



Okoto & another v Wasunna (Sued as the Administrator of the Estate of Edwin Dickson Wasunna - Deceased) (Environment and Land Case Civil Suit 1000 of 2012 & 403 of 2014 (Consolidated)) [2024] KEELC 3490 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3490 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT
1000 OF 2012 & 403 OF 2014 (CONSOLIDATED)**

SO OKONG'O, J

APRIL 25, 2024

BETWEEN

JOSEPH OKOTO 1ST PLAINTIFF

KENYA ELECTRICITY GENERATING COMPANY LTD 2ND PLAINTIFF

AND

HELLEN ALUOCH WASUNNA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF EDWIN DICKSON WASUNNA, DECEASED) DEFENDANT

JUDGMENT

1. I have before me two consolidated suits, ELC No. 1000 of 2012, Joseph Okoto v. Edwin Dickson Wasunna (hereinafter referred to only as “ELC No. 1000 of 2012”) and ELC No. 403 of 2014, Kenya Electricity Generating Company Limited v. Edwin Dickson Wasunna (hereinafter referred to only as “ELC No. 403 of 2014). ELC No. 1000 of 2012 and ELC No. 403 of 2014 were consolidated through an order made in ELC No. 1000 of 2012 on 16th June 2014. The court while making the order for consolidation directed that ELC No. 1000 of 2012 shall be the lead file and that the Plaintiff in ELC No. 1000 of 2012, Joseph Okoto shall be referred to as “the 1st Plaintiff” in the consolidated suit, the Plaintiff in ELC No. 403 of 2014, Kenya Electricity Generating Company Limited shall be referred to as “the 2nd Plaintiff” while the common defendant, Edwin Dickson Wasunna (now deceased and his estate represented by Hellen Aluoch Wasunna) shall be referred to only as “the Defendant”.
2. The 1st Plaintiff’s case against the Defendant is set out in the plaint dated 26th November 2012 filed in ELC No. 1000 of 2012. The 1st Plaintiff averred that all that property known as L.R No. 3734/703 Tende Drive, Lavington, Nairobi (hereinafter referred to only as the “suit property”) was an executive residential premises retained by the 2nd Plaintiff, Kenya Electricity Generating Company Limited following asset separation between Kenya Power & Lighting Company Limited (formerly East African



Power & Lighting Company Limited) and the 2nd Plaintiff as a result of the Energy Sector Reforms. The 1st Plaintiff averred that East African Power & Lighting Company Limited changed its name to Kenya Power & Lighting Company Limited (hereinafter referred to only as “Kenya Power”) on 11th October 1983 which change of name was registered against the title of the suit property on 25th October 2006.

3. The 1st Plaintiff averred that on or about 20th November 2002, the Government of Kenya released a circular communicating its decision to divest from non-strategic houses owned by the government and state corporations countrywide. The 1st Plaintiff averred that the government reinforced this decision by a further circular from the Ministry of Lands and Housing dated 18th August 2004 advising that identified non-strategic houses shall be sold to serving civil servants in occupation or otherwise qualified.
4. The 1st Plaintiff averred that as a result of the said government housing policy, the Board of Directors of the 2nd Plaintiff on or about 24th August 2005 approved the sale of ten (10) units of non-operation company-owned residential premises on terms and conditions similar to those of the Government of Kenya (GOK) asset divestiture procedure. The 1st Plaintiff averred that on or about 3rd July 2007, Kenya Power which hitherto owned the suit property transferred absolutely its proprietary interest in the suit property to the 2nd Plaintiff.
5. The 1st Plaintiff averred that the 2nd Plaintiff offered the said houses for sale by calling for bids from eligible staff. The 1st Plaintiff averred that he placed a bid and emerged the winner. The 1st Plaintiff averred that his bid was approved by the board of directors of the 2nd Plaintiff on 6th June 2007. The 1st Plaintiff averred that the 2nd Plaintiff on or about 3rd July 2007 made a formal offer to sell to him the suit property at a price of Kshs, 15,500,000/- based on the last valuation of the property that was carried out on 28th July 2005.
6. The 1st Plaintiff averred that the sale of the suit property to him was also approved by the 2nd Defendant’s parent ministry, the Ministry of Energy as required by the Ministry of Lands. The 1st Plaintiff averred that he paid for the suit property in instalments as follows;

Receipt No. Amount (Kshs.)

- i. 2300003573 1,700,000.00
- ii. 230004507 3,000,000.00
- iii. 2300007497 10,300,000.00
- iv. 2300007729 500,000.00

Total 15,500,000.00

7. The 1st Plaintiff averred that upon fulfilling the terms of sale of the suit property, the 2nd Plaintiff executed the instrument of transfer of the suit property in his favour on 6th May 2010. The 1st Plaintiff averred that the said transfer was registered on 12th August 2012 making the 1st Plaintiff the sole proprietor of the suit property. The 1st Plaintiff averred that on 4th October 2012, the 1st Plaintiff approached the Defendant who was in occupation of the suit property and demanded vacant possession but the Defendant who had no title to the property ignored the demand and refused to give possession.
8. The 1st Plaintiff averred that as a result of the refusal by the Defendant to vacate the suit property, he suffered and had continued to suffer loss of user and/or mesne profit. The 1st Plaintiff averred that the suit property had a monthly rental value of Kshs. 70,000/- which would increase annually by 5%.



9. The 1st Plaintiff sought judgment against the Defendant for; a declaration that the Defendant's occupation of the suit property was illegal and an act of trespass to land, an order directing the Defendant to vacate the suit property immediately in default of which the Plaintiff be at liberty to evict the Defendant therefrom using lawful force as might be necessary in the circumstance, special damages for loss of user and/or mesne profit as set out in paragraph 16 of the plaint, interest on damages and/or mesne profits at court rates from due dates until payment in full, and the cost of suit.
10. The 2nd Plaintiff's claim against the Defendant is set out in the plaint dated 18th August 2005 filed in ELC No. 403 of 2014 (formerly CMCC No. 9093 of 2005). The 2nd Plaintiff averred that at all material times relevant to this suit, the 2nd Plaintiff was the beneficial owner of the suit property which was registered in the name of Kenya Power. The 2nd Plaintiff averred that there was an agreement that Kenya Power would transfer the suit property to the 2nd Plaintiff and Kenya Power had executed an instrument of transfer in favour of the 2nd Plaintiff.
11. The 2nd Plaintiff averred that the Defendant had been residing on the suit property as a tenant of the 2nd Plaintiff paying a monthly for a rent of Kshs. 40,000/-. The 2nd Plaintiff averred that in breach his tenancy obligations, the Defendant defaulted in the payment of the aforesaid rent from December 2002 up to the time of filing the suit and had continued to stay in the said premises without paying rent as and when it fell due.
12. The 2nd Plaintiff averred that the Defendant had only paid a sum of Kshs. 80,000/- on account of rent since December 2002. The 2nd Plaintiff averred that it levied distress against the Defendant through which it recovered a sum of Kshs. 158,909.50 only. The 2nd Plaintiff averred that a sum of Kshs. 1,081,090.49/- remained due and payable by the Defendant to the 2nd Plaintiff as at August 2005. The 2nd Plaintiff averred that the Defendant admitted the outstanding rent in numerous correspondences with the 2nd Plaintiff and had promised to clear the same which promises had not yielded any fruit as at the time of filing the suit.
13. The 2nd Plaintiff averred that the Defendant had neglected and/or refused to settle the outstanding rent arrears and also to vacate the suit property. The 2nd Plaintiff prayed for judgment against the Defendant for; an order of eviction from the suit property, Kshs. 1,081,090.49/- being the outstanding rent arrears as at 30th August 2005 and a sum of Kshs. 40,000/- per month until possession was recovered, costs of the suit and interest at court rates.
14. The Defendant filed a defence to the 1st Plaintiff's suit and a counterclaim against the 1st Plaintiff dated 20th February 2013 on 21st February 2013. The Defendant denied the 1st Plaintiff's claim in its entirety. The Defendant denied that Kenya Power transferred the suit property to the 2nd Plaintiff and that the 2nd Plaintiff subsequently sold the same to the 1st Plaintiff.
15. The Defendant averred without prejudice that if at all the 1st Plaintiff had any interest in the suit property, such interest was subject to the Defendant's right over the property which was first in time. The Defendant denied that he was a trespasser on the suit property and that the 1st Plaintiff was entitled to any of the reliefs sought against him.
16. In his counter-claim against the 1st Plaintiff, the Defendant averred that he had lived on the suit property from about 1975 having been put in possession by and/or with the permission and consent of the then registered proprietor thereof, East Africa Power & Lighting Company Limited and/or its successor, Kenya Power & Lighting Company Limited (Kenya Power). The Defendant averred that he was at the time of filing suit working for a related parastatal, Rural Electrification Authority.



