Emfil Limited v Safaricom Limited (Civil Appeal E100 of 2022)
[2025] KECA 1331 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KECA 1331 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E100 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JULY 18, 2025

BETWEEN

EMFIL LIMITED ..... APPELLANT

AND

SAFARICOM LIMITED ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (Munyao Sila, J.) dated 26th April 2022 in ELC No. 5 of 2016)

JUDGMENT

1. The dispute that gave rise to this appeal is a suit filed by Safaricom Limited (the respondent) in the Environment and Land Court (the ELC) at Mombasa, being ELC Case No. 5 of 2016 against Emfil Limited (the appellant).

2. Vide a Plaint dated 15th January 2016, the respondent pleaded that, in May 2013, it sought to install and/or erect a mast to boost its network in Chale Island and the larger part of Kinondo Beach in South Coast and that, to this end, it engaged one of its service agents, Broadband Communication Networks Limited, to source and/or identify a suitable site for the installation. The respondent contended that the agents identified L.R. No. Kwale/Ramisi/Kinondo SSS/150 (the suit property), which was registered in the name of Jua Maisha Limited.

3. After conducting due diligence at Kwale Lands Office, the respondent was satisfied that the suit property belonged to Jua Maisha Limited, and thus entered into a lease agreement to lease a portion of the suit property measuring 102.72 sqm; and that it expended a sum of Twelve Million Five Hundred Thousand (Kshs.12,500,000) for the erection and/or installation of the mast.

4. On 2nd October 2015, the respondent received a demand letter dated 1st October 2015 from the appellant's advocates asking it to dismantle the mast from the suit property since it belonged to it. The

respondent contended that it had no relationship with the appellant in respect of the suit property, and that neither did the appellant demonstrate the relationship between itself and Jua Maisha Limited.

5. The impending threat from the appellant made the respondent apprehensive that its operations would be interfered with, and that it would suffer irreparable substantial loss and damage both to it and its customers in view of the capital invested in the project.

6. Those brief facts precipitated the filing of the suit before the ELC. The respondent prayed for judgement against the appellant as follows:

> " a) Permanent injunction restraining the appellant, its agents and/or assigns from interfering in any manner whatsoever with the respondent's access to or occupation of the leased portion of the leased property namely LR. No. Kwale/Ramisi/Kinondo SSS/150 during the subsistence of the lease;
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> b. Permanent injunction restraining the appellant, its agents and/or assigns from interfering in any manner whatsoever with the respondent's equipment and/or communication mast installed on portion of the leased property namely LR. No. Kwale/Ramisi/Kinondo SSS/150 during the subsistence of the lease or at all;
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> C. Costs of the suit; and
>
> d. Any other order or relief as the court may deem fit to grant."

7. In response, the appellant filed a Statement of Defence and Counterclaim dated 28th October 2016, which was later amended on 1st August 2020. The defence sought dismissal of the suit while the counterclaim sought a number of reliefs, among them a declaration that the respondent was a trespasser onto the suit property and for award of mesne profits.

8. While the suit was subsisting, the appellant, by an application dated 13th April 2018, sought, inter alia, orders that the respondent's suit be dismissed for want of prosecution. By a ruling (Omollo, J.) dated 7th May 2019, but delivered by Yano, J. on 16th May 2019, the respondent's suit was dismissed for want of prosecution. The respondent was further ordered to vacate and remove the installed mast within 45 days failure to which the appellant was at liberty to remove it.

9. The hearing then proceeded in respect of the appellant's amended counterclaim dated 1st August 2020, in which, the appellant pleaded that, in October 2015, it forwarded to the respondent all the necessary documents to prove that it was the owner of the suit property, but that the respondent declined to vacate and instead continued to allegedly trespass unto the suit property; that, despite several orders from the court directing the respondent to vacate, the respondent failed to do so and, therefore, its alleged illegal continued use of the suit property was to its detriment as it (the respondent) continued to derive proceeds and profits from thereon. The appellant thus prayed that:

> " a) The respondent's suit be dismissed with costs to the appellant;
>
> b. A declaration be made that the respondent trespassed on the appellant's property and that the appellant is entitled to general and exemplary damages for trespass against the respondent;
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> c. A declaration that the appellant is entitled to mesne profits at the market value for the period that the respondent trespassed on the appellant's property;

d. A declaration be made that the appellant is entitled to the profits the respondent received from the suit property while being in trespass amounting to Kshs.54,398,338.04;

e. A declaration be made that the respondent is in contempt of court orders in force relating to the suit property;

f. The respondent be ordered to return the property to the condition it was in before it trespassed onto the suit property;

g. Costs of the suit and interest thereof;

h. Costs of the counterclaim and interest thereof; and

i. Any such relief the court may deem fit to grant."

10. In response, the respondent filed a defence to the counterclaim dated 30th October 2020. In addition to reiterating the circumstances under which it entered into the lease agreement with Jua Maisha Limited, it averred that, despite knowing that it was Jua Maisha Limited who held the title to the suit property, the appellant failed to place any restriction on the suit property so as to assert its right to it; that, pursuant to the court orders of 16th May 2019, it removed the mast and vacated the suit property; and that, accordingly, the appellant had no further claim against it.

11. The respondent stated that the appellant's counterclaim was an affront to the doctrine of res judicata as espoused in Section 7 of the *Civil Procedure Act*; and that it bore no responsibility for the actions and inactions of both the Land Registry and Jua Maisha Limited who were the parties the appellant ought to direct its claim to.

12. In a brief response to the respondent's defence to the counterclaim dated 25th January 2021, the appellant conceded that the respondent removed the communication mast and vacated the suit property. However, the appellant stated that it had a claim against the respondent for trespass, loss of use of the suit property and its right of possession; that the respondent could not rely on the doctrine of res judicata as the counterclaim had not been heard and determined; that it informed the respondent sometime in 2015 of the orders affirming its title to the suit property; and that, therefore, the lease agreement between the respondent and Jua Maisha Limited was unlawful.

13. At the hearing, the appellant's director, one Vinay Chandra Damodar Popat (PW1), gave viva voce evidence. He adopted his witness statement dated 1st August 2020 and filed on 9th September 2020. A list of documents of even date also filed on 9th September 2020 were produced as Exhibits Nos. 1 - 24.

14. In his written statement, PW1 reiterated that the appellant had been in occupation of the suit property, having been lawfully registered as the owner of 140 plots, namely LR. No. 13433/6–13433/143 situate Southwest Mombasa Municipality in Kwale District, Kwale County, under the Registration of Titles Act, Cap 281; that, in the year 2006, it discovered that the Director of Land Adjudication and Settlement and the Land Registrar purported to unlawfully and under suspicious circumstances offer, allocate and issue title deeds to third parties under a different statute; that, to protect its interests, the appellant filed Mombasa Civil Case No. 181 of 2007 - Emfil Limited vs. Hamisi Mwalimu Mwarandani & 8 Others - whose substratum was, inter alia, a determination of the appellant's right to the suit property; and that, by a judgement delivered on 29th October 2010, the suit was determined in its favour.

15. It was PW1's further testimony that the Hon. Attorney General circumvented the judgement issued in favour of the appellant by revoking the appellant's titles to the suit property through a Gazette

Notice No. 6652 dated 14th June 2011 and published on 15th June 2011; that the appellant commenced Mombasa HC Civil Application (JR) No. 84 of 2011 seeking orders to quash the Gazette Notice; that on 8th August 2011, Maureen Odero, J. in a ruling stayed the implementation of the Gazette Notice; and that, in breach of the orders, the Commissioner of Lands, Registrar of Titles, District and Director Land Adjudication, unlawfully proceeded to issue title deeds, one of which was for the suit property.

16. PW1 further stated that the appellant filed contempt of court proceedings in Mombasa Constitutional Reference No. 12 of 2012 and that, on 7th September 2021, the Judge held that the interests of the third parties who had been allocated the land overrode its interests; that the appellant filed an appeal against the said judgement to the Court of Appeal, being Civil Appeal No. 312 of 2012; and that, by a judgement dated 18th July 2014, the Court of Appeal allowed the appeal in its favour.

17. We hasten to point out that we have combed the entire record of appeal and find that it does not contain the said Mombasa Constitutional Reference No. 12 of 2012 either in the form of pleadings or the judgment of the High Court. We are therefore unable to ascertain the exact outcome of the Judgment in the High Court as stated by PW1.

18. The appellant further contended that it extracted a decree of this Court's Judgement dated 18th December 2014 and served it upon the Registrar of Titles, Mombasa and Kwale; that it used the decree to publish a caveat emptor in various newspapers of 12th and 13th September 2014; that despite doing so, there had been adverse dealings with the suit property, which prompted it to file ELC No. 113 OF 2015 - Emfil Limited vs. AG & 423 Others - where Jua Maisha Limited is the 317th defendant; and that, by a letter dated 1st October 2015, the appellant informed the respondent that its lease with Jua Maisha Limited was against the orders issued by Omollo, J. on 27th May 2015, which restrained it from any dealings with the suit property.

19. The appellant stated that the continued use of the suit property by the appellant from 2015 to 2019 denied it its right of possession; and that its claim for mesne profits amounted to Kshs.54,398,338.04.

20. In cross-examination, PW1 stated that the portion of the suit property that had been occupied by the respondent was registered in the name of Jua Maisha Limited on 27th November 2013; that they had not registered a caveat against the suit property; that, since the respondent did not know about its claim, it was entitled to deal with Jua Maisha Limited; that the respondent proceeded rightfully to engage with Jua Maisha Limited as it relied on the information given by the Lands Registry with regard to who was the registered proprietor of the suit property; that the suit property is not among the parcels listed in the caveat emptor that the appellant advertised in the newspaper; and that the claim for Kshs.54,398,338.04 as mesne profits was based on what the respondent earned.

21. The respondent did not call any witness.

22. After considering the evidence adduced before him, Munyao, J. delivered his judgement on 26th April 2022. The learned Judge held that the claims of trespass, mesne profits or damages were not addressed substantively by any court and that, therefore, those issues were not res judicata; that it was not in contention that the respondent entered into the land pursuant to a lease with Jua Maisha Limited who were the registered proprietors of the suit property; that there were two competing titles over the suit property, one registered in the name of the appellant under the Registration of Titles Act, Cap 218 (repealed) and the other in the name of Jua Maisha Limited under the Registered *Land Act*, Cap 300 (repealed); that there was active litigation in Mombasa ELC No. 113 of 2015 over the two titles, which was still pending; that, in the premises, there was no judgement which had affirmed that the appellant's title was better than the one held by Jua Maisha Limited; that, furthermore, the previous litigation referred to by the appellant was not pitting the title that it held against the title that Jua Maisha Limited

held; and that, as such, it could not find that the respondent was guilty of trespass as at the time it entered into the suit property.

23. The learned Judge further held that the respondent could not be faulted for entering into the lease agreement with Jua Maisha Limited since the land registry gave it the impression that Jua Maisha Limited had a good title; that the caveat emptor placed in the newspaper did not mention the suit property and that, therefore, it would have been difficult for anyone to know that the suit property was the subject of a dispute; and that, even if it was to find the respondent guilty of trespass, it would award a nominal amount as general damages for the reasons that there were no injunctive orders in favour of the appellant as alleged but, instead, Omollo, J. in the ruling delivered on 28th January 2016, ordered that the status quo be maintained, and that the issue as to who was the rightful owner of the suit title be canvassed in the main suit.

24. The claims for mesne profits and exemplary damages of Kshs.54,398,338.40 and the pronouncement of contempt of court orders were found devoid of merit and accordingly dismissed.

25. As to the prayer for restoration of the suit property to its condition before the alleged trespass, the learned Judge held that it had already been spent by dint of the ruling delivered on 16th May 2019. The trial court opined that the appellant's claims and rights could only be affirmed as against Jua Maisha Limited. In sum, all the prayers in the counterclaim were thus found to be without merit, and the counterclaim was accordingly dismissed with costs to the respondent.

26. Dissatisfied, the appellant preferred this appeal. It has raised 10 grounds of appeal in its Memorandum of Appeal dated 14th October 2022, which we have condensed into six grounds, namely that the learned Judge erred in law and in fact:

    i. in failing to find that the respondent had trespassed onto the appellant's property and was entitled to general and exemplary damages and mesne profits at the market value and profits for the period the respondent had trespassed on the appellant's property;

    ii. in failing to find that the orders in force in ELC No. 113 of 2015 issued on 27th May 2015 restrained any dealing with the suit property were in force when the respondent entered into a lease and which the respondent was aware of during the pendency of the matter before the trial court;

    iii. in failing to find that the respondent was in contempt of the court orders in force relating to the suit property;

    iv. by failing to order the respondent to return the suit property to the condition it was in before it trespassed unto it;

    v. by failing to appreciate all the evidence on record when reaching its determination; and

    vi. by failing to award costs of the suit, counterclaim and interest thereon to the appellant.

27. The appellant urged us to allow the appeal and set aside the judgement of the ELC delivered on 26th April 2022 with orders that the respondent be condemned to pay the appellant's costs of this appeal and of the suit in the ELC; and that we grant any further or other alternative relief and/or order that the Court may deem fit and just to grant.

28. We heard the appeal on 18th February 2024. Learned counsel Mr. Kimathi was present for the appellant while learned counsel Mr. Amakobe was present for the respondent. Counsel relied on their respective written submissions, which they orally highlighted. Those of the appellant are dated 31st January 2024 while of the respondent are dated 4th April 2024.

29. The appellant's counsel condensed the issues for determination into two. The first issue related to the question as to whether the learned Judge erred in failing to hold that the respondent trespassed onto the appellant's property. It was submitted that the respondent was well informed that the appellant was the registered owner of the suit property, and that it knew of this fact as early as 1st October 2015; that, as at the time the respondent was entering into the lease agreement with Jua Maisha Limited, there was in existence a court order issued by Omollo, J. dated 27th May 2015 in ELC 113 of 2015 which restrained any dealings with the suit property; that the respondent cannot claim to be an innocent party without notice; and that, therefore, it (the appellant) proved the element of trespass against the respondent.

30. The appellant contended that the respondent did not produce the results of the search on the records in the lands Registry in support of its claim that Jua Maisha Limited was the registered owner of the suit property. Reliance was placed on the provisions of section 26(1) of the *Land Registration Act*, which stipulated an exception to the rule that a Certificate of Title is absolute and indefeasible; that Omollo, J. appreciated this fact in her ruling of 6th April 2017 by holding that, since the title had been challenged, it was expected that the respondent would conduct its own due diligence as to the ownership of the title and take measures to protect its interests; and that the appellant did not take any steps to disprove the assertion that it was the rightful owner of the suit property despite being notified as much.

31. The second limb of the appellant's submission was that it faulted the learned Judge for not granting a single prayer in the counterclaim without due regard to the extensive evidence adduced with regard to the negligent acts of the respondent; that it quantified the illegally derived financial benefit by the respondent from the use of the portion of the suit property it occupied; that, despite the computations not being challenged by the respondent, the trial court proceeded to award it costs of the suit. To buttress the submission, reference was made to the case of Bitange Ndemo vs. Director of Public Prosecution & 4 Others (2016) KEHC 1384 (KLR) where the superior court adopted with approval the principles set out in the case of Aussie Airlines Property Limited vs. Australian Airlines Limited (1996) 139 ALR 663 at 670 - 671 with which a court needs to be satisfied to warrant grant of declaratory reliefs; that the appellant had met the test, save that the learned Judge did not appreciate this fact; and that it is for this reason that the appellant deserved a grant of the orders sought. In sum, we were urged to find that the appeal is meritorious and that we should allow it with costs.

32. On its part, the respondent submitted that the appellant did not prove that there were subsisting court orders issued in Mombasa ELC No. 113 of 2015 as at the time the respondent entered into a lease agreement with Jua Maisha Limited; that, as at the time it occupied the suit property, the same was registered in the of Jua Maisha Limited; that PW1 admitted as much in cross-examination, more so that there was no caveat over the suit property then, and that in the absence of any restriction on the title, nothing prevented it from entering into a dealing with Jua Maisha Limited; that it was incumbent upon the appellant to prove before the trial court that the respondent had made an unauthorised entry on the suit property as was held by this Court in M'Ikiara M'Mukanya & Another vs. Gilbert Kabere M'Mbijiwe (1983) KECA 121 (KLR); and the superior court's decision in Gitwany Investments Limited vs. Tajmal Limited & 3 Others (2006) KEHC 2519 (KLR); and that, furthermore, the issue of the validity of the title to the suit property was a subject of ongoing litigation in a suit filed by the appellant in the ELC.

33. On the issue as to the claim for mesne profits, the respondent submitted that the appellant had the duty to prove the mesne profits, which are special damages; that mesne profits must be specifically pleaded and strictly proved as was held by this Court in Peter Mwangi Mbuthia & Another vs. Samow Edin Osman (2014) KECA 279 (KLR); that, as was rightly held by the trial Judge, the appellant failed to specifically plead and strictly prove its claim for mesne profits as sought in prayers (c) and (d) of the amended counterclaim; and that this claim was rightfully dismissed.

34. On the issue of costs, the respondent submitted that it is settled law that a successful party in litigation is entitled to costs, and that costs follow the event; and that since the appellant's counterclaim was dismissed, costs of the counterclaim were rightfully awarded to it.

35. In sum, the respondent urged us to be slow with interfering with the decision of the learned Judge as it was based on a proper evaluation of the evidence before him; and that we should dismiss the appeal with costs to it.

36. This being a first appeal, our mandate as a first appellate court is explicitly set out in rule 31(1) (a) of this Court's Rules, 2022 namely to re-appraise and re-analyse the evidence on record and draw inferences of fact. This mandate was expounded in the case of Selle vs. Associated Motor Boat Co. Ltd (1968) EA 123 where this Court expressed itself as follows:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

37. This Court further stated in Jabane vs. Olenja (1986) KECA 21 (KLR) thus:

> " This Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs Kenya Bus Services (1982-88) 1 KAR 870."

38. We have exercised our mandate and considered the record of appeal, the grounds on which the appeal is anchored, the rival submissions, the authorities relied upon by the parties and the law. The issue falling to be determined is whether the appellant proved the claim for trespass against the respondent so as to warrant an award of mesne profits or damages.

39. There are two undisputed facts: first is the fact that the title to the suit property bears the name of Jua Maisha Limited. According to the results of the search on the records in the Lands Registry, the title was issued to Jua Maisha Limited on 27th November 2013; and, secondly, the respondent entered into a lease agreement with Jua Maisha Limited on 26th August 2015. The purpose of the agreement was for the respondent to erect a communication mast on the suit property.

40. Section 26(1) of the *Land Registration Act* affirms that a Certificate of Title issued by the Registrar upon registration, or to a purchaser upon transfer, shall be taken as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible. This Court in Presbyterian Foundation vs. Kibera Siranga Self Help Group Nursery School (Civil Appeal 64 of 2014) (2023) KECA 371 (KLR) held, inter alia, that the best evidence of ownership of immovable property is the title deed to it.

41. To that extent, there is nothing which prohibited Jua Maisha Limited from dealing with the suit property in any manner as it wished and, on this basis, there would also have been nothing that created doubt in the mind of a third party that the suit property belonged to Jua Maisha Limited if the search results so affirmed.

42. From the record as put to us, the appellant has over the years been industrious in protecting its interest in the suit property through various litigation channels. Its complaint is that, despite making the respondent aware of an existing court order which prohibited any dealings with the suit property, the respondent still proceeded to erect its communication mast. The appellant's position is that it did not know of the impending court cases and had innocently entered into the lease agreement with Jua Maisha Limited based on the search results from the Kwale Land Registry.

43. In addition to the foregoing, it is indeed true that, on 1st October 2015, through the firm of LJA Associates, the appellant informed the respondent of the litigation history of the suit property, and that restraining orders from dealing with the property had been issued by Omollo, J. on 27th May 2015. Therefore, it is factual to state that the restraining orders were issued prior to the respondent entering into the lease agreement with Jua Maisha Limited as the agreement was executed on 26th August 2015. However, the existence of those orders was only brought to the attention of the respondent by way of a letter dated 1st October 2015 after the lease had been signed. At the time the respondent entered into the lease agreement, it had no knowledge of the orders prohibiting any dealings with the suit property and, therefore, it cannot shoulder the blame for entering into the lease agreement.

44. Munyao J., having the full advantage of the physical record in Mombasa ELC No. 113 of 2015 where the orders of 27th May 2015 emanated, perused the file and observed at paragraph 15 of his decision that the interim orders lapsed within 3 days for want of service pursuant to Order 40 Rule 4(3) of the Civil Procedure Rules. The Judge further observed that, by a further ruling of 28th January 2016, the issue as to who held the lawful title was reserved to be canvassed and determined in the main suit; and that the status quo obtaining as at that time was to be maintained.

45. We observe, as did the learned Judge, that the appellant was not vigilant enough to find out the dealings on the suit property. Had it been keen, a communication mast being an enormous structure, it would not have escaped its attention that it was being constructed and move with speed to stop it. Instead, it was not until after 2 months that it served the respondent with a letter demanding that it vacates the property.

46. From the chronology of the history giving rise to the dispute as related above, the question which we must address is whether the appellant could sustain a claim of trespass against the respondent. The Black's Law Dictionary, 10th Edition defines trespass as:

> " An unlawful act committed against the person or property of another: wrongful entry on another's real property"

47. Further, the learned authors in Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition at page 428 state as follows:

> " Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land." (Emphasis ours).

48. In M'Ikiara M'Mukanya & Another (supra), this Court summed up the ingredients of the tort of trespass as follows:

> " Trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See Thomson vs Ward, [1953] 2QB 153."

49. This Court in Godfrey Julius Ndumba Mbogori & another vs. Nairobi City County (2018) KECA 702 (KLR) quoted with approval the decision of Jones vs. Chapman [1847] 2 Exch 821 by Lord Maule, J. who stated:

> "...as soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner, so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, I answer, the person who has the title is in actual possession..."

50. Flowing from the above dictum, it can be authoritatively concluded that to recover anything against an alleged trespasser, or succeed in a claim of trespass, the claimant must fulfil two conditions. Firstly, have a title to the suit property; and secondly, in the absence of such title, be in actual or constructive possession of the land upon which trespasses are alleged to have been committed.

51. It is noteworthy that there is a pending suit that was filed by the appellant, being Mombasa ELC No. 113 of 2015 - Emfil Limited vs. Hon. Attorney General & 423 Others - in which Jua Maisha Limited is sued as the 317th defendant, and whose title to the suit property is being challenged by the appellant. As matters stand, and in the absence of a judicial pronouncement on who legally holds the title to the suit property, the appellant cannot claim that the respondent was a trespasser. We say so because the appellant did not produce a title showing that it owns the suit property. It did not also lead evidence that it was in occupation of the suit property as at the time when the communication mast was erected.

52. To the best of its ability and knowledge, the respondent conducted due diligence by a search on the records in respect of the suit property. And no caveat was lodged against the title notifying third parties of the appellant's interest, if any. The only interest which the respondent had on the suit property was the erection of the communication mast. It had no interest in the ownership of the suit property. Hence, the respondent cannot be apportioned any blame for any wrongdoings that the Registrar of Land may have done in the subdivision of the land. It merely entered into a clean business arrangement with Jua Maisha Limited.

53. Furthermore, by the time the appellant's counterclaim dated 1st August 2020 was being heard substantively, the respondent had vacated the suit property by dint of the ruling dated 7th May 2019, and delivered on 16th May 2019. There was therefore nothing which the appellant would have claimed against the respondent.

54. Turning to the claim for mesne profits, the appellant framed its prayer in its counterclaim as follows:

> " a declaration that the appellant is entitled to mesne profits at market value for the period that the respondent trespassed on the appellant's property."

55. Section 2 of the *Civil Procedure Act* defines mesne profits as follows:

> "mesne profits", in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession."

56. In Christine Nyanchama Oanda vs. Catholic Diocese of Homa Bay Registered Trustees (2020) KECA 536 KLR, this Court made a definition of mesne profits as follows:

> " Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves."

57. This Court has in several decisions held that a party claiming mesne profits must demonstrate how the amount claimed was arrived at. This means that mesne profits are to be pleaded and proved as special damages. This position was affirmed by this Court in the case of Peter Mwangi Mbuthia & Another (supra) 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...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."

58. More recently, this Court in Unifresh Exotics (K) Limited vs. Kaoyeni Enterprises Limited (Civil Appeal E065 of 2022) [2025] KECA 872 (KLR) (23 May 2025) (Judgment) while emphasising that mesne profits are to be specifically pleaded and strictly proved held:

> " 77. Mesne profits, which are profits earned by a person in wrongful possession of property during a period of unlawful possession, must be specifically pleaded and strictly proved. This means that the party claiming mesne profits must explicitly mention it in their pleadings and provide sufficient evidence to support their claim. Pleadings are comprised of all allegations of fact that are relevant to the case. On the other hand, a prayer is a request for a certain relief. In the instant case, the respondent merely prayed for mesne profits, which were not specifically pleaded in its plaint, but only surfaced in its prayers and in its counsel's submissions."

59. As observed above, the appellant simply sought a declaration that mesne profits be awarded. There were no particulars to the claim of the mesne profits sought. Therefore, we find nothing upon which to fault the trial court for disallowing the claim for mesne profits. We further emphasise that, in the absence of proof that the appellant was conducting some economic activity on the suit property, and that the entrance of the respondent into the suit property prevented it from conducting its business, a claim for mesne profits was not sustainable. Furthermore, the respondent vacated the premises even before it could substantively commence any business.

60. In the end, we reach the inescapable conclusion that the appeal has no merit and is hereby dismissed with costs to the respondent. Consequently, we hereby uphold the Judgement of the Environment and Land Court (Munyao, J.) delivered on 26th April 2022.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR