

**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. E152 OF 2024**

**MAUREEN HOMEM** .....

**APPELLANT**

**VERSUS**

**STANDARD GROUP PLC** .....

**RESPONDENT**

*(Being an Appeal from a portion of the Judgment and Decree issued by the Honourable B.M. Cheloti (SPM) on the 9th September 2024 in Milimani Chief Magistrate's Court, Suit No. E439 of 2021)*

**JUDGMENT**

**Introduction**

1. This is an appeal by **Maureen Homem (hereinafter "the Appellant")** against a portion of the Judgment and Decree of the **Honourable B.M. Cheloti, Senior Principal Magistrate (SPM)**, delivered on **9th September 2024 in Milimani Chief Magistrate's Court Suit No. E439 of 2021.**

2. The Appellant is aggrieved by the trial court's failure to grant orders for vacant possession, mesne profits and/or damages for trespass, reliefs which she avers were specifically pleaded in the Plaint and fully canvassed before the subordinate court.

3. The Respondent, **Standard Group PLC**, opposes the appeal and urges this Court to uphold the decision of the learned trial Magistrate in its entirety, dismissing the appeal with costs.

4. Upon admission of the appeal, this Court issued directions that the appeal be canvassed by way of written submissions. The parties duly complied. The Appellant's Written Submissions were filed on **6th November 2025**, by **Guandaru Thuita & Company**, Advocates. The Respondent's Written Submissions were filed on **7th April 2026** by **Rachier & Amollo LLP**, Advocates. The Court has considered both sets of written submissions together with the Record of Appeal, the Memorandum of Appeal and all pleadings filed before the subordinate court.

### **Background of facts**

5. The relevant background facts, which are largely common ground, may be summarised as follows, the Appellant is the registered proprietor of all that property known as LR No. 330/580 situate along Ngong Road near Junction Mall in Nairobi (hereinafter "the suit premises").

6. By a Licence Agreement dated 1st November 2017 (hereinafter "the Licence Agreement"), the Appellant granted the Respondent a licence to erect a double-sided, double-decker advertising billboard structure measuring 12m x 6m upon a portion of the suit premises for a term of five (5) years, expiring on 30th October 2022. The annual licence fee payable was Kshs. 950,000/- exclusive of VAT, subject to an annual escalation of 7%.

7. The trial court found, and this is undisputed, that the Respondent defaulted in the payment of the licence fee for the period from November 2019 to October 2021, accumulating arrears of Kshs. 2,251,445/=. Accordingly, the Respondent was ordered to pay the said sum together with the costs of the suit.

8. It is the Appellant's case that she issued a Notice of Termination of Licence and a demand to vacate ("the Termination Notice") requiring the Respondent to remove the

billboard structure from the suit premises upon expiry of the licence. The Respondent, however, failed and/or refused to comply.

9. At the trial, the Appellant testified as PW1 on 9th August 2023. During cross-examination, the Appellant made an admission that she had not issued a formal termination notice in compliance with the provisions of the Licence Agreement. That admission, as will be seen below, has a significant bearing on the outcome of this appeal.

10. As to the Third Party: the Respondent had, by an agreement dated 21st February 2020, purportedly sold its advertising business to Ujenzi Consultants, which was enjoined as a Third Party. The Third Party denied liability on grounds of privity, alleged material non-disclosure and further contended that possession of the suit premises was never granted to it. The trial court correctly dismissed all claims against the Third Party, holding that a contract only affects the parties to it.

11. The Judgment of 9th September 2024 awarded the Appellant the rent arrears of Kshs. 2,251,445/= with costs. However, the learned Magistrate made no determination whatsoever on the Appellant's prayers for vacant possession,

mesne profits and/or damages for trespass, notwithstanding that those reliefs had been specifically pleaded in the Plaint and argued at length in the Appellant's Final Written Submissions.

### **Summary of the parties' written submissions.**

#### **The Appellant's Written Submissions.**

12. The Appellant's Written Submissions were filed on **6th November 2025 by Guandaru Thuita & Company, Advocates.** The Appellant submits as follows:

13. On vacant possession: The Appellant contends that the Respondent took possession of part of LR No. 330/580 pursuant to the Licence Agreement dated 1st November 2017, and that having defaulted on rent payments a finding affirmed by the trial court the Respondent's right of occupation under the Licence ceased. The Appellant further contends that she issued a Notice of Termination of Licence requiring the Respondent to remove the billboard structure from the suit premises, but that the Respondent failed and/or refused to comply. The Appellant submits that the Respondent, having by that time already sold its advertising business to Ujenzi Consultants, has no commercial justification for retaining the billboard structure on the suit premises. It is the Appellant's submission that,

following the lawful termination of the Licence, the trial court was inexorably bound to order vacant possession, including the physical removal of the billboard structure, and that in default, the Appellant should be at liberty to engage contractors to remove and/or demolish the structure at the Respondent's cost without further reference to the court.

14. On mesne profits and/or damages for trespass: The Appellant submits that the Respondent, having failed to vacate the premises upon receipt of the Termination Notice, became and continues to be a trespasser. The Appellant relies on **Section 2 of the Civil Procedure Act (Cap 21)**, which defines mesne profits as profits that a person in wrongful possession of property actually received or might with ordinary diligence have received, together with interest. The Appellant further relies on the Court of Appeal's decision in **Mistry Valji v Janendra Raichand and 2 Others [2016] eKLR**, which confirmed that a claim for mesne profits is in the nature of a claim for damages for trespass. The Appellant acknowledges that the quantum of mesne profits was not specifically particularised in the Plaintiff and accordingly substitutes, in the alternative, a claim for general damages for trespass. The

Appellant relies on **Park Towers Limited v John Mithamo Njika and 7 Others [2014] eKLR** and **Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR** for the proposition that trespass is actionable per se and that no proof of specific damage is required for an award of general damages. The Appellant further relies on **Article 40 of the Constitution of Kenya 2010**, contending that the continued presence of the billboard structure on her land constitutes an arbitrary and unconstitutional deprivation of her property rights.

15. On quantum: The Appellant relies on the contractual licence fee as the benchmark for assessment. Using the annual fee of Kshs. 950,000/- subject to annual 7% escalation, the Appellant computes the applicable rate at approximately Kshs. 100,000/= per month from Year 5 of the agreement. The Appellant urges this Court to award damages in the sum of Kshs. 3,500,000/= for the period from November 2022 to November 2025, being 36 months at Kshs. 100,000/= per month, and further at the continuing rate of Kshs. 100,000/= per month from December 2025 until the date of actual vacation and removal of the billboard structure.

16. On the trial court's omission: The Appellant submits that the learned Magistrate erred in failing to adjudicate upon the reliefs of vacant possession, mesne profits and damages which were specifically pleaded in the Plaint and comprehensively argued in the Final Written Submissions before the trial court. The Appellant relies on **Order 21 Rule 5 of the Civil Procedure Rules, 2010, Section 78 of the Civil Procedure Act** and the appellate jurisdiction of this Court under **Order 42** to invite this Court to cure the omission and grant all pleaded reliefs. The Appellant also relies on **Selle v Associated Motor Boat Co Ltd [1968] EA 123** on the grounds upon which an appellate court may interfere with a trial court's decision.

17. On costs: The Appellant submits that all the expenses of both the lower court proceedings and this appeal were necessitated by the Respondent's breach of the Licence Agreement and its continued refusal to vacate, and that costs ought accordingly to follow the event in the Appellant's favour.

### **The Respondent's written submissions**

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18. The Respondent's written submissions were filed on **7th April 2026 by Rachier & Amollo LLP**, Advocates. The Respondent opposes the appeal in its entirety and submits as follows:

19. On the nature of the appeal, the Respondent submits that the appeal is wholly devoid of legal and factual foundation. It is the Respondent's primary position that the Appellant seeks to fault the learned trial Magistrate for declining to grant reliefs that were neither properly pleaded nor proved before the trial court, and that the appeal is a clear and improper attempt to reconstruct, enlarge and fundamentally alter the Appellant's case at the appellate stage through submissions and allegations unsupported by the pleadings and evidence on record.

20. On pleadings and trespass, the Respondent submits that the Appellant never pleaded an accrued cause of action in trespass. The operative pleading at paragraph 12 of the Plaintiff was expressly conditional and prospective pleading that "in the event" the Respondent failed to give vacant possession from November 2021, the Appellant "will demand" damages and mesne profits. That pleading did not

allege that the Respondent had already failed to vacate, did not plead actual trespass or continued occupation, and did not plead that the billboard structure remained erected on the suit premises. The Respondent submits that no amendment was ever made to convert the contingent pleading into an accrued cause of action, and that the Appellant's failure to do so particularly given that the hearing proceeded on 9th August 2023, well after the licence had expired is fatal to the claim. The Respondent relies on **Order 2 of the Civil Procedure Rules** and the principle that parties are bound by their pleadings, citing **Independent Electoral and Boundaries Commission & Another v Mule & 3 Others [2014] KECA 890 (KLR)** and **Malawi Railways Ltd v Nyasulu [1998] MWSC 3.**

21. On evidence, it was submitted that Respondent submits that the evidence tendered before the trial court equally failed to establish any basis for the reliefs sought. The Appellant did not produce photographs, inspection reports, site visit reports, correspondence showing refusal to vacate, or any other documentary or oral evidence demonstrating that the Respondent remained in occupation

of the suit premises after the alleged termination date or after expiry of the licence. Critically, the Respondent highlights that during the hearing the Appellant expressly admitted that she had not issued a termination notice in accordance with the Licence Agreement an admission that the Respondent submits is fatal to the entire trespass case. The Respondent further submits that the evidence of the Third Party (Ujenzi Consultants) positively established that possession had reverted to the Appellant, as the Third Party stated that it was unable to take possession because the Appellant herself declined to permit it to do so.

22. On the Appellant's concession, the Respondent draws particular attention to the Appellant's own concession at paragraph 29 of her Final Written Submissions before the trial court, in which she acknowledged that mesne profits had not been specifically pleaded and urged the court to award damages in lieu. The Respondent submits that having made that express concession, the Appellant is estopped from now faulting the learned Magistrate for declining to award the very relief the Appellant acknowledged had not been properly pleaded. The

Respondent relies on the principle against approbating and reprobating.

23. On mesne profits and damages, the Respondent submits that mesne profits constitute special damages which must not only be specifically pleaded but also strictly proved. No quantified amount, no computation, no rate and no particulars of the applicable rental value or period of claim were ever pleaded. Furthermore, the Respondent submits that a claim for damages for trespass cannot arise in a vacuum trespass must first be specifically pleaded and proved. In the absence of proof of wrongful possession, the claim for both mesne profits and damages collapses entirely. The Respondent relies on **Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] KEHC 1880 (KLR)** and the principle that wrongful possession is the very essence of a claim for mesne profits.

24. On the Appellant's attempt to quantify damages on appeal, it was submitted that the Appellant's attempt to claim mesne profits from November 2021 to November 2025, including periods beyond the contractual term of the licence, through appellate submissions alone is a clear and

impermissible attempt to introduce an entirely new and substantially enlarged claim. Such claims were never pleaded, never introduced by amendment and never proved before the trial court. The Respondent relies on **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR** for the proposition that submissions cannot take the place of evidence.

25. On appellate interference, it was submitted that the learned trial Magistrate properly evaluated the pleadings, evidence and submissions placed before her and correctly declined to grant the contested reliefs owing to the complete absence of a legal and evidentiary basis. The Respondent urges this Court not to interfere with the decision of the trial court. The Respondent prays that the appeal be dismissed with costs.

### **The appeal and cross-issues**

26. The Memorandum of Appeal dated 8th October 2024 raises four grounds:

27. First, that the learned Magistrate erred in fact and in law in failing to consider or determine the issue of the

Respondent's trespass arising from its failure to comply with the Notice of Termination of Licence.

28. Second, that the learned Magistrate erred in failing to appreciate that the failure to comply with the Termination Notice warranted an award of damages and/or mesne profits and an order for vacant possession.
29. Third, that the learned Magistrate erred in law in failing to consider or determine the issues of vacant possession, mesne profits and damages, all of which were specifically pleaded in the Plaint.
30. Fourth, that the learned Magistrate erred in failing to adequately consider the Appellant's submissions on vacant possession, mesne profits and damages.
31. The Respondent, in its Written Submissions, raises a number of preliminary and substantive arguments, which may be summarised as: (a) the reliefs sought were neither properly pleaded nor proved before the trial court; (b) the Appellant's case, as pleaded, was speculative and conditional; (c) no evidence of continued occupation or trespass was adduced; (d) the Appellant expressly

conceded before the trial court that mesne profits had not been specifically pleaded; and (e) the appeal is an improper attempt to reconstruct and enlarge the Appellant's case at the appellate stage.

**Issues for determination**

32. Having considered the Memorandum of Appeal, the submissions of both parties and the entire record of the subordinate court, the following five issues arise for determination:

- i. Whether the learned Magistrate erred in law and/or fact by failing to determine the specifically pleaded reliefs of vacant possession, mesne profits and/or damages for trespass.**
- ii. Whether the Appellant properly pleaded and proved trespass, continued occupation, or failure to give vacant possession.**
- iii. Whether the Appellant properly pleaded and proved entitlement to mesne profits and/or damages for trespass.**

**iv. Whether this Court ought to interfere with the decision of the learned Magistrate.**

**v. What consequential orders should issue, including as to costs.**

33. This Court's jurisdiction on first appeal is governed by **Section 78 of the Civil Procedure Act (Cap 21, Laws of Kenya)** and **Order 42 of the Civil Procedure Rules, 2010**.

On a first appeal, this Court is obliged to re-evaluate the evidence adduced before the trial court and to arrive at its own independent conclusions, bearing in mind that it did not have the benefit of seeing and hearing the witnesses. The locus classicus remains **Selle v Associated Motor Boat Co Ltd [1968] EA 123**, in which the court held that an appellate court will interfere with the decision of the trial court where that court: (i) failed to take account of particular circumstances or evidence; (ii) misdirected itself in law; or (iii) reached a decision that is plainly wrong.

34. However, the appellate jurisdiction of this Court does not extend to permitting a party to introduce, through submissions on appeal, facts, causes of action or reliefs that were never pleaded, never proved and were not properly before the trial

court. The doctrine that parties are bound by their pleadings is an elementary but fundamental principle of civil procedure, designed to ensure that litigation is conducted without surprise, and that the opposing party has a fair opportunity to respond. As the Court of Appeal affirmed in **Independent Electoral and Boundaries Commission & Another v Mule & 3 Others [2014] KECA 890 (KLR)**, citing the Malawi Supreme Court of Appeal in **Malawi Railways Ltd v Nyasulu [1998] MWSC 3**, for the sake of certainty and finality each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made.

35. With those principles firmly in mind, I now proceed to determine each of the issues identified above.

### **Analysis and determination**

#### **Issue 1: Whether the learned Magistrate erred by failing to determine the specifically pleaded reliefs**

36. The Appellant's primary complaint is that the learned Magistrate, having rightly found in her favour on the question of rent arrears, simply failed to make any finding at all on her prayers for vacant possession, mesne profits and/or damages

notwithstanding that those prayers were specifically pleaded in the Plaint at paragraphs 11 and 12, and at prayers (b), (c) and (d) of the Plaint, and were comprehensively argued in the Appellant's Final Written Submissions dated 21st July 2024.

37. It is a cardinal principle of civil procedure, embodied in **Order 21 Rule 5 of the Civil Procedure Rules, 2010**, that a court adjudicating a civil suit must determine all issues properly before it. Where a court of first instance has omitted to pronounce upon a relief that was specifically pleaded and argued without abandonment, that omission constitutes a misdirection not a discretionary act of declining and it falls squarely within the grounds upon which an appellate court is entitled to interfere under the principles in **Selle (supra)**.

38. I have perused the Judgment of 9th September 2024 as contained in the Record of Appeal. The learned Magistrate's findings were confined to: (i) the existence and terms of the Licence Agreement; (ii) the Respondent's breach by non-payment of rent from November 2019 to October 2021; (iii) the quantification of the outstanding rent at Kshs. 2,251,445/=; and (iv) the Third Party issue. The Judgment is entirely silent on the prayers for vacant possession, mesne profits and damages.

There is no statement that those prayers were considered and rejected, nor are any reasons given for their non-award. It follows that the learned Magistrate failed to adjudicate upon those reliefs altogether.

39. On this narrow but critical point, I find in favour of the Appellant. The learned Magistrate's failure to determine the specifically pleaded reliefs of vacant possession, mesne profits and/or damages constitutes a misdirection in law warranting appellate intervention. However and this is the crucial qualification the existence of a misdirection in the form of an omission to determine does not, of itself, entitle the Appellant to the reliefs sought. This Court, in exercising its appellate jurisdiction, must itself evaluate the evidence on record and determine whether, on the pleadings and evidence adduced at trial, those reliefs are warranted in law and in fact. I now turn to that evaluation.

**Issue 2: Whether the Appellant properly pleaded and proved trespass, continued occupation, or failure to give vacant possession.**

40. The Appellant contends that the Respondent became a trespasser upon its failure to comply with the Termination Notice and to remove the billboard structure from the suit premises following the termination of the Licence Agreement. To succeed on this issue, the Appellant must establish two things: first, that trespass was properly pleaded; and second, that it was sufficiently proved by admissible evidence.

**(a) Adequacy of the Pleadings on Trespass and Vacant Possession**

41. It is settled law that material facts giving rise to a cause of action must be specifically pleaded. Under **Order 2 Rule 4 of the Civil Procedure Rules, 2010**, every pleading shall contain a statement in summary form of the material facts on which the party pleading relies. Where a party claims damages for trespass, the particulars of trespass including the alleged date of entry, the nature and continuance of the wrongful occupation, and any demand to vacate must be specifically averred.

42. In the present case, the operative pleading at paragraph 12 of the Plaint reads as follows (as cited by both parties from page 6 of the Record of Appeal):

*"The Plaintiff avers that in the event that the Defendant shall fail to have given vacant possession of the suit property from November 2021, she will demand damages and mesne profits."*

43. The critical words are "in the event that" and "shall fail." Those words unambiguously render the pleading contingent and prospective. The Appellant did not plead that the Respondent had already failed to vacate. She did not plead that the Respondent was then in actual trespass. She did not plead that the billboard structure remained physically erected on the suit premises. She did not plead that any demand to vacate had been made and refused. The pleading, as framed, anticipated a future default which may or may not materialise which is the very antithesis of a pleaded, accrued cause of action.

44. Significantly, no amendment was ever made to the Plaint to convert the prospective, conditional averment into an accrued and actionable claim of trespass. This is so

notwithstanding that: the hearing proceeded on 9th August 2023, well over two years after the Plaintiff was filed; the Respondent's licence contractually expired on 30th October 2022; and therefore any genuine post-expiry trespass would by the time of the hearing have been an existing, provable fact. The Appellant's failure to amend the Plaintiff in those circumstances is legally significant. As the Court of Appeal observed in **Independent Electoral and Boundaries Commission (supra)**, a party who fails to amend her pleadings to reflect an accrued cause of action cannot at the appellate stage rely on submissions to fill that lacuna.

45. Moreover, the Appellant herself, at paragraph 29 of her written submissions before the trial court, expressly and unequivocally conceded;

*"We acknowledge that for mesne profits, the amounts must be specifically pleaded. Since that information is not there, we urge the Court to award damages in place of mesne profits."*

46. That concession before the subordinate court is binding on the Appellant. Having made it, she cannot now, at the

appellate stage, fault the learned Magistrate for declining to award the very relief she acknowledged had not been properly pleaded. It would offend the principle against approbating and reprobating a party cannot blow hot and cold on the same issue within the same proceedings. The concession reinforces this Court's finding that trespass and mesne profits were not properly pleaded as accrued causes of action.

**(b) The Termination Notice**

47. A further and independently decisive obstacle confronts the Appellant. For a licensee in occupation pursuant to a subsisting contractual right to become a trespasser, the licence must first be lawfully terminated. Trespass presupposes wrongful and unauthorised possession. A licensee who occupies premises pursuant to a subsisting agreement, even one that has been breached, cannot in law be characterised as a trespasser without more the remedy for breach of contract lies in contract, not in a tortious claim founded upon unlawful occupation: compare **Mistry Valji v Janendra Raichand and 2 Others [2016]**

**eKLR; Park Towers Limited v John Mithamo Njika and 7 Others [2014] eKLR.**

48. The Licence Agreement dated 1st November 2017 contained specific provisions governing its termination. The Appellant was therefore contractually obliged to comply with those termination provisions before seeking remedies contingent upon termination including vacant possession and mesne profits.

49. However, at the hearing before the trial court, the Appellant who testified as PW1 expressly admitted that no termination notice had been issued in accordance with the Licence Agreement. That admission is fatal to the trespass claim. In the absence of lawful termination of the licence, any occupation by the Respondent, if it subsisted after October 2022, would have been referable to the subsisting contractual arrangements rather than to wrongful possession. As affirmed in **Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] KEHC 1880 (KLR)**, wrongful possession is the very essence of a claim for mesne profits. Without proof of lawful termination, that foundation is entirely absent.

50. The Court notes that the Appellant's Written Submissions on appeal assert, at paragraph 8, that a Termination Notice was in fact issued and that the Respondent failed to comply with it. However, this assertion is directly and irreconcilably contradicted by the Appellant's own evidence under oath before the trial court, as recorded in the proceedings and the Record of Appeal. This Court cannot on appeal accept a factual assertion in submissions that is flatly contradicted by the deponent's own sworn testimony. Submissions cannot take the place of evidence as was stated in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR.**

**(c) Evidence of Continued Occupation**

51. Even if one were to assume contrary to the evidence that the Licence had been lawfully terminated, the Appellant was still required to prove, by admissible evidence, that the Respondent had in fact failed to vacate the suit premises and that the billboard structure remained erected thereon after the termination date.

52. The Appellant adduced no such evidence whatsoever. There were no photographs of the billboard on the property

post-termination. There was no inspection report. There was no witness who testified to having observed the structure on the premises after the alleged termination or after the contractual expiry of the licence on 30th October 2022. There was no correspondence from the Appellant to the Respondent complaining of continued occupation and demanding vacation. There were no site visit reports. No County Government compliance notices relating to the billboard post-termination were produced.

53. Against that complete evidentiary void, the record of the subordinate court in fact contains affirmative evidence pointing to the contrary conclusion namely, that possession had reverted to the Appellant after the Respondent's engagement with Ujenzi Consultants. As recorded at page 72 of the Record of Appeal, the Third Party (Ujenzi Consultants) stated in its witness statement at paragraph 9 that it was unable to take possession of the premises because the Appellant herself declined to permit it to do so. This evidence is wholly inconsistent with the Appellant's present assertion that the Respondent remained continuously in occupation. The inference is

rather that, upon the Respondent's dealings with Ujenzi Consultants, the Respondent surrendered occupation of the premises, and that possession thereafter reverted to and remained with the Appellant a conclusion that is entirely consistent with the Appellant's failure to amend her pleadings to assert continued occupation.

54. The Court further notes that the inference drawn from the Third Party evidence is reinforced by the Appellant's own conduct after the alleged termination of the Licence. If the Respondent had in fact remained in occupation of the suit premises and continued to use the billboard structure after October 2022, it would be reasonable to expect the Appellant to have taken prompt steps to document and report that continued occupation, to have written to the Respondent demanding vacation, and to have amended her pleadings to reflect the accrued cause of action. None of those steps were taken.

55. The Court has perused the Record of Appeal carefully and finds no letter, notice or correspondence from the Appellant to the Respondent after the alleged expiry of the Licence Agreement complaining of continued occupation of the suit

premises. The absence of such contemporaneous correspondence, particularly from a party represented by Counsel throughout the proceedings, is itself a significant evidentiary gap that undermines the assertion of continued trespass.

56. It is trite law that where a party seeks to establish the fact of wrongful occupation over a defined period, that party must adduce evidence capable of establishing both the commencement and the continuation of the wrongful occupation. In the present case, not only is there no direct evidence of the Respondent's continued physical occupation after October 2022, but the available evidence positively points to the contrary.

57. The Court is also mindful of the distinction between the continued presence of a physical structure and the continued active occupation or use of that structure by the licensor's counterpart. Even if, for the sake of argument, the billboard structure remained physically erected on the suit premises after the expiry of the Licence Agreement, that fact alone would not without more establish that the Respondent was in active occupation or use of the suit

premises. The Respondent had purportedly sold its advertising business to Ujenzi Consultants by February 2020, and there is no evidence that the Respondent continued to derive any commercial benefit from the billboard after that date.

58. Furthermore, no valuation evidence, no rental market evidence and no expert evidence was placed before the trial court to assist in the quantification of any loss or benefit referable to continued occupation. The Appellant's attempt to apply the contractual licence fee as the applicable rate for any post-expiry period, and to extend that calculation to November 2025, is entirely unsupported by evidence and is advanced exclusively through appellate submissions a course that is impermissible as a matter of law.

59. The Court has also considered whether the evidence of the Respondent's witnesses at trial offers any affirmative proof of continued occupation. It does not. The Respondent's witnesses equally failed to produce definitive evidence as to the precise state of the suit premises after October 2022. However, the burden of proving continued wrongful

occupation rests squarely on the Appellant, and that burden has not been discharged.

60. In summary, under Issue 2(c), the Court finds that the Appellant wholly failed to adduce any admissible evidence establishing that the Respondent remained in wrongful occupation of the suit premises after the expiry of the Licence Agreement or after any purported termination thereof. The evidentiary record on this question is bare, and the limited evidence that is available points to a conclusion adverse to the Appellant's position.

61. The Appellant's entire case on continued occupation therefore rests on bare assertions in submissions both before the trial court and on appeal unsupported by any admissible documentary or oral evidence. Courts of law do not grant relief founded upon conjecture and speculation. The evidential basis for a finding of trespass, continued occupation, and failure to give vacant possession is wholly absent.

62. In the premises, I find that the Appellant failed to properly plead trespass, continued occupation or failure to give vacant possession as an accrued cause of action, and

further that she entirely failed to adduce any evidence to establish those facts before the trial court.

**Issue 3: Whether the Appellant properly pleaded and proved entitlement to mesne profits and/or damages for trespass**

63. **Section 2 of the Civil Procedure Act (Cap 21, Laws of Kenya)** defines mesne profits in relation to property as meaning the profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but not including profits due to improvements made by the person in wrongful possession. The Court of Appeal in **Mistry Valji v Janendra Raichand and 2 Others [2016] eKLR** confirmed that a claim for mesne profits is in the nature of a claim for damages for trespass to land.

64. It is equally well settled that mesne profits constitute special damages, which must not only be specifically pleaded but must also be strictly proved as was stated in the case of **Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] KEHC 1880 (KLR)**. Without proof of

wrongful possession which is the very foundation and essence of a mesne profits claim the claim collapses entirely. For the reasons set out under Issue 2 above, wrongful possession has not been established in the present case.

65. Furthermore, and in any event, the Appellant wholly failed to satisfy the threshold of specific pleading and strict proof. No quantified amount of mesne profits was pleaded. No rate or computation was supplied in the pleadings. No particulars were given as to the applicable rental value, the precise period claimed or the basis of assessment. No amendment was made after November 2021 or after October 2022 to plead accrued mesne profits.

66. As noted under Issue 2 above, the Appellant herself expressly conceded before the trial court that the amounts required for a claim in mesne profits had not been specifically pleaded. Having made that concession, she substituted a claim for general damages for trespass. However, a claim for damages for trespass equally requires that trespass be first pleaded and proved. No particulars of trespass were pleaded and no evidence of trespass was

tendered, for the reasons comprehensively set out above. The foundational cause of action was therefore absent, and no award of damages can properly issue in its absence.

67. The Appellant's attempt on appeal to quantify mesne profits at Kshs. 3,500,000/=, calculated at Kshs. 100,000/= per month for the period from November 2022 to November 2025, warrants brief comment. This quantum never pleaded, never proved and indeed extending beyond the contractual term of the five-year licence is advanced entirely through appellate submissions. Such an approach is, as a matter of principle, impermissible. The law does not permit parties to litigate by ambush, nor does it allow submissions at the appellate stage to substitute for evidence and pleadings at trial.

68. In the result, I find that the Appellant has failed to properly plead and prove entitlement to mesne profits and/or damages for trespass. These claims must accordingly fail.

**Issue 4: Whether this Court ought to interfere with the decision of the learned Magistrate**

69. Having found under Issue 1 that the learned Magistrate misdirected herself by failing to adjudicate upon the prayers for vacant possession, mesne profits and damages at all, this Court is required to exercise its appellate jurisdiction afresh and to evaluate those reliefs on the evidence on record. That evaluation, conducted under Issues 2 and 3 above, has led this Court to the conclusion that the Appellant failed to properly plead and prove any of those reliefs.

70. The consequence is that although the misdirection by the learned Magistrate in failing to adjudicate upon the reliefs is established, the ultimate result is the same. Upon this Court's own re-evaluation of the pleadings and evidence on record, the reliefs sought by the Appellant on account of vacant possession, trespass and mesne profits are not warranted in law or in fact and cannot properly be granted.

71. An appellate court ought not to interfere with the exercise of judicial discretion merely to arrive at the same substantive outcome. Where the re-evaluation leads to the same conclusion as would have been reached by the trial court, even for different or more detailed reasons, appellate

intervention will produce no practical benefit. As was stated by the Court of Appeal in **David Bagine v Martin Bundi [1997] eKLR**, it is not the function of an appellate court to disturb a decision that, upon a fresh evaluation, is found to be correct on the merits. Interference is warranted only where the outcome, not merely the reasoning, would differ.

72. In the circumstances, notwithstanding the procedural misdirection by the learned Magistrate, this Court declines to disturb the substantive outcome of the Judgment of 9th September 2024.

#### **Issue 5: Costs**

73. The general rule under **Section 27 of the Civil Procedure Act** is that costs follow the event. The Respondent has succeeded in opposing the appeal. However, costs remain in the discretion of the court, and this Court is at liberty to make such order as is just, having regard to all the circumstances.

74. I take into account that the appeal arose in part from a genuine procedural omission by the learned Magistrate in failing to address the Appellant's pleaded prayers an

omission that reasonably precipitated this appeal. The Appellant was not wholly without basis in filing the appeal, even if, upon a full evaluation, the substantive reliefs sought cannot be awarded. In those circumstances, this Court considers it appropriate that each party bears its own costs of this appeal. The costs order of the subordinate court in favour of the Appellant shall remain undisturbed.

### **Final orders**

75. For all the reasons set out above, this Court makes the following final orders:

- (i) The appeal is hereby dismissed.**
- (ii) The judgment of the trial court and the consequential decree arising therefrom be and is hereby affirmed.**
- (iii) Each party shall bear own costs of the appeal.**

**Dated, Signed and Delivered Virtually this 14<sup>th</sup> day of May 2026.**

**E. K. WABWOTO  
JUDGE**

**In the presence of:-**

**Mr. Thuita and Ms. Machora for the Appellant.**

**Mr. Amimo for the Respondent.**

**Court Assistants: Mary Ngoira and David Ngoosa.**