Kariuki (Suing as the Personal Representative of Joseph Kariuki Karanja - Deceased) v Mugo & 9 others (Environment & Land Case 18 of 2024) [2025] KEELC 62 (KLR) (Environment and Land) (23 January 2025) (Judgment)

Neutral citation: [2025] KEELC 62 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

ENVIRONMENT & LAND CASE 18 OF 2024

MC OUNDO, J

JANUARY 23, 2025

BETWEEN

PETER KARANJA KARIUKI (SUING AS THE PERSONAL REPRESENTATIVE OF JOSEPH KARIUKI KARANJA - DECEASED) ..... PLAINTIFF

AND

JAMES GACHERU MUGO ..... 1ST DEFENDANT

JOHN KARANJA KAHORA ..... 2ND DEFENDANT

JESSE MAINA NDUATI ..... 3RD DEFENDANT

ISAACK K. MBUGUA ..... 4TH DEFENDANT

LEONARD KIRUI ..... 5TH DEFENDANT

JOSHUA MUREITHI MUIGAI ..... 6TH DEFENDANT

MS. MUNENE JANE ..... 7TH DEFENDANT

NJUGI MBOGO ..... 8TH DEFENDANT

HIRAM MACHARIA MIGUI ..... 9TH DEFENDANT

PETER MUCHIRI NDERU ..... 10TH DEFENDANT

JUDGMENT

1. Vide a Plaint dated 9th June, 2014 and amended on 7th April, 2022, the Plaintiff herein sought for the following orders:

i. A permanent injunction restraining the Defendants, their servants, agents, nominees, and/or employees from trespassing, selling, alienating, disposing off, constructing and/or building any structures, demarcating, encroaching and/or interfering with the parcel of land No. Nyandarua/South Kinangop/471.

ii. Vacant possession and/or eviction order against the Defendants jointly and severally.

iii. Mesne Profits.

iv. Costs and interest

v. Any other relief the court may deem fit to grant.

2. The Defendants filed their Defence dated 31st October, 2016 and amended it on 23rd September, 2022 in which they denied the contents of the Amended Plaint putting the Plaintiff to strict Proof.

3. They clarified that they were Civil Servants under the Ministry of Interior and Co-ordination of National Government and gave a brief history of the matter to the effect that in the year 1991, or thereabout, the Plaintiff sold and transferred half an acre of the suit property to the school committee of Mutarakwa Nursery School (the school) to build classrooms. That vide a judgement of 21st April, 1995 the court determined the issue of ownership of the suit property wherein the Plaintiff had been ordered to transfer half an acre portion of the suit land to Mutarakwa Nursery School pursuant to the valid sale of the same for sufficient consideration.

4. Subsequently the school committee had sought to fence off the school property using funds from the local CDF kitty and enlisted the supervision of the Defendants herein in their official capacities as employees of the Ministry of Interior and Co-ordination of National Government to so fence the school compound, which efforts the Plaintiff had been frustrating since the year 1994.

5. That further, the Plaintiff had failed and/or refused to serve the Hon. Attorney General with a notice of the intention to sue 30 days before commencing suit. That the suit was res judicata, had failed to follow due process before the institution of the same, the Plaint as drawn was based on fraud, deliberate concealment of material facts, was bad in law, fatally defective and an abuse of the process of the court and as such the suit should be dismissed with costs.

6. In Response, the Plaintiff reiterated that the Defendants had been sued in their personal capacity for actions done in their personal capacity and as such, their Statement of Defence be dismissed.

7. Subsequently, on 6th February 2020, the suit had been dismissed for want of prosecution wherein vide a court's Ruling of 30th March, 2022, the same was reinstated and the original Plaintiff, Joseph K. Karanja substituted with his personal representative one Peter Karanja Kariuki.

8. The matter had proceeded for hearing on the 14th March, 2023 wherein Peter Karanja Kariuki, the substituted Plaintiff adopted his witness statement as his evidence-in-chief and proceeded to testify as PW1 to the effect that the Original Plaintiff, one Joseph Kariuki Karanja (Deceased) was his father and proprietor of land Parcel No. Nyandarua/South Kinangop/471.

9. He then proceeded to produce the following documents s Pf exh 1-12 respectively.

i. Copy of the Title Deed dated 25th July 2007.

ii. Copy of the Certificate of Official Search for Nyandarua/South Kinangop/471 dated 17th April 2008

iii. Copy of Settlement Fund Trustees Statement of Account.

iv. Copy, of the Letter from the Ministry of Lands and Settlement dated on 1st December 1963

v. Copy of Transfer of Land in Settlement Scheme dated 14th November 1991.

vi. Copies of Rates Receipt from the County Council of Nyandarua.

vii. Copies of Official Receipts of Loan repayments towards the property dated 17" April 1989 and 18th October 1989.

viii. Photographs showing encroachment and demarcation of the parcel of land Nyandarua/South Kinangop/471.

ix. Letters from Isaac K. Mbugua dated 21st May 2014.

x. Memo from National Police Service dated 26th May 2014.

xi. Copy of KRA Taxpayer Registration Certificate.

xii. Demand letters dated 22nd May 2014 and 30th May 2014

10. That the Certificate of Search and the Title deed were proof that the land was registered in their father's name. That he was not aware of the purchase of the land by anyone as his father never told him anything to that effect. That the Defendants had been sued because they in the company of a mob had wanted to grab the whole land and fence it. That at the time, the Defendants had come as villagers and had not been accompanied with any government officer as evidenced from the photographs produced as Pf exh 8

11. That he had sought for an injunction in court because since the Defendants had not come in peace, were armed and had wanted the Plaintiff to vacate from the whole land wherein they had started fencing the same. It was his testimony that the Defendants did not want to be given half an acre as per the judgment. That further, they did not have any letter from the government requesting for the land neither did they come with any Surveyor but had measured the land using strides.

12. His evidence was that in the year 1965 there had been no schools around hence his father and other elders had agreed to give some land/space for children to have a school. That his father had then volunteered and given a small portion of about 40 by 50 feet. That however, when schools were established elsewhere, the children had moved to those schools. That subsequently, the parcel of land that his father had volunteered to give had been left vacant and no school had been established thereon to date. That nonetheless, the mob had wanted to establish a school on the entire land. That since there had not been any attempt to survey the land, the same had remained registered in his father's name whereupon they were living as a family.

13. When he was referred to Page 37 of the Defendants' trial bundle, he confirmed that his mother had been opposed to the sale of the land. Upon being referred to page 32 of Defendants' trial bundle, he responded that the Ministry had never gone to their home to ask for land.

14. On cross-examination, he confirmed that the original Plaintiff was his father and that he had passed away in the year 2020. He also confirmed that the school on the land was "Mutarakwa" and that the same had begun in the year1965. That however, the invasion by the Defendants had occurred in the year 2014. That none of the Defendants were government officers. That he knew them so since they had come from the same area.

15. When he was referred to the Judgment in the Defendants' trial bundle, he confirmed that his father had been the Defendant in that suit and that he had appealed against the said judgment. He maintained that

the Defendants had invaded the land as evidenced from the photographs. That whereas his deceased father had volunteered the land, there was no school on the said land as at the moment.

16. His evidence was that although his father had given away a piece of land measuring 50 feet by 40 feet, yet he did not have any document to prove the same. He confirmed that his mother had refuted the donation of the land.

17. In re-examination and while reference was made to page 15 of the Defendants' trial bundle, he had confirmed that the court vide its Judgement of the year 1995 in SRMCC Naivasha Civil Case No. 31/1994 had ordered that the school be given half an acre and not the whole land. That since the delivery of the said Judgement, nobody had ever lay claim to the land save for when the Defendants, while armed, had gone to the land in the year 2014 seeking the whole of it. That currently, while there were many schools in the area but none on the land. That he had sued the Defendants in their individual capacity because the government had never gone to claim the land. He confirmed that an injunction had been issued in the year 2014 in this matter.

18. When he was referred to page 56 of his trial bundle, he stated that the land had been obtained on loan terms which had been issued by Settlement Fund Trustee (SFT) and that his father had paid the same. When he was referred to pages 52 – 55 of the bundle, he confirmed that the same were payments made by his father for the land. Lastly, his evidence was that there was no school called Mutarakwa and insisted that the Defendants had been sued in their individual capacities.

The Plaintiff thus closed his case.

19. The Defence case proceeded for hearing with the evidence of M/s Emily Kemunto, a Court Administrator at Naivasha Law Courts who testified that she had received summons to attend court and produce a file being Naivasha Chief Magistrate's Court Civil Case No. 31/1994.

20. That she had traced the file in which the matter therein had been concluded at the Naivasha Law Court. That the parties to the said matter had been Maina Kuria Chege (1st Plaintiff), Mutarakwa Nursery School as the 2nd Plaintiff vs. Kariuki Karanja as the Defendant. That the Plaint had been received on 15th February, 1994 wherein the prayers sought therein had been as follows;

    i. A declaration that the Defendant do transfer ½ acre (1/2) to the 2nd Plaintiff.

    ii. Costs and interest for the suit and any further or other relief that this Honourable Court may deem fit and just to grant.

21. That judgment had been delivered on 21st April, 1995 by Hon. L. W. Gitari, Senior Resident Magistrate (as she was then) who had allowed the Plaintiff's Claim and ordered that the Defendant transfer ½ an acre parcel of land to the 2nd Plaintiff. The costs of the suit were awarded to the Plaintiff.

22. That the ½ an acre was to be excised from Plot No. 471 South Kinangop which land was registered to the Defendant. She produced the court file of Naivasha SRMC 31/1994 as Df exh 1.

23. On cross-examination, and in reference to the amended Plaint of 7th April, 2022, she confirmed that Mutarakwa Nursery School and Maina Kuria Chege were not parties in the present suit. That subsequently, according to the amended Plaint in ELC 18/2024, the parties in the matter did not appear in the SRMCC No. 31/1994. That further, the Hon. Attorney General had not been cited in the Magistrate's Case neither was the Ministry of Social Services mentioned therein.

24. She confirmed that Judgment had been delivered on the 21st April 1995. That however, from the record, she was unable to see any documents to the effect that Maina Kuria had executed the Judgment from the Magistracy Court.

The Defendants thus closed their case.

25. Despite parties having been directed to file submissions, only the Plaintiff complied and filed his submissions dated 28th October, 2024, wherein he summarized the factual background of the matter before framing his issues for determination as follows;

    i. Whether the validity of the Plaintiff's title has been challenged.

    ii. Whether the Defendants can claim land based on the judgement delivered in the year 1995.

    iii. Whether the Attorney General can represent parties sued in their own personal capacity.

    iv. Whether the Plaintiff's case is undefended for failure to call a witness.

    v. Whether a permanent injunction should be issued restraining the Defendants, their servants, agents, nominees and/or employees from trespassing, selling, alienating, disposing off, constructing and/or building any structures, demarcating, encroaching and/or interfering with the parcel of land number Nyandarua/South Kinangop/471.

26. On the first issue for determination as to whether the validity of the Plaintiff's title had been challenged, he submitted that while the validity of the Plaintiff's title had not been in contest, the Plaintiff held a title to the entire land which title remained valid and unchallenged as could be confirmed by the records at the lands office.

27. The Plaintiff submitted that the Defendants had not provided any evidence to support their assertion that a portion of the land had been transferred to Mutarakwa Nursery School or Maina Kuria Chege (the Plaintiffs in the Naivasha Magistrates Court case) as they had not provided any legal document or transaction record and therefore the Defendants' actions of invading the Plaintiffs land had amounted to unlawful trespass. That their claims could not override the Plaintiff's title which had remained intact.

28. On the second issue for determination as to whether the Defendants could claim the land based on the judgement that had been delivered in the year 1995, he submitted that the said judgment had been delivered over 12 years ago and ought to have been executed within 12 years from the date it had been delivered failure to which the same become unenforceable. Reliance was placed on the provisions of Section 4(4) of the Limitation of Action Act and the decided case of M'ikiara M'rinkanya & Another v Gilbert Kabeere M'mbijiwe [2007] eKLR.

29. Further submission was that those who sleep over their rights had no right to agitate for them after the lapse of the prescribed period. That since no action had been taken to enforce the judgement within the 12 years period, the Defendants could not rely on the said judgement as a basis for their claim over the said portion of the land.

30. That in any case, the Defendants herein had not been parties to the original suit hence they lacked the standing to execute or benefit from the previous judgement. That since the deceased original Plaintiff's ownership had not been legally transferred, the Defendants' action of fencing off the land and claiming it on behalf of the school was unlawful.

31. On the third issue for determination as to whether the Attorney General could represent parties that had been sued in their own personal capacity, reliance was placed on the decided case of Council of

Governors & 6 Others v Senate [2015] eKLR to submit that while it was true that pursuant to the provisions of Article 156 (4) of *the Constitution* the Attorney General could represent the National Government in court or in any legal proceedings to which the National Government was a party, other than criminal proceedings, there was a leeway for government officials to be sued in their own capacity thus in a case where the said government officials acted in a way that was beyond their powers, it was only fair that they were not shielded by the law for the unlawful acts done by them. It was thus his submission that the Attorney General's involvement be limited to defending the government or its officers only when they were sued for acts carried out within the scope of their official duties.

32. Further reliance was placed in the decided case of Kimunai Ole Kimeiwa & 5 others v Joseph Motari Mosigisi (The then District Commissioner, Rongai District) & 3 others [2019] eKLR to submit that in the instant case, the Defendants had been sued in their personal capacity because they had acted so fragrantly and maliciously that they had been acting on their own. That subsequently, the Defendants' claim that the Attorney General should have been served with a notice under the provisions of Section 12A of the *Government Proceedings Act* was misplaced as the said provision requiring a 30-day notice before instituting a suit against government officers applied only when they wee acting within their official duties. That nevertheless, in the present case, the Defendants' actions of fencing, trespassing and attempting to sell the land had been personal acts that had not been authorized or directed by the government.

33. On the fourth issue for determination as to whether the Plaintiff's case was undefended for failure to call a witness, he submitted in the negative to the effect that the legal burden of proof did not require litigants to present every possible witness to substantiate their claims. That the Plaintiff's case herein was robustly supported by compelling Plaintiff's evidence and documentary evidence, particularly the land title deed and the official records demonstrating his late father's lawful ownership of the parcel of land No. Nyandarua/South Kinangop/471.

34. That indeed, the Defendants did not testify in court hence their assertions were never tested. That there was no documentary proof to the effect that the Defendants were civil servants hence the Plaintiff's statements had essentially remained uncontroverted. That further, the Defendants had neither substantiated their claim nor did they produce the documents they wished to rely upon hence they merely had pleadings which had not been supported by evidence. Reliance was placed in the decided case in Equity Bank Limited v Bobbin (EPZ) Limited (Civil Suit 773 of 2009) [2021] KEHC 13189 (KLR) (Civ) (15 July 2021) (Judgment).

35. On the fifth issue for determination as to whether a permanent injunction against the Defendants should issue, he submitted in the affirmative to the effect that the Plaintiff had demonstrated a clear legal right to the land which had been unlawfully threatened and encroached upon by the Defendants. That the court was empowered under the provisions of Section 63(e) of the *Civil Procedure Act* to issue an injunction to restrain acts that were likely to cause irreparable harm or injustice. That in the present case, the Defendants had attempted to alienate and sell portions of the land without any legal authority hence warranting an injunction to prevent further illegal actions.

36. He also hinged his reliance in the precedent setting case of Giella v Cassman Brown & Co. Ltd [1973] E.A. 358 to the effect that they had established all the elements therein present and the continued trespass and attempted illegal sale of the land by the Defendants would result in irreversible harm thus undermining the Plaintiff's right to quiet possession and enjoyment of the land. The plaintiff sought that the court grants a permanent injunction restraining the Defendants and their agents from any further unlawful interference with the land.

Determination.

37. I have considered the evidence herein adduced as well as the submissions by the Plaintiff. The Plaintiff's case is that he was an administrator to the estate of Joseph Kariuki Karanja his father, who was the proprietor of land reference number Nyandarua/South Kinangop/471.

38. That sometime in the year 1965, since there had been no schools around the area, his father and other elders had agreed to give some land to the community to build a school for the children where his father had volunteered a small portion of about 40 by 50 feet. That however, when schools were established elsewhere, the children had moved to those schools and the parcel of land that his father had volunteered was left vacant.

39. That vide a judgment delivered on the 21st April 1995 in Naivasha SRMC 31/1994 where the parties had been Maina Kuria Chege and Mutarakwa Nursery School vs Kariuki Karanja, his father the Defendant had been ordered to transfer ½ an acre of land to the 2nd Plaintiff. (There is however no mention of the land reference number and since this is not in contention, I shall leave it at that) However, there had been no execution of the judgment wherein in the year 2014, the Defendants, while armed, descended and or trespassed on the land and proceeded to fence off the whole of it with the sole purpose to evict the Plaintiff from therein.

40. That he had sued the Defendants in their personal capacities because they had acted so fragrantly and maliciously, evidence that they had been acting on their own and not on behalf of the government or as officers of the government. In support of his case the Plaintiff had produced the exhibits herein above at paragraph *9*.

41. The Plaintiff therein sought that the Defendants be restrained through an injunction from interfering with the said suit parcel of land.

42. The Defendants opposition to the Plaintiffs suit was that they were Civil Servants under the Ministry of Interior and Co-ordination of National Government wherein the school committee had sought their supervision to fence off the school property using funds from the local CDF kitty. That this followed the sale of ½ acre of the suit property to the school committee of Mutarakwa Nursery School (the school) to build classrooms wherein after vide a judgement of 21st April, 1995, the Plaintiff had been ordered to transfer the ½ acre of land to the school wherein the Plaintiff had failed to comply and had been frustrating the school since the year 1994.

43. Their defence had been that the Plaintiff had failed and/or refused to serve the Hon. Attorney General with a Notice of the Intention to Sue 30 days before commencing suit, the suit was res judicata, and the Plaint as drawn was based on fraud, deliberate concealment of material facts, was bad in law, fatally defective and an abuse of the process of the court and as such the suit should be dismissed with costs.

44. However at the hearing, the Defence called only one witness who was an officer of the court, to produce the file in relation to Naivasha SRMCC No. 31/1994 which she did as Df exh 1.

45. The matters that arise herein for determination are as follows;

    i. Whether the current suit is res judicata Naivasha SRMCC No. 31 of 1994, if not;

    ii. Whether the Attorney General can represent parties sued in their own personal capacity.

    iii. Whether the Defendants can claim land based on the judgment delivered in the year 1995.

    iv. Whether orders sought by the Plaintiff should issue

46. The doctrine of Res Judicata is enshrined in Section 7 of the *Civil Procedure Act*, which provides that: -

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

47. The rationale for the doctrine of res judicata was discussed by the Court of Appeal in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR wherein it had observed as follows; -

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

48. I have keenly studied the proceedings and judgment dated 21st April 1995 in the impugned Naivasha SRMCC No. 31 of 1994. The parties therein had been Maina Kuria Chege and Mutarakwa Nursery School (Plaintiffs) vs Kariuki Karanja. (Defendant). The Plaintiffs had sued the Defendant claiming the transfer of ½ acre of land to the 2nd Plaintiff and for costs of the suit. There had been no defence filed by the Defendant. After a full trial, and consideration of the evidence adduced therein, the court had found in favour of the Plaintiffs and allowed their suit.

49. In the current suit, the parties herein are Peter Karanja Kariuki (suing as the personal representative of Joseph Kariuki Karanja (deceased) the original Plaintiff vs James Gacheru Mugo and others who have been sued for trespass on land parcel No. Nyandarua/South Kinangop/471.

50. In John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR the Supreme Court at paragraph 86 rendered itself on the threshold for proving the applicability of the doctrine of Res Judicata by stating as follows; -

> " We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
>
> a) There is a former Judgment or order which was final;
>
> b) The Judgment or order was on merit;
>
> c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
>
> d) There must be between the first and the second action identical parties, subject matter and cause of action."

51. In the present suit, it has not been contested that the judgment in the former suit had been rendered by a court of competent jurisdiction wherein a final decision had been made in relation to ½ acre of land that had no description. Save for Plaintiff whose father was a Defendant in the former suit, the parties between the two sets of proceedings are not the same, or those claiming under the same parties and litigating under the same title, the subject matter was also different and so was the cause of action and therefore given those plain facts, the res judicata objection stands absolutely no chance of succeeding and its rejection is inevitable. This suit cannot be said to be res judicata Naivasha SRMCC 31 of 1994 and as such I shall therefore proceed to determine on the other issues as herein above stated.

52. On the second issue for determination as to whether the Attorney General can represent parties sued in their own personal capacity, the evidence brought out by the Plaintiff herein which evidence was not contradicted by the defense was that sometime in the year 2014 the Defendants herein while in the company of a mob and while armed, had trespassed onto the Plaintiff's suit property wherein they had proceeded to fence the same. That at the time, the Defendants had invaded the land as villagers and had not been accompanied with any government officer as evidenced from the photographs produced as Pf exh 8.

53. Indeed at the hearing, there had been no evidence adduced to support the view that the Defendants were Civil Servants and while invading the Plaintiff's parcel of land that they had acted on the instructions of the Ministry of Interior and Co-ordination of National Government, and therefore it was not enough to merely allege in their pleadings as such.

54. I also find that by calling DW1 as a witness to produce the file that contained the judgment, in Naivasha SRMCC No. 31 of 1994, the Defendants had relied on a judgment that had been delivered on 21st April, 1995 wherein the trial Magistrate had ordered the Defendant to transfer ½ an acre parcel of land to the 2nd Plaintiff therein as the basis of their presence on the suit. However during the hearing of this case, the court had been informed that execution of the said judgment had not taken place until the year 2014 when the Defendants invaded the Plaintiff's land in an attempt to carry out the said execution.

55. It is trite that after a judgment for possession had been obtained in an action for recovery of land, the successful Plaintiff has 12 years from the date of judgment to enforce the judgment before any question of limitation could arise otherwise the rights of the decree holder would be extinguished.

56. Indeed Section 7 of the *Limitation of Actions Act* provides;

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

57. Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve (12) years from the date on which the right accrued. The Defendant's claim over the land, if any, them having invaded the same in the year 2014 which was over 19 years after delivery of the judgment, was thus time barred.

58. The Defendants herein had been sued in their personal capacities for trespass as they had conducted themselves so flagrantly that they were acting on their own; on their own frolic so to speak. In such circumstances, the Plaintiff was at liberty to sue them on their own and therefore there had been no need to either involve the Hon the Attorney General or issue notice in compliance with Section 13A of the *Government Proceedings Act*. Indeed there had been no defence brought forth that the Defendants were civil servants.

59. Trespass has been defined by the 10th Edition of Black's Law Dictionary as;

> " an unlawful act committed against the person or property of another; especially wrongful entry on another's real property."

60. Section 3 (1) of the *Trespass Act*, also defines trespass as follows;

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

61. In Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR the court held as follows:

> " 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 the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).

62. I thus find that the Plaintiff has proved his case against the Defendants to the effect that they had trespassed on the suit property No. Nyandarua/South Kinangop/471 without any legal claim or title. It is trite law that an act of trespass is actionable per se by an award of general damages once it is established.

63. The Plaintiff has also sought for mesne profit which is defined in Section 2 of the *Civil Procedure Act* to mean; -

> " in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession".

64. The term 'mesne profit' 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. Mense profits are in the category of special damages and therefore must be specifically pleaded and proved. The Plaintiff did not set out the particulars of mense profit in his claim nor furnish the Court with any evidence that the Defendants were in occupation of the suit property and the loss he has suffered. I therefore find that he is not entitled to mesne profits.

65. In the end, I enter judgment in favour of the Plaintiff as follows;

i. The Defendants shall each pay Ksh 50,000/= to the Plaintiff as General damages for trespass with interest from the date of this judgment, at Court rates, till payment in full.

ii. A permanent injunction is herein granted restraining the Defendants, their servants, agents, nominees, and/or employees from trespassing, selling, alienating, disposing off, constructing and/or building any structures, demarcating, encroaching and/or interfering with the parcel of land No. Nyandarua/South Kinangop/471.

iii. The Defendants shall give the Plaintiff vacant possession of parcel of land No. Nyandarua/South Kinangop/471 with immediate effect and in default they shall be evicted therefrom.

iv. Costs to the Plaintiff

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 23RD DAY OF JANUARY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE