



Anand & another v Matiku & another (Environment and Land Case Civil Suit 81 of 2021) [2024] KEELC 1266 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1266 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 81 OF 2021
LL NAIKUNI, J
FEBRUARY 22, 2024**

BETWEEN

GIRISHCHANDRA DEVIPRASH BHATT ANAND 1ST PLAINTIFF

NIRANJANA GIRISHCHANDRA BHATT 2ND PLAINTIFF

AND

JUMBO MUTISYA MATIKU 1ST DEFENDANT

LAVINGTON SECURITY LIMITED 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by Girishchandra Deviprash Bhatt Anand and Niranjana Girishchandra Bhatt the 1st and 2nd Plaintiffs herein through a Plaint dated 19th April, 2021 and filed on 30th April, 2021 against Jumbo Mutisya Matiku and Lavington Security Limited the 1st and 2nd Defendants herein.
2. Upon service of the pleadings and the Summons to Enter appearance, the 1st and 2nd Defendants herein entered appearance through a Memorandum of Appearance dated 18th May, 2021. Subsequently, they filed their Statement of Defence dated 7th June, 2021 on 23rd June, 2021. Notably, the Plaintiffs had initially filed a request for Judgment in default of filing the defence within the stipulated period dated 4th June, 2021 on 21st June, 2021.
3. Nonetheless, on 6th March, 2023 all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the pre-trial conference, the suit was fixed for full trial on the 18th July, 2023.



4. This matter proceeded on for hearing by way of adducing “viva voce” evidence with the Plaintiffs’ witness (PW – 1) testifying in Court on 18th July, 2023 at 11.45 am. After which the Plaintiffs closed their case. The 1st and 2nd Defendants never called any witnesses.

II. The 1st and 2nd Plaintiffs’ case

5. From the filed pleadings, the 1st and 2nd Plaintiffs are described in the Plaint as individuals of sound mind working for gains in Mombasa within the Republic of Kenya. The Plaintiffs claimed they are the legal registered owners of the prime land known as Plots No.MN/1/6262(Cr. No. 20752) and MN/1/6263(Cr. No.20753) (hereinafter “The Suit Properties”) situate within the County of Mombasa. On or about the 1st January, 2016 the 1st Defendant wrongfully entered and illegally took possession of the suit properties, remained in illegal possession of the suit properties and alleged to start to illegally operate garage business thereon. On or about 11th September, 2020, the 2nd Defendant also wrongfully entered and remained in illegal possession of the suit properties.
6. The Plaintiffs relied on the following particulars of the 1st Defendant’s trespass and/ or illegality:-
 - a. Entering, taking possession and remaining in possession of the suit properties without any color of right.
 - b. Erected and installed temporary structures including a cargo container on the suit properties.
 - c. Conducting commercial activities including a garage business on the suit properties.
 - d. Using the suit properties as dumping grounds for unlawful goods and scrap metals.
 - e. Despite having full knowledge that his occupation was without authority proceeded to collude with 2nd Defendant to deprive the Plaintiffs the use, occupation and enjoyment of the suit properties contrary to Article 40 (a) and (b) of *the Constitution*.
 - f. Continuing to unlawfully occupy the suit properties.
7. The Plaintiffs also relied on the following particulars of 2nd Defendant’s negligence, trespass and/or illegality:-
 - i. Entering and remaining in the suit properties without the consent or authority of the lawfully registered owners.
 - ii. Failing to exercise due diligence in ascertaining the registered legal proprietors of the suit properties before entry and occupation.
 - iii. Failing to yield vacant possession upon demand by the Plaintiffs to do so.
 - iv. Colluded with 1st Defendant to enter and continue the unlawful occupation and to deprive the Plaintiffs the use, occupation and enjoyment of the suit properties contrary to Article 40(a) and(b) of *the Constitution*.
8. As a result of the 1st and 2nd Defendants’ unlawful and illegally occupation of the Plaintiffs’ properties. The Plaintiffs relied on the following particulars of damages for the trespass and/ or illegal occupation of the Plaintiffs’ properties:-
 - a. The 1st and 2nd Plaintiffs had been deprived of the use and quiet enjoyment of the prime suit properties since 1st January, 2016.



- b. The Plaintiffs had been deprived the benefits of the use of the suit property including income generation.
 - c. The 1st and 2nd Defendants had prevented the Plaintiffs from accessing the suit properties.
 - d. The 1st and 2nd Defendants had threatened the Plaintiffs and their agents with physical violence whenever the agents and the plaintiff attempt to enter the suit properties.
 - e. The Defendants use of the suit property including storage of scrap metals, and garage activities had defaced and devalued the suit properties.
9. The Plaintiffs' further averred that the illegal occupation of the suit properties by the Defendants had denied them a rental income at the rate of a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000.00/=) per month from 1st January, 2016 and they would continue to incur damages due to the continued illegal occupation of the properties by the Defendants. Despite demand and notice of intention to sue being duly served, the Defendants had failed, neglected, refused and/or ignored to make good the Plaintiffs' claim rendering this suit necessary.
 10. The Plaintiffs averred that there were no other suit pending and there had been no previous proceedings in any court between the Plaintiffs and the Defendants over the same subject matter save for "Mombasa CMCC No.2315 of 2019 Jumbo Mutisya Matiku – Versus - Anand Girishchandra Bhatt & Niaranja Girishchandra Bhatt" filed by the 1st Defendant herein on 20th December, 2019 and which suit was struck out by the Court for lack of jurisdiction. The cause of action related to the Plaintiffs named in the Plaint. The suit properties were valued at approximate sum of Kenya Shillings Fifty Two Million (Kshs. 52,000,000.00/) and the cause of action related to a subject matter within the jurisdiction of this Honourable Court.
 11. On 18th June, 2023, the hearing for the Plaintiffs commenced whereby he summoned one witness – the PW 1. Before the testimony of the witness, the Learned Counsel on record for the Plaintiffs, Mr. Sionik presented to Court an opening remark on the case. In his opening remarks, he stated that the Plaintiffs owned the two properties within Nyal Estate. In 2016 the 1st Defendant entered the Property without the consent of the Plaintiffs. On realizing this, the matter was reported to the police. The 1st Defendant filed a suit before the lower court, claiming to be a tenant and that he had been paying rent. The Learned Counsel stated that the suit was struck off for lack of jurisdiction. In the lower court and documents he admitted that he had been running a profitable business in the garage and he eventually invited the 2nd Defendant. He informed Court that the case in this Honourable Court was for mesne profits for wrongful occupation. He stated that the 1st and 2nd Defendant vacated the suit premises in May 2022. In a nutshell, the Counsel held that the claim was purely for mesne profits.
 12. The Plaintiffs prayed for Judgment against the 1st and 2nd Defendants jointly and severally for:-
 - a. A Declaration that the Defendants' actions whether by themselves, their representatives, servants, agents, and/ or assigns of forcibly entering the suit properties known as Land number MN/1/6262 (Cr.No.20752) and MN/1/6263 (Cr.No.20753) are unlawful and in violation of the Plaintiffs' rights over their properties.
 - b. An order of permanent injunction restraining the Defendants', whether by themselves or their servants or agents or otherwise howsoever, from entering, remaining on or continuing in occupation of suit properties number MN/1/6262 (Cr. No. 20752) and MN/1/6263 (Cr. No.20753).



- c. An order of eviction of the Defendants, their agents and/or servants and/or anybody else claiming under them from the suit properties known as MN/1/6262 (Cr. No.20752) and MN/1/6263 (Cr.No.20753) and demolition of any structures erected by the defendants thereon.
- d. An order commanding the Officer Commanding Station, Nyali Police Station to enforce the Court order.
- e. Mense profit for user of the suit properties at the rate of Kshs 100,000 per month from 1/1/2016 until delivery of vacant possession.
- f. General damages for trespass.
- g. Costs
- h. Interest on prayer (e) and (f) above at Court rates.

13. PW – 1 testified as follows:-

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

14. PW - 1 was sworn and he testified in English language. He was a holder of the national identity card bearing numbers 21424068 and date of birth being 16th March, 1979. He identified himself as being Mr. Girishchandra Deviprash Bhatt Anand, the 1st Plaintiff herein. He told the Honourable Court that the 2nd Plaintiff was his mother and she had given him the authority to testify on her behalf. He recalled having prepared and signed a witness statement dated 30th April, 2021. He intended to rely on it as his evidence in this case. Further, he had filed a list of documents eleven (11) in number which he produced as Plaintiffs’ exhibit 1 to 11 in the following order:-Plaintiff Ex - 1 – Pages 15 to 16.Plaintiff Ex - 2 – Pages 17 to 18.Plaintiff Ex - 3 – Pages 19 to 41.Plaintiff Ex - 4 – Pages 42 to 43.Plaintiff Ex - 5 – Pages 44 to 50.Plaintiff Ex - 6 – Pages 51.Plaintiff Ex - 7 – Pages 52 to 62.Plaintiff Ex - 8 – Pages 63 to 103.Plaintiff Ex - 9 – Pages 104 to 119.Plaintiff Ex - 10 – Pages 120 to 121.Plaintiff Ex - 11 – Pages 183 to 184.
15. Further, the witness told the Honourable Court that he was in Court to prove that he was the registered and legal owner of the two suit properties as per the original title deed (Plaintiff Exhibits Numbers 1 and 2). The original Certificate of titles were for the two properties jointly owned by the 2nd Plaintiff, his late father and himself (see Entry No. 5 on both the title deeds). The properties were situated along Mombasa – Malindi Road next to the business premises known as the City Mall. His land was occupied by Mr. Jumbo Mutisya Matiku – the 1st Defendant. The 1st Defendant initially requested to occupy it with the intention to acquire it. Unfortunately, he never proceeded with the purchase. The property was fenced and locked.
16. According to the witness, the 1st Defendant broke the padlock and entered the suit property in the year 2016 without the Plaintiffs’ knowledge nor consent. He discovered this in the year 2019. He reported the matter to the police. By that time, his father had passed on and he was in the process of procuring the Grand Letters of administration to the estate of his father. They were alerted of these incidences by the neighbors. The 1st Defendant was summoned to appear at the police station (Page 51). He never showed to the Police Station. Instead the 1st Defendant served the Plaintiff with a Court order emanating from the lower Court being civil case CMCC No. 2315 of 2019 - Jumbo Mutisya Muatiku – Versus – Aand Girishchandra Bhatt & Ano” claiming that he was a tenant on the suit property.



17. The witness further stated that the 1st Defendant claimed to have been paying them a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) per month as rent. According to PW – 1, the afore stated Civil case before the lower court was dismissed for lack of jurisdiction through a ruling delivered on 26th November, 2020 found at pages 183 to page 184 of the Plaintiffs’ bundle of documents. From that time, the 1st Defendant disappeared and which caused the Plaintiffs to file this case. The Defence filed by the 1st Defendant claimed that there was an oral agreement, which was untrue. There was no such agreement. His claims of having constructed a perimeter wall and having spend a sum of Kenya Shillings Four Million (Kshs. 4,000,000/-) as his expenses on the improvement of the suit land was untrue. One would require approval from the Municipality to undertake such development. The 1st Defendant had none.
18. The witness told the Court that he was the one who constructed the perimeter wall and the 1st Defendant claimed to have been running a garage. He had sued the 2nd Defendant too as they were also present in the suit property. At present the 1st and 2nd Defendants had vacated the suit property after he filed the suit. The figure of a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) per month was cited by Mr. Mutisya in the lower Court. Both Defendants intimidated the Plaintiffs. The Defendants restricted the Plaintiffs from visiting their property for many years.
19. According to the witness his claim was for mesne profits and damages for trespass. They were there from the year 2016 – prayer (e) and (f) of the Plaint. The Plaintiffs marked the close their case on 18th July, 2023.

III. The Defendants’ Case

20. The Defendants entered appearance through a Memorandum of Appearance dated 18th May, 2021 and filed their Statement of Defence dated 7th June, 2021 on 23rd June, 2021 where the Defendants admitted that the Paragraph 3 of the Plaint in so far as the same is descriptive of the Plaintiff’s registration of ownership of the land but the Defendant denies that the Plaintiffs were entitled to ownership of the suit plot and states that the Plaintiffs hold the suit properties in trust for the Defendants.
21. The 1st Defendant denied the contents of Paragraph 5 of the Plaint and specifically denies that on 1st January, 2016 the 1st Defendant wrongfully entered into the suit property as alleged by the Plaintiffs and the 1st Defendant in his defense averred that the 1st Plaintiff permitted the 1st Defendant to enter into the suit premises on a promise to sell the same to the 1st Defendant and also gave the Defendants an oral tenancy contract with mandatory option to renew in the alternative to selling the suit premises to the Plaintiffs and were estopped from evicting the 1st Defendant from the suit property by doctrine of estoppel by conduct and as well the 2nd Plaintiff was bound by the Acts of the 1st Plaintiff by principal of agent.
22. The 1st and 2nd Defendants denied the averments of Paragraph 6 of the Plaint that on 11th September, 2020 the 2nd Defendant wrongfully entered into the suit property and in his defense the 2nd Defendant had no claim to the suit property as the 2nd Defendant was a security company and hired by the 1st Defendant to guard the 1st Defendant property on the suit plot hence the 2nd Defendants was wrongfully sued. The 1st and 2nd Defendants respectively specifically denied the particulars of negligence attributed under paragraph 6 of the Plaint and state that these particulars were false and in his Defense the 1st Defendant pleaded estoppel by conduct. The 1st Defendant in response to Paragraph 7 of the Plaint and specifically denied that the Plaintiffs had suffered any damages at all as pleaded under the Particulars of Damage as 7 (a), (b), (c), (d), and (e).



23. The 1st Defendant denied the contents of Paragraph 8 of the Plaintiff and specifically denied that the Plaintiff had been deprived of rental income of a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000.00/=) per month from 1st January, 2016 by the Defendants to date nor was the suit plot chargeable at the said rate. They put the Plaintiffs to strict proof thereof save that the 1st Defendant stated that the 1st Plaintiff deliberately stopped collecting rent and was estopped from claiming mense profit. The 1st Defendant in his defense pleaded the defense of estoppel by conduct.
24. Despite of the Plaintiffs having been aware of the 1st Defendant's tenancy and collecting rent from him, the Plaintiff had refused and failed to give the 1st Defendant a written tenancy agreement. The same could not be used as a defense to the Plaintiff under any law. The Plaintiff by conduct had removed themselves from any protection of the law save that the aid tenancy could only be terminated by a notice of not less than the tenancy period itself subject to the operative clauses of the oral agreement.
25. The 1st Defendant denied the averments of made out under Paragraph 9 of the Plaintiff. Specifically, he denied that demand letters were sent to him before the filing of this suit or at all, and that in the alternative even if the same was so to be considered as sent the same would be inconsequential in the circumstances of the case and as pleaded under the contents of Paragraphs 4 and 6 of the Statement of Defense herein. The contents of Paragraphs 10 and 11 of the Plaintiff were admitted as factual in so far as the same related to the Plaintiff's descriptions of the suit property save that the same was yet to be determined by the court. The Defendants prayed for Judgment to be entered against the 1st and 2nd Plaintiffs to the effect that the suit herein be dismissed with respect to prayers 11 (a), (b), (c), d),e),f),g) and h) of the Plaintiff with costs to the Defendants.

IV. The Submissions

26. On 18th July, 2023 after the Plaintiffs marked a close of their case. Subsequently, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that the Plaintiffs complied accordingly and on 27th September, 2023, the Honourable court reserved a date to deliver its Judgement on notice.

A. The Written Submissions by the 1st and 2nd Plaintiffs

27. On 26th September, 2023, the Learned Counsels for the 1st and 2nd Plaintiffs through the Law firm of Messrs. Sitonik Advocates filed their written submissions dated 26th September, 2023. Mr. Sitonik Advocate submitted that the submissions were in support of their case. He held that the Plaintiff would rely on the following:
 - a. The oral testimony of Mr. Anand Girishchandra Bhatt (PW-1)
 - b. The witness statement of PW-1 attached to the Plaintiff at pages 11 to 14 of the Plaintiffs' bound pleadings.
 - c. The documentary exhibits for the Plaintiffs identified and marked in the Witness Statement and the documents which were at pages 15 to 184 of the Plaintiffs' bound pleadings.
28. On the chronology of events, the Learned Counsel submitted that the Plaintiffs are the registered owners of the two suit properties which were adjacent to each other and situated at Nyalali within Mombasa County. (The titles were at pages 15 to 18 of the bound pleadings). The properties were valued at a sum of Kenya Shillings Fifty Two Million (Kshs. 52,000,000/-) as at 23rd September, 2020 as per the Report and Valuation produced as Dexb-3 at pages 19 to 40 of the Plaintiffs' pleadings. The aforementioned Report and Valuation at clause 6.0 page 26 described the properties as enclosed within



a masonry wall with a double lockable metal plate gate as an access point. The properties were thus enclosed within a high wall perimeter wall and with a main gate.

29. The Learned Counsel went further to submit that the Plaintiffs had no concerns of any possible invasion due to the aforementioned high wall and closed metal gate. In November 2019, the 1st Plaintiff visited the property and found that the 1st Defendant had gained entry into the properties and had set up some business operations thereon. The Plaintiffs demanded that the 1st Defendant vacate the property immediately. The 1st Defendant never vacated the properties. As a result, the Plaintiffs reported the Defendant's invasion into the properties to Nyali Police Station.
30. On 29th November, 2019, the Police formally summoned the 1st Defendant to appear at the police station. See the Police Summons at page 50 of the Plaintiffs' pleadings. The 1st Defendant, in a quest to avoid the Police Summons, reacted by filing a suit against the Plaintiff, vide "Mombasa, CMCC No. 2315 of 2019, Jumbo Mutisya Matiku – Versus - Anand Girish Bhatt where the 1st Defendant;
 - a. In his pleadings in the Lower Court, the 1st Defendant claimed "inter alia" that there was a Landlord - Tenant relationship between the parties and that he was paying rent to the Plaintiffs at the rate of a sum of Kenya Shillings One Hundred Thousand (Kshs.100,000/-) per month and that the tenancy relationship commenced in the year 2016. (The 1st Defendant's pleadings filed in the lower Court are at pages 51 to 58 and 104 to 116 of the Plaintiffs' bound pleadings.
 - b. On that basis, the 1st Defendant sought for interim orders to restrain the Plaintiffs from evicting him from the suit properties or locking him out of the suit premises.
31. At the "inter parties" stage in the Lower Court, the 1st Defendant claimed that personal service had been effected upon the Plaintiffs and the 1st Defendant then caused to be filed an Affidavit of Service alleging that service was effected by the process server upon the Plaintiffs in the presence of the 1st Defendant. (The Affidavit of Service was at page 60 of the Plaintiffs' bound pleadings). On the basis of the aforementioned Affidavit of Service, the 1st Defendant then secured orders at the inter-parties stage the 1st Defendant secured interim orders restraining the Plaintiffs from evicting him from the suit properties pending hearing and determination of the suit. (See the Interim Orders at page 61 of the Plaintiffs' bound pleadings). The 1st Defendant had secured the interim orders on pure lies to the Court since no service had been effected upon the Plaintiffs since both Plaintiffs were actually out of the Country at the time of the alleged service and the Plaintiffs subsequently applied to the Court to have the ex - parte interim orders set aside.
32. The Learned Counsel submitted that the Plaintiffs subsequently raised a Preliminary objection challenging the 1st Defendant's suit on the basis that the Lower Court lacked the requisite pecuniary jurisdiction. (The Preliminary objection was at pages 120 to 121 of the Plaintiffs' bound pleadings). On 26th November, 2020, Hon. M. L Nabibya delivered a ruling confirming that the Court lacked pecuniary jurisdiction and allowed the Plaintiffs preliminary objection. (The Court's Ruling was at pages 183 to 184 of the Plaintiffs' pleadings). The Plaintiffs herein then moved to this Court seeking inter alia eviction of the Plaintiffs from the suit properties as well as mesne profits and general damages for trespass based on the 1st Defendant's own admissions in his pleadings in the Lower Court.
33. The Learned Counsel averred that he intended to rely on the following four (4) issues for determination by this Court:-
34. Firstly, whether the Plaintiffs were the registered owners of the suit properties. The Learned Counsel told the Honourable Court that the Plaintiffs were the registered owners of the suit properties as demonstrated below:-



- a. PW - 1 produced the titles to the suit premises and the titles duly marked as “Exb-1” and “Exb 2”. The titles were at pages 15 to 18 of the bound pleadings.
 - b. PW - 1 availed the original titles deeds before Court for scrutiny by the Court.
 - c. The 1st Defendant admitted the Plaintiff’s registration status as demonstrated by the 1st Defendant’s pleadings previously filed in the lower Court. The 1st Defendant’s lower Court pleadings were at pages 51 to 58 of the bound pleadings.
35. Consequently, the Plaintiffs had demonstrated that they were the registered owners with valid interests in the suit properties that warrant protection from the Court.
36. Secondly, on whether the Defendants entered and remained in the Plaintiffs’ property. The Learned Counsel asserted the Plaintiffs had demonstrated that the 1st Defendants actually entered and remained in the suit properties as from 1st January, 2016 as demonstrated from the facts that the 1st Defendant’s entry into the Suit Property. Specifically, the Defendant admitted his documents filed in the lower Court being the Plaintiff dated 20th December, 2019 as follows:-
- a. At paragraphs 3 and 4, the 1st Defendant alleged that he was a lessee of the suit properties and had a lease of 5 years beginning in the year 2016.
 - b. He further alleged that he was paying monthly rent of a sum of Kenya Shillings One Hundred Thousand (Kshs.100,000/-). The lower Court’s Plaintiff was at page 56 to 58 of the Plaintiff’s bound pleadings.
 - c. Additionally, in his Supporting Affidavit sworn on 20th December, 2019, the 1st Defendant at paragraphs 3, 4 and 5 confirmed that he entered into the suit properties in 2016 but further claimed that he was a tenant and was paying a monthly rent on of a sum of Kenya Shillings One Hundred Thousand (Kshs.100,000/-) to the Plaintiffs. The Affidavit was at pages 54 to 55 of the Plaintiff’s bound pleadings.
37. The learned Counsel submitted that in his amended Plaintiff amended on 06th October, 2020 in the lower Court, the Defendant claimed;-
- a. At paragraph 3, that he was a lessee of the suit properties and was operating a garage business therein. The amended plaintiff was produced as Plaintiffs Exb-9 at pages 112 to 116 of the Plaintiff’s bound pleadings.
 - b. At paragraph 4 claimed that he had an oral agreement with the Plaintiffs to operate a garage business on the properties for a period of 5 years beginning the year 2016 at a monthly rent of a sum of Kenya Shillings (Kshs.100,000/-).
 - c. The 1st Defendant in his supporting affidavit sworn on 6th October, 2020, alleged at paragraph 5 that he had an oral tenancy commencing in February 2016 over the suit properties. The affidavit was at page 109 to 111 of the Plaintiffs pleadings.
 - d. The 1st Defendant in his statement of defence dated 7th June, 2021 and filed before this Court on 23rd June, 2021, at paragraph 4 has not denied that he justify his entry and continue stay by claiming that he was the Plaintiff’s tenant in the suit properties.
38. According to the Learned Counsel, the Plaintiffs had demonstrated that the 2nd Defendants actually entered and remained in the suit properties as from 11th September, 2019 as demonstrated as follows:-



- a. The PW-1 testified of at paragraph 6 of his written statement that the 2nd Defendant entered and joined the 1st Defendant in the suit property on or about the 11th September, 2019. (see paragraph 6 of the witness statement at page 11 of the bound pleadings)
 - b. In the defence dated 7th June, 2021 and filed in this Court on 23rd June, 2021, the 2nd Defendant never denied that it entered and remained in the suit premises as from the 11th September, 2019 but had only attempted to justify their entry and continued occupation by claiming that it was merely a security company hired by the 1st Defendant to guard the 1st Defendant's property in the suit properties.
39. In the premises, according to the Learned Counsel the Plaintiffs had demonstrated the Defendants' entry and continued occupation of the suit properties.
40. Thirdly, on the issue of whether the Defendants' entry and continued occupation was trespass, the Learned Counsel argued that the Plaintiffs had demonstrated that the Defendants had no authority or consent to enter and/or remain the suit property and the Plaintiffs had further demonstrated that there had never been any Landlord-Tenant relationship between the parties herein because:-
- a. The PW-1 testified that upon discovering the illegal occupation of the suit properties by the 1st Defendant in November 2019, he sought the assistance of the police to evict the Defendant for wrongful occupation. (See paragraphs 12 and 13 of the Witness Statement at pages 13 of the bound pleadings and the Plaintiff's Exhibit Number 6 being the Police summons at page 50 of the Plaintiffs bound pleadings).
 - b. The 1st Defendant reacted to the Police Summons by filing a Civil Suit vide Mombasa, CMCC No. 2315 of 2019 as against the Plaintiffs in an attempt to justify his entry into the suit properties by claiming that he was a tenant in the suit properties and was paying a monthly rent of a sum of Kenya Shillings One Hundred Thousand (Kshs.100,000/-) to the Plaintiffs. (See pages 52 to 116 of the Plaintiff's bound pleadings).
41. Despite the 1st Defendant's desperate attempt to justify his entry into the suit premises by claiming that there was a Landlord -Tenant relationship and that he was up to date in payment of a sum of Kenya Shillings One Hundred Thousand (Kshs.100,000/-) monthly rent to the Plaintiffs, the 1st Defendant was unable to substantiate his claims because:-
- a. The 1st Defendant claimed that he had been a rent-paying Tenant in the suit property as from the year 2016.
 - b. In his Affidavit sworn on 6th October, 2020 and filed in the lower Court, the 1st Defendant at Paragraph 8 seemed to suggest that there existed some records of payment of rent. (see page 110 of the Plaintiff bound pleadings)
 - c. Yet, in the entire proceedings in the lower Court the 1st Defendant never availed any receipts for or even copies of cheques, or bank deposit slips, or bank statements or cash vouchers or even MPESA statements to support his claims.
42. The Learned Counsel submitted that the Plaintiffs had been consistent that there had never been any Landlord-Tenancy relationship between them and the Defendants and thus no rents received because:-
- i. In response to the 1st Defendant's lower Court case, the Plaintiffs responded by filing an Application dated 21st September, 2020 supported by an Affidavit sworn on 21st September, 2020 where;-



- a. At paragraph 6(a) to (f) of the Affidavit the Plaintiff confirm that in 2016 the 1st Defendant only approached the 1st Plaintiff with an inquiry as to whether the property was for sale and at no time did any discussion about renting or occupation by the 1st Defendant ever arise. See pages 70 to 74 of the Plaintiffs bound pleadings.
 - b. In the Defence to the lower Court case the Plaintiffs filed a Statement of Defence specifically denying any existence of any landlord tenancy relationship. See pages 117 to 119 of the Plaintiffs' pleadings.
43. According to the Learned Counsel, in their Statement of Defence filed before this Court, the Defendants continued to claim that the 1st Defendant was a tenant and was paying rent to the Plaintiffs but had failed to substantiate the claim and again failed to produce any credible evidence to support the claim for Landlord - Tenant relationship as between the parties. The 2nd Plaintiff had not in any way claimed that it was authorized by the Plaintiffs to enter and/or remain in the suit premises in any way or form. Consequently, the Plaintiffs had demonstrated that the Defendants trespassed onto the suit properties.
44. Finally, on the issue of whether the Plaintiff deserve the Orders sought. The Learned Counsel urged the Court to find that the Plaintiffs deserve the orders sought in prayers number (a), (b) and (d) of the Plaintiffs taking that:-
 - a. The Plaintiffs had demonstrated that the Defendants gained entry into the suit premises and retained possession without consent of the Plaintiffs.
 - b. The Defendants thus trespassed into the property and an order permanently restraining them from entering and or remaining in the suit premises is appropriate.
 - c. The Defendants had no legal mandate to enter or remain the suit properties.
 - d. The orders sought was to ensure that the Defendants never launched fresh entry and occupation after this Court process.
45. According to the Learned Counsel, Prayer number (c) of the Plaintiffs had been overtaken by events in that:-
 - a. As at the time of filing this suit and service upon the Defendants the Defendants were in the suit properties.
 - b. As at the time of filing the Statement of Defence by the Defendants on 23rd June, 2021, the Defendants were still in the suit properties.
 - c. However, in September 2021, the Defendants silently vacated the suit properties and this was confirmed by the oral testimony of PW - 1.
46. The Learned Counsel urged the Honourable Court to grant prayer mesne profits to the Plaintiffs as against the 1st Defendant at the rate of Kenya Shillings One Hundred Thousand (Kshs.100,000/-) per month from 1st January, 2016, being the date of the 1st Defendant's entry to September 2021, being the 1st Defendant's departure from the suit properties because:-
 - i. At paragraph 3 of the Plaintiffs filed in the lower Court, the 1st Defendant averred that he was operating a garage business in the suit properties (See Page 56 of the Plaintiffs pleadings)



- ii. At paragraph 4, of the said Plaint, the 1st Defendant reiterated that he had been conducting business in the Suit Properties beginning the year 2016 at a monthly rent of a sum of Kenya Shillings One Hundred Thousand (Kshs.100,000/-). (See page 56 of the bound pleadings).
 - iii. At paragraph 3 of the supporting affidavit sworn on 20th December, 2019, the 1st Defendant claimed that he was paying a monthly rent at rate of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) to the Plaintiffs. (See page 54 of the bound pleading).
 - iv. At paragraph 4 of the aforementioned Supporting Affidavit, the 1st Defendant claimed he had been operating a garage business in the suit properties and that his customers were used to him. (See page 54 of the bound pleadings).
 - v. In his Amended Plaint amended on 6th October, 2020, the Defendant at Paragraphs 3 and 4, reiterated his claim that he was conducting a business in the suit properties on a monthly rent of Kenya Shillings One Hundred Thousand (Kshs.100,000/-) (See page 112 of the Plaintiffs bound pleadings).
 - vi. The rate of Kenya Shillings One Hundred Thousand (Kshs.100,000/-) per month was the appropriate rate to be adopted by the Court since the 1st Defendant in his pleadings in the lower court assessed that the appropriate monthly rent for the properties was a sum of Kenya Shillings One Hundred Thousand (Kshs.100,000/-) per month.
47. The Learned Counsel submitted that as against the 2nd Defendant, the Plaintiffs urged the Honourable Court to award mesne profits of a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) as from 11th September, 2020 the date of entry and 1st September, 2021 the date of departure by the 2nd Defendants at the rate of Kenya Shillings One Hundred Thousand (Kshs.100,000/-) per month because the 2nd Defendant joined the 1st Defendant in the suit properties.
48. The Learned Counsel urged the Honourable Court to find that the Plaintiffs qualify to be awarded the mesne profits as prayed because:-
- i. The provision of Section 2 of the [Civil Procedure Act](#) Cap 21 recognizes the concept of mesne profits and defines mesne profits.
 - ii. The provision of Order 21 Rule 13 of the Civil Procedure Rules, 2010 permits the ward of mesne profits.
49. The Learned Counsel submitted that in the instant case, the 1st Defendant through his own pleadings in the lower court solely accessed the monthly rent as at Kenya Shillings One Hundred (Kshs.100,000/-) payable as from the year 2016 due to the defendants use and enjoyment of the property.
50. The Learned Counsel relied on the Court of Appeal case of:- “Attorney General v Halal Meat Products Limited [2016] eKLR”, the court considered when mesne profits could be awarded. The Court stated as follows:-
- “It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another.”



51. The Learned Counsel further relied on the case of “Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR”, where the court stated:-

“The term ‘Mesne Profits’ relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.”

52. According to the Learned Counsel, the Plaintiffs had specifically pleaded mesne profits under Paragraph 8 of the Complaint and further that the Plaintiff had proved that the Defendants had been in wrongful occupation of the properties. Thus, he urged the Court to hold that the Plaintiffs were entitled to the prayers for mesne profits. Under prayer (D) of the Complaint, the Plaintiffs had further sought for general damages for trespass. The Learned Counsel urged the Court to award an award of Kenya Shillings Seven Hundred Thousand (Kshs. 700,000/-) as damages for the trespass and he relied on the decisions of:- “Park Towers Ltd v John Mithamo Njika & 7 others [2014] eKLR” as relied on by the Court of Appeal in “Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR”, where the Court 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.”

53. He further cited the case of:- “Hosea Nyandika Mosagwe & 2 others v County of Nyamira [2021] eKLR”, where the court awarded a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/-) as the nominal award of Kenya Shillings (Kshs. 500,000/-) as general damages for trespass.

54. In conclusion, the Learned Counsel held that the Plaintiffs further deserved an award for costs of the suit.

IV. Analysis and Determination

55. I have keenly assessed the filed pleadings by all the Plaintiffs herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

56. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following five (5) issues for its determination. These are: -

- a. Whether the Plaintiffs are the bona fide legal owners of the suit property
- b. Whether the Defendants trespassed onto the suit properties without authority of the Plaintiffs;
- c. Whether the Plaintiffs are entitled to damages.
- d. Whether the order of permanent injunction restraining the Defendants from dealing with the suit property should be given?
- e. Who bears the costs of the suit?



Issue No. a). Whether the Plaintiffs are the bona fide legal owners of the suit property

57. Under this sub – heading the Plaintiffs through their witness and in their submissions have averred that they are the legal registered owners of the suit property. It is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. This is what in law is termed as the “Burden of Proof” and is encapsulated for by Section 107 of the Evidence Act Cap 80 laws of Kenya which provides as follows:-

“ 107 Burden of Proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

58. Fundamentally, the issue of the ownership of the suit properties has been an issue in this proceedings. It is trite that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that they are the absolute and legal owner of the property. In so doing, based on the provision of Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012, the owner attains indefeasible rights, title and interests on the land vested in him/her by the law. The provision of Section 24 of the Land Registration Act provides:-

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

59. While the provision of Section 25 states as follows:-

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

- i. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

60. However, the registration of such title is not absolute as the same maybe impeached under certain circumstances as provided by the provision of Section 26(1) of the Land Registration Act which states 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—



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

61. In this instant suit as already stated above, the evidence of the 1st and 2nd Plaintiffs remain uncontroverted. The Plaintiffs have attached the original title deed (exhibit 1 and 2 as prover that they are the owners of the two properties owned by the 1st Plaintiff and the 2nd Plaintiff respectively. The Defendants on the other hand have not produced any title neither have they shown any authorization to be on the suit properties known as Land number MN/1/6262 (Cr.No.20752) and MN/1/6263 (Cr.No.20753). It has been said time and time again that a Title Deed is an indefeasible evidence of the ownership of land. It is also not in dispute that the ownership of the land is uncontroverted. There had not been any challenge by the Defendants on the Plaintiffs’ title by reason of fraud or otherwise as envisaged under Section 26 (1) (a) and (b) of the *Land Registration Act*.
62. I have looked at both the title deeds of Land parcel known as Land number MN/1/6262 (Cr. No. 20752) and MN/1/6263 (Cr. No. 20753) and I am satisfied that the suit property indeed belongs to the Plaintiffs who are the registered proprietors of the suit property. The registration and proprietorship of the Plaintiffs is therefore not in dispute and thus, the Plaintiffs remains the rightful, absolute and indefeasible owner of the property with all the rights and privileges accruing therefrom; including the right to possession, to a quiet and peaceful occupation and right to use of their property.
63. Therefore, I find and hold that the Plaintiffs are the rightful registered proprietor of the suit properties having been issued with the title deeds and the boundary features clearly outlined by the Land Registrar and is thus entitled to protection of the law.

Issue No. b). Whether the Defendants trespassed unto the suit properties without authority of the Plaintiffs?

64. Under this sub- title, the Plaintiffs have contended that on or about the 1st January, 2016 the 1st Defendant wrongfully entered and illegally took possession of the suit properties, remained in illegal possession of the suit properties and alleged to start to illegally operate garage business thereon. On or about 11th September, 2020, the 2nd Defendant also wrongfully entered an remained in illegal possession of the suit properties. The Plaintiffs relied on the following particulars of the 1st Defendant’s trespass and/ or illegality:-
 - a. Entering, taking possession and remaining in possession of the suit properties without any color of right.
 - b. Erected and installed temporary structures including a cargo container on the suit properties.
 - c. Conducting commercial activities including a garage business on the suit properties.
 - d. Using the suit properties as dumping grounds for unlawful goods and scrap metals.
 - e. Despite having full knowledge that his occupation was without authority proceeded to collude with 2nd Defendant to deprive the Plaintiffs the use, occupation and enjoyment of the suit properties contrary to Article 40(a) and (b) of *the Constitution*.
 - f. Continuing to unlawfully occupy the suit properties.



65. The Plaintiffs also relied on the following particulars of 2nd Defendant's negligence, trespass and/or illegality:-
- i. Entering and remaining in the suit properties without the consent or authority of the lawfully registered owners.
 - ii. Failing to exercise due diligence in ascertaining the registered legal proprietors of the suit properties before entry and occupation.
 - iii. Failing to yield vacant possession upon demand by the Plaintiffs to do so.
 - iv. Colluded with 1st Defendant to enter and continue the unlawful occupation and to deprive the Plaintiffs the use, occupation and enjoyment of the suit properties contrary to Article 40(a) and(b) of *the Constitution*.
66. The provision of Section 3 (1) of the *Trespass Act*, Cap 294 provides that:-
- “ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
67. Trespass is described under the *Trespass Act* Cap 403 to mean any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence. (Emphasis mine)
68. A continuing trespass is defined in Jowitt's Dictionary of English Law 2nd Edition as follows:-
- “ A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor's land”.
69. Finally, in Clerk & Lindsell On Torts 16th Edition, paragraph 23 - 01, it is stated that:-
- “ Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.
70. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. According to the Plaintiffs as a result of the Defendants' unlawful and illegally occupation of the Plaintiffs' properties. The Plaintiffs relied on the following particulars of damages for the trespass and/or illegal occupation of the Plaintiffs' properties:-
- a. The Plaintiffs have been deprived of the use and quiet enjoyment of the prime suit properties since 1st January, 2016.
 - b. The Plaintiffs have been deprived the benefits of the use of the suit property including income generation.
 - c. The Defendants have prevented the Plaintiff from accessing the suit properties.
 - d. The Defendants have threatened the Plaintiffs and their agents with physical violence whenever the agents and the Plaintiff attempt to enter the suit properties.
 - e. The Defendant's use of the suit property including storage of scrap metals, and garage activities have defaced and devalued the suit properties.



71. The Plaintiffs' further aver that the illegal occupation of the suit properties by the Defendants has denied them a rental income at the rate of Kenya Shillings One Hundred Thousand (Kshs 100,000.00) per month from 1st January, 2016 and they will continue to incur damages due to the continued illegal occupation of the properties by the Defendants. Despite demand and notice of intention to sue being duly served, the Defendants have failed, neglected, refused and/or ignored to make good the Plaintiffs' claim rendering this suit necessary.
72. The Plaintiffs lodged a complaint with the Police, the 1st Defendant was summoned to the police station according to PW 1 but he never showed up instead the 1st Defendant served PW - 1 with a Court order claiming that he was a tenant in (CMCC No. 2315 of 2019).
73. For these reasons, therefore, it is my opinion that the Plaintiffs have proved their claim for trespass being a continued tort and being that the same remains uncontroverted the Honourable Court is satisfied that the Defendants indeed trespassed the Plaintiffs' properties.

Issue No. c). Whether the Plaintiffs are entitled to damages

74. Under this Sub heading, the Honourable Court will embark on assessing whether the Plaintiff is entitled to the relief sought in the given circumstances. For whatever its worth, I have taken cognizance that the Learned Counsel for the Plaintiff has and rightfully so comprehensively submitted under this issue. The provision of Section 26 (i) of the Registered Land Act, Cap. 300 (Now repealed) provides: -

“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.”

75. Undoubtedly, the Honourable Court has already established that the suit property belongs to the Plaintiffs. Thus, 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 of 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 “Peter Mwangi Msuitia & Another v Samow Edin Osman [2014] eKLR”, this Court held as follows:

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

76. The provision of Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya defines mesne profits as follows:-

“Mesne Profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

77. The provision of Order 21 Rule 13 of the Civil Procedure Rules provides as follows:-



13. (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—

- (a) for the possession of the property;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
- (c) directing an inquiry as to rent or mesne profits from the institution of such suit until—
 - (i) the delivery of possession to the decree-holder;
 - (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or
 - (iii) the expiration of three years from the date of the decree, whichever event first occurs.
- (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

78. Further, I wish to cite the Court of Appeal’s case of:- “Attorney General v Halal Meat Products Limited [2016] eKLR” considered when mesne profits could be awarded. The court stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18thEd. para 34-42.”

79. Additionally, the court in the case of “Rajan Shah T/A Rajan S. Shah & Partners (Supra) had this to say in considering an issue of whether the Plaintiff had established a case for mesne profits:-

“In *Bramwell v Bramwell*, Justice Goddard stated that “..... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant.” Similarly, in an Australian case, *Williams & Bradley v Tobiasen* it was stated that these words: “Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.

The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant’s possession, or right to possession, which has been interfered with.

A more useful description of mesne profits can be found in Halsbury’s Laws of England, which defines mesne profits as an action by a land owner against another who is trespassing on the owner’s lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the Defendant ceased to hold the premises as a tenant and became a trespasser. The action for Mesne Profits does not lie unless either the landlord has recovered possession, or the tenant’s interest in the land has come to an end.

Halsbury’s, op. cit, 4th, above, suggests that where mesne profits are awarded they usually follow the previous rent rate and in the absence of that, a fair market value rent.



The Black's Law Dictionary defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession between (2) two dates." The Concise Oxford English Dictionary defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord."

The term 'mesne profits' relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.

Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.

After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne profits for the use and occupation of the premises till he delivers up possession.

In the present case, there was no written lease. The case leading to this appeal was filed by the tenant (the Respondent) against the land lord (appellant) in 2007 challenging a proclamation issued by auctioneers against him under the instructions of the appellant and also seeking an injunction against the Respondent. The initial defense filed by the appellant dated 18th October 2007 was a denial of the averments in the plaint. The Respondents claim as enumerated in the plaint discloses a rent dispute. An amended defense was filed on 9th August 2010 whereby the Appellant cited a notice dated 3rd March 2008 in which he communicated to the Respondent that he had terminated the lease and sought vacant possession. The Respondent through his advocates replied to the said letter and wrote inter alia as follows:-

"..... the alleged tenancy/lease herein between our client and yours is the subject matter in Nyeri CMCC No. 585 of 2007.....The issues your clients are raisingare the same issues already in court. Your clients notice of termination of leaseis therefore inconsequential."

Thus, the above notice was challenged on the above grounds. There is no further communication on record on the issue. The appellant never wrote back to dispute the Respondents response. It is important to point out that Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual illegal possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits provided the occupation is illegal.



For starters, it should be noted that the concept of mesne profits is a remedy available to the Landowner/Landlord in the event that a contractual tenancy ceases to exist and the tenant/occupier thereafter continues to occupy the premises as a trespasser.

Thus, where a landlord/tenant relationship existed like in the present case, it must be demonstrated beyond doubt that the tenancy was terminated legally and that the termination notwithstanding the tenant remained in occupation as a trespasser. Where a tenancy is created by operation of law, the tenant does not become a trespasser until the tenancy has become duly determined according to law. This position was reiterated by the apex court of Nigeria which stated:-

“Because a claim for ‘Mesne profits’ is based on trespass and is inappropriate in respect of lawful occupation as a tenant, it can only be maintained when the tenancy has been duly determined and the tenant becomes a trespasser...where a tenancy is created by operation of law, the status of trespasser will not arise, until the tenancy is duly determined according to law... however, the lawful use and occupation of the land and premises implies an agreement to pay damages for use and occupation of the land and premises. It is a quasi-tenancy which the law recognizes...”

80. The Learned Nyamweya J in the case of “Karanja Mbugua & another – Versus - Marybin Holding Co. Ltd [2014] eKLR” stated as follows with regard to mesne profits:-

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of [Civil Procedure Act](#). The said provisions state as follows with regard to a decree for possession and mesne profits:

- “(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-
- a. For the possession of the property.
 - b. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.
 - c. Directing an inquiry as to rent or mesne profits from the institution of such suit until :-
 - i. The delivery of possession to the decree-holder
 - ii. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or
 - iii. The expiration of three years from the date of the decree, whichever even first occurs.
- (2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

The Plaintiff did not bring any proof of the basis for the demand of mesne profits of Kshs 45,000/= per month, and this court is therefore not able



to award the same. In any event when the Plaintiffs agreed to give vacant possession to the Defendant after payment of only the deposit, and they must be taken to have accepted the risks that would follow in the event of non-performance of the contract. The forfeiture of the deposit by the Defendant therefore in the circumstances adequately compensates them for such non-performance.”

81. It is my humble opinion that the Plaintiffs have tabled evidence before this Honourable Court through a plaint dated 20th December, 2019 in Chief Magistrate Civil Suit No. 2315 of 2019 at paragraph 4 where the Plaintiff in that case who is the 1st Defendant in this case averred that he was a tenant and he paid Kenya Shillings One Hundred Thousand (Kshs 100,000/-).
82. The Plaintiffs’ advocate in his submissions urged the Honourable Court to grant prayer mesne profits to the Plaintiffs as against the 1st Defendant at the rate of Kenya Shillings One Hundred Thousand (Kshs 100,000/-) per month from 1st January, 2016, being the date of the 1st Defendant’s entry to September 2021, being the 1st Defendant’s departure from the suit properties because:-
- SUBPARA i.
- At paragraph 3 of the Plaint filed in the lower Court, the 1st Defendant averred that he was operating a garage business in the suit properties (See Page 56 of the Plaintiff pleadings)
- ii. At paragraph 4, of the said Plaint, the 1st Defendant reiterated that he had been conducting business in the Suit Properties beginning the year 2016 at a monthly rent of Kenya Shillings One Hundred Thousand (Kshs 100,000/-) (See page 56 of the bound pleadings).
- iii. At paragraph 3 of the supporting affidavit sworn on 20th December, 2019, the 1st Defendant claimed that he was paying a monthly rent of Kenya Shillings One Hundred Thousand (Kshs 100,000/-) to the Plaintiffs. (See page 54 of the bound pleading).
- iv. At paragraph 4 of the aforementioned Supporting Affidavit, the 1st Defendant claimed he has been operating a garage business in the suit properties and that his customers were used to him. (See page 54 of the bound pleadings).
- v. In his Amended Plaint amended on 6th October, 2020, the Defendant at Paragraphs 3 and 4, reiterated his claim that he was conducting a business in the suit properties on a monthly rent of Kenya Shillings One Hundred Thousand (Kshs 100,000/-) (See page 112 of the Plaintiffs bound pleadings).
- vi. The rate of Kenya Shillings One Hundred Thousand (Kshs 100,000/-) per month is the appropriate rate to be adopted by the Court since the 1st Defendant in his pleadings in the lower court assessed that the appropriate monthly rent for the properties was Kenya Shillings One Hundred Thousand (Kshs 100,000/-) per month.
83. This Honourable Court is satisfied that the Plaintiffs have made out a case for the grant of mesne damages for a sum of Kenya Shillings One Hundred Thousand (Kshs 100,000/-) per month between 1st January, 2016 to September 2021.
84. 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".

85. This Honourable Court has been urged to award general damages for trespass. As to General Damages for trespass, in "Park Towers Limited (Supra), the Court held that: -

"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."

86. The Plaintiffs have provided their title deeds as Exhibit 1 and 2 and as it may the Defendants failed to defend their case hence the Honourable Court finds that the Plaintiffs have proved their case.

87. I have also held that the Defendants are guilty of wrongful and illegal possession and trespassing onto the Plaintiffs' land. The said trespass whose magnitude was found to be approximately nought decimal one nought one one (0.1011) of a hectare or nought decimal two four nine eight (0.2498) of an acre approximately, did deny the Plaintiffs the use, occupation, possession and enjoyment of said land, the Defendants on the other side have been living on the suit property claiming to be paying a rent of Kshs 100,000/- that the Plaintiffs now seeks compensation for.

88. In the case of "Duncan Nderitu Ndegwa (Supra) where P. Nyamweya J. held that: -

"...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass"

89. In Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503, it is provided 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 sum as would reasonably be paid for that use.
- (d) --
- (e) --
90. From the evidence on record, the Plaintiffs has proved trespass and has also gone ahead to produce valuation report by Danco Limited dated 23rd September, 2020, valuing the land at a sum of Kenya Shillings Fifty Two Million (Kshs. 52,000,000/-).
91. In the case of "Willesden Investments Limited v Kenya Hotel properties limited NBI H.C.C. NO. 367 of 2000", the court stated that;
- "There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that Kshs. 10,000,000/- is a reasonable award for general damages".
92. Taking account that the damage to the perimeter of the wall and being that the suit property by the valuation report was a sum of Kenya Shillings Fifty-Two Million (Kshs 52, 000,000/-). I am of the view that an award of Kenya Shillings Fifteen Million (Kshs. 15,000,000/-) as general damages will be sufficient.

Issue No. d). Whether the order of permanent injunction restraining the Defendants from dealing with the suit property should be given.

93. Under this Sub-title, the Honourable Court will examine if for the order of permanent injunction restraining the Defendants from dealing with suit property should be given. Korir, J aptly captured the position as regards what constitutes a permanent or perpetual injunction in the case of "Kenya Power & Lighting Co. Ltd v Sheriff Molana Habib [2018] eKLR" when he stated thus:-
- "A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected."
94. In this case, the Honourable Court has ascertained that the Defendants have no legal mandate to use the suit land in any manner. As such this prayer is meritorious. The principles on Injunction were established in the celebrated case of "Giella v Cassman Brown & Co. Ltd [1973] EA 358". Having perused the Plaintiffs' title deeds, and the Plaintiffs' exhibits produced in court, I hold that the Plaintiffs have indeed established a prima facie case and proved its case to the required threshold to warrant the grant of permanent injunctive orders sought. Consequently, I will proceed to find that the Defendants either by themselves, agents, servants and /or anyone claiming under the defendants should be permanently restrained from entering, trespassing onto, cultivating, building structures thereon, interfering with and/or in any other manner dealing with the suit premises.

IssueNo. e). Who bears the Costs of the Suit?

95. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events.



By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri v Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

96. In the present case, the Plaintiffs have been able to establish their case as pleaded from the filed pleadings. Therefore, they are entitled to be awarded costs of the suit to be borne jointly and severally by the 1st and 2nd Defendants accordingly.

VII. Conclusion and Disposition

97. 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 1st and 2nd Plaintiffs against the 1st and 2nd Defendants herein in terms of the Plaint dated 19th April, 2021 and filed on 30th April, 2021.
 - b. That a declaration be and is that the 1st and 2nd Defendants' actions whether by themselves, their representatives, servants, agents, and/ or assigns of forcibly entering the suit properties known as Land number MN/1/6262 (Cr.No.20752) and MN/1/6263 (Cr.No.20753) are unlawful and in violation of the Plaintiffs' rights over their properties.
 - c. That an order of permanent injunction be and is hereby made restraining the 1st and 2nd Defendants', whether by themselves or their servants or agents or otherwise howsoever, from entering, remaining on or continuing in occupation of suit properties number MN/1/6262 (Cr. No. 20752) and MN/1/6263 (Cr. No.20753).
 - d. That order (c) and order (d) in the Plaint dated 19th April, 2021 have been overtaken by events being that the Defendants have since vacated the suit premises.
 - e. That a declaration be and is hereby made for the 1st and 2nd Defendants to pay the 1st and 2nd Plaintiffs mesne profit for user of the suit properties at the rate a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) per month from 1st January, 2016 upto September 2021 amounting to a sum of Kenya Shillings Six Million Nine Hundred Thousand (Kshs. 6,900,000/-).
 - f. That an order is hereby made that the Plaintiffs be and are hereby awarded general damages of sum of Kenya Shillings Fifteen Million (Kshs 15,000,000/-) to be paid jointly and severally by the Defendants.
 - g. That the interest of prayer (e) and (f) above shall incur interest at Court rate from the date of this Judgment until fully paid.
 - h. That Costs of the suit to be awarded to the 1st and 2nd Plaintiffs to be borne by the 1st and 2nd Defendants jointly and severally.

It is so Ordered Accordingly

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA



THIS 22ND 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. Mr. Sitonik Advocate for the Plaintiff.
- c. No appearance for the 1st & 2nd Defendants.

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