



REPUBLIC OF KENYA



**KENYA LAW**  
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**Portsmouth Holdings Limited v Kenya Railways Corporation (Environment & Land Case 7 of 2021) [2025] KEELC 4909 (KLR) (25 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4909 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 7 OF 2021**

**CK NZILI, J  
JUNE 25, 2025**

**BETWEEN**

**PORTSMOUTH HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**KENYA RAILWAYS CORPORATION ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff approached this court through an amended plaint filed on 3/3/2022. It was averred that the plaintiff in 2017 bought and became the registered owner of LR No. 2116/414, hereinafter the suit land, situated within Kitale Municipality, for Kshs.15,000,000/=, without any notice of adverse interests in 2017. The plaintiff avers that the suit land comprised permanent buildings used as stores or go downs and leased to third parties. Further, the plaintiff avers that the suit property exists distinctly from the Kenya Railways Station and other parts of the defendant's land.
2. The plaintiff avers that on 29/1/2021, the defendants' authorized representatives, without any notice and in the course of their employment, trespassed into the suit property and marked letter "X" on the building, alleging that the said buildings were situated on the defendant's operation land and hence earmarked them for demolition.
3. Accordingly, the plaintiff avers that on the night of 29<sup>th</sup>/30<sup>th</sup> January 2021 which was on weekend, the defendants deployed its bull dozers and prime mowers to the suit property, unlawfully and without any justifiable reason destroyed or demolished the said buildings where after the defendants workers or agents, begun a process to indiscriminately fence off the whole railway station area, including the suit land, hence dispossessing the plaintiff of its property, effectively denying it access, use and occupation of the land to date.
4. The plaintiff avers that unless the court intervenes, the defendant is hell bent on continuing its illegal activities to suppress or oppress its right to enjoyment of the suit property. In the amended plaint,



- Kshs.17,228,010/=, was pleaded as the assessment to rebuild the structures that had been destroyed. Further, the plaintiff averred that after the demolition and the fencing off of the suit land with chain link wire and concrete posts, the defendant had completely blocked any access to the suit land by posting armed guards round the clock, to date.
5. The plaintiff averred that the acts of the defendant amounted to violation of its constitutional right to ownership of property under Article 40 of the *Constitution*. The plaintiff sought compensation at the rate of Kshs.35,000,000/=, being the current value of the land in addition to Kshs.17,228,010/=. Additionally, the plaintiff prayed for lost rental income at the rate of Kshs.398,000/=, per month due to the unlawful demolition and eviction of its tenants with effect from 1/2/2021, until judgment and payment in full.
  6. The defendant opposed the suit through an amended statement of defence and counterclaim dated 11/3/2023. It was averred that the defendant is the true and legal owner of the suit property as it is part of the Kenya Railways Station as defined in Ref. No. 2116/414 by survey plan No. F.R. No. 83/185 dated 8/10/1958 from the Director of Surveys, layout of Kitale station, drawing No. LP 846 dated 30/3/1984, Kitale Station Yard drawing No. 98 dated 8/5/1995, Survey Plan FR. No. 24/2 dated 1926 and Registry Index Map, Kitale Municipality Block 4.
  7. The defendant avers that it never alienated, disposed of or transferred ownership of the suit land or any other part of their operational land in Kitale to the plaintiff or any other person, nor had it surrendered any of the operational area land including the suit land to the government, or any other authority for allocation to any entity including the plaintiff. The defendant avers that its predecessor in title had issued a grant of lease to M/S 020 East African Petroleum Corporation Ltd on 1/1/1955, for a lease over the subject matter for a term of 93 years under Grant No. LR 17107, with an annual rent payable at Kshs.4,205/= which grant was confirmed by a formal grant drawn, executed and registered on 19/2/1960. It is averred that the said grant was forwarded to the grantee by a letter dated 7/3/1960, from its predecessor in title.
  8. The defendant avers that the grantee later changed to Total Oil Products E.A. Ltd and a new grant was issued to then being LR No. 17107/3 on 17/3/1978, a change of user was granted for the parcel from the storage handling and bulk distribution of all kind of petroleum products to general go down and industrial purposes and again the grant was duly registered as LR. 17107/5. The defendant avers that the grant held by Total Oil Products EA Ltd was transferred to one Mohamed Salim and Mohamed Ashraf on 22/5/1978, and again the grant was registered on LR No. 17107/6 for Kshs.5,200/= as annual rent, later revised to Kshs.33,800/=.
  9. Equally, the defendant avers that its grant was later transferred to Mohamed Salim on 15/6/1981 and duly registered as LR No. 17107/7 and that all these grantees were paying the annual rent to them as grantors, including Mohamed Salim, who continued to do so until 2001 when he started defaulting in payments. The defendant avers that as a result of the default, a demand letter dated 14/8/2003 was sent for the outstanding rent of Kshs.324,190.20/=, which was never responded to by the grantee and had accrued to Kshs.954,831.20/= as at 1/1/2017.
  10. The defendant avers that from the wording of the original grant, it was clear that the suit lands were part of the Kitale Railway Station Operation area as is in Clauses No. 1, 2 and 3 of the special conditions regarding developments on the suit property which were subject to a written consent and supervision of its Chief Engineer of the predecessors to title, as the parcels of land were vested on it under vesting order No. 24 of 1985.
  11. According to the defendant, the original grant by which the lease in favour of the 1<sup>st</sup> grantee was created and contained special conditions how the grantee shall deal with the leasehold interests, that no assigns,



transfer, subletting or otherwise, dispose of the land with the prior consent in writing of the governor, which conditions were applicable upon any subsequent transfer of the grant and as such, no grantee would have the power or right to alienate, transfer or dispose of any interest in the grant without the prior consent of the defendant's managing director.

12. The defendant avers that their position in the purported sale, transfer and or alienation of any interest in the aforementioned grant without the express and written consent of the Managing Director to the defendant, was not sanctioned by law and any interest purportedly acquired by the plaintiff as a result of such a disposition would be null and void and could not confer any proprietary interest rights on the suit land capable of enforcement in law. Again, the defendant avers that the plaintiff's purported acquisition which lacks evidence of sale agreement, transfer and title, based on the history alluded to above, as land falling within the operational area of Kitale Railway station is illegal and fraudulent, which should be cancelled, for the defendant never alienated, sold or disposed of or surrendered the subject land to the government of Kenya for alienation to any entity including the plaintiff.
13. The defendant denies the allegation contained in paragraphs 8, 9, and 10 of the plaint and averred that the plaintiff and any other encroachers and trespassers on railway land and reserves had been given sufficient notices to vacate and or remove any illegal structures through the daily newspapers publications of 20/3/2018, 21/9/2019, and 30/9/2019.
14. Further, the defendant avers that other warnings were issued by the National Government administration officers to vacate, and the structures were marked letter "X"; otherwise, the plaintiff ought to have complied with the notices. The defendant denies any involvement in any demolition as alleged and stated that the demolition complained of was undertaken by a government of Kenya multi-agency operation team comprised of National Government Administration Officers, Presidential Delivery Unit, National Police Service, and Kenya Railways Officers after sufficient notices had been duly served. The defendant avers that they were strangers to the alleged loss and damage suffered by the plaintiff; otherwise, the plaintiff in law is not entitled to any compensation in the circumstances of this matter or any equitable remedies before this court.
15. The defendant avers that the plaintiff is not entitled to the reliefs sought, for they are not supported by law, equity, and have been overtaken by events. Again, the defendant denies the contents of the amended plaint as to the loss, special and general damages. It was averred that following the ruling on 22/7/2021, it moved to safeguard and protect its operational interests contained in the suit land, hence the plaintiff is not entitled to any compensation as the same is founded on an illegality.
16. By way of a counterclaim against the plaintiff and Mohamed Salim as the 2<sup>nd</sup> defendant, the defendant reiterates the contents of the statement of defence. The defendant avers that given the immediate former grantee Mr. Mohamed Salim had no proprietary right over the suit land capable of being sold, alienated and or transferred to the plaintiff, the purported sale and transfer of any interest thereon and such acts were both illegal, fraudulent and a nullity to confer upon the plaintiff any right over the suit land or be capable of making it enjoy the protection of the law.
17. The defendant lists particulars of fraud, illegality and nullity against the defendants to the counterclaim, including grabbing the land, following the law, holding a non-existent interest on the land, using illegal, corrupted, and unorthodox means to acquire the land, and occupying it illegally. The defendant counterclaimed for:
  - (a) The suit land belongs to and is part of the Kenya Railways Station land.
  - (b) Mohamed Salim had no right in law to alienate or dispose of any interest in the suit land without the consent or authorization of the defendant.



- (c) Any title acquired by the plaintiff is illegal, a nullity and may be revoked for the land to revert to it.
  - (d) Vacant possession in default eviction to issue.
  - (e) Permanent injunction.
18. By a reply to defence and defence to the counterclaim dated 14/2/2025, the plaintiff avers that its case is that the land comprised in the LR No. 2116/414/(IR No. 17107), was for consideration granted to 020 EA Petroleum Co. Ltd by the Government and Commander in Chief of the Colony and Protection of Kenya on behalf of the Queen, for a term of 93 years with effect from 1/1/1955, which then transferred the lease to Mohamed Salim and Mohamed Astraf on 15/6/1981, who later transferred the same to the plaintiff on 27/7/2012. That the parcel of land never belonged to the defendant or is defined by the alleged survey Plan No. FR. 83/185 of 1958 or any maps alluded to by the defendant in paragraphs 4(1) - (10) of the amended defence and counterclaim.
  19. The plaintiff denies that the initial lease for 93 years of 1/1/1955 was granted by or that any rental fee was payable to the defendant, except the colonial and the independent government after 1963, with the defendant being the grantee as alleged or at all. The plaintiff denies that the special conditions No. 1, 2, and 3 implied that the suit land formed part of the defendant's operational area, or that the requirement for the approval and supervision of the Chief Engineer of the defendant's predecessor in title.
  20. On the contrary, the plaintiff avers that it was because the user of the suit land was meant to complement the operation of the then EA Railways and Harbour, otherwise the suit property remained property of the registered lessee.
  21. Further, the plaintiff avers that special condition No. 9 in the grant required the written consent of the Governor of the Colony and Protectorate of Kenya on behalf of the Queen; otherwise, no consent from the Managing Director of the defendant was required. The plaintiff reiterates that the ownership of the suit land vested in the registered lessee and there was no requirement to obtain any consent from the defendant before the alienation of the land. The plaintiff avers that the sale and transfer of the suit land to it was a legal procedure and without any fraud or illegality whatsoever; otherwise, the defendant, its agents and servants wrongfully and maliciously destroyed its property, for which compensation should be ordered.
  22. In addition, the plaintiff contends that the sale and transfer of the land to it and its predecessors had complied with the grant and the special conditions of the grant, and there was no violation of any law. The plaintiff avers that the reliefs in the counterclaim were not legally obtainable as the defendant had never had any proprietary interest on the suit land, rendering the reliefs in the counterclaim without merit.
  23. The defendant filed a reply to the defence to the counterclaim dated 23/1/2025, reiterating that it was entitled to the reliefs in the counterclaim.
  24. During the hearing, Anthony Max Lucas, the General Manager of the plaintiff testified as PW1. He relied on a witness statement dated 4/2/2021 and 11/11/2022 as his evidence-in-chief. PW1 stated that the plaintiff company had authorized him through a board resolution dated 2/2/2021 as a general manager to plead, sign and represent it in these proceedings. He produced the same as P. Exhibit No. 1. PW1 testified that the plaintiff purchased the suit property in 2017, for the remainder of a lease of 93 with effect from 1/1/1955 issued to the initial grantee under the repealed Registration of Titles Act.
  25. PW1 told the court that the suit property comprised of the following buildings: an office block with self-contained five office rooms, domestic quarter with 3 staff rooms that had a toilet and a waiting



bay, two big stores, a go-down with three spacious stores, a shade comprising of a large workshop and a service bay and lastly, a block containing two go-downs.

26. PW1 said that on 29/1/2021 at around 3:00 p.m., he was at the gate when someone came and identified himself as a staff member of the defendant and without any explanation, marked the access gate with the letter "X". Further, PW1 said that the following morning, the defendant deployed bulldozers and prime movers to the suit property and caused all the buildings mentioned above, except one old go-down, to be demolished, without any prior notice or justification. PW1 told the court that it holds a valid title to the suit property, which is not and has never been part of Kitale Railway Station land.
27. PW1 relied on a sale agreement dated 30/6/2017, transfer form dated 5/7/2017, stamp duty payment slip dated 21/7/2017, land control board consent dated 21/7/2017, rent clearance certificate dated 18/7/2017, rates clearance receipts dated 17/7/2017, clearance certificate dated 7/7/2017, rates land notes, certificate of incorporation of the company issued on 3/10/1996, valuation reports dated 7/1/2022 and 14/1/2022, original grant/lease dated 1/1/1955, variation of the annual rates, as P. Exhibit Nos. 1-14 respectively. PW1 told the court that the initial grant, as contained in P. Exhibit No. 12, shows that the lease issued on 1/1/1995 to 030 EA. Petroleum Co, Ltd, to run for 93 years, was established by the government on behalf of Her Majesty Queen Elizabeth. PW1 denied that the grantee was the defendant at any given time. He added that the special conditions were clear that the user of the land could be solely for general go-downs.
28. In cross-examination, PW1 confirmed that before purchasing the land, due diligence was undertaken by the plaintiff, including ensuring that the seller disclosed all the details regarding the suit property. Equally, PW1 told the court that an official search certificate was also obtained. Asked about the statement of account and correspondence for rates and rents contained in the defendant's list of documents, with the immediate lessee, PW1 said that such details were not within his knowledge.
29. PW1 was emphatic that P. Exhibit No. 12 was a certificate of lease showing the current registered owner of the suit property as the plaintiff, after purchasing the same from Mohamed Salim, who had obtained a transfer of the land on 22/5/1978. PW1 told the court that the only involvement the defendant did in P. Exhibit No. 14 was to the endorsement of a change of user by a letter dated 14/4/1978. PW1 admitted that from the grant, it could mean that the defendant was only exercising a limited control over the suit land in terms of approving any development thereof as per special conditions number 1, 2 and 3 through the Chief Engineer, just the same way the local authority would approve any development plan. PW1 told the court that vacant possession took place upon the sale agreement in 2017, where after, it erected the referenced developments on the suit property.
30. In addition, PW1 said that he was not aware if building approvals for the same as per Clauses 1, 2, and 3 of the grant were sought and obtained from the defendant or the local authority. PW1 also stated that the addition to the development that they found on the suit land in 2017, all their trucks or lorries were being serviced at the service bay. PW1 was unable to provide any business permits and licenses for the business that they were undertaking on the suit land before demolition. PW1 told the court that the defendant had some police accompanying them during the demolition.
31. As to the valuation reports, PW1 told the court that the valuer was supplied with the necessary documentation and information to compile the report dated 14/1/2022. PW1 said that he had no copies or lease agreement with the tenants who had leases with the plaintiff before the demolition. PW1 admitted that Clause 9 of P. Exhibit No. 13 was an agreement of subletting to third parties without prior approval or consent from the lessor. Further, PW1 said he instructed Citadel Valuers Ltd, who prepared a report dated 7/1/2022. PW1 said that he had no business licenses or permits for the subletting, nor had he listed them as witnesses in this suit.



32. PW1 admitted that there were no supporting documents for the rental income of Kshs.398,000/= per month included in P. Exhibit No. 12. PW1 also admitted that other than letters of offer and correspondence contained in pages 59-68 of the bundle of documents, there were no bank records showing any rental income from the sub-tenants. Further, PW1 admitted that he had no documentation, such as bills of quantity or receipts, which were supplied to the Valuer to reach the figure of Kshs.17,228,010/=, as monies used to put up the developments on the suit property before it was demolished.
33. Equally, PW1 admitted that reports from any architects, quantity surveyors, contractors and or consultants and the accompanying receipts invoices and payments records for the work, as well as drawings and building plans for the structures and their approval from various government departments were not supplied to the Valuer to come up with the valuation report. Further, PW1 told the court that the valuer was not supplied with approved bills of quantities and drawings or documents to support the projected petrol station and a playground, to form a basis for coming up with the figure, or to address lost business opportunities.
34. Accordingly, PW1 told the court that P. Exhibit No. 14 was clear on the user as a go-down and for industrial purposes and therefore, the intended future business would have required a change of user. PW1 was unaware if such a request had been made to the grantor, as well as an application for an environmental Impact Assessment from the National Environment Management Act to that effect.
35. PW1 equally admitted that he had not produced any board resolution where the intended project was discussed and approved, following presentation of both a business proposal and bills of quantity for the same. He also admitted that he had no business permits or licenses that had been processed regarding the intended business venture, inclusive of a petrol station, a restaurant and a market mall.
36. As to the source of funds to finance the intended project, PW1 admitted that he had no record of a board resolution where, after bills of quantity from architectural and structural engineers had been tabled and approved, the board of the plaintiff approved to source a loan to undertake the project. Equally, PW1 had no evidence of letters of offer from potential tenants for the intended project. Though PW1 said that all those records attached to the above were available, he said that they were all destroyed during the demolition. There was no OB report containing an inventory of movable properties that were destroyed during the demolition exercise.
37. As to the valuation by Citadel Valuers Ltd of Kshs.35,000,000/=, PW1 said that it was unclear about the comparable rates of land in the neighborhood. PW1 told the court that P. Exhibit No. 13 had no reference to payment of annual rent to the defendant as the owner or grantor of the lease.
38. PW1 told the court that since acquiring the land in 2017, several developments were undertaken therein without objection from either the defendant or the government. Equally, PW1 said that before 2021, neither the government nor the defendant wrote to it regarding any breach of the special terms and conditions in the grant, generally and in particular, over the permanent developments undertaken on the suit land.
39. PW1 told the court that after the demolition, it has been impossible to access, let alone use the property, since it has been sealed by the defendant. PW1 told the court that P. Exhibit No. 12 was the valuation for the developments that were destroyed by the defendant during the demolition. PW1 said that after demolition and the sealing off of the suit property by the defendant, it has not been possible or easy to access the land to carry out a comprehensive valuation of what was destroyed.
40. Elizabeth Salome Kamau testified as DW1. She relied on an undated witness statement filed in court on 12/4/2021 as her evidence-in-chief. DW1 told the court that she is a Senior Land Surveyor working



- with the defendant. DW1 told the court that after going through the layout and the extent of the defendant's land and railway reserves in Kitale, she was able to confirm that LR No. 2116/414 lies within the Kenya Railways Station land.
41. Further, DW1 testified that from the full history of ownership of the defendants' parcels of land, the suit property forms part of the Kenya Railways station land in Kitale as defined by survey plan No. FR No. 3/185 dated 8/10/1958. DW1 told the court that the location and extent of Kitale Railways Station operational areas are defined by the layout of Kitale Station drawing No. 381 REV [KR] D. Exhibit No. (4) Kitale Station Yard Layout Drawing No. 581 R dated 11/11/1954 [KR] D. Exhibit No. 5, Kitale Station Yard layout drawing No. 98 dated 8/7/1955 D. Exhibit No. (6), Kitale Station yard Drawing No. LR 846 dated 303 1983 [KR], D. Exhibit No. (7), Survey Plan No. FR 24/2 dated [1926], (Director of Survey) D. Exhibit No. (8) and RIM, Kitale Municipality Block 4 (Director of Survey) D. Exhibit No. (9).
  42. DW1 also produced a copy of the grant as D Exhibit No. (10) also produced as P. Exhibit No. 13, memorandum of registration of grant dated 24/3/1960 as D. Exhibit No. (11), letter forwarding the grant dated 7/3/1960 as D. Exhibit No. (12), lawyer's letter dated 14/4/1978 (MFID-3) produced as D. Exhibit No. (3), statement of account marked as MFID-(1) as D. Exhibit No. (1), letter dated 14/8/2003 as D. Exhibit No. 2(MFID-(2), vesting orders as per gazette LN. No. 23 of 1986 as D. Exhibit No. (13), [Legal Notice No.44 of 1963](#) as D. Exhibit No. (14), Publication by the Government of Kenya issued on 20/3/2018 as D. Exhibit No. (15), newspaper publication notice in the standard newspaper issue of 27/9/2019 as D. Exhibit No. (16), and a public in the People's Daily newspaper issued on 30/3/2019 as D. Exhibit No. (17).
  43. In cross-examination, DW1 told the court that from the Grant produced as D. Exhibit No. (13), the grantor was the Governor and that annual rent was indicated to be payable to the government and not the defendant as per the special conditions of the Grant. DW1, however, said that as per special condition No. 10, there were some charges, taxes, duties, and outgoings payable to either the defendant or the local government authorities. DW1 admitted that the Grant was also accompanied by a deed plan FR No. Dated 3/9/1959, issued by the Director of Surveys. DW1 said that there have been complaints in Kitale town over some irregular surveys generally and in particular regarding the defendant's parcel of land in the operation area. DW1, however, did not produce some of those complaint letters that had been written to the Director of Surveys by the defendant.
  44. According to DW1 the suit land falls within the defendant's operation area land based on survey plan FR No. 24/2 dated 1926 and produced as D. Exhibit No. 8. DW1 told the court that she came across a complaint by the defendant regarding non-payment of annual rent by the plaintiff and other previous tenants to the suit land after 2017, as per notice issued in 2018 and 2019.
  45. DW1 said that she was aware that, other than genuine tenants who had leased the plots belonging to the defendant in the operation area, there were also trespassers and encroachers on the land. Regarding the suit property, DW1 told the court that although the grantor was the government of Kenya, the special terms and conditions were clear on the role of the defendant as an administrator to the parcels of land falling under its operation area, such as the collection of rent, standard premium and other duties including the approval of building plans, issuance of consents to the grantees on behalf of the government.
  46. DW1 told the court that the lease held by the grantees was issued under the repealed Government [Land Act](#). DW1 said that the transfer of lease to the plaintiff appears to have been approved by the Commissioner of Lands. However, DW1 said that the defendant did not raise any complaint about the issuance of such a consent and a title to the plaintiff. Regarding D. Exhibit Nos. (15), (16), and (17),



- DW1 told the court that they related to the proclamation of land owned by the defendant illegally, the acquisition of a parcel of land, tenants of the corporation and encroached railway reserves. DW1 told the court that any land not falling under the aforesaid categories was not affected by the notices.
47. Regarding the Vesting [Order No. 440 of 1963](#) and 24 of 1986, under Cap 397. DW1 told the court that it fell under subsidiary legislation. In this case, DW1 said that the vesting orders had a schedule defining the specific parcels of land affected. In this case, DW1 said that the suit property falls within the vested land since it has one railway line inside it and another one abutting it, as can be seen from D. Exhibit Nos. (4), (5),(6), and (7). DW1 acknowledged that P. Exhibit No. (13), that is, the grant issued to the plaintiff's predecessor in title, was accompanied by a deed plan which has no railway line crossing or cutting across the property. DW1 said that the deed plan shows the plot sizes, including those of LR No. 2116/415 and 2116/1/61. Equally, DW1 said that the deed plan shows that there is an open plan space as well as nine other parcels of land. DW1 told the court that she was last at the operation area in 2014, during which she found some structures on the land which were non-existent, other than a chain link fence, when she passed by before she came to testify in court.
  48. DW1 told the court that the chain link has been executed to block the boundary between the station area and the road reserve. DW1 told the court that she was not aware that there used to be in existence an access road to the suit land, which is now fully blocked and in accessible to the plaintiff.
  49. Again, DW1 stated that the immediate former tenant, unlike the plaintiff, used to pay annual charges and rent to the defendant, since it was the lessee. According to D. Exhibit Nos. (4), (5), (6), and (7), it was clear that there was a railway line cutting across the suit property, hence falling within the vested land as per D. Exhibit Nos. (13) and (14). DW1 said that the role of the defendant concerning the suit property was captured in the special terms and conditions Nos. 1, 2, 3, and 10 of the Grant, all which are tied to the Vesting Orders No. 24 of 1986 and the provisions of the repealed Government Lands Act as regards leases on public land.
  50. After the close of the defence case, parties were directed to file written submissions. The plaintiff relies on written submissions dated 30/4/2025. The plaintiff submits that based on the pleading, evidence tendered and the exhibits it has produced, the defendant was never a party to the Grant to O30 East Africa Petroleum Co. Ltd as per the deed plan prepared and signed by the Director of Survey annexed to the Grant. Further, the plaintiff submits that the conditions No. 1, 2, 3, 4, 5, 7, 8, 10, 11, and 12 did not refer to any approvals or consents from the defendant on any development, alienation, or transfer as a condition precedent. Even after the initial grantee managed to name and made a request for the change of user in 1977, the plaintiff submitted that the defendant had no role whatsoever as it was the government which could and did sanction the change of user, otherwise the claim by the defendant that it was the true and the legal owner of the suit land remain a legal joke.
  51. Similarly, the plaintiff submits that Schedule 2 of the Kenya Independence Order in Council 1963 was clear that all titles and interests in land issued by the former colony and protectorate of Kenya through the governor under powers conferred by any law had been validly created, granted, or recognized. Based on that law, the plaintiff submits that Grant of leasehold for 93 years with effect from 1/1/1955, alienating the suit land had full effect of the law and could not be varied or annulled by any subsidiary legislation such as the vesting order of 1986 to revert the land to the defendant or enable the suit property to be put to use by the defendant, to enable it to claim superior ownership rights.
  52. The plaintiff submits that, going by the evidence of DW1, regarding an alleged administrative fencing over the suit land, the interests or rights of a title or leasehold holder cannot be defeated or make the defendant a legal owner of the suit land. Concerning the vesting orders of 1986, produced as D. Exhibit No. (14), the plaintiff submitted that the vesting order of 1986 came too late after the governor had



- alienated the land by a grant dated 1/1/1955, following which a grant was issued by the Registrar of Titles on 13/2/1960.
53. Further, the plaintiff submits that other than the vesting orders and the map, the defendant failed to produce any other evidence to show that the suit land was reserved, used and placed at the disposal of the defendant and or comprised part of its operation land in Kitale Railway Station, before the allocation and Grant o 1955.
  54. The plaintiff submits that a subsidiary legislation that conflicts with an act of Parliament cannot be used to defeat the title held by the plaintiff, especially when the grant was perfected through the then Crown Land Ordinance, Cap 155. Regarding the map, the plaintiff submitted that the same was drawn many years after the Director of Surveys had issued a survey plan accompanying the Grant in 1955, dated 3/9/1959. The plaintiff submits that nothing was adduced by the defendant to show that the land had vested or had been alienated to the defendant before 1959.
  55. Equally, the plaintiff submits that Section 23(3) of the repealed Registration of Titles Act was the operative law by 8/7/1977, when the change of user was perfected, sanctity of title issued by a Registrar was absolute and indefeasible subject only to any encumbrances and conditions contained therein or exhibited thereon.
  56. The plaintiff submits that the same position obtains in Sections 24 and 25 of the [Land Registration Act](#). Since the defendant has not produced any superior certificate of lease or document to prove any ownership of the suit property, the plaintiff submits that the allegations in paragraph 3 of the amended defence and counterclaim are for rejection. Reliance is placed on *Wreck Motor Enterprises -vs- The Minister of Lands & Others C. A No. 71 of 1997* and *Dr. Joseph Arap Ng'ok & Another -vs- Moiyo Ole Keiwua & Others C.A 60 of 1997*.
  57. More particularly, the plaintiff submits that fraud must be specifically pleaded and proved. In this case, the plaintiff submits that the contents of paragraph 7(a)–(f) of the amended defence and counterclaim have not been substantiated to the standard as held in *Vijay Morjaria -vs- Nansingh Madhusing Darbar & Another [2000] eKLR*, more so given that the plaintiff has tendered evidence that the sale transfer and registration in its favor was regular, formal, procedural and legal given the paper trial produced as exhibits No. (5), (6), (7), (8) and (9). Reliance is placed on *Dina Management Ltd -vs- County Government of Mombasa & Others [2023] eKLR*. The plaintiff submits that since 1981, the defendant has taken no action to assert any right over the suit land and that the counterclaim is being made 46 years after the cause of action accrued.
  58. On trespass, the plaintiff submits that the contents of paragraphs 10 and 11 of the amended plaint are admitted under paragraph 17 of the amended defence and counterclaim, to the extent that the defendant admits that the demolition team included Kenya Railways officers, after sufficient notices were served.
  59. The plaintiff submits that the contents of the notices related to the defendant and that the fact that it has filed a counterclaim to claim ownership of the suit property and plead for the cancellation of title after it has forcefully taken possession using government force, is itself proof enough of the defendant's interest in the property and a clear motive for being responsible over the trespass, which is continuing trespass, after the fencing off of the suit land to block any access by the plaintiff.
  60. Moreover, the plaintiff submits that it did not belong to the class of persons described in the notices for it holds a certificate of lease and therefore by actualizing the threat in the notices on 29<sup>th</sup> or 30/1/2021, he defendant should take full responsibility for the trespass, demolition and the resultant loss and damage, otherwise there was no court order or declaration that the suit land belonged to



- the defendant. By taking the law into its own hands, the plaintiff submits that the demolition was oppressive, arbitrary, illegal and malicious. Reliance is placed on Section 3(1) of the *Trespass Act*, Article 40 of the *Constitution*, *Rajabali Kassam T/A Giraffe Snack Bar -vs- Total (K) Ltd [2009] eKLR*, and *Monica Wamuhu Macharia -vs- Kenya Railways Corporation [2023] eKLR*.
61. The defendant relies on written submissions dated 28/4/2025 isolating five issues for determination. It submits that defence Exhibits No. (4), (5), (6), (7), (8), (9), (13) and (14) show that the suit land falls within the defendant's operational area, and therefore any grant, transfer, issuance and registration of any lease of the land did not remove the ownership of the suit land from the defendant, its management and administration, going by the special conditions as well as correspondences in defence Exhibits No. (1), (2), (3), (10), (11) and (12).
  62. The defendant submitted that the Act governing its operations, read together with the survey plans as well as the vesting orders, were never revoked, the land was neither surrendered to anyone for reallocation and or removed from its administration and management nor was its consent, approval and authority obtained before the grant, lease, transfer and registration sought and obtained as admitted by PW1 and DW1.
  63. The defendant submits that it has pleaded and proved fraud and illegality against the plaintiff to the required standards, going by *Arthi Highway Developers Limited -vs- West End Butchery Limited & 6 others [2015]*, *Bullen and Leake 13<sup>th</sup> edition*, *Kinyanjui Kamau -vs- George Kamau 2015 eKLR* and *James Joram Nyaga & another -vs- Attorney General & another 2019 eKLR*.
  64. Again, the defendant submits that the plaintiff made developments on the suit land without any approvals, its bills of quantity were not availed, photographs before the court were not authenticated, building permits and licenses were not availed, and further the marking of letter "X" on the gate was admitted, in addition to the public notices issued before the demolition. Therefore, the defendant urges the court to find that the plaintiff had failed to discharge the burden of proof under the *Evidence Act* on illegal demolition, lack of a notice and to substantiate or justify the legality, nature, extent and value of the alleged loss and damage.
  65. The defendant submits that the plaintiff failed to prove lawful acquisition, development, trespass, loss and damage to be entitled to compensation commensurate with the loss and damage, which were in line with the special conditions No. 1, 2, and 3 in the Grant. As to Kshs.57,004,001/=, the defendant's submits that the plaintiff Exhibits No. 11 and 12 were inconclusive, inadmissible, lacked methodology or supporting documents such as bills of quantity, cost of materials, requisite permits, approvals and licenses for the construction of the structures. Reliance is placed on *Sarnager Singh Hayer & another -vs- Kenya Railways Corporation [2022] eKLR*, *Kagina -vs- kagina (2016) eKLR*, *Raila Amolo Odinga & another -vs- Independent Electoral and Boundaries Commission & 2 others [2017] eKLR*, *Thomas Kimutai Biwott & another -vs- Joseph Ndalaya Muyesu [2021] KECA 436 (KLR)*, *Silverbird Kenya Limited -vs- Junction Limited & 3 Others [2013] eKLR*, *John Michael Wanjao -vs- George Kimetto & 2 Others [2017] eKLR* and *Mitei -vs- Baseland Property Consultants Ltd & 2 others (Environment & Land. Case 56 of 2015) [2023] KEELC 148 (KLR) (25 January 2023) (Judgment)*.
  66. The defendant submits that general damages for loss of earnings and business opportunities were not substantiated at all in the valuation report or during the hearing, and going by the *Kenya Power and Lighting Company Limited* case, whose full citation was not provided, the court should not grant the stated figure of Kshs.209,120,000/= as per pages 69 and 70 of the plaintiff's bundle dated 11.11.2022.
  67. The issues calling for determination are:
    - i. If the plaintiff has proved that it owns the suit land.



- ii. If the plaintiff formally, procedurally and legally acquired, took possession and developed the suit land until 29<sup>th</sup> or 30/1/2021.
  - iii. What are the implications of not serving a summons to the 2<sup>nd</sup> defendant in the counterclaim?
  - iv. If the defendant has proved that the suit land is public land and or forms part of Kitale Railways Station Operation Area.
  - v. If the plaintiff has proved trespass, continuing trespass, breach of their right to own land, and commission of acts of waste, and the denial of use or occupation of the land.
  - vi. What was the effect of not taking out summons to enter appearance and serving them upon the 2<sup>nd</sup> defendant in the counterclaim?
  - vii. If the defendant was justified in entering onto, demolishing, and fencing the suit land as forming part of its land.
  - viii. If the plaintiff has pleaded, proved and is entitled to special and general damages for trespass, demolition and denial of the right to use, own and enjoy the suit land.
  - ix. What is the order of costs?
68. It is trite law that parties are bound by their pleadings and issues for the court's determination flow from the pleadings. The purpose of pleadings is to give notice to the opposite party that it is being sued and to prepare for the hearing. Equally, through pleadings, a court can know the issues for determination.
69. In this suit, what the plaintiff is seeking is a permanent injunction barring and restraining the defendant, its agents, servants, or employees from interfering with its ownership, possession and occupation rights to the suit land, which it acquired for valuable consideration in a regular, formal and procedural manner in 2011. In support of its case, the plaintiff has availed all the paper trail to show the history of the suit land, since issuance of the grant in 1/1/1955 signed by the governor on behalf of the Her Majesty the Queen in 1960, after which it was transferred in 2017 by the 2<sup>nd</sup> defendant to the counterclaim.
70. The plaintiff terms the purported trespass, demolition and fencing off of the suit land by the defendant, claim it form part of the Kitale Railways Station Operation area as a legal joke, unjustified, arbitrary, illegal malicious and amounting to breach of violation of its constitutional right to own, use and enjoy the right to ownership of land under Article 40 of the Constitution.
71. The defendant, on the other hand, insists that the suit land vests in it under Legal Notice No. 440 of 1963 and Vesting Order No. 24 of 1986. Further, the defendant avers that the plaintiff breached the special terms and conditions No. 1, 2, 3, 5, and 10 of the Grant, and for the period 2017, 219, and 2021, the plaintiff defaulted in clearing annual rates and those that the previous grantees were paying. The defendant insists that it was justified in reclaiming public land falling under its operational area, by dint of D. Exhibit Nos. 1, 2, 3, 4, 5, and 6, which clearly define the suit land as falling within the Kitale Railways Station- operation area.
72. In the counterclaim, the defendant has sued both defendants. Where a party brings a new party by way of a counterclaim, who was not a party in the initial plaint, a summons to enter appearance must be issued and served upon such a party under Order 7, Rules 9 and 10 of the Civil Procedure Rules. Failure to do so renders such a suit against a defendant a non-starter.
73. This suit turns on two determinations of two issues. One is whether the suit land was ever alienated or reserved as public land in favour of the defendant before and after the Grant issued on 1/1/1955



- and signed by the Registrar of Titles in 1960. Secondly, is whether the special terms and conditions in the Grant assigning the defendant to manage and or administer the land on behalf of the government amounted to ownership of the land or gave the defendant the status of a head lessor. In *National Land Commission -vs- Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae)* (Advisory Opinion Reference 2 of 2014) [2015] KESC 3 [KLR] (21<sup>st</sup> December 2015), the court opined that the Crown Land Ordinance empowered the Governor to make Grants of freehold and leasehold in favour of individual and co-operative bodies, on behalf of the Crown. The court said that after independence, government land was placed into two categories: alienated and unalienated government land.
74. The plaintiff takes the view that as at independence, the suit property was already alienated government land, hence was not available for use or could not vest in the defendant post-independence under Loyal Notice No. 440 of 1963 or [\*Legal Notice No. 24 of 1983\*](#).
  75. In *Kiluwa Ltd & Another -vs- Business Liaison Co. Ltd & Others* Petition 14 of 2017 [2021] KESC 37[KLR] (6<sup>th</sup> August 2021) (Judgment), the court observed that the status of the two parcels of land in dispute only be determined by an examination of the relevant provision of the [\*Constitution\*](#) and the applicable statutes. In this case, the status of the suit land must be looked at from the background of the retired Constitution of 1963 and the statutory laws in existence as of independence over alienated land.
  76. Section 97(1) of the [\*Evidence Act\*](#) provides that where the terms of a grant or any other disposition of property has been reduced in the form of a document, no evidence shall be given in proof of such grant or other disposition except the document itself or secondary evidence on its contents in cases where secondary evidence is admissible. It is the defendant who wants the court to disregard the Grant issued on 1/1/1955, alienating the suit land. The burden to discharge remains with the defendant as to why the primary evidence should be disregarded by this court as proof of alienation and conferring of rights of ownership to the grantee.
  77. In *Chief Land Registrar & Others -vs- Nathan Tirop Koech & Others* [2018] eKLR, the court observed that for the declaration of title, the onus is on the petitioner to satisfy the court on the evidence produced by them that they are entitled to the declaratory order sought.
  78. Section 23(1) of the repealed Registration of Title Act provided that a certificate issued based on the Act shall be taken as conclusive evidence that the person named therein was the absolute and indefeasible proprietor notwithstanding any defect in title; other than on account on fraud or misrepresentation which the registered owner is proved to be party to. Section 60 of the Registration of Title Act repealed listed the steps in which the Registrar, if it was brought to its attention, that there was an error or misdescription of land or boundaries or error in the endorsement on any grant or was wrongly obtained or was fraudulently obtained to correct it upon issuance of summons to the grantee and under Section 61 thereof the Registrar could move to court and seek its intervention.
  79. The Registrar could not, therefore, revoke or cancel the title, whether in public interest or otherwise, unless directed by a court under Section 64 of the Act. See *Kurai Greens Ltd -vs- Registrar of Titles & Commissioner of Lands, Nairobi* Petition No. 107 of 2010 and in *Satima Enterprises Ltd -vs- Registrar of Titles & Others* [2012] eKLR.
  80. In *Benja Properties Limited -vs- Syedna Mohammed Burhannudin Sahed & 4 others* [2015] KECA 457 (KLR), the court held that “...the legal effort of regulation made between 1907 and 1911 was to convert the suit property at the time from unalienated government land to alienated land with the consequences that the suit property became private and moved out of the ambits and confines of the Government [\*Land Act\*](#). In *African Line Transport Co. Ltd -vs- Attorney General* [2007] eKLR, the court held that planning precedes surveying.



81. My considered view of the independence Constitution and the repealed Registration of Titles Act, and the case law is that the Grant issued on 1/1/1955 and perfected by the Registrar of Titles in 1960, concluded the alienation of the suit land. Whereas the defendant alleges that the suit land vested in it under [Legal Notice No. 440 of 1963](#) and [Legal Notice No. 24 of 1986](#), my plain reading of [Legal Notice No. 440 of 1963](#) at Schedule 1 is that, what could only vest to the defendant was all land which immediately before the 1/6/1963, either was unalienated Crown land or was vested in the Trust Land Board and which was then in use, or vested for use by East African Railways & Harbours Administration for railway lines including yards and sidings, railway station, workshop and training schools, operation of ports.
82. The defendant has failed to prove any other alienation or reservation of the suit land apart from the grant of 1955 by the sovereign, whether before 1/1/1963, showing that the suit land was trust land, unalienated land, or under the use of E.A, Railways and Harbours as per D. Exhibit No. 4, 5, 6, and 7, before 1955.
83. The exhibits relied upon by the defendant fell short of dislodging the exhibits on alienation by the plaintiff. First and foremost, the exhibits by the defendant were not produced by the District Land Registrar or the District Land Surveyor, who are the custodians of land records such as survey maps, deed plans and RIM maps. The exhibits were not certified as true copies of the originals by the issuing authorities under Sections 80 and 81 of the [Evidence Act](#). The only certification is by the defendant's unnamed officers, yet their officers are not the makers or custodians of those documents. Admissibility of evidence is canvassed by Section 66 of the [Evidence Act](#). The contents of a document can be proved by either primary or secondary evidence. Secondary evidence under Section 66 thereof includes certified copies, copies of the original, counterparts or documents and oral account of the document, so long as they meet the criteria under Section 68 of the [Evidence Act](#).
84. In *Jemimah Moraa Sobu -vs- Transnational Bank (K) Ltd* [2016] eKLR, the court observed that secondary evidence may only be admissible in the absence of better evidence when there is a proper explanation why the primary evidence is unavailable.
85. The Land Registrar and the Land Surveyor are the statutory-mandated officers to ascertain, establish and or fit boundaries. There is evidence that the Grant issued on 1/1/1955 was accompanied by a Survey Plan No. F.R., sealed by the Director of Surveys. Section 32 of the [Survey Act](#), 2010 provides that no land shall be deemed to have been surveyed or resurveyed until the plan thereof has been authenticated by the signature of the Director, or of a government surveyor authorized in writing by the Director of Survey by affixing the seal of the Survey of Kenya.
86. The defendant has not produced evidence that it was unaware of the alienation of the suit land since 1955, the existence of the signed grant in 1960, the transfer of the same in 1981, and later to the plaintiff in 2017. There is no explanation given why the defendant never challenged the alienation, transfer and the registration of the same with the issuing authority of the Grant or the initial leases on the basis that the suit land was vested or was under its use and therefore had been allegedly or mistakenly, illegally alienated, leased out, transferred and registered in the name of the plaintiff and its predecessors in title.
87. It was upon the defendant if at all it doubted the alienation and the deed plan accompanying the Grant and the certificate of lease to invoke Section 63 of the Registration of Title Act repealed, and to complain to the Registrar of Titles and the Commissioner of Lands that there were errors, misrepresentation, illegality, fraud and or irregularity in the certificate of lease held by the plaintiff.
88. There is no evidence that the defendant before the trespass and the demolition sought the registrar of titles, the Director of Surveys and the Commissioner of Lands to cancel, grant, deed plans and



the lease of the suit land and the other nine as admitted by DW1, neighboring the suit land for an alleged encroachment on public land. Under Section 33 of the Survey Act, the Director of Survey can authenticate deed plan including D. Exhibit Nos. (5), (6), (7), and (8) and or cancel or recall certain deed plans if there are errors or omission in the survey or where the survey does not conform to the conditions given in the subdivision, under Registration 109 of the Survey Regulations of 1994. The defendant has not attacked the deed plan accompanying the Grant.

89. In *Gathondu -vs- Registrar & Others* [2024] KECA668 [KLR] (4<sup>th</sup> June 2024) (Judgment), the court observed that where a title is under challenge, it is not enough to dangle the instrument of title without going behind the same and establish that it was issued in a regular, formal and procedural manner. In this suit, the defendant has been unable to point out any irregularities, illegalities, unprocedural means and or fraud in the manner the suit land was alienated in 1955, a grant signed in 1960 registered and later transferred to the 2<sup>nd</sup> defendant to the counterclaim and later to the plaintiff by the 2<sup>nd</sup> defendant, without any protestation or objection for over 46 years.
90. The defendant, other than uncertified exhibits and vesting orders of 1963 and 1986, was unable to produce any paper trail that the land was reserved, allocated, acquired and would not therefore be private land after 1/1/1995, in favour of the E.A. Railway and Harbours and the successors in title. From the foregoing answer, issues Nos. (i) and (ii) are answered in the affirmative, while issue No. (iii) is answered in the negative.
91. Trespass refers to unjustified entry into the private land of another and the commission of illegal acts without justification. See Section 3(3) of the Trespass Act. In *M'Ikiara M'Mukunya & Another -vs- Gilbert Kabere M'Mbijiwe* [1993] eKLR, the court observed that to prove trespass, the claimant had to prove that he had a right to immediate and exclusive possession since trespass was a tort of a violation of the right to possession, which is different from ownership. Trespass is an actionable per se. See *Kenya Power and Lighting Company -vs- Ringera* [2022] KECA 104 [KLR] (4<sup>th</sup> February 2022) (Judgment),
92. Section 116 of the Evidence Act provides that when the question is whether any person is the owner of anything which he is shown to own, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.
93. The plaintiff has produced evidence of lawfully acquiring the suit land in 2017, taking vacant possession and developing the same to the exclusion of the defendant until 29<sup>th</sup> or 30/1/2021, when the defendant forcefully moved in and demolished all the structures and buildings on the suit property. It is the defendant who claims the suit land as public land belonging to it. The court has already found that the claim by the defendant is built on false premises and quicksand. Even if the defendant was challenging the invalidity of the title held by the plaintiff, there is no evidence that a court of law had made such a declaration that the suit property formed part of the defendant's land. There is also no evidence that the defendant followed the law on repossession, vacant possession and eviction in the pursuit of asserting its alleged rights to the suit land. There is evidence that the trespass is still continuing. The justification of continuing to occupy or deny access, use and the enjoyment of the right to protection of property under Article 40 of the Constitution currently and in 2021, has not been pleaded and proved by the defendant. Conclusive evidence that the suit land belonged to the defendant as of the date of trespass and to date is lacking.
94. In *Kenya Power and Lighting Company -vs- Ringera* (supra), the court dwelt exhaustively on general damages for continuing trespass especially if it is oppressive, cynical and carried out in deliberate disregard of the rights of the owner of the land, with the object of making a gain by the intruder's unlawful conduct or where trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.



95. Over and above not giving a 90 days' notice as per Section 152A-1 of the *Land Act*, the defendant used sheer force by bringing on board armed personnel to demolish the structures and buildings, fence off and station armed guards on the land to ensure that the plaintiff was unable to access, use and enjoy its right to protection of property under Article 40 of the *Constitution*. In *Duncan Nderitu Ndegwa -vs- Kenya Pipeline Co. Ltd & Another* [2013] eKLR, the court said damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land, with the overriding principle being to put the claimant in the position he was before the infliction of the harm. In *Philip Ayaya Aluchio -vs- Crispinus Ngayo* [2014] eKLR, the court said the measure of damages for trespass is the difference in the value of the plaintiff's property before and immediately after the trespass or the costs of the restoration, whichever is less.
96. The plaintiff is seeking both general and special damages for trespass, demolition and the denial of the right to use, occupy, and enjoy the suit land. General damages are at the discretion of the court to ensure that an aggrieved party is put into a position as if there had been no such breach of interference and to cushion them against the expenses caused as a result of the trespass and the loss of benefit over the period of the duration of the trespass. See *Total (K) Ltd -vs- Jane Van Ltd* [2015] eKLR.
97. In *Flavemart Enterprises Ltd -vs- County Government of Kisumu* [2024] KEELC 5481 [KLR] (25<sup>th</sup> July 20024) (Judgment), the court cited Halsbury's Laws of English 4<sup>th</sup> Edition, Vol. 45 para. 26 1503, that if trespass is proved, the plaintiff is entitled to compensation and where there is an oppression, arbitrary or unconstitutional trespass by a government official damages are payable.
98. In *Kenya Railways Corporation -vs- Omboto & Another* [2025] KECA 537 [KLR] (2<sup>nd</sup> March 2025) (Judgment), the court observed that breach of and a conduct constituting the breach of the respondents' right under Article 40(1) of the *Constitution* before there was no order to declare the property unlawfully acquired before adverse action being undertaken by way of demolition of the structures, without adhering to due process or securing a court order had violated Article 47 of the *Constitution*. The court held that an award of compensation depends on the circumstances and the gravity of the violation based on the principles of rationality and proportionality, public policy considerations, interests of the society and the valuation reports availed before the court.
99. In this suit, the plaintiff has relied on two valuation reports, which the defendant did not object to their production of. It has been submitted that the plaintiff has not substantiated the contents of the valuation reports by way of a bill of quantities, Kenya Revenue, Income tax returns, approved building plans, feasibility studies for the proposed project, lease and tenancy agreements with the tenants and receipts and bank statements or income and expenditures.
100. The defendant, on the other hand, has produced correspondences and invoices for land rates which were being paid by the former tenant or grantee for the land. As much as the defendant has submitted that general damages cannot be awarded, there is no evidence that the defendant wrote to and has counterclaimed for any alleged outstanding annual rates and rents since 2017 from the plaintiff, or the former grantee as a justification that it repossessed the suit land on account of breach of the special conditions in the grant.
101. In *Kenya Power and Lighting Company Ltd -vs- Ringera* (supra), the court said that every continuing trespass is a fresh trespass in respect of which a new cause of action arises from day to day as long as the trespass continues. Trespass is also a criminal offence under Section 5(1) of the *Trespass Act*. It is a violation of the right to possession. See *Municipal Council of Eldoret -vs- Titus Gatitu Njau* [2020] eKLR.



102. Loss of user, loss of opportunity to deal in and develop the land and the resultant denial and deprivation of usage of the suit land by the plaintiff are not denied in this suit. Professional evidence of qualified and registered Valuers has been availed before this court. There is no rebuttal of the evidence by the defendant, through experts, to challenge the correspondences and the valuation reports of the plaintiff's experts. See *Monica Wamuhu Macharia -vs- Kenya Railways Corporation (supra)*. Expert reports must be challenged through rival reports, as held in *Orbit Chemicals Industries -vs- Professor David M. Ndeti [2021] KECA 741 (KLR)*.
103. The court notes that on 3/3/2022, the plaintiff was granted leave to amend the plaint, subject to payment of the requisite court fees within 7 days. On general damages for the loss of earnings and business opportunities, as submitted by the defendant, was not specifically pleaded, proved, or substantiated. It is disallowed.
104. The upshot is that I grant prayers (a) and (b) of the amended plaint filed on 3/3/2022 as follows:-
- a. An order of permanent injunction is hereby issued, restraining the defendant, its agents and those claiming through it from laying any claim whatsoever on LR No.2116/414, trespassing thereto or doing anything to interfere with the plaintiff's quite enjoyment of the suit land.
  - b. An order for payment of compensation is hereby issued for Kshs.57,004,001.00, subject to confirmation of payment of the requisite court fees, in line with Section 96 of the *Civil Procedure Act*.
105. The counterclaim is dismissed with costs. Costs of the suit to the plaintiff.
106. Orders accordingly.

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

In the presence of:

Court Assistant - Dennis

Miss Moraa for the defendant present

Masai for Kiarie for the plaintiff present

**HON. C.K. NZILI**

**JUDGE, ELC KITALE**

