



Wainaina & another (Suing as Administrators of the Estate of Clement Wainaina alias Wainaina Ndirangu - Deceased) v Molyn Credit Limited & 2 others (Environment & Land Case 5 of 2022) [2024] KEELC 1743 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELC 1743 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 5 OF 2022
LC KOMINGOI, J
APRIL 11, 2024**

BETWEEN

CHRISTINE NJERI WAINAINA 1ST PLAINTIFF

SARA MUTHONI NGWIRI 2ND PLAINTIFF

**SUING AS ADMINISTRATORS OF THE ESTATE OF CLEMENT WAINAINA
ALIAS WAINAINA NDIRANGU - DECEASED**

AND

MOLYN CREDIT LIMITED 1ST DEFENDANT

LAND REGISTRAR, KAJIADO 2ND DEFENDANT

DISTRICT LAND REGISTRAR, NGONG 3RD DEFENDANT

JUDGMENT

1. By the Plaint dated 6th April 2016 and Amended on 28th July 2020 previously filed at the Chief Magistrates Court and later transferred to this Court, the Plaintiffs claim that the late Clement Wainaina purchased the suit property LR No. Kajiado/Olekasasi/776 for a consideration of Kshs. 450,000 from one Musa Tintamei Pasha through a sale agreement dated 28th March 2002. The property was transferred and registered in his favour on 19th February 2003 and a search undertaken confirmed the same. This was the status until his demise on 22nd April 2014.
2. On or about September 2014, the 1st Defendant trespassed on the suit property and began developing it. The Plaintiffs tried to put a caution against the property but the officials of the 2nd and 3rd Defendants indicated they could not do so without Letters of Administration. On 23rd July 2015 the Plaintiffs lodged a complaint at the Directorate of Criminal Investigation and at the National Land Commission (NLC) in respect of the trespass. On 2nd October 2015 they tried to carry out a search



but were informed that the property's file was missing and despite several letters from their advocates between 15th April 2016 and 20th May 2016, they could not have the caution registered.

3. Following the complaint filed with the National Land Commission, they received a response on 20th September 2016 directing the District Land Registrar Kajiado to avail records of the suit property and to restrain the 1st Defendant from undertaking further developments. Having received the file, National Land Commission noted irregularities in respect of issuance of title to the 1st Defendant and summoned the parties to appear before the Commission vide letters dated 31st January 2017 and 7th February 2017. On 16th February 2017 they attended the hearing and the then Chairman of the Commission Prof. Muhamamd A. Swazuri found that the 1st Defendant's title was invalid and should compensate the Plaintiffs for the trespass. Despite this, the 1st Defendant not only refused to compensate them for trespass but went ahead and subdivided the suit property into eleven plots LR No. Kajiado/Olekasasi/1635-1645 and the respective title deeds issued.
4. The Plaintiffs claim that the Defendants colluded to divest them off their interests in the suit property by tampering with its records; failing to produce the suit property's file and thus making it impossible for the Plaintiffs to lodge a caution; misleading the Plaintiffs that they could not lodge a caveat without letters of administration; fraudulently issuing title to the 1st Defendant; subdividing and selling the suit property to third parties despite court orders to maintain status quo.
5. The Plaintiffs thus sought:
 - i. A permanent injunction restraining the 1st Defendant whether by himself, his servants or his agents or any of them from wasting, damaging, alienating, selling, disposing of or in any other way interfering with the interests of the Plaintiffs in the property known as land parcel No. Kajiado/Olekasasi/776.
 - ii. A declaration that the Plaintiffs are the legal, beneficial and or otherwise equitable owners of the suit property known as Kajiado/Olekasasi/776.
 - iii. An order that all new title deeds to wit Kajiado/Olekasasi/1635-1645, created out of the subdivisions of the suit property known as parcel No. Kajiado/Olekasasi/776 be cancelled.
 - iv. A mandatory injunction against the 2nd and 3rd Defendants, jointly and severally, compelling them to register the suit property in the name of Wainaina Ndirangu.
 - v. An order that the 1st Defendant forthwith vacates the land parcel No. Kajiado/Olekasasi/776.
 - vi. An order that the OCS, Rongai Police Station enforce the orders granted by this Hon. Court.
 - vii. General damages for trespass.
 - viii. Costs of this suit and interest from the date of filing the suit.
 - ix. Any other relief that the Hon. Court deems fit.
6. The 1st Defendant in its Amended Statement of Defence contested the Plaintiffs claim stating that it was the registered proprietor of the suit property having purchased it from one Andrew Kibiwott Sawe and had been in active possession. The 1st Defendant claimed that the documents produced by the Plaintiffs were not authentic because they did not refer to the suit property and were also contradictory such as the search dated 19th February 2003 which showed the property was registered in Wainaina Ndirangu's name while the title deed was issued on 24th April 2003. The Defendant confirmed that it had subdivided the suit property and put up 11 houses as its registered proprietor and the suit should be dismissed with costs.



Evidence of the Plaintiff

7. PW1, Christine Njeri Wainaina, the late Wainaina Ndirangu's wife and Administrator of his Estate adopted her witness statement as part of her evidence in chief and produced documents marked as P. Exhibit 1-21 as exhibits. She stated that her late husband purchased the property from one Musa T. Pasha after its subdivision as per the mutation form and the transaction was undertaken by the firm O.T. Ngwiri and Company Advocates as per P. Exhibit 2. It was then transferred and registered in the name of Ndirangu Wainaina on the 19th February 2003 as entry number 3 in the green card. No other claim was laid on the suit property from 2003 until his demise in 2014. Sometimes in July 2014 she was informed that there were activities on the property and when she visited the land she found some beacons had been placed. She visited a lawyer so that they could place a caveat on the property but when the lawyer attempted to, the Land Registry at Ngong refused to register the caveat on grounds that she was not an Administrator of the Estate.
8. They then reported the matter to the Directorate of Criminal Investigations as well as National Land Commission between 2015 and 2016 and by a letter dated 20th September 2016 National Land Commission asked for the file in relation to the suit property. She stated that on 1st November 2016 the National Land Commission through a letter confirmed that her husband was the registered owner having purchased the property from Musa T. Pasha and also confirmed the legitimacy of the mutation form. She testified that in the meeting attended by the 1st Defendant's representative and herself on 16th February 2017, the National Land Commission informed the 1st Defendant that the property belonged to her late husband and the 1st Defendant's representative agreed to compensate her for the trespass.
9. On Cross examination she confirmed that the purchase price was paid by cheque. She confirmed that the name Clement was cancelled on the sale agreement although it was not countersigned. She indicated that she not aware of the process of the property's transfer and confirmed that she did not have a copy of the transfer, application for Land Control Board consent or the consent itself. She also confirmed that the title deed was issued on 24th April 2003 and the search which confirmed that Wainaina was the owner of the property was conducted on 19th February 2003. She confirmed that a search could not show proprietorship before a title deed was issued. After the purchase, they took possession of the property and visited it regularly although they did not physically occupy it. The intention was to put up hostels due to proximity of the land to Nazarene University. She stated that she did not have minutes of the meeting held at the National Land Commission although there was a witness but he had not recorded a statement. She confirmed that the green card in the Defendant's bundle of documents showed that Musa T. Pasha was issued a Title to the property on 13th August 2002 and on 14th February 2013 it was issued to Andrew Kipbiwot. She stated that she did not sue Andrew but the 1st Defendant who had title to the suit property.
10. On re- examination she confirmed that she had produced correspondence between her husband and O.T Ngwiri Advocates in relation to purchase of the suit property. And the letter from National Land Commission established that the property was properly transferred to her husband. She also confirmed that the green card in the 1st Defendant's bundle showed that the property was registered on 13th August 2002 and after subdivision of parcel 578, the 1st entry was in favour of Musa T. Pasha registered on 13th August 2003, entry number 2 showed 28th August 2002 title issued and entry 3 showed on 14th February 2012 Andrew Kibiwot Sawe title issued on 14th February 2013.
11. This marked the close of the Plaintiffs case.



Evidence of the 1st Defendant

12. DW1 Lydia Anyangu, the Director of the 1st Defendant adopted her witness statement as her evidence in chief and her bundle of documents as exhibits. She confirmed that the suit property had eleven houses on it developed by the 1st Defendant.
13. On cross examination she indicated that they started developing the suit property in 2014 after the order of status quo was lifted and sold off some of the houses because there was no restraining order against them. She stated that they purchased it from Andrew Kibiwott Sawe as per the sale agreement dated 12th July 2013. Before the purchase they conducted due diligence including meeting with Mzee Pasha who was with his sons. He confirmed he had sold the land to Andrew. The 1st defendant conducted a search at the Lands Registry and got a certified copy of the Green Card. She indicated that the numbering and dating of the entries on the title deed such as entry number 1 in 2003 and entry number 2 in 2002 did not seem like an issue to them because Andrew had a title in his name and the Musa T. Pasha had confirmed having sold the land to him.
14. On re-examination she stated that they became aware of mutation forms after buying the property although the search and title deed showed that the land belonged to Andrew Kibewott.
15. This marked close of the 1st Defendant's case.
16. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions

17. On whether the 1st Defendant was a bonafide purchaser as claimed, counsel submitted that the 1st Defendant's allegation did not meet the set threshold of a bonafide purchaser espoused in *Dina Management Ltd vs County Government of Mombasa & 5 others* [2023] KESC 30 (KLR), *Katende vs Haridar & Company Ltd* [2008] 2 EA 173 and *Samuel Kamere vs Lands Registrar, Kajiado* [2015] eKLR. This is because there were discrepancies on the 1st Defendant's documents such as chronology of dates on the Green Card, there was no production of copy of title held by the said Andrew, discrepancy between subdivision of land 576 and 578 and no evidence to show how the titles were acquired. As such, the 1st Defendant's title was impeachable under Section 26 of the [Land Registration Act](#).
18. On which title should prevail, counsel submitted that the Plaintiff's title should prevail since they had shown the root of their title citing *Dina Management Ltd* (supra) and the Court should order a rectification of the register as per Section 80 of the [Land Registration Act](#) and declare the late Wainaina was the lawful owner of the suit property.
19. On the issue of damages for trespass, counsel submitted that it was not in contention that the 1st Defendant was in possession of the suit property an act of trespass for ten years, subdivided it into eleven parcels, erected houses on it and leased/sold them off to third parties. Such actions warranted grant of damages of Kshs. 10,000,000 citing the Court of Appeal in *Kenya Power and Lighting Company Ltd v Ringera & 2 others* [2022] KECA 104 (KLR).
20. Counsel also sought exemplary damages of Kshs. 25,000,000 under the prayer any other relief because the 1st Defendant's actions were in total disregard of the Plaintiffs' rights to the suit property and court orders. Counsel made reference to the Court of Appeal's case of *Godfrey Julius Ndumba Mbogori & another vs Nairobi City County* [2018] eKLR in support of the prayer for exemplary damages and also prayed for costs of the suit.



The 1st Defendant's submissions

21. Counsel submitted that the Plaintiffs did not produce proof of payment of the purchase price for the suit property and that there were names cancelled out on the first and last page of the agreement without valid explanation. Adding that the Plaintiffs did not produce an application for consent/consent from LCB, approved mutation form from the District Land Registry, transfer of the land from Musa to Wainaina, stamp duty or even registration of the transfer. Counsel also submitted that it was impossible for a person to be registered as a proprietor before issuance of title making reference to the discrepancy between the search which was conducted on 19th February 2003 showing that Wainaina was the registered owner and the title deed which showed that the date of issuance was 24th April 2003. However, the 1st Defendant produced all requisite documents in the process of acquiring the property as was held in *Nebange Ltd vs Mire* [2023] KEELC 125 (KLR).
22. On the issue of the discrepancies on the green card, counsel submitted that only the Registrar of Lands could explain that but the 1st Defendant proceeded with the sale having undertaken due diligence and in confidence that the vendor had good title to the property as per the search and entries on the Green card which is an official document. As such they were bonafide purchasers for value as was held in *Weston Gitonga & 10 others vs Peter Rugu Gikanga & another* [2017] eKLR and *Katende vs Haridar* (supra) and had spent immense amounts of money in developing the same as well as sold off some of the houses to third parties.
23. On the issue of fraud, counsel submitted that fraud against the 1st Defendant had not been proved because no evidence of tampering with records, hiding of file, conniving to illegally dispose the Plaintiffs of the suit property or disrespecting court orders and that even the correspondence between the Plaintiffs and DCI did not show any fraud on the part of the 1st Defendant. Reference was made to *Nebange Ltd vs Mire* (supra) and *Ndolo v Ndolo* [2008] 2 KLR (G&F) 742.
24. As such, the Plaintiffs had not proved their case and the suit should be dismissed with costs to the 1st Defendant.

Analysis and Determination

25. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are:
 - i. Who is the bona fide owner of property LR No. Kajiado/Olekasasi/776;
 - ii. Whether the Plaintiff is entitled to the reliefs sought;
 - iii. Who should bear costs of the suit?
26. The issue at hand is on ownership of property LR No. Kajiado/Olekasasi/776 which both parties have laid claim to. The duty of this court entails ascertaining which of the two disputing parties possesses the rightful ownership of the land in question and verifying whether the entries recorded in the register of the said land at the Lands registry accurately represent the authentic details pertaining to the land in question.
27. There is no dispute that Musa Tintamei Pasha originally owned the unsubdivided land. He later subdivided it and sold it off. This has been acknowledged by both parties. The contention is on whether after subdivision, property LR No. Kajiado/Olekasasi/776 was sold off to the late Wainanina Ndirangu, or to Andrew Kibiwott Sawe who then sold it to Moly Credit Limited. Unfortunately, neither Musa T. Pasha (allegedly deceased) nor Andrew Kibiwott were called to testify. While dealing



with a case of two parties claiming ownership of the same property, *Munyao Sila J in Mariera & another v Ongwancho & 2 others* [2023] KEELC 21423 (KLR) stated:

“ 32. Courts need to be alive to this new kind of fraud and exercise caution when dealing with cases concerning two title holders. It is trite that only one title is the correct one; but which one? A careful and thorough analysis needs to be done... The root of title and paper trail needs to be carefully analysed. In all this, a judge needs to pray for God’s wisdom and guidance, for it can at times be extremely difficult to distinguish between which is the genuine title and which is the fraudulent title. Many times, some of these fraudulent schemes are extremely complex, if not watertight. What is depicted in the Land Registry may very well be what is fraudulent. If a court is not careful, the genuine owner may end up being declared the fraudster, and the crook will go laughing all the way to I don’t know where, alive to the fact that he will have deceived everyone, including the court...”

28. The Plaintiffs’ claim that the property was purchased by the late Wainaina Ndirangu from one Musa Tintamei Pasha in 2002. To support this, a sale agreement dated 25th March 2002 between Wainaina Ndirangu and Musa Tintamei Pasha for a consideration of Kshs. 450,000 was produced as P. Exhibit 4. The 1st Defendant did not adduce a sale agreement between the said Musa and Andrew as evidence that indeed Andrew Sawe purchased the suit property. However, produced as D. Exhibit 2 was a sale agreement dated 12th July 2013 between one Andrew Kibiwott Sawe and Moly credit Limited for a valuable consideration of Kshs. 12,000,000.
29. Also produced as P. Exhibit 5 is a letter dated 26th August 2002 to the late Wainaina from his advocates asking him to visit their offices to identify the plot he was purchasing since the survey work had been completed. On 23rd October 2002, his advocates once again wrote to him (P. Exhibit 6) enclosing the approved mutation of the subdivision with title numbers of respective plots. Subsequently, the advocates on 28th November 2002 (P. Exhibit 7) wrote to Wainaina asking him to visit their offices to sign the transfer and application for LCB consent. P. Exhibit 9 is a title deed in Wainaina’s name dated 24th April 2003 which shows that the file was opened on 13th August 2002 being a subdivision of property 578, the third entry dated 19th February 2003 was in favour of Wainaina Ndirangu and entry number four shows that on 24th April 2003 the title deed was issued.
30. This indeed a case that has taken this court a lot of time to conclude. The court has carefully analysed the documents produced by both parties trying to discern the party that has credible title; and arrived at its decision on a balance of probability on the basis of what is the more likely scenario. On the documents produced as evidence, the 1st Defendant in its Defence questioned the alleged purchase indicating that the Plaintiff neither produced copies of the transfer and consent from the Land Control Board nor payment of the purchase price.
31. While this may be the case, this court notes that produced as P. Exhibit 19 is a letter dated 1st November 2016 from National Land Commission (NLC) addressed to the Plaintiff and the 1st Defendant, which reads in part: “... The Commission received a complaint in respect of the property above, we have conducted investigations and established the following:... 2. Consent to transfer was procured from the Land Control Board and the same communicated to the purchaser vide letter Ref. No. MPOTN/13/2002 dated 28th November 2002 for which Kshs. 40,000 was paid to O.T. Ngwiri Advocates. From this excerpt, this court deduces that as much as copies of the transfer and consent were not produced, the letter from National Land Commission states that the same was procured and



issued. This court finds that this is enough evidence to prove that the consent from Land Control Board was issued and transfer procured.

32. DW1 produced as D. Exhibit 6 a certified copy of the green Card, which shows that the registry file was opened on 13th August 2002 as subdivision of parcel 576. Entry number 1 on the green card dated 13th August 2003 is in favour of Musa Tintamei Pasha; entry number 2 dated 28th August 2002 shows that title deed was issued; entry number 3 dated 14th February 2012 reads Andrew Kibiwott Sawe and entry No. 4 dated 14th February 2013 shows title issued. On the Title Deed produced as D. Exhibit 10, entry number 5 dated 8th October 2013 reads Molyn Credit Limited and entry number 6 dated 14th October 2013 shows title deed issued.
33. The Plaintiff questioned the discrepancy in chronology of the entry dates on the green card as well as the parcels of land subdivided between 578 and 576.
34. On the issue of chronology of entries, DW1 stated that she could not respond to why entry number 1 was for 2003 and entry number 2 was for 2002. Unfortunately the 2nd and 3rd Defendants did not lead evidence to explain this. This notwithstanding, it is procedural that the entries are prepared chronologically. Once again, Justice Sila Munyao in *Elias Joseph Waburi Wamunyu v Joseph Mwangi Njoroge* [2017] eKLR held:

“It was also explained that every time there is a resurvey, say due to subdivision, the map is amended and entered chronologically. Indeed, entries in the editions can only be chronological, and sequential. Therefore, if say, on 2nd January 2017, there is entry No. 5, you would expect that entry No. 6 will come after this day, not before. The map is supposed to be a permanent record, only showing subsequent amendments and should not be tampered with by being backdated...”

35. The foregoing discrepancies have this court questioning the integrity of the alleged records as well as the sanctity of title claimed by the 1st Defendant. The Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR held: “... where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register...”
36. Based on the documents produced, parties’ testimonies, down to the root of the title, this court is not convinced that the 1st Defendant’s title is indefeasible. The Court of Appeal in *Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others* [2014] eKLR held: “... a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title...”
37. This court finds that the Plaintiff’s story has been consistent and the documents show this. On the issue that the certificate of search on 19th February 2003 showed that the late Wainaina Ndirangu was the owner of the suit property preceded issuance of title, this court took note that the third entry on the title deed dated 19th February 2003 was in favour of Wainaina Ndirangu. This is the same date on the certificate of search. This court does not find any discrepancy or issue with this. The fourth entry is then dated 24th April 2003 which is the date the title deed was issued.
38. I thus find that the Plaintiffs have proved their case on the required standard that the late Wainaina Ndirangu is the bonafide purchaser and owner of property Kajiado/Olekasasi/776 as espoused by



Section 24 and 26 of the Land Registration Act. It thus follows that any other entries to the contrary should be cancelled and rectified

39. The Plaintiffs have sought for Kshs. 10,000,000 as general damages and Kshs. 25,000,000 as exemplary damages for trespass. Section 3(1) of the Trespass Act provides:

(1) 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.

40. DW1 in her testimony acknowledged that she developed and disposed part of the suit property because there was no restraining order. This court notes that P. Exhibit 18 is a letter dated 20th September 2016 from the National Land Commission to the District Lands Registrar Kajiado which reads in part; "... This is to ask you to give us a report on what transpired as per records and also restrict the second title and any further development on the land until the matter is determined by the National Land Commission..."

41. It is on record that National Land Commission recommended a restriction against the suit property, but the 1st Defendant went against it and it was her testimony that she developed the suit property and sold off some of the houses. Even if the court was to entertain the notion that there existed no restriction as asserted by the 1st Defendant, the act of disposing of a portion of the suit property while this legal action was pending stands in contradiction to the doctrine of *lis pendens*. The Court of Appeal in *Anne Jepkemboi Ngeny v Joseph Tireito & another* [2021]eKLR elaborated this doctrine and held that *lis pendens* is akin to contempt of court where it stated;

" 32. In Civil Appeal Number 44 of 2014, *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* [2015] eKLR, the Court address the issue of *lis pendens* as follows;

"Black's Law Dictionary 9th edition, defines *lis pendens* as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

... While addressing the purpose of the principle of *lis pendens*, Turner L. J, in *Bellamy vs Sabine* [1857] 1 De J 566 held as follows:-

"It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation *pendente lite* were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to defeat by the same course of proceedings."

33. The actions of the appellant and the 2nd respondent of proceeding to alienate the property and having it registered in their names during the pendency of the litigation process, ran afoul of the doctrine of *lis pendens* and was also tantamount to contempt of court."

42. Having found that the suit property belongs to the Plaintiff, it then means that the 1st Defendant's actions of entering and developing the suit property was an act of trespass. The Court of Appeal Kenya



Power & Lighting Company Limited vs. Fleetwood Enterprises Limited [2017] eKLR while affirming the High Court decision in Fleetwood Enterprises Ltd vs. Kenya Power & Lighting Co. Ltd [2015] eKLR held:

“... where trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damage or loss as a result so as to be awarded damages. The court is under the circumstances bound to award damages, of course depending on the facts of each case...”

43. The Court of Appeal in Kenya Power & Lighting Company Ltd vs. Ringera & 2 others [2022] KECA 104 (KLR) espoused the principles that guide an award of compensation as follows:

- i) Harlburys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner’s land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.
- ii) Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.
- iii) Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs’ property immediately before and immediately after the trespass or the cost of restoration whichever is less.

...

- (b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass;
- (c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass.”

44. Using the above indicated principles, the court will derive the damages for trespass from the difference in the value of the plaintiff’s property immediately before and immediately after the trespass or the cost of restoration whichever is less. Unfortunately, the Plaintiff did not produce a valuation report of the suit property. However, in 2002, the late Wainaina Ndirangu purchased the suit property for consideration of Kshs. 450,000 and the 1st Defendant in 2012 allegedly purchased it for Kshs.



12,000,000. This court also notes that there are developments on the suit property and the Plaintiff will incur costs of its restoration. I award Kshs.1, 000,000 which I think is adequate to compensate the Plaintiffs.

45. On the issue of exemplary damages, the Court of Appeal in the above cited case of Kenya Power & Lighting Company Ltd vs. Ringera & 2 others held:

“i) ... exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct...”

46. I find that the 1st Defendant defied the court orders and proceeded to develop the suit property. It has gone further to part with possession by selling the units to third parties. This was confirmed by DW1 in her testimony.

This is oppressive and cynical.

I award the Plaintiff Kshs. 5,000,000/= as exemplary damages.

47. Accordingly Judgement is entered for the plaintiffs against the defendants as follows:

- i. That a declaration is hereby issued that the late Wainaina Ndirangu is the lawful owner land parcel No. Kajiado/Olekasasi/776.
- ii. That the Land Registrar Kajiado is hereby directed to cancel all title deeds created out of the subdivisions of parcel No. Kajiado/Olekasasi/776 and register it in the name of Wainaina Ndirangu within one hundred and eighty (180) days from the date of this judgement.
- iii. That a permanent injunction is hereby issued restraining the defendants by themselves, their agents and/or servants from trespassing on, remaining or leasing, hiring, pledging, selling, constructing any structures on and/or interfering or dealing with the parcel No. Kajiado/Olekasasi/776 or interfering with the Plaintiffs quiet possession thereof.
- iv. That the 1st defendant is hereby directed to pull down, and or demolish and remove the structures together with parcel as rubbles, sand and other offending materials from parcel No. Kajiado/Olekasasi/776, within one hundred and eighty (180) days from the date of this judgement.
In default, the plaintiff be at liberty to demolish the same at the 1st Defendant's expense.
- v. General damages for trespass of Kshs. 1,000,000 and exemplary damages of Kshs. 5,000,000.
- vi. That costs of this suit be borne by the 1st Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11TH DAY OF APRIL 2024.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Mageto for the Plaintiff.

Mr. Chege for the 1st Defendant.



N/A for the 2nd & 3rd Defendants.

Court Assistant - Mutisya

