



**Githaiga & another (Suing as Legal Representative of the Estate of the Late James Githaiga Kuria) v Karanja (Environment & Land Case E059 of 2021) [2023] KEELC 599 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 599 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E059 OF 2021**

**JO MBOYA, J  
FEBRUARY 9, 2023**

**BETWEEN**

**GRACE WANJIRU GITHAIGA ..... 1<sup>ST</sup> PLAINTIFF  
PAUL KURIA GITHAIGA ..... 2<sup>ND</sup> PLAINTIFF  
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JAMES  
GITHAIGA KURIA**

**AND**

**JOHNSON GITHII KARANJA ..... DEFENDANT**

**JUDGMENT**

**INTRODUCTION AND BACKGROUND:**

1. Vide Plaintiff dated the 17<sup>th</sup> February 2021, the Plaintiffs' herein have approached the Honourable court seeking for the following reliefs;
  - i. A declaration that the lease between the Defendant and the Deceased dated 30<sup>th</sup> June 2015 was renewed upon expiry on 30<sup>th</sup> August 2021.
  - ii. A declaration that the lease renewed on 4<sup>th</sup> September 2021 shall expire on 30<sup>th</sup> October 2025.
  - iii. A declaration that the developments and structures within the Defendant's Property known as Land Reference Numbers: 209/18279 and 209/18280, Digo Road, Nairobi belongs to the Deceased's Estate.
  - iv. A Permanent order of Injunction restraining the Defendant whether by himself, his servants, agents, or any person whomsoever from doing any of the following acts, that is to say, evicting the Plaintiffs and their sub-tenants, demolishing the building, selling, leasing, charging or



otherwise howsoever interfering with the Plaintiffs'/Applicants' quiet, peaceful, actual and exclusive possession, sub-lease, user, development and enjoyment of the parcels of land known as Land Reference Numbers:209/18279 and 209/18280, DIGO ROAD, NAIROBI.

- v. Cost of this suit.
  - vi. Any such further or other relief as this Honourable court deems fit to grant.
2. Upon being served with the Plaint and Summons to Enter Appearance, pertaining to and concerning the subject matter, the Defendant duly entered appearance and thereafter filed a Statement of Defense and Counter-claim. For completeness, the Defendant sought for the following relief at the foot of the counterclaim:
- a. A Permanent injunction to restrain the Plaintiffs and their agents from trespassing, interfering, claiming of dealing in any way with the Defendant property no. Land Reference Numbers 209/18279.
  - b. An Order for the Plaintiff to indemnify the Defendant in respect of third-party liabilities that may arise out of their use of the land.
  - c. An Account and payment of all proceeds derived from the property since 1<sup>st</sup> December 2020.
  - d. Mesne Profits from 1<sup>st</sup> December 2020.
  - e. General damages for Trespass.
  - f. Costs of the suit.
  - g. Any other relief this court may deem fit to grant.
3. Following the filing and service of the Statement of Defense and Counter-claim, the Plaintiff was obliged to file and serve a Reply to Defense and Defense to Counter-claim. In this regard, it suffices to point out that indeed a Reply to Defense and Defense to Counter-claim was duly filed.
4. Subsequent to and upon the close pf pleadings, the Parties herein agreed to have the dispute to be referred to Court annexed mediation. In this regard and premised on the agreement by the Parties, the dispute herein was duly referred to Court annexed mediation, by a Mediator duly appointed by the Honourable court.
5. Pursuant to and arising from the order referring the dispute to mediation, both Parties appeared before Mr. Sammy Masila, being the appointed mediator, with a view to settling the dispute vide mediation.
6. However, despite bests efforts by the court appointed mediator, the parties herein were unable to resolve the dispute. Consequently, the court annexed mediator filed a report indicating that the Parties were unable to reach and arrive at a settlement.
7. Consequently and as a result of the foregoing, the dispute herein reverted to court and thereafter the Parties tendered and adduced their evidence.
8. For coherence, both the Plaintiff and the Defendant called one witness a piece and thereafter their respective cases were duly closed.



## Evidence by the Parties

### A. Plaintiffs' case:

9. The Plaintiffs' case gravitates and revolves around the evidence of the 1<sup>st</sup> Plaintiff, namely, Grace Wanjiru Githaiga, who testified as PW1.
10. PW1 testified that same is one of the widows of James Githaiga Kuria, now deceased who had hitherto entered into a lease agreement over and in respect of Land Reference Numbers: 209/18279 and 209/18280, respectively, with the Defendant herein. For clarity, the witness pointed out that the lease agreement was entered into and executed on the 30<sup>th</sup> June 2015.
11. Additionally, the witness averred that according to the lease agreement, which was entered into and executed on the 30<sup>th</sup> June 2015, the deceased herein agreed and covenanted with the Defendant that the lease in question shall subsist for a period of five years and three months.
12. On the other hand, the witness testify that it was also agreed between the deceased and the Defendant that the rents in respect of the demised premises was to be paid on a monthly basis and the quantum of the rents due and payable, were duly articulated and contained at the foot of the named lease agreement.
13. It was the further testimony of the witness that when the terms of the lease agreement lapsed, the deceased and the Defendant herein entered into verbal negotiations with a view to extending the terms of lease. In this regard, the witness added that the terms of the lease were duly extended on or about the 4<sup>th</sup> of September 2021.
14. In any event, the witness continued that by the time when the deceased was taken ill, there was rent arrears in respect of the month of November and December 2020 as well as January 2021. Nevertheless, the witness stated that same proceeded to and paid the entire amount of rent arrears in January 2021. For clarity, the witness averred that the outstanding rent arrears of Kes.690, 000/= only, were cleared vide Swift Transfer remittance made on the 7<sup>th</sup> January 2021.
15. In addition, the witness testified that prior to the death of the deceased, the deceased informed her that the lease agreement had been renewed and that the only adjustment was in respect of the monthly rents, which was agreed at in the sum of Kes.280, 000/= Only, effective September 2021.
16. Other than the foregoing, the witness further testified that during the lifetime of the lease agreement, which was entered into and executed on the 30<sup>th</sup> June 2015, the tenant, now deceased, was allowed to construct and or erect structures on the demised premises. In this regard, the witness added that pursuant to and in line with the terms of the said lease agreement, the deceased commenced and constructed a Four storey building on the demised property.
17. Furthermore, the witness added that the building that was constructed on the demised property costed the deceased approximately Kes.40, 000, 000/=, a fact which is well known to the Defendant herein.
18. Be that as it may, the witness added that upon the death of the deceased, the Defendant herein started to demand and insist that the Plaintiffs ought to vacate the suit properties, insofar as the term of the lease had lapsed and stood extinguished.
19. It was the further testimony of the witness that in the alternative, the Defendant insisted that if the Plaintiffs were to remain on the suit property, then same were to enter into and execute a new lease agreement, based on new terms. For clarity, the witness added that the Defendant demanded that the monthly rents in respect of the new lease would be Kes.900, 000/= only, per month.



20. In addition, the witness averred that the Defendant even went ahead and prepared a draft lease, which was forwarded to the 2<sup>nd</sup> Plaintiff, for purposes of execution. However, the witness continued and averred that the terms of the draft lease agreement were so onerous and hence same was not executed.
21. Notwithstanding the foregoing, the witness has further averred that the Defendant herein has continuously harassed and intimidated both the Second Plaintiff and herself, demanding that either same do sign a new lease agreement or better still vacate the suit properties.
22. Be that as it may, the witness has testified that the buildings on the suit properties was constructed and erected by the deceased and not otherwise and hence the Defendant herein cannot lay claim to the said building.
23. At any rate, the witness has added that unless the court grants the reliefs sought at the foot of the Plaint, the Defendant herein will evict the 2<sup>nd</sup> and Plaintiff and herself and thus subject same to extreme prejudice and suffering. Consequently, the witness impressed upon the court to inter-alia, grant an order of Permanent Injunction to bar and restrain the Defendant from evicting same from the suit properties.
24. Furthermore, the witness referred to her witness statement dated the 17<sup>th</sup> February 2021 and same sought to adopt and rely on the said witness statement. In this regard, the witness statement dated the 17<sup>th</sup> February 2021 was admitted and duly adopted as the evidence in chief of the witness.
25. Additionally, the witness also referred to the List and Bundle of documents dated the 14<sup>th</sup> June 2022 and sought to adopt and rely on the named documents, contained and alluded to at the foot of the said List of Documents.
26. Pursuant to and at the request of the witness, the documents contained at the foot of the list of documents dated the 14<sup>th</sup> June 2022 were produced and admitted as Plaintiff's exhibits 1 to 6 respectively.
27. On cross examination by counsel for the Defendant, the witness admitted and conceded that the lease agreement which was executed on the 30<sup>th</sup> June 2015, was to subsist for a period of five years and three months. For clarity, the witness added that the lease in question lapsed in January 2020.
28. In addition, the witness stated that there was no written renewal of the lease. In any event, the witness stated that the document at page 21 of her bundle refers to the draft lease agreement.
29. Nevertheless, the witness added that the draft lease agreement, was never executed or at all.
30. Furthermore, the witness also averred that immediately prior to the death of her husband, who was the Tenant in the suit properties, there were negotiations aimed at renewing the lease. However, the witness clarified that the said negotiations were not concluded and hence the proposed renewal did not materialize.
31. Additionally, the witness stated that it is the Defendant who has refused and declined to execute the renewal agreement.
32. On the other hand, the witness stated that despite the lapse of the lease agreement which was entered into and executed on the 30<sup>th</sup> June 2015, she is the one who is still in occupation and possession of the suit properties.
33. In any event, the witness has averred that same has continued to pay and remit rents to the Defendant. In this regard, the witness added that same must be paying rents of Kes.280, 000/= Only.



34. Other than the foregoing, the witness has added that same is aware that the court previously made an order, directing that the rents arising and emanating from the suit properties be deposited in a Joint Interest earning account in the names of the advocates for the respective Parties.
35. On re-examination, the witness added that the lease that was executed was for a duration of 5 years and 3 months. Besides, the witness averred that the said lease lapsed and same was not extended.
36. With the foregoing testimony, the Plaintiffs' case was closed.

#### **B. Defendant's Case:**

37. Similarly, the defense case revolves around the evidence of one witness namely, Johnson Githii Karanja, who testified as DW1.
38. It was the testimony of DW1 that same is the registered owner and proprietor of the suit properties herein.
39. Furthermore, the witness averred that on or about the 30<sup>th</sup> June 2015, same entered into and executed a lease agreement with one James Githaiga Kuria, now deceased, whereby same demised to and in favor of the deceased the suit properties for a duration of 5 years and 3 months, w.e.f 1<sup>st</sup> July 2015.
40. It was the further evidence of the witness that pursuant to the terms of the lease agreement, the deceased was at liberty to erect and construct a building on the suit properties, for purposes of his own use. However, the witness added that it was also agreed that upon the termination or determination of the lease, the deceased would remove the building or structures erected on the suit properties and to restore the suit properties to the status in which same were at the onset of the lease agreement.
41. In addition, the witness also averred that the lease agreement which was entered into and executed between himself and James Githaiga Kuria, now deceased stipulated the monthly rents, which were payable over and in respect of the duration/term of the lease.
42. Other than the foregoing, the witness averred that the lease agreement which was entered into and executed between him and the deceased lapsed at the end of September 2020 and thereafter the deceased and himself verbally/orally agreed that the monthly rents in respect of the suit properties would be increased to Kes.280, 000/= only, per month, pending formalization and conclusion of negotiation or renewal.
43. Be that as it may, the witness testified that the deceased passed on or died prior to and before the conclusion of the negotiations. In this regard, the witness added that the terms of the lease agreement were therefore not formally renewed.
44. Nevertheless, it was the further testimony of the witness that shortly after the death of the deceased, the Plaintiffs herein failed to pursue the issue of negotiations towards renewal of the lease agreement. Instead, the witness contended that the Plaintiffs herein proceeded to and gave instructions to the subtenants who are in occupation of the suit properties to commence and be paying rents to the 1<sup>st</sup> Plaintiff.
45. Furthermore, the witness stated that the lease over and in respect of the suit properties lapsed and terminated. In this regard, the witness has added that the Plaintiffs herein do not have any lawful basis to occupy and remain in the suit premises.
46. Additionally, the witness has averred that the continued occupation, possession and use of the suit premises by and at the instance of the Plaintiffs constitutes trespass to the suit properties.



47. Based on the foregoing, the witness has therefore implored the court to find and hold that the Plaintiffs herein do not have any lawful claim to the suit properties and hence same ought to be evicted therefrom.
48. In addition, the witness has referred to his written statement dated the 30<sup>th</sup> September 2021 and sought to rely on the contents thereof. For clarity, the witness statement dated the 30<sup>th</sup> September 2021, was thereafter duly admitted and constituted as the evidence in chief of the witness.
49. On the other hand, the witness also referred to the list and bundle of documents dated the 30<sup>th</sup> September 2021 and sought to adopt and rely on the documents named and contained thereunder. In this regard, the documents at the foot of the said lease were produced and admitted as exhibits D1 and D2, respectively.
50. On cross examination, the witness pointed out and admitted that same duly entered into and executed the lease agreement dated the 30<sup>th</sup> June 2015.
51. In addition, the witness stated that at the time when same entered into and executed the lease agreement, the suit properties, which were being leased were not developed. For clarity, the witness acknowledged that the Parcels of Land were bare.
52. On the other hand, the witness stated that the building standing on the suit properties was build and constructed by the deceased. However, the witness contended that the terms of the lease agreement were explicit.
53. Additionally, the witness stated that the lease agreement which was entered into and executed on the 30<sup>th</sup> June 2015 lapsed and expired in September 2020.
54. Whilst still under cross examination, the witness added that upon the lapse/expiry of the terms of the lease, the deceased approached same with a view to discussing and negotiating on the renewal of the lease.
55. Besides, the witness added that the discussions pertaining to and concerning the renewal of the lease were verbal and same were never reduced into writings.
56. Be that as it may, the witness averred that the renewal of the lease was neither realized nor achieved insofar as the deceased passed on before any formal agreement could be entered into or executed.
57. Furthermore, the witness stated that on or about the year 2021, same prepared a draft lease agreement and forwarded the draft to the 2<sup>nd</sup> Plaintiff herein, for purposes of consideration and execution. However, the witness added that the draft Lease agreement was neither acted upon nor executed by the 2<sup>nd</sup> Plaintiff or at all.
58. Finally, the witness stated that according to the terms of the lease agreement dated the 30<sup>th</sup> June 2015, the deceased was to leave the buildings/structures, if any, erected on the suit properties, at the conclusion/determination of the lease.
59. On re-examination, the witness stated that the deceased and himself agreed on the variation of the monthly rents payable during the intervening period prior to the formalization of the new lease agreement.
60. However, the witness added that the varied rent was in the sum of Kes.280, 000/= only. For clarity, it was the further testimony of the witness that no formal lease agreement was ever reached, entered into or otherwise executed.



61. With the foregoing testimony the Defendant's case was duly closed.

### **Submissions By The Parties**

#### **A. Plaintiffs' submissions:**

62. The Plaintiffs filed written submission dated the 2<sup>nd</sup> December 2022 and in respect of which same have identified, raised and highlighted Four issues for consideration by the Honourable Court.
63. First and foremost, learned counsel for the Plaintiffs' has submitted that the terms of the lease agreement that was entered into and executed on the 30<sup>th</sup> June 2015 was duly renewed upon the expiration thereof. In this regard, it has been contended that the lease was duly renewed on the 4<sup>th</sup> September 2021.
64. In addition, learned counsel has contended that the renewal of the lease under reference was for a similar duration of 5 years 3 months and in this regard, the renewed lease shall expire/lapse on the 30<sup>th</sup> October 2025.
65. Based on the foregoing, learned counsel for the Plaintiffs' has therefore contended and submitted that the Plaintiffs have lawful and legitimate rights to remain on and to occupy the suit properties, contrary to the allegations by the Defendant.
66. In any event, learned counsel for the Plaintiffs' has submitted that upon the lapse of the previous lease agreement, namely the lease agreement dated the 30<sup>th</sup> June 2015, the deceased and the Defendant herein verbally agreed to renew the terms of the lease.
67. Furthermore, counsel has contended that it was during the said verbal agreement that the monthly rents payable over and in respect of the properties was reviewed and increased to Kes.280, 000/= only.
68. In a nutshell, learned counsel has submitted that the deceased and the Defendant entered into a binding verbal contract, pertaining to the renewal of the lease.
69. In support of the submissions that there exists a verbal and binding contract/ Agreement between the Estate of the deceased and the Defendant herein, counsel has cited and quoted various decisions, inter-alia, Ali Abid Mohamed versus Kenya Shell & Company Ltd (2017)eKLR and William Muthii Muthami versus Bank of Baroda (2014)eKLR, respectively.
70. Secondly, learned counsel for the Plaintiffs has submitted that at the time when the deceased and the Defendant entered into and executed the lease agreement dated the 30<sup>th</sup> June 2015, the suit properties (which were the subject of the lease) were not developed.
71. Furthermore, learned counsel has added that it was the deceased who constructed and erected a Four storey building on the suit properties, pursuant to and in accordance with the terms of the lease agreement. In this regard, learned counsel for the Plaintiffs has invited the court to take cognizance of clause 2 (e) and (f) of the lease agreement.
72. Premised on the foregoing, learned counsel has thus invited the court to find and hold that the building/developments, which are currently standing on the suit properties belong to the Estate of the deceased.
73. In addition, learned counsel has thus submitted that it is therefore incumbent upon the honourable court to protect the investments of the deceased and by extension, vindicate the rights of the estate of the deceased to benefit from the named investments.



74. Thirdly, Learned counsel has submitted that upon the determination of the lease agreement entered into and executed on the 30<sup>th</sup> June 2015, the Plaintiffs herein remained in occupation of the suit property as lawful tenants. For clarity, counsel has added that the tenancy in question was controlled in nature and hence same is protected vide the provisions of Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya.
75. In this regard, counsel has submitted that by virtue of the provisions of the named Act, the tenancy that continues to exist between the Estate of the deceased and the Defendant herein can only be terminated by complying with or following the laid down and established procedures and not otherwise.
76. To vindicate the foregoing submissions, learned counsel has cited and quoted the decision in the case of Kirima Bus Services Ltd versus Joseph Kariuki Gichimu T/A Tausi Enterprises and Peacock Enterprises (2013)eKLR and Lack versus Jeypee Investments Ltd Nairobi HCCA No. 120 of 1971 (1971)EA 512, respectively.
77. Finally, learned counsel has submitted that the Plaintiffs herein have placed before the court sufficient and credible evidence to show that the Plaintiffs have lawful and legitimate rights to the suit property.
78. In this regard, it has been contended that the Plaintiffs have a subsisting/ existing lease agreement over and in respect of the suit property.
79. In addition, counsel has submitted that the impugned Building belongs to and is the property of the Estate of the deceased. In this regard, counsel has invited the court to find and hold that the Plaintiffs therefore are entitled to protection vide and pursuant to the provisions of Article 40 of [the Constitution](#) 2010.
80. Premised on the foregoing, learned counsel for the Plaintiffs has therefore submitted and contended that the Plaintiffs are entitled to an order of Permanent Injunction, as prayed for in the Pleint.
81. In support of the prayer for Permanent Injunction, learned counsel has cited and quoted various decisions inter-alia the case of Giella versus Cassman Brawn (1973) EA 358, Mrao Ltd versus First American Bank Ltd (2003)eKLR, Nguruman Ltd versus Jan Bonde Nielsen & 2 Others (2014)eKLR, Vivo Energy K Ltd versus Maloba Petrol Station Ltd & 3 Others (2015)eKLR, Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018)eKLR and Joesph Siro Mosioma versus Housing Finance Company of Kenya Ltd & 3 Others (2008)eKLR.
82. In a nutshell, counsel for the Plaintiffs' has implored the court to find and hold that the Plaintiffs herein have established and proved their claim and thus same are entitled to the reliefs sought at the foot of the Pleint dated the 17<sup>th</sup> February 2021.

#### **B. Defendant's submissions:**

83. The Defendant filed written submissions dated the 31<sup>st</sup> January 2023 and in respect of which same has raised, highlighted and amplified two issues for consideration and determination.
84. Firstly, learned counsel for the Defendant has submitted that the lease agreement which was entered into and executed between James Githaiga Kuria, now deceased and the Defendant herein, lapsed and expired in September 2020.
85. Furthermore, learned counsel has submitted that upon the expiry of the said lease, there was no renewal or at all that was entered into and executed between James Githaiga Kuria, now deceased and the Defendant herein.



86. In view of the foregoing, learned counsel has submitted that in the absence of a subsisting lease, the Plaintiffs herein have no lawful or legitimate rights to remain in occupation and possession of the suit property.
87. In any event, learned counsel has added that the Plaintiffs herein are tenants or representatives of a tenant, whose term has lapsed. Consequently, it behoves the Plaintiffs to vacate and hand over vacant possession of the suit properties to the Defendant.
88. Additionally, learned counsel for the Defendant has submitted that the claim before hand is tantamount to a scenario where the Plaintiffs are seeking to impose themselves on the property of the Defendant, albeit without a lawful cause.
89. To amplify the submissions that the Plaintiffs have no lawful rights to and in respect of the suit properties, counsel for the Defendant has cited the decisions in the case of inter-alia, *Kasturi Ltd versus Nyeri Wholesalers Ltd* (2014)eKLR and *R & K Investments versus Evanson Gitau* (1998)eKLR, respectively.
90. Secondly, learned counsel for the Defendant has submitted that by virtue of being the registered owner and proprietor of the suit properties, the Defendant herein is entitled to vacant possession and use of the properties.
91. Furthermore, learned counsel has submitted that despite being the lawful owner and proprietor of the suit properties, the Defendant herein has been denied and deprived of the rights and privileges attendant to the ownership of the suit properties.
92. In addition, learned counsel has contended that the actions and or activities by the Plaintiffs constitutes and amounts to wrongful deprivation and hence the Defendant is entitled to recover Mesne Profits from the Plaintiffs for the entire duration of wrongful possession.
93. Other than the foregoing, learned counsel has also submitted that the Defendant is also entitled to compensation on account of trespass to his property.
94. In this regard, it has been contended that given the unique location of the suit property and coupled with the facts that the suit properties is Prime land, the Defendant ought to be awarded to Kes.1, 000, 000/= Only, per month, for the entire duration of trespass/wrongful occupation.

### **Issues For Determination**

95. Having reviewed the Plaint dated the 17<sup>th</sup> February 2021, the documents attached thereto and the witness statement of the 1<sup>st</sup> Plaintiff and having reviewed the Defense and Counterclaim filed by and on behalf of the Defendant; and having taken into account the oral evidence tendered; and finally having considered the written submissions filed by the Parties, the following issues do arise and are thus germane for determination:
  - i. Whether the Lease Agreement between James Githaiga Kuria, now deceased and the Defendant herein was duly renewed or otherwise.
  - ii. Whether the suit by and on behalf of the Plaintiffs is legally tenable on the face of Sections 3(3) of the *Law of Contract Act*, Chapter 23 Laws of Kenya.
  - iii. Whether the Plaintiffs are entitled to the Reliefs sought at the foot of the Plaint.
  - iv. Whether the Defendant is entitled to the Reliefs sought at the foot of the Counter-claim.



## Analysis And Determination

### Issue Number 1 Whether the Lease Agreement between James Githaiga Kuria, now deceased and the Defendant herein was duly renewed or otherwise.

96. It is common ground that one James Githaiga Kuria, now deceased and the Defendant herein entered into and executed a lease agreement dated the 30<sup>th</sup> June 2015, over and in respect of the suit Properties, whose details are well enumerated at the Foot of the Lease Document.
97. Furthermore, it is not in dispute that the said lease agreement was for a term of 5 years and 3 months, commencing on the 1<sup>st</sup> July 2015.
98. Given that the term of the lease was to commence on the 1<sup>st</sup> July 2015, there is no gainsaying that the 5-year 3 months duration (being the term of the lease), was bound to lapse and indeed lapsed in September 2020.
99. Be that as it may, evidence was tendered by both PW1 and DW1, respectively that upon the lapse and determination of the lease agreement, James Githaiga Kuria, now deceased and the Defendant herein, commenced negotiations with a view to renewing the lease over and in respect of the suit properties.
100. In addition, DW1 stated that pursuant to and as a result of the said negotiations, it was mutually agreed between the deceased and himself that the monthly rents in respect of the suit properties, would be varied and increased to Kes.280, 000/= only, albeit during the intervening period prior to and before the formal renewal of the lease.
101. Furthermore, DW1 added that the deceased and himself had agreed that same would thereafter enter into a further lease agreement, whose terms were to be agreed upon and thereafter executed by both the deceased and himself.
102. Be that as it may, DW1 contended that though negotiations were duly commenced for purposes of renewing the lease over and in respect of the suit property, no such renewal was entered into or executed, because James Githaiga Kuria died or passed on prior to the formalization of the lease.
103. Premised on the foregoing, DW1 has contended and maintained that no formal lease agreement was ever entered into or executed. In this regard, the Defendant has taken the position that the lease agreement which hitherto existed between himself and the deceased, lapsed and terminated in September 2020.
104. On the other hand, learned counsel for the Plaintiffs has contended and submitted that the terms of the lease agreements that was entered into between James Githaiga Kuria, now deceased and the Defendant herein, were duly renewed and thus there is a valid lease agreement in existence.
105. To vindicate the contention that there is a valid lease agreement, learned counsel for the Plaintiff has contended that indeed there was a verbal agreement, wherein the deceased and the Defendant agreed only to vary the monthly rents, whilst preserving and maintaining the rest of the terms which were contained at the foot of the lease agreement dated the 30<sup>th</sup> June 2015.
106. Additionally, learned counsel for the Plaintiffs has sensationally submitted that there was a renewal of the lease agreement on the 4<sup>th</sup> September 2020 and that the renewed lease agreement is to subsists for a further period of 5 years and 3 months. In this regard, counsel has contended that the new lease agreement shall only expire on the 30<sup>th</sup> October 2025.



107. Based on the foregoing positions, it is therefore incumbent upon the court to determine whether or not the lease between James Githaiga Kuria and the Defendant, was duly renewed or otherwise.
108. Nevertheless, before endeavoring to address and resolve the critical issue herein, it is appropriate to revert to the evidence which was tendered by the Parties.
109. In particular, the evidence tendered by PW1, whilst under cross examination becomes pertinent and imperative. For clarity, PW1 stated as follows;
- “The lease between the deceased and the Defendant herein was for a duration of 5 years and 3 months. The lease lapsed in January 2020. There was no written renewal of the lease. The document at page 21 of my bundle (read Draft lease agreement) was not executed”.
110. In addition, the Plaintiff proceeded and testified as hereunder;
- “Immediately my husband died there was an attempt to renew the lease. The proposed renewal did not succeed. The Defendant has refused to execute the renewal agreement”.
111. Other than the foregoing, the Plaintiff also made very explicit admissions during re-examination. For coherence, the 1<sup>st</sup> Plaintiff stated as hereunder;
- “The lease that was executed was for a period of 5 years and 3 months. The lease lapsed. The lease was not extended”.
112. From the foregoing excerpts, what becomes clear and apparent is that the 1<sup>st</sup> Plaintiff, admits, confirms and acknowledges that the lease agreements which was hitherto entered into and executed between James Githaiga Kuria, now deceased and the Defendant herein, duly expired.
113. In addition, the 1<sup>st</sup> Plaintiff has also authenticated that despite there having been attempts to renew the lease, the draft lease agreement which same produced before the court as exhibit P4, was not executed. In this regard, it is obvious that there is no existing lease agreement over and in respect of the suit properties.
114. In view of the foregoing, it is difficult to understand the gist and foundation of the submissions made by counsel for the Plaintiff that the lease agreement was duly renewed.
115. Similarly, it is also difficult to understand the foundation and the basis of the contention by counsel for the Plaintiff that there is in existence a lease agreement, whose terms are bound to expire on the 30<sup>th</sup> October 2025.
116. Be that as it may, it is appropriate to state and underscore that submissions made by counsel for the Parties should be aimed at fostering and illuminating the evidence tendered by the respective parties and not otherwise.
117. Additionally, it is also worthy to restate and reiterate that learned counsel cannot seek to subvert the evidence tendered by his client and to propagate submissions, which are contrary to and are at variance with the totality of the evidence tendered by own witness.
118. Finally, it is trite learning that submission can neither take the place nor surpland the evidence on record. For good measure, cases are determined on the basis of pleadings filed and evidence tendered.
119. Without belaboring the established and hackneyed position, spoken to and espoused in the preceding paragraphs, it is worthy to reiterate the holding of the Court of Appeal in the case of Daniel Toroitich



Arap Moi versus Mwangi Stephen Muriithi & another [2014] eKLR, where the court stated as hereunder;

“Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it.

Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

120. In a nutshell, I come to the conclusion that the lease agreement which was entered into and executed between James Githaiga Kuria and the Defendant herein, on the 30<sup>th</sup> June 2015 lapsed and expired.
121. Similarly, I find and hold that the said lease was neither extended nor renewed whatsoever, following the death of James Githaiga Kuria, now deceased. In this regard, there is therefore no subsisting/ existing lease agreement between the Plaintiffs and the Defendant, whatsoever.

**Issue Number 2 Whether the suit by and on behalf of the Plaintiffs is legally tenable on the face of Sections 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya.**

122. There is no gainsaying that the subject matter pertains to and concerns disposition of an interests in land. Consequently, it is imperative to observe and state that being a matter that touches on and concerns disposition of an interest in land, any agreement thereto ought to be reduced into writing.
123. To this end, it is imperative to take cognizance of the import and tenor of the provisions of Section 3(3) of the Laws of Contract Act, Chapter 23 Laws of Kenya, whose terms are explicit and devoid of ambiguity.
124. Given the importance and significance of the said provisions, it is appropriate to reproduce same. In this regard, same are hereby reproduced as hereunder;

3. Certain contracts to be in writing

- (1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.
- (2) No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith.
- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless —
  - (a) the contract upon which the suit is founded—
    - i) is in writing;
    - (ii) is signed by all the parties thereto; and



- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

125. Other than the provision of the *Law of Contract Act*, (supra), it is also imperative to take cognizance of the provisions of Section 38(1) of the *Land Act*, 2012 (2016).

126. For coherence, the said provisions are reproduced as hereunder;

38.

- (1) No suit shall be brought upon a contract for the disposition of an interest in land unless — (a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and (b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.

127. My reading of the two named provisions, drives me to the conclusion that prior to and before a party can commence and originate a suit touching on and concerning the disposition of an interests in land, it behooves the claimant to ensure that there is in existence a lawful agreement that complies with and abides by the provisions of Section 3(3) of the *Law of Contract Act* as read together with Section 38(1) of the *Land Act*.

128. In respect of the subject matter, there is no gainsaying that the Plaintiffs' claim touches on and concerns disposition of an interests in land. For clarity, the Plaintiffs herein are contending that same have leasehold interests in respect of the suit properties, which this Honourable Court should vindicate or otherwise protect.

129. Additionally, the Plaintiffs herein have also leveraged their case on the basis of ownership of the building/development or structures that are standing on the suit properties.

130. In my humble view, the claim by and on behalf of the Plaintiffs herein cannot be maintained or sustained, once it becomes apparent that no written contract was entered into and executed in accordance with the law.

131. Finally, it is worth stating that the instant suit was mounted long after the previous lease agreement had lapsed and expired. For coherence, the previous lease agreement admittedly lapsed and determined in September 2020.

132. To underscore the foregoing observations, and essentially that no suit touching on and concerning disposition of an interests in land, can be mounted and maintained in the absence of a written agreement duly executed by the Parties, it is appropriate to re-echo and reiterate the holding of the Court of Appeal in the case of Peter Mbiriri Michuki versus Samuel Mugo Michuki [2014] eKLR, where the court stated as hereunder;

24. Section 3(3) of the *Law of Contract Act* provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested. Section 3(7) of the *Law of Contract Act* excludes the application of Section 3(3) of



the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on 1<sup>st</sup> June, 2003. The trial court found that the sale agreement between the parties was an oral agreement made in 1964 between the appellant and the plaintiff. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows:

(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

(1) Has in part performance of the contract taken possession of the property or any part thereof; or

(11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract. '

133. In the premises, I come to the conclusion that the Plaintiff's case herein, which touches on and concerns disposition of an interests in land is not legally tenable insofar as same is neither predicated nor anchored on any written lease agreement, as envisaged under the Law.

### **Issue Number 3 Whether the Plaintiffs' are entitled to the Reliefs sought at the foot of the Plaintiff.**

134. The Plaintiffs' herein have sought for various, albeit assorted reliefs at the foot of the Plaintiff dated the 17<sup>th</sup> February 2021.

135. Having alluded to the various and numerous reliefs, details in terms of the preceding paragraph, it was incumbent upon the Plaintiff to place before the honourable court cogent and credible evidence to warrant positive findings in their favor.

136. For clarity, it is common knowledge that the burden of proof laid on the shoulders of the Plaintiffs herein, to prove and establish their claims, albeit on a balance of probabilities.

137. In addition, where the Plaintiff/Claimant fails to tender and produce the requisite evidence in proof of his/her claim, then it is said that the claimant has failed to discharge the burden of proof.

138. To be able to understand the importance of the requirement to establish a case to the requisite standard and therefore be deemed to have discharged the burden of proof, it is appropriate to borrow and adopt the holding of the Court of appeal in the case of Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) versus Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] eKLR, where the honourable Court of Appeal expounded on the provisions of Section 107 and 108 of the Evidence Act.

139. For coherence, the court stated and observed as hereunder;

“The standard of proof is on a balance of probabilities which Lord Denning in the case of Miller vs Minister of Pensions (1947) explained as follows:-“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: „We think it more probable than not?, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or



preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

140. Having taken into account the ratio decidendi in the foregoing decision, it is now appropriate to interrogate whether the Plaintiffs herein have indeed placed before the court evidence to warrant the grant of the orders sought.
141. Firstly, this court has hitherto found and established that the lease agreement that hitherto existed between James Githaiga Kuria, now deceased and the Defendant herein, was never renewed. In this regard, it is therefore apparent and or evident that the declaratory reliefs sought vide prayers Numbers 1 and 2 at the foot of the Plaint cannot be granted.
142. Secondly, the Plaintiffs herein have contended that the building/developments and structures standing on the suit property belongs to the estate of the deceased. In this regard, the Plaintiff's contention is premised and anchored on the incontrovertible position that the impugned building/developments were constructed by the deceased.
143. Granted, the named developments/structures were constructed by the deceased. In any event, the terms of the lease agreement entered into and executed on the 30<sup>th</sup> June 2015 allowed the deceased to erect structures on the suit property, albeit during the lifetime of the lease.
144. Nevertheless, there is no gainsaying that the term of the lease entered into on the 30<sup>th</sup> June 2015, lapsed and expired.
145. In addition, there is also no gainsaying that currently there is no lease agreement between the Plaintiffs and the Defendant. In this respect, the question that arises is; on what basis do the Plaintiffs lay a claim to the suit buildings.
146. Be that as it may, it is common knowledge that any building or structure that is attached to land is deemed to comprise and forms part and parcel of the Land. In this regard, the building constitutes and forms part of the land and same are inseparable.
147. To this end, it is appropriate to restate and reiterate the provisions of Article 260 of [the Constitution](#) 2010, which defines Land as hereunder;  
“land” includes—
  - (a) the surface of the earth and the subsurface rock;
  - (b) any body of water on or under the surface;
  - (c) marine waters in the territorial sea and exclusive economic zone;
  - (d) natural resources completely contained on or under the surface; and
  - (e) the air space above the surface;
148. To the extent that the impugned development and structures forms part of the suit properties, belonging and registered in the name of the Defendant, there is no legal foundation upon which the Plaintiffs can stake or claim to be the legitimate owners of the development/structure standing on the suit properties.



149. In my humble view, the impugned development being permanent in nature, same by law is deemed to constitute and comprise part of the land. Consequently, without being owners of the land, the Plaintiffs herein cannot be heard to claim ownership of that which is attached to the land.
150. Finally, the Plaintiffs herein have impressed upon the court to grant an order of Permanent injunction and to restrain the Defendant from inter-alia, evicting and removing same from the suit properties.
151. To start with, there is no dispute that the suit properties are registered in the name of the Defendant. In fact, the deceased entered upon and constructed the impugned buildings on the suit properties, pursuant to a lease agreement.
152. Secondly, by virtue of being the registered owners of the suit properties, the Defendant herein is by law entitled to exclusive and absolute rights to and in respect of the suit properties. See Section 24 and 25 of the [Land Registration Act](#).
153. In any event, the nature and extent of the Defendant's right to and in respect of the suit property includes, the right to occupy (usus), then the right to benefit from ownership (fructus) and the right to alienate/transfer or dispose of same, which is otherwise referred to as (abusus).
154. To the extent that the Defendant is conferred and vested with the rights (whose details have been underscored vide the preceding paragraph), there is no gainsaying that same is thus entitled to the Land, subject only to the provisions of Section 28 of the [Land Registration Act](#).
155. Notwithstanding the foregoing, it must also be recalled that an order of Permanent injunction, either in the manner sought by the Plaintiffs or otherwise, can also not be issued, against the registered owners of the land.
156. Clearly, the issuance of an order of Permanent injunction as sought vide the instant suit would be tantamount to negating or revoking the Defendant's title to the suit property, albeit without there being a lawful basis.
157. In respect of the foregoing, it is appropriate to adopt, restate and reiterate the holding of the court of appeal in the case of Nguruman Limited versus Jan Bonde Nielsen & 2 others [2014] eKLR, where the court stated as hereunder;

It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so.

158. Having calibrated on the various reliefs that are contained at the foot of the Plaint, I am afraid that neither of the said reliefs is legally tenable, on the face of the obtaining and applicable provisions of [the Constitution](#) 2010 and the relevant laws governing land ownership/registration.

**Issue Number 3 Whether the Defendant is entitled to the Reliefs sought at the foot of the Counterclaim.**

159. Other than the claims that were mounted by and on behalf of the Plaintiffs, it is also apparent that the Defendant herein has also sought for various reliefs, albeit at the foot of the counterclaim dated the 30<sup>th</sup> September 2021.
160. In respect of the claims by and on behalf of the Defendant herein, it is appropriate to state that by virtue of being the registered owner and proprietor of the suit properties, same is lawfully entitled to vacant possession and occupation thereof, unless there exists any Lawful basis to deny or deprive same of such right.



161. In this respect, it is appropriate and expedient to state that insofar as the lease which was hitherto entered into has since lapsed and expired, then the Defendant is entitled to re-enter upon and take possession of the suit property.
162. In the circumstances, I am of the considered view that an order for vacant possession and by extension eviction of the Plaintiffs from the suit properties, is desirous and merited.
163. In addition, the Defendant is entitled to benefit from ownership of the suit properties. In this regard, the nature and tenor of the Defendants rights, include, inter-alia the right to possess and occupy without interference from any third party, the Plaintiffs not excepted.
164. Consequently and in the premises, it is therefore evident that to enable the Defendant to partake of and benefit from the rights and privileges that are conferred upon the registered owner, then an order of Permanent injunction would suffice.
165. Other than the foregoing, it is common knowledge that upon the determination of the lease agreement entered into and executed on the 30<sup>th</sup> June 2015, the tenant, now deceased and by extension the Plaintiffs herein, were obliged to vacate and hand over vacant possession of the suit properties to the Defendant.
166. In the alternative, the Plaintiffs herein were at liberty to pursue and address the issue of extension/ renewal of the lease agreement. However, it must be recalled that such renewal could only arise out of mutual consent and not otherwise. Clearly, the Tenants can not impose themselves on the Landlord/ Defendant and seek to unilaterally create a relationship.
167. In this regard, I beg to adopt and reiterate the holding of the Court of Appeal in the case of *Kasturi Ltd versus Nyeri Wholesalers Ltd (2014)eKLR*, where the court stated and observed as hereunder;

“A tenant cannot impose or force himself on a landlord. In the instant case, when the lease between the parties expired, it was incumbent upon the Appellant to give vacant possession.”

168. Insofar as the lease agreement was not renewed, it was therefore incumbent upon the Plaintiffs to hand over vacant possession over and in respect of the suit property.
169. Nevertheless, there is no gainsaying that the Plaintiffs herein did not vacate and hand over vacant possession. In this regard, the Plaintiffs herein have continued to remain in possession of the suit property albeit without the requisite authority, color of right and permission of the Defendant.
170. Clearly, the continued occupation, possession and use of the suit properties by the Plaintiffs, albeit without the mandate of the Defendant constitutes wrongful possession and unlawful deprivation. In this regard, the Defendant is therefore entitled to recompense on the basis of mesne profits.
171. As pertains to the circumstances where Mesne Profits ought to issue and be decreed, it is appropriate to recall and reiterate the holding of the Court of Appeal in the case of *Attorney General versus Halal Meat Products Limited [2016] eKLR*, where the court stated and observed as hereunder;

Furthermore, it is not in dispute that the Government took possession of the abattoir and utilized it without compensating the respondent as required by law. Consequently, its occupation of the abattoir was unlawful. 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, 18<sup>th</sup> Ed. para 34-42.

172. As concerns the scheme of reckoning or computing the quantum of Mesne Profits, it is appropriate and expedient reiterate the established position underscored vide the decision in the case of Mistry Valji versus Janendra Raichand & 2 others [2016] eKLR, where the court held as herenunder

Measure for mesne profit was described in the Privy Council decision in Invergue Investments v Hacketh (1995) 3 All ER 842 cited with approval in the Kenya Hotel Property Ltd case (supra) as follows:

“This is form of an ordinary claim for mesne profit, that is to say, a claim for damages for trespass to land....The question for decision is the appropriate measure of damages.”

The privy council observed that that measure of damages must be reasonable rent. The usual practice is to assess mesne profits down to the date when possession is given.

173. Having made the foregoing observation, it is now appropriate to discern, decipher and ascertain what was the reasonable rent that was obtainable from the suit properties up to and including the determination of the lease agreement.
174. In this regard, it is worthy to recall and recollect that PW1 testified and stated that upon the determination of the lease agreement entered into and executed on the 30<sup>th</sup> June 2015, the deceased and the Defendant agreed to adjust the monthly rents to the sum of Kes.280, 000/= only.
175. On the other hand, the Defendant also testified and acknowledged that following the determination of the lease period at the foot of the previous lease agreement, the Deceased and himself agreed on a stop-gap measure of rents in the sum of Kes,280, 000/= only, albeit during the intervening period prior to the formal renewal of the lease.
176. Besides, it is not lost on the court that PW1 testified that same paid the rent of Kes.280, 000/= only up to and including March 2021. For clarity, PW1 produced to and referred to exhibit P3, namely, the Swift Transfer Remittance paid out on the 11<sup>th</sup> March 2021.
177. In a nutshell, it is my conclusion that the reasonable measure of rents, for purposes of ascertaining and quantifying Mesne Profits is Kes.280, 000/= only per month.
178. Having addressed and resolved the issue of the reasonable rent, to be used and applied for ascertaining mesne profits, what remains outstanding is therefore the duration in respect of which same is payable.
179. To this end, it is appropriate to state that evidence was adduced that rents were paid to and in favor of the Defendant up to and including March 2021. See the Swift Transfer Remittance form – exhibit P3.
180. Consequently, it is therefore common ground that rents or the equivalent thereof were never paid between the month of April 2021 up to and including March 2022, when the honourable court ordered and directed that all the rental proceeds be paid/deposit into a Joint interests earning account in the names of the advocates for the parties.
181. In the premises, it is my finding that the Defendant herein is entitled to recover recompense on the basis of Mesne Profits at the rate of Kes.280, 000/= only, for a period of 12 months. In this regard, the quantum of Mesne Profits works out as hereunder;

Kshs.280, 000 x 12 Months = Kes.3, 360, 000/=Only.



182. Other than the claim for Mesne Profits, the Defendant herein had also sought for compensation on account of General damages for trespass. However, there is no gainsaying that the acts or activities that comprise of or constitutes trespass are the same acts the found and anchor wrongful/unlawful deprivation.
183. Consequently and in the premises, it is therefore evident that having found and held that the Defendant is entitled to recompense on account of Mesne Profits, then no doubt, same cannot in the same vain stake a claim for General damages for trespass.
184. In my humble view, to decree and award compensation on account of General damages for trespass, would be tantamount to double reward and thus unjust enrichment in favor of the Defendant.
185. Conversely, to decree that the Plaintiffs shall pay mesne profits and at the same time pay compensation on account of General damages, would constitutes subjecting the Plaintiffs to Double jeopardy. Clearly, such a process would be inimical to the rule of law and contrary to the provisions of Articles 10(2) of *the Constitution* 2010.
186. In my humble view, once the court decrees and awards recompense on account of Mesne Profits, then the Honourable court must strike down the claim for General damages for trespass.
187. To this extent, I beg to adopt, reiterate and underscore the holding of the Court of Appeal in the case of Christine Nyanchama Oanda versus Catholic Diocese of Homabay Registered Trustees (2020)eKLR, where the court stated and observed as hereunder;
- “It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black’s Law Dictionary 9th edition). Mesne Profits must be pleaded and proved”.
188. Finally, the Defendant also sought for an Account and payment of all proceeds derived from the suit property since the 1<sup>st</sup> December 2020. In this regard, it worthy to recall that the court has since decreed payment of Mesne Profits for a stipulated duration between April 2021 to March 2022.
189. Additionally, it is also important to recall that the court hitherto made an order that all the rental proceeds emanating from the suit property be deposited in a Joint earning account in the name of the advocates for the respective parties. See the ruling of the court rendered 28<sup>th</sup> March 2022.
190. From the foregoing, what becomes evident and apparent is that the claim for accounts has been suitably addressed and taken care of. In any event, the issue of accounts will be further addressed by a suitable order for the release of the all the monies in the Escrow account to the Defendant herein.
191. Essentially, I am of the view that a re-engagement with the issue of Accounts at this juncture, despite the award of Mesne Profits and coupled with the orders of the court vide ruling rendered on the 28<sup>th</sup> March 2022, would serve no useful purpose.
192. To surmise, I come to the conclusion that the Defendant has duly established and proved his claim as enumerated at the foot of the counterclaim, subject only to the deliberations alluded to and elaborated upon in terms of the preceding paragraphs.



## **Final Disposition**

193. Having analyzed, evaluated and duly considered the various perspectives that arose herein before, as well as the Issues that were isolated for determination, it is evident and apparent that the Plaintiff's case is not meritorious.
194. To the contrary, it must have become apparent, nay, obvious that the Defendant on his part has been able to place before the honourable court cogent and credible evidence, in proof of the counterclaim.
195. In the premises, it is my humble conclusion that whereas the Plaintiffs have failed to discharge the burden of proof as pertains to the claims at the foot of the Plaint, the Defendant has however discharged his portion of the burden of proof.
196. Consequently and in the premises, the Plaintiffs' suit be and is hereby Dismissed with costs to the Defendant.
197. Furthermore, Judgment be and is hereby entered in favor of the Defendant and on account of the Counterclaim in the manner following;
- a. The Plaintiffs herein be and are hereby ordered and directed to vacate and hand over vacant possession in respect of the suit properties, namely L.R No's 209/18279 and 18280, respectively within 90 days from the date hereof.
  - b. In default to vacate and hand over vacant possession of the suit properties to and in favor of the Defendant in terms of clause (a) hereof, the Defendant shall be at liberty to Evict the Plaintiffs, either by themselves, agents, servants and or employees from the suit properties.
  - c. An Order of Permanent Injunction be and is hereby granted to restrain and prohibit the Plaintiffs, either by themselves, agents, servants, employees and/or anyone claiming under the Plaintiffs from entering upon, re-entering and/or otherwise interfering with the Defendant's rights to and in respect of the suit properties.
  - d. The Plaintiffs shall pay to and in favor of the Defendant Mesne Profits assessed and certified in the sum of Kes.3, 360, 000/= only.
  - e. The Mesne Profits in terms of clause (d) shall attract interests at court rates (14%) from the date of Judgment.
  - f. The Monies which were deposited in the Joint Interests Earning account in the names of the advocates for the Parties pursuant to and by dint of the Ruling rendered on the 28<sup>th</sup> March 2022 shall be paid out to and in favor of the Defendant or his authorized agent/advocates.
  - g. The claim for General Damages for trespass is Dismissed.
  - h. The claim for Accounts and payments of all proceeds derived from the suit properties since 1<sup>st</sup> December 2020 is Duplicitous and is hereby declined.
  - i. For completeness, any order not expressly granted is declined.
  - j. The Defendant be and are hereby awarded costs of the counterclaim.
198. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023.**

**OGUTTU MBOYA**



**JUDGE**

In the Presence of;

***Benson - Court Assistant.***

Mr. Otieno h/b for Mr. Oruenjo for the Plaintiffs.

Mr. Thuita for the Defendant.

N/A for the Interested Party.

