



M'Ituma (Deceased) Suing through Sarah Kathure John v M'Mbijiwe & another (Environment & Land Case 68 of 2008) [2023] KEELC 17431 (KLR) (17 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17431 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 68 OF 2008**

CK NZILI, J

MAY 17, 2023

BETWEEN

**M'RIMBERIA M'ITUMA ALIAS JOHN RIMBERIA (DECEASED) SUING
THROUGH SARAH KATHURE JOHN PLAINTIFF**

AND

KINYUA M'MBIJIWE 1ST DEFENDANT

J. MUGHEDI E NGAI T/A JOCET AUCTIONEERS 2ND DEFENDANT

JUDGMENT

1. By an amended plaint dated February 18, 2009 the plaintiff under a limited grant of letters of administration dated April 15, 2004 brought this suit against the defendants but later on withdrew the case against the 2nd defendant. Her claim was that the late M'Rimberia M'Ituma was the registered owner of Plot Nos 57, 57A & 59 respectively situated in Nkubu market Meru Central which he had extensively developed and improved to the tune of over Kshs 6 million. She averred that on January 27, 2003, the 1st defendant obtained an ex parte order to evict tenants on Plot No 58 Nkubu market in Meru SRMCC No Civil Suit No 115 of 1972 and in the process unlawfully, negligently, and or carelessly demolished the deceased permanent buildings and stock in trade in the suit premises, which were either seized, stolen, or confiscated. She estimated the special damages as Kshs 83,000/=, equipment costing Kshs 70,000/=, and lost earnings of Ksh,50000/= all totaling to Kshs 16,288,000/=.
2. The plaintiff averred that the 1st defendant later on purported to acquire certificate of leases for Plot No 33 and 34 on the same locus in quo as that of Plots No57A & 58, despite her occupation and possession of valid documents.
3. Therefore, the plaintiff prayed for special damages of Kshs 16,288,000, general damages and a declaration that Plot No 57A Nkubu market belonged to the deceased and the leases issued for Plot



Nos 33 and 34 purporting to be on the locus in quo of Plot No 57A were null and void. The amended plaint was accompanied by a case summary dated June 8, 2015, and issues dated June 8, 2015 and January 24, 2014. List of documents dated December 16, 2011, a further list of documents dated March 23, 2022.

4. Through an amended defense and counterclaim dated April 11, 2014, the 1st defendant opposed the claim on the basis that he was wrongly sued, that Plot Nos 57, 58 (a) & (b) and 59 Nkubu market did not exist and have never legally existed since no valid allotment letters were in existence in respect of such plots.
5. Further, the 1st defendant averred that he legally owned plots No 33 & 34 Nkubu market, and any action that might have been taken could only have been on Plot Nos. 33 & 34 Nkubu market, originally unsurveyed Plot No 58 Nkubu market. The 1st defendant denied that the 2nd defendant was his agent and that he was negligent. He craved leave of court for the beacons for Plots Nos 33 & 34 Nkubu market to be marked on the ground. The 1st defendant denied receiving any demand notice from the plaintiff.
6. By way of a counterclaim, the 1st defendant averred that he was a valid owner of Plots Nos 33 & 34 formerly unsurveyed Plot No 58 Nkubu market, since allocation by the County Council of Meru in 1967, but which was invaded by the plaintiff in 1971, alongside other people, who developed illegal structures therein and illegally subdivided it. The 1st defendant averred that he filed a suit and a judgment was issued in his favor with the plaintiff among other people being declared as trespassers to his plots
7. The 1st defendant averred that in 2008, he was issued with a grant for 99 years and lease certificates by the Commissioner of Lands conferring him absolute and indefeasible titles to the said properties and extinguishing any interest on the part of the plaintiff. He prayed for declaratory reliefs that he exclusively owns the plots and that the plaintiff is a trespasser as previously declared by the Court of Appeal.
8. From the court record, there is no indication if the counterclaim was accompanied by a verifying affidavit and or paid for as regards the key prayers sought. The amended defense and counterclaim are accompanied by a list of documents dated April 4, 2014, a case summary and agreed issues dated June 25, 2015, a witness statement dated November 16, 2019, further list of documents dated November 16, 2019, further, a further list of documents dated February 8, 2022.
9. By consent of the parties, a scene visit was undertaken on April 9, 2014 and a report was filed before the Deputy Registrar on July 9, 2014. Meantime the plaintiff dropped her claim against the 2nd defendant.
10. Following directions given on October 26, 2021 under Order 18 of the *Civil Procedure Rules*, parties opted to start the suit denovo. At the trial, Sarah Kathure John testified as PW 1 and adopted her witness statement dated November 10, 2021 as her evidence in chief. Her testimony was that Plot No 57A originally belonged to her late father as allocated to him vide Meru County Council Minute No 5.4.1972, which he extensively developed after his building plans were approved by the Ministry of Health and the County Council of Meru. She relied on the physical planer report dated 27.6.2014 before the court confirming the ownership of the disputed plots.
11. Further, PW 1 told the court that on January 27, 2003 the defendant obtained an ex parte court order and demolished her permanent buildings and their contents on Plot No 57A, 57B, and 59 Nkubu market given the owner of Plot No 57A yet she was party to the suit or the orders, since her plot No 57A was separate from Plot No 58, to which the order was directed to. PW1 said that out of the 1st defendant's negligence, she had lost over Kshs 6.5 million of destroyed goods and household goods worth Kshs 6 million. The witness termed the alleged certificate of the leases as obtained during the



pendency of this suit and which could include her Plot No 57A as she has continued to pay rent and rates to the County Government of Meru.

12. PW 1 produced the document in her list of documents dated December 16, 2011 namely the list of stock in trade as P. Exh No (1), damages report as P. Exh No(2) together with the list of items destroyed as P. Exh No(3), survey report as PMFI No (4), copies of leases as P.Exh No 5(a) & (b), court order as P. Exh No (6), the decision in Nyeri appeal 124/2003 as P. Exh No (7), letter dated 8.6.1981 as P.Exh No (8), a bundle of receipts as P. Exh No (9), copy of the plan as P. Exh No (10), extract of minutes of 1972 as P. Exh No (11), a bundle of receipts as P. Exh No 12 and photographs as P.Exh No (13).
13. PW 1 told the court that all her plans to construct had been duly approved by the county council including being issued with permits to run a wholesale business, some of which receipts and permits were destroyed during the eviction. In cross-examination, PW 1 told the court that she had obtained a limited grant to sue on behalf of the deceased's estate before the court. Regarding the case in 1972, PW 1 said that it went up to the Court of Appeal but denied that the said court declared her plot number as invalid or an irregular subdivision. Shown the leases for Plot No's 33 & 34, PW 1 told the court that, that could not have happened since there was a pending dispute. Additionally, PW 1 told the court that some of her documents including electricity and water connectivity receipts were all destroyed during the demolition. PW 1 disputed that P. exh No 6 had authorized any demolition of her plot.
14. Concerning the counter-claim, the plaintiff insisted that the plot was validly hers regardless of the certificates of leases belatedly issued to the 1st defendant.
15. In re-examination, PW 1 confirmed that she had a valid limited grant which was also included in the 1st defendant list of documents dated February 11, 2003 as limited grant ad colligenda bona. PW 1 clarified that her Plot was No 57A and was not included in the eviction /demolition order.
16. Francis Gitonga M'Rimberia testified as PW 2. He adopted his witness statement dated February 8, 2019 as his evidence in chief. Associating his evidence with that of PW 1, PW 2 told the court that the case before the court was on Plot No 57 (2) (a) and not Plots No's 33 & 34, which were distinct and on separate localities on the ground.
17. Kinyua M'Mbijiwe the defendant testified as DW 1. He adopted his witness statement dated November 18, 2019. He told the court that in 1967, the Meru County Council allocated Plot No 58 at Nkubu market to his late father and by a letter dated June 26, 1970, the rent payable was communicated. DW 1 said that in 1972, his late father noticed that the plaintiff was carrying out some construction work on his plot, allegedly subdivided by councilors to her among other persons. DW 1 told the court that his late father found his plot on the county council register canceled but undated, leading to some correspondence with the Commissioner for Lands dated 23.8.1972. He later on filed a suit on November 17, 1972, for eviction of the intruders whose decree was granted on November 18, 1972.
18. DW 1 said that efforts by the plaintiff to lift the injunction orders were unsuccessful as the application was dismissed on March 23, 1973. He said a confirmation by the county council on his ownership was also made. In addition, DW 1 told the court that the trial court then issued general damages of Kshs 2000/= against the plaintiff for trespass to his property leading to an appeal both at the High Court and at the Court of Appeal. DW 1 said that he evicted the plaintiff in 2003 and took over vacant possession to date and has been leasing out the property to tenants, whom the plaintiff has sued in Nkubu ELC No 85 of 2019, but has been stayed to await the outcome of this suit.
19. DW 1 denied any alleged allocation of plot No 58 to the plaintiff, since there was now a new Paid Development Plans approved and new plots issued as plots No 33 & 34 Nkubu market meaning those



- Plot Nos. 58A, 58B, and 59 Nkubu market as not exist as held by the Senior Residence Magistrate's court and the Court of Appeal. Further, the DW1 testified that the appeal by the plaintiff was unsuccessful. He asked the court to find the suit lacking merits.
20. In support of his case, the 1st defendant produced a judgment in Civil Appeal No 13 of 1980 delivered on February 21, 1984 D. Exh No 1, ruling by the Court of Appeal delivered on June 13, 2013 in Civil Appeal No 279/07 as D. Exh No (2), ruling in the Court of Appeal in Civil Appeal No 324/2007 delivered on April 18, 2008 as D. Exh No (3), ruling in Civil Appeal No 124/05 delivered on July 31, 2007 in D. Exh No (4) official searches for Plots No 33 & 34 as D. Exh No (5) & (6), letters dated May 6, 2008 and April 17, 2008 as D. Exh No (7) & (8), paginated receipts dated April 29, 2008 and May 13, 2008 as D. Exh No (9) and (10), letters dated March 31, 2008, March 14, 2008 and March 14, 2008 as D. Exh No (11), (12) & (13), payment receipts dated 12.3.2008 as P. Exh No (15) and (16), letters dated 13.2.08 as D. Exh No (17) and (18), allotment letter dated 11.2.08 as D. Exh No (19), lease for plot No 34 as D. Exh No (20) certificate of the lease as D. Exh No (210), letter of allotment for plot No 33 and its lease as D. Exh No 23 & 24, letter of inquiry of the approval of the issuance of letters and allotment as D. Exh No (25), letters dated January 31, 2008, January 29, 2008 & June 13, 2007 as D. Exh Nos (26), (27) & (28), (29) & (30), minutes dated December 15, 1967 as D. Exh No (31) letters dated October 26, 1972, August 25, 1972, February 1, 1977, August 25, 1970 & February 7, 1977 as D. Exh No's 32-36, Paid Development Plan for Plot No 33 & 34 as D. Exh No (37), cadastral map for Plot No 33 & 34 & RIM maps as D. Exh No (38) & (39), letter dated 8.4.2006 as P. Exh No (40), pleadings in Nkubu ELC No 85/19 as D. Exh No (41) demand letter dated 14.8.2019 & 19.8.2019 as D. Exh's No (42) and (43) and lastly, a judgment in Wilfred Maigene Stephen vs Kinyua Mbijiwe in ELC No 90 of 2008 as D. Exh No (44). He urged the court to allow his counterclaim.
 21. In cross-examination, DW 1 told the court that he was not aware of any plot existing as Plot No 57A Nkubu. Further, he told the court any dispute relating to Plot No 57A was frivolous since he never gave auctioneers any instructions to demolish structures on Plot No 57A. Concerning the court scene visit report dated June 27, 2014. DW 1 said that he was not privy to the same and was unaware of its contents. He denied that the demolition following a court order had caused any damage or loss to the plaintiff since any structures on Plots No 33 & 34 were illegal. DW 1 reiterated that several court decisions had confirmed that the plaintiff had no plausible claim to his plot since her Plot No 57A did not exist in law or fact and was not registered by any relevant authority otherwise, it was an illegal allocation.
 22. DW 1 clarified that there was a valid demolition order dated 8.6.1974 and a valid injunction issued on 18.11.1974. Despite his certificate of a lease, DW 1 told the court that the plaintiff had no legal ownership documents of the plot as confirmed in various court decisions, hence the reason that he was seeking eviction orders in D. Exh No (41).
 23. Following the close of the defense testimony, parties were directed to file written submissions by March 13, 2023. The 1st defendant by written submissions dated March 16, 2023 submitted that his original Plot No 58 was subdivided into Plot Nos 57, 58, 59, through a second allocation and mutation which had not been sanctioned by the county council as held in the Court of Appeal No 13 of 1980. He submitted that out of that finding, a visit to the locus in quo generated a report dated June 27, 2021 which showed that plot nos. 33 & 34 overlapped what was on the ground as Plot No 57A.
 24. Further, the 1st defendant submitted that he had subsequently obtained certificates of leases for his two plots and was a legal title holder, unlike the plaintiff who was riding on an illegally acquired subdivision. Therefore, the 1st defendant urged the court not to be used to sanction illegality as held in *Alberta Mae Gacie vs AG & others* (2008) eKLR. Relying on *Winfred Maigene Stephen vs Kinyua Mbijiwe* (2020) eKLR, the 1st defendant urged the court to find the leases valid.



25. On the counterclaim, the 1st defendant urged the court to find that the plaintiff's claim stood on quicksand since her allocation was illegal and could not enjoy the protection of the law. Further, the 1st defendant submitted that his allocation of the title came before the plaintiff and so guided by the case of *Gitwany Investment Ltd vs Tajmal Ltd & others* (2006) eKLR, which cited with approval *Wreck Motors Enterprises vs Commissioner of Lands and others* (1997) eKLR and *Faraj Maharus vs J.B Martin Glass Industries & 3 others* (2005) eKLR, this court should find the first in time must prevail in absence of irregularity, unprocedural, fraud or acquisition through corrupt means.
26. As regards special damage, the 1st defendant submitted that since the occupation by the plaintiff was illegal in the first instance and secondly, the eviction had been sanctioned by a valid lawful court order over the whole of Plot No 58, and lastly that the plaintiff had failed to specifically plead and prove special damages, her case must fail and the counterclaim be allowed with costs. The plaintiff did not file any submissions as directed at the writing of this judgment
27. The court has carefully gone through the pleadings, evidence tendered, written submissions and the issues for determination raised by the plaintiff in his list dated January 24, 2014 and June 8, 2015 and the 1st defendant's list dated June 25, 2015.
28. It is trite law that parties are bound by their pleadings and issues flow from pleadings. Parties are the persons who set the agenda and so a court of law must determine issues flowing from pleadings and has no room for any other business apart from what is pleaded and proved or disproved by the parties. See *Stephen Mutinda Mule & 3 others vs IEBC* (2014) eKLR, *Raila vs IEBC* (2014) eKLR.
29. To this end, parties must not be allowed to travel outside the parameters they have set in their pleadings. Having said this, the issues for the court's determination are:
 - i. If there are proper pleadings before the court.
 - ii. If the plaintiff can file and prosecute this suit on behalf of the estate of the late M'Rimberia M'Ituma.
 - iii. If the 1st defendant's actions on January 27, 2003 were negligent, illegal, unjustified, and amounted to trespass to the plaintiff's Plot No 57 Nkubu market.
 - iv. If the plaintiff should have been affected by a court order which she was not privy to.
 - v. If the plaintiff suffered any loss or damage out of the demolition/eviction exercise carried out by the 1st defendant on January 27, 2003.
 - vi. If the plaintiff has proved any such loss and damage to the required standard.
 - vii. If the 1st defendant is liable for such loss or damage.
 - viii. Whether the 1st defendant pleaded proved and is entitled to the reliefs sought in the counterclaim.
 - ix. What is the order as to costs?
30. The primary documents in this suit are the amended plaint dated February 1, 2009 and the amended defense and counterclaim dated 11.4.2014
31. At paragraph 1 of the amended plaint, the plaintiff is described as bringing this suit on behalf of the late M'Rimberia M'Ituma alias John M'Rimberia (deceased) according to a limited grant of letters of administration order dated April 15, 2004 who used to own and had extensively developed Plot



- No 57A & 59, Nkubu market. The verifying affidavit sworn on February 18, 2008 was unfortunately signed by the deceased and not PW1.
32. The heading of the plaint indicated that the deceased was suing Sarah Kathure John instead of the other way round. In paragraph 6 of the amended plaint, it was averred that the deceased passed on 4.7.1996. Therefore, could he have possibly been the one who swore the affidavit and filed the suit? The answer is No To compound the whole thing if at all the legal representative was in possession of a limited grant, none was produced in this suit. I shall revisit this issue shortly. Coming to the amended statement of defence and counterclaim dated April 11, 2014, the same was not accompanied by a verifying affidavit in line with Order 7 *Civil Procedure Rules*. There is also no indication that there was the payment of the requisite fees for the two prayers sought in the counterclaim, which in law amounts to a cross-suit.
 33. Further to this, the counterclaim does not state which party it is brought against in view of the fundamental error demonstrated above as to who is the plaintiff in this matter. It does not describe the capacity of the person sued at all.
 34. Asked in cross-examination, about the letters of grant, PW 1 referred the court to a limited grant appearing on the 1st defendant's further list of documents dated November 16, 2019 in PMCC No 85 of 2019 Nkubu Law courts. The court has had a look at the said limited grant issued on February 11, 2003 by the High Court of Kenya Meru in Succession Misc. No 46 of 2003. It is a limited grant of letters of administration ad colligenda bona under Section 67 (1) of the *Law of Succession Act*, limited only to collecting, getting in and receiving the estate and doing such things as may be necessary until a further representation is issued to Sarah Kathure John.
 35. It does not grant the PW 1 right to sue or prosecute on behalf of the estate of the deceased.
 36. *Locus standi* has been defined as an authority to do something. In *Morjaria vs Abdalla* (1984) KLR 490 *Martha Ndiro Odera vs Come Corns Africa Ltd* (2015) eKLR, the court said that ad litem colligenda bona cannot clothe a party with power to sue or be prosecuted for the estate of the deceased. The court held that unless a party acquires a limited grant under section 54 of the *Law of Succession Act* or a limited grant colligenda bona specified the role of suing or prosecuting such a party appearing in court on behalf of the estate of the deceased is like a court acting without jurisdiction.
 37. In my considered view therefore, I find that the plaintiff herein in whatever description made in the amended plaint or the amended defence and counterclaim lacks the capacity to sue and be sued in this suit on behalf of the estate of the late M'Ribmeria M'Ituma.
 38. The next issue is whether the entry into Plot No 58 by the 1st defendant on January 27, 2003 was justified in law. Parties in this suit have belabored the point on who owns the Plot No 58, 57A and 59 and if the two plots overlap each other.
 39. In paragraph 17A of the amended plaint, the plaintiff acknowledged that the 1st defendant has acquired leases for Plot No 33 and 34 on the same locus in quo of Plot No 57A and 58. She has sought a declaration that Plot No 57A Nkubu market is the property of the deceased and that leases issued for Plots No's 33 & 34 be nullified and or voided.
 40. On the other hand, the 1st defendant in the amended defence and counterclaim averred that he legally owns Plot No 33 & 34, Plots No 57, 58A, 58B & 59 have never legally existed in 2008, he acquired titles to the two plots which are bonafide and indefensible and therefore he should be entitled to peaceful and quiet enjoyment of his properties at the exclusion of the plaintiff who was legally evicted from his land by a valid court order.



41. Any party seeking to have a court validate an assertion in a pleading has the burden of proof of approving or disproving that fact. Similarly, the burden of proof is on that party who stands to lose if a certain fact was not proved. In this case, the burden of proof was on the plaintiff to prove that as a matter of fact, she lawfully owns and occupies plot No 57 Nkubu market to the exclusion of the 1st defendant so as for the court to make a finding that the 1st defendant trespassed into it and committed acts of wastage as pleaded in the amended plaint.
42. In the case of *PankajKumar Hemraj Shah & another vs Abbas Lali Ahmed and 5 others* (2019) eKLR the court cited with approval *Benja Properties Ltd vs Sydena Mohamed Bursahannidin Sabed & others* (2015) eKLR, where it was held that all titles to land were ultimately based upon possession in the sense that the title of a man seised prevails against all who can show no better right to seisin.
43. The court cited Section 116 of the *Evidence Act* that when the question is whether any person was the owner of anything which he was shown to be in possession, the burden of proving that he was the owner was on the person who affirmed that he was not the owner.
44. In this suit, the defendant has produced documentary evidence showing that he has a better title than the plaintiff on the suit land, which facts have also been confirmed by the courts starting from the Senior Magistrate's Case No174of 1972 up to the Court of Appeal and a number of decisions in the High Court.
45. The 1st defendant has also pleaded and testified by way of documents that other than a letter of an allotment he has obtained a certificate of lease for the two plots in 2008.
46. Additionally, the 1st defendant pleaded and produced documents including the scene visit report it the effect that the purported Plot No 57, 58A, 58B and 59 do not exist in the registry of land and in documents of the County Government of Meru and therefore the plaintiff's suit was built on quicksand since the facts as pleaded by the plaintiff have not been backed by any valid documentary evidence showing that she holds a better title to the land, unlike him.
47. Other than producing the minutes, the plaintiff failed to back her evidence with rival ownership documents from the allotting authority. No evidence was called or tendered by the County Government of Meru to dispute that the certificate of leases held by the 1st defendant were not issued to him with their concurrence as the head lessor for the plots.
48. Further, other than seeking for the court to declare the certificates of titles to Plots No 33 & 34 as null and void, the plaintiff did not base or plead let alone prove her claim on the exceptions to the legality of a title as provided under Article 40 (6) of the *Constitution* as read together with Sections 24, 25, 26, 28 & 80 of the *Land Registration Act*.
49. Even though the plaintiff says she has been in possession of the suit parcel since 1972, she had, as held in *Munyū Maina vs Hiram Gathiba Maina* (2013) eKLR, to prove how she had acquired the title and how her acquisition was legal. She had to adduce cogent and tangible evidence showing the root cause of her claim to the land.
50. She had to challenge the registration on account of fraud, misrepresentation, impropriety, unprocedural and acquisition by way of corrupt means, fraud must be pleaded and proved. See *Aritbi Highway Developers Limited vs West End Butchery Limited* (2015) eKLR & *Virjay Mojararia vs Nasingh Madhusing Darbar & another* (2000) eKLR, *Ratilal Gordhanbhai Patel vs Lalji Makanji* (1957) E.A 314 *Elizabeth Kamene Ndolo vs George Mutota Ndolo* (1996) eKLR.



51. No evidence was tendered before this court to impeach the titles held by the 1st defendant. Counsel for the 1st defendant has submitted that the issue of ownership of Plot No's 57, 58A, 58B and 59 Nkubu market was determined in the Court of Appeal No's 13 of 1980 and 279 of 2007 and 324 of 2007 and 124 of 2003. In *Wilfred Maigene Stephen* (*supra*) the legitimacy of the Plot No's 33 & 34 was upheld. Parties are bound by their pleadings and issues flow from pleadings as held in *Galaxy Paints Co. Ltd vs Falcon Guard Ltd* (2000) eKLR.
52. Even though the 1st defendant in his counterclaim pleaded legality and regularity in the manner that he acquired the certificate of title deeds in 2008, the plaintiff never filed a reply to defence and defence to the counterclaim to dispute those assertions. Therefore, my finding is that the plaintiff has failed to plead and prove illegality or fraud in the manner that the 1st defendant acquired the certificates of title which have now crystallized and are protectable in law. The titles to land clothe the 1st defendant with a better title unlike those of the plaintiff which are yet to mature into the ambit of registration. See *Wilfred Maigene Stephen* (*supra*).
53. As to whether the certificate of title held by the 1st defendant for Plot Nos 33 and 34 overlap the plaintiff's Plot No 57 the Court of Appeal settled that issue in Civil Appeal No 13 of 1980. Even though the plaintiff was not a party, to the suit the Court of Appeal pronounced itself on the effect of its decisions on such parties at page (9) that Plot Nos 57 & 59 belonging to M'Rimberia and Wilfred were part of the original Plot No 58.
54. The next issue was whether the 1st defendant was justified in executing a decree against the plaintiff in 2003.
55. In Civil Appeal No 124 of 2003 delivered on July 31, 2007 the Court of Appeal held that the decree holder was barred from executing the judgment in the 1972 case due to the effluxion of time under Sections 4 & 7 of the *Limitation of Actions Act*.
56. In the Court of Appeal Civil Appeal No 124 of 2003, the issue was on whether the eviction order for a judgment delivered on February 21, 1984 was enforceable under Section 7 of the *Limitation of Actions Act*. The court held that Section 7 barred a party from bringing of an action for the recovery of land after the end of 12 years from the date in which the right of action accrued.
57. In this suit the plaintiff is complaining that the demolition was wrong, illegal and caused her loss and damage.
58. In paragraph 7 of the amended plaint the plaintiff was specific that the court order in execution on January 27, 2003 was pursuant to Meru CC Case No 115 of 1972.
59. At paragraph 6C of the amended defence and counterclaim it was averred that any action that the 1st defendant might have taken could only have been on plots Nos 33 & 34 Nkubu market, originally unsurveyed Plot No 58 Nkubu market. In re-examination by his counsel on record, the defendant told the court that the demolition order dated 8.6.1974 was valid legitimate and was lawfully executed against the plaintiff as an illegal occupation on plot No 58.
60. The burden was on the defendant to prove the legality of his actions. It is trite law that a decree for the recovery of land cannot be executed after 12 years. If the order was dated 8.6.1974, the last day for its execution would have been on 8.6.1986.
61. This was the holding in the defendant's own case *M'Ikiara M'Rinkanya & another vs Gilbert Kabeere M'Mbijiwe* (2007) eKLR. In the case of John Mwaniki Mwaura vs John Ndonyo Njuguna (2018) eKLR, the court was asked to extend the time to execute a decree on eviction after 12 years since the



decree had been caught up by Sections 4 (4) and 7 of the Law of Limitation Act. The court declined to do so since the time had positively accumulated to the trespasser and who had an accrued right to seek for adverse possession. See also *Walter Kamau Kinyanjui vs Wambui Wambu* (2005) eKLR, Joseph Mwangi Theuri & 37 others vs David Gitonga Githinji (2016) eKLR & Joseph Macharia Mwangi & another vs Kimeu Ndambuki & another (2012) eKLR.

62. In this suit, the 1st defendant failed to demonstrate whether he had issued a notice to show cause against the plaintiff. The plaintiff has said that she was not a party to P. Exh No (6). Other than the order, none of the decree or order of eviction were produced before this court by the 1st defendant. If then the order was issued on 16.11.2001, it means that by the time the defendant went to execute and evict the plaintiff, he was basing his actions on a decree which was already stale. There was no evidence that the 1st defendant gave notice to the plaintiff of the intended demolition, since the order was granted *ex parte* on the issue of loss & damage. My finding is that the 1st defendant took the path of the law of the jungle and should not benefit from the breach of the law. The plaintiff has produced a valuation report for the damage caused to her property and business. The defendant did not challenge it at all.
63. Similarly, the plaintiff admitted that she is still occupying Plot No 34. These facts were admitted by the 1st defendant in his testimony. If then the decree or demolition order was covering the whole of Plot No 58 as it was, how comes that the 1st defendant left out Plot No 34 and now wants this court to be used to finalize the eviction process over 50 years down the line?
64. Obviously, the counterclaim by the 1st defendant amounts to a recovery of land after 12 years or as an attempt to regularize an execution carried out in 2003 against a decree which was already caught up by Sections 4 & 7 of the *Limitation of Actions Act*.
65. Given that admission, I find that the 1st defendant's actions were unjustified, illegal and against the law, since even at the time his rights to own Plot Nos 33 and 34 only crystallized in 2008 when he was issued with certificates of title. Litigation was also live before the court especially Civil Appeal No 124 of 2003 which eventually established that the decree relating to the suit plots was already statute barred.
66. As concerns prove of loss and damages, special damages must be specifically pleaded and proved.
67. In paragraphs 6, 16 & 17 of the amended plaint the plaintiff has itemized special damages of totaling to Kshs 3,075,000/= plus 50,000 per month all totaling to Kshs 16,288,000/=. Filing fees for the special damages was not paid for. A valuation report by SK Mburu & Associates valued the property at Kshs 2,075,000/= as at 4.7.2002. The stock in a trade dated 14.12.2011, had no value for the listed items. No payment receipts were produced to prove the date of purchase or the expected income out of the stock.
68. That notwithstanding the 1st defendant in paragraph 6 of a replying affidavit filed on July 13, 2017 admitted and the plaintiff's structures on his property were illegal and built-in abuse of law. He said that they were demolished since the plaintiff had trespassed into his Plot No 33 & 34.
69. In paragraph 6 of the affidavit the defendant admitted that the plaintiff was at a party to the Court of Appeal decision. This means that the defendant knew that his decree was statute barred and since the plaintiff was not a party to it on what basis was he executing on? D. Exh Nos 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 40 were all issued after the demolition and after the court of appeal had found the decree statute barred. On 31.7.2007 so in essence, the 1st defendant was regularizing his ownership of the land in order to beat the rights of the plaintiff whom he has as at defence stage admitted that she continues to occupy Plot No 34 P. Exh No (7) acknowledged as a matter of fact the presence of the plaintiff on the suit premises.



70. In D. Exh No 2 the ruling was delivered on June 13, 2013 but the suit had not been determined on merits. It is therefore not true that the Court of Appeal determined the issue before this court. Other than making a mere denial to paragraphs 6, the 1st defendant did not deny the contents of paragraphs 16 & 17 of the amended plaint. Similarly, the 1st defendant did not challenge the authenticity of the documents produced as P. Exh No (6) the order to evict dated November 16, 2001.
71. The 1st defendant would not in law have used P. Exh No (6) to evict the plaintiff from the suit premises under a guise of executing a lawful court order. The order was issued *ex parte* and directed at two defendants who were not the plaintiff herein.
72. The OCS who supervised the eviction or demolition was not called to testify and give an inventory of what was found on the suit premises. The order itself talks of illegal structures and buildings. On what basis the same was being termed as illegal is not clear since no decree was attached to that effect. The date of the decree which was being executed was missing in the order. No report was made also after the eviction to show the status of the suit premises.
73. In essence, therefore, the plaintiff was condemned unheard and her rights violated at the mercy of the 1st defendant. This court cannot be used to sanction illegality and assist the 1st defendant to benefit from an illegality especially where he was trying to steal a march against the plaintiff. The 1st defendant abused the court process and used an order dated November 16, 2001, couched in a manner to avoid section 4 (4) and 7 of the Limitations of Action Act without complying with Order 22 rule 18, 19, 20, 28, 31 of the [Civil Procedure Rules](#) as read together with Sections 38 of the [Civil Procedure Act](#).
74. In [Willis Onditi Odhiambo vs Gateway Ins. Co. Ltd](#) (2014) eKLR the Court of Appeal interpreted sections 4 (4) of the [Limitation of Actions Act](#) and observed that the saving framework in Section 24 thereof, was not available to a litigant who failed to enforce his judgment within the time frame stipulated in Section 4 (4) above.
75. In similar circumstances the court in [Mwangi Njuguna & 1501 others v Moses Kubai & another](#) (2017) eKLR declined the invitation as I do here with the 1st defendant's counterclaim.
76. As regard damages the court has already found that the process of demolition was illegal and unlawful. Guided by [Munaver N. Alibhai t/a Diani Gallery vs South Coast Holding Ltd](#) (2020) eKLR, the court cited with approval [Richard Okaka Oloo vs South Nyanza Sugar Co. Ltd](#) (2013) eKLR, and in [Tana & Athi Rivers Development Authority vs Joseph Mbindyo & 3 others](#) (2013) eKLR, the court said that special damages must be pleaded and specially proved.
77. In [Mattarello Limited vs Michael Bell and another](#) (2018) eKLR the court said a country whose citizens have chosen to be led by the rule of law gets to know, if one be otherwise under some illusion that arbitrariness and or just impunity was not a virtue but a vice which cannot be countenanced but must be curtailed and discouraged.
78. The court said that a violation of the right of due process in the law invites a reprieve or remedy to the violation.
79. In this suit, though the plaintiff produced P. Exh No(1), (2) & (3) there were no accompanying reports by experts of damage assessment. I find a claim of special damages to the tune of 16 million is unproved.
80. Concerning general damages in [Abdullah Mohamed Farah & 3 others vs County Government of Mandera & another](#) (2022) eKLR the court cited with approval [Moi Education Centre Co. Ltd vs Wilson Musembi & 6 others](#) (2017) eKLR and [Mitu Bell Welfare Society vs KPA and 2 others](#) (2021) eKLR, on general damages for unlawful eviction.



81. In this suit the plaintiff deserved to be treated with dignity and equality before the law. I think an award of general damages of Kshs 5 million would have been appropriate in the circumstances if the plaintiff's suit had succeeded. For the reasons aforementioned, however her claim fails for lack of capacity. The 1st defendant's counterclaim also fails and is dismissed.

82. Each party to bear her or his own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 17TH DAY OF MAY 2023**

In presence of

C.A John Paul

Nyenyire for the plaintiff

Mrs. Muia for the defendant

HON. C.K. NZILI

ELC JUDGE

