



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wambura v Omari & 24 others; Agola (Interested Party) (Environment and Land Case 196 of 2023) [2025] KEELC 5774 (KLR) (1 August 2025) (Judgment)**

Neutral citation: [2025] KEELC 5774 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE 196 OF 2023  
SO OKONG'O, J  
AUGUST 1, 2025**

**BETWEEN**

**PETER WELLINGTON WAMBURA ..... PLAINTIFF**

**AND**

**MARY ATIENO OMARI ..... 1<sup>ST</sup> DEFENDANT**  
**PHILIP OCHIENG OTIENO ..... 2<sup>ND</sup> DEFENDANT**  
**GEORGE OWINO OKODE ..... 3<sup>RD</sup> DEFENDANT**  
**VINCENT OTIENO OCHANDA ..... 4<sup>TH</sup> DEFENDANT**  
**JOSEPHINE OUMA ..... 5<sup>TH</sup> DEFENDANT**  
**ANNE AKECH OMBIMA ..... 6<sup>TH</sup> DEFENDANT**  
**PATRICIA AWINO ADALA ..... 7<sup>TH</sup> DEFENDANT**  
**YVONNE ADHIAMBO ADALA ..... 8<sup>TH</sup> DEFENDANT**  
**SAMUEL OTIENO OJWANG ..... 9<sup>TH</sup> DEFENDANT**  
**HESBORN OUMA OKWAYO ..... 10<sup>TH</sup> DEFENDANT**  
**JEREMIAH OTIENO OKECH ..... 11<sup>TH</sup> DEFENDANT**  
**BENTER ANYANGO OGWENOH ..... 12<sup>TH</sup> DEFENDANT**  
**REXFORD ODUNDO GUCHE ..... 13<sup>TH</sup> DEFENDANT**  
**ROGGERS ONYANGO GUCHE ..... 14<sup>TH</sup> DEFENDANT**  
**LYDIA AKOTH OTIENO ..... 15<sup>TH</sup> DEFENDANT**  
**JOHN OCHIENG OCHOLA ..... 16<sup>TH</sup> DEFENDANT**  
**LEONARD OTIENO ORUKO ..... 17<sup>TH</sup> DEFENDANT**



VIOLET ADHIAMBO ODINDO ..... 18<sup>TH</sup> DEFENDANT  
OWEN NYANGORO ..... 19<sup>TH</sup> DEFENDANT  
GEOFFREY MANDUKU NYAMBANE ..... 20<sup>TH</sup> DEFENDANT  
DOROTHY AKINYI OBUYA ..... 21<sup>ST</sup> DEFENDANT  
DR IZAQ OKOTH ODONGO ..... 22<sup>ND</sup> DEFENDANT  
DISTRICT LAND REGISTRAR, KISUMU ..... 23<sup>RD</sup> DEFENDANT  
CHAIRMAN NATIONAL LAND COMMISSION ..... 24<sup>TH</sup> DEFENDANT  
THE NATIONAL LAND COMMISSION ..... 25<sup>TH</sup> DEFENDANT

AND

DANIEL OTIENO AGOLA ..... INTERESTED PARTY

## JUDGMENT

### The Pleadings

1. The Plaintiff brought this suit through a plaint dated 24<sup>th</sup> July 2013. The Plaintiff averred that he was the registered owner of the leasehold interest from the Government of the Republic of Kenya for a term of 99 years with effect from 1<sup>st</sup> May 1991 in all that parcel of land known as L.R No.22929 measuring 1.802 hectares or thereabouts situated within Kisumu Municipality [hereinafter referred to as “the suit property”]. The Plaintiff averred that the suit property was allocated to him by the Commissioner of Lands through a letter of allotment dated 27<sup>th</sup> February 1991.
2. The Plaintiff averred that sometime in July 2013, he noticed that a fence that he had erected around the suit property had been pulled down and structures had been put up on a portion of the suit property. The Plaintiff averred that upon inquiry, he discovered that the structures were erected by the 4<sup>th</sup> and 5<sup>th</sup> Defendants who claimed that the portion of the suit property on which they had put up the said structures was a separate parcel of land known as Title No. Kisumu/Kanyakwar “B”/1501, which was sold to them by the 3<sup>rd</sup> Defendant.
3. The Plaintiff averred that he carried out a search on Title No. Kisumu/Kanyakwar “B”/1501, which revealed that the title had been issued by the 23<sup>rd</sup> Defendant following a purported subdivision. The Plaintiff averred that upon doing a follow-up, he learnt that in 2008, the 23<sup>rd</sup> Defendant, together with the Kisumu District Land Surveyor, unlawfully created within the suit property a parcel of land registered under the Registered *Land Act*, Chapter 300 Laws of Kenya, known as or as part of Title No. Kisumu/Kanyakwar “B”/1410, which was registered in the name of the 2<sup>nd</sup> Defendant. The Plaintiff averred that the 2<sup>nd</sup> Defendant thereafter transferred Title No. Kisumu/Kanyakwar “B”/1410 to the 1<sup>st</sup> Defendant. The Plaintiff averred that he learnt that the 1<sup>st</sup> to 23<sup>rd</sup> Defendants had in 2009 caused to be registered in their names the subdivisions of the said Title No. Kisumu/Kanyakwar “B”/1410 namely; Title No. Kisumu/Kanyakwar “B”/1498 in the name of the 2<sup>nd</sup> Defendant, 1499 in the name of the 19<sup>th</sup> Defendant, Title Nos. Kisumu/Kanyakwar “B”/1500 and 1501 in the name of the 3<sup>rd</sup> Defendant, Title No. Kisumu/Kanyakwar “B”/1502 in the names of the 3<sup>rd</sup> and 21<sup>st</sup> Defendants, Title No. Kisumu/Kanyakwar “B”/1503 in the name of the 20<sup>th</sup> Defendant, Title No. Kisumu/Kanyakwar “B”/1504 in the name of the 19<sup>th</sup> Defendant, Title No. Kisumu/Kanyakwar “B”/1505 in the name of the 10<sup>th</sup> and



18<sup>th</sup> Defendants, Title No. Kisumu/Kanyakwar “B”/1506 in the name of the 7<sup>th</sup> and 8<sup>th</sup> Defendants, Title No. Kisumu/Kanyakwar “B”/1507 in the name of the 17<sup>th</sup> Defendants, Title No. Kisumu/Kanyakwar “B”/1510 in the name of the 16<sup>th</sup> Defendant, Title No. Kisumu/Kanyakwar “B”/1511 in the name of the 15<sup>th</sup> Defendant, Title No. Kisumu/Kanyakwar “B”/1513 in the name of the 13<sup>th</sup> and 14<sup>th</sup> Defendants, Title No. Kisumu/Kanyakwar “B”/1515 in the name of the 12<sup>th</sup> Defendant, Title No. Kisumu/Kanyakwar “B”/1516 in the name of the 11<sup>th</sup> Defendant, Title No. Kisumu/Kanyakwar “B”/1518 in the name of 9<sup>th</sup> and 10<sup>th</sup> Defendants, Title No. Kisumu/Kanyakwar “B”/1519 in the name of the 7<sup>th</sup> and 8<sup>th</sup> Defendants, and Title No. Kisumu/Kanyakwar “B”/1520 in the name of the 6<sup>th</sup> Defendant.

4. The Plaintiff averred that following the purported transfer of Title No. Kisumu/Kanyakwar “B”/1501 by the 3<sup>rd</sup> Defendant to the 4<sup>th</sup> and 5<sup>th</sup> Defendants, the 4<sup>th</sup> and 5<sup>th</sup> Defendants had begun massive construction of buildings and other structures on Title No. Kisumu/Kanyakwar “B”/1501 and had, in the process brought down the Plaintiff’s boundary fence thereby violating the Plaintiff’s right to quiet enjoyment and possession of the suit property.
5. The Plaintiff averred that he was still the registered proprietor of the suit property and that the purported registration of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as the proprietors of the portions thereof and the subsequent purported transfers of their interests to the other Defendants were irregular, fraudulent and unlawful. The Plaintiff pleaded several particulars of fraud and illegality against the Defendants.
6. The Plaintiff averred that as a result of the Defendants’ conduct complained of, the Plaintiff had suffered loss. The Plaintiff averred that the fence he had put up at a considerable cost had been brought down. The Plaintiff averred that he had also been denied the enjoyment of his right to quiet possession of the suit property and the use and proper development of the property due to the encroachment, particularly by the 4<sup>th</sup> and 5<sup>th</sup> Defendants.
7. The Plaintiff prayed for judgment against the Defendants for;
  1. A declaration that the purported conversion and issuance of Title No. Kisumu/Kanyakwar “B”/1410 by the 23<sup>rd</sup> Defendant, with complicity of the 24<sup>th</sup> and 25<sup>th</sup> Defendants is void and unlawful.
  2. A declaration that the registration of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as the proprietors of Title No. Kisumu/Kanyakwar “B”/1410 as well as the subsequent transfers arising therefrom are void and unlawful.
  3. A declaration that the purported subdivision of all that property referred to as Title No. Kisumu/Kanyakwar “B”/1410 as well as the subsequent transfers arising therefrom are void and unlawful.
  4. An injunction restraining the 4<sup>th</sup> and 5<sup>th</sup> Defendants jointly and severally from occupying and/or continuing with any construction work on the property known as L.R No. 22929, referred to as Title No. Kisumu/Kanyakwar “B”/1501 and/or selling, disposing of, transferring or otherwise interfering with the said property.
  5. An injunction restraining the Defendants jointly and severally from interfering with, selling, disposing of and/or transferring or causing to be transferred any interest in the property known as L.R No. 22929, referred to by them as Title No. Kisumu/Kanyakwar “B”/1410 or the purported sub-parcels referred to as Title Nos. Kisumu/Kanyakwar “B”/1497 to 1521.



6. An injunction restraining the Defendants jointly and severally from interfering with the Plaintiff's quiet enjoyment and possession of the property known as L.R No. 22929.
  7. General Damages for trespass and loss of use.
  8. The costs of the suit.
8. The 22<sup>nd</sup> Defendant filed a statement of defence on 24<sup>th</sup> September 2013. The 22<sup>nd</sup> Defendant averred that he was a stranger to the Plaintiff's claim. The 22<sup>nd</sup> Defendant denied that the property known as Kisumu/Kanyakwar "B"/1498 was transferred to him irregularly, fraudulently and illegally as claimed by the Plaintiff. The 22<sup>nd</sup> Defendant averred that he purchased the property in good faith for valuable consideration from the 1<sup>st</sup> Defendant after carrying out the necessary due diligence. The 22<sup>nd</sup> Defendant averred that he followed due process in acquiring the title to the property and that he had no notice of any defect in the 1<sup>st</sup> Defendant's title.
  9. The 18<sup>th</sup> Defendant filed her statement of defence on 20<sup>th</sup> November 2013. The 18<sup>th</sup> Defendant denied the Plaintiff's claim in its entirety. The 18<sup>th</sup> Defendant denied that she acquired the property known as Kisumu/Kanyakwar "B"/1505 irregularly, fraudulently and illegally as claimed by the Plaintiff. The 18<sup>th</sup> Defendant averred that she was an innocent and bona fide purchaser of the property for valuable consideration from the then registered owner thereof. The 18<sup>th</sup> Defendant averred that her title was freehold, while the Plaintiff's title was leasehold, and as such, the two properties were not the same. The 18<sup>th</sup> Defendant averred that she acquired the property without notice of the Plaintiff's claim over the same. The 18<sup>th</sup> Defendant averred that she was wrongly joined as a party to the suit.
  10. The 15<sup>th</sup> and 16<sup>th</sup> Defendants filed separate statements of defence with headings: "Reply To Defence" through the firm of M.Mochama & Company Advocates on 31<sup>st</sup> October 2014. The 15<sup>th</sup> and 16<sup>th</sup> Defendants denied the Plaintiff's claim in its entirety. The 15<sup>th</sup> and 16<sup>th</sup> Defendants denied that they acquired the properties, Title Nos. Kisumu/Kanyakwar "B"/1511 and 1510 respectively irregularly and fraudulently. The 15<sup>th</sup> and 16<sup>th</sup> Defendants averred that they followed due process in acquiring the two properties.
  11. The 4<sup>th</sup> and 5<sup>th</sup> Defendants filed a joint statement of defence dated 21<sup>st</sup> July 2014. The 4<sup>th</sup> and 5<sup>th</sup> Defendants denied the Plaintiff's claim in its entirety. The 4<sup>th</sup> and 5<sup>th</sup> Defendant denied that they acquired the property known as Kisumu/Kanyakwar "B"/1501 irregularly and fraudulently. The 4<sup>th</sup> and 5<sup>th</sup> Defendants averred that they acquired the property from the 3<sup>rd</sup> Defendant in good faith for valuable consideration without notice of the Plaintiff's interest in the property. The 4<sup>th</sup> and 5<sup>th</sup> Defendants averred that they were issued with a title deed for the property after following due process.
  12. The 19<sup>th</sup> Defendant filed a statement of defence dated 3<sup>rd</sup> November 2015 on 4<sup>th</sup> November 2015. The 19<sup>th</sup> Defendant denied the Plaintiff's claim in its entirety. The 19<sup>th</sup> Defendant denied that he acquired the properties known as Title Nos. Kisumu/Kanyakwar "B"/1499 and 1504 irregularly, fraudulently and illegally as claimed by the Plaintiff. The 19<sup>th</sup> Defendant averred that he purchased the properties from the 1<sup>st</sup> Defendant in good faith for valuable consideration without notice of the Plaintiff's interest in the same. The 19<sup>th</sup> Defendant averred that he was an innocent purchaser of the two properties for valuable consideration without notice of any defect in the titles thereof.
  13. The 10<sup>th</sup> Defendant filed a statement of defence on 28<sup>th</sup> June 2017. The 10<sup>th</sup> Defendant denied the Plaintiff's claim in its entirety. The 10<sup>th</sup> Defendant denied that he acquired the properties known as Title No. Kisumu/Kanyakwar "B"/1518 irregularly, fraudulently and illegally as claimed by the Plaintiff. The 10<sup>th</sup> Defendant averred that he purchased the properties from the 9<sup>th</sup> Defendant in



good faith for valuable consideration without notice of the Plaintiff's interest in the same. The 10<sup>th</sup> Defendant averred that he was an innocent purchaser of the property for valuable consideration without notice of any defect in the title thereof.

14. The 12<sup>th</sup> Defendant filed her statement of defence on 23<sup>rd</sup> January 2020. The 12<sup>th</sup> Defendant denied the Plaintiff's claim in its entirety. The 12<sup>th</sup> Defendant averred that she lawfully and procedurally purchased the properties known as Title No. Kisumu/Kanyakwar "B"/1514 and 1515 from the 1<sup>st</sup> Defendant for valuable consideration without notice of any defect in the titles that were held by the 1<sup>st</sup> Defendant. The 12<sup>th</sup> Defendant averred that she was an innocent purchaser of the suit properties for valuable consideration.
15. The Interested Party filed a statement of defence on 29<sup>th</sup> October 2020. The Interested Party averred that the parcel of land known as Title No. Kisumu/Kanyakwar "B"/385 belonged to his father, Gordon Mark Agola Hongo and that the Plaintiff had no lawful claim over the property. The Interested Party prayed for a declaration that Title No. Kisumu/Kanyakwar "B"/385 together with all the surrounding plots belonged to the Interested Party, a declaration that the land parcel, L.R No. 22929 was under investigation and an order striking out the Plaintiff's suit.
16. The 16<sup>th</sup> Defendant and the Attorney General entered an appearance but did not file a defence. The other Defendants never entered an appearance. Of the parties who defended the suit, only the 18<sup>th</sup>, 19<sup>th</sup>, and 22<sup>nd</sup> Defendants and the Interested Party gave evidence at the trial.
17. At the trial, the Plaintiff adopted his witness statement dated 24<sup>th</sup> July 2013 as his evidence in chief and produced the documents in his list of documents dated 24<sup>th</sup> July 2013 as P.EXH. 1 to 11 respectively. In his statement, the Plaintiff stated as follows in brief: In 1990, he applied to the Commissioner of Lands to be allocated land. Following that application, he was allocated the suit property through a letter of allotment dated 27<sup>th</sup> February 1991. After meeting the conditions in the letter of allotment, he was issued with a title Number I.R 73665 dated 7<sup>th</sup> July 1997. He was using the suit property as a farm. In 2013, he discovered that there were people who were erecting structures on the suit property, whom he later learnt to be the 4<sup>th</sup> and 5<sup>th</sup> Defendants. The 4<sup>th</sup> and 5<sup>th</sup> Defendants claimed that they had purchased the land they were developing from the 3<sup>rd</sup> Defendant.
18. The Plaintiff stated that he carried out a search on Title No. Kisumu/Kanyakwar "B"/1501 from which the 4<sup>th</sup> and 5<sup>th</sup> Defendants claimed to have derived their titles. The search revealed that Title No. Kisumu/Kanyakwar "B"/1501 was created by the 23<sup>rd</sup> Defendant following a subdivision of a parcel of land owned by the 2<sup>nd</sup> Defendant. The Plaintiff stated that he discovered that around 2008, the 23<sup>rd</sup> Defendant unlawfully created Registered Land Act, Chapter 300 Laws of Kenya [now repealed] titles, including Title No. Kisumu/Kanyakwar "B"/1410 within the suit property in favour of the 2<sup>nd</sup> Defendant. The Plaintiff stated that the 2<sup>nd</sup> Defendant transferred Title No. Kisumu/Kanyakwar "B"/1401 to the 1<sup>st</sup> Defendant. The Plaintiff stated that on diverse dates in 2009, Title No. Kisumu/Kanyakwar "B"/1410 was subdivided into Title Nos. Kisumu/Kanyakwar "B"/1498 to 1520, which were transferred and registered in the names of the 1<sup>st</sup> to 22<sup>nd</sup> Defendants. The Plaintiff stated that he wrote to the Chief Land Registrar on 11<sup>th</sup> July 2013, complaining about the creation of the said parcels of land within the suit property. The Plaintiff stated that the Chief Land Registrar directed the 23<sup>rd</sup> Defendant to expunge the irregular titles from the record. The Plaintiff stated that the 23<sup>rd</sup> Defendant did not take any action. The Plaintiff stated that the Defendants' actions amounted to trespass on the suit property and was irregular, fraudulent and unlawful.
19. The Plaintiff's next witness was Eng. Paul Omondi [PW2]. PW2 told the court that he was the Plaintiff's attorney. PW2 adopted his witness statement dated 21<sup>st</sup> February 2020 as his evidence in



- chief. In his statement, PW2 merely reiterated the contents of the plaint and the Plaintiff's witness statement.
20. The Plaintiff's last witness was Julius Orwa Obado [PW3]. PW3 told the court that he was a licensed surveyor and that the Plaintiff had instructed him to do a survey and prepare a report on the encroachment on the suit property, L.R No. 22929. He stated that he did the work and prepared a report dated 20<sup>th</sup> January 2020, which he produced as P.EXH. 12. He stated that the suit property was surveyed in 1997 before the title was issued. He stated that the suit property had fixed boundaries and that he found some beacons missing and replaced them. He stated that during his survey of the suit property, he found some land parcels which were of general boundaries encroaching on the property. He stated that the encroachment came about as a result of two parcels of land, namely, Title Nos. Kisumu/Kanyakwar "B"/1136 and 1137 measuring 2.48 Ha. and 0.5Ha. respectively, which were created fraudulently from a non-existent parcel of land. He stated that the parcel of land which gave rise to the two parcels of land did not exist on the ground and could not be traced in the relevant survey maps.
  21. PW3 stated that Title No. Kisumu/Kanyakwar "B"/1137, which measured 0.5Ha. was subdivided into 8 portions whose total measurement came to 0.88Ha. more than the size of the original parcel. He stated that one of the subdivisions of Title No. Kisumu/Kanyakwar "B"/1137 was Title No. Kisumu/Kanyakwar "B"/1260, which measured 0.10Ha. He stated that Title No. Kisumu/Kanyakwar "B"/1260 was subdivided into 25 portions each measuring 0.10Ha. He stated that one of the portions of Title No. Kisumu/Kanyakwar "B"/1260 was Title No. Kisumu/Kanyakwar "B"/1322 which was further subdivided into 40 portions also measuring 0.10 Ha. each. He stated that Title No. Kisumu/Kanyakwar "B"/1322 was subdivided by the 2<sup>nd</sup> Defendant, while Title No. Kisumu/Kanyakwar "B"/1260 was subdivided by James Odhiambo Oyola. He stated that all the said subdivisions were fraudulent and illegal, resulting in irregular and fraudulent parcels of land.
  22. The 22<sup>nd</sup> Defendant, Dr. Izaq Okoth Odongo [DW1], was the first to give evidence for the Defendants. DW1 adopted his witness statement dated 23<sup>rd</sup> September 2013 as his evidence in chief and produced the documents attached to his bundle of documents dated 23<sup>rd</sup> September 2013 as D.EXH. 1, 2, 3 and 4 respectively. He stated that he was introduced to the 1<sup>st</sup> Defendant, who was selling Title No. Kisumu/Kanyakwar "B"/1498 by a friend in 2009. They agreed on a purchase price of Kshs. 550,000/-. He did a search at the land office, which confirmed that the property was owned by the 1<sup>st</sup> Defendant. He also went to the ground and confirmed that the property existed and was vacant. PW3 stated that he followed the law while acquiring the suit property.
  23. The next witness for the defence was the Interested Party, Daniel Otieno Agola [DW2]. DW2 stated that the suit property originally belonged to his father, Gordon Mark Agola Hongo, deceased. He stated that his father owned Title No. Kisumu/Kanyakwar "B"/385 and all the surrounding parcels of land. He stated that the land was acquired by the Municipality of Kisumu from his grandfather without compensation. He stated that the land adjudication committee awarded his father the land. He stated that the dispute regarding among others the suit property was determined by the 25<sup>th</sup> Defendant which revoked the titles held by those who had invaded the land belonging to Kanyakwar community. DW2 stated that the Plaintiff's claim had been overtaken by events. He stated that the Plaintiff's title was created on top of his father's existing title. DW2 produced his bundle of documents as D.EXH. 5.
  24. The next witness was the 18<sup>th</sup> Defendant, Violet Adhiambo Odindo [DW3]. DW3 told the court that she was a director of Victory Christian School. He adopted her witness statement dated 15<sup>th</sup> May 2018 as part of her evidence in chief and produced the documents attached to her list of documents filed on 8<sup>th</sup> June 2018 as a bundle as D.EXH.6. DW3 stated that she was introduced to the 1<sup>st</sup> Defendant,



who was selling the parcel of land that she purchased by a friend. She stated that she went to the land after which she engaged an advocate who did a search which confirmed that the land was owned by the 1<sup>st</sup> Defendant. She stated that it was after that that she entered into an agreement of sale with the 1<sup>st</sup> Defendant, made the payment and had the land transferred to her name. She stated that when she went to the ground, she found a large parcel of land that had been subdivided into many portions. She stated that the parcel of land sold to her was vacant. She stated that the Plaintiff was claiming only a portion of her land, Title No. Kisumu/Kanyakwar “B”/1505 which was said to have encroached onto the suit property.

25. The last defence witness was the 19<sup>th</sup> Defendant, Owen Nyangoro [DW4]. DW4 told the court that he bought land parcels, Title Nos. Kisumu/Kanyakwar “B”/1499 and 1504 from the 1<sup>st</sup> Defendant, who was introduced to him by a friend. He stated that he first purchased Title No. Kisumu/Kanyakwar “B”/1499 and thereafter Title No. Kisumu/Kanyakwar “B”/1504. He stated that the two parcels of land were vacant. He stated that he fenced the properties and planted trees, but with time, the fence was vandalised. He adopted his witness statement dated 4<sup>th</sup> November 2015 as part of his evidence in chief and produced his bundle of documents filed on 4<sup>th</sup> November 2015 as D.EXH.7. He stated that he followed due process when acquiring the two properties in respect of which he held title deeds issued by the Ministry of Lands.

### **The submissions**

26. After the close of evidence, the court directed the parties who had participated in the hearing of the suit to make closing submissions in writing. The Plaintiff filed submissions dated 6<sup>th</sup> September 2024, and the Interested Party filed submissions dated 26<sup>th</sup> September 2024. The remaining parties did not file submissions.

### **The Plaintiff’s submissions**

27. The Plaintiff framed the following issues for determination by the court;
- a] Whether the Plaintiff had proved his case on a balance of probabilities hence entitled to the orders of prohibitory and mandatory injunctions sought against the Defendants.
  - b] Whether the Plaintiff was entitled to general damages for trespass and loss of user
28. On the first issue the Plaintiff submitted that he had proved that he was the true owner of land parcel L.R No. 22929 [the suit property] by producing the Grant for the suit property registered as No. I.R 73665 registered on the 7<sup>th</sup> July 1997 under the Registration of Titles Act, Chapter 281 Laws of Kenya [now repealed]. The Plaintiff submitted that the suit property was registered in his name after he had complied with all the conditions for the allotment of the property to him.
29. The Plaintiff cited Section 23 of the Registration of Titles Act [now repealed] and submitted that upon being registered as the owner of the suit property, he became the absolute and indefeasible proprietor of the property. The Plaintiff submitted that he retained the original title of the suit property and had never sold the said parcel of land to anyone. The Plaintiff submitted that he was shocked to find out that a new freehold title being Title No. Kisumu/Kanyakwar B/1410 had been issued for the whole of his property, yet he held a leasehold title and the same had been subdivided into numerous sub-parcels and sold to the 3<sup>rd</sup> to 22<sup>nd</sup> Defendants.
30. The Plaintiff submitted that the dispute before the court was a clear case of fraud which had been proved by the survey report by Julius Orwa Obado [PW3] dated 20<sup>th</sup> January 2020 and the survey report by the Kisumu Regional Surveyor, Isaiah Ouma. The Plaintiff submitted that the findings in



the survey report dated 20<sup>th</sup> January 2020 showed that the fraud took place at the Land Registrar's office where freehold titles were created over the Plaintiff's leasehold land, L.R No. 22929. The Plaintiff submitted that the Chief Land Registrar noted the existence of this illegality, irregularity and fraud and directed the Land Registrar, Kisumu, to expunge from the records any parcel of land that had been irregularly created under the provisions of the Registered Land Act [now repealed].

31. The Plaintiff submitted that he had challenged the titles held by the Defendants for having been acquired fraudulently, illegally, irregularly, unprocedurally, or through misrepresentation or corrupt scheme as provided for by Section 26 [1] of the Land Registration Act 2012. The Plaintiff submitted that the 1<sup>st</sup> to 22<sup>nd</sup> Defendants acquired their titles through fraud with the complicity and aid of the 23<sup>rd</sup>, 24<sup>th</sup> and 25<sup>th</sup> Defendants.
32. The Plaintiff submitted that the survey report dated 20<sup>th</sup> January 2020, the Regional Surveyor's report and the Plaintiff's pleadings proved fraud of the highest magnitude and thus the Plaintiff had pleaded and proved the particulars of fraud alleged against the Defendants to the required standard. The Plaintiff submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not acquire a good title to the land parcel, Title Number Kisumu/Kanyakwar "B"/1410, and as such, the 3<sup>rd</sup> to 22<sup>nd</sup> Defendants could not claim to have acquired a good title to the land that was acquired and subdivided fraudulently. In support of this submission, the Plaintiff relied on *Esther Ndegi Njiru & another v Leornard Gatei* [2014] eKLR.
33. The Plaintiff cited Section 80[1] of the Land Registration Act 2012 and urged the court to expunge the titles held by the 1<sup>st</sup> to 22<sup>nd</sup> Defendants from the records, and the suit property reverted to its original status. In support of this submission, the Plaintiff relied on *Joseph Wachira Mbiti v George Muhoho Wanjiru & another* [2020] eKLR. The Plaintiff submitted that he had proved his case on a balance of probabilities and, as such, was entitled to prohibitory and mandatory injunctions sought against the Defendants and the other orders sought in the plaint.
34. On the second issue, the Plaintiff submitted that he discovered trespass and encroachment on the suit property by the Defendants in 2013, and since then, he had not been able to enjoy the use of the said property. The Plaintiff submitted that he continued to pay land rates yet he could not use his land for the intended purpose. The Plaintiff urged the court to determine the appropriate general damages to award for the Defendants' acts of trespass and loss of user that the Plaintiff had suffered.

### **The Interested Party's submissions**

35. The Interested Party submitted that as the administrator of the estate of his father Gordon Mark Agola Hongo, he was the owner of the land parcels, Title Nos. Kisumu/Kanyakwar "B"/384, 385 and 844 and as such had the right to deal with the same in whichever way he deemed fit. The Interested Party submitted that the title for the parcel of land claimed by the Plaintiff was revoked, and the Interested Party's title to the land parcel, Title No. Kisumu/Kanyakwar "B"/385 upheld. The Interested Party submitted that the suit property encroached on the Interested Party's land parcels, Title Nos. Kisumu/Kanyakwar "B"/384, 385 and 844 and as such the title thereof was unlawful, null and void, being a product of collusion between the Plaintiff and the 23<sup>rd</sup> Defendant. The Interested Party submitted that a court of competent jurisdiction had already determined the dispute brought to court by the Plaintiff. The Interested Party submitted that the suit was *res judicata*. The Interested Party urged the court to dismiss the suit with costs.

### **Analysis and determination**

36. The Plaintiff's suit was defended by the 4<sup>th</sup>, 5<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, and 22<sup>nd</sup> Defendants, and the Interested Party. The 4<sup>th</sup>, 5<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 15<sup>th</sup>, and 16<sup>th</sup> Defendants did not however give evidence at



the trial. I have considered the pleadings, the evidence tendered by the parties who gave evidence at the trial, and the submissions of the parties who filed written submissions. From the pleadings and the evidence tendered, the following, in my view, are the issues arising for determination in this suit;

1. Whether the Plaintiff is the lawful owner of the parcel of land known as L.R No. 22929, Grant No. I.R 73665 measuring approximately 1.802 hectares [the suit property];
2. Whether the parcels of land owned by the 1<sup>st</sup> to 22<sup>nd</sup> Defendants were created within the suit property, and whether the 1<sup>st</sup> to 22<sup>nd</sup> Defendants are trespassers on the suit property;
3. Whether the Plaintiff is entitled to the reliefs sought in his plaint; and
4. Who is liable for the costs of the suit?

#### **Whether the Plaintiff is the lawful owner of the suit property.**

37. The suit property was registered under the Registration of Titles Act, Chapter 281 Laws of Kenya [now repealed]. Section 23 of the Registration of Titles Act provides as follows:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.

38. Section 26 of the *Land Registration Act* 2012, which repealed the Registration of Titles Act, provides as follows:

“26.

[1] The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

[a] on the ground of fraud or misrepresentation to which the person is proved to be a party; or

[b] where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

[2] A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

39. The Plaintiff produced in evidence as P.EXH. 6, Grant No. I.R 73665 for L.R No. 22929 [the suit property] which was issued by the Commissioner of Lands in his favour on 4<sup>th</sup> July 1997. The



Grant was registered on 7<sup>th</sup> July 1997. I am satisfied that the Plaintiff is the registered owner of the suit property. The court is enjoined under Section 23 of the Registration of Titles Act to take the Plaintiff's Grant as conclusive evidence that the Plaintiff is the absolute and indefeasible owner of the suit property unless it is proved that the title was acquired through fraud, misrepresentation, illegality, procedural impropriety or a corrupt scheme. The Plaintiff, having produced his title in evidence to prove his ownership of the suit property, the burden was on the Defendants if they were challenging the title to establish the grounds for its impeachment. None of the Defendants who defended the suit challenged the Plaintiff's title to the suit property. It was only the Interested Party who claimed that the suit property was created on top of land parcel No. Kisumu/Kanyakwar "B"/385 owned by his father, Gordon Mark Agola Hongo, through collusion between the Plaintiff and the 23<sup>rd</sup> Defendant. The burden was on the Interested Party to prove that the suit property was created from or on top of land parcel No. Kisumu/Kanyakwar "B"/385. I have considered all the evidence produced in court by the Interested Party, oral and documentary, including the survey report by Opiyo & Associates dated 1<sup>st</sup> October 2020. There is no proof that the suit property is part of or was created from land parcel No. Kisumu/Kanyakwar "B"/385 owned by the Interested Party's father, Gordon Mark Agola Hongo, deceased. The Interested Party has therefore failed to establish valid grounds for challenging the Plaintiff's title to the suit property. It is my finding that the Plaintiff is the lawful owner of the suit property.

**Whether the parcels of land owned by the 1<sup>st</sup> to 22<sup>nd</sup> Defendants were created within the suit property, and whether the 1<sup>st</sup> to 22<sup>nd</sup> Defendants are trespassers on the suit property.**

40. As submitted by the Plaintiff, trespass is any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, page 923, paragraph 18-01. In *Gitwany Investments Limited v Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. I have made a finding that the Plaintiff is the lawful owner of the suit property. The Plaintiff has contended that the 1<sup>st</sup> and 23<sup>rd</sup> Defendants illegally and fraudulently created land parcel Title No. Kisumu/Kanyakwar "B"/1401 within the suit property. The Plaintiff averred that the 1<sup>st</sup> Defendant purportedly subdivided land parcel Title No. Kisumu/Kanyakwar "B"/1401 into 25 portions namely: Title Nos. Kisumu/Kanyakwar "B"/1497-1521, some of which the 1<sup>st</sup> Defendant transferred to the 2<sup>nd</sup> to 22<sup>nd</sup> Defendants. The Plaintiff averred that the 2<sup>nd</sup> to 22<sup>nd</sup> Defendants who were occupying or claiming the said parcels of land, which originated from land parcel, Title No. Kisumu/Kanyakwar "B"/1401, illegally and fraudulently created within the suit property were trespassers on the suit property. The parcels of land in question were, Title Nos. Kisumu/Kanyakwar "B"/1497-1521. The 1<sup>st</sup> to 22<sup>nd</sup> Defendants denied the claim. What the court has been called upon to determine are; whether the parcels of land owned by the 1<sup>st</sup> to 22<sup>nd</sup> Defendants are within the suit property, whether they were created unlawfully and fraudulently, and whether the 1<sup>st</sup> to 22<sup>nd</sup> Defendants are trespassers on the suit property. As mentioned earlier, only the 4<sup>th</sup>, 5<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup> and 22<sup>nd</sup> Defendants who owned Title Nos. Kisumu/Kanyakwar "B"/1498, 1499, 1500, 1501, 1504, 1505, 1510, 1511, 1514, 1515, and 1518 defended the suit. The rest of the Defendants, namely: the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 17<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> Defendants, who were said to own the remaining parcels which emanated from the subdivision of land parcel, Title No. Kisumu/Kanyakwar "B"/1410, namely: Title Nos. Kisumu/Kanyakwar "B"/1502, 1503, 1507, 1508, 1509, 1512, 1513, 1516, 1517, 1519, 1520 and 1521 did not defend the suit. This means that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 17<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> Defendants did not dispute the Plaintiff's claim that Title Nos. Kisumu/Kanyakwar "B"/1502, 1503, 1507, 1508, 1509, 1512, 1513, 1516, 1517, 1519, 1520 and 1521 were subdivisions of the land parcel, Title No. Kisumu/Kanyakwar "B"/1410 and that Title No. Kisumu /Kanyakwar "B"/1410 was unlawfully and illegally created within the suit property.



41. From the Defendants who defended the suit, the 4<sup>th</sup>, 5<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> Defendants who were said to own land parcels, Title Nos. Kisumu/Kanyakwar “B”/1501, 1514, 1510, 1511 and 1518 did not tender any evidence at the trial. The effect of this is that they did not rebut, the Plaintiff’s claim that Title Nos. Kisumu/Kanyakwar “B”/1501, 1514, 1510, 1511 and 1518 were subdivisions of land parcel, Title No. Kisumu/Kanyakwar “B”/1410 and that Title No. Kisumu/Kanyakwar “B”/1410 was unlawfully and illegally created within the suit property.
42. This left only the 18<sup>th</sup>, 19<sup>th</sup> and 22<sup>nd</sup> Defendants who owned land parcels, Title Nos. Kisumu/Kanyakwar “B”/1505, 1499 and 1504, and 1498, respectively, contesting the Plaintiff’s claim. I have left out the Interested Party because I have made a finding that the parcels of land being claimed by the Interested Party are not related to the suit property. I am satisfied from the evidence on record that land parcels, Title Nos. Kisumu/Kanyakwar “B”/1497-1521, owned by the 2<sup>nd</sup> to 22<sup>nd</sup> Defendants, came about following the subdivision of the land parcel, Title No. Kisumu/Kanyakwar “B”/1410, which was owned by the 1<sup>st</sup> Defendant. From the evidence on record, land parcel, Title No. Title No. Kisumu/Kanyakwar “B”/1410 was a subdivision of the land parcel, Title No. Title Nos. Kisumu/Kanyakwar “B”/1322, and it measured 0.08Ha. Land parcel, Title No. Title Nos. Kisumu/Kanyakwar “B”/1410 was initially owned by the 2<sup>nd</sup> Defendant who transferred the same to the 1<sup>st</sup> Defendant on 29<sup>th</sup> April 2009. On 7<sup>th</sup> May 2009, the 1<sup>st</sup> Defendant purported to subdivide land parcel, Title No. Title Nos. Kisumu/Kanyakwar “B”/1410 which measured 0.08 Ha. when transferred to her into 25 portions measuring a total of 2.92Ha. This means that the 1<sup>st</sup> Defendant’s 25 parcels of land that measured a total of 2.92 Ha. originated from a parcel of land measuring 0.08Ha.! If this was not enough act of fraud, one of the subdivisions of the land parcel, Title No. Title Nos. Kisumu/Kanyakwar “B”/1410, namely: land parcel, Title No. Kisumu/Kanyakwar “B”/1521, which strangely measured 0.12 Ha. more than the size of the parent land parcel, was subdivided again by the 1<sup>st</sup> Defendant in 2010 into 55 plots measuring a total of 6.17Ha.
43. On 25<sup>th</sup> February 2020, the court ordered the Regional Surveyor, Kisumu, to survey the suit property and land parcels, Title Nos. Kisumu /Kanyakwar “B”/1330, 1331, 1351, 1352, 1353, 1355, 1356, 1357, 1358, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1522, 1523, 1793, 1794 and all the subdivisions that form the subject matter of the dispute. The Regional Surveyor conducted a survey and filed a report in court as ordered on 10<sup>th</sup> December 2020. According to the report, the following parcels of land encroached on and are wholly or partially within the suit property, L.R No. 22929, namely, Title No. Title Nos. Kisumu/Kanyakwar “B”/1351, 1352, 1353, 1354, 1356, 1357, 1358, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1522, and 1523.
44. The Plaintiff’s witness, Julius Orwa Obado [PW3] also carried out a survey on the suit property and produced in court a report dated 20<sup>th</sup> January 2020 which was marked as P.EXH.12. According to the report, the following parcels of land encroached on and are wholly within the suit property, L.R No. 22929, namely; Title No. Title Nos. Kisumu/Kanyakwar “B”/1351, 1352, 1353, 1354, 1355, 1356, 1498, 1499, 1500, 1501, 1502, 1522, and 1523, while the following parcels of land are partially within the suit property, L.R No. 22929, namely, Title Nos. Kisumu /Kanyakwar “B”/1330, 1331, 1357, 1358, 1503, 1504, 1505, 1506, and 1507. According to PW3, the following parcels of land are outside the suit property: Title Nos. Kisumu/Kanyakwar “B”/1359, 1360, 1361, 1362, 1363, 1367, 1510, 1513, 1515, 1516, 1518, 1519, 1520, 1793 and 1794.
45. The two survey reports are unanimous that from the parcels of land which resulted from the subdivision of the land parcel, Title No. Kisumu/Kanyakwar “B”/1410, the subject of this suit, land parcels, Title No. Kisumu/Kanyakwar “B”/1498 owned by the 22<sup>nd</sup> Defendant, Title No. Kisumu/Kanyakwar “B”/1499 owned by the 19<sup>th</sup> Defendant, Title No. Kisumu/Kanyakwar “B”/1500 owned



by the 3<sup>rd</sup> Defendant, Title No. Kisumu/Kanyakwar “B”/1501 owned by the 4<sup>th</sup> and 5<sup>th</sup> Defendants, and Title No. Kisumu/Kanyakwar “B”/1502 owned by the 21<sup>st</sup> Defendant are wholly within the suit property, while land parcels, Title No. Title No. Kisumu/Kanyakwar “B”/1503 owned by the 20<sup>th</sup> Defendant, Title No. Kisumu/Kanyakwar “B”/1504 owned by the 19<sup>th</sup> Defendant, Title No. Kisumu/Kanyakwar “B”/1505 owned by the 10<sup>th</sup> and 18<sup>th</sup> Defendants, Title No. Kisumu/Kanyakwar “B”/1506 owned by the 7<sup>th</sup> and 8<sup>th</sup> Defendants and Title No. Kisumu/Kanyakwar “B”/1507 owned by the 17<sup>th</sup> Defendant are partially within the suit property.

46. The two reports are also unanimous that land parcels, Title Nos. Kisumu/Kanyakwar “B”/1510-1520, owned by the 1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> Defendants respectively, are outside the suit property and have not encroached on the property.
47. According to the conclusions in the report produced by PW3, which was not challenged in my view, the entire process leading to the creation of the land parcel, Title No. Kisumu/Kanyakwar “B”/1410 and its subsequent subdivision that gave rise to Title Nos. Kisumu/Kanyakwar “B”/1497-1521 were irregular, fraudulent and illegal. According to PW3, freehold titles were extended to the leasehold title area, and titles were created on top of others. PW3 noted that whereas the suit property was registered in 1997, the freehold titles that have encroached on the same were created from 2005 onwards.
48. Given the foregoing, it is my finding that the parcels of land known as Title Nos. Kisumu/Kanyakwar “B”/1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, and 1507 which were registered under the Registered Land Act, Chapter 300 Laws of Kenya [now repealed] which are wholly or partially within the suit property were created on top of an existing leasehold title irregularly, fraudulently and illegally. The titles thereof are therefore illegal, null and void and could not confer upon the registered proprietors thereof any proprietary interest in the said parcels of land. Since the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> Defendants who purported to own the said parcels of land had no valid titles to the said parcels of land which form part of the suit property, their entry and occupation of the suit property had no lawful justification. In the absence of any valid justification for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> Defendants' entry and occupation of the suit property, they are trespassers on the property. The Plaintiff has, however, not made a case of trespass against the 6<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup> and 16<sup>th</sup> Defendants.

### **Whether the Plaintiff is entitled to the reliefs sought in its amended plaint**

49. I have set out earlier the reliefs sought by the Plaintiff. From my findings above, I am satisfied that the Plaintiff has proved his claim against the 1<sup>st</sup> to 23<sup>rd</sup> Defendants on a balance of probabilities. I have held that the creation and the purported subdivision of the land parcel, Title No. Kisumu/Kanyakwar “B”/1410 was irregular, fraudulent and illegal. Title No. Kisumu/Kanyakwar “B”/1410 was void and its subsequent purported subdivision could not clothe the titles for the subdivisions thereof with any legality. The Title Nos. Kisumu/Kanyakwar “B”/1497-1521, which resulted from the purported subdivision of Title No. Kisumu/Kanyakwar “B”/1410 were similarly null and void the same having been tainted by the illegal and fraudulent creation of Title No. Kisumu/Kanyakwar “B”/1410. The 2<sup>nd</sup> Defendant did not have a valid proprietary interest in Title No. Kisumu/Kanyakwar “B”/1410 that he could transfer to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant did not, therefore, acquire a valid title in respect of Title No. Kisumu/Kanyakwar “B”/1410. Since the 1<sup>st</sup> Defendant did not have a valid title to the land parcel, Title No. Kisumu/Kanyakwar “B”/1410 and its subdivisions, Title Nos. Kisumu/Kanyakwar “B”/1497-1521, she could not pass a valid title in respect thereof to the other Defendants to whom she transferred Title Nos. Kisumu/Kanyakwar “B”/1497-1521.



50. In *Munyu Maina v Hiram Gathiha Maina* [2013]eKLR the Court of Appeal stated that:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

51. In *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR the court stated that:

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

52. In *Nairobi High Court Civil Suit No. 1024 of 2005*[O.S], *Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

The Plaintiff is entitled to a declaration that the creation of Title No. Kisumu/Kanyakwar “B”/1410, the registration of the same in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the subsequent subdivision and transfer of the portions thereof were irregular, fraudulent, illegal, null and void. The Plaintiff is also entitled to an injunction restraining the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> Defendants by themselves or through their servants or agents from occupying, continuing with construction work, selling, transferring or interfering in any manner whatsoever with Title Nos. Kisumu/Kanyakwar “B”/1498, 1499, 1500, 1501, and 1502 which falls wholly within L.R No. 22929[the suit property] and such parts of Title Nos. Kisumu/Kanyakwar “B”/1503, 1504, 1505, 1506, and 1507 which falls within the suit property. The Plaintiff is also entitled to an injunction to restrain the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> Defendants by themselves or through their servants or agents from interfering with the Plaintiff’s quiet enjoyment and possession of the suit property.

53. The Plaintiff has proved that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> Defendants trespassed on the suit property. The Plaintiff is entitled to general damages for trespass. In *Park Towers Ltd. v John Mithamo Njika and 7 Others* [2014] eKLR, the court stated as follows:

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such



circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.”

54. In Halsbury’s Laws of England 4<sup>th</sup> Edition, Volume 45 para. 26 1503, the authors have stated as follows on assessment of damages for trespass:

- a] If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
- b] If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- c] Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.
- d] Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
- e] If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased.”

55. The Plaintiff did not prove that it had suffered actual loss as a result of the trespass. I will award the Plaintiff nominal damages for trespass in the sum of Kshs. 4,200,000/-. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> Defendants who have been found to have trespassed on the suit property shall pay Kshs. 300,000/- each.

56. On the issue of costs, in Halsbury’s Laws of England, 4<sup>th</sup> Edition [Re-issue], [2010] Vol. 10, para 16 the authors have stated as follows:

“The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the Court, a party has no right to costs unless and until the Court awards them to him and the Court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”.

57. The Plaintiff has proved his claim against the 1<sup>st</sup> to 23<sup>rd</sup> Defendants. There is no reason why the Plaintiff should be denied the costs of the suit. I will however not condemn the 6<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> Defendants to pay the costs of the suit. Although the court has found that the titles held by them were created irregularly, illegally and fraudulently, their parcels of land are outside the suit property. They did not, therefore, trespass on the property. The Plaintiff shall have the costs of the suit to be paid by the 1<sup>st</sup>, 2, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> Defendants.

58. Before concluding, I wish to say that I will not make any orders in respect of the parcels of land known as Title Nos. Kisumu/Kanyakwar “B”/1351, 1352, 1353, 1354, 1355, 1356, 1330, 1331, 1357, 1358, 1522, and 1523, which the two surveyors also found to be within the suit property wholly or partially. This is because the registered owners of these properties were not made parties to the suit, although the Plaintiff had in his possession reports showing that they had encroached on the suit property.



## **Conclusion**

59. In conclusion, I hereby enter judgment for the Plaintiff against the 1<sup>st</sup> to 23<sup>rd</sup> Defendants for;
1. A declaration that the creation of Title No. Kisumu/Kanyakwar “B”/1410, the registration of the same in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the subsequent subdivision and transfer of the portions thereof to the other Defendants were irregular, fraudulent, illegal, null and void.
  2. A permanent injunction restraining the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> Defendants by themselves or through their servants or agents from occupying, continuing with construction work, selling, transferring or interfering in any manner whatsoever with Title Nos. Kisumu/Kanyakwar “B”/1498, 1499, 1500, 1501, and 1502, which fall wholly within L.R.No. 22929[the suit property] and such parts of Title Nos. Kisumu/Kanyakwar “B”/1503, 1504, 1505, 1506, and 1507, which fall within the suit property.
  3. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> Defendants by themselves or through their servants or agents from interfering with the Plaintiff’s quiet enjoyment and possession of the suit property, L.R No. 22929.
  4. Kshs. 4,200,000/- being general damages for trespass payable by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> Defendants equally.
  5. Costs of the suit to be paid by 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> Defendants.
  6. The Interested Party shall bear his costs of the suit.

**DELIVERED AND SIGNED AT KISUMU ON THIS 1<sup>ST</sup> DAY OF AUGUST 2025**

**S. OKONG’O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Olum for the Plaintiff

Ms. Ochieng for the 19<sup>th</sup> Defendant

Ms. Raburu h/b for Mr. Munuango for the 4<sup>th</sup> Defendant

Ms. Omondi h/b for Mr. Odeny for the 22<sup>nd</sup> Defendant

Ms. J. Omondi-Court Assistant

