Aboud & 18 others v Khan (Civil Appeal 21 of 2020)
[2023] KECA 1286 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1286 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL 21 OF 2020

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

OCTOBER 27, 2023

BETWEEN

ALI DIDI ABOUD ..... 1ST APPELLANT

PASTOR NGANGA T/A WATAMU WORSHIP CENTER GOC 2ND APPELLANT

ATHMAN SHAIBU SHOSHI ..... 3RD APPELLANT

AO ATHMAN ..... 4TH APPELLANT

MULKI HASSAN ..... 5TH APPELLANT

MOHAMED HERI ..... 6TH APPELLANT

MWANAISHA MOHAMED ..... 7TH APPELLANT

OMAR FUNDI ..... 8TH APPELLANT

HASSAN ABDULLAH ..... 9TH APPELLANT

JACKLINE MWANIA ..... 10TH APPELLANT

ANNASTACIA KAHAMA ..... 11TH APPELLANT

HILDAGAD GASHAMBA ..... 12TH APPELLANT

JOICYE NYOKABI ..... 13TH APPELLANT

BWANA FAE USTAHIDI ..... 14TH APPELLANT

EMMANUEL CHARO TINGA ..... 15TH APPELLANT

HELEN MURUNGI ..... 16TH APPELLANT

HELEN MAKEBA ..... 17TH APPELLANT

SAIDI BWANA ..... 18TH APPELLANT

BARAKA KABERIA ..... 19TH APPELLANT

AND

MOHAMED SADEEEQUE KHAN ..... RESPONDENT

(An appeal against the judgment of the Environment and Land Court at Malindi (Olola, J.) delivered on 18th September 2020 in ELC Petition No. 7 of 2013)

JUDGMENT

1. In a judgment, the subject of this appeal, delivered on 18th September 2020 in *Petition No. 7 of 2013*, the Environment and Land Court at Malindi (J.O. Olola, J.) (ELC) allowed the respondent's petition against the appellants and declared that: the respondent is the legal owner of the property known as Plot No. 807 Watamu; and that the appellants had trespassed on, and illegally encroached on the same in violation of the respondent's constitutional rights. The ELC also restrained the appellants from erecting any buildings, structures, fencing or in any other manner interfering with the said property; or in any way interfering with or obstructing the survey and re- establishment of beacons on the property. The respondent was also awarded general damages of Kshs. 3.5 million.

2. The essence of the appellants' present appeal is that the ELC erred in failing to find that the respondent's title over the property is illegal, null and void, and for failing to uphold their claim for adverse possession. They are also aggrieved by the award of general damages.

3. Based on his petition presented to the ELC on 6th May 2013, and amended petition dated 16th July 2013, and based on his subsequent testimony during the trial, the respondent's case was that he is registered owner as grantee, for a term of 99 years from 1st July 1993, of the property known as Plot No. 807 (Grant No. C.R. 27676) situated in Watamu Township in Kilifi District measuring approximately 1.009 hectares (the property) having purchased it from the previous owner in 1994; that on the property are structures and developments erected by the 1st appellant and other illegal occupants; that at the time he purchased the property there was one illegal structure belonging to the 1st appellant, whom he described as "a powerful KANU councilor at the time"; and that his attempts to obtain vacant possession of the property were thwarted by the 1st appellant who used his political clout to stage violent demonstrations using local youths who locked the respondent out of the property.

4. The respondent stated that for the 1st appellant to vacate the property, he entered into an agreement with him dated 26th September 1996 in which he agreed to purchase the 1st appellant's developments thereon for a price of Ksh. 400,000.00; that despite that agreement, the 1st appellant thereafter, invited other parties to encroach and erect structures on the property; that on 5th January 2009 the respondent sought the intervention of Watamu Chief's Office who confirmed that the property had been crowded by illegal squatters with houses on it which were erected without his permission or approval of the Municipal Council of Malindi; that on 7th January 2009, a surveyor, one Martin Weldon, engaged by the respondent to survey and re-establish beacons on the property was prevented from doing so due to fierce resistance from the appellants who staged violent demonstrations to prevent the exercise; and that the respondent's attempts to recover the property have been met with fierce resistance and threat to his personal security and safety.

5. According to the respondent, the appellants' actions violated his constitutional rights to property under Article 40 of the *Constitution*; his right to equal treatment under Article 27; his right to human dignity under Article 28; and his right not to have his property seized under Article 31. He accordingly sought reliefs for: declarations that the appellants had contravened his constitutional rights; mandatory

injunction directing the appellants to demolish their structures on the property; an injunction to restrain the appellants from erecting buildings or structures on the property or fencing the same or in any manner interfering with the property; a declaration that he is the lawful and legal owner of the property; an injunction to restrain the appellants from obstructing or interfering with the survey and re- establishment of beacons on the property; and general damages.

6. On the other hand, the appellants case as pleaded in the answer and response to the petition dated 5th August 2013 (of 1st to 5th appellants) as expounded in the testimony of Athman Shaibu Shoshi, the 3rd appellant (who was the only witness who testified on behalf of the appellants) was that the respondent was not lawfully registered as the proprietor of the property; that the registration of the respondent as owner was unlawful, null and void and unconstitutional as the Grant was unlawfully obtained through unlawful methods; that at the time of registration of the property in favour of the respondent, the appellants were in occupation and use of the property with permanent buildings erected thereon and had been in occupation for a period of over 30 years in aggregate.

7. The appellants asserted that the respondent has never had physical occupation of the property; that the Grant in favour of the respondent relates to an area previously known as public utility area Plot No. 7 as per the Part Development Plan of Watamu which the government planned for squatter settlement and upgrading; that the respondent "is a land grabber" who ought not to be protected by law; that the Grant in favour of the respondent "is a direct grant from the President of the Republic of Kenya" issued without due process under the repealed *Government Lands Act* and *Registration of Titles Act* and is on the face of it an unlawful disposition.

8. The appellants maintained that their developments on the property are legal as they are genuine squatters who have been on the land for over 30 years and are recognized by the government. They asserted that the respondent is "a stranger" and they would not let him:

> "...take away from them their developments using unlawful grant and would fight to their death by their blood to ensure that their constitutional rights of occupation of the land is recognized and protected and to this end will never allow the [respondent] set foot within the confines of their developments which are ideally their homes and birth right entitlement." [Emphasis added]

9. The appellants denied violating the respondent's constitutional rights. They pleaded that should the court find that the Grant in favour of the respondent to be lawful, the court should find that the appellants have become owners by adverse possession and are entitled collectively to be registered as proprietors and a title should be issued to them in place of the respondent as they:

> "...have been on the said parcel of land notoriously, openly and without force for over 30 years and thus the title of the [respondent] has been extinguished by dint of the provisions of the *Limitation of Actions Act*..." [Emphasis added]

10. The appellants prayed for dismissal of the respondent's petition and for declaration and determination that the Grant in favour of the respondent was irregular, wrongful and illegal; that the appellants and other residents of Watamu are lawfully and regularly in occupation of the property; an order for cancellation of the Grant; in the alternative that the appellants are entitled to possessory and occupational rights by adverse possession and for the them to be registered as proprietors of the property.

11. We have alluded the testimonies of the two witnesses who testified. The respondent testified on 29th February 2016 and stated he was aged 81 years and resident in England. He adopted the averments in

his petition and his supporting affidavit as his evidence in chief. Under cross examination he stated that he was "allocated the property" in 1995; that he bought the plot from Shedrack Kiptugen and paid for it and obtained the Grant; that all his transaction documents were stolen except the title and deed plan; that when he visited the property in 1995 he was shocked it was occupied by someone and was chased away; that he knew that the land was a recreation park for children but was not aware it had been set aside as a settlement scheme; that there were many people on the property, and he had sued 19 people; that since being chased away from the property, he had not gone back there and was scared to do so.

12. The respondent maintained that there was only one person on the property, namely the 1st appellant who then encouraged others to move into the property; that his efforts to access the property were futile as the people almost killed him when he went there, and the Chief did not assist. He concluded that as a result, he has been deprived of the property and prayed to the court for orders for the demolition of the illegal structures.

13. In defence, the appellants' sole witness, Athuman Shaibu Shoshi, the 3rd appellant adopted, as his evidence in chief, his witness statement dated 13th October 2015 substantially reiterating the contents of the answer and response to the petition. Under cross-examination, he stated that he knows the 1st appellant, a former councilor; and that the 1st appellant does not reside on the property. He stated that the property was previously a picnic area which was converted to a squatter settlement, though he could not recall when that happened; that his father lived on the property from the 1970's and allocated the land to him and he is a beneficiary; that the appellants are the legal owners of the property because they have been there for more than 30 years and their structures are older than 12 years; that initially there were about 20 houses on the property and it is not true that in 1993 there was only one house. In part of his testimony that is not entirely clear, he also stated that a person named Charo sold the land to him and that is why he was selling (*sic*).

14. He stated further that the appellants have never had skirmishes with the respondent and the matter has never gone to the police; that the area Chief is aware of the dispute; that they have never chased the respondent from the property. He denied that the appellants had vowed "to spill blood" and never to allow the respondent on the property and that as far as he is concerned, there is no title to the property. He stated further that he knows all the appellants, and that they have lived on the property for more than 20 years; that they only learnt in the year 2000 that someone had title to the property and did not know how the respondent got it; and that when the title was issued, most of the appellants were on the property.

15. In his judgment, the learned trial Judge upon appraising the evidence found that the respondent holds a valid title over the property and that while the appellants alleged that the title was obtained unlawfully, they did not provide any evidence to support that claim.

16. As to whether the appellants acquired title by adverse possession, the Judge found that no evidence was placed before the court as to when each and every one of the appellants put up structures on the property and the dimensions; that while it was clear that the 1st appellant, who did not testify, was on the suit property as at 1995/1996, it was unclear when the other respondents entered the land. The Judge expressed that it was evident that as at the year 2000, the appellants were not only on the land but some of them had built permanent houses thereon and it was not in doubt that by the time the respondent filed suit, the respondents had been on the land for about 13 years. However, the Judge concluded that the occupation of the property by the appellants did not extinguish the respondent's

rights and interest in the property in that the appellants "had held onto the land by sheer force and concomitant threat of violence." In that regard, the Judge expressed:

> "I have no hesitation in finding that the [appellants] have since the year 2000 forcefully held onto the suit property and that their claim for adverse possession therefore must fail. Their occupation of that property is illegal, unlawful and without any foundation in law or otherwise. They have clearly by their admission used unlawful means to deprive the [respondent] of the use and occupation of his property. This court will not allow them to continue to benefit from the illegality of their actions."

17. The Judge observed that the respondent has for some 24 years been fighting to get the property taken away from him by threat of physical violence by the appellants who trespassed thereon, and awarded him Ksh. 3.5 million as general damages "compensation for those lost years."

18. With that, the ELC allowed the respondent's petition while dismissing the appellants' claims to the property, and hence the present appeal.

19. During the hearing of the appeal before us on 3rd May 2023, learned counsel Mr. Kilonzo appeared for the appellants while Mr. Tariq Khan, learned counsel appeared for the respondent. Counsel relied entirely on their respective written submissions in which they addressed us on four issues: First, whether the property was legally and procedurally allocated to the respondent; secondly, whether the respondent has good title to the property; third, whether the award of general damages of Ksh. 3.5 million is well founded; and fourth, whether the appellants established their claim for adverse possession. We will consider those issues in turn.

20. We will address the question whether the property was legally and procedurally allocated to the respondent and whether he has good title to the same together. In that regard, counsel for the appellants submitted that the Judge erred in finding that the respondent has a valid title to the property notwithstanding irregularities in acquiring it; that there was no evidence of purchase of the property and neither did the respondent show that he followed the steps laid down for allocation of public land. It was urged that the respondent gave contradictory evidence on how he acquired the property; that in one breath he said he purchased it from one Shedrack Kiptugen, while in another he said he was an allotee; that there was no evidence of the purchase price paid and nor was a sale agreement produced.

21. It was submitted, on the strength of the decision of ELC in *Abdi Mohamed Kahiya v. Fatuma Haji Kasim* [2019] eKLR (where steps to be followed in allocation of Government land was outlined) that no evidence of application for allotment, or the letter of allotment or copy of the part development plan (PDP) were produced; that although the respondent produced a certificate of title, the process by which he acquired the property was unlawful and unprocedural and it was incumbent upon him to show how he acquired it, which he failed to do. The decision of this Court in the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR and Section 26(1) of the *Land Registration Act* were cited for the proposition that the respondent had a duty to defend the process of acquiring the property.

22. Counsel for the respondent on the other hand submitted that under Section 23 of the repealed *Registration of Titles Act* which is the applicable provision by reason of Section 107(1) of the *Land Registration Act*, 2012, the respondent's title to the property is absolute, indefeasible, and protected under Article 40 of the *Constitution*; that in the absence of fraud or misrepresentation, the title is conclusive proof of his ownership of the property; and that under Sections 107 and 109 of the *Evidence Act* the appellants had the burden to prove their claims but failed to do so. The judgment of the ELC in *Kenya Anti-Corruption Commission v. Online Enterprises Limited & 4 others* [2019] eKLR, and the

decision of this Court in *Dr. Joseph Arap Ngok v. Justice Moijo ole Keiwua & 5 others*, Civil Appeal No. Nai. 60 of 1997 were cited.

23. It was submitted that whereas the 3rd appellant, the witness for the appellants, stated that the property was public utility land which was later set aside for squatter settlement scheme, no evidence was produced in support of those claims and the learned Judge was right in expressing that no evidence was placed before the court in that regard; that on the contrary, the property is private land within Article 64 of the *Constitution*.

24. We have considered the rival arguments in that regard. The case that the respondent presented to the ELC was that he is the registered proprietor of the property for a term of 99 years from 1st July 1993 based on a Grant issued by the Commissioner of Lands and registered on 3rd October 1995; and that the appellants had trespassed on the property thereby violating his constitutional right to property under Article 40 of the *Constitution*.

25. The appellants' response was three pronged, namely, that the respondent was not lawfully registered as proprietor of the property as due process in alienating the property under the repealed *Government Lands Act* was not followed; that the property was essentially public land for squatter settlement and there was no basis for allocating the same to the respondent; and that in any event, the appellants were in occupation of the property for over 30 years in aggregate and the respondent's title, if any, extinguished by adverse possession.

26. Counsel for the appellants submitted that the respondent's evidence on how he acquired the property was contradictory; that on the one hand he stated that he was an allotee while on the other hand he stated that he purchased the property. In that regard, we note that in his supporting affidavit which he relied upon during his testimony, the respondent deposed that he is the registered proprietor of the property and that when "he purchased" it, there was one illegal structure belonging to the 1st appellant. Under cross examination, he stated:

> "I was allocated the land in 1995. It was me and my daughter who also acquired plot 808. It was in my daughter's name. It was sold. I do not know if it was sold to Mr. Tinga. I bought the plot from Shedrack Kiptugen. Every document is with my lawyer. I do not know if I have produced the agreement. What I have is a grant. I went to the Commissioner of Lands with Mr. Kiptugen. I do not have the documents that we took to the commissioner. I bought the land and paid for it. I do not have a copy of the allotment or the application for allotment. I do not have a copy of the P.D.P. I have the title document."

27. It is not entirely clear from that extract of testimony whether the reference by the respondent to 'allocation' was in reference to the property or in reference to plot 808. On re-examination however he was clear that he bought the property in 1995. When his testimony during the hearing is considered alongside his deposition in the supporting affidavit, it emerges that his position is that he purchased the property from one Mr. Kiptugen who then accompanied him to the Commissioner of Lands who in turn issued Grant Number CR 27676 in his favour. On the face of it, the Grant was issued on 22nd September 1995 and registered on 3rd October 1995. We do not construe the statement by the respondent in his testimony that he was 'allocated the land in 1995' to mean, as counsel for the appellants has urged us to do, that he was the allotee of the property.

28. Moreover, it was the appellants who positively asserted, in their response to the respondent's petition, that the property was previously public utility land set aside for squatter settlement and that lawful steps were not followed in its acquisition by the respondent and in the issuance of the Grant in his favour. As the trial Judge stated, the appellants had a duty to produce "evidence to demonstrate either

that the land was previously a public utility playground" and that it was "set aside by the Government for purposes of settlement of squatters". They did not do so. Rather, the evidence presented by the appellants (essentially consisting of correspondence) related to their endeavour, in the year 2000, to have the property allocated to them on the basis that they were in occupation.

29. We are therefore in agreement with the learned Judge that while the appellants alleged that the respondent's:

> "...title was unlawfully obtained, they did not place anything before me to demonstrate that the same had been obtained in a manner that was unlawful. Having known of the existence of the title as far as back as the year 2000 when they engaged in the above correspondence, they took no steps to try and impeach the same on account of the alleged grounds of irregularity and only raised the issue some 13 years later after the Petitioner brought them to Court."

30. We are unable to fault the judge for concluding that the appellants had failed to establish that the property was illegally and un-procedurally acquired by the respondent and in upholding the respondent's title over the same.

31. Regarding the question whether the award of general damages of Ksh. 3.5 million is well founded counsel for the appellants submitted that damages have to be specifically pleaded and proven; that based on the amended petition, the court was not called upon to determine the question of general damages and no evidence was led in this regard; that the quantum of damages awardable is dependent on the nature of right that is violated, the extent of violation and gravity of injury caused and in this case the respondent's right to owning property was not violated; that in this case the respondent did not lawfully acquire the property and Article 40 of the *Constitution* was not violated; and that the award of Ksh. 3.5 million was arrived at unjustly without any justification.

32. Counsel for the respondent on the other hand submitted that the respondent established that the appellants are trespassers who unlawfully and illegally occupied his property; that by dispossessing the respondent of his property, compensation is awardable. The High Court judgment in the case of *Arnacherry Limited v. Attorney General* [2014] eKLR was cited in support.

33. In making the award, the learned trial Judge observed that the respondent was 81 old when he testified; that when he was issued with the title over the property in 1995, he was aged 57 years and that he had been fighting for 24 years to get his land taken away from him on threat of violence by the appellants who had trespassed on the property. The Judge noted that the respondent had asked for Ksh. 5.0 million in compensation but that he deserved "some compensation for those lost years" and awarded Ksh. 3.5 million.

34. There was, in the amended petition, a prayer for general damages. In his affidavit the respondent deponed that the continued illegal occupation of the property by the appellants "will cause" him "irreparable loss and damage." However, in his testimony before the trial court, the respondent did not indicate the nature of loss he was alluding to. Nonetheless, in his counsel's written submissions before the trial court, it was urged that the respondent "had always had the intention to develop the property but the invasion had infringed on his rights to the use and enjoyment of his property" and that he was claiming damages "for being deprived use of his property for over twenty (20) years". Submissions are of course no substitute for evidence. [See *Japhet Nkibutu & another v Regina Thirindi* [1998] eKLR]. There is merit therefore in the complaint by counsel for the appellants no evidence was led in this regard. See also *Peter Mwangi Mbuthia and another v. Samow Edin Osman* [2014] eKLR.

35. Furthermore, the normal measure of damages for trespass to land or wrongful occupation or user would be the market rental value of the property occupied or used for the period of wrongful occupation or user or mesne profits and one would have expected the respondent to lead evidence in that regard. See K*enya Hotel Properties Limited v. Willesden Investments Limited* [2009] eKLR. It is not evident how the learned Judge arrived at the award of Ksh. 3.5 million. We are therefore unable to uphold that award of general damages and the same is hereby set aside.

36. Lastly, there is the question whether the appellants established their claim for adverse possession. Counsel for the appellants submitted that the ingredients required in a claim for adverse possession were proved. This Court's decision in *Mtana Lewa v. Kahindi Ngala Mwagandi* [2015] eKLR among other decisions, was cited. It was submitted that the Judge erred in concluding that there was no evidence to show when each and every one of the appellants put up their structures and the measurements of the portions they occupied; that the appellants established they were in open and notorious use of the property and the timelines when they put up the structures on the property were set out in the documents that were filed; that the surveyors report by Welton Maritim which was produced also established the occupation; that it was also established that the appellants' possession of the property was exclusive, without force, without secrecy and without permission of the owner.

37. It was submitted that contrary to the finding by the Judge that the respondent was kept out of the property by force, no evidence was tendered in support; that the material on which the Judge relied to conclude that the respondent was prevented from accessing the property by use of violence carried no weight being "mere banters" which alone cannot be used as evidence of use of violence.

38. Counsel for the respondent on the other hand submitted that it was established, and the learned Judge properly found, that the appellants' did not satisfy all the requisite conditions required in a claim for adverse possession; that the illegal occupation of the appellants was openly challenged; that if, as the appellants claim, they were in occupation for over 30 years, nothing would have been easier than for them to have made an application to court for extinction of the respondent's title by adverse possession. It was urged that the appellants did not demonstrate that their occupation was not without force and the Judge correctly found that the appellants resisted the respondent's entry and occupation of the property by use of violence.

39. In *Mtana Lewa v. Kahindi Ngala Mwagandi* (above) Makhandia, JA explained that:

> "Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*..."

40. To sustain a claim for adverse possessions, those essential prerequisites should be proved on a balance of probabilities. They cannot be assumed. In *Watuko v. Busolo & 3 others* (Civil Appeal 129 of 2017) [2022] KECA 171 (KLR) this Court expressed as follows:

> "Adverse possession commences in a situation where an intruder who is in wrongful occupation makes a claim of ownership against a right of the true owner by alleging that due to clear and unequivocal evidence he/she has been in possession was not permissible, open,

with the knowledge of the true owner, and excluded the true owner from the enjoyment of his property. The onus is on the person claiming adverse possession to prove, in the words of Kneller J. (as he then was) in *Kimani Ruchine v Swift, Rutherford & Co. Ltd* (1980) KLR 10 that: -

> " The plaintiffs have to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration;"

41. As already stated, of the 19 appellants, only the 3rd appellant testified. Beyond the general averment in the answer to the petition, repeated by the 3rd appellant in his testimony, that the appellants have been in possession of the property for "over 30 years in aggregate", no evidence was tendered when each of the appellants occupied the property. There has to be certainty as to when time begins to run for purposes of claims in adverse possession. That as it may, even though the learned Judge of the ELC found, without determining when the alleged adverse possession with respect to each appellant began, that the appellants had been in possession of the property for over 13 years, he was not persuaded that the occupation was peaceful and without force.

42. In his petition and supporting affidavit, which he adopted as his evidence in chief, the respondent pleaded and deponed that he had immense problems in obtaining vacant possession of the property, that the 1st appellant used his political clout and used local youths to stage violent demonstrations to lock the respondent out of the property and who, as a result, had "real apprehension for his personal security and safety. He pleaded further that he engaged and paid for survey and re- establishment of beacons, but the exercise aborted on account of "staged violent demonstrations to prevent" the exercise; that his attempts to recover the property including involving the administration were unsuccessful.

43. In affirming the respondent's pleas in that regard, the appellants in their answer and response to the petition averred that the respondent "is not entitled to any single minute of any quiet enjoyment and/ or exclusive possession" of the property on account of being a "land grabber"; that the respondent and his surveyor have no right of entry and "shall never be allowed to set foot thereat whether with the police or otherwise" and that any attempts by the respondent to occupy the property would be defended by the appellants "with their blood, lives and spirits". Under cross examination, the respondent reiterated that when he went to the property, he was chased away and was scared going there.

44. Based on the foregoing, there was a proper factual basis for the learned Judge's finding that the appellants forcibly held onto the property preventing the respondent from occupying it. In that regard, the learned Judge of the ELC stated:

> " I have no hesitation in finding that the Respondents have since the year 2000 forcefully held onto the suit property and that their claim for adverse possession thereof must fail. Their occupation of that property is illegal, unlawful and without any foundation in law or otherwise. They have clearly by their admission used unlawful means to deprive the Petitioner of the use and occupation of his property. This Court will not allow them to continue to benefit from the illegality of their actions."

45. We respectfully agree. The averments in the appellants' answer to the claims by the respondent in the petition that he was forcibly kept out of the property are effectively admissions by the appellants that

the respondent was indeed forcibly denied access to the property. The argument that the appellants' averments in that regard were "banter" is hardly persuasive. Banter has no function in pleadings.

46. The upshot of the foregoing is that we uphold the judgment of the ELC delivered on 18th September 2020 except for the award of general damages of Ksh. 3.5 million which is hereby set aside.

47. We order that each party shall bears its own costs of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER 2023

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR