REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO.84 OF 2005

1. JANENDRA RAICHAND SHAH

2. VIRCHAND MULJI MALDE…….....……..PLAINTIFFS

3. RATILAL GHELA SAMAT

VERSUS

MISTRY WALJI NARAN MULJI…….....……DEFENDANT

J U D G M E N T

1. This litigation has been to the Court of Appeal and back. Its path has been a long one. The Plaintiffs are three gentlemen who claim to be the registered owners of all the piece of land known and described as Mombasa/Block 811/4 (the **suit premises**) between 28th June 1985 and November 2004. Thereafter they sold the suit premises to Vantage Road Transporters Ltd(hereinafter also referred to as "Vantage").
2. It is their contention that during this period the Defendant refused and/or neglected to vacate the suit premises notwithstanding their repeated demands. That although his occupation was unlawful, the Defendant by implication and expressly recognized and admitted the Plaintiffs' ownership to the suit premises. The Plaintiffs also pleaded several schemes allegedly employed by the Defendant to defeat the Plaintiff's title.
3. Prior to the filing of this suit, and while still owners of the suit premises, the Plaintiffs had filed Mbsa HCC No.423 of 2001 **JANENDRA RAICHAND SHAH & 2 OTHERS VS MR. WAIJI NARANI MULJI & ANOTHER** (hereinafter referred to as "**Civil Suit No.423 of 2001**") against the Defendant and another inter alia, seeking Damages for wrongful occupation of land and their ejectment. The need for that suit would be spent when the Plaintiffs sold the property to Vantage Road Transporters Ltd.
4. The Plaintiffs also aver that in an effort to defeat their title, the Defendant filed HCC No.204 (O.S) of 2001 **MISTRY VALJI NARAN MURJI VS JANENDRA RAICHAND SHAH & 3 OTHERS** (hereinafter referred to as "**HCC No.204 (O.S) of 2001**") against them. That Originating Summons was a claim in adverse possession.
5. Ultimately the Plaintiffs seek the following prayers:-

a. **Mesne profits of ksh.156,086,545.75**
b. **General damages for trespass, wrongful occupation and loss of user of the suit property.**
c. **Interest at commercial rates, costs and any other additional relief.**

6. In a Defence dated 2nd June 2005 and filed on 3rd June 2005, the Defendant resists the claim by the Plaintiffs. The backbone of the Defence is in paragraph (3) which is unusually lengthy! In a nutshell the following Defences are raised;

I. That the Plaintiffs title was extinguished by the Adverse Possession of the Defendant and they cannot bring this action.
II. The Defendants claim for Adverse Possession is the subject of High Court Civil Suit No.204 of 2001 which is still pending and that this suit ought to be stayed pending the determination thereof.
III. That the Plaintiffs having sued the Defendant for Damages for wrongful occupation in Mbsa 423 of 2001, they relinquished their claim for mesne profits. It is pleaded, in the alternative, that this suit is a duplication of Mbsa 423 of 2001 and should be stayed until the earlier claim is determined.
IV. The Defendant avers that the Plaintiffs claim, being one in Tort, is time barred under the provisions of The Limitation of Actions Act Cap 22.

7. It is further claimed in the Defence, that the Defendant having secured an overriding interested in the property under Section 35(f) (g) of The Registered Land Act, the Plaintiffs action of selling the suit property was wrongful and unlawful. That the sale would also be illegal because it was done inspite of the pendency of Civil Suits number 204 (O.S) of 2001 and 423 of 2001. The Defendant also thought that the Plaintiffs ought to have sought and obtained the consent of the Court for the sale under the provisions of Section 52 of the Transfer of Property Act.

THE ROAD TO HEARING

8. In a Notice of Preliminary Objection dated 15th May 2006 and filed on 17th May 2006, the Defendants objected to the Plaintiffs suit on two grounds. Firstly that the suit was time barred as the cause of action arose on 28th June 1985 and secondly this suit could not proceed in view of the 3 other pending suits.
9. After hearing arguments on these objections, Njagi J in a ruling dated 14thSeptember 2006, held that the suit was hopelessly out of time and having done so found it unnecessary to consider the arguments in respect to stay.
10. Aggrieved by that Decision of High Court, the Plaintiffs preferred Mbsa Civil Appeal No.237 of 2006 **Janendra Raichand Shah & 2 others vs Mistry Walji Naran Mulji**. In a judgment delivered on 7th October 2011, the Court of Appeal held,

> **"The suit should have proceeded to full hearing where parties would have led evidence to prove their respective positions to the dispute. We therefore hold that the Learned Judge was in error when he proceeded to determine the dispute on a Preliminary Objection on a point of Law. It follows that this Appeal must be allowed. Accordingly, we allow this Appeal, set aside the decision of the Learned Judge and direct that the suit be heard on merit in the High Court."**

That decision paved the way for hearing of this matter.

THE EVIDENCE

11. Hearing commenced on 10th September 2012. Janendra Raichand Shah (PW1) is the 1st Plaintiff. Vide a sale agreement dated 10th June 1985, Dhirajlal Vallabhdas Devani and Shantilal Raichand Devraj Shah sold the suit premises to Janendra Raichand Shah, Vichand Mulji Made and Ratilal Ghela Samat(the Plaintiffs herein). At that time of sale, the suit premises were under the occupation of the Defendant as a tenant. It would appear that there was rent owing by the Defendant as a term of the agreement was that,

> **"All outstanding rent to be received by the purchasers."**

12. In his written statement of 14th February 2012, which was adopted as his evidence in Chief, the 1st Plaintiff gives some history of the property and the Defendants' occupation of it. The suit premises initially belonged to Amirali Khetsi Hansraj Dahadnrali Khetsi Hansraj and Dolatkhanu A.K Hansraj (hereinafter jointly the Hansrajs). They leased the premises to Ubrika East Africa, a business owned by the Defendant.
13. Differences were to arise in respect of the tenancy and those differences were referred to the Arbitration by K.I Joshi Advocate. The highlight of the Arbitral award dated 31st May 1975 (PExhibit3) is reproduced below:-

> **"Taking all these facts into consideration, I am of the opinion that I hereby make an award of Shs.1,650/=, per month as the ground rent for the whole of the plot No.4 section XII to be paid by Mr. Valji to the owners of the said plot with effect from the 1st January 1975. Municipal Rates as from the 1st January 1975 shall be borne and paid by the owners; but any subsequent increase in Municipal Rates shall be passed over to the tenant – Mr. Valji Naran Mulji.**
>
> **As to the period of lease, I have examined carefully all the arguments put before me by Mr. Amirali and Mr. Valji Naran Mulji, in their evidence and their respective typed statements and am of the opinion and I hereby award that the period of lease should be five years with effect from the 1st January 1975 at the expiry of which period Mr. Valji Naran Mulji must deliver up vacant possession of the Plot to the owners. He may if he so desires, remove all his improvements before the expiry of the term of the lease. If he, however, does not then want to remove the improvements or any part thereof, he shall have no right of compensation against the owners."**

14. On or about 16th November 1979 (P Exhibit 10) the suit premises was sold to Dhirajlal V. Divani and Shantilal R.D. Shah. The relationship between the Defendant and the new owners was turbulent. The Defendant attempted to stop the transfer of the property to the new owners by lodging a caution. That caution was later to be removed by the Land Registrar on 1st November 1979. Whether that removal was lawful became the subject of litigation in Mbsa High Court Civil Appeal No.6 of 1980 – **Mistry Valji Naran Mulji –v- Chief Land Registrar & 3 others**. The Plaintiffs asked the Court to take notice to the following holding of Kneller J (as he then was);

> **"The appellant is now holding over from month to month because the lease expired and he does not know what the purchasers' attitude to him is and nor do the Hansrajs."**

The Appellant therein is the current Defendant.

15. Fast forward to 10th June 1985. This was the date when the new owners sold the suit premises to the Plaintiffs. But the transfer of that property to the Plaintiffs was not to be plain sailing. Although the Plaintiffs lodged the transfer for registration on 28th June 1985 it took The Land Registrar some considerable time to register it. In a letter dated 27th November 1986 (P Exhibit 18) the Senior Land Registrar explains this delay to the Plaintiffs Advocates as follows:-

> **"While your efforts to have your clients' interests safeguarded are very much appreciated, the contents of our letter are rather disturbing. Both your clients and yourselves are well aware of the fact that the registration of the transfer was withheld on instruction from the offices of the Provincial Commissioner and the Commissioner of land a fact which is clearly stated in our letter that you have referred to. Even before them you had been notified of the fact that we were awaiting the Government's decision on the matter and would communicate with you as soon as the same had been sorted out."**

16. Frustrated, the Plaintiffs turned to the Court for redress. They filed Judicial Review proceedings

(**Misc Civil case no.117 of 1987**) (PExhibit 20) seeking an order of Mandamus to direct the Chief Land Registrar to proceed as by law provided with the registration of the transfer presented on 28th June 1985 relating to the parcel of land known as Mombasa/Block 414/4 and to register the said transfer.

17. The 1st Plaintiff explains that during the pendency of this case, he was threatened, harassed and intimidated into selling the property to the Defendants. He gave an example by producing a letter dated 5th October 1987 (P Exhibit 21) in which Mr S.P. Mung'ala the then Provincial Commissioner writes to him:-

> **"This is further to or discussion in my office on 2nd October, 1987 between yourself, the landlords and myself.**
>
> **You may advise your advocates and those of Mistry Valji Naran Mulji to talk and agree on the current market value of the plot. The other details of rentals and interest should also be worked out and agreed. When this had been finalized please get in touch with me in order to formalize the matter.**
>
> **Please take note that the Government has decided that the plot should be sold to Messrs. Mistry Valji Naran Mulji who have for developed the plot."**

18. The Plaintiffs somewhat caved in to the threats and intimidation and agreed to a discussion of sale of the property to the Defendant. PW1 testified that two valuers were commissioned to give a value for the land only without any improvement.The valuers returned two values of ksh.9.00million and ksh.4.5million. That the Defendant refused to pay any of the amounts and insisted on buying the property at ksh.2.5 million. That standoff broke the deal.
19. After protracted correspondence exchanged between the Plaintiffs Advocates and Government officials, the property was eventually on 22nd August 1989 (P Exhibit 38) transferred to the Plaintiffs.
20. It was the evidence of PW1, that the Defendants occupied the property without paying rent from October 1979 to November 2004. It was his testimony that on the advice of Maina Chege & Co Valuers (PExhibit 57) the flat rent for this period is ksh.41,618,200/=. He also seeks interest on this amount worked on a fixed compound interest of 1.33% per month. In his written statement, the 1st Plaintiff prays for ksh.241,151,305.12 on account of mesne profits. One notices however that in the plaint the claim for mensne profits is for kshs.156,086,545.75.
21. Answering questions in cross examination, PW1 told Court that the 2nd Plaintiff died on 15th December 2011, while the 3rd Plaintiff was alive and residing in Mombasa. He explained that he was giving evidence on their behalf. He further told Court that sometime around 1987 the Defendant visited the Plaintiffs Advocate, Pandya & Talati, and agreed to pay rent. That he signed something to this effect but PW1 never had that document in Court.
22. PW1 told Court that from 1985, they did not demand rent from the Defendant in writing. On being referred to their letter of 21st August 2000(P Exhibit 44) PW1 confirmed that the Plaintiff had offered to sell the property to the Defendant but he never responded to the offer. PW1 also stated that notwithstanding notices that the Defendant vacates, the Defendant has neither vacated nor paid any rent.
23. The witness confirmed that the Plaintiffs sold the property to Vantage notwithstanding that the Defendants' claim for Adverse Possession in HCC No.204 of 2001 (O.S.) was still pending. He was also aware that Civil Suit No.423 of 2001 in which the Plaintiffs had sought a declaration that the Defendant is a trespasser is still pending.
24. It was the further testimony of the witness that the Defendant had exclusive possession of the property from 1985 to 2004 and that none of the Plaintiffs had ever set foot on it.
25. Maina Chege (PW2) is a valuer. The Plaintiffs instructed him to advise them of the market value of the suit property as at October 2004. He valued the property without development at ksh.70,300,000/=. He was also asked to advice on the fair rental income of the property from October 1979 to October 2014. He returned a value at ksh.41,618,200. He says that he derived the rent from rent prevailing at that material time for vacant sites.

26. The witness was on cross-examination probed on the basis of his valuation. He had assessed rent from 1979 to 1990 at ksh.75,000/= per month. He thought that the assessment of the Arbitrator at ksh.1,650/= for rent in 1975 was rather low. He also thought the same about the valuation of Burn & Fawcett which placed the rent at ksh.45,000/= per month in 1987. He explained that if the property was undervalued, the rent derived therefrom would be erroneous. He was surprised that the property had been sold at ksh.12,500,000/= on November 2004. He conceded that had it been brought to his attention then he would have used it as a reasonable sale price.
27. Ketan Visram Valji Patel is the son of the Defendant and is the holder of his Power of Attorney (D Exhibit 3). He adopted the contents of the statement of the Defendant dated 17th April 2012 and filed on 23rd April 2012 as his evidence in chief.
28. It was the Defence case that sometime in November 1968 the Defendant entered into a tenancy agreement with one Amirali K. Hansraj to occupy the suit property. Subsequently a dispute between him and the Landlord was referred to Arbitration. In the award made at the end of the Arbitration, ground rent for the plot was fixed at ksh.1,450/= per month from 1st January 1975. The lease was for a term of 5 years ending on 31st December 1979. It was the Defendants further evidence that he continued to occupy the premises even after the lease period had expired and paid a monthly rent of ksh.1,650/=.
29. That without consulting him, the Hansrajs sold the property to D.V. Devani and S.R Shah in 1979. That the new owners refused to recognize him as a tenant and refused to negotiate and/or accept any rent. On 28th June 1985, the new owners sold the property to the Plaintiffs. The Defendant continued to occupy the premises. And the Plaintiffs, just like the previous owners, refused to recognize the Defendant's tenancy. At one time the Defendant even offered to purchase the property but the Plaintiffs declined to negotiate.
30. The position of the Defendant is that after the expiry of the tenure in 1979, he continued to occupy the land as an Adverse Trespasser. That the Plaintiffs right to recover the suit premises extinguished in 1991 after the lapse of 12 years. This informed the decision of the Defendant to apply to be registered as the owner thereof in place of the Plaintiffs in HCC 204 of 2001 (O.S). Those Originating Summons are still pending.
31. The Defendant stated that, in an effort to defeat his interest in the property, the Plaintiffs sold the property to one Shahid P Butt who forcefully evicted the Defendant on 11th March 2005 in disregard of restraining orders in HCC No.55 of 2005 **MINSTRY VALJI NARAN MULJI VS JANENDRA RAICHAND SHAH & 5 OTHERS.** That Butt was found guilty of contempt of the Court order on 29th July 2008 and sentenced to civil jail.
32. In response to questions put to him in cross-examination, DW2 told Court that the Defendant paid rent up to the end of September 1979. It was also the position of the witness that the Defendant recognized the Devani and Shah, and later the Plaintiffs as his Landlord.
33. The Defendant instructed David John Fawcett to carry out two valuations in respect to the suit premises. By a report dated 29th October 1987 (D Exhibit 1) the valuer returned a market value for the undeveloped plot at ksh.4,500,000/=. In his opinion the rent for the vacant plot was ksh.540,000/= per annum on a 12% return on the capital value.
34. The second valuation was for mortgage purposes and in respect to the suit premises as developed. Vide a report of 10th July 2003(D Exhibit 2), the valuer returned a market value of ksh.28,000,000/=, a mortgage value of ksh.25,000,000/= and a forced sale value of ksh.22,000,000/=. He thought that the valuation of Mr. Chege of ksh.70 million was manifestly extensive. He defended his valuation as it was based on a site visit.

A PRELIMINARY MATTER

35. As the Court turns its attention to the determination hereof, it is dutybound to make some observations in respect to the two other matters pending between the litigants herein. In civil suit No.423 of 2001, the Plaintiffs herein sued the Defendant and Another for the following prayers:-

I. **A declaration that the defendants are mere occupiers on sufferance.**
II. **An order of ejectment of the defendants from the suit land;**
III. **An order compelling the defendants to restore the land at their expense, to its original state**

by removing all structures erected without the consent of the landowners or approval of the Municipal Council.

IV. **Damages for use and occupation, Municipal rates and damages for occupation on sufferance as tabulated under paragraphs 8 and 9 hereof.**

V. **Costs of this suit, and interest as the court may order.**

VI. **Any other relief the court may deem fit to grant in the circumstances of this case.**

36. While that suit was pending the Defendant herein commenced proceedings by way of Originating summons seeking to be registered as proprietor of the suit premises by way of Adverse Possession. Moved by the Plaintiffs herein, Hon J. Khaminiwa (Commissioner of Assize as she then was) stayed the hearing of the Originating Summons pending the outcome of the Civil Claim. The Plaintiffs are yet to prosecute the Civil Suit and on 24th November 2004 sold the property to Vantage Road Transporters Ltd. About six (6) months later, on 12th May 2005, the Plaintiffs filed this suit.

37. Undoubtedly there is commonality of some issues herein and those in the two pending suits. In the present suit the Plaintiffs seek Mesne Profits and General and punitive Damages for trespass, wrongful occupation and loss of user. Necessarily this Court will have to determine the status of Defendant in the period he is alleged to have been in wrongful occupation or trespass. A Defence to this claim is that the Defendant is an Adverse Possessor as the Plaintiffs title to the premises extinguished in 1991. This Court will therefore have to make a finding as to the merit of that Defence. To that extent the outcome of this matter will have a bearing on the Originating Summons.

38. In respect to HCCC No.423 of 2001, the Plaintiffs prayed for Damages for use and occupation which is not dissimilar to the Damages for use and occupation sought herein. This Court agrees with the Plaintiffs submission that if it were to grant this prayer in the present suit then it would be futile for the Plaintiffs to pursue it in Civil Suit No.423 of 2001.

