**Ivati v Kitaka & another (Environment and Land Case Civil Suit E387 of 2022) [2024] KEELC 7446 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7446 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT AND LAND CASE CIVIL SUIT E387 OF 2022**

**JO MBOYA, J**

**OCTOBER 31, 2024**

**BETWEEN**

**ESTHER NZILANI IVATI ..... PLAINTIFF**

**AND**

**DOMINIC MAINGI KITAKA ..... 1ST DEFENDANT**

**FRANCIS KITUMBU MAINGI ..... 2ND DEFENDANT**

## JUDGMENT

### Introduction

1. The Plaintiff commenced the instant suit vide Plaint dated the 17th November 2022 and in respect of which same [Plaintiff] sough for various reliefs touching on and concerning Plot No. 176 (Gekonyo Maringo Housing Co. Limited) New No. 31/25/58 [hereinafter referred to as the suit property].

2. Subsequently, the Plaintiff filed an amended Plaint and in respect of which the Plaintiff impleaded the following reliefs [verbatim]:

    a. That this Honourable Court makes a declaration that the Plaintiff is the rightful owner of all that parcel of land Plot No. 176 (Gekonyo Maringo Housing Co. Limited) New No. 31/25/58.

    b. That a permanent injunction be issued restraining the 1st Defendant from entering, encroaching, trespassing or in any way interfering with the Plaintiff's land Plot No. 176 (Gekonyo Maringo Housing Co. Limited) New No. 31/25/58 Filed on: - No Paid- - BY: Vusha Onsembe & Mambiri Compay Advovates - Reference: E3JFQ9BM - KSH. 0.00.

    c. That this Honourable Court do issue an order directing the 1st Defendant to, at his own costs move from the Applicant's land Plot No. 176(Gekonyo Maringo Housing Co. Limited) New No. 31/25/58.

d. That an order be and is hereby issued upon the OCS Lucky Summer to ensure compliance.

e. General and aggravated damages for trespass.

f. Costs of this suit.

g. Any other relief that this Honourable Court may deem fit to grant

3. Upon being served with the Plaint and summons to enter appearance, the 1st Defendant duly entered appearance and filed a statement of defence dated the 19th May 2023. Nevertheless, the statement of defence was thereafter amended resting with the statement of defence and counterclaim dated the 19th September 2023. For good measure, the counterclaim on behalf of the 1st Defendant has sought for the following reliefs;

a. An order for specific performance by the 2nd Defendant.

b. The 2nd Defendant be compelled to reimburse the 1st Defendant (Plaintiff in the Counterclaim) the total cost of the construction at today's market rates at Ksh.1,500,000/- plus a nominal amount for loss of opportunity cost together with Ksh.5,000/- deposited by the 1st Defendant plus interest from the date of deposit until payment in full.

c. Costs of this suit.

d. Any other relief that this Honourable Court may deem fit and just to grant.

4. Other than the foregoing, the 2nd Defendant duly entered appearance and filed a statement of defence dated the 3rd October 2023. Instructively, the 2nd Defendant denied the claims by and on behalf of the 1st Defendant. In particular, the 2nd Defendant denied the contention that same [2nd Defendant] had sold his portion of the suit property, namely, plot number 176B to the 1st Defendant.

5. Suffice it to point out that the instant matter came up for pretrial directions on the 8th February 2024 whereupon the advocates for the parties confirmed that same had filed and exchanged all the requisite pleadings; list and bundle of documents and the witness statement. In this regard, the advocates posited that the matter was thus ready for hearing.

6. Arising from the foregoing, the court proceeded to and confirmed the matter as being ready for hearing. Besides, the court ventured forward and fixed hearing dates in respect of the matter.

**Evidence by the Parties**

**Plaintiff's Case**

7. The Plaintiff's case is anchored and premised on the evidence of four [4] witnesses, namely, Esther Nzilani Ivati, Joel Guthi Mutunga, Johnathan Kitema Musimi and Willy Mutua Kitema. Same testified as PW1, PW2, PW3 and PW4, respectively.

8. It was the evidence of PW1 [Esther Nzilani Ivati] that same is the Plaintiff in respect of the instant matter. In this regard, the witness []PW1] averred that by virtue of being the Plaintiff in respect of the matter, same [witness] is therefore conversant with the facts of the case.

9. It was the further testimony of the witness [PW1] that same has since recorded a witness statement in respect of the instant matter. To this end, the witness adverted to the witness statement dated the 15th September 2023 and thereafter sought to adopt and rely on the contents of the said witness statement.

Instructively, the witness statement was thereafter adopted and constituted as the evidence in chief of the witness.

10. Additionally, the witness alluded to a list and bundle of documents dated the 15th September 2023, containing a total of 8 documents. Thereafter, the witness implored the court to adopt and admit the documents as exhibits on behalf of the Plaintiff.

11. There being no objection to the admission of the various documents, same [documents] were produced and marked as Plaintiff exhibits P1 to P8 respectively.

12. Other than the foregoing, the witness intimated to the court that same has filed an amended Plaint dated the 17th July 2023 and thereafter sought to adopt and rely on the contents of the amended Plaint. Furthermore, the witness also invited the court to proceed and grant the various reliefs highlighted at the foot of the amended Plaint.

13. On cross examination by learned counsel for the 1st Defendant, the witness [PW1] averred that same purchased plot number 176 [the suit property] from Francis Kitumbu Maingi and Another, namely, Willy Kitema.

14. It was the testimony of the witness that Willy Kitema sold unto her [witness] a portion of the suit property, namely, plot number 176A whereas the 2nd Defendant sold unto her the portion, namely, plot number 176B.

15. It was the further testimony of the witness that upon completion of the purchase price, same [witness] entered into a composite sale agreement with both the 2nd Defendant and Willy Kitema. In this regard, the witness adverted to the sale agreement dated the 14th April 2014.

16. Whilst under further cross examination, the witness averred that even though same [witness] concluded the payment of the purchase price, same [witness] did not take possession of the suit property immediately.

17. Furthermore, it was the testimony of the witness that same bought the 2nd portion of the suit property, namely, plot number 176B in the year 2009. In particular, the witness testified that the portion, namely, plot number 176B was bought from the 2nd Defendant.

18. On cross examination by learned counsel for the 2nd Defendant, the witness averred that the sale agreement for the purchase of the entirety of the suit property contained the names of the 2nd Defendant and Willy Kitema. Nevertheless, the witness clarified that the two [2] portions of the suit property were bought at separate times.

19. It was the further testimony of the witness that even though same bought the suit property, same [witness] did not enter upon the suit property immediately.

20. On re-examination by learned counsel for the Plaintiff, the witness averred that at the time when same [witness] purchased plot number 176B, the 1st Defendant was in occupation thereof. However, the witness added that the said plot belonged to and was owned by the 2nd Defendant.

21. Other than the foregoing, the witness testified that before entering into and executing the sale agreement with the 2nd Defendant and Willy Kitema, same [witness] undertook due diligence including procuring a copy of the share certificate showing that the land belonged to and was registered in the names of the 2nd Defendant and Willy Kitema.

22. In addition, it was the testimony of the witness that the portion of land namely plot number 176B contains some temporary structures. However, the witness averred that same enquired from the 2nd

Defendant as pertains to ownership of the temporary structure[s] and the 2nd Defendant intimated that the temporary structure[s] belonged to him [2nd Defendant].

23. The 2nd witness who testified on behalf of the Plaintiff was one John Guthi Mutunga. Same testified as PW2.

24. It was the testimony of the witness that same is conversant with the facts of this case. The witness averred that the Plaintiff herein is his aunt. Furthermore, it was the testimony of the witness herein that the Plaintiff invited and involved him [PW2] in matters pertaining to the suit property when a meeting was summoned by the area chief.

25. On the other hand, the witness averred that same has since recorded a witness statement in respect of the matter. In this regard, the witness sought to adopt and rely on the contents of the witness statement dated the 18th September 2023. Suffice it to state that the witness statement was thereafter adopted and constituted as the evidence in chief of the witness.

26. On cross examination by learned counsel for the 1st Defendant, the witness [PW2] averred that same was not involved in the matter during the time when the property was being purchased. However, the witness added that same got involved in the matter when the Plaintiff and the 1st Defendant were summoned to appear before the area chief. In this regard, the witness averred that same [witness] proceeded to and accompanied the plaintiff to the offices of the chief.

27. Whilst under further cross examination, the witness averred that the meeting before the chief was attended by the Plaintiff, the 1st Defendant, himself [witness] and other persons. In addition, the witness averred that the meeting before the area chief discussed the issues pertaining to and concerning the suit property.

28. It was the further testimony of the witness that during the proceedings before the chief, the 1st Defendant herein conceded that the land in question [suit property] belongs to the Plaintiff. Besides, the witness stated that the 1st Defendant sought to be granted 60 days to enable same [1st defendant] to vacate and hand over vacant possession of the suit property.

29. Additionally, it was the testimony of the witness that the proceedings before the chief were reduced into writing and same [proceedings] were signed by both the Plaintiff and the 1st Defendant. Similarly, the witness averred that the proceedings and the resultant agreement were also witnessed by various witnesses.

30. On further cross examination, the witness averred that the suit property lawfully belongs to the Plaintiff. Nevertheless, the witness added that despite the fact that the suit property belongs to the Plaintiff, the 1st Defendant has failed and or refused to hand over vacant possession to the Plaintiff.

31. It was the further testimony of the witness that same [witness] was present when the proceedings and the agreement before the chief were being written. In this regard, the witness averred that same [witness] is therefore conversant with the facts of the case.

32. Whilst still under cross examination, the witness [PW2] averred that during the proceedings before the chief, the 1st Defendant herein agreed and acknowledged that the suit property belongs to the Plaintiff. Besides, the witness averred that the 1st Defendant sought to be granted 60 days to enable him [1st Defendant] to arrange and vacate the suit property.

33. On re-examination, by learned counsel for the Plaintiff, the witness averred that the meeting in question was called and organized by the chief. The witness also added that the purpose of the meeting

was to address the land dispute between the Plaintiff on one hand and the 1st Defendant on the other hand.

34. On further re-examination, the witness averred that despite seeking 60 days to enable same to vacate, the 1st Defendant has failed to vacate. In any event, the witness added that the 1st Defendant is still on the suit property.

35. The third [3rd] witness who testified on behalf of the Plaintiff was one Johnathan Kitema Musimi. Same testified as PW3.

36. It was the testimony of the witness that same is knowledgeable of the facts pertaining to the suit property. In any event, the witness averred that the suit property was purchased by himself [PW3] and thereafter registered in the names of Willy Kitema [who is his son] and the 2nd Defendant herein.

37. Furthermore, the witness also averred that same has since recorded a witness statement in respect of the instant matter. In this regard, the witness has adverted to the witness stated dated the 15th September 2023 and which statement the witness sought to adopt as his evidence in chief.

38. Suffice it to underscore that the witness statement dated the 15th September 2023 was thereafter adopted and constituted as the evidence in chief of the witness.

39. On cross examination, by learned counsel for the 1st Defendant, the witness [PW3] averred that it is him [witness] who bought/purchased the suit property. Furthermore, the witness added that after buying the suit property same [witness] caused the suit property to be registered in the names of Willy Kitema and the 2nd Defendant herein.

40. Whilst under further cross examination, the witness averred that later on Willy Kitema approached him [witness] and sought his permission to sell his [Willy Kitema's] portion of the suit property. In this regard, the witness testified that same proceeded to and granted permission to Willy Kitema.

41. It was the further testimony of the witness that when Willy Kitema sold his [Willy Kitema's] portion same [witness] was present.

42. On re-examination, the witness averred that same is aware that the entire suit property was sold to the Plaintiff. In addition, it was the testimony of the witness that same was present when the land was bought by the Plaintiff.

43. The fourth witness who testified on behalf of the Plaintiff was one Willy Mutua Kitema. Same testified as PW4.

44. It was the testimony of the witness that same is conversant with the facts of this matter. In any event, the witness averred that same [witness] was previously the owner of plot number 176B and which plot was thereafter sold and transferred to the Plaintiff.

45. By virtue of having been the registered proprietor of plot number 176B and which plot was thereafter sold to the Plaintiff, the witness averred that same [witness] is therefore conversant with the facts of this case.

46. Other than the foregoing, the witness averred that same has since recorded a witness statement. In this regard, the witness sought to adopt and rely on the witness statement dated the 15th September 2023. For good measure, the witness statement dated the 15th September 2023 was thereafter adopted and constituted as the evidence in chief of the witness.

47. On cross examination, by learned counsel for the 1st Defendant, the witness averred that what constitutes the suit property belonged to both the 2nd Defendant and himself [witness]. In particular, the witness added that the 2nd Defendant owned plot number 176B whilst him [witness] owned plot number 176A.

48. It was the further testimony of the witness that both the 2nd Defendant and himself sold their respective portions to and in favour of the Plaintiff. In this regard, the witness clarified that the land in question belongs to the Plaintiff.

49. It was the further testimony of the witness that prior to the sale of his [witness] portion of the suit property to the Plaintiff, both himself [witness] and the 2nd Defendant had commenced to lay a foundation for the construction of residential/rental units. However, the witness posited that same [witness] ran out of money and thereafter sought to sell his portion of the suit property.

50. On the other hand, it was the testimony of the witness that the 2nd Defendant proceeded with the transaction of temporary/temporary units of his portion of the land. Furthermore, the witness averred that after completion of some of the temporary structures, the 2nd Defendant allowed the 1st Defendant to enter upon and stay in one of the structures.

51. Additionally, it was averred that the 1st Defendant was allowed to enter upon and take possession of the temporary structure on the 2nd Defendant's portion of land, because the 2nd Defendant had retired and gone home. In this regard, it was stated that the 1st Defendant was to assist with rents collection and remittance to the 2nd Defendant.

52. It was the further testimony, of the witness that the 1st Defendant does not have any lawful claims to and in respect of the suit property.

53. On cross examination by learned counsel for the 2nd Defendant, the witness averred that same [witness] is aware that the 2nd Defendant sold his [2nd Defendant's share] in the suit property. In any event, it was averred that the sale between the 2nd Defendant and the Plaintiff herein was duly reduced into writing.

54. With the foregoing testimony, the Plaintiff's case was closed.

**1ST Defendants Case**

55. The 1st Defendant's case revolves and gravitates around the evidence of three[3] witnesses, namely, Domnic Maingi Kitaka, Michael Kioko Ndunda and Muthembwa Maingi. Same testified as DW1, DW2 and DW3, respectively.

56. It was the testimony of the witness [DW1] that same is the 1st Defendant in respect of the instant matter. In this regard, the witness averred that by virtue of being the 1st Defendant, same [witness] is therefore conversant with the facts of the case.

57. It was the further testimony of the witness that same has since recorded a witness statement in respect of the instant matter. In this regard, the witness adverted to the statement dated the 15th September 2023. Instructively, the witness sought to adopt and rely on the contents of the said witness statement.

58. There being no objection to the adoption and reliance on the contents of the witness statement, same [witness statement] was admitted and constituted as the evidence in chief of the witness.

59. Other than the foregoing, the witness also adverted to a list and bundle of documents dated the 19th May 2023. In this regard, the witness sought to tender and produce the documents as exhibits before the court.

60. There being no objection to the production of the documents, the document[s] were thereafter admitted as exhibits D1 to D8, respectively on behalf of the 1st Defendant.

61. Other than the foregoing, the witness averred that same also filed a statement of defence and counterclaim dated the 18th September 2023. In this regard, the witness sought to adopt and rely on the contents of the statement of defence and counterclaim.

62. On cross examination by learned counsel for the 2nd Defendant, the witness averred that same [witness] had an agreement with Francis Kitumbu Mainge. Nevertheless, the witness confirmed that the sale agreement was never reduced into writing.

63. Whilst still under cross examination, the witness averred that the sale agreement was not reduced into writing because the 2nd Defendant was/his brother. At any rate, the witness testified that the verbal agreement between the 2nd Defendant and himself was witnessed by a witness.

64. Whilst under further cross examination, the witness averred that the witness who was present when the 2nd Defendant and himself were negotiating the sale agreement is not one of his witnesses before the court.

65. It was the further testimony of the witness that the sale agreement indicated that the sale price was agreed at kes.200, 000/= only. Nevertheless, the witness added that the witness who was present at the time of the negotiations is one of his witnesses in the matter.

66. On further cross examination, it was the testimony of the witness that after entering into a verbal agreement, the 2nd Defendant allowed same [witness] to commence the construction of assorted housing units which are temporary in nature.

67. Additionally, the witness averred that same also entered upon and took possession of the position that was sold by the 2nd Defendant. Besides, it was averred that the structure which were sitting on plot number 176B were constructed by the himself [1st Defendant].

68. Other than the foregoing, the witness herein also alluded to a sale agreement, which same [witness] has tendered before the court. However, the witness pointed out that the said sale agreement did not relate to plot number 176B. Furthermore, the witnesses also averred that the same [Sale agreement] was also not signed by any one

69. Whilst still under cross examination, the witness averred that plot number 176B belonged to the 2nd Defendant. However, the witness added that the 2nd Defendant sold the land to him [witness].

70. Additionally, it was the testimony of the witness that arising from the mutual arrangement/ understanding between the 1st Defendant and himself same [witness] paid to the 2nd Defendant the sum of kes.5. 000/= only on account of part of the purchase price.

71. Nevertheless, the witness clarified that other than the 5, 000 only, adverted to, same [witness] has not paid any other monies to the 2nd Defendant. On the other hand, it was the testimony of the witness that both the Plaintiff and himself [witness] were summoned before the chief. Furthermore, the witness added that both the Plaintiff and himself thereafter appeared before the chief and the dispute over the suit property was heard.

72. Whilst under further cross examination, the witness testified that the proceedings before the chief were reduced into writing. Besides, the witness acknowledged that it is him [DW1] who recorded the proceedings and the resultant agreement before the chief.

73. Additionally, the witness averred that during the proceedings before the chief, same [witness] acknowledged that the land belongs to the Plaintiff. Furthermore, the witness added that same also conceded that he [witness] would vacate and hand over vacant possession of the suit property within 60 days from the date of the agreement before the chief.

74. Be that as it may, the witness has averred that same [DW1] continues to occupy and reside on a portion of the suit property.

75. On cross examination by learned counsel for the Plaintiff, the witness averred that same has sued the Plaintiff herein as the 2nd Defendant to the counterclaim. Furthermore, the witness averred that same has sued the Plaintiff because the Plaintiff is claiming the portion of the suit property which is currently occupied by himself.

76. Whilst under further cross examination, the witness averred that he [witness] is aware that same had filed another suit against the Plaintiff herein. In any event, the witness testified that the said suit was subsequently dismissed by the court.

77. It was the further testimony of the witness that during the proceedings before the chief, same [witness] had agreed to vacate the suit property within 60 days. Furthermore, the witness averred that the agreement before the chief was recorded by himself.

78. Be that as it may, the witness has averred that despite the terms of the agreement, same [witness] is still in occupation of plot number 176B.

79. It was the further testimony of the witness that though he recorded/wrote the agreement before the chief, same [witness] was forced to record the said agreement. Nevertheless, the witness added that the issue of being forced to sign the said agreement has not been alluded to at the foot of his witness statement.

80. On the other hand, the witness has averred that same [witness] has also not challenged the validity or propriety of the agreement that was made before the area chief.

81. On re-examination by learned counsel for the 1st Defendant, the witness averred that the purchase price was agreed at kes.200, 000/= only. However, the witness added that out of the agreed purchase price, same [witness] has only paid kes.5, 000/= only.

82. In addition, the witness averred that subsequently, he [witness] has endeavoured to pay the balance of the purchase price to the 2nd Defendant. However, it was posited that the 2nd Defendant has declined to receive the balance of the purchase price or at all.

83. Other than the foregoing, the witness averred that it is him [witness] who constructed the temporary structures on the portion of the suit property. In any event, the witness added that the 2nd Defendant was privy to and knowledgeable of the construction that were being done by himself [witness].

84. The second witness who testified on behalf of the 1st Defendant was one Michael Kioko Ndunda. Same testified as DW2.

85. It was the testimony of the witness [DW2] that same resides on a portion of the suit property.

86. Owing to the fact that same resides on a portion of the suit property same [Witness] has averred that same is conversant wit the facts of this matter.

87. On the other hand, the witness averred that same has since recorded a witness statement in respect of the instant matter. In any event, the witness sought to rely on the contents of the witness statement dated the 19th May 2023.

88. There being no objection to the adoption of the witness statement, same was duly adopted and constituted as the evidence in chief of the witness [DW2].

89. On cross examination, by learned counsel for the 2nd Defendant, the witness stated that same [witness] has been residing on a portion of the suit property between the years 2008 upto 2012. It was the evidence of the witness that when same resided on a portion of the suit property, same knew that the land belongs to the 1st Defendant.

90. Whilst under further cross examination, the witness averred that he was privy to and knowledgeable of the arrangements/mutual understanding between the 1st Defendant and 2nd Defendants as pertains to the sale of plot number 176B to the 1st Defendant. For good measure, the witness averred that same witnessed the arrangements.

91. Whilst still under cross examination, the witness averred that the arrangement[s] was verbal and same was not reduced into writing. Furthermore, the witness stated that the arrangement[s] was entered into at Baba Dogo Area in Nairobi.

92. It was the further testimony of the witness that during the arrangement between the 1st and 2nd Defendants, it was agreed that the purchase price would be kes.200, 000/- only.

93. Be that as it may, it was the testimony of the witness that even though the sale price was agreed at kes.200, 000/= only, same [witness] did not see/witness any monies being paid out.

94. On cross examination by learned counsel for the Plaintiff, the witness averred that though same is testifying before the court he [witness] does not understand the nature of the dispute before the court. Furthermore, the witness added that same has never encountered / met the Plaintiff herein.

95. The third witness who testified on behalf of 1st Defendant was one Muthembwa Maingi. Same testified as DW3.

96. It was the testimony of the witness [DW3] that same is conversant with the facts of this matter. Furthermore, the witness added that same has since recorded a witness statement pertaining to and concerning his knowledge of the issues in dispute. In this regard, the witness [DW3] has averred that witness statement is dated the 18th September 2023.

97. Suffice it to point out that the witness thereafter implored the court to adopt the witness statement and constitute same as his [witness] evidence in chief. There being no objection, the witness statement was adopted and admitted as the evidence in chief of the witness.

98. On cross examination, by learned counsel for the 1st Defendant, the witness averred that same was present when the 1st and 2nd Defendants were negotiating the purchase price in respect of plot number 176B. In addition, it has been posited that the witness was also given money to take to the 2nd Defendant. In this regard, the witness stated that thereafter he [witness] took the money to the 2nd Defendant.

99. Whilst under further cross examination, the witness averred that the money which same had been given to take to the 2nd Defendant was towards part payment of the purchase price.

100. It was the further testimony of the witness that same [witness] was not present when the 1st Defendant entered into the verbal agreement.

101. With the foregoing testimony, the 1st Defendant's case was duly closed.

**The 2nd Defendants case**

102. The 2nd Defendant's case revolves around the evidence of one witness, namely, Fracis Kitumbu Maingi. Same testified as DW4.

103. It was the testimony of the witness [DW4] that same is the 2nd Defendant in respect of the instant matter. In this regard, the witness averred that by virtue of being the 2nd Defendant, same is therefore conversant with the facts of this matter. In any event, the witness has averred that the contents of the witness statement speak to the facts pertaining to the dispute beforehand.

104. Arising from the foregoing, the witness sought to adopt the witness statement dated the 3rd October 2023. Suffice it to posit that the witness statement dated the 3rd October 2023 was thereafter adopted and constituted as the evidence in chief of the witness.

105. On the other hand, the witness alluded to a list and bundle of documents containing assorted documents and which documents the witness sought to tender and produce before the court. In this regard, the documents at the foot of the list dated the 3rd October 2023 were thereafter admitted and constituted as Defence exhibits 1 to 13, respectively on behalf of the 2nd Defendant.

106. Additionally, the witness has also adverted to the witness statement dated the 3rd October 2023; and sought to rely on same. Suffice it to posit that the contents of the said statement of defence were duly admitted by the court.

107. On cross examination by learned counsel for the Plaintiff, the witness averred that plot number 176 was sold to the Plaintiff by both the 2nd and Defendant and Willy Mutua Kitema. In any event, the witness confirmed that same is the one who sold the suit plots to the Plaintiff.

108. On the other hand, the witness averred that same did not sell the suit property to the 1st Defendant. However, the witness clarified that same [witness] allowed the 1st Defendant to reside on a portion of the suit property. Furthermore, it was contended that the purpose why the 1st Defendant was allowed onto the land was to enable the 1st Defendant help the 2nd Defendant in the collection of rents.

109. Nevertheless, it was the testimony of the witness that same [witness] did not sell any portion of the suit property to the 1st Defendant. Furthermore, it was the testimony of the witness that same developed/ constructed on a portion of his plot. For good measure, the witness averred that the 1st Defendant did not construct any of the temporary structures on the suit property.

110. Whilst under cross examination, the witness averred that same [witness] had sold his share of the suit plot to the Plaintiff. In this regard, the witness reaffirmed that the Plaintiff is the lawful proprietor of the suit property.

111. On re-examination, the witness averred that the suit property was voluntarily sold to and registered in favour of the Plaintiff. Further and in addition, the witness testified that the Plaintiff fully paid the purchase price which was agreed upon by the parties.

112. Whilst under further re-examination, the witness averred that the 1st Defendant has no lawful rights to and in respect of the suit property. To the contrary, the question beforehand relates to the Plaintiff's land.

113. With the foregoing testimony, the 2nd Defendant's case was duly closed.

**Parties Submissions**

114. Following the conclusion of the hearing, the advocates for the respective parties covenanted to file and serve written submissions. In this regard, the court thereafter proceeded to and circumscribed the timeline[s] for the filing and exchange of the Written Submissions.

115. To start with, learned counsel for the Plaintiff filed written submissions dated 4th July 2024 and wherein same adverted to and highlighted three [3] salient issues for consideration and determination by the court. For coherence, learned counsel for the Plaintiff canvassed the issues namely, who is the legal and rightful owner of plot 176B; whether the 1st Defendant is a trespasser on plot number 176B and whether the Plaintiff is entitled to the remedy sought at the foot of the amended Plaint.

116. On the other hand, the 1st Defendant filed written submissions dated the 6th August 2024 and in respect of which the 1st Defendant has highlighted four [4] pertinent issues including whether the 2nd Defendant has a valid title over the suit property; whether the 2nd Defendant had the capacity to pass title to and in favour of the Plaintiff; whether the 1st Defendant has any lawful interests over the suit property and whether the 1st Defendant is entitled to the remedy sought.

117. Other than the foregoing, the 2nd Defendant filed written submissions dated the 22nd July 2024 and wherein counsel for the 2nd Defendant has highlighted three[3] issues, namely whether there exists a valid contract for the sale of land between the 2nd and 1st Defendant; whether an order for specific performance can be issued by the court and whether the 2nd Defendant can be compelled to refund the sum of Kes.1, 500, 000/= only plus nominal damages to the 1st Defendant.

118. Suffice it to underscore that the three [3] sets of written submissions [whose details have been highlighted in the preceding paragraphs], form part of the record of the court. In this regard, the contents of the written submissions shall be taken into account/ consideration in an endeavour to resolve some of the issues canvassed herein.

119. Nevertheless, it is worthy to point out that even though the court has not rehashed and/or reproduced the contents of written submissions filed by the parties, the failure to reproduce same [written submissions] is not informed by any contempt or at all. To the contrary, the court wishes to state that same [court] is hugely indebted to the advocates for the respective parties for the comprehensive and incisive submissions rendered on behalf of the parties.

120. To this end, allow me to express my gratitude to the advocates for the parties.

**Issues for Determination**

121. Having reviewed the pleadings filed and on behalf of the parties, the responses thereto and the written submissions filed by the advocates for the respective parties, the following issues emerge[ crystalise] and are thus worthy of determination;

    i. Whether the 2nd Defendant lawfully entered into and executed a sale agreement with the Plaintiff and if so, whether the Plaintiff acquired/accrued lawful rights to and in respect of the suit property.

    ii. Whether the 1st Defendant [sic] purchased and acquired any lawful rights to the suit property or any portion thereof.

    iii. What remedies, if any are available to the parties.

**Analysis and Determination**

**Issue Number 1**

Whether the 2nd Defendant lawfully entered into and executed a sale agreement with the Plaintiff and if so, whether the Plaintiff acquired/accrued lawful rights to and in respect of the suit property.

122. The suit property herein, namely, plot number 176B was initially bought and/or purchased by one Johnathan Musimi kitema. Same tested as PW3. According to the said witness, same bought the entire of what constitutes the suit property and thereafter proceeded to and registered same in the names of the 2nd Defendant and one Willy Mutua Kitema.

123. On the other hand, it was the testimony of PW3 that one Willy Mutua Kitema [PW4], later on developed a desire to sell and dispose of his [Willy Mutua Kitema's portion]. In this regard, the said Willy Kitema proceeded to and involved PW3.

124. It was the further testimony of PW3 that arising from the sale of a portion of the suit property to and in favour of the Plaintiff, the Plaintiff herein acquired and accrued lawful rights to and in respect of the suit property.

125. Other than the foregoing, it is also imperative to underscore that the portion of the suit property namely, plot number 176A was thereafter registered to and in favour of the Plaintiff.

126. On the other hand, evidence was also tendered that the 2nd Defendant also developed an interest to sell and dispose of the remainder portion of the suit property. For coherence, the remainder portion of the suit property, which was being adverted to, is what constitute plot number 176B.

127. Be that as it may, evidence was tendered that upon full payment of the purchase price/consideration, the 2nd Defendant and Willy Mutua Kitema [PW4] entered into and executed a composite sale agreement, which varied the previous acknowledgements over and in respect of the suit property.

128. Suffice it to underscore that the agreement which was entered into and executed by Willy Mutua Kitema and the 2nd Defendant on one hand and the Plaintiff on the other hand, vested all the rights to and in respect of the suit property in favour of the Plaintiff.

129. Instructively, both DW3 and DW4, are on record as confirming that the suit property was lawfully sold to and transferred in favour of the Plaintiff. In this regard, it was posited that the Plaintiff herein is therefore the lawful and legitimate proprietor of the suit property.

130. Other than the foregoing, the 1st Defendant contended that plot number 176B was lawfully sold unto him. In this regard, the 1st Defendant has therefore contended that the suit property having been sold unto him, same [1st Defendant] is therefore the lawful owner of plot number 176B.

131. Having considered the rival submissions filed by the parties, I wish to take to take the following position. Firstly, there is no gainsaying that plot number 176 [hereinafter referred to as the original property], belonged to and was registered in the name of Johnathan Musimi Kitema. [PW3].

132. Subsequently, PW3 sought to and subdivided plot number 176 into two portions culminating into the creation of plot numbers 176A and 176B, respectively. Thereafter plot number 176A was allocated/given to Willy Mutua Kitema. On the other hand, plot number 176B was given to the 2nd Defendant.

133. First forward, Willy Mutua Kitema sought to sell and transfer his portion of the suit property, namely plot number 176A, to and in favour of the Plaintiff. In this regard, plot number 176A was thereafter sold and transferred to the Plaintiff.

134. Other than the foregoing, it is also not lost on this court that the 2nd Defendant also sought to sell and transfer of the suit plot, namely, plot number 176A to the Plaintiff. In this regard, the 2nd Defendant duly entered and executed various agreements and acknowledgements.

135. Additionally, it is worth pointing out that the 2nd Defendant and Willy Mutua Kitema, respectively entered into and executed a final sale agreement dated the 14th April 2014. In this regard, the 2nd Defendant and Willy Mutua Kitema unanimously confirmed that same had sold the entire of the suit property to the Plaintiff.

136. Suffice it to posit that both PW3 and PW4 confirmed that the suit property lawfully belongs to and is the property of the Plaintiff.

137. Taking into account the totality of the evidence and coupled with the fact that the 2nd Defendant and Willy Mutua Kitema, respectively were the previous owners and coupled with the confirmation that the suit property was sold to the Plaintiff, there is no gainsaying that the Plaintiff herein is indeed the lawful and legitimate owner of the suit property.

138. At any rate, it is worth recalling that the Plaintiff herein has tendered and produced plausible, credible and cogent evidence underpinning the process that was deployed towards and in respect of the acquisition of the suit property.

139. To this end, I beg to adopt and reiterate the holding of the Court of Appeal in the case of *Munyu Maina versus Hiram Gathiha Maina (Civil Appeal 239 of 2009*) [2013] KECA 94 (KLR) (10 December 2013) (Judgment), where the court of appeal stated and held as hereunder;

> " We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony.

140. The importance of process in the acquisition, transfer and registration of a landed property in favour of the Claimant was also elaborated by the court in the case of Hubert L. Martin,Cyril Odemdo & Facet Khaemba versus Margaret J. Kamar,Damaris Lenayara,Eileen Kendagor,Mary Kaparo,Maendeleo Ya Wanawake & Commissioner of Lands (Environment & Land Case 98 of 2012) [2016] KEELC 1092 (KLR) (18 February 2016) (Judgment).

141. For coherence, the court underscored the threshold in the following terms;

> 31. A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root.

> No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.

142. Flowing from the foregoing analysis, there is no gainsaying that the Plaintiff has established and demonstrated that same [Plaintiff] is the lawful owner and/or proprietor of the suit property. In any event, the propriety and validity of the Plaintiff's title has been vindicated by the 2nd Defendant and Willy Mutua Kitema, respectively.

143. On the other hand, and taking into account that the Plaintiff is undeniably the lawful owner and proprietor of the suit property, there is no gainsaying that the Plaintiff is entitled to partake of and benefit from the rights and privileges attendant to ownership of the suit property. To this end, the court reference[s] the provisions of Sections 24 and 25 of the *Land Registration Act*, 2012.

144. Given the significance of the said provisions, it suffices to cite and reference same. In this regard, the said provisions are reproduced as hereunder;

> 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. Rights of a proprietor.
>
> 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.

145. To the extent that the Plaintiff is vested and bestowed with the rights and interests over the suit property, it suffices to point out that the scope of the rights which inhere in the Plaintiff entitle[s]

the Plaintiff to absolute and exclusive occupation, possession and use of the designated property. Consequently and in this regard, the Plaintiff herein is entitled to vacant possession.

146. As concerns the extent and scope of the rights of a land owner, the Plaintiff not excepted, its suffices to take cognizance of the holding in the case of *Mohansons (Kenya) Limited v Registrar of Titles, Mary Murtazza Ondatto & Attorney General (Petition 103 of 2012*) [2017] KEELC 2730 (KLR) (6 June 2017) (Ruling), where the court held thus;

> 17 The petitioner as a registered proprietor of the suit property has established a strong prima facie case for the grant of the reliefs for the protection of his property rights sought in the petition. I do not agree that the petition is about ownership of the suit property which should be determined by a civil suit rather than by petition for protection of property rights. Having perused petition, I do not accept that the petitioner has violated the rule of specificity of pleading constitutional claims as propounded by Anerita Karimi Nejru v. A.G No. 1 (1979) KLR 154. The petitioner as registered proprietor asserts his constitutional right to protection of property under Article 40 of *the Constitution*. If he 2nd Respondent contends that the title of the petition is vitiated by fraud, misrepresentation or the certificate of title is illegal, unprocedural or obtained through a corrupt scheme, it is for the said respondent to move the appropriate Court by suitable proceedings in that behalf for such determination. In the absence and prior to any such determination, the petitioner is entitled to protection of his undoubted property rights.
>
> (18) As held by the Court of Appeal for East Africa held in Moya Drift Farm Ltd. v. Theuri (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property. Spry, V-P at 116, considered the effect of section 23 of the Registration of Titles Act and held –
>
> > "I cannot see how a person could possibly be described as "the absolute and indefeasible owner" of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession."
>
> Sir William Duffus, P. ibid at p.117 agreed with Spry, JA as follows:
>
> > " In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land."
>
> The third member of the Court, Lutta, JA agreed with the judgment prepared by the Spry, V-P.

147. In a nutshell, my answer to issue number one [1] is threefold. Firstly, the Plaintiff has ably demonstrated the process that same sought to procure and obtain the suit property. In any event, the undisputed previous owners of the suit plot have vindicated the propriety and validity of the Plaintiffs title.

148. Secondly, though the 1st Defendant has also laid a claim to the suit property or better still the portion comprising plot number 176B, there is no gainsaying that the 1st Defendant has neither placed nor tendered before the court any cogent reason to underpin his claim to the suit property.

149. Thirdly, the registered owner and/or proprietor of a landed property is legally entitled to recover and enjoy the rights to and in respect of the landed property to the exclusion of all and sundry. [See the decision of the Court in the case of Waas Enterprises Limited versus Nairobi City Council [2014]eklr]

**Issue Number 2**

Whether the 1st Defendant [sic] purchased and acquired any lawful rights to the suit property or any portion thereof.

150. The 1st Defendant contended that the 2nd Defendant entered into a mutual understanding and/or arrangement with him [1st Defendant] where the 2nd Defendant undertook to sell plot number 176B to and in favour of the 1st Defendant. It was contended that the mutual arrangement was neither reduced into writing nor signed by any parties thereto.

151. Other than the foregoing, the 1st Defendant also contended that out of the mutual understanding/ arrangement, it was agreed that the purchase price would be kes.200, 000/= only.

152. Furthermore, it was the evidence by DW1 that out of the mutual understanding, the 2nd Defendant paid to and in favour of the 2nd Defendant the sum of kes.5, 000/= only. Nevertheless, DW1 acknowledged that other than the sum of Kes.5, 000/= only no other payments were made to and in favour of the 2nd Defendant.

153. On the other hand, the 2nd Defendant contended that the suit property was never sold to and in favour of the 1st Defendant. On the contrary, it has been posited that the 2nd Defendant allowed the 1st Defendant to enter upon and remain on the suit property on account of their relationship as Cousin[s] and not otherwise.

154. It was the further submissions by learned counsel for the 2nd Defendant that the impugned sale agreement, which has been alluded to by the 1st Defendant, cannot withstand the legal import and tenor of Section 3[3] of the *Law of Contract Act*, Chapter 23 Laws of Kenya.

155. For ease of reference, the said provisions are reproduced as hereunder;

> (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
>
> (a) the contract upon which the suit is founded—
>
> i. is in writing;
>
> ii. is signed by all the parties thereto; and
>
> (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

156. The import and tenor of Section 3[3] of the *Law of Contract Act*, which underpins the requirement that a sale agreement impacting on land must be reduced into writing, signed by the parties chargeable thereto and be attested by a witness present at the time of the execution was highlighted by the Court of Appeal in the case of Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 others (Civil

Appeal 155 of 1992) [1993] KECA 65 (KLR) (31 March 1993) (Judgment), where the court held as hereunder;

> With the greatest respect the learned trial judge misdirected himself completely. In the first place it matters not what the parties or one of them believed or was made to believe. The real issue was whether the agreement was duly executed by the parties, and if not, what were the legal consequences? Put it another way – was the agreement executed by the parties, and if not, was the agreement binding and enforceable against any of the parties?
>
> It is trite law on this point and is made beyond doubt under section 3 (3) of the Contracts Act (Cap 23 Laws of Kenya) as follows:-
>
> > "S 3(3): No suits shall be brought upon a contract for the disposition of an interest in land unless –
>
> (a) The contract upon which the suit is founded –
>
> (i) is in writing
>
> (ii) is signed by all the parties thereto; and
>
> (iii) incorporates all the terms which the parties have expressly agreed in one document; and
>
> (iv) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

157. The centrality of Section 3[3] of the *Law of Contract Act* [supra] in matters pertaining to disposition of an interest in land was also elaborated by the Court of Appeal in the case of Peter Mbiri Michuki vs Samuel Mugo Michuki (2014) eKLR, where the court held thus;

> 24. Section 3(3) of the *Law of Contract Act* provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested. Section 3(7) of the *Law of Contract Act* excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the *Law of Contract Act*, came into effect on 1st June, 2003. The trial court found that the sale agreement between the parties was an oral agreement made in 1964 between the appellant and the plaintiff.
>
> Prior to the amendment of Section 3(3) of the *Law of Contract Act* in 2003, the subsection read as follows:
>
> (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;
>
> Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-
>
> (1) Has in part performance of the contract taken possession of the property or any part thereof; or

(11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract. '

158. Additionally, this court has also had an occasion to address the importance of Section 3[3] of the *Law of Contract Act* in the case of Mutuku v M'Kiama & Another [Environment & Land Case 735 of 2007 and Civil Case 325 of 2009] [consolidated] [2024] KEELC 1493 [KLR], where the court stated thus;

> 252. Instructively, the ingredients alluded to and highlighted in the preceding paragraphs are well provided for and articulated vide the provisions of Section 3(3) of the Laws of Contract Act, Chapter 23 Laws of Kenya.
>
> 253. For the sake of brevity, it suffices to re-produce the provisions of Section 3(3) [supra]. Consequently same are reproduced as hereunder:
>
> (3) No suit shall be brought upon a contract for the disposition of an interest in land unless —
>
> (a) the contract upon which the suit is founded—
>
> i. is in writing;
>
> ii. (ii) is signed by all the parties thereto; and
>
> (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
>
> Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.
>
> 254. My understanding of the foregoing provisions of the law, is to the effect that any contract, [the one between the Plaintiff and the 1st and 2nd Defendants herein not excepted], was mandatorily required to be reduced into writing and thereafter be executed by the Parties chargeable therewith.
>
> 255. Furthermore, what is discernable from the import and tenure of Section 3(3) of the *Law of Contract Act*, which has since been re-enacted vide Section 36, 42 and 43 of The *Land Registration Act*, 2012 [2016], is to the effect that where a contract/transaction affecting an interest in land is not reduced into writing, then same is illegal and void.
>
> 256. Other than the foregoing, the other perspective that also arises from the named provisions of the *Law of Contract Act*, Chapter 23, Laws of Kenya; is to the effect that where the contract for the disposition of an interests in land is not reduced in writing, then, neither party to the contract can commence and/or anchor a suit thereon.

159. To the extent that the purported agreement between the 1st Defendant and the 2nd Defendant pertaining to [sic] the alleged sale of plot number 176B was not reduced into writing, no suit and/or counterclaim, can be founded and/or anchored on [sic] the oral agreement.

160. On the other hand, the 2nd Defendant herein purported to bring into the picture a sale agreement which was contended to have been entered into between him [1st Defendant] and the 2nd Defendant. However, during cross examination DW1 conceded that the purported sale agreement was neither signed nor executed by any of the parties adverted thereto. Similarly, DW1 also conceded that the sale agreement did not allude to any parcel of land, let alone plot number 176B.

161. For ease of appreciation, it is apposite to reproduce the evidence of DW1 whilst under cross examination by learned counsel for the 2nd Defendant. Same stated as hereunder;

> " I have alluded to a sale agreement as part of my exhibit before the court. The sale agreement relates to the land where i reside. The sale agreement does not have any date. The sale agreement does not reflect land/plot 176B. The details of the plots are not apparent on the face thereof. The agreement was not executed by the parties. The agreement has also not been attested by the witness".

162. Whilst under further cross examination, by learned counsel for the 2nd Defendant. DW1 stated as hereunder;

> " I agree that the agreement is not complete".

163. Suffice it to point out that even though the 1st Defendant had previously posited that the sale agreement between himself [1st Defendant] and the 2nd Defendant was not reduced into writing, the 1st Defendant sought to become ingenious and purported to bring forth some fake agreement. To my mind, the endeavour by the 1st Defendant in relying on the purported sale agreement which was neither executed nor witnessed was intended to conflate the issues.

164. Other than the foregoing, I beg to underscore that the attempt by the 1st Defendant to bring forth the unexecuted sale agreement, portrays the 1st Defendant as a dishonest person. Instructively, the 1st Defendant appears to have been hellbent on doing everything and anything to mislead/ dupe the court.

165. Be that as it may, the 1st Defendant had hitherto admitted and acknowledged that the purported agreement between himself [1st Defendant] and the 2nd Defendant was not reduced into writing. In any event, the position that the sale agreement was not reduced into writing was amplified by DW1 whilst responding to the question by the court.

166. For ease appreciation, it suffices to reproduce the answers that were given by DW1. Same stated as hereunder;

> " I wish to state that the agreement with Francis Kitumbi Maingi was entered into around the year 2009. However, the agreement was not reduced into writing. I dop confirm that the agreement was oral/parole. Further I wish to state that I only paid the sum of kes.5, 000/= only to and in favour of Francis".

167. From the foregoing excerpts, there is no gainsaying that the purported agreement between the 1st Defendant and the 2nd Defendant was never reduced into writing. In this regard, the production of [sic] the unsigned sale agreement, which was brought by the 1at Defendant, constitutes an afterthought.

168. Arising from the foregoing analysis, it is my finding and holding that the 1st Defendant herein did not accrue and/or acquire any lawful rights and/or interests over plot number 176B or at all.

169. Pertinently, no such rights could accrue in the absence a lawful sale agreement in accordance with the provisions of Section 3[3] of the *Law of Contract Act*.

**Issue Number 3**

What remedies, if any are available to the parties.

170. Both the Plaintiff and the 1st Defendant have sought for a plethora of reliefs before the court. The Plaintiff has sought for inter-alia a declaration that same is the rightful owner of the suit property, an order of permanent injunction, an order of eviction and an order of general damages for tress pass.

171. To start with, the court has found and held that the Plaintiff herein had lawfully bought/purchased the suit property from Willy Mutua Kitema and Francis Kitumbu Maingi, respectively. For good measure, both Willy Mutua Kitema and Francis Maingi [the 2nd Defendant] testified and confirmed sale of the suit property to the Plaintiff.

172. At any rate, whilst discussing issue number one, this court has found and held that the Plaintiff is the legitimate owner of the suit property. To the extent that the Plaintiff is the lawful owner of the suit property, same [Plaintiff] is therefore entitled to the reliefs sought, as owner and proprietor of the suit property. [See Mohanson Kenya Ltd v Registrar of Titles [2017]eKLR.

173. Secondly, the Plaintiff has sought for an order of permanent injunction to restrain the 1st Defendant either by themselves, agents and servants from interfering with the suit property. To this end, it suffices to state that the owner of a landed property is conferred with designated rights and exclusive rights. In this regard, the owner of land is thus entitled to exercise his rights of occupation, possession and use without interference from any third party. [see Section 24 and 25 of the *Land Registration Act*].

174. By virtue of being the lawful and legitimate proprietor of the suit property it is therefore imperative to state that the Plaintiff herein is entitled to an order of permeant injunction whose import is to vindicate the Plaintiffs rights as pertains to occupation possession and use without interreference by a third party.

175. As pertains to the import and tenor of an order of permanent injunction, it suffices to cite and reference the decision in the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib (Civil Appeal 24 of 2016)* [2018] KEHC 5027 (KLR) (26 July 2018) (Judgment), where the court stated as hereunder;

> 9. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties.
>
> 10. Generally, an injunction is sought in addition to other remedies. It is often difficult to seek an injunctive relief as a stand-alone remedy. In most cases it accompanies declaratory orders.

176. Other than the foregoing, the Plaintiff has also sought for an order of eviction of the 1st Defendant from the suit property or the portion thereof which is occupied by the 1st Defendant. Instructively, there is no denial that the 1st Defendant is indeed in occupation on a portion of the suit property.

177. For good measure, the 1st Defendant himself testified and stated that same has been in occupation of a portion of the suit property. In any event, the 1st Defendant contended that same entered upon and has remained in occupation of the suit property on the basis of a sale agreement entered into with the 2n Defendant in the year 2009.

178. To the extent that the 1st Defendant is in occupation of the suit property and having found that same [1st Defendant] does not have any lawful rights thereto, an order of eviction would suffice. Notably, an order of eviction is yet another perspective that enables the lawful and legitimate owner of the land to partake of his/her ownership to the designated property.

179. Put differently, an order of eviction would enable the owner of the designated land to remove any third party or trespasser from the suit property.

180. Furthermore, an order of eviction will ensure that the registered owner has exclusive rights to and over the land. In this respect, it suffices to reference the holding in the case of Waas Enterprises Limited v City Council Of Nairobi & Felisters Njambi Mwai (Environment & Land Case 537 of 2005) [2014] KEELC 605 (KLR) (26 September 2014) (Judgment), where the court dealt with the scope of rights inherent in the title holder.

181. For coherence, the court stated and held thus;

> As a registered proprietor, the plaintiff is entitled to enjoy all proprietary rights to the exclusion of all others. This includes the right to exclusive possession of the suit land. The rights of a proprietor of land are set out in Sections 24 and 25 of the *Land Registration Act*
>
> It therefore follows from the above that only the plaintiff is entitled to enjoy proprietary rights over the suit land. The 2nd defendant had no right to the suit land. She must therefore vacate the suit land and hand over possession to the plaintiff. It is my opinion that the 1st defendant should ensure that the 2nd defendant has vacated the suit land and hands over vacant possession of the suit land to the plaintiff within a period of 30 days from the date hereof.

182. Finally, the Plaintiff has sought for general damages for trespass. Suffice it to point out that the lawful and legitimate proprietor of the designated land is entitled to benefit from ownership of such land. However, where the rights of an owner are interfered with or infringed upon by a third-party trespasser, the lawful owner/proprietor is entitled to recompense. In this regard, the recompense is in terms of general damages for trespass.

183. The Plaintiff herein bought the suit property in the year 2014. Having bought the suit property in the year 2014, the Plaintiff was desirous to utilize same for purposes of constructing residential units thereon. To this end, the Plaintiff sought to have the 1st Defendant vacate and hand over vacant possession.

184. Furthermore, it is not lost on this court that when the 1st Defendant failed to vacate the suit property, the Plaintiff lodged a complaint with the area chief who then convened a meeting to discuss the dispute between the Plaintiff on one hand and the 1st Defendant on the other hand. Suffice it to point out, that the minutes of the meeting before the chief were reduced into writing. In this regard, it is important to underscore that an agreement was arrived at during the meeting at the office of the area chief.

185. Notably, the agreement that was arrived at during the meeting before the area chief contained various terms. Instructively, the 1st Defendant acknowledged and confirmed that the suit property belongs to the Plaintiff. Furthermore, the 1st Defendant agreed to vacate and hand over vacant possession to the Plaintiff. However, it is imperative to point out that despite undertaking to vacate and hand over vacant possession, the 1st Defendant has remained adamant and continues to occupy a portion of the suit property albeit without any lawful rights.

186. Arising from the foregoing, it is my finding and holding that the Plaintiff herein is entitled to recover general damages from the 1st Defendant. For good measure, the actions by and on behalf of the 1st Defendant constitutes trespass.

187. To buttress the foregoing exposition of the law, I beg to adopt and reiterate the holding of the court in the case of Joseph Kipchirchir Koech v Philip Cheruiyot Sang (Environment & Land Case 31 of 2013) [2018] KEELC 621 (KLR) (16 November 2018) (Judgment), where the court stated and held as hereunder;

51. According to BLACK'S LAW DICTIONARY 8TH EDITION, Trespass is defined, in the strictest sense, as:

> "An entry on another's ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property"

52. A continuing trespass is defined as:-

> "A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property"

53. Both the Plaintiff and the Defendant have admitted that they lived on the suit property in peace and harmony for a period of 30 years or thereabouts before their dispute arose. This evidence was corroborated by their witnesses who testified that the two parties have been living together on the suit property for a long time. The Plaintiff in paragraph 5 of the Plaint pleads that he authorized the Defendant, albeit for a temporary period, entry into the suit property. By demand letters dated 24th May 2012 and 4th June 2012, the Plaintiff asked the Defendant to vacate the suit property. I can therefore infer from this that the consent which the Plaintiff had granted the Defendant was officially revoked on 24th May 2012. The Defendant therefore had no authority to be on the suit property once the Plaintiff demanded his eviction from the land and his mere denial of the Plaintiff's right of proprietorship does not negate the trespass. In view of this, I find that the Defendant's continued occupation of the land after he was asked to vacate the same constitutes trespass upon private land.

188. Having found and held that the continued occupation of a portion of the suit property by the 1st Defendant amounts to trespass, what remains is the quantum of recompense. To this end, it is worth recalling that the 1st Defendant has illegally remained on the suit property or a portion thereof for more than 10 years.

189. Arising from the longevity of the trespass and taking into account that the 1st Defendant had himself agreed to vacate but thereafter reneged, I come to the conclusion that an award of Kes.5, 000, 000/ = would suffices as general damages for trespass. In this regard, I am therefore prepared to decree an award of kes.5, 000, 000/= only in favour of the Plaintiff.

190. In arriving at and awarding the sum of kes.5, 000, 000/= only on account of general damages, I have been guided by the holding of the Court of Appeal in the case of *Kenya Power & Lighting Company Ltd v Ringera & 2 others (Civil Appeal E247 & E248 of 2020* (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment), where the court stated and observed as hereunder;

> 38. The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distill and replicate as hereunder:
>
> i). Harlsburys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased

where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.

ii). Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.

iii). Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.

iv). Ephantus Mwangi & Another vs. Duncan Mwangi [1981 – 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence.

b) a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.

v). Kiambu Dairy, Farmers Co-operative Society Limited vs. Rhoda Njeri & 30 Others [2018] eKLR, - the extend of an award of compensatory damages lies in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well settled principles.

vi) Kemfro Africa Limited vs. Lubia & Another [No. 2] [1987] KLR 30 as approved in Peter M. Kariuki vs. Attorney General [2014] eKLR, - before interference with the quantum of damages awarded by a trial court the appellate court must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or short of the above, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages payable.

vii) Johnson Evans Gicheru vs. Andrew Martin & Another [2005] eKLR, - this Court on appeal will be disinclined to disturb the finding of the trial Judge as to the amount of damages awarded by the trial court merely because if it had tried the case itself in the first instance, it would have awarded either a higher or lesser sum

b) justification for reversing a trial Judge on an award of damages only applies where the court is convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very low as to make it an entirely erroneous estimate of the damage to which the aggrieved party is entitled.

viii) Sumaria & Another vs. Allied Industries Limited [2007] 2 KLR I, - an appellate court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence or based on a misapprehension of the evidence or that the Judge had been seen demonstrably to have acted on a wrong principle in reaching the finding he/she did.

ix) Butt vs. Khan [1981] KLR 349, - an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate

x) it must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.

vii. Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited vs. Janevans Limited [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss;

(b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass;

(c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass.

191. On the other hand, the 1st Defendant herein filed a counterclaim and wherein same [1st Defendant] sought for various orders inter-alia an order for specific performance of the sale agreement or payment of the sum of kes.1, 500, 000/= only on account of the value of the construction carried out on the suit property.

192. To start with, an order of specific performance is an equitable remedy and thus same can only issue where the Claimant has approached the court with clean hands and in good faith. However, in respect of the instant matter, there is no gainsaying that the 1st Defendant had endeavoured to mislead the court that there was a sale agreement yet, same [1st Defendant] was aware that there was no such agreement.

193. Furthermore, whilst dealing with issue number two [2] this court found and held that the 1st Defendant was being dishonest with the court. Indeed, the court found and established that the 1st Defendant was hellbent on resorting to underhand tactics to [sic] confuse the court into believing that same [1st Defendant] had a lawful sale agreement with the 2nd Defendant.

194. Simply put, an equitable order of specific performance cannot issue where the Claimant like in the instant case, has resorted to misrepresentation, propagation of falsehoods and dishonesty. [See the holding of the Court of Appeal in the case of GURDEV SINGH BIRDI & NARINDER SINGH GHATORA as *Trustees of RAMGHARIA INSTITUTE OF MOMBASA v ABUBAKAR MADHBUTI (Civil Appeal 165 of 1996)* [1997] KECA 89 (KLR) (28 May 1997) (Judgment)].

195. Secondly, it is not lost on the court that an order of specific performance can and does issue albeit in exceptional circumstances. However, before one can partake of an order of specific performance, the Claimant must demonstrate inter-alia that same [Claimant] has a lawful sale agreement/contract, has performed his/her part of the bargain or better still, is still willing to perform his part of the bargain. [See the holding in the case of Sisto Wambugu versus Kamau Njuguna [1983]eklr]

196. Nevertheless, in respect of the instant matter, there is no gainsaying that the 1st Defendant/counter-claimer did not have any lawful or legal sale agreement/contract with the 2nd Defendant. Furthermore, the 1st Defendant himself admitted that he [1st Defendant] has only paid the sum of Kes.5, 000/= only towards the purchase price. Surely, the 1st Defendant has not performed his [sic] part of the bargain. In this regard, the 1st Defendant cannot be heard to lay a claim for an order of specific performance.

197. To buttress the foregoing exposition of the law, it suffices to take cognizance of the holding in the case of *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited (Civil Case 190 of 2005*) [2006] KEHC 2855 (KLR) (31 March 2006) (Ruling), where the court held as hereunder;

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

198. Other than the fact that the 1st Defendant/Counter claimer has not met the threshold for the grant of an order of specific performance, it is also imperative to underscore that the sale agreement which is being relied upon by the 1st Defendant counter claimer is said to have been entered to or around the year 2009. However, the counterclaim beforehand was not filed until the 19th September 2023.

199. To my mind, the counterclaim which underpins the claim for specific performance has been filed more than 14 years from the date when the impugned contract was entered into. Suffice it to point out that a claim for specific performance is a claim on contract. In this regard, there is no gainsaying that the claim ought to have been brought within 6 years from [sic] date of breach and not otherwise. [See Section 4[1] of the *Limitation of Actions Act*].

200. To my mind, even if the 1st Defendant/Counter claimer had met the threshold for the issuance of an order of specific performance, same [1st Defendant/Counter claimer] would have to contend with the law on limitation. Simply put, the 1st Defendants Counter claim founded on [sic] the agreement entered into in 2009, stood extinguished.

201. To underscore the implication of limitation of actions/causes of action and in particular, the Claim by the 1st Defendant/counter claimer, it suffices to reference the holding in the case of Bosire Ogero v Royal Media Services [2015] eKLR, where the court stated and observed as hereunder;

> In Dhanesvar V. Mehta vs Manilal M. Shah (1965) EA 321, the court was categorical that the effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case, but it is not meant to extinguish claims.
>
> The *Limitation of Actions Act* Chapter 22 Laws of Kenya is the primary substantive legislative enactment which statute expects the intending plaintiffs to exercise reasonable diligence and to take reasonable steps in their own interest, as not all causes of action once barred by statutory limitations are capable of being revived.

202. Additionally, the implication[s] of the Law on Limitation was elaborated by the Court of appeal in the case of Gathoni v Kenya Co-operative Creameries Ltd[1982] eKLR, where the court held thus;

> The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is

made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.

203. Quite clearly, the 1st Defendant's claim pertaining to specific performance stood extinguished upon the lapse of the expected period. In this regard, the counterclaimer's agreement entered into in the year 2009 is statute barred [See Section 4[1] of The *Limitation of Actions Act*].

204. The other claim that have been ventilated by the 1st Defendant relates to compensation in the sum of kes.1. 5000/ only.

205. As pertains to the claim for compensation in the sum of kes1, 500, 000/ only which is underpinned by [sic] the construction on the suit property, my answer is therefore twofold.

206. Firstly, it was incumbent upon the 1st Defendant to particularly plead the claim and thereafter specifically prove same. However, it is apparent that the claim in question was neither pleaded with the requisite particularity nor was same specifically proved.

207. In the absence of the requisite pleadings and particulars thereof, the claim by the 1st Defendant for Kes.1, 500, 000/= only is premature and misconceived. In this respect the claim for payment of kes.1, 500, 000/= only, is to say the least, legally untenable.

208. To this end, I beg to adopt and reiterate the holding in the case of *Superior Homes (Kenya) PLC v Water Resources Authority & 9 others (Civil Appeal E330 of 2020)* [2024] KECA 1102 (KLR) (19 August 2024) (Judgment), where the Court of Appeal stated and observed as hereunder;

> 74. When the law requires special damages to be specially pleaded, it means that those damages must be stated with certainty and particularity in the plaint or petition. If the damages are not tabulated in the plaint or petition, the party claiming them must apply to amend the plaint or petition to include them. Such party cannot purport to specially plead special damages in a subsequent affidavit.

209. In addition, the necessity to plead special damages with the requisite particularity, was highlighted by the Court of Appeal in the case of Coast Bus Services Ltd v. Murunga Danyi & 2 Others, *CA No. 192 of 1992*, where the court stated and held as hereunder:

> " We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filling suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars.

210. Arising from the foregoing, I am afraid that the 1st Defendant/Counter claimer is not entitled to Kes.1, 500, 000/= only or at all. Suffice it to point out that the pleadings by the 1st Defendant/Counter claimer are deficient and devoid of the requisite particular.

211. Finally, there is the question as to whether the 1st Defendant counter claimer proved the value of the construction that is being claimed. To start with, it was incumbent upon the 1st Defendant/Counter claimer to bring forth an expert to issue a report. Nevertheless, there was no such report adduced before

the court. In the absence of such a report, it is difficult to understand how the Counter-claimer arrived at the sum of Kes.1, 500, 000/= only.

212. In my humble view, it is the 1st Defendant/Counter claimer who lay before the court a claim for compensation. In this regard, the 1st Defendant/Counter claimer was obliged to place before the Court cogent and plausible evidence to prove his claim. Unfortunately, the 1st Defendant/counter claimer failed to meet or satisfy the threshold.

213. To this end, it suffices to cite and reference the holding of the Court of Appeal in the case of Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] eKLR, where the court held thus;

> The burden of proving the existence of any fact lies with the person who makes the assertion. That much is clear from Sections 107 and 109 of the *Evidence Act*. The standard of proof is on a balance of probabilities which Lord Denning in the case of Miller vs Minister of Pensions (1947) ALL ER explained as follows:-
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

See D. T. Dobie & Company (K) Ltd vs Wanyonyi Wafula Chebukati [2014] eKLR.

214. Arising from the foregoing, my answer to issue number three [3] is twofold. Firstly, the Plaintiff herein has been able to place before the court cogent evidence that same [Plaintiff] is the lawful owner and proprietor of the suit property. In this regard, the Plaintiff is entitled to the reliefs sought at the foot of the amended Plaint dated the 17th July 2023.

215. Secondly the 1st Defendant/Counter claimer has failed to place before the court cogent and plausible evidence to underpin his claim for specific performance and compensation in the sum of Kes.1, 500, 000. In any event, the court has found and held that the claim by and on behalf of the 1st Defendant/ Counter claimer is barred by the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.

**Final Disposition**

216. Flowing from the analysis [details enumerated in the body of the judgment] it is apparent that the Plaintiff herein has duly established her entitlement to the reliefs at the foot of the amended Plaint dated the 17th July 2023. In this regard, it suffices to underscore that the Plaintiff's claim is indeed meritorious.

217. On the other hand, the 1st Defendant/Counter claimer has failed to discharge the burden of proof cast upon him as pertains to the counterclaim. For good measure, the claims on behalf of the 1st Defendant are prohibited by the Limitation of Action Act Chapter 22 Laws of Kenya.

218. In the premises, the final orders that commend themselves to the court are as hereunder;

a. Judgment be and is hereby entered in favour of the Plaintiff and in accordance with the amended plaint dated the 17th July 2023 in the following terms;

i. A declaration be and is hereby made that the Plaintiff is the rightful owner of all that parcel of land Plot No. 176 (Gekonyo Maringo Housing Co. Limited) New No. 31/25/58.

ii. The 1st Defendant be and is hereby ordered to vacate and hand over vacant possession of the suit property to and in favour of the Plaintiff. ame to vacate and hand over possession within 60 days from the date hereof.

iii. In default to comply with clause [ii], the Plaintiff shall be at liberty to levy eviction against the 1st Defendant. In this regard, an eviction order shall issue automatically.

iv. In the event that the eviction is levied and/or undertaken by the Plaintiff, the costs of the eviction exercise shall be certified by the deputy registrar and thereafter same shall be recoverable from the 1st Defendant.

v. An order of permanent injunction be and is hereby granted restraining the 1st Defendant from entering, encroaching, trespassing or in any way interfering with the Plaintiff's land Plot No. 176 (Gekonyo Maringo Housing Co. Limited) New No. 31/25/58 Filed on: - No Paid- - BY: VUSHA ONSEMBE & MAMBIRI COMPANY ADVOCATES - Reference: E3JFQ9BM - KSH. 0.00.

vi. General damages be and are hereby awarded in the sum of Kes.5, 000, 000/= only.

vii. Costs of the suit shall be borne by the 1st Defendant.

b. The counterclaim by the 1st Defendant/Counter-claimer be and is hereby dismissed.

c. The costs of the counterclaim be and are hereby awarded to the Plaintiff/1st Defendant to the Counterclaim and the 2nd Defendant, respectively.

d. Any order not expressly granted is declined.

219. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST____ DAY OF OCTOBER 2024.**

**OGUTTU MBOYA**

**JUDGE.**

**In the Presence of:**

Benson - Court Assistant

Ms. Mwanzia for the Plaintiff

Ms. Faith Wanjala for the 1st Defendant/Counter claimer

Mr. Weyombo for the 2nd Defendant