



**Wanyoike v Karanja (Environment & Land Case 18 of 2022)
[2023] KEELC 16410 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16410 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 18 OF 2022
LN GACHERU, J
MARCH 23, 2023**

BETWEEN

BERNARD MUNGAI WANYOIKE PLAINTIFF

AND

ERASTUS KAMAU KARANJA DEFENDANT

JUDGMENT

- 1 The Plaintiff filed the instant suit against the Defendant by way of Plaint dated 19th January, 2017. The suit was originally filed in Thika ELC, but was later transferred to this Court. The Plaintiff sought judgment against the Defendant for orders that; -
 - a. A permanent injunction be entered against the Defendant restraining him from entering, trespassing, interfering, alienating, sub-dividing or in any way interfering with land parcel number Mitubiri/wempa Block 2/930.
 - b. Mense profits.
 - c. Any other relief that this Honourable Court may deem fit to grant.
 - d. Costs of this suit and interest therein.
- 2 It was the Plaintiff's averments that whereas he is the registered owner of all that parcel of land known Mitubiri/ Wempa Block 2/ 930, The Defendant Is The Registered Owner Of Mitubiri/ Wempa Block 2/ 981. He averred that he acquired the land from Methi & Swani Cooperative Society Limited, after purchasing shares and was subsequently issued with a title deed to the suit property. He averred that the Defendant fenced off the suit property, and thus denied the Plaintiff access to his property.
- 3 Further, he averred that on 16th December 2016, he involved the services of a Surveyor, who visited the suit property and set up beacons which clearly confirmed the boundaries between the two parcels of



land. That despite the foregoing, the Defendant uprooted and destroyed the beacons, particulars of which are enumerated in paragraph 10 of the Plaintiff.

- 4 The Defendant filed his Statement of Defence on 13th February, 2018, opposing the Plaintiff's averments and invited him to strict proof of the contents thereof. The Defendant further averred that he is the registered owner of Mitubiri/ Wempa Block 2/ 981, and claimed that he took actual possession of the said land in 1979. It is his case that his ownership of the suit property has been challenged twice; - one was in April 2016, by a Mr. Ng'ang'a Kibono, and the other one in December 2016, by the Plaintiff. He refuted the Plaintiff's allegations and challenged the authenticity of his title.
- 5 The matter proceeded by way of viva voce evidence. The Plaintiff gave evidence for himself, called one more witness, while Defendant gave evidence and called three witnesses.

Plaintiff's Case

- 6 Pw1 Benard Mungai Wanyoike, the Plaintiff herein, adopted his witness statement dated 19th January 2017, as evidence in chief and relied on the bundle of documents filed alongside his Plaintiff. He maintained that his deceased father was a member of Methi & Swani Farmers Cooperative Society, hereinafter referred to as "the Society", That after his death, the Plaintiff sought for title deed for the suit land, which he was issued in 2016. He claimed that a Surveyor had visited the suit property, and beacons were set up, but were later destroyed by the Defendant.
- 7 On cross-exam, the Plaintiff maintained that his father was a member of the Society, but he did not have any register to demonstrate this. It was his testimony that he had no documents showing that the land belonged to his father. He added that his father never took him to the suit land, and it was his testimony that he was never issued with any beacon certificate.
- 8 Pw2 Stanley Ngotho, adopted his witness statement dated 22nd August 2018, as evidence in chief. He testified that he was a member of Methi & Swani Farmers Co-operative Society, since 1970, and became an official in June 2009, as treasurer. He also told this Court that there was double allocation of some parcels of land, and also added that the society had issued instructions that the name of the Plaintiff be registered as the owner of the suit property. Further that the society issued instructions based on the documents which showed that the Plaintiff was the owner of the suit property. Additionally, he told the Court that the Society started issuing titles in 2011. Unfortunately, the witness died before he was cross-examined. The Plaintiff closed his case.

Defence Case

- 9 Dw1 Erastus Kamau Karanja, adopted his witness statement dated 8th February 2018, as evidence in chief and relied on the documents filed alongside his Defence as exhibits. On cross-examination, he testified that he was allocated ½ acre piece of land by the Methi & Swani Farmers Cooperative Society, and a title deed issued in 2011. He also told this Court that the land is owned by himself and he has been living thereon since 1979. He also informed the Court that he removed the alleged beacons because they were placed on his parcel of land. He further added on re-exam, that the beacons were placed by a person not known to him.
- 10 Dw2 Jared Kimani Njoroge, adopted his witness statement dated 3rd December 2018, as evidence in chief. On cross –examination, he testified that he was issued with ballot No. 930, and he knew nothing about the land owned by the Plaintiff's father. The Defendant closed his case.
- 11 Dw3 Muthoni E. M Mputhia, the Land Registrar Murang'a, informed this Court that there was no boundary between the two suit properties. She added that the total area was 0.2550ha, for the suit



- properties;- that whereas land parcels No.930, measures 0.098ha, but land parcel No. 981, measures 0.16ha. Further that land parcel No.930, only appears on the Registry Index Map (R.I.M), but does not appear on the ground.
- 12 When examined by counsel for the Plaintiff, she told the Court that a wrong acreage was indicated on the Map, and that the acreage on the Green Card did not correspond to what is on the ground. It was her further testimony that the error can be cured by amending the RIM and the Green Card. She also told the Court through the Defendant's counsel on cross-exam that there is a problem with Mitubiri/Wempa Block 2, where the suit properties are located. Further that the Green Card for land parcel No. 930, has cancellation which she pointed out that it might have been surrendered.
- 13 Dw4 Peter Kimotho, testified that the general sizes of the parcels of land for members were ½ acres. Additionally, that ballot No. 930, belonged to Jared Kimani, who has title for Parcel No. Block 2/100. On cross-exam, he testified that there were a number of complaints about the sizes of the plots and also added that there was duplicity of land parcel No. 930, which showed 930 plain and 930 new. It was his further testimony that the titles were issued based on Maps and not what was on the ground.
- 14 At the end of the hearing, parties filed their written submissions as directed by the Court.
- 15 The Plaintiff filed his written submissions on the 1st February, 2023, through the Law Firm of Karanja Kang'iri & Co. Advocates. He submitted that he had established a case against the Defendant and added that *the Constitution* is protective of his right to property, which must be protected by the Court. He urged the Court to order the Land Registrar Murang'a, to mark boundaries and erect beacons. He invited this Court to be guided by the cases of Rose Wangui Kivunye vs. Samuel Mwangi Ngugi(2019) eKLR, and Hassan Mohammed Haji vs. Mohammed Keynan & Another (2019) eKRL.
- 16 The Defendant filed his written submissions through the Law Firm of Nduati Charagu & Co. Advocates, reiterating the evidence on record. The Defendant submitted that the acquisition of the Plaintiff's title was suspicious as the land had been first registered in the name of Martha Muthoni Muiruri, and it is not clear whether her title had been surrendered to Land's registry or no.
- 17 In submitting that the Plaintiff had not led evidence on how his title was acquired, he invited this Court to the pronouncement in case of Munyu Maina vs. Hiram Gathuha Maina(2013)eKRL, where the Court cautioned that a party ought to lead evidence as to the legality of how he acquired the title.
- 18 On whether the Defendant was a trespasser, he submitted that within the meaning of trespass espoused in Section 3(1) of the *Trespass Act*, the Plaintiff was not in possession or ownership of the suit land, thus no trespass can issue. Reliance was placed on the case of Samuel Mwangi vs. Jeremiah M'itobu {2012}eKLR, where the Court opined that a possessor of land may not claim trespass where he cannot, himself show that he has the right to recover the land immediately. It was the Defendant's submissions that the Plaintiff is not entitled to the prayers sought and urged this Court to dismiss the suit.
- 19 It is important for this Court to point out at the earliest that the Plaintiff is the registered owner of Mitubiri/Wempa/BK.2/930, measuring 0.2023Ha, having been issued with title on 5th May, 2016. The Defendant is the registered owner of Mitubiri/ Wempa/BLK.2/981, measuring 0.2023Ha, having been issued with a title deed on the 28th July, 2011. As per the Map, filed by the Plaintiff, the two parcels of land are adjacent to each other.
- 20 Further, it is common ground that Methi and Swani Farmers' Co-operative Society Limited, was the original allottee of Mitubiri/ Wempa Block 2. There was an admission by the liquidator that there existed disputes about the ownership and sizes of the parcels of land within the said block, but what was clear is that each member was entitled to ½ acres. There is also an admission that the parcels of land



contained in the Registry Index Map(RIM), are not in tandem with what was on the ground. This is to the extent that whereas land parcel No. Mitubiri/Wempa/BK.2/930, can be seen on the Map, the same cannot be located on the ground. The only body that can help this Court shade light on the foregoing is the said Methi & Swani Farmers Co-operative Society and the Land Registrar – Murang’a. Sadly, the said Society has since gone under and DW4 was limited with facts thereof.

21 However, this Court is alive to the Constitutional right of both the Plaintiff and the Defendant herein to own property as submitted by Plaintiff. Perhaps to emphasize, it is important to **reproduce Article 40 of *the Constitution***, which provides as follows;

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - (a) Of any description; and
 - (b) In any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person--
 - (a) To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) To limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--
 - (a) Results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) Is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that
 - (i) Requires prompt payment in full, of just compensation to the person; and
 - (ii) Allows any person who has an interest in, or right over, that property a right of access to a court of law...”

22 This Court has the mandate to protect proprietary rights of both parties herein. Thus, having read through the pleadings and annexures thereto, analyzed the testimonies and guided by the rival written submissions and the authorities thereto, the issues for determination are

- i. Whether the Defendant trespassed into the Plaintiff’s parcel of land
- ii. Whether the Plaintiff is entitled to the prayers sought?
- iii. Who should pay costs for the suit?

I. Whether the Defendant trespassed into the Plaintiff’s parcel of land?

23 The Plaintiff maintains that the Defendant has trespassed unto his land, while the Defendant objects and maintains that he is in occupation of his land. Both parties have title to their respective parcels



of land and are claiming to have duly and legally obtained their titles. Section 26 (1) (b) of the [Land Registration Act](#) gives sanctity to titles held by registered owners. It provides:

The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –

- (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

24 Both the Plaintiff and the Defendant have incontrovertible right over the suit properties as both parties have titles. By dint of the above provisions, both parties have the right to have their titles protected by this Court. What is evident from the Plaintiff's claim is that the Defendant has encroached on his land, and thus the reason that he seeks **mesne** profit and an order of permanent injunction from the Defendant. In seeking to answer this issue, the Court will determine the following;

- a. Where is the Plaintiff's land?
- b. Is the Defendant occupying the Plaintiff's land?
- c. Who is to blame for the confusion if any?

a. Where is the Plaintiff's land?

25 It is important for this Court to determine this for the reason that DW4 testified before the Court that while the Plaintiff's title is contained in the Map, it is not the case on the ground. Whereas the Defendant has his land reflected on the Map and the ground.

26 The burden of proof was on the plaintiff to show that although the Plaintiff and Defendant each have separate titles, that his land exists on the ground. Further that the Defendant had encroached unto the Plaintiff's portion of land, which according to him, the Defendant is occupying entirely. The Plaintiff did not bring out clearly or through evidence before this Court to demonstrate how he was able to identify his parcel of land and the boundaries if any. Interestingly, the Plaintiff testified that his deceased father was a member of the Methi & Swani Farmers Cooperative Society, and thus acquired the land through him. Even though he allegedly acquired the land through his deceased father, there is no evidence that he was ever shown the land by his father, and there was an admission on cross-examination by the PW1 that he never saw the land.

27 As per the report produced in Court by the Land Registrar, the Plaintiff claimed to be the owner of ballot No.930, and claimed to have been shown the land by officials from the Society. The Defendant on the other hand claimed to be aware of the boundaries. According to the Land Registrar's Report, there were no boundaries between the two parcels of land. Importantly, the Report indicated that both parcels measured 0.2023, which is not a reflection of the acreage contained in the title deeds. If this Court was to go by the said Report, then the total acreage would be 0.4046Ha. What this means is that this is only one land. The testimonies of DW3 and DW4 did not aid the Court in any way, but rather threw the Court in the realm of their inconsistency.

28 The question of boundaries is an issue to be determined by the Land Registrar. Section 18 of the [Land Registration Act](#) makes provisions for boundaries and it provides



18.

(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

29 Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the *Survey Act*, Cap. 299.

30 The approximate boundaries are supposed to be in line with the Cadastral Map as indicated in Section 18 of the *Land Registration Act*. This Court has not been called upon to determine the boundary dispute, but to issue an injunction based on alleged encroachment. In determining whether there was an encroachment or not, this Court will have to establish whether there were boundaries erected or not.

31 The Plaintiff is claiming ownership of the land parcel occupied by the Defendant, which as per the Land Registrar's Report, seems to be one at the same. DW4 testified that they gave land based on the RIM, but not the ground. As correctly put out by the Court in the case of Samuel Wangau Vs. AG & 2 others (2009) eKLR, RIM are not authorities on boundaries. The Court held as follows:

However, it is common ground that such maps (Registry Index Map) are not authorities on boundaries..... Indeed section 21(1) of the Registered *land Act* is to the effect that unless the boundaries of a parcel of land has been fixed as provided for under section 22 of the said Act, R.I.M. shall be deemed to indicate only the approximate position and situation of the parcel of land.....It means therefore that when and where there is a dispute as to the position and location of a boundary as in this case, unless the same is a fixed boundary, one has to go beyond the Registry Index Map in solving the dispute.”

32 Section 18(1) of the *Land Registration Act*, is a replica of Section 21(1) of the Registered *Land Act*(repealed) on fixed boundaries. Section 19 of the *Land Registration Act* empowers the Land Registrar to establish boundaries. It provides:

19.

(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.



- (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.
- 33 Presently, it is not clear how the RIM, could be obtained without clear demarcations and boundaries. DW3 admitted that there was no boundary on the ground between the two parcels of land, as at the time the boundary dispute report was availed. She added that the ground measurement for 930 was 0.098 ha. while that of 981 was supposed to be 0.16ha. She observed that “the observation was that the claim and the owner of land parcel No. 930 appears on RIM, but not reflected on the ground”
- 34 It is uncontroverted that the Defendant was the first to obtain ownership of the suit land. From the evidence on record, the Defendant was allocated plot No. 524, which is land parcel No 981, in the RIM. The Plaintiff on the other hand was issued with land parcel No. 930. There is glaring confusion on how he acquired the suit land. In the first instance, he indicated that his father bought him the shares from the Society. There was no evidence that his father was a member of the Methi & Swam Farmers Co-operative Society.
- 35 At the hearing before the Land Registrar and as per the Report filed in Court, the Plaintiff testified that he was the owner of ballot No. 930. Unfortunately, DW2 testified that he was the owner of ballot No. 930. This Court has perused both ballots and notes that whereas the Plaintiff’s ballot is 930, it is indicated as new while that of DW2 only indicate 930. DW4 testified that there was duplicity of ballots. The reason for the foregoing was not explained to this Court and it only remains to be a statement with no evidential support.
- 36 The Plaintiff testified to have been a member of the Society by dint of his father’s membership. As per his documents, specifically a Share Certificate issued by the Society, he was issued with Certificate No. 2257 on the 7th September, 1984. There is no evidence that his father had a Share Certificate. The Society through DW4 testified to have been dealing with adults only. It was the testimony of the Plaintiff that he was born in 1973. He was eleven (11) years when he was allegedly issued with the Share Certificate. He was therefore a minor. While this Court would have held otherwise, had it been established that the Plaintiff’s father was a Member or had done this for and on behalf of the Plaintiff, this Court is guided by the evidence of DW4 that minors could not own property. As per the letter dated 20th May 2014, addressed to the Land Registrar by Methi & Swani Farmers Co-op. Society Limited, the Society requested the Land Registrar to have the Plaintiff registered as the owner of Mitubiri/Wempa/BK.2/930. As per the contents thereof, the Plaintiff bought the suit land. This contradicts his testimony that his father acquired the land on his behalf.
- 37 It is not desirable for this Court to be led by such inconsistency, as to how the Plaintiff acquired the suit land. However, there is an admission by an official of the Society, DW4, that the Plaintiff acquired land from the Society. It was thus the sole duty of the Society to lead evidence before this Court as to the exact location of the parcel of land. While the burden of proof rested with the Plaintiff, the evidentiary burden was shifted to the DW4, to lead evidence. Unfortunately, the Plaintiff did not see the need to include the said Society, which sanctified his title and showed him his parcel of land. As per the boundary dispute report, he admitted that while he was shown the land there was a house and there was farming taking place. This confirms the Defendant’s claim that he is occupying the suit land. There is nowhere in the report that shows that the Defendant has encroached onto the Plaintiff’s land. If any, the Plaintiff’s land is not reflected on the ground.
- 38 Even though the issue of the Plaintiff’s membership in the Society was not clearly raised in the suit, it is relevant to determine it in order to know how he acquired the land, which as per the records had already been allocated to the Defendant. This Court has already found hereinabove that despite the



inconsistency on how the title was acquired, the admission by DW4 that they issued title to the Plaintiff based on the letter dated 20th May 2014, and the receipts, guides the Court in concluding that the Plaintiff's title is authentic.

39 Whether the Defendant trespassed unto the Plaintiff's land or not, could be obtained from the evidence on record. Section 3 (1) of the *Trespass Act*, Cap 294, provides that:

40 Any person who without reasonable excuse enters, in or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

41 The Court in *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR when determining an issue of trespass considered the following findings

35. In *M'Mukanya v M'Mbijiwe* (1984) KLR 761, the ingredients of the tort of trespass were revisited by this Court and restated as follows:

“trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See *Thomson v Ward*, (1953) 2QB 153.”

36. Further, in *Winfield & Jolowicz on Tort*, Sweet & Maxwell, 19th Edition at page 428 states as follows:

Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.” [Emphasis supplied].”

37 Based on the findings of the Court above, there is no evidence that the Defendant has encroached unto the Plaintiff's land. It is thus safe for this Court to conclude that the Plaintiff has not adequately established that he is the owner of the property occupied by the Defendant.

38 As it is, the Plaintiff is holding a valid title, which seems to be just a piece of paper conferring rights, but not reflective of ownership on the ground. He has a right to seek remedy from the Methi & Swani Farmers Co-operative Society and the Land Registrar Murang'a, who, as it appears from the evidence, are the reasons for the confusion and double allocation. In finding so, this Court appreciates the pronouncement of the Court of Appeal in the case of *Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* [2013] eKLR, where the Court held:

The Registration of Titles Act is entirely a product of the Torrens System of registration. The word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently active registerable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration, the person affected is guaranteed of government compensation. This statutory



presumption of indefeasibility and conclusiveness of title under the Torrens System can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved.”

42 To this end, this Court finds and holds that the Defendant has not trespassed unto the Plaintiff’s parcel of land. The Court empathizes with the Plaintiff, who might have fallen victim of the unscrupulous dealings of the society.

II. Whether the Plaintiff is entitled to the prayers sought ?

43 The Plaintiff sought orders for permanent injunction and mesne profit. It is on the premise of trespass that the Plaintiff sought for an order of permanent injunction against the Defendant. A permanent injunction unlike a temporary injunction seeks to give finality to a matter. This was well enunciated by the Court in the case of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR where it held:

A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

9. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties.”

44 Essentially a party should travel beyond the three fold principles established in *Giella v Cassman Brown Co. Ltd* 1973 E.A. 358, and prove his case on a balance of probability. This is in light of the fact that a permanent injunction is conclusive based on evidence adduced.

45 The Court has already found hereinabove that the Plaintiff has failed to establish her claim for trespass as against the Defendant. Additionally, the Plaintiff has on a balance of probability failed to show this Court that the Defendant is occupying his land or is occupying land in excess of his allowable **0.0203ha**, as per the title deed. This Court notes and appreciates that the Plaintiff has a title deed allegedly to the suit property. He has never been in occupation of the said suit land and it is right to find and hold that he has not developed thereon.

46 Be that as it may, he has a right that ought to be protected, but which he has not adequately led any evidence before this Court that the Defendant has infringed on by his occupation. There is no harm that the Plaintiff will suffer if the permanent injunction as sought is not granted. Even so, he has not adduced any shred of evidence to persuade this Court that he is entitled to the permanent injunction. This Court therefore concludes that the Plaintiff has not established his case on the required standard. Therefore, it follows that a permanent injunction cannot be issued against the Defendant and this prayer is not merited.

47 Having found that there was no trespass, the claim for mesne profit cannot be sustained and it must fail. Consequently, it is the finding of this Court that the Plaintiff has failed on a balance of probability to demonstrate that he is deserving of the prayers sought and proceeds to dismiss his claim as contained in the Plaintiff dated 19th January 2017, and filed on the same date.



III. Who should pay costs for the suit?

48 The award of costs is discretionary. The Defendant is the successful party and this Court finds no reasons to deny him costs. Thus the Defendant is awarded Costs of this suit.

49 The upshot of the foregoing is that the Court finds and holds that the Plaintiff has not proved his claim against the Defendant on the required standard of balance of probability.

50 Consequently, the Plaintiff's suit is dismissed entirely with costs to the Defendant herein.

50 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF MARCH, 2023

L. GACHERU

JUDGE

In the presence of; -

Lily Mwende - Court Assistant

M/s Mugo H/B Karanja Kang'iri for the Plaintiff

Mr Gichuki for the Defendant

23/3/2023

