



Taita Hills and Salt Lick Wildlife Resort Limited v Mwangombe & 8 others
(Environment & Land Case 12 of 2023) [2024] KEELC 13470 (KLR)
(Environment and Land) (22 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13470 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 12 OF 2023
EK WABWOTO, J
NOVEMBER 22, 2024

BETWEEN

TAITA HILLS AND SALT LICK WILDLIFE RESORT LIMITED PLAINTIFF

AND

JOSEPHAT MVOI MWANGOMBE 1ST DEFENDANT
MBULI MWALIKO MGHENYU 2ND DEFENDANT
STANLEY KATUU MWAMBULA 3RD DEFENDANT
JAVAN KIRUBAI MWAKISAGHU 4TH DEFENDANT
HERMAN MWANGEMI RIGHA 5TH DEFENDANT
MWADIME MUGHOYA MWANJEVE 6TH DEFENDANT
DORA CHAO 7TH DEFENDANT
CHRISTOPHER NYANGE 8TH DEFENDANT
ALIA COMMUNITY 9TH DEFENDANT

JUDGMENT

1. Before the court for determination is the plaint dated 27th August 2020 in which the Plaintiff is seeking for the following reliefs:-
 - a. A declaration that the Defendants actions whether by themselves, their representatives, servants, agents, and/or assigns of entering the property known as Land number L.R. No. 13007 and digging, excavating, clearing vegetation and/or in any other manner whatsoever



interfering with or otherwise dealing with the property is unlawful and in violation of the Plaintiff's rights over its property.

- b. A declaration that the Defendants actions whether by themselves, their representatives, servants, agents, and/or assigns of entering the property known as Land number L.R. No. 13007 and digging, excavating, clearing vegetation and/or in any other manner whatsoever interfering with or otherwise dealing with the property amounted to the offences enumerated under Section 102 of the [Wildlife Conservation and Management Act](#).
 - c. A permanent injunction restraining the Defendants whether by themselves or their representatives, servants, agents, and/or assigns from whatsoever interfering with or otherwise dealing with the property known as Land number L.R. No. 13007 situate at Taita (hereinafter "the Sanctuary") and commonly known as Taita Hills and Salt Lick Wildlife Sanctuary.
 - d. An order compelling the Defendants to restore the Plaintiff's Sanctuary to its original state subsisting immediately before the entry, digging, extraction and excavation by the Defendants.
 - e. General damages for trespass.
 - f. Interest on prayer (d) and (e) above at court rates.
 - g. Costs
2. The Plaintiff's complaint against the Defendants is that the Defendants whether by themselves or their representatives, employees, servants or agents have without a lawful reason violated the rights of the Plaintiff as guaranteed under Article 40(a) and (b) of [the Constitution](#) as shown below:-
- a. On or about 25th June 2020 the Defendants without any color of right forcibly entered and or trespassed the Plaintiff's Sanctuary.
 - b. Proceeded to drive and position heavy machineries within the Plaintiff's Sanctuary.
 - c. Started digging massive trenches, pits and destroying the delicate vegetation within the Sanctuary.
 - d. Interfered with the vibrant and diverse wildlife within the suit property.
3. Upon service of the pleadings to the Defendants, the Defendants contested the suit and filed a Statement of Defence and Counterclaim dated 28th April 2021. The Defendants sought for the following reliefs in the counterclaim:-
- i. Order of injunction restraining the Defendants from evicting or interfering with their ancestral land whatsoever.
 - ii. Declaration that the defendant illegally and unlawfully obtained the title I.R. No. 130010 bearing L.R. No. 13007, Taita Hills and be revoked and the Taita Land Registrar be allowed to rectify the record books.
 - iii. The Plaintiff be compensated for historic injustice or for their ancestral land by the Defendant if they want to compulsorily acquire the land and due process be effected.
- iv. Costs and interest of the suit.



The Plaintiff's case

4. The Plaintiff averred that the Defendants whether by themselves or their representatives, employees, servants or agents have without a lawful reason violated the rights of the Plaintiff as guaranteed under Article 40(a) and (b) of *the Constitution* as shown below:-
 - a. On or about 25th June 2020 the Defendants without any color of right forcibly entered and or trespassed the Plaintiff's Sanctuary.
 - b. Proceeded to drive and position heavy machineries within the Plaintiff's Sanctuary.
 - c. Started digging massive trenches, pits and destroying the delicate vegetation within the Sanctuary.
 - d. Interfered with the vibrant and diverse wildlife within the suit property.
5. The said actions run contrary to the provision of:-
 - a. Section 58 of the Environmental Management and Coordination act (EMCA) which requires an environmental impact assessment to be carried out prior to commencement of any activities.
 - b. Sections 39, 70, 71 and 72 of the *Wildlife Conservation and Management Act* which provide for protection of the wildlife and utilization of the protected area resources in a sustainable manner.
6. It was also averred that the Defendants actions also amount to the offences enumerated under Section 102 of the *Wildlife Conservation and Management Act*. It was further averred that the Plaintiff will suffer irreparable damage unless the criminal invasion of Plaintiff's private property by the Defendants is restrained by permanent injunction because the Defendants will:
 - i. Complete the invasion and politicise the invasion thereby converting a purely criminal issue of criminal trespass into a political matter on grounds that the excavated materials are for constructing road for the general public use.
 - ii. Continue destroying the vegetation which is the primary source of food for the wildlife within the Sanctuary.
 - iii. Continue jeopardizing the health and behavioural ecology of the wildlife within the Sanctuary.
 - iv. Continue interfering with the wildlife migration routes causing them to migrate through the adjacent private residential properties.
 - v. Completely destroy the various delicate and almost extinct fauna and flora conserved in the Sanctuary.
 - vi. Continue destroying and interfering with the entire landscape of the Plaintiff's Sanctuary.
 - vii. Continue accelerating the occurrence of the wildfires within the Sanctuary.
7. As a result of the foregoing, it was contended that the mainstay activity which is tourism recreation will be greatly affected.
8. During trial, Jacob Ngatia the Plaintiff's Sanctuary Manager testified as PW1 and the sole witness of the Plaintiff. He relied on his witness statement dated 29th February 2019 and the Plaintiff's bundle dated 29th February 2024. It was his testimony that the Plaintiff is the lawfully registered Grantee of the suit property parcel of land number L.R. No. 13007 situate at Taita (hereinafter "the Sanctuary")



and commonly known as Taita Hills and Salt Lick Wildlife Sanctuary measuring 11,331.2 hectares or 28,000 Acres. That the suit property was previously government land governed by the Governments Land Act (Chapter 280) as evidenced by paragraph b of the Grant No. IR 130010 produced as PEXh-1. By virtue of Article 62(1)(n), the suit property is thus public land which cannot be alienated as ancestral land as alleged by the Defendants.

9. It was his testimony that the Plaintiff has dedicated the Sanctuary to the conservation and protection of a diverse wildlife since the Sanctuary is a free ranging wildlife refuge corridor and the Plaintiff is utilizing and exploiting the wildlife resources within the Sanctuary as a tourist resource.
10. It was his testimony that on 25th June 2020 the Defendants forcibly entered the Sanctuary and proceeded to position heavy machineries such as hydraulic excavators and tractors within the Plaintiff's Sanctuary without permission from the Plaintiff or any lawful justification. Further the Defendants proceeded to dig massive trenches and pits to excavate and extract soil and stone aggregate without permission from the Plaintiff or any lawful justification.
11. He also stated that the Defendants have also attempted to forestall efforts by the Plaintiff and Kenya Wildlife Services to put a fence between the Plaintiff's land and the community in order to protect the wildlife in the Sanctuary. The same is demonstrated as follows:-
 - a. On 17th June 2019 the Plaintiffs herein filed ELC Cause No. E006 of 2023 (Formerly ELC No. 106 of 2019) opposing to Kenya Wildlife Services (the defendant in ELC No. E006 of 2023) erecting an electric fence to separate the Defendant's land and Sanctuary in order to protect the wildlife within the Sanctuary.
 - b. At paragraph 4 of the plaint dated 17th June 2019 the Plaintiffs (the Defendants in this suit) claim to be the legal owners of various parcels of land as described below:-
 - i. Josephat Mvoi Mwangombe – Taita Taveta/Mwachambo Scheme/973
 - ii. Mbuli Mwaliko Mghenyu – Taita Taveta/Mwachombo Scheme/1113
 - iii. Stanley Katuu Mwambula – Taita Taveta/Mwachombo Scheme/1159
 - iv. Javan Kirubai Mwakisaghu – Taita Taveta/Mwachombo Scheme/1111
 - v. Mwadime Mughoya Mwanjeve – Taita Taveta/Mwachombo Scheme/111
12. He also stated that in the plaint dated 17th June 209 the Defendants do not allege ownership of the suit property herein L.R. No. 13007.
13. According to him from 17th August 2020 to 20th August 2020, Korir Justice, the District Surveyor for Taita Taveta County by orders of the court in ELC No. 006 of 2023 (Formerly ELC No. 106 of 2019) conducted a ground survey and concluded as follows with regards to the suit property.
 - i. Taita Taveta/Mwachombo Scheme/111 is 1.3 kilometers from the existing fence (boundary) of L.R N o. 13007. Land owner informed surveyor that he had no dispute with neighbour.
 - ii. There exists a well-defined boundary for Land Reference Number 13007 defined by beacons NE, Mukiaia, Mugama SE. These beacons are all Angle Iron in concrete (A.I.C) for example boundary outline from beacon Mugama to Mukiaia is physically intact and defined.
 - iii. The boundary between these beacons are straight boundary lines defined by existing cut-lines and physically visible on the ground.



- iv. L. R. No. 13007 (F/R No. 118/36) was surveyed through fixed cadastral surveys and survey plan authenticated in 1970 by the Director of Surveys.
 - v. The whole of land parcels within Mwachabo Settlement Scheme bordering L.R. Numbers 13007 have a clear distinct boundary physically identifiable on the ground.
14. He also stated that it was clear from the findings of the District Surveyor that the suit property herein, registered is a distinct parcel of land from the aforementioned parcels of land over which the Defendants claim ownership. Thus, the Defendants have no right to enter to enter into, remain on or undertake any activities on the suit property. Further, the Court in ELC No. 006 of 2023 (Formerly ELC NO. 106 of 2019) has on several occasions noted that there is a clear boundary between the Plaintiff's land and the Defendants land. The same is demonstrated as follows:
- a. In a Ruling delivered on 9th March 2021 wherein the court declined to grant an order for injunction, the Court noted that the "The Report is conclusive that the defendant's fence does not encroach on the Plaintiff's land."
 - b. On 26th September 2019 the Plaintiff herein filed Chamber Summons seeking to be joined to the ELC No. E006 of 2023 (Formerly ELC 106 of 2019) as an interested party. Vide a Ruling dated 12th October 2022 wherein Hon. Sila Munyao joined the Plaintiff herein as the 1st Interested Party in E006 of 2023, the Hon. Judge noted that, "It is apparent that the electric fence in dispute runs along boundary of the applicant's land. That the said ELC No. 006 of 2023 was dismissed on 19th December 2023 for non-attendance, lack of prosecution and failure to comply with court orders.
15. On cross-examination, he stated that the land was initially government land before it was given to the Plaintiff. The Plaintiff's title deed was issued on 1st March 2011. He also stated that he could not recall exactly when the Plaintiff was registered. He was not aware if there was an initial lease and neither was he aware of the procedure for extension of the lease. He also stated that he was not aware if the Defendants had sought to claim part of the land. He did not have any report to confirm interference of the area.
16. On further cross-examination, he stated that the Defendants in the previous case filed in 1997 were different from the Defendants in the current case. He further stated that Mbuli Mwaliko who appeared in the charge sheet for the criminal case is the 3rd Defendant herein. He further stated that he is aware of what transpired in the ruling of the criminal case which was about trespass to land. The accused person were acquitted for the offence of trespass. There was no evidence implicating them.
17. He also stated in cross-examination that he did not know which parcel of land is owned by the Defendants and they are not their neighbours.
18. He further stated that he was not aware if the Mwachabo Settlement Scheme had been surveyed. He was not aware if the Defendants were issued with title deed.
19. On further cross examination, he stated that the Sanctuary was initially managed by Hilton Hotel even though he did not have any documents before court to confirm that. He had not tabled any evidence to demonstrate approving the extension of the lease by the County Government. The Defendants are not their neighbours and they had been sued because they encroached on their land. The erection of the fence had not been completed and the Plaintiff did not have interest in the erection of the fence. The issue before court is about encroachment. The land initially belonged to the Government before it was acquired by Hilton Hotel in the 1970s. The said land could not be the Defendants ancestral land. The lease documents shows that it was previously Government land.



20. He also stated on cross examination that according to him, Alia Community was sued because it comprised of people who had encroached on their land. The land does not border Mwakitau Community. It borders Mwashina village. The Sanctuary is a natural ecosystem. It is land set aside for wildlife. Kenya Wildlife Service wanted to put up a fence and protect the Sanctuary and retain wildlife from among outside the Sanctuary.
21. He further stated in cross-examination that their certificate of title was issued by the National Government and hence they did not require any minutes from County Government. The Plaintiff had not been sued in MSA ELC No. 106 of 2019.
22. When asked about the Survey report, he stated that the said report confirmed that Mwachabo Settlement Scheme was 1.3km away from the existing fence. There was clear boundary physically identifiable from the ground. The Plaintiff was not a party to the criminal case.

The Defendants case

23. The Defendants filed a Statement of Defence and Counterclaim dated 28th April 2021. The Defendants denied the averments made in the plaint. In their counterclaim they stated that sometimes in 1988 the Plaintiff tried to institute fraudulent charges vide Voi Criminal Case No. 619 of 1998 which charges were dismissed. It was averred that they had been on the land since time immemorial without any interruption. It was also averred that the issue was res judicata in view of Criminal Case No. 619 of 1998.
24. It was also averred that in the year 1998, the Plaintiff did not have any leasehold title and the Defendants were on their ancestral land. It was contended that the Plaintiff fraudulently acquired the leasehold title by forgery and fraud and the following particulars of forgery and fraud were pleaded;
 - i. Obtaining the leasehold title without the knowledge of the Defendants, information or consent.
 - ii. Obtaining the title on a matter which was res judicata had been dealt in court in the year 1998.
 - iii. Obtaining a title deed without the Plaintiff's public participation.
 - iv. Obtaining a title deed on the Defendant's ancestral land without any process or compensation.
25. The Defendants sought several reliefs in their Counterclaim.
26. During trial, Dora Chao Mwangambo testified as DW1 and the only Defence witness in the matter. She relied on her witness statement dated 28th April 2021 in her examination in chief. She added that she had been in the land since she was born. The Plaintiff began claiming the land at the time it was being surveyed.
27. According to her there was serious conflict in 1997 that led to the arrest of several members. Personally, she was not arrested at that time. Those who were arrested were charged for trespass and were granted cash bail of Kshs. 3,000/=. The criminal charges were later dismissed. She also stated that sometimes in 2013 Sarova Hotel informed them that they had been given a lease and that they should leave the property. In 2019 the land was extended to their area. The Defendants disputed the manner in which the lease was granted. The fence passed through their land. She concluded her evidence in chief by adopting the Defendants bundle of documents dated 28th April 2021.
28. On cross-examination, she stated that the name "Sarova" does not appear anywhere in the Plaintiff's pleadings. There are about 500 people on the land. She had not brought any documents to show



- that she resides in the land. She had not brought any documents to show that the Alia community is registered and that their Counter claim had not stated the L.R number of their property.
29. When asked about Mombasa ELC Case No. 106 of 2019, she stated that KWS had been sued in that case and not the Plaintiff nor Sarova Hotels. She also stated that she could not tell why the said suit was dismissed.
 30. When asked about the Survey Report, she stated that she did not agree with the same even though she had not filed any survey report, on behalf of the Defendants.
 31. When re-examined, she stated that Alia Community had been sued as the 9th Defendant. The community has about 500 people. They never bought any land. The Sanctuary belongs to the Plaintiff and all they want is to have a proper fence since the initial fence had encroached onto their land.

The Plaintiff's submissions

32. The Plaintiff filed written submissions dated 16th October 2024. Counsel submitted on the following issues;-
 - a. Whether the present suit is res judicata to Criminal Case No. 619 of 1998.
 - b. Whether the Plaintiff is the registered owner of the suit property.
 - c. Whether the Plaintiff has proved on a balance of probability that the Defendants have without the Plaintiff's consent entered into the suit property.
 - d. Whether the Defendants have established any lawful or viable claim or legal interest into the suit property.
 - e. Whether the Plaintiff is entitled to the order sought.
 - f. Whether the Defendants are entitled to the orders sought.
33. It was argued that the parties in respect to Criminal Suit No. 619 of 1998 are not similar with parties listed in the current suit. The Plaintiff's claim in Criminal Case No. 619 of 1998 was that the accused persons had trespassed on the suit property and were clearing the bush for the purposes of planting and the Plaintiff's claim in the current suit is that the Defendants herein have and are still trespassing, excavating, digging massive holes, extracting soil, erecting temporary and permanent structures on the Plaintiff's suit property. It was also submitted that the suit was dismissed only on the grounds that no witness from the District Land Survey, the Land Adjudication or any other officer who keeps land record did not avail themselves to confirm who between the two parties was the legal owner of the suit property. The question has now been established by way of evidence that the Plaintiff is the legal owner in possession but with threats of trespass and further two criminal case was not decided on merit.
34. On whether the Plaintiff is registered owner of the suit property, it was submitted that the same had been proven by the Plaintiff. The Plaintiff has also proved that he is in possession of the suit property and utilizing the same for wildlife protection and tourism purposes as demonstrated in P Exhibit No. 2. The Defendants have not produced any evidence to prove that they were owners of the suit parcel and neither have they proven that the said land was acquired through forgery and fraud.
35. It was also argued that Grant L.R 130010 for Land Reference 13007 was issued as a way to bring the Plaintiff's registration of the suit property into the new regime. The Plaintiff did not need the Defendants authority or consent to surrender the old registration in the suit property and obtain a new one.



36. It was also submitted that from the evidence of PW1, it had been proved that the Defendants had entered into the suit property without the Plaintiff's consent and were committing several authorized and unlawful activities. Reliance was placed on P Exhibit 3 which had been produced in evidence. It was also submitted that the Defendants properties were different and distinct from the Plaintiff's property as was stated in the Survey Report.
37. On whether the Defendants had established an lawful or viable claim or legal interest to the suit property, it was submitted that the Defendants have not discharged the burden of proving the assertion that the suit property is ancestral land. Reliance was placed to the cases of *Ogonga & Another =Versus= Orangi & 3 Others (2023) eKLR* and *Mwaura =Versus= Njuguna (sued in her capacity as the Administrator of the Estate of Njuguna Karanja)(2024) eKLR*.
38. On whether the Plaintiff is entitled to the orders sought, it was submitted that the Plaintiff's case has been proven to the required standard, the property is wildlife sanctuary and the Plaintiff is entitled to the reliefs sought together with costs of the suit and Counterclaim.
39. In respect to the Defendants reliefs, Counsel submitted that the Defendant had failed to prove that the Plaintiff obtained the suit property by way of fraud and forgery. It was submitted that this court also does not have jurisdiction to hear and determine matters related to historical land injustices without first referring them to NLC under Section 15(1) of the *National Land Commission Act*. Reliance was placed on the case of *Safepak Limited =Versus= Henry Wambega & 11 Others [2019] eKLR*.

The Defendants submissions

40. The Defendants submitted on the following issues in respect to their submissions dated 26th October 2024.
 - i. Whether the certificate of lease issued to the Plaintiff was obtained legally, procedurally and without misrepresentation.
 - ii. Whether the Defendants should be lawfully registered as proprietors of the suit property by having ancestral rights to the land.
 - iii. Whether the Defendants are entitled to the reliefs sought.
 - iv. Costs.
41. It was argued that the Plaintiff did not produce any evidence to demonstrate the legality of the title which lease was extended after its expiry. There was a dispute in respect to the land in 1997 in relation to the allegation of trespass and hence confirmation that the Defendants were already in the land by then. The cases of *Herbet Martin & 2 Others =Versus= Margaret J. Kamau & 5 Others [2016] eKLR*, *Munyu Maina =Versus= Hiram Gathiha Maina [2013] eKLR* and *Alice Chemutai Too =Versus= Nickson Kipkemu Korir & 2 Others 2013 eKLR* were cited in support.
42. As to whether the Defendants should be lawfully registered as proprietor of the suit property by dint of having ancestral rights to the land, it was submitted that the 9th Defendant though unregistered did not negate the fact that the suit property was communal land and they ought to have been registered as owners of the land. Reliance was placed on various provisions of the *Community Land Act*.
43. As to whether the Defendants are entitled to the reliefs sought, it was submitted that the Defendants have demonstrated a good case to grant the reliefs sought and the same ought to be granted together with costs of the suit and Counter claim.



Analysis and Determination

44. The court has considered the pleadings, evidence on record and proceeds to determine the suit on the following issues;
- i. Whether the suit herein is res judicata in view of Criminal Case No. 619 of 1998.
 - ii. Whether the Plaintiff is the legitimate owner of the suit property.
 - iii. Whether the particulars of fraud and forgery have been proven.
 - iv. Whether the Defendants Counterclaim is merited.
 - v. What are the appropriate reliefs to issue herein.
 - vi. What orders should issue as to costs.

Issue No. (i) Whether the suit property herein is res judicata in view of the Criminal Case No. 619 of 1998.

45. The issue was raised by the Defendants. In Kenya, the law on res judicata is found at Section 7 of the [Civil Procedure Act](#) which provides as follows;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

46. In the case of John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the Supreme Court expounded on the concept of res judicata as follows;

“... The essence of the res judicata doctrine is further explicated by Wigram, V-C in *Henderson v Henderson* (1843) 67 ER 313, as follows:

“... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time”.

Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined



by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads:

- (i) the matter in issue is identical in both suits;
- (ii) the parties in the suit are the same;
- (iii) sameness of the title/claim;
- (iv) concurrence of jurisdiction; and
- (v) finality of the previous decision.

47. The rationale behind the doctrine of *res judicata* is that if the controversy in issue is finally settled, determined or decided by a competent Court, it cannot be re-opened. The doctrine is therefore based on two principles: that there must be an end to litigation and that a party should not be vexed twice over the same cause. This was what was held with approval in *Omondi vs National Bank of Kenya Ltd and Others* (2001) EA 177.
48. In the instant case, the court has perused the documents that were availed in respect to the criminal case and it is evident that the Criminal case No. 619 of 1998 involved some parties who were different from the current suit and the Plaintiff was equally not a party to the said criminal case. Further the subject matters in the said criminal case was different from the current suit and as such the instant case cannot be said to be *res judicata* in view of Criminal Case No. 619 of 1998.
49. In view of the foregoing, it is the finding of this court that the instant suit cannot be considered *res judicata* in view of Criminal Case No. 619 of 1998.

Issue No. (ii) Whether the Plaintiff is the legitimate owner of the suit property

50. It is trite law that whoever alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

‘Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.’

51. On evidentiary burden of proof, Sections 109 and 112 of the *Evidence Act* provide as follows:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.”

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”

52. The two provisions were dealt with in the case of *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden, that is, placed upon a party..... the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”



53. Article 40 of *the Constitution* of Kenya, 2010, elaborates on the right to own property in Kenya. It provides as follows;

“

“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

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

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

54. Equally it is not automatic that simply accepting titles as conclusive, incontestable and indefeasible or the concomitant argument that in the face of two or more competing titles, the first in time automatically prevails. It is not enough to wave an instrument of title or rest easy on the former rock of chronological primacy. What must now be established by he who would prevail is the solidity of the root of title. No flowery foliage, absent a sturdy and settled root speaking to a regular and legal process preceding the product that is the title, will avail the holder. That much is now the law pronounced in a lengthening line of authorities such as *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR and *Funzi Development Ltd & Others vs Country Council Of Kwale* [2014] eKLR, and by the Supreme Court in its authoritative and all-binding decision of *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] eKLR

55. Section 26 of the *Land Registration Act, Act No. 3 of 2012*, provides that a title which was acquired by way of fraud or misrepresentation, where a person is proved to be a party can be attacked. So too a title which was acquired illegally, procedurally or through a corrupt scheme. The said Section is drawn as follows: -

“26.

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—



- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”
56. It cannot therefore be overemphasized that where the fact of registration of an individual as a proprietor of a parcel of land is challenged, the registered proprietor has to show that the land was lawfully registered in his name.
57. The Plaintiff’s witness Jacob Ngatia who testified as PW1 tendered evidence and averred that the Plaintiff is the current registered owner of the L.R No. 1300 currently known as Taita Hills and Salt Lick Wildlife Sanctuary measuring approximately 28,000 acres. The witness also produced a copy of the Grant No. L.R 130010 issued to the Plaintiff by the Registrar of Titles which was produced in evidence as PExhibit 1. The Defendants on the other hand did not produce any evidence during trial to prove their ownership in respect to the said parcel L.R. No. 13007 issued to the Plaintiff. The Plaintiff also adduced evidence during trial demonstrating that it is in possession of the suit parcel and utilizing the same as a wildlife sanctuary and wildlife protection and tourism purposes.
58. From the evidence that was tendered herein, it also emerged that prior to the utilisation of the said property by the Plaintiff, the same was previously government land government by the Government Land Act which was being used as a wildlife sanctuary and the Plaintiff continued using the same for the said purposes. The Defendants did not adduce any other evidence demonstrating that the suit property had been previously and historically utilised for a different purpose other than wildlife conservation and related activities. The joint survey report which was undertaken and conducted in the presence of all the parties equally confirmed that the said property L.R 13007 was exclusively owned by the Plaintiff and the Defendants parcel was entirely different from the same.
59. There was no evidence adduced by the Defendants controverting the same.
60. In view of the foregoing, it is the finding of this court that the Plaintiff is the legitimate owner of suit property L.R No. 13007 known as Taita Hills and Salt Lick Wildlife Sanctuary.

Issue No. (iii) Whether the particulars of forgery and fraud have been proved

61. The Defendants pleaded and particularized the following particulars of fraud and forgery in their defence and counterclaim dated 28th April 2021:-
- i. Obtaining the Defendants land leasehold title without the Plaintiff’s knowledge, information or consent.
 - ii. Obtaining the title on a matter which was res judicata.
 - iii. Obtaining title deed without public participation.
 - iv. Obtaining title deed on Defendants ancestral land without any process or compensation at all.
62. Whether there was fraud or not needs production of evidence. Fraud is defined under the Black’s Law Dictionary 10th Edition as “A knowing misrepresentation or knowing concealment of a material fact



made to induce another to act to his or her detriment”. To decipher that there was fraud it is important that knowledge of the existence of fraud be established on the part of the Defendant.

63. 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. As regards the standard of proof, the court of Appeal in the case of *Kinyanjui Kamau Vs George Kamau (2015) eKLR* expressed itself as follows: -

“It is trite law that any allegations of fraud must be pleaded and strictly proved. (See *Ndolo Vs Ndolo (2008) 2 KLR (G & F) 742* wherein the court stated that:-

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

“In cases where fraud is alleged, it is not enough to simply infer fraud from the facts”.

64. It is the burden of the person who makes such allegations to present cogent and believable evidence of the same. Indeed, given the seriousness of charges of such character that border on criminality, the standard of proof is necessarily higher than the usual civil standard of a preponderance of probabilities. The standard does not, however, reach the criminal law standard of proof beyond reasonable doubt. It is proof to a level just below beyond reasonable doubt but must, in my estimation, reach the level of assured and confident proof. See *Magutu Electrical Services Ltd vs Miriam Nyawira Ngure & Anor [2019] eKLR*.
65. During trial the Defendants witness stated that the said property was registered fraudulently and through forgery in the names of the Plaintiff despite the same being ancestral land.
66. However, from the evidence that was tendered herein which the court has carefully evaluated and analysed, it emerged that the Plaintiff became the registered owner of the suit land by way of Grant No. IR 130100 for L.R No. 13007. Upon the enactment of the *Land Registration Act* 2012, the Plaintiff surrendered the old registration to the land which surrender was registered as L.R 23956/6. Grant No. LR 130010 for Land Reference No. 13007 was issued as a way to bring the Plaintiff’s registration of the suit property into the new regime and no consent was required from the Defendants to surrender the old registration in the suit property and obtain a new one. It was also evident that the Criminal Case No. 169 of 1998 is distinct from the current case and the same could not have been a basis for alleging any fraud in respect to the Plaintiff’s acquisition of the property.
67. In respect to the other particulars of fraud, it is also evident that the suit property was previously government land before being set aside for use as a Wildlife Sanctuary. The same was issued to the Plaintiff when it had already been designated for use as a Wildlife Sanctuary.
68. Section 119[a] of the *Wildlife Conservation and Management Act* provides as follows;
- “Any land which immediately before the commencement of the Act was a National Park, National reserve, marine reserves or Sanctuary as set out in the Eleventh Schedule shall be deemed to be a National Park, marine protected area or Sanctuary under this Act”.
69. No evidence was adduced by the Defendants demonstrating that they challenged the government’s decision to set aside the said property as a Wildlife Sanctuary. There was also no evidence adduced to



the effect that the Plaintiff's title was a forgery and or was issued illegally and as such it is the finding of this court that the particulars of fraud as pleaded by the Defendants in their Counterclaim have not proven to the satisfaction of this court.

