Mwinyi v Bhai & another (Civil Appeal E023 of 2023)
[2025] KECA 1309 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KECA 1309 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E023 OF 2023

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JULY 18, 2025

BETWEEN

ZAINAB MWINYI ..... APPELLANT

AND

SAIFUDEEN ABDULLA BHAI ..... 1ST RESPONDENT

HUSSEIN ABDULLA BHAI ..... 2ND RESPONDENT

(Being an appeal against the Judgement of the Environment and Land Court of Kenya at Mombasa (Yano, J.) delivered on 17th January 2019 in ELC Case No. 424 of 1996)

JUDGMENT

1. This is a first appeal from the Judgement delivered on 17th January 2019 (Yano, J.) in which the learned Judge allowed the suit filed by the respondents, Saifudeen Abdulla Bhai and Hussein Abdulla Bhai, against the appellant, Zainab Mwinyi.

2. The suit was commenced before Mombasa High Court as Civil Suit No. 424 of 1996, which was later transferred to the Environment and Land Court (the ELC) under the same case number. By a re-amended plaint dated 10th February 2017, the respondents pleaded that they were the executors of the Will of Abdulla Suleimanji Essajee (deceased) who was the registered proprietor of Plot Number 27/Section XVI/Mombasa located at Guraya in Mombasa (the suit plot); that by an agreement dated 26th November 1991, the appellant purchased from one Mohamed Said Ahmed a house without land, which was built on the respondents' suit plot; and that the said Mohamed Said Ahmed had allegedly purchased the house without land at an auction on 16th April 1988 at the price of Kshs.140,000.

3. The respondents described the interest purchased in the house without land as one made of wattle, daub with corrugated iron sheet roof, cemented walls and floor, a ceiling made of mud on boriti poles with wooden doors and windows. They denied that the suit plot was among plots that were to

be subdivided under the so-called Presidential embargo; and that, as at the date of filing the suit, it remained as a single plot.

4. It was pleaded that, on or about 26th November 1991, the appellant wrongfully entered into the suit plot and commenced construction of a storey building without their consent or with the approval of the defunct Municipal Council of Mombasa; that the appellant extended the previous boundaries occupied by the house without land during the construction of the storied building; that, despite repeated requests by the respondents to cease construction, vacate the plot and give vacant possession, the appellant failed and/ or neglected to do so; that the actions of the appellant amounted to trespass; that, unless the appellant was restrained by the court, her actions were unlawful and intended to dispossess them of their property; that the appellant had not paid ground rent since the wrongful occupation and trespass onto the suit plot; and that, since the wrongful occupation and trespass, the respondents had suffered loss and damage, hence the claim for mesne profits and damages.

5. In view of the foregoing, the respondents sought the following reliefs:

> " a) A declaration that the interest purchased by the appellant in the agreement of 26th November 1991 was a house without land built on wattle and daub with corrugated iron sheet roof and the walls were cement plastered and floor cement screed, the ceiling was mud on boriti poles with wooden doors and windows;
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> b. A declaration that the house without land purchased by the appellant in 1991 was built on a portion of land on the suit plot belonging to the respondents;
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> c. That the appellant in order to demolish the house built on wattle and daub with corrugated iron sheet roof and the walls were cement plastered and floor cement screed, the ceiling was mud on boriti poles and construct a fresh structure on the said portion of land, she required the consent and authority of the respondents, the landowners and hence the landlords;
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> d. That having failed to seek for and obtain the consent of the respondents to demolish the interest she purchased in 1991 and put a different structure, she immediately on demolition became a trespasser and any structure put up thereafter was illegal;
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> e. An injunction to restrain the appellant (by herself, servants, or agents or otherwise howsoever) from continuing constructing the illegal structures on the suit plot;
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> f. A mandatory injunction directed at the appellant, her agents and/or servants to demolish and remove all of the structures erected and standing on the suit plot and in default, the respondents to undertake the same at the cost and expense of the appellant;
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> g. Delivery of the suit plot in vacant possession by the appellant to the respondents;
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> h. Damages;
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> i. Costs of the suit;
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> j. Any other or further relief the court may deem fit."

6. In her re-amended defence and counterclaim dated 17th February 2017, the appellant denied wrongfully entering into the suit plot, and that she was a trespasser. She averred that she purchased both the suit plot and the house without land from one Mohamed Said Ahmed in 1991 whereupon she took possession and started construction; and that the suit plot was among those to be subdivided under the Presidential embargo.

7. In her counterclaim, the appellant further averred that the respondents had been aware that she purchased the suit plot through a written agreement in 1991 from the Public Trustee, and that she was accordingly in lawful possession. She prayed that the suit be dismissed, her counterclaim be allowed and an order be issued directing the registration of the suit plot in her name.

8. The suit proceeded by way of viva voce evidence. The 1st appellant, Saifudeen Abdulla Bhai, testified as PW1. He testified that, together with the 2nd respondent, his brother, they were the executors of the Will of their deceased father, Abdulla Suleimanji Essajee, who died in 1989; that the house without land belonged to one Mohamed Said Ahmed, who had purchased it in an auction; that the house was later sold to the respondent for a consideration of Kshs.100,000; that the appellant, without consulting the respondents demolished the house without land and constructed another one; that they (the respondents) informed the appellant that she had only purchased the house without land, but that she did not heed and continued with the construction; and that the new house comprised two floors made of blocks and metal bars.

9. It was the further testimony of PW1 that, despite asking the appellant to vacate the premises in 1995, she failed to do so, prompting them to file suit in the year 1996; and that, when the appellant demolished the house without land, her interest in the suit plot was extinguished, and she became a trespasser. PW1 further prayed for rent of Kshs.3,000 per month as mesne profits. In support of this prayer, she produced a receipt for the rates paid in the year 2016.

10. PW1 denied that the suit plot was among the plots that were earmarked for subdivision under the Presidential embargo; that the suit plot has never been subdivided; and that there was no consent given to the appellant to construct a new house.

11. In support of the respondents' case, PW1 produced in evidence: Title Deed for the suit plot; Certificate of Official Search dated 15th February 2017; Notice of Auction for 16th April 1988; Sale Agreement dated 26th November 1991 between Said and the appellant; demand letter dated 28th November 1995; photographs of the house without land, the demolished house without land and the new construction of the storey building; and request for payment of rates dated 18th November 2015, which were marked as exhibits 1 to 9 respectively.

12. PW2, James Nduti, a Principal Surveyor with Coast Surveys, testified that he was approached by the respondents and requested to ascertain the boundaries of the suit plot, more so as to whether the house built thereon was inside or outside the plot; that, upon visiting the site, he confirmed that the beacons were in place, and that the house which occupied 150 square metres and was built within the plot. He produced a report to this effect as PEXH 13.

13. The appellant testified as DW1. She confirmed that she purchased the house without land situate on the suit plot; that the house was a mud Swahili-type house; that there was a Presidential embargo which stated that those who lived on the plot in Majengo would be given the opportunity to purchase the houses thereon; that she then purchased the house on the suit plot in the year 1991; and that, thereafter, she obtained the necessary approvals from the Municipal Council, including her building plan; and that she started the construction of the storey building. She denied being a tenant or that she was

required to pay any rent. Her contention was that she purchased the land through the government by virtue of a Presidential order.

14. Upon considering the material before it, the trial court (Yano, J.) observed that the respondents were indeed the registered proprietors of the suit plot by virtue of being the executors and beneficiaries, together with others, of the suit plot; that it was undisputed that the appellant bought a house without land built on the suit plot from one Mohamed Said Ahmed who had purchased it in an auction; and that, therefore, the interest which the appellant purchased was a house without land, which was also what was described both in the documents for the auction sale and in the sale agreement dated 26th November 1991.

15. The learned Judge was of the view that, the moment the appellant demolished the house sold to her, her interest on the suit plot was extinguished since what was sold to her was specifically the house without land; that the appellant's right to build another house on the respondents' suit plot could only be possible with the consent of, and agreement with, the respondents; that, in the absence of such an agreement and/or consent, the construction undertaken by the appellant other than a renovation of the original house was illegal; and that the appellant was therefore a trespasser on the suit plot the moment she commenced development thereon without the respondents' consent or permission.

16. It was further held that there was no evidence to support the appellant's contention that she was given the suit plot under the Presidential embargo; that, on the contrary, the title deed showed that the suit plot had not been subdivided; and that it was still in the respondents' names as an undivided plot.

17. In the end, judgement was entered in favour of the respondents as follows:

> "a) In terms of prayers (a), (b), (c), (d), (e), (f) and (g) of the re-amended plaint dated 10th February 2017;
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> b. Kshs.500,000 as general damages for trespass;
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> c. Kshs.3,000 per month as mesne profits from 26th November 1991 till vacant possession is given; and
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> d. Costs of the suit to be borne by the appellant."

18. Aggrieved, the appellant proffered the instant appeal. It is anchored on six (6) grounds of appeal in a Memorandum of Appeal dated 1st February 2025. She faults the learned Judge for erring in law and fact:

i. in finding that the appellant's interest in the house without land on Plot No. 27/XVI/Mombasa was extinguished when she demolished the house sold and commenced a reconstruction of another house;

ii. in finding that the appellant required consent from the respondents before she could renovate or develop the house without land standing on Plot No. 27/XVI/Mombasa;

iii. in finding that the renovations and development of the house without land standing on Plot No. 27/XVI/Mombasa were illegal;

iv. in failing to find that the Plot No. 27/VXI/Mombasa was subdivided under Presidential embargo and divided to the residents including the appellant;

v. by ordering for payment of general damages of Kshs. 500,000/= and mesne profits of Kshs. 3,000/= per month from 26th November 1991 until payment in full; and

vi. in failing to evaluate the evidence on record and thereby arrived at a wrong conclusion and occasioned a miscarriage of justice.

19. The appellant prays that this Court do: allow the appeal, and that the judgement delivered on 17th January 2019 be vacated; issue an order to the effect that the appellant is the lawful owner of the house without land standing on the suit plot; award her costs of the appeal and of the suit in the superior court; and issue any other orders with leave of the Court.

20. We heard this appeal on 19th February 2025. Learned counsel Mr. Khatib appeared for the appellant while learned counsel Mr. Kioko appeared for the respondents. Both counsel relied on their respective parties' written submissions, which they briefly highlighted. The appellant filed two sets of submission. One set is dated 14th August 2024 and another set titled

Further Submissions is dated 14th October 2024. Those of the respondents are dated 24th September 2024.

21. The appellant admitted that she bought a house without land; that, under Article 40 of *the Constitution*, she had the right to use and develop the house by way of renovation so as to prevent it from dilapidation; and that the concept of a house without land was one and the same as a lease of the land where the house is/was standing, but without the authority of disposing of the land itself. The appellant cited the decision of the superior court in Shaban Juma Ulaya vs. Mwajuma Juma Ulaya (2013) KEHC 851 (KLR) where the court cited the decision in Malindi HCCC No. 34 of 2005 - Famau Mwenye & 19 Others vs. Mariam Binti Said (UR) for the proposition that in a land tenure known as 'house without land' which has been reduced into writing, the arrangement is called a lease within the meaning of Section 105 of the Transfer of Property Act; and that, therefore, the trial court erred in holding that the appellant's right in the land was extinguished when she demolished the house.

22. It was further submitted that the appellant led evidence proving that the reconstructed house did not exceed the original boundaries of the original house sold. Thus, the appellant denied that she trespassed unto the respondents' land. The appellant further faulted the superior court for not holding that the suit was statute barred by virtue of the amended pleadings; that, in the original plaint of 7th August 1996, the respondents prayed for injunctive orders against the appellant from continuing with the construction of the house while, in the re-amended plaint dated 10th February 2017, the respondents pleaded trespass; that the cause of action of trespass arose upon demolition of the house, which took place on 26th November 1991, but that the claim was lodged in 1996; that Section 4(2) of the *Limitation of Actions Act* provides that an action in tort may not be brought after three years from the date when the cause of action accrued; that, as per this Court's decision in John Malembi vs. Trufosa Cheredi & 20 Others (2019) KECA 126 (KLR), the trial court was entitled to move suo moto to determine if it had jurisdiction to hear and determine the dispute or not where a jurisdictional issue was raised; and that, the suit having been filed after three years, the trial court had no jurisdiction to entertain the claim. We were accordingly urged to allow the appeal.

23. On the part of the respondents while posing the question as to whether the appellant's rights over the suit plot were extinguished when she demolished the house, it was submitted that, this being a concept of a house without land, the house is deemed to be a movable chattel constructed with the consent of the land owner. Reference was made to this Court's decisions in Abdukrazak Khalifa Salimu vs. Harun Rashid Khator & 2 others (2018) KECA 151 (KLR); and Muhiddin Mohammed Muhiddin (suing for and on behalf of the Estate of Mohammed Muhiddin Mohammed Hatimy) vs. Jackson Muthama & 168 others (2014) KECA 61 (KLR) for the proposition that, in a concept of a house without land,

the owner of the house is different from the land owner; and that, under this arrangement, the title to the land does not pass to the licensee.

24. Further, the respondents urged us to be persuaded by the decision of the superior court in Alwi Mohamed Alwi vs. Swaleh Omar Awadh (2019) KEELC 4926 (KLR) where the court extensively discussed the concept of a house without land. The respondents contended that, having demolished the house that she had bought, the appellant's interests in the house was extinguished; that, constructing a new house without the consent of the land owner, connotes trespass as was held by this Court in M'Ikiara M'Mukanya & Another vs. Gilbert Kabere M'Mbijiwe (1983) KECA 121 (KLR); and that for this reason, the respondents proved that the appellant had trespassed onto their land; and that that was the reason why, erringly, the appellant was not challenging the damages awarded under this head.

25. The respondents contended that Article 40 of *the Constitution* cannot salvage the appellant's case because the respondents are the lawful owners of the suit plot, a fact that is not disputed; and that the appellant having destroyed the house on the suit plot, cannot now claim that her right to property was violated.

26. Urging us to dismiss the appeal with costs, the respondents submitted that the main issue in contention was not whether the boundaries were exceeded, but whether the construction of the new house was done with their consent.

27. This is a first appeal and, as a first appellate court, our duty is to re assess and re-evaluate the evidence adduced before the trial court in order to reach our own conclusions. As we do so, we must bear in mind that, unlike the trial court, we neither saw nor heard the witnesses testify for which we should give due allowance. This principle was restated in the decision of this Court in Musera vs. Mwechelesi & Another (2007) KLR 159 thus:

28. Further, in United India Insurance Co Ltd vs. East African Underwriters (Kenya) Ltd (1985) KECA 39 (KLR), this Court was explicit that interference with the exercise of judicial discretion only arises where there is clear demonstration of misdirection in law, misapprehension of the facts, or taking into consideration factors that the trial court ought not to have taken into consideration, or failure to take into consideration factors that ought to have been taken into consideration, or, looking at the decision generally, the only plausible conclusion reached is that the decision albeit a discretionary one, is plainly wrong.

29. Taking to mind what our mandate entails as stated above, we have considered the record of appeal, the rival submissions, the authorities cited by the respective parties and the law. We have accordingly demarcated the issues for determination to be:

    a. whether the suit was time barred;

    b. whether the appellant was entitled to demolish the house without land for re-construction without the respondents' consent;

    c. whether the appellant's actions constituted trespass; and

    d. whether the damages awarded were merited.

30. On the first issue as to whether the suit was time-barred, learned counsel Mr. Khatib submitted that the plaint was re- amended 10 years after the initial filing of the suit to include the prayer on trespass, yet the suit became statute barred 3 years after the cause of action arose. According to the appellant, this being a jurisdictional issue, the trial court ought to have addressed and decided on it suo motto. On the part of Mr. Kioko, counsel for the respondents, it was submitted that raising issue that the suit

was time barred at this juncture was tantamount to trial by ambush, more so because it was not one of the grounds of appeal.

31. In Kenya Hotels Limited vs. Oriental Commercial Bank Limited (2018) KECA 692 (KLR), this Court frowned upon a party raising new issues in an appeal, and it held that:

> "Where the applicant seeks to introduce an entirely new point, there are well known structures that seek to ensure firstly, that an appellate court does not, in disguise, metamorphose into a trial court and make first- instance determinations without the benefit of the input of the court from which the appeal arises ...."
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> Due to these fundamental concerns, the Courts have developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In Openda v. Ahn, (ca 42/1981), this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant's case as conducted in the trial court, not changing it into a totally different case; the matter must have been properly pleaded and the facts in support of the new point must have come out in the trial court." (Emphasis added)

32. However, when an issue of jurisdiction is raised, it is well settled that it is an exception to the principles outlined. Jurisdiction is the authority which the court has to decide on matters litigated before it. It is trite law that, without jurisdiction, a court cannot decide on the issue before it as it would amount to nothing. This was the finding in the case of Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd (1989) KECA 48 (KLR). The issue of jurisdiction being fundamental, it can be raised by either parties or by the court suo motto.

33. O. Kiage, JA. rendered himself as follows on raising a jurisdictional issue even at the appellate stage in Francis

> Macharia Karanja & 6 others vs. Virginia Muthoni Karanja (2020) KECA 521 (KLR):
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> "As I considered the record of this appeal and was on the verge of rendering my decision on it, a fundamental jurisdictional issue came to my attention. The issue goes to the heart of this Court's jurisdiction and as such must be dealt with before we get into the merits of the appeal, if at all. It is trite law that jurisdiction is everything. It therefore must be raised and addressed at the earliest since without it, the Court must down its tools as well elucidated in the famous dicta by Nyarangi, JA in The Owners of the Motor Vessel "Lillian S" vs. Caltex Oil Kenya Ltd (1989) KLR 1. I appreciate that the respondents did not raise this issue. However, on crucial question of jurisdiction, the Court has authority to act on its own motion. It was so held by this Court in Hafswa Omar Abdalla Taib & 2 Others vs Swaleh Abdalla Taib (2015) eKLR;
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> 'Unfortunately for the parties and despite their industry in ventilating the issue of goodwill, the determination of the appeal will disappoint them as it turns on the question of jurisdiction; that is, whether this Court has jurisdiction to entertain this appeal in the first place. We appreciate that it is an issue that was not raised by any of the parties. However, it is an issue of law that has long been settled and the parties and indeed their legal teams are deemed to know. Accordingly, this Court can suo moto raise and determine the same.'"

34. The jurisdictional point which the appellant seeks to raise is that the suit was statute barred ab initio as the re-amended plaint raised a new cause of action, being one of trespass. Section 4(2) of the *Limitation of Actions Act*, Cap 22 makes proviso to the limitation of bringing a tortious action as follows:

> an action founded on tort may not be brought after the end of three years from the date upon which the cause of action accrued.

35. From the facts derived from the pleadings before us, the appellant entered into the suit property on 26th November 1991 upon signing an agreement which it is conceded was to purchase a house without land from one Mohamed Said Ahmed. At the point of filing the suit on 7th August 1996, the respondents prayed, inter alia, for an injunction to restrain the appellant from continuing with construction of illegal structures. In the re-amended plaint dated 10th February 2017, the respondents introduced a prayer that the appellant be termed as a trespasser for failure to obtain consent from them prior to demolishing the house without land.

36. Trespass is generally defined as an action of unlawfully intruding upon another land and forcibly taking another person's property. 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"

37. 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."

38. It is observed at this juncture, that the appellant was considered a trespasser the moment she demolished the original house without land and started constructing a storey building. She was also warned to stop the construction but did not heed. Her actions amounted to commission of a continuing tort of trespass. That is to say that the tort of trespass was a continuing injury; and that every time she continued with the construction despite a warning, constituted a continuing injury by itself amounting to a new cause of action. This Court in Warrakah (Suing as the Administrator and Legal Representative of the Estate of Gakweli Mohamed Warrakah-Deceased) vs. Mwatsami (2024) KECA 579 (KLR) referred to The Textbook 'Clerk & Lindsell on Torts 16th Edition' para. 23 - 01 which addressed continuing trespass as:

> " Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues."

39. In Isaack Ben Mulwa vs. Jonathan Mutunga Mweke (2016) KECA 754 (KLR), this Court stated as follows in regard to continuing trespass:

> "Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be res judicata simply because the same parties or their parents litigated over the same matter in 1985. It is a well-settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts."

40. None of the counsel submitted that the now constructed house had been demolished. It therefore follows that as long as the house was still on the suit plot as at the time the plaint was amended, a new cause of action had arisen which ultimately called for the amendment of the plaint. The appellant's trespass was thus a continuing injury, consequent to which the suit was not statute barred by virtue of the amendment of the plaint coming too late in the day. This ground of appeal thus fails.

41. On the second issue as to whether the appellant was entitled to demolish the house without land for re-construction without the respondents' consent, there is consensus that the interest the appellant purchased from one Mohamed Said Mohamed was a house without land. The sale agreement dated 26th November 1991 confirms this at the recital of the interest in the property being sold as:

> 'House without land built on Plot No. 27/XVI situated as Guraya Mombasa.'

42. Flowing from the foregoing condition of sale, it is obvious that the agreement did not confer any further rights to the appellant other than of acquiring the house without land. Taking to mind the concept of a house without land as was explained by this Court in the case of Famau Mwenye & 19 Others (supra) that the owner of the house is different from the owner of the land, it would not be correct for a purchaser of a house without land to alter the structure of the house or deal with the land itself in any manner without the consent of the landowner.

43. The concept of 'a house without land' was well enunciated by this Court in Abdukrazak Khalifa Salimu vs. Harun Rashid Khator & 2 others [2018] KECA 151 (KLR) as follows:

> " 1. Once again, the concept of "House without Land" is back before this Court. In coastal Kenya, a land tenure known as house without land is common. This is where a person can own a house without owning the land upon which the house stands. In Famau Mwenye & 19 others vs. Mariam Binti Said, Malindi H.C.C.C. No. 34 of 2005 (Ouko, J.) (as he then was) described the concept of house without land as follows:
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> 'The dispute arises from land tenure unique ... to Mombasa which has baffled scholars, practitioners and even jurists. That land system is only referred to as 'house without land'. That is, the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin maxim, cujus est solum ejus est usque ad coelum [meaning, 'whose is the soil, his is also that which is above it'].'"

44. This Court in Lassie (Suing on Behalf of the Estate of Lassie Bin Abdulla - Deceased) vs. Mombasa & 3 others (2025) KECA 870 (KLR) also had the following to say as regards to the concept of a house without land:

> " A lease agreement premised on a "house without land" will only confer proprietary rights of the house without land as its name suggests. A house without land is a separate entity from the land on which it stands."

45. Guided by the afore-cited decisions, it is trite to say that, in the event an occupier of a house without land is under the impression that the house is uninhabitable, he/she can only effect improvements to the existing structure with the consent of the owner. The occupier of the house without land, does not have untrammelled right to effect improvement to the dwelling to the detriment of the landowner. The proposed improvements nonetheless can only be necessary and reasonable so as to render his dwelling habitable, but still with the rider that the landowner must be notified of the proposed improvements.

46. The title deed to the suit plot indicates that it is co-owned in 1/5 share among five people, two of them being the respondents herein. None of those persons entered into a sale agreement with the appellant for sale of the suit plot. Further, from the evidence on record in form of the photographic evidence produced in court, the appellant commenced construction of a two-block stone storeyed building. It was out of order for her to proceed and destroy the original Swahili-type house and construct a new structure without the consent of the owners. The consent is imperative since the concept of a house without land defies the common law concept of land expressed in the Latin maxim, cujus est solum ejus est usque ad coelum (meaning, 'whose is the soil, his is also that which is above it).

47. Turning to the fourth issue as to whether the appellant's actions constituted trespass, we observe that we have already defined elsewhere in this judgment what constitutes trespass, and the actions of the appellant which made her a trespasser on the respondent's land. In M'Ikiara M'Mukanya & Another vs. Gilbert Kabere M'Mbijiwe (1983) KECA 121 (KLR), this Court outlined 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."

48. 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..."

49. 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, he must establish that he has 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.

50. We cannot belabour the issue in restating that the respondents satisfied the two tests. They held the title to the suit plot and, their engagement with the appellant was strictly with respect to the house without land. The moment the landscape of the engagement took a different turn, the appellant converted herself from a lessee into a trespasser.

51. Before we delve into the last issue, it is paramount to note that the appellant further contended that she became the owner of the suit plot by virtue of a Presidential embargo. As observed by the trial court, no evidence was led by the appellant to demonstrate how the suit plot was part of the Presidential embargo. Even though there is a letter dated 8th March 1991 confirming that the suit plot was placed under Presidential embargo to be sold to the tenants, the appellant did not demonstrate that she was one such tenant and hence entitled to the suit plot. The title to the suit plot was issued to the five co-owners on 30th December 1991, and it remained as such. No subdivision of the suit plot was carried out. More importantly, the appellant did not deem it fit to challenge the issuance of the title to the registered owners.

52. Linked to this discourse, learned counsel Mr. Khatib asked us to consider that the appellant had stayed on the suit plot for more than 12 years and that, therefore, she ought to have been registered as the owner pursuant to the doctrine of adverse possession. In this context, the observations of this Abdukrazak Khalifa Salimu vs. Harun Rashid Khator & 2 others (2018) KECA 151 (KLR) are illuminating and which we fully concur with:

> "In the instant appeal, the appellant is attempting to question the title of the respondents by invoking Section 4 (2) of the *Limitation of Actions Act*. He is also challenging the respondents' title by asserting that the trial court ought to have inquired who put Mr. Said A. Bawazir into possession of the suit property. In this context, the appellant as the owner of house without land and being a tenant is questioning the title of the respondents qua landlord. This he cannot do. The appellant is estopped from challenging the respondents' title as landlord of the suit property. If a tenant denies or challenges the title of the landlord, the tenant must first surrender the possession of the property back to landlord. He cannot on one hand oppose the landlord's title and on the other have possession of the property. Section 121 of the Kenya *Evidence Act*, Cap 80 aptly covers this as it provides: -
>
> '121. No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny that such person had a right to such possession at the time when the license was given.'"

53. The appellant's case is cast in stone. She cannot and could not plead the doctrine of adverse possession for the reason that there existed an agreement for lawful occupation of the land based on some agreement as was held by this Court in Samuel Miki Jane vs. Jane Njeri Richu (2007) KECA 465 (KLR).

54. In the case of Chevron (K) Ltd vs. Harrison Charo Wa Shutu [2016] KECA 248 (KLR) this Court set out the conditions for adverse possession thus:

> " Therefore, the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse

possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See Littledale vs. Liverpool College (1900)1 Ch.19, 21."

55. The law and requirements for adverse possession were also laid down in the case of Mbira vs. Gachuhi, [2002] I EALR 137 where it was held that:

> " .... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non- permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption...."

56. We sum it up by stating that the appellant having occupied the suit plot as a licensee with the permission of the respondents by virtue of the purchase of the house without land is estopped from claiming ownership by way of adverse possession. That aside, the doctrine of adverse possession is still inapplicable since the interest involved was a house without land.

57. We further find that the appellant's contention that her rights to the suit property are protected under Article 40 of *the Constitution* cannot stand for the reason that it was established that she trespassed on the suit plot.

58. Finally, we proceed to determine whether the damages awarded to the respondents were merited. It is trite law that this Court will not ordinarily interfere with the discretion of the trial court on award of damages unless it is established that the judge took into account irrelevant factors, or did not consider relevant factors, or that the award was so inordinately so low or too high as to represent an erroneous estimate. See Kemfro Africa Limited t/a Meru Express Services (1976) & Another vs. Lubia & Another (No 2) (1985) KECA 137 (KLR).

59. On the award of mesne profits, this Court in Samaki Industries (K) Limited vs. Kenya Ports Authority (2024) KECA 794 (KLR) aptly set out the principles to be considered in a claim of mesne profits as follows:

> "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."

60. In the same vein, the Court of Appeal in Christine Nyanchama Oanda vs Catholic Diocese of Homa Bay Registered Trustees (2020) KECA 536 (KLR) held that:

> " It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both.

Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved.

61. In the case of Peter Mwangi Msuitia & Another vs. Samow Edin Osman (2014) KECA 279 (KLR), this Court held as follows:

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

62. In support of the claim of mesne profits, the 1st respondent testified that they were seeking rent which the appellant had never paid them. They claimed Kshs.3,000 per month as rent. In support of the claim, PW1 produced receipts for the year 2016. On our part, we have not seen the receipts for this year from the record. The receipt which we have seen is one dated 9th April 1990. The rates depicted therein as being paid were Kshs.9, 635.40. A claim of mesne profits, being in the nature of special damages, must be specifically pleaded and strictly proved. The respondents failed to set out the factual basis of their prayer for mesne profits, and, as we have noted, the claim for Kshs.3000 a month was not supported by evidential documents or other satisfactory evidence adduced in court. Accordingly, we find that the learned Judge erred in awarding mesne profits in the sum of Kshs.3,000 per month from 26th November 1991 until vacant possession.

63. Furthermore, as was held by this Court in Christine Nyanchama Oanda (supra), a party cannot be awarded both the claim for mesne profits and for damages for trespass.

64. As regards the award for general damages of Kshs.500,000 for trespass, we find no reason upon which to upset the award. That aside, we noted that the learned Judge did not make a legal basis, more so even by way of decided cases, on how she arrived at the figure. It is trite though that, it is not mandatory that a party must go to length to prove the assessment of general damages. This means that a court may, by exercise of its discretion, award such sum as it deems reasonable in the particular circumstances of the case. The rationale is that, once trespass has been proved, a party is automatically entitled to damages for trespass if the same had been pleaded and prayed for. In so holding, we are guided by the decision of this Court in Kenya Power & Lighting Company Ltd vs. Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment) where it was held that:

> "10. Turning to appropriate reliefs to be awarded to the respondents, the learned Judge took into consideration the tabulations of losses suffered by each respondent as more particularly set out in their respective schedules of losses and damages tendered in evidence as exhibits without any objection from the appellant; holdings/proposition from decisions both binding and those of courts of coordinate jurisdiction. Among these was the case of Fleetwood Enterprises Ltd vs. Kenya Power & Lighting Co. Ltd [2015] eKLR, for the holding/ propositions that the award of damages for trespass is discretionary in nature but which discretion should however be exercised by the Court judiciously after taking into consideration all relevant factors. Second, that the value of the land and the nature and extent of developments that would have been carried out thereon had the trespass not occurred are also a determining factor. The Court of Appeal decision in the case of Kenya Power & Lighting Company Limited vs. Fleetwood Enterprises Limited [2017] eKLR in which the decision in Fleetwood Enterprises Ltd vs. Kenya Power & Lighting Co. Ltd [supra] was affirmed for the holding, inter alia, that where trespass is proven the affected party need not prove that it suffered damages or loss as a result of

the trespass so as to be awarded damages because once the trespass is proved, the court is bound to assess and award damages on a case to case basis. The case of Duncan Nderitu Ndegwa vs. KP& LC Limited & Another (2013) eKLR for the holding, inter alia, that once a trespass to land is established it is actionable per se and indeed no proof of damage is necessary for the court to award damages.

65. In the result, we find that the appeal partially succeeds. We uphold the Judgement of the Environment and Land Court at Mombasa (Yano, J.) dated and delivered on 17th January 2019 save that we hereby set aside the award of mesne profits. The appeal having failed in substantial part, the appellant shall bear the costs thereof.

66. Orders accordingly.

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