



REPUBLIC OF KENYA



**Ali v County Government of Mombasa & another (Civil Case
143 of 2019) [2024] KEELC 4055 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 4055 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL CASE 143 OF 2019**

**LL NAIKUNI, J
APRIL 30, 2024**

BETWEEN

FARID SALIM ALI PLAINTIFF

AND

COUNTY GOVERNMENT OF MOMBASA 1ST DEFENDANT

**AHMED ALI KIBWANA ALIAS ABDULMAJID ALI KIBWANA 2ND
DEFENDANT**

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by Farid Salim Ali the Plaintiff herein through a Complaint dated 1st August, 2019 and filed on 2nd August, 2019 against The County Government of Mombasa and Ahmed Ali Kibwana alias Abdulmajid Ali Kibwani the 1st and 2nd Defendants herein.
2. Upon service of the pleadings and the Summons to Enter appearance, the 2nd Defendant herein entered appearance through a Memorandum of Appearance dated 6th January, 2020. Never the less, for no apparent good reason nor justifiable cause, neither of the Defendants filed their Statements of Defence nor called any witnesses. On 15th June, 2022 the Court directed that the matter proceeds as a formal proof matter.
3. Thus, on 15th June, 2023 the Plaintiff having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the Pre - trial conference, the suit was fixed for full trial on the same date.
4. This matter proceeded on for hearing by way of adducing “viva voce” evidence with the Plaintiff’s witness (PW – 1) and (PW - 2) testifying in Court on 15th June, 2022. After which the Plaintiffs closed their case. The 1st and 2nd Defendants never filed any documents neither did they call any witnesses.



II. The Plaintiff's case

5. From the filed pleadings, the Plaintiff is described in the Plaint as an adult of sound mind residing and/or working for gain at Mombasa. The Plaintiff is one of the registered owners of the leasehold interest in the property known as C.R 23226 situate in Mtopanga, Mombasa County (Hereinafter referred to as "The Suit Property"). He was a grocer who resided and carried on business in a shop situated on the said plot. On 6th May, 2019 the 1st Defendant through the Sub - County Commander Kisauni served or caused to be served an enforcement Notice dated 6th May, 2019 on the Plaintiff's daughter who was present on the suit property at the time. On 8th May, 2019 the 2nd Defendant accompanied by several officers, employees, servants and/or agents of the 1st Defendant invaded the suit property and demolished the said shop, seized and carried away there from the stock-in-trade, goods of the Plaintiff, which were therein. According to the Plaintiff he was a stranger to the Notice as it never contained details on the plot such as land reference numbers, nor owner. It was therefore vague, null and void.
6. The Defendants had no legal basis visit the Plaintiff's property which was a private property and demolished the shop causing chaos and vandalism. The Defendants had trespassed on the Plaintiff's property and caused serious loss and damage. The Defendants' invasion of the suit property and demolishing the entire shop was illegal and amounted to trespass.
7. The Plaintiff relied on the following particulars of trespass by the Defendants and person authorized by them:-
 - a. That the Defendants either by themselves or through persons acting for them, on 6th May, 2019 forcefully gained entry into the suit property and served or caused to be served thereon a Notice that was not in relation to the suit property or the Plaintiffs.
 - b. The Defendants either by themselves or persons acting for them invaded the suit property on the 8th May, 2019 forcefully and unlawfully gained access thereto and demolished a shop on the said property.
 - c. The Plaintiff had been deprived of the use and quiet enjoyment of the suit property.
8. According to the Plaintiff other than trespassing on the suit property and causing serious damage thereon and threatening the Plaintiff, the Defendants threatened to evict the Plaintiff from the suit property. The Defendant's actions were in bad faith and amount to abuse of office and misuse of state machinery and resources to threaten and intimidate the Plaintiff who was an innocent private property owners.
9. The Plaintiff relied on the following particulars of bad faith and abuse:-
 - a. Purporting to serve a Notice that was in no way related to the plaintiff suit property.
 - b. Using the county askaris to intimidate, threaten and demolish the Plaintiff shop.
 - c. Using public resources such as motor vehicles to access the suit property and to commit illegalities thereon.
10. The Plaintiff also relied on the following particulars of special damages:-Building expenses – Kenya Shillings One Fifty Nine Thousand Two Thirty Hundred (Kshs.159,230/-) and the Plaintiff claimed damages.
11. By reason of the foregoing, the Defendants threaten and intend unless acts complained of. There was no suit pending and that there had been no previous proceedings in any court between the Plaintiff and



the Defendants in respect of the subject matter of this suit. The Plaintiff submitted to the jurisdiction of the Court.

