



**Munga & another v Katana & 8 others (Environment & Land Case
241 of 2018) [2023] KEELC 21585 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21585 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 241 OF 2018
LL NAIKUNI, J
NOVEMBER 2, 2023**

BETWEEN

STEPHEN MUNGAI MUNGA 1ST PLAINTIFF

DORIS NDUKU NYAMAI 2ND PLAINTIFF

AND

HENRY KALUME KATANA 1ST DEFENDANT

HAMISI FUGO FONDE 2ND DEFENDANT

KARISA MWALIMU NDORO ALIAS WISDOM 3RD DEFENDANT

SAMMY IHA 4TH DEFENDANT

ANTHONY CHAROKARISA 5TH DEFENDANT

WANJE KARISA 6TH DEFENDANT

CHENJE KARIA 7TH DEFENDANT

SAFARI KARISA 8TH DEFENDANT

JUMA KARISA KAHINDI 9TH DEFENDANT

JUDGMENT

i. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by Stephen Mungai Munga and Doris Nduku Nyamai the Plaintiffs herein through a plaint dated 17th October, 2018 and filed on the same day against Henry Kalume Katana, Hamisi Fugo Fonde, Karisa Mwalimu Nodoro alia Wisdom, Sammy Iha, Anthony Charo Karisa, Wanje Karisa, Chenje Karia, Safari Karisa and Juma Karisa Kahindi the Defendants herein.



2. Upon service of the pleadings and summons to enter appearance, on 26th October, 2018, the Defendants only entered appearance but never filed a defence nor complied as required by the provision of Orders 6, 7 and 11 of the Civil Procedure Rules, 2010. Notwithstanding that this was a land matter, hence not a liquidated claim, which requires the matter to proceed for formal proof under Order 10 Rules 4 of the Civil Procedure Rules, on 4th December, 2018 the Plaintiff requested for Judgment in default. Subsequently, the request was endorsed by the Court. On diverse dates of 18th October, 2022 and 22nd January, 2023, it was fixed for hearing accordingly.
3. On the 15th March, 2023, hearing proceeded on by way of adducing “Viva Voce” evidence with the Plaintiffs’ witness PW - 1 testifying in Court. After which the Plaintiffs closed their case.

ii. The Plaintiff’s case

4. From the filed pleadings, 1st Plaintiff is described as a male adult of sound mind residing and working for gain at Mombasa in the Republic of Kenya. The 2nd Plaintiff is described as a female adult of sound mind residing and working for gain at Mombasa in the Republic of Kenya. The 1st and 2nd Plaintiffs claimed that all material times, they were and are still the registered proprietors of all those parcels of land known as Plot Nos.11576, 11577, 11578, 11579, 11580, 11581, 1581 11583, 11584, 11585, 11586, 11587, 11588, 11589 and 11590 (Original No.10469/2)Section III Mainland North, Mombasa (Hereinafter referred to as “The Suit Properties”). The Plaintiffs averred that by virtue of the registration referred to in Paragraph 4 of the Plaint, Plaintiffs were and are still the absolute and indefeasible owners of the suit properties but not limited to the right to possession and quite enjoyment thereof without hindrance or restriction.
5. On 29th September, 2018, the Plaintiffs learned that the Defendants and their agents had unlawfully entered on the suit property without any authority or consent from the Plaintiffsdemolished a boundary wall that had been erected by the Plaintiffs around the suitstructures and/or building thereon. The Plaintiffs lodged a complaint at Mtwapa Police Station which was recorded as OB No. and 2nd Defendants were arrested and charged accordingly. Despite the aforesaid arrest and complaint the Defendants and their agents continued to threaten the Plaintiffs and their employees and on 11th October, 2018 at night the same group authority or consent from the Plaintiffs and commenced the excavation of the suit properties and construction of various structures and/or building thereon.
6. The Plaintiffs reported the matter again to the police station but the officers were adamant in works stating that they may be very violent and the only way they could be stopped was through a Court Order. On 12th October the Plaintiffs sought the assistant of the office of the county commissioner where the Plaintiffs were also advised that the office could only intervene with a court order. The fundamental rights and the rights of the Plaintiffs to ownership of properties as set out in [the Constitution](#) of Kenya, 2010 was threatened and is being infringed by all the Defendants.The entry by the Defendants on the suit properties was procedural, illegal and unconstitutional null and void. Despite the aforesaid complaints and demand notice the Defendants had fail and/or refused and/or neglected to stop the trespass, threats and vacate the properties.The Defendants’ activities were getting out of hand as the Defendants were bent on assuming proprietary interest in the Suit properties in complete disregard of our rights as registered proprietors.
7. The Plaintiffs had reasonable apprehension that the Defendants intend to continue trespassing onto the suit properties unless evicted by orders of this Honourable court and also ordered to demolish the illegal structures already erected thereon. The Plaintiffs averred that the unlawful entry and construction aforesaid amounts to trespass of the suit properties. As a result of the said acts of trespass, the Plaintiffs had been deprived of the use and enjoyment of the suit properties and had suffered loss



and damage which was continuing and for which he held the Defendants liable. The cause of action arose in Mombasa where also the Suit Property was situated within the jurisdiction of this Honourable Court.

