



**Tomno & 3 others v Ondimu (Environment & Land Case  
28 of 2020) [2023] KEELC 74 (KLR) (17 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 74 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 28 OF 2020**

**JA MOGENI, J  
JANUARY 17, 2023**

**BETWEEN**

**MIKAIL KIMUTAI TOMNO ..... 1<sup>ST</sup> PLAINTIFF  
MARIAM JEBET TOMNO ..... 2<sup>ND</sup> PLAINTIFF  
HAJI KIPNGETUNY TOMNO ..... 3<sup>RD</sup> PLAINTIFF  
IDRIS KIPRUTO TOMNO ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**SAIMA JEPKEMBOI ONDIMU ..... DEFENDANT**

**JUDGMENT**

1. By a plaint dated February 13, 2020, the plaintiff sued the defendant seeking the following orders;
  - i. A mandatory injunction, do issue compelling the defendant or his representatives and /or agents to vacate from, deliver vacant possession of the suit property of House No hg.580 B On LR No 26/41 within Kileleshwa immediately.
  - ii. In default of compliance with (a) above, the Plaintiffs be entitled to an order of eviction for forcible removal of the Defendant, his agents and /or servants from House No hg.580 B On LR No 26/1 within Kileleshwa.
  - iii. A Permanent Injunction be issued restraining the Defendant whether by himself or his servants, agents or otherwise from trespassing, remaining or continuing in occupation of, from interfering with Plaintiff's quiet possession, or dealing with the suit property in any other manner endangering the Plaintiff's occupation of the suit property.



- iv. An Order be issued directing an inquiry be made as to the rent and mesne profits which have accrued on the suit property during the period of the Defendant's unlawful occupation until delivery of possession of the suit property to the Plaintiffs.
  - v. General Damages for Trespass and Unlawful Occupation together with interest thereon at such rate and for such period of time as this Honorable Court may deem fit and just to grant.
  - vi. Costs of this suit together with the interest thereon at such rate and for such period of time as this Honourable Court may deem fit and just to grant.
  - vii. Any other or Further Relief the Honorable Court may deem fit and just to grant.
2. The suit is opposed, the defendant filed amended statement of defence and counter claim dated March 31, 2021.
  3. The suit proceeded by way of viva voce evidence, both the plaintiffs and the defendants called 4 and 5 witnesses respectively.

### **The Plaintiffs' Case**

4. The Plaintiffs aver that at all material times that on June 28, 1997, they lost their father and mother, the late Abdi Kiprono Tomno and the late Sarah Ongecha Tomno in a tragic road accident, at which time they were all minors. Before the Death of their parents, they used to live in House No hg.580 B On LR No 26/41 within Kileleshwa which had been assigned to their late father while serving as a civil servant in the Ministry of Lands and Housing, in the capacity of a Land Adjudicator.
5. It was the Plaintiffs' case that, after their parents' burial, the Plaintiffs were allotted House No hg.580 B On LR No 26/41 within Kileleshwa as children of the late Abdi Kiprono Tomno, and an allotment letter issued in their names. Subsequently, the Defendant together with the Plaintiffs' other relatives petitioned for Grant of Letters of Administration Intestate in Succession Cause No 2259 of 1997 for the Estate of Abdi Kiprono Tomno and in Succession Cause No 2316 of 1997 for the estate of Sarah Ongecha.
6. The Plaintiffs contend that after confirmation of Grant in Succession Cause No 2259 of 1997 of the Estate of Abdi Kiprono Tomno, the suit property did not form part of the Estate as it had not yet been allotted to their late father at the time of his death. Further, that because of the Plaintiffs' tender age at the time of their parents' death, they sent to live with their relatives in in pairs.
7. The Plaintiffs aver that the relatives taking advantage of the Plaintiffs' situation, the defendant took possession of the suit property and started managing, entering into agreement with third parties and collecting rent and profits arising from the suit property to the exclusion and detriment of the Plaintiffs.
8. The Plaintiffs asserted that, in 2001, the office of President issued a Circular Letter Ref No OP/18/A/VII/141 dated June 18, 2001 in which major changes in Public service Housing Policy were announced. These included changes like charging of a market rent for government houses; phasing out of leased houses for public servants, validation of illegally/irregularly alienated government houses, sale of non-strategic government houses to civil servants amongst other changes.
9. The Plaintiff contended that, following the aforementioned circular letter, they received a letter of offer on April 15, 2004 from the Ministry of Land notifying them that they have been allocated the



suit property and are required to execute a sale agreement with the administrator of the Civil Servants Housing Scheme Fund and to pay stamp duty and other transfer charges, land rent payable to the Commissioner of Lands, Local Authority Rates and Service Charge where applicable to regularize the initial allotment of the suit property to the plaintiffs.

10. The Plaintiffs asserted that, on August 18, 2004, the Permanent Secretary, Ministry of Lands and Housing further wrote to the Plaintiffs to regulate and validate the alienation of the suit property to them, under the exercise of sale of non-strategic government houses to civil servants that was ongoing. Also, On November 26, 2004 the Permanent secretary, Ministry of Lands and Housing vide a letter stated the terms and conditions upon which the validation of irregular alienations shall be done, which required non-civil servants allotted to compensate the Government for the Loss of rent, the cost of the building and market value of the land at the time of alienation plus interest on loss of capital.
11. The Plaintiffs encapsulated that, the market rent was to be paid at the rate of Kshs 28,000 per month from July 1, 2001 up to April 2003 which totaled Kshs 616,000. The Outstanding market Rent of Kshs 616,000 had been remitted on November 1, 2004 and receipt issued to the Plaintiffs acknowledging payment of the Rent Arrears in respect to the suit property. A Loan facility was also applied for and serviced at Transnational bank, that was directly paid by the bank to the Ministry of Lands and Housing on behalf of the plaintiffs, as the amount required to regularize the alienation of the suit property to the plaintiffs.
12. The Plaintiffs further stated that, the Defendant who used to live in the adjacent house, House No hg.580 A On LR No 26/41 within Kileleshwa was unsuccessful in her bid to be allocated House no HG.580 A on LR No 26/1 within Kileleshwa by the Ministry of Lands and Housing. The Defendant was evicted from House No HG.580 A On LR No 26/1 Within Kileleshwa following a Court Order in Judicial Review Miscellaneous Application No 648 of 2005 and ELC case No 650 of 2014, which had been filed and lost against the Permanent Secretary, Ministry of Lands and Housing.
13. The Defendant then tactfully falsified documents purporting to transfer ownership of House No HG.580B On LR No 26/41 within Kileleshwa to herself, and has declared that the suit property belongs to her. Also, the Defendant has unlawfully and without any right, justification, licence and express or implied authority of the Plaintiffs, entered into taken possession and is currently trespassing on House No HG.580 B on LR No 26/1 within Kileleshwa, which is a private property belonging to the Plaintiffs. Hence, the foregoing series of unlawful acts complained of amounts to trespass
14. It is the Plaintiffs' prayer that, they are granted mesne profits and rent arising or collected from the suit property.

