Muthiora v Marion Muthama Kiara (Suing on behalf of the Estate of Erastus Muthamia Kiara - Deceased) (Civil Appeal 43 of 2017) [2022] KECA 28 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 28 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 43 OF 2017

RN NAMBUYE, W KARANJA & KI LAIBUTA, JJA

FEBRUARY 4, 2022

BETWEEN

BEN MUTUNGI MUTHIORA ..... APPELLANT

AND

MARION MUTHAMA KIARA (SUING ON BEHALF OF THE ESTATE OF ERASTUS MUTHAMIA KIARA - DECEASED) ..... RESPONDENT

(An Appeal from the Judgment and Decree of Environment and Land Court of Kenya at Nyeri (L. N. Waithaka, J.) delivered on 6th December, 2016 in ELC Cause No. 233 of 2014)

JUDGMENT

1. By a plaint dated 14th September, 2010 Marion Muthamia (the respondent) moved the Environment and Land Court (ELC) on behalf of the Estate of her late husband who was the registered proprietor of parcels of land known as LR No. 2787/1274 and IR No. 56777 (the suit properties), contending that Dr. Ben Mutungi Muthiora's, (the appellant) occupation of the suit properties was illegal/unlawful.

2. In her suit, the respondent sought judgment against Dr. Ben Mutungi Muthiora, for, inter alia -

    a. A declaration that the parcel of land known as LR No. 2787/1274 and IR No.56777 delineated on land survey plan No. 167555 in Nanyuki Municipality in Nanyuki District ("the suit properties") forms part of the estate of Erastus Muthamia Kiara (deceased) and therefore the defendant is a trespasser thereat.

    b. A mandatory and perpetual injunction to compel the defendant by himself, his servants, employees or anybody else acting on his behalf to forthwith remove themselves from the portion of the suit properties they occupy.

    c. Damages for trespass, including aggravated damages therefor.

d. In the alternative, an order compelling the defendant to compensate and pay the plaintiff the market value of the portion of the suit properties he occupies.

3. In his statement of defence, the appellant denied the respondent's claim and averred that he was the legal owner of a portion of the suit property; that he was allocated the suit property by the Commissioner of Lands in 1991; that due process was followed in allotment of the portion of the suit property he occupied and that he had extensively developed it; that he was unaware of the respondent's competing interest to the suit property; that the respondent's claim against him was time barred and that he had acquired the portion of the suit property he occupied by adverse possession; that the respondent's case was tainted with fraud, illegality and irregularity.

4. In her testimony before the ELC, the respondent told the court that she did not know how her husband (deceased) got the land; that she got to know about the appellant's occupation of the suit property after her husband passed on and did not know when the developments thereon were erected or whether her husband was aware of the appellant's presence on the suit property; that she did not know that a letter of allotment was issued to the appellant on 3rd December, 1991 or that the Government had discovered that the plots were allocated to her husband by mistake.

5. She further testified that she was not aware that her husband had been asked to surrender the suit property in order to be offered alternative land and that nobody had approached her to surrender the titles in respect of the suit property; that once she learnt about the developments erected on the suit property by the appellant, she asked him to either vacate the suit property or pay her the market value of the portion he occupies. Concerning a claim for compensation, she told the court that she had no idea about the current market price of the suit property.

6. On his part, the appellant told the trial court that following an advertisement of plots by the Nanyuki local authority, he balloted and was allocated plot No. B1 8 Nanyuki Municipality. He paid the consideration required and the property was surveyed by a private surveyor. However, a title deed could not be issued in his favour because it was discovered that another person had a title deed to the property; that he began development on the suit property in 1993 and occupied it in 1995; that nothing happened on the ground until 2006, when the respondent approached him with a proposal to buy the plot, which proposal affected other neighbours, and he rejected the proposal; that he contacted Ecoplan Kenya for advice on how to get a title deed to the portion he occupied; Ecoplan Kenya did a report, through which he learnt that the suit property was also allocated to another person.

7. He admitted that he did not take any action against the double allocation because he did not know who he was dealing with. He also thought that the County Council of Nanyuki would correct the situation. In regard to his failure to challenge the deceased's interest in the suit property vide the succession proceedings instituted by the respondent, the appellant explained that he was not aware of the succession proceedings.

8. His witness Alexander Mwangi (DW2) an employee of the County Government of Laikipia, testified that he was in possession of records from the former office of the town clerk, County Council of Nanyuki. Among the documents in his possession, was a letter of allotment in the name of the appellant and a Part Development Plan map (PDP) of 9 plots (subdivided from the suit property); that he was not aware of any amendments to the PDP Map and that no communication on such amendments had been received from the office of the Director of Survey. Regarding the payment of rates, he stated that the appellant was in arrears of rate payments for two years, although he had been issued with a demand notice.

9. Josphat Wasilwa (DW3), an employee of the National Land Commission based at Laikipia County, took the court through the allocation process. He told the court that the suit property was allocated to the appellant in a meeting of the allocation committee chaired by the District Commissioner, Laikipia on 29th May, 1991 vide Min/Pac/1/91. After plot allocation a PDP map was drawn. The minutes were then forwarded to the Commissioner of Lands who issued a letter of allotment to the appellant. According to DW3, the appellant fully complied with the conditions set out in the letter of allotment, though belatedly; that another PDP map was prepared in Nairobi leading to issuance of a title deed to the respondent's husband.

10. According to DW3, there was an error in issuance of a second allotment letter to the respondent's husband. When the error was discovered, the Commissioner of Lands wrote to the Physical Planner Nanyuki to prepare an alternative plot for the respondent's husband. As a result, an alternative plan was developed for an industrial plot.

11. DW3 opined that the respondent's remedy lay with the Commissioner of Lands, to wit allocation of alternative land. Terming the allocation of the suit property to the respondent's husband irregular, DW3 explained that the deceased had been allocated an industrial plot within a residential area; that drawing of a second PDP map was done irregularly because the subject matter of that PDP was already committed.

12. The foregoing notwithstanding, he admitted that between an allotment letter and a lease, a lease was superior. He informed the court that although a lease was revocable under Section 14 of the *National Land Commission Act*, which came into operation in 2014, the lease issued in favour of the deceased had not been revoked, though revocation was underway. Arguing that the appellant's occupation of the suit property was lawful/proper, he pointed out that his developments on the suit property were approved by the County Government.

13. On behalf of the respondent, it was submitted that the certificate of lease produced by the respondent was legally binding because it had not been revoked or challenged by any regulatory authority; that the Letter of allotment relied on by the appellant was irrelevant because there existed a lawful Title Deed in respect of the suit property; that the appellant's letter of allotment was issued unprocedurally, because as at the time it was issued, a Title Deed in respect of the suit property existed.

14. It was pointed out that consideration in respect of the allotment was paid after the time stipulated in the letter of allotment had lapsed and that, because the appellant was in occupation of the suit property without the respondent's permission, he was a trespasser and that the law took precedence over all other equitable claims to property.

15. Conversely, it was submitted on behalf of the appellant that the respondent's claim was founded on the tort of trespass to land; that Title to the suit property having been obtained on 22nd October, 1992, and the appellant having been in use and occupation of the suit property since 1991 (for over 18 years), the respondent's claim was time barred by operation of law. Furthermore, the appellant was not a trespasser on the suit properties because he was thereon with the permission of the Commissioner of Lands.

16. From the pleadings and the submissions, the court discerned the issues for determination to be-

> " a) Whether the plaintiff's claim is time barred?
>
> b. If the answer to (a) above is negative, whether the plaintiff has made up a case for being granted the orders sought or any of them?

c. What orders should the court make?"

17. On whether the claim was time barred, inasmuch as there was evidence that the appellant was in occupation of the suit property for more than the time stipulated in Sections 4 of Cap 22 for bringing a claim based on the tort of trespass to land, the court found that the tortious act therein was a continuing one and thus that section could not be relied on to defeat the respondent's claim, if it was determined that the appellant's occupation of the suit property was unlawful.

18. As to whether the Title held by the respondent's late husband had been extinguished by the appellant's alleged adverse possession of the suit property, the court noted that the defendant neither urged nor proved a case for being declared to be in adverse possession of the suit property. That being the case and given the fact that mere occupation and use of land did not establish adverse possession, the court was not persuaded that the respondent's title to the suit property had become extinguished.

19. On whether the respondent had made a case for being granted the orders sought or any of them; the court found that this was a case of double allocation of land, and the appellant having failed to lead any evidence capable of proving that the respondent's husband was party to the alleged fraud in registration of the suit property in his favour, the court found that the appellant's continued occupation of the suit property was unlawful.

20. That notwithstanding, the appellant having taken possession and developed the suit properties on the mistaken belief that he had a good claim to it and given the fact that the respondent was not opposed to giving the appellant an opportunity to redeem his interest in the suit property, the court found and held that it was just and equitable to give the appellant an opportunity to redeem his interest in the suit property by paying to the respondent the current market price of the land he occupied.

21. The court noted that since the respondent did not adduce any evidence of the current market value of the suit properties, it directed that the respondent commissions a valuation of the suit properties by a registered valuer. In determining the market price of the land, the court directed that the valuer takes into account the value of the land only and disregard the improvements effected thereon by the appellant.

22. The court ordered that the report of the valuer be filed with the court within 45 days from the date of the judgment to enable it assess the compensation due to the appellant. The appellant was at liberty to commission an independent valuation of the portion he occupied and have the report filed with the court within the time intimated above.

23. In the event that the appellant was not willing to redeem his interest in the suit property, the court directed that he vacates the suit property within 45 days of delivery of the judgment, failing which the respondent would be at liberty to have him forcibly evicted therefrom. As the respondent had succeeded in her claim against the appellant, she was awarded the costs of the suit and interest at court's rate. The court also directed that ELC 233 of 2014 being a test suit, the judgment entered therein was to apply to HCCC No. 119 of 2016 and HCCC No. 120 of 2010.

24. Aggrieved by the above findings, the appellant proffered the instant appeal which is premised on six (6) grounds, inter alia, that the learned Judge erred in law by failing to adequately address her mind to the statutes and precedent with regard to Limitations of Actions and adverse possession or in other words misapprehending the law with regard to the Limitations of Actions and adverse possession, and by failing to find that the respondent's claim was time barred by virtue of the relevant provisions of the *Limitation of Actions Act*.

25. Further, that the Judge misdirected herself in failing to find that the respondent's registration as owner of the suit property was flawed and, therefore, invalid and in determining that the appellant was in illegal occupation of the suit property, erred in granting to the respondent a relief which the respondent had not claimed and erred in making an order for costs against the appellant.

26. When the appeal came up for plenary hearing through the virtual platform, learned counsel Ms Hellen who held brief for Mr Mwangi Kariuki for the appellant informed the Court that they were wholly relying on their written submissions filed before this Court, and so did Mr Kurauka learned counsel for the Respondent. The appeal was, therefore, canvassed through written submissions in the presence of counsel for the respective parties with no oral highlighting.

27. On the issue of whether the respondent's claim is time barred by virtue of the *Limitation of Actions Act*, the appellant submits that if the learned trial Judge was right in upholding that trespass is a continuing tort, this raises the question as to the particular time in which the tort the subject of the claim is alleged to have been committed; that the trespass for which the respondent sued is specific in time as can be seen from her pleadings; that the respondent in her oral testimony said that, on noticing that part of the suit land was occupied, she instructed her advocate who pursuant thereto wrote a demand letter on 20th September, 2006; that this could only mean she had noticed the trespass prior thereto; that neither in her pleadings nor in her oral testimony does the respondent state that the appellant continued to trespass on the suit property after she first noticed the trespass or after her said advocate's letter dated 20th September, 2006; that the appellant's pleadings, statement and oral testimony are very specific as to the trespass she sued for; that is the one committed before or as at 20th September, 2006 when the demand letter was written.

28. He further submits that there was no doubt as to the trespass complained of that existed as at 20th September, 2006 when the demand letter was written on behalf of the respondent; that this suit was brought as per the date stamp on the plaint on 20th September, 2010 coincidentally exactly four years after that trespass; that in the absence of any pleading and/or testimony of the trespass having been continued after 20th September, 2006 to a time within the limitation period of three years to 20th September, 2010 when the suit was brought, the respondent's case was clearly time barred by virtue of Section 4(2) of the *Limitation of Actions Act* and the learned Judge should have dismissed it on that ground; that she misdirected herself by failing to determine that the trespass for which the respondent sued was the one existing as at 20th September, 2006 and no other.

29. On whether the suit was time barred by virtue of Section 7 of the *Limitation of Actions Act* and the respondent's title is extinguished, he submits that the appellant's relationship with the suit premises was not that of mere occupation and use of the land; that the appellant's statement and his oral testimony point to a person who aggressively and confidently took the allocation of the suit premises with gusto, by commissioning a survey of the premises with a view to obtaining registration, construction of permanent residential accommodation within a year of allotment, completing and commencing residence in a house he had developed on the premises in 1995 and continuing to put up other developments in the premises.

30. The appellant further submits that his averments in the statement of defence, the purport of his documents and his oral evidence all went uncontroverted and unchallenged and were to the effect that he was in uninterrupted active use, possession and occupation of the suit premises from the year 1992 to the year 2010 (a period of 18 years) when the suit was instituted; that his dealings with the premises during the period could not by any account be termed as mere occupation and use; that those dealings were to say the least aggressive use, possession, occupation (including residence) all consistent with the

rights of a person in lawful use and inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.

31. On whether the appellant had acquired title by adverse possession, he submits that while it is true that the appellant did not pray for declaration of adverse possession, the rest of the learned Judge's findings are a misdirection; that the appellant had already drawn the attention of the court to the respondent's pleadings at paragraphs 5, 10 and 12 of his defense; that those averments in sum and substance amounted to a defense of trespass and in effect, a claim in adverse possession; that this was in the belief that such declaration could not be made in a defense but that the party should bring a suit specifically for the purpose.

32. On whether the appellant had trespassed, he invites the court to address its mind to the question as to what amounts to trespass and to uphold the appellant's opinion of the same as expressed in the superior court's submissions that the appellant's intrusion was justifiable and that the land as at the time of intrusion was not in possession of another person; that the upshot of such finding would be that the respondent had failed to prove trespass.

33. On Ground 4, the appellant submits that DW3, an official of the National Land Commission testifying in the lower court, stated that registration of the respondent as the owner of the suit premises was by error or fraud as the land had been earmarked for the appellant alongside other allotees and on realization of the error, the granting authority sought to rectify the same by asking the respondent to surrender the land in exchange for another parcel of land, which offer the respondent apparently never took up.

34. He further submits that the registration of the land in the respondent's name was also shrouded in mystery, he not having shown that like the appellant, there was compliance with the then applicable Government Lands Act which sets out the criteria, procedure, requisites and conditions for allocation of Government Land; that this being the case, the acquisition and registration of land in the name of the appellant was clearly tainted by fraud of which the respondent must have been a party to.

35. On the award of costs to the respondent, the appellant submits that in the case before the trial court, it was demonstrated beyond peradventure that the occupation, use and possession of the suit premises by the appellant was not out of malice, deliberate act of nuisance, negligence or a conscious effort at trespass but it was from a mistaken belief that he was the legitimate owner of the premises; that this should have been a mitigating factor; that the court should have considered that the appellant's trespass was "innocent" and occasioned by a third party; that the Commissioner of Lands who led the appellant to believe that he was in lawful occupation of the suit premises while at the same time granting similar rights to the respondent; that these circumstances if considered should have persuaded the trial Judge to exercise her discretion in favour of the appellant and decline to award costs to either party.

36. On her part, the respondent has filed submissions in which she identifies the following as issues for our determination;

    a. Is the estate of Erastus Muthamia Kiara (Deceased) the lawful owner of land premises known as L.R No. 2787/1274 and I.R. No. 56777, delineated on the land survey plan No. 167555 in Nanyuki Municipality in Nanyuki District?

    b. Is the allotment letter in favour of Appellant lawful?

    c. Is the Appellant trespasser of the said property?

d. Was the deceased granted alternative premises?

e. Is the Respondent entitled to the reliefs sought?

f. Who is to bear the costs of the suit?

37. On the first issue, the respondent submits that she produced the original certificate of lease in favour of the deceased; that the certificate of lease was legally binding because it has not been revoked or challenged by any regulatory authority.

38. On whether the allotment letter in favour of appellant was lawful, she submits that the letter of allotment relied on by the appellant is irrelevant because a lawful title had been granted in respect of the suit premises; that the certificate of lease overrides the allotment letter; that the evidence is clear that the property is registered in the deceased's name; that there is evidence by the appellant's witnesses that the respondent has superior rights over the premises and that the allotment letters were not issued procedurally; that the appellant did not pay for the allotment within 30 days; that in any case, the allotment was illegal and against procedure because there was an existing title to the property.

39. On whether the appellant is a trespasser on the said property, the respondent submits in the affirmative for reasons that he does not have the respondent's authority to occupy the premises.

40. On whether the deceased was granted alternative premises, the respondent submits that she has not and has never been made aware of an alternative property, and the appellant's witnesses confirmed that the respondent has never been shown and or informed of any alternative premises as alleged; that therefore she could not be expected to accept or challenge the new offer.

41. In conclusion, she submits that Section 23(1) of the *Registration of Titles Act* (Cap 281) gives an absolute and indefeasible title to the owner of the property; that the title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party; that such is the sanctity of title bestowed upon the title holder under the Act; that the law takes precedence over all other alleged equitable rights of title; that in fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.

42. We have reconsidered the evidence adduced before the trial court as rehashed above as expected of us in obedience to our mandate as prescribed under Rule 29(1)a of this Court's Rules. We have also considered the detailed and thorough rival submissions by counsel for both parties. This being a first appeal, the duty of this Court is as was stated in the case of *Abok James Odera t/a A. J. Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*, where this Court pronounced itself as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

43. Having re-considered and reanalyzed the evidence as stated above along with the rival submissions by learned counsel and the law, we discern the issues falling for our determination to be:-

i. Who between the appellant and the respondent holds good title to the suit premises;

ii. When the cause of action of trespass arose;

iii. Whether the appellant acquired title by adverse possession.

44. It is not disputed that the appellant's letter of offer for allotment of the suit property was dated 3rd December, 1991. The offer was accepted and the required payment made on 5th February, 1992. It would nonetheless appear that the appellant did not pursue the Certificate of Lease. In the meantime, the respondent's late husband was issued with a Certificate of Lease dated 22nd October, 1992, which indicated that the leasehold was from 1st December, 1991, which was two days before the appellant's letter of offer was issued and about 2 months before the offer was accepted and the required amount of money paid.

45. The question that therefore arises is whether the property in question was available to be allocated to the appellant. We find that it was not. Even if we were to assume that it was available for allocation, then the issue of who had better title in law comes in. This issue has been canvassed and determined before the High Court and before this Court innumerable times.

For instance, this Court in *Joseph Arap Ng'ok vs. Justice Moijo ole Keiwua, Nairobi Civil Application No. 60 of 1997*, (unreported) pronounced itself as follows:

> "Section 23(1) of the Act [RTA] gives an absolute and indefeasible title to the owner of the property. The title of such owner can only be challenged on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya will be placed in jeopardy."

46. *Similarly, in Faraj Maharus (Administrator of the Estate of Khadija Rajab Suleiman) vs. J. B. Martin Glass Industries & 3 Others*, inMombasa Court of Appeal Civil Appeal No. 130 of 2003, where the appellant was challenging a decision of the High Court that had struck off his suit for being frivolous, vexatious and an abuse of the process of the court, because his claim was based on a prior occupation license as against the respondent's later registration under Section 23 of the Registration of Titles Act, in dismissing the appeal, the Court observed:

> "The temporary occupation license issued in 1926 could not oust the certificate of title granted under the Registration of Titles Act. The appellant does not possess title under the Act. It is indeed settled law in Kenya that a temporary occupation license to occupy Government land is not sufficient to create or transfer title to the grantee or his personal representative."

Precisely put, a letter of allotment cannot supersede or override a Title Deed or Certificate of Lease. In this case, therefore, we are in agreement with the learned Judge that the suit property lawfully belonged to the respondent's late husband. His Title to the land could only be impeached if it was demonstrated that the transaction leading to the deceased's registration as the owner of the suit property was fraudulent, and that the deceased was party to such fraud.

47. Section 26 (1) of the *Land Registration Act* provides that;

> "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, restriction and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge." (Emphasis added)

48. In a bid to impugn the respondent's Title, the appellant alleged fraud on the part of the respondent in his statement of defence before the trial court where he averred that the respondent's case was tainted with fraud, illegality and irregularity. In its judgment, the trial court found that the appellant had failed to lead any evidence capable of proving that the respondent's husband was party to the alleged fraud in registration of the suit property. Relentless, the appellant reiterated in his submissions that the acquisition and registration of land in the name of the deceased was clearly tainted with fraud to which the respondent must have been a party.

49. Sections 109 and 112 of the *Evidence Act* provides that:

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. [emphasis added]
>
> ...
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

50. The law is clear as buttressed in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR*, where Tunoi, JA. (as he then was) stated as follows:

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

Apart from the allegations of fraud made by the appellant against the deceased, there was no proof to a degree higher than "a balance of probability" but lower than "beyond reasonable doubt" as required in law to demonstrate that the Certificate of lease was obtained fraudulently, and further that the deceased was involved in the said fraud. The allegations of fraud and irregularity as averred by the appellant herein thus fall by the way side.

51. From the foregoing, it is clear that the suit property belonged to the respondent's husband, and to herself by virtue of her being the administrator to the deceased's Estate. This inevitably leads us to the conclusion that the appellant was a trespasser in the suit property. Was the suit against him statutorily time barred?

52. Section 4(2) of the *Limitation of Actions Act* provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. This presupposes a case of a one-time trespass. The term "accrue" in the context of a cause of action means to arrive, to commence, to come into existence or to become a present enforceable demand or right. The time of accrual of a cause of action is a question of fact (see Black's Law dictionary at Page 23). However, in a case of a continuing trespass, a trespass consists of a series of acts done on consecutive

days that are of the same nature and that are renewed or continued from day to day so that the acts in the aggregate form one indivisible harm.

53. Trespass is described under the *Trespass Act* Cap 294 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". On the other hand, a continuing trespass is defined in *Jowitt's Dictionary of English Law 2nd Edition* (page or paragraph?) 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".

In *Black's Law Dictionary 8th Edition* (page or paragraph?), a continuing trespass is defined as:-

> " A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property"

Finally, in *Clerk & Lindsel 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".

54. From the above definitions of the term "trespass" by the eminent learned authors, it is clear that any unauthorized entry whether present or continuous is trespass. In this case, it is indeed common ground that the appellant entered into and has remained in occupation of the suit property. The appellant's continued occupation of the said property from the 1st date of entry in so far as it is unauthorized by the respondent amounts to trespass and remains as such to date. The respondent's claim for trespass being a continued tort is, therefore, not time barred. We find no fault with that finding by the trial court.

55. On whether the appellant acquired title to the suit property by adverse possession, the court noted that the respondent neither urged nor proved a case for adverse possession of the suit property. The appellant alluded to the claim of adverse possession in his statement of defence dated 28th March, 2011 at paragraph 12 where he stated:-

> " The defendant in answer to paragraph 15 of the plaint states that he has been in continuous and uninterrupted use, occupation and use of the property for a period of over 18 years as at the filing of the suit and since registration in the name of the deceased if at all. The defendant will therefore contend at the hearing of the suit that the same is time barred by virtue of the *Limitation of Actions Act* for which reason alone the suit ought to be dismissed."

The trial court having found that the tort of trespass was continuous, the appellant's defence of Limitation of time was rendered otiose as the three years limitation strictures set for claims based on trespass did not apply. We note further, that other than the above statement, there was no counterclaim or specific particulars given in support of a claim based on adverse possession. It is clear to us that as at the time the appellant occupied the suit property, he did so not in hostility to the respondent's title but in the mistaken belief that he was the legitimate owner of the suit property. He had no explicit intention to dispossess the respondent of the property. His occupation of the land only became adverse in 2006 after the appellant was made aware that the property belonged to the deceased and not to himself, and not before then. The 12 years statutory period had not lapsed before he was given the Notice to vacate and also sued for vacant possession.

56. We are also in agreement that the option given by the trial court for the appellant to compensate the respondent for the value of the land after valuation was fair and just in the circumstances of this case as it avails the appellant an opportunity to salvage the developments he has put up on the property, thus mitigating his loss instead of a non-optional order of eviction and demolition. We find no reason whatsoever to interfere with that decision.

57. On the issue of costs, it is trite law that costs follow the event and, the respondent having lost before the trial court after full trial, the learned Judge correctly awarded the respondent costs of the suit.

58. On the whole, we find no merit in this appeal and we dismiss it accordingly with costs to the respondent both here and in the court below.

Dated and delivered at Nairobi this 4th day of February, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR