



REPUBLIC OF KENYA



KENYA LAW
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**Transnzoia Securities Limited v Stuadae (Environment & Land Case
31 of 2021) [2023] KEELC 17553 (KLR) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 17553 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 31 OF 2021**

AE DENA, J

FEBRUARY 1, 2023

BETWEEN

TRANSNZOIA SECURITIES LIMITED PLAINTIFF

AND

ANN MUTHONI STUADTE DEFENDANT

JUDGMENT

- 1 The Plaintiff commenced this suit by way of Plaint dated 20/12/2019 filed on 23/12/2019 seeking the following reliefs for determination by the court; -
- a. A mandatory injunction directing the Defendant whether by herself or through her servants, agents, employees, assigns or anybody claiming under her to forthwith vacate or remove her personal belongings from the Plaintiffs property known as Cape Blush Massionate on title No. Kwale/Diani Beach Block/1228 measuring about 2.130 hectares situate in Kwale.
 - b. An order of permanent injunction restraining the Defendant whether by herself or through her servants, agents, employees, assigns or anybody claiming under her and or anybody whatsoever from re-entering, encroaching, trespassing, remaining on, putting up any structures thereon, carrying out any alterations, reconnecting electricity or water unto the property, leasing, damaging, wasting away and or in any way interfering with the Plaintiffs property known as Cape Blush Massionate on title No. Kwale/Diani Beach Block/1228 measuring about 2.130 hectares situate in Kwale.
 - c. Mesne profits for trespass from 3rd October 2018 until payment in full.
 - d. Costs of this suit and
 - e. Any other reliefs that this Honourable Court deems fit.



2. The above prayers arise from the Plaintiffs contention that the plaintiff is the registered proprietor of parcel No. Kwale/Diani Beach Block/1228 on which is constructed one fully furnished residential house and beach plot also known as Cape Blush (suit premises). The Defendant came into the suit premises on invitation of the plaintiff majority shareholder and Director one George Barbour (George) where she cohabited therein as licensee. That the said George Barbour died in October 2018 and since George's demise the plaintiff has unlawfully remained in the premises as a trespasser despite the plaintiffs demands to vacate.
3. The suit is defended by the Defendant through a Statement of Defence dated 19/10/2020 filed on the same date. The defendant states that she lived in the suit premises as George's partner and spouse. That in his last will George bequeathed the suit premises to her including his shares in the Plaintiff. She denies she is a trespasser and claims she lives in the suit premises as beneficial shareholder and member of the plaintiff.

The Plaintiffs Case

4. The Plaintiff called one witness at the trial which commenced on 7/03/2022 and the defence called one witness in support of its case.
5. PW1 was Tracy Deborah Pirine, a director and shareholder of the plaintiff. She relied on her witness statement dated 16/11/2020 and Supplementary witness statement. She also produced in support of her evidence copies of the documents in the plaintiffs list and supplementary list of documents dated 20/12/2019 and 16/11/20 which were marked as PEX 1-6 and 6-12). Item number 7 (letter dated 21/01/2019) was marked for identification following objections on its admissibility by counsel for the defendant but was later abandoned by the Plaintiff. She told the court she was George's daughter who was a Director and major shareholder of the Plaintiff. That the defendant was her father's lady friend and they did not live as spouses. She denied that the defendant lived in the suit premises as a beneficiary since she is neither listed a beneficiary or a shareholder in the CR 12 (pg 30), the issue whether she is beneficiary was before the High Court as the grant for her father's estate who died testate in October 2018 was yet to be confirmed. The suit property belonged to the Plaintiff and could not be bequeathed to the defendant as provided in the will. She wanted the Defendant evicted from the suit premises since the plaintiff has not received income therefrom estimated at Kshs. 158,900 nothing since her father's death in 3rd October 2018. It was her evidence that George occupied the suit premises as part of the housing benefits normally accorded to Directors and which remained the property of the Plaintiff. The benefit lapsed on his death. The defendant though a citizen of Kenya was mostly resident of the Federal Republic of Germany only visited her father occasionally and only lived with George in the suit premises for the last 17 months of his lifetime prior to his death.
6. In her witness statement PW1 states that the plaintiff did not have any restrictions on who its Directors would host in the houses hence no decision was made to evict the defendant as long as she was the visitor of the host therein and was only there when the host was present at the suit property. That, the suit property was maintained by the Plaintiff who regularly paid water and electricity bills for George. The plaintiff never sub-leased or licensed the Defendant to live on the property or authorized the deceased to lease it. The Defendant having no legal claim on the suit property and should have vacated the suit property and or sought to execute a lease or rent the suit property from the Plaintiff as she is not a Director of the Plaintiff to enjoy benefits accorded to Plaintiff's Director. The Defendants continued habitual re-entry and occupation of the suit property whenever she is occasionally in Kenya without payment of rent or consent of the Plaintiff subsequent to the death of her host in defiance of the Plaintiff's demand for vacant possession constitutes trespass. PW1 stated that the suit property is in deplorable and inhabitable state requiring repairs and restorative works but the Defendant by herself



and or her agents are aggressive and threaten violence towards the Plaintiff's management's attempts to access the property for inspection and carrying out repairs thereon.

7. Upon cross examination she conceded she had not presented the plaintiffs financial statements in proof of income revenue. That when she lived in the suit property she used to pay rent though she had no proof for the same. That though George used to pay rent for the suit premises she did not have proof of the same. She had no proof of the housing benefits. She conceded it was not possible to have housing benefits and pay rent at the same time. She confirmed no other beneficiary had challenged the will. She confirmed George held 98% of the shareholding and there are certain decisions that required his presence as majority shareholder.
8. On re-examination she clarified that clause 27 of the articles provided for a minimum quorum of two and maximum of 7. That the 1st directors of the company were no longer directors. There was no clause in the articles invalidating a resolution signed by three directors.

Defendants Case

9. DW1 was Ann Muthoni Stuada who gave evidence in support of her case. She relied on her two witness statements dated 8/2/21 and 24/01/22 as part of here evidence and produced as exhibits the documents listed in the plaintiff list of documents dated 8/2/21 and 16/5/2022. She told the court that Georges will gave her 136 shares in the plaintiff company. That she still lived in the suit premises she used to share with George1228G as per the survey plan she produced and which George desired in his will she occupies. That her relationship with Gorge was perfect, lived together, worked together and loved each other. That the property has since been subdivided into 6 including the suit premises. She lived in the premises since November 2015 and never received any communication about her said occupation. She told the court she never participated in the affairs of the plaintiff. That she was the residual legatee under the will. The plaintiff was moved with greed and racism. During her stay with George they never paid rent. She too has never paid any rent because it has never been a requirement to do so.
10. On cross examination she confirmed she was being represented by Mr. Okere in the probate proceedings in the HCCC 11/2019 but was not sure if the grant had been issued. She confirmed property no. 1228/G as cape blush the suit property registered in the plaintiff's name though she had no search to support the same. She stated she was not married to George but lived with him 24/7 and had no documents in proof of marriage. Her shareholding was based on the will. She conceded she was not a director of the plaintiff. She confirmed she was served with the court papers. On re-examination she clarified that though she did not produce a search she did produce the survey plan by Zimmerlin.
11. With the above the Defendant closed her case.

Submissions

12. The Plaintiff represented by Mr. Litoro filed two sets of submissions 29/06/22 and 21/11/2022 the later were in rebuttal of some issues raised in the defendant's submissions. The initial submissions were three-fold. That the defendants defence that she was bequeathed the suit premises does not disclose a reasonable defence to the claims of trespass. She does not become the owner of the property by reason of being bequeathed. In the absence of a resolution of the plaintiff allowing her possession she is trespasser and culpable of forceful detainer. That the suit property being the property of the plaintiff is distinct from the property of the shareholders and directors. Reference was made to the case of Paul Stuart Imison Vs. Jodada Investments Ltd. (2019)eKLR wherein several decisions of the court of appeal were referred to.



13. Referring to the provisions of Section 3(1) of the Trespass Act Chapter 294 of the laws of Kenya it was contended that the plaintiff having failed to obtain the plaintiff (occupier) consent to continue living in the suit premises became a trespasser after Georges death herein. The defendant was neither the owner or person lawfully in occupation for purposes of this section hence a trespasser and forceful detainer. Consequently, the plaintiff was entitled to the orders of eviction and permanent injunction.
14. On mesne profits it was urged that the defendant wrongly benefitted from housing in the suit premises without paying rent at all and mesne profits be awarded by dint of section 2 of the Civil Procedure Act and Order 21 rule 13 of the Civil Procedure Rules. Counsel quantified the same at Kshs. 7,627,200/= and relied on Fredrick Korir Vs. Soin United Women Group sued through Eunice Towett & 2 Others) 2018 eKLR.

Defendants Submissions

15. The Defendants through Mr. Okere filed submissions dated 14/09/2022 and raised five issues for determination. It was submitted the Plaintiff had no capacity to sue since the board resolution dated 17/12/2019 to commence these proceedings and appointing the firm of Litoro & Omwebu Advocates is void for failure to comply with the plaintiff's provisions as to quorum for an extra ordinary general meeting and notice requirements. The case of Auto Japan (Mombasa) Limited V Malik Ali Zaka & 2 Others (2021) eKLR was cited to buttress this point.
16. Relying on the Court of appeal decision in Samuel Mwangi Vs. Jeremiah M'Itobu (2012) eKLR it was submitted that the defendant's possession of the suit property required protection by dint of the defendant's long term possession. That while this protection could only be withdrawn in favour of the owner thereof or someone lawfully acting on the owners behalf, in view of the illegal resolution herein there lacked a proper claim for possession of the suit property by the plaintiff as owner of the suit property.
17. It was further submitted that the defendant's entry and continued stay on the suit property did not transform to trespass upon the death of George. That defendant having entered therein almost 10 years ago as the spouse of the then majority shareholder and director of the plaintiff and the defendant further being a beneficial shareholder of the plaintiff cannot be considered a trespasser. It was pointed that the plaintiff never objected to the continued stay tolerating it, encouraging it by allowing the property to be under maintenance of the defendant thus acquiescing to the stay. That the defendants claim over the suit property is not permission based but anchored on her status as George spouse and as beneficial shareholder has acquired prescriptive rights over the use and occupation of the suit property. Sections 28(h) of the Land Registration Act was also relied upon. Additionally, it was contended that the defendants interest in George shares upon becoming his spouse was recognised under the provisions of Section 564(1) read together with Sec.123 of the Companies Act 2015 having never ceased upon his death. It further crystallised upon the bequeaths in the will. The defendant could not therefore be a trespasser.
18. Relying on the South Africa High Court decision in Flexi Holiday Club Vs La Lucia Sand Shareblock Limited Case No.4990/2002 it was also submitted that the defendant retained an overriding interest over the portion of suit property 1228/G from the moment she became interested in George's shares by virtue of being both a spouse and beneficiary.
19. It was argued further, that the deceased had a licence over Cape Blush where he resided with the defendant and therefore his will created a will trust to observe a licence with an equitable interest in favour of the defendant and cited the case of Isack M'inanga Kiebia V. Isaaya Theuri M'lintari &



another (2018)eKLR which recognised trusts as overriding interests. Counsel urged the court to decide based on equitable principles and reject the assertion that the defendant is a trespasser.

The Plaintiff filed Supplementary Submissions in rejoinder to the Defendants submissions which I have considered in this judgement.

Analysis And Determination

20. From my analysis of the pleadings, documentary and oral evidence, and the submissions filed by both parties, I deduce the following as the main issues for determination;
 - a. Whether the plaintiff has capacity to file this suit
 - b. Whether the Defendant is a trespasser on the suit property Kwale/Diani Beach Block 1128 also known as Cape Blush
 - c. Whether the Plaintiff is entitled to the orders sought in this suit
 - d. Who is to bear the costs of this suit.

Mombasa High Court P &A Cause No. 11 of 2019 Estate of George Barbour

21. To put issues into perspective, I will briefly give a background and status of the above proceedings which feature extensively in these proceedings in relation to the will of George Barbor. Some of the issues raised in these proceedings are partly probate. This calls for caution lest this court clothe itself with jurisdiction that it does not have. The claim as pleaded is that of trespass and attendant mesne profits as a result thereof. I will therefore stick to my lane based on jurisdiction conferred upon this court under Section 13 [1] and [2] of the [Environment and Land Court Act](#) and leave the others to High Court as mandated under the [Law of Succession Act](#) cap 160 Laws of Kenya.

Whether the plaintiff has capacity to file the suit

22. The plaintiff produced a copy of the Company Resolution by Plaintiffs Management (PEX1 pg. 27) dated 17/12/2019. This resolution was impugned by the defendant for failure to comply with the Plaintiffs requirements as to notice and quorum for an extra ordinary general meeting. The defendant's rejoinder is that a meeting to approve filing of a suit, authorizing directors to act pursuant thereto and retaining of legal services does not require a general meeting of the directors but a directors meeting. That a reading of the resolution does not reveal it is a special resolution neither does it state the meeting was general meeting and therefore paragraph 23 and 25 of the Articles of Association did not apply but paragraph 29.
23. I observed that the resolution was made at a directors meeting held on 17/12/2019 at the registered office of the plaintiff and the agenda was 'to file suit in court for eviction/recovery of Cape Blush House from Anne Muthoni Staudte'. It is stated to be an extract of the minutes of the 'Company's meeting...'
24. From the above it is clear that the meeting was not a general meeting and it cannot have been one given the nature of business that was transacted at the meeting in issue. I say so because my understanding of a General Meeting is that it is the Company's highest decision-making body, at which the shareholders exercise their voting rights and decisions are taken regarding matters such as the annual accounts, dividend, election of the Board of Directors and the auditor as well as their remuneration. I note that article 29 stipulates that quorum for Directors for transacting business is two. Infact this is the number that seems to apply for an extra ordinary meeting. The meeting subject of the impugned resolution was attended by 5 directors of the plaintiffs. I find no problem with the quorum at all. As to notice it was



waived by members under article 24 which allows for a meeting to be convened at such shorter notice as may be agreed. It is my finding therefore that meeting was duly convened.

Whether the defendant is a trespasser on the suit property Kwale/Diani Beach Block 1128 also known as Cape Blush

25. Having dealt with the above preliminary issue I come to the main issue in dispute, Whether the defendant is a trespasser on the suit property Kwale/Diani Beach Block 1128 also known as Cape Blush. In my discussion of this issue I will also pronounce myself on whether the defendant's defence that she was bequeathed the property by Mr. George Barbour discloses a reasonable defence in law against the claim for trespass and Whether the defendant has acquired prescriptive rights over the suit premises among the other defences raised by the defendant.

26. Section 3(1) of the Trespass Act chapter 294 of the Laws of Kenya provides that:-

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

27. The above therefore sets out what constitutes trespass namely there must be entry into another's land (private land), such entry must be without permission of the occupier of the land and or without reasonable excuse. Trespass also consists of any unjustifiable intrusion by one person upon land in possession of another (see Clerk & Lindsell on Tort (21st Edn) page 1345).

28. An occupier for purpose of the Act is defined under Section 2 to mean; -

The owner or the person lawfully in occupation of private land, any manager or agent of such person and in respect of forest areas and railway land, the Chief Conservator of Forests and the Managing Director of Kenya Railways respectively'

The Act defines Private land as inter alia land which is owned or occupied by any person by virtue of a freehold title, a certificate of ownership or lease.

29. The Plaintiff claim that it is the registered proprietor of parcel No. Kwale/Diani Beach Block/1228 and presented as part of their evidence a copy of Certificate of Lease for the Suit Property (PEX 3). The Certificate of Lease is issued on 4th May 2006 for 99 years from 1.7.1997 to Tans Nzoia Securities Limited. The plaintiff certificate of incorporation was also produced (PEX 2). This goes to prove private ownership of the suit property by the plaintiff and their capacity to sue for trespass. In any event it is trite that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner (Section 26(1) of the Land Registration Act). Such title is subject to challenge on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. In the present case there has not been any challenge by the Defendant on the Plaintiff's title by reason of fraud or otherwise as envisaged under section 26 (1) (a) and (b) of the Land Registration Act.

30. The burden of proof also lay on the plaintiff to prove that the defendant entered the suit premises without their permission. It is pleaded at paragraph 5 of the plaint that the defendant lived with the deceased in the suit property also known as Cape Blush unofficially when she visited Kenya spread over the last 17 months of the deceased life. However, upon cross examination PW1 conceded she was aware of the defendant's stay in the suit property before her father's death. It is clear from the proceedings



that the defendant's entry into the suit property when George was alive is not an issue as she entered thereon on his invitation. It is the plaintiff's case that the defendant became a trespasser after the death of George. It is not in dispute that George died on 3/10/2018 as evidenced by a copy of the Death certificate of George Barbour which was produced as part of the plaintiff's evidence. The defendant during cross examination told the court that the property she lived in no. 1228/G was Cape Blush the suit property registered in the plaintiff's name. She therefore knew the property was registered in the plaintiff's name and therefore did not belong to George. To me the defendant having been left behind in the premises if at all ought to have made arrangements to regularize her stay on terms to be agreed upon since the house did not belong to the person with whom she allegedly lived with.

31. I note that the defendant pleads at paragraph 7 of the defence that 'she has consent of the plaintiff to reside on the suit property and further adds that she resides on the suit property as a beneficial shareholder and member of the plaintiff /applicant.' On the first part, no evidence was adduced by DW1 in proof of the plaintiff's consent. On the other part DW1 testified during her evidence in chief that she still lived in the suit premises she used to share with George and which George desired in his will she occupies. In other words, she stayed put pursuant to George's desire as expressed in the will. It is not in dispute that George died testate and bequeathed some shares and the house to the defendant. On being cross examined about grant of probate of written will, DW1 confirmed she was being represented by Mr. Okere in the probate proceedings in the HCCC No. 11 of 2009 but she was not sure if the grant of letters of probate had been issued. To my understanding the said proceedings are still pending in the High Court. At least none of the parties produced the grant before me. In my view the defendant cannot therefore lay a claim on this basis until such a time the grant has been issued and confirmed. The property still remains the plaintiff's property and the fact that it was bequeathed under the will is no defence to trespass. DW1 can also not raise the defence that she was staying in the premises by dint of being director entitled to housing benefits since the same argument will apply as the shares were bequeathed under the will and must await grant of probate. In any event even if George lived therein pursuant to the benefit this benefit had only accrued to him and extinguished on his death. DW1 confirmed in cross examination that her shareholding was based on the will. She conceded she was not a director of the plaintiff which was also corroborated by the CR 12 produced by the Plaintiff.
32. The defendant further pleads and states that she has never received any notice from the plaintiff to vacate, preceding this suit. The plaintiff pleads that the defendant refused to vacate the premises despite notice. DW1, on being asked during cross examination as to whether she received the suit papers DW1 admitted that she was served. This line of cross examination in my mind was intended to imply that even if notice was not served the suit papers should be treated as notice. For me there was all clear indication that the Defendant was aware that she was not required on the suit property even before this suit was filed but she decided to take matters head-on.
33. It has also been submitted on behalf of the defendant that her occupation should be protected in view of her over 10 year (prolonged) stay in the suit property. Let me first state that the period of the defendant's stay that should count, is the period after George's death for purposes of the allegations of trespass herein. I have already observed that the period before George died was not in issue after all. It therefore follows that from 3/10/2018 when George died to December 2019 when this suit was filed the defendant had stayed if at all for approximately 15 months. No proof of the defendant's alleged prolonged stay was led in this court or corroborated, DW1 also did not counter the allegations that she only used to come to Kenya occasionally. She had all the leeway to present her passport since this is information in her custody but she did not. Assuming I'm wrong on this one the defendant at paragraph 1 of her witness statement as well as paragraph 5 of the defence states that she was invited by George in the year 2015 meaning by the time this suit was filed she had stayed on the suit property



for less than 5 years. Can this be termed as prolonged stay to warrant the prescriptive rights. Clearly no and I need not belabour this point.

34. I need to render myself on the submission by Mr. Okere that the will created a will trust to observe a licence with an equitable interest in favor of the defendant where this court was referred to Isack M'inanga Kiebia V. Isaaya Theuri M'lintari & another (supra) which I have read. The said decision is pegged on the customary trust concept which the Supreme Court held cannot be extinguished even upon first registration. It is noteworthy that the claimants in that case gave a detailed narration of the ownership history of the land therein. That the land belonged to their clan and after the land adjudication process in the year 1963, it was decided after meetings between the clan members that the land was to be registered in the names of appointed members who would hold the same in trust for the specific households. The parties in the said suit were able to demonstrate to the court that the land was under customary trust and after adjudication it remained to be part of community land to be vested upon individual members of the said community. The parties further gave sufficient evidence that they had been in occupation of the land having been born and raised there. I have already made my finding on the Defendants allegations of the 10 year long stay. Respectfully the facts are distinguishable. I will also add that it is trite that parties are bound by their pleadings. Nowhere in the Statement of Defence was this pleaded and I will say no more.

Whether the Plaintiff is entitled to the orders sought in the suit

35. I think I have said enough to show the Defendant is an intruder on the Plaintiff property herein and had no reasonable justification to remain on the suit property. Having come to this conclusion the court is tasked to determine if the Plaintiff is entitled to the orders sought? I will start with the prayer for mesne profits.
36. It is alleged that the defendant benefitted from housing without paying rent and mesne profits of Kshs.7, 627,200/= was proposed based on rent valuation by Musyoki & Associates of one beach house of the plaintiff (see pg 78) dated 21/10/2020. During the hearing Mr. Okere raised objection to the leading of evidence in this regard on the basis that it was not pleaded. The court directed that this would be a matter to be addressed in the final submissions, he did not. It is pleaded at paragraph 12 of the Plaint thus; -

‘.....the Plaintiff has suffered and continues to suffer loss of rental income , use and peaceful enjoyment of the suit property.....’

The plaintiff then proceeds to pray in paragraph 20 (iii) for ‘Mesne profits for trespass from 3rd October 2018 until payment in full’

37. In my view the above was sufficient in terms of pleadings. I note that this item was further elaborated in PW1 witness statement and the valuation report of one of the units that was presented in evidence by the Plaintiffs in the supplementary list of documents. Section 2 of the [Civil Procedure Act](#) Cap 21 of the Laws of Kenya defines mesne profits as follows: -

“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;

38. Order 21 rule 13 state as follows with regard to a decree for possession and mesne profits:



- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-
 - a. For the possession of the property.
 - b. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.
 - c. Directing an inquiry as to rent or mesne profits from the institution of such suit until: -
 - I. The delivery of possession to the decree-holder
 - II. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or
 - III. The expiration of three years from the date of the decree, whichever even first occurs.
- (2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

39. In the case of Fredrick Korir v Soin United Women Group (Sued through Eunice Towett, Jane Mwolomet, Lucio Chebocho [2018] eKLR the court citing various authorities stated thus; -

The Court of Appeal in the case of Attorney General v Halal Meat Products Limited [2016] eKLR considered when mesne profits could be awarded. The court stated as follows: -

“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.”

28. The court in the case of Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR had this to say in considering an issue of whether the Plaintiff had established a case for mesne profits: -

“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 of 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.

Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.

After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne profits for the use and occupation of the premises till he delivers up possession.

.....

The appellant never wrote back to dispute the Respondents response. It is important to point out that 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 illegal 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 provided the occupation is illegal.



For starters, it should be noted that the concept of mesne profits is a remedy available to the Landowner/Landlord in the event that a contractual tenancy ceases to exist and the tenant/occupier thereafter continues to occupy the premises as a trespasser.

Thus, where a landlord/tenant relationship existed like in the present case, it must be demonstrated beyond doubt that the tenancy was terminated legally and that the termination notwithstanding the tenant remained in occupation as a trespasser. Where a tenancy is created by operation of law, the tenant does not become a trespasser until the tenancy has become duly determined according to law. This position was reiterated by the apex court of Nigeria which stated:-

“Because a claim for ‘Mesne profits’ is based on trespass and is inappropriate in respect of lawful occupation as a tenant, it can only be maintained when the tenancy has been duly determined and the tenant becomes a trespasser...where a tenancy is created by operation of law, the status of trespasser will not arise, until the tenancy is duly determined according to law... however, the lawful use and occupation of the land and premises implies an agreement to pay damages for use and occupation of the land and premises. It is a quasi-tenancy which the law recognizes...”

40. Applying the above case law and the law to this case there were no allegations that the defendant was making money from the premises and therefore this is not in issue. However, it is their case that they lost income in rent for the period the defendant has been occupation after Georges death which they pleaded at Kshs.7, 627,200/=. They produced rent valuation report by Musyoki & Associates of one of beach houses demonstrating how the amount pleaded was arrived at. It is my finding this amount was substantiated and established to the required standards. The only rider I will make is to direct that the mesne profits shall be computed from 1st February 2019 (a period of three months) taking into consideration that parties must have been mourning the death of George and in any case, it would have taken time before a tenant was secured.
41. The court has been invited to make an order for a mandatory injunction directing the Defendant or her agents or anybody claiming under her to forthwith vacate or remove her personal belongings from the Plaintiffs property known as Cape Blush Massionate on title No. Kwale/Diani Beach Block/1228 measuring about 2.130 hectares situate in Kwale. In view of the courts finding that the defendant is trespasser and the Plaintiff having established a prima facie case that it is the owner of the property, then these orders are merited but with some adjustments which I will make later in this judgement.
42. Lastly, on the prayer for costs, the applicable law is found in section 27 (1) of the *Civil Procedure Act* 2010 to the effect that costs largely follow the event, and the court is given discretion to determine which party will meet the costs and to what extent.
43. The upshot of the foregoing is that the plaintiff has proved its claim against the Defendant on a balance of probabilities. Judgement is hereby entered for the Plaintiff against the Defendant in the following terms; -
 - a. That a mandatory injunction hereby issues directing the Defendant, its agents, servants and any persons claiming through them to vacate the parcel of land and remove her personal belongings from the Plaintiffs property known as Cape Blush Massionate on title No. Kwale/Diani Beach



Block/1228 measuring about 2.130 hectares situate in Kwale within 90 days of service of the judgment decree by the Plaintiffs. In default, an order for eviction to issue.

- b. That during the period in (a) above an order of permanent injunction restraining the Defendant whether by herself or through her servants, agents, employees, assigns or anybody claiming under her from putting up any structures thereon, carrying out any alterations, leasing, damaging, wasting away the Plaintiffs property known as Cape Blush Massionate on title No. Kwale/Diani Beach Block/1228 measuring about 2.130 hectares situate in Kwale.
- c. Mesne profits for trespass from 1st February 2019, excluding the 90 days above until payment in full.
- d. Considering the award on mesne profits, each party shall bear their costs.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 1ST DAY OF FEBRUARY, 2023

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Litoro for the Plaintiff

N/A Mr. Okere for the Defendant

Mr. Daniel Disii Court Assistant.