### **Evidence By The Plaintiffs**

15. PW1 -Haji Kipngetuny Tomno, relied on and adopted his witness statement dated 1/02/2020 as his Evidence in Chief. He had to be recalled for cross-examination by the advocate of 1<sup>st</sup> defendant Mr Kibanya who was previously representing the Interested Party but had now come on record for the 2<sup>nd</sup> defendant.
16. During cross examination, he testified that when his parents passed away, they had to start living with his aunt, the 1<sup>st</sup> defendant and his siblings at Kileleshwa, and the 1<sup>st</sup> defendant was appointed as the administrator of the estate.
17. It was his testimony that the letter of allotment was dated November 11, 1997 while the date of death was June 28, 1997. It was his testimony that, by the time of the death of his parents, the suit property was not yet allotted to their late father. He testified that when they received the letter of allotment for



- the suit property, the letter stated that they were required to pay a total of Kshs 507,470 within 30 days. However, at the time of the death they were minors, and they did not know who paid the monies or whether the 1<sup>st</sup> defendant was paid. It was his testimony that there was no sale of suit property at that time and he never attended any meeting to discuss the sale of the suit property.
18. He testified that, there was a meeting held on April 22, 2000 as well as December 21, 2003 at which he was present together. It was his testimony that the subject of the meeting pertained the Sale of the Property, but since he was a minor, the defendant consented to the sale and transfer of the property devoid of their approval.
  19. During re-examination, PW1 reiterated that the letter of offer dated 2014 however it was his testimony that the plaintiffs were not involved in the sale and transfer of the property. Additionally, Page 55 there is a letter that made an offer to the plaintiffs from the government so that they would regularize the transfer of the suit property after paying the monies that the government required. He also testified that at page 6 of the plaintiffs' bundle there is another letter from the bank about the loan and it is addressed to Farida Tomno and himself. The amount borrowed was Ksh.3.5 million to purchase a house at Kileleshwa.
  20. The Plaintiff contended that the Minutes of the meeting held on April 10, 1997 contained at pages 9-10 of the 1<sup>st</sup> Defendant's documents indicate that that he was present during the meeting but it was his testimony that he was 16 years, thus a minor. From the meeting he testified that the minutes show that issues of debt of this father's estate were discussed and the fact that 1<sup>st</sup> defendant Saima needed to be compensated for having settled debt of the estate totaling Kshs Kshs 4 million.
  21. It was his testimony that the minutes recorded that the compensation that was agreed at the meeting was that she had to be compensated with the Kileleshwa house. He referred to page 16 of the 1<sup>st</sup> defendant's documents where there are minutes for a meeting in 2003 and there was also a letter from the Ministry which was said to have been addressing the debt owed by the late Tomno to the Ministry.
  22. He testified that on April 22, 2000 there was a meeting where the minutes the said meeting are reflected on pages 18-20 of the defendant's bundle where it is recorded that a report was presented by Ms.Fatma in relation to the debt of Kshs 4 million.
  23. It was the PW1's testimony that his documents contained at pages 56-57 refer to a letter dated September 2004, which sought to have payments made for regularization of the allotted house amounting to Kshs 412,600 by the 1<sup>st</sup> defendant. This is also captured in documents at pages 22-24 which are minutes of the meeting of 28/01/09, which he attended.
  24. He testified that at pages 65-68 there is a letter of offer from Trans National Bank for a loan facility. He testified that his aunt Farida and himself represented the family, and they took a facility of Ksh.3.5 million to purchase the allotted government house which was allotted to the plaintiffs. The plaintiffs' documents show that a cheque was issued and paid to the Ministry of Land. Further, the documents at pages 25-28 indicates minutes after the letter and cheque were paid.
  25. The PW1 asserted that documents at page 74 of the plaintiff's documents show that there was a letter written to request for time to clear the loan. The loan was paid directly to Transnational Bank. He testified that he never visited the Ministry of Land so as to charge the property. It was also his testimony that he never saw the letter that at page 39 of the defendant's bundle until when the late Fatma Boit called them to pick their documents from her office. He averred that the 1<sup>st</sup> defendant is not the rightful owner of the suit property and that she was trespassing and occupying the land.



26. During further re-examination, he testified that the minutes dated April 22, 2000 were not signed. There were no signatures for these minutes, so their authenticity cannot be proved. The vendors of the Sale Agreement were the administrators and the Purchaser is the 1<sup>st</sup> defendant Saima who is also an administrator of the estate of the late Abdi Kiprono Tomno and Sarah Tomno. The sale agreement is dated July 19, 1999 and at the part of execution Idris – PW 4 was the vendor, and none of the administrators signed the sale agreement.
27. The PW 1 averred that, the offer letter they received was for the purchase of the house the government through the Ministry of Lands had offered the children of the late Abdi Kiptoo Tomno. He testified that the properties that were sold to repay the loan were those that were to be bequeathed to him and his siblings. That the consent letter on page 19 was apparently authored by Idriss Kiptoo Tomno but one can see that it was not signed by any administrator nor any of the siblings. The document at Page 40 also show an address but PW1 testified that he did not know whom it belonged to.
28. PW2 Mikhail Kimutai Tomno, relied on his witness statement filed on 14/02/20 as his evidence in chief.
29. During cross examination by Advocate Kibanya, he stated that he was the youngest of the siblings and he was born on 5/5/94. He clarified that his parents died in 1986. As part of his evidence he produced the death certificate which was at page 26 of the Plaintiff's bundle of documents as his evidence.
30. It was the PW2's testimony that, that the documents on pages 36-39 of the Plaintiffs' bundle of documents indicate the allocation of properties in Eldama Ravine. He however stated that the suit property was in the Ministry of Lands and Housing (government)'s name which property was offered for sale in 2004. He averred that, the grant of Letters of Administration was applied for in December 1997 and in the same year 1997 there was a letter of allotment to the Plaintiffs. He averred that the administrator told them that he wanted to sell the suit property to take care of the debts accumulated by the estate of the late Abdi Kiprono Tomno as a result, a valuation for the suit property was done to establish the value the valuation document is at page 36 of the 1st defendant's documents.
31. PW2 stated that, he believes that the Sale Agreement in favor of the 1st defendant, was done as a formality since as an administrator she had consented to the property being sold. Accordingly, the documents at page 4 show that the administrator consented to the sale and that the 4th Defendant had to sign it. It was his case that, the 1<sup>st</sup> Defendant Saima was sold to the property and she paid Kshs 4 million. Further, Farida and Idris applied for the bank loan to pay for the extra 3.8 million which led to the clearance for transfer of the suit property by the Government of Kenya. He testified that, Saima the 1<sup>st</sup> defendant alleged to have paid over Kshs 5.1 million for the suit property.
32. The PW2 averred that, together with the other plaintiffs, they had paid Ksh. 616,000 to clear rent arrears through the estate. However, after the sale it was his testimony that the 1<sup>st</sup> defendant took over the property and moved in around 2016, since then she has been living in the property. He testified that the 1<sup>st</sup> defendant Ms Saima is a Trespasser and not the rightful owner of the property.
33. PW 3- Mariam Jebet Tomno, adopted her witness statement dated February 14, 2020 as her evidence before the Court.
34. During cross examination. she stated that after the burial of her parents, they went to stay in Rossyln Estate with her aunty the late Fatma Jebichii Boit. She stated that when their parents passed away being a minor she was not involved in any legal issues since decisions were made on their behalf. She testified that if there were meetings she was not involved although she had noted that the 1<sup>st</sup> defendant's bundle



