



**King'ara v Spring Hill Park Limited & 2 others (Environment & Land Case 225 of 2017) [2024] KEELC 6641 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6641 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 225 OF 2017  
MD MWANGI, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**PETER GICHUKI KING'ARA ..... PLAINTIFF**

**AND**

**SPRING HILL PARK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF NAIROBI CITY ..... 2<sup>ND</sup> DEFENDANT**

**MANAGEMENT AUTHORITY ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff initiated this suit vide the plaint dated 31<sup>st</sup> March, 2017 filed in court on the same date. The Plaintiff pleads that on or about the year 2002, Teleposta Pension Scheme Registered Trustees acquired three (3) plots known as L.R No. 209/14990/21, 209/14990/22, and 209/14990/23 and which they put on sale. The Plaintiff avers that he purchased plot L.R No. 209/14990/22 in the year 2003. The 1<sup>st</sup> Defendant's predecessors in title (Mr. & Mrs. Nzonzi) on the other hand purchased plot L.R No. 209/14990/23, whereas a 3<sup>rd</sup> party known as Immaculate Cheptum Chepkonga purchased the third plot known as L.R No. 209/14990/21 (then).
2. The Plaintiff further states that upon purchasing the plot L.R No. 209/14990/22, he gained possession thereof and moved into the existing old house therein. He afterwards obtained all the necessary approvals and put up his home on the plot and a boundary wall around it. He asserts that he has lived in the said property since then. The property, according to the Plaintiff measures approximately 0.1402 ha. It was apparently larger in size than the other 2 plots which measures 0.1326 ha.
3. The Plaintiff states that in the year 2007, the 1<sup>st</sup> Defendant's predecessors in title realized that there were anomalies and or errors in the titles that the purchasers of the 3 plots were holding. According to the Plaintiff, the Director of Surveys had issued, albeit erroneously, Deed plans that did not conform with the actual position on the ground. The Plaintiff explains the errors in his plaint as follows: -



- a. The plot that the Plaintiff was actually occupying was L.R. No.209/14990/21 on the survey map but he was holding title No. 209/14990/22.
  - b. The 1<sup>st</sup> Defendant's predecessors in title were actually occupying L.R No. 209/14990/22 in the survey map but holding title No. 209/14990/23.
  - c. Ms. Chepkonga was actually occupying L.R. NO. 209/14990/23 but holding title No. L.R. No.209/14990/21
4. The Plaintiff elaborates that the parties mutually agreed to rectify the anomalies. They resolved them by executing a Deed of Exchange dated 10<sup>th</sup> August, 2009, whereby they exchanged the certificates of titles to harmonize titles possession by each party.
  5. Pursuant to the provisions of the Deed of Exchange, the three titles were exchanged by substituting the registered proprietor in which case the Plaintiff took the title L.R. No.209/14990/21 whilst the 1<sup>st</sup> Defendant's predecessors in title took the title L.R. No. 209/14990/22; Ms. Chepkonga took the title L.R. No. 209/14990/23. The Plaintiff asserts that the parties did not however, at any time agree to change the existing acreages or boundaries of the plots. He insists that they were to remain on "as is basis". The issue of adjusting the physical boundaries or acreages according to the Plaintiff was left as unfinished business. Therefore, the Plaintiff continues to occupy the same physical acreage as he was in the year 2003.
  6. The Plaintiff pleads that the 1<sup>st</sup> Defendant purchased L.R. No. 209/14990/22 from it former owners, Mr. & Mrs. Nzonzi on or about the 6<sup>th</sup> of March, 2015.
  7. On or about 20<sup>th</sup> January, 2017, the Plaintiff alleges that he found a questionnaire for an Environmental Impact Assessment dropped at his home indicating that the 1<sup>st</sup> Defendant intended to build 12 additional units of 3-bedroom apartments from the 9<sup>th</sup> floor to 11<sup>th</sup> floor. He signed the questionnaire objecting to the proposed development by the 1<sup>st</sup> Defendant. It was around the same time that the 1<sup>st</sup> Defendant started excavating the ground in its parcel of land L.R. No. 209/14990/22, with a view to commencing the construction even prior to the issuance of the NEMA approval.
  8. Around the months of February, 2017, the Plaintiff alleges that the 1<sup>st</sup> Defendant's Director called him for a meeting whereby he claimed that the Plaintiff had encroached onto the 1<sup>st</sup> Defendant's land. The Plaintiff states that he explained to the 1<sup>st</sup> Defendant's Director the history of their parcels of land and why his parcel was now the one with the bigger acreage. in spite of the explanation, the 1<sup>st</sup> Defendant proceeded with the excavation and brought down part of the Plaintiff's wall and threatened to bring down the Plaintiff's power house and gate house.
  9. The Plaintiff claims that the development that the 1<sup>st</sup> Defendant is erecting on his property is a 12 storey structure which will change the face of the Plaintiff's neighborhood, block him from enjoying the afternoon sunshine and free circulation of air. He states that at the time that he built his seven (7) bed-roomed house, he had a legitimate expectation that the 2<sup>nd</sup> Defendant (the County Government of the Nairobi City County) would not allow his neighbor to build a skyscraper next to his home without consulting him and the Residents' Association prior to the conversions (if any) of the area form single dwelling houses to high-rise apartments.
  10. The Plaintiff asserts that to the best of his knowledge, the 'full council meeting' did not approve the 1<sup>st</sup> Defendant's construction plans neither were the County Government by-laws followed. He alleges that the 1<sup>st</sup> Defendant's structure is an 'unsound structure' likely to collapse onto his property at any time. The Plaintiff further accused the 1<sup>st</sup> Defendant of digging up his perimeter wall and leaving it



hanging precariously. Thereafter, the 1<sup>st</sup> Defendant brought down the wall on the pretext that it could fall if left as it was. The Plaintiff alleges that the 1<sup>st</sup> Defendant too carried away the building stones after demolishing the wall. The Plaintiff has been forced to put up an 'ugly temporary mabati wall' in place of the demolished wall to secure his home.

11. The Plaintiff reproves the 3<sup>rd</sup> Defendant, the National Environmental Management Authority (NEMA), for failing in its duty of ensuring that the Environmental Impact Assessment (EIA) for the 1<sup>st</sup> Defendant's project met the standards set out in the Act and to factor in public participation before issuing the license.
12. The Plaintiff states that the 1<sup>st</sup> Defendant has employed an inexperienced foreman without requisite professional qualifications. Further that there is no qualified Engineer on site contrary to the provisions of the various building and construction laws. He alleges that there are no architectural and structural drawings either.
13. The Plaintiff prays for orders against the Defendants as follows: -
  - a. A permanent injunction to restrain the 1<sup>st</sup> Defendant from erecting any structure or further structure(s) on L.R. NO. 209/14990/22 or to carry any further construction thereon, excavation and erecting any apartment.
  - b. A mandatory injunction compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to inspect and report to court the structural soundness, fitness of the existing construction and, to enforce the Physical Planning Act and Building Code in regard to open space built up area ratio and to further report on the encroachment by the 1<sup>st</sup> Defendant on other private property whilst constructing.
  - c. A permanent injunction restraining the 1<sup>st</sup> Defendant from conducting any further excavation along its common boundary with the Plaintiff's L.R. No. 209/14990/21 and or interfering with the Plaintiff's power house and gate house or any portion of the Plaintiff's property as presently preserved and existing.
  - d. An order directing the Director of Survey to forthwith resurvey L.R. No.209/14990/221 and L.R. No.209/14990/23 in accordance with the current physical boundaries borne out of the existing Masonry wall and to issue new Deed Plans that accord with the current occupation by the Plaintiff.
  - e. A declaration that the Plaintiff is in adverse possession of L.R. No.209/14990/22 to the extent that he has occupied the same over the last 15 years any space held within his masonry perimeter wall having occupied such space for a period of nearly 15 years Nec vic, nec clam, nec precario.
  - f. Any other or further relief the court may consider applicable.
  - g. Costs of this suit.

#### **Response by the 1st Defendant and Counter-claim against the Plaintiff**

14. In its statement of Defence and Counter-claim against the Plaintiff, the 1<sup>st</sup> Defendant denied the Plaintiff's claim against it in its entirety. The 1<sup>st</sup> Defendant asserts that the Plaintiff was aware from the year 2007 that even though he had acquired and rightfully occupied property L.R. No. 209/14990/21 which measured 0.1326 ha, the title Deed erroneously issued to him was for property L.R. No.



- 209/14990/22 which measured 0.1402 ha. As a result of that error, the Plaintiff had wrongfully encroached onto L.R. No. 209/14990/22 when he built his perimeter wall.
15. The 1<sup>st</sup> Defendant states that after rectification of the title Deeds, the title Deed for the property L.R. NO. 209/14990/22 measuring 0.1402ha was vested in the 1<sup>st</sup> Defendant's predecessors in title. The 1<sup>st</sup> Defendant avers that the Plaintiff is only entitled to the acreage indicated in the Title Deed duly issued over his property and delineated in the land survey plan 244499 which confirms his property as measuring 0.1326 ha.
  16. The 1<sup>st</sup> Defendant reiterates that the Plaintiff has indeed encroached on its property. Despite being aware of this, the Plaintiff blatantly refused to participate in the process that would have seen the boundaries properly marked and corrected. It is the 1<sup>st</sup> Defendant's position that the Plaintiff has always been aware of his encroachment into its property. The Plaintiff had in 2011 actually proposed to purchase the 1<sup>st</sup> Defendant's property after the issue of the encroachment was raised by the Advocates for the 1<sup>st</sup> Defendants' predecessors in title.
  17. The 1<sup>st</sup> Defendant asserts that it had agreed with the Plaintiff that his perimeter wall was to be demolished and a new one erected at the correct boundary line at its costs. However, before that could be accomplished, the Plaintiff moved to court filing this case.
  18. The 1<sup>st</sup> Defendant insists that it is constructing on its own property. It deny the allegations about its structure being substandard and all the other allegations of non-compliance with the law. The 1<sup>st</sup> Defendant insists that it is a legal entity that has employed the services of duly licensed and qualified professionals to carry on the construction using the best materials. Its construction is therefore safe and done in strict adherence to all relevant provisions of the law and regulations.
  19. The 1<sup>st</sup> Defendant's in its Counter-claims against the Plaintiff. It avers that in the year 2007, the plots L.R. No. 209/14990/21, L.R. No. 209/14990/22 and L.R. NO. 209/14990/23 were held by Ms. Immaculate Cheptum Chepkonga, the Plaintiff, and the 1<sup>st</sup> Defendant's predecessor's in title (Mr. & Mrs. Nzonzi) respectively. They however did not correspond with the title Deeds held by the proprietors.
  20. It is the 1<sup>st</sup> Defendant's case that the Plaintiff was made aware in writing by his neighbor that while they all occupied the correct plots physically, they all held the wrong Title Deeds owing to a mistake on the part of the previous owners of the property, Teleposta Pension Scheme Trustees during the subdivision of the larger portion of land and subsequent registration and transfer of the titles.
  21. The plot owners in order to remedy the situation executed a Deed of Exchange dated 10<sup>th</sup> August, 2009. Consequently, for L.R. No. 209/14990/21, the Plaintiff was substituted as the proprietor in place of Immaculate Cheptum Chepkonga whereas Mr. & Mrs. Nzonzi were substituted as the proprietors of L.R. No. 209/14990/22 in place of the Plaintiff while Immaculate Cheptum Chepkonga was substituted as the proprietor of L.R. No. 209/14990/23.
  22. The 1<sup>st</sup> Defendant posits that after the rectification of the Title Deeds, the parties embarked on ascertaining the proper boundary lines. Its predecessors in title of its property commissioned a survey to undertake the exercise. It was then discovered that the boundary line between the 1<sup>st</sup> Defendant and the Plaintiff as represented by the perimeter fence put up by the Plaintiff did not correspond with the accurate survey boundary. This promoted Mr. & Mrs. Nzonzi through their advocates to write to the Plaintiff on 13<sup>th</sup> April, 2010 informing him that he had encroached into L.R. No. 209/14990/22 and there was need to shift the boundary wall to correct the survey boundary.



23. The 1<sup>st</sup> Defendant contends that the Plaintiff declined to engage on the boundary rectification and instead offered to purchase the parcel of land L.R. No. 209/14990/22 at its market value in view of the extensive development existing on his parcel of land. He, according to the 1<sup>st</sup> Defendant also expressly indicated that he was unwilling to participate in the boundary rectification exercise and would resist any attempt to move the existing physical boundaries.
24. The 1<sup>st</sup> Defendant further affirms that after it commenced its construction and in subsequent discussions with the Plaintiff over the encroaching boundary wall, it was agreed that the existing boundary wall be brought down and a new one be put up by the 1<sup>st</sup> Defendant at its own costs, and at the correct survey boundary position. This was informed by the fact that the Plaintiff's encroaching boundary wall was interfering with the 1<sup>st</sup> Defendant's construction in its own parcel of land. It was on that basis that the said wall was brought down on the understanding that it was to be rebuilt in the course of construction.
25. The 1<sup>st</sup> Defendant prays that the Plaintiff's suit against it be dismissed with costs and that judgment be entered in its favour as follows:
- a. A declaration that the 1<sup>st</sup> Defendant is the bona fide registered proprietor of the suit property L.R. No. 209/14990/22 measuring 0.1402 ha.
  - b. A permanent injunction restraining the Plaintiff by himself, his servants, agents and or any of them from encroaching upon the suit property L.R. NO. 209/14990/22 measuring 0.1402 ha either by alienating, disposing off, subdividing, constructing upon, fencing or otherwise interfering in any manner with the 1<sup>st</sup> Defendant's right to enjoy quiet and peaceful possession of the land.
  - c. Costs of the suit and Counter-claim.
  - d. Any other just and equitable relief as this Honorable Court may deem appropriate.
26. In his reply to the 1<sup>st</sup> Defendant's Defence and Counter-claim, the Plaintiff insists that the boundaries of their respective plots were to remain as they were. He denies that he agreed to cede a portion of his property at any time as alleged by the 1<sup>st</sup> Defendant.
27. The Plaintiff asserts that he has lived in the suit property since 2003 and his premises measures 0.1402 ha on the ground. He states that the Director of Surveys had erroneously issued Deed Plans that did not conform with the actual position on the ground. That was why the parties agreed to exchange the titles without agreeing to change the existing acreage or boundaries. His offer to purchase the 1<sup>st</sup> Defendant's land was not an admission that he had encroached onto the 1<sup>st</sup> Defendant's land.

### **Statement of Defence by the 2nd Defendant**

28. The 2<sup>nd</sup> Defendant's statement of Defence is dated 30<sup>th</sup> April, 2018. The 2<sup>nd</sup> Defendant admits that the 1<sup>st</sup> Defendant is indeed constructing on its parcel of land but denies that the construction will change the Plaintiff's neighbourhood or block the Plaintiff's enjoyment of his property as alleged. It categorically affirms that construction of apartments in Kileleshwa area is permitted and is in compliance with Nairobi City County Zoning Plan. The construction by the 1<sup>st</sup> Defendant is therefore legal and valid.
29. In regard to the change of user, the 2<sup>nd</sup> Defendant asserts that the applications for change of user were properly advertised in the national dailies of wide circulation and a Board erected on site as required by the City by-laws. In spite of the above steps, the 2<sup>nd</sup> Defendant states that it did not receive any



objection either from the Plaintiff or any other person in regard to the intended construction on the 1<sup>st</sup> Defendant's parcel of land.

30. The 2<sup>nd</sup> Defendant alleges that it duly approved the 1<sup>st</sup> Defendant's building plans in accordance with its by-laws. It has carried out its statutory and constitutional mandate of oversight in strict adherence with the law. It prays for the dismissal of the Plaintiff's case against it.
31. There is no statement of Defence on record by the 3<sup>rd</sup> Defendant.

### **Evidence Adduced at the Hearing.**

32. This case proceeded to full hearing. The Plaintiff testified as a witness in his case and called 2 other witnesses. On its part, the 1<sup>st</sup> Defendant called 3 witnesses whereas the 2<sup>nd</sup> Defendant called 1 witness. The 3<sup>rd</sup> Defendant did not call a witness but participated in the hearing of the case through its duly appointed advocate.
33. The Plaintiff Peter Gichuki King'ara, testified as the 1<sup>st</sup> witness (PW 1) in this case. He adopted his two witness' statements dated 31<sup>st</sup> March, 2017 and 14<sup>th</sup> February 2022 as his evidence in chief. He too produced a total of 58 documents in his list of documents as exhibits in support of his case.
34. PW 1 affirmed the averments in his plaint stating that he bought the suit property in 2003 completing payment of the purchase price in the year 2004. He bought the property at Kshs.4.7 million from Teleposta Pension Scheme Trustees.
35. The Plaintiff testified that he chose the specific parcel of land because it had a longer road frontage than the other plots. He thereafter put up a 7 bedroomed house after erecting a wall around the plot. Amongst the other developments put up is a gate and power house in the year 2003/2004. He insisted that he followed the beacons in erecting the perimeter fence and there were no objections from any quarters including the 1<sup>st</sup> Defendant.
36. The Plaintiff told the court that in the year 2008, he received a letter from Kiplagat and Kipkenda Advocates informing him that there were errors in the title to his parcel of land and those of his neighbours. He was told that he had received the wrong title number though he was occupying the right plot.
37. The Plaintiff asserted that he had suggested the amendment of the survey plan as the easier way of sorting out the anomaly. That way, each proprietor would maintain the title number they were holding. After a meeting however, parties agreed on a Deed of rectification but the document was changed to a Deed of Exchange without his knowledge. The Deed of Exchange is the document that was eventually registered. The Plaintiff termed it as fraudulent.
38. After the Deed of Exchange, the Plaintiff alleged that the 1<sup>st</sup> Defendant started claiming 3 meters of land from him. The claim by the 1<sup>st</sup> Defendant was definitely going to affect his property since it touched on his gate house and power house and a part of his driveway. He refused to accede to the demand and instead offered to buy the 1<sup>st</sup> Defendant's property which is adjoining his property. That proposal did not work out and that is how the matter ended up in court. The Plaintiff averred that by the time he was filing the case in court, he had been in occupation of the suit property for over 12 years.
39. Responding to questions put to him in cross-examination, the Plaintiff admitted that he is the holder of title No. L.R 209/14990/21 measuring 0.1326 ha. That is the title that was previously held by Immaculate Cheptum Chepkonga before it was transferred to him after the Deed of Exchange.



