



REPUBLIC OF KENYA



**Mburu v Wanjiku & another (Environment & Land Case 622 of 2015)
[2023] KEELC 15869 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15869 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 622 OF 2015
OA ANGOTE, J
FEBRUARY 23, 2023**

BETWEEN

JOHN MAINA MBURU PLAINTIFF

AND

BETH WANJIKU 1ST DEFENDANT

EVANS KAGECHE MBORO 2ND DEFENDANT

JUDGMENT

Background

1. Vide an amended Complaint dated 26th February, 2015, the Plaintiff seeks the following reliefs against the Defendants jointly and severally;
 - i. A permanent injunction restraining the Defendants, their employees, servants and or/agents or otherwise from transferring, advertising for sale, disposing off, occupying and or otherwise interfering with the Plaintiff's enjoyment and occupation of the suit property Land Reference No 398/18(Orig no 398/10/3) Naivasha.
 - ii. An eviction order against the Defendants from the suit property; and
 - iii. Mesne profits and general damages for trespass.
 - iv. Costs of the suit.
 - v. Any other relief that this Honourable Court may deem fit to grant.
2. It is the Plaintiff's case that he is the lawfully registered proprietor of all that parcel of land known as L.R. 398/18(Orig no 398/10/3), Naivasha (the suit property) having purchased the same from Mary Woki Kaburu, John Mungai Kaburu, David Munyui Kaburu, Peter Kinyanjui Kaburu and Paul Kinuthia Kaburu sometime in 2013.



3. It was averred in the Plaint by the Plaintiff that before purchasing the suit property, he conducted due diligence and established that the sellers had the requisite authority to transfer the property to him; that there was no encumbrance registered against the title and that to finance the purchase, he obtained a loan of over Kshs 50,000,000 to which he repays a monthly sum of over Kshs 950,000.
4. According to the Plaintiff, despite having purchased the suit property aforesaid and being entitled to vacant possession thereof, the Defendants, a husband and wife, who resided on the property on account of a lease by the previous owners, refused to vacate despite the lease having expired; that on 31st October, 2014, he issued them with a notice to vacate the suit property by 31st December, 2014 and that the aforesaid notice was sufficient as the Defendants were mere licensees of the previous owners. According to the Plaintiff, the Defendants disregarded the notice which has since expired.
5. The Plaintiff averred that he purchased the suit property with a view to developing it and earning income from it; that he has been unable to do so as a result of the Defendants' illegal occupation causing him losses and financial harm entitling him to the orders sought and that whereas there is no suit pending between himself and the Defendants over the same subject matter, he has become aware of several proceedings concluded before his purchase of the suit property which affirmed that the Defendants had no right to the suit property.
6. In response to the amended Plaint, the Defendants filed a Defence and Counterclaim dated 10th May, 2015 in which they denied all the assertions as set out in the Plaint. It was the Defendants' case that in the event it is found that the Plaintiff is the registered owner of the suit property, his registration thereof was done fraudulently and maliciously.
7. According to the 2nd Defendant, he has been on the suit property since 1980; that Njoroge Mugo, Mugaacha Thaara, Mrs Peninah Wambui and Alexander Kaburu Mwangi gave him an irrevocable option to purchase the suit property on the expiration of the 3-year lease agreement at a sum of Kshs 2,000,000 and that the sum of Kshs 2,000,000 was to be shared equally amongst the parties in reasonable installments until payment in full.
8. It was averred in the Defence by the 2nd Defendant that vide HCCC No 213 of 2013, Alexander Kaburu commenced proceedings seeking to have him evicted from the suit property, which suit is yet to be determined; that the Plaintiff had no authority to serve them with an alleged notice of eviction as his arrangement with Alex Kaburu has not terminated nor the suit determined and that indeed in civil suit number 355 of 2004, he withdrew an application for injunction pending Appeal and in Civil Appeal 271/06 his application was dismissed.
9. Vide the Counter-claim, the Defendants sought for a declaration that the 2nd Defendant is the owner of L.R No 398/18 and for an injunction restraining the Plaintiff, his agents or servants or any person claiming through the Plaintiff from interfering with, harassing, or trying to evict the 2nd Defendant from L.R No 398/18.

