



REPUBLIC OF KENYA



Mbugua & another v Timber Manufacturers & Dealers Limited (Environment & Land Case 163 of 2017) [2025] KEELC 242 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KEELC 242 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 163 OF 2017**

**JO MBOYA, J
JANUARY 23, 2025**

BETWEEN

FLORENCE WAIRIMU MBUGUA 1ST PLAINTIFF

**SYLVIA MURUGI MBUGUA [SUING AS THE ADMINISTRATRATIX OF THE
ESTATE OF JOSEPH KIARIE MBUGUA, DECEASED] 2ND PLAINTIFF**

AND

TIMBER MANUFACTURERS & DEALERS LIMITED DEFENDANT

JUDGMENT

Introduction and Background:

1. The Plaintiffs' herein approached the court vide Plaint dated the 8th March 2017; and which Plaint was thereafter amended culminating into the amended Plaint dated the 19th July 2022. For coherence, the Plaintiffs' have sought for the following reliefs [verbatim]:
 - i. An Eviction order be issued forthwith directing that the Defendant herein, their agents and/or servant and any unauthorized persons be evicted from the property known as L.R No 4894/59 which is registered in the name of the deceased (Joseph Kiarie Mbugua) and located in Garden Estate, Nairobi and that the said eviction be carried out by the Court Bailiff with the assistance of the Officer Commanding Police Division (OCPD) Kasarani Division.
 - ii. A permanent injunction to be issued restraining the Defendants, their servants and/or agents and any unauthorized persons from trespassing or purporting to carry on any business on the property known as LR No 4894/59 which is registered in the name of the deceased [Joseph Kiarie Mbugua] of P.O Box 14202 Nairobi.
 - iii. A mandatory injunction be issued directing the Defendants, their servants and/or agents and any persons claiming under them to remove themselves and all of their belongings deposited



on the suit property within 14 days of making of the said order and if they fail to do so, the Plaintiffs be at liberty to remove any of their belongings at the expense of the Defendant.

- iv. General damages for trespass on and unlawful occupation of the suit property L.R No 4894/59; which is registered in the name of the deceased [Joseph Kiarie Mbugua].
 - v. Mesne profits and damages for loss of user from 15th March,2005 in the sum Kshs 104,000,000 Only.
 - vi. Interest on d) and e) above at prevailing commercial rates.
 - vii. Any other reliefs that this Honourable Court may deem fit to grant.
 - viii. Costs and interest of this suit.
2. Upon being served with the original Plaint, the Defendant duly entered appearance and thereafter filed a statement of defence dated the 16th April 2017. Nevertheless, the Statement of Defence was amended vide the amended Statement of Defence and counterclaim dated the 24th March 2022.
 3. Moreover, the amended Statement of Defence was re-amended culminating into the filing of the Further amended Statement of Defence dated the 27th July 2022. In any event, it is worthy to recall that the Further amended Statement of Defence and counterclaim was subsequently amended culminating into the Further Further [Second Further] amended Statement of Defence dated the 17th March 2023.
 4. Other than the amendments [details highlighted in the preceding paragraphs], it suffices to point out that the Defendants herein filed a Further Further and Further [Third Further] amended Statement Defence and Counterclaim dated the 27th November 2023 [hereinafter referred to as the operative Statement of Defence and Counterclaim].
 5. Vide the Statement of Defence and Counterclaim dated the 27th November 2023, the Defendant sought for the following reliefs;
 - i. That the Plaintiffs' suit be Dismissed with costs.
 - ii. A declaration that the defendant is the lawful and legal owner of the property known as of L.R No. 4894/59 Garden Estate Nairobi.
 - iii. An order compelling the administrators of the estate of John Kiarie Mbugua to sign a discharge, transfer and all other required documents to complete transfer of L.R. No. 4894/59 in favour of the defendant within fourteen days of judgment and in default the Deputy Registrar of the Environment and Land Court to sign and execute all such documents as are necessary to complete transfer of L.R. No. 4894/59 Garden Estate in favour of the defendant,
 - iv. Costs of this Counterclaim plus interest.
 6. The Plaintiff herein filed a Reply to Defence and Defence to the operative Statement of Defence and Counterclaim and wherein the Plaintiffs' denied the Defendant's claim. In particular, the Plaintiffs' contended that the Defendant herein was neither the lawful proprietor nor registered owner of the suit property. Furthermore, the Plaintiffs' also contended that the Defendant's claim anchored on adverse possession was not only misconceived, but legally untenable.
 7. The instant suit came up for case conference on the 23rd May 2023 whereupon the advocates for the respective parties intimated to the court that same [parties] had filed and exchanged all the requisite pleadings; list and bundle of documents; list of witnesses and witness statement. Moreover, the advocates for the parties also ventured forward and confirmed that the suit was ready for hearing.



