



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 5 OF 2016**

**SAFARICOM LIMITED ..... PLAINTIFF**

**VERSUS**

**EMFIL LIMITED ..... DEFENDANT**

**JUDGMENT**

*(Plaintiff holding a lease to the suit property with lessor being a third party company with a title over the same land; title of the third party issued under the regime of the Registered Land Act; plaintiff proceeding to erect a telecommunication mast on the land; defendant emerging and claiming to own the land; plaintiff filing suit to restrain the defendant from the land; defendant filing defence and counterclaim seeking damages for the plaintiff's presence on the land; suit by plaintiff dismissed for want of prosecution and subsequently on application of the defendant, plaintiff ordered to vacate the property; plaintiff duly vacating the property within the specified time; defendant still pursuing its counterclaim for damages on basis that she is the rightful owner of the suit property and that the plaintiff trespassed into it; position on the title of the property being that it is under dispute in a separate suit where the party which leased to the plaintiff the suit property is a defendant; suit can go either way; under those circumstances, and there being two titles to the land for which no decision is yet to be made, plaintiff cannot be held to be guilty of trespass; in any event, plaintiff cannot be faulted for entering into the lease and erecting the mast as the third party also had a title and plaintiff is thus innocent; no award for general damages for trespass given; in the same breadth, defendant also not entitled to any award for mesne profits; in any event, defendant not demonstrating any economic activity on the land or any income from it to entitle her to mesne profits; other claims for damages dismissed; counterclaim dismissed with costs)*

**A. Introduction and Pleadings**

1. This judgment is in respect of the defendant's counterclaim, for the plaintiff's suit was dismissed for want of prosecution through a ruling delivered on 16 May 2019. The background to the defendant's counterclaim is as follows :-

2. Through a plaint filed on 15 January 2016, the plaintiff, a telecommunications company, filed suit inter alia seeking to have the defendant restrained from the land parcel Kwale/Ramisi/Kinondo SS/150. It pleaded that in the year 2013, it engaged an agent, Broadband Communication Networks Limited, to source and identify a suitable site for the erection of a mast to boost its network in Chale Island and the larger part of Kinondo Beach at the South Coast. It averred that its agents found a suitable site, on the land parcel Kwale/Ramisi/Kinondo SS/150. Its due diligence revealed that the land was owned by Jua Maisha Limited who availed to the plaintiff her title. The plaintiff then entered into a lease agreement with Jua Maisha Limited for a portion of the land measuring approximately 102.72 square meters and the lease allowed the plaintiff to install a mast and have free access to the property. The plaintiff stated that it spent a sum of Kshs. 12,500,000/= to erect the mast. It pleaded that on 2 October 2015, it received a letter dated 1 October 2015, from the advocates of the defendant, demanding that it dismantles its installation. In apprehension that the defendant would interfere with the land, it filed this suit seeking orders to have the defendant permanently restrained from the suit property. Together with the suit, the plaintiff filed an application for injunction to restrain the defendant from the suit land. The application for injunction was heard by Omollo J, who dismissed it through a ruling delivered on 6 April 2017. Subsequently, the defendant filed an application dated 20 May 2019 to have the plaintiff's case dismissed for want of prosecution and for an order to have the plaintiff remove its mast from the suit land. That application was heard by Omollo J and the ruling was delivered on 16 May 2019. The Honourable Judge allowed the application and dismissed the plaintiff's suit for want of prosecution without any orders as to costs. She also gave the plaintiff 45 days to remove its mast from the suit land. The mast was subsequently removed. It will be seen that the plaintiff's suit was dismissed for want of prosecution and nothing arises out of it save that it does provide a background to the counterclaim filed by the defendant.

3. The defendant filed defence and a counterclaim which she later amended on 9 September 2020. In the amended counterclaim, it is pleaded that in October 2015, the plaintiff was informed of the defendant's right over the disputed property and that despite receiving all the necessary documentation, she declined to vacate the property and continued to trespass on it and later filed this suit. It is pleaded that after filing suit, the plaintiff filed an application for injunction which was dismissed. It is pleaded that the plaintiff declined to vacate the premises and intentionally failed to prosecute its case which led to its dismissal for want of prosecution on 16 May 2019. It is pleaded that since 2015, the plaintiff has benefitted from the use of the suit premises by using a base station to provide its services to residents in the coast region. The defendant has pleaded that it demands all proceeds and profits derived from the illegal use of the land. She specifically seeks the following

prayers in the counterclaim :-

(a) *The plaintiff's suit be dismissed with costs to the defendant.*

(b) *A declaration be made that the plaintiff trespassed on the defendant's property and that the defendant is entitled to general and exemplary damages for trespass against the plaintiff.*

(c) *A declaration that the defendant is entitled to mesne profits at the market value for the period that the plaintiff trespassed on the defendant's property.*

(d) *A declaration be made that the defendant is entitled to the profits of the plaintiff received from the suit property while being in trespass amounting to Kshs. 54, 398, 338.04/-.*

(e) *A declaration be made that the plaintiff is in contempt of court orders in force relating to the suit property.*

(f) *The plaintiff be ordered to return the property to the condition it was in before it trespassed onto the suit property.*

(g) *Costs of the suit and interest thereof.*

(h) *Costs of the counterclaim and interest thereof.*

(i) *Any such relief as the Honourable Court may deem fit to grant.*

4. The plaintiff filed a defence to the amended counterclaim. She more or less repeated what she had pleaded in the plaint; that she needed land to set up a telecommunication mast; that it engaged a company to look for a suitable site and the suit land was identified; and that she entered into a lease with the person who was the registered owner of the land i.e Jua Maisha Limited. She pleaded that she relied on documents from the land registry in entering into the agreement with Jua Maisha Limited and she cannot bear responsibility for wrong data or information in the land register or the actions or inactions of Jua Maisha Limited. She pleaded that the defendant was aware that Jua Maisha Limited had title to the land but failed to enter any restriction in the title and that the defendant is estopped from alleging otherwise. She further pleaded that in view of the orders made on 16 May 2019, the counterclaim is *res judicata*. She added that she vacated the suit property in compliance with the orders of court.

5. The defendant filed a reply to the plaintiff's defence to counterclaim. Inter alia, she affirmed that the plaintiff vacated the premises pursuant to the orders issued on 16 May 2019 requiring it to do so in 45 days. She nevertheless insisted that she has a claim on trespass against the plaintiff as it had been denied its right of possession. She pleaded that the plaintiff failed to vacate despite her letters asking her to do so. She refuted that the claim is *res judicata*. She added that the plaintiff ought to be held responsible for its actions as it was aware that the land was owned by the defendant given its communication of 1 October 2015. It also pleaded that it had published notices of caveat emptor in the local newspapers and that any person conducting due diligence would have discovered them, and would also have discovered court orders and judgments in favour of the defendant, and that the lease between the plaintiff and Jua Maisha Limited was unlawful. She pleaded that on 27 May 2015, Omollo J, issued orders restraining all dealings in the property while dealing with the suit *ELC No. 113 of 2015 (Mombasa) Emfil Limited vs Hon. Attorney General & 423 Others*.