Hearing & Evidence

10. The matter proceeded for hearing on the 11th October, 2018. The Plaintiff, PW1, testified that he is an Advocate of the High Court of Kenya as well as a businessman. He adopted his witness statement filed on the 25th January, 2015 as his evidence in chief and relied on the filed documents as his exhibits.
11. PW1 stated that the suit property is 25 acres and is located in Naivasha; that before purchasing the same, he conducted a search which affirmed that the suit property was in the names of the sellers; that he paid Kshs 82,500,000 being Kshs 3, 300,000 per acre; that he also visited the property in the presence



- of valuers from Equity Bank and a Government valuer and that the property was not encumbered in any way neither was there any objection to his purchase of the same.
12. It was the evidence of the Plaintiff that to finance the purchase, he obtained a loan of Kshs 50,000,000 from Equity Bank and was to make monthly repayments of Kshs 900,926; that he has a search indicating that the suit property is charged to Equity Bank; that after purchasing the suit property, he constructed three site offices and began fencing the land and that on 2nd December, 2014, he received a call from one of his workers informing him that someone was destroying the fence he had put up around the property, which fence had cost him approximately Kshs 2,000,000.
 13. PW1 testified that the 2nd Defendant was charged with the offence of malicious destruction of property in Naivasha SPMCCC No 157 of 2015; that the criminal case has yet to be concluded; that he did not deal with the 2nd Defendant because he was not the owner of the suit property and that he became aware of several suits touching on the suit property including HCCC 1519 of 1993; Civil Appeal No 355 of 2004 where the 2nd Defendant withdrew an application for injunction pending Appeal and Civil Appeal No 271 of 2006, where an application by the 2nd Defendant was dismissed.
 14. According to the Plaintiffs, there was a consent entered into by the original owners of the suit properties in which they agreed to partition the land into four portions of 25 acres; that the previous owners were at liberty to enter into agreements for the sale of their portions with any persons including himself; that the aforesaid consent was captured in this file in 2016 and that the Ruling delivered by Justice Muchelule on the 17th March, 2011 in HCCC No. 1519 of 1993 has never been appealed against.
 15. It was the evidence of PW1 that the 2nd Defendant is using part of the suit property which abuts Lake Naivasha; that the 1st Defendant died and was buried on the suit property on 5th January, 2018 but later on exhumed on 14th February, 2018 and buried in a public cemetery; that the 2nd Defendant has never paid any money towards the property in issue and that his suit should be upheld while the Defendants' counterclaim should be dismissed.
 16. On cross-examination, PW1 stated that he purchased the suit property in 2014 and it was registered as 398/18 and assigned number 398/10/3, Naivasha; that before purchasing the suit property, he visited it and found open land with an old house and animals grazing thereon and that on inquiry, he was informed that the animals were free range grazing and belonged to several individuals including the Defendants.
 17. It was the evidence of PW1 that the 1st Defendant (deceased) informed him that she did not have authority to deal with the suit land and was merely residing there as the 2nd Defendants' spouse; that when he found the fence destroyed, he reported the 2nd Defendant to the police who was charged with malicious damage of property but was later on acquitted and that the Police file indicates that it is the 2nd Defendant together with a gang of people who destroyed the fence.
 18. It was the testimony of the Plaintiff that the Defendants occupy half of the suit property which they have refused to vacate; that he has always been in occupation of the other half that was not occupied by the Defendants; that it was only in 2019 that the 2nd Defendant abandoned the property on his own volition and the Plaintiff did not destroy the structure the 2nd Defendant resided on and that despite having vacated, the 2nd Defendant has been visiting the suit property and threatening him.
 19. It was his testimony on cross-examination that whereas the 2nd Defendant had initially entered into the property as a tenant of the Kaburu family, he refused to leave and stopped paying rent leading them to institute a suit seeking his eviction; that he never demolished the structure the 2nd Defendant



- was residing in; that he is seeking an injunction because the 2nd Defendant and his sons have been attempting to get into the property and that he has a valuation on mesne profits.
20. PW2 was a valuer who prepared the valuation report dated 15th November, 2018 which he produced. It was his evidence that the loss of bargain/ value of the suit land is Kshs 298,000, loss or repayment for 49 months is Kshs 44,145,374; that adding stamp duty and valuation fees, the total is Kshs 344,855,374 and that the loss of bargain (Kshs 298,000,000/=) is what the owner has lost for the duration he has not been on the suit property.
 21. On cross-examination, PW2 testified that he visited the site on 26th October, 2018; that the site consisted of natural vegetation and an old farm house which was in poor shape; that he could not inspect the house; that there was little farming on the land; that the recent comparables show that the land was between Kshs 12,000,000 to Kshs 16,000,000 per acre and that he retrieved this figures from the land's office.
 22. According to PW2, loss of bargain is what was lost during the time the land was being unlawfully occupied by the Defendants and the owner could not grow anything nor sell it; that if he was working on the land at the relevant time, this is the money he would have made; that the lawyer was paid Kshs 2,460,000/= for the Conveyance whereas he was paid Kshs 233,000/= to prepare the report and that he does have a receipt for the sum paid to him nor was he shown the receipt for payment to the lawyer.
 23. DW1 was Evans Kageche Mburu. It was his testimony that the suit is with respect to the property known as L.R 398/18; that the 1st Defendant is his late wife who passed on in 2018; that he began living on the suit property in 1980 when it was a big parcel of land; that he was allowed onto the property by its four original owners all of whom are now deceased and that he leased the suit land and was allowed to develop it as the owners were avoiding it being repossessed.
 24. It was the evidence of DW1 that the owners agreed to sell him the property in the event they decided to sell it; that after three years, he began paying annual rent for the land which he continued paying even after their death; that two of the owners gave him consent to buy the property and he paid them; and that he initially used to pay them rent but later on bought the suit property where he reared animals and carried out farming.
 25. According to the 2nd Defendant, DW1, the suit property was subdivided into four portions and sold to the Plaintiff and others; that it is the purchasers who sub-divided the property but is not aware of when the division took place; that he has never been served with an eviction notice by the Plaintiff; that he saw the consents by the two original owners; that L.R 398/18 belonged to Alexander Kaburu; that he never gave Alex Kaburu money for the suit property and that Alex's children never informed him that they were selling the suit property nor did they ever serve him with an eviction notice.
 26. It was his further testimony that the suit property had a farm house and a borehole together with an irrigation zone, cattle troughs and small sheds for pigs and cattle; that he renovated the house and began living there with his wife who was in charge of taking care of the house and the livestock; that he is no longer on the suit property; that in 2018, he was accused and charged with attempted murder and that when he came back, he found that his house had been demolished and livestock removed.
 27. In cross-examination, DW1 stated that he has been on the suit property since 1980 and renovated the house that existed on the property at the time; that if the Plaintiff had paid him for what he developed, he would have vacated the suit property; that he buried his wife on the property but the body was exhumed; that he did not have any dispute with Alex Kaburu, the previous owner of the land and does not remember the dispute with Githunguri which went up to the Court of Appeal and that he does not know who destroyed the fence.



28. It was the evidence of the 2nd Defendant that he never bought the suit land; that he is not a tenant of the Plaintiff and cannot therefore pay him rent; that he has his developments on the suit land which he has counterclaimed and that it is the Plaintiff who found him on the suit property.

Submissions

29. The Plaintiff's counsel submitted that the Plaintiff is the owner of the suit property having lawfully purchased the same; that the Plaintiff has adduced into evidence the conveyance and a copy of the certificate of official search none of which was disputed and that the allegations of fraud by the 2nd Defendant as against the Plaintiff have no basis.
30. Counsel submitted that Section 26 of the *Land Registration Act* provides for indefeasibility of title subject to the conditions therein; that the 2nd Defendant's continual stay on the suit property without the Plaintiff's permission is tantamount to trespass as defined in Section 3(1) of the *Trespass Act* and that the 2nd Defendant destroyed the Plaintiff's barbed wire fence causing actual damage amounting to Kshs 3,200,000.
31. It was submitted that the that the Plaintiff is equally entitled to mesne profits as defined under Section 2 of the *Civil Procedure Act* and Order 21 Rule 13 of the *Civil Procedure Rules*, 2010 to the tune of Kshs 16,216,668/= being profits of the land and a reasonable sum to repay the loan from Equity Bank between 2014 at the time of the purchase of the property and June 2020 when the 2nd Defendant left the suit property.
32. The 2nd Defendant's counsel submitted that it has been admitted that the Plaintiff purchased the suit property from its initial owners and evicted the Defendants from the suit property; that the prayers for eviction orders are moot; that the valuation report sought to be relied on by the Plaintiff cannot form the basis of the Plaintiff's claim for mesne profits and that there is no evidence of any landlord-tenant relationship between the Plaintiff and the 2nd Defendant requiring any rental payments.
33. It was submitted that the Plaintiff cannot purport to claim mesne profits from 1984 when he purchased the suit property in 2015 and that the valuer was unable to explain how he arrived at the sum of Kshs 12,000,000 and Kshs 16,000,000 and the sum of Kshs 298,000,000 as loss of bargain.
34. Counsel submitted that the Defendants were not a party to the loan agreement between the Plaintiff and Equity Bank; that the conveyancing and stamp duty fees are equally not payable by the Defendants, the same not having been proven; that the sum of Kshs 233,000 allegedly paid to the valuer was not proved; that the Plaintiff did not issue the Defendants a notice to vacate the suit property before commencing proceedings and that the sum of Kshs 3, 200,000 sought as general damages was never pleaded in the Plaintiff.

Analysis & Determination

35. Having carefully considered the pleadings, testimonies and submissions herein, the issues that arise for determination are;
- i. Who is the lawful owner of the suit property?
 - ii. What are the appropriate reliefs to issue?
36. The Plaintiff instituted this suit seeking inter-alia, permanent injunctive orders restraining the Defendants from in any way interfering with the suit property, eviction orders against the Defendants, mesne profits, general damages for trespass and costs of the suit.



37. It is the Plaintiff's case that he is the registered proprietor of the suit property having purchased the same from its previous owners in 2013; that prior to its purchase, he conducted due diligence to ensure that the suit property was free from any encumbrances and that the Defendants, who resided on the suit property as lessees before he purchased it, have refused to vacate the land despite the lease granted to them by the properties' previous owners having lapsed.
38. It is the Plaintiff's case that the 2nd Defendant's presence on the suit property has caused him grievous financial losses as he is unable to develop the same and that further, he continues to repay Equity Bank which financed the purchase of the property. In support of his case, the Plaintiff adduced into evidence a copy of a notice to vacate issued to the 2nd Defendant dated 31st October, 2014.
39. The Plaintiff also produced in evidence the letter of offer from Equity Bank dated 11th November, 2014 and the certificate of official search indicating that as at 3rd July, 2014, the suit property was registered in the names of Mary Woki Kaburu, John Mungai Kaburu, Peter Kinyanjui Kaburu, David Munyui Kaburu and Paul Kinuthia Kaburu.
40. The Plaintiff also produced in evidence the Conveyance dated 28th October, 2014 between Mary Woki Kaburu, Peter Kinyanjui Kaburu, David Munyui Kaburu and Paul Kinuthia Kaburu and himself for the sale of the suit property, and a certificate of official search indicating that as at 28th November, 2018, the suit property was registered in his name.
41. Vide a supplementary list of documents dated 28th November, 2018, the Plaintiff adduced into evidence a Valuation Report from Dantu Valuers Limited dated 15th November, 2018; the charge sheet dated 29th January, 2015 in Naivasha criminal case No 157 of 2015, R v Evans Kageche Boro; the Ruling by Muchelule J in HCCC No 1519 of 1993, and pictures of the destroyed fence and public health officers exhumation report dated 26th February, 2018.
42. Vide a Counterclaim filed together with the Defence, the Defendants claim ownership of the suit property and seek injunctive orders against the Plaintiffs. They assert that they are rightfully on the property having occupied the same since 1980 at the instance of the four original proprietors.
43. According to the Defendants, the original proprietors of the suit property gave the 2nd Defendant an irrevocable option to purchase the suit property after the expiration of the 3-year lease for the sum of Kshs 2,000,000 which was paid to the owners, each receiving Kshs 500,000 and that it was a further term of the agreement that the 2nd Defendant would pay the aforesaid sums in installments until payment in full. Apart from the oral testimony rendered in Court, no other documentary evidence was adduced by the Defendants.
44. The onus to prove the assertion of who is entitled to the suit property was on both the Plaintiff and the Defendants. This principle is succinctly captured in Sections 107, 109 and 112 of the *Evidence Act*, CAP 80, Laws of Kenya. Section 107 provides as follows:
 - “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
45. Sections 109 and 112 of the same Act states;



109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
46. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea v David M Wachira* [2016] eKLR stated as follows:
- “In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:
- Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”
47. The Plaintiff has in respect to his claim of ownership of the suit property adduced into evidence a copy of the Conveyance made on 28th October, 2014 and a certificate of official search indicating that as at 28th November, 2014, he was the registered owner of the suit property, having been so registered under the *Land Registration Act*.
48. The 2nd Defendant on the other hand did not adduce any documentary evidence with respect to his claim. Indeed, the 2nd Defendant did not produce any sale agreement or an Indenture of Conveyance to show that he purchased the suit property contrary to the provisions of section 3(3) of the *Law of Contract Act*.
49. The provisions of Section 24(a) and 25(1) of the *Land Registration Act*, 2012 outlines the interests and rights of a registered proprietor. Section 24(a) of the Act provides as follows:
- “Subject to this Act—
- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
50. Whereas Section 25 (1) of the Act under the heading rights of a proprietor provides as follows:
1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever....”



51. Section 26(1) of the *Land Registration Act*, while affirming the principles of indefeasibility of title, also sets out the circumstances in which a party's title is amenable to challenge. The section provides;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

It can be seen from the above provisions of the law that whereas title is protected, the title can be impeached if it is proved to have been procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.

52. The Defendants assert that if indeed the Plaintiff has title to the suit property, the same was acquired fraudulently. The *Black's Law Dictionary* defines fraud thus:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another.”

53. It is trite law that any allegations of fraud must be pleaded and strictly proved. As expressed by the Court of Appeal in case of *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria –v- Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

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

54. The Defendants did not lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit property in favour of the Plaintiff. The Defendants' claim that the Plaintiff procured his title fraudulently therefore fails. In the circumstances, it is the finding of this court that the Plaintiff is



- the lawful owner of the suit property. The Plaintiff is therefore entitled to an order of permanent injunction.
55. The Plaintiff has sought for other prayers including eviction orders, mesne profits, general damages as well as costs of the suit. During trial, it emerged that the Defendants are no longer on the suit property. The 1st Defendant is since deceased and the 2nd Defendant has vacated the suit property. It follows therefore that this prayer is moot.
56. Section 2 of the *Civil Procedure Act*, defines mesne profits as follows:
- “mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession”
57. Order 21 Rule 13 of the *Civil Procedure Rules* provides as follows:
- “13.(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—
- (a) for the possession of the property;
 - (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.”
58. In the case of *Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah* [2016] eKLR, the Court defined Mesne profits thus;
- “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. Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.”
59. It is common ground that a claim for mesne profits being one in the nature of special damages must be specifically pleaded and proved. The burden of proof is on the party making the claim, in this case the Plaintiff. The Plaintiff was under a duty to prove what profits he might have received in the ordinary diligence and use of the suit property. This position was affirmed by the Court of Appeal in the case of *Peter Mwangi Mbutia & another v Samow Edin Osman* [2014] eKLR where the court posited;
- “We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”



60. The Court has keenly considered the pleadings and exhibits in this respect. While one of the orders sought in the amended Plaintiff is mesne profits, the same has not been specifically pleaded. This, the Court opines, falls short of the specificity required in pleading mesne profits.
61. The above notwithstanding, the Plaintiff, through PW2, produced a valuation report which he avers evinces the said mesne profits. Can there be proof of what is not pleaded?
62. It is common ground that pleadings are the foundation upon which proof is provided. The Court of Appeal in *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others* (2014) eKLR cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
- “...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”
63. It would appear then that the contents of the valuation report in so far as it purports to prove mesne profits, the sum of which has not been pleaded, must be disregarded.
64. Even if the court was to assume that mesne profits have been pleaded with the degree of particularity required by law, the question that arises is whether the same was proved. The Court has keenly studied the valuation report. The valuer has set out the sum of Kshs 345,000,000 as the total sum for loss of use. It is broken down as Kshs 298,000 being loss of bargain, which, according to PW2, means the difference between the original sale price and the current value of the property; loan re-payments for 49 months at Kshs 44,145,374; conveyancing and stamp duty fees of Kshs 2,460,000 and valuation fees of Kshs 233,000.
65. Looking back at the definition of ‘mesne profits’ as per Section 2 of the *Civil Procedure Rules*, it is clear that its essence is to compensate the owner of the property for the time in which a party is in wrongful possession of his property and to compensate him for the monies he would have gained if he was in possession and use of his property.
66. It was the Plaintiff’s testimony that he purchased the suit property to earn income from it. In claiming mesne profits, it would have been expected that the Plaintiff would provide evidence of how much income he anticipated to gain from the property over the period he was deprived of its use. Instead, the valuation report sets out the difference of the value of the suit property as at the time of the purchase and the current value of the property.
67. This, the Court opines, does not constitute mesne profits. The loan repayments set out by the Plaintiff can equally not form a basis for mesne profits. The Defendants cannot be liable for a contractual agreement between the Plaintiff and a third party which they were not a party to. With respect to fees paid to the Advocate and to the valuer, these are in the nature of special damages and ought to have been so pleaded. In the end, the Plaintiff’s claim for mesne profits fails.
68. The Plaintiff has sought for damages for trespass. Ordinarily, where a party claims for both mesne profits and damages for trespass, the Court can only grant one and not both. This position was affirmed



by the Court of Appeal in the case of *Kenya Hotel Properties Limited v Willesden Investments Limited* [2009] eKLR which stated as follows:

“...once the learned Judge made the award under the subhead “mesne profits” there was no justification for him awarding a further Kshs.10 million under the subhead “trespass”, since both mean one and the same thing.”

69. Having not granted any award under the head mesne profits, the Court will consider the plea for general damages for trespass. Section 3(1) of the *Trespass Act* states;

“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.”

70. It is not disputed that the Defendants have been on the suit property. Indeed, their presence thereon predates the Plaintiff’s ownership of the suit property. In the ordinary course of things, the Plaintiff’s purchase of the suit property in 2014 ought to have entitled him to vacant possession thereof. However, the Defendants were on the suit property until 2019. This therefore means that the Plaintiff was denied the full benefit of his property for approximately 5 years.

71. Taking into consideration the length of time for the trespass which has denied the Plaintiff the use of the suit land, the acreage involved and location of the property, it is the opinion of the Court that the sum of Kshs 5,000,000 would be reasonable compensation to the Plaintiff.

72. In the end, the Court proceeds to make the following final orders;

- i. The Defendants counterclaim be and is hereby dismissed in its entirety.
- ii. A permanent injunction be and is hereby issued restraining the Defendants, their employees, servants and or/agents or otherwise from transferring, advertising for sale, disposing off, occupying and or otherwise interfering with the Plaintiff’s enjoyment and occupation of the suit property Land Reference No 398/18(Orig no 398/10/3) Naivasha.
- iii. The Plaintiff is hereby awarded the sum of Kshs 5,000,000 as damages for trespass.
- iv. The 2nd Defendants to pay interest on the above at court rates from the date of this judgment until payment in full.
- v. The 2nd Defendant will pay the costs of the suit and counter-claim.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF FEBRUARY, 2023.

O. A. ANGOTE

Judge

In the presence of

Mr. Wachira for Kingara for Plaintiff

Mr. Oundo for Defendant

Court Assistant- June

