



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 303 OF 2011**

**SEVENTHDAY ADVENTIST CHURCH (E.A) LTD (NAIROBI EAST S.DA. CHURCH)...PLAINTIFF**

**=VERSUS=**

**STRATHMORE EDUCATIONAL TRUST REGISTERED TRUSTEES.....1<sup>ST</sup> DEFENDANT**

**KENYA RAILWAYS CORPORATION.....2<sup>ND</sup> DEFENDANT**

**STELLA MBAI T/A ST.MARY'S SCHOOL.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The plaintiff brought this suit by way of a plaint dated 20<sup>th</sup> June, 2011 which was amended, further amended and further further amended on 14<sup>th</sup> May, 2012, 29<sup>th</sup> April, 2013 and 17<sup>th</sup> October, 2016 respectively. In its further further amended plaint, the plaintiff averred that on diverse dates, the plaintiff, the 1<sup>st</sup> defendant and the 3<sup>rd</sup> defendant purchased from the 2<sup>nd</sup> defendant portions of land along Jogoo Road, Nairobi which were adjacent to each other. The plaintiff averred that through an agreement made between the plaintiff and the 2<sup>nd</sup> defendant, the 2<sup>nd</sup> defendant agreed to sell and transfer to the plaintiff a parcel of land measuring 4 acres.

The plaintiff averred that the said agreement was partly oral, partly in writing, and partly by conduct. The plaintiff averred that the parcel of land portions of which were sold to the plaintiff and the 1<sup>st</sup> and 3<sup>rd</sup> defendants was public land and that as at the time of sale, the land was un-surveyed. The plaintiff averred that while selling the said portion of land to the plaintiff, the 2<sup>nd</sup> defendant relied on a sub-division scheme in which the boundaries of the various parcels of land were clearly marked out. The plaintiff averred that the land which it purchased from the 2<sup>nd</sup> defendant was referred to as GL2/12A in the said sub-division scheme and the same shared a boundary with the parcels of land which were sold to the 1<sup>st</sup> and 3<sup>rd</sup> defendants by the 2<sup>nd</sup> defendant.

The plaintiff averred that on or about 2<sup>nd</sup> September, 2009, the 1<sup>st</sup> defendant with any colour of right or justification wrongfully entered upon the plaintiff's parcel of land, GL2/12 A (hereinafter referred to as "the suit property" where the context so permits) and destroyed a fence and a toilet that had been constructed thereon. The plaintiff averred that as a result of the said acts of trespass, the plaintiff suffered loss and damage amounting to Kshs.70,000/=.

The plaintiff averred further that on or about 7<sup>th</sup> August, 2016, the 3<sup>rd</sup> defendant without any right or justification wrongfully entered the suit property, pulled down the plaintiff's fence and carried away what remained to her compound. The plaintiff averred that as a result of the said acts of trespass by the 3<sup>rd</sup> defendant, the plaintiff was denied the use of a portion of the suit property as a result of which it suffered loss in the sum of Kshs.100,000/= exclusive of general damages for inconvenience.

The plaintiff averred that the 2<sup>nd</sup> defendant was estopped and precluded from refusing to transfer to the plaintiff land measuring 4 acres because the plaintiff had fully paid for land measuring 1 acre and the 2<sup>nd</sup> defendant had by its conduct and acquiescence permitted the plaintiff to occupy and induced it to believe that it had acquired additional land measuring 3 acres. The plaintiff averred that it was ready and willing to pay for the additional land measuring 3 acres. The plaintiff averred that it had fully developed a portion of the suit property measuring 1 acre while the other portion measuring 3 acres was partially developed.

The plaintiff averred that the 1<sup>st</sup> and 3<sup>rd</sup> defendants who knew all along of the plaintiff's occupation of additional land measuring 3 acres could not claim to be innocent purchasers for value without notice of any portion of the suit property. The plaintiff averred that if the 1<sup>st</sup> and 3<sup>rd</sup> defendants had purchased and obtained titles for the said portion of the suit property measuring 3 acres or any part thereof, such titles were obtained fraudulently.

The plaintiff sought judgment against the defendants jointly and severally for:

1. A permanent injunction restraining the defendants from trespassing on the suit property measuring 4 acres.
2. Special damages as pleaded in paragraphs 6 and 6A of the plaint.
3. General damages
4. A declaration that the sub-division that gave rise to L.R No. 209/19704, L.R. No. 209/19705, L.R. No. 209/19706 and L.R No. 209/19707 was un-procedural and illegal.
5. An order nullifying the sub-division referred to in paragraph 4 above so that a fresh transparent subdivision involving all stakeholders can be carried out.
6. An order compelling the 2<sup>nd</sup> defendant to transfer to the plaintiff land measuring 1 acre plus additional land measuring 3 acres in accordance with the sub-division scheme dated 24<sup>th</sup> January, 2007.
7. Costs of the suit and interest.

In its amended defence and counter-claim dated 11<sup>th</sup> November, 2006, the 1<sup>st</sup> defendant admitted that it purchased a parcel of land along Jogoo Road, Nairobi from the 2<sup>nd</sup> defendant which was adjacent to the plaintiff's parcel of land. The 1<sup>st</sup> defendant averred that one, Livingstone Kamande Gitau referred to in paragraph 3D of the further further amended plaint had no authority to confirm sale of land on behalf of the 2<sup>nd</sup> defendant and that only the 2<sup>nd</sup> defendant's board of directors could do so. The 1<sup>st</sup> defendant averred that the plaintiff was in occupation of a portion of the 2<sup>nd</sup> defendant's parcel of land known as L.R No. 209/19707 measuring 0.4023 hectares and not the alleged parcel of land known as GL2/12A (the suit property).

The 1<sup>st</sup> defendant averred that at no time did the plaintiff purchase from the 2<sup>nd</sup> defendant land measuring 3 acres going by reference No. GL2/12A and that, the parcel of land measuring 3 acres claimed by the plaintiff and referred to in paragraph 3F and 3G of the further further amended plaint was part of all that parcel of land known as L.R No. 209/19707 belonging to the 1<sup>st</sup> defendant and on which the plaintiff had trespassed and was continuing to trespass on. The 1<sup>st</sup> defendant averred that there was no basis for the plaintiff's claim over the said parcel of land measuring 3 acres which is part of the 1<sup>st</sup> defendant parcel of land known as L.R No. 209/19707. The 1<sup>st</sup> defendant averred that part of the plaintiff's car park and pit latrines are within the 1<sup>st</sup> defendant's parcel of land while the plaintiff's other developments such as church building and ablution block are within the undisputed 1acre piece of land owned by the plaintiff.

The 1<sup>st</sup> defendant averred further that the plaintiff's intention to purchase additional land measuring 3 acres from the 2<sup>nd</sup> defendant could not be a legal basis for the plaintiff's illegal occupation of the 1<sup>st</sup> defendant's property. The 1<sup>st</sup> defendant averred that in any event, it was the registered owner of L.R No. 209/19707 measuring 4.007 hectares and that the 2<sup>nd</sup> defendant no longer had any legal right to dispose of the property or any portion thereof. The 1<sup>st</sup> defendant denied all the allegations of fraud leveled against it by the plaintiff. The 1<sup>st</sup> defendant averred that the sub-division exercise that gave rise to L.R. No. 209/19707 was properly and procedurally carried out.

In its counter-claim, the 1<sup>st</sup> defendant averred that by a sale agreement dated 17<sup>th</sup> June, 2008 between it and the 2<sup>nd</sup> defendant, it purchased from the 2<sup>nd</sup> defendant land measuring ten (10) acres at a consideration of Kshs.30,000,000/=. The 1<sup>st</sup> defendant averred that after the sub-division of the hitherto larger parcel of land owned by the 2<sup>nd</sup> defendant known as L.R No. 209/1293/R was completed, its portion of land was given reference number 209/19707 and was successfully transferred and registered in its name on 26<sup>th</sup> March, 2012.

The 1<sup>st</sup> defendant averred that upon completing the payment of the purchase price, it took vacant possession of the property and erected a boundary fence. The 1<sup>st</sup> defendant averred that on or about 4<sup>th</sup> September, 2009 the plaintiff without any right to do so maliciously pulled down and destroyed the 1<sup>st</sup> defendant's fence valued at Kshs.200,000/=. The 1<sup>st</sup> defendant averred that it re-erected the perimeter fence and hired security guards to protect the same. The 1<sup>st</sup> defendant averred that on or about July, 2011, the plaintiff once again descended on the said fence and brought the same down. The 1<sup>st</sup> defendant averred that the loss incurred during the second demolition exercise amounted to Kshs.382,700/=. The 1<sup>st</sup> defendant averred that without any right, the plaintiff also leased out a portion of the 1<sup>st</sup> defendant's land to a Chinese construction company to store equipment and fabricated homes. The 1<sup>st</sup> defendant averred that as a result of the plaintiff's activities aforesaid, it had suffered loss and damage for which it held the plaintiff liable.

The 1<sup>st</sup> defendant sought judgment against the plaintiff by way of a counter-claim for: -

1. Eviction from L.R. No. 209/19707.
2. A permanent injunction restraining the plaintiff from trespassing on, demolishing any fence, removing any beacon or in any way interfering with the 1<sup>st</sup> defendant's enjoyment, use and occupation of LR. No. 209/19707.
3. General damages for loss of use and mense profits.
4. Costs of the suit.

The 2<sup>nd</sup> defendant filed a statement of defence dated 11<sup>th</sup> September, 2012. The 2<sup>nd</sup> defendant admitted that it sold parcels of land to the plaintiff and the 1<sup>st</sup> and 3<sup>rd</sup> defendants which were adjacent to each other. The 2<sup>nd</sup> defendant averred that the said parcels of land were subdivisions of a large parcel of land measuring 250 acres which was popularly known as Makadara Marshalling Yard. The 2<sup>nd</sup> defendant averred that the land sold to the plaintiff was sold under a letter of offer dated 28<sup>th</sup> February, 2002 and that the land was un-surveyed and as such unidentifiable. The 2<sup>nd</sup> defendant averred that there was no sketch drawing or deed plan that could be used to identify the property and that the land sold to the plaintiff was measuring 1 acre only within Makadara Marshalling Yard that measured 250 acres. The 2<sup>nd</sup> defendant averred that the plaintiff was to be shown the said portion of land measuring 1 acre within the said Marshalling Yard to occupy in the interim period awaiting survey which was to demarcate proper boundaries of the said parcel of land.

The 2<sup>nd</sup> defendant averred that it entered into an agreement for sale with the 1<sup>st</sup> defendant on 17<sup>th</sup> June, 2008 and that as at the time of this agreement, the property being sold was identified in a draft sub-division sketch plan which was attached to the agreement. The 2<sup>nd</sup> defendant averred that the land sold to the 1<sup>st</sup> defendant measured ten (10) acres and was to be exercised from L.R. No. 209/211/R which measured 250 acres. It averred that the purchase price for the property was Kshs.30,000,000/=.

The 2<sup>nd</sup> defendant averred that a survey was finally conducted and the plaintiff's parcel of land was registered as L.R No. 209/19706. The 2<sup>nd</sup> defendant averred that L.R No. 209/19706 measured 1 acre which was the measurement of land purchased by the plaintiff from the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant averred that it had not sold any other portion or additional portion of land to the plaintiff as alleged in the plaint. The 2<sup>nd</sup> defendant averred that the 1<sup>st</sup> defendant's parcel of land was registered as L.R No. 209/19707 and the same was duly transferred and registered in the name of the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant averred that L.R. No. 209/19706 and L.R No. 209/19707 had valid deed plans issued after a lawful survey and their boundaries were clearly identifiable.

The 2<sup>nd</sup> defendant averred that the two parcels of land did not overlap each other and that it had fulfilled its obligations to the plaintiff and the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant averred that in view of the provisions of section 3 (3) of the Contract Act, Chapter 23 Laws of Kenya, the plaintiff's claim over land other than L.R No. 209/19706 was unfounded and misconceived. The 2<sup>nd</sup> defendant averred that it did not have any other written agreement with the plaintiff other than that relating to L.R No. 209/19706 and that the plaintiff had not made any other payment to it save for the payment made for L.R No. 209/19706. The 2<sup>nd</sup> defendant averred that there was no land within Makadara Marshalling Yard known as GL2/12A or under that reference. The 2<sup>nd</sup> defendant averred that the plaintiff trespassed into the 1<sup>st</sup> defendant's land fully aware that it had no right to do so. The 2<sup>nd</sup> defendant denied that it entered into an oral agreement with the plaintiff for the sale of land measuring 3 acres. The 2<sup>nd</sup> defendant contended that there could be no oral agreement concerning disposition of an interest in land. The 2<sup>nd</sup> defendant averred that only its board of directors could authorise temporary occupation of its land and that its board of directors did not give permission implied or otherwise to the plaintiff to occupy the 2<sup>nd</sup> defendant's land. The 2<sup>nd</sup> defendant averred that it had no capacity to transfer to the plaintiff additional land measuring 3 acres claimed by the plaintiff since the said land is part of L.R No. 209/19707 owned by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant averred that in any event, there was no agreement between the plaintiff and the 2<sup>nd</sup> defendant for the sale of any land other than L.R No. 209/19706 measuring 1 acre. The 2<sup>nd</sup> defendant averred that the plaint did not disclose any cause of action against it.

The 3<sup>rd</sup> defendant filed her defence and counter-claim dated 23<sup>rd</sup> November, 2016 on the same date. The 3<sup>rd</sup> defendant admitted that the 2<sup>nd</sup> defendant sold to her a parcel of land which was adjacent to the plaintiff's portion of land. The 3<sup>rd</sup> defendant averred that she was a stranger to the agreements which the plaintiff entered into with the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant averred that the further further amended plaint did not disclose any reasonable cause of action against her. The 3<sup>rd</sup> defendant averred that the suit was brought contrary to the provisions of section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya. The 3<sup>rd</sup> defendant averred that she acquired her properties from the 2<sup>nd</sup> defendant which had land measuring 250 acres known as Makadara Marshalling Yard. The 3<sup>rd</sup> defendant averred that the plaintiff did not acquire land measuring more than 1 acre from the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant averred that her parcels of land which were known as L.R No. 209/19704 and L.R No. 209/19705 had valid deed plans issued after a lawful survey. The 3<sup>rd</sup> defendant denied that she entered the suit property on 7<sup>th</sup> August, 2016 and pulled down the plaintiff's barbed wire fence and carried the same away.

