



**Busienei v Busienei & another (Environment & Land Case 235 of 2014)
[2023] KEELC 19892 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19892 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 235 OF 2014
EO OBAGA, J
SEPTEMBER 19, 2023**

BETWEEN

SELLY J. BUSIENEI PLAINTIFF

AND

RICHARD K. BUSIENEI 1ST DEFENDANT

JACKSON K. CHEBET 2ND DEFENDANT

JUDGMENT

1. By an amended amended plaintiffs filed in court on 14/8/2019, the plaintiff sought the following reliefs from the defendants;
 - a. A declaration that land sale is void for want of spousal consent.
 - b. An order for permanent injunction against the Defendants jointly and severally preventing them from concluding the purported sale.
 - c. In the alternative an order directing the Defendants to only conclude the sale for the lower 50 acres portion of the land known as LR. No. 6459/Block 5 upon obtaining my express consent.
 - d. Special damages loss of user, general damages and loss of produce from wheat farming as per paragraph 12 hereof for the period of 2014 -2015 farming calendar year and the subsequent years to conclusion of this suit.
 - e. Special damages for loss of user, general damages and loss for greatly and detrimentally changing the said suit land's scape and shape against the Plaintiff's wish and as pleaded per paragraph 12 (c) (d) (e) (f) and (g).
 - f. Costs of this suit.



2. The 2nd defendant filed a further amended defence and raised a counter –claim against the plaintiff and 1st defendant in which he claimed the following reliefs;
 - a. Dismissal of the Plaintiff's suit with costs.
 - b. A declaration that the Plaintiff is a direct beneficiary of the proceed of the sale of the suit land.
 - c. A declaration that the agreement for sale dated 19/05/2014 is not voidable at the instance of the Plaintiff.
 - d. A declaration that the 2nd Defendant has acquired proprietary rights over LR. No. 6459/4 through purchase.
 - e. An order for specific performance directing the Plaintiff and the 1st Defendant, jointly and severally, to submit to the 2nd Defendant all the completion documents in respect of LR No. 6459/4.

Or In Default;

An order directing the Deputy Registrar to execute the completion documents in respect of LR. No. 6459/4 in favour of the 2nd Defendant.

- e(i) In the alternative, the Plaintiff and the 1st Defendant jointly and severally pay the 2nd Defendant Kshs. 50,300,000/= as particularized at paragraph 23A herein above.
- f. Mesne profits of Kshs 300,000/= per month from 20/09/2014 until the 2nd Defendant acquires possession of the entire suit land is paid the said Kshs. 50,300,000/=
 - f(i) In the alternative;
 - i. 1st Defendant do transfer to the 2nd Defendant the land registered as LR. 6459/5 as stated by the 1st Defendant in his amended defence and counterclaim dated 30th March, 2016, and,
 - ii. Pay the 2nd Defendant Kshs. 16,300,000/= being the cost of improvements on the fifty (50) acres of the land occupied by the 2nd Defendant, and,
 - iii. Mesne profits of KSHs 300,000/= per month from 20/09/2014 till he 2nd Defendant acquires possession of LR. No. 6459/5.
 - g. If prayer (e) succeeds, an order extending the period within which the application for the land control board consent may be made by the parties herein.
 - h. Costs of the suit.
 - i. Such other or further reliefs that the Honourable court may deem fit to grant.

Background;

3. The plaintiff is wife to the 1st defendant. The 1st defendant was the registered owner of LR No 6459/4 and LR No 6459/5 measuring 45.11 and 43.97 hectares respectively. When the present suit had been filled the two properties had been charged to CFC Starbic bank limited and Equity bank limited respectively.
4. The 1st Defendant was in loan arrears in respect of the two properties. He decided to sell one of the properties to enable him offset the outstanding loan arrears. The 1st defendant asked a property agent



known as Elite ventures limited to look for a buyer. One of the directors of Elite ventures limited found the 2nd Defendant who was willing to purchase one of the two properties.

