



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO. 554 OF 2008

NANCY WANJIRU WANGAI..... PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND..... 1ST DEFENDANT

DAVID NJOROGE NGURU.....2ND DEFENDANT

PATRICK NYAMU..... 3RD DEFENDANT

FRED OYUGI 4TH DEFENDANT

JOSEPH OLE KIAMBU..... 5TH DEFENDANT

JUDGMENT

This suit was filed by way of a Complaint dated 11th November 2008 and filed on 12th November 2008 in which the Plaintiff was praying for judgment to be entered against the Defendants, being National Social Security Fund and David Njoroge Nguru, jointly and severally for:

- a. Mesne profits
- b. General damages for trespass and loss of value
- c. Immediate removal of structures erected upon Nairobi/Block 97/2347 (hereinafter referred to as the "suit property")

The Plaintiff then filed her Amended Complaint dated 8th January 2009 and filed on 9th January 2009 by which she added 3 more defendants being Patrick Nyamu, Fred Oyugi and Joseph Ole Kiambu. In that Amended Complaint, she sought the following additional prayer:

- d. An order for the immediate demolition of all the structures and the buildings put on or erected upon the suit property by the Defendants.

The Plaintiff subsequently filed a Further Amended Complaint dated 11th February 2013 and filed on 12th February 2013 in which she introduced the following additional prayers:

- e. In the alternative Kshs. 15 million being the value of the suit property at the time.
- f. General damages for loss of rental income.
- g. The costs for the removal of the structures on the suit property.
- h. Costs of the suit and interest

Plaintiff's Case

In her said Plaint, the Plaintiff stated that at all material times, she was and is the registered proprietor of the suit property. She further stated that upon taking possession of that parcel of land in the year 2008, she came to realize that the 2nd Defendant had trespassed against that parcel of land and erected thereon some houses. She stated further that upon making enquiries, she came to learn that the 2nd Defendant had purportedly purchased the land from the 1st Defendant who was the original lessee from the Government of Kenya. She added that the 1st Defendant did not have and has no title to pass to the 2nd Defendant and the purported sale was null ab initio and cannot confer any proprietary interest to the 2nd Defendant. On that basis, the Plaintiff sought the removal of the structures erected on her plot, mesne profits for the periods of occupation for the same and general damages for trespass.

In the Amended Plaint, the Plaintiff averred that the 3rd, 4th and 5th Defendants are in illegal occupation of portions of the suit property and have erected thereon residential houses and that they claim to have purchased the said portions from the 1st Defendant. The Plaintiff emphasized that the 1st Defendant did not have and has no title to pass on to the other Defendants.

In her Further Amended Plaint, the Plaintiff stated that she purchased the suit property for purposes of investing in residential apartments for rental and had obtained approval for the proposed development from the City Council of Nairobi but was frustrated from proceeding with the development by the Defendants jointly and severally. Arising out of that, she claimed loss of rental income from the proposed residential apartments from the estimated completion date until the demolition of the structures on the suit property.

Defendants' Cases

The 1st Defendant filed its Statement of Defence dated 9th December 2008 and filed on 10th December 2008 in which it stated that it had no knowledge of the Plaintiff's allegations that the 2nd Defendant had trespassed on her property and erected houses thereon. It stated that it only sold a parcel of land known as Tassia-II-97/1389/220 to the 2nd Defendant which property is not in any way connected to the Plaintiff. The 1st Defendant also stated that the Plaintiff had no claim whatsoever against it as it had not entered nor trespassed on the suit property at all nor has it infringed upon any of the Plaintiff's rights. Subsequently, the 1st Defendant filed its Amended Statement of Defence dated 27th February 2009 and filed on 6th March 2009 in which it denied ever having sold the suit property to the 2nd, 3rd, 4th and 5th Defendants and put the Plaintiff to strict proof thereof. Thereafter the 1st Defendant filed its Further Amended Statement of Defence dated 6th February 2013 and filed on 7th February 2013 in which it admitted having received monies from the 2nd Defendant through its cash office in the course of receiving payments made to it but not for the sale of any parcel of land in Tassia or elsewhere as alleged by the 2nd Defendant.

The 2nd Defendant filed his Defence dated 1st February 2009 and filed on 6th February 2009 in which he stated that he was allotted the suit property by the 1st Defendant after which he took active occupation and constructed a permanent structure thereon. He added that the 1st Defendant had title to transfer to him the suit property. During the hearing of this suit, the Plaintiff withdrew its case against the 2nd Defendant.

The 3rd Defendant filed his Statement of Defence dated and filed on 19th January 2009 in which he stated that the Plaintiff has no land at all in the area in issue that that she is a busy body involved in sheer activism. He further added that since he has not occupied any land belonging to the Plaintiff the suit is an abuse of the court process. He further denied that the Plaintiff is the owner of the suit property and put her

to strict proof thereof. He also denied having been served with any demand or notice of intention to sue by the Plaintiff. The 3rd Defendant subsequently filed its Amended Statement of Defence dated 31st July 2009 and filed on 6th August 2009 in which he stated that he acquired for consideration title to the suit property by virtue of sale from the original registered owners namely Collins Muthangya, Erick Njiiru Murigu, Mundia Muritu and Joseph Njiiri between August 2007 and March 2009. He further stated that the aforesaid persons had good title acquired from the 1st Defendant who was at all material times the registered owner of the entire land from which the suit property was excised. He further added that as far as the alleged lease in favour of the Plaintiff does not flow from the 1st Defendant who was the original registered owner of the land from which the suit property was excised, any such lease was irregularly obtained through fraud and the same is therefore irregular, illegal and null and void *ab initio*. He also stated that he took possession and developed permanent structures on the suit property and has been in quiet possession thereof without any interference from the Plaintiff or at all. The 3rd Defendant also filed a Notice of Claim against the 1st Defendant dated 12th July 2013 claiming the following:

- i. The total sum paid to the 1st Defendant by the 3rd Defendant towards the settlement of the purchase price of L.R. No. Nairobi/Block 97/1389/221 and L.R. No. Nairobi/Block 97/1389/221 together with interest at current commercial rates;
- ii. The market value of the developments thereon together with interest at the current commercial rates;
- iii. Lost future business opportunities with interest at the current commercial rates; and,
- iv. The cost of this suit.

The 4th Defendant filed his Statement of Defence dated 9th February 2009 and filed on 11th February 2009 in which he stated that he was wrongly sued as he has never trespassed upon the suit property nor has he ever occupied any part thereof and that his piece of land is distinct from the suit property.

The 5th Defendant having been duly served with summons to enter appearance and having failed to file defence within the prescribed period and on application by the Plaintiff's advocates dated 1st December 2009, interlocutory judgment was entered against him on 11th December 2009.

Evidence

Hearing of this suit commenced on 24th January 2011 before Justice Muchelule when he took the evidence of the Plaintiff (PW1) and her husband (PW2). The Plaintiff, Nancy Wanjiru Wangai, stated that her husband, Joseph Waweru Kamau purchased for her the suit property. She produced a Certificate of Official Search over the suit property as her exhibit no. 1 which showed that the owners of the suit property were Elina Mwayitsi Nakaya, Michael Mulama Nakaya and Samson Masaba Munikah. She further testified that the purchase price of the suit property was Kshs. 2.2 million which they paid after which the suit property was transferred in her name. She confirmed that they paid the necessary stamp duty amounting to Kshs. 80,000/- and produced the deposit slip dated 6th March 2008 as proof of this as her exhibit no. 2. She further confirmed that she obtained the Certificate of Lease dated 30th May 2008 in her name, a copy of which she produced as her exhibit no. 3. She further testified that after the transfer of the suit property into her name, they commenced paying land rates and land rent and produced a bunch of receipts as evidence marked as her exhibit no. 4. She further stated that she intended to develop rental houses on the suit property but was not able to do so owing to the fact that when they went to establish the beacons, they found them removed and some construction was ongoing thereon. She testified that several houses were being built and that the same are now complete and occupied. She disclosed that some of the buildings erected on the suit property are 4 or 5 storey buildings, all of which are occupied. She confirmed that she knew some of the occupants thereof and mentioned the 2nd and 3rd Defendants. Upon cross examination, the Plaintiff disclosed that she noticed the encroachment into the suit property way back in the year 2001. She added that it took time to establish the identity of the people encroaching on the suit property and upon identifying them, they informed her that they purchased the suit property from the 1st Defendant. She further confirmed that the suit property is ¼ acre in size and that it is all now

built up. She also confirmed that she never approached the 1st Defendant as she did not know that the 1st Defendant had any ownership claims over the suit property. Upon cross examination by counsel for the 3rd Defendant, the Plaintiff stated that she bought the suit property in the year 2000 and took possession of it in the year 2001 which is the year the purchase price of Kshs. 2.2 million was paid. She further testified that she was not aware that the suit property belonged to the 1st Defendant. She further stated that when she filed suit, she was aware that the Defendants were claiming that the suit property belonged to the 1st Defendant who sold it to them. She confirmed that the Defendants had occupied portions of the suit property upon which they had built residential houses. She further testified that she does not know the respective portions occupied by each Defendant but confirmed that they had blocks of flats on the suit property. Upon cross examination by counsel for the 4th Defendant, the Plaintiff testified that she wanted to commence construction on the suit property in the year 2001 and that when she checked the suit property in that year, it was vacant. She further stated that when she wanted to verify the beacons in the year 2001, she found trenches being dug for purposes of construction. She further testified that she sought to know who was preparing to construct on the suit property and that it took time to ascertain the identity of those persons. She confirmed that she filed this case in the year 2008 but had tried to seek help from the Chief of the area without success. She also testified that she tried to talk to the Defendants to dissuade them from continuing with the construction but that they refused to listen to her and insisted that the 1st Defendant had sold to them the land. PW1, Nancy Wanjiru Wangai, was recalled and produced her bundle of documents as exhibits in this case as exhibit no. 1-4 and 7-39.

PW2, Joseph Waweru Kamau, stated that the Plaintiff was his wife. He testified that he wanted to invest in a housing project by putting up some apartments. He testified that at the time, he was living in Fedha Estate and came to learn that the family of Elina Mwayitsi Nakaya were selling the suit property. He testified that they entered into a sale agreement for the sale of the suit property at a price of Kshs. 2.2 million. He confirmed that he made the last payment in March 2001 and was granted vacant possession. He testified that he planted acacia seedlings and that in the year 2008, he transferred the suit property to his wife, the Plaintiff. He testified that the suit property was vacant when he purchased it. He testified further that he saw the beacons of the suit property when he purchased it. He further stated that he became aware of encroachment in the suit property late in the year 2001. He stated that he found the beacons had been interfered with and the acacia trees he had planted had been uprooted. He stated further that he had the beacons replaced but people kept uprooting them at night when he has not there. He confirmed having reported to the police who informed him to see the chief of the area. He testified further that later he went to the suit property and found a foundation dug and the workers refused to disclose to him whom they were working for. He also testified that he met hostile maasai guards whom he reported to the police and they were arrested. He testified further that in July 2002 the building on the suit property kept going on but he could not tell who was doing it. He stated further that some of the buildings came up in the year 2004 and before long the houses were ready and became occupied. He further stated that he hired a private investigator to find out who was encroaching on the suit property upon which he came to learn that it was the 2nd, 3rd, 4th and 5th Defendants. He further stated that he went to the suit property in the company of the area chief and placed demand notes from his advocates on the premises, a copy of which he produced as exhibit no. 5. He stated that they proceeded to file this suit. He also stated that the Plaintiff instructed engineers to do drawings and bills of quantities which were approved in the year 2001 by the City Council of Nairobi (as it then was). He further stated that the 1st Defendant was not the owner of the suit property but just a neighbor. He stated that there are several buildings on the suit property, some are storey buildings and others are not. He stated that the 2nd Defendant has a one storey building that the upper roof is incomplete, the 3rd Defendant has blocks of storey building with occupants, there is a block of flats belonging to the 5th Defendant and a maisonette owned by the 4th Defendant. He explained that they sued the 1st Defendant because all the Defendants were claiming to have purchased their portions of the suit property from the 1st Defendant. He added that the suit property does not belong to the 1st Defendant. He stated that their case is that the suit property never belonged to the 1st Defendant and remains his wife land. Upon cross examination by the 1st Defendant's counsel, PW2 confirmed that he visited the 1st Defendant's offices to verify the Defendant's claims of having purchased portions of the suit property from the 1st Defendant and he was informed that this was not the case. He stated that the 1st Defendant informed him that it had not sold the suit property to the Defendants. Upon cross examination

by counsel for the 3rd Defendant, PW2 stated that he did not know of any encroachment into the suit property in January 2001 but stated that he found the trees uprooted. He confirmed having made the last payment for the suit property in March 2001. He repeated that he inspected the suit property before purchase and the vendors showed him the beacons. He stated that he did not abandon the suit property but commissioned for drawings and bill of quantities to be prepared. He added that he was not aware that the case between his wife and the 2nd Defendant had been withdrawn. He stated that his case was about the illegal occupation and development of the suit property. Upon cross examination by counsel for the 4th Defendant, PW2 stated that he found the trees on the suit property uprooted but he did not think much about it. He stated that the beacons were removed later. He confirmed having gone to the chief to report the encroachment and the Defendants were summoned by the chief. He stated that the chief asked all of them to produce their ownership documents which they did. He confirmed that he took long to file suit because he did not know who was developing the suit property.

Hearing of this suit was taken over by Lady Justice Gitumbi on 5th February 2013 when the remaining witnesses commenced giving their evidence. PW3, Bernard Kaguiya Gitonga, testified that he works with the Provincial Survey Office in Nairobi. He stated that this court issued an order to him to survey and report on the status of the suit property on the ground. He testified that he got all the survey plans namely FR 278/28, 165/35, 165/36 and Nairobi/Block 97. He confirmed that when he went to do the survey work, he was accompanied by his colleagues namely Madam Mary Kori, Mr. Silas Gitonga and Mr. John Okinda. He stated that they carried out a GPS and a total station which indicates the position of the beacons. He confirmed the existence of the suit property on the ground and further established that there were buildings inside that parcel. He confirmed that there were about 4 buildings with one under construction, two being storey buildings, a maisonette and another building under construction. He produced his report. Upon cross examination by counsel for the 1st Defendant, he stated that he works for the Ministry of Lands and got the survey plans he used from the Director of Surveys. He further stated that he did not see any beacons on the suit property. He confirmed having presented his survey report to the court. On cross examination by counsel for the 3rd Defendant, he confirmed that he holds a Diploma and a Higher National Diploma and has worked for the Government since the year 2006 to date. He confirmed that he first went to the suit property in the year 2007 to confirm the existence of the suit property when he met the Plaintiff. He confirmed that he did not assist the Plaintiff to obtain title to the suit property. He confirmed that according to the records, the Plaintiff is the registered owner of the suit property. On cross examination by counsel for the 4th Defendant, PW3 confirmed that there were 7 sub-plots and one open space in the suit property. Upon re-examination, the witness confirmed that the order by the court for a survey of the suit property to be conducted was directed to the Director of Surveys and he was delegated to do the survey. He also confirmed that though they could not get the beacons, he was still able to conduct the survey. He confirmed that he had no personal interest in this matter.

PW4, Patrick Mwangi Muiyuro, stated that he is a quantity surveyor. He stated that he was commissioned by the Plaintiff to prepare a Bill of Quantities in the year 2002 in respect of the suit property. He confirmed that he was given the drawings by an engineer called Mr. Ndungu. He confirmed that the proposal was to build a storey building which was residential. He confirmed that the total cost for the construction was Kshs. 22,733,829/- at that time but stated that the cost would come to Kshs. 33,540,980/- as at 2012. He stated that the difference was attributable to the cost of labour and materials. The production of his report dated 28th February 2002 was denied on the grounds that he had not previously filed and served the same prior to the commencement of the hearing of the suit. Upon cross examination by counsel for the 1st Defendant, he disclosed that he did not visit the suit property before preparing his report but knew that he was referring to the suit property which was on the drawings which were handed over to him by engineer Ndungu. He further stated that he did not see any document of title and could not remember the number of storeys the proposed building was. He further stated that he had not indicated the size of the structure. He denied that his report was tailored to support the Plaintiff's case herein. On cross examination by the counsel for the 3rd Defendant, he stated that in preparation of this report, he assumed that there was title to the suit property in the name of the Plaintiff. He also confirmed that his report does not reflect the estimated cost of building on the suit property as at that date. On cross examination by counsel for the 4th Defendant, he confirmed that he did not have the plans or any documents relied upon by him to prepare his report. On re-examination, he stated that the instructions for

him to prepare a bill of quantities do not have to be in writing and it is not mandatory to visit a site for this purpose. He stated that all he needed to prepare the report is a plan which he received.

PW5, Stephen Boniface Muriithi Wamae, stated that he is a Land Economist by profession and holds a bachelor's degree in Land Economics, a full member of the Institute of Surveyors in Kenya and a registered practicing valuer. He stated that he operates the firm of Wamae Muriithi & Associates. He stated that he was requested to do a surveyor's report in respect of the suit property. He stated that he was to advise on the value of the land as at the date of valuation, the loss of rental earnings as at the date of valuation, the cost of demolition of the structures that were on site and reinstatement of the same. He confirmed having visited the site which was fully developed with some buildings. He stated that they had a survey map and was accompanied by the Plaintiff. He also stated that he had a search report. He stated that they carried out the first valuation on 16th September 2009 at which time the value of the suit property was Kshs. 3.5 million. He stated that he carried out an addendum on 4th February 2013 and gave the value of the suit property at Kshs. 15 million. He further stated that the second aspect of the valuation was to assess the loss of rental earnings and were provided with Building plans that had been approved in the year 2001. He stated that taking everything constant, it would have taken 12 months to complete the construction of the building and once complete, he estimated that the rents would have been earned would increase at the rate of 10% every two years. He stated that the interest forgone was estimated at the rate of 15% compound interest. He stated that the value of the suit property was taken as at the date of valuation. He also stated that the cost of site clearance was also at the date of valuation. He stated further that the estimated market rent per flat was Kshs 20,000/- per month. He stated that the total realizable rent was Kshs. 360,000/- per month giving a gross rent of Kshs. 4,320,000/- per annum. He gave an allowance of 15% being outgoings arriving at a net rent of Kshs. 3,672,000/-. He stated that the cost of development was given as Kshs. 22,733,829/- by a quantity surveyor (PW4) as at 2002. He further stated that in order to arrive at the loss of earnings, he summed the total net earnings plus interest from the year 2002 to 2009 less the realization cost. He stated that the realization cost is the cost of development as indicated in the bill of quantity. He stated further that a provision was also provided for site clearance and reinstatement of Kshs. 3 million. He stated that all these values taken together gave a total of Kshs. 36,683,025/- rounded to Kshs. 36,700,000/-. He confirmed having prepared the report and signed it. He testified that there were about 3 buildings on the site but that he did not use the developments on site for his calculations. He further stated that as at February 2013, the total loss was coming to Kshs. 128 million assuming the building had been constructed noting that the cost of construction keeps going up. Upon cross examination by counsel for the 1st Defendant, he reiterated that he did not use the buildings on site in his estimates. He stated that his report is independent and he was paid for the same. Upon cross examination by counsel for the 3rd Defendant, he stated that the plans he used were approved and the development was supposed to be done within 2 years of the approval though this period can be extended. He confirmed that the valuation was done on 16th September 2009 when the said plans had expired but stated that as at the baseline of 2002, the plans were valid. He clarified that he was working on the assumption that the building had been constructed in 2002 and that this is a conventional practice in survey. He stated that the Plaintiff said that she would have been able to construct in 2002. He also stated that the whole report was based on assumptions. He stated further that he assumed that the suit property belonged to the Plaintiff but added that he did a search and confirmed this to be the position. He stated that the title deed was issued in the year 2008. Upon cross examination by counsel for the 4th Defendant, he stated that that the Plaintiff did not construct the building as at 2002 and that his valuation report was based on an assumption that she did. On re-examination, he confirmed that it is possible to get building plans approved without the title deed. He stated that he saw the duly approved building plan and was convinced that it was genuine.

PW6, Peter Ndungu Ngunjiri, stated that he is an engineer working with the firm of Allan Peter Consultants & Management Ltd. He stated that he worked in the Ministry of Works for 3 years and for the Nairobi City Council (as it then was) for 18 years before setting up his private practice. He confirmed that he is a registered engineer. He stated that in January 2001, PW2, the husband of the Plaintiff was introduced to him after which they together visited the suit property and he surveyed it. He stated that he was assigned to draw plans for the development of flats on the suit property. He stated that he was given a sale agreement in the Plaintiff's name, a power of attorney and a copy of the title in for the original owner. He

stated that he carried out his brief by preparing a preliminary design which PW2 approved. He further stated that they submitted the plan to the Nairobi City Council and it was approved on 20th September 2001. He confirmed that he drew a 3 level (storey) building and each floor had 6 units of 3 bedroomed flats self-contained. He confirmed that in total there were 18 units to be developed. He stated that if PW2 had ready funds, it would have taken him a maximum of 2 years to put up the building. He confirmed that he has not been to the site lately and doesn't think there is any vacant space there. Upon cross-examination by counsel for the 1st Defendant, he confirmed that he came to later learnt that there arose some encroachments on the suit property but has not visited the site since he did the plan. Upon cross-examination by counsel for the 3rd Defendant, he stated that he met PW5 in January 2001 when he was introduced to him by the Plaintiff. He confirmed that an architect is the one who draws building plans. He confirmed that he is not an architect but had an architect who was working for him. He confirmed that the drafter of the building plan was his employee, one Mr. Njuguna. He confirmed that the architect is the one who was supposed to sign the elevations and reinforcement plans. On cross examination by counsel for the 4th Defendant, he stated that they went with the architect to the suit property. Upon re-examination, he stated that he owns a firm and has an engineer, architect, surveyor and 4 draftsmen working for him. He confirmed that instructions were given to the firm not to him personally. He confirmed that he is the overall in charge of the firm. He stated that the approved plans were prepared by the consulting firm. He stated that they were both architectural and structural plans and that he took the ultimate responsibility for the plans. He stated that the purpose of the plans is to get approval for the development. He confirmed that the draftsman Mr. Njuguna is still working in his firm and would be available to come and testify in court.

PW7, Stephen Muchiro Kinyua, stated that he is an architect working for Allan Peter Consulting & Management (PW6). He stated that he had come to produce a plan which was prepared by him. He stated that the plan was prepared in the year 2001 but him upon receiving directions to do so from PW6, the director of Allan Peter Consulting & Management. He further stated that instructions to prepare the plan were given by the Plaintiff to the firm of Allan Peter Consulting & Management. He stated that PW6 gave him the size and area of the suit property and he did the drawings and submitted the same to him. He stated that PW6 submitted the drawings to the Nairobi City Council (as it then was) for approval and the same was approved under DM 325. He stated that the title block on the drawings indicates the initials "SMK" which are the initials of his name. He further stated that the structural drawings were also submitted. He stated that the structural drawings were done by Mr. Njuguna. He proceeded to produce the architectural drawings as exhibit no. 5 and no. 6. Upon cross-examination by counsel for the 3rd Defendant, he confirmed having prepared the drawings in June 2001. He confirmed that he was at that time in the employment of PW6. He confirmed that he took directions from PW6 and gave him the complete drawings for submission for approval. He confirmed going to the suit property early 2001. He confirmed that it was a vacant ground at that time. He confirmed that he accompanied PW6 on this site visit. He confirmed that he has not been to the suit property since then. He also stated that he does not know whether his drawings were used. He confirmed that the approval of the plans lasts for 2 years and he did not know whether the period of approval was extended. He confirmed that he did not write his full name on the title block of the drawings. Upon re-examination, he confirmed that writing one's initials on the title block is a common practice and most drawings show the initials of the architect. He stated further that these particular drawings were submitted together with his certificate.

DW1, Aggrey Nyandong, stated that he works for the 1st Defendant as an accountant and was responsible for the Tassia project on behalf of the 1st Defendant. He stated that the land is owned by the 1st Defendant but that the same was invaded and occupied by squatters illegally. He stated that the 1st Defendant filed a suit and obtained an eviction order in the year 2004 but opted not to evict anyone. He stated that the squatters formed themselves into groups and approached David Mwenje, the MP for Embakasi at the time, now deceased, who came to plead with the 1st Defendant to let the squatters stay on the land. He further stated that Tassia Resettlement Scheme was one of the groups. He further stated that after the groups and the late David Mwenje approached the 1st Defendant, they were told to identify their members who were issued with certificates. He stated further that the members then went to the 1st Defendant which registered them. He also indicated that the members who were registered by NSSF were

required to make the necessary payments to it to regularize their stay. He stated that at the time, the 1st Defendant had not subdivided or surveyed the land. He stated that they were unaware of the suit property until this suit was filed in the year 2008. He stated that NSSF ordered for a survey to be carried out on the land and it was discovered that the suit property existed in the middle of the larger portion owned by NSSF. He stated that there was no sale agreement between the NSSF and any person in that land. He stated that he wished for the court to remove NSSF from this case as it was wrongly sued. Upon cross-examination by counsel for the Plaintiff, DW1 confirmed that he had the full authority of NSSF to testify in this case on its behalf. He stated that he was not present when the survey on the land was conducted and had not seen the survey report. He confirmed that there were people paying NSSF for the plots located in Tassia but that no titles were being given to those purchasers. He stated that most of those purchasers have put up structures on the land. He stated that he has not visited the suit property. He stated that he had come to know that the suit property is registered in the name of the Plaintiff. Upon cross-examination by counsel for the 3rd Defendant, DW1 stated that NSSF was aware that the Plaintiff has title to the suit property. He confirmed that NSSF received monies from the 3rd Defendant for Plot No. 221 and 217. He confirmed that NSSF took money carelessly. He confirmed that as at November 2012, NSSF had received Kshs. 381,227/- from the 3rd Defendant for Plot No. 221 and Kshs. 358,739/- for Plot No. 217. Upon cross examination by counsel for the 4th Defendant, he stated that they discovered that the suit property did not belong to NSSF. He confirmed that NSSF received money for plots located within the suit property without realizing the error in doing so.

DW2, Patrick Kangeri Nyamu, stated that he has 2 plots in Tassia being Plot No. 217 and 221. He stated that he bought Plot No. 217 from one Eric Njiiri Nurigu on 14th August 2007. He stated that the said Murigu told him that he bought the plots from NSSF. He stated further that the said Murigu showed him evidence of his dealings with NSSF and he was convinced. He stated that the said Murigu had not completed payments to the NSSF and after transfer of the plots to him, he took over making payments to NSSF. He confirmed that he completed making payments for the plots to NSSF. He confirmed that Plot No. 217 is now fully built with 6 two-bedroomed houses and 7 one-bedroomed houses. He confirmed having finished building on that plot in the year 2010. He confirmed that he bought Plot No. 221 from one Collins Muthangya for Kshs. 500,000/-. He stated that the said Collins gave him a certificate of ownership for the plot and requested NSSF to transfer that plot to him. He confirmed that he made full payment for that plot to NSSF and has not received a refund from NSSF. He stated that the plot is partly built with 11 one-bedroomed houses and one bedsitter. He testified that he bought the plots before the Plaintiff received the title deed to the suit property. He testified that NSSF was the original allottee of the suit property. He stated that the Plaintiff knew that he was in occupation of the suit property and had developed the same. He stated that he had filed a claim against NSSF because he received a letter from them disowning him and in which NSSF acknowledged that the transaction was erroneous. He stated that he wished to retain the two properties which are fully developed and which are his lifeline. Upon cross-examination by counsel for the Plaintiff, the 3rd Defendant stated that he owns other properties other than the plots and holds title deeds for them after undergoing the registration process. He stated that he was aware that before buying any property, he is required to conduct a search. He stated that he went to NSSF in respect of the two plots. He stated that he did not seek any approval to put up the structures on the suit property. He stated he was advised that it is not necessary if he does not have a title. He stated that he commenced construction on Plot No. 217 in December 2007 while on Plot No. 221, he constructed in 2010 when this matter was already in court. He confirmed having been summoned by the local chief in the year 2007 when he went to the site accompanied by PW2. He stated that he was shown the title to the suit property and was told the owner of the suit property. He stated that he never conducted a search on the suit property. He confirmed that the court ordered a survey to be done to confirm whether the suit property exists on the ground. He testified that the survey confirmed that only one of his buildings was within the suit property. He confirmed that when the suit was filed, he did not await the outcome of the suit before continuing to construct. He confirmed that he earns Kshs. 250,000/- per month from the two properties. Upon cross examination by counsel for the 1st Defendant, DW2 stated that he bought the plots under the Tenant Purchase Scheme with NSSF and that Mr. Njiiri was the previous owner thereof. He further stated that he visited NSSF before purchasing those plots and got a go ahead to purchase them.

DW3, Fred Nyaega Oyugi, stated that he was informed that his plot belongs to someone else. He stated

that his plot is No. 234 located on the land belonging to NSSF at Tassia. He stated that his plot is 16 plots away from the suit property. He stated that he bought his plot from NSSF under the Tenant Purchase Scheme and was issued with a certificate of ownership by Tassia Resettlement Scheme. He confirmed that he has fully paid for this plot. Upon cross examination by counsel for the Plaintiff, DW3 stated that he met PW2 in 2008 at his plot. He stated that PW2 was looking for the 3rd Defendant's plot upon which he introduced him to the 3rd Defendant. He confirmed having gone to the local chief because PW2 was claiming that his plot belonged to him. He confirmed that he was absent when the survey on the suit property was conducted. He stated that he was now aware that his building is one of the 8 buildings said to be within the suit property. He stated that his plot is not within the suit property. He confirmed that he did not conduct a search on his plot when he commenced building, that he built thereon without seeking any approvals and that he does not have a title deed. He confirmed that he has constructed a permanent 3 bedroomed house on his plot. He confirmed that his plot is his residence.

Submissions

After the hearing in court, parties filed their respective written submissions to support their claims.

The 1st Defendant filed their written submissions where they submitted that *mesne profits* as claimed by the Plaintiff are special damages which must be specifically pleaded and proved. It relied on the case of **Waas Enterprises Limited –vs- City Council of Nairobi & Another (2014) eKLR**. It submitted that the Plaintiff did not specifically plead and particularize *mesne profits* and loss of rental income adding that it was not enough for the Plaintiff to list them down as prayers as she did. It stated that it would be very unfair on the Defendants to be forced to pay an amount which had not been pleaded in the first place. The 1st Defendant further submitted that the Plaintiff claimed that the suit property was invaded in 2001 therefore it was impossible for her to have constructed on the suit property and the claim of loss of rental income was speculative. The 1st Defendant further submitted that the 3rd Defendant had claimed to have purchased plots from the 1st Defendant but he did not exhibit any written contract between the two parties adding that the documents produced by the 3rd Defendant did not meet the requirements of **section 3(3) of the Law of Contract Act** for the disposition of an interest in land therefore the 3rd Defendant had no claim or cause of action against the 1st Defendant. It further added that there being no approval of the improvements on the suit property by the City Council of Nairobi (as it then was), the 3rd Defendant's Notice of Claim against the 1st Defendant ought to fail. They further submitted that the 3rd Defendant admitted that the plots were pointed out to him by persons he had purchased them from and not the 1st Defendant. It further submitted that the 3rd Defendant had admitted that he did not do any search at the Lands office to confirm ownership of the suit property before purchase and added that the 3rd Defendant had contributed to the current state of affairs and should not blame other parties for his misfortunes. It stated that they would reimburse the monies paid by the 3rd Defendant.

The 3rd Defendant in his written submissions stated that the Plaintiff was guilty of inordinate laches for delaying to file this suit. He claimed that after being aware of the invasion, the Plaintiff sat and waited for the 3rd Defendant to complete construction before coming to court claiming trespass and seeking a demolition order and claimed that the Plaintiff had acquiesced the development and possession by the 3rd Defendant therefore she was estopped from challenging the title to his plots. He further submitted that his purchase, development and possession were done with the knowledge and authority of the 1st Defendant therefore his claim against the 1st Defendant. He submitted that the Plaintiff and the 1st Defendant were estopped by the doctrine of proprietary estoppel from challenging his title and possession on account of their conduct. He relied on the case of **Doge vs. Kenya Cannery Limited (1989) KLR** where the Court held that, “.....it is a principle of justice and equity that when a man by his words or conduct has let another to believe that he may safely act on the faith of them and the other does not act on them he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so”. The 3rd Defendant submitted that while acknowledging that there was a title document in the name of the Plaintiff who claimed that the suit property comprised in the said title included the 3rd Defendant's plots, he stated that the title and interest of his plots was an overriding interest under **section**

30(g) of the Registered Land Act to which the Plaintiff's registered interest is subject to. The 3rd Defendant further stated that he had a defence to trespass for the reason that he took and developed his plots with the authority and knowledge of the 1st Defendant which was the initial allottee by the government since the 1st Defendant had admitted having made the 3rd Defendant believe that it had the title to sell to him though it later disowned him. He relied on the case of **Peter Kimani Njuguna vs. Pius Karuri Kigami & Another (2009) eKLR** where the court held that, "*Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action for trespass to land is the person who was, or who is deemed to have been in possession at the time of the trespass. The owner has no right to sue in trespass if any other person was lawfully in possession of the land as at the time of the trespass since mere right of the property without possession is not sufficient to support the action*". The 3rd Defendant concluded his submissions by urging the court to invoke its overriding objective by finding that the proportionate and equitable justice does not allow for demolition of the 3rd Defendant's permanent structures on the suit property adding that the 1st Defendant was the author of his predicament.

The 4th defendant in his submissions claimed that he had wrongly been sued since his land was separate and distinct from the suit property.

The 5th defendant did not file any written submissions.

Determination

I have considered the pleadings, the evidence and the written submissions. The Plaintiff's case is that she is the registered proprietor of the suit property as evidenced by the exhibited title deed to the suit property issued by the Land Registrar in accordance with the **Registered Land Act** and that there is no evidence of fraud or unlawful acquisition on her part. **Section 26(1) of the Land Registration Act, Act No. 3 of 2012** provides that,

"The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party or where the certificate of title has been illegally, un procedurally or through a corrupt scheme."

The Court of Appeal in **Dr Joseph N K arap Ng'ok vs. Justice Moijo ole Keiuwa and Others Nairobi Civil Application No. NAI 60 of 1997 (Unreported)** held that,

"Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy."

It is noteworthy that none of the parties to this suit were able to successfully challenge the title deed to the suit property exhibited by the Plaintiff. The 1st Defendant admitted that after a survey was done on its property it noted that the suit property did not fall within their property. It also did not deny that the suit property belonged to the Plaintiff. The 3rd Defendant claimed that he entered into the suit property on the authorization of the 1st Defendant who had taken monies from him. The 3rd Defendant relied on the alleged certificate of ownership to the plots he purchased and the payment of monies to the 1st Defendant as authority to enter and occupy the suit property. After the survey was done, a report by the surveyor concluded that the 3rd Defendant's plots were within the suit property therefore the certificates of

ownership that the 3rd Defendant possessed could not confer any title to him. I find that since the plaintiff is the registered owner of this land, the entry, possession and occupation of the same by the 3rd Defendant was unlawful. In my view, the basis of competing interests between the certificate of ownership and a registered title, the holder of a validly registered title would be superior to that of the holder of a certificate of ownership over the same property even if the certificate of ownership may have been issued earlier than the title as the 3rd Defendant had claimed. This is buttressed in the case of **Njuwangu Holdings Ltd vs. Langata KPA Nairobi & 5 others (ELC NO. 139 OF 2013)** where the court held that,

“As matters now stand, the plaintiff who has a registered title over the suit property has a superior title to that of the 1st Defendant who only holds a letter of allotment. I am in agreement with the decision of the court of Appeal in the case of Satya Investments Ltd –Vs- J.K. Mbugua Civil Appeal NO. 164 of 2004, where the court held that a temporary occupation licence could not override a registered title under the Registration of Titles Act Cap 281 Laws of Kenya (repealed). Equally, it is my view that a letter of allotment cannot override a duly registered title under the Act and where there is a registered title and a letter of allotment over the same property barring any fraud on the part of the party holding the registered title, a letter of allotment must of necessity give way. The rights of a party who holds the registered title have crystallized as opposed to those of the party holding a letter of allotment which are yet to crystallize.”

Similarly, in this case, the certificates of ownership and other ownership documents exhibited by the Defendants must of necessity give way to the title document exhibited by the Plaintiff. As far as I can tell, the law cited above is very clear where a party holds a title deed. It is therefore my finding that the Plaintiff is the duly registered proprietor of the suit property and is entitled to enjoy all the rights of proprietorship including physical possession of the suit property as provided under the law to the exclusion of everybody else. Therefore, it is my finding that the 3rd and 5th Defendant and any other party occupying the suit property are in illegal and unlawful occupation thereof and are trespassers. They ought to vacate and deliver vacant possession of the suit property to the Plaintiff.

The Plaintiff has sought mesne profits and loss of rental income for the period she was not in possession of the suit property. She testified that she had the intention of developing flats on the suit property after completion of the payment of the purchase price. She stated that she had been prevented from doing so because the suit property was invaded by the Defendants who started constructing illegal structures thereon. The Plaintiff produced in court the plans of the construction and even brought an architect, an engineer and a Land Economist as witnesses to show that she had intentions of constructing on the suit property as at 2001. The land economist gave estimates of monies that would have been expended on the construction of the said flats by providing Bills of Quantities. It was the witnesses evidence that the gross project cost would have been about Kshs. 22,733,829/= as at 2002 and as at 2012 she would have used Ksh 33,540,980/=. Section 2 of the Civil Procedure Act defines “**mesne profits**”, in relation to property, to mean 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. Wrongful possession by the defendant is the very essence of a claim for mesne profits. In **Ishan Chandra Budhan vs. Amuddin [1901]5 C.W.N 720** Hill J held that damages are claimable only for the period of the defendant’s wrongful possession actual or constructive. However, the Plaintiff did not make a specific claim of the mesne profits of the amount she claimed from the defendants. Without pleading this amount, the court will not be in a position to grant the amount the Plaintiff has sought. This is because the court cannot pluck figures from the air and award her without justifying how those figures arose. The Court of Appeal in **Peter Mwangi Mbuthia vs. Samow Edin Osman & Naftali Ruth Kinyua Civil Application No.NAI No.38 of 2004** stated the law on mesne profit 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..... That being so, it must

be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all.”

It is therefore my opinion that the Plaintiff is not entitled to mesne profits as claimed as she did not state or prove the amount of the said mesne profits. The same also applies to the loss of rental income because she has not specifically pleaded or proved the lost rental income in her claim.

The Plaintiff has claimed general damages for trespass and loss of value. As regards general damages, it is a fact that the Defendants are in occupation of the suit property and have prevented the Plaintiff from utilizing or making use of her property. As the fact of trespass is already established, damages are awardable as a matter of course. I have held that the 3rd and 5th Defendants are in trespass on the suit property. Having regard to the circumstances of this case, I assess damages for trespass against the 1st to 5th Defendants jointly and severally in the sum of Kshs. 5,000,000/- in favour of the Plaintiff.

The 4th Defendant stated that his plot was far from the suit property and stated that he had been wrongly sued in this suit. He produced a letter from the 1st Defendant dated 22nd February 2012 that acknowledged that the 4th Defendant had been registered with the 1st Defendant as a tenant purchaser in respect of LR No. Nairobi/97/1413/234 Tassia Estate. The 4th Defendant's claim that his plot was far away from the suit property was not rebutted by the Plaintiff. I therefore find that the 4th Defendant was wrongly sued in this suit.

The 3rd Defendant filed a claim against the 1st Defendant for representing itself as the owner of the suit property and receiving monies from him. I have studied the 3rd Defendant's claim and note that the 3rd Defendant did not purchase any plots from the 1st Defendant and there was no privity of contract between the 1st and 3rd Defendants. The transactions leading to the 3rd Defendant's occupation of the suit property were as follows: Certificate of ownership on Plot No 221 to Collins Muthangya dated 2nd January 2002, sale agreement dated 14th August 2007 between the 3rd Defendant and Eric Njiiri Murigu on Plot No 217 where he paid a consideration of Kshs 310,000/= and a sale agreement dated 19th February 2008 for Plot No 221 for a consideration of Kshs 500,000/= between the 3rd Defendant and Collins Muthangya. The 1st Defendant collected the monies with the assumption that the plots were part of its larger parcel and after a survey was conducted it noted that it had erroneously collected money from the 3rd Defendant and this was communicated to him in a letter dated 3rd April 2012. The letter stated that,

“In the process of carrying out this exercise, the surveyor has informed us that Nairobi/Block 97/1389/217 does not belong to NSSF and have since established that NSSF does not hold title deed for block 97/1389. Consequently, NSSF cannot continue with the erroneous transaction any further. Kindly surrender the original receipts to the undersigned for all the payments made to NSSF to enable us refund your money”

By a further letter dated 3rd April 2012 on LR No. Nairobi/Block 97/1389/221, the 1st Defendant wrote to the 3rd Defendant stating that it cannot continue with the erroneous transaction any further. Further, the 3rd Defendant in his evidence in court confirmed that he did not conduct a search on the suit property to ascertain ownership after he received a demand letter. He also acknowledged that he received the demand letter when he was still constructing on ground floor and that he did not wait for this suit to be determined. It is therefore my opinion that the 3rd Defendant having not taken due diligence to find out who was the owner of the suit property compounded with the fact that he continued with the development of the suit property whilst this suit was pending in court shows how the 3rd Defendant acted brazenly and without care of his future investment. Further, the 3rd Defendant acknowledged that he constructed structures on the suit property without getting approvals from the City Council of Nairobi (as it then was) and in essence the structures put up by him were illegal structures. The court cannot aid a person breaking the law by making him earn a profit from an illegal conduct that is totally against the law. Accordingly, I find that the 3rd Defendant has failed to prove his claim against the 1st Defendant and the 1st Defendant

can only refund the 3rd Defendant the amounts it had received from him as it indicated it would.

Arising from the foregoing, it is my finding that the Plaintiff has proved her case and I accordingly enter judgment against the 3rd and 5th Defendants jointly and severally and make the following orders:-

- i. That the 3rd and 5th Defendants and any other parties together with their tenants, agents and/or servants are ordered to vacate and deliver vacant possession of the suit property to the Plaintiff within Ninety (90) days from the date of this judgment failing which eviction orders to issue on application.
- ii. I order for the immediate demolition of all the structures and the buildings put on or erected upon the suit property by the Defendants.
- iii. The Plaintiff is awarded Kshs. 5,000,000/- as general damages for trespass together with interest at court rates from the date of judgment.
- iv. Costs of the suit with interest at court rates are awarded to the Plaintiff.

DELIVERED AND DATED AT NAIROBI THIS 29TH DAY OF JANUARY 2016.

MARY M. GITUMBI

JUDGE