



**REPUBLIC OF KENYA**

**COURT OF APPEAL AT NAIROBI**

**civ app 13 of 80**

**M'Ikiara M'Mukanya and another v Gilbert Kabere M'Mbijiwe**

**(Potter & Kneller JJA & Chesoni Ag JA)**

Civil Appeal No 13 of 1980 Cases

1. Thompson v Ward [1955] 2 QB 155
2. Ashby v White [1703] 2 Ld Raynd 938
3. Basely v Clarkson [1682] 3 Lev 37
4. Hewlitt v Bickerton [1947] CLC 10504
5. Conway v Wimpey & Co (No 2) [1951] 2 KB 266

Advocates

Kamau Kuria with DP Mugambi for Appellants

SM Otieno with Kariba Mbabu for Respondent

21st February 1984. The following considered judgments were read pursuant to subrule (5) of Rule 52 of the Court of Appeal Rules:

KNELLER JA: This is a second appeal and one from a decision of the High Court (Cockar J) at Nyeri of July 10, 1979 who dismissed with costs the first appeal of M'Kiriara M'Mukanya (M'Mukanya) and Sebastiano Nyamu (Nyamu) from a judgment of January 25, 1979 of the then Senior Resident Magistrate at Meru in favour of Gilbert Kabeere M'Mbijiwe (M'Mbijiwe).

The Memorandum of appeal filed on May 16, 1980 by M'Mukanya and Nyamu's first advocates had just one (prolix) ground: "The learned judge erred in law failing to appreciate and in misdirecting himself on the legal ingredients of the tort of trespass and in particular erred in law in upholding the trial magistrate on the finding that the appellants were trespassers when in law the appellants were not and could not have been trespassers."

The litigation between the parties began in the middle of November 1972 when M'Mbijiwe filed a plaint claiming an eviction order against M'Mukanya and Nyamu from Plot 58 Nkubu Market, Meru and compensation for wrongful damage to it. M'Mbijiwe described himself as an agriculturist and his opponents as businessmen. The allegation was that they had trespassed on his plot and built on it without

his permission. M'Mukanya and Nyamu's written statement of defence denied all liability because they were not trespassers on this plot which Meru County Council allocated to them in common and for which they had paid rent in 1971 and 1972 and, in short, M'Mbijiwe it

Thus the issues, in my view, were (1) Did M'Mbijiwe prove on the balance of probabilities M'Mukanya and Nyamu were trespassers on this plot?

(2) If so, what damages?

The magistrate recorded evidence from, on the one hand, M'Mbijiwe, the agriculturist, and his witnesses who were Kithinji, the Meru County Council's Markets' supervisor and M'Imathiu, its chairman since 1966 and, on the other, from M'Mukanya and Nyamu, who called no witness. A summary of their testimony is this.

Nkubu is a class "A" market in Nkubu Location in the South Imenti Division of Meru District and the freehold is owned by Meru County Council. A standard plot of land in it is 40' x 50' and the rent for it between 1965 and 1975 was Kshs 100 a year. M'Mbijiwe applied to the Council in 1967 for a plot on which he intended to build a shop and trade in fertilizers in it. The Council's Trades and Market Committee discussed and approved of it, among other things, on November 6, 1961 (Minute 13/67 (d) (e)). The 3 year delay is not, like so many things this Council did, explained but it may have been due to the Council being unable to approve of its committee's award until the Commissioner of Lands passed the plans for Nkubu Market which he did on January 17, 1970 and even then the market had to be surveyed, plot 58 marked in red on the plan and with beacons on the ground.

Towards the end of June 1970 he was sent something called a "Notification Form" (one in Kiswahili and one in English) expressed to be under the Fifth Schedule to something or other which was not specified and the County Council of Meru (Markets) By-Laws 1966 which told him of the success of his application. Documents called "indications" were not introduced until 1971. He was asked in the Notification to report to the Council's offices as soon as possible to be told the number of the plot and to pay the rent for it which was Kshs 60 a year.

He was to bring along his plans for his building and if it was approved he would get a clearance certificate and he could put up his shop. When he had accomplished that he was to return to the office for a certificate authorising him to begin selling his fertilizers. Kithinji, the Council's markets' supervisor, testified that he 'indicated' in his presence plot 58 to M'Mbijiwe as his, but whether on a plan or on a ground or both is not clear, and, also, that M'Mbijiwe went to it and entered upon it as anyone so fortunate, I assume, would. This plot was not a standard one for it was 11,400 sq feet in size and the rent for it in 1970 was Kshs 240 a year.

Now a plot holder at this market cannot pay rent for it until he has been told its number and shown its boundaries. M'Mbijiwe produced a receipt (Exhibit B) dated September 17, 1970 for the rent for this plot for 1970 which is Kshs 180. It may be that this was for three quarters of the annual rent for 1970. He produced another Council rent receipt (Exhibit P2) dated March 20, 1972 for 1970, 1971 and 1972 and a penalty of Kshs 95 for late payment. Thus, it seems, he paid its 1970 rent twice and was irregular in paying that for 1971 and or 1972.

M'Mbijiwe's plan for his shop was accepted by the Council on some unspecified date but he did not build on the plot.

Sometime in 1971 a Committee of the Council approved M'Mukanya and Nyamu's joint application for a plot in the market which the Council passed and then M'Mbijiwe's large plot 58 was sub-divided and renumbered 57, 58, 58 and 59. These were then allocated in this way:

57 M'Rimberia

58 M'Mbijiwe

58 M'Mukanya and Nyamu

59 M'Mulagwa

This manoeuvre was not apparently passed on to the Commissioner and so he did not authorise it.

The minute of the Committee approving of the joint application by M'Mukanya and Nyamu was 5/71 (B) 77/15 but it does not set out the number of the plot. There is, apparently, no resolution of the Council to sub-divide the large plot 58 so Mawira, the Council's Clerk, seems to have done this without authority.

The Chief Financial Officer, or someone signing over this designation, sent them two documents (Exhibits D2 and D5) called "Indication on Plot Number" both dated May 25, 1971. These are headed with references to the Council and the Ninth Schedule of the Trade and Market By-Laws of 1969. They acknowledge receipt of Kshs 50 for some fee and go on to mention M'Mukanya and Nyamu as bearers of those documents who had been allocated a plot at this market and then follows a reference to the (Council?) Minute, the peg numbers of the plot and its serial number (58).

The rent for this small plot 58 was Kshs 60 a year and they have receipt (Exhibit D) for 1971 and 1972 paid on May 25, 1971 and January 1, 1972. M'Mukanya and Nyamu paid for some plans for building a shop on their small plot 58 but there is no evidence that it was approved by the Council or its relevant officers. They

went ahead, however, and put up their shop on it, and it cost them Kshs 20,000, or so, to do this.

So later M'Mbijiwe saw M'Mukanya and Nyamu enter part of his large plot and begin to build their shop on it. He went to the Council's offices and the Clerk told him his name had been removed from the Register, the plot split and these two given one part of it. He wrote (Exhibit P6) to the Commissioner of Lands on July 6, 1972 and told him what they were doing. He alleged this was the work of some wicked councillors who had subdivided this large plot and allocated portions of it to themselves and their cronies. M'Mbijiwe said he had a first class plan for developing this large plot and he asked the Commissioner to send him his lease so he could begin to do so. The Commissioner wrote (Exhibit P7) on August 23, 1972 to the Council's Clerk asking for his comments on M'Mbijiwe's allegations against the Councillors. He also wanted to know if M'Mbijiwe had paid the "land rent" in full each year since 1970 and something called "stand premium". The Clerk replied (Exhibit P8) a month or so later saying the register of the Council showed the plot belonged to M'Mbijiwe and he was up to date with "land rent" for it but not the 'stand premium' because the Council had not asked for it and could not do so as certain necessary "processes" had still not been completed yet (October 26, 1972). He told the Commissioner the Council had set up a committee to study the problem of plot 58.

Sometime in 1974 M'Mbijiwe obtained an injunction against M'Mukanya and Nyamu halting the building of their shop and 90 days later it was raised and they completed it. The senior resident magistrate asked the Council's Clerk why this confusion reigned over plot 58 at this market and the Clerk in a letter of September 22, 1976 explained that it was because M'Mbijiwe never followed up his Notification (he meant the letter headed application for a plot) of June 25, 1970 so although he was allocated a plot it did not mature into a plot marked with pegs and beacons and all. The advocates for the parties agreed in early December 2, 1976 that the Full Council should be asked to rule on whether M'Mbijiwe then owned the large plot 58 or one of the two small plots numbered 58? The Full Council replied that he owned the large one. They had their meeting on December 2, 1976, March 29 and 30 1977 and the Minute is 3/77 (Exhibit P8 and D3).

Their deliberations suggest some people had ignored the council's orders to halt building on their small plot and had gone ahead and put up Council should give the culprits notice to demolish or remove their Buildings and if they did not do so the servants would and sent them the bill for this. They were to have the rents they had paid restored refunded to them, their names erased from the register, M'Mbijiwe's restored in it as the owner of this plot and their "plans" and "indications" recovered by the council. They were named as M'Riaberia, M Mutea and Winifred M'Maigene Stephen. M'Mukanya and Nyamu are not

named.

The magistrate delivered his judgment on January 25, 1979. He found the parties and the witnesses told the truth though Kithinji, he said wavered on some points. This is correct, but they were confined to whether or not one party or the other or both' were allocated plot 58 to which the answer depends very much on what particular plot, the large or small plot 58, the question was based.

The magistrate declared the main issues were: 1. Who owns plot Nkubu market?

2. Are M'Mukanya and Nyamu trespassers on it?

3. Are they liable?

He found M'Mbijiwe was the owner of it (and the magistrate must have meant the large one, for there is no dispute that even after the subdivision he and M'Mukanya, together with Nyamu, had a small plot 58). He based this on the Full Council's resolution in Minute 5/77. He decided M'Mukanya and Nyamu were trespassers on the large plot 58 because it was allocated to M'Mbijiwe and they went on to it and built on it. He then held

M'Mukanya and Nyamu were liable in damages for what they did on M'Mbijiwe's plot. He then made these orders -

1. M'Mukanya and Nyamu to be evicted from plot 58

2. Kshs 2,000 general damages

3. Costs to M'Mbijiwe

Their grounds of appeal from this judgment to the High Court were that the magistrate erred in law and in fact in deciding -

1. the plot belonged to M'Mbijiwe

2. it did not belong to M'Mukanya and Nyamu

3. the greater plot 58 existed after subdivision

4. M'Mukanya and Nyamu must vacate it

5. the issues when the other parties had not been joined

6. the case against the weight of the evidence

7. the case on the Full Council's Resolution of March 30, 1977 Cockar J, in his judgment of July 10, 1979, refused to depart from the findings of the magistrate. The Council allocated plots in the market and this (large) one went to M'Mbijiwe in 1967. The allocation in 1972 of a small part of it to M'Mukanya and Nyamu was ultra vires. The magistrate was right to take into account the March 30, 1977 resolution of the Council which was the consequence of the parties advocates' suggestion the Council should give its view as to who owned the plot before the trial took place. The subdivision was irregular, he continued, and so the original large plot 58 still existed. M'Mukanya and Nyamu had no title to the small part of it referred to as (another) plot 58 and it followed they must vacate it.

The learned judge did not deal with the ground of appeal that subdivision meant that the magistrate could not declare M'Mbijiwe was allotted, and still entitled to occupy the large original plot 58 because this affected Meru County Council, M'Rimberia, (and Winifred M'Maigene Stephen) on plots 57 and 59 which were part of the original plot 58. They ought to have been joined, of course, all of them, if they

were still on the 1967 plot 58 and the judgments of the magistrate, the judge and even this court do not affect anyone but M'Mukanya and Nyamu.

The trial court awarded M'Mbijiwe Kshs 2,000 damages but on what basis it is impossible to fathom for there was no evidence to warrant it. A nominal sum of Kshs 100 would have been appropriate. There was no appeal from it in the High Court or this one so there is no call to reduce it. [www.kenyalawreports.or.ke](http://www.kenyalawreports.or.ke) The only issue in this second appeal is whether or not the magistrate and the judge erred in law in finding M'Mukanya and Nyamu were trespassers?

M'Mbijiwe could, and may be should, have asked for a declaratory judgment but he brought an action of trespass to land to determine the title to the large plot 58 in this market. He has to prove on the balance of probabilities M'Mukanya and Nyamu entered on this plot when it was in his possession. He must show he had the right to immediate possession and entered in exercise of it and then he will be said to have been in possession of it ever since he had that right. This tort is a violation of the right of possession and M'Mbijiwe must prove he, and not M'Mukanya and Nyamu, had the right to immediate and exclusive possession ok it which is different from ownership. *Thomson v Ward* [1953] 2 QB 153, 158-159. He does not have to prove damage. *Ashby v White* [1703 ], 2 Ld Raynd 938. M'Mukanya and Nyamu are liable for trespass if M'Mbijiwe has the right to possess and they intentionally entered his plot even though they honestly believed the land was their own and they had a right of entry on it or they did so under an inevitable mistake of law or fact. Thus, the following have been held liable: the defendant who when mowing his land mowed grass by mistake, on the plaintiff's adjoining land: *Basely v Clarkson* [1682], 3 Lev 37; the defendant who enters another's land to repair his own buildings: *Hewlitt v Bickerton* [1947] CLC 10504 *Lynskey J*; and the defendant who does not know he is a trespasser: *Conway v Wimpey & Co* (No 2), [1951] 2 KB 266, 273 *Asquith LJ*.

There are the findings of the magistrate and the judge that M'Mbijiwe had the right to immediate possession of it from the time the Full Council allocated and identified this large plot to him which was in June 1970 and when he went on to it then by a legal fiction he was in possession of it from the date of the accrual of his right of entry. *Salmond on the Law of Torts*, 1977, 17th edition, 47. The later division of it into 4 or 5 smaller ones and the allocation of the smaller 58 to M'Mukanya and Nyamu was irregular and of no effect. They intentionally swarmed on to his plot in the honest belief they were entitled to do so because the clerk said it was theirs. They did not know they were trespassers, but they were.

M'Mbijiwe thought he was entitled to a lease in due course and I agree with Chesoni Ag JA, whose judgment I have read in draft, he is not a licensee but, in any event, by recalling that trespass *quare clausum fregit* [because he (the defendant) broke or entered into the close or land of the plaintiff without lawful authority] is essentially a violation of the right of possession, and not of the right of property, the point may be technical one. What is to the point that M'Mbijiwe proved on the balance of probabilities he was entitled to immediate and exclusive possession of the plot. He established such a right to or interest in this land as supported his action for trespass.

Accordingly, I would dismiss this appeal with costs and as Chesoni Ag. JA agrees those are the orders of the court.

CHESONI AG JA:

In 1967 the Meru County Council (hereinafter called "the Council") allocated Plot No 58 at Nkubu Market to the respondent Gilbert Kabeere M'Mbijiwe. From the Council's letter dated June 26, 1970 the plot was for business purposes. The respondent was told in that letter that he would pay to the council a rent of Kshs 60 and it was in evidence that he respondent had paid such rent although the receipts (Exhibit 2 and 5) tendered in evidence showed Kshs 615 as penalty for 1970-1971 and Kshs 180 being rent respectively. Exhibits D2 and 5 on the file show that the appellants M'ikiara M'Mukanya and Sebastiano Nyamu had been allocated the same Plot No 58 at Nkubu Market and Exhibit D1 shows that the respondent paid rent of Kshs 60 annually for 1971 and 1972. Sometime in 1972 the respondent observed that the appellants were carrying out some construction work on Plot No 58 and he wrote to the

Commissioner of Lands (Exhibit 6) pointing out that the said plot had been illegally subdivided by a group of councilors who had allocated to themselves and their friends the subdivisions. He asked the Commissioner of Lands to issue him with a formal lease so that he could commence development of the plot. That letter was copied to, among others, the Meru County Council. The respondent said in his evidence that when he went to the Council's offices and checked the register of plots he discovered that his name had been cancelled, but the cancellation was undated. The Commissioner of Lands wrote to the Council on August 23, 1972 and sought its views on the respondent's letter of July 6, 1972 and also asked the Council to confirm whether the respondent had paid land rent and Stand Premium for the plot. The Clerk to the Council's reply to the Commissioner (Ex.8) confirmed that according to the council's register the plot belonged to Mr GK M'Mbijiwe and he had paid full land rents since 1970. The Stand Premium had not been demanded because of certain incomplete process relating to Nkubu Market.

On November 17, 1972 the respondent filed a suit in the Senior Residents Magistrate's Court at Meru for eviction of the appellants from the plot and damages for the wrongful damage to the property. A defence was filed by the appellants on April 17, 1975 in which they alleged that the plot was allocated to them by the council under minute No 3/71 (B) 77 (13) as read with the certificate of Indication (Ex D2 & 3). They asked for dismissal of the suit.

The Senior Resident Magistrate's record shows that on November 18, 1972 the court granted the respondent an injunction restraining the appellants, their servants, agents and workmen from entering and building on all that land known as plot no 58 Nkubu until the hearing of the respondent's suit or until a further order of the court. An application made by the appellants to have the injunction lifted was dismissed on March 23, 1975. On June 8, 1974 the Senior Resident Magistrate ordered that within 90 days from then the order for injunction was to be discharged unless the case could not proceed to hearing for the appellants' default. The suit was not heard until January 25, 1979 but prior to the hearing in 1977 the Senior Resident Magistrate's Court at Meru asked the Council to confirm to the Court the true position about plot No 58 and the council after discussing the matter arrived at the decision that the respondent owned the plot. The Senior Resident Magistrate gave judgment for the respondent the same day ie January 25, 1979 ordering eviction of the appellants and general damages of Kshs 2,000 holding that the appellants had trespassed on the respondent's plot. He also awarded costs to the respondent. The appellants unsuccessfully appealed to the High Court at Nyeri and this second appeal is from the judgment of Cockar J in the High Court. What I have endeavoured to set out above were the undisputed facts. The only ground of appeal reads as follows:

"1. The learned Appeal Judge erred in Law in failing to appreciate and in misdirecting himself on the legal ingredients of the tort of trespass and in particular erred in Law in upholding the trial Magistrate on the finding that the appellants were trespassers when in law the appellants were not and could not have been trespassers."

Mr Kamau for the appellants submitted that the respondent's claim was in trespass and that an action in trespass on land lies only where the plaintiff is in exclusive possession of the disputed land and that mere use of land without exclusive possession is insufficient to support an action for trespass. He relied on the authority of Salmond on the Law of Torts, 17th Edn p 45 and John G Flemming's, The Law of Torts 5th Edn p 41. It was Mr Kamau's contention that the respondent was a mere licensee and as such a licensee, unless he held a special licence, he had no claim against third parties and he had no proprietary interest. For this he cited The Law of Real Property 4th Edn by RE Megarry & HWR Wade pp 782 & 785 and Modern Equity by Hanbury and Madskey 11th Edn pp 717-729. It was further contended for the appellants that since the land belonged to the Meru County Council the Council by implication revoked the licence of the respondent when it granted the same land to the appellants, and the appellants having been put in possession of the land by the true owner could not be trespassers. Sections 115 and 117 of the Constitution were called in aid of that argument.

Mr SM Otieno for the respondent submitted that there was no question of licensee involved and the respondent was a lessee so his interest was possessory, and that whether the appellants were trespassers was a question of fact.

By referring to Sections 115 and 117 of the Constitution Mr Kamau accepted that the land in question was Trust land and Mr Otieno did not deny this suggestion. Section 115 vests all Trust land in the county council within whose area of Jurisdiction the land is situated. Section 117 authorises county councils to set apart Trust land required for use and occupation. The procedure of setting apart such land by a county council is to be found in Part IV Section 15 of the Trust Land Act (Cap 288). This Act also makes provisions for the administration and allocation of Trust land. Section 55 provides that the Commissioner of Lands shall administer the Trust Land of each council as agent for the council. The power of a county council to make grants or dispositions of any estate, interest or right in or over land set apart is to be found under Section 117(5.) of the Constitution.

I am satisfied that plot No 58, the subject matter of this appeal was in Trust land area and its administration fell under the Trust Land Act; Part VI of the Act deals with leases and licences. Under Section 57(1) licences over Trust land are granted only for the purposes specified under that section. The section reads as follows: "37(1) .Notwithstanding anything contained in this Act licences may be granted, in such manner and subject to such conditions as may be prescribed, and subject to the payment of such fees or royalties or both as the council may with the approval of the Minister fix, to any person for the purpose of - (a) the grazing of livestock; or

(b) the removal of timber or other forests produce from Trust Land which is not included in a forest area within the meaning of the Forest Act; or

(c) the taking of common minerals; or

(d) way leaves; or

(e) the establishment of temporary labour accommodation."

(See also Section 65(l)(g).

The purpose for which plot No 58 was granted to the respondent is none of those specified under Section 57. It was for business use or purpose (Exhibit 1). Section 37 also states that when a licence is granted fees or royalties or both are payable Exhibit 1 told the respondent that he would pay a rent of Kshs 60 and Exhibits 7 and 8 from the Commissioner of Lands and Meru County Council speak of land rent and Stand Premium, and not fees or royalties or both. The interest granted to the respondent in the letter of allotment dated June 25, 1970 was certainly not that of a licensee. There is no section in the Act dealing with the duration of the leases but since a county council has power to grant leases under Section 117(5) of the Constitution duration and conditions of a lease may be specified in the grant (see also Section 65(l)(b) of the Act.). Section 39 of the Trust Land Act deals with forfeiture of leases and licences, and provides as follows:

"39(1) If, in respect of land which is held under a lease granted under this Act - (a) any rent is at any time in arrear for a period of twenty-one days after it first became due; or (b) there has been any breach of any of the lessee's covenants; or (c) the lessee or a person deriving title under him remains in possession of the land after the expiration or other lawful determination of the lease, the council may serve on the lessee a notice specifying the rent in arrear, or the covenant or condition broken, or the unlawful possession, as the case may be, and the council may, at any time after thirty days from the service of the land notice bring proceedings for the recovery of the land in the Resident Magistrate's Court, if the value of the land falls within the limits of that court's civil jurisdiction, and to the High Court if it does not

(2) Upon proof of the facts alleged in a notice served under subsection (1) of this section, the court shall, subject to any relief which it may consider it just to grant, declare, the lease forfeited (if it is still subsisting), and make an order for the payment of the arrears of rent and the costs of the proceedings and for the delivery of possession of the land to the council either forthwith or on a specified date. Subsection (3) of the same section after stating that the provisions relating to forfeiture of leases apply to forfeiture of licences granted under the Act it states:

"(a) references to rent are to be taken as references to fees." In my view the section gives a guide on determining the nature of interest where the letter of allotment has not specified the same. Thus, when the allottee is informed that he will pay rent the interest granted or intended to be granted is a lease, but when the allottee is a licensee the terminology used is either fees or royalties or both. Reading Sections 37 and 39 of the Trust Land Act together and exhibits 1, 2, 3, 7 and 8 which speak of the rent payable by the respondent, I would hold that the respondent's interest in plot No 58 at Nkubu market is a leasehold and not a licence, and, that must have been the council's intention from the date the plot was allocated to him in 1967.

Even if we assume that Mr Kamau is correct, which he is not, and all that the respondent had was a licence from the County council, then that licence has not been terminated. Under the Trust Land Act a licence is not terminated by cancellation of the licensee's name in the Council register. If a licensee is in arrears with the payment of the fees or royalties; or is in any breach of any of the conditions in the licence; or he (licensee) or a person deriving title under him remains in possession of the land after the expiration or other lawful determination of the licence, the Council must serve on the licensee a notice specifying the fees or royalties in arrears, or the condition broken, or the unlawful possession, as the case may be, and the Council may, at any time after 30 days from the date of service of the notice bring proceedings for the recovery of the land in the Resident Magistrate's Court subject to the value of the land. In this case there was no dispute that M'Mbijiwe had paid the rent (if it were a licence the fees or royalties as the case may be); there was no evidence of breach of any condition nor was there any evidence that he had remained in unlawful possession, and, if any of the foregoing events which lead to determination of a licence or a lease had occurred, the Council never brought proceedings for the recovery of the land in question, which it had to do before the land could be free for reallocation. Failure to turn up at the Council's office to be shown the pegs of one's plot as requested in the letter of indication is not one of the causes specified under Section 59(1) and (5) of the Act for determining a licence. So whichever way one treats M'Mbijiwe's interest, that is, whether one calls it a lease, which I do, or a licence it could not be determined except in accordance with the provisions of the Act which required the Council to determine the interest only by a Court order. The Council having accepted and received payment for the plot by way of rent from M'Mbijiwe could not turn round and say that he had no interest in the plot.

As to the exclusive possession of this type of plot one must be presumed to be in possession when one pays the sums demanded by the council and is given the plot number. It is not necessary to live on the land. I do not think the phrase - necessarily means continuous physical possession and occupation. The respondent, was in my opinion, entitled to and in possession of the plot and he visited it for that is why he discovered the appellant's activities on the land and took an early action. I am satisfied his possession was exclusive. He was entitled to sue for trespass.

What of the appellants? The plot they were granted was not available for allocation since 1967 when it was granted to the respondent. The council had no plot No 58 at Nkubu Market to allocate and it could not allocate what it did not have. This may explain the fact that although the appellants exhibited the letter of indication requesting them to report at the Council's office and be shown the plot allocated to them, they neither spoke of nor exhibited in their evidence any Letter of Allocation granting to them the plot, which the respondent exhibited. The alleged allocation to the appellants is of no effect in law. On the other hand the respondent's interest whether as a licensee, which he is not, or a lessee, which I say he is, was never determined by the Council, and he remains the legal owner of plot No 58, Nkubu Market.

This appeal, for the reasons I have given, must fail and I would dismiss it with costs.

**24th May 1983**