



APEC Holdings Limited v Kenya Railways Corporation (Environment & Land Case 16(E012) of 2021) [2025] KEELC 4653 (KLR) (18 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4653 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 16(E012) OF 2021**

**CK NZILI, J
JUNE 18, 2025**

BETWEEN

APEC HOLDINGS LIMITED PLAINTIFF

AND

KENYA RAILWAYS CORPORATION DEFENDANT

JUDGMENT

1. The plaintiff approached this court through an amended plaint dated 21/9/2023 seeking for:
 - (a) An order of permanent injunction to restrain the defendant, its agents, and those claiming through it from laying any claim, whatsoever, over LR 3116/415, trespassing thereto, or doing anything to interfere with its quiet enjoyment of the suit property.
 - (b) Damages for trespass and destruction of the perimeter fence.
2. The plaintiff contended that it was the registered owner of LR No. 2116/415, situated within Kitale Municipality (hereinafter the suit land), having purchased it from the initial grantee of by the President vide Grant No. I.R 36842/1 dated 28.9.82, vide Deed Plan No. 107877, for valuable consideration on 23/8/2013, who formally and lawfully transferred to its name on 15/10/2014. Further, the plaintiff averred that the suit property exists distinctly from Kitale Railway Station and other various parts of the defendant's land at the railway station and various parts of the defendant's other in the railway station.
3. The plaintiff averred that on 29th and 30th January 2021 or thereabout, the defendant authorized representatives in the course of their duties and backed by armed police officers, without any prior notice trespassed into the suit property and destroyed a perimeter fence around the suit land, falsely claiming that the said property was part of its railway station. Despite protestation from the plaintiff, the defendant's agents or employees backed by armed policemen declined to hear any explanation from its representatives on the truth.



4. The plaintiff averred that after the unlawful demolition of its perimeter fence, the defendant indiscriminately and illegally began fencing off the whole of the railway station area buildings including the plaintiff's property, thus dispossessing it of its property or even allowing any access thereof.
5. Unless the reliefs sought were granted, the plaintiff averred that the defendant was hell-bent to continue with its illegal activities and oppress or suppress its right to the enjoyment of the suit land. The plaintiff urged the court to declare the defendant's conduct unlawful and order compensation commensurate with the loss and damage suffered.
6. Through an amended defense and counterclaim dated 16/10/2023, the defendant opposed the plaintiff's claim.
7. The defendant averred that it was the true and legal owner of the suit land which forms part of Kenya Railway Station Land Ref. No. 2116/415 as defined by Survey Plan No. FR. 83/184 dated 8/10/1958 from the Director of Surveys.
8. Further, the defendant averred that the location of Kenya Railways Station operational area is defined by the layout of Kitale Station Drawing No. 381 Rev (Kenya Railways), Kitale Station Yard Layout Drawing No. 581R dated 11/11/1958, Kitale Yard Drawing No. LP 846 of 30/3/1983, Survey Plan FR. No. 24/2 dated 1926 and the Registry Index Map for Kitale Municipality, which documents confirm that LR No. 2116/415 is within the Railway Station operational area.
9. The defendant averred that it never alienated, disposed of, or transferred the ownership of the suit land or any other part of its operational land in Kitale to the plaintiff or any other person, and has never surrendered such suit land or any other part of the Railway Station to the Government or any other authority for allocation to any entity including the plaintiff.
10. The defendant averred that all lands and interests on lands previously held by the defunct E.A. Railways and Harbours Corporation including the suit land were vested on it vide Vesting Orders No. 24 of 1963 and the Kenya Railways Corporation (Vesting of Land) Order 1986.
11. The defendant averred that the purported sale, transfer, and or alienation of any interest in LR. No. 2116/415 to the plaintiff 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 disposition would be null and void, and could not confer any proprietary interests or rights on the suit land, capable of enforcement in law.
12. In any event, the defendant averred that the plaintiff has not by way of evidence of a sale agreement, transfer or title demonstrated if indeed it owns the suit land or how it acquired the land. The defendant termed the acquisition of the land by the defendant given the foregoing history as illegal and fraudulent, hence the counterclaim for cancellation of any title documents purportedly held by the plaintiff, since it never alienated, sold, surrendered, or disposed of in any way to any party or surrendered the same to the government for allocation to anyone including to the plaintiff.
13. The defendant denied any responsibility for the acts complained about in paragraphs 6, 7, and 8 of the amended plaint. However, the defendant added that the plaintiff and any encroachers or trespassers or Railway's land and reserves had been given enough or sufficient public notices to vacate or remove any illegal structures, going by the public notices in the daily newspapers of 20/3/2018, 21/9/2019, and 30/9/2019.
14. The defendant averred that further warnings were issued to the encroachers or trespassers including the plaintiff by the national government administrators by marking "X" on such parcels of land to vacate, which notices the plaintiff ought to have complied with and left the premises.



15. Nevertheless, the defendant denied any involvement in any alleged demolition exercise which incidentally was undertaken by the Government of Kenya multi-agency operation team comprised of the National Government Administrative Officers, Presidential Delivery Unit, National Police Services, and the Kenya Railways Officers, after sufficient notices were duly served, hence the plaintiff is not entitled to any compensation in the circumstances of this matter or to any equitable remedies of an injunction.
16. By way of a counterclaim, the defendant as the plaintiff averred that it was a state corporation empowered under Sections 13 and 14 of the Kenya Railways Act to acquire, own, and hold land within the Republic of Kenya. As successors of E.A. Railways and Harbours Corporation, the defendant averred that all lands that belonged to, were held, and or occupied by the defunct E.A. Railways & Harbours, were vested on it under Vesting Order No. 24.
17. The defendant reiterated the contents of paragraphs 3, 4, 5, 6, 7, 8, 9, and 10 of the statement of defense and, stated that the suit land was subject to the Grant of Lease granted and subsequently transferred and remained the property of Kenya Railways, as it was within the Kitale Railways Station Operational Area, hence M/S Jayesh Auto Spares Ltd had no proprietary right over the suit land capable of being sold, alienated and or transferred to the defendant in the counterclaim. The defendant maintained that the sale, transfer, and registration were both illegal, fraudulent, and a nullity, and was incapable of conferring any right over the suitland to the defendant capable of enjoying the protection of the law.
18. The plaintiff to the counterclaim pleaded the particulars of fraud, illegality, and or nullity as acquiring the land without due regard to the law and due process, using corrupt, illegal, and unorthodox means to acquit it.
19. The plaintiff in the counterclaim sought for:
 - (a) Declaration that the suit land is part of the Kitale Railways Station land belongs to it.
 - (b) Declaration that the defendant could not acquire it without its consent or authorization.
 - (c) Declaration that any title acquired by the defendant is a nullity due for cancellation, revocation, and revert to it.
 - (d) Vacant possession of the same in default eviction to issue.
 - (e) Permanent injunction restraining the defendants in the counterclaim from interfering in any way or dealing with the suit land.
20. By a reply to the defense and defense to the counterclaim dated 13/5/2021, the plaintiff as the defendant averred that the suit land was lawfully granted by the Commissioner of Lands in 1978 through the order of the President of the Republic of Kenya, with the full knowledge and approval by the defendant through its Chief Engineer, as can be seen from the terms and conditions of the Grant attached to the plaintiff's list of documents and in particular Clause No. 14 of the special conditions of the Grant.
21. It was averred that the plaintiff and the previous owners religiously pay all statutory levies to the government and the local authority. The plaintiff averred that all public land was vested in the Government of Kenya. In this case, the plaintiff averred that the President of Kenya had the legal authority to cause alienation of the suit land to the initial owner and eventually gave consent for the same to be transferred to it in terms of the special conditions Clause No. 13.