## **B. Evidence of the Parties**

6. To support her case, the defendant called one witness, Mr. Vinay Chandra Demodar Popat who identified himself as a director of the defendant. He had a witness statement which he adopted as his evidence. I have gone through it. In it, he has stated inter alia that the defendant is the lawful registered owner of 140 plots being LR Numbers 13433/6-13433/143 registered under the Registration of Titles Act, Cap 281, Laws of Kenya (repealed in 2012). He stated that the defendant spent substantial resources to develop the property and has been in occupation. He stated that in the year 2006, they discovered that the Director of Land Adjudication and Settlement, and the Land Registrar, had purported to allocate and issue title deeds to the same land, to third parties under regime of the Registered Land Act, Cap 300, Laws of Kenya (also repealed in 2012). Arising out of this, the defendant filed the suit *Mombasa HCCC No. 181 of 2007, Emfil Limited vs Hamisi Mwalimu Mwarandani & 8 others*, challenging these actions. It is stated that judgment was delivered on 29 October 2010 and the same was produced as an exhibit alongside the decree. He stated that the issue of the defendant's lawful ownership of the property has therefore been conclusively litigated upon in a court of competent jurisdiction and decided upon with finality. He continued that with intention of circumventing the judgment, the Honourable Attorney General purported to revoke the defendant's titles through Gazette Notice No. 6652 of 14 June 2011 published on 15 June 2011. As a result the defendant commenced the suit *Mombasa High Court Judicial Review No. 84 of 2011* seeking orders of certiorari to quash the Gazette Notice, mandamus to reinstate the titles of the defendant, and prohibition to restrain dealings with the properties. He stated that on 8 August 2011, the court issued an order of stay of the implementation of the Gazette Notice, but rather than comply, the Commissioner of Lands, the Registrar of Titles, and the Director Land Adjudication and Settlement, proceeded to issue letters of offer and certificates of titles under a scheme referred to as the Kwale/Ramisi/Kinondo/Squatter Settlement Scheme. He explained that the property in issue in this suit, being Kwale/Ramisi/Kinondo SS/150 is among the titles issued. He added that in another case, *Mombasa Constitutional Reference No. 12 of 2012*, it was ruled that the interests of third parties who had been allocated the land overrode those of the defendant and that the third parties had acquired good titles. The defendant filed an appeal to the Court of Appeal and judgment was delivered on 18 July 2014 allowing the appeal. He produced a copy of the judgment. He stated that in the judgment, the Court of Appeal restored the defendant's titles and issued orders restraining the alienation of the properties. He stated that to protect its properties, the defendant published caveat emptor notices giving details of the various court rulings, in the Daily Nation of 12 September 2013, The Star of 13 September 2013, and the Coast Weekly. He availed copies of these. He stated that any person conducting due diligence on the property would have discovered the legal disputes surrounding the same and would have known of the caveat emptor notices and the court orders and judgments in favour of the defendant. He stated that dealings over the land still continued which led the defendant to file the suit *ELC 113 of 2015 (Mombasa) Emfil Limited vs The Hon. Attorney General & 423 Others*. He produced a copy of the plaint. He mentioned that the suit is

still ongoing, and that one of the defendants therein is Jua Maisha Limited, sued as the 317<sup>th</sup> defendant. He stated that alongside the plaint was filed a Notice of Motion application dated 20 May 2015, seeking restraining orders which were granted on 27 May 2015 and have been extended to date. He pointed out that Jua Maisha Limited entered into a lease with the plaintiff on 26 August 2015 over the suit land which was subject to the aforesaid litigation and orders. He stated that through a letter dated 1 October 2015, their advocate informed the plaintiff that the lease is contrary to judgments and orders affirming the defendant's title and a follow up letter was sent on 8 October 2015. He mentioned that their advocates have on numerous occasions demanded the plaintiff to remove its mast but instead the plaintiff filed this suit. He made reference to the application for injunction filed by the plaintiff, which was dismissed, and the order that dismissed the plaintiff's suit for want of prosecution. He stated that the plaintiff only removed the mast and vacated the land after the order requiring it to do so within 45 days (the order issued on 16 May 2019). He added that the defendant has suffered loss and the plaintiff should be held liable. He stated that since 2015, the plaintiff has been deriving benefit from its acts of trespass, and claimed mesne profits. He stated that according to the annual report of the plaintiff of 2015, it had 3,382 physical base stations in Kenya and its profits were of Kshs. 31,871,303,000/=. He claimed mesne profits using the formula  $1/3,382 \times 31,871,303,000/=$  thus Kshs. 9,423,803.37/=. He continued that in the annual report of the plaintiff of the year 2016, it had over 3,800 base stations, and that its profits were of Kshs. 38,104,290,000/=. He claimed mesne profits using the formula  $1/3,800 \times 38,104,290,000/=$  thus Kshs. 10,102,744.74/=. He similarly referred to the annual reports of the plaintiffs for the years 2017, 2018 and 2019, and on the basis of the same formula, i.e profits divided by the number of base stations, respectively claimed mesne profits of Kshs. 10,531,395.22/=: Kshs. 11, 788,699.36/=: and Kshs. 12,626,995.35/= for those years. He was of the view that the defendant deserves a total of Kshs. 54,398,338.04/= as mesne profits covering the years 2015 to 2019. He also asked for costs in defending the plaintiff's suit and prosecuting the counterclaim.

7. Cross-examined he affirmed that from the official search, the title Kwale/Ramisi/Kinondo/SSS/150 was registered in the name of Jua Maisha Limited from 27 November 2013. The defendant had not registered any caveat. He acknowledged that if Safaricom (the plaintiff) did not know about the defendant's claim to the same land, then she was entitled to deal with Jua Maisha Limited. He further acknowledged that Safaricom was paying rent to Jua Maisha Limited and the defendant did not apply to have this stopped or to have the money protected and put in an escrow account. He stated that they have had several cases over this land. He affirmed that the decree in *Mombasa HCCC No. 181 of 2007* did not have Jua Maisha Limited listed and neither did it contain the plot No.150 (Kwale/Ramisi/Kinondo/SS/150). It was after this decree that they put a notice in the newspaper. The plot No. 150 was not in the list. He stated that Safaricom was perfectly in order in relying on the information provided by the land registry. He conceded that his computation of the mesne profits is not in the counterclaim. He stated that they own about 500 acres in the area. He was not aware that what Safaricom had taken was about 10 metres x 10 metres of land. He did not bring to court the revenue that the plaintiff makes in the 500 acres that it owns. He affirmed that his computation of mesne profits is on the basis of profits divided by the number of masts that Safaricom has. He did not have any report on how many customers use this mast.

8. Mr. Wafula, learned counsel for the plaintiff, had no witness in court at the hearing of the case and closed the defence case without calling any. I thereafter directed counsel to file written submissions which they did, and I have taken note of the same before arriving at my decision. I will mention a couple of preliminary points raised in the submissions of counsel before delving into the meat of the matter.

### C. Analysis and Final Disposition

9. There was submission by Mr. Kimathi, learned counsel for the defendant, that there is no defence to the amended counterclaim because none was served. There is a defence to the amended counterclaim on record, and if the position was that this had not been served, it ought to have been pointed out during the pre-trial stages. Nothing of that nature was ever raised. In any event, even if I am to assume that this is the position, there is the older defence to counterclaim on record, and there is no contest on its service. It would still be considered as the defence of the plaintiff to the counterclaim. In essence, the counterclaim is defended. But again, even if it was not defended, it doesn't mean that the counterclaim must be allowed. The court must make an assessment of it, and be persuaded that it is merited, before judgment can be given in favour of the defendant. Mr. Kimathi referred me to various decisions on the consequences of not calling a witness. I am guided by them but it doesn't change my position that a party who alleges must prove, for that is what Section of the Evidence Act, Cap 80, provides. What I am saying in not so many words is that the burden of proving a case still subsists and remains upon a plaintiff (even for a plaintiff in a counterclaim) irrespective of whether or not a defence has been filed or evidence has been called by the defendant (including a defendant to a counterclaim).

10. On his part, Mr. Wafula, learned counsel for the plaintiff, raised issue that the defendant's suit is *res judicata* because within the application that sought for the dismissal of the plaintiff's suit for want of prosecution and for removal of the plaintiff from the premises, there was a prayer for the prayers sought in the counterclaim to be allowed. The court allowed the prayer for dismissal of suit and for demolition of the mast of the plaintiff, if the plaintiff did not remove it, in 45 days. On the other prayers, the Judge thought that they are consequential to the above orders. I am not persuaded that the Judge made any decision on the claims for trespass, or mesne profits, or damages or indeed addressed herself substantively to the prayers in the counterclaim for me to hold that the issues raised by the defendant are *res judicata*. I am not persuaded that they are, and this court can deal with the same. What was already determined is the presence of the plaintiff's suit and the costs thereof and it is this which cannot be canvassed within this judgment. That is contained in prayer (a) of the amended counterclaim. Prayer (a) of the counterclaim is thereof already determined and spent.

11. Having disposed with the above, I will go into determining the veracity of the other prayers in the plaint.

12. I observe that the facts of the case are really not in serious dispute. It is true, and it is not contested by the plaintiff, that she did enter the disputed land and did erect a telecommunication mast on it. The defendant is aware of the circumstances that led the plaintiff to enter the land and erect the mast. This is in Mr. Papat's evidence, and is also in the letter dated 1 October 2015, written by the defendant's advocates to the plaintiff. In that letter, the defendant asserts ownership of the titles LR Nos. 13433/6 – 13433/143 and states that it has come to her attention that Safaricom have erected a mast on the Plot No. 13433/35 pursuant to an agreement with Jua Maisha Limited. There is a follow up letter dated 13 October 2015 in which the defendant assumes that Safaricom entered into the lease agreement with Jua Maisha Limited after conducting a search of the property. She proceeds to contend in that letter that this would be contrary to judgments affirming her title and the orders of Omollo J of 27 May 2015 issued in respect of the case *Mombasa ELC No. 113 of 2015* "restraining all dealings in the property." It is therefore not in contest that Safaricom entered into the land pursuant to a lease that she held with Jua Maisha Limited. Jua Maisha Limited are the registered proprietors of the title in question, and it is because of that fact that Safaricom entered into the lease agreement, for that is what the land records showed.

13. Now, the position of the defendant is not as straightforward as it wants us to believe, and indeed the question of the defendant's ownership of the disputed land is a little more complicated than put by the defendant. The fact of the matter is that there are two titles to the same land. One title is held by the defendant and is issued under the regime of the Registration of Titles Act, Cap 281 (repealed). The second title is held by Jua Maisha Limited and is issued under the regime of the Registered Land Act, Cap 300 (repealed). The dispute between which of the two titles is the lawful one is still under litigation in the suit *Mombasa ELC No. 113 of 2015*, which case the defendant affirms is still pending. So that I avoid any conflict in judgment, I took the trouble to peruse that file, and I have confirmed that the suit is still pending. There is therefore no judgment in favour of the defendant that affirms that its title is better than the title held by Jua Maisha Limited. The previous litigation that the defendant has referred to has not been litigation pitting the title that it holds against the title that Jua Maisha Limited holds. The issue of which of the two titles is the genuine one will only be settled within the suit *Mombasa ELC No. 113 of 2015*. That case may go either way and we cannot speculate that it must be determined in favour of the defendant. It cannot therefore be affirmed with finality, at this particular time, that it is the defendant who has rights over the disputed land, and without that, this court cannot find that the plaintiff was guilty of trespass at the time.

14. I actually cannot fault Safaricom for entering into the lease agreement with Jua Maisha Limited. Jua Maisha Limited held a title which, if you went to the land registry, would give you the impression that it is a good title. The defendant faults Safaricom for not undertaking due diligence and points to various judgments and rulings and the notices that it put up in the newspaper. I have gone through them. None mentions the title Kwale/Ramisi/Kinondo SS/150. They only describe the land as demonstrated in the defendant's title. It would have been difficult for one to know that the title Kwale/Ramisi/Kinondo SS/150 is under dispute. In any event, the defendant knew that this title was in issue, because in May 2015, before this suit was filed, it had filed the suit *Mombasa ELC No. 113 of 2015*. It however never registered any caveat in the register of the title Kwale/Ramisi/Kinondo SS/150 to warn other persons that this title was disputed. That is why I find it difficult to fault Safaricom for entering into the subject lease with Jua Maisha Limited. I am of opinion that Safaricom genuinely believed that she was entering into a lease agreement with the rightful owner of the disputed land, and as I have said, even at this moment in time, the title in issue is still under contest and it has not been decided that the rightful owner is the defendant and not Jua Maisha Limited. There is no evidence that Safaricom was aware of the claims of the defendant when it entered into the lease with Jua Maisha Limited. Safaricom was thus an innocent lessor without notice. I am the circumstances unable to find Safaricom guilty of trespass.

15. Even if I was to find that Safaricom was guilty of trespass, given the circumstances of the case, I would only award a very nominal amount as general damages for trespass. There is no evidence that when Safaricom entered the land, the defendant took any steps to stop her from doing so. This is despite the fact that the defendant was at the same time litigating in *Mombasa ELC No. 113 of 2015*. You would have thought that because they are in court over the same land, they would be vigilant in knowing what is happening in it. Clearly, they were not vigilant and that is why the mast was erected without them raising an issue. Further, the defendant claims that it had a ruling in her favour, issued on 27 May 2015 by Omollo J, in the suit *Mombasa ELC No. 113 of 2015* stopping any dealings, and that the lease herein was entered when the order was in force. In fact, in his evidence, Mr. Popat stated that the orders have been extended to date. That is not what I found when I perused the file *Mombasa ELC No. 113 of 2015*. Indeed, interim orders were issued ex parte on 27 May 2015, but through a ruling dated 22 July 2015, the court found that the interim orders lapsed for failure to serve within 3 days as required by Order 40 rule 4 (3). The substantive motion was subsequently heard and ruling delivered on 28 January 2016. The court (Omollo J) found that in issue were two sets of titles and it was only through a full hearing that the rightful owner could be determined. The Judge did not issue any order of injunction as sought by the defendant herein but instead ordered that status quo be maintained "*to the extent that the respondents are restrained from undertaking any new and or further developments on, approving any development plans or parting with possession of the suit parcels described as Kwale/Ramisi Kinondo/SSS No. 1 to 213 pending hearing and determination of the suit.*" Thus, when the defendant wrote to the plaintiff on 1 October 2015 that there are orders issued on 27 March 2015 (sic) (should actually have read 27 May 2015) "which have been extended to date" the defendant was not being entirely candid. The defendant is also not being candid to this court for claiming that the orders of 27 May 2015 were granted and that they have been extended to date. In fact, the defendant failed, and I think deliberately, to be frank to this court and say that its application for injunction was heard and the court ordered that status quo, in the manner I have described above, be maintained, not that the interim orders of 27 May 2015 have been extended to date. The defendant was aware of this position when she filed her original defence and counterclaim on 28 October 2016 but it was never pleaded that the court directed status quo to remain in force. Looking at all the surrounding circumstances, if the position was that the suit land properly belongs to the defendant and there was a determinate judgment saying as much against Jua Maisha Limited, and I was to find Safaricom in trespass, I would only award a token Kshs. 1/= (that is One Kenya Shilling) merely in appreciation of the fact that she was the defendant is the rightful owner and another person had interfered with that possession. But I am not awarding that one Kenya shilling, because this far, there is still a dispute over the ownership of the land in issue and it has not been decided who between the defendant and Jua Maisha Limited is the rightful proprietor. I am unable to make any declaration that Safaricom has trespassed into the defendant's property and there will therefore be no award in general or exemplary damages for trespass as sought in prayer (b) of the plaint. As I have said above, if I was to make a declaration of trespass, I would only award a token Kshs. 1/= in general damages.

16. The other prayer in the plaint is that the defendant is entitled to mesne profits. I am not persuaded to award any, based on the same reasons above, that is, that it has yet to be determined who between the defendant and Jua Maisha Limited is entitled to the land. But if I was persuaded that the defendant has proved entitlement to the land, I would not make any award in respect of mesne profits. Mesne profits are what a party has actually lost in income because of the activity of another on her property. Mesne profits should not be confused for general damages which are awarded by court in the court's own discretion so as to assert the right of the person aggrieved. Mesne profits is actual loss; it is the actual economic benefit that one loses, or is expected to have lost, for not being in possession of land or for the interference by the defendant. In our case, what would constitute mesne profits is what the defendant would prove to have lost as income because Safaricom put up a mast and occupied the land. I have no evidence that the defendant was using this land before Safaricom put up its mast. The defendant did not state what economic activity it was undertaking on this land before Safaricom came into it. In fact, the assumption is that she wasn't using the land, and that is how Safaricom came in and made installations on the property, which cannot be something that is done in a single day or in the stealth of the night. In cross-examination, Mr. Popat indeed acknowledged that he has not brought any evidence to show the revenue that the defendant derives from its 500 acres of land. If he had, I would have divided that by the 2.5 acres or so that constitutes the disputed land and that would be the correct award in respect of mesne profits. Alternatively, I would readily have awarded the defendant the amount that Safaricom was paying in rent to Jua Maisha Limited, but to succeed, the defendant would have needed to sue both Safaricom and Jua Maisha Limited, so that whatever money has been received by Jua Maisha Limited is recovered jointly and/or severally from the two entities, and so that Jua Maisha Limited is also allowed an opportunity to be heard. In light of the above, the defendant cannot succeed on either alternative and I make no award as to mesne profits. Prayer (c) is therefore dismissed.

17. The other prayer of the defendant (d) is for a declaration that the defendant is entitled to the profits that the plaintiff received from the

disputed property while in trespass amounting to Kshs. 54, 398,338.40/=. This, if I am to award it, would be something akin to exemplary damages. In some instances, the court may award exemplary damages so that a wrongdoer does not profit from his wrongdoing and any benefit that he has derived needs to be taken away. Whatever the case, whether a special claim or a pursuit for exemplary damages, I am not persuaded to make any such award. I wouldn't in the circumstances of this case make any award for exemplary damages because the plaintiff did not deliberately go out of her way to interfere with the proprietary rights of the defendant. As I have shown above, the plaintiff cannot be faulted for dealing with Jua Maisha Limited and its dealings were in good faith. This is not the sort of situation where exemplary damages would be awarded. And if this claim for Kshs. 54,398,338.90/= is not a claim for exemplary damages, I see no basis upon which it can be awarded. It certainly cannot be an award in the nature of mesne profits which would be calculated differently as I have shown above. If it is a special head of damages, I do not see its place and why such award should be made. In any event, this formula of dividing profits by number of base stations is completely alien and is just plucked from the air. Where is the evidence that every base station brings about profits, and where is the evidence that every base station brings about the same revenue and profits, so that we can divide profits by the number of base stations? The defendant's formula is not only preposterous, but ridiculous to say the least, forgetting for a moment that it is not even clear to me under what head of damages this is being claimed. This prayer is dismissed.

18. There is a prayer (e) that a declaration be made that the plaintiff is in contempt of court orders in force relating to the suit property. I dismiss it. There is a way of dealing with contempt proceedings if at all the defendant thinks that the plaintiff is in contempt which is through a specific application for contempt. In any event, it is not said which specific order the plaintiff has violated so that I can proceed to determine whether or not there is disobedience of that order. The only order that I have seen directed at the plaintiff is the order requiring it to remove its masts within 45 days, and from the evidence adduced, this was done. I do not see any other order that can be alleged to have been violated by the plaintiff. There is no substance in prayer (e) of the amended counterclaim.

19. There is the prayer (f) for the plaintiff to return the property to its condition before the trespass. This was taken into account in the ruling giving the plaintiff 45 days to vacate. If the defendant thought that this was not properly done, then it needed to make an application for consideration. This prayer is dismissed.

20. Prayer (g) is for costs of the suit. I assume that this was for the main suit. As I mentioned earlier, the court in the ruling of 16 May 2019 dismissed the plaintiff's suit but made no order for costs. There was an application to review this prayer which I dismissed. That issue is thus settled and this court cannot revisit it now.

21. The only prayer left is (h), for the costs of the counterclaim. The defendant has not succeeded in a single prayer of her counterclaim. In fact I wonder why the defendant filed a counterclaim in this suit. She had already sued Jua Maisha Limited in the suit *Mombasa ELC No. 113 of 2015* which suit remains pending. The defendant is aware that Safaricom came into the land through a lease agreement entered into with Jua Maisha Limited. Her rights to the land can only be affirmed after the suit with Jua Maisha Limited. Ideally, the defendant ought to have joined Safaricom Limited to the suit that she has filed against Jua Maisha Limited and others. The defendant within this suit even applied for the removal of Safaricom on the disputed land, and obtained the order, while aware that within the suit *Mombasa ELC No. 113 of 2015*, the court had made an order of status quo, and status quo would have meant that Safaricom remains in the land until the case is heard and determined. I am not persuaded that the pursuit by the defendant of Safaricom was made in good faith. The counterclaim is thus dismissed with costs to the plaintiff.

22. Judgment accordingly.

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF APRIL 2022**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**