



**Wasike v Khisa & 5 others (Environment & Land Case 33 of 2014)
[2023] KEELC 19040 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19040 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 33 OF 2014**

EC CHERONO, J

JULY 25, 2023

BETWEEN

**DORCAS INDOMBI WASIKE ALIAS DORIKA INDOMBO
WASIKE PLAINTIFF**

AND

**BENSON WAMALWA KHISA 1ST DEFENDANT
ERNEST MUTUNGA KUYA 2ND DEFENDANT
JULIUS ASHIKANGA ALUTA 3RD DEFENDANT
JOHN NALIANYA SANYA 4TH DEFENDANT
JOHN NYONGESA NASIUMBA 5TH DEFENDANT
ABDALLA MUSA ABDI 6TH DEFENDANT**

JUDGMENT

Background

1. By a plaint dated 12th February, 2014 the plaintiff Dorcas Indombi Wasike sued the defendants Benson Wamalwa Khisa, Ernest Mutunga Kuya, Julius Ashikanga Aluta, John Nalianya Sanya, John Nyongesa Nasiumba and Abdalla Musa Abdi for orders that; -
 - a. The 1st to 6th defendants be ordered to vacate the 5.3 acres originally part of L.R No. Bungoma/ Naitiri/83 and presently a part of L.R No. Bungoma/ Naitiri/1118 registered in the name of Benson Wamalwa Khisa within fourteen (14) days of service of a decree.
 - b. In the event the 1st to 6th defendants refuse, neglect or fail to vacate the 5.3 acres portion originally part of L.R No. Bungoma/ Naitiri/83 and now part of L.R No. Bungoma/



Naitiri/1118 within 14 day they be evicted therefrom by the court bailiff with the assistance of Police officers detailed by the Officer Commanding Police Division, Bungoma

- c. The Land register be rectified to cancel all entries relating to L.R No. Bungoma/ Naitiri/1118 and to restore all the entries relating to L.R No. Bungoma/ Naitiri/83.
 - d. The 1st to 6th defendants do pay to the plaintiff damages by way of mesne profits.
 - e. Costs of this suit.
2. The defendants filed a joint statement of defence dated 3rd March, 2014 denying the plaintiff's claim in the plaint and making a prayer to have the same dismissed with costs to them. The defendants equally filed a Notice of Preliminary objection on an even date on the ground that the plaintiff's claim was res-judicata. The said Preliminary objection was heard and determined by Mukunya J on 20th April 2012 where the same was found without merit and dismissed with costs to the plaintiff.
 3. The plaintiffs filed an application under Order 2 Rule 15(1) (b) and 1 (c) dated 6th May 2014 seeking to have the defendants statement of defence struck out and judgment be entered for the plaintiff as prayed for in the plaint on the grounds that the said defence did not raise any triable issues. The said application was heard and determined by Mukunya J who found and held that the same was lacking merit and dismissed it with costs to the defendants'
 4. The plaintiffs again on 15th September 2017 filed an application under certificate of urgency seeking injunctive orders which were granted against an intended burial by the 3rd defendant over the suit property which application was thereafter compromised. This matter was thereafter set down for hearing of the main suit on various dates. Further, a Notice of preliminary objection was filed by the defendants dated 27th September 2017 and it was determined by Olao J who held that the issues raised therein be canvassed in the main suit noting the directions of the court in the previous Notice of Preliminary objection. Being aggrieved by that ruling, counsel for defendants Mr. Odhiambo sought leave to appeal on the same as well as an order for stay of the Honourable courts proceedings. That application was opposed by counsel for the plaintiff, Mr. Amollo stating that the suit was coming up for hearing. The court disallowed the application for stay and directed that the matter proceeds for hearing as earlier scheduled.
 5. The matter proceeded for hearing on various dates but was actually heard on 2nd October, 2019 with the plaintiff testifying and thereafter closing their case. The defence case was heard on 27th October 2020 where Benson Wamalwa Khisa(DW1) and Earnest Mutunga Kuya(DW2) testified. On 29th September 2021, Julius Ashikanga Aluta(DW3), John Nalianya Sanya(DW4), John Nyongesa Nasiumba(DW5), and Abdalla Musa Abdi(DW6) were heard and the defence case was closed. Thereafter, the parties agreed by consent to file written submissions. However, the defendant on 29th November, 2021 filed an application to re-open its case which application was allowed and Benson Wamalwa Khisa(DW1) was recalled. Thereafter, parties took directions to file submissions and the matter was subsequently set down for judgment.

Plaintiff's Case And Submissions

6. Dorcas Indombi (PW1) adopted her statement dated 12th February, 2014 and produced documents contained in her list of documents and marked as P-exhibit 1 -14. She reiterated the facts raised in her plaint and stated that she is the widow to Peter Wasike(deceased) who died in 1975 and who had been allocated a parcel of land in the Naitiri Scheme. She stated that her husband died before completing the requisite procedures which she later completed and had the property registered in her name on 5.11.1985 and title issued on 3rd December, 1958 with the parcel being L.R. No. Bungoma. /



- Naitir/83. She stated that bordering her parcel of land was L.R. No. Bungoma. / Naitir/79 registered in the name of the 1st defendant, Benson Wamalwa Khisa and his mother one Rispah Naliaka Khisa as administrators of Joannes Khisa their deceased father and husband respectively.
7. PW1 further stated that the said Benson Wamalwa Khisa and his mother one Rispah Naliaka Khisa sued her in Kitale HCCC No.17 of 1997 Benson Wamalwa Khisa & Another v. Dorcas Indombi Wasike for 5.3 acres from land parcel No. Bungoma. / Naitir/83 on the allegations that the said 5.3 acres were being held in trust for them. After the case was heard, Orders were granted in favour of the plaintiff's i.e Benson Wamalwa Khisa and Rispah Naliaka Khisa. Pursuant to the said orders, the land register was amended allocating 5.3 acres to the 1st defendant herein giving rise to L.R. No. Bungoma/ Naitiri/1118 measuring 15.36 Ha registered in the name of Benson Wamalwa Khisa and L.R. No. Bungoma/ Naitiri/1119 measuring 14.84 Ha Registered in her name Dorcas Indombi Wasike reflecting the changes pursuant to the decree in Kitale HCCC No.17 of 1997 Benson Wamalwa Khisa & Another v. Dorcas Indombi Wasike.
 8. It was the plaintiff's further testimony that the 1st defendant then allowed the 2nd to 6th defendant take possession of the 5.3 acres by purporting to sell the parcel to them. PW1 further stated that being aggrieved by the decision of the High Court in Kitale, she preferred an appeal at Eldoret being Civil Appeal No.87 of 2004 Dorcas Indombi Wasike v. Benson Wamalwa Khisa & Another which appeal overturned the High Court decision with costs thereby reverting ownership of the parcels of land as was before the High Court decision.
 9. It is the plaintiff's prayer that this court gives an order for the cancellation of the tiles issued for L.R. No. Bungoma/ Naitiri/1119 and L.R. No. Bungoma/ Naitiri/1118 and thus restoring the title for the parcels of land as was before the Kitale High Court's decision. She further prayed for mesne damages at the rate of Kshs. 15,000/= per year per acre from the year 2001 to 2014 and to the date of this court's judgment at an increased rate of Kshs. 15,000/= per year per acre stating that she had been denied use of the 5.3 acres.
 10. In support of her claim, the plaintiff in her submissions dated 12th October 2021 and 7th June 2023 respectively submitted that the 2nd to 6th defendants despite their alleged purchases of various portions of the said 5.3 acres, they have not obtained the consent of the Land Control, an omission which renders void the alleged purchases as the suit property is an agricultural land. She submitted that the 2nd to 6th defendants can therefore only follow up on the monies paid as debts from the 1st defendant. She placed reliance on Section 6 of the Land Control Act, CAP 302 Laws of Kenya and quoted the cases of Wamukota v. Donati (1987) KLR 280, Civil Appeal No.153 of 1996 Stanley Mbugua Gachie v. Lakeli Waithera & 2 others and High Court Civil Appeal No. 71 of 1998 M'Ringeri M'Nyange v. M'Murung M'Ngatunyi.

Defendants Case And Submissions

11. In their defence, all the six (6) defendants' testified as witnesses(DW1-DW6) and produced documents contained in their list of documents as D-Exhibit 1-14.
12. Benson Wamalwa Khisa(DW1) gave sworn testimony and stated that his father, one Joannes Khisa bought land from Settlement Fund Trustees ("SFT") L.R.No. Bungoma/ Naitiri/79. The 1st defendant further stated that his father also had land in L.R No. Bungoma/ Naitiri/83 registered in the name of the plaintiff herein measuring 5.3 acres which was held in trust for him. He stated that he settled arrears owed by SFT and the property L.R No. Bungoma/ Naitiri/79 was duly discharged. DW1 further stated that the plaintiff encroached onto the said 5.3 acres to his exclusion therefore together with his mother, they sued the plaintiff herein in Kitale HCCC No.17 of 1997 Benson Wamalwa Khisa & Another v.



Dorcas Indombi Wasike for the said 5.3 acres where the court gave judgment in his favour and ordered that the 5.3 acres be excised from the plaintiff's share in L.R No. Bungoma/ Naitiri/83 and the same be added to L.R No. Bungoma/ Naitiri/79 held by him and his mother (Rispa Naliaka Khisa) and fresh titles be issued reflecting the new acreage. He produced D-exhibit 1-4 in support. Eviction orders were subsequently issued as well and the plaintiff herein vacated the property. DW1 further stated that he thereafter moved to execute the decree and obtained title over the new parcel of land and even sold various pieces between the years 2000 and 2010 and subsequently sub-divided the same accordingly. He stated that he attended the Land Control Board for purposes of issuing titles to the various purchasers. He further produced D-Exhibit 6 a-d to 11. He stated that he was aware that the plaintiff had appealed the High court's decision but testified that he had not been served with the judgment of the Court of Appeal overturning the High Court's decision. He added that the plaintiff herein did not seek to stay the decision of the High Court even as she proceeded with the appeal.

13. In cross examination, DW1 testified that he was aware of the Court of Appeal's decision. Counsel for plaintiff noted that D-Exhibit 1, D-Exhibit 2, D-exhibit 3, D-exhibit 6, D-exhibit 7, D-exhibit 8, D-exhibit 9 were either undated, unsigned or incomplete. DW1 testified that he had not obtained any consent to sell or transfer the parcels of land sold to the 2nd -6th defendant's as for D-Exhibit 3 the same was not dated and the transferors name was not inserted
14. Earnest Mutunga Kuya(DW2) The 2nd defendant herein testified on oath and was referred his witness statement dated 13/4/2018 which he adopted as his testimony. He stated that he bought land measuring 2 Acres from one Winslas Wafula who had bought from the 1st defendant herein in the year 2009 being part of Bungoma/Naitiri/1118. He added that he has lived in the said parcel of land since then and he has never been evicted therefrom. He did not produce the agreement for sale pertaining to his portion of land. He stated that he did not have a title deed for the parcel and that the same was in the name of Winlas Wafula and further that he only learnt of the dispute between the plaintiff and the 1st defendant herein after he had purchased the parcel.
15. Julius Ashikanga Aluta(DW3) The 3rd defendant herein testified as DW3. He adopted his statement dated 13th April,2018 as his testimony-in-Chief. He stated that he bought his portion of land from the 1st defendant on 3rd May, 2005. He relied on the agreement for sale dated 3.5.2021 produced as D-Exhibit 15. He testified that he did not have a certificate of title to the parcel and that he had visited the Land Control Board but did not have the consent forms with him.
16. John Nalianga Sanya(DW4). The 4th defendant herein testified as DW4. He adopted his statement dated 23rd April,2018 as his testimony-in-Chief. He stated that he bought ½ acre of land from the 1st defendant on 23rd January, 2005 and produced an agreement for sale dated 23rd April 2018 as D-Exhibit No.16. He testified that he did not know the plaintiff and that he has constructed over the parcel of land and he produced a photograph of the home as D-Exhibit no. 17. He testified that he had not procured the Land Control Board Consent to date.
17. John Nyongesa(DW5). The 5th defendant herein testified as DW5. He adopted his statement dated 13th April,2018 as his testimony-in-Chief. He stated that he bought 2 acre of land from the 1st defendant on 18th January, 2005 and produced an agreement for sale dated 18th June 2005 as D-Exhibit No.17. He stated that he ploughs the land and nobody has ever interfered with his possession since he purchased it. DW5 also testified that he had obtained consent from the Land Control Board but did not have the same before court.
18. Abdalla Musa Abdi (DW6) the 6th defendant herein testified as DW6. He adopted his statement dated 13th April,2018 as his testimony-in-Chief. He stated that he bought ¾ acre of land from the 1st defendant on 19th August, 2008 and produced an agreement for sale dated 19th August 2008 as



D-Exhibit No.18. He stated that he has planted trees and ploughs the parcel and nobody has ever interfered with his possession since he purchased it. DW5 testified that he had obtained consent from the Land Control Board but did not have the same before court.

19. The defendants filed their submissions after the set timelines but I shall consider them nevertheless. They relied on the provisions of Order 42 Rule 6(1) and the doctrines of constructive trust and equity in support of their case. They quoted the cases of *Alianza v. Saul* (2022) KECA 583 (KLR), *Mohamed v. Duba & Another* (2022) KECA 442 (KLR), *Macharia Mwangi Maina & 87 Others v. Davidson Mwangi Kagiri* (2012) Eklr, *Twalib Hatayan Twalib Hatayan & Anor v. Said Saggat Ahmed Al-Heidy & Others* (2015) Eklr and *Abigael Barma v. Mwangi Theuri* ELC No.393 of 2012.

Analysis And Determination

20. I have carefully considered the pleadings by both parties, their oral testimonies and written submissions as well as the relevant law. What in my view commends for determination are four issues. These are:

i. Whether the defendants have any rights over the suit property

21. This is a matter that has some history dating back to the late 90's where the 1st defendant successfully sued the plaintiff in Kitale HCCC No.17 of 1997 *Benson Wamalwa Khisa & Another v. Dorcas Indombi Wasike* and the court in its award dated 16th December,1997 awarded the plaintiff therein the claimed portion of 5.3 acres to be excised from the defendant's (therein)portion and that the relevant titles be rectified to reflect that position. Being aggrieved by this decision the defendant therein appealed against the High Court's decision which was set aside by the Court of Appeal in *Eldoret Civil Appeal 87 of 2004* in its judgment dated 12th November,2010.
22. With regards to the sale of the suit property to the 2nd to 6th defendant's it is clear from the agreements for sale that the same were entered into between the years of 2005 to 2009 and subsequently payment of the consideration was done with the last being made in 2009. It is not contested that the parcels of land fall under the category of agricultural land as described in Section 2 of the [Land Control Act](#), Cap 302 of the Laws of Kenya.
23. Being agricultural land the property therefore falls within a land control area under Section 6 (1) (c) and 8(1) of the [Land Control Act](#).
24. The said Section 6(1) (c) provides as follows:-
- (c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act”
25. Section 8 (1) of the [Land Control Act](#) states:-
- “An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for controlled transaction by any party thereto:-
- Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considered that there is sufficient reasons so to do upon such conditions, if any, as it may think fit.”



26. It therefore follows that an application for consent in respect of the suit parcel of land ought to have been made within Six (6) months of the said agreements for sale to the relevant Land Control Board in the prescribed form. That was not done albeit for one transaction as evidenced in D-Exhibit 7 in favour of the 5th defendant. It should also be noted that the same was undated and it is therefore uncertain when the same was lodged if at all. The defendant's failure to obtain consent Under Section 6(1) of the aforementioned Act, rendered transactions concerning the piece of land in question void for all purposes for failure to adhere to this Section of the Law
27. Again Section 8(1) of the same Act provides that the High Court on application may notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient cause to do so, upon such conditions, if any, as it thinks fit. No application has been made by the defendants to extend the said statutory duration and as such the transactions are void.
28. The defendants submitted on the doctrines of proprietary estoppel and equity and relied on various decisions. In my view, the authorities relied on are distinguishable and do not apply in this case as the same arise out of distinct set of facts. The authorities would be applicable if this was a case between a seller and a buyer where the seller sought to rescind a sale on the grounds that consent was not obtained.
29. In *Simiyu V. Watambamala* [1985] KLR 852, Nyarangi, Ag. JA (as he then was) echoed *Karuri V. Gitura* (supra) at P 856 when he stated:
- “Here, the appellants had to obtain consent for the controlled transaction. They did not and so the agreement was void for all purposes including attempting to set up estoppel.”
30. In *Hirani Ngaithe Githire V Wanjiku Munge* [1979] KLR 50, Chesoni, J. (as he then was), stated as follows at page 52:
- “The position is simple and clear. Section 6 of the *Land Control Act* is an express provision of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The courts cannot do that; for it is not for us to legislate but to interpret what parliament has legislated. So in this case that agreement between the parties having been entered in June 1969 became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it; and, since no consent had been obtained within that time, nothing can revise or resurrect such agreement. Failure to obtain the necessary land control board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a land control area unless the consent of the land control board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes.”
31. The defendants' further relied on the case of *Twalib Hatayan Twalib Hatayan & Anor v. Said Saggar Ahmed Al-Heidy & Others* (2015) eKLR to make the argument that, as the persons in actual occupation of the suit property, they had acquired equitable rights thereon. I was accordingly invited to find that there was a constructive trust in favour of the 2nd to 6th defendant's, which was enforceable in law. However, a party cannot invoke the doctrines of equity as the basis for ignoring the express provisions of the *Land Control Act*.
32. I wish to echo the sentiments of the Court of appeal in *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR where it was stated that;
- It does not require too much imagination to see that under section 3(1) of the *Judicature Act* the application of the substance of the common law and the doctrines of equity is subject



first to the Constitution and the Statutes. Indeed, to emphasize that the substance of common law and the doctrines of equity cannot override provisions of the statute, section 3(1) (c) makes it clear that the substance of common law and the doctrines of equity apply only in so far as the statute does not apply. (Emphasis added). In other words, the Judicature Act does not allow a court of law to ignore an express statutory provision under the guise of applying the doctrines of equity.

33. The application of the substance of common law, the doctrines of equity and statutes of general application in Kenya is further circumscribed by the requirement in the Judicature Act that they shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary. (Emphasis added). In our view, the import of this qualification is that once an issue has been expressly and comprehensively provided for by legislation, the courts cannot invoke the substance of common law, the doctrines of equity and statutes of general application to contradict the provisions of the Kenya statute.

34. Section 3(1) (c) of the Judicature Act is really, in our view, no more than a restatement in statutory form, of one of the key maxims of equity, “Aequitas sequitur legem”, meaning that equity follows the law. Of that maxim, the late Sir Robert Edgar Megarry, a renowned jurist and judge of the Chancery Division of no mean repute, quoting the 3rd edition of Story On Equity, stated as follows:

“Where a rule, either of the common or statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it.” (See R.E. Megarry & P. V. Baker, Snell’s Principles Of Equity, 25th Ed. Sweet & Maxwell, 1960, p. 26).

35. The great American jurist, Benjamin Cardozo made the same point in his speech in *Graf V Hope Building Corporation*, 254 N.Y 1 at p. 9 [1930], as follows:

Equity works as a supplement for law and does not supersede the prevailing law.”

36. It was argued that the defendants have been in actual possession of the land and they relied on Section 28 of the Registered Land Act (repealed). However, for actual possession of land to amount to an overriding interest within the meaning of section 30(g) of the repealed Registered Land Act, that occupation must be occupation, which in law, is not declared to be illegal. I have already noted that under section 22 of the Land Control Act, occupation of agricultural land pursuant to a transaction, which has not obtained the consent of the relevant control board, is a criminal offence. To that extent, such occupation cannot, with respect, constitute an overriding interest. To hold such occupation declared by statute to be illegal as constituting an overriding interest would, with respect, amount to the courts recognizing and enforcing conduct that is by law declared to be illegal.

37. In *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR the court of Appeal cited the case of *Mapis Investment (K) Ltd V Kenya Railways Corporation* [2005] 2 KLR 410 which cited with approval Lindley L.J in *Scott V Brown, Doering, McNab & Co* (3) [1892] 2 QB 724, at 728 as follows:

“Ex turpi causa non oritur action. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether



the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.”

38. Having stated the above, I find that the sale of the suit property to the 2nd to 6th defendants invalid and without legal effect and as such the parties are restored to status quo ante.
39. Further, both judgments are acknowledged by the plaintiff and 1st Defendant while the 2nd to 6th defendant’s only learnt about the aforementioned decisions when the current suit was instituted.
40. It is the 1st defendant’s argument that he obtained a legal judgment from the High Court and that he proceeded to execute the resultant decree by obtaining fresh title, taking possession of the 5.3 acres awarded and subsequently selling the same as no stay orders were procured by the plaintiff barring him from execution. At this point it is imperative to note that Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

40. However, from the evidence placed before court, it is clear that the defendant was aware of the appeal but still went ahead and sold the very parcel of land that was contested perhaps that is why consent was never approved. Needless to say, the decision of the Court of appeal in Civil Appeal No. 87 of 2004 which is a superior court is binding upon this court. The said court set aside the judgment awarding the 1st defendant ownership of the suit property and as such, I cannot sit in appeal of that decision by awarding the 1st defendant the said property. No appeal has been preferred against that decision and the same therefore stands.

ii) Whether an order for eviction should issue against the defendants

41. Section 3 (1) of the *Trespass Act*, Cap 294 provides that:

“Any person who without reasonable excuse enters, is 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.”

42. In the case of *Entick vs Carrington* (1765) as quoted in the case of *Maina Kabuchwa v Gachuma Gacheru* [2018] eKLR, Lord Camden CJ had this to say:-

“Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave”.

43. In the case of *Maina Kabuchwa v Gachuma Gacheru* (Supra), the Learned Judge defined trespass “as the act of unauthorized and unjustifiable entry upon the land in another’s possession. The wrong of



trespass is actionable regardless of the extent of the incursion and without any necessary showing of injury or damage to the claimant.”

44. Having found that the defendants do not have any rights over the suit property it follows that they have no business being there.

iii) Whether the plaintiff is entitled to mesne profits

45. Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits as follows:-

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

46. While Order 21 Rule 13 of the Civil Procedure Rules provides as follows:

13.

- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—
- (a) for the possession of the property;
 - (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
 - (c) directing an inquiry as to rent or mesne profits from the institution of such suit until—
 - (i) the delivery of possession to the decree-holder;
 - (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or
 - (iii) the expiration of three years from the date of the decree, whichever event first occurs. (2) Where an inquiry is directed under sub rule (1) (b) or (1)(c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

47. The court in the case of Rajan Shah T/A The Court of Appeal in the case of Attorney General v Halal Meat Products Limited [2016] eKLR considered when mesne profits could be awarded. The court stated as follows: -

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42.”

48. The Learned Nyamweya J in the case of Karanja Mbugua & another v Marybin Holding Co. Ltd [2014] eKLR stated as follows with regard to mesne profits:-

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of



Civil Procedure Act. The said provisions state as follows with regard to a decree for possession and mesne profits:

49. It is my observation that the plaintiff pleaded for mesne profits and quoted figure of Kshs.15,000/= per year per acre from the year 2001 to 2014 and to the date of this court's judgment at an increased rate of Kshs.15,000/= per year per acre. However, in her testimony, she did not tender any evidence in support of the said award and how those figures were arrived at.
50. In the case of Peter Mwangi Mbutia & another v Samow Edin Osman [2014] eKLR, the Court of Appeal while dealing with the issue of mesne profits held as follows:
- “We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”
51. Based on the evidence placed before me while associating myself with the legal provisions and decisions cited above, I find that the Plaintiff has failed to discharge his burden of proof to prove that he is indeed entitled to a claim of mesne profits and I will decline to award him the same.

Who bears the costs of the suit

52. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap. 21). As such, a successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court finds no good reason why the successful litigant in this matter should be deprived of costs. Accordingly, the Plaintiff shall be awarded costs of the suit.

Conclusion

53. It is against the foregoing that I find the Plaintiff has proved his case on a balance of probability and will proceed to make the following orders:
1. The Defendants be and is hereby directed to give vacant possession of the 5.3 acres originally part of LR. No. Bungoma/ Naitiri/83 to the Plaintiff within 90 days from the date hereof, failure of which an eviction order will issue.
 2. The OCPD Bungoma to provide security to the court bailiff in the event order 1 above is not complied with.
 3. The Land register be rectified to cancel all entries relating to L.R No. Bungoma/ Naitiri/1118 and to restore all the entries relating to L.R No. Bungoma/ Naitiri/83.
 4. The land Registrar Bungoma to dispense with the production of the original title deed and any other statutory documents in restoring entries relating to L.R NO. Bungoma/Naitiri/83 in favour of the plaintiff
 5. The prayer for mesne profits is declined.
 6. The Costs of the suit is awarded to the Plaintiff

Orders accordingly.



READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 25TH DAY OF JULY 2023.

HON E. C. CHERONO

ELC JUDGE

In the presence of:-

Amollo for the Plaintiff

1st Defendant-present

2nd Defendant-present

3rd Defendant –present

4th defendant-absent

5th defendant-present

6th defendant-absent

Joy Court Assistant-present