40. PW 1 stated that he never wrote to the Director of Surveys because there was no issue with the Deed Plans. Physical occupation was not in dispute; only the number of the title Deed. PW 1 further stated that he had a surveyor who pointed out the beacons to him before he erected the perimeter wall.
41. The Advocate who was representing Teleposta Pension Scheme Trustees (the vendor) was the one who wrote to the Plaintiff about the discrepancies in title numbers. The Plaintiff agreed to the exchange of title in accordance with what he referred to as a Deed of rectification. He alleged that he did not sign the Deed of Exchange. He accused the lawyers of the parties of swapping what he had signed, the Deed of rectification with the Deed of Exchange.
42. The Plaintiff alleged that he wrote to S. K. Bundotich Advocate complaining of the swapping. He did not however sue the vendor despite the fact that it was the vendor who had pointed out the discrepancies in the title documents. He alleged that the Deed of Exchange was a nullity. The swapping constituted fraud. He did not however, specifically plead the swapping of titles as a particular of fraud in the plaint. PW 1 explained that his case is not based on the fraud alone.
43. The Plaintiff admitted receiving the letter from Mativo & Co. Advocates, at Page 90 of his trial bundle that brought out the issue of his boundary wall encroaching into L.R No. 209/14990/22. The letter explained that the boundary wall between plot numbers 22 and 21 is not aligned to the correct boundary line and encroached into plot number 22 by a margin of between 3.39m on the front side to 2.50m on the lower side. It recommended shifting the wall to the correct position. The Deed Plan showing the disparities was attached.
44. The Plaintiff in response wrote to Mativo and Co. Advocates on 15<sup>th</sup> April, 2011 saying that he did not wish to be drawn into the issue having already undertaken a title exchange and in view of the extensive development existing in his parcel. He offered to purchase plot 22 at its market value instead. He did not raise the issue of the alleged fraud in the said letter.
45. The Plaintiff further confirmed that he did not lodge a complaint with the National Environmental Tribunal in respect of the grievances against NEMA.
46. The Plaintiff insisted that there was no approval of the development by the 1<sup>st</sup> Defendant. The approvals were in favour of the previous owners Mr. & Mrs. Nzonzi.
47. On the structural soundness of the building erected by the 1<sup>st</sup> Defendant, the Plaintiff stated that the report that had informed his opinion was the one that had been marked for identification. It was not the report of a structural engineer through. He did not complain to the National Construction Authority (NCA) about the unsoundness of the 1<sup>st</sup> Defendant's structure.
48. Though he had sued the County Government of the Nairobi City County, he could not remember writing to them prior to his filing of this suit. He neither wrote to the NCA seeking to know about the qualifications of the 1<sup>st</sup> Defendant's foreman.
49. Shown the report by the Nairobi Regional Surveyor dated 4<sup>th</sup> November, 2022, the Plaintiff stated that he disagreed with it but he did not have a contrary report. He admitted that there was no mistake by the Director of Surveys. The mistakes were by Teleposta pension Scheme Trustees.
50. Responding to questions from the Advocate for the 2<sup>nd</sup> Defendant, PW 1 informed the court that he had not seen the advertisement of 18<sup>th</sup> June, 2013 in the Standard Newspaper. He too in response to the questions from the Advocate for the 3<sup>rd</sup> Defendant confirmed that he had not lodged any complaint against NEMA at the National Environmental Tribunal.



51. PW 2 was Immaculate Cheptum Chepkonga, the proprietor of L.R No. 209/14990/23. She confirmed the anomalies that were detected after purchasing the property which was originally described as L.R 209/14990/21. The anomaly was brought to her attention by her lawyer. Her title number did not correspond to the ground (survey plan). The Plaintiff's title too had a similar anomaly. They agreed to rectify the anomaly by signing the Deed of Exchange. That way each proprietor was to remain where they were.
52. In cross-examination by Mr. Kariuki, Advocate for the 1<sup>st</sup> Defendant, PW 2 averred that she visited her property with her lawyer before buying it. She did not go with a land surveyor then. She did not take any measurements of the property either. She only engaged a surveyor after she had acquired the property. She could not remember if she was shown the beacons of her property.
53. The anomaly according to PW 2 was that the title numbers did not correspond with the position on the ground.
54. PW 3 was one Mr. Gidraf Waitara Gitahi, a construction project manager and an environmental impact assessment expert certified by NEMA. He was commissioned by the Plaintiff to do a report on the impact of the 1<sup>st</sup> Defendant's development on his client's property. He made the report dated November 2017 which was produced and marked as PE 57. He found that his client (the Plaintiff) was exposed to damages in case a car veered off the driveway and also from falling objects from the 1<sup>st</sup> Defendant's structure on L.R No. 209/14990/22.
55. Responding to questions in cross-examination, PW 3 stated that he does opinions for clients. He does not possess a diploma in environmental impact assessment. He has a registration certificate from NEMA which he had however not brought to court.
56. Though PW 3 had allegedly visited the site, he could not remember the date he had visited. He had not included it in his report.
57. Shown the documents by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants confirming issuance of approvals and the license by NEMA, PW 3 stated that his report was based on the facts as at 2017.
58. During the site visit, PW 3 did not interview any of the neighbours. He relied solely on the brief by his client.
59. In re-examination, PW 3 confirmed that change of user was granted for the 1<sup>st</sup> Defendant's plot as well as the approvals which were varied into the 1<sup>st</sup> Defendant's name.

#### **Evidence adduced by the Defendants:**

60. The 1<sup>st</sup> Defendant called 3 witnesses. PW 1 was the Nairobi Regional Surveyor, Ms. Miriam Wanjiru Kigathi. She produced as an exhibit, her report dated 4<sup>th</sup> November, 2022. Her findings were that L.R No. 209/14990/21 had encroached 2.4 meters into L.R No. 209/14990/22 in the northern part and 4.5 meters on the southern part towards Kirichwa River as shown in the sketch attached to the report. The physical boundaries do not conform to the map. L.R No. 209/14990/21 was 0.1326 ha. while that of L.R No. 209/14990/22 is 0.1402 ha. The report was marked as DE 1.
61. Responding to questions in cross-examination, DW 1 stated that she did not physically enter into the Plaintiff's plot. She picked the beacons, using a map.
62. DW 2 was Stephen Mutuku Nzonzi, a director of the 1<sup>st</sup> Defendant company and the previous registered proprietor of L.R No. 209/14990/22. He adopted his witness statement dated 18<sup>th</sup> November, 2022 as his evidence in chief.



63. DW 2 testified about the mix-up of titles as confirmed by other witnesses. The mix-up was addressed by exchange of titles. No party had any issue with the Deed plans, they were correct. The parties discovered the mix up in the year 2008.
64. It was DW 2's evidence that the Plaintiff threatened to resist any attempts to move the existing physical boundaries.
65. DW 2 confirmed that the 1<sup>st</sup> Defendant had all the approvals for the development on its parcel of land from NEMA and the County Government of the Nairobi City County. Further, the 1<sup>st</sup> Defendant has engaged qualified professionals.
66. In cross-examination, DW 2 stated that he purchased the suit property in 2004. There was an old bungalow and a servant quarter on the land at the time of purchase. He was comfortable with the plot as it was. He was not aware if his lawyer conducted due diligence before the purchase. He purchased it for Kshs.5.0 million.
67. The Deed of Exchange was signed between 3 parties, DW 2, the Plaintiff and Ms. Cheptum. There was no written agreement on change of boundaries according to the witness.
68. DW 2 stated that he had not received any summons to appear before the Physical and Land Use Liaison Committee. He pointed out to the NEMA License at Page 27 of the 1<sup>st</sup> Defendant's bundle. It was issued on 21<sup>st</sup> January 2015. On page 89 of the bundle is the certificate of transfer of the license from his name and that of his wife to the 1<sup>st</sup> Defendant. The EIA license was also varied.
69. DW 3 was one Mr. Daniel Ojjo. He adopted his witness statement dated 10<sup>th</sup> January, 2020 as his evidence in chief.
70. DW 3 confirmed that the 1<sup>st</sup> Defendant initially had approval for construction of 31 units but later got a variation for 41 units. He affirmed that the Plaintiff had allowed him to bring down the boundary wall between the Plaintiff's plot and that of the 1<sup>st</sup> Defendant, on the understanding that the 1<sup>st</sup> Defendant would re-do it on the correct boundary position but the Plaintiff later changed his mind.
71. DW 3 asserted that the development on the 1<sup>st</sup> Defendant's plot was designed using the Deed Plan. The 1<sup>st</sup> Defendant had approvals for every part of the development both from NEMA and the County Government of the Nairobi City County. The witness produced the documents on the 1<sup>st</sup> Defendant's bundle dated 10<sup>th</sup> January 2020 in support of the 1<sup>st</sup> Defendant's case.
72. The construction commenced in the year 2013. The construction contract is dated 15<sup>th</sup> March, 2014. The 1<sup>st</sup> Defendant was categorical that the 1<sup>st</sup> Defendant had engaged qualified professionals including architects and engineers.
73. Mr. Ojjo was forthright that he demolished the wall between the 1<sup>st</sup> Defendant's plot and the Plaintiff's with the permission of the Plaintiff up to the point where the Plaintiff has a power house that houses a generator. The Plaintiff disallowed them to continue with the demolition. Moving the powerhouse would not have posed any challenges since they had the necessary expertise.
74. Responding to questions from the Plaintiff's advocate in cross-examination, DW 3 confirmed that the EIA license was issued to the 1<sup>st</sup> Defendant on 4<sup>th</sup> January, 2013. It required them to start construction within 24 months. They complied with the terms. The license does not expire once the project commences within the stipulated timelines.



75. The 2<sup>nd</sup> Defendant on its part called one witness by the name of Wilfred Wanyonyi who was the acting Deputy Director in the directorate of planning, compliance and enforcement of the 2<sup>nd</sup> Defendant. He adopted his two witness statements dated 28<sup>th</sup> March and 18<sup>th</sup> June, 2023.
76. DW 4 confirmed issuance of approvals on the 1<sup>st</sup> Defendants development on its property with the various conditions stipulated therein. He produced the documents as exhibits which were marked accordingly. Any dispute arising after the issuance of the approvals is to be dealt with by the County Liaison Committee.
77. Responding to Ms. Kimere, advocate for the Plaintiff, DW 4 stated that he had not seen any applications for renewal of the licenses in favour of the 1<sup>st</sup> Defendant.

### **Directions by the Court**

78. Upon the close of the hearing, the court directed parties to file written submissions. All the parties complied. The submissions form part of the record of the court. The parties too had occasion to highlight the submissions before the court on 24<sup>th</sup> April, 2024.

### **Highlight of Submissions**

79. In highlighting the Plaintiff's submissions, Ms. Kimere advocate submitted that the Plaintiff specifically chose the plot he is occupying at the time of purchase because it appeared larger than the rest and had a larger road frontage. At the time of purchase, the plot was fenced and was indeed developed.
80. At all the material time, the parties had co-existed peacefully without any issue. Subsequently after they discovered the error, they did the Deed of Exchange to rectify the situation.
81. Thereafter, the 1<sup>st</sup> Defendant's Director, Mr. Ojjo approached the Plaintiff claiming that he had encroached into the 1<sup>st</sup> Defendant's land. The Plaintiff claimed that Mr. Ojjo went ahead to demolish part of the Plaintiff's perimeter wall prompting him to seek refuge in court.
82. The Plaintiff's advocate submitted that what the 1<sup>st</sup> Defendant claims will substantially affect his property. She asserted that what the 1<sup>st</sup> Defendant was seeking was more acreage than what he was entitled to without consideration. The 1<sup>st</sup> Defendant has what he purchased in terms of acreage. It should not be allowed to benefit from what it did not pay for.
83. The Plaintiff's advocate reiterated the Plaintiff's claim that the 1<sup>st</sup> Defendant development on its land was contrary to the County By-Laws. The 1<sup>st</sup> Defendant had erected the structure on its parcel of land without leaving a 2 meters' space between the building and the boundary wall. She asserted that it was what the 1<sup>st</sup> Defendant was trying to cure by claiming a portion of the Plaintiff's land. The Plaintiff submitted that he enjoys constitutional protection under article 40 of *the Constitution*.
84. On its part, the 1<sup>st</sup> Defendant submitted that the acreage of the Plaintiff's land L.R No. 290/14990/21, is 0.1326 ha.
85. Mr. Kariuki, advocate for the 1<sup>st</sup> Defendant submitted that the Plaintiff's evidence suffers from duplicity. In the plaint, the Plaintiff accused the Director of Surveys of issuing Deed Plans that did not conform with the ground. In his oral evidence however, the Plaintiff disowned that paragraph in his plaint (paragraph 11) and testified that the Deed Plans had no issue.
86. The 1<sup>st</sup> Defendant's advocate further pointed out to the Plaintiff's evidence to the effect that a Deed of rectification had been prepared but ultimately the parties signed a Deed of Exchange that was also registered. In his plaint, the Plaintiff had averred that the Deed of exchange was signed in agreement.



The allegations of the Deed of exchange being fraudulent had not been particularized in the plaint. In any event, not all the parties to the Deed of exchange had been sued. There is no prayer challenging the validity of the Deed of Exchange in the plaint either.

87. The 1<sup>st</sup> Defendant further submitted that failure by the Plaintiff to pursue the Teleposta Pension Scheme Trustees on realizing that he had been sold lesser land than he had bargained for demonstrates acquiescence on the part of the Plaintiff. He did not move the court for the setting aside of the sale on account of mistake.
88. The 1<sup>st</sup> Defendant further pointed out that though the Plaintiff had claimed adverse possession of the portion of the 1<sup>st</sup> Defendant's land within the perimeter wall dividing their plots, there was no mention of it in his submissions. The claim according to the 1<sup>st</sup> Defendant in any event was not sustainable.
89. Regarding the claim against the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants, the 1<sup>st</sup> Defendant submitted that the Plaintiff failed to lodge his complaints with the established statutory bodies under the relevant statutes. That notwithstanding, the Deputy Director of Planning, Compliance and Enforcement of the 2<sup>nd</sup> Defendant had confirmed in his testimony before the Court that approvals were issued and the due process followed. An EIA license too had been issued by NEMA.
90. The allegation of lack of qualifications by the professionals engaged by the 1<sup>st</sup> Defendant was not proved. The 1<sup>st</sup> Defendant therefore prayed for dismissal of the Plaintiff's claim and that its Counter-claim be allowed.
91. The 2<sup>nd</sup> Defendant challenged the court's jurisdiction to issue the orders sought by the Plaintiff in view of Section 7 of the Physical Planning Act, 2012 (repealed), which established a Liaison Committee to handle complaints as the one advanced by the Plaintiff. The functions of the committee are stipulated under Section 10 of the Act. The jurisdiction of this court was only appellate.
92. The 2<sup>nd</sup> Defendant further submitted that it received no complaint from the Plaintiff in regard to the development on the 1<sup>st</sup> Defendant's land. The suit against it is pre-mature. Further, the approvals had been issued as by Law required. The 2<sup>nd</sup> Defendant has therefore carried out its constitutional and statutory responsibilities and functions. There was no evidence provided by the Plaintiff to the contrary. The Plaintiff did not discharge the burden of proof. Particulars of the alleged failure were not pleaded in his plaint. Finally, the 2<sup>nd</sup> Defendant submitted that structural soundness of a building is a function of NCA which was not a party in the suit.

#### **Issues for Determination:**

93. Having carefully considered the pleadings filed by the parties, the evidence adduced at the hearing and the submissions by the parties, the issues for determination in this matter in the court's considered opinion are: -
  - i. Whether the Plaintiff has proved the elements of adverse possession.
  - ii. Whether the Plaintiff has established the legal basis of his claim for the extra portion over and above the acreage under his certificate of title and the Deed Plan.
  - iii. Whether the Plaintiff has established a case against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
  - iv. Whether the 1<sup>st</sup> Defendant has established his Counter-claim against the Plaintiffs.
  - v. What orders should issue in regard to the costs of the suit and Counter-claim



## Analysis and Determination:

### A. Whether the plaintiff has proved the elements of adverse possession.

94. Amongst the orders that the Plaintiff prays for in his plaint is a declaration that the Plaintiff is in adverse possession of L.R. NO. 209/14990/22 to the extent that he has occupied over the last 15 years any space held within his masonry perimeter wall having occupied such space for a period of nearly 15 years “nec vi nec clam and nec Precario”.
95. In his plaint at paragraphs 7, 8, and 9, the Plaintiff had pleaded that upon purchasing his plot in 2003, he gained possession and moved into the existing old house. He has since lived therein from the year 2003 to date. He further pleaded that he had always lived harmoniously with his neighbours respecting the existing physical boundaries. Over 14 years there had not been any squabbles between him and his neighbours, more precisely, the 1<sup>st</sup> Defendant.
96. The import of the Plaintiff’s claim for adverse possession is that though his parcel of land in accordance with his certificate of title measures 0.1326 ha, he occupies and has so occupied for over 12 years, a space measuring 0.1402 ha. He therefore claims to have acquired the extra space of 0.0076 ha (over and above the acreage of 0.1326) from the 1<sup>st</sup> Defendant by adverse possession.
97. The law on adverse possession is one of the most litigated law in this country. One may confidently say that the law is well settled.
98. The Court of Appeal in the case of Mtana Lewa v Kahindi Ngala Mwangandi [2005] eKLR, held that: -  
“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years,”
99. Again in the case of Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui [2017] eKLR, the Court of Appeal citing with approval the Indian Supreme Court’s decision in the case of Kamataka Board of Wakf v Government of India & others [2004] 10SCC 779, where the court stated that: -  
“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is peaceful, open and continuous. The possession must be adequate in continuity, in publicity, and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, and hostile and continued over the statutory period.”
100. In the case of Gabriel Mbui v Mukindia Maranya [1993] eKLR Kuloba J (as he then was) enumerated the elements that need to be proved by a party invoking the doctrine of adverse possession as follows;
- a. The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.
  - b. The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.



- c. The occupation of land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupant.
  - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi. that is to say occupation with the clear intention of excluding the owner as well as other people.
  - e. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,
  - f. The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.
  - g. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
101. Though the Plaintiff did not submit on the issue of adverse possession, he neither indicated that he had abandoned his claim based on adverse possession. The court is therefore obligated to make a determination on it.
102. The Plaintiff's pleading and evidence adduced do not support a claim for adverse possession at all. In his plaint, the Plaintiff disclosed that in the year 2007, the 1<sup>st</sup> Defendant's predecessor in title realized that there were anomalies or errors in the titles that he and his neighbours were holding. This culminated in the signing of the Deed of exchange dated 10<sup>th</sup> August, 2009 whereby the parties exchanged the certificate of titles held by the three parties to harmonize the titles possession by each party.
103. The Plaintiff up to the year 2007 according to his own pleadings was not aware that he was occupying a portion of the 1<sup>st</sup> Defendant's parcel of land. He genuinely believed he was occupying his own land. The rightful owner of the claimed land too was not aware that he had been dispossessed by the Plaintiff. How then could the Plaintiff have dispossessed the 1<sup>st</sup> Defendant of his title to the claimed portion while he was not aware that he was in possession of the said portion?
104. The claim for adverse possession in the circumstances of this case cannot succeed.

**B. Whether the Plaintiff has established the legal basis of his claim for the extra portion over and above the acreage under his certificate of title (L.R No. 209/14990/21) and the Deed Plan 244499.**

105. Following the signing of the Deed of Exchange between Immaculate Cheptum Chepkonga, Peter Gichuki King'ara and Stephen Mutuku Nzonzi & Fidelina Mueni Sila, dated 10<sup>th</sup> August, 2009, the Plaintiff exchanged the title he held with Immaculate Cheptum Chepkonga thereby becoming the registered proprietor of L.R. NO. 209/14990/21 delineated on land survey plan 244499.
106. The Plaintiff in his evidence in chief alleged that the Deed of Exchange is not what they had agreed on with the other advocates for the other parties namely Immaculate Cheptum Chepkonga and Stephen Mutuku Nzonzi & Fidelina Mueni Sila. He asserted that what they had agreed on was a Deed of Rectification not the Deed of Exchange. He accused the advocates of swapping the Deed of Rectification with the Deed of Exchange. He referred to the Deed of exchange as a fraud.
107. The Plaintiff's testimony on the swapping of the Deed of rectification and the Deed of Exchange as rightly pointed out by the 1<sup>st</sup> Defendant contradicts his own Plaint where at paragraph 13 where he



stated that, “...the owners of the 3 plots agreed to and indeed executed a Deed of Exchange dated 10<sup>th</sup> August 2009...”.

108. The allegation by the Plaintiff of the swapping of the Deeds can only be termed to be an afterthought. The Plaintiff has not in his plaint pleaded any such allegation. He has not challenged the Deed of Exchange in any way. He has not pleaded fraud; neither has he proved any fraud on the part of the 1<sup>st</sup> Defendant.
109. The Plaintiff as he testified before the court is an advocate of high standing with vast experience in law. I find it improbable that he would have omitted to plead such a critical issue in his pleadings. Even if it had escaped his attention, he had the opportunity to amend his pleadings. He chose not to.
110. The law on the issue of fraud is settled. If the Plaintiff was alleging fraud as he purported to in his evidence in chief, he ought to have specifically pleaded in his Plaint.
111. Tunoi J.A. (as he then was), in the case of Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR stated that:-

“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.”
112. The Court of Appeal in Mombasa Civil Appeal No. 312 of 2012 Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR stated;

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities.”
113. My finding therefore is that, from the evidence before the court, and the Plaintiff’s own pleadings, the parties willfully signed the Deed of Exchange and are bound by it.
114. For emphasis purposes, the Deed of Exchange at paragraph ‘A’ was categorical that, Chepkonga was the registered proprietor of all that piece of land containing by measurement naught decimal one three two six (0.1326) of a hectare of thereabouts being Land Reference number 209/14990/21 delineated on land survey plan 244499.
115. On the other hand, L.R. NO. 209/14990/22 delineated on land survey plan number 244500 measures naught decimal one four naught two (0.1402) of a hectare or thereabouts.
116. Recital ‘5’ of the Deed of Exchange signed by the parties explicitly provided that, “save as aforesaid the terms upon which the titles are held shall continue to be of full force and effect.”
117. The Plaintiff’s parcel of land therefore is “all that piece of land situates in the city of Nairobi in the Nairobi Area containing by measurement naught decimal one three two six (0.1326) of a hectare or thereabout being Land Reference L.R.NO.209/14990/21 delineated on the Land Survey plan 244499.” The Deed Plan No. 244499 accompanying the Plaintiff’s title confirms the Plaintiff’s parcel as measuring 0.1326 ha.



118. Section 7 of the Land Act stipulates 8 methods of acquiring land in Kenya; namely; allocation, land adjudication process, compulsory acquisition, prescription, settlement programs, transmissions, transfers, and long term leases.
119. The Plaintiff if not by prescription, (adverse possession) could only have acquired the 1<sup>st</sup> Defendant's portion of L.R. NO. 209/14990/22 by either transfer or transmission. He has not provided evidence to justify his claim.
120. The Plaintiff has clearly not established the legal basis of the claim for the portion of land belonging to the 1<sup>st</sup> Defendant over and above the acreage under his certificate of title (L.R No. 209/14990/21) and the Deed Plan 244499. The upshot is that the Plaintiff's claim against the 1<sup>st</sup> Defendant fails in its entirety.

### **C. Whether the 1<sup>st</sup> Defendant has established his Counter-claim against the Plaintiff.**

121. It is not in dispute that the 1<sup>st</sup> Defendant is the registered proprietor of L.R. No. 209/14990/22. The Plaintiff in his plaint admits the fact of the 1<sup>st</sup> Defendant's proprietorship of L.R. No. 209/14990/22. That was indeed the basis of his claim for adverse possession against the 1<sup>st</sup> Defendant. At paragraph 16 of his plaint, the Plaintiff pleaded that, "on or about the 6<sup>th</sup> March, 2015, the 1<sup>st</sup> Defendant purchased L.R. No. 209/14990/22 from its former owner Mr. & Mrs. Nzonzi."
122. The 1<sup>st</sup> Defendant, on its part exhibited the certificate of title to the parcel of land L.R. No. 209/14990/22 in its name.
123. A certificate of title under the provisions of Section 26 of the Land Registration Act is prima facie evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner of that land.
124. Consequently, the court finds and declares that the 1<sup>st</sup> Defendant is the absolute and indefeasible owner/proprietor of all that parcel of land known as L.R. NO. 209/14990/22.
125. Registration of a person as the proprietor of land vests in that person the absolute ownership of the land together with all rights and privileges appurtenant thereto, to the exclusion of everyone else. The rights of the proprietor are only subject to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown on the register and to such liabilities, rights and interests, as affect the same and are declared by Section 28 of the Land Registration Act not to require noting on the register.
126. Consequently, the court finds and hold that the 1<sup>st</sup> Defendant is entitled to enjoy quiet and peaceful possession of it land without any interference whatsoever from the Plaintiff or any other person for that matter. The court grants the 1<sup>st</sup> Defendant an order of permanent injunction restraining the Plaintiff from encroaching upon the 1<sup>st</sup> Defendant's parcel of land L.R. NO. 209/14990/22 measuring 0.4102 ha.
127. The 1<sup>st</sup> Defendant's Counter-claim against the 1<sup>st</sup> Defendant therefore succeeds.
128. I would wish to briefly comment on the Plaintiff's prayer (D) in the plaint. The Plaintiff prays for an order directing the Director of Surveys to re-survey L.R. NO. 209/14990/21 and L.R. NO. 209/14990/23 in accordance with the current physical boundaries borne out by the existing masonry wall and to issue new Deed Plans that accord with the current occupation by the Plaintiff.
129. The basis upon which the Plaintiff sought the order is explained at paragraph 11 of his plaint. The Plaintiff alleges that the Director of Survey had erroneously issued Deed Plans that did not conform with the actual position on the ground.



130. The Plaintiff first and foremost did not call any evidence to support the allegation at paragraph 11 of his plaint. Indeed in his testimony before the court, the Plaintiff repeatedly stated the Deed Plans had no issues.
131. Secondly, the Law does not support the issuance of the order sought. Section 31 of the Survey Act, Cap 299 Law of Kenya only allows a grace period of only 12 months for the correction of survey plans from the time they are submitted to the Director of Surveys by a licensed Surveyor.

**D. Whether the Plaintiff has established his claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.**

132. The Plaintiff in his plaint sought an order of mandatory injunction compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to inspect and report to the court the structural soundness, fitness of the existing construction and to enforce the Physical Planning Act and Building Code in regard to open space build up area ratio and to further report on the encroachment by the 1<sup>st</sup> Defendant or other private property whilst constructing.
133. In the case of Gichinga Kibutha v Caroline Nduku [2018] eKLR, the court unequivocally stated:-  
“It is, therefore, settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts.”
134. The burden was upon the Plaintiff to prove the allegations against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Plaintiff failed to demonstrate which statutory obligations that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants failed to perform to justify the issuance of an order mandatory injunction sought against them. Its claim amounts to mere allegations that have not been proved.
135. Secondly, the 2<sup>nd</sup> Defendant rightly challenged this court’s jurisdiction to issue the orders sought by the Plaintiff in view of Section 7 of the Physical Planning Act, 2012 (repealed), which established a Liaison Committee to handle complaints as the one advanced by the Plaintiff. The functions of the committee are stipulated under Section 10 of the Act. The jurisdiction of this court was only appellate.
136. In the same vein, the complaints against NEMA falls within the jurisdiction of the National Environment Tribunal. The Court of Appeal exhaustively addressed this issue in the case of Kibos Distillers Ltd & 4 others v Benson Ambuti Andega & 3 others [2020] eKLR. Makhandia J.A stated that,

“As aptly stated by the Supreme Court in Samuel Kamau Macharia and another - v - Kenya Commercial Bank Ltd and 2 Others (supra), jurisdiction cannot be conferred by way of judicial craft and innovation. Likewise, I state jurisdiction cannot be conferred by the art and craft of counsel or a litigant drawing pleadings to confer or oust the jurisdiction conferred on a Tribunal or another institution by the Constitution or statute.

To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of



other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that in Speaker of the National Assembly v James Njenga Karume [1992] eKLR where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

Further, I observe that the jurisdiction of the ELC is appellate under Section 130 of EMCA. The ELC also has appellate jurisdiction under Sections 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.”

137. It is my finding that in addition to the finding that the Plaintiff did not prove the allegations against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant’s the court has no jurisdiction over the complaints by the Plaintiff against them in the 1<sup>st</sup> instance.

#### **E. What orders should issue as to costs**

138. From the foregoing, the Plaintiffs case against the Defendants fails in its entirety. I dismiss it with costs to the Defendants. As regards the ‘1<sup>st</sup> Defendants’ Counter-claim against the Plaintiff, the same succeeds. I grant the costs the Counter-claim to the 1<sup>st</sup> Defendant against the Plaintiff.

139. Consequently, the Court makes the following orders: -

- a. The Plaintiffs case against the Defendants is dismissed in its entirety with costs to the Defendants.
- b. A declaration be and is hereby made that the 1<sup>st</sup> Defendant is the bona fide registered proprietor of the suit property L.R. NO. 209/14990/22 measuring 0.1402 ha.
- c. An order of permanent injunction be and is hereby issued restraining the Plaintiff by himself, his servants, agents and or any of them from encroaching upon the suit property L.R. NO. 209/14990/22 measuring 0.1402 ha either by alienating, disposing off, subdividing, constructing upon, fencing or otherwise interfering in any manner with the 1<sup>st</sup> Defendant’s right to enjoy quiet and peaceful possession of the land.
- d. The 1<sup>st</sup> Defendant shall have the costs the Counter-claim against the Plaintiff.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24\*TH DAY OF SEPTEMBER, 2024.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Ms. Kimere for the Plaintiff

Mr. Kariuki for the 1<sup>st</sup> Defendant



Ms. Mitema for the 2<sup>nd</sup> Defendant

N/A by the 3<sup>rd</sup> Defendant

Court Assistant: Yvette

**M.D. MWANGI**

**JUDGE**