39. It was not lost to this Court that the two pending causes were related to the present matter and on 10th September 2012 the Court asked Counsels appearing herein to reflect on the possible implications of that relationship. On 27th September 2012, Counsels representing both sides were in agreement that this matter proceeds to hearing and finalization. In their final submissions both Counsels reiterated their positions that this Court does determine this matter notwithstanding that its determination will have a bearing on the other two matters. I have to agree with the stand taken by Counsel because the hearing and determination of the present suit has not been stayed. Upon the outcome here, the litigants will have to choose how to proceed in the two pending matters.

ISSUES FOR DETERMINATION AND THE COURTS RENDITION

40. The parties herein never agreed on the issues for determination and each proposed separate issues. After considering those proposals, the pleadings herein and the evidence, the Court sees the following questions as requiring its determination;

1. What was the nature of the Defendants' occupation of the suit premises between June 1985 to November 2004?
2. Is the claim of the Plaintiffs time barred?
3. Are the Plaintiffs entitled to mesne profits? and if so the quantum.
4. Are the Plaintiffs entitled to general damages for trespass, wrongful occupation and use of the suit property? If so, the quantum.
5. Order on costs.

41. The dispute herein arose when the suit premises was registered under the now repealed Registered Land Act (Cap 300). By virtue of Section 107 of The Land Registration Act, 2012 (Act No.3 of 2012) the rights, interests, title or obligations of the litigants herein continue to be governed by the repealed Registered Land Act.

42. There is unanimity that the Defendant entered the suit premises as a tenant of the Hansrajs. Differences arose between the Tenant and the Landlords and the same were referred to Arbitration before K.I Joshi Advocate. In the submission to Arbitration (P Exhibit 2) the Arbitrator was to

determine the following:-

> **"(i) The ground rent payable for Mombasa/Block/XII and (ii) the nature and extent of lease to be given by the Landlords to the Tenant."**

The parties to the Arbitration unequivocally agreed that the award of the Arbitrator would be binding on them.

43. In respect to the ground rent the Arbitrator made an award of ground rent of ksh.1,650/= per month with effect from 1st January 1975 and said the following in respect to the Municipal rates,

> **"Municipal rates from 1st January 1975 shall be borne and paid by the owners, but any subsequent increase in Municipal Rates shall be passed over to the Tenant."**

As to the term of the lease the Arbitrator made an award of five years with effect from 1st January 1975. The Arbitrator further held that a formal lease incorporating the award was to be executed by the contestants as early as possible.

44. As it turned out the formal lease was never executed. The parties blame each other for this failure. But for purposes of this dispute it would not matter that a formal lease was never executed because the parties had submitted themselves to a binding Arbitration in which the award of rent and the term of the lease had been made. On or about 16th November 1979 the Hanrajs sold the property to Dhrajlal V Divani and Shantilal R.D. Shah. A month or so later, the term of the lease expired on 31st December 1979.
45. What then was the status of the Defendant after 31st December 1979? It would be now apposite to recall the holding of Kneller J (as he then was) in **Civil Appeal no.6 of1980** (supra)where he said this of the status of the Defendant then,

> **"The Appellant is now holding over from month to month because the lease expired and he does not know what the purchasers attitude to him is and nor do the Hansrajs."** (my emphasis)

46. But during the hearing of this matter, the Defendant himself through DW2 was clear as to the new owner's attitude towards him. He stated,

> **"I am aware that there was a change of ownership and we paid rent to the new owners and it was refused."**

His written statement of 17th April 2012 was even more telling, he states;

> **"Subsequently, the land was purchased by two people namely D.V. Devani and S.R. Shah in 1979. These new owners refused to recognize my tenancy and further refused to negotiate and accept any rent and insisted that I was a trespasser and should surrender vacant possession of the land."**

47. In addition, the evidence on record shows that rent was paid up to September 1979. No rent was paid thereafter. So, no rent for any period after the expiry of the lease was paid or accepted by the Landlords. It is for this reason that this Court is unable to find that the Defendant continued in occupation as a Holding Over Tenant. The provisions of Section 52 of The Registered Land Act would be instructive:

> **"52.(1) Where a person, having lawfully entered into occupation of any land as lessee, continues to occupy that land with the consent of the lessor after the determination of the lease, he shall, subject to any written law governing agricultural tenancies and in the absence of any evidence to the contrary, he deemed to be a tenant holding the land**

on a periodic tenancy on the same conditions as those of the lease, so far as those conditions are appropriate to a periodic tenancy.

52(2) For the purposes of this section, the acceptance of rent in respect of any period after the determination of the lease shall, if the former tenant is still in occupation and subject to any agreement to the contrary, be taken as evidence of consent to the continued occupation of the land."

Two(2) things need to be noted. The continued occupation by the Defendant was without the consent of the lessor and secondly, no rent for any period after the determination of the lease was accepted by the Landlords.

48. I therefore have to agree with Counsel for the Plaintiff that with effect from 1st January 1980 the Defendant was a Tenant at Sufferance. Halsburys Laws of England (4th Edition) says this of Tenancy in Sufferance;

"A person who enters on land by a lawful title and, after his title has ended, continues in possession without statutory authority and without obtaining the consent of the person then entitled, is said to be a tenant at sufferance."

49. What about the Defendants claim that he obtained interest over the suit premises in Adverse Possession? This Defence is defeated by the Defendants own evidence. DW2 stated,

"The Defendant recognized the Devani's and the Plaintiffs as the Landlords."

And that was not an inadvertent admission as it is consistent with the stance of Defendant in the early part of the dispute when by a letter dated 14th July 1989 (D Exhibit 30) he sought the intervention of The Provincial Administration. The relevant portion of that letter reads:

"Without going into the details of the problem that you are well aware of, we would like to reiterate our wish which is, and has indeed always been, that we be given a chance to purchase the plot on which we have put up development and are in physical possession of for the last 20 years. The issue at stake is the purchase price and particularly the fear that the figure demanded by the other parties i.e. the 7 million is unreasonably impossible in so far as the current market value is concerned."

Then, as was the case on the date of the hearing, the Defendant acknowledged the Plaintiffs ownership of the suit premises. Save for the period after the filing of the Originating Summons, there had been explicit recognition of the Plaintiffs authority as land owners.

50. The Defendants Counsel referred this Court to two Indian Decisions (**Dalmir Singh versus Joti Prasad 1925 ALLAH BAD 698** and **Bisher Nath versus Kundan Air 1922**) for the proposition that when a Tenancy at Sufferance has existed for twelve years the Landlords right of entry is barred by statute and the tenant becomes the absolute and complete owner of the property. I have had opportunity of reading those two decisions. In my view, it may be of little assistance to the Defendant because, prior and during the hearing, the Defendant overtly recognized the Plaintiffs as the land owners during the period under dispute. The Defendant recognized the Plaintiffs title to the land.

51. The parties are not agreed as to which provisions of the Limitation of Actions Act govern the Plaintiffs claim. The Plaintiffs submit that their cause of action is one in equity. In their view, the claim for mesne profits is an equitable remedy and falls under Section 4 (1) of the Limitation of Actions Act. The Defendant is of a different view and urges the Court to find that the Plaintiffs action is founded on Tort. For that reason the provisions of Section 4(2) would apply. The provisions of Section 4(1) and 4(2) are reproduced below;

"4(1) The following actions may not be brought after the end of six years from the date

on which the cause of action accrued-

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

4 (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date."(my emphasis)

52. The Plaintiff's claim is founded on the Defendant's wrongful occupation of the suit premises from 28th June 1985 to November 2004. The Plaintiff's, firstly seek General Damages for trespass, wrongful occupation and loss of user. They also seek mesne profits of ksh.156,086,545.75. Mesne profits is defined in Section 2 of the Civil Procedure Act;

"In relation to property, means those profits which the person in wrongful possession of such property actually receive 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."

And the Plaintiff's Counsel cited the Court of Appeal's Decision in Civil Appeal No.149 of 2007 **Kenya Hotel Properties Limited and Willesdon Investments Ltd**. [2009] eKLR where the Court approved the Definition of Mesne Profits given by Stronds Judicial Dictionary. The Court said,

"And to lend credence to this, Stround's Judicial Dictionary 4th Edition volume 3 describes mesne profit as:-

"Another term for Trespass arising from particular relationship of Landlord and Tenant."

54) Occupation of a Tenant at Sufferance is without statutory authority or authority of the person entitled. Although a Tenant in Sufferance may not be the typical trespasser, nevertheless his occupation of the premises is without the authority of statute, Common Law, equity or contract. In that sense the wrongful occupation of a Tenant in Sufferance is akin to the wrongful occupation of a trespasser. In fact the definition of mesne profits accepted by the Court of Appeal in **Kenya Hotel Properties Ltd** (supra) is suggestive that a wrongful possession by a tenant could amount to trespass. It is for this reason that I am willing to hold that a wrongful occupation of a Tenant in sufferance is a Tort.

55. Under the provisions of Section 4(2) of the Limitation of Actions Act, an action founded on Tort may not be brought after the end of 3 years from the date on which the action accrued. In considering whether the Plaintiffs action is time-barred an essential determination is the date on which the cause of action accrued. The Plaintiffs submitted that,

"the cause of action for mesne profits and also for damages for wrongful occupation and use only arise when the Landlord has obtained an order for eviction or when the wrongful occupation ceases and possession is delivered up."

It was further contended by the Plaintiffs that mesne profits accrue from day to day and that the cause of action is a continuing one. For the Defendant it was argued that the cause of action accrued on 28th June 1985 when the Plaintiffs became the owners of the suit premises. In support of their argument, the Plaintiffs referred this Court to some passages from Halsbury (supra). As far as I can see the following passages are relevant;

Paragraph 208 …….

> **"Mesne profits, being a type of damage for trespass, may be recovered in respect of the Defendants continued occupation only after the expiry of his legal right to occupy the premises."**

Paragraph 259 …….

> **"In an action for mesne profits, which is an action for trespass, only arrears for six years before action may be recovered.**

56. The former point is discussed in the decision of **Canas Property vs- K.L Television Services Ltd** [1970]2 All ER. There Lord Denning (MR) held, at page 799,

> **"my conclusion is that where a tenant has been guilty of a breach which has not been waived, then, in order to effect a forfeiture, the lessor must actually re-enter, or do what is equivalent to re-entry, namely issue and serve a writ for possession on the lease or assignee, as the case may be. If the lessee or assignee is a partnership firm (or joint tenants) service on one of them is enough for that purpose, see Doe d Benner v Roe. The lease is determined as from the date when the writ is served. The rent is payable until the date of service. Mesne profits are payable after the date of service."**

The holding restates that mesne profits are payable after a lease is determined. In that suit the lease was determined by forfeiture but in the dispute under consideration the lease determined at its expiry. That date is 31st December 1989. It was from that period that mesne profits was payable. That the expiry of a lease is one way for determination of a lease is even more so clarified by the provisions of Section 64 (d) of The Registered Land Act which provides:-

> **"64(1) Where-**
>
> a. **The period of a lease has expired; or**
> b. **An event upon which a lease is expressed to determine has happened; or**
> c. **A lessor has lawfully re-entered and recovered possession of the land leased; or**
> d. **A notice duly given to determine the lease has expired, the lease and every other interest appearing on the register relating to the lease shall thereupon determine, and if the lease is registered the lessor may apply in writing to the Registrar to cancel its registration."** (My emphasis)

Although mesne profits would have been payable to the Landlords from 31st December 1989, those profits would only have become payable to the Plaintiffs herein when they became the owners of the premises. From the evidence, the Plaintiffs purchased the premises on 10th June 1985 and lodged a transfer in respect thereof on 28th June 1985. The detained registration of transfer came on 28th August 1989. On that date the Plaintiffs became the registered proprietors of the suit premises. But as will soon be apparent, it is not necessary for this court to make a finding as to which incident between the sale agreement, lodgment for registration or actual registration, gave the Plaintiffs the legal capacity to claim for Mesne Profits. But the parties herein seem to agree that the operative date is 28th June 1985. This Court, for a moment, assumes that they are right. The Plaintiffs cause of action first accrued on that date.

57. The all important question that follows is whether, as suggested by the Plaintiff's Counsel, the

cause of action is a continuing one which arose on each day the tenant was in wrongful occupation. It had been further submitted by Counsel that the decision in **Kenya Hotel Properties Limited –vs-** (supra) reiterates that a cause of action in mense profits is a continuing one. But with respect to Counsel this does not seem to be the pith of that decision. Certainty not the following part of the decision that was highlighted by the Plaintiff's Counsel for emphasis:-

> **"On damages the first consideration was the award of mesne profits. In regard to this award, it was incumbent upon the learned Judge to determine first the correct number of days the appellant could be held to have occupied the suit property as a trespasser and the correct daily rate charged for each motor vehicle."**

In the matter before that Court, there was no contention that the claim or any part thereof was time barred. I understand the holding of the Court to be simply that in determining the award to make for mesne profits, it is imperative that the Court determines the correct period that a trespasser has been in wrongful occupation.

58. Nevertheless in fairness to the Plaintiffs, their argument that their cause of action arose on each day that the Defendant was in wrongful occupation may be valid. On this, the Court draws an analogy from continuing trespass. Clerk & Lindsell on Torts (17th Edition at paragraph 17.02) states;

> **"Every continuance of a trespass is a fresh trespass, in respect of which a new cause of action arises from day to day as long as the trespass continues."**

The Defendant was in continuous wrongful possession from 1st January 1990 (a day after the lease determined) up to 24th November 2004 when the Plaintiffs sold the premises to Vantage. Yet in respect to the Plaintiffs, their cause of action first arose in June 1985 when they became owners of the property. So from June 1985 to 24th November 2004 a new cause of action arose each day the Defendant continued to be in wrongful possession. However for purposes of The Limitation of Actions Act, any cause of action that arose three (3) years before the date of filing of the suit would be statute barred. The suit was filed on 12th May 2005 and so any cause of action that arose prior to 12th May 2002 is time barred.

59. This Court has found that the Plaintiffs have a valid claim against the Defendant for mesne profits arising out of the Defendants wrongful occupation of the premises. The valid claim is in respect to the period from 12th May 2002 to 24th November 2004. As I turn the question of damages I also bear in mind that an appropriate measure for mesne profits would, in the circumstances of the case, be reasonable rent during the period of wrongful occupation.
60. Mr. Maina Chege (PW2) returned an opinion that the appropriate rent for the premises for the year 2002 was 304,300/= per month, and for the years 2003 and 2004 ksh.358,000/= per month. The opinion was prepared on instructions of the Plaintiffs. In cross examination, he told Court that rent is derived from the value of the property and so if the estimate on value is wrong then the estimate on rent would be wrong. He had, in arriving at the rent, estimated the open market value of the property as at October 2004 to be 70,300,000/=. In the report, the valuer derived the value of the property from comparable sales of property in the neighbourhood of the suit premises. He then states,

> "**we shall therefore adopt the sale rate of comparable number two (Kshs 10.101 per square metre) in assessing the open market value of the subject plot as at October, 2004**."

He was therefore surprised when it was put to him that his clients had in fact sold that property for ksh.12,500,00/= on 24th November 2004. He conceded that had he known this then he would have used it as a comparable.

61. David John Fawcett had carried out a valuation on the same property. He returned a market value

of ksh.28,000,000/= as at 10th July 2003. He therefore thought that the value of ksh.70,000,000/= given by Mr Chege as the value for the property as at October 2004 (nine months later) to be manifestly excessive. Although the witness stated that;

> **"The rental value does not necessarily depend on value of property, depends on other factors as well"**

He had on 29th October 1987 used the value of the property to estimate an annual rental. The conclusion of that report reads,

> "**VALUATION**
>
> **We would advise a present value for the freehold interest in the undeveloped plot, free from encumbrances and assuming vacant possession, of kshs. 4,500,000/=. (KENYA SHILLINGS FOUR POINT FIVE MILLION)**
>
> **Taking an interest rate of 12%, this is equivalent to an annual rental in perpetuity of kshs. 540,000/=. (KENYA SHILLINGS FIVE HUNDRED FOURTY THOUSAND)"**

62. In re-examination Mr Chege stated that if he was to accept the Defence value of ksh.25,000,000/= then the estimated rent would be about ksh.250,000/= per month. That would be a 12% return on capital value. That just happens to be the formula used by his colleague Mr Fawcett in his 1987 valuation. This leads the Court to place a reasonable rent at ksh.250,000/= per month for the period of wrongful occupation.
63. By definition (see paragraph 52 above) Damages for Mesne Profits includes interest on the profits. A substantial portion of the Plaintiffs claim is interest on the reasonable rent which was put at 1.3% per month by Mr Chege. The rate of interest and its application must be rationale. The basis must be laid out by the claimant. Unfortunately for the Plaintiffs, neither in his oral testimony nor report does Mr Chege justify the interest rate applied. For that reason this Court shall exclude the element of interest in working out the mesne profits.
64. From 12th May 2002 to 24th November 2004 is 30 months. Reasonable rent for this period, I have held, is kshs. 250,000/= per month. The profit which the Plaintiffs would earn with ordinary diligence for this period is kshs. 7,500,000/=. This Court makes an award of this sum in Mesne Profits. The Plaintiffs other prayer was for,

> **"General and Punitive Damages for trespass, wrongful occupation and loss of use of the suit premises."**

But having made an award for Mesne Profits I see no reason to make an award for Damages for Tresspass. The Court of Appeal in **Kenya Hotel Properties Limites** (Supra) stated'

> "**Our understanding of the above persuasive authorities 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**."

I am duly guided.

65) If I must say this. The argument by the Defendant that the Plaintiffs breached the Doctrine of *lis pendens* when they sold their property to Vantage is plainly wrong. That doctrine, laudable though it may be, did not apply to litigation over land registered under The Registered Land Act.

66) This now is the outcome. I hereby award the Plaintiffs Mesne Profits of kshs. 7,500,000/= with interest thereon at court rates from the date of filling of the suit. The Plaintiff shall also have costs.

F. TUIYOTT

J U D G E

COUNTERSINGED, DATED AND DELIVERED THIS 12TH DAY OF AUGUST 2014.

IN THE PRESENCE OF:

MR. KABALAKI FOR PLAINTIFF

NO APPEARANCE FOR RESPONDENT

J U D G E