Issue No. (iv) Whether the Defendants Counterclaim is merited

70. The Defendants sought for the following reliefs in their counterclaim:
 - a. Order of injunction restraining the Defendants from evicting or interfering with their ancestral land whatsoever.
 - b. Declaration that the defendant illegally and unlawfully obtained the title I.R. No. 130010 bearing L.R. No. 13007, Taita Hills and be revoked and the Taita Land Registrar be allowed to rectify the record books.
 - c. The Plaintiff be compensated for historic injustice or for their ancestral land by the Defendant if they want to compulsorily acquire the land and due process be effected.
 - d. Costs and interest of the suit.
71. The Defendants averred in their Counterclaim that they have lived on the land since time in memorial and that the Plaintiff acquired the said property through forgery and fraud.
72. It cannot be overemphasized that a counterclaim just like any other suit equally ought to be proved to the required standard.
73. From the analysis of the evidence adduced herein and this court having pronounced itself earlier it is the finding of this court that the said Counterclaim has not been proved to the required standard. The Defendants failed to demonstrate their ancestral lineage to the suit property. The Defendants provided no evidence to prove and demonstrate the same to enable this court consider their plea. The Defendants equally failed to adduce any evidence confirming any forgery and or fraud on the part of the Plaintiff towards the acquisition of the said property and as such, it is the finding of this court that the Defendants Counterclaim is unmerited and not deserving to the grant of the reliefs sought in the said Counterclaim.

Issue No. (v) What are the appropriate reliefs to grant herein

74. The Plaintiff sought for various reliefs as was pleaded in its plaint. The survey report that was produced herein and which survey was undertaken in the presence of the representatives of all the parties established inter alia that the whole of land parcels within Mwachabo Settlement Scheme bordering L.R No. 13007, 13140 have a clear distinct boundary physically identifiable on the ground and the Kenya Wildlife Fence has not passed through the Defendants parcel. The Defendants failed to file any report to the contrary and seeking to support their case. In this regard the court relies on the decision in the case of Ali Mohamed Sunkar -vs- Diamond Trust Bank Ltd (2011) eKLR where it was held that an expert report can only be challenged through a counter expert report which was not availed in the present case.
75. The analysis of the evidence tendered herein which the court has addressed itself on its earlier issues also leads to the conclusion that the Plaintiff has been able to prove its case to the required standard. The Court shall thus proceed to pronounce itself on the appropriate reliefs at the conclusion of this judgment. In granting the said reliefs, this court is also to the fact that the said reliefs ought to be geared towards ensuring the protection of the wildlife within the sanctuary and preservation of the flora and



fauna. In view of the foregoing, not all the reliefs sought by the parties may be available for granting by this Court.

Issue No. (vi) What orders should issue as to costs

76. As a general rule, costs follow the event unless the court for good reasons orders otherwise. In respect to costs of the suit and counterclaim, the Court has considered the fact that the dispute herein relates to the Wildlife Sanctuary and the Community and it is for the benefit of all the parties that there exists a harmonious and cordial relationship among them and as such the appropriate relief on costs is to direct each party to bear own costs of the suit and the counterclaim.

Final Orders

77. In conclusion, based on the totality of the evidence tendered herein, the Plaintiff has been able to prove its case on a balance of probabilities as against the Defendants. The court enters judgment in favour of the Plaintiff in the following terms;

- a. A declaration be and is hereby issued that the Defendants actions whether by themselves, their representatives, servants, agents and or assigns of entering the property known as L.R No. 13007 and digging, excavating, clearing and interfering with them and or otherwise dealing with the said property is unlawful and in violation of the Plaintiff's rights over its property.
- b. An order of permanent injunction be and is hereby issued restraining the Defendants whether by themselves, servants, agents and/or assigns from digging, excavating, clearing vegetation and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as land L.R No. 13007.
- c. Each party to bear own costs of the suit and Counterclaim.
- d. Any other relief not expressly granted is declined.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 22ND DAY OF NOVEMBER 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Karina for the Plaintiff.

Mr. Mwazighe for Defendants.

Court Assistants: Mary Ngoira and Norah Chao.

