



**Nyamboki v The Nairobi City County & 251 others (Environment & Land Case 672 of 2015) [2023] KEELC 18845 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18845 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 672 OF 2015**

**JO MBOYA, J**

**JULY 17, 2023**

**BETWEEN**

**HARUN OSORO NYAMBOKI ..... PLAINTIFF**

**AND**

**THE NAIROBI CITY COUNTY ..... 1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**ERUSTUS KAIRU KUNGU ..... 3<sup>RD</sup> DEFENDANT**

**GLADYS BONARERI OSUMBO ..... 4<sup>TH</sup> DEFENDANT**

**MAGDA ALENE MUNINI MUTUKU ..... 5<sup>TH</sup> DEFENDANT**

**BERNARD MULE MULONZI ..... 6<sup>TH</sup> DEFENDANT**

**JOSPHAT WAINAINA NJENGA ..... 7<sup>TH</sup> DEFENDANT**

**JOSEPH KAMAU MUNA ..... 8<sup>TH</sup> DEFENDANT**

**PETER MURIMI MURIITHI ..... 9<sup>TH</sup> DEFENDANT**

**ISABELA WAMUYU MWANGI ..... 10<sup>TH</sup> DEFENDANT**

**JOSEPH NJUGUNA & 241 OTHERS ..... 11<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed and or commenced the instant suit vide Plaintiff dated the 14<sup>th</sup> July 2015; and in respect of which the Plaintiff has sought for the following Reliefs;
  - a. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the parcel of land known as LR No. 209/13070; situated in Njiru, Nairobi and



the alleged occupation of the Plot by the 3rd – 252<sup>nd</sup> Defendants and other Trespassers is illegal and unlawful.

- b. An order of Permanent Injunction restraining the 3rd -252<sup>nd</sup> Defendants and all other Trespassers on the Plaintiff's land either by themselves, their employees, servants and/or agents from continuing to occupy, trespassing on, purporting to sell, sub dividing, erecting structures and/or in any other manner interfering with the Plaintiff's quiet enjoyment and possession of land known as LR No. 209/13070 situated in Njiru, Nairobi within the Republic of Kenya.
  - c. An order of Eviction against the 3rd -252<sup>nd</sup> Defendants and all other trespassers on the Plaintiff's land and demolition of the illegal structures on L.R No. 209/13070; Njiru, Nairobi.
  - d. An order directing the Officer Commanding Police Division (OCPD) Buru Buru to provide security and ensure compliance of the orders herein.
  - e. An order directing the 1st and 2nd Defendants to pay Damages for Breach of Statutory Duty and Negligence
  - f. General Damages for Loss of user.
  - g. General Damages for Trespass.
  - h. Costs of the suit and Interest thereupon.
  - i. Any other Relief this Honourable Court shall deem just and fit to grant.
2. Upon the filing of the instant suit, the Plaintiff extracted and obtained summons to enter appearance with a view to serving same upon the Defendants herein. For good measure, the Plaintiff duly effected service upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, respectively.
  3. Pursuant and upon being served with the summons to enter appearance and Plaintiff pertaining to and concerning the instant suit, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants variously entered appearance and also filed their respective Statement of Defense.
  4. On the other hand, the Plaintiff herein was unable to effect personal service upon the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants and in this regard the Plaintiff was constrained to and filed an Application dated the 14<sup>th</sup> July 2015; and in respect of which same sought Leave of the Honourable court to effect service of the Plaintiff and summons to enter appearance by way of Newspaper advertisement.
  5. Instructively, the Application under reference came up before the Duty Judge on even date, namely, the 14<sup>th</sup> July 2015, whereupon the Duty Judge proceeded to and granted Leave to effect service vide Newspaper advertisement.
  6. Subsequently, the Plaintiff proceeded to and effected service vide Newspaper advertisement, which service was advertised in the Daily nation of the 6<sup>th</sup> of August 2015. In this respect, it is imperative to underscore that the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants were served by way of substituted service, namely, advertisement.
  7. First forward, despite being served with the summons to enter appearance and Plaintiff by way of newspaper, the 3<sup>rd</sup> to 252<sup>nd</sup> Defendants neither entered appearance nor filed the requisite Statement of Defense or otherwise.
  8. Arising from the failure to enter appearance and/or file Statement of Defense, the Plaintiff herein applied for Interlocutory Judgment vide Request dated 9<sup>th</sup> September 2015; and which request was thereafter acted upon on the 20<sup>th</sup> November 2015.



9. Notwithstanding the foregoing, the 27<sup>th</sup> Defendants herein latter on instructed and engaged an advocate who filed an Application seeking to set aside the Interlocutory Judgment that had hitherto been entered against the 27<sup>th</sup> Defendants. In this respect, the Default Judgment that had hitherto been entered against the 27 named Defendants was set aside and the 27 Defendants were granted liberty to enter appearance and file Statement of Defense. For completeness, the 27 Defendants duly complied and indeed filed a Statement of Defense.
10. Notably, the subject matter was thereafter listed for Pre-trial Directions whereupon the Parties confirmed their readiness to proceed with the hearing, culminating into the suit being set down/ fixed for hearing. Invariably and in this regard, the Plaintiff's case was heard on the 6<sup>th</sup> March 2023.

### **Evidence By The Parties**

#### a. Plaintiff's Case:

11. The Plaintiff's case is anchored and/or premised of the Evidence of one witness, namely, Harun Osoro Nyamboki, who testified as PW1.
12. It was the evidence of the witness that what comprises of the suit property was hitherto allocated to and in favor of one Pamela A. N. Nyandat vide Letter of allotment dated the 15<sup>th</sup> February 1991. In this respect, the witness clarified that the Letter of allotment was in respect of unsurveyed Industrial Plots Numbers 5, 6, 7, 8 and 9, respectively.
13. It was the further testimony of the witness that the allottee of the named Plots passed on prior to and or before complying with the terms of the Letter of allotment. However, the witness averred that the Legal administrator of the Estate of the allottee thereafter took out Grant of Letters of Administration and upon the Confirmation of the Grant, the named Legal Administrator entered into a Sale Agreement with the witness, whereupon the Legal Administrator sold to and in favor of the witness the named Plots which had hitherto been allocated to Pamela A. N Nyandat.
14. Further and in addition, the witness testified that upon purchase of the various Plots, which had hitherto been allocated to Pamela A. N Nyandat, same complied with the terms of the Letter of allotment and made the various payments to and in favor of the Commissioner of Land. In this respect, the witness added that the payments were duly acknowledged and receipted.
15. Additionally, the witness testified that after due compliance with the terms of the Letter of allotment, the Office of the Commissioner of Land, processed and thereafter generated the requisite Lease Instrument, which was ultimately registered culminating into the issuance of Certificate of Title over and in respect of L.R No. 209/13070 (I.R No. 74360), which is the suit property.
16. Furthermore, the witness testified that upon being issued with the Certificate of Title, same entered upon and took possession of the suit property. Besides, the witness also pointed out that same also constructed a structure thereon.
17. Be that as it may, the witness testified that on or about the year 2011; a group of people invaded the suit property and commenced to erect and build structures on the suit property, albeit without the consent and permission of the witness and in any event, without the Colour of Rights or at all.
18. As a result of the offensive action by and on behalf of the invaders, the witness avers that same was constrained to and indeed wrote to the District Commissioner, Njiru District, informing same of the offensive actions and/or activities and by extension requesting him to take appropriate actions to prevent the offensive activities.



19. On the other hand, the witness also testified that same also wrote a Letter to the Town Clerk, Nairobi City Council (now defunct) and whereupon same also intimated to the Town Clerk the offensive invasion of the suit property by the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants.
20. Notwithstanding the foregoing, the witness testified that neither the Town Clerk nor the District Commissioner, Njiru Sub-County; took any steps and/or measures to protect his rights/interests to and in respect of the suit property.
21. It was the further testimony of the witness that arising from the offensive activities and invasion of the suit property by the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants, same (witness) has been prevented from entering upon, developing and/or otherwise benefiting from ownership of the suit property. In this regard, the witness has thus averred that the impugned actions by and on behalf of the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants constitutes and/or amounts to trespass.
22. In the circumstances, the witness testified that it is therefore imperative that the Court be pleased to Evict the trespassers and thereafter grant an order of Permanent Injunction, so as to protect and vindicate his rights to and in respect of the suit property.
23. Other than the foregoing, the witness referred to the witness statement dated the 24<sup>th</sup> June 2021; and which Statement the witness sought to adopt and rely on. In this regard, the witness statement dated the 24<sup>th</sup> June 2021; was duly admitted and constituted as Further evidence in chief of the witness.
24. On the other hand, the witness also alluded to the List and Bundle of Documents dated the 24<sup>th</sup> June 2021; and thereafter sought to adopt and rely on the various Documents contained and enumerated at the foot of the List and Bundle of Documents dated the 24<sup>th</sup> June 2021.
25. In the absence of any objection, the Documents at the foot of the List dated the 24<sup>th</sup> June 2021; were admitted and constituted as Plaintiff's Exhibits P1 to P19, respectively.
26. On cross examination, the witness stated that same bought and/or purchased what now constitutes the suit Property from the previous allottee. Furthermore, the witness averred that the witness complied with the terms contained at the foot of the Letter of allotment and that thereafter same was ultimately issued with a Certificate of Title from the Ministry of Lands.
27. Additionally, the witness also confirmed that the payments which were made to and on account of the suit property, were duly acknowledged and received by the Commissioner of Land.
28. Whilst still under cross examination, the witness averred that same has sued the 1<sup>st</sup> Defendant because it is the 1<sup>st</sup> Defendant who authorized the building/construction of the offensive structures on the suit Property.
29. In addition, the witness also averred that when the impugned trespass commenced, same reported the incidence both to the Town Clerk, Nairobi City Council, ( now defunct) as well as the District Commissioner, Njiru District, respectively.
30. On cross examination by Learned Counsel for the 2<sup>nd</sup> Defendant, the witness pointed out that he is not conversant/ familiar with the 3<sup>rd</sup> to 252<sup>nd</sup> Defendants. However, the witness added that it is the said 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants who have trespassed onto and constructed various structures on the suit land.
31. On the other hand, the witness also averred that upon being issued with the Certificate of Title, same entered upon and occupied the suit property, prior to and before same was invaded by the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants.



32. Further and in addition, the witness also averred that same has sued the 2<sup>nd</sup> Defendant because it is the duty of the 2<sup>nd</sup> Defendant to provide security and protection as pertains to private properties, including the suit property herein. Nevertheless, the witness averred that the 2<sup>nd</sup> Defendant has neither entered upon nor trespassed onto the suit property.
33. Further and in any event, the witness added that the persons who have trespassed onto the suit property are not agents, Employees and/or servants of the 2<sup>nd</sup> Defendant.
34. On cross examination by Learned Counsel for the 27 Defendants, the witness pointed out that same was duly and lawfully issued with the Certificate of title over and in respect of the suit property. In this regard, the witness averred that same is the lawful and Legitimate proprietor of the suit property.
35. Additionally, the witness averred that same became knowledgeable of the invasion of the suit property in the year 2011 and thereafter same engaged and involved the Area chief to enable him (witness) to procure and obtain the identities/ Details of the trespassers.
36. Furthermore, the witness testified that it is the Area Chief who thereafter assisted him and enabled same to obtain the details of the Defendants whom he had sued.
37. Whilst still under cross examination by Learned Counsel for the 27 Defendants, the witness admitted that same is aware that the 27 Defendants are contending to be outside the suit land.
38. Be that as it may, the witness added that same went onto the suit property in the year 2021 and took photographs showing the offensive activities and in particular; the structures which have been build on the suit property by the trespassers.
39. Furthermore, the witness also averred that other than the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants, there are other Entities, including churches and schools, which have been built/constructed on the suit property, albeit without his consent and permissions.
40. Finally, the witness stated that the actions and/or activities by the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants have denied and or deprived him of the right to enter upon and/or develop the suit property.
41. With the foregoing testimony, the Plaintiff's case was duly closed.
  - b. Evidence By The 1<sup>st</sup> Defendant
42. Though the 1<sup>st</sup> Defendant herein duly entered appearance and filed a Statement of Defense, the 1<sup>st</sup> Defendant however, did not call any witness and/or tender any documents before the Honourable court.
43. For good measure, Learned counsel for the 1<sup>st</sup> Defendant intimated to the Honourable court that the 1<sup>st</sup> Defendant shall not be calling any witness and in the premises, Learned counsel sought to close the 1<sup>st</sup> Defendant's case.
44. Pursuant to and arising from the sentiments of Learned counsel for the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant's case was closed, albeit without any Evidence having been tendered.
  - c. 2<sup>Nd</sup> Defendant's Case:
45. The 2<sup>nd</sup> Defendant herein called one witness, namely, Vincentia Juma, who testified as DW2. In this regard, the witness averred that same is a Land Registrar attached to the office of the Chief Land Registrar, Nairobi.



46. Furthermore, the witness testified that by virtue of being a Land Registrar, same has the mandate and or responsibility of inter-alia receiving Instruments and documents for purposes of registration; registering such instruments and also having custody of the various records pertaining to and concerning landed properties situated within the City of Nairobi.
47. Additionally, the witness herein averred that same is conversant/ familiar with one Gildine Karani Gatwiri, a Senior Land Registrar, who was previously attached to the office of the Chief Land Registrar- Nairobi.
48. On the other hand, the witness testified that the said Senior Land Registrar, namely, Gildine Karani Gatwiri, has since been transferred from the Office of the Chief Land Registrar. Nevertheless, the witness identified the witness statement of the Senior Land Registrar dated the 14<sup>th</sup> October 2022; and thereafter sought to adopt and rely on the named witness statement.
49. Further and in addition, the witness statement of Gildine Karani Gatwiri dated the 14<sup>th</sup> October 2022; was thereafter adopted and admitted as the Evidence- in- chief of the witness, to wit, DW2.
50. On the other hand, the witness also alluded to the List and Bundle of Documents filed by and on behalf of the 2<sup>nd</sup> Defendant and thereafter same sought to adopt and rely on the named documents. For good measure, the documents at the foot of the List of Documents dated the 14<sup>th</sup> October 2022; was thereafter admitted as Defense Exhibits 1 to 10, respectively.
51. On cross examination by Learned counsel for the Plaintiff, the witness herein confirmed that the suit property belongs to and is currently registered in the name of the Plaintiff. Further and in addition, the witness averred that the Certificate of title which has been produced by and on behalf of the Plaintiff herein is genuine and legitimate.
52. On cross examination by Learned Counsel for the 27 Defendants, the witness averred that the suit property measures 0.9920 Ha and that same belongs to and is registered in the name of the Plaintiff.
53. With the foregoing testimony, the 2<sup>nd</sup> Defendant's case was duly closed.
  - d. The 27 Defendants' Case:
54. The 27 Defendants' case is premised and anchored on the Evidence of one witness namely, Annah Wangu Kathera, who testified DW1. It was the Evidence of the witness that same lives of Kagura Road, Saika II within the City of Nairobi.
55. It was the further testimony of the witness that same has appeared before the court for and on behalf of 26 other Defendants; who have given authority unto her, to testify on their behalf.
56. It was the further testimony of the witness that same proceeded to and recorded a witness statement over and in respect of the subject matter. In this regard, the witness identified the witness statement dated the 5<sup>th</sup> July 2022; and thereafter sought to adopt and rely on the named Witness Statement.
57. On cross examination by Learned Counsel for the 2<sup>nd</sup> Defendant, the witness averred that same is a Defendant in the matter. Furthermore, the witness also stated that same is representing 26 other Defendants.
58. Nevertheless, the witness averred that she does not know where the suit property, which is the subject of the court proceedings, is located.
59. On cross examination by counsel for the Plaintiff, the witness pointed out that the 26 Defendants and herself have not trespassed onto the suit property, either as alleged or at all.



60. Additionally, the witness averred that the 26 Defendants and herself resides on land, which is located at Saika II Area and not on the suit property. However, the witness was unable to supply the details of the plots on which same resides.
61. Furthermore, the witness also averred that the plot on which she resides does not have a Letter of allotment. In any event, the witness added that her plot also does not have a parcel number.
62. Finally, the witness indicated and averred that when same became aware of this suit, the 26 Defendants represented by herself, engaged a Surveyor to confirm that their Plot was not within the Plaintiff's Property. Indeed, the witness added that the surveyor proceeded to and carried out a survey exercise, which showed that their plot was outside of the suit property.
63. Nevertheless, the witness admitted that same has neither tendered nor produced any Survey Report before the Honourable court.
64. With the foregoing testimony, the case for the 27 Defendants was duly closed.

### **Submissions By The Parties**

a. Plaintiff's Submissions:

65. The Plaintiff filed written submissions dated the 14<sup>th</sup> March 2023; but erroneously indicated to be 14<sup>th</sup> March 2022. Be that as it may, the Plaintiff has raised, highlighted and canvassed two issues for due consideration and determination by the Honourable court.
66. Firstly, Learned counsel for the Plaintiff has submitted that the Plaintiff is the lawful and legitimate proprietor/owner of the suit property insofar as same was issued with the requisite Certificate of Title thereto.
67. Furthermore, Learned counsel for the Plaintiff has also submitted that upon being issued with the Certificate of title, the Plaintiff herein acquired lawful and legitimate right to and in respect of the suit property. In this respect, Learned counsel has pointed that the rights of the Plaintiff herein cannot therefore be defeated by Third Parties, who have no known rights to and/or interest over the suit property.
68. In support of the foregoing submissions, Learned counsel for the Plaintiff has cited and relied on various decisions inter-alia Dr. Joseph N K Arap Ngok versus Moiyo Olekeywa (1997)eKLR; Elizabeth Wamboi Githinji & 29 Others versus Kenyan Urban Roads Authority & 4 Others (2019)eKLR and Embakasi Properties Ltd & Another versus The Commissioner of Lands & Another (2019)eKLR, respectively.
69. Secondly, Learned counsel for the Plaintiff has submitted that by virtue of being the Registered owner of the suit property, the Plaintiff has absolute and exclusive rights of occupation, possession and use thereof. In this regard, Learned counsel for the Plaintiff has cited and relied on the provisions of Sections 24 and 25 of the [Land Registration Act](#), 2012.
70. Furthermore, Learned counsel for the Plaintiff has also submitted that insofar as the offensive activities by and at the instance of the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants, were neither authorized nor sanctioned by the Plaintiff; then same constitutes and/or amounts to trespass.
71. Arising from the foregoing, Learned counsel for the Plaintiff has therefore submitted that the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants therefore have no lawful rights and/or interests over and in respect of the suit property, to warrant their remaining thereon, or at all.



72. Additionally, Learned counsel for the Plaintiff has submitted that insofar as the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants have no rights and in respect of the suit property, same ought to be evicted from the suit property and same be restrained and restricted from the entry thereon.
73. Lastly, Learned counsel for the Plaintiff has also submitted that arising from the impugned activities by and on behalf of the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants, the Plaintiff herein was denied and deprived of the rights to benefit from the suit property. Consequently and in this regard, Learned counsel has invited the Honourable court to find and hold that the Plaintiff is therefore entitled to compensation on account of trespass.
74. Instructively and arising from the foregoing, Learned counsel for the Plaintiff has proceeded to and proposed the award of compensation in the sum of kes.50, 000, 000/= only, to be borne by the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants.
75. In support of the proposed Quantum of damages, Learned counsel for the Plaintiff has cited and relied on inter-alia the case of Ajit Bhogal versus Kenya Power & Lighting Company Ltd (2020)eKLR; Duncan Nderitu Ndegwa versus Kenya Pipeline Company Ltd & Another (2013)eKLR; Park Towers Ltd versus Moses Chege & 7 Others (2014)eKLR and Kenya Power & Lighting Ltd & Another versus Ringera & 2 Others (2022)eKLR, respectively.
76. In a nutshell, Learned counsel for the Plaintiff has therefore implored the Honourable court to find and hold that the Plaintiff herein has been able to prove his case on a balance of probabilities and same is therefore entitled to the reliefs sought at the foot of the Plaintiff.
- b. 1<sup>st</sup> Defendant's Submissions
77. The 1<sup>st</sup> Defendant filed written submissions dated the 9<sup>th</sup> June 2023; and in respect of which same has raised, highlighted and canvassed three salient issues for consideration and ultimate determination by the Honourable court.
78. First and foremost, Learned counsel for the 1<sup>st</sup> Defendant has submitted that the claim by and on behalf of the Plaintiff for breach of Statutory Duty and Negligence as against the 1<sup>st</sup> Defendant, has neither been established nor demonstrated. In any event, Learned counsel for the 1<sup>st</sup> Defendant has contended that prior to and before the court can decree an award for breach of statutory duty and negligence; it behooves the claimant to place before the Honourable court evidence relating to the existence of Duty owed unto her (claimant).
79. Nevertheless, Learned counsel for the 1<sup>st</sup> Defendant has submitted that the Plaintiff herein was unable to show to the court the nature of the statutory duty which the 1<sup>st</sup> Defendant owes to the Plaintiff as pertains to the protection of the Plaintiff property or at all.
80. To the extent that the Plaintiff herein did not tender and/or produce before the court evidence of such duty, Learned counsel for the 1<sup>st</sup> Defendant has therefore contended that the Plaintiff's claim in this respect must therefore fail.
81. In support of the foregoing submissions, Learned counsel for the 1<sup>st</sup> Defendant has cited and relied on inter-alia Leonard Otieno versus Airtel Kenya Ltd (2018)eKLR, Agricultural Development Corporation versus Harjit Pandhal Singh & Another (2019)eKLR and Joseph Boro Ngera T/a Ngera Fancy Farm versus Attorney General (2019)eKLR, respectively.
82. Secondly, Learned counsel for the 1<sup>st</sup> Defendant has submitted that the Plaintiff's claim for payment of Damages on account of Trespass, can only be laid and raised against the persons who have trespassed



- onto the suit property and not otherwise. In this regard, the Learned Counsel for the 1<sup>st</sup> Defendant has submitted that no evidence has been tendered before the court to show and/or prove that the 1<sup>st</sup> Defendant has trespassed onto the suit property or otherwise.
83. Furthermore, Learned counsel for the 1<sup>st</sup> Defendant has added that the Plaintiff has similarly failed to demonstrate that same has suffered any loss, arising out of the impugned activities to warrant payments of General Damages.
84. In short, Learned counsel for the 1<sup>st</sup> Defendant has contended that the Plaintiff herein is not entitled to any award on account of General Damages, either has sought or at all.
85. Thirdly, Learned counsel for the 1<sup>st</sup> Defendant has submitted that the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants, who are said to have invaded and thereafter trespassed onto the suit property are neither Employees, agents nor servants of the 1<sup>st</sup> Defendant. In this regard, Learned counsel has contended that the Doctrine of Vicarious Liability does not therefore arise at all.
86. Finally, Learned counsel for the 1<sup>st</sup> Defendant has therefore contended that the Plaintiff herein has failed to establish and/or demonstrate his claim to the requisite standard and hence the Plaintiff's claim ought to be dismissed with costs to the 1<sup>st</sup> Defendant.
87. In any event, Learned counsel for the 1<sup>st</sup> Defendant has invited the Honourable court to take cognizance of the decision in the case of Cecilia Karungu Ngai versus Barclays Bank of Kenya & Another (2016)eKLR, in determining whether or not costs of the suit ought to be awarded to the 1<sup>st</sup> Defendant herein.
- c. 2<sup>nd</sup> Defendant's Submissions:
88. The 2<sup>nd</sup> Defendant filed written submissions dated the 9<sup>th</sup> May 2023; and in respect of which same has highlighted, raised and canvassed three (3) issues for due consideration by the Honourable court.
89. Firstly, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that the Plaintiff herein is the lawful and legitimate proprietor over and in respect of the suit property and hence same is entitled to absolute and exclusive rights thereto.
90. In particular, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that the records obtaining and kept by the office of the Chief Land Registrar, have confirmed and authenticated that the Plaintiff herein is the Lawful proprietor of the suit property. In this regard, Learned counsel invited the Honourable court to take cognizance of the evidence of DW2, who produced various copies of the Title documents held by the office of the Chief Land Registrar.
91. Secondly, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants, who have encroached onto and trespassed upon the suit property, have no lawful rights/ Interests to and in respect of the suit property.
92. Furthermore, Learned counsel has submitted that the registered owner of a particular parcel of land, the Plaintiff herein not excepted, are vested with the right to occupy, use and possess own property to the exclusion of all and sundry.
93. Notably and in the premises, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants have no lawful rights and or mandate to enter upon and or remain on the suit property, which lawfully belongs to the Plaintiff.



94. Consequently and in the premises, Learned counsel for the 2<sup>nd</sup> Defendant has therefore submitted that the impugned actions and/or activities by and on behalf of the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants therefore constitutes and amounts to trespass.
95. Thirdly, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that once trespass is established and/or demonstrated by the registered owner of the suit property, then same is entitled to recompense, arising from the deprivation of the suit Property.
96. Further and in addition, Learned counsel for the 2<sup>nd</sup> Respondent has submitted that compensation arising out of trespass to land, is awardable, albeit without proof of loss or injury. In this regard, Learned Counsel has pointed out that trespass is actionable per-se.
97. In support of the foregoing submissions, Learned counsel for the 2<sup>nd</sup> Defendant has cited and relied on, inter-alia, the case of Duncan Nderitu Ndegwa versus Kenya Power & Lighting Company Ltd & Another (2013)eKLR and Margaret Njeri Wachira versus Eliud Waweru Jenga (2018)eKLR, respectively.
98. Lastly, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that the claim by and on behalf of the Plaintiff arising out of breach of statutory duty and negligence, as against the 2<sup>nd</sup> Defendant, is otherwise misconceived and legally untenable. In this regard, Learned counsel has pointed out that the Plaintiff has not been able to place before the court any credible material/evidence to vindicate the said claim.
99. In the premises, Learned counsel for the 2<sup>nd</sup> Defendant has therefore implored the Honourable court to find and in favor of the Plaintiff, albeit as against the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants and not otherwise.

d. Submissions By The 27 Defendants:

100. The 27 Defendants, whose details are enumerated at the foot of the Notice of appointment of Counsel have filed written statement of submissions dated the 9<sup>th</sup> June 2023; and in respect of which same have highlighted and canvassed three issues for consideration by the Honourable court.
101. First and foremost, the 27 Defendants have submitted that the Plaintiff herein has neither demonstrated nor established the existence of a reasonable cause of action as against same, to warrant the issuance of the orders sought at the foot of the Plaintiff.
102. Further and in particular, learned counsel for the 27 Defendants has submitted that the Plaintiff failed to tender and/or produce before the court any investigation report or otherwise to show that the named Defendants are actually in occupation and possession of the suit property, either as claimed or at all.
103. As a result of the failure to establish and/or demonstrate that the named Defendants are indeed on the suit property, Learned counsel for the named 27 Defendants has therefore submitted that the Plaintiff has thus failed to prove his case as against the named Defendants.
104. Secondly, Learned counsel for the named 27 Defendants has submitted that the Plaintiff's suit is bad in law and legally untenable insofar as the Plaintiff herein has sued unknown persons and entities, whose details have neither been supplied nor availed. In this regard, Learned counsel for the 27 Defendants has submitted that the court cannot be asked to grant and/or issue orders in vein.
105. Thirdly, Learned counsel for the 27 Defendants has submitted that the Plaintiff herein has neither tendered nor produced before the Honourable court any credible evidence to warrant the grant of the reliefs sought at the foot of the Plaintiff or at all.



106. In particular, Learned counsel for the named 27 Defendants has submitted that the Plaintiff has not tendered and produced before the court any evidence that the persons accused of trespass have ever been arrested and charged with the offense of trespass or forcible retainer.
107. Further and in addition, Learned counsel for the named 27 Defendants has also contended that the Plaintiff has also not placed before the Honourable court any evidence to prove and or demonstrate trespass, let alone compensation for trespass.
108. In view of the foregoing, Learned counsel for the named 27 Defendants has therefore submitted that the Plaintiff's suit has not been proved in accordance with the provisions of Sections 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya.
109. In short, Learned counsel for the named 27 Defendants has therefore impressed upon the Honourable court to find and hold that the Plaintiff's case has not been proved and thereafter to dismiss same with costs to the named 27 Defendants.

### **Issues For Determination**

110. Having reviewed the pleadings filed by the respective Parties and essentially the Plaint dated the 14<sup>th</sup> July 2015; and the Statement of Defense by the various Defendants; and upon taking into account the testimonies tendered by the various witnesses and finally upon consideration of the written submissions filed on behalf of the Parties, the following issues are pertinent and are thus worthy of determination;
  - i. Whether or not the Plaintiff herein is the Lawful and Legitimate proprietor of the suit property.
  - ii. If the answer to number one is in the affirmative, whether the Plaintiff's rights and interests over the suit property can be encroached upon and or interfered with, albeit without the consent of the Plaintiff.
  - iii. What Reliefs, if any, ought to be granted.

### **Analysis And Determination**

#### Issue Number 1

Whether or not the Plaintiff herein is the Lawful and Legitimate Proprietor of the suit property.

111. The Plaintiff herein tendered and adduced before the court elaborate evidence showing that what constitutes the suit property was hitherto allocated to and in favor of one Pamela A. N Nyandat, now deceased, vide Letter of allotment dated the 15<sup>th</sup> February 1991.
112. Despite the fact that what comprises the suit property was lawfully allocated to the named allottee, the allottee was unable to meet the stipulated conditions contained at the foot of the Letter of allotment.
113. Subsequently, the allottee through her duly appointed legal administrator entered into and executed a lawful sale agreement dated the 2<sup>nd</sup> August 1995, wherein the interests contained at the foot of the letter of allotment was sold to and transferred in favor of the Plaintiff.
114. Notably, the Plaintiff herein proceeded to and made the requisite payments stipulated and enumerated at the foot of the Letter of allotment and thereafter the Commissioner of Lands proceeded to and processed the requisite Lease Instrument over and in respect of the suit property. For good measure, the Plaintiff tendered before the Honourable Court various documents including the Part Development



Plan and the Deed Plan, the latter which was prepared by the Director of survey and which culminated into the generation of the Land reference number.

115. Furthermore, the Plaintiff also testified and thereafter produced before the court a copy of the Certificate of title which was issued in his favor on the 11<sup>th</sup> September 1997 and which effectively vested and conferred lawful rights and interests over the suit property unto him.
116. Moreover, it is important to recall that DW2, a Land Registrar attached to the office of the Chief Land Registrar and who testified on behalf of the 2<sup>nd</sup> Defendant also produced and tendered before the Honourable court assorted documents, inter-alia, a copy of the Certificate of title held by the office of the Chief Land Registrar.
117. In particular, DW2 tendered the Certificate of title which showed and confirmed that the suit property herein lawfully belongs to and is registered in the name of the Plaintiff.
118. Other than the foregoing, Learned counsel for the 2<sup>nd</sup> Defendant has similarly submitted and acknowledged that the suit property lawfully belongs to and is registered in the name of the Plaintiff herein. For good measure, it is instructive to take cognizance of the paragraph 7 of the written submissions dated the 9<sup>th</sup> June 2023, whose import and tenor are explicit.
119. In any event, even the 27 Defendants who entered appearance and filed a Statement of Defense and who were represented by DW1, did not contest and/or challenge the fact that the suit property belongs to and is registered in the name of the Plaintiff.
120. Consequently and in the premises, there is no gainsaying that the Plaintiff herein is indeed the lawful and legitimate proprietor over and in respect of the suit property, which is the subject of the instant Proceedings.
121. Furthermore, it is instructive to recall that the Plaintiff herein was duly and lawfully issued with the Certificate of title over and in respect of the suit property. In this regard, it is common ground that the issuance of the certificate of title constitutes Conclusive evidence of ownership of the suit property by the Plaintiff.
122. To buttress the foregoing analysis, it is imperative to take cognizance of the ratio decidendi in the case of Dr. Joseph N K Arap Ngok versus Justice Moiwo Ole keiwua (1997)eKLR, where the Court of Appeal stated and held thus;

Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.

123. Furthermore, the significance and important of a Certificate of Title issued to and in favor of the bearer of the title was re-visited and elaborated upon in the case of Embakasi Properties Limited & Another versus The Commissioner of Lands & Another (2019)eKLR, where the court of appeal stated thus;

“On the facts and in the circumstances of this matter, therefore, we are convinced by the argument that the Torrens system of registration was applicable. It will be recalled from what we have said previously in this judgment that on 11<sup>th</sup> November, 2015 the Court directed that this appeal be heard by a bench of five (5) Judges on the argument that it raises novel and



weighty issues, in particular the applicability of the Torrens system of land registration in Kenya. With respect, there has been no confusion on the application of the Torrens system in Kenyan land law. Since the enactment of the repealed Registration of Titles Act and the Registered *Land Act*, it has consistently been acknowledged in countless judicial decisions that the law on registration of titles in Kenya is based on the Torrens System. *Souza Figueiredo V Moorings Hotel*, [1960] EA 926; *Cross V Great Insurance Company Limited of India*, [1966] EA 94 and *Charles Karathe Kiarie & 2 others V Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* [2013] eKLR are some of the authorities that have unequivocally applied the principles of Torrens system.

The three main principles of the Torrens system were aptly summarized by the Canadian Court of Appeal in the case of *Regal Constellation Hotel Ltd Re 2004 Can LII 2006 Ontario C.A.*) Page 13 para 42 as follows:

“42. The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy.”

124. The Honourable court went further and stated as hereunder;

Although it has been held time without end that the certificate of title is; “...conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the *Land Registration Act*, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme”.

125. Additionally, the importance of a Certificate of title, which was lawfully procured and obtained was also underscored by the Court of Appeal in the case of *Elizabeth Wambui Githinji & 29 Others versus Kenyan urban Roads Authority* (2019)eKLR, where the Court of Appeal (per Ouko JA) stated and reiterated the import of the Torrens principles and its application to the Kenyan Land system.

126. For good measure the court stated thus;

It has long been accepted beyond debate that the land registration process in Kenya is a product of the Torrens system. This was acknowledged in, among a long line of decided cases, this Court’s judgments in *Dr. Joseph Arap Ngok V. Justice Moiwo ole Keiwua & 5 others*, Civil Appeal No. Nai. 60 of 1997 and *Charles Karathe Kiarie & 2 Others V Administrators of Estate of John Wallace Muthare (deceased) & 5 others*, Civil Appeal 225 of 2006.

Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of



all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. Finally, the statutory presumption of indefeasibility and conclusiveness of title based on the register can be rebutted only by proof of fraud or misrepresentation which the buyer is himself shown to have been involved.

127. Based on the foregoing exposition and explication of the law, which has illuminated the key ingredients of the Torrens principles pertaining to the registration of land and coupled with the fact that the Plaintiff herein was duly and lawfully issued with Certificate of title; I come to the conclusion that the Plaintiff is indeed the lawful and legitimate proprietor of the suit property.
128. To the extent that the Plaintiff is the lawful and legitimate proprietor of the suit property, same is therefore entitled to partake of and benefit from the statutory rights and privileges that ordinarily vest in the registered proprietor of the immovable property in terms and by dint of the provisions of Sections 24 and 25 of the *Land Registration Act*, 2012.

## **Issue Number 2**

If the answer to number one is in the affirmative, whether the Plaintiff's Rights and Interests over the suit property can be encroached upon and or interfered with, albeit without the consent of the Plaintiff.

129. Having resolved the question at the foot of issue number one herein and having further come to the conclusion that the Plaintiff is the legitimate proprietor and/or owner of the suit property, the question that now needs to be addressed relates to whether or not the right of such a registered owner can be interfered with, albeit without the consent and or permission of the registered owner.
130. In respect to the instant matter, the Plaintiff herein tendered evidence before the court that upon acquisition of the suit property, same entered upon and took possession of the suit property in the year 1995.
131. Furthermore, the Plaintiff also tendered evidence that after entry upon and taking possession of the suit property, same constructed structures thereon, awaiting further developments. However, it was the further testimony of the Plaintiff that on or about the year 2011; various persons invaded the suit property and commenced to and indeed erected various structures thereon.
132. Additionally, the Plaintiff also tendered evidence that arising from the impugned invasion of the suit property, he (Plaintiff) wrote a Letter to the District Commissioner- Njiru sub-county, as well as the Town Clerk, Nairobi City Council (now defunct), wherein same sought the intervention of the named offices to help preventing the offensive invasion of the suit property.
133. On the other hand, the Plaintiff also testified that subsequently same engaged the Area Chief with a view to ascertaining the identities of the trespassers, who had entered onto the suit property. In this regard, the Plaintiff testified that with the help of the Area Chief and his agent, same established that the trespassers were the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants.
134. Notably, even though the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants were duly served with the summons to enter appearance and Plaint, same failed to enter appearance and/or file Statement of Defense, save for the named 27 Defendants who participated in the said proceedings. Premised on the foregoing, there is no gainsaying that the Plaintiff's suit/Claim against the various Defendants, who neither entered appearance nor filed a Statement of Defense stand uncontroverted and thus proved.



135. On the other hand, even though the 27 Defendants entered appearance and filed a Statement of Defense and thereafter tendered evidence through DW1, it is not lost on this court that the evidence of DW1 was essentially evasive and therefore unhelpful.
136. Instructively, DW1 stated as hereunder whilst under cross examination by counsel for the Plaintiff.
- “The 26<sup>th</sup> Defendant and I are not in occupation of the suit property. however, I have not supplied the details of the Land where I reside. I reside on the land situated at Saika II and do not have a Letter of allotment, I have not done survey on my land”.
137. Whilst under further cross examination, the witness stated as follows;
- “My plot does not have a parcel of number. However, my parcel is a plot and the same is found at Saika II Area within Nairobi. I am not on the land belonging to the Plaintiff”.
138. From the forgoing, one cannot but discern that DW1 was being evasive and escapist, whilst endeavoring to evade the fact that the rest of the 26 Defendants and herself are indeed resident on the suit property.
139. Surely, if the rest of the 26 Defendants and DW1, were not in occupation, but were occupying some other land, then certainly DW1 should have had some scintilla/semblance of documents showing the plots in which same are residing on. For good measure, there is no parcel of Land within the City of Nairobi, which has not been surveyed and thus has no known Parcel Number, save for Public Land; if at all.
140. To my mind, the reason why DW1 has neither tendered nor produced any scintilla of evidence to confirm the land on which same is residing on, is because there is no such other land save for the suit property.
141. Consequently and premised on the foregoing, I come to the conclusion that the Plaintiff has been able to tender and place before the Honorable court credible evidence that it is the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants, who have entered upon and unlawfully taken possession of the suit property.
142. In view of the foregoing, it is my humble conclusion that the Plaintiff has established and demonstrated, on a balance of probabilities, that the impugned actions and/or activities by and on behalf of the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants, constitutes and amounts to trespass.
143. For good measure, it is imperative to underscore that trespass denotes any offensive activities and/or entry upon the property belonging to and registered in the name of another, albeit without the permission and/or consent of the said registered owner.
144. In any event, what constitutes and amounts to trespass is well delineated by dint of Section 3 of the Trespass Act, Chapter 294 Laws of Kenya which provides and states as hereunder;

### 3. Trespass upon private land

- (1) 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.
- (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.



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- (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.

145. Furthermore, the moment the registered proprietor has neither authorized nor sanctioned the impugned entry upon and/or occupation of the suit property, then any occupation thereof, constitutes violation of and/or infringement of the rights of the registered owner.

146. Consequently, in such a situation, the registered owner of the property would no doubt, be entitled to procure and obtain an order of Eviction against the trespasser(s).

147. In this regard, it is appropriate to cite and adopt the holding in the case of *Waas Enterprises Limited versus The City Council of Nairobi (2014)eKLR*, where the court stated and held thus;

“To my understanding since the 2<sup>nd</sup> defendant has been in the suit property illegally, she is a trespasser. As a registered proprietor, the plaintiff is entitled to enjoy all proprietary rights to the exclusion of all others. This includes the right to exclusive possession of the suit land. The rights of a proprietor of land are set out in Sections 24 and 25 of the [Land Registration Act](#) which provide as follows :-

“24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

1. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
2. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”



It therefore follows from the above that only the plaintiff is entitled to enjoy proprietary rights over the suit land. The 2<sup>nd</sup> defendant had no right to the suit land. She must therefore vacate the suit land and hand over possession to the plaintiff.

148. To surmise, it is my finding and holding that by virtue of being the registered owner of the suit property, the Plaintiff is entitled to exclusive possession, occupation and use thereof.
149. Further and in addition, where ant Party, read the 3<sup>rd</sup> to the 352<sup>nd</sup> Defendants are in occupation, albeit without any colour of right; the permission and/or consent of the Plaintiff, then same must vacate the land.

### **Issue Number 3:**

What Reliefs, if any, ought to be granted.

150. The Plaintiff herein had sought for various reliefs at the foot of the plaint dated the 14<sup>th</sup> July 2015. For good measure, the Plaintiff had sought for, inter-alia, Declaration that same is entitled to exclusive and unimpeded right of possession of the suit property; eviction of the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants and permanent injunction.
151. In the course of discussing issue number one and number two herein before, this court has found and held that the Plaintiff is indeed the lawful and legitimate owner of the suit property. Further, the court has also held that by virtue of being the registered owner of the suit property, the Plaintiff is no doubt, entitled to the rights and interests underscored vide Sections 24 and 25 of the [Land Registration Act, 2012](#).
152. Consequently and in the premises, there no gainsaying that the Plaintiff herein has indeed established and demonstrated that same is entitled to the named orders.
153. Other than the foregoing, the Plaintiff has also sought for General Damages for Loss of user and General Damages for trespass. However, in my humble view, the two reliefs for General Damages relate to one and the same cause.
154. In any event, the Loss of user which is being claimed and arising from the activities complained of; constitutes the same actions that anchor and or ground the claim for trespass. Instructively, the two claims herein gravitates around the question of deprivation of the use of the suit Property.
155. In the premises, it is evident that once the Plaintiff procures and obtains recompense on account of trespass, then the Plaintiff cannot be dignified with another award (sic) on the basis of Loss of user. Invariably, such an award, if same were to be made, would be tantamount to unjust enrichment of the Plaintiff; or better still, Double Jeopardy as against the Offender.
156. To my mind, the claims which have been alluded to in terms of the preceding paragraphs reminds me of one/ situation; where a claimant seeks both General Damages for trespass to land and at the same time Mesne Profits, arising from the same cause of action.
157. Instructively, it is trite and established that where a claimant has been granted an order of compensation for trespass, same forfeits the claim for and in respect of Mesne profits. In this respect, it is worthy to



take cognizance of the holding in the case of Christine Nyanchama Oanda versus Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR, where the court of appeal stated and held thus;

“It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved. In the case Peter Mwangi Msuitia & Another v Samow Edin Osman [2014] eKLR, this Court held as follows:

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

In the case of Inverugie Investment v Hackett (Lord Lloyds [1995]3 ALL ER 842 it was held thus:

“Our understanding of the above persuasive authority is that once the learned Judge made the award under the subhead “mesne profits” there was no justification for him awarding a further Kshs.10 million under the subhead “trespass” since both mean one and the same thing...”

158. Having drawn the distinction alluded to in terms of the preceding paragraphs, it is my humble view that the Plaintiff herein can only partake of damages for trespass. In this regard, and taking into account the size/acreage of the suit property, the location thereof and the duration of trespass complained of, I come to the conclusion that an award of the sum of Kes.10, 000, 000/= Only, would suffice, as appropriate recompense to and in favor of the Plaintiff.
159. In arriving at the award of damages in the sum of Kshs.10, 000, 000/= only, (details in terms of the preceding paragraph), I have taken cognizance of the requisite principles relevant and applicable in the assessment and award of Damages as enunciated by the court of appeal in the case of Kenya Power & Lighting Company Ltd versus Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment), where the court stated and held as hereunder;

The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distill and replicate as hereunder:

- i) Harlshurys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.
- ii) Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.



- iii) Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.
- iv) Ephantus Mwangi & Another vs. Duncan Mwangi [1981 – 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence.
  - b) a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.
- v) Kiambu Dairy, Farmers Co-operative Society Limited vs. Rhoda Njeri & 30 Others [2018] eKLR, - the extend of an award of compensatory damages lies in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well settled principles.
- vi) Kemfro Africa Limited vs. Lubia & Another [No. 2] [1987] KLR 30 as approved in Peter M. Kariuki vs. Attorney General [2014] eKLR, - before interference with the quantum of damages awarded by a trial court the appellate court must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or short of the above, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages payable.
- vii) Johnson Evans Gicheru vs. Andrew Martin & Another [2005] eKLR, - this Court on appeal will be disinclined to disturb the finding of the trial Judge as to the amount of damages awarded by the trial court merely because if it had tried the case itself in the first instance, it would have awarded either a higher or lesser sum) justification for reversing a trial Judge on an award of damages only applies where the court is convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very low as to make it an entirely erroneous estimate of the damage to which the aggrieved party is entitled.
- viii) Sumaria & Another vs. Allied Industries Limited [2007] 2 KLR I, - an appellate court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence or based on a misapprehension of the evidence or that the Judge had been seen demonstrably to have acted on a wrong principle in reaching the finding he/she did.
- ix) Butt vs. Khan [1981] KLR 349, - an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate
- x) it must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.
- vii. Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited vs. Janevans Limited [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss;
  - (b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass;



(c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass.

160. Furthermore, it is imperative to state and underscore that the only persons who have trespassed onto the suit property are the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants and not otherwise. Consequently and in this regard, the amount on account of General Damages can only lie as against the named trespassers and not otherwise.
161. In short and for good measure, the award of General Damages in the sum of Kes.10, 000, 000/= only does not apply to and/or bind the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, who have not trespassed onto the suit property.
162. Lastly, the Plaintiff herein had also sought for Damages for breach of statutory duty and negligence as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. However, despite having sought for the said Damages, no evidence was placed before the Honourable court as pertains to the nature of the statutory duty, if any, that was owed to the Plaintiff by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
163. Similarly, the Plaintiff herein also did not tender and/or adduce any evidence to show the negligence of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, which culminated into the trespass complained of. For good measure, no evidence was tendered to show that the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants are either employees, agents and/or servants of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, to warrant the invocation of the doctrine of vicarious liability.
164. At any rate, it is not lost on this court that Learned counsel for the Plaintiff did not make any submissions pertaining to and concerning the claim for Damages for Breach of statutory duty and negligence as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. Perhaps, no submissions were made because Learned counsel appreciated that the impugned claim was premised on quick- sand.
165. Nevertheless, there being no evidence that was placed before the Honourable court to justify the compensation for breach of statutory duty and negligence, this court cannot therefore proceed to make any award in this respect.
166. Simply put, the claim for Damages for breach of statutory duty and negligence as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has been mounted in vacuum and is thus devoid of merits.
167. In this respect, the holding of the Court in the case of Agricultural Development Corporation versus Harjit Pandhal Singh & another [2019] eKLR, is apt and succinct.
168. For good measure, the court held and stated thus;

(23) The general constitutional and statutory duty of the Government or police to provide security to an individual citizen or his property only crystalizes in special individualized circumstances such as where a citizen has made an individual arrangement with the police, or some form of privity exists or where from the known individual circumstances, it is reasonable for police to provide protection for the person or his property. Otherwise, imposing a limitless legal duty to the Government to provide security to every citizen and his property in every circumstance would not only open floodgates of litigation against the Government, but would also be detrimental to public interest and impracticable in the context of this country.



## Final Disposition

169. From the foregoing discourse, it must have become evident and indeed apparent that the Plaintiff has placed before the Honourable court sufficient and credible material, to demonstrate that his rights and/or interests to and in respect of the suit property have been violated and/or infringed upon by the trespassers.
170. Consequently and in the premises, I come to the conclusion that the Plaintiff has proved his claim on a balance of probabilities and same is entitled to Judgment. In this respect, I therefore proceed to enter Judgment in favor of the Plaintiff on the following terms;
- a. Declaration be and is hereby granted that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the parcel of land known as LR No. 209/13070; situated in Njiru, Nairobi and the alleged occupation of the plot by the 3<sup>rd</sup> - 252<sup>nd</sup> Defendants and other trespassers is illegal and unlawful.
  - b. Consequently, the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants, who have encroached upon and/or trespassed onto the suit property be and are hereby directed to vacate and hand over vacant possession of the suit property within 180 days from the date hereof.
  - c. In default to vacate and hand over vacant possession of the suit property within the timeline captured in clause (b) hereof, the Plaintiff shall be at liberty to Evict the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants from the suit property.
  - d. In this respect, an order of Eviction shall be issued against the 3<sup>rd</sup> -252<sup>nd</sup> Defendants, automatically and without further reference to court, subject to proof of service of the decree upon the named Defendants.
  - e. Further and in addition, in the event that the Eviction is carried out and undertaken by the Plaintiff, the costs/expenses incurred in levying eviction shall be certified by the Deputy Registrar and same shall be recoverable from the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants.
  - f. An order of Permanent Injunction be and is hereby issued restraining the 3<sup>rd</sup> -252<sup>nd</sup> Defendants and all other trespassers on the Plaintiff's land either by themselves, their employees, servants and/or agents from continuing to occupy, trespassing on, purporting to sell, sub dividing, erecting structures and/or in any other manner interfering with the Plaintiff's quiet enjoyment and possession of land known as LR No. 209/13070 situated in Njiru, Nairobi within the Republic of Kenya.
  - g. General damages for trespass be and is hereby awarded in the sum of Kes.10, 000, 000/= only as against the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants only.
  - h. The Plaintiff's claim against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be and is hereby dismissed with costs.
  - i. The Plaintiff shall however be entitled to costs as against the 3<sup>rd</sup> to the 252<sup>nd</sup> Defendants and the same shall be taxed and Certified by the Deputy Registrar of the Court.
  - j. Any Relief not expressly granted is hereby Dismissed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY 2023.**

**OGUTTU MBOYA**



**JUDGE**

**In the presence of:**

**Benson – court Assistant**

**Mr. Manyara for the Plaintiff.**

**Ms. Naazi h/b for Mr. George Kithi for the 1st Defendant.**

**Mr. Menge Deputy Chief Litigation Counsel for the 2nd Defendant.**

**Mr. Misati for the named 27 Defendants.**

**N/A for the rest of the Defendants.**