17. The Defendant averred that on or about August 1997, Kenya Power offered to sell the suit property to the Defendant which offer was accepted by the Defendant. The Defendant averred that in light of that transaction that was pending and on security consideration and not otherwise, Kenya Power allowed the Defendant to make some improvements on the suit property on which the Defendant incurred a sum of Kshs. 1,620,600/-. The Defendant averred that the said improvements that he carried out greatly enhanced the value of the suit property particulars whereof were within the knowledge of the 1st Plaintiff and/or were brought to his attention before he purportedly purchased the property.
18. The Defendant averred that if the 1st Plaintiff purchased the suit property, which was denied, the 1st Plaintiff acquired the property with the Defendant's occupation thereof on the terms then obtaining and the Defendant's improvements thereon the particulars whereof were within the 1st Plaintiff's knowledge.
19. The Defendant sought judgment against the 1st Plaintiff for; Kshs. 1,620,600/- spent on improving the suit property together with interest at court rate from 14th April 1999 until payment in full, and the costs of the suit.
20. The 1st Plaintiff filed a reply to defence and defence to the Defendant's counterclaim on 20th March 2013. The 1st Plaintiff averred that the Defendant could not claim any legal right or interest in the suit property superior to that of the 1st Plaintiff. The 1st Plaintiff averred that he had no notice of the Defendant's alleged interest in the suit property and that the same was not noted as an encumbrance on the title of the property.
21. The 1st Plaintiff denied all the allegations pleaded by the Defendant in his counter-claim. The 1st Plaintiff denied that the Defendant made any improvement on the suit property or that he incurred costs amounting to Kshs. 1,620,600/- in the process. The 1st Plaintiff averred that if at all the Defendant incurred a sum of Kshs. 1,620,600/- in the improvement of the suit property, the Defendant could only seek reimbursement of such cost from the 2nd Plaintiff and not from the 1st Plaintiff. The 1st Plaintiff averred that the Defendant occupied the suit property as a tenant and that the Defendant's tenancy came to an end when the 1st Plaintiff acquired the property. The 1st Plaintiff averred that he acquired the suit property lawful and procedurally without notice of any defect in the title thereof.
22. The Defendant filed a defence and a counter-claim, and a set-off against the 2nd Plaintiff dated 27th September 2005 on 28th September 2005. The Defendant denied that the 2nd Plaintiff was the registered proprietor of the suit property and that the Defendant was the 2nd Plaintiff's tenant on the suit property. The Defendant averred that he had lived on the suit property since 1975 and that the same was owned by Kenya Power. The Defendant averred that the 2nd Plaintiff had no locus standi to institute a suit against the Defendant.
23. The Defendant denied that a sum of Kshs. 1,081,090.50/- was due from him to the 2nd Plaintiff as rent arrears. The Defendant also denied liability to the 2nd Plaintiff for further rent at the rate of Kshs. 40,000/- per month from August 2005. The Defendant averred that on or about 14th June 2005, the 2nd Plaintiff unlawfully levied distress for rent against the Defendant for the recovery of alleged rent arrears of Kshs. 1,200,000/-. The Defendant averred that the said amount was not due and payable to the 2nd Plaintiff.
24. The Defendant averred that if at all which was denied, the suit property was registered in the name of the 2nd Plaintiff, the Defendant had not entered into any tenancy agreement with the 2nd Plaintiff. The Defendant averred that in the circumstances, the Defendant was not privy to the alleged monthly rent of Kshs. 40,000/- and the rent arrears of Kshs. 1,081,090.49.



25. In his counter-claim against the 2nd Plaintiff, the Defendant averred that in or about 1997, Kenya Power offered to sell to the Defendant the suit property which offer was accepted by the Defendant. The Defendant averred that pursuant to that transaction, Kenya Power permitted and/or allowed the Defendant to renovate, extend and build a perimeter wall around the suit property to enhance security to the property which exercise the Defendant undertook at a cost of Kshs. 1,620,600/-.
26. The Defendant averred that if the court found that the 2nd Plaintiff was the registered owner of the suit property and that the Defendant was liable to the 2nd Plaintiff in the said sum of Kshs. 1,081,090.49 which was denied, the Defendant would seek to set off the said amount against the sum of Kshs. 1,620,600/- which the Defendant used to improve the suit property.
27. In the alternative and without prejudice to the foregoing, the Defendant averred that the 2nd Plaintiff received a total sum of Kshs. 438,909.50/- from the Defendant and from the sale of the Defendant's goods since August 2002. The Defendant averred that the said sum of Kshs. 438,909.50 was received from the Defendant by the 2nd Plaintiff by mistake which mistake was that the 2nd Plaintiff was the registered owner of the suit property. The Defendant averred that in the circumstances, the 2nd Plaintiff received the said sum of Kshs. 438,909.50 to the use of the Defendant and in respect of which the Defendant was entitled to a refund.
28. The Defendant sought judgment against the 2nd Plaintiff for; Kshs. 438,909.50 paid to the 2nd Plaintiff by mistake, general damages for wrongful attachment, an order restraining the 2nd Plaintiff from evicting the Defendant from the suit property together with costs and interest.
29. The 2nd Plaintiff filed a reply to the Defendant's defence and defence to the Defendant's counter-claim on 4th October 2005. The 2nd Plaintiff joined issue with the Defendant in his statement of defence save for the admissions. The 2nd Plaintiff reiterated that it was the owner of the suit property and as such it had the legal capacity to file the suit. The 2nd Plaintiff averred that the distress for rent against the Defendant was lawful and that the Defendant had admitted being in arrears of rent in various correspondence exchanged with the 2nd Plaintiff.
30. The 2nd Plaintiff reiterated that the Defendant had continued to be in rent arrears. The 2nd Plaintiff denied that Kenya Power had given the Defendant permission to renovate and/or extend or build a perimeter wall around the suit property in 1999 or at all. The 2nd Plaintiff denied further that the Defendant spent a sum of Kshs. 1,620,600/- in the said exercise. The 2nd Plaintiff averred further that the Defendant was a former Managing Director of the 2nd Plaintiff and as such he was fully aware of the terms and conditions under which he occupied the suit property. The 2nd Plaintiff urged the court to dismiss the Defendant's counter-claim and to enter judgment for the 2nd Plaintiff as prayed in the plaint.
31. The 1st Plaintiff, Joseph Okoto (PW1) told the court that he was a former employee of the 2nd Plaintiff. He stated that he retired when he was in the position of a Manager. He stated that he worked for the 2nd Plaintiff between July 2003 and July 2015. He stated that had sued the Defendant over the suit property which measured 0.307ha (0.758 acres). He stated that the suit property was developed with a bungalow. He stated that although he was the one who had a title to the suit property, it was the Defendant who was in possession thereof. He stated that searches on the suit property carried out on 15th May 2003 and 5th July 2016 showed that he was the registered owner of thereof.
32. PW1 produced a certified copy of the Certificate of title for the suit property as P.Exh.1. He stated that before the suit property was transferred to him, it was registered in the name of Kenya Power and subsequently, the 2nd Plaintiff. He stated that the property was first registered in the name of East



- Africa Power and Lighting Company Limited which changed its name to Kenya Power before the property was transferred to the 2nd Plaintiff. He stated that he purchased the suit property from the 2nd Plaintiff. He stated that he learnt that the 2nd Plaintiff was selling the suit property through internal advertisement. He stated that the property was being sold to staff members of the 2nd Plaintiff. He stated that the suit property was among other properties owned by the 2nd Defendant which were advertised for sale. He stated that the reserve price for the suit property was Kshs. 15,000,000/- and that the same was reserved for managers. He stated that he submitted a bid to the 2nd Plaintiff for Kshs. 15,500,000/-. He stated that there were other bids for the suit property apart from his.
33. He stated that among the other bidders were Rebecca Miano and Frank Konuche. Rebecca Miano was the company secretary of the 2nd Plaintiff while Frank Konuche was a manager at Sondu Miriu project in Kisumu. PW1 stated that they all placed bids of a similar amount. He stated that the advertisement provided that in such a scenario, the successful bidder would be determined through balloting. He stated the 2nd Plaintiff conducted balloting through an officer from the Betting Control Board. He stated that he emerged the winner in the exercise and the 2nd Plaintiff thereafter sent him the offer letter dated 3rd July 2007. He stated that the purchase price for the suit property was Kshs. 15,500,000/- and he was required to pay a deposit which he had submitted together with the application to purchase the property. He stated that he paid the purchase price in full and the suit property was transferred to him by the 2nd Plaintiff after the transfer was authorised by the Permanent Secretary, Ministry of Energy.
34. PW1 stated that the suit property was sold to him as it was. He stated that he was informed that there was a suit pending in court between the 2nd Plaintiff and the Defendant (ELC No. 403 of 2014) which was over rent payment. He stated that after the suit property was registered in his name, he asked the Defendant to vacate the suit property and he declined to do so even after a formal demand letter was served upon him by his advocates. He stated that he was seeking from the Defendant loss of rent at the rate of Kshs. 70,000/- per month from the date when the suit property was registered in his name. He stated that the claim was based on a professional valuation which was done by Douglas Mokuia of Maritime Valuers Ltd.
35. He stated that the 2nd Plaintiff was initially known as Kenya Power Company Ltd. He stated that the Defendant was the Managing Director of Kenya Power Company Ltd. which became the 2nd Plaintiff. He stated that Kenya Power Company Ltd. was different from Kenya Power & Lighting Company Ltd. PW1 stated that he was not aware that the Defendant spent money in improving the suit property and that an offer was made to the Defendant to purchase the suit property. PW1 urged the court to dismiss the Defendant's counter-claim with costs. He produced his bundle of documents as P.Exh.2.
36. The 1st Plaintiff's next witness was Douglas Mokuia(PW2). PW2 was a licensed valuer in private practice. He testified as follows in his evidence in chief: He was instructed by the 1st Plaintiff on 17th May 2013 to do a rental assessment for the suit property. He went to the ground, got access to the property and took measurements and photographs. He assessed the rent payable at Kshs. 120,000/- per month. He produced his report dated 17th May 2013 as P.Exh 3.
37. In cross-examination by the Defendant's advocate, he stated that the 1st Plaintiff's instructions were verbal. He stated that the 1st Plaintiff asked him to assess the rent that the suit property could fetch. He stated that he recommended a rent of Kshs. 120,000/- per month for the property. He stated that the property was old but well maintained. He stated that the property had a wall fence but he was not sure when the fence was put up. He stated that he did not get inside the house as there was a person in occupation.



38. After the close of the 1st Plaintiff's case, the 2nd Plaintiff called Jennifer Adhiambo Oduor (PW3) as its sole witness. PW3 was the 2nd Plaintiff's property manager. She stated that she joined the 2nd Plaintiff in 1999 and was familiar with the facts giving rise to the case. She adopted her witness statement dated 18th August 2014 as her evidence in chief. In her statement, she referred to several documents which were filed in court as a bundle which she produced as P.Exh.4.
39. She stated further as follows: When she joined the 2nd Plaintiff, the Defendant was the Managing Director of the 2nd Plaintiff and was occupying the suit property as a staff member. The suit property was originally owned by Kenya Power. During asset separation, all the properties that were used for generation of power and auxiliary facilities were transferred to the 2nd Plaintiff. The suit property was occupied by an employee who transitioned from Kenya Power to the 2nd Plaintiff so it was transferred to the 2nd Plaintiff.
40. The Defendant ceased to be an employee of the 2nd Plaintiff in May 2002. The Defendant was supposed to vacate the suit property when his employment with the 2nd Plaintiff came to an end. The Defendant did not vacate and continued in occupation of the suit property. The 2nd Plaintiff entered into a written lease agreement with the Defendant. The rent payable under the lease was Kshs. 40,000/- per month. The Defendant made a payment of Kshs. 200,000/- for rent for the suit property after several months. The Defendant did not make any other payment. The Defendant made several promises of payment which he never honored. The 2nd Plaintiff was forced to attach the Defendant's properties through distress for rent and managed to recover Kshs. 60,000/- only. The Defendant continued to make promises that he would pay the rent which he never did. As at the time of her evidence, the Defendant was still occupying the suit property although the property had been transferred to the 1st Plaintiff on 12th August 2012.
41. Kenya Power Retirement Benefits Scheme Trustees offered to sell the suit property to the Defendant through a letter of offer dated 13th August 1997 (See page 16 of P.Exh.4). The offer had terms and conditions. The offer lapsed and the suit property was transferred by Kenya Power to the 2nd Plaintiff. According to the 2nd Plaintiff's policy, staff did not repair company houses. She did not know under what circumstances the Defendant would have used his own money to repair the 2nd Plaintiff's house. PW3 stated that the 2nd Plaintiff was seeking an order for the eviction of the Defendant from the suit property, Kshs. 1,081,090.49 being the outstanding rent as at 30th August 2005 and further rent at the rate of Kshs. 40,000/- per month from 1st September 2005 up to the date of transfer of the suit property to the 1st Plaintiff on 12th August 2012 together with costs of the suit and interest.
42. On cross-examination by the Defendant's advocate, PW3 stated among others that the suit property was initially owned by East Africa Power & Lighting Company Limited which changed its name to Kenya Power. PW3 stated that although the suit property was registered in the name of Kenya Power at the time the 2nd Plaintiff came to court, Kenya Power had already transferred the property to the 2nd Plaintiff during the asset separation and that the actual transfer was to follow. PW3 admitted that in 2005, the suit property was not registered in the name of the 2nd Plaintiff. She stated that the registration of the transfer of the suit property in favour of the 2nd Plaintiff was in progress at the time the 2nd Plaintiff came to court. She stated that when the 2nd Plaintiff filed the suit against the Defendant, the suit property belonged to the 2nd Plaintiff. She stated that the instrument of transfer of the suit property from Kenya Power to the 2nd Plaintiff was signed on 14th October 2005 and the same was registered on 3rd July 2007.



43. PW3 stated that the 2nd Plaintiff entered into a lease agreement with the Defendant in 2002. She stated that the correct date of the lease was 1st August 2002 and not 2001. She stated that the year 2001 in the lease was a typographical error. PW3 stated that the lease was signed by the Defendant and that she knew the signature of the Defendant.
44. PW3 stated that she knew that the suit property had a stone wall. She stated that she did not know how the said wall was constructed particularly whether it was put up by the 2nd Plaintiff or the Defendant. She stated that if the Defendant carried out the repairs to the suit property it was for his good because the property had been offered for sale to him.
45. The Defendant, Edwin Dixon Wasunna(DW1) gave evidence after the close of the Plaintiffs' case. In summary, the Defendant stated as follows in his evidence in chief: He was first employed by East Africa Power & Lighting Company (EPLC) as a graduate trainee engineer in 1964. In that position, he worked for EPLC in several places in the country. He was posted to Nairobi as Chief Commercial Engineer in 1975. It was in that year that he moved to the suit property. He had occupied the suit property from 1975 to the date he was giving evidence. He adopted his witness statement dated 1st October 2014 as part of his evidence in chief. He stated that he was not aware that the 1st Plaintiff had bought the suit property and, that he was not ready to move out of the property. The Defendant stated that an offer was made to him to purchase the suit property but he did not pay for the property straight away.
46. He stated that he had a reason for delaying the transaction. The property was offered to him after he moved from Kenya Power to the 2nd Plaintiff as the Managing Director in January 1997. The property was offered to him by the Kenya Power Retirement Benefits Scheme Trustees. He was sure that the property was still registered in the name of EAPLC and had not been transferred to the Kenya Power Retirement Benefits Scheme Trustees.
47. He was waiting for the property to be transferred to the Kenya Power Retirement Benefits Scheme Trustees before getting involved in the purchase of the same. He had discussed the matter with the chairman of the Kenya Power Retirement Benefits Scheme Trustees, Mr. Gichuru who was aware that he was waiting for the transfer of the property to the Kenya Power Retirement Benefits Scheme Trustees before he could purchase the same. When he moved to the suit property, the same had a chain link fence. The property remained in that state until an offer was made to him to buy the same. He had a night security guard and the security company complained that the fence of the suit property was porous and was difficult to secure.
48. Following the offer made to him to purchase the property, he put up a stone wall around the property. He mentioned to the chairman of the Kenya Power Retirement Benefits Scheme Trustees that he was going to put up a stone wall around the property and he indicated that he had no objection. He paid KShs. 1, 620,600/- to the contractor who put up the said perimeter wall. He left the 2nd Plaintiff's employment on 3rd May 2002. At the time, he was not aware that the 1st Plaintiff had purchased the suit property. As far as he was concerned, the suit property belonged to the original owner thereof, EAPLC.
49. He did not know where the lease between him and the 2nd Plaintiff at page 20 of P.Exh. 4 came from. In 2001, he was still in office and there was no way he could have signed the lease as a tenant. He did not sign the purported lease. The signature in the document which was not witnessed was not his. He wrote letters admitting his tenancy with the 2nd Plaintiff and being in rent arrears. He wrote the letters to buy time to allow his family to deal with the marriage of his daughter. He risked being thrown out of the house if he had not written the said letters committing to pay rent to the 2nd Plaintiff.
50. He denied owing the 2nd Plaintiff any money as he had no contract with it. He stated that he was occupying the suit property because the same was offered to him to purchase. He stated that the distress



for rent that was levied against him by the 2nd Plaintiff was illegal and amounted to harassment. He stated that he wanted the money he had paid to the 2nd Plaintiff as rent refunded with interest. He stated further that his goods were sold at an undervalue. He stated that he wanted a refund of the difference between the sale value and actual value of the said goods with interest. He stated that the distress that was levied against him was meant to have him vacate the suit property. He reiterated that he was not aware that the property had been sold to the 1st Plaintiff. He stated that he should be given priority to buy the property.

51. He stated further that he was not aware that the suit property was being sold. He stated that the 1st Plaintiff was aware that he was on the property and that there was a case in court between him and the 2nd Plaintiff. He stated that the 1st Plaintiff was informed that vacant possession of the suit property was subject to the outcome of the suit that was pending between the Defendant and the 2nd Plaintiff (see the letter dated 28th March 2008 at page 91 of P.Exh.2). The Defendant urged the court to dismiss the Plaintiffs' suits against him and for his counter-claims against the Plaintiffs to be allowed with costs.
52. On cross-examination by the advocate for the 1st Plaintiff, DW1 stated that he accepted the offer that was made to him to purchase the suit property verbally. DW1 admitted that he did not pay the purchase price of Kshs. 9,450,000/-. DW1 stated that he constructed the perimeter wall around the suit property for security reasons and that the chairman of the Kenya Power Retirement Benefits Scheme Trustees was aware of the same. He admitted that there was no written approval of the expenditure. DW1 conceded that in his defence in ELC No. 403 of 2014, he admitted that he was a service tenant and that he was being charged some rent.
53. On cross-examination by the advocate for the 2nd Plaintiff, DW1 stated that the suit property was initially registered in the name of EPLC. DW1 stated further that he was initially employed by Kenya Power and that he occupied the suit property as an employee of Kenya Power. DW1 stated that he was employed by the 2nd Plaintiff with effect from 10th January 1997. He stated that his contract was not extended but he remained in office until 2002. He stated that even after he moved to the 2nd Plaintiff, he remained in occupation of the suit property. He stated that the suit property was still in the name of Kenya Power. He stated that he did not do anything after the offer that had been made to him to purchase the suit property lapsed. He stated that the value of the property increased due to the wall and that he paid the contractor who put up the wall in cash against an invoice.
54. The Defendant's second witness was John Oguk Kadede (DW2). He stated as follows in his evidence in chief. He was a contractor trading under the name Jokaza Construction. The Defendant engaged him to give a quotation for a concrete fence. He went to the suit property and took measurements of what the Defendant wanted him to do. He prepared and forwarded a quotation to the Defendant and his wife. The Defendant considered the quotation and after a discussion gave him the work. He did the work to the satisfaction of the Defendant and was paid Kshs. 1,620,000/- for his services as per the quotation that he had given. He stated that the particulars of the works that he undertook were in the Defendant's bundle of documents. He produced the documents at pages 2 to 38 of the Defendant's bundle of documents dated 1st October 2014 filed on 2nd October 2014 as D.Exh. 1.
55. After the close of evidence, the parties made closing submissions in writing. The 1st Plaintiff filed submissions dated 22nd February 2021, the 2nd Plaintiff filed submissions dated 31st May 2021 while the Defendant filed submissions dated 29th October 2021.
56. The 1st Plaintiff's submissions
57. In his submissions, the 1st Plaintiff framed the following six issues for determination by the court;



- a. What was the position regarding the ownership of the suit property as at 18th August 2005?
 - b. What was the Defendant's interest in the suit property?
 - c. Whether the 2nd Plaintiff lawfully sold and transferred the suit property to the 1st Plaintiff?
 - d. Is the Defendant entitled to claim Kshs. 1,620,600.00 from the 1st Plaintiff or at all?
 - e. Whether the 1st Plaintiff is entitled to the reliefs sought in his plaint.
 - f. Who should bear the costs of this suit?
58. What was the position regarding the ownership of the suit property as at 18th August 2005?
 59. The 1st Plaintiff submitted that the Plaintiffs presented in evidence a certificate of title together with a certificate of official search which showed that the suit property was registered in the name of the 2nd Plaintiff on 3rd July 2007 which transferred the same to the 1st Plaintiff on 2nd August 2012. The 1st Plaintiff submitted that the Defendant did not challenge the 1st Plaintiff's title to the suit property in his defence and counter-claim against the 1st Plaintiff. The 1st Plaintiff submitted that the only claim raised against the 1st Plaintiff by the Defendant was for Kshs. 1,620,060/- allegedly spent in the erection of a perimeter wall around the suit property sometime in 1999 by which time the 1st Plaintiff had no claim and/or interest in the suit property. The 1st Plaintiff submitted that the Defendant had not demonstrated that it had any valid proprietary interest in the suit property. The 1st Plaintiff submitted that Kenya Power Retirement Benefits Scheme which purported to offer the suit property for sale to the Defendant had no interest in the suit property and as such could not pass any title to the Defendant or any other person.
 60. What was the Defendant's interest in the suit property?
 61. The 1st Plaintiff submitted that all evidence adduced in this matter showed that at all material times, the Defendant was a tenant of the 2nd Plaintiff in the suit property. The 1st Plaintiff submitted that at no time did the Defendant show that he had any interest in the suit property.
 62. Whether the 2nd Plaintiff lawfully sold and transferred the suit property to the 1st Plaintiff?
 63. The 1st Plaintiff submitted that the 2nd Plaintiff lawfully sold and transferred the suit property to him. The 1st Plaintiff submitted that he paid the purchase price in full and the property was registered in his name on 2nd August 2012.
 64. Is the Defendant entitled to claim Kshs.1,620,600/= from the 1st Plaintiff?
 65. The 1st Plaintiff submitted that the Defendant had in his counter-claim sought to recover from the 1st Plaintiff a sum of Kshs. 1,620,600/- allegedly incurred by the Defendant in 1999 in constructing a perimeter wall around the suit property. The 1st Plaintiff submitted that he acquired his interest in the suit property on 2nd August 2012. The 1st Plaintiff submitted that the property was sold to him on "as is where is basis". The 1st Plaintiff submitted that he was not liable for any expenses or costs incurred on the suit property before 2nd August 2012.
 66. The 1st Plaintiff submitted further that in any event, the Defendant's claim that arose in 1999 was time-barred under Section 4(1) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. The 1st Plaintiff submitted further that the evidence led by the Defendant in support of the said claim for Kshs. 1,620,600/- did not also meet the evidentiary threshold. The 1st Plaintiff submitted further that the



Defendant's claim if allowed would offend the doctrine of unjust enrichment since a similar claim had been lodged by the Defendant against the 2nd Plaintiff.

67. Whether the 1st Plaintiff is entitled to the reliefs sought in his plaint?
68. The 1st Plaintiff submitted that he purchased the suit property for valuable consideration and acquired a good title in respect thereof. The 1st Plaintiff submitted that the Defendant was a trespasser on the property and should be evicted. The 1st Plaintiff submitted that he was also entitled to mesne profits for the unlawful occupation of the property in the sum of Kshs. 70,000/- per month. The 1st Plaintiff submitted that he was entitled to a total sum of Kshs.13,843,673.08 as mesne profits. The 1st Plaintiff submitted that the Defendant being a trespasser on the suit property must bear the consequences of such trespass. The 1st Plaintiff urged the court to allow his claim against the Defendant with costs and to dismiss the Defendant's counterclaim also with costs.
69. The 2nd Plaintiff's Submissions
70. The 2nd Plaintiff framed the following issues for determination by the court;
 - a. Whether there was a tenancy relationship between the 2nd plaintiff and the Defendant.
 - b. Whether any rent was due to the 2nd Plaintiff.
 - c. Whether the Defendant was entitled to the reliefs sought in his counter-claim.
71. Whether there was a tenancy relationship between the 2nd Plaintiff and the Defendant
72. The 2nd Plaintiff submitted that the Defendant had claimed that the 2nd Plaintiff did not hold a title to the suit property and as such it had no right to claim rent from the Defendant. The 2nd Plaintiff submitted that the Defendant left the 2nd Plaintiff's employment in May 2002 but requested to be allowed to continue occupying the suit property for some time. The 2nd Plaintiff submitted that it entered into a lease with the Defendant for a term of one year effective from 1st August 2002 at a monthly rent of Kshs 40,000/-. The 2nd Plaintiff submitted that in the said lease, the 2nd Plaintiff was described as the landlord and the Defendant as the tenant.
73. The 2nd Plaintiff submitted that it was not in dispute that the suit property was owned by Kenya Power and that the same was given to the 2nd Plaintiff in September 1997 following the split between the two companies. The 2nd Plaintiff submitted that the suit property was eventually transferred to the 2nd Plaintiff. The 2nd Plaintiff cited Section 121 of the *Evidence Act* and, Paragraph 334 of Halsbury's Laws of England, Volume 47, 5th Edition (2014) where it is stated that: "...the relationship of landlord and tenant may be brought into being even though the landlord has no title to the land of which he has purported to create a tenancy. The relationship so brought into being may subsist for purposes of the Rent Acts." The 2nd Plaintiff also cited Paragraph 335 of Halsbury's Laws of England, Volume 47, 5th Edition (2014) where it is stated that: "In general a tenant is estopped from disputing the title at the time of the demise of the landlord by whom he has been let into possession...The doctrine of estoppel which operates between landlord and tenant applies to tenancies from year to year, at will, or on sufferance, as well as to leases for years; and anyone holding under a tenant, or defending as landlord in possession proceedings, is bound by it."
74. The 2nd Plaintiff submitted that even if it was not the registered owner of the suit property at the time of entering into the lease with the Defendant, it had been acknowledged by the then-registered owner of the property, Kenya Power that the 2nd Plaintiff had been given the property following the separation



of assets between the two companies and that what was outstanding was the formal transfer of the property to the 2nd Plaintiff.

75. The 2nd Plaintiff submitted that Kenya Power understood that the 2nd Plaintiff was free to do with the property as it pleased and the Defendant was well aware that the 2nd Plaintiff was his landlord. The 2nd Plaintiff submitted that although the Defendant testified that he did not sign the lease agreement and/or that the signature on the lease was not his signature, the conduct of the Defendant and the various correspondence exchanged between the parties left no doubt that there was a lease agreement between the parties. In support of this submission, the 2nd Plaintiff cited, *Margaret Wanjiru Njuguna v. Muriuki Mburu t/a Heko Bar and Restaurant & Another* [1998] eKLR.
76. The 2nd Plaintiff submitted that after the expiry of the lease in August 2003, the Defendant was permitted exclusive occupation of the suit property and was required to pay the agreed rent. A periodic tenancy (a month-to-month tenancy) therefore existed between the parties after the expiry of the lease. In support of this submission, the 2nd Plaintiff cited Section 46(b) of the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed). The 2nd Plaintiff submitted that the Defendant did not make any further payment of rent for the suit property. The 2nd Plaintiff submitted that this prompted the 2nd Plaintiff to make various demands upon the Defendant for the outstanding rent arrears. The 2nd Plaintiff submitted that in all his responses to the said demands, the Defendant admitted his indebtedness to the 2nd Plaintiff and made various promises to settle the rent arrears which promises he never kept. The 2nd Plaintiff submitted that given his unequivocal admissions of his indebtedness to the 2nd Plaintiff, the Defendant could not be allowed to walk away from his obligations to settle the admitted rent. In support of his submission, the 2nd Plaintiff cited the case of *Simal Velji Shah v. Chemafrica Limited* [2014] eKLR.
77. The 2nd Plaintiff submitted that the Defendant testified under oath confirming that he made promises to pay the rent arrears but failed to do so. The 2nd Plaintiff submitted that the Defendant's reason for not paying the rent was that his daughter was getting married and as such he did not have funds to cater for the wedding and his rent obligations. The 2nd Plaintiff submitted that the Defendant's failure to pay rent necessitated the levying of distress against him for the recovery of the rent due.
78. The 2nd Plaintiff submitted that the Defendant's goods were auctioned for Kshs. 60,676/- which sum was applied to reduce the rent arrears. The 2nd Plaintiff submitted that the Defendant thereafter forwarded a cheque for Kshs. 80,000/- to the 2nd plaintiff under cover of a letter dated 18th July 2005 which he claimed to be the rent for July and August 2005. The 2nd Plaintiff submitted that this was not accepted and the Defendant's cheque was returned to his advocates then on record. The 2nd Plaintiff submitted that the defendant having acknowledged his obligation to pay rent to the 2nd Plaintiff in respect of the suit property, the Defendant was estopped from disputing the 2nd Plaintiff's title. The 2nd Plaintiff submitted that the Defendant had accepted that the 2nd Plaintiff was his landlord which position was buttressed by his conduct and admissions. The 2nd Plaintiff submitted that a landlord and tenant relationship existed between the 2nd Plaintiff and the Defendant.
79. Whether any rent is due to the 2nd Plaintiff
80. The 2nd Plaintiff submitted that having proved that the Defendant was occupying the suit property as a tenant of the 2nd Plaintiff, there was no doubt that the Defendant was required to pay the agreed monthly rent. The 2nd Plaintiff submitted that taking into account the payment made by the Defendant and the amount realised from the distress levied against the Defendant, the outstanding rent due from the Defendant for the period between 1st August 2002 and 30th August 2005 was Kshs. 1,081,090.49



