



Hanspal (Suing as the son and administrator Ad litem of the estate of Inderjit Singh Han) v Hanspal & another (Being sued as the daughters and legal representatives of the estate of the late Davinder Singh Hanspal(Deceased)) (Environment & Land Case 1218 of 2013) [2022] KEELC 2306 (KLR) (12 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2306 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1218 OF 2013**

LC KOMINGOI, J

MAY 12, 2022

BETWEEN

**VIJAY HANSPAL PLAINTIFF
SUING AS THE SON AND ADMINISTRATOR AD LITEM OF THE ESTATE OF
INDERJIT SINGH HAN**

AND

**JASPRIYA KAUR HANSPAL 1ST DEFENDANT
SACHNA KAUR HANSPAL 2ND DEFENDANT
BEING SUED AS THE DAUGHTERS AND LEGAL REPRESENTATIVES OF
THE ESTATE OF THE LATE DAVINDER SINGH HANSPAL(DECEASED)**

JUDGMENT

1. By a Complaint dated 10th October 2013, amended on 21st April 2016, further amended on 15th October 2018 and 7th February 2020, the Plaintiff prays for judgement against the Defendants for:-
 - a. An order that the defendants, their agents and servants or whosoever be evicted from L.R No.209/7496,Nairobi and possession be surrendered to the Plaintiff and the heirs and beneficiaries of the late Inderjit Singh Hanspal.
 - b. A permanent injunction to restrain the Defendants, their agents or whosoever from ejecting the Plaintiff, the administrator of the estate of the late Inderjit Singh Hanspal and the late Inderjit Singh Hanspal's beneficiaries and heirs from L.R No.209/7496,Nairobi or interfering with their right to occupy, enter into, reside on and administer or deal with L.R No.209/7496,Nairobi.



- c. An order for mesne profits against the Defendants at the prevailing market rent rates from February 2013 to the time vacant possession is obtained.
 - d. Damages including aggravated damages.
 - e. Costs and interest; and
 - f. Further or other reliefs as the court may deem fit to meet the ends of justice.
2. The Plaintiff contended that at all material times the late Inderjit Singh Hanspal has been the registered owner of L.R No.209/7496,Nairobi,which is situate in Manyani Road, Lavington Nairobi having purchased it in June 1973 to be used as the place of residence for him and his family. It is the Plaintiff's case that on or about 1988, the late Inderjit allowed the late Davinder Singh Hanspal to use the suit property and he continued to do so until his death on 25th October 2017.
 3. The Plaintiff stated that the late Inderjit stayed in England for constant medical care from 1988 and in 2013, he visited Kenya frequently and stayed on the suit property peacefully. He further stated that between February and March 2013, when the late Inderjit and his wife visited Kenya, the late Davinder without due cause used insulting and abusive language on them and forcibly evicted them from the suit property. The Plaintiff added that the late Inderjit thereafter requested the late Davinder and his family to vacate the suit premises but they refused depriving the late Inderjit's estate of use and enjoyment of the suit property. As a result they have suffered damage.

The Defendants' case.

4. The original defendant Davinder Singh Hanspal filed a statement of defence on 21st September 2016. The Defendants herein (his legal representatives) filed the amended statement of defence and counterclaim dated 25th September 2020.They admitted that the late Inderjit Singh Hanspal was the registered owner of the suit property but contended that the his registration was subject to the overriding interest of trust in favour of the Late Davinder Singh Hanspal and the 1st Defendant as pleaded in the counterclaim.They further contended that the late Inderjit and the late Davinder previously worked together as directors and shareholders of Allied Concrete Works Limited in 1971 and by virtue of the company's flourishing business, they mutually agreed vide an oral agreement to purchase the suit property in the name of Inderjit but to be held by him in trust for the company, and by extension them on the basis of utmost good faith between them as brothers, friends and business partners.
5. They added that the suit property was purchased in 1973 using the Company funds hence it legally belonged to the company and further that development permits to the suit property were applied for and procured by the Company. The property was developed by the company in 1976.They also contended that the company subsequently resolved to develop the suit property to house its directors operating in Kenya and when the company was awarded a contract to construct treasury building, the company resolved to appoint the late Davinder to oversee the project and they also resolved to allocate the house to him.
6. The Defendants also contended that the late Inderjit travelled to Zambia to oversee a project awarded to the company and funded by world bank and around 1983,he relocated to the United Kingdom but he was welcome to reside with the late Davinder anytime he was in Kenya. They added that that they did not evict him from the suit property in 2013 as alleged nor did they involve police since in May 2013,they were in the United Kingdom attending the 2nd Defendant's wedding while the late Inderjit was in Kenya attempting to forcibly enter the suit property but he was thwarted when house staff reported the matter to Muthangari police station. They further contended that they have had



peaceful and quiet enjoyment of the suit property since 1977 to date and they pay land rates and rent but Inderjit and his family have never permanently resided on the property thus it would be unfair, unjust and unequitable for the Plaintiff to demand vacant possession of the suit property.

7. In their counterclaim, the Defendants (Plaintiffs in the counterclaim) contended that the late Inderjit was the eldest of his two brothers the late Davinder and the late Kultar and that the brothers incorporated Allied Concrete Works Limited on 6th January 1971 with the late Inderjit holding 1500 shares, the late Davinder 1500 shares and Alcon Holdings Limited holding 7000 shares. They added that Allied Concrete works Limited later changed its name to Allied contractors Limited and thereafter Alcon International Limited.
8. The Defendants contended that in July 1976, the three brothers incorporated Alcon Holdings Limited with the late Inderjit holding 333 shares, the late Davinder holding 333 shares and the late Kultar holding 334 shares and that subsequently, the late Kultar sold his shares to the late Davinder, thus totaling his shares in Alcon Holdings Limited to 667. It was their case that from 1977 to October 2017, a period of over 40 years, the late Davinder and his immediate family have been in continuous, open and peaceful possession of the suit premises therefore they claim ownership of the suit premises by adverse possession. They also claimed to be the beneficial owners of the suit property by dint of the late Davinder's shareholding in Allied Concrete Works Limited.
9. In their counterclaim they pray for judgement against the Defendant for;
 - a. A declaration that Davinder Singh Hanspal and the Defendants have acquired LR No.209/7496 Manyani East Road, Lavington, by adverse possession.
 - b. An order directing the Plaintiff to sign all necessary documents for the purposes of transferring LR 209/7496 Manyani East Road, Lavington to the Defendants
 - c. In the alternative to (a) and (b) above, a declaration that the late Inderjit Singh Hanspal was registered in trust for Alcon International Limited. Consequently, Davinder Singh Hanspal is a beneficial owner of the property by dint of his shareholding in the company; and
 - d. Costs of the counterclaim.

The Plaintiff's/Defendant in the counterclaims) response

10. In response to the counterclaim, the Defendant denied that Allied Concrete Works Limited was incorporated by the three late brothers and that its name was subsequently changed to Alcon International Limited. He also argued that there is ongoing litigation over the shareholding of Alcon Holdings Limited and contended that the suit property was purchased solely by the late Inderjit and he only permitted the late Davinder to stay on the suit property on condition that he paid land rent and rates.

The Plaintiff's evidence.**

11. PW1, Adan Khan was an advocate of the High Court of Kenya practicing as such in the firm of Anjarwalla & Khanna Advocates testified on 17th March 2021. His witness statement dated 11th April 2017 was adopted as part of his evidence in chief. He stated that on 12th April 2013, he received an email from Vijay Hanspal requesting assistance with preparation of a will for his father Inderjit Hanspal. He further stated that he requested that Mr. Inderjit to attend his offices so that he could take instructions. He added that on 10th June 2013, Mr. Inderjit visited the Advocates offices at Appolo center in the company of his wife Parminder Kaur Hanspal and his son Mr. Vijay whereupon he identified himself by exhibiting his original passport. He stated that the late Inderjit then instructed him on how he would



like his estate to be administered after his death including the appointment of his son Mr. Vijay as his administrator and trustee of his will.

12. He stated that he prepared a draft will and on 12th June 2013, the late Inderjit went to the Advocates offices at Appolo center but since Mr. Inderjit was unable to go up to the office, he requested to meet him at the parking lot. He further stated that he went to the parking lot accompanied by his colleague Milly Minayo where Inderjit was in the company of his wife and after the late Inderjit read the final will, he signed it in his presence and his colleague advocate Milly Minayo. He was not cross-examined.
13. PW2, Milly Minayo Mbedi, also an Advocate, testified on 17th March 2021. Her witness statement dated 8th October 2020 was adopted as part of her evidence in chief. She confirmed that she witnessed the late Inderjit Singh Hanspal's will. She was not cross-examined.
14. PW3, Herbert Mwangi Kamau, was a valuer practicing in the style name of Amazon valuers testified on 17th March 2021. His witness statement dated 19th October 2020 was adopted as part of his evidence in chief. He produced the bundle of documents dated 19th October 2020 which includes his valuation report. In his valuation report, he stated that the suit property is a residential property measuring 0.83 acres (0.336 Ha) located at Lavington Manyani East Road off James Gichuru Road and it has a double storey mansion with five bedrooms and a detached servant's quarter and is supplied with electricity, water and sewer. The report indicated the current market rental value to be kshs. 400,000/= and the lost or foregone rent for the period between 1st February 2013 and 31st October 2020 to be Kshs.34,500,000/=.
15. When cross-examined, he stated that he carried out the valuation on 8th October 2020 after being given a little brief by the instructing client; the Plaintiff. He told the court that he was not able to access the house to do the inventory from inside as his client told him that he had been declined access to the house. He stated that he did not peruse the court records and he did not see any document declining his access.
16. He stated that he used google engine to locate the property and he took photographs of the house from outside. When referred to the photographs, he stated that they show partial images of the house; and one of them shows the left side of the house as having one window and it also shows part of the slab. He stated that from the photographs, one cannot tell how many windows the house has but since it is a five bed roomed house, it should have more windows. He told the court that the photographs do not show the layout of the house entirely but it shows an aspect of the development. When referred to his report stating that the house is private with necessary offices and outbuildings, he stated that he did not see the offices but he made the finding from an indication on the title that there could be offices even though not in use.
17. He stated that from the neighboring properties, he confirmed that there was a sewer connected to the house. He added that he gathered some information which he did not outline because he did not get into the building. He explained that the structure in the right as seen in the photographs is a three roomed servant's quarter which is information he got from his client. Put to task on his valuation of the property being burglar proof, double storeyed and having an internal staircase; he stated that internal details were given to him by his client. When questioned on the date of valuation being 8th October 2021 yet he valued monthly rent from 2013 at Kshs.245,000/=, he stated that he got the figure from documented rent comparable from the rent being charged in the neighborhood. He got from real estate agents and professionals but he cannot disclose them because of confidentiality.
18. When re-examined, he stated that rent comparables are used to assess rent payable but they are held in confidentiality and it is not easy to obtain consent to publish such information. He further stated



- that he interrogated fellow valuers, estate agents and did a retrospective determination of rent from 2013. He stated that he used survey maps to get the physical location.
19. PW4, Vijay Hanspal, the plaintiff testified on 17th March 2021. His witness statements dated 12th July 2019 and 8th October 2020 and his bundle of documents of even date were adopted as part of his evidence in chief. Counsel for the Defendants objected to the Plaintiff's production of the Plaintiff's list of documents dated 8th October 2020. The court however directed the parties to canvass the issue of production of the said documents in their submissions.
 20. PW4 stated that his father Inderjit Singh Hanspal moved to Tanzania in the year 1972 where he started a successful quarry business called Allied Concrete Works Limited in 1973 and the business was expanded to include construction and development of property. He further stated that his late father built a customized home in Oyster Bay, Dar es salaam which is similar in size and design to the house on the suit property which he solely purchased in 1972 to serve as his family residential house for the personal use and enjoyment of his family. He added that the suit property was not held in trust by his father for any of his Companies, it was not paid for by any other parties and it did not relate to any company.
 21. He stated that his late father returned to Kenya in 1970 and started a successful construction business as the sole founder of the company called Allied Concrete Works Limited which was later renamed Alcon Group of companies which included an aviation company as well as Allied Contractors Limited and the Alcon International Ltd in the construction industry.
 22. He stated that at the time his late father bought the suit property, the late Davinder lived in Mombasa and later on a rental property along Ngong road with his wife and children. He added that in 1980, the late Davinder got divorced from his wife. He further stated that his father, the late Inderjit invited him to the house on a temporary basis so that he could enjoy a sense of family environment, derive emotional support after the divorce and have food. He also stated that his father when buying the suit property bought another land with his own funds in the Lavington area near his own house for the Defendant to build a house for himself but the late Davinder instead sold that land.
 23. He stated that culturally as the eldest, his father felt obliged to allow his siblings and his mother to live at his house on temporary basis whenever they were visiting him or if they had personal emergencies and over time, all of his father's siblings and their family and children at one time or another on more than one occasion stayed with his father.
 24. He stated that in early 1980's, Davinder relocated to the United Kingdom where his wife and children joined him after reconciliation with his wife. He further stated that in February 2013, his late father and his mother were forcibly thrown out of the suit premises by the late Davinder on ground that the suit property is solely his for use by his immediate family. He added that in May 2013, he returned to the suit premises in the company of his late father and his mother only for the late Davinder to instruct his house help Deborah to report them to the police. He added that at the time, the late Davinder had taken over his father's companies, took over all the assets and income from the company and had cut out his father from any benefit derived from his share of the company forcing his late father and his ailing elderly mother to seek charity and accommodation from one of the religious temples in Nairobi.
 25. He stated that after Davinder passed away in October 2017, his daughters approached him between September and October 2018 stating that they wished to settle the matter by returning the property to him despite the fact that the late Davinder had bequeathed them the house in his will yet it does not belong to him. He added that subsequently, they invited him for discussions on the suit premises only for them to call the police. He urged that the court allows the prayers in the plaint.



26. When cross-examined, he stated that his late father started a successful construction company but he cannot recall whether the late Davinder or Kultar were part of the company as he was too young then, having been born in 1968. He further stated that he cannot recall the year the suit property was bought as he was too young but documents would show. When referred to the certificate of title to the suit property issued in 1973, he stated that he was a child then and he was not involved in the purchase of the suit property. He told the court that he does not recall whether he was in Kenya or in the United Kingdom in 1980.
27. He also stated that Davinder got divorced from his wife but he has no documents to show that. He stated that in the 1980's he was in boarding school in the United Kingdom and he could have gone between 1981 and 1982 and he was there most of the time. He stated that his late father invited the late Davinder to stay in the Lavington house after the divorce and that he found him living there when he came from school but he was present when his late father and late Davinder discussed about Davinder moving into the house but he did not participate in the discussion.
28. He also stated that his late father bought the late Davinder another parcel of land in the Lavington area but he is not sure if those documents are in court. He told the court that his father was bound by the culture of decency and generosity when he orally invited the late Davinder to live in his house. He stated that he came to Kenya in May 2013 but he was not aware that Jaspriya Hanspal was having a wedding in the United Kingdom in May 2013 as he was not invited.
29. He stated that his parents were forcibly evicted from the suit property in February 2013 then his father filed this suit to reclaim the suit property. He also stated that his family lived on the suit property from when he was a child in 1974. He told the court that Davinder came to the suit property in 1981-1982 or thereabouts. He stated that in 1980, he was in several places in United Kingdom, Zambia, Kenya, Tanzania, Uganda and India as his father liked to travel with him for pleasure and work. He stated that he went to school in the United Kingdom in 1981 but he'd come home to the suit property on end term and during holidays and also his grandmother, aunties and cousins would visit the house.

The Defendant's evidence

30. DW1, Paramjeet Kaur Hanspal, is the 1st Plaintiff in the counterclaim and the late Davinder Singh Hanspal's wife whom he married in 1972. She stated that on 6th January 1971, Inderjit Singh Hanspal, Kultar Singh Hanspal and Davinder Singh Hanspal incorporated a company by the name Allied concrete works Ltd now known as Alcon international limited with the following shareholding :
 - i. Inderjit Singh Hanspal 1500
 - ii. Davinder Singh Hanspal 1500
 - iii. Alcon Holdings Ltd 7000
31. She further stated that Alcon International Limited flourished in the construction business and the two directors mutually agreed orally on the basis of utmost good faith between them as brothers, friends and business partners, to purchase the suit property using the company's funds and all development permits in respect of the suit property were applied for and procured by the company. She added that the property was registered in the name of Inderjit; being the eldest brother to hold it in trust for the company and by extension for all of them.
32. She stated that in 1974, a small guest house was built on the suit land which was used as a temporary dwelling to house the family which included their mother, sister and their other brother Kultar. She



- further stated that Inderjit was staying in a rented property in Loresho, Nairobi and he relocated to Zambia in 1975 to oversee contractual projects awarded by world bank to the company.
33. She stated that in 1976, while Inderjit was still away in Zambia, the company resolved to put up a residential house on the suit property for purposes of housing the Company's directors operating in Kenya who were Davinder and their other brother Kultar. She further stated that in July 1976, the brothers incorporated a 2nd Company called Alcon Holdings Limited whose shareholding was as follows;
- i. Inderjit Singh Hanspal 333
 - ii. Davinder Singh Hanspal 333
 - iii. Kultar Singh Hanspal 334
34. She added that in 1997, Alcon Holdings Ltd was awarded a contract to build Treasury building upon which her husband was appointed by the company to oversee the project and since construction of the residential property on the suit land had been completed at the time, they moved into it. She stated that her husband and herself lived separately for a period of four years between 1980-1984 but upon her return to date, she has lived on the suit property.
35. She stated that prior to 1988, the land rates/rent was paid for by the company but her late husband paid from 1998 till his death, then her daughter took up payments upon his demise. She also stated that she is not aware of any plot in Lavington that was bought by the late Inderjit with his own funds for her deceased husband to build his home as alleged. She however stated that she is aware that in 1981, the company purchased L.R 7741/75 Kitisuru road which Kultar moved into after a four year stay in the suit property from 1977 until 1981.
36. She stated that in 1982, Inderjit relocated from Zambia to Nairobi and they accommodated him at the suit premises and in 1983, he relocated to the United Kingdom with his wife and children and have been residing at Newsbury House, 2 Knottocks Drive, Beaconsfield HP9 2 AH, which has been their permanent address to date. She added that the late Inderjit made several visits to Kenya during his lifetime and was always welcome to stay at the suit premises since he was her late husband's brother and business partner and he had a choice to stay with his other brother Kultar Singh Hanspal.
37. She stated that on 16th February 2005, the late Kultar transferred his shares to her late husband, so that he now has 667 shares. She further stated that from 1977 until his demise in October 2017, a period of over 40 years her husband and his immediate family had been in continuous, open and peaceful possession of the suit premises thus the Plaintiffs in the counterclaim claim ownership by way of adverse possession and in the alternative they claim that the late Inderjit was registered as owner in trust of Alcon International Limited.
38. When cross-examined, she stated that she has lived on the suit property for the last 38 years and she has no interest in the estate of Inderjit Singh Hanspal as executor and she is not opposed to the appointment of Vijay Hanspal. She further stated that Allied Concrete works Limited was incorporated in 1971 and Inderjit had 1500 shares but she was not involved in the running of the company affairs. She also stated that Allied Concrete Works Limited changed its name to Alcon International Limited ltd and that she has a certificate of incorporation of Allied Concrete Works Limited but she does not have the memorandum and Articles of Association.
39. She stated that she does not have the certificate of incorporation of Alcon Holdings Limited but she knows it was incorporated in 1971. She also stated that she did not have a certificate of shareholding from Allied Contractors Limited and she has no searches to show who the directors are or the



signatories are as she was not involved in the affairs of the company. She told the court that there was an oral agreement between her late husband and Inderjit and her husband told her about it and that she relies on that information. She stated that the grant in respect of her husband's estate has not been confirmed and that no one has replaced him as a director in the companies he has interest in. She stated that she does not have a resolution that Allied Concrete Works Limited bought the suit property and no resolution stating that the late Inderjit was to hold the suit property in trust. She stated that she does not know the accounts held by Allied Contractors Limited at the time the suit property was bought but she has seen the cheque of kshs.50,000/= and she is not aware if the account that was debited by that amount. She also stated that she is not aware that the company claims the suit property as part of its assets as no director has claimed it. The money used to develop the suit property came from the company and all the permits were applied for by Allied Contractors Limited as agents while Inderjit was the developer according to the permit. She stated that her late husband did not file a counterclaim but she decided to file the counterclaim since she has lived on the suit property for more than 37 years.

40. She stated that she was not involved in the preparation of the cheque thus she does not know who stamped it "Allied Contractors Limited" and compared to the rubber stamp on the permits, the stamps are different but she does not know which stamp was correct. She stated that she did not contact Equity estates limited and she believes the bank issuing the cheque existed in 1973. When referred to the receipt for payment stating that kshs.5,000/= was received from Mr. Inderjit Singh, she stated that there was nothing to show that it was received from the company. She stated that she has no documents to show that rates were paid in 2008 and she does not know who was paying rates before 2008. She also stated that there was no arrangement that they would pay rates and rent during the time they resided on the suit property.
41. She stated that she got married in 1972 and they first lived in a rented house in South C as the whole family then Inderjit stayed on the suit property before moving to the United Kingdom and he would stay on the suit property when he visited. She stated that she does not know when construction of the house was completed but it could be 1975-1976 as between 1974-1976, they were in Mombasa, as her husband had a project there. They came back to Nairobi in 1977 when her husband was allocated the suit property by the company. She stated that she is not aware of any dispute with regard to the suit property. She stated that in 1980, she lived with her mother in South C since she had separated from her husband. She stated that she is not aware of the deed of settlement and she did not make a proposal to settle the matter with the Plaintiff. She further stated that Alcon holdings Limited had taken a loan from Kenya Commercial Bank on a property in Industrial Area whose value she does not know. She also stated that she filed a counterclaim after negotiations failed and that the suit property is a five bedroomed double storey mansion with domestic quarters but she wouldn't know how much it would fetch in terms of rent.
42. DW2, Jaspariya Kaur Hanspal is the 1st Defendant and the late Davinder's daughter and executor of his will together with the 2nd Defendant. She testified on 21st October 2021. Her witness statement dated 25th September 2020 was adopted as part of her evidence in chief. She stated that she was born in 1974 while her sister; the 2nd Defendant was born in 1975 and by the time they started school in 1980 and 1981 respectively, they were living on the suit property. She further stated that she went to the United Kingdom in 1998 to further her studies but she returned home until her marriage in 2013 and that the 2nd Defendant left for further her studies in 2001 but she would return during holidays and she now stays on the suit property with their mother.
43. She also stated that at no point in time did her late father attempt to forcibly evict the late Inderjit from the suit property and she is aware that on 10th May 2013, when her parents were in the United Kingdom to attend her marriage ceremony, Inderjit, his wife and the Plaintiff attempted to forcefully



gain entry into the suit property whereby they broke the gate padlock and the front door of the main house and left thereafter but they locked the gates behind them. She added that the house staff reported the incidence to the police at Muthangari Police station as she had no means of re-entering the property where she resided and the police assisted her to break the padlocks that had been placed by the plaintiff and his parents.

44. She stated that her late father had continued possession and/or occupation and enjoyed peaceful and quiet enjoyment of the suit property since 1977 and satisfied all legal requirements pertaining to the property including payment of all land rates from the year 1988 to 2017 while she paid for the year 2018 after his demise. She added that the late Inderjit and his family have never permanently resided on the suit property. She stated that they attempted to resolve the matter but the Plaintiff's statement that she sent her a text via SMS agreeing that the house belonged to him is untrue as at the time, she was not in her senses due to extreme pressure exerted on her by the Plaintiff and strong medication she was taking for anxiety. She also stated that she involved police over this matter on 25th October 2018 when the Plaintiff attempted to physically and violently remove them from the suit property.
45. She stated that her late father never received a demand notice or intention to sue with respect to the suit property. She further stated that the Plaintiff does not have legal standing and/or valid authority to prosecute this suit on behalf of the deceased since the deceased's purported will is a forgery and the Plaintiff is not a legal representative of the deceased.
46. When cross-examined, she stated that the grant in respect of her father's estate is yet to be confirmed and none of her family members has taken up shareholding in the companies her father owned. She stated that the Plaintiff can be appointed executor of his father's estate. She stated that she was told that her sister was born in Mombasa. She also stated that they did not reside in South C and Ngong Road and that she recalls their mother coming back in 1984.
47. She told the court that she knows Inderjit's children Vijay and Jasna Hanspal and their mother since they grew up together on the suit property as they would visit. She stated that they came back from Zambia in 1979 and between 1980 and 1981, she went to school from the suit property where she lived with her grandmother until she moved to the United Kingdom in 1984. That Kultar stayed till 1981 when he moved out and her aunt Manjit also stayed on the suit property and moved out in 1979 when she got married.
48. She stated that Inderjit and his family resided on the suit property before migrating to the United Kingdom. She further stated that she went to school in the United Kingdom between 1987-1989 where he lived with Inderjit and his family and from 1998-2013, she was in the United Kingdom and she continued to stay there after she got married. She stated that her parents told her that they did not forcefully evict Inderjit from the suit property and that Inderjit and his family wanted to force themselves into the house.
49. When referred to A/c No. 019488120 in which rates were paid rates between 1998-2008, she stated that she did not know whom it belonged to and that her father has been paying from 2008. She stated that she was privy to proceedings in the succession cause with regard to Kultarr's estate and the estate has not accused them of taking their shares and the case is still pending. She stated that they filed a counterclaim since negotiations failed and her parents have been on the property for more than 30 years.
50. At the close of the oral testimonies parties tendered in their written submissions.



The Plaintiff's submissions.

51. They are dated 9th November 2021. Counsel for the Plaintiff submitted on the following issues: _
- a. Whether the Plaintiff is entitled to prayers sought in the plaint by virtue of Inderjit Singh Hanspal being the registered owner of the suit property, L.R No.209/7496?
 - b. Whether the late Inderjit Hanspal was registered as proprietor of the suit property to hold in trust for a company called Alcon International Limited and its shareholders.
 - c. Whether the Plaintiffs in the counterclaim have acquired adverse rights over the suit land against the Plaintiff.
 - d. Is the Plaintiff entitled to mesne profits and other prayers?
52. He submitted that Inderjit purchased the suit property from Aziz Mohammed through a transfer dated 14th May 1973 and in exercise of his proprietary rights, he charged the suit property severally. He added that the suit property is registered under the *Registration of Titles Act*, cap 281 (Repealed) and despite the act being repealed, by dint of Section 107 of the *Land Registration Act* 2012, the suit land is governed by the repealed law and in particular Section 23(1). He put forward the case of Dr. Joseph N. K. Arap Ng'ok and Justice Moiyo Ole Keiwa and 5 Others to submit that since the Defendants did not allege any fraud/misrepresentation in the manner in which the property was transferred and registered in the name of Inderjit Singh Hanspal, his title is indefeasible.
53. He put forward the case of *Salomon v Salomon Co. Ltd* [1987] AC 22, 51 to submit that a company is distinct and separate from its directors and shareholders which is a principle embodied in Section 19(a) of the *Companies Act*, 2015 and Section 16 of the (repealed) *Companies Act*. He further relied on the case of *Patrick Kang'ethe Njuguna v Co-operative Bank of Kenya & 4* [2018] eKLR to submit that the interest of shareholders in company and the surplus of assets are liabilities in case of a liquidation.
54. It was his submission that the late Davinder had 1500 shares in Alcon Holdings Limited out of 10,000 which is about 15% of the shares and even if the Defendants were entitled to pursue Alcon International Limited's rights, there is no evidence as to when it was incorporated.
55. On the issue whether the Plaintiffs in the counterclaim have acquired adverse rights, he submitted that they did not establish exclusive possession of the suit property. He added that mere possession of the suit property cannot found a claim in adverse possession. He cited the case of *Samuel Kihamba v Mary* [2015] e KLR which cited the case of *Kasuve v Mwaani Investment Limited & 4 others* [2004] e KLR.
56. He added that the Defendant demonstrated that when construction of the suit property was completed, the late Inderjit, his family and some of his relatives including his mother, brother and sisters moved into in 1974 and 1975 while the late Davinder and his wife were staying in Mombasa. He submitted that when the late Davinder started staying in the suit property at the invitation of Inderjit Hanspal, his family and the said relatives were still in the suit property and Inderjit was living in the suit property during his stay in Kenya and even after going to the United Kingdom, he made several visits and continued to stay in the suit property.
57. He also submitted that the late Inderjit was never dispossessed of the suit property and he did not discontinue his possession and even the Defendants admitted both in pleadings and in evidence that Inderjit continued to stay in the suit property whenever he was in Kenya even after moving to the United Kingdom. He relied on the case of *Gathure v Beverly* [1965] EA 514, 28, 519 cited in the court of Appeal's decision in *Samuel Kihamba v Mary Mbaisi* (*supra*) where the court held; "...where use and enjoyment of the land are possible, there cannot be dispossession if the registered owner enjoys it."



58. He also submitted that the late Inderjit was always in constructive possession of the suit property during the time he was in United Kingdom and by making several visits to Kenya. He relied on *Samuel Kihamba v Mary Mbaisi* (*supra*) to submit that there is a presumption of consent in adverse possession cases involving family members/relatives; thus the late Davinder and his family stayed in the suit property with the permission of late Inderjit.
59. It was also his submission that presumption of consent in case of relatives is more applicable in this case where DW1 revealed a common cultural practice in her community where family members stay together which was consistent with the Plaintiff's evidence that his father being the eldest felt obliged to allow his mother and siblings to live at his house.
60. On the issue of mesne profits, he submitted that the court's task is to determine the period that the Defendants were in wrongful possession of the suit property and the assessment of rent for the period which should be calculated from February 2013 when the Plaintiff and his parents was forcibly evicted from the suit property and barred from accessing it. He urged the court to consider the fact that the Defendants did not vacate the suit property even after the Plaintiff filed this suit in 2013 is consistent with wrongful possession.
61. He urged the court to consider awarding mesne profits as computed by PW3 but subject to amendment on the computation of the year 2013 where rent for that year was undervalued. He submitted that factoring in the amendment, the Plaintiff is entitled to kshs.55,345,535/=.He also submitted that there are no firm grounds to reject the computation.
62. He relied on Section 60 (1) of the *Evidence Act* to urge the court to take judicial notice of rent rates in Nairobi City and the fact that the suit property is located in a high end estate in Nairobi called Lavington. He further urged the court to consider the features of the development which include a 5 bedroomed all unsuited house with a detached domestic quarter, Defendants' submissions and the fact that the Defendants did not provide alternative figures of rent rates for properties in the neighbourhood of the suit property.

The Defendants' Submissions

63. They are dated 29th November 2021.Counsel for the Defendants submitted on the following preliminary issues raised over the Defendants' objection of production of Plaintiff's bundle of documents dated 8th October 2020 during PW4's hearing on 23rd June 2021:-
 - a. Whether the email communication and proposed deed of settlement at page 234 to 243 of the Plaintiff's bundle of documents are admissible.
 - b. Whether the WhatsApp messages at pages 248 to 250 of the Plaintiff's bundle of documents are admissible.
 - c. What is the fate of the witness statement of Parminder Kaur Hanspal?
64. On the issue of production of email communication, he urged the court to be guided by the decision of the court in *Charles Davy Kipngetchi Arap Kirui v Wangethi Mwangi & another*[2007]e KLR and the case of *D. Light Design Incorporated v Power point Systems E.A Limited*[2013] eKLR to find that the email communication of 14th February 2020 and 17th February 2020 between the Plaintiff's Advocates and the Defendants' Advocates, proposed deed of settlement contained in pages 234 and 243 of the Plaintiff's bundle of documents are not admissible as the same were made in furtherance of negotiations to settle the dispute herein and as such, they are protected under Section 23(1) of the *Evidence Act* even if the documents do not contain in the heading the words "without prejudice".



65. On the issue of WhatsApp messages, he submitted that production of the said messages, which is an electronic record allegedly extracted from a mobile phone offends sections 65(8), section 106B(1) and section 106B(4) of the Evidence Act which requires that electronic evidence ought to be accompanied by a certificate of electronic record to show how the said extraction was done, signed by a person holding a responsible position with respect to the management of the recording device or the management surrounding the recording and extraction thereof. He put forward the cases of Republic v Barisa Wayu Matguda [2011] eKLR, John Lokitare Lodinyo v IEBC and 2 others [2018] e KLR, MNN v ENK [2017] e KLR, Richard Nyagaka Tong'i v Independent Electoral & Boundaries Commission & 2 others, Election Petition No.5 of 2013 [2013] e KLR and the case of Rachael Njoki Kihara vs Gideon Migiro Nyambati [2020] e KLR to submit that without a certificate of electronic record from the person that had control or ownership of the mobile phone during the time when the communication was made, the WhatsApp messages between the Plaintiff and the 1st Defendant cannot be admitted.
66. On the issue of the witness statement of Parminder Kaur Hanspal signed on 12th July 2019, he urged the court to expunge it from the records since she did not testify.
67. Counsel raised the following issues for determination;
- a. Whether the Defendants are trespassers on the suit property.
 - b. Whether the Plaintiff is entitled to damages and mesne profits.
 - c. Whether the Defendants are entitled to the suit property by adverse possession.
 - d. In the alternative to (iii) above, whether Inderjit held the suit property in trust for the Defendants.
68. On the issue of trespass, he submitted that the late Inderjit allowed the late Davinder to use the suit property thus trespass cannot arise where there is consent. He cited the case of Samuel Motari Nyambati v Kenya Power and Lighting Company [2018] e KLR to support that position. He added that the Defendants also have an overriding interest in the property thus they cannot be said to be trespassers.
69. On whether the Plaintiff is entitled to mesne profits and damages, he submitted that the claim is based on the claim that the Defendants have been trespassing on the suit property from February 2013 which claim was not proved. He put forward the case of Maina Kabuchwa v Gachuma Gacheru [2018] eKLR to submit that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. He also relied on the case of Karanja Mbugua & another v Marybin Hoding Co.Ltd [2014] e KLR and the case of Peter Mwangi Msuitta & another v Samow Edin Osman [2014] e KLR to submit that mesne profits, being special damages must be pleaded and proved. He added that the Plaintiff did not plead a specific sum for mesne profits. He also pointed out that although the Defendant had computed mesne profits to be kshs.49, 400, 000/= as per the valuation report produced by PW3, he had amended the same to kshs.55,345,535/= in his submissions which is contrary to the legal position that parties are bound by their pleadings and that unless amended, the evidence adduced shall not deviate from the pleadings. He put forward the case of David Sironga Ole Tukai v Francis Arap Muge & 2 others Civil Appeal No.76 of 2014 [2014] e KLR and urged the court to reject the new figure raised in the Plaintiff's submissions.
70. Counsel for the Defendants also submitted that PW3's evidence was arrived at on the basis of assumption and since the said witness admitted that he did not get access to the property and his report was based on information supplied to him by the Plaintiff. He cited the case of Kemp Properties (United Kingdom) v Dentsply Research and Development Corporation (1991) to submit that an expert witnesses'



duty is to assist the court in matters of fact in an independent and partial manner and his allegiance is to the court and not at all to the person engaging him.

71. He also submitted that there is no evidence that access to the suit property was denied yet PW3 did not set foot on the property but rather took photographs from outside and relied on the title and survey map which cannot give an accurate value of the property. He added that there were no comparables either and the report is just an opinion which is not binding to the court. He urged the court to consider the weight a court of law should attach on expert opinion as held in *Stephen Kanini Wang'ondu v The Ark Limited* [2016]e KLR, *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* Civil Appeal No.203 of 2001[2007] 1 EA and *Murdesk Investments Pty Ltd v Roads Corporation* [2006] VSC 363,[36]-[37].
72. On the issue whether the Defendants are entitled to the suit property by adverse possession, he submitted put forward the case of *Mbira v Gachubi* [2002] IEALR 137 and the case of *Jandu v Kirplal & another* [1975] EA 225 to submit that the courts have set essential requirements that have to meet in order to succeed in an application for adverse possession. He added that the Defendants herein are required to show that they have been in continuous possession of the suit land for 12 years or more; that such possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.
73. It was his submission that by the time the suit was filed in 2013, Davinder and his family had been in exclusive, continuous uninterrupted possession of the suit property since the year 1977 to 2013, a period of over 40 years and his wife and daughters who are Plaintiffs in the counterclaim continued in occupation and possession of the suit premises after Davinder died. The late Davinder and his immediate family have been in continuous, open and peaceful possession of the suit property from 1997 which is a period of over 40 years and put forward the case of *Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others* [2018]e KLR and the case of *Wilson Njoroge Kamau v Nganga Muceru Kamau* [2020]e KLR.
74. He submitted that the incident in May 2013 where Inderjit and his family broke the gate padlock to the suit premises and locked the gates from behind is proof that the Davinder's were asserting ownership of the suit property. He put forward the case of *Githu v Ndete* [1984] LRR page 276 to submit that time only ceased to run in 2013 when the instant suit was filed it prior to that, occupation and possession by the Defendants was continuous and uninterrupted.
75. He also submitted that the occupation was open and notorious and it not controverted by the Plaintiff who admitted that between 1988 and 2003, Inderjit and his family visited Kenya frequently and during such visits, they were accommodated in the suit property.
76. Counsel submitted that the Defendants have asserted a hostile title to late Inderjit and Kultar who had proprietary rights to the suit property but they were dispossessed and discontinued possession of the suit property. He added that the Plaintiff's claim that late Inderjit permitted the Davinder's to occupy the suit land was not based on evidence but an assumption thus in absence of a consent from Inderjit to occupy the suit property, the Defendants have proved one of the ingredients for adverse possession. He put forward the case of *Kasuve v Mwaani Investments Limited & 4 others* 1klr 184, and the case of *Mtana Lewa v Khaindi Ngala Mwangandi* [2005] e KLR for that position.
77. He also submitted that the case of *Samuel Kihamba v Mary Mbaisi* (*supra*) relied on by the Defendant for the position that there is presumption of consent in case of family relatives claiming for adverse possession is distinguishable from this case since in this case, Defendants have proved that they have been in exclusive continuous possession for over 40 years.



78. On the Defendant's alternative claim that Inderjit held the suit property in trust for the Defendants, he submitted that his claim is based on trust since it is Alcon International Limited's funds that were used to purchase the suit property. He added that Section 28 of the Land Registration Act provides that land is subject to overriding interest without being noted on the register specified therein. He put forward the case of Willy Kimutai Kitilit v Michael Kibet [2018] eKLR for that position and added that the requirement that contracts for disposition of an interest in land should be in writing does not affect the creation of a resulting, implied or constructive trust.
79. He further submitted that equitable principles of constructive trust and proprietary estoppel have been established by the Defendants in that Inderjit was the eldest of his two brothers thus he was in a position of trust in respect of them and the fact that funds to purchase the property were by the company. He put forward the case of Gataimu Kinguru v Muraya Gathangi (1976-80) KLR 317, Twalib Hatayan & anor v Said Sagger Ahmed Albeidy & others [2015] eKLR and Alan Kiama v Ndia Mathunya & others C.A 42/1978.
80. I have considered the pleadings and the evidence on record I have also considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-
- i. Whether the Plaintiff is entitled to the prayers sought in the Plaintiff by virtue of Inderjit Singh Hanspal being the registered proprietor of the suit property.
 - ii. Whether the late Inderjit Singh Hanspal was registered as proprietor of the suit property to hold in trust for Alcon International Limited and its shareholders.
 - iii. Whether the Defendants (Plaintiffs in the counter claim) have acquired adverse rights over the suit property against the Plaintiff.
 - iv. Is the Plaintiff entitled to the reliefs sought?
 - v. Who should bear costs of this suit?
81. Before I delve into these issues it is important that I first address the two preliminary points raised by the counsel for the Defendants in his submissions. It is his submissions that Deed of Settlement contained in the Plaintiff's bundle of documents cannot be admissible by virtue of it being unsigned. The same was made in the context of the negotiations to compromise the suit.
82. It is the Plaintiff's counsel submissions that the offer for settlement in a deed to Settlement was not made on a without prejudice basis and therefore admissible.
83. I agree with the Defendant's counsel submissions that under Section 23(1) of the Evidence Act the said Deed of Settlement cannot be admissible. I am guided by the cited case of D.Light Design Incorporated vs power Point Systems East Africa Limited [2013] eKLR where the court held that:-
- “As was correctly submitted by the Plaintiff's counsel, negotiations that are done out of court must be guarded jealously to allow parties before to explore all possibilities of out of court settlement with a view to compromise a suit”.
84. I also agree with the Defendants' submissions that the WhatsApp messages between the Plaintiff and the 1st Defendant are not admissible as the Plaintiff did not produce a certificate of electronic record to show how the said extraction was done. The same are not accompanied by a certificate signed by a person holding a responsible position with respect to the management of the recording device or the management surrounding the recording and extraction thereof. This is in contravention of Section 65(8) and 106(b) of the Evidence Act.



85. It is the Plaintiff's case that his late father, Inderjit Singh Hanspal purchased the suit property from Aziz Mohammed. The purchase price was kshs.50,000. The transfer of the suit property was registered on 7th June 1973 as per the entry No 4 in the Title document. The said Inderjit developed the suit property for use as his residential home and for his family's use.
86. According the application for Building Plans, the owner and developer is Inderjit Singh Hanspal with Allied Contractors Limited as his agent. It was for construction of a "domestic building, two storey single residence with servant quarters". His position was confirmed by DW2 as far as the description of the suit property.
87. The Plaintiff confirmed that a part from his nuclear family other people who resided on the suit property were his grandmother Bakshish, his aunt Manjit Kaur and Kultar Hanspal (his uncle). This was confirmed by DW1 who stated that by the time she got married in 1972, the whole family resided in a rented house in South C.
88. There is no doubt that the said Inderfit Singh Hanspal is the registered owner of the suit property. Section 23(1) of the Registered Title Act (Repealed) provides that:-

"The Certificate of Title issued by the Registrar to purchaser of land upon transfer...by the proprietor thereof shall be taken by all courts as conclusive evidence that the person therein as proprietor of the land is the absolute and indefeasible owner thereof....and the title of that proprietor shall not be subject to challenge except on the grounds of fraud or misrepresentation to which he is proved to be a party".

The above provision was replicated by Section 26(1) of the *Land Registration Act*, 2012.

In the case of *Dr. Joseph N. K. Arap Ng'ok vs Justice Moyo Ole Keiuwa & 5 others* [1997] e KLR the court stated as follows:-

"Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. such is the sanctity of title bestowed upon the title holder under the Act. It is our law and saw takes precedence over all other alleged equitable rights or title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy. As no fraud on part of the sixth respondent, the registered proprietor of the leasehold interest in the suit property, is pleaded, we see no arguable appeal."

From the foregoing, I find that the Plaintiff is entitled to the prayers sought in the Plaintiff.

89. On the issue whether the late Inderjit purchased the suit property as a trustee of Allied Concrete Works Limited, there is no certificate of incorporation of Allied Concrete works Limited to prove its incorporation and alleged shareholding. There is also no evidence of its change of name to Allied Contractors Limited then to Alcon International Limited and evidence of when the changes were made.
90. The alleged shareholding of Allied Concrete Works Limited allegedly incorporated in 1971 raises more questions as well. The shareholders are said to be the late Inderjit, the late Davinder and Alcon Holdings Limited yet Alcon holdings limited was allegedly incorporated in 1976 thus Alcon International Limited cannot be a shareholder of a company incorporated in 1971. Further, there is no evidence of the shareholding of Allied Concrete Works Limited as at the time the Late Inderjit



purchased the suit property. It was alleged that their other brother, the Late Kultar was also a shareholder. Further, there are no Articles and Memorandum of Association of Allied Concrete Works Limited which if provided may have shed light in the manner in which Allied Concrete Works Limited would acquire property. Further, the Defendants claimed that the late Kultar sold his shares in Alcon Holdings Limited to the late Davinder, making him the largest shareholder in Allied Concrete Works Limited since Alcon Holdings Limited is a shareholder of Allied Concrete Works Limited. It is only with the evidence of the memorandum of association that the court can determine the issues of transfer of shares. I find guidance in *Mwai Kibaki & another v Mathingira Wholesalers Company Limited & 6 others* [2018] eKLR where the court of appeal stated, “We think that based on the material placed before the learned Judge, the holding is, with respect, erroneous and contrary to company and written law and would create a dangerous precedent to the administration and management of corporate entities. The learned Judge employed equitable principles that were not and could not apply in the case before her where there was express statutory law governing how shares should be transferred from existing members either to other members or to outsiders. The Company’s’ Law Cap 486 Laws of Kenya (repealed) and the Memorandum and Articles of Association of the 1st respondent had specific and definite procedure on how shares in the 1st respondent could pass from a member to another member or to a new member. Where, as here, such express conditions existed had to be complied with strictly.”

91. The entire Defendants’ evidence has no resolution of Allied Concrete Works Limited relating to the suit property. There is nothing from its acquisition, its development, management including payment of rates and none to have the property house its directors who were residing in Kenya as alleged by the Defendants. While the Defendant contended that the shareholders of Concrete Limited orally agreed that the late Inderjit would purchase the property in trust for them, it is odd that all resolutions in respect to the suit property would be oral.
92. The contention by the Defendants is that the later Inderjit Singh Hanspal held the property in trust for Allied Concrete Works Limited. The Defendants also argued that Allied Concrete Works Limited paid the purchase price. Their claim is that a trust was created between the company and the late Inderjit. In *Heartbeat Limited v Ng’ambwa Heartbeat Community Children’s Home & Rescue Center* [2018] eKLR the court of Appeal cited *Peter Ndungu Njenga v Sophia Watiri Ndungu* [2000] eKLR wherein the Court observed: “The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”
93. The Defendants claimed that since the shareholders of Allied Concrete Works Limited are brothers, they decided that the company would purchase the suit property but the late Inderjit would hold in trust it for all of them. They contended that the company advanced the purchase money. They claim that a resulting trust was created. I’m guided by the decision of the court of Appeal in *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR where the court stated “... a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial.”
94. Did the Defendants prove that the purchase money to the suit property was advanced by Allied Concrete Works Limited? The purchase price to the suit land was kshs.50,000/=. There is a transfer to the late Inderjit from Aziz Mohammed dated 14th May 1973. The Plaintiff testified that funds to purchase the suit property came from the late Inderjit. There is a receipt for kshs.5000/= issued to late Inderjit dated 15th March 1973 by Equity Estates Limited being payment of deposit of the purchase price of the suit property. There is also a cheque issued by Standard Bank Limited to pay



Equity estates Limited Kshs. 45,000/= being the balance of the purchase price as evidenced by the receipt issued by Aziz Mohammed Advocate to the Late Inderjit. There is no evidence that the said cheque emanated from Allied Concrete Works Limited account and the receipt was issued to Inderjit as purchaser. Therefore, there is no proof that the purchase money to the suit property was paid by the company. The claim that money to develop the suit property was paid by the company was not proved. The Defendant's contention that the approvals were obtained by the company were not proven, the approval plans in evidence indicate that Inderjit is owner/Developer while Allied Contractors Limited was the agent submitting the approvals.

95. Having found that the company did not pay the purchase price of the suit property, and there was no resolution placing the late Davinder on the suit property, it goes without saying that the late Inderjit purchased it. DW2's testimony and PW4's testimonies showed that the suit premises housed many relatives. The late Inderjit mother, brothers, sisters, nieces and nephews are said to have been housed there at one point in their lives. As DW1 stated during cross-examination, it was common in their culture for them to stay together. All the people that had stayed on the suit property left at different points in their lives without laying claim to the suit property. Even the late Kultar, their brother who is said to have been a shareholder in Allied Concrete Works Limited left. The Plaintiff has established that the Late Inderjit housed all these people with his permission.
96. From the foregoing, it is clear that the late Inderjit Singh Hanspal did not hold the suit property in trust for Alcon International Ltd and its shareholders.
97. It should be noted that the original Defendant Davinder Singh Hanspal in his statement of defence dated 21st September 2016 did not file a counterclaim. The Defendants herein however filed an Amended Statement of Defence and Counterclaim dated 25th September 2020. DW1 told the court that she has resided on the suit property for 37 years hence she is entitled to the prayers in the counterclaim.
98. DW2 confirmed that she was born in 1974 while her sister was born in 1975. She further stated that in 1980 and 1981 she and her sister lived on the suit property.
99. It is the Plaintiff's case that Davinder Singh Hanspal was invited by the late Inderjit to reside on the suit property as he had separated from his wife. It means the said Davinder entered the suit property with permission of the late Inderjit Singh Hanspal. DW2, admitted on cross examination that the rest of the family lived on the suit property. DW1 confirmed that she was separated from her husband Davinder for about four (4) years.
100. It is in evidence that Davinder and his family lived in the United Kingdom for some time upto 1988.
101. The law on adverse possession is now well settled. The Court of Appeal in the case of [*Samuel Kibamba vs Mary Mbaisi*](#) [2015] e KLR stated that:

“Occupation and use of land per se does not give rise to title by adverse possession”

The court went further to state :-

“Dispossession and discontinuance must go together, see section 9 (i) and 13 of the Limitation of Actions Act...So where the use and enjoyment of the land are possible; there cannot be dispossession if the registered owner enjoys it.”

102. I find that the Defendants have not proved exclusive possession of the suit property as it is in evidence that the Plaintiff's parents would always stay on the suit property when they visited Kenya from



- the United Kingdom. The Plaintiff attached the passports to confirm this fact. The same were not challenged. It was only in February 2013 when they were forcefully evicted from the suit property hence this suit.
103. It is also clear that Inderjit was not dispossessed of the suit property nor did he discontinue possession. There is evidence that he continued to stay in the suit property whenever he was in Kenya.
 104. The late Inderjit had access to the suit property until 2013 when he was barred on the original Defendant's instructions. I agree with the Plaintiff's submissions that he had actual and/or constructive possession at all times until the year 2013. In the case of *Peter Mbira Michuki vs Samuel Mugo Michuki* [2014] e KLR the Court of Appeal held thus:-

“Possession of land...need not be actual and physical; possession can also be constructive. In the instant case, the record shows that the Plaintiff entered the suit property in 1964; constructed a house there in 1970 and put his elder brother to live in the house and the Plaintiff together with his wife occasionally visited and lived in the house. These facts on record constitute constructive possession of the suit property by the Plaintiff. The elder brother was in possession of the suit property by the Plaintiff. The elder brother was in possession of the suit property by licence and permission of the Plaintiff. In law, actual possession of any property by a licensee is constructive possession by the licensor”.
 105. The late Inderjit invited Davinder to reside on the suit property. The Plaintiff gave an account of a discussion between his father and Davinder in which his father invited Davinder to stay in the suit property after he separated with his wife around 1980. DW1 admitted on cross examination that it was a common practice in her community for family members to stay together. This confirms the Plaintiff's evidence that since his father was eldest and the head of the family he felt obliged to allow his mother and siblings to live at his house.
 106. I find that there was no dispossession until Davinder forcefully evicted Inderjit in 2013.
 107. I find that the conditions set out in the case of *Mate Gitabi vs Jane Kabubu Muga alias Jane Kabubu Muga & 3 others* [2017] e KLR where the Court of Appeal held thus:- “For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim nec vi, nec clam, nec precario.”
 108. The Plaintiff seeks an order for mesne profits against the Defendants at the prevailing market rates from February 2013 to the time vacant possession is obtained. PW3 the valuer produced a valuation report in respect of the rent in the area.
 109. The Plaintiff seeks mesne profits as stated in prayer 3 of the second further amended plaint. Having established that the Defendants have been in wrongful possession of the suit property, the Plaintiff is entitled to mesne profits which is the rent for time they have been in occupation from February 2013.
 110. PW3, Herbert Mwangi, a valuer practicing in the name and style of Amazon Valuers produced a Valuation Report dated 12th October 2020 as exhibit P2. It is the computation of the rent from 1st February 2013 to 31st October 2020. He stated that he arrived at the monthly rent from the comparables from similar properties which is Kshs.400,000/- per month.



111. When he was cross examined by the defence counsel, he told the court that he did not inspect the inside of the house as he had been told by the Plaintiff that access had been denied. He also told the court that the monthly rent as at 2013 was Kshs.245,535/- from the comparable properties in the area.
112. It is the Plaintiff's submissions that he is entitled to mesne profits of Kshs.55,345,535/-. He has put forward the case of *P.W.W vs F.N.K* [2018] e KLR which was cited in *Junnet Karisa & another* Civil Appeal No 108 of 1988 (Kisumu) where the Court of Appeal held that "expert evidence is entitled to the highest possible regard though the court is not bound to accept and follow it. It must form its own independent opinion based on the entire evidence before it. Such evidence must not be rejected except in firm grounds"
113. The Defendants on the other hand stated that no specific sum was pleaded by the Plaintiff in his plaint hence has fallen short of the cardinal requirement that the mesne profits ought to be specifically pleaded. They further stated that the Plaintiff cannot amend the figure of Kshs.55,345,535 in his submissions as parties are bound by their pleadings. They have put forward the case of *David Sironga ole Tukai vs Francis Arap Muge & 2 others* [2014] e KLR.
114. They further submitted that PW3 did not give his independent opinion on the rent payable but that he was greatly influenced by what the Plaintiff told him as he did not gain access to the suit property. They urged the court to ignore the report by PW3. They urge the court to find that the Plaintiff has failed to prove that he is entitled to mesne profits.
115. In my view the Report by PW3 cannot be wished away. I find that the same is unchallenged. The Defendant did not engage their own expert who would have provided the court with an alternative opinion into the rent payable in the suit property.
116. The suit property is located in Lavington area which is a high end estate. I will however take the rent payable in the year 2013 in considering the rent payable. PW3 never went inside to assess the state of the house from the inside. I will take Kshs.245,345 as the rent payable. The Plaintiff would then be entitled to Kshs.245,345 x107 months = Kshs.26,251,916/=.
117. Accordingly, judgment is entered for the Plaintiff as against the defendants as follows:-
- a. That an order is hereby issued directing the Defendants, their agents, and/or servants to vacate the suit property being LR NO 209/7496 situated in Manyani Road Lavington Nairobi within Ninety (90) days from the date of this Judgment and be surrendered to the Plaintiff and the heirs and beneficiaries of the late Inderjit Singh Hanspal. In default the Plaintiff to use lawful means to evict the Defendants, their agents and/or servants.
 - (b) That an order of permanent injunction is hereby issued restraining the Defendants, their agents from interfering with the Plaintiff's and the heirs of the late Inderjit Singh Hanspal, entry, possession and occupation of the suit property LR NO 209/7496 situated in Manyani Road, Lavington Nairobi.**//
 - (c) That the Plaintiff is entitled to mesne profits of Kshs.26,251,915/= being the rent from February 2013.
 - (d) Costs of the suit and interest.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 12TH DAY OF MAY 2022.

.....



L. KOMINGOI

JUDGE

In the presence of:-

Mr. Mituga for the Plaintiff

Mr. Musyoka for the Defendants

Steve - Court Assistant

