



**Kimuri Housing Company Limited & another v GC Retail Limited
& 9 others (Environment and Land Case 528 & 592 of 2014
(Consolidated)) [2025] KEELC 4861 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4861 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 528 & 592 OF 2014 (CONSOLIDATED)
OA ANGOTE, J
JUNE 26, 2025**

BETWEEN

KIMURI HOUSING COMPANY LIMITED PLAINTIFF

AND

GC RETAIL LIMITED 1ST DEFENDANT

GC RESIDENTIAL LIMITED 2ND DEFENDANT

ACTIS LLP LIMITED 3RD DEFENDANT

SINOHYDRO CORPORATION LIMITED 4TH DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND CASE 592 OF 2014

BETWEEN

MERU NORTH COOPERATIVE LIMITED PLAINTIFF

AND

MECADA CONTRACTORS LIMITED 1ST DEFENDANT

SINOHYDRO CORPORATION LIMITED 2ND DEFENDANT

ACTIS AFRICA LIMITED 3RD DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT 4TH DEFENDANT

KIMURI HOUSING COMPANY LIMITED 5TH DEFENDANT

**ATTORNEY GENERAL (SUED ON BEHALF OF THE CHIEF LAND
REGISTRAR NAIROBI) 6TH DEFENDANT**



JUDGMENT

1. This judgment is with respect to ELC 528 of 2014 as consolidated with ELC 592 of 2014. The facts of these suits are summarized hereunder.

ELC 528 OF 2014

2. Kimuri Housing Co. Limited [hereinafter the 1st Plaintiff], through an Amended Plaint dated 20th May 2014, sought judgment against the Defendants jointly and severally for orders:
 - a. That an order of permanent injunction be issued restraining the Defendants their servants and/or agents or any other person acting or purporting to be acting on their behalf from trespassing, constructing the sewer line, digging trenches or do any manner interfering with the Plaintiffs quiet user of LR No. 5986/9 Nairobi pending the hearing and determination inter parties.
 - b. That the Defendants do remove all their equipment, machinery and materials from the Plaintiffs and cover all trenches and holes and return the Plaintiff's land into the condition it was.
 - c. General damages for trespass, gross interference with the Plaintiff's land and digging trenches and other actions which have interfered with the operations of the Plaintiff.
 - d. That the costs of this suit and any other costs which this court may deem fit to meet the ends of justice.
3. The 1st Plaintiff [Kimuri] averred that in 1993, it bought L.R. No. 5986/9 measuring 1.689 hectares [the suit property] from Messrs. Meru North Co-operative Union Limited at consideration of Kshs 4,550,000. The 1st Plaintiff averred that it paid the entire the purchase price and all the transfer documents were executed in its favor.
4. The 1st Plaintiff averred that it took possession of the suit property and applied for subdivision from the then Nairobi City Council, which approval was granted; that it sold the fifty-two plots to various individuals at the then current market price of Kshs 15 million and that the approved access road is nine meters and the size of each of the plots is 8.2 meters by 27 metres.
5. The 1st Plaintiff claimed that the 1st Defendant is building a shopping mall, Garden City Mall and that the Defendants have constructed a sewer line, which traverses through the nine-meter access road and the said sewerage tunnel has denied them access to their plots. The Plaintiff denied surrendering any access roads to the Ministry of Lands as the subdivision process was not complete and the Mother Title is yet to be surrendered.
6. The 1st Plaintiff asserted that the suit property is private land and the Defendants have no right of entering and constructing a sewage line in their land and that in any case, the Defendants are constructing a private sewer line which has no provision for use by others.
7. They contended that the Defendants while constructing the said sewerage tunnel did not seek their consent and that they have therefore trespassed into their land and are denying the purchasers of the aforesaid plots access to their respective plots.
8. According to the 1st Plaintiff, due to the size of the plots as approved by the then City Council of Nairobi, it is not possible to provide alternative access and the purchasers cannot access their respective



plots and that this will have the effect of a multiplicity of suits unless the Defendants are restrained from trespassing into the suit property.

9. The Defendants neither entered appearance nor filed a Defence.

ELC 592 of 2014

10. Through an Amended Plaintiff dated 11th February 2019, Meru North Co-operative Union Limited [hereinafter the 2nd Plaintiff] asserted that while the 1st Plaintiff/5th Defendant has claimed that it is the lawful proprietor of the suit property, it has never passed any resolution to dispose of the suit property to the 1st Plaintiff or any other person.
11. Meru North Co-operative Union Limited, the 2nd Plaintiff averred that it has never entered into any contract in writing or otherwise with the 1st Plaintiff in respect to the suit property and that no consideration has ever been paid in respect of the suit property. In any case, they argued, if the 1st Plaintiff/5th Defendant has any claim with respect to the suit property, the same is statute barred and that the 1st Plaintiff has been indolent.
12. According to the 2nd Plaintiff, the 1st Plaintiff fraudulently and unlawfully transferred the suit property to itself whilst this suit was ongoing.
13. The 2nd Plaintiff further stated in the Plaintiff that the 1st, 2nd and 3rd Defendants entered into the suit property without its authority or permission and commenced excavation to lay down a sewer line which amounts to trespass to the its property and unjustifiable interference with the exclusive possession of its land.
14. The 2nd Plaintiff contended that there is no wayleave for sewer line which is passing through the suit property and that the 2nd plaintiff has never surrendered any land for construction of a sewer line to the National Government, neither has the 4th Defendant nor the national government acquired the suit property in whole or in part by way of compulsory acquisition.
15. The 2nd Plaintiff stated that it was in the process of erecting apartments on the suit property and now it cannot proceed with the same until the trespass ceases; that it continues to suffer damage and loss as a result of the said trespass by the 1st, 2nd and 3rd Defendants as it cannot proceed with the intended construction of apartments, and that it cannot commercially use the suit property and shall incur costs to return the suit property to its original state prior to the trespass.
16. It is the 2nd Plaintiff's argument that the 4th Defendant allowed an illegal construction of the sewer line to commence on the suit property without following the necessary legal procedures and as a result of its inaction, it has suffered loss and damage.
17. The 2nd Plaintiff has sought the following orders against the Defendants:
 - a. An order of permanent injunction be and is hereby issued restraining the defendants by themselves or through their agents, servants and/or any one claiming under the defendants from trespassing into, interfering with, wasting, damaging and/or in any manner whatsoever dealing with parcel known as L.R. No. 5986/9.
 - aa. An order of mandatory injunction to compel the 1st, 2nd and 3rd Defendants herein to remove, demolish the sewer line laid down on the parcel of land known as L.R. No. 5986/9 and return the said L.R. No. 5986/9 to its original form before excavation and laying down the sewer line within thirty [30] days of issuance of the order failure to which the Plaintiff herein do remove



- the sewer line and return the land to its original form and the 1st, 2nd and 3rd Defendants do jointly and severally bear all the costs incurred.
- b. General damages for trespass against the 1st, 2nd and 3rd Defendants jointly and severally together with interest at court rates from the date of filing this suit until payment in full.
 - c. A declaration that the Plaintiff is the rightful, legal and registered proprietor of the land known as L.R. No. 5986/9.
 - d. An order of permanent injunction be issued to restrain the 5th Defendant through themselves of their agents, employees, servants, nominees from ever trespassing, alienating, invading, damaging, wasting, destroying or purporting to be registered owner or otherwise dealing with the parcel of land known as L.R. No. 5986/9 in a manner which is adverse to the interest of the registered proprietor, Meru North Cooperative Union Limited, the Plaintiff herein.
 - e. An order directing the Officer Commanding Station [OCS] or his agents, Kasarani Police Station, to ensure compliance with the order [aa] and [d] above.
 - f. An order directing the Chief Lands Registrar, Nairobi to cancel and/ or revoke the title issued to Kimuri Housing Company Limited, 5th Defendant herein in regard of Land Reference Number 5986/9.
 - g. An order directing the Chief Land Registrar, Nairobi to rectify and/or amend the register of the parcel of land known as Land Reference Number 5986/9 be rectified, so as to remove the entries in favor of Kimuri Housing Company Limited, the 5th Defendant herein and the title to revert back to the proprietorship of Meru North Co-operative Union Limited, the Plaintiff herein.
 - h. The Defendants do pay costs of this suit to the Plaintiff.
 - i. Such further or other reliefs as this Honourable court may deem appropriate.
18. The 5th Defendant/ 1st Plaintiff [Kimuri Housing] through a Defence and Counterclaim dated 24th November 2014, asserted that the 2nd Plaintiff's suit is a misrepresentation of facts and that some of the allegations are fraudulent.
19. It reiterated that it bought the suit land from the 2nd Plaintiff between 1993 and 1997; that all the documents to effect the transfer were released in 1997 after it filed High Court Civil Case Number 3909 of 1994 to compel the 2nd Plaintiff to release the said documents, and that all the parties and their lawyers signed the consent.
20. They further maintain that they paid the entire purchase price through Messrs. Wachira Wambugu and Co. Advocates, which firm is appearing for some of the Defendants in this suit and has been at the centre of this dispute from the beginning, having released the original certificates and documents to the 5th Defendant.
21. It is the 1st Plaintiff's contention that the 2nd Plaintiff's suit is res judicata because the matters raised herein were dealt with in High Court Civil Case Number 3909 of 1994. In its Counterclaim, the 1st Plaintiff averred that the 2nd Plaintiff sold the suit land to it and that it has fraudulently manufactured documents to defeat its claim in collusion with the other Defendants. The 1st Plaintiff/ 5th Defendant prayed for judgment against the 2nd Plaintiff as follows:
- a. That an order for permanent injunction be issued restraining the Plaintiffs, their servants and/ or agents or any other person acting or purporting to be acting on their behalf from interfering



or engaging in matters involving the constructing of the sewer line, digging trenches or do any manner interfering with the Plaintiff's quiet user or L.R. No. 598/9 Nairobi pending the hearing and determination of this suit and or in the alternative do remove all the sewage pipes, or tanks and any other equipment or machinery from the suit land.

- b. General damages for trespass, gross interference with the Plaintiff's land and digging trenches and other actions which have interfered with operations of the Plaintiff.
 - c. That the cost of this suit and any other orders which this court may deem fit to meet the ends of justice.
22. The 4th Defendant, the Nairobi City County Government, through a Statement of Defence dated 26th February 2019, argued that there was no cause of action established against it by the 2nd Plaintiff in its Plaint, and there is no relief being sought against it in this matter.
 23. They stated that they were not suited to be enjoined in this matter, as the approvals for the sewer design were done by Nairobi City Water and Sewerage Company Limited, which is a separate and distinct legal entity from the Nairobi City County, which has the capacity to be sued in its own name.
 24. The 4th Defendant asserted that by a letter dated 28th April 2014, the Nairobi City Water and Sewerage Company informed the 2nd Plaintiff's advocates that it approved sewer designs presented to it, which indicated that the sewer would be built within the way-leave. They avowed that the approval for the design was on the condition that the designer was to be responsible for acquiring the sewer way-leave, whether or not shown on the drawings at the time of approval.
 25. The 4th Defendant averred that the approval of the drawings did not relieve the developer of the full responsibility of the errors of the design which could have been discovered subsequently and that any damage and loss to the existing service such as water, sewer, telephone lines and power lines, were to be made good solely at the expense of the developer.
 26. They contended that the developer was to supervise the works to completion and was to inform the Nairobi City Water and Sewerage Company on commencement of construction works and ensure that all stages of works are inspected and approved by the inspection team as per the inspection sheet which was to be availed to the developer on submission on the works programme.
 27. The 4th Defendant averred that after completion, the developer was to submit the signed inspection sheet and certification from the assigned supervising officer and the developer was to submit 'as built' drawings for the completed works and the manufacturer's manuals where necessary.

