

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**ELC NO. 68 OF 2017**

**MICHAEL WAFULA-----**  
**PLAINTIFF**

**VERSUS**

**DAVID ONGERI ANGWEYI-----1<sup>ST</sup>**  
**DEFENDANT**

**ANORI BARASA MANYORORI-----2<sup>ND</sup>**  
**DEFENDANT**

**FRANCIS ASHOYA ANYANGO-----3<sup>RD</sup>**  
**DEFENDANT**

**FRED WAFULA FRANCIS-----4<sup>TH</sup>**  
**DEFENDANT**

**JUDGMENT**

1. In the plaint dated **23/3/2017**, the plaintiff contends that he is the registered owner of land parcel No. **Kiminini/Matunda Block 10/Matunda/37** measuring **2.5 acres**, which the defendants have trespassed into without any authority or permission, and proceeded to erect structures therein. He seeks their removal together with their families, servants, agents, or those claiming interest through them.
2. The defendants entered an appearance through M/S Simiyu Wafula & Co. Advocates on **12/6/2017**, but failed to file a defence, leading to a default judgment

dated **26/11/2018** and an eviction order dated **2/9/2019**.

- 3.** Through an application dated **7/2/2020**, filed by the law firm of Mukhooli & Associates advocates, the 1<sup>st</sup> - 3<sup>rd</sup> defendants sought to set aside the judgment. Khaoya Mitekho & Associates Advocates filed a notice of change of advocates on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, dated **24/2/2020**. Later, on **9/11/2021**, the firm of Wabomba Masinde & Associates came on record for the four initial defendants and filed a statement of defence and counterclaim dated **14/12/2021**.
- 4.** The four defendants denied the contents of the plaintiff's claim on ownership and instead averred that the registered owner of the suit land was the brother of the plaintiff before he passed on. The defendants averred that the late father Francis Khisa Ndalila is the one who had sold the parcel to the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants, as his allocated portion, which they took occupation of in **2007** and have continued occupying the land.
- 5.** The defendants averred that the plaintiff fraudulently obtained the title to the suit land on **12/11/2014** after

the death of his brother, hence the suit was full of falsehoods.

6. By way of a counterclaim which had no titular heading, the defendants averred that they have been in quiet use, possession, occupation, and appropriation of title No. **Kiminini/Matunda/ Block 10/Matunda/37.**
7. The defendants averred that on or about **May 2017**, the plaintiff unlawfully and without any colour of right trespassed onto the suit land, thereby committing a tort of trespass by sending strangers to forcefully enter the land, yet it does not belong to him.
8. The defendants averred that the issue of ownership of the parcel was heard and finally determined by the tribunal, whose decision was duly adopted as an order of the court on **28/9/2007** vide **Kitale Case No. 44 of 2008**, which decision was never appealed against.
9. The defendants, therefore, prayed for a permanent injunction restraining the plaintiff, as the defendant to the counterclaim, from trespassing or interfering with their occupation and use of title No. **Kiminini/Matunda Block 10/Matunda/37.** The counterclaim had no verifying affidavit. The record shows that by a notice of change of advocates dated **17/2/2023**, the firm of Mukabane Kagunza & Co.

Advocates came on record for the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants and filed an application dated **17/10/2023**, seeking on behalf of all the four initial defendants to amend the defence and counterclaim dated **28/1/2022** and join Florence Nasimiyu Siango, Alice Naliaka Wanjala, and Godfrey Simiyu Wafula as defendants to the suit.

**10.** It noted that by then the defendants were four in number and therefore at that juncture the firm of M/S Wanyama C.S. & Co. Advocates came on record for the plaintiff by a notice of appointment dated **30/10/2023**. The court record for **7/11/2024** does not indicate if the application was prosecuted, allowed, or otherwise determined. What is clear is that Miss Kesei, for the plaintiff, confirmed receiving an amended defence to the amended plaint.

**11.** Mr. Mukabane Advocate told the court that he was to “adopt my” defence and counterclaim. The court order was that the defendants’ defence and counterclaim dated **8/12/2023** is adopted on the response to the amended plaint, and the defendants are given **14** days to file their witness statements and trial bundles.

**12.** Subsequently, the parties were directed to comply with **Order 11** of the Civil Procedure Rules. By an

application dated **17/10/2023**, the defendants sought to amend the defence and counterclaim dated **26/1/2022**, and also join new parties. Before the application was allowed by the court, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed an amended statement of defence and counterclaim dated **8/12/2023**.

