



Mutuku v M’Kiama & another (Environment & Land Case 735 of 2007 & Civil Case 325 of 2009 (Consolidated)) [2024] KEELC 1493 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1493 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 735 OF 2007
& CIVIL CASE 325 OF 2009 (CONSOLIDATED)**

**JO MBOYA, J
MARCH 14, 2024**

BETWEEN

ESTHER MUKULU MUTUKU PLAINTIFF

AND

RAHAB M’KIAMA 1ST DEFENDANT

METRA INVESTMENTS LIMITED 2ND DEFENDANT

JUDGMENT

Introduction And Background:

1. The Plaintiff herein had hitherto filed civil proceedings vide Milimani ELC 735 of 2007; and in respect of which same impleaded the 1st and 2nd Defendants herein. Nevertheless, on or about the 5th June 2009; the Plaintiff proceeded to and filed a Notice of withdrawal of the suit which had hitherto been filed.
2. Be that as it may, prior to and before ELC No. 735 of 2007 could be withdrawn, the current 3rd Defendant filed a Statement of Defense and Counterclaim and in respect of which same impleaded the Plaintiff herein as well as the 1st Defendant. For good measure, the Statement of Defense under reference was subsequently amended vide amended Statement of Defense and Counter-claim dated the 16th June 2009.
3. On the other hand, upon the withdrawal of the suit vide ELC No. 735 of 2007, the Plaintiff herein proceeded to and filed another suit, namely, ELC No. 325 of 2009; and which was subsequently amended resting with the amended Plaintiff dated the 20th March 2017.
4. Vide the amended Plaintiff dated the 20th March 2017, the Plaintiff herein has sought for the following reliefs;
 - i. Special damages of Kes. 6,232,150.00/=



- ii. General damages
 - iii. A declaration that the verbal agreement between the Plaintiff and the 1st and 2nd Defendants is illegal, void, fraudulent and unenforceable.
 - iv. A declaration that the sale agreement between the 3rd Defendant and the 2nd Defendant in respect of parts of the suit property is illegal, null and void and unenforceable for lack of capacity.
 - v. A declaration that the house constructed on the suit property by the 3rd Defendant is fraudulently there and/or in the alternative is an illegal and unlawful structure and the same must be removed at the Defendant's costs.
 - vi. That this Honorable Court orders the Defendants to vacate the portion of property they have occupied unlawfully and commence the immediate reconstruction of the suit property to its original condition, replace the gate to the property, remove the guards from the property and pays damages to the Plaintiff for the unlawful occupation, the General damages to the aggravated damages and mesne profits.
 - vii. Exemplary damages as shall be ascertained by the Honorable court at the hearing hereof.
 - viii. The costs of the suit and interests at court rates.
5. Upon being served with the amended Plaint, the 1st and 2nd Defendants duly entered appearance and ultimately filed a Statement of Defense and in respect of which, the 1st and 2nd Defendants disputed the claims by and on behalf of the Plaintiff.
6. On the other hand, the 3rd Defendant herein filed and has since relied on the amended Statement of Defense and Counterclaim dated the 16th June 2009, which includes a Counterclaim thereunder. For coherence, the counterclaim by and on behalf of the 3rd Defendant has impleaded the following reliefs.
- i. A declaration that the part of the suit property L.R No. 209/12398 [I.R No. 75240] particularly plots No. 3 and 2B purchased, possessed, occupied and developed by the Plaintiff [by way of counterclaim] legally belongs to her [counterclaim]
 - ii. A declaration that the 1st Defendant is legally obligated to pass title of that part of the suit land, purchased, possessed, developed and occupied by the Plaintiff [by way of counterclaim]
 - iii. A permanent injunction restraining the Defendants [by way of counterclaim] jointly and severally by themselves, their employees and/or agents from transferring, charging, assigning or in any way dealing with the suit property, namely, L.R No. 209/12398 [I.R No. 75240] or interfering with the Plaintiff's quiet possession and right of access in the property known as L.R No. 209/12398 [I.R No. 75240].
 - iv. An order of specific performance ordering the 1st Defendant and the Defendants [by way of counterclaim] to transfer to the Plaintiff part of the property known as L.R No. 209/12398 [I.R No. 75240] being the subject of the sale agreement dated the 9th December 2004; and 3rd July 2007.
 - v. Costs of and incidental to this suit.
 - vi. Any further and other orders that this honorable court may deem fit and just to grant.



7. Following the close of pleadings in respect of the two [2] matters, namely, Milimani ELC No. 735 of 2007, which survived on the basis of a counterclaim by the 3rd Defendant and ELC No. 325 of 2009, the matters herein were subjected to the usual pre-trial directions.
8. Furthermore, the advocates for the respective Parties duly confirmed that same had filed all the requisite pleadings; List and bundle of documents and witness statements, to be relied on [upon] during the course of the hearing.
9. Arising from the confirmation by and on behalf of the respective advocates that the matter was ready and ripe for hearing, the Honorable court proceeded to and certified the matter ready for hearing and ultimately, the hearing of the consolidated suits commenced on the 30th November 2021.
10. Painfully, this is yet another matter where the formal hearing only commenced after a whooping 14 years of slumber, dithering and delay occasioned by the respective Parties. Nevertheless and by the grace of God, upon the commencement of the hearing, same [Hearing] proceeded seamlessly up to and including the 30th November 2023; when the 3rd Defendant's case was eventually closed.

Evidence By The Parties:

A. Plaintiff's Case:

11. The Plaintiff's case revolves and/or gravitates upon the Evidence of four [4] witnesses namely, Esther Mutuku Mwanthi, Joseph Muinde Mutuku, Elizabeth Nthunke and John Njoroge Nkonye, who testified as PW1, PW2, PW3 and PW4, respectively.
12. It was the evidence of PW1 [Esther Mutuku Mwanthi] that same is the Plaintiff in respect of the instant matter. Furthermore, the witness has also averred that same is the lawful and registered proprietor of L.R No. 209/12398 [I.R No. 75240] (hereinafter as the suit property) and thus same is conversant with and knowledgeable of the facts of the case.
13. Besides, the witness herein averred that same is familiar with the 1st Defendant [Rahab Mkiama] with whom same PW1 entered into a verbal sale agreement pertaining to and concerning the suit property.
14. Other than the foregoing, the witness averred that same has since recorded a witness statement dated the 17th February 2018 and in respect of which same [witness] has highlighted the facts pertaining to the subject matter. Furthermore, the witness thereafter sought to adopt and rely on the contents of the witness statement dated the 17th February 2018.
15. Suffice it to point out that the witness statement dated the 17th February 2018; was thereafter adopted and constituted as Evidence in chief of the witness.
16. Additionally, the witness alluded to another witness statement dated the 17th February 2018 and which was filed in response to the counterclaim vide ELC No. 735 of 2007. Consequently and in this regard, the witness also sought to and adopted the contents of the said witness statements.
17. Pursuant to and at the instance of the witness, the further witness statement dated the 17th February 2018; was also adopted and constituted as the Evidence in chief of the witness.
18. Other than the foregoing, the witness adverted to the List and bundle of documents dated the 6th February 2018; and containing 23 documents, which documents the witness sought to produced before the court as Exhibits.



19. There being no objection to the production and admission of the Bundle of documents at the foot of the List dated the 6th February 2019, the said documents were duly admitted and constituted as Exhibit[s] P1 to P23, respectively.
20. Furthermore, the witness also adverted to a Supplementary List and bundle of documents dated the 17th November 2012; and containing 17 documents; which the witness also sought to adopt and produce before the Honourable court as Exhibits. For good measure, the documents at the foot of the List dated the 17th November 2021; were similarly produced before the court as Exhibit P24 to P40, respectively.
21. Additionally, the witness alluded to the amended Plaintiff dated the 20th March 2017; and the verifying affidavit attached thereto and thereafter implored the Honourable court to adopt and rely on the contents thereof.
22. Besides, the witness herein also highlighted the statement of Defense to the counterclaim dated the 2nd January 2010; and which the witness also sought to adopt and to rely on.
23. On cross examination, by Learned counsel for the 1st and 2nd Defendants, the witness herein averred that same entered into an oral/verbal agreement with the 1st Defendant herein. Further, the witness averred that even though the agreement was verbal same [witness] confirmed to the 1st Defendant that she will not change and/or depart from the terms of the verbal agreement.
24. Whilst still under further cross examination, the witness averred that pursuant to and arising from the verbal agreement, same [witness] was paid a deposit/stakeholders sum of Kes.900, 000/= only by the 1st Defendant.
25. Additionally, the witness averred that even though same was paid the stakeholders sum of Kes.900, 000/= only, same did not grant to and in favor of the 1st Defendant the consent and/or authority to enter upon and subdivide the suit property. In any event, the witness averred that same also did not authorize the 1st Defendant to bring a surveyor onto the suit property and to subdivide same.
26. It was the further testimony of the witness that the verbal agreement which same entered into with the 1st Defendant was to be concluded on or about the 9th January 2005. Nevertheless, the witness stated that by the 9th January 2005, same had not handed over to the 1st Defendant the completion documents.
27. Other than the foregoing, it was the testimony of the witness that even though same [witness] was aware of the entry of the 3rd Defendant onto the suit property and the commencement of the construction thereof, same [witness] did not go to court to stop the construction in question.
28. On the other hand, the witness averred that the 1st Defendant also deposited into her [witness account] the sum of Kes.4, 000, 000/= only. For good measure, the witness averred that the money in question was deposited at her bank account at Cooperative bank of Kenya Ltd.
29. Further and in addition, the witness averred that subsequently same [witness] departed from Kenya to the United State of America, wherein same [witness] resides to date. However, the witness averred that she donated a power of attorney to and in favor of Joseph Mutuku [now deceased] to handle the matters pertaining to the transaction on her behalf.
30. Whilst under further cross examination, the witness averred that the Power of attorney which same donated to Joseph Mutuku [now deceased] was limited in scope and extent. In any event, the witness averred that the power of attorney was intended to address issues pertaining to the suit property.



31. It was the further testimony of the witness that same received the sum of Kes. 5,000,000/= only from the 1st Defendant. Nevertheless, the witness clarified that she [witness] did not receive any further sum from the 1st Defendant.
32. Additionally, the witness averred that same has never refunded the monies that were paid unto her by the 1st Defendant.
33. On the other hand, it was the testimony of the witness that the 1st Defendant herein ventured forward and demolished her [witness] three bedroomed house situate on the suit property. Further, the witness averred that after the impugned demolition, she retained and instructed a valuer to undertake valuation over and in respect of the premises and thereafter to prepare a valuation report. Instructively, the witness added that a valuation report was duly prepared and tendered as an Exhibit before the court.
34. On cross examination by Learned counsel for the 3rd Defendant, the witness averred that same indeed received and acknowledged the deposit of Kes. 900,000/= only which was paid by and on behalf of the 1st Defendant.
35. Besides, it was the testimony of the witness that the stakeholders sum of Kes. 900,000/= only was paid vide cheque, which cheque was thereafter deposited by her [witness] in her account.
36. Whilst under further cross examination, the witness averred that same did not grant to and in favor of the 1st Defendant possession of the suit property.
37. On further cross examination, the witness averred that even though the verbal sale agreement did not have set timelines, same however was to be concluded within six [6] months.
38. Be that as it may, the witness averred that prior to and before the payment of the full purchase price, the 1st Defendant entered onto the suit property and commenced to subdivide same albeit without her [witness] consent.
39. Nevertheless, it was the testimony of the witness that even though the 1st Defendant commenced to subdivide the suit property same [witness] did not take any action to stop the subdivision. In any event, the witness averred that the suit property was subdivided into 6 portions.
40. Furthermore, the witness averred that the 3rd Defendant herein has since built and or constructed on a portion of the suit property, which portion goes onto the road. Besides, the witness averred that the 3rd Defendant acquired her portion of the suit property from the 1st Defendant herein and not from her [witness].
41. Other than the foregoing, it was the testimony of the witness that she was informed of the subdivision that is being undertaken on the suit property by her daughter in law and that upon receipt of the information pertaining to the subdivision of the suit property, same [witness] travelled from Machakos to Nairobi and upon arriving to Nairobi, same [witness] found the suit Property to have been subdivided and beacons by the 1st Defendant.
42. Additionally, the witness also testified that same was available and present when the 3rd Defendant commenced to construct on a portion of the suit property. However, the witness averred that same did not object to the construction taken by the 3rd Defendant and neither did she authorize the said construction.
43. Whilst under further cross examination, she [witness] did not authorize and or allow the 3rd Defendant to connect water from her pipeline. Similarly, the witness also averred that she did not also allowed the 3rd Defendant to connect electricity to the suit property.



44. On further cross examination, the witness added that the 3rd Defendant connected Electricity to the suit property by using and invoking her powers as a Magistrate.
45. Furthermore, it was the testimony of the witness that she did not report the Defendant to KPLC for illegal connection of electricity to the suit property because she [witness] feared the 3rd Defendant, who was a Magistrate.
46. On the other hand, the witness averred that during the time when she was away, same [witness] authorized Joseph Mutuku [now deceased] to handle the matters pertaining to the transaction. In any event, the witness averred that Joseph Mutuku proceeded to and canceled the transaction.
47. Additionally, it was the testimony of the witness that the 3rd Defendant had entered upon and commenced occupation of the house erected on the suit property in the year 2008. However, the witness added that by the time the 3rd Defendant entered onto the suit property, the contract had been cancelled and/or revoked.
48. Other than the foregoing, the witness averred that the 3rd Defendant did not pay to and in favor of the witness any monies. To the contrary, the witness averred that the monies were paid to the 1st and 2nd Defendants.
49. Further and in addition, it was the testimony of the witness that the 3rd Defendant did not demolish her [witness] house which was standing on the suit property.
50. The second witness who testified on behalf of the plaintiff was Joseph Muinde Mutuku. Same testified as PW2.
51. It was the testimony of the witness [PW2] that same is a son of the Plaintiff and by virtue of being a son of the Plaintiff, same [witness] is conversant with the dispute beforehand.
52. On the other hand, the witness averred that same has since recorded a witness statement dated the 13th February 2018 and wherein same [PW2] has articulated the facts pertaining to the subject matter.
53. Furthermore, the witness sought to adopt and rely on the contents of the witness statement dated the 13th February 2018. Consequently and in this regard, the witness statement dated the 13th February 2018 was duly adopted and constituted as the Evidence in chief of the witness.
54. Additionally, the witness averred that same had also recorded a further witness statement dated the 4th April 2022 and the witness thereafter sought to adopt and rely on the said witness statement. For good measure, the witness statement dated the 4th April 2022 was similarly adopted and constituted as the further evidence in chief of the witness.
55. Other than the foregoing, the witness adverted to a List and bundle of documents dated the 4th April 2022, containing 21 documents and which document[s] the witness thereafter sought to produce and tender before the court as Exhibits.
56. Suffice it to point out that the documents at the foot of the List dated the 4th April 2022 were thereafter adopted and admitted as Exhibit P41 to P61, respectively.
57. Furthermore, it was the testimony of the witness that same was present when the 1st Defendant herein undertook the demolition of the three[3] bedroomed house that was situate and located on the suit property. In any event, the witness averred that the 1st Defendant brought a bulldozer and thugs [goons] to undertake the demolition.



58. Besides, it was the testimony of the witness that the 1st Defendant also brought police officers to guard the demolition. However, the witness averred that when the demolition was being undertaken, there was no court order to authorize the demolition in question.
59. On the other hand, the witness averred that at the time when the demolition was being undertaken, same [witness] protested the demolition, but the 1st Defendant proceeded with the demolition and the house [three bedroomed house] was fully demolished.
60. On cross examination by Learned counsel for the 1st and 2nd Defendants, the witness averred that at the time when the suit property was sold, it is his [witness's] sister Elizabeth and his [witness wife and children] who were staying at Kileleshwa.
61. Whilst under further cross examination, the witness averred that even though the property was sold, same [witness] was not happy with the sale of the suit property. In any event, the witness added that same [witness] got to know of the sale long after same had taken place and beacons had been placed by the 1st Defendant.
62. Nevertheless, the witness averred that the beacons which were placed on the suit property by and on behalf of the 1st Defendant are no longer in place.
63. Whilst under further cross examination, the witness averred that same got to know that various persons, including the 3rd Defendant had bought portions of the suit property in the year 2005.
64. Other than the foregoing, it was the testimony of the witness that the 3rd Defendant commenced to construct on the suit property on or about the year 2005. Besides, the witness averred that the witness also established and gathered that the 3rd Defendant paid the sum of Kes. 30,000/= on account of compensation in respect of the crops and the avocado trees which the 3rd Defendant had destroyed.
65. Furthermore, it was the evidence of the witness that by the time the 3rd Defendant came onto the property, his [witness mother] had left the country to the United of America.
66. Whilst under further cross examination, the witness averred that same [witness] was not present when the 3rd Defendant entered upon and took possession of the suit property.
67. On further cross examination, the witness averred that same is also aware the his [witness mother] was issued with a cheque for Kes.7, 600, 000/= only, but the cheque bounced and/or was dishonored. In any event, the witness added that the cheque in question was stopped by the 1st Defendant.
68. On the other hand, it was the testimony of the witness that after the demolition of the house which was standing, same [witness] did not instruct any valuers to value the house which had been demolished. However, the witness clarified that the valuer was instructed by Joseph Mutuku [now deceased].
69. Whilst under further cross examination, the witness stated that same was served with an Enforcement Notice by the City council of Nairobi, [now defunct]. However, the witness added that despite having been served with the Enforcement Notice, same did not challenge the Enforcement notice.
70. Other than the foregoing, it was the testimony of the witness that by the time the house was being demolished, same did not know the 3rd Defendant. At any rate, the witness added that the witness got to know the 3rd Defendant after the demolition.
71. Additionally, the witness averred that the demolition in question took place on or around the year 2006.



72. Whilst under further cross examination, the witness averred that the Enforcement Notice which was issued by the City Council of Nairobi, [now defunct] was issued on the 15th October 2007. However, the witness clarified that by the time of the issuance of the Notice the 1st and 3rd Defendants were not in possession of the suit property.
73. On further cross examination, the witness averred that the 3rd Defendant is illegally on the suit property. Other than the foregoing, it was the testimony of the witness that it is the 1st and 2nd Defendants, who demolished the house standing on the suit property.
74. The third [3rd] witness who testified on behalf of the Plaintiff was one Elizabeth Nthunka Mutuku. Same testified as PW3.
75. It was the testimony of the witness [PW3] that same is a civil servant currently employed by the Government of Kenya. Besides, the witness also averred that same is also conversant with the facts of the matter.
76. Furthermore, the witness testified that same [PW3] has since recorded a witness statement dated the 3rd February 2018 and which witness statement same sought to adopt and rely on as her Evidence in chief. For good measure, the witness statement dated the 3rd February 2018 was thereafter admitted and constituted as the Evidence in chief of the witness.
77. On cross examination by Learned counsel for the 1st and 2nd Defendants, the witness averred that the suit property was sold by the Plaintiff who is her [witness mother]. However the witness added that same was not happy with the sale of the suit property.
78. It was the further testimony of the witness [PW3] that same was not happy with the sale of the suit property because the sale agreement had not been reduced into writing.
79. Whilst under cross examination, the witness added that her mother [the Plaintiff herein] left to the USA in April 2006. In any event, the witness averred that by the time the Plaintiff left the country, the sale agreement in respect of the suit property had collapsed.
80. It was the further testimony of the witness that the 1st Defendant herein deposited the sum of Kes. 4,000,000/= only, into the account of the Plaintiff. Nevertheless, the witness clarified that the monies in question have never been refunded to the 1st Defendant.
81. It was the further testimony of the witness that the house which was standing on the suit property was demolished by the 1st Defendant. Furthermore, the witness averred that when the 1st Defendant was demolishing the house standing on the suit property, same [1st Defendant] was demanding to be given the title document of the suit property.
82. Whilst under further cross examination, the witness averred that after the demolition of the main house which was standing on the suit property, her brother and herself stayed outside, but were later accommodated by the 3rd Defendant for one month.
83. Other than the foregoing, it was the testimony of the witness that the suit property was subdivided by the 1st Defendant. However, the witness clarified that the subdivision was neither approved by the Plaintiff herein.
84. On cross examination by Learned counsel for the 3rd Defendant, the witness herein averred that same recorded a witness statement with the Police at the Police Headquarters. At any rate, the witness admitted that whilst recording her witness statement at the Police Headquarters, same intimated that



- she had been give Kes. 30,000/= Only, by the 3rd Defendants to hire guards to protect the suit property after the demolition.
85. It was the further testimony of the witness that same [witness] had hitherto dissuaded the Plaintiff from selling the suit property. Nevertheless, the witness averred that the property was sold by the Plaintiff to the 1st Defendant.
 86. Whilst under further cross examination, the witness averred that same did not see when the 3rd Defendant commenced the construction on the suit property, however, the witness clarified that same only found the house, [Structure] which by that time had reached the linton.
 87. It was the further testimony of the witness that initially same did not know who was constructing the house on the suit property. However, the witness added that same established that the house on the suit property was being constructed by the 3rd Defendant.
 88. The fourth [4th] witness who testified on behalf of the Plaintiff was John Njoroge Nkonye. Same testified as PW4.
 89. It was the testimony of the witness that same is a registered valuer, holding a Bachelors degree in Land Economic from the University of Nairobi [U.O.N]. Furthermore, the witness also averred that he is also a Member of the Institution of Surveyor[s] of Kenya.
 90. Other than the foregoing, the witness added that same was instructed to undertake a valuation over and in respect of the suit property and thereafter to prepare a valuation report. In this regard, the witness averred that same proceed to and prepared a valuation report dated the 24th January 2008.
 91. Furthermore, the witness proceeded to and identified the Valuation report, which thereafter produced and admitted before the court as Exhibit P16.
 92. On cross examination by Learned counsel for the 1st and 2nd Defendants, the witness herein averred that the Valuation Report in question was prepared on the 4th January 2008. However, the witness added that the house on the suit property was demolished in October 2007.
 93. Whilst under further cross examination, the witness averred that by the time same [witness] undertook the inspection, the house on the suit property had been demolished and was not in existence. Besides, it was the further evidence of the witness that the report in question was informed by various factors including the interview of PW3, who was present during the time when the inspection was carried out and/or undertaken.
 94. Furthermore, it was the testimony of the witness [PW4] that same was never availed receipt[s] for the various items which have been alluded to in the Valuation report.
 95. With the foregoing testimony, the Plaintiff's case was duly closed.

B. 1st and 2nd Defendants' Case:

96. The 1st and 2nd Defendants' case revolves around the Evidence of one [1] witness namely, Rahab Nkiama. Same testified as DW1.
97. It was the testimony of the witness that same [witness] is the 1st Defendant in respect of the instant matter. Furthermore, the witness also averred that same is also a Director of the 2nd Defendant Company.



98. Other than the foregoing, the witness averred that same is privy to and knowledgeable of the facts of the instant matter. In any event, the witness added that same entered into a verbal sale agreement pertaining to and concerning the suit property.
99. Furthermore, the witness averred that same has since recorded a witness statement dated the 4th December 2020 and wherein same has highlighted and articulated the facts pertaining to the instant matter. In this regard, the witness sought to adopt and rely on the witness statement dated the 4th December 2020.
100. For coherence, the witness statement dated the 4th of December 2020 was thereafter admitted and constituted as the Evidence in chief of the witness.
101. Additionally, the witness alluded to the List and bundle of documents dated the 4th December 2020, containing 15 documents and which documents the witness sought to adopt and produced before the court as Exhibits on behalf of the 1st and 2nd Defendants.
102. There being no objection to the production of the documents at the foot of the List dated the 4th December 2020, same were thereafter admitted and constituted as Exhibit[s] D1 to D15, respectively on behalf of the 1st and 2nd Defendants.
103. On the other hand, the witness averred that same has also filed a Statement of Defense dated the 29th October 2007; and has thereby sought to adopt and rely on the contents thereof.
104. On cross examination by Learned counsel for the 3rd Defendant, the witness herein averred that same purchased the suit property from the Plaintiff herein. In any event, the witness added that the suit property was purchased at the sum of Kes. 9,000,000/= only.
105. Whilst under further cross examination, the witness averred that same has paid a total of Kes. 7,000,000/= only in favor of the Plaintiff. However, the witness clarified that same has not paid the balance of Kes. 2,000,000/= only.
106. It was the further testimony of the witness that sale agreement was entered into on or about October 2004 and thereafter same paid a stakeholder sum of 10% of the purchase price [consideration], amounting to Kes. 900,000/= only.
107. It was the further testimony of the witness that after same paid the stakeholder sum of 10% of the purchase price; same proceeded to and subdivided the property into various portions. At any rate, the witness averred that upon subdivision of the suit property, same [witness] proceeded and advertised the sale vide Standard Newspaper of the 12th of December 2004.
108. Whilst under further cross examination, the witness averred that following the advertisement, which was carried out and/or undertaken by the 2nd Defendant, same received various responses from persons who were desirous to purchase and/or acquire the resultant subdivisions.
109. It was the further testimony of the witness that one of the persons who expressed interest in the acquisition of the resultant subdivision, was the 3rd Defendant herein.
110. Furthermore, it was the testimony of the witness that subsequently, the 1st and 2nd Defendant on one hand and the 3rd Defendant on the other hand, entered into a sale agreement whereupon the 3rd Defendant bought and acquired two portions arising out of the suit property.



111. It was the further evidence of the witness that subsequently the 3rd Defendant paid the entire purchase price [consideration] that was agreed upon and thereafter same entered upon and took possession of the portion of the suit property which had been sold to and in favor of the 3rd Defendant.
112. Additionally, it was the evidence of the witness that when the 3rd Defendant entered and took possession of the sold portion of the suit property, the Plaintiff herein did not object to the taking of possession by the 3rd Defendant.
113. In any event, the witness averred that same is aware that the 3rd Defendant has since developed the portion of the suit property which was sold unto her [3rd Defendant].
114. Whilst under further cross examination by Learned counsel for the 3rd Defendant, the witness averred that portions of the suit property which were sold to the 3rd Defendant are known as Plot 2B and 3, respectively.
115. Other than the foregoing, it was the testimony of the witness that the plots to and in favor of the 3rd Defendant were sold after the advertisement which was carried out vide the Standard Newspaper.
116. On cross examination by Learned counsel for the Plaintiff, the witness testified that the transaction/ sale agreement between her and the Plaintiff was verbal. In any event, the witness added that the sale agreement was never reduced into writing.
117. Whilst under further cross examination by the Learned counsel for the Plaintiff, the witness averred that even though the sale agreement was verbal, same [witness] had an understanding with the Plaintiff that same [witness] would enter upon and take possession upon payment of the 10% [stakeholder sum].
118. Other than the foregoing, it was the testimony of the witness that same [witness] was given possession of the suit property in the year 2004. For good measure, the witness added that same was given possession by the Plaintiff.
119. It was the further testimony of the witness that the Plaintiff did not give unto her any written consent.
120. Additionally, it was the testimony of the witness that the subdivision scheme, arising from the subdivision of the suit property was neither approved nor endorsed by the City council of Nairobi [now defunct]. Nevertheless, the witness averred that same proceeded to and sold the various subdivision[s] arising out of the suit property.
121. On the other hand, it was the testimony of the witness that the sale agreement[s] in favor of the 3rd Defendant were entered upon between the 1st and 2nd Defendant on one hand; and the 3rd Defendant on the other hand. However, the witness clarified that the Plaintiff herein was neither Party to nor privy to the sale agreement.
122. Whilst under further cross examination, the witness herein averred that the city council of Nairobi [now defunct] did not approve the subdivision scheme because the Plaintiff had not availed the Rates and Rents clearance certificate; consent to transfer and transfer instrument.
123. On further cross examination, the witness averred that the receipt before the Honourable court shows that what same [witness] has paid is Kes. 4,950,000/= only. However, the witness averred that the total sum of monies which same has paid to and in favor of the Plaintiff amounts to Kes.7,000,000/=.
124. As concerns the question of demolition of the house which was standing on the suit property, the witness averred that on the day/date when the demolition took place, the Plaintiff's son protested the demolition.



125. With the foregoing testimony, the 1st and 2nd Defendants case was closed.

C. 3rd Defendant's Case:

126. The 3rd Defendant's case is premised on the Evidence of Eight [8] witnesses, namely, Diana Rachael Mochache alias Diana Rachael Kavedza, Nick Mbithi, Stella Nguku, Prudence Shambi Mbogho, Samuel Wambulwa Mui, Dominic Kisavi, John Muchangi Kariki and James Achoki Ondeyo, respectively who testified as DW2, DW3, DW4, DW5, DW6, DW7, DW8 and DW9, respectively.
127. It was the testimony of DW2 [Diana Rachael Kavedza], that same is currently a Judge of the High Court stationed within Kibra High Court, within the City of Nairobi.
128. Furthermore it was the testimony of the witness [DW2] that same is privy to and knowledgeable of the facts of the instant matter insofar as same [witness] entered into sale agreements with the 1st Defendant culminating into the purchase of various [2] portions of the suit property.
129. Other than the foregoing, the witness averred that same has since recoded an undated witness statement, but which was filed before the court on the 15th of October 2019.
130. Suffice it to point out that the witness thereafter intimated to court that same was desirous to adopt the contents of the said undated, but duly filed witness statement as her Evidence in Chief.
131. Instructively, the contents of the undated witness statement which was ultimately filed before the Honourable court on the 15th October 2019 was thereafter adopted and constituted as the Evidence in chief of the witness.
132. Additionally, the witness adverted a further witness statement dated the 22nd November 2021 and which witness statement, the witness sought to adopt and rely on. In this regard, the witness statement dated the 2nd November 2021 was adopted and constituted as the further Evidence of the witness.
133. Furthermore, the witness herein alluded to a List and Bundle of documents dated the 26th November 2021 containing a total of 54 documents and which documents the witness sought to adopt and to rely on as her Exhibits before the court.
134. Suffice it to point out that the documents at the foot of the List of documents dated the 26th November 2021; were thereafter adopted and admitted as Exhibit[s] D1 to D54, respectively on behalf of the 3rd Defendant.
135. Other than the foregoing, the witness also adverted to a Supplementary List and bundle of documents dated the 15th February 2022 and containing 12 documents, which the witness again sought to tender and produced before the court as Exhibit[s].
136. There being no objection to the bundle of documents adverted to; same were produced and admitted as Exhibit[s] D55 to D67, respectively on behalf of the 3rd Defendant.
137. Furthermore, the witness also intimated to the court that same had also filed a Further List and bundle of documents dated the 30th March 2022, containing two [2] documents and thereafter same [witness] sought to adopt and produce the documents as further Exhibit[s] before the court.
138. Suffice it to point out that the documents at the foot of the Further List of documents dated the 30th March 2022 were thereafter admitted and produced as Exhibits D68 to D69, respectively on behalf of the 3rd Defendant.



139. On cross examination by Learned counsel for the 1st and 2nd Defendants, the witness herein confirmed that same is the 3rd Defendant in the matter.
140. It was the further testimony of the witness that same came across an advertisement which was carried out vide the Standard Newspaper by and on behalf of the 1st and 2nd Defendants; and who invited Interested Parties, keen [desirous] to acquire portions of the suit property to reach out to the 1st Defendant
141. It was the further testimony of the witness that after coming across and reading the advertisement in the Standard Newspaper, same [witness] reached out to the 1st Defendant and expressed a desire to purchase and acquire a portion of the suit property.
142. Whilst under cross examination , the witness averred that by the time same reached out to the 1st Defendant, same [witness] ascertained and established that the 1st Defendant had paid the 10% deposit to and in favor of the Plaintiff herein. In any event, the witness also averred that same also established that there was an agreement between the Plaintiff and the 1st Defendant, whereby the Plaintiff had agreed to sell the suit property to the 1st Defendant for the sum of Kes. 9,000,000/= only.
143. Additionally, it was the testimony of the witness that subsequently, same was taken to the suit property which is situate along Nyeri Road in Kileleshwa and upon viewing the suit property [locus in quo] same developed an interest and ultimately entered into a sale agreement with the 1st and 2nd Defendants. For good measure, the witness averred that same settled to buy Plot number 3, which was situate at the extreme corner of the suit property.
144. Whilst under further cross examination, the witness averred that to be able to access Plot Number 3, which was at the far corner of the suit property, one had to go through Plot number one [1] as shown in the sketch diagram, which was produced as Exhibit D2.
145. It was the further testimony of the witness that thereafter same bought two [2] plots namely, plots number 3 and 2B, respectively and to be able to access her plots, same [witness] engaged the Plaintiff , who allowed her [witness] to construct a temporary gate on a portion of the suit property. In any event, the witness added that the engagement between herself and the Plaintiff took place between early January to mid-January 2005.
146. Besides, the witness herein averred that arising out of the engagement with the Plaintiff same [witness] acquired and obtained permission of the Plaintiff to clear the crops and avocado trees which were standing on the portion that had been acquired by the witness.
147. It was the further testimony of the witness that thereafter same commenced to construct her house on the suit property and that the Plaintiff authorized and allowed her [witness] to use the Plaintiff's veranda for purposes of storage of building material.[s]. Besides, the witness averred that same also procured and obtained the permission of the Plaintiff to take electricity from the Plaintiff's house.
148. Whilst under further cross examination, the Witness averred that at the time when same entered into the sale agreement with the 1st and 2nd Defendant, same [witness] was aware that the 1st and 2nd Defendants did not have/hold title to the suit property.
149. Other than the foregoing, it was the evidence of the witness that same was able to procure and obtain approval for the building on the basis of the survey plan and the sale agreement, which same [witness] had entered into with the 1st and 2nd Defendants. For coherence, the witness added that the Building Plans in respect of the constructions of the suit property was ultimately approved.



150. On cross examination by Learned counsel for the Plaintiff, the witness averred that from the onset/ beginning, same [witness] was aware that the 1st and 2nd Defendants were never the registered owners of the suit property. Nevertheless, the witness averred that despite being aware of the status of the title, same entered into the sale agreement with the 1st and 2nd Defendants.
151. Whilst under further cross examination by Learned counsel for the Plaintiff, the witness averred that the sale agreement which same entered into and executed with the 1st and 2nd Defendants contained a clause pertaining to timelines.
152. Other than the foregoing, it was the testimony of the witness that the sale agreement which same [witness] entered into with the 1st and 2nd Defendants also had a provision for the removal of the structure that was standing on the road of access. For clarity, the witness averred that the vendor of the sale agreement had agreed to remove/demolish the said structure.
153. Whilst under further cross examination, the witness averred that the demolition of the structure [house] was to be undertaken by the 1st and 2nd Defendants, who were the vendors as pertains to the sale agreement in favor of the 3rd Defendant.
154. Other than the foregoing, it was the testimony of the witness that same lodged the Building plans for approval in the year 2005, but same were ultimately approved in the year 2008. Nevertheless, the witness admitted that the Building plans were approved long after the building had been completed.
155. Whist under further cross examination, the witness averred that the sketch plan [Diagram] that was used to demarcate the suit property has never been approved by the City council of Nairobi [now defunct].
156. On the other hand, the witness averred that same has filed a statement of defense and counterclaim dated the 16th June 2009 and in respect of which, same has sought for a plethora of reliefs. In particular, the witness avers that same has sought for specific performance from the 1st and 2nd Defendants.
157. Furthermore, the witness averred that the monies same paid at the foot of the sale agreement were paid to and in favor of the 1st and 2nd Defendants. For good measure, the witness clarified that same did not pay any money to and in favor of the Plaintiff [First Defendant to the Counter-claim] on account of the sale agreement.
158. The second witness who testified who testified on behalf of the 3rd Defendant was one Nick Mbithi. Same testified as DW3.
159. It was the evidence of the said witness [DW3] that same is an Electrical Engineer. Furthermore, the witness averred that same is privy to and knowledgeable of the facts of the instant matter.
160. Other than the foregoing, the witness averred that same has recorded a witness statement dated the 14th December 2021 and which witness statement, the witness sought to adopt as his Evidence in chief.
161. Instructively, the witness statement dated the 14th December 2021 was thereafter adopted and constituted as the Evidence in chief of the witness.
162. On cross examination by Learned counsel for the 1st and 2nd Defendant[s], the witness stated that same [witness] is related to the Plaintiff. In any event, the witness averred that the Plaintiff herein is his grandmother.
163. Furthermore, the witness averred that same is also conversant with PW2, namely, Joseph Muinde and furthermore, the witness added that PW2 is his Father.



164. On the other hand, the witness herein admitted and acknowledged that same is familiar with the 3rd Defendant. In any event, the witness added that same [witness] got to know of the 3rd Defendant in the year 2005.
165. Whilst under further cross examination, the witness averred that the Plaintiff [his grandmother] and DW2 used to meet at the suit property on various occasion[s]. However, the witness added that the Plaintiff was never residing on the suit property.
166. It was the further testimony of the witness that the DW2 used to draw water from the Plaintiff's kitchen. Furthermore, the witness averred that the Plaintiff herein was privy to and knowledgeable of the fact that DW2 would draw water from her kitchen.
167. Whilst under further cross examination, the witness averred that his grandfather [now deceased] informed him [witness] that he [grandfather] is the one who nullified the sale agreement between the Plaintiff and the 1st Defendant.
168. Other than the foregoing, the witness herein averred that DW2 helped him [witness] with a table which the witness used for purposes of reading. In addition, the Witness also averred that DW2 had cordial and good relationship with their [witness's family] including the Plaintiff and PW2.
169. Whilst under cross examination by counsel for the Plaintiff, the witness herein testified that PW2 [Joseph Muinde] is indeed his father. Furthermore, the witness averred that the dispute beforehand concerns three [3] namely the Plaintiff who was the owner of the suit property; the 1st and 2nd Defendants who bought the land from the Plaintiff and the 3rd Defendant who bought the land from (sic) the 1st and 2nd Defendants.
170. Additionally, the witness herein testified that his mother had a disagreement with his father [PW2]. Furthermore, the witness averred that the disagreement between his mother and father [PW2] has a relevance to the case beforehand.
171. Whilst under further cross examination, the witness averred that the Plaintiff's house which was standing on the suit property was demolished by the 1st Defendant. In any event, the witness added that the house which was standing on the suit property was a three [3] bedroomed house.
172. The fourth witness who testified on behalf of the 3rd Defendant was one Stella Nguku. Same testified as DW4.
173. It was the testimony of the witness that same is a tailor and she was carrying out a tailoring business/ activities along Nyeri Road, next to the gate of Catholic Church. Furthermore, the witness averred that her place of work was in Kileleshwa.
174. Additionally, the witness averred that by virtue of the location of her business, she [Witness], got to know the 3rd Defendant herein. For good measure, the witness added that her business was being carried out next to the home of the 3rd Defendant.
175. The witness also averred that same is also familiar with the facts of this matter. Other than the foregoing, the witness averred that same has since recoded a witness statement dated the 19th October 2019, which witness statement same sought to adopt and rely on as her Evidence in chief.
176. Suffice it to point out that the witness statement dated the 19th October 2019 was thereafter adopted and admitted as the Evidence in chief of the witness.



177. On cross examination by Learned counsel for the 1st and 2nd Defendants, the witness [DW4] stated that she had been carrying out her tailoring business at the designated place for more than fourteen [14] years. Further and in any event, the witness averred that she started her tailoring business next to the home of the Plaintiff.
178. Whilst under further cross examination, the witness averred that the place where she [witness] was carrying out the tailoring was authorized by one Jacinta, who is the daughter in law of the Plaintiff.
179. It was the further testimony of the witness that after every evening she [witness] would keep her sewing machine in the house of the Plaintiff.
180. Upon being shown assorted photographs [pictures], the witness herein proceeded to and identified various persons, inter-alia, Baba Ndinda, whom the witness averred was also known as Joseph Muinde.
181. On cross examination by Learned counsel for the Plaintiff, the witness averred that she used to keep her tailoring machine in the house of Jacinta. However, when the house of Jacinta was demolished, the witness averred that she thereafter commenced to keep her sewing machine in the premises of the 3rd Defendant.
182. Whilst under cross examination, the witness averred that she got to know of the case beforehand and she was requested to record a witness statement. Nevertheless, the witness added that she did not see the 3rd Defendant coming to the suit property with any police officers.
183. Other than the foregoing, it was the testimony of the witness that after the house belonging to Jacinta was demolished, various members of the family of Jacinta went to reside in the house of the 3rd Defendant. For coherence, the witness added that the 3rd Defendant is truly known to her.
184. Further and in addition, the witness stated that same is also aware that the 3rd Defendant donated and give a table to one Nick Mbithi to undertake his studies.
185. The fifth witness who testified on behalf of the 3rd Defendant was Prudence Shambi Mbogho. Same testified as DW5.
186. It was the testimony of the witness that same is a sales person with Trans Africa Wood. In any event, the witness averred that same resides in the same neighborhood with the 3rd Defendant.
187. Additionally, it was the testimony of the witness that same [witness] has resided along Nyeri Road, Kileleshwa since the year 2004. In this regard, the witness averred that same is therefore conversant and familiar with both the 3rd Defendant and the Plaintiff respectively.
188. Other than the foregoing, the witness averred that same has recorded a witness statement in respect of the instant matter and same sought to adopt and rely on the witness statement as her Evidence in chief. For coherence, the witness statement by and on behalf of the witness was duly adopted as her Evidence in chief.
189. On cross examination by Learned counsel for the 1st and 2nd Defendants, the witness averred that she is the one who allowed the 3rd Defendant to draw water from the house of the Plaintiff. In any event, the witness averred that same was conversant with both the Plaintiff, the Plaintiff's children's and the Plaintiff's daughters in law.
190. Whilst under further cross examination, the witness averred that she is aware that the 3rd Defendant is the one who constructed on the suit property.



191. On cross examination by Learned counsel for the Plaintiff, the witness averred that same witnessed the demolition of the house that was on the plot belonging to the Plaintiff. Furthermore, the witness averred that when the house belonging to the Plaintiff was demolished, there was commotion.
192. Whilst under further cross examination, the witness averred that when the bulldozer was leaving the suit property, the “Mutukus” were throwing stones. Besides, the witness reiterated that during the demolition of the Plaintiff’s house, the 3rd Defendant was present.
193. Other than the foregoing, the witness averred that same was aware that the Plaintiff and the 3rd Defendant had very cordial relationship.
194. The sixth [6th] witness who testified on behalf of the 3rd Defendant was one Samuel Wambulwa Mbui. Same testified as DW6.
195. It was the testimony of the witness [DW6] that same is conversant with the 3rd Defendant since childhood. Besides, the witness avers that as pertains to the matter herein, same has recorded a witness statement dated the 2nd November 2021. For good measure, the witness thereafter sought to adopt and rely on the witness statement.
196. Suffice it to point out that the witness statement by and on behalf of the witness herein was thereafter constituted as the Evidence in chief of the witness.
197. Additionally, the witness avers that it is him [Witness], that constructed the 3rd Defendant’s house situate on the suit property.
198. On cross examination by Learned counsel for the 1st and 2nd Defendants, the witness avers that same is conversant with the first [1ST] Defendant herein. In any event, the witness added that same [witness] was introduced to the first [1st] Defendant by the 3rd Defendant.
199. It was the further testimony of the witness that during the course of constructing the 3rd Defendant’s house, same [witness] used to draw water from the Plaintiff’s kitchen. At any rate, the witness added that the building material[s] were also being brought through the main gate.
200. Whilst under further cross examination, the witness averred that the Plaintiff and the 3rd Defendant had very cordial relationship.
201. On cross examination by Learned counsel for the Plaintiff, the witness averred that his witness statement does not allude to and/or make any reference to the Plaintiff. The witness averred that same was the supervisor in charge during the constructions of the house belonging to the 3rd Defendant.
202. Whilst under further cross examination, the witness averred that the Building plans relating to the 3rd Defendant’s house were duly approved and a stamp affixed thereto.
203. The sixth witness who testified on behalf of the 3rd Defendant was one Dominic Kisavi. Same testified as DW7.
204. It was the testimony of the witness that same is currently a Commissioner of Police based at the Police Headquarters within the city of Nairobi. Furthermore, the witness herein also testified that same is also conversant with the facts pertaining to the subject matter insofar as same recorded witness statement[s] from one Elizabeth Nthuka Ntuku.
205. Other than the foregoing, the witness averred that same recorded a witness statement dated the 2nd November 2021. In this regard, the witness thereafter sought to adopt the contents of the witness statement as his Evidence in chief.



206. Pursuant to and at the instance of the witness, the witness statement dated the 2nd November 2021 was thereafter admitted and constituted as the Evidence in chief of the witness herein.
207. Additionally, the witness herein alluded to the witness statement of Elizabeth Nthuka Mutuku and Joseph Muinde Mutuku, respectively, which witness statement[s] are dated the 4th November 2007. In any event, the witness averred that it is himself who recorded the witness statements.
208. Furthermore, the witness thereafter sought to have the witness statement of Elizabeth Nthuka and Joseph Muinde to be produced as Exhibits before the Honourable court.
209. On cross examination by Learned counsel for the 1st and 2nd Defendants, the witness averred that same received the hand-written statement from his superiors. Besides, the witness added that upon receipt of the said witness statement, same [witness] proceeded to and certified the witness statement.
210. Whilst under further cross examination, the witness avers that the complaint in question was lodged at the Police headquarters and thereafter, same received the witness statement of Joseph Muinde Mutuku.
211. On cross examination by Learned counsel for the Plaintiff, the witness testified that the Complaint that he was investigating touched on and concerned Trespass and malicious damage to property. Furthermore the witness averred that the Complaint related to the suit property.
212. Additionally, it was the testimony of the witness that upon receipt of the Complaint, same [Witness], recorded the witness statement of the witnesses. However, the witness clarified that same did not record the witness statement of Joseph Mwandia.
213. The seventh witness who testified on behalf of the 3rd Defendant is one John Muchangi Karigi. Same testified as DW8.
214. It was the testimony of the witness that same is an Engineer by Profession. Furthermore, the witness also averred that same is also conversant with the facts of the subject matter.
215. Other than the foregoing, the witness averred that same has also recorded a witness statement dated the 2nd November 2021 and which statement same [the Witness], sought to adopt as his Evidence in chief. For good measure, the witness statement dated the 2nd November 2021 was thereafter adopted and constituted as the Evidence in chief of the witness.
216. On cross examination by Learned counsel for the 1st and 2nd Defendants, the witness averred that same also came across the advertisement in the Standard Newspaper which was carried out at the instance of the 1st and 2nd Defendant.
217. Additionally, the witness averred that having coming across the advertisement vide the Standard Newspaper, same reached out to the 1st and 2nd Defendants vide cellphone number which had been provided at the foot of the advertisement and same [witness] was taken to view the suit property.
218. It was the further testimony of the witness that after viewing the suit property, [locus in quo] same developed an interest in a portion thereof and proceeded to purchase same from the 1st and 2nd Defendants.
219. Whilst under further cross examination, the witness averred that same [witness] is also aware that the 3rd Defendant also bought a portion of the suit property.
220. On cross examination by Learned counsel for the Plaintiff, the witness averred that same [witness] is aware that the dispute beforehand concerns ownership of the suit property. Furthermore, the witness averred that same is aware that the suit beforehand has been brought by the Plaintiff.



221. Nevertheless, it was the evidence of the witness that even though same bought a portion of the suit property, same [witness] is however appearing in court as a witness of the 3rd Defendant.
222. Other than the foregoing, the witness averred that same was also shown the sub-division plans relating to the suit property. Furthermore, the witness added that the seller, namely, the 1st Defendant also explained to him [witness] that same [seller] had the authority to subdivide the suit property and arising from the intimation, same [witness] proceeded to and bought Plot number 2.
223. Whilst under further cross examination, the witness averred that same entered into and executed a sale agreement with the 1st and 2nd Defendants. In any event, the witness added that same paid the entire purchase price, which was received and acknowledged by the 1st and 2nd Defendants.
224. Notwithstanding the foregoing, the witness averred that despite having bought and paid for Plot number 2, same [witness] did not proceed to construct on the suit property because of a Court order. Besides, the witness clarified that it is a court order that stopped him [witness] from going on with construction on the suit property.
225. The last witness who testified on behalf of the 3rd Defendant was one James Achoki Ondeyo. Same testified as DW9.
226. It was the testimony of the witness that same is a pilot. Furthermore, the witness also averred that same is also knowledgeable of the facts pertaining to and concerning the instant matter.
227. Other than the foregoing, the witness averred that same has since recorded a witness statement dated the 2nd November 2021 and which witness statement, the witness sought to adopt and rely on as his Evidence in chief.
228. Instructively, the witness statement by and on behalf of the witness dated the 2nd November 2021 was thereafter adopted and admitted as the Evidence in chief of the witness.
229. On cross examination by Learned counsel for the 1st and 2nd Defendants, the witness averred that same also came across the advertisement which was contained in the Standard Newspaper and thereafter same went to the suit property on several occasion[s]. Besides, the witness averred that ultimately same [witness] bought a portion of the suit property in the year 2007.
230. Whilst under further cross examination, same [witness] stated that by the time same was purchasing the suit property, the 3rd Defendant herein had already started construction.
231. On cross examination by Learned counsel for the Plaintiff, the witness averred that same [Witness], got to know of the availability of the suit property through a friend who had been dealing with the 2nd Defendant. Nevertheless, the witness added that same ultimately bought a Plot in the year 2007.
232. It was the testimony of the witness that the plot which was sold to and acquired by him was Plot number 1. Nevertheless, the witness clarified that whilst purchasing the Plot in question, same was availed a copy of Certificate of title which showed the name of the Plaintiff herein.
233. Additionally, it was the testimony of the witness that the First Defendant informed him that same [First Defendant] had the consent/authority of the Plaintiff to sell the subdivisions.
234. As concerns whether the subdivisions scheme/plans pertaining to the suit property were ever approved, the witness averred that same [witness] did not follow up to ascertain and/or establish whether the subdivision scheme was approved or otherwise.



235. Other than the foregoing, the witness averred that the sale agreement relating to the purchase of Plot number One [1] which the witness bought was entered into between himself [witness] and the 1st and 2nd Defendants. However, the witness clarified that the Plaintiff herein was not a party to the sale agreement.
236. Whilst under further cross examination, the witness averred that same did not construct/build on the suit property. For good measure, the witness averred that same did not build on the suit property because there was a dispute as pertains to ownership.
237. With the foregoing testimony, the 3rd Defendant's case was duly closed.

Parties Submissions:

238. Upon the close of the 3rd Defendant's case, the advocates for the Parties covenanted to file and exchange written submissions.
239. Consequently and in view of the foregoing, the Honourable court thereafter proceeded to and circumscribed the [s] for the filing and exchange of written submissions.
240. Moreover, the advocates for the Parties, thereafter proceeded to and filed written submissions in respect of the instant matter. For coherence, Learned counsel for the Plaintiff filed three [3] sets of written submissions, namely, the maiden submissions dated the 29th January 2024; and Rejoinder submissions dated the 19th and 26th February 2024.
241. On the other hand, the 1st and 2nd Defendant filed written submissions dated the 13th February 2024; whereas the 3rd Defendant filed written submission dated the 18th February 2024.
242. Suffice it to point out that the various sets of written submissions, [details in terms of the preceding paragraphs] forms part of the record of the Honourable court.
243. Furthermore, even though the court has not reproduced and or rehashed the written submissions filed on behalf of the respective Parties, there is no gainsaying that the contents of the written submissions have been considered and taken into account whilst crafting the subject Judgment.
244. Additionally, I beg to point out that the submission[s] by and on behalf of the Parties, which are extremely elaborate and comprehensive, have enabled the court to discern, decipher and synchronize the issues for determination.
245. Finally, it is imperative to state and underscore that the court is indeed grateful to the respective counsel for the Parties for the elaborate and comprehensive submissions which had been filed. For good measure, the failure to reproduce the submissions is not borne out of any contempt.

Issues For Determination:

246. Having reviewed the pleadings filed by and on behalf of the Parties; the evidence tendered [both oral and documentary], as well as written submissions by the Parties, the following issues crystalize and are thus worthy of determination;
- i. Whether the sale agreement between the Plaintiff and the 1st and 2nd Defendants, if at all; was lawful or otherwise.
 - ii. Whether the 1st and 2nd Defendants acquired any lawful rights to and in respect of the suit property capable of being sold/disposed of to Third partes, inter-alia, the 3rd Defendant.



- iii. Whether or not the Doctrine of Nemo dat quod-non-habet applies to and in respect of the transaction between the 1st and 2nd Defendants on one hand; and the 3rd Defendant on the other hand.
- iv. Whether the 3rd Defendant is entitled to specific performance or otherwise.
- v. Whether the 3rd Defendant has established or demonstrated a basis for the application of the concept/ Doctrine of constructive trust or otherwise.
- vi. What reliefs, if any; ought to be granted.

Analysis And Determination:

Issue Number 1 - Whether the sale agreement between the Plaintiff and the 1st and 2nd Defendants, if at all; was lawful or otherwise.

247. The dispute beforehand essentially gravitates and/or revolves around the sale agreement pertaining to and/or concerning L.R No. 209/12397 [I.R No. 75240] belonging to and registered in the name of the Plaintiff.
248. From the pleadings filed by and on behalf of the Plaintiff and the 1st and 2nd Defendants, respectively; and the evidence tendered, there is no gainsaying that the agreement beforehand touched on and/or concerned disposition of an interests in land.
249. Furthermore, it is common ground that whenever a transaction involving the disposition of an interest in land is to be undertaken, it suffices that such a transaction [agreement/contract] ought to be reduced into writing and wherein all the terms of the agreement/contract are to be articulated.
250. Additionally, it is also imperative to underscore that the contract/agreement in writing, must contained all the terms agreed upon between the Parties, namely, the vendor and the purchaser; and thereafter, the contract in question must be executed by both Parties chargeable therewith.
251. On the other hand, it is also paramount to highlight that the agreement in question, other than being signed/executed by the Parties chargeable therewith, the execution by the Parties, must be attested by a witness, who was present at the time of execution and witnessed the execution of the contract by the Parties.
252. Instructively, the ingredients alluded to and highlighted in the preceding paragraphs are well provided for and articulated vide the provisions of Section 3(3) of the Laws of Contract Act, Chapter 23 Laws of Kenya.
253. For the sake of brevity, it suffices to re-produce the provisions of Section 3(3) [supra]. Consequently same are reproduced as hereunder:
- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
 - (a) the contract upon which the suit is founded—
 - i. is in writing;
 - ii. (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:



Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

254. My understanding of the foregoing provisions of the law, is to the effect that any contract, [the one between the Plaintiff and the 1st and 2nd Defendants herein not excepted], was mandatorily required to be reduced into writing and thereafter be executed by the Parties chargeable therewith.
255. Furthermore, what is discernable from the import and tenure of Section 3(3) of the *Law of Contract Act*, which has since been re-enacted vide Section 36, 42 and 43 of The *Land Registration Act*, 2012 [2016], is to the effect that where a contract/transaction affecting an interest in land is not reduced into writing, then same is illegal and void.
256. Other than the foregoing, the other perspective that also arises from the named provisions of the *Law of Contract Act*, Chapter 23, Laws of Kenya; is to the effect that where the contract for the disposition of an interests in land is not reduced in writing, then, neither party to the contract can commence and/or anchor a suit thereon.
257. Moreover, it is appropriate to state and observe that import, tenor and implication of the provisions of Section 3(3) of The *Law of Contract Act*, Chapter 23 Laws of Kenya, have since been highlighted and elaborated upon by the Court of Appeal in the case of Peter Mbiri Michuki vs Samuel Mugo Michuki (2014) eKLR, where the court held thus;

24. Section 3(3) of the *Law of Contract Act* provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested. Section 3(7) of the *Law of Contract Act* excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the *Law of Contract Act*, came into effect on 1st June, 2003. The trial court found that the sale agreement between the parties was an oral agreement made in 1964 between the appellant and the plaintiff.

Prior to the amendment of Section 3(3) of the *Law of Contract Act* in 2003, the subsection read as follows:

- (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (1) Has in part performance of the contract taken possession of the property or any part thereof; or
- (11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract. '

258. From the foregoing excerpt and citation, there is no gainsaying that where a contract/agreement for disposition of an interest in land, is not reduced into writing, the impugned transaction is illegal, null and void. Consequently, no party, the 1st and 2nd Defendants not excepted can anchor any claim or interests thereon.



259. Be that as it may, both the Learned counsel for the 1st and 2nd Defendant and the 3rd Defendant have contended that a Party to such a transaction/contract, the Plaintiff herein not excepted, cannot hide under the statutory provision[s] to attract and/or accrue unjust enrichment and/or benefit[s].
260. Furthermore, Learned counsel for the 3rd Defendant has ventured forward and cited inter-alia, the decisions of the Court of Appeal in the cases of Willy Kimutai Kitilit vs Michael Kibet (2018)eKLR and Aliaza vs Soul (Civil Appeal No. 134 of 2017) (2022) KECA 583 [KLR], respectively, to anchor the contention that Equity would readily intervene in such situations to avert and/or mitigate the clear provisions of the law.
261. Be that as it may, it is appropriate to recall and reiterate that whereas Equity has since been elevated to a constitutional pedestal by dint of the provisions of Article 10(2) of *the Constitution* 2010, it must not be lost on legal scholars and jurists alike, that Equity shall forever follow and complement the law and not otherwise.
262. For coherence, if the Legal reasoning is allowed to elevate the Principle of Equity to a pedestal where same overtakes the text of the Law, then we risks usurping the mandate of the National Assembly and Senate [Parliament]; and by extension, the Courts risk starting to legislate as opposed to interpret.
263. Put differently, Equity despite its moderating and calming effect[s], shall never overtake, defeat and/or be deployed to negate clear and explicit terms of the law. In any event, it has been stated that Equity [like public policy] if not well taken care of and applied with necessary moderations, may very well become an unruly horse.
264. To this end, I beg to cite, adopt and reiterate the erudite position that was espoused by the decision in the case of Stephen Wannjau Karanja v Nairobi Women's Hospital Limited [2017] eKLR, where the court stated and held thus;
35. Public policy remains likened to an "unruly horse" which may lead us from sound law. In 1824, in Richardson vs Mellish,[27] an English Judge (Burrough J) expressed the metaphor often since repeated, when counseling against reliance of public policy, that:-

"...it is a very unruly horse, and when you astride it you never know where it will carry you...it is never argued at all but when other points fail."

265. Furthermore, the Court of Appeal in the case of Rose Wakanyi Karanja & 3 others vs Geoffrey Chege Kirundi & another [2016] eKLR, corroborated the position that Equity does not override the clear provisions of the law and stated that:

“We have therefore come to the conclusion that the consent obtained on 16th December, 1993 was not valid and the purported validation of a consent obtained outside the stipulated period is without the force of law. The upshot of the above is that the sale of the suit property being agricultural land became null and void on expiry of six months from the date of the agreement i.e. 26th October, 1990.

However, this is not to say we are unsympathetic to the respondents but this being a Court of Law, our sympathies have no place. Suffice to state that the provisions of the Land Control Board Act are harsh, but regrettably equity cannot be of any help.



In *Karuri v Gituru* (Supra), this Court held that:

“The provisions of the Land Control Board Act are of an imperative nature, there is no room for the application of any doctrine of equity to soften its harshness.”

266. Other than the foregoing, it is also important to observe that both the Plaintiff on one hand and the 1st and 2nd Defendants on the other hand, knew that same were entering into an agreement pertaining to and concerning the disposition of an interests in land and hence appropriate mechanism and measures ought to have been taken and/or put in place to ensure compliance with the law.
267. At any rate, if and where there is any difficulty to comply with the provisions of Section 3(3) of the *Law of Contract Act*, [the text of the Law], which was in force at the year 2004, [following the amendment of same in the year 2003], then the parties ought to have endeavored to comply therewith subsequently.
268. Either way, it is my humble finding and conclusion that the impugned verbal sale agreement which was entered into between the Plaintiff and the 1st and 2nd Defendants on the other hand and which was never regularized, was illegal, unlawful and thus a nullity.
269. Finally, I beg to point out that where an act stems from a transaction which is ex-facie illegal [like the transaction under reference] no legal right can ensure and/or arise therefrom.
270. In view of the foregoing, my answer to issue number one [1] is to the effect that the verbal sale agreement which was (sic) entered into in October 2004, during the tenure of the provisions of Section 3(3) of The Law of Contract , Chapter 23, Laws of Kenya, was therefore illegal and thus void for all intents and purpose.

Issues Number 2 And 3 Whether the 1st and 2nd Defendants acquired any lawful rights to and in respect of the suit property capable of being sold/disposed of to third partes, inter-alia, the 3rd Defendant.

Whether or not the Doctrine of Nemo dat quod-non-habet applies to and in respect of the transaction between the 1st and 2nd Defendants on one hand; and the 3rd Defendant on the other hand.

271. Whilst discussing issue number one [1] herein before, this court has come to the conclusion that the impugned sale agreement, which touched on and concerned the disposition of an interests in land and which was not reduced into writing, was illegal and thus void.
272. Nevertheless, there are still incidental perspectives, which require to be considered and addressed, with a view to discerning whether the 1st and 2nd Defendants herein procured and obtained any legal rights or interests over the suit property or any portion thereof.
273. To start with, it is imperative to observe that being a contract, like any other contract, there are certain critical ingredients that would arise and be satisfied before (sic) the agreement can crystalize into an effective and effectual contract.
274. In this respect, it is common ground that the existence of an agreement and/or effective contract would entail, inter-alia, the offer, the acceptance and thereafter the payment of the requisite consideration. In any event, it is the presence of the three ingredient[s] in any transaction that births a legal and enforceable contract.
275. To this end, it is appropriate to adopt and reiterate the erudite position that was espoused by the Supreme Court of Kenya [the Apex Court] in the case of *Moi University versus Zaippeline & another*



(Petition 43 of 2018) [2022] KESC 29 (KLR) (Civ) (17 June 2022) (Judgment), where the court held as hereunder;

37. It is trite that for any contract to be valid at law, it must meet certain elements commencing with offer and acceptance. The essential components of a contract as was observed by Harris JA in *Garvey v Richards* [2011] JMCA Civ 16 ought to ordinarily reflect the following principles: “[10] It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”
276. Having taken cognizance of the ratio decidendi in respect of the decision [supra], it is now appropriate to revert to the instant matter to ascertain whether the ingredient[s] that underpins a lawful and effective contract did exist between the Plaintiff and the 1st and 2nd Defendants.
277. Whereas both the Plaintiff and the 1st Defendant agree that there was a verbal agreement concerning the sale and disposition of the suit property; and whereas the property which was the subject of (sic) the intended sale was also defined, the aspect which merits interrogation touches on whether the agreed purchase price/consideration was duly paid.
278. As pertains to this aspect of the matter, it is not lost on the court that DW1 [Rahab M’kiama] testified and stated as hereunder whilst under cross examination by Learned counsel for the 3rd Defendant.
279. For ease of reference, the pertinent aspect of the testimony are reproduce as hereunder;
- “I purchased the property from the Plaintiff. I paid the sum of Kes. 7,000,000/= only. The agreed purchase price was Kes.9, 000, 000/=. I have not paid the sum of Kes. 2,000,000/= only.
280. From the foregoing testimony, it is evident that DW1 [Rahab M’kiama] is indeed admitting that up to and including the 30th of January 2023 when same testified before the court, same had neither fully paid or settled the agreed consideration.
281. On the other hand, it is also important to point out that DW1 did not make any tender towards and in respect of the payment of (sic) the outstanding portion of the consideration, if at all.
282. Other than the foregoing, DW1 also stated as hereunder whilst under cross examination by Learned counsel for the Plaintiff;
- “The purchase price was Kes. 9,000,000/=. I paid the sum of Kes. 7,000,000/=. The receipts are attached to the bundle of documents. I wish to add that Kes. 5,300,000/= has receipts. I ca see page 26 of my bundle of documents relates to deposit of Kes. 4,000,000/=. Page 27 of my bundle relates to deposit of Kes. 20,000/=. The last receipt before the court shows that what I have paid is Kes. 4,950,000/=. However, I do report that I have paid Kes. 7,000,000/= only to the Plaintiff.
283. Similarly, there is no gainsaying that even at the time when DW1 was testifying before the court; the agreed purchase price [read, Consideration], had not been paid and/or fully liquidated.



284. Arising from the foregoing, the question that begs the answer is whether or not the 1st and 2nd Defendants acquired and/or accrued any lawful rights, [known to Law], to the suit property.
285. Suffice it to point out that the 1st and 2nd Defendants herein would not have acquired and accrued any lawful rights to and in respect of the suit property prior to the payment and/or liquidation of the consideration.
286. Secondly, it is also important to recall that by the time the 1st and 2nd Defendants entered upon the suit property, undertook (sic) the subdivision thereof and thereafter endeavored to sell resultant portion[s] of the suit property to, inter-alia, the 3rd Defendant, the 1st and 2nd Defendant had only paid the stakeholders sum of Kes. 900,000/= only.
287. Consequently and in this regard, even adopting a liberal approach in an endeavor to discern whether the 1st and 2nd Defendants would have acquired any lawful rights to and in respect of the suit property, one would no doubt come to the conclusion that the mere payment of the 10% deposit [stakeholders sum], cannot be deemed and/or construed to facilitate the conveyance of any legal interests in respect of the designated property.
288. Thirdly, it is also imperative to take cognizance of the Doctrine of *nemo dat quod non habet*, which exemplifies the position that where one, in this case the first and 2nd Defendants, have no title to the designated property; then same [1st and 2nd Defendants] cannot purport to pass over a better title than the one (sic) owned by same, if at all.
289. To be able to appreciate and understand the import and tenor of the Doctrine of *Nemo dat quod non habet*, it suffices to take cognizance of the meaning and import thereof, as espoused in the case of *Bishopsgate Motor Finance Corporation Ltd vs. Transport Brakes Ltd (1949) 1 KB 322*, at pp. 336-337 when he [Lord Denning MR] stated thus;
- “In the development of our law, two principles have striven for mastery. The first is for the protection of property; no one can be given a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.”
290. Furthermore, the doctrine of *Nemo dat quod non habet* has also been widely applied within our jurisprudence. In this regard, the decision in the case of *Diamond Trust Bank Kenya Ltd v Said Hamad Shamisi & 2 others [2015] eKLR*, suffices and is relevant.
291. For brevity, the Court of Appeal stated and held as hereunder;
- Firstly, section 26 (1) and (2) are exceptions to the general rule in the sale of goods that a person who does not have title to goods cannot, without the owner’s authority or consent, sell and confer a better title in the goods than he has. (*Nemo dat quod non habet*).
292. Additionally, the doctrine under reference, namely, [*Nemo dat quod non habet*], was also elaborated upon by the Court of appeal in the case of *Ardhi Highway Developers Ltd vs Westend Butchery Ltd & 6 Others (2015)eKLR*, where the Honourable court of appeal stated as hereunder;
69. It is our finding that as between West End and Ardhi, no valid Title passed and the one exhibited by Ardhi before the trial court was an irredeemable fake. It follows that Ardhi had



no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.

293. In my humble albeit considered view, the answer to issue number two [2] and three [3] herein before is threefold. Firstly, by the time the 1st and 2nd Defendants were endeavoring to subdivide the suit property and thereafter selling same to the 3rd Defendant, the 1st and 2nd Defendants had no lawful or legitimate title over the suit property.
294. Secondly, the Doctrine of Nemo dat quod non habet, whose meaning, import and tenure is explicit, divested the 1st and 2nd Defendants of any capacity to alienate and/or dispose of the suit property, which neither belonged to nor was registered in their names at the point in time, applies.
295. Thirdly, the beneficiary of the transaction under reference [like the beneficiaries who were highlighted in the Ardhi Highway Developers case], accrued and/or acquired no lawful interests known to law.

Issue Number 4 Whether the 3rd Defendant is entitled to specific performance or otherwise.

296. The 3rd Defendant herein filed an amended statement of defense and counterclaim dated the 16th June 2009 and in respect of which same sought for a plethora of reliefs. For coherence, one of the reliefs that was sought by and on behalf of the 3rd Defendant is as hereunder;
- i. An order of specific performance ordering the 1st Defendant and the Defendants [by way of counterclaim] to transfer to the Plaintiff part of the property known as L.R No. 209/12398 [I.R No. 75240] being the subject of the sale agreement dated the 9th of December 2004 and 3rd of July 2007.
297. Instructively, the plea and/or prayer for specific performance has been mounted against the 1st Defendant to the main suit as well as 1st Defendant to the counterclaim, who is the Plaintiff herein.
298. From the plea for specific performance, what I hear the 3rd Defendant to be seeking is that same is entitled to the Equitable relief of specific performance as against the 1st Defendant to the main suit, namely, the Plaintiff [1st Defendant to the counterclaim].
299. Given the two [2] pronged approach that has been adopted by the 3rd Defendant herein, in pursuit of the prayer of specific performance, it is appropriate to also address and deal with the prayer in the same manner.
300. To start with, there is no gainsaying that the 1st Defendant to the suit [Rahab M'kiama], does not own the suit property. For coherence, both DW1 and DW2, admitted and acknowledged that the certificate of title of the suit property remains registered in the name of the Plaintiff.
301. Consequently and in the premises, the issue that comes to mind is whether this court can decree specific performance against one, namely, the 1st Defendant to the main suit to perform the contract and thereby transfer [sic] the title to the suit property or a portion thereof, yet the title is not in her name.
302. To my mind, a court of law, can only issue and/or grant an order, which is capable of implementation and/or enforcement; and not otherwise.
303. Put differently, it has been stated times without number that a court of law and I dare say, a court of Equity cannot grant an order in futility and/or vanity.
304. As pertains to whether or not the orders of specific performance can issue and/or be granted as against the Plaintiff herein [1st Defendant to the counterclaim], it is imperative to discern and/or decipher



whether the 3rd Defendant had any contract with the Plaintiff to anchor and/or underpin the plea for specific performance.

305. Nevertheless, it is common ground that the 3rd Defendant herein only entered into sale/purchase agreement with the 1st and 2nd Defendants and not the Plaintiff/1st Defendant to the counterclaim.

306. To this end, it suffices to take cognizance of the testimony by the 3rd Defendant whilst under cross examination by Learned counsel for the Plaintiff [First Defendant to the ounterclaim];

“I am seeking for a specific performance from the 1st Defendant to the counterclaim, namely Esther Mutuku. I am also seeking for specific performance from Metra Investment Ltd and Rahab M’kiama. The sale agreement between myself and the 1st and 2nd Defendants have a clause relating to breach of contract. The default clause relates to the fact that in the event of breach/default, the vendor [1st and 2nd Defendants] would refund the purchase price so far paid. I paid the monies to the 1st and 2nd Defendants. I did not have any sale agreement wit the Plaintiff. I did not pay any monies to the Plaintiff on account of the sale agreement.

307. Quiet clearly, the 3rd Defendant herein is confirming that same [3rd Defendant] did not have any contract with the Plaintiff, capable of underpinning a claim/plea for specific performance.

308. Furthermore, it is important to underscore that a plea/prayer for specific performance cannot be sought for and/or obtained, unless the claimant [in this case the 3rd Defendant] can demonstrate that indeed there existed a valid lawful and enforceable contract between herself [3rd Defendant] and the Plaintiff [1st Defendant to the counterclaim].

309. Be that as it may, it is important to observe that the law as pertains to the plea of claims for specific performance has since been clarified, highlighted and settled in a legion [dozen] of case law.

310. Firstly, the holding in the case of Reliable Electrical Engineering Ltd vs Mantrac Kenya Ltd (2006)eKLR, [which is widely cited and quoted] suffices.

311. For coherence, Hon Justice D. K. Maraga, Judge [as he then was] stated and held thus:

Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.

The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

312. Other than the foregoing decision, the circumstances under which the relief of specific performance would issue, were also amplified by the Court of Appeal in the case of Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramgharia Institute of Mombasa vs Abubakar Madhbuti [1997] eKLR, where the court stated as hereunder:

It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular



case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of Volume 44 of Halsbury's Laws of England, Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract:

“must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action, However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation.”

313. From the foregoing discourse, I am now disposed to answer issue number four [4]. For the avoidance of doubt, it is my finding and holding that there being no lawful, valid and enforceable contract between the 3rd Defendant and the Plaintiff [1st Defendant to the counterclaim], the plea/prayer for specific performance, is certainly premature, misconceived and otherwise legally untenable.

Issue Number 5 Whether the 3rd Defendant has established or demonstrated a basis for the application of the concept/ Doctrine of constructive trust or otherwise.

314. Other than the plea for specific performance, which has been discussed in the preceding paragraphs, the 3rd Defendant herein has also prayed for a declaration that constructive trust arose and thus does exist between herself [3rd Defendant] and the Plaintiff [1st Defendant to the counterclaim].

315. To anchor the contention that there does exist a cause of action for constructive trust as against the Plaintiff [1st Defendant to the counterclaim], the 3rd Defendant herein has contended, inter-alia, that the Plaintiff herein allowed same [3rd Defendant] to enter upon and even remain on the suit property.

316. Furthermore, it was also the testimony of the 3rd Defendant that after same [3rd Defendant] bought the designated portions of the suit property from the 1st Defendant, the Plaintiff herein also allowed her [3rd Defendant] to draw water from the Plaintiff's kitchen for purposes of construction and incidental activities.

317. Additionally, the 3rd Defendant also testified that the Plaintiff herein [1st Defendant to the counterclaim] and herself [3rd Defendant] had cordial and good relationship and in fact the Plaintiff and herself met at the suit property on various occasions.

318. Further and in any event, it was also the 3rd Defendant's testimony that the Plaintiff [1st Defendant to the counterclaim] allowed her [3rd Defendant] to construct a temporary Mabati Gate, which was being used to ferry building material on to the suit property.

319. As if the foregoing testimony was not enough, the 3rd Defendant also averred that when the main house, which was standing on the suit property was demolished, the 3rd Defendant accommodated the Plaintiff's daughter in-law and grandchildren and thus saved them from sleeping outside in the cold.

320. Other than the foregoing and in an endeavor to (sic) demonstrate the existence of constructive trust, the 3rd Defendant also procured the testimony of one Nick Mbithi who testified as DW3. For clarity, DW3 pointed to the court that same [DW3] is a grandson of the Plaintiff and that on various occasions same [DW3] met DW2 and the Plaintiff together whilst same were chatting.

321. According to DW3, the Plaintiff and the 3rd Defendant had a cordial relationship and thus the existence of the said cordial relationship denoted that the Plaintiff had approved of the 3rd Defendant's presence and construction on a portion of the suit property.



322. From the foregoing testimony, the 3rd Defendant has therefore sought to implore the Honourable Court to find and hold that a constructive trust does arise as between herself [3rd Defendant] and the Plaintiff, as pertains to the portion of the suit property under the occupation of the 3rd Defendant.
323. Before venturing to discern whether or not a constructive trust does exist as between the 3rd Defendant and the Plaintiff [1st Defendant to the counterclaim] it is important to state and observe that the plea of constructive trust, which has been espoused and canvassed by and on behalf of the 3rd Defendant was neither pleaded nor adverted to in the witness statements and by extension the evidence that was tendered by the 3rd Defendant.
324. Nevertheless, even though the plea [cause of action] for constructive trust was not impleaded at the foot of the amended statement of defense and counterclaim, it is not lost on this court that constructive trust can be discerned and thereafter proclaimed by a court of law [Equity] arising from the obtaining circumstances and taking into account the evidence beforehand.
325. Consequently, I beg to point out and underscore that the fact that the plea [cause of action] for constructive trust was not impleaded, lack of such pleading[s], therefore does not vitiate, negate, restrict and/or otherwise limit the mandate of the Honourable court to proclaim constructive trust, if and where, the circumstances permit.
326. To this end, it suffices to highlight and reiterate the decision in the Court of Appeal in the case of *Aliaza versus Saul* (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24 June 2022) (Judgment), where the honorable court stated and held as hereunder;
41. Contrary to the submission by the respondent, in the face of these constitutional provisions, the fact that the appellant had not pleaded a constructive trust in his counterclaim does not preclude this Court from inferring such a trust. Moreover, in his written submissions dated 30th August 2016, the appellant raised the issue of an implied or constructive trust having arisen in his favour. The respondent did not address this issue in his submissions dated 26th September 2016. I take the view, on the authority of the decisions in *Odd Jobs v Mubia* [1970] EA 476 and, among other decisions, *Ann Wairimu Wanjohi v James Wambiru Mukabi* [2021] eKLR that though unpleaded, the issue of a constructive or implied trust was left for the determination of the trial court.
327. Furthermore, I am emboldened by the decision of the Court of Appeal in the case of *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others* [2015] eKLR, wherein this Court expressed:-

“In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts...

A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury’s Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.”[Emphasis added]



328. Similarly, the position that constructive trust is construed from the circumstances and the obtaining evidence and must not of necessity be pleaded beforehand was also elaborated by the Supreme Court of Kenya [The Apex Court] in the case of *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment), where the court stated thus:

67. It further defines a constructive trust at pg 1649 as: “An equitable remedy that a court imposes against one who has obtained property by wrong doing.

68. Halsbury’s Laws of England, 4th edition, volume 48 at paragraph 690 states as follows on constructive trusts: “A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party’s words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate. The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive. Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.

Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement. The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property.”

69. A constructive trust is thus an equitable instrument which serves the purpose of preventing unjust enrichment. The Canadian Supreme Court in *Soulos v Korkontzilas*, [1997] 2 SCR 217, a case which involved a land dispute stated as follows, as to the purpose of constructive trust: “The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.”



329. Arising from the foregoing decisions, there is no gainsaying that a Claimant who seeks to pursue a claim founded on constructive trust, does not of necessity have to implead the cause of action for constructive trust. However, it is worthy to point out that if the claim is founded and anchored on resulting and/or implied trust, then the Claimant is legally enjoined to implead such kind of trust before same can tender evidence to that effect. [See the provisions of Order 2 Rule 10 of the Civil Procedure Rules, 2010]
330. Notwithstanding the foregoing, it is not lost on the court that what the 3rd Defendant is seeking beforehand is the plea and proclamation that same has accrued and is thus entitled to a declaration on the basis of constructive trust.
331. Be that as it may, even though the cause of action or the plea for constructive trust does not require to be impleaded before same can be sought for, it is however not lost on this court that the Claimant seeking declaration of constructive trust, must and is obligated to still place before the Honourable court plausible, cogent and evidence to underpin the declaration.
332. However, as pertains to the matter beforehand, I beg to state and underscore that no such evidence was tendered and placed before the court. For good measure, even a plea for declaration of constructive trust would require proof of the existence of some sort/ semblance of contractual or fiduciary relationship between the Claimant and the adverse party, namely, the Plaintiff herein.
333. Nevertheless, there is no gainsaying that the 3rd Defendant herein never entered into any scintilla of contract with the Plaintiff, nor did same pay any money to the Plaintiff/1st Defendant to the counterclaim to connote the existence of any iota of relationship.
334. In this respect, it is imperative to state and underscore that the ratio decidendi in the decision in the case of Mwangi Macharia & 87 Others vs Davidson Mwangi Kagiri (2014)eKLR, does not apply. Simply put, the holding of the Court of Appeal therein is distinguishable from the facts [circumstances], obtaining in this matter.
335. For brevity, it is not lost on this court, that the circumstances in the case of Mwangi Macharia (supra), concerned a scenario where the Appellants had purchased their respective portions of the suit property from the registered proprietor thereof, who even procured money from the purchasers [Appellants], with a view to undertaking the requisite sub-division [survey].
336. To put the said decision into perspective, it is appropriate to highlight the holding of the Court which stated as hereunder:
1. From the facts of the present case, it was the respondent who put the appellants in possession of the suit property. The respondent received the entire purchase price from the appellants. It is the respondent's submission that he rescinded the contract of sale since the appellants reneged or refused to pay survey fees, stamp duty, legal fees and other monies due for completion of the transaction. The issue for our consideration is whether there was an obligation on the part of the appellants to pay survey fees, stamp duty, legal fees and other monies. Was there a condition that unless the appellants paid the survey fees the respondent would rescind the sale agreement? The evidence from the various sale agreements on record reveals that in some agreements, it was expressly stated that the costs of acquiring title deeds, survey fees, stamp duty, land rent, legal fees and other costs was to be borne by the purchasers/appellants. Other sale agreements are silent on this issue. Another key consideration is that none of those charges are payable to the respondent, these were payable to the Government except the lawyer's fees. No sum was payable to the respondent, only the purchase price.



2. The respondent submitted that failure to obtain the Land Control Board consent rendered the agreements for sale of land and the transaction between the parties void for all intents and purposes and the only remedy for the appellants is to recover the purchase price or consideration they paid under Section 7 of the *Land Control Act* (See Kariuki – vs- Kariuki, 1983 KLR226). In Njamunyu – vs- Nyaga (1983) KLR 282 it was held that Land Control Board consent does not make an agreement for sale of land binding. The agreement is only binding between the parties who make it, though it is not enforceable until consent has been given.

In Hirani Ngaithe Githire – vs- Wanjiku Munge, (1979) KLR50, it was stated that under Section 6 of the *Land Control Act*, failure to obtain Land Control Board consent makes the sale agreement void for all intents and purposes and no principle of equity can soften or change this mandatory statutory provision. The respondent cited the case of Githu – vs- Katibi (1990) KLR 634 in support of its submission that the transaction between the parties in this appeal was null and void for want of consent of the Land Control Board. (See also Kahia – vs- Nganga (2004) 1 EA 75; Jacob Gichuki Minjire – vs- Agricultural Finance Corporation -Civil Appeal No. 61 of 1982; Richard Satia & Partners & another – vs- Samson Sichangi -Civil Appeal No. 164 of 1995); Simiyu – vs- Watambamala (1985) KLR 852).

337. Additionally, my attention was drawn to the holding of the Court of Appeal in the case of Willy Kimutai Kitilit versus Michael Kibet [2018] eKLR, wherein the court also considered the evidential scenario and thereafter found and held that constructive trust was evident and sufficed.
338. Be that as it may, it is not lost on this court that the facts underpinning the decision (supra) also bespoke of the existence of a sale agreement/contract, touching on and concerning sale of agricultural land between the disputants. For clarity, there was a contractual relationship that existed on the onset between the disputants before same aborted on the basis of the provisions of Section 6 of the *Land Control Act*, Chapter 302 Laws of Kenya.
339. However, in respect of the instant matter, I have found and held that there existed no contractual relationship and/or privity of contract [read, privity of Estate], between the Plaintiff [1st Defendant to the counterclaim] and the 3rd Defendant to the counterclaim or otherwise.
340. Other than the foregoing, I did not hear the 3rd Defendant to contend and remotely suggest that same [3rd Defendant] has any fiduciary relationship with the Plaintiff/1st Defendant to the counterclaim.
341. Additionally, I also did not hear the 3rd Defendant to contend that the Plaintiff/1st Defendant to the counterclaim, owes her [3rd Defendant] any scintilla of obligation, whether moral, social, economic or contractual. Surely, any Claimant who desires to espouse a claim based on constructive trust, must endeavor to come within the purview of the provisions of The *Trustee Act*, Cap 167 Laws of Kenya.
342. Before departing from the prayer for declaration of constructive trust, it is important to adopt and reiterate the holding of the Court of Appeal in the case of Kazungu Fondo Shutu & another v Japhet Noti Charo & another [2021] eKLR, where the court stated as hereunder:
 30. The argument by the appellants was that there was a constructive trust which was breached by the 1st respondent. The 1st respondent on the other hand argued that he inherited the suit property from his late father, and that the suit property was just a small portion of Plot M5 which belonged to his late father.



31. As earlier stated, the existence of a trust is a question of evidence. In the Juletabi case (supra), the court held that the onus lies on the party relying on the existence of a trust to prove it through evidence. That is because:

“The law never implies, the Court never presumes a trust, but [only] in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

32. The onus to prove existence of a trust lay squarely on the appellants. Section 107 of the [Evidence Act](#) further provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

343. Despite having found and held that the plea for declaration of constructive trust does not require to be impleaded before same can be proved, it is however imperative to state and underscore that the existence or otherwise of such trust is not a matter of speculation, conjecture and/or hypothesis.

344. In a nutshell, my answer to issue number five [5] is to the effect that after reviewing the totality of the evidence that was tendered and placed before the court, there is no shred of evidence at all to warrant a proclamation that a constructive trust does exist as between the 3rd Defendant and the Plaintiff [1st Defendant to the counterclaim]

Issue Number 6 What reliefs if any ought to be granted.

345. Both the Plaintiff and the 3rd Defendant herein have sought for various reliefs, at the foot of the amended Plaint and amended statement of defense and counterclaim, respectively. For ease of reference, the nature of the reliefs that have been sought by and on behalf of the Parties have been synchronized and highlighted at the onset of the Judgment.

346. Be that as it may, whilst discussing issues number one [1] to four [4] herein before, this court has had an occasion to interrogate various perspectives/nuances arising from and attendant to the claims by the 3rd Defendant.

347. Notably, whilst dealing with the claims by and on behalf of the 3rd Defendant, the Honourable Court came to the conclusion that the numerous [assorted] reliefs that were being sought for, have neither been established nor proven.

348. Suffice it to point out that the burden of proving the various claims that were outlined and highlighted by the 3rd Defendant laid on her shoulders. In this regard, the holding of the Supreme Court of Kenya [The Apex Court] in the case of Dr. Samson Gwer & 5 Others vs KEMRI (2020) eKLR, suffice.

349. For coherence, the Supreme Court of Kenya stated and held thus:

“(49) Section 108 of the [Evidence Act](#) provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in



its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

- (50) This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

- (51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

350. Having found and held that the 3rd Defendant herein has neither established nor proved the various reliefs sought at the foot of the amended statement of defense and counterclaim, I come to the inescapable [considered], conclusion that the 3rd Defendant’s counterclaim is devoid and bereft of merits.
351. Conversely, there is no gainsaying that the Plaintiff herein was and remains the registered and lawful proprietor of the suit property, which was the subject of the intended sale albeit at the foot of the verbal sale agreement, which this court found and held to be illegal, unlawful and thus void.
352. To the extent that the Plaintiff herein is the lawful and legitimate proprietor of the suit property, same [Plaintiff] is thus entitled to partake of and benefit from the statutory rights and privileges that accrue to and vest in the registered proprietor of land. [See Sections 24 and 25 of the [Land Registration Act, 2012](#)].
353. Furthermore, there is no gainsaying that the scope, tenor and extent of the rights of a registered owner have been the subject of a plethora of court decisions, inter-alia, the case of *Mohansons (Kenya) Limited versus Registrar of Titles & 2 others* [2017] eKLR.
354. For coherence, the court stated and held as hereunder:

- (18) As held by the Court of Appeal for East Africa held in *Moya Drift Farm Ltd. v. Theuri* (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property. Spry, V-P at 116, considered the effect of section 23 of the Registration of Titles Act and held –

“I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser to be evicted.

The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”



Sir William Duffus, P. *ibid* at p.117 agreed with Spry, JA as follows:

“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”

355. Premised on the foregoing finding and holding, it thus means that the Plaintiff herein is entitled to exclusive and absolute occupation, possession and use of the suit property, to the exclusion of all and sundry, the 1st, 2nd and 3rd Defendants not excepted.
356. By virtue of the foregoing, it then means that if there is any one, the 3rd Defendant not excepted, who is in occupation and possession of the suit property, albeit without the permission and consent of the Plaintiff, then such a person is a trespasser and must thus give way, irrespective of the nature of development undertaken on the suit property or otherwise.
357. Furthermore, it is important to point out that the suit property which is the subject of the matter beforehand, had a three [3] bedroomed house situate thereon. However, it is worth recalling that the said three bedroomed house was demolished by the 1st Defendant herein, shortly after paying the 10% stakeholder sum. [see the testimony of PW2; DW3 and dw7, respectively].
358. At any rate, it is not lost on this court that by the time the 1st Defendant took it upon herself to demolish the 3 bedroomed house that was situate on the suit property as a precursor to the construction that was undertaken by the 3rd Defendant, the 1st Defendant was neither the owner nor proprietor of the suit property.
359. Surely, the destruction of the three bedroomed house that was situate and sitting on the suit property by the 1st Defendant, albeit without the consent and permission of the Plaintiff [who remained the registered owner thereof] was the height of impunity, cruelty and oppression.
360. As pertains to the claim for compensation attendant to and arising from the impugned demolition and destruction of the various chattels that were contained in the said house, the Plaintiff herein procured and retained the services of a registered valuer, namely, John Njoroge Nkonye, who testified as PW4.
361. Instructively, the witness herein [PW4] testified that upon being retained by and on behalf of the Plaintiff, same visited the suit property and ultimately prepared a valuation report, which was tendered and produced before the court as Exhibit P16. For good measure, the report beforehand spoke to the value of the three [3] bedroomed house which had hitherto been demolished and assorted items that were destroyed.
362. Subsequently, the valuer [PW4] prepared a valuation report which quantified the value under reference to be the sum of Kes. 6,232,150/= only.
363. Notably, neither the 1st nor 2nd Defendants procured any contrary valuation [Valuation Report], to contradict and/or controvert the contents of the valuation report that was prepared by M/s Paragons Property Valuers Ltd.
364. Consequently and in this regard, there is no gainsaying that the contents of the valuation report and the figures articulated thereunder were neither controverted nor challenged.



