

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC NO. E335 OF 2021

ANTHONY WANGECHI WACHIRA

**[suing in his capacity as the personal
Representative of the Estate of HARRISON
WAWERU KIMENGERE Deceased]**

- PLAINTIFF

VS

ASUNTA WANGECHI WACHIRA

- 1ST DEFENDANT

KARAGITA EAST AFRICA LTD

- 2ND DEFENDANT

THE CHIEF LAND REGISTRAR

- 3RD DEFENDANT

JUDGEMENT

Introduction and Pleadings

1. The Plaintiff filed suit via a plaint dated 21/9/21 and sought the following orders;
 - a. A declaration that the suit property was acquired fraudulently by the 1st defendant.
 - b. A restraining order against the 1st Defendant from the suit property title No Nairobi/Block 115/1439 [suit land].
 - c. Eviction of the 1st Defendant from the suit property
 - d. An order directing the 3rd Defendant to cancel the title issued to the 1st Defendant in respect of the suit land and for the issuance of a new title for the said land in favour of the Plaintiff.
 - e. Damages and mesne profits for loss of use for the suit property
 - f. Costs of the suit

2. The Plaintiff avers that at all material times to the suit, Nairobi/Block 115/1439 and formerly Plot No FD/388 belonged to Harrison Waweru Kamengere, deceased. He averred further that he is the legal representative and beneficial owner of the suit land pursuant to the certificate of grant issued in his favour on 6/2/2020 in Succ Cause No 81 of 2019 at Muranga.
3. He has alleged fraudulent conduct by the Defendants pursuant to paragraph 8 of the Plaint and has urged the court to determine that the Defendants conspired to register the suit land in the name of the 1st Defendant, using forged documents, specifically a death certificate No 510934. It is further asserted that the 1st Defendant interfered with the estate of the deceased, falsified land ownership documents, and trespassed onto the subject land. The Court is hereby urged to render a judgment in favor of the Plaintiff.
4. The 1st Defendant denied the Plaintiff's claim and argued that she is the legal and registered owner of the suit land, formerly plot No FD/388, having acquired it through a joint purchase with the deceased using loans from a SACCO. She stated that the title was therefore transferred to her by virtue of a joint tenancy upon the death of the deceased. For that reason, she denied all allegations of fraud, misrepresentation, and illegality, and sought to put the Plaintiff to strict proof. She was subsequently issued with a certificate of title and invoked the principle of the indefeasibility of title to refute the Plaintiff's allegations.
5. She refuted the claim of trespass on the grounds that she is the registered owner of the land and stated that, in any event, the suit land is matrimonial property and therefore does not form part of the free property of the deceased estate.
6. The 1st Defendant sought Orders that the Plaintiff's case be dismissed; a declaration that she is the lawful and registered owner of the suit land; and the costs of the suit.

7. The 3rd Defendant, in its statement of defence dated 23/9/24, denied the Plaintiff's case and contended that the 1st Defendant was granted a title deed subsequent to a letter from the local chief, a burial permit, and a eulogy, all of which recognised her as the lawful wife and beneficiary of the deceased's estate. Inter alia, the 2nd Defendant challenged the Plaintiffs' claim on the basis that it does not establish any cause of action against it and urged the court to dismiss it with costs.

The evidence adduced at the hearing

8. At the hearing, Anthony Chege Wanjiru testified as PW1 and relied on his witness statement dated 22/9/21 in chief and produced documents in support of his claim marked as PEX No 1-8.
9. He stated that he is the legal representative of the deceased, who was his father. He obtained a grant of letters of administration for the said estate without involving the 1st Defendant, as she was not the deceased's wife. That his father was the beneficial owner of Plot No. FD 388, now the suit land. That the 1st Defendant was his late father's employee at the supermarket he owned in Mihango, and at no time was she married to him under any marriage system, including Kikuyu customary marriage. He informed the court that his father was shot in the company of the 1st Defendant and, upon his death, she booked his body at the morgue, which explains how she came to possess the burial permit. He stated that the eulogy delivered at the burial was not the same as the one presented by the 1st Defendant in this case. He added that his mother is Nancy Wanjiro Chege and resides in Germany.
10. He stated that the 1st Defendant acquired the land through fraud and illegality, noting that the ownership records were altered by the 2nd Defendant in its register from his father to the 1st Defendant even before the estate of his late father was settled.
11. The 1st Defendant attempted to revoke the grant issued in his name in the succession proceedings; however, the court, in its decision dated

23/5/22, dismissed the application, thereby confirming the grant issued to him as the only valid and lawful grant of letters of administration concerning his father's estate, given that the aforementioned ruling has not been overturned, appealed, or vacated.

12. DW1 Asunta Wangechi Wachira testified and relied on her witness statement dated 25/4/25 in evidence in chief and produced documents in support of her case marked as DEX No 1-4.
13. She stated that she was married to the deceased and that the suit land is matrimonial property, and she has lived in the said property as the proprietor after the death of the deceased in 2016. She was married to the deceased in a Kikuyu traditional marriage.
14. She stated that she is the lawful owner of the suit land, having jointly purchased it with the deceased before his death. She contended that all allegations of fraud, illegality, and misrepresentation made against her by the Plaintiff are unfounded, as she followed proper legal procedures to register the land in her name.
15. Without providing any documentary evidence, she claimed they bought the land from two sisters, namely Eunice Wamboi and Mary Wanjiku, at a cost of Kshs 800,000/- in 2013. Additionally, without producing documentary proof, she asserted that she paid for the land via an RTGS transfer from her Family Bank account. She admitted that she did not present any documentation to support the payment or to demonstrate the credit of the funds to either sister's account. When pressed further, she explained that she paid in cash, having withdrawn the money from her account and transferred it to Wambui through the RTGS system. She asserted that the current suit has been filed by the Plaintiff as a covert attempt to disinherit her and seize the property.
16. Explaining how she became registered as the owner of the property in the register maintained by the 2nd Defendant, she stated that she submitted a chief's letter dated 30/6/2017, her identification card, certificate of ownership of land, burial permit dated 23/9/2016, and

eulogy. She affirmed that these documents served as proof of ownership of the suit land as a spouse and were intended for the issuance of a title deed in her name.

17. She stated that at the time of the land transfer to her, there were no letters of grant of administration for the deceased's estate. Furthermore, she testified that she applied to revoke the grant issued to the Plaintiff in Succ Cause No. 81 of 2019; however, the court dismissed her application on 23/5/22. When asked whether she had appealed the decision, she responded that she was unaware of the reasons why her lawyer did not file an appeal.
18. DW2, Alfonse Mukwayo Musyimi testified and relied on his witness statement dated 23/9/24 and produced documents marked as DEX No 5-8 in support of his evidence in court.
19. He informed the Court that he is the director of the 2nd Defendant and, therefore, familiar with the facts of the case. He stated that the 1st Defendant is the lawful owner of the suit property. He also mentioned that she visited their offices and produced documents: a letter from the chief confirming that she was the deceased's wife, along with a burial permit and an eulogy for the deceased. Based on these documents, she was registered as the owner of the suit land.
20. In cross-examination, he affirmed that at the time the register was altered, he was aware that the deceased had passed on and that no letters of administration had been issued in the name of the 1st Defendant.

The written submissions

21. At the close of the hearing, the parties elected to file written submissions, which I have read and considered. The Plaintiff, 1st and 2nd Defendants filed submissions dated 11/12/2025, 17/1/2026 and 14/1/26 respectively.

Analysis and determination

22. Having considered the pleadings, the evidence presented at the hearing, the written submissions, and the relevant applicable law and precedent, I find that the key issues for determination are.

- a. Whether the suit property is matrimonial and /or whether the Plaintiff is a spouse of the deceased
- b. Whether the Plaintiff has proven fraud and illegality in the manner the land was registered in the name of the 1st Defendant.
- c. What the 1st Defendant is a trespasser on the suit land

23. The burden of proof in civil cases is on a balance of probabilities. The burden of proof is anchored in statute. **Sections 107 - 109** of the Evidence Act provide;

107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability Dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

24. In the case of **Daudi Kiptugen Vs Commissioner of Lands & 4 others (2015) EKLR** the court stated as follows;

“.. the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a lease or a certificate of title at a backyard or corner of a dingy street and by virtue thereof claim to be the rightful proprietor of the land indicated.”

25. From the above provisions, it is clear that the burden of proof rests with he who claims to prove his case to the standard of a balance of probabilities.

Whether the suit property is matrimonial and /or whether the Plaintiff is a spouse of the deceased

26. It is not in dispute that Harrison died on 20/9/2006 according to the death certificate issued on 30/9/2006 and confirmed by the office of the Civil Registration Services, Nairobi. It is also not in dispute that the Plaintiff is the son of the deceased and the legal administrator of the estate of the deceased, as evidenced by the letters of grant of administration issued on 6/2/2020 in Succession Cause No 81 of 2019 in the estate of Harrison Waweru Kamengere, deceased.
27. It is the 1st Defendant's case that she was married to the deceased through Kikuyu traditional marriage and that the suit property was matrimonial property, therefore forming free property of the deceased, which should not form part of his estate.
28. The Matrimonial Property Act is an Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. Section 2 of the said Act provides that matrimonial property means any interest in land or lease that is acquired by a spouse or spouses during the subsistence of the marriage.

29. The Act further goes ahead to define matrimonial property as follows;
- (1) For the purposes of this Act, matrimonial property means—
- (a) the matrimonial home or homes; (b) household goods and effects in the matrimonial home or homes; or (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property. (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights. (4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.
30. The Act further defines a spouse as either a husband or a wife. The case of the 1st Defendant is that she was the spouse of the deceased and, therefore, she is entitled to the suit land. It is not in dispute that when the 1st Defendant became aware that letters of grant of probate had already been issued in the name of the Plaintiff, she applied to the court in Murang'a for orders of revocation. The court dismissed the application in its ruling of 23/5/2022 and stated as follows;
- “I have considered the pleadings and written submissions and note that the applicant [Asunta Wangechi Wachira] has not satisfactorily proved that she is or was a wife /widow of the deceased. The applicant is described as an employee of the deceased in the mini supermarket. Despite her name appearing in the eulogy, the elder brother of the deceased has sworn in a replying affidavit that no dowry was paid or given, nor was a Nguracio [part of the Kikuyu traditional marriage ceremony] done.

The court notes that the chief's letter on record clearly identifies the deceased's dependents, and the applicant was not recognised as a dependent by the chief, who is the closest person, as an administrator, to know the relations of the people in his location. I further note that the threshold indicated in Section 29 of the Law of Succession Act, the said applicant's relationship to the deceased has not been fully satisfied as the applicant's affidavit of marriage was done after the death of the deceased. It is prudent that in an affidavit of marriage, both parties should sign the same to satisfy the validity of the marriage”

31. The tenor and meaning of the above decision is that the 1st Defendant was adjudged not to be a spouse of the deceased. Consequently, the suit property cannot be termed as matrimonial property in the absence of a marriage between the 1st defendant and the deceased.
32. It is borne of the record that the appeal filed by the 1st Defendant vide HCCA No E030 of 2022 was dismissed on the 26/6/24 for want of prosecution.
33. The 1st Defendant argued that the deceased held the suit land in trust for her, as she and the deceased purchased it jointly and, therefore, as a joint tenant under the doctrine of survivorship, the land belonged to her.
34. Section 3 of the Law of Contract Act provides as follows;

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) The contract upon which the suit is founded—

- (i) Is in writing;
- (ii) Is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

35. It is a legal requirement in Kenya that the sale of land must be documented in writing. During the hearing, the 1st defendant testified that she and the deceased purchased the suit land from two sisters through RTGS and or in cash. However, she was unable to produce any substantive evidence of a sale agreement, transfer, or payment of the purchase price. Her testimony was entirely unsubstantiated, and the court therefore takes the claim as unproven.
36. In the case of *In re Estate of Joseph Kipkemoi Limo (Deceased)* (Succession Cause E040 of 2021) [2025] KEHC 1623 (KLR) (21 February 2025) (Judgment)

The court held that

“The principle of survivorship, also known in law as *jus accrescendi*, stands as one of the foundational doctrines governing joint tenancy in property law. This principle establishes that upon the death of one joint tenant, their interest automatically and immediately passes to the surviving joint tenant(s), operating independently of any testamentary disposition or rules of intestacy. The doctrine's application is not discretionary but automatic, representing a defining characteristic that distinguishes joint tenancy from other forms of co-ownership. This implies that the property is not up for distribution as the surviving tenant is now the new owner. The property will only be up for distribution upon the demise of the new sole owner, and even then, this property would only be the subject of the Estate of this new owner. This is the hallmark of

the principle of jus accrescendi which provides for the right of survivorship.”

37. This finding was affirmed by the Court in the case of *In re Estate of Johnson Njogu Gichohi (Deceased) Succession Cause No. 112 of 2016* [2018] eKLR where L.W. Gitari J held as follows:

-“13. Section 60 of the Land Registration Act provides: “If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of death delete the name of the deceased tenant from the register by registering the death certificate.” This means that where property is in the names of joint owners, upon the death of one of them, the surviving owner automatically becomes the owner upon presenting the evidence of death of the joint tenant i.e death certificate to the registrar. The property automatically passes to the surviving joint tenant. This principle of survivorship over jointly owned property operates to exclude the property from the Law of Succession Act upon the death of one of the joint tenants. I am in agreement with the holding by Achode J. - *Mwangi Gakuri -v- Bernard Kigotho Maina & Another*, H. C NBI. Succ. Cause No. 2335/2011 where she stated: “Property is capable of passing upon death other than by will. It may pass by survivorship..... This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship..... The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants....”

38. Evidence presented by the Plaintiff shows that, according to the register maintained by the 2nd Defendant, the land was registered in the name of the deceased. This has been confirmed by DW2, the director of the

2nd Defendant, in his evidence-in-chief. A certificate of clearance issued to the deceased on 4/9/2013 confirms that Plot No FD/388 belonged to the deceased.

39. There is therefore no evidence that the 1st Defendant ever jointly owned the suit land with the deceased; thus, the claim of a right to survivorship is unfounded. Furthermore, the court did not receive any evidence supporting any interest based on trust in favour of the 1st Defendant, and likewise, the 1st Defendant's claim remains unsubstantiated and consequently fails on that ground.

Whether the Plaintiff has proven fraud and illegality in the manner the suit land was registered in the name of the 1st Defendant

40. The Plaintiff's case is hinged on fraud and illegality on the part of the 1st and 2nd defendant in transferring the suit land to the 1st Defendant without any lawful cause. Under para 8 the Plaintiff has pleaded fraud as follows;

- a. Using a forged copy of the deceased death certificate No 510934 to alter the particulars of ownership of the suit land membership record and thereafter acquiring a title to the suit land in her name.
- b. Intermeddling with the estate of the deceased
- c. Falsifying claim of ownership
- d. Trespassing on the plaintiff's suit land.

41. It is settled that the Court cannot infer fraud. Fraud must be pleaded and particularised in the pleadings. In the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, the Court stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course,

be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

42. Looking at the Plaintiff, the court is satisfied that particulars of fraud have not only been pleaded but particularised under para 8 (a-d) of the Plaintiff.
43. The standard of proof in matters fraud was settled by the Court in the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR** when it expressed itself as follows;-

“... It is trite law that any allegations of fraud must be pleaded and strictly proved. See **Ndolo vs Ndolo (2008) 1 KLR (G & F) 742** wherein the Court stated that: “...We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases....”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

44. The claim of the Plaintiff is anchored in fraud and illegality. Section 26 of the Land Registration Act states as follows;

“ 26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained

or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

45. The 2nd Defendant, which was a land-buying company and the original owner of the larger parcel of land from which the suit land was excised, led evidence that it transferred the deceased's land to the 1st Defendant based on a letter from the chief, a burial permit, and an eulogy. He also confirmed that he was aware that the deceased had passed away in 2016. That they relied on the Chief's letter to confirm that the 1st Defendant was the deceased's spouse.
46. Section 45 of the Law of Succession Act provides as follows;
- “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. (2) Any person who contravenes the provisions of this section shall— (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
- 47.** The effect of the above provision of the law is that the property of a deceased person cannot be legally dealt with by anyone unless they are authorised to do so by law. Such authority arises from a grant of representation, and any individual who handles such estate property

without proper authority is guilty of intermeddling. The law regards intermeddling very seriously and considers it a criminal offence.

48. Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. In **Re Estate of M'Ngarithi M'Miriti [2017] eKLR** it was held that:

“..... it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act..... any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under Section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the Court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

49. Both the 1st Defendant and DW2 admitted that by the time the suit land was registered in the name of the 1st Defendant, she had not obtained letters of grant of administration. She therefore lacked locus standi to hold the land, and neither did the 2nd Defendant have the authority to

transfer the suit land to the 1st Defendant. A chief's letter, coupled with a burial permit and an eulogy, does not constitute legal documents that entitle one to deal with a deceased estate. It is therefore clear that the disposition of the land was unlawful and amounted to intermeddling with the deceased's property; hence, the outcome of such a title is tainted with illegality and fraud in the eyes of the law and cannot be upheld.

50. The Plaintiff presented uncontested evidence that the 1st Defendant forged a death certificate No. 510934. The Plaintiff has submitted a death certificate No. 1290418, issued on 30/9/2016, which has been verified by the Office of the Civil Registration Services in Nairobi, as confirmed through the letter dated 4 /6/2025. In the absence of any opposition to the aforementioned death certificate, the court finds it authentic. By forging a death certificate, the 1st Defendant has demonstrated the extent of her willingness to engage in fraudulent conduct to acquire the deceased's property.
51. Needless to say, the 1st Defendant has not provided any evidence to establish she acquired any lawful interest or right in the land. In the absence of a sale agreement, transfer, Land Control Board consent, payment for the land, or evidence of marriage, I fully concur with the Succession Court's finding that she is a stranger, who, through deceit, fraud and in collusion with the 2nd defendant, fraudulently obtained the suit land in her name.
52. With respect to this issue, I answer in the positive.

Is the 1st Defendant a trespasser on the suit land?

53. Trespass is the unauthorized occupation of another's land without their consent and knowledge. In this case the court having held that the 1st Defendant is in illegal occupation of the suit land, there is no justifiable reason why she should be in occupation of the land other than as a trespasser.

54. **Halsbury 4th ed, Vol 45 at para 26, 1503** provides as follows on computation of damages in an action of trespass:-

(a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.

(b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.

(c) Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.

(d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.

(e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

55. In the case of **Duncan Ndegwa V Kenya Pipeline HCC No. 2577 of 1990 (Nairobi)** where the court held:-

“The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm.”

56. Further in the case of **Phillip Aluchio -vs- Crispinus Ngayo [2014] eKLR** the court held that-

“...The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage.

It has been held that the measure of damages for trespass is the difference in the value of Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less.....

57. It has been admitted by the 1st Defendant that she has occupied the suit land since 2016, which is a period of 5 years before the suit was filed and 10 years as of now. Given that trespass is actionable per se, the length of the trespass and the circumstances under which the 1st Defendant entered the suit land, I award general damages in the sum of Kenya Shillings One Million [Kshs 1,000,000/-.]

Mesne profits

58. Mesne profits are sums awarded by a court to the lawful owner or possessor of land for loss suffered because another person unlawfully occupied or used the land. They compensate for the value of occupation (rent, profits from use) for the period of wrongful possession up to delivery of possession.
59. Mesne profits are akin to special damages and must be pleaded with particulars and proven. A claimant is expected to provide particulars such as the dates of wrongful occupation, the basis of calculation [actual rents received, profits earned, or market rent]. The Civil Procedure Rules also allow for the assessment of mesne profits; however, courts have ruled that mesne profits cannot be awarded where a claim is unsupported. It is also well established that courts do not grant both general damages and mesne profits; a claimant must choose to claim one or the other.
60. In this case, the Plaintiff failed to particularize and prove this claim. It is therefore unsubstantiated and fails.

Costs

61. Although costs of an action or proceeding are at the discretion of the court, the general principle is that costs shall follow the event in accordance with the proviso to **Section 27** of the **Civil Procedure Act**

(Cap.21). As such, the successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. The court has found for the Plaintiff and I do not see any good reason to deny him costs of the suit.

What orders should be issue

62. The Plaintiff, having proven fraud and illegality, in which the 1st Defendant was a full participant and actor, the court is mandated by the provisions of Section 80 of the Land Registration Act to cancel and revoke the title and make the necessary orders to serve the cause of justice. The section states as follows;

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.(2)The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

63. Final orders for disposal

- a. It is hereby declared that the suit land belongs to Harrison Waweru Kamengere [now devolved to the Plaintiff via the grant of letters of administration issued on 6/2/2020].
- b. The registration of the suit land in the name of the 1st^t Defendant was fraudulent, illegal, null and void
- c. The title in the name of the 1st Defendant stands cancelled and revoked forthwith.
- d. Consequently, the Land Registrar is ordered to register the Plaintiff as the registered proprietor of the suit land forthwith.

- a) A permanent injunction do issue restraining the 1st and 2nd Defendants, their agents, servants and or employees or people working under them, from occupying, entering, trespassing and or in any other way interfering with the Plaintiffs' proprietorship, ownership, possession and use of the land parcel No Nairobi/Block 115/1439
- e. The 1st Defendant is ordered to vacate the suit land within the next 30 days from the date of this judgment; in default, she shall be evicted.
- f. I order general damages for trespass in the sum of Kenya Shillings One Million [Kshs 1,000,000/-] with interest at court rates from the date of this judgment until payment in full
- g. The costs of the suit shall be payable by the 1st^t and 2nd Defendant in favour of the Plaintiff

64. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF MARCH 2026 VIA MICROSOFT TEAMS.

J. G. KEMEI
JUDGE

Delivered Online in the presence of:

1. Mr. Kahia for Plaintiff
2. Ms. Kamau H/B for Swaka for 1st Defendant
3. Mr. Muriithi H/B for Mr. Kingori for 2nd Defendant
4. N/A for 3rd Defendant

5. C/A - Ms Yvette Njoroge

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