



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 65 OF 2008

DEXTER MUNGA MWAMBENI (Suing in his
capacity as the Administrator of the Estate of **MWAMBENI MWANGILA JITWA**
(Deceased)).....**PLAINTIFF**

VERSUS

A J OMAR.....**DEFENDANT**

JUDGMENT

Background

1. The suit was initially filed as **Malindi HCCC No. 65 of 2008**. The matter was subsequently transferred to this Court on 6th December 2012 but retained its original number as filed before the High Court.

2. By a Plaint dated 29th August, 2008 and filed on 12th September, 2008 the Plaintiff Dexter Munga Mwambeni suing on behalf of the Estate of Mwambeni Mwangila Jitwa prays for Judgment against the Defendant for: -

- a. A declaration that the Plaintiff's late father is the legal owner of Plot No. KILIFI BLOCK 3/1136 (formally Plot No. 5054/82).**
- b. An Order directing the Defendant to demolish and remove at his own costs all the developments on the suit property and give vacant possession of the suit property to the Plaintiff.**
- c. A permanent injunction against the Defendants by himself, his servants or agents from interfering with the peaceful occupation and enjoyment of the suit property.**
- d. An Order directing the Defendant to compensate the Plaintiff for loss of income at Kshs. 57,500/= p.m from the time the Defendant illegally occupied the suit property until the time he gives vacant possession.**
- e. Interest on loss of income costs at Court rates.**
- f. An Order that the Defendant to pay costs of and incidental to this suit.**

3. The prayers are borne of the Plaintiff's contention that the Plaintiff late father is the registered owner of Plot No. KILIFI BLOCK 3/1136 (formally Plot No. 5054/82) measuring 0.05 hectares. The Plaintiff avers that the Defendant has illegally trespassed upon the land and put up commercial developments thereon and has been earning rentals from the tenants who have been occupying the suit land.

4. The Plaintiff avers that the Plaintiff's deceased father vide a letter of allotment dated 6th November, 1987 was allocated the suit land by the then Kilifi Town Council upon payment of the requisite fee. The Plaintiff further avers that due to the Defendant's encroachment onto the Plaintiff's suit land and in a bid to settle the dispute, the suit land was re-surveyed and a portion of the suit land was hived off and added to the Defendant's portion. The Plaintiff's father was subsequently issued with another Allotment Letter and upon payment of the sum of KShs. 29, 828/- he was duly granted the suit land.

5. Despite several complaints lodged with the Town Council of Kilifi, the Defendant has defied the same and continues to occupy and develop the land.

6. But in his Statement of Defence and Counterclaim dated 26th September, 2008 as amended on 28th June 2010, the Defendant Abdulatif Jan Mohamed Omar denies that the Plaintiff is the owner of plot No. 5054/82 and avers that he is the owner of both Plot Nos 5054/81 and 5054/82 after the Kilifi Town Council in 1986 duly allotted him the said plots after the same were advertised for sale.

7. The Defendant avers that after allocation, the Kilifi Town Council inspected and approved the construction of a commercial building on the two plots and he was duly granted an occupation permit on 18th May, 1993.

8. The Defendant further avers that the said plots were thereafter not available for allotment to the Plaintiff 's father and in the meeting of 27th April, 1989 the Kilifi Town Council Committee recommended to the Commissioner of Lands the plots be granted to the Defendant and the Plaintiff's father was duly informed on 26th May, 1989 of the same and asked to return the allotment letter earlier issued to him erroneously.

9. The Defendant avers he was thereafter on the 21st November, 1994 issued with an allotment letter for both Plot Nos. 5054/81 and 5054/82 and he paid for the prescribed fee on 26th September, 1995. On 18th May, 1995 he paid the sum of Kshs. 540/- for the occupation licence for Plot 82 to the Kilifi Town Council. He further avers that he paid for registration fees and vide a letter dated 3rd October, 1995 the Director of Surveys informed the Commissioner of Lands that the two plots had been consolidated into plot No. 5054/1303 under the name of the Defendant as one plot.

10. The Defendant contends that Plot No. 5054/82 claimed by the Plaintiff' father (now deceased) was therefore non-existent as it is part of Plot No. 5054/1303 and the allotment issued to the Plaintiff on 22nd December, 1995 was illegal as the issuance conditions set by the Director of Surveys in his memo of 8th November, 1995 were not met. The Defendant avers therefore that the subsequent grant issued on 13th September, 2013 to the sons of the deceased in respect to Plot No. 5054/82 (Registered as Title No. KILIFI/TOWNSHIP BLOCK 3/1136) during the pendency of the suit herein were wrongly obtained.

11. By way of his counterclaim, the Defendant avers that he is the legal owner of Plot No. 5054/1303 (Plot Nos. 5054/81 and 5054/82) as he was allocated both Plots in the year 1986 by the Kilifi Town Council. On 21st November, 1994 he was issued with an Allotment Letter therefor and he has since made all the requisite payments.

12. The Defendant further avers that the subsequent allotment of Plot No. 5054/82 was erroneous and illegal as the Plaintiff's Deceased father had been asked by the District Lands Officer on 14th August, 1989 to surrender the letter of Allotment dated 6th November, 1987 and thus the Plot was unavailable for reallocation to the deceased on 22nd December, 1995.

13. Accordingly, the Defendant urges the court to dismiss the Plaintiff's suit and instead enter judgment in his favour for; -

a. Cancellation of the Title No. KILIFI/TOWNSHIP BLOCK 3/1136 issued on 13th September, 2013 during the pendency of this suit

b. A declaration that Plot Nos. 5054/81 and 5054/82 belong to the Defendant

c. Unhinged right of use of the suit property.

d. Damages for trespass and interest thereon.

e. A permanent injunction restraining the Plaintiff, his agents, employees, servant, family and/or otherwise from encroaching, accessing and/or remaining on the suit property or in any other manner interfering with the Defendant's use, possession and enjoyment of the said property.

f. The costs occasioned by this suit and interest thereon.

g. Any other relief the Honourable court may deem just to offer.

14. The Plaintiff in his reply to the Further Amended Defence and Counterclaim filed on 6th July, 2010 and amended on 31st January, 2018 denies the averments therein and specifically, that the Defendant applied for and was granted both Plot Nos 5054/81 and 5054/82 by the then Kilifi Town Council and or that in 1989 there was a resolution to grant the Defendant the same.

15. The Plaintiff further specifically denies that the Defendant had commenced construction on the two combined plots and that the Kilifi Town Council inspected, approved, and or issued an occupation permit on 18th May, 1993 to the Defendant. In further response, the Plaintiff denies that his deceased father was told to surrender the original title to Plot No. 5054/82 and invites the Defendant to strict proof.

16. The Plaintiff denies that he has together with his brothers wrongfully obtained and registered a leasehold interest on Plot No. 5054/82 (Title No. KILIFI/TOWNSHIP BLOCK 3/1136) and instead assert that the same was legally and regularly allocated to their deceased father. The Plaintiff thus urges this Court to dismiss the Defendant's Counterclaim.

17. By a memorandum of Appearance dated 15th August, 2017 and filed on 21st August, 2017, the Director for Legal Affairs, National Land Commission, entered appearance for the Commission which is sued in the Counterclaim as the 7th Defendant. The National Land Commission did not however file any Defence to the Counterclaim.

18. The Registrar of Lands Kilifi County and the Honourable the Attorney General sued herein as the 6th and 7th Defendants respectively in the Counterclaim, neither entered appearance nor filed a Statement of Defence.

The Plaintiff's case

19. At the trial herein, Elvis Gambo Mwambeni (PW1) testified on behalf of his brother Dexter Munga Mwambeni whom he told the Court had suffered a stroke and was unable to attend Court. Relying on his brother's statement and that of his own as recorded and filed herein earlier on 30th April 2012, PW1 told the Court that the property in dispute is Plot No. 5054/82 situated at Kilifi opposite the matatu/bus terminus.

20. PW1 testified that his father Mwambeni Mwangila Jitwa was allocated the said Plot vide a letter of Allotment dated 6th November 1987 for the purpose of construction of a dwelling house. On 25th January 1998, his father paid Kshs 3,140/- for conveyance, survey fees, rent, stand premium and Stamp Duty and was issued with a receipt for that matter. Another sum of Kshs 1,440/- had earlier on been paid on 22nd June 1990.

21. PW1 further testified that his father paid land rent for the suit property in 1990, 1992, 1993 to 1995. After the death of his father, the family contributed and have been paying land rent for the property since 1996 in the name of their father as they had not taken out Letters of Administration.

22. PW1 told the Court that sometime prior to the death of his father, the Defendant herein encroached upon the suit property. He told the Court the Defendant owns Plot No. 5054/81 (now Kilifi/Block 3/1137) and that he encroached onto the Plaintiff's father's portion in the process of developing his own said parcel of land. PW1 told the Court his father tried to settle the dispute with the Defendant as a result whereof the land was re-surveyed and another Allotment Letter dated 22nd December 2005 was issued in his father's name.

23. PW1 testified that the effect of the new survey was that his father's plot size reduced from the previous 0.0606 Ha to 0.50 Ha while the Defendant's plot increased in size by 0.10 Ha. The Defendant however continues to claim the Plot belonging to the Plaintiff's father and hence their resolution to file this case after the Defendant commenced construction on the land.

24. PW1 told the Court his father passed away on 17th October 2000 before he could be issued with a Certificate of Title for his portion given that at the time he had not paid land rent in full.

25. On cross-examination, PW1 told the Court he knew the Defendant and that the Defendant had been in possession of his own portion of land for more than 30 years. PW1 told the Court the Defendant runs a hardware shop selling building stones and timber on his plot. The Defendant had a yard outside the shop where he kept the stones and timber and also used as a parking.

26. PW1 further told the Court the area the Defendant has been using is what came to be known as Plot No. 5054/81 and 5054/82. He conceded he was aware that some meetings were held before the allocations were done but denied that his father was allocated the disputed parcel of land by mistake. On being shown a letter dated 14th August 1989, PW1 told the Court the letter required his father to return his allotment letter on the basis that his allocation had been nullified. He denied further that their family colluded with Government Officers to have their title processed.

27. PW1 further admitted that their title deed was processed and issued to them in 2013 during the pendency of their case herein having filed the case in 2018. He told the Court they had not notified the Commissioner of Lands of the existence of the suit herein as they proceeded to process the title.

The Defence Case

28. The Defence equally called one witness in support of their case at the trial herein.

29. DW1- Jan Muhamed Abdulatif is the son of the Defendant herein and the Administrator of his Estate. His father Abdulatif JanMohamed Omar passed away on 9th February 2019 during the pendency of this case.

30. DW1 told the Court that he had been born and raised on the suitland and that he was now 39 years old. He further told the Court that since this suit was filed, he had accompanied his father to Court a number of times and that upon his death, he had been show a statement recorded by his father in regard to these proceedings dated 14th June 2017. DW1 sought to rely on the father's statement and the list of documents in regard to how the father acquired the suitland.

31. In the said Statement, DW1's deceased father stated that the Land Portion No. Kilifi/Township Block 3/1136 was originally land portion No. 5054/81 and 5054/82 which was consolidated into 5054/1301. The Defendant further states that the two plots were advertised by the Kilifi County Council in 1986 and he was allocated the same and issued with a Letter of Allotment on 21st November 1994, for the combined plots after making all the requisite payments.

32. The Defendant further states that his developments have not encroached onto any other plot but sit on his own plot No. 5054/1301. All the developments thereon were approved by the Kilifi Town Council. The Defendant asserts that the Plot No. 5054/82 was erroneously allocated to the Plaintiff's father as no inspection was done on the ground before the recommendation for allocation was made.

33. The Defendant further states that following the allocation to the Plaintiff, he lodged several complaints with the Town Council of Kilifi

and the dispute was then resolved by requesting the Plaintiff and his brothers to surrender the plot and be allocated another but they declined and filed this suit.

34. On cross-examination, DW1 conceded that he had neither produced a copy of the application he had made to be allocated the suitland nor the advertisement for sale by the Town Council in Court. He further conceded that the Plaintiff was in possession of letters indicating that his father had been allocated unsurveyed Plot No. 82. He however insisted that both Plot Nos 81 and 82 belong to his father who was the Defendant herein.

Analysis and Determination

35. I have perused and considered the pleadings filed herein, the oral testimonies of the witnesses and the evidence adduced at the trial. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.

36. The Plaintiff is the administrator of the Estate of one Mwambeni Mwangila Jitwa who is said to have passed away on or about 17th October 2000. As such an administrator and being one of the sons of the deceased, the Plaintiff seeks a declaration that the deceased is the legal owner of Plot No. Kilifi/Block 3/1136 which he states was formally known as Plot No. 5054/82. The Plaintiff is similarly seeking an order directing the Defendant to demolish and remove all developments in the suitland and for the Defendant to hand over vacant possession to himself. He further urges this Court to grant an order of injunction restraining the Defendant from interfering with his peaceful occupation and enjoyment of the suit property as well as an order compelling the Defendants to pay the sum of Kshs 57,500/- per month as mesne profits from the time the Defendant took over possession of the suit land.

37. It is the Plaintiff's case that before his father passed away, he was allocated the suit property by the then Kilifi Town Council vide their letter of allotment dated 6th November 1987. The Plaintiff avers that his father subsequently made all the requisite payments pertaining to the allocation and that even after his father died, the family has been paying land rent for the property.

38. The Plaintiff is aggrieved that despite their ownership of the suit property, the Defendant has without any colour of right encroached thereupon and has put up a commercial building thereon without their authority and or consent. They accuse the Defendant of defying all efforts to resolve the dispute and continuing to occupy the suit property to their family's detriment.

39. As at the time the suit was instituted by the Plaintiff in the year 2008, Abdulatif Janmohamed Omar (the Defendant) was alive and well. In his Defence and Counterclaim dated 26th September 2008 as amended and further amended on 25th April 2017, he denies the Plaintiff is the owner of the said Plot No. 5054/82. On the contrary, he asserts that Plot Nos. 5054/81 and the said 5054/82 were long consolidated by the Town Council of Kilifi which consolidation resulted into one plot No. 5054/1301.

40. The Defendant further told the Court that the two consolidated plots were advertised by the Town Council of Kilifi sometime in 1986 and that he was thereafter allocated the same and was issued with a Letter of Allotment therefor on 21st November 1994. Accordingly, the Defendant asserted that while it is true that he had put up a commercial building in Kilifi, the same was solely within the confines of the said consolidated Plot No. 5054/1301 and had not encroached in any manner whatsoever upon any other property.

41. As it turned out, the Defendant also passed away on 9th February 2019. Following an application made herein dated 10th June 2019, the Defendant was substituted herein by his son Janmuhammed Abdulatif as the holder of a limited grant of letters of administration ad-litem for the estate.

42. In support of their case, Elvis Gambo Mwambeni (PW1) produced an extract of the 17th meeting of the Kilifi District Plots Allocation Committee held at the District Commissioner's Office at Kilifi on 20th and 21st May 1986. Minute No. 2/86 thereof indicates that the Plaintiff's father Mwambeni Mwangila was the successful applicant for Plot No. 5054/82 which was to be used for the purpose of a private dwelling house.

43. Subsequent to the said meeting and by a Letter of Allotment dated 6th November 1987, the Commissioner of Lands granted residential Plot No. 5054/82 measuring 0.0606 Ha situated within Kilifi Township to the Plaintiff's father subject to his formal acceptance thereof and the payment of certain charges.

44. It would appear however that the Defendant had also developed some interest in the suit plot and it did not therefore take long before the controversy regarding the property erupted. Some two years after the allocation of the property to the Plaintiff's father, his lawyers, Simiyu, Wetangula & Company Advocates wrote to the Defendant on 28th August 1989 in the relevant part as follows: -

"RE: Mr. Mwambeni Mwangila- Plot No. 5054/82 Kilifi

We have been instructed by our client above named who is the legal allottee of Plot No. 5254/82 (sic) which borders your Plot No. 5054/81 to write to you as follows: -

That your permanent building built on your above said Plot has partially encroached on our client's Plot, and that you have persistently continued to store your mangrove poles and other building materials on the remaining portion of our client's plot inspite of his repeated verbal appeals to you to remove the same. You have thus made it impossible for our client to develop his plot as required.

Our instructions are to advise you that our client is now possessed of an approved plan of the building he intends to put up on his above said plot and has executed an agreement with a contractor to commence work on the site on or before the 3rd of September

1989.

.....”

45. The Defendants would however hear none of it. A day after the Plaintiff’s letter, they shot back with their response through Anil Suchak Advocate stating as follows: -

“RE: Plot No. 5054/82-KILIFI

My client Mr. A.J Omar of Kilifi in the Coast Province of the Republic of Kenya has placed in my hands your letter Ref..... dated the 28th instant, addressed by you on behalf of your client Mr. Mwambeni Mwangila, also of Kilifi, to my client and am instructed to reply thereto as under.

My client instructs me to state that by a Letter Ref No.... dated the 14th instant addressed to the Commissioner of Lands, Nairobi by the District Lands Office, Kilifi, with copies thereof, inter alia, to your client as well as to my client. Your client was advised that he was required to surrender the Letter of Allotment Ref No...dated 6th November 1987 forthwith to the said Commissioner of Lands and in default of your client so doing, the said document be treated as lost and thereafter of no binding effect at all.

In the circumstances my client will not accede to your Client’s request set out in the last paragraph of your letter under reference.

Please note that should your client attempt through either his servant or agent or otherwise at all to interfere with my client’s quiet possession and occupation of the land in question or attempt to remove any of the building materials belonging to my client and lying on the land comprised in the said Plot No. 5054/82, my client shall not hesitate to take all necessary steps including obtaining an order of the Court against your client restraining him from so doing and hold him liable for all costs and consequences thereof, which please note.”

46. The genesis of this stance taken by the Defendant can be found in the extracts of a meeting of a committee of the Kilifi Urban Council held some two years after the Plaintiff’s father was allocated the suit plot. Minute 9/89 of the Meeting held on 27th April 1989 at Kilifi reads as follows: -

“RE PLOT NO. 5054/81 AND 5054/82- KILIFI

It was reported that a permanent building for Mr. AJ Omar built in 1980/81 encroached on the two plots Nos. 5054/81 and 82.

Mr. A.J Omar applied for the two plots when they were advertised in 1986 but erroneously one Plot No. 5054/82 was allocated to another person Mr. Mwambeni Mwangila. Mr. A.J Omar had now applied to the Council to be recommended for allocation of the two plots 5054/81 and 82 because his permanent building occupied all the two plots.

During the discussion, the members felt that there was an oversight at the time of the allocation because the plots were not inspected on the ground before they were allocated. It was further felt that had the plots been inspected before allocation priority would have been given to the person who had made some development on those plots. It was agreed that there were some other plots which Mr. Mwambeni could be considered for allocation.”

47. While it was not clear from the extract of the minutes if the Committee had itself inspected the developments on the two parcels of land, or taken any input from the Plaintiff’s father, they proceeded to resolve as follows: -

(i) That Mr. A. J. Omar be recommended to the Commissioner of Lands for allocation of the two plots Nos. 5054/81 and 82;

(ii) That Mr. Mwambeni Mwangila be recommended to the Commissioner of Lands for allocation of alternative Plot and that the District Physical Planning Officer be requested to select the Plot for allocation at the next Plot Allocation Committee Meeting and that Mr. Mwambeni be requested to surrender the Plot No. 5054/82 allocated to him; and

(iii) That in future all advertised plots be inspected on the ground before the Committee recommends them for allocation.

48. Again while it was not clear whether the Plot Allocation Committee met to identify an alternative plot as stated and or if a request was made to the Plaintiff’s father to surrender the said Plot No. 5054/82, the District Land Officer Kilifi acting on the said resolutions wrote some four (4) months later on 14th August 1989 to the Commissioner of Lands as follows:

“Alternative Plot for Plot No. 82 Kilifi Town

Allocation of Plot Nos. 81 and 82 Kilifi Town

I refer to your letter ref.....of 20th June 1989 and other relevant previous correspondence on the above subject and I am pleased to forward to you a plan showing the alternative site edged red for your immediate action.

By a Copy of this letter I am advising Mr. Mwambani to surrender the original copy of his letter of allotment ref.....of 6th November 1987 to you without delay. In the event of any delay the same may be treated as a lost document so that things can get moving. However, the alternative site is good and I do not expect objections from Mr. Mwambeni.

As recommended by all relevant authorities Plots Nos. 81 and 82 should be allocated to Mr. Omar who has carried out extensive developments on both.”

49. Some five (5) years after the above letter was written and by a Letter of Allotment dated 21st November 1994, the Commissioner of Lands issued another Letter of Allotment to the Defendant for what is described therein as LR No. 5054/81 and 82 (combined) Kilifi Township measuring 0.1166 Ha.

50. I did not however think that the Kilifi Urban Council and or the District Land Registrar could revoke the allotment of Plot No. 5054/82 to the Plaintiff's father in the manner that they purported to do. As Odunga J observed in **Republic –vs- City Council of Nairobi & 3 Others (2014) eKLR**: -

“Once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was outrightly illegal or it was against the public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

51. The Government Land Act (Cap 280 Laws of Kenya) only gives the Commissioner of Lands power to allocate “unalienated Government Land”. The said Act goes on to provide the procedure for the same. Unalienated Government land is indeed defined in the Act as: Government land which is not for the time being leased to any other person, or in respect of which the Commissioner had not issued any letter of allotment.

52. In the matter before me, there was absolutely no evidence that the Defendant had applied for the suit property earlier than the Plaintiff's father and or that he had been allocated the same. The Defendant did not tell this Court on what authority he had erected the commercial building said to extend to the suit property where the same had not been allocated to himself. Infact it would appear that he only presented a complaint to the Urban Council in 1989 seeking to be allocated the suit property.

53. From the material placed before me, there was infact evidence that the Defendant's building had only slightly encroached on the suit property. As at the time the decision to revoke his letter of allotment was being made, there was no evidence that he had either been consulted nor shown the alternative piece of land that was purportedly being allocated to him. In essence, it appeared to me that the Plaintiff's father was being blamed and punished for the Defendant's failure to follow the laid down procedures.

54. As was stated in **Onyango Oloo –vs- Attorney General (1986-1989) EA 456**: -

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard. There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice.”

55. The Plaintiff's father had a beneficial interest in the property and it was erroneous for the Council and the Kilifi District Lands Officer to make a conclusive determination in regard to the property without affording him an opportunity to be heard.

56. That being the case, the subsequent allotment of the land in 1994 to the Defendant was of no consequence. As Warsame J (as he then was) stated in **Rukaya Ali –vs- David Gikonyo Nambacha & Another (Kisumu HCCA No. 9 of 2004)**, once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment.

57. Be that as it may, it was further evident that upon learning of the attempt to deprive him of the entire parcel of land measuring 0.0606 Ha, on the purport that the same was fully developed by the Defendant, the Plaintiff's father opted to let the Defendant to retrain a portion of the original Plot No. 5054/82 measuring 0.1 Ha and requested the authorities to allow him retain the rest of the undeveloped portion.

58. Subsequently and by a Letter dated 2nd October 1995, addressed to the Commissioner of Lands and copied to all the parties herein, the new District Commissioner Kilifi Lucas Kisilbet wrote as follows: -

“Dispute Over Alternative Plot for Plot No. 82 Kilifi Town- Allocation of Two Plots to one Person

Reference is made to your letter Ref... of 14th August 1989 and your letter Ref...of 20th June 1989 and many other relevant previous correspondences including Town Council Minute 9/89 on the issue mentioned above.

This is a long standing dispute whereby two people were issued with allotment letters for one plot No. 5054/82 and each allottee has been paying for the same plot all along.

Investigations reveal that someone must have misled the Council (and) the District Commissioner that Mr. Omar had fully developed the two plots before allocation, but the fact is that Mr. Omar had fully developed Plot No. 5054/89 and 0.1 of the next Plot No. 5054/82.

Mr. Mwambeni Jitwa however agreed to surrender the developed portion (0.1) and take the remaining portion of which I consider a fair and reasonable compromise which should have been accepted by Mr. Omar. Now that Mr. Omar has developed Plot No. 82 on the strength of the allotment letter, Mr. Jitwa should further sacrifice by compensating Mr. Omar for the additional construction.

We therefore (in all fairness) recommend the following:

- a) Mr. Omar the owner of Plot No. 5054/81 be refrained from owning two plots and Mr. Jitwa without any.**
- b) If Mr. Omar must get two plots then he should accept the alternative plot.**
- c) Mr. Jitwa should be given plot No. 5054/82 less the developed portion (see sketch) and compensate Mr. Omar.**
- d) That these changes take place immediately.**

59. Acting on the said letter, the Commissioner of Lands in response wrote to the Kilifi District Physical Planning Officer on 10th November 1995 as follows: -

“RE: Re Planning of LR No. 5054/82 Kilifi

I enclose herewith Plan No. 12183/82A. The above plot was a subject of an allocation to one Mr. Omar who erroneously developed portion of the same as reflected on the attached plan.

You are requested to plan the remainder portion to facilitate allocation of the same to Mr. Mwangila Mwambeni who was the original allottee.”

60. It is apparent that the parcel of land was accordingly re-planned and by a Letter of Allotment dated 22nd December 1995, the Commissioner of Lands allocated the property described therein as unsurveyed BCR Plot 82- Kilifi now measuring 0.05 Ha to the Plaintiff's father for the purposes of settling the dispute.

61. While the Plaintiff's father accepted this position, it is evident that the Defendant did not accept the same and continues to occupy and use the whole of the original Plot No. 5054/82 Kilifi. As I have found above, there was no evidence that the Defendant either applied for the said plot and/or that the same was allocated to him prior to the year 1987 when it was initially allocated to the Plaintiff's father.

62. It follows therefore and I do hereby find that the Plaintiff's case has merit and that I did not find any basis for the Defendant's Counterclaim.

63. As part of his prayers, the Plaintiff pleaded for compensation in the sum of Kshs 57,500 per month from the time the Defendant started occupying the suitland until such a time that he vacates the same. According to PW1 his father had planned to build a guest house on the suit land and had by August 1989 gotten approval for the plans to build the same. It was therefore their case that they would have been making money from the venture and that the said sum of Kshs 57,500/- per month would be reasonable compensation for the losses incurred.

64. Where one is wrongfully deprived of his property, he/she is entitled to damages known as mesne profits for the loss suffered as a result of the wrongful period of occupation of his/her property. As was stated in **Rajan Shah T/A Rajan S Shah & Partners –vs- Bipin P. Shah (2016) eKLR: -**

“The term “mesne profits” relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is a settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits provided the occupation is illegal.”

65. It was however the duty of the Plaintiff to place material before the Court to demonstrate how the amount that was claimed for mesne profits had been arrived at. Mesne profits being special damages must not only be pleaded but also proved. In the absence of any material to support the award of Kshs 57,500/- per month, I decline to award the same.

66. In the result, I dismiss the Defendant's Counterclaim and hereby enter Judgment for the Plaintiff as follows: -

a) A declaration is hereby issued that the Estate of the late Mwambeni Mwangila Jitwa is the legal proprietor of Plot No. Kilifi Block 3/1136 (formerly Plot No. 5054/82) measuring 0.514 Ha.

b) An order is hereby issued directing the Defendant to demolish and remove at his own costs all the developments on the said

Plot No. 3/1136 (formerly Plot No. 5054/82 measuring 0.514 Ha and to give vacant possession thereof to the Plaintiff within 45 days from the date hereof.

c) A permanent injunction is hereby issued against the Defendant by himself, servants or agents from interfering with the peaceful occupation and enjoyment of the said Plot No. Kilifi Block 3/1136 (formerly Plot No. 5054/82) measuring 0.514 Ha.

d) The Plaintiff shall have the costs of this suit and that of the Counterclaim.

Dated, signed and delivered at Malindi this 23rd day of March, 2021.

J.O. OLOLA

JUDGE