



**Church Commissioners of Kenya v Mumba & another (Environment & Land Case E009 of 2023) [2025] KEELC 247 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 247 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E009 OF 2023  
FM NJOROGE, J  
JANUARY 29, 2025**

**BETWEEN**

**CHURCH COMMISSIONERS OF KENYA ..... PLAINTIFF**

**AND**

**GURU MUMBA ..... 1<sup>ST</sup> DEFENDANT**

**MUHAMMED SALIM ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Pleadings**

**Plaint**

1. In a plaint dated 21/2/2023, the Plaintiff sought the following reliefs: -
  - a. A permanent injunction restraining the Defendants, their representatives, employees, servants or agents from entering into, remaining, constructing, excavating, cultivating, depositing materials or in any other way interfering with the Plaintiff's possession of the suit property Plot No. 205A of 1894;
  - b. Costs of restoring the land into the original condition;
  - c. General damages for trespass;
  - d. Cost of the suit;
  - e. Interest on (b) and (d) above at court rate until payment in full;
  - f. Any other and such further relief that this honourable court deems fit.



2. The Plaintiff pleaded that it was at all material times the duly registered owner of the property identified as Plot No. 205A of 1894 situate in Rabai Constituency within Kilifi County (hereinafter ‘the suit property’); on 8/11/2022, the Defendants, without any consent entered the suit property and began excavation thereon; despite demands by the area Assistant Chief and the police that they cease the said activities, the Defendants declined to cease or to vacate the suit property.

## **Defence**

3. In a joint statement of defence dated 16/5/2023, the Defendants denied the allegations raised in the Plaintiff. They averred that the suit property was once under the control of the Sultan of Zanzibar who allowed the Evangelical Lutheran Mission to settle at its area of choice within the territory; that the Mission chose two plots one measuring 13.79 acres and the other 486.21 acres. On the former plot, the Mission set up a church and some dwelling houses; while the latter was allocated to freed slaves and Missionaries. Those people subsequently invited their relatives and sold their respective portions to third parties with the full knowledge of the Mission. In the year 1894, the Mission registered the 486.21 acres comprising the suit property herein as Plot No. 205/A/1894, The Mission later transferred the two plots to Church Missionary Society.
4. The Defendants averred that the Plaintiff and the said Church Missionary Society are not one and the same organization and that the suit property was never at any point transferred to the Plaintiff. They added that the issue of ownership was dealt with by the Kaloleni Land Dispute Tribunal in Claim No. LND/KAL/21/2008 and a decision rendered on 19/6/2009, that decision was subsequently adopted in Kaloleni RM Case Number 27 of 2009 on 1/12/2009.
5. The Defendants asserted that the 2<sup>nd</sup> Defendant leased 1 acre from the 1<sup>st</sup> Defendant and 2 acres from one Grace Maranza to cultivate tomatoes within the suit property and he is therefore not a trespasser as claimed.

## **Evidence**

### **Plaintiff’s Evidence**

6. The Plaintiff’s case was anchored on the testimonies of five witnesses.
7. Reverend Daniel Mwaro (PW1) adopted his written statement dated 22/2/2023 as part of his evidence-in-chief. He told the court that the Plaintiff owns the suit property and that the Defendants entered therein in 2022. He reported the Defendants’ actions to the Archdeacon who informed the area Chief of the same. A meeting was thus held where the Defendants and some elders were present. It was decided that the Defendants cease their activities on the suit property. The witness added on cross-examination that he was not aware of any case before the Tribunal.
8. Archdeacon Douglas Ojwang (PW2), adopted his written statement dated 12/4/2024. He testified that the suit property belongs to the church but was invaded by the Defendants who entered the land with tractors to plough and plant. He produced a copy of indenture as P. Exh. 1 and photographs as P. Exh. 5 (a) –(g). He narrated that he reported the Defendants’ actions to the area Chief who summoned both parties. On cross-examination, the witness told the court that the suit property was given to the church by Missionaries and he was not aware of any squatters therein. He added that there are people residing within the suit property and that there is a market and a school. Like PW1, the witness had no knowledge of the Kaloleni case.
9. Isaac Ndume Mkando (PW3), the area chief narrated that he summoned both parties to a meeting where the church presented its title documents and it was agreed that the Defendants vacate the suit



property. He produced a copy of the summons (P. Exh 2) and a report of the said meeting (P. Exh 3). The witness was categorical that his office was located within the suit property and asserted that he was not aware of any case before the tribunal. He explained that the individuals residing on the suit property obtained consent from the church.

10. Alex Munga (PW4) equally adopted his written statement dated 8/3/2024 as his evidence-in-chief. He is said to be an elder in the area plaintiff church. On cross-examination he told the court that he was not aware of any land given to slaves, but that the people residing on the land sought permission from the church. He added that the Defendants do not live on the suit property.
11. Reverend Ephron Mwashimba (PW5), an Anglican Reverend residing in Mombasa adopted his written statement dated 18/4/2024 as part of his evidence-in-chief. He testified that he lived in Jimba (where the suit property is located) when the Defendants entered the suit property. He was equally not aware of the dispute filed by at the Tribunal.

### **Defendant's Evidence**

12. The 2<sup>nd</sup> Defendant testified as DW1. He adopted his written statement dated 16/5/2023 and produced documents in the list of documents dated 16/5/2024 as D. Exh 1, 4 and 5 respectively as per those serial numbers. He told the court that he leased part of the suit property for Kshs. 3,000 to conduct farming business; that the lessors were the Plaintiff and one Grace. On cross-examination, he added that he does not claim the suit property neither does he live on it. He confirmed that he did not have any lease document or payment receipt to substantiate his claim. He also stated that he was not a party to the said dispute before the tribunal.

### **Submissions**

#### **Plaintiff's Submissions**

13. For the Plaintiff, the legal firm of Ndegwa Sitonik & Karina Advocates, filed submissions dated 25/10/2024, wherein they identified 3 issues for determination. Firstly, whether the Plaintiff is the legal and beneficial owner of the suit property. Counsel submitted that the indenture produced as P. Exh 1 was enough proof that the Plaintiff, previously referred to as The Church Missionary Society, is the legal proprietor of the suit property. He argued that following the above, the Plaintiff's title could only be challenged under Section 25 and 26 of the *Land Registration Act*, 2012; that the only bone of contention herein was the legality of the defendants' activities on the suit property. Counsel added that the Plaintiff had proved trespass under Section 3 of the *Trespass Act*; that since the Defendants failed to produce a copy of lease or licence to substantiate their claim, it was evident that they did not have consent to utilize the suit property, thus their entry thereon unlawful.
14. It was counsel's submission that having proven the above, the Plaintiff was thus entitled to the injunction order sought. He added that having established trespass on the part of the Defendants, the Plaintiff was entitled to general damages for trespass. To support this position, he relied on the cases of *Samco Holdings Ltd t/a Eka Hotel v Patrick Nyamweya* [2022] eKLR and also *KPLC Limited v Fleetwood Enterprises Limited* [2017] eKLR.

#### **Defendants' Submissions**

15. The firm of Wachira King'ang'ai Advocates filed submissions dated 1/11/2024 on behalf of the Defendants. Counsel rehashed the pleadings and evidence produced before this court. He submitted that the Plaintiff has failed to prove its case to the required standard. He urged the court to dismiss it with costs.



## Determination

16. It is trite law that he who alleges must prove. Section 107(i) of the *Evidence Act* provides that: -
- “Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
17. Under Section 26 of the *Land Registration Act*, a certificate of title will be held as conclusive evidence of proprietorship. The said section provides as follows;
- “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.”
18. Section 24(a) of the *Land Registration Act* on the other hand provides as follows:
- “(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;”
19. This position was reiterated in *Dr Joseph Arap Ngok Vs Justice Moiyo Ole Keiwa & 5 Others Civil Appeal No. CA 60 of 1997* where the Court of Appeal stated as follows:
- “Section 23 (1) of the Act gives absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.
20. The law on trespass is clear. Section 3 (1) of the *Trespass Act*, Cap 294 provides that:
- “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.”
21. There is no argument that this suit was filed by the Plaintiff as the Registered Trustees of the properties of the Anglican Church of Kenya. It is also not disputed that the Plaintiff is the registered owner of the suit property as evidenced by a copy of the indenture dated 10/10/1967. In his defence, the defendant admitted that the suit property was first registered in 1894 as Plot No. 205/A/1894. A perusal of the



proceedings before the Tribunal reveals that the proceedings were conducted sometime in the year 2009. It is also evident that there is no mention of the suit property herein. The proceedings refer to some land measuring 13.79 acres and another 486.21 acres. The correlation between the latter and the suit property has not been established, I am therefore unable to believe the Defendant's allegations. There is sufficient evidence that the suit property belongs to the Plaintiff and in the absence of proof that there was some sort of agreement between the parties herein allowing the Defendants to enter the suit property, I am satisfied that the Defendants are trespassers. Regarding the extent of damage and the cost of restoration of the land into its original condition, no evidence was adduced by the plaintiff. However, trespass per se even without damage is actionable. Where no evidence has been led as to quantum of damages the court has discretion to award a nominal sum of damages and in this case, where photographic evidence showed heavy machinery that the defendants deployed on land that was not theirs, this court thinks that the sum of Kshs 300,000/= suffices as general damages for trespass; that is what it will award the plaintiff as against both defendants jointly and severally.

22. The conclusion of this court is that the plaintiff's claim in the plaint dated 21/2/2023 is merited and it is hereby allowed in the following terms:
- a. A permanent injunction is hereby issued restraining the Defendants, their representatives, employees, servants or agents from entering into, remaining, constructing, excavating, cultivating, depositing materials or in any other way interfering with the Plaintiff's possession of the suit property Plot No. 205A of 1894;
  - b. The 1<sup>st</sup> and 2<sup>nd</sup> defendants shall jointly and severally pay to the plaintiff General damages for trespass in the sum of Kshs 300,000/-;
  - c. The defendants shall jointly and severally meet the costs of the present suit;
  - d. Interest is hereby awarded on the sum awarded as general damages in (b) and the costs in (c) herein above at court rates until payment in full.

**JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 29<sup>TH</sup> DAY OF JANUARY, 2025.**

**MWANGI NJOROGE**

**JUDGE, ELC MALINDI**

