286 yet, according to DW-2, this title was cancelled in 2005. He was of opinion that there was a scheme to work backwards to demonstrate a paper trail to support a fictitious title. He submitted that titles under the Registration of Titles Act, were anchored on a Deed Plan and a survey plan. He referred to the evidence of PW-2 as confirming that it is the plaintiff's Deed Plan which was genuine and that the Deed Plan displayed by the 1st defendant related to a property in Nairobi. He submitted that the 1st defendant's title is anchored on defective Deed Plan. On the claim that the land was subdivided in 2005, he submitted that this could not be so, since at that time, title was in the hands of Patrizia de Carli, and not the original owners of the mother title. He submitted that there was no evidence of any surrender of Deed Plan No. 180529. Counsel also raised issue with the LCB consent which he submitted predates the application. Counsel further submitted that the 1st defendant's title goes contrary to the doctrine of *lis pendens* in Section 52 of the Indian Transfer of Property Act, 1882 (ITPA) (repealed in 2012). He submitted that his client is entitled to general damages and asked for an award of Kshs. 2,000,000/=. He relied on the case of *Duncan Ndegwa vs Kenya Pipeline Corporation & Another (2013) eKLR*.

29. On the part of the 1st defendant, Mr. Oddiaga, learned counsel, reviewed the evidence tendered and specifically referred me to the report of DW-2. He submitted that the same captures that the suit land was subdivided. He pointed to the opinion of Mr. Kiguru that the title CR No. 34611 (plaintiff's title) was irregularly obtained as it was based on an already surrendered deed plan. He submitted that the plaintiff's title can only be complete if accompanied by an original regularly obtained Deed Plan. He submitted that the plaintiff's title only holds a certified Deed Plan, but the 1st defendant's contains an original Deed Plan. He submitted that the 1st defendant's title is based on a survey plan which was done by Mr. Kiguru, and which is the correct survey plan. He referred me to the case of *Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others (2016) eKLR*, on the need to demonstrate the root of title when there are two titles for the same land. He

submitted that the plaintiff bought the property from a party that he never met and did not see the vendor signing the transfer. He submitted that the plaintiff has also not explained how his title is accompanied by a certified copy of Deed Plan. He submitted that this was a burden for the plaintiff to discharge and referred me to the case of *Mourine Mukonyo vs Embu Water and Sanitation Company (2020) eKLR*. He submitted that the plaintiff failed to call anyone from Amesnet Enterprises who may have shed light on the copy of the plaintiff's Deed Plan. He submitted that the claim that Deed Plan No. 242710 refers to a property in Nairobi was never confirmed. He pointed me to Mr. Kiguru's evidence about the confusion and carelessness in the office of the Director of Surveys. He urged me to find that it is the 1st defendant's title which is genuine.

D. Analysis and determination

30. This is another sad case where two persons have different title to the same land, a phenomenon, that though outlawed, is now fairly common in Kenya. I am thus tasked with the burden of declaring which of the two titles is genuine and ought to be protected. I will have to make this determination on a balance of probabilities following the totality of the evidence that has been presented by the parties.

31. The first thing that I observe, is that when the plaintiff filed this suit, it was nothing more than a suit for trespass. The plaintiff sued the 1st defendant for interfering with the suit land and wanted her stopped from any further intrusion. Together with the plaintiff, the plaintiff filed an application for injunction. In her response to that application, the 1st defendant swore a replying affidavit on 30 September 2009, which was filed on 1 October 2009. Within that affidavit, she deposed that she had, through a sale agreement dated 23 March 2009, purchased the suit land from Oscar Muli. She did mention that she has obtained consent from the Land Control Board and was in the process of transferring the title into her name. The application for injunction was allowed through a ruling delivered on 5 March 2010. Despite this order, the 1st defendant went on to process title on 17 June 2010. This is already disturbing, for the court had already issued an order for injunction. At the time that this order was made, the 1st defendant was not the holder of the title that she claims under. The registered proprietor of that title was Oscar Muli Kithuka (Oscar Muli). What the 1st defendant ought to have done was to have Oscar Muli enjoined in the suit as co-defendant or sue Oscar Muli through a 3rd party notice. The processing of title while the suit was pending and after an order of injunction had already issued, by itself, would make this court proceed to cancel the title of the 1st defendant for violating the *lis pendens* doctrine under Section 52 of the ITPA, which was then still operative. It provided as follows :-

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

32. It will be seen from the foregoing, that once there was litigation over the subject land, and the title that the 1st defendant was professing, then the 1st defendant was barred from dealing with the suit land for this would go contrary to the *lis pendens* doctrine. The Court of Appeal affirmed this doctrine in the case of *Rose Wakanyi Karanja & 3 Others (Suing as the legal representatives of the Estates of the late Walter Karanja Muigai) V. Geoffrey Chege Kirundi, Civil Appeal No. 172 of 2010* that parties should not deal with the property in dispute when it is the subject of contentious litigation pending in court. The Court of Appeal held as follows: -

“It is therefore our considered finding, and we hold that the deceased and the respondents could not deal with the suit property as it was the subject of contentious litigation pending in court.

In the High Court decisions of Mawji v US International University & Another [1976] KLR Page 199 it was held:-

“Until the court is able to determine the issue both justice and the equities in the case demand that the status quo be preserved so that if the plaintiff succeeds, he will not be left with an empty victory, the just fruits of which he cannot realize, and justice would be defeated. Further, it would be a poor and insufficient system of justice, unethical to contemplate, if a successful plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit. If the property in dispute is transferred to a third party.”

The doctrine of lis pendens rests upon the foundation that it would plainly be impossible that any action or suit could be brought to a successful conclusion if alienations pendent lite were permitted to prevail.

In Bellamy v Sabine IDeG & J 566 it was held:

“The doctrine of lis pendens intends to prevent not only the defendant from transferring the suit property when litigation is pending but it is equally binding on those who derive their title through the defendant, whether they had or had no notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suit so as to defeat the rights of the other party”

33. I am in full agreement with the above dictum. Following it, the title of the 1st defendant having been obtained against the *lis pendens* doctrine cannot stand.

34. Despite the above, I still opt to delve into the issue of the substance of the title of the 1st defendant vis-à-vis that held by the plaintiff. I have the benefit of the original titles which were produced by both parties. I will start with the plaintiff's title. The same is title No. CR 34611 issued after a transfer registered as No. CR 4286/32. The title is to the land parcel described as Subdivision No. 2654 (Original No. 34/2) Section III Mainland North, measuring 0.0451 H and delineated on Land Survey Plan No. 180529. The latter number is the Deed Plan number, and a certified copy of the Deed Plan is annexed to the title. This Deed Plan was issued on 4 February 1994. The first registered

owner is Pamus Econo Investments Limited who became registered as proprietor on 17 May 2001 and the title was indeed issued on that day. On 27 October 2004, this title was transferred to Patrizia de Carli. On 7 August 2007, the same title was transferred to the plaintiff and Patricia Mwamburi as joint owners. It has been said that Patricia is now deceased. Now to the title of the 1st defendant, the same bears CR No. 45719 issued after a transfer registered as CR 4286/52. The title is to the land parcel Subdivision No. 2654 (Original NO. 34/2) Section III Mainland North, delineated on Land Survey Plan No. 242710, being the Deed Plan. A copy of the Deed Plan is annexed. The land measures 0.0508 Ha. Title was first issued to Oscar Muli Kithuka on 22 April 2009. On 17 June 2010, the title was transferred to the 1st defendant.

35. To determine which of the two is the genuine title, I need to go to the root of both of them as held in the case of *Hubert Martin & Others v Margaret J. Kamar (supra)*. Thankfully, my work is made easier since both parties trace their title to a subdivision of the mother title identified as Plot No. 34. There is no contention on the subdivision of this plot. The subdivision of it was done in the year 1994 by DW-2, Mr. Kiguru, Licenced surveyor. The subdivision of this plot gave forth the titles No. 2654 (the suit land) to 2692. The survey plan for this subdivision was produced by the plaintiff and it is FR No. 243/94. There is no dispute over this survey plan. In this survey plan, the suit land, Plot No. 2654, is identifiable by the Deed Plan No. 180529.

36. The point of departure is the allegation that this Deed Plan No. 180529 was surrendered upon a subdivision of the Plot No. 2654 in the year 2005. DW-2 testified that it was he who did the subdivision upon receiving instructions from the owner. I am not convinced by the evidence of Mr. Kiguru.

37. First, Mr. Kiguru was not even able to tell who gave him instructions to undertake the purported subdivision. Surely, a surveyor, a licenced surveyor at that, does keep records, and one key record would be an instruction to subdivide. I would not expect any surveyor worth his salt, not to know, or not to keep records, of the person instructing him to undertake a survey. This is extremely critical, for a surveyor cannot take instructions to subdivide from anybody. He must, certainly at least, affirm, that the person instructing him is a person who has title to the land and not any busybody who has no authority to affect the subject title. Secondly, though Mr. Kiguru stated that he undertook an amendment survey of the suit land, no survey plan was produced to demonstrate this. Just as we have a survey plan for the subdivision of the mother Plot No. 34 to produce the suit land, you would expect that there would be a similar survey plan, this time for the subdivision of the title to the suit land, that is Plot No. 2654. No such survey plan was produced. There was not even mention of the F/R number of such amendment survey in the report of Mr. Kiguru. I stand guided by the provisions of Section 32 of the Survey Act, 2010 which expressly states as follows :-

“No land shall be deemed to have been surveyed or resurveyed until the plan thereof has been authenticated by the signature of the Director or of a Government Surveyor authorized in writing by the Director in that behalf or by the affixing of the seal of the Survey of Kenya.”

38. If it is the case of the 1st defendant that the suit land was resurveyed, then it was the duty of the 1st defendant to avail to this court the survey plan for it, duly authenticated by the signature of the Director or a Government Surveyor authorized in writing by the Director. Without such document being availed, how can this court accept that there was ever an amendment survey of the Plot No. 2654 as alleged by the 1st defendant? I am afraid that without tangible evidence of such amendment survey, this court cannot accept that there was ever such amendment survey as claimed. The burden of adducing the evidence of the amendment survey was upon the 1st defendant and she has failed to discharge the burden.

39. Thirdly, though Mr. Kiguru mentioned that he surrendered the original Deed Plan for cancellation, there is no such record of surrender. He did acknowledge that a surrender is done through a letter. Mr. Kiguru was challenged to produce the letter forwarding this Deed Plan for cancellation, but he had no such letter. I recall him perusing a file, which he had with him when he testified, and which he said related to the suit land, but he could not find any such letter of surrender. Now, if there is no such letter of surrender, how then can we believe Mr. Kiguru when he states that he surrendered the Deed Plan No. 180529 for cancellation? I am afraid that I cannot believe such allegation. Moreover, you would also expect that the Deed Plan would not be surrendered in isolation, but would be surrendered together with the certificate of title, so that if there is any amendment to be done on the acreage of the land, then this would also be reflected in a re-issued title. It is clear that the title was never surrendered, for we have it right here, as it was originally issued in the year 2001. This supports the conclusion that there was no such surrender as alleged by Mr. Kiguru.

40. Fourthly, Mr. Kiguru's evidence was that upon surrender of Deed Plan No. 180529, and since there was some sort of subdivision, there emanated two Deed Plans, that is numbers 242710 for the suit land, and Deed Plan No. 242711 for the other affected land. Now, PW-2 demonstrated by production of Deed Plan No. 242710, that this related to a completely different parcel of land located in Nairobi. The suit land is located in Mtwapa. It is not correct, as submitted by Mr. Oddiaga, for the 1st defendant, that there was no proof that this Deed Plan is for a plot in Nairobi. I have already mentioned that the said Deed Plan No. 242710 was produced by the plaintiff as an exhibit. It is actually plaintiff's exhibit No. 7. The title of it clearly shows, *“District of Nairobi area, locality, City of Nairobi.”* Where then is the argument coming that there is no proof that this Deed Plan is for a plot that is located in Nairobi? It is right there in black and white.

41. Apart from the above, it is also apparent that the plaintiff's title was the title that was issued first in time. That title, as I have mentioned, was issued on 17 May 2001. The 1st defendant's title was issued on 22 April 2009, way after the plaintiff's title had been issued. A second title, for the same land, cannot lawfully be issued, where one already exists. I observe that the two titles bear a bit of a variation on the size, but it doesn't matter, I can see that they are both titles to the same parcel of land, that is Subdivision No. 2654 (Original No. 34/2) Section III Mainland North. But while I am on this issue of the size, the survey plan F/R No. 243/94 of the mother plot No. 34, which is the survey that birthed the suit land, shows that the suit land measures 0.0451 Ha. That is the same acreage in the title of the plaintiff. The acreage of 0.0508, in the 1st defendant's title has no explanation. As I mentioned, no survey plan for it was ever produced and where this acreage is from, cannot be deciphered from any records produced by the 1st defendant. If it is the case that the 1st defendant's title is supported by Deed Plan No. 242710, that does not help the 1st defendant, because the size of land noted therein is 0.4046 Ha, and not 0.0508 Ha, as indicated in the title.

