



Abura & another (Suing as the Administrators of the Estate of Isabella Akumu Abura (Deceased)) v Usonik Farm Purchase Co-operative Society Limited (Environment & Land Case 28 of 2014) [2024] KEELC 13739 (KLR) (9 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13739 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 28 OF 2014
SO OKONG'O, J
DECEMBER 9, 2024**

BETWEEN

JOAN ABURA 1ST PLAINTIFF

LYNETTE DAWA 2ND PLAINTIFF

SUING AS THE ADMINISTRATORS OF THE ESTATE OF ISABELLA AKUMU ABURA (DECEASED)

AND

USONIK FARM PURCHASE CO-OPERATIVE SOCIETY LIMITED DEFENDANT

JUDGMENT

1. This suit was brought on 17th February 2014 by Lydia Achieng' Abura (now deceased) as the administrator of the estate of Isabella Akumu Abura, deceased (hereinafter referred to only as "the deceased"). Lydia Achieng' Abura died on 20th October 2016 and Joan Abura and Lynette Dawa were appointed on 30th January 2017 to continue with the administration of the estate of the deceased. The Plaint was amended on 5th July 2019 to substitute Lydia Achieng' Abura with the new administrators of the estate of the deceased, Joan Abura and Lynette Dawa as the Plaintiffs. The Plaintiffs averred that the deceased owned all that parcel of land known as L.R No. 6015/3 (hereinafter referred to as "the suit property") which formed part of her estate.
2. The Plaintiffs averred that on or about 5th April 2012, the Agricultural Finance Corporation (hereinafter referred to only as "AFC") to which the suit property was charged to secure a loan served the then administrator of the estate of the deceased with a statutory notice of its intention to sell the suit property as the estate was heavily indebted to it and the debt had been outstanding for a long time. The Plaintiffs averred that the said administrator of the estate of the deceased with the consent of the



rest of the estate's beneficiaries decided to sell a portion of the property measuring approximately 500 acres to offset the debt from the sale proceeds and preserve the interest of the estate in the property.

3. The Plaintiffs averred that the said administrator of the estate got a suitable buyer who was willing, ready and able to pay the purchase price of Kshs. 80,000,000/- and entered into a sale agreement with it. The Plaintiffs averred that the sale transaction proceeded smoothly and the said purchaser made part payment which was used to offset the debt owed to AFC by the estate. The Plaintiffs averred that after settling AFC's debt, the original title to the suit property was released to the estate of the deceased. The Plaintiffs averred that on or about 7th November 2013, the Defendant through its advocates demanded that the Plaintiff rescinds the sale transaction with the said purchaser which was due for completion claiming that the late Jacob Abura who was then one of the administrators of the estate of the deceased had before his death offered to sell to the Defendant the said portion of the suit property measuring 500 acres and that the Defendant had already made a down payment of Kshs 500,000/- to him. The Plaintiffs averred that the Defendant furnished them with no document to support its claim.
4. The Plaintiffs averred that the Defendant by itself, its agents and/ or servants entered the suit property, erected informal structures thereon and leased parts of the same to third parties thereby frustrating the Plaintiff's efforts to complete the sale agreement they had entered into in respect of the said portion of the suit property measuring 500 acres. The Plaintiffs averred that they reported the invasion of the suit property by the Defendant to the area District Commissioner. The Plaintiffs averred that despite having been directed by the District Commissioner to stop the invasion and erection of structures on the suit property, the Defendant continued with the invasion and erection of the said structures. The Plaintiffs averred that heavily armed people invaded the suit property and threatened to harm any person working on the suit property. The Plaintiffs averred that as a result of this development, all activities on the suit property including farming ceased since the workers feared for their lives. The Plaintiffs contended that they had been threatened on several occasions and therefore they feared for their lives.
5. The Plaintiffs averred that the said actions by the Defendant, its agents, employees or persons acting under its direction amounted to trespass on the suit property. The Plaintiffs averred that if the said activities of the Defendant, its agents and/or servants were not stopped, they were apprehensive that the purchaser who had purchased the said portion of the suit property from them would institute a suit against the estate of the deceased for breach of sale agreement which was being frustrated by the activities of the Defendant. The Plaintiffs prayed for judgment against the Defendant for;
 - a. A permanent injunction stopping the invasion and erection of structures on the suit property;
 - b. Demolition orders against the Defendant to demolish the illegal structures erected on the suit property;
 - c. An order compelling the trespassers on the suit property to vacate the property;
 - d. General damages for the delay occasioned in completing the sale transaction;
 - e. General damages for trespass to property;
 - f. Mense profits for the illegal occupation and use of the property since 2013 to the time of their eviction;
 - g. Cost of this suit and interest at court rates.
6. The Defendant entered appearance and filed a statement of defence on 22nd July 2014 to the original plaint. The Defendant averred that Jack Abura (a.k.a Jacob Abura) (deceased) while still an



administrator of the estate of Isabella Akumu Abura, deceased made an offer to the Defendant to sell to it a portion of the suit property measuring 500 acres at a price of Kshs. 70,000/- per acre which offer was accepted by the Defendant. The Defendant averred that it made a down payment of Kshs. 500,000/- to the said Jack Abura. The Defendant averred that the sale agreement was to be formally reduced into writing on 4th October 2007 upon the Defendant paying off the loan arrears that was due from the estate of the deceased to AFC which stood at Kshs. 9,000,000/-. The Defendant averred that the said Jack Abura, unfortunately, died on 1st October 2007 before the sale transaction was formalised and completed. The Defendant averred that the siblings of Jack Abura including the Plaintiffs were aware of the said agreement and granted the Defendant's members free and uninterrupted occupation of the disputed portion of the suit property on which the said members had been cultivating sugarcane for over 7 years since the death of Jack Abura. The Defendant averred that the Plaintiffs were estopped from feigning ignorance of the said agreement with Jack Abura.

7. The Defendant denied that its members had invaded and erected illegal structures on the suit property. The Defendant averred that its members were lawfully occupying and using the portion of the suit property measuring 500 acres courtesy of the valid sale agreement the Defendant entered into with the Plaintiffs' predecessor whose action was ratified by the Plaintiffs and their siblings who allowed the Defendant free use and occupation of the property pending the completion of the said sale agreement. The Defendant averred that the Plaintiffs engaged in the sale of the said portion of the suit property to a third party while well aware of the existing agreement for sale between the Defendant and Jack Abura. The Defendant averred that the alleged threat to sue by the purported third-party purchaser was merely an excuse to invalidate a binding agreement.
8. At the trial, Lynette Anyango Dawa (PW1) adopted her witness statement filed on 5th July 2019 as her evidence in chief and produced the documents in the Plaintiffs' list of documents filed on the same date P.EXH. 1-9 respectively. PW1 stated as follows in her oral testimony: The suit property was registered in the name of her deceased mother, Isabella Akumu Abura. She and her sister Joan Abura were the administrators of the deceased's estate. They had not sold the suit property to the Defendant. They came to court when the Defendant invaded the property and occupied a portion thereof measuring 500 acres. This portion of the suit property was the most arable and they had been using it for sugarcane farming. The Defendant had also put up illegal structures on the suit property. They were seeking the eviction of the Defendant from the said portion of the suit property and the removal of their illegal structures therefrom. They also wanted compensation for the use of their land.
9. On cross-examination by the advocate for the Defendant, PW1 stated that they received various offers for the purchase of the said portion of the suit property from various groups. She stated that the offers were made in 2006/2007 when her late brother Jack Abura who was then an administrator of the estate of the deceased was still alive. She stated that the offers were from various informal groups. She stated that they received offers from Soba and Chebibi which were their neighbors. She stated that the suit property was charged to AFC and that the Soba group wanted to obtain a loan from AFC to purchase a portion of the suit property. She stated that they even went with them to AFC and that was how far the discussions with them went. She stated that she could recall that the chief of the area and a teacher were in the group that went with them to AFC.
10. She stated that she did not know the Defendant save from the letter the Defendant wrote to them. She stated that it was the Defendant which invaded the suit property. She stated that her brother Jack Abura accompanied her to the AFC office together with the said chief and teacher. She stated that at that stage, the Soba group were trying to get information on whether they could get a loan. She stated that her brother Jack Abura died in 2007 and by that time, there was no concrete offer from any of the local groups which were interested in purchasing the said portion of the suit property. She stated



that it was not until 2013 that they got somebody else who made a serious offer. She stated that the local groups did not get back to them and they did not have an agreement with them. She stated that the serious buyer offered them Kshs. 80,000,000/- and the outstanding loan at that time was Kshs. 48,000,000/- which was negotiated to Kshs. 14,013,000/-.

11. She stated that Soba and Chebibi groups showed interest in the suit property and may have started collecting money to purchase the same but nothing came out of it. On re-examination, PW1 stated that they did not receive any offer from the Defendant to purchase the suit property. She stated that the offers by Soba and Chebibi were not in writing and they did not enter into any agreement with them. On examination by the court, PW1 stated that her mother died in 1993 and that there were two administrators of her estate; herself and her sister Joan Abura who was residing in the United Kingdom. She stated that the first administrators who were appointed to administer the estate of the deceased soon after her death were, Jacob Abura, Carren Macpherson and Kennedy Abura all deceased. She stated that after them, her late sister Lydia Achieng' Abura became the administrator but she also passed on. She stated that it was after the death of Lydia Achieng' Abura that she and Joan Abura became the administrators of the estate. She stated that her brother Jack Abura (Jacob Abura) did not enter into any agreement with the Soba and Chebibi groups or with the Defendant. She stated that they only got to know of the Defendant when the Defendant wrote to them after they (Plaintiffs) got a buyer. She stated that the Defendant thereafter invaded the portion of the suit property measuring 500 acres which was not even the portion of the suit property they had offered to the local community.
12. The Defendant's first witness was Naftali Kimurwon Kemboi (DW1). DW1 adopted his witness statement filed on 22nd July 2014 as his evidence in chief. He stated as follows in his oral testimony. He was living at Kapkitany sublocation, Soba location, Nandi South District. He had lived in the area for about 40 years. They were neighbours of the deceased, Isabella Abura. He was a member of the Defendant. The Assistant Chief of the area came to him and told him that Jack Abura (Jacob Abura) wanted 5 elders. This was in 2007. On the following day, he went to Jack Abura's office. Jack Abura told them that they were selling a portion of their land. He told them that they were selling an acre at Kshs. 70,000/-. They agreed to purchase the land. They entered into a written agreement with Jack Abura. They paid Jack Abura Kshs. 200,000/-. Jack Abura was sick. They started collecting money and paid him a deposit of Kshs. 200,000/-. They established the Defendant for the purposes of buying the said portion of the suit property. Each member was to pay Kshs. 50,000/-. He paid Kshs. 20,000/-.
13. On cross-examination by the Plaintiff's advocate, he stated that they paid Jack Abura a total of Kshs. 200,000/- as a deposit. He stated that they then continued to collect money. He stated that they had an agreement and that, the chief and assistant chief were present. He confirmed that he was a neighbor to the deceased and that he was a farmer and had farms of his own. He stated that some members of the Defendant had occupied the suit property and were cultivating maize and sugarcane thereon. He stated that maize was for consumption only while sugarcane was for sale. He confirmed that Jack Abura was sick. DW1 stated that they entered into a written agreement which was in the Defendant's office. He stated that they were not willing to move out of the suit property because they paid for the same.
14. On re-examination, DW1 stated that he did not know PW1. He stated that he only knew Jack Abura and Leonard Abura. On examination by the court, he stated that they paid Jack Abura Kshs. 200,000/- out of a total purchase price of Kshs. 35,000,000/- which they were supposed to pay. DW1 stated further that they were occupying the 500 acres that they were to purchase. He stated that they had the balance of the purchase price in the account of the Defendant and they were ready to pay the same.
15. The Defendant's second witness was Christopher Kipkoech Choge (DW2). DW2 adopted his witness statement filed on 22nd July 2014 as his evidence in chief. He stated further as follows: He was living at Kapkitany and he was a farmer. He was a member of the Defendant. He knew the Plaintiffs' family.



They were neighbours. They had been neighbours since 1971. He came to know Jack Abura (Jacob Abura) when he called them and told them that he was hard-pressed with a bank loan. They went to his place with the chief, assistant chief, and other people. He told them that he wanted to sell a portion of the suit property. Jack Abura told them to go to the office of AFC to find out how much Jack Abura owed AFC. They collected money and went to AFC. Jack Abura agreed to sell to Kichaba the land. They decided to start a new society by the name Usonik to purchase the said portion of the suit property. He went with Jack Abura to AFC office in Nairobi. They were accompanied with others. They did not get the manager of AFC. They were told to go away and come back when the manager was back. Jack Abura told them that he was sick and needed Kshs. 300,000/-. They told him that they did not have Kshs. 300,000/-. They paid him Kshs. 200,000/- and made further payments. They paid him a total of about Kshs. 500,000/-. PW1 was known to him. He talked to her during the funeral of Jack Abura. The family of Jack Abura was aware of their agreement with Jack Abura.

16. On cross-examination by the Plaintiffs' advocate, DW2 stated that he bought the land he was staying on. He was occupying land measuring about 10 acres. The price of land in the area was about Kshs. 250,000/- per acre. He was cultivating sugar cane. He could harvest 40 tonnes of sugar cane per acre. A tonne of sugarcane fetched Kshs. 6500/-. That was gross before the deduction of items like transportation. The net income per tonne of sugarcane would come to about Kshs. 4000/-. They had occupied the suit property for about 10 years. They were occupying a portion thereof measuring 500 acres. Some parts of the land were rocky. They did not have a written agreement with Jack Abura. Jack Abura did not acknowledge the payment they made in writing. They paid Jack Abura a total of Kshs. 500,000/-. They had earned more than Kshs. 500,000/- from the suit property.
17. On re-examination, DW2 stated that after paying Jack Abura Kshs. 500,000/-, they started collecting money. He stated that they had money in their account.
18. The Defendant's next witness was Joshua Kiplego Melly (DW3). DW3 adopted his witness statement filed on 22nd July 2014 as his evidence in chief. He stated further as follows. He lived in Kapkitany, Soba and he was a farmer. He was born in the area in 1979 and knew the Abura family who were their neighbours. He was living on the suit property. He was a member of the Defendant and the treasurer of the group. He produced the Certificate of Registration of the Defendant as D.EXH.1. DW3 stated that the Defendant was registered on 17th July 2007. He stated that Jack Abura had given them a portion of the suit property on which they were growing food crops and in 2007 he agreed to sell to them a portion of the suit property measuring 500 acres. He stated that unfortunately, Jack Abura died the same year. He stated that when Jack Abura died they were occupying the suit property and had remained in occupation. He stated that the family of Jack Abura told them that after the mourning period, they would complete the agreement Jack Abura had with them.
19. He stated that they were not asked to vacate the suit property until 2013 when some people appeared and started surveying the land. He stated that they were then informed that the Abura family had decided to sell the said portion of the suit property to Caroli Omondi. He stated that they had a meeting as a group and agreed to approach an advocate who wrote a demand letter to the Abura family on 7th November 2013. He produced the letter as D.EXH. 2. He stated that after the said letter, they were summoned to the District Commissioner's office through a letter dated 8th April 2014. He produced the letter through which they were summoned by the District Commissioner as DEXH.3. He stated that after the meeting at the District Commissioner's office that was attended by the wife of Jack Abura, they were sued.
20. On cross-examination by the Plaintiffs' advocate, DW3 confirmed that he was born at Kapkitany and that his father had 18 acres of land on which they were staying as a family. He stated that Jack Abura gave the directors of Kichaba Farmers an offer to purchase land measuring 350 acres. He stated that he



- had not seen an acceptance of that offer. He stated that there was no acknowledgement in writing of the payment that they made to Jack Abura. On re-examination, DW3 stated that they had collected a total of Kshs. 50,000,000/- that they were ready to pay to the Plaintiffs.
21. The Defendant's next witness was Philip Kiptoo Tanui (DW4). DW4 adopted his witness statement dated 16th July 2014 as his evidence in chief. He stated further as follows: He was staying at Usonik in Songonor. He was a farmer and also carried out business of transportation. He was the secretary of the Defendant and was elected to office on 30th October 2013. He was given the mandate by the members of the Defendant to find out the status of the suit property that they were occupying. He started looking for Lydia Abura who refused to discuss the issue of the suit property with him. Lydia Abura told him that they had sold the land to Caroli Omondi. He stated that they entered the suit property in 2006/2007. He stated that Jack Abura had allowed the former officials of the Defendant to enter the land.
 22. On cross-examination by the Plaintiffs' advocate, DW4 stated that: He was born in Soba. Their family land in Soba measured 3 acres. He had not bought the land. He was born in 1974. He knew the deceased, Isabella Abura. They would vacate the suit property if ordered to vacate. They had benefited from the land. He was keeping the records of the Defendant. He had not come across any agreement of sale between the Defendant and the Abura's. He had only seen the letter of offer to Kichaba. He had not seen a response to that letter of offer. He had not seen any offer by the Defendant to purchase the suit property from Jack Abura or the Plaintiffs. He had not seen any acknowledgement of payment from Jack Abura. He neither talked to Jack Abura nor dealt with him. Jack Abura did not allow him to enter the land. The suit property was being cultivated by the Defendant's members. They were occupying a portion thereof measuring 500 acres. They did not agree on a price with the Abura family. If they fail to agree on the price they will have to vacate the property.
 23. On examination by the court, DW3 stated that they were occupying a portion of the suit property measuring 500 acres. He stated the Defendant had 100 members who were all staying on the suit property and also cultivating the land. He stated that they had put up semi-permanent houses and not permanent houses on the property. He stated that they did not have other parcels of land.
 24. The Defendant's next witness was David Kibet Biwott (DW5). DW5 adopted his witness statement filed on 22nd July 2014 as his evidence in chief. He stated further as follows: Initially, they were operating under the name Kichaba Farmers Society. They thereafter formed the Defendant herein for the purposes of purchasing the suit property. He was not in the first team that went to Nairobi. When they came back, it was resolved that they form a new society. He then went to Nairobi and had the Defendant registered. The purpose of registering the Defendant was to purchase the suit property. He had receipts to prove that they went to Nairobi. He produced the receipts as D.EXH. 4 (a) (b), (c), (d) and (e).
 25. They went to Nairobi with Jack Abura. While in Nairobi, they met with the then-area MP Hon. Kosgey, the Managing Director of AFC, and the Finance Manager of AFC. They wanted to know the loan that was due to AFC from the Abura's. They confirmed that the outstanding loan was Kshs. 11,000,000/-. This is indicated in the letter dated 20th September 2007 addressed to Kipsitoi Farm Ltd. by AFC. After some concession, the debt was reduced to Kshs. 9,000,000/-. This was the amount that they were to pay so that the suit property could be discharged. Before they went to Nairobi, Jack Abura had offered to sell to them land measuring 350 acres. This was through a letter dated 1st June 2007. Thereafter Jack Abura agreed to add them 150 acres. The total land they were buying was 500 acres. When they came back from Nairobi on 20th July 2007 they were to raise Kshs. 9,000,000/- which was the redemption amount. They had raised Kshs. 4,000,000/-. By around 20th September 2007, they had



raised about Kshs. 6,000,000/- and were planning to leave for Nairobi. Unfortunately, on 1st October 2007, Jack Abura passed away. They now found it difficult to move forward. They had a statement of account for the Defendant showing that as at 17th September 2007, they had Kshs. 2,559,694. He produced the letter dated 20th September 2007 from AFC, the letter of offer dated 1st June 2007 and the Defendant's statement of account as D.EXH. 5, 6 and 7 respectively.

26. On cross-examination by the Plaintiffs' advocate, DW5 stated that: He was a teacher at Sigoria Primary School next to Kipsitoi Farm. He was born in 1972 and went to Soba River Primary School. The school was within the locality where he was born. He was born at Kapkitany and that was where his family lived. Kapkitany was about 2km from Kipsitoi Farm. His family owned land measuring 10 acres. They were 10 in the family. It was only he who was occupying Kipsitoi Farm. His parents were still alive. As per D.EXH. 6, Jack Abura offered to sell to them land measuring 350 acres. He did not have a letter of offer to them of land measuring 500 acres. They were planting sugarcane on the suit property for sale. They also planted maize for subsistence and also for sale. They had occupied the suit property from 2005. He had leased some land from private persons. They charged him Kshs. 30,000/- per acre for 3 harvests. He had also leased land from other persons occupying the suit property. He was paying them Kshs. 20,000/- per acre for 3 harvests. They had never paid the Abura family for leasing or occupying their land. When they went to Nairobi, they used the Defendant's money and kept the receipts for accounting purposes to their members.
27. DW5 stated that they gave Jack Abura Kshs. 500,000/=. Kshs. 200,000/- was given to Jack Abura by the then interim officials of the Defendant. They thereafter gave him another Kshs. 200,000/- when Jack Abura came to them when he was sick. Jack Abura and members of his family did not acknowledge receipt of the money from them. The Defendant had a bank account. They collected money from members and took the same to the bank. There was no evidence that they withdrew Kshs. 500,000/- from their account. The money they paid to Jack Abura did not come from the bank account. It was cash from members. He knew the deceased, Isabella Abura.
28. After the close of evidence, the parties were directed to make closing submissions in writing.

The Plaintiffs' submissions

29. The Plaintiffs filed submissions dated 8th February 2024. The Plaintiffs framed several issues for determination which they submitted on. On whether they were entitled to the reliefs sought, the Plaintiffs submitted that the deceased was the registered proprietor of the suit property and as such her estate was entitled to enjoy the rights associated with such ownership which are protected under Article 40 of *the Constitution*. The Plaintiffs submitted that the deceased's title had not been challenged and as such was absolute. The Plaintiffs cited Sections 24 and 26 of the *Land Registration Act*, 2012 in support of this submission. The Plaintiffs submitted that the Defendants had no valid claim over the suit property and should be restrained from continuing with their illegal occupation of the suit property.
30. On whether the Defendant's occupation of the suit property constituted an act of trespass, the Plaintiffs submitted that trespass according to Section 3 of the *Trespass Act*, Chapter 294 Laws of Kenya is where a person without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof. The Plaintiffs submitted that the Defendant entered upon the suit property owned by the deceased without any reasonable excuse or permission from the Plaintiffs and had remained on the property even after being requested to vacate the same. The Plaintiffs submitted that the Defendant had not established any legal basis upon which it had invaded and occupied a portion of the suit property. The Plaintiffs submitted that the Defendant was a trespasser on the suit property. In support



- of this submission, the Plaintiffs cited *John Otieno Obade & Others v. Teresia Wairimu Kirima & Others* ELC Suit No.1257 of 2014 (OS), and *John Monyancha Ngoge v. Marcela Kerubo Kebabe* [2019] eKLR.
32. On whether Defendant had any proprietary rights over the suit property and had the right to occupy and use the same, the Plaintiff submitted that the Defendant did not have any proprietary interest over the suit property to warrant its occupation and use thereof. The Plaintiffs submitted that the Defendant purported to have received an offer to purchase a portion of the suit property. The Plaintiffs submitted that the Defendant relied on an offer that was purportedly given to Kichaba Farmers Cooperative Society to assert their claim to the said portion of the suit property. The Defendant submitted that the purported offer was made to another entity and not the Defendant. The Plaintiffs submitted that the Defendant could not therefore claim any rights or benefits under the offer.
33. The Plaintiff submitted further that the said letter of offer was just that; a letter of offer. The Plaintiffs submitted that the offer did not give rise to any legal obligations that could be actionable. The Plaintiffs submitted that there was no acceptance of the offer to make the engagement between the parties a contract. The Plaintiffs submitted that no contract for the sale of land existed between the parties that would give rise to any legal obligations between them in terms of Section 3 (3) of the *Law of Contract Act*, Chapter 16 Laws of Kenya. The Plaintiffs submitted further that there was no consideration given by the Defendant.
34. The Plaintiffs submitted that the Defendant claimed that it paid one Jack Abura about Kshs. 500,000/-. The Plaintiffs submitted that the Defendant did not produce any evidence in proof of that payment. The Plaintiffs submitted that the burden was on the Defendant to prove the existence of a valid agreement of sale between it and the estate of the deceased which burden they failed to discharge. In support of this submission, the Plaintiffs relied on *Kipkebe Limited v. Peterson Ondieki Tai*[2016] eKLR.
36. The Plaintiffs submitted further that the conduct of the Defendant constituted an offence of intermeddling under Section 45 of the *Law of Succession Act*, Chapter 160 Laws of Kenya. In support of this submission, the Plaintiffs cited *Veronica Njoki Wakagoto (Deceased)* [2013] eKLR and *In re Estate of M'Ngarithi M'Miriti* [2017] eKLR.
37. On whether the Plaintiffs were entitled to damages, the Plaintiffs submitted that they were entitled to an award of damages and mesne profits. The Plaintiffs submitted that the Defendant did not deny trespassing on the suit property. The Plaintiffs submitted that all the defence witnesses confirmed that they were in occupation of the suit property and that they had been commercially exploiting the same. The Plaintiffs submitted that the Defendant's witnesses admitted using the suit property to grow crops for subsistence and for sale. The Plaintiffs submitted that DW2 testified that he was planting sugarcane on the suit property from which he was earning an average Kshs. 160,000/- net per acre per harvest. The Plaintiffs submitted that the whole of the suit property measuring 500 acres would yield a total of Kshs. 80,000,000/- per harvest. The Plaintiffs submitted that the Defendant had illegally occupied the suit property since 2013 and had profited from the same. The Plaintiffs submitted that if the Defendants were harvesting sugarcane once every 2 years that would amount to about 6 harvests, which means that the Defendants would have made a total of Kshs. 480,000,000/- (Kshs. 80,000,000 X 6). The Plaintiffs submitted that this was the Plaintiffs' loss for the period of the Defendant's forceful occupation of the suit property.
38. The Plaintiffs submitted that based on the evidence of DW5 if they were to lease out the portion of the suit property in dispute for the entire period of the Defendant's unlawful occupation, they would have earned a total sum of Kshs. 90,000,000/-. The Plaintiffs submitted that DW5 admitted that some



members of the Defendant including he were leasing out parts of the suit property to third parties for profit.

39. The Plaintiffs submitted that the court should use the above parameters and figures in assessing damages and mesne profits payable to the Plaintiffs. In support of these submissions, the Plaintiffs cited *Park Towers Ltd. v. John Mithamo Njika & 7 others* [2014] eKLR, *Justine Magare Bosire v. Isaac Omboga* [2018] eKLR, *Attorney General v. Halal Meat Products Limited*[2016] eKLR and *Rajan Shah T/A Rajan S. Shah and Partners v. Bipin P Shah and Others*[2016] eKLR.
40. The Plaintiffs urged the court to enter judgment against the Defendant as prayed in the amended plaint with costs.

The Defendant's submissions

41. The Defendant framed three issues for determination by the court on which it submitted namely; whether the Plaintiffs had proved their case of trespass on a balance of probability to warrant the eviction of the Defendant from the suit property, whether the Plaintiffs are entitled to general damages for trespass and mesne profits until the time of eviction as claimed, and who should bear the costs of the suit?
42. On whether the Plaintiffs had proved their case on a balance of probability, the Defendant submitted that the Defendant entered the suit property around 2005 with the permission, consent and authority of the then administrator of the estate of the deceased, Jack Abura (Jacob Abura) (deceased) who was appointed in Nairobi HC. Succession Cause No. 580 of 1994. The Defendant submitted that the said administrator offered to sell to them the disputed portion of the suit property at the price of Kshs. 70,000/- per acre. The Defendant averred that it paid the said administrator of the deceased a deposit of Kshs. 500,000/- and the only issue that remained was for the Defendant to repay the entire loan that the estate of the deceased owed to AFC after which a formal sale agreement would be entered into for the portion of the suit property agreed upon by the parties and the balance of the consideration would be paid to the estate. The Defendant submitted that the agreement was not completed due to the death of Jack Abura on 1st October 2007. The Defendant submitted that the Plaintiffs promised the members of the Defendant that they would substitute the deceased administrator and get back to them which they never did. The Defendant submitted that they were able, willing and ready to complete the agreement they had with the late Jack Abura. The Defendant urged the court to find that there was an agreement of sale between the parties which should be completed notwithstanding that there was no written agreement of sale in compliance with Section 3(3) of the *Law of Contract Act*, Chapter 16 Laws of Kenya. In support of this submission, the Defendant relied on *Pius Kimaiyo Langat v. Co-operative Bank of Kenya Limited* [2017] e KLR.
43. The Defendant submitted that allowing the members of the Defendant to take possession and use the suit property and subsequently receiving a deposit of the purchase price from them constituted permissive occupation with the consent of the owner and as such the Defendant was not illegally in occupation of the suit property as the agreement superseded the title of the registered owner. The Defendant submitted that a constructive trust was created in favour of the Defendant. The Defendant submitted that the Plaintiffs were estopped from claiming that the members of the Defendant were intruders and strangers to the suit property having ceded possession of the same on account of a sale agreement. In support of this submission, the Defendant relied on *Veeland Housing Company Limited & 2 Others v. David Waweru Kahinga & 8 Others* [2021]eKLR) and *Benja Properties Limited v. Syedna Mohammed Burhannudin Sahed & 4 Others* [2015]eKLR.



44. The Defendant submitted that its members had a constitutional right to own property protected under Article 40 of *the Constitution*, which right must not be curtailed by any means.
45. On whether the Plaintiffs were entitled to general damages for trespass, and mesne profits, the Defendant submitted that its members were not trespassers on the suit property and as such the claim for general damages for trespass should not arise and must therefore fail. In support of this submission, the Defendant cited *Peter Lavatsa Kabwoya v. Nicholas G Karira & another* [2021] eKLR. The Defendant submitted further that mesne profits are special damages which must be specifically pleaded and proved. The Defendant submitted that the Plaintiffs did not specifically plead the amounts they were seeking as mesne profits. The Defendant submitted that the Plaintiffs did not also lead any evidence in proof of this claim of mesne profits. The Defendant urged the court to reject the Plaintiffs' mesne profits claim.
46. On the issue of costs, the Defendant submitted that the basic rule on attribution of costs is that costs are at the discretion of the court and that costs follow the event unless for some good reason the court orders otherwise as provided for under Section 27 (1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. The Defendant urged the court to find that the Plaintiffs had failed to prove their case against the Defendant on a balance of probability and proceed to dismiss the Plaintiffs' suit with costs to the Defendant.

Analysis and determination

47. I have considered the pleadings, the evidence tendered by the parties and the submissions by the advocates for the parties. In my view, the following are the issues that arise for determination in this suit;
 - a. Whether the Defendant is a trespasser on the suit property.
 - b. Whether the Plaintiffs are entitled to the reliefs sought in the amended plaint.
48. On the first issue, the following is my view: In Kenya, trespass is both a criminal offence and a civil wrong. Section 3 (1) of the *Trespass Act*, Cap 294 Laws of Kenya defines the offence of trespass as follows:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
49. Halsbury's Laws of England 3rd edition, Volume 38 at page 739 paragraph 1205 defines trespass as follows:

“A person trespasses upon land if he wrongfully sets foot on, or rides or drives over it, or takes possession of it, or expels the person in possession of pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it, or it seems if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land to another's land.”
50. In Clerk & Lindsell on Torts, 18th Edition at paragraph 18-01, trespass to land is defined as consisting of “any unjustifiable intrusion by one person upon land in the possession of another.”
51. It is common ground that the suit property was registered in the name of Isabella Akumu Abura, deceased (the deceased). The deceased died on 11th August 1993. From the evidence on record, a



Grant in respect of the estate of the deceased was first issued to Jacob Abura (Jack Abura), Kennedy Abura and Carren Macpherson in Nairobi High Court Succession Cause No. 580 of 1994. All these administrators of the estate of the deceased died before the estate was distributed. Carren Macpherson died on 31st May 2002, Kennedy Abura on 27th December 2003 and Jack Abura on 1st October 2007. Following the death of these administrators, Lydia Achieng' Abura was appointed on 30th April 2012 to complete the administration of the estate of the deceased. Lydia Achieng' Abura also died on 20th October 2016 before completing the administration of the estate. Following the death of Lydia Achieng' Abura, the Plaintiffs herein, Joan Abura and Lynette Dawa were appointed on 30th January 2017 to finalise the administration of the estate of the deceased.

52. It is common ground that the suit property devolved to the estate of the deceased following her death and could only be sold or disposed of by the administrators of her estate. As the administrators of the estate of the deceased, the Plaintiffs are entitled to quiet possession and enjoyment of the property. It is common ground that the members of the Defendant are in occupation of a portion of the suit property measuring 500 acres. The said members of the Defendant are not only living on the said portion of the suit property, but they are also cultivating both food and cash crops on the land. According to the Plaintiffs, the said members of the Defendant started entering and occupying the said portion of the suit property in 2013 and their entry and occupation of the suit property was illegal as the land was never sold to them by the administrators of the estate of the deceased.
53. From its statement of defence and evidence of its witnesses, the Defendant did not come out clearly as to when its members started occupying the suit property. There is, however, some intimation in the defence that the members of the Defendant entered the suit property in 2007. The Plaintiffs having established that the suit property belongs to the estate of the deceased, the burden shifted to the Defendant to prove that it had reasonable excuse or justifiable cause for entering and occupying the suit property.
54. The Defendant claimed that its members entered and occupied a portion of the suit property in 2007 with the permission, consent and authority of the then one of the administrators of the estate of the deceased, Jack Abura (Jacob Abura) (deceased) who had offered to sell to the Defendant a portion of the suit property measuring 500 acres which offer was accepted by the Defendant. The Defendant claimed that it paid to the said Jack Abura Kshs. 500,000/- as a deposit of the purchase price which was agreed at Kshs. 70,000/- per acre.
55. In proof of the alleged agreement with Jack Abura, the Defendant produced a letter dated 1st June 2007 addressed to an entity known as Kichaba Farmers Co. Society (hereinafter referred to only as "Kichaba") by Jack Abura. In the letter that was produced as D.EXH.6, Jack Abura informed Kichaba that the Directors of Kipsitoi Farm (the suit property) had resolved to sell a portion of their land next to Kichaba Farm measuring 350 acres at Kshs. 70,000/- per acre. The true intent and purpose of the letter are clear on its face. The letter merely informed Kichaba that the Directors of Kipsitoi Farm wished to sell a portion of the farm measuring 350 acres at a price of Kshs. 70,000/- per acre. The Defendant claimed that Jack Abura later increased the land that was on sale to 500 acres.
56. The Defendant has not convinced me that Kichaba and the Defendant are the same entity. Even if they were, I am not persuaded that the letter dated 1st June 2007 to Kichaba constituted an offer by Jack Abura to sell a portion of the suit property measuring 350 acres. Even if it was an offer, no evidence of its acceptance was placed before the court. There was also no evidence as to when and where the size of the land that was on sale was increased to 500 acres. The Defendant did not also tender any evidence of payment of the alleged deposit of Kshs. 500,000/- to Jack Abura. There was also no evidence that Jack Abura permitted the Defendant or Kichaba to enter and occupy the suit property. It is my finding



that the Defendant has not established the existence of the alleged agreement of sale between Jack Abura and the Defendant over a portion of the suit property measuring 500 acres. In any event, the purported agreement of sale did not comply with the provisions of Section 3(3) of the [Law of Contract Act](#), Chapter 16 Laws of Kenya which provides as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

57. In the absence of a valid agreement of sale and payment of the purchase price or part thereof, I am not persuaded that any trust was created or could be inferred in favour of the Defendant arising from its alleged dealing with Jack Abura. For the foregoing reasons, it is the finding of the court that the Defendant has not proved that it has reasonable excuse or justifiable cause for entering and occupying the suit property. I find the evidence by the Plaintiffs that the members of the Defendant invaded the suit property and occupied the same without their permission more believable. I therefore find that the Defendant and its members are trespassers on the suit property.

58. In whether the Plaintiffs are entitled to the reliefs sought in the amended plaint, I had set out at the beginning of this judgment, the reliefs sought by the Plaintiffs. The Plaintiffs having proved that the Defendant is a trespasser on the suit property are entitled to an injunction restraining the Defendant and its members from entering and occupying the suit property and an order for the eviction of the Defendant and its members who are in occupation of the suit property. The Plaintiffs had also sought general damages for trespass and mesne profits.

59. In *Park Towers Ltd. v. John Mithamo Njika and 7 Others* 2014 eKLR, the court stated as follows:

“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 general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.”

60. In *Halsbury’s Laws of England* 4th Edition Volume 45 para. 26, 1503 the authors have stated as follows on assessment of damages 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, exemplary 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.”

61. The Plaintiffs proved that the Defendant occupied and made use of the Plaintiffs’ land. From the evidence on record, it is difficult to assess with precision the income that the members of the Defendant in occupation of the suit property were deriving therefrom. The members of the Defendant in occupation of the suit property were involved in subsistence and commercial farming. There was no evidence on the extent of the land under commercial farming, subsistence farming and residence. Doing the best I can, I am of the view that an award of Kshs. 10,000,000/- would be a reasonable compensation to the Plaintiffs for the loss occasioned by the trespass.

62. With regard to the claim for mesne profits, in Attorney General v. Halal Meat Products Limited [2016] eKLR the Court of Appeal stated as follows on mesne profits:

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42.”

63. In Rajan Shah T/A Rajan S. Shah & Partners v. Bipin P. Shah [2016] eKLR the court stated as follows:

“The term ‘mesne profits’ relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.”

64. I have held that the Defendant is a trespasser on the suit property. The Defendant is therefore in wrongful occupation of the suit property and as such is liable to pay mesne profits to the Plaintiffs. The Defendant has been in occupation of the suit property since 2013 according to the Plaintiffs; that is a period over 10 years. The portion of the suit property under the Defendant’s occupation measures 500 acres and is used for subsistence and commercial farming. I agree with the Defendant that mesne profits must be pleaded and proved. The Plaintiffs pleaded mesne profits and established that they were entitled to the same. I will award the Plaintiffs a sum of Kshs. 20,000,000/- as mesne profits.

65. On the issue of costs, I will adopt Cecilia Karuru Ngayu v. Barclays Bank of Kenya & another [2016] eKLR cited by the Defendant where the court adopted the decision in Republic v. Rosemary Wairimu Munene, Ex-Parte Applicant and Ihururu Dairy Farmers Co-operative Society Ltd where it was held that:

“The issue of costs is at the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it



is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

66. In this case, the Plaintiffs have succeeded in their claim. No reason has been given to warrant denying them the costs of the suit. The Plaintiffs shall have the costs of the suit.

Conclusion

67. In conclusion I hereby enter judgment for the Plaintiffs against the Defendant for;
1. A permanent injunction restraining the Defendant, its members, servants or agents from entering, occupying and erecting structures on all that parcel of land known as L.R No. 6015/3.
 2. The Defendant, its members, servants or agents shall vacate and hand over possession of the portion of all that parcel of land known as L.R No. 6015/3 occupied by them within 60 days from the date hereof in default of which the Plaintiffs shall be at liberty to apply for warrants for their forceful eviction from the property.
 3. Kshs. 10,000,000/- being general damages for trespass.
 4. Kshs. 20,000,000/- being mesne profits.
 5. Costs of the suit.

DATED AND DELIVERED AT KISUMU ON THIS 9TH DAY OF DECEMBER 2024

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. W. Otieno for the Plaintiffs

Ms. Akech h/b for Mr. Kigen for the Defendant

Ms. J. Omondi-Court Assistant