**13.** The amendments also purported to remove Francis Ashoya Anyango. It is not clear if summons to enter appearance were sought, obtained, and served against the three new defendants to the counterclaim in line with **Orders 7 and 9, Rules 8, 9, 10, 11, and 12** of the Civil Procedure Rules. The titular heading of the counterclaim was also not in compliance with the law. The record shows that the plaintiff filed a reply to the amended statement of defence and defence to the counterclaim dated **3/5/2024**.

**14.** In the reply, the plaintiff avers that the late Francis Khisa Ndalila was never a registered owner of the suit land, the defendants failed to conduct due diligence before allegedly purchasing the land, he procedurally and legally acquired the land, he issued proper notices to the defendants to vacate his land, he bought the land from Mount Elgon Investment Co. Ltd, Matunda Farm through shares and that the defendants are illegal occupants on his land.

- 15.** Through an application dated **14/5/2024**, the plaintiff sought to amend the plaint dated **23/3/2017**. This was after an amended plaint dated **3/5/2024** was struck out on **6/5/2024**. By consent of the parties on **2/7/2024**, that application was allowed.
- 16.** The plaintiff was granted **3** days to file and serve the amended plaint together with summons to enter appearance on the other parties. What the plaintiff filed is an amended plaint dated **13/9/2024**, introducing four new prayers to the initial plaint. There is no evidence of any filing through payment of court filing fees within the three days as ordered by the court on **2/7/2024**. Equally, there is no evidence of the extraction of summons to enter appearance served upon the alleged 3<sup>rd</sup> - 6<sup>th</sup> defendants in the said amended plaint. The amended plaint was purportedly filed on **13/9/2024**. That was over **3** days from the date when leave was granted to amend the plaint.
- 17. Order 8 Rule 6** Civil Procedure Rules provides that once leave is granted and there is no amendment filed within 14 days, the order shall lapse. In **Giro Commercial Bank Ltd -vs- Mwangula Civil Appeal 87 of 2015 [2016] KECA 843 [KLR] (14<sup>th</sup> October 2016) (Judgment)**, the court said that pleadings may be struck out pursuant to **Order 2 Rule 15** of the

Civil Procedure Rules at any stage of the proceedings. The court held that summons to enter appearance is intended to give notice to the parties sued of the existence of the suit and requires them, if they wish to enter appearance, and if a party fails to enter appearance, there are consequences.

- 18.** The court said that by dint of **Order 5 Rule 3** of the Civil Procedure Rules, an amended plaint introducing new defendants must be accompanied by summons to enter appearance. The court said that **Order 8 Rule 6** of the Civil Procedure Rules is clear that where leave to amend is granted, unless a party amends within the period specified, or within **14** days, the order shall lapse.
- 19.** In this suit, no evidence exists that summons to enter appearance were extracted and served against the 2<sup>nd</sup> - 4<sup>th</sup> defendants, both in the counterclaim after leave was granted to amend the defence and introduce the 4<sup>th</sup> - 6<sup>th</sup> defendants, and or after leave was granted to amend the plaint. The amended defence and counterclaim was filed without a titular heading and or without accompanying summons to enter appearance for the parties joined to the counterclaim.
- 20.** Equally, the amended plaint dated **13/9/2024** was filed after two months. Leave to amend by dint of

**Order 8 Rule 6** of the Civil Procedure Rules had ceased to have any effect after fourteen days of the order. Leave was not subsequently sought and obtained to file the amended plaint out of time.

**21.** Unlike in **Giro Commercial Bank Ltd -vs- Mwangula** (*supra*), though there was an order by the court on **21/11/2024** regarding the pleadings, none of the parties sought leave for the court to exercise its discretion, despite the delay, or to dispense with summons to enter appearance, or to regularize the pleadings as the case might be.

**22.** **Order 10 Rule 2** of the Civil Procedure Rules requires that an affidavit of service be filed to show service of summons upon the added parties to a suit. **Order 5 Rules 1 and 6** of the Civil Procedure Rules are clear on the extraction and service of summons upon a defendant. Entry of appearance upon service with summons is an integral part of the proceedings.

**23.** In **Juja Coffee Export Ltd -vs- National Bank of Kenya & Others [2018] eKLR**, the court said that where no summons to enter appearance is lodged, issued, or served, the court has no inherent power to save the suit. The court held that without summons to enter appearance, a defendant has no obligation to enter appearance and file a defence. Further, the

court held that summons to enter appearance is not a mere decoration or an unmerited disturbance to the plaintiffs.