- which the Defendant expressly admitted in his various correspondence with the 2nd Plaintiff. The 2nd plaintiff submitted that it was also entitled to the rent for the period between 1st September 2005 and 12th August 2012 when the suit property was transferred to the 1st Plaintiff. The 2nd Plaintiff submitted that the total rent due to it as at 12th August 2012 was Kshs. 4,417,090.49.
81. On the issue of interest on the rent due, the 2nd Plaintiff submitted that having been deprived of money lawful due to it, it was entitled to interest. In support of this submission, the 2nd Plaintiff relied on *Magic Chemicals Inc. v. Prapid Enterprises Limited (E.A.) Limited* [2016] eKLR and *Nalinkumar M. Shah v. Mumias Sugar Company Ltd.* [2010] eKLR as well as Section 26(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
 82. Whether the Defendant is entitled to the reliefs sought against the 2nd Plaintiff in the counterclaim
 83. The 2nd Plaintiff submitted that the Defendant had alleged that upon receiving the offer to purchase the suit property, he undertook improvement of the property in 1999 at a total cost of Kshs. 1,998,250. The 2nd Plaintiff submitted that the amount claimed in the Defendant's defence and counterclaim was Kshs. 1,620,600/- and not Kshs. 1,998,250/- which was only brought out in the witness statements. The 2nd Plaintiff submitted that parties are bound by their pleadings and that the Defendant could only claim Kshs. 1,620,600/- in relation to the alleged improvement of the suit property as pleaded in his counterclaim. The 2nd Plaintiff submitted that it was its policy that staff did not repair the 2nd Plaintiff's houses occupied by them and that repairs were being undertaken by the 2nd Plaintiff.
 84. The 2nd Plaintiff submitted that in October 1997 the 2nd Plaintiff's administration manager sought approval for Kshs. 200,000/- to repair the suit property which request was approved. The 2nd Plaintiff submitted that the Defendant alleged that he had the authority to make improvements on the suit property. The 2nd Plaintiff submitted that the Defendant did not produce any evidence showing that he had authority to erect a perimeter wall around the suit property. The 2nd Plaintiff submitted that the Defendant's claim for the cost of improvements made to the suit property should fail. The 2nd Plaintiff submitted further that in any event, the Defendant's claim was time-barred in that the sum of Kshs. 1,620,600/- claimed by the Defendant was incurred by August 1999 while the counterclaim was filed on 25th September 2005 out of the 6-year limitation period for such claims.
 85. The 2nd Plaintiff submitted that even if the court were to find that the claim was not time-barred, the claim would still fail since the Defendant failed to prove that he incurred the claimed costs. The 2nd Plaintiff submitted that the Defendant did not produce evidence of payment of the sum claimed. The 2nd Plaintiff submitted further that even if the court were to find that the Defendant had authority from Kenya Power to erect the perimeter wall, such a claim could only be brought against Kenya Power and not against the 2nd Plaintiff. The 2nd Plaintiff submitted that in any event, the perimeter wall was erected for the use and benefit of the Defendant who had enjoyed the benefit of the wall for over 20 years. In support of this submission, the 2nd Plaintiff cited *Ramadhan Mohammed Ali v. Hashim Salim Ghanim* [2015] eKLR. The 2nd Plaintiff submitted that the Defendant was not entitled to compensation for improvements that he had benefitted from for over 20 years.
 86. The 2nd Plaintiff submitted that contrary to the Defendant's claim that he paid a total of Kshs. 438,909.50 to the 2nd Plaintiff, that is; Kshs. 280,000/- from the Defendant and Kshs. 158,909.50 from the distress, the Defendant made only one payment of Kshs. 200,000/-. The 2nd Plaintiff submitted that the payment was made through a letter dated 26th July 2002 in which the Defendant requested the 2nd Plaintiff to deduct a sum of Kshs 200,000/- from his dues on account of his lease with the 2nd Plaintiff. The 2nd Plaintiff submitted that the said sum of Kshs 200,000/- was applied to cover one month's rent deposit and rent for four months. The 2nd Plaintiff submitted that the Defendant thereafter forwarded



- a cheque for Kshs. 80,000/- to the 2nd Plaintiff under cover of a letter dated 18th July 2005 indicating that it was for the rent for July and August 2005. The 2nd Plaintiff submitted that this payment was not accepted by the 2nd Plaintiff and the cheque was returned to the Defendant's advocates then on record.
87. The 2nd Plaintiff submitted that it had established that the Defendant had an obligation to pay rent in his capacity as a tenant. The 2nd Plaintiff submitted that the Defendant could not claim the Kshs. 200,000/- paid by him as rent or the sum of Kshs.80,000/- which was returned to his advocates. The 2nd Plaintiff submitted that the Defendant had neither particularised nor proved his claim for Kshs. 158,909.50 which was in the nature of special damages. The 2nd Plaintiff submitted that the Defendant had not availed any evidence of the payment of Kshs. 158,909.50 which was the auctioneer's charges payable by the Defendant to the auctioneer. The 2nd Plaintiff submitted that the said charges arose as a result of the failure by the Defendant to pay rent and he must bear the same. The 2nd Plaintiff submitted that Defendant was not entitled to the sum of Kshs. 438,909.50 claimed from the 2nd Plaintiff.
88. On general damages for wrongful attachment, the 2nd Plaintiff submitted that the Defendant alleged that its goods were wrongfully and unlawfully attached. The 2nd Plaintiff submitted that the Defendant claimed that he owed no rent to the 2nd Plaintiff which could have formed a basis for the distress that was levied against him. The 2nd Plaintiff submitted that it had demonstrated that the Defendant owed it rent as at the date of the distress for rent complained of and as such the distress was lawfully levied. The 2nd Plaintiff submitted that Defendant was not entitled to the general damages claimed against the 2nd Plaintiff since the distress was lawful.
89. As for the order restraining the 2nd Plaintiff from evicting the Defendant from the suit property, the 2nd Plaintiff submitted that it lawfully transferred the suit property to the 1st Plaintiff on 1st August 2012. The 2nd Plaintiff submitted that the Defendant who had continued to illegally occupy the suit property must vacate the same. The 2nd Plaintiff urged the court to allow its claim against the Defendant and to dismiss the Defendant's counterclaim with costs.
90. The Defendant's submissions
91. The Defendant framed five issues for determination by the court. The first issue was; what was the ownership status of the suit property as at 18th August 2005? The Defendant submitted that Kenya Power transferred the suit property to the 2nd Plaintiff on 3rd July 2007. The Defendant submitted that the 2nd Plaintiff admitted that it was not the registered proprietor of the suit property as at 18th August 2005. The Defendant submitted that it was only registration of the instrument of transfer that could confer proprietary rights over land. The Defendant submitted that as at 18th August 2005 when the 2nd Plaintiff purported to institute a suit against the Defendant, the 2nd Plaintiff had no proprietary right over the suit property as it was not the registered proprietor of the said property. The Defendant submitted that the 2nd Plaintiff had no locus standi to institute a suit against the Defendant and as such its suit must fail.
92. The next issue raised by the Defendant concerned the Defendant's status on the suit property in 2002. The Defendant admitted that he was in occupation of the suit property. The Defendant submitted that he was duped to believe that he had a tenancy agreement with the 2nd Plaintiff. The Defendant submitted that he was conveniently misguided to enter into a purported lease agreement with the 2nd Plaintiff dated 1st August 2001. The Defendant submitted that the 2nd Plaintiff was not the registered proprietor of the subject property in 2002 and as such had no beneficial interest in the suit property. The Defendant submitted that the 2nd Plaintiff had no right whatsoever to purport to enter into a lease



agreement with the Defendant over the suit property. In support of this submission, the Defendant cited *Diamond Trust Bank Limited v. Said Hamad Shamisi*[2015] eKLR.

93. The Defendant submitted that the purported lease entered into by the 2nd Plaintiff and the Defendant on 1st August 2001 was devoid of legality, shrouded in misrepresentation and hence failed. The Defendant submitted that in any event, the said lease lapsed on 31st July 2002 and was never renewed under paragraph 4(c) thereof. The Defendant submitted that although he was in occupation of the suit property, no tenancy relationship existed between him and the 2nd Plaintiff.
94. The next issue concerned the merit of the 1st Plaintiff's claim against the Defendant. The Defendant submitted that the 1st Plaintiff knew and expressly acknowledged the existence of the suit that had been filed by the 2nd Plaintiff against the Defendant in the lower court that was subsequently transferred to this court and given case number ELC No. 403 of 2014 in which the Defendant had contested the 2nd Plaintiff's proprietorship of the subject property. The Defendant submitted that the 1st Plaintiff accepted to purchase the suit property without assurance of vacant possession which was the substratum of ELC No. 403 of 2014.
95. The Defendant submitted that the 1st Plaintiff misled the court that he did not know of the existence of the burden then attaching to the suit property in the form of a legal dispute between the 2nd Plaintiff and the Defendant regarding the proprietorship of the subject property. The Defendant submitted that the 1st Plaintiff was estopped from laying any claim against the Defendant as there existed no nexus through which the 1st Plaintiff could successfully do so.
96. The next issue was whether the Plaintiffs were entitled to mesne profits. On this issue, the Defendant submitted that the Plaintiffs were not entitled to mesne profits as he had demonstrated that the 2nd Plaintiff was not the registered proprietor of the suit property at the time it instituted ELC No. 403 of 2014 which suit should be struck out for lack of locus standi. The Defendant submitted in the alternative that the Plaintiffs had not expressly prayed for mesne and as such the court could not grant the same.
97. The next issue framed by the Defendant was whether the Defendant was entitled to the reliefs sought in his counterclaims against the Plaintiffs. The Defendant submitted that he had demonstrated the actual investment that he had put in to improve the status of the suit property. The Defendant submitted that these were actual expenses incurred by the Defendant in putting up a perimeter wall to safeguard the suit property. The Defendant submitted that it was not in dispute that this improved the value of the suit property. The Defendant submitted that it was only fair and just that the Defendant was reimbursed the said expenses together with interest for the period that these sums had remained withheld. The Defendant submitted that he was entitled to the reliefs sought in his counterclaim dated 27th September 2005.
98. The last issue concerned costs. The Defendant submitted that the 1st Plaintiff's claim failed for reasons discussed above while the 2nd Plaintiff's claim failed for lack of locus standi. The Defendant submitted that as a consequence of both suits failing and the Defendant succeeding in his counterclaims, it was only just that this court awards him the costs of the two suits.
99. Analysis and determination
100. I have considered the pleadings, the evidence on record and the submissions by the parties. I am of the view that the following are the issues arising for determination in the consolidated suits;
 - a. Whether the 1st Plaintiff acquired the suit property lawfully from the 2nd Plaintiff;



- b. Whether the Defendant was a tenant of the 2nd Plaintiff in the suit property;
 - c. Whether the Defendant had any proprietary interest in the suit property;
 - d. Whether the 1st Plaintiff is entitled to the reliefs sought against the Defendant;
 - e. Whether the 2nd Plaintiff is entitled to the reliefs sought against the Defendant;
 - f. Whether the Defendant is entitled to the reliefs sought against the 1st and 2nd Plaintiffs and;
 - g. Who is liable for the costs of the suit?
102. Whether the 1st Plaintiff acquired the suit property lawfully from the 2nd Plaintiff
103. I am satisfied from the evidence on record that the 2nd Plaintiff sold to the 1st Plaintiff the suit property at a consideration of Kshs. 15,500,000/-. The Plaintiffs placed evidence before the court showing that; the suit property was transferred and registered in the name of the 2nd Plaintiff on 3rd July 2007. On the same date, the 2nd Plaintiff offered to sell the suit property to the 1st Plaintiff at Kshs. 15,500,000/-. The 1st Plaintiff had paid a deposit of Kshs. 1,700,000/- when applying to purchase the property which was advertised for sale by the 2nd Plaintiff. The 1st Plaintiff paid the balance of the purchase price in instalments with the last of such instalments in the sum of Kshs. 500,000/- having been paid on 25th February 2010. The 2nd Plaintiff thereafter executed the instrument of transfer of the suit property dated 6th May 2010 in favour of the 1st Plaintiff. The said transfer was registered on 2nd August 2012 thereby conferring the ownership of the property upon the 1st Plaintiff who was also issued with a Certificate of Title in respect of the property. The 2nd Plaintiff has admitted having sold the suit property to the 1st Plaintiff and it is not challenging the 1st Plaintiff's title. It is therefore my finding that the 1st Plaintiff acquired the suit property lawfully from the 2nd Plaintiff.
104. Whether the Defendant was a tenant of the 2nd Plaintiff in the suit property
105. I am satisfied from the evidence on record that the suit property was given to the 2nd Plaintiff following the asset separation between Kenya Power and the 2nd Plaintiff. The evidence adduced by PW3 that the Defendant was the 2nd Plaintiff's Managing Director and was occupying the suit property in that capacity was not rebutted by the Defendant. It was also not disputed that the Defendant ceased to be an employee of the 2nd Plaintiff in May 2002. What was disputed was the status of the Defendant in the suit property after May 2002. I have carefully considered all the evidence adduced by the parties concerning this issue. I am of the view that the evidence given by PW3 gave the correct status of the Defendant on the suit property after his employment with the 2nd Plaintiff ceased. The evidence before the court shows that after the Defendant's employment with the 2nd Plaintiff came to an end, the Defendant requested the 2nd Plaintiff to allow him to remain in occupation of the suit property as a tenant. The Defendant's request was allowed and the Defendant and the 2nd Plaintiff entered into a lease agreement on 1st August 2002 mistakenly dated 1st August 2001 under which the Defendant was to occupy the suit property for a term of 1 year at a monthly rent of Kshs. 40,000/-. The evidence before the court shows that after the said lease was forwarded to the Defendant on 22nd July 2002 and having executed the same, the Defendant authorised the Chief Manager, Finance of the 2nd Plaintiff to credit his "housing lease account" with Kshs. 200,000/- from the monies that were due to him following his exit from the 2nd Plaintiff.
106. The evidence before the court shows that the Defendant was unable to keep up with his rent payment obligations and fell into arrears for several months. As at 31st July 2004, the Defendant was in rent arrears to the tune of Kshs. 800,000/-. Several letters were written to the Defendant by the 2nd Plaintiff



demanding rent payment. The Defendant equally wrote several letters promising to clear the rent. At no time did the Defendant dispute his indebtedness to the 2nd Plaintiff or the 2nd Plaintiff's title to the suit property. The Defendant did not honour his promises and on 18th May 2005, the 2nd Plaintiff through its advocates, Kabiru & Company served him with a letter demanding rent arrears of Kshs. 1,200,000/-. After this letter, the Defendant sought indulgence from the 2nd Plaintiff and made further promises to settle the account. The Defendant even undertook to sell one of his wife's properties in Kibera Highrise to clear the rent arrears. Nothing came out of all these promises and the 2nd Plaintiff had no alternative but to levy distress against the Defendant that did not yield much. The Defendant did not challenge the distress.

107. Given the foregoing, I did not take the Defendant seriously when he claimed at the trial that he did not enter into any lease agreement with the 2nd Plaintiff and that all the promises for payment that he made to the 2nd Plaintiff were only meant to buy time. It was even more strange when the Defendant who was the 2nd Plaintiff's Managing Director feigned ignorance of the fact that the suit property had been given to the 2nd Plaintiff by Kenya Power during the asset separation between the two companies. It is my finding that after the Defendant ceased to be an employee of the 2nd Plaintiff, the relationship between the 2nd Plaintiff and the Defendant was that of a landlord and a tenant. In my view, nothing turned on the offer that was made to the Defendant by Kenya Power & Lighting Co. Ltd. (Kenya Power) Retirement Benefits Scheme Trustees on 13th August 1997 to purchase the suit property at Kshs. 9,450,000/-. The offer that was for a limited period of 90 days was not accepted by the Defendant. The said offer could not therefore have entitled the Defendant to remain in occupation of the suit property 5 years later in 2002 after his service with the 2nd Defendant came to an end.
108. Whether the Defendant had any proprietary interest in the suit property
109. In his separate counter-claims against the Plaintiffs, the Defendant did not claim ownership of the suit property. The Defendant could have acquired proprietary interest in the suit property following the offer that was made to him to purchase the property by Kenya Power & Lighting Co. Ltd. (Kenya Power) Retirement Benefits Scheme Trustees on 13th August 1997. The Defendant did not accept the offer which lapsed. It is therefore my finding that the Defendant had no proprietary interest in the suit property which could entitle him to remain in occupation thereof free of charge.
110. Whether the 1st Plaintiff is entitled to the reliefs sought against the Defendant
111. From the finding I have arrived at above, I am satisfied that the 1st Plaintiff has proved his case against the Defendant and is entitled to the reliefs sought in his plaint. The 1st Plaintiff has proved that the Defendant is a trespasser on the suit property. The 1st Plaintiff is therefore entitled to possession of the suit property. The 1st Plaintiff is also entitled to damages for trespass and/or mesne profits. In his plaint, the 1st Plaintiff averred that the suit property could fetch a rent of Kshs. 70,000/- per month increasing by 5% annually. PW2 in his report produced as P.Exh.3 assessed monthly rent for the suit property at Kshs. 120,000/- as at 17th May 2013. The Defendant had agreed to pay a monthly rent of Kshs. 40,000/- for the suit property on 1st August 2002. I find the 1st Plaintiff's claim for mesne profits at the rate of Kshs. 70,000/- per month from November 2012 when the 1st Plaintiff became the owner of the suit property with an annual adjustment of 5% reasonable and fair. I will adopt the computation of the mesne profits contained in the 1st Plaintiff's submission. I, therefore, award the 1st Plaintiff mesne profits in the sum of Kshs. 8,745,209.40 as at June 2021. The said amount shall attract interest at court rates from the date hereof until payment in full. The 1st Plaintiff is also entitled to further mesne profits from July 2021 until vacant possession of the suit property is delivered.
112. Whether the 2nd Plaintiff is entitled to the reliefs sought against the Defendant;



113. I have made a finding that after the Defendant's employment with the 2nd Plaintiff came to an end, the Defendant continued to occupy the suit property as a tenant of the 2nd Plaintiff. As a tenant, the Defendant was contractually bound to pay the agreed rent of Kshs. 40,000/- per month. The Defendant was a tenant of the 2nd Plaintiff until August 2012 when the 2nd Plaintiff transferred the suit property to the 1st Plaintiff. In its plaint, the 2nd Plaintiff claimed from the Defendant a sum of Kshs. 1,081,090.49 as rent arrears as at 30th August 2005 and a further sum of Kshs. 40,000/- per month until possession was granted. In its submissions, the 2nd Plaintiff claimed a total sum of Kshs. 4,417,090.49 the particulars of which are set out therein. I am satisfied from the evidence on record that the Defendant had rent arrears of Kshs. 1,081,090.49 as at 30th August 2005 and that from 1st September 2005 to 12th August 2012 the Defendant accumulated rent arrears of Kshs. 3,336,000/- making total rent arrears of Kshs. 4,417,090.49 as at the time the 2nd Plaintiff transferred the suit property to the 1st Plaintiff. The 2nd Plaintiff is therefore entitled to the said sum of Kshs. 4,417,090.49 together with interest. The 2nd Plaintiff's claim for possession of the suit property has been overtaken by events.
114. Whether the Defendant is entitled to the reliefs sought against the 1st and 2nd Plaintiffs
115. In his counterclaim against the 1st Plaintiff, the Defendant sought payment of Kshs. 1,620,000/- together with interest. The Defendant averred that he spent the said amount in repairing the suit property and constructing a perimeter wall around the property which improved the value thereof. I find no basis for this claim against the 1st Plaintiff. The Defendant had no relationship with the 1st Plaintiff contractual or otherwise. The 1st Plaintiff acquired the suit property from the 2nd Plaintiff on "as is where is" basis. The 1st Plaintiff did not put the Defendant in the suit property nor did he authorise the Defendant to carry out the said repairs or construction of the perimeter wall. I agree with the 1st Plaintiff that he is not liable to the Defendant for this amount.
116. As against the 2nd Plaintiff, the Defendant claimed a sum of Kshs. 438,909.50 comprising of Kshs. 280,000/- which the Defendant paid to the 2nd Plaintiff as rent and Kshs. 158,909.50 that the 2nd Plaintiff recovered from the Defendant through distress for rent. This claim is premised on the Defendant's contention that he was not a tenant of the 2nd Plaintiff and as such he was not liable to pay rent to the 2nd Plaintiff. The Defendant contended that the rent was paid in error and that the distress levied against him was illegal. I have made a finding that the Defendant was a tenant of the 2nd Plaintiff and as such was liable to pay rent. I have also made a finding that the Defendant was in rent arrears and as such the distress for rent levied against him was lawful. Due to the foregoing the Defendant's claim herein against the 2nd Plaintiff has no basis.
117. Conclusion
118. In conclusion, I hereby make the following orders in the matter;
- a. Judgement is entered for the 1st Plaintiff, Joseph Okoto, against the Defendant in the consolidated suit as follows;
 - (i) A declaration that the Defendant is a trespasser on the suit property.
 - (ii) The Defendant shall vacate and hand over possession of the suit property to the 1st Plaintiff within thirty (30) days from the date of this judgment in default of the 1st Plaintiff shall be at liberty to apply for warrants for his forceful eviction from the property.



- (iii) Kshs. 8,745,209.40 being mesne profits as at June 2021 together with interest at court rates from the date hereof until payment in full.
 - (iv) Additional mesne profits at the rate of Kshs. 103,422/- from July 2021 to 31st December 2021 together with interest at court rates from the date hereof until payment in full.
 - (v) Additional mesne profits at the rate of Kshs. 108,593.10 per month from 1st January 2022 increasing by 5% annually until possession is delivered.
 - (vi) Costs of the suit.
- b. Judgement is entered for the 2nd Plaintiff, Kenya Electricity Generating Company Ltd, against the Defendant in the consolidated suit as follows;
- (i) Kshs. 4,417,090.49 being rent arrears as at 12th August 2012 together with interest at court rates from the date hereof until payment in full.
 - (ii) Costs of the suit.
- c. The Defendant's counter-claim against the 1st Plaintiff is dismissed with costs.
- d. The Defendant's counter-claim against the 2nd Plaintiff is dismissed with costs.

DELIVERED AND DATED AT KISUMU ON THIS 25TH DAY OF APRIL 2024

S. OKONG'O

JUDGE

Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the 1st Plaintiff

Mr. Mwendwa h/b for Ms. Kirimi for the 2nd Plaintiff

N/A for the Defendant

Mr. Oguta-Court Assistant

