



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC NO. 164 OF 2013

GATHENYA NGUMI.....PLAINTIFF

VERSUS

ERIC KOTUT & 4 OTHERS.....DEFENDANT

JUDGEMENT

INTRODUCTION

1. The Plaintiff instituted the present suit by way of a Plaint dated 22nd March, 2004. The plaint was filed on 6th April, 2004 and later amended in 6th June 2018.
2. The Plaintiff avers that he is the registered owner of the parcel of land known as LR 498/480 Eldama Ravine herein after referred to as the 'suit property'.
3. It is his averment that around the year 1997 the Defendant encroached onto the suit property and his claim, therefore, is for an order of eviction and an injunction restraining the Defendant from further interference with the property.
4. The Plaintiff prays for judgment against the Defendant for:
 - a) *A permanent injunction restraining the Defendant from occupying or remaining in occupation of LR 498/480 Eldama Ravine and an order of eviction.*
 - b) *Mesne Profit*
 - c) *Costs of this suit.*
 - d) *Interest*

FACTUAL BACKGROUND

5. The Plaintiff initially instituted the suit against 7 Defendants but subsequently, through an application dated 7th December, 2017, the Plaintiff was allowed to withdraw his case against 2nd to 7th Defendants leaving only the 1st Defendant, hereinafter referred to as the Defendant.
6. The Defendant filed a statement of defence dated 24th May, 2004 and denied all the allegations set out in the plaint.
7. On 12th March, 2019 the Defendant filed a preliminary objection dated 19th February, 2019. It is contention is that the witness statements of Sammy Gatheya filed on 20th March, 2012 and Patrick Wachira Gathenya filed on 15th January, 2019 were prepared by persons unqualified to represent the Plaintiff and that they are in violation of the Advocates Act, Chapter 16 Laws of Kenya.
8. On the 10th of December, 2019, the court gave directions that the preliminary Objection be addressed in the final submissions after hearing both the Plaintiff's and the Defendant's case.

9. This matter was finally heard on 21st September, 2021 and 7th October, 21 for Plaintiff's and Defendant's case respectively.

Plaintiff's Evidence

10. **Patrick Wachira Gatheya**, herein after referred to as **PW1**, testified as the first and only witness in support of the Plaintiff's case. He adopted his witness statement dated 6th December, 2018 as evidence in this suit and also gave oral evidence to highlight matters set out in his statement.

11. The documents as captured in his statement were produced as exhibits. They were marked as exhibits in the order in which they appear.

12. PW1 states that the Plaintiff Gathenya Ngumi is his grandfather adding that he, the Plaintiff, executed a general power of attorney in his favour. The said power of attorney was produced as **Exhibit P1**.

13. It is PW1's evidence that he knows the Defendant, that the Defendant is in occupation of the suit property, and has been in occupation for 24 years.

14. In respect of *mesne profits*, PW1 states that the suit parcel is 4 acres and that the Defendant has been ploughing and planting maize for the 24 years that he has been in occupation. It is his evidence that an acre produces 25 bags of maize adding that he would have harvested 100 bags of maize per year.

15. PW1 produced a copy of the Judgment in Nakuru HCCC No. 119 of 1984 as **Exhibit P2**. The said judgement according to his witness statement arose from a suit instituted by certain individuals against his grandfather; the Plaintiff herein. Vide the said judgement one of the orders issued was that the suit parcel; LR NO, 498/IV/15 Eldama Ravine be subdivided into four equal portions and separate titles be issued and transferred to the Plaintiffs and the Defendant (the Plaintiff in this suit)

16. PW1 also produced a copy of an indenture for partition dated 30th August, 1994 as **Exhibit P3**. On account of the partition a portion of land which is described as LR 498/ 480 vested in the Plaintiff. Subsequently, an application for registration of the said parcel was lodged. The application and receipts were produced as **Exhibit P4**.

17. A copy of an official search dated 5th February, 2018 was produced as **Exhibit P5**. The search, according to PW1, is part of the evidence that the suit parcel is owned by the Plaintiff.

18. A copy of a letter dated 13th March, 2018 by the Plaintiff to the National Land Commission requesting an extension of lease was produced as **Exhibit P6**.

19. A copy of a map from the director of survey was produced as **Exhibit P7**. The map, according to his statement, is proof that the suit parcel exists and was subdivided.

20. In his statement, PW1 states that his grandfather (the Plaintiff), had it not been for the illegal occupation, had planned to develop a commercial building and set up a family business. It is his evidence that his grandfather also planned to build residential houses on the suit parcel adding that had his grandfather developed the land, he would be receiving an income of kshs. 200,000 per month.

21. PW1 ended his testimony by stating that the actions of the Defendant should not be allowed to continue.

22. On cross examination, PW1 confirmed that the suit parcel in the Plaintiff filed in 2004 LR/489/IV/Eldama Ravine. He also confirmed that the amended Plaintiff contains an averment that the suit land is 4.1 acres while in the original Plaintiff the averment is that the land is 16.6 acres.

23. PW1 confirmed that the verifying affidavit in the original Plaintiff was sworn by the Plaintiff but the verifying affidavit in the amended Plaintiff was sworn by him.

24. In relation to the power of attorney, PW1 explained that the power of attorney (Exhibit P1) was registered on 3rd November, 2016 adding that as at that date the Plaintiff has not filed a witness statement in this matter.

25. PW1 reiterated that the Defendant has trespassed upon the Plaintiff's land and also confirmed that he is the donee of the power of attorney. He also confirmed that the power of attorney is titled "**general power of attorney**".

26. It is PW1's testimony that the power of Attorney did not say the power donated therein is irrevocable adding that he did not receive any payment or consideration from the Plaintiff to act on his behalf.

27. PW1 testified that prior to filing his witness statement there was a statement by Sammy Gathenya which was filed on behalf of the Plaintiff. He explained that Sammy Gathenya is his uncle; son of the Plaintiff.

28. PW1 confirmed that Sammy Gathenya also had a power of Attorney executed in his favour and that the same was filed on 20th March, 2012. He further confirmed that it was a general power of attorney.

29. PW1 explained that the power of attorney executed in favour of Sammy Gathenya was revoked but he had no evidence to prove the fact of revocation. He confirmed that there are two powers of Attorney filed in court without evidence of revocation.
30. PW1 acknowledged that both powers of Attorney, at line thirteen, give powers to both PW1 and Sammy Gathenya to commence, prosecute or defend any actions or suits.
31. PW1 explained that the Plaintiff is over 100 years old and mentally sound. He further explained that the Plaintiff was not able to come to court due to his advanced age.
32. It is PW1's evidence that he was born in 1985 and that the trespass occurred in the year 1997 when he was about 12 years old. He explained that when the trespass occurred his grandfather (the Plaintiff), his grandmother and himself moved to live in a nearby town.
33. PW1 stated that the fact of trespass was made known to him by the Plaintiff. He also stated that the Defendant is a former Governor of the Central Bank of Kenya.
34. PW1 confirmed that the amended Plaintiff at paragraph 4, 5 and 6 contains an averment that the Defendant trespassed onto the suit parcel in 1997. He reiterated that the Defendant was in occupation of the suit parcel for 24 years,
- and that by the time the suit was filed the Defendant was no longer Governor of the Central Bank of Kenya.
35. PW1 stated that the Defendant harvested 100 bags of maize per acre, per year adding that his evidence was an estimation based his farming knowledge.
36. When questioned on the contents of the Original Plaintiff, PW1 confirmed that there were 7 Defendants and not four as stated in his examination in chief. PW1 stated that suit was withdrawn against the other Defendants because the plaintiff was mistaken as to certain matters.
37. PW1 was referred to his witness statement filed on 15th January 2019 and he confirmed that he did not know in whose name parcel No. 498/499 was registered. He also confirmed that in his witness statement he stated that the Defendant had interest in land parcel No. 498/499 but was in occupation of land parcel No. 498/480. He explained that land parcel No. 498/499 belongs to the Defendant and is distinct from land parcel No. 498/480 which belongs to his grandfather- the Plaintiff.
38. PW1 further explained that information relating to land parcel No. 498/499 was given to him at Eldama Ravine Town Council adding that he was told that it belongs to the Defendant.
39. PW1 reiterated that land parcel number 498/499 and 498/480 are distinct titles. He added that the former belongs to the Plaintiff while the latter belongs to the Defendant.
40. On re-examination, PW1 reiterated that the power of attorney was donated to him by his grandfather (the Plaintiff) and that initially Sammy Gathenya was a donee vide a power of attorney also executed in his favour by the Plaintiff.
41. PW1 confirmed that the defendant had not produced any title documents with regards to the two parcels of land that is parcel No. 498/499 and 498/480.
42. PW1 also confirmed that the trespass occurred between the years 1994 and 1997. He explained that during the 1997 post election cashes, they left the suit parcel and when they returned, the land had been fenced off by people he believes to be the Defendant's agents.
43. It is PW1's evidence that he is in his possession of the title deed of the suit parcel, which is in the name of the Plaintiff. He reiterated that he also did a search which shows that the suit parcel is in the Plaintiff's name.
44. PW1, in conclusion stated that the parcel is in the Plaintiff's name but the Defendant is in occupation.
45. The Plaintiff's case was closed.