**24.** In this suit, the court has not come across any summons filed, extracted, and served upon the new parties to the amended defence and counterclaim dated **8/12/2023**, and the amended plaint dated **13/9/2024**. The filing, extracting, and service of summons to enter an appearance is not a procedural irregularity. An amended defence and counterclaim or an amended plaint filed in court on its own carries no power to summon a party to a suit. Activating a cause of action against a party is through issuance and service upon that party with a summons to enter an appearance. Such pleadings as held in **Karandep Sighn Dhillon & Another -vs- Nteppes Enterprises Ltd & Another [2010] eKLR**, will simply lie there impotently.

**25.** That is why under **Order 6 Rule 1** of the Civil Procedure Rules, a defendant who has been served with a summons to appear, shall file an appearance as per the prescribed timelines in the summons. Again, **Order 7 Rule 7(1)** of the Civil Procedure Rules provides that a defendant who has been served with

summons shall file a statement of defence within **14** days after he has filed a memorandum of appearance.

**26.** My take, therefore, is that in this suit, the initial defendants who sought to amend the defence and introduce new parties to the counterclaim, as well as the plaintiff, if he wanted the 3<sup>rd</sup> - 6<sup>th</sup> defendants to be parties in the suit through an amended plaint dated **13/9/2024**, had to file, extract, and serve summons upon them. Without summons to enter appearance, any pleadings filed by the 3<sup>rd</sup> - 6<sup>th</sup> defendants either in the main suit or the counterclaim were made by them without a valid invitation. He said amendments and pleadings are a nullity.

**27.** An amendment supercedes and replaces the original pleadings as to the issues for determination. Once an amended pleading is struck out, the party has no pleadings or record save for the original one before the amendment was sought. See **Phoebe Wangui - vs- James Kamore Njomo, Nairobi High Court Civil Suit No. 367 of 2010.**

**28.** In **Gerald Iha Thoya -vs- Chiriba Daniel Chai & Another [2018] eKLR**, the court held that where an amended petition is struck out, the original petition is not obliterated and is automatically revived by the act of striking out the amendment.

- 29.** From the foregoing, I think it is quite clear that the application seeking the amendment of the defence and counterclaim was never determined or allowed by the court. No evidence has been tendered to show that before the amended defence and counterclaim dated **8/12/2023** was filed on **8/12/2023**, the initial defendants had prosecuted their application dated **17/10/2023**, or sought the leave of the court to do so.
- 30.** A pleading filed without leave of court is incompetent. Joinder of parties is a substantive relief. Under **Order 1 Rule 1** of the Civil Procedure Rules. In this case, it was the joinder of new parties as defendants and the plaintiffs in the counterclaim. It means that the pleadings had to be substantially amended to reflect the new parties.
- 31.** In view of the non-compliance with the law, it then means that the only validly filed pleading by the plaintiff remains the plaint dated **23/3/2017**. With respect to the defendants, the only valid defence and counterclaim is the one dated **28/1/2022**. Equally, the only defendants to this suit remain David Ongari Angwenyi, Anori Barasa Manyoror, Francis Ashoya Anyango, and Fred Wafula Francis as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants.

- 32.** Florence Nasimiyu Siango, Alice Naliaka Wanjala, and Godfrey Simiyu Wafula, purporting to be the 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> defendants or plaintiffs in the counterclaim in this suit, either through the amended plaint dated **13/9/2024** and an amended counterclaim dated **8/12/2024**, are strangers to this suit. Any witness statements or documents filed on their behalf are not only incompetent but also irregular before this court.
- 33.** At the hearing, **Michael Wafula** testified as **PW1**. He relied on a witness statement dated **23/6/2025**. He told the court that he owns parcel No. **Kiminini/Matunda/ Block 10/Matunda/37** measuring **2.5 acres**, which he purchased from Mt. Elgon Investment Co. Ltd, as per the bundle of payment receipts herein, following which he was issued with a clearance certificate.
- 34.** PW1 said that he paid land rates before he could be transferred the land, after which he obtained a title deed on **12/10/2015** as per the green card. PW1 said that he took peaceful possession of the land in **1971** and continued developing it by farming and the construction of temporary structures.
- 35.** PW1 said that upon the death of his father in **2007**, the defendants trespassed into the land and erected temporary structures therein as per a bundle of

photographs. PW1 said that he verbally notified them to vacate his land, in vain, only for them to threaten him not to set foot on the land. PW1 termed the defendants as illegal occupants on his land, actuated by malice to deny him access, use, and enjoyment of his property rights.

- 36.** Further, PW1 produced a copy of a title deed, official search certificate dated **25/4/2017**, bundle of receipts dated **21/11/1970, 4/7/1970, 20/8/1970** as **P. Exhibit. No. 3(a), (b), and (c)**, letter dated **21/9/1981** as **P. Exhibit. No. 4**, payment receipt dated **14/8/1991** as **P. Exhibit No. 5(a), (b), (c), and (d)**, clearance certificate, **P. Exhibit. No. 6**, demand letter dated **24/10/2008** as **P. Exhibit. No. 7**, land rates receipt as **P. Exhibit. No. 8**, a copy of the green card, **P. Exhibit No. 9**, bundle of photographs accompanied by a certificate of electronic production as **P. Exhibits. No. 10 and 11**.
- 37.** PW1 denied that he acquired the land jointly with his late step-brother, Francis; otherwise, correspondence from Mt. Elgon Investment Co. Ltd was clear that he was the sole shareholder. PW1 said that his stepbrother died in **2010**.
- 38.** PW1 said that the 1<sup>st</sup> defendant was one of he trespassers on his land, alleging to have bought it

from his step-brother, which was not true. PW1 said that he reported the 1<sup>st</sup> defendant to the area chief in **2015**. PW1 said that Godfrey Simiyu and Fred are the sons of his late step-brother, who had no authority to sell his land to the defendants.

**39.** PW1 said that he was the one who had made a report to the land disputes tribunal, which gave orders for the *status quo* to be maintained. PW1 contended that he later appealed against the said orders at the High Court. PW1 said that it has taken him a long time to file this suit due to sickness and lack of legal fees.

**40.** PW1 said that the 2<sup>nd</sup> defendant, Florence, and Alice purportedly bought the land from his late brother without his authority. PW1 said that he has been unable to settle his children on the land because of the defendants, who have been threatening him.

**41. David Onger Angwenyi, Anori Baraza Mangoro, Florence Nasimiyu Siango, Alice Naliaka Wanjala, and Godfrey Simiyu Wafula** testified as **DW1, DW2, DW3, DW4, and DW5**. They all relied on witness statements dated **18/12/2024** as their evidence in chief. They told the court that they bought their portions of land out of **Kiminini/Matunda/ Block 10/Matunda/37**, from their step-brother, Francis Khisa Ndalila, at **Kshs.**

**197,000/=, Kshs. 105,000/=, Kshs. 105,000/=, Kshs. 87,000/=, and Kshs. 180,000/=, measuring 0.3 acres, 0.3 acres, 0.3 acres, 0.3 acres, and 0.5 acres, respectively.**

- 42.** According to the defendants, the seller, before he passed on in **2012**, the seller had told him that the owner was his brother, who, relinquished his shares on the land and gone to live elsewhere.
- 43.** DW1 told the court that since **2007**, he has been on the land until **26/1/2020**, when the plaintiff came and ordered them to vacate his land. DW1 said that from the land disputes tribunal proceedings, it appears the matter was resolved in favour of the late Francis Ndalila. He termed the registration of the land in favour of the plaintiff as irregular.
- 44.** DW1 relied on the land disputes tribunal proceedings of **16/1/2007** as **D. Exhibit. No. 1**, land rates clearance receipt dated **9/7/2007**, as **D. Exhibit. No. 2**, decree in **Kitale Misc. Land Case No. 44 of 2017**, as **D. Exhibit. No. 3**, certificate of death of Francis Khisa Ndalila as **D. Exhibit. No. 4**, a sale agreement dated **24/10/2007**, as **D. Exhibit. No. 5**, and a sale agreement dated **9/3/2011**, as **D. Exhibit. No. 6**.

**45.** DW2, on his part, relied on a sale agreement dated **15/12/2011** as **D. Exhibit. No. 7**, signed by the area chief. DW4, on his part, relied on a sale agreement dated **10/1/2011** as **D. Exhibit. No. 8**. On his part, DW5 relied on a sale agreement dated **2/7/2011** as **D. Exhibit. No. 9**.

**46.** Recalled for cross-examination, DW1 told the court that though the defendants undertook no due diligence, the seller had shown them some receipts for the payment of land rates and the land disputes tribunal proceedings as evidence that he was the owner of the land. DW1 said that his sale agreement was witnessed by a son of the deceased, called Fred Wafula.

**47.** DW1 said that the seller and his son were not living on the suit land in **2007**. DW1 said that he only came to know the owner after the late Francis Khisa Nalia had passed on. DW1 admitted that he undertook no historical investigation to confirm who the registered owner of the land was, apart from relying on the village elder and the area chief. DW1 insisted that the land disputes tribunal proceedings and the court decree were enough due diligence.

**48.** The plaintiff relies on written submissions dated **27/10/2025**, isolating five issues for the court's

determination based on the amended plaint dated **13/9/2024** and the amended defence and counterclaim dated **8/12/2023**.

**49.** As to ownership, the plaintiff submits that **P. Exhibits No. 1-9** are clear on how he acquired the title, unlike the defendants, who allege purchasers' interests, whose root is not supported by law.

**50.** The plaintiff submits that the defendants have failed to impeach his title on account of any fraud or misrepresentation under **Sections 25, 26, and 80** of the Land Registration Act, as read together with **Article 40** of the Constitution, by way of tangible or cogent evidence.

**51.** Reliance is placed on **Fanikiwa Ltd -vs- Sirikwa Squatters Group & Others KECA 1286 [KLR] (18<sup>th</sup> November 2022) (Judgment), Denis Noel Mukhulo & Another -vs- Elizabeth Murungari Njoroge & Another [2018] eKLR, R.G. Patel -vs- Lalji Makanji [1957] EA 314, Arthi Highway Developers Ltd -vs- West End Butchery Ltd & Others [2015] eKLR, Davy -vs- Garrett [1878] 7Ch.D.473, Dina Management Ltd -vs- County Government of Mombasa & Others [2023] KESC 30 [KLR], Insurance Co. of East Africa -vs- Attorney General & Others HCCC No. 135 of**

**1998, Zaabwe -vs- Orient Bank & Others SCCA No. 4 of 2006** cited in **Joseph Mutuku Mwanthi & Others -vs- Aimi Ma Kilungu Co. Ltd [2021] eKLR** and **Kuria Kiarie & Others vs Sammy Magera [2018] eKLR**.

- 52.** On trespass, the plaintiff submits that the acts of trespass by way of entry into and erection of temporary structures on his land have been admitted by the defendants. Therefore, being a legitimate owner as per **Section 26** of the Land Registration Act, he is entitled under **Article 40** of the Constitution to enjoy his proprietary rights. Reliance is placed on **John Kiragu Kimani -vs- Rural Electrification Authority [2018] eKLR** and **DIM Agencies Ltd -vs- Kenya Airports Authority [2021] eKLR**.
- 53.** On grant of permanent injunction, general damages for trespass, *mesne* profits, and costs, the plaintiff relying on **Section 3(3)** of the Trespass Act, **Section 26** of the Land Registration Act and **Article 40** of the Constitution, submits that so long as his title remains valid, lawful and regular, he should be free to access, occupy, possess, use and enjoy his proprietary rights exclusive of any third parties such as the defendants.
- 54.** The plaintiff submits that, having established that the defendants' entry into his land is unjustified, the

court, under **Article 23(2)** of the Constitution, should award him damages of **Kshs. 500,000/=**, to vindicate him for the violation of his rights to property and for mesne profits for the deprivation of use of the property. Reliance is placed on **Stephen Makau Kanyia -vs- Wilson Njeru Wega & Others [2021] eKLR, Joseph Murimi Gaita -vs- Susan Mbeke Kasome [2022] eKLR,** and **Hosea Nyandika Mosagwe & Others -vs- County government of Nyamira [2021] eKLR.**

**55.** On eviction, the plaintiff submitted that, guided by **Section 152A** of the Land Act, it is illegal to occupy private land with no legal mandate, hence the defendants should be evicted from his land. Reliance is placed on **Maina Kabuchwa -vs- Gachuma Gacheru [2018] eKLR,** citing with approval **Entick -vs- Carrington [1765].**

**56.** The defendants relied on written submissions dated **23/10/2025** based on the amended plaint dated **13/9/2024** and the amended defence and counterclaim dated **8/12/2023**. They submit that the plaintiff's title was issued in **2014**, which was **7** years after the land disputes tribunal made its decision, which was adopted by the court.

**57.** The defendants submit that the title deed did not align with the decision of the tribunal, hence the same does not enjoy the protection of a title under **Section 26** of the Land Registration Act, especially if acquired illegally and, in this case, not in conformity with a court decree produced as **D. Exhibit. No. 3**. The defendants submit that the plaintiff knew the outcome of the decree but still processed his title, yet the decision remains valid.

**58.** Again, the defendants submit that they were purchasers for value based on the proceedings and decree of the court, which the seller used to convince them to buy the land. The defendants submit that they have demonstrated a *prima facie* case, irreparable damage, and the balance of convenience to be entitled to the reliefs sought on account of an illegally obtained title. Reliance is placed on **M'Aruyaru -vs- M'Itaru ELC Appeal No E046 of 2021 [2023] KEELC 15861 [KLR] (1<sup>st</sup> March 2023).**

**59.** The issues for calling for my determination are:

- (1) If the plaintiff has proved trespass to Title No. Kiminini/Matunda Block 10/Matunda/37 to be entitled to eviction orders.**
- (2) If the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants have proved justification for entry into and**

***occupation of the suit land, to be entitled to the relief of permanent injunction.***

**(3) What is the order as to costs?**

**60.** It is trite law that parties are bound by their pleadings, and issues for the court's determination flow from the pleadings. See **Dakianga Distributors (K) Ltd -vs- Kenya Seed Co. Ltd [2015] eKLR**. The purpose of pleadings is to alert the other party to the case that they need to meet as a way of satisfying the basic procedural fairness requirements. Pleadings, as held in **Barmasai -vs- Rono & 9 others (Civil Appeal E068 of 2023)[2025] KECA 1489 (KLR)(19 September 2025) (Judgment)**, are to state all the material facts to establish a reasonable cause of action or defence. The court said that the general rule is that courts only pronounce judgment on issues arising from the pleadings.

**61.** In **South Nyanza Sugar Co. Ltd -vs- Samuel Osewe Ochillo T/A Ochillo & Co. Advocates Civil Appl. No. 1270 of 2003**, the court observed that the Deputy Registrar has no powers to exempt the respondent from paying the requisite fee, where the plaint was not properly filed, hence making it void. The court termed the judgment as based on no plaint.

- 62.** In **Unta Exports Ltd -vs- Customs [1977] EA 648,** the court said that it is both a matter of practice and of law that documents cannot be validly filed in the civil registry unless court fees are paid for them. **Section 71** of the Interpretation and General Provisions Act, Cap **2**, provides that a public officer cannot act on a document where the fee is not paid. The procedure to exempt payment of court fees only applies to paupers. The court is not aware of any suspension of the Court Fees Assessment Schedule rolled out from **1/7/2021**, published by the Hon. Chief Justice and the President of the Supreme Court dated **31/6/2021**. Furthermore, the plaintiff and the defendants, who included more reliefs than in the original pleadings, have not invoked the jurisdiction of this court under **Section 96** of the Civil Procedure Act to explain why their pleadings are not properly filed.
- 63.** Procedural law has been termed the handmaid of justice. It is meant to advance and not to obstruct the cause of justice. In **Mwicigi & 14 Others -vs- Independent Electoral and Boundaries Commission & Others [2016] KESC 2[KLR],** the court said that where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate

to declare the attached pleadings incompetent. The court held that **Article 159(2) (d)** of the Constitution is not a *panacea* for all situations befalling judicial intervention; otherwise, in many cases, procedure is so intertwined with the substance of a case that it is not the attribute of a mere technicality. See also **John Florence Maritime Services Ltd & Another -vs- C.S. Transport & Infrastructure Petition No. 17 of 2015.**

**64.** Having found the only pleadings properly before the court and the parties thereto, the sole issue raised and which the court has to determine is whether the plaintiff has proved ownership of the suit property. It is trite law that when a land title is under challenge, it is not enough to waive the instrument of title without proving that it was obtained regularly, procedurally, and free of any encumbrances. See **Munyu Maina -vs- Hiram Gathiha Maina [2013] eKLR**

**65.** In **Kemboi -vs- Macharia & Others Civil Appeal No. 17 of 220 [2025] KECA 1665 [KLR] (21<sup>st</sup> October 2025) (Judgment)**, the court cited **Samuel Kamere -vs- Land Registrar Kajjado [2015] KECA 644 [KLR]** and **Dina Management Ltd -vs- County Government of Mombasa** (*supra*), that where the

registered proprietor's root title is under challenge, he must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal, and free of any encumbrances.

**66.** In this suit, the plaintiff has produced a paper trail on how he bought the land from Mt. Elgon Investment Co. Ltd as per **P. Exhibit. No. 3(a), (b), (c), 6, 8**, and eventually obtained a title deed on **12/11/2014**. A copy of the green card shows that the register for the land was opened on **12/11/2014**, in favour of the Government of Kenya.

**67.** On the other hand, the defendants rely on land disputes tribunal proceedings dated **7/5/2007** and a decree in **Kitale CM Land Case No. 44 of 2007** issued on **28/9/2007**. The two exhibits do not refer to the suit land. A court decree has to be executed within **12** years; otherwise, it will be caught up by limitation under **Section 4(4)** of the Limitation of Actions Act, Cap **22**. There is no evidence that the same was executed concerning the registration of the suit land in favour of the late Francis Khisa Ndalila against his brother, regarding the allocating authority of the suit land.

**68.** As of **2007**, when the 1<sup>st</sup> defendant alleges to have bought the land from the deceased, there is no

evidence that the deceased held a superior title by way of a share certificate, allotment letter, or authority from the owner of the land at the time to the exclusion of the plaintiff. Apart from the death certificate of Francis Khisa Ndalila issued on **30/11/2015**, there is no evidence that his estate after his death sought to have the suit land declared by any court of law as formally forming part of his estate. The defendant's case was that they had legitimately purchased their portions out of the **2.2** acres of the suit land from the late Francis Khisa Ndalila. They must produce tangible and credible evidence that he had legal rights to deal with the suit land as if it belonged to him.

- 69.** Minutes or evidence of the root of his title, apart from the land disputes proceedings, are missing. Lack of valid documentation strikes at the very foundation of the defendants' claim. A sale agreement made after **June 2003** has to comply with **Section 3(3)** of the Law of Contract Act. The specific parcel of land is not captured in the sale agreements. The seller must have had the capacity to deal with the property in question.
- 70.** A verifiable basis of the seller's capacity to deal with the land is what the defendants failed to establish. A

nullity is a nullity. One cannot dispose of what he does not own. See *nemo dat quod non habet*. In **Dina Management Ltd -vs- County Government of Mombasa** (*supra*), the court observed that where the initial acquisition of title is unlawful, all subsequent transfers, even to innocent purchasers, are void. There is no evidence that the seller had any legal or equitable interest in the suit property.

**71.** In this suit, the defendants have been unable, unlike the plaintiff, to trace the entire chain of the acquisition of their title or provable rights by the alleged seller, clothing him with any equitable or legal rights to the property. One cannot offer for sale what he does not own in the first instance. The plaintiff, on the other hand, has produced documentary evidence leading to the issuance of the title deed. From **2015** to the present, there is no evidence that the estate of the late Francis Khisa Ndalila has challenged the title held by the plaintiff on account of fraud, misrepresentation, or illegality.

**72.** Whereas the defendants allege that they paid adequate consideration and were put into possession by the late Francis Khisa Ndalila between **2007** and **2011** to the present, the question is, what efforts

have they taken to ensure that he transferred them a title to the land?

**73.** In paragraph **5** of the statement of defence dated **28/1/2022**, the defendants alleged that the plaintiff fraudulently obtained title to the land after the death of his brother. Fraud must be specifically pleaded and proved. The particulars of fraud were not pleaded in the statement of defence. The death certificate produced by the defendants was issued on **7/12/2015**, while the plaintiff's title deed was issued on **12/11/2014**. Therefore, it cannot be true that the title was fraudulently issued after the death of the seller. Be that as it may, fraud was not specifically pleaded and evidence tendered to the required standard to impeach the title going by the case law of **Fanikiwa -vs- Sirikwa** (supra), **Denis Noel Mukhulo & Another -vs- Elizabeth Murungari Njoroge** (supra), **R.G. Patel -vs- Lalji Makanji** (supra), **Arthi Highway Developers Ltd -vs- West End Butchery Ltd** (supra), **ICEA -vs- Attorney General** (supra), **Joseph Mutuku Mwanthi & Others -vs- Aimi Ma Kilungu** (supra) and **Kuria Kiarie & Others -vs- Sammy Magera** (supra).

- 74.** Having failed to impeach the title held by the plaintiff, the next question is whether the defendants are guilty of trespass.
- 75.** Trespass under **Section 3(1)** of the Trespass Act occurs when a person enters, remains, or erects structures on private land without the consent of the occupier or without reasonable excuse. *Clerk & Lindsell on Torts* and *Black's Law Dictionary 9<sup>th</sup> Edition* define trespass as an unjustifiable intrusion on another's land without lawful authority. In **John Kiragu Kimani -vs- Rural Electrification Authority** (*supra*), trespass is termed as actionable *per se*.
- 76.** To prove trespass, one is required to establish an immediate and exclusive right to possession. See **M'Mukanya -vs- M'Mbijiwe [1984] KLR 761, Ricky -vs- Chebet & Another [2025] eKLR.** In **Maina -vs- Waweru ELC Appeal No. 10 of 2023 [2025] KEELC 791 KLR (19<sup>th</sup> February 2025) (Judgment)**, the court cited **Margaret Iminza Luyayi -vs- Moses Opudo Mudaka [2019] eKLR,** that there must be proof of wrongful entry or violation of the plaintiff's right to possession.
- 77.** In this suit, the plaintiff has proved that he holds a valid title deed, which the defendants have not

impeached. The defendants trace their entry from a person who had no title to pass to them in the first instance. The sale agreements in possession of the defendants cannot pass the test of law.

**78.** Long possession or occupation cannot entitle the defendants to any protectable legal rights or interests, especially where they trace their interest by alleging the doctrine of *bona fide* purchasers for value without notice. Being mere licensees of the deceased gives the defendants no protectable rights or interests, as held in **Faraj Maharus -vs- J. B. Martin Glass Industries & Others Civil Appeal No. 130 Of 2003 [2005] 2 KLR 289.**

**79.** As held in **Sehmi & Another -vs- Tarabana Co. Ltd & Others [2025] KESC 21 [KLR] (11<sup>th</sup> April 2025) (Judgment)**, the doctrine of innocent purchaser only applies if there is an innocent purchase for value and a legal estate. There is no evidence that the defendants conducted meaningful due diligence, as held in **Torino Enterprises -vs- Attorney General [2023] KESC 79 [KLR]**, and in **Dina Management Ltd -vs- County Government of Mombasa (supra).**

**80.** The deceased Francis Khisa Ndalila had no legal estate *vis-à-vis* an equitable interest in the suit land. He was neither an allottee nor a shareholder of the

initial owner of the land, the Government. The concept of innocence means that a purchaser must act in good faith. His conduct must not raise any doubt as to whether, indeed, he did not have any notice or knowledge of the existence of a rival interest in the suit land.

**81.** The plaintiff has tendered evidence that he notified the defendants of his interest or right, but they turned hostile. There is no evidence that the defendants took any meaningful measures to verify or ascertain the genuineness and authenticity of the seller's ownership of the land. It was not enough to deal with the area chief or village elders. Land is a valuable asset. It is not like vegetables to be dwelt with casually as held in **Said -vs- Shume & Others [2024] KECA 866 [KLR] (26<sup>th</sup> July 2024) (Judgment).**

**82.** The sale agreements produced by the defendants do not describe vividly the land that the defendants were purchasing as the suit land herein. They cast doubts as to whether the defendants really can allege valuable consideration. See **General & another -vs- Hussein & 3 others (Civil Appeal 100 (ELD No. 32) of 2018) [2025] KECA 1022 (KLR) (5 June 2025) (Judgment).**

**83.** As to *mesne* profits and general damages, parties are bound by their pleadings. The initial plaint did not plead the relief of *mesne* profits, and General damages for trespass. Equally, the plaintiff did not lead evidence on *mesne* profits and general damages. See **Kenya Power & Lighting Company Ltd -vs- Ringera & 2 others [2022] KECA 104 (KLR).** Written submissions cannot replace pleadings or amount to evidence. See **Daniel Toroitich Arap Moi -vs- Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR).**

**84.** The upshot is that the plaintiff's suit is allowed. An order of eviction shall issue to the defendants to voluntarily vacate the suit land within **three (3) months** from the date hereof, in default of which, the costs and the attendant expenses of the eviction shall be borne by the four defendants.

**85.** Costs of the suit and the counterclaim, which is hereby dismissed, are awarded to the plaintiff.

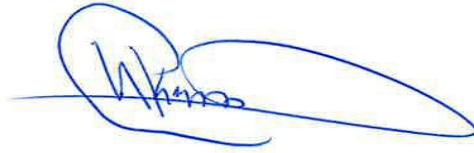
**86.** Orders accordingly.

**Judgment dated, signed, and delivered** via **Microsoft Teams/Open Court** at **Kitale** on this **19<sup>th</sup>** day of **November 2025**.

**In the presence of:**

Court Assistant - Dennis

Wanyama for the plaintiff present  
Mukabane for the defendant present



**HON. C.K. NZILI  
JUDGE, ELC KITALE.**

ORIGINAL