



**ASHBRO International Limited v Kamunyu & 2 others; Development Bank of Kenya Limited (Interested Party) (Land Case 6 of 2020) [2024] KEELC 5833 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5833 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
LAND CASE 6 OF 2020  
EK WABWOTO, J  
JULY 30, 2024**

**BETWEEN**

**ASHBRO INTERNATIONAL LIMITED ..... PLAINTIFF**

**AND**

**CATHERINE MATHONDE NJERI KAMUNYU ..... 1<sup>ST</sup> DEFENDANT**

**RIROY COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**NAIROBI CITY COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**THE DEVELOPMENT BANK OF KENYA LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

1. The Plaintiff brought this suit vide an Amended Plaintiff dated 9<sup>th</sup> March 2021 seeking the following orders against the defendants:
  - a. A declaration that the Plaintiff is the registered, legal proprietor and purchaser for value of the parcel of land known as LR No. 209/3694 measuring 0.1366 hectare located in “South B” area within Nairobi City County.
  - b. An order of eviction directed to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and/or agents from the suit property known as LR. No 209/3694 measuring 0.1366 hectare located in “South B” area within Nairobi City County and the said eviction be supervised by the Kenya Police Service officer Commanding Station (OCS) Industrial area, the Administration Police Service Commandant Makadara Sub-County and/or The Directorate of Criminal Investigations Land Fraud Department or their agents.



- c. An order directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to demolish at their costs the illegal structures on the suit property whether permanent or temporary under the supervision of the Kenya Police Service officer Commanding Station (OCS) Industrial Area, the Administration Police Service Commandant Makadara Sub-county and/or The Directorate of Criminal Investigations Land Fraud Department or their agents.
  - d. A permanent injunction to restrain the Defendants by themselves or any other person from trespassing, entering, damaging, alienating or building any structures or otherwise dealing with the parcel of land known as L.R. No 209/3694 measuring 0.1366 hectare located in “South B” area within Nairobi City County.
  - e. A declaration that the fundamental rights to ownership of the property as guaranteed under Article 40(1) and 40(3)(b) of *the Constitution* of the Republic of Kenya 2010 have been infringed upon by the illegal actions of the Defendants who ought to pay just compensation to the Plaintiff in the form of damages for trespass to property.
  - f. Costs of this suit.
  - g. Any other relief or order that this Honourable Court deems fit to grant for the interest of justice.
2. The suit was contested by the Defendants. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a statement of defense and counterclaim dated 29<sup>th</sup> June 2020. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants sought for the dismissal of the Plaintiff’s suit while in the counterclaim the 2<sup>nd</sup> Defendant sought for the following reliefs:
    - a. An order compelling the 3<sup>rd</sup> Defendant to pay for the works so far executed by the 2<sup>nd</sup> Defendant and the costs of the materials on site.
  3. The 3<sup>rd</sup> Defendant filed a statement of defence and a defence to the 2<sup>nd</sup> Defendant’s counterclaim together with a witness statement of one Ghovel Joseph Cheruiyot. The same were filed on 30<sup>th</sup> March 2021. The 3<sup>rd</sup> Defendant prayed for dismissal of the Plaintiff’s suit and the 2<sup>nd</sup> Defendant’s counterclaim.