- at page 9 contain minutes and the record indicates that she attended the meetings on that day. She avers that she was only 9 years then.
35. In re-examination she testified that the 1<sup>st</sup> defendant was paid Kshs 78,000 vide a cheque number 792 for rental payments made for the months of May, June and July of 2003 for House No 580 B.
  36. PW 4 Idris Kipruto Tomno, stated that he was the 4<sup>th</sup> Plaintiff and that he was 17 years old when his parents died. He testified that the sale agreement which is at page 30 of the bundle of documents show that the vendors were himself and his siblings who however were minors at the time of the sale of the suit property. The sale was to the 1<sup>st</sup> defendant and the cost was Kshs 4 million. prepared the witness statement and would like it adopted as his evidence.
  37. During cross examination, he stated that the defendant was his aunt, they were orphaned young and the defendant took care of them. The defendants did propose mediation but the Counsel for the Plaintiff rejected mediation. He testified that the 1<sup>st</sup> defendant was a government employee working at State House when his dad died. They lived in Kileleshwa in the suit property. That the suit property House No 580 B does not have a title deed. That the Allocation letter dated November 11, 1997 which is on page 36 of the plaintiff's bundle is the basis for the cause of action.
  38. He testified that the government put conditions to that needed to be fulfilled before the house allocated to the children of the late Abdi Kiprono Tomno could have the suit property transferred to them. The letter outlining the conditions is contained at page 32 of the bundle of documents and one of this was payment of Kshs 407,700 which was money to be paid otherwise the offer would lapse. Further Islam did not entertain haram and therefore debts owed had to be paid prior to the burial.
  39. It was his testimony that the document on page 3 of the bundle bears the letter authored by the 1<sup>st</sup> defendant Ms Saima which is a letter dated August 21, 1997 addressed to PS in office of President and the subject matter was the suit property. The defendant asked for extension of time for the family of the deceased. It was his testimony that at the time of authoring the said letter the suit property belonged to the government and it did not belong to the late Abdi Kiprono Tomno. Further he testified that he was not aware at all that the 1<sup>st</sup> defendant sought an extension for the children of the late Abdi Tomno to stay on the suit property, and he was not aware who followed up to ensure that the suit property was allocated to the children.
  40. It was PW4's testimony that, they did not know the premium was paid of Kshs 550, 000. He was not aware rents and land rates are paid annually. He testified that the 1<sup>st</sup> defendant moved into the suit property in 2013. That at page 6 there is a letter dated 3/11/1997, and since he was a minor the letter was signed by Reuben Biriri and Saima Ondimu. The two signatories were administrators of his mother's and father's estate respectively.
  41. He contended that he was unaware about debts amounting to Kshs 10,000,000, and he only saw this as reflected on the documents at page 21 of the bundle of documents for the defendant that there was an agreement dated 5/02/2004. He was an adult of 24 years old and he notes that the Defendant had paid Kshs 4 million.
  42. He testified that as per the minutes filed on page 9 of the defendant's bundle, he did attend the meetings of 10<sup>th</sup> and April 11, 1999. He was an adult however the minutes show that he was the only one who signed the said minutes and none of the administrators appended their signature.
  43. The said minutes were said to be the record of the deliberations made concerning the sale of the House in Kileleshwa to pay the debts. Again, the said minutes indicated that the house should be sold to a relative. Further at page 13 of the bundle also shows minutes dated 1/07/1999, showing that the



- chairman was not agreeable to the sale of the suit property but in the end Ms Saima Ondimu was approached about the sale of the property. Also, in 2003, the record of minutes carried at page 17 of the bundle indicate that the defendant wanted a refund of Kshs 4 million, and therefore the meeting resolved that it would be therefore appropriate to sell the suit property to her since there was no money to refund her expenses.
44. It was his contention that under the defendants' supplementary list there is a schedule showing that the 1<sup>st</sup> defendant paid up to Kshs 7,554,727 towards the settlements of debts but he was not privy to the payments made amounting to this figure. According to PW4, the only amount he knew as debt was Kshs 4 million. Again, under Paragraph 32 of the Plaintiff, he had stated that the defendant has illegally occupied the property and that he seeks orders against 1<sup>st</sup> defendant.
  45. It was his testimony that at page 35 of the 1<sup>st</sup> Defendant's bundle there was a consent by administrators of his mother's estate, where they authorized him to sign the documents for the sale of the suit property.
  46. It was his assertion that vide the valuation report dated 14/4/1999, at page 55 of the defendant's bundle the suit property was valued at Kshs 4 million. Further that at page 30 of the bundle, it shows that there was an Agreement for sale of the suit property dated July 11, 1999, which is 3 months after the date of valuation of the suit property.
  47. At the same time, at page 32 of the defendant's bundle the documents show that PW4 signed the sale agreement and the 1<sup>st</sup> defendant did sign too. He however testifies that the signature on the document for sale at page 32 is not his signature. Despite noting that this was not his signature he did not report to DCI he only pleaded it in the Plaintiff, at paragraphs 8 and 19. He testified that he never saw the Sale agreement nor the letter of offer produced by the 1<sup>st</sup> defendant that he only saw the documents about 3 years ago, but he did not plead forgery in the plaintiff.
  48. He averred that, between 2012-2013 the 1<sup>st</sup> Defendant took possession of the suit property and has been on the said suit property for a period of over 20 years. He also testified that at page 45 of the defendant's bundle there is a letter dated September 25, 2022 asking the Commissioner of Lands to transfer the property to the 1<sup>st</sup> defendant.
  49. He stated that the 1<sup>st</sup> defendant filed a second supplementary affidavit dated 5/02/2021, and she has attached a bill of quantities which however, was not attached to the counterclaim made by the 1<sup>st</sup> defendant. He stated that he had seen a new valuation report showing that the suit property is now valued at Kshs 46 million but he has not rebutted this figure. Again, page 46 of the defendant's bundle, he testifies there is information pointing to the fact that there were pending payments for land rent and rates which the 1<sup>st</sup> defendant has not been paying as a tenant.
  50. During Cross examination by Mr Kibanya, PW4 stated that at the time of death of the plaintiffs' parents there was construction going on at Eldama Ravine, where mansionettes and bungalows were constructed and currently there are about 4 unfinished ones.
  51. The PW4 asserted that, the insurance compensation was paid after the accident but he did not know how much was paid and he had no document(s) to show how much was paid. He testified that the documents at pages 36-39 show the amended Certificate of Confirmation of Grant of Letters of Administration in respect of the late Kiprono Tomno's property, LR 498/459 which is the Kibasisio estate, first block of 6 flats and one bungalow which was given to Eliza Cheptoo Tomno, who is the elder sister in the family of the late Abdi Kiprono Tomno.
  52. It was his testimony when he was cross-examined that the defendant's bundle of documents shows the minutes of the meeting held on 10<sup>th</sup> and April 11, 1999. Further that the 2<sup>nd</sup> defendants list of



documents at page 14 shows a comment to regularize the release of the property to the 1<sup>st</sup> defendant and to act on behalf of the Plaintiffs. There is also a cheque which was paying the defendants.

53. It was his testimony in cross-examination that he could not recall delivering a letter of consent to the Commissioner of Lands authorizing the transfer of the suit property to the 1<sup>st</sup> defendant.
54. In re- examination, the PW4 stated that before 2002 all titles including the suit property's title were revoked and ownership of the property reverted back to the government. He testified that at the point of applying for letters of administration, there was no debt indicated to show that the late Abdi Kiprono Tomno owed any monies to anybody. Therefore, there was no liability indicated when the administrator applied for letters and that is why it is not clear how 1<sup>st</sup> defendant came up with the figure of debts that she allegedly paid.
55. He testified that the Sale Agreement dated July 19, 1999 was between administrators of the Late Sarah Ongeche Tomno's estate and the children of the late Sarah Tomno. The Purchaser of the property is indicated as being Saima Chepkemboi. None of the administrators executed the sale agreement and the only one who witnessed was Phillip Koech Businai.
56. With this the Plaintiffs closed their case.

### **The Defendant's Case**

57. The Defendants filed an amended Statement of Defence and Counter claim dated March 31, 2020. At all material times, the Defendant denied that the Plaintiffs are the proprietors of the property known as House Number HG 580-B situated on Land reference No 26/24 in Kileleshwa Nairobi, herein referred to as the suit property.
58. The Defendants contend that, and/or at the time of his demise, the deceased Mr Abdi Kiprono Tomno was working and was/or employed as a Land Adjudicator, hence being a civil servant at the Ministry of Lands and after his demise his family was required to move from the Civil Servant Quarters wherein the said family was residing at the time, but upon and/or after issuance and lapse of a notice, as is the normal trend under such circumstance.
59. The Defendants averred that, the funeral committee requested and or directed the 1<sup>st</sup> defendant who was a civil servant and a member of the subject family to write a letter to the then Permanent Secretary, Directorate of Personnel Management of the Office of President on behalf of plaintiffs and the family of the deceased seeking extension of occupation of the suit property for a period of one year.
60. It was the defendant's contention that he accepted the request by the plaintiffs' family and the Administrators of the Estate of the deceased Abdi Kiprono Tomno and Sarah Ongecha Tomno in good faith and for the best interest of the said Estate despite her other engagements and she paid the sum of Kshs 507,470/= for the above stated premium so as to secure the allocation the suit property to the plaintiffs through a Bankers cheque No 003927. She further paid for numerous other debts on behalf of the estate of the deceased.
61. The 1<sup>st</sup> defendant encapsulated that, she was nominated by the parties' family to be one of the Administrators of the Estate of the Plaintiffs' father and as one of the Administrators of the said Estate applied for the Grant of Letters in High Court Succession case pleaded above.
62. The 1<sup>st</sup> defendant asserted that, at the time of the demise of the Plaintiffs' father, the Estate was left with huge debts, whereas the personal Bank Account only had a Balance of Ksh.19,874. Consequently, the Administrators of the Estate of the Plaintiffs' deceased father and the family had to make appropriate decisions to save the estate. Under the circumstances, for the interest of the Estate and the interest of



the Beneficiaries including the Plaintiffs there was need to agree on how to settle the debts from the said estate which was approximately Kshs 10,000,000.00/=

63. At the material time, the 1<sup>st</sup> defendant in her personal capacity and the Administrators of the Estate of the Plaintiffs' father were under extreme pressure to settle some of the debts. The 1<sup>st</sup> defendant agreed to the request from the plaintiffs' family and the Administrators of the said Estate to purchase the suit property for a consideration of Kshs 4,000,00/=.
64. It was her testimony that she had a schedule including bank statements at page 34-36 of the 2<sup>nd</sup> defendant's bundle that show that she made payments to some suppliers and that the aim of the sale of the suit property was for purposes of settling bills owed by the deceased who was her late brother. The debts include the construction workers who were constructing houses for her late brother and suppliers. Apart from the Kshs 616,000 she stated that she paid the difference and for the suit property for regularization to the Ministry of Lands she testified that they had to pay market rates and hidden rent arrears. She testified that her nephew paid the Kshs. 616,000 and so for purchase of the suit property she paid Kshs 3,396,000 and the balance of was paid through a loan from the bank as had been testified by PW4 (see page 65 of the plaintiff's bundle).
65. She testified that the letter of offer for the sale of the suit property was to the two children of the late Abdi Kiprono Tomno who however were not administrators of the estate of the late Abdi Kiprono Tomno. She contends that she has paid fully for the purchase price of the suit property. She testified that she has paid upto Kshs 8 million in respect of the suit property. She stated that she acted on behalf of her brother's children together with the former personal assistant to the late Abdi Kiprono Tomno.
66. The 1<sup>st</sup> defendant also avers on 3/11/1997 or thereabout, she wrote a response to the then Commissioner of Lands accepting the allocation of the house made to the plaintiffs and seeking re assignment and/or change of the beneficiary from Kibasisio Enterprise Limited to the benefit of the Plaintiffs in good faith as the initial beneficiary.
67. The 1<sup>st</sup> defendant asserted that, she paid the applicable and/or required premium and she therefore filed an amended defence and a counterclaim as an alternative relief to the claim sought and pleaded in the amended defence full indemnity for the premium and the associated costs tabulated at Kshs 616,338 together with the interest at commercial rate.
68. The defendant contended that, that she paid the sum of Kshs 4,000,000 to the Estate of Abdi Kiprono Tomno(Deceased) and the Estate of Sarah Ongecha (Deceased) on behalf of the Plaintiffs herein and so the 1<sup>st</sup> defendant in the counter claim cited the principle and the doctrine of unjust enrichment and also seeks restitution of the money and or sums paid based on funds and for monies paid by the 1<sup>st</sup> defendant and the current market value of the suit property.
69. The defendant in the amended defence and counter-claim seeks for judgement against the Plaintiffs for;
  - i. A Declaration that the Defendant validly purchased the suit property, being House No HG 580 B which is situated on Land Reference No 26.24 within Kileleshwa in Nairobi.
  - ii. A Declaration that the Defendant is the legal and Beneficial owner of the suit property being House No HG 580 B which is situated on Land Reference No 26/24 within Kileleshwa Nairobi.
  - iii. In the alternative to (a) and (b) above, a declaration that the Plaintiffs should compensate and indemnify the defendant for the suit property, being



House No HG 580 B, which is situated on Land Reference No 26/24, within Kileleshwa in Nairobi based on the market value of the said property.

- iv. Further to (c ) above, Kshs 46,100,000
- v. Interest on (d )above
- vi. Kshs 7,240,812.75 on account of improvement costs.
- vii. Interests on (f) above
- viii. Costs for the suit and the counterclaim

### **Evidence by the Defendant**

- 70. DW1 Saima Jepkemboi Ondimu, relied on her witness statement dated September 23, 2020 as her evidence- in- chief, and adopted the 1<sup>st</sup> defendant's documents marked DW1 Exh.1-36 dated January 15, 2021 Exh 1-10 and a 3<sup>rd</sup> bundle dated 12/0/2021 as her evidence in chief.
- 71. During cross examination, the 1<sup>st</sup> defendant testified that she lived at Kileleshwa House No HG 580 B, and had made improvements to the house, improved the bungalow which was being used as an office. She testified that she collected rent from the improvements. It was her testimony that she had lived there at the bungalow for between 20-22 years or thereabout.
- 72. She testified that she was involved in case of Kileleshwa House No HG 580 A, and that she occupied both houses. She testified that she was aware the property was registered in the name of the children, and that the Ministry of Lands asked them to regularize the allotment made to the children (the plaintiffs) in 1997 and that there was a loan facility taken to pay for the suit property and the loan was paid.
- 73. The Defendant postulated that in 1999, the grant for the estate of the late Abdi Kiprono Tomno was not made yet but it was awarded in 2002, further the amended grant was made in 2004. She testified that in Muslim religion when someone dies, the immediate action is to pay off the debts of the person who has passed on. That her brother had a balance of Kshs 19,000 in his account and a debt of Kshs 10,000,000 so it was agreed that the property in Kileleshwa had to be sold.
- 74. She testified that in 1997 the Kileleshwa House (suit property) did not belong to the late Tomno and neither did the property belong to the late Sarah. At the point of the death of Abdi Tomno and Sarah Tomno the house was rented from Government of Kenya.
- 75. The 1<sup>st</sup> defendant stated that Plaintiffs' late father was her brother, and she was an administrator on the father's side and Sarah Ongeche Tomno. She testified that the documents in the bundle of the interested party's documents on page 4 show the balance in the bank account of the late Abdi and also that the suit property was government property. There was an allotment letter issued in November 1997 and a change was made necessitating issuance of a new letter in December 1997.
- 76. It was her testimony that the suit property was first allotted to Kibasisio Enterprises, which is the Company that was owned by the late Abdi and Sarah. That when the family and the administrators met there was a discussion to change the names from Kibasisio to the (plaintiffs') children's names (see page 41). She testified that the family feared that the allocated suit property would be taken away. She contends that a subsequent letter was to be issued to safeguard the property and this is contained on pages 36-37 and it is dated November 11, 1997 and it is issued in the names of the four plaintiffs.



77. The defendant stated that, the suit property bore the names of the children to protect the children. Further that since Mr Birir and herself were the administrators of the estate of both Mr Abdi Kiprono Tomno and Sarah Ongeche Tomno, they both applied for the suit property.
78. It was her testimony that Mr Abdi passed on, he had a lot of construction work going on, this included three flats and 2 bungalows in Eldama Ravine, which were unfinished. That the debts from the unfinished work amounted to Kshs 10,000,000. The record of the minutes dated April 10, 1999 indicate that the 4<sup>th</sup> plaintiff was present and also accepted that the suit property should be sold to offset debt by selling the Kileleshwa House which is the suit property.
79. The defendant asserted that, the Sale Agreement was between the Plaintiffs and herself and that PW4- Idris signed the agreement on behalf of the Plaintiffs. She testified that she made payments of the premiums which was Kshs 507,470 to Ministry of Land and also made a cheque of Kshs 1,250,000 to administrators of Sarah Ongeche Tomno the mother of the plaintiffs as indicated through document number 35 at page 17 of the 2<sup>nd</sup> defendant's bundle of documents.
80. The Defendant contended that, he had a schedule at Pg 34 of the 2<sup>nd</sup> defendant's bundle pg 34-36, he has produced bank statements. Pg 11 to pg 22 1<sup>st</sup> defendant's schedule, he made payments to some suppliers, he was requested to pay also the chairman the aim of selling of the property was to pay suppliers, builders and warehouses. His late brother was also building a house for his father.
81. The Defendant asserted that apart from the 616,000 mentioned, he also paid the remaining balance to the Ministry of Land, pg 56 of the Plaintiffs documents to which was for regularizing of the sale. For the regularization, they were to pay the market rate and hidden rent arrears. His nephew paid Kshs 616,000, what he paid was reduced to Ksh.3 million thereabout Kshs 3,396,000. The balance was paid by loan from the bank. Again, Pg 65 of the Plaintiff's documents letter of offer was to the two children of both families but they were not administrators, they were just appointed. The loan was paid by Sale of two bungalows as indicated in the letter at pg.64.
82. During re-examination, the Defendant reinstated that he had paid upto 8 million in respect of the facility. Accordingly, having lived for 22 years, him together with his mother's administrator acted on behalf of the children, accordingly, pg. 34-36 showed that the remaining amount was Kshs 1,500,000. DW2 – Mr Joseph Musyoki valuer, testified that he has 37 years of experience as a valuer. He works at Musyoki Consultants limited.
83. The 2<sup>nd</sup> Defendant averred that under the 1<sup>st</sup> defendant's bundle at page 64, he recalled being engaged to value a property in Kileleshwa identified as House No H580B. He prepared a report dated September 14, 1999 signed it, and produced it as his evidence in chief. It was his testimony that the market value then was Kshs. 4 million.
84. He recalled that he was later instructed by the 1<sup>st</sup> defendant and he revalued the suit property some time in 2021 on 18/02/21. He prepared the report on the listed date and therefore produced the report as his exhibit. The market value as at 2021 has appreciated to Kshs 46,100,000 the reports are marked as produced. During cross examination by Mr Kibanya, he confirmed that it was the same property that he valued.
85. During cross examination by Mr. Mosongo, he testified that he prepared the reports. According to the reports, the registered proprietors are Idriss Kipruto Tomno, Haji Kingetuny Tomno, Miriam Tomno and Kimutai Tomno. At the time of preparing his report. He never knew where Saima was living in 1999, but now confirms her current occupancy to be at the suit property and it was his testimony that there were substantial improvements on the suit property and there was a bungalow built plus offices.



86. During re-examination, he stated that the only document he was given was a letter of allotment and not any registered land document. The property was occupied by the client who gave him the assignment by the name Mrs. Saima Ondimu and she testified that she said she was the one who had done the improvements. Also, his report of 1999 indicated that the house was in a poor state of repairs. However, in 2021, the same property was in very good state of repair, decoration and some additional accommodation was constructed.
87. DW3 Stephen Kipkenda Kiplagat, is an Advocate of the High Court of Kenya since 1992. He was called in as an expert witness. It was his testimony that he recalled for a client where they prepared the Sale Agreement dated July 19, 1999 where he acted for both the vendor and purchaser for property in Kileleshwa being Plot No.580B. There was a massionette A & B and the property was sold by the administrator of the late Sarah Ongeche acting through her children, Idris, Haji, Miriam, Chebet and Kimutai Tomno.
88. Further, it was his testimony that, the purchaser was Mrs. Saima Chepkemboi the price agreed was Ksh.4 million and they prepared the agreement to confirm that the vendors had agreed. That Idris had signed on behalf of other beneficiaries. The purchaser was to pay Stamp Premium and Stamp Duty which was due under the letter of allotment. The Bankers cheques copies of which are at page 36 of the defendant's bundle. That the stamp duty was paid through 3<sup>rd</sup> defendant's law firm forwarded vide a letter dated September 18, 1999.
89. During cross examination by Mr Mosongo, he testified that, the Consent for the sale of the suit property is the one at page 35 and that PW4 -Idris was authorized to sign the sale agreement dated July 19, 1999 on behalf of the other beneficiaries. It was his testimony that the law firm did not do a search.
90. It was his testimony that the consideration in the sale agreement was for of Ksh.4 million and the amount had been paid. The completion date was 30 days from July 19, 1999. He stated that he never saw the proof of payment but that it was Idris and Saima who told him that payment was made. He testified that he did not attest to the execution of the sale agreement but that a partner in the law firm did so.
91. He further stated that, prior to selling of the property, there was no consent or order of the Court for the selling of the property. Transfer of the property had never been done. Equally, he was unaware of it and was not privy to what had been recorded at the Ministry of Land's office.
92. During re-examination, the Defendant stated that the parties signed the agreement in his office. He stated that the administrators of the estate acknowledged that a consideration had been paid.
93. DW4, Ayub Kiplagat, he testified that he was a business man, he signed a statement dated January 15, 2022 which he asked that the court adopts as his evidence in Chief. He stated that the 1<sup>st</sup> defendant was his mother.
94. During cross examination by Mr Kibanya, he testified having been involved in the issuance of title, at around 2006, he was given documents for the property and the 1<sup>st</sup> defendant asked that he pursues the issuance of title. It was his testimony that when he went to the Land Registry he saw the names on the title were for the Plaintiffs. He testified that Idris and Haji gave him their ID. That also visited the Survey of Kenya with Idris, but none of the Plaintiffs raised any objection.
95. It was the Defendant's contention that the title was to come out in the Plaintiffs' name. However, there was a consent that the plaintiffs had signed for transfer which is contained at page 45 which stated that the consent was stated that the transfer of title would allow for it to come out in the name of Saima, the 1<sup>st</sup> defendant. The said consent was addressed to the Commissioner of Lands.



96. He stated that he pursued it to the last stage where there was now a letter of offer from Ministry of Lands showing there is approval for title to issue. They went to Survey of Kenya for correction of the size of the plot as is stated in the document at page 40. It was his testimony that his mum had never lived at that property but she had drawn rent from it.
97. During cross examination by Mr Mosongo, the defendant stated that, the parents of the plaintiffs died in 1997 and they lived with Idriss. At the point of purchase of the suit property it was his testimony that his mum the 1<sup>st</sup> defendant lived in Westlands. Later that in 2016 she moved to the house and she was not in possession, he was 20 years in 1999. At the point of pursuing the land, he was with Idris. It was his testimony that though he had a consent to transfer, there was no transfer instrument. Also, when she was moving to the suit property, she did not seek any permission from Idris to move. He testified that his mother constructed some houses on the suit property and collects rent but he was not aware of how much rent she collects.
98. During re- examination by Mr Munge, he contended that, Haji gave him his national ID around 2007. The consent was the one on page 45 of the Defendant's bundle. He went with Idris to survey just because their cordial relationship. The letters at Pages 9 and 10 through his actions, his mother took possession of the suit property in 1999 and she moved in 2016.
99. DW 5 Hawa Chebet Kigen, relied on her witness statement dated November 16, 2021 as her evidence in chief.
100. During cross examination by Mr Kibanya she stated that the deceased Mr Abdi Kiprono was her brother. She testified that among the issues that were discussed in the meeting was the sale of Kileleshwa house to the 1<sup>st</sup> defendant to settle the debts owed by her late brother. Also at page 8 of the defendant's bundle the document indicates the invitees to the meeting while the document at page 10 shows the decision to sell Kileleshwa. She clarified having attended all meetings and was aware of the property being sold.
101. The DW5 testified that at the meeting of 11/04, Idris and all the children were present and they were aware about regularization of the Kileleshwa property and the 1<sup>st</sup> defendants made payments. According to her the 1<sup>st</sup> defendant was the owner of the Kileleshwa property, and she made payments to suppliers following requests from them.
102. During cross examination by Mr Mosongo, she testified that the time of the administration the debt was paid through the sale of Kileleshwa house which was Kshs 4 million, none of the properties were paid to pay Saima Kshs 4 million. Also, other properties were sold but Kileleshwa was given to Saima to repay her for settling the debts.
103. The Defendant stated that the committee identified together with the family the properties to sell. The administrators of Sarah and Abdi Tomno made the decision to sale, as the plaintiffs were minors.
104. During re -examination by Mr. Munge, she stated that members of the family attended the meeting including administrators, but she was not an administrator. She testified that the debts were paid upon requesting Saima.
105. At this point Mr Munge informed the court that Fatma Boit who was one of the administrators died when the proceedings were going on and she was not going to be available to testify. He notified the court that the issues that Fatma had raised in here statement would be addressed in his submissions. The other parties had no objection. With this the advocate for the 1<sup>st</sup> defendant closed his case. The court adjourned due to the fact that the advocate for the 2<sup>nd</sup> defendant had had an accident and was indisposed. When the hearing resumed the sixth defence witness testified



106. DW6Mohammed Suleiman Munyu, stated that he was an Islamic Sheikh. He relied on a witness statement dated February 15, 2022 and documents filed on February 16, 2022 as his evidence in chief and exhibits as his evidence.
107. During cross examination by Mr Munge, he testified having no interest in the suit property and he stated that he had known known the family of Tomno for many years, and had participated in the burial of the deceased following Islamic Burial Rites.
108. In his testimony he clarified that, upon the demise of a Muslim, burial any debts owed by the deceased are subtracted and what the deceased owed was to be paid prior to the division of properties. It was his case that in the above matter, the Islamic Rites were followed. He stated that he was aware that Mr.Tomno had borrowed but never knew the source of the debt. The Defendant also stated having been present in the meeting held on November 14, 1998 at Eldama Ravine where the contractors were demanding payment.
109. The Defendant testified that having heard that Mr Tomno owed the employer more than 10 million. Haji who is the Plaintiffs' grandfather called a meeting to discuss how best to settle the debts. A subsequent meeting was convened as shown on the documents at page 13 and the minutes show that the meeting was held on 1/07/1999 and chairman was Ali Kipkorir Tomno he acting as the chairman.
110. It was his testimony that he could not recall hearing the interim chairman Ali stating that the house should be sold to repay the debts. He stated that he was the administrator for the estate of the late Sarah Ongeche Tomno. He testified that the house was sold for Kshs 4 million and the other administrators consented to the sale including Idris who signed the consent contained at page 45 of the defendant's bundle of document.
111. He testified that the family agreed to have the house sold to a member of the family to benefit the children but he but he did not state how this would benefit the children. He stated that he did not know how the monies that Samia the 1<sup>st</sup> defendant paid were spent. He testified that he knew the suit property and that the 1<sup>st</sup> defendant stayed there.
112. During cross examination by Mr Mosongo, he testified that he was among the administrators of the estate of Sarah Ongecha, but could not remember if any property of the Elizabeth, the 1<sup>st</sup> Wife were sold to offset the debt of Mr Tomno Abdi. It was his case that, at the time of the deceased's death, they did not own any Kileleshwa house as it was a government house.
113. He clarified that the house was sold and the money from the sale of the house was paid through himself, Birir and Fatuma. He stated that the children were not given any money as the house was sold for a purpose. Again, prior to the deceased's death, he had visited the suit property, and even after the deceased's death he visited the property and found Saima residing there, and she had also made improvements on the suit property.
114. During re -examination by Mr Kibanya, he reiterated that, that the purpose of the sale of Kileleshwa house was to offset debts that Mr Tomno owed the government and payment to fundis, and the total debts stood at Kshs 10 million.
115. He testified that the grandfather of the plaintiffs is the one who advised Saima to by the house. He stated that he signed the consent contained in the 2<sup>nd</sup> defendant's bundle appointing him as an administrator with Fatma, Mohammed Suleiman and Biriri (since deceased). He stated that he did not recall signing the sale agreement. With this the advocate for the 2<sup>nd</sup> defendant closed his case.



## Analysis and Determination

116. I must unreservedly appreciate the effort made by the advocates of both parties in this case that was fought so spiritedly by the Counsels, Mr Mosongo for the plaintiffs Mr Munge for the 1<sup>st</sup> defendant and Mr Kibanya for the 2<sup>nd</sup> defendant in postulating their distinct assertions in a bid to buttress their clients' cases.
117. I have carefully considered the pleadings, the oral evidence and the authorities proffered by the parties. Referring to the authorities both parties have proffered to court, which by all standards are all good authorities in their facts and circumstances. In making my determination in this instant suit I have equally perused and considered the submissions and authorities cited by the parties and the principles enunciated in those authorities.
118. The plaintiffs, the defendants and their witnesses in their evidence have sought to prove the proprietorship of the parties of the suit property. In their evidence there have been some inconsistencies by the parties and their witnesses. At the end of the day, the plaintiffs have claimed that the 1<sup>st</sup> defendant has trespassed on the suit property and is also claiming proprietorship. The 1<sup>st</sup> defendant repeses that she bought the suit property and is therefore the legal proprietor.
119. From the evidence by some of the administrators it is clear that that they never saw the sale agreement purporting to confer ownership of the suit property to the 1<sup>st</sup> defendant. DW3 – The advocate testified and stated that he never saw the proof of payment for the sale of the suit property. He also stated that prior to the sale of the suit property there was no court order nor consent and that the transfer of the suit property has never been done.
120. DW4 testified that when he went to pursue the issuance of the title he saw that the names on the title were those of the plaintiffs.
121. The plaintiffs have complained that the 1<sup>st</sup> defendant had without consent or express authority of the plaintiffs without right or licence occupied and erected buildings on Hse No HG 580B ON LR 26/41 within Kileleshwa.
122. The Plaintiffs case is outlined in the Plaint dated February 13, 2020 as well as Defence and Counterclaim amended and dated 31/03/2021. The Plaintiffs' prayers is for a mandatory injunction compelling the defendant to deliver vacant possession of the suit property, a permanent injunction be issued restraining the Defendants from trespassing and interfering with the suit property and as well as occupation of the suit property which the plaintiffs describes as House NNo HG 580 B on LR No 26/41 within Kileleshwa.
123. In addition, the Plaintiffs crave an order for mesne profits accrued during the 1<sup>st</sup> defendant's occupation of the suit property from rent and general damages.
124. It is the Plaintiffs' case that at all times material to this suit, the plaintiffs received a letter dated May 15, 2004 from the Ministry of Land notifying them that they had been allocated the suit property and they were to abide by the terms in the Letter of Offer. The plaintiffs took a loan facility through Transnational Bank paid directly to the Ministry of Land to validate the alienation. The payments made included Kshs 616,000 as accumulated rent and Kshs 3,500,000 as consideration for the suit property.
125. The plaintiffs told the court that upon allocation of the suit property the 1<sup>st</sup> defendant without consent trespassed onto the suit property, occupied it and erected building on it. The unlawful occupation by the 1<sup>st</sup> defendant has led to this suit.



126. On the other hand, the 1<sup>st</sup> defendant purports to have bought the suit property known as House Number HG 580-B situated on LR No 26/24 having acquired through a sale agreement dated July 19, 1999. She states that she was requested to buy the suit property by other administrators to keep the suit property in the family and also to offset the monies she had paid for the estate of the late Abdi Kiprono Tomno which had incurred debts amounting to over Kshs 10,000,000. She avers to have paid the applicable premium over and above the stated allocation.
127. In her counter-claim she avers to have obtained the allotment of the suit property vide a letter dated November 11, 1997 and had the allotment issued in the names of the plaintiffs. The defendant told the court the plaintiffs are seeking to unjustly enrich themselves and that she will an indemnity and restitution for monies paid amounting Kshs 7,240,812.75 towards the improvements she claims to have done and a market rate indemnity of Kshs 46,000,000 being the current market value of the property and costs of the suit and counter-claim. The defendant told the court that the plaintiffs' conduct was illegal and unlawful as they did not have any proprietary interest or right over the suit land.
128. The parties did not file issues for determination the court will therefore frame what it believes to be the issues for determination. It is evident that the 1st defendant did file a cross-claim and counterclaim where she sought indemnity and restitution since according to her she is the rightful proprietor of the suit and the plaintiffs are seeking unlawful enrichment.
129. The issues now for determination are;
- i. Are the plaintiffs the lawful proprietors of the suit property?
  - ii. Is the 1st defendant in lawful occupation of the suit premises?
  - iii. Who is the lawful proprietor of the suit premise?
  - iv. Is the plaintiff entitled to the prayers sought in the plaint?
  - v. Is the 1st defendant entitled to the prayers sought in the cross-claim and counter –claim?
  - vi. Who is liable to pay costs?
130. On the 1st issue, the court has considered the available evidence and exhibits produced in court. For the plaintiffs the letter referenced HG 580 B Kileleshwa (5) dated September 12, 2006 confirmed that the family of the late Mr Abdi Kiprono. Tomno had cleared paying for the full purchase price for HG 580 B Block 26/241 Kileleshwa. The letter was signed by for the Permanent Secretary by Mr OM Nzwili and was written to the Commissioner of Lands and copied to the plaintiffs.
131. Further there is no doubt that the plaintiffs have been confirmed to be the rightful owners through a letter from the Ministry of Land dated February 20, 2020 addressed to the advocate of the plaintiffs in response to the inquiry made vide the letter from the advocated referenced MCA/48/IHMM/ELC/6/VOL.1/4. The writer, Mr Simon Opondo writes to confirm that the Ministry will process the lease certificate of the suit property in the name of the four children of the late Mr Haji K. Tomno the plaintiffs herein.
132. In the same letter it is confirmed that the suit property was sold to the father of the plaintiffs under a scheme of Outright Purchase Agreement. It is evident that the suit property was a Government house. The plaintiffs' father herein was a civil servant at the time of his death. Though the certificate of lease or title have not been processed but the said letters confirm that the suit property is fully paid for and the allocation is in the name of the plaintiffs.



133. Whereas the 1<sup>st</sup> defendant claims that she purchased the suit property there is no evidence presented before court to show how she purchased a house already allotted to the plaintiffs who were the children of the late Abdi Tomno. The 1<sup>st</sup> defendant was one of the administrators of the Late Abdi Tomno and the suit property was not part of the estate that was listed in the confirmation of grant. This is property that was allotted after the grant and the letters dated September 2006 and February 2020 from the Ministry of Lands which evidence is not controverted clearly indicate that the suit property was in the name of the plaintiffs. These letters have been attached and adduced in evidence by the plaintiffs.
134. From the above discourse it is evident that the plaintiffs herein did obtain the allotment legally and are in the process of obtaining the certificate of lease. The plaintiffs are therefore lawful proprietors of the suit property.
135. Section 152A of the [Land Act, 2016](#) [2012] stipulates that a person shall not unlawfully occupy private land, among others. It is pretty clear that the 1<sup>st</sup> defendant is a trespassor on the 1 plaintiffs' suit property as PW4 testified and produced the letters of confirmation of the allotment from the Ministry of Lands.
136. The 2<sup>nd</sup> issue is whether the 1st defendant is in lawful occupation of the suit property.
137. It is evident that the 1<sup>st</sup> defendant was never allotted the suit premises as a tenant of the Government instead it was the children of the late Abdi Tomno and as a condition of the allotment they were required to pay lost market rent of Kshs 26,000/= per month effective from July 1, 2001 upto October 31, 2004 amounting to Kshs 616,000 which was paid and the house was allotted to the plaintiffs.
138. The 1<sup>st</sup> defendant purports from the Amended Defence and Counter Claim dated March 31, 2021 to have validly purchased the suit property House No HG 580B situate on LR No 26/24 which clearly is different from the suit property referred to by the plaintiffs and the offer letters from the Ministry of Lands dated September 12, 2006 and February 20, 2020. I will however not delve into the variance in the numbers of the suit property but focus on the suit property which is the house to which all parties refer to as House No HG 580B.
139. The 2<sup>nd</sup> defendant's testimony was to lend support to the 1<sup>st</sup> defendant's claim to the suit property. I am however not persuaded that the 1<sup>st</sup> defendant is the legal proprietor of the suit property a finding that I have already made and therefore the 2<sup>nd</sup> defendant's evidence fails to convince me on the 1<sup>st</sup> defendant's proprietorship of the suit property.
140. The 3<sup>rd</sup> issue is who is the lawful proprietor of the suit property? The court has found that the plaintiffs were the lawful proprietors of the suit property and are awaiting the Certificate of Lease to be processed. It is evident that the allotment of the suit property to the plaintiffs followed due process by the Ministry of Land which was selling Non-Strategic Government Houses. The plaintiffs it is confirmed have completed payment of the purchase price. The plaintiffs are therefore the lawful proprietor of the suit premises.
141. The 4<sup>th</sup> issue is whether the plaintiffs are entitled to the prayers sought in the Plaintiff.
142. Having found that the plaintiff herein are the lawful proprietor of the suit property the court finds that the plaintiffs are entitled to the prayers sought in the Plaintiff. However, on the issue of damages, I am in absolute agreement with the position taken by my senior sister, M Odera, J that the tort of trespass is one which is actionable without proof of any damage; see [Nakuru Industries Ltd v SS Mahta and Sons](#) [2016] eKLR.
143. On that score, all the plaintiffs are entitled to is not mesne profits because this calls for specific proof and also if one awards general damages then mesne profits cannot also be awarded and therefore I will



consider a modest amount of general damages. I am of the view and considering the entire case, an amount of Kshs 100,000/= would be appropriate in the circumstances of this case.

144. Section 13 (7) (a) of the *Environment and Land Court Act, 2011* mandates this court to grant permanent preservation orders including permanent injunctions; see also *Nguruman Limited v Jan Bonde Nielsen and 2 others* [2014] eKLR.
145. On the 5<sup>th</sup> issue of whether the 1<sup>st</sup> defendant is entitled to the prayers sought in Cross Claim and Counter Claim, the court finds that the 1<sup>st</sup> defendant has illegally occupied the suit property and is therefore trespassing on the said property having entered upon the property illegally. The counter-claim by the 1<sup>st</sup> defendant is therefore dismissed.
146. The 6<sup>th</sup> issue is who is liable to pay costs. Orders as to costs follow the event. The plaintiffs herein are the successful litigant and therefore they are entitled to costs but noting the nature of this matter being a quasi-family dispute arising from a succession matter I will direct that each party shall bear their own costs to this suit.
147. In the end, I find that the plaintiffs are therefore entitled to the reliefs sought in their plaint. They have proved a claim against the 1<sup>st</sup> defendant on the balance of probabilities. The court however finds that the 1<sup>st</sup> defendant herein has failed to prove her case in the counter-claim on balance of probabilities and consequently her claim is dismissed.
148. In conclusion, I hereby enter Judgment in the main suit and in the counter-claim on the following terms:-
  - a) Prayers (a), (c),
  - b) Prayer (f) totaling Kshs 100,000 together with interest at court rates.
  - c) The counter-claim is dismissed
  - d) Due to the peculiar nature of the case, each party shall bear its own costs of the suit and the counter-claim.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI, THIS 17<sup>TH</sup> DAY OF JANUARY, 2023**

.....

**MOGENI J**

**JUDGE**

**In the virtual presence of:**

Mr Kibaya for the 2<sup>nd</sup> Defendant

Mr Mosongo for the Plaintiffs

Mr Odundo holding brief for Mr Munge for the 1<sup>st</sup> Defendant

Ms Caroline Sagina : Court Assistant

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**MOGENI J**

**JUDGE**