365. Suffice it to point out that where one desires to contradict and/or challenge the figures contained at the foot of a valuation report, it behooves such a party, the 1st Defendant not excepted, to procure and obtain a report by another qualified expert.
366. As pertains to the foregoing exposition of the law, it is instructive to adopt and reiterate the holding of the Court of Appeal in *Criticos v National Bank of Kenya Limited* (as the successor in Business to Kenya National Capital Corporation Limited “KENYAC”) & another (Civil Appeal 80 of 2017) [2022] KECA 541 (KLR) (28 April 2022) (Judgment), where the court held thus:

As properly held in *Stephen Kinini Wang’onde* (*supra*), expert evidence can only be challenged by another expert. We also associate ourselves with the criteria for assessing an expert’s evidence as outlined in the same decision, rehashed herein below for emphasis. “A further criteria for assessing an expert’s evidence focuses on the quality of the expert’s reasoning. A court should examine each expert’s testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd. v. Minorities Finance Ltd. and Another* [Same v. Bird and others [1997] B.C.C. 180] Jacob J. observed that what really mattered in most cases was the reasons given for an expert’s opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented “[i]f the reasons stand up the opinion does, if not, not.” (Emphasis ours)

367. Other than the claim for special damages which has been highlighted in the preceding paragraph, the Plaintiff herein also sought for general damages. To my mind, the claim for general damages essentially is being raised as against the 3rd Defendant who is admittedly in occupation and possession of a portion of the suit property albeit without the permission and/or consent of the Plaintiff.
368. Remarkably, the claim for General damages for trespass touches on and/or concerns the interference with the registered proprietor’s right to occupation, possession and use of the property.
369. Put differently, the claim for General damages for trespass, cannot arise and/or ensue in the absence of interference with occupation and possession of the designated property.
370. In this respect, it suffices to adopt, reiterate and restate a passage in *Winfield & Jolowicz on Tort, Sweet & Maxwell*, 19th Edition at page 428, which states as follows;

“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.” [Emphasis supplied].

371. Arising from the foregoing, it is my finding and holding that the claim for General damages for trespass, particularly as against the 3rd Defendant, who is guilty of trespass, has been well established and proved.
372. Having come to the conclusion that the Plaintiff has indeed established and demonstrated the claim for General damages for trespass as against the 3rd Defendant, the next question that must be addressed relates to the quantum of recompense.



373. In assessing and determining the quantum of recompense due and payable on account of General damages, it is instructive to take cognizance of the established and trite principles that bely and/or underpin the assessment and award of such damages.
374. For brevity, the principles to be adopted, deployed and utilized for purposes of assessing general damages for trespass, were well articulated and elaborated upon by the Court of Appeal in the case of Kenya Power & Lighting Company Ltd v Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment), where the court stated as hereunder:
38. The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distill and replicate as hereunder:
- i) Halsbury's Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.
 - ii) Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.
 - iii) Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.
 - iv) Ephantus Mwangi & Another vs. Duncan Mwangi [1981 – 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence.
 - b) a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.
 - v) Kiambu Dairy, Farmers Co-operative Society Limited vs. Rhoda Njeri & 30 Others [2018] eKLR, - the extend of an award of compensatory damages lies in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well settled principles.
 - vi) Kemfro Africa Limited vs. Lubia & Another [No. 2] [1987] KLR 30 as approved in Peter M. Kariuki vs. Attorney General [2014] eKLR, - before interference with the quantum of damages awarded by a trial court the appellate court must be satisfied that



either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or short of the above, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages payable.

- vii) Johnson Evans Gicheru vs. Andrew Martin & Another [2005] eKLR, - this Court on appeal will be disinclined to disturb the finding of the trial Judge as to the amount of damages awarded by the trial court merely because if it had tried the case itself in the first instance, it would have awarded either a higher or lesser sum
 - b) justification for reversing a trial Judge on an award of damages only applies where the court is convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very low as to make it an entirely erroneous estimate of the damage to which the aggrieved party is entitled.
- viii) Sumaria & Another vs. Allied Industries Limited [2007] 2 KLR I, - an appellate court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence or based on a misapprehension of the evidence or that the Judge had been seen demonstrably to have acted on a wrong principle in reaching the finding he/she did.
- ix) Butt vs. Khan [1981] KLR 349, - an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate
- x) it must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.
- vii. Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited vs. Janevans Limited [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss;
 - (b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass;
 - (c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass.

375. Taking into account the elaborate principles which have been enumerated and highlighted by the Honorable Court of Appeal, coupled with the locality of the suit property; as well as the duration of the trespass complained of and juxtaposing same [circumstances] against the right to ownership of land as espoused vide Article 40[3] of *the Constitution* 2010; I find and hold that an award in the sum of Kes. 10,000,000/= as against the 3rd Defendant would suffice.

376. Additionally, the Plaintiff herein also sought for Exemplary and aggravated damages as well as Mesne profits. To start with, I beg to point out that a plea for mesne profits cannot be sought for and/or pursued alongside a claim for general damages.



377. Simply put, a litigant is at liberty to choose whether to pursue a claim for General damages for trespass and forego a claim for mesne profits or vice versa.
378. Without belaboring the point, it suffices to cite and adopt the holding in the case of Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR, where the court held as hereunder:

It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved. In the case Peter Mwangi Msuitia & Another v Samow Edin Osman [2014] eKLR, this Court held as follows:

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

In the case of Inverugie Investment v Hackett (Lord Lloyds [1995]3 ALL ER 842 it was held thus:

“Our understanding of the above persuasive authority is that once the learned Judge made the award under the subhead “mesne profits” there was no justification for him awarding a further Kshs.10 million under the subhead “trespass” since both mean one and the same thing...”

379. In short, having awarded recompense on account of General damages as against the 3rd Defendant, who is the person in active trespass of the suit property, the plea of mesne profits is therefore misconceived.
380. On the other hand, the Plaintiff has also sought for both aggravated and exemplary damages. However, I beg to point out and underscore that the claims for exemplary and aggravated damages are like Siamese twins and thus both cannot be awarded in the same course.
381. Nevertheless, having taken into account the totality of the evidence that was tendered before the court, inter-alia, the endeavor of the 1st and 2nd Defendants to subdivide the suit property prior to and before payment of the purchase price and without the requisite approved subdivision scheme; and coupled with the offensive demolition of the three [3] Bedroomed house that was standing on the suit property, it suffices to point out that credible basis has been indeed laid out for an award of Exemplary damages.
382. Be that as it may, the law as pertains to award of exemplary damages has since been settled and in this regard, the court invokes, adopts and reiterates the holding in the case of Municipal Council of Eldoret v Titus Gatitu Njau [2020] eKLR, where the court stated and held thus:

25. The respondent prayed for exemplary damages. As stated by this Court in Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR:

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of Rookes v Barnard [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:



- i. in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
 - ii. cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
 - iii. where exemplary damages are expressly authorized by statute".
383. Having taken cognizance of the circumstances under which exemplary damages ought to issue, I come to the conclusion that indeed the behavior displayed by the 1st and 2nd Defendants; and in particular, the First Defendant, as pertains to the demolition of the Plaintiff's house on the suit property warrants an award on account of exemplary damages.
384. Having come to the foregoing conclusion, the next issue that merits amplification is the quantum of such an award.
385. Elsewhere hereinbefore, the court pointed out that the conduct that was exhibited by the 1st and 2nd Defendants and more particularly the 1st Defendant amounted to gross impunity, oppression, cruel and inhuman behavior, which cannot be countenanced by a court of law. [See Article 10(2) of *the Constitution*, 2010].
386. In view of the foregoing, I beg to state that an award of Kes. 20,000,000/= would suffice as appropriate and suitable recompense on account of Exemplary damages [See the parameters highlighted by the Court of Appeal in *Godfrey Julius Ndumba Mbogori & Another vs Nairobi City County* (2018)eKLR].
387. To the contrary, having found that the Plaintiff is entitled to recompense on account of exemplary damages and having proceeded to and awarded damages to that effect, it suffices to point out that the claim for aggravated damages therefore fails.
388. Arising from the foregoing, it is evident and apparent that the Plaintiff herein has indeed established and demonstrated her case on a balance of probabilities. See Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya. [See also the ratio decidendi in the case of *Daniel Toroitich Arap Moi versus Mwangi Stephen Murriithi* [2014] eKLR]

Final Disposition:

389. Having reviewed and analyzed the atomized issues for determination which were highlighted in the body of the Judgment, it must have becomes crystal clear; evident and nay, apparent, that the Plaintiff has proved her case to the requisite standard.
390. Conversely, the 3rd Defendant who also had raised a counterclaim has failed to prove her claim on a balance of probabilities.
391. Nevertheless, before venturing forward to render and make the final proclamation, [Final Orders] two [2] issues merit mention and a short discourse.
392. Firstly, even though there is evidence that the 1st and 2nd Defendants paid monies to and in favor of the Plaintiff herein and which monies were acknowledged by the Plaintiff, there was no counterclaim by the 1st and 2nd Defendants for refund.
393. Secondly, it is also not lost on this court that the 3rd Defendant also entered into two separate agreement[s] with the 1st and 2nd Defendants as pertains to plot 2B and 3 respectively, and which were



curved out of the suit property. However, the 3rd Defendant neither filed any Third-party Notice in terms of Order 1 Rule 15 of the Civil Procedure Rules 2010 or Notice of indemnity or at all.

394. Instructively, ours is an adversarial system and hence the parties, the 1st, 2nd and 3rd Defendants not excepted, are bound by their pleadings. [See the holding of the Court of Appeal in the case of IEBC vs Stephen Mutinda Mule (2013)eKLR and Dakianga Distributors Ltd vs Kenya Seed Company Ltd (2015)eKLR].
395. In view of the cited decisions, this Honorable Court is precluded from venturing forward to speak to and/or grant reliefs which were neither sought for nor impleaded. Simply put, such an endeavor would be contrary to and in contravention of Order 2 Rule 6 of the Civil Procedure Rules 2010; which essentially, underpins the Doctrine of Departure.
396. Having made the foregoing remarks, it is now appropriate to bring the Judgment to a close. Consequently and in this regard, I proceed to and do hereby enter Judgment for the Plaintiff in the following terms:
- i. A declaration be and is hereby issued that the verbal agreement between the Plaintiff and the 1st and 2nd Defendants is illegal, void, fraudulent and unenforceable.
 - ii. A declaration be and is hereby issued that the sale agreement between the 3rd Defendant and the 2nd Defendant in respect of parts of the suit property is illegal, null and void and unenforceable for lack of capacity.
 - iii. A declaration be and is hereby issued that the House constructed on the suit property by the 3rd Defendant constitutes and amounts to trespass.
 - iv. The 3rd Defendant be and is hereby ordered and directed to vacate and hand over vacant possession of the suit property or the portion thereof under her occupation within 180 days from the date hereof.
 - v. Furthermore, the 3rd Defendant shall proceed to demolish the [Offensive] building erected and/or constructed on the suit property or the portion thereof at own costs and shall thereafter restore the suit property back to the status quo ante [obtaining before the offensive construction]
 - vi. That in default to vacate and hand over vacant possession of the suit property and/or the portion thereof under her occupation, the Plaintiff shall be at liberty to demolish the offensive structure [house] and evict the 3rd Defendant from the suit property.
 - vii. In the event of eviction and demolition being levied by the Plaintiff, the costs/expenses attendant thereto shall be certified by the Deputy Registrar and shall be recoverable as costs.
 - viii. A permanent injunction be and is hereby issued to restrain the Defendants either by themselves, agents, servants, employees and/or anyone claiming under them from entering upon, remaining on and/or otherwise dealing with the suit property in any manner whatsoever.
 - ix. Special damages in the sum of Kes. 6,232,150.00/= only be and is hereby awarded against the 1st Defendant.
 - x. Exemplary damages in the sum of Kes. 20,000,000/= only be and is hereby awarded to the Plaintiff as against the 1st Defendant.



- xi. General damages for trespass in the sum of Kes. 10,000,000/= only be and is hereby awarded as against the 3rd Defendant.
- xii. The award of Damages [in terms of the preceding paragraphs] shall attract interests at court rates [14%] from the date of Judgment.
- xiii. The 3rd Defendant's counterclaim in ELC No. 735 of 2007; be and is hereby dismissed with costs to the Plaintiff [1st Defendant to the counterclaim].
- xiv. The Plaintiff be and is hereby awarded costs of the suit.
- xv. Any other relief not expressly granted is Declined.

397. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14th DAY OF MARCH 2024.

OGUTTU MBOYA

JUDGE.

In the Presence of:

Benson - Court Assistant

Mrs. Mutua for the Plaintiff and 1st Defendant to the counterclaim

Mr. Mutunga for the 1st & 2nd Defendants

Mr Mutunga h/b for Mr. Simiyu for the 3rd Defendant and counter-claimer

