



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC CIVIL 2755 OF 1996**

**WAINAINA KIGATHI MUNGAI.....PLAINITFF**

**-VERSUS-**

**TRADE PAN REALITY LTD.....1<sup>ST</sup> DEFENDANT**

**KAMAU JOHN KINYANJUI ..... 2<sup>ND</sup> DEFENDANT**

**PAUL KINUTHIA NJENGA .....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

By an ***Amended Plaintiff*** dated ***22<sup>nd</sup> May 2012***, the Plaintiff herein brought a claim against the Defendants and sought for the following orders:-

- 1) An injunction to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves, their servants or agents from destroying or poisoning the Plaintiff's fence trees or flowers or from diverting River Ruaka from its natural course and directing it onto the Plaintiff's land or from destroying or removing the gabion or wall put against the said river by the Plaintiff.***
- 2) An injunction to restrain the Defendants by themselves, their agents or servants from harassing the Plaintiff and interfering with his quiet possession of his plot No.7785/74, by cutting telephone wires, keeping traditional goats or any other livestock, pheasants or turkey on their plot No.7785/73, and from abusing and threatening the Plaintiff with violence or physical harm.***
- 3) An injunction to restrain the 3<sup>rd</sup> Defendants either by himself, his servants or agents from putting the illegal structure near the common boundary thus interfering with the Plaintiff's privacy and quiet possession of his premises.***
- 4) Damages for nuisance and trespass to the Plaintiff's parcel of land.***
- 5) Costs of this suit.***
- 6) Interest on 4, 5 and 6 above from the date of Judgement until payment in full.***
- 7) Any other or relief that this court may deem fit to grant.***

In his claim, he alleged that he is the registered owner of plot ***No.7785/74, Runda Estate*** and the 1<sup>st</sup> and

2<sup>nd</sup> Defendants were initially the registered owners of plot **No.7785/73**, which borders his parcel of land on the western side. At first, the 2<sup>nd</sup> Defendant was in occupation and possession of the said plot **No.7785/73**, but on **6<sup>th</sup> May 2011**, the 3<sup>rd</sup> Defendant acquired proprietorship of the plot **No.7785/73** from the 1<sup>st</sup> Defendant during the pendency of this suit.

He also alleged that in **April 1996**, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants started construction of a two storey building barely one meter from the boundary of the said plots **No.7785/74** and **7785/73**. Further that the said building was put up without the approval of the defunct **City Council of Nairobi**, and its windows face the Plaintiff's compound and in particular the Plaintiff's living room and bedroom contrary to the existing defunct **Nairobi City Council Building Code and Planning By-laws**. He also alleged that the said illegal structure has blocked the flow of natural light to the Plaintiff's bedroom and has also invaded his privacy. He also feared that the said illegal structure might collapse on his side of the fence as it was constructed without approval from the defunct **Nairobi City Council's Planning Department** and thus being potentially dangerous to him and his family.

He further averred that in **August 2011**, the 3<sup>rd</sup> Defendant engaged in massive construction on his plot **No.7785/73**, and he did not put a **Bill Board** on the said property to show the due approval of the construction that the 3<sup>rd</sup> Defendant erected on the said property and/or other relevant particulars supposed to be displayed for such construction.

He had also alleged that in various dates in the months of **August, September** and **October 1996**, the 2<sup>nd</sup> Defendant destroyed the Plaintiff's carefully nurtured cypress fence by cutting off branches and poisoning the remainder. Further, the 2<sup>nd</sup> Defendant diverted **River Ruaka** from its natural course and destroyed the wall gabion put up by the Plaintiff thus risking flooding of the said river during the rainy season. That in addition to that, the 3<sup>rd</sup> Defendant also engaged in farming activities along the riparian land bordering his plot and installed sprinkler system with piped water connection, causing the soil thereby to loosen and therefore easily eroded and swept away by the flood water. That such bursting of River Ruaka occurred on diverse dates in **May 2011**, due to the interference of the riparian land thus causing flooding on the Plaintiff's property and damages as a result thereof.

The Plaintiff had also alleged that the 2<sup>nd</sup> Defendant caused unbearable nuisance and trespass to the Plaintiff's parcel of land thus interfering with his quiet possession and making life almost unbearable. He particularized the said instances of Nuisance in paragraph 12 of his **Amended Pleint**.

He therefore urged the Court to injunct the Defendants from carrying on with the illegal activities which amount to trespass and nuisance, since despite his demand to the Defendants to stop the said illegal activities and Notice of intention to sue, they defiantly failed to cease the said illegal acts and/or behavior.

The Defendants opposed the Plaintiff's claim and filed their respective Defences.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their **Defence** and **Counter-claim** on **1<sup>st</sup> April 1997**, and denied all the allegations made in the Pleint and did put the Plaintiff to strict proof thereof. The 2<sup>nd</sup> Defendant denied that he has ever interfered with the Plaintiff's quiet possession of his parcel of land as alleged in the Pleint. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also denied that they are liable to the Plaintiff at all.

In their **Counter-claim**, the 2<sup>nd</sup> Defendant claimed for general damages from the Plaintiff arising out of defamation, trespass and nuisance. The 2<sup>nd</sup> Defendant further alleged that on diverse dates in the months **of September, October** and **December 1996**, the Plaintiff interfered with his quiet occupation of his parcel of land by causing unwarranted acts of nuisance and trespass thus causing annoyance and inconvenience to the 2<sup>nd</sup> Defendant and his family. He particularized the instance of nuisance in paragraph 12 of the Defence and Counter-claim. The 2<sup>nd</sup> Defendant further alleged that by reason of the Plaintiff's conduct, he has been defamed and as a result, his reputation has been injured and lowered in the estimation of the right thinking members of the society and has therefore suffered loss and damage.

The 2<sup>nd</sup> Defendant urged the Court to injunct the Plaintiff and enter judgement against the Plaintiff in the following terms;-

- a) **An injunction to restrain the Plaintiff by himself, his servants and/or agents from allowing dogs to stray into the 2<sup>nd</sup> Defendant's plot No.7785/73.**
- b) **General damages for defamation.**
- c) **General damages for nuisance and trespass to the 2<sup>nd</sup> Defendant's parcel of land.**
- d) **Costs of counterclaim.**
- e) **Interest on (b), (c), and (d) above from the date of judgement until payment in full.**
- f) **Any other or further relief.**

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also urged the Court to dismiss the Plaintiff's claim.

The 3<sup>rd</sup> Defendant also filed his statement of defence and admitted that he is the registered owner of property known as **No.7785/73**, having acquired the same from the 1<sup>st</sup> Defendant in **May 2010**. The 3<sup>rd</sup> Defendant further averred that the approvals for the construction of the building on the suit property were duly obtained and he denied that the building is illegal and did put the Plaintiff to strict proof. He further denied that the erection of the said house on the suit property contravened any **By laws** or regulations as alleged by the Plaintiff.

It was his further contention that the building complained of which constitutes his residential house is erected within his own property and in positioning with respect to the Plaintiff's house does not constitute any nuisance at all as alluded by the Plaintiff and does not violate any **By-laws** and regulations as alleged by the Plaintiff and did put him to strict proof thereof.

It was his further contention that there is a mature hedge planted on the common boundary separating his house and the Plaintiff's house and he denied that the erection of his house constitutes breach of the Plaintiff's privacy or blocks flow of natural light to his compound as alleged or at all. Further that the Plaintiff's allegations of the probable collapse of the house erected on the suit property is highly speculative and without any basis whatsoever as the house was constructed more than **16 years ago** with approval from the relevant authorities. He also denied having undertaken massive construction on the said property and did put the Plaintiff to strict proof thereof and averred that he was only undertaking renovation work on the said building for the purpose of making it suitable for habitation.

He further averred that before undertaking the said renovation works he obtained all the approval from the relevant authorities including the defunct **City Council of Nairobi**, and did put the Plaintiff to strict proof thereof. Therefore, it was his allegations that the Plaintiff has not suffered any loss, damage or prejudice on account of the renovation work undertaken. Further that he has utilized part of his property fronting the River Ruaka as a kitchen garden and it is not true that the same has resulted in flooding of the Plaintiff's lower part of the property alleged or at all and did put the Plaintiff to strict proof. He also denied diverting the natural course or flow of River Ruaka as claimed by the Plaintiff. He contended that if there was any flooding at all, it was not caused by the act of the 3<sup>rd</sup> Defendant but by the unusually heavy rainfall in the month of **May 2011**, and he had no control and the said floods also affected his property (3<sup>rd</sup> Defendant's)

The 3<sup>rd</sup> Defendant denied receipt of any **demand** or **notice** of the Plaintiff's allegations and he averred that the current suit against him is **frivolous, vexatious** and **an abuse** of the court process, which is activated by bad faith and should be dismissed with costs.

After several adjournments and interlocutory applications, the matter commenced hearing on **26<sup>th</sup> November 2014**, before this Court. The Plaintiff gave evidence for himself and called no witness. On his part, the 3<sup>rd</sup> Defendant gave evidence for himself and called one witness to support his case.

### **The Plaintiff's Case**

**PW1 – Wainaina Kigathi Mungai**, stated that he had given evidence previously on **7<sup>th</sup> October 2002**, and he wished to rely on it entirely. He also produced all the exhibits stated in the list of documents dated **25<sup>th</sup> August 1999**. It was his further testimony that he had initially sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants but later joined the 3<sup>rd</sup> Defendant after he obtained leave to do so on **18<sup>th</sup> May 2012**. Further that the 3<sup>rd</sup> Defendant purchased the suit property from the 1<sup>st</sup> Defendant in the **year 2010**.

It was his testimony that on or around **June 2010**, he noticed construction going on plot **No.7785/73**, which was owned previously by 1<sup>st</sup> Defendant, occupied by 2<sup>nd</sup> Defendant and later sold to 3<sup>rd</sup> Defendant. He checked and saw that there was no **Bill board** showing the name of the Contractor and **NEMA licence**, so that he could inquire more. After failing to see the **Bill board**, he went to the Lands Office and noted that the suit property was now owned by 3<sup>rd</sup> Defendant and that is when he filed an application to enjoin him in the suit which was allowed and he subsequently filed the instant **Amended Plaintiff**.

It was his further testimony that the 3<sup>rd</sup> Defendant did not obtain approvals to carry out the construction on his parcel of land. Further that the said building is a two storey building which is next to his house. That the windows of the storey building faces his bedroom and his sitting room. Further that the 3<sup>rd</sup> Defendant constructed a huge swimming pool and changing room and the changing room faces his bedroom. That the 3<sup>rd</sup> Defendant also constructed a guest house without approval from the City Council. It was his further evidence that the 3<sup>rd</sup> Defendant has been using the riparian land and the gardening has loosened his soil and the same has affected his land making it permanently flooded and that the 3<sup>rd</sup> Defendant has never approached him for an amicable solution of the matter.

The Plaintiff further testified that he was in possession of a letter dated **28<sup>th</sup> August 1996**, from the **Directorate of City Planning**, confirming that this construction were not approved. The letter was addressed to 2<sup>nd</sup> Defendant and he was given 7 days to remove the illegal construction. He also produced photographs showing the alleged illegal construction and the diverted River Ruaka. In cross-examination, he reiterated that the building in issue were put up by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and they did not have approval from the City Planning Directorate. He also confirmed that 2<sup>nd</sup> Defendant had building plans but reiterated that they were not approved plans as they did not bear the City Council Stamp. He also admitted that the enforcement of City **By laws** is by **Nairobi City Council**, and he did not know why they had not taken any action against the Defendants. He further stated that the 2<sup>nd</sup> Defendant was to be prosecuted in the **year 1998**, but he did not know if he was prosecuted or not. He was not aware of any **enforcement notice** served on the 3<sup>rd</sup> Defendant. He also admitted that he does not work for **Nairobi City Council**, and he was not an architect but he only feared that the building would collapse as it was not approved.

He also admitted that he did not have a report from **City Council of Nairobi** showing that the building was not sound structurally and would collapse. It was his further testimony that he had filed an application to stop the 3<sup>rd</sup> Defendant from purchasing the property owned by 1<sup>st</sup> Defendant but he still purchased it. That the 3<sup>rd</sup> Defendant uses the riparian land as a garden and has diverted Ruaka River, thus causing massive flooding on his land. He also stated that he reported the matter to **NEMA** in the **year 2009**, who only went to the said site and took photographs. He also confirmed that he has not complained against the 3<sup>rd</sup> Defendant to the Nairobi City Council. The Plaintiff further reiterated that the 3<sup>rd</sup> Defendant's building has blocked natural light to his house. That the 3<sup>rd</sup> Defendant's window look and open towards his compound and his right to privacy has been affected.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Case**

**2<sup>nd</sup> Defendant – Wesley Johnstone Kamau**, formerly known as **Kamau John Kinyanjui**, gave evidence for himself and the 1<sup>st</sup> Defendant. He relied on the witness statement filed in court on **15<sup>th</sup> June 2015**. He further stated that he is a Director of the 1<sup>st</sup> Defendant and so was entitled to give evidence on behalf of the 1<sup>st</sup> Defendant. It was his testimony that though the Plaintiff alleged that the **City Council of Nairobi**, wrote a letter to him, he was never prosecuted by the said City Council in regard to the construction of his property. He also stated that though the Plaintiff filed a criminal charge against him, he was acquitted under Section 210 of the Civil Procedure Code.

He also stated that he actually had approvals for the construction of his house which he commenced in **1989**. He also admitted to have sold the house to the 3<sup>rd</sup> Defendant when he had entirely completed the building of the said house. He also denied to have been served with any enforcement notice by the **Nairobi City Council**, nor prosecuted by the said **City Council**, over his Runda property which he later sold to the 3<sup>rd</sup> Defendant. He admitted that there was bad blood between himself and the Plaintiff and that they could not see eye to eye and had a lot of tension simmering between the two everyday. He denied all the claims made against him in the Plaintiff.

### **The 3<sup>rd</sup> Defendant's Case**

**3<sup>rd</sup> Defendant – Paul Kinuthia Njenga**, confirmed that he owns plot **No.7785/73**, in **Runda** which he bought from the 1<sup>st</sup> Defendant. He confirmed that the Plaintiff is his first neighbor on the east side. He further stated that he was not aware of the case before he bought the house. When he did due diligence, he noted that the title was very clean and was owned by **Trade Pan Realty**, the 1<sup>st</sup> Defendant herein and there was no caveat. He was shown the approved plans for the constructed house and they were okay. He also stated that the plans were for **K. J. Kinyanjui**, the 2<sup>nd</sup> Defendant dated **9<sup>th</sup> August 1988**, and they were approved by Nairobi City Commission. He produced a letter dated **December 1996**, which approved the building plans for the servant quarter. It was his evidence that the houses as constructed conforms to the plan. He denied that his house do constitute nuisance as there is a mature fence between the two houses and this fence has not been interfered with. He further stated that he has not interfered with the riparian area as claimed by the Plaintiff. He also denied ever carrying extensive farming on the riparian area. He testified that he has only cultivated a kitchen garden which cannot cause flooding. He produced all the exhibits in court.

In cross-examination, he confirmed that he purchased the suit property in **May 2010**, during the pendency of this suit. He also confirmed to have verified the drawings from the **City Council of Nairobi**, and confirmed that the drawings were approved. He also denied to have extensively renovated the building, but he admitted that he built a swimming pool after getting approval from the **City Council of Nairobi**. He also renovated the house after obtaining approvals from the said **City Council**. He denied to having diverted River Ruaka as claimed by the Plaintiff. He only admitted that he is cultivating on the riparian reserve of this River Ruaka and has not interfered with the flow of the River.

It was his further testimony that there is a mature cypress fence and he cannot see the Plaintiff's compound from his side. He also confirmed that his building is within the boundary of his property and he has not obstructed air and light to the Plaintiff's property.

**DW2 – Thomas Lawrence Ndudi Adaye**, told the Court that he is a **Senior Development Control Officer**, from **Nairobi City County**. That his office accepts applications from developers on behalf of **Nairobi City County** and these applications are submitted by registered architects. He further stated that he ascertains approvals of buildings and evaluate applications and recommend approvals. He would therefore be in a position to know if a building has been approved or not. He identified the building plans for **LR.No.7785/73, Runda Estate** owned by **K. J. Kinyanjui**. That the said plans were submitted by **Wagayu Kariuki Architect** and they were evaluated and later approved. The plans were for residential house, double storey with a lounge. It had a guest room on 1<sup>st</sup> floor and a detached servant quarter. The

plans were approved on **9<sup>th</sup> August 1989**, by the **Works and Town Committee of Nairobi City Commission** at that time. He produced the minutes of the said committee. It was his evidence that the building plans for 2<sup>nd</sup> Defendant's house were duly approved by the **Nairobi City Commission** in **1989**.

After the close of viva voce evidence, the parties herein filed their written submissions which this court has carefully read and considered. The Court has also considered the cited authorities and the entire evidence adduced by the parties and will render itself as follows;

There is no doubt that the Plaintiff herein is the registered owner of **LR.No.7785/74**, which is situated in **Runda Estate** and where he has put up his residential house. The Plaintiff alleged that he acquired the property in the **year 1982** and has lived therein with his family since then.

There is also no doubt that the 1<sup>st</sup> Defendant became the registered owner of **LR.No.7785/73**, which borders plot **No.7785/74**, in **1988** and thereafter the 2<sup>nd</sup> Defendant applied for approval of the building plans in **1989**. It is also evident that the 1<sup>st</sup> Defendant through the 2<sup>nd</sup> Defendant started construction of a residential house on the suit property in the **year 1996**. The Plaintiff has alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not have approved plans and thus this suit. However, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants alleged that they had the relevant approved plans which were approved by the Defunct **Nairobi City Commission** in **1989**. The said approved plans were produced as exhibit by DW2 together with the minutes of the Town Planning Committee.

There is also no doubt that the Plaintiff and the 2<sup>nd</sup> Defendant had a sour relationship and in the **year 2005**, the 2<sup>nd</sup> Defendant was charged with a criminal offence at **Kibera Law Court** wherein he was charged with two counts. The first being an offence of Creating Disturbance and the 2<sup>nd</sup> Count was Malicious Damage to Property. The complainant in the said criminal offence was the Plaintiff herein. The said criminal charges were preferred against the 2<sup>nd</sup> Defendant during the pendency of this suit. However, the 2<sup>nd</sup> Defendant was later acquitted under Section 210 of the Civil Procedure Code on both counts meaning that he had no case to answer.

The Court has also noted that the 2<sup>nd</sup> Defendant thereafter filed a Civil suit against the Plaintiff herein being **Civil Suit NO.6076 of 2012**, at **Milimani Chief Magistrate's Court** seeking damages for malicious prosecution.

It is also evident that in the **year 2010** the 1<sup>st</sup> Defendant sold the suit property to the 3<sup>rd</sup> Defendant while the suit herein was on-going. It is also evident that the Plaintiff had objected to the sale of this suit property to the 3<sup>rd</sup> Defendant due to existence of this case but the Court overruled him. However, after the 3<sup>rd</sup> Defendant purchased the property from the 1<sup>st</sup> Defendant, the Plaintiff applied to enjoin him in the suit and the said application was allowed.

Accordingly, the Plaintiff was amended on **25<sup>th</sup> May 2012**, and the Plaintiff alleged that the 3<sup>rd</sup> Defendant did engage in massive construction on plot **No.7785/73**, without approval from the **City Council of Nairobi**. Further that the 3<sup>rd</sup> Defendant engaged in farming activities along the riparian area of **River Ruaka**, thus causing flooding on the Plaintiff's land. The 3<sup>rd</sup> Defendant denied those allegations and stated that he only renovated the purchased house with approval from **City Council of Nairobi** and that he has cultivated a kitchen garden on his land that fronts River Ruaka and that cultivation cannot certainly cause flooding.

The above being the undisputed facts, the Court finds that the issues for determination are as follows;-

- i. Whether the Defendants obtained the requisite approvals for construction on the suit property in 1996 and 2011?**
- ii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants engaged in activities that constituted nuisance**

*against the Plaintiff in 1996.*

*iii. Whether the buildings on the 3<sup>rd</sup> Defendant's property constitutes nuisance and infringement of the Plaintiff's right to privacy and natural light?*

*iv. Whether there was flooding on the Plaintiff's parcel of Land in May/June 2011 and if so whether the same was caused by the 3<sup>rd</sup> Defendant's farming activities.*

*v. Whether the Plaintiff is entitled to the orders sought in the Plaintiff.*

*vi. Who is to pay costs of the suit?*

**i) Whether the Defendants obtained the requisite approvals for construction on the suit property in 1996 and 2011?**

It is trite that parties are bound by their pleadings. In the Amended Plaintiff, the Plaintiff had alleged that in **April 1996**, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants started construction of a two storey building barely a meter from their common boundary and the said building was without approval from the **City Council of Nairobi**. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied the said allegations. It was the Plaintiff who had alleged and therefore it was incumbent upon him to prove his claim on the required standard. It is trite that he who alleges must prove. Further Sections 107 and 109 of the Evidence Act behove upon the person alleging to prove the allegations. The said Sections provide as follows:-

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

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

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

The Plaintiff in his evidence in chief which was adduced on **7<sup>th</sup> October 2002**, and which he wholly adopted, stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' servant quarter was constructed approximately 3 meters from their common boundary. However, in his Amended Plaintiff, he alleged that the same was barely one meter from the common boundary. Further in cross-examination, the Plaintiff alleged that the two buildings are about 12 metres apart. Further, the Plaintiff alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants constructed the alleged residential house on plot **No.7785/73**, between the **year 1994 and 1995** without approved plans from the **City Council of Nairobi**. He produced letter dated **28<sup>th</sup> August 1996** from the **City Council of Nairobi**, which correspondences were to the effect that the construction on the Defendants parcel of land were without approvals. However, the said letters were not produced by any officials from the **City Council of Nairobi** to give them authenticity. Further, there was no evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were ever charged with the offence of putting up a construction without approved plans.

On the part of the Defendants, they produced approved plans for plot **LR.No.7785/73**, which were issued to **K. J. Kinyanjui**, the 2<sup>nd</sup> Defendant herein. The said plans were approved on **9<sup>th</sup> August 1989**. **DW2, Thomas Ndudi Adaje** an employee of the **City Council of Nairobi**, also testified in Court and confirmed that the plans used by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were approved by the **City Council of Nairobi** on **9<sup>th</sup> August 1989**. He produced the said approved plans and extract of the Town Planning Committee as exhibits in Court.

From the evidence adduced by the Defendants, it is evident that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants obtained

approved plans in **1989** and therefore the construction being carried out in **1996**, was with approved plans and approval from the **City Council of Nairobi**. The Court cannot rely on the letters produced by the Plaintiff because he was not the maker and there was no witness called from the defunct **City Council of Nairobi**, to confirm that the construction carried out by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in **1996** was without approval.

The 3<sup>rd</sup> Defendant testified that he purchased the suit property which was in a state of disrepair. It was his allegations that in the **year 2011**, he carried out renovations with approval from the **City Council of Nairobi**. The Plaintiff alleged that the 3<sup>rd</sup> Defendant failed to place a bill board at the said plot to show that the said construction (renovation) was approved by the **City Council of Nairobi**. It was his evidence that this failure to erect a Bill board contravened the Nairobi City by-laws. However, he did not indicate which by-laws. Further, the **City Council of Nairobi** did not complain of failure to erect the said Bill board or contravention of any of its by-laws by the 3<sup>rd</sup> Defendant. The 3<sup>rd</sup> Defendant was never charged with any criminal offence relating to the said construction or renovation. The Plaintiff is the one who has alleged and the onus was on him to prove his allegations. He has not discharged the said onerous task and the Court finds no reason to doubt the Defendants evidence that they indeed had the approvals in **1996** and **2011**.

**ii) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants engaged in activities that constituted nuisance against the Plaintiff in 1996?**

In his Amended Complaint, the Plaintiff alleged that the 2<sup>nd</sup> Defendant destroyed his well nurtured cypress fence by cutting off branches and poisoning the remainders. The 2<sup>nd</sup> Defendant denied this allegation. The Plaintiff did not avail any evidence of either photographs of the destroyed cypress fence, a complaint to the Police Station or any charges against the 2<sup>nd</sup> Defendant for malicious damage. There was also no expert report on poisoning of any cypress fence or diversion of Ruaka River. The Plaintiff made allegations which were not backed by any tangible evidence. How would the Court arrive at a conclusion that indeed the cypress fence was destroyed and the remainder poisoned without evidence of the destroyed fence, evidence of report of such destruction to the police station and even expert report on the poisoned cypress fence? Without such evidence, the Plaintiff's allegations remain mere allegations which are not sufficient to prove the case.

Further the Plaintiff alleged that the 2<sup>nd</sup> Defendant diverted River Ruaka during the months of **August, September and October 1996**. The Court finds that the Plaintiff did not avail evidence of such diversion or even report from **NEMA** or other expert to confirm that indeed River Ruaka was diverted and the effect of such diversion caused flooding on the Plaintiff's plot. The Plaintiff also alleged that the 2<sup>nd</sup> Defendant reared traditional goats and kept Turkeys which kept on croaking and disturbing the Plaintiff's peace. There was also no evidence of such goats and Turkeys on the 2<sup>nd</sup> Defendant's plot. No evidence that the Plaintiff reported such activities to the relevant authorities. No photographs of such animals on the 2<sup>nd</sup> Defendant's plot. The Court finds that the Plaintiff's allegation on the keeping of such animals, is just a mere allegation which the Court cannot rely on. There was no evidence from the Public Health Department of **City Council of Nairobi**, that indeed the 2<sup>nd</sup> Defendant did keep and rear goats and turkeys on plot **No.7785/73**, so that the Court can hold and find that such activity caused nuisance on the part of the Plaintiff.

Having carefully considered the available evidence, the Court finds and holds that the Plaintiff has not proved that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants engaged in activities that caused nuisance to him in the **year 1996**.

**iii) Whether the building on the 3<sup>rd</sup> Defendant's property constitute nuisance and infringement of the right to privacy and natural right?**

As this Court held and found hereinabove, the 3<sup>rd</sup> Defendant purchased **LR.No.7785/73**, from the 1<sup>st</sup> Defendant in the **year 2010**. It is not in doubt that the Plaintiff had objected to this purchase. However,

after the 3<sup>rd</sup> Defendant purchased the property in issue, he became the registered owner and as provided by Section 24(a) and 25(1) of the Land Registration Act 2012. The 3<sup>rd</sup> Defendant indeed become the absolute owner with rights and privileges. Section 24(a) of the said Act provides:-

***Subject to this Act—***

***(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;***

Further under Section 25(1) of the said Act, such rights shall not be liable to be defeated except as provided by the law. Such right include right to enjoyment of quiet possession and ownership. The said Section provides as follows:-

***The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—***

***(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and***

***(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.***

It is evident that when the 3<sup>rd</sup> Defendant acquired the said property, he expected to have absolute ownership with rights and privileges appurtenant thereto. It is also evident that he acquired the suit property with constructions on it. The approval was done in **1989** and construction began in **1994/1995**. Indeed the 3<sup>rd</sup> Defendant did not carry any structural construction. The Plaintiff alleged that the 3<sup>rd</sup> Defendant carried a massive construction without approval from the **City Council of Nairobi**.

However, the Court found and held that the 3<sup>rd</sup> Defendant only did renovation of the premises which were on the suit property and there was no evidence that the said renovation was not done with approvals from the **City Council of Nairobi**. Further the Court has seen the photographs which show the Plaintiff's house which has been separated from the 3<sup>rd</sup> Defendant guest house by a mature cypress fence. This cypress fence was allegedly planted by the Plaintiff. He cannot certainly accuse the 3<sup>rd</sup> Defendant over the same. Further, the Plaintiff confirmed in cross-examination that his house and that of the 3<sup>rd</sup> Defendant are about 12 metres apart. The said distance is good enough to allow privacy and flow of natural light.

The Plaintiff also has alleged that the 3<sup>rd</sup> Defendant has cultivated on the riparian area of River Ruaka which activities caused flooding in **May/June 2011**. However, the Plaintiff did not call expert evidence from **NEMA** to confirm that indeed the farming activities done by the 3<sup>rd</sup> Defendant is massive and not just kitchen garden and the said activities did contribute to flowing in the months of **May/June 2011**. The Court takes judicial notice that the month of **May/June**, are months of long rains and if there was any flooding then, it might have been caused by natural cause of long rains but not caused by the 3<sup>rd</sup> Defendant's activities on his property. Further, the 3<sup>rd</sup> Defendant did admit that he had constructed a swimming pool on his plot with approvals from the **City Council of Nairobi**. Though the Plaintiff alleged that the changing room of the swimming pool faces his sitting room, no evidence was availed to that effect and the Court was not even invited to the site to see and observe how this swimming pool has infringed on the Plaintiff's right to privacy.

Having found that there is a mature fence separating the two compounds and having found that the 3<sup>rd</sup> Defendant is the absolute and indefeasible owner of his property **LR.No.7785/73**, with rights and privileges appurtenant thereto, the Court finds and holds that there is no evidence adduced by the Plaintiff

to prove that the 3<sup>rd</sup> Defendant's construction and activities on his parcel of land amounts to nuisance on the part of the Plaintiff and infringes on his right to privacy and natural light.

**iv) Whether there was flooding on the Plaintiff's parcel of land in May/June 2011 and if so whether the same was caused by the 3<sup>rd</sup> Defendant's activities.**

The Plaintiff alleged that the 3<sup>rd</sup> Defendant did engage in farming activities along the riparian land bordering his plot and installed sprinkler system of piped water which activity caused flooding of River Ruaka.

The Plaintiff alleged and he therefore had a duty to prove Was there flooding? No evidence of such flooding was availed. There was no report produced by experts to confirm that indeed in **May/June 2011**, River Ruaka flooded because of the activities carried out by the 3<sup>rd</sup> Defendant on the riparian land bordering his land. There was no tangible evidence of flooding such as photographs or photographs of activities being carried out by the 3<sup>rd</sup> Defendant on the riparian area of River Ruaka. The allegations of flooding are mere allegations which have not been substantiated. The installing of sprinkler system of piping water to the land is for use during the dry season but not during the rainy season and the installation of the sprinkler system could certainly not have caused the bursting of River Ruaka. If River Ruaka bursted, it must have been **caused by the long and heavy rains of May/June** but **not the activities of the 3<sup>rd</sup> Defendant**.

**v) Whether the Plaintiff is entitled to the orders sought in the *Plaint*.**

The Plaintiff has sought for various prayers in his **Amended *Plaint***. The Court has analysed the available evidence and found that as provided by Section 107 and 109 of the Evidence Act, the Plaintiff has failed to prove any of the allegations that he had made against the Defendants. Having failed to prove his allegations, the **Court finds that the Plaintiff is therefore not entitled to any of the prayers sought in the *Plaint***.

**vi) Who is to bear costs of the suit?**

The issue of cost is governed by Section 27 of the Civil Procedure Act which provides that costs are granted at the discretion of the court. However, it is trite that costs follow the event. Costs are ordinarily granted to the successful litigant. Therefore the **Court finds that the Defendants are entitled to costs to be borne by the Plaintiff herein**.

**vii) Are the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entitled to their Counter- claim?**

Though the 1<sup>st</sup> and 2<sup>nd</sup> Defendant in their Defence also lodged a Counter-claim and sought for various prayers, the 2<sup>nd</sup> Defendant in his evidence did not give any evidence to support the Counter-claim. He did not allude to the Counter-claim at all in his Defence. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are therefore not entitled to the Counter-claim as stated in their Defence.

Having now carefully considered the available evidence, the **Court finds and holds that the Plaintiff has not proved his case on the required standard of proving his case on the balance of probabilities**.

For the above reasons the **Court dismissed the Plaintiff's claim as sought in the Amended *Plaint* dated 22<sup>nd</sup> May 2012, with costs to the Defendants herein**. The Court also disallows the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Counter-claim entirely.

It is so ordered.

**Dated, Signed and Delivered at Thika this 23<sup>rd</sup> day of February 2018.**

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Mungai for Plaintiff

No appearance for 1<sup>st</sup> Defendant Not reached for service

No appearance for 2<sup>nd</sup> Defendant

Mr. Njoroge holding brief for Mr. Chege for 3<sup>rd</sup> Defendant

Diana - Court clerk.

**L. GACHERU**

**JUDGE**

**Court** – Judgement read in open court in the presence of the above stated advocates.

**L. GACHERU**

**JUDGE**

**23/2/2018**