42. There is also the problem of the consent of the Land Control Board. The 1st defendant produced documentation showing that she made

the application to the Land Control Board on 4 September 2009, yet the consent was purportedly issued on 3 September 2009. She was at pains to explain how come the consent was issued before the application was received for processing. That consent is of dubious authenticity.

43. I am aware that the 1st defendant's counsel in his submissions, tried to make heavy weather of the fact that the Deed Plan in the plaintiff's title is a certified copy, and not the original, and that the plaintiff had no good explanation for this. I am afraid, that in the circumstances of this case, this is neither here nor there. The fact remains that the correct Deed Plan for the suit land is Deed Plan No. 180529. What does it matter that what is in the title is a certified copy and not the original ? It is completely irrelevant in this case. There was also some attempt to impugn the sale to the plaintiff, that he did not see the vendor signing the sale agreement or the transfer. Again, for the purposes herein, that is irrelevant. There is no contention that Patrizia de Carli did not sell the suit land to the plaintiff, and that he did not sign the transfer to him.

44. I have also not forgotten that the surveyors called by the plaintiff questioned the authenticity of the Deed Plan in the title displayed by the 1st defendant given the rather feeble material that it was printed on. But I need not go to that, because as I have demonstrated, the Deed Plan of the 1st defendant, is not authentic in substance, and the material upon which the Deed Plan was printed on, is therefore not relevant.

45. The totality of my above analysis drives me to the conclusion that the 1st defendant's title was procured fraudulently. At best, it was issued by mistake. It is not a title that can be upheld. I hereby proceed to cancel it. It is hereby declared null and void ab initio. I also order the Registrar of Titles not to undertake any further registration of dispositions based on the title held by the 1st defendant. So that it does not circulate out there, I order that the said title to be retained by the Court, and never to be released to any person.

46. The other matter that I am left with is the claim for general damages for trespass against the 1st defendant. It is clear that the 1st defendant trespassed into land that was owned by the plaintiff. I have not seen any bona fides from the 1st defendant. If she genuinely, and in good faith, bought the suit land from Oscar Muli, I would expect that she would produce in evidence the sale agreement and proof of payment of the purchase price. These were not produced. She also did not call as a witness the said Oscar Muli. I am starting to wonder if at all there exists such a person. I am persuaded that the 1st defendant was a party to the fraud that led to her having title to the suit land. I have earlier mentioned that she transferred the suit land while this case was pending. I am not persuaded that she is an innocent purchaser for value. I am not in the same vein, persuaded that she took possession of the suit land in good faith. She was out to illegally dispossess the plaintiff. She in fact moved into the land when she did not have title. She went in and started erecting a wall and other structures. She did not demonstrate any proof that she had procured building plans for this. She cannot escape payment of general damages for trespass. In his submissions, Mr. Mwakisha pitched for general damages in the sum of Kshs. 2 million. Mr. Oddiaga did not make any submissions on the quantum of general damages. I have seen the case of *Duncan Nderitu Ndegwa vs Kenya Pipeline Company Limited & Another (2013)eKLR* referred to me by Mr. Mwakisha. In that case, Nyamweya J, awarded general damages in the sum of Kshs. 100,000/= for trespass. The quantification of such general damages is in the discretion of the court. On my part, considering the conduct of the 1st defendant, the length of time that the plaintiff has been kept out of possession, the size of the land, the location thereof, and all other factors, I do award general damages in the sum of Kshs. 1,000,000/= in favour of the plaintiff payable by the 1st defendant. The same shall attract interest at court rates from the date hereof.

47. The only issue left is costs. The 1st defendant will shoulder the costs of this suit and will also shoulder the costs of the counterclaim.

48. Judgment accordingly.

DATED AND DELIVERED THIS 13TH DAY OF OCTOBER 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA