



**Push Enterprises Limited v Kenya Airports Authority (Environment & Land
Case 721 of 2013) [2024] KEELC 449 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 449 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 721 OF 2013**

**JO MBOYA, J
JANUARY 25, 2024**

BETWEEN

PUSH ENTERPRISES LIMITED PLAINTIFF

AND

KENYA AIRPORTS AUTHORITY DEFENDANT

JUDGMENT

Introduction and Background

1. The Plaintiff herein has approached the Honourable court vide Plaint dated the 12th June 2013; and in respect of which the Plaintiff herein has sought for the following reliefs;[verbatim];
 - i. The Defendant whether by themselves, agents, servants, employees or otherwise howsoever be restrained from remaining upon, entering upon, trespassing upon and/or interfering with the Plaintiff's quiet possession of the suit property known as L.R No. 25799/1.
 - ii. An Order of be issued against the Defendant prohibiting whether by himself, themselves, servants, officers from remaining upon, entering upon, transferring, occupying, leasing, charging, mortgaging, assigning or interfering with the Plaintiff's quiet possession of the suit property known as L.R No. 25799/1.
 - iii. A Mandatory Injunction do issue compelling the Defendants, their agents, servants and/or any other person occupying L.R No. 25799/1 to vacate unconditionally and remove any materials deposited or erected thereon at their own costs.
 - iv. Declaration that the Plaintiff is the lawful, legal, absolute and registered owner of the property known as L.R No. 25799/1.
 - v. Damages for trespass against the Defendant.



- vi. Costs of this suit together with Interest thereon for such period and at such rate as this Honorable court may deem appropriate.
- vii. Any such other or further relief as this Honorable court may deem appropriate to grant.
2. Upon being served with the Plaint and summons to enter appearance, the Defendant duly entered appearance and thereafter filed a Statement of Defense dated the 16th July 2013; and in respect of which same [Defendant] disputed the claims adverted to by the Plaintiff.
3. Be that as it may, the Defendant subsequently sought for and obtained Leave to file and serve an amended Statement of Defense. For coherence, the amended Statement of Defense was thereafter filed on the 18th December 2017.
4. Moreover, on the 16th October, 2020, the Defendant again proceeded to and filed and Further amended Statement of Defense and counterclaim and wherein the Defendant sought for inter-alia;
 - i. A declaration that the plaintiff's suit property [LR No. 25799/1] overlaps and indeed falls within the boundary confines of the Defendant's LR No. 21919 and land survey plan No. 205580 and what thus irregularity and un-procedureally hived from the Defendant's suit portion of land and the title held by the plaintiff is an irregular one and therefore null and void ab initio.
 - ii. A Mandatory injunctive order restraining the Plaintiff by itself, its agents, servants and/or employees from trespassing, building, alienating, clearing, charging, transferring and/or dealing in whatsoever manner with the said property LR No. 25799/1
 - iii. Cost of the plaintiff's suit and the Counter-claim
5. Suffice it to point out that despite having been served with the Further amended statement of defense and counterclaim, it is evident and apparent that the Plaintiff herein neither filed nor served any reply to the Further amended defense nor defense to the counterclaim.
6. Furthermore, it is instructive to underscore that the pleadings attendant to and in respect of the instant matter thereafter closed and the subject matter underwent the requisite pre-trial procedures and thereby paving way for the hearing of the matter.

Evidence by the Parties':

a.Plaintiff's Case:

7. The Plaintiff's case revolves around the Evidence of two [2] witnesses, namely, Christopher Mugonye Wamae and Martin Andati, who testified as PW1 and PW2, respectively.
8. It was the evidence of PW1 [Christopher Mugonye Wamae] that same is the Managing Director of the Plaintiff company. Further, the witness averred that by virtue of being the Managing Director of the company, same is authorized to attend to the matters and/or affairs of the Plaintiff company.
9. At any rate, the witness averred that same is conversant with the facts pertaining to the instant matter which touches on and/or concerns ownership of L.R No. 25799/1 (hereinafter referred to as the suit property).
10. It was the further testimony of the witness that the Plaintiff company was duly allocated the suit property vide Letter of allotment dated the 14th July 1998; and that thereafter the Plaintiff company



- was issued with the Certificate of title, confirming that the Plaintiff is the lawful and legitimate owner of the suit property.
11. Furthermore, it is the testimony of the witness that despite the fact that the suit property belongs to and is registered in the name of the Plaintiff company, the Defendant has unlawfully and illegally taken possession of the suit property. Further and in addition, the witness averred that the Defendant has also allowed assorted shanties to be erected on the suit property, albeit without the permission of the Plaintiff.
 12. It was the further testimony of the witness that other than allowing the erection of the various shanties and semi-permanent structures on the suit property, the Defendant has also erected a signage on a portion of the suit property.
 13. Other than the foregoing, the witness averred that the actions and or commissions by and on behalf of the Defendant, have effectively dispossessed and deprived the Plaintiff of her lawful rights to and in respect of the suit property.
 14. As a result of the foregoing, the witness averred that the Plaintiff has thus suffered loss and damages and hence seeks compensation against the Defendant in the manner articulated in the Plaintiff.
 15. Additionally, the witness alluded to the witness statement dated the 12th June 2013, whose contents have been highlighted herein before and thereafter sought to adopt the contents of the witness statement.
 16. For coherence, the witness statement dated the 12th June 2013, was thereafter adopted and constituted as the Evidence in chief of the witness.
 17. Moreover, the witness also referred to a List and Bundle of documents dated the 12th June 2013; and sought to produce and rely on the various documents enumerated thereunder.
 18. There being no objection to the production and admission of the documents alluded to at the foot of the List and Bundle of Documents dated the 12th June 2013, same were thereafter duly admitted as Exhibits P1 to P14, respectively.
 19. On the other hand, the witness also referred to the List and Bundle of documents dated the 18th November 2021; and similarly sought to adopt and rely on the named documents. For good measure, the documents at the foot of the List and Bundle of documents dated the 18th November 2021, save for document number 1 thereof, were duly admitted and constituted as Exhibits P15 to P23, respectively.
 20. Additionally, the witness alluded to the contents of the Plaintiff dated the 12th August 2013; and invited the Honourable court to proceed and grant the reliefs sought thereunder.
 21. On cross examination by Learned counsel for the Defendant, the witness herein stated that he (witness) has been able to peruse and appreciate the contents of the witness statement filed by one Mr. Omwenga, on behalf of the Defendant. In any event, the witness has averred that from the witness statement of the said Mr. Omwenga, same has given a history pertaining to the land in question.
 22. Whilst under further cross examination, the witness averred that the land in question, which Mr. Omwenga has given the historical background to is L.R No. 21919 (I.R No. 70118) and whose title was issued on the 26th July 1996.
 23. On the other hand, it was the testimony of the witness that the land, namely, L.R No. 211919, is separate and distinct from the Plaintiff's parcel of land. In any event, the witness averred that the Plaintiff's parcel of land is L.R No. 25799/1.



24. Furthermore, it was the testimony of the witness that the Plaintiff company herein applied to be allocated the suit property through her advocate. Nevertheless the witness added that even though same (Plaintiff applied to be allocated the suit property) he (witness) has not tendered before the court a copy of the application letter.
25. In any event, it is the evidence of the witness that by the time the Plaintiff applied to be allocated the suit property, neither the Plaintiff nor the witness was privy to or knowledgeable of the ground/exact location of the land, which same sought to be allocated.
26. Moreover, whilst under further cross examination, the witness averred that even though an application Letter for allotment of the suit property was made, same was however not knowledgeable of the office to which the application letter was addressed.
27. Be that as it may, it was the testimony of the witness that later on the Plaintiff was issued with a Certificate of title. Further, the witnesses added that the Letter of allotment which was issued to and in favor of the Plaintiff contained various conditions, including issuance of an acceptance letter as well as payments of stand premium. Nevertheless, the witness averred that same has neither tendered nor produced before the court any letter of acceptance or receipt relative to the payment of the statutory levies alluded to at the foot of the Letter of allotment.
28. Be that as it may, it was the testimony of the witness that the Letter of allotment in favor of the Plaintiff was duly processed culminating into the issuance of a Certificate of title to and in favor of the Plaintiff. For coherence, the witness averred that the certificate of title was issued on the 28th June 2012.
29. On cross examination as to why same (witness) had neither tendered nor produced a copy of the application letter, letter of acceptance and the revenue receipt on account of payment of the statutory levies, the witness averred that same were under the custody of the Plaintiff's transaction advocate, namely, Mr. Rioba, who (sic) passed on/died in the year 2012.
30. It was the further testimony of the witness that by the time the certificate of title to and in favor of the Plaintiff was being issued, the Defendant's certificate of title over and in respect of L.R No. 21919, had long been issued.
31. Furthermore, it was the testimony of the witness that same (witness) is not aware of whether the Defendant's title in respect of L.R No. 21919 is still in existence to date. In any event, the witness averred that same is not aware whether the land in question, namely, L.R No. 21919 was ever surrendered.
32. Whilst under further cross examination, the witness averred that same is not knowledgeable of or conversant with the difference between L.R No. 25799 and L.R No. 21919. However, it was the further testimony of the witness that L.R No. 25799 was surrendered by the Defendant and thereafter same was subdivided culminating into the creation of, inter-alia, the suit property.
33. Nevertheless, when pressed further as pertains to the question of surrender, the witness stated that same has neither tendered nor produced the instrument of surrender. Other than the foregoing, it was the further testimony of the witness that L.R No. 21919 was also surrendered by the Defendant. Similarly, the witness added that L.R No. 25799 was also surrendered by the Defendant.
34. Be that as it may, it was the evidence of the witness that same however did not know when the two parcels were surrendered.
35. Other than the foregoing, the witness averred that the suit property, namely, L.R No. 25799/1, measures approximately 10 acres. In any event, the witness avers that the Plaintiff was previously in



- occupation of the suit property, but same was evicted by the Defendant who unlawfully entered upon and took possession of the suit property after inter-alia, uprooting the Plaintiff's fence.
36. Furthermore, the witness testified that the suit property, which belongs to the Plaintiff is situated within the neighborhood of Jomo Kenyatta International Airport[JKIA].
 37. On further cross examination, the witness herein averred that same has come across the Kenya gazette notice relating to various plots which are said to have been illegally curved/excised out of L.R No. 21919. In any event, the witness herein admitted that the suit property is indeed contained and/or referenced in the Gazette notice in question.
 38. Other than the foregoing, the witness herein also admitted that according to the Kenya gazette notice, which has been referenced to, it is indicated that the suit property falls on the flight path, earmarked at the second runway. On the other hand, it was the further testimony of the witness that the title to and in respect of the suit property was not obtained vide fraud.
 39. To the contrary, the witness averred that the title to the suit property was lawfully processed and thereafter registered in the name of the Plaintiff company.
 40. The second witness who testified on behalf of the Plaintiff is Martin Andati. Same testified as PW2.
 41. It was the testimony of the said witness that same is a License surveyor currently plying his trade as a surveyor under M/s J.R.R Aganyo & Associates Surveyors. In addition, the witness avers that same graduated with a Diploma from Technical University of Kenya.
 42. It was also the testimony of the witness that same (witness) has been in practice since the year 1991. Furthermore, it was the evidence of the witness that same was engaged and/or instructed by the Plaintiff herein to undertake, inter-alia, the visitation of the locus in quo[parcel of Land], as well as to review the various documents filed by the Defendant before the court.
 43. Other than the foregoing, the witness averred that pursuant to and upon receipt of the instructions, same proceeded to and undertook the designated exercise and thereafter same (witness) recorded a witness statement dated the 9th November 2021.
 44. Additionally, the witness sought to adopt and rely on the witness statement dated the 9th November 2021. For coherence, the witness statement dated the 9th November 2021, was thereafter admitted and constituted as the Evidence in chief of the witness.
 45. Other than the foregoing, the witness stated that in the course of executing and/or carrying out his instruction, same came across a Survey Report which was prepared by M/s Southlands Surveyors and which report was prepared by and at the request of the Defendant herein.
 46. It was the further testimony of the witness that upon examination of the said surveyors report, same (witness) established that the report indicated that there was an error in the acreage of the land belonging to the Defendant. In any event, the witness averred that it was indicated that airport land, namely, L.R No. 21919 was short of some acreage. Indeed, the witness pointed out that the deficiency amounted to 228.8Ha.
 47. On cross examination by Learned counsel for the Defendant, the witness herein stated/averred that same is a Land surveyor and not a License surveyor. In any event, the witness ventured forward and stated that he (witness) is a registered surveyor.



48. Whilst under further cross examination, the witness avers that same was retained and/or instructed by the Plaintiff and that his instructions entailed visitation to the locus in quo and providing a critique of the witness statement filed by Mr. Omwenga on behalf of the Defendant herein.
49. Moreover, the witness averred that the Plaintiff's land, namely, L.R No. 25799/1 falls outside the Defendant's land. However, the witness admitted and/or conceded that same (witness) did not state as much in the body of his witness statement.
50. Whilst under further cross examination, it was the testimony of the witness that same (witness) visited the office of the Directorate of survey and that whilst thereat same procured and obtained some documents. Nevertheless, the witness averred that he however did not visit the land office.
51. On further cross examination, the witness averred that same acted in accordance with his instructions and that in any event, his instructions were limited and did not require him to prepare a map/sketch plan.
52. On the other hand, it was the testimony of the witness that during the course of executing his mandate, same had occasion to examine the Defendant's certificate of title.
53. Furthermore, the witness herein averred that same is conversant with the process of surrender. In any event, the witness averred that surrender must be done by the owner of the land.
54. When pressed further, the witness averred that same has not been able to see any surrender instrument and/or document before the court. However, the witness added that on reconsideration, the surrender of the land was done on the 7th November 2005.
55. It was the further testimony of the witness that where a particular parcel of land is surrendered, the owner of the surrendered land is obligated to surrender and hand over the original certificate of title. However, in respect of the instant matter, the witness stated that same (witness) was not knowledgeable of whether the Defendant was still holding the original certificate of title.
56. On re-examination, the witness averred that same is knowledgeable in survey and in any event, same has worked under a licensed surveyor. In this regard, the witness added that same was therefore competent to give an opinion before the Honourable court.
57. Furthermore, the witness averred that he (witness) has been able to respond to the allegations contained in the witness statement of Mr. Omwenga.
58. On the other hand, it was the testimony of the witness that the title belonging to the Defendant was indeed surrendered. In this regard, the witness referred to page 61 of the Plaintiff's bundle of documents, which indicates that the title was surrendered.
59. With the foregoing evidence, the Plaintiff's case was closed.

b. Defendant's Case:

60. The Defendant's case revolves around the testimony of one witness, namely, Joseph Waitheru, who testified as DW1.
61. It was the testimony of the witness that same is an employee of the Defendant and that by virtue of being such employee he (witness) is conversant with and knowledgeable of the facts pertaining to the subject dispute.



62. Moreover, it was the testimony of the witness that same is holding the portfolio of Engineering Surveyor and that by virtue of his portfolio he (witness) is tasked to liaise with the Ministry of Lands as pertains to matters of survey records relating to all Airports.
63. Other than the foregoing, the witness averred that same has been working with the Defendant since the year 2012. Additionally, the witness intimated to the court that same has since recorded a witness statement dated the 23rd February 2023; and which witness statement same (witness) sought to adopt as his Evidence in chief.
64. Pursuant to and at the request of the witness, the witness statement dated the 23rd February 2023 was duly adopted and constituted as the Evidence in chief of the witness.
65. Other than the foregoing, the witness also alluded to the List and Bundle of documents, dated the 15th July 2020; and thereafter sought to produce the various documents as Exhibits before the court.
66. There being no objection by and on behalf of the Plaintiff, the documents at the foot of the List dated 15th July 2020; were duly produced and admitted in evidence as Exhibits D1 to D16, respectively.
67. Other than the foregoing, it was the further testimony of the witness that same (witness) has tendered and highlighted the history pertaining to the property belonging to the Defendant. In any event, the witness averred that there was a multi-task Agency committee which deliberated on a Complaint mounted by the Defendant. In this respect, the witness alluded to Exhibit D8.
68. Other than the deliberations by the multi-task Agency committee, the witness also referred to a Report by the National Land Commission and a subsequent Kenya gazette notice, relating to the propriety/ validity of the Plaintiff's title.
69. Moreover, it was the testimony of the witness that same has also tendered and provided before the Honourable court various Survey Plans relative to the Defendants parcel of land. In any event, the witness added that the Plaintiff's parcel of land falls within the land belonging to the Defendant.
70. In view of the foregoing, the witness averred that the Plaintiff's title was neither lawful nor legitimate.
71. On cross examination, the witness averred that same is not a licensed surveyor, but a surveyor working the Director of survey. In this regard, the witness averred that he (witness) is a Government surveyor.
72. Whilst under further cross examination, the witness averred that he does not have a practicing license.
73. Other than the foregoing, it was the evidence of the witness that same has been involved in the exercise of ascertaining the extent and scope of the Defendant's land. Furthermore, the witness averred that same is also tasked with keeping survey records.
74. Be that as it may, it was the evidence of the witness that as pertains to the subject dispute he (witness) did not write any letter to the Ministry of Lands and neither did same collect any data as pertains to the Defendant's property.
75. Additionally, the witness herein testified that same has neither tendered nor produced before the court any certificate of official search in respect of the property being claimed by the Defendant.
76. On further cross examination, the witness averred that same has neither tendered nor produced any document before the Honourable court, which has been signed by the Director of survey.
77. Other than the foregoing, it was also the testimony of the witness that there are a List of properties/ plots which were compulsorily acquired. In this regard, the witness pointed out to page 13 of the Defendant's bundle of documents.



78. Moreover, the witness also averred that same was conversant with what constitutes Part Development Plan. In any event, the witness added that a Part Development Plan [PDP], is ordinarily prepared by the Director of Physical Planning.
79. Upon being referred to the Part Development Plan tendered and adduced before the Honourable Court, the witness averred that same [Part Development Plan], does not show that it was prepared by the Director of Physical Planning.
80. In respect of a Survey Plan, the witness pointed out that same is prepared by the Directorate of survey. However, when referred to the document at page 14 of the Defendant's bundle of documents, the witness admitted that same (witness) does not know who prepared the documents. Furthermore, the witness averred that the documents under reference was prepared in 1999.
81. Whilst under further cross examination, the witness averred that same has the survey plan relating to and in respect of L.R No. 21919, which belongs to the Defendant. In any event, the witness referred to the Survey Plan before the court and thereafter clarified that same was drawn on the 26th March 1996.
82. Additionally, it was the testimony of the witness that same is aware that the Defendant herein was granted a Letter of allotment. However, the witness clarified that the letter of allotment was not before the court.
83. Besides, it was the testimony of the witness that after the allotment of the land to the Defendant, the Defendant engaged a private surveyor for purposes of carrying out the survey and preparation of a Survey Plan. At any rate, the witness added that the survey was undertaken and the survey plan was prepared by Mr. Gordon Wayumba.
84. Nevertheless, when pressed further, the witness pointed out that even though the survey plan contains the names of Mr. Gordon Wayumba, there is however no signature of the said Gordon Wayumba affixed/ appended thereon.
85. On the other hand, the witness averred that the total acreage of the land which was surveyed measures 4674.6Ha.
86. Other than the forgoing, it was the testimony of the witness that though same is conversant with a Deed Plan, no such Deed Plan has been availed to the court. In any event, the witness added that the Deed plan would show the boundaries of a designated title.
87. On cross examination as to whether same (witness) was privy to or knowledgeable of the filing of a counterclaim, the witness stated that same was not aware. Furthermore, the witness also added that he was also not aware whether a verifying affidavit had been filed.
88. It was the further testimony of the witness that to date the Defendant herein has under her custody and possession the Survey plan relating to L.R No. 21919, belonging to the Defendant. In any event, the witness added that the Defendant was duly and lawfully allocated land, whose details are contained at the foot of the Letter dated the 27th August 1990.
89. As concerns whether the Defendant herein has filed and/or taken any proceedings against the Commissioner of Lands, the witness stated that same is not aware of any such proceedings. Nevertheless, the witness averred that the Plaintiff's title was fraudulently and irregularly created by superimposing same on L.R No. 21919, belonging to the Defendant.



90. Lastly, the witness averred that the fraudulent acts complained of, were carried out and/or undertaken with the connivance and collusion of the Plaintiff. In any event, it was the testimony of the witness that the Defendant neither surrendered nor handed over any portion of her land to the Plaintiff herein.
91. On re-examination, it was the testimony of the witness that same had provided and availed the historical background relative to the land belonging to the Defendant. Furthermore, the witness averred that the portion of land which was allocated to the Defendant is not wholly captured at the foot of the Certificate of title.
92. Further and in addition, the witness averred that the Survey plan which had been prepared by Mr. Gordon Wayumba was duly signed. In this regard, the witness clarified that the signature of Mr. Gordon Wayumba, namely, private surveyor is indicated at the lower portion of the Survey Plan.
93. Other than the foregoing, the witness averred that the Survey plan would also be required to be transmitted to and be signed by the Director of survey. In any event, the witness averred that the Survey plan tendered before the court was similarly signed by the Director of survey.
94. Moreover, it was the testimony of the witness that the Survey plan was similarly registered and the registration mark is evident/ apparent on the face thereof.
95. In respect of whether or not the Defendant has tendered a copy of the Deed plan, the witness averred that same has not availed a copy thereof. However, the witness added that the purpose of a Deed plan is to outline/delineate the boundaries of a particular parcel of land.
96. Finally, the witness averred that the suit property, which is claimed by the Plaintiff falls within the 4674.6Ha, which are covered within the Defendant's certificate of title. In any event, the witness averred that the Google map which was tendered, clearly shows that the Plaintiff's land falls within the land belonging to the Defendant.
97. With the foregoing testimony the Defendant's case was duly closed.

The Parties' Submissions:

a. Plaintiff's Submissions:

98. The Plaintiff herein filed two [2] sets of written submissions dated the 14th October 2023 and 4th December 2023, respectively. In respect of the two [2] sets of written submission, the Plaintiff has proceeded to and highlighted seven [7] salient issues for due consideration and determination by the Honourable court.
99. Firstly, Learned counsel for the Plaintiff has contended that the various documents, which have been relied upon by and on behalf of the Defendant herein are not admissible and hence same have no probative value whatsoever.
100. Furthermore, Learned counsel for the Plaintiff pointed out that the Survey Plan of 1996, which the Defendant herein sought to adopt and rely on is contrary to the provisions of Sections 23, 30 and 32 of the *Survey Act*, Chapter 299 Laws of Kenya.
101. At any rate, it was also the submissions by counsel for the Plaintiff that the impugned documents being Public Documents also could only be tendered in evidence either in its original form or a certified copy thereof in compliance with the provisions with Section 80 and 81 of the *Evidence Act*.



102. Nevertheless, Learned counsel contended that the documents which the Defendant sought to rely on were neither original nor certified in accordance with the provisions of the Law of Evidence. In this regard, Learned counsel has contended that the document in question was/is therefore inadmissible.
103. In support of the foregoing submissions and especially pertaining to the inadmissibility of the Survey Plan, Learned counsel for the Plaintiff has cited and quoted, inter-alia, the case of *Kenneth Nyaga Mwige vs Austin Kiguta* (2015)eKLR, *George Kimani Njuki vs National Lands Commission & 2 Others* (2022)eKLR and *Julius Makao Malombe vs Charity Kaloki Ngilu & 2 Others* (2018)eKLR, respectively.
104. Secondly, Learned counsel for the Plaintiff has submitted that the Counterclaim filed and/or mounted by the Defendant herein has not been indorsed/accompanied with a verifying affidavit; and thus the counterclaim under reference is contrary to and in contravention of the provisions of Order 7 Rule 5 of the Civil Procedure Rules, as read together with Order 4 Rule 1(2) of the Civil Procedure Rules, 2010.
105. In any event, Learned counsel for the Plaintiff has submitted that to the extent that the Defendant has failed and/or neglected to file the requisite Verifying affidavit, the entire counterclaim, is fatally defective and thus ought to be struck out.
106. To vindicate the foregoing submissions, Learned counsel for the Plaintiff has cited and quoted, inter-alia, the case of *Prisca Onyango Ojwang & Others vs Henry Ojwang Nyabende* (2018)eKLR and *Joel Nyabuti Aricha vs Karibu Hotel* (2019)eKLR, respectively.
107. Thirdly, Learned counsel for the Plaintiff has submitted that the Plaintiff herein was lawfully and duly issued with the Letter of allotment over and in respect of L.R No. 25799/1 [hereinafter referred to as the suit property] and which property was subsequently registered in the name of the Plaintiff.
108. Moreover, Learned counsel for the Plaintiff has submitted that upon the registration of the suit property in the name of the Plaintiff, same became the lawful and legitimate proprietor thereof and is therefore entitled to absolute and exclusive possession of the suit property, without interference by the Defendant.
109. In any event, Learned counsel for the Plaintiff has contended that the allocation of the suit property to and in favor of the Plaintiff company was carried out and undertaken by the Commissioner of Land in accordance with the provisions of Section 3 of the Government *Land Act*, Chapter 280, Laws of Kenya, [now repealed].
110. Furthermore, it was the testimony of the Plaintiff's counsel that upon being issued with a Certificate of Title, the Plaintiff herein acquired indefeasible rights over and in respect to the suit property and that the Plaintiff's rights and Interests are vindicated vide the provisions of Section 24 and 25 of the *Land Registration Act*.
111. Besides, Learned counsel has submitted that the Plaintiff's title to and in respect of the suit property can only be invalidated in accordance with the law and in any event, upon demonstration of the ingredients articulated by the provisions of Section 26 of the *Land Registration Act*, 2012 and not otherwise.
112. Be that as it may, Learned counsel has pointed out that none of the ingredients espoused vide Section 26 of the *Land Registration Act*, 2012, have been demonstrated by the Defendant or at all.
113. Fourthly, Learned counsel for the Plaintiff has submitted that the Defendant herein has no lawful rights to and in respect of the suit property which lawfully belongs to the Plaintiff. Consequently and in this regard, the counsel for the Plaintiff has invited the court to take cognizance of the provisions of Article



40 of *the Constitution*, 2010 which protects/ vindicates property rights, like the ones belonging to the Plaintiff.

114. In any event, Learned counsel for the Plaintiff has submitted that if the Plaintiff's rights are to be interfered with, then it behooves the Defendant to comply with the law, as opposed to taking the law in own hands.
115. To this end, Learned counsel for the Defendant has cited and relied on the decision of the Supreme Court of Kenya in the case of Attorney General vs Zinj Ltd (Petition No. 1 of 2020) (2021) KESC 23 (KLR).
116. Fifthly, Learned counsel for the Plaintiff has submitted that even though the Defendant herein raised and adverted to issues of fraud against the Plaintiff's title, no credible and/or plausible evidence was ever placed before the Honourable court, to warrant a finding that there was any fraud in the transfer and ultimate registration of the suit property in the name of the Plaintiff.
117. Furthermore, learned counsel for the Plaintiff has submitted that the burden of proof, namely, proving the existence of fraud, if any, laid on the shoulders of the Defendant, who is the one who had impleaded fraud.
118. Owing to the fact that no evidence has been tendered to prove and/or demonstrate fraud, Learned counsel for the Plaintiff has invited the Honourable court to find and hold that the plea of fraud alluded to by and on behalf of the Defendant herein have neither been proved nor established, to the requisite standard or at all.
119. To buttress the foregoing submissions, Learned counsel for the Plaintiff has cited, inter-alia, Ndolo vs Ndolo (2008)1KLR 742, Vijay Morjaria vs Nansingh Madhusingh Dabar Another (2002)eKLR, respectively.
120. Sixthly, Learned counsel for the Plaintiff has submitted that the Defendant herein has entered upon and taken possession of the Plaintiff's property, albeit without the permissions and/or concurrence of the Plaintiff and hence the Plaintiff has been put to great prejudice and thereby deserving of compensation.
121. Moreover, Learned counsel for the Plaintiff has contended that the actions by and on behalf of the Defendant herein have indeed caused the Plaintiff loss and damage and consequently, learned counsel has implored the Honourable court to decree and award the sum of Kes.50, 000, 000/= only, on account of General Damages.
122. In support of the claim for General Damages for trespass and the quantum of damages alluded to, Learned counsel for the Plaintiff has cited and quoted, inter-alia, Municipal Council of Eldoret vs Titus Gatito Njau (2020)eKLR; Total Kenya Ltd (Formerly Caltex Oil Kenya Ltd) vs Janevams Ltd (2015)eKLR; and Njue vs Matiabe & 3 Others (Environment and Land Case E050 and E010 (consolidated) (2023) KE ELC 17361 (KLR), respectively.
123. In view of the foregoing, Learned counsel for the Plaintiff has thus invited the Honourable Court to find and hold that the Plaintiff has established and duly demonstrated her claim to and in respect of the suit property and hence same is entitled to compensation in terms of the Plaint filed before the court.
124. Furthermore, learned counsel has also invited the court to decree and award costs of the suit, as well as the Costs of the Counter-claim in favor of the Plaintiff.
125. Other than the foregoing, Learned counsel for the Plaintiff has contended that the counterclaim by and on behalf of the Defendant herein is misconceived and legally untenable and hence ought to be



dismissed, essentially for being incompetent and in breach of the provisions of Order 7 Rule 5 of the Civil Procedure Rules 2010.

b. Defendant's Submissions:

126. On her part, the Defendant filed written submissions dated the 24th November 2023; and wherein same has raised, highlighted and canvassed four [4] issues for consideration by the Honourable court.
127. Firstly, Learned counsel for the Defendant has submitted that even though the Plaintiff has tendered and produced before the court a Certificate of title in respect of L.R No. 25799/1 [the suit property], same has however failed to establish and demonstrate the origin of the suit property or at all.
128. Moreover, Learned counsel for the Defendant has submitted that it is not enough for the Plaintiff herein to tender and produce before the court a Certificate of title and thereafter to imagine that the production of such certificate of title suffices to vindicate the validity and/or propriety thereof.
129. For coherence, Learned counsel for the Defendant has submitted that it behooved the Plaintiff to go beyond the mere production of the impugned Certificate of title. However, Learned counsel for the Defendant has submitted that the Plaintiff has failed to justify/vindicate the root of her title.
130. Furthermore, Learned counsel for the Defendant has submitted that though the Plaintiff has indicated that the suit property arose from the sub-division of L.R No. 25799, which was allegedly surrendered by the Defendant, no evidence of Surrender was ever placed or tendered before the Honourable court.
131. Arising from the foregoing, Learned counsel for the Defendant has therefore submitted that the impugned Certificate of title by and on behalf of the Plaintiff is fraudulent, illegal and thus unlawful, for all intents and purposes.
132. In support of the submissions that a Claimant, the Plaintiff herein not excepted, must justify the root of his/her title, Learned counsel for the Defendant has cited and quoted, inter-alia, the holding in the case of *Munyu Maina vs Hiram Gathiha Maina (2013)eKLR* and *Daudi Kiptugen vs Commissioner of Lands and 4 Others (2015)eKLR*, respectively.
133. Secondly, Learned counsel for the Defendant has submitted that what is claimed by the Plaintiff, namely, L.R No. 25799/1, having been illegally acquired, same is invalid and void.
134. Additionally, Learned counsel for the Defendant has also contended that insofar as the Plaintiff has not been able to justify the process leading to her acquisition of the suit property, which in any event, is contended to fall within the Defendant's land, then it cannot be said that the Defendant has trespassed on to the suit property, either as claimed or at all.
135. As pertains to what constitutes trespass, Learned counsel for the Defendant has cited and quoted the decision in *Julie Mathenge vs Kenya School of Government & 2 Others (2022)eKLR*, wherein the Honourable court underscored the meaning, import and tenor of trespass.
136. Thirdly, Learned counsel for the Defendant has submitted that insofar as the Plaintiff has neither established nor demonstrated any lawful title to the suit property, same is not entitled to partake of and/or benefit from the reliefs sought at the foot of the Plaintiff or at all.
137. Fourthly, Learned counsel for the Defendant has submitted that unlike the Plaintiff, the Defendant herein has been able to demonstrate that same is the lawful proprietor of L.R No. 21919, which has been never been surrendered to the Government, either as alleged by the Plaintiff or at all.



138. Furthermore, Learned counsel for the Defendant has submitted that if there was any surrender, the surrender instrument would require to be duly signed by both the owner of the land and the recipient, namely, the Government and thereafter same would be duly registered.
139. Be that as it may, Learned counsel has pointed out that the Defendant herein never surrendered her title No. 21919; and hence same is deserving of protection in terms of the counterclaim.
140. Other than the foregoing, Learned counsel for the Defendant has also submitted that the counterclaim before the Honourable court ought not to be struck out merely on account of want of a verifying affidavit. To the contrary, Learned counsel for the Defendant has invited the court to endeavor to determine the dispute beforehand on merits as opposed to invocation and reliance on procedural technicalities.
141. In support of the foregoing submissions, Learned counsel for the Defendant has cited and quoted, inter-alia, the case of Salim Verjii vs Attorney General & 3 Others (2021)eKLR, Microsoft Corporation vs Mitsumi Computer Garage Ltd & Another (2001)KLR 470 and Luke Cheruyiot & 37 Others vs Nairobi Oil Corporation (2015)eKLR, respectively.
142. In a nutshell, Learned counsel for the Defendant has thus invited the court to find and hold that the Plaintiff has failed to prove her case to the requisite standard whilst the Defendant has duly proved the counterclaim.
143. Premised on the foregoing, the Honourable court has been implored to dismiss the Plaintiff's suit, whilst allowing the counterclaim with costs.

Issues for Determination:

144. Having appraised the pleadings filed, as well as the Evidence tendered [both oral and documentary] and upon taking into consideration the written submissions tendered by and on behalf of the respective Parties, the following issues do arise and are thus germane of determination;
 - i. Whether the Plaintiff acquired lawful rights to and in respect of the suit property or otherwise.
 - ii. Whether the Defendant has trespassed onto and/or interfered with [sic] the Plaintiff's title to the suit property either as claimed or at all.
 - iii. Whether the counterclaim by and on behalf of the Defendant is invalid and hence ought to be struck out.
 - iv. What Reliefs, if any, ought to be granted.

Analysis and Determination

Issue Number 1

Whether the Plaintiff acquired Lawful Rights to and in respect of the suit property or otherwise.

145. The substratum/ crux of the Plaintiff's case before the Honourable court pertains to and concerns ownership of L.R No. 25799/1 [hereinafter referred to as the suit property], which the Plaintiff company contends to have been duly allocated and thereafter transferred to and registered in her name.
146. Furthermore, it is the contention by and on behalf of the Plaintiff that upon compliance with (sic) the conditions at the foot of the Letter of allotment dated the 14th July 1998, the Plaintiff herein was duly issued with a Certificate of title/Grant denoting ownership of the suit property.



147. Instructively, the Plaintiff's claim to and in respect of the suit property is premised and or predicated upon the Certificate of Title issued and registered on the 6th February 2013.
148. Owing to the foregoing, it is therefore imperative to ascertain and/or discern whether the process attendant to the allocation, transfer and ultimate issuance of the suit property were lawful, legal and legitimate or otherwise. For coherence, it is the propriety and/or the validity of the process taken in obtaining the impugned title that will confirm and/or otherwise validate same.
149. To this end, it is instructive to recall and take cognizance of the dictum of the Court of Appeal in the case of *Munyu Maina versus Hiram Gathiha Maina (2013)eKLR*, where the Court of Appeal stated and held thus;

“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 need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony.”

150. Similarly, it is also important to recall the remarks of the Court in the case of *Daudi Kiptugen vs The Commissioner of Lands & 4 Others (2015)eKLR*, where the court stated and held thus;

“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. 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 the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or 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. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.”

151. Guided by the ratio decidendi highlighted and elaborated in the two [2] decisions cited herein before, it is now appropriate to venture forward and undertake review and due examination of the documents underpinning the Plaintiff's title to the suit property.
152. Furthermore, in my endeavor to answer the question raised herein before, I shall explore four [4] pertinent perspectives, which impact on the validity or otherwise, of a Certificate of title, the one held by the Plaintiff not excepted.
153. Firstly, it is worthy to recall that the Plaintiff contends that same was lawfully and duly allocated the suit property by the Commissioner of land in terms of the Letter of allotment dated the 14th July 1998.
154. In any event, it was also the Plaintiff's position that prior to being allocated the suit property, the Plaintiff herein made an application for allotment of a Plot situated along Mombasa Road. In addition,



it is not lost on the court that the Plaintiff herein intimated that at the time of applying to be allocated the Plot along Mombasa Road, same [Plaintiff], was not knowledgeable of the ground position/ location of (sic) the Plot applied for.

155. Nevertheless, it is imperative to recall that during the hearing of this particular matter, the Plaintiff's witness, namely, PW1, did not tender and/or produce before the Honourable Court a copy of the Application Letter. For good measure, whilst under cross examination, PW1 contended that the application for allotment of the suit property was made through his advocate and hence he did not have a copy.
156. Other than the foregoing, it is also instructive to recall that the Plaintiff herein was under obligation to issue a Letter of acceptance and also to pay the statutory levies alluded to and articulated at the foot of the Letter of allotment dated the 14th July 1998. In any event, the acceptance letter and the payment of the levies, was to be undertaken within 30 days from the date of issuance of the Letter of allotment.
157. Further and in any event, it is important to point out that the terms and conditions contained on the face of the Letter of allotment and more particularly, the ones relating to payment of the stand premium, were coached in mandatory/ peremptory terms and that in the event of default, the Letter of allotment would stand extinguished by effluxion of time.
158. Arising from the foregoing, it was therefore incumbent upon the Plaintiff to tender and produce before the Honourable court evidence that same, inter-alia, accepted the terms of the Letter of allotment as well as payments, rendered within the statutory 30 days.
159. However, there is no gainsaying that the Plaintiff herein neither tendered nor produced any acceptance Letter or Revenue receipt; or even a copy of a Bankers cheque, if any, that was issued towards settlement of the stand premium.
160. At any rate, when the Plaintiff's witness, namely, PW1 was cross examined on the failure to produce before the Honourable court a copy of the Letter of acceptance and receipt on account of payment of stand premium, the witness contended that the documents in question were (sic) in the custody of his transaction advocate, namely, Mr. Rioba, who was stated to have died on or about 2012/2013.
161. Nevertheless, even though the Plaintiff's transaction advocate may have died, as averred by PW1, however it is worth noting that if there was ever any acceptance Letter and/or payment receipt, certified copies thereof would have been procured and obtained from the Parcel file kept by the office of the Chief Land Registrar.
162. On the other hand, it is also common knowledge that if a Bankers cheque towards payments of the stand premium, was ever generated, surely the originator thereof, [the Plaintiff herein], would have retained a copy.
163. Be that as it may, it was the obligation of the Plaintiff herein to tender and or place before the court plausible and cogent evidence to demonstrate that same (Plaintiff) truly complied with and/or adhered to the terms of the Letter of allotment.
164. However, in respect of the instant matter, the court is afraid that no tangible evidence has been placed before the court to vindicate the position as to whether or not the terms of the Letter of allotment were duly complied with. Consequently and in this regard, it is evident that the person chargeable with the burden of proof has not met the requisite threshold.



165. In any event, it is important to underscore that the burden of proof, which is placed on the Plaintiff, is ordinarily to be discharged by tendering credible and plausible evidence and not by throwing omnibus and sugar-coated allegations, albeit devoid of any veracity or otherwise.
166. Simply put, a court of law acts on credible and plausible evidence unless the issue in dispute is either admitted or otherwise falls within the category of those that a court is obligated to take Judicial notice of.
167. Having found and established that the Plaintiff herein did not meet and/or satisfy the terms and/or conditions alluded at the foot of the Letter of allotment, it is my finding and holding that the impugned Letter of allotment dated the 14th July 1998; and which is the document that underpins the allocation, lapsed and/or expired and was thus rendered redundant and void.
168. In short, once a Letter of allotment is neither acted upon nor the terms complied with during its currency, such a Letter of allotment cannot birth any Certificate of Title/Grant or at all.
169. In respect of the foregoing exposition, it suffices to restate and reiterate the dictum of the Supreme Court of Kenya in the case of Torino Enterprises Limited versus Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment), where the court held thus;
62. Back to the facts of this case, the allotment letter issued to Renton company limited was subject to payment of stand premium of Kshs. 2,400,000.00, annual rent of Kshs. 480,000.00 amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.
63. While the allotment letter is dated December 19, 1999, Renton company limited made the specified payments on April 24, 2001, one hundred and twenty-seven (127) days from the date of the offer. It is not in question that Renton had not complied with the terms and conditions of the allotment letter. Therefore, the letter ought to have been deemed as lapsed at the time it purported to transfer the same to the appellant. The respondent submitted that a letter of allotment does not confer any property rights unless it is perfected, failure to which it is rendered inoperative and of no legal import. We have already declared that an allotment letter, even if perfected, cannot by and in itself confer transferable title to the Allottee, unless the latter completes the process by registration. Therefore, the grim reality is that all transactions between Renton company limited and the appellant were a nullity in law.
170. The second perspective that also merits due interrogation, analysis and exposition, touches on and/or concerns the origin of the suit property, prior to and/or before same was [sic] allocated to and in favor of the Plaintiff.
171. In this respect, it is instructive to take cognizance of the Further affidavit sworn by Christopher Mugonye Wamae [PW1] sworn on the 28th January 2014; and which was filed in court on the 18th March 2014. For good measure, the contents of paragraphs 13 and 14 are instructive and thus worthy of reproduction.
172. Same are reproduced as hereunder;
- 13 The Defendant having surrendered L.R No. 25799 to the government and the same was subdivided and allotment letters issued by the government through the commissioners of lands, the Defendant has no basis at all in alleging that it is the proprietor of L.R No. 25799/1.



- 14 The Plaintiff having complied with the conditions on the allotment letter was duly issued with a grant for land parcel number 25799/1 by the registrar of titles.
173. From the contents of the paragraphs alluded to herein before, it is evident and apparent that the Plaintiff herein seem to trace the origin of her title to an original parcel of land, contended to have been owned by the Defendant, before (sic) same was surrendered to the Government.
174. Other than the foregoing, it was also the Plaintiff's testimony before the court that indeed L.R No. 25799/1 as well as 21919, were duly surrendered to the Government by the Defendant and that arising from the surrender, the Defendant herein ceased to have interests and/or title thereto.
175. Given the importance of the contention surrounding [sic] the Surrender of L.R No's 21919 and 25799 respectively, it is appropriate to reproduce part of the evidence tendered by PW1 during cross examination by Learned counsel for the Defendant.
176. In the course of cross examination, PW1 stated thus;
- “I don't know whether land herein was surrendered before I got my title. However, I don't know who surrendered the title. I don't know when it was surrendered. I don't know the difference between L.R No. 25799 and L.R No. 21919.”
177. Whilst under further cross examination, PW1 proceeded and stated thus;
- “L.R No. 25799 was surrendered by the Defendant and then the same was subdivided leading to the creation of the suit property. I don't have any surrender document before the court.”
178. Additionally, the witness ventured forward and stated as follows;
- “I have said that L.R No. 21919 was surrendered to the government. I have also said that L.R No. 25799 was also surrendered by the Defendant. However, I don't know when the parcels of lands herein were surrendered”
179. Furthermore, whilst still under further cross examination, PW1 stated thus;
- “Before surrender there must be a consent to surrender the land. However, I have never seen any letter/consent by the Defendant about the surrender of the land”.
180. My understanding of the evidence by PW1 is to the effect that the Plaintiff's land is stated to have originated from a previous parcel, which is contended to have been surrendered to the Government by the Defendant.
181. Instructively, it is the Plaintiff's position that having Surrendered (sic) L.R No. 25799; and which the witness could not differentiate with L.R No. 21919, same goes further to contend that the Defendant therefore cannot purport to retain any further interests after surrender.
182. However, the contention by the Plaintiff and which hinged on the question of surrender is built and established on quick sand and is thus legally untenable.
183. To start with, the Plaintiff herein has neither tendered nor produced before the court any evidence that L.R No. 25799, which is alleged to have been surrendered, ever belonged to the Defendant. Quiet clearly, the Defendant herein could not have surrendered what did not belong to her.



184. Secondly, it is also important to underscore that whenever there is a surrender, there must be an instrument of surrender duly executed by, inter-alia, the owner of the land and which must thereafter be lodged for registration and be duly registered. For good measure, surrender only takes effects upon registration of the surrender instrument and not otherwise.

185. To buttress the foregoing position, it is worthy to adopt and reiterate the exposition of the law by the Court of Appeal in the case of Chief Land Registrar and Another versus Nathan Tirop & Others (2018)eKLR, where the court stated thus;

“ 86. Guided by the dicta in *Mwinyi Hamisi Appeal vs. Attorney General*, Civil Appeal No. 125 of 1997, it is our considered view that the entry in the Register that Eldoret Municipality Block 15/1 measuring 666.41 was surrendered to the Government ipso jure extinguished all rights and interest of the then registered proprietors over the suit property. We note that the 1st to 4th respondents contend that the surrender was unlawful. There is a presumption that all acts done by a public official has lawfully been done and that all procedures have been duly followed. The onus is on the 1st and 4th respondents to prove otherwise. They have failed to do this. A bare allegation that a lawful procedure was not followed is not proof of the allegation. It was open to the 1st to 4th respondents to make an application before the trial court to compel the Commissioner of Lands to produce the original instrument of surrender, the memorial and the endorsement thereon. The 1st to 4th respondents failed to do so.”

186. Taking the ratio decidendi in the foregoing decision into perspective, it is difficult to understand the foundation and/or basis, upon which the Plaintiff herein contends that L.R No. 25799, was ever surrendered or at all. In any event, it is also not lost on the Honourable court that no evidence was tendered to show and/or demonstrate that the said parcel of land hitherto belonged to the Defendant.

187. Other than the foregoing, it was also the Plaintiff's case that L.R No. 21919, which the Plaintiff confuses with L.R No. 25799, was also surrendered by the Defendant and hence, the Defendant cannot be heard to lay a claim to the said parcel of land.

188. Invariably, the contention by and on behalf of the Plaintiff that L.R No. 21919 was surrendered and thus the Defendant herein ceased to have any interests thereto, is allegedly anchored on a copy of the annexure which was attached to the affidavit of one Victor Arika and wherein it is shown that the Grant was surrendered.

189. However, it is worthy to draw the attention of the Plaintiff to the obvious facts that the surrender being alluded to in terms of document No. 2, at the foot of the Supplementary List of Documents dated the 18th November 2021; [exhibit P16)] relates to the surrender of L.R No. 21919 for obvious purposes.

190. For coherence, it suffices to reproduce the contents of the stamp embossed on the copy of the Grant tendered in evidence.

191. Same are reproduced as hereunder;

“Surrender to the Government of Kenya in exchange of new Grant I.R 90243.”

192. Even assuming that L.R No. 21919, was the same as L.R No. 25799 [which is not the case]; and even assuming that there was a surrender, albeit in the absence of a surrender instrument, there is



no gainsaying that the surrender was never intended to facilitate any subdivisions and consequential allocation.

193. Quiet clearly, the embossment evident and discernable from the Exhibit tendered before the court, simply shows that despite the surrender, the purpose thereof was in exchange for a new Grant; and hence the Defendant retained the entirety of her interests and rights to the portion of land at the foot of L.R No. 21919.
194. In any event, whenever a surrender is undertaken, the surrender instrument would denote the purpose for surrender and hence it behooves the Plaintiff herein to place before the court evidence of a surrender showing that the land was being surrendered to the Government for alienation and/or subsequent allocation, to inter-alia, the Plaintiff herein.
195. As pertains to the position that the surrender instrument would denote the purpose of surrender, it is instructive to echo/ reiterate the holding of the Supreme Court of Kenya in the case of *Fanikiwa Limited v Sirikwa Squatters Group & 20 others* (Petition 32 (E036) & 35 (E038) of 2022 (Consolidated)) [2023] KESC 58 (KLR) (16 June 2023) (Ruling), where the court stated thus;
- “ 108. More recently, in *Chief Land Registrar & 4 Others v. Nathan Tirop Koech & 4 Others*, Civil Appeal 51 & 58 of 2016 (Consolidated); [2018] eKLR the Court of Appeal (Githinji, Mohammed & Otieno-Odek, JJ.A.) held at paragraph 96 that: “A surrender of Grant or instrument of title is not compulsory acquisition. The legal framework and procedure for surrender of title to land is different from the legal regime for compulsory acquisition. Section 44 of the RTA is the legal framework for surrender and the Land Acquisition Act is the regime for compulsory acquisition. Surrender cannot be construed and equated to compulsory acquisition.”
109. It is notable that Section 2 of the RTA did not define the term “surrender”. However, the concept of surrender is one of long lineage and wide usage in land law. The Black’s Law Dictionary (7th edition) at page 1458 defines “surrender” as follows: Petition Nos. 32 (E036), 35 (E038) & 36 (E039) of 2022 46 “... 3. The return of an estate to the person who has a reversion or remainder, so as to merge the estate into a larger estate... 5. A tenant’s relinquishment of possession before the lease has expired, allowing the landlord to take possession and treat the lease as terminated.”
110. Lord Millett at the House of Lords in *Barrett v. Morgan*, [2000] 2 AC 264, aptly noted thus on the nature of ‘surrender of leases’: “A surrender is simply an assurance by which a lesser estate is yielded up to the greater, and the term is usually applied to the giving up of a lease or tenancy before its expiration. If a tenant surrenders his tenancy to an immediate landlord, who accepts the surrender, the tenancy is absorbed by the landlord’s conversion and is extinguished by operation of law. A surrender is ineffective unless the landlord consents to accept it, and is therefore consensual in the fullest sense of the term.” [Emphasis added]
111. The “consensual” nature of a surrender is emphasized in Robert Megarry & William Wade, *The Law of Real Property* (Sweet & Maxwell; 2012, 8th ed.) page 851 as follows: “surrender is a consensual transaction between the landlord and the tenant, and therefore dependent for its effectiveness



on the consent of both parties” [Emphasis added]. Similarly, Martin Dixon, Principles of Land Law, (Cavendish Publishing; 2002, 4th ed.) at page 237 notes that: “a surrender, being a consensual act between landlord and tenant.” [Emphasis added]

112. We are persuaded by the foregoing propositions that the “consensual” nature of a surrender is the cardinal ingredient of a surrender of lease. Indeed, this is the essence of the proviso in Section 44 of RTA that: “and the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof”. This raises the question as to what was the “consensual arrangement” or “agreement” between Lonrho Agribusiness and the Government of Kenya, being the lessee and lessor respectively, that underpinned the contested surrender. Petition Nos. 32 (E036), 35 (E038) & 36 (E039) of 2022 47 [113] Put differently, to resolve the present dispute, the Court needs to determine what was agreed between the Government of Kenya and Lonrho Agribusiness at the time of alleged surrender of the subject leases in 2000. It is here that we meet the evidential contestation between the two parties which is at the heart of the question as framed.
196. Even for the sake of arguments only, the Plaintiff’s case which is hinged on the alleged surrender of land, [which even the Plaintiff is not pretty sure about], cannot catapult the Plaintiff’s case to safety.
197. The third perspective that merits mention and a short address relates to the nature of land out of which the Plaintiff’s title is alleged to have been created from.
198. Notably, it is worthy to state that the Defendant organization is a Public body and the land allocated to the Defendant is reserved for a designated purpose. In this regard, it is not lost on the court that the Defendant’s land is reserved and designated for purposes of Aerodrome or Airport services.
199. Having taken cognizance of the nature of the Defendant and the services offered by same, the question that does arise is whether land which had been reserved and designated for Airport services, could by any stretch of imagination, be available for allocation and/or alienation.
200. In my humble albeit considered view, once land has been designated and/or reserved for a particular Public use, such land ceases to be unalienated Government land and cannot thus be available for alienation or at all.
201. Without belaboring the point, it is appropriate to take cognizance of the holding of the Supreme Court of Kenya in the case of Kiluwa Limited & Another versus Business Liaison Company Limited & 3 Others, SC Petition No. 14 of 2017; [2021] KESC 37 (KLR) had this to say about unalienated government land at paragraph 55:

“This notwithstanding the fact that, the expression “Public Land” only came to the fore with the promulgation of the 2010 Constitution. What Article 62 of *the Constitution* does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of “public tenure”. The retired constitution used the term “government” instead of “public” to define such lands.

Therefore, it is incorrect for the respondents to assert that the lands in question were unalienated government land but not public land. It is even more inaccurate to argue that the said parcels had never been public land. Unalienated government land remains public until it is privatized through allocation to individuals or other private entities.”



202. Taking into account the various perspectives, [read, dimensions], which have been highlighted and thereafter analyzed in the preceding paragraphs, it is my humble finding and holding that the Plaintiff herein did not procure and/or obtain a legitimate title to and in respect of the suit property.
203. Consequently and in the premises, my answer to issue number one [1], is to the effect that the Plaintiff's title was procured and/or obtained through illegal, unlawful and illegitimate process, which thus vitiates the entirety of the title in question.

Issue Number 2 - Whether the Defendant has trespassed onto and/or interfered with (sic) the Plaintiff's title to the suit property either as claimed or at all.

204. The Plaintiff herein had contended that the Defendant had unlawfully, illegally and without lawful cause entered upon and taken possession of (sic) the suit property and thereby deprived the Plaintiff of lawful rights.
205. Arising from the foregoing contention, the Plaintiff took the position that the acts and/or omissions by and on behalf of the Defendant constitutes trespass. Consequently and in this regard, the Plaintiff herein has sought for recompense.
206. Be that as it may, before endeavoring to discern whether or not the Defendant has trespassed onto the Plaintiff's property, it is imperative to ascertain whether or not the Plaintiff truly owns the suit property, which underpins the claim for trespass.
207. However, whilst discussing issue number one [1] herein before, the court has found and held that the Plaintiff's title to the suit property was illegally and unlawfully acquired and thus same is null and void.
208. Having come to the forgoing conclusion, the question that begs an answer is whether a claim founded on trespass can be sustained by [sic] a person who has a defective or void title. However, my answer to this question is in the negative.
209. Furthermore, it is also instructive to recall that the court has also found and held that the Defendant herein was and remains the lawful owner and/or proprietor of L.R No. 21919, and hence same is lawfully entitled to exclusive occupation, possession and use. [See the holding of the Court in the case of Mohanson {K} Limited versus Registrar of Titles and Another [2017] eKLR]
210. Further and in any event, it is also not lost on this Honourable court that the Defendant tendered and produced before the court evidence to show that what was purported to constitute the suit property, fell right inside the Defendant's land.
211. Taking the totality of the evidence into account, it is difficult, nay impossible to appreciate the basis upon which the Plaintiff herein propagates the claim of trespass.
212. To my mind, the contention by and or on behalf of the Plaintiff and which are predicated upon the impugned certificate of title/Grant [which I have found to be invalid], is tantamount to a fraudster who after acquiring a fictitious instrument gains bravery and approaches a court of law seeking validation of the fraudulent title.
213. With humility, the case being propagated by the Plaintiff herein falls within the prescription of what was highlighted by Maraga J, [as her then was] in the case of Republic vs. Minister For Transport &



“Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed. It is clear from section 75 of *the Constitution* that the doctrine of public trust is recognised and provided for by the superior law of the land and applies in a very explicit way as regards trust land. The doctrine is, however, not confined to trust lands and covers all common properties and resources as well as public land. Although the doctrine had origins in Roman Law it is now a common heritage in all countries who adopted the English common law..... It is quite evident that should a constitutional challenge succeed either under the trust land provisions of *the Constitution* or under section 1 and 1A of *the Constitution* or under the doctrine of public trust a title would have to be nullified because *the Constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of *the Constitution*.”

214. In a nutshell, my answer to issue number two [2] is to the effect that the Defendant has neither encroached upon nor trespassed onto the Plaintiff's land, either as claimed or at all.

Issue Number 3 - Whether the Counter-claim by and on behalf of the Defendant is invalid and hence ought to be struck out.

215. Other than the issues which have since been highlighted and addressed herein before, Learned counsel for the Plaintiff contended and thereafter made extensive submissions pertaining to the validity of the counterclaim dated 5th October 2020.

216. According to Learned counsel for the Defendant, the counterclaim that was filed by and on behalf of the Defendant herein was neither indorsed with nor accompanied by the requisite verifying affidavit in compliance with Order 7 Rule 5 of the Civil procedure Rules 2010 as read together with Order 4 Rule 1(2) of the Civil Procedure Rules 2010.

217. Arising from the foregoing, Learned counsel for the Defendant therefore implored the Honourable court to find and hold that the impugned counterclaim offends the mandatory provisions of the law and hence same ought to be struck out.

218. Furthermore, Learned counsel for the Defendant thereafter cited and quoted inter-alia, the decision in *Zakaria Okoth Obado vs Edward Akomo Oyugi & 2 Others* (2014)KLR; *Nicholas Kiptoo Arap Korir Salat & 6 Others* (2013)eKLR and *SMW vs TKM* (2016)eKLR, respectively, where the Court of Appeal and the Supreme Court of Kenya, have respectively underscored the necessity to comply with and/or abide by the Rules of Procedure.

219. On his part, Counsel for the Defendant does not dispute that no verifying affidavit was ever filed. In any event, neither the counsel nor the Defendant endeavors to avail any explanation and/or reason for the failure to file and serve the requisite verifying affidavit.

220. On the other hand, the Defendant herein takes the position that the failure to file a verifying affidavit is a small, technical and procedural issue and which should not in any event, be [sic] glorified by the court. Instructively, Learned counsel thereafter proceeds to and invokes the provisions of Article 159(2)(d) of *the Constitution* 2010.



221. In my humble view, it was incumbent upon the Defendant to generate, commission and thereafter file the requisite verifying affidavit alongside the counterclaim.
222. At any rate, where the Defendant failed and/or neglected to file the requisite verifying affidavit, then it behooved same to move the court and seek leave with a view to remedy the lapse/defects.
223. Suffice it to point out that this court or such other court of law, if moved by a Party seeking leave to file a verifying affidavit, would be seized of the requisite discretion, to consider and grant liberty, albeit subject to demonstration/proof of sufficient cause.
224. Nevertheless, in respect of the instant matter, both the Defendant and Learned counsel are privy to and knowledgeable of the lapse and failure to file the requisite verifying affidavit, but despite the failure, same have adopted a nonechalant attitude and bravado, which does not augur well with the Rule of Law and the Administration of Justice.
225. Surely, a Party cannot be allowed to pay scant respect for and disregard to the timelines and rules of procedure; and still expect to be treated with kid-gloves by the Courts.
226. To my mind, the Defendant herein has neither explained and/or demonstrated any difficulty that same encountered in filing the requisite verifying affidavit. Furthermore, the Defendant and counsel have also not demonstrated, why same have found it difficult to even beseech the court to exercise discretion, even upon being notified.
227. Arising from the foregoing, I am not prepared to dignify the Defendant with the latitude to disregard the Rules of Procedure with abandon. Furthermore, I am also not disposed to countenance litigants who perceive themselves to be above the law, whether same be Rules of Procedure or Substantive provisions of statute.
228. In this regard, I am inclined to and do hereby endorse and adopt the dictum espoused in the case of *S M W versus T K M* [2016] eKLR, where the Court stated and held thus;
1. In *Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others* [2015] eKLR the Supreme Court had this to say while reminding litigants that Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls -

“Although the appellant invokes the principal of the prevalence of substance over form, this Court did signal in *Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others*, Petition No. 14 of 2013, that “Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls.” Not all procedural deficiencies can be remedied by Article 159;”

 1. In this case, failure by the Respondent to personally sign the Answer to Petition and Cross Petition and to file a verifying affidavit is in my view, fatal. It is not a mere technicality. The Respondent cannot invoke the provisions of Article 159(2)(d) to remedy the omission as “not all procedural deficiencies can be remedied by Article 159”. Consequently I find that the Answer to Petition and Cross Petition are a nullity.



229. Additionally, it is also worthy to cite and adopt the holding of the Court of Appeal in the case of Kakuta Maimai Hamisi versus Peris Pesi Tobiko & 2 others [2013] eKLR, where the court held as hereunder;

“A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of Mumo Matemu Vs. Trusted Society of Human Rights Alliance & 5 others Civil Appeal No. 290 of 2012 as follows;

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases.”

230. From the foregoing, it must have become crystal clear that this court is not prepared to countenance and or sanction unbridled contempt and disregard of Rules of Procedure by the Defendant. Consequently, it is my holding that the counterclaim dated the 5th October 2020, is premature, misconceived, bad in law and otherwise legally untenable.

Issue Number 4: - What Reliefs, if any; ought to be granted.

231. The Plaintiff herein had sought for a plethora of reliefs at the foot of the Plaintiff dated the 12th June 2013, inter-alia, that same (Plaintiff) is the lawful owner of the suit property. Furthermore, the Plaintiff had also sought for General Damages for trespass.

232. However, whilst discussing issues number one [1] and number two [2] herein before, the court came into the conclusion that the Plaintiff's title was procured and obtained in a manner that was not only illegal, but unlawful. Consequently, the court returned a proclamation that the Plaintiff's title was void and/or invalid.

233. On the other hand, it is also worthy to recall that the court also came to the conclusion that the Defendant has neither encroached upon nor trespassed onto (sic) the suit property.

234. Additionally, it is also common ground that the court has found and held that the counterclaim by and on behalf of the Defendant was/is invalid and thus bad in law for flagrant disregard of the mandatory Rules of Procedure.

235. Be that as it may, there is one last issue that remains outstanding and thus deserves due consideration. For good measure, the issue relates to whether the title over and in respect of the (sic) L.R No. 25799/1, registered in the name of the Plaintiff, ought to be left intact.

236. However, having agonized over the issue, it is my finding and holding that to leave the impugned title in existence, [despite the findings of the court], shall be tantamount to dereliction of Constitutional Duty.

237. Further and in any event, it is also not lost on the court that the continued existence and circulation of the impugned title, would foster commission of further mischief and hence the need to avert further harm and/or injury to, inter-alia, innocent persons who may become victims of transactions founded on the impugned Certificate of title.



238. Consequently and in view of the foregoing elaboration, I hold the firm view that the impugned Certificate of title, merits cancellation and or revocation in accordance with the provisions of Section 80 of the [Land Registration Act](#), 2012.

Final Disposition:

239. From the foregoing analysis, which touches on the various issues that were highlighted, it is evident, clear and explicit that the Plaintiff herein has neither established nor proved the claims underpinned by the Plaint dated the 12th June 2013.

240. On the other hand, it is also apparent that though the Defendant herein filed a Counter-claim, same failed to comply with and or adhere to mandatory Rules of Procedure. Further and in any event, the Defendant adopted a nonechallant attitude, which does not bode/ portend well with the General Administration of Justice.

241. Consequently and arising from the foregoing, I am therefore minded to and do hereby make the following Orders;

- i. The Plaintiff's suit be and is hereby Dismissed.
- ii. The Defendant's counterclaim be and is hereby Struck out.
- iii. The Plaintiff and the Defendant herein shall bear own costs of the suit and the counterclaim, respectively.
- iv. In the interest of justice and to avert future mischief and/or transactions pertaining to L.R No. 25799/1, the Certificate of title thereto be and is hereby revoked.
- v. Consequently, the Plaintiff herein be and is hereby ordered to Surrender and/or deliver to the Chief Land Registrar the original certificate of title in respect of L.R No. 25799/1 for purposes of cancellation.
- vi. For coherence, the original certificate of title in terms of clause (v) shall be surrendered within 60 days from the date hereof.
- vii. Nevertheless, the Chief Land Registrar shall still be at liberty to proceed and cancel/ revoke the Certificate of title in respect of L.R No. 25799/1 even where there is default to surrender same by the Plaintiff.
- viii. Furthermore, upon the cancellation of the original Certificate of Title in respect of L.R No. 25799/1, the Chief Land Registrar shall proceed to generate and publish a Gazette Notice in the Kenya gazette, albeit at the expense of the Defendant.
- ix. Any other relief not expressly granted is deemed Declined.

242. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

OGUTTU MBOYA,

JUDGE

In the Presence of;

Benson - Court Assistant.



Mr. Osundwa and Mr. Shikanda for the Plaintiff.

Mr. Jeremy M NJenga for the Defendant.

