

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYERI**

**ELC APPEAL NO. E004 OF 2023**

**FRANCIS KARIITHI WAMBU.....APPELLANT**

**-VERSUS-**

**PATRICK MAINA KINYUA.....1<sup>ST</sup> RESPONDENT**

**WAIRIMU MURIUKI.....2<sup>ND</sup> RESPONDENT**

**JOSEPH KINARO MAINA.....3<sup>RD</sup> RESPONDENT**

**JANE WANGUI KINARO.....4<sup>TH</sup> RESPONDENT**

*(Being an appeal against the judgment delivered on 27<sup>th</sup> February 2023 by the Honourable E. Kanyiri, Principal Magistrate in Karatina SPM Court, ELC Case No.41 of 2018(as consolidated with Karatina SPM ELC No.77 of 2018)*

**JUDGEMENT**

1. Before the Court is an Appeal against the judgment delivered on 27<sup>th</sup> February 2023 by the Honourable E. Kanyiri, Principal Magistrate in Karatina SPM Court in **ELC Case No.41 of 2018** (as consolidated with Karatina **SPM ELC No.77 of 2018**).
2. The Grounds of Appeal contained in the Memorandum of Appeal dated 20<sup>th</sup> March 2023 are;
  - i) **That the Learned Trial Magistrate erred in law and fact in holding that the 1<sup>st</sup> Respondent had proved a case on damages sought on a balance of probabilities which was against the weight of the evidence before the court and the applicable law and thereby arrived at a wrong decision.**
  - ii) **That the Learned Trial Magistrate erred in law and fact in holding that the Appellant did not deny that there was a valid court order in existence, barring him from dealing with the property Title No.Konyu/Barich/4211 despite the same having not been an issue pleaded by the 1<sup>st</sup> Respondent/Plaintiff and a rebuttal expected from the Appellant/1<sup>st</sup> Defendant,**

**notwithstanding the Appellant had in evidence canvased he was not aware nor served with a court order of the nature claimed and thereby arrived at a wrong decision.**

- iii) That the Learned Trial Magistrate erred in law and fact in holding the Appellant was in disobedience or contempt of a court order and proceeded to penalize him with damages thereby leading to a miscarriage of justice.**
- iv) That the Learned Trial Magistrate erred in law and fact in awarding damages to the 1<sup>st</sup> Respondent for demolition in the sum of Kshs.535,000= which had not been specifically pleaded, particularized and or proved as statutory required and thereby arrived at a wrong decision.**
- v) That the Learned Trial Magistrate erred in law and fact in awarding benefits in form of damages to the 1<sup>st</sup> Respondent, a wrong doer, being a trespasser in the premises, when ignoring the same was an unlawful act and thereby arrived at a wrong decision.**
- vi) That the Learned Trial Magistrate erred in law and fact in failing to appreciate that the parties are bound by their pleadings especially, the 1<sup>st</sup> Respondent /Plaintiff had not pleaded any contravention of a court order by the Appellant/1<sup>st</sup> Defendant and therefore could not shift his case from that set out in his Plaint and replace it with what was in his witness statement and thereby arrived at a wrong decision.**
- vii) That the Learned Trial Magistrate erred in law and fact in entertaining an alleged issue of disobedience of a Court Order, and granting a relief thereof, which had not been sought and thereby arrived at a wrong decision.**
- viii) That the Learned Trial Magistrate erred in law and fact in purporting to make a determination on disobedience of a Court Order, allegedly by the Appellant, which was not an issue which had been pleaded by the 1<sup>st</sup> Respondent/Plaintiff and therefore**

could not form a basis of determination by the court and thereby arrived at a wrong decision.

- ix) That the Learned Trial Magistrate erred in law and fact in shifting the burden of proof to the Appellant when in fact he had no such obligation and thereby arrived at a wrong decision.
- x) That the Learned Trial Magistrate erred in law in failing to evaluate the evidence tendered by the Appellant nor take cognizance of the Appellant's submissions and the case laws put to her and thereby arrived at a wrong decision.

3. The Appellant prays for the following orders:

- a) This Appeal be allowed.
- b) The judgment dated 27<sup>th</sup> February 2023 allowing the relief sought by the 1<sup>st</sup> Respondent for the payment of damages in the sum of Ksh.535,000/= be quashed and set aside and in place thereof, be substituted with an order dismissing the 1<sup>st</sup> Respondent/Plaintiff's suit with costs to the 1<sup>st</sup> Defendant/Appellant.
- c) The Appellant be awarded the costs of this Appeal.

#### Summary of the case before the trial Court

4. The suit before the trial court comprised of a number of cases:

A) Nyeri ELC case No.178 of 2014, Francis Kariithi Wambu versus Maina Daudi. In the said suit, the Plaintiff sought "An order that the Defendant vacates Land Parcel No.KONYU/BARICHO/4211 belonging to the Plaintiff and in default the defendant be evicted from the said parcel of land"

B) Nyeri ELC Case No.150 of 2014(O.S) Patrick Maina Kinyua versus Wairimu Muriuki, Joseph Kinaro Maina and Jane Wangui Kinaro

The Applicant in an Originating Summons dated 7th July 2014 sought orders -

- i) *That it be declared that the 1<sup>st</sup> Respondent Wairimu Muriuki created a trust for sale over 0.1 HA out of land LR. KONYU/BARICHO/4162 in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, Joseph Kinaro Maina and Jane Wanjiru Kinaro.*
- ii) *That it be declared that the sale of 0.1 ha out of parcel of land L.R. NO, KONYU/BARICHO/4162 BY THE 2<sup>ND</sup> AND 3<sup>RD</sup> Respondents to the Applicant vide the sale agreement dated 5<sup>th</sup> July 2011 resulted in the 1<sup>st</sup> Respondent holding the sold property in trust for the Applicant.*
- iii) *That the trust so declared be determined in favour of the Applicant be ordering transfer of the 0.1 ha of the 1<sup>st</sup> Respondent to the Applicant.*
- iv) *That alternatively and without prejudice to the aforesaid, the Respondents be ordered to refund to the Applicant the purchase price at Kshs 520,000/= and value of developments on the suit land.*
- C) The above two suits were, by an order of the ELC Court issued on 8<sup>th</sup> October 2018 transferred to the Karatina SPM's Court for hearing and determination. In Karatina the two suits were consolidated and given the number Karatina Principal Magistrate's Court CMELC Case No.77 of 2018.
- D) Karatina Principal Magistrate's Court **CMELC Case 41 of 2018 Maina versus Francis Kariithi Wambu.** In this suit, vide Complaint dated 12<sup>th</sup> June 2018 the Plaintiff claimed ownership of the rental premises situated in the parcel of land LR. NO. KONYU/BARICHO/4211, comprising nineteen (19) residential rental units and other necessary amenities which the defendant demolished causing him loss. He prayed for Damages and mesne profits in the form of rental income from June 2018 to the date of judgment.
- E) The above Case number 41 of 2018 was then consolidated with Karatina SPM's court case number 77 of 2018 with the lead file being 77 of 2018 and the matter was set down for hearing.

### Hearing of the Suit

5. During the hearing, **PW 1, Patrick Maina Kinyua** the Plaintiff, testified that Wairimu Muriuki (2<sup>nd</sup> Respondent (deceased) sold to him the suit land Konyu/Baricho/4211 where he constructed houses. That the 3<sup>rd</sup> Respondent Joseph Kinaro Maina is a grandchild to Wairimu while Jane (4<sup>th</sup> Respondent) is the mother to the 3<sup>rd</sup> Respondent herein.
6. The Plaintiff confirmed that they entered into an agreement for sale of land in 2014 for a consideration of Kshs.400, 000/=. That he constructed houses for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, and he was allowed to construct for himself 19 houses from which he got rental income at the rate of Kshs.1, 500/= per room making a monthly income of Kshs.27, 000. Later on, the Appellant and the Respondents herein complained that the land did not belong to him and a letter of eviction was sent to the tenants. He reported the matter to the police and informed his lawyer, who moved to Court through Nyeri High Court case 150 of 2014, where he obtained status quo orders.
7. Despite the Court orders, the Plaintiff stated that from 18<sup>th</sup> May 2018, the Defendants started demolishing his rental premises without any notice to him or his tenants and as a result he filed a suit Karatina MCELC 41 of 2018 claiming Ksh.534, 000/= in damages. Damages were assessed by a valuer. In his witness statement, the Plaintiff stated that he constructed the rental houses on the suit property in 2011, but later learnt that the Defendant who is the Appellant herein had, without his knowledge, been registered as proprietor of the land on or about 4<sup>th</sup> July 2014.
8. On cross-examination, the Plaintiff stated that when he conducted a search on the suit property, it was in Muriuki Gathirimu's name, and that the 2<sup>nd</sup> Respondent herein was not indicated as the vendor. That they informed the lawyer that the owner was deceased and they were awaiting succession so that he could be given his share of the land.

9. **DW 1 Francis Kariithi Wambu**, the 1<sup>st</sup> Defendant and the Appellant herein testified, adopting his witness statement dated 29/5/2019 as evidence as well as his bundle of documents dated 5/10/2018. He stated that between 21/10/2011 and 7/7/2014, he purchased from one Wairimu Muriuki, the 2<sup>nd</sup> Respondent herein a piece of land measuring approximately 0.1012 Ha which was excised out of Title No. Konyu/Baricho/55. The resultant title was L.R Konyu/Baricho/4211. After paying full consideration he was registered as proprietor.
10. He testified that on the land were dilapidated and uninhabitable shanties, which belonged to the vendor which he bought together with the land. That since nobody was residing in the houses, some squatters trespassed and entered into the premises where they occupied two of the rooms and he demanded that they leave. They left and he thereafter pulled down the said structures and fenced the land.
11. The 1<sup>st</sup> Defendant/Appellant herein asserted that the Plaintiff/1<sup>st</sup> Respondent herein had no proprietary right over the property Title Konyu/Baricho/4211, which rightfully belongs to him and that if the plaintiff entered the suit property, he can only be a wrongful trespasser. He also denied being served with a court order restricting him on the use of his land.
12. **DW 2 Mary Wambui Karuri** testified, adopting her witness statement dated 1/2/22. She stated that she was representing her grandmother, Wairimu Muriuki as her legal representative since she is now deceased. She confirmed that her grandmother sold the suit land to the Appellant herein, and she witnessed the agreement.
13. She adopted the witness statement of Wairimu Muriuki (Deceased) dated 29<sup>th</sup> May 2019 filed in CMELC 41 Of 2018.
14. In the said witness statement, Wairimu Muriuki (Deceased) stated that she inherited from her husband Muriuki Gathirimu (Deceased), the property known as LR Konyu/Baricho/55. The land was sub-divided into 3 equal

portions and she was the beneficiary of 0.5 acres known as LR Konyu/Baricho/4162.

15. On or around 21/10/2011, to finance the Succession Cause and to help her secure a title deed to her portion of the land, she sold a portion of her land measuring 0.56Ha for a consideration of Ksh.750,000/= to Francis Kariithi Wambu, the Appellant herein, which he paid. Further, on or around 7<sup>th</sup> July 2014, she entered into a further agreement for the sale of a portion measuring 0.0452Ha together with the developments thereon, for a consideration of Kshs.680,000/=, making the land, together with the previous land, a total of 0.1012Ha the entire portion was known as LR Konyu/Baricho/4211. They attended the Land Control Board and the Appellant was registered as the absolute owner of the land.
16. She denied entering into an agreement for the sale of LR Konyu/Baricho/4211 with Patrick Maina Kinyua, the 1<sup>st</sup> Respondent herein or allowing him to enter into her land. She stated that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein had no capacity to grant any license to pass or enter her land or transfer any interest or title thereof.
17. **DW 3 Jane Wangui Kinaru** adopted her witness statement dated 9/1/2016 as her evidence in chief, in which she denied selling the suit land to the 1<sup>st</sup> Respondent herein, stating that she had no locus to sell it on behalf of the 2<sup>nd</sup> Respondent, Wairimu Muriuki. On cross-examination, the witness admitted to being in a long romantic relationship with the Plaintiff, where he moved in as her husband and built her a house. She denied getting Ksh.400,000/= cash from him for the sale of land, but acknowledged that the agreement was brought to her to sign and that the Plaintiff had 19 tenants, from whom he would sometimes collect rent even though he built the houses for her.
18. She however, denied knowledge of the sale agreement dated 5/7/2011. She acknowledged witnessing the agreements dated 21/10/2011 and 7/7/2018

between the Plaintiff and the 2<sup>nd</sup> Respondent and stated that the Plaintiff kick started the succession process.

19. **DW 4 Joseph Kinaro Maina** adopted his witness statement dated 15/7/2014 which was a reply to the Originating Summons as his evidence in chief. Therein he denied that the 2<sup>nd</sup> Respondent herein ever gave him a portion of the suit land and also denied selling a portion of it to the Plaintiff.
20. He also stated that the agreement mentioned in the originating summons was drawn by the plaintiff and he was forced to sign it by his mother, since they were living together as husband and wife with the applicant. He denied receiving any money for the same. On cross-examination, he denied signing the agreement by the Plaintiff and dismissed it as fake.
21. The Trial Court delivered judgment on 26<sup>th</sup> February 2023, finding that the suit land initially belonged to the 2<sup>nd</sup> Defendant's husband and later to her. The Court found that the 3<sup>rd</sup> and 4<sup>th</sup> defendants did not have legal right to transact the agreement of sale dated 5<sup>th</sup> July 2011. The Court also found that since the Plaintiff did not challenge the manner in which the defendant's title to the suit land had been acquired, then the title as per the law remains absolute and indefeasible.
22. On the part of the Appellant who was the 1<sup>st</sup> Defendant before the Trial Court, the Trial Court found that he did not deny that he chased some squatters away from the suit land and demolished the structures therein and fenced the land against the backdrop of a valid court order which had never been vacated. Therefore, the trial court made orders maintaining the 1<sup>st</sup> Defendant as the legal and rightful proprietor of L.R NO.KONYU BARICHO/4211.
23. Further, the Trial Magistrate made an order that the Appellant herein shall pay the Plaintiff damages of Ksh.535,000/=being damages for the demolition of the 19 rental houses. It is this order which the Appellant herein seeks an appeal against.

### **Appellant's Written Submissions**

24. Counsel for the Appellant submitted that the judgment of the trial court was faulty in the award of damages to the 1<sup>st</sup> Respondent/Plaintiff in the sum of Ksh.535, 000/=. He submitted that this was an award of special damages but had not been specifically pleaded, particularized nor proven as statutorily required. Counsel further highlighted that there is no schedule attached to the Plaint as alleged. On this point, Counsel relied on the following authorities: **Ouma v. Nairobi City Council(1976)KLR 304, Swalleh C. Kariuki and another vs Violet Omiso Okuyu(2021)eKLR**
25. It was submitted that if there was any loss suffered by the 1<sup>st</sup> Respondent/Plaintiff, he could have quantified the same and brought the calculation before the Honourable Trial Court for compensation.
26. On grounds 3 and 5, the Appellant faults the judgment of the trial court as being punitive, taking into account that the Appellant had not been found to be in Contempt of Court and the court's discretion did not meet the legal threshold for such an award, relying on the holding of Mativo J in the case of **Nairobi Misc Application No.573 of 2017: Republic vs. Kenya University Ex parte Losem Naomi Chepkemoi** on the elements necessary to prove contempt of Court.
27. It is the Appellant's submission that there is no evidence that the Plaintiff had filed a suit against the Appellant seeking to bar him from dealing with the suit land Title No.Konyo/Baricho/4211, noting that in Nyeri HCCC No.150 of 2011(OS), the Appellant was not a party to the suit. That no process server was called to testify on service of the court order dated 7/7/2014 upon the Appellant. It was highlighted that the Appellant confirmed that no court order was served on him on re-examination during the trial.

28. On the issue of personal service of a court order being crucial in contempt of court proceedings, Counsel relied on Lenaola J's decision (as he then was) in **High Court Misc. Civil Application No.389 of 2004:Kariuki and 2 others v. Minister for Gender, Culture & Social Services & 2 others**, submitting that the Trial Court should not have inferred knowledge of the said court order when there was no personal service.
29. Counsel submitted that contempt of Court has a higher threshold of proof that in normal civil cases, relying on the authority in **Judicial Review Misc. Application No.9 of 2019; Republic vs Unviversity of Nairobi & 2 others Ex parte Mwangi Emma Wahito and another**, which was not met before the trial court before he was penalized with damages of Ksh.535,000.
30. On grounds 6, 7 and 8, the Appellant submitted that parties are bound by their pleadings and that the 1<sup>st</sup> Respondent/Plaintiff and the 1<sup>st</sup> Respondent had not pleaded any issue of contravention of a court order and had not sought for specific damages assessed at Ksh.534,000/= in the plaint and had also not sought for general damages.
31. By finding that the Appellant should pay the 1<sup>st</sup> Respondent damages of Ksh.534,000/=, Counsel submitted that this was akin to condemning him with contempt of court before being heard on the issue, where there was no application made nor the issue pleaded.
32. It is also their position that submissions are not pleadings, and the fact that the Plaintiff mentioned the assessed damages amount therein does not mean that the matter was properly before the trial court.

#### **1<sup>st</sup> Respondent's Submissions**

33. Counsel for the 1<sup>st</sup> Respondent began by submitting on grounds 1, 2, 3, 6, 7 and 8 of the Appeal. He quoted from Section 5 of the Judicature Act as read together with Section 29 of the Environment and Land Court Act as the guiding laws on contempt of court after the Contempt of Court Act was declared unconstitutional. They also quoted Order 40 Rule 3(1) of the Civil

Procedure Rules on the punishment for disobedience of an injunction by attachment of property and detention in prison for a term not exceeding six months.

34. Counsel submits that in the case ELC (OS) 150/2014 through an application under Certificate of Urgency dated 7.7.2014, an order was issued on the same day restricting the respondents from alienating the suit land or interfering with the 1<sup>st</sup> respondent's property pending hearing and determination of the application. That despite the appellant knowing of and having been served with the court order as evidenced by his testimony upon cross examination in his own words, he said, "**I was served with a court order to stop me from interfering with the shamba, but I already had the title.**" the Appellant went ahead to interfere with the suit land by issuing eviction notices to tenants as well as demolishing the 1<sup>st</sup> respondent's rental houses, forcing the 1<sup>st</sup> Respondent herein to file an application for contempt dated 15.5.2018 as well as a new suit against the appellant in Karatina C.M ELC 41/2018, seeking for damages for destruction of the rental property as well as loss of income.
35. Counsel relied on the ingredients of contempt as given in the authority of **Samuel M. N. Maweu & others v National Land Commission (2020) eKLR**, submitting that the appellant willfully disobeyed the court orders in the pretext that he already had the title to the suit land. It is therefore their submission that the trial court was not in error in considering the issue of the court order in its determination, the same having been in issue in ELC (OS) 150/2014.
36. Submitting on grounds 4, 5, 9 and 10 of the memorandum of appeal, the 1<sup>st</sup> respondent relied on the case of **Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003**, on the authority that special damages must be specifically pleaded and proven, in Karatina CM ELC 41/2018, the 1<sup>st</sup> Respondent particularized loss/damages

under paragraph 5 of the Plaint. That they proceeded to attach a valuation report from Rwingo Valuers dated 6th June 2018 which assessed the total damage caused at Ksh.534,000/= and loss of rental income at Ksh.27,000 per month.

37. Counsel concluded that that the trial court entered a proper finding as guided by the evidence presented in court, the 1<sup>st</sup> respondent having particularized his losses in his pleadings which arose from the appellant disobeying the court orders of 7.7.2014 despite having been in the knowledge of it, and urged this Court to uphold the judgment of the trial court

### **Analysis and Determination**

38. The role of a first appellate court was stated in the Court of Appeal case of **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR**, as follows:

*“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”*

39. The Court has considered the Grounds of Appeal contained in the Memorandum of Appeal, the record of appeal and submissions by Counsel for the parties and is of the view that the Grounds of Appeal can be summarized as follows:

- 1) **Grounds 2, 3, 6, 7 and 8: Whether the trial court erred in finding that the Appellant demolished the 1<sup>st</sup> Respondents’ houses in contravention of a valid court order barring the said act.**
  
- 2) **Grounds 1, 2, 4 and 6: Whether damages awarded by the trial court were special damages and were required to be specifically pleaded and strictly proved and whether the trial court erred in making the award.**

- 3) **Ground 5: Whether the trial court erred in awarding damages to a trespasser.**
- 4) **Ground 8 and 9: Whether the trial court erred in shifting the burden of proof to the Appellant and whether the court considered the evidence and submissions of the Appellant in arriving at its decision.**

**1) Whether the trial court erred in finding that the Appellant demolished the 1<sup>st</sup> Respondents' houses in contravention of a valid court order.**

40. The Appellant argued that he was wrongly found guilty of contempt of court by the Trial Court while the issue was not specifically pleaded and proven, even though it formed the basis for condemning him to pay damages. The trial court found that the demolition of the 1<sup>st</sup> Respondent's houses was made against a backdrop of a valid court order thus it was illegal, null and not justified.
41. In reply to this issue, the 1<sup>st</sup> Respondent relied on Section 5 of the Judicature Act as read with Section 29 of the Environment and Land Court Act as the guiding laws on contempt of court. He also relied on Order 40 Rule 3(1) of the Civil Procedure Rules on the punishment for disobedience of an order of injunction.
42. The Court Order under consideration emanated from Nyeri ELC suit no. 150/2014 (OS). The 1<sup>st</sup> Respondent herein filed an application dated 7<sup>th</sup> July 2014 under Order 40 Rule 1 of the Civil Procedure Rules seeking an injunction against the respondents restraining them from alienating or interfering with LR No. KONYU/BARICHO/4162 pending hearing and determination of the suit. The Court notes that the Appellant herein was not a party to the said suit. The Respondents in the said suit were Wairimu Muriuki, Joseph Kinaro Maina and Jane Wangui Kinaro the 2<sup>nd</sup> – 4<sup>th</sup> Respondents herein. They are the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents in this appeal. Interim orders were granted on the date of filing the application and

confirmed by consent of Counsel for the parties in that suit on 26<sup>th</sup> January 2015.

43. In the course of the proceedings in the said ELC Case No.150/2014(OS), the 1<sup>st</sup> Respondent filed an application dated 15<sup>th</sup> May 2018 where the name of the Appellant herein was inserted as a Respondent. He sought orders *inter alia* all the 4 respondents had violated the court order and requested the court to further restrain them from alienating the suit land and to include the Appellant herein.
44. The court record shows that this application was never heard but was by consent of the Counsels withdrawn on 18<sup>th</sup> June 2018. The court has perused the entire record of appeal and has not found any indication that the Appellant was ever joined as a party to the suit150/2014 (OS).
45. The court finds that the orders made in that suit were not directed at, or addressed to the Appellant who was not a party to the suit. Further, the 1<sup>st</sup> Respondent did not show and the trial court did not find that the Appellant was an agent or a servant of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein. The evidence on record shows that the Appellant was issued with the title deed to the suit land on 4<sup>th</sup> July 2014 a few days before the suit ELC 150/2014 was filed. There is no reason why he was not joined as a party to the suit.
46. The Appellant had substantive rights and interests to the suit land as the registered owner and not as an agent or servant of the person from whom he had purchased the land. **Section 24 (1) of the Land Registration Act** defines the interests a person is conferred by registration of land.

***“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and***

**Section 25 (1)** provides details of the rights conferred to the proprietor of land and states that;

*The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—*

47. The Appellant's proprietary rights in the suit land were not curtailed by the court order since the persons enjoined were the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein. Indeed the court is of the view that the said Respondents agreed to confirm the order of injunction by consent probably because they no longer had any interests in the land.
48. Ancillary to the issue under consideration herein, is the question of whether the 1<sup>st</sup> Respondent herein followed the correct procedure in filing a separate suit for compensation for demolition of the suit houses on the ground that the said demolition was in contravention of a court order. This court is of the view that the proper procedure the 1<sup>st</sup> Respondent ought to have followed was filing an application citing the Respondents for contempt of court within the same suit where the order of injunction was issued.
49. This view is supported by the provisions of **Order 40 Rule 3** of the **Civil Procedure Rules** which states that;
- (1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release. 97 Civil Procedure Rules (Legal Notice 151 of 2010) Kenya***
- (2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds***

*the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.*

*(3) An application under this rule shall be made by notice of motion in the same suit.*

50. The foregoing rule provides that an application for contempt of court under Order 40 shall be made in the same suit. Further, the rule provides that the court hearing an application for contempt of court can award such compensation as it thinks fit and order that the property of the person who is in breach be attached and sold.

51. Further to this, if an application citing the Respondents for contempt of court had been properly made, the court would have considered all factors relevant in determining whether an alleged contemnor is guilty of contempt of court or not. This would have included issues of whether or not there was service of the order. Lenaola J (as he then was) in the case of **Kariuki & 2 others v Minister for Gender, Sports, Culture & Social Services & 2 others [2004] eKLR** quoted thus:

*Briefly the effect of these provisions is that as a general rule, no order of court requiring a person to do or restrain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be indorsed with a notice informing the person on whom the order is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it.”*

52. Further, the procedure for dealing with an application for contempt of court was restated when the Contempt of Court Act was declared unconstitutional by the Court in the case of **Kenya Human Rights Commission v Attorney General & another [2018] eKLR** . Since then the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed as quoted above. Under Rule 81.4 of

the *English Civil Procedure Rules (Amendment No. 3) Rules, 2020* provides in details for the requirements of a contempt application.

53. This court is of the view that the trial court proceeded with determination of the issue of whether or not the 1<sup>st</sup> Respondent was entitled to an award of damages for demolition of his houses as though the court was hearing an application for contempt of court. The trial court stated that ***“court orders are not to be taken as suggestions by litigants and must be complied with”*** The trial court cited the case of **Mike Maina Kamau versus The Attorney General (2017) Eklr.**
54. This court agrees with the trial court’s view on the grave consequences of disobedience and noncompliance with court orders. However, this court finds that the trial court erred in treating the matter before it as though it was an application for contempt of court which was in clear contravention of the procedure provided under Order 40 Rule 3 of the Civil Procedure Rules and other provisions of the law.
55. Without following the correct procedure in hearing an application for alleged contempt of court by the Appellant, the Trial Court did not establish the elements required to be met before proceeding to find the Appellant as having been in contravention of the court order. The court is thus of the opinion that the trial court erred in this regard.
56. The Appellant further complained that the fact of violation of a valid court order was not pleaded in any pleadings subject matter of the consolidated suits before the trial court.
57. The court has looked at all the pleadings and noted that in Karatina PMCC No. 41/2018, the Plaintiff pleaded at Paragraph 4 of the Plaint as follows:
- “The Plaintiff avers that without lawful cause or jurisdiction and illegally, the Defendant on diverse dates between 18<sup>th</sup> May 2018 and 29<sup>th</sup> May 2018 demolished the suit rental premises”***

58. The Court considers the above averments in the Plaintiff as adequate pleading noting that the details of the illegality, lack of lawful cause, unlawfulness and lack of jurisdiction are explained in the Plaintiff's witness statement filed together with the Plaintiff. In the witness statement and the evidence adduced before court, the Plaintiff gave details of the Court Order. Further, the Defendant, in his witness statement denied having been served with the court order.

***2) Whether damages awarded by the trial court were special damages and were required to be specifically pleaded and strictly proved and whether the trial court erred in making the award.***

59. On this issue the court has looked at Karatina Principal Magistrate's Court CMELC Case 41 of 2018, where the 1<sup>st</sup> Respondent herein pleaded in his Plaintiff that as a result of demolition of the suit rental premises, he suffered loss details of which are in the report and valuation dated 6<sup>th</sup> June 2018. He claimed that the said valuation report was attached to the Plaintiff and formed a schedule to the claim.

60. The Court has looked at the Plaintiff which states at Paragraph 5 ***"Owing to the said acts by the Defendants, the Plaintiff avers that he has suffered and continue to suffer loss – Particulars of Los/Damages***

***a) Destruction of the suit rental premises with loss as per the Report and valuation in respect thereof dated 6<sup>th</sup> June 2018 attached hereto and forming a schedule to the claim***

***b) Loss of rental income as assessed in the Report and Valuation in respect thereof dated 6<sup>th</sup> June 2018 attached hereto and forming a schedule to the claim at the rate of Kshs.27,000 per month"***

61. The court notes that there was no schedule to the Plaintiff. The Valuation Report was attached to the Plaintiff's List of Documents dated 12<sup>th</sup> June 2018.

62. The Applicant claimed that the particulars of this loss amounted to special damages and the same ought to have been particularized in the Plea and proved strictly. He relied on the case of Ouma Vs. NCC (Supra) Which stated as follows –

***“Here it simply means that for special damages to be awarded they must be pleaded and proved.***

***Thus for the Plaintiff to succeed on a claim of special damages, he must plead it with sufficient particulars and must also prove it by evidence.”***

The Appellants’ Counsel argued that the sum awarded was not pleaded as required by law.

63. The Court has considered the provisions of **Order 4, Rule 2** of the **Civil Procedure Rules** which provide for particulars that are to be contained in a money suit stating that:

***(1) Where the plaintiff seeks the recovery of money, the plaintiff shall state the precise amount claimed, except where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant.***

64. It is trite in law that special damages must be specifically pleaded and proven. A claim for special damages is made to recover specific, quantifiable financial losses that a claimant has incurred as a direct result of another party's actions. Unlike general damages, which are awarded for subjective losses like pain and suffering, special damages must be specifically itemized, pleaded in court documents, and strictly proven with supporting evidence such as receipts.

65. In the Court’s view, what the 1<sup>st</sup> Respondent was claiming were special damages for property damaged and/or demolished as a result of what he considered to be the Appellant’s acts. The 1<sup>st</sup> Respondent filed the Report

and Valuation by Rwingo Valuers dated 6/5/2018 seeking compensation of structural developments on Plot No.Konyu/Baricho/4211. The sum of Kshs.534,000= was stated to be for ***“the fair Depreciated Capital Cost of the construction of the structural developments on Plot No.4211 prior to their demolition (which took place between 18<sup>th</sup> – 29<sup>th</sup> May) for compensation purposes.”*** The Valuer also assessed loss of monthly rental income from the demolished 19 single rental rooms at Kshs.27,000= with each room being rented at Kshs.1,500= per month. From the above, the specific amount claimed by the 1<sup>st</sup> Respondent was clearly known to him prior to filing the suit for compensation but was not stated in the Plaint.

66. Counsel for the 1<sup>st</sup> Respondent relied on the authority of **Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003**, in which **Kimaru, J** (as he then was) held that:

***“In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...”***

67. In the Court’s view, attaching the Valuation Report to the List of Documents does not satisfy the requirement to specifically plead special damages. **Order 3, Rule 2** of the **Civil Procedure Rules** provides for documents to accompany a suit and states that –

***All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—***

***(d) copies of documents to be relied on at the trial including a demand letter before action:***

68. The Court is satisfied that the 1<sup>st</sup> Respondent's claim was for special damages for financial loss that had already been incurred prior to filing the suit and had been quantified. The amount ought to have been specifically pleaded and stated in the Plaint. On this issue the court finds that the trial court erred in making an award of special damages without the same having been specifically pleaded.
69. Another related issue that arose in the Grounds of Appeal and in submissions was whether the Trial Magistrate erred in not considering that parties are bound by their pleadings.
70. It is trite in law that parties to a suit are bound by their pleadings. This means that the case must be decided based on the facts and claims presented in the pleadings, and parties cannot introduce new issues or evidence that contradicts their original pleadings. Adherence to pleadings ensures a fair process, allowing each side to prepare and know the case they need to meet, thereby avoiding surprise. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as follows:

*11.It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR.*

71. In The Supreme Court of Kenya At Nairobi (*Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ*) *Petition 15(E022) OF 2021 -Evans*

**Muriuki Muthuuri & Others Versus Attorney General & Others**, the court stated as hereunder;

*[48] The short answer to the first question regarding the jurisdiction of the ELRC to entertain the dispute is that, apart from the fact that the respondents have not cross-appealed this issue, we note that this question is being introduced for the first time before us. It was neither raised in the ELRC nor determined by the Court of Appeal. The general rule is that parties are bound by their pleadings. However, a court may make a determination on an unpleaded issue where in the course of the hearing, parties have canvassed the issue and left it to the court to determine. See *Odd Jobs v. Mubia* [1970] EA 476. This was not the case here. We cannot, in those circumstances, consider or determine the question in vacuo without the benefit of the opinions of the learned Judges of the two superior courts below. Both objections must therefore fail”*

3) **Whether the trial court erred in awarding damages to a trespasser.**

72. The trial court found on the issue “***Who is the rightful owner of L.R. NO. KONYU/BARICHO/4211,***” that the Appellant herein, is the legal and rightful proprietor of the suit land. This finding was not challenged on appeal and thus the Appellant’s title remains absolute and indefeasible as per section 26 of the Land Registration Act. According to the evidence adduced in court, the Appellant was issued with the title deed to the land on 4<sup>th</sup> July 2014 while the demolition is said to have occurred between 18<sup>th</sup> and 29<sup>th</sup> May 2028.

73. The Court of Appeal sitting at Eldoret elaborated on the ingredients of the tort of trespass in the case of **Municipal Council of Eldoret v Titus Gatitu Njau [2020] eKLR** cited with approval the following authorities:

*In M’Mukanya v M’Mbijiwe (1984) KLR 761, the ingredients of the tort of trespass were revisited by this Court and restated as follows:*

*“trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See Thomson v Ward, (1953) 2QB 153.”*

*Further, in Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition at page 428 states as follows:*

*“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession.”*

74. The court is of the view that since the Appellant was found to be the lawful owner of the suit land having been issued with a title deed, he had proved that he had a right to possession of the land.

75. The law defines land under **Article 260** of the **Constitution of Kenya** and restates the same definition under the **Land Act** and the **Land Registration Act** as;

*“land” includes— (a) the surface of the earth and the subsurface rock; 159 Constitution of Kenya, 2010 (b) any body of water on or under the surface; (c) marine waters in the territorial sea and exclusive economic zone; (d) natural resources completely contained on or under the surface; and (e) the air space above the surface;*

76. In the Court's view the 1<sup>st</sup> Respondent did not prove that he had a right to maintain possession and/or ownership of the structures on the suit land while the Appellant held legal ownership of the land itself.
77. Notwithstanding the finding that the 1<sup>st</sup> Respondent was not entitled to retain possession of the structures within the land, the said respondent was entitled to protection under the law. Section 152 (B) of the Land Act states that an unlawful occupant of land shall only be evicted in accordance with that Act.
78. **Section 152 E** provides for issuance of an eviction Notice to unlawful occupiers of private land and states that:

***(1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.***

***(2) The notice under subsection (1) shall—***

***(a) be in writing and in a national and official language;***

***(b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;***

***(c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and***

***(d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.***

79. The Appellant herein claimed that he purchased the structures on the suit land which had belonged to the Vendor, the 2<sup>nd</sup> Respondent. However, on

this question the court agrees with the trial court that the structures were constructed by the 1<sup>st</sup> Respondent and not by the 2<sup>nd</sup> Respondent. The court stated that –

*“The other defence witness also admitted that the Plaintiff had erected residential houses. Of more importance is the testimony of the 3<sup>rd</sup> Defence witness who had cohabited with the Plaintiff and confirmed that the Plaintiff had built 19 residential houses which she collected rent and later the Plaintiff declined to offer the rent.”*

80. From the foregoing, it is clear that even a trespasser is entitled to protection of the law when it becomes necessary to remove them from the land they unlawfully occupy. The 1<sup>st</sup> Respondent was therefore entitled to recourse before the court if the removal from the suit land did not follow the procedure set out in the law.
81. The 1<sup>st</sup> Respondent approached the court with his grievance however, as earlier found by this court, he failed to specifically plead the amount of compensation he sought for the court’s consideration despite the fact that the amount was known to him at the time when he filed the suit or even at the time of hearing.
82. The exercise of judicial discretion in an appeal was discussed in **Price and Another v Hilder [1996] KLR 95** quoted by Aburili J in the case of **Ojwang v Kara & another (Civil Appeal E097 of 2023) [2024] KEHC 3131 (KLR) (28 March 2024) (Judgment)** as follows:

*“In considering the exercise of judicial discretion, as to whether or not to set aside a Judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment. The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters*

*on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision.”*

83. In this particular case the court has considered all the facts and circumstances of this case and the merits thereof and finds it is a proper case to interfere with the award made by the trial court.

**Who will bear the Cost of the Suit?**

84. On the question of who bears the costs of the suit before the trial court and the appeal before this court, the court has considered the provisions of **Section 27** of the **Civil Procedure Act**, that costs of a suit are at the discretion of the court. The court found in this appeal as did the trial court that the structures on the land were constructed by the 1<sup>st</sup> Respondent and were demolished without following the procedure laid down in law. The award made by the trial court was quashed on the ground that the same was not specifically pleaded as provided by law. In the above circumstance, the court is of the view that in the interests of justice each party ought to bear their own costs of the suit before the trial court and the appeal herein.

**Court's Decision**

85. The final decision of the court is that the appeal herein has merit and the following orders are made;
- (1) **The Appeal is allowed.**
  - (2) **The Judgment of the trial court Honourable E. Kanyiri, Principal Magistrate SPM, dated 27<sup>th</sup> February 2023, is hereby set aside and in place thereof, is substituted with an order dismissing the 1<sup>st</sup> Respondent/Plaintiff's suit with costs awarded to the Appellant.**
  - (3) **Each party will bear his/her own costs of the suit before the trial court and this appeal.**

**Delivered, Dated and Signed at Nyeri on the 14<sup>th</sup> day of October, 2025**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

Judgment delivered in open court in the presence of-

Ms. Kendi - Court Assistant

Wangari holding brief for the Appellant

No attendance for the 1<sup>st</sup> Respondent

No attendance for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents

Original Judgment