**The Plaintiff’s case.**

4. The Plaintiff averred that at all material times it was the registered property of LR No. 209/3694 measuring 0.1366 hectare located in “South B” area within Nairobi City County known as the suit property herein. It was averred that the suit property was acquired by way of purchase from Michael S. Kibui vide a sale agreement in 1996 for a sum of Kshs 1,500,000.
5. The Plaintiff averred that prior to its purchase it did due diligence and was satisfied that Michael S. Kibui was the lawful owner having acquired the same vide allotment and had complied with all the application conditions. It was also averred that the suit property is currently charged in favour of Development Bank of Kenya for a sum of Kshs 32,500,000 created on 16<sup>th</sup> May 2018.
6. It was averred that on or about 25<sup>th</sup> December 2019, while one of the Plaintiff’s director was on routine inspection of the suit property, he realized that there was a group of trespassers who were constructing a structure on the suit property without any consent from the Plaintiff’s directors. The matter was reported to the Industrial Area Police Station wherein the incident was booked under OB No. 8330/12/2019.
7. It was further averred that after preliminary investigations the director of the 2<sup>nd</sup> Defendant who is the 1<sup>st</sup> Defendant admitted that she was under instructions of the 3<sup>rd</sup> Defendant herein to construct an



ablution block for public use on the suit property. The Plaintiff also averred that due to the Defendants actions of trespass it suffered loss and damage and continues to suffer the same.

8. At the trial, Peter Waita, a director of the Plaintiff testified as the sole Plaintiff's witness. The witness adopted and relied on his witness statement and also produced the Plaintiff's bundle of documents which were on record during his evidence in chief.
9. The witness testified that the property was transferred from Michael S. Kibui wherein a transfer was done on 21<sup>st</sup> December 1995. It was also stated that after the transfer, the Plaintiff took possession of the same and has been paying all the land rates to date. He also stated that the Plaintiff intends to put up a high rise apartment in the area and had even obtained an approved development plans which had been produced in evidence. He also added that the Plaintiff did due diligence before purchase of the property and that the same was duly owned by Kibui. It was also stated that the property had been charged to the interested party for a sum of Ksh 32,500,000.
10. When cross-examined by Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he stated that he had not produced form CR12 to confirm that he was a director of the Plaintiff company. He also stated that the contractor who went to his property had not done due diligence before visiting the site. He also stated that he had not visited the property recently.
11. When cross-examined by Counsel for the 3<sup>rd</sup> Defendant, he stated that he did due diligence before purchase of the property even though he had not produced a search before the court.
12. When re-examined he stated that he had made reference to a letter dated 5<sup>th</sup> January 1994 from the Land's office which showed that the suit property had been re-planned from an open space. He reiterated that he was not aware of any tender that was issued to the 2<sup>nd</sup> Defendant for works to be undertaken at the suit property. He also reiterated that his lawyer did due diligence before purchasing the suit property.

#### **The case of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

13. It was the case of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants case that they were not trespassers to the suit property. It was averred that sometimes in the year 2019, the 3<sup>rd</sup> Defendant put up an advertisement in the local dailies inviting bids for construction of ablution block in Nairobi South B Ward Tender No. NCC/WS&E/T/422/2018-2019 and in response to the same, the 2<sup>nd</sup> Defendant submitted its bid which was successful.
14. It was averred that on 24<sup>th</sup> September 2019, the 2<sup>nd</sup> Defendant entered into a formal contract being contract no. NCC/WS&E/T/422/2018-2019 with the 3<sup>rd</sup> Defendant for the construction of ablution block at a cost of Kshs 4,702,094.48.
15. The 2<sup>nd</sup> Defendant also filed a counterclaim against the 3<sup>rd</sup> Defendant seeking for payment of the works that had already been completed at the suit property.
16. During trial, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants never called any witnesses to testify on their behalf.

#### **The case of the Interested Party**

17. The Interested Party never filed any pleadings, never called any witnesses and it never participated in the proceedings herein.



### **The case of the 3<sup>rd</sup> Defendant.**

18. The 3<sup>rd</sup> Defendant filed a statement of defence and defence to counterclaim on 30<sup>th</sup> March 2021. The 3<sup>rd</sup> Defendant also filed a witness statement by Ghovel Joseph Cheruiyot dated 15<sup>th</sup> June 2022.
19. The 3<sup>rd</sup> Defendant denied trespassing onto the suit property and averred that the same was for use by the public and was not available for allocation to any private entity. It was also averred that the allocation of the suit property to Kibui was null and void and the Plaintiff cannot claim to have any legitimate right over the same and equally the 3<sup>rd</sup> Defendant cannot trespass onto the property which they are holding in trust on behalf of the public.
20. Ghovel Joseph Cheruiyot testified as the sole 3<sup>rd</sup> Defendant's witness in the matter. He adopted and relied on his witness statement dated 15<sup>th</sup> June 2022 in his evidence in chief.
21. On cross examination by Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he stated that the 2<sup>nd</sup> Defendant was awarded the tender for construction of the ablution blocks in the suit property even though the works were not completed.
22. On cross examination by Counsel for the Plaintiff he stated that he did background check for this property and found out that the same was a public space which was not available for allocation since it was public property. He also stated that there was a newspaper advert in respect to the construction works even though the same did not indicate the suit property number. He also stated that he is aware that the Plaintiff holds a title to the suit property.
23. On further cross examination, he stated that the records of the 3<sup>rd</sup> Defendant confirms that the same is public property. He also stated that it is possible to have a title on a public property. He also stated that he was not aware of the internal memo dated 14<sup>th</sup> January 2021 neither could he confirm its contents since he was not part of the said investigations.
24. When re-examined he stated that the letter dated 14<sup>th</sup> January 2021 was never brought to his attention. He also stated that he could not confirm whether the Plaintiff had paid its rates to the county.

### **The Plaintiff's submissions.**

25. The Plaintiff filled written submissions dated 25<sup>th</sup> March 2024. Counsel for the Plaintiff submitted on the following issues:
  - i. Whether the Plaintiff is the registered, legal proprietor and purchaser of the suit property?
  - ii. Whether the 3<sup>rd</sup> Defendant has legal rights over the suit property?
  - iii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are legally correct to construct on the suit property?
26. It was submitted that the Plaintiff had adduced evidence that it purchased the suit property from Kibui after conducting due diligence and paid a consideration of Kshs 1,500,000. The said property had also been charged to the interested party and that the plaintiff was also paying rates in respect to the same. It was also submitted that the Plaintiff was a bonafide purchaser for value and a registered owner. The cases of Republic v Nairobi City County Government & 2 others, Attorney General (Interested Party) [2021]eKLR and Joseph Njihia Kihiko vs Doris Nyokabi Mwaniki & 16 others [2022] eKLR were cited in support of the Plaintiff's position.
27. On whether the 3<sup>rd</sup> Defendant has any legal right over the suit property, it was submitted that the 3<sup>rd</sup> Defendant had not adduced any evidence to show that the suit property was public land and further



that the letter dated 14<sup>th</sup> January 2021 had stated that the same was not public land. Reliance was placed on Article 62(1) (a) to (d) of *the Constitution* and the case of Joseph Njihia Kihiko [supra].

28. It was also submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had no right to construct on the suit property on the basis that the same rightfully belonged to the Plaintiff.

29. The plaintiff concluded its submissions by urging the Court to grant the prayers sought.

### **1<sup>st</sup> and 2<sup>nd</sup> Defendants submissions.**

30. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed submissions dated 23<sup>rd</sup> April 2024. It was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have no claim over the suit property and that the issue of ownership of the suit property is a contest between the Plaintiff and 3<sup>rd</sup> Defendant. It was also submitted that the 2<sup>nd</sup> Defendant was present on the property in execution of the contract for the construction of the ablution block which it had entered with the 3<sup>rd</sup> Defendant and as such the Plaintiff's case against them should be dismissed and the court should grant the reliefs sought in the counterclaim.

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

31. The 3<sup>rd</sup> Defendant filed its written submissions dated 16<sup>th</sup> May 2024. Counsel submitted that the Plaintiff's witness had not produced a CR12 showing that he is a director of the Plaintiff. It was also submitted that the Plaintiff had not done due diligence to know whether the suit land was public land and was available for allocation or sale to private parties. It was argued that no search had been exhibited to demonstrate if any due diligence had been done and as such the said property was not available for sale. It was also argued that Michael S. Kibui who purportedly sold the land to the Plaintiff was not available and hence the transaction must have been fraudulent.

32. It was further submitted that the 3<sup>rd</sup> Defendant could not have trespassed on the suit land because the same was public land being held in trust by the 3<sup>rd</sup> Defendant and public interest overrides private interest.

33. In respect to the 2<sup>nd</sup> Defendant's counterclaim, it was submitted that the 3<sup>rd</sup> Defendant was not responsible for the restraining orders which were issued and halted the works hence the 3<sup>rd</sup> Defendant was not liable to compensate the 2<sup>nd</sup> Defendant.

34. The 3<sup>rd</sup> Defendant concluded its submissions by urging the court to dismiss the Plaintiff's suit together with the 2<sup>nd</sup> Defendant's counterclaim against it.

### **Analysis and Determination.**

35. The court has considered the pleadings, the evidence tendered and submissions filed by the parties. The court is of the view that following are the issues arising for determination in this suit:

- I. Whether the Plaintiff is the lawful and legitimate owner of LR No 209/3694(the suit property)?
- II. Whether the Plaintiff is entitled to the reliefs sought?
- III. Whether the 2<sup>nd</sup> Defendant's counterclaim is merited and whether this Court should grant the relief sought in the counterclaim?
- IV. What orders should issue as to the costs of the suit and counterclaim?

36. The Court shall now proceed to address the said issues sequentially.



37. Article 40 of *the Constitution* stipulates as follows –

- “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property —
- (a) of any description; and
  - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
    - (i) requires prompt payment in full, of just compensation to the person; and
    - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

38. Where one’s title to the suit property is challenged the court must look into the root of ownership of the suit property. This approach was well appreciated in the case of *Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others* [2016] eKLR. Equally in the case of *Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accordance with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which



claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

39. A party must always bear in mind that where his or her title is under scrutiny there is need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property.

40. The Court of Appeal in the case of Jacob Wekesa Bokoko Balongo vs. Kincho Olokio Adeya & another [2020] eKLR held as follows on the importance of deciphering the historical acquisition of title:

“The historical background to the acquisition of the title is as good as the title itself. How else, for example, can a person seeking to impugn or impeach the title on the grounds of fraud, misrepresentation or it having been obtained unprocedurally or through corrupt means do so without placing the title in its historical context? On the ground of indefeasibility of title, it was urged that the trial judge erred in failing to find that the appellant’s title to the suit land was indefeasible... In the persuasive case of Fahiye & 2 others – v- Omar & 4 others [201] 2KLR, 224, it was held that indefeasibility of title is not absolute particularly where the whole transaction was void. In Milankumar Shah and 2 Others vs. City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (05), it was correctly pointed out that: “The concept of absolute and indefeasible ownership of land cannot be clothed with legal and constitutional protection if the interest was acquired through fraud, misrepresentation, illegality, unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the case of Champaklal Ramji Shah & 3 Anors –v- AG & Anor, HCCC No. 145 of 1997, it was held that the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required.”

41. The apex court also shed light on the relevance of a historical background analysis insofar as acquisition of title is concerned restating that the ownership of land whose title was not acquired regularly is not protected under Article 40 of *the Constitution* on the protection of right to property. It held as follows in Dina Management Limited vs. County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment);

“Where the registered proprietor’s root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership. It was the instrument that was in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

42. In answering the first issue, the Court cannot avoid going into the history of the suit property. From the evidence on record, The suit parcel was created sometimes in 1993 from an open space. The evidence on record also show that Michael Kibui who was then a government officer and a senior valuation officer in the Department of Lands applied for allocation of the said property vide his letter dated 20<sup>th</sup> December 1993. There was also a letter dated 5<sup>th</sup> January 1994 confirming that “The site has now been planned from an open space to BCR” [Emphasis made]



43. It is also worth noting that the letter dated 14<sup>th</sup> January 2021 from the 3<sup>rd</sup> Defendant which detailed the investigations in relation to the acquisition of the suit property established the following:

“The plot had been left as an open space after sub division, The plot was pre-planned by the Director of Physical Planning and approved as a proposed business cum residential plot and was allocated to Michael Sebastian Kibui after application to the Commissioner of Lands vide letter dated 20<sup>th</sup> December 1993.”

44. The testimony of Ghovel Joseph Cheruiyot who testified on behalf of the 3<sup>rd</sup> Defendant equally confirmed that the suit property was initially an open space as per the records of the 3<sup>rd</sup> Defendant and hence the same could not have been available for allocation to any party.

45. From the trail of documentation presented herein and considering the historical trail of the said property there is indeed irrefutable evidence that the suit property was an open space before it was allocated and registered in the name of Michael S. Kibui who later transferred it to the Plaintiff.

46. In the case of Henry Muthee Kathurima v. Commissioner of Lands & Another [2015] eKLR, the Court of Appeal stated that:

“We have considered the provisions of Section 26 of the *Land Registration Act* in light of the provisions of Article 40(6) of *the Constitution* and it is our considered view that the concept of indefeasibility of title is subject to Article 40(6) of *the Constitution*. Guided by Article 40 (6) of *the Constitution*, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that the title to the property was unlawfully acquired.”

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

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

48. In Adan Abdirahani Hassan & 2 others v. Registrar of Titles & 2 others [2013] eKLR, the court stated as follows:

“19. Section 75 of the repealed Constitution recognised the doctrine of public trust which applies to land set aside for public purpose. Such parcels of land are held by the Government in trust for the public and any purported allocation to individuals or legal persons cannot be said to fall under the purview of the protected property pursuant to the provisions of Section 75 of the repealed Constitution. It is true that under section 23 of the Registration of Titles Act cap 281, a title is sacrosanct and indefeasible and can only be challenged on the ground of fraud and misrepresentation. However, any alienation of land contrary to the provisions of section 75 of the repealed Constitution or the provisions of the Government *Land Act* or any other Act of parliament would be null and void ab initio.



20. Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognises the fact that *the Constitution* protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by *the Constitution*, he must show that he has followed the due process in acquiring that which he wants to be protected...”

49. The court is satisfied that from the evidence placed before this court, the suit property was created from land that was reserved and or set aside as an open space. The land use planning legislation that was in force at the time was the Land Planning Act Chapter 303 Laws of Kenya (now repealed) together with the rules and regulations that were made thereunder. Regulation 11(3) of the Development and Use of Land (Planning) regulations of 1961 under the Land Planning Act Chapter 303 Laws of Kenya (now repealed) provided as follows:

“ 11

- (3) For the purpose of this regulation “public purpose means any non-profit making purpose which may be declared by the Minister to be public purpose and includes:
- a. Educational, medical and religious purposes
  - b. Public open spaces and car parks
  - c. Government and local government purposes”

50. The land from which the suit property was created was reserved as an open space which was in line with the public purpose for which it was reserved.

51. The suit property was allocated to Michael S. Kibui for use of BCR (Business cum residential) which was not for the purpose it was reserved. The suit property was not available for allocation by the Commissioner for Lands for private purposes. The said allocation was undertaken illegally since the said property had been reserved as an open space and was not available for allocation to any party for private use.

52. The next question that this court needs to answer is whether the Plaintiff acquired any valid title from Michael Kibui. The answer is in the negative. In *Dina Management Limited v. County Government of Mombasa & 5 Others*(supra) the Supreme Court stated as follows:

“ [100] From the record and submissions, we note that the land was first allocated to H.E. Daniel T. Arap Moi in 1989. The applicable law at the time was the Land Planning Act, Cap 303, which was repealed by the Physical Planning Act Cap 286 which has since been repealed by the *Physical and Land Use Planning Act* No.13 of 2019. The Land Planning Act made provision for open spaces. Regulation 11(3) of the Development and Use of Land (Planning) Regulations, 1961 made under the Land Planning Act defined “public purpose” as any non-profit making purpose declared by the Minister to be a public purpose and includes educational, medical and religious purposes,



public open spaces and car parks; and Government and local government purposes. Similarly, under the Physical Planning Act, Section 29 gave the local authorities power to reserve and maintain land planned for open spaces.

[101] The suit property was at the time designated as an open space. Having been designated as such, it was rendered a public utility and could not be described as unalienated public land as urged by the appellant. It was therefore not available for alienation to H. E. Daniel T. Arap Moi or for further alienation.”

53. The court agrees with the testimony of the 3<sup>rd</sup> Defendant’s witness that all signs were there that the suit property was created from land reserved for public purposes and that the Plaintiff did not do due diligence to confirm the same.
54. This court is also guided by the Court of Appeal decision in Civil Appeal No. 8 of 2004- Kephma Maobe & 365 Others v Benson I. Mwangi and City Council of Nairobi which addressed the issue of the Council’s allocation of the open spaces left after the development of Kimathi Estate. The Court of Appeal observed as follows:

“Public land is not a birthday cake for mere chopping up and distribution to favoured allottees. It is a rare commodity which is ring-fenced by Constitutional and statutory provisions and regulations to ensure environmental sustainability and inter-generational equity.”

The court found that the Council did not have the carte blanche to use the land as it wished and that it could not alienate the special purpose plots.
55. Being guided by the foregoing, it is the finding of this court that the Plaintiff did not acquire a valid title and cannot be its lawful and bonafide owner. Having acquired a null and void title, the title held by the Plaintiff is a nullity.
56. From the findings of the court, it is evident that the Plaintiff failed to prove that it is the lawful owner of the suit property and hence has failed to prove its case to the required standard. In light of the contention that the suit property historically had been left as an open space a fact which was demonstrated from the documentation trial and evidence tendered herein this court declines to grant the reliefs sought whose effect would be to validate the Plaintiff’s title to the suit property.
57. In respect to the counterclaim, a counterclaim just like a suit ought to be proved to the required standard on a balance of probability. The 2<sup>nd</sup> Defendant sought for payment of the work done in the suit property as well as costs of the materials on site.
58. The nature of the reliefs sought by the 2<sup>nd</sup> Defendant in its counterclaim is akin to a claim of special damages. In respect to special damages, it is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect.
59. During trial, the 2<sup>nd</sup> Defendant never quantified nor adduced any evidence, nor called any witness to support its case and as such it is the finding of the court that the 2<sup>nd</sup> Defendant’s counterclaim has not been proved to the required standard and the same is for dismissal.
60. On the issue of costs, as a general rule, costs follow the event unless the court for good reason orders otherwise. In this case, the Plaintiff has failed in its claim against the Defendants and the 2<sup>nd</sup> Defendant has failed in its counterclaim and in the circumstances, this court directs each party to bear own costs of the suit and the counterclaim.



**Final orders.**

61. In conclusion, this court hereby makes the following orders;
- a. The Plaintiff's suit is dismissed.
  - b. The 2<sup>nd</sup> Defendant's counterclaim is equally dismissed.
  - c. Each party to bear own costs of the suit and the 2<sup>nd</sup> Defendant's counterclaim.
- Judgment accordingly.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT VOI THIS 30<sup>TH</sup> JULY 2024.**

**E. K. WABWOTO**

**JUDGE**

In the presence of:-

Ms. Adika for the Plaintiff.

Mr. Khaemba for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Ms. Oduku h/b for Mr. Nyakoe for the 3<sup>rd</sup> Defendant.

Court Assistant; Judith.

