



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT MOMBASA

ELC SUIT NO. 18 OF 2008

ELF OIL KENYA LIMITED.....1ST PLAINTIFF

TOTAL KENYA LIMITED.....2ND PLAINTIFF

VERSUS

AHMAD SALIM.....1ST DEFENDANT

ADAM HAMADI.....2ND DEFENDANT

MANZU KHAMIS.....3RD DEFENDANT

THE BOARD OF DIRECTORS OF

KHADIJA PRIMARY SCHOOL.....4TH DEFENDANT

MUNICIPAL COUNCIL OF MOMBASA.....5TH DEFENDANT

JUDGEMENT

THE PLAINTIFF'S CASE

1. The 1st Plaintiff filed this suit vide a plaint dated and filed on 29th November 2002, which was amended and the amended plaint dated is 22nd January 2009 and filed on 27th January 2009. The plaint was further amended on 5th December 2012 and the plaintiff prays for judgement against the defendants jointly and/or severally for:-

- i. A declaration that the suit premises belong to and are properly vested in the plaintiff, wherefore the defendants are not entitled to the same.
- ii. An injunction to restrain the defendants whether by themselves, their servants or agents or otherwise howsoever from entering or pulling down or destroying or preventing construction/development works by the plaintiff or interfering in any manner whatsoever with the suit premises.
- iii. Damages for trespass.
- iv. Special damages as stated above of Kshs 170,000/=.
- v. Costs of and incidental to this suit
- vi. Interest on (iii), (iv) & (v) above at Court rates until payment in full thereof.
- vii. Any further or other relief.

2. The plaintiffs case is that it is and was at all material times the registered leasehold owner and entitled to the possession of all that land and premises situated at Plot No L.R. MN/1/10281(hereinafter referred to as "the suit premises"). That by way of lease dated the 21st August 1997 the 5th defendant did lease to the plaintiffs the suit premises for a period of 99 years. That on or about 23rd November 2002, the 1st, 2nd, 3rd and 4th defendants wrongfully entered the suit premises and wrongfully pulled down and destroyed a fence being erected thereon by the

plaintiffs claiming that the suit premises was leased to them by the 5th defendant. The defendants wrongfully claim that the suit premises belong to Khadija Primary School and that the 5th defendant being a trustee of the said school is vicariously liable for the acts or omissions of the said school. That the defendants thereafter and intent, unless restrained by this court to repeat the acts complained of more particularly to prevent the plaintiff from developing the suit premises. The plaintiff aver that the 5th defendant being the lessor of the said property has failed and/or neglected to restrain the 1st, 2nd, 3rd and 4th defendants from destroying the plaintiff's fence, rendering the suit necessary. That by reason of the matter aforesaid, the plaintiff have been deprived of the use and enjoyment of the suit premises and have thereby suffered loss and damage. That the plaintiffs' have been unable to develop or make use of the suit property due to threats and intimidation by the 1st – 4th defendants. The plaintiffs are claiming special damages of Kshs 170,000 being the cost of the fence pulled down/destroyed by the 1st-4th defendants.

3. The plaintiffs have in the alternative pleaded that if the suit premises is found to belong to the 1st, 2nd, 3rd and 4th defendants, the said registration was obtained fraudulently and illegally with the abetting, aiding and assistance of the 5th defendant. The plaintiff have given particulars of fraud of the 5th defendant as leasing the suit premises to the plaintiff with the knowledge that they had no authority to do so; leasing the suit premises to the 1st, 2nd, 3rd and 4th defendants, causing a double registration; failing to notify the plaintiffs of the double registration; failing to inform the plaintiffs, the 1st, 2nd, 3rd and 4th defendants of a prior existing interest (whether registered or not); issuing a sublease to the plaintiffs purporting the said sublease to be a genuine valid document; and receiving rent from the plaintiffs on the said property without advising them of the double registration. The plaintiffs aver that they wrote to the defendants on 22nd November 2012 requesting them to desist from interfering with their quiet enjoyment but the defendants have persisted in their acts, hence the suit.

4. The plaintiffs called Stephen Atenya (PW1) who testified that he works at Total Kenya Ltd as legal manager and produced his work identification card which is among the documents filed on 4th July 2013. He stated that the 1st plaintiff is an oil company which was initially operating in the name Vision Oil Ltd and produced the Certificate of Incorporation dated 27th April 1992. That it later changed to Elf Oil Kenya Ltd in 1992 and he produced a change of name dated 22nd January 1999. He stated that in 2000 the 2nd defendant bought the entire business of the 1st defendant including all the assets and petrol stations. The petrol station includes the suit property in this case which is LR No MN/1/10281.

5. He further stated that the petrol station is situated in Bombolulu along Mombasa-Malindi road next to Khadija Primary School which occupies two plots LR MN/1/10281 and MN/1/2775, the former being the suit property. He also told court that in 2002, two years after Total Kenya Limited bought Elf Oil Kenya Ltd, it commissioned a contractor to construct a wall around the whole petrol station. That before the wall was completely done, the 1st and 3rd defendant and other members of the 4th defendant accompanied by other people brought down a section of that wall, claiming that the property belonged to Khadija Primary school.

6. That on 19th November 2002 the head teacher of Khadija primary school wrote to Total Kenya limited that it had grabbed the suit property. On 22nd November 2002, Total Kenya wrote back clarifying that it's the owner of the suit property. Both letters are part of the plaintiffs' list of documents dated 2nd July 2013. There was no amicable solution to the dispute and the plaintiffs' filed the suit seeking injunction. That the orders of injunction issued on 26th March 2014 are still in force.

7. PW1 produced a consent to transfer letter that was issued by the then town clerk of the former City Council of Mombasa to Vision Oil Limited. He further produced a transfer of lease from Elf Oil Kenya to Total Kenya Limited that was registered on 23rd September 2009. That the lease at page 11 of the plaintiffs' list of documents dated 17th May 2012 shows that the property was leased from the Municipal Council of Mombasa to Shariff Nassir Taib. The lease further shows that suit property was transferred to various entities namely, Panal Enterprises Limited, Shazmeer Enterprises, Vision Oil Limited and Vision Oil Limited changed its name to Elf Oil Kenya which then transferred to Total Kenya Limited. Total Kenya Limited, the 2nd defendant has occupied the property since 2002 utilizing it as a petrol service station. Among the developments on the suit property are underground tanks for storage of petroleum products.

8. The plaintiffs witness in addition told court that he had perused the witness statement of Abdulhahim Mohamed Hassan filed on 28th May 2014 on behalf of the 1st to 4th defendant that states its Elf Petrol standing on the plot. However the statement of Tubman Otieno filed on 26th March 2012 on behalf of the 5th defendant confirms that the suit property was leased to the original lessee and finally transferred to Total Kenya Limited.

9. That the 2nd plaintiff has not had quiet possession because the wall was demolished and the inflammable goods are in risk of disaster. That there are budgeted developments but they have never been carried out because of fear from the school. He prayed court to grant the prayers in the further amended plaint dated 5th December 2012. He also produced the documents filed on 17th May 2012, 4th July 2013 and 2nd October 2017 as exhibits.

10. On cross examination, PW1 he stated that the wall was brought down in 2002 and since then there has been no demolition. However in 2007 people came threatening to demolish it claiming the land belongs to the school. Before the suit property was acquired from the 1st plaintiff, the 2nd plaintiff did a site visit as well as due diligence with the council, however they did not have a reason to visit the school.

11. He stated that the threats that the plaintiffs were getting were not from the 5th defendant and he had no reason to believe that the 5th defendant participated in the demolitions. That the 1st to 3rd defendants were identified as the ones leading the demolition and were members of the 4th defendant. That the suit property was transferred vide a consent issued by the 5th defendants and later came to the control of the plaintiffs.

12. On re-examination, PW1 stated that the 1st to 3rd defendants led people who demolished the plaintiff's wall claiming they had grabbed the 4th defendant's property. That the plaintiffs have sued the 5th defendant because they are the head lessor and the plaintiffs registered the

transfer with them. PW1 reaffirmed the prayers sought in the further amended plaint. The plaintiffs' then closed their case.

Plaintiffs' submissions

13. On 14th October 2020 the plaintiffs filed written submissions in support of their case and had the following issues for determination;

- i. Whether or not the plaintiff holds a good title to the suit property.
- ii. Whether or not the plaintiff acquired the suit property through fraud, misrepresentation or mistake.
- iii. Whether or not the plaintiff is entitled to the declaration sought.
- iv. Whether the plaintiffs are entitled to any compensation.
- v. What should be the orders as to costs.

14. The plaintiffs submitted that they hold an indefeasible title which the 5th defendant have admitted to have issued to them, further they have produced the title in court. That the 1st to 4th defendants have not produced an indefeasible title to challenge the interest of the plaintiffs nor do they know the dimensions of their property. They relied on Section 26 (1) (a)&(b) of the Land Registration Act 2012 which provides:-

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

15. The plaintiffs also submitted that the 1st to the 4th defendants alleged fraud on the part of the plaintiffs, but they failed to discharge the duty of proving it. They cited Section 107 of the Evidence Act which states:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

While Section 109 of the Evidence Act states:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

16. The plaintiffs further urged court to find the title held by the plaintiffs to be indefeasible and also to forestall any further interference from the 1st to 4th defendants on the suit property. That the court had a duty under Article 40 (2) of the Constitution of Kenya to uphold the sanctity of the plaintiffs' title.

17. The plaintiffs went ahead to pray for Kshs 170,000 as special damages to rebuild the perimeter wall, a claim supported by the letter dated 13th May 2009 where the 1st to 4th defendants admit to bringing down the wall. That damages for trespass are discretionary to court and that court should consider the economic loss that the plaintiffs have suffered for not being able to carry out any development on the property since 2004. The plaintiffs concluded by urging court to allow the suit and award the costs they have incurred to litigate the matter since 2008.

1ST, 2ND, 3RD AND 4TH DEFENDANT'S CASE

18. The Attorney General entered appearance on behalf 1st, 2nd and 3rd defendants on 28th January 2003 and filed on 7th February 2003. On 28th May 2014 the 2nd defendant filed a witness statement of one Abdulhalim Mohamed Hassan. On 27th October 2020 the 1st, 2nd, 3rd and 4th defendant filed their submissions, while the 5th defendant filed on 19th November 2020.

19. On 8th February 2018, the defendants called Abdulhalim Mohamed Hassan (DW1) who adopted the statement filed on 28th May 2014, and she also produced all documents filed herein by the 1st to the 4th defendants. She stated that she is the chairperson of Board of Management of Khadija primary school. That she became the chairperson in 2007 and found the dispute between Total Kenya Limited and the school over the suit property. That the community demolished the wall constructed by Total Kenya Limited alleging that the 2nd plaintiff had trespassed onto the school land. That the head teacher wrote to provincial commissioner on 26th April 1999, town clerk on 27th September 2002 and to the 2nd plaintiff on 19th November 2002 complaining over the trespass by the 2nd plaintiff on the school land.

20. DW1 also testified that the surveyors brought by the defendants confirmed that the suit property belongs to the school. That when Total Kenya brought its surveyors, they were stopped by the school administration. That the defendants are not laying claim to the portion where

the petrol station stands.

21. On cross examination DW1 testified that she was told of the events that transpired in 2002 when she became a chairlady in 2007. That the school is on the property of the 5th defendant in whose name the certificate reads but she doesn't know the plot number of the school land. She could not also confirm if the various letters written by the school to the town clerk, provincial commissioner and mayor were responded to. That some titles that were given from the school's land were revoked but she doesn't have a map that shows revocation. That the school had consulted the area MP, councilor and 5th defendant when conducting a survey in 2008 but did not involve Total Kenya Limited.

22. That the sublease between the 5th defendant and 2nd plaintiff dated 21st August 1997 is for 464/61/1/MN, CR No 12723/1. However the 5th defendant leased out to the 1st plaintiff Plot No 10281, the original being 1469. The original plot was 74.5 acres while the one leased to the 1st plaintiff was 0.2283 ha. She also admitted to not having any title document of title in the name of the school neither did she know the acreage of the land that belongs to the school.

23. DW1 stated that she doesn't know if the county has mandate to lease out land neither does she know if the county has control of the actions of those who are in possession. She is however aware of that the council had leased out the plot to Shariff Nassir initially but it was revoked but she didn't have the evidence of such.

24. On re-examination she stated that public schools didn't have titles at the material time and it was the 5th defendant who was the custodian. That the 1st to 4th defendants have no issue with what the 5th defendant has leased to Total Kenya Limited.

25. The 1st to 4th defendants requested for a surveyor to conduct a site visit and make a report on the boundary. The court ordered that all parties to instruct their surveyors to visit the site in the presence of the parties or their representatives and confirm the acreage, point out the boundary and file a report in court. However the report was never filed in court after several mentions in court.

The 1st to 4th defendants' submissions

26. The 1st to the 4th defendants filed their written submissions on 27th October 2020. They submitted that the actions of the plaintiffs of uprooting school property and putting up a fence with undue regard to children's right to education amounts to land grabbing. That the court should consider the rights of the school going children to education.

27. That the school and its administration was not involved in the protest or pulling down of the fence, that during that material time there was a teacher's strike and the schools were closed. That more so the plaintiffs have not adduced specific evidence that it's the defendants who brought down the fence. The defendants submitted to court not to hold them liable for tortuous activities of persons unknown to them and who were not acting on behalf of the school.

28. That Khadija Primary school is the only public school serving a large population of Kisauni/Bombolulu area and currently being expanded to accommodate a secondary school.

29. The defendants further submitted that the orders of court to survey the suit property had not been obeyed. That the delay was caused by missing documentation at the government survey's office. That the court should order for a proper survey to be conducted to establish the boundaries between the parties. They relied on the case of **Andrew Marigwa V Josphat Ondieki Kebati ELC Kisii 1163 of 2016**, where it was held:-

“Recognizing the instant suit related to a boundary dispute which definitely the court lacked the technical ability to deal with, the court made a reference of the matter to the Land Registrar and the County Surveyor who are the persons mandated under the Act to deal with disputes relating to boundary. The Land Registrar is the custodian of the records relating to land, have the technical ability or capacity to determine, establish and fix boundaries of parcels of land as required under the Land Registration Act, 2012.”
The court further stated that:-

“From the observations and findings by the Land Registrar and the Surveyor there is in fact a need for the Registry Index Map to be amended to reflect the correct status as appears on the ground. The applicant by his application seeks an order that the Land Registrar's and the Surveyor's report be disregarded and the matter fixed for hearing. What would the court proceed to hear? The dispute would still remain a boundary dispute which the court cannot entertain under the provisions of Section 18(2) of the Land Registration Act, 2012. My view is that the Land Registrar's reports have finally disposed of this matter. I hereby endorse the reports as judgment of the court and direct that the same be implemented”

30. The 1st to 4th defendants concluded by praying for the suit to be dismissed.

5TH DEFENDANT'S CASE

31. The 5th defendant entered appearance and filed a written statement of defence on the 24th February 2009 denying the plaintiffs claim and, on 21st June 2012 filed a list of documents and witnesses. The 5th defendant further filed a witness statement of one Tubmun Otieno on 26th March 2013. On 21st September 2020, the matter came up for the 5th defendant's defence hearing. The 5th defendant adopted the witness statement that was filed on 26th March 2013, and its case was closed.

32. In the statement made by Tubmun Otieno it was stated that the 5th defendant leased the suit property to Shariff Nassir Taib in 1997 out of the larger portion given by the government. That Shariff Nassir Taib sold and transferred the same to Panal Enterprises Limited who in turn transferred to Shazneer Enterprises and it was further transferred to Total Kenya Limited. That all the transactions are contained in the certificate of lease and that the plaintiffs did not obtain lease from the 5th defendant as its alleged. The statement further states that the 5th defendant leased the land to Shariff Nassir but has no control over the actions of whoever comes in possession of the suit land. The 5th defendant had no power to restrain activities of the 1st to 4th defendants as alleged by the plaintiffs.

5th defendant's submissions

33. The 5th defendants filed submissions on 19th November 2020 and had the following issues for determination:-

- i. Whether the 5th defendant had authority to lease the suit property.
- ii. Whether the 5th defendant registered the suit property.
- iii. Whether the 5th defendant failed/neglected to restrict the 1st to the 4th defendant from destroying the plaintiff's fence.

34. The 5th defendant submitted that it had authority to lease the suit land under the Local Government Act to one Shariff Nassir Taib via a sublease dated 21st August 1997 for commercial/residential purposes. That the said Shariff Nassir Taib transferred to it Panal Enterprises Limited who transferred it to Shazneer Enterprises who later transferred it to Vision Oil Limited. There was a certificate of change of name from Vision Oil Limited to Elf Oil Limited that was presented to the 5th defendant who effected the change in the sublease. That the 5th defendant consented to the transfer of the sublease from Elf Oil Limited to Total Kenya Limited by a letter of consent dated 20th February 2018.

35. That the 4th defendant did not adduce evidence to prove the suit property is part of the land allocated to Khadija Primary School and their allegations should be dismissed as per Section 106 of the Evidence Act. The 1st to the 4th defendants alleged fraud on part of the plaintiffs but failed to provide evidence to support their claim. That those allegations are hearsay and cannot be used as evidence in court.

36. The 5th defendant further denied double registration on the suit property and maintains that the 2nd plaintiff is the only registered person as evident from the sublease and letter of consent. Further to that, that the 5th defendant cannot be held liable for failing to restrict the 1st to the 4th defendants from demolishing the wall. Despite being the lessor, it cannot be held liable for the tortious acts of the 1st to 4th defendants. The individuals who destroyed the plaintiffs' fence should be held responsible for their actions, as the 5th defendant did not direct, approve, instruct and/or condone the tortious acts. In conclusion, the 5th defendant prayed for court to dismiss the suit against it with costs.

37. Taking the pleadings, the evidence adduced together with the submissions rendered and authorities in support, this Court is tasked to determine the following questions:

- a) Whether the suit premises is properly vested upon the 2nd plaintiff.
- b) Whether the plaintiffs have proved on a balance of probability the conditions to grant an injunction to restrain the defendants from interfering in any manner whatsoever with the suit premises.
- c) Whether the plaintiffs have proved their claim of special damages of Kshs 170,000.
- d) Whether the plaintiffs are entitled to general damages.

38. In this case, the plaintiffs produced a sub-lease in respect of Plot No L.R No MN/1/108281 dated 21st August 1997. The plaintiffs also produced a transfer of lease from the 1st plaintiff to the 2nd plaintiff which was registered on 23rd September 2009. The 5th defendant stated that it consented to the transfer of lease from the 1st plaintiff to the 2nd plaintiff. The 1st to the 4th defendants have not produced any evidence to challenge the indefeasible title of the 2nd plaintiff.

39. Section 26(1) of the Land Registration Act provides:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

40. The 2nd plaintiff holds an absolute and indefeasible title to the suit premises and is therefore entitled to enjoy the rights and privileges

as a proprietor as provided by Section 24(a) of the Land Registration Act which states:-

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

41. The 2nd plaintiff has the right to use, possess and enjoy the suit premises to the exclusion of third parties including the defendants. These rights and interest that the 2nd plaintiff has in the suit premises are protected by Section 25 (1) of the Land Registration Act that states:-

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to:-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register.

42. The 1st to the 4th defendants have alleged fraud on part of the plaintiffs in acquiring the suit premises. They allege that the suit premises is public property and that the plaintiffs have grabbed it. However when DW1 testified she did not adduce any evidence to prove the allegations. Fraud is a serious allegation that needs to be proved strictly as required in Law. The Evidence Act Section 109 places the burden of proof on the 1st to 4th defendants to prove to court through evidence any fact that they plead exists.

43. In regards to standard of proof in substantiating fraud, I am guided by the Court of Appeal in the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR, where it expressed itself as follows;**

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

44. On 20th December 2002, the court issued an injunction restraining the defendants from interfering with the suit premises pending hearing and determination of the suit. In the further amended plaint the plaintiffs sought a permanent injunction against the defendants. Injunctions that have been sought herein are also called perpetual injunction that can only be granted upon hearing and determination of the suit. While granting perpetual injunction, the Court has to see the nature of right being invaded, whether the compensation would be an inadequate remedy for its redressal, there is no standard for ascertaining the actual damage caused by such invasion, there shall not have efficacious remedy to the plaintiff in respect of such invasion, the plaintiff would not have been guilty of delay and laches and his conduct is not unfair. The plaintiffs submitted to court that the activities of the 1st to 4th defendants of demolishing the wall have caused them not to make any further development on the suit premises. This court finds that the 1st to 4th defendants have caused the 2nd plaintiff economic hardship. Therefore there is need for permanent injunction to perpetually restrain the defendants from interfering with the suit premises.

45. The plaintiff has further prayed for special damages of Kshs 170,000 to rebuild the perimeter wall that was damaged. Special damages are used to financially compensate the injured person for losses suffered due to the defendant's actions. Special damages are out-of-pocket expenses that can be determined by adding together all the plaintiff's quantifiable financial losses. The losses however must be proven with specificity.

46. The plaintiffs should specifically and with certainty prove special damages for this court to award them. The the 1st to 4th defendants in their letter dated 13th May 2009 admitted demolition of the wall. Its therefore not denied that there was demolition of the wall. Consequently, this court will grant the said amount of Kshs 170,000/=.

47. On general damages, **Mutungi J In the case of Ochako Obinchi v Zachary Oyoti Nyamongo [2018] eKLR**, referred to the case in **Nakuru Industries Limited -vs- S S Mehta & Sons [2016] eKLR** where it observed:-

“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. The value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the cost of restoration of the land to the position it was in before the wrongful act was committed.”

The court also relied on the case of **Phillip Aluchio -vs- Crispinus Ngayo [2014] eKLR where Obaga, J. held:-**

“...The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It

has been held that the measure of damages for trespass is the difference in the value of 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.....''

48. The plaintiffs has been unable to develop the suit premises as they so wish since the 1st to 4th defendants have deprived them of the quiet enjoyment of the suit premises. The 1st to 4th defendants' entry and occupation of the suit property without the authority, consent and/or permission by the 2nd plaintiff who is the lawful owner of the property constituted trespass. The defendants have deprived and denied the 2nd plaintiff of the use of its property and in those circumstances the plaintiffs would be entitled to damages.

49. The plaintiffs however did not adduce any evidence that valued the suit premises before and after the trespass that would have guided court on the loss that has been suffered. The plaintiffs are nevertheless entitled to damages that would reasonably compensate them for the denial and deprivation of the suit premises by the 1st to 4th defendants since the cause of action arose in 2002.

50. In my view, general damages in the sum of Kshs 1,000,000/= would be reasonable. The upshot is that I find that the plaintiffs have proved their case on a balance of probabilities against the 1st, 2nd, 3rd and 4th defendants. The case against the 5th defendant has not been proved. I accordingly enter judgment for the plaintiffs against the 1st, 2nd, 3rd and 4th defendants and make the following orders:

(a) A declaration that the Plot Number L.R No MN/1/10281 belongs and is properly vested upon the Total Kenya Limited.

(b) A permanent injunction is granted restraining the 1st, 2nd, 3rd and 4th defendants whether by themselves, their servants or agents or otherwise howsoever from entering or pulling down or destroying or preventing construction/development works by the plaintiff or interfering in any manner whatsoever with the suit premises.

(c) Kshs 170,000/= as special damages.

(d) General damages of Kshs 1,000,000/= with interest at court rate from date of judgement until payment in full.

(e) Costs of the suit is awarded to the plaintiffs to be borne by the 1st, 2nd, 3rd and 4th defendants jointly and severally.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF MARCH, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE