Ofwona v Muthoni & 3 others (Civil Suit 332 of 2015) [2023] KEELC 19192 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19192 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT 332 OF 2015

LL NAIKUNI, J

JULY 6, 2023

BETWEEN

PAUL CAROLUS OFWONA ..... PLAINTIFF

AND

MARGARET MUTHONI ..... 1ST DEFENDANT

JOSEPHAT NYAGA MWANGI ..... 2ND DEFENDANT

SUSAN WAWIRA MWANGI ..... 3RD DEFENDANT

LAND REGISTRAR MOMBASA ..... 4TH DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by Paul Carolus Ofwona the Plaintiff herein. It was through an Amended Plaint dated 31st October, 2017 and filed on court on 21st November, 2017. The suit was against the 4 Defendants herein. Fundamentally, the Plaintiff moved court by filing a Notice of Motion application dated 11th December, 2015 under Certificate of Urgency seeking temporary injunction orders to restrain the 1st, 2nd, 3rd and 4th Defendants from selling, demolishing and or dealing in any manner prejudicial to the Plaintiff's proprietary rights with regards to plot no. Mombasa/Ziwa la Ngombe Settlement Scheme/1760 and the workshop on the front portion. (hereinafter referred as "The Suit Property" No. 1760).

2. Upon service of the pleadings and summons to enter appearance dated 18th December, 2015 thereon, the 1st, 2nd and 3rd Defendants filed their statement of Defence and Counterclaim dated 6th December, 2017 and 31st November, 2017 respectively.

3. On 4th April, 2019 upon all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the pre-trial conference, it was fixed for full trial. In the meantime, for a

while parties would be informing the Honourable Court that they were attempting to explore an out of court negotiation with a view of arriving at a settlement but nonetheless all the efforts became a cropper. Thus, it necessitated the fixing and hearing of the suit accordingly.

4. On 19th October, 2019 the hearing commenced in earnest whereby the PW – 1 and PW - 2 testified on behalf of the Plaintiff and closed down its case. Subsequently, on 21st April, 2022, the Defence case commenced whereby the Defendants summoned DW – 1 and DW 2 and they testified. On 21st April, 2022 they closed their case.

II. The Plaintiff's case.

5. Based on the filed pleadings the Plaintiff claimed that at all time material to this suit the Plaintiff is the owner of Plot No. Mombasa/Ziwa la Ngombe Scheme/1760. The Plaintiff acquired ownership over the said plot way back in the year 2002. This was done after the two (2) plots which were formally bought by his mother were declared as a settlement scheme and survey and allotment done granting the Plaintiff ownership of the plot.

6. The Plaintiff claimed that in the month of October 2015, the 1st, 2nd and 3rd Defendants without any colour of right and in collusion with the Land Adjudication Officer encroached into the Plaintiff's plot and through a disputed survey exercise put beacons right infront of the steel structure on the front portion of the Plaintiff's plot which was leased out.

7. He relied on particulars of fraud against the Defendants claiming that:

    a. Moving the boundaries between the Plot No.1760 and 1759 Mombasa/Ziwa la Ngombe settlement scheme.

    b. Unlawfully allocating a portio/n of Plot No.1760 Mombas/Ziwa la Ngombe settlement scheme to the 1st and 2nd Defendants.

    c. Colluding to dispossess the Plaintiff off a portion comprising his tenants' workshop and part of plot No.1760 Mombasa/Ziwa la Ngombe settlement scheme.

    d. Issuing a title to the 1st Defendant comprising the portion of the Plaintiff's plot.

8. On the 9th December 2015, the 1st, 2nd and 3rd Defendants through their agents trespassed into the plot after performing some bizarre rituals and declared that they intended to demolish the Plaintiff's tenant's workshop. The Defendants were in fact bearing the intent on dispossession the Plaintiff off a portion of his plot through dubious and underhanded deals which would occasion the Plaintiff to suffer irreparable damage and loss since the Plaintiff earned a monthly income from the leased portion of his plot. The Plaintiff had now been notified that part of the front portion of his plot had been allocated to the 2nd and 3rd Defendants who held a title comprising the same which act was fraudulently orchestrated to favour the Defendants. Despite demand and notice of intention to sue the Defendants had failed, refused and/or neglected to stop the trespass.

9. The Plaintiff prayed for Judgment to be entered against the 1st, 2nd, 3rd & 4th Defendants jointly and severally for:-

    a. An order of permanent injunction restraining the Defendants by themselves, their agents, assignees, employees and/or servants from selling, demolishing and or dealing in any manner prejudicial to the plaintiff's proprietary rights with regards to plot no. Mombasa/Ziwa la Ngombe Settlement Scheme/1760 and the workshop on the front portion.

b. A declaration that the portion occupied by the workshop is part of plot No.1760 Msa/Ziwa la Ngombe.

c. Costs of this suit and interest thereon

d. Any other or further relief this Honourable court may deem fit and just to grant.

10. On 16th October, 2019, the hearing for the Plaintiff commenced whereby he summoned two (2) witnesses - the PW – 1 and PW 2. They testified as follows: -

A. Examination in Chief of PW - 1 by M/s. Kayatta Advocate.

11. PW – 1 was sworn and testified in English language. He identified himself as Mr. Paul Carlus Ofwona. He lived in Changamwe. He said he is the Plaintiff in this case. He has sued the 1st, 2nd , 3rd and 4th Defendants. He filed his witness statement dated 11th December, 2015 which he wished to rely on as his evidence in chief. He also filed a list of documents on 11th December, 2015 which he wished to produce as Plaintiff Exhibit 1 to 6.

12. He told the court that he had further filed a further list of documents on 4th July, 2018 which he wished to produce as Plaintiff Exhibit 7 to 11. The suit is over a piece of land known as Plot No. 1760 Ziwa la Ng'ombe settlement, and was previously plot No. 1652. In the early 1990's his mother bought the piece of land from one Mohamed Abdalla who in turn had bought from Nyanje Kazungu and Matsui Kzungu.

13. They were also plots, after his mother acquired the two plots, she used the Plots until her demise in the year 1998. Thereafter inherited the plots and later got the title. The area was demarcated, subdivided, numbered and title deeds produced. Title deeds were given before the initial steps were taken, the exercise was undertaken by Land Adjudication Committee. The Principal Council of Mombasa were involving at some stage, though he was not sure. The Plot in dispute was Plot No. 1760 which was initially Plot No. 1652 and previously No. Z55269.

14. He was issued with two allotment letters because he had two plots. He made payments for Plot No. 1652 of a sum of Kenya Shillings Six Thousand Seven Fifty Hundred (Kshs 6,750/-) on 12th June, 2002. By then it had the initial number of 1760. Subsequently he was given a letter of offer for Plot No. 1760 which also charged the amount payable to a sum of Kenya Shillings Six Thousand Seven Sixty Two Hundred (Kshs. 6,762/-) which was an additional sum of Kenya Shillings twelve (Kshs. 12/-) which he paid on 5th June, 2013. He had the receipt for the initial payment and the subsequent payment. He also had all the documents which he had produced as exhibits. Later he acquired the title deed in year 2013 which he had produce in the bundle. There was already a house built by his mother before he got title, he had built two shops and was to build another on the left. He rented out one of the shops to one Oscar Sagwe. He also had opened a workshop which he planned to build another shop. This was in the year 2007 and the rent was a sum of Kenya Shillings Two Thousand Five Hundred (Kshs. 2,500/-). The tenant was using the shop as an office and used the open space for welding which Oscar Sagwe was operating. His neighbour, the 1st Defendant asked him for some space at the corner of the plot to put up open stalls. He had no problem as the 1st Defendant had been his tenant in his main house in the suit plot. She later bought land next to her plot. The 1st Defendant later out up room in the space that had allowed her to operate a stall on. The building she put up now encroached his land. He was disappointed but he thought the space was not that much. The 1st Defendant went further and wanted to remove Oscar from the space he had rented him. Before Oscar came to him, the 1st Defendant had

come to him requesting him to sell him to sell the land to him for a sum of Kenya Shillings Thirty Thousand (Kshs 30,000/-). He told him that he would think about it. Oscar came to him again asking to be allowed to put up a structure which the Witness allowed him to. The 1st Defendant panicked thinking he had sold the land to Oscar.

15. He told the court that he assured that in the event they reached an agreement for sale with Oscar would pull down his structure. The 1st Defendant went to local administration to claim that he had built a structure on her land, Plot No. 1759. The dispute went up to the Ministry of Lands and he received Summons from the Assistant County Commissioner. Subsequently, the Assistant County Commissioner ordered that surveyors go and survey the land.

16. The surveyors came but he disputed their findings or report. The report is dated 13th October, 2015 issued by the District Land Adjudication and Settlement Officer, Mombasa to the Assistant County Commissioner Kongowea. (Sea Document 2 in the Defendant's list of documents). After that, surveyor started putting beacons which he protested. The beacons were placed long after the titles had been issued. The letter dated 23rd December, 2015 in the Defendant's list of documents (page 7), confirmed that beacon identification exercise was done. The letter confirmed that he objected to the placing of the beacons in 2015.

17. He informed the court that nonetheless, the beacons were forcibly placed. Thereafter, he filed this in court. The original map has been changed. In his further list of documents, he had attached the contested map as well as the initial map. The boundaries have been changed in the contested map. According to him, his plot was of a rectangular shape. That was why he filed the suit against the Defendants and the Land Registrar. In his further bundles of documents, he had attached the transfer in which his mother purchased the plot.

18. He testified that after the suit was filed, an order was issued to the effect that nobody would tamper with the workshop until the suit is determined. He later realized that the 1st Defendant had claimed a portion which was extending to Oscar's workshop. It was his evidence that the Defendants fraudulently moved the boundary and allocated the 1st Defendant a portion of his plot. The Defendants are not entitled to the rent that Oscar had been paying him as he was being paid Kshs 2,500/- and not Kshs. 3,000/- from 2007. He did not agree with the survey report dated 8th May, 2018 filed in Court on 11th May, 2018.

Cross examination of PW - 1 by Mr. Oluga Advocate

19. He confirmed that he inherited the suit land from his father. He had his national identification card. His mother died in 1998. She was the one who originally owned the land. He did not do a succession cause. He did not obtain letters of administration in respect to her estate but it was eventually obtained. He did not file or produce a certificate of confirmation of grant indicating that he inherited the property. He told the court that in his further list of documents filed on 4th July, 2018, there is a transfer indicating that his mother purchased House without land erected on plot 464/1/MN. The suit property is plot No. 1760 Mombasa/ Ziwa La Ng'ombe Scheme/ 1760. The original number is plot no. 464/1/MN which was changed to Z.S.S. /269 and then it was changed again to 1652 and then 1760 and a letter of allotment was issued. There is the original letter of allotment date 15th February, 2002 for plot No. 1652. The suit property was originally plot No. 1652. The letter of offer does not indicate it has changed to No. 1760. There is a letter of offer dated 2nd January, 2013 for plot No. 1760.

20. He told the court that the letter does not show it changed from plot No. 1652 to 1760. There is nothing to show that the plot number changed. By his oath, these are one and the same plot. There is also a letter of allotment dated 15th February, 2002 for plot No. 1646. Plot No. 1646 is a different plot which is not subject to this case. It must have been filed by mistake. The letter of offer dated 2nd January,

2013 was valid for 90 days i.e. up to 2nd April, 2013. By 2nd April, 2013, he was required to have paid ksh.6,762/= which he paid ksh.12/= vice receipt No. 1767406 dated 5th June, 2013. The letter of offer required him to pay by 2nd April, 2013, he paid out of time. By the time he paid, the offer had lapsed. The first payment was made on 12th June, 2002 vide receipt No. 504120 for a sum of Kenya Shillings Six Thousand Seven Fifty Hundred (Kshs. 6,750/=) for Plot No. 1652.

21. He told the court that his claim is that the boundary of his plot was altered by the Land Adjudication Officers. He had sold them through the Land Registrar. He believed that the Land Adjudication Officer was under the Land Registrar. He filed two maps in his further list of documents. The small map is the latest map while the big one is the old map. These maps were changed severally. They were told the latest maps supersedes the older maps. All plot numbers were changed. Plot No. 1759 was not there in the original map. It should be there as plot No. 1650. His plot No. 1760 was in the original map as plot No. 1652. Plot No. 1759 and 1760 did not exist in the original map.

22. He had seen Plot No. 1759 and 1760 in the old (big) map. When he stated Plot No. 1759 and 1760 do not exist, he was misunderstood. He could not deny Plot No. 1759 and 1760 are in the original map as he had seen them. Plot No. 1761 is to the east of plot no.1759. he could see Plot No. 1760 and 1759, the transfer attached to the Plaint indicated that his mother purchased house without land. According to the document, his mother bought house without land from the owner of the 11 rooms without land. It was true that his mother could own bequeath him a house without land. He developed two shops on one side and a garage on the other side of the suit property. At that time there, no requirement to seek approval.

23. He developed the suit property before his title was issued, he developed the rental houses in the year 2006. He could see the letter dated 29th December, 2015 from the County Government of Mombasa to him on illegal development of a garage on Plot No. 1760/1/MN. It is true the letter says he did not seek approval, although this is a boundary dispute and the alteration that took place during the adjudication process. He was aware that anybody dissatisfied with the adjudication Process was supposed to lodge a complaint or objection of the process. What he had brought to court was a boundary dispute. He was not aware such complaints were supposed to be lodged with the land registrar. Surveyors had come to survey the suit property as he was aware that the court had ordered the County Surveyor to conduct survey and file a report.

24. He informed the court that he was aware the County Surveyor filed his report in court. He was aware the report stated that the welding shade encroached on Defendant's plot. He could not see the letter dated 13th October, 2015 in Defendant's list form District Land Adjudication and Settlement officer stated garage on Plot No. 1760 encroached Plot No. 1759. He disputed the small map which was current, disputing the map used by the surveyor during the joint survey attached to the report dated 8th May, 2018. The map existed before the case was filed. In the Plaintiff's further list of documents, there was a letter dated 16th December, 2015 from the District Surveyor to him. The letter was not signed. The letter does not state the Defendant was there. He had never earned any money from the garage. Their agreement was that Mr. Oscar Mugomba Sagwe would use and when he leaves, the garage became his. Mr. Sagwe was paying him rent for the shop. The garage was used for storage.

25. His testimony was that that Oscar Sagwe constructed the garage and he used it for free, but would leave it for him when he left. In Paragraph 8 of the Plaint, he had pleaded that the Defendants performed bizarre rituals. He had not described the said rituals.

Cross examination of PW - 1 by Mr. Mkok Advocate

26. He testified that he followed due process in acquiring the property. He had title to the property dated 18th November, 2013 and this was the first time the property was in dispute. He faced challenges during adjudication. He protested but they went ahead and placed the beacons. He was not aware of the functions of the Land Registrar vis a vis the Adjudication officer. His lawyer advised him on the parties to sue. He felt the Adjudication officer should have been sued as Defendant because they are the ones who put the beacons. He was not sure if he had sued the wrong party. If he was given an opportunity to bring in the Land Adjudication Officer, he would fake it.

Re - Examination of PW - 1 by M/s Kayatta Advocate

27. He confirmed that he had been working on the plot. He thought it necessary to apply for grant Letters of Administration in the given circumstances. Referred to annexure 9 the original does not show the Plot, it was the mother title. They were allocated new numbers 1652 and 1760 i.e. the same plot later changed the numbers -Exhibit No. 2 11th December, 2015. Letter of allotment-5th February, 2002. There was no new number 1760 was the first they were given there was the second one. They were given 90 days to pay the rent but they paid later as they received the letters of allotment late. They would write the date at the back of the letter of allotment. Hence, he did not remember when he received it.

28. He testified that he had two exhibit 3 receipts, one had number 1652, they were to pay a sum of Kenya Shillings Six Thousand Five Fifty hundred (Kshs. 6,550/=). By the time they were paying the figure had changed and that is why he paid Kshs 12/-. He did not participate in the adjudication process and when he saw the MAP, he was not aware that his portion had been taken and added into the Defendants' portion. He sued the Land Registrar instead of the land adjudication officer as it was an issue was a boundary dispute.

Examination in chief of PW - 2 by Ms Kayatta Advocate

29. PW - 2 was sworn and testified in Kiswahili language. He told the Court that he was Mathui Kazungu Mkaua, lived in Bombolulu, Ziwa la Ng'ombe. He recorded his statement dated 25th January, 2007 and he wished to adopt his as his examination in chief.

Cross Examination of PW - 2 By Mr. Oluga Advocate

30. The mother of the Plaintiff sold the suit property to an Arab. It was in the year 1996. PW – 2 was ten (10) years old by then. The Arab built and sold to the mother of the Plaintiff the suit property. The Arab was called Ahmed. There was an agreement. PW – 2 was educated up to Class 6 of Primary School Education. The Plaintiff's mother was called Josphine Awiko. He was referred to the sale agreement duly executed between Ahmed and Josephine and the transfer made on 2nd April, 1993. It was for the house only and not for the land (the house without land). There was a map for the land but he did not have it in court. They never sold land to Mama Paul as it was Ahmed who sold it. There was no surveyor. Their land was stretched. By this time land had no beacons. The beacons were placed after Abdalla sold it to Mama Paul.

Cross Examination of PW – 2 by Mr. Makuto Advocate

31. He told the court that he came to the Coast in the year 1976. He was 50 years of age now. He was born on 7th April, 1970. He came to Mombasa with his parents and they did not have title to the suit property then. They had not produced the agreement sold to Mr. Abdalla who later sold the land to Mama Paul. The plot had 13 rooms. There was no land surveyor who had visited. During the adjudication, he was

present. He never lodged any complaint to the Land Adjudication on the size of the land. There were elders appointed to resolve the land dispute, he had a title deed issued to him in the year 2007.

Re - Examination of PW - 2 by Ms. Kayatta Advocate

32. He testified that in the year 1986, they sold a plot of 13 rooms (measuring 12 feet by 11 feet), they were the ones who sold the land to the Defendant – Margaret Muthoni, she bought the length.

III. The 1st, 2nd and 3rd Defendants' Case

33. The 1st, 2nd and 3rd Defendants were two females and one male adults of sound mind and understanding. From the onset, the 1st, 2nd and 3rd Defendants aver that the Amended Plaint dated 31st October 2017 is fatally defective for being materially and substantially different from the Draft Amended Plaint for which the Court granted leave to be/ filed. They admitted Paragraph 6 of the Amended Plaint. Paragraph 7 of the Amended Plaint was denied, the 1st, 2nd and 3rd Defendants averred that they were strangers to the averments at paragraph 8. In response to paragraph 9, the 1st, 2nd and 3rd Defendants reiterated the contents of their Amended Defence and Counterclaim and aver that the steel structure was constructed on the 2nd and 3rd Defendants' portion of land and not on the Plaintiffs.

34. They denied the contents of paragraphs 10 and the particulars under sub-paragraphs (a) to (d) in toto. In response to the allegations contained in the said paragraph 10 (a) to (d), the 1st, 2nd and 3rd Defendants aver that they neither colluded with the Land Adjudication Officer nor encroached on the Plaintiffs plot. The survey exercise was conducted in the presence of the Plaintiff and the turnaround is caused by the fact that the survey report was not favourable to the Plaintiff because it clearly showed that the Plaintiff had encroached on the 2nd and 3rd Defendants' plot.

35. They denied that they performed bizarre rituals as alleged at paragraph 11 of the Amended Plaint. The Defendants plead that if indeed they conducted any bizarre rituals, the Plaintiff should have taken action and reported the matter to the police as performance of bizarre rituals is a criminal act. They denied that they had intent on dispossessing the Plaintiff of its portion of the plot through dubious and underhand deals or through any other means whatsoever as alleged at paragraph 12 of the Amended Plaint. Instead, the 1st, 2nd and 3rd Defendants pleaded that it is the Plaintiff who has taken away a portion of the 2nd and 3rd Defendants' land and has constructed thereon a workshop. They denied that the Plaintiff has or will suffer any loss and damage as alleged in paragraph 12 of the Amended Plaint. Instead, the 1st, 2nd and 3rd Defendants plead that it is the Plaintiff who has unjustly enriched himself by collecting rent from the workshop constructed on a portion of the 2nd and 3rd Defendants' portion of land.

36. The 2nd and 3rd Defendants denied that part of the Plaintiff's front portion has been allocated to them as alleged at paragraph 13 of the Amended Plaint. The 1st, 2nd and 3rd Defendants stated that the Plaintiff's suit was misconceived, vexatious and scandalous and never disclosed any cause of action and never warranted the granting of prayers sought therein. Service of demand and notice of intention to sue was denied. The jurisdiction of this court was admitted.

37. The 1st Defendant filed a counter claim pursuant to leave of the Court granted on 31st November, 2017 where she averred that she admitted the descriptive parts contained in Paragraphs 1, and 2 of the Plaint and stated that her address for purposes of this suit shall henceforth be Care of M/s. Selina Egesa and Company Advocates, 3rd floor Talab Building, Jomo Kenyatta Avenue of P.O. box 834990 – 80100, Mombasa, Ooluga & Company Advocates, K.C.B Treasury Square building, office suite a P.O. Box Number 41703 - 80100 Mombasa.

38. She denied the contents of Paragraphs 3, 4 and 5 of the Plaint and the contents of Paragraph 6 and 7 of the Plaint and in particular that the said OSCAR SAGWA put up steel structure in 2007 or at all. The Defendant denied the contents of paragraphs 8 and 9 of the Plaint and in particular the performance of bizarre rituals and declaration of intention to demolish the said steel workshop as alleged. She denied that the Plaintiff had suffered any loss and damage as alleged in paragraph 9 admitting to contents of paragraph 11 of the Plaintiff and averring that however the Plaintiff was not entitled to costs as prayed.

39. In terms of the Counter Claim in verbatim the 1st Defendant alleged:

    a. References in this Counterclaim to "Plaintiffs" would mean the Plaintiffs in the Counterclaim while references in this Counterclaim to "Defendant" would mean the Defendant in the Counterclaim.

    b. The 2nd and 3rd Plaintiffs were the registered owners of that property known as MOMBASA/ ZIWA LA NGOMBE SCHEME/1759 (hereinafter "the suit property") which they were given by their mother, the 1st Plaintiff herein.

    c. The Plaintiffs were in occupation of the suit property where the 1st Plaintiff carried on the business of tailoring and dressmaking as well as fresh water business to earn a living.

    d. The suit property was allocated to the 1st Plaintiff over 10 years ago and the Plaintiffs occupied the same even before the title deed was processed.

    e. The Defendant was the registered owner of the property known as Mombasa/ziwa La Ngombe Scheme/1760 which immediately borders the suit property.

    f. The Defendant trespassed on the suit property by exceeding the boundary of his property and constructed a garage measuring 3.5 meters onto the Plaintiffs' suit property without the Plaintiffs' consent.

    g. The Defendant developed the garage without obtaining the approval of the County Government of Mombasa as mandated by the provision of Section 36 of the Physical Planning Act Cap. 286 Laws of Kenya and without the Environment Impact Assessment Report from the National Environmental Management Authority (NEMA).

    h. Upon completion of the garage, the Defendant leased the same out to a tenant known as OSCAR SAGWA who had been operating thereon a steel and welding workshop at a monthly rent of a sum of Kenya Shillings Three Thousand (Kshs. 3,000.00).

    i. The Plaintiffs averred that the Defendant trespassed on their property and denied, them the use and income generated therefrom at a sum of Kenya Shillings Three Million (Kshs. 3,000.00) per month from the year 2007.

40. From the Counter – Claim, the Plaintiffs in the Counter Claim prayed for Judgment to be entered against the Defendant in the Counter Claim for:

    a. An order of Mandatory injunction to compel the Defendant to demolish and remove the debris of the garage which he constructed on Mombasa/ziwa La Ngombe Scheme/1759 within 14 days of this order.

    b. An order of permanent injunction to restrain the Defendant from trespassing on the property known as Mombasa/ziwa La Ngombe Scheme/1759

c. A sum of Kenya Shillings Three Fourty Five Thousand (Kshs. 345,000.00) being rental income collected by the Defendant from the garage from the year 2007 to date.

d. Mesne profits

e. Costs of this Counterclaim

41. For that reason, the 1st, 2nd and 3rd Defendants prayed that the Plaintiff's suit be dismissed with costs and their Counter claim be allowed.

IV. The testimony by the 1st, 2nd & 3rd Defendants

42. On 21st April, 2022, DW - 1 and DW - 2 testified as follows:-

Examination in Chief of DW - 1 by Mr. Oluga Advocate

43. She testified and was sworn in Kiswahili language. She identified herself as being Margaret Muthoni. She was the 1st Defendant herein. She recorded the witness statement dated 22nd February, 2016 filed on 23rd February, 2016 which she adopted as part of her evidence in chief. She filed a bundle of 8 documents dated 22nd February, 2016 which she produced as Defendant exhibit No. 1 and 2. A survey report by Gilbert Nderitu County Surveyor, she was aware of the report and the Plaintiff was also present.

Cross examination of DW - 1 by Ms. Kayatta Advocate

44. She informed the court that she was not from Coast originally, she bought her plot from the people she found there. They wrote an agreement, he did not have a copy there. The Defendant identified Mr. Muthui and Mr. Nyanje were present and who sold the plot to him. They showed her the plot, there were no surveyor and no proper measurements. It was based on estimation, she found Mr. Paul Ofwona there. She was his tenant in one of his building, he found the Plaintiff there. He bought her Plot in 1995 and she occupied and lived there from 2000. By then there was no shed by Mr. Paul Ofwona.

45. She testified that from her counter claim she was claiming to be paid a sum of Kenya Shillings Three Thousand (Kshs. 3,000/-) per month from the year 2007 as from the year 2007 the Plaintiff i.e. paragraph 18 did prayer No. 3. i.e. a sum of Kenya Shillings Three Forty Five Thousand (Kshs. 345,000/=) being rental income collected by the Defendant from the garage from the year 2007 to date. It was her testimony that they had been assisting some people, there was a letter dated 13th October, 2015 by the District Land Adjudication and Settlement Officer (DLAO) from this letter it showed that there was encroachment. There was a letter dated 23rd December, 2015. It was different from the previous letter. It did not mention the tanks.

46. From the letter by the surveyor, the people who sold them land were not heard. Its only themselves. By the time the survey was done, the garage was there. The 1st survey was 2015 and 2nd survey was 2018 and title deeds were issued 2013. The title deeds were issued first then beacons followed.

Cross Examination of DW - 1 By Mr. Makuto- Advocate

47. DW – 1 was referred to ground reports dated 13th October 2015 and another dated 23rd December 2015 after there was a complaint. They were only coming to identify the beacons. Later on the land surveyors came. The Plaintiff indicated he was never present. She got her title deed on 11th November,

2013. She was referred to her title deed. The DLAO came and showed as their own position. When the decision on the land boundaries was made, she was not present.

48. She still had the water tank. The tanks were there even when the surveyor conducted the surveying of the land. She never compromised the surveyor, she did not interfere with the surveying process. She only had a claim against the Plaintiff/ Paul and not the Land Registrar.

Re - Examination of DW - 1 By Mr Oluga Advocate

49. The garage was constructed January 2015, she had a claim against Plaintiff, a sum of Kenya Shillings Three Fourty Five Thousand (Kshs. 345,000/-) arising from the encroachment. From the Amended Plaint dated 13th October, 2017, according to the Plaintiff, the garage was constructed in the year 2007, her tanks, one is on the Plaintiff's portion. The letter dated 13th October 2015, indicated that the two water tanks fall along the boundary lines between the two (2) plots on plot 1760. She would be very ready to remove the tanks. She was not the one who wrote these reports, she was not a surveyor. During the verification of the beacons by the surveyor the sellers were not present but Paul was present. The sellers had never complained. The dispute was between herself and the Plaintiff. She remembered the offices where the Complaint was lodged one of them was the Land Registrar's. The complaint was from the District Officer to the Land Registrar. The DLAO had written to the Land Surveyor and the District Commissioner. None of these letters were addressed to the Land Registrar clearly there is no claim with the office of the Land Registrar. The survey was done after the title deed was undertaken but later on the Ministry of Lands came to do a verification of each person's their exact places. The Plaintiff refused for the concreting but plus he agreed to be placed.

Examination in Chief of DW - 2- By Oluga Advocate

50. She told the court that she was Susan Wawira Mwangi, the 3rd Defendant herein who filed her witness statement dated 8th November, 2017 and wanted to adopt her witness statement as her evidence in chief. She told the court that the Plot belonged to her brother Josephat Nyaga Mwangi and she was given the same as a gift inherited.

Cross Examination of DW - 2 by Ms. Kayatta Advocate: -

51. She testified that she was still a baby when the Plot was bought and all he knew was what her mother told her.

Cross Examination of DW 2 by Mr Makuto Advocate: -

52. She told the court that they were given the plot by their mother. They had lived there from the year 2000.

V. The Submissions

53. Upon the closure of the case by both the Plaintiff, the 1st, 2nd and 3rd Defendants herein, the parties were directed to file their written submission within stringent timeframe thereof on. Pursuant to that they all complied accordingly. The honourable court reserved a date to deliver its judgement on notice to all the parties.

A. The Written submission by the Plaintiff

54. On 18th May, 2022, the Learned Counsel for the Plaintiff through the Law firm of Messrs. M.K. Mulei & Company Advocates filed their written submissions dated 18th May, 2022. M/s. Kayatta Advocate

submitted that through an Amended Plaint dated the 31st October 2007, she re – capped the reliefs that the Plaintiff had sought. She indicated that the Defendant in opposition also filed an Amended Statement of Defence and Counterclaim.

55. The Learned Counsel submitted that the brief facts of the case were that the Plaintiff averred that he was the owner of Plot No. Msa/Ziwa la Ngombe Scheme/1970. That he acquired the plot after the plot which had initially been purchased by his mother was left to him and when the area was eventually declared a government settlement scheme. He was issued with a Letter of Offer after being found in possession of a house in the portion where he occupied. He developed and renovated the rental houses which were on the plot and on the front undeveloped portion he leased the space to one Oscar Sagwe who put up a workshop thereon.

56. It was the portion that was in dispute, with the Defendants claiming that the workshop had encroached on a portion of the land which was neighbouring the Plaintiff's and was part of plot No.Msa/Ziwa la Ngombe Scheme/1759. The Plaintiff filed its list of issues on the 4th July 2013. The Learned Counsel raised three issues for determination as follows:-

57. Firstly, on whether the Plaintiff had trespassed into Plot no. Msa/ziwa La Ngombe Scheme/1759. The Learned Counsel submitted that it was the Plaintiff's evidence that he acquired his Plot No. Msa/Ziwa la Ngombe Scheme/1760 from his mother initially. When the area was declared a settlement scheme he was found in occupation and allotted the land after the government declared the area a settlement scheme. It was the Plaintiff further evidence that he complied with all due processes and was allotted the land and issued with a title deed Plaintiff Exhibit - 1, 2, 3 confirm that 2 allotment letters were given after the Plot changed numbers from 1652 then finally to 1760.

58. It was the Plaintiff's further contention that the plot he was allotted was inclusive of the disputed area where his tenant's workshop was located. The Plaintiff's evidence was supported by the evidence of PW - 2 who were the initial occupants of the area. It was PW - 2's evidence that both the Plaintiff and the Defendants purchased portions from third parties who purchased the same from them and it was PW - 2's evidence that the portion in dispute forms part of the portion belonging to the Plaintiff.

59. The Learned Counsel was instructive to note, that even through the Plaintiff provided evidence confirming how he initially acquired the plot, the Defendants never availed their initial agreements with PW - 2 probably because they knew the same would show, the exact portion sold to them to their detriment. When the survey and demarcation process was done, the Plaintiff's tenant's workshop was in existence. It is the Plaintiff's evidence that beacons were placed on the plots after the dispute between the parties arose. That it was then that the Plaintiff became aware of the Defendant's claim of the portion. This was indeed confirmed even by the Defendant's annextures which all showed that she started making her claims in the year 2015, in spite of title deeds being issued in the year 2013 and allotment letters even earlier.

60. It was therefore the Learned Counsel's humble submission that the Plaintiff had not encroached in any way. On the contrary, it was the Defendant who had done so. Besides, from the Defendants' annexture 2 being a letter dated 13th October 2015 which showed that both parties had encroached on each other's plot. Also, the report by the District Land Adjudication and Settlement Officer and the 1st Defendant also admitted that her 2 water tanks encroached on the boundary and one into the Plaintiff's plot. They urged the court to take cognizance of the bias in the other reports inclusive of the court ordered report whose findings the plaintiff was not contented with.

61. Secondly, the Learned Counsel raised the issue on the allocation process. According to her, from the Plaintiff's evidence after the area was declared a settlement scheme survey was done and parties were

issued with Letters of Offer. The Plaintiff had two letters being - Exhibit - B2 and Exhibit - 3 showing the initial No. 1652 for which receipt for a sum of Kenya Shillings Six Thousand Seven Fifty Hundred (Kshs.6,750/=) was issued after payment and new allotment letter dated the 2nd January 2013 for which a receipt of Kenya Shillings Twelve (Ksh.12/-) was issued showing payment of the additional charges thereafter the government issued titles Exhibit - 1 in the year 2013. As early as the year 2007 as per Plaintiff's exhibit 11, the Plaintiff's tenant was already in occupation of the workshop in occupation of the disputed portion, why was there no claim until the year 2015? It was apparent that it was because there was no such claim and the Plaintiff continued with possession unaware of the alleged claim by the Defendants

62. Thirdly, the Learned Counsel raised the issue on whether the boundaries between the 2 plots were tampered with. The Learned Counsel contention was that the Plaintiff's evidence supported by the maps produced as Exhibit No. 7 that his plot was initially straight rectangular with no contours as opposed to the claim now being made. It was apparent from the Defendant's exhibit marked as Exhibit no. 8, being the Surveyors Map attached thereof, the alleged portion had been hived off from Plot No.1760 the welding shade was clearly on the front portion of Plot No.1760.

63. Therefore, the Learned Counsel averred that the inclusion of the portion with the shade to form part of the Defendants Plot No.1759 was unlawful. The Plaintiff had further produced a letter produced as the Plaintiff Exhibit - 8 which was issued by the District Land Surveyor Mombasa County dated 16th December 2005, which stated that the dispute between the parties was not on boundary but a claim of a portion between the Plaintiff and the Defendants. The Plaintiff had demonstrated that the initial portion his mother acquired and which was to be later allocated to him after the area was declared a settlement scheme was known, his contention has been confirmed by PW - 2 who were the original occupants of the land, hence the allotment of the portion where the workshop existed to the Defendants was unlawful and fraudulent. The Plaintiff's original maps show that changes were made on the plots and no justification had been given.

64. It was the Learned Counsel's argument therefore that the Plaintiff had proved on a balance of probability his case and ought to be awarded the prayers sought with costs. To buttress her point, the Learned Counsel referred the Court to the case of "ELC NO. 881 of 2017 Sangale Ole Langas – Versus - Stephen Mishishi & Another where the Court in almost similar circumstances made a finding in favour of the Plaintiff.

65. The Learned Counsel referred to the Counter claim by the Defendants submitting that the Defendants. had failed to establish their claim as stated in their counterclaim and the same sought to be dismissed with costs to the Plaintiff. The Defendants had sought for: -

    i. An order of mandatory injunction to compel the defendants to demolish and remove the debris of the garage which he constructed on Msa/Ziwa la Ngombe Scheme/1759 within 14 days of issuance of the order.

66. The Learned Counsel opined that the portion in dispute was a portion of Plot No. Msa/Ziwa la Ngombe Scheme/1760 hence the Defendants prayers ought not be granted. In further response to the prayer seeking an order of permanent injunction, the Defendants had not established a prime facie case, that the portion fell with its title, that there was conflict and collusion and a claim of change of allocation without reasons. On a balance of convenience, the workshop had since the inception, the year 2007 been managed by the Plaintiff who considered the same to fall within his portion, hence the Plaintiff stood to suffer more loss than the Defendants at the loss of the said space.

67. On the rental income of a sum of Kenya Shillings Three Hundred and Fourty Five Thousand (Kshs. 345,000/-) from the year 2007, it was the Learned Counsel's submission that this claim had not been sufficiently established. It was certain from all the Defendants documents that they commenced their claim in the year 2015, infact it was the Plaintiff who filed the current suit why would they seek income from year 2007, besides the Plaintiff's annextures produced as Plaintiff Exhibit - 11 showed that the rent in year 2007 was a sum of Kenya Shillings Two Thousand Five Hundred (Ksh.2,500/=) and later increased, Thus, why would the Defendants be awarded a sum of Kenya Shillings Three Thousand (Ksh.3,000/=). Further, they submitted that this amount was not justifiable since in any event the Plaintiff believed the portion to be his until the Defendants claim from the year 2015 after which the matter was filed for determination before this court since each party believed the portion to be theirs. They similarly submitted that on account of the foregoing the claim on mesne profits was unjustified and unproved. They prayed for a dismissal of the Counter Claim with costs of the Plaintiff.

VI. Issues of Determination

68. I have keenly assessed the filed pleadings, the oral and documentary evidence adduced in Court by all the witnesses herein, the written submissions and the cited authorities by all the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

69. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) issues for its determination. These are: -

    a. Whether the suit instituted by the Plaintiff herein against the 1st, 2nd, 3rd & 4th Defendants has any merit whatsoever.

    b. Whether the Counter Claim instituted and/or raised by the 1st, 2nd and 3rd Defendants/ Plaintiffs' herein against the Plaintiff has any merit whatsoever.

    c. Whether the parties herein are entitled to the reliefs sought.

    d. Who should bear costs of the Suit and the Counterclaim.

VII. Analysis and Determination

ISSUE No. a). Whether the suit instituted by the Plaintiff herein against the 1st, 2nd, 3rd & 4th Defendants has any merit whatsoever.

Brief facts

70. Before embarking on the issues under this sub-heading its imperative that the Honourable Court dealt with brief facts on this case. From the filed Plaint, it is not disputed that the Plaintiff is the legal registered owner to the Mombasa/Ziwa la Ng'ombe Settlement Scheme/1760 while the 2nd and 3rd Defendants are the registered owners of that property known as Mombasa/ Ziwa la Ng'ombe. Sometimes back, a boundary dispute arose between the Plaintiff and the Defendants.

71. It is the Plaintiff's evidence as stated herein that after the area was declared a settlement scheme survey was done and parties were issued with letters of offer. The Plaintiff has two letters Exhibit B2 and Exhibit 3 showing the initial No.1652 for which receipt for Kenya Shillings Six Thousand Seven Fifty Hundred (Kshs.6,750/=) was issued after payment and new allotment letter dated the 2nd January 2013 for which a receipt of Ksh.12 was issued showing payment of the additional charges thereafter the government issued titles Exhibit 1 in 2013.

72. The Director of Survey is empowered under Sections 15 - 17 of the *Land Registration Act*, No. 3 of 2012 to alter and rectify boundary lines or position of a boundary based on a cadastral map based on subdivision plan, combination plan or any other approved plan necessitating the alteration of the boundary.

73. In the instant case, the Defendants/Plaintiffs to the Counter claim in the Counter Claim contended that the proper procedure for resolution of the boundary dispute herein had been followed.The suit property was allocated to the 1st Plaintiff over 10 years ago and the Plaintiff occupied the same even before the title deed was processed.The survey exercise was conducted in the presence of the Plaintiff and the turnaround is caused by the fact that the survey report was not favourable to the Plaintiff because it clearly showed that the Plaintiff had encroached on the 2nd and 3rd Defendants' plot.

74. The dispute went up to the Ministry of Lands and he received Summons from the Assistant County Commissioner. Subsequently, the Assistant County Commissioner ordered that surveyors go and survey the land. The surveyors came but he disputed their findings or report. The report is dated 13th October, 2015 issued by the District Land Adjudication and Settlement Officer, Mombasa to the Assistant County Commissioner Kongowea as per Document 2 in the Defendant's list of documents. After that, surveyor started putting beacons which he protested. The beacons were placed long after the titles had been issued. The letter dated 23rd December, 2015 in the Defendant's list of documents (page 7), confirmed that beacon identification exercise was done. The letter confirmed that he objected to the placing of the beacons in 2015. That is adequate on the facts.

91. Now turning to the issues under this sub-heading it's trite law that according to the Provisions of Section 7 of the *Land Act* No. 6 of 2012 of the Laws of Kenya, one may acquire ownership to land through various means. These are: -

    a. Allocation;

    b. Land adjudication process;

    c. Compulsory acquisition;

    d. Prescription;

    e. Settlement program

    f. Transmission

    g. Transfer

    h. Long term leases exceeding twenty one (21) years created out private land; or

    SUBPARA i.

    Any other manner prescribed in an act of parliament.

    The Provisions of Sections 24, 25 and 26 of the *Land Registration Act* provides as follows: -

    Section 24 provides: - Interest conferred by registration

    Subject to this Act—

    a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

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

Section 25 provides: - Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

92 Section 26 provide: - Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

93. Upon acquisition of a Land through the above legal means one is granted a Certificate of Title Deed and hence conferred with indefeasible title, rights and ownership to the land. This court was satisfied that the process by the Regional Surveyor in visiting the site and subsequently preparing the said report was proper and within the law. As such, it was the finding of this Court that the proper procedure was followed in resolving the dispute herein and the said report is adopted for consideration.

94. I therefore find that the Plaintiff in the main suit has failed to prove his case against the Defendants as the report dated 23rd December, 2015 by the surveyor itself indicates that the boundary is on the Defendants' plot of land.

ISSUE No. b). Whether the Counter Claim instituted and/or raised by the 1st, 2nd and 3rd Defendants/ Plaintiffs' herein against the Plaintiff has any merit whatsoever.

95. Under this sub - heading and based on the facts staffed herein, from the facts of the case, 2nd and 3rd Plaintiffs are the registered owners of that property known as MOMBASA/ZIWA LA NGOMBE SCHEME/1759 (hereinafter "the suit property") which they were given by their mother, the 1st Defendant/Plaintiff in the counter claim herein.The Defendants/Plaintiffs to the Counter claim are in occupation of the suit property where the 1st Plaintiff in the Counter claim carried on the business of tailoring and dressmaking as well as fresh water business to earn a living. The suit property was allocated to the 1st Plaintiff in the counterclaim over 10 years ago and the Plaintiffs in the Counter claim occupied the same even before the title deed was processed. The Defendant is the registered owner of the property known as MOMBASA/ZIWA LA NGOMBE SCHEME/1760 which immediately borders the suit property. The Defendant trespassed on the suit property by exceeding the boundary of his property and constructed a garage measuring 3.5 meters onto the Plaintiffs' suit property without the Plaintiffs' consent. The Defendant developed the garage without obtaining the approval of the County Government of Mombasa as mandated by section 36 of the Physical Planning Act Cap. 286 Laws of Kenya and without Environment Impact Assessment Report from National Environmental Management Authority (NEMA).

96. Upon completion of the garage, the Defendant leased the same out to a tenant known as Oscar Sagwe who had been operating thereon a steel and welding workshop at a monthly rent of Kenys Shilling Three Thousand (Kshs. 3,000.00/=). The Plaintiff averred that the Defendant trespassed on their property and denied, them the use and income generated therefrom at a sum of Kenya Shillings Three Thousand (Kshs. 3,000.00/=) per month from the year 2007.

97. It is now well established that the rule of evidence under the provision of Sections 109 to 112 of the *Evidence Act*, Cap. 80 is clear on the burden of proof that he who alleged must prove. The Defendants/ Plaintiffs in the counterclaim has to proof his case so as to be entitled to the reliefs sought in the Counter Claim. In relying on the facts as presented it is the finding of this Court that the Regional Surveyor who was an expert properly arrived at his conclusions in respect to the suit property. Based on this and my own view is that the Plaintiff's action on the Defendants property amounted to a continuous trespass on the suit property. It is imperative that the Court provides the meaning of the concept trespass and continuous trespass. The provision of Section 3 (1) of the *Trespass Act*, Cap 294 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."

95. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership.

96. In Clerk and Lindsell on Torts, 17th Edition page 1354 paragraph 24. It is stated:-

> " Nuisance" is defined as an act or omission which is an interference with, disturbance of or annoyance to, a person's rights used or enjoyed in connection with land. It is caused usually when the consequences of a person's actions on his land are not confined to the land, but escape to his neighbours land causing an encroachment and causing physical damage or unduly interfering with the neighbour's use and enjoyment of his land".

95. It is trite law that trespass to land is actionable per se (without proof of any damage). See the case of "Park Towers Ltd – Versus - John Mithamo Njika & 7 others (2014) eKLR" where J.M Mutungi J., stated:

> "I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case....."

95. In the case of: Duncan Nderitu Ndegwa – Versus - KP& LC Limited & Another (2013) eKLR P. Nyamweya J. (as she then was) held: -

> "....once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants' trespass"

95. The Defendants/ Counter claimants therefore prayed for Judgment to be entered against the Plaintiff for a mandatory injunction to compel the Plaintiff to demolish and remove the debris of the garage which he constructed on MOMBASA/ZIWA LA NGOMBE SCHEME/1759 within 14 days of this order and a permanent injunction to restrain the Defendant from trespassing on the property known as Mombasa/ziwa La Ngombe Scheme/1759.

96. The Defendants in their counter claim stated that the suit property was allocated to the 1st Defendant over 10 years ago and they have occupied the same even before the title deed was processed. The Plaintiff is the registered owner of the property known as Mombasa/ziwa La Ngombe Scheme/1760 which immediately borders the suit property. According to the Defendants in their counter claim, the Plaintiff trespassed on the suit property by exceeding the boundary of his property and constructed a garage measuring 3.5 meters onto the Plaintiffs' suit property without the Plaintiffs' consent.On this aspect, it is the Court's finding that the Plaintiff's action amounted to continuous trespass.

97. Granted that Trespass is actionable perse, the Court has noted that the Defendants in their Counter Claim, they indicated that a sum of Kenya Shillings Three Fourty Five Thousand (Kshs. 345,000.00/=) being rental income collected by the Plaintiff from the garage from the year 2007 to date and mesne profits.

98. On the prayer for permanent injunction, from the Defendants evidence stated above. It is my finding that, the Defendants from the Counter Claim has met the threshold for the grant of the orders sought. Similarly, the Plaintiff had no right to encroach over the suit property in any manner. As such this prayer by the Defendants is meritorious and the same is for granting.

99. On the issue of rental income collected by the Plaintiff, taking that this Court has established that there was trespass occasioned by the Plaintiff which in turn entails that the Plaintiff owes the Defendants the rental income he had been collecting from the garage. It follows, therefore, I be compelled to proceed to grant the same.

100. The Plaintiffs to the Counter claim have prayed for mesne profits but have not indicated how much should be awarded to them. The provision of 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;

101. The provision of Order 21 Rule 13 of the Civil Procedure Rules provides as follows:-

> 13.
>
> (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 event 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.

102. The Court of Appeal in the case of "Attorney General – Versus - 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."

103. The court in the case of Rajan Shah T/A Rajan S. Shah & Partners – Versus - 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 – Versus - 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 – Versus - 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 the 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.
>
> In the present case, there was no written lease. The case leading to this appeal was filed by the tenant (the Respondent) against the land lord (appellant) in 2007 challenging a proclamation issued by auctioneers against him under the instructions of the Appellant and

also seeking an injunction against the Respondent. The initial defense filed by the appellant dated 18th October 2007 was a denial of the averments in the plaint. The respondents claim as enumerated in the plaint discloses a rent dispute. An amended defense was filed on 9th August 2010 whereby the Appellant cited a notice dated 3rd March 2008 in which he communicated to the Respondent that he had terminated the lease and sought vacant possession. The Respondent through his advocates replied to the said letter and wrote inter alia as follows:-

"..... the alleged tenancy/lease herein between our client and yours is the subject matter in Nyeri CMCC No. 585 of 2007.....The issues your clients are raising .....are the same issues already in court. Your clients notice of termination of lease ....is therefore inconsequential."

Thus, the above notice was challenged on the above grounds. There is no further communication on record on the issue. 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 reiterates 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..."

104. Despite all the evidence placed before Court, it is my humble opinion that the Plaintiffs in the counter claim have not tabled any empirical proof justifying being awarded Mesne Profits. Thus, this Honourable Court is unable to consider awarding them with the prayers sought as to an award of mesne profits.

ISSUE No. c). Who should bear costs of the suit and the Counter – Claim.

105. It's now well established that the issue of Costs is at the discretion of Court. Costs means any award that a party is as the conclusion of any legal action, proceedings and process of any litigation. The Proviso of

the provision of Section 27(1) of *Civil Procedure Act* provides that costs follow the events. By events it means the result such a legal action, process and/or proceedings. (See the Supreme Court case of "Jasbir Rai Singh Rai – Versus Tarchalon Singh (2014) eKLR; and the Court RoseMary Wambui Munene – Versus – Ihururu Dairies Co – Operative Limited (2014) eKLR, Kenya Sugar Board – Versus – Ndungu Gathini (2013) eKLR; and Cecilia Nyayo – Versus Barclays Bank of Kenya Limited (2016) eKLR" where Courts held that:-

> " The basic rule on attribution of costs is that costs follow the event.....it is well recognised that the principles costs follow the event is not be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting of defending the case".

106. Although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

107. In the instant case, the Plaintiff in the Counter Claim has managed to prove its case herein, for these reasons, they are entitled to the Costs and interest of the suit and Counter Claim at Courts rate accordingly.

VIII. Conclusion & Disposition.

108. In conclusion, having caused an indepth analysis to the framed issues herein, while the Honourable Court finds that the Plaintiff has failed to establish its case in the main suit, the Counter Claim by the 1st, 2nd, and 3rd Defendants and especially the 1st Defendant against the Plaintiff have proved their on a preponderance of probabilities. For avoidance of doubt, I specifically hereby make the following final orders:-

a). THAT the suit instituted by the Plaintiff in the main suit against the 1st, 2nd, 3rd and 4th Defendants has not been proved and hence it is hereby dismissed with costs.

b). THAT Judgment be and is hereby entered in favour of the Plaintiffs in Counterclaim as follows:

i. The action of trespass by the Plaintiff onto the Defendants land has been established.

ii. An order be and is hereby made that the Defendant to the Counter Claim to pay the Plaintiffs to the Counter Claim a sum of Kenya Shillings Three Forty Five Thousand (Kshs. 345,000.00) being rental income collected by the Defendant from the garage from 2007 to date.

c. THAT an order Permanent injunction be and is hereby made to restrain the Defendant to the counterclaim from trespassing on the property known as MOMBASA/ZIWA LA NGOMBE SCHEME/1759.

e. THAT an order of Mandatory injunction be and is hereby to compel the Defendant to the Counter Claim to demolish and remove the debris of the garage which he constructed on Mombasa/ziwa La Ngombe Scheme/1759 within the next 45 days from the date of the delivery of this Judgment.

f. THAT the Costs and interest of the suit and Counter Claim at Courts rate to be awarded to the Plaintiff in the Counter claim herein and to be borne by the Defendant to the Counter claim.

109 It Is So Ordered Accordingly

JUDGEMENT DELIEVERD THOUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS.....6TH ....DAY OF .....JULY .....2023.

.....

HON. MR. JUSTICE L.L. NAIKUNI (JUDGE)

ENVIRONMENT & LAND COURT AT

MOMBASA

Judgement delivered in the presence of:

a. M/s. Yumna, the Court Assistant.

b. M/s. Kayatta Advocate for the Plaintiff.

c. Mr. Oluga Advocate for the 1st, 2nd and 3rd Defendants.

d. No appearance Advocate for the 4th Defendant.