8. The Plaintiff prayed for Judgment to be entered against the 1st to 9th Defendants jointly and severally for:-
 - a. A declaration that the Plaintiffs are the lawfully registered proprietors of the Suit Properties;
 - b. A declaration that the entry and putting up by the Defendants through their servants of various structures on the Suit Properties is unlawful;
 - c. A declaration that the continued existence of the said structures on the Suit Properties amounts to an act of trespass by the Defendants;
 - d. An order that the said structures on the Suit Properties be demolished forthwith by the Defendants;
 - e. An order that the Defendants do clear all the debris resulting from the demolition aforesaid;
 - f. A permanent injunction restraining the Defendants whether by themselves or through their servants, employees, agents or through any one deriving title through him or otherwise howsoever from entering, using, occupying, leasing, transferring, charging, selling or in any manner whatsoever dealing adversely with the Suit Properties;
 - g. Damages for trespass;
 - h. Costs of and incidental to the suit; and
 - i. Any other or further relief that this Honourable Court may deem appropriate award.
9. As indicated, on 15th March, 2023, the hearing for the Plaintiffs' case commenced in earnest whereby he summoned two (2) witnesses who testified as follows:-

a. Examination - in - Chief of PW - 1 by Mr. Kageni Advocate

10. PW - 1 was sworn and testified accordingly. He identified himself as being Mr. Stephen Mungai Munga who was born on 1st January, 1968. He was the 1st Plaintiff herein. He recalled that on 15th July, 2020 and filed on 21st July, 2020, he wrote a statement which he wished to rely on as his evidence in chief and in support of his case. He also filed a list of documents dated 15th July, 2020. He produced the documents dated 15th July, 2020 as Plaintiff Exhibit No. 1 to 9. The 2nd Plaintiff was Doris Nduku Nyamai. She had given him the authority to appear and plead on her behalf – the Authority to Act under Order 1 Rule 13, of the Civil Procedure Rules, 2010 was dated 16th October, 2018 - 'Plaintiff Exhibit - 1'. On the Plaintiff at Paragraph No. 4 there were 15 plots namely:- Numbers Nos. 11576, 11577, 11578, 11579, 11580, 11581, 11582, 11583, 11584, 11585, 11586, 11587, 11588, 11589 and 11590 (Original Number 10469/2) section III Mainland North, Mombasa – the Suit properties.
11. He told the court that he had filed a copy of all these Certificate Title deeds and produced both the originals and copies in Court and marked as Plaintiff Exhibit - 2(a),(b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n) and (o). (Court noted and made an observation that indeed the Plaintiff produced these original Certificate of the Title Deeds. He was allowed to retain the Originals as the copies were retained in the Court file). He eventually sold off some (5) of the parcels. These were parcel numbers - 11577, 11580, 11583, 11584 and 11587. Hence the original Certificate of Title Deeds shown in Court



- were for the nine (9) parcels numbers 11578, 11576, 11578, 11579, 11581, 11582, 11585, 11589 and 11590 all measuring nautical decimal naught four five one (0.0451) Hectares.
12. He told the court that he bought them from Mr. Mwalimu Khamis Mwachadzi. They entered into a sale agreement duly executed on 25th October, 2014. He produced it as a Plaintiff Exhibit - 3 in Court. The original number was CR. 25460 sub - division no. 1665 (original No. 802/2). Initially, it measured three (3) acres but he hived off one (1_ acre. Its found under Clause 1.2 of the sale agreement. He sub - divided it – See Plaintiff Exhibit – 3 at the time of the transfer. He signed the transfer form dated 17th August, 2015 – Plaintiff Exhibit - 4. The other transfers were from Chumrani Rashid Abdalla, a holder of the national identity card bearing numbers 3904854 and Mwanamkuu Azi a holder of the national identity card bearing numbers No. 3904018. They were the first owners by virtue of transmission.
 13. Further, the witness testified that the Land Reference No. 10469/Sec/III/MN Mombasa in the transfer instrument measured two (2) acres. He bought and he sub - divided it into 15 plots as they appear under Paragraph 4 of the Plaint. His work was to buy land and sell the land. He obtained the statutory approval for the sub - division for the 15 sub - divided plots from the relevant authorities. These were from: –
 - a. The County Government of Kilifi dated 17th July, 2017.
 - b. The Ministry of Lands and Physical Planning dated 13th July, 2017.
 - c. The Ministry of Lands and Physical Planning dated 19th July, 2017.
 14. The witness produced the approval documents as Plaintiff Exhibit - 5 (a) to (d). Also, there were correspondence from the Land Surveyors office to the relevant authorities dated 29th July, 2017 produced as Plaintiff Exhibits - 6.
 15. The witness told the court that he had receipts for the statutory payments – rates clearance certificates of receipts – No. 11577 dated 16th July, 2017 produced as Plaintiff Exhibit - 7); two rate certificates of clearance – Plaintiff Exhibit - 8 (a) and (b); a computation of the payment of rates paid to the County Government of Kilifi and stamped 16th July, 2017 produced as Plaintiff Exhibit - 9. Once the sub - division process was concluded the parcels were registered in his names and he was issued with the Certificate of title deeds accordingly. He sued the Defendants on 29th September, 2015. PW – 1 was told by his Caretaker that some unknown people had broken down his perimeter wall on one side of his land and invaded the two acres. He was informed that they were putting up temporary structures (Vibandas). Since he lived in Nairobi, he sent his caretaker to report the incident to the police. He informed Court that that did happen. The Caretaker reported the matter at Mtwapa Police Station. On 6th October, 2018 he travelled to the Coast from Nairobi. He was given an OB No. 55/06/10/2018 by the police. He had photographs of the broken perimeter walls produced as Plaintiff Exhibits 10 (a) and (b).
 16. PW – 1 informed Court that three people were immediately arrested. They were the 1st, 2nd and 3rd Defendants herein. Later on, the 4th to 9th Defendants were arrested based on police investigations. Several charges were preferred against them. These were forceable entry under the provision of Section 90(1) of the Penal Code; Malicious damage to property under Section 339 of the Penal Code; Stealing contrary to Section 268 and 275 of the Penal Code and Arson contrary to Section 332(a) as per the charge sheet dated 11th October, 2018. PW – 1 stated that they were arraigned to Shanzu Court in Criminal Case No. SPM No. 11 of 2018 – Shanzu Courts. They took plea of not guilty and the matter proceeded for hearing and finally Judgment was delivered. He testified that in the course of the hearing of the criminal case, out of the ten, nine of the Defendants approached him pleading for an out of court settlement. After some negotiations, were able to reach into a settlement. As a result, the matter



was settled and the charges were withdrawn under the provision of Section 87(a) of the Penal Code. However, the case proceeded on against the other Defendants'. Eventually, they were convicted and sentenced to serve three (3) years suspended to non - custodial sentence. Mr. Karisa Kahindi Karisa was not one of the Defendants.

17. Before the criminal matter, PW – 1 had instituted civil proceedings against the nine Defendants. From the broken perimeter wall, a Land Valuer i.e. Messrs. Nyange & Associates Quality Surveyors (Valuers) had valued it and prepared a valuation report dated 3rd October, 2018. The total damages was valued at a sum of Kenya Shillings Five Fifteen Seven and One Hundred and twenty cents (Kshs 515,701.20) the valuation report was produced as Plaintiff Exhibit - 12). He asked for the Honourable Court to protect the 1st and 2nd Plaintiffs as the registered owners of the properties against the Defendants and other persons who had become too notorious in invading and destroying their properties. They also sought for compensation for damage caused to the land and declaration as the registered owner to the suit property together. He also asked the Honourable Court to award them the costs of the suit. The Plaintiffs closed their case.

iii. The Submissions

18. On 15th March, 2023, after the closure of the 1st and 2nd Plaintiffs' case, the Honourable court directed that parties to file their written submissions within stringent timeframe thereof on. Pursuant to that and upon compliance by the Plaintiffs accordingly, on 11th May, 2023, the Honourable court reserved a date to deliver its Judgement on notice.

a. The Written Submissions of the 1st and 2nd Plaintiffs

19. The 1st and 2nd Plaintiffs through the Law firm of Messrs. CM Advocates LLP filed its written submissions dated 9th June, 2023. M/s. Kageni Advocate stated that these were the Plaintiffs' submissions in support of the suit above lodged against the Defendants herein. She commenced the submissions by providing the Honorable Court with a detailed background and brief facts of the Plaintiffs' case. By way of a Plaint dated 17th October 2018, the 1st and 2nd Plaintiffs lodged a claim against the Defendants and seeking for the following prayers:
 - a. A declaration that the Plaintiffs were the lawfully registered proprietors of the suit properties;
 - b. A declaration that the entry and putting up by the Defendants through their servants of various structures on the suit properties is unlawfully;
 - c. A declaration that continued existence of the said structures on the suit properties amounts to an act of trespass by the Defendants;
 - d. An order that the said structures on the suit properties be demolished forthwith by the Defendants;
 - e. An order that the Defendants do clear all the debris resulting from the demolition aforesaid;
 - f. A permanent injunction restraining the Defendants whether by themselves or through their servant, employees, agents or through any one deriving title through him or otherwise howsoever from entering, using or occupying, leasing, transferring, charging, selling or in any manner whatsoever dealing adversely with the suit properties;
 - g. Damage for trespass;
 - h. Costs of and incidental to the suit; and



- i. Any other further relief that this Honourable Court may deem appropriate to award.
20. The Learned Counsel averred that although the Defendants entered appearance on 26th October 2018 but never filed a Defence in the matter. As a result, the Plaintiffs requested for Judgment on 4th December 2018 which was subsequently endorsed by the court on 22nd January 2023.
21. On the brief facts and evidence of the case, the Learned Counsel informed Court that this suit proceeded for hearing on the 15th March 2023 in the absence of the Defendants despite adequate service of the hearing notice through an advertisement placed on “the Taifa Leo”, the edition of 8th December, 2022 at page 3, a Kiswahili Newspaper local daily of wide national circulation and readership within the Coastal region of Kenya. The 1st Plaintiff, Stephen Mungai Munga, the PW - 1, having been duly authorized by the 2nd Plaintiff, tendered his testimony and produced the documents comprising the Plaintiffs List of documents dated 15th July 2020. The Authority to Act duly executed by the 2nd Plaintiff was produced as Plaintiff Exhibit - 1. At the time of filing this suit, the Plaintiffs were the registered proprietors of all those 15 parcels of land known as plot numbers 11576, 11577, 11578, 11579, 11580, 11581, 11582, 11583, 11584, 11585, 11586, 11587, 11588, 11589 and 11590 (Original Number 10469/2) section III Mainland North, Mombasa – “the Suit Properties”). See the Certificates of Titles produced as Plaintiff Exhibits - 2(a)-(o).
22. PW - 1 testified that they purchased the suit properties from Mwalimu Khamisi Mwachizi of national identity card bearing numbers 0084631 (“the Vendor herein”) who was Legal Administrator and/or trustee (see clause 1.9 of the Agreement for Sale) registered proprietor of all that piece of land known as Sub - division No. 1665 (original number: 802/1 Section III Mainland North measuring (1.344) hectares or thereabouts situate in North of the Mombasa Municipality. The Vendor agreed to sell to the Plaintiffs two(2) acres hived from the Sub - division No. 1665 (original number: 802/1 Section III Mainland North.(see Clause 1.2 of the Agreement for Sale.) The two (2) acres were transferred to the Plaintiffs as Land Reference No. 10469 Section III Mainland North. The PW - 1 produced the Agreement for Sale marked as Plaintiff Exhibit - 3 and Transfer dated 17th August 2015 marked as Plaintiff Exhibit - 4 to support his statement.
23. The Learned Counsel further reiterated that following the transfer of the property (then known as L.R No.10469), the Plaintiffs further subdivided it into the 15 parcels of land i.e. 11576, 11577, 11578, 11579, 11580, 11581, 11582, 11583, 11584, 11585, 11586, 11587, 11588, 11589 and 11590 referred to herein as the suit properties.PW1 produced in court Plaintiff Exhibit - 5(a) - (d) which evidenced the approvals of the process of the further subdivision and Plaintiff Exhibits - 7 and Plaintiff Exhibit – 8 (a) and (b) respectively to prove paid land rates on the said property as a condition precedent to the said subdivision. On 29th September, 2018, the Defendants and their agents had unlawfully entered on the properties without any authority or consent from them demolished a boundary wall that had been erected around the properties, commenced the excavation of the properties and construction of various structures and/or building thereon. PW - 1 produced photographs marked as Plaintiff Exhibit – 10 (a) and (b) as evidence in support of the said destruction.
24. The Plaintiffs lodged a complaint at Mtwapa Police Station which was recorded as OB No.55/06/10/2018 and only the 1st and 2nd Defendants together with other persons not party to this case were arrested and charged. The said persons were charged with 3 counts of forcible entry contrary to the provision of Section 90 of the Penal Code, 3 counts of Malicious damage to property contrary to the provision of Section 339 (1) of the Penal Code and 1 count of Stealing contrary to the provision of Section 268 as read with Section 275 of the Penal Code. The 3rd to 9th Defendants managed to escape. PW - 1 produced the charge sheet marked as Plaintiff Exhibit - 11 in the bundle of documents as evidence in support. Despite the aforesaid arrest, the Defendants and their agents continued to threaten



- the Plaintiffs and their employee and on 11th October, 2018 at night the same group who led by the Defendants again unlawfully entered on the suit properties without any authority or consent from the Plaintiffs and commenced the excavation and construction of various structures and/or buildings thereon. The Plaintiffs reported the matter again to the police station but the officers were adamant in making further arrests or stopping the Defendants from proceeding with the construction works stating that they may be very violent and the only way they could be stopped was through a Court Order.
25. The Learned Counsel submitted that on 12th October 2018 the Plaintiffs sought the assistance of the Office of the County Commissioner where they also advised that the office could only intervene with a Court Order. PW - 1 produced a letter to the commissioner dated 12th October 2018 as Plaintiff Exhibit - 9 as evidence in support of this fact. PW - 1 testified that during the pendency of this suit the Plaintiffs sold six (6) parcels of the said properties and remained with nine (9) parcels identified as plot No. 11576, 11578, 11579, 11581, 11582, 11585, 11586, 11589 and 11590. PW - 1 testified that he had not been able to enjoy and exercise his lawful rights over the said parcels due to the continued trespass and threats from the Defendants/their agents.
26. On the issues of determination, the Learned Counsel submitted on whether the Plaintiffs were the lawfully registered proprietors of the remaining nine (9) suit properties. She cited the provisions under Sections 24 and 26 of the [Land Registration Act](#) whereby a certificate of title was to be held as conclusive evidence of proprietorship.
27. The Learned Counsel asserted that the Plaintiffs produced in court the original Certificates of Titles over remaining nine (9) suit properties being land parcels no. 11576, 11578, 11579, 11581, 11582, 11585, 11586, 11589 and 11590. She held that the Plaintiffs had also through evidence shown how they lawfully came upon the property through sub - division, sale and transfer from the previous owners. This evidence remains uncontested and thus it was just and fair for this court to declare the Plaintiffs as the lawfully registered owners of the nine (9) remaining suit properties.
28. On the issue of whether the Defendants trespassed on the Plaintiffs' property, the Learned Counsel relied on the provision of Section 3(1) of the [Trespass Act](#), Chapter 294. To buttress on her point, the Learned Counsel cited the case of: "Rhoda S Kiilu – Versus - Jiangxi Water and Hydropower Construction Kenya limited [2019] eKLR" where the court interpreted the above provision of the law to mean:
- “...trespass is an intrusion by a person into the land of another who is in possession and ownership.”
29. Accordingly from the facts of the above cited case were that the Defendant had been contracted by the Kenyan government to construct a road in Maua Meru County. Plaintiff claimed that the Defendant unlawfully trespassed onto her properties without justifiable cause and proceeded to dump and deposit waste and other useless materials into the property. The Defendant also cleared trees and bushes, created roads, quarries, deep gullies and proceeded to carry out acts of excavation of soil, murrum and rocks and carried them for construction. The Honourable Court found that the Defendant was indeed a trespasser because the Plaintiff never authorized the Defendant to enter her land and carry out works of the construction or dumping.
30. In the instant case, the Learned Counsel averred that the Plaintiffs had proved that they were the absolute registered owners of the suit properties through Certificates of Titles produced. The Plaintiffs had also shown that the Defendants unlawfully and without permission entered upon their properties, destroyed the boundary wall and starting excavating and erection of temporary instructions. It was



the Plaintiffs' case these acts amounted to trespass. The acts of trespass were reported to the police were in the first place and thereafter to the Office of the County Commissioner. Criminal charges were preferred against the 1st and 2nd Defendants. In addition, the Plaintiffs engaged the services of a valuer who visited the properties and through a report confirmed that boundary wall was indeed demolished. In the valuation report was produced in court as Plaintiff Exhibit – 12. The Valuer made their observations as follows:

“the rear part of the boundary wall was demolished a length of approximately 63.0 metres, 2.0 meters wide”.

31. The Learned Counsel held that PW - 1 also testified that the Plaintiffs were up to this date, unable to use and peacefully enjoy the properties due to the constant threats by the Defendants and/or their agents. The Plaintiffs did not in any way, manner or form authorize or give their consent to the Defendants to enter the properties to excavate and construct various buildings/structures on it. Relying on the evidence produced by the Plaintiffs. The facts of the previous cases and the legal provision cited above, the Learned Counsel submitted to this Honourable Court that the aforementioned actions by the Defendants herein amounted to an illegal entry into the Plaintiffs properties which was deemed as trespass.
32. The Learned Counsel submitted that the acts of trespass were a direct violation of the Plaintiffs' rights envisaged under the provision of Article 40(1) and (2) of *the Constitution* of the Kenya, 2010 which provides for the right of every person to either individually or in association with others, to acquire and own property of any description in any part of Kenya and further guarantees that the said rights shall not be arbitrarily deprived limited, or in any way restricted on the basis of any of the grounds specified or contemplated in the provision of Article 27 (4) of *the Constitution* of Kenya, 2010.
33. The Learned Counsel urged this Honourable court to safeguard the rights of the Plaintiffs over the remaining nine (9) suit properties by ordering and/or declaring that:
 - i. the entry and putting up by the Defendants through their servants of various structures on the suit properties is unlawful;
 - ii. the continued existence of the said structures on the suit properties amounts to an act of trespass by the Defendants;
 - iii. the said structures on the suit properties be demolished forthwith by the Defendants;
 - iv. the Defendants do clear all the debris resulting from the demolition aforesaid;
34. To discontinue and ensure that no further trespass takes place, the Learned Counsel, in addition to the orders sought above, prayed that this Honourable court to issue an order of permanent injunction restraining the Defendants whether by themselves or through their servant, employees, agents or through any one deriving title through him or otherwise howsoever from entering, using or occupying, leasing, transferring, charging, selling or in any manner whatsoever dealing adversely with the suit properties.
35. The Learned Counsel further submitted on whether the Plaintiffs were entitled to an order of Damages. On this aspect, the Learned Counsel relied on the Court of Appeal decision in the case of: “Kenya Power & Lighting Company Limited – Versus - Fleetwood Enterprises Limited [2017] eKLR” held, inter alia, that where trespass was proven the affected party need not prove that it suffered damages or loss as a result of the trespass so as to be awarded damages because once the trespass was proved, the court was bound to assess and award damages on a case to case basis. In other words, once a trespass to



land was established it was actionable per se and indeed no proof of damage is necessary for the court to award damages. It therefore followed that the issue which arises in the instant case is as to what is the measure of such damage. In this regard, the Learned Counsel asked the court to be guided by the case of “Rhoda S Kiilu [Supra]” where the court awarded a sum of Kenya Shilling Ten Million (Kshs. 10,000,000.00/=) for acts of trespass that consisted of dumping and deposited waste and other useless materials into the property clearing trees and bushes, created roads, quarries, deep gullies and carrying out acts of excavation of soil, murram and rocks for construction.

36. In conclusion and on special damages the Learned Counsel submitted that the Valuation Report (Plaintiff Exhibit - 12) showed that it would cost the Plaintiffs a sum of Kenya shillings Five Fifteen Seven and One Hundred (Ksh. 515,701.00/=) to rebuild the boundary wall. Thus, the Plaintiffs prayed to be awarded the aforesaid sum as special damages. The Plaintiffs also prayed that this court to issue an order directing the officer in charge-Mtwapa Police Station to ensure there was peace and tranquility for the Plaintiffs to use and peacefully enjoy their properties and to assist in enforcing the orders this court may issue herein.

iv. Analysis and Determination

37. I have keenly assessed the filed pleadings by all the 1st and 2nd Plaintiffs herein, the evidence adduced in Court by the witnesses summoned by the Plaintiffs, the written submissions and the various cited authorities, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.
38. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three (3) issues for its determination. These are: -
- a. Whether the suit instituted by the 1st and 2nd Plaintiffs against Defendants by way of Plaint has any merit.
 - b. Whether the Plaintiffs are entitled to the reliefs sought.
 - c. Who will bear the costs of the suit?
- ISSUE No. a). Whether the suit instituted by the 1st and 2nd Plaintiffs against Defendants by way of Plaint has any merit.
39. Under this sub heading, broadly speaking, the main substrata of the case are three – fold in nature – the issue e and declaration of the ownership of the suit properties; the allegation of trespass onto the suit land by the Defendants and finally the reliefs sought in form of permanent inaction orders, the general and exemplary damages thereof. From the very onset, the Honourable Court wishes to state that it is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. This is what in law is termed as the “Burden of Proof” and is encapsulated for by Section 107 of the Evidence Act Cap 80 laws of Kenya which provides as follows:-

“ 107 Burden of Proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.



40. Public notoriety will be taken to the fact that land is a very emotive and sensitive issue in Kenya. Land is a source of livelihood in terms of social, economic and political aspects. According to the Constitution of Kenya, 2010 the provisions of Articles 61, 62, 63 and 64 land is classified into three (3) categories namely Public, Private and Community land. The provision of Article 40 (1) and (2) safeguards the right to private ownership and anywhere within the Republic of Kenya. The provision of Section 7 (1) of the Land Act, No. 6 of 2012 provides the means and modes upon which a person may acquire land in Kenya. This includes acquisition through sale as it is in the instant case. Legally speaking, and based on the provision of Section 107 of the Land Registration Act, No. 3 of 2012, it provides saving and transition clause where the said Act is now applicable as it is in the instant case. Flowing from that and pursuant to the provisions of Article 40 (1) and (2) of the Constitution of Kenya, 2010 and Sections 24, 25 and 26 of the land Registration Act, No. 3 of 2012 that he was the absolute and legal registered owner to the land with indefeasible interest, title and right vested on him by law. The effect of the registration of Land is founded in the provisions of Section 24 of The Land Registration Act which provides as follows:-

“Subject to this Act – 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 appurtenances thereto and;

41. To advance on this legal preposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title is deemed to be the “prima facie” evidence of the stated registration. The Certificate of Title held by the land owner is protected under the provisions of Law- Sections 25 (1) and 26 (1) of the said Act provides as follows:-

“The right 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 interest and claims whatsoever.....”

This fact is strengthened by the following decisions - “ELC (Nku) No. 272 of 2015 (OS) – Masek Ole Timukoi & 3 others –Versus- Kenya Grain Growers Ltd & 2 others and “ELC (Chuka) No. 110 of 2017 – M’Mbaoni M’Thaara – Versus- James Mbaka. And in Civil Appeal 60 of 1992 – ‘Dr. Joseph M. K. Arap Ngok –Versus- Justice Moiyo Ole Keiwua’ where courts has held that:-

‘It is trite law that land property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to Provisions in the Act under the property is held.’

42. The provisions of Section 26 (1) of the Land Registration Act Verbatim:-

“(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.”

43. From the facts in the pleadings and the evidence adduced herein, it has been demonstrated that the Plaintiffs are the absolute, legal and rightful registered proprietor with all indefeasible rights, title and interest vested in them by law of the suit properties plot No. 11576, 11578, 11579, 11581, 11582, 11585, 11586, 11589 and 11590. On the contrary, the Defendants are guilty of encroaching and trespassing onto the Plaintiff's land. The said trespass whose magnitude was found to be 0.0451 hectares, did deny the Plaintiffs the use, occupation, possession and enjoyment of said land, the Defendants on the other side have been building structures and enjoying the use of the unlawful actions. The Defendants when as far as destroying the Plaintiffs' wall. It is this destruction of the wall, loss of use and all the incidental rights that have been infringed by the Defendants that the Plaintiffs now seeks compensation for.
44. On 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.”
45. Trespass is described under the Trespass Act Cap 403 to mean 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. (Emphasis mine)
46. A continuing trespass is defined in:- Jowitt's Dictionary Of English Law 2Nd Edition as follows:-
- “ A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor's land”.
47. Finally, in the Clerk & Lindsell on Torts 16th Edition, paragraph 23 - 01, it is stated that:-
- “ Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.
48. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. On 29th September, 2018 that the Defendants and their agents had unlawfully entered on the properties without any authority or consent from them demolished a boundary wall that has been erected around the properties, commenced the excavation of the properties and construction of various structures and/or building thereon. PW - 1 produced photographs marked as Plaintiff Exhibit 10 (a) and (b) as evidence in support of the said destruction. PW - 1 testified that he has not been able to enjoy and exercise his lawful rights over the said parcels due to the continued trespass and threats from the defendants/their agents.
49. The Plaintiffs lodged a complaint at Mtwapa Police Station which was recorded as OB No.55/06/10/2018 and only the 1st and 2nd Defendants together with other persons not party to this case were arrested and charged. The said persons were charged with 3 counts of forcible entry contrary to the provision of Section 90 of the Penal code, 3 counts of malicious damage to property contrary to Section 339 (1) of the Penal code and 1 count of stealing contrary to Section 268 as read with Section 275 of the Penal code. The 3rd to 9th Defendants managed to escape. PW - 1 produced the charge sheet marked as Plaintiff Exhibit - 11 in the bundle of documents as evidence in support where the



Defendants were arraigned before Shanzu Law Courts. Despite the aforesaid arrest, the Defendants and their agents continued to threaten the Plaintiffs and their employee and on 11th October, 2018 at night the same group who led by the Defendants again unlawfully entered on the suit properties without any authority or consent from the Plaintiffs and commenced the excavation and construction of various structures and/or buildings thereon.

50. The Plaintiffs reported the matter again to the police station but the officers were adamant in making further arrests or stopping the Defendants from proceeding with the construction works stating that they may be very violent and the only way they could be stopped was through a Court Order. On 12th October 2018 the Plaintiffs sought the assistance of the Office of the County Commissioner where they also advised that the office could only intervene with a Court Order. PW - 1 produced a letter to the commissioner dated 12th October 2018 as P – Exhibit as evidence in support of this fact. For all these reasons, I hold that the Plaintiffs have proved their claim for trespass being a continued tort.

51. With regard to whether the Plaintiffs were entitled to damages. The provision of Section 26 (i) of the Registered [Land Act](#), Cap. 300 (Now Repealed) provides: -

“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.”

52. The Plaintiffs have produced title deeds for the nine parcels of land namely plot No. 11576, 11578, 11579, 11581, 11582, 11585, 11586, 11589 and 11590. There has not been any challenge by the Defendants on the Plaintiffs' title by reason of fraud or otherwise as envisaged under section 26 (1) (a) and (b) of the [Land Registration Act](#) and as it may be the Defendants failed to defend their case hence the Honourable Court finds that the Plaintiffs have proved their case.

53. I have already held and found hold that the Plaintiffs are the rightful registered proprietor of the suit properties plot No. 11576, 11578, 11579, 11581, 11582, 11585, 11586, 11589 and 11590. I have also held that the Defendants are guilty of encroaching and trespassing onto the Plaintiff's land. The said trespass whose magnitude was found to be 0.0451 hectares, did deny the Plaintiffs the use, occupation, possession and enjoyment of said land, the Defendants on the other side have been building structures and enjoying the use of the unlawful actions. The Defendants when as far as destroying the Plaintiffs' wall. It is this destruction of the wall, loss of use and all the incidental rights that have been infringed by the Defendants that the Plaintiffs now seek compensation for.

54. The Plaintiffs have claimed for a sum of Kenya Shillings Five Fifteen Seven and One Hundred (Kshs 515,701.00/=) to rebuild the boundary wall and damages for trespass. It is trite law that special damages require to be specifically pleaded and proved. In this case, the plaintiff has pleaded and proved this claim through production of the valuation report. I hence allow the claim of special damages.

55. On the issue of general damages for trespass, the issue that arises is: what is the measure of it? This question was answered by E. Obaga J in the case of “Philip Ayaya Aluchio – Versus - Crispinus Ngayo [2014]eKLR” where it was held as follows:

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the



costs of restoration, whichever is less See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).”

56. In the case of “Duncan Nderitu Ndegwa – Versus - KP& LC Limited & Another (2013) eKLR” where P. Nyamweya J. held that: -

“...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”

57. According to the Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503, it is provided as follows:-

- (a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
- (b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- (c) Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.
- (d) --
- (e) --

58. From the evidence on record, the Plaintiffs has proved trespass and has also gone ahead to produce agreement of sale between the 1st Plaintiff and Mwalimu Khamis Mwachizi, duly executed on 25th October, 2014 valuing the land at a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-).

59. I refer to the case of “Willesden Investments Limited – Versus - Kenya Hotel properties limited NBI H.C.C. NO. 367 of 2000”, the court stated that:-

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that Kshs. 10 000 000 is a reasonable award for general damages”.

60. Taking account that the damage to the perimeter of the wall and being that the suit property by the sale agreement a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-). I am of the view that an award of Kenya Shillings Five Million (Kshs. 5,000,000/-) as general damages should be sufficient in the given circumstances of this case hereof.

61. On the prayer for being granted permanent injunction orders restraining the Defendants from dealing with suit property. I wish to make reference to Korir, J who aptly captured the position as regards what constitutes a permanent or perpetual injunction in the case of “Kenya Power & Lighting Co. Ltd - Versus - Sheriff Molana Habib (2018) eKLR” when he stated thus:-

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually



restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

62. In this case, the Honourable Court has ascertained that the Defendants have no legal mandate to use the suit land in any manner. Based on the surrounding facts and inferences of this case, therefore, the prayer is meritorious and hence granted therefo.

Issue No. d). Who bears the Costs of the Suit?

63. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat - Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
64. In the present case, the 1st and 2nd Plaintiffs have been able to establish its case as pleaded from the filed pleadings. Therefore, they are entitled to be awarded costs of the suit to be borne jointly by the Defendants accordingly.

v. Conclusion and Disposition

65. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has established his case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:
- a. That Judgement be and is hereby entered in favour of the Plaintiffs against the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th Defendants herein.
 - b. That a declaration be and is hereby made that Plaintiffs are the lawfully registered proprietors of the suit properties and that the entry and putting up by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th Defendants through their servants of various structures on the suit properties is unlawfully.
 - c. That a declaration be and is hereby made that the continued existence of the said structures on the suit properties amounts to an act of trespass by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th Defendants.
 - d. That an order hereby do issue that the said structures on the suit properties be demolished forthwith by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th Defendants and that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th Defendants do clear all the debris resulting from the demolition aforesaid.
 - e. That a permanent injunction do hereby issue restraining the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th Defendants whether by themselves or through their servant, employees, agents or through any one deriving title through him or otherwise howsoever from entering, using or occupying, leasing, transferring, charging, selling or in any manner whatsoever dealing adversely with the suit properties



- f. That an order is hereby made that the Plaintiffs be and are hereby awarded general damages of sum of Kenya Shillings Five Million (Kshs 5,000,000/-) to be paid jointly by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th Defendants.
- g. That the Plaintiffs are also hereby awarded Special damages of Kenya Shillings Five Hundred and Fifteen Thousand, Seven hundred and one shillings (Kshs 515,701/-) to be paid by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th Defendants.
- h. That the Plaintiffs shall have the costs of the suit to be paid jointly and severally by the Defendants.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 2ND DAY OFNOVEMBER 2023.

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**HON. JUSTICE L.L. NAIKUNI (MR.)
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Judgement delivered in the presence of:-

- a. M/s. Yumna – the Court Assistant
- b. M/s. Mbwana Advocate holding brief for M/s. Kageni Advocate for the Plaintiffs
- c. No appearance for the Defendants

