

**REPUBLIC OF KENYA**

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

**ELC NO. E007 OF 2022**

**KUNDAN RAJNIKANT SHAH &  
PARAS RAJNIKANT SHAH**

*(Suing for and on behalf of the Estate of  
RAJNIKANT DEVCHAND SHAH (Deceased))-----*  
**1<sup>ST</sup> PLAINTIFF**

**JITEN RASIKLAL DEVCHAND SHAH**

*(Suing for and on behalf of the Estate of  
RASIKLAL DEVCHAND GOVINDJI SHAH(Deceased)----*  
**2<sup>ND</sup> PLAINTIFF**

**MIKUL RASIKLAL DEVCHAND SHAH**

*(Suing for and on behalf of the Estate of  
RASIKLAL DEVCHAND GOVINDJI SHAH (Deceased)----*  
**3<sup>RD</sup> PLAINTIFF**

**SUAM HANDWARE LIMITED-----**

**4<sup>TH</sup> PLAINTIFF**

**MOI'S BRIDGE QUARRY LIMITED-----**

**5<sup>TH</sup> PLAINTIFF**

**VERSUS**

**KENYA RAILWAYS CORPORATION-----1<sup>ST</sup>**  
**DEFENDANT**

**NATIONAL LAND COMMISSION-----2<sup>ND</sup>**  
**DEFENDANT**

**COUNTY GOVERNMENT OF  
TRANS NZOIA-----**

**3<sup>RD</sup> DEFENDANT**

**CHIEF LAND REGISTRAR-----**

**4<sup>TH</sup> DEFENDANT**

**HON. ATTORNEY GENERAL-----5<sup>TH</sup>**

**DEFENDANT**

## **JUDGMENT**

- 1.** The plaintiffs approached this court through a plaint dated **27/1/2022**, later amended on **2/3/2023**.
- 2.** The plaintiffs seek:
  - (a) Declaration that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs are the bona fide and registered owners of properties known as Kitale Municipality Block 4/197, 4/198, 4/199, 4/200, 4/201, and 4/202, hereinafter the suit properties.**
  - (b) Declaration that the plaintiffs have a right to enjoy peaceful and uninterrupted ownership and possession of the suit properties.**
  - (c) Permanent injunction against the defendant or any other persons acting on their behalf from interfering with the plaintiffs' quiet enjoyment and use of the suit properties.**
  - (d) An order that the 4<sup>th</sup> plaintiff be paid special damages of Kshs. 79,020,810.02.**
  - (e) An order that the 5<sup>th</sup> plaintiff be paid Kshs. 59,501,865.00 as special damages.**

**(f) The 1<sup>st</sup> defendant be compelled to compulsorily acquire the subject properties, and the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs be paid the value of the subject properties, valued at Kshs. 102,000,000.00.**

3. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs aver that they are the executors and administrators of the estate of Rasiklal Devchand Govindji Shah (deceased), respectively pursuant to rectified confirmation of grant issued on **13/6/2019**, who are the legitimate bona fide and registered owners and occupants of the suit properties, in which they have been running and conducting the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs' commercial businesses peacefully and uninterrupted.
4. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs aver that they acquired the suit properties for valuable consideration from various vendors, and that these properties initially were referred to as **Plot Nos. 2116/321-326**, and upon signing of the various transfer documents, registration was undertaken pursuant to which titles were issued under the Registration of Titles Act as **Kitale Municipality Block 4/197, 4/198, 4/199, 4/200, 4/201, and 4/202**, respectively.
5. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs aver that since acquiring the subject properties and titles, they

have enjoyed free, uninterrupted and peaceful possession thereof, no task force or state agency in the Republic of Kenya such as the Commissioner of Lands, Commission of Inquiry into illegal, irregular allocation of public land (Ndungu Report) and the National Land Commission, have questioned the regularity or alleged illegality of the suit properties, if at all.

- 6.** The plaintiffs aver that on or about **29/1/2021** at **10:00 - 11:00 p.m.**, the 1<sup>st</sup> defendant, at the behest of its servants, agents, and or employees, without any colour of right, invaded the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs' premises located in the suit properties, causing wanton and brazen destruction to the structures and other business elements put up thereon and or on sale at the material time.
- 7.** The plaintiffs aver that there was no due notification of the illegal scheduled eviction and the plaintiffs assert that the purported and unwarranted destruction of property was tainted with procedural irregularities, given that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs are the legal owners of the suit properties who had not received any objection, or complaint over the ownership; the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs hold

legitimate titles of the suit properties which have never been revoked.

- 8.** Further, the plaintiffs aver that there was nil compliance with **Section 151** of the Land Act as no notice of eviction had been served; the 2<sup>nd</sup> defendant had not held any public hearing to ascertain whether the subject properties constitute public land; the 2<sup>nd</sup> defendant has never published any decision to evict the plaintiffs from the suit properties in the Kenya Gazette as per **Section 152C** of the Land Act; and that the plaintiffs have never been declared unlawful occupants of the suit properties, otherwise, they hold valid titles issued by the Government of Kenya.
- 9.** The plaintiffs aver that, as a consequence of the wanton destruction of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs' properties and forcible and or illegal eviction, their rights to personal security and that of its employees, right to privacy and protection of its properties protected under **Articles 40** and **47** of the Constitution, including those of the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs, were violated.
- 10.** The plaintiffs aver that there was no justification to disregard their proprietary rights without a hearing

process; titles to the suit land remain intact and unchallenged; the wanton destruction was uncalled for and contrary to the law; notices of eviction had not been issued as per **Sections 152A to 152I** of the Land Act, no review of the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs titles was undertaken as per **Section 14** of the National Land Commission act and **Article 68(V)** of the Constitution; the eviction and destruction of property in an unclear manner amounts to abuse of the due process and is clearly arbitrary; and that the plaintiffs had violated no legal provisions with respect to the suit properties.

- 11.** The plaintiffs aver that there was wanton destruction caused to the 4<sup>th</sup> plaintiff's business premises situated on the subject properties, leading to unimaginable losses, including relocation costs pegged approximately at **Kshs. 79,208,810.02**, as per expert reports.
- 12.** The plaintiffs aver that there was wanton destruction caused to the 5<sup>th</sup> plaintiff's business premises situated on the suit properties, leading to enumerable losses, including but not limited to loss of demolished office on site, loss of available ballast on site, loss of installed weigh-bridge, loss of fuel

stock available on site, loss of installed fuel tank and pump, and relocation costs, as assessed by its experts at **Kshs. 59,501,865/=**.

**13.** The plaintiffs aver that in view of the forceful, and unlawful destruction of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs' business as hereinabove, caused them to be relocated to another site to continue carrying on its business/commercial activities to their detriment and in clear contravention of **Article 40** of the Constitution, hence the reliefs sought for the action at the behest of the 1<sup>st</sup> defendant and other government agencies in blatant unconstitutional, ultra vires, and in a total violation of the rule of law, since the court has jurisdiction to enforce the protection of their fundamental rights and freedoms and grant the reliefs to remedy the breaches and the contraventions.

**14.** The 1<sup>st</sup> defendant opposed the suit through a statement of defence dated **25/5/2022**. It generally denied the contents of the plaint. In response to paragraphs **11, 12, 12, 14** and **15** of the plaint, the 1<sup>st</sup> defendant averred that:

**(a) The five parcels comprised in the suit properties initially L.R. Nos. 2116/317, 318, 319, 321, 322, 323, 324, 325, and**

**326 were part of the land comprised in the railway reserve vested in the 1<sup>st</sup> defendant.**

- (b) Sometime in 1930, the 1<sup>st</sup> defendant surrendered the said properties to the government.**
- (c) Upon surrender of the plots to the government, the boundaries were never revised to reflect that the surrender had the effect that the plots no longer fell within the reserve.**
- (d) Sometimes in 1954-55, the 1<sup>st</sup> defendant constructed a cattle loading ramp on his said plots.**
- (e) Because the 1<sup>st</sup> defendant still desired the plots to form part of its reserved land, the 1<sup>st</sup> defendant re-applied to be allocated the said plots sometime in August 1959.**
- (f) Vide the letter dated 14/12/1959, the Commissioner of Lands allocated the said plots as requested without demanding any payment.**
- (g) By virtue of the said re-allocation, the 1<sup>st</sup> defendant avers that the suit properties became vested in it by operation of the Kenya Railway Corporation (vesting land) Order 1986, contained in Legal Notice No. 24 of 1986, which replaced and revoked Vesting of Land Regulation 1963, which created an exclusive proprietary interest hereon in favour of E.A. Railways and Corporation, the predecessor to the 1<sup>st</sup> defendant.**

- (h) The 1<sup>st</sup> defendant avers that the suit parcels of land fell within land reserved for its operations within Kitale Railway station as it appears in the Kitale Development Plan 1972-1977, and which plan was approved by the Commissioner of Lands on 3/12/1973, the Layout of Kitale Station, drawing No. 381 Rev. Kitale Station Yard, Layout Drawing No. G.8 dated 8/7/1955 and Survey Plan FR No 24/2/1926.**
- (i) The 1<sup>st</sup> defendant avers that it never surrendered the suit properties ever again to the government for re-allocation to third parties, including Meshack Odima, Sifrimus Adika Ohito, Ali Akibaya, Judith Ngaulo, Erick Maende, and by extension the plaintiffs herein.**
- (j) The 1<sup>st</sup> defendant avers that upon discovery of the fraudulently acquired titles to the suit properties, it moved to the Kitale Land Registry and caused cautions against the titles to the suit properties, sometime in 1997, claiming proprietary interests thereon.**
- 15.** The 1<sup>st</sup> defendant avers that the titles to the suit properties were fraudulently and illegally obtained by the plaintiffs in that they fall within its reserved land which the predecessor to the plaintiffs illegally and unlawfully acquired as unalienated land, yet the land had already been alienated to it; there were no

board meetings nor resultant minutes for approval of surrender of titles by the 1<sup>st</sup> defendant to enable the Commissioner of Lands to facilitate issuance of titles to the said predecessor, and neither were the titles executed to the effect that the 1<sup>st</sup> defendant was surrendering the suit properties for re-allocation

- 16.** The 1<sup>st</sup> defendant terms any amendments to the Kitale Development Plans **1972-1977** to facilitate issuance of titles to the predecessors and the plaintiffs were undertaken without its involvement in the acquisition process of the resultant titles to the predecessors and the plaintiffs herein.
- 17.** The 1<sup>st</sup> defendant avers that due to those infirmities, the predecessors to the titles and the plaintiffs herein did not and have not obtained valid titles.
- 18.** The 1<sup>st</sup> defendant terms the removal of its cautions, which it had registered against the title registers at the Kitale Land Registry, as being done without inviting it for a hearing.
- 19.** Moreover, the 1<sup>st</sup> defendant avers that the plaintiffs lack proprietary interests in obtaining titles without the requisite consents, including from it; the plaintiffs failed to conduct due diligence to ascertain the status of the suit properties prior to the land

transactions enabling them to obtain titles to the suit properties; the contracts enabling the plaintiffs get titles to the suit properties were therefore void *ab initio*, incapable of enforcement and lastly, the 1<sup>st</sup> defendant was not paid any monetary compensation for acquisition of land vested in it.

- 20.** The 1<sup>st</sup> defendant denies the alleged infringement of the plaintiffs' rights and avers that the demolition was carried out by a multiagency operation by the government to clear all encroaching developments on the railway reserves in a bid to rehabilitate and revitalise the Leseru-Kitale branch line.
- 21.** The 1<sup>st</sup> defendant avers the suit properties fall within the railway reserve which is land vested in it pursuant to which it is charged with the mandate of providing rail transport to the public for personal and commercial use; the rehabilitation and the revitalization of the branch line will therefore serve the public interests, failure of which it will adversely affect the economic status of the residents; the rehabilitation and revitalization fall within the statutory mandate of the 1<sup>st</sup> defendant to ensure that no danger arise while it is supplying rail transport services.

- 22.** The 1<sup>st</sup> defendant avers that any failure in ensuring the safety thereof risks it being found culpable in the event of loss or damage. Again, the 1<sup>st</sup> defendant avers that before the alleged demolition, several notices were issued to the encroachers on land vested in the 1<sup>st</sup> defendant, requiring them to vacate, and these notices were published on **20/3/2018, 27/9/2019, and 30/9/2019** by My Government Publication as well as Daily Newspapers such as the Standard and People Daily. The 1<sup>st</sup> defendant denies any particulars of loss or damage suffered or incurred by the plaintiffs.
- 23.** The 2<sup>nd</sup> defendant opposed the suit by a statement of defence dated **13/12/2023**.
- 24.** The 3<sup>rd</sup> defendant opposed the suit through a statement of defence dated **21/2/2024**. It denied the contents of paragraphs **11, 12, 13, 14, and 15** of the amended plaint. Further, the 3<sup>rd</sup> defendant averred that the plaintiffs in paragraphs **16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28** have miserably failed to disclose how the 3<sup>rd</sup> defendant was caused or was involved in the alleged destruction, loss, and damage to the plaintiffs.

- 25.** The 3<sup>rd</sup> and 4<sup>th</sup> defendants opposed the suit through a statement of defence dated **16/11/2022**, denying that the plaintiffs were the lawful owners of the suit properties, which they had lawfully acquired to develop, and lawfully occupied as alleged or at all.
- 26.** The 3<sup>rd</sup> and 4<sup>th</sup> defendants aver that the fact that the plaintiffs' title documents had not been questioned previously does not ipso facto mean that the titles, if any, were acquired regularly. The 4<sup>th</sup> and 5<sup>th</sup> defendants aver that they are strangers to the alleged pleadings in paragraphs **16** and **17** of the plaint; otherwise, liability for acts of commission and omission alleged thereof only lies against the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants.
- 27.** The 4<sup>th</sup> and 5<sup>th</sup> defendants deny the alleged forceful entry or eviction and state that if any occurred, which is denied, the same were solely committed by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants with no involvement by any government agency. The 4<sup>th</sup> and 5<sup>th</sup> defendants aver that a claim over the alleged violation of the constitution as per paragraphs **18(i-vi)** of plaint cannot lie against the 4<sup>th</sup> and 5<sup>th</sup> defendants since no facts have been set out against them in respect of the same, and that, if any liability

is to arise as a consequence of the said allegations, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants are solely liable, otherwise, they were not parties to the allegations complained of in paragraphs **19, 20, and 21** of the plaint.

- 28.** The 4<sup>th</sup> and 5<sup>th</sup> defendants, in response to paragraphs **22, 23, 23, 25, 26, and 27** of the plaint, state that they have no proprietary interests in the subject property and therefore, any issue and claim for damages can only lie against the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants, to which they shall be calcimining indemnity, against in the event of any order s to damages or costs against the 4<sup>th</sup> and 5<sup>th</sup> defendants in these proceedings.
- 29.** The 4<sup>th</sup> and 5<sup>th</sup> defendant deny the contents of paragraph 28 of the plaint, and state that if at all, there was any government agency that participated as such, they did so only in discharge of their respective lawful mandates and with due regard to the law, reasonableness, utmost true and due diligence.
- 30.** Further, the 4<sup>th</sup> and 5<sup>th</sup> defendants aver that the procedure under which one should claim damages as a result of a violation of constitutional rights is

well anchored in the law and that these proceedings are not the right method of seeking such enforcement.

- 31.** The 4<sup>th</sup> and 5<sup>th</sup> defendants aver that the plaintiffs have not set out the particulars of the said constitutional violations, and strictly specify with precision how the Articles were infringed; otherwise, the jurisdiction of this court is anchored on **Section 13** of the Environment and Land Court Act.
- 32.** By way of replies to the 1<sup>st</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants' statements of defence dated **9/6/2023**, the plaintiffs aver that:
- (i) On 10/6/1952, vide File No CT/13/416, the Survey Department subdivided L.R. No. 2116, which was registered under Folio 64/17, and thereafter subplots L.R. No. 2116/73 to 93 were registered.**
  - (ii) In 1958, further subdivision of Plot No. L.R. No. 2116/89 was carried out by the Director of Survey, and new grants, namely Kitale Municipality Block 4/197, 4/198, 4/199, 4/200, and 4/202, with the signed and sealed deed plans, were issued by the Commissioner of Lands.**
  - (iii) The then initial L.R. No. 2116/321-326 were cancelled, and new numbers, Kitale Municipality Block No. 4/197,**

**4/198, 4/199, 4/200, and 4/202, were instead allocated.**

- (iv) That Survey Plan FR 84/36 shows that the afore stated plots do not encroach the railway reserve, which is clearly demarcated.**
- (v) The plots were registered in 1993, and any subsequent amendments by way of part development plans after 1993 have not been reflected on these titles.**
- (vi) That in view of the foregoing, the subject properties are not part of the land comprised in the railway reserve, and neither were they vested in the 1<sup>st</sup> defendant as alleged therein or at all.**
- (vii) The 1<sup>st</sup> plaintiff purchased the suit properties from various vendors initially referred to as Plot No. 2116/321-326, and the requisite process of registration was undertaken under the Registration of Titles Act, and the deed plans were attached.**
- (viii) The plaintiffs formally applied for a change of user from residential to commercial, and no objections were raised by the then Municipal Council of Kitale, the then District Land Office, the Ministry of Lands and Settlement, Housing and Public Works.**

**33.** The plaintiffs aver that they lawfully acquired the subject properties, became legitimate registered owners and occupants thereof contrary to paragraph

**5** of the 1<sup>st</sup> defendant's statement of defence. The plaintiffs aver that the issue of approval of surrender of titles of the subject properties by the 1<sup>st</sup> defendant to the predecessors to titles does not arise for the suit parcels of land did not fall within the railway reserve as alleged or at all.

**34.** The plaintiffs deny that they illegally and unprocedurally acquired the titles to the suit properties or that the previous owners, who sold the same to them, had unlawfully and unprocedurally acquired their titles. The plaintiffs aver that the registration of the caution against the title registers for the suit parcels of land by the 1<sup>st</sup> defendant had no legal basis, and that its existence amounted to an infringement of their rights to use and enjoy the interests confirmed by the titles.

**35.** The plaintiffs aver that they were under no obligation to seek any consent from the 1<sup>st</sup> defendant in the purchase of the land as the subject properties did not fall within the railway reserve, and neither were they registered in favour of the 1<sup>st</sup> defendant. The plaintiffs aver that they conducted due diligence before purchasing the subject

properties, making the contracts enabling them to obtain titles valid and enforceable in land; otherwise, there could have been no consideration paid to the 1<sup>st</sup> defendant for the subject properties as compensation in law.

- 36.** The plaintiffs aver that any land that the 1<sup>st</sup> defendant may have desired to acquire, such as the suit property, should have been acquired by way of compulsory acquisition and due compensation paid to the registered owners. The plaintiffs insist that on the contents of paragraphs **16, 17, 18, 19, 20, 22, 23, 24, 25, 26,** and **27** of the amended plaint as regards paragraphs **7, 10,** and **11** of the 1<sup>st</sup> defendant statement of defence.
- 37.** As regards the 4<sup>th</sup> and 5<sup>th</sup> defendants' statement of defence, the plaintiff avers that this suit is properly filed before the right forum, it sets out particulars of the infringement of **Article 40** of the Constitution, going by the contents of paragraphs **15, 22, 23, 24, 25, 26, 27,** and **28** of the plaint.
- 38.** At the hearing of this suit, the plaintiffs called a total of six witnesses to sustain their claim. **Paras Rajnikant Shah** testified as **PW1**. He relied on a witness statement dated **27/1/2022** as his

evidence-in-chief. PW1 told the court that he holds a power of attorney to represent and testify on behalf of the 1<sup>st</sup> plaintiff, who is also a director and shareholder of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs, as per a copy of the certificate of incorporation and **CR 12** produced before the court. PW1 also said that he is a shareholder and director of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs, versed with the contents set out in the amended plaint.

- 39.** PW1 told the court that it was within his knowledge that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are administrators of the estate of Rasiklal Devchand Govindji Shah (deceased), as per a copy of the rectified certificate of grant issued on **13/6/2019**, who together with the 1<sup>st</sup> plaintiff were the registered owners of the suit properties as per certificates of leases, which were issued under the repealed Registration of Titles Act between **June 1995** and **2019**. He said that the two plaintiffs had acquired the suit property, then known as Plot No. **2116/321-326**, as per the copies of titles, deed plans, and transfer forms before the court.
- 40.** PW1 told the court that after acquiring the titles, the 1<sup>st</sup> plaintiff formally applied for a change of user of

the parcels from residential to commercial, to the relevant authority, without any objection by the then municipal council of Kitale, District Land office, Ministry of Lands & Settlement, Ministry of Lands & Housing, and Ministry of Public Works, as per the various correspondences before the court.

- 41.** PW1 said that subsequently, the titles hitherto issued under the Registration of Titles Act were cancelled and converted under the Registered Land Act, now repealed, between **1995** and **2019**, without any objection, hence generating new parcel numbers.
- 42.** PW1 said that the 1<sup>st</sup> defendant had unsuccessfully filed **Nairobi HCCC No. 624 of 1996**, seeking various reliefs, including a declaration that the allotment, grant, and transfer of the aforesaid plots to the 1<sup>st</sup> plaintiff and the late deceased was illegal, unlawful, and fraudulent, or procured without its authority, or was null and void.
- 43.** PW1 said that the suit was transferred to Eldoret High Court and later to Kitale as **High Court Civil Suit No. 59 of 1997**, but was dismissed with costs, which generated no as per a decree dated **24/5/2007**. He said that the 1<sup>st</sup> defendant was

directed and did clear the costs of **Kshs. 274,700/=** by a letter dated **18/2/2010**.

- 44.** PW1 said that since the acquisition of the titles to the suit properties on the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs have enjoyed free, uninterrupted, and peaceful possession of the suit properties, including leasing it out to the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs to set up and conduct their business and or commercial activities unimpeded, while paying land rent and rates as per the clearance certificate before the court.
- 45.** PW1 denied the claim that the 1<sup>st</sup> defendant had any rights to the suit properties, for after the dismissal of its case never lodged any appeal to the decree in the earlier suit. PW1 said that the plaintiffs' own licensed surveyor had confirmed that the suit properties were and have never been part of the 1<sup>st</sup> defendant's land or encroached on its railway reserve, as clearly shown in the demarcation map.
- 46.** PW1 said that since the issuance of titles to the suit properties, no task force or state agency in Kenya had questioned the regularity or alleged illegality of the suit properties, such as the Commissioner of Lands, the Ndungu Report, and the National Land Commission.

- 47.** PW1 told the court that on **29/1/2021**, at around **10:00 - 11:00 p.m.**, the 1<sup>st</sup> defendant at the behest of its servants, agents, and or employees and without any colour of right invaded the 4<sup>th</sup> and 5<sup>th</sup> defendants' premises located on the suit properties causing wanton and brazen destruction to the structures and other business elements put up therewith and or the site at the material time, without any notification of the scheduled illegal eviction.
- 48.** PW1 said that the purported eviction and the unwarranted destruction of its property and structures therein, together with the buildings and business equipment, stock in trade, and the assets, were tainted with procedural irregularities as pleaded in the amended plaint generally. In particular, PW1 said that the defendants did not comply with **Sections 131, 151, and 152** of the Land Act; there was no public hearing; their titles remain valid and have never been declared unlawful occupants of the suit properties.
- 49.** PW1 said that the forceful and illegal eviction infringed on the plaintiffs' rights to personal security, privacy, and ownership of land under

**Articles 40** and **47** of the Constitution, without any justification or compliance with **Sections 152A-152I** of the Land Act, **Article 68(v)** of the Constitution, and **Section 14** of the National Land Commission Act.

- 50.** PW1 told the court that as a result of the forceful entry, illegal eviction, and destruction, the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs suffered loss and damage of **Kshs. 79,020,810.02** and **Kshs. 59,501,865.00**, as per the expert reports before the court
- 51.** PW1 told the court that after the forcible entry and occupation by the 1<sup>st</sup> defendant, destruction and eviction, they had to relocate their business to another site to continue carrying out their business contrary to **Article 40** of the Constitution, from the suit premises, which they have occupied for over **22** years, hence the reliefs before the court.
- 52.** PW1 relied on as exhibits the documents contained in the bundle of documents dated **22/1/2022**, namely, a certificate of incorporation dated **27/4/1984** and **17/4/1988**, **P. Exhibit No. (1)** and **(2)**, **CR 12** for 4<sup>th</sup> and 5<sup>th</sup> plaintiffs as **P. Exhibit No. (3)** and **(4)**, rectified grant, **P. Exhibit No. (5)**, certificate for parcel No. **Kitale Municipality Block**

**4/197** issued on **13/6/1995**, **P. Exhibit No. (6)**, **Kitale Municipality Block 4/199**, dated **20/6/1995**, **P. Exhibit No. (7)**, **Kitale Municipality Block 4/200**, issued on **20/6/1995**, **P. Exhibit No. (8)**, **Kitale Municipality Block 4/201**, issued of **13/6/1995**, **P. Exhibit No. (9)**, **Kitale Municipality Block 4/202**, issued on **13/6/1995**, **P. Exhibit No. (10)**.

- 53.** Further PW1 relied on a transfer form dated **13/3/1995** for **L.R. No. 2116/321**, **P. Exhibit No (11)**, letter dated **14/8/1995** for assessment of land rates, **P. Exhibit No. 11(a)** and **(b)**, land rent clearance certificate dated **10/3/1995**, **P. Exhibit No 11(c)** and **(d)**, and an application for registration of a new grant dated **18/3/1993** as **P. Exhibit No. 11(e)**.
- 54.** Additionally, PW1 produced a transfer dated **13/3/1995** for **L.R. No. 2116/2313**, **P. Exhibit No. (12)**, the land rent clearance certificate and Land Control Board consent dated **13/3/1995** and **20/3/1993**, **P. Exhibit No. 12(a)** and **(b)**, transfer for **L.R. No. 2116/324**, **P. Exhibit No. (13)**, transfer for **L.R. No. 2116/325**, **P. Exhibit No.**

**(14)**, and a transfer for **L.R. No. 2116/326**, as **P. Exhibit No. (15)**.

**55.** Similarly, PW1 relied on a letter dated **10/6/1995**, **P. Exhibit No. (16)**, letters dated **14/6/1992**, **15/6/1993**, and **14/9/2012**, **P. Exhibit No. (17)**, **(18)**, **(19)**, **(20)**, and **(21)**, pleadings in **Nairobi Case No. 624 of 1996**, **P. Exhibit No. (22)**, letter dated **14/3/1996**, **P. Exhibit No. (23)**, decree in **Kitale High Court No. 31 of 1997**, **P. Exhibit No. (24)**, letter dated **18/3/2010**, **P. Exhibit No. (25)**, and lastly, a bundle of rent clearance certificates as **P. Exhibit No. (26)**.

**56.** In cross-examination, PW1 told the court that the sale agreements for the six parcels of land are not before the court and could not tell how the vendors of the suit properties had acquired titles to the land before the sale. Shown letters or a bundle of correspondences contained in the 1<sup>st</sup> defendant's list of documents dated **24/7/2024**, and **18/1/2024** running from pages **2-11**, PW1 said that it was true that the 1<sup>st</sup> defendant was seeking permission, authority, and or allocation of some land from various state departments.

- 57.** Asked about the 1st defendant's vesting orders of **1963** and **1986** *vis-à-vis* the plaintiffs' bundle of documents, PW1 denied that the 1<sup>st</sup> defendant was neither the original owner of the suit properties nor a subsequent allottee as alleged or at all, otherwise the vendors who sold and transferred titles of the suit parcels land to the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs, held valid titles documents, given there were in existence at the time of issuance of allotment letters and title deeds no valid and binding deeds of surrender or reservation of the suit parcels of land to the 1<sup>st</sup> defendant as alleged or at all.
- 58.** PW1 conceded that, despite the application for the change of user, no letter of approval from the Commissioner of Lands on the change of user was issued to them. PW1 said that there are business permits, licenses, and approvals before the court showing that the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs had been conducting various business and commercial activities on the suit premises before and at the material time when the forceful entry and demolition occurred, as captured in the valuation report and its financial records

- 59.** PW1 conceded that he had no quantity surveyor's report on the building costs and expenses for both restoration and relocation. PW1 said that the breakdown of all the losses and damage is clearly captured in pages **153-173, 176-179, 182,** and **202 to 208** of the trial bundle.
- 60.** PW1 said that he has availed before the court the annual financial reports, VAT, and income tax returns for the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs, generally and in particular covering salaries, stock, and purchases of materials or stock in trade allegedly lost during the demolition. PW1 said that all these documents clearly show how much tax was paid by the 4<sup>th</sup> and 5<sup>th</sup> defendants before and after the demolition.
- 61.** PW1 reiterated that other than the information and documents supplied to the experts to generate the experts' reports, the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs had no other independent internal records to show the quality and quantity of the items, equipment, and materials lost in the demolition exercise.
- 62.** PW1 said that even though a police OB report was made, he was uncertain if the police had actually visited the locus in quo to assess the damage or loss, or later on caused some investigations to be

undertaken, and or whether the police eventually made a recommendation or report on the circumstances surrounding the forceful entry and demolition.

- 63.** PW1 in re-examination insisted that the 1<sup>st</sup> defendant's letter dated **4/12/1951** had no land reference number, sketch map, or letter of allotment in relation to the suit properties. Concerning the vesting order dated **12/7/1963** and **of 1986**, PW1 said that the two documents lacked a reference number or specific details in relation to the suit properties.
- 64.** PW1 confirmed that the plaintiffs were constructively forcefully evicted from the suit premises on **29/1/2021** and have since stayed away, and they can no longer access, use, possess, or occupy the same.
- 65.** **Suleiman Abdul Shakur**, a Licensed Land Surveyor, testified as **PW2**. He told the court that he was contracted by the plaintiffs to visit, assess, and prepare a report in respect to **Kitale Municipality Block 4/197-202**. He produced a report as **P. Exhibit No. (26)**, whose attachment includes a survey plan, Nos. **FR. 64/17**, dated **1952**, **FR.**

**84/36** dated **10/6/1958** marked and produced as **P. Exhibit No. 26(a), (b), (c), and (d).**

- 66.** PW2 said that from his investigations, the truth of the matter is that the Director of Surveys had already subdivided the plots leading to the suit properties, before the 1<sup>st</sup> defendant's letter dated **4/12/1959**, as per **FR No. 84/36**, which he produced as **P. Exhibit No. 26(c) and (d)**, referring to **L.R. No. 2116/1/89**, being the entire resultant block after alienation.
- 67.** According to PW2, planning comes first before surveys and allocation. In this case, PW2 said that the Physical Planning Department was not in existence or in place as of **1959**, though by that time survey works had already been done in relation to the plots to **No. 73-93** out of **Section 1** of **L.R. No. 2116**.
- 68.** PW2 confirmed that from the history of the land, he came across it was factually correct that the 1<sup>st</sup> defendant had surrendered some portion of its **118** acres in **1930** to cater for reallocation of the suit plots. Shown the 1<sup>st</sup> defendant's letters dated **5/11/1956** and **11/8/1959**, PW2 said there was no

evidence that the two letters were ever approved and implemented both on paper and on the ground.

- 69.** PW2 said there was no evidence that the coordinates of plan **No. 381R** appeared on the 1<sup>st</sup> defendant's trial bundle at page **11**. PW2 conformed with the Physical Development Plan No. **19** of Kitale Township, as duly signed by the Director and the Commissioner of Lands, which was to run up to **1977**. PW2 confirmed that the document appearing in the 1<sup>st</sup> and 2<sup>nd</sup> defendants' trial bundle also captures parcel **Nos. 321** and **326**, which are owned by the plaintiffs.
- 70.** PW2 said that the **FR. No.84/36** which was used to generate the suit properties, has never been recalled or cancelled on an alleged earlier reservation or alienation of the suit properties as public land. He said that the mandate falls within the Director of Surveys to resolve any disputes where there are conflicts in the survey plans or overlaps of the same regarding the same property. PW2 said that where there are conflicting FRs, a survey plan or PDP may not be prepared.
- 71.** PW2 said that **FR No. 24/2** was a **1925** edition, which, according to him, had been superseded by

the **1952** and **1958** editions that he had produced as **P. Exhibit No. 26(a), (b), (c), and (d)**, showing the status of the plaintiffs' plots as of **1968**. PW2 said that from his investigations, he did not come across any material to show that the 1<sup>st</sup> defendant was re-allocated the suit properties in **1959**, following its request through its letter dated **4/12/1959**.

**72. David Ngetich**, a Land Valuer, testified as **PW3**. He told the court that after the plaintiffs contracted his services to undertake a valuation report over the suit properties, which he visited, assessed, and prepared a report returning a value of **Kshs. 72,000,000/=**, based on a comparative methodology. PW3 produced the report dated **23/7/2019** as **P. Exhibit No. (27)**. PW3 said that the report contains official search certificates for the suit properties, save for parcel No. **198**, copies of title deeds, and photographs. He said that the status of the suit premises had significantly changed after the demolition.

**73.** PW3 admitted that his certificate and a gazette notice as a valuer were not attached to his report, save that they were available online. PW3 said that

he had visited, prepared, and made the report before the demolition took place; otherwise, he did not visit the suit properties after the demolition.

**74. C.P.A. Mustafa Mikidadi** testified as **PW4**. PW4 told the court that he is member No. **24236** with the Institute of Certified Professional Accountants of Kenya (ICPAK), with ten years of experience. PW4 told the court that he has worked with the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs for more than four years as the head of finance. He said that he was the maker of a management report in respect of Moi's Bridge Quarry and Suam Hardware Ltd, appearing on pages **147-108** of the plaintiffs' supplementary list of documents dated **9/6/2023**. PW4 produced a copy of the report, his certificate of qualifications, VAT returns for both companies, and a police abstract, as **P. Exhibit No. (28), (29), (30), (31), and (32)**, respectively.

**75.** PW4, in summary, told the court that developments on the suit properties before the **29/1/2021** comprised a perimeter wall, office buildings, a storage building, a garage, a weighbridge station, and a filing station. During the demolition, PW4 said that the two companies suffered loss and damage

comprising the stock of goods stored at Suam Hardware worth **Kshs. 50,431,888,85**, and stock of ballast for sale worth **Kshs. 2,412,788/=**, as per the list of items lost and their book values appearing in Appendix **A1** of his report. PW4 said that the weighbridge was also damaged to the extent that it is not usable, which is valued at **Kshs. 3,801,920.00** as per Appendix **A2**.

**76.** PW4 said that the stocks for Suam Hardware were kept at the nearby office block, garage, and store, whose materials for construction and the office administration block were valued **Kshs.22,367,321.44** and **Kshs. 2,378,550.00**, respectively, as per Appendix **A3**. PW4 said that at the filing station, there used to be fuel stocks for their day-to-day running operations, in which, together with a fuel pump and a tank, the installation cost was worth **Kshs. 216,550/=**, **Kshs. 850,000/=**, and **Kshs. 120,000/=**, respectively, all captured in supporting documents attached as Appendix **A4**.

**77.** PW4 said that it was the fully equipped garage that the 4<sup>th</sup> and 5<sup>th</sup> defendants relied upon to maintain the fleet of vehicles used for daily operations.

According to PW4, all the garage machinery and equipment damaged was worth **Kshs. 4,271,6000**.

- 78.** PW4 said that the sourcing of ballast and quarry materials in Kitale town was a challenge as the closest quarry was **30 km** away, and therefore, due to this, the plaintiffs would bring and store the said products closer to their customers, at the suit properties. By demolishing the suit properties, PW4 said that the Quarry business, which had previously yielded close to **50%** of the previous year's revenue, lost business opportunities and revenue.
- 79.** PW4 said that for the period **January 2021** to **September 2021**, the two plaintiffs made a gross revenue of **Kshs. 121,848,896/=** and a profit of **Kshs. 70,939,663/=**. So PW4 said that if they prorate the same to **12** months, they anticipated a profit of **Kshs. 94,586,217.00**. PW4 said that they also lost **50%** in opportunities, which is equivalent to **Kshs. 47,293,100.00** profit as per Appendix **A5**.
- 80.** PW4 said that the two companies also suffered relocation fees due to the demolition, leading them to set up the new location. These, according to PW4, included the movement of all goods to the new location, logistics costs, supervision transport,

loading, and offloading costs, at **Kshs. 600,000.00**, and **Kshs. 1,950,000.00** respectively.

- 81.** PW4, at page **7** of **P. Exhibit No. (28)** said it captures summary figures for both the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs concerning relocation costs, machinery and tools, loss of stock, demolished buildings and materials, loss of fuel, and loss of profit totaling **Kshs. 59,501,865.00**, and **Kshs. 79,020,810.02**, respectively,
- 82.** In cross-examination, PW4 said that the existing long lease agreement between the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs, and proof of payment of rent whose landlord was the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs, were not before the court. Equally, PW4 admitted that permits and licenses to undertake quarrying activities by the 4<sup>th</sup> plaintiff were not before the court.
- 83.** PW4 said that the license appearing on pages **171-172** was for large storage activities but not for the production of quarry stones. PW4 denied that parcels Nos. **321-326** were for residential use only, hence could not undertake such business therein. He clarified that only quarry materials were stored and not quarry extraction services. PW4 said that he was not certain if the Commissioner of Lands had

approved a change of user from residential to commercial with respect to the suit properties.

- 84.** PW4 said that as the head of finance, his role was to maintain all the company's financial records and share them with the directors of the company. PW4 said that the two companies had fully complied with the law on declaration of profits and losses as displayed in pages **153** and **196** of the financial reports. He said that the same is also captured in the Auditor's report dated **30/6/2021**, appearing on pages **126** and **128** of the 2<sup>nd</sup> trial bundle.
- 85.** PW4 said that his financial report had captured several invoices of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs, though it was silent on ownership documents for the suit properties, including logbooks. PW4 said that the purchase records for the lost stock were also captured in pages **204-205** and **207 of P. Exhibit No. (28)** and on page **116** of the 2<sup>nd</sup> trial bundle.
- 86.** As to the qualified opinion in the report by the Auditors that the inventories could not be verified, to the extent of **Kshs. 130,000,000/=**, PW4 said that his report at pages **123, 162, 174, 176, 137, 147, 197, 202-205**, had captured all the said details, which are based on the types and current

value at the time. PW4 said that some of the lost or destroyed inventories at the time of the demolition were captured based on the existing records before the events of **29/1/2021**.

**87.** PW4 said that the auditor's report dated **31/12/2021**, which relied heavily on his financial report, had captured the loss or damage as an impairment loss. PW4 confirmed that the relocation lease agreement is captured before the court at pages **185-196**, save that it had not been executed by the parties. Similarly, he conceded that evidence of payment of rent after relocation is missing.

**88.** As to the loss appearing on pages **173** and **202** of **P. Exhibit No. (28)** of **Kshs. 22.000,000/=**, PW4 said that these were goods in transit to its site in Lodwar, for construction purposes. He conceded that records to show that such stock was being held on the site by **29/1/2021** are missing, save for the sales and invoices appearing on pages **152-171** and his report. PW4 clarified that the 4<sup>th</sup> plaintiff used to sell goods to the 5<sup>th</sup> plaintiff, as reflected in the invoices, dispatch stamps, and the attached receipts.

- 89.** Concerning the police abstract, PW4 said that it relates to the demolition on **30/1/2021**. He said the police abstract was silent on the details of the alleged offender.
- 90.** PW4 said that the reason the financial report for the two companies shows there was an increase and not a decrease in income and wages after the demolition is because of business diversification; otherwise, they would have made more profits but for the demolition.
- 91.** Concerning the National Land Commission, PW4 said that he was not aware if the two companies had made a report or complaint to them on compulsory acquisition or correspondences or an investigation report available regarding the demolition. PW4 said that the police abstract **OB No. 24/22/6/2021** narrates what was destroyed as reported by the 2<sup>nd</sup> plaintiff. He admitted that the OB report was made and prepared almost 6 months after **29/1/2021**. PW4 said that the police abstract was silent on the role of the defendants in the demolition. PW4 said that he was unaware of any investigations that may have been undertaken and their outcome, following the OB report.

- 92.** PW4 said that the change of user from residential to commercial use of the premises is captured in pages **72-77** of the trial bundle. PW4 was emphatic that the loss or damage indicated in **P. Exhibit No. (28)** is matched with what the auditors established in their reports.
- 93.** PW4 said that the suit premises were not a production site; otherwise, the site was opened in **August 2020** to assist in bringing and selling ballast close to the customers, hence licenses and permits for quarrying production were irrelevant. So, PW4 said that the loss of **50%** was real.
- 94. C.P.A. Peter Thuo** testified as **PW5**. He produced, as **P. Exhibit No. (33) (a)** and **(b)**, an ICPAK membership certificate and a letter of good standing. PW5 told the court that PKF (K) LLP was the contracted auditor of the books of account of the 4<sup>th</sup> plaintiff from **1/7/2020** to **20/6/2021**. According to their report dated **22/12/2021**, produced as **P. Exhibit No. (34)**, PW5 said the performance of the 4<sup>th</sup> plaintiff for the year in issue was as positive as per his findings on page **116**, since a profit of **Kshs. 29,269,970** was reported for the year ended on **30/6/2021**.

- 95.** As to the loss occasioned, PW5 said that page **132** of the report mentions the loss from the demolition of **Kshs. 42,236,163.00**. PW5 said that the auditors, after accessing the ERP system of the claimant, were able to establish that the lost goods or stock were available in the ERP system on the date of the demolition.
- 96.** PW5 said that the claimant was licensed to sell hardware and building materials, as shown by the directors' report at page **43**, showing a turnover compared to the previous year due to an increase in demand for goods and services in their business.
- 97.** PW5 said that the claimant's directors had also disclosed to him the potential principal risks and uncertainties likely to affect the company. PW5 said that the basis of his qualified opinion was that the inventories as of **30/6/2021** lacked an itemised stock record, capable of being verified through a physical stock count.
- 98.** PW5 said that his report at page 116 had returned a qualified opinion since he did not satisfy himself through any other alternative means regarding the inventory and the current assets of the claimant. PW5 said that all the information on stocks is

ordinarily supposed to be made available to auditors by the company. He said that the figure appearing on page **120** of the report could not be independently verified.

**99.** PW5 said that his opinion on pages **117-127** of the report shows that there was an increase in profit from the previous year based on an increase in turnover. PW5 said that the increase was also captured in the declared tax returns. As to depreciation of value, PW5 said that his report did not capture any de-recognised assets since the lost assets were bought in the year under review, whose significant changes were not captured.

**100.** As to the opinion on impairment of property, plant, and equipment, PW5 said that pages **126-127** of his report captured the same. PW5 said that he did not capture the relocation costs because they were missing in the financial report by the directors on page **132**. PW5 told the court that though he participated in the auditing of the 4<sup>th</sup> plaintiff's books of account, he could not tell when his report, **P. Exhibit No. (34)** was approved, dated, and signed by the Board of Directors of the claimant.

- 101.** PW5 said that his report on page **132** had captured the loss due to the demolition, as at the time the ERP system had captured all the stocks in place, based on the invoices available during the audit exercise. PW5 said that assets that were lost during the demolition are all captured as neither recognised nor de-recognised in his report.
- 102. S.J. Fatania** testified as **PW6**. He produced his membership certificate with ICPAK and credentials as **P. Exhibit No. 35(a), (b), and (c)**. PW6 told the court that he works with B.C. Patel Auditors, as per a letter of appointment dated **15/8/2019**, produced as **P. Exhibit No. 35(d)**. PW6 produced an audit report dated **31/12/2021** as **P. Exhibit No. (36)**.
- 103.** In summary, PW6 told the court that the company's performance, as captured on page **145** of the report, had realised a profit of **Kshs. 80,850,984.00**. As to the loss, PW6 said that he undertook two reports dated **27/10/2021**, with respect to the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs, which he produced as **P. Exhibit No. 37(a) and (b)** and **P. Exhibit No. 37(c) and (d)** capturing the loss at **Kshs.72,020,810.00** and **Kshs 59,501,865.00** respectively at pages **209-223**, and **224-234** of the

supplementary trial bundles. PW6 said that his firm had been undertaking audit work for the plaintiffs for the last 4 years.

- 104.** Asked about the Gazette Notice captured on pages **213** and **228** of his report as **No. 6601** and **6602** of **4/9/2021**, PW6 said that they were not attached to his report. He said that he was not aware whether any of his reports were purposely made and or forwarded to the National Land Commission by the claimant. PW6 said that the report given to him by the directors on page **113** of **P. Exhibit No. (34)** was silent on the demolition. Equally, he said that he did not capture the referenced suit properties in pages **215** and **230** of his report, from which the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs were operating.
- 105.** PW6 said that pages **216**, **232**, and **236** of his report give a summary of his conclusion on the loss occasioned to both the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs based on documentary evidence that was made available to him.
- 106.** PW6 said that his report does not make any note of the loss attributable to the demolition since, according to the directors, it was not a significant event in the financial report for **December 2021**,

and therefore it ought to have featured in the financial report of **2020**. He said that **Kshs. 47,000,000/=** was for a loss of opportunity, hence the reason why it was not declared.

**107.** PW6 said that the figure was a conservative professional projection of **50%** based on trends of the past performance management accounts of the claimant. PW6 admitted that the records on the claimant's previous accounts were not attached to his report as a basis upon which he arrived at the projection. PW6 said that the loss of opportunity was due to the unique locality of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs' business.

**108.** PW6, in cross-examination by the 4<sup>th</sup> and 5<sup>th</sup> defendants, confirmed that though he was part of the report, his name was missing from the report. He said that none of the three reports he prepared captured any loss of fixed assets, or were based on a professional land valuation that was made available to him by the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs' directors.

**109.** PW6 admitted that the projected future profits were not based on any actual financial records and therefore remain mere professional estimates.

- 110.** PW6 admitted that though the loss appearing on pages **232-233** of his report was based on the stocks or inventories on records of the claimants a day before the demolition, the actual record of the figures and the date of the stock before demolition was not attached to the financial report or his own report.
- 111.** PW6 said that he did not prepare a schedule of the demolition, measure the size, or conditions of the materials, equipment, or the assets, or rely on a site report capturing such information a day before the demolition, so as to form a basis for analysing the cost of the demolition. In the absence of such data from the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs, PW6 said that his team only relied on the accounting systems of the two companies and their financial statements.
- 112.** PW6 admitted that he could not rule out the possibility of the said records, as availed to them, being marred with fraud or inconsistencies. PW6 said that demolition was a technical thing, which is not an accounting aspect per se. PW6 said that his team, other than verifying the title deeds, did not conduct an official search on the title registers to

suit properties, let alone assess the market value of the same as of **January 2021**.

**113.** PW6 denied that the data and figures used in their reports have assumed compensation rather than the right to compensate the plaintiffs. PW6 said that the right to claimant compensation on compulsory acquisition by the two claimants was not within their scope of work; otherwise, the figure of **Kshs. 70,000,000/=** appearing on page **163** is accompanied by supporting explanation notes. He said that the companies were unable to salvage anything during the demolition, hence the losses captured at pages **126, 132, and 210** of his report.

**114. Salome K. Kamau** testified as **DW1**. She relied on a witness statement dated and filed on **5/5/2022** as her evidence-in-chief. DW1 told the court that she is a Senior Land Surveyor, working with the 1<sup>st</sup> defendant. According to her, the suit parcels of land form part of the land comprised in the railway reserve vested in the 1<sup>st</sup> defendant. DW1 said that sometimes in **1930**, the 1<sup>st</sup> defendant did surrender to the government the land on which the suit premises are located upon request by the government. DW1 testified that upon surrender, the

boundaries to the surrendered land vis-à-vis the remainder were not revised to reflect that after the surrender to the government, the said land no longer fell within the railway reserve.

- 115.** DW1 said that sometimes in **1954-1955**, the 1<sup>st</sup> defendant constructed a cattle loading ramp on part of the surrendered land, and that the 1<sup>st</sup> defendant still desired part of the surrendered land to form part of its railway reserve, the 1<sup>st</sup> defendant requested the Commissioner of Lands in **August 1959** to re-allocate the land and reserve it for railway purposes.
- 116.** DW1 said that vide a letter dated **4/12/1959**, the Commissioner of Lands conceded to the request and re-allocated the said land, namely **L.R. Nos. 2116/317-326**, to the 1<sup>st</sup> defendant without demanding any payment.
- 117.** Further, DW1 said that by virtue of the re-allocation, the said parcels of land became property vested in it by virtue of the Kenya Railways Corporation Vesting Land Order **1986**, and were henceforth not replaced or revoked. DW1 said that Legal Notice No. **440 of 1963**, which had created an exclusive proprietary interest thereon in favour of E.A. Railways

Corporation, the predecessor to the 1<sup>st</sup> defendant. DW1 said that the suit properties therefore fell within land reserved for the railway operations within Kitale Railway Station, as captured in the Kitale Development Plan **1972-1977** as approved by the Commissioner of Lands on **3/12/1973**, the layout of Kitale Station Drawing No. **381** Rev, Kitale Station Yard Layout Drawing No. **9.8** dated **2/1/1985**, and Survey Plan E.R. No. **24/2 of 1926**.

- 118.** DW1 said that the 1<sup>st</sup> defendant, following the reallocation and reservations, never surrendered the suit properties ever again to the government for reallocation to third parties, including Meshack Odima, Sifrimus Adika Ohito, Ali Akibaya, Judith Ngaulo, Erick Maende and by extension the plaintiffs herein.
- 119.** DW1 said that there were no board meeting minutes for approval of the surrender of land by the 1<sup>st</sup> defendant to enable the Commissioner of Lands to re-allocate its land and issue title deeds to the plaintiffs, nor did it execute any deed of surrender to that effect, or ever receive monetary consideration for the acquisition of land vested in it.

- 120.** DW1 said that upon discovery of the illegal alienation or fraud, the 1<sup>st</sup> defendant issued several notices to the plaintiffs requiring them to remove the fences erected on the suit properties, followed by the filing of a **Nairobi HCCC No. 524 of 1996** against the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs and the said Meshack Odima and his team, later transferred to Kitale High Court, seeking to claim proprietary interests.
- 121.** DW1 said that the 1<sup>st</sup> defendant had also caused several cautionary notices to be registered against the title registers, which, unfortunately, were removed without an invitation to a hearing contrary to the law at the Kitale Land Registry.
- 122.** DW1 said that any alleged amendment of the Kitale Development Plan **1972-1977**, to facilitate the issuance of titles in favour of the plaintiffs and the predecessors in title, was illegal or unprocedural, having been undertaken without the involvement of the 1<sup>st</sup> defendant.
- 123.** DW1 said that the 1<sup>st</sup> defendant was not involved in the alienation of the suit parcel of land in favour of the plaintiffs or their predecessors in title, to which

the titles were issued without the requisite consents, including that of the 1st defendant.

- 124.** DW1 said that the suit parcels and at the time of alienation were not unalienated land within the meaning of the Government Land Act, rendering the contracts of sale between the plaintiffs and their predecessors, in title, void ab initio, and unenforceable.
- 125.** DW1 said that the suit properties fall within the 1<sup>st</sup> defendant's railway reserve, which is land vested in it under its mandate of providing rail transport to the public for personal and commercial use. DW1 said that reliability and revitalising the branch line to serve the public interest, failure of which the 21<sup>st</sup> defendant will adversely affect the economic status of the residents.
- 126.** DW1 said that the rehabilitation and revaluation seek to ensure that no danger arises while the 1<sup>st</sup> defendant is supplying rail transport services, failure of which the 1<sup>st</sup> defendant risks being found culpable in the event of loss or damage.
- 127.** Again, DW1 produced in support of the 1<sup>st</sup> defendant's defence the following exhibits, namely a bundle of letters on page **10** of the bundle as D.

**Exhibit No. 1(a), (b), and (c)**, a copy of KR Board Memo No. **2133, D. Exhibit No. (2)**. Bundle of cautions over the suit title registered on **27/3/1997, as D. Exhibit No. 3(a), (b), (c), and (d)**, approved development plan Ref. No. **91**, approved on **17/1/1974 as D. Exhibit No. (4)**, Survey Plan **F.R. 24/2 of 1926, D. Exhibit No. 5(a) and (b)**, Tracing plan station layout drawing No. **5181** dated **11/11/1954, D. Exhibit No. (6)**, Drawing Layout No. **98** dated **8/7/1955, D. Exhibit No. (7)**, Drawing No. **381, D. Exhibit No. (8)**, copies of notices dated **20/3/2018, 27/3/2017, and 30/9/2019, as D. Exhibit No. 9(a), (b), and (c)**, Legal Notice No. **44 of 1963** and No. **24 of 1986, D. Exhibit No. 10(a) and (b)**, bundle of letters on the 2<sup>nd</sup> trial bundle dated **2/10/2024 as D. Exhibit No. 11(a)-(k)**, bundle of cautions registered against **Kitale Block 4/196, 445, 436, 435, and 446, as D. Exhibit No. 12(a) - (e)**.

**128.** DW1 said that, going by a survey plan **F/R No. 24/2 of 16/4/1926, it** defines the Kitale Railway Station reserve in terms of coordinates, bearings, distances, and beacons marking the extent of the station as per Beacon No. **3A Rail F**. DW1 said that the 1<sup>st</sup>

defendant's land is also captured in the survey plan under the two vesting Orders **1963** and **1986**, as L.R. No. **245**. Based on the foregoing exhibits, DW1 urged the court to find and hold that the suit parcels of land fall within and inside the railway reserve.

**129.** Similarly, DW1 said that as per the 2<sup>nd</sup> revised plan No **381**, the Kitale Railway Station is clearly defined, with its boundaries and a general layout to include the area occupied by the cattle crash. DW1 said the same position applies with **D. Exhibit Nos. (7), 10(a) and (b), 11(d) and (4)**.

**130.** DW1 said that the Kitale Railway Station Operational area had also been reserved by the Commissioner of Lands in **1956**, vide letters **D. Exhibit No. 11(a) and (b)**, which letters, dated **26/11/1986** and **3/12/1959**, to date have not been revoked or consent given to the government by the 1<sup>st</sup> defendant for registration of the suit properties in favour of any third parties, least of all the plaintiffs herein.

**131.** DW1 said that the suit properties, as established currently, create a safety issue to the railway operations as they fall within the railway visibility Diamond area of the railway level crossing and the

standard railway reserve of the mainline between Kitale and Eldoret. DW1 said that Land Ref. Nos. **197, 198, and 199** are approximately **2.8** meters from a railway track, hence hindering railway operations on the lines as captured in **D. Exhibit No. 26(c) and (d)**.

**132.** DW1 said that ordinarily, no developments are and can be allowed in the railway diamond visibility area to ensure that there is clear visibility between motorists on the road and the train driver for the safety of road users and the train operation. DW1 said that this area is defined as a minimum of **300ft (91.4 meters)** along the intersection of the road and the railway.

**133.** DW1 said that only vegetation and cultivation of not more than **90** inches is allowed in the area as per the ERH Engineering Manual Vol. **1 of 1962** and the Physical and Land Use Planning Act, which defines the minimum length as **10** meters along the intersection of the road and the railway. The manual was not produced before the court.

**134.** In cross-examination, DW1 admitted that she was not a licensed government surveyor in line with the memo dated **28/10/2025** by the Chief Registrar of

the Judiciary, from the Land Surveyors Board. DW1 said that she never prepared an expert survey report, save her witness statement to present before the court.

**135.** Concerning **D. Exhibit No. 1(a)** and **(b)**, DW1 said that there are two ways of locating a property, one being through the use of coordinates, while the other is by physical features. In this case, she said that **D. Exhibit No. 10(a), (b), and (d)** had given a general description of the land, without northings and eastings.

**136.** DW1 admitted that **D. Exhibit No. 10(a)** refers to no survey plan, land reference number, or physical features. DW1 said that between **1963** and **1985**, she was not privy to any letters of allotment issued to the 1<sup>st</sup> defendant by the Commissioner of Lands other than the letter of reservation dated **4/12/1959**, which she had produced as **D. Exhibit No. 11(d)**.

**137.** According to DW1 **D. Exhibit No. 11(a)** lacks a mathematical description of the land. DW1 said that **D. Exhibit No. 11(d)**, however, refers to a plan, which gives the physical description of the reserved land. DW1 said that the 1<sup>st</sup> defendant had yet to

acquire a title deed or deed plan for the disputed parcels of land. DW1 said that **D. Exhibit No. (5)** was not a land survey touching on the suit land.

**138.** DW1 conceded that after **D. Exhibit No. (5)**, more surveys had been done by the Director of Surveys, as can be seen from **P. Exhibit No. 26(b) and (d), and (5)**, which show the coordinates and beacons in the survey plan.

**139.** DW1 admitted that before writing her witness statement, she was privy to those subsequent survey plans. Other than **D. Exhibit No. 9(a), (b), and (c)**, DW1 admitted that the 1<sup>st</sup> defendant did not serve the plaintiffs with any specific notices before the demolition by a multi-agency team.

**140.** DW1 could not tell how the demolition was organised, who was involved, or when it took place. She, however, admitted that part of the 1<sup>st</sup> defendant's security team was involved.

**141.** DW1 admitted that there were no court orders in favour of any of the defendants when the demolition took place. DW1 said that it was not the 1<sup>st</sup> defendant's policy to destroy private property; otherwise, the 1<sup>st</sup> defendant's security department did not file before the court an incident report on

what transpired on the material date in issue. DW1 could not confirm if the 1<sup>st</sup> defendant involved the National Land Commission in the recovery of the land or lodged a complaint to review any alleged illegal alienation through grants of its land.

**142.** DW1 admitted that the 1<sup>st</sup> defendant had not succeeded in causing the title deeds held by the plaintiffs to be cancelled or revoked before the demolition exercise. DW1 admitted that after the demolition, the 1<sup>st</sup> defendant exclusively took over vacant possession of the said plots from the plaintiffs with effect from **29-30/1/2021**. She denied that the 1<sup>st</sup> defendant's acts amounted to impunity. DW1 admitted that the 1<sup>st</sup> defendant had previously filed another suit as per **D. Exhibits No. (22) and (23)**, which were dismissed for want of prosecution on **24/5/2001**.

**143.** DW1 said that between **2001** and **2021**, the plaintiffs were still utilising the land. DW1 admitted that the 1<sup>st</sup> defendant has not filed any rival valuation report to challenge **P. Exhibit No. (27)**. DW1 clarified that she is a member of the Institution of Surveyors of Kenya (ISK) No. **1701**. DW1 clarified that the railway reserve is clearly defined in the

documents relied upon by the 1<sup>st</sup> defendant in this suit, and in particular, **D. Exhibit No. (8)** and **11(d), (h)** and **(i)**. DW1 insisted that valid eviction notices had been issued to the plaintiffs as per **D. Exhibit No. 1(b)** and **(c)**.

**144.** The plaintiffs rely on written submissions dated **24/2/2026**, isolating six issues for determination. It is submitted that the plaintiffs' claim was substantiated through six witnesses, namely, PW1, the 1<sup>st</sup> plaintiff and a director of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs, PW2, a licensed surveyor, PW3, a licensed valuer, PW4, a licensed accountant, and PW4 and PW5, a licensed accountant and auditor respectively.

**145.** The plaintiffs submit that although the 1<sup>st</sup> defendant testified DW1, paragraph **7** of the statement of defence shows that it was at the heart of the demolition activities, which were not sanctioned by any court order. The plaintiffs submit that despite the existence of the National Land Commission, with powers to review the grants and titles under **Section 14** of the National Land Commission Act, no complaint was lodged with it on the titles legality and validity between **2012** and **2017** or notices

served upon the plaintiffs with the intention by the 1<sup>st</sup> defendant to demolish or evict them from the suit premises in line with **Section 152(A) to (I)** of the Land Act.

- 146.** The plaintiffs submit that the 1<sup>st</sup> defendant harboured a real intention to evict them from the suit properties for a long time, but were not prepared to follow the law and the Constitution. The plaintiffs submit that the only basis for the objection to the validity and legality of the titles was a survey plan **FR 24/2**, dated **1921**, which they proved to have been overtaken by events and replaced with **FR 64/12** and **84/36**.
- 147.** The plaintiffs submit that the 1<sup>st</sup> defendant to date has no deed plan to its alleged land, survey for the same, letter of allotment, or any iota of document to support its claim for the suit properties, and does not even pay rates or land rent for the same.
- 148.** The plaintiffs submit that the totality of the yawning gaps in the 1<sup>st</sup> defendant's evidence leads to one conclusion: that the plaintiffs' properties were demolished through a well-planned process undertaken by a government multi-agency team in which the 1<sup>st</sup> defendant took the law into its own

hands and decided to evict and demolish the suit properties.

**149.** The plaintiffs submit that no iota of legally admissible evidence with probative value was adduced to support the 1<sup>st</sup> defendant and indeed all the other defendants, contending that the plaintiffs' titles to the suit premises were invalid or unlawfully acquired. The plaintiffs submit that it is settled law that an expert's evidence must have a basis. In this case, the evidence of DW1 is not only baseless but also inadmissible, for it is based on an alleged letter of allotment which does not specify the alleged title numbers to the property vested in it dated **4/12/1969**.

**150.** The plaintiffs submit that no title documents exist to support the contention of DW1 that the 1<sup>st</sup> - 3<sup>rd</sup> plaintiffs' properties belong to the 1<sup>st</sup> defendant. The plaintiffs submit that evidence of an expert is not automatically admissible and the court must test its credibility and its foundation, as held in **Criticos - vs- National Bank of Kenya Ltd [2022] KECA 870 [KLR]**, citing with approval **Stephen Kinini Wangondu -vs- The Ark Ltd [2016]**.

**151.** In this instance, the plaintiffs submit that the evidence of DW1 tendered no survey report. The plaintiffs submit that the 1<sup>st</sup> defendant had filed **Nairobi HCCC No. 624 of 1996**, later on **Kitale HCCC No. 131 of 1997**, to invalidate the titles held by the 1<sup>st</sup> - 3<sup>rd</sup> plaintiffs which was dismissed for want of prosecution under **Order 16 Rule 5** of the Civil Procedure Rules, and which dismissal though does not act as a bar, to bringing a similar cause of action, the party must overcome the defence of limitation of action, as per **Order 16 Rule 4** of the Civil Procedure Rules.

**152.** The plaintiffs submit that the 1<sup>st</sup> defendant is barred from raising the issue of the validity of the 1<sup>st</sup>, - 3<sup>rd</sup> plaintiffs' titles as its defence is res judicata. The plaintiffs submit that they have produced documents of ownership, including documents of purchase of plots, and change of user, which, in the initial suit, the 1<sup>st</sup> defendant had admitted that the plaintiffs owned the plots. The plaintiffs submit that PW3 confirmed that the plaintiffs' suit properties were lawfully surveyed and the subdivisions were lawful after the 1<sup>st</sup> defendant's surveys were lawfully

replaced by subsequent surveys on the plots now owned by the 1<sup>st</sup> - 3<sup>rd</sup> plaintiffs.

- 153.** The plaintiffs submit that no evidence was tendered by any of the defendants to impeach the titles held by the 1<sup>st</sup> - 3<sup>rd</sup> plaintiffs with respect to the suit properties; otherwise, the burden was on the defendants to empirically prove that there was a corrupt scheme or inherent invalidity to support the said allegations under **Section 24** of the Land Act.
- 154.** The plaintiffs submit that though the 1<sup>st</sup> defendant contended it was allocated and vested ownership of the subject properties, no evidence was adduced or a title to the subject properties in that respect.
- 155.** Reliance is placed on the **Kenya National Highway Authority -vs- Mistry Premji Ganji Investment Ltd [2024] KECA 500 [KLR]**, that recent surveys to ascertain boundaries, the gazette notices, and the intention to acquire the land remained as such in the absence of a demonstration for the compulsory acquisition to have taken place.
- 156.** The plaintiffs submit that they have adduced enough evidence, including the OB showing that the structures on the suit properties were demolished after which the 1<sup>st</sup> defendant took over, moved in,

and is currently occupying the said suit properties. The plaintiffs submit that in paragraph **7** of the 1<sup>st</sup> defendant's statement of defence, it admitted that there was demolition and that the same was undertaken by a multi-agency team of the defendants, which it allegedly attempted to justify.

**157.** The plaintiffs submit that none of the defendants called a witness to deny that there was demolition by the team comprised of the police, county government officials, national youth service, and other government personnel. The plaintiffs submit that it is clear beyond peradventure that the demolition of its structures greatly violated their rights, disrupted the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs' business activities, and that the same was done without any lawful proceedings or processes to challenge the titles to the suit premises.

**158.** Further, the plaintiffs submit that they had not reported the matter to the National Land Commission, the 2<sup>nd</sup> defendant, to review the titles between **2012 - 2017**; the suit properties did not appear in the Ndungu Report, and no court order was procured before the demolition and the eviction. Reliance is placed on **Kenya Railways**

**Corporation -vs- Omboto & Another [2025] KECA 537 [KLR], Portsmouth Holdings Ltd -vs- Kenya Railways Corporation [2025] KEELC 4909 [KLR], and Kental Enterprises Ltd -vs- Attorney General & Others [2025] KEELC 1470 [KLR].**

- 159.** The plaintiffs submit that they have called many witnesses to prove that, since their respective rights were violated, compensation should be given for both the value of the properties and the loss of income, which is based on expert reports and was not challenged through rival expert reports. Reliance is placed on **Criticos -vs- National Bank of Kenya Ltd (supra).**
- 160.** Regarding loss of income, the plaintiffs submit that PW1, PW2, PW3, PW4, PW5, and PW6 testified at great length to explain all the income channels and revenue of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs, totaling **Kshs.79,020,810.02** and **Kshs. 59,510,865.00**, respectively, as contained in pages **15, 210, 216 to 271, 225, and 232 to 234** of the plaintiffs' 1<sup>st</sup> bundle of documents. Reliance is placed on **Agricultural Development Corporation -vs-**

**Harjit Pandhal Singh & Another [2019] KECA 459 [KLR].**

- 161.** The 1<sup>st</sup> defendant relies on written submissions dated **34/2/2026**, isolating six issues for the court's determination. On whether the suit properties fall under the 1<sup>st</sup> defendant's operational areas and were fraudulently acquired by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs, the 1<sup>st</sup> defendant submits that Survey Plan No. **23062** and **FR 24/2** show that the plan is for Portion No. **L.R. No. 211** measuring **118.8 acres**, and captures the coordinates of the beacons placed, distances, and bearing, markings, the extent of the Kitale Station Reserve, and also highlights the 200 wide road reserve distant from the railway boundary.
- 162.** The 1<sup>st</sup> defendant submits that whereas PW2 testified and relied on several maps in support of the plaintiffs' claim, he was unable to trace any PDP that was drawn and approved before the drawing of Survey Plan **FR 64/17** and **FR 84/36**.
- 163.** The 1<sup>st</sup> defendant submits that in cross-examination of both PW1 and PW2, several admissions came out that there was surrender, planning of suit properties for public purposes as per Kitale Development Plan

**1972-1977**, and that there were no allotment letters available before the court concerning the original allottees, that the suit properties fall along the railway sidings which constitute land vested in the 1<sup>st</sup> defendant's reserved land, which the 1<sup>st</sup> defendant has been using as a cattle crush.

**164.** Therefore, the 1<sup>st</sup> defendant submits that the plaintiffs, with these admissions, were required to demonstrate that they lawfully acquired the suit properties when the root title was challenged, as held in **James Joram Nyaga & Another -vs- Attorney General & Another [2019] eKLR, Munyu Maina -vs- Hiram Gathiha Maina Civil Appeal No. 239 of 2009.**

**165.** On the other hand, the 1<sup>st</sup> defendant submits that it was required to discharge the burden which it has, that the titles to the suit properties were obtained through fraud on a balance higher than in ordinary suits, as held in **Arthi Highway Developers Ltd -vs- West End Butchery Ltd & Others [2015] eKLR**, and in **Kinyanjui Kamau -vs- George Kamau [2015] eKLR.**

**166.** The 1<sup>st</sup> defendant submits that the plaintiffs have failed to prove and demonstrate that there was a

proper allocation of land in favour of the alleged original allottees as per the Government Land Act. Reliance is placed on **Dina Management Ltd -vs- County Government of Mombasa & Others [2023] KESC 30 [KLR]**, citing with approval **Nelson Kazungu Chai & Others -vs- Pwani University [2014] eKLR**, and **African Line Transport Co. Ltd -vs- Hon. Attorney General, Mombasa HCCC No. 276 of 2013**, that planning precedes surveying and allocation.

**167.** The 1<sup>st</sup> defendant submits that at the time Survey Plans **FR/64/17**, and **FR/84/36** were drawn, the applicable planning law was **Section 24** of the Town Planning and Development Ordinance, 1931, which made it mandatory for land within any municipality or township to be divided or subdivided in accordance with a town planning scheme approved under the Ordinance, unless there was an express permission of the Commissioner for Local Government.

**168.** The 1<sup>st</sup> defendant submits that the plaintiffs have failed to prove proper and lawful acquisition of the suit properties owing to the absence of any application letter for allocation, letters of allotment

as proof of perfection of the same by the original allottees, and an approved town planning scheme.

**169.** The 1<sup>st</sup> defendant submits that in the absence of an approved town planning scheme that led to Survey Plan **FR/64/7**, and the creation of **L.R. No. 2116/73-93**, the said survey plan was not lawfully and properly created or drawn. The 1<sup>st</sup> defendant submits that Survey Plan No. **84/36**, which led to the creation of **LR No. 2116/89**, was not properly and lawfully done in the absence of an approved town planning scheme with a clear express permission of the Commissioner for Local Government.

**170.** The 1<sup>st</sup> defendant submits that the plaintiffs have also failed to demonstrate proof of surrender of interest in the suit properties, which fall within the **5.1 acres** reserved for railway use. The 1<sup>st</sup> defendant submits that **Sections 13** and **14** of the Kenya Railway Corporation Act stipulate the process of surrender of land by the 1<sup>st</sup> defendant before allocation of its land for private purposes, and since there was no such surrender for re-allocation, which was sought and obtained by consent from the

original allottees, and by extension, the plaintiffs have no valid titles on already reserved railway land.

- 171.** The 1<sup>st</sup> defendant submits that when land has been reserved for public use, the same cannot be used for private purposes unless it is surrendered for reallocation within the meaning of **Section 2** of the Government Land Act (repealed) and **Sections 13** and **14** of the Kenya Railway Corporation Act. Reliance is placed on ***Kipsirgoi Investments Ltd - vs- Kenya Anti-Corruption Commission Civil Appeal No. 288 of 2010***, and ***Kenya Anti-Corruption Commission -vs- Ahmed Karama Said [2011] eKLR***.
- 172.** The 1<sup>st</sup> defendant submits that the right to acquire land under Article 10 of the Constitution and **Sections 24, 25, and 26** of the Land Registration Act does not extend to land where acquisition is fraudulent or unlawful. Reliance is placed on ***Henry Muthee Kathurima -vs- Commissioner of Lands & Another [2015] eKLR***.
- 173.** On whether the plaintiffs have proved their claim for trespass and demolition as alleged, the 1<sup>st</sup> defendant submits that since the suit properties fall within its railway reserve, there was no trespass as

alleged or at all, as the 1<sup>st</sup> defendant was utilising and protecting properties which are reserved and vested in it. The 1<sup>st</sup> defendant nevertheless submits that the plaintiff has not discharged their mandate under **Sections 107, 108, 109, and 110** of the Evidence Act to prove trespass and demolition as alleged in **2021**, through either eye witnesses, photographs, or reports by experts such as contractors, engineers, or architects, showing drawings or outcomes of the same out of police investigations.

- 174.** The 1<sup>st</sup> defendant faults the police report for a lack of an itemised list of items lost or destroyed.
- 175.** Regarding the audit report produced as **P. Exhibit No. (34)**, the 1<sup>st</sup> defendant submits that PW5 and PW6 confirmed that, apart from other factors, the issue of demolition was not captured as having had any adverse impact on the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs' business.
- 176.** On **P. Exhibit No. 37(a) and (b)**, the 1<sup>st</sup> defendant submitted that PW6 said that he never witnessed the demolition and that he was not provided with any proof of tenancy agreements, proof of payment of rent, or loss of items on **LR No. Block 11/316**,

and **LR No. 209/12686**, by the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs' businesses.

- 177.** The 1<sup>st</sup> defendant submits that if the court were to find there was demolition, then the plaintiffs had, as per the list of documents filed and produced, the encroached or had been issued with several adequate warnings, or notices for a period of two years, which were available to all.
- 178.** The 1<sup>st</sup> defendant submits that special damages must not only be specifically pleaded but also distinctly proved, as held in **Kenya Power and Lighting Company Limited -vs- Phillip A M Kimondiu [2018] eKLR**. The 1<sup>st</sup> defendant submits that the plaintiffs' amended plaint has failed to specifically plead the breakdown of what constitutes the special damages. The 1<sup>st</sup> defendant submits that the reports produced by PW4 and PW6 do not constitute pleadings within the meaning of **Section 2** of the Civil Procedure Act.
- 179.** It is submitted relying on **Galaxy Paints Co. Ltd vs Falcon Guards Ltd [2000] eKLR** and **Mumo Matemu -vs- Trusted Society of Human Rights Alliance & Others [2013] eKLR**, that the plaintiffs by raising the specifics of the special

damages by way of documents without doing so in the plaint, they are enlarging the issues which ought to have been set in the amended plaint, hence jeopardizing its right to fair trial.

**180.** As to the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs alleging to be the legitimate owners of the suit properties, where the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs conduct their business.

**181.** The 1<sup>st</sup> defendant submits that in the absence of proof of a lease agreement between the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs and the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs, or proof of payments of rent, a company being separate from its shareholders or directors, as held in **Salomon -vs- Salomon & Co. Ltd [1897] AC 22**, and in **Victor Mabachi & Another -vs- Nurturn Bates Ltd [2013] eKLR**, and **Justine Nyambu -vs- Jaspa Logistic [2017] eKLR**, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs should be treated as separate persons in law.

**182.** The 1<sup>st</sup> defendant therefore submits that in the absence of declared rental income returns or bank statement, or receipts to the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs or proof of occupation of the suit premises by the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs from the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs, the court find that the alleged long-term leases referred into the reports **P. Exhibit No.**

**38(a)** and **(b)** by PW6 do not clearly relate to the suit properties herein.

**183.** The 1<sup>st</sup> defendant submits that **Section 3(3)** of the Law of Contract Act stipulates that any agreements affecting the disposition of land, which includes lease agreements, ought to be in writing; otherwise, they will be unenforceable. Reliance is placed on **Thomas Kimutai Biwott & Another -vs- Joseph Ndalaya Muyesu [2021] eKLR, Silverbid Kenya Ltd -vs- Junction Ltd & Others [2013] eKLR, John Michael Wanjao -vs- Alubala Abenayo Andambi [2011] eKLR,** and **Emily Jebet Mitei -vs- Baseland Property Consultants Ltd & Others ELC No. 56 of 2015.**

**184.** The 1<sup>st</sup> defendant submits that it is necessary to have the nexus amongst the 1<sup>st</sup> - 3<sup>rd</sup> plaintiffs demonstrated to support their claim of occupation, loss, and damages. In the absence of any agreements, proof of payment of rent, or proof of occupation of the suit properties, the 1<sup>st</sup> defendant urges the court to find that the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs have failed to demonstrate their claim that they primarily conducted their business and or

commercial activities on the suit premises as pleaded.

**185.** On the user of land, the 1<sup>st</sup> defendant submits that it is not in issue that the user of the suit premises was residential. Though the PW1 produced several letters requesting to a change of user from the Commissioner of Lands, sometimes in **1990s**, the PW1 in his cross-examination admitted that the application for residential to commercial was still pending, he had no documentation on the change of user that PW1 and PW6 had no letter authorizing the change of user, it means, therefore, that the plaintiffs were not authorized to conduct businesses and or carry out commercial activities on the suit premises as the user of the properties was limited to residential going by the letter of the Town Planning Advisers dated **1/10/1959**, on the 1<sup>st</sup> defendant's trial bundle.

**186.** The 1<sup>st</sup> defendant submits that **Article 66** of the Constitution provided State powers to regulate the use of land or any interest in or right over any land in the interest of defence, public safety, public order, public morality, public health, or land use planning. The 1<sup>st</sup> defendant submits that one of the

reasons for such regulation is to ensure that the principles of land policy under **Article 60** of the Constitution are met.

**187.** The 1<sup>st</sup> defendant submits that such a regulatory framework includes the Physical and Land Use Planning Act, the Physical Planning Act (the applicable law when the change of user was requested in **1990**), the Land Act, the Land Registration Act, amongst others. Therefore, the 1<sup>st</sup> defendant submits that such laws stipulate the need for issuance of a change of user to align with the zoning laws governing land use in a specific region in a bid to regulate in the interest of public safety.

**188.** In this instance, the 1<sup>st</sup> defendant submits that the 4<sup>th</sup> plaintiff has pleaded and testified that they sell and distribute building and hardware materials, though they produced no business license to that effect, while the 5<sup>th</sup> plaintiff admitted had stocked fuel on the suit premises for purposes of refueling its fleet of vehicles. The 1<sup>st</sup> defendant submits that such activities are not contemplated in an area whose user is categorised as residential.

**189.** For instance, the 1<sup>st</sup> defendant submits that quarrying activities require holders of such permits

under **Section 179** of the Mining Act and **Section 141** of the Environmental Management and Co-ordination Act (EMCA) to ensure sustainable use of land by managing any materials on its property, and restore any abandoned mines or quarries should the need arise. Therefore, it is submitted that the plaintiffs had an obligation to demonstrate that the Commissioner of Lands approved the change of user from residential to commercial to enable the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs to conduct their commercial activities.

**190.** The 1<sup>st</sup> defendant submits that the said transactions were, in law, a nullity which the court should not enforce or aid an illegality for the plaintiffs to benefit out of it. Reliance is placed on **Macfoy -vs- United Africa Co. Ltd [1961] ALLER 1169**, and **Birket -vs- Arcon Business Machines Ltd [1999] 2 ALLER 429**.

**191.** The 1<sup>st</sup> defendant submits that without consent to sublet, from the head lessor under **Section 55** of the Land Registration Act, lack of permits or licenses to trade, proof of permits or license to conduct quarrying business, under **Section 10** of the Mining Act, proof of license, permit or authority to the purchaser, store, handle and sell fuel or damage to

the fueling station, such as from National Environment Management Authority (NEMA) which are mandatory under EMCA, the court is urged to find that the plaintiffs were undertaking illegal and unauthorized commercial activities on the suit premises.

**192.** On loss of stock, the 1<sup>st</sup> defendant submits that the PW1 and PW4 were unable to prove the acquisition of stocks worth **Kshs. 50,431,888.00**, or any sales or purchases of stocks of this amount by the 4<sup>th</sup> plaintiff. The 1<sup>st</sup> defendant submits that PW4 admitted that the audited reports or the records did not capture such details. The 1<sup>st</sup> defendant submits that the said situation was corroborated by PW5, who admitted that he gave a qualified opinion due to the inventories kept by the 4<sup>th</sup> plaintiff as of **30/6/2021**, being unsatisfactory. In view of the qualified opinion and non-declaration of the said losses in the tax returns, as per the evidence of PW4, PW5, and PW6, the 1<sup>st</sup> defendant submits that the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs ought to have presented evidence before the court on the acquisition of stock in trade, worth **Kshs. 50,431,888.00** and **Kshs. 2,412,788.00**, respectively.

- 193.** Regarding the demolished building and materials, the loss amounts to **Kshs. 22,367,321.00**, and **Kshs. 2,378,550.00**, the 1<sup>st</sup> defendant submitted that other than the evidence of PW6, the plaintiffs failed to tender any evidence in the form of a structural damage report prepared by either PW6 or a qualified quantity surveyor to enable the court to verify the same.
- 194.** The 1<sup>st</sup> defendant submits that evidence by way of reports from the contractors, engineers, architects, or quantity surveyors that were engaged to construct the building and structures herein, proof of the existence of development plans, building plans or drawings, photographs, and supporting documents, ongoing, completed, or otherwise, including a bill of quantities capturing the costs were not availed by both PW1 and PW4.
- 195.** The 1<sup>st</sup> defendant submits that no invoices and documents accompanied by corresponding records, receipts, delivery notices, and acknowledgements from the alleged suppliers, duly paid for by the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs, including discounts, were not availed before the court by PW1, PW2, PW4, PW4,

PW5, and PW6, as regards the constructions of the building, and the materials used.

- 196.** Moreover, the 1<sup>st</sup> defendant submits that PW4 admitted that he did not capture any impairment of property in the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs' books of account, and so was the case in the audited report presented by PW5 and PW6, making the claim on this head unsupported by evidence.
- 197.** On the good lost in the alleged demolition, the 1<sup>st</sup> defendant submits that the figure of **Kshs. 42,236,163.00** was not supported by any credible and or reliable documentation of any, in terms of receipts to prove the acquisition of the said goods.
- 198.** Regarding the profit of **Kshs. 47,293, 100.00**, the 1<sup>st</sup> defendant, placing reliance on the case law of **KPLC -vs- Kimondiu** (*supra*), submits that the same does not constitute special damages as it is not a claim that can be inferred from the nature of the act, nor does it follow from the ordinary course of business. The 1<sup>st</sup> defendant submits that PW6 was categorical that such a loss was a mere projection and was not constituted in actual financial records. The 1<sup>st</sup> defendant submits that the plaintiffs did not specifically plead loss of profits and or general

damages; otherwise, parties are bound by their pleadings, as held in **Raila Odinga & Others -vs- Independent Electoral and Boundaries Commission & Others [2017] eKLR**, and hence, a claim of this nature raised in the first instance by way of documentary evidence should be disregarded.

- 199.** The 1<sup>st</sup> defendant submits that even if the courts were to take such a claim as falling under special damages, which it is not, the plaintiffs failed to produce proof of previous years' financial records to demonstrate how the projection of **Kshs. 47,293,100.00** was based on historical sales and projections.
- 200.** The 1<sup>st</sup> defendant submits that PW6 was categorical that he was not aware of the previous financial performance of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs, as a historical information on the basis of applying a hybrid methodology to arrive at a loss of profit of **Kshs. 47,293,100.00**, including the audited financial accounts for the past four years, or the sales record.
- 201.** The 1<sup>st</sup> defendant submitted that the projection by the loss of profit was not based on any verifiable

financial or sales record of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs, hence it had probative value as evidence of an expert under **Section 48** of the Evidence Act for lack of supporting documents or facts to such opinion. Reliance is placed on **Kagina -vs- Kagina & Others [2021] KECA 242 [KLR]**.

- 202.** The 1<sup>st</sup> defendant submits that PW4 and PW6 confirmed that no loss was indicated and that, on the contrary, the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs made a profit due to an increase in revenue from sales, and despite the other disclosed risks, meaning that the alleged demolition, despite not being captured in the records, had no significant impact.
- 203.** On loss of machinery and tools, the 1<sup>st</sup> defendant submitted that PW1 produced no proof of any acquisition of the same by way of receipts or ownership documents or proof of damage or loss of the same during the demolition, equivalent to what is prayed for or captured in the reports.
- 204.** As to relocation costs, the 1<sup>st</sup> defendant submits that PW6 only referred to loss incurred in plots **Block 11/316**, one industrial showroom, and go down on **L.R. No. 209/12686**, as **per P. Exhibit No. 37(a)** and **(b)**.

- 205.** That notwithstanding, the 1<sup>st</sup> defendant submits that proof to support the relocation costs of **Kshs 1,950,000.00** or **Kshs. 600,000.00** was not tendered or captured in the audit reports or supporting documents by way of lease agreements, proof of rent, proof of insurance, or transport expenses. Reliance is placed on **Richard Kipkemei Limo -vs- Hassan Kipkemboi Ngeny & Others [2019] eKLR, Thomas Kimutai Biwott -vs- Joseph Ndalaya Muyesu (supra), Silverbid Kenya Ltd -vs- Junction Ltd & Others (supra), John Michael Wanjao -vs- Alubala Abenayo Andambi (supra), and Emily Jebet Mitei -vs- Baseland Property Consultants Ltd (supra).**
- 206.** On compulsory acquisition, the 1<sup>st</sup> defendant submits that the suit parcel of land, having been established as reserved land, cannot be subjected to compulsory acquisition, nor has the process commenced under **Section 107** of the Land Act
- 207.** It is submitted that the 1<sup>st</sup> defendant was not aware of the commencement of such a process as alleged at pages **213** and **228** of the reports produced by PW6.

**208.** The 1<sup>st</sup> defendant submits that the valuation report produced by PW3 was not accompanied by a qualification, permits, or licenses of the maker as a valuer, who is qualified and licensed to undertake such reports. Reliance is placed on **Section 48** of the Evidence Act and **Kagina -vs- Kagina (supra)**, that the expert report is not based on facts, was a mere speculation, and should not be binding on the court.

**209.** The issues calling for determination are:

- (1) If the plaintiffs have pleaded and proved that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs are bona fide purchasers for value without notice of any defect of the title, absolute and indefeasible owners of the suit properties.**
- (2) If the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs have proved that they were bona fide operators of businesses and commercial activities on the suit properties.**
- (3) If the plaintiffs have proved trespass onto, commission of acts of destruction, loss, and wastage by all the defendants on 29/1/2021, therefrom, the forceful occupation of the suit properties by the 1<sup>st</sup> defendant, to date.**
- (4) If the defendants generally and the 1<sup>st</sup> defendant in particular were justified to enter onto, commit acts of trespass, commission of destruction, and**

**subsequent forceful eviction and exclusion of the plaintiffs from the suit premises.**

- (5) If the plaintiffs have proved special damages against the defendants.**
- (6) If the suit properties are part of reserved or vested land falling within the 1<sup>st</sup> defendant's operational area.**
- (7) If the suit properties are public land as surrendered and vested land belonging to the 1<sup>st</sup> defendant, which was fraudulently and allegedly alienated for private use, yet it was unavailable for re-allocation.**
- (8) If the defendants gave adequate, and or lawful notice to vacate of an intended eviction, which the plaintiffs ignored.**
- (9) If the defendants were justified in entering into, demolishing, evicting, and taking vacant possession on 29/1/2021.**
- (10) Whether the plaintiffs are entitled to the reliefs sought**
- (11) What is the order as to costs?**

**210.** It is trite that courts determine disputes within the framework of the pleadings and issues framed by the parties, as held in **Independent Electoral and Boundaries Commission & Others -vs- Stephen Mutinda Mule & Others [2014] eKLR, Berlin Equipment Ltd -vs- Mascor (K) Ltd Civil Appeal**

**No. E112 of 2023 [2026] KECA 530 [KLR] (13<sup>th</sup> March 2026) (Judgment).**

- 211.** In **Mburu -vs- Kariuki & Others Civil Appeal No. 15 of 2020 [2026] KECA 529 [KLR] (13<sup>th</sup> March 2026) (Judgment)**, the court cited **Odd Jobs -vs- Mubia (1979) EA 476 and Ann Wairimu Wanjohi -vs- James Wambiru Mukabi [2021] eKLR**, that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are the primary document that guides the court and the parties concerning the claim and the contesting position of the parties.
- 212.** The court said that although it is desirable that, where necessary, the pleadings should be amended to bring in all the issues, the **Odd Jobs -vs- Mubia (1979) EA 476** case remains good law, that in limited circumstances, where an unpleaded issue is crucial to the matters in issue, the court may determine a suit on an unpleaded issue, provided both parties have clearly addressed the unpleaded issue, in their evidence or submissions and left the matter for the determination of the court.

- 213.** A cause of action is an act on the part of the defendant that gives the plaintiff his cause of complaint. See **D.T. Dobie & Co. (K) Ltd -vs- Muchina & Another [1980] 3 [KLR]**. In **Ruto & 2 Others -vs- Tesot & Others Civil Appeal No 82 of 2020 [2026] KECA 321 [KLR] (27<sup>th</sup> February 2026) (Judgment)**, the court said a cause of action arises when the plaintiff becomes aware of the act complained of.
- 214.** The plaintiffs' cause of action, as pleaded, is that on **29/1/2021**, the defendants, without any colour of right, notice or justification, court order or otherwise, at around **10:00 -11:00 p.m.**, invaded the 4<sup>th</sup> and 5<sup>th</sup> defendants' business and commercial business located on the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs' suit properties.
- 215.** It is pleaded that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs own the suit properties of land as per certificates of leases that were issued to them issued following a valid, regular and lawful purchases and transfer, which unfortunately the defendants on **29/1/2021**, caused wanton and brazen destruction to the structures and other business elements put up there

with, and forcefully and illegally evicted the plaintiffs from the suit properties.

**216.** It is averred that the defendants infringed on the rights and privacy, personal security, protection of property, and fair administrative action, without justification and in total disregard of the law on eviction, their proprietary rights, fair hearing, yet the titles to the suit properties remain intact, legitimate, unchallenged, and valid. As a result of the foregoing, the plaintiffs aver that they suffered loss, damage, and eviction from the suit properties, which the 1<sup>st</sup> defendant took possession of and has denied them use, access, possession, and occupation to date, leading to relocation of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs' businesses.

**217.** The 1<sup>st</sup> defendant's answer to the plaintiffs' complaint is that the five parcels of land comprising the suit properties were initially known as **L.R. No. 216/317, 378, 379, 321, 322, 323, 324, 325,** and **326**, and were part of land comprised in the Kitale Railway reserve.

**218.** It is averred that the suit properties were and remain vested in the 1<sup>st</sup> defendant, which though in **1930**, it were surrendered to the government, its

boundaries, were never revised to effect the surrender, but instead continued to utilize the same as a cattle crush, or loading ramp until **1954-1955**, it reapplied for its reallocation which was allowed sometimes in **1959** by the Commissioner of Lands, and thereafter the suit properties became vested to it through the Legal Notice **No. 44 of 1963**, and **No. 24 of 1986**.

**219.** It is averred that the vesting or reservation was captured in the Kitale Development Plan **1972-1977**, as well as in other available survey plans and drawings produced by the 1<sup>st</sup> defendant in court. The 1<sup>st</sup> defendant averred that the suit properties upon vesting on it were never reallocated to any third parties with its consent, approval, or authority, including the predecessors to the tiles and by extension the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs herein.

**220.** The 1<sup>st</sup> defendant averred and testified based on its evidence, that if the plaintiffs and their predecessors hold any titles the same were fraudulently obtained or acquired; upon discovery of the same sometime in **1997**, it registered its proprietary interest on the tile registers; that the titles held by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs are void *ab initio*, and incapable of

enforcement and lastly, that the 1<sup>st</sup> defendant was not paid for any monetary compensation for acquisition of the land in law vested in it.

**221.** The 1<sup>st</sup> defendant denies the alleged infringement of any of the plaintiffs' constitutional rights, though it admits the demolition was carried out by a multi-agency team after adequate notices were granted to all encroachers onto its operational area for it to exercise its statutory mandate of rehabilitation, and revitalize the Leseru - Kitale branch line in public interest, the suit properties which fall within the railway reserve pose security and health risk. The 1<sup>st</sup> defendant denies any alleged loss, damage, and or infringement of any of the plaintiffs' rights.

**222.** The 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants equally opposed the suit generally and, in particular, averred that if there was any liability, the same falls under the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants.

**223.** The law is that when there are two competing claims over one piece of land, each party has a duty to tender evidence to show the root of the title it holds was procedurally, regularly, and lawfully acquired. In **Board of Trustees, National Social Security -vs- Keiyo Teachers Co-operative**

**Savings and Credit Society & 6 others [2026]**

**KECA 327 (KLR)**, at issue was land purchased by the 1<sup>st</sup> respondent in **2004**, which the 2<sup>nd</sup> - 6<sup>th</sup> respondents claimed to be gazetted prison land under Legal Notice No. **37** Prison Ordinance **1961**, making it unavailable for private alienation.

**224.** The trial court was called to determine whether the disputed parcels were classified as unalienated public land or gazetted prison land reserved for public use, which directly impacted their availability for private transactions. The court resolved that the Commissioner of Lands unlawfully allocated the land to private individuals, hence the 1<sup>st</sup> respondent had no good title due to the fraudulent and irregular nature of the land acquisition.

**225.** The court held that a person cannot transfer a better title to property than they themselves possess. The court said that gazetted land reserved for public use cannot be alienated for private purposes without degazettement. The court said that gazetted prison land was protected land unavailable for private allocation under the Government Land Act and the Physical Planning Act (repealed).

- 226.** In *Karenge & another -vs- Mbogo & Others Civil Appeal No. 52 of 2020 [2026] KECA 714 [KLR] (25<sup>th</sup> March 2026) (Judgment)*, at issue was an unsurveyed council land previously used as a dumping site which was rehabilitated into a public park, Moi's Garden, and thereafter portions were alienated for public utility purposes and allocated to hawkers.
- 227.** The Commissioner of Lands had allegedly fraudulently through misrepresentation, issued a certificate of lease over. On appeal, the contestation was whether the trial court erred in applying post-**2010** laws instead of the applicable pre-**2010** legal framework since the lease in dispute had been issued in **August 2003**. The Court of Appeal held that the legal regime in force at the time included the Government Land Act (repealed), the Physical Planning Act (repealed), and the Registered Land Act (repealed).
- 228.** The court cited **Section 106** of the Land Registration Act, that any right, interest or title, power or obligation acquired, accrued, established, before coming into force or exercisable before the coming in force of this Act shall continue being

governed by the law applicable to it immediately before the commencement of this Act, and so are the rights, liabilities and remedies of parties under any lease, thereto which was in place.

**229.** The court cited **Wreck Motors Enterprises -vs- Commissioner of Lands & Others [1997] KECA 391 [KLR]**, that title to land or property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated therein, and actual issuance of title documents, in pursuance of the provisions held.

**230.** Further, the court cited **Joseph N.K. Arap Ngok -vs- Moijo Ole Keiwua & Others [1997] KECA 1 [KLR]**, that a letter of allotment, being an invitation to treat does not constitute a contract between the offeror and the offeree or confer interest in land at all, or defeat a title of a person who is the registered proprietor of a land and that once a title is issued, it becomes indefeasible unless where fraud or misrepresentation is proved. Similarly, the court cited **Kenya National Highway Authority -vs- Shalien Masood Mughal & Others [2017] eKLR**, that the issuance of a title deed by the Registrar is a solemn act that is presumed to have been

undertaken in accordance with the law, unless there is clear evidence to the contrary that is adduced.

- 231.** In **Dina Management Ltd -vs- County Government of Mombasa & Others [2023] KESC 30 [KLR]**, the court cited **Munyu Maina (supra)**, that a claimant must go beyond the instrument of title and show that the process leading to the acquisition of title, was regular, valid, legal, procedural, and free of any encumbrances including charge that need not be noted in the register.
- 232.** The 1<sup>st</sup> defendant is alleging fraud or illegality in the manner in which its reserved and vested property was alienated for private use.
- 233.** Fraud is a serious allegation. It has to be particularized and proved, as held in **Eldoret Express Ltd -vs- Tawai Ltd & Another [2019] eKLR, Vijay Morjaria -vs- Nansingh Madhusingh Darbar (supra)**, and **Kinyanjui Kamau -vs- George Kamau (supra)**. The 1<sup>st</sup> defendant's case is that it surrendered the land in **1930** and later re-applied for it in **1959**; subsequently, there were vesting orders in **1963** and **1986**. The 1<sup>st</sup> defendant terms the alienation of the already vested land

illegal, fraudulent, and the resultant titles held by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs null and void.

**234.**

**235.** Allegations of fraud and corruption are serious accusations that require a very high standard of proof, between a balance of probability and below a reasonable doubt, as held in **Kinyanjui Kamau -vs- George Kamau** (*supra*). Fraud must be specifically pleaded and distinctly proved. It cannot be inferred from the facts. See **Vijay Morjaria -vs- Nansingh Madhusingh Darbar [2000] eKLR.**

**236.** In **Mwangi -vs- CDF Committee, Nyali Constituency & Another Civil Appeal No. E039 of 2023 [2026] KECA 325 [KLR] (27<sup>th</sup> February 2026) (Judgment)**, the allocated land was challenged as being designated as public utility land or open space in a settlement scheme. The primary issue at the Court of Appeal was whether the trial court erred in dismissing the title issued to the appellant as irregularly and illegally obtained. The court said that the doctrine of indefeasibility of title does not protect irregular allocation to private parties of public utility land. The court relied on the principle from **Shah -vs- KeNHA [2023] KECA**

**404[KLR]**, that any alienation of land set aside for public utility is illegal and void ab initio, regardless of the current holder's culpability.

**237.** The court relied on **Dina Management Ltd -vs- County Government of Mombasa** (*supra*), on the principle that the registration of a person as a proprietor does not vest absolute ownership if the land was originally set aside for public purposes.

**238.** The court said that it could not, based on the indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. The court said that, as a general rule, an individual could not be inoculated from a declaration of defeasibility of the title where it is demonstrated that a parcel of land was set aside for public utilities or public purpose, and was subsequently irregularly allocated to an individual for private use or private ownership. The court said that the principle applies even where it was not demonstrated that the property holder expressly acted illegally and without the necessity or proof of culpability or the part of the present owner.

**239.** The starting point in this suit is that the plaintiffs must produce the paper trail to show that it was an

innocent purchasers for value without notice or any defect to the title. The plaintiff must therefore meet the essentials set out in **Sehmi -vs- Tarabana [2025] KESC 21 [KLR]**, on innocence, legal estate, and payment of valuable consideration. On the other hand, the 1<sup>st</sup> defendant must prove that there was a surrender of land in the first instance, reservation and vesting of the land in it as public land.

**240.** In **Chief Land Registrar & Others -vs- Nathan Tirop Koech & Others [2018] KECA 27 [KLR]**,

the court said that **Section 44** of the Registration of Titles Act, Cap **281**, required that the surrender of land leased by the government to a person be registered to terminate the interest of the lessee and that registration of the surrender is such evidence of surrender.

**241.** The court, however, said that the section does not envisage that a lack of such registration would make null and *void de facto* surrenders. The court cited **Mwinyi Hamisi -vs- Attorney General Civil Appeal No. 25 of 1997**, that the lack of registration of a surrender did not give Hamisi a title; otherwise, after the factual surrender, the Commissioner had de facto control of the plot, and if

he proceeded as he did to allocate the land to other persons, their titles cannot be impugned except as provided for in **Section 24** of the Act.

**242.** In **Chief Land Registrar & Others -vs- Nathan Tirop Koech** (*supra*), the court said that there is a presumption in law that all acts done by a public official have lawfully been done and that all procedures have been duly followed. The court said that a lawful procedure was not followed is not proof of the allegation. Still on surrender, in **Fanikiwa Ltd & Others -vs- Sirikwa Squatters Group & Others [2023] KESC 102 [KLR]**, the court cited *Halsbury's Law of England Vol. 27 paragraph 444*, that a surrender is the yielding up of the term of lease to the person who has the immediate estate in reversion, so that by mutual agreement, the term may merge in the reversion.

**243.** In this suit, the burden was on the 1<sup>st</sup> defendant to lead cogent and tangible evidence to show that the suit land was validly surrendered to the government and validly reserved or vested on it in compliance with the law. The plaintiff, in its attempt to show that the land was no longer public, relied on

subsequent survey plans which removed it from the ambit of public land to the realm of private property.

- 244.** In **Kiluwa Ltd & Another -vs- Business Liaison Co. Ltd & Others [2023] KESC 37 [KLR]**, the court said that the term public land only came up with the **2010** Constitution, the repealed Constitution used the term government land to define such land, and that unalienated land remains public land until it is privatized through allocation to individuals or other private entities.
- 245.** The procedure for the alienation of unalienated land was set out in **Nelson Kazungu Chai & Others -vs- Pwani University** (*supra*). The court said that under the repealed Government Land Act, the PDP must be drawn and approved by the Commissioner of Lands or the Minister for Land before any unalienated land could be allocated, after which a letter of allotment based on the approved PDP is then issued to the allottees.
- 246.** Once the letter of allotment terms and conditions are complied with, a cadastral survey work will be conducted for the issuance of a certificate of lease. After the survey is done, the same is referred to the Director of Surveys for authentication and approval.

Thereafter, a land reference number is issued. In **Africa Line Transport Co. Ltd -vs- Attorney General, Mombasa HCCC No. 276 of 2013**, the court said that a PDP can only be prepared in respect of government land that has not been alienated or surveyed. The court said that planning comes first, then surveying.

**247.** It is the 1<sup>st</sup> defendant who is alleging that the land was not available for alienation. The 1<sup>st</sup> defendant did not challenge through an expert and licensed surveyor, or through the Director of Surveys, seek a recall, invalidation, or nullification of the two survey plans that were used to alienate an otherwise reserved land. The 1<sup>st</sup> defendant did not seek the recall or invalidation of the titles held by the plaintiffs and their predecessors in allotment based on an irregular, illegal, and unlawful purported alienation of land already reserved or vested in it. The 1<sup>st</sup> defendant did not call any officer from the Lands Office to support its evidence.

**248.** As of the vesting orders in **1963** and **1986**, there is no evidence that after the surrender of the parcels of land in **1930**, and the time that the 1<sup>st</sup> defendant was re-applying for the land, it caused official

searches and or received any official correspondence and valid documentation that what it had surrendered over **25** years ago, was still, as per records, unalienated government land.

**249.** There is equally no evidence that the vesting orders of **1963** and **1986** were accompanied by approved survey plans, deed plans, or such instruments to show that the Director of Surveys, and the Director of Physical Planning and the Commissioner of Lands as custodians of all survey maps, physical plans and land records had concurrently ascertained and approved and authenticated the lands claimed by the 1<sup>st</sup> defendant as public land vested in it.

**250.** There is equally no evidence that after the 1<sup>st</sup> defendant's suit challenging titles held by the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs and their predecessors in title and before **29/1/2021**, it had conducted an investigation through the National Land Commission and had made a case that indeed the certificates of titles held by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs were invalid, null, and void.

**251.** As held in **Kuria Kiarie & Others -vs- Sammy Magera [2018] KECA 467 [KLR]**, fraud must be specifically pleaded, and that fraudulent conduct

must be alleged and distinctly proved, and that it is not allowable to leave fraud to be inferred from the facts.

- 252.** Further, as held in **Doshi -vs- Chemutut & Others [2025] KECA 776 [KLR]**, proof of fraud requires direct and incriminating evidence, and where the evidence is circumstantial, it must be plausible, cogent, concrete, compelling, and credible. It must not be left to be deduced from inference, conjecture, speculation, or hypothesis.
- 253.** Beyond a bare statement or assertion, reservation and vesting orders, the 1<sup>st</sup> defendant has called forth no other credible and supporting evidence to confirm that its application for reallocation, reservation, and vesting orders was anchored in any known land registration systems in Kenya, apart from its internal processes. The makers of the documents, which the 1<sup>st</sup> defendant is relying on to impeach the process of alienation of the suit parcels of land, were not called to testify.
- 254.** DW1 was not the author, maker, or signatory of the same. The custodians of survey maps and physical plans are the Director of Surveys and the Director of Physical Planning. None of their officers was called

to buttress the 1<sup>st</sup> defenders' defence, that valid deed plans, survey maps, lay out plans, and drawings anchored in law support the 1<sup>st</sup> defenders' assertion that the survey maps and PDPs used to alienate the suit parcels of land are inferior or inconsequential in view of earlier survey plans alienating the land parcels as public land.

**255.** As held in **Nelson Kazungu Chai** (*supra*), a right can only be protected when it exists in reality and not where it remains an illusion. The court said that property rights are not among those inherent to every human being at birth, but are acquired in different ways, as provided by law.

**256.** The right to ownership of the property held by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs had not been legally revoked or nullified in terms of **Section 26** of the Land Registration Act on account of illegality, fraud, or acquisition through misrepresentation, mistake, or corruption as of **29/1/2021**. See **Frank Logistics Limited -vs- Golden Lion Real Estate Company & Others [2025] KECA 1471 [KLR]**.

**257.** In **Nguruman Ltd -vs- Jan Bonde Nielsen & Others [2014] KECA 606 [KLR]**, the court observed that it is a serious thing to restrain a

registered proprietor of a property over what is undoubtedly his unless there are justifiable grounds.

- 258.** The plaintiffs' claim is on unjustified entry into and commission of acts of trespass, destruction, and forceful eviction from the suit properties. Trespass to private property is defined under **Section 3(1)** of the Trespass Act as wrongful entry and commission of acts of wastage to private property without justification, right, authority, consent, or approval of the owner.
- 259.** Trespass is actionable per se. See **Kenya Power and Lighting Company -vs- Kimondiu** (*supra*) and **Kenya Power & Lighting Company Ltd -vs- Ringera** (*supra*). A claimant on trespass must prove immediate and exclusive possession of the property whose rights have been violated by the intruder without justification. See **M'Ikiara M'Mukanya & Another -vs- Gilbert Kabere M'Mbijiwe [1983] eKLR.**
- 260.** In **Mohamed -vs- BOM Pentrose Community School & Another Civil Appeal No. E136 of 2023 [2026] KECA 501 [KLR] (13<sup>th</sup> March 2026) (Judgment)**, the court cited **Church Commissioners of Kenya of ACK of Wayuga**

**[2024] KECA 1048 [KLR]**, that trespass includes entry, remaining, or erection of structures on private land without the consent of the occupier thereof. The court cited the **MFI Office Solutions -vs- Landlords Ltd & Others [2025] KECA 1200 [KLR]**, that to call upon title holders to prove the root of their titles, there must be credible allegations and a basis laid for believing that acquisition of property may not have been through property channels, and only then can the registered proprietors be called upon to prove the process through which the titles was acquired.

- 261.** In **Presbyterian Foundation -vs- Kibera Siranga SHG Nursery School [2025] eKLR** the court held that the best evidence of ownership of immovable property is the title to it and when competing interests arise, all the parties are required to give evidence of the title starting with a good root of title, and an unbroken chain of ownership, showing its origin of ownership, a clear and recognisable description of the property and lastly, it must not contain anything that casts any doubt on the title.
- 262.** Looking at the paper trial of the plaintiffs vis-à-vis that of the 1<sup>st</sup> defendant, there are doubts as to the

claim by the 1<sup>st</sup> defendant which even before it could be proved in law, upheld and the titles cancelled under **Section 80** of the Land Registration Act, took the law into its own hands, without a court order or compliance with **Section 152A-I** of the Land Act, to invade the suit parcels of land at night on **29/1/2021**, and to carry out with impunity acts of destruction, forceful entry, and eviction and assume full use, possession, and control of the suit parcels of land until to date, as if, there is no law over the issue. Such acts of impunity cannot be justified in a civilized society such as ours, which is a democratic state governed by the rule of law and not the rule of the jungle, which applies in a banana republic.

**263.** The next issue is whether there was justification in the events of **29/1/2021** on the suit properties and the businesses of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs. **Article 40** of the Constitution guarantees a property holder's rights of use, possession, and occupation. Acquisition and ownership of property is guaranteed either individually or in association with others.

**264. Article 40(2)** of the Constitution provides that Parliament shall not enact any law that permits any

person or the state to arbitrarily deprive a person of property of any description or of any interest in, or right over, or limit or in any way restrict the enjoyment of any right under this Article based on any grant contemplated, specified in **Article 21(4)** of the Constitution.

**265.** Forceful or unlawful eviction and demolition without due notice was addressed in **Mitu Bell Welfare Society -vs- Kenya Airport Authority & Others** **Petition 3 of 2018**. The court held that the United Nations guidelines on evictions were properly invoked by the trial court due to the then-lacunae in the law on how the government could conduct evictions without offending the Constitution. The court said that due to a long period of occupation by the group of people, crystallized their rights to housing over public land under **Article 42(1)** of the Constitution. The court, however, said that illegal occupation of private land cannot create prescription rights over land in favour of the occupants.

**266.** The court held that if an eviction is warranted in public interest, potential evictees can petition the court for protection, and that by virtue of **Article**

**23(3)** of the Constitution, the court can craft orders such as compensation, requirement of adequate notice, observance of human conditions during eviction, and provision of alternative land to protect the evictees' right to housing.

**267.** In **Satrose Ayuma & Others -vs- Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & Others, Petition No. 65 of 2010**, the court lamented at the time, on the need for appropriate legislation to provide guidelines on eviction. The United Nations Basic Principles concerning developments based on eviction and settlement, **2007**, were then invoked by dint of **Article 2(3)** and **(5)** of the Constitution. The provisions state that urban or rural planning and development processes should involve all those likely to be affected by giving appropriate notice and reasonable time for public review, holding of public hearings, offering alternatives to evictions, engagement in opportunities of dialogue and consultation with the likely people to be affected, demonstration that the eviction is unavoidable and consistent with the law.

- 268.** In *Ibrahim Sangor Osman -vs- Minister of State for Provincial Administration and Internal Security, Embu Petition No 2 of 2011 [2011] eKLR*, the court said that appropriate procedural protection and due process are essential aspects of all human rights and pertinent in relation to a matter of forced eviction as provided under **Article 11.1** of the United Nations Office of the High Commissioner for Human Rights.
- 269.** In *Kenya Railways Corporation -vs- Birah & Others, Civil Appeal No. E206 of 2021 [2025] KECA 545 [KLR] (21<sup>st</sup> March 2025) (Judgment)*, the trial court had ruled the eviction of the Nubian community in Kibos, Kisumu, who were licensees with effect from **1937**, in **March 2020**, without notice, as violating **Articles 40** and **43** of the Constitution, and failing the due process. On appeal, the question was whether Kenya Railways followed the Land Laws Amendment Act of **2016** and the principle of fair administrative action under **Article 47** of the Constitution. The court found that the eviction by Kenya Railways violated the respondents' right to protection under **Article 40** of

the Constitution, as the respondents were licensees to the land since **1937**.

**270.** The evictions were deemed illegal, irregular, and unprocedural due to a lack of proper notice and adherence to statutory procedures. The court said that the manner of eviction carried out at night during curfew hours and without providing alternative shelter violated the respondent's socio-economic rights under **Article 43** of the Constitution. The court emphasised the need for proportionality and adherence to due process in administrative action.

**271.** The Court of Appeal judgment incorporated the United Nations Convention on Economic, Social and Cultural Rights (UNCESCR), which recognises the right to adequate housing and the obligation to avoid forced eviction. The court aligned its interpretation with the International Human Rights Standards under **Article 2(6)** of the Constitution. The court ruled that non-compliance with a mandatory **90**-day eviction notice period and the procedures was an affront to the respondents' rights.

**272.** The next issue is whether the plaintiffs are entitled to the relief sought. The 1<sup>st</sup> defendant has submitted that the specific particulars of special damages demonstrated by the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs were not specifically pleaded in the plaint and that they are being introduced through exhibits which cannot amount to pleadings in law.

**273.** In **Johnson Mugwe Wanganga -vs- Joseph Nyaga Karingi Civil Appeal No. 4 of 2011**, the respondent had asked for a declaration that the attachment of his property and the eviction from the rented premises were illegal, irregular, and for an amount of all the goods attached, proceeds of sale of those goods, taking of accounts, and payment of by the appellant of all sums due on taking the accounts or delivery of those goods, damage and interest.

**274.** The trial court entered judgment for **Kshs.1,847,906/=**, for trade debt, loan unpaid, lost goodwill, and double value of the goods. On appeal, the court said that parties as held in **Galaxy Paints Co. Ltd -vs- Falcon Guards Ltd [200] eKLR**, are bound by their pleadings and that a claim for trade debts, lost gradual, and bank loans fell under special

damages and that special damages as held in **Sande -vs- Kenva Co-operative Creameries Limited Civil Appeal No. 154 of 1992, (unreported)**, must be specifically pleaded but also specifically proved and cannot be allowed if not pleaded.

**275.** The contention by the 1<sup>st</sup> defendant is that the plaintiff did not specifically plead particulars of the special damages in the body of the plaint, hence the introduction of the same at the hearing through documentary evidence is not only irregular but also prejudicial to them on account of fair hearing. In the amended dated **2/3/2023** at paragraphs **25** and **26**, the plaintiffs aver that they seek special damages of **Ksh. 79,020,865.00**, in favour of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs respectively.

**276.** At paragraphs **27, 28, and 29** thereof, the plaintiffs urge the court to compel the 1<sup>st</sup> defendant to compulsorily acquire the suit premises and for the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendant plaintiffs to be paid the value of the suit properties at **Kshs. 702,000,000.00** due to its actions and other government agencies for the blatant unconstitutional ultra vires.

**277.** It is pleaded that the defendants, in total violation of the rule of law, threatened and breached their fundamental rights and freedoms, which this court is mandated to uphold, protect, and grant relief to remedy the breaches and or contraventions. In paragraphs **19** and **20** of the amended pleadings, the plaintiffs aver that there was wanton destruction caused to the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs' business premises, situated on the subject properties, leading:

**(a)** *To unimaginable losses, inclusive of relocation costs pegged at approximately **Kshs. 79,020,810.02.***

**(b)** *To enumerable losses, including but not limited to loss of demolished office on site, loss of available ballast on site, loss of installed weighbridge, loss of fuel stock available on site, loss of installed fuel tanks and pump, and relocation costs, approximated at **Kshs. 59,501,865.00.***

**278.** The plaintiffs, through their supplementary list of bundle of documents dated **25/9/2023** and **9/6/2023**, filed and served the defendant with both the management report and independent auditors' reports for the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs' businesses, as well as the valuation report dated **July 2019**. The witness statement of Suleiman Abdul Shakur, the

licensed surveyor who prepared the report dated **9/5/2023**, was also filed and served on **17/11/2023**.

- 279.** Additionally, another further and further supplementary list of bundles of documents dated **2/4/2025** was filed and served, containing the audit dated **5/9/2015**, business permits, VAT returns, income tax returns, and a police abstract in relation to the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs.
- 280.** The purpose of pleadings is to give notice to the opposite party what the case of the other is about, the issues to answer to, and also for the court to know what the matter is all about, to avoid ambush at the hearing. In the statement of defence by the 1<sup>st</sup> defence, it specifically pleaded to the contents of both the initial and the subsequent amended plaint.
- 281.** No request for better particulars was made. Similarly, the court finds that the subheadings of the special damages were clear and known to the defendants before the suit was listed for hearing. Equally, the court finds that the defendants had every opportunity to cross-examine in detail every aspect of the plaintiffs' claim, generally and in particular, the claim for special damages. The court

finds the objection that special damages were not pleaded unmerited. See **Johnson Mugwe Wanganga** (*supra*).

**282.** The next issue is whether the plaintiffs have proved trespass, demolition, and forceful occupation of the suit properties by the defendants generally and, in particular, the 1<sup>st</sup> defendant to be entitled to any damages and the other reliefs sought.

**283.** Trespass, as indicated above, refers to wrongful entry into private land without justification, consent, or authority of the true owner. See **Section 3(1)** of the Trespass Act. Trespass is actionable per se. A claimant must prove immediate and exclusive possession before the wrongful entry. See **M'Mukunya -vs- M'Mbijiwe** (*supra*). Entry with permission of another does not amount to trespass. See **Mudaka -vs- Ochako**. In **Gusii Mwalimu Investments Co. Ltd & Others -vs- Mwalimu Hotel Kisii Ltd Civil Appeal No.160 of 1995**, the court held that to obtain possession by laying illegal distress was per se wrong.

**284.** Damages recoverable should be such as may fairly and reasonably be contested, rather than arising naturally or as a probable consequence of the

breach. See **Hadley -vs- Baxendale [1854] 9 Exch 341.**

- 285.** The plaintiffs aver and have pleaded that what the 1<sup>st</sup> defendant has not denied is that after the forceful entry, the 1<sup>st</sup> defendant took possession of the suit properties and has since denied them its use, possession, and occupation to date.
- 286.** In **Nguruman Ltd -vs- Shampole Group Ranch & Others Civil Appeal No. 73 of 2004,** the court cited Clerk and *Lindsell on Torts 16<sup>th</sup> Edition, para 21-01*, that every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as the trespass continues.
- 287.** In **Ochieng & Another -vs- Gitu & Others Civil Appeal No, 287 of 2017 [2023] KECA 122 [KLR] (3<sup>rd</sup> February 2023) (Judgment),** the court cited **Kenya Hotels Properties Ltd -vs- Willesden Investment Ltd [2023] eKLR,** that the first court can award general damages for the tort of trespass. In **Mohamed -vs- BOM Pentrose Community School** (*supra*), the court said that a claimant for trespass must demonstrate a valid proprietary

interest in the land in question to be entitled to any reliefs.

- 288.** The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs' titles to the six pieces of land are being challenged as illegally obtained; hence, the entry into and commission of any illegal demotion and occupation should not attract any damages or reliefs if at all the plaintiffs suffered any.
- 289.** As held in **Funzi Island Development Limited & 2 others -vs- County Council of Kwale & 2 others [2014] KECA 882 (KLR)**, and in **Chemey Investments Ltd -vs- Attorney General & Others [2018] eKLR**, courts can decline to recognize and protect title to land based on indefeasibility of title, to sanction an illegality, or give their real and approval to an illegal and irregularly obtained title.
- 290.** Further, in **Dina Management Ltd (supra)**, the court held that the rights under **Article 40(6)** of the Constitution do not extend to any property that is found to have been acquired unlawfully or irregularly.
- 291.** To be entitled to damages or reliefs of declarations, the plaintiffs have led evidence of title starting with a good title, showing its original, a recognizable

description of the same and must not contain anything to cast doubt on the title as held in **Presbyterian Foundation -vs- Kibera Siranga SHG Nursery School Civil Appeal No. 64 of 2014 [2023] KECA 371 [KLR]** and **MFI Office Solutions -vs- Landlords Ltd (supra)**.

- 292.** In **Mburu -vs- Kariuki (supra)**, the trial court held that a proprietor of land is entitled to be heard before any action is taken to deprive him of his interest under **Articles 40** and **47** of the Constitution. The court found that the council failed to notify the 1<sup>st</sup> respondent of its intention to revoke the suit property, in violation of the fair hearing right before the purported revocation.
- 293.** On damages, the court found that the destruction caused on the suit property had not been denied and awarded damages for trespass based on **Philip Ayaya Aluchio -vs- Crispinus Ngayo [2014] eKLR**.
- 294.** On appeal, the court agreed with the trial court on the need to notify the affected party of the intended action, as held in **Onyango Oloo -vs- Attorney General [1986-1989] eKLR**. The court cited **Catholic Diocese of Kisumu -vs- Sophia**

**Achieng Tete [2004] 2 [KLR] 55**, that the assessment of general damages is at the discretion of the trial court.

**295.** In **Kenya Power and Light Company -vs- Ringera** (*supra*), the court cited *Halsbury's Law of England 4<sup>th</sup> Edition Vol. 45 Para 21 page 1503*, that the owner of land is entitled reasonable damages, include loss of use resulting for the damages occasioned by the trespass, exemplary damages, where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in a deliberate disregard of the right of the owner to the land with the object of making a gain by his unlawful conduct, and where the trespass is accompanied by aggravated circumstances to the detriment of the owner of the land.

**296.** In **Duncan Nderitu Ndegwa -vs- Kenya Pipeline Co. Ltd & Another [2013] eKLR**, the court said damages are payable in trespass for diminution in value or loss of reinstatement of the land, with the overriding principle being to put the claimant in a position he was before the infliction of the harm. In **Kiambu Dairy Farmers Co-operative Society Ltd -vs- Rhoda Njeri & Others [2018] eKLR**, the

court said that the extent of award of compensatory damages lies in the discretion of the trial court.

**297.** From the cited case law, the plaintiffs specifically pleaded the heading of their losses and damages. They also produced financial records, audited accounts, income and VAT tax returns, and the supporting documents. A valuation report for the land was also produced by expert witnesses. The defendants did not find it necessary to provide a rival expert report to counter the expert reports by the plaintiffs.

**298.** The 1<sup>st</sup> defendant has not denied that it has taken possession of the land with effect from **29/1/2021** to the present, so if the plaintiffs figures of loss and damage are exaggerated or that the plaintiffs generally and the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs were able to salvage anything on the land after the fateful event, definitely the 1<sup>st</sup> defendant would be the one countering the same by producing an inventory of what items, structures, equipment, stock in trade or goods which it found on the suit properties and or which it gave the plaintiffs an opportunity or notice to salvage or carry away. Compensatory damage, as

held in **KPLC -vs- Ringera** (*supra*), can be awarded unless they will amount to unjust enrichment.

**299.** Tension between public and private claims is what the court is faced with. Where there are two competing claims over one piece of land, each party has to prove the root of its title. In **Dellian Langata Limited -vs- Symon Thuo Muhia & Others Civil Appeal No. 144 of 2014**, the issue was whether the disputed road was a public road of access or a private road. The court cited **E.A. Cables Ltd -vs- The Public Procurement Complaint Review & Appeals Board & Another [2007] eKLR**, expressing the view that public interest should take precedence, that as per John Stuart Mill that in evaluating the rightness or wrongness of an action, court should be primarily concerned with the consequences of its action, by comparing the ethical quality of the two ways of acting and to choose the alternative which tends to produce the greatest happiness to the greatest number of people and produces the most good.

**300.** The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs' titles to land had not been impeached, invalidated, cancelled, or recalled by the time the defendants forcefully entered the

suit land without notice or court order on **29/1/2021** and committed acts of trespass, destruction, displacement, and forceful eviction of the plaintiffs from the suit land.

- 301.** The defendants have not offered cogent evidence or a defence justifying the taking of the law into their own hands to commit illegalities. Two wrongs do not make a right. An eye for an eye is not what the rule of law, democracy, and good governance entail. Visiting the suit properties at night, under the cover of darkness, to effect a wrongful eviction does not amount to following the law on eviction and cannot be justified in a democratic country.
- 302.** The 1<sup>st</sup> defendant, having effected the illegal entry, forceful eviction, and destruction, cannot turn around and say sorry. The business and commercial activities of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs were without permits, licenses, and against the use of the land.
- 303.** The 1<sup>st</sup> defendant and the rest of the defendants did not lodge a complaint with the licensing authorities to have the plaintiffs cease operating business or commercial activities on the suit properties without a change of user, permit, or licenses. The 1<sup>st</sup> defendant did not specifically plead illegalities,

irregularities, or give particulars of conducting illegal and unauthorized business or commercial activities by the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs, on the suit properties.

**304.** Parties are bound by their pleadings. Fraud and illegalities must be specifically pleaded and proved. Fraudulent conduct must equally be specifically pleaded and distinctly proved. The 4<sup>th</sup> and 5<sup>th</sup> plaintiffs have tendered supporting documents for the claimed special damages. There are income tax and value-added tax returns in support of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs' businesses. It could not have been possible for the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs to be eligible for income and value-added tax by the Kenya Revenue Authority if they were not licensed and permitted to undertake legal businesses on their suit properties.

**305.** PW1 has admitted that the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs were *bona fide* tenants of the suit premises. If the 1<sup>st</sup> defendant had a superior title to the suit premises and was apprehensive that the commercial activities and businesses of the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs were illegal, unlicensed, unpermitted, or unlawful, or were interfering with the change of user or zoning laws applied in the area. Nothing would have stopped the 1<sup>st</sup> defendant from lodging a complaint with the

regulatory agencies such as the National Environment Management Authority (NEMA), Energy and Petroleum Regulatory Authority (EPRA), and the like, and to bring such reports that the 4<sup>th</sup> and 5<sup>th</sup> plaintiffs had been charged and convicted with operating businesses without permits or licenses or were operating in an area designated as residential and not commercial zone.

**306.** In the absence of a rival expert report or evidence, therefore, my finding is that the plaintiffs have pleaded and proved that they suffered loss and damages during the eviction. The plaintiffs have also proved that after the forceful entry and eviction, it is the 1<sup>st</sup> defendant who, henceforth, took and has remained in possession of the suit properties, effectively and constructively denying them access, use, possession, occupation, and enjoyment of their land contrary to **Articles 40 and 47** of the Constitution. The trespass is therefore continuing to date. The 1<sup>st</sup> defendant is therefore held to be **100** percent liable for the loss and damage.

**307.** Flowing from the foregoing, the court is satisfied that the plaintiffs have justified that they are

entitled to **prayers (a), (b), (c), (d), and (e)** in the following terms;

**a)A declaration be, and is hereby issued that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> plaintiffs are the bona fide and registered owners of properties known as Kitale Municipality Block 4/197, 4/198, 4/199, 4/200, 4/201, and 4/202, hereinafter the suit properties.**

**b)A declaration be, and is hereby granted that the plaintiffs have a right to enjoy peaceful and uninterrupted ownership and possession of the suit properties.**

**c)An order of permanent injunction is hereby issued against the defendants or any other persons acting on their behalf, from interfering with the plaintiffs' quiet enjoyment and use of parcels of land numbers Kitale Municipality Block 4/197, 4/198, 4/199, 4/200, 4/201, and 4/202.**

**d)An order is hereby issued for the 1<sup>st</sup> defendant to pay special damages of Kshs. 79,020,810.02, to the 4<sup>th</sup> plaintiff.**

***e)An order is hereby issued to the 1<sup>st</sup> defendant to pay special damages of Kshs. 59,501,865.00, to the 5<sup>th</sup> plaintiff.***

***f) Interest on (d) and (e) above at the court's rates from the date of filing the suit till payment in full.***

***g)Costs of the suit to the plaintiffs.***

**308.** Orders accordingly.

**Judgment dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 29<sup>th</sup> day of April 2026.**

**In the presence of:**

Court Assistant - Dennis

1<sup>st</sup> plaintiff present

Mr. Mwangi & Wanyoike for the plaintiffs present

Miss Mora for the 1<sup>st</sup> defendant present

No appearance for the NLC, the 2<sup>nd</sup> defendant

2<sup>nd</sup> defendant absent

3<sup>rd</sup> and 4<sup>th</sup> defendants absent



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