



**Waitherero v Gicheha & 6 others (Environment & Land Case
260 of 2017) [2022] KEELC 3522 (KLR) (2 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3522 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 260 OF 2017**

LA OMOLLO, J

JUNE 2, 2022

BETWEEN

SERAH WAITHERERO PLAINTIFF

AND

JOSEPH NJURE GICHEHA 1ST DEFENDANT

DISTRICT LAND REGISTRAR, NAIVASHA 2ND DEFENDANT

COMMISSIONER OF LANDS 3RD DEFENDANT

DIRECTOR OF SURVEYS 4TH DEFENDANT

DISTRICT SURVEYOR 5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

GILLETE TRADERS AUCTIONEERS 7TH DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff filed a Complaint dated 22nd June, 2017. She avers that she is the absolute proprietor of land parcel No. Naivasha/ Maraigushu Block 1/1173 and all the buildings and improvements that form part of the suit property.
2. It is her averment that the 1st Defendant had obtained a court order in Naivasha Civil Case No. 53 of 1986 dated 7th March, 2016 for eviction against Parcel Number Naivasha/Maraigushu Block 1/1113.
3. She avers that on 11th March, 2016, the 1st Defendant through the 7th Defendant trespassed onto the Plaintiff's parcel of land and demolished the Plaintiff's house built on her parcel of land No. Naivasha/ Maraigushu Block 1/1173 causing the Plaintiff loss and damage.



4. She further avers as a result of the said unlawful and malicious eviction, the Plaintiff suffered special damages and holds the defendants jointly and severally liable.
5. It is her averment that on 10th October, 2016 the Plaintiff took out boundary dispute summons in respect of the suit property which required the 1st Defendant to appear at the disputed boundary on 10th November, 2016. She avers that said summons were served upon the 1st Defendant.
6. The Plaintiff avers that on 10th November, 2016 the 5th Defendant carried out the survey of the parcel No's Naivasha/Maraigushu Block 1/1173 and Naivasha/Maraigushu Block 1/1113 in the presence of the Plaintiff, the 1st and 2nd Defendants, the Criminal Investigation Department officers and neighbors.
7. She further avers that on 22nd November, 2016 the 5th Defendant issued a survey report that found that the Plaintiff's parcel of land number Naivasha/Maraigushu Block 1/1173 was in its rightful position.
8. It is her averment that despite the 5th Defendant's report, the 1st Defendant still continues to trespass upon the Plaintiff's property.
9. The Plaintiff prays for judgement against the Defendants for:
 - a. Declaration that the Plaintiff is the lawful proprietor of the entire parcel of land known as Title No. Naivasha/Maraigushu Block 1/1173.
 - b. An order that the 2nd Defendant do cancel all titles on the suit property and to re-issue title to the Plaintiff over the property known as Title No. Naivasha/ Maraigushu Block 1/1173.
 - c. An order restraining the 2nd Defendant from altering the boundaries of the entire parcels of the land known as Title No. Naivasha/Maraigushu Block 1/1173.
 - d. An order compelling the 4th and 5th Defendants to affix beacons on the suit property in accordance with the Nakuru District Registry Index Map.
 - e. A permanent injunction restraining the Defendants or their agents and/or servants from entering upon or trespassing upon or in any other way interfering with the entire parcel of land known as Title No. Naivasha/Maraigushu Block 1/1173.
 - f. Special damages amounting to a total of Kshs. 1,061,000/= as particularized in paragraph 12 above.
 - g. General damages
 - h. Loss of earnings.
 - i. Interest on clause (f) and (g) above at court rates.
 - j. Costs of the suit.
 - k. Such further or other orders as this Honorable Court may deem fit and just to grant.
10. The 3rd Defendant filed its Statement of Defence dated 11th September, 2017 on 15th September, 2017. It is stated that 3rd Defendant was a stranger to the allegations contained in the Plaint and wrongly enjoined in the suit. The 3rd Defendant sought for the suit to be dismissed with costs as against him.
11. The 1st Defendant filed his statement of Defence dated 12th November, 2019 on the same date. He admitted that the Plaintiff is the registered owner of land parcel No. Naivasha/Maraigushu Block 1/1173 but denied that the structures on the property belonged to her.



12. He admits that he has a court order in Naivasha Civil Case No. 53 of 1986 dated ,7th March, 2016 for eviction and that the eviction was in respect of parcel No. Naivasha/Maraigushu Block1/1113.
13. The 1st Defendant further sates that eviction was carried out on buildings which had been constructed on land parcel No. Naivasha/ Maraigushu Block 1/1113 that he owns.
14. The 1st Defendant denied the allegations of special damages, he denies the fact of summons having been taken out and served upon him to appear at the disputed boundary, he also denies the fact that the Plaintiff, neighbours, Criminal Investigation Department officers congregated at the suit parcel and a survey carried out.
15. He states that it is the Plaintiff who had trespassed onto his parcel of land in spite of a judgement and orders of a court that ordered for her eviction.
16. He states that the matter herein was subject of Naivasha CMCC No. 53 of 1986 wherein the court made a determination and no Appeal was preferred against that decision.
17. He also states that the Plaintiff's suit is bad in law and is res judicata as the dispute between them had already been determined by the Naivasha Court.
18. He then prayed that the suit be struck out or dismissed with costs to him.

Factual Background

19. On 26th November, 2019, this court with the agreement on the Plaintiff and 1st Defendant referred what appeared to be a boundary dispute to the Land Registrar ad County surveyor for delineation of boundary between the two parcels i.e. Naivasha/ Maraigushu Block 1/1173 and Naivasha/ Maraigushu Block 1/1113.
20. A report was prepared and filed in court on 30th June, 2020. The court invited comments from the Plaintiff and the 1st Defendant to enable it make a ruling. Only the 1st Defendant filed his comments
21. This court issued a ruling on 17th June, 2021 and stated that after consideration of the surveyor's report, it found that it did not resolve the issues raised by the parties and the court declined to adopt the same. The court went on to state that the report forms part of the record and any party is free to make reference to it. The court then directed that the matter proceeds to hearing.
22. The 1st Defendant was served, filed a written statement of defence but did not appear in court on 16th December, 2021 when the matter came up for hearing. There is an affidavit of service confirming the fact of service of the hearing notice upon him.
23. The 2nd-6th Defendants were present during the trial.
24. The suit against the 7th Defendant was withdrawn and marked as such.

Plaintiff's Evidence.

25. At the hearing Sarah Waitherero Karanja testified as PW1. She adopted her witness statements dated 1st October, 2021 and 22nd June, 2017 as part of her evidence.
26. She testified that land parcel No. Naivasha/Maraigushu Block 1/1173 measuring 1.615 hectares belongs to her. She produced the title deed as Exhibit P1.



27. It is her testimony that she occupied the suit land in the year 1983 adding that she was a member of the Missouri Safari Farmers Co. Ltd.
28. PW1 narrated that she worked in Tanzania for four years and saved money to purchase the suit parcel. She produced the receipts given to her by Missouri Farmers Co. Ltd dated 7th November, 1964, 9th May, 1968 and 12th December, 1964 as Exhibit P2 (a), (b) and (C).
29. It was her evidence that that there was mismanagement and distribution of the assets of Missouri Farmers Company Limited and that she fought against the said misappropriation. It is her evidence that she fought against the grabbing of parcels of land earmarked for a school and other public utility.
30. She also testified that because of those fights she made enemies and so during distribution, she was given land that did not amount to 12.8 acres despite having contributed shares that would have entitled her to twelve acres.
31. She testified further that after the land was subdivided, she built on her parcel which is her correct position while her neighbor, Daniel Gitau Njoroge, sold his portion to a number of people. She added that the land had been surveyed, beacons were put and people occupied their respective portions.
32. She also testified that the 1st Defendant Joseph Ngure Gicheha is the person who bought land from her original neighbour adding that he wants to take over her parcel of land and has never wanted the suit to be determined on its merit. She produced the certificate dated 1st March, 1978 from Missouri farmers as Exhibit P3.
33. PW1 testified that the 1st Defendant was given an eviction order dated 1st March, 2016 in Naivasha Civil Case No. 53 of 1986 against land parcel number Naivasha/Maraigushu Block 1/1113. She produced the eviction order as Exhibit P4.
34. She testified further that on 11th March, 2016, while she was at work at the orphanage, she was called by her grandchild who informed her that the 1st Defendant through auctioneers were demolishing her house built on her parcel of land No. Naivasha/Maraigushu Block 1/1173 which was not subject to the court order as the order was against land parcel No. Naivasha/Maraigushu Block 1/1113 as a result of which she suffered loss and damage.
35. She testified further that when she arrived at home, she found everything destroyed and that her son had been arrested for trying to stop the destruction. She produced a report prepared by her lawyer as Exhibit P5. It is dated 18th March, 2021.
36. She testified that after her house and property were destroyed by the said Joseph Ngure Gicheha, she reported the matter to the CID and to Ardhi house. It is her evidence that after she reported the mater, an investigation was ordered.
37. It was her evidence that after investigations by the minister in charge of lands and confessions by officers at the Lands Office, the real reports that showed the true position were unearthed and the Minister and Permanent Secretary ordered for a resurvey and a copy of the report forwarded to Ardhi House. The survey report dated 22nd November, 2016 was produced as Exhibit P6.
38. It is PW1's testimony that after demolition, she got a valuer who prepared a valuation report dated 19th April, 2017. She produced the report as Exhibit P7.
39. PW1 confirmed that she knew Kimani Ngugi adding that he was deceased. She explained that they worked with him in Tanzania and that he filed a statement which she produced as Exhibit P8.



40. Exhibit P8 is Kimani Ngugi's statement. He states that he was informed of the boundary dispute between the Plaintiff and the 1st Defendant herein. He had also stated that on 10th November, 2016, the District Surveyor carried out the survey of both parcels in his presence and the presence of the 1st and 2nd Defendants, CID officers and neighbors. That the surveyor indicated that the Plaintiff was within her boundaries and rightful property and by his letter dated 22nd November, 2016, the District Surveyor issued a survey report showing that the Plaintiff's parcel of land number Naivasha/Maraigushu Block 1/1173 was in its rightful position.
41. PW1 in her witness statement states that Joseph Ngure Gicheha has refused to accept that he was defrauded by her neighbour Gitau who sold to him parcel No. 1113.
42. In her statement, PW1 states that she is ninety years old and that the 1st Defendant has tried to take advantage of her advanced age adding that he takes surveyors to the ground they always find in her favour but somehow the reports always indicate otherwise.
43. She also states that the 1st Defendant ought to sue Mr. Gitau for misrepresentation as Mr. Gitau had already sold the land to eleven other persons and if the measurements of the properties sold and the 1st Defendant's portion were added together, they would aggregate to twelve acres which is the rightful and official acreage owned by the original owner who was Mr. Gitau.
44. It was her evidence that if the word of Mr. Gicheha the 1st Defendant was taken to be true then it would result in Mr. Gitau having eighteen acres which cannot be true. She stated that this is the reason for all the surveyors on actual visits to the ground have found her to be at her rightful ground position.
45. In her statement PW1 further states that the 1st Defendant's actions of levying execution on LR No. Naivasha/Maraigushu Block 1/1173 instead of LR No. Naivasha/Maraigushu Block 1/1113 was wrong and the question to be determined in this matter is where the execution was levied and whether both parcel No's refer to one and the same parcel of land.
46. PW1 ended by praying for compensation for the loss occasioned to her and damages.
47. On cross examination, by counsel for the 2nd -6th Defendants, PW1 confirmed that she had unresolved issues with the Land Registry. She explained that her documents were taken to the Attorney General and she neither received them back nor got a response.
48. She also confirmed that the Surveyor and the Land Registrar had told her that her parcel of land was in its rightful place and that they made no mistake in letting her stay on the parcel of land that belongs to her.
49. The second witness to testify in support of the Plaintiff's case is one John Kipruto, herein after referred to as PW2. It was his evidence that he is a Land Surveyor that works with the government. He testified that he was served with a court order that required him to go to the ground.
50. He testified further that he visited the land and made a report dated 30th June, 2020 which he produced as Exhibit P9. He also testified that when he visited the land he found that the 1st Defendant had not demarcated his land and that the trespass was on parcel No. 1173 while the court order stated that the eviction was to happen on land parcel No. 1113. He produced the survey report dated 30th June, 2020 as Exhibit P9.
51. Counsel for the 2nd -6th Defendants has no question in cross-examination.



52. The third person to testify in support of the Plaintiff's case is one Judy Njeri Karanja hereinafter referred to as PW3. She stated that she is the grandchild of the Plaintiff. PW3 adopted her witness statement dated 1st October, 2021 as part of her evidence.
53. It is her testimony that in the year 2016, she was called by neighbors who informed that her grandmother's house was being demolished.
54. She testified further that upon arriving at her grandmother's house she was shown an eviction order that had been issued and after looking at that order, she realized that it was in respect of land parcel No. 1113.
55. She went on to testify that her grandmother, the Plaintiff was in occupation of land parcel No. 1173. She testified that after the demolition, she took the Plaintiff to Ardhi House because she had been told she could get help there.
56. PW3 testified further that they found the minister, Hon Kaimenyi at Ardhi House and after narrating their troubles, he sent a surveyor to the suit parcel.
57. It is her evidence that the surveyor went to the suit parcel on 10th November, 2016 as he was ordered and found that the Plaintiff was at her parcel of land and that the demolition was done on the wrong parcel.
58. She testified that she knew Gitau who sold land to Gicheha the 1st Defendant. It is her evidence that Gitau sold eleven plots and kept the rest of the plots. He stated that the 1st Defendant ought to have sued Gitau.
59. It is PW3's evidence that the genesis of the problem was that the 1st defendant wanted her grandmother's land by claiming that it was a boundary dispute while his parcel was different from theirs and that the surveyor's reports always indicated that the land belonged to her grandmother but they were doctored to mislead the court.
60. On cross examination by counsel for the 2nd – 6th Defendants, pw3 confirmed that She went to the Minister's office and got help.
61. She also confirmed that what was reported by the surveyor is correct.
62. She further confirmed that he has no claim against the land Registrar adding that the registrar confirmed to them that their land is in its rightful place.
63. On re-examination, he stated that he initially had a problem with the land Registrar because they would undertake survey of the suit parcel but never gave a report.
64. Danson Karanja testified as PW4. He testified that the Plaintiff is his mother and adopted his witness statement dated 1st October, 2021 as part of is evidence.
65. In his oral testimony, he stated that he is a business man and that the plaintiff is his mother. He stated that one day they woke up and found a fence adjacent to their land.
66. He stated that the problem that they have faced over the years is that whenever a surveyor visits the suit property, the find one thing but report differently.
67. He stated that parcel 1113 is not his mothers, adding that his mother's parcel is 1173 and that demolition took place on 1173



68. He stated that on the day of demolition, his mother was at a women's meeting and that there was no one at home. He further stated that they lost a television set, a posho mill that he used for business, house hold items and farm animals (pigs.)
69. PW4 stated that after demolition he had to move his mother to his house. He also stated that they did a valuation and the report shows that estimated value for the damage occasioned to land and building is Kshs. 1,500,000.
70. It is his evidence that four houses were demolished and they were valued at Kshs. 1,500,000/=. He also sought damages for trespass.
71. In his witness statement, PW4 states that after investigations were ordered by the Minister in charge of lands the true position was unearthed and the Minister and Permanent Secretary ordered a resurvey and a copy of the report be forwarded to Ardhi house.
72. In his witness statement, he states that on 10th November, 2016 the Land Registrar, CID officers and the 1st Defendant together with the Plaintiff went to the ground and found his mother to be the rightful owner of the parcel of land and that the properties that were destroyed were on his mother's land.
73. In his statement PW4 states that the 1st Defendant has refused to accept that he was a victim of fraud and should institute proceedings against Njonge Gitau.
74. In his statement he states that there has always been a manipulation on paper and each time officials are sent to the ground it is found that the Plaintiff is on her land but the reports presented are different. He states that when officials are summoned, not a single report produced by them shows that the Plaintiff has trespassed onto someone else's property. He states that the reports filed in court are mischievous.
75. Pw4 in his statement states that the original owner of land parcel No. 1113- Mr. Gitau sold his parcel to 11 people before the purported sale to the 1st defendant and that if the 1st Defendant's claim is included in the parcel No 1113 it will be more than 12 acres with is Mr. Gitau's acreage.
76. On cross- examination by advocate for the 2nd- 6th Defendants, PW4 stated that he wants to be paid Kshs. 1,500,000 being the cost of the demolished house.
77. He confirmed that demolition was on account of a court order and that he was not there when demolition was done. He clarified that the court ordered demolition on Plot Number 1113 and not 1173. He stated that his mother is on 1173 and has a title deed.
78. PW4 stated that no one from the land office has ever informed the Plaintiff that she is on the wrong or that the parcel isn't hers. He stated that the records at the land's registry show that she is the owner of the suit land.
79. PW4 ended his cross examination by stating that he has no complaints against the Lands Office.
80. On re-examination he stated that the Lands Office has never stated that land parcel No. 1173 does not belong to his mother.
81. The Plaintiff then closed her case.
82. The 2nd to 6th Defendants opted not to call any witnesses and closed their case, the suit as against the 7th Defendant was withdrawn and parties were directed to file their submissions.



The Plaintiff's Submissions.

83. The Plaintiff in her submissions gave a brief history of the case and addressed the court on the following issues:
- a. Who is the registered owner of the property known as LR No. Naivasha/ Maraigushu Block 1/1173?
 - b. Who is the registered owner of the property known as LR No. Naivasha/Maraigushu Block 1/1113?
 - c. Which parcel of land did the execution of the order dated 7th March 2016 take place? - (sic)
 - d. What was the extent of the damage caused as a result of the said execution?
 - e. Is the 1st Defendant guilty of series of acts of trespass unto the Plaintiff's parcel of land LR No. Naivasha/Maraigushu Block 1/1173?
 - f. What damages are due if any to the Plaintiff?
84. On the 1st and 2nd issue the Plaintiff submitted that Exhibit P1 shows that she is the registered owner of land parcel No. LR No. Naivasha/Maraigushu Block 1/1173 while the 1st Defendant is the registered owner of land parcel No. LR No. Naivasha/Maraigushu Block 1/1113. It was submitted that the eviction happened on land parcel No. Naivasha/Maraigushu Block 1/1173 with the 1st Defendant having the knowledge that the Plaintiff had never trespassed onto his parcel of land.
85. The Plaintiff further submits that the 1st Defendant is not an original allottee, that he purchased his parcel from One Daniel Gitau who had also sold the same parcel to 11 other people. The Plaintiff submits that the 1st Defendant is a victim of fraud and invited the court to look at the comments that they submitted on the survey report filed in court, as ordered by the court.
86. On Res judicata, the Plaintiff submits that the previous suit was in relation to parcel Number 1113 and not 1117. The Plaintiff also submits that the cause of action in the present suit relates to illegal eviction premised on a court order dated 7th March, 2016.
87. The Plaintiff submits that she has no claim in respect of parcel number 1113 adding that her land is 1173. She submits that the root of the problem has always been on account of manipulated survey reports despite findings that she is in occupation of her rightful portion.
88. On the question-the court order dated 7th March, 2016 the Plaintiff submits that it was in relation to parcel Number 1113 and not 1173. She submits that during execution, the 1st defendant pointed out the structures on the neighboring plot number 1173 belonging to her. This is where the demolition was done and that it is illegal, taking into consideration the testimony of the surveyor (PW2) and his report. (Exhibit p9).
89. The Plaintiff submitted that the buildings that were demolished were already on the property before the 1st Defendant bought the parcel of land. She submits that the matter is not Res Judicata because the previous proceedings were in relation to parcel number 1113 and not parcel number 1173.
90. On the question of damages, the Plaintiff submits that the valuation report dated 19th April, 2017 showed the extent of damages done to her property during the illegal eviction process. She further submits that an award of Kshs. 4 million would adequately compensate the wrong suffered by her.



2ND, 3RD, 4TH, 5TH and 6TH Defendants' Submissions .

91. The 2nd, 3rd, 4th, 5th and 6th Defendants in their submissions gave a background of the matter and addressed the court on the following issues:
- a. Whether the 2nd, 3rd, 4th, 5th and 6th Defendants have abdicated their roles as far as determining the boundary dispute between Naivasha/Maraigushu Block1/1173 and Naivasha/Maraigushu Block 1/1113 (Missouri) is concerned.
 - b. Whether the Plaintiff is entitled to costs of the suit.
92. On the first issue it was submitted that the 2nd, 3rd, 4th, 5th and 6th Defendants have faithfully carried out their duties as required by the law and should not be held liable for any wrongful actions of the 1st Defendant. In support of this point, the 2nd to 6th Defendants referred to Section 19 of the [Land Registration Act](#) 2012 and the case of [Johnson Nyamoko Vs Otiso Ondicho & Another](#) [2019] eKLR and submitted that on 10th November, 2016 they carried out a survey of the parcels of land and the Survey report dated 22nd November, 2016 states that the Plaintiff is at her rightful ground position and has not encroached on land parcel No. Naivasha/Maraigushu Block 1/1113 which belongs to the 1st Defendant.
93. The 2nd, 3rd, 4th, 5th and 6th Defendants also make reference to section 13 A (5) of the [Land Registration Act](#) which provides that the Registrar shall not be held personally liable for lawful acts discharged by the registrar under the Act in good faith.
94. The 2nd, 3rd, 4th, 5th and 6th Defendants submit that the Plaintiff in her affidavit swore that she took out boundary dispute summons in respect of Naivasha/ Maraigushu Block 1/1173 which summons called upon the 1st Defendant to appear at the disputed boundary on 10th November, 2016. On the said date the 5th Defendant (District Surveyor) carried out the survey in the presence of the 1st Defendant, 2nd Defendant, CID officers, neighbours and herself.
95. On 22nd November, 2016, the 5th Defendant issued a survey report which report stated that the proprietor of Naivasha/ Maraigushu Block 1/1173 is at her rightful ground position and that the said parcel of land did not encroach on Naivasha/ Maraigushu Block 1/1113 which belongs to the 1st Defendant.
96. On account of these, it is submitted that the 2nd and 5th Defendants have discharged their mandate. They further submit that the 1st Defendant is not an agent of the 2nd, 3rd, 4th, 5th and 6th and that the 2nd, 3rd, 4th, 5th and 6th have not trespassed on the land of the Plaintiff. They pray that the suit against them be dismissed with costs.

Analysis and Determination.

97. After considering the pleadings, the evidence and submissions, the following issues arise for determination:
- a. Whether this suit is res judicata
 - b. If (a) above is in the negative, whether the Plaintiff is the lawful proprietor of the entire parcel of land known as Title No. Naivasha/Maraigushu Block 1/1173.
 - c. Whether the 2nd Defendant should cancel all titles on the suit property and re-issue title to the Plaintiff over the property known as Naivasha/ Maraigushu Block 1/1173



- d. Whether the court should restrain the 2nd Defendant from altering the boundaries of land parcel No. Naivasha/Maraigushu Block 1/1173.
- e. Whether the suit against the 2nd, 3rd, 4th, 5th and 6th Defendants should be dismissed with costs.
- f. Whether the Plaintiff is entitled to special damages amounting to Kshs. 1,061,000/=,
- g. Whether the Plaintiff is entitled to general damages and loss of earnings.
- h. Who should bear the costs of the suit.

A. Whether this Suit is Res Judicata.

98. The first issue for determination is whether this suit is res judicata. This is a question of law which is capable of disposing off the entire suit and I am minded to address it first. It has been pleaded in paragraph 13 of the 1st Defendant's written statement of defence.
99. The 1st Defendant in his Statement of Defence stated that the matters herein were in issue in Naivasha CMCC No. 53 of 1986 (David Gitau Njonge & Joseph Ngure Gicheha Vs Serah Waitherero) where the court made a full determination of the issues and no Appeal was made.
100. The Plaintiff on the other hand submitted that this matter is not res judicata as the previous proceedings were in relation to parcel number 1113 and not land parcel No. 1173 and further because the Plaintiff's cause of action is pegged on the 1st Defendant's illegal eviction process that took place vide the order dated 7th March, 2016.
101. On 17th October, 2019, the 1st Defendant had filed the application dated the same date seeking for orders that this suit as against the him be struck out for being res judicata which application he did not prosecute. On the same date he had also filed a Notice of Preliminary Objection on the grounds that the suit was res judicata having been determined in Naivasha CMCC No. 53 of 1986.
102. The court record reveals that this application was not determined and the 1st defendant did not participate in the proceedings before this court after 25th February, 2021. This application and the annexures to the affidavit in support of the application
103. Section 7 of the *Civil Procedure Act* provides for the doctrine of Res Judicata which prevents a court from hearing and determining any suit or issue which has been determined by a court of competent jurisdiction. The doctrine only applies where the issue or suit was directly in issue in the former suit, the suit was between the same parties, the parties were litigating under the same title, the issue in question was heard and determined in the former suit and the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent case.
104. The Supreme Court also in the case of *Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 Others* [2017] eKLR in considering Section 7 of the *Civil Procedure Act* stated as follows on the elements that need to be proved for the doctrine of res judicata to be invoked;
 - “(a) The suit or issue was directly and substantially in issue in the former suit.
 - (b) That former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating under the same title.
 - (d) The issue was heard and finally determined in the former suit.



(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

105. There is a former suit being Naivasha CMCC Civil Case No. 53 of 1986, in which the 1st Defendant in this matter together with Daniel Gitau Njonge had sued the Plaintiff herein. The land parcels in issue were Naivasha/Maraigushu/Block 1/185, 182 and 712 Missouri. The court in that matter referred the dispute to the elders who gave an award to the effect that Serah Waitherero was wrongly in occupation of the Plaintiff's land.
106. Serah Waitherero, who is the Plaintiff in this matter, challenged the said award through an application which was dismissed vide the order dated 26th May, 1993 and there is no evidence of further challenge of the said orders.
107. During the hearing, the Plaintiff produced as exhibit P4 an eviction order which she stated was used to evict her. The said order was issued in Naivasha CMCC Misc. Civil Application No. 5 of 2016 between Daniel Gitau Njoroge & Joseph Gure Gicheha Vs Sarah Waitherero. The said order was for eviction against the Plaintiff herein from land parcel No. Naivasha/Maraigushu Block 1/1113 (Missouri).
108. It would seem, therefore, that even though the dispute begun over land parcel No's Naivasha/Maraigushu/Block 1/185, 182 and 712 Missouri it has metamorphosized to a dispute between land parcel No. Naivasha/Maraigushu Block 1/1113 (Missouri) and Naivasha/Maraigushu Block 1/1173.
109. It is evident that the parties in Naivasha CMCC Civil Case No. 53 of 1986 and the Naivasha CMCC Misc. Civil Application No. 5 of 2016 are the same but the present suit has different parties being:
 - a. Sara Waitherero
 - b. Joseph Ngure Gichena
 - c. The District Land Registrar Naivasha
 - d. Commissioner of Lands
 - e. Director of Surveys
 - f. District Surveyor
 - g. The Honourable Attorney General
 - h. Gillette Traders Auctioneers
110. The orders sought in the present suit are in respect of Naivasha/Maraigushu/Block 1173. It is pleaded, at paragraph 10 of the plaint, that they are sought on account of orders of eviction dated 7th March, 2016 obtained in Naivasha CMCC Civil Case No. 53 of 1986. The said orders however, were issued in Naivasha Misc. Civil Application No. 5 of 2016 and are in respect of Naivasha/Maraigushu/Block 1113.
111. There is no doubt that the suit or issues that are was directly and substantially in issue in the former suit are not directly and/or substantially in issue in the present suit. Further, the former and present suit is not between the same parties or parties under whom they claim. Consequently, I find that this suit is not res judicata.
112. Having found in the negative, I will proceed to determine the other questions.



B. Whether the Plaintiff is the lawful proprietor of parcel of land known as Naivasha/Maraigushu Block 1/1173.

113. The Plaintiff in her oral testimony explained the history of her acquisition of the suit property and how it was finally registered in her name. She produced the title deed as Exhibit P1, receipts given to her by Missouri Farmers Co. Ltd dated 7th November, 1964, 9th May, 1968 and 12th December, 1964 as Exhibit P2 (a), (b) and (c) and a certificate from Missouri firm as Exhibit P3.
114. The 1st Defendant at paragraph 2 of his written statement of defence admits that that the Plaintiff is the registered owner of land parcel No. Naivasha/Maraigushu Block 1/1173.
115. To this end, I find and declare that the Plaintiff is the registered owner of the property known as LR No. Naivasha/Maraigushu Block 1/1173.

C. Whether the 2nd Defendant should cancel all titles on the suit property and re-issue title to the Plaintiff over the property known as Naivasha/ Maraigushu Block 1/1173.

116. This is one of the prayers set out in the Plaint. The Plaintiff has not led any evidence to show that the 2nd Defendant has issued title to the suit property to third parties or that the 2nd Defendant has had any dealing in the suit property inconsistent with the title of the Plaintiff.
117. In fact, the Plaintiff and her witnesses have categorically stated that they have no claim against the 2nd Defendant.
118. I decline to grant this order.

D. Whether the court should restrain the 2nd Defendant from altering the boundaries of land parcel No. Naivasha/Maraigushu Block 1/1173.

119. The 2nd Defendant in its submissions has explained the efforts it has mandate in fulfilling its mandate under the *Land Registration Act*.
120. Specifically, the 2nd Defendant submits that the Plaintiff in her affidavit swore that she took out boundary dispute summons in respect of Naivasha/ Maraigushu Block 1/1173 which summons called upon the 1st Defendant to appear at the disputed boundary on 10th November, 2016. On the said date the 5th Defendant (District Surveyor) carried out the survey in the presence of the 1st Defendant, 2nd Defendant, CID officers, neighbours and herself. The 2nd defendant submits that the said report made findings in favour of the Plaintiff.
121. It is trite law that he who alleges must prove, the Plaintiff has failed to discharge her burden of proof in support of allegations that the 2nd Defendant is engaged in or is threatening to alter boundaries of the suit parcel.
122. On account of this, I decline to grant orders under this heading.

E. Whether the suit against the 2nd, 3rd, 4th, 5th and 6th Defendants should be dismissed with costs.

123. The 2nd, 3rd, 4th, 5th and 6th Defendants submit that have faithfully carried out their duties as required by the law and should not be held liable for any wrongful actions of the 1st Defendant.
124. The Plaintiff in her oral evidence, witness statement and documents produced confirms that she took out boundary dispute summons in respect of the suit property which summons called upon the 1st Defendant to appear at the disputed boundary on 10th March, 2016. She confirms that the 5th defendant



(District Surveyor) carried out the survey in the presence of the Plaintiff, 1st Defendant, 2nd Defendant, CID officers and neighbours.

125. The Plaintiff further confirms that the report made findings in her favour. These findings are reported on the reports dated 22nd November, 2016 and the report dated 31st November, 2017. Both reports were prepared after a visit to the suit property on 10th November, 2016.
126. Subsequently, on 26th November, 2019, the court ordered for a survey of the suit parcel and L.R. Naivasha/Maraigushu Block 1/1113 and a report dated 30th June, 2020. It was prepared after a visit the two parcels on 18th February, 2020 by the District Land Registrar and the District Surveyor. The report found that both the plaintiff and 1st Defendant are in their rightful ground positions and that none of them is encroaching on the others' parcel.
127. My analysis shows that the 2nd and 5th Defendants have been extremely helpful in issuing reports that might help resolve the dispute between the Plaintiff and the 1st Defendant. Whenever called upon, they have conscientiously discharged their mandate as set out in the law.
128. It is not clear what transgressions are alleged in respect of the 3rd and 4th Defendant. No mention has been made of them in the witness statements or oral testimonies of the Plaintiff and her witnesses. The only mention is in the descriptive paragraphs of the plaint.
129. Consequently, I find that the suit against the 2nd, 3rd, 4th, 5th and 6th Defendants should be and is hereby dismissed with no order as to costs.

F. Whether the Plaintiff is entitled to special damages amounting to Kshs. 1,061,000/=

130. Section 13(7) of the *Environment and Land Court Act* provides that this court has power to make any orders and grant any relief as the court deems fit and just including, among others, award of damages.
131. I am further guided by the decision of the court of Appeal in *Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd* [2013] eKLR wherein it was observed.

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”
132. The Plaintiff in paragraph 12 of the plaint has set out the particulars of special damages and particulars of loss. The plaintiff and her witness testified that the 1st Defendant through the 7th Defendant trespassed upon her land and demolished houses built therein which culminated to loss and destruction of household items, loss of farm animals (pigs) and other items.
133. The Plaintiff has produced a document (Exhibit P 7) from Shapa Consulting Limited which she describes as a valuation report. The said report states that the cost of re-building the destroyed house is Kshs. 1,061,000.
134. This report and assessment therein have not been challenged by the 1st defendant in any meaningful manner. I have no reason to doubt it and therefore accept it as a fair assessment. Consequently, I find that the plaintiff is entitled to special damages of Kshs. 1,061,000.



G. Whether the Plaintiff is entitled to general damages for trespass and loss of earnings.

135. Having found that the 1st Defendant indeed trespassed upon the land of the Plaintiff and carried out unlawful demolition and thereby occasioning damage to the Plaintiff. I will proceed to make a determination on general damages and loss of earnings.
136. I will take the liberty of distinguishing loss of earnings, loss of earning capacity and loss of future earnings.
137. The Court of Appeal in the case of *S J Vs Francesco Di Nello & Another* [2015] eKLR held that: -
- “...Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved.”
138. My deduction of the decision in is that loss of earnings is in the nature of special damages and must be specifically pleaded and proved. The Plaintiff has not led evidence to show what she was earning and/or how the demolition by the 1st Defendant caused her to lose her earnings. I decline to award any amount under the heading loss of earnings.
139. On general damages, the Plaintiff in her pleadings and testimony state that the 1st defendant trespassed upon her land and demolished buildings and caused damage and loss of her property. A valuation report (Exhibit P7) has also been produced which confirms demolition and destruction of building and offers estimated cost of re-building. PW2 in his testimony and report confirms the fact of trespass by the 1st Defendant.
140. The 1st Defendant did not adduce any evidence to counter the allegation of trespass and destruction of property.
141. Halsbury’s law of England 3d edition, Volume 38 at page 739 paragraph 1205 defines trespass as follows:
- A person trespasses upon land if he wrongfully sets foot on, Or rides or drives over, it, or takes possession of it, or expels the person in possession of pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it, or it seems if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water upon another’s land, or sends filth or any injurious substance which has been collected by him on his own land to another’s land.
142. 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.
143. 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. (Emphasis is mine)
 - 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.
144. PW2, the surveyor who prepared the survey report dated 30th June, 2020 stated that he found that the 1st Defendant had not demarcated his land and that the 1st Defendant had trespassed upon Parcel No. 1173.
145. PW2 states that the court ordered eviction upon Parcel No. 1113. Even though trespass is actionable per se, it is clear from the evidence adduced by the Plaintiffs that they suffered loss and damage as a result of the 1st Defendant trespassing upon her land and causing damage to her property. She is therefore entitled to general damages.
146. The Plaintiffs' counsel urged the court to award the Plaintiffs the sum of Kshs.4,000,000.00 as general damages as a form of redress for the Defendant's unlawful action of trespass and demolition.
147. Considering all the circumstances of this case I am of the opinion that an award of general damages in the sum of Kshs. 2,000,000.00 would be adequate compensation to the Plaintiffs for the loss suffered as a result of the Defendant's act of trespass and demolition.

H. Who should bear the costs of the suit.

148. 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 Janohamed & Sons Vs Twentsche Overseas Trading Co. Ltd* (1967) EA 287

Disposition.

149. In conclusion therefore, I enter judgment for the Plaintiff against the 1st Defendant in the following terms:
- a. A declaration that the Plaintiff is the lawful proprietor of the entire parcel of land known as Title No. Naivasha/Maraigushu Block 1/1173.
 - b. Kshs. 1,061,000/= as special damages.
 - c. Kshs. 2,000,000 as General Damages for trespass.
 - d. Cost of the suit.
 - e. Interest on (b), (c) and (d) at court rates from the date of this judgment until payment in full.
150. The suit against the 2nd, 3rd, 4th, 5th and 6th Defendants is dismissed with no order as to costs.



151. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 2ND DAY OF JUNE, 2022

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Makori for the Plaintiff

Mr. Njuguna for the 1st Defendant

AG (Miss Wanjeri) the 2nd, 3rd, 4th, 5th and 6th Defendant

Court clerk. Ms. Jeniffer Chepkorir.

