



Gori Investments Limited v Basco Products (K) Limited & another (Environment & Land Case 1528 of 2016) [2024] KEELC 7447 (KLR) (11 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7447 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1528 OF 2016**

**JA MOGENI, J
NOVEMBER 11, 2024**

BETWEEN

GORI INVESTMENTS LIMITED PLAINTIFF

AND

BASCO PRODUCTS (K) LIMITED 1ST DEFENDANT

DAVID N GICHOHI 2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit vide a plaint dated 28/11/2016 and filed on 7/12/2016. The plaintiff states that at all material times they have been the owner of the suit property known as Title No 209/9329 situate at 1st Parklands Avenue and has been lawfully and rightfully in possession. That the defendants have wrongfully and unlawfully commenced without authority from the plaintiff have wrongfully entered and taken possession of the suit property and have thereafter wrongfully remained in possession thereof and have thereby trespassed and continue to trespass thereon and have commenced development and construction on the suit property in disregard of the plaintiff's proprietary rights.
2. That the 2nd defendant has applied for permission on 14/08/2013 for approval of development permission from the then City Council of Nairobi requesting for amalgamation of the suit property with LR No. 209/9330 which is adjacent to the suit property and it belongs to the 1st defendant and change of useR from single dwelling to multi dwelling (apartments).
3. In addition to that the plaintiff discovered that on or about September 2015 the 1st defendant submitted for approval to the Nairobi City County proposed additions and alterations to the development plans over the suit property. Thus due to the said trespass the defendants have misused, damaged, wasted, destroyed, polluted and/or degraded the suit property depriving the plaintiff of the use and enjoyment of the suit property,



4. That despite the trespass the defendants have never enjoyed peaceful, uninterrupted and/or exclusive occupation of the suit property and as such, the defendants have continued in their wrongful occupation of the suit property.
5. The plaintiff avers that the trespass by the defendants on the suit property has led to loss and damage particulars of which have been itemized as:
 - a. The plaintiff has been fraudulently deprived of the use and quiet enjoyment of the suit property
 - b. The defendants' misuse of the suit property, including erecting of permanent structures on the suit property has occasioned detriment to the Plaintiff
 - c. Further, the Defendants have prevented the Plaintiff from accessing the suit property to erect a perimeter boundary wall thereon
 - d. The Defendants' purported illegal and fraudulent attempt to amalgamate the suit property with LR No. 209/9330 is unlawful and solely intended to fraudulently alienate the Plaintiff's suit property.
6. The plaintiff as a result of being deprived of the use, possession, occupation and quiet enjoyment of the suit property and prays for judgment against the defendants for: -
 - a. A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property
 - b. A declaration that the defendants whether by themselves or their servants or agents and/or otherwise howsoever are wrongfully in occupation of the suit property and are accordingly, trespassers on the same.
 - c. A declaration that the defendants whether by themselves or their servants or agents and/or otherwise however are not entitled to remain on the suit property.
 - d. A permanent injunction restraining the defendants whether by themselves or their servants or agents and/or otherwise howsoever from remaining on or continuing in occupation of the suit property.
 - e. Vacant possession of the suit property
 - f. General damages for trespass.
 - g. Costs of this suit together with interest thereon at such rate and for such period of time as this Honorable Court may deem fit to grant.
 - h. Any such other or further relief as this Honorable Court may deem appropriate.
7. The 1st defendant filed a statement of defence and counter-claim dated 15/02/2017 and filed on even date. The 1st defendant denied all the averments of the plaintiff stating that it has been in possession of the suit property since purchasing it from the previous owners Kiritkumar Hariprasad Dave and Shradha Kirikumar Dave on 6/07/2010 who obtained a decree in court that granted them vacant possession in 2010 and have been in quiet possession since then.
8. At the same time the 1st defendant denies the particulars of loss and damage and avers that the title to the suit property by the 1st defendant was obtained in 1979 whereas the one for the plaintiff was issued



in 1980. That the amalgamation was due to the fact that the 1st defendant owns the adjacent property LR No. 209/9330.