Hearing and Evidence

28. The 1st Plaintiff [Kimuri Housing Company Limited] adduced the testimony of one witness, Margaret Wambui Ngugi, [PW1]. She relied on her witness statement as her evidence in chief and the Bundles of Documents dated 10th December 2021, 12th July 2022 and 27th January 2024 as DEXB 1,2 and 3 respectively.
29. In her statement, PW1 averred that she is a director of the 1st Plaintiff; that the 1st Plaintiff bought the suit property from Meru North Cooperative Union Limited in 1993, and duly paid the purchase price of Kshs. 4,550,000 and that the vendor then duly executed the indenture in favour of the 1st Plaintiff.
30. PW1 stated that the 1st Plaintiff took possession of the suit property, subdivided it into 52 plots and got approval for the subdivision from the Nairobi City Council. It was her evidence that the 1st Plaintiff



- then sold the plots to individuals and that the plots measured 8.2 metres by 27 metres and the 1st Plaintiff also surrendered an access road to the plots measuring nine metres.
31. According to PW1, the 1st Defendant is constructing a mall and contracted the 2nd Defendant to construct a sewage tunnel; that the Defendants have, however, constructed the sewage tunnel through the middle of the nine-metre access road and that the Defendants have trespassed into the suit property without the 1st Plaintiff's consent and the said trespass will deny the purchasers of the plots access to their plots.
 32. According to PW1, they obtained all the approvals; that the land was to be auctioned by Co-operative Bank but they salvaged the auction. PW1 produced in evidence the re-conveyance by the Bank after they bought the land and stated that they have all the documents which their lawyers forwarded to them.
 33. PW1 averred that the sewer line was by the developer, Sino Hydro Corporation Ltd, who put the sewer line on their land; that they have a joint surveyors report confirming the presence of the sewer line on the disputed property, which they pray should be removed.
 34. In cross-examination, she admitted that the 1st Plaintiff did not have the agreement with Meru North for the sale of the suit property; that she also did not have a resolution from Meru North to sell the land and that the Indenture indicates that it was booked at lands offices on 6th November 1994.
 35. The 2nd Plaintiff [Meru North Co-operative] adduced the testimony of five witnesses in support of its case. Josephat Thiani [PW2] stated that he has been the Chairman of Meru North Cooperative Union Limited since 2008 and a delegate since 2006. He relied on his witness statement as his evidence in chief and produced two bundles of documents dated 8th June 2022 and 25th October 2022 as 2PEXB1 and 2.
 36. PW2 stated in cross-examination that Meru North never made a resolution to sell the land to Kimuri Housing; that the 2nd Plaintiff never received any money from Kimuri Housing and that if there is any sale, the same was against the co-operative law.
 37. PW2 admitted that there were minutes by Meru North about selling the land to Mwenendo Investments Limited. He denied that the deposit of Kshs. 2,000,000 and the balance of Kshs. 2,095,000 was paid to their advocates, although he did admit that Wambugu Advocates were their advocates.
 38. It was the evidence of PW2 that they issued a completion notice for the payment of the balance of the purchase price within 21 days and that the buyer failed to pay within that time and Meru Cooperative then cancelled the agreement for sale with Mwenendo through the letter dated 30th June 1994.
 39. PW2 stated that the land was still in the 2nd Plaintiff's name as at 30th September 2013 as evident in the search annexed in their bundle. However, a search dated 17th November 2014 shows that the land had been registered in favour of Kimuri, the 1st Plaintiff.
 40. He testified that the Indenture was not signed by the officials of the 2nd Plaintiff and emphasized that their advocates, Wambugu, did not remit any of the purported monies paid as the purchase price. He averred that HCCC No. 3909 of 1994 was dismissed and was never heard. He also denied that Meru Cooperative agreed to release the documents as indicated in the letter by Wambugu.
 41. PW3 was Edward Muhoro, Assistant Director, Enterprise Development, Ministry of Co-operatives and SME Development. He adopted his statement as his evidence in chief. He testified he is a former Principal Co-operative Officer; that there function is to support governance in cooperatives and that the impugned agreement was not completed as the records were not forwarded to them and the procedure which was to be followed by a co-operative was not followed in this matter.



42. PW4 was Gichunge Muchubu John, the General Manager of Meru North Cooperative, a post he stated he has held since 2016. He adopted his statement as his evidence in chief. He averred that the transfer attached to the Plaintiff's bundle was never signed by their officials.
43. In cross-examination he testified that he was not involved in the transaction and that Meru North resolved to sell the land to Mwenendo Investments and not to Kimuri Housing.
44. PW5 was Gabriel Kobia Imethiu, who was a treasurer in Meru North Cooperative between 1999 and 2008. He relied on his witness statement at page 243 of 2PEXB1. He stated that while the Indenture presented by Kimuri Housing indicates that he signed the document, he denied signing the document.
45. In cross-examination, PW5 stated that the letter dated 28th November 1998 was forwarding the Indenture in triplicate by Wambugu but at the said time, he was not the treasurer and could not have signed the Indenture.
46. PW6 was Stephen Kubai, who was the Chairman of Meru North Co-operative between 1998 and 2008. He adopted his witness statement as his evidence in chief. He denied that he signed the Indenture and stated that Meru North Cooperative never agreed to sell the land to Kimuri.

Submissions

47. Counsel for the 1st Plaintiff in ELC 528 of 2014 submitted that the 1st Plaintiff was a nominee of M/S Mwenendo Investment Co. Ltd and that the company contributed towards the purchase price of the suit property.
48. It was Counsel's submission that after payment of the balance of the purchase price, a dispute arose in relation to completion and that the 1st Plaintiff then filed High Court Civil Suit No. 3909 of 1994 against Meru North Sacco, wherein it sought completion and transfer of the suit property in favor of the 1st Plaintiff.
49. Counsel submitted that the parties explored out of court negotiations after the suit was filed; that the completion documents were then released through a letter dated 28th January 1998 to the advocates of the 1st Plaintiff and that on 6th November 2014, the Indenture was registered in favor of the 1st Plaintiff.
50. Counsel contended that the evidence by the witnesses of the 2nd Plaintiff does not prove ownership of the suit property; that PW2 did not have minutes or accounts for the years 1993 to 1998 which would have confirmed that the purchase price was never received by Meru North Sacco and that the 2nd Plaintiff's witnesses did not have a forensic document examiner's report to confirm that the signatures on the Indentures were a forgery.
51. Further, it was submitted that although Civil Case No. 3909 of 1994 was dismissed for want of prosecution, it was Counsel's submission that the suit had been compromised as the completion documents were released to Kimuri Ltd.
52. Counsel further submitted that PW3 did not have knowledge of the transaction and did not have the relevant documents in respect of affairs conducted in 1993 and 1994; that PW5 also admitted that he was a Treasurer of Meru North between 1999 and 2008 and would therefore not have been part of the officials who signed the Indenture in 1992 and that PW6 also admitted in cross-examination that he was elected as chairman in 1999 and not 1998 as he had testified. He could therefore not have been part of the persons who signed the Indenture in 1997.
53. It was the 1st Plaintiff's counsel's submission that Meru North Cooperative has not proved that the signatures contained in the Indenture are fraudulent or were forged. Counsel relied on the case of



- Kinyanjui Kamau v George Kamau [2015] eKLR where the Court of Appeal held that fraud and forgery are serious allegations that require a higher threshold to prove. They also relied on Daniel Gachanja Githaiga v Credit Reference Bureau Africa Ltd & 2 others [2020] eKLR where the court held that for a signature to be certified as forged, a document examiner's report must be produced.
54. Counsel stated that following a consent order between Kimuri Ltd, Meru North Sacco, G.C Retail Limited, G.C. Residential Limited and Actis Africa Limited, a survey exercise was conducted by M/S Harunani & Associates who prepared a Survey Report dated 9th March 2021, which has been produced by both Plaintiffs, and that the survey found that the developers had constructed the sewer line and storm water drainage in the suit property without authority and consent from its owner.
 55. Counsel relied on the cases of Ajit Bhogal v Kenya Power and Lighting Co. Ltd [2020] eKLR, Olympic Trading Company Limited v Said Mohamed & Others Milimani ELC No. 259 of 2012 [unreported] and Willesden Investments Limited v Kenya Hotel Properties Limited Nbi HCC No .367 of 2000 [Unreported] as cited in Rhoda S. Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited [2019] eKLR.
 56. Counsel for the 2nd Plaintiff submitted that on 2nd December 1993, Meru North Co-operative Union Limited and Mwenendo Investment Co. Ltd entered into an agreement for the sale of the suit property and that the completion date of the agreement for sale was 26th May 1994.
 57. It was submitted that by the said completion date, Mwenendo Investment Co. Ltd had not paid the agreed purchase price of Kshs. 4,500,000 and owing to this failure the 2nd Plaintiff's advocates issued Mwenendo Investment Co Ltd a completion notice to complete the sale by tendering the balance of the purchase price and any interest payable within 21 days and that a further completion notice was sent within 48 hours.
 58. Counsel submitted that on 30th June 1994, Mwenendo Investment Co. Ltd having failed to comply with the completion notices, the Plaintiff cancelled the transactions for the sale and purchase of the suit property and that on 1st July 1994, Meru North Cooperative's advocates informed Mwenendo Investments that they had no intention to extend the completion date unless Mwenendo approached them directly, which they never did and the completion period for the sale and purchase of the suit property was never extended.
 59. It was submitted that any payment that may have been done after the revocation of the agreement for sale was of no effect. Counsel has relied on the Court of Appeal decision in Samuel Ngige Kiarie v Njowamu Construction Limited & another [2019] eKLR.
 60. It was Counsel's further submission that no agreement for sale of the suit property was ever executed between Meru North Co-operative Union limited and Kimuri Housing Company Limited and that no deed of appointment of nominee has been availed before this court wherein Mwenendo Investment Co. Ltd appointed Kimuri Housing Company as its nominee for purposes of the sale and transfer of the suit property.
 61. Counsel submitted that it is trite that a contract cannot be enforced by a person who was not a party to it and only the parties who negotiated it are entitled to enforce its terms and that Kimuri Housing Limited cannot enforce the contract between itself and Mwenendo Investment Co.
 62. They relied on the Court of Appeal's decision in Savings & Loan [K] Limited v Kanyenje Karangaita Gakombe & Another [2015] eKLR which quoted with approval the decision in Agricultural Finance Corporation v Lengetia Ltd [1985] KLR. Counsel also relied on Halsbury's Laws of England, 4th



- Edition Volume 9 [1] Paragraph 749 on privity of contract, as quoted by the Court of Appeal in *William Muthee v Bank of Baroda* [2014] eKLR.
63. According to Counsel, the claim by Kimuri Housing Company Limited against Meru North Cooperative is statute barred, as the sale agreement was entered into on 2nd December 1993 while this suit was instituted on 5th May 2014, more than 20 years after the date of the agreement for sale between Meru North and Mwenendo Investments Company yet it ought to have been filed within 12 years from the date of the agreement for sale.
 64. Counsel relied on Section 7 of the *Limitation of Actions Act* as well as the case of *Sohanlaldurgadass Rajput & Another v Divisional Integrated Development Programmes Co Ltd* [2021] eKLR.
 65. Counsel submitted that the transfer of the suit property while this suit was ongoing in November 2014 was fraudulent and illegal and that the doctrine of *lis pendens* is applicable in this suit and none of the parties ought to have alienated the suit property pending hearing and determination of the suit with the view of defeating the rights of the other party.
 66. Counsel relied on the case of *Olympic Trading Ltd & another v Said Mohamed & 4 others* [2014] eKLR as well as the Court of Appeal case of *Naftali Ruth Kinyua v Patrick Thuita Gachure & another* [2015] eKLR, which quoted with approval the decision in *Bernadette Wangare Muriu v National Social Security Fund Board of Trustees & 2 others* [2012] eKLR.
 67. Counsel submitted that the directors of Kimuri Housing failed to file any authority or resolution authorizing the filing of this suit. They contend that Margaret Wambui Ngugi swore the verifying affidavits dated 5th May 2014 and 22nd May 2014, and made witness statements and appeared in court for and behalf of Kimuri Housing Limited without ant authority.
 68. Counsel relied on the case of *Thome Farmers Company No. 4 Ltd v Farm of Gaith Investors Ltd* [2019] eKLR and *Philomena Ndanga Karanja 7 2 others v Edward Kamau Maina* [2015] eKLR.
 69. Counsel submitted that while Kimuri Housing Company filed a Defence and Counterclaim dated 24th November 2014 in this suit, they failed to file any verifying affidavit in support of its counterclaim, contrary to Order 7 Rule 5[a] of the Civil Procedure Rules.
 70. Counsel accordingly argued that the 5th Defendant's counterclaim is defective for its failure to comply with Order 7 Rule 5[a] of the Civil Procedure Rules. Counsel quoted the case of *Galerius Investments Limited v County Government of Mombasa & Another* [2020] eKLR.
 71. According to Plaintiff's Counsel, in the Complaint dated 2nd May 2014, the Amended Complaint dated 20th May 2014 and Counterclaim dated 24th November 2014, Kimuri Housing has not sought orders to be declared as the registered proprietor of the suit property. He contended that parties are bound by their pleadings and they urge that Kimuri Housing cannot be declared as the registered proprietor of the suit property as it has not sought this order. They relied on the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR.
 72. It was Counsel's submission that the surveyor's report by Harunani & Associates dated 9th March 2021 and the Survey Report by Popedel Consultants dated 1st March 2022 confirms that the sewer line and the storm water drainage were constructed inside the suit property by the 1st, 2nd and 3rd Defendants. He asserted that the 2nd Plaintiff did not give consent for the construction of the said sewer line nor did it surrender any part of the suit property for purposes of construction of the sewerline.
 73. It was submitted that from the surveyors' reports, the 1st, 2nd and 3rd Defendants trespassed on 0.79 acres of the suit property for a period of 10 years; that an award of Kshs. 500,000 a month for 10 years,



- which is an aggregate sum of Kshs. 60,000,000, should be awarded as general damages for trespass. They relied on the case of Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR.
74. The 3rd Defendant in ELC No. 592 of 2014 and the 1st, 2nd and 3rd Defendants' counsel in ELC No. 528 of 2014 filed submissions dated 17th April 2025 with the consent of this court. Actis and GC Companies submitted that the removal of the sewer line, as sought by the Plaintiffs does more harm than good because notwithstanding the trespass, the sewer line presents a tangible benefit to the future development of the suit property and to the neighbours.
 75. Counsel submitted that the sewer line serves approximately 862 residential units and the Garden City Mall and an order for removal of the sewer would affect innocent third parties currently using the sewer. They contended that the removal of the sewer line would be a complex process going beyond Actis and GC Companies' control, as it involves stakeholders such as landowners in the area and government regulatory authorities.
 76. The Defendants' counsel additionally submitted that as Kimuri avers, it had subdivided the suit property into fifty two subplots and that under the current regulatory regime, the proposed subdivision will require the surrender of a 9 meter strip of land to the Government for purposes of public utilities including sewerage and vehicular access to the proposed sub-plots.
 77. He argued that Actis and GC Companies have already constructed a functioning sewer line that can accommodate additional users and that this is an opportunity for the rightful owner of the suit property to cooperate for the mutual benefit of the owner and the intended occupants, including contributing towards the costs that the rightful owner would have incurred to build a service/vehicular access road.
 78. Counsel relied on the case of Wanjiku Wanyee v Athi Water Services Board [2010] KEHC 1167 [KLR], where the court in considering similar circumstances of a sewer line, acknowledged that the Defendant had trespassed on the property in question but concluded that the line served a public good and its removal would present a serious inconvenience.
 79. The Defendants' counsel submitted that without prejudice, should this court direct for the removal of the sewer line and payment of general damages for trespass, the damages sought by the Plaintiffs should not be exorbitant or unreasonable. They relied on the Court of Appeal case of Kenya Power & Lighting Company Ltd v Ringera & 2 others [Civil Appeal E247 & E248 of 2020 [Consolidated]] [2022] KECA 104 [KLR] [4th February 2022] where the court restated a list of parameters to be applied when dealing with the issues of damages for trespass.
 80. The Defendants' counsel argued that the Plaintiffs have not tendered any evidence of damage or loss, whether financial or through diminished property value, lost rental income or other quantifiable harm and that the Plaintiffs have not provided any evidence on how they arrived at the figures they have sought as damages. Counsel relied on the case of Gitwany Investment Limited v Tajmal Limited & 3 others [2006] KEHC 2519 [KLR].
 81. Defendant's Counsel urged this court to take into account the size, value and location of the suit property as well as the duration that the rightful proprietor had been kept off the land. They relied on the case of Aster Holdings Limited v City Council of Nairobi & 4 others [2017] eKLR as upheld by the Court of Appeal in Caroget Investment Limited v Aster Holdings Limited & 4 others [2019] eKLR.
 82. The Defendants' counsel submitted that the final survey report confirmed that Actis and GC Companies' sewer line encroaches on 0.2272 HA [0.561 acres] of the suit property; that in comparable cases which related to bigger parcels of land in prime areas of Nairobi, the court awarded amounts



that are a fraction of what the Plaintiffs seek. These include *John Roki Waithaka v Julius Njuguna* [2022] KEELC 14673 [KLR], *Samco Holdings Ltd t/a Eka Hotel v Patrick Nyamweya* [2022] KEELC 724 [KLR] and *Shah [Suing as the Legal Representatives of the Estate of Vinodrai Hirji Shah] v Co-operative Society Limited & another* [2022] KEELC 2192 [KLR].

83. The Defendants' counsel submitted that the period between 2014 and the judgment date, when both Kimuri and Meru North claimed ownership of the suit property, should be excluded from the assessment and computation of general damages because this dispute created disruptions and hindered the ability of Actis and GC Companies to engage meaningfully with the rightful owner on the use of the sewer line and third parties and prevented it from proceeding with any plans for the removal of the sewer line.
84. The Defendants' Counsel relied on the case of *Maina & another v Ogola & 28 others; Hussein [Interested Party]* [2024] KEELC 560 [KLR] where the court held that in certain circumstances, the removal or eviction would alone suffice without the award of damages on top of this. They urged that should this court be minded to direct the removal of the sewer line, a maximum award of Kshs 2 million would be reasonable and fair as general damages for the trespass, noting that the removal would ultimately be at the Actis and GC Companies' cost.

Analysis and Determination

85. The court has considered the pleadings and evidence filed by the parties in ELC No. 528 of 2014 and ELC No. 592 of 2014. The issues that arise for this court's determination are as follows:
 - a. Who between Kimuri Housing Limited and Meru North Co-operative Union Limited is the lawful proprietor of the suit property?
 - b. Whether the Defendants have trespassed on the suit property?
 - c. The orders which should issue?
86. The consolidated suits herein concern LR No. 5986/9 Nairobi. The first legal issue that arises is whether Kimuri Housing Limited, the 1st Plaintiff, which is the registered proprietor of the suit property, lawfully acquired title to the suit property from Meru North Co-operative Union Limited, the 2nd Plaintiff.
87. The 1st Plaintiff's title is disputed by the 2nd Plaintiff, Meru North Cooperative Union Limited, who contended that it never entered into an agreement of sale with the 1st Plaintiff, nor did it pass a resolution to transfer the land to them.
88. Meru North Cooperative Union Limited averred that the transfer of the suit property to Kimuri Housing was fraudulent. Kimuri Housing conversely argued that it lawfully acquired the suit property and that it paid the entire purchase price through the firm of Messrs Wachira Wambugu and Co. Advocates.
89. It is also the contention of the 2nd Plaintiff that the suit is barred by res judicata because the issues they raise were settled in High Court Civil Case Number 3909 of 1994 and all the documents to effect the transfer were released to them following the filing of the suit in 1997.
90. On the issue of trespass, it is not disputed that the Defendants, Actis and G.C. Retail Limited have constructed a sewer line that traverses across the suit property. The Plaintiffs, who both claim ownership rights over the suit property, claim that the construction of the sewer line on the suit property was done without their consent and constitutes trespass.



91. It is also contended that the sewer line obstructs access to the suit property. They seek that the said sewer line be removed; that the suit property be returned to its original condition, and that the owner of the suit property be duly compensated by way of damages.
92. Although the Defendants neither filed defences nor adduced witness testimony, they relied on the Survey Report dated 9th March 2021 prepared by M/S Harunani & Associates after a survey exercise was undertaken following a consent order between Kimuri Ltd, Meru North Sacco. G.C Retail Limited, G.C. Residential Limited and Actis Africa Limited.
93. In their Complaint, the 1st Plaintiff objected to the jurisdiction of this court on the basis of the doctrine of res judicata. This court duly takes note that this issue was raised as a preliminary objection earlier on in this matter, which was dismissed by Hon. Justice L. Gacheru in a ruling dated 17th October 2016. Justice Gacheru found that this suit was not res judicata because the earlier matter, High Court Case No. 3909 of 1994, had been dismissed for want of prosecution and was not determined on merit.

Whether Kimuri Housing Limited, the 1st Plaintiff, is the lawful proprietor of the suit property

94. Meru North Co-operative Union Limited, the 2nd Plaintiff, has challenged the title to LR No. 5986/9 which was issued in favor of the 1st Plaintiff, Kimuri Housing Company Limited, through an Indenture of Conveyance received at the Land Registry on 6th November 2014. The said registration was confirmed by the 2nd Plaintiff through a Certificate of Postal Search dated 17th November 2014.
95. According to the 2nd Plaintiff, it has never contracted to sell the suit property to the 1st Plaintiff; that it has never passed any resolution to dispose of the suit property to the 1st Plaintiff or any other person; that no consideration has ever been paid in respect of the suit property and that the 1st Plaintiff fraudulently and unlawfully transferred the suit property to itself whilst this suit was ongoing.
96. Meru North Co-operative Union Limited, the 2nd Plaintiff, further averred that the purported transfer was fraudulent because it was registered without passport photos of the Cooperative's officials and without the said officials' submitting copies of identity cards and PIN certificate.
97. It is now the legal position that where a party's title is under challenge, such party must establish the root of its title, which is the legality of how it acquired the title. This was the holding by the Court of Appeal in the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, as quoted with approval by the Supreme Court in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 [KLR]:

“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.”

98. Kimuri Housing, the 1st Plaintiff, adduced into evidence a letter dated 19th November 1993 from Meru North Co-operative Union addressed to M/S Town Properties and copied to Mwenendo Investment Co. Ltd.
99. Vide the letter, they indicated that during the Union's Management Committee meeting held on 17th November 1993, the Committee resolved to sell LR No. 5986/9 Ruaraka Nairobi to M/S Mwenendo



- Investments Company Limited at the price of Kshs. 4,550,000, having been the highest bidders during the tendering process.
100. This culminated in a sale agreement between Meru North Co-operative Union Limited and Mwenendo Investment Company Limited dated 2nd December 1993. The validity of this agreement has not been contested.
 101. The 1st Plaintiff asserted that it was a nominee of M/S Mwenendo Investment Co. Ltd and that the company contributed towards the purchase price of the suit property by payment of Kshs. 2,000,000 vide a cheque, and payment of the balance of the purchase price of Kshs. 2,095,000 vide a cheque No. NU/AC 681246, which was forwarded through a letter dated 28th July 1994.
 102. The legal concept of a nominee in contracts is rooted in agency law and trust law. Under agency law, a nominee can act on behalf of a principal. Equally, under trust law, a person can be nominated to hold legal title to land while the beneficial interest of the land remains vested in the real purchaser.
 103. In the case of Rukaria & 15 others v Matumaini Ventures Limited & 6 Others [2023] KEELC 20346 [KLR], this court held that a nomination entitles a nominee to take over a transaction in place of the purchaser and constitutes an assignment of the purchaser's rights under the contract of sale to the nominee.
 104. The question is then whether in this suit, the 1st Plaintiff, Kimuri Housing, has proved that it was duly nominated by Mwenendo Investments Limited, which is the company that entered into a sale agreement with the 2nd Plaintiff in 1993.
 105. Kimuri Housing has adduced a letter dated 25th July 1994 from their advocates to the advocates of Mwenendo Investments Limited. In the first paragraph, they indicated that Mwenendo Investment had nominated Kimuri Housing Company to take over the purchase of the suit property.
 106. They thereafter sought written confirmation that the deposit of Kshs. 2 million was paid by Kimuri Housing and asked for a confirmation that the nominee was prepared to pay the balance of the purchase price.
 107. The firm of J.K. Winayak & Co. Advocates, acting for Mwenendo Investments, responded through a letter dated 27th July 1994 and stated that they agreed with the contents as stated in the first paragraph of the received letter. They also confirmed that the Kshs. 2 million deposit was paid by Kimuri Housing Co. Ltd and urged Kimuri to pay the balance of the purchase price Kshs. 2,095,000, reminding them that the date of completion was 28th July 1994.
 108. From the nature of agreement purported to have been entered into between Kimuri Housing and Mwenendo Investments Limited, the same was neither an agency relationship nor one based on trust law.
 109. Rather, it appears that Mwenendo Investments Limited was constrained to fulfill its contractual obligations, and it intended that Kimuri Housing Ltd steps into its place in the contract between Mwenendo Investment and Meru North Co-operative, such that Kimuri Housing Limited pays the purchase price fully and Kimuri Housing equally obtains legal and equitable title to the suit property.
 110. However, the sale agreement did not provide for the nomination of a nominee by the purchaser. Furthermore, there is no resolution by Mwenendo Investments Company Limited nominating Kimuri Housing Company Limited to replace it as a purchaser.
 111. That being the case, it is the finding of the court that the arrangement between Kimuri Housing Company Limited, the 1st Plaintiff, and Mwenendo Investment Company Limited runs afoul the



doctrine of privity of contract, which stipulates that it is only the parties to a contract who are entitled to enforce its terms by suing or being sued.

112. Indeed, overtime, courts have developed certain exceptions that allow a person who is not a party to the contract to enforce it. Such exceptions include, firstly, if a contract is made for the benefit of a person, and one party is a trustee for that person, the beneficiary can sue even if he is not a party to the contract.
113. Secondly, if a party has acknowledged a liability or acted as an agent for another person, the person can sue, and lastly a party can assign their rights under a contract to a third party. In such a case, an assignee can sue.
114. Kimuri Housing has not established that its relationship with Mwenendo Investment Company Limited falls within the exceptions of privity of contract, neither has it established the existence of a collateral contract to the one in question in which it was a party, or an agency relationship in which Mwenendo transacted on its behalf, or a trust by which the Mwenendo entered into the contract or that Kimuri was to hold the property in trust for Mwenendo Investment Company Limited.
115. Furthermore, the Sale Agreement dated 2nd December 1993 did not provide for nomination, as it simply indicates that the purchaser was Mwenendo Investment Company Ltd.
116. For these reasons, Kimuri Housing Limited was a third party to the contract between Meru North Co-operative Union and Mwenendo Investment Co. Ltd, and could not have legally signed the Indenture in respect to the suit property in the year 2006, which was not presented for registration until 6th November 2014, at which point in time, this suit was already pending before this court.
117. Indeed, the registration of the transfer in favour of Kimuri Housing Limited on 6th November, 2014, a few months after the two suits herein were filed, was contrary to the doctrine of lis pendens, which is defined under the Black's Law Dictionary 9th edition as the jurisdictional, power or control acquired by a court over property while a legal action is pending.
118. Lis pendens is a common law principle applied by courts to ensure the finality of judgment, by preventing alienation of land while suits are ongoing. In the case of *Mawji v US International University & another* [1976] KLR 185, as quoted in *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] KECA 911 [KLR] Madan, J.A. stated thus:-

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

119. The transfer of the suit property in 2014 during the pendency of this suit by the 1st Plaintiff is furthermore invalid under Section 44[5] of the *Land Registration Act* as it does not include the passport size photographs of the officials who signed the transfer on behalf of the Meru Co-operative Union Limited, nor is it accompanied by the copies of the identity cards and PIN Certificates of the officials. Section 44[5] of the Act prescribes that:

“The transferee shall in addition to executing the instrument, attach the following-

- a. a copy of an identity card or passport; and



- b. a copy of a Personal Identification Number certificate;
 - c. passport-size photographs;
 - d. where applicable, a marriage certificate; or
 - e. a copy of the certificate of incorporation, in the case of a corporate entity; or
 - f. such other identification documents as the Cabinet Secretary may prescribe.”
120. Although the 1st Plaintiff argued that the sale and transfer documents were signed way before the enactment of the *Land Registration Act*, the transfer document shows that it was lodged for registration in the year 2014, by which time the Act was in operation.
121. The other issue that was raised by Meru Co-operative, the 2nd Plaintiff, was that the suit by Kimuri Housing is time barred. Section 7 of the *Limitation of Actions Act* provide that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
122. It is not contested that by the time the two suits were filed on 5th May, 20014 and 15th May, 2014 respectively, the suit property was still registered in favour of Meru Co-operative, the 2nd Plaintiff. Considering that as at the time the two suits were filed twelve years had lapsed from the time the Sale Agreement between Meru North Co-operative Union and Mwenendo Investment Company Limited was signed [in 1993], it follows that the 1st Plaintiff’s suit was time barred.
123. That explains why the 1st Plaintiff rushed to have the suit property registered in its favour during the pendency of this suit, and notwithstanding the fact the 2nd Plaintiff had challenged the 1st Plaintiff’s claim over the suit property on the ground that its suit was time barred.
124. Consequently, it is the finding of the court that the said registration of the suit property in favour of Kimuri Housing Company, the 1st Plaintiff, was fraudulent, null and void. The tile to the suit property should revert to Meru North Co-operative Union Limited.
125. The 1st Plaintiff, is at liberty to pursue a refund of the payments made to the 2nd Plaintiff’s advocates, Wambugu & Co. Advocates.

Whether the Defendants have trespassed on the suit property.

126. Having found that the 2nd Plaintiff is the lawful proprietor of the suit property, there is then the question of trespass by the 1st, 2nd and 3rd Defendants. Pursuant to a consent order between Kimuri Housing Limited, Meru North Co-operative Union Limited, G.C Retail Limited, G.C. Residential Limited and Actis Africa Limited, a survey was conducted by S. A Harunani, whose report was adduced and relied on by the parties to this dispute.
127. In his report dated 9th March 2019, S.A Harunani confirmed that the sewer line sits on the suit property LR No. 5986/9. He also found that the total area occupied by the 6-meter sewer line wayleave was approximately 0.217Ha [0.537 acres].
128. He additionally found that there was a corridor between the 6 meter sewer line and the boundary as defined by the perimeter wall of the EABL covering an area of 0.107Ha [0.264 acres]. He concluded that the total area under the sewer line and the area which could not be economically be used between the wall and the 6m way leave is approximately 0.32Ha [o.79 acres].



129. The Survey Report by Popedel Consultants dated 1st March 2022 reached a similar conclusion, finding that the sewer line was constructed on the suit property; that the average combined width of the sewer line and the storm water drainage is 6 meters wide; that the area affected by the 6m way leave of the sewer line and the storm drain is approximately 0.235 Ha [0.581 acres]; that there is a corridor between the boundary wall and the 6m way leave covering an area of approximately 0.07 Ha [0.188 acres] and that the total area of land affected is approximately 0.311 Ha [0.768 acres].
130. These reports prove that there is trespass on the part of Actis Ltd, G.C. Retail and G.C Residential in their construction of a sewer line over the 2nd Plaintiff's property. Indeed, no evidence was adduced by the said Defendants to show otherwise.
131. The law on trespass is clear. Section 3 [1] of the *Trespass Act*, provides that:
- “ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
132. Trespass per se, even without damage is actionable. Having established that there was trespass, the only issue is on the quantum of damages to be awarded to the 2nd Plaintiff.
133. Neither of the parties adduced a valuation report of the suit property to guide this court as to the value of the affected portion of the suit property. Equally, the basis of the 1st Plaintiff's claim of Kshs. 500,000/- per month for 10 years aggregating to Kshs. 60,000,000/- was also not established.
134. The issue of assessment of damages was determined in 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].”
135. The suit property in this matter was undeveloped before and after the trespass. Taking into consideration the purchase price of the suit property in 1993 was Kshs 4, 550,000/-, and the trespass having been undertaken for more than ten years, and was with respect to about 0.77 acres of the suit property, this court finds that Kshs. 10,000,000 should be awarded as damages for trespass.
136. Having trespassed on the suit property, the Defendants cannot be allowed to keep the said sewer line on the suit property. This is despite the arguments by the Defendants' counsel that the said sewer line will not only benefit the Defendants, but also the Plaintiffs. That in my view is legalizing what the court has already found to be illegal. The Defendants are however at liberty to enter into a subsequent agreement with the 1st Plaintiff on that issue.
137. For these reasons, this court finds that the Plaintiff's suit in ELC No. 528 of 2014 and its counterclaim in ELC 592 of 2014 is unmerited and is hereby dismissed with costs. The said costs are payable to Meru North Co-operative Union Limited, the Plaintiff in ELC 592 of 2014.
138. The Plaintiff's [Meru North Co-operative Union Limited] suit in ELC 592 of 2014 is meritorious and is allowed as follows:



- a. An order of permanent injunction be and is hereby issued restraining the Defendants by themselves or through their agents, servants and/or anyone claiming under the Defendants from trespassing into, interfering with, wasting, damaging and/or in any manner whatsoever dealing with parcel known as L.R. No. 5986/9.
- b. An order of mandatory injunction be and is hereby issued compelling Actis Africa L.L.P Limited, G.C. Retail Limited and G.C Residential Limited to remove, and demolish the sewer line laid on the parcel of land known as L.R. No. 5986/9 and return the said L.R. No. 5986/9 to its original form before excavation and laying down of the said the sewer line within ninety [90] days of issuance of this Judgment failure to which the Plaintiff herein do remove the sewer line and return the land to its original form and Actis Africa L.L.P Limited, G.C. Retail Limited and G.C Residential Limited to jointly and severally bear all the costs incurred by the Plaintiff.
- c. General damages for trespass of Kshs 10,000,000 to be paid to the Plaintiff by Actis Africa L.L.P Limited, G.C. Retail Limited and G.C Residential Limited jointly and severally together with interest at court rates from the date of filing this suit until payment in full.
- d. An order of permanent injunction be issued to restrain the Kimuri Housing Limited through themselves or their agents, employees, servants, nominees or anyone acting under them, including the purchasers, from trespassing, alienating, invading, damaging, wasting, destroying or purporting to be registered owner or otherwise dealing with the parcel of land known as L.R. No. 5986/9 in a manner which is adverse to the interests of the Meru North Cooperative Union Limited, the Plaintiff herein.
- e. An order be and is hereby issued cancelling the registration of L.R. No. 5986/9 in favour of Kimuri Housing Limited and all subsequent sub-divisions by Kimuri Housing Limited.
- f. An order be and is hereby issued directing the Chief Land Registrar to rectify and/or amend the register of the parcel of land known as Land Reference Number 5986/9, so as to remove the entries in favor of Kimuri Housing Company Limited, the 5th Defendant herein, and the title to revert back to the proprietorship of Meru North Co-operative Union Limited, the Plaintiff herein.
- g. An order be and is hereby issued directing the Officer Commanding Station [OCS] or his agents, Kasarani Police Station, to ensure compliance with the above orders.
- h. The Defendants do pay costs of this suit to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF JUNE, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kalii holding brief for Eric Mutua [S.C.] for the 1st Plaintiff

Mr. Ikoha for Defendants

Court Assistant: Tracy

