



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO.136 OF 2014

MARGARET MWIHAKI WANJAU APPELLANT

-VERSUS-

JOSEPH MUIRURI MUGO RESPONDENT

JUDGMENT

Background

1. By a plaint dated **4th June, 2012**, the respondent herein instituted a suit against the appellant before the lower court to wit Nyeri CMCCC No.419 of 2012.
2. In that suit, the respondent claimed several reliefs against the appellant whom she accused of having unlawfully entered into the parcel of land known as **LR No. Ndarugu/Gathaite/728** (herein after the suit property), which he had beneficial interest in, and destroyed the crop of pineapples he had planted thereon. The respondent also accused the appellant of having destroyed a five roomed house and a toilet he had put up on the suit property.
3. The respondent further sought to recover costs he had incurred in respect of criminal proceedings that had been instituted pursuant to the appellant's said unlawful actions.
4. In response to the respondent's claim, the appellant had filed a statement of defence and a counter-claim through which beside denying all the allegations made against her, she contended that she was authorized to take possession of the suit property by court and that the tenancy pursuant to which the respondent took possession of the suit property was null and void for want of consent of the Land Control Board and the consent of the registered proprietor of the suit property.
5. The foregoing notwithstanding, the appellant had admitted that she was convicted on account of the alleged malicious destruction of the respondent's properties but contended that her conviction does not impute civil liability on her part.
6. Concerning the respondent's plea for payment of expenses and costs incurred in respect of the criminal case instituted against her, the appellant contended that the respondent should not be reimbursed/awarded those costs because it was not necessary for him to hire an advocate to watch brief on his behalf in a case that was being prosecuted by the state.
7. The appellant further contended that the tenancy agreement on which the respondent's claim was premised was irregular, bad in law and void abinitio for want of the consent of the Land Control Board,

the written consent of the registered proprietor of the suit property and because the tenancy had determined by effluxion of time.

8. For the foregoing reasons, the appellant urged the court to declare the tenancy agreement pursuant to which the respondent was given possession of the suit property null and void and that no benefits could be derived therefrom by the respondent.

9. Upon considering the cases urged before her, the trial Magistrate entered judgment in favour of the respondent in the following terms:

“.....

a). On prayer 1, the plaintiff seeks to be placed back on the land for the term of 3 years unexpired lease. However the defendant stated that she had already cleared the land to plant coffee and was not willing to place the plaintiff on the said land. In the alternative, the plaintiff seeks to be paid Kshs. 250,000/- per annum for the unexpired 3 years. The plaintiff testified that she used to earn about that figure per annum, as such I grant prayer 1 to the extent that the defendant does pay the plaintiff Kshs. 250,000/- per annum for the 3 years, to be paid with interest from the date of filing the suit.

b). On prayer 2, the plaintiff seeks that the defendant reinstates the house and toilet constructed at a cost of Kshs. 522, 800. The plaintiff produced receipts for Kshs. 522,800. The defendant witness stated that the small house which the plaintiff constructed was demolished. However the defendant was charged and convicted of malicious damage to property. She admitted that she cleared the parcel of land to enable her to plant coffee. The plaintiff has proved this prayer on a balance of probabilities and is granted in terms that the defendant pays the plaintiff Kshs. 522,800 as costs of the damaged toilet and house. This is to be paid with interest from the date of filing the suit.

c). The defendant was charged and convicted for destroying pineapples worth Kshs. 181, 489/-. She has not appealed against the judgment of court. the proceedings were produced before court. The defendant is further ordered to pay the plaintiff the cost of the pineapples at Kshs. 181, 489.00, the sum to be paid with interest from the date of filing suit.

d). The plaintiff expended Kshs. 169,000/- on legal fees. Though the defendant argued that he needed no advocate to watch brief in criminal proceedings. The law allows the plaintiff to have legal representation. However, this is not limited to act in person. If the plaintiff felt that he needed the input of counsel, he could not be denied the same. He produced receipts and all the proceedings of the court indicate that Mr. Nderi, advocate was always present, watching brief for the plaintiff. This prayer has been proved on a balance of probabilities and is allowed as prayed. The defendant to pay Kshs. 169,000/= as legal fees, and the same to be paid with interest from the date of filing the suit.

e). The plaintiff seeks Kshs.122,000/= being the plaintiff and witness travelling expenses. In the criminal case against the defendant. However it was the duty of the state to avail witnesses and not the plaintiff. I hereby will not grant this prayer to the plaintiff.

f). On the general damages and exemplary damages, the plaintiff stated he suffered psychological trauma as his children were kept out of school when the pineapples were destroyed. This prayer was not proved. He did not lay any connection between his children and the damaged pineapples. I will therefore not grant this prayer to the plaintiff.

The defendant's counter-claim is dismissed with costs to the plaintiff. The instant court cannot be called upon at this stage to declare the order of another court a nullity while that order has not been revoked or set aside or appealed against.

g) The cost and interest of this suit are awarded to the plaintiff.”

10. Aggrieved by the said judgment, the appellant appealed to this court on the following grounds.

That the learned trial Magistrate erred in law and fact by:

- (i) failing to apply the law and principles relating to pleadings and proving special damages;
- (ii) allowing damages that are not otherwise recoverable from the defendant in law or at all;
- (iii) failing to consider the effects of Section 6 of the Land Control Act, Cap.302, Laws of Kenya on the transaction which forms the basis of the respondent's claims;
- (iv) failing to find and hold that the transaction forming the basis of the respondent's claim was null and void ab initio for want of the Consent of the Land Control Board;
- (v) failing to find and hold that the acts complained of by the respondent and which form the basis of the claim for special damages were lawfully and regularly undertaken (that is to say were taken pursuant to a valid court order granting her vacant possession of the suit property);
- (vi) failing to consider the evidence and submissions before it and proceeding to consider extraneous and irrelevant factors in arriving at the judgment.

11. For the foregoing reasons, the appellant urges this court to allow the appeal and vary or set aside the judgment. Alternatively, the appellant urges this court to vary and/or substitute the judgment with its own decision. The appellant also prays for costs of the appeal.

12. The appeal was disposed of by way of written submissions.

Appellant's submissions

13. In the submissions filed on behalf of the appellant, a background of the case is given and submitted that the appellant's contention that the lease agreement pursuant to which the respondent gained interest to the suit property was null and void for want of the consent of the land control board was not challenged; that the issue of admissibility of the receipts relied on by the respondent was reserved for consideration later but the trial Magistrate failed to address that issue.

14. The trial Magistrate is faulted for having relied on the assessment report produced in criminal proceedings as proof of damages sustained by the respondent in the subsequent civil proceedings and for relying on the report of the agricultural officer yet it was not produced in the civil proceedings to enable the court analyze and ascertain its contents.

15. The trial magistrate is also faulted for allowing the respondent's claim of loss of income at Kshs. 250,000 per year for three years on grounds that the claim was not supported by the evidence adduced in the criminal case and for awarding the respondent the costs incurred in procuring an advocate to watch brief for him in the criminal case.

16. Arguing that the criminal case was handled by an officer of state and that the prosecution was not a private one, the appellant contends that the respondent should not have been reimbursed the costs incurred in respect of procuring an advocate to watch his brief.

17. In view of the foregoing, the appellant frames the following as the issues for the court's determination:

- (i) Whether the tenancy agreement/lease pursuant to which the respondent took possession of the suit property was void ab initio;

(ii) Whether there was a valid order for vacant possession at the time he took possession of the suit property;

(iii) Whether the debt of a 3rd party is transferable;

(iv) Whether the prayer for special damages awarded was merited.

18. Based on **Section 6(1)** of the Land Control Act, Cap 302 Laws of Kenya and on the fact that no consent of the Land Control Board was sought and obtained as by law required, it is submitted that the transaction that forms the basis of the respondent's claim was illegal.

19. It is pointed out that neither the appellant nor her husband was a party to the proceedings in which the respondent gained rights to the suit property and submitted that orders issued in those proceedings should not affect the appellant who was not a party.

20. It is further pointed out that there was a valid court order allowing the appellant to have vacant possession of the suit property and submitted that the respondent ought to have obeyed that order, because at the time of execution, it had not been set aside.

21. It is further submitted that the respondent did not show the nexus between his claim against a third party and the appellant who was not party to that claim and contended that the claim against a third party could not be transferred to the appellant without her knowledge.

22. Concerning the claim for special damages, it is contended that the respondent did not specifically plead and strictly prove the damages as by law required. For instance, for the award of Kshs.250,000/= per annum for 3 years, there was no assessment report or evidence to show that the respondent made that amount yearly. Because the respondent was put into the suit property to recover Kshs.334,181.20/= and was awarded Kshs. 750,000/- in respect of what she would have earned in the remaining 3 years of the lease, it is said to be tantamount to unjust enrichment.

23. Concerning the claim for recovering of costs incurred in putting up the destroyed house and toilet, it is submitted that the claim should not have been awarded because the receipts produced in respect to those costs were not stamped as required under the Stamp Duty Act.

24. The trial Magistrate is also faulted for having failed to consider the testimony of D.W.2 to the effect that the respondent took down the house himself.

25. In support of her case, the appellant relies on the following authorities: **Apex International Ltd & Anglo-Leasing Finance International Limited v. Kenya Anti-Corruption Commission (2012)eKLR; Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Another (2005) 1 KLR 828; Hadkinson v. Hadkinson (1952) 2 ALL ER 567; Mwangi v. Braeburn Limited (2004) KLR 419; Sande v. KCC Ltd (1992) LLR 314 CAK; Francis Ogoti Otundo v. Republic (2012) e KLR.**

Respondent's submissions

26. In the submissions filed on behalf of the respondent, a brief background of the dispute hereto is given and submitted that the trial Magistrate did not err when she observed:

“the circumstances under which Mr. Joseph (the respondent herein) came unto the farm were that he was granted a lease vide a court order by the court in Nyeri CMCC No. 310 of 1991. The orders granted to Mr. Joseph Muiruri were never stayed, set aside nor appealed”.

27. In view of the foregoing observation by the trial Magistrate, it is submitted that the appellant has no proper basis for claiming that the lease was null and void ab initio.

28. With regard to the contention that the respondent was not party to the proceedings pursuant to which the respondent gained rights to the suit property, it is contended that the appellant was aware of the tenancy agreement between her late husband and Paul Kiboo Kabecha and that she was aware of the arrangement that placed the respondent in legal possession of the land.

29. Based on the decisions in the cases of **Macharia Mwangi Maina & 87 Others v. Davidson Mwangi Kagiri** (2014)e KLR and **John Simiyu Ndalila v. Francis Soita** (2014) e KLR it is submitted that the lease was proper.

30. According to the respondent, allowing proprietors of land to renege land sale contracts for want of the consent of the Land Control Board would cause injustice and be tantamount to allowing them to use a statute to perpetuate fraud.

31. Concerning the contention that the appellant was authorized by court to carry out the impugned eviction, it is contended that the appellant irregularly obtained an order for vacant possession which she improperly executed (by using persons not authorized by law to carry out executions).

32. The cases of **Econet Wireless Kenya Ltd and that of Hadkinson v. Hadkinson** cited by the appellant are said to be inapplicable to the circumstances of this case because there was no deliberate disobedience of a court order by the respondent (It is contended that the respondent was not served with the court order).

33. Based on the order given in Nyeri CMCCC No. 310 of 1991 pursuant to which the respondent took possession of the suit property, it is submitted that the respondent's possession and occupation of the suit property was proper and legal.

34. Concerning the contention that the appellant was not party to the proceedings pursuant to which the respondent gained interest to the suit property, it is submitted that the court that heard and determined Nyeri CMCC No. 310 of 1991 had jurisdiction and legal right to transfer the rights of the third party, Paul Kiboo, in the suit property to the respondent. In that regard, it is pointed out that the orders issued in that suit were registered against the title and a penal notice duly issued and served.

35. According to the respondent, the transfer of the suit property to the respondent did not affect the rights of the registered proprietor as at the expiry of the lease the property would revert to him. Moreover, the order pursuant to which the respondent gained rights to the suit property was never appealed from or set aside.

36. Transfer of the rights in the lease is said to have not in anyway affected the registered proprietor but the leasee because the registered proprietor had been paid his dues.

37. With regard to the contention that the special damages awarded were not properly pleaded and proved, the respondent urges the court to consider the report of the agricultural officer on which the claim for 181, 489/- was premised.

38. As for the award of Kshs. 250,000/- per annum, it is contended that the award is premised on the report of the Agricultural Officer plus the value of subsistence crops that were also growing on the respondents land. In respect of that award, it is also submitted that the respondent had prior knowledge on how much he made from the land per year. Maintaining that the award was not baseless, counsel for the respondent urges the court to take judicial notice that a 2 ½ acre parcel of land filled with pineapples is definitely worth a valuable amount. Pointing out that the standard of proof in civil cases is on a balance of probabilities, the respondent's counsel submitted that the trial Magistrate was right to award that prayer.

39. With regard to the claim for Kshs. 522 800/- incurred in respect of the house and toilet the respondent constructed on the suit property, it is submitted that that claim was proved by production of receipts. Concerning the appellant's objection to reliance on the receipts produced in respect of that claim, it is submitted that the trial magistrate was convinced that the receipts were authentic.

40. In respect of the prayer for legal fees, it is reiterated that the respondent had a right to counsel to watch brief in the criminal trial. According to the respondent, the mere fact that watching brief is not a legal requirement does not mean it is not within the respondent's rights. The case of **Francis Ogoti Otundo v. Republic** (*supra*) is said to be inapplicable in the circumstances of this case.
41. Based on the proceedings in the criminal case, which shows that the respondent had engaged counsel to watch brief on his behalf and the receipts produced in support of the said claim, it is submitted that the claim was rightly awarded.
42. Based on the case of **Macharia Mwangi** *supra* where the Court of Appeal observed that equity shall suffer no wrong without remedy and that no man shall benefit from his wrongdoing and that equity detests unjust enrichment, the respondent urges the court not to allow the appellant to benefit from her illegal activities.
43. This being a first appeal, it is the duty of this court to evaluate afresh the evidence on record in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. See **Selle & Another vs. Associated Motor Co. Ltd & Others (1968) E.A. 123**.
44. The cases of the parties to this appeal basically were as highlighted herein above.
45. When the matter came up for hearing, the respondent who testified as P.W.1 informed the court that he was given 2 ½ acres of the suit property by court vide Nyeri CMCC No.10 of 1991; that he was supposed to utilize the suit property for 8 years. In that regard, he produced the court order as **Pexbt 1**. He informed the court that the order related to a debt the defendant in that suit owed him, of **Kshs. 334,181**.
46. Pursuant to that order, he took possession of the suit property and hired 3 people to develop the suit property and planted pineapples thereon. He also constructed a toilet and built a five (5) bed-roomed house. He further informed the court that the house and the toilet were worth **Kshs. 522, 800/=**. He produced a bundle of receipts in that respect as **Pexbt 2 to 10**.
47. During his stay in the suit property, he got information that the appellant and her son and a group of 30 people had come to the suit property and damaged everything thereon-pineapples, trees, arrow roots, food crops and the house and toilet.
48. Upon getting that information, he informed his lawyer who advised him to report the matter at Gatundu Police Station, which he did.
49. The respondent told the court that the pineapples were worth about **Kshs. 400,000/-** but the Agricultural officer he contacted valued them at **Kshs. 181, 489/=**.
50. The respondent further told the court that the case was investigated and the appellant charged, prosecuted and convicted vide Gatundu Cr. Case No.242 of 2003-Republic v. Mwihaki Wanjau.
51. The respondent further informed the court that he filed many cases. For example, he filed a case at Nairobi HC to wit Nairobi HC Cr. Application No. 175 of 2013. He produced proceedings in that case as **Pexbt 12**.
52. He informed the court that he had a lawyer who was watching his brief in the Thika and Gatundu cases. He spent **Kshs. 189,000/-**. He produced a bundle of receipts in respect of that claim as **Pexbts 15-30**.
53. The respondent admitted that the receipts he produced did not have an ETR stamp (Despite objection to admission of those receipts by the appellant the court allowed the receipts to be produced and promised to make a decision on those receipts at a later stage).
54. The respondent informed the court that she spent **Kshs. 122,000/-** as court attendance expenses.

Arguing that the burden of attending court was imposed on him by the appellant, he urged the court to order the appellant to reimburse those costs.

55. He further urged the court to order the appellant to return the suit property to him for a period of 3 years being the unexpired term of the term ordered by the court, compel the appellant to pay or plant for him the crops she destroyed and to rebuild the house and toilet she destroyed or pay him **Kshs. 522,000**.

56. The respondent admitted that he was not a party to the original lease and contented that the contention that the lease was irregular can only be raised against the person who had a lease with the appellant's husband.

57. Explaining that she would remove the house and the toilet at the expiry of the lease, the respondent produced the demand letter from her advocate dated 7th February, 2012 as **Pexbt 31**.

58. On cross examination, the respondent explained that the original lease was produced before the Nyeri Court while the Agricultural Report was produced in the criminal case. He maintained that he was placed in possession of the suit property by the court.

59. Besides the special damages, the respondent informed the court that he was seeking aggravated damages because his children had missed school because he had lost money.

60. In re examination, the respondent informed the court that all matters concerning the agricultural report by the agricultural officer are in the criminal case. He also pointed out that neither the decision in the criminal case nor the order putting him in possession of the suit property was set aside or appealed from.

61. The respondent further informed the court that on account of the unlawful actions of the appellant he suffered psychological torture.

62. The respondent also availed Simon Maina Gathangi who witnessed the damage made to the respondent's properties, the pineapples, the house and the toilet.

63. On her part, the appellant informed the court that she is the owner of the suit property; that she acquired it after her husband who was the owner passed on. She acknowledged that her husband had leased the suit property for **Kshs. 22, 500/=** to a Mr. Paul Kabecha in 1996 and that the lease was for 8 years.

64. Arguing that the lease was done secretly, she informed the court that she was annoyed when the respondent invaded the land and started cutting down the coffee trees on the suit property. According to the appellant, the leasee was to plant pineapples in the suit property while they continued harvesting the coffee thereon.

65. She informed the court that they (her husband and herself) had written to the respondent telling him to stop cutting the coffee.

66. She filed a suit to wit Nairobi HCC No. 636 of 2002 and obtained eviction orders against the respondent.

67. After she obtained the court order she started removing the pineapples and re-planting coffee. As a result she was arrested, charged, convicted and placed on probation for one year.

68. With regard to the respondent's claim on account of damages occasioned on him, she stated that she did not cause the respondent any damage. She contended that it is the respondent who cut down her trees and coffee.

69. She acknowledged that the respondent had built a house in the suit property but contended that it was a one roomed house.

70. In cross examination, she admitted that the respondent took possession of the suit property pursuant to a court order which they did not prefer any appeal against. She also acknowledged that she did not refund the money paid by Paul Kabecha in respect of the suit property.
71. Arguing that the Nyeri Court made an error by awarding the lease to the respondent, she contended that the lease between her husband and Paul Kabecha was not lawful. In this regard, she pointed out that no consent of the Land Control Board was obtained in respect of the lease.
72. She acknowledged that when she filed her case in the High Court in Nairobi she neither sought for review or setting aside of the orders pursuant to which the respondent took possession of the suit property nor a declaration that the lease agreement executed between her husband and Paul Kabecha was null and void. She also contended that the lease had terminated by effluxion of time.
73. She acknowledged that the respondent was on the suit property for 5 years before she evicted her therefrom.
74. Despite having been found guilty of malicious damage of the respondent's property, she stated that she did not maliciously damage the respondent's property.
75. Concerning the plea for payment of costs incurred for hiring a lawyer to watch brief in the criminal case she stated that the respondent is not entitled to this claim because he hired a lawyer out of his own will.
76. She admitted that his advocate wrote to the respondent informing him that she had taken possession of the suit property and indicated that the only issues pending were those of damages and trespass.
77. In re-examination, the appellant explained that she was not party to the case in which the orders placing the respondent in possession of the suit property were issued.
78. Concerning the claim for Kshs. 250,000/= per year on account of lost income, she stated that she is not aware how that figure was arrived at.
79. Maintaining that the lease executed between her husband and Paul Kabecha was null and void she urged the court to dismiss the respondent's suit with costs to her and allow her counter-claim.
80. The appellant availed Dominic Maina Mwangi (D.W.2) who informed the court that he used to work for Paul Kabecha before the suit property was given to the respondent through a court order.
81. Even after the suit property was given to the respondent, on behalf of the appellant, he continued picking coffee from the suit property.
82. Like the appellant, he informed the court that the respondent later cut down all the trees and coffee using a power saw.
83. He informed the court that after the appellant's husband passed on, the appellant asked them to go and clear the land so as to plant coffee.
84. Unlike the appellant, he claimed that it is the respondent who demolished the house.
85. In cross examination, he informed the court that five people and the appellant demolished the house. He saw her doing so.
86. Concerning the impugned lease, he informed the court that he had information from Paul Kabecha that he had leased the suit property for 8 years. He, however, did not see the lease.
87. The foregoing was the evidence which the trial court relied on in arriving at the impugned decision.

Analysis and determination

88. The sole issue for determination is whether the trial magistrate erred by entering judgment in favour of the respondent.

89. In determining that question, it behoves this court to resolve several issues of law and fact raised in this matter. These are as follows:

- (i) Whether the respondent's possession of the suit property was lawful;
- (ii) Whether the ejection or eviction of the the respondent from the suit property was lawful;
- (iii) Subject to the outcome of (ii) above, whether the respondent suffered any loss and damage from his eviction from the suit properties;
- (iv) Subject to the outcome of (iii) above, what loss/damage did the respondent incur on account of the eviction;
- (v) Is the loss/damage suffered by the respondent recoverable, if yes from whom and
- (vi) What orders should the court make;

90. **On whether the respondent's possession of the suit property was lawful**, it is common ground that the respondent took possession of the suit property pursuant to court orders. Whilst it is true that the appellant was not party to the suit in which orders pursuant to which the respondent took possession of the suit property, the evidence on record shows that she was aware of the circumstances that led to the respondent being given possession of the suit property. In fact, the evidence on record shows that the respondent had been in possession and use of the suit property for five (5) years before the appellant decided to remove him from the suit property for allegedly cutting down their coffee trees.

91. The evidence on record shows that the appellant did not apply for review and/or setting aside of the orders issued in favour of the respondent and which order was registered against the title to the suit property thus being an encumbrance to their interest in the suit property.

92. The question to answer is whether the respondent who did not challenge the legal process pursuant to which the respondent obtained interest/rights into the suit property can be heard to claim that the respondent's possession and occupation of the suit property was illegal. My view of that matter is that she cannot. That is so because, until and unless varied, set aside and/or discharged, the orders pursuant to which the respondent acquired rights to the suit proper remain valid court orders in respect of which the appellant is duty bound to obey.

93. The legal import of the foregoing determination, is that the respondent's possession and occupation of the suit property was legal and proper.

94. **On whether the ejection of the respondent from the suit property was lawful**, the evidence adduced in this matter shows that the appellant went to court and obtained orders for vacant possession of the suit property which orders were unlawfully enforced against the respondent. (I say that enforcement of the orders obtained by the appellant was unlawful because, firstly, the right legal processes of carrying out execution were not followed. Secondly, the order did not authorize the appellant to destroy the respondent's property).

95. In view of the foregoing and without going to the merits and demerits of the process used to obtain the orders for vacant possession of the suit property, I find and hold that the ejection of the respondent from the suit property was unlawful. The order of vacant possession that the appellant had obtained, did not give her any right to violate the respondent's right to property. If there was resistance by the respondent, it behoved the appellant to go back to the court and ask for assistance in getting the respondent out of the

suit property or leave of the court to remove the developments the respondent had effected on the suit property in order to be able to obtain vacant possession of the suit property.

96. As the appellant did not demonstrate that the order she obtained allowed her to destroy the respondent's property in order to obtain vacant possession, I find and hold that she acted beyond the authority donated by the court and to that extend her actions were illegal and/or unlawful.

97. **On whether the respondent suffered any loss and damage on account of the illegal eviction**, upon review of the evidence adduced in this matter, I find and hold that the respondent;

(i) Lost his crop of pineapples which was valued at **Kshs. 181,489/=** by the Agricultural Officer;

(ii) Lost the house and toilet which he had constructed on the suit property;

(iii) Incurred legal costs in hiring an advocate to watch his brief in the criminal case that was preferred by the state against the respondent.

(iv) The respondent also lost the right to be on the suit property for the remaining term of the lease granted him by court.

98. As pointed out herein above, the respondent lodged various claims concerning the above findings which the trial magistrate found to be valid and proceeded to make various awards in respect thereof.

99. Having carefully reviewed the cases urged both in support and against the awards in respect of the above findings, I find and hold as follows:

(i) That the claim in respect of destroyed pineapples and their value was sufficiently proved through the evidence adduced in the criminal case. In this regard see the case of **Captain Moses Kariuki Wachira v. Joseph Mureithi Kanyita & 3 others (2013)eKLR** where it was observed:

7“The admissibility of evidence taken in criminal proceedings and the judgments arising therefrom, in subsequent civil proceedings, is provided for under various Sections of the Evidence Act Cap 80 of the Laws of Kenya. The admission of any such evidence before the Criminal Court may not be conclusive evidence of facts, but may be used by a Plaintiff in civil case by way of establishing a prima facie case as against a Defendant being the accused person(s) in the criminal suit. Section 34 (1) of the Evidence Act allows for the admission of evidence in judicial proceedings in subsequent proceedings, including those of a civil nature but in the following circumstances:

“(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable;” (Emphasis mine).

Sub-section (b) and (d) of section 34 (1) as read together with Section 45 of the Act, enunciate the admissibility of evidence in proceedings between the same parties and the question in issue being substantially similar in the first as in the second proceeding. Section 45 provides that the judgment obtained in such proceedings may be admissible as evidence if the matter is of public interest. It therefore follows that evidence taken in a prior criminal case, at the discretion of the Court (exercising such discretion as provided under Section 3A of the Civil Procedure Act and the overriding objective enunciated under Sections 1A and 1B of the same Act), may be allowed in subsequent civil proceedings. The Court in exercising such discretion shall take cognizance of the provisions of the Section 34 (1) (b) and (d) as aforesaid in that the issues in question in the two proceedings are similar in nature as the parties thereto.

8. Given that the scope of reference in such matters is so diverse, the Court would be at liberty to admit evidence and judgments rendered in criminal matters in subsequent civil matters, but not the alternate...”

(ii) That although the evidence adduced in this matter sufficed to prove that the appellant destroyed the house and the toilet he had constructed thereon, the evidence adduced in support of that loss, which by law ought to have been specifically pleaded and strictly proved, was insufficient to enable the court to make a fair determination of the size of the house (was it one bed-roomed as contended by the appellant or 5 bed-roomed as contended by the respondent). Issues abound concerning the size and the materials used in the construction of the house. One wonders why, if the respondent had lost a property of that value, it hardly featured in the criminal proceedings! For the foregoing reasons, I find and hold that the claim was not sufficiently proved.

(iii) That the claim for recovery of costs incurred in hiring an advocate to watch brief in the criminal case in which the respondent was the victim has a bearing on the respondent’s right to a fair hearing in the criminal case hence recoverable. In this regard see the case of **Republic v. Joseph Lentrrix Waswa (2016) e KLR** where it was observed:

“...the issue for determination is whether a counsel watching brief for the family of a deceased in a criminal matter can actively participate in the trial on behalf of a victim? and if so to what extent?

He went on to state:

29. From the Cited Articles of the Constitution 2010, provisions of the Victim Protection Act 2014 and cases cited from within and outside, the law has shifted the traditional parameters of a victim in a criminal case and therefore the arguments advanced by the defence are certainly out of place and would if adopted by court be contrary to the provision of the Constitution and the Victim Protection Act, and by all means against progressive jurisprudence. The victims counsel can no longer be considered a passive observer.

30. However the participation cannot be active and parallel to that of the prosecutor as advanced in the Indian case of Sathyavani and as advocated by counsel for the family herein The above Indian case in that regard is distinguishable as the Victim Protection Act 2014 gives the parameters of involvement during trial to include; the victim’s views and concerns at various stages of the trial as the court may determine either directly by a victim or his/her representatives, at plea bargaining, at the level of sentencing or where a decision is likely to affect the right of the victim and not thought out the trial and parallel to the prosecution.”

Although the above cited case does not speak about the victim’s right to recover costs incurred in procuring legal representation, it nevertheless makes it clear that circumstances may arise in a criminal case requiring representation of the victim of the criminal action complained of by counsel of their choice.

When the victim exercises the said legal and constitutional right a question arises as to whether they are entitled to recover the costs they incurred in exercise of those rights and if so against whom.

It is my considered view that the victim is entitled to recover such expenses against the person who caused the situation complained of, in this case, the accused person.

(iv) That despite being germane, the claim for loss of user was a claim in the nature of special damages that ought to have been specifically pleaded and strictly proved. In the circumstances of this case, that claim was neither specifically pleaded nor strictly proved as by law required. There was, in the circumstances, no legal basis and/or justification for the award of Kshs. 250,000/ per annum for three years.

100. Whilst the respondent did not meet the legal threshold for award of special damages in respect of the loss and damage he sustained owing to the appellant's illegal activities, unlike the lower court I find and hold that the trial magistrate should have proceeded to award general damages in favour of the respondent for trespass. However, since that issue does not form part of the issues presented before this court for determination, I will say no more about it.

101. The import of this determination is that the appeal has merit and is allowed to the extent that the award of Kshs. 522, 000/= and Kshs. 750,000/= in respect of the destroyed house and toilet and loss of user respectively is set aside.

102. As the appellant has partially succeeded in his appeal, he shall have $\frac{1}{2}$ the costs of the appeal.

103. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 16th day of August, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Gathega Mwangi for the respondent

Mr. Thuo h/b for Mr. Kamau of Waruhiu K'owade for the appellant

Court clerk - Esther