Waitiki v Kenya Power & Lighting Co. Limited (Environment & Land Case 87 of 2012) [2022] KEELC 13795 (KLR) (12 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13795 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 87 OF 2012

LL NAIKUNI, J

OCTOBER 12, 2022

BETWEEN

EVANSON WAITIKI .... PLAINTIFF

AND

KENYA POWER & LIGHTING CO. LIMITED .... RESPONDENT

JUDGMENT

I. Preliminaries.

1. The Judgment before this Honorable Court emanates from a suit instituted close to seven (7) years ago, precisely on May 14, 2016 by Mr Evanson Waitiki (Aka Evanson Jidraph Kamau Waitiki) (hereinafter referred to as The Plaintiff) herein against the Kenya Power & Lighting Company Limited (hereinafter referred to as 'The Defendant' or 'The KPLC') herein. The Plaintiff filed a Plaint on May 14, 2016. Later on, he filed an Amended Plaint dated November 8, 2017 filed in Court on November 9, 2017. From the filed pleadings the Plaintiff sought for the following reliefs namely: -

    a. General damages for continuing trespass upto January 6, 2016.

    b. Costs of this suit.

2. Upon service, the Defendant filed its statement of Defence and thereafter filed an amended Defence dated October 4, 2017. On December 2, 2019 the full trial commenced with the Plaintiff himself as PW – 1 testifying until February 25, 2021 when he closed his case thereof. On diverse dates of the June 24, 2021 and January 18, 2022 respectively, the Defendant had a hearing of its case whereby DW – 1 and DW – 2 testified respectively. They then closed their case and tendered their written submissions. In order to fully appreciate the issues and actual trajectory of the case on the ground, the Honorable Court, 'Suo Moto' invoked the provision of Order 18 Rule 11 of the *Civil Procedure Rules, 2010* and directed that there be conducted a site visit ('Locus in Quo'). There was no objection raised by any party. On August 1, 2022 the site visit was successfully undertaken and a report prepared. Indeed, the

brief site visit report is attached and forms part of this Judgement for ease of reference. Suffice it to say, in addition to the parties tendering their written submissions, on April 28, 2022 they were each accorded ample time to highlight the said submission in support of their case.

II. The Plaintiff's Case:

3. The case for the Plaintiff commenced hearing on December 2, 2019. It was closed on February 25, 2021. The Plaintiff summoned one witness – PW – 1 only. The testimony was as follows herein below.

Examination in Chief of PW – 1 – Mr Evanson Kamau Waitiki by Mr Gacheru Advocate.

4. Mr Waitiki as PW – 1 was sworn and testified in the English Language. He stated being the Plaintiff in this case. He lived in the city of Nairobi. He was a retiree aged 76 years old. He filed two (2) written statements dated May 14, 2012 and November 9, 2017 respectively. He filed a List and bundle of documents on May 14, 2012 and a further witness statement on November 9, 2017. There being no objection, he produced them. They were marked as Plaintiff Exhibits numbers 1 to 22. He was referred to the amended Plaint filed on November 9, 2017. He testified that his late wife Bertha Wanjiru Kamau, who died in September, 2002, and him were the legal and registered joint owners to all that four (4) parcels of land (otherwise known as Waitiki Farm) situated at Likoni, just across the ferry in the County of Mombasa. There was a Map of the land as part of the further bundle of documents. These parcels of land were Land Reference Numbers Mombasa/Mainland/ South/Block 1/363 & 1/1031; Mombasa/ Mainland South/Block V/109; and V/110 respectively. They all measured approximately 930 acres.

5. They bought the land as a going concern between the years the years 1975 and 1999 through private negotiations entered with a company trading in the names and style of Guldwood Dairy and Poultry Farm. They were rearing chicken, exporting day old chicks to Tanzania, Zanzibar, Pemba and Uganda. They were also one of the largest farms in Dairy Farming where we were milking over 600 head of cattle on a daily basis. Additionally, they were practicing crop agriculture growing various fruits - tangerine, oranges, lime, lemon and selling them within Mombasa. They had put up a lot of structures. They had poultry houses which could house over 100,000 chicken. They had equipment such as pumps, milking machines. He testified that the case before court was about trespass of the suit land by the Defendant and other persons.

6. However, in the year 1998, they started experiencing problem of people invading their land. The government would assist by arresting, charging and arraigning them to court. He referred to Pages 2 to 19 of further bundle which showed the prosecution of trespassers. But from the year 1999, the arrests of trespassers stopped. Eventually, in December, 1999 a group of youth invaded the farm and destroyed everything and evicted him, his family and employees. The group had been illegally residing on part of the land, selling portions of it and also excavating stones for their own benefit. They destroyed buildings, equipment and other items. Whenever they reported, there would be no arrests at all. He got threatened of his life. Even his neighbor was killed. He fled from the suit land. Later on he learnt that his livestock and structures were burnt. At the same time, he realized that his life was in danger. Pursuant to this he made several attempts to have the police and the local administration intervene to no avail. On failure to receive any assistance he filed a civil suit being High Court Misc No 40 of 2000 to compel the police do their work by arresting the trespassers and offering him security to his property. (the Ruling and order was on Pages 15 - 38). He sued the squatters, other people and the Attorney General. At Pages 32 - 33 of the bundle was the decision ordering the government to evict the squatters from his land. On November 8, 2001, Justice Hayanga (Rtd) directed 'inter alia:-

> ' The Commissioner of police do move into Land Reference Mombasa/Mainland/South/ Block1/363, & Mombasa/ Mainland/ South/Block1/1031, Mombasa/ Mainland South/

Block V/109 and Mombasa/Mainland South/Block V/110 and evict trespassers upon the said pieces of land, arrest investigate and cause prosecution of the trespassers who have destroyed and damaged houses and property and plants on the said land and offer security and maintain land and order in the suit land.'

7. At Page 26 was a copy of the ruling. The extracted order was at page 35. He was aware that the Attorney General appealed against the ruling and the appeal was struck out. (See page 37 of the Original bundle) the Government never assisted him for a long time. Despite this, still the Commissioner of police and the provincial administration never assisted him in enforcing the said the order. On September 30, 2004, the Plaintiff through his then Advocates, Flora Rodrigues placed a Caveat Emptor published in the local daily. 'The Daily Nation' newspaper. The caveat is at page 52 of Original bundle, He stated that in the year 2008, he discovered that the Defendant had trespassed on their farm and erected electricity powers posts/lines and transformers on it. lines ostensibly to supply power to the trespassers. As the owner of the land he was never consulted by the Defendant. They never got his consent nor authority to do that. Further to this, on October 24, 2011 through his then Advocates, Kamau, Kuria and Kiraitu Advocates advertised the court order made in Mombasa High Court Misc. Application No 4 of 2000. Therefore, the Plaintiff held that the Defendant could not then be heard to say it was not aware that the people it was dealing with on the land were criminals, trespassers and had no right on the land. In the year 2012 he decided to institute this Civil Suit. . On August 10, 2012 the Defendant swore an affidavit confirming having connected over 2,987 people with power on the Plaintiff's land as at August 14, 2012. Todate, there were over 10,000 houses connected to power. The Plaintiff challenged them to produce any title given to it by any of the trespassers to prove ownership before entering them to power. None of them could give any consent/authority or permission onto the Defendant to enter into his land.

8. On December 18, 2012 this court granted orders restraining the Defendant from erecting and/or installing its power lines, apparatus, installation, appliances transformers and meters on the suit land. On February 26, 2013, the order was varied slightly to restrain new connection only though the Defendant still ignored the injunction orders and continued to carry out new connection.

9. The Court issued an order against the Defendant. The order was at Page 81 of further bundle. The Defendant was restrained from further installing electricity power lines. On February 26, 2013 found on pages 90 - 91 there was an order that there shall be no new connections on the land. Despite that, they continued. On March 19, 2012 the Plaintiff's Advocate wrote a demand letter to the Defendant demanding that they cease to the acts of' trespass on the land but the letter never elicited any response and this necessitated the institution of this suit. The order was issued in November, 2002 and from that time, he entered every government offices starting from the Office of the President of the Republic of Kenya. At Pages 20 - 28 of the further bundle were the correspondence requesting for assistance which he never received. It was a matter of public interest. He also attached newspaper cuttings from pages 29 to 79. He discovered the trespass in the year 2008. This was when he visited his farm. He saw what was happening there. There were a lot of transformer electricity wires.

   By that time, there were over 10,000 families living there. When he saw that, his Advocates on record wrote a demand letter to the Defendant restraining from undertaking any further activities on the land. But they still continued. He made reference to Page 111 of the further bundle, which was a Supporting Affidavit. It started from page 108 where there was an application to join 2, 978 people to the case. The affidavit was sworn on August 14, 2012 a time in which he had not yet sold the land. He was seeking for damages for trespass until January, 2016. It was not true that the squatters on his land had ancestral rights. When he bought the land in the year 1975, there were no squatters. He argued that whenever one wanted electricity connection, he had to show authority as the right owner. In the forms at pages

188 - 189, he never signed as an owner of the land. It was within the public knowledge and interest that everybody knew he was the owner of the land. The matter had become volatile. The Government of Kenya approached him wanting to the suit property so as to settle squatters. In the year 2015 he decided to sell the land to Government of Kenya.

10. Negotiations commenced with Government of Kenya through Attorney General and the Principal Secretary Ministry of Land Housing and Urban Development. That was the reason he amended the Plaint. The squatters were to be charged some money to be deducted by the Government.

    It was not true that he was compensated by the Government for the trespass during the sale of the land to the government.

    On August 10, 2012 the Defendant swore an affidavit confirming having connected over 2,987 people with power on the Plaintiff's land as at August 14, 2012. Todate, there are over 10,000 houses connected to power. The Plaintiff challenged them to produce any title given to it by any of the trespassers to prove ownership before entering them to power. None of them could give any consent/ authority or permission onto the Defendant to enter into his land. During the negotiations period, the Defendant issue came in, and we agreed the Defendant was not part of Government and was not a party to the agreement. This case was not part of the Agreement. It was raised but it was removed. They never agreed on the damages. The Defendant was liable to pay the damages.

11. Eventually, on January 6, 2016 an agreement of sale was signed and transfer of land was done. The agreement of sale was strictly to do with the sale of the land titles. He sold the land to the Government of Kenya for a sum of Kenya Shillings One Billion Two Hundred and Fifty Million (Kshs 1,250,000,000.00/=). As the owner of the land he was entitled to exclusive possession of the entire land. By this time, the matter was in the public domain with wide press coverage. PW – 1 testified that the transaction did not deal with the issue of squatters/trespassers or any compensation for non-user or trespass by alleged squatters. The Plaintiff was aware that in the course of the negotiations of the sale agreement with the Government of Kenya the Defendant had attempted to sneak in a clause in the draft agreement where this (HCCC No 87 of 2012 would be marked as settled the transfer of the land but the clause was rejected since parties did not agree on the damages payable for trespass in the suit. That was all.

Cross Examination of PW – 1 by Mr Chacha Odera Advocate.

12. PW – 1 confirmed that as pleaded in Paragraph 5 of Amended Plaint, he was in full possession and utilization of the entire land known as 'Waitiki Farm'. It was his case that in December, 1999, illegal mobs invaded part of the farm trespassed and destroyed everything and ejected him. They were scattered around the 930 acres farm. He confirmed that the Plaintiff never invited them to his farm. They were occupying the farm by force. In the year 2016, by the time the Plaintiff resolved the issue with Government of Kenya, the mob was still on his farm. There was an agreement entered between the Government of Kenya and the Plaintiff to buy the land. That agreement was primarily as a result of the mob occupying his land. In the year 1999, he had to leave his land because of the threat to his life. He assumed the threat was from the same people who were on the farm. It was true his livestock were burnt and equipment vandalized and destroyed. He would assume that was done by the same people who had invaded the farm.

13. At the time, he had a highly mechanized farm. These operations were powered by electricity. There was already electricity connected to his farm. These mechanized operations came to an abrupt end in December, 1999 when the mob invaded his farm. It was the mob which invaded the farm who kept him away from his farm. It was not the Kenya Power & Lighting Company that drove the Plaintiff away from his farm. But he stated in evidence that the Kenya Power had indirectly kept him away from

the farm. He stated if the people in occupation of the land had not been supplied with electricity by Kenya Power perhaps they would not have been interested in the continued occupation of the land. He stressed that if there had been no power, they would not have been interested in buying the land. He informed Court that he would not be calling any witness to confirm that position. The immediate people who kept him out of the land were the squatters.

14. The Plaintiff sued Kenya Power because they put up electricity transformers and power lines on his land. The only evidence he had was that Kenya Power entered the land in year 2008 when he noticed it. There were schools built on that land with electricity connected. They had title deeds. There was also a police post and shops. He could not sue the Ministry of Education because they sued the Government of Kenya.

 The only remedy he was seeking was general damages for continuing trespass on the land upto January, 2016. Kenya Power was there because there were already trespassers on the land. At the time they entered into the sale Agreement, certain individuals had entered his land. There were about 12,000 people on the land. These were the people Kenya Power supplied electricity to. They were the people who entered his land without his authority. Kenya Power also entered his land without his permission. The only entry by Kenya Power was to put poles, transformers, cables, metres and so forth. The agreement was between the Government of Kenya and himself. He was referred to Clauses 'B' and 'C' of the Agreement. PW – 1 stated that the High Court application No 40 of 2000 dealt with the squatters who were in the land.

15. The scheme to purchase the land was based on the portion they occupied. They were occupying those portions of land without his permission. They were trespassers. He did not have the list of people who were occupying his land. Kenya Power and all the invaders were trespassers on the land. Clause 'E' would have referring to the 11,287 families. Clause 'G' stipulated that the property was occupied by squatters and the transfer to Government of Kenya for purposes of re - settling the current occupants. The agreement may not expressly state that Kenya Power was excluded but in the negotiations they did not include Kenya Power. He recalled they went through the agreement between the Government of Kenya and himself founded at Page 190 of his Supplementary list of documents. The agreement was not based on any valuation. It was based on negotiations which he undertook with the government. He confirmed that they all agreed on the amount. There was a framework of agreement between the government and himself which ceased to be the agreement when they signed the agreement. He was referred to Clause 'C' of the agreement at page 191 of the bundle of documents. He confirmed he could not see anywhere where it said the framework ceased to exist. He was also referred to Clause 'B' of the agreement. He read it. He testified that it mentioned individuals who were occupying his land. He did not know if they were the people supplied Power by KPLC. He had not produced a list of the people who were supplied electricity by KPLC as he did not have the list. There were more than 10,000 people. He did not know who were connected lawfully by KPLC and those who were not. Waitiki farm comprised of 4 blocks. They did not have access road to enter each block. There was only one access to the farm. On the map at Page. 1 of the Supplementary list, there were no roads leading to each block. There was only a road leading to his house and another to an Approved School. Block No. 363 was his residence, Plot No 367 was for the Approved School, but it changed when he transferred it to the Catholic Church a portion. They had their internal roads for their own use in the farm but not accessible to anybody.

16. The Dairy Unit did have power supply. There were poles and wires and they were authorized. They had put photographs showing the unauthorized power lines. The electricity poles, wires and transformers were connected to users whom were 10,000 people. The Government came and negotiated with him to his land. He did not know whether the people/individuals referred to at Page 191. The individuals

referred to at Page 191 were the same ones to whom power were supplied to. He was referred Clause 'D' at page 191-192. They were the people which power was supplied to. They were trespassers/invaders and were criminals. He was referred to the Clause 'E of the agreement'. They were the same people.

He stated that they agreed with the government that they could not evict those people, but instead pay a total sum of Kenya Shillings One Billion Two Hundred and Fifty Million (Kshs 1,250, 000, 000.00). The land was worth Kenya Shillings Nine Billion Four Million (Kshs 9, 400, 000, 000.00). He held that the sum of sum of Kenya Shillings One Billion Two Hundred and Fifty Million (Kshs 1,250, 000, 000.00) was just for the land, and did not include the livestock which were killed, houses that were burnt, the connections by KPLC and so forth.

He agreed that KPLC did not burn his houses nor kill any of his livestock but he was chased away. KPLC did not directly threaten him. They indirectly contributed to all these activities. He was invaded in the year1998. KPLC came soon after the invasion. He was referred to his statement filed in Court on May 14, 2012.

17. At Paragraph 11 of the statement, he stated that sometimes in the year 2008, he discovered that KPLC had entered the land, erected transformers and power lines. At Paragraph 5 he stated that in December, 1999, a group of youth invaded the farm, and destroyed everything and evicted him and his family from the land.

These people were very violent and chased him away. He went to every police station in Coast Province but was not assisted. He left for Nairobi with his family. He later on came while disguised as a lady and that discovered KLPC had laid transformers. By this time the politicians were inviting people to invade the land and occupy it. Some of the Politicians include Suleiman Shakombo who was a Minister. He had not sued any of the Politicians from bringing people into his land.

He had sued KPLC for providing electricity. The invaders came first and gained access to electricity. He was referred to his further witness statements filed in Court on November 9, 2017. At Paragraph 9, he had set out what he left at the farm and which were destroyed by the invaders/youth. Some properties were destroyed while he was still there and others after he had fled. It was true that KPLC were not involved in the destruction. The invasion continued gradually, but he never got any help from the police of even the Government. He went to the police and the Provincial Administration because they were the people who were charged with protecting him and his property, but they failed. He stressed that his property was valued about a sum of Kenya Shillings Nine Billion Four Hundred Million (Kshs 9, 400, 000, 000.00). However, he never had a valuation report of on his estimated value of the property. In the amended Plaint, under Paragraph 4B, he stated that he sold the land to the Government of Kenya thereby surrendering all his rights and interest on the land.

His claim was based on things that occurred before the year 2016. He admitted that he never sued the trespassers for the damage occasioned to him before the property was sold to the Government of Kenya.

18. There could have been mosques, Police Station and many other structures there. He reiterated discovering KPLC being on his land in the year 2008 and they took action. He did not know whoever else were there as he could only see buildings. He did not know the owners. He could see KPLC.

It was his testimony that on January 16, 2016, he concluded an agreement with the Government of Kenya. He had attached four original title deeds to the suit land all measuring approximately 930 acres.

Re - Examination of PW – 1 by Mr Gacheru Advocate:-

19. In this case, PW – 1 stated that he sued KPLC because as when he visited the farm in the year 2008, it was clear, they had put electricity power lines and transformers. He sued KPLC for trespass. He also

filed another case against other trespassers in Mombasa Misc 40 of 2000, and he had produced the Judgment. He had electricity connected before. When he bought the farm in the year 1975, power was connected to it and even changed from the previous owner to their farm. This was legally done. His complaint was the power connection that fed the invaders. At page 49 was a transformer which was not there when he left the farm.

20. At Page 108 of the bundle an application with a list of the people connected by KPLC. At page 1 was a map with 4 Blocks, parcel Nos MS/367 (which changed to 1031 after is sold to Church), and No MS/109, 163 and 110 where he was the owner until the year 2016. There were only internal roads because the whole farm was fenced. The power lines were mainly on his farm. KPLC never approached him to put the electricity power connections.

21. The people who were there were there illegally and the court even called them criminals. The agreement was between the Government of Kenya, Ministry of Lands and himself. The KPLC and other people were not parties. There was no role of KPLC. When they went for negotiations, the clause over KPLC was left out because the case was still in court. He was referred to Clauses 7.0, 7.2.0 of the Sale Agreement which he claimed he objected to having the inclusion of KPLC. The sum of Kenya Shillings One Billion Two Hundred and Fifty Million (Kshs 1, 250, 000, 000.00) was the purchase price for the land and not compensation. It was a case of direct sale and not compulsory acquisition of land.

III. Defendants's Case

Examination In Chief of DW - 1: Mr Walter Akello Mboro by Mr Chacha Odera Advocate

22. Mr Mboro, the DW – 1, was sworn and testifies in English Language. He stated being a retiree and now a farmer in the County of Homa Bay County. By October 14, 2013, he was working in Kenya Power in West Kenya Region. He was the Way Leaves Officer of the region. He stated that on October 3, 2013, he signed a witness statement which was filed in court. He adopted it as his evidence in court. He worked for Kenya Power based in the Coast region from the year 1994 upto the year 2010. In the year 1997, he was in Mombasa. In year 1997, there was a Government Policy that KPLC was supposed to supply electricity power to both formal and informal settlements in coast province. He recalls there had been tribal clashes in year 1997 in Coast Province.

23. By the year 1997, there was power supply upto the Plaintiff's farm that was supplied by the Defendant. They had to supply power in a settled area, where people had developed. Under the averment of Paragraph 7 of his statement, he referred to disputes of way leaves. They would organize meetings with the Provincial Administration and the customers to be.

    At that state, if they never received any resistance or negative response, then they would go ahead and supply the electricity power. In Paragraph 9 of his statement he referred to slum upgrading program in Likoni.

24. In Likoni, there was the Shelly Beach which a well - developed place with high-rise buildings. However, in the neighboring area along the farm for the Plaintiff, there was darkness and therefore they wanted to eradicate darkness in order to address the insecurity issue. This was a Government Policy.

    In the supplementary list of documents by the Plaintiff dated November 8, 2017, at Page 157 of the list, there was the Consolata Ujamaa Likoni and Consolata Primary School. At page 163 of the list, there was an Approved School. At Page 166 of the list, there was Likoni Approved School.

25. From the list of documents for the Plaintiff filed on May 14, 2012 there were four (4) titles listed. There was a titled Location meaning the exact area of supply. It showed areas where power was supplied. The 4th Line showed power was supplied to Ukunda. At page 118 of the list, he could see different titles

disclosed in different places. At page 119 of the list, 7th Line was title No MS Block I/656 Likoni. At Page 127 of the list, the 8th Line from the bottom was MSA/Block/VI 38 Shelly Beach. He could see on page 161 of the list– written therein was Kona ya Mtongwe Likoni. It was the road leading to the navy. It is not anywhere near the suit plot. He had not seen anywhere written Waitiki Farm.

Cross Examination of DW – 1 by Mr Gacheru Advocate

26. DW – 1 stated that he worked with the Kenya Power for many years. He was conversant with the dispute in this case. The meter showed it was not only Mr Waitiki's Farm that was supplied with electricity power. The power was to be supplied to any house within Likoni area. He could see on Page 108 of the list, prayer 1 was seeking to join 2nd to 2978 people as Defendants in the suit. Some of the people listed were not in Waitiki's farm. It was true in Waitiki's farm, KPLC had customers in thousands.

    He agreed that by January 2016, KPLC had supplied power to thousands of people in Waitiki's farm. He knew Owiti Awuor. He was a colleague. In his affidavit, he stated KPLC had supplied power to 11,000 people. He could see the photographs in the List of documents filed by the Plaintiff of 2012. There was a transformer, power lines, buildings, roads. By the year 2016, the numbers had obviously increased. Mr Waitiki was supplied power earlier. He did not have the government policy document with him in Court. He was aware Kenya Power was regulated by the *Energy Act*. He was not conversant with the provision of Section 46 of the Act. However, he was aware that Kenya Power could not enter into any parcel of land without the consent of the owners. He was aware of the form that Kenya Power had that one filled before being connected or supplied with electricity power. It was at Pages 188 - 189. At page 189, as one of the conditions to be supplied with power one had to attach a copy of a title deed.

27. When they supplied electricity power in this area, they did not obtain consent from the owner. In Coast, there were both many absentee landlords and present land owners. When they failed to get Mr. Waitiki, they went to the District Commissioner, District Officer and discussed issues of security. On ownership, they thought those in occupation of the land were his sons or relatives. They obtained consent from the local government. They established ownership of the four parcels of land. They were for Mr Waitiki. They did not seek the consent of Mr Waitiki. From the contents of paragraph 6 of the Amended Defence, they got the consent from the people who were on the ground and the local administration. The people who were on the ground gave consent. He was not aware how Mr Waitiki was evicted. In the year 1997, there were skirmishes in Likoni. He saw a copy of the ruling on Page 12 of the Plaintiff's list of documents. He could see the court held that the trespassers had committed a criminal offence. He could see the customers were referred to as terrorists. They were supplying power to customers. He could see Paragraph 6(c) of the amended defence. He would go by the contents of that paragraph. He did not have evidence of the agreement that Mr Waitiki was compensated to the tune of one Billion Shillings. It was in the public domain. He could see the Agreement for sale at page 190 of the list. KPLC was not a party to the agreement. Clause 2.0 was over sale of Waitiki's Land. It was between Mr Waitiki and the Government of Kenya. Clause 7.2.0 confirms all pending cases settled, except Mic Appl No 40 of 2000. He was aware the inclusion of case against KPLC was rejected in the sale agreement.

Re - Examination of DW - 1 by Mr Munyithya Advocate-

28. DW – 1 confirmed seeing the names on pages 114 – 187 of the list. He could not see these names in High Court Misc Appl No 40 of 2000. He had not seen any documents showing that squatters were occupying the 4 parcels of land and were supplied power. They obtained consent from the owners of the structures before supplying the power.

Examination in Chief of DW - 2 Mr Owiti Awour by Mr Chacha Odera Advocate

29. Mr Awuor was sworn and testified in the English Language. He was a Board Member of the Regulatory Board by the time of the suit was filed. He was a Manager Legal Service for KPLC He was familiar with the matter before hand. He had seen the supplementary statements dated June 14, 2018. He signed it on June 14, 2018.

30. He adopted the statement as his evidence. There was no objection. The witness Statement was admitted as his evidence.

Cross Examination of DW – 2 by Mr. Gacheru Advocate

31. DW – 2 stated being an Advocate of the High Court of Kenya. He was admitted in the year 2000. The legal status of KPLC was it was a State Corporation with perpetual succession capacity. It was not correct to say that it was not represented by the Attorney General on legal matters. In this case it was not represented by the Attorney General. It was bound by the Laws of Kenya. It was one of the Provider of electricity power in the Republic of Kenya. It was bound by the provision of Section 46 of the *Energy Act*. He was refereed to the sale agreement on page 190. At Paragraph 15 – it was an agreement. From his understanding it was for compensation. He insisted it was for compensation. He was aware of the process for compulsory acquisition under the provision of Article 40 (3) of the *Constitution* of Kenya and Sections 108 to 118 of the *Land Act*, No 3 of 2012 was where compensation was applicable. He agreed this land was not under this category.

32. DW - 2 agreed that this was a land sale. The Clause 2.0 it appeared to be a normal clause for the sale of land agreement. Under Clause 3.1 of the agreement was the Purchase price. He agreed it was a normal sale agreement and there was no word compensation on it. KPLC was not a signatory to the agreement. The KPLC was individually involved with the Government of Kenya when the agreement was made. He referred to a letter dated January 23, 2016 it was a culmination of many correspondences that had been written.

33. The KPLC appealed to the Attorney General to resolve the matter, mark all the suits against the Attorney General to be marked as withdrawn. Indeed, their appeal was heeded to though this suit was not withdrawn and the costs. This court case was not put in that clause. He saw the letter by the Plaintiff's Advocate dated December 15, 2015. It is not true that their case was sneaked in to be part of the cases for withdrawal and that it was rejected. The land was registered in the name of the Plaintiff.

34. DW – 2 confirmed that the KPLC never sought consent of the owner before entering the land. He knew about easement/ way leave but did not know about the provision of Section 46 of the *Energy Act*. He was referred to Page 89 and the signing the declaration. He stated that he was not aware of it. He was referred to the Amended Defence filed on October 5, 2017.

    Under Paragraph 6, on consents. DW - 2 held that they obtained consents from people on the land. These people were not squatters. He was referred to the Affidavit sworn by M/s Imelda Mbuya. There was a list of people who were occupying the land and they are the ones who gave KPLC consent.

35. Upto January, 2016 when the land was sold to the Government of Kenya, KPLC had supplied power to thousands of people – 1100 people. There were several power lines and transformers on the land. On Page 91 there was an order to stop any new connection. It was issued on February 26, 2013. He was not aware that there were any new connection after the order. It was not correct that after this order that there were trespassers on the land. These were the individuals who were in possession of the land. They were not the legal owners. He was referred to the contents of Paragraph 6(b) of his statement. The KPLC were asking for land to connect power. The individuals held the land had been their ancestral

land. They were the owners of the land. He got this information from the meeting held at the DC's Offices where there were security officers. This was the source of the information. They said there were several cases to that effect.

36. On being referred to letter dated January 13, 2016 under Item No he pointed out that was not conversant with the cases referred to as HCCC No 40/2000. However he confirmed that there was no doubt that the land belonged to Mr Jedraph Waitiki. On the Ruling of November 8, 2001, he refuted the fact that the issues had not been finalized. That is by the time of filing the case. He was not aware as to who was being to referred as terrorists in the Ruling delivered by Justice (Rtd) Hayanga on Pages 34 – 52 of the list. On Page 37 it was a document of Civil Appeal. It was an order appealing from the decision of the Ruling by Justice (Rtd) Hayanga. The matter was never litigated to finality. He stuck to the contents of his statement under Paragraph 6(b). He had referred to it in his letter dated January 13, 2016. It was from wide media report. He had not seen the sale agreement.

37. While being refereed to Paragraph 9 of the Defence, he stuck to the point it was as per the provisions of the *Energy Act*. Further, on reference to the contents of Paragraph 2 of his statement where he used the phrase 'the so called Waitiki Land'. He indicated there was nothing derogatory about it. It was meant and referred to the wide parcel and a term loosely used by many while referring to the suit land. They were guided by others/ the residents. He had no information on the boundaries and beacons of the parcels of the land.

    Under Paragraph 9 – the reference made of the 'Land Claimed by Waitiki' was because he had no knowledge of the land and he was being guided. The Plaint was received on May 22, 2012 by the KPLC. He had not been the Manager by then. The bundle of these documents were served which contained the certificate of title.

    Paragraph 12 it was the Plaintiff to get compensation for the entire land. Paragraph 13 – he was not aware of the boundaries and it had to be the Plaintiff to inform them. They made efforts to get the maps on the land. Whether they were used or not he was not aware.

    He did not know the owner of the land. They were not driven by profits. Some of these people did pay for the supply power while others never paid. It was mainly an issue of security. It was correct to supply power to the whole country not just the Waitiki at Likoni.

Court:-

38. The Honorable Court requested to be explained to the issue of security as the driving force or cause leading to the connection of electricity project by KPLC. It was stated that the Government of Kenya felt that the place which was already over populated by the people invading and settling in here, it had become a hot spot infiltrated by terrorists activities. For these reasons, it was felt there was need to supply electricity within the area in order to have lighting and modern development undertaken by known people and property. That was the reason KPLC held a meeting with security apparatus. It included the Police, Intelligence and Provincial Administration.

Mr. Gacheru:-

39. DW – 2 was referred to the Court order of February 8, 2001 delivered by Justice (Rtd) Hayanga KJ. To have the Police move to land. But the security apparatus failed to comply. Due to the non - compliance by the police, it caused more people to keep on entering kept the land.

Re - Examination of DW - 2 by Mr Odera Advocate

40. The occupants of the land were there to see the connections of the electricity line. They had been there way before. The occupants had been there from the year 1997 meaning for thirteen (13) years. The occupants were invaders and not peaceful occupants. The year 1997 was the Presidential and national Assembly general election year. The Government was unable to evict the invaders after the orders of this court by Justice (Rtd) Hayanga.

41. He did recall the orders by Justice (Rtd) Hayanga were following the application to have the court to assist in the evictions of the invaders. The KPLC was requested by the Government of Kenya to provide electricity connection for the users. The connection was to do with the security issues. There had been many invaders on the land. They include for instance the Al Shabab, Terrorists and so forth. The Government of Kenya realized the place was becoming a security hub and hence it requested the KPLC to provide electricity for security purposes. After that KPLC would have no interest on the land. They would leave immediately. Following the injunction order issued by this Court, KPLC did not carry out any further connections to the electricity.

IV. Submissions

42. As indicated herein, upon the closure of the hearing on January 18, 2022, each party was granted time to file their written submissions they each complied accordingly. On April 28, 2022, both the Plaintiffs and the Defendants Advocates were accorded an opportunity to highlight their written submissions. This Honorable Court will not hesitate to sincerely applaud the Learned Counsel in this matter, Mr Gacheru, Mr Chaha Odera and Mr J Munyithya in the manner in which they executed their mandate with extreme professionalism clothed with decorum, diligence, devotion, dedication and resilience.

43. Unfortunately, being an adversarial system, the case has to be adjudicated and decided in one away of the other. However, Courts of law are and must remain Citadels of Truths and Justice and must not be made prone to rushed, biased or impartial pronouncements. Thereafter the Honorable Court reserved a date to render its judgment accordingly.

B. The written submissions for the Plaintiff

44. On February 8, 2022 the Law firm of Messrs Gacheru, Ng'ang'a & Company Advocate filed the written submissions for the Plaintiff dated February 7, 2022. Mr Gacheru Advocate in his submissions recounted to detail the background facts if this case. He stated that the Learned Counsel averred that the Plaintiff was aware of the provisions of Section 46 of the *Energy Act* No 12 of 2006 expressly obliges the Defendant to seek permission of the owner of the land and not from the 'Person in possession' of the land. He further attested that the Plaintiff was aware it was a requirement for the Applicant of electricity supplier to supply a copy of title and search to prove that he was the owner of the land. It was his submissions therefore that before the Plaintiff sold the land to the Government of Kenya the Defendant had illegally and unjustly earned if a Colossal amount of money from the sale of power on his land. He averred that due to the supply of power, the number of trespassers increased and the matter had attracted huge political interest.

The Learned Counsel argued that away from the sale of the land to the Government of Kenya, the Plaintiff was categorical that this suit was about damages of trespass which ought to be negotiated separately, position that the Government of Kenya accepted and hence the clause from the agreement was struck off from the sale agreement leaving only HC Misc No 40/2000 which was to be marked as settled save for the costs in that case.

45. The Learned Counsel averred that the Plaintiff was aware that shortly after he transferred the land to the Government of Kenya, the Defendant herein made an application to strike out the suit for being an abuse of court process on the grounds that the Plaintiff had sold the land to the Government of Kenya and allegedly had been fully compensated for the trespass. The application and orders were allowed. However, the ruling of the High Court was reversed by the Court of Appeal. Further the Learned Counsel submitted by raising the following issues:-

Firstly, the Defendant entered the Plaintiff's Land without the permission consent/authority of the Plaintiff. The Defendant never complied with the provisions of Section 46 of the *Energy Act* No 12 of 2006. The Defendant committed the tort of trespass on the land belonging to the Plaintiff. To buttress his point, he cited the provisions of section 3 of the *Trespass Act* Cap 294 of Laws of Kenya and Halsbury Law of England Vol 38 Paragraph 1205 and the case of' *Lutaaya –Versus- Sterling Civil Engineering Company Ltd (2009) 1 EA 274.*

46. He further held that once a party acquired a legal title over a parcel of land, such a party was entitled to not only possession but occupation of the land. To support this legal position, he cited the case of '*Wamwea –Versus- Catholic Diocese of Murang'a Registered Trustee (2003) KLR 389*. He held that it was not in dispute the Plaintiff was the legal and registered owner of the suit land having taken possession of it until the year 2016 when he sold it to the Government of Kenya

47. He argued that the Plaintiff had the title and possession sufficient to maintain an action on trespass of land against the Defendant. He cited the book '*Clark and Lindsell on Torts 19th Edition*, where the writer states as follows on Paragraph 19-13.

> ' Proof of ownership is prima facie proof of possession, unless there is evidence that another person is in possession, but if there is a dispute as to which of the two persons are in possession, the presumption is that the person holding title to land is in possession.'

It was his contention that the Defendant had entered the land unlawfully and erected transformers, power lines and other equipment to supply power. It was his submission that the Defendant never controverted this evidence. Instead they accepted that it entered the Plaintiff's land. There was enough documentary evidence adduced to this effect.

Further the Learned Counsel averred that the Defendant did not obtain consent to enter the land from the Plaintiff. He submitted that the Defendant's witness confirmed this position while the DW-1 stated that the Defendant obtained the consent from the trespass on the ground DW-2 the consent was obtained from the Government Officials.

48. Secondly the Learned Counsel averred by making reference to Paragraph 7A of the Amended Defence by the Defendant whereby the Defendant alleged to have held a statutory duty under section 32 of the *Energy Act* to supply power. The Counsel held that this duty was however to be performed strictly in accordance with the provisions of the Act including section 46 of the Act which the Defendant violated. To him in tort of trespass, the Plaintiff's suit was also based on the tort of breach of statutory duty – defined in *Halsbury's Law of England, 5th Edition Vol 97* at paragraph 495 as follows:-

> ' Essentials of cause of action. Breach of Statutory duty is an independent tort recognized under common law. In order to succeed the Claimant must establish a breach of statutory obligations which on the proper construction of statute was intended to confer private rights of action upon a class of persons of whom he is one'

He held based on the content of Paragraph 11 of the Amended Plaint indicated that the Plaintiff had pleaded the tort of breach of Section 46 of the *Energy Act*, No 12 of 2006 which enjoined the Defendant to seek the permission of the owner of the land before entering the land to law down or connect electricity supply power lines. He reiterated the Defendant had no sought for the Plaintiff's permission hence the Claim. He argued that the tort of breach of statutory duty overlapped with that of the action on trespass. To support his argument, he cited the case of '*Brooke Bond (K) Limited – Versus- James Bii (2013) eKLR* where the Court of Appeal held the Respondent liable for trespass after he had entered the Applicant's land and started excavating it without obtaining its consent as required by the *Water Act*.

In summary he held that the Defendant's witnesses – DW-1 agree that such consent ought to have been obtained from the owner of the land before entering the land as envisaged in law Section 45 of the *Energy Act* No 12 of 2006.

To juxtapose the defence relied on by the Defendant, the Learned Counsel stated that the Defendants alleged that they had obtained the consent for the electricity connection from the persons based on living on the ground. He held that the said consent was not in conformity with the law as founded under the provision of Section 46 of The *Energy Act* – whereby the consent ought to have been obtained from the legally registered and absolute owner of the land and not any other person as alleged. It did not make reference to one obtaining the permission from person in possession of the land as alluded to by DW - 1 nor the Government officials as alleged by DW - 2. Besides the alleged persons on the ground as had been intimated by the witnesses had already been adjudicated and declared as being trespassers and invaders by the court in High Court (Mombasa) Misc Civil Application No 40 of 2000.

He held that the assertion by the Defendants – under Paragraph 6B of the Amended Defence that the Defendant claim that the said trespassers had raised ancestral rights over the suit land, as factually and legally wrong. This claim was dismissed by court as follow:-

> ' There is no doubt that the named parcels of land in this case which belongs to Jidiraph Kamau constitute private property of the applicants and that the same has been overran by force and illegally occupied by people who are not otherwise individually identifiable except through a group called Likoni Land Development Committee whose registration as lawful society has not been shown to this court and whose aims are unknown to court, except of their belief that they own the disputed land through rights denied from their ancestors which they claim entitled them to have superior title. But this is wrong. It negates the rights of ownership. It is terroristic and it is a negation terror of law and order and organized society. There is no doubt that criminal acts have been committed here. A group of people using force to dispossess a person of his property is a subversive group is the opposite of law and order. The two cannot exist.'

The Learned Counsel contended that there was no way the trespassers and invaders into the land that belonged to the Plaintiff, would claim or being in a legal position to have granted legal permission to the Defendant undertake the task of electricity connection as envisaged in law. Their illegal possession of the land never negated the Plaintiff's rights to possession and ownership which was the basis for instituting the suit for trespass. To buttress its point, the Counsel relied on the decision of 'Lutaya Supra & Kalinga –Versus- Kalumwana 1990-1993 EA 137';

49. He further held a wrong could not found any right as stated in the decision of '*Nabro Properties Limited. – Versus- Sky Structure Limited & 2 Others 2002 eKLR 312*' as the Defendant knew the land belonged to the Plaintiff and the person who allegedly gave a it permission were trespassers.

He cited the case of '*Munina – Versus - Budesiono (2016) 3EA 311*' where it was held that trespass was a continuous tort when an unlawful entry on the land was followed by continuous or exploitation. On the relief sought and the awarding for the trespass, the learned Counsel made reference to the case of '*Kenya Hotel Properties Limited – Versus - Willesden Investments Limited (2009) eKLR*' this court awarded damages for trespass against a company that had trespassed upon the Respondent's land for a definite period between January, 1994 to February 1998 when it vacated the land upon expiry of the lease (trespass ceased).

The Counsel relied on the case of '*Kenya Power and Lighting Company Limited –Versus- Philip AM Kimundu (2018) eKLR* a similar case where the KPLC had trespassed upon land by laying power distribution line on the Plaintiff land. The High Court had awarded damages a sum of Kenya Shillings Five Million Five Sixty Five Thousand (Kshs 5,565,000/=) in the year 2010 for land measuring 7.1 acres. The Counsel also cited the cases of '*Rhoda S. Kiilu –Versus- Jianaxi Water & Hydro Power Construction Kenya Limited 2019 eKLR*, *John K Koech –Versus- Peter Chepkwony (2019) eKLR*, *Joshua Ngeno –Versus- KPLC (2021) eKLR*, and *Eunice Nkirote Ringera –Versus- KPLC (2020) eKLR* . where courts variously awarded damages ranging from a sum of Kenya Shillings Ten Million (Kshs 10,000,000.00) in the year 2019 to that of Kenya Shillings Twenty Million (Kshs 20,000,000.00) in the year 2019 for land measuring 1.5 acres from the said cited cases.

50. While making these awards on damages, the Court considered the value of the parcels of the suit land. Therefore, the Learned Counsel, urged court while granting damages to the instant case by the Plaintiff, to take into account the size of his four (4) parcels of land which were all totaling to a measurement of 930 acres – and the development made thereof. Further, he urged Court to consider the value of the suit land – the permanent structures that were on the land whereby they were estimated value were a sum of Kenya Shilling One Thirty Two Million Four Fifty Thousand (Kshs 132,450,000/=) _and the land which had been valued and stated from the sale agreement to the land while selling to Government of Kenya as produced as exhibits to be at a sum of Kenya Shillings One Billion Two Hundred and Fifty Million (Kshs 1, 250,000.00). Hence, according to the Counsel this translated to a sum of Kenya Shillings One Million Three Forty Four Thousand and Forty Six (Kshs 1, 344,046.00 per acre, which figure, he argued was still undervalued the suit land being a beach land situated at Likoni area near the City of Mombasa. Additional, the court to consider the Defendant made a profit from the land. In this case the Defendant made a profit by selling power and making an income. In this case, the evidence of the Defendant indicated the Defendant supplied power to 11,287 families hence they made a colossal profit for more than eight (8) years.

51. Finally, the court to consider where there was oppressive, arbitrary or unconstitutional trespass by Government official or where the Defendant cynically disregarded the right of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded. In this case, Waitiki had been evicted from the land and Government refusal to comply with court orders to remove and prosecute the trespassers a matter which was in the public domain.

Based on the above factors he urged court to award the Plaintiffs a consolidated award of Kenya Shillings Six Hundred Million (Kshs 600,000,000/=) as reasonable in the given circumstances.

He concluded that the court to grant the prayers sought from the amended Plaint plus costs and interests.

B. The written submissions for the Defendant

52. On March 15, 2022 the Learned Counsel for the Defendant Law firm of Messrs Munyithia Mutugi, Umara Muzna & Company Advocates filed their written submissions date even date. Mr Odera

Advocate leading Mr Munyithia Advocate submitted by briefly stating out the case by the Plaintiffs herein and the Defendant mounted by the Defendants herein before this Honorable Court. He argued the Defendant contended that whereas the Plaintiff and his wife the late Berta Wanjiru Kamau were the joint proprietors of the suit land, but they were not in possession of the suit property to the extent required to prove the tort of trespass against the Defendant.

He further argued that despite a court order requiring the Government of Kenya to evict the invaders from the suit property the Government of Kenya was unable to do so hence the decision of the Government of Kenya to acquire the land from the Plaintiff. The Learned Counsel averred that the by the time it laid electricity cables and the attendant infrastructure, the Plaintiff was not in possession of the suit property and the request for the connection and supply of electricity was made by individuals who were in actual possession of the suit property and who had established an entire community that was resident on the said parcels of the land.

53. The Learned Counsel held that based on the testimony of DW-1 the invasion of the suit land and continued occupation by the invaders posed a widespread security and terror threat and hence the electricity connection was part of the Government effort to address the security and terror concerns.

He held that it was not in dispute that in the year 2016 the Plaintiff was paid a sum of Kshs 1,100,000,000/= by the Government of Kenya in respect of the suit land as a purchase for the land and further the Government of Kenya issued the occupying residents of the suit land with title deeds. For these reasons, the counsel argued that the Plaintiff could no longer sustain the present suit against the Defendant and without suing the persons who displaced him and drove him off from the suit property.

The Learned Counsel further averred that the Plaintiff's cause of action lid as against the people who drove him out of the suit land and occupied his property.

The Learned Counsel argued that the Defendant's held that it supplied electricity to individuals who were in possession of the land, a claim had been validated by the issuance of title deeds to the said individuals by the Government of Kenya.

The Learned Counsel also contended that the Defendant was under statutory duty to provide access to electrical power supply to the individuals who were in possession of suit as provided for under the provisions of Section 32(1) of the *Energy Act* No 12 of 2006 and hence if they failed to comply with this statutory requirements, the same would be a regulatory breach which could only be addressed by the regulator. In the event that there is a dispute it is within the Energy and Petroleum Tribunal established under Section 125 of the *Energy Act* to hear and determine.

54. The Learned Counsel submitted under the following three (3) broad sub-heading:

Firstly, the Learned Counsel refuted that the Defendant had committed the tort of trespass against the Plaintiff. Relying on the definition of what constituted trespass to land from '*Halsbury's laws of England 4th Edition Vol 45* Pg 1384', 'Clerk and Lindsell on Torts, 12th Edition paragraph 1131 and the case of Lutaaya (Supra) – held that possession of land was a requirement in bringing an action for trespass to land. He held that the Plaintiff from its pleadings had conceded that he was not in possession/occupation of the suit land at the time the Defendant laid the electricity cables and associated infrastructure. For this reason, the only party the Plaintiff could sustain a cause of action based on trespass were the people who entered upon his land and drove him out of the said land. He could not sustain an action based on trespass as against persons who may have entered the land when he was not in possession of the same. The squatters who were subsequently issued with title deeds to the land by Government of Kenya had dispossessed the Plaintiff of his land. The Learned Counsel the cause of action crystallized against the intruder who entered into the Plaintiff's land without his

consent and as a precursor to an action based on trespass. Simply put, the Defendant did not displace or dispossess the Plaintiff from the said property.

He held that the Plaintiff had to demonstrate that he was in possession must be exclusive. For instance, a land owner who had leased their property was deemed to be out of possession and could not sustain an action in trespass. In the present case, the Plaintiff conceded that sometimes in December, 1999 his family and himself were driven out of the suit property by the illegal trespassers who invaded the suit land and destroyed everything. He stressed that the Defendant supplied electricity to individuals who were already in possession of the suit property upon and that power was connected to already existing structures and had a claim of right over the same upon their request which claim had since been validated by the issuance of title deeds to the said individuals by the Government of Kenya. These were 11,287 families. He held that for the Plaintiff to insist on prosecuting this suit the Plaintiff was not only suing the wrong party but also seeking to enrich himself unjustly. He held that for this suit to succeed proof of ownership was prima facie of possession only where there was no evidence that another person was in possession. Hence this claim was superfluous, unmeritorious and an abuse of the court process and ought to be dismissed. On the issue whether they invoked the provision of Section 46 of the *Energy Act* the Defendant sought the consent, approvals and permission of the individuals who were in possession of the land and had a claim over the land and which claim had been validated by the issuance of title deed to them to the said individuals by the Government of Kenya.

56. The Learned Counsel contention was that the Plaintiff in his Amended Plaint only sought for general damages for continuing trespassers. Upto the January 6, 2016 but from his submission he is now introducing for breach of statutory duty and submit that apart from the tort of trespass, his suit was also based on tort of breach of statutory duty.

The Learned Counsel submitted that the Plaintiff did not plead for damages for breach of statutory duty and as such this claim must fail. He held that parties were bound by their pleadings as per the case of '*Galaxy Paints Co Limited -–Versus- Falcon Guards Limited. (2000) eKLR*, *Independent Electrical and Boundary Commission and Another – Versus - Stephen Mutinda Mule & 3 others (2014) eKLR*' and *'Housing Finance Commission of Kenya – Versus - JN Wafubwa (2014) eKLR*'.

57. In conclusion with regard to the reliefs sought by the Plaintiff, the Learned Counsel contended and reiterated the Defendant never neither trespassed upon the Plaintiff's had nor committed a breach of Statutory duty. He argued that even if the Defendant was a party that dispossessed the Plaintiff of his land, it should be noted that upon the Plaintiff selling his land to the Government of Kenya the Plaintiff could not maintain his suit taking into account the sale of the land and payment of Kenya Shillings One Billion Two Hundred and Fifty Million (Kshs 1,250,000,000/=). The Counsel held that the agreement entered into between the Plaintiff and the Government of Kenya was not a sale agreement per se but rather settlement following the Government's inability to evict the persons who trespassed upon the Plaintiff's land and evicted him from the said land. Should the Plaintiff want to be compensated for the period preceding the sale of the sais property, then he could only seek the same from those persons who drove him off the land. He argued that the payment made to the Plaintiff upon the execution of the sale agreement dated March 8, 2017 with the Government and payment for a sum of Kenya Shillings One Billion Two Hundred and Fifty Million (Kshs 1, 250,000,000) was sufficient compensation for all and any claims the Plaintiffs had up to the date of the agreement.

The Learned Counsel also stated that the Plaintiff had also made a claim for compensation for what he referred to as damages and destruction visited upon his farm, development and various equipment. Not only had the Plaintiff failed to specifically plead this damages but also failed to lead any evidence in support of this claim.

58. Finally the Learned Counsel distinguished several cases cited by the Plaintiff being 'KPLC – Versus - Philip AM Kimondiu Supra holding that it only dealt on issues of way leaves and a 220KV power distribution line 'Phida Kisilu – Versus - Jiangxi Water & Hydro Power (Supra) dealt with trespassers when land was occupied by the trespassers. By the time the Defendant connected power, the land had already been trespassed on and building erected and Eunice Nkirote Ringera (Supra) The proposal to use the value of the land as a basis of compensation was misleading as the Plaintiff was not in possession. Instead the land was in the lands of squatters by the time Defendant connected power. Even if Kenya Power and Lighting Company had not connected power, the land was not available to the Plaintiff.

    In conclusion he held that the Plaintiff had failed to establish a case which met the threshold of proof of trespass.

59. Further, any award to the Plaintiff would amount to unjust enrichment as the sale and compensation paid by the Government of Kenya was in recognition that Government of Kenya were unable to evict the trespassers who drove the Plaintiff out of the suit land and as a settlement the Government opted to negotiate with the Plaintiff.

    He urged court to dismiss the suit by the Plaintiff against the Defendant with costs.

IV. Issues for Determination

60. The Honorable Court has keenly considered all the filed pleading, the evidence adduced by the summoned witnesses, both the oral and written submissions, the cited authorities relevant provisions of the *Constitution* of Kenya, 2010 and the Statutes. In order to arrive at an informed, reasonable and fair decision this Court has condensed all the matters emerging in this suit into the following three (3) salient issues. These are:-

    a. Whether the Plaintiff has proved that Defendant entered and/or trespassed into the suit land without his consent and permission and/or authority – if so who was in physical possession on what basis did the Defendant enter the Plaintiff's land – was the requirement of Sections 46 complied with and Section 32(1) of the *Energy Act* possession of land statutory duty and obligation.

    b. Whether the parties herein are entitled to the relief sought.

    c. Who will meet the costs of the suit?

ISSUE NO. (a) Whether the Plaintiff has proved that Defendant entered and/or trespassed into the suit land without his consent and permission and/or authority – if so who was in physical possession on what basis did the Defendant enter the Plaintiff's land – was the requirement of Sections 46 complied with and Section 32(1) of the *Energy Act* possession of land statutory duty and obligation.

Brief Facts

61. Before the Honorable Court embarks on with the analysis of the issue framed under this sub-heading, it's imperative that it extrapolated on the brief facts of this case to begin with. From the filed pleadings by both Plaintiff and the Defendant, it is not in dispute the suit property was registered in joint names of the late Bertha Wanjiru Kamau the wife to the Plaintiff and the Plaintiff himself. For four parcels measured 930 acres. The owners had purchased this parcels in the year 1975. In the course of time, they caused extensive development on it which included modern agricultural practices, dairy farming and poultry. They also caused several statutory such as houses for the farm manager, offices, staff and so forth. They lived on the land quietly and enjoyed the rights interest and title over the parcels of

the land. However, in the year 1999, some people invaded the land and forceful evicted the Plaintiff from the land. They dispossess and disowned them of the suit land. They destroyed all the structures on it. The Plaintiff made emphatic efforts to have the police and provincial administration have them removed but in vain. He opted on instituting a suit and was able to obtain injunction orders vide a Mombasa High Court No 40/2000 – restraining them from causing any development. Later on had Plaintiff discovered that the Defendant had caused connection and supply of electrification power lines onto the land eventually connection to over 11,200 families which he alleged was done illegally and wrongful to the effect they never complied with the requirements of section 46 of the *Energy Act* 2016. – without his consent, approval and permission. For these reason, he had termed the Defendant as a trespasser and sought for general damages under Tort and breach of statutory duty.

Subsequently on January 6, 2016 the Plaintiff and the Government of Kenya entered into some negotiation and it agreed to purchase the parcels of land at Kenya Shillings One Billion Two Hundred and Fifty Million (Kshs 1,250,000,000/=) as compensation.

62. On this part the Defendant has argued that the Plaintiff in its own pleadings is conceded having left possession of the land from 1999 having been driven off. For this reason, by the time they were laying down the cables for the connection of electricity line to the individuals on the land the Plaintiff was not on the land. Further they obtained consents, approvals and permission to connect the power line from these individuals. There were structures already in existence. Further, it would be breach not to supply power to the recipients being a statutory duty as provided for under section 36 of the *Energy Act* of 2012.

Finally, they argued they were the wrong persons being sued and that the payment the Plaintiff received from the Government of Kenya was not merely for the sale of the land per se but was full compensation for all the activities on the land including the connection of the power line. That is adequate in facts of the case.

63. In addition to this, upon the closure of the hearing of the both the Plaintiff and the Defendant's case, this Court wanting to attain the actual feel of the situation on the ground, with the consensus of the parties invoked the provision of Section 173 of the *Evidence Act*, Cap 80 and Order 18 Rule 11 of the Civil Procedure Rules, 2010 of the Laws of Kenya.

Order 18 Rule 11 provides:-

> 'The Court may at any stage of a suit inspect any property or thing concerning which any question may arise'

Section 173 (1) The provision of Section 173 (1) provides 'inter alia:-

> 'The extended powers of Court of obtaining proper evidence – A Judge or Magistrate may, in order to discover or obtain proper evidence, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact whether or not it is otherwise admissible ; any may order the production of any document or thing and neither the parties nor their agents shall be entitled to object to any such question or order nor without leave of court to cross – examine the witness upon any answer given in Reply to any such question.'

Provided that Judgement shall be based only upon facts which are otherwise admissible and which have been duly proved'

64. Pursuant to this, on August 1, 2022 it conducted a site visit ('Locus In Quo') on the suit land. This is the site report re – produced herein verbatim: -

REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

PETITION 87 OF 2012

EVANSON WAITIKI - PLAINTIFF

VERSUS –

KENYA POWER & LIGHTING CO LIMITED - RESPONDENTS

SITE VISIT REPORT DATED August 1, 2022

I. Site location:

The suit property situated on the Likoni Sub County, of the County of Mombasa. Its close to 10 Kilometres on the left hand side after crossing the Ferry manned by the Kenya Ferry Services (KFS).

II. Day of the site visit:

August 1, 2022 from 2.00pm to 4.00pm.

III. Conducted by Court:

a. Hon Justice LL Naikuni, Environment & Land Court No 3, Mombasa.

b. M/s Yumnah Hassan, Court Assistant.

c. M/s Esther and Katumbe, Legal Researcher and Driver.

d. Security operatives provided by the Officer Commanding Police Division, (OCPD Kisauni) and Officer In Charge (OCS) of Likoni, Police Station.

IV. The parties present:

a. Mr Gacheru Counsel for the Plaintiff and Mr Evanson Gidraph Waitiki, the Plaintiff .

b. Mr Chacha Odera & Mr Mutugi Counsels for the Defendant (left after the second stop along Diani road just after Consolata Catholic Church, Likoni), Court.

V. Purpose of the visit:

To ascertain the situation on the ground as pleaded by parties.

VI. The Visitation, per excellence and the Observations made.

The team made four (4) stop overs on the three portions of suit land which measures approximately 1000 acres or thereabout. Upon sub division of the main land resultant to mainly Land Reference Numbers MSA/MAINLAND SOUTH/BLOCK 367, 1031, 109 & 110 respectively. He sold No 1031 to the Catholic church.

The first stop was at the Bilaal Bin Rabaah High School and Mosque. There was a volatile community who were suspicious of our intentions particularly seeing the Counsel for the

Plaintiff referring Court to a map of the area. The Counsel for the Defendant opposed the use of the map. They indicated they would not be willing to continue with the site visit further as according to them the situation never appeared peaceful any more. But the team calmed down and continued with the visitation.

The second step was at the Likoni Rehabilitation School and the Children Remand Home. The Counsel for the Defendant joined the convoy, however he did not leave his car to address the court. Here we were informed that the approved school did not form part of the suit properties but the opposite land did. Counsel informed court that there were approximate 10,000 poles within the 1000 acres of land.

The third stop was at Consolata Catholic Church Likoni. Here the Honourable Court was informed that the portion of that suit never formed part of the suit property. It was explained that the Plaintiff hived and sold off three (3) acres of the land to the church. Thereafter, the church built several structures which included several churches, Mosques, a hospital and a school. The Counsel for the Plaintiff further informed Court that the Mrima Maternity Hospital was outside the suit property, as the same was owned by the government of Kenya.

At this juncture, the Counsels for the Defendant who had been part of the convoy all along left. They did not make it to the next stop.

The last place we visited along a well developed area known as the Shelly beach. We stopped at the Masjid Khalid Bin Walled, which borders the suit property. Here the Counsel for the Plaintiff using the Map of the area informed Court that the Plaintiff acquired a Certificate of title to the suit land in the year 1974 as a leasehold for 999 years. However, upon the government acquired the suit land in the year 2016, the land was further sub – divided into small portions and each of the occupants were issued with individual title deeds onto the places they were occupying.

We observed that the whole of the suit property is densely populated with low income families living in semi-permanent and permanent Swahili constructed houses. There are several social amenities ranging from schools, hospitals, religious institutions and shopping centres within the area. From where the suit property begins the population is densely populated with electricity poles every 100 - 150 meters, however the same decreases as the property nears the beach front. Due to the vastness of the sit land, Court was not able to cover the whole of it. The Court only estimated that there could be 10, 000 electricity poles mounted in the whole of the suit land.

The Court concluded by retaining a copy of the original map of the suit properties. It informed the Counsel for the Plaintiff that the Judgement on the suit would be delivered on notice to be served upon all the parties in good time.

The Site Visit was concluded at 4.00pm.

THE SITE VISIT REPORT SIGNED AND DATED August 5, 2022

HON JUSTICE (MR) LL NAIKUNI

ENVIRONMENT & LAND COURT AT

MOMBASA

65. Now turning to the framed issue under this sub-heading. It is instructive that this court expends a little bit of time on certain concepts pertaining to trespass. According to the provision of Section 3(1) of *Trespass Act* Cap 294, it provides: -

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

From the book *'Clark & Lindsell on Torts 12th edition'* Paragraph 113, defines trespass as follows

> ' Trespass to land consists in any unjustifiable infusion by one person or property upon land in the possession of another'

Thus trespass is an intrusion by a person into the land of another, especially wrongful entry on another's real property who is in possession and ownership. While 'Continuous trespass' is tress in the nature of permanent invasion on another's rights, such as a sign that overhangs another's property'.

In the case of 'Lutaaya – Versus- Sterling Civil Engineering (Supra) the court stated as follows regarding the tort of trespass to land:-

> ' Trespass to land occurs when a person makes unauthorized entry upon land and thereby interferes or portends to thereby, therefore with another's lawful possession of that land. Needless to say, the tort of trespass to land is committed not against the land but against the person who is in actual or constructive possession of the land. As common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus the owner of unencumbered land has such capacity to sue, but a land owner who grants a lease of his land does not have capacity to sue because he pa with possession of land' where trespass in continuous, the person with the right to sue subject to the law on limitation of action exercise the right immediately after the trespass commences or any time during its continuous or after it has ended.

Further according to Clerk & Lindsell on Torts, 19th Edition the writer states at Paragraphs 9 - 13:-

> ' Proof of ownership is Prima Facie of possession, unless there is evidence that another person is in possession but if there is a dispute as to which of the two persons are in possession the presumption is that the person holding title to land is in possession.'

From the afore going definition of trespass as tort, it appears the legal connotation of the legal terminologies of 'Possession', 'Ownership' and 'Occupation' of land is a requirement in bringing an action for trespass to land. According to the Black Law Dictionary these terms means:-
'Possession' means 'The fact of having or holding control of property in one's power; the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others'.'Ownership' means 'The bundle of rights allowing one to use, manage and enjoy property including the right to convey it to others. The right to possess a thing regardless of any actual or constructive control'.'Occupation' means 'Possession, control, or use of real property. The seizure and control of a territory or property.

Now applying these definitions to the instant case. On one part the Plaintiff holds that possession of the suit land in the year 1975 when he purchased it. He holds he continued being in possession of it until January 6, 2016 when he sold it to the Government of Kenya. On the other hand, the Defendant submits that the Plaintiff in his pleadings and testimony conceded that he was not in occupation of

the suit land at the time the Defendant laid electricity cables and associated infrastructure. Hence that being the case, the only party that the Plaintiff could sustain the cause of action based on trespass are the people who entered upon his land and drove him out of the said land. He could not sustain an action based on trespass as against person who may have entered the land when he was not in possession of it.

In order to proceed further this court is compelled to seek refuge from the provision of The *Energy Act*, No 12 of 2006 provided as follows:-

the law applicable at the time of the acquisition of the land was 'The Electric Power Act', 'the *Land Act*, No 6 of 2012 and 'The *Energy Act*, Cap 1 of 2019'.

The provisions of Section 46 (1) of the Electric Power Act provides that:-

' (1) An owner shall be deemed to have assented to a proposal to lay an electric supply line on his land if he fails to notify the person desiring to lay an electric supply line in writing of his dissent thereform within the sixty days after the service on him of the notice required by this section; and in the event of dissent the Court, on the application of the licensee, shall decide:-

a. What injury, if any, the proposed electric supply line will cause to the owner, or to the occupier or other person interested in the land; and

b. Whether any injury that will be caused is capable of being fully compensated for by money, unless the owner requires those questions to be decided by arbitration.

(2). The result of a decision under Sub – section (1) shall be as follows:

a. If the decision is that injury shall be caused to the owner, occupier or other party interested in the land, but that the injury is of the nature of being fully compensated by money, the Court or arbitrator shall proceed to assess the compensation and apportion it amongst the owner, occupier and other parties in his or their Judgement entitled thereto, and payment of the sum so assessed the licensee may proceed to lay the proposed electric supply line;

b. If the decision is that injury will be caused to the owner, occupier or other party interested in the land, and that the injury is not of the nature to admit of being fully compensated by money the licensee shall be entitled to lay the proposed electric supply line.

c. If the decision is that no injury will be caused to the owner, occupier party interested to the land, the licensee, may forthwith proceed to lay the electric supply line.

d. If any difficulty or question arises as to the person entitled to the compensation payable under this Act, the Court shall order the compensation to be paid into Court pending the making of an application under Sub - Section 4'.

The provisions of Section 171 (1) and 173 (1) of the *Energy Act* provides:-

> ' A person who wishes to enter upon, other than his own to a). undertake exploratory activities relating to exploitation of energy resources and development of energy infrastructure, including but not limited to laying or connecting electric supply lines, petroleum or gas pipelines, or drilling exploratory wells b). carry out a survey of the land for the purposes of paragraph (a); shall seek the prior consent of the owner of such land, which consent- shall not be unreasonably withheld. Provided that where the owner cannot be traced, the applicant shall have fifteen days notice through appropriate mechanisms including public advertisement in at least two newspapers of nationwide circulation and an announcement in a radio station of local coverage for a period of two weeks'
>
> 173 'An owner, after receiving the request for the consent and under Section 171 may consent in writing to the development of energy infrastructure, upon agreement being reached with the applicant as to the amount of compensation payable, if any, and any consent so given shall be binding on all parties having an interest in the land, subject to the following provisions a). that any compensation to be paid by the licensee giving notice to the owner, in case where the owner is under incapacity or has no power to consent to the application except under this Act, shall be paid to the legal representative of the owner; and b). that an occupier or person other than the owner interested in the land shall be entitled to compensation for any loss or damage he may sustain by the development of energy i infrastructure, including but not limited to laying or connecting electric supply lines, petroleum or gas pipelines, drilling geothermal wells or coal long as the claim is made within three months after the development'

From the above provisions of the law, it is clear that a person ought not enter into another's land in order to lay electricity supply lines unless with the consent and permission of the land owner. Such a person needs to give notice accompanied by a statement giving particulars of entry. It tantamount to acts of trespass. Undoubtedly, from the surrounding facts and inferences, the provisions of the law, this Honorable Court finds that the Defendant was in total contravention with all these requirements of law. Evidently, they never obtained the prior consent or authorization of the Plaintiff before entering the land. The procedure for laying electric supply lines is not found in Section 46 provides:-

Permission to survey and use land to lay electric lines

1) No person shall enter upon any land, other than his own

   a. To lay or connect an electric supply line or

   b. To carry out a survey of the land for the purpose of paragraph (a) except with prior permission of the owner of high land

(2) The permission sought in sub-section (1) shall be done by way of notice which shall be accompanied by a statement of particulars of entry.

The provisions of Sections 47 and 52 of the *Energy Act* No. 1 2019 provides that the conduct and regulation of business of the Corporation shall be regulated by its Board. By no means, whatsoever, does this Act relieve the Corporation from any liability to pay for compensation or damages to any person for an injury to that person , that person's property or any of the persons interests caused by the exercise of the powers conferred on the Board by the Act.

Having critically explored into the above provisions of the law it is well established that for any supplier of electric line onto the land of the occupier, as a fundamental requirement, it is mandatory that Consent, Permission and approval of the land owner is a basic requirement before entering into such land. Moreover, a notice is required to be given which notice should be accompanied by a statement giving the particulars of entry. It's after the notice an owner may give asset and is entitled to compensation to be agreed. In the instant case, it's not in any doubt nor evidence by any of the parties herein that the Plaintiff was the registered and legal owner to the suit land from the years 1975 to 2016.

Based on the surrounding facts although the Plaintiff was driven off from the suit land by some individuals in the year 1999, that never meant him being dispossessed, disowned or displaced from the seat of the legal ownership to the land until the year 2016. Therefore, it's for this primary reason that his consent and permission was required by both the individuals who applied to be supplied and connectivity with power and the Defendant. The Defendant has admitted that they laid the cables and power lines based on the consent granted by the individuals who were then in possession of the land, and never required consent from the Plaintiff. These individuals though got title deeds later on but they that time they were not title holders and hence without any indefeasible title, right and interest on the land as required by law. For this reason, its my view that the said individuals and the Defendant herein graphically and willfully trespassed onto the land belonging to the Plaintiff and the acts of trespassing continued until the year 2016 when the land was bought by the Government of Kenya to settle the squatters on it.

ISSUE NO. (b) Whether the parties herein are entitled to the relief sought.

66. From the very onset, this Honorable Court confesses that the issue under this sub heading has been the most weighty, complex and intriguing. The Court has been called upon by the Plaintiff to adjudicate and decide on whether the Defendant is liable to pay the general and exemplary damages as prayed for from the filed Amended Plaint. Precisely, the Plaintiff prayed for, inter alia:-

    a. 'General damages for continuing trespass up to January 6, 2016.

    b. Costs of this suit.

    It is trite law that where trespass to land is actionable per se (without proof of any damage). I am compelled to cited the case of '*Park Towers Limited – versus – John Mithama Njika & 7 Others (2014) eKLR*' where JM Mutungi J, stated

    > 'I agree with the Learned Judge that where trespass is proved a party need not prove that he/she suffered any specific damage or loss to be awarded damages. The court in such circumstances is under duty to assess the damages awardable depending on unique facts and circumstances of each case'.

    In other words, once a trespass to land is established it is actionable per se and indeed no proof of damage is necessary for the court to award general damages.

    From the instant case, I have noted that there was no evidence adduced by the Plaintiff in form of a Land Valuation report or photographs to support the claim of the damages caused by the Defendant. Indeed, the Defendant has argued that the Plaintiff was already compensated from the payment made when the Government of Kenya paid them for the transfer of the land. This issue was vehemently opposed by the Plaintiff. He indicated that the specific individuals who illegally dispossess and disowned his land must be held liable.

66. Before I proceed on to consider granting the damages. The Court fully agrees with the submissions tendered by the Learned Counsel for the Defendant to the effect that parties are bound by their

pleadings. Equally, I concur with the Learned Counsel for the Defendant that indeed, the Plaintiff never sought for the damages on breach statutory of duty or tort. Therefore, I find that damage for the breach Statutory of duty cannot be sustained herein.

67. However, I reiterate that having proved trespass of land, the Plaintiff is entitled to general damages as pleaded. Broadly speaking, in order to justify the awards herein as prayed, the court has taken cognizance of several factors. Firstly, this Honorable Court is on the same page with the Learned Counsel for the Plaintiff where he submitted that the Court when considering damages, it should take into account the value of the land among other required legal factors. On the value of the suit land, since there was no valuation report adduced by the Plaintiff, the only tangible evidence and guide would be the sale agreement duly executed between the Government of Kenya and the Plaintiff. The sale agreement was produced in evidence. The agreement indicated that the total purchase price for the suit land was a sum of Kenya Shillings One Billion Two Fifty Million (Kshs 1,250,000,000/=) for the size of the land measuring 930 acres. This translated to about a sum of Kenya Shillings One Million Three Fourty Four Thousand and Fourty six (Kshs 1,344,046) per acre. Hence, this Court is persuaded to settle on that value as being the one for the suit property. It is instructive to note that the Plaintiff has emphatically argued that during the negotiation for the purchase of the land held with the Government of Kenya through the office of the Attorney General and the Ministry of Land Housing and Urban Development culminating to the execution of the sale agreement on January 6, 2016, it was strictly about the sale of the land. He stressed that it did not deal with the issue of squatters, of trespassers or any compensation for non-users or trespass by the alleged squatters. Indeed, as a way of emphasizing this point, the Learned Counsel for the Plaintiff verbally and without any empirical documentary evidence opined that during the negotiation of the sale of land, the Defendant attempted to sneak in a clause in the draft agreement where this suit would be marked as settled upon the transfer of land but the clause was strongly rejected. He was categorical that this instant Civil case was strictly about damages of trespass, which ought to be negotiated separately.

68. Be that as it may, this Court has a distinct and distinguishing view on that aspect. It is my view that the purchase was for suit land. The Black Law Dictionary defines Land to means:-

> ' An immovable and indestructible three – dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything on or permanently affixed on it'

Therefore, to me the land bought in this process, meant all that was on the surface and underneath the surface of the land. It included all the affixed improvements and structures including the electricity supply lines and posts connected by the Defendant thereon. To my understanding, though a highly contested issue, this payment ought to have adequately covered even the connection of electricity power lines by the Defendants to all the 11, 287 households. From the agreement, the KPLC have not been mentioned but my own view the Attorney General was also representing the interest of the KPLC an established State Corporation in the negotiation. I strongly hold the KPLC being a State Corporation is funded by the Government and hence all its legal, management and administrative obligations are well articulated by the Attorney General. This included in this negotiation. In order to attain a clear picture of the Court's arguments, Court has decided to deliberately re – produce certain Clauses of the Sale Agreement herein which support this preposition. These are:-

`Whereas:

A. Evanson Jidiraph Kamau is the registered proprietor of four parcels of land registered as MOMBASA/MAINLAND SOUTH BLOCK 1/363; MOMBASA/MAINLAND SOUTH BLOCK I/1031; MOMBASA MAINLAND SOUTH BLOCK V/109; and

MOMBASA/MAINLAND SOUTH BLOCK V/110 in Mainland South (Likoni), in Mombasa County (otherwise known as 'Waitiki' land more particularly described in Schedule A (the 'Land);

B. Certain individuals have occupied all the parcels of land and continue to do so in spite of the registered owners' many attempts to evict them from the said land. That the long-standing dispute on the land has now evolved into a matter of immense social and political proportions;

C. Recognizing that on November 18, 2015, Government of Kenya and the Transferor signed a framework agreement to establish the mechanism for cooperation and partnership to resolve the matter.

D. The High Court Order issued on the November 8, 2001 in the Mombasa High Court Misc Application No 40 of 2000. Which order requires the Government to evict the trespassers on Mr Waitiki's land recognizing the social, economic and cultural rights under Article 43 of the *Constitution* of Kenya; the parties have agreed to therefore find a mechanism to ensure the occupations on the said parcels will not be evicted but they will be given an opportunity to purchase their parcels in which they are occupying and titles to be issued to them.

E. The parties agree that the implementation of the court order, would require eviction of over 11,287 families, destroying their livelihood and may have serious political and social implications which that may affect the stability of the County of Mombasa and the country as a whole.

F. The transferor agrees to transfer and the Government of Kenya is willing to have transferred to it all that property described in schedule A and the interest contained therein for considerations and no terms and condition hereinafter appearing.

G. The property is occupied by squatters and the transfer to GOK is for purposes of resettling the current occupants and for them to pay a price to be determined by the Government.

7. 0 Legal Status Of The Agreement

7. 1.0 This agreement is binding on both parties. The same supersedes any other agreement which may have been previously entered between the Transferor and GOK in regard to the transaction parcels herein.

7. 2.0 The execution of this agreement marks all pending cases against the government as settled. This does not apply to the costs awarded in Mombasa High Court Miscellaneous Application No 40 of 2000.'

69. The above cited terms and conditions of the Sale Agreement are clear and plain. Clause 7.2.0 implies that all matters against the Government has been settled. This Court discerns that, it is only one case that is mentioned in the agreement. That Miscellaneous Application No 40 of 2000. If at all the matter of the payment arising from the trespass by KPLC was not be part of the negotiation as has been implied by the Plaintiff herein, what would have been easier to do than expressly inserting these very critical precedent conditions – exclusion of the issue of the KPLC and the pending suit ELC No 67 of 2000 as part of the above agreement. I thought that was always the purposes of express legal documents. To say the least, the provision of Clauses 7.2.0 of the Agreement is ambiguous and open ended. At least the Court would have expected the Plaintiff to have filed or produced authentic and certified records, proceedings or minutes with resolution from the said negotiation session. Short of these, then this court is left to conclude that all these matter remain matters of conjecture, abstract and theoretical assumption. Anyway, for the benefit of doubt, the court is of the view and rightfully so based on the

principle of natural justice equity and conscience although these issues may have been exhaustively discussed during the negotiation for the purchase of the land but due to these short comings, the Court concludes that all factors were fully covered. These ought to have included, the full, adequate, reasonable and fair compensation for the action of trespass meted by the Defendant.

70. Secondly, the undoubted invasion took place in the year 1999 and which compelled the Plaintiff to file a civil case High Court Miscellaneous 40 of 2000. Clearly, the Defendant was never a party to this suit. There is no contention that the Defendant was not part of the initial invasion of the land and where the property, livestock and machineries and structures were demolition and destroyed. The Plaintiff testified that it was much later almost after eight (8) years in the year 2008 that he discovered that the Defendant had entered the land, erected electricity transformers and power lines ostensible supplying power to the trespassers.

71. Thirdly, on January 6, 2016, the Government of Kenya decided it would purchase the land and all its improvements. The Plaintiff alleges that by this time the Defendant had illegally and unlawfully earned million if not billions of shillings from the sale of power on his land. While this court fully concurs with the Plaintiff on the fact that there was breach by the Defendant having caused trespass on the land without consent or authority from the Plaintiff this court finds it difficult to fathom the extend of the alleged substantial loss and damage the Plaintiff had incurred by this act amounting to the colossal sum of Kenya Shillings Six Hundred Million (Kshs 600, 000, 000.00) as no single particular or evidence produced to substantiate or justify this claim was produced by the Plaintiff during the hearing hereof nor the site visitation conducted by this Court.

72. Fourthly, this Court has noted from the pleadings and the facts by the Plaintiff himself that the KPLC had always been on the land. It's a fact that from the time the Plaintiff bought the land in the year 1975, there has already been electricity power connected by the KPLC on the land. Thus, they were not entering the suit land for the first time.

73. Fifthly, from the evidence adduced all parties have indicated that the Defendant were supposedly approached and granted Consent by the over 11, 287 families or households and indeed connected them electricity supply thereof. The view of the Court is that these families or households who by then had not yet acquired the Certificate of Title deeds or proof of ownership and legally speaking were merely licensees ought to be equally liable for the damages caused to the Plaintiff. Suffice it say, these households and other related third parties such as the national Land Commission ought to have been joined as parties into these proceedings as provided for under the provision of Order 1 Rules 1 to 13 of the Civil Procedure Rules, 2010. By so doing these parties would have added value and assisted Court in the smooth adjudication of the case and thus expedient and fair determination of the case. All said and done, the Court has seen that through a Chamber Summons Application dated October 13, 2015, the Defendant applied to join the National Land Commission and the Honorable Attorney General to the matter but the Court in its ruling of December 17, 2018 it declined to grant the orders for joiner of these parties on grounds that there would have been no remedy to have been levelled against them in the given circumstances . But nonetheless, as parties are bound by their own pleadings as provided for under Order 2 Rule 6 of the Civil Procedure Rules, 2010, the Court will proceed on with the matter as it stands.

74. Finally, on general damages arising from the action of trespass by the Defendant herein as prayed for by the Plaintiff herein, I have decided to cite a few cases to back up my legal reasoning. In *Nakuru Industries Limited – Versus – S Mehta & Sons (2016) eKLR*'. The Court held:-

> ' In tort, damages are awarded as a way to compensate a Plaintiff for loss he had incurred due to a wrongful action on the part of the Defendant. The damages so awarded are intended

to return the Plaintiff back to the position he was before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. He value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the Costs of the restoration of the land to the position it was in before the wrongful act was committed.'

In Halsbury 4th edition Vol 45 at Paragraph 26, 1503 provides as follows on computation of damages in an action of trespass.

(a). If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.

b). If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.

c). Where the Defendant has made use of the Plaintiffs land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.

d). Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.

e). If the trespass is accomplished by aggravating circumstances which do not allow an award of exemplary damages, the general damages my be increased.

In the case of *Phillip Aluchio – Versus – Crispinus Ngayo (2014) eKLR* Court held:-

> 'The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damages. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration whichever is less. The Plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass.'

75. In the instant case and from the evidence adduced herein, it is admitted that the invasion of the land and the destruction of the property belonging to the Plaintiff being livestock, building structures and crops were undertaken by Squatters or invaders of the far. Be that as it may, apart from the Sale Agreement the Plaintiff never produced any empirical documentary evidence such as Land Valuation Report indicating the value of the land and its improvement before and after the invasion of the land by the Invaders and the Squatters in the year 2018. It is instructive to note that the KPLC was never part to these acts of atrocities to be caused to meet the extensive general damages demanded. It is my view that KPLC were only liable for trespass action and hence only subject to both exemplary and nominal damages and not statutory breach of torts as the same was never pleaded. Thus, the Court proceeds to award a sum of Kenya Shillings One Million (Kshs 1, 000, 000.00) on account of nominal general damages for the trespass together with interest at the Court rates from the date of this Judgement until payment in full.

ISSUE NO. (c) Who will meet the costs of the suit?

79. The Black Law Dictionary defines 'Cost' to mean, 'the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other'.

The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap 21 holds that Costs follow events. It is trite law that the issue of Costs is the discretion of Courts. In the case of '*Reids Heweet & Company – Versus – Joseph AIR 1918 cal 717* & *Myres – Versus – Defries (1880) 5 Ex D 180*, the House of the Lords noted:-

> 'The expression 'Costs shall follow the events' means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.'

80. The Supreme Court fortified this position in the case of '*Jasbir Singh Rai & 3 others – Versus - Tarlochan Singh Rai & 4 Others [2014] eKLR* thus:

> ' So, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.

81. Based on this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The out come in the instant case is the Plaintiff fully succeeded in his cases. For that very fundamental reason, therefore, the costs of this suit will be borne by the Defendant.

V. Conclusion and Disposition

82. Ultimately, upon conducting such an intensive, robust and thorough analysis of all the framed issues hereof, this Honorable Court is fully satisfied that the Plaintiff has successfully established his case on preponderance of probability. Therefore, for avoidance of doubt I proceed to grant the following orders: -

    a. THAT Judgment be and is hereby entered against the Defendant and all the individuals on the suit land for acts of the trespass of tort as prayed with Costs.

    b. THAT the general and exemplary/punitive damages in the sum of Kenya Shillings Twenty Million (Kshs 20,000,000/=) for the loss, oppressive, arbitrary and unconstitutional action of trespass by the Defendant as led by all the 11,285 households who were the beneficiaries of the supply of the electricity without the consent and permission of the Plaintiff.

    c. THAT the Plaintiff be and is hereby awarded a sum of Kenya Shillings One Million (Kshs 1, 000, 000.00/=) as nominal damages for the breach of trespass by the Defendant onto the land belonging to the Plaintiff.

    d. THAT the costs of the suit plus interest on (b) and (c) above to be borne by the Defendant herein at the Court rate of 14% per annum from the date of the Judgement until payment in full.

It is ordered accordingly

JUDGEMENT DELIVERED, SIGNED AND DATED AT MOMBASA ON THIS 12TH DAY OF OCTOBER 2022

HON. MR. JUSTICE L.L NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT

MOMBASA

In the presence of:-

a. M/s. Yumna Hassan & Mr. Omar, the Court Assistants.

b. Mr. Gacheru Advocate for the Plaintiff.

c. Mr. Mkomba holding brief for Mr. Chacha Odera Advocate leading Mr. Munyithya Advocate for the Defendant.

JUDGMENT. ELC 87 OF 2012 Page 15 of 15 JUSTICE L.L. NAIKUNI