



**Yegon v Sang & another (Environment & Land Case 54 of 2008)
[2024] KEELC 841 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 54 OF 2008
MC OUNDO, J
FEBRUARY 22, 2024**

BETWEEN

WILSON MALAKWEN YEGON PLAINTIFF

AND

PETER SANG 1ST DEFENDANT

GRACE MARITIM 2ND DEFENDANT

JUDGMENT

1. Vide a Plaint dated 19th November, 2008 the Plaintiff herein sought for the following orders;
 - i. A declaration that the Defendants are trespassers on the Plaintiff’s land parcel number Kericho/Kipchimchim/2059 and an order that they deliver up vacant possession in default eviction order to issue.
 - ii. Mesne profits from 2004 till (sic) vacation.
 - iii. Cost of the suit and interest.
 - iv. Any other or further relief.
2. The Defendants filed their Statement of Defence and a Counterclaim dated 9th December, 2008 wherein they denied the contents of the Plaint putting the Plaintiff to strict proof while stating that the Plaintiff had falsely and fraudulently obtained the whole parcel of land No. Kericho/ Kipchimchim/2059 (suit land) when he knew that they were entitled to a portion measuring 128 feet by 122 feet.
3. They particularized the fraud committed by the Plaintiff as falsely obtaining title deed to the whole of the suit land in his name and refusing to disclose to the Kericho District Land Registrar that they jointly and severally were entitled to a portion of 128 feet by 122 feet in the suit land.



4. In their counter-claim, the Defendants jointly and severally prayed that the Plaintiff's (now Defendant) suit be dismissed with costs and judgement be entered on the Counterclaim for the following orders;
 - i. That the Defendants (now the Plaintiffs) are legally entitled to a portion of 128 feet by 122 feet to be excised from Kericho/Kipchimchim/2059.
 - ii. That the Plaintiff (now the Defendant) be compelled by the court to execute the relevant documents and transfer the same to the Defendants (now Plaintiffs) to facilitate the transfer of the said portion to them and in default of this, court do nominate the executive officer to execute in place of the Plaintiff (now the Defendant)
 - iii. Costs of the counter claim be granted by the court and any other relief that the court may deem fit.
5. Vide a Reply to Defence and Defence to Counter-claim dated 7th January, 2009, the Plaintiff reiterated the contents of his plaint denying the allegations brought for the by the Defendants and putting them to strict proof. He sought for the Defendants' Defence to be dismissed with costs.
6. In the cause of the trial, on 8th February, 2018, the court had been informed of the demise of 1st Defendant wherein the Plaintiff had been directed to consider withdrawing upon which Counsel had sought for time to file an application for substitution of the 1st Defendant. However, from the records, there is no indication that such application was ever filed and therefore the suit against the 1st Defendant automatically abated and/or died a natural death.
7. Nevertheless, upon the parties' compliance with the provisions of Order 11 of the Civil Procedure Rules, the matter proceeded for hearing on 2nd November 2022 whereby the Plaintiff herein, Wilson Malakwen Yegon testified as PW1 to the effect that he lived in Brook within Kericho County and was a farmer as well as a businessman. That he knew the 2nd Defendant who had trespassed on his land being Kericho/Kipchimchim/2059 (the suit land) which land he and his brothers Sammy Kiprono Yegon and Reuben Kipkemoi Yegon inherited from their parents.
8. He proceeded to testify that his brother Sammy had passed away in the year 1996 before marrying hence his share of the suit land was divided between himself (Plaintiff) and his brother Reuben. He contended that his brother Sammy did not sell the suit land to the 2nd Defendant. When he was referred to the Certificate of confirmation of Grant dated 8th December, 1998, he confirmed that according to the grant, the suit land had been given to him. He produced the said Grant dated 8th December, 1998 as Pf Exhibit 1. He was also referred to the Certificate of Search dated 10th August, 2010, wherein he confirmed that the same was in his name and that the title to the suit land was issued on 11th January 2007. The said certificate of search dated 10th August, 2010 was marked as Pf MFI 2.
9. He proceeded to testify that his mother died in the year 1970 and therefore she could not have sold the suit land to the Defendants. The Death certificate of Tapelga W/O Kigen Kirui was marked as Pf MFI 3. He reiterated that the suit land had initially belonged to him and his brothers as seen from the Green card dated 26th January, 2009 which was marked Pf MFI 4 wherein it had later been registered to his name as per a second Green Card dated 26th January 2009 to that effect which Green Card was marked as Pf MFI 4.
10. His evidence was that the 2nd Defendant trespassed onto his property in the year 2007 but initially she had placed a caution on the said land in the year 2003 wherein he had received the information on the said caution vide a letter from the Land Registrar who advised him to write a letter if he was



- objecting to the same. That subsequently, he wrote a letter dated 15th April, 2003 which he produced as Pf Exhibit 6. He denied ever selling the suit land to the Defendant.
11. On being cross examined, he confirmed that his Identity Card indicated that he was born in the year 1961. He maintained that the suit land which is in Brook Kericho County was his and that he had a Green Card to prove the same. That notwithstanding that he had been 11 years old in the year 1972, it was not true that at that time, his mother and brother had sold the suit land but again he would not have known if the land had been sold. He confirmed that his brother Sammy was mentally handicapped. But
 12. He confirmed that the suit land bordered shops but that it was not true that after the land had been sold in the year 1972, the Defendant got onto occupation. That he would have known if his parents had sold the suit land because when he became of age, he started ploughing the said land. He denied knowing John Kipsang Maritim and when he was referred to a title deed for the land parcel No. Kericho/Kipchimchim/2059 registered to John Kipsang Arap Maritim on 8th November, 1988 (DMFI 1), he maintained that his parents did not sell the suit land since there was no consent to that effect.
 13. He confirmed that his father and mother died in the years 1966 and 1970 respectively while his brother Samuel died in the year 1996. That they had filed a Succession Cause after the death of their mother. He admitted that he had not produced anything to that effect but he could provide evidence if the court so wished.
 14. That when the Defendants came to them in the year 2007 asking them to transfer the land to them, they had asked them for evidence of having purchased the land. He confirmed that he knew his brother Reuben's signature and upon being referred to a Receipt dated 30th January, 1991 (DMF 2), he confirmed that the signature therein although resembling his was not his signature. When he was further referred to the payment receipts, he read the writing of the receipts of Kshs. 5,000/= but maintained that he did not sign on the said receipt. He also denied having asked the 2nd Defendant to give them a sum of Kshs. 5,000/= so that he could sign the transfer letter to her. His evidence was that anybody would have signed the receipts.
 15. His further evidence on cross-examination was that he and his brother had been arrested after they had refused to allow the 2nd Defendant take possession of the suit land but had been released after it had been extinguished that the suit land was theirs and not because they had reconciled with the Defendant.
 16. He confirmed that he was aware of Land Parcel No. Kericho/Kipchimchim/1068 which was his mother's land and that the suit land was its sub division. He however reiterated that his mother did not sell the suit land as all the sub-divisions were in their names. That it was also not true that that they had been filing suits against all persons who bought the sub-divisions.
 17. He further confirmed that there were houses on the suit land and which houses had been built around the year 2008 by the 2nd Defendants who had defied both their plea and the court order to stop building. That that in defiance of the orders, she had taken occupation of the suit land to date.
 18. He stated that the 2nd Defendant had not taken occupation of the suit land in the year 1972 because at that time, the land had not been developed and he Plaintiff had been ploughing the same.
 19. When he was re-examined he reiterated that he did not know how Maritim (2nd Defendant) got the title because the land was theirs. He maintained that the Defendant got onto the suit land in the year 2007. That he and his brothers were not taken to court after their arrest but were released upon the land search result showing that the suit land was theirs.
 20. On the 26th September 2023, by consent the parties counsel agreed to produce the plaintiffs documents marked for identification as plaintiff exhibits respectively. The Plaintiff closed its case.



21. Grace Chemutai Maritim, the 2nd Defendant herein testified as DW1 to the effect that she lived in Brooke and was ran a business of renting out rooms. She adopted her Witness Statement as evidence in chief and proceeded to testify that she had bought the suit land No. Kericho/Kipchimchim/2059 measuring $\frac{3}{4}$ of an acre from one Tabelga in the year 1972 wherein she had been issued with a title deed in the year 1988 by the Land Registrar. She marked her title as Df MFI 1. That after she had bought the said land, she proceeded to erect the buildings thereon and started renting out the rooms.
22. She testified that the proprietor's three sons signed the transfer documents after she had added them some money and thereafter had issued receipts herein produced as Df Exhibit 2 (a-k). That however, when she went to the site, she found another person by the name Peter on the suit land whereby she reported the matter to the police before placing a caution on the suit land which caution had subsequently been removed. She explained that she had placed the first caution in the year 2000, another one in the year 2001 and a final one in the year 2003 but she suspected that the said cautions had been removed by the proprietor's sons although she was not sure. She produced the Cautions dated 22nd November, 2000, and 7th April, 2003 Df Exhibit 3 (a) and (b).
23. Her further evidence was that even after placing the caution, the Plaintiff and his brothers had kept on disturbing her which forced her to report them to the police after which they had been arrested. That after their arrest, she had also reported the matter to Anti-corruption and CID Nairobi and made a further report to the land Registrar. She reiterated that the proprietor's sons had asked for Kshs. 5,000/= and Kshs. 1,500/= so that they could give her the title, but they had not kept their promise.
24. She confirmed that they did a search and discovered that at the moment the land was registered to one Peter Okoth and a woman's name as proprietors and that the said land did not contain either her name or her husband's name. She marked the said search dated 8th March, 2022 as DMF1 4. She further confirmed that she had built houses on the suit land where she had been paying rent since the year 1972 and had been in occupation to date. She sought that the title to the suit land be registered in her name and further that the court protects her from disturbance from the proprietor's sons.
25. Upon being cross-examined, she reiterated that she bought the suit land from Tapelga in the year 1972 but her sons wanted to demolish the houses on the said land. She confirmed that Tapelga's son had signed the transfer whereupon the suit land had been registered in the name of her deceased husband. That she had taken out a Grant of Letters of Administration.
26. Upon her statement being read to her, she confirmed that the suit land was sold to her by Tapelga and an agreement drafted to that effect. She confirmed that the title was given to them by the Land Registrar in the year 1988. That her husband's name was in the green card a long time ago and that she was not aware that her husband's name was no longer in the said green card.
27. That she neither had an office in her house nor knew about the green card, although she knew that the suit land was hers. She further confirmed that she had placed a caution on the suit land in the year 2003 because the suit land was hers. That she did a search and found that the land was in another person's name.
28. She maintained that she got the title legally and that she had sworn to tell the truth. That she bought the suit land along time ago after she had taken a loan of Kshs. 6,000/= from her husband because at the time one would have even bought a house for Kshs.1000/=.
29. Her testimony was that after Tabelga died, her sons stated claiming that the money she and her husband had given their mother did not concern them hence she started paying them so that they do not demolish the houses. It was her evidence that indeed she had thus bought the suit land a second time



from Tabelga's son. That Tabelga's sons and the Registrar Grace did the transfer in the year 1988 after which she and her husband built the rental houses on the suit land. That her husband died around January 1999.

30. In re-examination, she confirmed that John Kipsang Arap Maritim was her husband whose name had been on the Green Card although she could not understand now why the name was no longer on the said Green Card. She reiterated that she placed a caution on the suit land because Tabelga's children wanted her to pay for the suit land a third time. She explained that the suit land was now hers because her husband passed away.
31. She produced a certificate of confirmation of grant, issued on the 12th July, 2002 as Df exhibit 5 and a letter seeking to place a caution on the suit land dated 30th April, 2003 as Df Exhibit 6.
32. She also produced a letter by the Registrar dated 12th May 2003, calling them for a hearing although they were not heard, as Df exhibit No.7. She proceeded to testify that after she had reported the matter at the criminal investigation department (CID) the officers had promised to investigate the matter and she produced the said letter dated 28th August, 2003 as Df Exhibit 8. She also produced a letter dated 30th December, 2003 from the Land Registrar advising them to remove the caution, as Df Exhibit 9 and Lastly a letter dated 11th July 2022 in relation to the missing Register, as Df Exhibit 10. By consent the documents she had also marked for identification had been produced as the Defence exhibits.
33. The Defence closed its case and parties were directed to file their written submissions to which I shall herein summarize as follows;

Plaintiff's submissions.

34. The Plaintiff summarized the factual background of the matter as well as the evidence adduced in court before framing his issues for determination as follows:
 - i. Whether the Defendant's counterclaim has merit.
 - ii. Whether the Defendant has any legal capacity to lay claim over the suit land (sic)
 - iii. Whether the Defendants are trespassers on the suit property.
 - iv. Whether the Plaintiff is entitled to mesne profit.
 - v. Who should bear the cost of the suit.
35. On the issue as to whether the Defendant had any lawful claim over the suit property, the Plaintiff reiterated the 2nd Defendant's evidence adduced in court and submitted that although the Defendant's claim was that they had purchased the land measuring 128 feet by 122 feet to be excised from land parcel number Kericho/Kipchimchim/2059 yet the suit property herein measured 0.05 hectares and was smaller in size in comparison to the property alleged to have been purchased by the Defendants and which ought to be excised therefrom. In essence therefore, the Defendants' prayer in their counterclaim was unenforceable.
36. That from the green card, it was evident that the suit property had never been registered to Samuel Arap Biegon and thus the said Samuel Arap Biegon had no capacity to sell the suit property. Further, that the Defendants did not produce any Land Sale Agreement to prove their allegations of purchase. He placed reliance on the decided case of Samuel Kamere v Land Registrar [2015] eKLR to submit that in the absence of any evidence to confirm that the purchase was proper, the title deed in the hands of the Defendants was in question as the same must have been acquired in an illegitimate way thus the court should order its cancellation forthwith.



37. His further submission was that the 2nd Defendant had not proved how the said title was obtained from the land registry as none of the Plaintiff's family members were invited and or attended land control board to give consent to the transfer of the same. Further, that no evidence of the transfer instrument was presented by the defendant to prove the alleged purchase and transfer. Reliance was placed on Section 80 of the *Land Registration Act* that empowers the court to order for rectification of the Register where any registration was obtained by fraud or mistake to submit that the 2nd Defendant's registration having been obtained in the absence of a previous owner's consent, the court should find that the said registration was obtained by mistake and/or fraudulently hence it was due for cancellation.
38. On the third issue for determination as to whether the Defendants were trespassers on the suit property, the Plaintiff's reliance was hinged on the definition of trespass from the Black's law dictionary to submit that the Defendants were in occupation of the Plaintiff's parcel of land having forcefully entered into occupation of the same from the year 2004 without any color of right. That the Defendants took advantage of the demise of the Plaintiff's mother and colluded with the then Land Registrar to have the land registered in the name of her husband who was now deceased. He thus submitted that the Defendants trespassed into the Plaintiff's parcel of land and took possession forcefully hence they were deemed as trespasser.
39. As to whether the Plaintiff was entitled to mesne profit, the Plaintiff placed reliance on a combination of the Provisions of Section 2 of the *Civil Procedure Act* on the definition of mesne profit, Order 21 rule 13 of the Civil Procedure Rules as well as a combination of the decisions in the case of Attorney General vs. Halal Meat Products Limited [2016] eKLR and Peter Mwangi Mbuthia & another vs. Samow Edin Osman [2014] eKLR to submit that the Plaintiff had exhaustively proven that the Defendants were trespassers who came under the pretense of being purchasers of the suit property and forcefully took possession hence they were liable to pay mesne profit to the legitimate owner of the suit property.
40. Regarding who should bear the cost of the suit, reliance was placed on the provisions of Section 27 of the *Civil Procedure Act* to submit that costs were discretionary and ordinarily followed the event to and therefore costs of the instant suit be borne by the Defendants.
41. In conclusion, the Plaintiff submitted that he had proven his case on a balance of probabilities hence judgement should be entered in his favour and the Defendants' case be dismissed with costs to him.

Defendant's Submissions.

42. The Defendant framed her issues for determination as follows:
- i. Whether the Plaintiff has a legal interest on the suit land.
 - ii. Whether the Plaintiff proved his case on a balance of probability.
 - iii. Whether the Defendants (sic) are the legal beneficial owners of the suit land.
 - iv. Whether the Land Registrar fraudulently conspired with the Plaintiff to defraud the Defendants(s) of their property.
 - v. Whether the third parties(sic) acquired a good title.
 - vi. Whether the Defendant acquired the suit property through adverse possession.
 - vii. Whether the Defendants (sic) have proved their case on a balance of probability.
43. On the first issue for determination as to whether the Plaintiff had a legal interest on the suit land, the Defendant submitted in the negative and reiterated her statement that the Plaintiff had transferred the



suit land to Peter Okoth Oloo and Chepkoech Irine on 5th June, 2014 and proceeded to produce an official search dated 6th March, 2022 confirming the same. She relied on the decided case of Titus Laisa Waliuba vs. Calistus Barasa Khisa & 3 Others [2018] eKLR to submit that the Plaintiff had sold the suit land while the instant matter was pending hearing and determination thereby relinquishing his interest on the suit land and therefore had no legal interest in the instant suit which should be dismissed in its entirety with costs to the Defendant.

44. On the second issue for determination as to whether the Plaintiff had proved his case on a balance of probability, the Defendant interrogated the Plaintiff's evidence that had inherited the same from his parents whereby he and his brothers had jointly owned the same as at 28th September 1967. That thereafter, he had owned it solely from 11th January 2007 to date which suit land he had been cultivating.
45. That from the official search produced as evidence, it was clear that the suit land had been registered in the names of third parties. Further, the ground report and the photos produced were evident that the suit land had been occupied by rental houses built by the Defendants. That the orders sought by the Plaintiff were therefore untenable as he was not the owner and lacked interest on the suit property. That the Plaintiff's suit ought to be dismissed with cost to the Defendant and the orders sought by the Defendant in her counterclaim allowed.
46. As to whether the 2nd Defendant was the legal beneficial owner of the suit land, she reiterated that she was the wife of the late John Kipsang Maritim and an administrator of his estate. That they bought had the suit land in the year 1972 from Samuel Arap Biegon and his mother Mrs. Talbega wherein they had immediately built rental houses where she had been collecting rent to date. That the land had been sub-divided wherein they had been issued with new parcel numbers. That in the year 1988, after the Plaintiff and his brothers demanded for more money on claims that their mother had sold the land cheaply, they had complied wherein the Plaintiff and his brothers had signed the transfer forms and her husband John Arap Maritim acquired the title deed on 8th November, 1988. She being a beneficiary of the estate of the said John Kipsang Arap Maritim, inherited the suit property where she has been in occupation to date.
47. On the fourth issue for determination, the 2nd Defendant reiterated that she had produced a copy of the title deed in the name of John Kipsang Maritim issued on 8th November 1998 and protest letters as to why a caution she had placed on the land, after discovering the entry of her husband's name was missing in the green card, had been removed. That there had also been in evidence complaint letters to the Provincial Criminal Investigation Director of the issue of double titles to the suit land. That the Plaintiff had also admitted to having been arrested for encroaching into the Defendants' land. The sequence of these activities was proof that the 2nd Defendant's husband was initially the registered owner of the suit land and hence the Land Registrar's action of removing the cautions to the suit land without notice was un-procedural.
48. As to whether the third parties had acquired a good title, the Defendant's submitted in the negative for reason that the Plaintiff had acquired title fraudulently hence he could not pass a better title to the third parties than what he had. Reliance was placed on the decided case of Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others [2015] eKLR. That there be therefore a cancellation of the entries in the green card as well as the title deed in the names of Peter Okoth Oloo and Chepkoech Irine and the 2nd Defendant be registered as the owner of the suit land known as land parcel No. Kericho/ Kipchimchim/2059 measuring 128 feet by 122 feet.
49. On the sixth issue for determination as to whether the Defendant acquired the suit property by adverse possession, the Defendant submitted that since the Plaintiff's evidence was that his mother had never



sold the suit land to the Defendants, and that he was its legal owner, then the Defendant's entry onto the suit land was not permissive. That she had been in occupation of the suit land since the year 1972 and had developed the same by building rental houses from which she collected rent, as evidenced by the site visit report of 30th May, 2023, it followed that 36 years had lapsed and therefore, ownership of the suit land, by adverse possession had already passed to the Defendants who had been in open, continuous, peaceful and uninterrupted occupation of the said land to date. That judgment in favour of the Defendant as prayed in their counterclaim was inevitable.

50. That she had proven their case on a balance of probability, her evidence was uncontroverted and further confirmed by the ground report that they were in occupation of the suit land and that there were old houses built therein and occupied by the tenants. That the Plaintiff's testimony that he was cultivating the suit property was displaced by the ground report.

Determination.

51. I have considered the evidence on record as well as the submission by counsel for both parties, the law and the authorities herein cited. I have also considered that the 1st Defendant herein passed away in the cause of the proceedings and was not substituted and therefore the suit against him abated.
52. From the totality of the evidence herein produced, while it is not in dispute that the Plaintiff was one of the sons to the original proprietor of parcel No. Kericho/Kipchimchim/2059, it is also not in contention that the 2nd Defendant herein while claiming ownership of the said parcel of land, she being a beneficiary of the estate of John Kipsang Arap Maritim who was its alleged registered proprietor, has built semi-permanent rental houses on the said parcel of land wherein she has been collecting rent from her tenants.
53. The Plaintiff's case and which forms the bone of contention is that he and his brothers Sammy Kiprono Yegon and Reuben Kipkemoi Yegon had inherited the land from his parents, as evidenced by Green card dated 26th January, 2009 herein produced as Pf exh 4. That after his brother Sammy had passed away in the year 1996 his share of the suit land was divided between himself (Plaintiff) and his brother Reuben. That subsequently the land had been registered to himself and a title issued on 11th January 2007.
54. That although the 2nd Defendant claimed to have purchased the land from his mother Tapelga W/O Kigen Kirui in 1972, the said Tapelga W/O Kigen Kirui died in the year 1970 and she could therefore not have sold the suit land to the Defendant and her husband and neither did his brother Sammy, who was mentally handicapped, sell the land to them. His conviction was that the 2nd Defendant had trespassed onto the suit land, which was his property in the year 2007. That his parents had not sold the land as his father had died in 1966, his mother in 1970 and Samuel in 1996. That in 2007, when the 2nd Defendant had got into the land she had approached them to transfer the land wherein they had refused to do so because she had no evidence that they had sold her the land. That they had been arrested thereafter but after it had been established that the land was theirs, they had been released. That the Defendant had proceeded to build the rental houses on their land despite their protests.
55. The Plaintiff thus sought for a declaration that the Defendants were trespassers on his land parcel No. Kericho/Kipchimchim/2059 and thereafter, an order issue that they deliver up vacant possession and in default they be evicted from the said land. The Plaintiff also sought for mesne profits from the 2004 to date.
56. The 2nd Defendant's case on the other was to the effect that she was an administrator to her late husband's estate and that she and her deceased husband John Kipsang Arap Maritim, had purchased



- ¾ acre of land parcel No. Kericho/Kipchimchim/2059 from Mrs. Talbega. (who was the Plaintiff's mother) in 1972 wherein her husband had been issued with a title deed on 8th November 1988. That they had taken possession of the suit land and built rental houses from where they had been collecting rent to date. That subsequently her husband had died around January 1999 and the vendor's sons asked her for more money before they could transfer the land to her. That she had obliged them.
57. Later she had come to discover that her husband's name was not in the Green Card wherein she had placed a caution on the land and had sought to find out from the Land Registrar the position. That it was true that the persistent nagging and extortion by the vendor's sons caused them to be summoned after she had reported them to the police wherein they had been arrested.
58. Her argument had been that since the land was registered in her husband's name and they had paid the Plaintiff and his brothers a second time, the land now belonged to her as her husband who was now deceased.
59. In her counterclaim, the 2nd Defendant argued that the Plaintiff had falsely and fraudulently obtained the whole parcel of land No. Kericho/Kipchimchim/2059 (suit land) knowing very well that she was entitled to a portion measuring 128 feet by 122 feet and therefore she sought for orders that she was entitled to the said portion of land to be excised from Kericho/Kipchimchim/2059 and the court orders the Plaintiff to execute the relevant documents and transfer the same to her and in default the Executive Officer to execute the same.
60. The issues that stand out for determination herein are as follows;
- i. Whether the Plaintiff has established his case on a balance of probabilities.
 - ii. Whether there was a valid Sale Agreement between the 2nd Defendant, her husband and the Plaintiff's mother.
 - iii. Whether the 2nd Defendant is entitled to the remedies sought in her counterclaim.
 - iv. Who should pay costs of the suit and the counterclaim?
61. After weighing the evidence from both the Plaintiff and the 2nd Defendant, I find of interest, the green card herein produced as Pf exh 4 which showed that unlike the Plaintiff's evidence that the suit land herein being Kericho/Kipchimchim/2059 was a subdivision of Land Parcel No. Kericho/Kipchimchim/1068, the said parcel of land had been a subdivision of Kericho/Kipchimchim/1971. That No. Kericho/Kipchimchim/2059 had been registered to Sammy Kiprono Yegon, Reuben Kipkemoi Yegon and the Plaintiff Wilson Malawen Yegon on the 28th Septembers 1987 wherein a title deed had been issued to them on the 14th October 1987.
62. The certificate of Confirmation of Grant in the said succession proceedings dated 8th December 1998 and produced as Pf exh 1, confirmed that indeed the Plaintiff had inherited the suit land being No. Kericho/Kipchimchim/2059 that measured 0.5 hectares, through transmission.
63. That subsequently on 11th January 2007, the Plaintiff herein had been registered as its proprietor pursuant to Succession Cause No. 9 of 1997 and a title deed issued. (see Pf exh 4)
64. The Green card further indicted that on 9th April 2003, the 2nd Defendant herein had placed a caution on the land claiming purchaser's interest. Wherein the caution had been removed on the 28th December



2005 by the Land Registrar pursuant to the provisions of Section 133(2)(b) of the Registered Land Act Cap 300. Which stipulates as follows:

“(2)

- (a) The Registrar may, on the application of any person interested, serve notice on the cautioner warning him that his caution will be removed at the expiration of the time stated in the notice.
- (b) If at the expiration of the time stated the cautioner has not objected, the Registrar may remove the caution.”

65. And it is also evident from the said Green card as well as from the Certificate of Search dated 10th August 2010, herein produced as Pf exh 2, that on the 31st January 2007, the land had been charged to secure a loan of Ksh. 100,000/= from KCB Ltd. I am satisfied that the Plaintiff has discharged the onus placed on him as proof of ownership of the suit parcel of land to the required standard.

66. This evidence juxtaposed with the 2nd Defendant’s claim that she and her husband had bought the suit property being Kericho/Kipchichim/2059 from the Plaintiffs mother one Mrs. Talbega in 1972 cannot stand for the following reasons; firstly, that by the time at which it is alleged that the 2nd Defendant had purchased the suit land from Mrs. Talbega in 1972, she had long been dead having passed away on the 5th January 1970 as per the death certificate herein produced as Pf exh 3.

67. Secondly, Section 3(3) of the Contract Act provides as follows;

3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless

—

- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

68. There had been no written sale agreement produced by the 2nd Defendant herein containing the names of the parties, the description of the property, the Sale premium, and the conditions thereto and signed by the parties herein which then did not support her allegations that she had bought the suit property. Although she had attempted to produce receipts as her Df exh 2 (a–k) purportedly as sums of money she had given the Plaintiff and his brothers as an additional purchase price, the said receipts dated 31st May 1989 for 1200/-, 5th January 1990 for 1200/=, 3 receipts for 9th January 1990 for 1000/=, 6th November 1991 for 900/=, two receipts for 6th November 1990 for 5000/=, 30th January 1991 for 5000/=, 6th December 1991 for 5000/= and one undated receipt for 5000/=, the said receipts did not pass the test of being receipts of the purchase of the suit property, whereas some did not contain the description of the property, most did not contain the name from whom the money had been received from and yet others did not contain the signatures of both parties and or their witnesses. It could also be easily discerned that the receipts were for rental payment given that some of them had the same date for an equal amount of money.

69. The third issue that discredited the 2nd Defendant’s evidence was that whereas she had alleged that she and her husband had bought the suit property from Mrs. Talbega in 1972, evidence was that the suit



- property had been transmitted to the Plaintiff through Succession Cause No. 9 of 1997 wherein he had been registered as its proprietor on 11th January 2007 which was about 35 years after the said sale.
70. In fact it is not common to have a bank which normally conducts due diligence before charging a property, have this particular property charged for Ksh. 100,000/= on the 31st January 2007 knowing that the suit land was not registered to the Plaintiff.
71. The 2nd Defendant exhibited a Title deed registered to her husband John Kipsang Arap Maritim on 8th November, 1988 as Df exh 1. The court having not found that the 2nd Defendant and her deceased husband could have possibly bought the suit property from the Plaintiff's mother who had since passed away at the time the transaction is alleged to have occurred, and further there having been no production of any evidence in support thereof of the purchase in form of an agreement, in essence hereof, no evidence had been adduced of how the 2nd Defendant and her husband had acquired the suit land apart from the fact that they had in their possession a title deed, then it goes without saying that the title held by the 2nd Defendants' husband was suspect and therefore liable to be impeached.
72. As was held by the Court of Appeal in *Munyua Maina vs. Hiram Gathiha Maina* Civil Appeal No. 239 of 2009 [2013] eKLR:
- “Where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register”
73. The 2nd Defendant having failed to discharge its burden of proving that the root of the acquisition of her title to the suit land was legal, formal and free from any encumbrance, I find that the registration of Kericho/Kipchimchim/2059 to John Kipsang Arap Maritim was irregularly obtained.
74. Whereas the 2nd Defendant's evidence was that she had put up the rental houses on the suit property in 1972 after the purchase of the suit land herein, the Plaintiff's assertion was that she had trespassed on the said land in 2007. The court went on a fact-finding mission, wherein the court Deputy Registrar vide a report dated the 11th July 2023 had established that indeed there had been rental houses built on the suit land that were occupied with tenants. That there had also been shops for which the fact finding team had been informed that the buildings had been put up by the Defendants in the 1970's.
75. That the 2nd Defendant (now the Plaintiff) in the counterclaim has sought for orders that she was legally entitled to a portion of 128 feet by 122 feet to be excised from Kericho/Kipchimchim/2059. By the virtue of the analyses herein above, I find that the counterclaim lacks merit and is herein dismissed.
76. The Plaintiff (now Defendant in the counterclaim) on the other hand sought for orders that being the proprietor of the suit land herein, that the 2nd Defendant was a trespasser and therefore ought to be ordered to pay mesne profits from the year 2004 to date.
77. Trespass has been defined by the 10th Edition of Black's Law Dictionary as;
- “an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”



78. Section 3 (1) of the *Trespass Act*, also defines trespass as follows;
- “ 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.”
79. The Court in *John Kiragu Kimani vs Rural Electrification Authority* [2018] eKLR also in defining trespass relied on *Clark & Lindsell on Torts*, 18th Edition on page 923 which defines trespass as;
- ‘any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason’.
80. Having found that the 2nd Defendant had no legal standing to be declared as proprietor of land parcel number Kericho/Kipchimchim/2059, her presence on the suit land herein constituted trespass as herein above defined. The Plaintiff is indeed entitled to protection by the law from the 2nd Defendant who interfered with his rights and privileges over the suit land.
81. It is trite law that trespass to land is actionable per se (without proof of any damage). See the case of *Park Towers Ltd vs. John Mithamo Njika & 7 others* (2014) eKLR where J.M Mutungi J., 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...’
82. In *Philip Ayaya Aluchio vs. Crispinus Ngayo* [2014] eKLR the court held as follows:
- “ The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less.”
83. Mesne profit on the other hand is defined in Section 2 of the *Civil Procedure Act* to mean; -
- “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”.
84. 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 another’s 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.
85. As held in *Zacharia Waweru Thumbi vs. Samuel Njoroge Thuku*, [2006] eKLR special damages are, in layman’s language, a reimbursement of what the Plaintiff has actually spent or lost, as a consequence of



the tortuous act by the Defendant/tortfeasor. All that the law requires is that the said special damages are pleaded, particularized, and proved. Upon that the Court awards, not assesses, the figure proved.

86. The Court of Appeal in the case of Peter Mwangi Mbuthia & another vs Samow Edin Osman [2014] eKLR was of the opinion that it was upon a party to place evidence before the Court upon which an order of mesne profits could be made. The Court stated as follows:-

“We agree with Counsel for the appellants that it was incumbent upon the respondent to place material before the Court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

87. Since it trite that mesne profits, being special damages must not only be pleaded but also proved and the Plaintiff herein having failed to particularize and prove any mesne profit, this prayer is rejected.

88. In the end, in dismissing the 2nd Defendant’s counterclaim, I find that the Plaintiff has proved his case against the 2nd Defendant on a balance of probabilities to the effect that she trespassed on the suit property without any legal claim or title. It is trite law that an act of trespass is actionable per se by an award of general damages once it is established, yet the Plaintiff has not sought for damages in the present circumstance and therefore the same shall not be awarded. I thus enter judgment in favour of the Plaintiff as follows;

- i. A declaration that the Defendant is a trespasser on the Plaintiff’s land parcel No. Kericho/ Kipchimchim/2059 and therefore must deliver vacant possession within 30 days and in default an eviction order shall issue.
- ii. The Plaintiff shall also have the cost of the suit and Counterclaim with interest at court rate.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 22ND DAY OF FEBRUARY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