9. The 1st defendant has thus filed a counter claim in which it has reiterated the contents of the defence and further stated that since purchase and transfer of the subject property into its name, it has been paying all the rates and rent to date. That once its ownership was confirmed the 1st defendant took a financial facility with Barclays Bank charging the suit property to the favor of the bank and commenced construction.
10. The 1st defendant avers that the plaintiff procured its title in a fraudulent manner and lists the particulars of fraud as follows:
 - a. Forging documents purporting to be true receipt and share certificate for the said parcel of land
 - b. Making false entry into the Nairobi County Government Records
 - c. Preparing forged documents and presenting the same to the Registrar of Lands at Nairobi Lands Registry
 - d. Using the said title deed fraudulently acquired to purport to enter or gain entry into the subject property and stop ongoing construction.
11. The 1st defendant in the Counter-Claim thus prays for the following:
 - a. A declaration that the 1st defendant's title no LR No. 209/9329 GRANT No. IR 34465/1 is the indefeasible and absolute title to the subject property
 - b. The title held by the plaintiff be cancelled and destroyed
 - c. A permanent injunction do issue restraining the plaintiff whether by themselves, or their servants, agents, 3rd parties or otherwise from occupying, constructing, blocking or laying claim on the subject property
 - d. The Plaintiff to reimburse to the 1st Defendant damages incurred as a result of delay occasioned by this suit
 - e. Damages for trespass
 - f. Costs for this suit and interest thereon for such period of time and at such rate as the Court may determine
 - g. Such other or further relief as this Honorable Court may deem just to grant.
12. The plaintiff did not file a reply to defence and to the counterclaim thus the claim against the plaintiff remains undefended.
13. The 2nd defendant did not enter appearance despite being served and therefore all claims against it remain unopposed.
14. By the time I took over this matter from my brother Justice Wamboto, the plaintiff had already called one witness and the parties were in agreement that the hearing should continue. So the plaintiff called PW1- Gopal Dhanji Patel who was sworn in English stated that he was one of the directors of the plaintiff and he adopted his witness statement dated 26/04/2018 and a supplementary list of documents which had 11 documents marked as PExh 1-11. He pointed the court to the fact the lease by the defendant has variance between the figure and words of the correct year since one refers to 1979



- and the other one states 1980 and paragraph 14 of the documents even refer to the date as 1880 instead of 1980.
15. He testified that the deed plan is dated 26/01/1980 yet the original date in the title of the plaintiff is 28/01/1980. Thus it seems that the title was issued before deed plan was issued. He informed the court that he had the original document and that he pays rates of the property.
 16. Upon cross-examination he stated that he had not produced any evidence to show that he is the director of the plaintiff. That he had never been in occupation of the property. That the last lease title was issued on 1st August 1979. He testified that they did not have any evidence confirming whether the title was ever revoked or cancelled. That their title was issued on 1st November 1994 and that he bought it from someone.
 17. He informed the court that he is not the one who was initially allocated the land and that he bought the interest of the original allottee who had an allotment letter dated 27th October 1994. The said letter is produced at page 22 of the plaintiff's bundle. The plaintiff also produced in support of this claim at page 25 a receipt number 148687 for Kshs. 119,050/- which the original allottee paid as stand premium upon accepting the initial allotment.
 18. It was his testimony that the original allottees transferred their interest to the plaintiff ^{allottees after making} an application to the Commissioner of Lands, who consented to have them transfer their interest in the property on 23rd May, 1995 as per the annexed letter at page 26 of the plaintiff's bundle. Upon paying for the consent the plaintiff testified that they were issued with a receipt dated 26th May, 1995 and which is produced at pages 27 of the plaintiff's bundle. At same time the plaintiffs made a payment of Kshs 8,967/- in lieu of rates evidenced by the receipt at page 28 of the plaintiff's bundle.
 19. The plaintiff when cross-examined further stated that he there existed a title from 1979. It was his testimony that he had not sued the original allottees. That he knew the 1st defendant through the same lady who was occupying the suit property.
 20. It was his testimony that they did a search and they came to know that the 1979 title had been revoked by the government. He testified that whereas he had a search done in 2016 and 2017 he however did not have a search showing BASCO. That at page 44 of the Defendant's bundle there is a search that show that the property was charged to Barclays Bank for Kshs 31,000,000 but that it was not their concern to sue the bank.
 21. He testified that the reason he has not been on the suit property is not because he was duped but because there was a lady who was staying there although the plaintiff did not buy the property from her. He stated that he bought the property from Kiplagat who occupied the property through the said lady. Further that there was no urgency of taking over vacant possession.
 22. He told the court during re-examination that when he purchased the property the advocates who did the process of sell and purchase were Mitei Advocates who acted for both the vendor and purchaser and that the lady continued staying on the property and the PW-1 was in constant touch with her.
 23. He stated that the documents at page 31 of the bundle show a transfer from May 1995. That the search done on 10/02/2017 show that the plaintiff is the owner of the suit property. That the title of 1/08/1979 was revoked by the Commissioner of Lands and that according to him the defendant's title has three discrepancies which he referred to in his evidence in chief.
 24. The second plaintiff's witness is PW2- Rodgers Gacewa who stated that he is the Principal Land Surveyor based at Survey of Kenya and he had brought a copy of the survey plan FR No. 150/2 and it



- shows data of three (3) properties which are LR 209/9330, 9331 and 9329 which are the records held their offices and which he produced as PExh 10.
25. On cross-examination he stated that the deed plan was supplied to the court and he was producing the survey report although the production was objected by the Counsel for the 1st defendant he was overruled since he would have an opportunity to cross-examine the witness on the same.
 26. PW2 further testified that the deed plan was issued in 1979 but that what he had with him was the survey plan and not the deed plan. The Counsel for the 2nd defendant Mr. Michuki raised an objection regarding the production by the 2nd defendant of the Survey plan which objection was overruled by the court since the documents being produced were by an expert witness the same documents were in the defendant's bundle.
 27. PW2 stated that the survey plan he had showed that there is a road. That the plan he had bore the letters G.L to mean Government Land and that whereas the property is marked it is not however surrendered as a road and the property was authenticated on 22/11/1979. This was preceded with a process of registration and checking which the survey cannot do.
 28. On reexamination, he stated that the original deed plan was issued on 28/01/1980 although whatever is filed on the CTS show a survey copy of a deed plan issued on 20/03/2000. With this the plaintiff's sought an adjournment to allow calling of their last witness. When the matter came for hearing on 23/11/2023 the plaintiff applied to their case since they decided not to call another witness.

Defendant's Case

29. The defence case was heard by myself after my brother Justice Wamboto was transferred.
30. DW1- Kamlesh Amratlal Tarachand – testified that he was a director of the 1st defendant and that he had recorded a witness statement after the death of his brother Anil Shah who was the one to testify but died on 21/11/2023 and so on his behalf the witness DW1 took over. His witness statement which he adopted as evidence in chief is dated 17/04/2024. He testified that BASCO who the 1st defendant bought the suit property LR 209/9329 IR No. 34465 in July 2010 and have occupied it since.
31. That the suit property was sold to the 1st defendant by Dave Kiritkumar Hariprasad and his wife and they got vacant possession straight away and in 2016 they charged it to Barclays Bank for Kshs 400 million. That LR 209/9330 was amalgamated to the suit property and that they developed apartments on the suit property through a project that begun in 2016. That this suit was filed in 2016 when the title was charged and that LR 209/9329 title has never been revoked. DW1 asked the court to adopt its list of documents dated 15/02/2017 containing 10 exhibits as DW1- Exhibits 1-10.
32. The plaintiff objected to the production of document 9 in the bundle of documents asking that the maker comes to produce it or that it is expunged from the court record. DW1- opted to have it expunged from the court record and the court proceeded and expunged it from the court record.
33. Upon cross examination he testified that he did not have the title with him since the bank is holding the document as a charge. Further he stated that the document at page 11 is certified as a true copy and is dated 26.01.1980 by the Director of Survey and Exhibit No. 10 for the plaintiff's documents has a map from Survey of Kenya which show Deed Plan to be No. 107716 and the date indicated on it is 28/01/1980 so there is a variance with the dates.
34. He testified that he had not called the sellers as witnesses and also that from his list of documents he has not produced any proof of payment of Kshs 31 million. At the same time he stated that although he testified having charged the property to Barclays Bank he had not produced a copy of the charge. He



- testified that he started construction in 2016 and that he bought the property which had a government building but it was vacant.
35. DW1 told the court that the suit property was amalgamated with LR 209/9330 but he had not presented proof of the amalgamation. That they continued construction in 2017 where there are 32 apartments on an 8 storey building. That the pictures produced at page 54 to 64 show the position as at 15/02/2017 but that as at 2017 February the 32 apartments were not constructed yet. He stated that they own LR 209/9330 and have constructed on it although they had not produced any documents to show ownership.
 36. On re-examination, DW1 testified that the errors reflected on the dates on the Certificate of Ownership be attributed to the Registrar of Lands. Although DW1 decided to expunge the said Certificate of Title from the list of documents. He further stated that he paid Kshs 31 million for the suit property and that the developments are done on the two parcels of land.
 37. DW2- George Gitonga testified that he is the Land Registrar and that he had come to shade light on the LR NO. 209/9329 Grant IR No. 34465. He stated that he has records held by their office, a certified copy showing the registered owner at entry no. 5 to be BASCO Ltd via a transfer done on 29/11/2019. That the Grant shown at page 5 is number IR 68428 for LR 209/9329 but that according to their records, LR 209/9329 refers to grant number IR 34465 and that Grant No. 68428 corresponds to LR 209/20751 deed plan number 202469 which is not part of the suit property and it belongs to a party who is not in court.
 38. On cross-examination he testified that the grant at page 9 runs from 1/08/1979 although at paragraph 3 of the same document it shows the term to run from 1/08/1980. This he stated is an error which is not fatal since it can be rectified. It was his testimony that the registration date for the grant he was testifying about is 4/03/1980 but that this is another of the many inconsistencies with the document since the term should have began from 01/08/1979.
 39. He further clarified that for a grant to be issued there must be a deed plan. That the deed plan at page 11 shows the date to be 26/01/1980 meaning that the deed plan was issued after the grant was issued. He informed the court that as at 1.08.1979 all the property known as LR 209/9329 did not exist it had not been surveyed and demarcated by the Survey of Kenya and therefore there was no deed plan.
 40. He pointed out that the document at page 10 at the bottom bears the date 3/03/1880 yet the Republic of Kenya as we know it today did not exist and therefore a grant containing that date would not have been granted by a Registrar of Lands and it is ridiculous. He further stated that the deed plan at page 11 indicates that it is a certified true copy meaning that it is a copy of the original grant and the said grant was issued on the basis of a certified true copy. It is dated 26/01/1980 and certified as a true copy on 28.02.1980 and the grant was initialized on 1/08/1979 which was before the issuance of the deed plan and this means that term started earlier than the grant.
 41. When re-examined he sought to produce the documents at this point. The Counsel for the plaintiff objected to the witness producing the documents at this point but was overruled since it was not a fatal mistake the plaintiff would be granted opportunity to cross-examine the witness if need be.
 42. The witness produced Grant IR No. 68428 for LR 20751 and Grant Number 34465 for LR 209/9329. The Counsel for the Plaintiff was granted an opportunity to cross-examine DW2. Upon being examined DW2 told the court that the execution page of the document IR 68428 shows that it is not the original document but a copy made for the office and also it has no indication on the face of it where it was coming from. Thus that there is not document before the court to indicate where the original document IR 68428 is or what happened to it.



