



**Nguru & 2 others v Kenya Railways Co-operation (Environment & Land Case 49 of 2021) [2024] KEELC 5476 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5476 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 49 OF 2021**

**LA OMOLLO, J  
JULY 25, 2024**

**BETWEEN**

**CHARLES NGURU ..... 1<sup>ST</sup> PLAINTIFF  
PETER MWIHIA ..... 2<sup>ND</sup> PLAINTIFF  
LILIAN WAMBUI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KENYA RAILWAYS CO-OPORATION ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiffs commenced this suit vide a Plaint dated 8<sup>th</sup> June, 2021 which plaint was later amended and filed in court on 5<sup>th</sup> August 2021.
2. The Plaintiffs aver that they are duly registered owners of Grant Number I.R 82473 as tenants in common in equal shares of all that parcel of land situated in Gilgil Township measuring 0.2598 hectares, that is to say L.R No 1317/677 for a period of 99 years from 1<sup>st</sup> March, 1997.
3. The Plaintiffs aver that they duly developed the said parcel of land from the year 1997 and put up commercial houses which they rent out to tenants.
4. They aver that on or about 12<sup>th</sup> February, 2021, the Defendant unlawfully entered into the Plaintiffs parcel at night and demolished all the developments therein without any notice alleging that the said parcel of land belongs to it.
5. The Plaintiffs aver that after the said unlawful demolition, they raised a complaint and upon scrutiny of the documents it was found that the parcel does not form part of the Defendant's land and as such the said demolition was unlawful.



6. The Plaintiffs aver that the Defendant later, after the demolition, brought in its own surveyors who fixed beacons showing the extent of its land which fell completely out of the Plaintiffs parcel and developments.
7. The Plaintiffs aver that after establishing the beacons which they fixed on the suit parcel, they put up a fence between the two parcels to protect their parcel but the Defendant again demolished the said fence unlawfully.
8. The Plaintiffs aver that the acts of the Defendant are a blatant abuse of the law and their rights to ownership, possession and use of their land which rights are protected by *the Constitution* of Kenya.
9. The Plaintiffs aver that despite complaints and demands that the Defendant ceases its arrogant and unlawful acts, the Defendant has continued interfering with the Plaintiffs land and refuses them the right to fence and use their land.
10. The Plaintiffs pray for judgment against the Defendant for:
  - a. A declaration that the Plaintiffs are the lawful owners of all that parcel of land known as L.R NO 1317/677 situated in Gilgil Township and the Defendant has no right at all over the said parcel.
  - b. A declaration that the demolition of the Plaintiffs' development on the parcel done on 12<sup>th</sup> February, 2021 and later denial of possession and use of the land is unlawful.
  - c. Permanent injunction restraining the Defendant by itself, servants and/or agents from interfering with the Plaintiffs Grant, possession, development and use of all that parcel of land known as L.R 1317/677.
  - d. Special, punitive and general damages and mesne profits.
  - e. Costs of the suit and interest.
11. The Defendant filed a statement of defence and counterclaim on 7<sup>th</sup> October, 2021. In the statement of defence, the Defendant denies the averments in the plaint and states that the Plaintiffs parcel of land known as L.R No 1317/677 situated in Gilgil township or a portion thereof is illegal as it was obtained fraudulently or through a corrupt scheme.
12. The Defendant states that no reasonable cause of action has been disclosed against the Defendant. It states that the suit is a non-starter as the requisite statutory notice under Section 87 (a) of the *Kenya Railways Corporation Act* Chapter 397, Laws of Kenya has not been served.
13. In the counterclaim, the Defendant avers that the land parcel known as L.R NO 1317/677 or a portion thereof is within its operational area i.e. Gilgil Railway Station.
14. The Defendant avers that the Kenya Railways Land in Gilgil Railways Station is defined by survey plans drawn in 1916, 1927, 1949, 1960, 1952, 1963 and 2017. The Defendant avers that the Plaintiffs parcel number known as L.R No 1317/677 is illegal as it was obtained fraudulently.
15. The Defendant lists the particulars of fraud as:
  - a. Fraudulently causing Parcel number known as 1317/677 to issue whilst knowing that the suit land belonged to the Defendant and/or was within the Defendant's operational area.



- b. Fraudulently causing Parcel number known as L.R 1317/677 to issue whilst knowing or ought to have known that the Government did not have jurisdiction to allocate public land or land already allocated to Kenya Railway.
  - c. Fraudulently causing parcel number known as L.R 1317/677 to be allocated and/or curved out from the Defendant's parcel of land without the knowledge and/or consent of the Defendant.
  - d. Fraudulently causing public land to be allocated or curved out to private persons/individuals.
16. The Defendant prays that the Plaintiffs claim be dismissed with costs and judgment be entered as per the counterclaim for:
- a. A declaration that parcel of land known as L.R No 1317/677 or portion thereof is within the Defendant's operation area i.e. Gilgil Railway Station.
  - b. An order for cancellation of the Title to parcel of land known as L.R No 1317/677 and an order for rectification of the register at the Nairobi Central Land registry to reflect the Defendant as the rightful owner.
  - c. A permanent injunction restraining the Plaintiffs by themselves, servants, agents and/or employees from interfering with the Defendant's quiet possession and occupation of the suit land.
  - d. Costs and interests on costs at court rates.

**Plaintiffs Evidence.**

17. The first witness to testify in support of the Plaintiffs case was one Charles Nguru (herein after referred to as PW1). He introduced himself as a business man living in Gilgil.
18. PW1 stated that he had sworn an affidavit on 8<sup>th</sup> June, 2021 and prayed that the court adopts it as part of his evidence in this suit, which prayer the court acceded to.
19. PW1 testified that he has sued the Defendant in respect of LR number 1317/677 and added that on 12<sup>th</sup> February, 2021, Kenya Railways Co-operation demolished their structures built on the suit parcel. He testified that the demolition took place in the night at 11:00pm. It was his testimony that prior to the demolition, there had never been any dispute between them and the Defendant.
20. It was PW1's testimony that he had a further list of documents filed on 10<sup>th</sup> November, 2021 and that he has been owner of the suit land since 5<sup>th</sup> March, 1997.
21. The documents attached to the list of documents were marked and produced as follows:
  - a. Allotment letter - Exhibit P1.
  - b. Memorandum of registration of transfer of land serial No 1685/99 - Exhibit P2.
  - c. Receipt dated 16<sup>th</sup> December, 1999 for stamp duty - Exhibit P3.
  - d. Letter dated 29<sup>th</sup> June, 1999 from the Commissioner of Lands - Exhibit P4.
  - e. Letter dated 16<sup>th</sup> December, 1999 from the Commissioner of Lands- Exhibit P5.
  - f. Letter of acceptance dated 6<sup>th</sup> January- Exhibit P6.
  - g. Letter of approval dated 3<sup>rd</sup> March, 1997- Exhibit P7.



- h. Letter dated 14<sup>th</sup> January, 1998 from the Commissioner of Lands -Exhibit P8.
  - i. Letter dated 8<sup>th</sup> June, 1999 from the director of survey -Exhibit P9.
  - j. An approval development plan dated 23<sup>rd</sup> October, 1998- Exhibit P10.
  - k. Copy of grant dated 8<sup>th</sup> June, 2021- Exhibit P11.
  - l. Clearance certificate dated 23<sup>rd</sup> March, 2021 from the county government of Nakuru- Exhibit P12.
  - m. Receipts dated 23<sup>rd</sup> March, 2021 for payment of rates- Exhibit 13 (a) and 13 (b).
22. PW1 testified that the document she had produced show how they acquired the parcel from allotment to issuance of the grant.
23. He went on to state that the parcel of land was not acquired by means of fraud and added that he used all legal means to obtain it.
24. He testified that Exhibit P2 shows that the Defendant is one of the entities that this letter (memorandum of registration of transfer) was given to. He testified that none of the people listed in Exhibit P2 filed any objections. He testified that the suit parcel has never been in use by the Defendant and neither did it belong to them.
25. PW1 testified that the suit parcel neighbors a parcel of land owned by the Defendant. He confirmed that the said  
parcel plot belonging to the Defendant has been in the Defendant's occupation for many years and added that he found it there.
26. It was his testimony that the suit parcel belongs to them and that there is a road separating the suit parcel from the one occupied by the Defendant.
27. It was PW1's further testimony that the Defendant's parcel is not fenced and he added that they have not encroached onto the Defendant's land.
28. PW1 went on to testify that after the demolition, they went to Nairobi and they met the Defendant's director who informed them that he would send surveyors. He testified that the surveyors sent by the Defendant visited the suit parcel and they put beacons on their land. PW1 testified that he was present when the surveyors came to the suit parcel. He clarified that the beacons were only placed on the Defendant's parcel and not theirs.
29. He testified that after the survey, he got a boundary verification form and explained that it is the first document on the Defendant's list of documents. He testified that the surveyor's comments are that parcel No. 1317/677 overlaps by between 1.2 and 1.4 meters into the station boundary and they recommended resurvey of L.R 1317/677 to correct the small overlap.
30. PW1 testified that it is therefore not true that their parcel was obtained fraudulently or that the entire parcel belongs to the Defendant. He testified that before demolition, they had built semi-permanent structures made of iron-sheets, wood and they had cement floors. He added that one person had a permanent structure and that all these structures no longer exist.
31. PW1 in his written statement states that the averments contained in the Plaintiff are correct to the best of his knowledge, information and belief.



32. Upon cross-examination, PW1 confirmed that it is true that the Defendant did not object to their acquisition.
33. When referred to Exhibit P7, PW1 informed the court that the remarks by the Commissioner of Lands are at paragraph 5 and it reads “recommended.” He stated that paragraph 7 states permanent secretary “issue of allotment” and paragraph 8 states the minister’s remarks as “recommended.” PW1 confirmed that the Defendant is not one of the government agencies issuing approval or recommendation.
34. When referred to Exhibit P1 which is a letter of allotment, PW1 stated that it was issued on 5<sup>th</sup> March, 1997 and the date is not clear. PW1 stated that it is signed by the Commissioner of Lands and it is copied to several government agencies. He stated that it is true that the Defendant is not one of them.
35. When referred to Exhibit P2 which is a memorandum of registration of transfer of lands, PW1 stated that it bears serial number 1685/99. He stated that the date of presentation is 20<sup>th</sup> December, 1999 and added that it is copied to the managing director of the Defendant. He confirmed that he has no evidence that it was received.
36. When referred to Exhibit P11 which is the grant, PW1 stated that page number 4 of the grant was witnessed by the registrar of titles on 9<sup>th</sup> December, 1999. He confirmed that the date of registration and date of notification to the Defendant as it appears on Exhibit P7 are the same.
37. PW1 confirmed that he put up commercial buildings. He further confirmed that there are conditions attached to the letter of allotment (Exhibit P1) specifically condition 5. He stated that he sees a hand-written condition that the parcel of land is for residential purposes. He stated that this condition was not on the original document. When referred to Exhibit P11 (the grant), PW1 confirmed that condition 5 appearing at page 2 of the grant states that the land and building shall only be used for residential purposes.
38. PW1 confirmed that he put up a commercial building contrary to the conditions of the grant. PW1 stated that their building was demolished on the night of 12<sup>th</sup> February, 2021. He stated that he was present and he does not know who demolished it. He stated that he saw five government of Kenya tractors and there was police presence.
39. PW1 confirmed that he does not have evidence that the tractors belonged to the Defendant and all he knows is that they belonged to the government.
40. PW1 stated that the parcel is on the outskirts of Gilgil town towards Nyahururu and it is situated along Gilgil Nyahururu Highway. He stated that it is on the left facing Nyahururu from Gilgil. He stated that it is true that they are on the same side with the railway station but they do not share a boundary.
41. PW1 stated that there is a railway line passing in front of the suit parcel and the road going to Nyahururu passes through the railway crossing.
42. He stated that they never got any notice from the Defendant and that he specifically did not get a notice in the year 2004 and therefore never responded to it.
43. When referred to the notice attached to the Defendant’s further list of documents, PW1 stated that he never saw this notice. He however confirmed that the letter dated 19<sup>th</sup> February, 2004 is written by Ayub Njuguna Mwaura and also confirmed that the said Ayub is a co-owner. PW1 stated that in the said letter, Ayub is writing on behalf of three others and it is addressed to the managing director of the Defendant.



44. PW1 confirmed that Ayub Njuguna Mwaura is referring to the notice served on him on 13<sup>th</sup> February, 2004 and it refers to the suit parcel. He further confirmed that paragraph 2 refers to a Diamond Quadrant for clear visibility and it is signed by Ayub Njuguna Mwaura. He confirmed that the letter was received by the chief estates' manager of the Defendant. PW1 stated, however, that he is a stranger to the things stated in the letter.
45. When referred to document number one on the Defendant's list of documents dated 25<sup>th</sup> September, 2021 (a boundary verification report) PW1 confirmed that he went to Nairobi and met the managing director of the Defendant who sent the surveyor.
46. PW1 was categorical that the suit land does not share a boundary with the Railway station and that their parcel of land is at a corner. He stated that the surveyor's report says that they have encroached on to the railway station land and added that this is not true.
47. PW1 went on to state that a joint survey was ordered and they recommended a person by the name of Mr. Gitau who met with Mr. Ochieng representing the Defendant as the surveyor. PW1 confirmed that he was present when the joint survey was done.
48. PW1 stated that he did not know that their surveyor refused to sign the joint report. He went on to state that the surveyor made a report but the report has not been produced in evidence. PW1 was referred to document number one in the Defendant's supplementary list of documents which is a joint survey of Gilgil station and he confirmed that it is the report and it is dated 8<sup>th</sup> February, 2022.
49. PW1 stated that there is a subheading which says "Analysis" "A diamond of 300 feet quadrant." He stated that he does not know what a diamond quadrant means. PW1 also informed the court that he does not know that 300 feet on both sides of the level crossing should not have any buildings. He stated that he does not know that this is meant to help the vision of a driver to see an oncoming train.
50. PW1 stated that he does not know about a vesting order vesting all land along the railway to the Defendant. He stated that he knows that 100 feet of land belongs to the Defendant and he does not understand anything about 300 feet at a level crossing.
51. PW1 confirmed that they made an application for allotment and was not aware that it was the Defendant's land and he only knows that it is government land. He stated that if it belonged to the Defendant, it would not have been allocated to them.
52. He stated that he does not know about the vesting order of 1963 or 1986 or legal notice No 24 of 1986. He stated that it is not true that in 1999 the Commissioner of Lands did not have land to allocate to them. PW1 stated that it is not true that he conspired to give notice to the Defendant on the date that the grant was registered. He stated that he does not agree that the title should be granted.
53. Upon re-examination, PW1 clarified that document number two on the defendant's list of documents, which is a letter by Ayub Njuguna Mwaura, was not written with their authority. He testified that the letter refers to a notice served upon him personally and added that not all of them got the notice.
54. PW1 further clarified that the notice by the Defendant, does not bear anyone's name and it does not have a title number. He testified that the notice is effective from 2004 and the demolitions of their buildings was in 2021.
55. PW1 further clarified that in respect of the diamond quadrant mentioned in the survey report, there is nothing indicating that a portion should belong to the Defendant. He went on to state that there is no encumbrance registered on the parcel.



56. PW1 testified that there is a railway line next to their parcel of land and that there is a road between their parcel and the railway line. On the issue of an overlap of 1.2 meters, he stated that its not their parcel of land but the road that is encroaching.
57. The second witness to testify in support of the Plaintiff's case is one Mungai Wa Njenga; hereinafter referred to as PW2. In his introduction he stated that he lives in Nakuru and is a licensed land surveyor. He added that he has a certificate and a license. He produced the annual certificate for 2023 which was marked as Exhibit P14. The license which is No 235 was marked as Exhibit P15.
58. PW2 testified that on account of the order issued by this court on 15<sup>th</sup> December, 2021, he visited the suit land and prepared a report dated 4<sup>th</sup> July, 2022. PW2 produced the report as Exhibit P16.
59. PW2 testified that his finding is that the suit property is not within the Kenya Railway reserve. He testified that paragraph 3 of his report states that the diamond is a square in the shape of a diamond which is sometimes put on survey maps for the purpose of visibility when crossing the railway line.
60. He testified that on the survey map for this particular land, there is no provision for the diamond and it is not present on the survey records or on the land.
61. He went on to testify that at paragraph 4, he states that if there was an encumbrance on the property, it should have formed part of the special conditions and it is not indicated in this case. PW2 testified that his view is that the diamond can only be excised from LR No 1317/677 by way of compulsory acquisition because it is on private property.
62. Upon cross examination, PW2 informed the court that he visited the suit land in late June of the year 2022. He stated that he made the visit together with a surveyor from Kenya Railways one Nathaniel Ochieng.
63. He stated that the suit land borders the railway line and his report does not give the distance. PW2 further confirmed that on the eastern side of the suit land is Gilgil-Nyahururu road.
64. He further stated that on the northern side is Nairobi-Nakuru Railway line. He further confirmed that there is a level crossing on the road and the road crosses the railway line at about 90 degrees.
65. He stated that the diamond quadrant does not necessarily apply at the level crossing. When referred to the railways and harbors engineering manual which is annexure 7 on the further list of documents, PW2 stated that the first figure on annexure 7 is a demonstration of the Diamond quadrant. He stated that it shows a level crossing at a right angle. He stated that the Diamond quadrant ensures visibility by motorists. He went on to explain that there should be 300 feet on all sides from the point the road intersects with the railway line and the four points are then joined to make the Diamond quadrant.
66. PW2 confirmed that it is true that there should not be any development on the Diamond quadrant to ensure visibility. He stated that the quadrant should be part of the railway reserve if it has been surveyed. He stated that in this case, it does not form part of the survey. He stated that the diamond quadrant ensures motorists can see the train and the train can see motorists and avoid accidents.
67. PW2 stated that if there are buildings within the quadrant, it would affect visibility and likely cause accidents. He stated that his report does not contain a sketch.
68. PW2 was referred to document number 2 on the Defendants further list of documents, which is a sketch, and he stated that it is the same as the sketch on the Defendant's survey report, only that it is enlarged.



69. PW2 confirmed that there is a diamond quadrant on the sketch and that is how it should be but not on the survey records. PW2 confirmed that it is true that the sketch shows that part of the land is on the diamond quadrant. He stated that his report says that if the Defendant wants to have it, it can only be excised through the process of compulsory acquisition because it is on private property.
70. He stated that planning comes first in the process of acquisition of land, the pre-approved development plan is then prepared and sent to various government departments for approval. He stated that in respect of the pre-approved development plan, he is not sure if it was circulated to the Defendant for approval and he did not think it was necessary. He stated that he only looked at the deed plan and the survey. He stated that he is aware that the Plaintiffs had buildings on the suit land that were demolished.
71. PW2 informed the court that he cannot confirm that the buildings would have affected visibility. He stated that if there was a storeyed building, it would have affected visibility and it would have been an issue when seeking approval.
72. Upon re-examination, PW2 testified that he has been referred to the sketch which he did not draw. He testified that the diamond quadrant is not on the ground and not on the survey records or any official records. He testified that it is not marked on the register or a special condition on the title.
73. PW2 testified that the suit parcel is clearly indicated on the sketch as 1317/677. He testified that apart from the intended diamond quadrant, the parcel of land is not encroaching on the Kenya Railway line. He testified that the station boundary and the railway line are clearly away from it.
74. PW2 confirmed that he has been shown the engineering manual Volume 1 of 1962 and he testified that the manual is not applicable to survey of land. PW2 further testified that the manual has no influence in their work.
75. He testified that it could be useful to a Kenya Railway Surveyor when constructing new railways lines but not on existing surveys. He testified that the manual does not apply to private land.

### **Defendant's Evidence**

76. The first witness to testify in support of the Defendant's case is Nathaniel Ochieng; herein after referred to as DW1. He introduced himself as a senior land surveyor for Kenya Railways Corporation and added that he lives in Nairobi.
77. He testified that he is familiar with matters relating to this case and prayed that his witness statement dated 22<sup>nd</sup> October, 2021 be adopted as part of his evidence, which request the court acceded to.
78. DW1 referred to the list of documents and testified that the suit land is located at Gilgil town adjacent to Gilgil railway station and added that the parcel is L.R No 1317/677.
79. He testified that the Plaintiffs approached the Defendant for boundary verification via an application dated 11<sup>th</sup> November, 2020 and added that they wanted the verification done because they wanted to check if the parcel was encroaching on the railway reserve. He clarified that the application was voluntary.
80. DW1 testified that he went to the site and also received plans supplied by the Applicant. He testified that he did a report and the report stated that the land is within the boundary reserve. He testified that he also observed that parcel number 1317/677 is partly overlapping on to the Gilgil Railways Station area. He testified that the report is dated 27<sup>th</sup> January, 2021 and it is signed. It was marked and produced it as Exhibit D1.



81. DW1 testified that the position of the land in relation to the railway station is that the suit land has the railway reserve, to the north is the railway reserve, to the west is the Gilgil railway station and to the east is the Gilgil Nyahururu highway. He testified that the land is at a corner. DW1 testified that in his comments, he has referred to FR 106/112 and he states that it is issued when a survey plan is authenticated. He testified that he has it in his list of documents and he produced it as Exhibit D2.
82. DW1 testified that the parties agreed to do a joint survey and he attended on behalf of the Defendant. He testified that the Plaintiff also had a surveyor by the name Peter Gitau and he is the one who came to the site. He testified that he did not know him before the date of the survey.
83. DW1 testified that they undertook a joint survey and he prepared the report. He testified that Peter Gitau did not sign but he did and it is on the supplementary list.
84. DW1 further testified that in addition to the site visit, he used survey plans for FR No 27/37, FR No 15/223 marked and produced as Exhibit D4, FR No 602/22 produced as Exhibit D3 and FR No 106/112. He testified that he also used the East African Railways & Harbors Engineering Manual of 1962.
85. DW1 testified that their finding on the joint survey report was that the suit property fell within the diamond crossing at Gilgil Railway station level crossing and the joint survey report mentions that visibility considerations at railway crossing is covered by the East African Railways & Harbors Engineering manual of 1962 which provides that all level crossing shall have a diamond of 300 feet quadrant.
86. He went on to testify that the aim shall be a distance standard of visibility that will enable a motorist when he is at least 300 feet from the crossing to see the leading component of a train when it is also at least 300 feet from the crossing. He testified that he signed the report. it was marked and produced as Exhibit D5.
87. DW1 testified that he has part of the East African Railway and engineering manual attached to the further list of documents.  
He testified that paragraph 7.08 talks about visibility at the level crossing and discusses the diamond quadrant. He testified that it also makes reference to an annexure 7.
88. It was DW1's testimony that the diamond quadrant is a diamond of visibility for safety at all level crossings. He testified that the diamond is formed by a distance of 300 feet from the point of intersection between the road and the railway line in all four directions. He testified that when the four points are joined, they form the diamond quadrant. He went on to testify that it is for visibility and therefore there should be no development within the diamond quadrant.
89. It was DW1's testimony that a motorist when at least 300 feet from the intersection must be able to see the engine of the train while it is 300 feet from the point of intersection and this is for purposes of safety. He testified that annexure 7 has two diagrams and the first diagram is in reference to a right angled intersection. He testified that the second diagram refers to a skewed intersection. DW1 testified that the first diagram is applicable to this case and he produced the manual as Exhibit D6.
90. DW1 testified that he has another document titled Land Parcel L.R 1317/677 which is the diamond crossing. He testified that it is an overlay of the suit parcel vis-a-vis the diamond crossing. He testified that the suit land is at the bottom corner. He stated that the railway line, Nyahururu road and the diamond crossing are all marked.



91. He testified that they can see that part of the suit property falls within the crossing or diamond quadrant. He testified that slightly less than half of the suit property is within the diamond quadrant which is about 45%. He produced the sketch as Exhibit D7.
92. DW1 testified that the effect of having obstruction between the visibility of the train driver and motorist is the fear of accidents occurring at the level crossing.
93. DW1 testified that in his report which is Exhibit D5, he says that there is no other property between the suit property and the railway reserve. He testified that the reserve is 30.48 meters (100 feet) where there is no railway station. He testified that where there is a railway station, the reserve could be larger. He testified that the diamond quadrant is 300 meters on each side of the intersection.
94. DW1 went on to testify that he has seen the document produced by the Plaintiff and he stated that he has not seen any approval for allotment or development. He stated that he is aware that there were developments on the suit land and added that when they visited the parcel for joint survey, there were no developments. He testified that he does not know who demolished them.
95. It was DW1's further testimony that the allocation of the suit land to the Plaintiff was irregular and should be revoked and the title cancelled. He testified that the Defendant has a title deed for railway stations but as for the reserve, they depend on the vesting order of 1986 which is Legal Notice No 24.
96. DW1 in his witness statement filed in court on 22<sup>nd</sup> October, 2021 states the Defendant's land in Gilgil Railway Station is defined by various documents as listed in the Defendant's list of documents. He states that the various survey plans, part development plans and registry index maps have been evaluated by the Defendant and it has been found out that part of L.R No 1317/677 encroaches on the Defendant's land at Gilgil Railway Station.
97. DW1 states that the allocation and registration of as L.R 1317/677 was obtained fraudulently and without due regard to the boundaries of the Defendant's land and land reserved for use by the Defendant. He states that the Defendant has not at any one time surrendered its land at Gilgil Railway Station to the government of Kenya for allocation to private persons or for any other use. He states that it is only fair and just that this case be dismissed with costs.
98. Upon cross-examination, DW1 stated that he did a verification following an application by one of the owners. He stated that he has produced Exhibit D1 as his report. He stated that the land surveyor's comments state that it overlaps by between 1.2 and 1.4 meters into the station boundary. He stated that he recommended a resurvey to correct the small overlap.
99. DW1 stated that that he would not like the court to order a re-survey to correct the small overlap. He informed the court that this is because the recommendation was before the court process and his recommendations are correct.
100. DW1 confirmed that at the time of the site visit for the boundary verification, the site was developed. He stated that it had mixed development of permanent and semi-permanent structures and he does not know if they were fully developed.
101. DW1 went on to state that when he went for the second visit, there were no developments but he could see foundations of the buildings. He stated that he is aware that the Plaintiffs have ownership documents.
102. DW1 was referred to the allotment letter produced as Exhibit P1 and confirmed that the allotment says that rent is payable from 1<sup>st</sup> March, 1997.



103. DW1 was also referred to the memorandum of registration produced as Exhibit P2 and he confirmed that it shows the managing director of the Defendant as among the offices that the memorandum was circulated to. He stated that in 1997, he was in primary school. He stated that he cannot tell whether it was taken to Kenya Railways and he does not have a received copy.
104. On the question of the Diamond Quadrant, DW1 stated that it is not marked in the register but it is in the engineer's manual. He stated that the manual was applied in 1962 and it is still applicable today. He further stated that the manual is for citizens of Kenya and the citizens include Kenya Railway engineers.
105. DW1 went on to state the manual is intended for citizens and engineers. He stated that the marking of the Diamond Quadrant is the responsibility of the Defendant and he does not know if the Diamond Quadrant has ever been marked.
106. He stated that when he went to the site, he did not see any markings of the Diamond Quadrant and added that the quadrant needs not be marked, just like the reserve of the railway. He confirmed that it is not physically marked but a surveyor can point it out.
107. When referred to Exhibit D5 which is a joint survey report, DW1 confirmed that the report was written by him. He further confirmed that the surveyor who visited the suit parcel with him did not sign the report. DW1 stated that they did not have any disagreements and also denied that there was a disagreement on the issue of a diamond quadrant.
108. When referred to Exhibit D7 which is a sketch, DW1 stated that the land, road and railway line are marked. He stated that the Diamond Crossing or Quadrant is also marked but the boundary is faint. He stated that this is because it was printed in black and white. DW1 confirmed that the survey map will not show the Diamond Quadrant.
109. When referred to Exhibit D4, DW1 stated that it does not show the Diamond Quadrant. He stated that all the maps produced do not have the Diamond Quadrant. He stated that it is not true that the Defendant has no registered interest in the Diamond Quadrant and added that he cannot confirm it because no search has been produced.
110. DW1 ended by stating that he does not know who demolished the property.
111. Upon re-examination, DW1 was referred to the boundary verification report produced as Exhibit D1 and also referred to his comments on the overlap. He clarified that when the Plaintiffs presented FR 360/97, he plotted it on FR 106/112. He testified that from the plotting, it was clear that the boundary of the suit parcel was overlapping that of Gilgil railway station.
112. The court sought clarification from DW1 on whether the issue of the diamond quadrant had come up as at the time of the application for boundary verification i.e. on 27<sup>th</sup> January, 2021. DW1 responded stating that the question of the diamond quadrant came up after this suit had been filed.
113. When referred to Exhibit P8, which is a letter from the Commissioner of Lands dated 14<sup>th</sup> January, 1998, DW1 stated that there are several offices copied to this letter and some acknowledged receipt and others did not.
114. When referred to Exhibit P6, DW1 stated that he was informed that the memorandum of sale was circulated to the Defendant but there is no indication that it was received by the Defendant.

### **Issues for Determination.**

115. The Plaintiffs filed submissions on 16<sup>th</sup> November, 2023. The Plaintiffs submitted that they filed this case against the Defendant seeking a declaration that they are the lawful owners of all that parcel of



land known as LR NO. 1317/677 situated in Gilgil/Township, a declaration that the demolition of their development on the parcel on 12<sup>th</sup> February, 2021 and denial of possession and use of the land are unlawful, a permanent injunction restraining the Defendant from interfering with their Grant, possession, development and use of all that parcel LR 1317/677, special, punitive and general damages plus costs of suit.

116. The Plaintiffs submit that that Defendant filed a defence and counterclaim in which it sought orders that the parcel herein or part thereof is within its operation area i.e. Gilgil Railway Station, cancellation of the Plaintiff's title and issuance of another to itself, a permanent injunction restraining the plaintiffs from interfering with it's quiet possession and occupation of the land, costs of suit plus interest.
117. The Plaintiffs submit that the case in essence is about ownership of LR 1317/677 and the issue the court should determine is who, between the Plaintiffs and the Defendant, owns this land.
118. The Plaintiffs submit that PW1 testified and gave a narrative of how they obtained a grant to the land. The Plaintiffs submit that their witness produced exhibits which were admitted as per the further list of documents filed in court on 10<sup>th</sup> November, 2021. They submit that it is clear from his evidence that the suit parcel was lawfully and procedurally obtained from the Commissioner of Land who granted the same to them. The Plaintiffs submit that before the grant, all the relevant authorities including the Defendant were invited to comment on the intention to grant the land and none raised any objection.
119. The Plaintiffs further submit that consequently, upon payment of all the required fees, they were issued with a grant which was produced in evidence. The Plaintiffs submit that they proved their case to the required standard and that the suit parcel therefore belongs to them.
120. The Plaintiffs submit that they are entitled to all privileges and benefits of ownership as protected by law and the court should ensure they get the same.
121. It is the Plaintiffs submissions that PW2 testified and stated that he visited the parcel of land with a surveyor from the Defendant. They submit that PW2 produced his report where he stated that the suit parcel belongs to the Plaintiffs. They submit that PW2 also testified that no interest in the suit property is noted against the title in favour of the Defendant or any other person. They further submit that PW2 also testified that the Defendant owns land next to the suit parcel which is distinct and not part of the suit parcel.
122. The Plaintiffs submit that PW2 further stated that the Defendant alleged that part of the land should be left to it to create what was being called a "Diamond Quadrant". The Plaintiffs submit that PW2 stated that the alleged Quadrant does not exist and is not marked. They submit that it also does not exist as encumbrances against the Grant in all official documents for the parcel. They Plaintiffs submit that PW2 in his report and evidence stated that should the Defendant want to take part of the land, then it has to be compulsorily acquired following the legal process.
123. The Plaintiffs also submit that in defence, the Defendant called one witness who is its surveyor and he produced a report in which he stated clearly that the suit parcel exists and is owned by the Plaintiffs.
124. The Plaintiffs submit that the defence witness stated that the only claim the Defendant has against the land is a portion he called "Diamond Quadrant" which should be curved out of the land.
125. It is the Plaintiffs submission that the Defendant's witness did not testify or give evidence that points to its allegations that the suit land was fraudulently or unprocedurally obtained. They submit that he also did not prove any fraud on the Plaintiff's part and if anything, the particulars of fraud as alleged in the counter-claim have not been attributed to any party.



126. The Plaintiffs submit that the Defendant admitted that the said Quadrant is not noted anywhere as an encumbrance or restriction against the grant in all government official records.
- They submit that the Defendant's witness also admitted that the said "Quadrant" is not marked on the suit parcel and has never existed.
127. The Plaintiffs submit that the Defendant's witness also admitted having visited the parcel before the suit was filed and made a report in which he stated that: "It was noted that parcel 1317/677 overlaps by between 1.2m and 1.4m into the station boundary. We recommend re-survey of LR 1317/677 to correct the small overlap."
128. It is the Plaintiffs submission that this report surprisingly changed when the case was filed and the same surveyor now comes with another report which directly contradicts the earlier one. They submit that it is clear that the second report and evidence is an afterthought. The Plaintiffs submit that the Defendant's witness tried to justify his second report using what he called a "manual" from Kenya Railways. The Plaintiff's submit that it is imperative to note that the said manual cannot over-ride express provisions of the law specifically *the Constitution* and the *Land Act*. They submit that it cannot be used to limit the rights of a proprietor as provided for by the law and should not be considered at all.
129. The Plaintiffs submit that in it's pleadings, the Defendant admits being in possession of the suit parcel. They submit that this is clear from its prayers in the counter-claim where it states that the Plaintiff be restrained from interfering with its possession of LR 1317/677.
130. The Plaintiffs submit that the Defendant cannot turn around and claim that it did not demolish the Plaintiff's development on the premises on the night in issue and it cannot also claim not to be responsible or not to have evicted the Plaintiffs from the premises. They submit that the court should dismiss this hypocrisy where the Defendant now pretends not to have demolished or evicted the Plaintiffs from their land.
131. The Plaintiffs further submit that it is a matter of common notoriety that Kenya Railways engaged in acts of unlawful demolition and destruction of private property in Kenya on allegations that the properties were either on Railway land or had been unlawfully obtained or grabbed. The Plaintiffs submit that the issue was a national one in Kenya and all the news in both radio and TV showed images of the said destruction.
132. The Plaintiffs submit that Kenya Railways did not come out to deny the acts of destruction of property or say who did it. They submit that this court should not ignore this and the Defendant cannot now come and state that it did not do the acts complained of by the Plaintiffs in this case.
133. The Plaintiffs submit that it is their case that a sum of Kenya Shilling 5,000,000/= should be fair compensation as damages as prayed for in the plaint. They submit that the counterclaim should be dismissed with costs and judgment entered for the Plaintiff including costs of the suit and interest.
134. The Defendant filed submissions on 15<sup>th</sup> February, 2024 and identified the following issues for determination:
- a. Who between the Plaintiffs and the defendant is the rightful and lawful owner of the suit land?
  - b. Whether the suit land falls within the diamond quadrant?
  - c. Whether the Plaintiff's developments on the suit land were demolished by the Defendant?
  - d. Whether the Defendant is entitled to damages and mesne profits?



- e. The costs
135. The Defendant submits that the defence witness Nathaniel Ochieng in his witness statement and evidence in court testified that the suit land is the Defendant's land and it has never surrendered it to the government of Kenya for allocation to private citizens. It submits that from the survey plan FR 106/11 (Exhibit D2) for Gilgil Railway Station, Parcel LR 1317/677 (suit land) does not appear anywhere in the said survey plan. It submits that this is the same position in FR 15/223 that was prepared in 1916.
  136. The Defendant submits that LN 24/1986 vested all the land previously vested into East African Railways Corporation to it. It submits that this was land in use or reserved for use by the former corporation as vested in it by the Kenya (vesting of land) regulations 1963. The Defendant submits that the Plaintiffs have not adduced any evidence that the land was surrendered to the government of Kenya by it pursuant to section 14 of the Railways Corporation Act and it was therefore available for allocation.
  137. The Defendant submits that the Plaintiffs have produced a Memorandum of transfer of land (Exhibit P2) in respect of the registration of a new grant for the suit land. The Defendant submits that the said document is expressed to have been addressed to the managing director of the Defendant amongst other addressees. It submits that however, there is no evidence that the said memorandum was delivered to the Defendant and besides it is dated 9<sup>th</sup> December, 1999 whereas the letter of allotment issued in 1977 was not copied to the Defendant.
  138. The Defendant relies on the judicial authorities of Johannes Akello Ombotto & Another vs Kenya Railways Corporation & 4 others [2020] eKLR and Patel vs Kenya Railways Corporation & 4 others [2022] KE ELC 2523. It submits that there is no evidence that the Plaintiff paid the sums payable in the letter of allotment. It submits that no receipts have been produced; only a letter dated 6<sup>th</sup> January, 1998 (Exhibit P6) forwarding a banker's cheque a copy of which has not even been produced in evidence.
  139. The Defendant further submits that in any event, the land falls within the diamond quadrant and was unavailable for allocation in law and as a matter of public policy. The Defendant submits that in its counterclaim, they have stated that the suit land is within its operation area.
  140. It submits that the diamond quadrant is provided for in the East African Railways and Harbours Engineering Manual (Exhibit D6) under section 7.08. It submits that the rationale behind the diamond quadrant is to ensure visibility by motorists to avoid accidents that may result to loss of life and property.
  141. The Defendant also submits that it is not in dispute that the suit land abuts a railway line on a level crossing and that the diamond quadrant has not been provided for. The Defendant further submits that in the survey report by Mungai Njenga Kabitu (Exhibit P15) dated 4<sup>th</sup> July, 2023 he states that: "The diamond at the railway crossing was not provided for at the time of survey and issuance of deed plans." The Defendant submits that he then concludes that: "It is our view that the DIAMOND can only be excised from this L. R. 1317/677 by compulsory acquisition."
  142. The Defendant submits that in his report (Exhibit D5) dated 8<sup>th</sup> February, 2022, Nathaniel Ochieng, the land surveyor states that: "The suit property was found to fall within the diamond crossing at Gilgil station." It submits that the enlarged sketch of the Diamond Quadrant (DEx7) vis-a-vis the suit land clearly shows that a substantial part of the land falls within the diamond quadrant.
  143. The Defendant submits that in his report dated 4<sup>th</sup> July, 2022, Mungai Njenga Kabitu (PW 2) states that the Diamond Quadrant was not shown in the deed plan and was not noted as a condition in the land register. The Defendant submits that these concerns were answered by Nathaniel Ochieng (DW1)



when in cross-examination he explained that all diamond quadrant exist as railway reserves and they do not need to be marked on the ground or in the maps. It submits that the suit land was allocated for commercial and residential purposes.

144. The Defendant submits that in the event it is developed in the manner of its allocation, the buildings constructed on it will prevent a motorist from seeing the leading component of the train when it is at least 300 feet from the level crossing. It submits that this will most likely lead to accidents and the consequent loss of limb, life and property. It submits that this should not be allowed as a matter of public policy.
145. The Defendant submits that it is pleaded at paragraph 5 of the plaint that on 12<sup>th</sup> February, 2021, the Defendant unlawfully entered into the suit land at night and demolished all the Plaintiff's developments and the Defendant denied this averment in its defence.
146. It is the Defendant's submission that the Plaintiffs have the burden under Section 107 and 108 of the *Evidence Act* to prove that indeed the demolition was undertaken by the Defendant. It submits that in his evidence in chief, the Plaintiff stated that the Defendant came and demolished their constructions. It further submits that however, under cross- examination he stated that he was present on the night of 12<sup>th</sup> February, 2021 when the demolition was effected but he could not name a specific person who demolished as there were 5 tractors and police men. It submits that he conceded that he had no evidence to prove that the tractors were owned by the Defendant. It submits that in his evidence, the Defendant's witness testified that he did not know the person who demolished properties on the suit land. The Defendant submits that the Plaintiffs have not proved on a balance of probability that the Defendant demolished their properties on the suit land.
147. The Defendant submits that in their plaint, the Plaintiffs have prayed for special, punitive and general damages and mesne profits. It submits that the Plaintiff's case is that their houses were demolished. It submits that the value of the houses can be assessed and the damage expressed in Kenya Shillings and the Plaintiffs suffered special damages. The Defendant submits that the law is that special damages have to be specifically pleaded and then proved at the trial. It submits that in this case, none have been pleaded or proved and none can therefore be awarded. It submits that a valuer would have assessed the loss but no such report was produced at the trial.
148. The Defendant submits that general damages cannot be awarded for demolished houses and damages cannot be at large and they have to be special damages. The Defendant submits that the Plaintiffs have claimed mesne profits but no evidence was adduced at the trial in support of this prayer and no evidence of rental income was adduced. It submits that the prayer should be denied.
149. The Defendant submits that the costs are at the discretion of the court and the general rule is that they will follow the event save for good reasons to be recorded. The Defendant urged the court to dismiss the Plaintiff's case and allow it's counterclaim and award it costs.

### **Analysis and Determination.**

150. After considering the pleadings, submissions and testimonies of the parties, the following issues arise for determination:
  - a. Who between the Plaintiffs and the Defendant is the rightful and legal owner of the parcel of land known as L.R NO 1317/677 situated in Gilgil Township?
  - b. Whether the parcel of land known as L.R No 1317/677 or portion thereof has encroached on or is within the Defendant's parcel of land and/or area of operation i.e. Gilgil Railway Station.



- c. Whether the Plaintiff's developments on the parcel of land known as L.R NO 1317/677 were demolished by the Defendant.
- d. Whether the Plaintiff is entitled to General Damages, Special Damages and mesne profits.
- e. Who shall bear costs of this suit?

**A. Who between the Plaintiffs and the Defendant is the rightful and legal owner of the parcel of land known as L.R NO 1317/677 situated in Gilgil Township?**

151. It is the Plaintiffs case that they are duly registered owners of Grant Number I.R 82473 as tenants in common with equal shares of the suit parcel and PW1 in his testimony produced a letter of allotment dated 5<sup>th</sup> March, 1997 and a memorandum of registration of transfer of land from the Land registry Nairobi.
152. It is the Defendant's case that the land parcel known as L.R NO 1317/677 or a portion thereof is within its operational area i.e. Gilgil Railway Station. The Defendant in its counterclaim states that the Plaintiffs parcel number known as L.R No 1317/677 is illegal as it was obtained fraudulently.
153. The Defendant lists the particulars of fraud as follows:
- a. Fraudulently causing Parcel number known as 1317/677 to issue whilst knowing that the suit land belonged to the Defendant and/or was within the Defendant's operational area.
  - b. Fraudulently causing Parcel number known as L.R 1317/677 to issue whilst knowing or ought to have known that the Government did not have jurisdiction to allocate public land or land already allocated to Kenya Railway.
  - c. Fraudulently causing parcel number known as L.R 1317/677 to be allocated and/or curved out from the Defendant's parcel of land without the knowledge and/or consent of the Defendant.
  - d. Fraudulently causing public land to be allocated or curved out to private persons/individuals.
154. Fraud has been defined in Black's Law Dictionary 11<sup>th</sup> Edition as;
- “A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”
155. It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. The Court of Appeal in the decision of Vijay Morjaria vs Nansingh, Madhusingh Darbar & another [2000] eKLR held thus;
- “It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”
156. The Defendant has not provided this court with any evidence of fraudulent conduct on the part of the Plaintiffs in acquisition of the parcel of land known as L.R 1317/677. A person's interest in land once registered cannot be defeated save for under circumstances enumerated in the law.



157. Sections 24 and 25 of the *Land Registration Act*, 2012 provides as follows:

“24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
  - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

158. The Plaintiffs in a bid to prove the root of their title have produced a grant No IR 82473, an allotment letter dated 5<sup>th</sup> March, 1997 and a memorandum of registration of transfer of land from the land registry. I have no reason to doubt that they are the rightful and legal owners of the parcel of land known as L.R NO 1317/677.

**B. Whether the parcel of land known as L.R No 1317/677 or portion thereof has encroached on or is within the Defendant’s parcel of land and/or area of operation i.e. Gilgil Railway Station.**

159. In its counterclaim, the Defendant seeks an order declaring that parcel of land known as L.R No. 1317/677 or portion thereof is within its operation area i.e. Gilgil Railway Station. The Defendant also seeks these other orders;

- a. An order of cancellation of title and rectification of the register to reflect the Defendant as owner of the suit parcel
- b. An order of permanent injunction against the Plaintiffs



- c. Costs of the suit and interest thereon.
160. The Defendant called one witness; Nathaniel Ochieng who in his statement filed in court on 22<sup>nd</sup> October, 2021 states that he found that part of LR No 1317/677 encroaches on the Defendant's land at Gilgil Railway Station.
161. In his oral evidence, the issue of the Diamond quadrant was prominent. The Defendant's case hinges on the existence of a diamond quadrant within which the suit land lies. The Defendant states that this parcel of land should not have been allocated to the Plaintiffs because according to the East African Railway and Engineering manual, there should be no development on the diamond quadrant. The rationale of having the diamond quadrant, as explained by DW1, is that it ensures that no development is undertaken on it for the reason that a development on it is likely to affect visibility of motorists and cause accidents which may result to loss of life and property.
162. Essentially, the Defendant's case is that the suit land was not available for allocation to the Plaintiffs for the reason that it falls within the diamond quadrant as provided for in the East African Railways and Harbors Engineering Manual (Exhibit D6) under section 7.08.
163. On the other hand, PW2, a licensed land surveyor who testified in support of the Plaintiffs case, stated that he visited the suit land and prepared a report dated 4<sup>th</sup> July, 2022. He went on to state that the suit property is not within the Kenya Railway reserve. He explained that the Diamond Quadrant is a square in the shape of a diamond which is sometimes put on survey maps for the purpose of visibility when crossing the railway line.
164. PW2's evidence is that on the survey map for the suit parcel, there is no provision for the diamond and it is not present on the survey records or on the land.
165. PW2 stated that his view is that the diamond can only be excised from LR No 1317/677 by way of compulsory acquisition because it is on private property.
166. The Defendant has gone to great lengths in tendering evidence on the issue of the visibility diamond. The basis for this argument is the East African Railways and Harbours Engineering Manual of 1962.
167. The Defendant only gave excerpts of the manual and particularly, section 4 and section 7. (Exhibit D6). Section 4 has a heading "boundaries, firebreaks, Telecommunication lines and electric supply." Section 7 has a heading "level crossings" paragraph 7.08 which speaks to visibility. I have looked up and found the complete copy of the said manual. It was printed at D. L. Patel Press LTD Nairobi.
168. Section I of the East African Railways and Harbours Engineering Manual of 1962 has a heading "Introduction". It is as follows:

"The instructions contained in this Manual will come into force immediately and supersede all relevant instructions contained in the publications Engineering Department circulars – revised 1940 of the Kenya and Uganda Railways Harbours and Engineering Manual, Vol.1 -Technical Instructions, -1925 Tanganyika railways.

Circulars on administration matters will be provided in Volume II.

The instructions contained in this book must be read in conjunction with and not in lieu of, the

regulations contained in the following publications they in no wise (sic) supersede.

General Rules



General Appendix to the Working Time Table and General Rules.

Sectional Appendix to the Working Time Table and General Rule book.

Accident Instructions.

Working Time Table.

Each employee placed in possession of a copy of this Manual must make thoroughly acquainted with and act upon the instructions contained in it. In the event of a contingency arising which is not provided for in the Manual, he will exercise all necessary discretion or follow implicitly orders received from his superior officers. (Emphasis is mine)

The instructions contained herein are subject to amendment from time to time any such amendments will be notified by the chief Engineer and issued in the form of printed slips numbered consecutively. The slips must be pasted or neatly

written in ink in the appropriate places and their receipt recorded in the page Register of Amendments...”

169. It is clear that this manual is meant for the employees of the Defendant and not the general public. The instructions are meant to provide guidance to engineers concerned with building and design of harbours and railways in East Africa.
170. The Railways and Harbours Engineering Manual Volume 1(1962) at paragraph 7.08 under visibility provides that;
- “...Where speed on the railway is likely to be high or the road carries fast traffic, consideration shall be given to increasing the sighting distance over 300 feet, particularly from the road to the railway...”
171. The Defendant has provided a sketch drawn by it to show that the suit parcel falls within the visibility diamond (Exhibit D7). In cross examination DW1 confirmed that the diamond quadrant is not noted in the register and that when he visited the suit land, he did not see any marking of it. DW1 stated that the Diamond Quadrant, just like the railway reserve, needs to be marked. He further confirmed that even though not physically marked, a surveyor can point it out.
172. DW1, in cross-examination, stated that Exhibit D1 (Dated 27<sup>th</sup> January, 2021) observes that the suit parcel overlaps by between 1.2 and 1.4m into the Gilgil Railway station boundary. He recommended a re-survey to correct what he describes as a small overlap. DW1 however stated that the Defendant was no longer interested in the court ordering a resurvey to correct the overlap. He confirmed that this report was made before the suit was filed. It is important to note that none of the parties has sought an order for a resurvey. The overlap has been described as small and I shall not therefore delve into it any further.
173. Three things stand out from this analysis. First is that the Diamond Quadrant is an imaginary point that unless marked either during or after the construction of the railway line is not possible to be ascertained using the naked eye. Second is that the Diamond Quadrant, in the instant suit, is not noted in any register or marked at any point along the railway line. Third is that the suit parcel was allocated to plaintiffs without them knowing that it falls within the Diamond Quadrant. Does the allocation of the suit parcel then become illegal? I think not. Maybe erroneous but certainly not illegal.
174. The question that follows is who then is liable for this error or how is it to be resolved? The answer lies with the government departments that were part of the allocation process. The Defendant has



attempted to absolve itself from the error by stating that it was not consulted and did not give authorization for the allocation of the suit land which according to it falls within the railway reserve. The Defendant says that while it has title documents for railway stations, the reserves belongs to it on account of a vesting order of 1986 legal notice NO. 24.

175. I am not keen in making suggestions on the options that might be available as between the Commissioner of Land (as it then was) and the Defendant in resolving what in my view is a glaring example of lack of proper communication between government departments but if it is true that the fact of allocation of the suit parcel to the Plaintiffs and any developments thereon has overtime been found to stand in the way of safety of the motorists, the Defendant knows what it should do but that does not include violating the property rights of the Plaintiffs.
176. Ultimately, this court is not convinced by the Defendant's arguments that the East African Railways and Harbors Engineering Manual which is intended for the employees of the Defendant and in particular to provide guidance to engineers concerned with building and design of harbours and railways in East Africa can defeat the registered interest of a proprietor of land.
177. I find that the parcel of land known as L.R No 1317/677 has not encroached on and/or is not within the Defendant's parcel of land and/or area of operation i.e. Gilgil Railway Station. It follows that I decline to issue orders of cancellation of the Plaintiffs' title and orders of permanent injunction against the Plaintiffs. In essence the counterclaim fails.

**C. Whether the Plaintiff's developments on the parcel of land known as L.R NO 1317/677 were demolished by the Defendant.**

178. The Plaintiffs in their amended Plaint state that on or about 12<sup>th</sup> February, 2021, the Defendant unlawfully entered into the Plaintiffs parcel at night and demolished all the developments therein without any notice and while alleging that the said parcel of land belongs to it.
179. It is trite law that he who alleges must prove. This is set out in section 107 of the *evidence Act*. It is as follows:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove 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.
180. In the judicial decision of Anne Wambui Nderitu vs Joseph Kiprono Rapkoi & Another [2005] IEA 334, the Court of appeal held as follows: -
- “As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act”.
181. PW1 during cross-examination confirmed that he put up commercial buildings. He further confirmed that there are conditions attached to the letter of allotment specifically condition 5. He stated that he sees a hand-written condition that the allocation to him is for residential purposes. He alleged that this condition was not on the original document. PW1 was referred to Exhibit P11 which is the grant and he confirmed that page 2 of the grant under condition 5 states that the land and building shall only be used for residential purposes.



182. PW1 confirmed that he put up a commercial building contrary to the conditions of the grant. This notwithstanding, the Plaintiff has not tendered any evidence to prove that the developments on the suit parcel were demolished by the Defendant.
183. In his cross-examination, PW1 only mentions that tractors and police officers were seen during the demolition.
184. On this question, I am unable to find in favour of the Plaintiff.

**D. Whether the Plaintiff is entitled to Special Damages, General Damages, Punitive Damages and mesne profits**

185. The Plaintiffs' case is that their houses were demolished. It is upon this background that they pray for general and punitive damages. I have, in the preceding paragraphs, made a finding that there is no proof that the houses were demolished by the Defendant.
186. The law is that special damages must be specifically pleaded and proved. The Plaintiffs neither pleaded nor proved any special damages.
187. Mesne profits are in the nature of special damages. They too must be specifically pleaded and proved. The Plaintiffs did neither.
188. Ultimately, I am unable to find in favour of the Plaintiffs under this heading.

**E. Who shall bear costs of this suit?**

189. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

**Disposition.**

190. In the result, I find that the Plaintiffs suit partly succeeds. Consequently, I enter judgment in favour of the Plaintiffs in the following terms.
- a. A declaration is hereby made that the Plaintiffs are the lawful owners of all that parcel of land known as L.R NO 1317/677 situated in Gilgil Township and the Defendant has no right at all over the said parcel.
  - b. A Permanent injunction is hereby issued restraining the Defendant by itself, servants and/or agents from interfering with the Plaintiffs Grant, possession, development and use of all that parcel of land known as L.R 1317/677.
  - c. The Defendant's counterclaim is hereby dismissed with costs.
  - d. The Plaintiffs shall have costs of the suit from the date of judgment till payment in full.

191. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 25<sup>TH</sup> DAY OF JULY, 2024.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of: -



Miss Omondi for the Plaintiffs.

Mr. Mutonyi for the Defendant - Absent

Court Assistant; Mr. Joseph Makori.

