



Mwangona & 2 others (Suing as administrators to the Estate of the Late Daniel Shem Mwangona) v Zania Limited & another (Environment & Land Case E154 of 2021) [2024] KEELC 1543 (KLR) (28 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1543 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E154 OF 2021**

LL NAIKUNI, J

FEBRUARY 28, 2024

BETWEEN

SUSAN DANIEL MWAGONA, JOSEPH KAILO MWAGONA & FRANKLIN KAILO MWAGONA (SUING AS ADMINISTRATORS TO THE ESTATE OF THE LATE DANIEL SHEM MWAGONA) PLAINTIFF

AND

ZANIA LIMITED 1ST DEFENDANT

RISING STAR COMMODITIES LIMITED 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by the Susan Daniel Mwangona, Joseph Kailo Mwangona and Franklin Kailo Mwangona suing as administrators to the estate of the late Daniel Shem Mwangona the Plaintiffs herein through a Plaint dated 10th August, 2021 and filed in Court on 12th August, 2021. It was against the Zania Limited and Rising Star Commodities Limited the 1st and 2nd Defendants herein.
2. The Plaintiffs as per the Plaint are described as adults, of the Kenyan National of sound mind and disposition, bring this suit in their capacity as administrators to the estate of the late Daniel Shem Mwangona. The 1st and 2nd Defendant is a limited liability company incorporated within the provisions of the Companies Act of the laws of Kenya with their head offices within Mombasa, Kenya.
3. It is instructive to note that upon service of the Plaint and Summons to Enter Appearance, the 1st and 2nd Defendants neither filed a Defence nor did they tender any evidence as required under Order 7 and 11 of the Civil Procedure Rules, 2010 and provisions of Part II and III of the Evidence Act, Cap. 80 of



the Laws of Kenya. Instead, the Defendants preferred to only file and rely on their Written submissions. Accordingly, the Court has proceeded to make a decision on merit thereof.

4. On 20th March, 2023 upon all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the pre-trial conference, it was fixed for full trial on 11th July, 2023.

II. The Plaintiff's case

5. Based on the filed pleadings being the Plaint by the Plaintiff herein, the brief facts of the case are that at all material times herein the late Daniel Shem Mwagona (Hereinafter referred to as "The Deceased") was the legal and beneficial owner of Land Title Number Kwale/Shimoni Adjudication/215 measuring approximately 17.7 hectares (Hereinafter referred to as "The Suit Property"). As fate would have it, the deceased passed away on 9th May 2013. Prior to that, he would always involve his oldest son Joseph Kailo Mwagona in all his land dealings and transactions be it selling or buying of the land. Subsequently, the Plaintiffs herein petitioned and were issued with the Grant Letters of administration in the year 2013 and had the same confirmed on 28th May 2014. On or about February 2021, the Plaintiffs set out to investigate the records at the Kwale lands registry in respect to ownership records for the suit land. Pursuant to that, they were surprised from the information they obtained from the Certificate of the official search and the records which indicated that the said parcel of land was in the names of the 1st Defendant and not the deceased's names would have been expected thereof. From the said information obtained at the Land Registry, it showed that the property had been allegedly transferred to the 1st Defendant though a transfer instrument dated 13th May, 2013 which was a date after the deceased had already passed away.
6. Immediate thereafter, the Plaintiffs through Mr. Joseph Kailo Mwagona, a duly appointed Co - Legal Administrator for the Estate of the deceased and the oldest son to the deceased lodged a fraud complaint at Makupa police station under the O.BNO. 32/22/2/2021. Later on, the Plaintiffs through Mr. Mwagona registered a Caution against the same land on 19th April 2021. The 1st and 2nd Defendants admitted the existence of fraud and started negotiations with the Plaintiffs to legitimize the fraud by buying the land from the Plaintiffs at current price but the Defendants had since withdrawn from the said negotiations. The Plaintiffs averred that the transfer and registration of the suit land into the 1st Defendant's name was done illegally and fraudulently whereas no consideration was paid to them or their dad.
7. The Plaintiffs relied on the following particulars of fraud and illegality:-
 - a. Falsifying and or forging the Transfer 13th May, 2013.
 - b. Falsifying and or forging the application and the Letter of consent dated 17th April, 2013 from the Land Control Board.
 - c. Failing to pay any consideration to the deceased or his administrators prior to transfer of the land.
 - d. Forging and or falsifying records to indicate that the suit land was sold to the 2nd Defendant yet the transfer instrument dated 13th May, 2013 showed its transferred to the 1st Defendant.
 - e. Stealing the suit land and getting it fraudulently transferred to the Defendants.
 - f. Falsifying the application and the Letter of Consent from the Land Control Board letter and he transfer instruments on dates when the deceased was bedridden for 2 months unable to transact any business.



- g. Stealing the suit land.
 - h. Purporting to transfer the land without paying stamp duty against it.
 - i. Sweet talking the Plaintiffs into withdrawing the caution registered against the land and persuaded them into withdrawing the police case without paying sufficient consideration.
8. According to the Plaintiff, the suit land still belonged to their late father and prayed for revocation and/or cancellation of the title entry in favor of the Defendants. They prayed that the same should revert into the Plaintiffs names as the duly appointed Legal Administrators to the estate of the deceased. The Defendants were summoned by the police officers but instead started to have discussions with the Plaintiffs about buying the land to legitimize the illegality. The Plaintiffs had after attempting to discuss with them realized they were being taken for a ride and opted to instruct a lawyer to file this suit.
 9. The Plaintiffs had reliably been informed by an employee to the Defendants that the Defendants were negotiating with a potential buyer to sell the property to them or in the alternative take a loan from Diamond TrustBank Limited using the property as collateral security so as to defeat the Plaintiff interest in the property.
 10. The Plaintiffs confirmed that there was no other suit pending or existing between the parties herein over the existing subject matter. The Plaintiffs submitted themselves to the jurisdiction of the Honourable Court.
 11. The Plaintiff prayed for Judgment to be entered against the 1st and 2nd Defendants jointly and severally for:-
 - a. This Honorable Court be pleased to issue a Permanent Injunction restraining the 1st and 2nd Defendants by themselves, their employees or agents from taking possession of the suit land, leasing, advertising for sale, attempting to sell, offering for sale, or concluding any agreement for sale over the suit land Title Number KWALE/ SHIMONI ADJ./215 to any third party or using it as collateral either by a formal or informal Charge to secure any monies from any bank or financial institution.
 - b. This court be pleased to Declare the Transfer Instrument dated 13th May 2013 and the Consent of the Land Control Board dated 17th April 2013 invalid, null and void.
 - c. This court be pleased to Revoke and or Cancel the Title for the suit land KWALE/SHIMONI ADJ./215 issued to the 1st Defendant and order the same to revert to the name of DANIEL SHEM MWAGONA and or the plaintiffs as administrators to his estate.
 - d. The Defendants do pay the plaintiffs general damages as shall be determined by court for disenfranchising them of the suit land.
 - e. Costs of this suit be borne by the Defendants.
 - f. The Court be pleased to grant any other relief that the court may deem fit to grant.
 12. The Plaintiff called its first witness on the 11th July, 2023 where the Witness testified as follows:



A. Examination - in - Chief of PW 1 by Mr. Simiyu Advocate.

13. PW – 1 was sworn and testified in Kiswahili language. He identified himself as Joseph Kailo Mwagona. He informed the Honourable Court that he filed his witness statement dated 10th August, 2021 and at page 51 to 54 he had list of documents of 12 documents dated 12th August, 2021 produced as Plaintiffs' Exhibit No. 1 to 12 pages 55 to 76 which he adopted as his evidence.
14. He testified that Daniel Mwagona Shem (the deceased was his father). He died intestate on 9th May, 2013. He had attached a Certificate of death marked as Plaintiff Exhibit number 2 at page 59. He told the Court that he understood the case between the Plaintiffs and the Defendants. From the official search conducted at the land registry revealed that the suit was registered in the name of Zania Limited as indicated at page 64 and the transfer was in page 66. The deceased died on 9th May, 2013 from appendix, the witness was with him. He was leaving with his father for three months before his death. The deceased underwent a surgery. He was discharged and came back home but after a month he died. The witness did not know what relationship the deceased had with the Defendants.
15. He told the Court that they found out that one of their lands had been taken away. He stated that they needed the land and the costs of the suit. His father was the owner of the suit land evidenced by the title deed at page 28. The writings were not legible, they were faded. There was also a transfer on page 31.

B. Cross examination of PW - 1 by Mr. Birir Advocate

16. He was referred to the transfer at page 31 and 32. He stated that the same was to Rising Star Commodities Limited. He was not aware of Anjarwalla and Khanna Advocate who were alleged to have done the transfer on 13th May, 2023 after the death of his father. He had no knowledge that the document was received on 3rd June, 2013 and certified on 22nd March, 201. They were only presented by the advocates. The Land Control Board Consent was issued on 17th April, 2013 which was at page 34. The advocate told them that he sold a plot and they took the balance from Anjarwalla & Khanna Advocates. He knew that they were the advocates for their deceased father. They were the ones who processed the Grant Letters of administration but on this matter they disagreed with him. The firm was no longer co - operative with him and he lost confidence in the firm.
17. The witness told the court that that they found that the title was registered in the name of the 2nd Defendant. When referred to the transfer form, the witness told the Court that the photo was his and the signature belonged to his father. They were surprised that the signature was not done in his presence. The transfer apparently occurred when the deceased had already passed on and the same land was registered in the name of the 1st Defendant. He had not conducted a recent official search onto the suit land.

C. Re – examination of PW - 1 by Mr. Simiyu Advocate

18. He reiterated that his father had several plots at Kisauni although he had sold the plots. The suit property was situated in Shimoni.
19. On 11th July, 2023 the Plaintiffs through their Counsel Mr. Simiyu marked their case closed. The Defendants also closed their case on the same date with the Counsel Mr. Birir for the Defendants informing the Court that they never wished to present any defence.



III. Submissions

20. On 11th July, 2023 the Honourable Court in the presence of all the parties gave directions on the disposition of the plaint dated 10th August, 2021 by way of written submission. Pursuant to that on 28th September, 2023 after the Honourable Court confirming compliance set the Judgment date on 30th January, 2024. However, this date was deferred to 28th February, 2024 whatsoever.

A. The Written Submissions by the Plaintiff

21. The Plaintiff through the law firm of Messrs. Wafula Simiyu & Co. Advocates, filed their written submissions dated 7th September, 2023. Mr. Simiyu Advocate submitted that through the Plaint dated 10th August 2021 the Plaintiffs instituted this suit against the 1st and 2nd Defendants seeking for the orders already stated out hereinabove.
22. The Learned Counsel submitted that the cause of action was anchored in fraud, misrepresentation and illegality in so far as the 1st and 2nd Defendants purported to transfer the suit land by Transfer instrument dated 13th May 2013 supported by a letter of Consent from the Land Control Board dated 17th April 2013. This was blatantly false on the face of it in so far as a Certificate of Death to the late deceased was produced at page 59 of the bundle showing he passed away 9th May 2013.
23. Alongside the filed Plaint, the suit was filed under a Certificate of urgency application seeking a temporary injunction. The court fixed it for hearing on 17th August 2021. It ordered the status quo to be maintained in order to preserve the suit land until the 4th October 2021 for the inter party hearing. On 4th October 2021, It granted a temporary injunction and ordered that the matter mentioned on 8th November 2021 to ascertain service. However, taking that the court was not satisfied with service upon the 1st and 2nd Defendants on 8th November 2021 it granted leave for the Plaintiffs to effect service by way of substituted means by publishing the notice in the newspapers of wide national circulation. It fixed a mention on 8th December 2021. The Court order was full of wisdom as indeed, upon serving them through this means, the Defendant's entered appearance on 7th December 2021 through Chebukaka & Associates Advocates. The parties compromised the notice of motion application dated 10th August 2023 by allowing the injunction to pave way for the hearing and final determination of the case and consented to have the matter determined expeditiously on its merits. The case was certified ready for trial.
24. The Learned Counsel submitted that the Defendants ended up changing their advocates two more times. They preferred not to file any documents nor call any witness at trial. The Plaintiff's called one witness Joseph Kailo Mwagona the 1st borne son to the deceased. He obtained his locus to testify from the Grant of Letters of administration intestate filed in Mombasa Succession Case No. 256 of 2013 attached at page 60 of the bundle. His witness statement appears at page 51 through to 54 of the bundles of documents and he produced the documents appearing on the list of documents filed in court appearing at page 55 of the bundle and the respective documents appearing from pages 56 through to 76.
25. According to the Learned Counsel at the hearing, the Plaintiff witness confirmed the fact that he was one of the administrators to the father's estate as per document 3 on the list. He produced the fathers copy of identity card and attached his death certificate as document 1 and 2 on the list of documents. He swore that his father was at all material times the legal and beneficial owner of the suit land. See copy of title at page 69. That his father had been bed ridden for close to 3 months prior to his death and he was the one nursing him at his house. This he said, was the reason he was sure that he could not have



- either received any consideration towards the sale and purchase of the land, or executed the impugned transfer and land control board consent. Upon his death they took out his letters of administration to administer his estate as seen at Pages 61 and 62 of the bundles of the Plaintiff's documents.
26. On cross examination by Mr. Birir Advocate currently on record for the 1st and 2nd Defendants, he stated that his father had previously sold a different plot of land through the office of Law firm of Messrs. Anjarwalla & Khanna Advocates and that was where he suspected the national card identity card and Personal identification Number (PIN) Certificate belonging to the deceased were obtained. He denied the fact that his father may have sold the land to either of the Defendants behind his back because he stated that his father always involved him in all his affairs. They carried out an official search appearing at page 64 and were surprised to establish that the father was alleged to have sold land to the 1st and 2nd Defendants after his death. They lodged a caution being the documents marked as Plaintiff Exhibit Numbers 11 and 12 was the caution and the entry of the OB NO.32/22/2/2021 at Makupa Police Station. He reiterated the statement that the Defendants admitted to the offense and sought to rectify the mistake by now negotiating to buy the suit land from the plaintiffs as per paragraph 10 of the plaint.
 27. The Learned Counsel submitted that according to the Plaintiff's case and evidence, it was true that there was on record a Transfer Instrument appearing at Page 66 that was dated 13th May 2013 allegedly transferring the suit land for a consideration of a sum of Kenya Shillings Three Million Three Ninety Four Thousand Four Hundred (Kshs. 3,394,400.00/=) to the 2nd Defendant. It was legally perplexing at what point in time the suit property was transferred to the 1st Defendant who from the records never had dealings with the Plaintiffs. The evidence adduced before court cleared the air that no consideration was paid to the deceased or his administrators. The Plaintiffs closed their case accordingly. However, the 1st and 2nd Defendants never adduced any evidence to proof of payment of the said money and that explain why they chose to tender no evidence despite having appointed three lawyers to act for them at different times.
 28. The Learned Counsel submitted that the Plaintiffs had proved their case on a balance of probability. He prayed that the court be pleased to award them the sought orders by declaring the transfer instrument dated 13th May 2013 and the Land Control Board Consent dated 17th April 2013 invalid, null and void. Further, that the Court should be pleased to revoke and or cancel the title issued to the 1st Defendant and order the same to revert to the deceased through his Legal appointed Administrators – the Plaintiffs herein.
 29. According to the Learned Counsel, it was settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit from an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved. In the instant case, the Plaintiffs never pleaded for mesne profit but general damages for disenfranchising their suit land.
 30. Further the Learned Counsel submitted that save for mesne profits being a special damage claim that needs to be specifically pleaded and proved, the legal principle between them and general damages was the same. It was an amount payable by a person in possession or occupation of land in circumstances when that person had no right to be in possession or occupation. In this case, the 1st and 2nd Defendants had no right to be in possession and occupation of the Plaintiffs land since the year 2013 to 2023 but they had been in possession and been trading with it for gain.
 31. To buttress on this point, the Learned Counsel relied on the case of:- "Park Towers Ltd v John Mithamo Njika & 7 others [2014] eKLR". Therefore, granted that trespass to land is actionable per



se, and indeed no proof of damage is necessary for the court to award general damages. The continued occupation represents the opportunity cost for the deprivation of the use of the land by the Plaintiff's either to till it for profit or to use it as collateral to secure financing. In tort, damages are awarded as a way to compensate a party for the loss he or she had incurred due to a wrongful action on the part of the other party. The damages so awarded are intended to return the party back to the position he or she was in before the wrongful act was committed. Halsbury's Laws of England 4th Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass:

- (a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
- (b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- (c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.
- (d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded.
- (e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased".

32. Similarly, the Learned Counsel cited the case of:- "Duncan Ndegwa – Versus - Kenya Pipeline Limited HCC No.2577 OF 1990 (unreported)" the court held that:

"The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principles is to put the claimant in the position he was prior to the infliction of the harm."

33. The Learned Counsel also relied on the Court of Appeal decision in "Christine Nyanchama Oanda v The Catholic diocese of Homa Bay Registered Trustees [2020] eKLR" where the cases in paragraphs 7 and 8 of his submissions had been cited with approval. A copy is attached to their submissions for ease of reference.

34. Finally, the Plaintiffs had prayed for general damages in so far as the 1st and 2nd Defendants had been in physical possession and illegal ownership of the suit land from the year 2013 to date in 2023. It was instructive that the 1st and 2nd Defendants trespassed in to the said land by use of falsified transfers and a consent from the Land Control Board. They used government office documents to make it look legitimate. No stamp duty was paid whatsoever to legitimize the sell meaning a government officer assisted them bend the law to had the property registered in their favor. The land was vast measuring 17.17 hectares which translated to about 40 acres. The Plaintiffs prayed that the Honourable court takes into account the fact that the 1st and 2nd Defendants had generated income from possession and occupation of the land at the expense of the Plaintiffs. The Plaintiffs were entitled to general damages for the 10 years the Defendants had been in occupation of the land and the Learned Counsel submitted that the court should assess the same at a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) loss on the 40 acres (or 17.17 hectares) per year totaling to a sum of Kenya Shillings Ten Million (Kshs.



10,000,000/-) loss for the 10 years. He submitted that the court should make the general damage award punitive to prevent repeat of similar action by any other third party.

35. In conclusion, the Learned Counsel submitted that the Plaintiffs had been made to incur a cost which they would not have incurred were it not for the Defendant's illegal activity. He concluded that the Plaintiffs prayed that the 1st and 2nd Defendants should be condemned to pay costs of the suit and interest on all the monetary awards until full and final payment.

B. The Written Submissions by the 1st and 2nd Defendants

36. The 1st and 2nd Defendants through the Law firm of Messrs. Birir & Company Advocates filed their written submissions dated 27th September, 2023. Mr. Birir Advocate commenced their submissions by stating that the Plaintiffs failed to prove their case on a balance of probability so as to revoke the title to the 1st and 2nd Defendants in respect to the suit land. Their main contention was that the registration was done when the former owner who was their father had passed on. They did not prove that there existed any fraud and if at all it did, it was committed by the 1st and 2nd Defendants hereof.
37. It was the Learned Counsel's contention that in a case where a party sought to revoke and/or cancel a title, one must prove that fraud was committed. The Plaintiffs averred that the Letter of Consent from the Land Control Board was obtained on 17th April, 2013. He further said that the deceased passed on 9th May, 2013. According to him, PW - 1 never informed the Honourable Court how it was impossible for the said deceased to appear before Board on 17th April, 2013 and pass away on 9th May, 2013. This was not an impossibility whatsoever. Infact all the documents produced in court concerning the transfer were signed by the 1st Defendant before the death of the Plaintiffs' father. It was not always true that upon signing of the documents one must rush for registration as it all depended on the circumstances prevailing like the availability of funds.
38. The Learned Counsel submitted that the Plaintiffs had not demonstrated to the court that the deceased never signed the documents. They ought to have had the Law firm of Messrs. Anjarwalla & Khanna Advocates to appear in Court as witnesses in this case since they were acting for both parties and in any event they were the Plaintiffs' father's advocates for long time. Further, they were the ones who were in custody of all the documents pertaining to the Plaintiffs' father's properties. The Plaintiffs were on wild goose chase seeking to deny the 1st and 2nd Defendants the right to enjoy the property they legally purchased. The Defendants were not obliged to file any documents as long as they entered appearance and participated in the proceedings.
39. In conclusion, the Learned Counsel submitted that the suit on the face of the record was a nullity and was based on conjecture and surmise and the same should be dismissed with costs.

IV. Analysis and Determination

40. I have carefully read and considered the pleadings herein by the Plaintiff and the 1st and 2nd Defendants, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes. This case proceeded whereby the Plaintiffs tendered evidence and produced several documents in support of their cases. As indicated above, it should be noted that the 1st and 2nd Defendants never filed a defence neither did they tender any evidence although they filed submissions. Thus, the Court will proceed to make its determination on its merit whatsoever.
41. The suit has not been contested by the Defendants therefore the Plaintiff's evidence remains uncontroverted and unchallenged. Before indulging into the issues before this Honourable Court, feels it imperative to extrapolate on the situation where a party has failed to file a Defence nor witness



statements. According to the provision of Order 6 Rule 1 of the Civil Procedure Rules, 2010 prescribes the rules for entering appearance, while Order 7 Rule 1 provides for the time within which a Defence should be filed. Order 6 Rule 1 provides as follows:

“Where a Defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons.”

42. The provision of Order 7 Rule 1 on the other hand provides as follows:

“Where a Defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his Defence within fourteen days after he has entered an appearance in the suit and serve it on the Plaintiff within fourteen days from the date of filing the Defence and file an Affidavit of Service.”

The provision of Order 7 Rule 5 provides as follows: -

“The Defence and Counterclaim filed under Order 1 and 2 shall be accompanied by:-

- a. An Affidavit under Order 4 Rule 1 (2) where there is a Counterclaim.
- b. A list of witnesses to be called at the trial.
- c. Written statements signed by the witnesses except expert’s witnesses and
- d. Copies of documents to be relied on at the trial provided that the statements under Sub-Rule (c) may the leave of the Court be furnished at least fifteen (15) days prior to the trial conference under Order 11”

Further, the provision of Order 11 of the Civil Procedure Rules, 2010 holds that some of the issues to be dealt with by the Court during Pre-trial Conference include whether a party has given full disclosure of documents to the other part; whether the inspection of documents has been done; whether a party has filed and exchanged all witness statements among other things. It’s all meant to avoid ambushing the other party in the dispute.

Additionally, the provision of Order 11 (2) (a) to (d) of the Civil Procedure Rules, 2010 on case management checklist empowers the court to order for the filing and service of any necessary particulars during a Pre-trial conference. The court can also give any equitable directions to facilitate expeditious disposal of the suit.

43. The provision of Order 7 Rule 11 is clear that non filing of witness statements does stop the holding of a Pre-trial conference. The intentions for the Pre-trial conference is to find out whether the suit is ready for hearing or not and to sort out all the preliminaries. At that stage a party may request for time to comply of other rules for instance filing of other documents. Therefore, from the provision of Order 7 the failure to file statements does not lead to striking out of the Defence. Nonetheless, the consequences for failure to file a Defence can easily be deduced from cited cases. For instance, in the case of “North End Trading Company Limited (Carrying on the Business Under the Registered Name of) Kenya Refuse Handlers Limited v City Council of Nairobi [2019] eKLR”, the Honourable Court held as follows:-

“18. In *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No.23 of 1997*, it was held that where a Defendant does not adduce



evidence the Plaintiff's evidence is to be believed, as allegations by the defence is not evidence.

19. In the case of Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002, Lesiit, J. citing the case of Autar Singh Bahra And Another v Raju Govindji, HCCC No.548 of 1998 appreciated that:-

‘Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.’

44. Similarly, the Court of Appeal in the case “Edward Mariga Through Stanley Mobisa Mariga v Nathaniel David Shulter & Another [1979] eKLR” said:-

“The Respondents filed a defence in which they denied the appellant's claim and averred that the accident was caused by the appellant's own negligence in that he suddenly ran across the road and in the process was hit by the motor vehicle. The Respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother.”

45. In the instant case, the Defendants did not file a defence to deny the facts of the statement neither did they call any witness meaning that the facts of this case according to the Plaintiff remain uncontested. Definitely, this Court will be informed and hence apply these legal principles in the instant case.
46. Be that as it may, this Honourable Court will still examine the facts of the case and in order to arrive at an informed, just, equitable and reasonable decision, the Honourable Court has issues for its determination. These are:-
- a. Whether the suit instituted by the Plaintiff through the Plaintiff dated.....has any merit to wit – whether Land Title Number Kwale/ Shimoni Adjudication/215 was fraudulently and illegally transferred to the Defendants and whether the Doctrines of Estoppel and/ or Equity are applicable in the circumstance.
 - b. Whether the Plaintiffs are entitled to the prayers sought?
 - c. Who will bear the Costs of suit?

Issue No. a). Whether the suit instituted by the Plaintiff through the Plaintiff dated 10th August, 2021 has any merit to wit – Whether Land Title Number Kwale/ Shimoni Adjudication/215 was fraudulently and illegally transferred to the Defendants and whether the Doctrines of Estoppel and/ or Equity are applicable in the circumstance

47. Under this sub title, the main substratum in this matter is three – fold a). on the legal and bona fide ownership of the suit property b). Whether the suit land had ever been illegally and irregularly acquired through fraudulent means and c). In the given circumstances what would be the legal remedies available whatsoever
48. From the very onset, the Plaintiffs' case is that they are the duly appointed Co - Legal administrators of the Estate of the deceased. Historically, the deceased had always been the bona fide and legal proprietor to



the suit land. Prior to his demise, the deceased had always involved his oldest son Joseph Kailo Mwagona in all his land dealings and transactions be it selling or buying of the land. The Plaintiffs took out Grant Letters of administration in the year 2013 and had the same confirmed on 28th May 2014. On or about February 2021 the Plaintiffs set out to investigate the records at the Kwale lands registry in respect to ownership records for the suit land. They were surprised to have an official search and the records indicated that the said parcel of land was in the names of the 1st Defendant. The property was allegedly transferred to the 1st Defendant by a transfer instrument dated 13th May, 2013 a date after the deceased had already passed away. The Plaintiffs through Mr. Mwagona as an Legal Co - Administrator and the oldest son to the deceased lodged a fraud complaint at Makupa police station under O.B NO. 32/22/2/2021.

49. The Plaintiffs later through the said Mr. Mwagona registered a Caution against the same land on 19th April 2021. The 1st and 2nd Defendants admitted the fraud and started negotiations with the Plaintiffs to legitimize the fraud by buying the land from the Plaintiffs at current price but the Defendants have since withdrawn from the said negotiations. The Plaintiffs aver that the transfer and registration of the suit land into the 1st Defendant's name was done illegally and fraudulently whereas no consideration was paid to them or their dad.
50. Via the documentary as well as the oral evidence adduced, it is clear that suit land was transferred to Zania Limited, the 1st Defendant herein which according to the transfer instrument dated 13th May, 2013 was a date after the deceased had passed away.
51. It is clear that the deceased died on 9th May, 2013 wherein Grant Letters of administration were obtained on 28th May, 2014 wherein both the Plaintiffs were made Co - Administrators of the deceased's estate. It therefore follows that by the time the suit property was transferred to the 1st Defendant no succession proceedings had ever been filed in respect of the estate of the deceased thus the estate of the deceased has not been distributed as provided for under the provision of the laws of Succession, Cap. 160 of the Laws of Kenya.
52. It was the submission of the Defendants' Learned Counsel that in a case where a party sought to revoke and/or cancel a title, one must prove that fraud was committed. The Plaintiffs averred that the Letter of Consent from the Land Control Board was obtained on 17th April, 2013. He further said that the deceased passed on 9th May, 2013 and that PW - 1 failed to inform the court how on the impossibilities of the deceased appearing before the Land Control Board on 17th April, 2013 and pass away on 9th May, 2013. The contention by the Learned Counsel was that there was no impossibility whatsoever, infact all the documents produced in court concerning the transfer were signed by the 1st Defendant before the death of the Plaintiffs' father. He advanced the argument that it was not always true that upon signing of the documents one must rush for registration as it all depends on the circumstances prevailing like the availability of funds. Indeed, the Honourable Court fully concurs and sees the logical argument taken up by the Learned Counsel. In all due respect and for the sake of arguments, definitely, I will not hesitate to accord the Learned Counsel (as a respectable officer of this Court) for the 1st and 2nd Defendants some benefit of doubt for whatever its worth!
53. But be that as it may, it will not be necessary to belabor the point that both these titles were improperly acquired. It is critical to focus on crystal ball and not allow ourselves to digress. Fundamentally, what is important is to deduce the legalities of what happened after the death of the deceased on 9th May, 2013. The provision Section 45 of the *Law of Succession Act*, 160, termed as "Intermeddling into the Estate of a Deceased person" and which provides as follows:-



- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
54. In saying this, I seek quick refuge from the case of:- “Bahola Mkalindi v Michael Seth Kseme & 2 others [2012] eKLR” the Court held that:-
- ‘The *Law of Succession Act*, Cap. 160 is concerned with the administration of the estate of deceased persons. The estate of a deceased person has been defined by the Act as property which the deceased person was legally competent to freely dispose of during his lifetime, and in respect of which his interest has not been terminated by his death.’
55. Additionally, the provision of Section 55 of the *Law of Succession Act*, Cap. 160 stipulates that:-
- “No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by section 71.”
56. The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the *Law of Succession Act* is tainted with killer poison; and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under article 40(6) of *the Constitution*. See the claw-back provision of *the Constitution* that:-
- 40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
57. Having considered the evidence before this Honourable Court as well as the exhibits herein produced, it clearly emerges that Section 55 of the *Law of Succession Act* was not complied with before these properties were transferred. I therefore find that the said registration was a nullity as the estate of deceased could only have been dealt with under the *Law of succession Act*, Cap. 160 after his death and not otherwise.
58. Therefore, in essence, it is this Honourable Court’s very strong finding that the deceased was the legal and beneficial proprietor of suit property with all indefeasible interest, title and rights over it as vested in him and founded under the provision of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 20102 having been registered as such on the 26th March, 2003.
59. As previously stated, the 1st and 2nd Defendants did not file any defence neither did they call any evidence. Legally, therefore the facts as adduced by the Plaintiffs are uncontroverted. Suffice to say, a keen look at the sale agreement that the 1st Defendant, claims to have executed was dated 13th May,



2013. Undoubtedly, this was after the death of the deceased – the legal proprietor of the suit land. He had no knowledge that the document was received on 3rd June, 2013 and certified on 22nd March, 2013. The Land Control Board Consent was issued on 17th April, 2013 which was at page 34. The said sale transaction was carried on 4 days after the death of the proprietor of the suit land and before the letters of administration had been issued with the result that there was intermeddling with the deceased's estate. The whole affair is overly untidy and messy.

60. The provisions of Section 26 of the [Land Registration Act](#), Act No.3 of 2012 provide as follows:-

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

1. As it may be observed, the law is extremely protective of title but the protection can be removed and title impeached, on two instances. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
2. The import of Section 26 of the [Land Registration Act](#) was considered in the case of “Elijah Makeri Nyangwra v Stephen Mungai Njuguna & Another [2013] eKLR” where Munyao J, answered the question as to whether title is impeachable under the provision of Section 26 (1) (b) of the said Act as follows:-

“First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

63. In the given circumstance, I am left with no alternative but to invoke the provision of Section 80 (1) of the [Land Registration Act](#), 2012 which provides thus:-

80 (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

64. Having found that the deceased was the legal and beneficial proprietor of the suit land even after his death, it therefore follows that the title of the 1st Defendant was obtained by fraud and misrepresentation. Although there was no evidence adduced that pointed out to the 1st and 2nd Defendants as being parties to the fraud or misrepresentation, I am fully satisfied that the conditions



provided for impeachment of a title as per the provisions of Section 26 (1) (b) have been met. I discern that the title of the 1st and 2nd Defendant having been obtained illegally, unprocedurally and/or through a corrupt scheme, the same is liable to be cancelled. Regrettably, the doctrines of Estoppel and equity would not apply in the present instance to sanitize an illegality.

65. For these reasons, this court is however empowered under this section to order for rectification of the register by directing that any registration be cancelled or amended if it is satisfied that there was an error, mistake or fraud.

Issue No. b.) Whether the Plaintiffs are entitled to the prayers sought

66. Under this Sub heading and as stated above, I reiterate that the provision of Section 80 of the [Land registration Act](#), No. 3 of 2012 empowers this court to order the rectification of a register of a suit property directing it be cancelled. Though, the plaintiffs have sought the relief that the suit property be restored in the deceased or the Plaintiffs as the administrators of the estate of the deceased which is attainable, they also seek for general damages as the legal administrators of the estate of the deceased.
67. The Plaintiffs have made prayers for general damages for disenfranchising them of the suit land. According to the Learned Counsel for the Plaintiffs in their submissions, it is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit from an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved. In the case before your lordship, the plaintiff did not plead mesne profit but general damages for disenfranchising their suit land.
68. Further the Learned Counsel submitted that save for mesne profits being a special damage claim that needs to be specifically pleaded and proved, the legal principle between them and general damages is the same. It is an amount payable by a person in possession or occupation of land in circumstances when that person has no right to be in possession or occupation. In this case, the defendant had no right to be in possession and occupation of the plaintiffs land since 2013 to 2023 but they have been in possession and been trading with it for gain.
69. The Learned Counsel relied on the case of "Park Towers Ltd (Supra) it was stated:
- “I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case...”
70. According to the Plaintiffs granted that trespass to land is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. The continued occupation represents the opportunity cost for the deprivation of the use of the land by the Plaintiff's either to till it for profit or to use it as collateral to secure financing. In tort, damages are awarded as a way to compensate a party for the loss he or she had incurred due to a wrongful action on the part of the other party. The damages so awarded are intended to return the party back to the position he or she was in before the wrongful act was committed. Halsbury's Laws of England 4th Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass:
- (a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.



- (b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
 - (c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.
 - (d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded.
 - (e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased".
71. According to the Learned Counsel of the Plaintiffs as earlier stated submitted that the 1st and 2nd Defendants have had the suit property from the years 2013 to 2023 a period of 10 years whatsoever. For the reasons and findings stated, I find the 1st and 2nd Defendants are trespassers as envisaged by Section 3 of the *Trespass Act*. The Plaintiffs pleaded general damages for disenfranchising and trespass but failed to quantify the damages they suffered.
72. I will exercise my discretion and award him nominal damages of a sum of Kenya Shillings One Million (Kshs 1,000,000/=). Halsbury's 4th ed, Vol 45, at para 26, 1503 was cited with approval in the case of:- "Nakuru Industries Limited – Versus - S S Mehta & Sons [2016] eKLR" which expressed itself on computation of damages in an action of trespass as follows:
- '(a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
 - (b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
 - (c) Where the defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.
 - (d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights or the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
 - (e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased'.

Issue No c). Who will bear the Costs of suit

73. It is now well established that the issue of Costs is discretionary. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

74. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. It provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to



all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

75. As described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.
76. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.
77. In this case, as this Honourable Court has opined above, the Plaintiffs have proved their claim against the 1st and 2nd Defendants. Therefore, the Plaintiffs have the costs of the suit as per the amended Plaintiff dated 10th August, 2021 and filed in Court on 12th August, 2021 to be paid jointly by the Defendants.

V. Conclusion and Disposition

78. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiffs have established his case against the Defendants herein. Thus, the Court proceeds to make the following specific orders:-
 - a. That Judgement be and is hereby entered in favour of the Plaintiffs against the 1st and 2nd Defendants herein as per the Plaintiff dated 10th August, 2021.
 - b. That a permanent injunction do hereby issue restraining the 1st and 2nd Defendants by themselves, their employees or agents from taking possession of the suit land, leasing, advertising for sale, attempting to sell, offering for sale, or concluding any agreement for sale over the suit land Title Number Kwale/ Shimoni ADJ./215 to any third party or using it as collateral either by a formal or informal Charge to secure any monies from any bank or financial institution.
 - c. That a declaration do and is hereby made that the Transfer Instrument dated 13th May 2013 and the Consent of the Land Control Board dated 17th April 2013 invalid, null and void.
 - d. That this Honourable Court do and hereby makes an order revoking and cancelling the Title for the suit land Kwale/Shimoni ADJ./215 issued to the 1st Defendant and order the same to revert to the name of Daniel Shem Mwagona and or the plaintiffs as administrators to his estate.
 - e. That the Plaintiffs are awarded general damages of a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) to be paid by the 1st and 2nd Defendants jointly and severally.
 - f. That the Plaintiffs shall have the costs of the suit to be paid jointly and severally by the 1st and 2nd Defendants.
 - g. That the Interests on (e) and (f) above shall apply at court rates from the date of the Judgement.



It Is So Ordered Accordingly.

JUDGMENT DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 28TH DAY OF FEBRUARY 2024.

.....

HON. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Judgement delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.**
- b. M/s. Kipruto Advocate hold brief for Mr. Simiyu Advocate for the Plaintiffs**
- c. Mr. Birir Advocate for the 1st and 2nd Defendants.**

