Muhotetu Farmers Company Ltd v Nderitu & another (Environment & Land Case 6 of 2023) [2024] KEELC 13583 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13583 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ENVIRONMENT & LAND CASE 6 OF 2023

AK BOR, J

NOVEMBER 14, 2024

BETWEEN

MUHOTETU FARMERS COMPANY LTD ..... PLAINTIFF

AND

JOHN MAINA NDERITU ..... 1ST DEFENDANT

CHARLES WARUGONGO KIERU ..... 2ND DEFENDANT

JUDGMENT

1. This suit was initially filed in the Chief Magistrates Court at Nyahururu sin 2006 before being transferred to the High Court in Nakuru. It was later transferred to the Nyahururu Environment and Land Court (ELC). The typed proceedings show that the hearing of the suit commenced on 27/4/2017 before Lady Justice Mary Oundo at the Nyahururu Law Courts. After taking the evidence of the remaining witnesses and concluding the hearing, Hon. Mr. Justice Y. Angima disqualified himself from handling the matter on 26/4/2023 and transferred the suit to Nanyuki ELC on the ground that during the pendency of the suit, one of the parties sent an emissary to see him over the dispute.

2. When the matter was transferred to Nanyuki ELC, this court directed parties to file and exchange the trial bundles containing the pleadings, witness statements and the documents which were produced during the trial to enable the court write the judgment since the matter had been heard and concluded by different Judges of the court. This judgment is therefore based on the trial bundles which the parties submitted to court as well as the typed proceedings showing what transpired during the trial.

3. The plaint which the Plaintiff included in its trial bundle relates to Nyahururu Principal Magistrate Court Civil Suit No. 365 of 2006 in which Muhotetu Farmers Company Limited had sued John Maina Nderitu seeking a declaration that the lease between it and the 1st Defendant over land reference number (L.R No.) 6585/296 which is now Nyahururu Municipality Block 4/138 (the suit property)

had expired and that the Defendant's continued occupation of the suit property was unlawful. The Plaintiff sought an order for eviction of the Defendant and mesne profits with effect from 1/11/2006 at the rate of Kshs. 16,000/= per month until the Defendant vacated the suit land. The 2nd Defendant was added to the suit after he acquired the suit property from the Plaintiff sometime in 2013 in a sale transaction which the 1st Defendant contests was unlawful.

4. The Plaintiff averred that it was the registered proprietor of the suit property situated within Nyahururu Municipality and that vide a lease agreement dated 1/8/2001, it agreed to lease and the 1st Defendant agreed to take the lease over the suit property for a period of five years and three months from 1/8/2001 to 31/10/2006 for purposes of running a temporary petrol or filling station at a monthly rent to be paid according to the terms of the lease. It averred that it was an express condition of the lease that the 1st Defendant would not erect any permanent structures on the suit property without written consent of the Plaintiff.

5. The Plaintiff's claim was that although the 1st Defendant took possession of the suit property and started running the business of a petrol station, he failed to pay the agreed monthly rent as a result of which the Plaintiff filed Nyahururu PMCC No. 252 of 2006 seeking to recover rent of Kshs. 450,543/=. Further, it was its averment that the 1st Defendant had without its consent or knowledge, and in breach of the terms of the lease, erected permanent structures on the suit property which he had failed to pull down despite demand being made by the Plaintiff.

6. The Plaintiff averred that on 11/5/2006 and 17/7/2006 it gave notice to the 1st Defendant that it would not renew the lease upon its expiry on 31/10/2006. According to the Plaintiff, the lease expired on 31/10/2006 and the 1st Defendant's continued occupation of the suit property was unlawful. Further, it averred that the 1st Defendant had refused to vacate the suit property and to remove the structures he illegally erected on the suit land after the expiry of the lease.

7. In his Further Amended Defence and Counterclaim filed in Nakuru ELC Case No. 286 of 2015, the 1st Defendant averred that the terms of the lease agreement were rendered void or frustrated by the refusal of the Physical Planning Department to approve the change of user of the suit property to that of a temporary petrol station and instead allowed the construction of a permanent petrol station. The 1st Defendant averred that by its conduct and in writing, the Plaintiff invited him to construct a permanent petrol station together with commercial building's on the suit property at his own expense on the promise that upon construction of those developments, the Plaintiff would let the premises to him at a nominal rent for a reasonable period which is a lease of not lease than 35 years.

8. The 1st Defendant pleaded that based on the Plaintiff's invitation and encouragement, he and his friends charged various properties to secure a loan of Kshs. 3,000,000/= from Barclays Bank of Kenya. The properties charged included the land known as Mutitu/Ngoru Block 1 (Leshan Pondo)/241, Laikipia/Nyahururu/1815, Nyahururu Municipality/Block 6/195, Nyahururu Municipality/Block 6/169, Othaya/Kihugiru/696, Nya/Kirita Leshau Pondo/449 and Laikipia/Nyahururu/995, 1008, 1066 and 1997.

9. The 1st Defendant averred that the Plaintiff's encouragement and invitation to build a permanent petrol station was evidenced by the Plaintiff's letter dated 8/1/2002 stating that following a board meeting held on 15/1/2002, the board had authorised the 1st Defendant to build permanent offices and toilets and complete a petrol station in the suit property for the Plaintiff. The letter was indicated to have been signed by the Plaintiff's Chairman. He averred that with the loan of Kshs. 3,000,000/= borrowed from Barclays Bank and his earnings from Mwireri Petrol Station and Aberdare Petrol station the 1st Defendant constructed a three storeyed commercial building, a permanent petrol station with tanks to hold petroleum products, a medium sized commercial building and the building which

houses a generator, all of which cost Kshs. 12,000,000/=. Upon completion of the building, the 1st Defendant started running the petrol station and a restaurant on the 1st floor of the 3 storeyed permanent commercial building and embarked on looking for tenants to let the other premises to.

10. The 1st Defendant averred that he took possession of the suit property on 1/8/2001 under a lease for 5 years and 3 months under which he was to run a temporary petrol station. That following the Plaintiff's invitation and encouragement to put up a permanent petrol station and the buildings mentioned above, and after the Physical Planning Department declined to give approval for the construction of a temporary petrol station but instead granted approval for the construction of a permanent petrol station based on the application submitted by the Plaintiff.

11. The 1st Defendant averred that after the said change of user, he could not have utilised the suit property for purposes of a filling station which rendered the lease agreement frustrated and incapable of being complied with. He maintained that the effect of the refusal by the Physical Planning Department to grant permission to construct a temporary petrol station was to frustrate the lease made on 1/8/2001. Further, he averred that upon grant to the Plaintiff by the Physical Planning Department of approval to construct a permanent petrol station the parties varied the lease dated 1/8/2001 and the 1st Defendant was to pay rent reserved in the lease dated 1/8/2001 but on expiry of that lease, he was to occupy the suit property with the new buildings on it at a nominal rent and was to carry out businesses on some of the premises and let out the other premises to obtain a return on his investment for the permanent improvements he had made to the suit property.

12. He averred that as the construction of the buildings continued, the terms of the loan granted by Barclays Bank of Kenya became onerous and he looked for alternative facilities from the Co-operative Bank of Kenya. He transferred his banking facilities to this bank together with the securities over the parcels of land known as Mutitu/Ngoru Block 1 (Leshan Pondo)/241, Laikipia/Nyahururu/1815, Nyahururu Municipality/Block 6/195, Nyahururu Municipality/Block 6/169, Othaya/Kihugiru/696, Nya/Kirita Leshau Pondo/449 and Laikipia/Nyahururu/995, 1008, 1066 and 1997.

13. The 1st Defendant averred that no new lease agreement was executed after the change of user nor were the terms of lease varied to suit the circumstances but that he was in occupation of the suit property with the full knowledge of the Plaintiff. He averred that the Plaintiff's conduct, which amounted to representation, induced him into constructing the permanent structures on the suit plot on the understanding that he would be compensated for the cost of the developments incurred through setting off against the monthly rent until payment in full.

14. He maintained that the Plaintiff was estopped from denying the representation in view of the Plaintiff's refusal or failure to have a new lease executed after the change of user; not objecting immediately to the construction of the permanent structures on the suit property which started in September 2001; the Plaintiff's officials visiting the suit property all along since the 1st Defendant took possession and never raising any query over the structures constructed on it; and lastly, the officials visiting the suit property during the construction of all the structures and never raising any objection.

15. He averred that the Plaintiff intended to unjustly enrich itself by seeking his eviction from the suit property so that it could reap benefits from the developments that are on the plot courtesy of his own effort and finance. He pleaded that he should be allowed to continue in possession of the suit property until he was fully compensated for all the developments on the plot and added that any developments on the suit property should be fully compensated by having the suit property valued and the cost of developments set off against the monthly rent until payment in full.

16. By way of counterclaim, the 1st Defendant averred that the Plaintiff's conduct which amounted to representation, induced him to incur costs on developing the suit property on the understanding that he would be fully compensated by the Plaintiff by setting off the cost of developing the suit property against the agreed monthly rent. That on about 2006 after they had completed construction of the buildings, the Plaintiff set in motion actions to force him to vacate the suit property and deprive him of the rights which had accrued to him when he acted on the Plaintiff's representations as pleaded.

17. He added that the Plaintiff fraudulently filed SPMCC Case No. 355 of 2006 in which the court lacked jurisdiction to entertain the claim. Additionally, that it induced breach of contracts which the 1st Defendant had entered into for the supply of petroleum and petroleum products to his petrol station on the suit property by lying that he was a trespasser on the suit property which led to the termination of the license agreement for the distribution of petrol and petroleum products. Lastly, by discouraging and preventing tenants whom the 1st Defendant would have let the premises to from taking possession on them.

18. He pleaded that there was an order in force which was made on 27/1/2014 based on the Notice of Motion dated 7/3/2014 requiring the Plaintiff to maintain the status quo. That the order was made in the presence of the Plaintiff's advocate and forbade the Plaintiff from selling the suit property or interfering with the 1st Defendant's quite possession of the suit property until the court made further orders.

19. While the suit and application were pending, the Plaintiff in breach of the status quo order and the doctrine of lis pendens purported to sell and transfer the suit property on 4/3/2014 to Charles Warugongo Kieru, the 2nd Defendant, who was registered as proprietor. The 1st Defendant emphasised that the sale and transfer were fraudulent and void and that the 2nd Defendant held the legal estate in the suit property upon a constructive trust. He maintained that the 2nd Defendant knew of the suit and the fact that he was in possession of the suit property at the time of the purported sell and purchase. The 1st Defendant set out particulars of fraud on the part of the Plaintiff and the 2nd Defendant in the counterclaim while urging that the 2nd Defendant stole a match on him. The Defendant added Charles Warurongo Kieru as the 2nd Defendant to its counterclaim,

20. The 1st Defendant sought for a valuation of the developments he had carried out on the suit property and for compensation through having value of the developments set off against the agreed rent. He urged the court to dismiss the Plaintiff's claim and declare that the lease entered into on 1/8/2001 was frustrated and was null and void, and in the alternative a declaration that the said lease was varied on or about 8/1/2002; a declaration that he was entitled to carry on business on the suit property and sublet the premises which he was not using for a reasonable period of not less than 35 years paying the Plaintiff a nominal rent of a shilling per month.

21. He also sought a declaration that proprietary estoppel restrained the Plaintiff from entering into or interfering with his enjoyment of the suit property for 35 years and a permanent injunction to retrain the Plaintiff from interfering with his quiet possession of the suit property; a declaration that the Plaintiff had committed trespass on a portion of the suit property since 2006, and a declaration that the Plaintiff had induced breaches of tenancies between him and the tenants.

22. The 1st Defendant sought an order for the Plaintiff to grant him a lease of 35 years or in the alternative, that it assigns its lease to him at a reasonable remuneration; valuation of the developments he carried out and compensation for the total cost incurred plus interest by having that set off against the agreed monthly rent or the rent which the court may deem reasonable.

23. The other reliefs which the 1st Defendant sought in his Further Amended Defence and Counterclaim dated 9/5/2016 were a declaration that the purported sale and transfer of the suit property to the 2nd Defendant was fraudulent and void; a declaration that the 2nd Defendant held the suit property upon trust for him and an order for the 2nd Defendant to deliver up the title over the suit property for cancellation by the Land Registrar. Lastly, he sought an order for the 2nd Defendant to transfer the suit property to him, general damages plus cost of the suit and interest.

24. From the typed proceedings it can be discerned that Hon. Justice Sila Munyao made an order on 9/10/2015 for the transfer of the file to the ELC and for it to be given an ELC number. A consent seems to have been adopted on 5/5/2016 granting the 1st Defendant leave to amend his defence and counterclaim while joining the 2nd Defendant to the counterclaim. A further order was made for the maintenance of the status quo until the suit was heard and determined.

25. The hearing of the suit commenced on 27/4/2017 when Wiliam Gathecha Guyo, the Plaintiff's secretary gave evidence and told the court he was elected director and Secretary of the company in 1997 and that every time they held elections he was re-elected. In 2001, he was a director and the secretary of the Plaintiff. He stated that the Plaintiff entered into an agreement with the 1st Defendant on 1/8/2001 for the lease of the suit property for five years and three months and was to build a temporary petrol station on the land. He produced a copy of the agreement which showed how the rent would be paid. The 1st Defendant gave the Plaintiff Kshs. 241,000/= to pay rates to the Municipal Council.

26. They agreed that he was to pay rent of Kshs. 6,000/= with this increasing to 14,000/= per month after two years. He was also to pay Kshs. 7,000/= to the council. The last one year and three months of the lease he was to pay monthly rent of Kshs. 16,000/=. He was emphatic that the Plaintiff did not allow the 1st Defendant to put up permanent structures on its land. The 1st Defendant gave them Kshs. 241,000 to pay the rates and he also paid 18,000/= upon which they gave him possession of the suit property.

27. When the 1st Defendant started putting up permanent houses and digging trenches on the suit property, the witness went to him with the Chairman and asked him to stop. When he did not stop they instructed Njagi Nderitu advocates to write him the demand letter dated 30/11/2004, a copy of which he produced. He told the court that the 1st Defendant paid Kshs. 365,000/= and then stopped making payments.

28. He told the court that after the purported author of the impugned letter had died, the letter turned up in 2006 which indicated that the 1st Defendant was allowed to put up permanent offices, toilets and to complete petrol station on the land. According to him, the letter did not permit the 1st Defendant to put up a storeyed building. His view was that a petrol station permitted an office and toilet and nothing else. He maintained that the 1st Defendant did not involve the Plaintiff when he went to borrow the loan and that whatever monies he supposedly borrowed were not used for the Plaintiff's benefit since he did not even pay the land rates. He was emphatic that they did not agree that the 1st Defendant would be given a lease of 35 years where he would be paying a shilling every month and added that they were not ready to pay the 1st Defendant any costs because he built the permanent structures without their permission.

29. He referred the court to the quantity surveyor's report dated 25/3/2016 which put the value of the building at Kshs. 4,171,315/= and stated that if they were to pay him, the Defendant would first need to pay what he owed the Plaintiff. The witness told the court the Plaintiff did not know how much the 1st Defendant collected as rent from the premises and that they did not agree with the findings in

the 1st Defendant's valuation dated 31/10/2016. In his view, what the 1st Defendant had constructed could not amount to the value that he had put in the valuation report as the cost of the building.

30. On cross-examination, he conceded that when the lease agreement was entered into, the suit property was empty which is why they agreed that the 1st Defendant would build a temporary petrol station. He told the court that a section of the plot had a petrol station and the other had buildings for rent.

The Plaintiff sold the suit property to the 2nd Defendant in 2006. He admitted that they sued the 1st Defendant vide Nyahururu PMCC Case No. 256 of 2006 and produced a copy of the plaint.

31. He told the court that when the term of the lease came to an end, the 1st Defendant did not leave the suit property and was still there even at the time the witness testified. Mr. Guyo told the court that the 1st Defendant had put up a permanent building of two floors on the suit property which had a butchery, a restaurant, bar and shops. He added that the premises had been sublet to other people which was not in the agreement. He produced a copy of the letter dated 6/11/2012 from the Registrar of Companies and told the court that the Plaintiff's board had permitted him to come and testify on its behalf. He produced a copy of the resolution of the board of directors passed on 4/10/2011 in evidence. He told the court that he would like the court to remove the 1st Defendant from the suit property and for him to pay costs as well as mesne profits from 1st November 2006 at Kshs. 16,000 per month.

32. He confirmed that the Plaintiff sold the suit property to Charles Warugongo Kieru after it passed a resolution on 14/12/2013 to sell all the assets of the Plaintiff. They advertised the sale in the daily newspapers and Charles Warugongo's bid was the highest. They sold the land to him at Kshs. 16,000,000/=. He was adamant that at the time when they sold the plot, there were no court orders stopping the sale and that the 1st Defendant had not placed a caution against the land. They would be happy if the 2nd Defendant were to remove the 1st Defendant from the suit property as they considered him a trespasser.

33. When he was shown the letter dated 8/1/2002 written by J.G Kirago, he told the court that he did not recognize it. It stated that the 1st Defendant was given permission by the Plaintiff's board to put up permanent structures on the land and that the board had sat on 15/1/2002. He told the court that the board did not sit on that day and that being the Secretary he knew that no such meeting took place. When he was shown the signature on the letter he denied that it was Gathuma signature while mentioning that he had worked with him for 20 years. He added that even the rubber stamp on the letter was not the Plaintiff's. They used to seal all their letters including the agreement made in 2001 which had the company seal.

34. When they entered into the lease, they had heard that the 1st Defendant had another petrol station and they agreed that he would build a temporary petrol station, a small office and a toilet. The terms of the lease under the agreement was five years and three months. He was emphatic that they did not vary the agreement with the 1st Defendant nor did they agree that the 1st Defendant was to put up a permanent petrol station and shops for rent.

35. The witness could not remember writing to the Ministry of Lands for change of user of the suit property. When he was shown the letter written to the Ministry of Lands and Settlement dated 8/11/2001, he told the court that the 1st Defendant made the application because they had agreed that he would build a temporary structure. He reiterated that the Plaintiff did not apply for change of user so that the 1st Defendant could put up a permanent building.

36. He told the court that he saw the letter dated 8/1/2002 by J.G Kiragu who was the Chairman of the company in 2012. He maintained that the Plaintiff and the 1st Defendant did not agree to vary the lease

dated 1/8/2001 or that the lease was abandoned and the 1st Defendant allowed to put up permanent structures and carry out his business on the suit property until such time as he would have recouped his money or investment. He denied that the Plaintiff watched with satisfaction as the 1st Defendant developed the plot without raising a finger since they wanted to steal his investment.

37. He told the court that the 1st Defendant did not pay rent even at the date he was testifying in court. It was true that the Plaintiff wrote to the Council of Nyahururu seeking approval of the building plans with regard to the permanent station building. He denied that the Plaintiff had surrendered the original title. The Plaintiff complained to its advocate about the structures the Defendant put upon the land before they took him to court in 2006. By then the building was complete. They did not do anything to stop him from proceeding with the construction. By the time they sued him the building was complete and tenants were occupying it. He did not know whether the 1st Defendant took a loan to develop the building. When he was shown the charge documents he stated that they did not give the 1st Defendant permission to borrow money and develop the Plaintiff's property. Once the building was complete, they did not interfere with the 1st Defendant's tenants.

38. In 2006, they saw the National Oil Company supplying petrol to the 1st Defendant. He together with the Chairman Gathuma and Charles Mukunya went to the offices of the National Oil Company and told them to stop supplying oil to the 1st Defendant. They did not know that the station was operational. He denied that they wanted to hijack the petroleum business from the 1st Defendant and sublet it to another person.

39. When they sold the suit property to the 2nd Defendant there was another case in Nakuru, which was transferred form the Chief Magistrate's Court in Nyahururu to the High Court in Nakuru. When the shareholders passed a resolution to have the properties of the Plaintiff sold in 2013, they informed them of the case pending in Nakuru and the permanent structures. The sum of Kshs. 16,000,000/= paid as consideration was the shareholders money according to him which they distributed to them.

40. He maintained that the Plaintiff's shareholders had not benefited from the improvements on the suit land made by the 1st Defendant. He told the court that the value of the land in 2001 was Kshs. 5,000,000/= and that by 2016 it had appreciated to 12,000,000/=. He clarified that they sold the plot but did not sell the buildings. The interest of the Plaintiff was that the 1st Defendant be removed from the suit property so that the 2nd Defendant could occupy it since they had his money. He maintained that the 1st Defendant went and changed the user of the land. He reiterated that the improvements made by the 1st Defendant on the suit property were not agreed upon with the directors orally. He was adamant that the letter dated 8/1/2002 was not Mr. Kiragu's letter.

41. On being cross-examined by Ms. Njeri he told the court that the 1st Defendant had been on the suit property since 1/8/2001 and that his lease was to expire on 1/11/2006 hence in 2013, the 1st Defendant did not have permission to be on the suit land. They filed Civil Case No. 355 of 2006 seeking to evict the 1st Defendant from the land because his lease had expired. He confirmed that they sold the suit property to the 2nd Defendant in 2013 after advertising its sale. He produced a copy of the letter dated 7/11/2013 vide which the 2nd Defendant applied to buy the suit property. They accepted his offer vide the letter dated 14/11/2013 at the agreed purchase price of Kshs. 16,002,100/=. They entered into an agreement on 15/11/2013 and received a deposit of Kshs. 4,005,251/=. Warugongo paid 8 million leaving a balance 3 million which they had not received because Warugongo was to pay once he got possession of the suit property.

42. They conducted a valuation before selling the land and effected the transfer after receiving the deposit. He referred to the transfer dated 26/2/2014 which had the Plaintiff's seal and the signatures of the

directors. After the transfer, the 2nd Defendant got the lease which was issued on 3/3/2014. He was emphatic that there was no order from court restraining them from selling the suit property and that the 2nd Defendant knew about the case pending in court.

43. The witness had not seen the building plans of the storeyed building on the suit property nor had they seen the bill of quantities. They did not know how much was used to put up the building. They had agreed that the 1st Defendant would build a temporary petrol station, a small office and a toilet and once he left, the Plaintiff was to pay him but instead he put up permanent structures. He told the court that they stopped the 1st Defendant in 2001 but he refused and went ahead. He did not know if the 1st Defendant had changed the user of the land. He told the court that the letter of change of user indicated that it was from commercial to petrol station and if there was a commercial building on site then it was contrary to the change of user.

44. The 1st Defendant had not paid rent up to that date. He had tenants on the suit property. The valuation report dated 31/10/2016 was done by the 1st Defendant and gave the value of the land at Kshs. 12,000,000/= and the improvements were valued at Kshs. 25,100,300/= all totaling up to Kshs. 37,100,100 which he did not agree with. The report indicated that the rental value of the premises was Kshs. 240,000/= per month which according to him was a lot of money. He went on to add that if at all there was money which the Plaintiff owed the 1st Defendant, the 1st Defendant had recovered such money because in 2006 he got rent of Kshs. 144, 000/= per month. From 2006 up to the time he was giving evidence was about 11 years which meant that by that time the 1st Defendant had recovered all his money.

45. He clarified that they entered into an agreement with the 1st Defendant and not Mwireru Petrol station. He told the court that Aberdare Company is the one they had a case with and he did not know if it was the 1st Defendant's company. He reiterated that they were not involved when the 1st Defendant borrowed money from the bank. They could not agree that the 1st Defendant be given a 35-year lease. The Plaintiff paid rates for the land. It did not have a dispute with the 2nd Defendant.

46. He told the court that the valuation they conducted on the suit land indicated that the structures were valued at Kshs. 4,000,000/= and he hastened to add that the 1st Defendant should first pay them after which they will pay for his structures. He was emphatic that they did not sell the suit property to defraud the 1st Defendant but that they sold it because a resolution had been passed. He was adamant that they did not enter into any other agreement with the 1st Defendant and that the agreement written in 2001 was never changed. On re-examination, by the Plaintiffs advocate, he told the court that they did not go to the County Council and had not seen any building plans nor did they sign any document.

47. The Plaintiff called Nathaniel Ngure Kihiu, a quantity surveyor to testify on its behalf. He told the court that he received instructions from a director of the Plaintiff on 20/3/2012 to establish the construction costs of the building on the suit property. He visited the land and found a two storeyed building with the ground floor, first floor and one room on the second floor. The building measured approximately 25 meters by 8 meters. He came up with a bill of quantities but when he asked for the drawings he was told they did not have them so he did his own measurement on the site. He measured every item on the site and prepared a bill of quantities. Using the prices in 2012, he came up with the cost of Kshs. 4,171,315/=. He gave a breakdown of the costs of the foundation, slab, wall, roofing and all the other costs of the building. He noted that the building had developed some cracks near the chimney and that the standard and design of the workmanship of the building was not done by professionals owing to the fact that there were no drawings and the building had cracks.

48. On cross-examination and being shown the documents in the 1st Defendant's trial bundle, he told the court that there was an approval of the building plans although he could not tell if it was related to the same plot. He stated that his clients lied to him that there were no approvals. He was instructed to prepare the bill of quantities for the building and not the petrol station. He only saw one building with four rooms and a restaurant. The 1st floor had a bar, he was not shown the other three buildings. He went to the site and conducted measurements on the site. He denied that he was brought by the Plaintiff to lie on its behalf.

49. When he was cross-examined by Ms. Wamithi advocate, he told the court that he was instructed to value the suit property in 2012 and that the figures in his report were based on the prices of 2012. When he was shown the building plans, his view was that they did not appear like what he had seen on the ground because the drawing was for a proposed petrol station and not a two-storeyed building. The plans showed that the client was Muhotetu c/o John Maina Nderitu. His view was that the plan was not consistent with the building that he had inspected and did not bear a signature. His opinion was that the structure was worth Kshs. 4,000,000/= which was what the person spent to put up the building which he inspected. When he visited the suit property, the premises were in use with the ground floor having a restaurant and the building being used for commercial purposes.

50. On re-examination he told the court that the structure he found was a two storey structure. He was not shown a building plan for the two storeyed building and what he was shown in court was a plan for the petrol station. The building that he valued did not have a plan. Apart from the two storeyed building, there was a petrol pump and no other buildings on the suit property. He still maintained that the workmanship of the building of the suit property was unprofessionally done.

51. After the Plaintiff had closed its case, Dr. Kamau Kuria, Senior Counsel made an opening statement giving the overview of the case while citing authorities. John Maina Nderitu, the 1st Defendant testified and told the court that he was a business man at Nyahururu. He had a petrol station known as Aberdare Petrol Station and carried out business at Mwireri Petrol station on Kenyatta Avenue, which was leased to him by KFA. He learnt that the Plaintiff was leasing out a plot at the roundabout on Kenyatta Avenue. He attended the meeting called by the Plaintiff on 1/8/2001 and after the meeting he was given a letter informing him that he was successful and would be given the plot.

52. He signed a document to that effect with the terms of the lease being that he was leasing the property for five years and 3 months and was to sell petrol on the land. He produced a copy of the lease. When they went to the physical planner in Nanyuki, the request to put up a temporary petrol station was rejected. He explained this to the Plaintiff and he then did the change of user and the Plaintiff was issued a letter for the change the user. He told the court that the Plaintiff was informed to return the title deed and they did return it. He confirmed that the chairman who was dead by then was director Muiruri and the Secretary was Gathecha when they returned the title deed.

53. He told the court that the petrol station belonged to the company but he was the foreman or agent. When he was referred to the letter dated 14/12/2001 he told the court that a Mr. Kibaki was sent from the Ministry of Roads from Nairobi and that they went and sat down with the Plaintiff and agreed on the issues in that letter. He stated that the people from the Physical Planning Department were supervising the building and that the engineer supervising the building was from the Council. He added that the Plaintiff's directors were also available to supervise the construction.

54. He referred the court to the plan approved on 18/10/2001 which he told the court was a plan for the proposed petrol station. It indicated that the Plaintiff was the client while Syntech Engineers Nairobi were the Engineers for the project. He was referred to the building plans which were approved on 6/2/2002 and he told the court those were the plans for the building which was put up on the suit

property. They first built a janitor room then put up a place for the gas service and an office. They also put up a shop to sell oil as well as tanks and pumps. Upon completion of the petrol station, they put up a hotel which was a boarding and lodging hotel. The building which was storeyed had a hotel and a butchery and was on two floors. The 1st floor had four rooms and a restaurant. He told the court the first floor had a shop and office which was closed in 2006 when the Plaintiff got a court order. They were using the side which had a hotel and a butchery. The second building which had a compressor and service was also closed.

55. He told the court that he took a loan of Kshs. 3,000,000/= from Barclays Bank which he secured using title deeds from his friends. He had borrowed Kshs. 5,000,000/= from Barclays Bank but was only given 3,000,000/=. He stated that he got the other finances from Mwireri filling station when he was putting up the building. He told the court that he had no issues with the Plaintiff and they used to go and inspect how the building was coming up and had a cordial relationship. The problems between him and the Plaintiff started when the 5 year and 3 months ended. He was then asked for the title to the suit property. The Chairman Mr. Gathuma confronted him when he went to deposit money at Barclays bank and told him that he had stolen their title and that they would sue him in court. He referred to Nyahururu PMCCC No. 2255 of 2006. By the time his troubles started he had reached where the building stood to date.

56. He wanted to utilise the building to sell oil and had a shop. He was selling petrol at the petrol station and had over six workers. He was selling more than 250,000 liters of petrol per month and used to make over Kshs. 300,000/= per day. After his encounter with the Plaintiff's director at the bank he tried calling for a meeting but they refused. The people who gave him their land as securities lost the land when it was sold. He lamented that the Plaintiff had caused him problems and that he even separated with his wife because he became broke. He had had to sell more than six plots to sustain himself.

57. When Dr. Kamau Kuria sought directions in terms of producing the bundles as exhibits, Mr. Waichungo Advocate did not have an objection to the production of some of the documents filed on 13/5/2016 but he objected to some documents being produced. The court went through the process of marking documents some as exhibits and others for identification. The 1st Defendant adopted his statement which he recorded on 18/8/2014.

58. There were further proceedings in the matter during which applications for witness summons were made after the 1st Defendant was stood down.

59. Christopher Maina Gichuki, the Land Registrar for Nyandarua and Samburu district was called to give evidence on 9/4/2018. The witness was discharged based on Dr. Kamau Kuria's wish to have the Land Registrar appear in court to testify. Emojong Fredirick was sworn as 1st Defendant 3rd witness and when he told the court that he was not Rachael Wangechi, Dr. Kamau Kuria requested to have the witness discharged because he wished to have Rachael Wangechi attend court to testify.

60. John Maina Nderitu attended court and was re-sworn. He told the court that he did not know whether the lease agreement was registered. The agreement allowed him to put up a temporary petrol station. He denied subletting the plots to other people and stated that the only person he had given a plot was the pastor who paid him a rent of Kshs. 3,000/= per month. The building had a bar which had been operating for 7 years. He had a license to run the bar. At the time he was testifying the bar was closed because of his own issues. He denied renting it out and stated that Wanjohi who died was his manager. His cousin, John Nderitu was also a manager at the bar. The hotel on the suit property was his and he also managed the butchery. The car wash was his. The council had allowed someone to build a mabati shop on the plot.

61. He maintained that the terms of the lease agreement were changed vide the letter dated 8/11/2002 which was marked for identification. The letter dated 8/1/2002 allowed him to build permanent structures on the suit property. According to him, the Plaintiff wrote the letter which did not have a letter head but had a seal and the rubber stamp. The letter was signed by the Plaintiff's chairman called J.Gathuma. The board meeting which authorized him to put up a permanent structure took place on 15/1/2002. He was given the letter by the Plaintiff. The lease was changed when he was allowed to put up a permanent structure on the land. After the lease expired there was another agreement according to him. He told the court two cases were filed against him and he filed his defences in the suit through Kariuki Mwangi Advocate who was his lawyer up to 2012 when he instructed his present advocate. He did not give Kairuki Mwangi advocate the letter dated 8/1/2002. When he was asked whether the letter was not mentioned in any of the proceedings in court he chose to remain silent. Mr. Gathuma who is said to have written the letter was dead by then and the witness could not remember when he died. He denied that he forged that letter after Mr. Gathuma died. When he was shown the seal on the agreement dated 1/8/2001 and the one on the document dated 8/1/2002, he confirmed that the original document had a seal and a stamp.

62. He told the court that he was allowed to put up permanent structures on the suit property and had invested Kshs. 19,000,000/=. The Plaintiff refused to sit down with him to discuss and they said that the change of user would suffice and that the documents signed by Mr. Gathuma was sufficient. He told the court he built a petrol station and the storeyed building on the suit land. The first floor had an office and store. The second phase of the building had a butchery and hotel and bar on top. He told the court they had agreed orally that he would put up a second building that had a bar and hotel. It had also been agreed that he would put up a cafeteria. When he was referred to the approved plans marked for identification, he confirmed that the directors of Muhotetu had not signed the plans.

63. He told the court that from the time he entered the building in 2001 he had paid Kshs. 265,000/= and later gave them some other money. He paid Kshs 50,000/= to the council. He maintained that the Plaintiff owed him a debt of the money he used to build the petrol station because they had agreed to build a petrol station and they were to refund his money. That by the time the matter went to court the petrol station was not complete. The Plaintiff's directors used to visit the site while he was building the petrol station and they told him to build then they would add up the money which he had used to build. He had done a valuation of the building which gave the value as Kshs. 19,300,000/= as at 6/12/2010. Another valuation was done on 30/10/2016 when it was valued at Kshs. 25, 100,000/=. He explained that the valuation went up because the interest rates at the bank continued to rise.

64. He stated that he finished building the petrol station in 2005 but did not know what the value of the structure was that year. He was emphatic that the value was not 4,000,000/= while stating that the loans he took from the bank were to build the petrol station and put up the building. He was referred to one of the exhibits which showed that he had taken a loan for home improvement. His response was that that could be removed from the list of documents because it was not used for the suit property. He averred that his income was Kshs. 300,000/= per day and that his bank statements were proof of this fact. When the Plaintiff stopped his business he got into debt with the National Oil Corporation. He incurred more debts when he was involved in a road accident but blamed the Plaintiff's actions that made him have financial woes. He claimed that the Plaintiff also closed his petrol station in Nairobi.

65. He was asking for a lease of 35 years from the Plaintiff because it was an order from the court which file got lost. Since he started this case it had been having problems. He was not ready to accept the sum of Kshs. 4,000,000/= from the Plaintiff to leave the suit property. He maintained that the Plaintiff prepared the plans and that he had the original plans.

66. When he was cross examined by Ms. Njeri advocate, he confirmed that the suit property was owned by the Plaintiff before 2013. His name was not on the lease documents and what brought them together with the Plaintiff was the agreement dated 1/8/2001 being a lease for 5 years and 3 months. He was to pay rent for the plot with the annual rent for the first two years being Kshs. 144,000/=. When he signed the agreement he gave the Plaintiff Kshs. 260,000/=. At the time he gave evidence he was on the suit property. He told the court that from the time the case was brought he was demanding money from the Plaintiff because he was not conducting business. He maintained that the Plaintiff made the application for change of user and that he could only put up the petrol station once there was a change of user. When he went to see the physical planner in Nanyuki he was told the change of user had been approved. The approval document was given to the Plaintiff. He was emphatic that the documents allowed him to put up a permanent building.

67. He explained that there was a change of user from commercial to a petrol station and that there must be another letter for petrol station and commercial since the plans could not have been approved without permission to use the plot for both a petrol station and commercial purposes. He told the court that the original title was returned to the lands office, Nairobi. He believed there could have been another layer of change of user even though he did not go to the office at lands. He did not want to respond to the question whether there was a new lease with the change of user. When he was referred to one of the documents marked for identification, he stated that the user was commercial/petrol station and that the valuation report also showed that the user was commercial/petrol station.

68. He went on to add that the building showed cafeteria/kitchen/store/office and a generator which was the plan of the proposed petrol station. He confirmed that the Plaintiff had not signed the plan or the request documents. According to him, the plan which was approved in 2002 must have been signed by the Town engineer. The plan was approved by the Physical Planning Department on 6/2/2002 and was also approved by the Public Health Officer. The engineer approved it on 18/10/2001. When he was shown the building plans marked for identification, he confirmed that it showed the petrol station and had a proposed storeyed building. He had the plans which showed that there was to be a storeyed building.

69. He stated that the Plaintiff was kept informed of all developments since he was like a messenger in the whole process. His view was that he could not have constructed the building without the engineer's approval and that of the Plaintiff. He told the court that the documents showing he was to complete the petrol station and lease the land for 35 years were in the Nakuru case. He emphasised that the petrol station belonged to the Plaintiff. He stated that he got Kshs. 12,000,000/= from the bank to put up the petrol station and that he used the Aberdare petrol station to secure the loan. He confirmed that the bank statement which he was referred to were for his personal account held at Barclays. Given time, he could have retrieve the documents. He had testified that he sublet a corridor but was using the rest of the building.

70. The terms of the lease agreement according to him changed when they were given the change of user. His view was that he was helping the Plaintiff to get a petrol station by helping them with money. The petrol station and the land belonged to the Plaintiff and his position was that the Plaintiff built the petrol station. He stated that they had agreed to finish building the storeyed structure then put up the petrol station. It was not true that he did not finish the petrol station for lack of funds, according to him it was the Plaintiff which stopped the building. When the Plaintiff was required to put up a petrol station it did not have the money.

71. The suit property was sold in 2013 while the case was still pending in court. When he was shown the advertisement inviting buyers for the land he did not bother with the advertisement because they had a

case in court. He did not place any restriction against the suit property because there was a case in court. He did not bother with the agreement between the Plaintiff and the subsequent buyer. He told the court they had an order from the Nakuru court stopping the Plaintiff from dealing with the plot. He later added that they had placed a caution on the land but it was removed when the plot was sold. The documents which they used in the case got lost as did the documents in Ardhi house. He knew that the suit property had been sold to the 2nd Defendant and maintained that he had used a lot of money to build on the plot and was continuing to repay loans to the banks. He was referred to the building plans and asked whether they were approved before the change of user was granted. He was emphatic that he had the right to use the suit property because his money was in that plot. He explained that he could not pay land rent and rates because the Plaintiff's officials had chased him away from the suit property.

72. He told the court that he put up the building on the suit property in 2005 and that he had spent Kshs. 12,000,000/= to put up the petrol station and the storeyed building. The bill of quantities was with the engineers. He conceded that they did not agree with the Plaintiff on how much he would use to put up the petrol station and that this would have become apparent when he finished putting it up. The Plaintiff had not called a meeting to discuss the modalities of payment. He refused to accept that he was only entitled to Kshs. 4,000,000/=.

73. On re-examination, he told the court the agreement dated 1/8/2001 was taken to him by the Plaintiff and he was not involved in drafting it. That agreement was for the construction of a temporary petrol station and when the physical planner rejected the temporary petrol station, he went back to the Plaintiff and they then wrote an application for change of user and they sent the title to Nairobi and were given a change of user. They built a permanent petrol station instead of a temporary one but was stopped from proceeding with the construction by the Plaintiff. He explained that there was an agreement for him to use the plot and since he thought he was covered by the law he proceeded to use it. He built the offices described and when he reached the hotel, the engineers went and told him that there was some space remaining and he built the toilet. He could not put cabro and the roof.

74. When the premises were handed over to him in 2001, there was a timber building on it and he removed the previous tenants from the premises. He told the court that the letter signed by Chairman Kiragu was not a forgery and that the documents produced in the Nakuru proceedings had an original document with the seal. He added that he paid rent for the first two years and that there were noises regarding rent until the Plaintiff filed suit in 2006. The construction of the petrol station was halted in 2005. The late Muiruri informed the chairman that the suit property had been stolen and that he had stolen it. He thought it was a joke until a case was filed against him. He was empathic that the Plaintiff applied for the approval of the building plans. He had never been in possession of the title and only saw it when the Plaintiff's officials were taking it to Ardhi house. He reiterated that the building plans belonged to the Plaintiff. He concluded that there were empty shops and offices on the suit property without tenants because when the Plaintiff filed the case in court they obtained an injunction restricting interference with the building.

75. Grace Wangeci Mwangi the Executive Assistant at the ELC Nakuru was called to give evidence. She confirmed that Miscellaneous Application No. 557 of 2012 was opened in Nakuru. Owing to lack of space files from 2013 were archived. They had done their case auditing but could not trace the file. The advocate in the case had not brought any application for a skeleton file to be opened. They had done their best to look for the file but were unable to trace it. She sought two weeks to look for it again. She attended court again on a different date.

76. Charles Ayende attended court on 27/11/2018 and sought time to familiarize himself with the matter so that he could come and testify on another date. The court discharged him and lifted the warrant

for his arrest on condition that he attended court at the next hearing date to produce the documents relating to the suit.

77. Grace Wangechi Mwangi gave evidence. Witness summons to produce the file for Nakuru ELC Case No. 557 of 2010. She did not have the file with her. She had tried tracing it but could not find the miscellaneous file. It could not be found anywhere.

78. Dr. Kamau Kuria, SC, applied to reconstruct the court file in Nyahururu instead of Nakuru and the court granted him time.

79. On 20/3/2019 Ayende Charles Morara attended court again and this time testified as the Land Registrar in charge of Nyandarua and Samburu Counties. He told the court that the suit property was registered under the repealed RLA after the register was opened on 13/5/1992. The property was held under a leasehold of 99 years from November 1972. He did not have the lease containing the terms of the property but had the register which was opened upon the registration of the lease. The lease would give the terms and conditions under which it was held whether it was commercial or agricultural.

80. Under the repealed Government Lands Act, the government held the revisionary interest in the freehold land. He clarified that allotment letters would be with the land administration office and the lease would be forwarded by the Chief Land Registrar upon preparation to the district land registrar for registration and issuance of a certificate of lease. He conceded that as a matter of practice, some documents were with the land registrar, somewhere in Nairobi and some were held by the lessor and lessee. When he was shown some correspondence, he stated that he did not have a copy of the letter since it was correspondence between the lessor and the land administration department.

81. The green card did not reflect the user of the suit property. He conceded that he had scanty documents on the suit property. He had tried to trace the lease in vain and brought he only record he could get to court. He agreed that their filing system had been poor but insisted they are trying to rectify that anomaly. His opinion was that the file could be reconstructed at the instance of the lessor. He had with him the green and the white cards and the order issued on 27/10/2014 which he produced as exhibit.

82. On cross-examination, Mr. Morara stated that the registry was chaotic before he went there and that he was trying to reform it. He conceded that they had had challenges in getting copies of leases in other instances. He told the court that the practice was that three copies of the lease were forwarded to the land registrar and the office retained one copy upon registration. One copy was returned to the Chief Registrar in Nairobi.

83. The Land Registrar confirmed that entry no. 3 on the register showed that the certificate of lease had been reissued which showed that the original certificate got lost and was reissued vide Kenya Gazette notice no. 14403 of 8/11/2013. The records he held were reconstructed documents. The current registered owner of the suit property was Charles Warugongo Kiarie who was registered on 3/3/2014 and a certificate of lease issued to him on 4/3/2014. Before registration of Kiarie, there was no caveat in force or restriction restricting dealings on the land. He clarified that the letter on change of user was not authorized by their office because they did not deal with issues of changes of user, as these were dealt with by the office of the land administration.

84. He confirmed that the register was opened on 13/5/1992 and before then the registry did not hold any record with regard to the suit property. The interest was a leasehold for 99 years from 1/11/1972. Regarding conversion of titles, he clarified that once a grant was converted, green cards would be opened in Nairobi and the certificate of grant would be enclosed in a letter forwarded to the District Land Registrar to open and register a certificate of lease. The terms in the grant would remain in the lease after conversion unless the guarantee had applied for change of terms. He also clarified that the

central registry kept those files while the district land registry kept the parcel files. He did not have the records from Nairobi.

85. He took the court through the process for transferring land and stated that upon transfer of a property under the Registered *Land Act*, a transfer was drawn by the lessor and a valuation done for purposes of payment of stamp duty. Consent to transfer would be given with the rent clearance being issued by the national government while the county council would issue the rates clearance certificate. Assessment of stamp duty is done on the transfer before it is booked and registered following which a certificate of lease is issued.

86. He confirmed that the transfer of the suit property to the 2nd Defendant was duly executed by the Plaintiff's directors and its seal affixed. The transfer was registered on 3/3/2014 and the consideration was indicated as Kshs. 16,021,005/=. Payment of stamp duty was made at the bank. The application for assessment of stamp duty was done on 26/2/2014 and the duty paid was Kshs. 640,901/= plus bank charges of Kshs. 110. This was based on 4% of the lease. For one to get consent to transfer, they had to clear rent and rates. He reiterated that there was no encumbrance against the land before the 2nd Defendant was registered as the proprietor of the suit property.

87. The order for maintaining status quo was registered on 4/6/2014. He spoke of the order of 29/9/2014 inhibiting any dealings on the property for a period of 90 days and that it meant that there should be no sale, charge, letting or subletting or dealing with the suit property for 90 days. He told the court that the order automatically lapsed after 90 days. The lease was presented for registration on 3/3/2014 and was properly registered and released.

88. On re-examination he conceded that he ought to have had a copy of the consent, transfer, and the KRA receipt originals in court but he did not have them. He did not have the valuation report as well. The parcel file which should have contained those documents was not in his office. After conversion the office in Nyahururu should have had the original grant which was to be placed in the parcel file alongside the letter from Nairobi requesting them to open a register. He explained that several parcel files could not be traced in the Nyahururu land registry because of poor file management.

89. When he was referred to the order issued on 23/10/2014, he stated that it was made in Nakuru High Court Miscellaneous Application No. 557 of 2012 which was an earlier version of the present case. He conceded that the transfer of the suit property took place during the pendency of this suit. He did not have the documents supporting the registration of the land at that time. He maintained that the evidence he had given in court was complete and that if a parcel file got lost it was the registered proprietor to assist him in reconstructing it.

90. Simeon Wanyeri Kanyi, a land valuer was called by the 1st Defendant to give evidence. He prepared a valuation report for the 1st Defendant in October 2016 and confirmed that he had signed it. He stated that the improvements on the suit property included a three floor commercial building with underground petroleum tanks 100ms and a garage as well as the generator. He described the underground tanks. He gave a value of Kshs. 37,100,000/= and the monthly rental values. He attached photographs of the property showing different parts of the building to his report.

91. On being cross-examined by Ms. Wamithi, he stated that he valued the property on the 1st Defendant's instructions on 6/12/2010 for purposes of determining the value of the improvements on the land. In his view, by 2010, the value of the improvements was Kshs. 19,300,000/=. He did not value the land. When they did the valuation in 2010 they did not have the building plans but they had them in 2016. He explained that the cost of construction had gone up from 2010 and 2016. He maintained that as time went by the cost of building appreciated and depreciated and that nothing had been added to the

suit property to give it a higher value. According to the observation he made in his report, there were residential rooms because he could see beds.

92. He confirmed that he got a requisition although he could not confirm the value but it was for around Kshs. 16,000,000/=. He conceded that the figure of 16,021,005/= was accepted as the consideration on 28/2/2014 after the valuation department endorsed that figure. He did the valuation of the property before the sale to confirm that by 2013 the value could not have exceeded 16,000,000/= for the land together with the improvements. He was emphatic that he could defend his report and the value of Kshs. 37,000,000 which he gave a breakdown of in the valuation. He maintained that the report he prepared in 2010 contained the near value of the suit property. His report did not contain items such as excavations, foundation, compartments and distribution.

93. The valuer stated that on the ground there was one building with one staircase. The maps attached to his report showed three offices on the first floor which were used as shops. The rent at the time was Kshs. 240,000/= per month. When he prepared the report in 2016, the premises were not fully occupied. There was a hotel, a butchery and a restaurant upstairs. He factored in this premises in the rent of 2016. The status was the same as it was in 2010 and the instructing client gave him the figure of Kshs. 240,000/= as the rent he was receiving in 2010. He was only given the floor plans but did not check if they had been approved or not.

94. On re-examination, the valuer stated that when valuing property, they inspect it as well as the searches and maps and take measurements. It was not necessary to take into account the quantity surveyor's report. He added that the valuation of 2014 for stamp duty purposes was conducted in a similar manner and that property values may increase or decrease. He told the court that the value of the suit property on the day he testified could not be less than 16,000,000/= but he stood by his valuation reports on the improvements.

95. Arthur Kanyagia Mbatia, a Senior Physical Planner, also gave evidence. He told the court that before devolution, the Directorate of Physical Planning used to prepare regional and local plans which were to be implemented by local authorities. When he was shown the certificate of compliance he confirmed that it was issued by the District Physical Planning Officer in charge of the Nanyuki office in 2001 by the name Njuguna Njau. It was issued to the Plaintiff as the applicant. His opinion is that it must have applied for the change of user by the local authority which would have circulated to various offices within the local authority and discussed for approval by local committee. The application should have met the physical planning standards including the acreage and an elaborate waste disposal mechanism besides the zoning guidelines for the surrounding areas.

96. Once those standards were met, the application was channeled from the local authority to the District Planning Officer for the issuance of the compliance certificate. The person applying for approval had to be the owner of the property, who had to present ownership documents including a search. After devolution, the physical planning activities were devolved to the county governments. Prior to that, the approving authority was the county town clerk after receiving comments from the district physical planning officer. When the witness was referred to the letter by the Nyahururu Municipal Council, he explained that the role of the municipal council was to approve development and to implement plans prepared by the physical planning office.

97. When shown the maps and correspondence, he stated that the client was indicated as the Plaintiff care of John Nderitu, who is the 1st Defendant. He noted that there was a stamp of approval of the District Planning Officer, Laikipia dated 6/2/2002. At the bottom there was an approval by The District Health Officer, Nyandarua district on the building plan for a petrol service station. He referred to the approvals by the District Public Health Officer and took the court through the other procedures that

one had to undertake before beginning construction. Prior to 2010, the District Physical Planning Office for Laikipia was in Nanyuki while that for Nyandarua was in Nyahururu. He produced the certificate of compliance as an exhibit and told the court that the client had the original copy. When the advocates objected to the production of that certificate, the witness produced DMF1 14 and DMF1 1.

98. On cross-examination, the witness told the court that DMFI 12 did not have a date showing when it was issued and that its title was change of user with the applicant being the Plaintiff. He did not have the letter mentioned in the certificate of compliance and did not know its contents. He did not know whether their office approved the change of user and clarified that if the change of user was allowed from commercial to petrol station it could not be used for commercial purposes because a petrol station was for industrial use, unless the application made was for mixed use.

99. On the issue of petrol stations, he elaborated that when the word 'service' is used then the premises could be used for a small cafeteria and a candy shop. On being shown the building plans, he stated that they were ordinarily signed by the architect or the engineer. The one he was shown for the suit property was not signed by the architect and had not made provision for any plan or storeyed building. The plans were approved on 6/2/2002. The plans showing the sections of the pit where the fuel was to be stored neither bore the signature of the architect nor the applicant.

100. He explained that when one forwarded building plans they had to be accompanied by the documents showing ownership and that in this case the applicant could only have been the Plaintiff. He stated that the final approval was a document given by the Commissioner of Lands to show that the land had changed from the previous use to another user and the title would be given with the new user and different conditions. He stated that by 21/10/2001 the 1st Defendant's developments had not complied with the change of user. Before the final change of user, the Physical Planning Officer was involved at the district level and had to give a "no objection" or approval. He had not come across any document of approval in Nairobi unless it was in the Nanyuki office but he did not know whether it existed.

101. On further cross-examination by Mr. Waichungo, he explained that for a certificate of compliance to be issued, the title holder needed to submit a written application through form PPA 1. They did not have access to it because it remained in the Nanyuki office. When he was shown more documents relating to the developments on the suit property, he stated that as at 18/10/2001, the applicant sought to put up permanent structures with a cafeteria, sales room, two offices and an area for servicing motor vehicles. The cafeteria had provision for a kitchen and the applicant was indicated as the Plaintiff care of John Maina. Where an applicant was not the registered proprietor, he required the written consent of the proprietor of the land.

102. An applicant had to have an official search or documents of ownership otherwise no approval would be given. This is what the witness stated on re-examination. He added that the maps did not contain the 1st and 2nd floors because they did not have elevations and that many documents are produced for approval such as plans, elevations and sections.

103. The Hon. Mr. Justice Y. Angima gave directions on 18/1/2021 to the effect that the suit would proceed for further hearing from where it had reached before Lady Justice Oundo.

104. James Mwathi Kungu gave evidence on 22/9/2021 following the issuance of witness summons. He had the letter dated 14/12/2001 (MF1.19) and the one dated 30/1/2002 (MF1-23). The first letter was addressed to the Plaintiff and granted it approval to construct access roads to the property subject to certain conditions. The second letter was addressed to the District Works Officer. On cross-examination, he stated that it appeared that the letter dated 14/12/2001 although addressed to the Plaintiff, was received by the 1st Defendant as the authorised agent of the Plaintiff. The witness did not

have the drawings referred to in the letters. He did not have a copy of the letter dated 1/11/2001. The letter showed that the drawings were submitted by the 1st Defendant on behalf of the Plaintiff. On further cross-examination, he stated that their files did not contain a change of user approval and that it was the local District Works Officer who could verify the user of the suit property.

105. Arthur Mbatia gave evidence on the same day following the issuance of summons to produce the file in respect of the suit property together with the letter dated 17/5/2001 addressed to the Plaintiff. He clarified that his director was not the custodian of the file sought and that it was with the Director of Land Administration.

106. Charles Warugongo Kieru, the 2nd Defendant in the suit gave evidence after the 1st Defendant had closed his case. He was sued because he purchased the suit property. The purchase price was Kshs. 16,000,000/= but he only paid 12,000,000/= and was to pay the balance upon being given vacant possession. The suit property was transferred to him and a title was issued to him. He adopted the contents of his witness statement dated 13/5/2016 and produced the documents on his list of documents.

107. On being cross-examined by Dr. Kamau Kuria, he confirmed that his letter dated 7/11/2013 offered to purchase the suit property for Kshs. 16,000,000/= from the Plaintiff. The 1st Defendant was in occupation of the suit property at the material time. The property was described as a prime plot in the newspaper advertisement. It had an incomplete house and a disused petrol station. He conceded that by the time he was registered as proprietor of the suit property following the transfer, the suit was pending in court but was quick to add that the sale was not undertaken in violation of the court order. He was not aware that the application dated 7/3/2013 was allowed on 28/3/2014. He denied that the sale agreement which he entered into was fraudulent and was intended to dispossess the 1st Defendant.

108. On re-examination, he told the court that his understanding of the relationship between the 1st Defendant and Plaintiff was that of landlord and the tenant. He confirmed the issue of ownership and verified that the Plaintiff owned the suit property. There were no encumbrances against the title at the time of sale. The only court order he was aware of was the one issued in 2014 after the land had been sold and transferred to him.

109. After the close of the case the court gave directions for parties to file and exchange written submissions. The court has considered the submissions filed by the parties.

110. The Plaintiff submitted that the 1st Defendant agreed to take on the lease of the suit property for a period of 5 years and 3 months with effect from 1/8/2001 paying rent of Kshs. 144,000/= per year and thereafter for the next two years at Kshs. 168,000/= per year. For the remainder of the term, the 1st Defendant was to pay rent of Kshs. 192,000/= per year. It submitted that the 1st Defendant paid Kshs. 259,434/= on the date of execution of the sale agreement. The permitted use of the premises was solely as a petrol filling or service station as an independent dealer. Clause 3 (h) of the lease authorised the 1st Defendant to put up a permanent office and toilets on the suit property at a cost to be agreed on with the landlord and the structures would become the property of the Plaintiff. Clause 3 (k) prohibited the 1st Defendant from erecting any permanent structures on the suit property without the prior written consent of the landlord.

111. The Plaintiff submitted that the 1st Defendant took possession of the suit property but failed to pay the agreed rent save for Kshs. 259,434/= which was paid on execution of the agreement. Further, that the 1st Defendant went ahead to construct permanent structures on the suit property over and beyond the office and toilets which had been agreed on. The Plaintiff submitted that it filed Nyahururu CMCC No. 525 of 2006 for the recovery of the accrued rent arrears from 1/8/2001 to 31/7/2006 when the

tenancy was terminated and that the original file got lost before that suit was heard after it had been transferred to the High Court, Nakuru for hearing of the appeal against the orders declining to stay the suit pending hearing and determination of the current suit. According to the Plaintiff, an automatic stay was somewhat created by the loss of the file. The Plaintiff filed the present suit seeking to evict the 1st Defendant from the suit property and payment of mesne profits from 1/11/2006.

112. The Plaintiff submitted that the 1st Defendant did not mention in his defence that the Plaintiff had vide the letter dated 8/1/2002 authorised him to construct permanent buildings on the suit property and that that letter was first brought to light after he engaged his present advocate.

113. The Plaintiff submitted that the 2nd Defendant in the counterclaim supported the Plaintiff's claim. The Plaintiff framed six issues for determination. These are, whether the 1st Defendant breached the lease agreement dated 1/8/2001; whether the permanent storeyed building constructed on the suit property by the 1st Defendant was authorised by the Plaintiff; whether the 1st Defendant was entitled to a lease of 35 years paying a nominal rent of Kshs. 1 per month; whether the 1st Defendant was entitled to compensation of the total cost of the developments carried out on the suit property, and if yes, at what value. The other issue is whether the costs should be offset against the unpaid rent. What also needs to be determined is whether the registration of the 2nd Defendant as proprietor of the suit property should be cancelled for the land to revert to the Plaintiff and lastly, whether the 1st Defendant should be evicted and pay mesne profits to the Plaintiff.

114. The Plaintiff submitted that the 1st Defendant breached the lease agreement by defaulting in paying rent, constructing a permanent commercial building on the suit property and subletting part of the leased property. The Plaintiff submitted that the 1st Defendant paid the sum of Kshs. 251,434/= on 1/8/2001 and a further sum of Kshs. 113, 566/=. The Plaintiff urged that the default on the part of the 1st Defendant resulted in breach of clause 2 (b) and the first schedule of the lease agreement.

115. Regarding construction of a permanent commercial building, the Plaintiff submitted that the 1st Defendant did not deny that he had constructed a storeyed building on the suit property which is used for commercial purposes and hosts a hotel room with a kitchen, butchery, candy shop and two other shops. The Plaintiff relied on the valuation report produced by the 1st Defendant's valuer and was emphatic that that building was put up without its authority because the agreement only authorised the 1st Defendant to construct a permanent office and toilet. Regarding the condition not to sublet the premises, the Plaintiff relied on the 1st Defendant's contention that the Plaintiff had prevented tenants to whom he had sublet the premises from taking possession of the premises. In its view, this was an admission that the 1st Defendant breached Clause 2 (k) of the lease agreement.

116. Regarding the construction of the permanent storeyed building on the suit property, the Plaintiff submitted that it did not permit the 1st Defendant to construct it and relied on the evidence of its witness. In response to the 1st Defendant's contention that he was given authority by the Plaintiff vide the letter dated 8/1/2002 signed by J.G Kiragu who was the Plaintiff's chairman, the Plaintiff denied knowledge of that letter which it claimed was only produced in the proceedings after the said signatory had died. Further, the Plaintiff pointed out that although the letter was dated 8/1/2002, it made reference to a meeting held on 15/1/2002 which was after the letter had been written. In any event, the letter did not authorise construction of the storeyed commercial building but only mentioned a permanent office, toilets and a petrol station. The Plaintiff was emphatic that the letter was a forgery and did not give authority to the 1st Defendant to put up the impugned building.

117. The Plaintiff denied inducing the 1st Defendant to construct the permanent commercial building on the suit property. It urged that the 1st Defendant had benefited from the building by operating his own

businesses on part of it and renting out rooms without paying monthly rent to the Plaintiff. Further, that he did not pay outgoings like land rates and rent for the property. The Plaintiff submitted that by April 2023 when it filed its submissions the 1st Defendant had been in occupation of the suit property for 22 years and that granting him a further lease of 35 years would be tantamount to granting him a lifetime leasehold over the suit property.

118. The Plaintiff submitted that the proposed rent of one shilling per month was derisive and made in bad faith. It maintained that it stopped the 1st Defendant from construction verbally and through the demand letter dated 30/11/2004. The Plaintiff submitted that the decision in Commissioner of Lands v Hussein and Dilluyna v Llewlly were not applicable in this case. It relied on Nassor Mohamed Nahdy v Abdalla Ahmed Omar (2020) eKLR and urged that granting the lease sought by the 1st Defendant would allow him to benefit from his wrongdoing and breach of contract. The Plaintiff submitted that parties were bound by the agreement and it was not for the court to rewrite an agreement for the parties to grant the 1st Defendant the lease he seeks. The Plaintiff invited the court to declare the 1st Defendant a trespasser on its property and order him to vacate the suit property forthwith.

119. Regarding the 1st Defendant's prayer for compensation for the total cost of the developments on the suit property, the Plaintiff submitted that the 1st Defendant constructed them without its permission and took up the issue of lack of approved architectural drawings for the building. Additionally, that no evidence was produced to confirm the successful change of user from a petrol station to commercial purpose since after the agreement the user of the suit property was changed from commercial to a filling petrol station. The Plaintiff made reference to the evidence of its second witness who stated that the building had developed cracks. In addition, the Plaintiff relied on the evidence of its witness who gave the value of the building as Kshs. 4,171,315/= and urged the court to order the 1st Defendant to demolish the substandard, unauthorised and unapproved buildings constructed on the suit property and give vacant possession.

120. On the valuation report dated 31/10/2016 produced by the 1st Defendant's witness, the Plaintiff submitted that the purpose of that valuation was to determine the market value of the property as opposed to the cost incurred in constructing the impugned building. The valuer gave the cost of the improvements as Kshs. 25,100,000/= which the Plaintiff contended included improvements such as a garage pit, compressor and generator rooms, an open and semi covered parking as well as the petrol station. The Plaintiff maintained that the cost of construction was not included in the valuation report and that on cross-examination, the valuer confirmed that he had prepared a different report in 2010 indicating that the value of the improvements on the suit plot was Kshs. 19,300,000. Based on the witnesses' statement that the cost of construction had gone up between 2010 and 2016, it implied the valuation was not pegged on what the 1st Defendant actually expended in putting up the buildings but on the market value of the building.

121. The Plaintiff submitted that that witness testified and told the court that the 1st Defendant informed him that the rental income he was collecting from the suit property in 2016 was Kshs. 240,000/= per month which translated to Kshs. 2,880,000 per year. In light of this, the Plaintiff argued that the 1st Defendant had fully recovered the cost of constructing the impugned building for the 22 years that he had been in possession of the suit property and that asking the Plaintiff to pay the 1st Defendant a further sum of Kshs. 25,100,000/= as compensation would be unjust and amount to unjust enrichment and would allow the 1st Defendant to benefit from his wrong doing and breach of construct. The Plaintiff stressed that the value given by its witness of Kshs. 4,171,315/= was a fair value of what the 1st Defendant incurred in constructing the building. The Plaintiff invited the court to find that that amount had already been recovered by the 1st Defendant. Further, that the building ought to be demolished.

122. Regarding the claim for compensation, the Plaintiff submitted that it being a claim for special damages, it should have been specifically pleaded and proved which the 1st Defendant had failed to do. The Plaintiff relied on Sunil Vinayak v Santoch Singh Mool Singh & 2 Others (2017) where the court dealt with a similar issue regarding proof of expenditure and found it was not authorised. The Plaintiff maintained that no compensation was payable to the 1st Defendant.

123. The Plaintiff submitted that the registration of the 2nd Defendant as proprietor of the suit property should not be cancelled as the 1st Defendant seeks on the basis that it voluntarily transferred the suit property to the 2nd Defendant following a sale. It pointed out that the 1st Defendant's interest in the suit property was that of a tenant whose tenancy had expired by the time the suit property was transferred and who remained a trespasser on the land. The Plaintiff maintained that it had legally transferred the suit property to the 2nd Defendant and relied on Section 26 of the *Land Registration Act* which affords a registered proprietor with a certificate of title legal protection as an absolute and indefeasible owner subject to the encumbrances and conditions contained in the certificate of title. The Plaintiff contended that the particulars pleaded by the 1st Defendant in paragraph *36* C (a) to (d) of his counterclaim did not qualify as exemptions under Section 26 (1) (a) and (b) of the Act. The Plaintiff submitted that the other prayers sought by the 1st Defendant were an abuse of the court process and urged the court to dismiss the prayer for cancellation of the title.

124. The Plaintiff was emphatic that the 1st Defendant was a trespasser who was liable for eviction because his tenancy expired on 1/8/2006 and he had not been paying rent to the Plaintiff. That according to the 1st Defendant's valuation report, rent for 2006 was Kshs. 144, 000 per month and in 2016 it had risen to Kshs. 240,000 per month. The Plaintiff prayed for judgment as against the 1st Defendant for mesne profits from 1/8/2006 calculated as follows:

    a. Rent from 1/11/2006 to December 2015 (11 months' x 144,000/= per month) – Kshs: 15,840,000/=

    b. Rent from January 2016 to the date of judgment or time of vacating (at Kshs. 240,000/= per month x a period to be determined by the court.

125. The Plaintiff relied on Rajan Shah t/a Rajan S. Shah v Bipin P. Shah (2016) eKLR where the court stated that mesne profit was another term for trespass which arose from the particular relationship of a landlord and tenant. That they are the pecuniary benefits deemed to be lost when a person entitled to possession of land or to rents and profits by reason of his being wrongly excluded from the premises. The court stated that the wrongful occupant was a trespasser and a remedy rested on that fact. The Plaintiff submitted that the 1st Defendant made a vague claim in his counterclaim for general damages which is suit able for dismissal and concluded that it was entitled to costs of the suit to be borne by the 1st Defendant and dismissal of the counterclaim in its entirety.

126. On its part, the 1st Defendant submitted that this suit had a checkered history having started as Nyahururu PMCC Case No. 755 of 2006, and since the Magistrate's Court did not have the pecuniary jurisdiction to handle the claim, the 1st Defendant applied for the suit to be transferred to the High Court and it became Nakuru HCCC No. 557 of 2012. The 1st Defendant filed his Further Amended Defence and Counterclaim dated 9/5/2016. He submitted that the Nakuru High Court file got lost and by consent of the parties, the court ordered in 2019 that the 1st Defendant would file his pleadings which he filed in March, 2019.

127. The 1st Defendant submitted that the Hon. Mr. Justice Emukule in his ruling delivered on 28/3/2014 granted the 1st Defendant leave to amend his defence and counterclaim in the Nakuru suit. He

summarised his case as having been supported by documents including a valuer, Physical Planner and a Chief Engineer. He faulted the 2nd Defendant for purchasing the suit property knowing that this suit was pending. He contended that the Plaintiff and the 2nd Defendant dealt with him fraudulently and that their objective was to enrich themselves with the developments on the suit property constructed by the 1st Defendant.

128. The 1st Defendant submitted that he had established on a balance of probabilities that he had acquired proprietary estoppel as formulated in Commissioner of Lands v Hussein [1968] EA 584. Further, that the doctrine of lis pendens formulated by the Court of Appeal in Moline v Oganda [2009] KLR 620 applied with the result that the transfer of the suit property to the 2nd Defendant was fraudulent, null and void. He maintained that he was entitled to the reliefs sought in his counterclaim dated 9/5/2016.

129. The 1st Defendant submitted that the trial took place before two judges, Lady Justice M. Oundo and Mr. Justice Y. Angima and the Plaintiff called two witnesses while the 1st and 2nd Defendants called six witnesses and one witness respectively. The 1st Defendant submitted that William Gathecha Nguyo who testified on behalf of the Plaintiff was not a witness of truth. He contended that the Plaintiff's witness based its case on the lease agreement dated 1/8/2001 and elected to shut his eyes to the subsequent developments where the Plaintiff applied to change the user to a petrol station which was granted after which it applied for approval of the development plans for a petrol station. The 1st Defendant went through the summary of the witnesses he called as well as the documents he produced.

130. The 1st Defendant referred to different volumes and page numbers of the documents he filed but the court notes that the documents in the court file are not arranged in volumes. The 1st Defendant submitted that the valuation report dated 31/10/2016 was crucial as it contained photographs of the buildings which the 1st Defendant constructed on the suit property as well as copies of the building plans and valuation. He gave the value of the suit property as Kshs. 37,100,000/= as at 31/10/2016 when the market rent was 240,000/= a month. Further, that the rental value for running the petrol station in 2006 when he was prevented from renting the premises or running the petrol station was Kshs. 144,000/=. He submitted that these valuations were not controverted by the Plaintiff and should be accepted by the court. He submitted that the Plaintiff's case should fail because it lied to the court. He urged that the suit property was registered under the repealed RLA which provided for an overriding interest in the form of his occupation of the suit property on which he carried out the business of a butchery after being prevented by the Plaintiff from carrying on the business of a petrol station.

131. The 1st Defendant submitted that he testified that he developed the suit property with the written request and permission of the Plaintiff and that it consented to the change of user and for the building to be constructed using his own money. He relied on the evidence of DW7 and DW9 who he claimed confirmed that the Plaintiff applied for and obtained the necessary permission of the Physical Planning Department to construct buildings and access roads to the petrol station.

132. The 1st Defendant submitted that the purported sale agreement dated 15/11/2013 was intended to defeat this suit by ensuring that by the time judgment was delivered, suit the property would have been transferred to the 2nd Defendant. The 1st Defendant relied on paragraph 6 of the agreement which mentioned that the purchaser was aware that the 1st Defendant was in possession of the property as a tenant holding it under a controlled tenancy and that he was also aware of the pending suit.

133. The 1st Defendant submitted that between 2002 and 2005 and at the written request of the Plaintiff, he personally constructed a medium size commercial building to house offices and shops on the suit property; a building to house a generator and a machine for putting pressure on tyres and a big permanent two storeyed commercial building all at the cost of Kshs. 12,000,000/=. His relationship

with the Plaintiff commenced on 1/8/2001 when the Plaintiff let the suit premises to him for a term of 5 years and 3 months for use as a temporary petrol filling and service station. After entering into the lease agreement, an application was made to the planning authorities for change of user from commercial to a semi-permanent petrol station. The planning authorities declined to approve the change of user from commercial to semi-permanent petrol station and instead permitted the change of user on condition that a permanent petrol station was what would be constructed.

134. According to the 1st Defendant, the effect of the decline was that the terms of the lease were substantially rendered void or frustrated by the refusal by the Physical Planning Department to approve the change of user of the suit property to that of a temporary petrol station and instead allowed the construction of a permanent petrol station. The 1st Defendant submitted that on 8/1/2002, the Plaintiff authorised him to build permanent offices, a toilet and a permanent petrol station. He relied on the Plaintiff's letter dated 8/1/2002 which read as follows:

Muhotetu Farmers Company Ltd

O. Box 143

NYAHURURU

8th January, 2002

John Maina Nderitu

Box 1361

NYAHURURU

REF: LEASE AGREEMENT PLOT NO. 4/138 NYAHURURU MUNICIPALITY

Following the Board meeting held on 15th January, 2002, I am pleased to inform you that the Board authorized you to build permanent offices and Toilets and complete a Petrol Station in the above – named plot for Muhotetu Farmers Company Limited.

Yours faithfully,

J. G. Kiragu

CHAIRMAN

135. The 1st Defendant submitted that parties to a contract could vary it but a unilateral notification by one party without any agreement could not be a variation. He added that variation may be by express agreement or implied by conduct. He submitted that the agreement between him and the Plaintiff was that upon the construction of a permanent petrol station and building, the Plaintiff would grant him a lease at a nominal rent for a reasonable period to enable him get a return on his investment in the suit property. That the effect of these new instructions was to render totally ineffective the lease agreement he had entered into with the Plaintiff on 1/8/2001.

136. It was his case that through conduct and in writing, the Plaintiff invited him to construct a permanent petrol station together with commercial buildings on the suit property at his expense on the promise that upon construction, the Plaintiff would let the premises to him at a nominal rent for a reasonable period which is a lease of not less than 35 years. That upon that invitation and encouragement, he charged several parcels of land in Laikipia, Nyahururu and Nyeri to secure a loan of Kshs. 3,000,000/= from Barclays Bank of Kenya. Together with his earnings from Mwireri and Aberdare petrol stations, he constructed a three storeyed permanent commercial building, a permanent petrol station with tanks to hold petroleum products, a medium sized commercial building and a building which houses a generator at a total cost of Kshs. 12,000,000/=. That upon completion of the buildings, he started

running a petrol station and a restaurant on the 1st floor of the three storeyed permanent commercial building and started looking for tenants to sublet the other premises.

137. The 1st Defendant clarified that the Plaintiff's invitation and encouragement to put up a permanent petrol station and the buildings pleaded were made after the Physical Planning Department to whom the Plaintiff had submitted an application for the construction of a temporary petrol station on the suit property was declined and instead approval was granted for the construction of a permanent petrol station. That upon the grant by the Physical Planning Department to the Plaintiff to construct a permanent petrol station, the parties varied the lease dated 1/8/2001 and thereafter the 1st Defendant was to pay the rent reserved in the lease dated 1/8/2001 but upon its expiration, he was to occupy the suit property with the new buildings at a nominal rent and was to carry on businesses on some of the premises and sublet some of the premises to obtain a return on the investment of the permanent improvements he made to the suit property.

138. That as the construction of the buildings continued, the terms of the loan granted by Barclays Bank of Kenya became onerous and he was forced to transfer his banking facilities together with the securities over the seven parcels of land to Cooperative Bank Limited. He submitted that no new lease agreement was executed after the change of user and the terms of the lease were not varied to suit the circumstances. He maintained that he had been in occupation of the suit property with the full knowledge of the Plaintiff and that it was the Plaintiff's conduct which amounted to representation that induced him into constructing the permanent structures on the suit plot on the understanding that he would be compensated for the cost of the developments incurred by setting off the cost against the monthly rent until payment in full.

139. He went on to argue that the Plaintiff was estopped from denying the representation in view of its conduct of refusing or failing to have a new lease executed after the change of user; not immediately objecting to the construction of the permanent structures on the suit property which started in September 2001; the Plaintiff's officials visited the suit property since he took possession and had never raised any query over the structures constructed on it; the Plaintiff's officials visited the suit property during the construction of the structures but never objected to that. He argued that the Plaintiff was estopped from alleging that the structures were constructed without its knowledge.

140. The 1st Defendant contended that the Plaintiff intended to enrich itself by evicting him to enable it reap the developments which are on the suit property courtesy of him. He urged that he should be allowed to continue with possession until he was fully compensated for all the developments on the plot. He pointed out that when he took possession of the suit property, the plot was undeveloped and he deserved to be fully compensated by having the suit plot valued and the cost of the development set off against the monthly rent until payment in full. He maintained that the lease between him and the Plaintiff became void and unenforceable and that his occupation of the suit property was lawful hence an order for his eviction should not be issued.

141. He urged that on or about 2006 when he had completed construction of the buildings, the Plaintiff set in motion actions aimed at forcing him to vacate the suit property and deprive him of the rights which had accrued to him upon acting on the Plaintiff's representations. To this end he claimed that the Plaintiff fraudulently filed Nyahururu SPMC Case No. 355 of 2006 before a court which lacked pecuniary jurisdiction to entertain the suit. He claimed that the Plaintiff induced a breach of contract which he had entered into for the supply of petroleum and petroleum products to his petrol station on the suit property by lying to the National Oil Corporation that he was a trespasser on the suit property and procuring the termination of the licence agreement under which the corporation supplied him petrol and petroleum products for distribution. He also claimed that the Plaintiff embarked on a

program of discouraging and preventing tenants to whom he had sublet the premises from taking possession of them.

142. The 1st Defendant submitted that although the Plaintiff was the absolute proprietor of the suit property, Section 28 of the repealed RLA under which the property was registered made it clear that a proprietor was under a liability imposed by a trust. He also relied on Section 30 setting out the overriding interest which did not need to be noted on the register which included the rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription and the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation save where inquiry is made of such person and the rights are not disclosed.

143. He relied on Kanyi v Muthiora [1984] KLR where the court stated that the Respondent had rights against the Appellant stemming from possession and occupation of part of the land which amounted to overriding interest not required to be noted on the register. He went on to argue that Section 28 (H) of the *Land Registration Act* treated an overriding interest as a right acquired or in the process of being acquired by prescription. He argued that acquisition of title by proprietary estoppel was a form of prescription which is included in that section. Further, that the doctrine of proprietary estoppel applied to a registered proprietor and that consequently he had acquired property rights over the suit property. He claimed that the rights were based on representations, assurances made and investment of money and labour on a property in expectation that one will derive benefit from it.

144. He cited Gray and Gray which described the essence of proprietary estoppel as having its root in the principle upon which all courts of equity proceed to prevent a person from insisting on his strict legal rights whether arising under a contract, his title or by statute when it would be inequitable for him to do so having regard to the dealings which had taken place between the parties. Further, that the estoppel doctrine dictated that legal entitlements could not be enforced in total isolation from the relational context in which the relevant dealings had taken place. Accordingly, the law of proprietary estoppel conferred on the court a residual power to scrutinise and restrain or estop particular assertions of legal entitlement on the grounds of conscience.

145. The 1st Defendant submitted that there was evidence that the Plaintiff had wanted to develop the suit property but lacked the money to do so and it asked him to develop the suit property on terms it now wants to depart from. He submitted that in November 2001, the Plaintiff obtained a change of user from commercial to petrol station and on 8/1/2002 it invited him to build permanent buildings on the suit property. He emphasised that there was no reference to the lease agreement dated 1/8/2001 on the two occasions and maintained that the lease dated 1/8/2001 was frustrated.

146. He relied on F.A Tamplin Steamships Co. Ltd v Anglo Mexican Petroleum Products Co. Ltd where Lord Loreburn stated that a court ought to examine the contract and the circumstances in which it was made not vary it but to explain it in order to see whether or not from the nature of the contract the parties made their bargain on the footing that a particular thing or state of things would continue to exist and if they do so, a term to that effect would be implied even though it is not expressed in the contract. That sometimes it is put that the performance has become impossible and parties concerned did not intend to perform an impossibility.

147. The 1st Defendant urged that the Plaintiff was relying on an agreement which was overtaken after approval was given for the construction of a permanent petrol station. He argued that there was nothing that would have stopped the Plaintiff from stopping him from constructing the four permanent buildings if the letter dated 8/1/2002 was a forgery.

148. The 1st Defendant submitted that it was not in dispute that the Plaintiff filed this suit on 2/11/2006 as Nyahururu PMCC No. 355 of 2006 and the suit was transferred following his application in Nakuru High Court Misc. No. 557 of 2012 and that at all material times he was in possession of the suit property. Further, that he filed the notice of motion dated 7/3/2013 seeking to restrain the Plaintiff or his agents from interfering with his possession of the suit property pending hearing and determination of the suit and to restrain the Plaintiff from charging, selling or subdividing the suit property pending hearing and determination of this suit.

149. He also filed the application dated 28/11/2013 seeking to restrain the Plaintiff from advertising for sale or lease the suit property until his application dated 7/3/2013 was heard and determined. He claimed that this prayer was granted on 2/12/2013 by Mr. Justice Emukule pending hearing and determination of his application dated 7/3/2013 and that the court further ordered that the application dated 7/3/2013 would be heard on 10/12/2013. The application was allowed on 28/3/2014. That therefore between 2/12/2013 and 28/3/2014 when the injunction granted was in force, the Plaintiff could not deal with the suit property and sell it to the 2nd Defendant. He urged that the sale constituted contempt of the court and that the court should not allow that illegality.

150. He also contended that an order was made on 27/1/2014 for the status quo to be maintained in the presence of the Plaintiff's advocate. He urged that on 4/3/2014 while the application and the suit were pending and in breach of the order issued on 2/12/2013 and the lis pendens doctrine, the Plaintiff fraudulently sold the suit property to the 2nd Defendant. The 1st Defendant contended that the sale and transfer were fraudulent, null and void and that the 2nd Defendant holds the legal estate in the suit property upon a constructive trust.

151. Further, that the Plaintiff knew of the orders issued on 2/12/2013, the lis pendens doctrine, the order for maintenance status quo as well as the fact that the court was to deliver its ruling 28/3/2014 when it purported to sell and transfer the suit property to the 2nd Defendant who knew that the 1st Defendant was in possession of the suit property since he was a resident of Nyahururu and knew about the suit. The 1st Defendant relied on the acknowledgement dated 25/2/2014 which showed that the Plaintiff accepted Kshs. 12,816,804/= being the purchase price on 25/2/2014 which was during the existence of the order issued on 2/12/2013. Further, that the transfer dated 26/2/2014 was lodged at the Lands Registry on 3/3/2014 while the valuation requisition for stamp duty was made on 26/2/2014.

152. The 1st Defendant referred to the replying affidavit sworn on 18th June 2014 by William Gathecha Nguyo on 18/6/2014 where he confirmed that the Plaintiff advertised the property for sale on 19/10/2013, they received the 2nd Defendant's bid on 11/11/2013 and that the parties entered into a sale agreement on 15/11/2013. Further, that he confirmed at paragraph *24* that the order issued by the court on 2/12/2013 was served on the Plaintiff but it alleged that it had been overtaken by events. The 1st Defendant submitted that the Plaintiff and the 2nd Defendant stole a match on him and contravened the lis pendens doctrine. He asserted that by virtue of the suit and application and doctrine of lis pendens, the Plaintiff lacked capacity to sell the suit property to the 2nd Defendant. The 1st Defendant went on to rely on the offence created by Section 121 (1) (d) of the Penal Code. He added that the action of selling the suit property was a contempt of court and relied on various decision in support of this submission.

153. Regarding proprietary estoppel, the 1st Defendant relied on Commissioner of Lands v Hussein [1968] EA 584 and urged that he fit the bill of a man who under a verbal agreement with a landlord for a certain interest in the suit property under an expectation created or encouraged by the landlord that he would have a certain interest, took possession of the suit property with the consent of the landlord on the faith of such promise or expectation with the knowledge of the landlord and without objection by

him laid out money and constructed the buildings, hence a court of equity would compel the Plaintiff to give effect to such promise or expectation. The 1st Defendant submitted that the court ought to grant him a lease of at least 35 years over the suit property and that he had demonstrated at the trial that the Plaintiff made the assurances in writing verbally and through the conduct of the shareholders of the Plaintiff.

154. He also relied on John Cartwright, Formality and Informality in Property and Contract, in John Getszler: Rationalizing Property, Equity and Trust, Essays in Honour of Edward Burn, pages 38-39 where it states that proprietary estoppel or estoppel by encouragement or acquiescence covers the case where the owner of land causes the claimant to believe that he has or will have an interest in his land and in reliance on this the claimant acts in such a way that it becomes unconscionable for the landowner to insist on his strict legal rights in a way that will deny the claimant the interest he believed would have. The believe may be created by the landowner allowing or (acquiescing in) the claimant to continue in his own mistaken belief about his rights.

155. The 1st Defendant relied on Snell's Equity, 31st edition pages 273 to 274 where the auditors stated that equity had a long tradition of enforcing or granting rights over land to those who had been induced to invest in or improve land by others either as a consequence of their mistake (acquiescence in) by the owner or direct encouragement or informal agreement. He also relied on Cheshire and Burns' Modern Law of Real Property, 18th Edition Chapter 22 pages 916 to 917 where it state that courts have ordered that the party in whose favour an equity arises by estoppel be granted other interests in land such as an easement or a lease or that his expenditure be reimbursed rather he being given a positive interest in the land.

156. The 1st Defendant adverted to the case of Commissioner of Lands v Hussein and set out the facts of the case in which the army authorities verbally suggested to the defendant that he could at his own expense erect buildings for a canteen on an area of land in Nairobi occupied by the army. The defendant accepted the suggestion on condition that he was given a 50-year lease but the army officer present suggested 30 years. The Defendant had the plans prepared and approved by the army and spent a substantial amount of money in putting up a building but no lease was ever given to him. When the plaintiff required him to quit the premises, he raised the defence that the plaintiff was prevented from ejecting him by the doctrine of equitable estoppel. The court found that the Plaintiff was estopped by acquiescence from claiming possession of the suit premises.

157. On damages, the 1st Defendant submitted that after completing construction of the petrol station, he acquired a proprietary estoppel which entitled him to run a petrol station and let out the premises which he had constructed for a period of 35 years as a consequence of which he was the owner of the suit property during that duration and no one could enter the land without his permission. He submitted that he proved that the Plaintiff committed trespass to land when it stopped him running the petrol station in 2016 when monthly market rent was Kshs. 144,000/= according to the valuation report of his sixth witness and that he was therefore entitled to be paid rent at Kshs. 240,000/= per month from 2006 to 2016 and that he was entitled to that rent until the judgement was delivered.

158. The 1st Defendant computed the monthly rent 2006 to 2016 as Kshs. 144,000/= x 128 months amounting to Kshs. 18,432,000/=. The rent payable between 1/11/2016 and 31/5/2023 would be Kshs. 240,000/= x 74 months =17,760,000. He maintained that the Plaintiff had on numerous occasions interfered with his quiet possession of the suit property and in his dealings with the suit property causing financial loses to him by denying him tenants on the suit property despite the fact that he had invested heavily in the suit property.

159. The 1st Defendant relied on several decisions on the issue of general damages for trespass and sought the total sum of Kshs. 36,192,000/=. He also sought the prayers set out in the counterclaim as well as the costs of this suit. He cited Republic v Communications Authority of Kenya and Another, Ex-parte Legal Advice Centre aka Kituo cha Sheria [2015] eKLR where the court stated that it was entitled to look at the conduct of the parties, subject of litigation and the circumstances which led to the institution of the legal proceedings and the events leading to their termination.

160. The 2nd Defendant set out the facts of the case in his submissions and referred to the clauses in the lease agreement dated 1/8/2001. He averred that upon execution of the lease, the 1st Defendant paid Kshs. 259,000/= being rent in advance to the Plaintiff out of which Kshs. 241,434/= was paid to Nyahururu Municipal Council as rates. He added that for the entire term of the lease the 1st Defendant only paid Kshs. 365,000/= to the Plaintiff as rent.

161. The 2nd Defendant set out seven main issues for determination by the court, three of which related to the dispute between the Plaintiff and the 1st Defendant. The issues touching on the 1st and 2nd Defendant was whether the registration of the 2nd Defendant as the owner of the suit property was fraudulent and whether the registration was subject to any trust or overriding interest. The other issue is whether the continued use of the suit property by the 1st Defendant amounted to trespass and if general damages were payable to 2nd Defendant.

162. The 2nd Defendant submitted that the 1st Defendant breached the terms of the lease agreement which he entered into with the Plaintiff by failing to pay rent. Further, that he had continued to occupy the suit property for eight years after the lease expired before the suit property was sold to the 2nd Defendant without paying rent to the Plaintiff. According to the 2nd Defendant, the 1st Defendant's occupation of the suit property was without the Plaintiff's consent making him a trespasser. He relied on Section 60 of the *Land Registration Act* and decisions on mesne profits.

163. The 2nd Defendant held the view that whatever structures the 1st Defendant put up on the suit property were for his own use and benefit. Further, that he incurred costs putting up the structures while on a frolic of his own and it would be unfair to make the Plaintiff compensate him for structures it does not need. In any event, the 2nd Defendant invited the court to note that the 1st Defendant confirmed in his evidence that he had been collecting rent from his tenants amounting of Kshs. 240,000/= per month which would translate to Kshs. 23,000.000/= for the eight years that he had been on the suit property. The 2nd Defendant urged that it should be assumed that the 1st Defendant had recovered the cost incurred on building and if the court were to find that the Plaintiff was liable to pay the cost of the buildings, then this should be offset against the rent and mesne profits payable by the 1st Defendant.

164. The 2nd Defendant submitted that before 3/3/2014, the Plaintiff was the registered owner of the suit property and held it without any inhibitions of encumbrances. That when the Plaintiff sold him the suit property for valuable consideration, he became the absolute and indefeasible owner once he was registered as the owner of the land. The 2nd Defendant relied on Sections 24 and 26 of the *Land Registration Act* on the protection afforded to a registered proprietor of land. He argued that it had not been proved that his title was obtained by fraud or misrepresentation to which he was a party and secondly, that it had not been demonstrated that his certificate of title had been acquired illegally, unprocedurally or through a corrupt scheme. The 2nd Defendant submitted that the burden to prove fraud rested upon the 1st Defendant who was supposed to specifically plead and prove the particulars of fraud he was alleging.

165. The 2nd Defendant relied on Section 25 of the *Land Registration Act* and contended that there was no evidence to show that the Plaintiff held the suit property on behalf of the 1st Defendant before it sold

it to the 2nd Defendant. He reiterated that the 1st Defendant took possession of the suit property as a tenant for a fixed period which was never extended and that he did not have the Plaintiff's permission to continue occupying the suit property. He denied that any trust in favour of the 1st Defendant had been established or proved. He urged the court to find that he was the absolute registered owner of the suit property together with the rights and privileges and go with that registration.

166. The 2nd Defendant submitted that the 1st Defendant was a trespasser on the suit property and invited the court to order him to vacate the land and in default, an order for his eviction was to be made. The 2nd Defendant urged the court to grant him general damages for trespass while arguing that he had suffered loss because had not used the suit property since 2014 when he purchased it. The 2nd Defendant urged the court to award him the costs of the suit.

167. The court has read the pleadings, typed proceedings and considered the submissions and authorities which the parties furnished to the court. The following issues fall for determination in this dispute:-

a. whether the 1st Defendant breached the lease agreement dated 1/8/2001;

b. was the lease agreement dated 1/8/2001 frustrated and rendered void by the refusal of the Physical Planning Department to approve the construction of a temporary filling station on the suit property?

c. did the Plaintiff invite and encourage the 1st Defendant to build a permanent petrol station and other buildings on the suit property through its conduct?

d. did the Plaintiff authorise the 1st Defendant to build permanent offices, toilets and a complete petrol station on the suit property through the letter dated 8/1/2002?

e. who applied for change of user?

f. was there an agreement between the Plaintiff and 1st Defendant for the 1st Defendant to carry on business on the suit property and occupy the new buildings while subletting the space not used by him for a reasonable period of not less than 35 years while paying nominal rent of a shilling a month?

g. did the Plaintiff's conduct induce the 1st Defendant into incurring costs in developing the suit property on the understanding that the Plaintiff would fully compensate the 1st Defendant by setting off the cost of the development against the agreed monthly rent?

h. was the transfer of the suit property to the 2nd Defendant fraudulently done?

i. should the court grant the reliefs sought by the Plaintiff, or those sought by the 1st and 2nd Defendants in their respective counterclaims?

j. who should pay the costs of the suit and the counterclaims?

168. It is not in dispute that the Plaintiff and the 1st Defendant entered into a lease on 1/8/2001 vide which the 1st Defendant leased the suit property for a period of 5 years and 3 months and was to pay annual rent of Kshs. 144, 000/= for the first two years; Kshs. 168,000/= for the next two years and Kshs. 192, 000/= for the remainder of the term as stipulated in the first schedule of the lease. The permitted user of the premises was a temporary petrol service station. Clause 2 (m) enjoined the tenant to use the premises solely for the purposes stipulated in clause 9 of the schedule and no other purpose without the written consent of the landlord, which consent was not to be unreasonably withheld.

169. The lease set out other terms including the tenant's covenant at clause 3 (k) not to erect permanent structures on the premises without the prior written consent of the landlord first had (sic) received. Clause 2(k) forbade the tenant from transferring or parting with possession of the premises or part of it without the landlord's consent while under clause 2(l) the tenant was not to permit any part of the premises to be used by other persons without the prior written consent of the landlord.

170. What emerged from the evidence adduced at the trial is that after signing the lease, the 1st Defendant applied for change of user of the leased property from commercial to petrol station as indicated in the letter dated 8/11/2001 from the Commissioner of Lands which was addressed to the Plaintiff. The 1st Defendant contended that the Physical Planning Department declined to approve the construction of a temporary petrol station which prompted him to apply for change of user so as to put up a permanent petrol station on the suit land. The lease required the 1st Defendant as the tenant to first obtain the consent of the Plaintiff if it were to deviate from the permitted use of the demised premises under the lease.

171. The 1st Defendant argues that the Plaintiff granted him approval to build permanent offices and toilets and to complete a petrol station on the suit property for the Plaintiff vide the letter dated 8/1/2002 indicated to have been signed by the Plaintiff's Chairman, J.G Kiragu. The letter referred to a board meeting said to have been held on 15/1/2002, which is impossible because the meeting could not have been held a week before the letter was authored. The 1st Defendant did not offer any explanation for this peculiarity.

172. The Plaintiff's secretary testified and told the court that the board did not sit on 15/1/2002. In the ordinary course of business, a secretary would be actively involved in arranging board meetings. The court is inclined to believe the secretary's position that no board meeting took place on 15/1/2002 at which the Plaintiff granted the 1st Defendant approval to build permanent offices and toilets and to complete a petrol station on the suit property for the Plaintiff. As the Plaintiff's secretary, he was familiar with the signature of the Chairman especially having worked with him for 20 years. The witness denied that the signature on the impugned letter was that of the Plaintiff's chairman as the 1st Defendant contended.

173. The Plaintiff strenuously argued that that letter was a forgery and that it only came to the fore after the person alleged to have authored it had died. The Plaintiff's secretary gave evidence and told the court that when the 1st Defendant started putting up permanent houses and digging trenches on the suit property, they went to him with the Chairman and asked him to stop. He told the court that they instructed advocates to write the demand letter 30/11/2004 to the 1st Defendant. The Plaintiff filed Nyahururu CMCC No. 525 of 2006 for the recovery of the accrued rent arrears from 1/8/2001 to 31/7/2006 when the tenancy was terminated. In the court's view, these actions run contrary to the 1st Defendant's contention that the by its conduct the Plaintiff encouraged him to erect the commercial buildings and other developments on the suit property.

174. The 1st Defendant placed a lot of emphasis on the letter dated 8/1/2002. Looking at that letter, it did not authorise construction of the storeyed commercial building but only mentioned a permanent office, toilets and a petrol station. The 1st Defendant failed to prove that the Plaintiff authorised him to put up the commercial building together with permanent offices, toilets and a complete petrol station on the suit property. The 1st Defendant erected permanent structures on the suit property without the Plaintiff's consent in breach of the terms of the lease.

175. The Plaintiff's evidence that the 1st Defendant stopped paying rent after the initial payment was not controverted. The Plaintiff's secretary stated in his evidence that the 1st Defendant paid Kshs. 365,000/

= towards rent and then stopped making payments. From the evidence it is apparent that the 1st Defendant stopped paying rent during the subsistence of the lease which amounts to a breach of the lease agreement.

176. The gravamen of the 1st Defendant's case is that the Plaintiff invited him by its conduct and in writing to construct a permanent petrol station and the commercial building on the suit property on the promise that upon construction of those developments at his expense, the Plaintiff would let the premises to him at a nominal rent of one shilling per month for at least 35 years. The 1st Defendant does not indicate when he envisaged that that period would begin to run.

177. The 1st Defendant averred that upon grant to the Plaintiff by the Physical Planning Department of approval to construct a permanent petrol station the parties varied the lease dated 1/8/2001. In his testimony, the 1st Defendant told the court that the petrol station belonged to the company but he was the foreman or agent. From the evidence tendered by the 1st Defendant and the witnesses he called, there is no doubt that the 1st Defendant was running the petrol station on the suit property as a business for his own benefit. He used the Plaintiff's name when making the application for change of user but beyond that there is nothing to show that he ever ran the petrol station and other businesses on the suit property on behalf of the Plaintiff.

178. It was the 1st Defendant's contention that the terms of the lease were rendered void or frustrated by the refusal of the Physical Planning Department to approve the change of user of the suit property to that of a temporary petrol station and instead allowed the construction of a permanent petrol station. The evidence adduced in court does not support the 1st Defendant's contention that the lease agreement dated 1/8/2001 was frustrated and rendered void by the refusal of the Physical Planning Department to approve the construction of a temporary filling station on the suit property. The 1st Defendant applied for change of user in the Plaintiff's name and there is no evidence to show that he involved the Plaintiff in the quest for change of user; or that he communicated the refusal by the physical planning department to grant him approval to put up a temporary petrol station on the suit property in accordance with the terms of the lease.

179. While the position at law is that parties to a contract can vary it by express agreement or the variation could be implied from the conduct of the parties, there is nothing to show that the terms of the lease which the Plaintiff and 1st Defendant entered into on 1/8/2001 was ever varied. The agreement was for the 1st Defendant to put up a temporary filling station on the suit property. There ought to have been another agreement between the parties setting out terms and conditions providing for the construction of a permanent petrol station and building and how much the 1st Defendant would invest on the project with an understanding on how the 1st Defendant would get a return on his investment in the suit property.

180. The Physical Planner who was called by the 1st Defendant to give evidence took the court through the steps for obtaining a compliance certificate and approval from the Physical Planning Department. He told the court that an application for approval of change of user had to be made by the owner of the property, who was required to present ownership documents. This is the reason which made the 1st Defendant apply for change of user in the Plaintiff's name even though it was he who was to run the temporary petrol station on the suit property as agreed under the terms of the lease dated 1/8/2001.

181. It was the evidence of the Physical Planner who testified that if the change of user was allowed from commercial to petrol station then it could not be used for commercial purposes because a petrol station was for industrial use, unless the application made was for mixed use. The Planner stated that the plans were ordinarily signed by the architect or the engineer but that the one he was shown for the suit

property approved on 6/2/2002 was not signed by the architect and did not made provision for any plan or storeyed building. The manner in which the 1st Defendant obtained change of user for the suit property is questionable on the face of it.

182. The 1st Defendant blames the Plaintiff for refusal or failure to have a new lease executed after the change of user. There is nothing to show that he wrote to the Plaintiff seeking a new lease or communicating the challenges he faced in putting the suit property into the permitted use under the lease. He faults the Plaintiff for not objecting to the construction of the permanent structures on the suit property which started in September 2001 and adds that the Plaintiff's officials visited the suit property during the construction of all the structures and never raising any objection. These assertions were countered by the evidence of the Plaintiff's witness who stated that he and the chairman asked the 1st Defendant to stop the construction when he began digging trenches. In the court's view, the loss must lie where it falls.

183. The 1st Defendant failed to prove that the Plaintiff's conduct amounted to a representation which induced him to construct the permanent structures on the suit property. Prudence would have demanded that he obtain the written consent of the Plaintiff before expending colossal sums of money to develop the suit property especially since the land had been leased to him for a fixed term on 5years and three months with lease stipulating that the land was to be used for a temporary petrol service station. The understanding that the 1st Defendant relied on for the belief that the Plaintiff would compensate him for the cost of the developments incurred through setting off against the monthly rent until payment in full should have been reduced to writing for certainty and to avoid misunderstandings. Variations to the terms of the lease or any other transaction entered into by the Plaintiff and the 1st Defendant should have been reduced into writing just as the lease was drawn and executed by both parties in August 2001.

184. Clause 3 (h) of the lease authorised the 1st Defendant to put up a permanent office and toilets on the suit property at a cost to be agreed on with the landlord and the structures would become the property of the Plaintiff. Clause 3 (k) prohibited the 1st Defendant from erecting any permanent structures on the suit property without the prior written consent of the landlord. The evidence adduced at the trial proves that the 1st Defendant developed the suit property without the written permission of the Plaintiff.

185. The 1st Defendant based his prayer for a lease of 35 years from the Plaintiff on an order which he claimed was made by the court in a file which got lost. It is not clear why the parties did not have the court file reconstructed. The 1st Defendant did not provide evidence of the existence of such an order. It is unlikely that the court would have made such an order with far reaching implications on the subject matter of the suit at the interlocutory stage before the trial commenced.

186. It was the 1st Defendant's prayer that he ought to be allowed to continue with possession until he was fully compensated for all the developments on the plot. He claimed that he deserved to be fully compensated by having the suit plot valued and the cost of the development set off against the monthly rent until payment in full. The 1st Defendant has been on the suit property for more than 22 years and it was not controverted that after taking possession of the suit property he only paid rent for a few months. He has carried out business on the suit property for more than 22 years and at some point was earning rent of Kshs. 240,000/= per month. The Plaintiff as the registered owner of the suit property has been deprived of the use and enjoyment of its property. Allowing the 1st Defendant to continue occupying the suit property would amount to unjust enrichment besides being unconscionable.

187. The 1st Defendant took possession of the suit property as a tenant for a fixed period and after it ended in 2006, it was not extended. He did not have the Plaintiff's permission to continue occupying the

suit property. He failed to prove his counterclaim on a balance of probabilities. His claim based on proprietary estoppel and constructive trust therefore fail. The Plaintiff cannot have been a trespasser on its own land as the 1st Defendant claimed. The 1st Defendant is not entitled to the damages he sought against the Plaintiff who was deprived of the use of its land after the expiry of the lease term.

188. The 2nd Defendant knew that the 1st Defendant was in occupation of the suit property when he purchased it in 2014 and only paid part of the purchase price for the land on the understanding that he would pay the balance of Kshs. 4 million once he was put in possession. He is therefore not entitled to general damages for trespass as against the 1st Defendant which he sought in his counterclaim. The 1st Defendant failed to prove that the transfer of the suit property to the 2nd Defendant was done fraudulently.

189. The court makes the following orders:

i. The court dismisses the 1st Defendant's counterclaim dated 9/5/2016.

ii. A declaration is issued that the 2nd Defendant is the absolute registered proprietor of the suit property.

iii. The 1st Defendant is directed to vacate the suit property within 45 days of the date of this judgment failing which he will be evicted from the suit land;

iv. A permanent injunction is issued to restrain the 1st Defendant or his employees, servants or agents from trespassing, entering, remaining or interfering with the suit property.

v. The Plaintiff is awarded mesne profits against the 1st Defendant of Kshs. 16,000/= per month from 1/11/2006 until the 1st Defendant vacates the suit property.

vi. The Plaintiff is awarded the costs of the suit to be borne by the 1st Defendant. The Defendants will bear the costs for their counterclaims.

DELIVERED VIRTUALLY AT NANYUKI THIS 14TH DAY OF NOVEMBER 2024.

K. BOR

JUDGE

In the presence of:

Mr. G. Gicheru holding brief for Mr. M. Waichungo for the Plaintiff

Dr. Kamau Kuria, Senior Counsel, for the 1st Defendant

Ms. Njeri Wamithi for the 2nd Defendant