IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, ASIKE-MAKHANDIA & F. SICHALE, JJ.A)

CIVIL APPEAL NO. 208 OF 2018

BETWEEN

CHRISTINE NYANCHAMA OANDA.....APPELLANT

AND

THE CATHOLIC DIOCESE OF HOMA BAY REGISTERED TRUSTEES.....RESPONDENT

(An appeal from the Judgment of the Environment & Land Court

***at Nairobi (K. Bor, J.) dated 4th April, 2018* in ELC Cause No. 440 of 2010)**

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JUDGMENT OF THE COURT

The Diocese of Homa Bay Registered Trustees hereinafter "**the respondent"** entered into a sale agreement with **Christine Nyanchama Oanda**, hereinafter "**the appellant**" to sell all that piece or parcel of land known as **LR.NO 12778/260 Langata** hereinafter "**the suit property**" at a consideration of Kshs. 3,000,000. Upon execution of the agreement the appellant was to pay to the Government on behalf of the respondent Kshs.412, 911.00 on account of land rent. The balance of the purchase price was however to be paid upon completion. The sale agreement incorporated the terms of the law society conditions of sale as well and in so far as they were not inconsistent with terms of the agreement.

The agreement did not set a date for completion. However to the respondent the agreement having been dated 21st January, 2009 by the appellant the date of completion should have been within 42 days meaning therefore that the completion date should have been on 12th March, 2009.

The appellant according to the respondent failed to pay the balance of the purchase price. It therefore issued a 21 day days' notice of intention to rescind the contract. Despite the rescission notice, the appellant went ahead and developed the suit property by constructing a house on the suit property. The respondent claimed that it was entitled to rescind the agreement based on the appellant's taking possession of the suit property and developing it without paying the entire purchase price.

The respondent had therefore been denied its right to possess and use the suit property and had in the circumstances suffered loss and damage. Based on the foregoing, the respondent sued the appellant in the Environment and Land Court at Nairobi seeking a declaration that the appellant was a trespasser on the suit property; a permanent injunction to restrain the appellant or her agents from occupying or remaining in possession or developing the suit property, vacant possession; a mandatory injunction to compel the appellant to demolish and remove the structures and developments she had put up on the suit property at her expense; general damages, interest and costs.

In her defence, the appellant admitted entering into the agreement with the respondent for the purchase of the suit property for Kshs.3, 000,000/-. She claimed that she had paid Kshs.412, 911/- towards the land rent as agreed with respondent. She also claimed to have incurred further costs at the respondent's request in procuring titles for the respondents' other parcels of land. According to her she had paid Kshs. 1, 250,000/- over and above the agreed deposit sum of Kshs.412.911.

To the appellant, the balance of the purchase price was Kshs. 1, 336,589/- and not Kshs. 2, 587,089 as claimed by the respondent. The appellant further pleaded that she had always been ready and willing to complete the sale transaction and pay the balance of purchase price. By way of a counterclaim, the appellant claimed that the respondent was not entitled to rescind the sale agreement as it did and prayed for a declaration that the contract signed on 21st January, 2009 was valid and the respondent's purported rescission was unlawful and invalid. She therefore sought an order of specific performance to compel the respondent to complete the sale, and that the respondent should be compelled

to execute the transfer of the suit property in her favour in default of which the Registrar of the High Court should do so to facilitate the registration of suit property in her name.

In turn, the respondent filed Reply to Defence and Defence to the Counterclaim in which it joined issue with the appellant's defence and counterclaim and reiterated what it had pleaded in the plaint.

At trial, **Mr. Wasuna** who oversaw the transaction on behalf of the respondent testified and acknowledged payment of Kshs. 412,911/- as captured in the agreement. He denied that the appellant paid any amount other than what was stated in the agreement. By a letter dated 9th September, 2009 on the instructions of the respondent, he issued a notice to the appellant to complete the sale by paying the balance of the purchase price being Kshs. 2,586,589/-. What followed was the appellant's advocate's letter dated 17th September, 2009 forwarding transfer forms for execution. It was the respondent's position that the sale agreement only permitted the appellant to take possession of the suit property but did not permit her to develop the same or alter its condition and that the appellant had constructed a mansion on the suit property without its consent and before paying the full purchase price. The respondent relied on copies of the Certificate of Title attached to the deed plan dated 2nd August, 2006; agreement for sale; advocate's letter authorizing disbursement of up to Kshs. 750,000/- to facilitate registration of titles; and the letter dated 1st July, 2008 requesting the appellant's advocates to prepare and forward to him the transfer documents. He confirmed that an agreement was prepared and forwarded for execution in 2008 but was executed in January 2009. That the letter dated 21st October, 2009 treated the agreement as determined since the 21 days period within which the outstanding balance was to be paid had expired without the appellant making any payment. He referred to the agreement dated 23rd August, 2008 and made reference to Clause 2C and D of the Law Society Conditions which provides that where the completion period is not provided for in the agreement, it shall be 42 days after the date of the contract.

In her testimony, the appellant stated that she had spent a further sum of Kshs. 750,000/- on the suit property with the approval of **Mr. Wasuna** and that a further authorization to spend Kshs. 500,000/- on the five plots was made. She maintained that she had performed her part of the agreement and was always ready and willing to complete the transaction. That she had deposited the balance of the purchase price in the sum of Kshs. 1,296,589/- in court on 20th June, 2013. It was conceded that the balance of the purchase price was not paid within the 21 days' notice given by the respondent.

Mr. Osero who had been contracted by the appellant to oversee the sub-division testified as the appellant's witness and confirmed to court that he was not a licensed surveyor and that the payments shown in the sub-division scheme approvals were not made in 2008 despite the fact that he was contracted to act for the appellant in May, 2008 and was paid Kshs. 1,250,000/- for his services. He further conceded to not having paid for the deed plans and that though sub-division was undertaken in 2005, it was the grant which was issued in 2008.

On the basis of the foregoing testimonies the court, (Bor, J) was persuaded by the respondent's argument that the appellant failed to prove that Kshs. 1,250,000/-was paid by the appellant's husband for the subdivision and preparation of titles for the suit property and the other plots in 2008 based on the fact that the subdivision scheme approvals were done in 2005. That the deed plan for the suit property was dated 2nd August, 2006 and therefore it was highly unlikely that **Mr. Osero** undertook the subdivision work he claimed to have since by the time he was contracted in 2008 survey work had already been concluded. The learned Judge also noted that the Kshs. 1,250,000/- said to have been paid by Mr. Oanda was not mentioned in any of the correspondence between the parties. That no transfer was forwarded to the respondent's advocates for over eight (8) months and even when the 21 days' notice to complete sale was served on the appellant. By this time, the court noted that the appellant was already in possession of the suit property and had commenced construction. The court took note that time became of the essence when the respondent's advocates issued a 21 days' notice to the appellant which the appellant responded by forwarding the transfer thus intimating her willingness to complete the sale. However, the learned Judge pointed out that merely stating willingness to pay did not itself confirm that she was ready, able and willing to complete the transaction. That there was no explanation given by the appellant for the delay of more than 8 months in forwarding the transfer after execution and neither did the appellant make payment of the balance after issuance of notice nor did she at any given time challenge the amount demanded as the balance of the purchase price in any of the letters forwarded to the respondent's advocates. The court therefore held that the balance of the purchase price was Kshs. 2,587,589/- and not Kshs. 1,336,589/- as claimed by the appellant.

The Judge further held that even though the appellant deposited Kshs. 1,296,589/- in court, it was not the entire balance of the purchase price and she had not demonstrated that she was ready and willing to complete the transaction within a reasonable time for the court to grant the order of specific performance.

The court went on to hold that the respondent was in those circumstances thus entitled to rescind the sale as it did. Referring to Clause 5 of the agreement which provided that the appellant would be given vacant possession upon execution of the agreement and the Law Society Conditions which stipulated that where a purchaser takes possession of the property before completion, the purchaser occupies the property as a licensee of the vendor and held that the appellant was enjoined to keep the suit property in a good state of repair and condition as it was when she took possession from the date of taking possession until completion or until the vendor retakes possession. Finally the court noted that unreasonable delay in performing the obligation of completion would entitle a party to make time of essence. The appellant failed to prove her ability and readiness to pay the balance and subsequently the court allowed the respondent's claim and dismissed the appellant's defence and counter-claim with costs.

Aggrieved, the appellant lodged the present appeal and raised 12 grounds to wit that: the learned Judge erred in law and fact in; misinterpreting the date and manner of completion of the agreement for sale of the suit property between the appellant and the respondent; holding that the appellant's obligation to pay the balance of the purchase price arose before the registration of the transfer of the suit property in the name of the appellant; holding that the appellant was 8 months late in honouring her outstanding obligation to complete the agreement for sale; holding that the letter dated 9th September, 2009 from the respondent's advocates to the appellant's advocates was a valid completion notice for the agreement for sale; failure to hold that the respondent's refusal to execute the transfer forwarded to it on 17th September, 2009 and return the same with completion documents was a breach of the agreement entitling the appellant to specific performance; holding that the appellant had not paid to the respondent or to its order Kshs. 1,703,411/-towards the purchase price of the suit property; determining that the balance of the purchase price was Kshs. 2,587,589/-; holding that the appellant's deposit in court of Kshs. 1,296,589/- pursuant to an order of the court was not sufficient demonstration of her willingness and ability to perform her outstanding

obligation to pay the balance of the purchase price under the agreement; holding that the appellant was in breach of the agreement and that the respondent was entitled to rescind the same on 21st October, 2009; declaring the appellant a trespasser on the suit property and directing the demolition of the premises erected thereon; refusing to order specific performance of the agreement despite substantial performance thereof and absence of the impediment to performance; and disregarding and failing to be guided by the law on sale of land and specific performance.

The respondent filed a cross-appeal and raised three grounds thus: the learned Judge erred in law and fact in; failing to assess or quantify and award the respondent damages for trespass even after finding that the respondent was entitled to such damages and after entering judgment for the same as had been prayed for in the plaint; purporting to exclude or set aside the order for general damages for trespass which she had granted in the judgment delivered on 4th April, 2018 by a subsequent order made on 28th May, 2018 *suo moto* purportedly under Section 99 of the Civil Procedure Act; and failing to assess the damages she would have awarded in the event that her order made *suo moto* on 28th May, 2018 were found to be erroneous.

At the hearing of the appeal, **Mr. Havi,** learned counsel appeared for the appellant whereas **Mr. Amuga,** learned counsel appeared for the respondent.

Mr. Havi consolidated the 12 grounds into two broad themes: the date of completion and whether the balance of the purchase price was payable before or after the transfer. Counsel referred the court to Clause 8 of the agreement which stated that payment of the balance was due after registration of the transfer and faulted the learned Judge for finding to the contrary. He contended that the completion date was not specifically provided for in the agreement which meant that the Law Society terms and Conditions of Sale would come into play, that is 42 days which would have been on 12th March, 2009. That on the completion date none of the parties had performed part of their bargain and neither was the notice to rescind the agreement issued. He maintained that time was not of essence. The appellant was given vacant possession of the suit property on which she had developed a dwelling house and settled in. That the appeal should succeed since both parties substantially performed their obligations. Counsel reiterated that there was a difference between the appellant's and the respondent's amount of the balance due and payable and the learned Judge erred in holding that the contract was validly rescinded. He was of the view that the learned Judge should have determined the balance and directed the appellant to pay as the amount was already deposited in court in any event.

Opposing the appeal, **Mr. Amuga** rebutted the appellant's contention that the balance was payable after registration of transfer. This meant that the amount was to be paid after completion of the transfer which was once the transfer had been signed by the parties. He disputed the claim by the appellant that it did not avail to her the transfer document or at all. That the appellant was a cash purchaser hence the balance of the purchase price was payable on execution of the transfer. Counsel pointed out that when the respondent issued the 21 days' completion notice, it made time of essence. That when the appellant failed to comply with the notice, the respondent rescinded the sale. It was his view that the appellant was never ready or willing to complete the transaction as even to-date she has not been able to pay the said balance. That for the appellant to now ask the court to allow her perform the contract would be tantamount to the court rewriting the contract for the parties.

Counsel stressed that the Law Society terms and Conditions of Sale do not allow a party to develop property before completion. On the cross-appeal, counsel faulted the learned Judge for not awarding mesne profits after finding that the appellant was a trespasser and for reversing the order for damages in chambers after delivery of judgment as she was *functus officio.* He urged that should the cross-appeal be successful, damages payable should be assessed.

This is a first appeal. It is settled law that the duty of the first appellate Court is to re-evaluate evidence tendered in the trial court and come up with its own findings and conclusions. In the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR** this Court stated 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. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-***
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> ***"On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

We have considered the record, submissions by the parties and the law. The issues for determination are whether the appellant was liable for breach of the agreement and closely intertwined is whether time was of the essence and finally whether the respondent was entitled to rescind the contract, and whether the Judge was in error in revisiting the Judgment making amendments to the same in chambers in the absence of the parties, and the fate of the cross-appeal.

It is trite law that parties to a contract are bound by the terms and conditions stipulated therein. In the instant appeal, the facts confirm that the parties acknowledged having entered into the agreement for the sale of the suit property. None complained of fraud or coercion and they were accordingly bound by its terms. This is what this Court had in mind in **National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR** when it stated:

> ***"The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."***

The agreement having been lawfully entered into by the parties was legally binding on both of them. This leaves us with the burden of its interpretation. We must reiterate that the general rule of interpretation is to ascertain and give effect to the intention of the parties as it is that intention that was crystallized in the execution of the agreement.

It is common ground that the appellant and the respondent entered into an agreement for the purchase of the suit property for a consideration of Kshs. 3 Million. It is also not in dispute that the appellant paid the agreed deposit of Kshs. 412,911/-. On the face of it the expected balance of the purchase price was Kshs. 2,587,589/-. However, the appellant contended that she had facilitated the subdivision and processing of titles for the respondent's five other plots at the cost of Kshs. 1,250,000/- and therefore the balance of the purchase price was Kshs. 1,336,589/-. This issue was broadly dealt with by the trial court. It was clear from the proceedings that **Mr. Osero** who had allegedly been contracted by the appellant in 2008 to oversee the alleged subdivision of the respondent's other plots did not do so since subdivision had already been undertaken and paid for way back in 2005 and 2006. Further there was no evidence that Kshs. 1,250,000/- was utilized for the benefit of the respondent. It does appear to us that indeed both the appellant and her witness Mr. Osero were not credible witnesses. They were untruthful and their evidence unbelievable. On the basis of the foregoing, we uphold the finding by the trial court that the balance of the purchase price was Kshs. 2,587,589/- and that **Mr. Osero** had not undertaken the subdivision of the respondent's other plots and for which the appellant incurred any expenses on behalf of the respondent.

We now turn to the issue of breach, time and rescission. It was the respondent's claim that the appellant was in breach of the agreement when she failed to pay the balance of the purchase price and that it was on account of this breach that it rescinded the contract. This assertion was not disputed save that the appellant was acting on the notion that since the agreement did not expressly provide for a completion date, time was not of essence. She further argued that she was required to pay the balance of the purchase price after the transfer and registration of the suit property in her name. As to whether time was of essence or not, there was no definite provision for the payment of the balance in the agreement, hence the appellant was entitled to be served with a notice making time of the essence as elucidated in **Halbury's Laws of England, 3rd Edition volume 8 at page 165** that:

> **"In cases where time is not originally of the essence of the contract; or where a stipulation making time of the essence has been waived, time may be made of the essence where there is unreasonable delay, by notice from the party who is not in default fixing a reasonable time for completion and stating that in the event of non-completion within the time so fixed he intends to enforce or abandon the contract. But the time fixed must be reasonable having regard to the position of things at the time when the notice was given, and to all circumstances of the case."**

We are of the considered view that the six months lapse after the completion date of 12th March, 2009 and over eight months from the date of execution of the agreement constituted an unreasonable delay and the 21 days' notice served on the appellant was sufficient notice. In **Samuel Ngige Kiarie v Njowamu Construction Company Limited & Ano. Civil Appeal No. 61 of 2016** the Court held that, a delay of six months after the lapse of the completion date in the contract for sale of land constitutes unreasonable delay. The completion notice issued to the appellant by the respondent rendered time of the essence in this instance and the learned Judge was justified in so holding. Thus the respondent was perfectly entitled to terminate the agreement.

In **David Moses Gekara v Hezron Nyachae [2012] eKLR**, the court was persuaded with the holding in **Njamuya v Nyaga [1983] KLR 282** in which it was stated that:

> ***"…where it was emphasized that in case where it is not stipulated in the contract that time is of the essence, the notice must be given to the defaulting party and that notice is what will make time to be of essence. It is also clearly stated there that the notice must also give a defaulting party a reasonable time within which to rectify the default."***

(See also: **Gurdev Singh Birdi & Another as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhbuti [1997] eKLR).**

The respondent was tasked with preparing the agreement while the appellant was to prepare the transfer documents upon execution of the agreement. The agreement was executed on 21st January, 2009 and the appellant given vacant possession of the suit property in terms of the agreement. However, the appellant failed to fulfill the end of her bargain by preparing and forwarding the transfer documents to the respondent and only acted on the same after being served with the 21 days completion notice in September 2009. The completion notice was specific that the appellant pays the balance off the purchase price failure of which the agreement stood determined. The appellant did not attempt to explain the delay at all or even seek to extend time within which to complete. The appellant was responsible for the delay hence she cannot claim that the balance was to be paid after registration. In a normal conveyance registration of the transfer can only be undertaken if the purchaser gives an undertaking to remit the balance of the purchase price immediately upon the registration. This was not the case here! This fact alone disapproves the appellant's contention that the balance of the purchase price was to be upon registration of the transfer instrument in her favour. The appellant then proceeded to develop the suit property all the while knowing that she had not paid the balance. It is trite that the respondent could not wait for the appellant to register the suit property at her own pace and pleasure before paying the balance of the purchase price. In our view this amounted to breach of the sale agreement. As a consequence of the breach, the respondent was entitled to treat itself as discharged from further liability under the agreement. (See: **Chitty on Contracts, General Principles (28th Edition, Vol 1) para 25-001 and 25-038**). At the lapse of the 21 days, the respondent rescinded the sale agreement. (See also: **Halsbury's Laws of England (4th Edition Vol. 42) paragraph 242** and **Karanja Mbugua & another *v* Marybin Holding Co. Ltd [2014] eKLR).**

In the case of **Sisto Wambugu v Kamau Njuguna[1983]eKLR** it was held that the vendor's right to rescind an agreement for sale for non-payment at the appointed time is only exercisable where time is of essence or where the innocent party has issued a notice to the defaulting party making time of essence. Condition 6.3 of LSK Terms and Conditions of Sale and the case of **Kasturi Ltd v Nyeri Wholesalers Ltd [2014] eKLR** point to the fact that upon rescission the appellant had no basis for continuing to occupy the suit property.

The law and its process cannot be used to circumvent express agreements between parties nor can it be used as a delaying tactic. The

appellant had no right to develop the suit property as she was merely holding the same as a licensee of the respondent in accordance with the Law Society Terms and Conditions of Sale. Indeed, under Condition 4(7) of the Law Society Terms and Conditions of Sale to which the agreement for sale was subject, either party was at liberty to issue and serve a completion notice, being then ready, able and willing to complete: That Condition stipulates that:

> **"Upon service of a completion notice it shall become a term of the contract that the transaction shall be completed within twenty-one (21) days of service and, in respect of such period, time shall be of the essence to the contract."**

In the circumstances, it is manifest that by failing to prepare and avail the transfer documents for execution on or before the completion date and failure to honour the terms of 21 day completion notice, the appellant paved the way for the subsequent rescission of the agreement by the respondent. The appellant was under obligation to pay the balance of the purchase price within 21 days of the notice of completion. (See: **Parminder Singh Sagoo & Ano. v Neville Anthony Dourado & Ano. [1983]**

KLR 365. The trial court was thus right in holding thus. The appellant did not also sufficiently demonstrate that she was deserving of an order of specific performance as she had not satisfied her obligation as per the agreement, which was full payment of the purchase price. It is trite that a party seeking the equitable remedy of specific performance of a contract must show that he or she has performed all the terms of the contract which he or she has undertaken to perform whether expressly or by implication, and which he or she ought to have performed. (See: **Gurdev Singh case (supra**)). Similarly in the case of **Sisto Wambugu** (Supra) it was observed:

> ***"In my judgment the respondent cannot come to the court and obtain an order of specific performance of the agreement, unless he had performed his part of the bargain or can show that he was at all times ready and willing to do so."***

This was not the case here.

As regards the cross-appeal, the respondent was aggrieved for not being awarded mesne profits after the trial court made a finding that the appellant was a trespasser and also faulted the learned Judge for reversing the order for damages in chambers after delivery of judgment and urged that damages payable should be assessed. The respondent contended the amendment made by the court to the judgment to exclude damages for trespass by Court Order on 28th May, 2018 made *suo moto* was erroneous. The law regarding amendment of judgment is found under Section 99 of the Civil Procedure Act. It states:

> ***"Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."***

A plain reading of the section shows that the High Court has power both under the rules and inherent powers of the court to correct clerical or arithmetical mistakes in judgments, decrees or orders arising therein from any accidental slip or omission. Courts have set out guidelines which govern the circumstances under which the exercise of the jurisdiction to correct clerical or arithmetical mistakes in judgments, decrees or orders are made. In **Vallabhdas Karsandas Raniga v Mansukhlal Jivraj and Others [1965] EA 780,** the East African Court of Appeal held as follows:

> ***"Section 3(2) of the Appellate Jurisdiction Act confers on the Court of Appeal the same jurisdiction to amend judgments, decrees and orders that the High Court has under section 99 of the Civil Procedure Act, making it unnecessary to look to the inherent powers of the court. The words "at any time" in section 99 clearly allow the power of amendment to be exercised after the issue of a formal order…."Slip orders" are made to rectify omissions resulting from the failure of counsel to ask for costs and other matters to which their clients are entitled……A court will only apply the slip rules where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention. In the present case, if the facts had been before the court when judgment was given on appeal, the court would, on application or indeed of its own motion, have made the order for refund, now sought, which was necessarily consequential on the decision on the main issues."***

The question then is whether the award of damages for trespass was a defect that would warrant correction by the trial court. It is trite that the court will only correct a defect where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given. The court found the respondent's evidence to be satisfactory and awarded the prayers sought in the plaint. The court had thus become *functus officio* in the matter. Having found the appellant a trespasser on the suit property, it follows that the respondent was entitled to damages for trespass. It is our view that the alleged defect the court sought to amend cannot be said to amount to arithmetical error which could be cured by the trial court in exercise of its power under Section 99 of the Civil Procedure Act. It was a substantial question that if corrected would affect the substance of the judgment and would amount in essence to setting aside a portion of the judgment of the trial court. The trial court had no powers or jurisdiction to do so or set aside its judgment on the ground that the respondent's advocate did not submit on the same as so doing amounted to the trial court sitting on appeal against its own decision. (See: **Telkom Kenya Limited v John Ochanda & 996 Others [2014] eKLR)**. The trial court having found that the appellant was a trespasser, should have proceeded to award damages. Further and as per the routine the learned Judge failed to assess the damages it would have awarded in the event the suit was dismissed. (See: **C.Y.O. Owayo v George Hannington Zephania Aduda t/a Aduda Auctioneers & Ano. [2007] 2 KLR 140**). From the foregoing, we find that the learned Judge erred in making the amendment and not awarding damages for trespass.

It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: **Black's Law Dictionary 9th edition**). Mesne Profits must be pleaded and proved. In the case **Peter Mwangi Msuitia & Another v Samow Edin Osman [2014] eKLR**, this Court held as follows:

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

In the case of **Inverugie Investment v Hackett (Lord Lloyds [1995]3 ALL ER 842** it was held thus:

> ***"Our understanding of the above persuasive authority is that once the learned Judge made the award under the subhead "mesne profits" there was no justification for him awarding a further Kshs.10 million under the subhead "trespass" since both mean one and the same thing…"***

The above decision was followed by this Court's decision in the case of **Kenya**

Hotel Proprietors Ltd v Willesden Investments Ltd [2009] KLR 126.

In the instant appeal, the trial court made a finding that the appellant was a trespasser from the time the respondent rescinded the agreement. As such the respondent was entitled to compensation for the period the appellant was in occupation of the suit land. The respondent sought both mesne profits and damages for trespass. The law is that trespass to land is actionable *per se* (without proof of any damage). In **Park Towers Ltd v John Mithamo Njika & 7 others [2014] eKLR** it was stated:

> ***"I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages***
>
> ***awardable depending on the unique facts and circumstances of each case..."***

Therefore, granted that trespass to land is actionable *per se*, and indeed no proof of damage is necessary for the court to award general damages. We note that the respondent did not claim any amount to guide the court in assessing general damages for trespass. The court would have expected the respondent to obtain the actual benefits accrued by the appellant from the suit property for the duration of the trespass. It is common ground that the appellant had erected a mansion on the suit property. Such information represents the opportunity of cost of the deprivation of the use of land by the appellant's continued occupation.

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

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

Similarly, in the case of **Duncan Ndegwa v Kenya Pipeline Limited HCC No. 2577 OF 1990** the court held that:

> ***"The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principles is to put the claimant in the position he was prior to the infliction of the harm."***

We have no doubt that when the appellant was constructing a mansion on the suit property; she had neither sought nor obtained the consent of the respondent to so develop the suit property. The appellant was not acting in good faith. She was aware of the pending balance of the purchase price and her duties and responsibilities as a licensee of the respondent while in possession of the suit property. She was notified of the unlawful act and trespass by the respondent's advocate's letter dated 31st May, 2010. The appellant's actions on the suit land were therefore unlawful and thereby altered the use of the suit property. The respondent is therefore entitled to compensation. No evidence was adduced as to the state of suit property after the trespass and it thus becomes difficult to assess general damages for trespass. The exact value of the land before trespass was Kshs. 3,000,000/- but the value after the trespass is not proved. However, as we have found that the appellant did trespass onto the respondent's land and started construction thereof, we would award the respondent a nominal figure of Kshs. 500,000/-

plus interest from the date of this judgment until payment in full as general damages for trespass.

In the result, this appeal fails and is dismissed. The cross-appeal is allowed.

The respondent shall have the costs of the appeal as well as of the cross-appeal.

Dated and delivered at Nairobi this 10th day of July, 2020.

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR