**Mwaura v County Government of Trans Nzoia (Environment & Land Case 2 of 2023) [2025] KEELC 4953 (KLR) (25 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4953 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ENVIRONMENT & LAND CASE 2 OF 2023**

**CK NZILI, J**

**JUNE 25, 2025**

**BETWEEN**

**PETER K. MWAURA ..... PLAINTIFF**

**AND**

**THE COUNTY GOVERNMENT OF TRANS NZOIA ..... DEFENDANT**

## JUDGMENT

1. The plaintiff came to court through a plaint dated 17/7/2023. He seeks: -

   (a) Declaration that he is the sole owner of Land Parcel No. Kitale Municipality Block 3/850.

   (b) Declaration that Land Parcel No. Kitale Municipality Block 3/850, does not form part of the Kenyatta Stadium Land.

   (c) Declaration that the demolition of his developments standing on Land Parcel No. Kitale Municipality Block 3/850 was illegal, high-handed and malicious.

   (d) General and exemplary damages for trespass.

   (e) Special damages of Kshs 7,500,000/=.

   (f) Loss of income at the rate of Kshs.55,000/= per month.

   (g) Permanent injunction.

2. The plaintiff averred that the land parcel No. Kitale Municipality Block 3/850, hereinafter the suit property, was initially allocated to one Clement Nyasero Ndunga, as a leasehold with effect from 1/11/1992 at an annual ground rent of Kshs.1,600/=, before he bought it vide sale agreements dated 19/12/2012 and 3/1/2014 at Kshs.1,560,000/=. That he was awaiting a lease after the RIM was amended to reflect his parcel number.

3. The plaintiff avers that in 2015, he presented his development plans for approval to the defendant, which were circulated to all the requisite government departments, were approved and a notification of approval of development permission was issued vide a letter dated 9/7/2015. The plaintiff avers that upon obtaining the approval, he undertook permanent developments on the suit property, comprising a medium-sized hotel offering self-contained accommodation rooms, a bar and restaurant, kitchen, butchery, a nyama choma zone and a permanent wall with three steel gates.

4. According to the plaintiff, upon obtaining the relevant licences in 2018, he commenced an accommodation business, leased the bar and restaurant businesses, which continued until 18/4/2023. The plaintiff avers that on 17/4/2023, the defendant, without any prior notice and using a bulldozer and goons, trespassed and or invaded the suit property and demolished the developments on the suit property, claiming that the same was part of the Kenyatta Stadium land.

5. Again, the plaintiff avers that on 17/4/2023, one of the officers of the defendant and a County Executive Committee member for Land and Housing applied white chalk to the area earmarked for demolition, which now included the whole of the suit property and informed him to remove whatever he wanted from the said development or else he would lose everything through demolition just like it had happened to his neighbors' premises. The plaintiff avers that he only managed to remove a few movables and on the following day, all his structures on the suit property were flattened and the accompanying goons carried all the materials off the site.

6. In addition, the plaintiff termed the demolition of his buildings, gates, walls and other structures as illegal and high-handed, hence his claim for special, general and exemplary damages, including the value of the suit property and its developments or improvements at Kshs.18,500,000/=; loss of user or rental income for the leased bar, restaurant and the accommodation at Kshs.55,000/= per month.

7. The defendant opposed the suit through a statement of defence and counterclaim dated 18/7/2024, maintaining that the suit property was public land over which the plaintiff has no proprietary interest, for it forms part of the Kenyatta Stadium land. The defendant avers that it was the beneficial owner of the suit property, which legally and lawfully belonged to it as forming part of government land, which is under its possession, reserved to put up public utilities and as a casting point of the Kenyatta Stadium.

8. By way of a counterclaim, the defendant maintained that the suit property measuring approximately 0.126 Ha was land reserved by the government for putting up public utilities. The defendant avers that its officers, who included the CEMC Land and Housing, had applied white chalk to the area earmarked for demolition, which included the whole of the plaintiff's plot and the plaintiff was informed to remove whatever he wanted or else everything was to be lost through demolition.

9. The defendant counterclaimed for:

   (a) Declaration that it was the legal owner of the suit property.

   (b) Permanent injunction.

10. Through a reply to defence and defence to the counterclaim dated 4/11/2024, the plaintiff denied that the suit property was public land or comprised in land forming part of Kenyatta Stadium land; otherwise, the defendant's claim of ownership was misconceived and lacked merit.

11. During the hearing, Peter K. Mwaura testified as PW1. He relied on a witness statement dated 17/7/2023 as his evidence in chief. He began his testimony by stating that the suit property measures 0.1267 Ha, which has a 99-year leasehold with effect from 1/11/1992, initially allocated to Clement Nyasero Ndunga, as per an allotment letter dated 26/11/1992.

12. PW1 stated that he bought the land at Kshs. 1,560,000/= as per sale agreements dated 19/12/2012 and 3/1/2014. The letter of allotment, PDP map, receipts, payments, letter dated 2/6/1993 correcting the change of user from the Ministry of Lands and Housing produced as P. Exhibits 1(a), (b), (c), and (d). Further, PW1 relied on a bundle of receipts for annual rents and rates as P. Exhibit No. 4(a) and (b).

13. Subsequently, PW1 stated the court that upon making full payments, he embarked on seeking approval of the plans to develop the plot from government agencies. PW1 told the court that all nine mandatory government agencies approved his development plans as per the document dated 4/6/2015, and a notification of approval of the development plan dated 9/7/2015, which he produced as P. Exhibit Nos. 5 and 6.

14. PW1 testified that after obtaining P. Exhibit Nos. 5 and 6, he constructed a guest house, a bar, restaurant, kitchen, and a dining room as per a bundle of photographs produced as P. Exhibit Nos. 7(a), (b), and (c). Equally, PW1 told the court that after seeking and obtaining the requisite licenses, permits, and licences produced as P. Exhibit No. 8(a)-(d), he started operating the guest house and leased the bar and restaurant. Further, PW1 said that he received a letter from the Ministry of Lands dated 7/3/2013, addressed to the Director of Surveys seeking the amendment of the RIM, whose reply is dated 7/7/2015, which shows that the RIM was amended to reflect the suit property. He produced the two letters and the amended RIM as P. Exhibit Nos. 9, 10, and 11. Further, PW1 told the court that he has been receiving Kshs 35,000/= per month as rent for the first year, Kshs.40,000/= for the tenant for the bar and restaurant as per P. Exhibit No. 12.

15. Further, PW1 stated that on 17/4/2023, the defendant's personnel came and demolished all the development plots next to Kenyatta Stadium, but left his plot intact. However, at around 3:00 p.m., the team came and surrounded his plot and marked it with white chalk. PW1 said that he was called by the caretaker, after which he went to the suit property where the team gave him 2 hours only to salvage whatever he was able to, otherwise they were going to demolish his property. Upon negotiating with the team, PW1 said that he was given up to morning to effect the exercise. He said that due to the short notice, he was only able to remove a few movable properties from the plot.

16. PW1 said that the following day, bulldozers and prime movers from the defendant demolished everything on the suit property. He said that he engaged a valuer, as per MFIP-13. Additionally, PW1 produced copies of photographs, a certificate to operate a business and a land rates invoice from the defendant for the year 2020, which he had cleared as P. Exhibit Nos. 15(a) and (b) and 16.

17. PW1 denied that the plot was public land as alleged by the defendant. PW1 said that his plot borders two churches next to the Kenyatta Stadium, which were not demolished during the exercise. Though PW1 said that he obtained a court order after the demolition exercise, he was unable to re-develop the plot, save to secure it with a wire fence; otherwise, the public works at the stadium were still going on.

18. In cross-examination, PW1 confirmed that the plot was not part of Kenyatta Stadium or public land, before allocation to the initial allottee. PW1 said that he was not certain if the first allottee had met all the elementary steps before the allocation of the plot in 1992, by undertaking due diligence to confirm availability of the plot for allocation. Equally, PW1 said that he did not have any documents to confirm that all the processes towards the allocation of the plot were complied with, including minutes from the defunct Municipal Council of Kitale and a gazette notice showing how the plots were to be sold through a public auction. PW1 told the court that he started the construction of his plot in 2015. PW1 said that he bought the land in 2012 from the first allottee as vacant land. PW1 said that the allotment letter was copied to all other government departments in Nairobi and Kitale.

19. Francis Kariuki, a Registered Land Valuer, testified as PW2. He told the court that following instructions from the plaintiff, he visited the suit property assessed and prepared a valuation report dated 10/5/2025, which he produced as P. Exhibit No. 12. PW2 told the court that his instructions from PW1 were to advise on the value of the property that had been demolished. He said that he assessed the same at Kshs.18,500,000/= which he had broken down at Kshs.11,000,000/= for the land and Kshs.7,500,000/= for the improvements that had been undertaken before the demolition, based on the photographs in the report that were availed to him as well as the interview conducted from the property owner on the status of the plot before demolition.

20. Similarly, PW2 told the court that he based his valuation on the contractor's approach through the depreciation, replacement cost methodology. PW2 said that he also analyzed the comparable scales in order to arrive at the value. PW2 added that given the current zoning, use of the suit property was both residential and commercial, therefore, the current market trend for the area was approximately Kshs.35,000,00/= per acre. PW2 admitted that such comparable scales or values had not been attached to his report.

21. At the close of the plaintiff's case, the defendant sought an adjournment on account of sickness of counsel and the non-availability of the witness.

22. The court readily granted an adjournment and listed the defence for 17/3/2025. The defendant's witness was not available at the next hearing. The defence once again sought for adjournment based on the sickness of counsel. Counsel had no information that the defence witness was not before the court. Despite protests from the plaintiff, the court gave the defendant a last adjournment. At the defence hearing on 3/4/2025, the witness was not availed. This time round, the court was informed that the likely witness had been summoned to the Senate for audit queries, under Article 125 of *the Constitution*. The court declined to grant any further adjournment; hence, the defendant's counsel present opted to close the defendant's case.

23. The plaintiff relies on written submissions dated 28/4/2024. It is the plaintiff's submission that, going by the ownership documents before the court, particularly the allotment letter dated 20/11/1992 and amended on 2/6/1995, the suit property was lawfully allocated to the initial allottee who complied with the requisite requirements on the offer letter as per the exhibits produced. Further, the plaintiff submitted that the defendant vide a letter dated 9/7/2015 notified him of the approval of development permission for the construction of a residential cum commercial building, on the suit property, as per the exhibits.

24. The plaintiff submitted that pursuant to the approval, he constructed the buildings on the suit property, after which the defendant issued business permits and licences for the years 2018, 2019, 2021, and 2023. The plaintiff submitted that public land is defined under Articles 62 and 64 of *the Constitution*. Relying on Kambanga Ranching (DA) Co Ltd -vs- Ndoro & 146 others [2024] KEELC 333 (KLR), the plaintiff submitted that after the alienation of the land in 1992, it ceased being public land.

25. On justification of the demolition, the plaintiff submitted that at paragraph 4 of the defence, admission was made by the defendant of the demolition, yet the defendant was privy to the plaintiff's occupation, ownership, developments and had licensed all the processes of development and subsequently issued him with business permits and licenses. Equally, the plaintiff submitted that the plot had been duly surveyed as F/R No. 298/11, going by the amended RIM, the letter and map produced as P. Exhibit Nos. 9, 10, and 11. The plaintiff submitted that the exhibits clearly show that the suit property was private land pursuant to the alienation by the government.

26. Therefore, the plaintiff submitted that before embarking on the illegal and offensive demolition, the defendant should have filed a suit in court to determine whether or not the land comprised public land or part of the Kenyatta Stadium. It was submitted that the defendant took the law into his own hands, oppressively and maliciously demolished private land belonging to him. Reliance is placed on Teresia Irungu -vs- Jackson Ocharo & Others [2013] eKLR and Rajabali Kassam T/A Giraffe Snack Bar vs Total (K) Ltd [2009] eKLR. The plaintiff submitted that the demolition was not only oppressive, arbitrary, but also violated his right to property under Article 40 of *the Constitution* and Section 3 of the *Trespass Act*.

27. Further, the plaintiff submitted that he was entitled to general damages of Kshs.5,000,000/= for exemplary damages of Kshs.7,500,000/=, since there was no court order. Reliance is based on Parkview Towers Ltd -vs- John Mithamo [2014] eKLR and Monica Wamuhu Macharia -vs- Kenya Railways Corporation, Nakuru ELC No. E026 of 2020 [2023] KEELC 20676 [KLR]. On special damages, the plaintiff submitted that the valuation report had not been challenged as produced by PW2.

28. The defendant relied on a written submission dated 19/5/2025. The defendant submitted that land standards are at the heart of Kenya's social, economic, cultural fabric and the present dispute, while localized in its immediate facts, calls for the court to reaffirm fundamental principles enshrined in Article 40 of *the Constitution*. The defendant submitted that the determination of this matter does not merely resolve competing claims, but shall also speak to the larger question of certainty, security and justice in land tenure as envisaged in our law.

29. On whether a letter of allotment in and by itself can confer a transferable title to the allottee and or a third party purchaser, the defendant submitted that a letter of offer is a mere offer to allocate land and confers no ownership right unless specific conditions are met such as an acceptance of the offer, payment of requisite fees and compliance with stipulated terms. Reliance is placed on Torino Enterprises Ltd -vs- Attorney General Petition 5 (E006) of 2022 [2023] KESC 79 [KLR] (22nd September 2023) (Judgment).

30. Again, the defendant submitted that the plaintiff has neither demonstrated compliance with the terms and conditions of the allotment letter, nor has he provided evidence of a registered title, so as to be capable of asserting legal ownership over the land.

31. The defendant submits that under the Registration of Titles Act (repealed) or Registered *Land Act* (repealed), interests in land only gained legal effect upon registration, and therefore, failure to register the lease or obtain a certificate of lease means no registrable interest was acquired. In this court, without a certificate of lease, the defendant submitted that there was no conclusive evidence of ownership to confer the plaintiff's proprietary interest in the suit land as defined in the *Land Act* and the *Land Registration Act*.

32. As to whether the suit property was procedurally acquired or converted to private land and was subsequently available for transfer, the defendant submitted that under Article 62 of *the Constitution*, public land is held by the defendant in trust for the residents in the County of Trans Nzoia, with the mandate to manage and protect it. Therefore, the defendant submitted that if the land in question was not lawfully alienated and registered, it remains public land and any private claim on it is untenable.

33. Guided by Leah Magoma Ongai -vs- Attorney General [2015] eKLR and Nancy Wanjira Gathuri -vs- David Ndungu Mburu & Another [2019] eKLR, James Joram Nyaga & Another vs Attorney General & Another [2019] KECA 608 [KLR] and in the matter of the National Land Commission [2015] eKLR, the defendant submitted that it strongly held the view that the suit property, before it vested in the Kitale Municipal Council, was unalienated public land and only the president could

allocate it under the law. The defendant submitted that the first alienation took place in favour of the Kitale Municipal Council, wherein a certificate of grant was issued according to the registration of the ordinance dated 1/4/1957.

34. The defendant submitted that once the suit property was reserved as public utility land, the Commissioner of Lands or the Municipality held it in trust for the public and the Commissioner of Lands could not therefore commit or allocate the suit property for any use other than public use. The defendant submitted that any purported allocation of the suit property by the Commissioner of Lands to a private individual was irregular and a nullity.

35. More so, defendant submitted that a letter of grant No. IR 19234 giving the Kitale Municipal Council exclusive right to hold the land in trust, clearly indicates that the suit land constitutes the bigger Kenyatta Stadium, which is a public utility, illegally carved off by land grabbers. The defendant submitted that it holds a strong view that the land was originally unalienated public land which was later given to the predecessor to the defendant, hence it was never available for allocation, allotment, or public auction.

36. In addition, the defendant submitted that the allotment of the suit property was irregular, unprocedural and unlawful in that it did not comply with the procedures set out in the repealed Trust *Land Act*, Sections 114-115 of the retired Constitution and the repealed Registered Titles Act. In particular, the defendant submitted that there was no proof of de-gazettement of public land, evidence of advertisement inviting bids, minutes and resolutions of the Municipal Council approving such advertisement and allocation, evidence of an award, payment of requisite fees or premium, compliance with the allotment letter, registration and the issuance of certificate of lease, as evidence of ownership rights. The defendant submitted that the plaintiff failed, refused, neglected and or declined to provide such evidence.

37. As a result, the defendant submitted that the purported allotment to the plaintiff and or its predecessor in title was tainted with procedural impropriety, lack of transparency, and illegality, which was common in the 1990s regime. The defendant also submitted that the plaintiff's evidence has doubts on how public land changed to private land as held in Dina Management Ltd -vs- County Government of Mombasa & Others Petition 8 (E010) of 2021 [2023] eKLR, on the need to undertake due diligence in land transactions.

38. On whether the land should revert to the public, the defendant submitted that given the glaring inconsistence in the manner in which the land became private land, the defendant submitted that under Article 62(2) of *the Constitution*, such land is held in trust by the defendant and since the plaintiff had failed to show how he acquired public land, given the grant issued under Registration of Titles Ordinance, attached to the trial bundle, the land should revert to the public. Reliance was placed on Jimmy Gichuki Kiago & Another -vs- Transitional Authority & Others; County Government of Trans Nzoia (IP) [2019] KEELC 4738 [KLR], on the proposition that land reserved for a public purpose cannot be alienated, transferred or used in any other way than for the set public purpose.

39. The defendant also placed reliance on Funzi Island Development Ltd & Others -vs- County Council of Kwale & Others [2014] eKLR, on the proposition that a court should not sanction an illegality or give its seal to any illegal or irregularly obtained title as enshrined in Article 40(6) of *the Constitution*. The defendant submitted that the root of the title held by the plaintiff having been challenged, the plaintiff cannot benefit from the doctrine of bona fide purchaser as observed in Dina Management Ltd -vs- County Government of Mombasa & Others Petition 8 (E010) of 2021 [2023] (supra) and reaffirmed in Sehmi & Another -vs- Tarabana Co. Ltd & Others [2025] KESC 21 [KLR].

40. The defendant submitted that the approval of the development plan by its department of physical planning, receipt of ground and land rate payments, did not legitimize an illegally obtained title or transaction over public land or confer any interest. The defendant submitted that the alleged legitimate expectation by the plaintiff, as held in Sehmi & Another -vs- Tarabana & Co. Ltd & Others (supra), does not extend to illegally acquired title and that the plaintiff lacked locus standi or capacity, to apply for approvals for development over public land.

41. Accordingly, the defendant submitted that it did not illegally demolish the suit property; otherwise, it was acting within its mandate after issuing a demolition notice, when it became apparent that the suit property was part of the stadium land, hence a public utility.

42. The defendant submitted that it is trite law that a party is not entitled to compensation for demolition of a building constructed on an illegally obtained public land or through acts of trespass. The defendant submitted that the plaintiff's claim is unsustainable, for it is based on an unregistered allotment letter or sale agreement without a title deed, which documents confer no right of ownership.

43. The court has carefully perused the pleadings, issues for determination set out by the plaintiff and the defendant on 1/3/2025 and 28/2/2025, evidence tendered, written submissions and the law. The issues calling for my determination are:

    1. Whether the plaintiff lawfully, procedurally and legally acquired, occupied, possessed and developed the suit property by 17/4/2025.

    2. If the plaintiff has traced the root to the title, ownership, possession and development of the suit property.

    3. If the defendant has tendered evidence to prove that the suit property is public land and or forms part of the Kitale Stadium.

        (4) If the defendant was justified in entering into, demolishing and repossessing the suit property based on public interest.

        (5) Whether the plaintiff suffered loss and damage out of the acts of the defendant, in repossessing and demolishing the building structures and developments on the suit property.

        (6) Whether the defendant is liable for the loss and damage.

        (7) If the defendant is entitled to the reliefs sought in the counterclaim.

        (8) What is the order as to costs?

44. The plaintiff's case is that he lawfully and procedurally bought, took possession, sought for and obtained development approvals, developed the suit property, sought and was issued with business permits and licenses to operate business on the buildings set on the suit property, only for the defendant, who was privy to all the above possession, to send the officers without adequate notice or justification in law or otherwise, to demolish his developments and purport to repossess the suit property claiming that it was public land or part of the Kitale Stadium. In support of his claim, the paper trail on the acquisition starting with a letter of allotment dated 26/11/1992, PDP plan, receipts for payment of fees, rates, rents, letter varying or changing the user dated 2/6/1993, sale agreements, notification of approval of development dated 9/7/2015 by the defendant's County Physical Planning committee minutes number 111/CPPC/7/2015, submitted development plans, photographs, of the developments, single business permits for 2018, 2019, 2021 and 2023, letters dated 7/7/2015 and

7/2/2013, confirming that amendment of RIM to reflect the suit property as per F/R 298/11, RIM map, lease agreements with tenants for the guest house, valuation report, letter and certificate of photographic print authenticating the photographs, as Exhibits Nos. 1-15(a) and (b).

45. The defendant, on the other hand, opposed the suit through a statement of defence and counterclaim dated 18/7/2024, accompanied by a list of documents dated 28/7/2024 and a list of witness statements. The defendant's defence is that it is the legal, lawful and beneficial owner of the suit property, since it is public land and or forms part of the government land reserved for laying public utilities, and a case point is the Kitale Stadium.

46. By way of counterclaim, the defence averred that the suit land is land reserved by the government for laying public utilities. It was averred that the officers of the defendant, including a CECM for land and housing, applied white chalk to the area earmarked for demolition, which included the plaintiff's land, and was informed to vacate and or remove his structures, as well as movable structures.

47. The defendant, as the plaintiff in the counterclaim, counterclaimed for a declaration that it is the legal owner of the suit property and for a permanent injunction.

48. It is trite law that parties are bound by their pleadings and issues for the court's determination, flow from the pleadings. See Independent Electoral and Boundaries Commission & another -vs- Stephen Mutinda Mule & 3 Others [2014] eKLR. Written submissions cannot amount to pleadings or replicate pleadings. See D.T. Moi -vs- Mwangi Stephen Mureithi (2014) eKLR. In the defendant's statement of defence and counterclaim, the defendant did not plead illegality, irregularity, procedural impropriety, or fraud in the manner that the plaintiff acquired, possessed, developed, obtained development permits, approvals, and subsequently sought and obtained business permits and licences. Further, the defendant did not plead and pray for the invalidation of any conversion and for reversal of the letters of allotment held by the plaintiff.

49. The plaintiff relies on a sale agreement and letters of allotment. Equally, the plaintiff has backed the letter of allotment with payment receipts, PDP, plan, amended RIM, and correspondences showing that the suit property was included in the amended RIM. The defendant, in an attempt to impeach the status of the suit property as private land, invoked a Grant No. I.R. 19234 issued to the defunct Municipal Board of Kitale with effect from 1/4/1957 for L.R No. 2116/464, as per the land survey plan number 70408, taking the view that the suit land was alienated or reserved land, that was unavailable for re-allocation by the defunct Commissioner of Lands to the initial allottee Clement Ndunga.

50. In Diasproperty Ltd & Another -vs- Githae & Others Petition E019 of 2024 [2025] KESC 19 [KLR] (14TH April 2025) (Judgment), the court reiterated that in an adversarial system like ours, rules of pleadings serve to ensure that parties define succinctly, the issues for determination so as not to take the rest of the parties by surprise. The court said that a court does not automatically acquire jurisdiction based merely on what a party claims in their pleadings or submissions. The court observed that when a grievance is presented in court, the court makes an inquiry to determine the issues raised through evidence presented and answers the questions raised by the parties.

51. It is on record that the defendant did not object to the exhibits produced by the plaintiff. It is also on record that the defendant in cross-examination did not point out any irregularities or illegalities in the paper trial produced by the plaintiff in support of his case. Similarly, it is on record that the defendant did not object to the production of documents approved, authenticated, and emanating from the defendant's own officers, or offices and its predecessor in title. It is also on record that the plaintiff is yet to obtain a title deed for the suit land.

52. Further, it is also on record that the defendant did not call any witness to sustain the averments in the statement of defence and or advance the contents of the counterclaim. Any alleged fraud, illegality and unprocedural means in acquiring documents of ownership must be strictly pleaded and proved under Order 2 Rule 11 of the Civil Procedure Rules. See Koinange & Others -vs- Koinange [1968] KLR 23.

53. It is not enough for a party to allege illegality or fraud and procedural impropriety without tendering proof. Pleadings must be substantiated by tendering evidence. Pleadings not supported by evidence remain mere allegations. The burden of proof under Sections 107, 108, 109, and 112 of the *Evidence Act* remained with the defendant to prove that the title register and parcel number, its size dimensions, coordinates, locality and area encompassing or covering the suit property.

54. He who alleges must prove. It is the defendant who alleged in the pleadings that the suit property is public land and or forms part of Kitale Stadium, which is public land under its management and control, hence the reason that it went onto the land on 17/4/2023 to reclaim it. See Evans Nyakwana -vs- Cleophas Bwana Ongaro [2015] eKLR. It is the defendant who stood to fail if no evidence was availed to challenge the allocation process and show that the plaintiff was party to the illegal acquisition of public land. It was for the defendant to tender evidence to show that the plaintiff had acquired no protectable interest or right over the suit property, beyond the exhibits tendered, since the land, as public land, was already reserved and or alienated as public land. Reservation and or alienation for public land is a matter of both law and facts.

55. Section 108 of the *Evidence Act* provides that the burden of proof lies on the person who would fail if no evidence at all were given on either side. In this case, it was the defendant who stood to fail if no evidence was given in support of its counterclaim, in seeking to impeach the allocation process and the alleged lawful possession, occupation and development of the suit land by the plaintiff from 2012 to 2023. Neither the Land Registrar nor the Land Surveyor was called to support the defendant assertions that Kitale Municipality Block 3/850 does not exists as private land and if it does exist, its history shows that it is part of public land that could not have been alienated in 1992 or was never available for alienation, since it was reserved as public land, for putting up public utilities.

56. A court of law cannot infer irregularity, illegality, unprocedural means, or fraud. P. Exhibit Nos. 1, 2, 6, 8(a-d), 9, 10, and 11 were part of the paper trial which the plaintiff relied upon. The officers from the defendant who signed, approved and issued some of those exhibits were not called to disown them and or say that the suit property does not exist in their records, as private land.

57. Trespass under Section 3(2) of the *Trespass Act* is entry into private land under possession or occupation of another without justification. It is the defendant using the public interest and or eminent domain doctrine who must prove the basis of entry into the land and commission of the alleged illegal acts of destruction or demolition. It is the defendant who had the burden to point out and prove the illegalities of the ownership documents held by the plaintiff as unprocedural under Section 26(1) of the *Land Registration Act*.

58. Whereas it is true as held in Dina Management Ltd -vs- County Government of Mombasa (supra) and Torino Enterprises Ltd -vs- Attorney General (supra) that due diligence is a prerequisite, the cited caselaw would only be applicable in this suit if the defendant laid evidence from its end that from the records of its predecessor in title, the suit property was and remains public land that was reserved or was non-available for re-allocation by the Commissioner of Lands through P. Exhibit No. (1) and the subsequent documents.

