



Big Tree Farm Limited v Rono & 25 others (Environment & Land Case 104 of 2018) [2024] KEELC 14155 (KLR) (23 December 2024) (Judgment)

Neutral citation: [2024] KEELC 14155 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 104 OF 2018
FO NYAGAKA, J
DECEMBER 23, 2024**

BETWEEN

BIG TREE FARM LIMITED PLAINTIFF

AND

MARY ANGOLA RONO 1ST DEFENDANT

JOSIA MASAJA & 24 OTHERS & 24 OTHERS & 24 OTHERS & 24 OTHERS 2ND DEFENDANT

JUDGMENT

1. If I were a poet, I would write poems about money from America. But I am not one! This money from America flows easily in many hands in Africa, Kenya in particular. No wonder it has caused many a heartache, as I often see on television and social media about many relatives and friends of many who reside in America, have sent sums of money for investment back home (in Kenya) but in the end it has turned out to be the cause of wailing and mourning. “America money” you are doing us great and yet giving pain!
2. The facts of what is alleged to have taken place in relation to the transactions that brought some of the Defendants who testified in this matter about how they miserably attempted to or obtained interest in land in the suit land is like a movie from Hollywood. No wonder one of the Defendants stated how money from America was sent to her account and she withdrew it immediately to pay for land on which maize was planted then and she was promised to take possession thereof after harvest only for it to turn out to be belonging to someone else after the harvest.
3. By a Plaint dated 23/11/2018 and filed on 26/11/2018, the Plaintiff, a Limited Liability Company sued the Defendants. On 07/03/2019 it withdrew the cases against the 17th, 18th, 19th, 25th and 26th Defendants. It then filed an application on 31/07/2019 to amend the Plaint. On the 4/11/2019 the



Application was allowed by consent, for the Amended Plaint to be filed within 15 days of the order. It filed the Amended Plaint on 20/11/2019. In it the Plaintiff sought the following reliefs:

1. A permanent injunction against the defendants, their agents or anybody claiming through them jointly and severally from claiming, using, entering or in any other manner dealing with any part of land known as LR. No. 8986 having IR. No. 7098/15.
 2. A declaration that the Plaintiff is the sole owner of land parcel known as LR. No. 8986 having IR. No. 7098/15.
 - 2A. A declaration that any agreement covenants done between the defendant and 3rd parties in respect of LR. No. 8986 is void.
 - 2B. An order of eviction of the defendants, its (sic) agents or anybody claiming under them from land known as LR. No. 8986.
 3. Costs.
 4. Any other relief the Court may deem fit to grant.**
4. The Plaintiff averred that it was registered under certificate of incorporation No. CPR/2014/140356 and was the owner of all that parcel of land known as LR. No. 8986 having IR. No. 7098/15 measuring approximately 16.45 acres. Further, that prior to 2015, the entire suit land had been charged to various Financial Institutions which charge was discharged on 5/02/2015. It averred further that the Defendants purport to have purchased part of the suit land from 3rd parties, which transactions are void ab initio by operation of the law. It pleaded particulars of voidness of the transactions as follows:
- i. Purchasing land that its interest has encumbrances from various financial institutions.
 - ii. Purchasing land from 3rd parties who are not authorized by the Plaintiff.
 - iii. Purchasing land without the express authority of the Plaintiff.
5. It pleaded further that it was in exclusive occupation and use of the land. Again, it pleaded that since the year 2007 or thereabouts the Defendants had been invading the land in peace meal and had occupied part of the suit land. It pleaded that until early 2018 the defendants jointly and severally began laying claim over the land by purchasing interests thereto through 3rd parties. It protested the move to the County Commissioner who held a meeting and warned and cautioned them. It averred further that on 15/11/2018 after harvesting cereals from the land, the Defendants threatened invasion and some of the defendants and their agents invaded more land belonging to it, which action was unlawful and tailored to deny the Plaintiff enjoyment of the land. Having averred that this Court had jurisdiction, and there was no suit pending and demand had been given it prayed for the reliefs stated above.
6. On 22/01/2019 the 1st Defendant entered appearance and filed Defence and Counterclaim the same date. She filed an Amended Defence and Counterclaim on 31/01/2020. In it she denied all the allegations in the Plaint. She averred that she had a valid claim against the Plaintiff which, through its agent, Gladys Wabuge, sold to her five (5) acres of the part of the suit land at a price of KShs. 850,000/= which sum she paid in full. She averred that if indeed there was a charge on the land as pleaded in the Amended Plaint, then the Plaintiff's agent or representative did not disclose the same to her and the Plaintiff cannot use the law as an instrument of fraud. She denied that the transaction of sale was void ab initio by dint of the law as pleaded. She then averred that the Plaintiff held the suit land in trust for herself arising from the purchase agreement which had never been nullified by operation of the law or otherwise. She pleaded further that on being given possession of the land she found on it a stranger who claimed to have been sold to the same parcel of land by the said Gladys. She reported the matter to the



- County Commissioner who asked the Plaintiff to honour the terms of the agreement. She pleaded that she was entitled to use and enjoyment of the land without hindrance from the Plaintiff. She averred that the Plaintiff's claim was statute-barred and he would be seeking to have it struck out with costs.
7. The 1st Defendant then raised a Counterclaim that she was the lawful owner of the 5 acres of land being part of the 16.5 acres of LR. No. 8986 having IR No. 7098/15 measuring 16.45 acres. She reiterated that the Plaintiff was enjoined to give quiet possession thereof in her favour. She pleaded that the said Gladys Nakhumicha Wabuge who purported to be a director of the Plaintiff had committed fraud and misrepresentation by hiding under the corporate veil. She pleaded that in due time she would seek to uncover (sic) the veil. She prayed for the dismissal of the Plaintiff's suit and judgment to be entered in her favour in the Counterclaim against the Plaintiff. In it she sought for an order for the Plaintiff to transfer five (5) acres comprised in LR. No. 8986 (IR. 7098/15) and in default the Deputy Registrar of this Court to execute documents of transfer on behalf of the Plaintiff. She prayed for costs, interest and any other order (sic) the Court shall deem fit to grant.
 8. On 5/02/2019 the 11th Defendant entered appearance. On 20/02/2019 the 6th, 12th, 15th, 20th, 21st and 24th filed a Notice of Appointment of Advocates. On 22/03/2019 the 11th Defendant filed a Defence and Counterclaim. He amended the Pleading on 13/12/2019, denying the contents of the Amended Plaint as herein stated. Save for the descriptive paragraphs of the Plaint, he denied all the other parts and put it to strict proof thereof. He too averred that he had a valid claim over 7 acres of the suit land, having purchased them from one Jeffrey Kilwake Wabuge at a consideration of Kshs. 950,000/= which consideration he paid in full. He averred further that the said Jeffrey Kilwake gave voluntary possession of the land but upon the 11th Defendant taking it he realized that he had been put into possession of only five (5) acres. He averred further that he nevertheless took possession of the 5 acres and constructed permanent houses thereon and resided on it since. He too pleaded that the Plaintiff's claim was statute-barred and he would be seeking to have it struck out with costs.
 9. After that he raised a counterclaim in which he pleaded that he was the rightful owner of 7 acres which comprised in LR. No. 8986 having IR. 7098/15 and the Plaintiff should be ordered to execute transfer documents in his favour. He too pleaded that Gladys Nakhumicha Wabuge had committed fraud and obtained money by false pretence and misrepresentation and was hiding in the corporate veil which he too would in due time seek to uncover (sic).
 10. In the end he sought she sought for an order for the Plaintiff to transfer seven (7) acres comprised in LR. No. 8986 (IR. 7098/15) and in default the Deputy Registrar of this Court to execute documents of transfer on behalf of the Plaintiff. He prayed for costs, interest and any other relief the Court shall deem fit to grant.
 11. On 25/03/2019 the 7th Defendant filed a Defence and Counterclaim. He amended the Pleading on 20/12/2019, denying the contents of the Amended Plaint as herein stated. Save for the descriptive paragraphs of the Plaint, he denied all the other parts and put it to strict proof thereof. He too averred that he had a valid claim over three (3) acres of the suit land, having purchased them from one Jeffrey Kilwake Wabuge at a consideration of Kshs. 450,000/= which consideration he paid in full. He averred further that the said Jeffrey Kilwake gave voluntary possession of the land but upon the 7th Defendant taking it he realized that he had been put into possession of only one and half (1½) acres instead of three. He averred further that he nevertheless took possession of the one and half (1½) acres and constructed a permanent house thereon and resided on it since. He too pleaded that the Plaintiff's claim was statute-barred and he would be seeking to have it struck out with costs.
 12. After that he raised a counterclaim in which he pleaded that he was the rightful owner of 3 acres which comprised in LR. No. 8986 having IR. 7098/15 and the Plaintiff should be ordered to execute transfer



- documents in his favour. He too pleaded that Gladys Nakhumicha Wabuge had committed fraud and obtained money by false pretence and misrepresentation and was hiding in the corporate veil which he too would in due time seek to uncover (sic).
13. In the end he sought for an order for the Plaintiff to transfer three (3) acres comprised in LR. No. 8986 (IR. 7098/15) and in default the Deputy Registrar of this Court to execute documents of transfer on behalf of the Plaintiff. He prayed for costs, interest and any other relief the Court shall deem fit to grant.
 14. On 25/03/2019 the 21st Defendant filed a Defence and Counterclaim. He amended the Pleading on 20/12/2019, denying the contents of the Amended Plaintiff as herein stated. Save for the descriptive paragraphs of the Plaintiff, he denied all the other parts and put it to strict proof thereof. He too averred that he had a valid claim over four (4) acres of the suit land, having purchased them from one Jeffrey Kilwake Wabuge at a consideration of Kshs. 652,000/= which consideration he paid in full. He averred further that the said Jeffrey Kilwake gave voluntary possession of the land but upon the 7th Defendant taking it he realized that he had been put into possession of only one and decimal seven (1.7) acres instead of three. He averred further that he nevertheless took possession of the one decimal seven (1.7) acres and constructed a permanent house thereon and resided on it since. He too pleaded that the Plaintiff's claim was statute-barred and he would be seeking to have it struck out with costs.
 15. After that he raised a counterclaim in which he pleaded that he was the rightful owner of 4 acres which comprised in LR. No. 8986 having IR. 7098/15 and the Plaintiff should be ordered to execute transfer documents in his favour. He too pleaded that Gladys Nakhumicha Wabuge had committed fraud and obtained money by false pretence and misrepresentation and was hiding in the corporate veil which he too would in due time seek to uncover (sic).
 16. In the end he sought for an order for the Plaintiff to transfer four (4) acres comprised in LR. No. 8986 (IR. 7098/15) and in default the Deputy Registrar of this Court to execute documents of transfer on behalf of the Plaintiff. He prayed for costs, interest and any other relief the Court shall deem fit to grant.
 17. On 25/03/2019 the 24th Defendant filed a Defence and Counterclaim. He amended the Pleading on 16/12/2019, denying the contents of the Amended Plaintiff as herein stated. Save for the descriptive paragraphs of the Plaintiff, he denied all the other parts and put it to strict proof thereof. He pleaded that he was wrongly sued since he only executed the agreement of sale of two (2) acres on behalf of one Teresa Nyarinda Matura with one Jeffrey Kilwake Wabuge. He averred the said Teresa Nyarinda Matura purchased the two (2) acres from one Jeffrey Kilwake Wabuge at a consideration of Kshs. 340,000/= which consideration he paid in full. He pleaded that he was only a caretaker on the parcel of land Teresa Nyarinda Matura bought. He too pleaded that the Plaintiff's claim was statute-barred and he would be seeking to have it struck out with costs.
 18. Whereas the document was titled Defence and Counterclaim, the 24th Defendant did not raise any Counterclaim. Instead he prayed for the dismissal of the Plaintiff's suit with costs.
 19. On 06/05/2019 the 20th Defendant filed a Defence and Counterclaim. After the Plaintiff amended its Plaintiff, the 20th Defendant did not amend his Defence. Save for the descriptive paragraphs of the Plaintiff, he denied all the other parts and put it to strict proof thereof. He too averred that he had a valid claim over two (2) acres of the suit land, having purchased them from one Gabriel Wabuge at a consideration of Kshs. 340,000/= which consideration he paid in full. He averred further that the said Gabriel Wabuge did not give him possession of the portion purchased and he reported to the Sub-County Criminal Investigation Officer. He too pleaded that the Plaintiff's claim was statute-barred and he would be seeking to have it struck out with costs.



20. After that he raised a counterclaim in which he pleaded that he was the rightful owner of 2 acres which comprised in LR. No. 8986 having IR. 7098/15 and the Plaintiff should be ordered to execute transfer documents in his favour. He too pleaded that Gladys Nakhumicha Wabuge had committed fraud and obtained money by false pretence and misrepresentation and was hiding in the corporate veil which he too would in due time seek to uncover (sic).
21. In the end he sought for an order for the Plaintiff to transfer two (2) acres comprised in LR. No. 8986 (IR. 7098/15) and in default the Deputy Registrar of this Court to execute documents of transfer on behalf of the Plaintiff. He prayed for costs, interest and any other relief the Court shall deem fit to grant.
22. On 21/05/2019 the 15th Defendant filed a Defence and Counterclaim. After the Plaintiff amended its Plaint, the 15th Defendant did not amend its Defence. Save for the descriptive paragraphs of the Plaint, she denied all the other parts and put it to strict proof thereof. He too averred that he had a valid claim over one and half (1½) acres of the suit land, having purchased them from one Gabriel Wabuge at a consideration of Kshs. 190,000/= which consideration he paid in full. He averred further that up to the date of filing Defence and Counterclaim, the said Gabriel Wabuge had not given her possession of the one and half (1½) acres. She pleaded that she was rightfully entitled to enjoy user of the purchased portion without hindrance from the Plaintiff. She too pleaded that the Plaintiff's claim was statute-barred and she would be seeking to have it struck out with costs.
23. After that she raised a counterclaim in which he pleaded that she was the rightful owner of 1½ acres which comprised in LR. No. 8986 having IR. 7098/15 and the Plaintiff should be ordered to execute transfer documents in her favour. She too pleaded that Gladys Nakhumicha Wabuge had committed fraud and obtained money by false pretence and misrepresentation and was hiding in the corporate veil which he too would in due time seek to uncover (sic).
24. In the end she sought for an order for the Plaintiff to transfer one and half (1½) acres comprised in LR. No. 8986 (IR. 7098/15) and in default the Deputy Registrar of this Court to execute documents of transfer on behalf of the Plaintiff. She prayed for costs, interest and any other relief the Court shall deem fit to grant.
25. On 17/02/2020 learned counsel for the 6th, 12, 15th and 20th Defendants moved the court vide an application dated 14/02/2020 to cease acting for them. On 18/02/2020 was allowed to cease acting for the 20th Defendant, in the presence of his client. On 4/03/2020 he was allowed to cease for the 6th, 12, and 15th Defendants too, in their presence.
26. When the matter came for hearing on 17/11/2021, learned counsel for the Plaintiff pointed to court that it had become difficult to serve summons to enter appearance on the 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, and 14th Defendants. Indeed, the record shows that ever since the suit was filed and the summons to enter appearance issued and taken on 20/11/2018 for service, they had never been properly served with the summons. But while the Plaintiff's learned counsel singled out the eight Defendants as not having been served with summons to enter appearance, he did not tell the Court what became of the service upon the 13th, 16th, 22nd and 23rd Defendants since the cases against them were not withdrawn as was that against the 17th, 18th, 19th, 25th and 26th and there were Affidavits to show that they were served. Thus, the Court will agree that they too were never served with summons to enter appearance.
27. The Affidavit of Service sworn before John Bororio Advocate by one Raphael Nyongesa Simiyu on an unknown date and filed on 04/12/2018 was defective and could not be evidence of service of the summons on the persons indicated as not served. For one, the process server swore in the Affidavit that he was accompanied by the Plaintiff to Big Tree Farm Ltd and effected service on the persons named in the Affidavit. It is noteworthy that the Plaintiff herein is a corporation. It is inconceivable how the



corporation could accompany the process server. I know not of such an artificial person being capable of moving from place to place, unless through its directors, shareholders or duly authorized agents. Again, it was not indicated in it as to who identified each of, and how, the persons purported to be served. No wonder none of them ever entered appearance or filed any documents in the matter, ever since.

