



Karuga & another v Macharia & another (Environment & Land Case 610 of 2013) [2023] KEELC 16929 (KLR) (13 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16929 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 610 OF 2013**

EK WABWOTO, J

APRIL 13, 2023

BETWEEN

ERNEST NGUGI KARUGA 1ST PLAINTIFF

JANE NJERI GOERGE 2ND PLAINTIFF

AND

JAMES MBUGUA MACHARIA 1ST DEFENDANT

ROSE WAITHERA GITAHU 2ND DEFENDANT

JUDGMENT

1. This suit was brought against the Defendants seeking the following reliefs as pleaded in the Amended Plaintiff dated June 14, 2015;
 - a) A declaration that the Defendants actions of trespassing and hiving off a portion of the suit property LR No 20920/8 without consent and or knowledge of both Plaintiffs is illegal, unlawful, tantamount to trespass and an infringement on the Plaintiff's proprietary rights over the suit said property.
 - b) An Order requiring the Defendants by themselves, their servants, agents, employees and or proxies to remove the poles or any other structure erected on the suit premises (LR No 20920/8) portion of the suit and restore the portion of the suit property in issue to its pre-trespass status within a period of fourteen (14) days from the date of the order or within such other reasonable period as the Honourable Court may deem fit to grant.
 - c) A declaration that any purported sale of any portion of the suit property in issue undertaken by the Defendants and the 1st Plaintiff and or any other third



party and without the spousal consent of the 2nd Plaintiff is null and void ab initio.

- d) That in default of the Defendants complying with the orders sought in prayer (b) hereinabove in time or at all, the Plaintiff's be at liberty to remove the said poles and or any other structures erected by the Defendants on the suit property (LR No 202920/8) and restore the same to its pre-trespass status at the Defendants costs.
 - e) A permanent injunction restraining the Defendants by themselves, their servants, agents, employees and or proxies from trespassing and further erecting, building, developing, fencing, alienating and or interfering in whatsoever manner with the Plaintiff's quiet possession and ownership of the suit premises (LR No 20920/8) or any part therefore.
 - f) General damages for trespass.
 - g) Costs of the suit.
 - h) Any other relief this Court may deem fit and just to grant.
2. The 1st Plaintiff who was the initial Plaintiff passed away in 2017 during the pendency of the suit. It was the 2nd Plaintiff's case that the 1st Plaintiff was the beneficial owner of the suit property LR No 20920/8 which was an inheritance as a gift inter vivos by the 1st Plaintiff now deceased from his late father Charles Karuga Koinange and they have been in physical occupation since the 1990s though they are yet to acquire title to the same owing to Nairobi High Court Succession Cause No 998 of 2006 which is yet to be concluded.
3. The suit was contested by the Defendants who filed a joint statement of defence dated April 29, 2021. In their defence the Defendants denied the averments in the Plaintiff and averred that the 1st Defendant entered into a valid sale agreement with the 1st Plaintiff (deceased) on October 4, 2013 and the 1st Plaintiff had the capacity to sell and execute the same. They denied any fraud and pleaded being innocent purchaser for value. They urged the court to dismiss the suit with costs.

The Plaintiffs case

- 4. It was also the Plaintiffs case that on or about May 2015 or thereafter, the Defendant without the Plaintiff's knowledge, consent, acquiescence and or iota of right and justification trespassed into the suit premises and hived off by erecting concrete poles on a portion of the said land with the intention of alienating, constructing on the hived portion.
- 5. It was contended that as a result of the Defendants action, the Plaintiffs were denied usage of the property measuring about two (2) acres and therefore continue to suffer loss and damage.
- 6. During the hearing of the suit, Jane Njeri George testified as the sole Plaintiffs witness in the matter. She adopted relied on her witness statement that was on record and also adopted the 1st Plaintiff witness statement which was admitted under the provisions of Section 35 of the *Evidence Act*. She stated that succession proceedings in respect to the suit property had been done and its administrators were her son and herself even though it is still registered in the names of her father in law the late Charles Koinange.
- 7. It was also her testimony that she was not aware of any agreement done by her late husband in respect to the sale of any part of the property. She told the court that her late husband could not execute any



agreement since he was not in good health and was an alcohol addict and this meant that she was the one in charge of all the issues involving her late husband.

8. She further stated that she was granted a power of attorney in 2007 over the same property and she was still using the same as at the year 2013 when the purported sale agreement was executed. She also referred and produced a medical report dated May 5, 2008 from Nazareth Hospital confirming her husbands' condition.
9. She also added that K Mwaura Advocates were not known to her and neither did she instruct any other Advocate to act them in the said transaction. It was also her testimony that she would attend all meetings and engagements with her husband and further that her husband did not operate any separate bank account. The only bank account they had was a joint account at Cooperative Bank of which she was a signatory and at no time did they ever receive any cheque of Kshs 200,000/- as purchase price.
10. She narrated to the court how Charles Karuga was her first born son who used to misuse her late husband and she had even complained of the same to the Chief and the elders. She also stated that her late husband had also complained of his conduct.
11. She further stated that there was no spousal consent obtained prior to the sale and neither was any consent and approval from the Land Control Board.
12. On cross examination by Counsel for the Defendants, she stated that her the Plaintiffs' pleadings filed in court stated that the 1st Plaintiff was a person of sound mind at the time of filing suit. She stated that the property was still registered in the names of her late father in law Charles Koinange and the same had been gifted to her late husband.
13. She also stated that she was given the power of attorney by her late husband and was the one in charge of his affairs.
14. In reexamination, she clarified that her husband was not mentally ill but only had an alcohol problem. She also stated that she was not aware of what matrimonial property was.

The Defendants case

15. The Defendants case is contained in their statement of defence dated April 29, 2021, the 1st Defendant's witness statement dated April 29, 2021 and the Defendants bundle of documents dated April 29, 2021, the oral testimony that was adduced by the 1st Defendant during trial together with the written submissions dated October 12, 2022 that were filed herein.
16. During, the 1st Defendant, James Mbugua Macharia testified as the sole defence witness. He relied on his witness statement and defendants bundle of documents as his evidence in chief.
17. It was his testimony as reproduced from his witness statement that:-
 1. He entered into an agreement for sale/purchase of all that piece of land measuring approximately two (2) acres to be excised from land reference number 20920/8, hereinafter referred to as the suit property with the 1st Plaintiff.
 2. The aforementioned suit property was part of Succession Cause Number 998 of 2006, in the Matter of the Estate of Charles Karuga Koinange(deceased) but was not part of the disputed properties as per the pleadings filed in the high court at Milimani.



3. The agreed consideration of the suit property was Kenya Shillings Six Million only (Kshs 6,000,000/-) and on execution of the Agreement for sale we proceeded to pay the agreed paid 10% deposit of the purchase price which was Kenya Shillings Six Hundred Thousand Only (Kshs 600,000/-) to the 1st Plaintiff's/Vendor's Advocates on October 2, 2013.
4. It was also a term in the agreement for sale that the vendor's Advocates would hold the balance of the purchase price as a stakeholder but would be allowed to use a maximum sum of Kenya Shillings Four Hundred and Twenty Thousand Only (Kshs 420,000/-) to facilitate the excision of the suit property from land reference 201920/8 and any outgoing in respect of land rent and rates if any.
5. On October 2, 2013 the 1st Plaintiff/Vendor's advocate acknowledged receipt of the duly executed agreement for sale by ourselves and the aforementioned cheque for Kenya Shillings Six Hundred Thousand Only (Kshs 600,000/-)
6. We requested for completion documents from the 1st Plaintiff/Vendor through our advocates vide a letter dated January 14, 2014.
7. In response to our above aforementioned letter the 1st Plaintiff/Vendor's Advocate wrote a letter explaining that they were not in a position to release the completion documents since they were yet to receive the deed plan from the surveyor.
8. The 1st Plaintiff/Vendor's Advocates managed to acquire a certified copy of the deed plan, which they forwarded to Geomeasure Surveyors Limited vide a letter dated February 5, 2014 and copied to our advocates on record.
9. Due to delay in completing the sale transaction our advocates requested the Plaintiff's advocate to grant us vacant possession of the suit property pending completion.
10. The 1st Plaintiff/Vendor's Advocates confirmed that we may take possession of the suit property before completion on condition that our advocates issue a professional undertaking or guarantee.
11. Our advocates then wrote the letter dated May 28, 2014 to the 1st Plaintiff's/Vendor's advocates giving their professional undertaking to remit the balance of the purchase price amounting to Kenya Shillings Five Million Four Hundred Thousand Only (Kshs 5,400,000/-) in exchange of the completion of documents.
12. The suit property was then sub-divided and beacons in my presence and that of the 1st Plaintiff and his advocates and the 1st Plaintiff/Vendor, through his advocates confirmed that I may take possession of the property as demarcated by the set beacons.
13. Consequently, the 1st Plaintiff/Vendor through his advocates requested me to make a further payment of Kenya Shillings Two Hundred Thousand Only (Kshs 200,000/-) being part of the purchase price via a cheque drawn in his favour together with an amended undertaking for the balance of the purchase



price which now amounted to Kenya Shillings Five Million Two Hundred Thousand Only (Kshs 5,200,000/-)

14. My Advocates issued cheque number xxxx for Kenya Shillings Two Hundred Thousand only (Kshs 200,000/-) drawn in favour of the 1st Plaintiff/Vendor together with an amended Professional undertaking to remit the balance of the purchase price amounting to Kenya Shillings Five Million Two Hundred Thousand Only (Kshs 5,200,000/-) to the Plaintiff's advocate in exchange of the completion documents.
15. On February 17, 2015, our advocates wrote to the 1st Plaintiff's/Vendor's advocates requesting for the completion documents and the Plaintiff's advocates responded vide a letter dated February 17, 2015 explaining that the succession matter that involved of Charles Karuga Koinange was now proceeding to distribution of the estate.
16. In a drastic turn of events we received a letter dated June 25, 2015 from JM Njenga & Co Advocates accusing us of trespass and unlawful fencing of part of land reference number 20920/8 and demanding that I immediately proceed to uproot the poles that I had erected on the property.
17. We forwarded the aforementioned letter to my advocates who then wrote to the 1st Plaintiff/Vendor's inquiring what was transpiring since we had been assured all along that the 1st Plaintiff/Vendor would avail the completion documents to us.
18. In response the 1st Plaintiff/Vendor's advocates furnished us with a statutory declaration sworn by the 1st Plaintiff/Vendor confirming that he has received a total of Kenya shillings Eight Hundred Thousand Only (Kshs 800,000/-) from us being part of the purchase price of the suit property and that he gave us vacant possession pending completion of the pending sale transaction.
19. In his aforementioned affidavit the 1st Plaintiff/vendor also denied having filed any suit against ourselves for trespass nor instructing any advocate to file any such suit and further denied having signed any affidavit or witness statement in support of any suit or application against us in regard to the suit property.
20. The 1st Plaintiff had the capacity to sell and sign the sale agreement as he was of sound mind, ready and willing to attend court and explain himself orally in court, be further cross-examined and was mentally sane.
18. Upon cross examination, he stated that he only fenced 2 acres of the land in the year 2015 and has been in possession since then. He also stated that he proceeded to fence the land on the strength of the sale agreement between him and the late Ernest Ngugi Karuga. He also stated that he never knew whether the deceased was a drunkard and neither did he know his wife. He conceded that the agreement was not signed in the presence of the deceased wife since only his son was present. He also stated that he was not aware of any power of attorney.
19. He also stated there was evidence that he paid Kshs 600,000/- as part of purchase price and that the deceased also requested a further Kshs 200,000/- which payment was made through his lawyers.
20. He also stated that payment of about Kshs 5,200,000/- had not been paid even though clause 4.3 of the said agreement provided that the said balance was to be paid on or before the completion date. He also stated that the agreement did not provide when he was to take possession.



21. On further cross examination he stated that the sale agreement did not specifically provide the location of the 2 acres from the entire parcel. He also conceded that no search was carried out, neither did he saw any title, no consent from the Land Control Board was obtained and neither was their any spousal consent obtained.
22. On re-examination, he reiterated that the agreement was signed by Ernest Ngugi Karuga even though the transaction was never concluded and the remaining balance was never paid to him. He never got the deed plan before occupying the land and he denied any fraud in respect to the transaction.

The Plaintiffs submissions

23. The Plaintiffs filed written submissions dated July 4, 2022 through JM Njenga Advocates. In the said submissions, Counsel outlined brief facts of the case and submitted that there exists no binding sale agreement on the following grounds:-
 - a) The 1st Plaintiffs capacity to execute the agreement due to his medical noted limitations to engage into 'concrete transactions' due to limitations associated with his addiction to alcohol which as per the medical evidence before the court effected his ability to 'enter into concrete transactions' to use the words in the medical report of May 5, 2008.
 - b) Lack of spousal consent from the 2nd Plaintiff.
 - c) Lack of Land Control Board Consent.
 - d) Want of consideration.
 - e) The fact that the sale agreement was purportedly signed by the 1st Deceased's Plaintiff yet he had years before donated a power of attorney to the 2nd Plaintiff and as such having donated all his powers, he would not at the same time deal in his own name.
24. On the issue of lack of capacity to contract, it was submitted that the 1st Defendant's addiction to alcohol was no secret it dates back to 2007 as per the medical report on record. It was also submitted that there was no evidence brought by the Defendants to controvert the same. It was submitted that the Plaintiff's first born son Charles Karuga Ngugi was working in cahoots with the Defendants to influence his late father into doing all that he was supposed to do and hence the sale agreement surfacing and the statutory declaration purportedly signed by the deceased 1st Plaintiff on July 8, 2015 and filed in court on July 10, 2015 while on the other hand the deceased 1st Plaintiff swore on oath that he had not sold the land. The cases of *Basavaraji & Others v SMt Adilaksh Mamma [1998] KAE 220* and *Manan J Chuwibhai & Ano v Jitendrakumar C Patel & Anr [2019] eKLR* were cited in support of the Plaintiffs submissions.
25. On the issue of lack of spousal consent, it was submitted that it was not disputed that the 2nd Plaintiff was the spouse to the 1st Plaintiff and that the 1st Defendant had admitted in cross examination that indeed he knew the 1st Plaintiff was married but had not met his wife and hence therefore pursuant to Section 93 (4) of the *Land Registration Act*, spousal consent ought to have been sought failure of which the transaction becomes null and void. The case of *Kadzo Mkutano vs Mukutano Mwamboje Kadasho & Others [2016] eKLR* was cited in support.
26. On the lack of Land Control Board Consent, it was submitted that the land in issue is agricultural land and under the provisions of Section 6 (i) of the *Land Control Act*, the consent of the Land Control Board was required. The cases of *Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR*



and Harambe Co-operative Savings & [Credit Society v Mwilinye Enterprises Ltd \[1982\] eKLR](#) were cited in support.

27. On want of consideration, it was submitted that to the effect that the deceased defendant ever received any payment as purchase price and hence therefore the Defendants could not plead being innocent purchasers for value.
28. It was also submitted that the Defendants had no justification to take possession over the said property and the said action was unlawful and unjustified.
29. The Plaintiffs concluded their submissions by urging the Court to grant the reliefs sought in the amended Plaint dated July 14, 2015.

The Defendant's submissions

30. The Defendants filed submissions dated October 12, 2022. The Defendants framed the following issues for determination;
 - i. Whether the sale agreement entered into between the 1st Plaintiff and the Defendants is valid?
 - ii. Whether spousal consent was required?
 - iii. Whether the Defendants trespassed a portion of Land Reference Number 20910/8?
 - iv. Whether the 2nd Plaintiff is entitled to the reliefs sought?
31. The Defendants submitted that the sale agreement dated October 4, 2013 had a consideration of Kshs 6,000,000/- upon which a sum of Kshs 800,000/- was paid as deposit. The agreement was signed by all the parties. The 1st Plaintiff's signature was witnessed by Kirumba Mwaura Advocates and the Defendants signatures witnessed by William KT Richu Advocate thus being a valid agreement.
32. It was also submitted that the 2nd Plaintiff 's allegations of undue influence, fraud and misrepresentation were not proven.
33. On the aspect of the Land Control Board consent, it was submitted that the land was part of the Estate of Charles Karuga Koinange (Deceased) and had no title deed and hence the land was unregistered and, in the circumstances, there was no need for the Land Control Board consent and further that Section 8 of the [Land Control Act](#) empowers the High Court to extend time for the application of the consent.
34. On the aspect of spousal consent, the Defendants submitted that the suit property did not form part of matrimonial property as it was yet to be transferred to the 1st Plaintiff through transmission.
35. The Defendants submitted that they had not trespassed onto the said property since they had a justifiable cause occupying the same. And that they were also innocent purchasers for value.
36. On whether or not the 2nd Plaintiff is entitled to the reliefs sought, the Defendants urged the court to dismiss the suit since the 2nd Plaintiff had not shown any prima facie case nor proved her case.



Analysis and Determination

37. From the pleadings, the evidence tendered by the parties and the submissions, I am of the view that the issues rising for determination in this suit are the following;
- a) Whether the agreement dated October 4, 2013 between the 1st Plaintiff and Defendants is valid and enforceable?
 - b) Whether spousal consent was required herein?
 - c) What is the effect of failure to obtain the Land Control Board. consent on the transaction between the parties in respect to the suit premises?
 - d) Whether the Defendants are innocent purchasers for value?
 - e) Whether the 2nd Plaintiff is entitled to the reliefs sought in the plaint?
 - f) What orders should issue as to the costs of the suit?
38. The 2nd Plaintiff contended that the agreement dated October 4, 2013 was not valid and enforceable owing to the reasons listed at paragraph 23 of this judgment. The Defendant on the other hand maintained the position that the said agreement was valid and enforcement and hence could not be rendered null and void.
39. During trial the 2nd Plaintiff adduced evidence to the effect that the 1st Plaintiff her deceased husband was had an alcohol problem and had even signed a power of attorney which required her to deal with his affairs. The said power of attorney had not been revoked as at October 4, 2013 which the said agreement was executed between the 1st Plaintiff and the Defendants and in the circumstances the 1st Plaintiff had no capacity to contract.
40. Having analysed the available evidence, and the relevant provisions of law and the above quoted relevant provisions of law and the above quoted decided cases the court finds that the sale agreement was not valid.
41. The 2nd Plaintiff raised the aspect of lack of spousal consent in the transaction. The said issue was challenged by the Defendants on the position that the suit property did not form part of the matrimonial property. The law requiring spousal consent in relation to transactions of this nature, that is to say the *Land Registration Act*, Act No 3 of 2012 as read with the *Matrimonial Property Act*, 2013, were enacted in 2012 and 2013 and commenced on May 2, 2012 and January 16, 2014 respectively. No evidence was tendered by the 2nd Plaintiff to the effect that the suit property was party of matrimonial home and in the circumstances, it is the finding of the court that spousal consent ought not to have been sought as a conditional precedent herein prior to the finalization of the transaction.
42. It was also contended by the 2nd Plaintiff that no Land Control Board consent was obtained in respect to the said transaction. During trial the Defendants indeed conceded that the same was not obtained. It is therefore not in dispute in this case that the Land Control Board consent provided for under the *Land Control Act* was not obtained in this instance. Both parties agree that the suit premises was agricultural land and was therefore subject to the provisions of the *Land Control Act*, Chapter 302 of the Laws of Kenya (hereinafter called 'the Act').



43. The provisions in relation to the Land Control Board have been considered extensively by various courts, the Court of Appeal recently in the case of *Aliaza v Saul (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24 June 2022)* (Judgment) stated as follows;

' 31. I recognise that there is some conflict in the jurisprudence regarding the validity of a transaction for the sale of land where no consent from the Land Control Board has been obtained. I believe, however, that the reasoning and holdings in *Macharia Mwangi Maina, William Kipsoi Sigei v Kipkoech Arusei & another and Kiplagat Kotut v Rose Jebor Kipngok* best capture the spirit of the *Land Control Act* when interpreted through the prism of the *Constitution* of Kenya 2010, particularly section 7 of the Transitional and Consequential Provisions contained in the Sixth Schedule of the *Constitution*. I should observe at this point that these constitutional provisions were not cited and were therefore not the subject of consideration before the Court in the Ole Tukai decision.

32. As was recognized by this Court in the *Macharia Mwangi Maina* case, the *Land Control Act* is an old legislation, enacted in 1967. The public policy considerations underpinning the Act were well articulated in the Ole Tukai decision where this Court observed as follows: 'What is beyond doubt, the paternalistic nuances of its colonial origins notwithstanding, is the fact that the enactment of the *Land Control Act* in 1967 was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in agricultural land, to among other things avoid sub-division of land holdings into uneconomical units, thus undermining agricultural production; to mitigate the danger of landlessness inherent in unchecked sale and alienation of land; to control land holding by non Kenyans, etc. It is for these reasons that in considering whether to grant or refuse consent regarding dealings in agricultural land, the land control board is obliged under the Act to consider, among others, such factors as the economic development of the land in question, the possibility of maintenance or improvement of standards of good husbandry; the agricultural land already owned by the proposed transferee; the fairness or unfairness of the proposed consideration or purchase price; and whether subdivision of the land in question would reduce the productivity of the land.'

44. In essence, the court reiterated that failure to obtain the consent of the Land Control Board required under section 6 (1) of the Act rendered the transaction void. This court adopts the same position.

45. The other issue for consideration by this court, is whether the Defendants are innocent purchasers for value. It was the Defendants case that they were innocent purchaser for value in respect to the transaction that was contracted between the 1st Plaintiff and the Defendants herein.

46. The definition of a bona fide purchaser is one who genuinely intends to purchase the property offered for sale and does not intend to acquire it wrongly. A bona fide purchaser may successfully rely on the bona fide doctrine if he proves that:

- a) He holds a certificate of Title.
- b) He purchased the Property in good faith;
- c) He had no knowledge of the fraud;
- d) The vendors had apparent valid title;
- e) He purchased without notice of any fraud;



f) He was not party to any fraud.

47. The Court of Appeal in [Munyu Maina v Hiram Gatbiha Maina \[2013\] eKLR](#) emphasized the duty of the holder of an impugned title in a claim such as the present one in the following words:

' We state that when a registered proprietors' root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances, including any and all interests which need not be noted on the register.'

48. For a party to successful plead and claim to have been an innocent purchaser for value, he or she must demonstrate the aforementioned factors. In the instance case the from the evidence that was tendered, the 1st Plaintiff did not have capacity to contract neither did he hold a valid title in respect to the property that was purchased by the Defendants. The Defendants therefore cannot plead to have been innocent purchasers for value. In view of the foregoing this court finds that the Defendants cannot have acquired the suit property lawfully on the pretext of being a bonafide purchaser for value. The sale started on a wrong footing, having been premised on the fact that the 1st Plaintiff did not have the capacity to contract and that the transaction was never completed.

49. After carefully considering and analyzing the evidence adduced, the court finds that the Plaintiffs have proven their case to the required standard and the reliefs sought are for granting. In respect to the reliefs sought, the Plaintiffs sought for various reliefs which included inter alia damages for trespass and permanent injunction against the Defendants.

50. Whether the Plaintiffs are entitled to be granted the Permanent Injunction restraining the Defendants on the suit property. This Court has the powers to grant the Permanent Injunction under **Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010** . The principles upon which the court should grant an injunction were set out in the case of *Giella V Cassman Brown & Company Ltd 1973 EA 358* and they are as follows:

' First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.'

51. In the case of [Mrao v First American Bank of Kenya Limited \[2003\] eKLR](#) Bosire JA (as he then was) stated as follows:

' A prima facie case is one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter'.

52. The case of [Kenya Power & Lightning Company Ltd v Sheriff Molan Habib \[2018\] eKLR](#) where the court observed with regards to a permanent injunction that:

' It determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merit 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.'

53. Having considered the foregoing circumstances and being guided by the above authorities, It is the finding of this court that the Plaintiff has met the conditions for grant of the prayer for permanent injunction and I will proceed to grant the same.
54. In respect to whether the Plaintiffs are entitled to General Damages for trespass, In the case of *Park Towers Limited v John Mithamo Njika & 7 others [2014] eKLR*, where the Court held that:-
- ' I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.'
55. The Plaintiffs in their submissions submitted that a sum of Kshs 3,000,000/- would be adequate compensation for damages of trespass. In the case of *Simeon Nyachae & Another v County Government of Mombasa [2020] eKLR* which had similar issues in respect to the instant case, the Learned Judge awarded Kshs 1,500,000/= for general damages for trespass. Considering all the circumstances of this case and doing the best I can, I will grant an award of general damages for trespass in the sum of Kshs 1,000,000/=
56. As to costs, the same is a discretion of the court and looking at the circumstances of this case, I will direct each party to bear own costs of the suit.

Final Orders

57. In conclusion, I hereby make the following orders; I enter judgment for the Plaintiffs against the 1st and 2nd defendants for;
- a) A declaration that the Defendants actions of trespassing and hiving off a portion of the suit property LR No 2090/8 is illegal, unlawful and tantamount to trespass and an infringement on the Plaintiffs proprietary rights over the said property.
 - b) An order requiring the Defendants to remove the poles and other structures erected in the suit property without ninety (90) days from today. Failure of which the 2nd Plaintiff shall be at liberty to remove the same at the Defendants costs.
 - c) A permanent injunction restraining the Defendants from dealing with or in any way interfering with the suit property in any manner whatsoever.
 - d) General damages for trespass of Kshs 1,000,000/-
 - e) Prayer (b), (c), and (d) above shall be subject to a grace period of ninety 90 days from the date of this judgment.
 - f) Each party to bear own costs of the suit.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF APRIL 2023.

E. K. WABWOTO

JUDGE



In the presence of;

Ms. Kimani h/b for Mr. Njenga for the Plaintiffs.

N/A for the Defendants.

Court Assistant: Caroline Nafuna.