12. The Plaintiff prayed for Judgment against the 1st and 2nd Defendants jointly and severally for:-
 - a. An order of permanent injunction to restrain the defendants by themselves or their servants or agents and/or otherwise howsoever from invading, trespassing, visting on the plaintiffs property known as C.R. 23226 and from demolishing any other structure erected on the said property and from generally interfering with the plaintiffs quiet and peaceable use, occupation, possession and ownership and title of the suit property known as land reference number 23226.
 - b. General damages for trespass
 - c. Special damages
 - d. Costs of this suit and interest at court rates
 - e. Any such other or further relief as this Honourable court may deem appropriate.
13. Subsequently, the Plaintiff commenced whereon the PW – 1 testified as follows:-

A. Examination in Chief of PW – 1 by Mr. Chebukaka Advocate

14. PW - 1 was sworn and he testified in Swahili language. He identified himself as FARID SALIM ALI, the 1st Plaintiff herein. He told the Honourable Court that the he had recorded a statement 1st August, 2019 and a list of documents dated the same day and supplementary list of documents dated 3rd November, 2019. He had sued the Defendants as they demolished his house in Mtopanga. He was a holder of a Certificate of Title Deed, a copy of which was produced and marked as Plaintiff Exhibit - 1 for land reference 1013/II/MN. The official search showed that the land belonged to Ali Kibwana Shali (Deceased); Ahmed Mohamed Ramadhan; Farid Salim Ali; Jamal Ali, Fatuma Ali Mohamed an Mariam Ali Mohamed. They were not in this matter and could appear when required to. He was never served with any notice by the County Government of Mombasa. From the notice served dated 6th May, 2019 there was no reference to the suit property. They came to demolish the building in May, 2019. It was a shop and he used to pay the statutory rates to the Municipality.
15. PW - 1 explained to the Court that he had photographs to show the demolition. There was a certificate of photographs. He had sued the 2nd Defendant as they were the ones who caused the demolition which costed to incur a loss of him Kenya Shillings One Fifty Nine Thousand Two Thirty Hundred (Kshs.159,230/-). He was able to rescue the property. He prayed for the Court to grant him the costs of the demolition and case. He was never given the reasons for the demotions. It was only his shop that was demolished. The land was 3 ½ acres. According to the current market value, an acre should be going at a sum of Kenya Shillings Six Million (Kshs. 6,000,000/-) for the whole parcel it would amount to a sum of Kenya Shillings Eighteen Million (Kshs. 18,000,000/-). The land was not occupied at the moment.
16. There was neither cross – examination nor Re – examination whatsoever.

B. Examination in Chief of PW - 2 by Mr. Chebukaka Advocate:-

17. PW - 2 was sworn and she testified in Swahili language. She identified herself as NAJUMA KHAMIS SWALEH. She told the court that she was the wife to Farid Salim Ali, the Plaintiff herein. Her husband was never served with a notice on 5th May, 2019. The Defendants send people who threatened to demolish the structures. They claimed that the shop was on road reserve and parking for motor vehicle.



She was trying to prevent them but they forcefully pushed her away. The shop had the usual maize meal, rice and other food stuff. As a result of this melee and confusion it caused people to storm into our shop and started vandalizing and looting all the stuff from the shop. Nothing was left.

18. The advocate to the Plaintiff, Mr. Chebukaka produced the video showing the demolition of the shop which was admitted by the Court under the provision of Section 106A to 106B of the Evidence Act Cap 80 Laws of Kenya.
19. The Plaintiff closed their case on 15th June, 2022.

IV. The Submissions

20. On 5th December, 2022 after the Plaintiff marked a close of their case. Subsequently, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that the Plaintiffs complied accordingly and on 19th February, 2023, the Honourable court reserved a date to deliver its Judgement on 19th March, 2024 though this changed due to unavoidable circumstances including the one week training for the Environment and Land Court Judges. Thus, the Judgement was delivered on 30th April, 2024.

A. The Written Submissions by the Plaintiff.

21. On 16th January, 2023, the Learned Counsels for the Plaintiff through the Law firm of Messrs. Chebukaka & Associates Advocates filed their written submissions dated 13th January, 2023. Mr. Chebukaka Advocate submitted that in the Plaint as initially filed in these proceedings on 2nd August, 2019 the Plaintiff had sought inter alia an order of injunction, general damages, special damages amounting to Kenya Shillings One and Fifty Nine Thousand Two and Thirty Hundred (Kshs. 159,230/-). The Defendants never filed any statements of defence even after being served with the Plaintiff's pleadings. The Plaintiff and his witnesses testified on how the 1st Defendant's agents and/ or proxies destroyed his premises on his property under the guise that it was a road reserve.
22. The Learned Counsel averred that it was not in dispute that the Plaintiff is one of the registered owners of the suit property even though the 1st Defendant contends that the plaintiff is illegally occupying plot No.1013/II/MN C.R. No.23226 without the Plaintiffs knowledge which was further sub-divided into title numbers C.R. 26646 and 2664 as per the supplementary list of documents filed on the 14th October, 2022 where the Notice was served which notice stated that it was to remove abandoned container, structure and vehicle on the road/public pavement and goods as per exhibit 3 on the list of documents filed on the 2nd August, 2019 which allegation was false, reckless, irresponsible and outrageous as the county government was responsible for physical planning in the county of Mombasa and which has custody of official records. There were a series of illegalities committed by the Defendants and their officers and which the Plaintiff's was complaining about as the other owners of the plot refused to co-operate to file suit for reasons best known to them. Since the invasion and destruction of private property and which action had not been denied by any of the Defendants, on that issue alone, the Plaintiff had established a prima facie case and thus the prayers sought should be granted. The Plaintiff had shown on a "prima facie" basis that the Defendants had no basis of serving the enforcement notice on the Plaintiff's suit property as it was private property and not on a road reserve as claimed by the 1st Defendant.
23. It was the Learned Council's submission that the Defendant had proved his case beyond reasonable doubt as the provision of Section 24(a) of the Land Registration Act, No. 3 of 2012. Further, he referred



to the provision of Section 26 (1). He additionally, cited the provision of Section 116 of Evidence Act, cap. Which was very clear:-

“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner”.

24. The Learned Counsel argued that no evidence was produced by the Defendants to contradict the issue of title as being fraudulent or was fraudulently obtained. On damages the Plaintiffs submit that the Defendant's actions comprise of absolute illegalities. The allegations that the Plaintiff's property lies on a road reserve is false as no evidence was produced to prove that fact by the 1st Defendant. On a balance of convenience, the Plaintiffs having demonstrated that they are the registered owners of the suit property and that the same was not on a road reserve, the balance of convenience tilts in favour of the Plaintiffs being given a chance to enjoy their private property without interference from the Defendants.
25. In conclusion, the Learned Counsel submitted that they had shown that the Plaintiff was entitled to the orders sought. The Learned Counsel relied on the following case laws to show the entitlement of the prayers sought:-
 - a. “E.L.C CASE NO. 791 of 2014 - Nduku Mbindyo & Another – Versus - Mungali Musya & 2 Others”.
 - b. “E.L.C No. 792 of 2014 - David King'oo Ngongu – Versus - Peter Ndingu Musembi & 3 Others

IV. Analysis and Determination

26. I have keenly assessed the filed pleadings by all the Plaintiffs herein against the Defendant, the written submissions and the cited authorities, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.
27. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following five (5) issues for its determination. These are: -
 - a. Whether the Plaintiff is the bona fide legal owners of the suit property
 - b. Whether the Defendants trespassed unto the suit properties without authority of the Plaintiffs;
 - c. Whether the Plaintiff is entitled to the damages.
 - d. Whether the order of permanent injunction restraining the Defendants from dealing with the suit property should be given?
 - e. Who bears the costs of the suit?

Issue No. a). Whether the Plaintiffs are the bona fide legal owners of the suit property

28. Under this sub – heading, the Honourable Court has deciphered that the main issue is on the legal ownership of the suit property and the whether therein were illegalities over it by the Defendants. To begin with, the Plaintiffs through their witness and in their submissions have averred that he is the legal registered owners of the suit property. It is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. This is



what in law is termed as the “Burden of Proof” and is encapsulated for by Section 107 of the Evidence Act Cap 80 laws of Kenya which provides as follows:-

“ 107 Burden of Proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

29. Fundamentally, I reiterate that the issue of the ownership of the suit properties has been an issue in this proceedings. It is trite that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that they are the absolute and legal owner of the property. In so doing, based on the provision of Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012, the owner attains indefeasible rights, title and interests on the land vested in him/her by the law. The provision of Section 24 of the Land Registration Act provides:-

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;”

30. While the provision of Section 25 states as follows:-

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- i. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

31. However, the registration of such title is not absolute as the same maybe impeached under certain circumstances as provided by the provision of Section 26(1) of the Land Registration Act which states as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

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



32. In this instant suit as already stated above, the evidence of the Plaintiff remain uncontroverted. The Plaintiff produced and has attached the original title deed (exhibit 1 as prove that he is the owner of the suit property. The Defendants on the other hand never produced any title neither have they shown any authorization to be on the suit properties known as Land number C.R 23226 situate in Mtopanga, Mombasa County. It has been said time and time again that a Title Deed is an indefeasible evidence of the ownership of land. It is also not in dispute that the ownership of the land is uncontroverted. There had not been any challenge by the Defendants on the Plaintiff's title by reason of fraud or otherwise as envisaged under the provision of Section 26 (1) (a) and (b) of the [Land Registration Act](#), No. 3 of 2012.
33. I have looked at both the title deed of Land parcel known as Land number C.R 23226 and I am satisfied that the suit property indeed belongs to the Plaintiff who is the registered proprietors of the suit property. The registration and proprietorship of the Plaintiff is therefore not in dispute and thus, the Plaintiff remains the rightful, absolute and indefeasible owner of the property with all the rights and privileges accruing therefrom; including the right to possession, to a quiet and peaceful occupation and right to use of their property.
34. herefore, based on the overwhelming evidence by the Plaintiff and which was never controverted by the Defendant, I am persuaded and hence hold that the Plaintiff is the rightful registered proprietor of the suit properties having been issued with the title deeds and the boundary features clearly outlined by the Land Registrar and is thus entitled to protection of the law.

Issue No. b). Whether the Defendants trespassed unto the suit properties without authority of the Plaintiffs?

35. Under this sub- title, the Honourable Court having pronounced that the suit land legally and absolutely owned by the Plaintiff, its to access the trespass and the damages entitled to the Plaintiff. The Plaintiff have contended that on 8th May, 2019 the 2nd Defendant accompanied by several officers, employees, servants and/or agents of the 1st Defendant invaded the suit property and demolished the said shop, seized and carried away there from the stock-in-trade, goods of the Plaintiff, which were therein. According to the Plaintiff he was a stranger to the Notice as it did not contain the plot number and was therefore vague, null and void. According to the Plaintiff, the Defendants had no legal basis visit the Plaintiff's property which is a private property and demolish the shop causing chaos and vandalism. The Defendants had trespassed on the plaintiff's property and caused serious loss and damage. The Defendants' invasion of the suit property and demolishing the entire shop is illegal and amounts to trespass. The Plaintiff relied on the following particulars of trespass by the Defendants and person authorized by them:-
 - a. The Defendants either by themselves or through persons acting for them, on 6th May, 2019 forcefully gained entry into the suit property and served or caused to be served thereon a Notice that was not in relation to the suit property or the Plaintiffs.
 - b. The Defendants either by themselves or persons acting for them invaded the suit property on the 8th May, 2019 forcefully and unlawfully gained access thereto and demolished a shop on the said property.
 - c. The Plaintiff has been deprived of the use and quiet enjoyment of the suit property.
36. According to the Plaintiff other than trespassing on the suit property and causing serious damage thereon and threatening the Plaintiff, the Defendants threatened to evict the Plaintiff from the suit property. The Defendant's actions were in bad faith and amount to abuse of office and misuse of state



- machinery and resources to threaten and intimidate the Plaintiff who is an innocent private property owners.
37. Accordingly, the provision of Section 3 (1) of the Trespass Act, Cap 294 provides that:-
- “ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
38. Trespass is described under the Trespass Act Cap 403 to mean any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence. (Emphasis mine)
39. A continuing trespass is defined in Jowitt’s Dictionary of English Law 2nd Edition as follows:-
- “ A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor’s land”.
40. Finally, in Clerk & Lindsell on Torts 16th Edition, paragraph 23 - 01, it is stated that:-
- “ 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”.
41. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. According to the Plaintiffs as a result of the Defendants’ unlawful and illegally occupation of the Plaintiffs’ properties. The Plaintiffs relied on the following particulars of trespass by the Defendants and person authorized by them:-
- a. The Defendants either by themselves or through persons acting for them, on 6th May, 2019 forcefully gained entry into the suit property and served or caused to be served thereon a Notice that was not in relation to the suit property or the Plaintiffs.
 - b. The Defendants either by themselves or persons acting for them invaded the suit property on the 8th May, 2019 forcefully and unlawfully gained access thereto and demolished a shop on the said property.
 - c. Indeed, from the evidence by PW – 2 the wife to the Plaintiff and the video shown to Court by the Plaintiff’s Advocate in accordance with the provision of Sections 106A and 106 B of the Evidence Act, Cap. 80 upon causing the demolition of the structures belonging to the Plaintiff by the Defendant, a crowd stormed into the shop and caused wanton vandalism and looting of everything on sight to the chagrin of the Plaintiff. PW – 2 could only watch at a distance in amazement and disbelief.
 - d. The Plaintiff has been deprived of the use and quiet enjoyment of the suit property.
42. PW - 1 explained to the Court that he had photographs to show the demolition. There was a certificate of photographs. He had sued the 2nd Defendant as he was the one who caused the demolition which costed him a sum of Kenya Shillings One Fifty Nine Thousand Two Thirty Hundred (Kshs. 159,230/-). He was able to rescue the property. He prayed for the Court to grant him the costs of the demolition and case. He was never given the reasons for the demotions. It was only his shop that was demolished. The land was 3 ½ acres. It was estimated at the current market rate being an acre going



for a sum of Kenya Shillings Six Million (Kshs. 6,000,000/-) which in total would be a sum of Kenya Shillings Eighteen Million (Kshs. 18,000,000/-). The land was not occupied at the moment.

43. For these reasons, therefore, it is my opinion that the Plaintiff have proved his claim for trespass being a continued tort and being that the same remains uncontroverted the Honourable Court is satisfied that the Defendants indeed trespassed the Plaintiff's properties.

Issue No. c). Whether the Plaintiff is entitled to damages

44. Under this Sub heading, the Honourable Court will embark on assessing whether the Plaintiff is entitled to the relief sought in the given circumstances. For whatever its worth, I have taken cognizance that the Learned Counsel for the Plaintiff has and rightfully so comprehensively submitted under this issue. The provision of Section 26 (i) of the Registered Land Act, Cap. 300 (Now repealed) provides: -

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge.”

45. Undoubtedly, the Honourable Court has already established that the suit property belongs to the Plaintiff. Thus, it is settled law that where a party claims for both general damages for trespass and special damages. Compensation for a wrong committed could be claimed as general damages or special damages. In general damages compensation cannot be quantified but will be assessed by the court. In the case of special damage, such claim of the loss must be specifically pleaded and strictly proved. Proof of damages is by evidence and the Court will decide each case on balance of probability. Strict proof of special damages is not defined but Section 12 of the Evidence Act (Cap 80) provides:

“In suits in which damages are claimed, one fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant.”

46. In tort damages are awarded as a way to compensate a party for the loss he or she had incurred due to a wrongful action on the part of the other party. The damages so awarded are intended to return the party back to the position he or she was in before the wrongful act was committed. Halsbury's Laws of England 4th Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass:

- a. If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss
- b. If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss
- c. Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use
- d. Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded
- e. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased”.



47. This Honourable Court has been urged to award general damages for trespass. As to General Damages for trespass, in “Park Towers Limited (Supra), the Court held that: -
- “I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.”
48. The Plaintiffs have provided their Certificate of title deeds as Plaintiff Exhibits Numbers 1 and 2 and as it may be the Defendants failed to defend their case hence the Honourable Court finds that the Plaintiffs have proved their case.
49. I have also held that the Defendants are guilty of wrongful and illegal possession and trespassing onto the Plaintiffs’ land. According to the Plaintiff other than trespassing on the suit property and causing serious damage thereon and threatening the Plaintiff, the defendants threatened to evict the plaintiff from the suit property. Undoubtedly, the Defendant’s actions were in bad faith and amount to abuse of office and misuse of state machinery and resources to threaten and intimidate the Plaintiff who is an innocent private property owners.
50. The Plaintiff relied on the following particulars of bad faith and abuse:-
- a. Purporting to serve a Notice that was in no way related to the plaintiff suit property.
 - b. Using the county askaris to intimidate, threaten and demolish the plaintiff shop.
 - c. Using public resources such as motor vehicles to access the suit property and to commit illegalities thereon.
51. I wish to refer to the case of: “Duncan Nderitu Ndegwa (Supra) where P. Nyamweya J. held 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 general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass”
52. In the Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503, it is provided as follows:-
- (a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
 - (b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
 - (c) Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.
 - (d) --
 - (e) --
53. From the evidence on record, the Plaintiff has proved trespass and according to PW - 1, the land was 3 ½ acres valued at a sum of Kenya Shillings Six Million)Kshs. 6, 000, 000.00/=) per acre and hence a total of Kenya Shillings Eighteen Million should be Kshs (Kshs. 18,000,000/-). The land was not occupied at the moment.



54. In the case of “Willesden *Investments Limited – Versus - Kenya Hotel properties limited NBI H.C.C. NO. 367 of 2000*”, the court stated that;

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that Kshs. 10,000,000/- is a reasonable award for general damages”.

55. Taking account that the damage to the shop and being that the suit property by was quantified at a sum of Kenya Shillings Eighteen Million (Kshs 18,000,000/-). I am of the view that an award of Kenya Shillings Fifteen Million (Kshs. 1,000,000/-) as general damages will be sufficient.

56. In the Plaintiff the Plaintiff claimed that the Defendants had demolished a shop belonging to him when they trespassed. In the terminology given in Mac Gregor on Damages, Fifteenth Edition para 21 is that:-

“Special damages, are given in respect of any consequences reasonably and probably arising from the breach complained of”

57. And para 23 provides:

“Special damages, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore, they must be claimed specifically and proved strictly.”

58. In MacGregor on Damages 15th Ed (Sweet & Maxwell) 1968 paragraph 1790 on page 1791 it is stated:

“The evidence in proof of special damages must show the same particularity as is necessary for its pleading. It should therefore normally consist of evidence of particular losses such as the loss of specific customers or specific contracts. Thus, had there been a sufficient allegation of special damage in all the cases where its proof has been refused because of the plaintiff’s failure to plead specific instances, the plaintiff would still have been required to give evidence of these specific instances to prove the special damages.”

59. The Plaintiff had a shop that was demolished by the Defendants and the goods in the shop looted. PW 1 explained to the Court that he had photographs to show the demolition. There was a certificate of photographs. He had sued the 2nd Defendant as he was the one who caused the demolition which costed him a sum of Kenya Shillings One Fifty Nine Thousand Two Thirty Hundred (Kshs. 159,230/-). He was able to rescue the property. He prayed for the Court to grant him the costs of the demolition and case. He was never given the reasons for the demotions. It was only his shop that was demolished.

60. As to the quantum, it is true that special damages must be proved, but I do not accept that damages can only be proved by supporting documentary evidence. For these reasons I accept PW 1’s evidence on quantum in its entirety. Thus, I proceed to award the Plaintiff special damages of a sum of Kenya Shillings One Fifty Nine Thousand Two Thirty Hundred (Kshs. 159,230/-).

Issue No. d). Whether the order of permanent injunction restraining the Defendants from dealing with the suit property should be given.

61. Under this Sub-title, the Honourable Court will examine if for the order of permanent injunction restraining the Defendants from dealing with suit property should be given. Korir, J aptly captured the



position as regards what constitutes a permanent or perpetual injunction in the case of “Kenya Power & Lighting Co. Ltd -Versus - Sheriff Molana Habib (2018) eKLR” when he stated thus:-

“ A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

62. In this case, the Honourable Court has ascertained that the Defendants have no legal mandate to use the suit land in any manner. As such this prayer is meritorious. The principles on Injunction were established in the celebrated case of “Giella – Versus - Cassman Brown & Co. Ltd (1973) EA 358”. Having perused the Plaintiffs’ title deeds, and the Plaintiffs’ exhibits produced in court, I hold that the Plaintiffs have indeed established a prima facie case and proved its case to the required threshold to warrant the grant of permanent injunctive orders sought. Consequently, I will proceed to find that the Defendants either by themselves, agents, servants and /or anyone claiming under the defendants should be permanently restrained from entering, trespassing onto, cultivating, building structures thereon, interfering with and/or in any other manner dealing with the suit premises.

Issue No. e). Who bears the Costs of the Suit?

63. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
64. In the present case, the Plaintiff has been able to establish his case as pleaded from the filed pleadings. Therefore, they are entitled to be awarded costs of the suit to be borne jointly and severally by the 1st and 2nd Defendants accordingly.

VII. Conclusion and Disposition

65. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has established his case against the Defendants herein. Thus, the Court proceeds to make the following specific orders:
- a. That Judgement be and is hereby entered in favour of the Plaintiff against the 1st and 2nd Defendants herein in terms of the Plaint dated 1st August, 2019 and filed on 2nd August, 2019.
 - b. That an order of permanent injunction be and is hereby made restraining the defendants by themselves or their servants or agents and/or otherwise howsoever from invading, trespassing, vising on the plaintiffs property known as C.R. 23226 and from demolishing any other structure erected on the said property and from generally interfering with the plaintiffs quiet



and peaceable use, occupation, possession and ownership and title of the suit property known as land reference number 23226.

- c. That an order is hereby made that the Plaintiff be and is hereby awarded general damages for trespass of sum of Kenya Shillings One Million (Kshs 1,000,000/-) to be paid jointly and severally by the Defendants.
- d. That an order is hereby made that the Plaintiff be and is hereby awarded special damages for trespass of sum of Kenya Shillings One Hundred and Fifty Nine Thousand, Two Hundred and Thirty (Kshs 159,230/-) to be paid jointly and severally by the Defendants.
- e. That the interest of prayer (c) and (d) above shall incur interest at Court rate from the date of this Judgment until fully paid.
- f. That Costs of the suit to be awarded to the Plaintiff to be borne by the 1st and 2nd Defendants jointly and severally.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 30TH DAY OF APRIL 2024.

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HON. JUSTICE L.L NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Judgement delivered in the presence of:-

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. No appearance for the Plaintiff.
- c. No appearance for the 1st & 2nd Defendants.

