



**Kibiego v Gichuru & another (Environment & Land Case 333 of 2013)
[2023] KEELC 22282 (KLR) (13 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22282 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 333 OF 2013
SM KIBUNJA, J
DECEMBER 13, 2023**

BETWEEN

KIPKURGAT KIBOR KIBIEGO PLAINTIFF

AND

NICHOLAS NKUNJA GICHURU 1ST DEFENDANT

MESHACK RONO 2ND DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit against the defendant vide the plaint dated the 30th May 2013 seeking for the following prayers;
 - a. A declaration in terms of paragraphs 6 and 7, which seeks a declaration that the plaintiff is the sole and absolute proprietor of the parcel of land measuring 40.47 Ha; and that the defendant is a trespasser on land parcel No.Soy/Soy Block 10 (Navillus)/129.
 - b. An injunction in terms of paragraph 8, which seeks a permanent injunction restraining the Defendant by himself, his servants, agents, relatives, proxies and/or employees from trespassing into, entering into, wasting, or otherwise interfering with the plaintiff's land.
 - c. An eviction order against the defendant.
 - d. Mesne profits arising from the defendant's wrongful occupation of the land.
 - e. Costs of this suit together with interest at court rates.
 - f. Any other or alternative relief which this Honourable Court may deem fit.



2. The defendant entered appearance and filed a defence and a counterclaim against the plaintiff as 1st defendant and Meshack Rono as 2nd defendant. He sought for the following prayers in the counterclaim:
 - a. An order compelling the 1st defendant jointly and severally to transfer ten (10) acres out of the parcel of land known as Soy/Soy Block 10 (navilus)/129 to the plaintiff and in the alternative a refund by the 2nd defendant of the purchase consideration amount of 10 acres of land from the suit parcel at the current market value.
 - b. Pursuant to granting the compelling order for transfer, an order of permanent injunction against the defendants whether by himself/themselves or through their agents, servants or persons claiming through them from entering, remaining in, charging, leasing, transferring, alienating or any dealing in any way whatsoever with the 10 acres from the land known as Soy/Soy Block 10 (navilus)/129 to the detriment of the plaintiff.
 - c. Costs of this suit.
 - d. Any other relief as this Honourable court may deem fit to grant.
3. The plaintiff filed a reply to the defence and defence to the counterclaim dated the 18th October 2017 disputing the counterclaim and insisting that the ten (10) acres portion is part of the suit property that belongs to him.
4. Meshack Rono, hereinafter referred to as 2nd defendant, was joined in this proceeding on an application by the defendant that was allowed through the ruling delivered on the 17th August 2017. He then filed his statement of defence dated 23rd October 2018 and prayed that the plaintiff's suit be dismissed and the counterclaim be allowed as pleaded.
5. The plaintiff testified on 1st October 2015 as PW1 and told the court that he had bought the suit property from Lonrho Agribusiness E.A. He produced a copy of his title deed, the transfer, an application for consent of the Land Control Board among other documents as exhibits. He testified that he was in a group with other people when he bought the suit property and that the defendant was not among those people. He admitted being aware of the undated mutation that he was shown and that the 2nd defendant in the counterclaim sold the portion of the land in dispute to the defendant. PW1 was recalled again on the 16th May 2019. He testified that he had remembered buying the suit property from EATEC (East Africa Tanning Co. Ltd). He stated that it was his son Paulo Kemei who lives on the suit property. He added that he was not aware of any sale agreement between the defendant and 2nd defendant. He added that there was no dispute over the location of the access road. He admitted that he does not know his land reference number but insisted that his son knew and that his land (suit property) is 100 acres.
6. The defendant testified as DW1 on the 20th January 2017. He testified that he came to know the plaintiff in 2003, when he got to know of land being sold by EATEC through one Levi Aneka. That he then met the 2nd defendant and bought from him the ten (10) acres that he had bought from EATEC and had been registered as parcel Nos. 1379 & 1380, on the condition that the plaintiff would cause the subdivision to be done within a year. That the plaintiff and the 2nd defendant had agreed with him on the location of the road of access. The witness was stood down and recalled to continue with his testimony on the 9th November 2020. He testified that he had initially agreed to buy parcel No. 1379



on 4th May 2002, which was 5 acres from the 2nd defendant but was later convinced to buy parcel No. 1380 on 10th May 2002, after the 2nd defendant had negotiated with the plaintiff to give him an access road. That when the 2nd defendant took him to the plaintiff, they discussed and agreed to change the boundaries of his 10-acre land to give access to the plaintiff's remaining 90 acres. That he has been living on the 10 acres since 2003 and was in the process of registering titles in his name when he later learnt that the plaintiff had already processed the title of the whole 100 acres, including his 10-acre land, in his name. That the 2nd defendant had bought the 10-acre land he sold to him from Lonrho, and he reiterated that the plaintiff's title is invalid as it is not supported by a survey plan. On cross examination, he stated that he was not aware that the plaintiff had obtained a consent from the Land Control Board for registration of the whole farm including the 10 acres in his name. He admitted that he did not produce the afore stated written agreements and that he was evicted from the farm during the post-election violence in February 2008, but came back in 2009. He then explained that he bought his 10 acres in 2002. That the plaintiff obtained title to the 100-acre farm before the subdivision into parcels 1378 to 1380. That parcel 1378 belonged to the plaintiff and the latter two to the 2nd defendant. He agreed that the mutation form Dexh 1 shows the subdivision of the suit property into the three portions was not signed by the Land Registrar. He also stated that there is no existing written document showing that the plaintiff was aware he had bought 10 acres from the 2nd defendant.

7. The 2nd defendant testified as DW2 on the 27th October 2021 that he had bought the 10 acres of land from EATEC for Kshs. 400,000/- and built a house on it. Later the plaintiff and his son, one Isaack, requested access to the road upon which DW2 agreed on the condition that EATEC gives guidance on the same. It is there that the said Benjamin Bett advised that it was possible. Consequently, the plaintiff hired a surveyor and the 2nd defendant was allocated land next to the tarmac road. From there he introduced the defendant to the plaintiff and informed him that he has sold his land to him, and that any survey works should involve him henceforth. He told the court the sale agreement between EATEC and himself was burnt down together with his house. Upon cross examination, DW2 admitted that he had left the house by the time it was burnt and that he never negotiated with the plaintiff when he purchased the 10 acres from EATEC. He also admitted to not having obtained consent from Land Control Board for transfer of title from EATEC to himself. He agreed that the mutation form Dexh 2 which was for subdivision of the farm by EATEC was also never executed by the Land Registrar. He also agreed that the transfer was never executed in favour of the defendant.
8. The learned counsel for the parties agreed to have the Land Registrar to testify as an independent witness. Rahab Muthoni Njoroge, the Land Registrar, Uasin Gishu, testified and produced a certified copy of the green card of the suit property, transfer form in favour of plaintiff from Lonrho and consent of the Land Control Board to transfer as exhibits. She testified that the transfer of the suit property was from Lonrho to the plaintiff at a consideration of Kshs. 3,444,000 and was registered on the 18th July 2002. That the consent was issued on 7th February 2002. It was her testimony that the mutation form she was shown in court over the subdivision of the suit property had not been registered.
9. After the defence closed their case on the 27th October 2021, the court issued directions on filing and exchanging submissions within the given timelines. The learned counsel for the defendant filed their submissions dated the 22nd February 2022 while that for the plaintiff filed theirs dated the 4th July 2023 which the court has considered. Then ELC Eldoret forwarded this file to ELC Mombasa for me to write and deliver the judgement.
10. The learned counsel for the plaintiff has in their submissions inter alia submitted that the plaintiff was the lawful owner of the suit property and relied on the documents produced by the Land Registrar. The suit property according to counsel measures 40.47 ha and stamp duty was paid and then the suit property was registered in the name of the plaintiff on 18th July 2002. The counsel challenged



the evidence of the defendant and submitted that he could not have purchased the 10 acres out of L.R No. Soy/Soy Block 10(navilus)/129 on 4th May 2002 and 10th May 2002 from the 2nd defendant, who was not registered as the proprietor. The counsel submitted that as the green card produced by the Land Registrar confirmed the suit property had never been subdivided into parcels 1378 to 1380, the claim by the defendant that he had purchased L.R No. 1379 and 1380 from the 2nd defendant cannot be true. The counsel referred to the testimony of the Land Registrar who was confirmed that the mutation form that the defendants were relying on, dexh 2, was never registered at the land registry and submitted that parcels L.R No. 1379 and 1380 do not exist in the land registry. The counsel cited the cases of Jaj Super Power Cash and Carry Ltd versus Nairobi City Council & Others CA Civil Appeal No. 11 of 2002 [unreported], Elijah Makeri Nyangwira versus Stephen Mungai Njuguna & Another [2013] eKLR, and Zacharia Wambugu Gathimu & Another versus John Ndungu Maina [2019] eKLR, Gathure versus Beverly (1965) EA 514, Jaber Mohsen Ali & Another versus Priscillah Boit & Another [2014] eKLR, Alice Too versus Nickson Korir & Others [2015] eKLR, and Jasbar Singh Raj & Others versus Tarlochan Rai & Others [2014] eKLR, among others, in their submissions.

11. The learned counsel for the defendant submitted inter alia that the defendant was a bonafide purchaser for value without notice. Counsel relied on section 3(3) of the Law of Contract chapter 23 of Laws of Kenya, and the following two superior courts decisions; Katende versus Haridar & Company Limited (2008) 2 E.A 173 and Kimani Ruchine versus Swift Rutherford & Co. Ltd (1980) KLR. They also submitted on the fact that the defendant has lived on the suit property cumulatively for over 20 years without interruption by the plaintiff and has even developed thereon semi-permanent and permanent structures.
12. The issues for the court's determinations are as follows:
 - a. Whether the plaintiff is the legal and or registered proprietor of the suit property.
 - b. Whether the defendant has established a legal claim over the ten (10) portion of the suit property against the plaintiff.
 - c. Alternatively, whether the defendant is entitled for an order of refund of purchase price against the 2nd defendant.
 - d. Whether the defendant has trespassed onto the suit property, and if so, whether eviction and injunction orders against him should issue.
 - e. Whether the plaintiff is entitled to mesne profits.
 - f. Who pays the costs in the main suit and counterclaim?
13. The court has carefully considered the pleadings as summarized above, testimonies of PW1, DW1, DW2, and that of the Land Registrar, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations:
 - a. From the facts presented by the parties to the court, the plaintiff became the registered proprietor of land parcel Soy/Soy Block 10 (navilus)/129 measuring 40.47 Ha, hereinafter known as the suit property, on the 18th July 2002. He had bought the said land from Lonrho E. A. Ltd. That sometime in 2003, the defendant trespassed onto a ten (10) acre portion of the suit property and has been living there to date despite several demands by the plaintiff to vacate and hence this suit. The plaintiff's claim is disputed by the defendant claiming that he had bought the portion of the said land that is in dispute from the 2nd defendant in the



counterclaim. The 2nd defendant in the counterclaim supports the defendant's defence against the plaintiff's claim.

- b. The suit property as earlier described is Soy/Soy Block 10 (navilus)/129 and it measures 40.47 ha and is registered with the plaintiff as is evidenced by the copies of title and the green card produced as pexh 1 and pexh 7 respectively. It is important to note the arithmetics that 40.47 ha when converted to acres is 100 acres. Section 26 (1) of the [Land Registration Act](#) states as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

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

The Land Registrar produced certified copy of the green card as required by section 26 (2) which states:

“A certified copy of any registered instrument, signed by the Registrar and sealed with seal of the Registrar, shall be received in evidence in the same manner as the original”

- c. As can be observed from above, it is not enough to show ownership through title. There has to be due procedure followed in obtaining the title and I am guided by *Munyu Maina versus Hiram Gathiha Maina* [2013] eKLR where the Court of Appeal was stated that:

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

The Land Registrar also produced a consent, pexh 9, dated 7th February 2002 and a transfer form which is undated but was executed, and according to the green card, pexh 7, it was registered on 18th July 2022. There are also no further transactions as can be seen from the said green card.

- d. The defendant produced a copy of a mutation form showing that the suit property was subdivided into three portions and it is unfortunate



that the same is not clearly visible. Section 107 of the Evidence Act provides that:

107. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (1) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
- (2) Incidence of burden. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
108. Proof of particular fact. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

In order to prove that the subdivision of the suit property happened and created the new parcel 1378 to 1380 as alluded by the 1st defendant, there must have been registration also. Sadly, for the defendants, the Land Registrar denied that the suit property’s subdivision was registered. The green card also shows that there was no subdivision. There being no registered parcels 1378 to 1380 existing, from where did parcels 1379 and 1380 come from to have been sold to the defendant? The 2nd defendant could not therefore pass any title to the Defendant. The latin maxim *nemo dat quod non habet* which simply means you cannot give what you do not have applies to the alleged transaction between the 2nd defendant and defendant. The 2nd defendant could not have sold parcel 1379 & 1380 because they did not exist and he did not have title to them to pass on!

- e. Be that as it may, it is important to consider that the plaintiff admitted he had not lived on his property. He also did not dispute that the defendant has been living on the property since 2003 with a brief interlude of absence between 2008 and 2009. In the case of *Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR, the court stated that:

“It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in *Ghana of Wuta-Ofei - v-Danquah* [1961] All ER 596 at 600, the slightest amount of possession would be sufficient.”

The circumstances in the above case are however different from those in this case.

- f. The defendant appears to say through submissions that he has been on the suit property for over twelve (12) years. That may have been so, but the question that arises



is whether he was in adverse possession. The position the defendant has put forward is that he took possession of the ten-acre portion of the suit land as a purchaser from the 2nd defendant and with the plaintiff's consent. In that case, the defendant possession being that of a purchaser and or owner and with consent could not amount to be adverse the title of the registered proprietor. From the evidence availed to the court, the plaintiff has proved that he is the absolute registered proprietor of the suit property. Prayer (a) in the plaint seeks for a declaration that the suit property belongs to the plaintiff, which ownership the plaintiff has established. It follows therefore that the defendant is a trespasser on the suit property.

g. 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.”

Since 2003, the Defendant has been living on the suit property without consent from the plaintiff and has constructed structures on the suit property according to his testimony. I therefore declare that the defendant has trespassed upon the suit property. For prayer (b), the plaintiff seeks a permanent injunction. In the case of *Kenya Power & Lightning Company Ltd v Sheriff Molan Habib* the court observed with regards to a permanent injunction as follows:

“It determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merit of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.”

As the substantial issue of proprietorship of the suit property has already been determined, I find that a perpetual injunction against the defendant would be a proper order to issue.

h. With regard to prayer(d), Section 2 of the *Civil Procedure Act* Chapter 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. Order 21 Rule 13 of the Civil Procedure Rules provides as follows:

13. 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.”

i. In the case of Attorney General versus Halal Meat Products Limited [2016] eKLR the court considered mesne profits and 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, 18thEd. para 34-42.”

And in the case of Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR the court had this to say in considering an issue of whether the Plaintiff had established a case for mesne profits:

“In Bramwell vs. Bramwell, Justice Goddard stated that “... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant.” Similarly, in an Australian case, Williams & Bradley v Tobiasen it was stated that these words: “Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from. The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant's possession, or



right to possession, which has been interfered with. A more useful description of mesne profits can be found in Halsburys Laws of England, which defines mesne profits as an action by a land owner against another who is trespassing on the owner's lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession, or the tenant's interest in the land has come to an end.

Halsburys, *op. cit.*, 4th, above, suggests that where mesne profits are awarded they usually follow the previous rent rate and in the absence of that, a fair market value rent.

The Black's Law Dictionary defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession between (2) two dates." The Concise Oxford English Dictionary defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord."

The term 'mesne profits' relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.

Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.

After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne profits for the use and occupation of the premises till he delivers up possession.



In the present case, there was no written lease. The case leading to this appeal was filed by the tenant (the Respondent) against the land lord (appellant) in 2007 challenging a proclamation issued by auctioneers against him under the instructions of the appellant and also seeking an injunction against the Respondent. The initial defense filed by the appellant dated 18th October 2007 was a denial of the averments in the plaint. The respondents claim as enumerated in the plaint discloses a rent dispute. An amended defense was filed on 9th August 2010 whereby the Appellant cited a notice dated 3rd March 2008 in which he communicated to the Respondent that he had terminated the lease and sought vacant possession. The Respondent through his advocates replied to the said letter and wrote inter alia as follows:

“ the alleged tenancy/lease herein between our client and yours is the subject matter in Nyeri CMCC No. 585 of 2007.....The issues your clients are raisingare the same issues already in court. Your clients notice of termination of leaseis therefore inconsequential.”

Thus, the above notice was challenged on the above grounds. There is no further communication on record on the issue. The appellant never wrote back to dispute the Respondents response. It is important to point out that Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual illegal possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits provided the occupation is illegal.

For starters, it should be noted that the concept of mesne profits is a remedy available to the Landowner/Landlord in the event that a contractual tenancy ceases to exist and the tenant/occupier thereafter continues to occupy the premises as a trespasser.

Thus, where a landlord/tenant relationship existed like in the present case, it must be demonstrated beyond doubt that the tenancy was terminated legally and that the termination notwithstanding the tenant remained in occupation as a trespasser. Where a tenancy is created by operation of law, the tenant does not become a trespasser until the tenancy has become duly determined according to law. This position was reiterated by the apex court of Nigeria which stated:-

“Because a claim for ‘Mesne profits’ is based on trespass and is inappropriate in respect of lawful occupation as a tenant, it can only be maintained when the tenancy has been duly determined and the tenant becomes a trespasser...where a tenancy is created by operation of law, the status of trespasser will not arise, until the tenancy is duly determined according to law... however, the



lawful use and occupation of the land and premises implies an agreement to pay damages for use and occupation of the land and premises. It is a quasi-tenancy which the law recognizes...”

- j. The Court of Appeal in the case of Peter Mwangi Mbuthia & Another v Samow Edin Osman [2014] eKLR was of the opinion that it was upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated 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.”

Nyamweya J, as she then was, 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:

- “(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 even 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.”

The Plaintiff did not bring any proof of the basis for the demand of mesne profits of Kshs 45,000/= per month, and this court is therefore not able to award the same. In any event when the Plaintiffs agreed



to give vacant possession to the Defendant after payment of only the deposit, and they must be taken to have accepted the risks that would follow in the event of non-performance of the contract. The forfeiture of the deposit by the Defendant therefore in the circumstances adequately compensates them for such non-performance.”

Based on the above case laws and the fact that there was no evidence tendered on assessment of any damages or loss on the part of the plaintiff, I decline to grant prayer (d).

- l. On the prayer (c) for eviction, I find the defendant should be given reasonable time to give vacant possession of the suit land but should he fail to do so, then eviction order to issue to be executed in accordance with the law.
- m. On the counterclaim by the defendant against the plaintiff and 2nd defendant, I find the defendant has failed to prove his claim against the plaintiff to the standard required by the law. The counterclaim against the plaintiff is therefore dismissed with costs. In respect of the defendant’s counterclaim against the 2nd defendant, I find the latter did not dispute or deny it selling the ten-acre portion. Even though the alternative prayer in the counterclaim is phrased without giving details or particulars of how much money he had paid the defendant as purchase price for the ten-acre portion of the land, the court is of the view that the defendant is entitled to a refund from the 2nd defendant with interests at court rates.
- n. As under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya costs follow the event, unless otherwise directed for good cause, the plaintiff’s costs will be borne jointly and severally by the defendants. The defendant will have costs in his counterclaim against the 2nd defendant.

14. In the upshot of the foregoing conclusions the court finds and orders as follows:

- a. That the plaintiff has established his claim against the defendant on a balance of probabilities. Judgement is therefore entered for the plaintiff against the defendant in the following terms:
 - i. That a declaration be and is hereby issued that the plaintiff is the sole and absolute proprietor of Soy/Soy Block 10 (Navillus)/129, the suit property, measuring 40.47 hectares.
 - ii. That a declaration be and is hereby issued that the defendant is a trespasser on the ten-acre portion of the suit property.
 - iii. That the defendant is hereby ordered to give the plaintiff vacant possession of the ten-acre portion of the suit property within the next ninety (90) days in default eviction order to issue to be executed in accordance with the law.
 - iv. The plaintiff’s costs to be paid by the defendant.
- b. On the defendant’s counterclaim, the court finds and orders as follows:
 - i. That the defendant has failed to prove his counterclaim against the plaintiff to the standard required and the same is dismissed with costs.



- ii. That as the 2nd defendant admitted selling the ten-acre portion of the suit property to the defendant, and the court having found that he had no title to pass to the purchaser, then judgement is hereby entered for the defendant against the 2nd defendant for refund of the purchase price received with interest at court rates until payment in full.
- iii. The defendant is awarded costs in the counterclaim against the 2nd defendant.

DATED AND VIRTUALLY DELIVERED THIS 13TH DAY OF DECEMBER, 2023.

S. M. Kibunja, J.

IN THE PRESENCE OF:

PLAINTIFF: M/S Cheso

DEFENDANT : No appearance.

2ND DEFENDANT: No appearance.

WILSON – COURT ASSISTANT

S. M. Kibunja, J.

ELC MOMBASA.