28. When this suit came up for hearing on 01/12/2021, the Plaintiff, though represented by learned counsel, did not attend Court. The suit was dismissed with costs to the Defendants and the Counterclaims of the respective Defendants, as shown below, proceeded to hearing. The orders of 01/12/2021 have never been set aside.

THE EVIDENCE

29. The 1st Defendant, Mary Angola Rono, testified as DW1. She stated that she was a house wife. She adopted her witness statement which she wrote on 31/07/2019. In the statement she stated that she scouted for land and found one in Big Tree Farm. She went to view it in early September, 2007. She found one Gladys Wabuge and her late son Jeff. Gladys informed her that the land was hers although it was still in the name of her late husband. Gladys informed her that she was the one of the administratrixes of the estate of her husband. They discussed on the price and agreed. On that basis they came to town (not named) and withdrew a sum of Kshs. 680,000/= and went to the law firm of Kidiavai Advocates she the said Gladys directed them to. The lawyers drew an agreement which Gladys and Jeff signed upon paying the sum to Gladys. She named the parcel of land as out of which she bought 5 acres as LR. No. 8986, Big Tree Farm.
30. It was agreed that she takes possession after the maize crop that was growing thereon was harvested. The agreement on 24/09/2017 (sic) and in December, 2017 (sic) she bought iron sheets, other building and fencing materials and took them to the land only to find someone else was in occupation. She went to look for Gladys and Jeff but found them missing. Later she found Gladys who assured her that all would be well.
31. On 16/02/2008 she went back to Kidiavai & Co. Advocates whereat she paid the balance. On that date Gladys informed her that she would go to Nairobi and look for Jeff so that they both would show her a different area to occupy but to date she had not been given the land. She stated that she severally met Gladys who gave her false promises. She even stated further that she had severally talked to the said Gladys who would call her to her house and whenever she goes there the said Gladys would “keep house.”
32. She reported the matter to the local Chief of the area known as Waitaluk, the DO and Deputy County Commissioner of Kiminini. The said Gladys had been summoned to the offices and she gave excuses for not turning up. Her evidence was that Gladys had refused to give her the land and or refund her the money paid. She prayed for the land to be given to her or in the alternative she be refunded the money paid together with interest thereon.
33. Lastly, the 1st Defendant stated that on 19/03/2018 Gladys sent to her a message informing her that a surveyor was available to demarcate for her a portion of the land. After Jeff died she, the 1st Defendant, attended his funeral. Then Gladys informed her to surrender to her the original agreement to enable her to process pending claims.
34. In her oral testimony she testified that she claimed five (5) acres of the suit land which portion she bought from Big Tree Farm through Gladys Wabuge who was now one of the Directors of the Plaintiff. She stated that she was not let to occupy it because when she was given possession she found that someone was already in occupation.



35. Her further testimony was that on 07/08/2015 she paid in the Plaintiff's office money for the survey of the land. She produced the receipt thereof as D. Exhibit 1. She complained about obtaining money by false pretenses to the County Commissioner's office through a letter dated 28/03/2018. She produced as D. Exhibit 2 the letter to the County Commissioner.
36. Her further testimony was that she bought the parcel of land from one Geoffrey Kilwake Wabuge on 24/09/2007. She produced as D. Exhibit 3 the agreement made on that date. She stated that she completed payment on 15/02/2008 which sum was acknowledged by the vendor through a document dated the same date. She produced it as D. Exhibit 4. She gave evidence that she issued a demand letter on 09/08/2018. She produced the letter as D. Exhibit 5. She prayed for her counterclaim to be allowed.
37. The 1st Defendant called her witness, one Luvindi Mirungishi Khalisa, who testified as DW2. He too adopted his witness statement as his evidence in-chief. In the statement he stated that he was a retired teacher and the 1st Defendant was his cousin. He stated that on 24/09/2007 the 1st Defendant informed him that he had acquired a piece of land in Big Tree Farm. She informed him that the husband had viewed the land and was going back to America to send her money for the purpose.
38. The 1st Defendant and he proceeded to Big Tree Farm and found Gladys in her house. At the time, her son Jeff who was said to be contesting for Saboti Parliamentary seat was not home. Gladys informed them that she wanted the money to enable her son to conduct campaigns. She told them to go to her lawyer's office and they draw an agreement. They all went to the offices of Kidiavai Advocate. They agreed to draw an agreement of sale for five acres which would be sold at Kshs. 850,000/=. The 1st Defendant withdrew the money from the bank and paid Gladys in his presence.
39. After that Gladys promised to give the 1st Defendant possession in December of that year, after the harvest. Upon going to take possession in December, the 1st Defendant found someone on the land. By that time somebody had fenced the land and was busy constructing a house thereon.
40. On 16/02/2018 he accompanied the 1st Defendant to Kidiavai Advocate's offices to pay the balance. Jeff was not present on the latter occasion too. The 1st Defendant paid Kshs. 170,000/= to Gladys whereupon she stated that she was going to Nairobi to see Jeff who was hospitalized and she would communicate later. In December, 2008 he and the 1st Defendant went to Gladys' place but she could not be found.
41. In 2018, Jeff died and Gladys asked the 1st Defendant together with other purchasers to avail the original agreement so that the family could address the issue. The 1st Defendant did so but to date nothing was forthcoming from Gladys.
42. His oral evidence was that he witnessed the agreement between Mrs. Gladys Wabuge and her son Jeff Wabuge on the one hand and the 1st Defendant on the other. He testified that the sale was for 5 acres of which she was given possession. He stated further that the 1st Defendant tried to occupy the land by taking cows onto it. The cows disappeared. His last testimony was that ultimately the 1st Defendant was never given possession of the land. With that testimony the 1st Defendant closed her case.
43. The 7th Defendant, one Michael Munialo Mulongo, testified on his Counterclaim as DW3. He stated that he was an officer working with the Ministry of Water in Nairobi Headquarters. His further evidence was that he lived in Big Tree Farm. He adopted his witness statement which he wrote on 20/5/2019. He stated in it that on 30/09/2004 his spouse one Beatrice Naswa Wanyonyi and he executed an agreement between them and Geoffrey Kilwake Wabuge for the purchase of three (3) acres. They were part of the estate of the late Wafula Wabuge and the said Geoffrey Wabuge was a beneficiary thereof. They were given only 1½ acres of the land which they duly developed and used as their



- matrimonial home. He then stated that they bought the land on which they had lived peacefully since 30/09/2004 yet the Plaintiff company was incorporated on 22/04/2014, long after the transaction was entered into.
44. In the oral testimony he stated that he together with his wife bought 3 acres of land from Geoffrey Waluke who sold it to him on behalf of his father, Wafula Wabuge. He stated that the said Wafula Wabuge was now deceased.
45. He stated that upon purchase of the land for which he paid in full he was given possession of only 1½ acres on which he resided since. He testified that his wife, his sister-in-law and other people witnessed the agreement. He produced the agreement dated 30/09/2004 as D. Exhibit 6. He testified that he built on it a house. He produced a photograph of the same as D. Exhibit 7. He prayed to be given his land and the portion that remained. He asked the Court to direct the Deputy Registrar to sign transfer documents on behalf of the Plaintiff if it did not execute them in his favour. He prayed for costs of the Counterclaim.
46. Benard Nyabera Ondimu, the 11th Defendant, testified as DW4. He adopted his witness statement dated 20/05/2019 as his evidence in-chief. He stated in it that on 08/03/2004, 06/05/2004, 13/10/2004, 05/08/2006 and 11/06/2011 he executed agreements with one Geoffrey Kilwake Wabuge to purchase a total of seven (7) acres being part of the suit land which was LR. No. 8986. The said Geoffrey Wabuge was a beneficiary of the estate of the Wafula Wabuge. Out of the seven (7) acres he was given only 5 of which he had fully developed. He then stated that he had bought the land between 2004 and 2011 yet the Plaintiff had been incorporated on 22/04/2014 long after the agreements of purchase.
47. In the oral testimony, he stated that he bought 2 acres of land on 08/03/2004 from Geoffrey Kilwake Wabuge. His evidence was that initially he bought the 2 acres but added five to make it 7 acres. He stated that the agreement was signed in the office of Sichale, Kidiavai and Co. Advocates. He produced the agreement as D. Exhibit 8 and a set of ten (10) acknowledgements as P. Exhibit 9(a)-(j). He testified that he was given possession of five (5) acres. When he was added the other two (2) acres, one Kisia a son to the one of the directors named Gladys fenced it off. He complained to the District Officer (DO) on the area. The DOC summoned Gladys to the office. She promised before him that she would show him another portion of two acres elsewhere but to date he has never been put into possession of the two more acres. He too prayed for the Counterclaim to be allowed with costs. He closed his case.
48. The 21st Defendant, one Antony Sabwani, a retired teacher, testified as DW5. He testified that he bought four (4) acres of land on the suit land from one Geoffrey Kilwake Wabuge. He stated that the land used to be owned by the late Wafula Wabuge. He bought the four (4) acres on 01/03/2006. His testimony was that he did not complete the payment initially paid Kshs. 400,000/=, leaving a balance of Kshs. 252,000/=. Therefore, he was given only one acre to be residing on. He produced the agreement of 01/03/2006 as D. Exhibit 10.
49. Later, he added Kshs. 41,000/= and they made another agreement. He stated that on 12/02/2012 and 18/03/2016 he paid an additional Kshs. 15,000/= and Kshs. 26,000/= respectively. This was acknowledged through the late mama Esther Kilwake Wabuge who was the wife of Geoffrey Kilwake Wabuge. He stated that he was given possession of only 1 acre and now occupies 1.7 acres of which he had developed. He said the Plaintiff was incorporated in 2014 after he had purchased the land. He prayed to be given land equivalent to the sum total he had paid, and not as the entire land intended to be purchased as per the agreement. He prayed for costs of the counterclaim as he closed his case.
50. The 24th Defendant, one Mayani Orina, testified as DW6. He stated that he was also known as Mohammed Orina. He stated that he resided in Big Tree Farm and was a farmer. He stated that he owned one (1) acre on the Farm. He stated that he bought the land on behalf of Teresia Nyarinda



Matura through an agreement between him and Geoffrey Kilwake Wabuge. He stated that the land Teresia bought was 2 acres but the said Geoffrey Kilwake gave her only one (1) acre. He testified further that at first she paid Kshs. 220,000/=. Later she paid Kshs. 60,000/=, Kshs. 15,000/= and Kshs. 38,000/=. He stated that the payments were made to the wife of Geoffrey Kilwake, one Esther Kitavi. His evidence was that he was not the owner but only a caretaker of the land. He produced the agreement entered into between the two on 11/05/2006 and an acknowledgement dated 20/05/2008 as D. Exhibit 11(a) and (b) respectively. He stated that he had been wrongly sued. He prayed for costs of the suit and closed his case.

SUBMISSIONS

51. The Plaintiff submitted on the cases of defendant Nos. 1, 7, 11th, 21st and 24th defendants. First, it noted that its suit was on the 01/12/2022 dismissed for want of prosecution and an application to set aside the dismissal order and reinstate the suit was refused. The counterclaims were heard on the same on 01/12/2022.
52. It submitted that as pleaded in paragraph 4 of the Amended Plaint the land comprised in L.R No. 8986 which was legally owned by the plaintiff. Further that the Plaintiff was a limited liability company known as Big Tree Co. Ltd. It submitted that in paragraph 4 of the Defence and Counterclaims filed individually by the 1st, 7th, 11th, 21st and 24th defendants, it was pleaded that the defendants had valid claims against the Plaintiff and who willingly and voluntarily through its agents Gladys Wabuge (In case of the 1st defendant) and Jeoffrey Kilwake Wabuge (In case of the 7th, 11th, 21st and 24th defendants) sold various acreages of land to them. It submitted further that it was admitted by the Defendants that L.R No. 8986 belonged to the plaintiff, herein a Limited Liability Company. Again, it submitted that at paragraph 11 of the defendants individual defence and counterclaims of the defendant Nos. 1st, 7th, 11th, 21st and 24th it was pleaded that the defendants were lawful purchasers of various acreages, comprised in L.R No. 8986, and that the plaintiff was legally enjoined to give possession and execute transfers in favour of the said defendants.
53. Its submission was that the evidence availed to Court was greatly at variance with the defendants' pleadings. It summed that the agreements produced as D. Exhibit 3 by the 1st defendant), D. Exhibit 6 by the 7th defendant, D. Exhibit 8 by the 11th defendant and D. Exhibit. 10(a) and 10(b) by the 21st defendant were all drawn by the firm of M/S Kidiavai & Co. Advocates. In the agreements, the vendor was Jeoffrey Kilwake Wabuge and who was said to be a beneficiary of the estate of the late Wafula Wabuge, the owner of L.R No. 8986. Further, that the agreements provided that the portions sold were part of the Vendors entitlement from the estate of the late Wafula Wabuge. Again, it submitted that under Clause No. 5 of the agreements the purchasers understood that the vendor had no title yet, but that after completion of the Succession Cause, the vendor would process title for the purchaser. Again, Clause No. 6 indicated that the consent of the Land Control Board for both sub-division and transfer was to be obtained within six (6) months and Clause No. 7 that if the vendor failed to complete the transaction then the vendor undertook to indemnify the purchaser.
54. It was the Plaintiff's submission that the succession cause was not indicated in the agreements and the purchasers defendants undertook no due diligence at all. They did not obtained searches to proof the owner of the land or confirm if truly there was a pending succession cause over the estate of the late Wafula Wabuge. It argued that the provision in the agreements that the land sold was part of the estate of the late Wafula Wabuge contradicted the admission in the Defendants' pleadings that L.R No. 8986 was owned by the Plaintiff, namely, Big Tree Farm Ltd.
55. It submitted that it never entered into any sale agreement with the defendants and that the vendor, Jeoffrey Kilwake Wabuge, was only a beneficiary to the estate of the late Wafula Wabuge. On that score



it submitted that before a beneficiary's land interest in an estate crystallizes through confirmation of a grant, a beneficiary cannot sell since that would be inter meddling with the estate of a deceased.

56. It submitted that the vendor, Jeffrey Kilwake Wabuge, had no proven relationship with Big Tree Co. Ltd the owner of L.R No. 8986 and no evidence of him being a shareholder or director of Big Tree Co Ltd had been adduced. It submitted that a limited liability company had corporate personality from shareholders and directors. It relied on *George W M Omondi & Another v National Bank of Kenya Ltd & 2 Others* [2001] eKLR.
57. Regarding the Counterclaim of the 24th defendant the agreements produced as Exhibit 11(a) and 11(b) were executed by Jeffrey Kilwake Wabuge as vendor and Teresa Nyarinda Matura as the purchaser. It stated that the purchaser did not testify and she was not a defendant in the suit. It submitted therefore that DW6 could not lodge a counterclaim for the purchaser and that indeed the 24th defendant had no counterclaim. It then submitted that the evidence of DW6, seeking reliefs for Teresa Nyarinda Matura was misplaced since the said Teresa N. Matura was not a party, and she had no counterclaim, on record.
58. About the agreement produced as D. Exhibit 9(a) by Bernard Nyambara Odimu, it submitted that it was executed by one Esther Kitavi as the vendor and DW4, the 11th defendant. It submitted that said vendor was not the owner of the land and she could not legally sell what never belonged to her. It was its contention that the defendant exercised no due diligence in the transaction.
59. It summed up that there was not a single sale agreement executed by the Plaintiff, in favour of any defendant hence the evidence on record by the defendants fell far too short of the requisite threshold of proof. Regarding the issue of trust pleaded and testified on by the 1st defendant it submitted that it did not arise because the owner of the land never sold land to the defendants. Further, the owner never received consideration of it from the defendant and the plaintiff/owner never gave possession to any defendant.
60. Lastly, it submitted that the consent of the Land Control Board was needed over the sale of the land parcels to the defendants. It stated that Section 6 of the *Land Control Act*, Cap 302 provided that upon expiry of six (6) months from the dates of the agreements, the sale agreements became null and void. It then submitted that the defendants could only claim refunds of the money paid, and the seller had undertaken to indemnify the defendants. It then submitted that the Court could not order specific performance over void contract. It relied on the Court of Appeal case of *Fred C. Fedha & another v Edwine E. Asava Majani* [2010] eKLR. It submitted that the defendant Nos. 1,7,11,21 and 24 failed to prove their counterclaims, and they should be dismissed with costs. The 1st Defendant submitted by first summarizing the history of the pleadings. The she summed it up that in her evidence she stated that she entered into a sale agreement for the purchase of the land she claimed. She was prevented by the Plaintiff's agents from taking possession. She submitted that to date neither had she been given an alternative land nor refunded her money. She gave three issues for determination. These were whether a valid agreement existed between her and the Plaintiff, whether the agreement is enforceable, and whether the Plaintiff holds the land in trust for her.
61. On the 1st issue, she submitted that the agreement she entered into was between she and Jeffrey Kilwake Wabuge who was a beneficiary of LR. No. 8986 consisting in the estate of the late Wafula Wabuge. She stated that she paid Kshs. 680,000/= to one Gladys Wabuge who signed the agreement on behalf of Jeffrey Kilwake Wabuge. After that she paid a sum of Kshs. 170,000/= to Gladys Wabuge who acknowledged it on behalf of Jeffrey Wabuge. After that the vendor refused to surrender the land and began a cat and mouse game.



62. On 07/08/2015 the vendor asked for survey fees from the 1st Defendant who paid it but no possession was given. Later she reported the matter to the Deputy County Commissioner and later Gladys took her original agreement, promising to sort of the issue but in vain.
63. She submitted that there was no testimony to contradict the fact that the Plaintiff which claims to be owner of LR. No. 8986 IR No. 7098/15 measuring approximately 16.45 acres was incorporated under Certificate number CPR/2014/140356. She then referred to the documents the Plaintiff had filed in which she claimed that the Plaintiff had acknowledged that indeed she had a claim of 5 acres on the suit land. She submitted that at the time of the agreement Jeffrey Wabuge represented the Big Tree Company which when it was incorporated it assumed all assets and liabilities of the estate of the late Wafula Wabuge.
64. On whether the agreement was enforceable, she submitted that the agreement she made was subsisting. She submitted that the contention that it was void ab initio by operation of the law because it was executed when there was a subsisting charge over the suit land could not hold because there was no evidence that the land was owned by the Plaintiff and it had a subsisting charge. Also, she submitted that there was no proof that the land was sold without the authority of the Plaintiff. Further, since the land was not terminated it was enforceable. She relied on the case of *Ann Murambi v John Munyao Nyamu & Another* [2018] eKLR, Civil Appeal No. 51 of 2015 and the one of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR. She summed that in the latter case the Court of Appeal held that an agreement relating to a controlled transaction was not void from inception nor illegal except it becomes void when no application for Land Control Board Consent is made, or is refused or an appeal from refusal is dismissed. She stated further that by the authority the Court held that the Court should uphold equity by virtue of the provisions of Article 10(2)(b) of *the Constitution*. She then submitted that the doctrines of constructive trust and proprietary estoppel apply and supersede the provisions of the *Land Control Act* where the transaction is void.
65. About whether the Plaintiff holds the land in trust, she submitted that this Court finds so by virtue of the holding of the Court of Appeal and Judge Eboso. She stated that the Administrator of the estate of the late Wafula Wabuge dilly dallied transferring the land to the Defendant, with a view of defrauding her of her money and that the said Gladys was hiding under the corporate veil.
66. The 7th, 11th, 21st, 21st and 24th filed joint submissions on 26/04/2022. They started by summarizing the prayers in the Plaint. However, they did not submit on the prayers in the Amended Plaint. Also, they did not submit on any of the amendments in the Amended Plaint. Rather they did on the averments in the Plaint, and I need not summarize them since they were already summarized above as part of those in the Amended Plaint. Having summarized the counterclaims of the parties, they submitted that the defendants had proved their cases on a balance of probabilities that they purchased the parcels of land from the directors of the Plaintiff, and that the Plaintiff had refused to transfer the land to them. They stated that a valid sale took place between the Plaintiff and its directors or agents and the Defendants. Lastly, they submitted that it was clear that the land had not been transferred to the Defendants and therefore judgment ought to be entered in their favour as prayed in the counterclaims.

ISSUES, ANALYSIS AND DETERMINATION

67. I have considered entire case before me, starting with the Plaintiff's pleadings being the Plaint and Amended Plaint, the Defences and Counter-Claims and the amended versions thereof, the evidence of the parties, the submissions and the law. I am of the view that eight (8) issues lie before me for determination. Some of them are purely on points of law while others relate to both the law and evidence. They are as follows:



- a. Whether failure to file a Defence to the Counterclaims had any effect in a case.
 - b. What the effect of failure to serve summons to enter appearance is.
 - c. What the effect of entering appearance and failing to file Defence is.
 - d. What the effect of failing to prosecute a claim or counterclaim is,
 - e. Whether the agreements entered into by the Defendants are void.
 - f. Whether putting any of the Defendants into possession has any effect in relation to recovery of the portions possessed and if the doctrines of proprietary estoppel and trust apply.
 - g. Whether each of the Defendants proved their counterclaims to the required standard.
 - h. Who should bear the costs of the Counterclaims.
68. Before setting out on determining the issues this Court has identified, it is worth noting that when this suit was filed by the Plaintiff which was said to be a Limited Liability Company duly registered under the *Companies Act*, Chapter 486 of the Laws of Kenya, now *Act No. 17 of 2015*. Some of the undisputed facts are that the Plaintiff was duly incorporated on 22/04/2014, as at the time of filing the instant suit the Plaintiff was the registered proprietor of all that parcel of land known as LR. 8986 IR. 7089/15 situate within Trans Nzoia County of Kenya. The other fact is that when this suit came up for hearing of the Plaintiff's case on 01/12/2021 the Plaintiff neither attended court nor presented a witness on its behalf. As such its suit was dismissed with costs to the Defendants and the Defendants' counterclaims proceeded to hearing, with those who were present and testifying closing their case.
69. The record shows that although the 6th, 12th, 15th and 20th Defendants were at first represented by learned counsel, on 04/03/2020 and 18/02/2020 he was permitted to cease acting for the 6th, 12th and 15th, and the 20th respectively. Further, it shows that although the 15th and 20th Defendants filed their defences and counterclaims, they did not prosecute them. Again, it shows that even though the 6th and 12th filed Notices of Appointment of Advocates through their former learned counsel they did not file any Defence or Counterclaim. I now proceed to analyze the issues, some of which are pretty straightforward.
- a. Whether failure to file a Defence to the Counterclaims had any effect in a case
70. In this suit the record shows that the Plaintiff did not file any Defence to the counterclaims filed by all the parties who filed them. The issue that would automatically arise is what the effect of that is. The answer thereto is based on the what a Counterclaim is in law. The filing of a Counterclaim by a party is provided for under Order 7 of the Civil Procedure Rules. Specifically, Order 7 Rule 3 provides that a defendant may set up by way of a counterclaim against the claims of a Plaintiff any right or claim which shall then have the effect of a cross-suit. Order 7 Rule 13 provides further that if "in any case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with."
71. Under Section 35 of the *Limitation of Actions Act* it is provided that:
- "For the purposes of this Act and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded."



72. In WILLIAM KOROSS (LEGAL PERSONAL REPRESENTATIVE OF ELIJAH C.A. KOROSS) VS HEZEKIAH KIPTOO KOMEN & 4 OTHERS [2015] EKLR the Court of Appeal held as follows:

“..... We need to state that there cannot properly be two judgments, and contradictory ones at that, in the same suit. The presence of a counterclaim in a suit, while essentially amounting to a cross-suit, does not give rise to a separate, stand-alone second judgment. A counterclaim never stands on its own and cannot be a pleading independent of a defence..... A plain reading of Order 7 Rule 13 shows that whereas a stay, discontinuance or dismissal of the plaintiff’s suit may still leave a live and efficacious counterclaim that may be proceeded with and determined by way of a judgment, there is no corresponding provision whereby a judgment for the plaintiff leaves a residual counterclaim to be determined at a later date as purported to happen in this case.”

73. In Muna & 5 Others v Boscardin & 5 Others (Environment & Land Case 27 of 2020) [2022] KEELC 3133 (KLR) (2 June, 2022) (Ruling) this Court held that:

“The import of the provision is that as much as a defendant can and is permitted to bring a counter-claim in a suit, the latter, basically independent of the matter that gave rise to it, being filed by him to seek to resolve all matters in one judgment. It means that where the suit is either stayed or ceases to exist but there is reason to maintain the Counterclaim, the defendant is not barred from proceeding with the counterclaim.”

74. The import of treating the suit and a counterclaim as separate is clear: that in case the suit does not proceed or exist for one reason or other the Counter-claim can proceed in a manner as though it was an independent suit. What it means is that a counterclaim cannot arise, emanate or come into existence independent of a suit. But once it is filed it exists basically as an independent suit. It is a conjoined twin that can survive the life of the suit and bring a fruit of judgment as any other suit.

75. This is important in the practice and procedure of law in that it then calls for a party against whom it is brought to file a Defence to it. Failure to file a defence means the party admits to the claim in it. This is because he/she shall have not complied with Order 7 Rule 17(3) of the Civil Procedure Rules which provides that in case a counterclaim is pleaded, a defence thereto shall be subject to the rules applicable to a defence. In this case it means that the sub-rule as read with Order 7 Rule 1 of the Civil Procedure Rules, unless some other order is made, he/she is required to file defence thereto within fourteen days of service thereof. In essence the party does not have a defence to it that he can mount. Where the claim is liquidated, judgment will be requested for and entered against the Plaintiff upon expiry of the time for filing a Defence the Rules provide.

76. The importance of complying with the Rule above is that a party is bound by his pleadings. Therefore, where the Plaintiff does not file a Defence to the Counterclaim, as in the instant case, it cannot be permitted to give any evidence beyond that which it has to give, and that is only on the Plaintiff and a Reply to defence if it filed any. With regard to the averments in the Counterclaim, it is enclosed in its ‘house’ of no evidence. About parties being bound by pleadings, the Court of Appeal in Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 Others (2014) eKLR reaffirmed the reasoning of Adereji, JSC of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where expressed himself follows:

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings,



or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

77. Also, the Supreme Court of Kenya in *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR held as follows: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

78. It does not mean that even though a counterclaim is treated as an independent suit it must be filed separately from an already existing suit between the Plaintiff and Defendant, even on a different subject than that which is being litigated between them, as long as the defendant wishes to proceed and wishes to avoid a multiplicity of suits between them. He could file it in the suit and they will proceed. Once the suit and counterclaim proceed together the judge will render judgement. Thus in *William Koross v Hezekiah Kiptoo & 4 others, C.A. No. 223 of 2013* the Court of Appeal held:-

“...Before delving into res judicata proper, we need to state that there cannot properly be two judgments, and contradictory ones at that, in the same suit. The presence of a counterclaim in a suit, while essentially amounting to a cross-suit, does not give rise to a separate, stand-alone second judgment. A counterclaim never stands on its own and cannot be a pleading independent of a defence.”

79. On the aspect of combining a suit and counterclaim on even different subjects, *Sh. Jag Mohan Chawla & Another v Dera Radha Swami Satsang & Ors* on 7th May, 1996 the Supreme Court of India stated that:

“...The counter-claim expressly is treated as a cross suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection, the legislature intended to try both the suit and the counter- claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit.....”



80. Also, the Court of Appeal in *County Government of Kilifi v Mombasa Cement Limited* [2017] eKLR held on the issue as follows:-

“In view of the foregoing, it is safe to conclude that a defendant is permitted to raise a counterclaim against a plaintiff on any right and claim he may have against the plaintiff even where the subject matter or cause of action maybe different from the original suit. The rationale is to avoid multiplicity of proceedings and claims based on same or different cause of action between parties to the suit to enable a court to pronounce a final judgment in the suit both on the original claim and on the counter claim.”

81. However, the judge has wide discretion, under Order 7 Rule 13 of the Civil Procedure Rules, to order the suit and counter-claim to proceed separately. The reasons for doing so as many and the list inexhaustive. That was the holding in the *County Government of Kilifi* case (supra).

82. The totality of the above reasoning that, as supported by both case law and statutory law, is the failure by the Plaintiff to file a Defence to the Counterclaims of the Defendants who brought them is that it admitted to the issues raised in them. It could not lead any evidence to the contrary. Only issues of law that militate against such counterclaims can come to its aid. Absent of any legal hurdles against them meant that the Defendants were entitled to proceed on their counterclaims against the Plaintiff by adducing evidence to prove their claims therein by way of formal proof.

b. What the effect of failure to serve summons to enter appearance is

83. In this suit the Plaintiff informed the Court through his learned counsel that it had been difficult to serve the 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 13th, 14th, 16th, 22nd and 23rd Defendants. This Court has found that indeed summons were not properly, if at, effected on the Defendants. Why the Plaintiff did not use other modes of service if personal service was problematic is not known: it demonstrates that it was not keen to do so. Order 5 Rule 1 (1) provides that once summons to enter appearance are issued they ought to be collected for service within 30 days, failure of which the suit will abate. In the instant case, upon the suit being filed, Summons to Enter Appearance were collected on time. It was before the suit abated. What became difficult was service on the Defendants named.

84. Order 5 Rule 2(1) provides that except for concurrent summons any other summons to enter appearance shall be valid for 12 months from the date of issuance of the summons, unless in terms of Order 5 Rule 2(2) the time is extended by the Court on an application of the party. And in terms of Order 5 Rule 2(7), after expiry of twenty-four (24) months the Court may dismiss the suit. In the instant case by the time the Plaintiff raised the issue of non-service the Court had not dismissed the suit against the defendants not served.

85. What then is the effect of a party not serving summons to enter appearance and the matter is due for hearing, and his suit is dismissed not non-attendance as in this case? First, it is this Court’s view, while drawing from the overall objective of the Court as stipulated in Section 1A (1) of the *Civil Procedure Act* and the duty of the Court and determine matters in a just and expeditious manner as provided for under Section 1B of the Act as read with Section 3(1) of the *Environment and Land Court Act*, that time is of essence in service of summons. It would defeat logic for one to expeditiously collect summons for service within thirty (30) days of issuance and stay with them for one and up to two years and seek an extension beyond the two years. While the procedure Rules are silent on what should become of summons not served within two years despite extension of their validity, it is my considered view that the suit against the party not served should abate or be dismissed immediately after the 24 months’ elapse without service of the summons.



86. I am alive to the differing opinions of my learned brothers and sisters in the courts of equal status about the effect of non-service of the summons within 24 months. For instance, in *Tropical Foods International & Another v Eastern and Southern African Trade and Development Bank & Another* [2017] eKLR when F. Tuiyott J (as he then was) held the view that for reason that changes to the duration of not more than 24 months was introduced under [Legal Notice No. 5 of 1996](#) by leaving out the time limit and letting it open, an extension should be given as and there is good reason why the timelines as to service of summons to enter appearance were given.
87. What complicates the situation in the instant case is that no extension for the validity was sought by the Plaintiff. For this reason, even if the Plaintiff's suit could not have been dismissed for non-attendance, this Court could nevertheless have dismissed the Plaintiff's claim against the 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 13th, 14th, 16th, 22nd and 23rd Defendants.

c. What the effect of entering appearance and failing to file Defence is

88. This issue stems from the fact that the 6th and 12th Defendants instructed their then learned counsel M/S Bororio who filed a Notice of Appointment of Advocates on 20/02/2019. After that he filed a Replying Affidavit by each of them the same date and participated in their behalf in the Application filed on 26/11/2018 by the Plaintiff, seeking an order of injunction against the Defendants. The Application was determined on 30/04/2019. It would appear that the two Defendants failed to give further instructions, and on 04/3/2020, the Advocate ceased to act for them.
89. By that date the two Defendants had not filed a Defence. They did not file any afterward. Order 10 of the Civil Procedure Rules provides for consequences for failure to enter appearance and file defence. In case of a claim for liquidated sum, where the party fails to appear within the stipulated time the Plaintiff will request for interlocutory judgment and it will be entered on those terms. Where it is not for a liquidated claim, then in terms of Order 10 Rule 9, the relief which is for an unliquidated claim will be set down for hearing.
90. In the instant case, the claim against the two Defendants was for a declaration over ownership of the suit land and an injunction. Again, the suit was set down for hearing on many occasions and on the material date, in as much as the Plaintiff's case was dismissed, his case against them was dismissed as much. Had the Plaintiff's suit not been dismissed it would have proceeded by way of formal proof against the two Defendants. Thus, failure to file a Defence to a claim or suit or petition entitles the party to proceed by way of formal proof in non-pecuniary matters.

d. What the effect of failing to prosecute a counterclaim is

91. This issue relates to the counterclaims of the 15th and 20th Defendants. The record shows that the two filed their defences and counterclaims on 21/05/2019 and 06/05/2019 respectively through learned counsel. On 04/03/2020 counsel was permitted to cease acting for them as they failed to give further instructions and they were duly served with the Application to cease acting. From then, they were acting in person. On the material date, being 01/12/2021 they did not attend court to prosecute their counterclaims. The counterclaims have not been proved hence they stand dismissed as against the case of the Plaintiff.

e. Whether the Agreements entered into by the Defendants are void

92. The Plaintiff pleaded at paragraph 4B of the Amended Plaint filed on 20/11/2019 that the agreements between the defendants and 3rd parties were void ab initio by operation of the law. Its particulars of the pleading in regard to the voidness (sic) were that they Plaintiffs purchased the interest on land which



had encumbrances, the 3rd parties were not authorized by the Plaintiff to transact on the land and there was no express authority from the Plaintiff for the transactions.

93. It is an undisputed fact as summarized above that the Plaintiff was incorporated in 2014. The question that arises immediately is, who owned the parcel of land in the years when the agreements were entered into. From the evidence on record, and the documents that the Plaintiff filed in support of its case, it is shown that the Plaintiff was incorporated on 22/04/2014, and issued with Certificate No. CPR/2014/140356, as pleaded at paragraph 3 of the Amended Plaintiff. The suit land was transferred to it on 22/04/2015. What it means is that the land was not owned by the Plaintiff by the time it was incorporated: a non-existent entity or being cannot own that which is in existence when that non-existent entity or being is not. Given the above, there would be two sets of agreements in question: those entered into before incorporation of the plaintiff and those entered into after.
94. Flowing from the above, this Court has to look, first, at the validity or otherwise of the transactions made before the Plaintiff was incorporated. Incorporation alone did not entitle the Plaintiff to be owner of the land, the land had to be transferred to it first, whether by sale, gift or other lawful means, in order for the Plaintiff to claim that any transactions over the land after the transfer were void or otherwise for want of capacity. It follows that only the transactions of purchase and sale of any part of the suit land entered into after the land was transferred to the Plaintiff on the said date, would be void if they were entered into not with the Company but by any person or even directors of the company in their individual capacity. And to the extent that the other agreements were entered into between parties who purported to be the owners of the land and they put the Plaintiff into possession and occupation and use of the land to the exclusion of the owner thereof, and the owner never raised any issue and that owner(s) at the time have never questioned the presence and occupation of the Defendants on the land, it is only testament to the fact that the said owners consented to the transactions, thus the agreements were not void. In any event, he who alleges proves, and the Plaintiff never proved that claim. It fails to that extent. Needless to say that the parties who entered into the agreements before the incorporation of the Plaintiff are the once who discharged the parcel of land from the charge placed over it as a result of the loan they had taken over the land. It would be unconscionable therefore and against the doctrine of unjust enrichment for them now to argue that the agreements they entered into whilst knowing that the loan persisted were void for the reason of the same issue they deliberately overlooked in order to gain money from the Defendants. It would be against *the Constitution*, particularly, the Article 10(2) (b), which elevates equity into being part of our law.

(f) Whether putting any of the Defendants into possession has any effect in relation to recovery of the portions possessed and if the doctrines of proprietary estoppel and trust apply

95. In its submissions, the Plaintiff departed from the particulars of the voidness (sic) and raised the issue that no consent from the Land Control Board was sought within the six months as provided by law. It relied on Section 8 of the *Land Control Act*, Chapter 302 of the Laws of Kenya. Since this is a legal issue, this Court is bound to examine it and make a finding thereon.
96. A similar argument, regarding a case where a party was put into possession but the consent of the Land Control Board not sought, was posed before the Court of Appeal: whether the transaction was void and could fail. In that case, being WILLY KIMUTAI KITILIT V MICHAEL KIBET [2018] EKLK, the Court of Appeal stated as follows: -

“(23) The *Land Control Act* does not, unlike Section 3 (3) of the *Law of Contract Act* and Section 38 (2) of the *Land Act* save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of



the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.

(24) There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the Land Control Act. By Article 10(2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10(1) (b)). Further, by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution, the Land Control Act should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the Constitution.

(25) The word equity broadly means a branch of law denoting fundamental principles of justice. It has various meanings according to the context but three definitions from Black's Law Dictionary, Ninth Edition will suffice for our purpose:

- “1. --
2. The body of principles constituting what is fair and right.
3. The recourse to principles of justice to correct or supplement the law as applied to particular circumstances --
4. he system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called “Law” in the narrower sense) when the two conflict”

Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to



an interest in land is void and enforceable for lack of consent of the Land Control Board.

(26) For the reasons in paragraphs 20, 21, 22, 23, 24 and 25 above, we are in agreement with the Macharia Mwangi Maina decision that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance.”

97. In the instant matter, a number of Defendants testified that when they bought their parcels they were put in possession, either in full or part of the sizes of the parcels or portions they bought, and they have been on them since the entry onto or possession of the portions sold to them. What follows and which is clear to me is that whoever sold the portions of the land while knowing well that the subject parcel of land was encumbered by way of a loan was clear in their mind that if by their conduct they offered to sell the portions of land which they were not entitled to sell by virtue of that encumbrance and they put the purchasers into possession, they did at the risk of breach of the conditions of the charge over the property. That did not necessarily make the transactions of no effect if the chargee bank(s) did not raise an issue over the same. In any event the loans seem to have been cleared, and the banks have never raised an issue over that. Again, if the bank(s) which had charged the property had an issue(s) regarding the transactions the sellers entered into and had a stake in the property following the agreements of sale with the Defendants who are alleged to have entered into void transactions, the Plaintiff ought to have joined them as interested parties to this suit. By raising an issue about and for and on behalf of a party claimed to have an interest in the property while not joining them in the suit it clearly shows that the Plaintiff is only groping in darkness and holding onto any reed that it can hold onto to avoid sinking and confuse the issues. The sellers’ conduct regarding the transactions voluntarily entered into when the land was owned by someone else than the current owner (Plaintiff) only import the application and operation of two doctrines: proprietary estoppel and constructive trust.
98. By the two doctrines, if a party by his conduct and promise causes another to enter into an agreement and act in a manner that changes his position to his detriment the promisor, in this case the vendor cannot be permitted by law to resile to his original position without consequences. He creates a position of trust for which if he resiles he has to be liable for breach of trust. The parties who sold the respective portions to the Defendants and put them into possession held themselves out by their conduct that they had the capacity to sell and transact on the portions they did. All the while the transactions took place under their watch and without any protest by way of legal action from the Plaintiff (which in any event did not exist), the sellers firmed up their actions under constructive trust and estoppel.
99. Further, when the Plaintiff had the land transferred to it while knowing after due diligence (of if it did not know it for failure to carry out due diligence, which then would be counted on its as its own misfortune), it took up the ownership of the land together with the issues of constructive trust and estoppel that the parties who sold the respective portions of land the Defendants who have proved that they bought and were put into possession of actually took possession and claim on. The Plaintiff could not hide behind the smokescreen of absence to defeat such a firm doctrine of equity, and now the law. Thus, the Plaintiffs along that line claim fails. In any event, he who alleges the existence or non-existence of a fact bears the onus of proof, as stipulated under Section 107 of the Evidence Act. The Plaintiff never led evidence to back its allegation.



100. In any event, the 7th defendant testified that he had been in possession since 30/09/2004. The Plaintiff's claim was being raised in 2018. Clearly, the claim fell short of the limitation period given under Section 7 of *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya. Similarly, the 11th defendant bought the land and had been in possession since 18/03/2004; the 21st Defendant since 01/03/2006. The Plaintiff's claim against such transactions is barred by way of limitation of time under the provision cited above.
101. Regarding the 21st Defendant's additional purchase of the portion added vide the transactions of Kshs. 15,000/= on 12/02/2012, I have already stated that the doctrine of constructive trust and estoppel operates against the Plaintiff's claim. In regard to the transaction of Kshs. 26,000/= paid on 18/03/2016 to Geoffrey Kilwakwe, it is clear that as at that date the Plaintiff was the owner of the portion of land purported to be sold to the 21st Defendant. That transaction was void for want of capacity since Geoffrey Kilwake was a third (3rd) party and not the owner thereof. Thus, the claim by the 21st Defendant for land equivalent to the sum paid cannot succeed to the full extent he prayed for. The portion of land he bought from a stranger or not the owner cannot by virtue of a void transaction be given to him. He has recourse for a claim of refund of the Kshs. 26,000/= from the person to whom he paid it.
102. Regarding the 24th Defendant his defence was that the land was bought on behalf of two people, being himself and Teresa Nyarinda. His evidence was that he was the Caretaker on behalf of Teresa Nyarinda and he testified on her behalf. His evidence was they were in possession of one (1) acre and not two (2) which the said Teresa Nyarinda had bought on 11/05/2006 and 20/5/2008. It is clear that it was only one acre she was made to act on to her detriment. The Plaintiff cannot, by virtue of the doctrine of constructive trust and proprietary estoppel, recover the one acre from her. In any event it sued the wrong party. Thus, as for the 24th Defendant, and caretaker, they are entitled to be given the acreage they were put into possession. The equivalent of what they were not put into possession, they can only claim the refund from whoever received it. In sum, the doctrine of trust operates here in respect of the portions they were put into possession. The rest of the portions the Defendants were not put into possession failed for want of limitation of actions as provided by law, by the same token as was for the Plaintiff's claims for the portions they occupied.
103. Regarding the 1st Defendant, it is sad that she paid but was not put into possession. Thus, what she is entitled to is not performance of the contract but a refund of her money. Her claim made the basis of the classic metaphoric poem at the beginning of this Judgment. The question of the agreement was addressed via a ruling given earlier by the Court. The parties who sold to her the land have held onto her money for all that while since the transactions despite her spirited fight to be put into possession, which, as she testified, did not materialize when she moved onto the portion pointed out to her and found other persons in occupation and claim thereto. Thus, she made efforts to actualize her part of the bargain but it was frustrated by the parties who claimed to have sold to her the land. Thus, to avoid the unconscionable conduct of unjust enrichment, her refunds to be worked in such a way that they constitute sums equivalent to the value of land she should have gotten had they been put into possession at the time of entering into the agreement or sued for failure of the transaction at the time. Therefore, since she did not sue immediately over the failed transaction she too cannot get the sum equivalent to the current price of the land she ought to have been given. Thus, doing the best I can, I find that her refund should be the sum she paid over the failed transaction together with interest thereon at court rates, from the date it was received by the party who sold it.
104. Regarding the refunds to the other parties who were put into possession only in part of the portions they bought, they can only be entitled to refunds from the parties who received the money for which



they were to be put into possession but were not, but of the difference they were not given. Their refunds can only be for the sums as were not put into possession. Interest thereon can only be at court rates from the date of judgment.

(g) Whether each of the Defendants proved their counterclaims to the required standard

105. I find that the 1st, 7th, 11th, 21st and 24th have proved their counterclaims only to the extent outlined above. All their other claims (for being awarded the portions of land they were not put into possession) have not been proved to the required standard.

(h) Who should bear the costs of the Counterclaims

106. The Defendants whose counterclaims succeeded to have costs to the extent of the success of their claims.

FINAL DISPOSITION

107. In the end I enter judgment for the Defendants against the Plaintiff as follows:

- a. The Plaintiff's case was dismissed with costs to the Defendants who succeeded in part or as explained.
- b. The cases against the Defendants who were not served with summons to enter appearance are dismissed with no order as to costs.
- c. The Counterclaims of the Defendants who did not adduce evidence are dismissed with no order as to costs.
- d. The Counterclaims of the Defendants who adduced evidence, being the 7th, 11th, 21st and 24th, succeed to the extent they were put into possession and are entitled to titles being processed by the Plaintiff, upon survey of their respective portions but at their own cost, in their favour to the extent of their occupation and use as found above, in default, after thirty days from the date(s) of survey, the Deputy Registrar of this Court to sign the necessary documents to facilitate the transfer of the parcels of land in their favour.
- e. The 1st Defendant is entitled to the refund of her money and interest at court rates from the date the same was received by the seller(s) of the land in respect of the failed agreement.
- f. The other defendants whose counterclaims succeeded and were entitled to refunds are to be refunded the sums of the difference (as explained in the judgment herein) whose equivalent of land was not given to them together with interest at court rates from today's date.
- g. The Defendants whose counterclaims succeeded are entitled to the costs of the suit and counterclaims.

108. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED ORALLY VIA THE TEAMS PLATFORM
THIS 23RD DAY OF DECEMBER, 2024.**

HON. DR. IUR F. NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Mr. Kiarie Advocate



Mr. Wanyonyi Advocate for the 1st Defendant

Mr. Bororio Advocate for the 7th, 11th, 21st and 24th Defendants

