



Rest Villa Limited v Kenya Power & Lighting Company Ltd & 4 others (Civil Suit 448 of 2013) [2023] KEELC 758 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEELC 758 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT 448 OF 2013
JA MOGENI, J
FEBRUARY 15, 2023**

BETWEEN

REST VILLA LIMITED PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LTD 1ST DEFENDANT

CITY COUNCIL OF NAIROBI 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

COMMISSIONER OF LANDS 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

1. By an amended plaint dated October 5, 2021, the plaintiff herein sought for Judgment against the defendants jointly and severally for the following orders: -
 1. A declaration that parcels LR No Nairobi/Block 37/167 and LR No Nairobi/Block 37/168 belong to the plaintiff and the Title documents in its favour are bona fide and authentic.
 - 1A. Further, and or in the alternative without prejudice to the aforestated the damages in the sum of Kshs 620,000,000/- being the value of the suit property or such other sum as may be determined by this Honourable court.
 - 1B. Special Damages of Kshs 368,080/- being the cost of valuation of the suit
 1. A declaration that the title of LR No 209/11590 in the name of the 1st defendant are fraudulent, null and void and of no legal effect.



5. General and exemplary damages.
6. Cost for the suit with interest thereon at court rates.
7. Any other or further order this honourable court may deem fit to grant.

Plaintiff's Case

2. It was the plaintiff's case that it was at all material times and continues to be the legal owner and registered proprietor of all those two parcels of land situated in the city of Nairobi known as Nairobi/Block 37/167 and Nairobi/Block 37/168.
3. The plaintiff avers that it purchased the two parcels of land for good value, with no notice of any defect in any of the titles and throughout the course of the transfer the 2nd 3rd and 4th defendants were involved and raised no objection and made no indication that there was any limitation or challenge or contest to the titles of the property the plaintiff was purchasing.
4. They further contend that on or about July 6, 2007 in the morning the 1st defendant through its agent's M/s Expeditious General Merchants Auctioneers forcefully invaded the plaintiff's company's premises with no prior notice and showed the company's employees an order given on February 5, 2007 and started demolishing and damaging everything belonging to the plaintiff company.
5. That as at 5.00pm on the same day the 1st defendant had demolished the plaintiff's perimeter wall, pulled down some of its buildings, and taken away its assets including furniture, files inventories, machinery, and office equipment, and parked some of its cars in the plaintiff's parcels.
6. It is the plaintiff's case that the said demolitions and damages were not preceded with any notice to the plaintiff company and did not refer to any land parcel and the same targeted the eviction of Njilux Motors and not the plaintiff company. That the said order was given on February 5, 2007 and no explanation exists for the delay of its execution since February 2007 to July 6, 2007 and it is trite law that a party cannot be evicted without an eviction order and notice duly issued to the party evicted obtained from a competent court.
7. The plaintiff avers that as at 3.30 pm it had obtained an objection order Under order XX rule 53 of the previous *Civil Procedure rules*, but the 1st defendant disregarded it and continued with damaging and carting away the plaintiff's goods and assets.
8. It is their contention that the plaintiff's legal assistant spoke to one of the directors of the previous owner of the parcels herein hon Peter Muriigi Njirwa and he confirmed that the previous owner of the parcels, Njima Investment Limited had never been sued as to their title, and that Njilux Motors Limited has never owned the parcels and that they were tenants. That the plaintiff's legal assistant further learnt from the same source stated in paragraph 14 above that the 1st defendant had earlier on attempted to effect eviction and the same was restrained by an order made by court in Nairobi HCCC No 1047 of 2000.
9. It is their case that the 1st defendant when invading and trespassing onto the plaintiff's parcel did not care that the plaintiff had title to the properties for value, in good faith and without notice. That the 2nd 3rd and 4th defendants were involved and gave approvals throughout the course of the conveyance of the parcels to the plaintiff for valuable consideration and did not demur the conveyance and further received such fees and payments as are ordinarily due in acquiescence to the plaintiff's bona fide acquisition of the title.



10. The plaintiff avers that it has registered rights and that the said registered status makes the plaintiff the bona fide registered owner of the parcels and its titles are conclusive evidence that it is the owner, absolutely and indefeasibly, subject to lawful encumbrance's easements and restrictions. That the 1st defendant's invasion was not pursuant to any encumbrance and or easement and or restriction as the plaintiff may have had notice of as from either the 2nd 3rd or 4th defendant at purchase.
11. The plaintiff contends that it purchased the parcels of land from Njima Investment Ltd who was the predecessor of the plaintiff and the plaintiff had initially filed High Court Case No 199 of 2007 against the 1st defendant and obtained a confirmation of interim injunctive orders pending the hearing and determination of the suit but the suit was dismissed for want of prosecution.
12. That the plaintiff's previous advocate in the aforesaid suit above did not inform the plaintiff that the suit had been dismissed for want of prosecution until the plaintiff's legal assistant saw the 1st defendant's agents and or contractors on the parcels of land depositing building material and carrying out construction. The plaintiff avers that the 1st defendant's recent entry to the suit property after the dismissal of the suit for want of prosecution does not give the 1st defendant the rights of ownership as the dismissed suit was not heard on merit.
13. The plaintiff avers that it has the right to seek fresh interim orders granted to enable it to establish its claim against the 1st defendant and that the 1st defendant's actions are unlawful illegal, unconstitutional, callous, an affront to the rule of law and an act of trespass calculated purely to deprive the plaintiff of its private property without compensation.
14. It is the plaintiff's contention that there is real and present danger that unless the prayers sought are urgently granted the 1st defendant will unlawfully remain in occupation of the suit premises and continue to flout the law to the grave detriment of the authority of law and the administration of justice in Kenya and to the plaintiff's protection of the law.
15. The plaintiff avers that the 4th defendant did not have authority under section 4 of the Government Land Act (now repealed) to allot the parcels of land that had already been allocated and registered in the name of the 2nd defendant.
16. The plaintiff further avers that it was the 2nd defendant who had the legal right to allot the parcels of land to Njima investments and the subdivisions thereof sold to the plaintiff
17. That save for HCC No 199 of 2007 where the plaintiff had sued the 1st defendant to recover the suit property, the suit was consequently dismissed for want of prosecution, and there is no suit pending before this Honourable court or any other court between the parties hereto in respect to the same cause of action and subject matter.

Plaintiff's Evidence

18. PW1 – Kailesh Jopanputra adopted his witness statement dated October 15, 2021 and produced the list of documents dated 1-8 dated October 5, 2021 as his evidence in chief.
19. In cross-examination, PW1 testified that he is a director of the plaintiff company and that he is still a director. He stated that he has talked about case No 199 of 2007 and he is aware that Justice Mwangi issued a judgment. He is also aware of Civil No 69 of 2016 and its outcome. He further gave evidence that it is not the case that Nairobi city council assisted him with the approvals. There was no objection by the 2nd defendant at the time of purchase. It was a willing buyer, willing seller. He confirmed that he did not purchase the land from city county, and he paid nothing to the city county.



20. It was PW1's testimony that he has evidence that he is a director of the plaintiff company. He added that he purchased the land and has an agreement, but it is not part of the documents produced in court. He testified that he did not recall how much he purchased the land. He was not directly involved with the purchase, and he cannot remember. He further testified that he was sure that there is a search in the archives though it is not filed in court. It is his case that they have not taken possession physically but on paper. He has been there visiting severally but cannot confirm that Kenya power is on site. He did not have the titles with him. The two properties are not charged.
21. He stated that he has brought a claim for Nairobi Block 37/168 and Nairobi Block 37/167. He reiterated that he is aware of ELC 199/2007 and that he is not aware that he has subdivided the block Nairobi 37/167. He is not aware of Intoil Ltd. He does not recall the name. The claim for Kshs 620,000,000.00 is against NLC and registrar of lands. The property was previously known as LR No 209/11590 and converted to Nairobi 37/167 and Nairobi 37/168, but he was not aware of it. He testified that he had paid for transfer and legal fees to the Registrar. He has not come across transfer of the two properties. He has no evidence of payment of stamp duty with him.
22. With that evidence, the plaintiff closed its case.

Defendants' Case

23. The 1st defendant entered appearance and filed an amended defence dated October 26, 2021, the 2nd defendant entered appearance on April 17, 2013 and filed a statement of defence dated April 24, 2013 and the 3rd, 4th and 5th defendants entered appearance and filed a statement of defence dated July 10, 2013.

1st Defendant's case

24. The 1st defendant denies the contents of the amended plaintiff and further denies the contents of paragraphs 7 and 8 of the amended plaintiff and specifically the lawful creation, registration, and existence; and/ or any alleged sale and transfer thereof of the properties LR Nos Nairobi/Block 37/167 and 168.
25. The 1st defendant states in retrospect that the pleadings in paragraphs 9,10 and 11 of the plaintiff are pleadings that are partly litigated and partly pending before the High Court in Civil Suit No 199 of 2007 and can therefore not be pleaded and litigated as proposed by the plaintiff herein.
26. The 1st defendant in reply to the contents of paragraph 12 of the amended plaintiff reiterates the contents as stated above and further states that there is no law that stops the enforcement of eviction orders five months after the issuance thereof. Further the 1st defendant duly obtained a competent eviction order in respect of the subject matter in the eviction order of the February 5, 2007.
27. The 1st defendant states that the contents of paragraph 14 of the amended plaintiff are incorrect as the said Njima Investments was a party in HCCC No 1887 of 1994 and Civil Appeal No 206 of 1998 with the 1st defendant and other parties involving the issue of ownership of LR No 209/11590 that the plaintiff is now pleading as the suit properties herein albeit unlawfully.
28. The 1st defendant in answer to the contents of paragraph 15 of the amended plaintiff avers that on realizing that it had absolutely no case, the plaintiff in HCCC No 1047 of 2000 withdrew the same unilaterally to avoid its dismissal and was condemned to pay costs to the 1st defendant which remains unpaid to date. The said interim order went with the withdrawn suit.



29. The 1st defendant contends that they never invaded or trespassed onto the alleged properties of the plaintiff, and to the best of the 1st defendant's knowledge, the plaintiff has no title or good title to the property known as LR No 209/11590 to which the eviction order of the February 5, 2007 relates. The contents of paragraph 16 of the Amended plaint are denied by the 1st defendant.
30. It is their contention that there were no lawful approvals given or that could have been given as alleged in paragraph 17 of the plaint. In the event that such approvals were given as alleged by the plaintiff then the same are unlawful, null, void and inconsequential.
31. The 1st defendant in response to the contents of paragraph 18 of the amended plaint reiterates the contents of paragraph 7 of the defence herein and states that the issue as to ownership (if at all) and indefeasibility of such ownership of the alleged LR Nos Nairobi/Block37/167 and 168 is pending before the High Court in Civil Suit No 199 of 2007 and as such cannot be pleaded or litigated in this suit. The said interim Order alluded to in paragraph 19 of the amended plaint did not confirm the alleged ownership to the said LR Nos Nairobi/Block 37/167 & 168. What the Order did was to preserve the status quo pending the hearing of the suit. The suit was however dismissed inclusive of the said order which order is therefore of no consequence/significance in this suit in the manner purported or proposed by the plaintiff.
32. The 1st defendant in answer to the pleadings in paragraph 20 of the amended plaint states that the plaintiff was involved in all the two applications to dismiss the suit and indeed swore affidavits in opposition to the same and can therefore not be heard to say that it was not aware of the outcome of the final application to dismiss its suit. In any event, the 1st defendant avers that it has always been in occupation of the 1st defendant's property known as LR No 209/11590 and upon the dismissal of the status quo orders continued with the work that the said order had put on hold in 2007.
33. The 1st defendant denies that the plaintiff is entitled to seek fresh interim orders as pleaded in paragraph 21 of the amended plaint and the 1st defendant categorically denies unlawfully, illegally, unconstitutionally occupying or trespassing on its property LR No 209/11590.
34. Without prejudice to the foregoing, the 1st defendant contends that it is in occupation of land reference number 209/11590, Nairobi to which it holds a title under the former registration of titles act, the same having been issued to them on the January 27, 1993 which title is valid and has never been cancelled by any court.
35. The 1st defendant further contends that it had in August 1992 applied to the Government of Kenya for allotment to it of the said Property for purposes of putting up a Power Substation to boost its power supply to the residents of parklands, Nairobi and the Government did allocate the same to them on the 6/08/1992. The said parcel of land was excised from the Land that is known as City Park and that the Government had granted in favour of the former City Council of Nairobi with terms and conditions therein reserving the same to be used only for public utility purposes.
36. It is their case that the grant to the city council of Nairobi had on it imposed special conditions and special conditions numbers 3 to 5 read as follows:
 - (1) The Land and buildings shall only be used for open space park sports grounds and any other municipal purpose to be approved by the commissioner of lands in writing.
 - (2) The grantee shall not subdivide the land without the prior approval of the commissioner of Lands.



- (3) The grantee shall not sell transfer or part with the possession of the land. Sub-leases of the plots thereof shall require prior consent and approval of the terms and conditions in writing by HE the President.
37. The 1st defendant claims that sometimes in the year 1994, two (2) entities, one known as Njilux Motors Limited, and a business name known as Njirwa Investments claimed that:
- a) Peter Mwirigi Njirwa, the Managing Director of Njilux Motors Limited on the March September, 1992 applied for allocation of a temporary occupation License at Limuru Road from the Nairobi City Council and on the March 20, 1992, he was allocated the said Plot to be used for parking of new and used vehicles.
 - b) On July 20, 1992, Mr Peter Mwirigi Njirwa trading as Njima Investments applied to be allocated the same Property by the Nairobi City Commission and the Nairobi City Commission allegedly allocated him Land Reference Number 209/11590, Nairobi, for use for commercial-cum-residential purposes.
38. That pursuant to the above, Njilux Motors Limited, in HCCC No 892 of 1993 sued the Nairobi City Commission and the Kenya Power & Lighting Co Ltd over Land Reference Number 209/11590. Nairobi claiming ownership.
39. The 1st defendant avers that also in HCCC No 1887 of 1994, sued Njilux Motors Limited for vacant possession of the said Land Reference Number 209/11590, Nairobi which the said Njilux Motors was allegedly occupying as a tenant of Njima Investments.
40. HCCC No 892 of 1993 and HCCC No 1887 of 1994 were consolidated and heard together and a Judgement was delivered on the May 25, 1998 by the Hon Mbogholi J The suit by the Kenya Power & Lighting Co Ltd succeeded while the suit by the Njilux Motors Limited failed with costs to be paid to the 1st defendant herein. Njilux Motors Limited not being satisfied with the Judgement appealed to the Court of Appeal in Civil Appeal No 206 of 1998 which Appeal was decided on the March 31, 2000 unanimously by a three-judge judgement dismissing the appeal and confirming the Judgement of the High Court.
41. That the Court of Appeal in that decision went further and held that the Grant of the suit Land - Land Reference Number 209/11590, Nairobi to the 1st defendant, is guaranteed by the Government and cannot be challenged by virtue of the provision of Section 23(1) of the former RTA which stated: "The certificate of title issued by the registrar to a purchaser of land upon transfer or transmission by the proprietor thereof, shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute indefeasible owner thereof subject to the encumbrances, easements, restrictions and contained therein or endorsed thereon and the title of that proprietor shall not be subject to the challenge, except on grounds of fraud or misrepresentation to which he/she is proved to be a party."
42. The 1st defendant contends that the Court of Appeal further held that the suit land was government land before the grant of lease was made to the council and will revert back to the government when the lease expires. When the government allocated the land to the council, the council was only authorized to use the land for purposes in the special conditions in the grant. The council was held to have breached those conditions when it purported to lease the premises to Mr Njirwa for use other than those in the grant. The alleged allotment to Mr Njirwa was held by the Court of Appeal to be contra law.



43. It is their further contention that following the Court of Appeal decision confirming the honourable Mbogholi Msagha's Judgement, the High Court did on the June 16, 2000, issue an eviction order against Njilux Motors Limited, its agents and/or assignees and any other person bound by the decree who may refuse to vacate. That in the year 2000, another of Mr Peter Njrwa's Company known as Njima Investments Limited filed Civil Suit No 1047 of 2000 against Nairobi City Council, the 1st defendant herein, the commissioner of lands and the registrar of titles claiming again the subject suit herein in the name of Land Reference Number Nairobi/Block 37/164 registered under the now repealed Chapter 300 Laws of Kenya.
44. The 1st defendant avers that upon realizing the futility of the suit more so on the face of the Court of Appeal's decision hereinbefore referred to which clearly stated and held that – "The City Council of Nairobi cannot allocate the subject grant to any person/party to be used for a purpose other than a public purpose", the said Njima Investments Limited withdrew the suit on the November 22, 2006.
45. The 1st defendant avers that through a Judicial Review Suit No 605 of 2006 obtained orders of prohibition and mandamus against the commissioner of lands to recall and indorse on the grant issued to the City Council of Nairobi being Land Reference Number 209/6559/R Nairobi, the Grant issued to the 1st defendant herein to halt those continuing purported unlawful allotments of the defendant's Grant. In yet another suit filed by the former City Council of Nairobi against the 1st defendant herein over LR No 209/11590, the former City Council of Nairobi lost the same.
46. It is the 1st defendant's case that in the face of all these happenings since the year 1992 when the Government of Kenya allocated the suit Land to the 1st Respondent herein to put up a Power sub-station to supply and upgrade supply of power to the Parklands area of Nairobi County, the plaintiff herein surfaced with HC Civil Suit No ELC 199 of 2007 to again challenge the 1st defendant's proprietorship of the defendant's Property LR No 209.11590. That when HCC ELC No 199 of 2007, was filed, the 1st defendant was in occupation of the 1st defendant's subject Property known as Land Reference Number 209/11590, Nairobi. The injunction order issued on the February 28, 2008 by the honourable Aganyanya J as he then was, did not order the 1st defendant evicted from the suit premises. The court indeed appreciated that the 1st defendant was in occupation of the subject premises.
47. The 1st defendant states that it is the registered and lawful owner of Land Reference Number 209/11590, Nairobi and to the extent that Land Reference Numbers Nairobi/Block 37/167 & 168 purport to be a conversion of Land Reference Number 209/11590, Nairobi, then such Registrations of Land Reference Numbers Nairobi/Block 37/167 & 168 are a nullity, fraudulent, unlawful and the titles allegedly issued thereto are but mere pieces of paper not capable of conferring any property rights to the plaintiff.
48. It is their case that the plaintiff has never ever been in possession of Land Reference Number 209/11590, Nairobi (or the alleged Land Reference Number Nairobi/Block 37/167 & 168 if it be alleged that the said two (2) parcels of Land refer to Land Reference Number 209/11590, Nairobi for that matter).
49. The 1st defendant states that by the time the plaintiff served upon the 1st defendant the objection order obtained under former order xx rule 53 of the CPR, the court authorized auctioneer had already enforced the subject order of the February 2, 2007. That as long as the plaintiff pleads and purports to state and urge that its alleged suit Property is the same as Land Reference Number 209/11590, Nairobi, the 1st defendant herein states that the plaintiff and whoever it bought the alleged Properties from have never had any lawful or good Title to the Property known as Land Reference Number 209/11590, Nairobi.



50. The 1st defendant avers that the plaintiff has failed to disclose that before the dismissal of the plaintiff's suit in HC ELC No 199 of 2007, the Honourable Mbogholi Msagha J had by a Ruling dated the December 6, 2010 directed the plaintiff to comply and have the suit heard within thirty (30) days. The plaintiff has further deliberately failed to disclose to this honourable court that it has preferred appeal against the decision of the honourable Kimondo J which appeal is and was pending when the plaintiff instituted this suit thereby making this suit incompetent, bad in law and not maintainable at all.
51. The 1st defendant contends that the plaintiff has also failed to disclose to this honourable court that there is a pending suit by way of a counter-claim in HC ELC No199 of 2007 against the plaintiff by the 1st defendant wherein the 1st defendant is seeking for a declaration to the effect that certificates of leases for Land Reference Numbers Nairobi/Block 37/167 & 168 are not legal documents and are null and void amongst other prayers. The plaintiff has indeed defended the counterclaim thereby making this suit void ab initio and a candidate for striking out for being contra Law.
52. Further, that the chief land registrar has no authority in law to cancel a duly registered certificate of lease. Such cancellation is a preserve of the High Court. The alleged letter of the chief lands registrar is not capable of cancelling the registration of the 1st defendant as the proprietor of Land Reference Number 209/11590 Nairobi and the issues raised therein are for any avoidance of doubt superseded by the Judgement of Honourable Wendo J in HCCC Misc No 605 of 2006 wherein the Hon. Judge ordered both the Commissioner of Land and the Chief Lands Registrar not to deal with the suit property contrary to the proprietary interests of the 1st defendant herein.
53. The 1st defendant avers that the suit by the plaintiff in HC ELC No 199 of 2007 having been lawfully dismissed, the 1st defendant embarked on carrying out the development of a power Sub-Station of Land Reference Number 209/11590, Nairobi to supply and improve the existing power supply to the Parklands Area of Nairobi County at enormous costs to the Taxpayers
54. The 1st defendant avers that it did not enter into Land Reference Number 209/11590, Nairobi and start construction upon the dismissal of the plaintiff's suit in HC ELC No 199 of 2007. The 1st defendant was all along in the suit Property and only resumed construction in the month of May 2012 after having suspended the same in the month of June 2007 due to the injunction order obtained ex parte by the plaintiff in HC ELC No 199 of 2007.
55. The 1st defendant confirms that it is sitting squarely on its property Land Reference Number 209/11590, Nairobi to which Title it holds, and the said title has to date never been challenged successfully by any party and in fact, no court in this country has ordered for it to be cancelled. The 1st defendant cannot therefore in law or in fact be held to have trespassed on its own property. The said decision emanating from a ruling delivered in this Suit clearly puts to rest the issue of the ownership of the subject property herein and determines the same absolutely.
56. Lastly, it is the 1st defendant's case that the suit is bad in law, an abuse of this court's process and should be dismissed with costs to the 1st defendant.

2nd Defendant's case

57. The 2nd defendant denies each and every averment of law and/or fact set out in the plaint and further denies that it gave approvals throughout the course of the conveyance of the parcels to the plaintiff.
58. In the alternative and without prejudice to the foregoing, the 2nd defendant avers that it has been wrongfully enjoined in this suit as the plaintiff has not set out any valid cause of action whatsoever



against the 2nd defendant and the 2nd defendant shall at the earliest opportunity apply to have its name struck out from this suit.

59. Further in the alternative and without prejudice to the foregoing, the 2nd defendant avers that the suit herein is fatally defective and should be dismissed in limine as it is merely brought to resuscitate, albeit in an unprocedural manner, a suit that was dismissed for want of prosecution.
60. The 2nd defendant further states that prior to the institution of this suit, the 2nd defendant has not received any demand or notice of this suit.
61. Lastly, the 2nd defendant prays that the plaintiff's suit be dismissed with costs.

3rd, 4th and 5th defendants' case

62. The 3rd, 4th and 5th defendants deny each and every allegation of fact contained in the plaint.
63. They aver that The allegations as contained in paragraphs 9, 10, 11, 12, 13, 14, 15 and 16 of the plaint contain matters within the peculiar knowledge of the plaintiff and the 1st defendant to which the interplay between the legal and evidential burden is on them.
64. The 3rd, 4th and 5th defendants aver that the issue of trespass, damages, and eviction, are disputed matters of facts strictly between the plaintiff and the 1st defendant as they are not privy to such matters of facts which facts are so not discernible from the register.
65. It is their contention that the 3rd, 4th and 5th defendants are strangers to the contents of paragraphs 19 and 20 of the plaint as the same are matters of facts strictly between the plaintiff and the 1st defendant and especially as pertains to the particulars of the High Court Case No 199 of 2007.
66. The 3rd, 4th and 5th defendants aver that the contents of paragraphs 21 and 22 of the plaint are matters of facts strictly between the plaintiff and the 1st defendant. That save for the Injunctive, Declaratory and costs reliefs craved thereunder the contents of paragraphs 23 of the plaint are admitted.
67. Lastly, 3rd, 4th and 5th defendants pray that the plaintiff's suit be dismissed with costs.

Defendants' Evidence

68. DW1 – Allan Owiti Awuor testified that he is employed by the 1st defendant as a manager, board and regulatory affairs. He then adopted his witness statement dated October 2, 2013 as his evidence in chief and produced a list and bundle of documents dated October 2, 2013, marked as exhibits 1-15 (DW1Exh 1-15) together with a supplement list of documents marked as DW1Exh 1-16.
69. In cross-examination, DW1 testified that he has worked at KPLC for 18 years. He is aware of the controversy. There have been 11 suits in relation to this suit and he has participated in some of them. The initial grant was given to KPLC in 1993 on January 20, 1993 in respect of LR 209/11590 grant No I.R57669 measuring 66.25 hectares. User was public for sub-station construction excised from Nairobi City Council land. This is the plot refereed to at page 32-34 . the plots LR 37/168 and LR 37/167 being claimed by the plaintiff refer to the same land. The Court of Appeal affirmed LR 209/11590 was the genuine title issued to KPLC, by the time this was made it arose from two cases. The Court of Appeal described the attempt to arrest land from KPLC as land grabbing. In the High Court Civil Case No 199 of 2007, the court affirmed that the KPLC title was genuine.
70. He further testified that his witness statement details the conditions that KPLC was to meet. Number 2 was about non-subdivision. Number 3 was about selling, transferring, sub-leasing which was not to be done unless the president gives permission. They fulfilled the conditions and they have never



attempted to sub-divide or sell the suit property. He confirmed that KPLC is in possession, and it took physical possession.

71. He recalled from 2007 they had been on the property at the moment it is being used as a parking yard. The title was issued to KPLC on 20/01/1993. The plaintiff's company claims Nairobi block 37/167 is dated September 27, 2006 and Nairobi Block 37/168 is dated 30/09/2005.
72. It was his testimony that they hold an RTA title and KPLC has never handed over the title for conversion in any form. The deed plan for the grant is still intact. KPLC has never sought consent to subdivide. This land was allocated to KPLC on August 6, 1992 by the commissioner of lands. Special condition No 5 in respect of the grant stated that the land was to be used for substation with auxiliary offices and stores.
73. In re-examination, he testified that ELC 199 of 2007 is where Hon Justice Mwangi delivered judgment on May 11, 2022.
74. With that evidence, the 1st defendant closed its case.
75. The 2nd defendant's counsel, Mr Okore informed the court that the witness that appended the signature of the 2nd defendant has since left the employ of the 2nd defendant and therefore, they decided not to call any witness. Mr Okore proceeded to close the 2nd defendant's case.
76. The 3rd, 4th and 5th defendants did not call any witness. They also closed their case.

Written submissions

77. At the close of hearing on May 25, 2022, the court gave directions on filing of written submissions. Parties submitted and I have considered them. The plaintiff's filed its submissions dated September 27, 2022 on the even date, the 1st defendant filed its submissions dated September 30, 2022 on October 3, 2022 and the 2nd defendant filed its submissions dated October 3, 2022 on the even date.

Analysis and determination

78. I have carefully considered the plaintiff's claims against the defendants, the evidence, the submissions as well as the law applicable thereto. I find that the matter arising for determination is whether the plaintiff is entitled to the orders sought.
79. The plaintiff has sought for a declaration that the suit parcels Title No Nairobi/Block 37/167 and Nairobi/Block 37/168 belong to the plaintiff, special damages in lieu of the said declaration, a declaration that the title held by the 1st defendant is fraudulent, general, and exemplary damages and costs of the suit with interest. For the court to find in favour of the plaintiff, it is not in doubt that the plaintiff ought to prove that it is deserving of the orders sought.
80. The bone of contention herein relates to two competing titles to the suit property known as LR No 209/1159 and/or Title No Nairobi/Block 37/167 and Nairobi/Block 37/168. It revolves around double allocation and duplicity of titles. It is evident herein that both the plaintiff and the 1st defendant are in possession of a title over the suit property.
81. The plaintiff claims to have been issued with a certificate of lease for Title No Nairobi/Block 37/167 on 27/09/2006 and Nairobi/Block 37/168 on September 30, 2005. The 1st defendant on the other hand, claims to have been issued with a Title to LR No 209/11590 on January 20, 1993.



82. When a party's title to land is called into question, the party has an obligation to show the root of its title. See the case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No 239 of 2009, where the Court of Appeal held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

83. Ordinarily, no land should be registered more than once and having two separate title deeds held by separate persons. Therefore, in this case, there must be one title deed which is genuine and one which was issued either unlawfully or through mistake and thus double allocation.

84. In the case of *Hubert L Martin & 2 others v Margaret J Kamar & 5 others*[2016] eKLR, Munyao J held as follows:

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

85. The evidence tabled by the plaintiff was that it purchased the two parcels of land with no notice of any defect in any of the titles from Njima Investment Limited and that throughout the course of the transfer the 2nd 3rd and 4th defendants were involved and raised no objection and made no indication that there was any limitation or challenge or contest to the titles of the property the plaintiff was purchasing. The plaintiff further alleged that the previous owner of the suit properties, Hon Peter Murigi Njirwa confirmed that Njima Investment Limited had never been sued as to their title.

86. It is their claim that the plaintiff has registered rights and that the said registered status makes the plaintiff the bona fide registered owner of the parcels and its titles are conclusive evidence that it is the owner, absolutely and indefeasibly, subject to lawful encumbrance's easements and restrictions.

87. From the plaintiff's annexures, it is not evident that the root of its title can be traced. The plaintiff only adduced two copies of certificate of lease for Nairobi/Block 37/167 and Nairobi/Block 37/168, two search documents both dated 16/05/2007, copy of ruling in HCCC No 199 of 2007 and copies of correspondences that seemingly indicate that Njima Investment Limited sold the suit properties to the plaintiffs.

88. The plaintiff did not provide a copy of a sale agreement Njima Investment Limited and itself even though PW1 testified that he had one. Pw1 could not recall how much he purchased the land for as he was allegedly not directly involved. The plaintiff did not produce the original copies of the titles to



- the suit properties. PW1 further testified that the plaintiff had not taken physical possession of the suit properties, but they would visit severally. He confirmed that he did not adduce any transfer document or proof of payment of stamp duty.
89. Evidently, the plaintiff did not prove the root of its title. No sufficient evidence was tendered by the plaintiff as to how the issuance of their title came to be. They failed to provide a letter of allotment to Njima Investment Limited, being that it was allegedly the previous owner. The plaintiff failed to produce a copy of the title issued to Njima Investment Limited, the sale agreement for the sale of the suit properties, transfer documents, proof of payment of the consideration, PW1 could not even recall the purchase price for the suit properties claiming that he was not directly involved with the purchase.
90. On the other hand, the 1st defendant has also tendered evidence to show how the issuance of its title came to be. To begin with, the 1st defendant alleges that they are in occupation of LR No 209/11590 to which it holds a Title under the former Registration of Titles Act, the same having been issued to them on the January 27, 1993 which title is valid and has never been cancelled by any Court. That it had in August 1992 applied to the Government of Kenya for allotment to it of the said property for purposes of putting up a Power Substation and the Government did allocate the same to them on the August 6, 1992.
91. Further to the above, the 1st defendant adduced a copy of title for LR No 209/11590 issued on January 20, 1993, a copy of the letter of allotment issued to the 1st defendant on August 6, 1992, two fee receipts for LR No 209/11590 indicating payments made as per the allotment letter and a grant of title to the city council dated September 1, 1992 for LR No 209/11590.
92. Aside from the above, evidence before me demonstrated that the Court of Appeal in Civil Appeal No 206 of 1998, as has been heavily mentioned and relied on in this present case, upheld the decision in HCCC No 1887 of 1994 wherein it was found that the 1st defendant is the absolute and indefeasible title holder. No evidence has been tendered demonstrating that the same has been overturned. From a perusal of the evidence before me, the 1st defendant's title has also not been cancelled. The court in ELC No 199 of 2007 also held in favor of the 1st defendant herein.
93. The court finds that the plaintiff did not tender sufficient evidence to demonstrate how they got their title starting with its root. The 2nd defendant herein submitted that the 1st defendant is still in custody of the original title to the suit land and that the process that led to the subdivision of LR No 209/11590 (IR 57667) which gave rise to Nairobi/Block 39/167 and Nairobi/Block 37/168 did not follow the statutorily stipulated procedure of alienating/converting public land.
94. The Court in ELC 199 of 2007 also found that the plaintiff's titles were a product of corrupt dealings and emanated from an illegal conversion, such that the City Council of Nairobi admitted to the breach of the conditions of terms of the grant.
95. The Court also made a declaration that the certificate of lease for both Nairobi/Block 37/167 and Nairobi/Block 37/168 registered in the plaintiff's name are not legal documents and proceeded to declare them null and void. The plaintiff has not adduced evidence demonstrating that the said Judgment of ELC 199/2007 had been overturned.
96. Balancing the two competing titles, it is my view that the plaintiff has failed to prove that it is the absolute and indefeasible owner of the suit property. The plaintiff has failed to prove that it holds good title to the suit property. Therefore, it is this Court's finding that the plaintiff has failed to demonstrate its case to the required standards.



97. Costs generally follow the event, and in this instant case, since the 1st defendant has been inconvenienced, I find that they are indeed entitled to costs of the suit and will award it to them. All these litigation matters relating to this subject property could have been avoided if the 2nd defendant had complied with the initial order of Hon Mr Justice Msagha in the first place. Additionally, had the plaintiff proved ownership of the suit property without notice, the court would have ordered that the 2nd defendant pay the costs as they clearly carry some responsibility in the unfortunate outcomes regarding the subject property LR No 209/11590.

98. That said and done, this court finds and holds that the plaintiff failed to prove its case on a balance of probabilities and is therefore not entitled to the reliefs sought.

99. Consequently, the amended plaint dated October 2020/2021 is hereby dismissed with costs to the 1st defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF FEBRUARY 2023

.....

MOGENI J

JUDGE

In the Virtual presence of:

Mr Kamau for 3rd, 4th and 5th defendants,

I hold brief of Mr Okeyo for the 1st defendant

No appearance for the plaintiff

No appearance for the 2nd defendant

Caroline Sagina: Court Assistant

.....

MOGENI J

JUDGE

