



**Koinange & 2 others (Suing as the Administrators of the Estate of Dinah Muthoni Mbuthia) v M'Ikunyua & 9 others (Sued as the Officials and Members of Githurai Mwihoti Settlement Society and all other persons unknown to the Plaintiffs who are illegally Occupying L.R No. 3811/6 (Original Number 3811/1/2) (Environment and Land Case Civil Suit 1314 of 2013 & Civil Suit 623 of 2009 (Consolidated)) [2022] KEELC 3491 (KLR) (19 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3491 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT  
1314 OF 2013 & CIVIL SUIT 623 OF 2009 (CONSOLIDATED)**

**JO MBOYA, J**

**JULY 19, 2022**

**BETWEEN**

**JUNE WANJUGU KOINANGE ..... 1<sup>ST</sup> PLAINTIFF  
JANE NJERI NGURE ..... 2<sup>ND</sup> PLAINTIFF  
SAMUEL GITAU MBUTHIA ..... 3<sup>RD</sup> PLAINTIFF  
SUING AS THE ADMINISTRATORS OF THE ESTATE OF DINAH MUTHONI  
MBUTHIA**

**AND**

**FRANCIS KIRIMA M'IKUNYUA ..... 1<sup>ST</sup> DEFENDANT  
PETER KIOKO NDIKU ..... 2<sup>ND</sup> DEFENDANT  
DAVID MURIGI MWANGI ..... 3<sup>RD</sup> DEFENDANT  
MOSES KINGATI WANGARI ..... 4<sup>TH</sup> DEFENDANT  
MICHAEL MWENDA MANYARA ..... 5<sup>TH</sup> DEFENDANT  
JOSEPH MUSYOKA WAMBUA ..... 6<sup>TH</sup> DEFENDANT  
SAMUEL ANDIKA MATAHANA ..... 7<sup>TH</sup> DEFENDANT  
BENEDITA NJERI MWENDA ..... 8<sup>TH</sup> DEFENDANT  
JOHN DICKENS OTIENO ..... 9<sup>TH</sup> DEFENDANT  
PETER MUTHEE KIHUYU ..... 10<sup>TH</sup> DEFENDANT**



**SUED AS THE OFFICIALS AND MEMBERS OF GITHURAI MWIHOTI SETTLEMENT SOCIETY AND ALL OTHER PERSONS UNKNOWN TO THE PLAINTIFFS WHO ARE ILLEGALLY OCCUPYING L.R NO. 3811/6 (ORIGINAL NUMBER 3811/1/2)**

**JUDGMENT**

1. Vide the Complaint dated the 1<sup>st</sup> November 2013, the Plaintiff herein has approached the Court seeking for the following Reliefs;
  - a. An Eviction Order to be issued forthwith directing that the Defendants herein, their Agents, Servants and/or Unauthorized Persons be Evicted from all that Property Known as L.R No. 3811/6 (Original Number 3811/1/2) comprised in the Certificate of Title No. I.R No 16024 situate in the County of Nairobi which is registered in the names of Dinah Muthoni Mbutia (deceased) and David Gitau Mbutia and the said Eviction be carried out by the Court Bailiff with the assistance of the Nairobi County Police Commandant.
  - b. A Permanent Injunction be issued restraining the Defendants herein, their Agents, Servants and/or Unauthorized persons from Trespassing on all that Property known as L.R No. 3811/6 (Original Number 3811/1/2) comprised in the Certificate of Title No. I.R No 16024 situate in the County of Nairobi which is registered in the names of Dinah Muthoni Mbutia (deceased) and David Gitau Mbutia.
  - c. An Order of Mandatory Injunction be granted directing the Defendants herein, their Agents, Servants and/or Unauthorized Persons claiming under them to remove themselves and buildings, structures and constructions materials that they may have deposited on to the suit property known as L.R No. 3811/6 (Original Number 3811/1/2) comprised in the certificate of Title No. I.R No 16024 situate in the County of Nairobi within 14 days of making of the said order and if they fail to do so, the Plaintiffs be at liberty to remove them at the Defendants expense.
  - d. General damages for Trespass on the suit Property known as L.R No. 3811/6 (Original Number 3811/1/2).
  - e. Any Other or Further Relief that this Honourable Court may deem fit and just to grant.
2. Upon being served with the Complaint and Summons to Enter Appearance in the subject matter, the Defendants herein duly entered appearance and thereafter filed a Statement of Defense dated the 5<sup>th</sup> December 2013 and in respect of which same opposed the claim by and/or on behalf of the Plaintiffs herein.
3. Subsequently, the Plaintiffs filed a Reply to defense dated the 20<sup>th</sup> December 2013.
4. On the other hand, the Defendants in respect of the subject suit, namely, ELC No 1314 of 2013 also filed and/or lodged an Originating Summons vide ELC No. 623 of 2009. For clarity, the Defendants herein sought for the following Reliefs;
  - a. The Plaintiffs (read the Defendants in ELC 1314 of 2013) be Declared to have become entitled by Adverse Possession of over 12 years to all that Piece or Parcel of Land registered under the Registration Titles Act (Chapter 281 Laws of Kenya) and comprised in Title Number L.R No. 3811/6 (Original Number 3811/1/2) and situate in the City of Nairobi.



- b. That the said Plaintiffs be registered as the Sole Proprietors of the said piece or parcel of L.R No. 3811/6 (Original Number 3811/1/2), in place of the above-named Joseph Thugo, David Kiarie Waiya and Silas Kinyanjui Kimemia in whose favor the said parcel of Land is registered.
  - c. The Registrar of this Honourable Court do execute all the necessary Instrument and Documents to effect Transfer of L.R No. 3811/6 (Original Number 3811/1/2) and situate in the city of Nairobi from the Defendants to the Plaintiffs name.
  - d. Cost of this Application be provided for.
5. It is important to note that the Originating Summons was indeed filed against Joseph Thugo Mwaura, David Kiarie Waiya and Silas Kinyanjui Kimemia. However, the said Defendants neither entered appearance nor filed any Responses to the Originating summons.
  6. Nevertheless, to the extent that the suit property belonged to and was registered in the names of David Gitau Mbuthia and Dinah Muthoni Mbuthia, now deceased, whose Estates are being Administered by the Plaintiffs in ELC 1314 of 2013, same filed an Application seeking to be joined in the Originating Summons as Parties.
  7. For the avoidance of doubt, the Plaintiffs in ELC 1314 of 2013 were thereafter joined and admitted as the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the originating summons.
  8. Pursuant to and upon the admission of the Plaintiffs in ELC 1314 of 2013 as the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the originating summons, one June Wanjugu Koinange, proceeded to and filed a Replying Affidavit sworn on the 15<sup>th</sup> March 2021 and in respect of which same denied and/or disputed the claim on behalf of the Plaintiffs to the Originating Summons.

#### **Evidence By The Parties:**

##### **a)**

##### The Plaintiffs' Case:

9. The Plaintiffs' case is anchored on the basis of the testimony of one June Wanjugu Koinange, who testified as Pw1.
10. According to the witness, same stated that she is a Daughter of one Dinah Muthoni Mbuthia, now deceased and that she (the witness) was constituted and/or appointed as the legal administratrix of the Estate of Dinah Muthoni Mbuthia, Deceased alongside Jane Njeri Ngure and Samuel Gitau Mbuthia vide Grant Of Letters of Administration issued on the 30<sup>th</sup> April 2013.
11. Further, the witness testified that the suit property, L.R No. 3811/6 (Original Number 3811/1/2), belonged to and was registered in the names of Dinah Muthoni Mbuthia and Dr. Arthur Samuel Mbuthia, now Deceased.
12. It was the witness' further testimony that Dr. Arthur Samuel Mbuthia and Dinah Muthoni Mbuthia, both now deceased purchased the suit property from one Arthur Grant and Julia Mary Grant, who were the owners and/or proprietors thereof.
13. It was the witness' further testimony that upon the death of one Dr. Arthur Samuel Mbuthia, his Estate was succeeded by Dinah Muthoni Mbuthia and one David Gitau Mbuthia, who were issued with Grant of Letters of Administration, over and in respect of the Estate of the said Deceased.



14. Besides, the witness also testified that thereafter, the said Dinah Muthoni Mbuthia and David Gitau Mbuthia, became registered as the Proprietors of the suit property vide transmission.
15. On the other hand, the witness herein testified that upon the registration of the suit property in the names of Dinah Muthoni Mbuthia and David Gitau Mbuthia respectively, one Dinah Muthoni Mbuthia commenced to carryout developmental activities over and in respect of the suit property and in particular, same constructed a residential dwelling house and rental houses on a portion of the suit property.
16. Nevertheless, the witness further testified that the suit property herein has been the subject of various court proceedings including Nairobi HCC Misc. Application No. 1264 of 1994 and Nairobi HCC Misc. Application No 938 of 1995, which proceedings was latter on consolidated and disposed of vide Judgment rendered on the 7<sup>th</sup> November 2011.
17. On the other hand, the witness testified that on or about the 4<sup>th</sup> December 2009, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants herein filed and/or lodged a suit vide ELC No. 623 of 2009, whereby same sued Joseph Thugo Mwaura, David Waiya and Silas Kinyanjui Kimemia, claiming to be entitled to the suit property by way of Adverse possession.
18. Further, the witness testified that even though the Plaintiffs in respect of the subject matter were not joined in the originating summons, same proceeded to and sought Leave to be joined in the originating summons.
19. Besides, the witness has testified that after same was joined as a Party to the Originating Summons, same filed and/or lodged an Application for Temporary Injunction to stop the Plaintiff in the originating summons from further trespassing onto and/or interfering with the suit property.
20. It was the witness' further testimony that the Application for Temporary Injunction was heard and allowed vide ruling rendered on the 4<sup>th</sup> November 2010, whereby the court restrained the Plaintiffs in the Originating summons from further trespassing on to the suit property.
21. Be that as it may, the witness continued that despite the orders of Temporary Injunction, which were granted by the court on the 4<sup>th</sup> November 2010, the Defendants herein continued with the offensive activities and have since remained thereon to date.
22. It was the witness' further testimony that the actions and/or activities by the Defendants herein have interfered with the rights and/or ownership by the Plaintiffs and therefore the Defendants ought to be evicted and removed from the suit property.
23. Further, the witness testified that by virtue of being the Legal administratrix of the Estate of Dinah Muthoni Mbuthia and Dr. Arthur Samuel Mbuthia, respectively, the Plaintiffs herein are lawfully entitled to exclusive occupation, possession and use of the suit property.
24. On the other hand, the witness testified that the Defendants herein, who were the Plaintiffs in the originating summons, have no lawful rights and/or claims to the suit Property.
25. In any event, the witness testified that a claim for Adverse Possession by and/or on behalf of the Defendants/Plaintiffs in the Originating Summons, cannot lie insofar as the suit property has been the subject of various court proceedings/litigation since the year 1995.
26. At any rate, the witness further testified that the claim for Adverse possession cannot also arise where the said Defendants/Plaintiffs to the originating summons contend that same have been in occupation



- of part of the suit property on the basis of same having been allocated to them by one David Gitau Mbuthia.
27. For the avoidance of doubt, the witness testified that if the Plaintiffs to the originating summons are in occupation of a portion of the suit property, on the basis of permission, consent and/or licensed by one David Gitau Mbuthia (which is not the case) then the claim for Adverse possession cannot lie.
  28. Other than the foregoing, the witness referred to her written statement dated the 15<sup>th</sup> March 2021 and of which same sought to adopt and rely on. In this regard, the witness statement dated the 15<sup>th</sup> March 2021 was duly admitted as further evidence in chief of the witness.
  29. Other than the foregoing, the witness referred to the Bundle of Documents dated the 1<sup>st</sup> November 2013 and which same sought to rely on as part of the Documentary Exhibits. In this regard, the Documents at the foot of the List dated the 1<sup>st</sup> November 2013 were duly admitted as Exhibits P1 to P3 respectively.
  30. Further, the Witness herein also referred to the Replying Affidavit sworn on the 15<sup>th</sup> March 2021, which was filed in response to the Originating Summons and sought to have same adopted as her Further Evidence- in- chief.
  31. Notwithstanding the foregoing, the witness also alluded to the annexures which were attached to the said Replying Affidavit and same sought to produce the Annexures as Documentary Exhibits.
  32. Consequently, the annexures which were attached to the Replying Affidavit sworn on the 15<sup>th</sup> March 2021, were admitted in Evidence and marked as exhibits P4 to p7, respectively.
  33. Having produced the various Documentary Exhibits, including relying on the witness statement as well as the Replying affidavit, the witness herein implored the court to find and hold that the Plaintiffs were entitled to the reliefs sought at the foot of the Plaint dated the 1<sup>st</sup> November 2013.
  34. On cross examination, the witness stated that she grew up on the suit Property and that her late Father, namely, Dr. Arthur Samuel Mbuthia, Deceased, only had one wife.
  35. Further, the Witness stated that same does not reside on the suit property, but however her siblings, including one, Samuel Gitau resides and/or stays on the suit property.
  36. On the other hand, the witness herein stated that the suit property had hitherto been sold and auctioned by the City Council of Nairobi. However, the witness contended that the auction was fraudulent and was subject of previous Court proceedings, culminating into a Judgment rendered on the 7<sup>th</sup> November 2011, by Justice D. K. Musinga, Judge, who reversed the illegal sale/auction of the suit property.
  37. Besides, the witness herein stated that the suit land was previously part of savannah grass land and that there were no Workers thereon.
  38. Other than the foregoing, the witness further testified that the land in question was invaded by various quarters who proceeded to build several Houses/Structures.
  39. Nevertheless, the Witness clarified that the invasion and the construction of the assorted structures commenced and/or arose in the year 2009.
  40. Further the witness testified that after the offensive encroachment and/or trespass onto the suit property, same proceeded to and filed the subject suit in the year 2013.



41. Be that as it may, the witness further stated that the illegal structures which have been erected on portions of the suit property include a school and a church, some of which are Semi-Permanent in nature.
42. On re-examination, the witness herein clarified that after the offensive invasion of the suit property, same applied for and obtained an order of Temporary Injunction, which was directed against the Plaintiff in the Originating summons.
43. Based on the foregoing, the witness clarified that any structures and or houses that were built by the Plaintiffs, were therefore built in flagrant disregard and/or disobedience of the lawful Court order.
44. With that the Plaintiffs' case was closed.

**b)**

Defendants' Case:

45. The Defendants' case gravitates and/or revolves around the Evidence of one Moses Kingati Wangare, who testified as Dw1.
46. It was the testimony of the witness herein that same alongside other officials of Githurai Mwihoti Settlement Society filed an Originating summons on the 4<sup>th</sup> December 2009.
47. Further, the witness also stated that same similarly filed a Supporting affidavit to the Originating Summons, which underlined the circumstances culminating into the entry onto and taking possession of the suit property herein by the Plaintiffs to the originating summons.
48. On the other hand, the witness herein also stated that the Plaintiff to the Originating Summons have been in occupation of the suit property, openly and continuously without interruption by any one, including the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the Originating summons.
49. Other than the foregoing, the witness referred to the various Photographs attached to the Supporting affidavit and same sought to have the Photographs produced before the court.
50. Further, the witness referred to the Witness Statement dated the 30<sup>th</sup> March 2022 and which same sought to adopt as his further Evidence- in Chief.
51. Other than the foregoing, the witness also relied on the various Documents which were attached to the Supporting affidavit dated the 4<sup>th</sup> December 2009 and same were thereafter produced and marked as exhibits D1 and D2 respectively.
52. On cross examination, the witness herein confirmed that he is one of the Plaintiffs in the originating summons and that the originating summons has been filed on behalf of the Githurai Mwihoti Settlement Society.
53. On the other hand, the witness testified that Githurai Mwihoti settlement Society is duly registered, but same admitted that the Certificate of registration of the said society was not produced before the court.
54. Further, the witness conceded that as at the year 1994, there was a Prohibition order that was registered against the title of the suit property
55. Notwithstanding the foregoing, the witness also clarified that by the year 1994 he was not in occupation of the suit property.



56. Be that as it may, the witness stated that when he entered on to the suit property, there were other people in occupation thereof. The witness has also conceded that same has not seen any other person before the court laying a claim to the suit property.
57. When referred to entry number 21 on the Certificate of title, the witness herein conceded that Entry Number 21 shows that the owner of the suit property was restored to and registered in the names of Dinah Muthoni Mbuthia.
58. Other than the foregoing, the Witness herein also stated that he was aware that he had sworn an affidavit wherein same indicated that he had been allowed to be in possession of the Suit property by the owner of the land.
59. Further, the witness herein went ahead to admit that indeed he is on the land by virtue of the Consent and/or Permission of the owner of the land.
60. As pertains to the Photographs, which were produced in Evidence, the witness indicated that same do not show when they were taken. At any rate, the witness conceded that no Electronic Certificate was attached to the Photographs.
61. On re-examination, the witness stated that same is claiming Adverse Possession, but however same is not aware whether the suit property belongs to the Plaintiffs vide ELC No. 1314 of 2013 or otherwise.
62. Other than the foregoing, the witness also stated that the Originating summons which was filed herein was never amended to implead a claim against the Plaintiffs in ELC No. 1314 of 2013.
63. Nevertheless, the witness went ahead and stated that he is seeking for Adverse possession over and in respect of the suit property.
64. Finally, the witness herein reiterated that he was not aware whether the Plaintiffs herein own the Suit Property.
65. At this juncture the Defendants' case was closed.

#### **Submissions By The Parties:**

66. The Plaintiffs' herein filed their Written submission dated the 25<sup>th</sup> April 2022 and in respect of which the Plaintiffs raised various issues, inter-alia, that the Plaintiffs herein by virtue of being the duly constituted the Legal administratrix / Legal Administrators of the Estate of Dinah Muthoni Mbuthia, Now Deceased, are entitled to exclusive occupation and use of the suit property.
67. Secondly, Learned counsel for the Plaintiffs further submitted that the Defendants herein illegally and unlawfully entered upon the suit property in the year 2009, and that same have remained thereon, albeit without any Color of right or at all.
68. Thirdly, Counsel for the Plaintiffs has submitted that upon entering onto and/or trespassing upon the suit property, the Plaintiffs herein proceeded to and procured an order of Injunction to restrain the Defendants from further interfering with the suit property and which order was granted on the 4<sup>th</sup> November 2010.
69. Nevertheless, the Plaintiffs counsel has submitted that despite the orders of Temporary Injunction, the Defendants herein have continued to interfere with the suit property and thereby denying and/or depriving the Plaintiffs of their lawful rights and/or entitlement to the suit property.



70. Fourthly, counsel for the Plaintiffs' has submitted that the Defendants herein have not acquired and/or accrued any Adverse possessory rights over and in respect of the suit property, either as claimed or at all.
71. In any event, counsel for the Plaintiffs has submitted that to the extent that Dw1 conceded to have entered upon and remained in occupation of the suit property with the consent and/or permission of the owners thereof, no claim for Adverse possession can be sustained and/or otherwise maintained.
72. Finally, counsel for the Plaintiffs has submitted that the Plaintiffs herein are entitled to compensation and in this regard, Learned counsel has contended that the Plaintiffs are entitled to General Damages, Punitive Damages and Mesne Profits.
73. Having made the foregoing submissions, Learned counsel for the Plaintiffs has thereafter contended that the Plaintiffs are entitled to the following awards;
- i. Mesne Profit Kshs.103, 680, 000/= Only.
  - ii. Punitive Damages Kshs.500, 000/=Only.
  - iii. General Damages kes.300, 000, 000/=Only.
74. On his part, Learned Counsel for the Defendants filed his written submissions dated the 26<sup>th</sup> may 2022 and same has essentially addressed one singular issue, namely, acquisition of Adverse possession by the Defendants/Plaintiffs to the Originating summons.
75. Essentially, counsel for the Defendants has submitted that the Defendants entered upon the suit property on or around the year 1995 and that same have remained in occupation thereof, for a duration of more than 12 year and therefore the Defendants are entitled to a claim for Adverse Possession.
76. Secondly, Counsel for the Defendants has also submitted that though the originating summons had impleaded Joseph Thugo Mwaura, David Kiarie Waiya and Silas Kinyanjui Kimemia, it was not peremptory to have the originating summons amended to reflect the names of the Plaintiffs in respect of the subject matter.
77. In any event, counsel has submitted that a claim for Adverse possession attaches to the Title of the property in question and not the registered owners thereof. In this regard, counsel for the Defendants also contended that the court is still seized of the Jurisdiction to grant the Originating Summons as prayed.
78. Premised on the foregoing, Counsel for the Defendants has therefore submitted that the court ought to allow the Originating Summons dated the 4<sup>th</sup> December 2009, as prayed.

**Issues For Determination:**

79. Having reviewed the Plaint dated the 1<sup>st</sup> November 2013, the Statement of Defense dated the 5<sup>th</sup> December 2013, the Originating Summons dated the 4<sup>th</sup> December 2009 and the Replying Affidavit thereto sworn on the 15<sup>th</sup> March 2021; and having similarly considered the testimonies tendered by and/or on behalf of the Parties and upon considering the written submissions filed, the following issues are pertinent and germane for determination;
- i. Whether the suit Property Lawfully belongs to the Estate of Dinah Muthoni Mbuthia, now Deceased and if so, whether the Plaintiffs as the Legal administratix/administrators are entitled to vacant possession.



- ii. Whether the Defendants' herein have acquired and/or accrued Adverse Possessory rights to and in favor of the suit property.
- iii. What Reliefs ought to be granted.

### **Analysis And Determination:**

#### **Issue Number 1:**

Whether the suit Property Lawfully belongs to the Estate of Dinah Muthoni Mbuthia, now Deceased and if so, whether the Plaintiffs' as the Legal Administratrix/Administrators are entitled to vacant Possession.

80. It is common ground that L.R No. 3811/6 (original number 3811/1/2) hereinafter referred to as the suit property, hitherto belonged to and was registered in the names of Arthur Grant and Julia Mary Grant, who thereafter sold and transferred the suit property to Dr. Arthur Samuel Mbuthia and Dinah Muthoni Mbuthia, respectively.
81. Subsequently, in the year 1971 Dr. Arthur Samuel Mbuthia passed on and his Estate was succeeded by Dinah Muthoni Mbuthia and David Gitau Mbuthia, respectively vide Grant of Letters of Administration issued in respect of the said estate.
82. Following the transfer and registration of the suit property to and in the names of Dinah Muthoni Mbugua, now deceased and David Gitau Mbuthia vide transmission, the two held the suit property on their own behalf and on behalf of the Beneficiaries of the Estate of Dr. Arthur Samuel Mbuthia, deceased.
83. By virtue of the registration of Dinah Muthoni Mbuthia and David Gitau Mbuthia, respectively, as the proprietors of the suit property, albeit via transmission, same had lawful and legitimate rights thereto subject only to the rights and interests of the legitimate heirs of Dr. Arthur Samuel Mbuthia.
84. Nevertheless, it is also appropriate to state that somewhere in the year 1994 the suit property herein was sold vide auction by the City Council of Nairobi and thereafter the suit property was transferred to and registered in the names of Joseph Thugo Mwaura, David Kiarie Waiya and Silas Kinyanjui Kimemia, respectively.
85. However, the Plaintiffs' herein, who upon the death of Dinah Muthoni Mbuthia, took out Grant of Letters of Administration, were constrained to and indeed file proceedings vide HCC Misc. Application No.1264 of 1994 and HCC Misc. No. 938 of 1995, wherein the current Plaintiffs challenged the auction of the suit Property by the City Council of Nairobi.
86. Suffice it to note that the two suits, details in terms of the preceding paragraphs were thereafter consolidated and heard together, culminating into a Judgment which was rendered on the 7<sup>th</sup> November 2011. For clarity, the Honourable court ordered and decreed that the sale of the suit property by and/or at the instance of the city council of Nairobi, was unlawful, illegal and void.
87. Pursuant to the Judgment rendered on the 7<sup>th</sup> November 2011 the suit property, which had by then been transferred and registered in the names of Joseph Thugo Mwaura, David Kiarie Waiya and Salas Kimemia, was ordered to be transferred back to and in favor of Dinah Muthoni Mbuthia and David Gitau Mbuthia, respectively.
88. It is imperative to note that the suit property was indeed transferred to and registered in the names of Dinah Muthoni Mbuthi and David Gitau Mbuthia, respectively on the 12<sup>th</sup> March 2012, as evidenced vide Entry Number 21 contained in the Certificate of title, which was produced as exhibit P3.



89. From the foregoing, it is therefore appropriate to underscore that as at the time of the filing of the subject suit, the suit property was duly registered in the names of Dinah Muthoni Mbuthia and David Gitau Mbuthia.
90. Consequently, the two registered proprietors, became conferred with and seized of lawful rights over and in respect of the suit property.
91. Be that as it may, it is also worthy to recall that Dinah Muthoni Mbuthia, subsequently passed on and her Estate was succeeded by the current Plaintiffs. In this regard, the current Plaintiffs have similarly accrued and/or acquired lawful rights and/or interests over the suit property, subject only to the beneficial rights of the heirs of the Estate of Dr. Samuel Mbuthia and by extension, the Beneficiaries of Dinah Muthoni Mbuthia.
92. In view of the foregoing and coupled with the fact that the suit property is currently registered in the names of Dinah Muthoni Mbuthia and David Gitau Mbuthia, respectively, it is my finding and holding that the two have lawful and legitimate rights to the suit property.
93. To underscore the extent and tenor of the rights and/or interest vested upon the registered proprietors of the suit property, it is appropriate and desirable to refer to the provisions of Section 24 and 25 of the *Land Registration Act*, No. 3 of 2012.
94. For convenience, the said provisions of Section 24 and 25 (supra) are reproduced as hereunder;
24. Interest conferred by registration Subject to this Act—
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
  - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
25. Rights of a proprietor
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
    - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
    - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.



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

95. Other than the foregoing, it is also important to underline that the issuance of a certificate of title to and in favor of the registered proprietor of land, vest in the proprietor inviolable rights, which are rights in Rem and therefore valid against the whole world subject only to known statutory limitations, if any.
96. To vindicate the foregoing observation, it is appropriate to adopt and restate the holding of the court in the case of *Ocean View Plaza Ltd v Attorney General* [2002] eKLR, where the court observed as hereunder;
- ‘Allotment of land to a citizen or others protected under *the Constitution*, which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under Land Acquisition Act. It is not in evidence that such procedure was followed.’
97. Based on the foregoing observation, it is therefore my finding and holding that to the extent that the suit property is currently registered in the names of Dinah Muthoni Mbuthia, now deceased and David Gitau Mbuthia, respectively, the said registered proprietors and by extension, their Legal administratrix/administrators are duly bestowed with ownership rights to and in respect of the suit property.
98. Further, it is also my finding and holding that by virtue of such registration, the registered proprietors and by extension the legal administratrix/administrators thereof are entitled to protection under the law, to facilitate and ensure their enjoyment of the Constitutional rights to Property.

#### ISSUE NUMBER 2

Whether the Defendants herein have acquired and/or accrued Adverse Possessory rights to and in favor of the suit property.

99. The Defendants herein, who are the Plaintiffs vide ELC 623 of 2009, had filed originating summons dated the 4<sup>th</sup> December 2009, wherein same had sought to be declared as the lawful owners and/or proprietors of the suit property vide Adverse Possession.
100. Before venturing to address the issue herein, it is appropriate to mention and/or state that the originating summons dated the 4<sup>th</sup> December 2009, had sought that the Declaratory orders be issued against the following persons;
- a) Joseph Thugo
  - b) David Kiarie Waiya
  - c) Silas Kinyanjui Kimemia
101. It is also important to observe that even after the Plaintiffs in respect of the subject matter sought for and obtained Leave to be joined as the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the Originating Summons, the Originating summons was never amended or at all.
102. Other than the foregoing, it is also evident that the originating summons was prosecuted to conclusion, albeit on the basis that the suit property belongs to and is registered in the names of Joseph Thugo, David Kiarie and Silas Kinyanjui, respectively.
103. However, it is common ground that the said Joseph Thugo, David Kiarie and Silas Kimemia, ceased to be the registered proprietors of the suit property pursuant to and by dint of the Judgment rendered



on the 7<sup>th</sup> November 2011 vide Nairobi HCC Misc. Application No. 1264 of 1994, as consolidated with HCC Misc. Application No. 938 of 1995.

104. In any event, it is also common knowledge that pursuant to the Judgment of the court rendered on the 7<sup>th</sup> November 2011, details in terms of the preceding paragraph, the suit property was reverted to and became registered in the names of Dinah Muthoni Mbutia and David Gitau Mbutia, respectively vide Entry Number 21 and endorsed on the Certificate of title on the 12<sup>th</sup> March 2012.
105. Given the established fact that the suit property lawfully belongs to and is registered in the names of Dinah Muthoni Mbutia and David Gitau Mbutia, respectively, against whom no reliefs have been claimed in the originating summons, the question is whether the court can decree any Declaration against same, albeit in the absence of any Pleadings to that effect.
106. To my mind, the Defendants herein, maintained the originating summons and prosecuted same against persons who are not the registered owners and/or proprietors of the suit property.
107. In this regard, it is not legally tenable to decree any order as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the originating summons, when it is evident and apparent that same have no ownership rights over the suit property, capable of being extinguished, either as claimed or at all.
108. On the other hand, though the Plaintiffs herein sought and obtained leave to be joined as the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the originating summons, no claim was mounted against them and in this regard, no order can issue and/or be made to extinguish their rights and/or entitlement to the suit property.
109. Suffice it to note, that Parties are bound by their Pleadings and that the Doctrine of Departure prohibits a Party from travelling outside and beyond the scope of his/her pleadings. Consequently, a Party can only appropriate such Reliefs that are grounded and/or anchored on the pleadings placed before the court and not otherwise.
110. To buttress the foregoing observation, it is apt to refer to and adopt the holding of the Court of Appeal vide the decision in the case of Independent Electoral and Boundaries Commission v Steven Mutinda Mule & Others (2014) eKLR,

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....”

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”



111. Other than the defect evident in the originating summons and which I have alluded to in the preceding paragraph, it is important to note that a claim of adverse possession can only arise if the occupation of the suit property by the adverse claimant is without the Consent and/or permission of the registered owner of the suit property.
112. At any rate, it is also important to underscore that prior to and/or before attracting and/or accruing a Declaratory for Adverse possession, the claimant must establish that his/her occupation has not only been hostile to the title of the registered proprietor, but must also establish that the occupation has been, continuous and uninterrupted for a period of over 12 years.
113. In respect of the foregoing observation, which is sufficiently notorious, it is nevertheless appropriate to invoke and restate the holding in the case of *Kweyu Vs Omutut* [1990] KLR 709, where the Court of appeal as per (Gicheru JA stated at page 716, as hereunder:-

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which a title in appearance, but in reality is). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford colour; and, second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use, done publicly and notoriously.”

114. Other than the foregoing observation, it is also desirable to revisit the decision in the case of *Sisto Wambugu v Kamau Njuguna* (1983) eKLR, where the Honourable court observed as hereunder;

“It has not always been easy to determine precisely what is meant by the term “adverse possession”. The words are of ancient lineage, and, before 1833, there had to be something in the nature of an ouster of the true owner. This was changed by the Limitation Acts, beginning with the Real Property Limitation (No 1) Act 1833, which did not in terms mention adverse possession. But the phrase reappeared in section 10(1) of the Limitation Act 1939, which is in similar terms to section 13(1) of our *Limitation of Actions Act*, cap 22, and of which Harman LJ said in *Hughes v Griffin* [1969] 1 WLR 23:

“Notwithstanding that, the words ‘adverse possession’ have crept back into the statute of 1939, but there they only mean that a person is in adverse possession in whose favour time can run. Nevertheless it does seem to me that ‘adverse possession’ means to some extent at least that which it says. Time cannot run, as I see it, in favour of a licensee, and therefore he has no adverse possession. It can run in favour of a tenant at will, because by virtue of section 9 of the statute (our section 12) a tenancy at will is put an end to at the end of the year ... so that in thirteen years he acquires title to the land in question.”



I have only included the last sentence regarding a tenant at will because that was the basis of the decision of Simpson J as he then was, in *Amos Wainaina v Belinda Murai* [1976] Kenya LR 227, a case which has frequently been cited in actions of this nature and which was subsequently brought on appeal to this court and dismissed (Civ App 46 of 1977).

*Hughes v Griffin* has been cited in Megarry's *Law of Real Property* on this topic (4th Edn) at p 1013 and, applying its reasoning, it is in my judgment evident that a person (here the appellant) must have an effective right to make entry and to recover possession of the land in order that the statute may begin to run. He cannot have that effective right if the person in occupation is there under a contract, or other valid permission or licence, which has not been determined.

There have been several cases, of which the *Livingstone Ndeete* case is one, in which the claimant of land puts his case in the alternative, that is to say by pleading the agreement under which he is entered, and then asking for an order based on subsequent adverse possession. For instance in *Hosea v Njiru & Others* [1974] EA 526, Simpson J, following *Bridges v Mees* [1957] 2 All ER 577, held that once payment of the last instalment of the purchase price had been effected, the purchaser's possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it. In *Jandu v Kirpal* (supra) Chanan Singh J held that:

“The rule on ‘permissive possession’ is that possession does not become adverse before the end of the period during which (the possessor) is permitted to occupy the land.”

115. Having taken cognizance of the holding in the decisions alluded to in the preceding paragraph, it is now appropriate to discern whether the Defendants herein have acquired any possessory rights to and in respect of the suit property.

116. First and foremost, it is important to state that when the Defendants herein were sued, same filed a Statement of Defense and in paragraph 8 thereof, the Defendants stated as hereunder;

“Paragraph 8 of the Plaintiff is denied in toto and the Defendants would wish to state that they have only settled on the part which was allocated to them by David Gitau Mbutia and to the best of their knowledge David Gitau Mbutia has never raised any complaint against the said Defendants”

117. Other than the foregoing, it is also imperative to recall that during the cross examination of DW1 same is on record as having stated as hereunder;

“I know that I swore an affidavit that says that I have been allowed to be on the land by the owner of the land. In this regard, I confirm that I am on the land by virtue of the Consent and Permission of the owners of the Land”.

118. Further to the foregoing, the same witness is also on record to have stated as hereunder;

“I am claiming Adverse possession to the suit property. However I don't know whether the land belongs to the Plaintiffs or otherwise. We have not amended the originating summons to include the Plaintiffs in the current suit and no claim has been made against same as pertains to the suit property. I don't know whether the Plaintiffs herein own the land in question”.



119. From the foregoing testimony, there is no gainsaying that the Defendants admit that their entry onto and occupation of the suit property or any portion thereof is premised on the permission, consent and or license of the owners of the suit property.
120. Consequently, even though the Defendants also do not seem to know who the legitimate owners of the suit property are, but the pertinent point to underscore is that permissible occupation cannot anchor and/or found a claim for adverse possession.
121. Perhaps, it is appropriate to adopt and restate the succinct observation of the Court of Appeal in the case of Samuel Miki Waweru v Jane Njeri Richu, CA NO 122 OF 2001, (unreported) where the Court stated as hereunder:

“It is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in provisions of an agreement of sale or lease or otherwise. Further as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been given. The principle to be extracted from the case of *Sisto Wambugu v Kamau Njuguna*, 1982 – 88 1 KLR 217 relied on by Mr Gitonga, learned counsel for the appellant, seems to be that a purchaser of land under a contract of sale who is in possession of the land with the permission of the vendor pending completion cannot lay a claim of a license or possession of such land only after the period of validity of the contract unless and until the contract of sale has first been repudiated as required by the parties in which case, adverse possession starts from the date of the termination of the contract.”

122. In the premises, it is my finding and holding that the Defendants herein have neither established nor proved their claim of adverse possession to and in respect of the suit property.
123. Be that as it may, it is imperative to reiterate that the burden of proving the claim for Adverse possession laid at the door step of the Defendants. Consequently same were obliged to tender and/or adduce credible evidence before the court.
124. Unfortunately, the Defendants herein have not tendered and/or adduced any such evidence to warrant a positive finding in their favor.
125. To underscore the legal statement that the burden of proof laid on the shoulders of the Defendants and that same were obliged to discharge the burden, it is appropriate to invoke and restate the holding of the court in the case of *Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard)* [2018] eKLR, the Court expounded on section 107 and 109 of the *Evidence Act* as;

“The standard of proof is on a balance of probabilities which Lord Denning in the case of *Miller vs Minister of Pensions* [1947] explained as follows:-“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: „We think it more probable than not?, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties? explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”



### Issue Number 3:

#### What Reliefs ought to be granted.

126. The Plaintiffs' herein have sought for various reliefs, inter-alia, General Damages for Trespass to the suit property by the Defendant herein.
127. While discussing issue number one elsewhere herein before, I have found and held that the Plaintiffs are entitled to exclusive occupation, possession and use of the suit property, to the exclusion of all and sundry, the Defendants not excepted.
128. However, it is common ground that the Plaintiffs rights to exclusive occupation, possession and use, have admittedly been infringed upon by the Defendants.
129. For the avoidance of doubt, the Defendants herein admitted and confirmed that same are truly in occupation and possession of the suit property, even though same have no lawful and/or legitimate rights thereto.
130. To my mind, the actions and/or activities by the Defendants constitutes and/or amounts to trespass.
131. To underscore the fact that the impugned activities amount to Trespass it is appropriate to take cognizance of the definition of Trespass as underscored vide Section 3(1) of the Trespass Act. For convenience the said Section is reproduced as hereunder;

Section 3 (1) of the Trespass Act, Cap 294 provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

132. Having found and held that the actions and/or activities by and/or on behalf of the Defendants constitutes Trespass, the next question for determination is whether the Plaintiffs would thus be entitled to General Damages.
133. In my considered view, trespass is actionable per se and hence once trespass is proved, the proprietor of the suit property becomes entitled to compensation on account to General Damages.
134. As concerns assessment and determination of Quantum, it is appropriate to take cognizance of the decision in the case of Willesden Investments Limited vs. Kenya Hotel properties limited NBI H.C.C. NO. 367 of 2000, the Court stated that;

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that K.Sh. 10 000 000 is a reasonable award for general damages”.

135. Other than the foregoing decision, the manner of quantifying and/or ascertaining the quantum of damages was also deliberated upon in the case of Nakuru Industries Limited v S S Mehta & Sons [2016] eKLR where the court faced a similar situation it was held as follows:

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff's land and conduct some excavation. For this reason I award the defendant damages



in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

136. In view of the foregoing, it is my finding and holding that the Plaintiffs’ herein are entitled to recompense on account of General Damages, premised on the duration of which same have been denied and/or deprived the right to use and/or benefit from the suit property.
137. Further, taking into account the size of the property and the duration of deprivation w.e.f 12<sup>th</sup> March 2012 when the title was reverted to the names of Dinah Muthoni Mbuthia and David Gitau Mbuthia, it is my considered view that an award of Kshs.20, 000, 000/= Only, would suffice.
138. Other than the claim for General Damages for Trespass, which was pleaded and captured in the Plaint filed by and/or on behalf of the Plaintiffs herein, counsel for the Plaintiffs made submissions pertaining to and/or concerning a claim for Mesne profits.
139. Besides, Learned counsel proceeded to quantify the claim for Mesne Profit in the sum of Kshs.103, 680, 000/= only.
140. However, it is imperative to note that the claim for Mesne Profits was not pleaded vide the Plaint and neither was evidence offered to justify the award for Mesne Profits.
141. To my mind, a claim for Mesne Profits is akin to a claim for Special Damages. Consequently any Party who seeks Mesne Profits is called upon not only to specifically plead same, but also to place before the court sufficient material and/or Evidence to demonstrate how the claim for Mesne Profits has been arrived at.
142. To buttress the foregoing statement, it is desirable to take cognizance of the holding in the case of *Karanja Mbugua & another v Marybin Holding Co. Ltd* [2014] eKLR, where the Court stated as follows with regard to Mesne Profits:-

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of *Civil Procedure Act*. The said provisions state as follows with regard to a decree for possession and mesne profits:

“(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-

- a. For the possession of the property.
- b. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.
- c. Directing an inquiry as to rent or mesne profits from the institution of such suit until :-
  - i. The delivery of possession to the decree-holder
  - ii. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or
  - iii. The expiration of three years from the date of the decree, whichever even first occurs.



- (2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

The Plaintiff did not bring any proof of the basis for the demand of mesne profits of Kshs 45,000/= per month, and this court is therefore not able to award the same. In any event when the Plaintiffs agreed to give vacant possession to the Defendant after payment of only the deposit, and they must be taken to have accepted the risks that would follow in the event of non-performance of the contract. The forfeiture of the deposit by the Defendant therefore in the circumstances adequately compensates them for such non-performance.”

143. In any event, the need to specifically prove a claim for Mesne Profits was reiterated by the Court of Appeal in the case of Peter Mwangi Mbuthia & another versus Samow Edin Osman [2014] eKLR, where the Court was of the opinion that it was upon a Party to place evidence before the court upon which an order of Mesne profits could be made. The court stated as follows:-

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

144. In view of the foregoing, it is my finding and holding that the claim for Mesne Profits, which was only introduced vide written submissions, albeit in the absence of any pleadings, is not only misconceived, but is also legally untenable.
145. Further, it is also appropriate to point out that the Plaintiffs herein also introduced a claim for payment of Punitive Damages vide their written submissions and thereafter proceeded to and quantified a figure of Kshs.500, 000/= only, which same implored the court to award as against the Defendants.
146. First and foremost, it is imperative to state that a claim for Punitive Damages was neither pleaded nor proved. Consequently, in the absence of the present pleadings and proof, submissions cannot be ventilated, with a view to attracting such an award.
147. Simply put, submissions by Learned counsel cannot take the place of pleadings and Evidence. In any event, submissions also cannot be the basis for seeking an award for which no evidence was placed before the court.
148. In my considered view, the claim for payment for Punitive damages, was made in vacuum.
149. To fortify the foregoing, I can do no better than to reiterate the words of the Court of Appeal in the case Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi & another [2014] eKLR, where the Court stated as hereunder;

“Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”



## Final Disposition

150. Having reviewed and analyzed the Issues for determination that were set out in the Body of the Judgment herein, it is now appropriate and mete to bring the subject Judgment to harbor by making the Final and Dispositive Orders.
151. Based on the various observations made hereinbefore, I now come to the Conclusion that the Plaintiffs' have proved and established their case on a Balance of probabilities and I am disposed to and Do hereby Enter Judgment in favour of the Plaintiffs.
152. On the other hand, I have also come to the conclusion that the Defendants herein have not proved the Claims contained at the foot of the Originating Summons dated the 4<sup>TH</sup> December 2009.
153. In the Premises, the Orders that commend themselves to me are as hereunder:
- a. Declaration be and is hereby made that the Plaintiffs are entitled to the Exclusive and absolute Occupation , Possession and use of the Suit Property known as L.R No. 3811/6 (Original Number 3811/1/2) comprised in the certificate of Title No. I.R No 16024, to the exclusion of the Defendants herein.
  - b. The Defendants herein be and are hereby ordered and/or directed to vacate and hand over the suit property known as L.R No. 3811/6 (Original Number 3811/1/2) comprised in the certificate of Title No. I.R No 16024 within a period of 120 days from the date of delivery of the Judgment herein.
  - c. In default to vacate and grant vacant possession over and in respect of the suit property, the Plaintiffs shall be at liberty to Evict the Defendants from L.R No. 3811/6 (Original Number 3811/1/2) comprised in the certificate of Title No. I.R No 16024, provided that in the course of levying the eviction, the Plaintiffs shall comply with and adhere to the provisions of Section 152G and F of the Land Act, No. 6 of 2012 [2016].
  - d. In the Event that the Eviction is carried out and or undertaken by the Plaintiffs, the Costs and/ or charges incurred shall be certified by the Deputy Registrar of the court and same shall be chargeable on the Defendants.
  - e. There be and is hereby granted an Order of Permanent Injunction to bar and/ or restrain the Defendants, by themselves. Agents, servants and/ or anyone claiming under the Defendants herein from reverting back to, entering upon, trespassing onto or in any other way interfering with the Plaintiffs rights over and in respect of the Suit Property known as L.R No. 3811/6 (Original Number 3811/1/2) comprised in the certificate of Title No. I.R No 16024.
  - f. General Damages be and are hereby awarded to the Plaintiffs in the sum of Kshs.20,000,000 Only as against the Defendants.
  - g. The award of General Damages shall bear Interest at Court Rates from the Date of the Judgment until full settlement and/ or liquidation.
  - h. The Originating Summons vide ELC No. 623 of 2009 be and is hereby Dismissed.
  - i. Costs of the Suit and the Originating Summons vide ELC No. 623 of 2009 be and are hereby awarded to the Plaintiffs and same to be agreed upon and/ or taxed by the Taxing Officer of the Court.
154. It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JULY 2022.**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE,**

**In the Presence of;**

**Kevin Court Assistance**

**Mr. Lawrence for the Plaintiffs**

**Mr. S. G Kimathi for the Defendants**