Evidence by the Parties:

a. Plaintiffs' Case:

8. The Plaintiffs' case is anchored on the evidence of one witness, namely, Florence Wairimu Mbugua. Same testified as PW1.
9. It was the testimony of the witness [PW1] that same is the widow of Joseph Kiarie Mbugua, now deceased. Furthermore, the witness averred that same is also a co-administratrix of the estate of the deceased. In this regard, the witness averred that by virtue of being one of the co-administratrices of the estate of the deceased, same is therefore mandated and authorized to commence and maintain the instant suit on behalf of the estate of the deceased.
10. Additionally, the witness averred that by virtue of being a legal administratrix of the estate of the deceased, same [PW1] is therefore conversant with the facts of the instant matter. Besides, the witness testified that same has since recorded a witness statement dated the 29th April 2023 and which witness statement the witness sought to adopt and rely upon. Suffice it to state that the witness statement was thereafter constituted as the evidence in chief of the witness.
11. The witness further referenced a list and further bundle of documents dated the 8th March 2017 containing four [4] documents and which documents the witness sought to tender and produce before the court. There being no objection, the documents under reference were tendered and produced before the court as exhibits P1 to P4, respectively.
12. Additionally, the witness referenced the list and bundle of documents dated the 29th April 2023 containing six [6] documents and which documents the witness sought to tender and produce before the court. Instructively, the documents under reference were tendered and produced before the court and marked as exhibits P5 to P11, respectively.
13. Moreover, the witness adverted to a further list and bundle of document dated the 4th May 2023 containing two [2] documents and which documents the witness sought to rely on. Suffice it to state that the documents at the foot of the list dated the 4th May 2023 were admitted and marked as exhibits P12 to P13, respectively.
14. Furthermore, the witness averred that the suit property belonged to the deceased. In this regard, the witness referenced the original indenture of conveyance made on the 26th September 1985. In any event, the witness tendered before the court the original indenture of conveyance.
15. Other than the foregoing, the witness adverted to the amended Plaintiff dated the 18th July 2022 and the verifying affidavit thereto. Thereafter, the witness implored the court to grant the reliefs sought at the foot of the amended Plaintiff.
16. On cross examination by learned counsel for the Defendant, the witness [PW1] averred that same is a Legal administratrix of the estate of the deceased. Nevertheless, the witness added that there are other administratrix [ces] of the estate of the deceased.
17. It was the further testimony of the witness that same [PW1] was aware of the sale of L.R No. 4894/59 to the Defendant. Moreover, the witness averred that same got to know of the sale of L.R No. 4894/59; on the basis of information that she [witness] received from her late husband [the deceased].
18. Whilst still under cross examination, the witness averred that the sale of the suit property was undertaken in the year 1990. In addition, the witness averred that same was also aware of the previous suit, namely, Nairobi HCC No. 626 of 2006.



19. It was the further evidence of the witness that the suit under reference was heard and determined vide judgment delivered on the 15th March 2005. Besides, the witness averred that same was not aware of any consent that was recorded.
20. Regarding the letter at page 70 of the Plaintiffs' list and bundle of documents, the witness averred that the letter in question is dated the 14th June 2005. Furthermore, the witness averred that the letter in question came to her knowledge after the death of the deceased.
21. It was the further testimony of the witness that her late husband [the deceased] had also informed her of the existence of the letter. In any event, the witness testified that the deceased refunded the monies at the foot of the sale agreement.
22. On further cross examination, the witness testified that the sale agreement relating to and concerning the suit property was entered into between the deceased and the Defendant company. Nevertheless, the witness averred that the sale transaction was not concluded and hence the dispute escalated to court.
23. It was the further testimony of the witness that the suit that was filed in court was heard and disposed of. Nevertheless, the witness averred that the deceased did not authorize and/or sanction the entry into and execution of any consent.
24. Additionally, it was the testimony of the witness that the monies at the foot of the sale agreement were duly refunded to the Defendant. In this regard, the witness referenced the documents at page 70 of the list and bundle of documents tendered on behalf of the Plaintiff. In particular, the witness confirmed that the document in question was a letter directed/addressed to the managing director of the defendant company.
25. Whilst under further cross examination, the witness averred that the letter at page 70 of the Plaintiff bundle of documents relates to a different person from the current Defendant. In any event, the witness added that the property before the court was bought/purchased by a company.
26. Moreover, it was the testimony of the witness that the Defendant herein was granted occupation of the suit property by the deceased. In particular, it has been averred that the Defendant was granted occupation on the 30th August 1990.
27. It was the further testimony of the witness that though the Defendant herein had sought for various reliefs at the foot of Nairobi HCC No. 1048 of 1994, the court did not grant to and in favour of the Defendant the prayer for specific performance. The witness averred that the prayer for specific performance was dismissed.
28. Whilst under further cross examination, the witness averred that the certificate of title in respect of the suit property is under her [witness custody]. In any event, the witness averred that same has since tendered and produced the original title document as evidence before the Court.
29. The witness further testified that following the delivery of the judgment that was rendered vide Nairobi HCC No. 1048 of 1994, the defendant herein proceeded to and filed an appeal. In any event, the witness averred that the appeal under reference was challenging the judgment of the court.
30. It was the further testimony of the witness that there was also a consent that was entered into. In this regard, the witness referenced the documents at page 35 of the defendant's list and bundle of documents. Nevertheless, the witness averred that the consent in question touched on and concerned the release of the discharge of charge relating to the suit property.



31. On re-examination, the witness averred that the judgment that was rendered in respect of Nairobi HCC No. 1048 of 1994 ordered and directed the defendant to vacate and hand over vacant possession of the suit property. Nevertheless, the witness averred that despite the judgment, the Defendant failed to vacate the suit property.
32. On further re-examination, the witness testified that the original certificate of title of the suit property is under her custody. Furthermore, the witness averred that the Defendant herein has no rights to and in respect of the suit property.
33. With the foregoing testimony, the Plaintiffs' case was duly closed.

b. Defendant's Case:

34. The Defendant's case is premised on the evidence of two witnesses, namely, Romano Rosielo and Faridah Ahmud Salim. Same testified and DW1 and DW2, respectively.
35. It was the testimony of the witness [DW1] that same is a director of the Defendant company. Furthermore, the witness averred that by virtue of being a director of the Defendant company, same [witness] is therefore conversant with the facts of the matter.
36. Moreover, the witness averred that same has since recorded a witness statement in respect of the matter. To this end, the witness referenced the witness statement dated the 8th May 2017; and which witness statement the witness sought to adopt and rely on.
37. Suffice it to state that the witness statement under reference was thereafter adopted and constituted as the evidence in chief of the witness.
38. Additionally, the witness referenced the witness statement dated the 22nd February 2024; and which witness statement the witness sought to adopt and rely on as further evidence before the court. Instructively, the further witness statement was adopted and same constituted as further evidence in chief of the witness.
39. Other than the foregoing, the witness adverted to the list and bundle of documents dated the 9th May 2017; containing 5 documents and which documents the witness sought to tender and produce before the court. There being no objection, the documents under reference were tendered and produced as exhibits D1 to D5, respectively.
40. Moreover, the witness alluded to the supplementary list and bundle of documents dated the 10th May 2023; and containing 12 documents. Suffice it to state that the witness sought to tender and produce the documents as further exhibits before the court. In the absence of any objection, the documents under reference were tendered as exhibits D6 to D18, respectively.
41. Furthermore, the witness also intimated to the court that same had also filed a further list and bundle of documents. To this end, the witness highlighted the further list and bundle of documents dated the 22nd May 2023 and thereafter sought to produce the documents as exhibits before the court. Instructively, the document at the foot of the further list and bundle of documents was tendered and admitted as exhibit D19.
42. On the other hand, the witness referenced the supplementary list and bundle of documents dated the 27th February 2024 containing two [2] documents and thereafter sought to tender and produce same as exhibits. Instructively, the documents were produced as exhibits D20 and D21, respectively.



43. Other than the foregoing, the witness referenced the 3rd further amended statement of defence and counterclaim dated the 27th November 2023. In particular, the witness invited the court to take cognizance of the terms thereof and to grant the relief[s] sought.
44. On cross examination by learned counsel for the Plaintiff, the witness averred that the Defendant herein entered into and executed a sale agreement with the deceased. Furthermore, the witness averred that the sale agreement is dated the 6th August 1990.
45. The witness testified that the sale agreement which was entered into and executed between the Defendant and the deceased contained various terms. In particular, the witness averred that sale agreement contained terms including the clause relating to the taking of possession.
46. Whilst still under cross examination, the witness averred that the Defendant herein entered upon and took possession of the suit property on the basis of the sale agreement.
47. Moreover, the witness averred that the sale transaction between the Defendant and the deceased did not materialize. In this regard, the witness averred that a dispute arose which culminated into the filing of a civil suit, namely, Nairobi HCC No. 1048 of 1994.
48. It was the further testimony of the witness that vide the civil suit, namely, No. 1048 of 1994 the Defendant sought for various reliefs inter-alia specific performance of the contract. Nevertheless, the witness testified that the claim for specific performance was dismissed by the court.
49. The witness further testified that the suit which had been filed, namely, Nairobi HCC 1048 of 1994 was disposed of vide judgment rendered on the 15th March 2005. In any event, the witness averred that all the issues that had been canvassed/raised at the foot of the said suit were determined.
50. On further cross examination, the witness testified that the decree arising from the judgment of the court has been filed as part of the documents beforehand. In this respect, the witness referenced the duly extracted decree and which highlights the reliefs that were granted by the court.
51. It was the further testimony of the witness that same is aware that the Defendant has filed a statement of defence and counterclaim dated the 27th November 2023. Furthermore, the witness averred that the contents of the statement of defence are correct.
52. It was the further testimony of the witness that vide the statement of defence and counterclaim, the Defendant herein has referenced the sale agreement entered into in 1990. Moreover, the witness averred that the Defendant herein is seeking for an order of transfer of the suit property.
53. Whilst still under cross examination, the witness testified that same is aware that the Defendant herein filed and appealed against the judgment that was delivered in respect of Nairobi HCC No. 1048 of 1994. Nevertheless, the witness averred that same is not aware of the case file number for the appeal.
54. It was the further testimony of the witness that even though the Defendant filed an appeal against the judgment rendered vide Nairobi HCC No. 1048 of 1994, same [witness] does not have a judgment from the court of appeal. In any event, the witness averred that same is not conversant with or knowledgeable of the outcome of the said appeal.
55. Whilst still under cross examination, the witness averred that there was a consent that was entered into in respect of the appeal. The witness clarified that the consent related to various parties. Moreover, the witness averred that same has since tendered and produced the consent before the court.
56. It was the further testimony of the witness that the consent which was entered into between the parties touched on and concerned the intended appeal to the court of appeal. However, the witness averred



- that by the time the consent was being entered into judgment had already been delivered in respect of Nairobi HCC No. 1048 of 1994.
57. Whilst still under cross examination, the witness averred that the suit property is under the custody of the defendant. In any event, it was the testimony of the witness that the Plaintiffs herein have neither sought to recover nor recovered possession of the suit property.
 58. Additionally, it was the testimony of the witness that even though a portion of the suit property was sold to two purchasers, the said purchasers have neither entered upon nor taken possession of the suit property. In any event, it was posited that it is the defendant who is in occupation of the suit property.
 59. Furthermore, the witness averred that same is aware that there have been other cases in respect of the instant mater. Nevertheless, the witness added that the other cases did not concern recovery of vacant possession of the suit property.
 60. On further cross examination, the witness averred that there is a pending case before the court of appeal. Moreover, the witness added that same is aware that there is an application that has been filed by the Plaintiff herein seeking certification to appeal to the supreme court of Kenya.
 61. The second witness who testified on behalf of the Defendant is Faridah Ahmud Salim. Same testified as DW2.
 62. It was the testimony of the witness [DW2] that same is also a director of the Defendant company. In addition, the witness averred that same is privy to and knowledgeable of the facts of this matter.
 63. Furthermore, the witness averred that same has since recorded a witness statement dated the 22nd May 2023 and which statement the witness sought to adopt and rely on. Instructively, the witness statement was adopted and constituted as the evidence in chief of the witness.
 64. On cross examination, by learned counsel for the Plaintiff, the witness averred that though same is aware that the suit property was purchased by the Defendant she [witness] did not execute the sale agreement. In any event, the witness averred that the sale agreement was executed by her late husband.
 65. It was the further testimony of the witness that the suit property was bought/purchased by the Defendant. However, the witness added that a dispute arose culminating into the filing of a suit, namely, Nairobi HCC No. 1048 of 1994.
 66. It was the further testimony of the witness that the suit which was filed was heard and determined. In this regard, the witness averred that same [witness] is aware of the judgment that was rendered by the court.
 67. Moreover, the witness averred that the Defendant company has various bank accounts and that the accounts are operated by the directors. However, it was the testimony of the witness that the Defendant herein did not receive any refund of the purchase price from the deceased.
 68. Other than the foregoing, the witness testified that same is not privy to nor knowledgeable of any acknowledgement that was executed by the Defendant. Further and in any event, the witness testified that the acknowledgement that has been referenced by the Plaintiff herein does not relate to the Defendant.
 69. Whilst still under cross examination, the witness averred that the Defendant did not receive any refund of the purchase price from the deceased. Furthermore, the witness added that the acknowledgement being alluded to relates to a different entity/company.
 70. With the foregoing testimony, the Defendant's case was closed.



Parties Submissions:

71. At the close of the hearing, the advocates for the parties sought for liberty to file and exchange written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the write submissions.
72. The Plaintiff filed two [2] sets of written submissions dated the 22nd October 2024 and the 2nd December 2024. On the other hand, the Defendant filed written submissions dated the 15th November 2024.
73. Suffice it to state that the three [3] sets of written submissions [details highlighted in the preceding paragraph] form part of the record of the court. Furthermore, it suffices to posit that the court has taken cognizance of the issue[s] raised vide written submissions by and on behalf of the parties.
74. Even though the court has neither reproduced nor rehashed the contents of the written submissions in the body of the judgment, it is imperative to underscore that the submissions under reference have greatly assisted the court in the determination of the issues in dispute.
75. Moreover, it suffices to express gratitude and indebtedness to the advocates for the parties on the basis of the incisive and comprehensive submissions that have been filed. The labour and research put in by the parties is commendable.

Issues for Determination:

76. Having reviewed the pleadings filed; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed on behalf of the respective parties, the following issues do crystalize [emerge] and are therefore worthy of determination;
 - i. Whether the Plaintiffs herein have established and demonstrated entitlement to the suit property, namely L.R No. 4894/59 or otherwise.
 - ii. Whether the Defendant's claim pertaining to ownership of the suit property is Res-judicata or otherwise.
 - iii. Whether the Defendant's claim based on adverse possession is meritorious or otherwise.
 - iv. What reliefs; if any, ought to be granted

Analysis and Determination

Issue Number 1 Whether the Plaintiffs herein have established and demonstrated entitlement to the suit property, namely L.R No. 4894/59 or otherwise.

77. The Plaintiffs herein have approached the court on the basis of the amended Plaint dated the 19th July 2022 and wherein the Plaintiffs have contended inter-alia that L.R No. 4894/59 [the suit property] lawfully belongs to and constitutes part of the estate of Joseph Kiarie Mbugua [deceased].
78. Moreover, the Plaintiffs herein have averred that the deceased entered into and executed a sale agreement dated the 8th August 1990 and wherein the deceased sought to sell and disposed of the suit property to the Defendants. However, it was posited that the sale transaction between the deceased and the Defendant failed to materialize and hence the suit property was not transferred to and in favour of the Defendant.



79. Furthermore, the Plaintiffs have averred that arising from the failure to effect the transfer and registration of the suit property in favour of the Defendant, the Defendant herein proceeded to and filed a civil suit, namely, Nairobi HCC No. 1048 of 1994 against Joseph Kiarie Mbugua [now Deceased] and Consolidated Bank of Kenya Ltd.
80. It was the averment by and on behalf of the Plaintiff that the suit under reference, namely, Nairobi HCC No. 1048 of 1994, was heard and determined vide judgment rendered on the 15th March 2005. Suffice it to state that the Plaintiffs' tendered and produced before the court a copy of the judgment under reference as well as the resultant decree containing the reliefs that were granted by the court.
81. Be that as it may, it was contended by the Plaintiffs that even though the Defendant had sought for an order of specific performance in respect of the suit property, the court declined to grant the order. In any event, it was posited that the court decreed refund of the purchase price together with general damages, which was assessed in the sum of Kes.1, 000, 000/= only.
82. From the foregoing position, what becomes apparent is that though the Defendant had entered into and executed a sale agreement with the deceased, the sale agreement did not materialize. Furthermore, the suit which was filed by the Defendant and wherein the Defendant sought to compel the performance of the contract by the deceased did not culminate into a favorable order for specific performance.
83. The bottom line is to the effect that the suit property remained registered in the name of Joseph Kiarie Mbugua [deceased]. To the extent that the suit property remained registered in the name of the deceased, there is no gainsaying that the deceased and by extension the estate of the deceased are the registered owners thereof.
84. Suffice it to state that by virtue of being the registered owner of the suit property, the estate of the deceased are conferred with lawful rights to and in respect of the sit property. For good measure, the rights and interest of the estate of the deceased arising from ownership of the suit property are underpinned by the provisions of Sections 24 and 25 of the Land Registration Act, 2012
85. Moreover, the scope and extent of the rights that accrue to the owner of a landed property have been highlighted proclaimed in a plethora of suits. In the case of Moya Drift Farm Ltd. v. Theuri (1973) EA 114, the Court of Appeal for Eastern Africa elaborated on the rights of a title holder and stated thus;

a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property. Spry, V-P at 116, considered the effect of section 23 of the Registration of Titles Act and held –

“I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”

Sir William Duffus, P. *ibid* at p.117 agreed with Spry, JA as follows:

“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was



sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”

The third member of the Court, Lutta, JA agreed with the judgment prepared by the Spry, V-P.

86. Similarly, the rights attaching to and accruing in favour of a title holder were also espoused in the case of *Wreck Motor Enterprises versus Commissioner of Lands & 3 others* [1997] Eklr, where the court stated as hereunder;

“Section 23 (1)

The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misinterpretation to which he is proved to be a party.”

87. Other than the foregoing, it is important to recall that DW1 [Romano Rosielo] confirmed that the suit property is still registered in the name of the deceased herein. Nevertheless, DW1 posited that the Defendant herein has a claim to and in respect of the suit property. In this regard, DW1 underscored that the Defendant is seeking for an order of transfer of the suit property.

88. The pertinent aspects of the evidence of DW1 states as hereunder;

“I am seeking for an order of transfer of the suit property. I still believed that we have a case against the Plaintiff”.

89. From the foregoing excerpts, what becomes apparent is that DW1 is acknowledging that the suit property belongs to and is registered in the name of the deceased. However, DW1 ventures forward to contend that the Defendant is seeking an order of transfer of the suit property.

90. Simply put, there is no gainsaying that the suit property remains registered in the name of the deceased and barring any order impeaching the registration in question, the suit property lawfully belongs to the estate of the deceased and by extension the Plaintiffs, who are the legal administratrix of the estate.

91. In a nutshell, my answer to issue number one [1] is to the effect that the Plaintiffs herein have established and demonstrated that same have lawful rights to and interests over the suit property. In any event, the Plaintiffs rights to and in respect of the suit property merits protection unless there exists compelling reason to the contract.

Issue Number 2 Whether the Defendant’s claim pertaining to ownership of the suit property is Res-Judicata or otherwise.

92. The Defendant herein filed a counterclaim and in respect of which [Defendant] has sought for various/diverse reliefs. One of the reliefs that has been sought for by the Defendant herein touches on and concerns a declaration that the Defendant is the lawful and legal owner of the suit of the suit property.

93. Moreover, the Defendant has also sought for an Order to compel the administrators of the estate of the deceased to execute the requisite transfer instrument[s] over and in respect of the suit property and to facilitate the transfer and registration of the suit property in favour of the Defendant herein.



94. Suffice it to state that the Defendant's claim touching on and concerning ownership of the suit property stems from the sale agreement [contract] that was entered into and executed between the Defendant and the deceased on the 6th August 1990. However, even though the Defendant's claim traces its roots to the sale agreement, there is no gainsaying that the claim founded on and anchored upon the sale agreement is statute barred. See Section 4[1] of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
95. Notwithstanding the foregoing, it is not lost on this court that the Defendant herein had previously filed a civil suit, namely, Nairobi HCC No. 1048 of 1994 and wherein the Plaintiff sought for various reliefs.
96. For coherence the Plaintiff sought for the following reliefs;
- i. An order for specific performance of the said agreement by the 1st Defendant
 - ii. An order directing the 1st defendant to discharge the charge aforesaid within 60 days of the date of the order
 - iii. An order directing the 1st defendant to discharge the charge aforesaid within 60 days of the date of the order
 - iv. All necessary and consequential orders, accounts directions and inquiries
 - v. General damages for breach of contract against the 1st Defendant.
 - vi. An injunction to restrain the defendants, servants -or agents, from harassing and intimidating or in any manner whatsoever interfering with the Plaintiff's quiet possession of the suit premises pending the final determination of this suit.
 - vii. Further or other relief.
 - viii. Costs and interest.
97. It is imperative to state that the suit under reference, which was filed by the Defendant herein and wherein same [Defendant] sought for inter-alia specific performance was heard and determined. In particular, the court decreed refund of the purchase price.
98. Nevertheless, there is no gainsaying that the prayer relating to specific performance was declined by the court. In any event, DW1 is on record as stating that upon the delivery of the judgment in respect of the said suit, the Defendant proceeded to and filed an appeal at the court of appeal.
99. Be that as it may, the concern of this court touches on the question whether the Defendant who had hitherto propagated a claim for specific performance can now revert and canvass a similar or near similar claim.
100. In my humble view, the segment of the counterclaim wherein the Defendant is seeking to be declared as the lawful owners/proprietor of the suit property is barred by the doctrine of res-judicata.
101. Pertinently, the doctrine of res-judicata prohibits the re-litigation of the same or similar issues that have hitherto been canvassed between the same parties and before a competent court of jurisdiction.
102. There is no gainsaying that the court that heard and determined Nairobi HCC No. 1048 of 1994, [the previous suit] was seized of competent jurisdiction.
103. The elements/ingredients that must be proven to underpin the invocation and application of the doctrine of res-judicata have been spoken to and highlighted in a plethora of suits.



104. To start with, the Court of Appeal in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, stated and held thus;

That finding has caused the appellant grief as expressed in its ground of appeal under consideration. Is the grief justified? We think not. Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the *Civil Procedure Act*, 2010;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (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. The doctrine of res-judicata and the scope of its application was also elaborated by the Court of Appeal in the case of Kenya Commercial Bank Ltd v Benjo Amalgamated [2016]eKLR, where the court stated thus;

Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in *Henderson v Henderson* (1843) 67 ER 313, res judicata applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. In the case of *Mburu Kinyua v Gachini Tutu* (1978) KLR 69 Madan, J. Quoting with approval *Wilgram V.C.* in *Henderson v Henderson* (supra) stated:

“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest,



but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time” (emphasis added).

106. The Supreme Court of Kenya [the apex court] has also had an occasion to elaborate on the doctrine of res-judicata. In the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the court stated thus;

56. The doctrine of “res judicata” is provided for under section 7 of the *Civil Procedure Act* in that: -No court shall, try, any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or issue in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

57. The *Civil Procedure Act* has also provided explanations with respect to the application of the res judicata rule. Explanation 1-6 are in the following terms:

Explanation (1) — The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation (2) — For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation (3) — The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation (4) — Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation (5) — Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation (6) — Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

58. This court in the case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another Motion No 42 of 2014 [2016] eKLR (Muiri Coffee case) held as follows regarding the doctrine of res judicata: “52 Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon Norbert Mao v Attorney-General, Constitutional Petition No 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under article 137 of the



Uganda Constitution, and for redress under article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under article 50, seeking similar relief; and Judgment had been given in Hon Ronald Reagan Okumu v Attorney-General, Misc Application No0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment

53. In *Silas Make Otuke v Attorney-General & 3 others*, [2014] eKLR, the High Court of Kenya agreed with the Privy Council decision in *Thomas v The AG of Trinidad and Tobago* (1991) LRC (Const) 1001, in which the Board was “satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata”.
54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.
55. It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of article 159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.
56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293): The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”
57. The essence of the res judicata doctrine is further explicated by Wigram, V-C in *Henderson v Henderson* (1843) 67 ER 313, as follows:... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time” [emphasis supplied].



58. Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads:
- (i) the matter in issue is identical in both suits;
 - (ii) the parties in the suit are the same;
 - (iii) sameness of the title/claim;
 - (iv) concurrence of jurisdiction; and
 - (v) finality of the previous decision.
59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *ET v Attorney-General & another*, (2012) eKLR, thus: The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others*, (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted *Kuloba J*, in the case of *Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991* (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’
59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
- a) There is a former Judgment or order which was final;
 - b) The Judgment or order was on merit;
 - c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d) There must be between the first and the second action identical parties, subject matter and cause of action. (See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and See the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011* (2013) eKLR)
60. However, the courts have differed on whether the doctrine of res judicata is applicable to constitutional matters. Some of the decisions include *In Okiya Omtatah Okoiti & another v Attorney General and Another* Petition No 593 of 2013 [2014] eKLR where *Lenaola J.* (as he then was) held as follows: For res judicata to be invoked in a civil matter therefore, the issue in a current suit must have been decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the



parties in the suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. (See the case of *Karia & another v Attorney General & others* (2005) 1EA 83). It therefore follows that the essence of the doctrine of res judicata is to bring an end to litigation and a party should not be vexed twice over the same cause. This was what was held with approval in *Omondi v National Bank of Kenya Ltd and others* (2001) EA 177. Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.” [Emphasis added]

107. It is pertinent to state and underscore that the Defendant herein had previously sought to procure the transfer and registration of the suit property in her name. Instructively, the Defendant invoked and relied on the equitable principle of specific performance. However, the Defendant’s endeavors were unsuccessful.
108. Nevertheless, the Defendant herein has since returned to court and same is by side-wind seeking to compel the Plaintiffs and the legal administratrix of the estate of the deceased to transfer the suit property. Surely, the Defendant herein is not only playing lottery with the due process of the court, but same is throwing dirt/mud on the doctrine of res-judicata.
109. To my mind, the Defendant herein ought to and must be stopped in her track. Unless the Defendant is stopped, it is evident that the litigation in respect of the dispute herein shall continue to swirl around for eternity/ad infinitum.
110. Without belaboring the point, it is my finding and holding that the counterclaim by the Defendant which gravitates around the title/ownership of the suit property is clearly res-judicata [see Section 7 of the *Civil Procedure Act*, Chapter 22 Laws of Kenya].

Issue Number 3 Whether the Defendant’s claim based on adverse possession is meritorious or otherwise.

111. Other than the segment of the Defendant’s counterclaim which seeks to have the Defendant declared as the lawful and legitimate owner of the suit property, the Defendant has also invoked the doctrine of adverse possession.
112. According to the Defendant same entered upon and took possession of the suit property in the year 1990. Furthermore, the Defendant has contended that same has remained in occupation of the suit property for a duration of more than 12 years.
113. Moreover, the Defendant herein has also posited that neither the deceased nor the Plaintiffs herein have undertaken any process/action to recover vacant possession of the suit property. In this regard, the Defendant holds the position that same has therefore accrued and acquired adverse possessory rights to the suit property.
114. Be that as it may, what the Defendant does not seem to appreciate is that same [Defendant] entered upon and took possession of the suit property on the basis of the sale agreement entered into and executed on the 6th August 1990; and which agreement the Defendant still propagates todate.



115. To the extent that the Defendant entered upon and took possession of the suit property on the basis of the sale agreement [contract] there is no gainsaying that the entry under reference was permissive and consensual. Simply put, the entry and occupation was predicated on the existence of a lawful contract.
116. Secondly, it is not lost on this court that the Defendant herself filed civil proceedings vide Nairobi HCC No. 1048 of 1994 and wherein the Defendant propagated a claim for specific performance. Suffice it to state that as long as the Defendant acknowledge[s] the existence of the sale agreement [contract] which [sic] underpinned the claim of specific performance, the Defendant cannot turn around and purport that the occupation was hostile to the right of the Plaintiffs.
117. At any rate, there is no gainsaying that a claim to title and ownership of the suit property is mutually inconsistent with a claim for adverse possession. For coherence, the claim for adverse possession is antithetical to a claim for ownership/title and thus same cannot be espoused contemporaneously.
118. To this end, I beg to adopt and reiterate the holding of the Court Appeal in the case of Richard Wefwafwa Songoi versus Ben Munyifwa Songoi [2020] Eklr, where the court stated as hereunder;
43. Comparatively, the Supreme Court of India in Mohan Lal –v- irza Abdul Gaffar, 1996, 1 SCC 639 faced with an inconsistent claim of title by agreement and adverse possession stated that since the appellant admitted he came into possession of land lawfully under an agreement and continued to remain in possession till date of the suit, the plea of adverse possession was not available to the appellant. That having come into possession by agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor and that the latter had acquiesced to his illegal possession during the entire period of 12 years.
44. Persuaded by the merits of the legal principle enunciated by the India Supreme Court and which we hereby adopt, in the instant matter, the appellant cannot found his claim to possession of the suit property on a gift from his father then also assert a claim over the parcel founded on adverse possession. He either proves he had a gift or proves independently his claim for adverse possession. The appellant’s claim founded on a gift fails as his father had no proprietary interest in the suit property that he could gift to the appellant in 1970.
119. Finally, it is also important to recall that the dispute between the Defendant on one hand and the Plaintiffs herein, has been in and out of the court for a long time. In any event, there is no gainsaying that a judgment was rendered in respect of Nairobi HCC No. 1048 of 1994 on the 15th March 2005.
120. For as long as the dispute at the foot of Nairobi HCC No. 1048 of 1994 was pending before the court, it suffices to state that time for [sic] reckoning/computing adverse possession stopped. In this regard, if at all the Defendant is entitled to stake a claim on the basis of adverse possession, then time can only be reckoned from the date of delivery of judgment namely the 15th march 2005 and thereafter.
121. Nevertheless, it is important to underscore that the suit beforehand was filed in court on the 8th March 2017. In this regard, it suffices to posit that by the time the instant suit was filed the statutory/peremptory 12-year period for computing adverse possession had not lapsed.
122. Moreover, evidence abound that the Defendant herein filed an appeal against the decision of the court rendered vide Nairobi HCC No. 1048 of 1994. In this regard, it is appropriate to reproduce pertinent aspects of the evidence of DW1 whilst under cross examination by learned counsel for the Plaintiffs.



123. For coherence, Dw1 stated thus;

“I am aware that the Defendant herein lodged an appeal against the judgment rendered in respect of Nairobi HCC No. 1048 of 1994. I am not aware of the civil appeal number. I have not availed any document to that effect. I don’t have any judgment from the court of appeal. I am not aware of the court come of the said appeal”

124. Moreover and whilst still under cross examination, DW1 is on record as stating as hereunder;

“I a aware that there were other cases. There is the case that is pending before the court of appeal. There was a judgment and I know that the Plaintiffs herein filed an application seeking certification to proceed to the supreme court”.

125. From the excerpts which have been reproduced in the preceding paragraphs, what comes to the fore, is that there are some other proceedings touching on and concerning the suit property. To my mind, the existence of the said proceedings negate and militates against the running of time for purposes of adverse possession.

126. Before departing from this issue, it is apposite to cite and reference the holding in *Mwangi Githu v Livingstone Ndeete* [1980] eKLR, where the Court stated as hereunder;

Time ceases to run under the *Limitation of Actions Act* either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see *Cheshire’s Modern Law of Real Property*, 11th edition at p 894. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*. The appellant did not assert his right to the whole suit plot until he commenced suit No 1056 of 1976 on April 30, 1976.

127. Moreover, before a person, the Defendant not excepted, can partake of a favorable order on the basis of adverse possession, the Claimant must demonstrate non-permissive, non-consensual, uninterrupted and continuous occupation and possession of the designated property for a duration of 12 years and not anything less. See Section 7, 12, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

128. Furthermore, it suffices to state that the necessity to demonstrate and satisfy the statutory timelines that underpins a claim for adverse possession was espoused and underscored in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015]eKLR, where the court stated thus;

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

129. Flowing from the foregoing analysis, I am afraid that the Defendant herein has neither established nor satisfied the requisite ingredients that underpin a claim for adverse possession. Instructively, the Defendant has not proven that her occupation of the suit property was adverse/hostile to the rights and interests of the [sic] the title holder.



Issue Number 4 What reliefs; if any, ought to be granted.

130. The Plaintiffs herein sought for various/diverse reliefs at the foot of the amended Plaint. Pertinently, the Plaintiffs sought for declaration that the suit property lawfully belongs to and constitutes part of the estate of the deceased.
131. Suffice it to point out that whilst discussing issue number one, the court found and held that the suit property remains registered in the name of the deceased. In this regard, there is no gainsaying that the Plaintiff's quest for a declaratory order is well grounded and meritorious.
132. Furthermore, the Plaintiffs also sought for an eviction order. In this respect, the Plaintiffs are keen to procure and obtain vacant possession over and in respect of the suit property. Pertinently, the Plaintiffs are entitled to partake of and benefit from the statutory rights and privileges underpinned by the provisions of Sections 24 and 25 of the [Land Registration Act](#).
133. To be able to benefit from and partake of the privilege[s] attaching to right of absolute and indefeasible possession and occupation, an order for eviction and by extension, permanent injunction, are paramount.
134. Moreover, the Plaintiffs herein also sought for general damages for trespass. There is no gainsaying that the impugned actions and/or activities by the Defendant constitutes and amounts to trespass.
135. To the extent that the impugned actions by the Defendant constitutes trespass, there is no gainsaying that the Plaintiffs are therefore entitled to recompense. In this regard, I find and hold that the Plaintiffs herein are entitled to general damages for trespass. Consequently, I decree and award the sum of Kes.10, 000, 000/= only. [See the guidelines for assessing and general damages in the case of Kenya Power & Lighting Company Ltd v Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment)].
136. On the other hand, the Plaintiffs herein had also sought for mesne profits. However, my response to the claim for mesne profits is twofold. Firstly, there is no gainsaying that a claim for mesne profits is akin for a claim for special damages and hence same must not only be particularly pleaded and must specifically prove.
137. Nevertheless, even though the Plaintiff pleaded the claim for mesne profits, no evidence was however tendered and/or adduced before the court. In this regard, there is no gainsaying that the claim for mesne profits was not suitably and duly proved.
138. Secondly, it is apposite to state and underscore that a claim for mesne profits concerns the loss of profits arising from and attendant to the deprivation occasioned by the actions of the trespasser. [See Section 2 of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya].
139. Given the nature of what underpins a claim for mesne profits and taking into account, the circumstances for a claim for general damages, there is no gainsaying that the two circumstances are interwoven/intertwined. In this regard, the claim for mesne profits cannot issue simultaneously [contemporaneously] with a claim for general damages for trespass.
140. The above legal position was highlighted in the case of Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR, where the Court of Appeal stated as hereunder;

It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit of an estate



received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved. In the case Peter Mwangi Msuitia & Another v Samow Edin Osman [2014] eKLR, this Court 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 Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

141. On the other hand, the Defendant filed a counterclaim. To this end, it suffices to recall the 3rd further [Further Further Further] amended defence and counterclaim dated the 27th November 2023.
142. As pertains to the counterclaim under reference, the Defendant sought for various reliefs. However, in the course of analyzing issues numbers 2 and 3, the court came to the conclusion that the Defendant's claim was not only premature and misconceived, but otherwise constituted an abuse of the due process of the court.
143. Arising from the foregoing, it is common ground that the claim[s] by and on behalf of the Defendant are legally untenable. In this regard, the counterclaim under reference is devoid of merits.

FINAL DISPOSITION:

144. Flowing from the discussion [details highlighted in the body of the judgment], it must have become crystal clear that the Plaintiffs have established and demonstrated their entitlement to and in respect of the suit property.
145. Conversely, the Defendant herein has failed to prove her claim to the suit property. Pertinently, the counterclaim by the Defendant is devoid of merits.
146. In the circumstances, Judgment be and is hereby entered in favour of the Plaintiffs on the following terms;
 - i. A declaration be and is hereby made that the Plaintiffs herein are the legal and legitimate owners/proprietor of the suit property known as L.R No 4894/59; which is registered in the name of the deceased [Joseph Kiarie Mbugua] and located in Garden Estate, Nairobi and that the said eviction be carried out by the Court Bailiff with the assistance of the Officer Commanding Police Division (OCPD) Kasarani Division.
 - ii. The Defendant be and is hereby ordered to vacate and hand over L.R No 4894/59; to the Plaintiffs within 90 days from the date hereof.
 - iii. In default by the Defendant to vacate and hand over vacant possession of the suit property in terms of [ii] hereof, the Plaintiffs shall be at liberty to levy eviction against the Defendant and in this regard an eviction order shall automatically issue.
 - iv. In the event of eviction being levied and/or undertaken by the Plaintiffs, the costs/expenses [if any] incurred shall be certified by the Deputy Registrar and same shall be recoverable from the Defendant as part of costs.
 - v. There be and is hereby granted permanent injunction to restraining the Defendants, their servants and/or agents and any unauthorized persons from trespassing or purporting to carry on any business on the property known as LR No 4894/59 which is registered in the name of the deceased [Joseph Kiarie Mbugua] of P.O Box 14202 Nairobi.



- vi. The Plaintiff is hereby awarded the sum of Kes.10, 000, 000/= only, account of General Damages.
- vii. The award of General Damages in terms of [vi] above shall attract interest at court rates [14% per annum] from the date of the Judgment until payment in full
- viii. The counterclaim be and is hereby dismissed
- ix. Costs and of the suit and the counterclaim be and are hereby awarded to the Plaintiffs.
- x. Any other relief not expressly granted is hereby declined.

147. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JANUARY 2025.

OGUTTU MBOYA

JUDGE.

In the presence of

Benson/Mutuma Court Assistant

Mr. Lawrence Mbambu for the Plaintiffs

Mr. Karuga Maina & Ms. Ann Njoroge for the Defendant