5. On 19/5/2014, the 1st Defendant and the 2nd defendant entered into a sale agreement in respect of LR No 6459/4 For the sum of 43,456,000/= and take possession of 50 acres by 20/6/2014. He was to take possession of the remainder of 58.64 acres by 29/9/2014 upon clearing the balance of purchase price of Kshs. 23,456,000/=
6. The 2nd Defendant was shown the portion he was to take possession. Part of the land he was to occupy had been tilled. He agreed with the 2nd Defendant to reimburse him a sum of Kshs 200,000/= which he had incurred in tilling the land. The sum of kshs 200,000/= was paid to the defendant by Elite Ventures limited on behalf of the 2nd defendant.
7. The 2nd Defendant then embarked on fencing the 50 acre which he had taken possession of. He constructed staff houses, drilled a borehole, constructed a store, partitioned the 50 acres, set up water tank, built a cow shed and kraal, brought in cows, put poultry breeding houses, and planted trees.
8. It is after the 2nd defendant had started developing the 50 acres which he had taken possession of that the plaintiff moved to court and filled a suit against the defendants on 10/7/2014 in which she sought the following reliefs;
 - a. A declaration that land sale is void for want of spousal consent.
 - b. An order or permanent injunction against the Defendant jointly and severally preventing them from concluding the purported sale.
 - c. In the alternative an order directing the Defendant to only conclude the sale for the lower 50 acres proportion of the suit land.
 - d. Special damages and loss of produce from wheat farming for the period of 2014 – 2015 farming calendar year.
 - e. Costs and interest of the suit.
9. The plaintiff contemporaneously filed a note of motion dated 10/7/2014 in which he sought the following orders;
 - a. That the application be certified as urgent and service thereof be dispensed with in the first instance.
 - b. That pending the hearing of this application interparties, the Defendants be restrained by way of temporary injunction from concluding the purported land sale agreement/contract of land reference No. 6459/4 and further the 2nd Defendant be restrained from blocking the Plaintiff from planting this year's wheat crop on the upper portion of the land which had been prepared for the same.
 - c. That pending the hearing of this suit, the Defendants be restrained by way of an injunction from concluding the land sale transaction of land reference No. 6459/4.
 - d. That's costs of this application be provided for.
10. The 2nd Defendant also filled a notice of motion dated 21/7/2014 in which he sought the following orders;
 1. That the application herein be certified urgent and heard ex-parte in the first instance.



2. That this honourable court be pleased to issue an order of temporary injunction to restrain the Respondents, their employees, agents and/or servants from trespassing, encroaching, cultivating and/or in any manner whatsoever dealing with the portion of the property registered as LR. No. 6459/4, measuring fifty (50) acres and currently occupied by the Applicant pending the hearing and determination of this application.
 3. That this honourable court be pleased to issue an order of interlocutory injunction to restrain the Respondents, their employees, agents and/or servants from trespassing, encroaching, cultivating and/or in any manner whatsoever dealing with the portion of the property registered as LR. No. 6459/4, measuring fifty (50) acres and currently occupied by the Applicant pending the hearing and determination of this suit.
 4. That costs of this application be provided for.
11. In a ruling delivered on 18/9/2014 Justice Munyao allowed the Plaintiff's application and ordered the 2nd Plaintiff to stay away from LR. No 6459/4 until hearing and determination of the suit. The 2nd defendant was given 14 days to move out of LR No 6459/4 and pull down the structures which he had put up. The defendants were barred from concluding the agreement of 19/5/2014 pending hearing and determination of this suit
 12. Aggrieved by the Ruling of 18/9/2014, the 2nd Defendant moved to the Court of Appeal at Eldoret Vide Civil Application No 248 of 2014 where he obtained stay of the order given on 18/9/2014. The 2nd Defendant's appeal was heard Vide Eldoret civil appeal No 347 of 2014. In a judgement delivered on 29/7/2016, the Court of Appeal set aside the orders requiring the 2nd Defendant to stay away from LR No 6459/4 but upheld the orders barring the Defendants from concluding the agreement of 19/5/2014.
 13. As this case was pending in court for determination, LR 6459/4 which had been charged to CFC Stanbic Bank Limited was sold by the bank. The registered owner of LR 6459/4 is now Limo limited who was so registered on 12/3/2020.
 14. On 9/4/2019, a partial judgement was entered by consent against the 1st Defendant in favour of the 2nd Defendant whereby the 1st Defendant was to refund the 2nd Defendant a sum of Kshs 34,340,000/= within 60 days failing which, the 2nd Defendant was to surrender 50 acres to be excised from the lower part of LR 6459/5. It was further agreed that the mesne profits claimed by the Plaintiff and the 2nd Defendant together with costs for developments be determined by the court on trial.

Plaintiff's case;

15. During the hearing of this case the Plaintiff testified that the issue of LR. 6452/5 had been sorted out and that the 2nd Defendant had moved out of LR. 6459/4 in the year 2014. She stated that she was only pursuing what she lost while the 2nd Defendant was utilising the 50 acres comprised in LR. 6459/4.
16. The plaintiff stated that she used to plant wheat but as a result of occupation by the 2nd Defendant, she was prevented from cultivating. She stated that the 2nd Defendant utilised the 50 acres for five years. She further stated that she engaged the services of an Agricultural officer who assessed what she lost.
17. The plaintiff testified that though she obtained an injunction restraining the 2nd Defendant from carrying on activities on the land, the 2nd Defendant continued to carry out his business on the land. she further stated that even though the 2nd Defendant finally moved out, he left behind his permanent structures which he had put up.



18. The plaintiff called PW2 Samuel Kiprotich Misoi a former Agricultural Officer who testified that he was asked by the Plaintiff to assess what she would have earned per year had she proceeded to plant wheat on the 50 acres which were occupied by the 2nd Defendant. He was also asked to assess what she would have earned from the wattle trees which were allegedly cut down by the 2nd Defendant upon taking possession of 50 acres.
19. The former Agricultural Officer produced two reports which he had prepared. The first report is in respect of what the Plaintiff would have earned had she planted wheat. He stated in the report that the profit margin would have been Kshs 2,804,000/=per annum. This is after deducting the output from the total cost. In the second report he found out that one acre produces 400 bags of charcoal. He found out that the area covered by the wattle trees was 35 acres. He thus found that the Plaintiff would have made 14,000 bags of charcoal from the 35 acres. A bag of charcoal goes for kshs 1000/=. He therefore found out that the Plaintiff would have made kshs 14,000,000/= from the charcoal.

1st Defendants case;

20. The 1st Defendant testified that he had pressing financial issues which he wanted to sort out. He approached the Plaintiff whom he informed about the pressing financial issues. The two agreed he goes ahead to sell LR 6459/5. The 1st Defendant then proceeded to his advocate's offices where a sale agreement was entered into.
21. Later his wife came to know that the 2nd Defendant had purchased the entire LR. 6459/4. The wife knew this when the 2nd Defendant took possession of 50 acres of the upper side of LR. 6459/4 which she had already tilled ready for planting wheat. It is then when the Plaintiff filed a suit against him and the 2nd Defendant.
22. The 1st Defendant states that he had not intended to sell LR. No. 6459/4. He intended to sell LR. No. 6459/5. He states that there was a mistake in the agreement which described the property being sold as LR. No. 6459/4 which was later sold by CFC Stanbic Bank through a public auction in 2019. He stated that he has since sorted out the issue and that the 2nd Defendant is now occupying 50 acres on the lower side of LR. No. 6459/5 which he took after he failed to refund the purchase price in accordance with the partial judgement of 9/4/2019.

2nd Defendant's case;

23. The 2nd Defendant testified that he is no longer interested in LR. No 6459/4 as he has been compensated in terms of the partial judgment recorded on 9/4/2019. He states that he is only interested in being compensated for the developments on LR. No. 6459/4 which he had put up as well as mesne profits.
24. The 2nd Defendant testified that he was approached by a director of Elite Ventures Limited who informed him that the 1st Defendant was selling land. He was interested in over 100 acres. The agent connected him to the Advocate of the 1st Defendant where a sale agreement was signed. He was taken to the ground where he was shown 50 acres. Part of the 50 acres had been tilled. The 1st Defendant asked him to compensate him for what he used to plough.
25. The 1st Defendant was reimbursed Kshs 200,000/= which was paid by Elite Ventures Limited on his behalf. Elite ventures Limited later realized that the area which had been ploughed was less than the amount paid to 1st Defendant. The 1st Defendant was asked to make a refund which he has not made todate.



26. The Plaintiff stated that he is now claiming Kshs 16,300,000/= as he has already been compensated to the tune of Kshs 34, 000,000/= in form of 50 acres out of LR. No. 6459/5 which he was given after the 1st Defendant failed to raise Kshs 34,340,000/= refund.
27. The 2nd Defendant called DW4 Richard Kimutai Kigen who is a valuer practicing under the name of Afriland Valuers Limited. He stated that he was asked to value the developments which the 2nd Defendant had carried out on LR. No. 6459/4. He prepared a report which he produced as exhibit 19. He stated that the total value of the Developments was 50,300,000= The value of the land was 34,000,000/=

Analysis and determination;

28. The parties were directed to file written submissions. The Plaintiff filed her submissions on 24/4/2023. The 2nd Defendant filed his submissions on 29/5/2023. The 1st Defendant did not file any submissions and if any were filed, then they are not in the court file as at 20/9/2023 when writing this judgement.
29. The Plaintiff has submitted at length on the issue of lack of spousal consent, lack of consent of the land Control Board, lack of consent of the charge and lack of consent of the head lessor. In my view, these submissions will not assist in solving the issues before this court. Once a partial judgment was recorded by the parties herein on 9/4/2019 this rendered the issue of the consents being submitted on moot.
30. The Plaintiff had wanted the sale in respect of LR. No. 6459/4 declared null for lack of spousal consent. This was achieved when the 1st Defendant agreed to refund the purchase price to the 2nd Defendant. The Plaintiff had also in the alternative sought to have the 2nd Defendant take 50 acres of the lower part of LR. 6459/5. This was achieved when the 1st Defendant failed to raise the refund money and the 2nd Defendant was given 50 acres out of LR. No. 6459/5 in default refund which was in accordance with the partial judgment of 9/4/2019.
31. The only issue remaining for determination by court and to which the parties herein wanted the court to determine is whether the Plaintiff and the 2nd Defendant are entitled to mesne profits and costs of developments. The Plaintiff is seeking to be awarded for what she would have earned in respect of wheat which she was prevented from planting for 5 years when the 2nd Defendant was on the land. She is also seeking compensation for wattle trees which were on LR. 6459/4 which the 2nd Defendant allegedly cut down. The 2nd Defendant on the other hand is claiming to be compensated for developments which he put up on LR. No. 6459/4 and mesne profits.
32. The Plaintiff in her testimony stated that the issue of LR. No. 6459/4 and LR. 6459/5 had been sorted out. The partial judgement of 9/5/2019 rendered prayers (a) (b) and (c) in her claim superfluous. In other words, these prayers were overtaken by entry of the partial judgement of 9/5/2019.
33. The Plaintiff is seeking Kshs 250,000/= being the cost of tiling LR. No. 6459/4. There was no evidence given that she spent Kshs 250,000/= to plough. Evidence on record from her husband the 1st Defendant is that as at the time he sold LR. No. 6459/4 to the 2nd Defendant, 35 acres were fallow and 15 acres were under wattle trees. The 1st Defendant asked that he be reimbursed Kshs 200,000/= being the cost of ploughing. He was paid this amount as per the evidence of DW3 James K. Cheluley. It later turned out that the area which had been tilled was only 25 acres. The 1st Defendant was informed that he was only entitled to Kshs 82,000/=for the 25 acres though he had claimed that he had ploughed the entire 50 acres. The 1st Defendant was thus paid at the rate of Kshs 3,280/=per acre an amount which was even higher than what PW2 an Agricultural officer assessed. PW2 assessed the cost of ploughing at Kshs 3000/per acre.



34. The 1st Defendant is husband of the Plaintiff and was then the registered owner of the land. As the 2nd Defendant was reimbursed for ploughing, there is no basis upon which the Plaintiff can again claim Kshs 250,000/= for ploughing. The letter of 15/5/2014 which was produced as defence exhibit 2 clearly shows how the 1st Defendant was given the money. The 1st Defendant acknowledged that he received the money during cross examination but pretended not to know the purpose for which it was made. He had even signed an acknowledgement of Kshs 100,000/= This acknowledgement was produced as defence exhibit 1.
35. Mesne profits are defined as profits which have accrued while there was a dispute over land ownership. They are normally payable where it is determined that the party who has been using the land had no legal ownership. In the instant case the 2nd Defendant entered into a sale agreement with the 1st Defendant for purchase LR. No. 6459/4. He was put in possession of 50 acres upon payment of Kshs 20,000,000/=
36. In her testimony, the Plaintiff adopted her witness statement dated 10/7/2014 as part of her evidence in chief. In this statement, she stated that her husband, the 1st Defendant had approached her and told her that he had pressing financial issues to sort out. He had loan arrears. The two agreed that they subdivide LR. 6459/4 into two portions and that her husband was to sell the lower portion of 50 acres and the remainder of the upper portion was to remain with the family. She later learned that her husband had sold the entire land.
37. There is evidence that it is the 1st Defendant who showed the 2nd Defendant where he was to excise the 50 acres from. This is the portion which had been tilled. The 1st Defendant was paid for the cost of ploughing. He cannot therefore turn round and say that he had actually intended to sell LR. No. 6459/5 and not LR. No. 6459/4. Even if the agreement described that the property being sold is the one which had been charged to Equity Bank, the fact remains that the 2nd Defendant was shown LR. No 6459/4 on the ground.
38. The Plaintiff and the 1st Defendant are trying to show that the 2nd Defendant imposed himself on LR. No. 6459/4 by citing the clauses in the sale agreement. The agreement may as well have been deliberately couched to lay ground for kicking out the 2nd Defendant from LR. No. 6459/4. This is so because even after receiving Kshs. 17,000,000/= from the 2nd Defendant, the 1st Defendant returned the money back and this is the time the Plaintiff filed this suit alleging that there was no spousal consent.
39. LR. No. 6459/4 was finally auctioned by the bank and this is what informed the partial judgement of 9/4/2019 which ultimately forced the 2nd Defendant to be given land where he had not chosen. When Justice Munyao directed that the 2nd Defendant stays away from the suit property, the 2nd Defendant quickly moved to the Court of Appeal and obtained stay of the orders. Subsequently the Judge's order directing the 2nd Defendant to keep away from the suit property until hearing and determination of the suit was set aside.
40. The 2nd Defendant was therefore not on the 50 acres comprised in LR. No. 6459/4 unlawfully. There is therefore no basis for grant of mesne profits to the Plaintiff. It is said that parties are bound by their pleadings. The Plaintiff is seeking mesne profits of 696, 000/= per annum until conclusion of this suit. There is no evidence which was led to show how the plaintiff arrived at this figure. It is not even supported by the evidence adduced by the Plaintiff. It would appear that the Plaintiff's lawyer picked this figure from the total cost of preparing one acre for wheat planting. The lawyer should have pleaded the sum of Kshs 2,804,000/= shown in the Agricultural Officer's report produced as Plaintiff exhibit 1(a). It is therefore clear that the evidence is at variance with the pleadings.



41. The Plaintiff is also claiming Kshs. 14,000,000/= being the cost of 14,000 bags of charcoal from 35 acres at Kshs 1000/- per bag. As I have stated herein above, the 1st Defendant in his testimony claimed that out of the 50 acres which the 2nd Defendant occupied, 15 acres were under wattle trees and 35 acres were fallow. This therefore shows that the Plaintiff was not being candid. She was not being truthful and in any case, this report on which she is basing this figure was prepared on 30/4/2019 after the entry of the partial judgement which settled the issue of LR. No. 6459/4 and LR. No. 6459/5. In any case, LR. No. 6459/4 had been sold through auction by CFC Stanbic Bank. This was therefore a fictitious claim which is not backed by any credible evidence.
42. The Plaintiff is also seeking special damages for loss of user as well as general damages for loss of user. The Plaintiff has particularized the alleged special damages under paragraph 12 (d), (e), (f) and (g). she is claiming a total of Kshs 16,400,000/= Apart from pleading these special damages, there was absolutely no evidence led on the same. The law is clear that special damages must not only be pleaded but must also be strictly be proved. What the Plaintiff has done is to throw the figures at the court and expect the court to award her. In the case of Capital Fish Kenya Limited –Vs- The Kenya Power Lightning Co. Ltd 2016 eKLR the Court of Appeal held as follows: -
- “The Appellant apart from listing the alleged loss and damage, it did not, according to the Respondent lead any evidence at all in support of the alleged loss and damage. As it were, the Appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was no credible documentary evidence in support of the alleged special damages...
- For all the foregoing reasons, we are satisfied that although the trial court correctly found that the special damages had been specifically pleaded, there was no credible evidence whatsoever that proved the pleaded special damages...”
43. In addition to special damages for loss of user, the Plaintiff is also seeking for general damages for the same loss of user. The law is clear that one cannot seek to have general damages in addition to special damages.
44. On the part of the 2nd Defendant, prayers (b) (c) (d) (e) and f(i) have been overtaken by the partial judgement which was entered on 9/4/2019. The only issue for determination is whether he is entitled to Kshs 16,300,000/= being the cost of the developments which he had put up on LR. No. 6459/4 and whether he is entitled to mesne profits at the rate of Kshs 300,000/= per month until he acquires possession of LR. No. 6459/5.
45. The 2nd Defendant in his counter –claim is claiming a total of Kshs 16,300,000/= This is broken down as Kshs 12,200,000/= being chicken infrastructure, Kshs 900,000/= being fences and farm and other ornamental plantings and Kshs 1,600,000/= for other developments including roads, drainage and foundations to the farm house among others.
46. The valuer has given details of each of the developments in his report which was produced as exhibit 19. He has described in detail the stage of each developments and the materials used. I do not have any reason to doubt the report. Infact the value of the land which he arrived at is the one which was used in the partial judgement recorded on 9/4/2019. This shows that even the Plaintiff, the 1st Defendant and their lawyers had no reason to doubt the valuation.



47. In the case of Attorney General –Vs- Zinj Limited (petition 1 of 2020) (2021) KESC 2 KLR, the Supreme Court held as follows:

“We take note of the Appellant’s submission to the effect that in arriving at the quantum of special damages, the trial court placed reliance upon valuation report by a private valuer. Such report, in the view of the Appellant, was not only unreliable, but could very likely have been tailored to support the respondent’s claim. However, in answer to this court’s question as to whether, the Appellant had tabled in court, a Government valuation report to counter the contents of the impugned one, counsel for the Appellant stated that no such report was ever tabled at the trial court. The main basis upon which special damages can be granted for the deprivation of property, is the market value of the said property. In case of general damages, a court of law exercises discretion guided by the circumstances of each case. In granting special damages, the trial judge was guided by the valuation report tabled by the respondent. In the absence of a contrary report on record, we have no basis upon which to interfere with the award. Even if there had been one such other report, our jurisdiction to interfere would still have been largely circumscribed, unless the award had clearly ignored the fundamental principles of valuation as demonstrated by the counter-report.”

48. In the case of Criticos –Vs- National Bank of KENYA Limited (as the successor in business to Kenya National Capital Corporation Limited “KENYAC” & Another (Civil Appeal No. 80 of 2017) KECA 541 (KLR) 28 April 2022 (Judgement), the Court of Appeal stated as follows: -

“There is also no substantive rebuttal of Mr. Musau’s valuation report based on a similar valuation undertaken in the year 2010. As properly held in Stephen Kinini Wang’ondy (Supra), expert evidence can only be challenged by another expert. We also associate ourselves with the criteria for assessing an expert’s evidence as outlined in the same decision, rehashed herein below for emphasis.

A further criterion for assessing an expert’s evidence focuses on the quality of the expert’s reasoning. A court should examine each expert’s testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd –Vs- Minorities Finance Ltd and Another (Same Vs Bird and others (1997) B.C.C 180)* Jacob J. observed that what really mattered in most cases was the reasons given for an expert’s opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The Judge pithily commented (i) If the reasons stand up the opinion does, if not, not.” (Emphasis ours).

In the result, subject to what we shall shortly state with regard to the crops we find the Appellant’s valuation report to be solid in content and uncontroverted. It was not to be merely wished away...”

49. The 2nd Defendant is claiming mesne profits at the rate of Kshs 300,000/= per month from 20/9/2014 until he acquires possession of LR. No. 6459/5. Mesne profits are in the nature of special damages. They must be pleaded and proved. In the instant case, the 2nd Defendant did not lead any evidence on the basis for claiming this amount. The 2nd Defendant was in possession of the 50 acres comprised in LR. No. 6459/4 until the property was sold to Limo Limited when he moved out.
50. During hearing, the 2nd Defendant testified that he is now in occupation of a portion measuring 50 acres on LR. No. 6459/5 and that he is growing avocados on it. He continued being in occupation of 50 acres on LR. No 6459/4 until the entry of the partial judgement entered on 9/4/2019. Even after



the partial judgment, he continued to be in the property until after Limo Limited was registered as owner. There is therefore no basis for claiming mesne profits.

Disposition;

51. From the above analysis, it is clear that the Plaintiff has failed to prove her case on a balance of probabilities. The same is dismissed with costs to the 2nd Defendant. On the other hand, the 2nd Defendant has proved his counter-claim on a balance of probabilities save for a claim for mesne profits which is not granted. I enter judgement for him in the sum of Kshs 16,300,000/= with costs and interest to be paid jointly and severally by the Plaintiff and 1st Defendant.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 19TH DAY OF SEPTEMBER, 2023.

E. O. OBAGA

JUDGE

In the virtual absence of parties who were aware of the date of Judgement.

Court Assistant –Laban

E. O. OBAGA

JUDGE

19TH SEPTEMBER, 2023

