



**Muthui v National Social Security Fund Board of Trustees (Environment & Land
Case 591 of 2017) [2023] KEELC 16721 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16721 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 591 OF 2017**

**JO MBOYA, J
MARCH 29, 2023**

BETWEEN

ROBERT NDUNGU MUTHUI PLAINTIFF

AND

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES DEFENDANT

JUDGMENT

Introduction And Background

1. *Vide* Plaintiff dated the 19th September 2017, the Plaintiff herein has approached the Honourable court seeking for the following relief;
 - i. A Permanent injunction restraining the Defendant, its agents, servants and/or any one claiming under it, to forthwith amend the existing re-planning survey plan for Nairobi/Block 97/2364.
 - ii. An order of Mandatory injunction directed at the Defendant, and any one else claiming under it, to forthwith amend the existing re-planning survey plan for Nairobi/Block 97, and exclude the Plaintiff's parcel, being Nairobi/Block 97/2364, from the parent parcel, and further to remove the access roads, sewer lines and squatters/allottees from the Plaintiff's parcel of land.
 - iii. Damages, including, Exemplary Damages, for illegal annexation of the suit land, loss of use and income, inconvenience and trespass.
 - iv. Alternatively an order directing and compelling the Defendant to buy the Plaintiff's parcel of land at the current market price and damages in terms of prayer No. (iii) hereof.
 - v. Cost of the suit.



2. Upon being served with the Plaint and summons to enter appearance, the Defendant duly entered appearance on the 5th October 2017 and thereafter filed a Statement of Defense on the 18th October 2017 and in respect of which the Defendant disputed the claims by and on behalf of the Plaintiff herein.
3. It is imperative to point out that the pleading in respect of the instant matter thereafter closed and same proceeded to the usual pre-trial conference, where the suit was confirmed to be ready and or ripe for hearing.

Evidence by the parties

a. plaintiff's case

4. The Plaintiff's case gravitates and revolves around the evidence of one witness, namely, Robert Ndungu Muthui, who testified as PW1.
5. It was the evidence of the witness herein that same is the lawful and registered proprietor of all that parcel of land otherwise known as Nairobi/Block 97/2364 (hereinafter referred to as the suit property) measuring approximately 0.18 Ha or thereabout, situate within Tassia Estate, in the City of Nairobi.
6. In addition, the witness stated that the suit property was designated for residential purposes. Furthermore, the witness stated that on or about the year 2008/2009, the Defendant herein laid a claim to and in respect of the entire L.R No. Nairobi/Block 97 including the suit property.
7. Furthermore, the witness stated that the Defendant even proceeded to and instructed her Physical Planners' and surveyors to re-plan/re-survey the said parcel of land, namely, Nairobi/Block 97.
8. It was the further testimony of the witness that in the process of carrying out the re-planning and re-survey of the entire of the parcel in question, namely, Nairobi/Block 97, the Defendant herein annexed and amalgamated the suit property into her land and thereafter deemed the suit property as her own.
9. On the other hand, the witness averred that other than the illegal annexation and alienation, the Defendant also commenced to and created access roads and sewer lines on the suit property and as a result of the said infrastructural facilities, the Defendant proceeded to and deprived the witness of the entirety of the suit property.
10. On the other hand, the witness averred that owing to the actions and/or activities by the Defendant, same was constrained to and indeed protested to the Defendant and sought to have the Defendant remedy the situation by undertaking the re-planning and re-survey of the arear, with a view to excluding the suit property from the Defendant's land.
11. Additionally, the witness testified that even though same sought the intervention of the Defendant with a view to excluding the suit property, the Defendant herein remained adamant and otherwise failed to comply with his (witness) demand.
12. Other than the foregoing, the witness also testified and stated that prior to the impugned actions and/or activities by the Defendant, same had prepared his building plans and caused same to be submitted to the City Council of Nairobi for due approval and further actions.
13. However, the witness added that the building plans were rejected by the City Council of Nairobi, on the basis that the entire L.R No. Nairobi/Block 97, belonged to the Defendant, on the basis of a re-planning scheme, which had been illegally prepared and submitted by the Defendant.
14. Besides, it was the further testimony of the witness that after the Defendant failed to comply and or adhere to his demand to remove the suit property from the re-planning scheme prepared by and on



behalf of the Defendant, same was constrained to and indeed lodged a complaint with the commission on administration of justice (Ombudsman).

15. Additionally, the witness stated that upon the lodgment of the complaint with the Ombudsman, the complaint was duly adjudicated upon culminating into recommendations dated the 19th April 2017, wherein the Ombudsman duly found and established that the Defendant had encroached upon the suit property belonging to and registered in the name of the Plaintiff.
16. Despite the recommendations by the Commission of Administration of Justice, the witness herein pointed out that the Defendant failed to comply with and or adhere to the named recommendations.
17. It was the further testimony of the witness that as a result of the failure and neglect by the Defendant to comply with the recommendation of the Ombudsman, same was left with no alternative, but to file/lodge the instant suit.
18. Other than the foregoing, the witness referred to the witness statement dated the 19th September 2017 and sought to rely on same. In this regard, the witness statement was adopted and admitted as Further evidence in chief.
19. Besides, the witness also referred to the List and Bundle of documents dated the 19th September 2017 and similarly sought to adopt the documents at the foot of the List.
20. Prior to and before, the documents alluded to and contained at the foot of the list dated the 19th September 2017 could be admitted, learned counsel for the Defendant objected to the production of documents No. 6 and No. 11, respectively.
21. Subsequently, the court was obliged to and indeed entertained the submissions of both counsel and thereafter the Honourable court rendered a ruling pertaining to and concerning the said documents. For clarity, the court proceeded to and directed that document No. 6 be marked as PMFI 6, whilst document number 11, was to be produced and admitted in Evidence.
22. For coherence, the documents contained at the foot of the List dated the 19th September 2017, were therefore produced as exhibit P1 to P5 and P7 to P12, respectively, save for document number 6 which was marked for identification.
23. Furthermore, the witness also referred to a Further List dated the 28th January 2021 and sought to produce the documents at the foot of the named list. However, yet again the named document was subjected to objection and same was also marked for identification. (see PMFI 13).
24. On the other hand, the witness also referred to a Further list and bundle of documents dated the 4th March 2022 and sought to rely on same. For clarity, the documents at the foot of the named list were admitted in evidence and marked as exhibits P14 to P18 respectively.
25. On cross examination, the witness indicated that the first act/ incidence of trespass occurred/ commenced in the year 2008/2009.
26. In addition, the witness stated that the offensive acts of trespass have since continued from the year 2008 to date. In this regard, the witness pointed out that the impugned activities constitute continuous trespass.
27. In addition, the witness pointed out that the Defendant herein have constructed and established sewer lines and access roads on the suit property belonging to the witness.



28. Whilst still under cross examination, the witness stated that same had prepared building plans and submitted same to the City Council of Nairobi, for purposes of approval and to pave way for developments on the suit property.
29. Other than the foregoing, the witness indicated that same would not have been able to carryout and or undertake developments on the suit property, in any manner, without the requisite approvals from the planning authority.
30. In respect of whether the Defendant procured and obtained any approvals for undertaking developments on the suit property, the witness pointed out that the Defendant indeed procured and obtained partial approval to carryout and undertake sewer lines and access roads on the entire L.R No. Nairobi/Block 97, including the suit property.
31. Furthermore, the witness testified and stated that the Defendant herein sold part of the suit property to the squatters and thereafter undertook a process known as a regularization exercise.
32. In any event, the witness added that the regularization plan was meant to make the area conform with the Physical Planning Act and thereafter pave the way for proper development of the land by the Defendant.
33. It was the further testimony of the witness that the suit plot, which lawfully belongs to him is currently occupied by someone, who contends that same bought the land from the Defendant herein.
34. Furthermore, the witness added that the sewer lines and the access roads, which have been placed on the suit property, were erected and established by the Defendant herein. In this regard, the witness reiterated that it is the Defendant who has trespassed onto or encroached upon the suit property and thus deprived the witness of his right to use and benefit from the suit property.
35. With the foregoing testimony, the Plaintiff's case was closed.

b. The Defendant's Case:

36. Similarly, the Defendant's case is premised and anchored on the evidence of one witness, namely, Enos Cheron, who testified as DW1.
37. It was the evidence of the said witness that same is the Tenant Purchase Scheme and Bond Accountant-Capital and Money Department within the Defendant organization and therefore conversant with the facts and issues beforehand.
38. Additionally, the witness herein proceeded to and testified that the suit property does not belong to the Defendant. However, the witness added that the suit property is contiguous to the Defendant's Property, namely, L.R No. block 21189, Block 21190 and Block 97 in Tersia Estate, Embakasi within the City of Nairobi.
39. On the other hand, the witness further testified that the Defendant herein procured and retained the services of Geoinfo Survey Ltd, for purposes of carrying out and undertaking Physical Planning in respect of the Defendant's land with a view to developing a plan and to map out the Defendant's property in Tassia.
40. On the other hand, the witness testified that the Defendant herein proceeded to and gave copies of her title documents to the designated Physical Planner, with a view to enable same to professionally undertake and perform the assigned duties.



41. Additionally, the witness testified that the Physical Planner was to be guided by the documents and the map which same obtained from the survey of Kenya, so as to determine the size and extent of the Defendant's land on the ground.
42. In any event, the witness testified that the Defendant herein did not give the Physical Planner instructions outside the documents which were availed and handed over to the Physical Planner.
43. Be that as it may, the witness added that the Defendant herein neither instructed nor authorized the physical planner to include the Plaintiff's property in the Physical Development Plans or at all.
44. Notwithstanding the foregoing, it was the further testimony of the witness that the Defendant herein latter learnt that Geoinfo Survey Limited erroneously included the Plaintiff's property in the Embakasi regularization plan that was then submitted to City Council of Nairobi.
45. Furthermore, the witness averred that thereafter the Defendant and in the company of the Plaintiff, conducted a field visit on the 28th July 2017 with a view to ascertaining the level of Embakasi regularization plan and in particular, the extent of encroachment onto the Plaintiff's property.
46. In addition, the witness averred that the parties ascertained that out of the purported 6 plots that were allegedly curved out of the Plaintiff's land, only one plot was erroneously sold and registered in the Defendant's system and in the name of Adan Ibrahim.
47. Other than the foregoing, the witness further testified that the Defendant acknowledged the error and agreed to rectify and remove the property from it's register. Besides, the Defendant similarly agreed to refund Mr. Adan Ibrahim, the money which same had paid towards and in purchase of the portion of the Plaintiff's property.
48. On the other hand, it was the further testimony of the witness that the Defendant herein similarly agreed to remedy the situation by instructing a surveyor with a view to re-survey and re-plan the Defendant's parcel in Tassia Estate, to exclude the Plaintiff's property from its plan.
49. Furthermore, the witness added that the Defendant herein has not been able to carry out any infrastructural developments and/or sewer line which can be attested to by the fact that the Defendant contracted and organization, namely, Multi-scope Consulting Ltd, to carryout comprehensive design works and to prepare costs estimates which were only finalized and submitted to the County Government of Nairobi vide letter dated 4th February 2013.
50. Consequently and in the premises, the witness herein contended that it is therefore false for the Plaintiff to allege that the Defendant has put up structures in the Plaintiff's property and constructed sewer lines and access roads thereon.
51. It was the further testimony of the witness that the Defendant herein has not ignored and or disregarded the protest by the Plaintiff, either in the manner alluded to or at all. To the contrary, the witness averred that the Defendant has offered to rectify the survey plans and to resolve the issue herein.
52. Nevertheless, the witness contended that despite the offer by and at the instance of the Defendant, the Plaintiff has remained adamant and same insists that the Defendant ought to purchase and acquire the suit property.
53. Additionally, the witness testified that the Defendant herein has made efforts to arrange a meeting between the Physical Planner and the Plaintiff so that the survey plans can be reviewed and rectified, but that the Plaintiff has declined.



54. Notwithstanding the foregoing and despite the various contention contained and enumerated in the witness statement which was constituted and admitted as evidence in chief, the witness herein proceeded to (sic) and stated that the Defendant herein has not encroached onto the suit property.
55. Other than the foregoing, the witness alluded to and sought to adopt the contents of the witness statement dated the 11th July 2019. In this regard, the witness statement was duly admitted and constituted as the evidence in chief of the witness.
56. Additionally, the witness also referred to the List and Bundle of documents dated the 11th July 2019; and sought to adopt and rely on the named documents. In this regard, the documents in question were duly admitted and produced as exhibits D1 to D16.
57. On cross examination by counsel for the Plaintiff, the witness conceded and admitted that the Defendant's Physical planner has not amended the Physical plan so as to exclude the Plaintiff's plot.
58. With the foregoing testimony, the Defendant's case was closed.

Submissions by the Parties

a. Plaintiff's Submissions:

59. The Plaintiff filed written submissions dated the 24th February 2023 and in respect of which the Plaintiff has raised and highlighted three issues for consideration and determination by this Honourable court.
60. Firstly, learned counsel for the Plaintiff has submitted that the Defendant herein has admitted and acknowledged encroachment onto and trespass upon the Plaintiff's parcel of land in question. In this regard, learned counsel has therefore contended that the question of trespass is therefore not debatable.
61. In addition, learned counsel for the Plaintiff has submitted that it is the Defendant who retained and engaged Geoinfo Survey Ltd to carry out and undertake the impugned planning and re-survey, which culminated into the annexation of the Plaintiff's property. Consequently, counsel has added that the Defendant herein is thus liable and culpable for the acts and/or omission of her agents/servants.
62. Secondly, learned counsel for the Plaintiff has submitted that having trespassed onto the suit property, the Defendant has therefore denied and deprived the Plaintiff of his right of occupation, possession and use. In this regard, learned counsel has therefore submitted that the Plaintiff is therefore entitled to compensation on account for General damages for trespass.
63. Nevertheless, despite making extensive submissions on the Plaintiff's entitlement to compensation on account for General damages on trespass, learned counsel for the Plaintiff failed and/or neglected to quantify the amount of damages on behalf of the Plaintiff.
64. Be that as it may, learned counsel has cited and quoted various decisions, *inter-alia*, [Roda S Kiilu versus Jiangxi Water Hydropower Construction Company Ltd](#) (2019)eKLR, [Philip Ayaya Oluchio versus Crispinos Ngayo](#) (2014)eKLR, [Nakuru Industries Ltd versus S S Meta & Sons](#) (2016)eKLR and [Park Towers versus Moses Chege & Others](#) (2014)eKLR, respectively.
65. Other than the foregoing, learned counsel for the Plaintiff has also submitted that the Plaintiff herein is also entitled to an order of Mandatory injunction to compel and/or direct the Defendant herein to undertake a re-planning and a re-survey of L.R No. Nairobi/Block 97 and thereafter to remove and/or exclude the suit property from the Defendant's regularization plan, which has illegally annexed the suit property.



66. In support of the submissions pertaining to and concerning the grant of an order of Mandatory injunction, learned counsel for the Plaintiff has cited and quoted various decisions including, *inter-alia*, *Bandari Investments and Company Ltd versus Martin Chiponda & 139 others* (2022)eKLR, *Malier Unissa Karim versus Edward Oluoch Odumbe* (2015)eKLR and *Kenya Breweries Ltd versus Washington Okeyo* (2002)eKLR, respectively.
67. In a nutshell, learned counsel for the Plaintiff has implored the Honourable court to find and hold that the Plaintiff has duly proved and established his case on a balance of probabilities and thus same ought to be allowed

b. Defendant's Submissions

68. On the other hand, the Defendant filed written submission dated the 7th March 2023 and same has raised and amplified three (3) issues for due consideration and determination by the Honourable Court.
69. First and foremost, learned counsel for the Defendant has submitted that the order of Mandatory injunction that has been sought for by and at the instance of the Plaintiff herein ought not to be granted insofar as the Defendant is not responsible for the squatters who are in occupation of the Plaintiff's parcel of land/suit property.
70. In addition, learned counsel for the Defendant has submitted that the impugned squatters who have occupied a portion of the suit property are neither servants nor agents of the Defendant and hence the Defendant herein is not responsible for their actions and/or activities.
71. On the other hand, learned counsel has further submitted that in any event the impugned squatters who had occupied a portion of the suit property were never parties to the suit and hence no order can issue against the impugned squatters, albeit without same being afforded an opportunity to be heard. In this regard, Learned Counsel for the Defendant has invoked and relied upon the Rule of Natural Justice.
72. In short, learned counsel for the Defendant has submitted that the order of Mandatory injunction sought by and at the instance of the Plaintiff ought not to issue and/ or be granted.
73. Secondly, learned counsel for the Defendant has submitted that the Plaintiff herein is not entitled to an order for Mesne Profits insofar as the Plaintiff has not placed before the Honourable court any evidence that same has suffered any financial loss, arising from and/or attendant to the impugned trespass.
74. Thirdly, learned counsel for the Defendant has also submitted that the Plaintiff has neither established nor satisfied the threshold to warrant the grant of an order for Exemplary Damages either as pleaded or at all.
75. In this regard, learned counsel for the Defendant has invited the Honourable court to take cognizance of the holding in the case of *Municipal Council of Eldoret versus Titus Gatitu Njau* (2020)eKLR, where the Court of Appeal underlined the instances wherein Exemplary Damages can be awarded.
76. Lastly, learned counsel has submitted that the Plaintiff herein is only entitled to nominal award on account of General Damages for trespass. For clarity, learned counsel has pointed out that the Plaintiff has been unable to show that the Defendant has caused physical damages to the suit property, in any manner whatsoever.



77. Furthermore, learned counsel for the Defendant has similarly submitted that the Plaintiff has also failed to place before the Honourable court material under which the court can proceed to rely on and to assess damages claimed by the Plaintiff herein.
78. In support of the submissions that the Plaintiff is only entitled to Nominal damages, learned counsel has cited and quoted the holding in the case of *Joyce Nyansiaboka Onchonga versus Joseph Kenyaya & 2 others* (2013)eKLR.
79. Curiously and despite the admission that the Defendant had indeed trespassed onto the Plaintiff's property, learned counsel for the Defendant has submitted that the Plaintiff has failed to lay a basis for the grant of the reliefs sought at the foot of the Plaintiff.
80. Consequently and in the premises, learned counsel for the Defendant has invited the Honourable Court to find and hold that the Plaintiff has not proved his case on a balance of probabilities and to dismiss the Plaintiff's suit.

Issues For Determination

81. Having reviewed and evaluated the Plaintiff's plaint dated the 19th September 2017, together with the attachment thereto and having taken into account the Statement of Defense filed on behalf of the Defendant and upon consideration of the oral evidence tendered before the court; and finally upon taking into account the written submissions filed by the Parties, the following issues are pertinent and thus worthy of determination;
 - i. Whether the Defendant herein has encroached upon and trespassed onto the suit Property belonging to the Plaintiff.
 - ii. Whether the Plaintiff is entitled to the reliefs sought, including, compensation on account of General Damages and if so, the Quantum thereof.

Analysis And Determination

Issue Number 1- Whether the Defendant herein has encroached upon and trespassed onto the suit Property belonging to the Plaintiff?

82. To start with, there is no gainsaying that L.R No. Nairobi/Block 97/2364 (hereinafter referred to as the suit property) lawfully belongs to and is registered in the name of the Plaintiff herein.
83. In this regard, the Plaintiff tendered and produced before the Honourable court a certificate of lease issued on the 16th November 2009, as well as a certificate of official search, confirming that indeed the suit property belongs to and is the property of the Plaintiff.
84. Furthermore, even the Defendant's own witness, namely, DW1 acknowledged and admitted that the suit property belongs to and is registered in the name of the Plaintiff. In this regard, the witness stated as hereunder;

“Paragraph 36

There is no basis for the claim for exemplary damages as for the inclusion of the Plaintiff's property, namely L.R Nairobi/Block 97/2364 was a genuine mistake that arose from the convoluted history of the land and not arising out of malice as alleged in paragraph 7 of the plaint and the Defendant has been ready and willing to rectify the plans and even had



negotiations with the Plaintiff towards achieving this goal. However, the Plaintiff is adamant that the land should be compulsorily acquired”.

85. From the foregoing excerpt, which is contained in the written statement of DW1, it is apparent and evident that indeed the Defendant concedes that the Plaintiff is the owner/proprietor of the suit property.
86. Having dealt with and disposed of the question of ownership of the suit property, which in any event is not in contest, the next issue to be addressed is whether or not the Defendant has trespassed onto the suit property.
87. As pertains to whether or not the Defendant herein has trespassed onto the suit property, it is also imperative to take cognizance of salient aspects of the witness statement, which was relied upon by DW1 and admitted as the evidence in chief.
88. For ease of reference, DW1 stated as hereunder;

“Since then NSSF has learnt that Geoinfo Survey Ltd Physical Planner erroneously included the Plaintiff’s property in the Embakasi regularization plan that was submitted to the then City Council of Nairobi.

Thereafter, the Defendant in the company of the Plaintiff conducted a filed visit on the 28th July 2017 to ascertain the level Embakasi regularization plan encroached onto the Plaintiff parcel of land.

The Fund (NSSF) acknowledged the error and agreed to rectify and remove the property from its register and agreed to refund Mr. Adan Ibrahim. The Fund also offered to remedy the situation by instructing its surveyor to re-survey and re-plan the Defendant’s parcel in Tersia Estate to exclude the Plaintiff’s property from it’s plans”.

89. My understanding of the foregoing excerpts, which are lifted from the written statement of DW1, is to the effect that the Defendant actually re-surveyed and re-planned her parcels of lands at Tassia Area, within the City of Nairobi and that in the course of such re-planning, same annexed and caused the suit property to be included as part of the Defendant’s land.
90. In any event, the question that the Defendant had excised and annexed the suit property, was the subject of deliberations, before the commission on administration of justice, whereupon the said commission indeed found and held that the Defendant had annexed the Plaintiff’s property. For ease of reference, the Plaintiff produced before the Honourable court the decision/award of the Ombudsman, which was marked as Exhibit P7.
91. Given the foregoing position, there is no gainsaying that the Defendant herein has indeed trespassed onto and continues to trespass onto the suit property, and continues to retain the suit property, belonging to the Plaintiff, albeit without the permission and consent of the Plaintiff.
92. Surely, the Defendant cannot annex and include the suit property in her regularization plan and thereby deprive the Plaintiff of the right to develop same and yet still, be heard to contend (sic) that same is not a trespasser.
93. To my mind, the evidence tendered by the Defendant’s witness contradicts the Statement of Defense that was filed by and on behalf of the Defendant.



94. Furthermore, when one juxtaposes the Statement of Defense filed, the evidence tendered and adduced, vis- a- viz the written submissions on behalf of the Defendant, what comes to the fore is that the Defendant is approbating and reprobating at the same time.
95. Be that as it may, it is my considered view that the impugned activities and/or actions that are complained against; and which have variously been admitted, constitutes and amounts to trespass.
96. To this end, it is imperative to take cognizance of the definition of what constitutes trespass. In this regard, the provision of Section 3 of the Trespass Act suffice and offer suitable anchorage towards understanding what constitutes Trespass.
97. For coherence, the said Section provides as hereunder;
3. Trespass upon private land.
- (1) 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.
- (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.
98. Furthermore, what constitutes trespass has similarly been defined in Clerk and Lindsell on Torts (*supra*) page 1354 para 24-01 ‘Trespass’ is defined as
- “an act or omission which is an interference with, disturbance of or annoyance to, a person’s rights used or enjoyed in connection with land. It is caused, usually when the consequences of a person’s actions on his land are not confined to the land, but escape to his neighbours’ land causing an encroachment and causing physical damage or unduly interfering with the neighbours use and enjoyment of his land”
99. In a nutshell, I come to the conclusion that the Defendant herein has encroached upon and trespassed onto the suit property and thereby denied and deprived the Plaintiff of his entitlement to occupy, possess and use the suit property.
100. Additionally, the impugned actions by and at the instance of the Defendant herein have thus violated and infringed upon the Plaintiff’s statutory rights as stipulated vide the provisions of Sections 24 and 25 of the Land Registration Act, 2012.

Issue Number 2- Whether the Plaintiff is entitled to the Reliefs sought, including, compensation on account of General Damages and if so, the Quantum thereof.

101. The Plaintiff herein has sought for a plethora of reliefs at the foot of the Plaint before the Honourable court. Consequently, it is appropriate to interrogate the reliefs that are contained at the foot of the Plaint beforehand.
102. Firstly, the Plaintiff has sought for an order or Permanent Injunction to restrain and or prohibit the Defendant herein and/or her agents and servants from further trespassing onto the suit property.
103. In this regard, what the Plaintiff is essentially seeking is that the court be pleased to protect and vindicate his right to and in respect to the suit property, which lawfully belongs to and his registered in his name.



104. In my humble view, by virtue of being the registered proprietor and/or owner of the suit property, the Plaintiff is entitled to the requisite protection and vindication under the law.
105. Without belaboring the point, it is appropriate to recall and reiterate the holding of the Court of Appeal in the case of *George Orago Orango versus Liewa Jagalo & Another* (2010)eKLR, where the Court stated and held as hereunder;

“The appellant was in possession. Prima facie, he is the owner of the land and until his title to it is set aside, there would be no proper basis for dispossessing him of the land. The denial of injunction has the effect of dispossessing the appellant of his land. The purpose of an injunction is to conserve or preserve the subject property pending determination of a suit concerning the property.”
106. Secondly, the Plaintiff herein has also sought for an order of Mandatory injunction to compel the Defendant to undertake a re-planning and re-survey of the Defendant’s property, namely, L.R No. Nairobi/Block 97, with a view to excising and removing the suit property from within the Defendant’s larger parcel of land.
107. For coherence, DW1 admitted and acknowledged that upon the retention and engagement of Geoinfo Surveys Ltd Physical Planner same erroneously undertook a re-planning and a re-survey exercise which culminated into the erroneous inclusion of the suit property in the Embakasi regularization plan, that was undertaken on behalf of the Defendant.
108. Furthermore, the witness went ahead and stated that the Defendant herein duly acknowledged the error and agreed to rectify same and to remove the suit property from its register.
109. Additionally, DW1 also stated that the Defendant herein had also offered to remedy the situation by instructing her surveyor to re-survey and re-plan the Defendant’s parcels in Tassia Estate, to exclude the Plaintiff’s property from its plans.
110. Clearly, the Defendant herein appears to appreciate what essentially is required of her. For clarity, all that the Plaintiff requires is the excision and removal of his property from the entanglement of the Defendant’s parcels of land and restoration thereof unto the Plaintiff.
111. Though the Defendant has been aware of the foregoing requirement, same has failed to undertake same and in this regard, I hold the opinion that an order of Mandatory injunction is not only merited, but efficacious to remedy the situation.
112. In the premises, an order of mandatory injunction shall be and is hereby issued to compel the Defendant to undertake the necessary steps towards re-planning and re-survey of her parcel of land, namely, L.R No. Nairobi/Block 97, with a view to excising and removing the suit property therefrom.
113. Finally, the Plaintiff has also sought for an order of General damages for trespass onto the suit property.
114. As pertains to the claim for General damages for trespass, it is common ground that once trespass is proved, (like in this case), the claimant becomes entitled to recompense/compensation for such trespass.
115. Simply put, trespass is actionable per se and the claimant is not called upon to show that same has suffered any loss or damage, as a result of the impugned trespass.



116. In this regard, I disagree with the Submissions of Learned Counsel for the Defendant, who contended that the Plaintiff is not entitled to General Damages on account of failure to show that same had suffered physical Loss.
117. To this end and to further distinguish the contention by Counsel for the Defendant, I propose to adopt the stipulations at the foot of *Halsbury's Law of England*, 4th Edition, Volume 45, at para 26, 1503, which provides as follows on computation of damages in an action of trespass:
- (a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
 - (b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
 - (c) Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.
 - (d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
 - (e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.
118. Other than the excerpt alluded to in the preceding paragraph, it is also imperative to adopt and reiterate the holding in the case of *Park Towers Ltd v Moses Chege & 7 others* (2014)eKLR, where the court stated and held as hereunder;
- “I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. As observed in the cases referred to there is no mathematical or scientific formula in such cases for assessment of general damages. However in the case before me I consider that the suit properties are sizeable parcels sitting on nearly three quarters of an acre of land located in the Central Business District (CBD). This is a prime property in the City Centre and any unlawful act of aggression and/or intrusion that prevents the rightful owner of the property from enjoyment of his ownership rights of possession and use is to be frowned at and is punishable by way of an award of damages.
119. On the question of quantum of damages payable, I beg to state that there is no mathematical, nay, arithmetical formula approved and/or established for purposes of ascertainment of General damages where trespass has been established and/or proven.
120. For the avoidance of doubt, it is imperative to state and underscore that the award of general damages for trespass is an exercise of discretion, albeit depending on the various and obtaining circumstance.
121. Furthermore, the award of damages is done on a case by case basis and taking into account, inter-alia, the size of the Land in question, the nature of the activities complained of, the duration and the inflationary tendencies.
122. In this respect, it is appropriate to reiterate the holding in the case of *Rboda S Kiilu versus Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR, where the court held as hereunder;



17. In the case of *Willesden Investments Limited vs. Kenya Hotel properties limited* NBI H.C.C. No. 367 of 2000 (a case cited by the plaintiff), the court stated that;
- “There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that K.Sh. 10 000 000 is a reasonable award for general damages”.
18. I have taken into account the fact that the damage occurred in a rather expansive chunk of land, though the same is situated in a rural area. I am of the view that an award of Kshs.10,000,000/- as general damages is sufficient.
123. In respect of the instant matter, the Plaintiff tendered evidence that the suit property measures 0.81 Ha and that same is situated within the prime area, namely, Embakassi, within the City of Nairobi.
124. Additionally, the Plaintiff also testified that the offensive encroachment and annexation of the suit property took place way back in the year 2009, when the Defendant herein undertook the illegal re-planning and re-survey that culminating into the offensive encroachment.
125. Clearly, the impugned activities, which are complained of and which color the claim by the Plaintiff have existed for a duration of more than 14 years, despite the fact that the Defendant has been aware and knowledgeable of same.
126. Worse still, the Commission on Administration of Justice, (CAJ), had occasion to deal with the Dispute and indeed directed the Defendant to remedy the situation. However, despite the clear and unequivocal decision, the Defendant still remained adamant and ambivalent.
127. To my mind, the Plaintiff as the owner of the suit property has been substantially denied and deprived of his statutory entitlements pertaining to and concerning the suit property. (See the Provisions of Sections 24 and 25 of the *Land Registration Act*, 2012)
128. Consequently and in the premises, I come to the conclusion that an award of Kes.10, 000, 000/= on account of General damages (taking into account the size of the land, the location thereof and the duration of trespass thereof), would suffice on account of atonement.

Final Disposition

129. Having reviewed, appraised and analyzed the two named issues, (details elaborated elsewhere herein before) I come to the conclusion that the Plaintiff has duly and suitably proved his claim on a balance of probabilities.
130. Consequently and in the premises, I hereby proceed to enter Judgment in favor of the Plaintiff in the following terms;
- i. An order of Mandatory injunction be and is hereby issued and directed against the Defendant, and any one else claiming under it, to forthwith amend the existing re-planning survey plan for Nairobi/Block 97, and exclude the Plaintiff's parcel, being Nairobi/Block 97/2364, from the parent parcel, and further to remove the access roads, sewer lines and squatters/allottees from the Plaintiff's parcel of land.
 - ii. The Intended re-planning and re-survey of L.R No Nairobi/Block 97, belonging to and registered in the name of the Defendant with a view to excising and/or excluding the suit property therefrom, shall be carried out and undertaken within a duration of 120 days from the date hereof.



- iii. Furthermore, the costs/charges attendant to the re-planning and re-survey, with a view to achieving the excision and removal of the suit property shall be borne and/or shouldered by the Defendant and not otherwise.
- iv. In default by the Defendant to carryout and undertake the re-planning and re-survey of L.R No Nairobi/Block 97, for purposes of excising the suit property therefrom, the Plaintiff shall be at liberty to engage a designated professional physical planner to undertake the exercise and the requisite instruments/ Documents, shall be executed and signed by the Deputy Registrar of the Honourable Court for and on behalf of the Defendant herein, where appropriate.
- v. In any event, the costs and/or charges, if any, borne and paid by the Plaintiff towards the re-planning and re-survey, if any, shall be certified by the Deputy Registrar of this Honourable court and same shall be recoverable from the Defendant as an element on costs.
- vi. On the other hand, the Defendant shall also undertake the removal and/or evacuation of any structures and/or development erected on the suit property and which have constituted part of the impugned trespass.
- vii. In default by the Defendant to carry out the removal of the offensive structures/ Developments standing on the Suit Property, the Plaintiff shall be at Liberty to carry out the demolition thereof and the Costs of such Demolition shall be recoverable from the Defendant herein.
- viii. An order of Permanent Injunction be and is hereby issued restraining the Defendant, its agents, servants and/or any one claiming under it, from further entering upon, remaining on , interfering with and/ or otherwise, dealing with the Suit Property, in any manner adverse to the Rights and Interests of the Plaintiff over and in respect of L.R. No. Nairobi/Block 97/2364.
- ix. General damages assessed in the sum of Kes.10, 000, 000/= only be and are hereby awarded to the Plaintiff.
- x. The award of General Damages shall accrue Interests at court rates (14 %) per annum, from the date of Judgment until payment in full.
- xi. Costs of the suit shall be borne by the Defendant

131. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MARCH 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson Court Assistant

Ms Ndolo for the Plaintiff

Mr. Brian Ochieng for the Defendant

