



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wachiuri v Wanjau & 2 others (Environment and Land Appeal  
E028 of 2021) [2024] KEELC 561 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 561 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E028 OF 2021  
OA ANGOTE, J  
FEBRUARY 8, 2024**

**BETWEEN**

**WILLIAM KAGOTHO WACHIURI ..... APPELLANT**

**AND**

**JULIUS KANYUKU WANJAU ..... 1<sup>ST</sup> RESPONDENT**

**BISHAR ALI MOHAMED ..... 2<sup>ND</sup> RESPONDENT**

**NAIROBI CITY COUNTY ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal arising from the Judgment and Decree of Hon G.A. Mmasi in  
Milimani Commercial Court Civil Suit No. 3862 of 2016 delivered on 15th March 2021)*

**JUDGMENT**

**Introduction**

1. Vide a Complaint filed on 15<sup>th</sup> June, 2016 in the lower court in CMCC No 3862 of 2016, the Plaintiff (Appellant herein) sought for the following orders:
  - a. A declaration that the Plaintiff is the lawful owner of parcel of land known as Plot No. 163/1 Komarok Bridge Jua Kali (Residential), Nairobi.
  - b. An order of permanent injunction against the Defendants either by themselves, their agents, their servants and/or anybody else whomsoever acting on their behalf from dealing with the said land or in any way interfering with the Plaintiff's ownership and/or quiet possession.
  - c. General damages for trespass.
  - d. Costs of this suit and interest at court rates.



- e. Any other and/or further relief that the Honourable Court may deem fit and just to grant.
2. The Appellant (Plaintiff) averred in the Plaint that he is the owner of Plot No. 163/1 Komarok Bridge Jua Kali (Residential), Nairobi (the suit property) having purchased it vide an agreement dated 16<sup>th</sup> May, 2012 and that he bought it from Caroline Wambui Muriuki who had been allocated the same vide letter of allotment by the 3<sup>rd</sup> Respondent.
3. It was the Appellants case that he enjoyed possession of the suit property until the 2<sup>nd</sup> Respondent trespassed thereon and deposited building materials intending to commence construction thus infringing on his rights as the owner of the suit property. The Appellant particularised in the Plaint the Respondent's trespass, conversion and illegal possession which, he averred, occasioned him great loss and damage, as well as misuse and degradation of the suit property.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case was that the 1<sup>st</sup> Respondent purchased the suit property from Caroline Wambui Muriuki vide an agreement dated 7<sup>th</sup> March, 2008 for KShs. 750,000; that by an agreement dated 14<sup>th</sup> July, 2011, the 1<sup>st</sup> Respondent sold the suit property to the 2<sup>nd</sup> Respondent for KShs. 2,150,000 and vide letter dated 21<sup>st</sup> April, 2011 consented to the property being transferred to the 2<sup>nd</sup> Respondent who has been in lawful possession thereto.
5. It was the Respondents' case that the Appellant had never been in possession of the suit property and was not entitled to the reliefs sought. They urged the court to disallow the claim.
6. The 3<sup>rd</sup> Respondent in response denied all the averments in the Plaint, save for an admission that the suit property had been allocated to Caroline Wambui Muriuki. In the 3<sup>rd</sup> Respondent's case Caroline transferred her interests in the suit property to the 1<sup>st</sup> Respondent who later on sold it to the 2<sup>nd</sup> Respondent, the current registered owner.
7. Vide a Judgment delivered on 15<sup>th</sup> March, 2021, the Chief Magistrate's Court held that the Appellant had not proved his case on a balance of probabilities as required, and dismissed the suit with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The Plaintiff/Appellant dissatisfied with the trial court's Judgment, filed this appeal vide the Memorandum of Appeal dated 20<sup>th</sup> April, 2021 raising 13 grounds which have been enumerated as follows:-
  - b. That the Learned Trial Magistrate erred in law and fact and misdirected herself in finding that the Appellant had not proven fraud in the sale of Plot No. 163/1 Komarok Bridge Jua Kali (Residential), Nairobi (the suitland).
  - b. That the Learned Trial Magistrate erred in law and fact and misdirected herself in determining that there was no fraud by the Respondents based on a single issue despite the Appellant having brought out a myriad of irregularities in the alleged purchase of the suit land by the 2<sup>nd</sup> Respondent.
  - b. That the Learned Trial Magistrate erred in law and fact and misdirected herself by failing to consider that the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was executed by two unknown parties allegedly sellers who have no legal interest in the suit land.
  - b. That the Learned Trial Magistrate erred in law and fact by failing to analyse the massive irregularities carried out while transferring the suitland from the



original owner Caroline Wambui Muriuki to the 1<sup>st</sup> Respondent then to the 2<sup>nd</sup> Respondent.

- b. That the Learned Trial Magistrate erred in law and fact and misdirected herself when she failed to consider that the sale agreement between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent states that the original allottee is Simon Ryboy Mwangi and not Caroline Wambui Muriuki thus contradicting the pleadings and the alleged agreement with the latter.
- b. That the Learned Trial Magistrate erred in law and fact and misdirected herself by equating an agreement for sale to a transfer.
- b. That the Learned Trial Magistrate erred in law and fact and misdirected herself by holding that there was no evidence to show that the signature on the agreement for sale was a forgery yet Caroline Wambui Muriuki testified and confirmed that the same was not her signature under oath.
- b. That the Learned Trial Magistrate erred in law and fact and misdirected herself by failing to acknowledge that Caroline Wambui Muriuki did not receive any monies from the alleged sale of the suitland to the 1<sup>st</sup> Respondent.
- b. That the Learned Trial Magistrate erred in law and fact and misdirected herself by finding that the transactions of sale from Caroline Wambui Muriuki to the 1<sup>st</sup> Respondent and onward to the 2<sup>nd</sup> Respondent were regular despite there being no evidence of transfer from the original allottee.
- b. That the Learned Trial Magistrate erred in law and fact and misdirected herself by finding that the transactions of sale from Caroline Wambui Muriuki to the 1<sup>st</sup> Respondent and onward to the 2<sup>nd</sup> Respondent were regular despite there being evidence that at the time the transfer from the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent was effected, the land was still in the name of the Original Allottee.
- b. That the Learned Trial Magistrate erred in law and fact and misdirected herself by failing to consider the testimony of the Appellant and his witness.
- b. That the Learned Trial Magistrate erred in law and fact and misdirected herself by failing to consider submissions and quoted authorities by learned counsel for the Appellant when arriving at her decision.
- c. That the decision of the Learned Trial Magistrate erred is against the law and weight of the evidence and material on.

### **Submissions**

8. The Appeal was canvassed by way of written submissions. The Appellant, through his counsel, submitted that the agreement for sale dated 7<sup>th</sup> March, 2008 was signed by James Mwangi Magundu, Caroline Wambui and Roselyn Wanjiku whereas the registered owner of the suit property at the time was only Caroline Wambui who sold the said land to the Appellant.
9. It was submitted that there is no evidence to show that a transfer was done to the 1<sup>st</sup> Respondent; that the agreement dated 14<sup>th</sup> July, 2011 between the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent shows that the original allottee of the suit property was one Simon Ryboy Mwangi, an unknown person, contradicting the



earlier agreement and that the Respondents bore the burden of proving that the transfer to the 1<sup>st</sup> Respondent and later to the 2<sup>nd</sup> Respondent was done procedurally.

10. Counsel relied on the case of Michael Njiru Kariuki v Ferdinand Ndungu Waititu & 3 Others [2021] eKLR, where the court held as follows:

“Further, it is trite that if no evidence is tendered to support an averment in a pleading, in this case, the Defence, such averment stands as a mere statement. Further if there is no rebuttal of evidence by a party, the evidence remains uncontroverted...”

11. Counsel submitted that up to 22<sup>nd</sup> June, 2011 after the purported transfer, the 3<sup>rd</sup> Respondent was still accepting rates payments from Caroline Wambui Muriuki and issuing receipts in her name and that there was no evidence to show that the personal cheques produced were ever banked or that the said Caroline Wambui was ever paid by the 1<sup>st</sup> Respondent.

12. On ownership of unregistered land, Counsel relied on the case of Caroline Awinja Ochieng & Another vs Jane Anne Mbithe Gitau & 2 Others (2015) eKLR as well as Danson Kimani Gacina & Another vs Embakasi Ranching Co. Ltd (2014) eKLR where the court held as follows:

“The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property...”

13. Counsel submitted that the 2<sup>nd</sup> Respondent produced no building plans or Environmental Impact Assessment as required under Section 57(1) and 58 of the Physical Planning and Land Use Act; that any intended construction without these permits is illegal and that the 2<sup>nd</sup> Respondent could not obtain the said documents because under Section 59(4) of the Act, she needed written consent of the registered owner and the County Executive Committee member which she did not have.

14. It was submitted by counsel for the Petitioner that the learned magistrate erroneously found that Caroline Wambui had consented to the sale; that an agreement for sale is not a transfer or consent to transfer, neither can it be proof that a transaction was completed especially since the original allottee testified that she did not sign the agreement for sale and that failure to provide forensic analysis of the signature on the agreement for sale was not fatal to the Appellant’s suit.

15. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ counsel submitted that a purchaser of land has the burden of conducting comprehensive due diligence; that by his testimony, the Appellant did not carry out due diligence before purchasing the suit property and thus cannot allege to be a bonafide purchaser. Counsel relied on the case of Antony Ted Andrew Hoareau v Mary Muthoni Wanjohi [2018] eKLR where the Court stated as follows:

“22. I do not see, how the defendant, assuming that the bona fide purchaser defence can be available to her, can be said to be innocent. She could only be said to be innocent if she showed that she did all the necessary due diligence and background check on the property and also of the seller, given that the seller never had title in his own name. She never did this, and I do not see how she can claim to be an innocent purchaser for value. It will be seen that Section



143(2) does not protect a proprietor who “caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.” ...In the instance of this case, I do not hesitate to find that the defendant substantially contributed to the fraud, by her neglect or default, in failing to investigate whether Mr. Kiongo actually held a valid sale agreement with the original land owner, as he had purported to hold himself out as having. A simple inquiry would have revealed that Mr. Kiongo was a fraudster...”

16. Counsel submitted that no consent was obtained for the transfer of the suit property from Caroline Wambui Muriuki to the Appellant; that the 1<sup>st</sup> Respondent purchased the suit property from Caroline Wambui Muriuki and her husband and co-wife and later sold it to the 2<sup>nd</sup> Respondent and that they produced the Letter of Allotment, transfer and consent issued by the 3<sup>rd</sup> Respondent whose authenticity the Appellant did not challenge.
17. It was submitted that Caroline Wambui Muriuki did not adduce evidence in support of the allegation that she did not sign the agreement for sale to the 1<sup>st</sup> Respondent thus fraud was not established and that at the time the Appellant purchased the suit property, Caroline Wambui Muriuki had no interest to pass.
18. The 3<sup>rd</sup> Respondent’s Counsel submitted that a claim of fraud must be strictly proved (*Mutsonga vs Nyati* (1984) KLR 425) and *Koinange & 13 Others vs Koinange* (1986) KLR 23); that the Appellant having alleged fraud was bound to prove it to the required standard, which was held in *Kinyanjui Kamau vs George Kamau Njoroge* (2015) eKLR, to be higher than on a balance of probabilities but not beyond reasonable doubt.
19. It was submitted that since the Appellant did not meet the standard of proof, the trial magistrate was right in finding as he did and that the trial court considered the evidence before making its decision, thus there was no error.
20. It was Counsel’s submission that the sale agreement was properly executed and it does not have unknown people; that the necessary procedures were followed in the sale of the suit property from Caroline Wambui Muriuki to the 1<sup>st</sup> Respondent and later to the 2<sup>nd</sup> Respondent and that the trial Magistrate did not err when he found that Caroline Wambui Muriuki relinquished her rights to the 1<sup>st</sup> Respondent and later to the 2<sup>nd</sup> Respondent.

### **Analysis and findings**

21. The issues as framed by the lower court were (i) whether the Caroline Wambui consented to the disposal of her interest in the suit property; (ii) if the answer to issue 1 is in the affirmative, whether the Plaintiff on the basis of the evidence and material placed in evidence has satisfied the conditions in law to warrant the grant of the orders sought; and (iii) who bears the costs of the suit?
22. Having read and considered the entire record, pleadings and submissions, the following issues fall for determination in this appeal:
  - a. Whether the 1<sup>st</sup> Respondent lawfully obtained title to the suit property capable of being passed to the 2<sup>nd</sup> Respondent?
  - b. Whether the Appellant is entitled to the prayers sought in this Appeal?
  - c. Costs



23. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to determine whether or not to uphold the decision of the lower court, as was held in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123 where the court stated as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

24. The 2<sup>nd</sup> Respondent is claiming the suit property on the strength of an alleged sale and transfer of the same from the 1<sup>st</sup> Respondent for valuable consideration. The 1<sup>st</sup> Respondent informed the court that he purchased the suit property from Caroline Wambui Muriuki, the original allottee, who testified at trial as PW2.
25. Before this court can determine whether the 2<sup>nd</sup> Respondent has valid claim over the suit property, it must first determine if the 1<sup>st</sup> Respondent obtained an interest thereto, capable of being sold and/or transferred.
26. The Appellant challenged the 2<sup>nd</sup> Respondent’s claim and entry into the suit property for being illegal. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents thus needed to show that the process upon which they acquired their interest was legal. In *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, the Court of Appeal held that:-

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

27. The Learned Trial Magistrate made the following finding:-

“DW2 in the testimony holds the said signature appended in the said agreement as having been a forgery and that she did not participate in the sale as indicated therein. Essentially that her signature was forged which matter in the context of a sale of property, imputes fraud... while Section 107 of the *Evidence Act* required the Plaintiff to such allegation of fraud to adduce evidence in support of the same, there has been none to the Court Satisfaction that the signature of DW2 was forged. Evidence in form of expert comparisons of her signature samples or otherwise an indication of the fraud has not been shown.”

28. The lower courts’ finding is based on Section 107 of the *Evidence Act* which provides that:

“107. Burden of proof.



- (1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

29. In his suit, the Appellant challenged the process through which the Respondents acquired their respective interests over the suit property. He therefore bore the burden of proving that the transactions that led to the acquisition of the suit property by the 1<sup>st</sup> Respondent and ultimately to the 2<sup>nd</sup> Respondent were illegal, un-procedural and could not be supported by law.
30. The Appellant called PW2 who told the court that she sold the suit property to him (the Appellant) and not the 1<sup>st</sup> Respondent. She denied executing the Agreement for Sale of the suit property to the 1<sup>st</sup> Respondent, which is the basis for the competing claim on the suit property as against the Appellant’s interest.
31. In my view, having called the original allottee who sold the suit property to him, to testify, the Appellant at that point discharged the said burden, and the same was effectively shifted to the Respondents to prove that the signature on the Agreement for Sale dated 7<sup>th</sup> March, 2008 belonged to PW2. This position is supported by Section 109 of the Evidence Act which provides as follows:  
  
“ 109. Proof of particular fact.  
  
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.”
32. It is the Respondents who desired the court to believe that the signature on their Agreement was genuine. Therefore, they should have endeavoured to adduce evidence to show that the impugned signature was genuine. Since the 1<sup>st</sup> Respondent’s title which he passed to the 2<sup>nd</sup> Respondent was being challenged, it was upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to prove that the process under which they acquired their interests was proper.
33. However, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not discharge this burden. That being the case, the learned trial magistrate erred in holding that the Appellant failed to discharge his burden of proof.
34. Furthermore, since the signature of Caroline on the 1<sup>st</sup> Respondent’s agreement was denied by the said Caroline, it could not have given rise to estoppel under Section 120 of the Evidence Act as was held by the learned trial Magistrate. The trial courts finding that PW2 had consented to the sale without proof that the signature on the 1<sup>st</sup> Respondent’s agreement was genuine was erroneous.
35. Having identified fraud as an issue in the trial court, the learned trial Magistrate relied on *Ratlal Gordhabai Patel v Lalji Makoni* [1956] (correct citation is *R. G. Patel v Lalji Makanji* [1957] EA 314), where the court held that the standard of proof in fraud is above a balance of probabilities, but not as heavy as proof beyond reasonable doubt.



36. It appears however, that the trial magistrate still expected the Appellant to prove the alleged fraud beyond reasonable doubt, which in itself is an error. In *Aster Holdings Limited v City Council of Nairobi & 4 others* [2017] eKLR, the court held that:-

“ 30. The standard of proof in cases where fraud is alleged is above balance of probabilities but not beyond reasonable doubt. Expecting the plaintiff to have called forensic evidence in the face of this clear evidence of fraud was to require the plaintiff to prove its case beyond reasonable doubt which is not the standard of proof for civil cases where fraud is alleged. Furthermore, the First Defendant who transferred the suit property to the Fifth Defendant had owned up that the suit property which it transferred to the Fifth Defendant was not its property. The Fifth Defendant cannot therefore maintain that it has good title which it obtained from the First Defendant.”

37. In addition, from the documents produced, the letter of allotment issued to PW2 was clear that she was to pay KShs. 15,000 being stand premium and Kshs. 1,500 ground rate within 30 days of its issuance. The letter of allotment is an offer to allot the land which is accepted by the allottee through fulfilling the conditions specified for the said allotment.

38. Once an allottee is issued with a letter of allotment to land by the allotting authority, they must pay the stand premium and other related charges for them to be considered to have acquired rights over such land. In *Lagat v Kebut (Environment and Land Appeal E021 of 2022)* [2023] KEELC 18432 (KLR), the court held that:-

“ An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. See the decisions in: *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* 182/1992 (Nyeri); and in *Dr. Joseph N.K. Arap Ng'ok v Justice Moiyo Ole Keiyua & 4 others* C.A.60/1997 where the Court of Appeal held as follows:

“It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land.”

In order for an allotment letter to become operative, the allottee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period. See the decision in: *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands & 2 others* [2014] eKLR.”

39. In this case, the Letter of Allotment as produced by both the Appellant and the Respondents is dated 21<sup>st</sup> September, 2001. However, the payment of the Kshs. 15,000 being stand premium was done on 22<sup>nd</sup> June, 2011 as evidenced by the copy of the receipt from the Local Authority Integrated Financial Operations System produced by the Appellant.

40. The agreement between the 1<sup>st</sup> Respondent and PW2 is dated 7<sup>th</sup> March, 2008. As submitted by the Appellant, PW2's interests over the suit property only crystallised after payment of the stand premium. Before then, she had no interest capable of being transferred to the 1<sup>st</sup> Respondent vide the Agreement dated 7<sup>th</sup> March, 2008.



41. In contrast, the Sale Agreement between the Appellant and PW2 is dated 12<sup>th</sup> May, 2012. By this time, PW2 had paid the stand premium and her interest over the suit property had crystallised. It is no wonder then, that she chose to sale the suit property at that time, when she had an interest capable of being sold. Therefore, whereas the 1<sup>st</sup> Respondent testified that he bought the suit property from PW2, as set out above, PW2 had no title to pass to him at the time of the alleged sale.
42. That aside, the Appellant raised inconsistencies in the Agreement for Sale dated 7<sup>th</sup> March, 2008. To begin with, the Letter of Allotment was issued only to PW2, yet the said Agreement for Sale introduces one James Mwangi Magondu and Roselyne Wanjiku.
43. The 1<sup>st</sup> Respondent alleged that the two persons were the husband and co-wife of PW2. Even ignoring the fact that there is no proof of this allegation, this court cannot ignore the fact that these were not relevant parties to the transaction having no interest in the suit property. The said Agreement apparently gave the said James Wangondu the rights to receive payment on behalf of PW2, who denied receiving any payment for the alleged sale of the land to the 1<sup>st</sup> Respondent.
44. The Respondents also did not produce any proof of payment, whether to PW2 or to her purported husband, James Mwangi Magondu, and neither was the said husband called to testify that he did receive payments for the land from the 1<sup>st</sup> Respondent. It is the finding of this court that the 1<sup>st</sup> Respondent cannot purport to have purchased the suit property if he cannot even prove payment of the consideration.
45. On the other hand, the Appellant showed an unbroken chain to the root of his title. He purchased the suit property from PW2 to whom the 3<sup>rd</sup> Respondent had allotted the land. He exhibited a copy of the Letter of Allotment accompanied by a Police Abstract to prove its loss. He has also produced a letter dated 9<sup>th</sup> August, 2007 from the 3<sup>rd</sup> Respondent confirming that the suit property was indeed allotted to PW2.
46. The 3<sup>rd</sup> Defendant did not deny issuing the said letter of allotment, or the accompanying letter of 9<sup>th</sup> August, 2007 confirming the allotment. To boost his claim, he also has the testimony of PW2 confirming that she sold the suit property to him. He therefore, on a balance of probabilities established his interest in the suit property and showed that his claim is valid.
47. The Appellant has been kept off his property for approximately 8 years. The Appellant is entitled to general damages for trespass to land, which has been held to be actionable per se without proof of any damage. In the case of *Park Tower vs Moses Chege & Others HC Civil suit No. 1825 of 1999 [2014] eKLR*, the court held as follows:-

“I agree with the learned judges that where trespass is proved a party needs not prove that he has suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. As observed on the cases referred to there is no mathematical or scientific formula in such cases for assessment of general damages. However, in the cases before me, I consider that the suit properties are sizeable parcels sitting on nearly three quarters of an acre of land located in the central Business District. This is prime property in the city centre and any unlawful act of aggression and/or intrusion that prevents the rightful owner of the property from enjoyment of his ownership rights of possession and use is to be frowned at and is punishable by way of an award of damages.”



48. What remains is to assess the amount sufficient as general damages for the said trespass. The issue of assessment of general damages was determined in Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR where it was 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 v Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).”

49. It appears that the suit property was not developed at the time of the 2<sup>nd</sup> Respondent’s forcible entry. No evidence was adduced as to the state or the value of the suit property before and after the trespass. This makes it difficult to assess general damages in line with the parameters laid out in Philip Ayaya Aluchio vs Crispinus Ngayo (supra). In the circumstances, this court will be guided by the case of Nakuru Industries Limited v S S Mehta & Sons [2016] eKLR where the court held as follows:

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff’s land and conducted some excavation. For this reason I award the defendant damages in the amount of Ksh 500,000/- (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

50. Considering the rate of inflation in this country, and the rise in value of land, this court is of the opinion that an award of Kshs. 2,000,000 in general damages for trespass is sufficient.

51. For those reasons, this court finds that the Appeal herein is merited and sets aside the Judgement of the lower court in Milimani Commercial Courts, CMCC No 3862 of 2016 dated 15<sup>th</sup> March, 2021, and substitute it with the following orders:

a. A declaration be and is hereby issued that the Appellant is the lawful owner of Plot No. 163/1 Komarok Bridge Jua Kali (Residential), Nairobi.

b. A Permanent injunction be and is hereby issued restraining the Respondents, either by themselves, their agents, their servants and/or anybody else whomsoever acting on their behalf from dealing with the said land or in any way interfering with the Appellant’s ownership and/or quiet possession.

c. General damages for trespass in the sum of Kshs. 2,000,000 to be paid to the Appellant by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

d. Costs of this Appeal and the suit in the lower court to be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Kuria for Appellant

Ms. Karumba for 1<sup>st</sup> and 2<sup>nd</sup> Respondent

Ms. Kamunya for 3<sup>rd</sup> Respondent



Court Assistant - Tracy

