



**Mbogo v Muigai; Ager (Third party) (Environment & Land Case
694 of 2017) [2024] KEELC 883 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 883 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 694 OF 2017
OA ANGOTE, J
FEBRUARY 15, 2024**

BETWEEN

IRENE MAITHA MBOGO PLAINTIFF

AND

EDWARD NGIGI MUIGAI DEFENDANT

AND

JOHNSON OCHIENG AGER THIRD PARTY

JUDGMENT

Background

1. In the Complaint dated 31st October, 2017, the Plaintiff seeks the following reliefs as against the Defendant;
 - i. A mandatory injunction do issue ordering the Defendant to surrender the suit premises namely, L.R No 209/10921, Nairobi to the Plaintiff and to vacate therefrom within such period as will be directed by this Honourable Court and to restore the same to its former condition and state.
 - ii. An eviction order do issue against the Defendant permitting the Plaintiff to forcibly eject the Defendant from the suit premises namely L.R No 209/10921, Nairobi and to remove all the Defendants movables thereat at the cost of the said Defendant.
 - iii. Mesne Profits in the sum of Kshs 100,000/= per month from 1.12.2016 till delivery of possession of the suit property to the Plaintiff as pleaded in paragraph 15 hereinabove with interest at 12% per annum from the date of filing hereof and further interest from the date of the decree till full payment.



- iv. Special damages of Kshs 6,000/= per day from 1.12.2013 in terms of paragraph 13 hereinabove with interest at 12% per annum from the date of filing hereof and further interest from the date of the decree till full payment.
 - v. General Damages for trespass and wrongful deprivation of property, namely L.R No 209/10921, Nairobi with interest at 12% per annum from the date of the decree hereof.
 - vi. Costs of this suit together with the interest thereon at 14% per annum.
2. It is the Plaintiff's case that she is the lawful owner of all that parcel of land known as L.R No 209/11095/56(hereinafter the suit property), having purchased it for a sum of Kshs 3, 200,000/= vide an agreement for sale dated 20th July, 2011; that she was registered as the proprietor of the suit property on 27th July, 2012 by virtue of a transfer dated 2nd September, 2011 and that she is in possession of all the original legal documents pertaining to her ownership.
 3. According to the Plaintiff, prior to the purchase of the suit property, her husband inspected the property and carried out due diligence and in particular made incidental inquiries from the guards at the gate confirming the property had been offered for sale and insisted that the vendor should be represented by a reputable law firm.
 4. It was averred by the Plaintiff that her husband also demanded to be shown the original title documents to which he was presented with the Certificate of Title(I.R No 79384) dated 15th February, 1999, Deed Plan No 222731 dated 25th January, 1999 ,Transfer dated 17th June, 2003 and unregistered transfer of 7th December, 2007 between Phoebe Akoth and the Third Party/vendor and conducted an official search revealing entry number 5 as the last transaction.
 5. The Plaintiff averred in the Plaint that upon completion of the aforesaid purchase, the Third Party granted her husband vacant possession of the suit property and that upon her return to the Country in 2014, her attempts to take possession of the suit property were resisted by the Defendant who alleged that he purchased the same from the Third Party.
 6. It is the Plaintiff's case that vide a letter dated 17th December, 2012, she learnt that the Defendant had instituted ELC 328 of 2011 against the Third Party seeking inter-alia a declaration that he is the owner of the suit property, orders for specific performance directing the Third Party to facilitate the transfer of the suit property and permanent injunctive orders and that on 29th July, 2011, the Court issued ex-parte temporary injunctive orders restraining the Third Party from interfering with the suit property.
 7. It was averred that the aforesaid orders were confirmed on 9th August, 2011 and that ELC No. 328 of 2011 was dismissed for want of prosecution on 22nd June, 2017.
 8. It was averred by the Plaintiff that the Defendant has no legally valid and/or enforceable interest in the suit property and is a trespasser; that the borehole he has sunk on the property earns him an average of 2, 5000-litre tanks of water per day @Kshs 3000 each; that she intended to construct a bungalow on the property, complete it within a year and let out the ground and first floors at Kshs 50,000/= per month from 1st January, 2016 and that as a result of the Defendant's actions aforesaid, she has suffered and continues to suffer loss and damages.
 9. In response to the Plaint, the Defendant filed a Defence on 5th February, 2018 and denied the assertions as set out in the Plaint. The Defendant averred that the original title document to the suit property were carted away by the original owners from its then Advocates in fraudulent disregard of the agreement for sale and that he has run a business on the suit property since January, 2011.



10. It is the Defendant's case that the Third Party could not have granted the Plaintiff vacant possession as alleged because he was already in possession of the property; that as early as July, 2011 when the Plaintiffs representatives visited the suit property, they were categorically informed that he was in occupation having bought the property six months earlier and that he is a stranger to the assertions that the suit he filed was dismissed.
11. The Third Party was served by way of substituted service but did not Participate in the Proceedings.

Hearing and Evidence

12. The matter proceeded for hearing on 3rd July, 2023. The Plaintiff, PW1, adopted her original and supplementary witness statements dated 31st October, 2017 and 1st March, 2018 as her evidence in chief and produced in evidence the bundle of documents filed on 29th June, 2023 as PEXHB1.
13. In cross-examination, PW1 stated that she was out of the Country on 20th July, 2011 when she signed the agreement; that she did not personally view the land during the aforesaid dates, neither did she personally speak to the neighbors and that she was unaware of the earlier case in respect of the suit property.
14. According to PW1, she was unaware of a Court order restraining the transfer of the suit property; that she is a civil servant attached at Ardhi House and knows about conducting due diligence; that she was not present when the Third Party granted her husband vacant possession and that she has not produced any evidence supporting her claims on the amounts of monies the Defendant is making from the business at the suit property.
15. PW2 was Francis Zachary Oundo. He adopted his witness statement dated 31st October, 2017 as his evidence in chief. It was his evidence that he is the Plaintiff's husband and that he learnt from an agent that the suit property was being sold and asked to be introduced to the seller and that he was introduced to the Third Party who indicated that whereas he was not the registered owner of suit property, he had beneficial interest therein.
16. According to PW1, the Third Party showed him the original title documents as well as the unregistered transfer dated 6th December, 2007; that he informed the Third Party that the purchaser would only proceed with the transaction if he had Counsel and the Third Party was represented by M/S Okoth & Kiplagat Advocates.
17. PW2 stated that they thereafter proceeded to the suit property which was fenced off with loose strands of barbed wire at the front and littered kales at the rear; that the Third Party gave him copies of the Certificate of Title dated 15th February, 1999 and the aforesaid unregistered transfer and that after their visit to the suit property, he went back to the site and confirmed from the security guards manning the property that the property was indeed on sale as other persons had visited to view it.
18. It was the evidence of PW2 that he instructed the firm of M/S Njagi Wanjeru to represent the Plaintiff in the transaction; that he thereafter visited the property at least three times before leaving for Switzerland in December, 2012 and that the seller was not the registered owner of the suit property at the time of the sale.
19. According to PW1, the registered owner of the land was Phoebe Akoth Odhiambo; that as at May, 2011, Phoebe Akoth was not the registered owner; that he conducted a search, found information pertaining to the owner and saw the land and that by the time the property was bought, Ms Phoebe Akoth's husband was deceased.



20. The Defendant, DW1, adopted his witness statements dated 5th February, 2018 and 23rd February, 2022 respectively. DW1 produced the bundle of documents dated 30th June, 2022 as 1DEXB1.
21. It was his evidence that the borehole is on plot 209/11095/210 where he resides; that the suit property is across the road and opposite his house; that he has water tanks on the suit property and that he dug the borehole in 2018 before he expressed interest in purchasing the land.
22. According to DW1, he met the owner of the suit property, Phoebe Akoth, during the administration process; that she informed him that she was the registered owner of the property and gave him Mr. Ochieng's number and that Phoebe informed the Chief that she had never dealt with him or the Plaintiff but acknowledged signing the transfer.
23. It was his evidence on cross-examination that he paid a sum of Kshs 555,000 for the suit property and not Kshs 350,000 as erroneously indicated in his statement; that he never signed any agreement with Phoebe; that he was aware that the land was in Phoebe's husband's name and that she had letters of administration.
24. It was the evidence of DW1 that he sells water on the plot and has water bowsers; that he does not have an estimate of the amount he makes from the sell of water; that he cannot confirm if the transfer signed by Phoebe to the Third Party is a forgery and that he paid the purchase price after signing the Agreement with the Third Party on condition that the Third Party would have the property transferred to his name and thereafter transfer it to him.
25. DW2 was Joseph Kariuki. It was his evidence that he is a neighbor to the Defendant and has known him for more than 15 years; that he is aware that the Defendant was given possession of the property known as L.R 209/11095/56 and that he resides near the suit property.
26. It was the evidence of DW2 that the Defendant has been in occupation of the suit property since January, 2011 to date and has been operating a business thereon; that the said business is clearly visible as the property is not fenced and that he did not know about the transactions concerning the land.
27. DW3 was Phoebe Akoth. She adopted her witness statement dated 30th June, 2023 as her evidence in chief. In brief, it was her evidence that she is the legal representative of the Estate of the Late Wencleslas Ochuka, her late husband, who was the registered owner of the property known as L.R No 209/11095/56, I.R No 62527/1 Nairobi; that she sold the suit property to her brother in law, Johnson Ochieng Ager which was formalized vide a Transfer dated 6th December, 2007.
28. It was the evidence of DW3 that even though she remained the registered owner of the property by virtue of being the legal representative of her late husbands' property, she had no further interest in the property.
29. DW3 stated that she did not sell the suit property to either the Plaintiff or the Defendant; that she executed all the documents prepared by her Counsel and the Third Party's Counsel in order to transfer the ownership of the suit property and that she never received any consideration for the sale of the land.
30. It was her testimony on cross-examination that having sold the property to the Third Party, she signed the documents given to her by him; that he never explained to her that she was signing documents for the Plaintiff and that she later learnt that the Third Party had sold the property to the Defendant and thereafter to the Plaintiff because the Defendant did not complete the agreement.



Submissions

31. The Plaintiff's counsel submitted that the Plaintiff has a right to own property; that the Plaintiff holds an indefeasible title to the suit property whose sanctity is guaranteed under Sections 25 and 26 of the [Land Registration Act](#) and that during trial, no evidence was tendered against the Plaintiff establishing fraud or misrepresentation as laid out under Section 26(1)(a) and (b) of the [Land Registration Act](#).
32. Counsel submitted that the suit property never passed to the Defendant; that the Third Party merely had beneficial interest in the suit property which could not be vested in the Defendant without the participation of the registered owner and that according to the Defendant's own testimony, he did not complete payment of the purchase price before taking possession thereof and undertaking business thereon.
33. The Defendant's counsel submitted that the Plaintiff failed to provide any evidence with respect to his claim for special damages to the tune of Kshs 6000 per day from 1st December, 2013; that the Plaintiff has similarly failed to prove her claim of mesne profits and that it is the Defendant who is in lawful possession of the suit property having entered into an agreement with the Third Party who had beneficial interest in the property.
34. It was submitted that the Plaintiff's claim of trespass does not lie as the Plaintiff was never in possession of the property; that by the time the Plaintiff claimed ownership, the Defendant was already in possession; that the Plaintiff does not have a good title as the transfer to her was fraudulent; that Phoebe Akoth's signature in the unregistered transfer of lease dated 2nd September, 2011 was fraudulent and that she denied having signed the transfer of the suit property to the Plaintiff.
35. Counsel submitted that further, the transfer was in contravention of an existing Court order and that as held in [Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another](#)[2013]eKLR, and that the law is protective of title and the court should not hesitate to cancel a title procured by fraud or misrepresentation as set out in Section 26(1)(a)(b) of the [Land Registration Act](#).

Analysis and Determination

36. Having carefully considered the pleadings, the testimonies and submissions herein, the issues that arise for determination are;
 - i. Whether the Plaintiff has established her case on a balance of probabilities?
 - ii. What are the appropriate reliefs to issue?
 - iii. Whether the Third Party is liable to indemnify the Defendant?
37. The Plaintiff instituted this suit seeking, inter-alia, for a mandatory injunction ordering the Defendant to surrender the suit property, eviction orders, mesne profits, special and general damages.
38. It is the Plaintiff's case that she is the registered proprietor of the suit property having purchased it in 2011; that prior to its purchase, through her husband, she conducted due diligence ensuring the property was free from any encumbrances and that sometime in 2013, upon visiting the suit property, she noted that the Defendant had encroached thereon and was conducting business which he is profiting from.
39. In support of his case, the Plaintiff adduced into evidence the unregistered transfer dated 6th December, 2007 between Phoebe Akoth & Johnson Ochieng Ager, Certificate of Title (I.R No 79384) dated 15th February, 1999, Deed Plan No 222731 dated 25th January, 1999, Transfer dated 17th June, 2003, Official



Search dated 21st July, 2011, Sale Agreement dated 20th July, 2011 and Transfer dated 2nd September, 2011, amongst other documents.

40. On the other hand, it is the Defendant's case that he purchased the suit property sometime in 2011 from the Third Party and was granted vacant possession thereof; that he paid the deposit together with the sum of Kshs 550,000, and was granted vacant possession of the property; that while awaiting for the third party to obtain the instrument of assent from the registered owner to complete the sale transaction, the Third Party informed him of the Plaintiff's claim.
41. The Defendant adduced into evidence the Sale Agreement dated 11th February, 2011, Stamp duty declaration, assessment and pay in slip dated 17th May, 2011, application for registration of Caveat, transfer of L.R No 209/11095/56 between Phoebe Akoth and Johnson Ochieng, correspondence, grant of Letters of Administration Intestate dated 26th September, 2006, Certificate of confirmation of grant dated 21st September, 2007 and petty cash vouchers.
42. It is trite that he who alleges must prove. This principle is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides as follows:
- “ (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
43. And Sections 109 and 112 of the same Act state as follows::
- “
- “ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
- “112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
44. It is not in dispute that the suit property is currently registered in the name of the Plaintiff herein pursuant to a transfer on 27th June, 2012 under the Registration of Titles Act. The repealed Section 23 (1) of the Registration of Titles Act (RTA) and the new Section 26 (1) of the Land Registration Act, No. 3 of 2012 embody the doctrine of indefeasibility of title as envisaged under the Torrens System of registration. Section 23 (1) of the Registration of Titles Act provided as follows:
- “ 23 (1) 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 of 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 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.”
45. Whereas Section 26 of the Land Registration Act, 2012 now provides;
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie



evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

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

46. In the case of *Charles Karaathe Kiarie & 2 Others vs Administrators of Estate of John Wallace Mathare (deceased) & 5 Others* [2013] eKLR, the Court of Appeal considered the application of the doctrine of indefeasibility of title stating that;

“The Registration of Titles Act is entirely a product of the Torren system of registration. The Word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and Pioneer and authors of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register, which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss, arising from an error in registration the person affected is guaranteed of government compensation. This statutory; presumption of indefeasibility and conclusiveness of title under the Torrens system can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved.”

47. It can be seen from the above that whereas title is protected, the protection can be removed and title impeached, if it is proved to have been procured through fraud or misrepresentation to which the person is proved to be a party, or where it is procured illegally, un-procedurally, or through a corrupt scheme.

48. This principle, and the exceptions were discussed by the Court in *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others* [2015] eKLR as follows;

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows :-

“...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title



holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. "I stand by the above words and I am unable to put it better than I did in the said dictum."

49. In view of the above, the question that lends itself is whether the Plaintiff's title has been impugned as per the provisions of Section 26(1)(a) and (b) above or section 23 (1) of the repealed *Registration of Titles Act*.

50. In determining this question, the Court is mindful of the fact that the Defendant, not having filed a Counterclaim does not seek any orders as against the Plaintiff. He is merely defending himself against the claims by the Plaintiff.

51. The Black's Law Dictionary defines fraud thus:

"Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another."

52. It is trite law that any allegations of fraud must be pleaded and strictly proved. This was re-affirmed by the Court of Appeal in the case of *Kuria Kiarie & 2 Others vs Sammy Magera* [2018] eKLR as follows:

"The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." [Emphasis added].

53. Indeed, Order 2 rule 10 (1) of the *Civil Procedure Rules* provides;

"subject to Sub-Rule (2) every pleading shall contain the necessary particulars of any claim, defence or other matters pleaded including, without prejudice to the generality of the following:-

a. Particulars of every misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies and..."

54. In the instant case, the Defendant is resisting the Plaintiff's claim on the ground that by the time the Plaintiff allegedly purchased the suit property, he had already purchased the same and that the Plaintiff's registration as proprietor was dubious.



55. The Defendant also asserts that the Plaintiff's acquisition of the suit property was irregular. His argument in this respect is two-fold. First, it is his case that whereas the Sale Agreement adduced by the Plaintiff indicates the Third Party and Ms Phoebe Akoth as vendors, the transfer was only signed by Ms Phoebe Akoth who disowned her signature on the transfer, and that at the time of the transfer to the Plaintiff, injunctive orders were in place restraining the transfer to any other party and as such the sale breached the doctrine of *lis pendens*.
56. To begin with, it is not disputed that as at 2007, the Third Party was the owner of the suit property albeit unregistered. Ms Phoebe Akoth, the undisputed registered owner of the property before its transfer to the Plaintiff testified as DW3. It was her evidence that she sold the property to the Third party sometime in 2007, which sale was formalized vide a Transfer Deed dated 6th December, 2007 and that although she remained the registered owner thereof, she had no further interest in the property.
57. The Third Party thereafter entered into two separate transactions with respect to the suit property. First, vide an Agreement dated 11th February, 2011 with the Defendant and thereafter vide the Agreement dated 20th July, 2011 with the Plaintiff, which culminated in the transfer of the suit property in the Plaintiff's name.
58. Ms Phoebe Akoth informed the court that she did not conduct any transactions with the Plaintiff or Defendant. Despite this, it was her evidence that the Third Party gave her several documents to sign and she did not know which documents she was signing. She did not denounce her signatures outright, only stating that she was not sure of the same, and that the signatures "looked like hers".
59. It is therefore completely plausible that she signed the documents and was in so doing merely aiding in the formal transfer of the property to the Third Party, to whom she had sold and given all rights to the property.
60. In view of the foregoing and in the absence of evidence that the Third party did not undertake the sale and transfer of the suit the property to the Plaintiff, the Court is not convinced that there was any irregularity in the transfer of the property to the Plaintiff.
61. In the present case, it has been stated that on 27th July, 2011 the Court in ELC 328 of 2011 issued temporary injunctive orders restraining, inter-alia, the transfer of the suit property which orders were confirmed on 9th August, 2011. None of the parties adduced these orders although the Plaintiff has conceded to having knowledge on the same.
62. At the time of the agreement for sale between the Plaintiff and the Third Party, being 20th July, 2011, there were no orders in place. No evidence has been adduced with respect to whether the orders were still subsisting as at the time of the transfer, being 2nd September, 2011. If indeed they were, the Third Party would have been liable for contempt. This would however only have been at the instance of the Court which issued the orders.
63. Nonetheless, it is undisputed that at the time of the transfer, the suit property was the subject of proceedings and its sale invoked the principle of *lis pendens*. So did this invalidate the suit? Mulla in his treatise *Transfer of Property Act*, 5th Edition observed that;

"The effect of the maxim is not to annul the conveyance but only to render it subservient to the rights of the parties subject to litigation."



64. Similarly, the Court in the case of *Patrick Gathitu Kariuki vs Hottensiah Wambui Hinga & Another* [2020] eKLR, stated as follows;

“Breach of the lis pendens rule per se in my view does not nullify a sale transaction. What it does is to make the transaction subject to the outcome of the court proceedings which were pending when the transaction involving the land in question was carried out. It follows therefore that, whereas the sale transaction between the 1st and 2nd defendants was valid and enforceable as between them, the same is subject to the outcome of this suit.”

65. The Court agrees. It is not clear what became of ELC 328 of 2011. The Plaintiff states that it was dismissed while the Defendant states that the Court file went missing. Nonetheless, there are no orders touching on the suit property and as such the sale remains valid.

66. The Court has affirmed the Plaintiff’s proprietorship. As the established proprietor of the suit property, the Plaintiff is entitled to all the rights appurtenant thereto, which include the rights to exclusive possession thereof.

67. It follows therefore that the Plaintiff has established a case for the mandatory injunctive orders and eviction orders in light of the admission by the Defendant that he is in possession of the suit property, and carrying business thereon.

68. The Plaintiff also seeks mesne profits to the tune of Kshs 100,000 per month being the rent she intended to charge on the premises. It is trite that a claim for mesne profits being one in the nature of special damages must be specifically proven and proved. The burden of proof was on the Plaintiff to specifically plead and prove what profits he/she might have received in the ordinary use of the suit property

69. This position was affirmed by the Court of Appeal in the case of *Peter Mwangi Mbutia & another vs Samow Edin Osman* [2014] eKLR where the Court posited 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.”

70. In this respect, the Plaintiff only produced into evidence plans showing the proposed development of the plot. Apart from showing that plans were indeed underway to develop the suit property, it does not in any way aid the Plaintiff’s claim for mesne profits. This plea fails. In the same vein, the Plaintiff’s claim for special damages is not backed by any evidence and must fail.

71. The Plaintiff also seeks for general damages. It is trite law that where a party claims for both mesne profits and damages for trespass, the Court can only grant one and not both. The Court of Appeal in the case of *Kenya Hotel Properties Limited vs Willesden Investments Limited* [2009] eKLR held that

“...once the learned Judge made the award under the subhead “mesne profits” there was no justification for him awarding a further Kshs.10 million under the subhead “trespass”, since both mean one and the same thing.”



72. Having not granted any award under the head mesne profits, the Court will consider the plea for general damages for trespass. Section 3(1) of the Trespass Act states;
- “ 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.”
73. It is not disputed that the Defendant has been on the suit property. Indeed, his presence thereon predates the Plaintiff’s ownership of the property. In the ordinary course of matters, the Plaintiff’s purchase of the suit property in 2012 ought to have entitled her to vacant possession thereof.
74. However, the Defendant has possession of the property to date. This therefore means that the Plaintiff has been denied the full benefit of her property for approximately 12 years.
75. Taking into consideration the length of time for the trespass which has denied the Plaintiff the use of the suit land, the acreage involved and the location of the property, it is the opinion of the Court that the sum of Kshs 5,000,000, (Five Million Shillings only) would be reasonable compensation to the Plaintiff.
76. Vide the Third Party notice, the Defendant claims as against the Third Party indemnity to the extent of any sums that the Plaintiff may recover against him. It is the Defendants’ case that the Third Party is liable as aforesaid being the author of the twin transactions.
77. Indeed, it has been sufficiently established that the Third Party sold the suit property to both the Plaintiff and the Defendant and is undeniably the author of the misfortune that brought the Plaintiff and the Defendant into the corridors of justice.
78. Having found that the Plaintiff is entitled to general damages to the tune of 5,000,000/=, the Court invokes and applies order 1 rule 19 of the Civil Procedure Rules as against the Third Party and finds him liable to indemnify the Defendant.
79. In the end, the Court finds that the Plaintiff has established her case on a balance of probabilities and proceeds to make the following final orders;
- i. A mandatory injunction does hereby issue ordering the Defendant to surrender the suit premises namely, L.R No 209/11095/56, Nairobi to the Plaintiff and to vacate therefrom within 90 days of the date of this Judgement.
 - ii. In the event of failure by the Defendant to abide by (1) above, eviction orders will issue.
 - iii. General Damages as against the Defendant in the sum of Kshs 5,000,000 for trespass and wrongful deprivation of property, namely L.R No 209/11095/56 Nairobi, with interest at court rates at 12% per annum from the date of the Judgment until payment in full.
 - iv. The Defendant shall bear the costs of this suit.
 - v. The Third Party shall wholly indemnify the Defendant in respect to the damages and costs incurred herein.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15TH DAY OF FEBRUARY, 2024.

O. A. ANGOTE
JUDGE



In the presence of;
Mr. Banji for Defendant
Mr. Ingutya for Plaintiff
Court Assistant - Tracy