59. Other than admitting visiting the suit property on 19/4/2023 and earmarking the plaintiff's plot with white chalk as part of the Kenyatta Stadium in the statement of defence and counterclaim at paragraphs

*8* and *11* and in the witness statement of Truphosa Otwala dated 18/7/2024 at paragraph *12*, no evidence was tendered by the defendant and its officers as to why they held a strong opinion and or arrived at such a conclusion that the suit land is public land.

60. Acquisition of land is a process and not an event. In M'Kiara M'Rinkanya & another -vs- Gilbert Kabeere M'Mbijiwe (1982 – 1988) 1 KAR 196, the court observed that where there is double allocation, the first allocation prevails. It is the defendant who wants the court to give a legal right on the suit land based on the existence of facts that the suit land was reserved for public use before allocation, and or forms part of the Kitale Stadium land. The burden to prove those facts lay with the defendant before it could poke holes in the paper trail of the plaintiff on how he acquired the land in the first instance. That legal obligation was never discharged by the defendant either in its pleadings or through evidence. Litigation must be based on factual issues supported by material evidence.

61. The defendant has strongly repeated in its written submissions that the suit property is public property and that any acquisition or developments and businesses thereon were unauthorized, illegal, irregular, since the plaintiff holds no registrable or proprietary interests or title as conclusive evidence of ownership, in the face of the law. As much as the court is bound or persuaded by the reasoning in Leah Magoma Ongai -vs- Attorney General (supra) and James Joram Nyaga & Another -vs- Attorney General (supra), and in the matter of the National Land Commission [2015] eKLR, and Dina Management Ltd -vs- County Government of Mombasa (supra), where a party fails to give evidence or offer an explanation on the existence of a certain events or facts, then the version put forward by the opposite party and its documentation prevails, as held in Edward Muriga through Stanley Muriga -vs- Nathaniel Schutler [1997] eKLR. Laying the basis by way of credible evidence on how and when the suit land was reserved as public land or forms part of Kitale Stadium land, for the court to make a finding that indeed the suit property is public land is missing in this suit. See Moses Parantai & Another -vs- Stephen Njoroge Macharia [2020] eKLR.

62. The plaintiff, on the other hand, has tendered paper trail to an extent that there is an amended RIM indicating the existence of the suit land, both on paper and on the ground as per P. Exhibit Nos. 8, 9, 10, and 11. In Raphael Kimani Mwangi -vs- Chair, Treasurer and Secretary Mukuru Kwa Njenga Jua Kali Association & Others [2020] eKLR, the court cited *Munyu Maina -vs- Hiram Gathiha Maina CA No. 239 of 2009* that when the root of title is under challenge, it is not sufficient to dangle the instrument of title without prove that the acquisition of title was legal, formal and free of any encumbrances.

63. The tracing of ownership of the title to the suit land by both the plaintiff and the defendant was critical in this suit. Records or the history of the land, as one time belonging to the defendant or its predecessors in title, are missing in the list of documents filed by the defendant, even if it's witnesses were to testify. Similarly, the plaintiff has not called the land registrar and the land surveyor, to enable the court to issue prayers (a), (b) and (g), of the plaint.

64. In Iruki & another -vs- Mangaara *& 3 others (Environment and Land Appeal 115 of 2021*) [2024] KEELC 5561 (KLR) (24 July 2024) (Judgment), the court as regards Section 9 of the Trust *Land Act* and Sections 114-118 of the retired Constitution observed that, the successor in title of the allocating authorities should have been sued if they were liable of double allocation or, that a court faced with two or more titles has to make an investigation to discover which of the two titles should be upheld as per Hubert L. Martin -vs- Margaret Kamar [2016] eKLR. The court held that there must be no gaps in the paper trial leading to the doorstep of the Land Registrar, who is now seized of an amended RIM.

65. The defendant in this suit has failed to substantiate any encumbrance or red flags that were raised by its predecessor in title or so soon after 2023, before the events of 17/4/2023, such as superior ownership rights, justifying it to enter into and carry out the acts of demolition.

66. In Sehmi & Another -vs- Tarabana & Co. Ltd (supra), at issue was whether there was unlawful acquisition, lawful removal, eviction from the land, a bona fide purchaser and whether an irregular allocation can create a genuine title. The court observed that to succeed in invoking the doctrine of innocent purchaser for value, a legal estate must exist and lastly, the demonstration of acting diligently by conducting a reasonable inquiry into the status of the land sought to be purchased. The court observed that an original allottee of a leasehold estate over public land cannot be regarded as a purchasers of land and that anyone who purchase a leasehold from the original allottee can only acquire the unexpired terms of the lease and therefore anyone purchasing such land would take it subject to the rights of the third party beneficiary.

67. The court said that the doctrine of innocent purchaser for value does not extend to any property under Article 40 (6) of *the Constitution*, found to have been unlawfully acquired, which is now a complete departure from Section 23 of the repealed Registration of Titles Act. The court cited Dina Management Ltd -vs- County Government of Mombasa (supra), that to establish a bona fide purchaser, one had to go first to the root right from the first allotment. In this suit, the defendant has failed to attack the initial allotment and show that the plaintiff is laying claim to land which was not available for allocation in the first instance.

68. The next issue is whether in the absence of a certificate of lease or title, makes the plaintiff's interests or rights on the suit property incapable of protection by a court of law. In Danson Kimani Gacina & another -vs- Embakasi Ranching Company Ltd [2014] eKLR, the court observed that proof of ownership of unregistered land is found in documentary evidence, which must lead to the root of title, must have an unbroken chain pointing at the applicant as the true owner. The court said that once proof of ownership is tendered, then the holders of the documents are entitled to the protection of the law.

69. Section 7 of the *Land Act* provides several modes of land acquisition. Allocation is one of them. The plaintiff has produced P. Exhibit Nos. 1-15 which discloses his registrable interest over the suit land, which documents are at the tail end of in offices of the Chief Land Registrar and the Director of Surveys. The sale agreement meets the requirements of Section 3(3) of the *Law of Contract Act*. Possession and occupation of the land and the developments thereto were approved by the officers of the defendant. The issuance of business permits and licenses to run a business on the buildings erected on the suit premises, were equally issued by the defendant. I find that the plaintiff has rights and interest in the suit land. The plaintiff has, therefore, equitable interests or overriding interests created on the land entitling him to the protection of the law.

70. Coming to trespass, in M'Kiara M'Mukanga & Another -vs- Gilbert Kabere M'Mbijiwe (supra), the court observed that to prove an action on trespass to land to determine the title, M'Mbijiwe had to prove on a balance of probabilities that the appellants had entered his plot while he was in possession, that he had a right to immediate possession and entered in exercise of it. The court said that trespass was a tool in violation of the right to possession. Further, the court said that the claimant had to prove that he had the right to immediate and exclusive possession, which is different from ownership. In this suit, there is evidence of sale agreements, putting into vacant possession by the initial allottee, payment of valuable consideration, payment of annual rates and rents to the defendant, issuance of building approvals, business permits, and licences from 2018, 2019, 2021, and 2023.

71. The defendant has not denied issuance of the development approvals, business permit and licenses to the plaintiff, immediately before 17/4/2023. Evidence of any prior notice of an intended eviction or to yield vacant possession is lacking. Eviction based on trespass to public, private and community land is governed by Section 152A-I of the *Land Act*.

72. There is no evidence of issuance of the requisite mandatory eviction notice to the plaintiff by the defendant. There was no court order obtained by the defendant for the plaintiff to yield vacant possession. My finding is that, there is no justification for the defendant on taking the law into their hands to effect the demolition without following due process.

73. The court in Mitubell Welfare Society -vs- Kenya Airports Authority SC Petition No. 3 of 2018 and Satrose Ayuma & 11 Others -vs- Registered Trustees of Kenya Railways Staff Retirement Pension Scheme & Others Petition 65 of 2010, held that under Section 152(a) to (g) of the *Land Act*, there are legal principles and duties that must be complied with during an eviction, otherwise, it would amount to violation of constitutional rights and freedoms. See also Dina Management Ltd -vs- County Government of Mombasa (supra).

74. In Rutongot Farm Ltd -vs- Kenya Forest Service & Others, Petition 2 of 2016 [2018] KESC 27 [KLR] (19th September 2018) (Ruling), the court held that once a proprietary interest has been lawfully acquired, a party is entitled to protection of right to property under Article 40 of *the Constitution*, hence no one should arbitrarily be deprived of his property.

75. In view of the foregoing, the acts of the defendant were highly unjustified, illegal and unconstitutional. Trespass is actionable per se. Any aggrieved party need not prove loss or damage to be entitled to damages. The defendant has not challenged the loss and damage as pleaded and proved by the plaintiff. I therefore find the plaintiff entitled to prayers (c) and (e) of the plaint dated 17/7/2023, namely:-

    (c). A declaration is hereby issued that the demolition of the plaintiff's developments standing on Land Parcel No. Kitale Municipality Block 3/850 was illegal, high-handed and malicious.

    (e). Damages of Kshs.7,500,000/=.

**JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 25TH DAY OF JUNE 2025.**

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

In the presence of:

Court Assistant - Dennis