DEFENDANT'S EVIDENCE.

46. The Defendant, one Eric Kotut testified as **DW1**. He adopted his witness statement dated 17th September 2021 and filed on 20th September 2021.
47. It is his testimony that he does not know the Plaintiff.
48. DW1 also stated that he is neither the owner of Land Parcel No 498/499 nor in occupation of it.
49. DW1 further testified that he does not know who the owners of the two parcels of land are and further, that he doesn't know who is in occupation of them.
50. On the question of orders seeking his eviction, DW1 stated that he did not have anything to say since he did not have any interest in

suit parcel.

51. On cross examination DW1 confirmed that he has interest in Baringo and Eldama Ravine.
52. He further confirmed that he has two parcels of land in Ravine Town which are LR 498/53 and 498/54. He also confirmed that he is not in possession of LR 498/480.
53. He further stated that if there is anyone claiming that they are protecting his interest in the suit parcel. They should be evicted.
54. On re-examination, DW1 stated that there is no one protecting his interest in the suit parcel adding that he was in court and testifying in his own capacity. This marked the close of the Defendant's case.
55. The parties were directed to file their written submissions. On account of the preliminary objection raised by the Defendant, he was directed to file and serve his submissions first.

SUBMISSIONS

56. The Defendant filed his submission on 10th November, 2021. In his submissions, he gives his version of what constitutes a factual background of the suit.
57. The Defendant also gives a summary of the evidence as presented by both the Plaintiff and the Defendant in their testimonies and upon cross-examination.
58. The defendant has identified the following as issues for determination:
 - i. Whether the Defendant has trespassed onto LR No. 498/480.*
 - ii. Whether the defendant's preliminary objection dated 19th February, 2019 and filed on 13th March, 2019 is merited.*
 - iii. Who is to bear costs of the suit?*
59. The Defendant has also referred to and attached a host of judicial decisions in support of his submissions.
60. The Plaintiff filed his submissions on the 9th December, 2021. He gives a brief background of the suit, narrates his evidence and that of the Defendant.
61. The issues for determination as identified by the plaintiff are:
 - i. Whether the Defendant violated the Plaintiff's proprietary rights in trespassing upon his property LR No. 498/480 Eldama Ravine.*
 - ii. Whether the Plaintiff is entitled to mesne profits and general damages for trespass.*
 - iii. Who should bear the costs of this suit?*
62. It is my considered view that the issues for determination are:
 - i. Whether the Defendants preliminary objection is merited.*
 - ii. Whether the Defendant has trespassed upon and/or is in occupation of the Plaintiff's parcel of land known as L.R. 498/480 ELDAMA RAVINE.*
 - iii. Whether orders of permanent injunction and eviction should issue against the Defendant restraining him from occupying or remaining in occupation of L.R. 498/480 ELDAMA RAVINE.*
 - iv. Whether the Plaintiff is entitled to mesne profits.*
 - v. Who should bear costs of the suit? Is the Plaintiff entitled to interest on costs?*
63. I have read and taken into consideration the pleadings filed in respect of this matter, oral evidence tendered, exhibits produced, submissions of the parties herein and judicial decisions referred to.

ANALYSIS AND DETERMINATION

- A. *Whether the Defendants preliminary objection is merited*

64. The Defendant's preliminary objection is that the witness statements of Sammy Macharia Gathenya dated 20th March, 2012 and Patrick Wachira Gathenya dated 6th December, 2018 have been prepared by a person unqualified to represent the Plaintiff and are therefore in violation of the Advocates Act, Chapter 16 Laws of Kenya.

65. The Defendant quotes from the Power of Attorney Produced as Exhibit P1. It is his contention that the powers of Attorney states that the donor is donating to PW1 powers to;

...submit any matter in dispute to arbitration and to sign, seal and execute the necessary acts for that purpose..... to use and take all lawful ways and means for recovery thereof by attachment, ejectment, or otherwise; also if necessary for me and in my name to commence, prosecute, defend or continue any action or actions, suit or suits, at law or at equity in any courts in Kenya.

66. The Defendant contends that the Power of Attorney did not confer power on the donee to give evidence on behalf of the donor. It is his contention that both Sammy Macharia Gathenya and Patrick Wachira Gathenya (PW1) were unqualified persons and ought not to have prepared the witness statements filed in court.

67. The Defendant goes on to make reference to Order 9 of the Civil Procedure rules. The order provides for recognised agents and states:

1. Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:

Provided that—

(a) any such appearance shall, if the court so directs, be made by the party in person; and

(b) where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney-General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act.

68. Order 9 Rule 2

2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) subject to approval by the court in any particular suit persons holding powers of Attorney or an affidavit sworn by the party authorizing them to make such appearances and applications and do such acts on behalf of parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;

(c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

69. The Defendant also makes reference to Section 34 of the Advocates Act. The said section provides that;

No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document on instrument.

70. The Defendant in his submissions states that there is a conflict between the provision of Order 9 and those of section 34 of the Advocates Act and refers the court to Section 31 (b) of the Interpretation and General provisions Act.

No subsidiary legislation shall be inconsistent with the provisions of an Act.

71. In support of his submissions the defendant has relied on the judicial decisions in **Geoffrey Ndungu Theuri Vs Republic [1990] eKLR and Jack J.Khanjira & another vs Safaricom Limited [2012]eKLR.**

72. The Plaintiff in his submissions responds to the preliminary objection by stating that the Defendants contention suggests that one cannot appoint another to represent him or her in court.

73. PW1 explains the reason for the Plaintiff executing the power of Attorney is that he is of advanced age; over 100 years. He states further that this has made it difficult for the Plaintiff to attend court.

74. My reading and interpretation of Order 9 Rule 1 is that whenever the law authorizes an application, appearance or act to be done or made in court, such application, appearance or act is to be done by a party in person, by his recognized agent or by an advocate duly appointed to act on his behalf.

75. It is important to note that the Plaintiff has all along been represented by counsel. The Amended Complaint, Witness Statement and Power of Attorney were drawn and filed by the firm of Mirugi Kariuki. No evidence has been tendered before me that either the firm doesn't exist

or that the persons who appeared for the Plaintiff in court were not advocates.

76. To this extent, the provisions of section 34 of the Advocates Act do not apply in this matter. The allegations by the Defendant are unfounded.

77. The Defendant also contends that the wording of the Power of Attorney (Exhibit P1) does not give PWI power to give evidence on behalf of the donor. This contention by the Defendant is baffling. A General Power of Attorney by its very nature is intended to and gives very wide powers to the donee to do all things, possible and lawful, under the sun on behalf of and for the benefit of the donor. An interrogation of Exhibit P1 supports this proposition.

78. Although Exhibit P1 does not, in its wording, specifically use the words “give evidence”. It provides ;

“...in my name commence, prosecute, defend or continue any action or actions, suit or suits at law or in equity in any of the courts in Kenya...

...to manage and transact all of my affairs in Kenya and to execute such deeds or instruments as may be necessary or most to my advantage and to use all lawful ways and means thereto, s fully and effectively to all intent and purposes as I might or could do if personally present and acting herein...”

79. Its needless to say that prosecuting or commencing action will invariably require the person instituting action to sign documents and give evidence.

80. In **Mayfair Holdings Ltd Vs Ahmed [1990] eKLR**, the learned Judges of Appeal observed that since 1971 powers of attorney are controlled by the Powers of Attorney Act of the United Kingdom. There is no similar Act in Kenya.

81. The General power of Attorney is provided for in Section 10 of the said UK Act as follows:

a) Effect of general power of Attorney in specified form.

(1) Subject to subsection (2) of this section, a general power of Attorney in the form set out in Schedule 1 to this Act, or in a form to the like effect but expressed to be made under this Act, shall operate to confer—

(a) on the donee of the power; or

(b) if there is more than one donee, on the donees acting jointly or acting jointly or severally, as the case may be, authority to do on behalf of the donor anything which he can lawfully do by an attorney.

(2) Subject to section 1 of the Trustee Delegation Act 1999, this section does not apply to functions which the donor has as a trustee or personal representative or as a tenant for life or statutory owner within the meaning of the Settled Land Act 1925.

82. I would like to also distinguish the circumstances presenting in this suit from the ones referred to in the judicial decisions in support of the preliminary objection. In the case of Geoffrey Ndungu Theuri *supra* the Appellant drew legal documents. In this suit, as observed in the preceding paragraphs, legal documents were drawn by counsel.

83. The Case of Jack J Khanjira *supra* sets out the scope of the mandate of a recognized agent and it was held that Mr. Kalama could not donate power to his agent to give evidence because no person can substitute his evidence for another. In the present case, PW1 filed a witness statement in his name and gave evidence as set out in his witness statement.

84. The Case of **Isabel Chelangat Vs Samuel Tiro Rotich & 5 Others [2012] eKLR** the Learned Judge observes that the donor can only donate powers to the donee to perform such acts as he/she would be legally capable of. The Learned Judge gives an example that one cannot donate power to another to represent him in a suit as this would be tantamount to having an unqualified person representing a litigant. This is far from the circumstances presenting in this case. The Plaintiff was represented by counsel at the hearing and also engaged counsel to draft his pleading and other legal documents.

85. Consequently, I find that the preliminary objection is a misapprehension of the law and circumstances in this suit and is therefore dismissed.

B. Whether the Defendant has trespassed and/or is in occupation of the Plaintiff's parcel of land known as L.R. 498/480 Eldama Ravine.

86. The Defendant submits that the Plaintiff did not prove his case on a balance of probabilities as the Defendant is a total stranger to the Plaintiff's allegations of trespass. The Defendant relied on **Section 107 of the Evidence Act Cap 80** and submitted that the onus of proving the tort of trespass is on the Plaintiff who is making an allegation of trespass on the part of the Defendant.

87. The Defendant relies on the decision in **Justin Gatumuta Vs Kenya Power and Co. Ltd[2018] eKLR** in support of his submission on this point.

103. On his part, the Defendant simply stated that the Plaintiff is a total stranger to him and that he has no right nor interest in the suit property and is not in occupation of it. It has taken the defendant a shocking eighteen years to say this.

104. The defendant however admitted that he has land within the same area as the suit property. In essence, the Defendant dismissed the Plaintiff's grievance of over 18 years as purely fictional and urged the court to dismiss the same with costs.

105. I do not think that a party would pursue a fictional case for over 18 years and plead for a judicial remedy as the Plaintiff did before me.

106. In the decision of **David Ogutu Onda Vs Walter Ndede Owino [2014] eKLR** the learned Judge while citing the decision in **Zacharia Onsongo Momanyi Vs Evans Omurwa Onchagwa [2014] eKLR** stated that Trespass has been defined as any unjustified intrusion by one person upon the land in the possession of another. To be able to establish the tort of trespass the Plaintiff had to establish his ownership of the suit property and the fact that the defendant's occupation of the property is unjustified.

107. The tort of trespass upon land is comprised of any or all of the following acts:

- a) *Wrongfully entry onto another's Land.*
- b) *Taking possession of another's land.*
- c) *Expelling the person in possession.*
- d) *Pulling down, destroying anything permanently fixed on another's land.*
- e) *Wrongfully taking minerals from another's land.*
- f) *Placing or fixing anything on another's Land.*
- g) *Erecting or causing to continue on his own land anything which invades the air space of another.*
- h) *Discharging water upon another's land.*
- i) *Sending filth or any injurious substance which has been collected by him on his own land to another's land.*

108. The Plaintiff has led oral evidence that sometime in 1995 his use and occupation of the suit was interrupted when the defendant entered into the suit parcel and commenced farming activities thereon. This covers both expulsion and taking possession which are acts comprised in the tort of trespass.

109. Nothing would have been easier for the Defendant and/ or his counsel to bring information before this Honourable Court of the fact that he is a stranger to the allegation of trespass and also declare that he is no interest in the suit parcel. Had he done this, the court would have struck out his name from the suit according to the provisions of Order 2 Rule 15. In any event, in the year 2017, the Plaintiff withdrew the suit against other parties, leaving only the Defendant. This presented the perfect opportunity for the Defendant too, to ask to be excused from the suit but he stayed on. Why did he stay on? I read mischief in conduct and intention of the Defendant.

110. Lord Denning J. in **Miller Vs Minister of Pensions (1947) 2 ALL ER 372**, discussing the burden of proof had this to say-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.

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

111. It is more probable than not that the Defendant, his agents or persons claiming through him are in occupation of the suit parcel. In cross examination, a question was put to the Defendant about the fact that the people in occupation might be protecting his interest in the suit parcel. He stated that that should anyone make such claim, they should be evicted.

112. **It is my view, therefore, that the Plaintiff has proved his case on a balance of probabilities which is the required standard of proof in Civil cases**

C. Whether orders of permanent injunction and eviction should issue against the Defendant restraining him from occupying or remaining in occupation of L.R. 498/480 ELDAMA RAVINE.

113. This question is dependent on the finding in C above. I have made a finding that the Defendant has indeed trespassed upon and/or is in occupation of the Plaintiff's parcel of land known as L.R. 498/480 ELDAMA RAVINE.

114. The Plaintiff is entitled to the protection of the law as set out in sections 24, 25 and 26 of the Land Registration Act 2012 as was held in *Willy Kipsongok Morogo Vs Albert K. Morogo (2017) eKLR*. The Learned Judge stated as follows:

“The evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the Land Registration Act.”

115. The said sections 24, 25 and 26 of the Land Registration Act 2012 are as follows:

Section 24 of the Land Registration Act 2012 provides that 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 that 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 of the said Act provides that 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 the 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 to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and 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 and that nothing in the section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26 provides that 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—on the ground of fraud or misrepresentation to which the person is proved to be a party where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

116. Failure to grant orders of permanent injunction and eviction against the defendant and/or persons claiming through him would be tantamount to negating the title of the Plaintiff contrary to provisions of the law, which law acknowledges sanctity of title and requires that it be protected.

117. The facts in *Simeon Kiprono Mutai Vs Hillary Rotich & Another [2018] eKLR* mirror those in the present suit. The learned Judge stated as follows:

“The Defendants in their defence have categorically stated that they have no interest in the Plaintiff’s land. I find this baffling to say the least and the Defendants Defence are just mere denials.

On whether the Defendants have trespassed on the suit parcel, it is in the affirmative despite the denial, PW1 and PW2 have proved that the Defendants are on the land illegally and without the consent and authority of the Plaintiff.

Having found that the Plaintiff has proved his case on a balance of probability and the Defendants have trespassed on his land, I will thus enter judgment for the Plaintiff against the Defendants jointly and severally...”

118. The testimony by the Defendant, his written statement of defence and his oral evidence are nothing but mere denials.

119. Consequently, I find that orders of permanent injunction and eviction should issue against the Defendant restraining him from occupying or remaining in occupation of L.R. 498/480 Eldama Ravine

D. Whether the Plaintiff is entitled to mesne profits

120. On whether the Plaintiff is entitled to mesne profits the Plaintiff relied on the case of *Mistry Valji Vs Janendra Raichand & 2 Others [2016] eKLR*.

121. The Plaintiff submits that had it not been for the unlawful occupation by the Defendant, he would have put a commercial and residential building. The Plaintiff prays mesne profits at the rate of Kshs 200,000 per month from the year 1995 until the judgment date. The Plaintiff also relied on other cases and prayed that the Plaintiff’s claim in the plaint be allowed as prayed together with costs.

122. The Defendant has not submitted on mesne profits.

123. In *Rajan Shah T/A Rajan S. Shah & Partners Vs Bipin P. Shah (2016) eKLR* the court held as follows:-

“The term ‘mesne profits’ relates to damages or compensation from a person who has been in wrongful possession of immovable property...they are the rents and profits which a trespasser has or might have received or made during his occupation of the premises and which therefore he must pay over to the true owner as compensation for tort which he has committed.”

124. In the case **Peter Mwangi Msuitia & Another Vs Samow Edin Osman (2014) e KLR**, the Court of Appeal held as follows:

“As regards the payment of mesne profit, we think the Applicant has an arguable Appeal. No specific sum was claimed in the Plaintiff as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

125. It follows that the Plaintiff has failed to meet the requirement for an award of mesne profits in the instant suit. Mesne profits are in the nature of special damages and must be specifically pleaded and proved. No evidence was led as to specific amounts received by Defendant from use of the suit parcel during his occupation. Consequently, the prayer for mesne profits is hereby declined.

126. I need to point out that the Plaintiff has submitted on General damages. I decline to comment on it as it was not pleaded. Needless to say, parties are bound by their pleadings and submissions are not pleadings.

127. In **Independent Electoral and Boundaries Commission & another Vs Stephen Mutinda Mule & 3 others [2014] eKLR** which also cited with approval the decision of the **Supreme Court of Nigeria in Adetoun Oladeji (NIG) Vs Nigeria Breweries PLC SC 91/2002 where Adereji JSC** expressed himself thus on the importance and place of pleadings as follows:

“... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with averments of the pleadings was to no issues and must be disregarded...”

D. Who should bear the cost of the suit? Is the Plaintiff entitled to interest?

128. Lastly, on the issue of costs, the general rule is that costs shall follow the event in accordance with the provisions of 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. This was the holding in **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**.

129. The Plaintiff has been in court for the last 18 years asserting his proprietary rights over the suit parcel. The Defendant, 18 years later states that he has no interest in the suit parcel and doesn't know the Plaintiff. Had he said this 18 years ago, he would have saved himself from this often uncomfortable outcome of litigation.

130. In the circumstances, I find that the Plaintiff is entitled to cost of the suit and interest thereon.

DISPOSITION

131. The Upshot of the foregoing is that the Plaintiff suit as against the Defendant succeeds and I grant orders as follows:

- a) A permanent injunction do issue restraining the Defendant from occupying or remaining in occupation of LR 498/480 Eldama Ravine.***
- b) An order of eviction do issue against the Defendant.***
- c) The eviction orders in (b) above, to be effected after 90 days of service of this judgement and court order on the Defendant and/or his agents.***
- d) The Plaintiff shall have the costs and interest on the suit.***

132. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 1ST OF FEBRUARY, 2022

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Mwangi for Kibet for the Plaintiff.

Mr. Wachira for the Defendant.

Jennifer Court Assistant.