



Dim Agencies Limited v Kenya Airports Authority (Environment and Land Case Civil Suit E055 of 2021) [2023] KEELC 15765 (KLR) (23 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15765 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E055 OF 2021**

JO MBOYA, J

FEBRUARY 23, 2023

BETWEEN

DIM AGENCIES LIMITED PLAINTIFF

AND

KENYA AIRPORTS AUTHORITY DEFENDANT

JUDGMENT

Introduction And Background:

1. Vide Plaintiff dated the February 12, 2021, the Plaintiff herein has approached the Honourable Court seeking for the following reliefs;
 - i. A declaration be and is hereby made that the Plaintiff is the *bona fide* and registered owner of Property Land Reference Number 9042/617.
 - ii. A declaration be and is hereby made that the Defendant has trespass and is in continued trespass onto the Plaintiff's property.
 - iii. A declaration be and is hereby made that the Defendant has violated the Plaintiff's right to property under Article 40 of the [Constitution of Kenya, 2010](#).
 - iv. General Damages for trespass to land.
 - v. Compensation for breach of the Plaintiff's right to property under Article 40 of the [Constitution of Kenya, 2010](#).
 - vi. Interest on (d) and (e) above from date of Judgement until payment in full.
 - vii. Costs of the suit.
 - viii. Any other reliefs that this Honourable Court may deem fit and just to grant.



2. Though served with the Plaint and summons to enter appearance, the Defendant herein failed to enter appearance and or file statement of Defense. Consequently, the Plaintiff proceeded to and sought for an Interlocutory Judgment as against the Defendant and thereafter proceeded to formal proof as pertains to the subject matter.
3. Nevertheless, upon delivery of the Judgment and the consequential of extraction of the Decree, which was issued on the November 11, 2021, the Defendant herein filed and lodged an application seeking to set aside the default Judgment.
4. Suffice it to point out that the Application for setting aside the default Judgment was canvassed and ventilated, culminating into a Ruling delivered by the court on the June 23, 2022, wherein the impugned default Judgment was set aside and/or rescinded.
5. Following the setting aside of the Judgment which had hitherto been entered in favor of the Plaintiff, the Honourable court granted liberty to and in favor of the Defendant to enter appearance and file the requisite Statement of Defense, if any.
6. For coherence, it is appropriate to state that the Defendant thereafter duly entered appearance and filed a Statement of Defense and Counter-claim. In this regard, the Statement of Defense and Counter-claim was filed on the July 14, 2022.
7. Vide the Counter-claim, the Defendant herein sought for the following reliefs;
 - a. A declaration that the Defendant is the Lawful Owner of Grant IR 70118 LR21919- JKIA.
 - b. Cancellation and revocation of Grant IR 69538 LR 9042/617
 - c. General Damages
 - d. Costs of the suit and Interests.
8. Upon being served with the Statement of Defense and the Counter-claim, the Plaintiff herein filed a Reply to the Statement to Defense and Defense to the Counter-claim. For completeness, the named Reply to Defense and Defense to Counter-claim was filed on the September 26, 2022.
9. Subsequently, the pleadings in respect of the subject matter closed and the matter was thereafter listed for Case Conference, whereupon direction were issued and a hearing date fixed.

Evidence By The Parties:

a. Plaintiff's case:

10. The Plaintiff's case gravitates and revolves around the evidence of two witnesses, namely, Mr Ashok L Doshi, who testified as PW1 and Mr Edwin Mutwiri, the latter, who testified as PW2.
11. It was the testimony of PW1, that same is a Director of the Plaintiff company and hence conversant with and knowledgeable of the facts pertaining to and concerning the issues in respect of the subject matter.
12. Additionally, the witness testified that the Plaintiff company herein bought and purchased the suit property, namely, LR No 9042/617, from one Hussein Maalim Mohamed, for valuable consideration. Besides, the witness proceeded to and stated that upon the purchase of the suit property, same was transferred and was ultimately registered in the name of the Plaintiff company.



13. Furthermore, the witness stated that upon being registered as the proprietor of the suit property, the Plaintiff became the lawful and legitimate owner thereof and was thus entitled to entry upon and occupation of the suit plot.
14. Other than the foregoing, the witness averred that for more than 10 years, the Plaintiff company sought the permission and approval of the Defendant to enable the Plaintiff to construct a boundary wall and to undertake developments on the suit property. However, the witness added that the request for permission and approval, were declined albeit without any valid reasons.
15. In addition, the witness also testified that on or about February 2018, same visited the suit property and discovered that the Defendant herein had proceeded to and fully fenced the suit property. For clarity, the witness added that the Defendant had therefore annexed the suit property and constituted same to be part of her (Defendant's) Land.
16. Other than the foregoing, the witness further averred that upon enquiry, the Defendant herein refused and/or declined to vacate and to remove the offensive perimeter wall, which same had erected over and in respect of the suit Property, albeit without the permission of the Plaintiff.
17. As a result of the foregoing, the witness contended that the actions and or activities by and at the instance of the Defendant or her agents amounts to and constitutes trespass. In any event, the witness also added that when the Plaintiff bought the suit property, the Plaintiff was keen and desirous to use same for commercial purposes. However, the witness averred that as a result of the offensive activities by the Defendant, the Plaintiff has been denied and deprived of the opportunity to develop the suit property.
18. Furthermore, the witness added that arising from the offensive activities by the Defendant, the Plaintiff's rights and fundamental freedoms in terms of Article 40 of the Constitution, have since been breached, infringed upon and/or violated.
19. Consequently and in the premises, the witness invited the court to find and hold that the impugned activities by the Defendant, amounted to trespass and hence the Defendant should be directed to vacate and hand over the suit property to and in favor of the Plaintiff.
20. On the other hand, the witness referred to his witness statement dated the February 12, 2021 and sought to adopt and rely on same. In this regard, the witness statement dated the February 12, 2021 was duly admitted and constituted as further evidence in chief of the witness.
21. Besides, the witness also referred to the list and bundle of documents dated the February 12, 2021 and sought to adopt and rely on the documents listed/stated thereunder. In this regard, it suffices to point out that the documents at the foot of the named List of Documents were thereafter admitted and produced as exhibits P1 to P16, respectively.
22. Additionally, the witness also referred to the Further list and Bundle of documents dated the 6th June 2022, and sought to adopt and rely on same.
23. Nevertheless, the documents at the foot of the list dated the June 6, 2022, were objected to by learned counsel for the Defendant. Consequently, the documents at the foot of the said List were marked as PMFI 17, 18 and 19, respectively.
24. On the other hand, the witness also alluded to the further list and bundle of documents dated the September 26, 2022 and in this regard same sought to produce and rely on the named documents thereunder.



25. Suffice it to point out that the documents at the foot of the List dated the September 26, 2022, were thereafter produced and admitted in evidence as Plaintiff's Exhibits 21 to 28, respectively.
26. On cross examination, the witness herein reiterated that same is a Director of the Plaintiff company and thus same was authorized to swear the Verifying affidavit and also to testify on behalf of the Plaintiff company.
27. Nevertheless, the witness has admitted and conceded that same has neither tendered nor produced before the Honourable court either the Certificate of Incorporation of the Plaintiff company or evidence of his Directorship.
28. Other than the foregoing, the witness repeated that the Plaintiff company bought and acquired the suit property from one Hussein Maalim Mohamed, who was hitherto the registered owner of the suit property.
29. It was the further testimony of the witness that at the time of purchase/acquisition of the suit property, a sale agreement was duly prepared and thereafter signed by the respective parties. However, the witness admitted that same has not produced a copy of the Sale Agreement.
30. In addition, the witness herein stated that same paid to and in favor of Hussein Maalim Mohamed the entire purchase price. For clarity, the witness pointed out that part of the purchase price was paid directly to the vendor, whilst another part was paid to Kenya Power & Lighting Kenya Ltd, albeit on account of Hussein Maalim Mohamed.
31. Furthermore, the witness testified that prior to and before the purchase and acquisition of the suit property by the Plaintiff, same visited the ground location pertaining to and concerning the suit property. For clarity, it was the testimony of the witness that same visited the suit property around the years 1998/1999.
32. Be that as it may, the witness added that when same visited the suit property it was an open plot and the ground delineation/ location, was pointed out unto him by the Estate Agent, who was representing the vendor.
33. At any rate, the witness testified that when he visited the suit property, he established and confirmed that the Plot was outside the Airport. However, the witness added that subsequently the suit plot has since been fenced by the Defendant and same now falls within the Airport land.
34. Furthermore, the witness also averred that currently one can only access and reach the suit property through the gate of the Airport.
35. Whilst still under cross examination, the witness testified that an official search was procured and obtained after the transfer and registration of the suit property in favor of the Plaintiff.
36. However, it was the testimony of the witness that same (read the Plaintiff) did not carry out a search prior to and before transfer of the suit property. For clarity, the witness admitted that same did not carry out any due diligence at the Director's office of survey.
37. Beside, the witness herein averred that during the time that the Plaintiff was purchasing and acquiring the suit property, same did not come across any Letter of allotment, which had hitherto been issued in favor of the vendor.
38. Nevertheless, it was the further testimony of the witness that the Letter of allotment was not necessary, insofar as the Plaintiff herein was purchasing the suit property which had already been registered and has a certificate of title.



39. Additionally, the witness stated that the Plaintiff has variously sought the permission of the Defendant to erect a wall and commence developments on the suit property, because the suit property is located adjacent to the property belonging to the Defendant.
40. Notwithstanding the foregoing, the Plaintiff added that despite the request for permission and approval to develop the suit property, the Defendant herein declined to offer the requisite permission and hence the Plaintiff has not been able to undertake and/or carryout any developments thereof.
41. On the other hand, it was the testimony of the witness that same re-visited the suit property in the year 2018 and found that the Defendant was still in occupation thereof. In this regard, the witness added that the Plaintiff herein has never been able to enter upon and/or take possession of the suit plot.
42. Furthermore, the witness averred that it is the Defendant who has blocked and barred the Plaintiff herein from accessing, taking possession of and developing the suit property.
43. In addition, the witness averred that the Plaintiff herein had proposed to erect and build a hotel on the land. However, the witness stated that the Plaintiff was unable to build the proposed hotel or to carryout further development on the suit property because of the offensive activities by the Defendant.
44. It was the further testimony of the witness that the suit property lies adjacent to the gate/entrance of the airport. For clarity, the witness pointed out that the suit property lies on the right-hand side to the entrance of the airport.
45. Furthermore, the witness testified that same had seen a copy of the Deed Plan relating to and concerning the suit property. However, the witness added that the Deed Plan does not show that the Plaintiff's land is situated within the airport.
46. On the other hand, it was also the testimony of the witness that the suit property had been surveyed and the requisite Deed Plan prepared over and in respect of the suit property. In fact, the witness stated that the survey in question was carried out and undertaken by the survey of Kenya.
47. Other than the foregoing, the witness added that the survey by the Defendant in respect of their land was done long after the survey of the suit property. In this regard, the witness stated that the Deed Plan in respect of the suit property was prepared and authenticated earlier than the Deed Plan relating to LR No 7075/10.
48. On re-examination, the witness stated that same was taken to the suit property by the Estate Agent, who was however acting on behalf of the vendor.
49. In respect of whether the total purchase price/consideration was duly paid, the witness affirmed that the entire purchase price was paid to and duly confirmed by the vendor. In any event, the witness added that the vendor has never contested the payments/receipt of the purchase price.
50. Furthermore, the witness stated that when same visited the suit property, same found and established that the suit property laid outside the boundaries of the airport. Essentially, the witness added that the land was outside the entrance of the airport.
51. The 2nd witness who testified on behalf of the Plaintiff was namely, Edwin Mutwiri, who testified as PW2. For clarity, the witness stated that he is a qualified and registered valuer practicing as such in the name and style of M/s Ultimate Valuers Limited.
52. Furthermore, the witness testified that same was instructed and engaged by the Plaintiff company to inspect the suit property and thereafter prepare a valuation report over and in respect of the suit property.



53. It was the further testimony of the witness that upon receipt of the instructions from the Plaintiff, same proceeded to and prepared a Report. In this regard, the witness added that the report in question was dated the June 22, 2022.
54. In addition, the witness proposed to tender and produce the said report as an exhibit before the court. For the avoidance of doubt, the valuation report dated the 22nd August 2022 was thereafter produced and admitted as exhibit P17.
55. On cross examination, the witness herein stated that same is a duly qualified, licensed and registered valuer. In this regard, the witness stated that same was registered as a valuer in the year 2009.
56. Other than the foregoing, the witness also testified that M/s Ultimate Valuers Ltd was incorporated in the year 2010.
57. Furthermore, the witness added that initially the said company, that is Ultimate Valuers Ltd had two Directors, but currently, he (the witness) pointed out that he is currently the only Director of the said company.
58. Additionally, the witness testified that upon receipt of the instruction to inspect and value the suit property, same proceeded to suit property, but had to access the suit property through the airport gate.
59. Furthermore the witness reiterated that after getting in through the Airport gate, he thereafter drove into and proceeded to the suit property. Nevertheless, the witness admitted that the suit property is situated within the security zone of Kenya Airport Authority.
60. Other than the foregoing, the witness also stated that prior to and before inspecting and valuing the suit property, same purchased and obtained survey maps from the Director of survey.
61. However, the witness added that he did not avail any map, that he bought or acquired from the Director of survey.
62. With the foregoing testimony, the Plaintiff's case was closed.

b. Defendant's Case

63. The Defendant's case revolves around the testimony of three witness; namely, Joseph Ng'ang'a Waitheru, Arthur Kanjwa Mbatia and Wilfred Muchae, who testified as DW1, DW2 and DW3, respectively.
64. It was the evidence of DW1 that same is a qualified surveyor and an employee of the Defendant herein. For clarity, the witness added that same had worked with the Defendant for more than 10 years as at the time of testifying before the court.
65. Furthermore, the witness herein averred that by virtue of his portfolio as a surveyor with the Defendant, same is conversant with and knowledgeable of the facts pertaining to the subject matter. In particular, the witness averred that same is knowledgeable of the ground position in respect of the suit property.
66. In addition, the witness averred that same had recorded a witness statement pertaining to and concerning the subject matter. In this regard, the witness alluded to the witness statement dated the 19th May 2022. In this regard, the witness proposed to adopt and rely on the contents of the named witness statements.
67. Suffice it to point out that the witness statement dated the May 19, 2022 was thereafter adopted and constituted as the Evidence in chief of the witness.



68. Additionally, the witness stated that same was privy to and aware of the List and Bundle of documents which were filed on behalf of the Defendant. Consequently, the witness sought to adopt and rely on the documents at the foot of the List dated the May 19, 2022.
69. There being no objection to the production and admission of the documents at the foot of the List dated the May 19, 2022, same were duly admitted and produced as exhibit D1 to D17, respectively.
70. On cross examination and upon being referred to the document at page 43 of the Defendant's bundle, the witness admitted and acknowledged that the said documents was in respect of the certificate of title relating to LR No 9042/617.
71. In addition, and whilst being referred to the gazette notice number 1106 of April 26, 1971, the witness admitted that the said gazette notice does not include the suit property in its body.
72. Be that as it may, the witness further stated that prior to the year 1971, the Defendant herein had neither acquired nor obtained any certificate of title over her land.
73. Furthermore, it was the testimony of the witness that LR No 9042 is one title. At any rate, the witness further added that LR No 9042/617 falls within and forms part of the Airport land.
74. Whilst still under cross-examination, the witness stated that the documents at page 61 of the Defendant's bundle relates to a letter dated the 27th August 1999, issued by the office of the Commissioner of Lands. For clarity, the witness added that the named letter was addressed to the Managing director of the Defendant.
75. In addition, the witness also averred that vide the Letter under reference, the Commissioner of Land was confirming the existence of LR No 9042/1.
76. Other than the foregoing, the witness also testified that the letter of the commissioner of land also speaks to and confirms the existence of some errors in some works that were carried out and undertaken by the Director of survey.
77. Whilst answering a question pertaining to the document contained in the Plaintiff's bundle, the witness herein pointed out that document number one relates to a Deed Plan Number 203407. Besides, the witness pointed out that the said Deed Plan bore the date of February 27, 1996.
78. Other than the foregoing, the witness was referred to the documents at page 65 of the Defendant's bundle and same pointed out that the said documents relates to the Deed Plan in respect of LR No 7075/1. However, the witness stated that the named Deed Plan was dated the May 21, 1996.
79. Additionally, the witness herein testified that the Deed Plan in respect of LR No 9042/617, was earlier than the Deed Plan in respect of LR No 7075/1, which is registered in the name of the Defendant.
80. On the other hand and upon being referred to the Plaintiff's certificate of title, the witness pointed out that same was issued by the Registrar of title on the 1st April 1996. In any event, the witness added that by looking at the Plaintiff's title, it was evident that same was issued earlier and prior to the Letter of allotment in favor of the Defendant.
81. On re-examination, the witness stated that LR No 9042 relates to the subsequent acquisition on behalf of the Defendant. For clarity, the witness pointed out that the acquisition of LR No 9042 was not done in the year 1971.



82. On further re-examination, the witness stated that the letter from the office of the commissioner of land dated the August 27, 1999, does not mention the suit property. However, the witness clarified that the suit property falls within the airport land.
83. The second witness who testified on behalf of the Defendant was Arthur K Mbatia who stated that same is a civil servant and currently working at the State Department of Lands and Physical Planning. In addition, the witness added that same has worked with the Ministry of Land ever since the year 2008.
84. Furthermore, the witness testified that currently he holds the portfolio of the Principal Physical Planner. Consequently, the witness added that same is therefore conversant with matters pertaining to and concerning Physical Planning and in particular, the facts of the subject matter.
85. On the other hand, the witness stated that as pertains to the subject matter, same had recorded a witness statement dated the September 26, 2022 and in this regard, same sought for indulgence of the court to adopt and rely on the witness statement dated the September 26, 2022.
86. Suffice it to point out that the witness statement dated the September 26, 2022, was thereafter admitted and constituted as the evidence in chief of the witness herein.
87. In addition, the witness herein stated that same was aware that the Defendant had filed a List and Bundle of documents and particularly, same sought to produce document number 21 in the list dated the September 26, 2022. In this regard, the named document was produced as exhibit D38.
88. On cross examination and upon being referred to the document at page 13 of the Plaintiff's bundle of documents, the witness stated and confirmed that same related to a certificate of title.
89. Furthermore, the witness admitted that the certificate of title bore the name of the Plaintiff and that same was also issued by the Registrar of titles.
90. On being shown a letter by on P. M Muthiwa, the witness herein stated that same is not conversant with the named person. In addition, the witness added that the said P. M Muthiwa may be working in a different Department within the Ministry of Lands.
91. Other than the foregoing, the witness confirmed that the Letter written by P M Muthiwa confirmed that the suit property, namely, LR No 9042/617, is registered in the name of the Plaintiff.
92. Similarly, the witness also said that the letter in question was also attached with a certificate of official search, which showed that the suit property belonged to and was registered in the name of the Plaintiff.
93. The third witness called by the Defendant was one Wilfred Muchae Kabui, who testified as DW3. In addition, the witness stated that he is a qualified, licensed and registered surveyor.
94. Furthermore, the witness added that currently same works at the State Department of Survey with the Ministry of Lands and Physical Planning. In any event, the witness added that same has worked at the State Department of Survey for more than 21 years.
95. Additionally, the witness stated that same is conversant with issues pertaining to survey and in particular the matters relating to the subject dispute.
96. Other than the foregoing, the witness stated that same had recorded and signed a witness statement, detailing and containing the issues in respect of the subject matter. For clarity, the witness indicated that the witness statement is dated the September 26, 2022.



97. Be that as it may, the witness indicated that same was keen and desirous to adopt and rely on the witness statement. In this regard, the witness statement dated the September 26, 2022, was duly admitted and constituted as the evidence in chief of the witness.
98. Other than the foregoing, the witness alluded to the Supplementary List and Bundle of documents dated the September 26, 2022 and sought to produce the documents contained therein.
99. Suffice it to point out that the documents contained at the foot of the list of Documents dated the September 26, 2022, were thereafter produced as exhibit D18 to D37 and D39, respectively.
100. On cross examination, the witness herein stated and clarified that the last person in the process pertaining to and concerning the preparation and authentication of the Deed Plan is the Director of Survey.
101. In addition, the witness clarified that it is the Director of Survey who authenticates the Deed Plan. In any event, the witness added that the Deed Plan in respect of LR No 9042/617 was duly authenticated by the Director of survey.
102. Whilst still under cross examination, the witness confirmed that the Deed Plan in respect of LR No 9042/617, was submitted to the Director of Survey and same was duly sealed and authenticated on the February 26, 1996.
103. Other than the foregoing, the witness was also referred to D exhibit 19 and the witness stated that the said document was Deed Plan number 25580.
104. Furthermore, the witness added that the named Deed Plan, was dated the 21st May 1996, and that same was similarly authenticated by the Director of survey.
105. With the foregoing testimony, the Defendant's case was duly closed.

Submissions By The Parties

a. Plaintiff's submissions

106. The Plaintiff filed written submissions dated the January 13, 2023 and in respect of which the Plaintiff has identified, isolated, highlighted and amplified five salient issues for consideration and determination by the court.
107. Firstly, learned counsel for the Plaintiff has submitted that the Plaintiff herein bought, purchased and acquired the suit property from the previous owner thereof, namely, Hussein Maalim Mohamed.
108. Additionally, learned counsel submitted that upon the purchase and acquisition, the suit property was transferred to and ultimately registered in the name of the Plaintiff, culminating into the issuance of a certificate of title bearing the name of the Plaintiff.
109. Furthermore, counsel for the Plaintiff has also added that on or about the December 20, 2018, the Ministry of Land and Physical Planning generated and issued a letter, wherein same confirmed and authenticate that the Plaintiff was the registered proprietor over and in respect of the suit property.
110. Other than the foregoing, learned counsel for the Plaintiff has also submitted that the Nairobi City County Government has also acknowledged and confirmed that the Plaintiff is the rate payer over and in respect of the suit property.
111. In the premises, learned counsel for the Plaintiff has therefore contended that the Plaintiff herein is therefore the lawful and registered proprietor of the suit property. In this regard, counsel has contended



- that the rights and interests of the Plaintiff over and in respect of the suit property, ought to be protected.
112. Secondly, learned counsel for the Plaintiff has submitted that the Plaintiff's title to and in respect of the suit property preceded the Defendant's title. In any event, counsel has further added that the Plaintiff's title does not form part of the Defendant's title, either as stated or otherwise.
 113. Other than the foregoing, learned counsel has further submitted that the Plaintiff's title was issued on the April 1, 1996, whereas the Defendant's title was issued on the August 1, 1996.
 114. In view of the foregoing, learned counsel for the Plaintiff has submitted that on the basis of priority in terms of issuance, the Plaintiff's title therefore takes priority and hence ought to prevail on account of being first in time.
 115. To vindicate the foregoing submissions, learned counsel cited and relied on the case of *Gitwany Investment Ltd v Taj Mall Ltd & 3 others* (2006) eKLR, particularly, to amplify the submission that when two Equities are Equal, the First in time takes precedence.
 116. Thirdly, learned counsel for the Plaintiff submitted that the Plaintiff's title was lawfully and legitimately issued and that in any event, DW3, namely Wilfred Muchae, had confirmed that the Deed Plan pertaining to and concerning the Plaintiff's title was lawful and valid.
 117. Furthermore, learned counsel added that DW3 also confirmed that the Deed Plan which was produced by the Plaintiff had gone through the legal process including authentication by the Director of survey.
 118. In short, learned counsel contended that the Plaintiff herein had thus established and proved that the title which was issued to and in favor of the Plaintiff was legitimate.
 119. Fourthly, learned counsel has submitted that even though the Defendant had failed and neglected to approve the construction of the perimeter wall and developments by the Plaintiff in respect of the suit property, such refusal, was irrelevant and inconsequential.
 120. Furthermore, learned counsel has submitted that it has since transpired that the Plaintiff did not require the permission and or authority the Defendant to erect the perimeter wall and to develop upon her property.
 121. In this respect, the counsel has cited and quoted the decision in the case of *Republic v Kenya Civil Aviation Authority & another Ex-parte Elite Earth Movers Ltd* (2017)eKLR.
 122. Fifthly, learned counsel has submitted that on or about February 2018, the Plaintiff's witness proceeded to and inspected the suit property, whereupon it was discovered that the Defendant had fenced of the suit property and annexed same as part of her own property.
 123. In any event, the counsel has further added that the fact of trespass onto the suit property by the Defendant was never disputed. Consequently, counsel has added that the Plaintiff has therefore placed before the court sufficient evidence to confirm and authenticate that indeed the Defendant has trespassed onto the suit property.
 124. Additionally, learned counsel has submitted that once trespass is established and proved, the owner of the land, which has been trespassed upon becomes entitled to compensation. In this regard, counsel has contended that trespass is actionable per-see.
 125. In respect of the issue of quantum and compensation, learned counsel for the Plaintiff has submitted that the honourable court ought to grant to and in favor of the Plaintiff herein general damages in the sum of KES 100, 000, 000/= only.



126. To this extent, learned counsel for the Plaintiff has cited and quoted various decisions, *inter-alia*, [Joshua Ng'eno v Kenya Power & Lighting Company Ltd and County Government of Kericho](#) (2021)eKLR, [Aster Holding Ltd v City Council of Nairobi & 4 others](#) (2017)eKLR, [Caroget Investment Ltd v Aster Holdings Ltd & 4 others](#) (2019)eKLR.
127. Other than the foregoing, learned counsel for the Plaintiff has further submitted that the impugned activities by and on behalf of the Defendant constitutes a violation of the Plaintiff's right to property as articulated vide Article 40 of the [Constitution](#).
128. In the premises, learned counsel has proceeded to and invited the court to find and hold that the Plaintiff herein is also entitled to recompense on the basis of breach, violation and infringement of the Plaintiff's Constitutional right to property.
129. As pertains to the claim for violation of the Plaintiff's right to property, learned counsel has submitted that the Plaintiff ought to be awarded appropriate compensation. In this regard, counsel has invited the Honourable court to award compensation in the sum of KES 20, 000, 000/= only.
130. Finally, learned counsel for the Plaintiff has submitted that the Defendant herein has not been able to establish and prove the allegation contained at the foot of the counterclaim. In particular, learned counsel has submitted that the Defendant has not been able to prove that the suit property formed part and parcel of what was hitherto compulsorily acquired for purposes of the airport.
131. Furthermore, learned counsel has added that the Defendant has similarly not been able to prove and established that the Plaintiff's title was acquired and obtained vide fraud or corrupt scheme, either in the manner alluded to in the counterclaim or at all.
132. In a nutshell, learned counsel has implored the court to find and hold that the Plaintiff herein has established and proved her case to the requisite standard. Consequently, counsel has invited the court to enter Judgment in terms of the Plaint dated the February 12, 2021.

b. Defendant's Submissions

133. The Defendant on her part filed written submissions dated the February 10, 2023 and in respect of which learned counsel raised, highlighted and amplified two issues for determination.
134. First and foremost, learned counsel for the Defendant has submitted that it was incumbent upon the Plaintiff to place before the honourable court cogent and credible evidence to establish that the title in respect of the suit property was lawfully and procedurally acquired.
135. However, learned counsel Mr Allan Kamau has submitted that the Plaintiff failed to show and prove that the title over and in respect of the suit property was lawfully acquired. In this regard, counsel pointed out that the Plaintiff did not tender before the court evidence of the relevant Part Development Plan, if any, that was used and relied upon to alienate the suit property.
136. Furthermore, learned counsel has added that in the absence of a Part Development Plan, there is no way that the suit property could have been alienated and thereafter allocated, in the first place.
137. Additionally, learned counsel has also submitted that what comprises of the suit property was Public land, which had hitherto been reserved for public purpose, namely, Jomo Kenyatta International Airport.
138. It was the further submissions of learned counsel for the Defendant that to the extent that the suit property fell within public land, which had hitherto been reserved for public use, then same was



- therefore not available for alienation and allocation to any third party, the Plaintiff's predecessor not excepted.
139. In view of the foregoing, learned counsel for the Defendant has therefore contended that the alienation, allocation and the ultimate registration of the suit property in favor of the Plaintiff's predecessor was therefore a nullity.
 140. Similarly, counsel has added that to the extent that the allocation, alienation and registration of the suit property in favor of the Plaintiff's predecessor was a nullity, then the Plaintiff's predecessor had no valid title capable of being passed over to the Plaintiff herein.
 141. In a nutshell, learned counsel has therefore invited the honourable court to find and hold that the issuance of a certificate of title to and in favor of the Plaintiff herein, does not by itself confer any valid title to the Plaintiff and more particularly, when what was being alienated was not available in the first place.
 142. In support of the foregoing submissions, learned counsel has cited and relied on various decisions inter-alia, *Moses Okatch Owuor v Attorney General & another* (2017)eKLR, *Henry Muthii Kathurima v Commissioner of Lands & another* (2015)eKLR, *Redcliff Holdings Ltd v The Registrar of titles & 2 others* (2017)eKLR, *Moses Lutomia Wachiali v Zephania Ngaira Angweye & another* (2018)eKLR, *Kenya National Highway Authority v Shalian Massud Mugal & 5 others* (2017)eKLR, *Funzi Island Development Ltd & 2 Others v County Council of Kwale & 2 Others* (2014)eKLR, *Daudi Kiptugen v Commissioner of Lands & 4 Others* (2015)eKLR and *John Waweru Gakuru & Another v David Mulwa Malamu* (2015)eKLR.
 143. Secondly, learned counsel for the Defendant has submitted that the suit property falls within and constitutes part and parcel of LR No 21919, I.R No 70118, belonging to the Defendant company.
 144. To the extent that the suit property falls within the land belonging to the Defendant, same constitutes public land, which had hitherto been reserved for use by Jomo Kenyatta International Airport. Consequently, what comprises the suit property was no longer available for alienation or allocation, whatsoever.
 145. In view of the foregoing submissions, learned counsel has added that what stood as public land, which had been reserved for public use therefore fell outside the mandate and authority of the commissioner of lands, now defunct, by dint of the provisions of Section 3, 7 and 12 of the *Government Lands Act*, Chapter 280, now repealed.
 146. In the premises, learned counsel has submitted that the title bearing the name of the Plaintiff and pertaining to the suit property was therefore a nullity ab initio and thus invalid.
 147. In support of the foregoing submissions, counsel has invited the court to take cognizance of *inter-alia*, the case of *Kenya National Highway Authority v Shalen Massud Mugal & 5 Others* (2017)eKLR, *Narok County Government v Livingstone Kunini Mututu & 2 Others* (2018)eKLR, *Funzi Island Development Ltd & 2 Others v County Council of Kwale & 2 Others* (2014)eKLR, *Kenya Medical Supplies Agencies (KEMSA) v Mavji Kanji Hirani & 8 Others* (2018)eKLR, *Nelson Kazungu Chai & 9 others v Pwani university* (2014)eKLR and *Munyua Maina v Hiram Gathiba Maina* (2013)eKLR.
 148. In a nutshell, learned counsel for the Defendant has implored the court to find and hold that the Plaintiff has neither established nor proved her case to the requisite standard and hence same ought to be dismissed.
 149. Conversely, learned counsel for the Defendant has submitted that the Defendant has indeed placed before the honourable court cogent and credible evidence to show that the suit property, fell within



and constituted public land, which was already reserved for public use and was hence not available for alienation or allocation to any Third Party, the Plaintiff's predecessor, not excepted.

Issues For Determination

150. Having reviewed the Plaint dated the 12th of February 2021, the witness statement attached thereto and the various documents relied upon and having also reviewed the Statement of Defense and Counterclaim filed by and on behalf of the Defendant; and having evaluated the oral evidence adduced before the Honourable court and finally having considered the elaborate submissions that were tendered before the honourable court, the following issues do arise and are thus worthy of determination;
- i. Whether the Plaint dated the February 12, 2021 was duly verified by a competent and legitimate Verifying affidavit or better still, Whether the Verifying affidavits offends the provision of Section 4(1) of the *Oaths and Statutory Declarations Act*, Chapter 15, Laws of Kenya.
 - ii. Whether the Plaintiff acquired Lawful and Legitimate title over and in respect of the suit property or otherwise.
 - iii. Whether the Defendant herein has established and proved that what constitutes the suit property was hitherto Public land reserved for a designated purpose.
 - iv. What Reliefs ought to be granted.

Analysis And Determination

Issue Number 1

Whether the Plaint dated the 12th February 2021 was duly verified by a competent and legitimate Verifying affidavit or better still, Whether the verifying affidavits offends the provision of Section 4(1) of the Oaths and Statutory Declaration Act, Chapter 15, Laws of Kenya.

151. It is common ground that the instant suit was drawn and filed by the Law firm of M/s Rene & Hans, LLP Advocates, for and on behalf of the Plaintiff. For clarity, the address of the Plaintiff's Advocates at the time of the filing of the instant suit is provide as hereunder;

M/s Rene & Hans, LLP.
Advocates,
Town House – Kaunda Street,
8th Floor, Suit No 812,
Box 40774 -00100,
Nairobi.

152. Subsequent to the preparation of the Plaint and the requisite verifying affidavit, it is evident and apparent that the verifying affidavit was presented before a named/designated Commissioner of oaths.
153. For coherence, the Commissioner of oaths before whom the verifying affidavit was presented for commissioning bears the following details;

Ochieng Elizabeth Akinyi,



Advocates and Commissioner for Oaths,

Box 40774 -00100

Nairobi.

154. From the postal address, which is evident at the foot of the commissioner of oath's stamp, what arises and is otherwise crystal clear is that the commissioner of oaths bears and uses the same postal address as the one owned/ used by the Plaintiff's Advocates.
155. In view of the foregoing, what does arise is that the verifying affidavit attached to the subject Plaintiff was commissioned in-house by an advocate working with the same law firm, acting for the Plaintiff herein.
156. Furthermore, it is also apparent that the named commissioner of oaths, would either be a partner, an associate in the same law firm, or better still, a person who has Interest in the affairs of the named Lawfirm.
157. Be that as it may, the point that does arise and which deserves interrogation is whether an advocate acting in a particular matter, a partner in the firm or better still an associate in the same firm, acting for a party (read in this case the Plaintiff) can commission an affidavit for use in court over and in respect of the matter in which her firm is acting.
158. Before venturing to address the legal implication and legal consequences of an advocate, whether a commissioner, within the law firm acting for a particular party, can commission an affidavit in respect of a matter in which the law firm has been instructed and retained, it is imperative to take cognizance of the provisions of Section 4 of the *Oaths and Statutory Declarations Act*, Chapter 15 laws of Kenya.
159. For ease of reference, the provisions of Section 4 (*supra*) are reproduced as hereunder;
 4. Powers of commissioner for oaths
 - (1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.
 - (2) A commissioner for oaths shall, in the exercise of any of the powers mentioned in subsection (1), be entitled to charge and be paid such fees as may be authorized by any rules of court for the time being.
160. My reading of the foregoing provisions and in particular the proviso thereto, drives me to the conclusion that a partner or an associate in the law firm retained by a particular Party, in this case, the Plaintiff, is not authorized to commission an affidavit prepared by the said law firm.
161. Additionally, it is common ground that where a particular law firm has been retained, instructed and engaged in a matter, it is therefore evident and apparent that every partner or associate in the said law firm acquires and accrues interests in the matter and in particular, the outcome thereof.



162. Owing to the foregoing, the provisions of Section 4(1) of the *Oaths and Statutory Declaration Act*, therefore bars or prohibits any such advocate/commissioner from commissioning any affidavit in respect of a matter where his/her (their) law firm is acting.
163. Notwithstanding the foregoing, what is evident in the matter before hand is that the commissioner of oaths, who has commissioned the impugned verifying affidavit, is either a partner or associate in the law firm acting for the Plaintiff. In any event, the named provisions also bars any Clerk of the same Lawfirm or any other person associated therewith or interested in the affairs of the said Firm.
164. However, despite the named commissioner being hugely associated with the law firm acting for the Plaintiff, on account of bearing and using the same postal address, which creates a clear position of interests, same no doubt, proceeded to and commissioned the impugned verifying affidavit.
165. In my humble view, the law ought to be respected, complied with and adhered to by all and sundry, least of all, by advocates/commissioner of oaths, who should indeed, be the trendsetters.
166. Furthermore, it is imperative to state and observe that issues pertaining to commissioning of affidavits and administration of oaths are so critical and paramount to the extent that any irregularity or illegality, would vitiate the impugned documents.
167. Nevertheless, I beg to point out that the point herein was neither raised nor canvassed by either of the advocates. However, being an issue of law that is discernable form the face of the pleadings, it falls within the mandate, competence and jurisdiction of the concerned court to address same and deal with the issue in accordance with the law.
168. Additionally, time is ripe for each and every one, not least the advocates and commissioners of oaths, to endeavor to and ensure that the substantive provisions of the law are respected and adhered to. For clarity, unless such adherence is enforced then sooner than later, anarchy will prevail and thus affect the rule of law and administration of justice.
169. To my mind where a partner/associate in the law firm retained by a party, administers oath or commissions an affidavit, such affidavit becomes a nullity and thus invalid in the face of the law. It is one that courts striking out and expunction from the records of the court.
170. In respect of the foregoing observation, I wish to state that I am no alone. In addition, breach and violation of substantive law cannot be condoned or sanctioned by a court of law. In this regard, if the court fails to enforce the law then the court would be deemed to have abandoned and abdicate its constitutional mandate.
171. Without belaboring the point, I wish to cite and adopt the holding in the case of *R.E Bagley* (1911) 1 KBD 317, where the court held as hereunder;

“Now one of those affidavits was sworn before Mr Goddard, who was the solicitor for the trustee of the deed, and they also have been interested in it. It is sufficient to say that he was solicitor for the trustee of the deed, as appears from the endorsement of the deed itself. That is the really important point in this case. Is an affidavit, or what purport to be an affidavit, sworn before the solicitor of the trustee of the deed a nullity and is its effect to render the deed void?”



The court further stated as follows;

“Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding in which he is solicitor to any of the parties to the proceeding, or clerk to any such solicitor, or in which he is interested.”

“That is to say, although under the first part of the section he is generally empowered to administer an oath whether the oath be in the form of an affidavit or of a statutory declaration, yet there is a proviso that this general power may not be exercised by any person who is solicitor to any of the parties in any proceeding.”

.....

“If am right in the view that Goddard had no authority to administer this particular oath, it seems to me that there was no affidavit at all, and, that being so, the deed to the validity of which the filing of the debtor’s affidavit is essential is no deed at all and is gone.”.....

172. In the case of *James Francis Kariuki & another v United Insurance Co. Ltd* Civil Appeal No 1450 of 2000, Hon. Justice Onyango Otieno, as he then was; held as follows:

“That the verifying affidavit sworn by the plaintiffs is incurably defective as the Commissioner for Oaths while exercising the powers given, offended the mandatory proviso of Section 4(1) of the Oaths and Statutory Declarations Act.”

“The simple facts of this case are that the Plaintiffs are, according to the Plaint represented by Njenga Mwaura and Company, Advocates. Mr Njenga Mwaura is a Partner in the firm of Njenga Mwaura and Company, Advocates, who are the Advocates representing the Plaintiffs. The Verifying affidavit has been sworn before Njenga Mwaura as Commissioner for Oaths.”.....

“It will be clear from the above that Mr Njenga Mwaura, being an Advocate in the firm that is acting for the plaintiff should not have allowed the verifying affidavit to be sworn before him as in any event, is an interested party.”

173. Furthermore, the legal implication of Section 4(1) of the *Oaths and Statutory Declaration Act* (*supra*), was also elaborated upon in the case of *Kenya Federation of Labour & another v Attorney General & 2 Others* Industrial Court of Kenya at Nairobi, Case No 735 of 2012.

174. For coherence, Hon. Justice Nzioki wa Makau held:

“The short answer to that is that it would be against the provisions of the Oaths and Statutory Declarations Act. A Lawyer cannot commission a document drawn by his/her firm. Indeed the further affidavit by the claimants was defective in form as the jurat was not in conformity with the Oaths and Statutory Declaration Act.”

175. Additionally, the issue was also revisited in the case of *Caltex Oil (Kenya) Limited v New Stadium Services Station Limited & another* [2002] eKLR, where Hon Justice Onyango Otieno, as he then was, stated as follows:

“I do think that the courts have a duty to rightly interpret the laws and to ensure that they do not condone any breaches of the same laws under any pretenses whatsoever. I still stand by what I did say in the case of James Francis Kariuki & Another Vs. United Insurance Co.



Ltd HCCC No 1450 at 2000 that such an affidavit sworn in violation of section 4 (1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an affidavit as envisaged in law and is not capable of being received under Order 18 Rule 7 as it offends a provision of an Act of Parliament and does not represent a mere irregularity either in defect as to form or by misdirection of the parties, or in the title.”

176. Recently, Hon. Justice James Makau, Judge, (as he then was) also dealt with a similar situation in the case of *Stephen M Mogaka v Independent Electoral & Boundaries Commission (IEBC) & 2 others* [2017] eKLR, where the court and stated as hereunder;
54. In view of the above authorities and the provision of Section 4 (1) of the Oaths and Statutory Declarations Act, it is clear from the facts of this petition, that the Petitioner in this petition is represented by the firm of M/s Musyoki Mogaka & Co. Advocates, the firm which drew and filed this petition. The affidavits were sworn before Mercy Moragwa Mogusu, a Commissioner for Oaths who practices or works with the said firm, which is representing the Petitioner. It was clear at the time of commissioning of the affidavits that M/s Mercy Moragwa Mogusu, being an Advocate practicing law in the firm, that is acting for the Petitioner should not have allowed the supportive affidavit of the Petitioner as well as the six witnesses affidavits to be sworn before her as in the event she is an interested party.
55. The next issue is whether the Court can strike and expunge the seven (7) affidavits referred in the 2nd Respondent’s Notice of Motion dated 8.11.2017? The Petitioner and his witnesses affidavits offends Section 4 (1) of the Oaths and Statutory Declarations Act. The seven affidavits have been sworn before an unauthorized commissioner by virtue of Section 4 (1) of the Oaths and Declarations Act as a Commissioner cannot commission his or her own documents or documents prepared by the firm where that Commissioner works or where he/she is interested. The said Section is couched in a mandatory form. The swearing of the aforesaid affidavits by the said commissioner offends an Act of Parliament and in my view that do not represent a mere irregularity either in a defect in form neither can it be said to be a technical irregularity as it goes to the root of the substantive issue before court. It is an irregularity that is incurably defective. All the affidavits in the Petition having been commissioned by an unauthorized person or contrary to the law are in my view defective. I accordingly strike out and expunge from the Court records the affidavits.
177. From the case law, which have been reproduced herein before, it is common ground that any affidavit that contravenes and violates the mandatory provisions of Section 4(1) of the *Oaths and Statutory Declaration Act*, Chapter 15 Laws of Kenya, must of necessity be struck out and expunged.
178. Having come to the foregoing conclusion, I am constrained to find and hold that the impugned verifying affidavit, which was commissioned by Ms. Ochieng Elizabeth Akinyi, whose postal address corresponds with the one of the law firm retained by the Plaintiff herein, is a candidate for striking out. Consequently, same be and is hereby struck out.
179. The next incidental question that does arise is whether upon the striking out of the verifying affidavit, the suit by and on behalf of the Plaintiff is competent and legitimate in the eyes of the provisions of Order 4 Rule 1(2) of the Civil Procedure Rules, 2010.
180. In my humble view in the absence of a verifying affidavit, the impugned Plaint and the suit anchored on the Plaint, becomes incompetent and thus legally untenable. In this regard, the consequence of the striking out of the verifying affidavit therefore renders the Plaintiff’s suit fatally defective and legally untenable.



181. To this end, it is imperative to take cognizance of the holding of the Court of Appeal in the case of *Research International v Julius Arisi & 198 others* (2007)eKLR, where the court stated and held as hereunder;

In our view, the true construction of rule 1 (2) of Order VII Civil Procedure Rules is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing, and, files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule. Moreover, the Grace Ndegwa's case (supra) and rule 12(1) of Order I CP Rules leave no doubt that one or more of the co-plaintiffs can validly file an affidavit verifying the correctness of the averments of the plaint on behalf of the other co-plaintiffs with their authority in writing.

Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1 (2) of Order VII Civil Procedure Rules and that their suit was liable to be struck out by the superior court under rule 1 (3) of Order VII CP Rules.

182. Guided by the ratio decidendi in the Research International case (supra), I come to the conclusion that the Plaintiff's suit herein, is effectively stillborn and otherwise incompetent. Consequently, I would have been constrained to strike out the suit and terminate the proceedings at this juncture.
183. Nevertheless and taking into account that the parties tendered evidence in respect of the matter, it behooves this court to now venture and adjudicate upon the merits of the case, taking into account the totality of the evidence that was placed before the honourable court.
184. In the circumstances, I shall now venture to address and deal with the other issues for determination that were similarly itemized, enumerated and highlighted herein before.

Issue Number 2

Whether the Plaintiff acquired lawful and legitimate title over and in respect of the Suit Property or otherwise.

185. It was the Plaintiff's case that same bought, purchased and acquired the suit property from one Hussein Maalim Mohamed, in whose favor the suit property had hitherto been allocated beforehand.
186. Though the Plaintiff's witness alluded to a sale agreement which was entered into and executed between the Plaintiff and Hussein Maalim Mohamed, no such sale agreement was tendered or produced before the honourable court.
187. Additionally, it is also common knowledge that even though the Plaintiff stated that same bought and acquired the suit property, the Plaintiff yet again failed to procure and obtain from the vendor certain critical documents that would have illuminated the process belying the alienation, allocation and ultimate registration of the suit property in the name of her predecessor.
188. Suffice it to point out, that the Plaintiff herein bears the certificate of title over and in respect of the suit property. However, the validity and legality of the certificate of title registered in her name has been questioned, impugned and challenged by the Defendant herein.



189. In fact, the Defendant herein has contended that what comprises of the suit property, is public land, which had hitherto been reserved for public use as part of the Jomo Kenyatta International Airport.
190. Notwithstanding the foregoing, even PW1, admitted and acknowledged that for one to access and reach the suit property, one must use and go through the gate/entrance of Jomo Kenyatta International Airport. In this regard, the fact that the suit property falls within Jomo Kenyatta International Airport is not in dispute.
191. Perhaps, at this juncture it is pertinent to reproduce certain pertinent answers that fell from the lips of PW1.
192. For clarity, PW1 stated as hereunder during cross examination;
- “I first instructed the firm of M/s Prof. Albert Muma and the same confirmed that the property is situate a few meters before the airport. The land is still adjacent to the gate/entrance of the airport. It is on the right-hand side of the entrance of the airport”.
193. From the foregoing excerpt, there is no gainsaying that the suit property is indeed proximate to and within the neighborhood of Jomo Kenyatta International Airport.
194. Other than the testimony of PW1, the other witness who was called by the Plaintiff, namely, Edwin Mutwiri, was more explicit and succinct.
195. This is what PW2 said during his cross examination by counsel for the Defendant;
- “I used the airport gate to access and to inspect the property. I got through the airport gate and thereafter drove inn to access the property. I thereafter used and locked at the google map and the same confirms that the plot is within the airport. The property is situated within a security zone. The property is within security zone of Kenya Airport Authority”.
196. If there was any ambiguity left by the testimony of PW1, then the ambiguity was clarified, eliminated and redressed by the succinct evidence tendered by PW2.
197. From the foregoing, there is no gainsaying that the suit property, which was hitherto alienated to and in favor of one Mr Hussein Maalim Mohamed, indeed fell within public land that had been reserved for a designated use.
198. To the extent that the suit property fell within land that had hitherto been reserved for public use, same was and could therefore not be available for alienation or allocation to and in favor of the Plaintiff’s predecessor.
199. To this end, it is imperative to take cognizance of the holding of the court of appeal in the case of Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, where the court held and stated as hereunder;

Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5th respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.



200. Additionally, the issue as to whether public land which has hitherto been reserved and designated for a particular purposes could be allocated or otherwise alienated by the Commissioner of Land, now defunct, was recently calibrated upon and addressed by the Court of Appeal in the case of *Henry Muthee Katburima v The Commissioner of Land & another* (2015)eKLR, where the court stated and held as hereunder;
17. A further argument by the appellant is that the Commissioner for Land issued him the Certificate of Lease which is indefeasible. On the part of the respondents, it was submitted that the Commissioner of Land had no authority to alienate the suit property and issue the Certificate of Lease. We have examined the evidence on record; there is nothing on record to show that the President had authorized the Commissioner of Lands to alienate the suit property. We have examined the provisions of Sections, 3, 7, 9 and 12 of the Government Land Act and we are satisfied that the Commissioner of Lands had no power or authority to alienate the suit property and issue the Certificate of Lease. In *Republic vs. Kenya Revenue Authority, ex parte Aberdare Freight Services Limited*, [2004] 2 eKLR 530 it was held:
- “...a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.... Purported authorization, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims...”.
18. . We have considered the submissions by the appellant in this appeal and have no hesitation to state that we concur with the findings and decision of the trial court. The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity. We cite the case of *Said Bin Seif v Shariff Mohammed Shatry*, (1940)19 (1) KLR 9, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity, and not only voidable but void with no effect, either as legitimate expectation, estoppel or otherwise.
201. Whereas the decisions cited in the preceding paragraphs dealt with the validity of alienation and allotment of public land, which had hitherto been reserved for a purposes, I am aware that the Plaintiff’s case is not one of allocation and alienation.
202. To the contrary, the Plaintiff’s case is that same purchased the suit property from the previous allottee/ registered owner and hence, the Plaintiff has invoked and relied on the doctrine of bona fide purchaser for value without notice of any defect in the title of her predecessor.
203. Nevertheless, the critical question that does arise and which makes the previous decisions, cited herein before relevant, is if the previous allottee/owner did not acquire a valid and legitimate title, can same (predecessor) vests, transmit and confer a valid title to the successor, in this case the Plaintiff.
204. Before addressing the question raised in the preceding paragraph, it is appropriate to restate and reiterate the holding of the Court of Appeal in the case of *Caroget Investment Limited v Aster Holdings Limited & 4 others* [2019] eKLR, where the court stated and observed as hereunder;
- From the Council to the appellant and from the appellant to White Horse no title could be passed because *ex nihilo nihil fit* – out of nothing comes nothing.
205. In my humble view, the alienation and allocation of the suit property, which fell within and comprised of public land which had hitherto been reserved for a designated purpose did not vests in the Plaintiff’s



predecessor any legitimate and lawful title that was capable of being conveyed to and in favor of the Plaintiff.

206. Notwithstanding the foregoing, I also wish to state that on the face of challenge of her title, it behooved the Plaintiff herein to procure and place before the honourable court background documents, most of which ought to have been in the custody of the Plaintiff's predecessor, in a bid to justify and authenticate the root of her title.
207. Suffice it to point out that it was not enough for the Plaintiff herein to wave unto the Honourable court the certificate of title and contend that such certificate of title is indefeasible, without more.
208. In my humble view, it was incumbent upon the Plaintiff to do more. In this regard, the ratio decidendi in the case of *Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others* [2014] eKLR, the Court of Appeal held that:

"As / have pointed out, the 3rd respondent, relying on Section 23(1) of the Registration of Titles Act, Cap 281 of the Laws of Kenya, contended that the Grant of the suit land conferred on it an absolute and indefeasible title. I hasten to point out that that Section refers to a certificate of title issued to a purchaser. In the case of allocated land, even if the section is applicable, a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title."(Emphasis supplied)

209. In a nutshell, though the plaintiff herein bought the suit property and was thereafter issued with a certificate of title, the impugned certificate of title does not vests and confer in the Plaintiff the requisite ownership Rights, over and in respect of the named Property.
210. In my humble view, the root of the title/ certificate of Title, was colored with illegality and impropriety, that negates the legitimacy of the Plaintiff's title.

Issue Number 3

Whether the Defendant herein has established and proved that what constitutes the suit property was hitherto Public land reserved for a designated purpose.

211. The Defendant herein called three witnesses, who adopted their respective witness statements as evidence in chief. For clarity, one of the witnesses was called by the Defendant was Wilfred Muchae Kabui who testified as DW3.
212. It is imperative to recall that the witness alluded to his witness statement dated the September 26, 2022 and which same adopted as his evidence in chief.
213. Given the importance of the witness statement, which was adopted by the named witness, it is appropriate to reproduce certain pertinent aspects thereof as hereunder;

"26. That an investigation of the spatial location and relationship between Parcels of Land Numbers LR No9042/617,LR No7075/10,and LRNo21919 revealed that Parcel of Land Number LR No7075/10 measuring approximately 42.70 Hectares was surveyed on or about 12th September 1930 as represented on Cadastral Plan No F/R No 35/74-Comps No 3529, survey records of which were examined, approved, and authenticated by the Director of Surveys on 22nd October 1930, and Deed Plan No30145 issued by the



Director of Surveys on 25th April 1931 in support of the registration of title to this Parcel.

27. That parcel of Land Number LR No7075/10 was later acquired by the Government for purposes of the expansion of the Nairobi Airport pursuant to the provisions of the Land Acquisition Act Number 47 of 1968 (now repealed) under Kenya Gazette Notices No 1105 and 1106 dated 30th April 1971.
28. That the publication of the acquisition of Parcel of Land Number LR No 7075/10 indicated that the subject area of the parcel acquired measured approximately 42.70 Hectares which would indicate acquisition of the whole of this subject parcel which is defined and enclosed by survey beacon markers; P9,P10,D9,x3,and D8 as depicted on Cadastral Plan No F/R No35/74.
29. That parcel of Land Number LR No9042/617 as surveyed in 1996 encroached onto LRNo7075/10 causing an overlap of surveys in total ignorance of the existence of prior approved survey records, that is, Cadastral Plan No F/R No35/74 in respect of Parcel of Land Numbers LR No7075/8, 7075/9(Later re-named 7075/17) &7075/10 and which Parcels were all acquired by the Government through Kenya Gazette Notices No 1105 and 1106 dated 30" April 1971 for expansion and development of Jomo Kenyatta International Airport-Nairobi.
30. That the Geo-space therefore over which Parcel of Land Numbers LR No 7075/8,7075/9(Later re-named 7075/17) & 7075/10 occupy as indicated on Cadastral Plan No F/R No 35/74 and as enclosed and defined by the survey beacon markers: P7, P8, P9, P10,D9, x3, D8, D6,E7,and E6 following the acquisition by the Government for Airport purpose (public purpose) was therefore NOT available for alienation to private entities.
31. That the New Grant survey of Parcel of Land Number LR No9042/617 which was carried out on or about 12th February 1996 to confer a proprietary right of ownership of this parcel to a private person/entity should NOT have been carried out as the Geo-space occupied by this parcel and which is defined and enclosed by survey beacon markers; C5,C4,C3 and C6 as indicated on Cadastral Plan No F/R No294/106 was unavailable for alienation as it was prior committed and acquired by the Government for Airport use.
32. That surprisingly, the New Grant survey of Parcel of Land Number LR No 9042/617 was carried out on or about 12th February 1996 by M/S-Gordon O. Wayumba-Licensed Land Surveyor who 43 days later, on 26th March 1996 carried out the acquisition survey for the expansion and development of Jomo Kenyatta International Airport -Nairobi giving rise to Parcel of Land Number LR.No21919 as represented on Cadastral Plan No F/R No 265/27-Survey Computations (Comps.) Number 36213.
33. That notably, the effective date of Grant from the Government and commencement of the tenancy in respect of Parcel of Land Number LR No 9042/617 is 1st April 1996, which date is preceded by the date upon which the survey of Parcel of Land Number LRNo21919-Jomo Kenyatta International Airport was concluded, that is 26th March 1996.



34. That the calculated sequence of events and actions leading to the survey of Parcel of Land Number LR No9042/617, which parcel was surveyed over Parcel of Land Number LR No7075/10, causing an overlap of survey and land parcels, points to blatant action to reserve land for allocation for private use to persons/entities for personal benefit at the expense of the public interest as this same land had been acquired by the Government for the expansion of the Nairobi Airport for public use.”

214. The foregoing evidence which was tendered by DW3 was neither challenged nor controverted by the Plaintiff. In any event, it is not lost on the court that the Plaintiff did not call any surveyor to respond to or otherwise contradict the testimony of DW3, himself qualified licensed and registered surveyor.
215. On the other hand, what is so evident from the testimony of DW3 is that even though the suit property was duly surveyed and a Deed Plan issued, it was pointed out that the impugned deed plan caused an overlap and thereby superimposed the suit property onto LR No 7075/10, which is land forming and comprising of Jomo Kenyatta International Airport.
216. Be that as it may, I am aware and alive to the fact that during cross examination DW3 confirmed that the Deed plan relating to the suit property had been processed and authenticated by the Director of survey, however, the critical question relates to the ground position and delineation of the suit property.
217. In any event, I must add that the overlap that has occasioned the superimposition of the suit property onto the land belonging to the Defendant, would have been avoided had the requisite Part Development Plan been generated prior to and before (sic) the purported alienation of the suit property in favor of the Plaintiff's predecessor.
218. Despite the foregoing and taking into account the totality of the evidence beforehand, I come to the conclusion that indeed the suit property falls within the public land which had been hitherto been reserved for a designated purpose. In this regard, the certificate of title held by the Plaintiff must give way.
219. In respect of the foregoing statement of law, I am constrained to and do hereby find inspiration in the holding in the case of *Republic v Minister for Transport & Communication & 5 Others, Ex-parte Waa Ship Garbage Collectors & 15 others* Mombasa HCMCA No 617 of 2003 (2006)1KLR (E & L) 563 where Maraga J, as he the was held and stated as hereunder;

“Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefensibility of title deed. It is clear from section 75 of the *Constitution* that the doctrine of public trust is recognized and provided for by the superior law of the land and applies in a very explicit way as regards trust land. The doctrine is, however, not confined to trust lands and covers all common properties and resources as well as public land. Although the doctrine had origins in Roman Law it is now a common heritage in all countries who adopted the English common law..... It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the *Constitution* or under section 1 and 1A of the *Constitution* or under the doctrine of public trust a title would have to be nullified because the *Constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of the *Constitution*. (Repealed)”



220. In view of the foregoing considerations, it is my conclusion and finding that the title of the suit property ought to be revoked and nullified.

Issue Number 4

What Reliefs ought to be granted.

221. The Plaintiff herein had sought for various reliefs, *inter-alia*, Declaration that same is the lawful and legitimate proprietor of the suit property.
222. In addition, the Plaintiff has also sought a declaration that the activities, *inter-alia*, the entry upon and fencing of the suit property by the Defendant constitutes and amounts to trespass.
223. Premised on the preceding paragraph, the Plaintiff thereafter implored upon the court to calculate and award compensation on account of trespass as well as infringement of her constitutional right to property.
224. Be that as it may, I beg to point out that dealing with issue number two herein before, I came to the conclusion that the Plaintiff's predecessor in title, did not acquire any valid title to and in respect of the suit property. Furthermore, I also held that owing to the foregoing that the doctrine of *ex nihilo nihil fit*- out of nothing comes nothing, applies to and affects the Plaintiff.
225. In short, I have hitherto pronounced my self that the Plaintiff did not acquire valid title and in this regard, the declaration that the Plaintiff is the lawful and legitimate owner of the suit property, cannot issue either in the manner sought or at all.
226. In the absence, of a valid certificate of title to and in respect of the suit property, the foundation upon which an award for general damages for trespass and breach of constitutional right to property, could be based, dissipates.
227. Notwithstanding the foregoing, I must point out that if, I had found in favor of the Plaintiff, (which is not the case), I would have granted an award of General damages for trespass in the sum of KES 20, 000, 000/= only.
228. On the other hand, it is important to point out that the acts and/or activities which constitutes trespass are the same and similar acts or activities that would underline the claim for infringement of the Plaintiff's constitutional right to property.
229. Consequently, once and award is made on account of General damages, to atone for the offensive activities, in my humble view, then an award on account of breach of constitutional right to property would be duplicitous.
230. On the part of the Defendant, same had sought for an order to nullify and revoke the title in favor of the Plaintiff. In this regard, it is worthy to point out that elsewhere herein before, I have already found and held that the Plaintiff's title was vitiated and thus invalid.
231. It thus follows as a matter of course and essentially, that the prayer for cancelation of the Plaintiff's title has succeeded.
232. On the other hand, the Defendant had also sought for general damages, albeit without specificity. For coherence, it is not stated what kind of general damages, are being sought for by the Defendant.



233. However, assuming that the general damages relates to trespass, I beg to state that save for the fact that the Plaintiff was issued with and therefore held a certificate of title in respect of LR No 9042/617, the Plaintiff neither had access to nor took possession of the suit property.
234. Contrarily, evidence was tendered that it is the Defendant who has always been in occupation of the suit property and even fenced same within her land. In this regard, the question that arises is whether the Defendant has suffered any loss, to warrant recompense on account for (sic) General damages.
235. In my humble view, the Defendant has not placed before the court any material or otherwise to warrant an award of damages in her favor. Suffice it to point out that trespass is actionable per-see, but the point is; no such trespass was established or proved.

Final Disposition

236. In the course of analyzing and evaluating the various issues that were highlighted in the body of the Judgment herein, it must have become evident and crystal clear that the Plaintiff's case is not meritorious.
237. Conversely, the Defendant has placed before the Honourable court cogent and credible evidence and in particular, showing that the impugned suit property fell within and formed part of the public land that had hitherto been reserved for public use as part of Jomo Kenyatta International Airport.
238. In view of the foregoing consideration, it is therefore appropriate to state and underscore that the Defendant has duly proved and established her counterclaim, albeit in part.
239. Consequently and in the premises, I now come to the conclusion that the Plaintiff's suit courts dismissal. In this regard, the Plaintiff's suit be and is hereby dismissed.
240. On the other hand, Judgment be and is hereby entered in favor of the Defendant in terms of the counterclaim dated the July 14, 2022 as hereunder;
- i. The Title over and in respect of LR No 9042/617, I.R No 69538, in the name of the Plaintiff be and is hereby revoked and cancel.
 - ii. The Plaintiff herein shall surrender and hand over the Certificate of Title of LR. No 9042/617, IR. No 69538, to the Chief Land Registrar for cancellation within 60 Days from the Date hereof.
 - iii. Permanent Injunction be and is hereby issued against the Plaintiff, barring same from entering upon, interfering with and in other way dealing with the certificate of title in respect of LR No 9042/617 and by extension the property bearing the said details.
 - iv. The claim for General damages be and is hereby dismissed.
241. As pertains to costs, it is my humble view that either party shall bear own costs of the proceedings, taking into account the peculiar circumstance touching on and concerning the subject matter.
242. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:



Benson - Court Assistant.

Mr Isaac Rene and Mr Hans Oichoe for the Plaintiff.

Mr Allan Kamau for the Defendant.

