



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURT

ELC CASE NO. E127 OF 2020

AFRICA FUND ENDANGERED WILDLIFE (USA) INCORPORATED.....PLAINTIFF

=VERSUS=

JANUARIS MUTYSIA.....DEFENDANT

RULING

INTRODUCTION

1. On the 30th November 2020, the Plaintiff/Applicant herein took out a Notice of Motion Application of even date, whereby the Plaintiff/Applicant seeks a raft of orders, namely;

a.(spent)

b. The Defendants Defense dated the 2nd November 2020 be struck out and judgment be entered for the Plaintiff as prayed in the Plaint dated the 14th September 2020.

c. In the alternative to be above a mandatory injunctive orders of eviction, be and is hereby issued compelling the Defendants, his servants, agents, employees or anyone claiming to be on the suit property by the defendant authority to vacate the property known as L.R No. 1286 (original number 120053/2) with immediate effect.

d. An order be and is hereby issued directed at the officer commanding Hardy Police Station Karen to ensure compliance of the court order herein to over-see the eviction of the Defendant from the suit property and to ensure that peace prevails.

e. Costs.

2. The subject Notice of Motion is supported by an affidavit sworn by one Edward Hochman, who is said to be the chairman of the Plaintiff/Applicant organization and which affidavit was sworn on the **30th November 2020**. Besides the deponent to the supporting affidavit has also attached to the said affidavit a bundle of annexures *inter-alia* a copy of the title to the suit property, which is the outcome of a sale transaction entered into with one Peter Hill Beared, the vendor, now deceased.

3. On the other hand, the Deponent to the supporting affidavit, has also attached copies of the Eviction notices, which were issued and served upon the Defendant/Respondent.

For clarity, the Eviction notices were issued pursuant to and in line with the provision of **Section 152A, 152B & 152E of the Land Act, 2012 (2016)**, whereby the Plaintiff/Applicant had notified the Defendant to vacate the suit property within the statutory three months period, from the date of service of the notices.

4. Following the filing of the subject application, the Defendant/Respondent herein, responded to same by a Replying affidavit sworn on the **5th February 2021**, albeit filed on the **15th February 2021**, whereby the Defendant/Respondent disputed the Plaintiff/Applicants claim at the foot of the Notice of Motion and further reiterated the contents of the statement of defense hitherto filed on the **3rd November 2020**.

5. From the Replying affidavit the Defendant/Respondent herein, has adverted to various albeit numerous issues, which the Defendant/Respondent contend, do constitute bona fide and thus triable issues, which should be allowed to proceed to plenary hearing, in the usual manner, subject to interrogatories, adoption of evidence and cross examination.

BACKGROUND

6. The subject suit filed vide Plaint **14th September 2020**, arises from a transaction whereby the by the Plaintiff/Applicant herein entered into a lawful sale agreement with one, Peter Hill Beard ,who was the vendor, whereby the vendor sold to and thereafter transferred all that piece of land otherwise known as **L.R N0. 1286 (original number 12053/2)**, hereinafter referred to as the suit property.

7. Other than the sale of the suit property in favour of the Plaintiff/Applicant ,the two parties ,namely, the Plaintiff/Applicant and Vendor, now Deceased, also negotiated a Lease, whereby the Vendor, was to occupy a designated portion of the suit Property. For clarity, the clause relating to the Lease was contained in and formed part of Sale Agreement .For ease of reference, I beg to reproduce the said clause as hereunder:

i. 10 grants of leases

ii. 10.1 ... immediately following completion of the sale and purchase of the property the purchaser shall grant to the vendor gillies turle of those portions of the property and of their adjoining property Africa Foundation wild endangered (K) LTD identified on the sketch plan annexed to the leases.

iii. 10.2 the leases shall in the case of the vendor be for a term of his life and in the case of gillies turle be for a term for the life time of the vendor or until the balance of the purchase price has been paid in full by the purchaser to the vendor whichever is latter and shall be at a rent of Ten (10) Shillings per year (if demanded).

8. Pursuant to and by dint of the aforesaid clauses, which have been reproduced herein before, the vendor remained in possession of the designated portions of the suit property and he occupied same up to and including his death. For clarity the lease to and/or in favor of the vendor was tied to his life time.

9. It is also apparent that during the life time of the vendor (read the seller), same engaged and/or employed Domestic workers to help him navigate Domestic chores and/or activities. It is in this regard that the Defendant/Respondent herein, entered upon and remained in occupation and possession of the suit property.

10. Be that as it may, it is apparent that the Defendant/Respondents entry on to and possession of the suit property, was tied to the interest of the vendor, now deceased during the life long lease, conferred in favor of the vendor by dint of clause 10.2 of the sale agreement, (Supra).

11. Nevertheless, it appears that upon the death of the vendor, the Defendant/Respondent herein, has remained in possession and/or occupation of the suit property and the continued possession and/or occupation by the Defendant/Respondent culminated into the issuance of the eviction notices, which were served on the Defendant on the 29th May 2020.

12. Despite service of the Eviction notices, the Defendant/Respondent did not comply and/or adhere to same. For clarity the Defendant/respondent remained adamant and thus same remains in occupation of the suit Property, to date.

13. As a result of the failure and/or neglect to comply with the Eviction notices, the Plaintiff/Applicant was constrained to commence the subject suit, seeking principally, to Recover vacant possession over and in respect of same, as well as an order of Permanent injunction.

14. It is also imperative to note that upon the filing of the suit and service of the court process, the Defendant/Respondent, duly entered appearance and filed a statement of defense, whereby same denied the claims by the Plaintiff/Applicant.

ISSUES FOR DETERMINATION

15. From the pleadings on record, namely, the Plaint filed by the Applicant, the Notice of Motion Application and the affidavit in support thereof on one hand, and Statement of Defense and Replying affidavit filed by the Defendant/Respondent, the following issues stand out for determination;

a. Whether statement of defense dated the 2nd November 2020 raises any bona fide and triable issues.

b. Whether the plaintiffs case merits entry of judgment in the manner sought in the application.

c. What reliefs are appropriate in light of the subject matter.

ANALYSIS AND DETERMINATION

NUMBER 1

Whether statement of defense dated the 2nd November 2020 raises any bona fide and triable issues.

16. According to the Plaintiff/Applicant, upon entry into and execution of the sale agreement dated the 27th November 1996, the suit property herein, was ultimately transferred in her name. In this regard, the Plaintiff/Applicant contends that same thus acquired lawful and legitimate title to the suit property, subject only clauses 10.1 and 10.2 of the sale agreement.

17. Premised on the foregoing, the Plaintiff/Applicant now contends that the Defendant/Respondent, has no lawful basis and/or reasonable excuse, to remain in occupation and/or possession thereof. For clarity, the Plaintiff/Applicant avers that the Defendant/Respondent is a trespasser and ought to be evicted.

18. On his part, the Defendant/Respondent contends that same was an employee of Peter Hill Beared, who was the vendor in respect of the suit property and that by virtue of being such employee, same is lawfully in occupation and/or possession of the suit property. Simply put, the Defendant thus contends that he is lawfully there and thus he is not a trespasser.

19. On the other hand, the Defendant/respondent further avers that according to the terms of the sale agreement, which was entered into between the Plaintiff/Applicant and the vendor, the Plaintiff/Applicant was to liquidate and/or settle the outstanding balance of the purchase price, but however up to and including the death of the vendor, the Plaintiff/Applicant had not fully liquidated the purchase price.

20. Besides, it is the Defendant/respondent further argument that owing to the fact that the Plaintiff/Applicant herein had not fully paid and/or liquidated the purchase price in respect to the suit property, the vendor had caused to register a charge over the suit property on the 18th March 1997, which charge has not been discharged to date. In short, the Defendant/Respondent contends that the Plaintiff/Applicant title is thus encumbered.

21. Other than the foregoing contentions by the Defendant/Respondent, it is similarly the Defendants/respondents position that the plaintiff/Applicant has breached and/or violated the terms of the Sale agreement (read the contract). Consequently the Defendant/Respondent takes the position that the foregoing issues raised and canvassed hereinbefore, reflect bona fide and triable issues, that should found a basis for a Plenary hearing.

22. Before venturing to determine and/or ascertain whether the issues raised and/or alluded to by the Defendant/Respondent, have espoused bona fide triable issues, to warrant a plenary hearing, it is imperative to ascertain the meaning and tenor of the word, bona fide and triable issues.

