REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 11 OF 2015

(FORMERLY KERUGOYA ELC NO. 316 OF 2013

COSMAS N.E. KATHUNGU.....PLAINTIFF

VERSUS

NJUE KIARIE.....1ST DEFENDANT

JANET WAIHUNE NJUE.....2ND DEFENDANT

AND

NATIONAL LAND COMMISSION.....1ST NECESSARY PARTY

THE CHIEF LAND REGISTRAR.....2ND NECESSARY PARTY

THE DIRECTOR OF PHYSICAL PLANNING....3RD NECESSARY PARTY

DIRECTOR OF SURVEYS.....4TH NECESSARY PARTY

EMBU COUNTY GOVERNMENT.....5TH NECESSARY PARTY

HONOURABLE ATTORNEY GENERAL.....6TH NECESSARY PARTY

JUDGEMENT

1. By a plaint originally dated 19th December 2000, amended on 2nd February 2001 and further amended on 26th March 2004, the Plaintiff sought the following reliefs against the Defendants:

> *a. That the Defendants do by themselves remove and/or demolish their building unlawfully constructed, built and/or encroaching on the Plaintiff's plot No. Embu/Municipality/1503 and that in default the said building construction be removed and/or demolished and that the Defendants do meet the cost of the demolition.*
>
> *b. The Defendants, their agents/servants or anybody acting under their instructions be restrained by way of permanent injunction from constructing on, encroaching, trespassing or in any other manner interfering with the Plaintiff's plot number Embu/Municipality/1503.*
>
> *c. That the Defendants do pay the Plaintiff mesne profits at the rate of Kshs. 192,000/- per month as from August 2000 to the date of judgement.*
>
> *d. Cost of this suit and interest on (c) above.*

2. The Plaintiff pleaded that he was the proprietor of *Plot No. Embu Municipality/1112/1503* (hereinafter plot 1503) which shared a common boundary with *Plot. No. Embu Municipality/112/81* (hereinafter Plot 81) which belonged to the Defendants.

3. It was further pleaded that the Defendants had without lawful justification encroached into the Plaintiff's said plot No. 1503, removed some beacons marking the boundary and fenced off 0.009 ha thereof into the Plot No. 81 and commenced construction of a permanent

building thereon.

4. By his amended plaint, the Plaintiff pleaded that in spite of the existence of a consent order which required the Defendants to confine construction to their Plot No. 81, they had ignored it and extended construction into his Plot No. 1503.

5. In his further amended plaint, the Plaintiff stated that the Defendants had completed construction of a two storey building which extended to his property and put in possession some tenants who were in occupation.

6. The Plaintiff contended that the Defendants' said actions constituted trespass. He pleaded that the Defendants had constructed 24 shops on his Plot No. 1503 and were collecting monthly rent of Ksh. 8,000/- from each tenant. The Plaintiff sought an award of the said sum as mesne profits with effect from August 2000.

7. The 1st Defendant filed a written statement of defence dated 21st December 2000 denying, in general terms, the Plaintiff's claim in its entirety. The 1st Defendant contended that he only undertook construction on his own plot No. 81.

8. The 2nd Defendant filed a statement of defence dated 20th March 2001 admitting joint ownership of Plot No. 81 with the 1st Defendant. The Plaintiff's claim was otherwise denied. She denied any encroachment or trespass upon the Plaintiff's plot or disobedience of any court order.

9. By a joint amended statement of defence dated and filed on 1st April 2004 both Defendants denied knowledge of the existence, or the Plaintiff's ownership, of parcel No. 1503. They denied the meaning and purport of the consent order as pleaded by the Plaintiff. They further pleaded that the Plaintiff was estopped from raising any complaints regarding Plot No. 1503 since he had stood by and watched the Defendants construct and complete the storey building using their hard earned money.

10. By leave of court granted on 15th May 2018 the Defendants joined six (6) necessary parties to the suit. The Defendants contended that the necessary parties were responsible for double allocation, overlapping allocation, or misallocation with respect to the disputed plots. The Defendants contended that their plot was located on the same spot where Plot No. 1503 is located. The Defendant, therefore, sought the following reliefs against them:

a) *That the allotment of Plot No. 1503 and all the documents of allotment thereof be "revoked and cancelled."*

b) *That in the alternative, the necessary parties do allocate a suitable plot to the Plaintiff away from the Defendant's Plot No. 81.*

11. Although the Attorney General appeared for the 2nd, 3rd, 4th & 6th necessary parties and participated in the hearing, no pleadings were filed on behalf of those parties. The 1st necessary party neither entered appearance nor participated in the proceedings.

12. The 5th necessary party (hereinafter the *'County'*) entered appearance and filed a statement of defence dated 17th September 2018. The County contended in its defence that the Plaintiff held a lease from its predecessor which was not disputed and that the only issue for determination was a dispute between private citizens on whether or not there was encroachment upon the Plaitniff's plot No. 1503. The County did not want to be dragged into such private dispute.

13. By an amended defence and counterclaim dated 4th February 2019 and filed on 5th February 2019 the County changed strategy and denied the Plaintiff's claim in its entirety and pleaded that the Plaintiff had irregularly obtained title to Plot No. 1503. It was pleaded in the counterclaim that the said plot was allocated to the Plaintiff without approval of the relevant plot allocation committee. It was further pleaded that when it was discovered that the plot had some County water supply installations including a water tank, the Plaintiff's letter of allotment was withdrawn by the Commissioner of Lands.

14. The County further pleaded that vide a letter dated 5th September 2000 the Commissioner of Lands reinstated the Plaintiff's allocation on condition that the Plaintiff met the cost of re-routing the underground water pipe passing through Plot 1503, a condition which the Plaintiff failed to meet.

15. It was, therefore, contended that the Plaintiff had acquired Plot 1503 through fraudulent means and the County enumerated ten (10) particulars of irregularity and fraud in paragraph 27 of the counterclaim against the Plaintiff. The County consequently sought the following reliefs in the counterclaim:

a) *An order for cancellation of the Plaintiff's certificate of lease for Plot No. 1503.*

b) *An order for the Plaintiff's eviction from Plot No. 1503.*

c) *Dismissal of the Plaintiff's suit with costs.*

d) *Any other relief the court may deem fit to grant.*

16. By a reply to defence and defence to counterclaim dated 12th February 2019 the Plaintiff responded to the County's said amended pleading. The Plaintiff denied all the material allegations made against him in the counterclaim and reiterated the contents of his further amended plaint. The Plaintiff denied any fraud or irregularity in the acquisition of Plot 1503. He contended that he acquired the lease for Plot 1503 in a regular, procedural and lawful manner.

17. The Plaintiff further contended that upon the conditional reinstatement of his allotment letter by the Commissioner of Lands he accepted the conditions specified therein but that before he could take possession of his plot the Defendants encroached upon it and built a permanent building thereon. It was the Plaintiff's case that the purported extension of the boundaries of Plot 81 by 10 feet into Plot 1503 was illegal and irregular in the circumstances.

18. It was also the Plaintiff's contention that the County's counterclaim was statute-barred under the **Limitation of Actions Act (Cap. 22)** hence it did not disclose a reasonable cause of action against him.

19. The Plaintiff herein called 3 witnesses and closed his case. The first was the Government Land Surveyor (PW1) stationed at Embu. His evidence was that the two plots in dispute existed on the ground and that they had two separate survey plans. He further stated that there was massive encroachment upon Plot 1503 by a two storey building running across from the adjacent Plot 81. The surveyor produced a report dated 6th February 2018 which was prepared jointly with the Land Registrar Embu on the basis of the court order dated 7th December 2017. He denied that there was any overlap between Plot 1503 and 81 on the ground and in the survey records.

20. The Plaintiff adopted his witness statement dated 21st March 2017 and his further statement dated 18th February 2019. His evidence essentially followed the script of his pleadings. He denied any fraud or irregularity in the acquisition of Plot 1503. He stated that his application was considered by the plot allocation committee and that the Permanent Secretary in charge of the then Ministry of Local Government gave approval for the allocation on behalf of the County.

21. The Plaintiff's third witness was the Land Registrar Embu who testified as PW3. She stated that according to the available records (the white cards), the Plaintiff was the registered lessee of Plot 1503 whereas the Defendants were the joint registered lessees of Plot 81. She stated that there was no indication of sub-division of any of the two plots in dispute. Her evidence was that Plot 1503 was not a sub-division of Plot 81. It was her evidence that there was no indication of irregularities on the face of the register in the registration of the two plots.

22. The Defendants called two witnesses and closed their case. The 1st witness (DW1) was Daniel Mbai who stated that he was a registered physical planner. He was formerly working for the County but had by the time of trial moved to the national government at Nairobi as a Principal Planner. He stated that whilst working for the County he received a court order requiring him to prepare a report on the two plots in issue. He stated that in his view the site for Plot 1503 was not suitable for allocation as it fell within County water installations.

23. The 1st Defendant testified herein as DW2. He adopted his witness statement dated 11th May 2018 as his sworn testimony. He denied having encroached upon the Plaintiff's Plot 1503 at all. His testimony was that when he requested the County to extend the size of his plot by 10 feet, his request was granted. He consequently built a two storey building which he completed and let out to tenants. He denied knowledge of the existence of Plot 1503.

24. Although one physical planner of the County had signed and filed a witness statement in this matter he was not called as a witness. Instead, the County opted to hire a consultant to testify of its behalf. The consultant, Planner Joyce Kariuki, adopted her witness statement dated 14th March 2019 as her sworn testimony. She stated that there was no valid allotment of Plot 1503 to the Plaintiff in that the site was reserved for water supply installations and the allotment was never approved by the defunct Municipal Council of Embu.

25. Upon conclusion of the hearing on 18th March 2019 the Plaintiff was given 45 days to file his submissions whereas the Defendants and the necessary parties were granted 45 days thereafter to file their respective submissions. The record shows that the Plaintiff and the County filed their submissions on 4th July 2019, the 1st Defendant filed his on 15th July 2019 whereas the 2nd Defendant filed hers on 18th June 2019.

26. The court has noted that the parties did not file any agreed statement of issues for determination. The court shall, therefore, frame the issues for determination as provided for in law. Under **Order 15 Rule 2** of the **Civil Procedure Rules,** the court may frame issues from the following:-

a) The allegations contained in the pleadings.

b) The contents of documents produced by the parties.

c) Allegations made on oath by the parties.

27. The court has considered the pleadings, documents and evidence on record in this matter. The court is of the opinion that the following issues arise for determination in this suit:

a) Whether the Plaintiff's plot No. 1503 is in existence.

b) Whether there is any overlap between Plot No. 1503 and Plot No. 81.

c) Whether the Defendants have encroached upon Plot No. 1503 without unlawful justification.

d) Whether the extension of the boundaries of the Defendant's Plot No. 81 was irregular and unlawful.

e) Whether the Plaintiff acquired Plot No. 1503 irregularly and fraudulently.

f) Whether the County's counterclaim is statute-barred under the **Limitation of Actions Act (Cap. 22)**.

g) Whether the Plaintiff is entitled to the reliefs sought in the further amended plaint.

h) Whether the County is entitled to the reliefs sought in the counterclaim.

i) Whether the Defendants are entitled to the reliefs sought against the 1st – 6th necessary parties.

j) Who shall bear the costs of the suit and the counterclaim.

28. The court has considered the evidence on record and the submissions of the parties on the 1st issue. In their joint amended statement of defence, the Defendants denied the existence of Plot No. 1503. It was even suggested in the Defendants' claim against the necessary parties that the plot rested on the same spot as Plot 81. The court is aware that in Kenya the existence of a plot in survey records is not necessarily indicative of its existence on the ground.

29. The evidence of PW1 was clear that Plot No. 1503 was surveyed and had its own authenticated survey plan F/R 380/76. The nature of the survey undertaken was a fixed boundary survey hence quite accurate. The said plot was not even a sub-division of Plot 81 according to the evidence on record.

30. There is a report on record by the County Land Registrar and County Land Surveyor dated 6th February 2018 which was filed pursuant to a court order made on 7th December 2017 which required those public officials to visit the site and confirm whether or not Plot 1503 existed, whether it was surveyed; and whether there was any encroachment thereon. The said report clearly confirms the existence of the said plot both on the ground and survey records. There being no credible documentary evidence to the contrary, the court believes the evidence of PW1 and PW3 on the existence of Plot 1503.

31. The 2nd issue is whether there is any overlap either on the ground or in the survey records between Plot 1503 and Plot 81. The Defendants contended in their claim against the necessary parties that there was either an overlapping or double allocation of the two plots. In fact, it was specifically pleaded by the Defendants in paragraph 4(B) of their notice to the necessary parties dated 23rd June 2018 that:

> *"The defendants allege that on the spot where the plaintiff claims his plot is situated, is where the defendant's plot number Embu/Municipality/1112/81 exists since the year 1984 …"*

32. The court has considered the evidence on record and the submissions on record on this issue. In spite of the inconsistencies between the Defendants' amended defence and their notice to the necessary parties, there is abundant evidence on record to demonstrate that there is no overlap between the two plots. There is evidence on record that even though the two plots were surveyed 46 years apart, their survey records do not overlap at all.

33. The joint report by the Land Registrar and Land surveyor dated 6th February 2018 demonstrates that there is no overlap of the two plots on the ground. The said report was filed together with sketch plans and maps drawn to scale as ordered by the court. The only thing which the two plots share is a common boundary on one side measuring 30.48m. (See Fig. 1 of the sketch map to the report). The Defendants did not tender credible evidence to demonstrate an overlap. The court does not believe as credible the letter dated 10th April 2018 by DW1 that it was the Plaintiff's plot which was 'overlapping' upon the Defendant's plot. The said letter was not backed up by any survey records, maps or sketches to demonstrate the same. The 2nd issue is consequently answered in the negative.

34. The 3rd issue is the question of encroachment and trespass. This is really the main issue in controversy as between the Plaintiff and the Defendants. Whereas the Plaintiff contended that the Defendants had encroached into a substantial part of his plot No. 1503, the Defendants denied having done so. The 1st Defendant maintained in both his amended defence and evidence at the trial that his storey building known as 'Morning Glory' was confined to his Plot No. 81.

35. The court has considered the entire evidence on record and the parties submissions on this issue. The court has considered the report dated 6th February 2018 filed in court by the Land Registrar and the Land Surveyor. The court has noted that the Defendants did not produce any report from their own surveyor to rebut or contract the contents of the report filed by the two public officials. As indicated before, DW1's letter dated 10th April 2018 is not a serious report. It was not backed up by any official records. The letter was not authored by a surveyor but a planner. DW1 conceded in cross examination that he did not take any measurements on the ground. He did not produce copies of any survey plans he may have relied upon. He did not even produce copies of the plot registers he claimed to have relied upon.

36. The court is of the view that DW1 was not a candid and truthful witness. He maintained both in his evidence in chief and during cross-examination that he prepared his letter or report pursuant to a court order. However, he did not indicate where such order originated from and when it was issued. It was not produced in evidence. There is no such order in the court file. One also wonders why it was addressed to the Defendants' Advocates and not to the court if it was prepared at the instance of the court. It is also noteworthy that there is no mention of a site visit in the said report even though he claimed to have visited the site during cross examination by the Plaintiff's advocate.

37. It is pertinent to note that when the court made the orders of 7th December 2017, the parties were given liberty to appoint their own private surveyors to be present during the site visit by the public officials. The Defendants did not choose to avail themselves of that opportunity. Consequently, the court shall accept the report of the two public officials without qualification. It is evident from both the evidence of PW1 and the report dated 6th February 2018 that there is massive encroachment by the Defendants upon Plot 1503.

38. The report dated 6th February 2018 indicates that the encroachment covers more than three-quarters of the Plaintiff's plot. The remainder of Plot 1503 is barely 0.004 ha out of the surveyed area of 0.0237 ha. The area of encroachment is captured in the sketches and maps annexed to the report. See Fig. 3 of the report which depicts the extent of encroachment in the shaded area. The 3rd issue is consequently answered in the affirmative.

39. The 4th issue is whether the extension of boundaries of Plot 81 was regular and lawful. It was the Defendants' evidence that they applied for extension of the boundaries of their plot by 10 feet to the predecessor of the County. Although the 1st Defendant contended that the request was granted, he conceded that he did not have any official records from either the Land or Survey Departments to confirm the extension. He also conceded that he never surrendered his lease in exchange for a new one for the bigger acreage. He was content to rely on a resolution by the predecessor of the County which was said to have granted the extension.

40. When the consultant who testified on behalf of the County was questioned on whether a PDP was ever prepared for the additional acreage which was allocated to the Defendants, she stated that none was prepared. It was her evidence that one should have been prepared. It was also her evidence that such PDP should have been annexed to the original PDP. She stated that it was not possible in this instance to prepare one because the area of extension had already been surveyed as part of Plot 1503 and a survey plan registered.

41. The court is of the opinion that in the absence of an approved PDP, authenticated survey plan and a letter of allotment for the extension sought by the Defendant there could be no valid or regular extension of the boundaries of Plot 81 whose survey plan was drawn and authenticated in 1954. The purported resolutions of extension by the predecessor of the County on their own were, therefore, ineffectual to confer any property rights on the Defendants.

42. The court's attention has been drawn to the provisions of the **Survey Act (Cap. 299)** which regulates all surveys undertaken within the Republic of Kenya. There is no doubt that the authority responsible for receiving, checking and registration of survey plans is the Director of Surveys. It is thus clear that under **section 30 (2) of the Survey Act** the deposited survey plans cannot be altered or amended without the permission of the Director of Surveys. In the circumstances, there was no and there could be no valid alteration of the boundaries of the two plots in issue.

43. The 5th issue is whether the Plaintiff acquired Plot 1503 irregularly and fraudulently. This issue was raised by the County in the counterclaim. It was not raised by any of the Defendants in their statement of defence. The court shall deal with the two aspects of alleged impropriety together since the particulars of the alleged irregularity and fraud were combined in the counterclaim.

44. The County contended that the allocation of Plot 1503 to the Plaintiff was irregular and fraudulent because:

a) The plot was planned for water supply installations by virtue of PDP No. E21/98/6.

b) The allocation was not approved by the plot allocation committee.

c) The allocation was done without the approval of the County's predecessor.

d) The letter of allotment had been withdrawn and the conditions of the subsequent letter were not satisfied.

e) The Plaintiff failed to take into account the extension of 10 feet into the adjacent Plot No. 81.

45. The County contended that the Plot 1503 was already planned for water supply facilities by the time it was allocated to the Plaintiff hence it was not available for allocation. The County's consultant produced a copy of a plan No. E/21/98/6 in support of that contention. The witness conceded during cross examination that the copy of the plan was not dated, signed or approved by the authorities stated on the plan.

46. The court has noted that the said copy was neither stamped nor certified by any public authority hence its source was not authenticated. The consultant had referred to a master plan for Embu No. 39 of 1977 on the basis of which the PDP for water installations was prepared. However, the said master plan was never produced or shown to the court at the trial.

47. The court has considered the report dated 6th February 2018 filed by the Land Registrar and the Surveyor including the annexures thereto. It would appear from Fig. No. 3 of the annexures thereto that there are some water supply facilities some distance away but within the vicinity of Plot 1503. However, in the absence of a credible plan for the water installations it is difficult to establish whether the area earmarked for water facilities falls within or without the boundaries of Plot 1503. The mere passage of a water pipe through a plot is not necessarily evidence that the entire plot was reserved for water facilities.

48. The court has considered the entire evidence on record on the issue of the alleged reservation of Plot No. 1503 for water installations. The County was not quite straightforward on this issue. There is adequate evidence on record to demonstrate that the Defendants have encroached on a substantial portion of Plot 1503. The County has no problem with that encroachment. It does not seem keen to recover that portion for County water facilities. It is only keen to recover it when the ownership is with the Plaintiff but quite content to look the other way if ownership thereof is with the Defendants. The court, therefore, finds that County did not adequately prove the issue of reservation.

49. The County also challenged the Plaintiff's allocation on the ground that the allocation was not approved by the Plot allocation committee. The court was not informed what was the legal status of the so called plot allocation committee in the allocation of public land. The court is, however, aware of an *adhoc* administrative arrangement whereby a multi-sectoral committee chaired by either the District Commissioner (DC) or Provincial Commissioner (PC) would sit to deliberate on allocations. There was no legal basis for such committees. In any event, the evidence on record reveals that the Town Clerk of the defunct Municipal Council of Embu was a member of the committee and that the Plaintiff's application was channeled through the P.C. of Eastern Province. That is what appeared from the Plaintiff's evidence

and Exhibit P.1 dated 1st April 1998.

50. The other allegation of impropriety raised by the County was that the Plaintiff was allocated Plot No. 1503 without the approval of its predecessor. It was submitted that in the absence of such approval there could be no valid allocation. The County did not cite any authority to support that proposition in the face of the authority of the then Commissioner of Lands to allocate such land on behalf of the defunct local authorities under the provisions of **section 9 of the Government Lands Act** (now repealed).

51. The court is, however, aware that the consent of the Minister for Local Government for long-term leases (exceeding 7 years) was required under **section 144 (6) of the Local Government Act** (now repealed). Although this issue of consent was not raised in the counterclaim or at the hearing, the County merely sneaked it into its written submissions. However, on the material on record there is evidence on record to demonstrate that the Commissioner of Lands sought and obtained such consent from the Permanent Secretary of the Ministry of Local Government prior to the allocation of Plot 1503.

52. The County contended that the Plaintiff's letter of allotment by the Commissioner of Lands was withdrawn hence he could not obtain a valid allocation of Plot 1503. It was further contended and submitted that even after the reinstatement of the allotment, the Plaintiff did not meet the conditions set out therein.

53. The court has perused the two letters dated 27th June 2000 (Exhibit P. 11) and 5th September 2000 (Exhibit P. 13) respectively. The first letter cancelled the allocation on the basis that there was a water supply line and pressure breaker tank on Plot 1503. The second letter reinstated the allotment on the basis that the water tank was found to fall outside the plot. However, the Plaintiff was required to meet the cost of re-routing an underground water pipe passing through the plot. The ancillary question which comes to mind is where did the Commissioner of Lands get such information if not from the Municipal Council of Embu. And how come the said Council never contested such a finding but was instead actively engaged in the allocation of the same land to the Defendants?

54. The main issue which arose during the trial was whether the Plaintiff had complied with the condition in the letter of reinstatement dated 5th September 2000. The County contended that the Plaintiff was obligated to undertake the actual works of re-routing the pipe. The Plaintiff conceded that he had not re-routed that pipe for the reason that the Defendants soon thereafter encroached upon the plot and undertook construction thereon. The court is of the view that the letter of reinstatement did not require the Plaintiff to re-route the water pipe in issue. It only required him to meet the **cost** of its relocation.

55. The court is of the opinion that the Plaintiff was not required to undertake the civil works. That obligation still remained with the County's predecessor and the Plaintiff was only expected to meet the cost of such civil works. It was up to the County (or its predecessor) to determine whether the Plaintiff would be billed before or after the works. There is no evidence on record to demonstrate that the Plaintiff was ever given any bill, invoice, or quotation for the works and failed or declined to meet the same. The court consequently finds that the default in re-routing the pipe could not be attributed to the Plaintiff's failure or inability to meet the attendant cost.

56. The County further faulted the Plaintiff for failing to take into account the extension of the boundaries of Plot 81 in the process of his acquisition of the lease for Plot 1503. As indicated before, the purported extension of the size of the Defendants' plot and the reduction in the Plaintiff's plot was irregular and unlawful. It was done in contravention of the **Survey Act (Cap. 299)** hence could not form the basis of a plea of irregularity or fraud against the Plaintiff.

57. In the result, the court finds that none of the particulars of irregularity and fraud have been proved by the County against the Plaintiff in this suit. In the circumstances, the court is unable to find that there are legal grounds for impeaching the Plaintiff's title to plot No. 1503. The 5th issue is therefore answered in the negative.

58. The 6th issue is whether the County's counterclaim is time-barred under the law. This issue was raised by the Plaintiff in his defence to the counterclaim. It was contended that the counterclaim was brought for recovery of land beyond the statutory limitation period of 12 years stipulated in **section 7 of the Limitation of Actions Act** (hereinafter *the Act)*. The said section stipulates as follows:

> **"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."**

59. The Plaintiff contended that the cause of action herein arose in the year 2000 when he was allocated plot No. 1503 hence the counterclaim was filed after a lapse of over 18 years. The County submitted that its counterclaim was not statute barred on two grounds. First, it was contended that it was not aware of the fraud and irregularity in the acquisition of Plot 1503 until only 4 years back. Second, it was contended that under **section 42 of the Act** the limitation period does not apply to proceedings for recovery of *government land.*

60. The court is unable to agree with the submission by the County that its predecessor was not aware of the allocation of Plot 1503 to the Plaintiff. There is evidence on record to demonstrate that the relevant letters from the Commissioner of Lands were copied the defunct Municipal Council of Embu. There is evidence on record to indicate that the said Council had passed resolutions to rescind the extension of the boundaries to Plot 81 upon discovery that the extension encroached upon Plot 1503. There is evidence to demonstrate that the Plaintiff wrote some letters of complaint to the then Town Clerk of the said Municipal Council (eg. Exhibits P. 19 and P. 20) complaining about the Defendants' encroachment on his plot as far back as the year 2000.

61. There is also evidence on record to demonstrate that the County and its predecessor collected rates from the Plaintiff over several years. The County also issued a rates clearance certificate to the Plaintiff to enable him to charge Plot 1503 to secure a loan facility. The said conduct on the part of the County and its predecessor is totally inconsistent with lack of knowledge of alienation of Plot 1503.

62. The next aspect for consideration is whether or not the **Act** applies to a counterclaim by a county government as opposed to the national

government. **Section 42 of the Act** stipulates that: -

> **"(1) This Act does not apply to—**
>
> **a) ….**
>
> **b) .....**
>
> **c) An action to recover possession of Trust land; or**
>
> **d) Proceedings by the Government to recover possession of Government land, or to recover any tax or duty, or the interest on any tax or duty, or any penalty for non-payment or late payment of any tax or duty, or any costs or expense in connexion with any such recovery;**
>
> **e) ….**
>
> **f) ….**
>
> **g) ….**
>
> **h) ….**
>
> **i) ….**
>
> **j) ….**
>
> **k) actions, including actions claiming equitable relief, in which recovery or compensation in respect of the loss of or damage to any public property is sought.**
>
> **(2) Subsection (1)(k) shall apply retroactively."**

63. **Section 2** of the Act defines "the Government" to include corporations. This definition does not really describe or define what the Government means. Similarly, **Section 3 of the Interpretation and General Provisions Act (Cap.2)** states that it means "the Government of Kenya". **Article 260** of the Constitution does not define the term Government. However, since the Constitution creates two levels of Government the reference to Government land and in **Section 42(d)** must have referred to the national government which was responsible for the management and administration of government land under the **Government Lands Act** (now repealed).

64. The County submitted that the term Government as used in **section 42(1)(d)** of the **Act** should be interpreted widely to include county governments established after the promulgation of the Constitution of Kenya 2010. The court is aware that there are conflicting authorities on the question of whether the term "Government" includes the county governments whenever it appears in legislation. For instance, it is debatable whether the **Government Proceedings Act (Cap. 40)** applies to county governments. The court is of the view that the context and the circumstances of the case ought to be considered in the interpretation of the law. The intention of the legislature also ought to be considered.

65. The court is of the opinion that the text, context and circumstances under consideration do not permit such a wide interpretation as contended by the County. The court is, however, of the opinion that the counterclaim in this case falls squarely within the provisions of **Section 4 (1) (k) of the Act** which exclude the application of the limitation period to claims for recovery of *public property* regardless of who has filed the action. The court, therefore, finds and holds that the counterclaim is not statute–barred.

66. The 7th issue is whether the Plaintiff is entitled to the reliefs sought in the further amended plaint. The court has already found that the Plaintiff's Plot No. 1503 is in existence; that it does not overlap with the Defendant's plot; that the Defendants have encroached thereon; and that the County has failed to demonstrate that it was acquired irregularly and fraudulently. It would follow that the Plaintiff is entitled to the reliefs sought.

67. The Plaintiff's claim for *mesne* profits, however, requires further consideration. The Plaintiff contended that the Defendants had constructed some 24 shops upon his plot No. 1503 from which the Defendants were drawing monthly rent of Kshs. 8,000/- from each tenant. The Plaintiff therefore claimed a sum of Kshs. 192,000/- per month with effect from August 2000 to the date of judgment.

68. In the case of **Attorney General Vs Halal Meat Products Ltd Civil Appeal No. 114 of 2009 [2016] eKLR** it was said of *mesne* profits as follows:

> **"It follows, therefore, that where a person is wrongly deprived of his property he/she is entitled to damages known as *mesne* profits for loss suffered as a result of the wrongful period of occupation of his or her property by another. See McGregor on Damages, 18th Ed. Para 34-42".**

69. What is the measure of *mesne* profits and how are they to be assessed? In **Civil Appeal No. 149 Of 2007 Kenya Hotel Properties Ltd Vs Willesden Investments Ltd [2009] eKLR** it was held, *inter alia*, that:

> **"On damages the first consideration was the award of *mesne* profits. In regard to this award, it was incumbent upon the learned judge to determine the correct number of days the appellant could be held to have occupied the suit property as a trespasser and the correct daily rate charged for each motor vehicle. Although the Respondent claimed that the Appellant trespassed thereon between January 1994 to February 1998, the evidence on record shows that the said respondent was not registered as proprietor of the suit property until 15th September 1995. In that regard, the respondent could not have held the appellant as trespasser thereon during the period between January 1994 and 15th September 1995 when it was not registered as the owner of the same."**

70. In the said case, while setting aside the award of damages of Kshs. 10 million by the High Court on account of duplicity, the Court of Appeal cited with approval a passage from **Lord Lloyd of Berwick** in the Privy Council decision of **Ivergurie Investments Vs Hackett (Lord Lloyd) [1995] 3 All Eng. Rep: 482: -**

> **"This is in form of an ordinary claim for *mesne* profits, that is to say a claim for damages for trespass to land … The trespass thus lasted for a continuous period of 15½ years. The question for decision is the appropriate measure of damages. Mr. Mowbray QC made clear to the Board, as he had already made clear in the court below that Mr. Hackett was claiming a reasonable rent for the apartments throughout the period of the trespass. This is the basis on which damages for *mesne profits* are awarded everyday in the County Courts."**

71. The court has considered the entire evidence on record and the submissions on record on the issue of *mesne* profits. Although the Plaintiff was claiming a flat rate of Kshs. 8,000/- per month per shop, the evidence of the 1st Defendant at the trial was that he was collecting between a variable amount of between Kshs. 15,000/- and Kshs. 20,000/- per month for each shop. Since the Plaintiff asked for the lower figure that is what shall be granted to him and not the higher figures which were not pleaded. The court shall also make the award with effect from the date of registration of the Plaintiff as lessee on 1st December 2000 as opposed to the date of August 2000 indicated in the pleadings.

72. Accordingly, the Plaintiff shall be awarded a sum of Kshs. 192,000/- per month for 18 years and 8 months which translates into Ksh. 192,000 x 224 months making a total of Kshs. 43,008,000.00 as *mesne* profits. This sum shall attract interest at court rates from the date of judgment until payment in full.

73. It was submitted by the 1st Defendant that the Plaintiff was not entitled to any remedy on account of estoppel. The 1st Defendant relied upon the authority of **Century Automobiles Ltd Vs Hutchings Biemer Ltd [1965] EA 304.** It was further submitted that the Plaintiff had consented to the construction of the Defendants' building by virtue of a consent order recorded 19 years ago and that he sat on his rights for an unduly long period of time. It was further submitted that through his conduct he made a 'representation' which the Defendants acted upon to the effect that he would not seek to recover his property.

74. In the case of **Century Automobiles Ltd** (supra) the landlord had made a representation to its tenant that the tenancy would not be terminated unless the premises were required for the purpose of a supermarket and that such need would not arise for another 3 years. The tenant, in reliance upon such representation, incurred huge expenses on the demised premises only for the landlord to give a notice of termination within 6 months. It was held by Court of Appeal for Eastern Africa that equitable estoppel applied to preclude the landlord from going back on its promise. The court found that there was a clear and unequivocal representation by the landlord; an intention that it should be acted upon; and that the tenant had in fact acted upon it to its detriment.

75. In the said case, the court cited with approval the following description of equitable estoppel in the earlier case **of Nurdin Bandali V Lombank Tanganyika Ltd [1963] E.A. 304:**

> **"The precise limits of an equitable estoppel are, however, by no means clear. It is clear, however, that before it can arise one party must have made to another a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it should be acted upon and the other party, in the belief of the truth of the representation, acted upon it."**

76. The court finds that the case of **Century Automobiles Ltd** is clearly distinguishable from the instant case. The material on record indicates that there were no dealings whatsoever between the Plaintiff and the Defendants in relation to Parcel No. 1503. There is no evidence on record to demonstrate that the Plaintiff made any sort of representation, let alone an unequivocal one, to the Defendants. Whereas mere silence or inaction may amount of a representation in some cases, it would be a rare case where such would amount to an *unequivocal* representation capable of forming the basis of equitable estoppel.

77. The Defendants also contended that the Plaintiff is not entitled to the remedies on account of acquiescence. The court has considered the evidence on record on this aspect. The material on record indicates that upon learning that the Defendants had deposited building materials and began construction on Plot 1503, the Plaintiff filed the instant suit on 20th December 2000. The Plaintiff also filed an application for interim orders which appears to have been settled by consent of the parties. The consent order dated 21st December 2000 permitted the Defendants to continue with construction within the boundaries of their Plot No. 81. It did not authorize construction to be extended to the Plaintiff's plot. The Defendants' submission that the Plaintiff consented to the encroachment on Plot 1503 therefore has no basis whatsoever.

78. There is also some material on record to the effect that upon learning of the County's purported extension of the boundaries to Plot 81 which encroached upon Plot 1503, the Plaintiff protested to the predecessor of the County in consequence of which the offending resolution was rescinded. It would appear from the material on record that the Defendants must have prevailed upon the predecessor of the County to reinstate the extension through a subsequent resolution. So, the Defendants were not just innocent by standers who were watching as the defunct Municipal Council of Embu was approbating and reprobating.

79. The 8th issue is whether the County is entitled to the reliefs sought in the counterclaim. The court having found that the County has failed to prove that the Plaintiff acquired Plot 1503 either irregularly or fraudulently, it would follow that it is not entitled to the reliefs sought in the counterclaim.

80. The 9th issue is whether the Defendants are entitled to the reliefs sought in their notice against the necessary parties. The court has already found that the purported extension of the boundaries of the Defendant's plot into the Plaintiff's plot was invalid and irregular. The Defendants were not merely innocent bystanders in the purported extension of the boundaries to their Plot No. 81. The court has also found that there is no overlap or double allocation with respect to the two plots. The court finds no legal basis for the two reliefs sought in their notice dated 23rd June 2018. The 9th issue is therefore answered in the negative.

81. The 10th issue is on costs of the suit and counterclaim. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant should normally be awarded costs of the action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Ltd V Twentsche Overseas Trading Co. Ltd [1967] E A 287.** The court finds no good reason why the successful litigant in this suit should not be awarded costs of the suit. Accordingly, the Plaintiff shall be awarded costs of the suit and the counterclaim.

82. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved his case to the required standard against the Defendants. The court further finds and holds that the County has failed to prove its counterclaim against the Plaintiff to the required standard. The court further finds that the Defendants are not entitled to the reliefs sought against the 1st – 6th necessary parties as pleaded in their notice dated 23rd June 2018. Consequently, the court makes the following orders for disposal of the suit:

a) Judgement is hereby entered for the Plaintiff against the Defendants in the following terms:

i. The Defendants by themselves do remove or demolish their building currently encroaching upon *Plot No. Embu/Municipality/1503* within 60 days in default of which the Plaintiff shall be at liberty to demolish the same at the Defendants' cost.

ii. The Defendants shall pay the Plaintiff *mesne* profits at the rate of Ksh.192,000/- per month with effect from 1st December 2000 until the date of judgement amounting to Ksh.43,008,000.00

iii. The said amount of Ksh.43,008,000.00 shall attract interest at court rates from the date of judgement until payment in full.

iv. The Defendants shall meet the Plaintiff's costs of the suit.

b) The 5th necessary party's counterclaim against the Plaintiff is hereby dismissed in its entirety with costs to the Plaintiff.

c) The Defendants' claim against the necessary parties is hereby dismissed in its entirety with costs to the 2nd – 6th necessary parties.

83. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 25TH DAY of JULY, 2019

In the presence of Mr. Okwaro for the Plaintiff; Mr. Njagi for the 1st Defendant, Mr. Momanyi holding brief for Ms. Wairimu for the 2nd Defendant; Mr. Siro for 2nd, 3rd, 4th and 6th necessary parties, Njagi holding brief for Mr. Kigen for the 5th necessary party and in the absence of the 1st necessary party.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

25.07.19