22. The plaintiff averred that the Kenya Railways Corporation (Vesting Order) Order 1986 was inapplicable since it was gazetted long after LR No. 2116/415 had been granted to the original allottee and a title deed issued.
23. The plaintiff averred that the defendant is managed by a Board of Directors and with the Government of Kenya and therefore, the defendant was liable to the plaintiff for the acts of omission or commission visited upon the plaintiff on the stated dates and for the illegal subsequent acts, hence denied the contents of the counterclaim, terming it as misconceived an abuse of the due process of court process.
24. The plaintiff averred that LR No. 2116/415 was alienated by a deed plan No. 107877 of 25/2/1980 and the same having been validly registered on 15/10/1982 with the full knowledge and approval of the defendant, the counterclaim was time-barred.
25. The plaintiff denied the particulars of fraud set out in the counterclaim and averred that it was an innocent purchaser for value and without notice of any third party interest or claim, and therefore was never privy to any fraud or illegal scheme, otherwise the reliefs sought in the counterclaim were not capable of being granted.
26. At the hearing, Anthony Lucas Max, the general manager of the plaintiff, testified as PW1. He relied on witness statements dated 21/2/2021 and 17/1/2025 as his evidence in chief. He told the court that by a sale agreement dated 23/8/2013, the plaintiff acquired the suit land following which it put up a perimeter fence around the parcel and later undertook a valuation for development through M/S Pavida Consultants Ltd, who came up with a valuation of Kshs.6,000,000/=. He said that on 29/1/2021, a mark 'X' was affixed at its gate and the following day, bulldozers and prime movers from the defendant were deployed and demolished the fence with no prior notice or justification.
27. PW1 relied on a board resolution dated 2/2/2021 authorizing him to plead for the plaintiff a certificate of lease, copy of an official search certificate dated 23/8/2013, transfer form dated 23/8/2013, letter of consent for the transfer dated 13/2/2015, rent clearance certificate dated 23/1/2014, County Government Clearance Certificate dated 21/1/2014 and valuation report dated 15/7/2014.
28. In cross-examination, PW1 acknowledged that P. Exhibit No. (1) did not indicate that he is the general manager of the plaintiff. PW1 told the court that before acquiring the land from M/S Jayesh Autospares Ltd, due diligence was undertaken, though they were not aware of how the seller had acquired the land. Asked why P. Exhibit No. (5) is dated 20/8/2014 yet the transfer was effected on 15/10/2014, PW1 had no explanation for that anomaly. Similarly, PW1 admitted that the sale agreement dated 10/6/1992 for LR No. 2116/415 and the lease had special conditions among them the clearance of all outstanding rates, rents, and charges up to and including 1992.
29. Again, PW1 said that before the execution of the sale agreement, the seller did not avail to them most of or all the documents contained in the defendant's supplementary list of documents dated 7/7/2021 on pages 125 - 127. According to PW1, P. Exhibit No. (2) had special conditions including seeking prior approval of any new developments on the suit land from the Chief Engineer Kenya Railways Corporation, and the local authority. PW1 said that there was no prior approval of the plaintiff's erection of a perimeter wall around the suit property, which was demolished by the defendant's agents, servants, or employees.
30. Similarly, PW1 acknowledged that paragraph 14 in the special conditions of the lease, had listed some charges that were to be imposed upon the allottee. PW1 admitted that none of the charges were ever demanded and or cleared by the plaintiff with the defendant, since neither the initial owner nor the defendant had disclosed or demanded that such payments as mandatory or availed any invoices or demand notes to confirm that they were due and owing to the defendant.



31. Even though the supplementary list of documents dated 7/7/2024 by the defendant showed that some cheques from Turkana Fishermen Co-operative Society and a letter dated 8/12/1985, which was acknowledged by the defendant's engineer for payment of land rates and correspondence between the former grantee and the M.D. Kenya Railways, PW1 said that all those details or issues were never disclosed to the plaintiff by Jayesh Autospares Ltd at the time it acquired the suit property or brought to their attention by the defendant.
32. PW1 admitted that Clause No. 2 of P. Exhibit No. 2 referred to a railway siding. However, he said that in reality, there was no such siding on the suit land. PW1 admitted that he had no documentation in support of the alleged expenses used to erect the perimeter fence that was demolished by the defendant's agents as per P. Exhibit No. (g).
33. More so, PW1 said that the valuation report lacked the credentials of the valuer who had been contracted by the plaintiff to visit the locus in quo and prepare the report. PW1 admitted that the fence that was demolished by the defendant was a semi-permanent otherwise, the plaintiff was not running any business inside the suit land by the time the temporary fence was demolished.
34. In re-examination, PW1 told the court that the certificate of lease shows the initial grantee was authorized to acquire the lease by the President of the Republic of Kenya otherwise the defendant was neither a party to the initial sale, transfer, and on the approval of the certificate of lease nor the subsequent ones issued to the plaintiff.
35. As to approval for development, PW1 told the court that Clause No. (1) of the certificate of the lease, listed the defunct Municipal Council of Kitale and the Civil Engineer of the defendant as some of the persons to approve the intended development plant. PW1 told the court that the rates and rent clearance before the court were clear to prove that it complied with the special conditions in the certificate of lease, otherwise, there was no clause in the certificate of lease for the plaintiff to pay any land rent to the defendant. PW1 said that it was not clear why the former grantee used to pay rent to the defendant.
36. PW1 denied that the sale and transfer of the land from Jayesh Autospares Ltd was irregular or unprocedural, for lack of any approvals of the same by the defendant. PW1 was emphatic that between 2014 and the demolition date, there was no correspondence exchanged between the defendant and the plaintiff demanding the land as irregularly acquired or seeking any pending or outstanding land rent or rates due to the defendant, as a breach to Clause No. 13 of P. Exhibit No. (2). PW1 insisted that the defendant was not the grantor of the land to be entitled to any land rent or land rates.
37. Similarly, PW1 said that the sale and transfer were valid notwithstanding the lack of consent or approval of the same by the defendant, otherwise, the defunct Commissioner of Lands had issued a consent authorizing the transaction before the transfer was effected.
38. In any event, PW1 told the court that the defendant was never an owner of the suit land to be entitled to any land rates, rents, or charges, for a lease otherwise the allocation, transfer, and registration of title had been lawfully issued by the President.
39. Salome Kamau, a senior land Surveyor working with the defendant testified as DW1. She relied on a witness statement dated 27/4/2021 and filed on 17/10/2023 as her evidence in chief. Her testimony was that the suit land is situated within the Kenya Railways Station operational area in Kitale Town as defined by Survey Plan No. FR No. 3/185 dated 8/10/1958 and the Map from the Survey of Kenya for Kitale Municipality Block 4.



40. DW1 told the court that the Kitale Railway Station operational area is defined by the following documents: FR Plan Ref No. 83/185, Layout No. 381, D. Exhibit No. (1), Kitale Railway Station Layout No. 581R, D. Exhibit No. (2), Station Yard, D. Exhibit No. (3), Layout Drawing No. 98, D. Exhibit No. (4), Drawing No. LP 846, D. Exhibit No. (5), Survey Plan FR/24/2, D. Exhibit No. (6), RIM Map for Kitale Municipality Block 4 (unpublished), D. Exhibit No. (7), Vesting Order Gazette Nos. LN.440 of 12/7/1963 and 245 of 1996, D. Exhibit No. (8) and (9).
41. DW1 told the court that the suit land was subleased to Turkana Fishermen Co-operative Society Ltd with the consent of the defendant sometime in 1982 for a term of 69 years and 6 months, commencing 1.7.1978 as per the copy of the title, who used to pay rent to it going by the receipts, invoices and letters before the court.
42. DW1 stated that it never subleased nor issued consent for the creation of proprietary interest in the form of a sublease over the suit property in favor of M/S Jayesh Auto Spares Ltd or the plaintiff and save for the Turkana fishermen cop society ltd, it never surrendered the suit property for allocation to third parties including the plaintiff or Jayesh Auto Spares Ltd, otherwise, the acquisition of the land by the plaintiff was illegal, unlawful, null and void.
43. DW1 told the court that the defendant as the bona fide vested owner of the reserved land did not alienate, dispose of, transfer to anyone, or surrender part of the suit land for re-allocation to anyone. She said that all land and interests on land previously held by the defunct East African Railways and Harbours were vested to the defendant, as per D. Exhibit Nos. (8) and (9). DW1 told the court that the defendant issued public notices dated 20/3/2018 and in the Daily Newspapers of 27/9/2019, and 30/9/2019, produced as D. Exhibit Nos. (10), (11), and (12), regarding the suit land. Further, DW1 relied on a copy of a lease dated 28/9/1982 for LR. No. 2116/415, D. Exhibit No. (13), copy of a cheque payment, authorization voucher dated 21/10/1986 as D. Exhibit No. (14), bundle of 9 letters as D. Exhibit No. 15(1-9), sale agreement dated 10/6/1992 between Turkana Fishermen Co-operative Society and Jayesh Auto Spares Ltd as D. Exhibit No. (16).
44. Additionally, DW1 relied on a copy of the transfer form dated 13/7/1993 as D. Exhibit No. (17), demand notices to the Turkana Fishermen as D. Exhibit No. (18 (a-b)), and two copies of invoices issued by the defendant to Turkana Fishermen Co-operative Society as D. Exhibit No. 19(a-b).
45. In cross-examination, DW1 told the court that even though going by the lease, the grantor was the President of the Republic of Kenya and the grantee Turkana Fishermen Co-operative Society, in which the defendant was not a party to the same, the terms and conditions of the special conditions were clear that the defendant was required to approve all building plans and other developments on the suit land in terms of Clause Nos. (6) and (8), for any land that fell within the Kenya Railways Station Yard, going by D. Exhibit No. (5), dated 8/10/1958.
46. DW1 told the court that the suit land fell within the Kenya Railways go-down plants as covered in Clause No. (6) of P. Exhibit No. (2). DW1 confirmed that going by the special conditions in the lease, the consent to transfer the suit land was required to be issued only by the President and not the defendant. Regarding construction on the suit land,
47. According to DW1, the Turkana Fishermen Co-operative Society Ltd as the initial grantee had not erected any buildings on the land. DW1 admitted that there were existing leases that had been issued to private individual plot owners for the land falling under its jurisdiction apart from the instant suit land, as could be seen from the layout plan, that the same had been surveyed out of the mother title LR No. 2116. DW1 listed some of the plots as Nos. 414, 22, 23, 20 and 49.



48. DW1 told the court that Clauses No. 3 and 14 of the certificate of lease related to payment of rates and charges, some of which implied to be due and payable to the defendant, hence the demand notices issued to the Turkana Fishermen Co-operative Society. DW1 told the court that even though the plaintiff had obtained clearance certificates as per P. Exhibit No. (7) for rates and rent payments, consent to transfer and acquire the land from the defendant was a condition precedent before any transfer could take place, going by the special conditions in the certificate of lease.
49. However, DW1 admitted that from their office records, there was no evidence that with effect from 2014 and the filing of the suit, demand notices had been issued to the plaintiff for any outstanding rates, rents or payments due and owing to the defendant or on illegalities in acquiring the plot.
50. DW1 told the court that other than the vesting orders, DW1 has no title documents for the suit land. DW1 confirmed that the title documents for the suit parcel and the surveyed plots listed above were issued to third parties long before the vesting orders were gazetted. DW1 told the court that leases for the surveyed and allocated plots were issued to private individuals in existence before the vesting orders were administered through the repealed Government *Land Act*.
51. The allocation notwithstanding, DW1 said that in this case, the special conditions Nos. 1, 2, 3, 5, 7, 9, 10, 12, 15, 19, and 20 of the P. Exhibit No. (3), gave the defendant administrative rights for the land including the issuance of prior approval for any development plans, building alterations, collection of rents, standard premises, railway siding fee, and contribution for improvement services on all parcels of land abutting the Kenya Railway operational land to ensure safety of railways operations in the area. DW1 told the court that P. Exhibit No. (2), Clause No. (8) was specific to the user's purpose namely temporary structures and was not meant for any permanent structures.
52. After the close of the defence parties filed written submissions. The plaintiff relied on written submissions dated 14/3/2025, isolating five issues for the court determination. Regarding the ownership of the suit land, the plaintiff submits that the burden under Sections 107 and 108 of the *Evidence Act* is on the two parties to prove on a balance of probabilities who has a better title for the land.
53. The plaintiff submitted that it acquired the land from the Government of Kenya under the repealed Registration of Titles Act for valuable consideration in 2014. The plaintiff submitted that it has produced ownership documents which show that the original grantee namely, Turkana Fishermen Co-operative Society Ltd had lawfully acquired the lease, accompanied by a deed plan prepared and signed by the Director of Surveys, to which transactions, the defendant was not party to.
54. Equally, the plaintiff submitted that the lease was only subject to payment of annual rent and rates to the government, the provisions of the Government *Land Act* (repealed), and the twenty special conditions and not to any payment of charges to the defendant. As to developments, the plaintiff submitted that Condition No. (2) related to submission of drawing plans of a substantial design and a suitable platform in the railway site of the land to the developed while Condition No. (8) provided that the land shall only be used for go-down warehouse or factory purposes and offices connected therein.
55. Further, the plaintiff submitted that Conditions Nos. (10), (12, and (13), prohibited stacking of goods or materials within 3.67 meters of the center line of any railway siding, adjoining the land or subdivision, transfer, sub-letting, charge, or parting with possession without the written authority of the President.
56. The plaintiff submitted that Condition No. (18) and (20) allowed the Civil Engineer to enter and inspect the buildings, and to make full use of the railway siding adjoining the plot. From the Conditions, the plaintiff submitted that the defendant was not the grantee, hence there was never a



- need for any consent from the defendant to sell, alienate, or transfer the land as alleged in paragraph 7 of the defense and counterclaim. The plaintiff submitted that the alleged administration functions over the land and the lease by DW1 could not make the defendant the legal owner of the suit land.
57. As to the defunct East African Railways and Harbours' alleged interest or ownership of the vested land, as per D. Exhibit Nos. (9) and (10), the plaintiff submitted that the certificate of lease is dated 28/9/198, following the alienation of the land by the President with effect from 1/7/1978. Therefore the plaintiff submitted that no evidence was called by the defendant to show that the land as of the date had been vested by any written law to the defendant, or whether the land had been reserved for the defendant and who was using the land before 1986.
 58. The plaintiff submitted that the vesting orders were subsidiary legislation that could not conflict with or override anything done through an Act of Parliament or *the Constitution* sanctioned to be undertaken by the President.
 59. In this case, the plaintiff submitted that the alienation of the land by the President in 1978 followed by the certificate of lease signed on his behalf by the Commissioner of Lands, was perfected through the defunct Government *Land Act* and the Registration of Titles Act (repealed), and therefore, the court should not find and hold that the vesting order in 1986 as having any legal effect.
 60. The plaintiff submitted that the maps and deed plans produced by the defendant showing the layout of the Kenya Railways Station were drawn by the Director of Surveyors, who had also drawn the deed plan leading to the alienation of LR No. 2116/415. In this case, the defendant has not alleged that the acts of the Director of Surveys were ultra vires or unlawful, otherwise, legal action would have been taken against him.
 61. In addition, the plaintiff submitted that the operative law was Section 23(1) of the Registration of Titles Act (repealed), which required that any certificate of lease shall be taken by the court as conclusive evidence of absolute and indefeasible proprietorship of the holder of the same, which doctrine of sanctity of title is now fortified by Sections 24 and 25 of the *Land Registration Act*.
 62. In the absence of a certificate of lease or any other document to prove the alleged ownership, the plaintiff urged the court to find the contents of paragraph 3 of the defense and counterclaim unsubstantiated. Reliance is placed on Wreck Motors Enterprises -vs- Commissioner of Land & Others Nairobi C.A. No. 71 of 1997 Dr Joseph NK Arap Ng'ok -vs- Justice Moijo Ole Keiyua & 4 others *CA 60/1997* [unreported].
 63. The plaintiff submitted that the issue of fraud pleaded in paragraphs 5 and 15 of the amended defense and counterclaim has not been proved to the required standard by way of tangible and cogent evidence more so when the plaintiff has produced and there is evidence of acquisition, sale, transfer, and registration of the land in the name of the plaintiff from the original grantee in a formal, regular and lawful manner, since the consent of the defendant was not necessary, going by the consent as of Vijay Morjaria -vs- Nansingh Madhusing Darbar & Another [2000] eKLR, Dina Management Ltd -vs- County Government of Mombasa & Others [2023] eKLR.
 64. Similarly, the plaintiff submitted that the counterclaim by the defendant based on fraud or the recovery of land was time-barred as pleaded in paragraph 9 of the reply to the defense and defense to the counterclaim. Reliance is placed on Section 7 of the *Limitation of Actions Act* (Cap 22), that the counterclaim is being raised 12 years after the land was alienated by the President on 1/7/1978 and a title of lease issued on 28/9/1982.
 65. The plaintiff submitted that the defendant being a state corporation under Section 3(d) of Cap 397 is not exempted from the *Limitation of Actions Act* as per Section 42 thereof. The plaintiff submitted that



- if the defendant was of a strong conviction that the land belonged to it, it ought to have sued the initial title holder in 1978 who remained as owner for 14 years before transferring it to Jayesh Autospares Ltd in 1992, who after 22 years passed it onto it in 2014, without the defendant ever asserting any claim, or challenge to the transaction or taking any legal action. From the correspondence between the defendant and Turkana Fishermen Co. Society, the plaintiff submitted that as of 1986, the defendant knew of the certificate of lease, and took no action to assert ownership until the 12 years expired on 7/12/1998, hence the cause of action filed on 21/4/2021 was filed out of time. Reliance is placed on Kenya Forest Service -vs- Rutong'ot Farm Ltd [2015] eKLR.
66. On trespass, on the night of 29th and 30th January 2021, the plaintiff submitted that the same as pleaded in paragraphs 6, 7, and 8 of the amended plaint, though denied in paragraph 13 of the amended defense and counterclaim, the defendant acknowledges that its officers were part of the multi-agencies team, who took part in the exercise and immediate fence of the land.
67. Further, it is submitted that the defendant acknowledged issuing public notices for the intended reclamation of its lands through an intended demolition of illegal structures encroaching on its reserves.
68. Equally, the plaintiff submitted that the defendant is also seeking the cancellation of the certificate of the lease, after it stormed out of the property, and took possession using government force, which demonstrates that the defendant's interests and motive led to a continuing trespass by way of occupation. The plaintiff submitted that though it did not belong to the class envisaged in the reclamation notice, the defendant acknowledged the threat, destroyed the fence and gate, and made it impossible for it to access the land, hence should take full responsibility for the trespass and the resultant damage, for there was no court order to authorize the action. Reliance is placed on Teresia Irungu -vs- Jackson Ochora & Others [2013] eKLR, Rajabali T/A Giraffe Snack Bar -vs- Total (K) Ltd [2009] eKLR and Sarah Murigi Wangondu -vs- John Maina Nderitu [2024] KEELC 4289 [KLR].
69. The defendant relied on written submissions dated 14/3/2025, isolating four issues for the court's determination. The defendant submitted that evidence tendered by way of D. Exhibits Nos. (1), (2), (3), (4), (5), (6), (7), (8), and (9) point to the fact that the suit land, falls within the Kenya Railways Operational Area.
70. It is submitted that the suit land falls under land that is administered, enjoys, and retains administrative rights as set out in the Special Condition Clauses Nos. 1, 2, 3, 5, 7, 9, 10, 14, 15, 18, 19 and 20, which rights include prior approval of building plans, developments and alterations, collection of rents, stand premium, and raiing siding fee and contribution of services, as shown by D. Exhibit Nos. (13), (14), (15), (16), (18) and (19).
71. The defendant submitted that it is established under the Kenya Railways Act to provide rail and port services to the public, and is vested with property in performance of its obligation going by D. Exhibit Nos. (5), (6), (8), (9), with administrative rights over vested properties, which rights in this case were never revoked.
72. Accordingly, the defendant submitted that the plaintiff has not produced any deed plans or maps contradicting the information contained in drawing layout LP.846 dated 30/3/1983, as authenticated by D. Exhibit No. (5), that the suit land falls within the railway boundary which is property vested in it.
73. The defendant submitted that even after the initial grant was issued to Turkana Fishermen Co-operative Society Ltd in 1982, the defendant did not surrender its interests as required in Sections 13 and 14 of the Kenya Railways Corporation Act, but rather continued to administer the suit land as



- demonstrated by the bundle of documents contained in D. Exhibit Nos. (15), D. Exhibit No. (16) and the bundle of demand notices and invoices contained in D. Exhibit Nos. (18) and (19).
74. Further, the defendant submitted that the acquisition of the suit land by the plaintiff was both fraudulent and illegal, going by the definition and ingredients set out in *Arthi Highway Developers Ltd -vs- West End Butchery Ltd & Others* [2015] eKLR, *Bullen & Leake & Jacobs; Precedents of Pleadings*, 13th Edition and *Kinyanjui Kamau -vs- George Kamau* [2015] eKLR.
 75. The particulars the defendant submitted that going by the documents highlighted above showing that the suit land falls within the railway boundary, wherein the railway station operation area is located, on property vested on it, for administration and control, coupled with the documents showing that the former grantee, *Turkana Fishermen C.S.* was aware of the administrative rights, had the plaintiff conducted due diligence before purchasing the suit property, it would have been well informed of the true position of the suit land, including inquiring and establishing the issues of sum charged by the defendant, as railway rent, development approvals and consents.
 76. Moreover, the defendant submitted that the plaintiff was obligated to demonstrate that the title it holds was validly obtained to warrant the protection of the law, which it has failed as held in *James Joram Nyaga & Another -vs- Attorney General & Another* [2019] eKLR.
 77. The defendant submitted that P. Exhibit No. (4) was not duly executed as required under the *Companies Act*, for only one director of the seller appended his signature, and the same lacks a company seal. Equally, the defendant submitted that P. Exhibit Nos. (2), (5), and (6), were registered in favor of the plaintiff without the consent of the President, making the entire transaction unlawful and fraudulent.
 78. More importantly, the defendant submitted that the transfer - P. Exhibit No. (5), appears to have been registered on 15/10/2014 before the consent - P. Exhibit No. (6), was obtained on 13/5/2015, yet Clause (13) of the grant stipulates that consent from the President ought to precede the transfer.
 79. The defendant submitted that PW1 admitted that the access gate had been marked “X”. The onus under Sections 107, 108, 109, and 110 of the *Evidence Act*, according to the defendant was on the plaintiff, which it failed to discharge to produce documentation, or costs of the construction of the perimeter fence/wall, or gate to prove its existence in the first instance, after obtaining the requisite approval to erect them from the relevant local authorities. The defendant submitted that no evidence or proof of the demolition was produced.
 80. The defendant submitted that D. Exhibit Nos. (9) and (10), were clear proof of reasonable and prior warnings covering close to two years warning encroachers on properties falling within the Kenya Railways Kitale Station operation area.
 81. As to damages for trespass, the defendant submitted that the plaintiff failed to demonstrate lawful acquisition of title, it cannot be held liable for trespass on its vested land, the developments if any, undertaken by the plaintiff were illegal and or in contravention of the special Conditions Nos. 1, 2 and 8, of the grant and that the plaintiff failed to substantiate the cost of putting up the perimeter fence/wall or gate and that the valuation report produced as P. Exhibit No. (9) lacks qualification of the maker, and his practicing certificate or license and registration are also missing, contrary to Section 21 of the *Valuers Act*.
 82. Further, the defendant submitted that the valuation report failed to disclose any evidence of comparable sales to justify how the value of Kshs. 6,000,000/= was arrived at. Reliance was placed on *Kenya Power & Lighting Company Ltd -vs- Philip Kimondiu* [2018] eKLR, *Kagina -vs- Kagina*



- & Others Civil Appeal 21 of 2017 [2021] KECA 242 [KLR] (30th December 2021 (Judgment), and Christopher Ndaru Kagina -vs- Esther Mbandi Kagina & Another [2016] eKLR. The defendant urged the court to find the suit lacking merits and award its costs as per Section 27 of the Civil Procedure Act.
83. The court has carefully perused the pleadings, evidence tendered, written submissions, and the law. The issues calling for my determination are:
- (1) If the plaintiff lawfully obtained the certificate of title for the suit land.
 - (2) If the suit land falls within the Kitale Railway Station operation land
 - (3) If the sale, transfer and registration of the suit land in to the name of the plaintiff was subject to any approvals consents, administrative conditions, rights, and interests by the defendant.
 - (4) If the defendant has proved fraud or illegality in the acquisition, sale, transfer, registration, use, and occupation of the suit land by the plaintiff.
 - (5) If the counterclaim by the defendant is time-barred.
 - (6) If there was trespass to the suit land by the defendant, its agents, servants, or employees on 29th and 30th January 2021.
 - (7) Whether the acts of the defendant were justified.
 - (8) If the plaintiff is entitled to the reliefs sought.
 - (9) If the defendant is entitled to the reliefs in the counterclaim.
 - (10) Who is entitled to costs?
84. It is trite law that parties are bound by their pleadings and issues for the court's determination, arise out of those pleadings. In Stephen Mutinda Mule -vs- IEBC & Others (2014) eKLR, the court observed that in an adversarial system, parties are supposed to define the issues for the court's determination through pleadings and may not divert without leave of court to address an unpleaded issue.
85. The plaintiff has pleaded ownership of the suit land. It relied as exhibits on the certificate of lease dated 28.9.1982, deed plan dated 25.2.1980, plan, official search certificate dated 15.2.2014, sale agreement dated 23/8/2014, transfer dated 23/8/2014, lodged at the Land Registry on 15/10/2014, consent by the Commissioner of Lands dated 13/2/2015, rent clearance certificate dated 24/1/2015 and 21/1/2014.
86. The plaintiff in its written submissions and the caselaw cited contends that the sale, transfer, and registration of the suit land from the initial grantee had fully complied with the provisions of the Government Lands Act, (repealed), the special conditions of the Grant, and the Registration of Titles Act (repealed), going by the exhibits produced before the court, hence the title is not impeachable in law.
87. The plaintiff contends that the actions of the defendant to invade, fence off, and deny it access to, use, and occupancy of the suit land lawfully belonging to it was an act of trespass, unjustified, and hence it was entitled to the reliefs sought in the plaint.
88. In the Attorney General -vs- Zinj Ltd (Petition No. 1 of 2020 [2021] KESC 23 [KLR] CIV (30th December 2021) (Judgment), the court observed that any injury or loss suffered by a person either through a tortious act, omission or breach of contract or law attracted redress in a court of law. In this suit, the plaintiff is blaming the defendant for trespassing into the lawfully owned suit land and



- committing acts of destruction and deprivation of the land claiming that the sit land formed part of the Kitale Railway Station operation land.
89. On the other hand, the defendant avers that the suit land formed part of the vested parcel of land in 1926, 1958, and 1986, which it has the right over to administer, control, and regulate as per Sections 13 and 14 of the *Kenya Railways Corporation Act*. It is averred by the defendant that it has never surrendered or authorized alienation or allocation of its land to anyone and that the plaintiff fraudulently and illegally holds title which should be canceled by this court under the law.
 90. Section 23 of the Registration of Titles Act (repealed) holds that a certificate of title issued by the Registrar of any purchase of land is to be taken by all courts as conclusive evidence that the person named therein as the proprietor of land is the absolute and indefeasible owner thereof. The Section provides how a title can be invalidated.
 91. The plaintiff urges the court to go by P. Exhibit No. (1-9) and hold or find that the certificate of lease it holds fits the description of a bona fide purchaser and that it holds a valid title to the suit land, since it obtained all the requisite approval, consent, and transfer from the President through the Commissioner of Lands, and for the court to find that the land having been alienated in 1978 by the President could not vest to the defendant in 1986 as alleged.
 92. In *Joseph Arap Ng'ok -vs- Justice Moiwo Ole Keiwua* (supra), the court observed that title held under Section 23(1) of the repealed Registration of Titles Act, can be challenged on grounds of misrepresentation and fraud. The plaintiff pleaded and testified that the counterclaim based on fraud and illegality, and for recovery of land is time-barred, for the defendant did not challenge the initial alienation by 1998, with effect from the date the land was alienated by the President in 1978, and a certificate of lease issued by the Commissioner of Lands and approved by the President was never challenged by the defendant before 2014 or thereafter until 2021.
 93. The defendant did not file a reply to the defense to the counterclaim, to address the issue of time limitation and also concerning the initial survey, allocation, transfer, registration, and issuance of a grant or certificates of lease to the initial grantee before the vesting order of 1986.
 94. Equally, DW1 in her testimony was silent on the same other than acknowledging the sublease, collection, and receipt of rents and rents from Turkana Fishermen Cooperative Society from 1982 to 1998. It is DW1 who produced as exhibits the correspondences, invoices, letters, receipts, and demand notices with the initial grantee and the subsequent grantee before the transfer to the plaintiff.
 95. The defendant did not tender any evidence to show that it challenged the allocation of the land between 1978 and 2021 based on the alleged existing vesting orders, administrative rights, interests, licensing, approvals for developments, and the collection of railway rents, stand premiums, and railway siding fees by the defunct East African Railways and Harbours Corporation, and after the vesting order was gazetted in 1986. Further, there was no pleading and or evidence tendered that the defendant asserted superior ownership rights over the survey plots on its alleged vested land soon after 1978, 1986, 2014 and 2021 when it purported to forcefully take over the suit premises.
 96. In *Bandi -vs- Dzomo & 76 Others* Civil Appeal 16 of 2020 [2022] KECA 584 [KLR] (24TH June 2022) (Judgment), the court cited *Embakasi Properties Ltd & Another -vs- Commissioner of Lands & Another* [2019] eKLR, that ownership of title can only be challenged on the grounds of fraud or misrepresentation, where the proprietor named is proved to be a party, and that anyone who wishes the court to believe in the existence of any fact or who could fail if no evidence were adduced by either side, has the burden to prove its existence.



97. Further, the court cited *Munyu Maina -vs- Hiram Gathiha Maina* [2013] eKLR, that when a proprietor's right of the title is under challenge, it is not enough to dangle the instrument of title but must go beyond the instrument and prove the legality of how he acquired the title and to show that the acquisition was legal, formal and free of any encumbrances including any interests which would not be noted in the register.
98. Section 116 of the *Evidence Act* provides that when the question is whether any person is owner of anything of which he is shown to be in possession the burden of proving that he is not the owner is on the person who affirms that he is not the owner. In this suit, the plaintiff has produced a paper trail on how the suit land was initially alienated in 1978, a grant created and issued in 1982, and later was transferred to it with the approval and consent of the President. The defendant has not challenged the authenticity of the paper trail and the legality of the process of acquisition with superior documents that the exhibits are forgeries or were irregularly issued or procured. The custodians of land documents and the survey maps are the government land registrar and the land surveyors, whom the defendant did not call to support its defense and counterclaim regarding the veracity, authenticity legality, and the locality of the suit land vis a vis the defense exhibits.
99. Article 40(6) of *the Constitution* provides that the protection of property rights does not extend to unlawfully acquired land. Section 60 of the repealed Registration of Titles Act, provides that where it appears to the satisfaction of the Registrar that a certificate of title or other instrument was made in error, was fraudulent, or wrongfully obtained, the Registrar may summon such person. Section 64 thereof provided that a court of law could order or direct the Registrar to cancel, correct, or substitute a removal or entry in the register to give effect to a judgment or order of the court. See *Kurai Greens Ltd -vs- Registrar of Titles and Commissioner of Lands, Nairobi H.C. Petition No. 107 of 2020 and Satima Enterprises Ltd -vs- Registrar of Titles Nairobi* [2012] eKLR.
100. A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint. The plaintiff's claim is on trespass to a plot it has a title to which the defendant unlawfully invaded, fenced off, demolished a fence, and has since denied its use, access, and occupation. The defendant on the other hand avers it was recovering an illegally alienated land falling under its lawfully vested parcels of land. It urges the court to cancel the title and evict the plaintiff therefrom.
101. The plaintiff terms any such attempts as unjustified and based on a statute-barred defense or counterclaim. See *Attorney General & Another Andrew Maina Githinji & Another* [2016] eKLR. In *Gathoni -vs- KCC Ltd* [1982] KLR 104, the court observed that the law of limitation is intended to protect the defendants against unreasonable delay in the bringing of suits against them and that the statute expects an intending plaintiff to exercise reasonable diligence and to take reasonable steps in his interest. The defendant is blamed for filing a counterclaim to recover the land said to fall under the Kitale Railways Station operation area that was allegedly illegally alienated to third parties contrary to the law, its operational purposes, and statutory obligations under Sections 13 and 14 of the *Kenya Railways Corporation Act*.
102. Limitation of action goes to the jurisdiction of the court to entertain the counterclaim. The admitted that it was privy to and aware of the sublease of the initial grantee for it even collected for many years annual charges and levies from it. In *Peter Kimani Njenga -vs- Mugo Kamabuni Mugo & Others* [2018] eKLR, the court with the approval of *Bosire Ongero -vs- Royal Media Services* [2015] eKLR, that the rationale of the limitation statute is to protect courts from the prejudice of stale claims whose statutory effect is based on the principle of legal certainty and of repose, by avoiding the disruption of settled expectation and rebuilding uncertainty about the future as held in *Attorney General of Uganda & Another -vs- Omar Awadh & Others* [2013] eKLR.



103. Equity and justice abhors indolence and sloth. Stale claims prejudice and negatively impacts the efficacy and efficiency of the administration of justice. See Attorney General of Uganda & Another -vs- Omar Awadh & Others (supra). Equity aids the vigilant and not those who slumber on their rights. In Abigael Barma -vs- Mwangi Theuri ELC No. 393 of 2013, the court cited Snell's Equity 30th Edition p 33, the Courts of Lord Camden LC, that a court of equity has always refused its aid to stale demands where a party has acquiesced for a great length of time.
104. In this suit, the owner of the initial grant and the allocating authorities are not parties to the suit. The defendant lays no liability on them. The concept of the owner be vigilant and aware of intruders on your land applies. The defendant has only availed uncertified documents by the issuing offices namely Survey Plan No. 71494 of FR 83/185 of 1958, Layout Drawing No. 381 Rev, Layout Drawing No. 581 R, Layout Drawing No. 98, Layout Drawing No. LP 846, authenticated in 1983, Survey Plan 230638 FR 24/2 of 1926 Vesting Order LN No. 440 of 12/7/1963 and Vesting Order No. 24 of 22/2/2986, and D. Exhibit No. (15), Letters dated 8/12/1986, 8/6/1982, 3/4/1989, 2/3/1989, 27/11/1995, 5/7/2000, 11/7/2003, 9/2/2009, and Demand Notices as D. Exhibit No. (18), written between 1988 and 1998, complied with invoices produced as D. Exhibit No. 19(a) and (b). The exhibits do not comply with Sections 79 and 80 of the *Evidence Act* regarding the production of public documents.
105. Due diligence as held in Dina Management Ltd vs County Government of Mombasa (supra), Torino Enterprises Limited -vs- Attorney General (Petition5(E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment) and recently Sehmi & another -vs- Tarabana Company Limited [§ 5 others; Law Society of Kenya \(Proposed Interested Party\) \(Petition \(Application\) E033 of 2023\)](#) [2024] KESC 13, required that both the plaintiff and the defendant before this court trace the root of the they claim belongs to them. It included producing how the land was alienated and its position on the ground. The defendant, from the exhibits produced, was privy to the initial alienation of the land, consented and approved the rights of the initial grantee, and continued to receive and benefit from its payment of charges and levies.
106. By conduct or otherwise, the defendant waived and or neglected to assert its rights, to the extent of seeking to demand rents due to it from the 2nd grantee to the land. The last demand notice is per D. Exhibit No. (18) is dated 31/3/1998. There is no evidence or explanation as to why the defendant did not assert superior tile or seek to recover the land in 1986, if it knew the land was vested to it. It is not possible that the defendant would just sit, while knowing of the existence of the vesting orders relating to the Railway Station operation land and fail to initiate recovery proceedings. See Joshua Ngatu -vs- Jane Mpinda & Others [2019] eKLR.
107. The defendant challenges the occupation, allocation, sale, transfer, registration, and issuance of title to the plaintiff on account of fraud and illegality which must be strictly pleaded and proved on a balance higher than in ordinary suits as held in R.G. Patel -vs- Lalji Makanji [1957] EA 314. The defendant has pleaded that it is a body corporate with powers under Section 3 of the *Kenya Railways Corporation Act*, to acquire, own, and dispose of property in its name. The defendant pleads that the suit land was statutorily vested to its predecessor in title, long before alienation in 1978 and that it did not convey, surrender, or transfer the same to the plaintiff as required under Section 14 thereof, nor did it approve or consent to any allocation, alienation, sale, transfer and registration of the same in the name of the plaintiff and its predecessors in title.
108. Section 14(4) of the *Kenya Railways Corporation Act*, has a proviso that, land that was public land or trust land shall be surrendered to the government and shall not be conveyed or transferred to any other person unless the minister responsible for the land shall consent and so direct. Subsection (5) provides



that Subsection (4) shall apply to land vested in the corporation by any written law, including this Act as well as land conveyed at its disposal.

109. The way I understand the defense case is that it is disputes that the President and the defunct Commissioner of Lands had no power to re-alienate already vested land, under the repealed Government Lands Act. Section 7 thereof, provided that the Commissioner or an officer of the land department, may subject to any general or special direction from the President execute for and on behalf of the President any conveyance, lease, or license of or for the occupation of government land, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised given or signed by the President under the Act. The proviso that the powers of the Commissioner of Lands were limited under the Act to executing leases on behalf of the President and no more. See James Joram Nyaga & Another -vs- Attorney General & Another (2019) KECA 608 (KLR).
110. The question to be answered then is whether the defendant has proved that the suit land in the first instance was already alienated for its use and was therefore not available to the President in 1978 to re-alienate it to another person. Equally, is whether it was a condition precedent under the law, for the President or any grantee to seek prior consent or approval from the defendant since the land was already vested to its predecessor in title by 1926 and 1958.
111. The burden was on the plaintiff to prove that the suit land in the first instance did not constitute part of the defendant's Kitale Railway Station operation area. Secondly, the plaintiff had to prove that the suit land was not vested land. Third, the plaintiff was to prove whether the sale, and transfer in 2014 was legal, formal, and procedural in line with the provisions of the Government Lands Act (repealed), the [*Kenya Railways Corporation Act*](#), the Registration of Titles Act (repealed) and the State Corporation Act. Alienation to the initial grantee in 1978 and the vesting order of 1986 are not disputed.
112. The plaintiff produced the sale agreement, transfer and consent duly signed by the seller, the vendor and approved by the Commissioner of Lands.
113. The process of acquisition is material. A title in the hands of an innocent third party can be impugned if proven that it was obtained illegally, unprocedurally, or through a corrupt scheme. See Elijah Makeri Nyagwira -vs- Stephen Mungai Njuguna & Another [2013] eKLR. See Chemei Investment Ltd -vs- The Hon. Attorney General & Others Nairobi, Petition No. 94 of 2005, Alice Chemutai Too -vs- Nickson Kipkurui Korir & Others [2015] eKLR.
114. The parties had the burden to distinguish between vested and unalienated land. Unalienated land is defined both under Section 2 of the Government Lands Act (repealed) and Section 3 of the repealed Physical Planning Act Cap 286 as government land that is not for the time being leased to any other person, or in respect of which the commissioner has not issued any letter of allotment. Courts have had a chance to define vested land and whether it is available for alienation. In Kenya Railway Corporation -vs- Alice & Another [2024] KEELC [1814] [KLR] (11th April 2024) (Judgment), at issue was whether the suit property was lawfully vested in the plaintiff and if the Commissioner of Land lawfully allotted the suit property to the defendant.
115. The plaintiff had invoked Gazette No. 440 of 1963 by the then Governor Malcom McDonald and Gazette Notice No. 24 of 1986. Addressing its mind on Kenya (vesting of land) Regulations 1963 public in L.N No. 40 of 1963, and whether LR No. 209/6228, falls under the classification in the vesting order; the court looking at the drawing plans and deed plan presented at the time of publication of the legal notice, held that it was surveyed land reserved for use and was indeed utilized as the industrial area signed and telegraphs workshop for the East African Railways and Harbours and hence, was



- vested in the plaintiff by operation of [LN No. 24 of 1986](#), that replaced and revoked vesting of Land Registration 1963.
116. Therefore, the court cited *Nelson Kazungu Chai & Others -vs- Pwani University College* [2014] eKLR, on the process of alienating government land. Further, the court cited *Kenya Industrial Estates Ltd -vs- Anne Chepsiror & Others* [2015] eKLR, that there is a reason why the government holds certain land and does not give it away to private individuals, or why it assigns certain land to its institutions, such as state corporations, schools, and other educational institutions as such land is meant for use by the public.
 117. The court observed that there would be no legitimate reason, to hand over to private hands, land that is still required for a public purpose or what is held and occupied by a public institution, and if such land had to revert to private hands, then the procedure of offering the said land by way of public auction would have to be followed.
 118. The court cited *Republic -vs- Commissioner of Land & Others; Exparte Associated Steel Ltd* [2014] eKLR, that a public road was not available for allocation or alienated and for conversion of the same from public to private land. Sections 12 and 13 of the Government Lands Act (repealed) had to be followed, otherwise, the Commissioner of Lands held it in trust on behalf of the public.
 119. In *Dodhia & Another -vs- Kenya Railways Corporation*, ELC No. E003 of 2022 [2024] KEELC 1260 [KLR] (7th March 2024) (Judgment), the court held that once the land of whatever land regime has been reserved for Kenya Railways Corporation, the procedure for changing it to be owned privately or for private use has to be followed. In this instance, the court held that going by the Survey Plan FR No. 24/2 dated 31/5/1925, indicated that the Railway Station Reserve measures 118.8 acres. The court cited *Henry Muthee Kathurima -vs- Commissioner of Lands & Another* [2015] eKLR, that the Commissioner of Lands had no power to alienate public land. In the case before the court, it held that since the suit land had been reserved for Kenya Railways Corporation, it could not be dwelt otherwise by the Commissioner of Lands, than is provided in Sections 13 and 14 of the [Kenya Railways Corporation Act](#). The court found the land was unlawfully and unprocedurally owned by the plaintiff to lawfully pass out any person let alone retain it.
 120. In *Patel -vs- Kenya Railways Corporation & Others*, Constitutional Petition No. E006 of 2021 [2022] KEELC 2523 [KLR] (15th July 2022) (judgment), the court observed that for one to transfer any land vested in the Kenya Railways Corporation, a surrender of title has to be executed as per Section 14 of the [Kenya Railways Corporation Act](#) and since the procedure was not followed to allocate the land to private individuals, the Commissioner of Lands had no powers to re-alienate the same. The court found the suit parcel of land was illegally and unprocedurally acquired. In *Shariff & Others -vs- Kenya Railway Corporation* [2023] KEELC 18561 [KLR] (8th July 2023) (Judgment), the court observed that under Section 16 of the [Kenya Railways Corporation act](#) as read together with Section 7 of the Engineers Manual Volume 1 - Technical Institution over the East African Railways & Harbours, a legitimate expectation is erected for persons who have acquired interest in land within 300 feet of the level crossing to seek and obtain approval from the Managing Director of Kenya Railways Corporation before enacting any structures and that Section 16 thereof equally applies to land near railway line, and therefore in absence of the plaintiffs seeking and obtaining the requisite consent from the Managing Director, before undertaking the developments on the suit property, the plaintiff lacked legal to claim the loss prayed in the plaint.
 121. The court declined to issue a permanent injunction as the same was not only going to prejudice the defendant's right to perform statutory objection under Sections 8, 13, 16, and 20 of the [Kenya](#)



- Railways Corporation Act* but also would expose the lives of the general public to danger due to accidents.
122. In *Okeyo & Another -vs- Kenya Railway Corporation* [2024] KEELC 4851 [KLR] (19th June 2024) (Judgment), the court found that the Commissioner of Lands had no power to allocate the land to the defendant or anyone else since the land was not un alienated government land because the land had vested to the Kenya Railways Corporation through LR No. 24 of 1963, under Sections 93 and 95(4) of the *Kenya Railways Corporation Act*. See also *Nguru & Others -vs- Kenya Railway Corporation* [2024] KEELC 5476 [KLR] (25th July 2024) (Judgment), *KACC -vs- Ken Drep Construction Ltd & Another* [2019] eKLR and *Kenya Railway Corporation -vs- Kuinet Hardware Ltd & Others* [2023] KEELC 188896 [KLR] (25th July 2023) (Judgment).
 123. Paragraph 3 of the amended plaint confirms that the plaintiff acquired a certificate of a lease for a remainder of 69 years and 6 months commencing 1/7/1978 from the Government of the Republic of Kenya, issued under the repealed Registration of Titles Act. The sale according to the plaintiff from Jayesh Autospares Ltd occurred on 23/8/2013, followed by a formal transfer on 15/10/2014.
 124. The defendant faults the same since the transfer occurred long before the consent of the Commissioner of Land from the President was issued on 13/2/2015, going by P. Exhibit No. 6. The defendant faults the sale agreement for lack of execution by all the directors and for missing a company seal. The transfer is attacked also for taking place long before the consent of the President, contrary to Clause No. 13 of the grant.
 125. This court is being called upon to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain of the process of acquisition. In *Rai -vs- Mwinzi* (Appeal) E001 of 2023 [2024] KEELC 3771 [KLR] (13th May 2024) (Judgment), Dena L J observed that a good compilation of the documents or deed relating to the property and concerning the claimant as well as the previous owner leading to the title certainly proves ownership, with no break in the chain.
 126. In *Osoro -vs- Mwangi & Another* [2023] KEELC 18639 [KLR] (30th July 2023) (Judgment), Angote J cited *Caroline Awinja Ochieng & Another -vs- Jane Anne Mbithe Gitau & Others* [2015] eKLR, that in registered land, ownership is domiciled and founded in the register of titles.
 127. The plaintiff has given an explanation as to why the registration of the transfer took place before formal consent to approve the transaction was obtained from the President. The consent also came almost a year after the transfer had been registered. It is the law that the burden is on he who would fail if evidence to prove certain facts is not adduced. In the absence of a rebuttal, the plaintiff's root or chain of acquisition is not broken.
 128. In *Hubert L. Martin & 2 Others -vs- Margaret J. Kamar & 5 Others*[2016] eKLR,, the court observed that when a court is faced with two titles over the same land, an investigation must start at the root of the title and follow all the processes and procedures that are brought forth the two titles; without a break of the chain. Further, the court held that every party must show that their title has a good foundation and passed a valid property to the current title holder. The court is aware that the office of the Commissioner of Lands was succeeded by the National Land Commission in 2010.
 129. The defendant in its amended defense and counterclaim in paragraphs 5, 6, 7, 8, 9, and 10, set out that the suit land was vested land, which was alienated, sold, transferred, and registered in the name of the plaintiff and its predecessors in the title was a nullity, illegal, void, unlawful, un-surrendered, unconsented to and conferred no proprietary interest, rights capable of enforcement in law.



130. In the reply to the defense and defense to counterclaim dated 13/5/2021, the plaintiff in paragraphs 5, 6, and 7 insists that the vesting order 1986 came after the alienation of the suit land to the original allottee, that the order did not apply to the plaintiff, that the defendant is managed by a Board of Directors and not the government and that the defendant is liable for acts of omission and commission. Further, the plaintiff at paragraph 9 avers that the suit land having been alienated by deed plan No. 107877 of 25/2/1980, and having been validly registered on 15/10/1982, with the full knowledge and approval of the defendant, the counterclaim is time-barred.
131. First and foremost, it is the defendant who is alleging the existence of and the binding nature of the vesting orders on the subject land. Secondly, it is the defendant who is alleging that the alienation was not approved and known to it. D. Exhibit No. 8 is the Kenya (Vesting of land) Regulation 1963, published by Malcolm MacDonald. The vesting order is not specific that the land described in the First Schedule to the regulation was vested in the General Manager of the East African Railways and Harbours Administration.
132. The First Schedule states “All land which immediately before 1st of 1963 either was unalienated crown land, or was vested in the Trust Land Board, and which was then in use, or reserved for use, by the East African Harbours Administration for:
- a. Premises used for the administration and control of the services provided by the administration.
 - b. Railway lines (including marshaling yards and sidings).
 - c. Railway stations.
 - d. Workshops and training schools.
133. Judicial notice can be taken that at independence in 1963, there was in existence a railway line, from Mombasa to Uganda, whose operation was under the East African Railways & Harbours Corporation under the auspices of East African Community until it was disbanded in 1978. Further, the court takes judicial notice that after the East African Community was disbanded in 1978, each country had to operate its railways independently, hence the [Kenya Railways Corporation Act](#) (Cap 397) creating the defendant and taking over the functions and assets of the East African Railways & Harbours Corporation.
134. D. Exhibit No. (9) is a vesting order that was specifically made under the [Kenya Railways Corporation Act](#), replacing the Kenya (Vesting of Land) Regulation 1963. The legal implications of the vesting orders before 1978 and after 1986 are on the status of the suit land duly defined as falling under the Kenya Railways Station for Kitale Station Yard as described in paragraph 4 of the amended defense and counterclaim, in my view is what the defendant had to tender in evidence and address before this court. The Director of Surveys as the custodian of the map was not called as a witness.
135. The plaintiff in its reply to the defense and defense to the counterclaim pleaded that the vesting order of 1986 had no legal effect on alienated land in 1978 and the subsequent issuance of a grant under the signature of the President to the initial alienation based on the Government Lands Act. The defendant has not specifically pleaded and tendered evidence on whether or not the subject suit land had specifically vested to it before 1986 other than the general vesting order of 1963. The defendant solely relied on uncertified survey maps and deed plans whose makers and or government officers were not called to testify.
136. DW1 was not the maker of the said exhibits. There were no reports or correspondence specifically generated by the defendant as well as its senior officers showing that it raised issues, concerns,



- complaints, protests, and demands to the alienating authority in 1978, 1986 and 2013 or 2014 claiming that its plots had illegally been alienated and transferred to private individuals.
137. It is trite law that while alienating public land under the repealed Government Lands Act and Registration of Titles Act, a Part Development Plan and a Deed Plan would be drawn first and approved by the Commissioner of Lands and the Director of Surveys. The deed plan produced by the plaintiff has no number. See *Nelson Kazunza Chai & Others -vs- Pwani University* [2014] eKLR.
 138. Further, it is trite law that where land is set aside for public purpose so long as the public purpose remains, the land ought to be considered as part of government land incapable of being alienated to private individuals for private use. See *KACC -vs- Frann Investment Ltd & Others* [2020] eKLR, cited in *Sunflag Property Investment Ltd -vs- Kenya Railways Corporation* [2022] KEELC 14735 [KLR] (10th November 2022) (Judgment).
 139. It is also trite law that in the normal course of events, planning comes first then surveying follows. Once surveying is complete, it is then referred to the Director of Surveys for authentication and approval followed by issuance of a reference number for the plot. See *African Line Transport Co. Ltd -vs- Attorney General Mombasa* HCC No. 276 of 2013.
 140. In *Attorney General -vs- KCCB & Others* [2014] eKLR, the court observed that parties to a transaction must satisfy and also trace the history of the land to establish whether or not the title to the land was legitimately acquired. Similarly, in *Adan Abdirahaman Hassan & Others -vs- Registrar of Titles & Others* [2023] eKLR, the court observed that the Commissioner of Lands or his subordinates while alienating government land, cannot purport to alienate land that is already set aside for public purpose.
 141. Further, in *Norbixin (K) Ltd -vs- Attorney General Nairobi* HCCC No. 1814 of 2002, the court observed that once a suit property was designated as a police station, it caused it to be unalienated government land. See also *Paul Nderitu Ndungu & Others -vs- Pashito Holdings Ltd* HCCC No.3063 OF 1996 and *Republic -vs- Registrar of Titles Kilifi* Exparte Daniel Rill [2013] eKLR.
 142. From the foregoing, the court finds that even though DW1 produced and relied on Legal Notice No. 440 produced as D. Exhibit No. 8, and [Legal Notice No. 24 of 1986](#) the nexus between the two and the suit land as part of the vested land forming part of the Kenya Railway Station, as defined by Survey Plan No. FR No. 83/185 dated 8/10/1958, Layout of Kitale Station Drawing No. 581 R dated 11/11/1954, Kitale Station Land Drawing No. LP 846 dated 30/3/1983, Survey Plan FR No. 24/2 dated 1926, and RIM for Kitale Municipality Block 4 was not established.
 143. There is no evidence that the defendant in writing or otherwise challenged the alienation in 1978 based on earlier deed plans, layout maps, the land drawings, and on account of any lack of degazetted, setting aside, or resurveyed of the suit land as Kenya Railway Corporation property before the Commissioner of Lands or the President who had purported to issue a grant to Turkana Fishermen Co-operative Society Ltd under survey plan No. 107877 for 69 years and 6 months with effect from 1/7/1978, in line with the Government Lands Act, Registration of Titles (repealed), sections 13 and 14 of [Kenya Railways Corporation Act](#) and the Physical Planning Act (repealed). It was not enough to allege illegalities without bringing tangible evidence. Evidence of how the plaintiff was party to and committed irregularities, or illegalities in the alienation, survey, sale, transfer, registration, and acquisition of title to the land is missing. See *Ndolo -vs- Ndolo* (2008) 1KLR742, *Gatirau Peter Munya -vs- Dickson Mwenda Kithinji and others* (2014) eKLR. *Kagina -vs- Kagina* (2021) KECA 242 KLR, and *Chief Land Registrar & others -vs- Nathan Tirop Koech and others* (2018) KECA 27 KLR.



144. The next issue is whether the defendant was justified in purporting to recover the land, by entering, demolishing structures, fencing off, and denying the plaintiff use, access, and occupation of the land. Trespass is defined under Section 3(3) of the [Trespass Act](#) as unjustified entry into and commission of destruction on the private land of another. See Kenya Power & Lighting Company Ltd -vs- Eunice Nkirote Ringera [2020] KECA 54 (KLR).
145. Based on this historical evidence and documentation, the defendant pleads that it had issued a public notice for persons encroaching onto its parcels of land to vacate and hand over vacant possession, which the plaintiff failed to honor leading to the alleged unfortunate events on the 29 and 30th January 2021. The defendant denies being part of the multi-agency team which effected the taking over possession of the suit land. The plaintiff on the other hand states that the defendant gave no specific notice as required by the law, took the law into its own hands, demolished its fence, fenced off the suit land, and forcefully occupied it hence denying the use, access, and utilization of the plot. The law governing evictions and the removal of trespassers on public, private, and community land is Section 152 of the [Land Act](#).
146. The public notice(s) issued by the defendant did not comply with the law. Two wrongs do not make a right. The certificate of the lease held by the plaintiff had not been canceled through a court of law in line with Section 23 of the Registration of Titles Act.
147. As indicated above, there was no evidence tendered to show that the defendant had in writing or otherwise protested or questioned the legality of the certificate of; lease or the basis of occupation of the plaintiff on the suit land since 2014. No formal notice had been issued or served upon the plaintiff giving it the mandatory 3 months' notice to vacate the land on account of illegality or unlawful occupation thereof. The forceful takeover and the demolition were therefore not justified by law.
148. In Kenya Railways Corporation -vs- Omboto & Another Civil Appeal 78 of 2020 [2025] KECA 537 [KLR] (21st March 2023) (Judgment), at issue was whether the appellant's actions of destruction of the respondent's perimeter wall without notice violated [the Constitution](#). The issue of ownership of the suit property was pending in another Environment Land Court suit. The court found the action of demolition unjustified under any written law, given that the appellant could have used proper channels including the court to have the respondent's title canceled and an order of eviction, given as a prior notice to the respondent. The court also found it unfortunate for the appellant to undertake such acts while aware of the pending Kisumu ELC No. 78 of 2015, where ownership was in question, instead of resorting to illegal and unconstitutional means to gain forceful possession of the suit property.
149. The Court of Appeal found the conduct of the appellant was contrary to Article 40(1) of [the Constitution](#) before a court determination was made declaring the suit property unlawfully acquired prior to any adverse action being taken.
150. The court faulted the proceeding with the demolition of the respondent's structures without adhering to due process or securing a court order, contrary to Articles 47 and 50 of [the Constitution](#), 2010. As to general damages, the court observed that public policy consideration, rationality, and proportionality are some of the considerations in the award of reasonable damages on declaratory orders.
151. In paragraph 11 of the statement of defense, the defendant pleads that sufficient notices were issued to the plaintiff and other encroachers on railway land to vacate and or remove any illegal structures. Further, in paragraph 12, the defendant averred that further warnings were issued by the National Government Officer to vacate and the structures were marked "X", which instructions or warnings unfortunately, the plaintiff failed to comply with.



152. The defendant also averred in paragraphs 13 and 14 of the defense that they were not involved in any demolition and was not in law at liberty to compensate due to the circumstances of this matter. In reply to the defense and defense to the counterclaim dated 13/5/2021, the plaintiff did not specifically plead to the contents of paragraphs 11, 12, 13, and 14 of the amended defence and counterclaim, as to the service of publication, legality, sufficiency of the notices to vacate and remove the structures, compliance with the notice, particulars of who carried out the demolitions, justification for the carrying out of the demolition, nature and particulars of the loss and damage and whether the notice was in compliance with Section 152A-1 of the [Land Act](#).
153. The amended plaint dated 21/9/2023 at paragraphs 6 and 7 is not specific on who were the defendant authorized representatives who destroyed the perimeter fence and also failed to listen to the plaintiff's representatives on the truth. PW1 admitted that he was not at the scene on 29th and 30th January 2021 when the destruction occurred. Paragraph 8 of the amended plaint does not specify when the suit land was fenced off by the defendant. The amended plaint does not question or give particulars, legality or appropriateness of the notice to vacate, or remove the structures, illegality of the entire repossession, demolition and recovery of the land. The loss and damage occasioned by the alleged forceful or illegal entry, demolition and repossession has not been pleaded. Needless to say however, is that there was no order for eviction, or vacant possession and a formal declaration by the court that the plaintiff was wrongfully on the land. The court takes judicial notice that the initial alienation of the land took place in 1978 and a certificate of lease issued on 1982. The defendant was aware of its vesting orders prior to 1978 and 1982. The notices issued on 20/3/2018, 27/9/2019, and 30/9/2019, were general in nature and not specific to the suit land.
154. In my view, the notices were not in compliance with Section 152A-1 of the [Land Act](#) regarding eviction. In the counterclaim, the defendant prays for vacant possession in default eviction. A party may not blow hot and cold, approbate and reprobate. Two wrongs cannot make a right. A party cannot move to court to sanitize and illegality. See *Evans -vs- Bartlam* 1937 2 ALLER 649. The defendant cannot blow hot and cold at the same time. See *Beham & Okero Advocates -vs- NBK* [2007] eKLR. The defendant took the law into its own hands in effecting, participating and benefiting from an illegal eviction.
155. In *Musembi & Others -vs- Moi Educational Centre Co. Ltd & Others* (Petition No. 2 of 2018) [2021] KESC 50 [KLR] (16th July 2021) (Judgment), the court observed that constitutional right on property guaranteed are only in relation to property that has been legally acquired under Article 40(6) of [the Constitution](#). The court observed that Section 152 (1) of the [Land Act](#) is the procedure to be followed in the event of eviction. The court said that forced eviction generally constitute a violation of fundamental rights and freedoms and an abuse of inherent human rights and dignity, hence the state has an obligation to ensure that in an eviction, such rights especially for the most vulnerable are not violated, abused, infringed and or breached.
156. Written submissions cannot replace evidence or amount to pleadings as *Daniel Toroitich Arap Moi -vs- Mwangi Stephen Muriithi & another* [2014] KECA 642 (KLR). In this suit, the defendant has not justified why it would undertake an otherwise illegal action without giving an eviction notice for 90 days and purport to seek for vacant possession when it knows that it has already fenced off the land. See *Satrose Ayuma & 11 others -vs- Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* [2016] KECA 586 (KLR) and *Mitubell Welfare Society -vs- Kenya Airport Authority S.C.* Petition No. 3 of 2018. See also *Rajan Shah T/A Rajan S. Shah & Partners -vs- Bipin P. Shah* [2016] eKLR, *Peter Mwangi Mbuthia & Another -vs- Samow Edin Osman* [2014] eKLR and *Nakuru Industries Ltd -vs- S.S. Mehta & Sons* [2016] eKLR.



157. Regarding costs, the general rule is, costs follow the event. A successful party should ordinarily be awarded costs unless there are good reasons as held in *Hussein Jonmohamed & Son -vs- Twentsche Overseas Treaty Co. Ltd* [1967] EA 287. In *Jasbir Singh Rai & 3 others -vs- Tarlochan Singh Rai & 13 others* [2002] KECA 42 (KLR), the court observed that ground for departure from the general rule must be indicated. The court has already made a finding that the defendant took the law into its own hands, participated in and became a beneficiary to the events of 29th and 30th January, 2021. The court observed that between 28/9/1982 and 21/4/2021, when the counterclaim seeking for eviction or vacant possession was filed, the defendant knew of its right or interest in the suit land. The court find no specific demand notice made to the plaintiff to yield vacant possession, surrender the certificate of lease or remove any illegal structures on the land. Other than the last letter written to the Jayesh Auto Spares Ltd in 1998, there is no evidence to show that the defendant directly engaged the plaintiff between 1998 and January 2021, regarding the illegal title to its land and or occupation.
158. The final disposition is that the plaintiff's suit is allowed with no costs to the defendant. The defendant's amended defence and counterclaim is not time-barred as alleged by the plaintiff, in view of Section 42 of the *Limitation of Actions Act*, since other than fraud, it is based on illegality and nullity.
159. As to damages, trespass is actionable per se. A party need not prove any loss or damages for the court to grant them. Mesne profits however are in the nature of special damages. They must be strictly pleaded and proved. In this case, the plaintiff did not specifically plead and prove the same. The claim is rejected.
160. As to general damages, the forceful take over, denial of access and use are not disputed. An award of Kshs.2,000,000/= is granted to the plaintiff, guided by the principles set in *Kenya Power and Lighting Company -vs- Ringera* (supra), which the plaintiff has satisfied.
161. Orders accordingly.

JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 18TH DAY OF JUNE 2025.

In the presence of:

Court Assistant – Dennis

Mr. Ndarwa for Kiarie for the plaintiff present

Miss Moraa for the defendant present

HON. C.K. NZILI

JUDGE, ELC KITALE.