23. In seeking to ascertain the meaning and tenor of what constitutes a Bona fide triable issue, it is imperative to take cognizance of the age-old words of Justice Sheridan in *PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.)*

***“that “...a triable issue ...is an issue which raises a prima facie defence and which should go to trial for adjudication.”
Therefore, on applying the test, a defence which is a sham should be struck out straight away.***

24. On the other hand, a triable issue has also been stated to be an issue which raises a *prima facie* defense and thus should go for trial and adjudication. See *Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR.*

25. Notwithstanding the foregoing, it is imperative to note that in an Application for striking out, or better still one for Summary judgment, (both being aspects of summary procedure), even one triable issue, if bona fide, should entitle a Defendant to have unconditional leave to defend or to allow the defense to proceed to plenary hearing, in the usual manner of adjudication. In this regard, I take refuge in this decision in *Rift valley water services board v oriental construction company ltd (2018 eKLR,* where the honourable Court of Appeal referred to the decision in the case of *UAP PROVISION INSURANCE LIMITED V LENY M KIVUTI (CIVIL APPEAL NO.216 OF 1996 (unreported)* and observed as hereunder;

“In an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend.”

26. Other than the holding in the decision referred to in the preceding paragraph, it is also important to take cognizance of the holding of the Court of Appeal in the decision in the case of *Kenya Trade Combine Ltd vs M Shah (Civil appeal No.193 of 1999) (unreported),* this court said:

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”

27. Taking into account and applying the principles gleaned from the forecited Decisions, it is now important to consider the various aspect and/or issues of raised by the Defendant/Respondent, with a view to discerning whether there are triable issues or even a single Trial Issue ,to warrant the matter proceeding for hearing in the usual manner.

28. First, the Defendant/respondent herein contends that according to the Sale Agreement, clause 10.2 of the Lease in favor of the vendor, was to subsist for a term of the life of the vendor, or until the balance of the purchase price had been fully paid to Peter Hill Beared, whichever the latter. **See paragraph 5 of the statement of Defense.**

29.However, the contention by the Defendant/Respondent in terms of paragraph 5 of the statement of defense and essentially which has been reproduced in the immediate preceding paragraph, is at variance with clause 10.2 of the Sale Agreement. For the avoidance of doubt, the lease term which was conferred in favor of the vendor, was for a term of his (vendors life). Simply put it was a lifelong lease, nor more.

30. As pertains to the interpretation and/or construction of the meaning to be ascribed to the terms contained in the Sale Agreement, suffice it to say, that it is not open to a party and/or person to pollute and/or extrapolate the said terms. The Sale Agreement must be read in accordance the explicit terms thereof and also taking into account the provisions of **Section 97 (1) of the evidence Act;**

(1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

31. To fortify the foregoing observation, I invoke and rely on the decision in the case of **THE SPEAKER KISII COUNTY ASEMBLY V JAMES OMARIBA NYAOGA (COURT OF APPEAL AT KISUMU) (2015) eKLR**, where the Honourable Court observed as hereunder;

“The 1st appellant's attempt to vary the terms of the letters of appointment, in our view, offends the provisions of Sections 97 and 98 of the Evidence Act, Chapter 80 Laws of Kenya, which attempt we must reject. This is not the first time we are doing so. In the case of John Onyancha Zurwe v Oreti Atinda alias Olethi Atinda [Kisumu Civil Appeal No. 217 of 2003] (UR), we cited, with approval, Halsbury's Laws of England 4th Edition vol. 12, on interpretation of deeds and non-Testamentary Instruments paragraph,1478 as follows:-

“ Extrinsic evidence generally excluded: Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document.

Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document.”

32. From the foregoing decision the Defendant herein cannot pollute and/or extrapolate and/or vary the terms of clause 10.2 of the Sale Agreement, with a view to generating a triable issue .Clearly, the meaning that the Defendant is attributing to the terms of the Sale Agreement and in particular, the aspect relating to the Lease, amounts to a derogation from the said terms, whose import is explicit.

33. It is my humble observation that the period of the lease was circumscribed to the life of the vendor and not otherwise. Consequently, the lease and/or leasehold interest, which vested in the vendor lapsed with the death of same. In this regard, no triable issue arises.

34. Secondly, the Defendant/Respondent has also raised the issue that the Plaintiff/Applicant did not and has not fully liquidated the purchase price in respect of the suit property to the vendor (now deceased) or to the estate thereof. In this regard, the Defendant/Respondent contends that the Plaintiff/Applicants rights to the suit property, have not fully accrued and therefore the same is not entitled to vacant possession.

35. My short answer to the contention by the Defendant/Respondent is that same was not party and/or privy to the contract between the Plaintiff/Applicant and the vendor (now deceased) and in this regard the Doctrine of privity of contracts bars and/or precludes any claims or issues raised by a stranger, the Defendant/Respondent not excepted.

36. To fortify the foregoing observation, I take solace in the case of **SAVINGS AND LOANS KENYA LTD V KANYENJE KARANGAITA GAKOMBE & ANOTHER (2015) eKLR** where the Court of Appeal held as hereunder;

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In DUNLOP PNEUMATIC TYRE CO LTD v SELFRIDGE & CO LTD [1915] AC 847, Lord Haldane, LC rendered the principles thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them AGRICULTURAL FINANCE CORPORATION v LENDETIA LTD (supra), KENYA NATIONAL CAPITALCORPORATION LTD v ALBERT MARIO CORDEIRO & ANOTHER (supra) and WILLIAM MUTHEE MUTHAMI v BANK OF BARODA, (supra).

Thus in AGRICULTURAL FINANCE CORPORATION v LENDETIA LTD (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. Thus in SHANKLIN PIER v DETEL PRODUCTS LTD (1951) 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contract to use that paint. The contractor purchased the paint from the defendant, which proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint

was concerned.

While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the subject of much criticism. In DARLINGTON BOUROUGH COUNCIL v WITSHIRE NORTHERN LTD [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms.

“The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract.”

Some jurisdictions have, accordingly and in a bid to introduce reforms and ameliorate the harshness of the rule, resorted to legislative intervention. The best examples are the United Kingdom and Singapore where the Contracts (Rights of Third Parties) Act, 1999 and the Contract (Rights of Third Parties Act, 2001 have respectively been enacted.’

37. Thirdly, the Defendant/Respondent claims founded and/or anchored on breach of contract, on the basis of non-payment of the balance of the purchase price, is also invalidated by dint of **Section 82 of the Law of Succession Act, Chapter 160, Laws of Kenya**. For clarity any claim for breach of contract, if any, could only be espoused by the Legal representative of vendor (now deceased), for which the Defendant/Respondent is not one.

38. To vindicate the foregoing holding, it is worthy to take cognizance of the decision in the case of **VIRGINIA EDITH WAMBUI OTIENO V JOASH OUKO OCHIENG AND ANOTHER, COURT OF APPEAL (1987) Eklr, where the Honourable Court observed as hereunder,**

“But the difficulty remains that the general rule in relation to administration is that a party entitled to administration can do nothing as administrator before letters of administration are granted. Section 80(2) of the Law of Succession Act provides that a grant of letters of administration, with or without the will annexed, shall only take effect as from the date of the grant. In contrast section 80(1) provides that a grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such. This means that in the case of an executor he may perform most of the acts appertaining to his office before probate including the bringing of a fresh action, because he derives title from the will and the property of the deceased vest in him from the moment of the intestate’s death (see 1 Williams on Executors and Administrators (14th edn) paras 84 et seq and 230 et seq). But an administrator is not entitled to bring as action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception. The doctrine of the relation back of an administrator’s title, on obtaining a grant of letters of administration, to the date of the intestate’s death, cannot be invoked so as to render the action competent (see Ingall v Moran [1944] 1 KB, and the case which follow namely Burns v Campbell [1952] KB 15).” This Doctrine is as old as Wankford v Wankford [1702] where Powys J said:

‘but an administrator cannot act before letters of administration granted to him.’

39. Fourthly, the Defendant/Respondent also claims that he has remained in occupation and possession of the suit property, to take care of the properties of the deceased and that same is lawfully in occupation of the suit property. To the contrary, the Plaintiff/applicant posits that the defendant/Respondent occupation is unlawful.

40. To begin with, having been an employee of the vendor (now deceased), who enjoyed a life long lease in respect to the suit property, the Defendants/Respondents rights, which appear to constitute a license, were tied to the interest of the vendor. Consequently, the determination of the interest of the vendor, who had allowed him, entry on the basis of permission, terminated the Defendants/Respondents rights.

41. Quite frankly, the Defendant/Respondent herein can only now remain in occupation and/or possession of the suit property, with the permission of the Plaintiff/Applicant and not otherwise. However, the Plaintiff/Applicant has not availed such permission and hence the activities by and/ or on behalf of the Defendant/Respondent constitutes trespass to the land.

42. In this regard, it is imperative to take cognizance of the Decision in the case of **John K. Koech v Peter Chepkwony [2019] eKLR, where the honourable court relied on the book,** Clerk & Lindsell on Torts 18th Edition at paragraph 18-01, which defines trespass as follows:

“Any unjustifiable intrusion by one person upon land in possession of another.” Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”

43. In my humble view, the the activities by and/ or on behalf of the Defendant/Respondent constitute not only unjustifiable intrusion to the suit property belonging to the Plaintiff/Applicant, but also amounts to forcible detainer of the suit property, which is also a criminal offence.

44. In view of the foregoing, it is my finding and holding that the statement of defense mounted by and/or on behalf of the Defendant/respondent, does not disclose and/or reveal, even a single bona fide issue, to warrant a plenary hearing. In any event, no amount of Evidence poured on the issues of law alluded to herein before, shall change the import and tenor of the Principles of the law, which I pointed out elsewhere hereinbefore..

ISSUE NUMBER 2

Whether the plaintiffs case merits entry of judgment in the manner sought in the application.

45. As pertains to the second issue herein, what is imperative is to confirm whether the statement of defense by and/or on behalf of the Defendant/Respondent, can be redeemed with a view to bringing forth, any triable issue.

46. On the other hand, it must be noted that where there is no bona fide triable issue, the honourable court must not speculate on any, merely to facilitate a plenary hearing. For clarity, a hearing must not be carried out and/or undertaken, for the sake of pleasing the whims of the parties, particularly where there is no issue before hand.

47. Nevertheless, I am cognizant of the decision in **D. T DOBIE & COMPANY (KENYA) LTD V JOSEPH MBARIA MUCHINA (1980) eKLR**, where the Court of Appeal observed as hereunder;

“no suit shall be summarily be dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable course of action, and is so weak as to be beyond redemption and incurable amendment”

48. Taking the cue and the warning in the case of **D. T. DOBIE & COMPANY (KENYA) LTD** Supra, I must exercise necessary caution and circumspection, knowing that Summary procedure is a radical process, which drives away a party from the seat of justice, prior to a hearing in the usual manner.

49. However, despite the caution, alluded to in the preceding paragraph, I must say that sustaining a hopeless and otherwise irredeemable case, merely to attract a plenary hearing, is inimical to public policy and does not augur well for the Rule of Law. Such kind of cases are part of the endemic problems that bedevils the administration of justice in the Republic of Kenya.

50. On the other hand ,it is worthy to note the courts are now called upon to ensure that justice is dispensed to the parties, without undue delay .In this regard, where the situation permits, the Courts must apply Summary Procedure to get of cases, which evidently do not merit plenary hearing. **See Article 159 (2) b of the Constitution 2010.**

51. Coupled with the provision of **Article 159 (2) b (Supra)**, the Civil Procedure Act, Chapter 21, Laws of Kenya, also has near similar provisions, namely, Sections 1A and 1B, which are generally referred to as the overriding objectives, whose purport is to help in fasttracking the disposal of cases. For clarity, the said provision provides as hereunder;

1A. Objective of Act (1) *The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.* (2) *The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).* (3) *A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

1B. Duty of Court (1) *For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims— (a) the just determination of the proceedings; (b) the efficient disposal of the business of the Court; (c) the efficient use of the available judicial and administrative resources; (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and (e) the use of suitable technology.*

ISSUE NUMBER 3

What reliefs are appropriate in light of the subject matter.

52. From the observations and findings, which have been articulated herein before, it must by now be clear that the statement of defense mounted by and/or on behalf of the Defendant/Respondent is a candidate for striking out. In this regard I hereby proceed, after exercising of necessary caution, to strike out the Statement of Defence.

53. Having struck out the Statement of defense filed by and/or on behalf of the defendant/respondent, the outstanding issue is whether or not the Plaintiff/Applicant is entitled to summary judgment. For clarity, summary judgment does apply to a claim *inter alia* where a litigant like the Plaintiff/Applicant herein seeks for Recovery of land with or without a claim for Rent or Mesne Profits. **See Order 36 Rule 1(b) of the Civil Procedure Rules.**

54. I must state that the Application beforehand namely, the Application dated the 30th November 2020, was not brought pursuant to and/or did not include the provision of Order 36(1) b of the Civil Procedure Rules, but I do hasten to state, that the non-inclusion of the said provision or basically the omission of same, does not negate the inherent power of the court to grant summary judgment, particularly where the threshold has been made.

55. In any event, I am alive to the provision of Article 159 (2) [d] of Constitution, 2010, which frowns upon undue reliance on procedural technicalities, such as omission to include a provision of the law in an Application.

56. In the premises, I now proceed to enter a summary judgment to and/or or in favor of the Plaintiff/Applicant in terms of the Plaint dated **14th September 2020**. For clarity, I enter judgment in terms of **Paragraphs a, b and c.**

57. As pertains to the claims to the General damages, it suffices to note that the Plaintiff/Applicant has Laid before the Honourable Court evidence of ownership of the Land and in this regard the Plaintiff/Applicant is entitled to partake of and/or benefit from the rights provided for under **Section 24 and 25 of the Land Registration Act 2012.**

58. On account of General damages for trespass, I must state that once the claimant, in this case the Plaintiff/Applicant, has proven trespass (*which has indeed been satisfied*), then the Plaintiff/Applicant is entitled to compensation. For the avoidance of doubt, trespass is actionable per se, without proof of any loss suffered

59. To fortify the foregoing observation, I invoke and reiterate the statement of law espoused in the case **Park Towers Ltd V John Mithamo Njika and Others 2014 eKLR** where Mutungi J stated as follows:

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case”

60. In the premises, even though the Plaintiff/Applicant has not proven any actual loss, accrued and/or occasioned by the occupation and/or possession of the suit property by the Defendant/Respondent, it is sufficient to say that the inability of the Plaintiff/Applicant to enjoy exclusive and quiet possession of the property, warrants compensation.

61. Having made a foregoing observation, it is my considered view that the loss that has been suffered does not warrant a huge compensation. In this regard, I opine that an award the sum of Kenya Shillings Five Hundred Thousand only would suffice, based on the location of the property, the consideration that was paid towards the purchase thereof, and finally the antecedent conduct of the Defendant/Respondent, who has remained adamant despite having been issued with statutory notices, which were never challenged and/or impeached, whatsoever.

COSTS

62. The General principles as pertains the costs is that costs follow the event, unless the honourable court for good reasons, which must be stated, deems otherwise. For clarity, the provision **of Section 27 of the Civil procedure Act will suffice.**

63. In respect of the subject matter and taking into account the circumstances obtaining both prior to and after the filing of the subject suit, [without losing sight of the fact that the eviction notices were served and the same were never challenged], but the Defendant/Respondent remained *in situ*, I would proceed to award costs of the Notice of Motion Application dated the **30th November 2020**, as well as the Main suit to the Plaintiff/Applicant.

FINAL DISPOSITION

In a nutshell, the court makes the following orders;

- i. The Notice of Motion application dated the **30th November 2020**, be and is hereby allowed in terms of prayer b thereof.*
- ii. Summary judgment be and is hereby granted in favor of the Plaintiff/Applicant in terms of prayers a, b and c of the Plaint dated the **14th September 2020**.*
- iii. General damages be and is hereby awarded in the sum of Kenya Shillings Five Hundred Thousand (500, 000/=) only.*
- iv. The Damages awarded in order (iii) herein above, shall attract Interest at courts rates from the date hereof.*
- v. The Defendant/Respondent herein shall vacate the suit property and deliver vacant possession to the Plaintiff/Applicant **within 60 days** from the date of the Judgment herein and in default, the Plaintiff/Applicant shall be at liberty to forcefully evict the Defendant/Respondent or such other person residing thereon under the authority of the Defendant/Respondent.*
- vi. Subject to order [v] hereof, the Officer Commanding Hardy Police station, Karen is hereby ordered to ensure compliance with the Eviction order and/or oversee the implantation thereof, upon payment of the usual statutory charges due to the National Police service and which shall be borne by the Plaintiff/Applicant.*
- vii. Costs of the suit, (which shall include charges incurred on eviction if any) are awarded to the Plaintiff/Applicant.*

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2021.

HON. JUSTICE OGUTTU MBOYA,

JUDGE,

ENVIROMENT AND LAND COURT,

MILIMANI.

In the presence of;