43. When DW2 was re-examined after the plaintiff's counsel's cross-examination, he testified that the term of the Grant is indicated to have started on 1/08/1979 for 1999 years. That at the 3rd paragraph it shows that it started from 1/08/1980 but the execution page shows that it started to run from 3/03/1880 yet for the document of the 1st defendant at page 9 the 1st registration is indicated as from 4/03/1980. That these are glaring errors but since they are typographical they are not fatal. With this the 1st defendant closed their case.
44. The court gave directions at the close of the 1st defendant's case on filing of submissions.

Analysis and Determination

45. Now, this case represents the theatre of the absurd that has become the classical cases of land matters in Kenya where parties go to all lengths to lay claim to a title even if they are just holding onto one reed at the farthest corner of the land. In this case this court has been tasked to tell the parties who is the true owner of the suit property herein LR 209/9329 since it is being claimed by two different parties.
46. Counsel for the Plaintiff submitted that the Plaintiff has demonstrated the process they went through in acquiring the suit property. That the 1st defendant could not have acquired any title since the documents produced in court to support their averment did not match the claim they were making. The documents were fraught with a myriad of errors according to the plaintiff which show that the deed plan number 107716 is dated 26/01/1980 yet the 1st defendant produced documents that indicate that the grant is dated 1/08/1979 and in the same document at paragraph 3 the term shows that it runs from 1/08/1980 and the registration date for the grant is reflected as 4/03/1980 this means that the deed plan was issued after the grant was issued. The registration processes require that without a deed plan there can be no issuance of a grant.
47. Taking the pleadings, the evidence adduced together with the submissions rendered and authorities in support, this Court is tasked to determine the following questions:
- a. Whether the plaintiff is the registered proprietor of the suit property.
 - b. Whether the plaintiff is entitled to the orders sought in the plaint
 - c. Whether the 1st defendant is entitled to orders sought in the counter claim.
 - d. Who meets the costs of the suit and the counter-claim
48. The 1st defendant submitted that they are the lawful owners of the suit property through their submissions dated 19/07/2024. That they bought the suit property through a sale agreement dated 6/07/2010 and paid rate and rent as evidenced by the receipts that they produced in evidence. That DW2 who is a Land Registrar confirmed that an original grant was issued in relation to the suit property number IR 34465. I noted however that the DW2 produced a certified copy of the original which is dated 28/02/1980 whereas the said grant is purportedly dated 26/01/1980 yet the same grant was initialized on 1/08/1979 which was before the issuance of the deed plan. DW2 in his evidence alleged that IR 68428 corresponds to title LR 20751 and deed plan 202469 but he never placed before the court any documents to lend credence to his claim.
49. When DW2 was cross-examined on the glaring errors of dates including the fact that the document indicated that it was issued on 3/03/1880 when the Republic of Kenya did not exist, although he noted that this is ridiculous he held to his averment that these errors are not fatal.



50. It is evident herein that both the Plaintiff and the 1st Defendant are both claiming ownership of the suit property. However, the Inland Registration Numbers (I.R Nos) that they both hold are different as the Plaintiff's grant bears the I.R No. 68428, while the 1st Defendant holds a grant with I.R No. 34465.
51. When a party's title to land is called into question, the Party has an obligation to show the root of its title. See the case of *Munyu Maina..Vs..Hiram Gathiha Maina*, Civil Appeal No.239 of 2009, where the Court of Appeal held that:-
- “We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
52. As already noted above, the 1st Defendant presented documents that had inconsistencies as to the registration including the fact that the grant was issued before the deed plan. In essence there was no land to allocate in those circumstances therefore the court is of the position that the 1st Defendant did not prove the root of its title.
53. The Plaintiff on the other hand testified that it had the transfer from Mayo Kiplagat to it as elaborated hereinabove. The Plaintiff has produced in evidence a transfer document indicating the transaction between it and the original allottees. The Plaintiff did produce the letter to Commissioner of Lands seeking allocation of land and the response, the Commissioner of Lands confirmed receiving the monies paid for the transfer and a receipt produced to support the averment. It therefore followed that once the original allottees were allotted the said land, no one else could be allotted. See the case of *Rukaya Ali MohamedVs... David Gikonyo Nambacha & Another* (Kisumu HCCA No. 9 of 2009:-
- “Once (an) allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment, since a letter of allotment confers (an) absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation, or that the allotment was out rightly illegal or it was against the public interest.”
54. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.
55. Which brings me to the question that if both parties are claiming the suit land and waving their respective grants, could one parcel have two grants, and if so, what is the root of each.
56. The plaintiff produced before the court for examination grant documents IR Number 68428 from 1/11/1994 for LR 209/9329 and Land Survey Deed Plan No. 107716 dated 28/01/1980. The plaintiff produced a search showing that it is the owner of the suit property and this evidence of the search of 1/02/2017 was not recanted. The title of 1/08/1979 was revoked by the Commissioner of Lands. The plaintiff also called the Principal Land Surveyor PW2 who in his testimony produced the copy of the survey plan FR No. 150/2 and it bore details of three properties including the suit property LR 290/9329. He also stated that the original deed plan was issued on 28/01/1980.
57. The 1st defendant on his part produced IR 34465 which is from 1/08/1979 relating to LR 209/9329 Land Survey Deed Plan 107716 attached to a copy of the title certified as true copy made on 28/02/1980.



58. The Plaintiff having been able to show the root of its title, the Court finds and holds that it has then proved that it is the absolute and indefeasible owner of the suit property. See the case of Hubert L. Martin & 2 OthersVs... Margaret J. Kamar & 5 Others[2016] eKLR, where the Court held that;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

59. Even assuming the 1st Defendant was able to show the root of its title, from the documentation attached to the pleadings, the 1st Defendant was allotted the suit property way after the original allottees had already been allotted. It is evident that where there is a double allocation, there is no doubt that the first in time will prevail. The court finds that the Plaintiff’s title was first in time and the Court will rely on the Maximum of Equity which states that, “when two equities are equal, the first in time shall prevail”. See the case of Gitwany Investment Ltd..Vs.. Tajmal Ltd & 3 Others (2006)eKLR.

60. Having found that Plaintiff is the absolute and indefeasible owner of the suit property, then the Court finds that the Plaintiff is entitled to enjoy the rights of an absolute owner of the property as is provided by Sections 24 and 25 of the Land Registration Act. Section 24(a) of the said Act provides as follows: -

61. Subject to this Act: -

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto:”

62. Further as an absolute proprietor, such right attaching to it can only be defeated by operation of the law as provided by Section 25(1) of the Land Registration Act which provides as follows:-

25.

(1) The rights of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject: -

- a. to the leased, charges and other encumbrances and to the conditions and restrictions if any, shown in the register; and
- b. to such liabilities, rights and interests as affect the same and are declared by Section 28 and to require noting on the register, unless the contrary is expressed in the register.



63. As the Court finds that the Plaintiff acquired its allocation and registration regularly and without any evidence of fraud, then it is evident that the Plaintiff is entitled to protection of its property as provided by Article 40 of *the Constitution* and therefore entitled to the Injunction orders sought.
64. The court is satisfied on the material placed before it that the Plaintiff is the registered proprietor of the suit land. The Plaintiff has accused the 1st Defendant of encroaching upon its land and putting beacons. This evidence has not been controverted. The 1st Defendant having entered onto the Plaintiff's suit land without any lawful or justifiable cause while the Plaintiff was in possession, the 1st Defendant was therefore a trespasser in law.
65. Plaintiff's evidence that the 1st Defendant did enter upon the suit land and put up apartments has been confirmed by the 1st defendant. Its actions caused interference with the Plaintiff's use and occupation of the suit land. It is a fact that the 1st Defendant has been in occupation of the suit property and have prevented the Plaintiff from utilizing or making use of its property. As the fact of trespass is already established, damages are awardable as a matter of course.
66. Going by the evidence produced by the Plaintiff before this court, this court finds that the suit property does indeed belong to the Plaintiff. As there cannot be two grants and titles over the same parcel of land, this court further finds that the claim of ownership over the suit property made by the 1st Defendant is invalid and is hereby cancelled.
67. One of the rights belonging to absolute ownership of land is the right to possession of the same to the exclusion of all others. This is precisely the right that the Plaintiff is seeking in this suit. This court has no difficulty in finding that indeed the Plaintiff is entitled to occupy the entire suit property to the exclusion of the Defendants. The Plaintiff is therefore entitled to vacant possession of the suit property by the 1st Defendant. I order that the 1st Defendant do give the Plaintiff vacant possession of the suit property and do bear the costs of demolition of the illegal structures erected by its agents thereon.
68. In the counterclaim, the 1st defendant has alleged that the plaintiff fraudulently and unlawfully obtained ownership documents to the suit property while being aware that the 1st defendant had already acquired the suit property. Allegations of fraud must always be properly particularized. An allegation of fraud in this instance, if proved can lead to cancellation of title as per Section 26 of the *Land Registration Act* 2012. Being a serious allegation of misconduct, the 1st defendant has a greater burden of adducing particulars to explain the basis for the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty. Allegations of fraud must be clear and express and pleaded separately. The 1st defendant did not produce evidence to prove fraud and illegality in how the plaintiff acquired the title to the suit property. In the absence of compelling evidence, the court cannot find fraud on the part of the plaintiff in acquiring title to the suit property.
69. The plaintiff has prayed for general damages for trespass and having proved that the 1st defendant is a trespasser the plaintiff is entitled to general damages against the 1st defendant. The Court will be persuaded by the case of *Park Towers Limited versus John Mithamo Njika & 7 others* (2014)eKLR, where the Court held that:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.”



70. In the case of Nakuru Industries Limited -vs- S S Mehta & Sons [2016]eKLR the court observed:-

“In tort, damages are awarded as a way to compensate a plaintiff for loss he had incurred due to a wrongful action on the part of the defendant. The damages so awarded are intended to return the plaintiff back to the position he was before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the cost of restoration of the land to the position it was in before the wrongful act was committed.”

71. In as much as the plaintiff is entitled to general damages, there was no evidence that established the exact value of the suit property before and after the trespass or the value of damage that was occasioned on the suit property by the actions of the defendants. Nevertheless, the plaintiff is entitled to be compensated for the denial of use of the suit property for over a decade, and for this reason I award the plaintiff damages of Kshs 2,000,000/= on account of nominal general damages for trespass together with interest at court rates from the date of this judgment until payment in full. I am satisfied that the plaintiff has proved its case on a balance of probabilities while the defendants counterclaim has not been proved to the required standard.

72. I accordingly enter judgment for the plaintiff against all defendants jointly and severally and make the following orders: -

- a. The 1st defendant’s counterclaim is dismissed.
- b. The defendants be and are hereby ordered to vacate and deliver vacant possession of the suit property, Land Reference No 209/9329 to the plaintiff within 90 days from the date of service of the decree herein upon them.
- c. In default of compliance with (b) above as aforestated the plaintiff shall be entitled to an order of eviction for the forcible removal of the defendants, their agents and/or servants from Land Reference No 209/9329 upon application.
- d. A permanent injunction be and is hereby issued restraining the defendants whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the suit property.
- e. The plaintiff is awarded Kshs. 2,000,000/= as general damages for trespass together with interest at court rates from the date of judgment until payment in full.
- f. Costs of the suit and counterclaim are awarded to the plaintiff to be borne by the defendants jointly and severally.

It is so ordered

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2024.

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MOGENI J.
JUDGE

In the Virtual presence of: -



Mr. Kangethe for the 1st Defendant

Ms. Muthui holding brief for Mr. Michuki for Plaintiff

No appearance for 2nd Defendant

Caroline Sagina - Court Assistant

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MOGENI J.

JUDGE

