



Gaita v Kanyingi; Belgravia Services [K] Ltd (Interested Party) (Environment & Land Case E424 of 2021) [2024] KEELC 5129 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5129 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E424 OF 2021**

**JO MBOYA, J
JULY 10, 2024**

BETWEEN

JOHN MAHINDA GAITA PLAINTIFF

AND

MARTIN NG'ANG'A KANYINGI DEFENDANT

AND

BELGRAVIA SERVICES [K] LTD INTERESTED PARTY

JUDGMENT

Introduction and Background

1. The Plaintiff herein, who claims to be the registered owner and/or proprietor of the property described as House number 4 at Windy Ridge Estate situate on L.R No. 192/60 [hereinafter referred to as the suit property] commenced the instant suit vide Plaintiff dated the 9th December 2021 and in respect of which same sought for various reliefs.
2. Subsequently and with leave of the court, the Plaintiff filed an amended Plaintiff dated the 14th July 2023; and wherein same has impleaded the following reliefs;
 - a. The Defendant to pay the Plaintiff mesne profits amounting to Kes.9, 562, 061.10/= only which is broken down as follows;
 - b. The monthly rent for the period the Respondent was in unlawful occupation as follows;



Period	Number of Months	Monthly Rent	Total Reents [Kes]
30 th November 2019 to 30 th September 2020	10	Kes.292, 162.00	2, 921, 620.00
1 st October 2020 to 30 th September 2021	12	Kes.306, 770.00	3, 681, 240.00
1 st October to 23 rd March 2022	5 months and 23 days	Kes.322, 108.50	1, 849, 523.70

c. The service charge.

Period	Number of Months	Service Charge	Total rents
30 th November 2019 to 30 th September 2020	10	Kes.40, 000.00	400, 000.00
1 st October 2020 to 30 th September 2021	12	Kes.40, 000.00	480, 000.00
1 st October 2021 to 23 rd March 2022	5 Months and 23 days	Kes.40, 000.00	229, 677.00
TOTAL	27 months and 23 days	1, 109, 677.40	

d. Costs of the suit.

e. Interests on above at court rates from the date of the Judgment until payment in full.

3. Upon being served with the Plaintiff and the summons to enter appearance, the Defendant ultimately entered appearance and filed a statement of defence dated the 16th March 2023 and wherein same [Defendant] contended inter-alia that the Plaintiff herein has neither established nor demonstrated that same [Plaintiff] is the registered owner of the suit property to warrant a claim for mesne profits either in the manner adverted to at the foot of the amended Plaintiff or at all.
4. First forward, the instant suit came up for pretrial directions on the 26th October 2023 and the 8th December 2023, both days inclusive, whereupon the advocates for the respective parties intimated to the court that same had duly filed and exchanged the list and bundle of documents; list of witnesses and the witness statement. For good measure, the advocates for the respective parties intimated that the suit was thus ready for hearing.



5. Pursuant to and premised on the intimation [details in terms of the preceding paragraph] the court proceeded to and confirmed the matter as ready for hearing. Consequently, the matter was set down ready for hearing.

Evidence By The Parties’:

a. Plaintiff’s Case:

6. The Plaintiff’s case revolves around the evidence of two witness, namely, John Mahinda Gaita and Dickens Owuor Abiala, who testified as PW1 and PW2 respectively.
7. It was the testimony of PW1 [John Mahinda Gaita] that same is the Plaintiff in respect of the instant matter. Furthermore, the witness averred that by virtue of being the Plaintiff, same [witness] is therefore knowledgeable of and conversant with the facts of the instant matter.
8. Additionally, the witness averred that same has since recorded a witness statement dated the 9th December 2021 and which witness statement the witness [PW1] sought to adopt and rely on. In this regard, the witness statement dated the 9th December 2021 was thereafter adopted and constituted as the evidence in chief of the witness.
9. On the other hand, the witness also alluded to a further witness statement dated the 20th July 2022 and which statement the witness similarly sought to adopt and rely on. Suffice it to point out that the further witness statement was also adopted and constituted as further evidence in chief of the witness.
10. Other than the foregoing, the witness intimated to the court that same has filed a list and bundle of documents dated the 9th December 2021, containing three [3] documents. In this respect, the witness sought to adopt and produce the various documents as exhibits before the court.
11. There being no objection to the production of the documents at the foot of the list dated the 9th December 2021, same were thereafter admitted and marked as Exhibit[s] P1 to P3, respectively.
12. In addition, the witness also adverted to the further list and bundle of documents dated the 20th July 2022; and thereafter sought to adopt and produce the documents thereunder as exhibits before the court. For good measure, the documents at the foot of the said list were admitted and constituted as exhibits P4 to P6, respectively.
13. Furthermore, the witness also referenced the supplementary list and bundle of documents dated the 19th October 2023 and thereafter sought to tender and produced the documents at the foot thereof. Instructively, the documents at the foot of the said supplementary list were thereafter admitted and constituted as Exhibits P7 to p9 respectively.
14. It was the further testimony of the witness that same has since filed an amended Plaintiff dated the 14th July 2023; and which amended Plaintiff same [witness] implored the court to adopt and thereafter to grant the various reliefs articulated thereunder.
15. On cross examination by learned counsel for the Defendant, the witness herein averred that same is a business person engaged in real estate as well as motor vehicle business. For good measure, the witness testified that his businesses are located within the city of Nairobi.
16. It was the further testimony of the witness that same purchased the suit property from the previous owner, namely, the interested party herein. In this regard, the witness averred that a sale agreement was entered into and executed between himself [witness] and the interested party.



17. Furthermore, it was the evidence of the witness that the sale agreement contained the terms of the agreement and in any event, the terms of the said agreement were duly completed.
18. Whilst under further cross examination, the witness averred that the sale agreement has been tendered and produced before the court and that same is found at pages 21 to 32 of the Plaintiff's bundle of documents. Besides, the witness added that the sale agreement was prepared by the law firm of M/s Rafman Dhanji & Co Advocates.
19. Other than the foregoing, the witness averred that the purchase price pertaining to and concerning the suit property was agreed at Kes.60,000,000 [Sixty Million] only. In any event, the witness testified that same made payment pertaining to the deposit vide cheque which was remitted one week prior and/or before the execution of the sale agreement.
20. Be that as it may, it was the evidence of the witness that thereafter same forwarded to and in favour of the vendor [interested party] cash of Kes.6, 000, 000/= Only, in substitution of the cheque which had hitherto been remitted to the vendor.
21. Whilst under further cross examination, the witness averred that the issuance of the cheque for Kes.6, 000, 000/= Only, was a confirmation that same [witness] was indeed ready to purchase the suit property. For good measure, the witness added that the issuance of the cheque was a sign of commitment.
22. Additionally, it was the testimony of the witness that upon the payment of the cash of Kes.6, 000, 000/= the transaction advocates thereafter proceeded to and crafted the sale agreement. In any event, the witness averred that the payment of the deposit was duly received and acknowledged by the vendor. However, the witness admitted that same has not tendered or produced any evidence pertaining to the acknowledgement by the vendor.
23. It was the further testimony of the witness that the transfer of the suit property to himself was evidence of the payment of the purchase price. In particular, the witness reiterated that same duly paid the full purchase price in respect of the suit property.
24. On further cross examination, the witness testified that even though same paid the entire purchase to the vendor same [witness] has not produced any evidence to confirm such payments.
25. On the other hand, it was the evidence of the witness that the balance of the purchase price was paid sometimes in September 2020. Nevertheless, the witness conceded that the payment of the balance of the purchase price was made long after the lapse of the 60-day period stipulated in the sale agreement.
26. While still under cross examination, the witness averred that even though he paid the balance of the purchase price same [witness] does not have the details of the payment that were made. Nevertheless, the witness reiterated that the purchase price was indeed paid to the interested party.
27. It was the further evidence of the witness that during the period relating to the signing of the sale agreement up to and including the payment of the purchase price, same [witness] did not personally inform the Defendant that he [witness] was purchasing the suit property.
28. Further and in any event, the witness testified that between the 26th November 2019 to September 2020, the suit property was registered in the name of the interested party and not otherwise.
29. On the other hand, it was the testimony of the witness that the sale transaction pertaining to the acquisition of the suit property was handled by one transaction advocate, who represented both the vendor and the purchaser. To this end, the witness alluded to clause 1.1 of the sale agreement.



30. It was the further testimony of the witness that the lease pertaining to and concerning the suit property was duly lodged at the land registry. However, the witness clarified that the lodgement of the lease was not done by himself.
31. Whilst under further cross examination, it was the testimony of the witness that same [witness] believed that the lease was duly lodged at the land registry because same [witness] was issued with a copy of the duly registered lease.
32. Be that as it may, the witness admitted that same has neither tendered nor produced before the court a copy of the registered lease. Besides, the witness also admitted that same has also not tendered a copy of presentation book number of the receipt relative to the payments, if any that was made at the land registry. Nevertheless, the witness reiterated that same is the registered owner of the suit property.
33. While under further cross examination, the witness averred that same is no longer the registered proprietor of the suit property as of to date. For good measure, the witness averred that the suit property has since been disposed of.
34. It was the further testimony of the witness that same however became the registered owner of the suit property in September 2020. Instructively, the witness added that same became the registered owner of the suit property upon the registration of the lease. In any event, the witness averred that the lease in his favour was registered in September 2020.
35. Other than the foregoing, it was the testimony of the witness that same purchased the suit property in the year 2019 and that thereafter same [witness] anticipated to receive vacant possession. In any event, it was the testimony of the witness that vacant possession was to be granted unto him by the seller and the tenant who was in actual possession of the suit property.
36. Other than the foregoing, the witness testified that the tenant who was in possession of the suit property was duly informed of the sale of the suit property. For good measure, the witness averred that the tenant who was in possession of the suit property is the Defendant herein. Furthermore, the witness also averred that his advocates also wrote to the Defendant in December 2021.
37. On further cross examination, it was the testimony of the witness that same [witness] did not inform the Defendant that he was buying the house in 2019. Besides, the witness admitted that same has no letter to show and/or prove that the Defendant was informed that the property was being sold to the Plaintiff in the year 2019.
38. Nevertheless, it was the testimony of the witness that same was to receive vacant possession of the suit property upon conclusion of the terms of the sale agreement. In this regard, the witness adverted to clause 6.1 of the sale agreement.
39. Whilst under further cross examination, the witness pointed out that same [witness] was to receive vacant possession upon the registration of the lease. However, the witness averred that same only obtained the keys pertaining to the house in March 2022.
40. Furthermore, it was the testimony of the witness that the keys to the house were never handed over directly to him [witness] by the Defendant. On the contrary, the witness testified that the keys to the house were handed over to one Joshua Muinde, who was admittedly a representative of the interested party herein.
41. Whilst under still under cross examination for the Defendant, the witness averred that same only took possession of the house in March 2022 and not otherwise.



42. It was the further testimony of the witness that same became aware of a suit which had been filed by the Defendant herein as against the interested party and thereafter same [witness] filed an application seeking to be joined in the said suit. However, the witness added that the application for joinder in the said suit was thereafter withdrawn at his [witness] request/instructions.
43. Additionally, the witness averred that the dispute between the Defendant herein and the interested party was heard and disposed of vide Judgment which was rendered by the court on the 20th December 2021 and wherein the Defendant's case [suit] was dismissed.
44. It was the further testimony of the witness that same [witness] became the owner of the suit property when the lease in his favour was duly registered. Furthermore, the witness averred that thereafter same wrote to the Defendant in December 2021 and informed same [Defendant] of the fact that he [witness] was the registered owner of the suit property.
45. Be that as it may, the witness admitted that the letter which same [witness] wrote to the Defendant in December 2021 did not seek for payments of rents or mesne profits or at all from the Defendant. For good measure, the witness averred that same has not tendered any document to show that same [witness] ever demanded for rents from the Defendant.
46. On further cross examination, the witness stated that the pleadings in respect of the instant matter were duly served upon the interested party. Nevertheless, it was the testimony of the witness that despite service on the interested party same [interested party] has not responded to the issues at the foot of the pleadings.
47. Upon being referred to the letter at pages 136 of the Plaintiff's bundle of documents, the witness avers that the letter in question has not been authored by the interested party. In any event, it was the testimony of the witness that the letter under reference came from the law firm of M/s Rafman Dhanji Elms & Virdee Advocates LLP.
48. It was the further evidence of the witness that same [witness] has not tendered any document from the interested party to show that the interested party did not receive the rents for the period under reference.
49. Whilst still under cross examination, the witness admitted that same was not to be granted vacant possession of the suit property as at 26th November 2019. For good measure, the witness averred that 26th November 2019 was the date of the sale agreement.
50. Other than the foregoing, the witness averred that same was only entitled to vacant possession upon the formal registration of the lease.
51. Furthermore, the witness also stated that the purchase price pertaining to and in respect of the suit property was released to the vendor [interested party] before the lease was registered in his favour. In any event, the witness added and reiterated that same was entitled to vacant possession upon registration of the lease.
52. On the other hand, it was the testimony of the witness that the registration of the lease was to attract payment of stamp duty. Besides, the witness averred that stamp duty was chargeable at 4% of the purchase price.
53. While under further cross examination, the witness averred that same is aware that stamp duty was paid. However, the witness conceded that same [Witness] has not tendered and/or produced any evidence to show that stamp duty was paid.



54. Furthermore, it was the testimony of the witness that the document at pages 35 of the Plaintiff's bundle of documents does not show the date of presentation, the presentation book number and even the registration of the same. Besides, the witness also confirms that the lease at page 65 of the Plaintiff's bundle of documents also does not show any date of registration.
55. It was the further testimony of the witness that even though the lease is indicated to have been presented for registration at the land registry, there is no evidence that same was actually registered. Nevertheless, the witness testified that same is the owner of the suit property on the basis of the stamp reflected on the face of the lease instrument.
56. On re-examination by learned counsel for the Plaintiff, the witness pointed out that the sale agreement was entered into and executed by both parties. For good measure, the witness confirmed that same executed the sale agreement.
57. Besides, it was the testimony of the witness that both parties to the sale transaction also executed the lease over and in respect of the suit property. To this end, the witness adverted to the document at page 33 of the Plaintiff's bundle of documents.
58. Whilst under re- examination, the witness testified that same indeed paid the deposit towards the purchase of the suit property and emphasized that the cash payments were made to Ms. Susan Waithaka, who was the person in charge of finance[s] on behalf of the vendor [interested party].
59. Other than the foregoing, it was the testimony of the witness that same proceeded to and paid the balance of the purchase price. In any event, the witness added that the transaction pertaining to the sale of the suit property was duly concluded.
60. It was the further testimony of the witness that the lease in respect of the suit property was registered in September 2020. Nevertheless, the witness pointed out that the registered lease is not part of the documents tendered before the court.
61. On the other hand, the witness averred that same has filed the instant suit and in respect of which same [witness] is claiming rents and service charge as well as loss of income from the Defendant.
62. Finally, the witness averred that the Defendant herein did not pay any rents to and in favour of the premises before the court. In this regard, the witness reiterated that the suit before the court touches on and concerns claim for payment of rents and mesne profits.
63. The second witness who testified on behalf of the Plaintiff was one Dickens Owuor Abiala. Same testified as PW2.
64. It was the testimony of the witness [PW2] that same is a registered valuer and thus possessed and seized of the requisite knowledge in valuation. In any event, the witness averred that same was instructed by the Plaintiff herein to undertake valuation in respect of the suit property with a view to discerning the market rents payable from the property in question.
65. It was the further evidence of the witness that upon receipt of the instruction[s] from the Plaintiff same [witness] indeed complied with the instructions and undertook the requisite valuation. Besides, the witness pointed out that the valuation Report in question forms part of the record of the court.
66. Pertinently, the witness thereafter sought to tender and produced the valuation report as an exhibit. Instructively, the valuation report was tendered and produced as Exhibit P9.
67. On cross examination by learned counsel for the Defendant, the witness [PW2] averred that same received instruction from the Plaintiff to undertake inspection of the suit property and thereafter



- prepare a valuation report. Nevertheless, the witness averred that prior to undertaking the inspection, same [witness] was only issued with a copy of the lease.
68. Whilst under further cross examination, the witness averred that same was not issued with a certificate of lease or a copy thereof. Furthermore, the witness conceded that same did not procure and/or obtain any certificate of official search over and in respect of the suit property.
 69. Be that as it may, it was the testimony of the witness that same [PW2] believed the information that was given unto him by the Plaintiff.
 70. On re-examination by learned counsel for the Plaintiff, the witness averred that same was instructed to undertake inspection and valuation of the suit property. Furthermore, the witness averred that upon receipt of the instruction[s] same proceeded to and indeed undertook the inspection.
 71. On further re-examination, the witness averred that same did not undertake any official search over and in respect of the suit property. In any event, the witness averred that same deemed the copy of the lease which was handed over to him by the Plaintiff as sufficient for purposes of valuation.
 72. With the foregoing testimony, the Plaintiff's case was closed.

b. The Defendant's Case:

73. The Defendant's case is anchored on the evidence of one witness; namely, Martin Ngángá Kanyingi. Same testified as DW1.
74. It was the testimony of the witness [DW1] that same is the Defendant in respect of the instant matter. Furthermore, the witness averred that by virtue of being the Defendant, same is conversant with the facts of the instant matter.
75. Additionally, the witness testified that same has since recorded a witness statement dated the 25th April 2023; and which witness statement the witness sought to adopt and rely on. For good measure, the witness statement dated the 25th April 2023 was thereafter adopted and constituted as the evidence in chief of the witness.
76. Other than the foregoing, the witness adverted to the list and bundle of document dated the 25th April 2023 and thereafter sought to tender and produce the documents thereunder as exhibits before the court. Suffice it to point out that the documents at the foot of the list under reference were thereafter admitted and marked as Exhibits D1 to D7, respectively.
77. It was the further testimony of the witness that same [witness] has also filed a statement of defence dated the 10th August 2023; and which statement of defence the witness sought to adopt and rely on.
78. On cross examination by learned counsel for the Plaintiff, the witness averred that same entered into a lease/tenancy agreement with the interested party over and in respect of the suit property. For good measure, the witness added that the tenancy agreement was dated the 1st October 2018.
79. It was the further testimony of the witness that subsequently the interested party, who was the landlord of the premises issued and served him [witness] with a termination notice dated the 31st August 2019. Besides, the witness averred that upon receipt of the termination notice issued by the interested party herein same [witness] proceeded to and filed a suit, namely ELC No. 412 of 2019.
80. Whilst under further cross examination, the witness averred that the suit [ELC No. 412 of 2019] was thereafter heard and determined vide judgment rendered on the 20th December 2021.



81. Other than the foregoing, it was the testimony of the witness that same also received a letter which was issued by the Plaintiff herein. Instructively, the witness adverted to the letter dated 1st December 2019.
82. It was the further testimony of the witness that same subsequently vacated the suit premises and handed over vacant possession to the interested party. Nevertheless, the witness averred that between the 20th December 2021 to 23rd March 2022 same [witness] was in occupation of the suit property.
83. Whilst under further cross examination, the witness testified that during the time when same was in occupation of the suit property same [witness] instructed his advocate [Rafman Dhanji Elms & Virdee LLP] to release monies on account of rents to the interested party. In this respect, the witness averred that same paid the entire rents pertaining to the suit property.
84. Nevertheless, on further cross examination, the witness averred that the interested party and himself undertook reconciliation as pertains to the payment of rents. However, the witness added that despite undertaking the reconciliation same [witness] has not produced before the court the records pertaining to the accounts that were taken between himself and the interested party [landlord].
85. On re-examination, by learned counsel for the Defendant, the witness averred that the rents in respect of the suit property were being paid by himself, albeit through his company. In any event, the witness added that the rents in respect of the period being claimed by the Plaintiff herein were duly paid.
86. Whilst under further re-examination, the witness averred that the Judgment of the court which was rendered on the 20th December 2021 directed same [witness] to hand over the suit property to the interested party. In this regard, the witness averred that he proceeded to and handed over the suit property to the interested party in compliance with the Judgment of the court.
87. Other than the foregoing, the witness averred that same paid all the rents that were due and payable to the interested party. Upon being referred to the letter at page 136 of the Plaintiff's bundle of document, the witness averred that same was a copy of letter written at the request of the Plaintiff herein.
88. With the foregoing testimony, the Defendant's case was duly closed.

Parties' submissions

89. Upon the close of the Defendant's case on the 11th March 2024, the advocates for the respective parties covenanted to file and exchange written submissions. Consequently and in this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
90. At any rate, it suffices to point out that thereafter the Plaintiff proceeded to and filed written submissions dated the 25th April 2024 and wherein the Plaintiff has isolated, highlighted and canvassed three [3] pertinent issues; namely, whether the Plaintiff was the lawful owner of the suit property between the 30th November 2019 till the 23rd March 2022; whether the Defendant was in unlawful occupation of the suit property between the 30th November 2019 till the 23rd March 2022; and whether the Plaintiff is entitled to mesne profits in terms of the amended plaint.
91. On the other hand, learned counsel for the Defendant filed written submissions dated and in respect of which same [counsel] highlighted four [4] issues for consideration.
92. Suffice it to point out that the two [2] sets of written submissions forms part of the record of the court. Nevertheless, even though the court has not rehashed and or reproduced the contents of the written submissions in the body of the Judgment it is imperative to underscore that same have been duly taken into account and indeed considered.



93. Furthermore, it would be remis of the court not to acknowledge and appreciate the comprehensive and illuminating submissions together with the case law that have been cited and relied upon by the respective advocates. For good measure, the court is truly indebted to the respective advocates for highlighting critical issues that would assist the court in determining the issues in dispute.

Issues For Determination:

94. Having reviewed the pleadings filed; the evidence [both oral and documentary] and upon consideration of the written submissions filed on behalf of the respective parties, the following issues do arise [emerge] and are thus worthy of determination;
- i. Whether the Plaintiff herein has established and proved his claim to be the registered owner of the suit property or otherwise.
 - ii. Whether the Plaintiff is entitled to mesne profits either as claimed or otherwise; and if so, the quantum thereof.
 - iii. What reliefs/orders ought to be granted.

Analysis And Determination

Issue Number 1 Whether the Plaintiff herein has established and proved his claim to be the registered owner of the suit property or otherwise.

95. The Plaintiff filed the instant suit and in respect of which same [Plaintiff] has described himself as the registered owner of the property in question. To this end, it suffices to reproduce the contents of paragraphs 4 and 12 of the amended Plaint dated the 14th July 2023.
96. Same are reproduced as hereunder;
4. the Plaintiff is the registered owner of the property known as House Number Four at Windi Ridge Estate being part of L.R No. 192/60 [the property]
 12. as the registered owner of the property, the Plaintiff did not have any tenancy or lease agreement with the Defendant and did not in any way consent to the Defendant being in possession and/or occupation of the property. The Defendant is/was therefore a trespasser on the property and this was the finding of this court in ELC No. 412 of 2019.
97. Upon being served with the suit pleadings, the Defendant herein filed a statement of defence and which was thereafter amended vide amended statement of defence dated the 10th August 2023; and wherein same inter-alia stated as hereunder;
10. The Defendant further avers that the Plaintiff not being the registered owner of the suit property had no legal rights to enforce against the Defendant. The Defendant remained unaware of any interests acquired by the Plaintiff in the suit property, if any.
98. From the contents of paragraph 10 of the amended statement of defence, the Defendant herein espouses a position that the Plaintiff has never been and is not the registered proprietor of the suit property and thus by virtue of not being the registered proprietor, [registered Owner] the Plaintiff is not entitled to the relief[s] being claimed.
99. To my mind, what comes out of the statement of defence by the Defendant is that same is contesting the Plaintiff's registration as the owner and/or proprietor of the suit property and by extension the reliefs sought thereunder.



100. Owing to the fact that the Plaintiff's claim to be the registered owner and/or proprietor of House Number Four [4] situate on L.R No. 192/60 [suit property], is under contest, it behooved the Plaintiff to tender and produce before the court evidence to demonstrate his ownership to and in respect of the suit property.
101. In any event, there is no gainsaying that it is the Plaintiff who has asserted that same [Plaintiff] is the registered owner of the suit property and thus same [Plaintiff] is by law obligated to tender evidence towards proving the said assertion.
102. Put differently, the burden of proving that same [Plaintiff] is the registered owner of the suit property lies on the shoulders of the Plaintiff and not otherwise. Instructively, this is the import and tenor of the provisions of Section 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya.
103. Other than the foregoing, the position that the burden of proof falls upon the Plaintiff to prove his/her case on a balance of probabilities has also been amplified in a plethora of decisions.
104. To this end, I beg to cite and highlight just a few. To start with, the legal requirement that the Plaintiff [Claimant] is chargeable with the burden of proof was underscored by the Court of Appeal in the case of Daniel Toroitich Arp Moi versus Mwangi Stephen Muriithi [2014] eKLR, where the court stated thus;

With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence, when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the Evidence Act to be demanding of a party like the 1st respondent that:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

105. Furthermore, the court ventured forward and stated thus;

It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

106. Likewise, in the case of Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR, the Supreme Court of Kenya [the apex court] amplified the incident of burden of proof in the manner following;

- (49) Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “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.”



[50] This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...”

- (51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.
107. From the foregoing case law, it is trite and established that the burden of proving the assertion that the Plaintiff is the registered owner of the suit property, which is a critical and integral fact, underpinning the suit beforehand lies on the shoulders of the Plaintiff.
108. Having taken cognizance of the trite and established position of the law, [details in terms of the preceding paragraph], it is now appropriate to revert back to the suit and to discern whether the Plaintiff has indeed placed before the court evidence towards proving the assertion beforehand.
109. To start with, it was the evidence of the Plaintiff that same entered into a sale agreement with the interested party on the 26th November 2019; and which sale agreement was thereafter executed by the respective parties. For good measure, the sale agreement was tendered and produced before the court as exhibit P1.
110. Furthermore, the Plaintiff also averred that upon the execution of the sale agreement same paid the requisite purchase price/consideration and ultimately a lease was entered into and thereafter registered at the land registry sometimes in September 2020. However, there is no gainsaying that the Plaintiff herein did not tender and/or produce before the court registered lease and/or certificate of lease, to confirm that indeed the lease in question was actualized by way of registration.
111. To put the Plaintiff's evidence into perspective, it suffices to take cognizance of certain aspects of the evidence that was tendered by the Plaintiff, who testified as Pw1.
112. Whilst under cross examination by learned counsel for the Defendant, Pw1 stated thus;
- “The lease was duly lodged at the land registry. I am not the one who lodged the lease at the land registry. However, I presumed that the same was duly lodged at the land registry. I believed that the same was duly lodged because I received a copy duly registered at the land registry. I have not presented the memorandum of presentation and the receipt for payment made at the land registry”
113. Additionally, PW1 further stated thus;
- “I am the registered owner of the suit property. However, I am not the registered owner of the suit property as at to date. I wish to add that I have since disposed of the same. However, I became the registered owner in September 2020. I became the registered owner upon the registration of the suit property in my name”



114. In the course of further cross examination, PW1 stated and averred as hereunder;
- “That the lease in my favour was registered in 2020. However, I have not availed to court a copy of the registered lease. The lease at page 65 of the bundle herein does not show any date of registration”
115. From the testimony, [details which have been reproduced in the preceding paragraph], it is evident and apparent that though the Plaintiff tendered and produced before the court a copy of the sale agreement and the lease, same [Plaintiff] however, was unable to tender evidence of a registered lease or a certificate of lease.
116. Notwithstanding the failure to tender and/or produce a copy of the registered lease or the resultant certificate of lease, if any, the Plaintiff still maintained that same [Plaintiff] is the registered owner of the suit property.
117. To my mind, any person, the Plaintiff not excepted can only contend that same is the registered owner of the designated property [suit property], upon production of the requisite certificate of lease or title [depending on the designated registration regime].
118. Expressed differently, it is the issuance of a certificate of tile or lease [whichever is the case] that denotes the registration of a particular person as the owner of the property in question. Barring possession of a certificate of lease or title, one cannot purport to be the registered owner of [sic] the property in question.
119. I beg to point out that the Plaintiff may very well be the owner of the suit property or may have been the owner of the suit property, but without producing and tendering the ownership documents [certificate of lease/title], this court cannot be called upon to proceed on the basis of conjecture speculation and/or hypothesis.
120. Worse still, this court cannot be invited to venture forward and make a finding on the basis of a sale agreement and an unregistered lease [which are inchoate documents] and thereafter imagine that the said documents may have been lodged for registration and/or registered.
121. In my considered view, the burden of proving that the Plaintiff was indeed the registered proprietor of the suit property, which in my humble view is a pertinent fact underpinning the claim beforehand, laid on the shoulders of the Plaintiff.
122. At any rate, it is not lost on this court that the Defendant indeed put the Plaintiff and his learned counsel on notice that there was a contest as pertains to whether or not the Plaintiff was ever the registered proprietor of the suit property.
123. Nevertheless and despite the pleading[s] to that effect, the Plaintiff herein and his legal counsel, appeared to have been content with the sale agreement and [sic] the unregistered lease which was produced as exhibit P2. [See pages 33 to 65 of the Plaintiff's bundle].
124. Before departing from the issue herein, it suffices to draw the attention of the Plaintiff and his learned counsel to the provisions of Sections 24 and 25 of the [Land Registration Act, 2012](#).
125. For ease of reference same are reproduced as hereunder;
24. Interest conferred by registration Subject to this Act—



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

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

126. Finally, the import and significance of registration and the attendant issuance of a certificate of title/ lease was amplified by the court of appeal in the case of Elizabeth Wambui Githinji v Kenya urban Roads Authority & Another [2019]eKLR. [See the Judgment of Ouko JA].

127. Arising from the foregoing, my answer to issue number one is to the effect that the Plaintiff herein has neither established nor demonstrated to the court that same was the registered owner of the suit property.

128. For good measure, I reiterate that this court, just any other Court, is obligated to make decision[s] on the basis of empirical evidence, as opposed to assumption, conjecture, belief or hypothesis.

Issue Number 2 Whether the Plaintiff is entitled to mesne profits either as claimed or otherwise; and if so, the quantum thereof.

129. Having disposed of issue number one, which essentially gravitates around ownership of the suit property, the next issue that merits discussion touches on and concerns the meaning and import of mesne profits and the person to whom mesne profits are payable.

130. To start with, it is imperative to discern and ascertain the meaning and import of mesne profits. In this regard, I shall endeavour to cite various decision wherein courts have hitherto amplified the definition of mesne profits.

131. In the case of Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR, the court [Mativo J as then was] highlighted the meaning of mesne profits as hereunder;

In Bramwell vs. Bramwell, Justice Goddard stated that "... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord



and tenant." Similarly, in an Australian case, *Williams & Bradley v Tobiasen* it was stated that these words: "Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.

The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant's possession, or right to possession, which has been interfered with.

A more useful description of mesne profits can be found in Halsburys Laws of England, which defines mesne profits as an action by a land owner against another who is trespassing on the owner's lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession, or the tenant's interest in the land has come to an end.

Halsburys, *op. cit.*, 4th, above, suggests that where mesne profits are awarded they usually follow the previous rent rate and in the absence of that, a fair market value rent.

The Black's Law Dictionary defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession between (2) two dates." The Concise Oxford English Dictionary defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord."

The term 'mesne profits' relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore.

As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.

132. On the other hand, the Court of Appeal for Eastern Africa [EACA] had occasion to deal with the meaning and import of mesne profits in the case of *Rioki Estate Co (1970) Ltd v Kinuthia Njoroge* [1977] eKLR, where it was held thus;

I think that there is some merit in this argument, particularly having regard to the definition of "mesne profits" in section 2 of the *Civil Procedure Act*. The section provides:

Mesne profits, 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.



133. Furthermore, what constitutes mesne profits and the circumstances under which same can be decreed was also highlighted by the court of appeal in the case of Attorney General v Halal Meat Products Limited [2016] eKLR, where the court stated as hereunder;

It follows therefore that where a person is wrongfully deprived of his property, he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42.

134. Flowing from the excerpts [supra], it is imperative to underscore that mesne profits are only claimable by and/or payable to the land owner, who has unlawfully been dispossessed and/or deprived of his/her rights to and in respect of the designated property.

135. Pertinently, prior to and before one, the Plaintiff not excepted can stake a claim for mesne profits, it behooves same [Plaintiff] to place before the court evidence underpinning his ownership rights.

136. However, whilst discussing issue number one [1] elsewhere herein before, this court has since found and held that the Plaintiff did not tender and/or produce a copy of the registered lease or the requisite certificate of lease to signify ownership of the suit property.

137. Additionally, it is worth repeating that this court has also found and held that it is the issuance of a certificate of title/lease, which bestows/confers upon a person, in this case the Plaintiff of ownership rights which would entitle same [the Plaintiff] to stake a claim for mesne profits.

138. In my humble view, the failure by the Plaintiff to demonstrate and/or prove to the court on a balance of probability that same [Plaintiff] is/was the registered owner of the suit property, negates and diminishes the foundation underpinning a claim for mesne profits.

139. In a nutshell, I am hard pressed to find and hold that the Plaintiff herein has not satisfied the threshold to warrant a decree on account of mesne profits, in the manner envisaged under the Law.

Issue Number 3 What reliefs/orders ought to be granted.

140. Notwithstanding the findings which have been highlighted whilst discussing issue number two [2] hereof, there is still yet another perspective that merits a short discussion.

141. To this end, I beg to address the question as to whether or not the Plaintiff has proved that same was entitled to take possession of the suit property and that his rights to take possession were negated and/or defeated by the offensive actions of the Defendant.

142. Firstly, it is important to recall that the Plaintiff herein was relying on the terms of the lease agreement dated 26th November 2019 and contending that same was entitled to possession of the suit property. Consequently and in this regard, it suffices to take cognizance of clause 6 of the lease.

143. Same provides as hereunder;

6.1 The vendor will grant the purchaser vacant possession of the property upon registration of the lease in favour of the purchaser or when the vendor shall be entitled to release of the purchase price to them on the terms hereof, if earlier”

144. My understanding of the said clause [supra] is to the effect that the Plaintiff herein would only be entitled to vacant possession of the suit property upon registration of the lease. To this end, it thus means that the Plaintiff was obligated to demonstrate and prove the registration of the lease. Unfortunately, this court has found and held that no registered lease was ever placed before the court.



145. Secondly, the Plaintiff would have been entitled to vacant possession upon demonstration that the purchase price was released to the vendor. Yet again, evidence abound that the Plaintiff was unable to demonstrate when that purchase price or the balance thereof was remitted.
146. To my recollection, the Plaintiff conceded during cross examination that same had not tendered any document [evidence] to demonstrate when the balance of the purchase price was released to the vendor [interested party].
147. In my humble view, proof of the ingredient[s] captured and underpinned by clause 6.1 of the lease, would also be essential in discerning the Plaintiffs entitlement to mesne profits if at all.
148. Other than the foregoing, it is also worth stating that another aspect of the Plaintiff's claim gravitate[s] around payment of rent for the period the Respondent was in unlawful occupation of the suit property. For clarity, what is [sic] claimed as rents have thereafter been tabulated at the foot of the amended Plaint.
149. Be that as it may, it is my humble view, that a claim for rents can only arise and/or be pursued where there is a landlord- tenant relationship and not otherwise. For good measure, no evidence was ever tendered to demonstrate that the Plaintiff and the Defendant had such a relationship.
150. On the contrary, I am aware that the Plaintiff herein tendered evidence and clarified that same had no tenancy relationship with the Defendant. In any event, the Defendant herein only had a tenancy relationship with the interested party and which tenancy was duly terminated by the interested party.
151. Finally, the Plaintiff also sought for service charge. Be that as it may, it is my finding and holding that service charge presupposes the existence of a contract between the claimant and the adverse party and wherein there is a clause underpinning payments of service charge.
152. However, in respect of the instant matter, it suffices to reiterate that there was no such contract. In any event, the claim for service charge seems to be anchored on the basis of the tenancy agreement dated the 1st October 2018. Nevertheless, it is worth recalling that the said tenancy agreement was between the interested party [landlord and the Defendant herein] and not otherwise.
153. To my mind, the Plaintiff herein was not privy to the said tenancy agreement and cannot therefore seek to attract a benefit out of the tenancy agreement or at all. Simply put, the doctrine of privity of contract prohibits such a claim. [See Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR].
154. In a nutshell, the Plaintiff's claim is devoid of substance.

Final Disposition:

155. Flowing from the discussion [details highlighted in the body of the Judgment], I come to the conclusion that the Plaintiff has neither established not proved his claim to the requisite standard.
156. Consequently, and in the premises, I am minded to and do hereby make the following Final orders;
- i. The Plaintiff's suit be and is hereby dismissed.
 - ii. Cost of the suit be and are hereby awarded to the Defendant and same shall be agreed upon and/or taxed in the conventional manner.
157. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY 2024.



OGUTTU MBOYA

JUDGE.

In the presence of:

Benson/ Brian: court Assistant.

Ms. Gakure h/b for Mr. James Warioto for the Plaintiff.

Ms. Gachinga h/b for Mr. Collins Namachanja for the Defendant.