The 3<sup>rd</sup> defendant averred that it was the plaintiff who encroached on the property owned by the 3<sup>rd</sup> defendant and erected a fence thereon. The 3<sup>rd</sup> defendant denied that she was involved in any acts of fraud as claimed by the plaintiff. The 3<sup>rd</sup> defendant averred that the plaintiff had no valid claim over L.R No. 209/19704 and L.R No. 209/19705. In her counter-claim, the 3<sup>rd</sup> defendant averred that the plaintiff had on several occasions between 2<sup>nd</sup> August 2016 and 17<sup>th</sup> August, 2016 encroached on her land and caused her loss and damage. The 3<sup>rd</sup> defendant averred that the plaintiff proceeded to erect a barbed wire fence on her parcel of land known as L.R No. 209/19704 which deprived her of the use of that land. The 3<sup>rd</sup> defendant averred that the plaintiff's continued acts of trespass forced her to close down a school that she was operating on the property on which she had invested heavily. The 3<sup>rd</sup> defendant sought judgment against the plaintiff by way of counter-claim for: -

1. Damages for trespass
2. Costs of the suit and the counter-claim.

The plaintiff filed a reply to the 3<sup>rd</sup> defendant defence and defence to counter-claim on 9<sup>th</sup> February, 2017 in which it joined issue with the 3<sup>rd</sup> defendant in her defence save where the same consisted of admissions. The plaintiff also denied all the allegations made against it in the counter-claim.

At the trial, the plaintiff called 4 witnesses while the defendants called 1 witness each. The first witness for the plaintiff was Phillip Meli Rono (PW1). PW1 told the court that at all material times he was an elder in the plaintiff's church. He told the court that the plaintiff was

occupying a parcel of land measuring 1 acre which it acquired from the 2<sup>nd</sup> defendant in 2003 when the 2<sup>nd</sup> defendant was disposing off its unused land. He stated that the plaintiff applied for the land and was allocated the same. He stated that after taking possession of the land measuring 1 acre, the plaintiff applied to the 2<sup>nd</sup> defendant to be allocated additional land measuring 3 acres. He stated that while the plaintiff was waiting for a response from the 2<sup>nd</sup> defendant on its application for additional land, the 1<sup>st</sup> defendant came along and demarcated the land that was occupied by the plaintiff and in the process changed the subdivision plan that had been approved thereby interfering with the boundary of the plaintiff's parcel of land. PW1 stated that the 1<sup>st</sup> defendant told the plaintiff that it owned the land.

He stated further that the 2<sup>nd</sup> defendant did not respond to the plaintiff's application for additional land. He stated that as a result of the 1<sup>st</sup> defendant's interference with the boundary of the plaintiff's land, the plaintiff was occupying land measuring less than 1 acre. He stated that the 1<sup>st</sup> defendant demolished the plaintiff's toilet when it came to demarcate its land. In addition to his oral evidence, PW1 also relied on his witness statement dated 29<sup>th</sup> April, 2013. PW1 produced documents attached to the plaintiff's list of documents dated 14<sup>th</sup> May, 2012, 29<sup>th</sup> April, 2013 and 17<sup>th</sup> October, 2016 as exhibits.

In cross-examination by the 1<sup>st</sup> defendant's advocate, PW1 stated that the plaintiff was allocated land measuring 1 acre by the 2<sup>nd</sup> defendant possession of which it took immediately and commenced construction of a church building after obtaining the necessary approvals. PW1 stated that the land that was allocated to the plaintiff was un-surveyed and had no beacons or land reference but before they took possession, the land was surveyed and demarcated and what remained was the issuance of deed plans. He stated that the land that was sold to the plaintiff was given reference number GL2/12A. He stated that the plaintiff applied for additional land measuring 3 acres on 6<sup>th</sup> July, 2009 which was un-surveyed. He stated that the 2<sup>nd</sup> defendant did not respond to the application and no agreement was executed between the plaintiff and the 2<sup>nd</sup> defendant in respect of the said additional land measuring 3 acres. PW1 stated that the plaintiff had also not made any payment for the said additional land. He stated that when the plaintiff applied for additional land, it was not aware that the land which it had applied for had already been sold by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant.

He stated that the plaintiff was occupying land measuring less than 1 acre and that it had not seen the title for L.R No. 209/19706. He stated that the plaintiff had surveyed the land under its occupation. When shown a survey report attached to a letter from the Ministry of Lands at page 72 of P.Exh. 2, PW1 stated that he could see the plaintiff's parcel of land and that it measured 0.4023ha. He stated that it was on that land that the plaintiff had constructed a church building. He stated further that according to that report the additional 3 acres of land which the plaintiff was occupying was part of the 1<sup>st</sup> defendant's parcel of land, L.R No. 209/19707.

In further cross-examination by the advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, PW1 reiterated that the plaintiff was occupying land measuring less than 1 acre. PW1 stated that he was not aware of where the plaintiff got land reference No. GL2/12A. PW1 reiterated that the plaintiff bought and paid for the land measuring 1 acre although it was occupying land measuring 4 acres. He stated that the plaintiff had not paid for additional land measuring 3 acres. He admitted that the plaintiff had rented out the land measuring 3 acres. He stated that the 2<sup>nd</sup> defendant had granted the plaintiff permission to occupy the said land measuring 3 acres. He stated that the permission was not in writing. He stated that the plaintiff was claiming the additional land measuring 3 acres because it had applied for and had been given possession of the same by the 2<sup>nd</sup> defendant's estate manager. He stated that although the church building was on land measuring 1 acre, the plaintiff's developments were planned to cover land measuring 4 acres. He stated that the plaintiff intended to put up in addition to the church building, a hospital facility, a school and a conference centre. He admitted that the plaintiff was in occupation of the additional land measuring 3 acres. He stated that the land was an open space which the plaintiff was using as a car park. He stated that the 3<sup>rd</sup> defendant was occupying L.R No. 209/19705 on which she was running a school and that he was not aware of the nature of the complaint which the plaintiff had against the 3<sup>rd</sup> defendant.

The plaintiff's next witness was Livingstone Kamande Gitau (PW2). PW2 testified as follows. He was a surveyor by profession. He worked with the 2<sup>nd</sup> defendant between 1979 until 2010. He was in charge of survey. He could recall that the plaintiff applied for a plot to put up a church building at Makadara Marshalling Yard in 2002. The application was in respect of land measuring 1 acre. The plaintiff subsequently expressed interest in more land. At the time, he (PW 2) was the acting estate manager of the 2<sup>nd</sup> defendant. He asked the plaintiff to make an application for additional land. After the plaintiff had made the application, he allowed it to occupy the additional land it had applied for awaiting formal allocation. The plaintiff applied for additional land measuring 3 acres which was comprised in 3 plots. One of the plots was next to the Railway Line and the remaining 2 plots were on the southern part of the land measuring 1 acre that had already been allocated to the plaintiff. PW2 stated that the 2<sup>nd</sup> defendant had already carried out physical ground demarcation but had not carried out a survey for the purposes of issuing titles.

In cross-examination by the 1<sup>st</sup> defendant's advocate, PW2 stated that when he dealt with the plaintiff, he was acting as the 2<sup>nd</sup> defendant's estate manager. He stated that he had no power to dispose of the assets of the 2<sup>nd</sup> defendant which was the prerogative of the 2<sup>nd</sup> defendant's board of directors. PW2 stated that he told the plaintiff that he had no objection to it occupying the land but that before it took possession it had to ensure that it formalised the allocation.

In cross-examination by the advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, PW2 stated that the plaintiff took possession of the additional land measuring 3 acres after it had made an application for the same which application seemed not to have been approved. He stated that when he received the application, he forwarded the same to the managing director of the 2<sup>nd</sup> defendant and he did not follow it up.

The plaintiff's next witness was Christopher Wadoyi (PW3). He told the court that he was an elder in the plaintiff's church. He stated that the church was built on 1acre plot. He stated that apart from the church building, the plaintiff had a guest wing, a school and a borehole in the same compound. He stated that the plaintiff's compound was accessed by 2 roads, one of which was used by motorists and the other by pedestrians. He stated that the plaintiff had a 2 acre piece of land next to the church building which it was using for parking. PW3 stated that the 3<sup>rd</sup> defendant fenced off using a perimeter wall the area the plaintiff was using for parking. He stated that when the plaintiff took possession of its land, the 3<sup>rd</sup> defendant was in occupation of but was not using part of the land which she fenced off. He stated that when the plaintiff took possession of its land, the area now used for parking was bushy and swampy and the plaintiff had to clear the same and

level it using gravel. He stated that on its part, the 1<sup>st</sup> defendant fenced off the plaintiff's access road to the church building and brought down the ablutio block. He stated that the 1<sup>st</sup> defendant did not give any notice to the plaintiff. He stated that the 1<sup>st</sup> defendant claimed that it owned the land which it had fenced and that the plaintiff was forced to move part of the 1<sup>st</sup> defendant's fence so as to access the church. PW3 stated that the plaintiff sued the 1<sup>st</sup> defendant for encroaching on the land that had been allocated to the plaintiff by the 2<sup>nd</sup> defendant.

In cross-examination by the advocate for the 1<sup>st</sup> defendant, PW 3 stated that the plaintiff fenced off its land in 2005 when the plaintiff took possession of the one (1) acre parcel of land that was allocated to it. He stated that the plaintiff fenced the additional parcel of land in 2008. He stated further that the plaintiff was still waiting for a response from the 2<sup>nd</sup> defendant on their application for additional land.

In cross-examination by the advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, PW 3 stated that the plaintiff sued the 2<sup>nd</sup> defendant because it sold to the plaintiff the land a portion of which was being claimed by the 1<sup>st</sup> defendant. PW3 stated that the 2<sup>nd</sup> defendant sold to the plaintiff land measuring 1 acre and that the plaintiff's claim related to the said land measuring 1 acre and additional land measuring 3 acres. He stated that the plaintiff had not followed up the title for the land measuring 1 acre which the 2<sup>nd</sup> defendant sold to it because of some new developments. He stated that the plaintiff had not demanded the title formally but verbally. He stated that the problem the plaintiff had with its 1 acre piece of land was that the 1<sup>st</sup> defendant's fence was placed right outside the plaintiff's gate. He stated that the plaintiff had a boundary dispute with the 1<sup>st</sup> defendant and was also waiting for a response from the 2<sup>nd</sup> defendant on its application to be allocated additional land measuring 3 acres. PW3 stated that the problem the plaintiff had with the 3<sup>rd</sup> defendant was that she had taken land measuring 1 acre out of the three (3) acres the plaintiff had applied for to the 2<sup>nd</sup> defendant. He stated that the 1<sup>st</sup> defendant had taken two (2) acres of the additional land that the plaintiff had applied for while the 3<sup>rd</sup> defendant took the remaining 1 acre.

He stated that the 3<sup>rd</sup> defendant had taken L.R. No. 209/19704 which the plaintiff was using for parking. He stated that L.R No. 209/19704 is part of the additional land which the plaintiff had sought to be allocated by the 2<sup>nd</sup> defendant. He stated that the plaintiff had fenced the entire land belonging to the 3<sup>rd</sup> defendant but the 3<sup>rd</sup> defendant removed the plaintiff's fence towards the road next to L.R No. 209/19705. He stated that the plaintiff learnt later that the land had been sold to the 3<sup>rd</sup> defendant.

In examination by the court, PW 3 stated that when the plaintiff erected its fence, the fence was put up on the boundary of its 1 acre parcel of land and that it did not leave out any space between the fence and the boundary of the plot. He stated that the plaintiff accessed the church building through L.R No. 209/19707. He stated further that if the plaintiff's land remained as it was and L.R No. 209/19707 was taken away from the plaintiff; the plaintiff would have no access to its church building.

The plaintiff's last witness was Pastor Timothy Guto (PW4). PW4 told the court that he was a pastor with the plaintiff serving in its Central Kenya Conference under which Nairobi East Churches fell. PW4 stated that the plaintiff started using the land in dispute in 2006 when it took possession of the land that was allocated to it by the 2<sup>nd</sup> defendant. He stated that the plaintiff was allowed to fence off the land in dispute between it and the 1<sup>st</sup> defendant and had put up a tent thereon while constructing a church building on its land. He stated that the plaintiff also fenced off L.R No. 209/19704 which it was using for parking. When shown a survey plan that was produced as part of P.Exh. 2, PW4 stated that if the boundary of the 1<sup>st</sup> defendant's land reached the entrance of the plaintiff's church, the plaintiff would have difficulty accessing its church building and it would also lose its parking space. PW4 stated that in addition, the security of the church would be compromised and its development plans put in jeopardy. PW4 stated that those coming to the church on foot used an access road through L.R No. 209/19704 while those using vehicles access the church through L.R No. 209/19707 on which they also park their vehicles. PW4 stated that the plaintiff had no problem with the 3<sup>rd</sup> defendant and that the 3<sup>rd</sup> defendant was occupying land on the western side of the plaintiff's land and that the land on the northern boundary namely, L.R. No. 209/19704 which the 3<sup>rd</sup> defendant was claiming was given to the plaintiff by the 2<sup>nd</sup> defendant. PW4 urged the court to nullify the Part Development Plan (PDP) which gave rise to the various plots in dispute and allow the plaintiff to continue in occupation of the land which it was occupying.

In cross-examination by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's advocate, PW4 stated that the plaintiff purchased its parcel of land on the basis of a subdivision scheme and that, the land measured 1 acre but the 2<sup>nd</sup> defendant allowed the plaintiff to occupy and develop additional land measuring 3 acres. PW4 stated that the plaintiff was occupying its land measuring 1 acre together with L.R No. 209/19704 and the land in dispute between it and the 1<sup>st</sup> defendant. He stated that the new boundaries introduced through the subdivision complained of would reduce the plaintiff's land by ¼ of an acre. He stated that the 2<sup>nd</sup> defendant still had land which it could allocate to the 1<sup>st</sup> defendant. He stated that the plaintiff had no problem with the 3<sup>rd</sup> defendant and that the 3<sup>rd</sup> defendant had never interfered with the plaintiff. He stated that if there was a dispute between the plaintiff and the 3<sup>rd</sup> defendant, he was not privy to the same.

In cross-examination by the advocate for the 1<sup>st</sup> defendant, PW4 when referred to D.Exh. 2 confirmed that the plaintiff's land measured 0.4023 hectares which was equivalent to one (1) acre. PW4 also confirmed from the exhibit that the 1<sup>st</sup> defendant's parcel of land L.R No.209/19707 covers the area claimed by the plaintiff as part of the additional land measuring 3 acres which it was allocated by the 2<sup>nd</sup> defendant. PW4 stated that the plaintiff was not claiming any land from the 1<sup>st</sup> defendant and that the plaintiff's claim was against the 2<sup>nd</sup> defendant from which it was claiming land measuring 2.95 acres. PW4 stated in re-examination that the plaintiff had not taken any land from the 1<sup>st</sup> defendant and that the land the plaintiff was occupying belonged to the 2<sup>nd</sup> defendant and it was allowed to occupy the same by the 2<sup>nd</sup> defendant.

The 1<sup>st</sup> defendant witness was Andrew Olea (DW1). DW1 told the court that he was a trustee of the 1<sup>st</sup> defendant and a project manager of Eastland College of Technology which was being promoted by the 1<sup>st</sup> defendant. He stated that Eastland College of Technology was situated on the parcel of land in dispute between the 1<sup>st</sup> defendant and the plaintiff namely, L.R No. 209/19707. DW1 stated that the 1<sup>st</sup> defendant wrote to the 2<sup>nd</sup> defendant on 20<sup>th</sup> December, 2007 requesting to be allocated land measuring 10 acres at Makadara Railways Yard for the establishment of a college of technology. He stated that the 1<sup>st</sup> defendant offered to pay Kshs.30,000,000/= for the land. The 1<sup>st</sup> defendant's request was accepted by the 2<sup>nd</sup> defendant through a letter dated 15<sup>th</sup> January, 2008. The 2<sup>nd</sup> defendant thereafter showed the 1<sup>st</sup>

defendant land measuring 10 acres that it offered to the 1<sup>st</sup> defendant. The land was at the Marshalling Yard. When the 1<sup>st</sup> defendant was being shown the land, the same was not surveyed. After being shown the land, the 1<sup>st</sup> defendant entered into an agreement for sale with the 2<sup>nd</sup> defendant on 17<sup>th</sup> June, 2008. Under the said agreement for sale, the 1<sup>st</sup> defendant purchased land measuring 4.08 hectares which was identified as "A" on a subdivision sketch that was attached to the said agreement at a consideration of Kshs.30,000,000/=. The subdivision sketch aforesaid was a proposed subdivision plan for the 2<sup>nd</sup> defendant's Makadara Marshalling Yard.

He stated that according to the said proposed subdivision plan, there was an earth road shown at the top which was meant to be a road of access. He stated that changes were made after survey and that earth road was no longer the designated access road to the area. He stated that the land that was purchased by the 1<sup>st</sup> defendant was a portion of un-surveyed land known as L.R No. 209/211/R. He stated that the 1<sup>st</sup> defendant paid a deposit of Kshs.3,000,000/= on 2<sup>nd</sup> October, 2008 after which the 1<sup>st</sup> defendant was given possession by the 2<sup>nd</sup> defendant through a letter dated 6<sup>th</sup> April, 2009. DW1 stated that the 1<sup>st</sup> defendant contacted the 2<sup>nd</sup> defendant's surveyors who pointed out to it the beacons of the property as the 1<sup>st</sup> defendant embarked on a plan to put up a college on the property. DW1 stated that the building plans for the college were approved by the relevant authorities with the assistance of the 2<sup>nd</sup> defendant. He stated that the 2<sup>nd</sup> defendant thereafter commenced the sub-division of the Marshalling Yard which was approved by the Commissioner of Lands through a letter dated 10<sup>th</sup> December, 2009. The Marshalling Yard was sub-divided into 7 portions shown in a subdivision plan at page 18 of D. Exh. 1. He stated that the land that was sold to the 1<sup>st</sup> defendant was marked in the plan as No. 3 while that which belonged to the plaintiff was marked as No. 4. He stated that in the subdivision plan, the road that was at the top in the subdivision plan at page 11 of D.Exh. 1 had been relocated to the bottom. He stated that this did not however change the sizes of the land that the 1<sup>st</sup> defendant and the plaintiff had purchased which remained 4.08 hectares and 0.40 hectares respectively.

DW1 stated that the Commissioner of Lands gave his final approval to the subdivision through a letter dated 15<sup>th</sup> December 2009 at page 20 of D. Exh.1. He stated that an approved sub-division plan was attached to the said letter in which the 1<sup>st</sup> defendant's parcel of land was given reference No. 209/19707 while the plaintiff's parcel of land was given reference No. 209/19706. He stated that this was the final survey plan approved by the Commissioner of Lands pursuant to which the title of for the 1<sup>st</sup> defendant's parcel of land at page 25 of D.Exh.1 was issued. He stated that the deed plan attached to the 1<sup>st</sup> defendant's Grant No. I.R 125877 for LR No. 209/19707 shows that the land measures approximately 4.007 hectares. He stated that the property was transferred to the 1<sup>st</sup> defendant on 26<sup>th</sup> March, 2012 after the 1<sup>st</sup> defendant had paid the balance of the purchase price on 25<sup>th</sup> February 2011. DW1 stated that the 1<sup>st</sup> defendant followed due process in acquiring L.R No. 209/19707. He stated that the transfer of the property to the 1<sup>st</sup> defendant was delayed because the plaintiff had lodged a complaint with Kenya Anti-Corruption Commission over the transaction and that it was after the transaction got clearance that the transfer was effected. He stated that the 1<sup>st</sup> defendant got a change of user of the property from light industrial to educational (University). DW1 stated that the plaintiff invaded the 1<sup>st</sup> defendant's land in September, 2009 and destroyed its fence. The invasion was reported to the 2<sup>nd</sup> defendant who requested the police to intervene and protect the 1<sup>st</sup> defendant. He stated that the 1<sup>st</sup> defendant retook possession of its land and re-installed the fence. He stated that the 1<sup>st</sup> defendant was however unable to use the portion of the land in dispute due to a court injunction.

DW 1 stated that the portion of the 1<sup>st</sup> defendant's land occupied by the plaintiff measured 2.97 acres according to the map that was produced in evidence as D.Exh. 2. He stated that D.Exh. 2 showed that there was a road of access to the plaintiff's land on the left side of the map. DW1 stated that the plaintiff did not obey the terms of the court order of injunction. He stated that the plaintiff rented out the disputed land to a tenant from which it was receiving rent. He stated that the 1<sup>st</sup> defendant spent Kshs.72,940/= to restore the fence that was brought down by the plaintiff. He stated further that due to the conflict, the 1<sup>st</sup> defendant was compelled to hire guards and a consultant. The guards were paid Kshs.182,700/= while the consultant was paid Kshs.27,000/=. He stated that the consultant was paid a further sum of Kshs.55,000/=. DW1 urged the court to dismiss the plaintiffs claim and to enter judgment for the 1<sup>st</sup> defendant against the plaintiff as prayed in the counter-claim. DW1 urged the court to award the 1<sup>st</sup> defendant special damages in the sum of Kshs.509,600/= inclusive of withholding tax together with general damages and mesne profits. He stated that the 1<sup>st</sup> defendant had not used the disputed land since September, 2009. He stated that the 1<sup>st</sup> defendant was prevented from developing the land and that the 1<sup>st</sup> defendant had planned to put up on the land among others, a cafeteria and a chapel. DW1 produced as exhibits documents attached to the 1<sup>st</sup> defendant's bundles of documents.

In cross-examination by the plaintiff's advocate, DW1 stated that when the 1<sup>st</sup> defendant purchased land measuring 10 acres from the 2<sup>nd</sup> defendant, the plaintiff was not in occupation of the land. He stated that that the plaintiff was occupying land measuring 1 acre that was sold to it by the 2<sup>nd</sup> defendant and had constructed a pit latrine 5 metres outside the boundary of its land. He stated that the plaintiff trespassed on the 1<sup>st</sup> defendant's land in September, 2009 after the 1<sup>st</sup> defendant fenced the property. He stated that the entrance to the plaintiff's premises is 5 metres from the 1<sup>st</sup> defendant's fence and that the plaintiff was using the 1<sup>st</sup> defendant's land for parking. He stated that the 1<sup>st</sup> defendant's fence was destroyed at night and he did not know whether the plaintiff's church members were involved directly or whether they had hired goons to do the job. He stated that the incident was reported to the Kenya Railways Police. DW1 stated further that the plaintiff went against the court order that had been issued that restrained the use of the land by continuing to park thereon. He denied that the 1<sup>st</sup> defendant conspired with the 2<sup>nd</sup> defendant to acquire the land in dispute. He stated that it was the 2<sup>nd</sup> defendant who surveyed the land and subdivided the same.

The 2<sup>nd</sup> defendant's witness was Stanley Gitari (DW2). DW2 was a senior legal officer with the 2<sup>nd</sup> defendant. DW2 confirmed that the 2<sup>nd</sup> defendant sold land to the parties to this suit. He stated that the portions sold to the parties were parts of a large parcel of land used by the 2<sup>nd</sup> defendant as a marshalling yard at Makadara, Nairobi. DW2 stated that the plaintiff approached the 2<sup>nd</sup> defendant in 2002 seeking to purchase land measuring 1 acre. The 2<sup>nd</sup> defendant thereafter entered into an agreement for sale with the plaintiff. The sale was completed and the 2<sup>nd</sup> defendant transferred the land to the plaintiff. DW2 stated that the 2<sup>nd</sup> defendant did not enter into any other agreement with the plaintiff for sale of land and that it did not sell to the plaintiff additional land measuring 3 acres. He stated that the land which was sold to the plaintiff had a title and had been given land reference No. 209/19706. He stated that the plaintiff was in occupation of its land and had never been denied access the same. He stated that the Commissioner of Lands had approved the subdivision of the 2<sup>nd</sup> defendant's

Marshalling yard and that the final subdivision scheme was at page 21 of D.Exh.1. He stated that the 2<sup>nd</sup> defendant sold to the plaintiff L.R No. 209/19706 and L.R No. 209/19707 to the 1<sup>st</sup> defendant and that, the 2<sup>nd</sup> defendant had already transferred L.R No. 209/19707 to the 1<sup>st</sup> defendant. He stated that the 1<sup>st</sup> defendant's parcel of land measures 10 acres and was sold to the 1<sup>st</sup> defendant at a consideration of Kshs.30,000,000/=. He stated that the 2<sup>nd</sup> defendant gave both the plaintiff and the 1<sup>st</sup> defendant possession of their respective parcels of land.

DW2 stated that the 2<sup>nd</sup> defendant sold to the 3<sup>rd</sup> defendant parcels of land known as L.R NO. 209/19704 and L.R No. 209/19705. He stated that the 3<sup>rd</sup> defendant had made payment for the two parcels of land and as such the 2<sup>nd</sup> defendant had no claim against her and had already given her possession of the same. He stated that the 2<sup>nd</sup> defendant did not sell to the plaintiff the land in dispute between the plaintiff and the 1<sup>st</sup> defendant and had not received any payment from the plaintiff in respect thereof. He stated that the land in dispute belonged to the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant had no capacity to transfer the same to the plaintiff. He stated that the 2<sup>nd</sup> defendant was not aware of the land reference No. GL2/12A. He stated that the Marshalling Yard was known as L.R No. 209/211/R. DW 2 stated that none of the reliefs sought in the plaint were available to the plaintiff as against the 2<sup>nd</sup> defendant. He stated that the 2<sup>nd</sup> defendant followed due process in subdividing the Marshalling Yard. He stated that the sub-division did not affect any of the structures that the plaintiff had already put up on its parcel of land. He stated that the toilet that the plaintiff had put up was outside its 1acre piece of land. DW2 stated that the 2<sup>nd</sup> defendant's board of directors did not give the plaintiff permission to occupy additional land. He stated that occupation by the plaintiff of land more than its 1acre piece of land amounted to trespass. He stated that the 2<sup>nd</sup> defendant had not refused to transfer to the plaintiff its parcel of land measuring 1 acre. He produced in evidence as exhibits the documents attached to the 2<sup>nd</sup> defendant's bundle of documents dated 11<sup>th</sup> September, 2013.

In cross-examination by the advocate for the plaintiff, DW2 stated that he was employed by the 2<sup>nd</sup> defendant in 2007 and that he was conversant with the operations of the 2<sup>nd</sup> defendant generally. He stated that the land sold to the 1<sup>st</sup> defendant was un-surveyed and the sale was subject to survey. He stated that the subdivision of the Marshalling Yard was approved by all the relevant authorities. He stated that the 2<sup>nd</sup> defendant's acting estate Manager, Mr. Kamande (PW2) had no authority to give out the 2<sup>nd</sup> defendant's land to the plaintiff.

The 3<sup>rd</sup> defendant, Stella Mbai was the last to give evidence. She told the court that she was an accountant and that she used to run a school between 2004 and 2014 known as St. Mary's Jogoo Road School. She stated that she owned L.R No. 209/19704 and L.R No. 209/19705. She stated that in the survey plan at page 21 of D.Exh.1, her parcels of land were on the upper part while the parcel of land owned by the plaintiff and the 1<sup>st</sup> defendant were below. She stated that the plaintiff and the 1<sup>st</sup> defendant were her neighbours. She stated that she had constructed a wall fence which was demolished by the plaintiff in 2016. She stated that there was no fence between her parcels of land and the plaintiff's parcel of land after the demolition of the earlier fence. She stated that the plaintiff demolished her fence after it filed a suit against her and that the fence was 90 metres long. She stated that she was the one using L.R No. 209/19704 and that the property was not being used by the plaintiff. She stated that there was a barrier preventing the plaintiff from entering L.R No. 209/19704 which barrier remained in place after the wall was demolished. She stated that the value of the wall that was demolished by the plaintiff was Kshs.516,000/=. The 3<sup>rd</sup> defendant stated that she did not know why the plaintiff destroyed her wall as she did not demolish and carry away the plaintiff's fence as claimed.

The 3<sup>rd</sup> defendant stated that she had earlier put up a barbed wire fence which she removed to install a wall fence. She stated that the wall was on her land L.R No. 209/19705. She stated that the barbed wire fence did not belong to the plaintiff. She stated that after putting up the wall fence, the plaintiff came and demolished the same. She stated that the plaintiff put up a barrier and prevented her from using an access road below L.R No. 209/19704. She stated that L.R No. 209/19704 had no access road as the same was blocked by the plaintiff. The 3<sup>rd</sup> defendant stated that the plaintiff had been harassing her and had prevented her from fencing her land. She stated that after she removed the barbed wire fence on L.R No. 209/19705, the plaintiff came and installed a chain link fence on her land and also put up tents illegally on the land. The 3<sup>rd</sup> defendant urged the court to grant the reliefs she had sought in her counter-claim against the plaintiff. The 3<sup>rd</sup> defendant averred that there was no basis for cancelling her titles which she acquired lawfully. The 3<sup>rd</sup> defendant produced her witness statement dated 15<sup>th</sup> December, 2016 together with the attached documents as exhibits.

In cross-examination by the plaintiff's advocate, the 3<sup>rd</sup> defendant admitted that when she put up a wall that was brought down, she did not have approval from the City Council of Nairobi. The 3<sup>rd</sup> defendant also admitted that she got a notice from the City Council of Nairobi to stop the construction of the wall and to remove the portion that she had constructed. The 3<sup>rd</sup> defendant contended however that the plaintiff had no right to demolish the wall. She stated that she was informed by the City Council of Nairobi that it was the plaintiff which demolished the wall. The 3<sup>rd</sup> defendant stated that she suffered loss and damage as a result of that demolition. She stated that L.R No. 209/19704 was about  $\frac{3}{4}$  of an acre while L.R No. 209/19705 was about 3 acres. She stated that she had obtained a title for L.R No. 209/19705 and that the same measured 1.442 hectares. The 3<sup>rd</sup> defendant stated that when she purchased her parcels of land the same were un-surveyed and that after survey, the sizes could increase or reduce. She stated that the plaintiff trespassed on her land on several occasions. The 3<sup>rd</sup> defendant stated she acquired titles for her two parcels of land lawfully.

After the close of evidence, the parties made closing submissions in writing. The plaintiff filed its submissions on 4<sup>th</sup> September, 2018, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their submissions on 30<sup>th</sup> January 2019 while the 3<sup>rd</sup> defendant filed her submissions on 14<sup>th</sup> January 2019. I have considered the pleadings and the evidence adduced by the parties in proof of their respective cases. I have also considered the submissions of counsels. The parties did not agree on the issues for determination by the court. In their submissions, each party framed its own issues. From the pleadings, the following in my view is a summary of the issues arising in this suit for determination: -

1. Whether the subdivision that gave rise to L.R No.209/19704, L.R No. 209/19705, L.R No. 209/19706 and L.R No. 209/19707 was un-procedural and illegal.
2. Whether the sub division referred to in number 1 above should be nullified together with the titles issued pursuant thereto and a

new subdivision ordered.

3. Whether the plaintiff is entitled to land measuring 4 acres from the 2<sup>nd</sup> defendant.
4. Whether the plaintiff is entitled to the reliefs sought in the further further amended plaint.
5. Whether the plaintiff entered into the 1<sup>st</sup> defendant's parcel of land known as L.R No. 209/19707 illegally and destroyed the 1<sup>st</sup> defendant's perimeter fence on 4<sup>th</sup> September 2009 and again in July, 2011 and leased out the 1<sup>st</sup> defendant's parcel of land to a third party.
6. Whether the 1<sup>st</sup> defendant is entitled to the reliefs set out in its amended counter-claim dated 11<sup>th</sup> November, 2016.
7. Whether the Plaintiff illegally entered the 3<sup>rd</sup> defendant's parcel of land and caused loss and damage to the 3<sup>rd</sup> defendant.
8. Whether the 3<sup>rd</sup> defendant is entitled to the reliefs sought in her counter-claim.
9. Who should bear the costs of the suit and the counter-claims?

Whether the subdivision that gave rise to L.R No.209/19704, L.R No. 209/19705, L.R No. 209/19706 and L.R No. 209/19707 was un-procedural and illegal.

There is no material placed before the court from which the court can conclude or infer that the subdivision of L.R. No. 209/221/R which gave rise to L.R No. 209/19704, L.R No. 209/19705, L.R No. 209/19706 and L.R No. 209/19707 was carried out un-procedurally and illegally. In support of this contention, the plaintiff had relied heavily on the report dated 21<sup>st</sup> March, 2012 that was filed in court by S.K. Mburugu for the Commissioner of Lands (See Page 72 of P.Exh.2) in which he stated that there was no current part development plan and approved survey plan in the Commissioner of Lands records for L.R No. 209/190706 and L.R No. 209/19707. I have carefully considered that report. The Commissioner of Lands did not in any way state or suggest that the subdivision that gave rise to L.R No. 209/19706 and L.R No. 209/19707 was un-procedural. What S.K Mburugu stated was that the Commissioner of Lands did not have in its custody copies of the part development plan and approved survey plan for the subdivision. In my view, this does not mean that a part development plan was not prepared or that a survey plan for the subdivision was not approved. I have noted from the record a copy of a letter dated 4<sup>th</sup> May, 2007 that was written by the 2<sup>nd</sup> defendant to the Director City Planning and Architecture, City Council of Nairobi requesting him to assist the plaintiff with approval of its development plans (See page 17 of P.Exh.1). The 2<sup>nd</sup> defendant stated in the said letter in part as follows: -

“Kenya Railways has only pegged the plot for them awaiting the final survey after the approval of the part Development Plan which is already submitted to you for approval. Please accord the church the necessary help they may need (emphasis mine)”.

The contents of this letter suggests that the 2<sup>nd</sup> defendant had indeed prepared a Part Development Plan for the subdivision of the Marshalling Yard and forwarded the same to the relevant authorities for approval. In his report dated 21<sup>st</sup> March, 2012, S.K.Mburugu stated that he managed to obtain field data in relation to the survey that gave rise to L.R No. 209/19706 and L.R No. 209/19707 from the Director of Surveys. In conclusion, he stated that it was not possible for him to establish if the procedure of carrying out survey was followed with the regard to the survey under consideration. He did not however make a finding that the process was un-procedural. The 1<sup>st</sup> defendant placed evidence before the court showing that the Commissioner of Lands gave a provisional and final approval to the subdivision of L.R No. 209/211R which gave rise to L.R No. 209/19704 – L.R No.209/19707(See pages 17-21 of D.Exh.1). I am in agreement with the contention by the 1<sup>st</sup> defendant that the Commissioner of Lands could not have given a final approval to the said subdivision if the laid down procedures for subdivision were not followed by the 2<sup>nd</sup> defendant. A copy of the deed plan No. 308558 dated 4<sup>th</sup> May, 2010 attached to the 1<sup>st</sup> defendant's Grant No. I.R. 125877 in respect of L.R No. 209/19707 shows that it was a product of survey Plan F/R No. 361/61 (See page 27 of D.Exh.1). Survey Plan No. F/R 361/61 was produced by the 1<sup>st</sup> defendant in evidence as part of D.Exh.1(See page 21 of D.Exh.1). The plaintiff had contended that it was not involved in the subdivision exercise. From the evidence on record, it was the duty of the 2<sup>nd</sup> defendant to carry out the subdivision. The 2<sup>nd</sup> defendant had no contractual duty or otherwise to consult the plaintiff while carrying out the subdivision. Its duty was to ensure that the plaintiff got the land that it had purchased and was occupying. The plaintiff was aware that the agreement for sale between it and the 2<sup>nd</sup> defendant was subject to survey and that the boundaries that it had been shown when it purchased the suit property and other features could change after survey. The plaintiff did not place convincing evidence before the court showing that it received less than the 1acre piece of land which it purchased from the 2<sup>nd</sup> defendant after the survey. Even if that was to be the case, that in my view would not render the subdivision un-procedural and illegal. Due to the foregoing, it is my finding that the subdivision of L.R No. 209/211R which gave rise to L.R No. 209/19704 to L.R No. 209/19707 was not un-procedural or illegal.

Whether the subdivision referred to in number 1 above should be nullified together with the titles issued pursuant thereto and a new subdivision ordered.

In view of my findings on the first issue, I have to answer this issue in the negative. In the absence of any impropriety or illegality in the subdivision of L.R No. 209/211R, there is no basis for nullifying the same and cancelling the titles that resulted from the exercise.

Whether the plaintiff is entitled to land measuring 4 acres from the 2<sup>nd</sup> defendant.

The plaintiff has not laid any valid basis for its claim for additional land measuring 3 acres. It was not disputed that the plaintiff purchased from the 2<sup>nd</sup> defendant and paid for land measuring 1 acre. The plaintiff's claim for additional land measuring 3 acres according to its

pleadings arose from alleged oral contract and the 2<sup>nd</sup> defendant's conduct. In its submissions, the plaintiff relied on equitable or proprietary estoppel. As correctly submitted by the defendants, the plaintiff's claim to the extent that it was based on oral contract was contrary to the provisions of section 3(3) of the Law of Contract Act, Chapter 23 of Kenya and as such unenforceable. To the extent that the plaintiff relied on the 2<sup>nd</sup> defendant's conduct, the plaintiff fell short of establishing equitable estoppel. The plaintiff did not establish that the 2<sup>nd</sup> defendant made representations which the plaintiff relied on and that the plaintiff changed its circumstances. The plaintiff did not place any evidence before the court showing that the 2<sup>nd</sup> defendant represented to the plaintiff that it would allocate the plaintiff additional land measuring 3 acres. There was also no evidence that the plaintiff acted on that representation and changed its circumstances as a result. The plaintiff led evidence that it was authorised to occupy additional land measuring 3 acres by the 2<sup>nd</sup> defendant's then acting estate manager (PW2). There was however no evidence that PW2 had authority to verbally authorise the plaintiff to occupy the 2<sup>nd</sup> defendant's land. There was also no evidence that PW2 represented to the plaintiff that its application for additional land measuring 3 acres would be approved by the 2<sup>nd</sup> defendant.

In my view, even if the plaintiff was authorised to occupy additional land measuring 3 acres pending consideration of its application to be allotted the land, that without more did not entitle him to claim the land in respect of which it had no agreement with the 2<sup>nd</sup> defendant and for which it had not made any payment. In my view at most, the plaintiff was a non-contractual licensee whose licence could be revoked by the 2<sup>nd</sup> defendant without notice; that is, if it is assumed that it had permission of the 2<sup>nd</sup> defendant to occupy the additional three (3) acres of land which was not established.

In the circumstances, it is my finding that the plaintiff failed to establish his claim over additional land measuring 3 acres from the 2<sup>nd</sup> defendant. The plaintiff is only entitled to land measuring 1 acre which the 2<sup>nd</sup> defendant is ready to transfer to it according to the evidence on record.

Whether the plaintiff is entitled to the reliefs sought in the further further amended plaint.

From my findings above, the plaintiff's suit cannot succeed. The plaintiff has failed to prove its case against the defendants and as such it is not entitled to any of the reliefs sought in its further further amended plaint.

Whether the plaintiff entered into the 1<sup>st</sup> defendant's parcel of land known as L.R No. 209/19707 illegally and destroyed the 1<sup>st</sup> defendant's perimeter fence on 4<sup>th</sup> September 2009 and again in July, 2011 and leased out the 1<sup>st</sup> defendant's land to a third party.

I am satisfied from the evidence on record that the additional land measuring 3 acres which the plaintiff claimed to have acquired from the 2<sup>nd</sup> defendant belonged to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant has a title to the property which was produced in evidence. As the owner of the land that was part of its title L.R No. 209/19707, the 1<sup>st</sup> defendant was entitled to possession thereof. The 1<sup>st</sup> defendant was therefore entitled to secure the land by fencing the same. I am satisfied from the evidence before the court that the 1<sup>st</sup> defendant fenced its parcel of land L.R No. 209/19707 and a portion of the fence adjacent to the plaintiff's parcel of land, L.R No. 209/19706 was brought down by the plaintiff. In fact, at the trial the plaintiff's witness (PW1) admitted that the plaintiff removed the fence to access the church building. I am in agreement with the 1<sup>st</sup> defendant that the plaintiff had no right to demolish the 1<sup>st</sup> defendant's fence. The plaintiff did not place any evidence before the court that the said fence had been put up on its 1acre piece of land, L.R No. 209/19706. The plaintiff's contention was that the area fenced by the 1<sup>st</sup> defendant formed part of the additional 3 acres of land that it acquired from the 2<sup>nd</sup> defendant. As I have held above, the plaintiff was not entitled and did not acquire any additional land from the 2<sup>nd</sup> defendant. The plaintiff had no right therefore to interfere with the 1<sup>st</sup> defendant's use of the portion of L.R No. 209/19707 which was adjacent to L.R No. 209/19706. The 1<sup>st</sup> defendant had contended that the plaintiff demolished its fence twice; on 4<sup>th</sup> September, 2009 and in July, 2011. From the evidence on record, only the demolition carried out on 4<sup>th</sup> September 2009 was established. The demolition carried out in July, 2011 was at night and no credible evidence was presented to show that the plaintiff was involved directly or through proxy. The plaintiff is therefore not liable to the 1<sup>st</sup> defendant for that demolition and the expenses incurred in relation thereto. The plaintiff will however have to meet the loss occasioned to the 1<sup>st</sup> defendant as a result of the first demolition. As concerns the leasing of the land to a third party, the 1<sup>st</sup> defendant presented evidence that was not contested that the plaintiff leased out its land to a Chinese construction company for a fee.

Whether the 1<sup>st</sup> defendant is entitled to the reliefs sought in its amended counter-claim dated 11<sup>th</sup> November, 2016.

From the above findings, I am satisfied that the 1<sup>st</sup> defendant has established its claim against the plaintiff. The 1<sup>st</sup> defendant has proved that that the plaintiff is in occupation of its land. The 1<sup>st</sup> defendant is therefore entitled to an order of eviction and an injunction to restrain the plaintiff from interfering with its quiet enjoyment of L.R No. 209/19707. The 1<sup>st</sup> defendant is also entitled to special damages which has been proved in the sum of Kshs. 72,940/= . For general damages and mesne profits, taking all factors into account, I would award Kshs. 2,000,000/= to the 1<sup>st</sup> defendant.

Whether the plaintiff illegally entered the 3<sup>rd</sup> defendant's parcel of land and caused loss and damage to the 3<sup>rd</sup> defendant.

At the trial, it did not really come out clearly what the plaintiff's dispute with the 3<sup>rd</sup> defendant entailed. Most of the witnesses who gave evidence for the plaintiff told the court that they did not understand what the plaintiff's claim against the 3<sup>rd</sup> defendant was all about. The 3<sup>rd</sup> defendant led evidence that she owned L.R No. 209/19704 and L.R No. 209/19705 which she acquired from the 2<sup>nd</sup> defendant. The plaintiff did not satisfy this court that it had any claim over any of the 3<sup>rd</sup> defendant's two parcels of land. The plaintiff did not deny at the trial that it entered into the 3<sup>rd</sup> defendant's parcel of land, L.R No. 209/19704 from time to time and interfered with her activities thereon and that it had stopped her from putting up a perimeter wall. I am satisfied from the evidence on record that the plaintiff wrongfully entered the 3<sup>rd</sup> defendant's parcel of land and caused her loss and damage.

Whether the 3<sup>rd</sup> defendant is entitled to the reliefs sought in her counter-claim.

From the findings above, I am satisfied that the 3<sup>rd</sup> defendant has proved her claim against the plaintiff and is entitled to the reliefs sought in her counter-claim. I would award the 3<sup>rd</sup> defendant Kshs. 250,000/= as general damages for trespass.

Who shall bear the costs of the suit and the counter-claims?

Costs is at the discretion of the court. As a general rule, costs follow the event. The plaintiff has failed in its claim against the defendants while the 1<sup>st</sup> and 3<sup>rd</sup> defendants have succeeded in their counter-claims. No reason has been put forward to warrant a departure from the general rule on costs. The plaintiff shall bear the costs of the suit and the counter-claims.

Conclusion:

In conclusion, I hereby make the following orders: -

1. The plaintiff's suit is dismissed as against all the defendants.
2. Judgment is entered for the 1<sup>st</sup> defendant against the plaintiff: -
  - (i) in terms of prayers (a) and (b) in the amended defence and counter-claim dated 11<sup>th</sup> November, 2016.
  - (ii) for special damages in the sum of Kshs.72,940/= being the cost for partial fencing of L.R No. 209/19707 after the fence was demolished by the plaintiff.
  - (iii) for general damages in the sum of Kshs.2,000,000/= for trespass and mesne profits.
  - (iv) for interest on (ii) and (iii) above at court rates from the date hereof until payment in full.
3. Judgment is entered for the 3<sup>rd</sup> defendant against the plaintiff for Kshs.250,000/-being general damages for trespass together with interest at court rates from the date hereof until payment in full.
4. The plaintiff shall pay the costs of the suit and the two counter-claims.

**Delivered and Dated at Nairobi this 30<sup>th</sup> day of September 2019**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Manyara h/b for Mr. Oyugi for the Plaintiff

Mr. Nyiha for the 1<sup>st</sup> Defendant

Mr. Mbabu h/b for Mr. Kamau Maturui for the 2<sup>nd</sup> Defendant

Mr. Dachi h/b for Mr. Nyaanga for the 3<sup>rd</sup> Defendant

C. Nyokabi-Court Assistant